JURY COMPROMISE IN PENNSYLVANIA NEGLIGENCE ACTIONS

INTRODUCTION

While crossing the street on a snowy evening, Peter Partygoer is hit and injured by an automobile driven by Stirling Speedster. Peter sues Stirling in a Pennsylvania court of common pleas. The plaintiff establishes that the defendant was speeding and that his negligence seems to be causative of the accident. Peter goes on to prove certain damages which are undisputed by the defendant: $1,000 for medical expenses and $500 for loss of earnings. In addition, $2,000 is sought for pain and suffering. Stirling's defense is based solely upon the allegation that the plaintiff darted into the street without looking and so contributed to the accident. The defendant is successful in making a fairly strong argument for contributory negligence. On this basis the case is properly sent to the jury with the standard charge on the law of negligence: that causative fault is required to hold the defendant liable, and that plaintiff's contributory negligence, if found, will totally bar his recovery. The jury returns a verdict for the plaintiff but awards him only $1,200, well below the proven special damages. Something is clearly amiss, but the trouble cannot be isolated with certainty.

The simplest explanation for the jury's anomalous result is clerical error—an inadvertent mistake in recording the figures. This type of error is, however, improbable, and, if counsel are careful in polling the jury, nearly impossible. A less appealing explanation is the chance that the jury was influenced by prejudice against one of the parties and resolved this extralegal feeling on a financial basis.[1] Neither of these factors is in any real sense a compromise of legal issues; they are total failures of the jury to perform its function because of either mistake or passion. Thus, the impetus of error in the $1,200 verdict is not necessarily compromise. In spite of this uncertainty, the Pennsylvania courts have displayed a willingness to treat verdicts such as that returned in Peter's case as compromises.[2] Even though most of the apparent "compromise" cases may

[1] Although in passing on the adequacy of a verdict the element of prejudice is a ground for reversal, the burden placed on one who would overturn the result is heavy. See note 17 *infra* and accompanying text. It is doubtful that the amount of the verdict alone would be sufficient in Peter's case to meet the test which requires "'a clear conviction, compelled by the evidence, that the jury must have been influenced by partiality, passion or prejudice . . . .'" Carpenelli v. Scranton Bus Co., 350 Pa. 184, 187, 38 A.2d 44, 45 (1944).

[2] See, *e.g.*, Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150 (1955). In reversing the order of the trial court granting a new trial, the superior court recently stated: "We believe that this was a compromise verdict which arose out of the evidence concerning damages *and* negligence, and that the refusal of the court below to accept the jury's judgment in the matter was error." Hilscher v. Ickinger, 166 A.2d 678, 682 (Pa. Super. 1960).

be actual compromises on liability, a court can never be sure, in any specific case, that the apparent is the actual. A verdict which seems to reflect some doubt or disagreement as to the defendant's negligence may in fact be the result of complete agreement on two matters: negligence and an intense dislike of the plaintiff's manner.

Actual compromise may take various forms.[3] While entertaining doubts as to the defendant's liability, the jury may wish, out of sympathy, to give the plaintiff something—possibly with an awareness that some unknown insurance company will suffer the loss. Or it may question the plaintiff's freedom from contributory negligence.[4] Or the jury may be uncertain, despite uncontradicted testimony, as to the plaintiff's loss and compromise the amount awarded on the basis of conjecture. But whatever factors are behind the result, some form of jury lawlessness is involved in the verdict.

Before examining the Pennsylvania treatment of compromise cases, it will be helpful to distinguish several other types of uncustomary verdicts which are not analytically useful in solving the compromise problem.[5] The common features of these verdicts are two: first, the deviations relate to the amount of the verdict; and second, the deviations may proceed from identical jury motivation. Should the jury return a verdict of one dollar, the question is whether the nominal verdict is effectively a judgment for the defendant or a grossly incorrect verdict on the amount of the damages. It is patent, if there be some proven damages, that the jury has made a mistake; the problem goes to the method of judicial correction. Shall a new trial be granted or must the judgment be reversed and rendered for the defendant? Or the jury might return an amount of $1,500—constituting the exact amount of, or an amount only slightly higher than, the out-of-pocket expenses of the plaintiff. Now there is an issue of substantiality or adequacy of damages centered around the disregard of the more speculative pain and suffering.[6] The error of the jury does not appear on the face of the verdict. Thus the reviewing court is forced to look into the factual record for a plausible explanation and, in the absence of a satisfactory rationale, to return the case for retrial. Apparently quite

[3] "The compromise may arise out of damages or negligence or the balance of evidence concerning either or both . . . ." Elza v. Chovan, 396 Pa. 112, 115, 152 A.2d 238, 240 (1959).

[4] Compromise may also be present where plaintiff claims that, despite his contributory negligence, defendant was wantonly negligent. The Pennsylvania rule in such a case is that contributory negligence is not a bar. Kasanovich v. George, 348 Pa. 199, 34 A.2d 523 (1943). This type of case raises the further question of the seriousness of plaintiff's contributory conduct; if it rises to the level of contributory recklessness, he will be barred in spite of defendant's reckless action. Elliott v. Philadelphia Transp. Co., 356 Pa. 643, 53 A.2d 81 (1947). Obviously, compromise may occur with regard to any of these legal questions.

[5] For an excellent review of many of the problems involved in jury verdicts, see Wilson, *The Motion for New Trial Based on Inadequacy of Damages Awarded*, 39 NEB. L. REV. 694 (1960).

[6] This is true unless the damages for pain and suffering were proven with a certainty approaching that of proof of the special damages; in such cases the problems are essentially those of compromise.

often in adequacy cases—and with much less regularity in instances of the nominal verdict—compromise is at work.[7] However, because of the context of these two types of cases, the issue is not squarely raised and does not lend itself to detachment from the previously mentioned questions. But in Peter's verdict of $1,200, the element of compromise is unavoidably presented to the court on appeal, provided, of course, that the court is willing to assume that neither simple mistake nor prejudice was the motivating factor.

Since in Pennsylvania the problems created by compromise verdicts can be seen most clearly in connection with the question of the plaintiff's contributory negligence, the analysis of this Note will be limited to those cases. However, the implications and effects of jury lawlessness with regard to the judicial process are not peculiar to cases in this category—such difficulties are produced by all forms of compromise.

THE DOUBLE STANDARD

Faced with verdicts viewed as reflecting compromise, the reviewing court must juggle two statements of the Supreme Court of Pennsylvania which, when taken together, raise serious problems of both a practical and a theoretical nature:[8]

> (1) The rule is that any degree of negligence on the part of the plaintiff, contributing to the injury, destroys his right to recover . . . . [The rule] is safe and easy of application by the jury. It is the kind of action, not the quantity, on the part of the plaintiff, which prevents the law from measuring between plaintiff and defendant their respective degrees of negligence when the former comes into a court of justice.[9]
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> (2) Where the evidence of negligence or contributory negligence, or both, is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict and to sustain a verdict which is substantial—a capricious verdict or one against the weight of the evidence or against the law, can and should always be corrected by the Court.[10]

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[7] *Cf.* Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958).

[8] Undoubtedly, the present problem was generated by the exigencies of reality impinging on theory. The concern of this Note will be with the practical problems flowing from the theoretical incompatability presented by the existence of the two rules, and with possible means of resolving the conflict.

[9] Oil City Fuel Supply Co. v. Boundy, 122 Pa. 449, 463, 15 Atl. 865, 867 (1888); *accord*, Kasanovich v. George, 348 Pa. 199, 202, 34 A.2d 523, 525 (1943); see Monongahela City v. Fischer, 111 Pa. 9, 2 Atl. 87 (1885).

[10] Karcesky v. Laria, 382 Pa. 227, 235, 114 A.2d 150, 154 (1955); *accord*, Elza v. Chovan, 396 Pa. 112, 115, 152 A.2d 238, 240 (1959) ("compromise verdicts are both expected and allowed"); Hilscher v. Ickinger, 166 A.2d 678, 680 (Pa. Super. 1960); *cf.* Carpenelli v. Scranton Bus Co., 350 Pa. 184, 38 A.2d 14 (1944); Ewing v. Marsh, 174 Pa. Super. 589, 101 A.2d 391 (1954); see Salemmo v. Dolan, 192 Pa. Super. 51, 159 A.2d 253 (1960).

Seemingly contradictory rules such as these do not always present a serious dilemma. The rules may, in fact, not be conflicting, or they may represent the abandonment of an established rule for a different one—a process clearly within the function of common-law courts.[11] However, neither answer provides an adequate explanation of the compromise cases.

At common law, contributory negligence on the part of the plaintiff is an absolute bar to recovery.[12] As indicated in the first quotation, a quantitative measurement is unnecessary.[13] Thus, if a plaintiff is guilty of *any* negligence, his damages are entirely denied; conversely, if he does recover, there is necessarily a finding that he is entirely free from contributory negligence and so will be allowed all proven damages.[14] Hence, under the common-law rule it is theoretically impossible for the plaintiff to recover and then have the measure of damages reduced because of his own negligence. The traditional view compels the jury to resolve the issue of contributory negligence, regardless of whether "the evidence . . . is conflicting or not free from doubt." Any doubt or conflict has to be resolved *before* allowing recovery and does not carry over to the damage issue. It is clear that the two rules are in conflict. Unfortunately, the conflict has not yet been obviated by judicial or legislative abandonment of one or the other; Pennsylvania has neither openly adopted comparative negligence nor disavowed the traditional bar.[15] Thus, the "time-honored right of a jury to render a compromise verdict" in Pennsylvania merits close scrutiny.

Upholding Jury Compromise

Prior to reaching the issue of compromise, the court must appraise the verdict to ascertain whether it meets the test of substantiality and adequacy:[16]

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[11] See, *e.g.*, Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951) (complaint alleging prenatal injuries states a cause of action; Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921), overruled).

[12] *E.g.*, Fleming, Torts 244 (1957); James, Torts 152-53 (1959); Morris, Torts 215 (1953).

[13] There is an exception to this rule where defendant's negligence is said to rise to a level of a wanton breach of duty. Such cases are not free of the problems presented by compromise verdicts, see note 4 *supra*. See generally Mole & Wilson, *A Study of Comparative Negligence*, 17 Cornell L.Q. 333, 334-35 (1932).

[14] Within this simple dichotomy there is a type of situation which is not easily classified into either mutually exclusive category—*viz.*, when the plaintiff is negligent and this negligence, though not contributing to his accident, does, in fact increase his injury. Although this theoretical hybrid is important, it is more relevant in explaining a particular factual result and will be treated in that context. See notes 29-33 *infra* and accompanying text.

[15] The court reiterated the traditional bar theory in Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150 (1955). However, it also spoke of the "time-honored right" of compromise. *Id.* at 235, 114 A.2d at 154. For cases stating the common-law rule, see Pascarella v. Pittsburgh Ry., 389 Pa. 8, 131 A.2d 445 (1957); Kasanovich v. George, 343 Pa. 199, 34 A.2d 523 (1943); Weir v. Haverford Elec. Light Co., 221 Pa. 611, 70 Atl. 874 (1908); Oil City Fuel Supply Co. v. Boundy, 122 Pa. 449, 15 Atl. 865 (1888); Monongahela City v. Fischer, 111 Pa. 9, 2 Atl. 87 (1885).

[16] If the verdict is held to be inadequate, there will be a new trial and the issue of compromise relates only to the jury's motivation in returning an erroneous verdict.

> No mere difference of opinion, nothing short of a clear conviction, compelled by the evidence, that the jury must have been influenced by partiality, passion or prejudice or *by some misconception of the law* or the evidence, will justify an appellate court in declaring that the trial court was guilty of an abuse of discretion in refusing a new trial for inadequacy of damages where neither the evidence in the particular case nor the law applicable thereto furnished any definite standard by which they might be measured, and the jury had no other guide in arriving at the amount to be awarded but pure conjecture.[17]

This rule, if literally applied, would be sufficient to strike down compromise verdicts, for the jury has indeed misconceived the law in believing that contributory negligence could be utilized to reduce plaintiff's recovery; even more certainly the rule would censure a verdict resulting from clerical error or prejudice. Nevertheless, this is done only where the defendant is clearly liable and where the court finds the conflicting evidence of contributory negligence extremely weak or nonexistent.[18] Such an interpretation allows most compromise verdicts to pass the sufficiency test with little difficulty. However, this does not prevent the court from considering, apart from substantiality, a further question: can the verdict, being a compromise, stand?[19]

Many of the various rationales for sustaining court-recognized compromise verdicts do not attempt to fit the result within the law as charged to the jury. Without doubt the simplest solution for the problem posed by the existence of compromises is to ignore the common-law rule and treat them as a long-recognized function of juries.[20]

Unfortunately, the label "time-honored"—if historical precedents are existent[21]—is not up to the task of showing why the jury has a "right"

However, the courts' test for substantiality is so broad that it could, if the court desired, include compromise verdicts. On the other hand, if the court does not find a verdict inadequate under this test, the very broad language of the rule becomes a barrier to a subsequent holding of compromise. *Cf.* Salemmo v. Dolan, 192 Pa. Super. 51, 159 A.2d 253 (1960).

[17] Carpenelli v. Scranton Bus Co., 350 Pa. 184, 187, 38 A.2d 44, 45 (1944). (Emphasis added.) *Cf.* Salemmo v. Dolan, *supra* note 16, where the substantiality test goes only to adequacy of amount.

[18] See, *e.g.*, Coward v. Ruckert, 381 Pa. 388, 113 A.2d 287 (1958); Fitzgerald v. Pennsylvania Transp. Co., 353 Pa. 43, 44 A.2d 288 (1945). These cases indicate that only a few of the compromise cases are in fact reversed by application of the substantiality rule.

[19] Aside from the broad formulation of the court, the questions can best be dealt with separately; although both spring from juries' actions, one is based on factual value judgments, while the argument in compromise cases is basically predicated on disobedience of instructions, regardless of the results. See Carpenelli v. Scranton Bus Co., 350 Pa. 184, 38 A.2d 44 (1944).

[20] This is precisely what Mr. Justice Bell did when he spoke of the "time-honored right" in Karcesky v. Laria, 382 Pa. 227, 235, 114 A.2d 150, 154 (1955).

[21] Unfortunately there were, in the opinion, no cases cited to support this proposition. Earlier Pennsylvania cases hold to the contrary. See, *e.g.*, Weir v. Haverford

to disregard instructions. It merely notes and accepts what in fact has already happened. True, this tolerant view may easily eliminate the difficulties of reversal or retrial, but in the process it sanctions jury lawlessness. This judicial shuffle around the larger problem merely compounds the confusion which will exist until the conflict is eliminated.

Another argument brought forth where plaintiffs attack compromise verdicts assumes that the plaintiff has received a sympathy verdict—damages to which he was not entitled;[22] but, continues the argument, it is unfair to subject the defendant to the inconvenience of a new trial.[23] What is being said is nothing more than that the verdict should be allowed to stand as a compromise. Again, as with the former explanation, it is more descriptive than analytical.

A final argument—again reflecting a certain resignation in the face of reality—is that juries generally compromise in all types of cases, usually without detection; therefore, where compromise is evident it should similarly be permitted.[24] This is hardly persuasive: it is seldom thought unjust to discriminate against known lawlessness even though similar activity goes undetected. Still further, this defense reduces the law to so much doctrinal clay in the jury's grasp, inasmuch as it is premised upon the fact that juries do, silently, disobey their instructions. Finally, as is true with all these theories, it puts the court in the position of affirming known jury disobedience; at least this cannot be said when disobedience goes undetected.

Since compromise verdicts are theoretically at war with the black letter rules stating the effect of contributory negligence on plaintiffs' cases, it is not surprising that the more sophisticated judicial attempts at explanation do not admit the element of compromise; rather they seek to rationalize the result within the conventional role of juries and the law.

Elec. Light Co., 221 Pa. 611, 70 Atl. 874 (1908); Oil City Fuel Supply Co. v. Boundy, 122 Pa. 449, 15 Atl. 865 (1888); Monongahela City v. Fischer, 111 Pa. 9, 2 Atl. 87 (1885). *But see* Carpenelli v. Scranton Bus Co., 350 Pa. 184, 38 A.2d 44 (1944). This seems to be the earliest case supporting a compromise verdict, although it does not do so overtly.

[22] This was mentioned as a basis in Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150 (1955).

[23] "[B]ecause of such doubts [of contributory negligence] the verdicts may have been the result of a compromise, and, in such cases, the evidence not being clearly preponderant, and the verdicts rendered being at least substantial, it would be 'just as likely, or more likely, that the granting of a new trial would constitute an act of injustice to the defendant rather than one of justice to the plaintiff' . . . ." Patterson v. Palley Mfg. Co., 360 Pa. 259, 268, 61 A.2d 861, 866 (1948), quoting in part from Carpenelli v. Scranton Bus Co., 350 Pa. 184, 188, 38 A.2d 44, 46 (1944).

[24] "It is unrealistic to assume that the judge's charge, filled with technical rules for the jury to follow in arriving at its verdict, is never dimmed in the jury room by the guiding light of a layman's sense of right . . . . Jurors are more likely to view the evidence as a whole and apply their accumulated experience and combined sense of justice to arrive at a result they think fair to all the parties under all the circumstances. This is not a fault but a virtue of the jury system; it is one of the system's blessings, not one of its evils. This humanizes and tempers the cold logic which *accepts no compromises* and recognizes no grays." Friedman v. Matovich, 191 Pa. Super. 275, 279-80, 156 A.2d 608, 611 (1959). (Emphasis added.)

One such argument relies on the jury's undoubted right, as trier of fact, to believe or disbelieve the evidence. If the verdict does not in fact equal plaintiff's special damages, the reason must be that the jury did not accept his evidence on damages, despite finding liability. Therefore, it is entirely proper that he be limited to an award commensurate with his "actual" losses, as found by the panel.[25] This solution is undoubtedly a theoretical possibility, but instances in which it may be practically applied are not numerous. In many cases the defendant, although contesting liability, does not offer conflicting evidence on damages. In such a case, the jury's disbelief of uncontradicted evidence would seem to warrant a new trial under the substantiality test,[26] for if the jury awards an amount under the special damages, without conflicting evidence, the necessary basis for a rational determination of the figure is absent.[27] This argument may well be valid in certain restricted fact situations, but its general application to sustain verdicts that are obviously compromises is unwarranted; widely applied, it would be no more than a silent evasion of the reviewing court's duty to confine jury action to its proper hemisphere.

In still another argument attempting to delineate a rationale for compromise verdicts within the traditional concepts, Dean Prosser has added a third branch [28] to the common-law dichotomy.[29] As yet seldom used by the courts in compromise cases,[30] his "doctrine of avoidable consequences" suggests that a plaintiff may be negligent in such a way as not to contribute to his accident but rather to aggravate the extent of his injury. For example, the driver of an automobile which hits an unguarded chuckhole at sixty miles per hour is seriously injured. But had he been traveling at a legal rate of thirty-five miles per hour, the accident, while unavoidable, would have produced only minor injuries. The jury, argues Dean Prosser, would be justified in reducing plaintiff's recovery by the amount attributable to his own fault. It must be stated that Dean Prosser himself does not see the difference from contributory negligence as being really much more than that the jury can apportion damages.[31] Underlying the doctrine is an attempt to use the causation principle to allocate damages; its relevance goes much more to an argument in favor of comparative negligence over the present system. In the traditional setting, with contributory negligence as a bar, it stands no better than the contention of the person concurrently negligent who claims that but for another's

[25] See, *e.g.*, Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150 (1955); Takac v. Bamford, 370 Pa. 389, 88 A.2d 86 (1952).

[26] See, *e.g.*, Karcesky v. Laria, *supra* note 25, at 238, 114 A.2d at 156 (dissent); Takac v. Bamford, *supra* note 25, at 395, 88 A.2d at 89 (dissent).

[27] *Cf.* Krusinski v. Chioda, 394 Pa. 90, 145 A.2d 681 (1958).

[28] See note 14 *supra* and accompanying text.

[29] PROSSER, TORTS § 52, at 397-400 (1941).

[30] See Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866); O'Keefe v. Kansas City W. Ry., 87 Kan. 322, 124 Pac. 416 (1912). Prosser also suggests that Gould v. McKenna, 86 Pa. 297 (1878), might be read as following the rule.

[31] PROSSER, TORTS § 52, at 400 (1941).

negligence there would have been no accident; his fault was not the entire cause of the accident, and so he should be relieved from liability. Needless to say, this attempt to divorce one's self partially or totally from responsibility is unavailing;[32] likewise, ingenious structures based on casuality are of little help in resolving the compromise verdict problem. If subsequent to the accident the plaintiff negligently increases his injuries, existing law recognizes this distinction and refuses to give damages for the aggravation,[33] but Dean Prosser's assertion is not restricted to this fact situation. He is arguing that the defendant may escape payment of damages for injuries flowing from the accident insofar as the plaintiff caused them. Current law, however, provides that if the plaintiff has contributed in any way he is precluded from all recovery. When causation is used to solve the dilemma of compromise verdicts, it must be recognized that this involves changing the present law.

CHANGING THE LAW SUB SILENTIO

Inasmuch as it is impossible to reconcile compromise verdicts with the espoused law of negligence, it is apparent that a judicial imprimatur has been placed upon a sub silentio change of the law—a change effected by jury action.[34] Rather than altering the rule openly by a direct pronouncement rejecting the former standard in favor of a different one, the common-law bar is charged to the jury while sanction is given to a device which undermines and eventually modifies the law.[35] This method of change poses problems relating to the proper functioning of the judicial process.

Jury lawmaking decreases the possibility that the merits and disadvantages of the change will receive full consideration and lessens the chance that the optimum degree and direction of revision will be attained. Each instance raising the question of alteration presents a unique problem. It contains complex balances and considerations, many of which the jury cannot be expected to evaluate competently. Needless to say, if the law is changed silently, many judgments are unexpressed—even unthought. The fact that the relative merits of the classical tort rule and comparative negligence have been aired by commentators[36] does not relieve the court

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[32] RESTATEMENT, TORTS § 439 (1934).

[33] See, *e.g.*, Potts v. Guthrie, 282 Pa. 200, 127 Atl. 605 (1925).

[34] Unlike the classical example of nullification of the penal law in England—the jury often refused to find guilt for a minor crime when the penalty was disproportionately severe—in this instance the change is often within the awareness, control, and sanction of the court.

[35] Necessarily, courts cannot, like legislatures, be silent on issues presented to them. For this reason there may be some pronouncement by the court and some sanction given. However, this does not obviate the fact that the most basic principles may be changed quietly, thus attracting a minimum amount of attention to the shift. For one argument as to why maximum attention should be devoted to such a change, see text accompanying notes 36-38 *infra*.

[36] *E.g.*, HARPER & JAMES, TORTS § 22.3 (1956); PROSSER, TORTS 297-99 (1955); Mole & Wilson, *supra* note 13; Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 503 (1953). This is not to imply commentators can or should do the reasoning for the courts. See text accompanying note 37 *infra*.

of the responsibility for expressing *its* reasoning.[37] The common-law process, as described by Professor Karl N. Llewellyn, demands that "the rule follows where its reason leads; where the reason stops, there stops the law."[38] Obviously this change and growth must be reasoned if the law is to move forward cohesively and coherently. Only by carefully scrutinizing social policy and by sifting all available ideas on a question can a court make informed advances and preserve for its successors the wisdom of its reasoning. Most important, the courts' interaction with the bar requires out-in-the-open judicial thinking to enable the latter actively to contribute to the process of legal development; without articulated premises the profession can only stand by and at best act as commentator rather than participant. Change of the law sub silentio does not recommend itself as a tool for forging the best possible rules of substantive law.

The methodology of unarticulated change by jury action causes other problems. The panel is carefully and fully instructed on the traditional law of torts, with contributory negligence as an absolute bar to recovery. Without any justification in the current law it returns a verdict contrary to the court's instructions, and instead of censure the jurors receive the approbation of the court. It is one thing to speak of the jury as humanizing and tempering the law[39] and a vastly different one to allow and approve of disobedience of instructions. With this background in torts, how does a reviewing court in criminal cases say that the instructions given to a jury are any more sacred or the rules of law any more inviolate?[40] If prejudice is the operative feature, how does the court limit it? Different rights may be at stake, but jury lawlessness is the same. The price of change by this method seems very high, and equally dangerous.

In the face of these drawbacks, the argument for using juries to revise the substantive law must be based on the premise that they can do that which the courts are unable or unwilling to do, and do it despite their common-law function as triers of fact rather than makers of law. Dean Griswold has well stated the traditional reaches of jury power:

> Juries have an important function, but it is a limited function. It is not a function of caprice or whim, or of expressing vindictive or generous impulses. It is a function of deciding questions of fact on evidence to support a verdict. Whether the evidence is adequate to

[37] It might be argued, for example, that this method of changing the law would be more applicable to the law of divorce than that of contracts, since in the former there are such vital "political" factors preventing change that this is the only method by which the law may move forward. See Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 638 (1958).

[38] LLEWELLYN, THE BRAMBLE BUSH 157 (1951); *cf.* Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1321 (1942).

[39] See Friedman v. Matovich, 191 Pa. Super. 275, 156 A.2d 608 (1959). See also note 23 *supra*.

[40] See, *e.g.*, Commonwealth v. Kravitz, 400 Pa. 198, 161 A.2d 861 (1960) (second degree murder affirmed; if defendant guilty at all, crime must have been in the first degree); *cf.* Commonwealth v. Wentzel, 360 Pa. 137, 61 A.2d 309 (1948); Commonwealth v. Ferko, 269 Pa. 39, 112 Atl. 38 (1920).

> support a verdict is a question of law which a court cannot properly avoid by merely referring all the evidence to a jury. Nor can a court properly decline to resolve any other question of law by remitting the entire matter to the trier of the facts.[41]

To this narrow duty the jury brings a representative reflection of public opinion and popular sentiment. While it is unavoidable that community feeling will color close questions of fact, it is not the office of the jury to interject it into the law. Yet it is undoubtedly this attribute that appeals to those who advocate the jury as a legitimate medium of change.

"Traditionally juries are the device by which the rigor of the law is modified pending the enactment of new statutes." [42] Judges "are mindful that the community no longer accepts as completely valid legal principles basing liability upon fault." [43] What is advocated is the popularization of the law pending either legislative or judicial pronouncement. Often this willingness to leave the law to the jury stems from the belief that certain substantive changes, considered desirable by the advocate, will result.[44] But this zeal for the end disregards the means. When this tempering of—or tampering with—the law is done by a jury apparently within its function as a trier of fact and therefore is not readily discernible by a court reviewing the verdict, there is some merit in the contention in terms of expediency; but when the jury's action is within sight of the court, expediency cannot justify judicial abdication.[45] The quick solution to one problem levies a high toll on the system. This same argument is perhaps more effective in cases where the verdict appears on its face manifestly within the jury's function, and a court refuses to look behind the fact-finding process to see if the jury has actually performed in accordance with its instructions. For example, in the current law of divorce, if the fact-finding process were drastically tightened, the substantive law would become oppressive.[46] In this vein, Justice Traynor noted that "more would be lost than gained by a

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[41] Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 86-87 (1960).

[42] Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1286 (1952).

[43] *Id.* at 1285.

[44] It is submitted that this is exactly the position of James when he says: "A reasoned determination that a broad delegation is needed today on the issue of accident liability may well reflect judicial statesmanship rather than an evasion of judicial responsibility." James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 343 (1959). On the other hand, he would not leave the same discretion to the jury on issues of amount of damages. *Id.* at 344. It seems evident that James' hope is for more universal compensation. One wonders if his position on "judicial statesmanship" would change if it were to be shown that freedom of the jury was resulting in fewer recoveries.

[45] *But see* James, *supra* note 44, at 343: "It is not, I submit, an improper abdication of responsibility to the jury to call on its dispensing power—its equitable function when the occasion is appropriate."

[46] For example, the requisite finding of domicile is often found on questionable evidence. Similarly, collusion which would invalidate the grounds for divorce is not closely investigated. In either of these two areas more extensive methods of fact finding would make the obtaining of a divorce considerably more difficult in many states.

reform of fact-finding that would only compel righteous adherence to the wrong rules." [47] The court in such a situation is not openly sanctioning lawlessness, but it is engaging in a fiction. Although this may be better than rigid adherence to a poor substantive rule, it can hardly be advocated as the ideal method of change and it may remove the stimulus for better devised action.[48]

Allowing the jury openly to modify the law has practical ramifications. When the court has permitted the jury this freedom, no firm rule pronounces the freedom's limits. Assuming there has been a decision to compromise, not only has the substantive rule been altered but the jury has also set itself loose in the damage area with no legal guides whatsoever. Inevitably this situation leads to confusion and a waste of time and money. The trial court is trapped in a maze of contrary holdings which are not helpful in instructing the jury or in ruling on a motion for new trial.[49] A former rule of law has become meaningless, but how far-reaching is the shift? [50] Has the change affected the standards of nonsuits, judgments notwithstanding the verdict, or new trials because of inadequacy? Difficulty at the trial level is unavoidable, and many of the problems will reach the appellate courts. There is no theoretical line on which to distinguish the test for substantiality and the common-law bar rule from permitted jury compromise—the standard for review seems impossible to verbalize. It would be extremely wasteful of the court's time to compel it to weigh each piece of evidence, but no other solution presents itself. The limits of the "time-honored right" can be ascertained—assuming that the appellate courts do not favor complete abdication—only by first looking at the evidence and then at the jury's verdict in the light of that evidence. If the courts are to maintain the new position regarding the effect of jury compromise, they are virtually forced to function as a superjury in deciding what amount of contributory negligence, if any, *will* bar a plaintiff. Finally, since juries have this "right" to compromise, it would seem that even if an incorrect monetary award were discovered, a complete new trial would be required —unless this particular plaintiff's conduct has transgressed a judicially demarcated point beyond which the jury can no longer compromise. Before reaching this line, the court could not say that contributory negligence defeats the plaintiff, nor, on the other hand, could the court allow the plaintiff his undisputed damages as of right. Such a process would clearly be time-consuming; and in this day of crowded dockets, anything productive of increased trial time cannot be regarded neutrally.

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[47] Traynor, *supra* note 37, at 638.

[48] Since the hardship of the rule is presumably mitigated, legislative action becomes less likely, and the court itself is no longer pressured as rigorously by the bar for change. Divorce law is again an example of this phenomenon.

[49] See Davis v. Great Atl. & Pac. Tea Co., 108 PITTSBURGH LEGAL J. 351 (Pa. C.P. 1960); *cf.* Salemmo v. Dolan, 192 Pa. Super. 51, 159 A.2d 253 (1960) (fairness of compromise). See also Murosky v. Spaulding, 166 A.2d 34 (Pa. 1961).

[50] See text accompanying note 17 *supra*. See also Pascarella v. Pittsburgh Ry., 389 Pa. 8, 131 A.2d 445 (1957). In this case the compromise rule was not applied, and a new trial granted. The opinion, by Mr. Justice Musmanno, had no dissenting votes.

FUTURE RESOLUTION OF THE PRESENT PROBLEM

Compromise verdicts in Pennsylvania negligence actions—commonplace and yet irreconcilable with the common-law rule supposedly still in effect—might well be expressly authorized or rejected by the legislature. The broadest solution, and in many respects the most elementary, would be a legislative pronouncement adopting the rule of comparative negligence.[51] If the underlying reason for the breadth of jury power to render compromise verdicts is dissatisfaction with the present substantive rule, this resolution commends itself. In terms of prospective notice, scope of pronouncement, and the relative certainty of the rules to be applied in various cases, the common-law process cannot compete with statutory revision. But in the absence of legislative action, the courts could attempt the change.[52] Necessarily, however, a judicially effected change would be accomplished less rapidly and less precisely than a legislative revision.

Other more easily implemented solutions than the adoption of comparative negligence are available to the courts, provided that they find the common-law rule satisfactory. First and most apparent would be the disallowance of compromise verdicts. Upon the elimination of the "time-honored right" doctrine, the remaining problem is one of enforcement of the common-law rule upon juries prone to compromise. Providing for separate trials on the issues of liability and of damages approaches the problem directly and also conforms to the theoretical division between the two issues. But a division is time-consuming and financially burdensome. Moreover, separation may result in a tightening of the fact-finding process far beyond the requirements of the problem.[53] Much of tort damage law—especially in the area of pain and suffering—remains hazy, and rigid policing would tend to bring about unconsidered changes in areas perhaps not ready to be clearly defined.

Other less drastic means are available for policing verdicts for compromise. On finding a compromise verdict, an appellate court could probably do no more than to reverse and remand. However, the use of special verdicts could decrease the frequency of cases in which this would be necessary. In addition to sharpening the jury's thinking, special verdicts properly employed can make compromise verdicts readily detectable and correctable at the trial level, thereby effecting control of verdicts where that control is most effective and relieving the appellate courts of an unnecessary—though self-created—burden.

A. S. L.

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51 See Federal Employers' Liability Acts (Railroads), 35 Stat. 65, 66 (1908), 45 U.S.C. §§ 51, 53 (1958); Jones Act (Injuries to Seamen), 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958); MISS. CODE ANN. § 1454 (1942).

52 See Mole & Wilson, *supra* note 13, where the availability of the various methods of change to comparative negligence is considered. *Cf.* Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230.

53 See Traynor, *supra* note 37. This is his fear when the juries are over-policed without an examination of the entire substantive law in the area.