

9/16/65

## First Supplement to Memorandum 65-56

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

Since preparing the principal memorandum, we have confirmed the enactment of Senate Bill 24 relating to new trials (see Stats. 1965, Ch. 1749). This legislation amends Section 657 of the Code of Civil Procedure which is also recommended for amendment in the proposed tentative recommendation attached to the principal memorandum. Accordingly, we have prepared a new version of the proposed change to be considered in place of pages 9-11 of the previous draft. This is attached as Exhibit I (pink).

Senate Bill 24 was originally opposed by the State Bar but was amended to incorporate almost verbatim the text of the Bar's own bill (S.B. 485) relating to new trials. In the form in which it was enacted, the bill was supported by the State Bar and the Judicial Council. The following information relating to S.B. 24 is quoted from a recent report of the State Bar's Committee on

## Legislation:

In its final form, S.B. 24 provides: (1) A new trial shall not be granted upon the ground of insufficiency of evidence unless, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the trier of fact should have reached a contrary verdict or decision. (2) If the motion is granted, the order must state the "ground or grounds relied upon" by the trial court. In addition, the trial court must give a "specification of reasons." Such "specification" may be in the order granting the new trial; if not, the court must, within 10 days after filing of the order, prepare, sign and file such written "specification" of reasons with the clerk. (3) On appeal, the order granting a new trial shall not be affirmed upon the ground of insufficiency of evidence, unless such ground was stated in the "order" and, as to the ground of insufficiency of evidence or the ground of excessive damages, it is to be conclusively presumed that the order granting the new trial was made only for the reasons specified in the "order" or in the "specification of reasons". As to the other grounds for a new trial, on appeal the order is to be affirmed if it should have been granted upon any ground stated in the motion for new trial. (4) The trial court shall not direct the attorney for a party to prepare either the "order" or the "specification of reasons". This latter provision was not included in the text prepared by the special committee, but was accepted by the Board of Governors, in connection with the amendment of S.B. 485 into S.B. 24.

Respectfully submitted,

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EXHIBIT I

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, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision , nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a contrary different verdict or decision.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in

the motion, whether or not specified in the order or specification of reasons; provided, that the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision unless such ground is stated in the order granting the motion; and provided further that on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages ~~appearing-to-have-been-given-under-the-influence-of-passion-or prejudice~~, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.

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.

The second paragraph following subdivision 7 was added to this section as a part of the 1965 revision of Section 657. It directs the court not to grant a new trial upon the ground of insufficiency of the evidence unless the court is convinced that a contrary verdict should have been rendered. The addition of an explicit reference to excessive or inadequate damages is in keeping with the purpose of this paragraph. The phrase "contrary verdict or decision" is changed to "different verdict or decision" to avoid any misunderstanding that might result from the addition of a reference to excessive or inadequate damages.