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NOTES

Invasion of the Jury's Province: May the Court Determine Damages? *Shamblin's Ready Mix, Inc. v. Eaton Corp.*

In a conversion suit, the jury awards punitive damages that are almost two hundred times the compensatory damages awarded. The court of appeals affirms the compensatory award, but because it finds the punitive award excessive, remands for a new trial on the punitive damages amount. On remand a second jury returns an even higher punitive award. When the case reaches the appellate court for the second time, the court again sets aside the punitive award as excessive. After two excessive jury verdicts, what options are then within the authority of the appellate court?

In *Shamblin's Ready Mix, Inc. v. Eaton Corp.*¹ the United States Court of Appeals for the Fourth Circuit determined that a litigant has no right to a jury determination of the amount of punitive damages.² Rather than remand for a third jury determination, the court of appeals itself assessed the measure of punitive damages. Relying upon *Tull v. United States*,³ the *Shamblin's* court held that the amount of punitive damages is not a fundamental element of a jury trial and that the seventh amendment does not extend to the phase of a trial in which damages are assessed.⁴

This Note explores the constitutionality of the action taken by the court of appeals in *Shamblin's*, focusing on the doctrine of remittitur and the limitations imposed upon courts by the seventh amendment. The Note explains why *Shamblin's* was not supported by *Tull*, the principal authority upon which the Fourth Circuit relied, and describes the *Shamblin's* court's departure from the traditional allocation of duties between judge and jury. The Note concludes that the judicial overreaching in *Shamblin's* is an unjustified and unwarranted assault on the seventh amendment right to a trial by jury.⁵

In 1984 plaintiff *Shamblin's Ready Mix, Inc.* ("Shamblin's"), a West Virginia company, purchased a motor and pump for a paddle-wheel boat from Scott Equipment Company ("Scott"), a West Virginia distributor for an Ohio manufacturer, the Eaton Corporation ("Eaton").⁶ The equipment malfunctioned, and Shamblin's returned it to Scott for replacement under the manufacturer's war-

1. 873 F.2d 736 (4th Cir. 1989).

2. *Id.* at 742-43.

3. 481 U.S. 412 (1987). In *Tull* the United States Supreme Court held that although a litigant is entitled to a jury trial on the issue of liability for civil penalties, the jury right does not extend to the assessment of penalties. *Id.* at 427; see *infra* text accompanying notes 79-95.

4. *Shamblin's*, 873 F.2d at 742-43.

5. The seventh amendment provides that "[i]n 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." U.S. CONST. amend. VII.

6. *Shamblin's*, 873 F.2d at 738.

ranty.⁷ Scott informed Shamblin's that the fault in the equipment was unrelated to materials or workmanship and, therefore, the warranty covered neither replacement nor repair.⁸ Without consulting Shamblin's, Scott then shipped the equipment to Eaton for further warranty consideration.⁹

Shamblin's, insisting on replacement and threatening to bring suit, repeatedly demanded the return of its unrepaired equipment.¹⁰ Scott informed Shamblin's that it had shipped the equipment to Ohio and that Eaton agreed that the warranty did not cover the problems.¹¹ Eaton offered to repair and return the equipment with a new warranty at a cost of \$2,069.¹² Shamblin's again demanded the return of the equipment.¹³ Scott informed Shamblin's that due to its threat to bring a lawsuit, Eaton refused to return the equipment unrepaired and was awaiting Shamblin's authorization of repairs at the stated price.¹⁴ Eaton continued to disregard demands for the return of the equipment, and Shamblin's filed suit for conversion against both Scott and Eaton.¹⁵

In the district court, a jury awarded \$3,531 in compensatory damages and \$600,000 in punitive damages.¹⁶ The United States Court of Appeals for the Fourth Circuit affirmed the compensatory award but set aside the punitive award, finding it tainted by the "improper and highly prejudicial" closing argument delivered by counsel for plaintiff Shamblin's.¹⁷ The court of appeals remanded for a new trial on the issue of punitive damages.¹⁸

On remand the jury awarded Shamblin's punitive damages in the amount of \$650,000.¹⁹ When the case reached the court of appeals for the second time, that court again found the punitive damages award grossly excessive, the "product of erroneously admitted evidence and misleading argument."²⁰ Defendant urged the appeals court to set aside the \$650,000 punitive damages verdict and determine an appropriate punitive award.²¹ Plaintiff Shamblin's opposed the denial of a new trial, asserting that such a denial would violate its seventh

7. *Id.* Initially Scott offered to pick up and repair the equipment free of charge. Shamblin's refused the offer and demanded replacement of the faulty equipment. Scott then withdrew its offer of free repair. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Before answering the complaint, Eaton contacted Shamblin's with an unconditional offer to return the unrepaired equipment. Shamblin's refused the offer. *Id.*

16. *See id.* at 737.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 739. A former Scott employee testified that Eaton's refusal to return the unrepaired equipment was in accordance with company policy. *Id.* The attorney for Shamblin's based his closing argument on this testimony, which the appellate court determined had been admitted erroneously into evidence because the witness had no personal knowledge of Eaton's policies. *Id.*

21. *Id.* at 739-40.

amendment right to a jury trial.²² The court of appeals ruled for defendant Eaton and declined to remand the case for a third jury trial, reasoning that the Constitution does not require that a jury determine the amount of punitive damages.²³ The court determined \$60,000 to be an appropriate punitive award and entered judgment for that amount.²⁴

In setting aside the jury verdict and substituting its own calculation of damages, the Fourth Circuit proposed a new theory of the jury's role in the determination of remedies. The court of appeals extrapolated from a United States Supreme Court case, *Tull v. United States*,²⁵ the broad proposition that the seventh amendment jury right attaches to the question of liability for damages but does not extend to the assessment of damages.²⁶

Traditionally, courts have determined the scope of the seventh amendment right to trial by jury by reference to the common-law rules existing at the time of the amendment's adoption in 1791.²⁷ At common law the right to a jury attached only to those actions considered legal in nature; actions in equity or admiralty did not afford the right to a jury.²⁸ Accordingly, the United States Supreme Court has held that the seventh amendment applies to "action[s] involv[ing] rights and remedies of the sort typically enforced in . . . action[s] at law."²⁹

In 1791 juries, not judges, determined awards of punitive damages,³⁰ and modern cases have held the assessment of damages to be "peculiarly within the province of the jury."³¹ The United States Supreme Court has held that a claim for actual and punitive damages is "the traditional form of relief offered in the courts of law" and thus requires a jury trial upon demand.³²

The fates of the doctrines of *additur*³³ and *remittitur*³⁴ under the seventh

22. *Id.* at 740.

23. *Id.* at 742-43.

24. *Id.* at 743. The court found this amount appropriate because of the absence of any personal injury or property damage. The court also considered it significant that the willful retention of plaintiff's equipment was due to defendant's effort to preserve it as evidence in light of plaintiff's threat to bring suit. *Id.*

25. 481 U.S. 412 (1987) (litigant found liable for civil penalties by a jury does not have the right to have the jury also determine the amount of the penalty); see *infra* text accompanying notes 79-95.

26. *Shamblin's*, 873 F.2d at 742. The court of appeals did not address the obvious question why it remanded the case for a second jury trial on the punitive damages issue upon the first excessive jury verdict if it was not necessary to do so.

27. See *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935).

28. *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830)).

29. *Id.* at 195. Thus, under the historical test of the seventh amendment, if an action existed at the time the seventh amendment was adopted and the action afforded a right to a jury trial, that action today also falls within the seventh amendment.

30. *Huckle v. Money*, 95 Eng. Rep. 768 (1763), is thought to be the first English case to award punitive damages. A jury awarded three hundred pounds in an action for trespass and false imprisonment. *Id.* For further discussion of the historic role of the jury as determiner of damages, see *Boyd v. Bulala*, 672 F. Supp. 915, 920-21 (W.D. Va. 1987).

31. *Virginia M.R.R. v. White*, 84 Va. 498, 508, 5 S.E. 573, 579 (1888); see also *Ward v. White*, 86 Va. 212, 219-21, 9 S.E. 1021, 1023-24 (1889) (damages award within strict province and discretion of jury).

32. *Curtis*, 415 U.S. at 196.

33. The doctrine of *additur* allows a court to increase an inadequate jury award without re-

amendment illustrate the jury's role as determiner of damages. The United States Supreme Court has ruled that the seventh amendment does not permit additur because additur would compel litigants to forgo the constitutional right to the verdict of a jury.³⁵ Further, the Supreme Court has limited the use of remittitur to cases in which evidence does not support the damages awarded.³⁶ When evidence does not support the award, a court may order a new trial, or it may condition the denial of defendant's motion for a new trial on a voluntary remittance of part of the damages by the plaintiff.³⁷ Application of the remittitur doctrine is appropriate only when the jury has returned an excessive verdict,³⁸ and the plaintiff must be given the choice of submitting to a new trial on the damages issue or of accepting the lesser amount chosen by the court.³⁹

In the landmark case *Dimick v. Schiedt*⁴⁰ the United States Supreme Court condemned the use of additur, but in dictum legitimized the use of remittitur in federal courts.⁴¹ In plaintiff's personal injury action, the jury returned a \$500 verdict.⁴² The trial court offered defendant the option of consenting to a \$1000 additur, or in the alternative, accepting a new trial.⁴³ Defendant consented to the additur, and the court denied plaintiff's motion for a new trial.⁴⁴ The United States Court of Appeals for the First Circuit reversed the trial court's additur decision as a violation of the plaintiff's seventh amendment right to a

manding for a jury determination. BLACK'S LAW DICTIONARY 35 (5th ed. 1979); see also *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935) (describing and condemning additur).

34. Remittitur is

the procedural process by which the verdict of a jury is diminished by subtraction. . . . The term is used to describe generally any reduction made by the court without consent of the jury; but the typical situation in which it is employed . . . is where, on a motion by a defendant for a new trial, the verdict is considered excessive and the plaintiff is given an election to remit a portion of the amount or submit to a new trial.

Carlin, *Remittiturs and Additurs*, 49 W. VA. L.Q. 1, 1 (1942).

35. *Dimick*, 293 U.S. at 486-87.

36. *Kennon v. Gilmer*, 131 U.S. 22, 28-29 (1889).

37. *Id.*

38. See Note, *O'Gilvie v. International Playtex, Inc.: An Improper Remittitur of a Punitive Damages Award*, 81 Nw. U.L. REV. 288, 294 (1987); see also *Ouachita Nat'l Bank v. Tosco Corp.*, 716 F.2d 485, 488 (8th Cir. 1983) (remittitur proper only when verdict "so grossly excessive as to shock the conscience of [the] court" (quoting *Drotzmann's, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830, 835 (8th Cir. 1974))); *Nelson v. Trujillo*, 657 P.2d 730, 734 (Utah 1982) (remittitur on basis of attorney misconduct improper when damages award not excessive).

39. See *Dimick*, 293 U.S. at 479-84. The new trial option ensures the constitutionality of remittitur. If plaintiff accepts the remittitur and chooses not to accept the new trial, she has voluntarily given up her right to a jury trial, and no seventh amendment issue exists. See *id.* at 474, 492-93 (Stone, J., dissenting); *Kennon*, 131 U.S. at 30; *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447 (10th Cir. 1987), cert. denied, 108 S. Ct. 2014 (1988); *Higgins v. Smith Int'l, Inc.*, 716 F.2d 278, 281 (5th Cir. 1983); *Scott v. Plante*, 641 F.2d 117, 136 (3d Cir. 1981), vacated on other grounds, 458 U.S. 1101 (1982); *United States v. 93,970 Acres of Land*, 258 F.2d 17, 31 (7th Cir. 1958) (court may not apply additur or remittitur without parties' consent, even in condemnation suit in which parties have no constitutional right to a jury), rev'd on other grounds, 360 U.S. 328 (1959); *May v. Ellis Trucking Co.*, 243 F.2d 526, 526 (6th Cir.) (per curiam), cert. denied, 355 U.S. 816 (1957).

40. 293 U.S. 474 (1935).

41. See *id.* at 485.

42. *Id.* at 475.

43. *Id.* at 475-76.

44. *Id.* at 476.

trial by jury.⁴⁵ The United States Supreme Court upheld the court of appeals' decision, agreeing that to allow the court to increase the verdict would "bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon."⁴⁶ In dictum, however, the Court addressed the long-accepted practice of remittitur, a decrease in plaintiff's damages award conditioned upon his rejecting the option of a new trial.⁴⁷ Citing the uniform acceptance and application of the remittitur doctrine in the federal courts since Justice Story first applied it in 1822, the *Dimick* Court declared it unlikely that a modern Court would reconsider or disturb the doctrine.⁴⁸

The United States Supreme Court held in *Kennon v. Gilmer*⁴⁹ that, except for the limited power to order remittitur when plaintiff elects to remit rather than face a new trial, a court has no power to replace a damages verdict assessed by a jury with its own assessment of what the damage amount should be.⁵⁰ Plaintiff in *Kennon* brought an action in a Montana district court against a common carrier for negligent operation of a stagecoach resulting in plaintiff's injuries.⁵¹ The jury returned a judgment for the plaintiff in the amount of \$20,750.⁵² Defendants appealed to the Supreme Court of Montana, which found the award unsupported by the evidence.⁵³ The supreme court affirmed the verdict as to liability, but reduced the damages award to \$10,750, believing the award amount to be tainted by passion and prejudice.⁵⁴ The United States Supreme Court reversed, holding that in replacing the jury's assessment of dam-

45. *Schiedt v. Dimick*, 70 F.2d 558, 562 (1st Cir. 1934), *aff'd*, 293 U.S. 474 (1935).

46. *Dimick*, 293 U.S. at 486.

47. *Id.* at 484. The Court observed that if the question of remittitur then had been before it for the first time, the doctrine likely would have been condemned. *Id.*

48. *Id.* at 484-85 (citing *Blunt v. Little*, 3 F. Cas. 760, 761-62 (C.C.D. Mass. 1822) (No. 1578) (Story, J.)). The *Dimick* Court endorsed the application of remittitur under certain circumstances:

Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were in the first instance, to have a jury properly determine the question of liability and the extent of injury by an assessment of damages. Both are questions of fact.

Id. at 486. Remittitur is rarely used and is not appropriate if the verdict is found to be the result of passion or prejudice, because prejudice may have affected the jury's decision on liability as well as damages. 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2815, at 103 (1973). In such cases it is not enough to require a remittitur as a condition of the verdict's being allowed to stand.

Involved in the verdict is the finding on the hotly contested question of liability as well as the question of damages; and the fact that the jury rendered a verdict for damages which the court found unreasonable and grossly excessive [is] a matter impeaching the fitness of the verdict with respect to both questions.

Ford Motor Co. v. Mahone, 205 F.2d 267, 272 (4th Cir. 1953); *see also* *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521 (1931) (verdict found to be the result of jury passion and prejudice cannot stand because appeals to jury passion "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one"); *Gulf Coast Bldg. & Constr. Trades Council v. F. R. Hoar & Son, Inc.*, 370 F.2d 746, 749 (5th Cir. 1967) (if excessive verdict is result of passion, prejudice, or caprice, remittitur is improper).

49. 131 U.S. 22 (1889).

50. *Kennon*, 131 U.S. at 29.

51. *Id.* at 22-23.

52. *Id.* at 24.

53. *Id.*

54. *Id.* The district court had denied defendant's motion for a change of venue on the ground that plaintiff could not obtain an impartial trial in his home county. *Id.* at 23.

ages with its own the Supreme Court of Montana had acted beyond its constitutional authority.⁵⁵ The Montana court had the discretion to deny the motion for a new trial, to grant it generally, or to order that a new trial be had unless the plaintiff chose to remit part of the verdict.⁵⁶ The territorial appeals court did not, however, have the authority to usurp the seventh amendment and reexamine the facts in ruling on the motion for a new trial.⁵⁷ Under *Kennon*, therefore, the court may remit part of the judgment only if the plaintiff is given the option of a new trial; a court that does otherwise acts beyond its authority.⁵⁸

A more recent case in the United States Court of Appeals for the Third Circuit reiterated the principles enunciated in *Kennon* and *Dimick*. In *Scott v. Plante*⁵⁹ a jury awarded \$15,000 in compensatory damages and \$10,000 in punitive damages to plaintiff, an involuntary patient at a psychiatric hospital.⁶⁰ Plaintiff, previously found not competent to stand trial for the murder of his grandmother, brought suit claiming that his confinement without treatment violated his fifth amendment due process right.⁶¹ The federal district court judge deemed the jury's award excessive and reduced it to nominal damages of one dollar.⁶² The court did not offer plaintiff the option of a new trial.⁶³ The Third Circuit reversed, reasoning that the trial court had acted beyond its powers and had violated plaintiff's seventh amendment right.⁶⁴

In a highly publicized 1987 case, a federal judge used punitive damages as leverage to induce corrective action by a defendant. In *O'Gilvie v. International Playtex, Inc.*⁶⁵ Judge Patrick Kelly, a federal district judge in Kansas, reduced a jury's punitive damage assessment from \$10 million to \$1.35 million in a toxic shock syndrome product liability case.⁶⁶ In return for the reduction, defendant

55. *Id.* at 28-29. At the time of *Kennon*, Montana was only a territory and not yet a state. *Id.* at 22. The United States Supreme Court observed that the seventh amendment was "in full force in Montana, as in all other organized territories of the United States." *Id.* at 28 (citing Act of May 26, 1864, ch. 95, § 13, 13 Stat. 91). Although United States territories are bound by the federal rule, states are not. The seventh amendment is not binding on the states and therefore applies only in federal courts. See *Scott, Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 670-71 (1918). Most state constitutions, however, provide for a right to jury trials in certain cases. *Id.*

56. *Kennon*, 131 U.S. at 29; see also Note, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299, 310 (1976) (appellate court, upon determination that damages award is excessive, may remand for a new trial or may deny a new trial conditioned upon plaintiff's acceptance of remittance of part of award).

57. *Kennon*, 131 U.S. at 29.

58. *Id.*

59. 641 F.2d 117 (3d Cir. 1981), *vacated on other grounds*, 458 U.S. 1101 (1982).

60. *Id.* at 120-24.

61. *Id.* at 121.

62. *Id.* at 136.

63. *Id.*

64. *Id.* (citing *Kennon v. Gilmer*, 131 U.S. 22 (1889)). The court distinguished the case before it from a case in which the amount of damages is a matter of undisputed calculation. *Id.* at 136-37; see e.g., *Garfield Aniline Works v. Zandle*, 43 F.2d 537, 538 (3d Cir. 1930) (in action based on contract, where excess can be ascertained readily, court may reduce verdict to proper amount). Presumably, courts have the power to correct simple mathematical errors made by juries.

65. 609 F. Supp. 817 (D. Kan. 1985), *aff'd in part, rev'd in part*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988).

66. *Id.* at 820.

ceased sale of its super-absorbent tampon and undertook a preventive educational campaign.⁶⁷ Although some commentators have applauded Judge Kelly's actions as fulfilling the dual purposes of punitive damages,⁶⁸ the Court of Appeals for the Tenth Circuit rejected his innovative attempt at bargaining and reversed.⁶⁹ The appellate court held that the trial court erred in reducing the amount of the punitive award, because the defendant's promised amelioration on which the remittitur was based was irrelevant to the injury underlying the plaintiff's punitive damages claim.⁷⁰ Even if the case had been a proper one for the use of remittitur,⁷¹ the court observed that

in an ordinary remittitur case, the plaintiff must be offered a choice between a new trial and accepting a remittitur to avoid a serious problem under the Seventh Amendment, which reserves to the jury the determination of damages.⁷²

The appellate court, citing *Kennon*, restated the rule that the seventh amendment prohibition on intruding into the jury sphere limits a court's power to exercise remittitur.⁷³

In *McKinnon v. City of Berwyn*⁷⁴ the United States Court of Appeals for the Seventh Circuit held that although a judge can set aside an excessive jury verdict, he may fix the proper level of damages himself only if the plaintiff is entitled to a specific amount of damages as a matter of law, as where a fixed sum is specified by statute as liquidated damages.⁷⁵ In *McKinnon*, a civil rights action, the trial judge granted judgment notwithstanding the verdict as to two defendants and remitted part of the jury's punitive damage award against a third defendant.⁷⁶ The appellate court reversed as to the remittitur, holding that the court may fix damage awards in cases in which an amount is set as a matter of law, but in cases in which the amount of damages depends on the specifics of the case, the "proper corrective is to give [the plaintiff] the choice . . . between accepting the remittitur and . . . a new trial on the damages."⁷⁷ The *McKinnon* court determined that denying plaintiff the option of a new trial when remitting

67. *Id.* at 819. Judge Kelly did not label his action a remittitur, but described his form of judicial bargaining as "an innovative remedy geared to what the court reasoned as 'that which ought to be.'" *Id.* at 818.

68. See Prentice, *Reforming Punitive Damages: The Judicial Bargaining Concept*, 7 REV. LITIG. 113, 148-63 (1988); Comment, *Remedial Activism: Judicial Bargaining With Punitive Damage Awards*, 19 LOY. L.A.L. REV. 941, 952-58 (1986). Punitive damages are intended to punish the wrongdoer as well as to deter future instances of the same conduct. J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES LAW AND PRACTICE* §§ 2.01-2.13 (1985); Ervin, *Punitive Damages in North Carolina*, 59 N.C.L. REV. 1255, 1256 (1982).

69. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1450 (10th Cir. 1987), cert. denied, 108 S. Ct. 2014 (1988).

70. *Id.*

71. Remittitur was not proper because the trial judge did not find the amount of the award excessive. *Id.* at 1448-49.

72. *Id.* at 1447 (citing *Kennon v. Gilmer*, 131 U.S. 22 (1889)).

73. *Id.*

74. 750 F.2d 1383 (7th Cir. 1984).

75. *Id.* at 1392.

76. *Id.* at 1385.

77. *Id.* at 1392.

punitive damages was improper and violated the seventh amendment.⁷⁸

Despite the abundance of authority recognizing the jury's role as determiner of damages, the United States Supreme Court recently observed in a footnote that "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial."⁷⁹ In 1987 the Court decided *Tull v. United States*,⁸⁰ a case in which the government sought civil penalties and injunctions under the Clean Water Act⁸¹ against a real estate developer who had dumped fill into wetlands illegally.⁸² The government contended that an action for civil penalties is equitable in nature and under the historical test of the seventh amendment⁸³ does not afford a litigant the right to trial by jury.⁸⁴ The *Tull* Court disagreed, however, concluding that the penalties authorized by the Clean Water Act were intended to be punitive rather than restitutional, yielding "a type of remedy at common law that could only be enforced at courts of law."⁸⁵ After characterizing civil penalties as both punitive and legal, the Court reasoned that the developer was entitled to have a jury determine whether he was liable for penalties.⁸⁶

The *Tull* Court then addressed the issue of whether the developer also was entitled to a jury determination of the penalty amount.⁸⁷ Here the Court abandoned the historical test and adopted a delegation theory to uphold the power of a court to calculate civil penalties.⁸⁸ After examining the legislative history of the Clean Water Act, the Court determined that Congress intended that trial judges perform the necessary calculations after juries determine initial liability for civil penalties. Further, the Court held that Congress can delegate to judges its own authority to calculate and assess civil penalties,⁸⁹ and that such delegation is not inconsistent with the seventh amendment.⁹⁰ The Court quoted its opinion in *Galloway v. United States*:⁹¹ "[T]he [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements."⁹² Because Congress had predetermined the amount of recovery by statute, the Court found that "[t]he assessment of penalties . . . cannot be said

78. *Id.*

79. *Tull v. United States*, 481 U.S. 412, 426 n.9 (1987).

80. 481 U.S. 412 (1987).

81. 33 U.S.C. § 1319 (1982). The statute does not state explicitly whether trial judges or juries are to make the calculations necessary to assess civil penalties. *See id.*

82. *Tull*, 481 U.S. at 414.

83. *See supra* notes 27-32 and accompanying text.

84. *Tull*, 481 U.S. at 418-25.

85. *Id.* at 422.

86. *Id.* at 423. The Court applied the historical seventh amendment test. *See supra* notes 27-29 and accompanying text (describing the test).

87. *Tull*, 481 U.S. at 425-27.

88. *Id.* at 426-27.

89. *Id.* at 427. The Court noted that Congress' authority to assess civil penalties was not in question, and "[s]ince Congress itself may fix the civil penalties, it may delegate that determination to trial judges." *Id.*

90. *Id.*

91. 319 U.S. 372 (1943) (upholding the court's authority to direct a verdict when offered evidence is insufficient to raise a question of fact for the jury).

92. *Tull*, 481 U.S. at 426 (quoting *Galloway*, 319 U.S. at 392).

to involve . . . a 'fundamental element of a jury trial.'"⁹³ The *Tull* Court thus concluded that notwithstanding the right to a jury trial on the question of liability, the right does not extend to the phase of the trial during which civil penalties are calculated.⁹⁴ In cases in which penalties are established by law, there is no need for jury involvement; courts may calculate the appropriate penalty themselves.⁹⁵

Contrary to the limitations of remittitur and extensive precedent regarding application of the doctrine,⁹⁶ the United States Court of Appeals for the Fourth Circuit in *Shamblin's* reduced the jury's punitive damages award without offering plaintiff *Shamblin's* the option of a new trial.⁹⁷ The *Shamblin's* court erroneously interpreted *Tull* broadly to hold that the right to a jury trial does not extend to the remedy phase of a trial.⁹⁸ A narrower reading of *Tull* would recognize that its holding rested on the delegation theory and, absent this theory, the *Tull* Court would have reached the opposite result. Because there is no such congressional determination or delegation of authority to determine punitive awards, it is improper to apply *Tull's* reasoning to the facts of *Shamblin's*. Punitive awards are determined by reference to the particular facts of the case before the court, taking into consideration such factors as the nature of the defendant's conduct and the extent of harm.⁹⁹ Because the calculation of punitive damages occurs on a case-by-case basis, rather than by congressional predetermination, the Court's reasoning in *Tull* regarding the calculation of fixed penalties is inapplicable to fact-based determinations of the appropriate amounts of punitive damages.¹⁰⁰ A court has power to determine only questions of law;

93. *Id.* (quoting *Galloway*, 319 U.S. at 392).

94. *Id.* at 427.

95. *Id.* at 426. The Court noted that the action to recover civil penalties usually seeks the amount fixed by Congress. *Id.*

96. See *supra* notes 36-39 and accompanying text.

97. *Shamblin's*, 873 F.2d at 743. The *Shamblin's* court did not label its action remittitur. See *infra* note 118. In support of its action, the *Shamblin's* court cited three pre-*Tull* cases in which appellate courts reduced excessive jury verdicts rather than remanding the damages issues for jury determinations. *Shamblin's*, 873 F.2d at 740-41. The court cited *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987) ("remanding a case under such circumstances serves no useful purpose"); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1267 (7th Cir. 1984) (punitive award reduced to amount commensurate with amounts awarded against other parties in same case); and *Guzman v. Western State Bank*, 540 F.2d 948, 954 (8th Cir. 1976) (appellate court can reduce "unfair and shocking" jury punitive damage award).

As the *Shamblin's* court noted, neither *Rowlett*, *Guzman*, nor *Bell* discusses the seventh amendment. *Shamblin's*, 873 F.2d at 741. Nor do these cases discuss *Kennon*. The courts did not consider the doctrine of remittitur, but simply reduced the damages, without discussing whether they had the authority to do so. In the same year the United States Court of Appeals for the Seventh Circuit decided *Bell*, it decided *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984), in which it held that before remitting part of a verdict, the judge must offer the plaintiff the option of a new trial. *Id.* at 1391-92. *McKinnon* did not mention *Bell*.

98. No court has interpreted *Tull* as broadly as the Fourth Circuit interpreted it in *Shamblin's*. A number of controversial district court decisions have addressed *Tull's* applicability to the constitutionality of legislative caps on damages. For an example of the confusion surrounding *Tull's* relevance to damages determination, see the *Boyd* litigation: *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986), *reconsideration denied*, 672 F. Supp. 915 (W.D. Va. 1987), *rev'd in relevant part*, 877 F.2d 1191 (1989); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (declining to follow *Boyd*); *Reuwer v. Hunter*, 684 F. Supp. 1340 (W.D. Va. 1988) (refusing to reconsider *Boyd*).

99. K. REDDEN, PUNITIVE DAMAGES § 3.5 (1980).

100. To justify its reliance on *Tull*, the *Shamblin's* court relied on a footnote in the *Tull* opinion

damages fall within that category only when they are fixed by statute, as with statutory liquidated damages¹⁰¹ or civil penalties, or when the amount of damages is a matter of undisputed calculation.¹⁰²

The *Shamblin's* court virtually ignored the *Tull* Court's explanation of the delegation theory and instead relied on a footnote to the *Tull* opinion, in which the Court remarked that "[n]othing in the [Seventh] Amendment's language suggests that . . . the Framers meant to extend the right to a jury to the remedy phase of a civil trial."¹⁰³ It is clear from the *Tull* opinion, however, that the Court's holding rested not on this dicta but on the delegation theory.¹⁰⁴ Furthermore, although evidence of the Framers' intent to extend the jury trial right to the remedy phase was missing, certainly American jurisprudence and the Supreme Court itself have long interpreted the right to extend thus.¹⁰⁵ Indeed, there is no historical justification for distinguishing the jury's role in the liability and remedy phases of a trial of a common-law action.¹⁰⁶ In *Tull*, the theory

that noted the similarity between punitive damages and civil penalties. *Shamblin's*, 873 F.2d at 741 (citing *Tull*, 481 U.S. at 422 n.7). The footnote passage quoted discusses the two remedies only in terms of the legal/equitable characterization. See *Tull*, 481 U.S. at 422 n.7. It does not provide a basis for the *Shamblin's* court's conclusion that "[t]here is no principled distinction between civil penalties and the modern concept of punitive damages." *Shamblin's*, 873 F.2d at 742. In a recent case more directly confronting the issue, the United States Supreme Court found civil penalties and punitive damages so dissimilar that it held that the excessive fines clause of the eighth amendment does not apply to punitive damage assessments. See *Browning-Ferris Indus. v. Kelco Disposal Inc.*, 109 S. Ct. 2909, 2920 (1989); *infra* notes 108-11 and accompanying text.

101. See *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984); *supra* text accompanying notes 74-78. The *Shamblin's* court asserted that the measure of damages is a matter of law for the court to decide, rather than a question of fact for the jury. *Shamblin's*, 873 F.2d at 742. The United States Supreme Court, however, has held otherwise. See *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (both liability issue and assessment of damages are questions of fact). It is true that the measure of damages, that is, the factors to be considered when calculating the damages, is a question of law.

Whether the facts of a given case will allow an award of punitive damages to be made by the jury is originally a question of law for the judge to decide. Once the issue of punitive damages is submitted to the jury, it has the discretion to decide if such damages are recoverable.

K. REDDEN, *supra* note 99, at § 3.4(A). But the proper amount of punitive damages, the calculation of which is based on the unique fact situation of a particular case, is a question of fact. The *Shamblin's* court, sitting in diversity, applied the substantive law of West Virginia in allowing punitive damages, which "requires consideration of 'all the circumstances surrounding the particular occurrence including the nature of the wrongdoing, the extent of harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances.'" *Shamblin's*, 873 F.2d at 738 (quoting *Wells v. Smith*, 297 S.E.2d 872, 878 (W. Va. 1982)). According to one appellate court,

[t]he allowance of [punitive] damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary payment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof inflicted, are of necessity within the discretion of the trier of fact.

Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970).

102. See *supra* note 64.

103. *Tull*, 481 U.S. at 426 n.9.

104. See *id.* at 426-27.

105. "If the Court has [the] authority [to determine punitive damages], the right to a jury trial . . . is little more than an empty gesture. The jury is stripped of the factfinding characteristics inherent in the traditional jury trial and its function becomes nothing more than advisory." *United States v. 93.970 Acres of Land*, 258 F.2d 17, 31 (7th Cir. 1958), *rev'd on other grounds*, 360 U.S. 328 (1959).

106. Justice Scalia's dissent in *Tull* observed the lack of historical precedent for such a distinc-

that Congress may delegate its penalty-assessing authority to the courts—a theory completely divorced from any analysis of the historical allocation of the fact-finding function to the jury—justified the distinction between the liability and remedy phases of a trial. Delegation, however, may occur only if Congress has the authority to determine penalties and does so by statute. *Tull*'s delegation theory cannot possibly justify the distinction between the liability and remedy phases when trying a claim, such as in *Shamblin's*, that existed at common law.¹⁰⁷

The Supreme Court's recent decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*¹⁰⁸ further weakens the *Shamblin's* court's interpretation of *Tull*. In *Kelco* the Court held that the excessive fines clause does not apply to punitive damage awards in cases between private parties.¹⁰⁹ The Court distinguished a punitive damage award between private parties from a "fine," the latter historically defined as "a payment to a sovereign for some offense."¹¹⁰ One modern equivalent of a fine by the sovereign is the statutorily imposed civil penalty.¹¹¹ The Court's holding that punitive damages should not receive the same constitutional treatment as government-imposed penalties undermines the *Shamblin's* court's reliance on *Tull* in the punitive damage context.

If the *Shamblin's* court's broad interpretation of *Tull* was accurate, then *Tull* overruled *Kennon v. Gilmer*.¹¹² *Tull* did not purport to do so. Indeed the *Shamblin's* court did not read *Tull* as overruling *Kennon*, but felt compelled to distinguish *Kennon* in order to reach *Tull*.¹¹³ The *Shamblin's* court distinguished its own reduction of a damages award from that of the Supreme Court of Montana in *Kennon* based on the difference in the purposes of punitive damages and compensatory damages.¹¹⁴ The "marked difference"¹¹⁵ between the

tion. According to Justice Scalia, there is "no precedent for judgment of civil liability by jury but assessment of amount by the court. . . . Even punitive damages are assessed by the jury when liability is determined in this fashion." *Tull*, 481 U.S. at 428 (Scalia, J., dissenting) (emphasis added). Such a division is even less justifiable outside of the *Tull* context when factfinding is necessary to the determination.

107. "Litigating an entire case with the understanding that the jury is going to determine the punitive damages award and, after that award is established, unilaterally and arbitrarily usurping the jury's discretion is an improper invasion of the jury's function." Note, *supra* note 38, at 301-02.

108. 109 S. Ct. 2909 (1989). *Kelco* was an antitrust case in which defendant challenged a decision of the United States Court of Appeals for the Second Circuit upholding a jury award of \$6 million in punitive damages. See *id.* at 2913. Defendant argued that the size of the award violated the excessive fines clause of the eighth amendment. See *id.* The Court held that the excessive fines clause was intended to place limits on the powers of the federal government; it was not concerned with "the extent or purposes of civil damages." *Id.* at 2915.

109. *Id.* at 2920.

110. *Id.* at 2915.

111. See *Gosselink v. Campbell*, 4 Iowa 296, 300-01 (Clarke 1856) (fines include money recovered in a civil suit that is paid to the government); *Hanscomb v. Russell*, 77 Mass. 373, 375 (1858) (same); 36A C.J.S. *Fines* § 1 (1961).

112. 131 U.S. 22 (1889); see *supra* text accompanying notes 49-58 (discussing *Kennon*). The *Shamblin's* court apparently also read *Tull* as overruling *Dimick v. Schiedt*, 293 U.S. 474 (1935), see *supra* text accompanying notes 40-48; *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), cert. denied, 108 S. Ct. 2014 (1988), see *supra* text accompanying notes 65-73; and *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984), see *supra* text accompanying notes 74-78.

113. See *Shamblin's*, 873 F.2d at 741.

114. *Id.*

two types of damages persuaded the court that it need not heed *Kennon*.¹¹⁶ Yet the *Kennon* Court in no way limited its holding to punitive damage awards, but clearly stated that

no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury.¹¹⁷

The *Shamblin's* court's distinguishing of *Kennon* is therefore unpersuasive. Because *Tull* was not dispositive of a litigant's entitlement to a jury trial on the amount of punitive damages, the *Shamblin's* court was bound by *Kennon*, which requires that remittitur be exercised properly or not at all.¹¹⁸

The *Shamblin's* court's application of the *Tull* holding to a punitive damages case gives a reviewing court power beyond its discretion. An appellate court may "modify, vacate, set aside or reverse any judgment . . . brought before it for review, and may remand the cause and direct the entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances."¹¹⁹ The appellate court has a wide range of options from which it may choose. The case law, exemplified by *Kennon*, is clear, however, that arbitrarily reducing (or increasing) a jury determination of damages is not

115. *Id.*

116. *Id.* The *Shamblin's* court interpreted *Kennon* to apply only to compensatory damage awards, and because *Shamblin's* concerned the reduction of a punitive award, the court concluded that it was not bound by *Kennon*. The *Shamblin's* court reasoned that punitive damages serve a public purpose rather than serving to make the plaintiff whole. *Id.* Punitive damages, said the court, are "private fines levied by civil juries." *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). *But see supra* notes 108-110 and accompanying text (punitive damages are not the equivalent of civil penalties).

117. *Kennon*, 131 U.S. at 29.

118. *Id.* at 29-30. The *Shamblin's* court, however, did not profess to be applying remittitur. Although clearly the court's action was based in part upon an efficiency rationale and its belief that a third jury trial would be wasteful, *see Shamblin's*, 873 F.2d at 742, there are at least two additional reasons why the court did not label its action remittitur. First, remittitur was improper in *Shamblin's* because the court found the verdict to be the result of erroneously admitted testimony and a prejudicial closing argument. *See id.* at 739; *supra* note 48 (noting cases holding remittitur improper if excessive award is due to jury passion).

Another possible reason that the court did not profess to apply remittitur is the restrictiveness of the doctrine in West Virginia. West Virginia law does not allow remittitur unless there is data before the court by which the amount of the excess may be ascertained definitively. *Earl T. Browder, Inc. v. County Court of Webster County*, 145 W. Va. 696, 701, 116 S.E.2d 867, 872 (1960); *D.D. Cox & Co. v. Carter Coal Co.*, 81 W. Va. 555, 557, 94 S.E. 956, 957 (1918); *T.J. Flanagan v. Flanagan Coal Co.*, 77 W. Va. 757, 759, 88 S.E. 397, 398 (1918). Professors Wright and Miller state a similar rule:

Except in those cases in which it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there, the court may not arbitrarily reduce the amount of damages, for to do so would deprive the parties of their constitutional right to a jury.

11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2815, at 95 (1973) (footnote omitted).

Nevertheless, even when the court does not profess to be applying the remittitur doctrine, if the action it takes amounts to a de facto application of the doctrine, the same constitutional standard must apply. *See O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447-50 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) (discussed *supra* notes 65-73 and accompanying text).

119. 28 U.S.C. § 2106 (1982).

one of those options.¹²⁰

The appellate role is not to reexamine the facts of the case, but to review the trial court's determination of whether the verdict is within the confines set by state law under an abuse of discretion standard.¹²¹ The appellate judge has only a written record of the trial before him and is not well-qualified to determine if a jury verdict is excessive.¹²² When a court reduces a jury's determination of damages, whether compensatory or punitive, absent consent by the parties, it is necessarily reexamining the facts of the case. If the jury determination was improper, the appellate court has several options. The court can remand for a complete new trial, or for a trial on the issue of damages.¹²³ If a court chooses to remit part of the jury verdict, it is bound to apply the remittitur doctrine with the restrictions placed upon it by the Supreme Court in *Dimick v. Schiedt*¹²⁴ and reaffirmed by the Court in *Kennon v. Gilmer*.¹²⁵

The *Shamblin's* court's reluctance, after two excessive jury verdicts, to remand for a third jury trial on the issue of punitive damages is understandable. Nevertheless, the jury and its role as the finder of fact is of such importance in our jurisprudence that any intrusion into the jury realm must be scrutinized strictly.¹²⁶ When a court usurps the jury role as the *Shamblin's* court did, the resulting verdict is "an assessment partly made by a jury which has acted improperly and partly made by a tribunal which has no power to assess."¹²⁷ Neither the plaintiff nor the jury should be blamed for excessive verdicts; more specific jury instructions and guidelines and legislative caps or formulas for calculating punitive damages¹²⁸ are effective methods for preventing excessive verdicts before the fact. An excessive jury verdict, or even two or three of them, cannot justify usurpation of the jury role. The mandate of the seventh amendment must override any questions of judicial efficiency or expediency.¹²⁹ It is

120. See *Kennon*, 113 U.S. at 29; *supra* notes 49-58 and accompanying text (discussing *Kennon*).

121. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2922 (1989). Indeed, the Supreme Court never has held expressly that the seventh amendment even allows appellate review of a district court's denial of a motion to set aside an award as excessive. *Id.* at 2922 n.25.

122. See Note, *supra* note 56, at 304.

123. Because of the restrictiveness of the remittitur doctrine in West Virginia, remittitur was not an option under the *Shamblin's* facts. See *supra* note 118.

124. 293 U.S. 474 (1935); see *supra* notes 40-48 and accompanying text (discussing *Dimick*).

125. 131 U.S. 22 (1889); see *supra* notes 49-58 and accompanying text (discussing *Kennon*).

126. See *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); see also *In re United States Fin. Sec. Litig.*, 609 F.2d 411, 430 (9th Cir. 1979) ("Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks."), *cert. denied*, 446 U.S. 929 (1980).

127. *Dimick*, 293 U.S. at 487 (quoting *Barbour & Co. v. Deutsche Bank*, [1919] A.C. 304, 335).

128. "[I]n view of the mandate of the Seventh Amendment, time might be better spent in searching for ways to improve rather than erode the jury system." *In re Sec. Litig.*, 609 F.2d at 432.

129. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983). "[J]udges must remember that they have no general charge to go about righting wrongs as knights errant might do." Prentice, *supra* note 68, at 135. Recall Judge Kelly's claim that his overreaching was geared to what the court reasoned was "that which ought to be." See *supra* note 67.

clear that in *Shamblin's*, any benefits of the judicial intrusion into the realm of the jury were outweighed by the resulting constitutional infringement.

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