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Procedure - The Power of a Trial Judge to Order a Remittitur After a Jury Verdict for Personal Injuries

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PROCEDURE

Power of a Trial Judge to Order a Remittitur After a Jury Verdict For Personal Injuries

The case of *Smithey* v. *Sinclair Refining Co.*[1] recently came to the Supreme Court of Appeals of Virginia on the question of a trial judge's power to order a remittitur after a jury verdict in a personal injury case. The trial judge ordered a remittitur of $10,000 after a jury verdict of $15,000 for the plaintiff's injuries. The reduced verdict of $5,000 was accepted by the plaintiff under protest, in accordance with the provisions of § 8-350, Code of Virginia, 1950, which allows an appeal when a verdict is reduced by the court and accepted under protest.

On appeal it was urged by the plaintiff that in personal injury cases the amount of the award is left largely to the discretion of the jury, and their verdict is not usually disturbed. But the Supreme Court adopted the decision of the trial court, holding that the remittitur was proper, since the jury verdict was excessive and shocked the conscience of the court, and indicated that the jury misconstrued the facts.

Many cases in Virginia, as well as in other jurisdictions, have been appealed to ascertain the authority of a trial judge to disturb a jury verdict. In most, if not all, of these cases the statement that there is "no weight or measure for determining the proper compensation to be allowed for injuries caused by a wrong"[2] has appeared. The most frequently quoted and certainly the most frequently used, measure was stated by Lacy, J., in *Ward* v. *White*,[3] when, in referring to the parties involved in a damage suit, he said, "They [the parties] admit to no other test than the intelligence of the jury governed by a sense of justice."[4]

It goes without saying that an intelligent jury verdict is the most practical and fair method for determining the extent

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1 203 Va. 142, 122 S.E.2d 872 (1961).

2 Ward v. White, 86 Va. 200, 212, 9 S.E. 1021, 1024 (1889); Dinwiddie v. Hamilton, 201 Va. 348, 352, 111 S.E.2d 275, 277 (1959).

3 Ward v. White, *supra* note 2.

4 *Ibid.*

of one's injuries and ascertaining what award should be given, but at the same time there must also be a measure for deciding when a jury verdict is intelligent. A mere difference of opinion between the jury and the trial judge as to the adequacy of the award will not justify any interference by the trial judge, but when the award is clearly out of proportion to the injury suffered it is the duty of the court to add to the verdict or to put the plaintiff on terms.[5] When the verdict is clearly out of proportion it may indicate "that the jury has been influenced by passion or prejudice, or in some way has misconstrued or misinterpreted the facts or the law."[6] This explanation may seem gratifying in that it appears to balance the scales of authority between judge and jury when a question arises as to the extent of award for the plaintiff's injuries, but again, it is necessary to provide a measure for determining when a verdict is out of proportion. The "shocked conscience" test is certainly the one most frequently referred to and appears to complete this circular explanation of tests and measures. Where the verdict is so excessive or so inadequate as to shock the conscience of the court it may warrant the conclusion "that the jury were actuated by bias or prejudice, or that the evidence of the extent of the injuries was disregarded."[7]

However, the results might be interesting if the question were posed, "what measure or test shall be used in determining when the conscience of the court is shocked?" Clearly no such test is available; thus, the circular explanation of tests must be amended to the extent that an award should be subject not only "to the intelligence of the jury",[8] but also to the intelligence and experience of the trial judge which is frequently more fully developed than that of the jury.

In *Smithey* v. *Sinclair Refining Co.* it was made manifest that the plaintiff suffered no serious or permanent injury; that he lost only $45.00 in wages while away from his job; that he spent only $59.00 for medical treatment; yet the jury returned

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[5] C. D. Kinney Co. v. Solomon, 158 Va. 25, 163 S.E. 97 (1932); Dinwiddie v. Hamilton, *supra* note 2.

[6] C. D. Kinney Co. v. Solomon, *supra* note 5.

[7] Dinwiddie v. Hamilton, *supra* note 2.

[8] Ward v. White, *supra* note 2.

a $15,000 verdict in his favor.[9] Granted, it is difficult to ascertain the extent of pain and suffering, but for relatively slight injuries such a verdict clearly seems out of proportion. Yet in Virginia, as well as in many other jurisdictions, a comparatively easy means of appellate review[10] is available to litigants, upon proper motion, to question the trial judge's discretion if he changes the verdict.

Section 8-224, Code of Virginia, 1950, gives the trial judge power to grant a new trial if the verdict is contrary to the evidence, and § 8-350 allows for a remittitur on the same grounds. However, if the plaintiff accepts the reduced verdict under protest, he is entitled to review before the Supreme Court. Section 8-224 appears to satisfy the litigant's rights while at the same time it allows the trial judge to exercise his discretion which usually goes undisturbed. However, § 8-350 does not provide the same equality. The trial judge may alter a jury verdict, but without extensive effort by the plaintiff his decision is immediately subject to review. This arrangement hardly seems satisfactory, for with such a provision not only is the trial judge's discretion suspect but the entire theory behind giving the trial judge the power to order a remittitur seems useless. Unless the entire case is pleaded before the Supreme Court, who besides the trial judge is better able to ascertain whether or not the verdict is contrary to the evidence? Certainly not the jury.

Consequently, when a reduced verdict is accepted under protest and it is presented to the Supreme Court for review, the judges are faced with a great dilemma. They have only two alternatives from which to choose; either allow the remittitur to stand or reinstate the jury verdict. The opinions of the judges cannot be substituted for that of the jury in deciding the adequacy of a verdict for they were not present at the trial. Since the judges are confronted with little more than the verdict itself, it is apparent that the judgment of the jury is substantially binding on them, and as extrinsic evidence is not available to them the verdict may or may not show upon

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[9] Smithey v. Sinclair Refining Co., *supra* note 1.

[10] VA. CODE ANN., § 8-350 (1950) (Repl. Vol. 1957).

its face indicia of bias or prejudice or mistakes of fact or law.[11] It is evident that the burden placed upon the Supreme Court to determine whether a remittitur should stand or a jury verdict should be reinstated is too great. Therefore, it should not be incumbent upon the Supreme Court to make the choice between remittitur and jury verdict when all of the facts are not at hand, but a third alternative should be available to the judges, viz., being able to order a new trial as to the damages.

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[11] Abronovitch v. Ayres, 169 Va. 308, 193 S.E. 524 (1937).