

#55(L)

8/9/65

Memorandum 65-56

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

At the July meeting, the Commission agreed not to solicit comments on alternative means of providing additur authority (by constitutional amendment vs. by statute). Instead, the staff was asked to prepare a draft of a tentative recommendation based upon a statutory approach. Attached are two copies of a proposed tentative recommendation on this subject. Please mark any suggestions you may have for revision on one of the copies for return to the staff at the October meeting.

The Commission discussed alternative means of stating the condition in subdivision (a) of the draft statute so that it would not appear so obviously that the court is setting aside a perfectly valid jury verdict. After considering several alternatives, the staff has concluded that the most desirable approach is a direct one. Any attempt to veil the precise effect of this condition not only clouds the issue but also makes it more difficult to explain the constitutionality of the proposal. Retaining a semi-direct approach, however, the Commission might consider as a substitute a requirement that "the court finds" that the jury verdict is supported by substantial evidence. Aside from blunting the effect of the court's action, it has the merit of requiring a specific finding that the condition exists (which otherwise would be left to implication by the mere exercise of additur authority).

The Commission also discussed the desirability of limiting the court's discretion in fixing damages by an affirmative standard, such as damages in an amount justified by the evidence. The staff believes that

such a statement would leave the way open to a defendant to raise the issue on appeal notwithstanding his consent to the additur order; hence, the statutory language is essentially in the same form as previously considered. Instead, the Comment has been "beefed up" on this point so as to clarify the intent of the statutory language.

We believe that the compromise new trial bill (Senate Bill No. 24) passed the Legislature and was signed by the Governor. However, we have been unable to verify this and do not know the exact form in which the bill passed. Hence, an adjustment may be necessary to conform Section 657 as set out in the proposed tentative recommendation to the language of the section as amended if such is the case.

The staff has no other specific matters to raise in connection with this draft. However, we believe it would be highly desirable before considering this matter at the October meeting that each of you read the majority and minority opinions in each of the two Dorsey reports: 38 Cal.2d 350, 240 P.2d 604 (1952); 226 P.2d 677 (Cal. App. 1951)(opinion of District Court of Appeal vacated upon hearing granted by the Supreme Court). The DCA opinions are particularly informative in regard to the facts of the case and contain an excellent discussion of the other California cases bearing upon this problem as well as various theories advanced in support of additur.

Respectfully submitted,

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#55(L)

TENTATIVE RECOMMENDATION
of the
CALIFORNIA LAW REVISION COMMISSION
relating to
ADDITUR

BACKGROUND

In 1957, the California Law Revision Commission was directed by the Legislature to make a study to determine whether a trial court should have the power to require, as a condition of denying a motion for a new trial, that the party opposing the motion stipulate to the entry of judgment for damages in excess of the damages awarded by the jury. This practice is commonly known as additur; it is the logical converse of remittitur, a practice whereby the court conditions the denial of a defendant's motion for a new trial upon the plaintiff's consent to the entry of judgment for damages in a lesser amount than the damages awarded by the jury. In 1965, the Legislature expanded the scope of its previous directive to include a study of remittitur as well as additur at both the trial and appellate court levels. In response to these legislative directives, the Commission submits this recommendation relating to additur; the Commission makes no recommendation at this time concerning the subject of remittitur but plans to continue its study of this topic.

Additur and remittitur are incidents of the general power of a court to grant a motion for new trial because of inadequate or excessive damages awarded by a jury. Any consideration of the exercise of additur and remittitur authority necessarily involves a consideration of the court's

function in ruling on motions for new trial and the effect of this judicial duty on the parties' right to a trial by jury on the issue of damages.

The right to a jury trial is guaranteed by the California Constitution in these terms: "The right of trial by jury shall be secured to all, and remain inviolate" CAL. CONST., Art. I, § 7. This constitutionally guaranteed right to a jury trial does not, however, preclude a court from exercising its judicial authority to grant a new trial in appropriate circumstances. "The courts in this country, and in England since long before the time of Blackstone, had always exercised the power of granting a new trial after verdict, and for the causes, among others, of insufficiency of evidence, or that the damages were either inadequate or excessive" Ingraham v. Weidler, 139 Cal. 588, 589-590, 73 Pac. 415 (1903). In this respect, the court acts as "a thirteenth juror" who has not only the power but the duty to review conflicting evidence, weigh its sufficiency, judge the credibility of witnesses, and exercise its independent judgment in determining whether to set aside a jury verdict. Green v. Soule, 145 Cal. 96, 78 Pac. 337 (1904); Tice v. Kaiser Co., 102 Cal. App.2d 44, 226 P.2d 624 (1951). The parties' right to a jury trial is not violated by the exercise of this authority because "it is clear that the constitutional guarantee [Article I, Section 7] is fully observed when the verdict of the jury in the case is rendered and recorded." Estate of Bainbridge, 169 Cal. 166, 169, 146 Pac. 427, 428 (1915)("whether judgment shall be pronounced upon the verdict or the verdict set aside--is 'strictly of legal cognizance,' which must be determined by the trial court, and unless a manifest abuse of discretion is shown, the decision will not be disturbed on appeal").

In California, the grounds for granting a new trial are set out in Section 657 of the Code of Civil Procedure. Excessive damages and

insufficiency of the evidence to support the verdict are separately stated as independent grounds for granting a new trial. An inadequate award of damages is not explicitly recognized as a separate ground for granting a new trial. However, it is clear that an inadequate award of damages constitutes a sufficient basis for granting a new trial on the ground of insufficiency of the evidence to support the verdict. Phillips v. Lyon, 109 Cal. App. 264, 292 Pac. 711 (1930); 3 WITKIN, CALIFORNIA PROCEDURE, Attack on Judgment in Trial Court § 20 (1954). See also Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954). It is thus clear that either an excessive award of damages or an inadequate award of damages constitutes a sufficient basis for granting a motion for new trial in California.

It is only with respect to the issue of damages that additur and remittitur have any relevance. Thus, excluding all other grounds upon which a new trial might be appropriate in a given case, additur and remittitur come into play as reasonable alternatives to the granting of a new trial where the sole issue involves the adequacy of damages. Each is recognized as well suited to the efficient administration of justice. Additur and remittitur authority serve to bring litigation to a more speedy and economical conclusion than would be possible by a retrial of the issue of damages before another jury. Avoiding the delay and expense of a retrial also contributes to expeditious handling of judicial business. These practical advantages of additur and remittitur have long led legal writers to conclude that these procedures should form an integral part of the judicial machinery. See, e.g., Carlin, Remittiturs and Additurs, 49 W. VA. L.Q. 1 (1942); Comment 44 YALE L.J. 318 (1934). However, practical expediency may not supplant

constitutionally guaranteed rights. Hence, it is appropriate to consider the legal basis for the exercise of additur and remittitur authority as adjuncts to the power of a trial court to grant a new trial.

The practice of remittitur has long been recognized as an appropriate exercise of judicial authority as an alternative to granting a motion for new trial in the case of an excessive award of damages by a jury. Draper v. Hellman Com. Trust & Sav. Bank, 203 Cal. 26, 263 Pac. 240 (1928). It does not violate a defendant's constitutional right to a jury trial on the issue of damages. See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). Additur is logically indistinguishable from remittitur insofar as each of these practices relates to the power of a trial court to substitute its judgment for the judgment of the jury. Attempts have been made to distinguish the two practices on several bases. See Dimick v. Schiedt, 293 U.S. 474 (1935); Comment, 40 CAL. L. REV. 276, 283 (1952); Comment, 3 STAN. L. REV. 738 (1951). However, the attempt to distinguish the practices leads to inconclusive results; legal writers and courts alike have rejected such distinctions as being unconvincing. The plain fact is that under both practices the court substitutes its judgment for the judgment of the jury. The question is whether this practice violates either party's constitutional right to a jury determination of the issue of damages.

Logically, it might be said that unrestricted remittitur and additur practices do violate one or the other party's right to a jury determination of the issue of damages. Remittitur practice, however, is so well established that it is recognized as constitutionally permissible. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). On the other hand, additur is a lesser known procedure with an apparently more recent history. Accordingly, when the issue was squarely raised in California, the Supreme Court held in

Dorsey v. Barba, supra, 38 Cal.2d 350, 240 P.2d 604 (1952), that an additur order based upon only the defendant's consent in an unliquidated damages case violated plaintiff's constitutional right to a jury trial on the issue of damages. The court distinguished but failed to overrule several earlier cases that had recognized additur as being permissible in several circumstances. As a result, the current status of additur in California is not at all clear. It seems reasonable to conclude, however, from the earlier cases on the subject as well as from the Dorsey opinion itself, that additur is not unconstitutional per se and that it is currently permissible in the following cases:

(1) In any case where damages are certain and ascertainable by a fixed standard. In effect, the court by an additur order merely fixes damages in the only amount justified by the evidence and the only amount that the jury could find. Any variance in that amount would either be excessive or inadequate as a matter of law. Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921).

(2) In any case where the court's conditional order granting a new trial requires the consent of both plaintiff and defendant. Failure of either party to consent will result in granting a new trial; hence, the plaintiff retains control over whether or not he will receive a second jury trial. Since consent of both parties operates to waive each party's right to a jury trial, there can be no complaint to this form of additur. Hall v. Murphy, 187 Cal. App.2d 296, 9 Cal. Rptr. 547 (1960).

(3) With only the defendant's consent in any case where it is the defendant who is complaining from the final judgment. His consent waives his right to complain about the judgment as entered. Blackmore v. Brennan, 43 Cal. App.2d 280, 710 P.2d 723 (1941). See also Dorsey v. Barba, 38 Cal.2d

350, 240 P.2d 604 (1952).

(4) In any case where the court fixes damages in the highest amount justified by the evidence even though only the consent of the defendant is obtained. Since any amount in excess of this sum would be excessive as a matter of law, no plaintiff could possibly receive a higher amount from any jury. Dorsey v. Barba, 38 Cal.2d 350, 358, 240 P.2d 604, 608 (1952)("the plaintiff has actually been injured if, under the evidence, he could have obtained a still larger award from a second jury"); Dorsey v. Barba, 226 P.2d 677, 690 (Cal. Dist. Ct. App. 1951).

In addition to the foregoing, it seems reasonable to conclude that additur is permissible in at least one other area. Where a jury verdict is supported by substantial evidence, a judgment entered on the verdict would be sustained on appeal against a plaintiff's attack based upon an inadequate award of damages. Lambert v. Kemp, 101 Cal. App. 388, 281 Pac. 690 (1929). Notwithstanding evidentiary support for the verdict, however, a trial court has the power to set aside a jury verdict where, in its view, the verdict is against the weight of the evidence. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465 (1946). As an incident to the exercise of its discretion in granting or denying a plaintiff's motion for new trial on the ground of inadequacy of damages, it is not unreasonable to conclude that the trial court may enter an additur order with only the defendant's consent in cases where the jury verdict is in fact supported by substantial evidence. This conclusion is supported by the Dorsey opinion itself, but no reported decision in California discusses the possible application of additur authority in this narrow situation. Accordingly, a statutory grant of additur authority restricted to this situation appears to be warranted.

RECOMMENDATION

The Commission recommends the amendment of existing legislation and the enactment of new legislation to accomplish the following objectives:

(1) Inadequacy of damages awarded by a jury should be explicitly recognized by statute as a ground for granting a new trial. It is presently recognized in fact by the courts, but the specific ground for such recognition is stated to be insufficiency of the evidence to support the verdict. Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954). This is technically correct and would not be altered by specific recognition of inadequate damages; however, explicit statutory recognition of excessive damages without apparent recognition of its converse--inadequate damages--tends to cast doubt on the availability of the latter as a ground for granting a new trial. Hence, the language of Section 657 of the Code of Civil Procedure should be revised to conform it to existing case law.

(2) The statement of excessive damages as an independent ground for granting a new trial should be revised to eliminate the purported requirement that the excessive damages resulted from passion or prejudice. As in the case of inadequate damages, the true basis for granting a new trial because of an excessive award of damages is the insufficiency of the evidence to support the verdict. Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941 (1938). Despite this fact, the statement of excessive damages as an independent ground for granting a new trial should be continued. First, it serves to indicate precisely wherein the verdict is defective and distinguishes the damage issue from other evidentiary matters whose sufficiency may be questioned. Second, elimination of excessive damages as an independent ground for granting a new trial would cast doubt upon its continued availability just as the

failure to recognize explicitly an award of inadequate damages tends to cast doubt on its availability as an independent ground for granting a new trial.

(3) A limited form of additur practice should be specifically authorized by statute. There is no need to detail by statute the variety of circumstances in which various forms of additur are permissible under existing case law; these exist and will continue to exist on a common law basis just the same as remittitur authority may continue to be exercised without benefit of explicit statutory recognition. Because of the confusion that exists with respect to the exercise of additur authority, however, there is a need for explicit statutory recognition of this salutary practice in at least one area where its availability has not been clearly felt. Where the evidence of damage is conflicting and uncertain and the jury returns a verdict for an amount which, though supported by substantial evidence, the court determines to be against the weight of the evidence, the court should have the power to enter an additur order as an alternative to granting a plaintiff's motion for new trial because of inadequate damages. Explicit statutory recognition of additur authority in this narrowly confined area would serve to clarify an ambiguity in the law that presently exists with respect to the availability of additur as an alternative to granting a motion for new trial limited to the issue of damages. The delay and expense of a retrial could be avoided by the judicious use of additur authority in this situation.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Section 657 of, and to add Section 657.5 to, the Code of Civil Procedure, relating to new trials.

The people of the State of California do enact as follows:

SECTION 1. Section 657 of the Code of Civil Procedure is amended to read:

657. The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive or inadequate damages ~~, appearing to have been given under the influence of passion or prejudice ;~~

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order.

Comment. This amendment to Section 657 simply conforms the language of the section to the judicial decisions declaring its substantive effect. Specifically, the amendment accomplishes two purposes.

First, an inadequate award of damages is explicitly recognized as a ground for granting a new trial in the same manner as an excessive award of damages presently is recognized. The availability of this basis for granting a new trial is well settled in California. Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954). Since an excessive award of damages is stated explicitly as a sufficient ground for granting a new trial, the availability of its converse--inadequate damages--also should be made explicit to avoid any ambiguity.

Second, the qualifying language in subdivision (5) that purports to limit the ground of excessive damages to an award influenced by "passion

or prejudice" is eliminated. This revision is in recognition of the fact that the true basis for granting a new trial because of excessive damages is the insufficiency of the evidence to support the award; neither passion nor prejudice need be shown. Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941 (1938). See Sinz v. Owens, 33 Cal.2d 749, 205 P.2d 3 (1949). It is clear, also, that the qualifying language is unnecessary with respect to new trials based upon an inadequate award of damages. Reilley v. McIntire, 29 Cal. App.2d 559, 85 P.2d 169 (1938). Hence, the language is eliminated as being unnecessary.

SEC. 2. Section 657.5 is added to the Code of Civil Procedure, to read:

657.5. In any civil action tried by jury where a new trial limited to the issue of damages is otherwise appropriate, the trial court may, as a condition of denying a motion for new trial on the ground of inadequate damages, order an addition of so much thereto as the court in its discretion determines if:

(a) The verdict of the jury on the issue of damages is supported by any substantial evidence; and

(b) The party against whom the verdict has been rendered consents to such addition.

Comment. This section is entirely permissive in nature. It does not preclude the exercise of additur authority in any other case in which it may appropriately be exercised, nor does it require that additur be resorted to in any case where the conditions of the statute are otherwise satisfied. The effect of the statute, then is simply to authorize the use of additur in a limited situation as an alternative to granting a motion for new trial on the ground of inadequacy of damages.

1. The first part of the introductory clause limits the applicability of the section to civil actions tried by jury; excluded entirely from this statutory grant of additur authority are all actions tried by the court without a jury. Hence, the availability of additur authority in the excluded actions is unaffected by this statute. Sufficient statutory authority presently exists for the exercise of discretionary additur authority in cases tried by the court without a jury. CAL. CODE CIV. PROC. § 662.

2. The remainder of the introductory clause restricts the exercise of

additur authority under this section to cases "where a new trial limited to the issue of damages is otherwise appropriate." This limitation excludes two distinct classes of cases from this statutory grant of additur authority: (1) additur is not authorized where a new trial is appropriate on any issue other than damages but only where the amount of damages to be awarded is the sole issue that ought to be retried; (2) additur is authorized only where a new trial would otherwise be appropriate. Thus, if an error in the amount of damages can be cured without the necessity of a new trial, whether or not the curative action actually results in increasing the amount awarded, a new trial limited to the issue of damages is not otherwise appropriate and the statute is inapplicable. This language makes it clear that the statute does not affect the existing additur practice in unliquidated damages cases where the amount to be awarded can be fixed with certainty. See Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 Pac. 52 (1921).

3. The statute grants additur authority to trial courts only. Hence, existing appellate additur practice is unaffected. See CAL. CODE CIV. PROC. § 53; CAL. CT. RULES Rule 24(b). Restriction of this grant of additur authority to trial courts is in recognition of the difference between trial and appellate functions. Extension to the appellate level of the additur authority granted to the trial court by this statute would require an appellate court to exercise discretion in the same manner as a trial court but without benefit of seeing the witnesses and hearing the testimony.

4. The specification of the ground of the motion for new trial as being "inadequate damages" is predicated upon an amendment to Section 657 of the Code of Civil Procedure recognizing explicitly inadequate damages as a specific ground for granting a new trial just as excessive damages is now recognized as a specific ground for granting a new trial. Although both are based in fact

on the insufficiency of the evidence to support the verdict (Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941 (1938); Harper v. Superior Air Parts, Inc., 124 Cal. App.2d 91, 268 P.2d 115 (1954)), they are nonetheless distinguishable aspects of such insufficiency and deserve separate statement.

5. The statute permits the trial court to fix damages in an amount determined to be appropriate in the exercise of the court's discretion. Such discretion is, of course, not absolute; it may not be arbitrarily exercised. In the first place, a practical limitation is placed upon the court's discretion by subdivision (b) which requires the defendant's consent. A defendant quite obviously would be unwilling to consent to entry of an inordinately excessive judgment. Moreover, discretion of this nature vested in a trial court means "legal discretion" and not a whim or caprice. "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."

Bailey v. Taaffe, 29 Cal. 422, 424 (1866).

6. Subdivisions (a) and (b) state the conditions to be satisfied before additur may be ordered. These conditions are designed to meet the constitutional objections to additur in unliquidated damages cases that were raised in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952).

Subdivision (b) requires only the consent of the party opposing the motion for new trial (the defendant). If the defendant fails to consent, the condition upon which the court's order denying a new trial is predicated will not have been satisfied; hence, the order granting a motion for new trial limited to the issue of damages would become effective as the order of the court.

See Secreto v. Carlander, 35 Cal. App.2d 361, 95 P.2d 476 (1939). If the defendant consents to the addition, however, he cannot complain of deprivation of jury trial because he waives the right to jury trial by his consent. Blackmore v. Brennan, 43 Cal. App.2d 280, 110 P.2d 723 (1941). See Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). See also Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951 (1950). Consent of the defendant in compliance with subdivision (b) thus removes from consideration any complaint the defendant may have regarding the amount of damages reflected in a judgment entered on an additur order.

Because the plaintiff's consent to additur is not required by the statute, there are two bases he may have for complaint about the damages awarded pursuant to an additur order: (1) that the amount of damages reflected in the judgment still is inadequate because the evidence is insufficient to support the damages fixed by the court and (2) that he has been deprived of a jury trial on the issue of damages. The statute meets both of these objections by the condition stated in subdivision (a), namely, that the verdict of the jury on the issue of damages must be supported by substantial evidence.

Under existing law, where there is a conflict in the evidence on the issue of damages, the trial court has discretion to grant a motion for new trial based upon either an excessive or an inadequate award of damages. "The amount of damages is committed to the sound discretion of the jury, and next, to the discretion of the judge of the trial court who, in ruling upon the motion for new trial, may consider the evidence anew and set aside the verdict if it is not just." Baker v. Board of Trustees, 133 Cal. App. 243, 249, 23 P.2d 1071, 1073 (1933). In reviewing the trial court's discretion, the appellate court's function "begins and ends" with a determination as to

whether there is any substantial evidence to support its action. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183 (1935). If the trial court grants a motion for new trial because, in its view, the verdict on the issue of damages is against the weight of the evidence, the test on appeal is not whether the jury verdict is supported by substantial evidence but whether there is any substantial evidence to support the trial court's action. It is thus clear that the trial court's power to grant a new trial because of an excessive or an inadequate award of damages exists notwithstanding the fact that the jury verdict may be supported by substantial evidence. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465 (1946).

With respect to the parties' constitutional right to a jury trial on the issue of damages, the question of whether there is or is not substantial evidence to support a jury verdict becomes paramount. If there is no substantial evidence to support the damages awarded by the jury, neither plaintiff nor defendant has been accorded a proper trial by jury on this issue. On the other hand, if the jury verdict on the issue of damages is supported by substantial evidence, it seems appropriate to conclude that the jury properly performed its function and that the parties have been accorded the substance of a jury trial on this issue. However, "whether judgment shall be pronounced upon the verdict or the verdict set aside" is a different question, "'strictly of legal cognizance,' which must be determined by the trial court, and unless a manifest abuse of discretion is shown, the decision will not be disturbed on appeal." Estate of Bainbridge, 169 Cal. 166, 169, 146 Pac. 427, 428 (1915).

The distinction between jury verdicts that are and are not supported by substantial evidence is of significance in determining the proper limits of any additur authority to be provided by statute. If the jury verdict is supported by substantial evidence, the plaintiff could not successfully upset a judgment

entered upon the verdict; not only is his right to a jury trial satisfied, but the amount of damages is not insufficient as a matter of law. Lambert v. Kamp, 101 Cal. App. 388, 281 Pac. 690 (1929). The amount of damages reflected in a judgment based upon an additur order necessarily exceeds the amount of the jury verdict. If the jury verdict is supported by substantial evidence, as subdivision (a) requires that it be before the court is authorized to exercise additur authority, the plaintiff in fact would be receiving a larger judgment based upon an additur order than the lesser amount reflected in the jury verdict that is supported by substantial evidence. He could not successfully contend, therefore, that the damages reflected in a judgment based upon an additur order made pursuant to this statute are legally insufficient.

The second basis for complaint by the plaintiff concerns the asserted deprivation of his right to a jury trial on the issue of damages. This was the problem involved in Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). The jury returned a verdict for plaintiffs in amounts that were "insufficient to cover medical expenses and loss of earnings" (38 Cal.2d at 355, 240 P.2d at 607); no allowance was made for pain and disfigurement. The trial court denied plaintiffs' motion for new trial based on an inadequate jury award upon defendant's consent to pay additional sums that resulted in a judgment being entered for amounts that "exceeded the special damages proved and apparently included some compensation for pain and disfigurement" (38 Cal.2d at 355, 240 P.2d at 607). Upon plaintiffs' appeal from the judgment entered on the basis of the additur order, the California Supreme Court held that the trial court's action violated plaintiffs' right to a jury trial on the issue of damages as guaranteed by the California Constitution ("The right of

trial by jury shall be secured to all, and remain inviolate" CAL. CONST., Art. I, § 7). After noting that "the evidence would sustain recovery for pain and disfigurement well in excess of the amounts assessed by the court," the court held that "a court may not impose conditions which impair the right of either party to a reassessment of damages by the jury where the first verdict was inadequate, and the defendant's waiver of his right to jury trial by consenting to modification of the judgment cannot be treated as binding on the plaintiff" (38 Cal.2d at 358, 240 P.2d at 609 (emphasis added)).

Mr. Justice (now Chief Justice) Traynor vigorously dissented, noting particularly that "plaintiffs have already had their jury trial" (38 Cal.2d at 363, 240 P.2d at 612) and that "the right to a jury trial . . . does not include the right to a new trial" (38 Cal.2d at 360, 240 P.2d at 610) involving "a reassessment of damages by a second jury" (38 Cal.2d at 365, 240 P.2d at 613).

Although it is not entirely clear from either opinion, it seems reasonable to conclude that the fundamental difference between the majority and minority positions in the Dorsey case stemmed from differing views of the original verdict that was rendered in the case--the majority viewing the verdict as one not supported by the evidence so that plaintiffs never had a valid jury determination of the issue of damages and the minority justice viewing the verdict as one sufficiently supported by the evidence so as to satisfy plaintiffs' constitutional right to a jury determination of this factual question. Depending upon the view taken of conflicting evidence, the original verdict awarded damages in amounts that were less than the proven special damages and contained no awards for pain or disfigurement. See Dorsey v. Barba, 226 P.2d 677 (Cal. Dist. Ct. App. 1951). Hence, it is reasonable to conclude (as the majority must have concluded) that the verdict was not supported by the evidence because of its inadequacy and that the plaintiffs did not receive a proper jury determination

on the issue of damages, particularly in regard to damages for pain and disfigurement. Accordingly, the trial court could not enter a judgment based upon its own determination of this question without violating plaintiffs' constitutional right to a trial by jury. This interpretation of the Dorsey opinion is supported by the court's statement that "a court may not impose conditions which impair the right of either party to a reassessment of damages by the jury where the first verdict was inadequate" (38 Cal.2d at 358, 240 P.2d at 609 (emphasis added)).

It seems reasonable to conclude, therefore, that an additur practice can be authorized by statute, without a supporting constitutional amendment, in those cases where there is substantial evidence to support the jury verdict and a judgment entered on the verdict could not be reversed for inadequacy. In such a case, the plaintiff could not successfully contend that he had been deprived of a jury determination of the issue of damages if judgment were entered on the verdict. Lambert v. Kamp, 101 Cal. App. 388, 281 Pac. 690 (1929). Hence, he cannot possibly be injured by a judgment entered on an additur order in an amount that exceeds the verdict.

Subdivision (a), therefore, is drafted with a view to distinguishing the situation where the verdict is supported by substantial evidence and the situation where it is, as a matter of law, for an inadequate amount. Where the verdict is not supported by the evidence, the trial court is granted no authority under this statute to substitute for the verdict its own determination of a question of fact upon which the parties are entitled to a jury's determination; even though the defendant may consent to an increase in the amount to be awarded and thereby waive his right to complain of deprivation of jury trial on this issue (Blackmore v. Brennan, 43 Cal. App.2d 280, 110 P.2d 723 (1941)), his consent can in no way bind the plaintiff to forgo his

constitutional right to have the issue properly decided by a jury. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952). However, where a verdict is supported by substantial evidence, both parties' right to a jury determination of the issue of damages has been satisfied. Estate of Bainbridge, 169 Cal. 166, 169, 146 Pac. 427, 428 (1915)("the constitutional guarantee . . . is fully observed when the verdict of the jury in the case is rendered and recorded"). Subdivision (a) simply authorizes the court, in lieu of granting a motion for new trial limited to the issue of damages, to increase the jury's assessment of damages when the court is convinced that the verdict is against the weight of the evidence.

Since the statute grants additur authority to trial courts only in cases where the jury verdict is supported by substantial evidence, the plaintiff's right to jury trial is logically and constitutionally satisfied. No injury is perceived in awarding to the plaintiff more than he has a constitutional right to obtain.