

#55(L)

6/8/65

First Supplement to Memorandum 65-28

Subject: Study No. 55(L) - Additur (and Remittitur)

In the course of preparing the principal memorandum, the staff worked out an alternative statutory scheme which may avoid the necessity for a constitutional amendment to effectuate additur authority. Although the precise statutory language has not been perfected, the principles underlying this scheme may be sufficiently articulated to present the issue for Commission consideration. Hence, the purpose of this Supplement is to present this alternative for Commission consideration.

As noted in Memorandum 65-19 (see pages 1-3), it seems likely that Article 1, Section 7, of the California Constitution, as interpreted in Dorsey v. Barba, 38 Cal.2d 350 (1952), stands as a constitutional barrier to additur authority only in unliquidated damages cases "where the first verdict was inadequate" and the plaintiff, under the evidence, "could have obtained a still larger award from a second jury" (38 Cal.2d at 358). The court's opinion is not at all clear as to whether the reference to "inadequate" means that there was no substantial evidence to sustain the judgment entered or, alternatively, that the trial court, in weighing the evidence, simply believed that the verdict was inadequate as against the weight of the evidence. The issue was not discussed because the appellate court, in reviewing the action taken at the trial level, was concerned primarily with the jury trial issue and the power of the court to order additur instead of simply determining whether there was any substantial evidence to support the action taken below. On the facts of the case, however (jury verdict for less than the "specials"; judgment (after defendant consented to additur) in an amount that "exceeded the special damages proved and apparently included some [not enough?] compensation for pain and disfigurement"), it seems reasonable to conclude

that the majority of the court viewed the case as being a situation where there was no substantial evidence to sustain the verdict. In this situation, the case can be viewed as holding that the Constitution guarantees a party a valid jury verdict, i.e., a verdict that is justified by the evidence, and that, in the absence of such valid verdict, the court may not itself assess damages on conflicting or uncertain evidence and modify the judgment with the assent of only one party. It does not necessarily follow, however, that, if the plaintiff's right to a jury is satisfied by a valid jury determination, a court cannot reassess damages and give him more than the jury verdict. This distinction is the basis for the alternative statutory scheme presented in this Supplement.

The alternative statutory scheme may be summarized as follows:

1. If the jury verdict is within the high-low range supported by the evidence, i.e., the jury verdict is supported by the evidence, both plaintiff's and defendant's right to a valid jury determination of the issue of damages has been satisfied; notwithstanding a valid jury verdict, however, the trial court has the duty in ruling on a motion for a new trial to weigh the evidence and to determine whether, in its independent judgment, the verdict is in accord with or against the weight of the evidence. In performing this function, the trial judge has the power to order a new trial limited to the issue of damages. As an alternative to unconditionally ordering a new trial limited to the issue of damages, however, the trial court may, in the case of excessive damages, order the remission of a portion thereof with plaintiff's consent to reduce the judgment to an amount fixed by the court in its discretion (plaintiff cannot complain of deprivation of jury trial because he waives the right to jury trial by consent; defendant cannot complain of deprivation of jury trial because the final judgment against him is less than an amount that, but for the trial

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court's remittitur action, is justified by the evidence and would be sustained on appeal); or the trial court may, in the case of inadequate damages, order an addition thereto with defendant's consent to raise the judgment to an amount fixed by the court in its discretion (defendant cannot complain of deprivation of jury trial because he waives the right to jury trial by consent; plaintiff cannot complain of deprivation of jury trial because the final judgment in his favor exceeds a verdict in an amount that, but for the court's additur action, is justified by the evidence and would be sustained on appeal). The right to jury trial is thus satisfied because the parties have had a valid jury verdict on the issue of damages; any judgment consented to by an opposing party is necessarily more favorable to the party in a technical position to complain than would be a judgment entered on the verdict (which, admittedly, would be a valid judgment).

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Proposed statutory language to effectuate this authority is as follows:

In ruling on a motion for new trial in a civil case tried by jury where it is claimed that damages are excessive or inadequate, the trial court may, if the verdict is supported by any substantial evidence:

(1) With the plaintiff's consent, in the case of excessive damages, order the remission of so much thereof as the court in its discretion determines.

(2) With the defendant's consent, in the case of inadequate damages, order an addition of so much thereto as the court in its discretion determines.

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2. If the jury verdict is outside the high-low range supported by the evidence, i.e., the jury verdict is not supported by the evidence, neither plaintiff's nor defendant's right to a valid jury determination of the issue of damages has been satisfied; hence, the trial court has the duty in ruling on a motion for new trial to do substantial justice between the parties

vis-a-vis their right to a jury determination of the issue of damages. Free rein to the court in fixing damages in this situation would merely result in a court determination of the issue of damages without the parties' ever having had a valid jury determination of this issue. The trial court, of course, has the power to order a new trial limited to the issue of damages. As an alternative to unconditionally ordering a new trial limited to the issue of damages, however, the trial court may, in the case of excessive damages, offer an alternative to the parties as follows: The court may, with the plaintiff's consent, order the remission of such amount as will reduce the judgment to the lowest amount justified by the evidence (plaintiff cannot complain of deprivation of jury trial because he waives the right to jury trial by consent; defendant cannot complain of deprivation of jury trial because the final judgment against him is for the lowest amount that is justified by the evidence and is the least amount that could be awarded in a verdict that could be sustained on appeal); if the plaintiff does not consent to this remission, the court then may, with the defendant's consent, order the remission of such amount as will reduce the judgment to the highest amount justified by the evidence (defendant cannot complain of deprivation of jury trial because he waives the right to jury trial by consent; plaintiff cannot complain of deprivation of jury trial because the final judgment in his favor is for the highest amount that is justified by the evidence and is the greatest amount that could be awarded in a verdict that could be sustained on appeal). In the case of inadequate damages, the situation would be exactly reversed. Thus, the trial court may, with the defendant's consent, order an addition of such amount as will raise the judgment to the highest amount justified by the evidence (defendant cannot complain of deprivation of jury trial because he waives the right to jury trial by consent; plaintiff cannot complain of deprivation of jury trial because the final judgment in his

favor is for the highest amount that is justified by the evidence and is the greatest amount that could be awarded in a verdict that could be sustained on appeal); if the defendant does not consent to this addition, the trial court then may, with the plaintiff's consent, order the addition of such amount as will raise the judgment to the lowest amount justified by the evidence (plaintiff cannot complain of deprivation of jury trial because he waives the right to jury trial by consent; defendant cannot complain of deprivation of jury trial because the final judgment against him is for the lowest amount that is justified by the evidence and is the least amount that could be awarded in a verdict that could be sustained on appeal). In effect, the right to jury trial would be satisfied by entering judgment for the most favorable amount that the party in a position to complain could obtain from a jury.

Proposed statutory language to effectuate this authority is as follows:

In ruling on a motion for new trial in a civil case tried by jury where it is claimed that damages are excessive or inadequate, the trial court may, if the verdict is not supported by any substantial evidence:

(1) In the case of excessive damages, order the remission of so much thereof as will reduce the judgment to the lowest amount justified by the evidence, if the plaintiff consents, or, if the plaintiff does not consent, order the remission of so much thereof as will reduce the judgment to the highest amount justified by the evidence if the defendant consents.

(2) In the case of inadequate damages, order an addition of so much thereto as will raise the judgment to the highest amount justified by the evidence, if the defendant consents, or, if the defendant does not consent, order an addition of so much thereto as will raise the judgment to the lowest amount justified by the evidence if the plaintiff

consents.

[Note: If neither party consents in either case, the proper action is for the trial court to grant a new trial limited to the issue of damages.]

3. Appellate review of any action taken at the trial court level would be exactly the same as under existing law and as proposed in the principal memorandum, namely, the appellate court reviews the action taken at the trial level to determine if there is any substantial evidence to support the action taken below: If so, the lower court action is affirmed without regard to the appellate court's independent view of the evidence; if there is no substantial evidence to sustain the action taken below, however, regardless of whether that action consists of a judgment on the verdict without regard to additur or remittitur or a judgment entered after either additur or remittitur, then the appellate court either could apply exactly the same rule mentioned above with respect to the power of the trial court to enter additur or remittitur orders in cases where the verdict is not supported by any substantial evidence or, in the alternative, could be limited to fixed highs and lows as suggested on page 7 of the principal memorandum.

(Note that the option given the plaintiff and defendant in additur and remittitur situations in cases where the verdict is not supported by any substantial evidence is an alternative that ought to be considered for the rule to be applied at the appellate level even if this proposed scheme is rejected and a constitutional amendment is deemed necessary.)

There is no assurance that the foregoing scheme will circumvent constitutional objection to additur authority in California. It seems reasonably clear, however, that adoption of such a scheme would eliminate any logical objection to such practice. Thus, plaintiff's and defendant's rights would be fully protected in every case.

Respectfully submitted,

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STUDIES ON CURRENT AGENDA OF LAW REVISION COMMISSION
(includes studies added by SCR 80, 1965 Session)

Study No.	Research Consultant	Study Status
12	Taking Instruction to Jury Room Staff	---
23	Confirmation--Partition Sales ---	---
26	Escheat Staff	---
27	Putative Spouse ---	---
30	Custody Jurisdiction Kingsley	Study on hand
36(L)	Condemnation Nibley firm	Study on hand
39	Attachment, Garnishment, Execution ---	---
41	Small Claims Court Law ---	---
42	Rights of Good Faith Improver Merryman	Study on hand
44	Suit in Common Name Crane	Study on hand
45	Mutuality re Specific Performance ---	---
47	Contracts in Writing--CC § 1698 Harvard Student Legislative Bureau	---
49	Rights of Unlicenced Contractor Sumner	Study on hand
50(L)	Rights Upon Abandonment or Termination of Lease Verrall	Study on hand
51	Right of Spouse to Support after Ex Parte Divorce Staff	---
52(L)	Sovereign Immunity ---	---
53(L)	Personal Injury Damages Brunn	Study on hand
55(L)	Additur and Remittitur Pickering	Study on hand
59	Service by Publication ---	---
60	Representation Credit (CCP § 1974) Harvard Student Legislative Bureau	---
61	Election of Remedies ---	---
62	Vehicle Code Section 17150 and related statutes Friedenthal	Study on hand
63(L)	Evidence Code Staff	---
64(L)	Pour-over Trusts and Powers of Appointment ---	---
65(L)	Inverse Condemnation ---	---