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7/9/68

Commissioner primarily responsible: Wolford

Memorandum 68-50

Subject: Study 55 - Additur and Remittitur

You will recall that at a recent meeting the Commission determined that Code of Civil Procedure Section 662.5 (authorizing additur) should be revised to recognize additur and remittitur practice but should contain no procedural limitations on the practice.

The attached tentative recommendation has been prepared to effectuate this decision. Please mark your editorial revisions on one copy so that they can be considered in revising the tentative recommendation for distribution after the meeting.

Respectfully submitted,

John H. DeMouly
Executive Secretary

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

ADDITUR AND REMITTITUR

In Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604 (1952), the California Supreme Court held that a trial court could not condition its denial of a plaintiff's motion for new trial on the ground of inadequate damages upon the defendant's consent to the entry of a judgement for damages in a greater amount than the amount awarded by the jury. The court held that this practice--known as additur-- violated the nonconsenting plaintiff's constitutional right to have a jury determine the amount of the damages to which he is entitled.

Section 662.5 of the Code of Civil Procedure was enacted in 1967 upon recommendation of the Law Revision Commission to permit additur under circumstances where it was thought not to be inconsistent with Dorsey. Section 662.5 authorizes additur where granting a new trial on the issue of damages is otherwise appropriate and the jury verdict is supported by substantial evidence. The Commission noted, however, in its report proposing Section 662.5 that the section "leaves the California Supreme Court free to modify, limit, or even overrule its decision in the Dorsey case and allow additur practice in cases where the jury verdict on damages is not supported by substantial evidence."¹

1. Recommendation and Study Relating to Additur, 8 Cal. L. Revision Comm'n Reports at 612 (1967).

In June 1967, the California Supreme Court, in Jehl v. Southern Pacific Co., 66 Cal.2d 821, 427 P.2d 988, 59 Cal. Rptr. 276 (1967), expressly overruled the Dorsey decision. In a unanimous opinion, the court held that additur does not impair the right to a jury trial and is a proper procedure well suited to the efficient administration of justice. With reference to the Commission recommended legislation, the Court stated: "Since we overrule Dorsey it is unnecessary to limit additur to those cases where the jury's verdict is supported by substantial evidence."²

The Commission has reviewed the Jehl case to determine whether Section 662.5 should be revised or repealed. The section could be repealed since the Jehl case has clearly established additur as an accepted and desirable practice in this state. However, the Commission recommends that the section not be repealed but be revised to conform to the Jehl case. The presence in the code of a section relating to additur will serve as a constant reminder to lawyers and judges that this useful corrective device is available in California and the annotations under Section 662.5 in the annotated codes will provide a helpful starting point for research on any question involving additur.

Specifically, the Commission recommends that Section 662.5 be revised to eliminate the apparently restrictive language purporting to authorize additur "where the verdict of the jury on

2. 66 Cal.2d at 832 n.15, 427 P.2d at 995, 50 Cal. Rptr. at 283.

the issue of damages is supported by substantial evidence," a limitation that no longer exists in California. In addition, the language of the section should be revised to adopt the test stated in the Jehl case for determining the amount of the additur, i.e., that amount that the court in its independent judgment determines from the evidence to be fair and reasonable.

The same reasons that cause the Commission to recommend that Section 662.5 be revised rather than repealed cause the Commission to recommend that Section 662.5 be further revised to provide statutory recognition for remittitur. Closely analogous to additur, remittitur is the practice whereby the defendant's motion for a new trial on the ground of excessive damages will be denied if the plaintiff waives the part of the award considered excessive by the court.

No procedural limitations, such as the time within which the additur or remittitur must be accepted, should be stated in Section 662.5. Instead, the section merely should recognize by an appropriate reference that statutory and decisional law and the rules of the Judicial Council may impose procedural limitations on additur and remittitur.

The Commission's recommendations would make no substantive change in existing law. The recommendations would, however, conform Section 662.5 to the Jehl case and provide statutory recognition for additur and remittitur practice.

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

An act to amend Section 662.5 of the Code of Civil Procedure,
relating to new trials.

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

Section 1. Section 662.5 of the Code of Civil Procedure is amended to read:

662.5. (a) In Subject to any limitations established by law,
in any civil action where the verdict of the jury on the issue of
damages is supported by substantial evidence but an order granting
a new trial limited to the issue of damages would nevertheless be
proper, the trial court in its discretion, may:

(1) grant Grant a motion for a new trial on the ground of
inadequate damages and make its order subject to the condition that
the motion for a new trial is denied if the party against whom the
verdict has been rendered consents to an addition of so much there-
to as the court in its discretion independent judgment determines
from the evidence to be fair and reasonable and specifies in its
order .

(2) Grant a motion for a new trial on the ground of excessive
damages and make its order subject to the condition that the motion
for a new trial is denied if the party who recovered the damages
consents to a reduction of so much thereof as the court in its
independent judgment determines from the evidence to be fair and
reasonable.

(b) As used in this section, "law" includes statutory and decisional law and rules of practice and procedure for the courts of this state adopted by the Judicial Council.

~~(b)--Nothing in this section precludes a court from making an order of the kind described in subdivision (a) in any other case where such an order is constitutionally permissible.~~

~~(c) Nothing in this section affects the authority of the court to grant a motion for a new trial on the ground of excessive damages and to make its order granting a new trial subject to the condition that the motion for a new trial on that ground is denied if the party recovering the damages consents to a reduction of so much therefrom as the court in its discretion determines and specifies in its order.~~

Comment. As amended, Section 662.5 merely recognizes that additur and remittitur practice exists in California. The section incorporates the general standard for granting additur and remittitur as set out in Jehl v. Southern Pacific Co., 66 Cal.2d 821, 427 P.2d 988, 59 Cal. Rptr. 276 (1967):

There is no essential difference between the procedures appropriate for remittitur and additur, and we may therefore look to remittitur cases to determine the proper procedure for additur.

Upon a motion for new trial grounded on insufficiency of the evidence because the damages are inadequate, the court should first determine whether the damages are clearly inadequate and, if so, whether the case would be a proper one for granting a motion for new trial limited to damages. . . . If both conditions exist, the court in its discretion may issue an order granting the motion for new trial unless the defendant consents to an additur as determined by the court. The court's power extends to all such cases. It is not limited to those cases in which an appellate court would sustain either the granting or denial of a motion for new trial on the ground of insufficiency of the evidence. The court shall prescribe the time within which the defendant must accept the additur, and in no

case may this time be longer than the jurisdictional period for granting a new trial. . . . If the defendant fails to consent within the prescribed time, the order granting the new trial becomes final.

If the court decides to order an additur, it should set the amount that it determines from the evidence to be fair and reasonable. In this respect it should exercise its completely independent judgment. It need not fix either the minimum or maximum amount that it would have sustained on a motion for new trial or the minimum or maximum amount that would be supported by substantial evidence and therefore sustainable on appeal. If the defendant deems the additur excessive, he may reject it and seek to sustain the jury's award on an appeal from the order granting a new trial. If the plaintiff deems the additur insufficient, he may raise the issue on an appeal from the judgment as modified by the additur. [66 Cal.2d at 832-833, 427 P.2d at 995, 59 Cal.Rptr. at 283. Citations omitted.]

It should be noted that the additur and remittitur procedure under Section 662.5 is not specified in the section. Instead, the section is subject "to any limitations established by law," and "law" is defined in subdivision (b) to incorporate not only statutory and decisional limitations, (such as the requirement that acceptance of the additur or remittitur be within the jurisdictional period for granting a new trial) but also such procedural requirements as may be established by the rules of practice and procedure for the courts of this state adopted by the Judicial Council.