

6/7/65

## Memorandum 65-28

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

At the May meeting, the Commission tentatively approved the principle that courts generally should have additur authority and that a constitutional amendment to effectuate additur power should be drafted for Commission consideration. In addition, the Commission agreed to seek authority to broaden this topic to include a study of remittitur in order that constitutional authority to cover the entire problem can be provided. Also, the staff was requested to provide additional material relating to appellate review that sets forth alternative situations for the exercise of additur and remittitur authority at the appellate level.

Attached to this memorandum are two exhibits that detail in parallel columns the alternative courses of action that reasonably can be taken by trial and appellate courts when faced with additur (Exhibit I) and remittitur (Exhibit II) problems. These are presented primarily for the purpose of illustrating the variety of actions that might be taken in either of these situations and to suggest that, in view of the variety of actions that might be taken at the appellate level, changes in the normal rules pertaining to appellate review should be held to a minimum.

This memorandum is divided into three parts. First, there is a brief discussion of the general rules applicable under existing law with respect to trial and appellate practice in regard to motions for new trial based upon insufficiency of the evidence to sustain the verdict or other finding. Second, there is presented a draft of a proposed constitutional amendment to effectuate additur and remittitur authority together with a brief comment explaining the proposal. Lastly, there is presented material for Commission consideration relating to the implementation of additur and remittitur authority to be provided by the constitutional amendment.

### Existing Law on Motions for New Trial

Trial court. When the issue involves a claim of excessive or inadequate damages, the trial court is called upon to determine the sufficiency of the evidence to sustain the verdict. Unlike ruling on a motion for nonsuit or directed verdict, where the trial court merely determines whether there is any substantial evidence to support the plaintiff's showing or the jury's verdict, and unlike ruling on a motion for judgment notwithstanding the verdict, where the trial court is similarly limited to determining whether there is any substantial evidence to support the verdict, the trial court in ruling on a motion for new trial must weigh the evidence, judge the credibility of witnesses, exercise independent judgment, and grant the motion if the court in its discretion determines that the verdict is against the weight of the evidence. In cases tried by jury, where the independent judgment exercised by the trial court is of most significance, the complaining party in effect has two hearings: one before the jury and another before the court as a "thirteenth juror". In sum, the court exercises a wide discretion in reviewing the entire case to determine whether to grant a motion for new trial.

[Note that Senate Bill No. 24, mentioned at the last meeting as a compromise bill that now has the support of both the State Bar and NACCA (American Association of Trial Counsel), attempts to restrict the judge's authority in ruling on a motion for new trial. In the form in which it passed the Senate (the bill presently is in the Assembly Judiciary Committee), the principal provision affecting the trial judge's scope of review provides that:

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision unless after weighing the evidence the court is convinced from the entire record, including the reasonable inferences therefrom, that the court or jury clearly should have reached a contrary verdict or decision.

The probable fate of this bill is not known.]

Appellate court. An appellate court's review of a trial court's denial of a motion for new trial is identical to its review of a judgment generally where attack is based upon the sufficiency of the evidence (there is no appeal from a trial court's denial of a motion for new trial; hence, appeal is only from the judgment as entered): The appellate court's power begins and ends with a determination as to whether there is any substantial evidence to support the judgment; it has no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. Overton v. Vita-Food Corporation, 94 Cal. App.2d 367, 370 (1949). Similarly, appellate review of a trial court's granting of a motion for new trial is limited to determining whether there is any substantial evidence to support the trial court's determination; the trial court's discretion will not be disturbed unless clearly abused. In short, the appellate court follows the rule of conflicting evidence. With respect to its scope of review, no distinction is drawn between cases tried by jury and cases tried by the court without a jury.

Constitutional provision

Article 1, Section 7, of the California Constitution provides that:

The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court.

It was this provision which led the court in Dorsey v. Barba, 38 Cal.2d 350 (1952), to declare additur practice in California unconstitutional as a denial

of plaintiff's right to a jury trial. Since this appears to be the only constitutional bar to additur practice (and, logically, ought to serve as a constitutional bar to remittitur practice), the following language (added as a second paragraph to Section 7) may suffice to eliminate the basis for constitutional objection:

Nothing in this section precludes a court from ordering the remission of excessive damages or an addition to inadequate damages.

The language proposed above is purposefully broad for a variety of reasons. First, if there is to be any distinction drawn between trial and appellate additur and remittitur practice, it may be dangerous to refer to both trial and appellate courts in any constitutional amendment (short of an amendment that would contain the same specificity that might be included in a statute) since it would permit a court to ignore any statutory language by finding additur and remittitur authority constitutionally provided. Second, although the additur and remittitur authority with which we are primarily concerned relates to such authority in unliquidated damages cases where a new trial limited to the issue of damages would otherwise be appropriate, specification of this limitation in a constitutional amendment might preclude general additur and remittitur authority presently exercised in cases involving amounts that are ascertainable by a fixed standard. Similarly, there is a substantial existing additur and remittitur practice as a means of correcting clerical and other errors that in fact increase or decrease a jury verdict. It should be noted that errors of this type are correctible without the consent of any party. Hence, a detailed constitutional specification of additur and remittitur authority could result in unanticipated consequences that would be adverse to existing judicial practice. On balance, therefore, it seems advisable to say as little as possible in the constitutional amendment and, instead, provide for the broadest possible authority. The suggested language appears to be broad enough to accomplish this purpose.

### Implementing Provisions

Rule 24(b) of the California Rules of Court presently contemplates both additur and remittitur practice in the following terms:

(b) If the reviewing court orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remission of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become final unless within thirty days after the filing of the decision two copies of a written consent by such party to the remission or addition shall be filed in the reviewing court. One of the copies shall be transmitted with the remittitur to the superior court.

This suggests that one means of implementing the constitutional authority for additur and remittitur practice is simply to leave the matter to court rule. Whether this court rule is sufficient may be debated. Nevertheless, it would seem appropriate as one avenue to pursue to contact the Judicial Council to determine whether it seems advisable to leave the matter entirely to court rule.

An alternative to existing or additional court rules would be to provide no implementing legislation and leave the matter entirely to court decision. This clearly lacks the certainty that ought to be provided for the normal case, even though it probably would result in the greatest flexibility of reasonable alternatives available.

Aside from leaving the matter to court rule or to court decision, the remaining alternative is to provide legislation providing guidelines for the exercise of additur and remittitur authority. While providing the greatest amount of certainty, the primary danger in a legislative solution as opposed to leaving the matter to court rule is the possibility of providing too stringent rules within which to operate effectively. For purposes of

discussion, and to raise policy questions inherent in a statutory scheme, the following is presented for Commission consideration.

Add Section 657.2 to the Code of Civil Procedure, to read:

657.2. As a condition of denying a motion for new trial on the ground of excessive or inadequate damages in any civil case where a new trial limited to the issue of damages is otherwise appropriate, the trial court may, with the consent of the party opposing the motion, order the remission of a portion thereof, in the case of an excessive verdict, or to an addition thereto, in the case of an inadequate verdict, in such amount as the court in its discretion determines.

Comment. The section is drafted in contemplation of leaving the trial court free to exercise discretion in fixing the amount to be awarded. At the trial level, this seems appropriate in light of the existing discretion exercised at the trial level in determining whether to grant a motion for new trial. It would seem anomalous, for example, to provide broad discretion to determine whether to grant a new trial limited to the issue of damages but limit available alternatives for the trial court to pursue to a stringent standard of high or low amounts justified by the evidence. Note, however, that a constitutional amendment probably would not be required if the trial court were granted authority to enter an additur order only for the highest amount justified by the evidence (since the prevailing party could not validly obtain a higher amount from any jury).

The section grants broad additur and remittitur authority to a trial court in any civil case where a new trial limited to the issue of damages is otherwise appropriate. This language makes the section applicable in unliquidated damages cases but does not preclude unconditional additur and remittitur practice in cases where the proper amount to be awarded can be determined by a fixed standard. Similarly, the same language limits additur and remittitur authority to make it unavailable in a case where a new trial on other issues is appropriate,

Add Section 53.2 (see Comment) to the Code of Civil Procedure, to read:

53.2. In any civil case where a new trial limited to the issue of damages is otherwise appropriate, the appellate court may, as an alternative to ordering that a judgment be reversed and a new trial granted, affirm the judgment on condition that:

(a) In the case of excessive damages, the party in whose favor judgment has been rendered consent to a remission thereof in such amount as will reduce the judgment to the lowest amount justified by the evidence.

(b) In the case of inadequate damages, the party against whom judgment has been rendered consent to an addition thereto in such amount as will raise the judgment to the highest amount justified by the evidence.

Comment. The query regarding placement of the section arises because of the present organization of the Code of Civil Procedure. The power to modify a judgment on appeal is presently detailed in Section 53 (in a chapter relating to appellate courts). On the other hand, Section 657 is in an article relating generally to new trials, which is part of a chapter relating to trials generally. Given the present organization, the section governing appellate practice logically ought to follow Section 53.

The language in the introductory clause limits the appellate court to these conditions governing additur and remittitur only in cases where a new trial limited to the issue of damages would otherwise be appropriate. Under normal rules of appellate review, therefore, the appellate court would have the power to resort to additur and remittitur in an unliquidated damages case only where the judgment is not supported by any substantial evidence. For example, if judgment were rendered for \$50,000, the appellate court would affirm the judgment if there is any substantial evidence to sustain it. Similarly, if the appellate court is reviewing the action of the trial court in granting either additur (\$60,000) or remittitur (\$40,000), the appellate court would affirm the trial court's action if there is any sub-

stantial evidence to sustain the judgment as entered. The way in which the case reaches the appellate level is therefore immaterial, i.e., whether it be an appeal from the judgment (with or without an additur or remittitur order at the trial level), or an appeal from an order granting a new trial (either unconditionally or conditioned upon consent to additur or remittitur where the party fails to consent). The review in each case is the same as the review under existing law: The judgment or order appealed from would be affirmed if there is any substantial evidence to sustain it. Only where there is no evidence to justify the judgment or order, i.e., only where a new trial is otherwise appropriate, would the appellate court's additur and remittitur authority under this statute come into play. Then the appellate court, in the case of additur, would be limited to ordering the highest amount justified by the evidence (otherwise, it would be performing the trial court's function of weighing the evidence, judging credibility, etc., which is an improper function at the appellate level). Similarly, in the case of remittitur, the appellate court would be limited to the lowest amount justified by the evidence. By pegging the appellate court authority to fix amounts at the highest and lowest supportable by the evidence, neither party can be in a position to complain. In a remittitur case, the defendant cannot complain because he is as well off as he could possibly be--a judgment for any lower amount would be inadequate as a matter of law--and the plaintiff cannot complain because his consent would be required; if he fails to consent, the court orders a new trial. In an additur case, the plaintiff cannot complain because he is as well off as he could possibly be--a judgment for a higher amount would be excessive as a matter of law--and the defendant cannot complain because his consent is required; if he fails to consent, the court orders a new trial.



Note that nothing in this scheme prevents the court from exercising present additur and remittitur authority in cases where consent is not required, i.e., a new trial "limited to the issue of damages" is not in order because the problem merely involves entry of a correct judgment based upon factors already known. See 3 WITKIN, CALIFORNIA PROCEDURE Appeal § 182 (1954).

Amend Section 657 of the Code of Civil Procedure, 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:

\* \* \* \* \*

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

\* \* \* \* \*

Comment. The "passion or prejudice" language has, in effect, been read out of the statute by court decision; hence, the existing language serves merely as a barrier to stating the rule of insufficiency of the evidence in the simplest terms and requires masking this rule by elaborate language that means only that the evidence is insufficient. "To say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it . . . ." Doolin v. Omnibus Cable Co., 125 Cal. 141, 144 (1899). See Sinz v. Owens, 33 Cal.2d 749, 760 (1949), which realistically notes that a new trial granted because of excessive damages "necessarily is granted on the ground of the insufficiency of the evidence to sustain a verdict for the amount awarded by the jury." Amendment of the

statute in the form suggested would merely conform the language of the statute to the existing law. To completely nail down the intent of such an amendment, consideration might be given to adding the phrase "by whatever error induced" to the foregoing language.

Respectfully submitted,

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## ADDITUR

Verdict for plaintiff for \$50,000 in a personal injury action. The evidence would support a verdict for any amount between \$52,500 (low) and \$67,500 (high). Plaintiff moves for new trial on the ground that damages are inadequate. The reasonable alternatives available at the trial and appellate levels are as follows:

- | <u>Trial Court</u>   | <u>Appellate Court</u>  |
|----------------------|---|
| 1. New trial granted | 1. (a) Affirm new trial order<br>(b) Modify new trial order to condition it on defendant's nonconsent to additur for: <ul style="list-style-type: none"><li>(1) Amount fixed by exercise of independent judgment (\$55,000)</li><li>(2) Lowest amount supported by the evidence (\$52,500)</li><li>(3) Highest amount supported by the evidence (\$67,500)</li></ul>                              |
| 2. New trial denied  | 2. (a) Reverse the judgment for \$50,000 and unconditionally order a new trial<br>(b) Order a new trial unless defendant consents to additur for : <ul style="list-style-type: none"><li>(1) Amount fixed by exercise of independent judgment (\$55,000)</li><li>(2) Lowest amount supported by the evidence (\$52,500)</li><li>(3) Highest amount supported by the evidence (\$67,500)</li></ul> |

Trial Court (cont.)

3. New trial denied on condition of additur (defendant consents to additur) for:
- (a) Amount fixed by exercise of independent judgment (\$60,000)
  - (b) Lowest amount supported by the evidence (\$52,500)
  - (c) Highest amount supported by the evidence (\$67,500)

Appellate Court (cont.)

3. [By slight change in amounts and terminology, each of the following alternatives would be available for each of the alternatives available at the trial court level. To avoid repetition, however, the following alternatives are based upon the trial court's exercise of independent judgment and entry of additur order for total of \$60,000]
- (a) Affirm the judgment for \$60,000
  - (b) Reverse the judgment and unconditionally order a new trial
  - (c) Order a new trial unless defendant consents to additur for:
    - (1) Amount fixed by exercise of independent judgment (\$65,000)
    - (2) Highest amount justified by the evidence (\$67,500)

Modify the judgment and enter unconditional remittitur for:

- (1) Amount fixed by exercise of independent judgment (\$55,000)
- (2) Lowest amount justified by the evidence (\$52,500)

EXHIBIT II

REMITTITUR

Verdict for plaintiff for \$50,000 in a personal injury action. The evidence would support a verdict for any amount between \$32,500 (low) and \$47,500 (high). Defendant moves for new trial on the ground that damages are excessive. The reasonable alternatives available at the trial and appellate levels are as follows:

Trial Court

1. New trial granted

2. New trial denied

Appellate Court

1. (a) Affirm new trial order

(b) Modify new trial order to condition it on plaintiff's nonconsent to remittitur for:

(1) Amount fixed by exercise of independent judgment (\$45,000)

(2) Highest amount supported by the evidence (\$47,500)

(3) Lowest amount supported by the evidence (\$32,500)

2. (a) Reverse the judgment for \$50,000 and unconditionally order a new trial

(b) Order a new trial unless plaintiff consents to remittitur for:

(1) Amount fixed by exercise of independent judgment (\$45,000)

(2) Highest amount supported by the evidence (\$47,500)

(3) Lowest amount supported by the evidence (\$32,500)

Trial Court (cont.)

3. New trial denied on condition of remittitur (plaintiff consents to remittitur) for:

- (a) Amount fixed by exercise of independent judgment (\$40,000)
- (b) Highest amount supported by the evidence (\$47,500)
- (c) Lowest amount supported by the evidence (\$32,500)

Appellate Court (cont.)

3. [By slight change in amounts and terminology, each of the following alternatives would be available for each of the alternatives available at the trial court level. To avoid repetition, however, the following alternatives are based upon the trial court's exercise of independent judgment and entry of remittitur order for total of \$40,000]

- (a) Affirm the judgment for \$40,000
- (b) Reverse the judgment and unconditionally order a new trial
- (c) Order a new trial unless plaintiff consents to remittitur for:

- (1) Amount fixed by exercise of independent judgment (\$35,000)

- (2) Lowest amount justified by the evidence (\$32,500)

- (d) Modify the judgment and enter unconditional additur for:

- (1) Amount fixed by exercise of independent judgment (\$45,000)

- (2) Highest amount justified by the evidence (\$47,500)