North Dakota Law Review

Volume 42 | Number 4 Article 1

1966

Appellate Courts and the Quest for Just Compensation Additur and Remittitur

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APPELLATE COURTS AND THE QUEST FOR JUST COMPENSATION ADDITUR AND REMITTITUR

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When an appellate court is called upon to review an award of damages made by a lower branch of the judicial system, what should it do? The trial court—both judge and jury—were sworn to do justice, as are the members of the higher tribunal. Yet "justice" like all transcendent ideals, does not arise untarnished from the sea, nor drop unannounced from heaven. Justice must be constantly pursued with the fair assurance that it will never be captivated but only approximated[1]. With this humiliating reality confronting us we may more properly examine the institutional competence and appropriate role of an appellate court in our system of jurisprudence when the final award of a lower tribunal is challenged as excessive, inadequate, or otherwise "unjust".

First, what *can* an appellate court do? The Supreme Court of the United States has the practical political responsibility of setting the fundamental public policy of the entire nation.[2] This is merely another way of saying that the Court's sovereign prerogative consists in its power to declare the constitutional limitations upon all political bodies in the United States—including lower courts and judges.[3] Subject only to the possibility of conflicting with a federal public policy, the highest courts of the several states share the same solemn prerogatives. Our system of government empowers the highest court of each state with the transcendent power to determine the public policy of that state—subject only to the tedious

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1. The pursuit of just compensation in these United States has been well organized and amply endowed for a number of years. The National Association of Claimant Compensation Attorneys (NACCA)—now called the American Trial Lawyers Association (ATL)—provides a natural habitat for those attorneys who are in pursuit of "more". The Defense Research Institute provides solace for those attorneys who are gathered in pursuit of "less". The journals, reprints, and assorted propaganda emanating from these organizations in the finest of the adversary tradition readily afford a comprehensive coverage of cases and arguments which may be utilized in the adjudicative process.

2. See Shatten, *The Determination of Public Policy*, 51 AMERICAN BAR ASSOCIATION JOURNAL 1048 (1965). Although every decision rendered by an American appellate tribunal is a public policy decision, the policy decisions enunciated as constitutional limitations of necessity embody and articulate policy decisions of a more fundamental and sweeping nature.

3. See Rostow, THE SOVEREIGN PREROGATIVE, (1962). See also Corwin, THE 'HIGHER LAW' BACKGROUND OF AMERICAN CONSTITUTIONAL LAW, (1961).

process of constitutional amendment or electoral displacement if the choice of the Court does not substantially echo the *vox populi*.

Every decision made by a court of last resort determines the public policy of the political entities subject to its jurisdiction or power. The court may, of course, be guided by the legislature through a host of statutes authorizing such devices as additur or remittitur—or setting limitations on liability in certain types of contract or tort action. But the court always carries the trump card in its power to declare the legislative enactment unconstitutional because the legislative effort conflicts with the plain words of an artfully drawn and deliberately ambiguous document which we call a written constitution.

The purpose of this brief exigesis on the sovereign powers of our highest state and federal courts is to bring the topic into proper perspective. The role of an appellate court in reviewing the proceedings of a lower court depends in great part upon the real power of the appellate tribunal. And once the practicing attorney finally realizes that an American high court has the real power to do just about anything he can persuade it to do, the mirage of "settled principles" should quickly evanesce.

Granted that the highest tribunal of the state or nation can do just about anything that it can be persuaded to do—including modifying every monetary verdict presented to it—what should it do when it reviews monetary awards made by inferior tribunals? What is the best public policy for 1966 and the years beyond?

Over the years, several devices have evolved whereby higher courts seek to remedy the injustices perpetrated by lower courts in their excessive or penurious awards of damages.[4] [Sometimes these procedures have been authorized by statute—more often by tradition.][5] If a higher tribunal finds that a lower court award was excessive, it may grant a remittitur.[6] Essentially this consists in providing the original plaintiff with an option—either to accept a reduced amount of damages—or face the expense and uncertainty of a new trial. Should the higher court find the lower court's award inadequate, it may, in effect, offer the defendant a similar option

4. In all states, trial or appellate courts are generally empowered to grant new trials. The procedural devices may differ from state to state. One common approach is to call the motion a judgment *n.o.v.* Another common device is to grant a new trial limited to the amount of damages. This article is not concerned with appellate review of these procedural motions, because the appellate tribunal does not become involved in fixing the monetary amount of damages.

5. For example, Rule 59.04 W(5) Washington Rules of Pleading, Practice and Procedure empowers the trial court to grant a new trial in cases where an original verdict awarded excessive or inadequate damages. This rule has been consistently interpreted to permit the trial court to make a conditional grant of a new trial. See Lanegan v. Crauford, 49 Wash.2d 462, 304 P.2d 953 (1956); Sherman v. City of Seattle, 57 Wash.2d 233, 356 P.2d 316 (1960).

6. The word remittitur may have several meanings. As employed in this article it is used in its narrowest sense: the conditional grant of a new trial to a defendant—the condition being that the plaintiff remit part of the original verdict.

or additur[7]—either pay a larger sum in damages or face the same expenses and uncertainty.

The common sense rationalization for these procedures lies in the economic aspects of justice. If the members of a higher tribunal can agree that a given sum is unjust, the quickest way to dispose of the matter is to attempt to do substantial justice in the shortest time possible. Rather than force the injured plaintiff, who is entitled to something, to bear the expense of another, perhaps protracted, litigation, the appellate court will attempt to get the parties to compromise.

The speed and efficiency with which inter-personal disputes are settled in most cases far outweighs the precise amount of monetary satisfaction realized. The vast majority of claims of financial liability are settled extra-judicially through agreement and formal release, arbitration or compromise within private associations which settle their own disputes. Even in those cases which actually are initiated in the public forum, a substantial portion are settled shortly before or during the course of litigation. And of those which go to judgment in a lower tribunal, the decision not to appeal finally terminates another large portion of private disputes.

Underlying this practical working of the social process are two jurisprudential principles or public policies of the highest order: there must be an end to litigation; and justice delayed is justice denied. The point here is that the relatively few causes of action which reach a court of last resort do so because the private or public mechanisms for resolving disputes at a less rarefied level have either proved unavailable or have broken down. Thus, the appellate tribunal utilizes the procedural devices of additur and remittitur to accomplish the same purposes which the inferior (and far less expensive) tribunals accomplish in the vast majority of cases. The court of last resort is formally invested with the power to impose finality; but it is equally interested in effectuating the public policy of speedy justice.

Are the procedural devices of additur and remittitur consonant with sound considerations of public policy? The Supreme Court of the United States, in *Dimick v. Schiedt*[8] held that the procedure

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7. Although sometimes called remittitur in a generic sense, the word additur is used to designate the converse of the sense in which remittitur was used in note 6 *supra*: additur is a conditional grant of a new trial to a plaintiff—the condition being that the defendant must either pay more or else face a new trial. See Annot., 56 A.L.R.2d 213 (1957).

8. 293 U.S. 474 (1934). Accord, Corsey v. Barba, 28 Cal.2d 350, 240 P.2d 604 (1952); Sarvis v. Folsom, 114 So.2d 490 (Fla. App. 1951). On the problem of remittitur, the federal courts and the Seventh Amendment, see Arkansas Land and Cattle v. Mann, 130 U.S. 69 (1889). The excellent opinion of Judge Medina in Dagnello v. Long Island Railroad Co., 289 F.2d 797 (2nd Cir. 1961) explains in detail why a federal court of appeals has constitutional power to review the discretion of a trial judge who refused to set aside a verdict in a personal injury action on the grounds of excessiveness. *Dagnello*, read with Solomon Dehydrating Co. v. Guyton, 394 F.2d 439 (8th Cir. 1961), not only affirms the power of a federal circuit court to review allegations of excessiveness of jury verdicts, but also responds to the views of professor Moore in 6 MOORE, FEDERAL PRACTICE 3834 (1965), wherein Professor Moore characterizes the Second and Eighth Circuits as "the most adamant expounders" of the "old doctrine of non-reviewability of decisions on motions for a new

of remittitur may stand as historical gloss on the federal Constitution; but that the procedure of additur violates the fundamental public policy expressed in the Seventh Amendment which guarantees a trial by jury in all suits at common law.

> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess,—in that sense that it has been found by the jury,—and that the remittitur has the effect of merely lopping off an excresence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. Where, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication?[9]

Dimick may be read in the narrowest of confines as applicable only where the enriched plaintiff objects to the insufficiency of the additur. But even given this narrow reading, isn't there danger of marching up the hill and marching down again? For example: plaintiff is awarded $10,000 by jury trial number one. On appeal the Circuit Court of Appeals offers plaintiff the impermissible option of $50,000. The Supreme Court orders a new trial based on the *Dimick* reasoning. At the new trial plaintiff is awarded $60,000. What is to prevent the Circuit Court from employing the authorized procedure of remittitur and reducing the new award to $50,000—or less?

Perhaps *Dimick* now binds the States through the Fourteenth Amendment.[10] If so, there is no further point in discussing additur. However, *Dimick* was a five to four decision and the dissenters

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trial based on the inadequacy or excessiveness of the damages". Professor Moore's chief complaint is that the Second and Eighth Circuits do not exercise the discretion which they have. As will be explained *infra*, the author of this article disagrees with Professor Moore.

9. Dimick v. Schiedt, 293 U.S. 474, 485 (1934). For the opposite view see O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E.2d 883 (1956); Fisch v. Manger 24 N.J. 66, 130 A.2d 815 (1957) (dictum).

10. The extent to which the guarantees in the federal Bill of Rights bind the states through the due process clause of the Fourteenth Amendment has been continuously debated during the past few years. Certainly all the provisions of the First Amendment now bind the states. The Supreme Court has declared binding on the states the Fourth Amendment: Wolf v. Colorado, 338 U.S. 25 (1949); (including the exclusionary rule rejected in *Wolf*) Mapp v. Ohio, 367 U.S. 643 (1961); part of the Fifth Amendment (self incrimination): Malloy v. Hogan, 376 U.S. 1 (1964); Murphy v. New York Waterfront Comm'n., 376 U.S. 52 (1964): Griffin v. California, 380 U.S. 609 (1965): The Sixth Amendment (confrontation): Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965); (counsel): Gideon v. Wainwright, 372 U.S. 335 (1963); The Ninth Amendment (right to privacy): Griswold v. Connecticut, 381 U.S. 479 (1965). A special problem is presented by Louisiana, which is not a common law state. The civil law approach to the problem of inadequate or excessive damage awards is delineated in Garafola v. North River Insurance Co., 153 So.2d 445 (La. App. 1963).

(Stone, Hughes, Brandeis & Cardozo) seem to the author to have advanced the more persuasive arguments. The majority opinion in *Dimick* relies heavily upon a narrow and somewhat technical reading of Anglo-American legal history which is interesting, but would hardly be persuasive to the pragmatic activists on the Court today.

The decision in *Dimick* purports to rest upon an acceptance of the jury's supreme role as triers of "fact". Thus, the permissibility of additur—as a question of public policy—will boil down to an analysis of the precise role of the jury in our system of justice.[12] Of recent years, there has been a continuing and occasionally incisive criticism of the jury system as such. This is not to say that we are ready to abandon the Anglo-Saxon heritage of trial by jury. But the intangible value which an individual justice assigns to the role and competency of a jury may have far more to do with a final award of damages than any amount of statistical information.

There are, of course, many areas where damages can be ascertained with a *reasonable* degree of mathematical precision. For example, an annuity which will bear interest equal to the prospective earning capacity of a disabled person would be an economically justifiable award in a case of total disability. If the defendant has deprived the plaintiff of the latter's capacity to make a living, such an award would restore that capacity as far as this is humanly possible. And the same may be said for computations of loss of business, etc., due to malicious slander—although the actual burden of proof upon the plaintiff may be formidable.[13]

This underscores quite another aspect of this problem. The procedural devices of remittitur and, where permissible, of additur, may be used to correct a defect in the evidence. It may be that the record before the appellate court does not adequately sustain the plaintiff's prayer for relief or the jury's award. In such a case, it would seem more appropriate for the appellate court (as a matter of public policy) to remand the case for a new trial with appropriate instructions as to what it expects in the form of evidence. The purpose of the instructed remand in such a case is to

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11. See Kelly, *Clio And The Court: An Illicit Love Affair*, in KURLAND, THE SUPREME COURT REVIEW, (1965). The *Dimick* opinion, written in the shadow of Holmes, is not free from the pre-Hitler delusions about the Anglo-Saxon race and its superiority in the administration of justice. The opinion doesn't say that the jury system is the only possible method of achieving justice—but the implication is strong when this opinion is read in the context of the legal philosophy which prevailed on the Court in the first half of this century.

12. The Court has evidenced a continued respect for the jury system. See Beacon Theatres v. Westover, 359 U.S. 500 (1959); Simler v. Conner, 372 U.S. 221 (1963). However, even the respect expressed for the jury system in *Beacon* and *Simler* do not necessarily support the reasoning in *Dimick*.

13. See, Eastman Kodak Co. v. Southern Photo Materials, 273 U.S. 359 (1927): Crane Iron Works v. Cox & Sons, 28 F.2d 328 (3rd Cir.1928). These cases illustrate the complexity of the facts which may have to be established in an action for damages. An excellent summary of the whole subject of evidence in actions for damages may be found in PRACTICING LAW INSTITUTE, DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH (1965).

acquaint the legal profession with the appropriate criteria of financial responsibility so that the same appellate court will not have to waste time with a similar incomplete record in the immediate future.[14]

A similar disposition of such "legal errors"—if I may be permitted to categorize—as remarks of counsel,[15] erroneous admission of evidence,[16] errors in instructions[17] or failures to award damages for specific items, would seem to be more appropriately cured by reasoned remand. On the other hand, if the appellate tribunal judges that the "legal error" was "harmless" or "non-prejudicial", it would seem to be more efficient to let the jury award stand. The danger seems to be that an appellate tribunal may seek to justify its own judgment of what constitutes a proper award by ascribing an apparent excess to what would otherwise be considered "harmless" error. The cure for this problem lies in judicial restraint—which means that each justice must think through the problem on his own. And if he finds that reasonable men could differ on the mathematical precision of the award he should let the inferior judgment stand.

When a trial court grants a new trial conditioned by remittitur or additur the court makes what is essentially an *ad hoc* decision which has very little real effect upon the judicial process except upon the immediate parties to the controversy. In this sense, the decision of a trial court to modify a jury award is very similar to the actual function of the jury itself—to make specific, particularized decisions with no general implications. This exercise in particularity can be justified insofar as the trial court has the

14. Quite frequently, references to the fact that the evidence does not support the jury award are merely shorthand ways of saying that the judges of the appellate tribunal do not agree with the jury on the precise amount of the economic loss sustained by the plaintiff. A good illustration of an appellate tribunal indulging in a type of speculation which it should forego is Lindemann v. San Joaquin Cotton Oil Co., 5 Cal. 2d 480, 55 P.2d 870 (1936), wherein the Supreme Court of California overturned a jury award of $62,500 for damages to a middle-age cotton producer and sought to cure this excessive verdict by ordering a deduction of $12,500. Why the evidence supported the newly affirmed verdict of $50,000; but did not support the jury's verdict of $62,500 is nowhere explained in the opinion. About all the guidance which this opinion supplies for lawyers and lower tribunals is that a big loser may get a break at the appellate level if he keeps trying. Such a "rule of law" hardly contributes to the orderly administration of justice. A number of these cases are collected in Annot., 16 A.L.R.2d 3 (1951).

15. In Brabeck v. Chicago & Northwestern Ry., 264 Minn. 160, 117 N.W.2d 921 (1962), the attorney for the plaintiff directly addressed the decedent's children, who were seated in th courtroom. The court sought to cure this error by reducing the F.E.L.A. award from $110,000, to $90,000. In Josephson v. Wilbrew, 15 App. Div.2d 533, 222 N.Y.S.2d 739, 12 N.Y.2d 930 (1963), a judgment for $115,000 for wrongful death and $48,000 for pain was reduced to $75,000 and $14,000 to correct the prejudicial argument on the part of plaintiff's counsel. A New York tribunal also sought to cure a sinister argument by defense counsel by granting a conditional additur from $13,500 to $25,000. Metz v. Great Atl. & Pac. Co., 215 N.Y.S.2d 175 (Sup. Ct. 1961). *Contra,* Irvine v. Gibson, 117 Ky. 306, 77 S.W. 1196 (1904).

16. Josephson v. Wilbrew, note 15 *supra,* also involved the erroneous admission of a photograph. In Coca-Cola Bottling Co. v. Carter, 202 Ark. 1026, 154 S.W.2d 824 (1941), a verdict of $10,000 for a fracture of the coccyx was reduced to $1,000 because of the erroneous evidence admitted by the trial court. And in Crandall v. St. Mary's Hosp., 13 App. Div.2d 595, 212 N.Y.S.2d 189 (1961), the device of remittitur was employed to reduce an award of $35,000 to $16,000 for an ankylosed finger—thus curing the trial court's erroneous acceptance of speculative evidence about the damages which were not attributable to plaintiff's injury.

17. In Devaney v. Atchison, T. & S.F. R.R., 219 Cal.487, 27 P.2d 635 (1933), the trial court's erroneous instructions on the Safety Appliance Act were "cured" by reducing a verdict of $35,000 to $20,000.

advantage of having access to the all important and frequently decisive "demeanor evidence".

Of their very nature, the decisions of an appellate tribunal are "law" and enunciate principles of general applicability binding upon an entire state or nation. If there are legal errors in regards to evidence or anything else in the cold and otherwise silent statement of facts before it, the appropriate function of an appellate tribunal consists in enunciating principles of general applicability which are properly called law, or statements of public policy which will serve as guides for the future. When, however, an appellate court indulges in the common temptation to usurp the lower tribunal's role of particularizer, it abrogates its true function and enunciates "particulars" which serve no useful purpose except to encourage future litigants to seek more detailed reviews of particulars in subsequent cases.

Expressed in a slightly different fashion: lower courts sit to resolve all controversies which come within their jurisdiction because the alternative is chaos. Appellate tribunals sit to render a principled judgment of more general applicability by reviewing what has already been authoritatively determined at an inferior level. When appellate courts become activists and particularists they risk the danger of fomenting the primordeal chaos which the lower courts seek to order initially and, usually, quite adequately.

The additur or remittitur procedure has been occasionally employed to correct another quite distinct type of problem which is generally called an "inconsistent" jury verdict. This problem arises when a jury finds the defendant liable but fails to assess damages for a specific item such as pain and suffering. In a word, the jury finds the defendant liable for the whole loaf but assesses damages only for one half or one third as the case may be.[18] If a trial court, with the demeanor evidence before it, declines to alter a jury verdict in such a situation, it seems singularly inappropriate for an appellate court to intervene. The inconsistent verdict, which is evidence of compromise, seems to be an inherent part and parcel of the jury system.[19] Of course, the plaintiff's attorney will argue, with some justification, that his cantankerous client is still entitled to adequate compensation, despite his client's unsociable attitude on the stand. On the other hand, the compromise verdict rests largely upon the demeanor evidence which is inaccessible to the appellate tribunal. And the experienced trial judge is in a much better position to see that justice is done in

18. One of the better reasoned opinions in this matter is found in Thompson v. Iannuzzi, 403 Pa.329, 160 A.2d 777 (1961). In the classic case of inconsistency (jury returns a verdict for the plaintiff but awards no damages), the courts usually grant a new trial on all the issues. See, Clemets v. Veterans Cab. Co., 344 S.W.2d 572 (Tenn. App. 1960).

19. This view is well expressed in Jackson v. Capello, 201 Pa. Super. 91, 191 A.2d 903 (1963) and Elza v. Chovan, 396 Pa. 112, 152 A.2d 238 (1959).

such an *ad hoc* type of situation. The point here is that the compromise verdict, in the vast majority of cases, usually evidences a compromise agreement on the facts essential to establish liability. Only in the exceptionally rare case where the factual proof of liability in uncontradicted or, at least, quite clear and the trial judge has failed to correct a clearly erroneous jury verdict, would it seem appropriate for an appellate court to intervene. And in such a rare instance, it seems that the better procedure would be for the appellate tribunal to order a new trial limited to the question of damages or even to one element of damages, rather than for that tribunal to attempt to make a monetary assessment of damages on its own.[20] Quite apart from the area of reasonable mathematical precision, but inextricably interwoven with it, lies the trackless sea of intangible elements: pain and suffering, humiliation, loss of reputation, etc. Punitive damages seem particularly susceptible to abuse and some states have flatly outlawed them on more express grounds of public policy.[21] The problems of intangible damages are most susceptible to resolution through the procedures of additur and remittitur. And it is precisely in these areas that these procedural devices should be conscientiously and intelligently employed.

This focuses our attention once again upon the true role of an appellate court. When is an award too great or too small? There is no pat answer—only "factors" or "elements" which an appellate tribunal should take into account. These "factors" have been verbalized in terms of those occasions when a lower tribunal's verdict reflects "passion and prejudice"—a formula which tells us very little.[22] Some of the criteria which may well be taken into account are such factors as comparative verdicts in similar cases[23] —without subscribing to the fallacy that there will never be iden-

20. See Thieneman v. Cameron, 126 So.2d 170 (Fla. App. 1961). The jury awarded injured plaintiff for pain and suffering but made no award to her husband for medical expenses he had incurred; loss of consortium, etc. Another good example is Henderson v. Kansas Power & Light Co., 188 Kan. 283, 362 P.2d 60 (1961), where a $5,000 award was found inadequate for burns and electrical shock—new trial granted on all the issues.

21. See Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072 (1891). *Contra,* Smithhisler v. Dutter, 157 Ohio St. 454, 105 N.E.2d 868 (1952).

22. In Mathis v. Atchison T. & S. F. R.R., 61 N.M. 330, 330 P.2d 482, 487 (1956), a $43,000 verdict to a railroad switchman for injury causing rupture and excessive pain was held not excessive because:

> The fact that a verdict appears to be excessive is not a ground for a motion for a new trial. It is only when the excessive damages appear to have been given under the influence of passion or prejudice that a new trial may be granted for that reason. There is no standard fixed by law for measuring the value of human pain and suffering. In every case of personal injury a wide latitude is allowed for the exercise of the judgment of the jury, and unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience, this court cannot substitute its judgment for that of the jury.

23. See Van Norman v. Illinois Cent. R.R., 320 S.W.2d 512 (Mo. App. 1959), wherein the court considered a $62,500 award to a twenty-eight year old laborer and found it excessive in view of the fact that previous maximum recoveries had been between $40,000 and $45,000 for similar injuries. The court adopted the principle that reasonable uniformity of awards is desirable and reduced the trial court's award to $47,400. In Vest v. Gay, 154 So.2d. 297 (Ala. 1963), the Supreme Court of Alabama affirmed a verdict of $40,000 for personal injuries received in an intersectional collision and expressed approval at the comparative verdicts cited from Annot., 16 A.L.R.2d Supp. 1161. The court indicated that these comparative verdicts afforded a valid basis for comparison.

tical cases;[24] the degree of fault of the defendant; the ability and experience of the trial judge;[25] (very real factors in less populated states where judges are more apt to be personally acquainted); personal knowledge of the locale, etc.

The jury system of administering justice hopefully draws upon the distilled experience of twelve common citizens who inevitably administer justice by consensus. The learned members of an appellate tribunal, who may be woefully lacking in practical business experience, distort the vital function of the common law when they hastily substitute their judgment of practical justice for the jury's. The purpose of the jury system is to give the learned and inevitably isolated members of the appellate tribunal the benefit of a rough, yet substantially just, appraisal of a community consensus on intangible damages. The appropriate role of an appellate tribunal is not to do mathematical justice in every case, but to set down general guidelines wherein the lower tribunals may function effectively.

In this view the practice of some appellate courts in remitting damages on a percentage basis, e.g., reducing the award by 10 percent or 15 percent seems to be an exercise in futility.[26] The appellate tribunal has no access to the demeanor evidence which may support a trial court's percentage reduction remittitur. And, in the nature of things, an appellate tribunal cannot possibly find time to exhaustively review all the evidence in every damage action.

In summary, the author submits that the appropriate role for an appellate tribunal lies in the exercise of considerable judicial

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24. The dangers of simplistic reliance upon comparative verdicts as binding precedent are stressed in Ahlstrom v. Minneapolis, St. P. & S. Ste. M. Ry., 244 Minn. 1, 68 N.W.2d 873 (1955); Mendenhall v. MacGregor Triangle Co., 83 Idaho 145, 358 P.2d 860 (1961).

25. Mann v. Hunt, 283 App. Div. 140, 126 N.Y.S.2d 823 (1953).

> Everyone would admit that there are circumstances in which a trial judge's duty may require him to set aside a verdict which is too high, too low, or so wrong that it will not stand. The judge, indeed, has the active and continuous burden of supervising the work of the juries which report to him—the point of interference is not fixed on the caprice of judicial individualism; it is rather arrived at by a synthesis of all the experience that the judge has had; in the beginning as a law student, in the later controversies of law practice, in the hearing of cases and the writing of decisions, in the sum of all that he has absorbed in the courtroom and in the library.
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> In the end it is an informed professional judgment; and although lawyers might differ greatly about how the components of the judgment are arranged and added up, there would be a very considerable agreement about the result to be reached in any case once the facts were thoroughly understood—even if the judges who look at the case on appeal would not themselves have set the verdict aside had they acted in the first instance, they should not find in this alone a ground for reversal. If the case comes within the area within which judicial interference would not be regarded by the profession as unreasonable, the exercise of the power thus to deal with the verdict ought to be upheld.

Citing *Mann*, the Court in Butler v. General Motors Corp., 143 F.Supp. 261 (N.D.N.Y. 1956), stated, "By this application of principle, which is fundamentally experience and instinct, I shall grant the motion of the defendant for a new trial in this instance, unless the plaintiff . . . agrees to a remission of $40,000 of the verdict of $200,000 returned in his favor. Despite the inflationary trend of the day, I still have the sense that $160,000 is a lot of money, but I feel it is justified by the extreme period of hospitalization undergone by Greenslet previous to the amputation . . . ."

26. See Pitrowski v. New York, Chicago & St.L. R.R. 6 Ill. App.2d 495, 128 N.E.2d 577 (1955), where a jury verdict for injuries in a F.E.L.A. action was $150,000. The trial court ordered a remittitur to $100,000. The appellate court reduced the trial court's judgment by 10% to $90,000.

restraint in the review of jury awards for damages which are incapable of being ascertained with mathematical precision.[27] If reasonable men can differ—and they usually can—on the monetary value of such an award, the appellate tribunal should affirm the inferior court's adjudication of the case. In the rare instance where the lower award has been affirmatively proved to be unreasonable, a higher court should make a cautious but dispassionate use of such flexible procedural devices as additur and remittitur in order to reduce the cost of obtaining justice for the injured party. Even in reviewing the conditional grant of a new trial by a lower court judge the same principles apply. The role of an appellate tribunal does not consist in second guessing a trial judge on the precise amount of a sum which cannot be calculated with mathematical precision. In an appropriate case an appellate court should lay down general principles to guide *all* trial courts. But it should deal with monetary figures only when there has been a clear and affirmative showing of irrationality on the part of the inferior tribunal.[28]

Why should appellate courts follow this suggested procedure as a matter of public policy? The basic justification rests upon a perhaps undemonstrable assumption—that inferior tribunals are more apt to act in a responsible manner if these tribunals are invested with wide discretion. In terms of institutional competence, the legislature with its potentially limitless power to investigate and acquire factual or statistical evidence is in a far better position to enact wise statutory limits of liability—if such limitations are deemed necessary or appropriate. The proper institutional role for an appellate tribunal lies in its educative power over inferior tribunals. A jury will, of course, be generally unfamiliar with the public policy grounds which permit the jury to make a definitive assessment of monetary damages. However, the lesson of judicial restraint will not be ignored by the members of the bar. Once the practicing attorneys are made to realize that they will not be permitted an opportunity to re-litigate the details of damage actions at the appellate level, they will be constrained to exert greater care and show more professional competence at the trial level.

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27. The philosophy of judicial restrain enunciated by James B. Thayer seems particularly appropriate for the resolution of the controversies inherent in determining a just compensation for damages. In Thayer's view, a court reviewing a legislative act should defer to the judgment of that body so long as the legislature's choice is rational. Thus, in the complex area of deliberate ambiguity in the written constitution, a wide range of choice and judgment is left to the legislative responsibility. *A pari*, the courts of last resort should sustain any rational determination made by an inferior tribunal, whether judge or jury or combination of both. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. Law Rev. 129, 143-144; 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW 503, 516-17 (1938). Perhaps the most eloquent expression of the doctrine of judicial restraint is contained in Mr. Justice Frankfurter's memorable dissenting opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 646 (1943) concerning Jehovah's Witnesses children who refused to salute the flag in a public school.

28. The utility of the procedural device which we have termed remittitur in cases of awards which "shock the conscience" is based upon the fact that most grossly excessive awards are, in fact, usually based upon unquestioned liability wherein the conduct of the defendant has been particularly outrageous and the jury inclined to wreak vengeance. Rather than force the plaintiff to submit to the rigors of a completely new trial the device of remittitur seeks to remedy the situation in as expeditious a manner as possible.

Expressed in a slightly different fashion, the underlying reasons for great judicial restraint in reviewing awards for damages rest upon concepts of political pluralism and subsidiarity. Essentially, these ideas stress the importance of resolving local problems at the local level. This policy can be effectuated only by granting a large measure of autonomy to the inferior tribunals. A higher court, charged with the more delicate task of determining issues of far more than local significance will be better able to address itself to more important issues if it budgets its time by adroitly refusing to indulge in the futile exercise of second guessing the reasonable estimates of a composite judgment of ordinary citizens. Following this philosophy an appellate court will intervene only in the extraordinary case where it is self-evident that a manifest injustice has been perpetrated in an inferior tribunal. Anything short of manifest injustice should be dismissed *per curiam*.