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Judgments: New Mexico and the Additur

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INTRODUCTION

The amount of a jury award in tort litigation is often not what plaintiff's attorney feels is just in light of evidence he has presented. Is there any recourse open to him in New Mexico trial procedure once the verdict is in? Of course, the motion for a New Trial[1] is available, as is the motion for a New Trial limited to the issue of damages.[2] However, both of these procedures entail considerable additional effort should they be granted. One additional alternative remains open to plaintiff's counsel in some jurisdictions—the additur.[3] The expense and effort involved in this alternative is considerably less for all parties concerned. The trial court merely tells the defendant to give the plaintiff more money than the jury originally awarded, or plaintiff will receive a new trial. This is not always the procedure. The alternative of a new trial need not always be open to the defendant.

If one accepts the premise that conservation of judicial resources is desirable, additur is the most logical alternative of the three. The availability of this alternative to New Mexico's trial judges and attorneys is the subject of this comment.

THE LAW TODAY

The existence of any law in New Mexico concerning additur is, at very best, questionable. Two relatively recent cases comprise New Mexico's law in this area.[4]

In the *Harris* case, the jury returned a verdict of $3,600.00 for plaintiff. The plaintiff did not feel this to be adequate as he had presented uncontroverted evidence that he had incurred medical expenses in an amount over $3,000.00 plus $2,000.00 worth of damage to his automobile. His damages also included pain and suffering, future medical expenses, as well as a $600.00 bill for a rented car. He

1. *See* N.M.R. Civ. P. 59.

2. *See* Hammond v. Black, 77 N.M. 209, 213, 421 P.2d 124, 127 (1966).

3. "Where a verdict for the plaintiff or defendant (under certain circumstances) is so small as plainly to manifest prejudice or an arbitrary or capricious disregard of the evidence or instructions of the court, it is held in some cases that the court may condition the overruling of a motion to set aside a verdict and grant a new trial upon the opponent of the motion consenting to an increase of the verdict (additur or increscitur) to an amount deemed by the court to accord with the law and the evidence." F. Busch, Law and Tactics in Jury Trials § 600, at 1116 (1949).

4. Jones v. Pollock, 72 N.M. 315, 383 P.2d 271 (1963) and Harris v. Cotton, No. 641 (N.M. Ct. App., Apr. 2, 1971), *cert. denied,* No. 9249 (N.M. Sup. Ct., May 5, 1971).

therefore moved the court to grant an additur or in the alternative a new trial. The Honorable Paul F. Larrazolo presided in the case in the Bernalillo County District Court and granted an additur of $5,400.00. A motion for a new trial was granted in the alternative. The defendants failed to file the additur within the specified time, and a new trial was ordered. The defendants appealed the order granting a new trial, and the plaintiff moved for dismissal. The court of appeals dismissed, and the defendants petitioned the New Mexico Supreme Court for a Writ of Certiorari, which was denied.

The real issue, of course, was the ability of defendants to appeal an order granting a new trial. However, implicit in this dismissal by the court of appeals and the denial of certiorari by the supreme court was a recognition that trial courts in New Mexico have discretion to grant an additur or a new trial in the alternative.

In *Jones,* the jury returned an award of $3,800.00. The plaintiffs had shown undisputed medical expenses of over $11,000.00 in addition to the other types of damages normally sought in tort litigation. "Plaintiffs . . . filed a motion in three alternatives: (1) that an additur be granted; (2) that a new trial limited to the issue of damages only be granted; and (3) that a new trial on all issues in the case be granted. The motion was denied [and] [p]laintiffs appealed."[5] The court felt the only issue was whether the lower court committed error in failing to grant a new trial, thereby accepting an obviously inadequate award: "[W]here it is shown, as it is here, that the verdict of the jury on the question of damages is clearly not supported by substantial evidence adduced at the trial of the case, a motion for a new trial should be granted, and not to do so is an abuse of discretion by the court."[6] It is reversible error for a trial court to accept a verdict clearly unsupported by substantial evidence. The *Jones* case was ". . . remanded to the district court with direction to set aside the verdict and grant a new trial as to all issues."[7]

Taking the two cases together, we get the very strong implication that a trial court must not accept a clearly inadequate verdict, that it has discretion to grant a new trial conditioned upon the unacceptability of an additur, and that it is reversible error not to exercise this discretion.

It can be said, then, that adidtur is available to New Mexico's courts and lawyers. Admittedly, the authority is not crystal clear. The usual procedure when confronted with a similar situation is to look to other jurisdictions for support. If we do this concerning the

5. Jones v. Pollock, 72 N.M. 315, 316, 383 P.2d 271, 272 (1963).
6. *Id.* at 318, 383 P.2d at 274 (1963).
7. *Id.*

power of trial court to grant an additur where the amount in question is undisputed, we find twelve jurisdictions in accord.[8] We could say, then, that at least twelve jurisdictions lend their support to New Mexico's position when, as in both the *Jones* and *Harris* cases, the amount of at least part of the damage incurred by the plaintiff is undisputed, and the verdict returned is substantially less than the amount of undisputed damages. However, it must again be admitted that this area of the law is in need of clarification.

FUNCTIONS OF THE ADDITUR

Additur can serve to protect the rights of plaintiffs. Accepting the premise that the purpose of Tort Law is to adequately compensate an injured party for a wrong done, a judge could provide this protection should the jury render a verdict in a case containing evidence substantiating a higher award.

Additur can also serve to remedy inconsistencies in jury activities inherent in the system. For example, the jury in the *Jones* case found for plaintiff on the issue of liability, but grossly undercompensated him. It is inconsistent to find a defendant liable for his act, and yet not compensate the party to whom he is liable when that party has shown, undisputedly, just how much the defendant is liable to him.

The administration of the judicial system at the trial level can be greatly facilitated through use of the additur. One aspect of administration where it could be most useful is in the area of jury instruction. The ability to grant an additur would permit a trial judge to rectify a verdict rendered in obvious disregard of the instructions.[9]

A second aspect where additur would be effective is in the area of the directed verdict. As the system now operates, the jury is able to "second guess" the court on the issue of liability when the court has granted a directed verdict. The jury does so by awarding only nominal or no damages to the plaintiff regardless of what damages he has shown. This is exactly what occurred in *Watkins v. The State of New Mexico.*[10] The case involved a wrongful death action caused by a fire resulting from negligence on the part of the New Mexico State Hospital. The court granted plaintiff's motion for a directed verdict, and the matter went to the jury solely on the issue of damages. The jury returned a verdict of $2.00. They had no verdict in which they could award plaintiff nothing, or perhaps this would have been the

8. *See* Annot., 56 A.L.R.2d 213, 233 (1957).

9. "The basic policy reason for additur and remittitur is the court's control over the jury by determining the bounds within which the jury may operate, and by modifying the verdict so that it comes within these bounds. . . ." 15 Drake L. Rev. 23 (1965).

10. No. 39986 (Dist. Ct. Santa Fe County, filed Aug. 28, 1968).

case. The plaintiff moved the trial court for an additur or in the alternative a New Trial limited only to the issue of damages or in the alternative a New Trial as the plaintiff did in *Jones.* The trial court ruled against plaintiff on the motion. However, were the law clear on the trial court's ability to grant the additur, the result could conceivably have been the opposite. In any case, the jury has the ability to successfully undermine the court's ruling on liability as the system stands. The ability of the trial court to grant an additur would allow it to make its directed verdict on the issue of liability mean something and correct this inconsistency in the system.

The present state of the law usually prompts one side or the other to appeal the case. In New Mexico, when the plaintiff appeals and wins, the result is a new trial limited to the issue of damages only.[11] In other jurisdictions, again depending on the circumstances of the case, the appellate court will grant an additur.[12] In the event a new trial is granted, a great deal of time and effort has been expended in arriving back to where the issues arose—the trial court. In the event the appellate court grants the additur, which could have been granted by the trial court, needless effort and time has still been taken preparing the appeal.[13] The additur could remedy this situation. If the trial court could clearly grant additur, or in the alternative a new trial, congestion, at least at the appellate level, could be alleviated and the system would be making better use of its resources.[14]

OBJECTIONS TO THE ADDITUR

Objections to additur usually[15] focus around our constitutional guarantee of a right to trial by jury.[16] However, upon closer examination, most cases adhering to this view of additur involve damages not supported by substantial evidence and, therefore, "... in no

11. *See* Hammond v. Black, 77 N.M. 209, 213, 421 P.2d 124, 127 (1966).

12. *See* Annot., 56 A.L.R.2d 213, 255 (1957).

13. "A case that reaches a reviewing court has already cost both the plaintiff and defendant a considerable sum of money, even though the plaintiff may have a contingent arrangement with his attorney.... A reviewing court may not bring the parties into court and force them to consider a settlement of the litigation. A trial court, on the hearing of the motion for a new trial, will be able to bring pressure on the parties to increase the jury's award and to accept... the 'additur'...." Mooney, *Additur–A Court's Power to Increase the Amount of a Verdict in a Negligence Case,* Ins. L. Rep. 389 (July, 1966).

14. "The social and economic costs of overcrowded court dockets increase in geometric proportions.... The situation is rapidly becoming critical and solutions such as additur must be speedily employed." Comment, *Additur–Procedural Boon or Constitutional Calamity,* 17 De Paul L. Rev. 175, 193 (1967).

15. For an objection that is seldom heard, *see* 8 Santa Clara Lawyer 123 (1967), in which the author expressed fear that the additur will lead to forced settlement of cases rather than trial by jury.

16. *See* Dimick v. Schiedt, 293 U.S. 474 (1935).

sense can be said to be included in the verdict."[17] In *Sarvis v. Folsom*[18] the court stated: "We hold in line with what we consider to be the better rule and the weight of authority that in actions at law involving *controverted* and unliquidated damages, courts are without power to require a party to consent to an additur as a condition to refusal to grant a new trial" (emphasis added).

This was not the situation in either the *Jones* or *Harris* cases as pointed out above. In those cases, certain amounts of damages were undisputed, were supported by the evidence, and had to be included in the verdict upon a finding for plaintiff on the issue of liability, yet the award was well below those amounts.

The distinction seems to lie in the reason for altering a verdict. A patent substitution of the judge's idea of what the verdict ought to have been has never been tolerated. But a correction by the judge as to the substance or form of the verdict seems to be acceptable. "[I]t is the duty of the judge to look after [the verdict's] form and substance, so as to prevent a doubtful or insufficient finding from passing into the records of the court. . . . The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs."[19] The Supreme Court of the United States in *Dimick v. Schiedt*[20] recognized this principle stating: "[W]here the verdict is too small, an increase by the court is a bald addition of something which . . . no jury has ever passed upon either explicitly or by implication. . . . [and] compel[s] the plaintiff to forego his constitutional right to the verdict of a jury. . . ."[21] However, when the judge grants an additur in an amount which coincides with the evidence presented in a case in which the jury has passed upon the question of liability, it is not an addition of something the jury has not passed on. The jury has passed upon the defendant's liability and, when the plaintiff has undisputedly shown the amount of that liability, the judge is not violating the Seventh Amendment if he grants an additur making the award conform with the finding of liability.

This may explain the apparent conflicts which exist even within the same jurisdiction, as well as the attention paid to the particular circumstances of each case by appellate courts. The question is re-

17. *Id.* at 486.
18. 114 So.2d 490, 492 (Fla. 1959).
19. 53 Am. Jur. *Trial* § 1094, at 758 (1945).
20. 293 U.S. 474, 486 (1935).
21. *See* Bender, *Additur–The Power of the Trial Courts to Deny a New Trial on the Condition That Damages be Increased,* 3 Calif. W. L. Rev. 1, 39 (1967), for a similar interpretation of the *Dimick* decision.

solved upon determination of what the trial court was doing—replacing or correcting a verdict.[22]

New Mexico's law as set out in the *Jones* and *Harris* cases indicates that additur should be used to resolve issues when the amount of damages incurred by the plaintiff is uncontroverted. This being New Mexico's position, the customary argument involving violations of the constitutional guarantees of trial by jury do not seem to be in point. A correction in form or substance is a practice ". . . of long standing, based on principles of the soundest public policy in the furtherance of justice. . . ."[23] It is not an infringement of the Seventh Amendment.

CONCLUSION

New Mexico's appellate courts have probably adopted additur in this state. However, the law is in great need of clarification if this valuable tool is to be properly utilized by New Mexico's trial judges and lawyers. Such clarification can only come from an appellate court opinion speaking directly to the point[24] or by legislative fiat. Many of our sister states have already granted their trial courts this discretion applicable under varying circumstances.[25] New Mexico is behind her sister states in this regard, and it is time she caught up.

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22. "[I]f we bear in mind . . . the fact that an increase in amount may be an attempt to correct a mistake in form or substance, a great deal of the conflict may be resolved." Annot., 53 A.L.R.2d 213, 221 (1957).

23. 53 Am. Jur. *Trial* § 1094 (1945).

24. *See, e.g.*, McLaughlin v. Chicago, M., St. P. & P.R. Co., 31 Wis.2d 378, 143 N.W.2d 32 (1966). The effect of this decision upon the law in Wisconsin concerning the additur is commented upon in Comment, *Damages: Remittitur and Additur in Wisconsin: Bringing the Powers Rule up to Date*, 51 Marq. L. Rev. 354, 361 (1967-68).

25. *See* 56 A.L.R.2d 213, 226 (1957), for cases in Arizona, California, Colorado, Idaho, and Texas.