Beware the Net Verdict

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Ten years ago, a concerned colleague called me on his way back from a trial in a medical malpractice case in Vernal. His jury came back with a good verdict; but in post-trial conversations with jurors he learned they had deducted the plaintiff's 20% comparative fault from the damages award. They didn't understand, and were never told, that the judge is supposed to make this deduction, not them. Of course, when the judge made the additional 20% deduction before entering the judgment, the plaintiff ended up with a double deduction for comparative fault. The trial judge refused to consider the jury affidavits, and entered the judgment with the "double deduction."

This is the problem of the so-called "net verdict." Until recently, it was not unusual, and you still need to watch out for it. But could my colleague do anything about it? In my defense days, I tried a case where the jury retumed a verdict that was almost exactly what had been requested, less the percentage of allocated comparative fault. Counsel for plaintiff noticed this shortly after returning to the office, promptly informed the trial judge, and moved to correct the verdict. The judge, over my objection, allowed affidavits to be obtained from the jurors and, iudeed, it was clear that they had mistakenly made the deduction themselves. The judge therefore entered judgment in the correct amount to fix what he characterized as a "clerical" mistake. But not all judges would have allowed this error to be corrected. This has changed.

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The Liability Reform Act, Utah Code sections 78B-5-817 *et seq*., says nothing about whether the jury or the judge should make the deduction for comparative fault from the gross damage award, except in the context of the reallocation provisions for immune defendants under section 78-27-39. Nor am I aware of any case addressing whether the judge and not the jury should make the deduction.

Regardless, it is the customary, if not universal, practice for the judge to make the necessary deductions upon entry of final judgment. It is not something that the jury should be concerned about, although until recently they were rarely told so. *Bishop v. GenTec, Inc*., 48 P.3d 218, 2002 UT 36, provides some guidance on this issue. In *Bishop*, a wrongful death plaintiff received a jury verdict award of $1,550,000 for the death of her husband. The jury allocated 25% fault on the decedent and the rest on the defendants which, after being reallocated because of an immune employer, resulted in a 35.71 % allocation of fault to the plaintiff. After the jury was discharged, plaintiff's counsel talked to the jurors and learned that they had already deducted 25% from their general and special damages award. In other words, they intended Mrs. Bishop to receive a gross award of $1,937,500 and thus a net award of $1,550,000, not less.

Counsel for plaintiff thereupon moved to correct the "clerical error" in the jury verdict under Utah Rule of Civil Procedure 60. The trial court denied the motion on the grounds that it was in fact a motion to alter or amend the judgment under rule 59, and that juror affidavits were inadmissible to impeach the verdict. Our Supreme Court reversed. It held that this was a failure to accurately record the amount of the verdict and was a "clerical," not a "judicial," error. Therefore, the jury affidavits were admissible, and the award was increased to reflect the true award.

The court in passing noted that there is a split of authority over whether evidence is admissible to determine whether a jury verdict reflects the true intent of the jury. Some jurisdictions refuse to allow this sort of evidence at all. *See, e.g.*, *Plummer v. Springfield Terminal Ry. Co*., 5 F.3d 1I (1st Cir. 1993) (motion to amend verdict to correct admitted "double deduction" was more than correcting a mere clerical error and should have been denied), *cert. denied*, 510 U.S. 1112 (1994); *Karl v. Burlington N. Ry. Co.*, 880 F.2d 68 (8th Cir. 1989) (trial court could not "correct" a verdict to fix jury mistake in rendering a "net" verdict).

But, with little analysis, the *Bishop* court decreed that accurately recording the intent of the jury in its calculation of the damage award is the "correction" of a clerical error, not a judicial error: "[t]he distinction between judicial error and clerical error . . . depends on whether it was made in rendering the judgment or in recording the judgment as rendered." 48 P.3d 227 (citations omitted).

Surprisingly, the *Bishop* decision did not discuss Utah Rule of Civil Procedure 47(s)[2] or Utah Rule of Evidence 606(b). Rule 47(s) provides that "if the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again." The cases interpret the words "informal or insufficient" broadly, and hold that any irregularity appearing on the face of a jury verdict is waived unless an objection is made before the jury is discharged. *See, e.g.*, *Martineau v. Anderson*, 636 P.2d 1039, 1043 (Utah 1981).

Rule 47(s) does not require that the error be patent or obvious; all that is necessary is that the error appear on the face of the verdict. When a special verdict is ambiguous, counsel's obliged to either to object to the filing of the verdict or to move that the cause be resubmitted to

[2] Then Rule 47(r).

the jury for clarification. If a party fails to take appropriate action before the discharge of the verdict, that party generally may not later move for a new trial on the ground that the verdict was defective. *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1083 (Utah 1985) (citations omitted).

Rule 606(b) prohibits a court from considering any testimony from jurors about the validity of a verdict except on the question of whether extraneous prejudicial information was improperly brought to the jury's attention. Several federal courts have interpreted the identical federal rule to prohibit correction of a "net" verdict:

> The foreman's testimony and the jurors' affidavits contain specific references as to what the jurors understood or intended when the figure was written. The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' "mental processes," which is forbidden by the rule.

Karl v. Burlington N. Ry. Co., 880 F.2d at 74; *see also Plummer v. Springfield Terminal Ry. Co.*, 5 F.3d 1 (1st Cir. 1993); *Peveto v. Sears*, 807 F.2d 486 (5th Cir. 1987); *Chicago, Rock Island & P.R.R. v. Speth*, 404 F.2d 291 (8th Cir. 1968).

Bishop is indeed a good case for the plaintiff's counsel faced with a "net verdict" issue. But the limited analysis and the total lack of discussion of rules 47(s) and 606(b) are curious. It would be wiser for a plaintiff's counsel to avoid the problem in the first place.

The 1993 Model Utah Jury Instructions-Civil (MUJI 1st) did not tell jurors that they shouldn't deduct the percentage of fault from the gross damage award.[3] The new Model Utah

[3]See MODEL UTAH JURY INSTRUCTIONS- CIVIL forms 36.1 to 36j (1993) .

Jury Instructions-Civil 2d[4] do, and they contain an instruction specifically designed to foreclose the net verdict problem:

CV211 Allocation of fault.

[Name of party] claims that more than one person's fault was a cause of the harm. If you decide that more than one person is at fault, you must decide each person's percentage of fault that caused the harm. This allocation must total 100%.

You may also decide to allocate a percentage to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage that you attribute to [him]. If you decide that [name of plaintiff]'s percentage is 50% or greater, [name of plaintiff] will recover nothing.

When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage. I will make that calculation later. (Emphasis added.)

MUJI 2d has also included this language in the new personal injury special verdict forms, CV299 ("Do not deduct from the damages any percentage of fault that you have assessed to [name of plaintiff]. The judge will make any necessary deductions later.")

So make sure that CV 211 is given as written, and that the special verdict also contains the language advising the jury *not* to make a deduction for any comparative fault allocated. Counsel for the plaintiff should also reinforce this point in closing argument when explaining the special verdict form.

When a jury verdict is returned, and if damages are awarded, and comparative fault assessed, take a few minutes before the jury is discharged to do the math and check that the jury has not incorrectly made the fault deduction. The quickest way to do this is to compare the amount of special damages that were requested with what was awarded. Were the undisputed medical expenses $100,000 and the award for expenses only $75,000? Did the jury also assess

[4]http://www.utcourts.gov/resources/muji

25% comparative fault? If so, that's strong evidence for a net verdict. Raise the issue with the court immediately, and ask the jury to be polled on their intentions. Avoid the rule 47(s) trap even if *Bishop* may give you a way out of it.

And ask the jurors about their verdict after they have been discharged. In some cases this may be the only way counsel will ever learn about a net verdict.

What about that case in Vernal? Fortunately, it turned out just fine for my friend on the appeal: the Court of Appeals reversed the trial judge who refused to correct the jury's improper deduction of the comparative fault percentage. *Haase v. Ashley Valley Medical Center,* 2003 WL 21664781, 2003 UT App 260. The case was sent back with direction to enter the correct amount of the verdict, without the "double deduction."

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