Nebraska Law Review

Volume 34 | Issue 1 Article 11

1954

Damages—Additur and Its Use in Nebraska

James W. Hewitt
University of Nebraska College of Law

DAMAGES—ADDITUR AND ITS USE IN NEBRASKA

A recent Nebraska case,[1] outlining the present law on remittitur, evokes a discussion of additur.[2] Additur is the procedural opposite of remittitur. It has been rarely invoked in Nebraska,[3] but the possibility of its use presents a question of general interest.

I. HOW IS ADDITUR USED?

On motion by the plaintiff for a new trial the judge announces that he will grant the motion unless the defendant agrees to the judge's increasing the amount of damages. If the defendant consents, the judge awards an increased verdict to the plaintiff and denies the motion for a new trial. If the defendant does not consent, a new trial follows as a matter of course. His consent is binding upon the defendant, but the plaintiff may appeal the order denying the new trial if he feels that the amount of the additur is insufficient.

1 Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N.W. 2d 643 (1953).

2 Additur was first considered in the United States in McCoy v. Lemon, 11 Rich. 165 (U. S. 1856), and was not allowed. It has been clearly approved in only a few cases: Morrell v. Gobeil, 84 N.H. 150, 147 Atl. 413 (1929); Clausing v. Kershaw, 129 Wash. 67, 224 Pac. 573 (1924); Gaffney v. Illingsworth, 90 N.J.L. 490, 101 Atl. 243 (1917).

3 Calmon v. Fidelity-Phenix Fire Ins. Co., 114 Neb. 194, 206 N.W. 765 (1925). It was used because the jury had failed to allow definitely calculable damages.

The rule pertaining to the granting of remittitur, which is authorized in Nebraska by statute,[4] has been set out in a series of Nebraska cases.[5] This rule might provide a framework for a rule governing the allowance of additur. The rule is that remittitur is permitted in Nebraska only when a verdict is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or when it is clear that the jury disregarded the evidence or rules of law.[6] This could be made applicable to additur by substitution of the word "insufficient" for the word "exorbitant".

II. WHY ADDITUR?

The usual remedy where damages are inadequate is the setting aside of the verdict and the granting of a new trial.[7] In most jurisdictions a needless retrial of all the issues can be avoided by limiting the retrial to the issue of damages.[8] This procedure has been authorized by the United States Supreme Court.[9]

Additur has been acclaimed, however, as a more expeditious process. In a state with crowded court dockets there may be a long delay between the time of filing a motion for a retrial and the date of hearing.[10] Many litigants can ill afford the long wait

4 Neb. Rev. Stat. § 25-1929 (Supp. 1953).

5 Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643 (1953); Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853 (1951); Remmenga v. Selk, 152 Neb. 625, 42 N.W.2d 186 (1950); Erickson v. Morrison, 152 Neb. 133, 40 N.W.2d 413 (1950); Thoren v. Myers, 151 Neb. 453, 37 N.W.2d 725 (1949); Reuger v. Hawks, 150 Neb. 834, 36 N.W.2d 236 (1949); Horky v. Schroll, 148 Neb. 96, 26 N.W.2d 396 (1947); Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N.W.2d 451 (1943).

6 Van Aucker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N.W.2d 451 (1943).

7 Goodwin v. Denato, 144 Atl. 177 (N.J. Sup. Ct. 1929); Reuter v. Hickman, Lauson & Diener Co., 160 Wis. 284, 151 N.W. 795 (1915); Taylor v. Northern Electric Ry., 25 Cal. App. 765, 148 Pac. 543 (1915); Ferrari v. Brooks-Harrison Fuel Co., 53 Colo. 259, 125 Pac. 125 (1912); Aboltin v. Heney, 62 Wash. 65, 113 Pac. 245 (1911); Anglin v. City of Columbus. 128 Ga. 469, 57 S.E. 780 (1907).

8 Note, 15 Va. L. Rev. 592 (1929).

9 Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931); cf. Fed. R. Civ. P. 59(a) and Rice v. Union Pac. Ry., 82 F. Supp. 1002 (D Neb. 1949).

10 Elliott, Judicial Administration 163 (1953), says, "A nation-wide survey of the status of trial court calendars in 1953 shows that the overall average time interval from 'at issue' to trial of civil cases in the 97 metropolitan courts covered was 11.5 months for jury cases and 5.7 months for nonjury cases." The greatest delays reported were in New York City, Worcester County in Massachusetts, and Cook County, Illinois. In the Supreme Court of Kings County (Brooklyn), the average figure was 53 months, and in New York County (Manhattan), 43 months.

and many settle out of court for sums substantially less than they could have received had the case gone before a jury. Additur eliminates the delay, pares expenses, and provides an end to the litigation.

Expendiency and the interests of the average litigant thus form a persuasive argument for the use of additur. Yet there are problems connected with its use.

III. CONSTITUTIONAL PROBLEMS

One of the vexing problems is that of constitutionality. In the case of *Dimick v. Schiedt*[11] a five justice majority of the United States Supreme Court held the use of additur in the federal courts unconstitutional.[12] The Court reasoned that additur violated the Seventh Amendment by substituting the opinion of the court on the question of damages for that of the jury.

Remittitur was also condemned, but the Court did not declare it to be unconstitutional, probably because remittitur had become too solidly entrenched in American law to be overruled. The Court therefore distinguished between remittitur and additur, stating that the jury passed on all lesser sums when setting the amount of damages, but did not pass upon greater sums.

The Court stated that only those practices known at common law at the time of the passage of the Seventh Amendment were acceptable under its terms. Additur had been occasionally used in England prior to 1791, mostly in cases of mayhem,[13] but had fallen into disuse at the time of the adoption of the Constitution. It has since been expressly condemned by the English courts.[14]

In a strong dissent the minority cited precedent to show that the Seventh Amendment was not meant to perpetuate all the minute procedural details of the common law, but was merely intended to preserve the essentials of jury trial and to safeguard the jury's function from encroachments not permitted by the com-

11 293 U.S. 474 (1935).

12 U.S. Const. Amend. VII provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law".

13 Carlin, Remittiturs and Additurs, 49 W. Va. L.Q. 1 (1942). The practice, known as *super visum vulneris*, was used when the court, upon viewing the wound, might grant extra damages.

14 Watt v. Watt, [1905] A.C. 115.

mon law.[15] No procedure is therefore forbidden if it does not curtail the power of the jury to decide facts as it would have before the adoption of the amendment.

It seems that here the minority has posed a dilemma and has been impaled on its horns. In discussing additur and remittitur the minority stated:

> In neither case does the jury return a verdict for the amount actually recovered, and in both the amount of the recovery is fixed, not by the verdict, but by the consent of the party resisting the motion for a new trial.[16]

It must be noted that the opinion of the minority itself infers that additur does not allow the jury to find the fact of what the amount of the verdict should be.[17]

Since the Seventh Amendment has not been incorporated into the Fourteenth, *Dimick v. Schiedt* applies only to Federal Courts. As far as the Federal Constitution is concerned, state courts are free to allow or disallow additur as they choose.

State constitutions ordinarily do not contain provisions similar to the Seventh Amendment but simply provide that the right of trial by jury should remain inviolate.[18] Thus state courts need not determine whether additur is a re-examination of a fact tried by a jury.

Nebraska's constitution provides that the right to trial by jury should remain inviolate;[19] this has been determined to mean nothing more than a declaration of the common law as to the mode of trial.[20] Therefore additur probably could constitutionally be used in Nebraska.

Additur might be utilized when the amount of damages is liquidated and certain, or when the amount of damages could be

[15] Gasoline Products Co. v. Champlin Refining Co. 283 U.S. 494 (1931), followed in Galloway v. United States, 319 U.S. 372 (1943).

[16] Dimick v. Schiedt, 293 U.S. 474, 494 (1935).

[17] For a thorough discussion of this point see Schiedt v. Dimick, 70 F.2d 528 (1st Cir. 1934).

[18] 44 Yale L.J. 319 (1934).

[19] Neb. Const. Art. I, § 2 provides: "The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve in courts inferior to the district court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury."

[20] Omaha Fire Insurance Co. v. Thompson, 50 Neb. 580, 70 N.W. 30 (1897).

determined by fixed rules of law. In such situations there could be no question of a usurpation of the task of the jury.

Wisconsin follows a unique practice, allowing additur in cases where the damages are uncertain, provided that the defendant will consent to such a large increase that any further increase would warrant the court's setting aside the same amount as excessive.[21]

CONCLUSION

Since the use of additur is open in Nebraska and its expendiency is conceded, it is submitted that additur should be used in cases where damages can clearly be determined.

The shadow of deprivation of the right to jury trial is heavy enough, however, that additur would be a quite questionable device if used where the amount of damages is uncertain. It is an unquestionable fact that when unliquidated damages are involved the use of additur means the substitution of the judgment of the court for the judgment of the jury. When such substitution occurs, it is impossible to contend that the jury has tried the issue of damages. In such cases there has been a deprivation of the right to trial by jury.

James W. Hewitt, '56.

21 Reuter v. Hickman, Lauson & Diener Co., 160 Wis. 284, 151 N.W. 795 (1915).