Montana Law Review

Volume 15
Issue 1 *Spring 1954*

Article 10

January 1954

Court Control over Jury Verdicts

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by virtue of Section 67 sub a(1) making liens by legal proceedings within four months of the petition null and void, with the exception that the court may on due notice order any such lien to be preserved for the benefit of the estate under Section 67 sub a(3). But Section 6 provides that the Bankruptcy Act shall not affect the allowance to bankrupts of exemptions prescribed by state laws in force at the time of filing the petition wherein the debtor was domiciled over the longer part of the preceding six months.

Thus, where there is in sequence attachment, homestead filed, and subsequent bankruptcy, Montana lawyers would do well to look to the Meyers and California decisions and fit them to the doctrine of the Wall case. Otherwise, it is submitted that the doctrine of *White v. Stump* would require a holding that the homestead declarant must record by declaration prior to the date of the bankruptcy petition else the title of the bankruptcy trustee would be superior by operation of the Bankruptcy Act as related to local Montana law.

ROBT. M. HOLTER

COURT CONTROL OVER JURY VERDICTS

When, if ever, may a jury be overruled, assuming it has rendered a verdict on a material issue of fact, has long presented a problem in our system of trial by jury.

As noted in Scott's *Fundamentals of Procedure in Actions at Law,* from the beginning of the thirteenth century until about the nineteenth century a procedure was followed that where a verdict was false in fact, that is against the evidence, it could be set aside by attaint. Thereafter, a new jury could be summoned and if, upon consideration of the issues tried by the original jury, it found the verdict to be false, the verdict would be reversed. After which, the original jury would be harshly punished. The verdict would not be reversed if it had support either by evidence introduced or by facts not in evidence; the reason being that during this period of history the jurors were allowed to decide a fact considering both their own personal knowledge of the circumstances and the evidence introduced. This advice of controlling juries was used in this country until more modern and effective methods of control were developed.[1] Thus, it is apparent that there has long been a difficult struggle in an attempt to prevent jurors from rendering unreasonable verdicts.

In the year 1655, as reported in *Woody v. Guston,*[2] the power

[1]Scott, *Fundamentals of Procedure in Actions at Law,* 91-91.
[2]Style, 466; 82 Eng. Reprints, 867.

to order a new trial on the ground that the verdict was against the evidence was recognized in the court. This remedy was found by simply extending their ancient jurisdiction of granting new trials under circumstances of misconduct.[3] If the verdict was against the evidence or the damages awarded were inadequate or excessive, these were considered suitable grounds for the granting of a new trial.[4]

The practice developed early in this country of nonsuiting the plaintiff in those cases where he failed to prove his case. Nonsuiting was generally the name given to a judgment rendered against the plaintiff when he was unable to prove his case, or when he refused or neglected to proceed to the trial of a cause after it had been placed in issue, without determining this issue.[5] The term "nonsuit" has been broadly applied to a variety of terminations of actions which do not adjudicate the issues on the merits.[6]

The meaning or definition given to the term nonsuit has been extended considerably in Montana by the case of *McKay v. Montana Union Railway Company*.[7] In that case a judgment was entered upon a verdict which was directed for defendant upon a motion at the close of the introduction of both the plaintiff's and the defendant's testimony, upon the ground of want of sufficient proof on the part of the plaintiff to support the material allegations of his complaint. This was treated as a judgment of nonsuit and was reviewed as such on appeal. Upon review, all facts will be considered which the evidence tends to prove.[8]

It is clear that a judgment of nonsuit is not a judgment on the merits. *McCulloch v. Horton*,[9] decided by Mr. Justice Anderson in 1936, states (p. 147):

> "We have said a judgment of nonsuit is not a judgment on the merits, and nothing short of a judgment on the merits can prevent a new action. (*Arnold v. Genzberger*, 96 Mont. 358, 31 P. (2d) 296; *Bennetts v. Silver Bow Amusement Co.*, 65 Mont. 340, 211 Pac. 336; *Glass v. Basin and Bay State Min. Co.*, 35 Mont. 567, 90 Pac. 753, 755.)"

The traditional view of a directed verdict was that such a

[3]Thayer, *Evidence*, 169.
[4]Scott, *op. cit.*
[5]*Wyckoff v. Bradley*, 172 A. 790, 113 N.J. Law 104; *Cooper v. Crosco*, 161 S.E. 310, 201 N. C. 739.
[6]18 C. J. p. 1147, Note 23; *McColgan v. Jones, Hubbard and Donnell*, 78 P. (2) 1010, 11 Cal. (2d) 243.
[7]13 Mont. 15; 31 Pac. 999.
[8]*Herbert v. King*, 1 Mont. 475.
[9]102 Mont. 135, 56 P. (2d) 1344.

verdict decided the case upon the merits. In the decision of *In Re Sharon's Estate,*[10] the appellant contended that a decision upon a directed verdict was not a decision upon the merits, but the equivalent of a nonsuit, and did not bar a subsequent proceeding by him for the same relief. The court, however, stated that the law was well settled to the contrary and that a verdict directed by the court is a decision upon the merits of the case.

R. C. M., 1947, Section 93-4705[11] specifies those instances when an action may be dismissed or a judgment of nonsuit entered. Immediately following, Section 93-4706 states:

> "In every case other than those mentioned in the last section, judgment must be rendered on the merits."

Section 93-4706 would appear to be complete and very broad in its scope; however, it must be read in the light of Section 93-4708 before its full meaning becomes clear. Section 93-4708 reads as follows:

> "A final judgment dismissing the complaint, either before or after a trial, does not prevent a new action from the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon its merits."

In *Glass v. Basin and Bay State Min. Co.,*[12] the court, through Mr. Chief Justice Brantly (p. 95), points out that Section 93-4708 means that judgments of dismissal, whether enumerated in Section 93-4705 or not, shall not be a bar to another action upon the same cause of action, unless rendered on the merits, which fact must be expressly declared upon the face of the judgment or appear from the judgment-roll.

Dunseth v. Butte Electric Ry. Co.,[13] decides that in Montana a judgment on a directed verdict may or may not be a judgment on the merits depending upon the questions decided by the court and the scope of the ruling. The plaintiff brought an action in the federal courts against a street-railway company to recover damages for personal injuries, and the judgment in that court recited that, after the impaneling of a jury, evidence was submitted by both parties, and at its conclusion a verdict was di-

[10]177 Pac. 283, 289; 179 Cal. 447.

[11]R. C. M., 1947, Section 93-4705. (1937) "Action may be dismissed or nonsuit entered. An action may be dismissed or a judgment of nonsuit entered in the following cases:

. . . . . .

5. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury;

. . . . . "

[12]34 Mont. 88; 85 Pac. 746.

[13]41 Mont. 14; 108 Pac. 567.

rected in favor of defendant, and plaintiff subsequently instituted suit in the state court on the same cause of action against the same defendant, the judgment in the federal court was upon the merits, and a bar to the action in the state court.

Thus, it is apparent that a directed verdict may be on the merits but only if it complies with Section 93-4708.

Having briefly discussed the nature and effect of a nonsuit and a directed verdict, we are presented with the important problem of determining under what circumstances the judge may withdraw the case from the jury and direct a verdict on the merits.

As the recognized function of the jury became one of deciding issues of fact upon the basis of evidence produced in open court as distinct from facts which they had personal knowledge of at that time, it logically followed that where the party bearing the burden of proof had introduced no evidence, a jury could not decide in his favor.[14] Therefore, if the party having the burden of proof, the proponent, as Professor Wigmore calls him, has offered no proof a directed verdict would be in order. As has been suggested, *Syderbottom v. Smith*[15] was probably the first case of a directed verdict on this grounds.[16]

The U.S.S.C. in *Parks v. Rose*,[17] states (p. 372):

> "It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred."

In 1856 we find the U.S.S.C. saying that where there is "some evidence" tending to establish a fact in issue, the jury must judge of its sufficiency after having received proper instructions from the court.[18]

Thus, it developed that in cases where there was a "scintilla" of evidence in support of the case, the judge was bound to leave it to the jury. This rule was early discarded for a more reasonable and workable rule. As early as 1857, we find the English Court in *Toomey v. London Ry. Co.*[19] stating:

[14]Smith, *The Power of the Judge to Direct a Verdict*, 24 Columbia Law Rev. 113.
[15]1 Strange 649, 93 Eng. Reprints 759.
[16]Smith, *op. cit.*
[17]11 How 362.
[18]*Thomas Richardson v. The City of Boston*, 19 How. 263, 269.
[19]140 Eng. Reprints 694, 696.

> "A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence."

This rule was adopted by the U. S. S. C. in *Improvement Company v. Munson*[20] in 1871, wherein the court points out that before the judge is permitted to give the evidence to the jury he is required to ask himself whether there is any evidence upon which the jury can properly proceed to find a verdict for the proponent, that is, for the party charged with the burden of proof. The court further specifies that the question for the judge is not one of determining whether there is literally no evidence.

R. C. M. of 1947, Section 93-5205, states:

> "Where, upon the trial of an issue by a jury, the case presents only questions of law the judge may direct the jury to render a verdict in favor of the party entitled thereto."

This section codifies what is now a well recognized rule of law, to which reference was made previously. The difficult query arises, however, in determining how far beyond this statement of the law the power of the judge extends.

Early in the Montana Cases there is obiter to the effect that there must be more than a mere scintilla of evidence to justify a verdict, or it will not be permitted to stand.[21]

In 1912 Mr. Chief Justice Brantly and Mr. Justice Smith, concurring with the majority of the court in the case of *Tudor v. Northern Pacific Ry. Co.*[22] (p. 462), state:

> "By a process of elimination, counsel for the plaintiff seek to draw the inference that it must have been the brakeman who caused the plaintiff's fall; but the circumstances from which the inference is sought to be drawn are so intangible that at best they produce nothing more than a bare scintilla of evidence, and that is not sufficient to support a judgment."

The better and more modern rule is stated by Mr. Chief Justice Brantly in *Milwaukee Land Co. v. Ruesink, et al*[23] (p. 498):

> "If a case is being tried to a jury and the evidence is

[20] 14 Wall 442, 448.
[21] *Pierce v. Great Falls and Canada Railway Co.*, 22 Mont. 445, 448; 56 Pac. 867.
[22] 45 Mont. 456; 124 Pac. 276.
[23] 50 Mont. 489; 148 Pac. 396.

> such that reasonable men can come to but one conclusion thereon, the court may, as the case requires, direct a verdict for the party entitled to it, or withdraw the case from the jury and render judgment."

In 1945 Mr. Justice Cheadle quotes the above statement of the law with approval in the case of *Eric v. Wahl, State Liquor Control Administrator*[24] (p. 522, 523).

It is pointed out that there must be more than a mere scintilla of evidence in order to justify a verdict, there must be substantial evidence in *Escallier v. Great Northern Ry. Co.*[25]

From these cases it appears to be certain that Montana has fully adopted the modern rule that a verdict may be directed against the party having the burden of proof if, on the evidence adduced, the jury could "reasonably" declare the facts to be proved which are necessary to establish his case.

Upon appeal from an order directing a verdict for defendant, the supreme court will consider only the evidence of the plaintiff, excluding a bare scintilla, but including all fair inferences which may be drawn from the facts proved. Furthermore, any evidence which is introduced by the defendant which tends to support the plaintiff's case will be considered. If all this evidence viewed in its most favorable light tends to establish the case made by plaintiff's pleadings, the order of the lower court will be reversed.[26]

Having determined what test is to be applied when the judge withdraws a case from the jury and directs a verdict, it becomes necessary to query a bit further and determine whether or not the same rule should be applied where direction of verdict is attempted and where a verdict is to be set aside as being against the evidence.

The N. Y. court, in *McDonald v. Metropolitan Street Ry. Co.*,[27] takes the view that there should not be a single rule applied where the above problem presents itself. States Justice Martin (pp. 282, 283):

> "The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and elusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict and the result of directing one are

[24]116 Mont. 515; 155 Pac. (2d) 201.
[25]46 Mont. 238; 127 Pac. 458.
[26]*Johnson v. Chicago, etc., Ry. Co.*, 71 Mont. 390, 394; 23 Pac. 52.
[27]60 N. E. 282; 167 N. Y. 66, 1901.

> widely different, and should not be controlled by the same conditions as circumstances. In one case there is a retrial in the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure; the other determines substantive and substantial rights. Such a rule would have no just principal upon which to rest."

The Circuit Court of Appeals, in the case of *McPeck v. Central Vt. R. C.*,[28] takes quite the contrary view (p. 591):

> "As was said by us in *DeLaries v. Whitney,* 11 C. C. A. 355, 361, 63 Fed. 611, 617: 'When a verdict in one direction ought to be set aside as against the weight of evidence, then, under the rule as now understood, the court ought to direct a verdict in the other direction.' The time has gone by when the federal courts sit, at their own loss of time, and at the expense of the parties, to take verdicts which they can foresee ought not to be taken."

Montana cases show that, where a court is required to set a verdict for proponent aside because of lack of evidence, it follows that the court's action would be correct to direct a verdict in favor of the opposite party.

Mr. Chief Justice Brantly, speaking for the court in *Bean v. Missoula Lumber Co.*,[29] states at page 37:

> "But when the evidence is clear and satisfactory, and of such a character that, if it should be submitted to the jury and a verdict be rendered contrary to it, the court would be required to set the verdict aside, then the court may direct a verdict."

Again, Mr. Chief Justice Brantly, in *Escallier v. Great Northern Ry. Co.*,[30] states (p. 251):

> "This rule obtains where the evidence is in such a condition that, if the case should be submitted to the jury and a verdict for the plaintiff returned, it would be the duty of the court to set it aside."

In 1945 Mr. Justice Cheadle, delivering the opinion of the court in *Eric v. Wahl, State Liquor Control Administrator*[31] (p. 523), reasons:

> "It is our view that, had this cause of action been submitted to the jury resulting in a verdict in plaintiff's

[28] 79 Fed. 570.
[29] 40 Mont. 31; 104 Pac. 869.
[30] *Supra*, footnote 24.
[31] *Supra*, footnote 23.

> favor, the court would have been required to set such verdict aside. It follows that the court's action in directing a verdict for defendants was correct."

From these decisions it is clear that Montana judges may exercise considerable authority in keeping the jury within the bounds of reasonableness. Presume that at the trial a motion is made for a directed verdict or for a compulsory nonsuit, and the district court erroneously refuses to grant the motion and a verdict is rendered against the party who made the motion; what will the remedy be? At the common law an appellate court could not reverse the judgment and enter final judgment dismissing the complaint. The only action to be taken by the appellate court was to grant a new trial. Would it not be better to allow the appellate court or the supreme court of Montana to enter judgment in favor of the party for whom the verdict should have been rendered, or would this practice be unconstitutional? The U. S. S. C., in *Slocum v. New York Life Ins. Co.*,[82] held that this power to reverse and render final judgments did not exist in the federal appellate courts and for such action to be taken would violate the Seventh Amendment to the Federal Constitution.[83]

There has been a great deal of criticism of this decision.[84] What can be the objection of doing after the trial what should have been done at the trial? There is not an encroachment upon the province of the jury. The Seventh Amendment to the Constitution of the United States does not guarantee a trial by jury in a civil action in a state court, and so far as this amendment is concerned, the states are left to regulate trials in their own courts in their own way.[85] Of course, under Section 23 of Article III of our State Constitution, trial by jury in a civil suit in the state courts is guaranteed; however, for the supreme court to direct a verdict in a proper case does not deny this. Under R. C. M., 1947, Section 93-216 (8805), the powers and duties of the supreme court on appeal are designated. The applicable portion of this section reads as follows:

> "The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the

[82]228 U. S. 364; 33 Sup. Ct. 523.

[83]The Seventh Amendment to the Federal Constitution states:
"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

[84]Thorndike, *Trial by Jury in United States Courts*, 26 Harv. L. Rev. 732; Thayer, *Judicial Administration*, 63 U. Pa. L. Rev. 585.

[85]*Walker v. Sauvinet*, 92 U. S. 92; 23 L. Ed. 679.

proper judgment or order to be entered, or direct a new trial or further proceeding to be had."

In the case of *State ex rel LaFrance Copper Co. v. District Court*,[86] the court considers this problem for the first time. At the close of the plaintiff's case, the defendant interposed a motion for a nonsuit, the motion was denied. The plaintiff had verdict and judgment. The defendant made a motion for a new trial, which was overruled, thereupon being appealed to the supreme court. A motion for a nonsuit is considered to be one of law.[87] The supreme court states:

"We conclude, therefore, that no general rule may be laid down to determine when this court will, upon deciding that a plaintiff should have been nonsuited, order his action to be dismissed. This court undoubtedly has the power, in all proper cases, to make such an order; and in future the authority will be exercised, when the parties have one fair opportunity to try the issue before them."

The court continues:

"When a judgment for the plaintiff is reversed for error in refusing to direct a verdict for the defendant, after the former has had full opportunity to introduce all of his evidence, and it appears that his case is not supplemented by the defendant, we apprehend that, even in actions at law, the instances must be rare in which this court will hereafter feel justified in refusing to make a final disposition of the cause. And, on like principle, the court will not hesitate to order a judgment for the plaintiff when the defendant's case, as made in the court below, no prejudicial error having been committed against him, shows that he has no defense to the action."

Thus, the supreme court under the circumstances will dismiss the cause with a view to putting an end to litigation.

In *Gregory v. Chicago, Milwaukee & St. Paul Railway Co.*,[88] where the plaintiff in a personal injury suit had full opportunity to prove his cause but failed, and the evidence introduced by the defendant did not strengthen or supplement his proof, the supreme court did not direct a new trial, but made such disposition of the case as would finally dispose of the case.

Again, in *Wertz v. Lamb*,[89] the court points out (p. 484):

"In actions at law, where plaintiff should have been non-suited or a directed verdict for defendant should

[86] 40 Mont. 206; 105 Pac. 721.
[87] *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247; 44 Pac. 969.
[88] 42 Mont. 551; 113 Pac. 1123.
[89] 43 Mont. 477; 117 Pac. 89.

> have been ordered, and the proper motion was made and denied, the court will generally direct final disposition of the cause. (*State ex rel La France Copper Co. v. District Court,* 40 Mont. 206, 105 Pac. 721.)"

It may be concluded, therefore, that in cases at law where the parties to the suit have had one fair opportunity to try the issues in conflict and the question of whether the plaintiff should have been nonsuited is appealed, the supreme court may clearly take such action as will finally dispose of the cause of action.

The further problem presents itself of what circumstances must exist before an appellate court or the supreme court will review the amount of damages awarded? Will a new trial be granted, or will the court remit or increase the amount of damages awarded?

Even before our constitution was framed, the granting of new trials outright had become an ingrained part of the English system of jury trials. Thus, we find the courts saying that such action on the part of courts does not offend the constitutional guaranties of trials by jury. Montana has taken such a view, pointing out that not only does the statute enumerate various grounds upon which the trial court may set aside a verdict and grant a new trial, but also adopting the common law rule which authorized the court, in cases where a motion for a new trial was made, to order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict and that, if he does so remit, judgment will be entered for the rest.[40]

It is certain today that neither the trial judge nor the appellate court may order straight out the reduction or increase of the amount of damages returned in a verdict, even though the English judges did it in early times.[41]

If an award of damages made by a jury is so excessive as to furnish ground for a new trial, the trial judge or the appellate court may in the federal courts and in many of the state jurisdictions make an order that a new trial be had, unless the plaintiff will file a remittitur releasing the excess.[42] In *Northern Pacific R. R. Co. v. Herbert,*[43] the supreme court of the United States ruled that vesting discretion in the trial judge to order a remittitur as an alternative to a new trial does not violate the right of a trial by jury.

[40]*Bull v. Butte Electric Railway Co.*, 69 Mont. 529, p. 532; 223 Pac. 514.
[41]McCormick, *Damages*, 78.
[42]McCormick, *op. cit.* 76.
[43]116 U.S. 642; 29 L. Ed. 755; 6 Sup. Ct. Rep. 458.

Montana courts have held in *Bull v. Butte Electric Railway Co.*[44]

> "If the award of damages is so excessive as to lead to the conclusion that passion and prejudice have influenced the jury, and the circumstances disclosed are such as to indicate fairly that the jury was influenced by the same passion and prejudice in determining the other issues, a new trial should be granted absolutely as was done in *Chenoweth v. Great Northern Ry. Co.*, above. But, where it is made to appear that the successful party is clearly entitled to recover some substantial amount, and that, if passion and prejudice have entered into the jury's determination at all, they have gone no further than to swell the amount, the rule may be applied and the excess remitted as a condition to denying a motion for a new trial. (*Helena & Livingston S. & R. Co. v. Lynch,* 25 Mont. 497; 65 Pac. 919; *Griffin v. Chicago, Milwaukee & St. Paul Ry. Co.,* 67 Mont. 386; 216 Pac. 765; *Liston v. Reynolds,* above.)"

The fact that jurors were actuated by passion and prejudice are not the only basis for a new trial or a review of the amount of damages awarded. If there has been a mistake as to law or fact we find the courts reviewing the excessiveness of damages as such. It is true that where a verdict is excessive, that alone, is not made a statutory ground for a new trial;[45] however, this problem as to the excessiveness of damages may be raised under the specification that the evidence is insufficient to sustain a verdict.[46] While the circuit courts of appeals generally state there is no authority to review "excessiveness as such," the fourth and the ninth circuits do claim such authority to a limited degree.[47] Two relatively recent and very interesting cases which clearly recognize the power of the ninth circuit to review "excessiveness as such" are *Southern Pacific Co. v. Guthrie*[48] and *Covey Gas & Oil Co. v. Checketts.*[49]

It is worthy of notation that in *Southern Pacific v. Guthrie*[50] the court referred to *Affolder v. New York, C. & St. L. R.R.*[51] a U.S.S.C. case, as implying the power in the circuit courts of having authority to review "excessiveness as such."

[44]69 Mont. 529; 223 Pac. 514.
[45]*Kelley v. Daily Co.*, 56 Mont. 63; 181 Pac. 326.
[46]*Bull v. Butte Electric Ry. Co.*, 69 Mont. 529; 223 Pac. 514.
[47]Jaffe, *Damages for Personal Injury: The Impact of Insurance*, p. 233.
[48]186 F. (2d) 926 (9th Cir. 1951) cert. denied; 341 U. S. 904 (1951).
[49]187 F. (2d) 561 (9th Cir. 1951).
[50]*Supra*, footnote 48.
[51]339 U. S. 96, (1950).

This brings us very logically to the problem of just what, in the opinion of the court, constitutes an excessive verdict, that is a verdict so large that remittitur must be applied. To adequately illustrate the extremely difficult problem which is presented in the attempted formulation of a test or a guide as to just what constitutes excessiveness in the eyes of the court, we shall examine more thoroughly the two recent ninth circuit cases previously referred to[53] as well as *Affolder v. New York, C. & St. L. R.A.*[58]

The *Affolder* case involved a personal injury suit in which the jury awarded the plaintiff $95,000.[54] The trial judge saw fit to reduce this amount to $89,000 after consideration of similar cases and the remittitur was made. Upon appeal to the Supreme Court via the Court of Appeals[55] the court stated: "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgments is not monstrous. . . ."[56]

Thus, it appears that a verdict which is awarded by the jury in a personal injury suit will be reduced by the Supreme Court when it appears to be "monstrous," and, as we noted previously, this *Affolder* case has been construed as implying the power in the circuit courts to review "excessiveness as such" in personal injury cases.[57]

In the case of *Southern Pacific Co. v. Guthrie,*[58] circuit Judge Pope, speaking for the majority of the court which was sitting in bank, decided that the word "monstrous" as used by the Supreme Court means "grossly excessive" and they refused to order remittitur. In this case a verdict of $100,000 had been awarded to the plaintiff. The court of appeals was of the opinion that no more than $60,000 of this was attributable to loss of earnings. This left $40,000 for pain and suffering. The verdict was "too high" stated the court, but $40,000 for intangibles is not "grossly excessive," thus, no remittitur was ordered. There were three dissents in this case. Chief Justice Denman seems to apply a test that if the amount awarded is "substantially" more than the appellant should pay, it is a denial of justice to make him pay more than he admittedly "owes."[59]

Circuit Judge Stephens[60] in his dissent rejects the so-called

[53] *Supra*, footnote 48, 49.
[54] 339 U. S. 96, *op. cit.*
[55] 79 F. Supp. 365 (E.D. Mo. 1948).
[56] *New York, C. & St. L. R.R. v. Affolder*, VGD *F.* ABdQ DBF, DTC AB*th Cir.* 1949).
[57] 339 U. S. 96, 101, *op. cit.*
[58] *Supra*, footnote 48.
[59] *Supra*, footnote 48.
[60] 186 F. (2) 926, 933.
[60] 186 F. (2) 926, 934.

"monstrous" doctrine and points out that these cases must be viewed from the standpoint of compensation and not from the standpoint of punishment or resentment against the defendant or from sympathy for the plaintiff. Furthermore, he states that he cannot believe that our system of jurisprudence places everybody's material fortune, such as our free enterprise enables us to accumulate, at the unbridled whim of any twelve men and women no matter how good and true they may be. There must be some basis for estimating the sum of money which one causing an injury must be compelled to pay to put the injured party in as good a fortune as he could be expected to be in had he not suffered the injury, plus, of course, a generous sum for pain and suffering. Judge Stephens concludes by pointing out that no injured person has the right to go into court for sympathy money, and that in the case at hand no more than a sixty or seventy thousand dollar award would be reasonable.

In 1951, just a year after the decision in the *Guthrie* case, a division of the ninth circuit held that a verdict of $35,000 for the death of an eight year old son was "monstrous," and ordered a remittitur of $15,000.[61]

From these two recent ninth circuit decisions two very important factors emerge. Namely, that at present there would appear to be little, if any, uniformity or standardization in the appellate court's treatment of personal injury verdicts and that, even though there may be no absolute or certain basis upon which our appellate judges may exercise their control, they are able to introduce considerable uniformity in personal injury awards if they are willing to assume this obligation.

More numerous are the writers who contend that the law grows ever more hospitable to insurability in lieu of fault as the premise of liability for personal injury.[62] Mr. Ehrenzweig has collected much of the literature on this subject in his book *Negligence Without Fault*. As is pointed out by Jeffe:[63]

> "The basic fact is the pervasive and systematic use of machinery. The consequence is high productivity and vast markets. These in turn have given rise to a concept of measurable risk and an ability to set aside part of the product to insure the risk. Judges no longer fear to accept this view, if not always overtly, as the major premise of the administration of the traditional concepts. But this creates certain contraditions which are

[61] *Covey Gas & Oil Co. v. Checketts*, 187 F. (2) 561.
[62] *Supra*, footnote 47, p. 219.
[63] *Supra*, footnote 47.

> only dimly felt or deliberately ignored. These seem to me to be particularly acute in the field of damages."

The contention has been advanced that the traditional negligence principle should be rejected where insurance is available, that is, where the subject matter or industry is susceptible to insurability. In other words, the insurance carrier would as a matter of course make payment for an injury and the negligenece principle would not be involved. Of course where non-insurable risks are involved the negligence principle would be retained.[64]

Some writers contend that a possible solution to this problem of ever increasing verdicts and unreasonable discrepancies in personal injury actions may be a plan of a statutory insurance scheme, similar to workmen's compensation or as Frank Grad has pointed out, a plan similar to the Saskatchewan auto accident compensation scheme.[65] Were any such plan to become an acceptable canon of tort law, it is apparent that more control over jury verdicts would have to be exercised by our judges and considerable more predictability as to the amount of damages awarded by a jury would have to be forthcoming before any reasonable basis could be developed for computation of premiums by an insurer.

Lastly, we consider the award which is clearly inadequate. It would appear that a new trial may be ordered unless the defendant consents to a judgment in an amount considered to be adequate.[66] In 1935, however, the supreme court of the United States held that the judge may not properly suggest, as an alternative to a new trial for inadequacy, that the defendant consent to a judgment for an amount named, higher than the jury's award. This was considered to be in violation of the 7th Amendment.[67] This convenient practice would therefore no longer be available for the federal courts.

In *Osterholm v. Butte Electric Ry. Co.*[68] we find this problem arising for the first time in Montana (p. 203):

> "That a judgment may be reversed and a new trial ordered, where the damages awarded are clearly inadequate under the evidence, has been many times affirmed by this and other courts; that this court never has as-

[64] *Supra*, footnote 47, p. 237.
[65] Grad, *Recent Development in Automobile Accident Compensation*, 50 Col. L. Rev. 300 (1950).
[66] *Supra*, footnote 41.
[67] *Dimick v. Schmeidt*, 293 U. S. 474, 55 S. Ct. 296, 95 A. L. R. 1150, (1935); Cooley Cas. Damages (2d ed.) p. 14 (four justices dissenting.)
[68] 60 Mont. 193; 199 Pac. 252.

sumed to exercise the authority to power of 'scaling a verdict upward.' ''

The court does not find it necessary to decide the problem of the court's power of *increscitur* in this case, however. In *Coombes v. Letcher,*[66] which was a suit over personal injuries where a new trial was granted because of an inadequate verdict, Mr. Justice Stewart and Mr. Justice Morris appear to recognize the power of the court to increase an inadequate verdict in a personal injury case. A special concurring opinion by Mr. Justice Angstman, in which Chief Justice Sands, and Associate Justice Anderson agree, states:

> ''. . . I am not to be understood as subscribing to the view that it is ever proper for the court in personal injury cases to increase an award for damages. I think our only right in such a case is to send the case back for a new trial, before the jury, as we are doing here.''

From these two cases it would appear that in a personal injury case in which an alleged inadequate verdict had been rendered, increscitur would not be available as a remedy in Montana.

There are other useful expedients for the lessening of effort and expense upon a retrial. One of these would be to place a restriction upon the order for a new trial, limiting the new hearing to the issue of the amount of damages, and leaving undisturbed the finding of liability.

The discussion in this comment is not intended to be a complete discussion of all of the powers of the judge as regards directing verdicts, but only an attempt to point out to what extent this power may be exercised should the judge so choose.

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[66]104 Mont. 371; 66 P. (2d) 769.