Supreme Court of the United States

OCT. TERM 1968

In the Matter of:

Docket No. 35

Carl F. Gruenthal

Petitioner

vs.

The Long Island Railroad Company, et al.

Respondent

Place Washington, D. C.

Date October 24, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

ARGUMENTS OF:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Carl F. Gruenthal :

: Petitioner :

vs. : No. 35

The Long Island Railroad Company, et al. :

: Respondent :

Washington, D. C.
October 24, 1968

The above-entitled matter came on for argument at 12:57 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R, WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

MILFORD J. MEYER
One East Penn Square
Philadelphia, Pa., 19107

DANIEL M. GRIBBON
Washington, D. C.

P R O C E E D I N G S

CHIEF JUSTICE WARREN: No. 35, Carl F. Gruenthal versus The Long Island Railroad Company et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Meyer.

ORAL ARGUMENT OF MILFORD J. MEYER

FOR PETITIONER

MR. MEYER: Mr. Chief Justice, may it please the court. This case presents a constitutional challenge to the power of the Courts of Appeals to review the denial by the District Courts of motions for new trial on the ground that verdicts are excessive.

This was an action in the District Court of the Southern District of New York under the Federal Employers Liability Act. It was tried in two parts.

In the first trial, the jury found the liability of the railroad to its employee.

A separate trial was then held in which the amount of the damage was fixed by the jury.

Judgment was entered upon the total verdict, and on the railroad's motions for new trial the District Judge dismissed all of its objections on the record as to matters of evidence.

As to the specific argument that the verdict was excessive, the trial judge carefully reviewed all of the

evidence that had been produced, none of which was controverted, and found that in an opinion which appears in the Appendix that the verdict was fully justified by the evidence.

On appeal to the Second Circuit, two judges of that court found, as did the third, that there was no merit in the railroad's other arguments on error in the trial, but reach the conclusion that the verdict was grossly excessive,and directed a new trial unless a remittitur be filed.

The third judge who sat on the case disagreed, found that the verdict was sustained by the evidence, and the court should not have disturbed it.

We go directly to the constitutional question of whether the Court of Appeals had the power to make this order. The Seventh Amendment was passed upon as early as 1830 by Chief Justice Marshall's court in an opinion by Justice Story in Parson v. Bedford, in which this court specifically denied to itself the power to review questions of fact which had been passed upon and approved by the trial courts.

That was the law until 1879 when the specific question here involved was first raised in Railroad v. Fraloff when this court in an opinion by Justice Harlan specifically held that it had no power to review the excessiveness of a verdict found to be proper by the District Court.

When the Circuit Courts, now the Courts of Appeals, were created certainly they obtained no greater power of

review than this court had, when it itself was passing on appeals from the District Courts.

And the history of the Circuits in the early days was early acceptance of this rule which had been promulgated by this court - that there was no power under the Seventh Amendment to interfere on the basis of the excessiveness of a verdict.

That early acceptance gradually, in the Circuits one after another, passed to arguments which constituted a rationalization of reasons why they should have some power of interference.

And finally, in the last twenty years, specifically before 1948, each of the Courts of Appeals has made the statement that it has the inherent power to interfere and overrule on the basis of excessiveness alone.

The Courts of Appeals have made three approaches to the statement of this power which they have that the Supreme Court did not have when it was hearing appeals itself.

First, some of the Courts of Appeals have said that the common law history which was looked to by the Seventh Amendment does not support the position that the early judges of this court took on these questions; that, as a matter of fact, when we look to the history of the common law procedure before 1791, when the amendment was adopted, that the British courts did in fact review, in sort of an appellate procedure, the

quantum of a verdict as well as the weight of evidence. This, I think is completely erroneous and has no basis whatsoever.

It is based entirely upon the fact that the English Court of Queen's Bench decided en banc motions for new trial which may have been tried before one of their judges at the Assizes.

But Justice Story in the Parsons v. Bedford case realized that as well as all of the early judges of this court when he said that there could be no review of questions of fact except in the court in which the case was tried, or to which it was returned - certainly, recognizing the fact that Queen's Bench sat as a court en banc.

And so any rationalization that the Court of Appeals today is like Westminster sitting in Queen's Bench en banc because some of the history books tell us sometimes the trial judge did not sit in the court en banc certainly has no basis historically.

The fact is, and the writers have said and we have studied every one of the cases which have been referred to by any of the Courts of Appeals, there is no case reported prior to 1791 in the English books in which a new trial was granted except for error of law in which the trial judge did not sit at Westminster upon the hearing of a motion.

Now, a second tack which has been taken, and which was taken by the Second Circuit in the early cases upon which our

court relied, was that true it is, and this court has held, that a review of a quantum of the evidence may not ordinarily be made by an Appellate Court under the Seventh Amendment because this is the review of a question of fact, and that this court has said time and time again - but, said the Second Circuit and others following it, there must be an upper limit.

That is, a verdict may be somewhat excessive. We cannot interfere. But it may reach an upper limit at which the question then becomes one of law and not one of fact.

Then, says the court, we do not review the verdict which the Seventh Amendment forbids us from doing. We review the discretion of the trial judge in passing upon that verdict.

No effort is made by any of the Courts of Appeal to explain how this question of fact, the excessiveness of a verdict, is transmuted into a question of law by saying, "We are not reviewing the verdict; we are reviewing the discretion of a trial judge and whether he has abused that discretion."

And if that be true, that discretion may be reviewed and may be set aside because of abuse, on what basis should it be made? This has never been explained by any of the Courts of Appeal except to say that each case must be decided on its own facts. We will not review for mere excessiveness.

But this particular case looks like one in which the trial judge was way out of line, even though he saw the witnesses

he heard all the evidence, he was in a much better position than we, nevertheless he was so far out of line that we say he abused his discretion, and that then becomes a question of law but with no explanation as to how this may be transmuted into a question of law and come outside the purview of the Seventh Amendment.

And the third rationalization has been that modern times require a re-interpretation of the Seventh Amendment, and that this prohibition against the review of fact in modern times must be re-examined, and since this court has gone so far as to say that changes in practice, changes in methods of appeal, changes in pleadings need not be prohibited and we need not follow common law procedures, that therefore the Seventh Amendment may now be re-interpreted and we may now say that although ordinarily questions of fact may not be reviewed after the trial judge has approved them, that in this type of case where there is an excessiveness involved this is an exception, this court should now re-interpret the amendment to say that here we will permit it.

This court has never done this. The Courts of Appeals have, on various occasions, looked to some of the expressions that this Court has made in refusing to pass on this question since 1879, the latest one being in the Neese v. Southern Railway in 1955, where the specific question was posed on a precisely similar situation, and what this Court said was, "We will

not reach at this time the constitutional question because viewing the record, we cannot say that this verdict was not without support in the record," and therefore reversed the Fourth Circuit without going to the constitutional question.

And that may well be the position that this Court will decide to take in this case because, as we have pointed out, there is no justification in fact for the interference by the Second Circuit with this verdict. There is no justification in fact for the Second Circuit in a vote of two judges to one to decide that the trial judge who saw the witness and heard the evidence abused his discretion in permitting this verdict to stand.

The Second Circuit majority did not even take the trouble to review in its opinion the evidence to determine whether in the language of this Court, in the Neese case, this verdict was without support in the record. It contents itself with saying that this verdict appears to us to be grossly excessive, and it used another phrase which is difficult to rationalize at all.

It said that we cannot find ourselves - and I am paraphrasing - I do not have the precise words before me - able to reach a verdict greater than so much, and therefore directed a remittitur.

The verdict in this case was $305,000. The trial judge found it to be fully justified by the record, and so did

the dissenting judge on the Second Circuit.

The two judges joined in the majority opinion and said that they could not find themselves able to justify a verdict beyond $200,000 and directed a remittitur to that amount, or else a new trial.

Now, if Your Honors at this time, as you did in Neese, feel that this case does not present a question to be decided, that Fraloff and Parsons v. Bedford may stand, as they should until another case comes along, we are perfectly satisfied, of course.

But if there is any right of review that this court is willing to leave with the Court of Appeals it cannot be on such a subjective basis as two judges feel that this is grossly excessive while the trial judge and the other judge on the Court of Appeals feel it is perfectly proper.

There must be some objective treatment of this question and not this subjective approach to what is excessive, what is grossly excessive, what is monstrous, if this is to be the judgment upon which the Courts of Appeals are to base their decisions.

We have raised one other question in our brief which I think Your Honors will not require me to argue orally. That goes only to this second question which I have discussed.

This was an action under the Federal Employers Liability Act. Certainly as this Court has said time and time

again, the right of a jury trial and the right to have the jury verdict inviolate is part and parcel of that act, so that if in any case a verdict of a jury as to amounts sustained by the trial judge should be sustained it is in a case under the act.

Mr. Chief Justice, I would like to reserve whatever time I may need.

MR. CHIEF JUSTICE: You may.

Mr. Gribbon?

ORAL ARGUMENT OF MR. DANIEL M. GRIBBON

FOR RESPONDENT

Mr. Chief Justice and Honorable Justices, petitioner's principal contention is that a Court of Appeals is without power to review a trial court's refusal to grant a new trial on the ground the jury verdict is either excessive or inadequate.

It is plain that the exercise of this power contravenes the Seventh Amendment of the constitution in that it constitutes a re-examination of the fact tried by jury otherwise than according to the rules of the common law.

I believe it is worth makeing explicit that there is not involved here the question of whether a court can look into a jury verdict for purposes of considering a challenge either to its adequacy or inadequacy.

So much is conceded by the petitioner that a court can do that, and the burden of the complaint is that a Court of Appeals lacks that power under the Seventh Amendment, and that

only the trial court has any authority whatsoever under the Seventh Amendment to look into, on any basis, the amount of a jury verdict when it is challenged for either excessiveness or inadequacy.

In this case the Appellate Court directed that a new trial would be unnecessary if petitioner agreed to remit a portion of the verdict. I do not believe, and it has not been argued, that this remittitur feature of the Appellant Court's decision has any bearing on the question which has been raised as to the power of the Appellate Court to order a new trial

Q The Court of Appeals was unimous with respect to its power?

A. It was unanimous, yes. Judge Hayes specifically said that he agreed with the majority of the constitutional question.

Q He simply disagreed on the facts of this case?

A. He disagreed on the facts of this case and said he would uphold the determinations of Judge Irving Cooper in the trial court. It appears that this constitutional question never has been directly resolved by this Court. In 1955, in the Neese case, where the question was raised but no resolved, the Court so stated in a brief opinion.

As to the cases before Neese there are certainly, it must be conceded, statements in cases of this Court, particularly in the last century, which tend to support the viewpoint that the petitioner has suggested here.

In no case in my judgment was the kind of review that the Appellate Court has performed here before the Court when any sort of statement bearing on this question was made.

As to the cases, more recent cases in this century, none of them deal directly with this problem but I think they bear heavily on the problem in that they suggest that the test to be applied in applying the Seventh Amendment is really one of substantial justice without principal regard for the forms and practices of common law.

What the Seventh Amendment does do is first to preserve the function of the court and jury as they exist in common law and the essentials of trial by jury, which the court has said consist of the jury of twelve presided over by a judge, and a unanimous verdict. And I think that is the teaching of the cases which would come to bear in this case.

As petitioner has said, all eleven of the Circuit Courts have considered this constitutional question, some before Neese, some after Neese. All of them have considered in some measure the very arguments presented here.

Each of the eleven Appellate Courts has concluded that the Court of Appeals does have constitutional power to review a determination by a District Judge which refuses to order a new trial on the ground of a verdict being excessive.

In addition, a case decided by this Court last term, Neely v. Eli Construction Company, while not directly in point,

I think by close analysis establishes the power of the Appellate Court to determine that a new trial shall be given.

In that case the court rejected the contention that the Court of Appeals was without constitutional power either to grant a judgment n.o.v. to direct a new trial. In so doing it specifically stated that so far as the restriction of the Seventh Amendment was concerned, it really was not any greater restriction on the right of jury trial whether a trial court or an Appellate Court were to enter the judgment n.o.v. or a new trial provided they applied the proper test.

The argument is advanced in support of petitioner's contention is essentially historic based upon the practice that at common law it was the King's Bench or Queen's Bench which seemed to have plenary power over the amount of the verdict. I submit that that argument does not support the position petitioners suggest, either as a matter of history or as a matter of constitutional analysis.

First, as a matter of history, the argument really proves too much because at common law it was not the judge who presided over the trial that had the authority acting alone to determine whether the amount of the verdict was excessive or inadequate.

That power did not reside in the single judge who presided over the trial. Rather the power over verdicts, the amount of verdicts, resided in the full court of King's Bench

sitting en banc in Westminster consisting of the four judges, three of whom would not have participated in the trial at all.

I submit, therefore, as far as substance is concerned, this re-examination, if you wish, or review of the jury verdict that King's Bench did, which consisted of four judges, really gives in essence the kind of appellate review that we are talking about here, because you had participating in that review three judges who had not been exposed to the tempers of the courtroom, and who brought an element of detachment and objectiveness to this.

Furthermore, the right to look over the jury verdict was never given solely to that one judge who had participated in the trial and who quite possibly had been exposed to the tempers of the trial.

Q Could that be review by a higher court?

A My information is that it could not be reviewed by a higher court.

Q In prior law it was only the court where the case was tried, even though some of the judges participated who had not presided at the trial.

A I think it is formalistic to say it was only the court before whom the case was tried because three of the men sitting on the court had not tried the case.

Q I ask you - - was it not the same judges and the same court meeting together which was composed of the judges who

tried it and the other judges who did not try it?

A That is right. It was not subject to appeal.

Q That is the fact of the common law procedure.

A Those are the facts. My suggestion is that those facts, particularly the circumstance of the three judges who did not sit in on the trial, had not reviewed the demeanor of the witnesses, and were looking at it from afar, in effect, did participate in the examination of the challenge to the jury's verdict as being excessive.

It is for that reason that I suggest the cases in this Court which hold that it is the substance of what was required at common law without regard to the formalities of the common law procedure that are preserved by the Seventh Amendment.

This, I submit in line with the decision of the Neely case, is simply a matter of distributing the function of the court as between trial court and an appellate court and does not go to the division of function or the province of the jury on the one hand and the court on the other.

Nor, I submit does it have any effect on the real vital parts of trial by jury as this court has noted. There are twelve men presided over by a judge and their verdict is unanimous.

Q If this case had been tried in a state court what court first set aside the verdict of excessiveness?

A In the state court, the Court of First Instance.

Q I believe there is a procedure in Pennsylvania where they have a bevy of judges to pass on it, all members of the same court which tried the case. Is that true here?

A It is not true in the Southern District of New York which is where this case came from.

Q Is it true in the State of New York, that is, a case tried in the State of New York with regard to the question of damages? Could that be decided by the single judge who tried it or did they call in other judges of that same court?

A I regret to say I am not an expert on New York practices. I do not think they call in other judges. I know in the District of Columbia they do not call in other judges.

Q What about Pennsylvania? Do you know about that?

A I am sorry, I do not know. If the court please, the petitioner also contends that even if the Court of Appeals can constitutionally review a trial court's refusal to order a new trial on the ground that the verdict is excessive, that this court erred in exercising that review.

There are two aspects to this problem, one of which the standard of review which was applied by this Court I think goes to the question of the constitutional power.

It is not argued here by respondent that an appellate court has exactly the same kind of power that a trial court has in dealing with the challenge to a verdict as being excessive.

The standard of review that this Court applied,and

has been applied by the other ten Circuit Courts, is that every benefit of the doubt must be given to the trial court's examination of the jury verdict.

Every deference must be paid to the fact that the trial court had a superior opportunity to examine the witnesses and know more about the case.

It is only when, after giving every benefit of the doubt to what the trial court has decided, that the appellate court has the authority, the constitutional authority, which we say the court has here to set aside the action of the trial court as being either without support in the evidence or an abuse of discretion.

The Second Circuit, in perhaps the most detailed examination of this problem in the Dagnello Case in 1961, in which this Court denied cert, went into great detail as to the limits of appellate court review of a determination by a trial judge not to grant a new trial.

That decision of the Second Circuit was written by Judge Medina, who wrote this opinion here, and he incorporated the views expressed in Dagnello into his decision here and said he was applying the teaching of that case.

The Dagnello decision elaborated on the number of words which had been used to describe the kind of a determination that the appellate court must come to before it was justified in rejecting the determinations of the District Court.

I think that the words "overly excessive," "monstrous," without any support in the record all seem to me to mean about the same thing, and that is giving what the District Court has decided as to be excessiveness charged in the verdict, giving them every benefit of the doubt, nevertheless the court concludes that the amount of the verdict simply does not comport with standards of justice.

Maybe abuse of discretion is as good a term as can be used but in any event appellate court is giving the District Court, the trial court in these circumstances, I suggest, exactly the same kind of benefit of doubt that a District Court must give to a jury verdict in considering whether the evidence is sufficient to go to the jury.

Every benefit of the doubt must be resolved in favor of the petitioner. That is precisely what Judge Medina did in this case here - giving every benefit of the doubt, as he said to the petitioner, his conclusions joined in by the other member of the court, was that nonetheless the jury verdict was outside the bounds of appropriateness as set by legal standards and not simply by subjective standards.

Q Am I right in thinking, Mr. Gribbon, that the verdict was some thousands of dollars more than the amount sued for?

A. Your Honor, you are right. Let me deal with that now, and I would like to suggest briefly, at least four different elements that I believe fully support the determinations by the

appellate court here that the verdict that was entered was in excess of any legal standards of reasonableness.

In the first place, the complaint in this case asked for $250,000, $55,000 less than the verdict that was brought in.

I do not suggest that a plaintiff shall never be able to get any more than he asked for in his complaint. But this complaint was not a do-it-yourself job. It was not prepared by inexperienced counsel. Plaintiff has been exceedingly well represented all the way through here. Able trial counsel rarely understate the abdominal. Therefore I believe it was quite appropriate for the Appellate Court to consider the amount asked for in the complaint as one of the operative facts in looking to whether this jury verdict did exceed the bounds of reasonableness.

The second point, and this, too, was considered by the appellate court, is that the plaintiff here did not suffer injuries to the vital body functions or even loss of limb.

His own doctor, who was entirely candid in his examination, said that the plaintiff was left all in all with a poor functioning foot.

A tie had fallen on his foot in the course of his work on the railroad, and smashed a couple of toes. He had been subjected to considerable hospitalization. There was no question that the plaintiff suffered damages. He was hurt and he suffered injury.

On the other hand, he did not suffer a loss of limb. His leg was not amputated. As long as it is necessary under our legal system of law to equate suffering and damages with dollars, some kind of rule has to be employed in order that the damages shall be in accordance with some standards of justice, so that the doctor said, all in all, we have got a poor functioning foot.

While such a handicap as this is admittedly serious I suggest it is not worth, in the parlance of damage awards, the loss of a leg, an arm or an eye.

Q There is no such analysis in the Court of Appeals opinion, though, is there?

A The Court of Appeals did not draw the comparision that I am drawing.

Q No. The Court of Appeals just said this is too much.

A The Court of Appeals did refer to the right foot being crushed, hospitalized, and did speak of the plaintiff's injuries.

The Court of Appeals at pages 65 and 66 of the record, did relate the circumstances of the injury and gave what in the judgment of the Court of Appeals was an accurate, factual description of the injury and of plaintiff's suffering.

Q There was no attempt at analysis in the Court of Appeals. I do not know how you would go about it if that is part of the problem of the case, how you would go about saying

that this man's suffering is figured at $5.00 a second or something like that, and would have been entitled to so much and no more. I do not know how you do it. But the Court of Appeals here made no attempt to do it, as I see it. They just said that it is too much.

A. They made no attempt to compare the $200,000 which the court concluded was the maximum that would be permitted under the law with the $305,000 which the jury had brought in and which the judge had approved. But they did state his damages and his sufferings in some considerable detail so it was perfectly clear that the Court of Appeals considered this.

I do not think it is incumbent upon them to go out and say, "We think Judge Cooper was wrong in assessing it at this, that and the other." We think it has to be considered in the aggregate.

Q. What standard did the Court of Appeals use in determining what his damages were for suffering?

A. They did not put a dollar amount on suffering.

Q. They just said, "We think it's too much."

A. "We think the whole verdict is too much."

Q. Not the whole verdict. They said they thought this was too much, didn't they?

A. What they said was $126,000 was suggested to the jury by his own counsel as being the amount involved for loss of past wages and future wages.

The difference between $126,000 and $305,000 presumably is for pain and suffering, and I think it is fair to say the Court of Appeals said that shocked them. They thought it was too much.

Q They didn't say it shocked them, did they?

A They said they didn't think anything over $200,000 would be adequate.

Q That is just placing themselves in the position of the jury, is it not? Saying "We don't think he suffered that much."

A Mr. Chief Justice, I think the Court of Appeals took every pain not to put itself in the place of the jury.

Q Why?

A Because of what they said here.

Q In the opinion they didn't.

A In the opinion, yes.

Q But in their subjective judgment they did.

A No more so, I think, than any other court in considering whether evidence should go to a jury or whether n.o.v. should be granted.

There is a problem here in making allowances for what somebody else could possibly think, as for example, what a jury could think as to whether certain things amount to negligence, and yet concluding that no reasonable jury could come to that conclusion - - not just that you, the Court, cannot come to that conclusion but really that no reasonable person

could come to that conclusion. That is the kind of determination made by courts in directing verdicts and entering judgments n.o.v. all the time.

The Appellate Court did its very best, and I think the results it had here do indicate - -

Q They didn't say that, did they?

A Your Honor - -

Q They didn't even say that in this case, did they? They didn't say anything except that it is too much. Is that right?

A They incorporated by reference their elaborate discussions in Dagnello and in which just a few years previously Judge Medina had gone into this very thing about how necessary it was to give every benefit of doubt to the injured party.

In that case, with a jury verdict of $97,000 for a leg that was amputated above the knee, he concluded that was not in excess of the bounds of reasonableness.

Q Presumably trial judges see a lot of these cases and have some sense of what sort of a going rate is for pain and suffering, to put it in those horrible terms, which we have to.

But this Appellate Court here, without saying - we don't believe any reasonable man could have arrived at that - without using any of the conventional magic of our profession - they just said - we will set this aside. It's too much.

A I wonder if the court had not exhausted its use of

the words in the earlier Dagnello opinion.

Q When we exhaust the use of words like that we are in a pretty pickle.

A All sides agreed that the rule that was to be applied and which had been articulated in Dagnello is what controlled here. In Dagnello, this court, through Judge Medina, specifically said - you have to give every benefit of the doubt.

Even the District Court recognized here that there was some point beyond which, as a matter of law, the jury could go. He spoke of it - indeed he started out. He said at first blush concededly this is excessive.

Then the judge went on and described the nature of the injuries and the Appellate Court here was impressed by the difference between the trial judge's characterization of the injuries based upon the plaintiff and the doctor's testimony and the testimony itself, and there is a considerable difference between what these candid witnesses said as to their injuries and how the trial judge viewed it when the amount of the verdict was challenged.

The petitioner here said the pain was sort of like a dull toothache. He learned to live with it and it was bearable.

Q The trial judge did not like to have a toothache. He used fairly extreme language here.

A And I think it is clear that that entered into the determination of the Appellate Court.

Q Is the full trial record in the court?

A The full trial record is in the court. Only the portion dealing with injuries has been printed but the full trial record is there.

Q How long did the trial take? Roughly, what was it?

A Two or three days.

Q How big is it?

A This is the full trial record. It was not a long trial.

Q Is it true that the Court of Appeals could not substitute its judgment for that of the jury as to the factual situation, but yet it can do it on the question of damages?

A No, Mr. Justice Marshall. I am not suggesting that it can substitute its view for that of the jury.

Q Didn't it just about say that in its opinion - - we just can't go on with this?

A It did say that - we believe the jury verdict is excessive, is beyond all reasonable bounds.

Q Did they say that?

A That is the net effect of saying $305,000 is excessive, the most that can be allowed for this sort of injury is $200,00.

Q Why not $250,000?

A This is where a certain amount of expertise and experience, as Mr. Justice Fortas pointed out, has to come into

play.

Q Where does the expertise get into this? This is a matter for the jury. It is not the expertise of the judge.

A The amount of the jury verdict was never even at common law exclusively for the jury.

Q I did not say exclusively. I said it is their problem and they are not experts.

A But if the jury comes in with a verdict of one million dollars for a sprained thumb, I submit that that is going to be set aside. It will be set aside. If the District Court does not set it aside the Appellate Court will, and if it does not, this Court will set it aside.

Q I don't know how much a jury would give if Gibson sprained his thumb.

A Maybe it would be inadequate. In any event, the court is going to review - -

Q The jury verdict was $305,000.

A Yes, Sir.

Q The Dagnello trial was $250,000. Since the jury gave $50,000 more, maybe the Court of Appeals said, "We'll cut $50,000 off" - that is how they will get the $200,000 figure.

A They didn't say that. I can't say what they thought.

Q You see what my problem is. I don't know what they meant to do. They took a figure of $200,000. They didn't justify it one way or the other.

A I can't say they didn't justify it. They took the figures that had been put to the jury on loss of wages, past and future, and then they related the testimony as was on the closed record and not controverted as to the amount of suffering.

Based on that they said, that in their judgment, giving the trial judge every benefit of the doubt in his upholding the verdict, nonetheless this seemed to them to be excessive, so excessive as to require reversal.

Q You see my problem?

A I do, and I am not suggesting it is not a difficult problem. Along the lines of Mr. Justice Fortas, alluded to earlier, trial judges are not the only ones who have experience in jury verdicts. Appellate Judges have the same course of experience and indeed may be in as good a position to view them.

A In that connection - -

Q I gather only one of this panel had any trial experience.

A Judge Medina?

Q He is the only one. I do not think any of the others had been trial judges.

A I saw them many times in the courtroom.

Q He was never a trial judge as I remember it.

A I think that is correct.

Q Neither had Judge Hayes.

A That is correct.

Q Do you think Appellate Judges get as much experience in this are as Trial Judges?

A I think it depends on the court.

Q As a former trial judge I will not agree with you.

A In a state court I think probably not.

Q In this problem what difference does it make, whether it is a trial court experience or federal?

A I am suggesting that in a federal court the District Judge may not necessarily get a greater exposure than in the Federal Appellate Court.

Q Then I don't understand your argument on expertise.

A It may be a question of two people or three people who have not been exposed to exactly the same problem as the trial judge bringing their judgment to bear on it - not just to second guess them but to give them every possible benefit of the doubt and in some few instances they will conclude that this was beyond the bounds of reasonableness.

We have put into the Appendix to our brief quite a complete list of jury verdicts in recent cases and dollars that have been awarded.

I think it is from a distillation of those cases that the common law principles of excessiveness of verdict must be determined.

If the court please, in closing let me suggest, if I may, that I think the second aspect of this case, that is

whether the Appellate Court should be upheld in reversing the District Court, calls really for more than most cases that quality of judging that Judge Learned Hand spoke of on the occasion of his fiftieth anniversary on the court when he said that the judging was in the nature of an art - -"The judge has some vague purpose and frames of references and among these he must choose, but choose he must do."

Unfortunately the choices made here really cannot be proven by words or numbers the way you would prove a mathematical or a logical proposition.

But I submit that the manner in which this District Court, particularly in the light of its Dagnello case, this Appellate Court, went about resolving this question shows a thoroughly objective and reasonable resolution of the interests of the parties and should accordingly be affirmed.

Thank you.

Q Suppose you prevailed in this case? What would be the scope of the trial in the event there is no remittitur?

A Just on the damages.

Q Just on the damages.

A Yes, Sir

Thank you.

MR. MEYER: Mr. Chief Justice and members of the court, I would be perfectly willing to re-try this case before this jury if that is the railroad's position here. I do not

think we should have to re-try a case in the Court of Appeals on damages and then in the Supreme Court on damages. That is precisely what counsel for the railroad here is contending - - that we must justify now before this Court that its members would determine what was the proper amount that should be awarded. This was the particular purpose of the Seventh Amendment when it was passed, that this should not occur in the Supreme Court or in any Appellate Court in the United States.

If I may I would like to answer a few of the questions that were asked, and some of them may be very relevant.

A question was asked by Mr. Justice Harlan as to how long the case took to try. That appears in the docket entries. It started on February 21 and ended on March 2. That does not tell the whole story, of course, because February 22 was a holiday, and I am sure there was a weekend involved. I know I went back and forth from Philadelphia many days to try the case.

The question was asked by Mr. Justice Black as to the practice in Pennsylvania with which, of course, I am very familiar. That carried out the common law practice. It still does.

A case tried by a single judge with a motion for new trial is heard by the three judges of which he was a member of the panel, unless it is waived.

But that question is not new to this court. This court had the same question before it in Metropolitan against

Moore when the question arose as to whether the General Sessions of the then Supreme Court of the District of Columbia was the same court as the special session that tried the case.

That was precisely what you had in England, as Mr. Justice Black pointed out. You had one judge in assize and the motion for new trial came to Westminster and he sat there with his colleagues, the three others, and they decided the case. That is what this court said was not an appellate review in Metropolitan against Moore in the General Sessions of the Supreme Court of the District of Columbia.

Finally, I suppose I must make answer to the question asked by Mr. Justice Harlan as to the ad damnum.

The Court of Appeals said, in its opinion, although it did not discuss or try to justify in any way its cutting down the verdict, it did say that the fact that the ad damnum claimed less than the amount awarded the jury has some significance, quoting its language. What significance it does not say.

Let's examine it for just a moment. What is its significance? This man was injured in 1962 and this action was started in 1963. It was not amended until after the trial, and at that time it was amended with leave of court, and there is no contest by the railroad that that is not proper. It has been done hundreds and hundreds of times and always has been held to be proper.

But the important point is this, and the Court of

Appeals recognizes it and the records show it - - the ad dammum clause was never mentioned to the jury. The jury never saw the complaint. The jury was on its own on the facts to determine the amount that should be awarded.

Where my friend gets this figure of $126,000 dollars I do not know. It is not in the opinion of the Court of Appeals.

The figure that the lower court mentions was $155,000 dollars, plus $27,000 which would be $182,000. We have indicated in the brief they well may have awarded $192,000 dollars without stretching themselves one bit for loss of future earnings.

As Mr. Justice Marshall just said, the only question here is how much should the jury have awarded for this man's pain and suffering? Is this court going to decide that? Because if the Courts of Appeals are to decide that purely on the basis that this is grossly excessive, then must not this court also determine whether the Court of Appeals has abused its discretion in deciding that the court below has abused its discretion on this issue?

I like particularly also something Judge Learned Hand said, but in this specific connection I have it in my brief.

In discussing this type of review he called attention to the fact that a Court of Appeals must come at the matter once removed and not in the position of the trial judge. He said, "We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within

the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable. Parties ought not to engage in scholastic refinements."

That is precisely what the court below has done here.

Thank you.