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NEW TRIALS AND THE NEED FOR UNIFORMITY IN STANDARDS

INTRODUCTION

Under modern practice, a post trial motion commonly includes, what were under prior practice, two motions challenging the verdict solely on the weight of the evidence; a motion for a judgment notwithstanding the verdict and a motion for a new trial.[1] Each of these motions, if both are presented,[2] must be ruled on by the trial judge.[3]

In a recent case, the Illinois Supreme Court recognized the problem of the disparity in standards applied by those courts confronted with the question of when to direct or grant a judgment notwithstanding the verdict stating:

> The formulae evolved by the courts for determining when the circumstances are appropriate for taking the case from the jury are many and varied, and understandably so, for there is no mathematically exact standard or rule . . . which will enable the trial judge or reviewing court to ascertain precisely when the proof in a given case presents a factual situation with sufficient certainty to justify removing it from a jury's consideration.[4]

The Illinois court thereupon arrived at a unified standard to guide the trial judge with respect to directing or granting a judgment notwithstanding the verdict stating:

> [V]erdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelming favors movant that no contrary verdict on that evidence could ever stand.[5]

Yet anomalously, the Supreme Court has remained silent with respect to the problem of the disparity in standards governing the grant or denial of a motion for a new trial. The standards applied to determine when the trial judge should grant a new trial and the scope of review of his decision have been as varied as those previously applied to motions for a directed verdict and to motions for a judgment notwithstanding the verdict.[6]

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[1] ILL. REV. STAT. ch. 110, §68.1(2) (1967); May v. Columbian Rope, 40 Ill. App. 2d 264, 189 N.E.2d 394 (1963).

[2] ILL. REV. STAT. ch. 110, §68.1(2) (1967) does not require both motions to be made; either may be made independently of the other.

[3] ILL. REV. STAT. ch. 110, §68.1(2) (1967).

[4] Pedrick v. Peoria & Eastern R.R., 37 Ill.2d 494, 500-01, 229 N.E.2d 504, 508 (1967).

[5] *Id.* at 510, 229 N.E.2d at 513-14.

[6] The predominant view had been that a motion for a judgment notwithstanding the verdict presented only a question of whether there was any evidence to support the verdict. Stilfield v. Iowa-Illinois Gas & Elec. Co., 25 Ill. App. 2d 478, 167 N.E.2d 295 (1960). *But see* Mesich v. Austin, 70 Ill. App. 2d 334, 217 N.E.2d 574 (1966), in which the dissenting opinion advocates the use of the "manifest weight" or "predominance of the evidence" standards to determine the propriety of a motion for a judgment notwithstanding the verdict.

Indeed, ruling on a motion for a new trial, unlike ruling on a motion for a judgment notwithstanding the verdict, requires the application of different standards on both the trial and appellate level.

A motion for a new trial presents, not a question of law, but a question of fact. Inasmuch as questions of fact were always determined by a jury, new trials based on the assertion that the verdict is against the weight of the evidence were slow in gaining judicial approval. In fact, under the early Illinois jury system a verdict could not be attacked on the ground that it was against the weight of the evidence.[7] The only available proceeding was an action against the jurors directly, in which they could be severely punished for rendering a false verdict.[8] Due to the severity of these penalties, the trial courts began the practice of setting aside a verdict if it was found to be against the weight of the evidence.[9] With the advent of this procedure, the questions arose as to what standard the trial judge should use in his determination and, if such determination is subject to review, what standard of review should be followed by the appellate court.

THE TRIAL STANDARD

That a verdict is contrary to, or not sustained by the evidence is generally considered a proper standard under which a trial judge may grant a new trial. Such language is found in the statutes of numerous states, for example: that the verdict is "contrary to the evidence,"[10] or "contrary to the weight of the evidence,"[11] or "against the evidence;"[12] that the verdict is "not sustained by sufficient evidence,"[13] or "not sustained by the great preponderance of the evidence,"[14] or "not justified by the evidence."[15] "Insufficiency of the evidence"[16] and "insufficiency of the evidence to justify the verdict"[17] are also statutory grounds for a new trial. In applying the standard, the trial judge must decide what facts are to be considered in determining the pro-

[7] *See* Mullen v. Chicago Transit Authority, 33 Ill. App. 2d 103, 109, 178 N.E.2d 670, 673 (1961).

[8] *Id.*

[9] *Id.*

[10] GA. CODE ANN. §70-202 (1963); LA. STAT. ANN., CODE CIV. PROC. art. 1972(1) (WEST 1961); MO. ANN. STAT., RULES OF SUPREME COURT, rule 27.19(5) (VERNON 1949); CODE OF VA. §§8-352, 8-491 (1950).

[11] ARIZ. REV. STAT., RULES CRIM. PROC. rule 310(2) (1956); FLA. STAT. ANN. §920.04(2) (1944).

[12] ME. REV. STAT. ANN. ch. 113, §59 (1954).

[13] ARK. STAT. §27-1901(6) (1947); IOWA CODE ANN., RULES CIV. PROC. rule 244(f) (1951); OKLA. STAT. ANN., CIV. PROC. §651(6) (1951).

[14] ALAS. CODE tit. 7, §276 (1959).

[15] MINN. STAT. ANN., COURT RULES rule 59.01(8) (1966).

[16] COLO. REV. STAT., RULES CIV. PROC. rule 59(a)(6) (1963); N.C. GEN. STAT. §1-207 (1953).

[17] ANN. CAL. CODES, CODE CIV. PROC. §657(6) (WEST 1955); UTAH CODE ANN., RULES CIV. PROC. rule 58(a)(6) (1953).

priety of the motion. Thus, it is often stated that a motion for a new trial is addressed to the sound discretion of the trial judge,[18] or the judge may exercise considerable discretion in passing on the motion.[19] The rule is equally applicable whether, in the exercise of his discretion, the judge grants a new trial[20] or denies the motion.[21]

In Illinois . . .

The practice in the trial courts of Illinois, with regard to motions for a new trial, although not prescribed by statute, closely approximates that used in numerous other states. The standard that has been most widely applied by trial judges in Illinois in ruling on the motion is the "preponderance of the evidence standard."[22] The term "preponderance," in the context of this standard, means the greater weight of the evidence, or evidence which is more credible and convincing to the mind.[23] If, in applying this standard, the trial judge determines that the verdict is against the preponderance of the evidence, he must grant a new trial.[24]

Applying the "preponderance standard" to the facts in a case requires the judge to weigh the evidence.[25] At this point, the legal discretion of the judge becomes quite significant, because he must determine the weight to be accorded each item received in evidence. He must consider not only the quantity of the evidence adduced by both parties, but also the quality of this evidence. After deciding what the relevant facts are and where these facts should be grouped, either for the benefit of the plaintiff or the defendant, the judge then applies the "preponderance

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[18] *E.g.*, Shoopman v. Pacific Greyhound Lines, 169 Cal. App. 2d 848, 338 P.2d3 (1959). *See also* 66 C.J.S. *New Trial* §201 (1950).

[19] *See* 66 C.J.S. *New Trial* §201 n. 21 (1950), for a comprehensive listing of the courts that take this position.

[20] *Id.* at n. 22.

[21] *Id.* at n. 23.

[22] Read v. Cummings, 324 Ill. App. 607, 59 N.E.2d 325 (1945). This case involved an appeal from the denial of a motion for a new trial. The trial judge had stated that it was not within his province to judge the manifest weight of the evidence. The appellate court in reversing and remanding the case stated:

> The law on this subject is plain. Where a motion is made by defendant at the close of all the evidence to direct a verdict, the court cannot weigh the evidence, but the evidence must be considered in the light most favorable to plaintiff and obviously such motion should then be denied if there is any evidence, more than a scintilla, that may be reasonably construed to prove plaintiff's case. . . . But after the verdict is returned a different question arises. It is then the duty of the trial judge to consider the weight of the evidence and if he is of opinion that plaintiff has not proven his case by a preponderance of the evidence, taking into consideration the fact that the jury has found otherwise, it is his duty to set aside the verdict and grant a new trial.

Id. at 609, 59 N.E.2d at 326.

[23] Griffy v. Ellis, 26 Ill. App. 2d 112, 117, 168 N.E.2d 58, 61 (1960).

[24] Read v. Cummings, 324 Ill. App. 607, 609, 59 N.E.2d 325, 326 (1945).

[25] *Id.*

of the evidence standard" to the facts in order to determine whether the jury's verdict will stand.

Because the judge must necessarily make value judgments in evaluating the quality of the evidence, certain limitations have been placed on the exercise of his discretion. His discretion must be reasonably exercised;[26] *i.e.*, the judge must take into account the fact that the jury heard the evidence, observed the witnesses and rendered a verdict on these facts.[27] The trial judge may not set aside the verdict and grant a new trial merely because he would have decided the case differently or merely because he disbelieved the evidence.[28] Following the entry of an order by the trial judge, either granting or denying the motion for a new trial, the unsuccessful party may appeal such order to the appellate court.[29]

THE APPELLATE STANDARDS

Where Motion Granted . . .

The standard to be applied by the appellate court in its review of an order granting a new trial varies among the states. Nevertheless, three basic patterns are discernible. In a minority of states the trial judge, in granting a new trial, has almost unlimited discretion which will not be deemed abused "where there is any evidence which would support a judgment in favor of the moving party."[30] In these states, the trial judge is, in effect, invited to act as the thirteenth and controlling juror.[31] In a second group of states, also a minority, the trial judge is forbidden to set aside a verdict if "on the evidence as presented and under the pleadings, the jury could reasonably have found in accordance with the verdict as rendered. . . ."[32] Thus, in these states, the propriety of the exercise of such discretion is far more narrowly

[26] Lukich v. Angeli, 31 Ill. App. 2d 20, 27, 175 N.E.2d 796, 799 (1961).

[27] Hanck v. Ruan Transp. Corp., 3 Ill. App. 2d 372, 380, 122 N.E.2d 445, 449 (1951).

[28] Dunlavey v. Patti, 79 Ill. App. 2d 442, 446, 223 N.E.2d 858, 860 (1967). *See also* Foster v. VanGilder, 65 Ill. App. 2d 373, 376-77, 213 N.E.2d 421, 423 (1965).

[29] ILL. REV. STAT. ch. 110A, §306 (1967). *See also* text at notes 82-83 *infra*. If the motion for a new trial is granted, the party against whom it is entered may petition for leave to appeal or may wait until the case is retried and then appeal the order granting the new trial along with any other matter raised during the new trial.

[30] Hawk v. City of Newport Beach, 46 Cal.2d 213, 219, 293 P.2d 48, 51 (1956). *See* Denney v. Tate, 96 Ga. App. 3, 99 S.E.2d 296 (1957); McLaughlin v. Broyles, 36 Tenn. App. 391, 255 S.W.2d 1020 (1952).

[31] McLaughlin v. Broyles, 36 Tenn. App. 391, 397, 255 S.W.2d 1020, 1023 (1952).

[32] Kerrigan v. Detroit Steel Corp., 146 Conn. 658, 659-60, 154 A.2d 517, 518 (1959). *See* Monihan v. Public Service Interstate Transp. Co., 22 N.J. Super. 149, 91 A.2d 585 (1952); Dyer v. Hastings, 87 Ohio App. 147, 94 N.E.2d 213 (1950).

delimited than that of the trial judge in the first group of states. In these stricter-test jurisdictions, judges are frequently reversed for setting aside a verdict in violation of the standard.[33] Furthermore, in these states the standard for a new trial is phrased and administered in such a way that it would appear to be nearly analogous to the standard for directing a verdict, though the two are not fully coextensive.[34]

Most jurisdictions, however, take an intermediate position as to the appropriate standard of review. This position was well summarized in *Aetna Casualty & Surety Co.* v. *Yeatts*:[35]

> On such a motion it is the duty of the [trial] judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.[36]

Such a standard does not contemplate that the trial judge substitute his judgment for that of the jury. It adjures trial courts to accept jury findings on matters of credibility of testimony and weight of evidence, even where the judge disagrees with them, "unless the verdict is clearly against the undoubted general current of the evidence, so that the court can clearly see that they have acted under some mistake, or from some improper motive, bias, or feeling."[37] As a result, in those jurisdictions that adhere to this standard, there are few reversals of orders granting new trials.[38]

In Illinois . . .

In Illinois, the standard applied in the review of the trial judge's order granting a new trial falls within the intermediate position taken by the appellate courts of the majority of the states. The Illinois appellate courts hold that neither an order granting nor an order denying a motion for a new trial may be set aside in the absence of a clear "abuse of discretion" on the part of the trial judge.[39] This rule is qualified by yet another rule which declares that the trial judge has greater discretion in

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[33] *See, e.g.*, Hagstrom v. Sargent, 137 Conn. 556, 79 A.2d 189 (1951).

[34] *See* Joannis v. Engstrom, 135 Conn. 248, 63 A.2d 151 (1948); Roma v. Thames River Specialties Co., 90 Conn. 18, 96 A. 169 (1915), where a new trial order was upheld but probably a verdict should not have been directed. In Ohio, the equation between the standards seems to be complete. Dyer v. Hastings, 87 Ohio App. 147, 94 N.E.2d 213 (1950).

[35] 122 F.2d 350 (4th Cir. 1941).

[36] *Id.* at 352-53. *See also* 39 AM. JUR. *New Trial* §§129-31 (1942).

[37] Fuller v. Fletcher, 6 F. 128, 129-30 (D.R.I. 1881).

[38] C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 368-69 (1963).

[39] *E.g.*, Lukich v. Angeli, 31 Ill. App. 2d 20, 27, 175 N.E.2d 796, 799 (1961).

granting than in denying a motion for a new trial.[40] The courts have held that this greater scope of discretion indicates a reluctance, on the part of the appellate court, to interfere with an order granting a new trial.[41] Two reasons for this reluctance are stated. First, the judge who initially hears the case is afforded an opportunity to observe the trial proceeding and determine whether a fair trial has resulted and substantial justice done.[42] Secondly, an order granting a new trial is only an interlocutory order, while an order denying a new trial results in a final judgment.[43]

It is submitted that neither of these reasons justifies the trial judge having greater discretion in granting than in denying a motion for a new trial. The first reason is easily rebutted once it is recognized that a trial judge has the same opportunity to observe the trial and determine whether substantial justice has been done when he denies the motion for a new trial, as when he grants the new trial.[44] The reasoning that the grant of a new trial is an interlocutory order and thus does not operate as harshly upon the party against whom is is entered, is also of dubious merit when it is considered that the successful party at the trial must relinquish a favorable verdict and suffer the time and expense of a retrial.[45] Nevertheless, taking the situation as it exists, it is apparent that a finding of an abuse of discretion by the appellate court in reviewing an order granting a new trial will rarely occur, save under three unusual circumstances: (a) when there could be no other verdict;[46] (b) when the judge has

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[40] Village of LaGrange v. Clark, 278 Ill. App. 269 (1934). The appellate court in ruling on the correctness of the trial judge's order setting aside a verdict and granting a new trial stated:

> It is generally held that motions for a new trial are addressed to the discretion of the trial court and are not reviewable unless the record shows a *clear abuse* of such discretion, especially where such motions were based on questions of fact arising on the trial, or on matters which occurred in the presence of the court during the trial. . . . Appellate courts have encouraged trial courts in exercising this discretion to prevent a miscarriage of right and are reluctant to interfere unless the discretion has been exercised capriciously, arbitrarily or improvidently. Even greater latitude is allowed the trial court in granting than in refusing new trials, and the appellate court will interfere more reluctantly where the new trial is granted than where it is denied, since in such cases the rights of the parties are not finally settled as they are where the new trial is refused.

Id. at 285.

[41] *E.g.*, Couch v. Southern Ry., 294 Ill. App. 490, 492, 14 N.E.2d 266, 267 (1938).

[42] *Id.* at 492-93, 14 N.E.2d at 267.

[43] *Id.* at 493, 14 N.E. 2d at 267.

[44] Read v. Cummings, 324 Ill. App. 607, 609-10, 59 N.E.2d 325, 326 (1945).

[45] Hall v. Chicago & N.W. Ry., 349 Ill. App. 175, 182-83, 110 N.E.2d 654, 657 (1953).

[46] Redding v. Schroeder, 54 Ill. App. 2d 306, 315, 203 N.E.2d 616, 620-21 (1964).

acted arbitrarily or capriciously;[47] (c) when the judge has written a memorandum setting out his reasons for granting the new trial and such reasons are improper.[48] Since these circumstances rarely materialize, there are few cases in which an order granting a new trial has been reversed.

Where Motion Denied . . .

The standard used for appellate review of an order denying a motion for a new trial, in Illinois, differs from the standard used in reviewing an order granting a new trial, and varies among the several states. Some states have taken the position that the denial of a motion for a new trial will not be disturbed where there was sufficient evidence to support the verdict or judgment;[49] where there was a conflict in the evidence on which the verdict or finding was based,[50] or where the testimony warranted submission of the case to the jury.[51] Other states have taken the position that the order of the trial court denying a new trial will be set aside where the verdict is unsupported by the evidence,[52] where there has been a manifest denial of justice,[53] where the verdict is clearly wrong and unjust,[54] where the trial judge's decision is clearly wrong,[55] or where the verdict is against the manifest weight of the evidence.[56] The standard followed in Illinois approximates the position of the latter jurisdictions mentioned above, and has been characterized as the "manifest weight of the evidence standard."[57]

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[47] Wagner v. Chicago Motor Coach Co., 288 Ill. App. 402, 405, 6 N.E.2d 250, 251 (1937); Village of LaGrange v. Clark, 278 Ill. 269, 285 (1934).

[48] Dunlavey v. Patti, 79 Ill. App. 2d 442, 446, 223 N.E.2d 858, 860 (1967).

[49] Goodman v. Norwalk Jewish Center, Inc., 145 Conn. 146, 154, 139 A.2d 812, 816 (1958). *See* Manis v. Bing, 98 Ga. App. 232, 105 S.E.2d 463 (1958); Blair v. Williams, 109 Cal. App. 2d 516, 240 P.2d 1043 (1952).

[50] Florida Fire & Cas. Ins. Co. v. Hart, 73 Fla. 970, 977, 75 S. 528, 532 (1917). *See* Northern Indiana Fin. Co. v. Yakob, 105 Ind. App. 1, 13 N.E.2d 313 (1938).

[51] Guignard Brick Works v. Allen Univ., 155 S.C. 507, 520, 152 S.E. 707, 711 (1930).

[52] Templin v. Crestliner, Inc., 263 Minn. 149, 151, 116 N.W.2d 178, 180 (1962).

[53] Kulbacki v. Sobchinsky, 38 N.J. 435, 446, 185 A.2d 835, 842 (1962). *See* Feltovich v. City of Sharon, 409 Pa. 314, 186 A.2d 247 (1962).

[54] Kendall v. Southwestern Pub. Serv. Co., 336 S.W.2d 770, 775 (Ct. of Civ. App. of Texas) (1960).

[55] Harju v. Shelby Mut. Cas. Co., 91 R.I. 294, 301-02, 162 A.2d 532, 536 (1960). *See* Tellefsen v. Key Sys. Transit Lines, 158 Cal. App. 2d 243, 322 P.2d 469 (1958).

[56] Rochester Civic Theatre, Inc. v. Ramsay, 368 F.2d 748, 753 (8th Cir. 1966).

[57] Mullen v. Chicago Transit Authority, 33 Ill. App. 2d 103, 110, 178 N.E.2d 670, 673 (1961). This court declared:

> [A] reviewing court in passing upon the verdict of a jury should not allow itself the latitude which the common law allowed to the trial court, that is, to set aside the verdict as against the weight or preponderance of the evidence. To express that qualification of the power of the Appellate Court, different terms were used, such as 'strong preponderance,'

The term "manifest" has been defined as "palpable, evident, . . . apparent to the senses, obvious, and . . . show[n] plainly."[58] Other terms have been used to delineate the standard. The two more common terms employed in place of "manifest weight of the evidence" to identify the standard are, "clearly and palpably erroneous"[59] and "opposite conclusion clearly evident."[60] Each of these phrases is recognizably derived from the term "manifest," as defined. Lack of uniformity in the terms by which the standard is designated, itself, accounts for much of the confusion in the area.

Applying this standard, the appellate court weighs the evidence in order to determine if the verdict is against its manifest weight.[61] It is evident that to justify setting aside a verdict under the "manifest standard" will require a more blatant showing of "insufficiency of the evidence," than is required under the "preponderance standard" used by the trial judge.[62] Requiring this higher standard is justified for the reason that the appellate court has only the record of the trial proceedings and briefs of counsel to guide it, while the trial judge has the benefit of personal observation of witnesses, of their manner in testifying, and of other circumstances aiding in the determination of credibility, thus putting him in a better position to weigh the evidence.[63]

While the rationale of the "manifest standard" is relatively clear, there is confusion regarding the application of this standard to the facts and evidence of individual cases which indicates a lack of uniformity among the courts. In *Bunton* v. *Illinois Central Railroad*,[64] the court pointed out that there exist two schools of thought in the Illinois appellate court concerned with the application of the "manifest standard." The first of these concludes that a jury verdict should be upheld in almost every case. In brief, this school is confident of the ability of jurors to correctly decide questions of fact and to determine where a pre-

'where the verdict was clearly wrong,' or 'manifest weight.' The last phrase, 'manifest weight,' was the one most frequently used. *Id.*

[58] Seeden v. Kolarik, 350 Ill. App. 238, 243, 112 N.E.2d 514, 516 (1953). *Cf.* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961 ed.) which defines "manifest," as capable of being readily and instantly perceived by the senses and esp. by the sight: not hidden or concealed . . . b. capable of being easily understood or recognized at once by the mind . . . ."

[59] Griggas v. Clauson, 6 Ill. App. 2d 412, 419, 128 N.E.2d 363, 366 (1955).

[60] Hammer v. Slive, 27 Ill. App. 2d 196, 201, 169 N.E.2d 400, 402 (1960).

[61] Mullen v. Chicago Transit Authority, 33 Ill. App. 2d 103, 111, 178 N.E.2d 670, 673-74 (1961).

[62] Read v. Cummings, 324 Ill. App. 607, 610, 59 N.E.2d 325, 326 (1945). *Accord*, Village of LaGrange v. Clark, 278 Ill. App. 269, 285 (1934).

[63] Couch v. Southern Ry., 294 Ill. App. 490, 492-93, 14 N.S.2d 266, 267 (1938).

[64] 15 Ill. App. 2d 311, 146 N.E.2d 205 (1957).

ponderance of the evidence lies. It thus interprets the "manifest standard" to require only the slightest amount of evidence in support of a verdict in order for the appellate court to uphold the verdict and the trial judge's denial of a motion for a new trial.[65]

Such an interpretation of the "manifest standard" is not materially different from the "any evidence standard" formerly applied by the trial judge in ruling on a motion for a judgment notwithstanding the verdict.[66] It is submitted that such a strict interpretation of the standard, deprives the appellate court of any meaningful discretion to rectify a harsh or relatively arbitrary jury verdict. The facts in *Heideman* v. *Kelsey*,[67] are illustrative of such a situation. There, the party clearly entitled to relief from a harsh jury determination would have been precluded from obtaining it if the strict interpretation of the manifest weight standard were followed. In the *Kelsey* case, the decedent, in a will dated January 10, 1950, left the bulk of his estate to his brothers and sisters. The plaintiff, testator's only child, challenged the will on the ground that the testator lacked the necessary testamentary capacity. The trial judge submitted the case to the jury, which found that the will in question was not the last will and testament of the decedent. A verdict for the plaintiff followed and the trial judge denied the defendants' motion for a new trial. The defendants appealed from this order, alleging that the verdict was against the "manifest weight of the evidence."

The reviewing court reconsidered all of the testimony adduced at the trial. The plaintiff's case rested almost entirely on the testimony of the testator's attending physician, who stated that, in his opinion, the testator "was simply not competent to transact ordinary business."[68] The remaining plaintiff's witnesses testified only as to the physical appearance of the testator and, when asked, had no opinion as to his mental capacity.[69]

The defendant's witnesses, on the other hand, twelve in

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[65] *Id.* at 321-22, 146 N.E.2d at 210-11. *See also* Saikley, *The Disciplinary Procedure of the Illinois State Bar Association Under Rule 59 of the Supreme Court*, 52 ILL. B. J. 912 (1963). In discussing the role of the Board of Governors in a disciplinary proceeding against an attorney, Mr. Saikley stated:

> [T]he Board of Governors [review the findings of the Hearing Division and in so reviewing] should adhere to the manifest weight of the evidence doctrine, and modify or reject findings of fact only when the record contains no evidence whatever to support the findings . . . .

Id. at 916-17.

[66] *See* Stilfield v. Iowa-Illinois Gas & Elec. Co., 25 Ill. App. 2d 478, 167 N.E.2d 295 (1960) where it was held that if there was any evidence to support the verdict, a motion for a judgment notwithstanding the verdict must be denied.

[67] 414 Ill. 453, 111 N.E.2d 538 (1953).

[68] *Id.* at 456, 111 N.E.2d at 540.

[69] *Id.* at 457-59, 111 N.E.2d at 541.

number, all agreed that the testator was of sufficient mental capacity to conduct ordinary business at the time that the will was executed.[70] In addition, these witnesses were not casual acquaintances of the decedent, but had known or done business with him for a considerable length of time. Thus, these witnesses were in an excellent position to know whether the testator was capable of conducting his business. In further support of their position, defendants produced two letters written by the testator, one of which had been written only twelve days prior to the execution of his will. Considering these letters, the reviewing court stated:

> These two exhibits lend much strength to the defense in this case . . . [and] demonstrate rather conclusively that the testator was not only capable of thinking clearly but that he was able to express himself and write with remarkable coherence and conciseness.[71]

The court concluded by stating:

> It is our opinion that the proof in this case demonstrates that . . . [testator] was a person with adequate testamentary capacity on January 10, 1950, and the jury's verdict . . . is against the manifest weight of the evidence.[72]

Because of three subsequent adverse trial court verdicts and judgments entered thereon, this case was appealed three more times, on the same facts, for the same reasons, and involving the same parties.[73] On the final appeal, the Illinois Supreme Court, instead of granting a new trial, as the appellate court had previously done, reversed the judgment entered in the trial court on the verdict.[74] Significantly, under the strict interpretation of the "manifest standard"[75] advocated, the supreme court, in *Kelsey,* would have been required to affirm the denial of the motion for a new trial because there was a slight amount of evidence to support the verdict and the jury had reached the same verdict on four occasions.

The second school of thought, explained by the court in the *Bunton* case, is more skeptical of the ability of the jury to correctly determine questions of fact and determine where a preponderance of the evidence lies. As this school has less faith in the jury system, it follows that they would require more than a "slight amount" of evidence in support of a verdict for the appellate court to uphold the trial judge's denial of a motion for a new trial. Under the latter's approach, the "manifest standard" has been held to be practically synonymous with the term,

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[70] *Id.* at 460-65, 111 N.E.2d at 542-44.

[71] *Id.* at 465-66, 111 N.E.2d at 544.

[72] *Id.* at 466, 111 N.E.2d at 544-45.

[73] 3 Ill. App. 2d 189, 121 N.E.2d 45 (1954), *new trial granted,* 7 Ill. 2d 601, 131 N.E.2d 531 (1956), *new trial granted,* 19 Ill. 2d 258, 166 N.E.2d 596 (1960), *rev'd, no remand.*

[74] 19 Ill.2d 258, 166 N.E.2d 596 (1960).

[75] *See* text at notes 65-66 *supra.*

"greater weight of the evidence," thus, in effect, allowing the appellate courts to apply approximately the same standard on review of the order as applied by the trial courts initially in ruling on the motion for a new trial.[76]

It is submitted that this view of the "manifest standard" is no more equitable than that of the first school of thought.[77] This view suffers in that it fails to take cognizance of the fact that the jury is the sole judge of the credibility of the witnesses and of the additional fact that the trial judge is in a much more advantageous position to weigh the evidence for the purpose of ruling on a motion for a new trial.[78] By disregarding these facts this school would, in effect, allow the appellate court to substitute its view of the trial proceedings for that of both the jury and the trial judge.[79]

What a particular appellate court determines to be *the* appropriate test rule in applying the "manifest standard" to determine the propriety of the trial judge's order denying a new trial has also been influenced by the type of case, the judges sitting at the time, and other variable factors which go into making a decision.[80] In the interest of developing a more uniform practice with respect to appellate review of motions for a new trial in order to better approximate equality among litigants, it is submitted that the courts should choose a single school of thought to implement the "manifest standard" by "selecting one or the other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes. . . ."[81]

In summary, the present practice with regard to motions for a new trial finds the trial court applying the "preponderance of the evidence standard" to the facts of the case in order to determine the propriety of a motion for a new trial; and, the

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[76] Bunton v. Illinois Cent. R.R., 15 Ill. App. 2d 311, 321-22, 146 N.E.2d 205, 209-10 (1957).

[77] See text at notes 65-66 *supra* for a discussion of the alternative school of thought.

[78] Hulke v. International Mfg. Co., 14 Ill. App. 2d 5, 142 N.E.2d 717 (1957).

[79] Hilbert v. Dougherty, 34 Ill. App. 2d 174, 179, 180 N.E.2d 699, 702 (1962). *See also* text at note 65 *supra*.

[80] Hogan, *Some Thoughts on Juries in Civil Cases*, 50 A.B.A.J. 752, 753 (1964).

> [A judge] . . . is presumably learned in the law through education and experience in dealing with legal problems. He is guided, controlled and limited by statutes and decisions of higher tribunals. But when confronted with issues of fact in deciding, for example, issues of negligence, contributory negligence, damages or the veracity of a witness, we judges must use the same means as jurors — our experience, our native intelligence and our judgment. And, like jurors, we are the products of our individual environments and experiences. Moreover, each of us carries within him, unrecognized and unknown to him but perhaps not to others, certain prejudices and predilections. In a word, we are human beings.

[81] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 40 (1948).

appellate court applying the "abuse of discretion standard" in reviewing the trial judge's order granting a new trial, and the "manifest weight of the evidence standard" in reviewing the trial judge's order denying a new trial.

SUGGESTED REVISIONS

To promote uniformity and fairness to litigants, it is submitted that the practice with regard to motions for a new trial should be revised at both the trial and appellate levels.

Revision at the trial level is necessary because of the implicit inequity in the current practice. The propriety of the trial judge's exercise of discretion is the ultimate factor to be examined by the reviewing court to determine if justice has been done. The trial judge's determination, through the exercise of his discretion, of the weight to be accorded to each item of evidence establishes the facts to which he applies the "preponderance of the evidence standard." If the trial judge grants a new trial based solely on the weight of the evidence, the party against whom this order is entered finds himself at a distinct disadvantage. That is, he may not appeal from such order as a matter of right, but must petition for leave to appeal. The reason for this restricted right of appeal is based primarily on past judicial practice. Traditionally, an order granting a new trial could not be appealed because it was not a final order.[82] The basis for this rule was that the disputed issues might become moot after the second trial. Further, the appellate courts were apprehensive that they would be overburdened with the review of interlocutory appeals. This restricted right of review not only imposes a hardship on the party who must give up a favorable verdict,[83] but also indirectly questions the integrity of the jury by allowing the trial judge so much latitude in granting new trials.

The procedure involving a motion for a new trial could be improved by adopting the following alternative at the trial level, which would further limit the discretion of the trial judge in ruling on a motion for a new trial and, thus, limit the possibility of an abuse of his discretion.[84] This alternative procedure would continue the use of the "preponderance of the evidence standard" by the trial judge, but would, in addition, require a written memorandum by the judge setting forth his reasons for granting or denying the motion. In other words, this memorandum would effectively limit any abuse by the trial judge of his discretion by requiring him to explain why he attributed different weight to

[82] *See* text at note 43 *supra.*
[83] *See* text at note 45 *supra.*
[84] *See* text at notes 25-28 *supra.*

the various items of evidence. Such a memorandum would also be beneficial to the appellate court because it would enable the court to more objectively and effectively review the trial judge's order. The appellate courts have, in fact, indicated a desire to have such a memorandum prepared by the trial judge.[85]

Beneficial revision of the appellate practice involved in reviewing orders either granting or denying motions for a new trial could be achieved by requiring the appellate court to apply the "manifest weight of the evidence standard" in its review of both orders. Such a change would, of course, necessitate the abandonment of the "abuse of discretion standard" presently used to review orders granting a new trial.[86] The appellate court has, in fact, indicated its dissatisfaction with this standard.[87] The use of a single standard for reviewing both orders should result in a more uniform practice and, at the same time, put the parties on a more equal footing.

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[85] *E.g.*, Lukich v. Angeli, 31 Ill. App. 2d 20, 175 N.E.2d 796 (1961); Couch v. Southern Ry., 294 Ill. App. 490, 14 N.E.2d 266 (1938). It is also significant to note that in 1965 the California General Assembly amended their Code of Civil Procedure, relating to new trials, to provide the requirement that the trial judge prepare a memorandum setting out his reasons for granting a new trial. ANN. CAL. CODES, CODE CIV. PROC. §657 (WEST 1955).

[86] Lukich v. Angeli, 31 Ill. App. 2d 20, 175 N.E.2d 796 (1961).

[87] *See, e.g.*, Lukich v. Angeli, 31 Ill. App. 2d 20, 175 N.E.2d 796 (1961); Coach v. Southern Ry., 294 Ill. App. 490, 14 N.E.2d 266 (1938). In each case, the appellate court intimated that in the absence of a written memorandum prepared by the trial judge setting forth his reasons for granting a new trial, the court has no adequate means to effectively evaluate the propriety of the trial judge's exercise of discretion under the "abuse of discretion standard."