

# Beware the "Net Verdict"

by Francis J. Carney, Esq.

A concerned colleague recently called me on his way back from a trial in a medical malpractice case in Vernal. Seems that his jury came back with a good verdict; however, in post-trial conversations he learned that they had deducted the plaintiff's twenty percent comparative fault from the general and special damages award. They didn't understand, and were never told, that the judge is supposed to make this deduction. Of course, when the judge made an additional deduction before entering the judgment, the plaintiff had a double deduction for comparative fault.

This is the problem of the "net verdict." It is not uncommon. But could my colleague do anything about it? In my defense days I tried a case against a well-known UTLA member where the jury returned a verdict that was almost exactly what had been requested, less the percentage of allocated fault. Counsel for plaintiff noticed this shortly after returning to the office and promptly informed the judge and moved to correct the verdict. Judge Henriod, over my objection, allowed affidavits to be obtained from the jurors, and, indeed, 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. Until just two days before my colleague's call, there was no Utah decision

addressing the problem of the "net verdict," and cases supporting both sides of the argument could be found. But my colleague was in luck, or so we thought, because of a brand-new decision from the Utah Supreme Court.

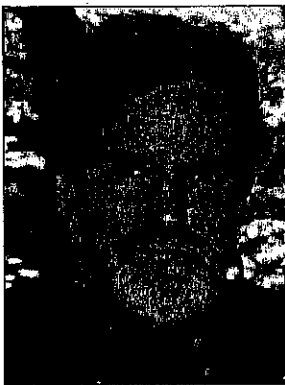
## The Bishop Case

The so-called Liability Reform Act, UTAH CODE ANN. §§ 78-27-37 to -43 (1999), 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 mandating that 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 the judgment. It is not something that the jury should be concerned about—although they are rarely told so.

The recent decision in *Bishop v. GenTec, Inc.*, 2002 UT 36, 444 Utah Adv. Rep 10, has finally provided some guidance on this issue. 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 on 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 a net award of \$1,550,000.

Counsel for plaintiff thereupon moved to correct the "clerical error" in the jury verdict under Utah Rule of Civil Procedure 60.<sup>1</sup> 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. The 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 1 (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's 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 correction of a clerical error, not a judicial error. "The distinction between judicial error and clerical error . . . depends on whether it was made in rendering the judgment or in recording the judgment as rendered." 2002 UT 36, ¶ 32 (citations omitted).



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# Net Verdict

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## Does Bishop Fix the Problem?

Surprisingly, there is no discussion in the *Bishop* decision of Utah Rule of Civil Procedure 47(r) or Utah Rule of Evidence 606(b). Rule 47(r) provides: "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." (Emphasis added.) 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. *Martineau v. Anderson*, 636 P.2d 1039, 1043 (Utah 1981).

There is no requirement under rule 47(r) 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 has an obligation either

to object to the filing of the verdict or to move that the cause be resubmitted to 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. The identical federal rule has been interpreted by several federal courts to prohibit correction of a "net" verdict:

The foreman's testimony and the jurors' affidavits contain specific references 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. However, the limited analysis and the total lack of discussion of rules 47(r) and 606(b) may allow a creative defense argument to get around the holding. It would be wise for plaintiffs' counsel to avoid the problem in the first place.

The 1993 MODEL UTAH JURY INSTRUCTIONS do not tell jurors that they should not deduct the percentage of fault from the gross damage award.<sup>2</sup> The Litigation Section of the Utah State Bar is in the process of revising MUJI. The second edition should be out by the beginning of next year. This problem should be corrected in the new edition.

## Some Advice

Until the new pattern verdict forms are out, counsel for the plaintiff should routinely take several precautions:

First, always request that language similar to the following be included in the proposed special verdict form:

*What is the amount of special and general damages, if any, sustained by plaintiff as a proximate result of her injuries? (In setting forth these damages, do not deduct any percentage of fault that you may have allocated to plaintiff. Simply put the "gross" figure for damages, and the court will make any necessary deduction for fault percentages to arrive at a "net" figure.)*

I have never encountered opposition to the additional language being included in the verdict form. Nor is there any basis for doing so, given the lack of potential harm to the defendant and the history of juries making this type of error.

Second, when a jury verdict is returned, damages awarded, and comparative fault assessed, take a minute before the jury is discharged to do the math and check that the jury has not incorrectly made the fault deduction itself. The quickest way to do this is to compare the amount of special damages that were requested to what was awarded. Were the undisputed medical expenses \$100,000 and the award for expenses only \$75,000? Did the jury also assess 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(r) trap.

Third, 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 happened to my friend with the Vernal net verdict?

Surprisingly, the judge did *not* correct it. The jury was reconvened. After the court asked the jurors questions and defense counsel spoke with them, their "mistake" was not as obvious as it originally appeared. The motion to correct the verdict was denied, and the verdict stands pending appeal.

1. "Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, as any, as the court orders."
2. See MODEL UTAH JURY INSTRUCTIONS—CIVIL forms 36.1 to 36.5 (1993).