

**CAPPING JUDICIAL DISCRETION: DRAWING THE LINE FOR OREGON TRIAL JUDGES
IN GRANTING MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR A NEW
TRIAL IN CIVIL CASES**

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The vast and complex system of law which governs the United States consists of far more than massive sets of rules definitively controlling decisions or judgments. Discretion in the American legal system is prevalent in all components of the court. Judges, juries, and attorneys all have a significant amount of discretion at the trial level. Greater discretion undoubtedly leads to an increased potential for error, overstepping of bounds, incorrect decisions, and abuses of power. However, even with these potential problems, it is clear that today's society places great reliance on the decisions of these courts. In an effort to control the amount of discretion given to the courtroom actors and ensure legitimacy of the judicial system at the trial level, both state and federal systems have constructed rules to regulate the roles of these actors while promoting justice, the goal of the American system of law.

"Even the most conscientious and educated decision-maker is destined to make mistakes. Not surprisingly, juries make more." [FN1] Because of these mistakes, judges in civil cases are often called upon to take corrective action. In extreme cases, judges may have a duty to overturn the verdicts of juries or order new trials following a jury's verdict. This power of discretion in the hands of a trial judge is an immense responsibility. Accordingly, both the state and federal systems require judges to follow certain protocols to validate the use of this power. However, it is apparent from statutory and case law that the rules which govern judicial discretion in Oregon differ significantly from those of the *588 federal courts. [FN2]

Federal appellate courts consistently give federal district judges considerable discretion in reviewing jury verdicts. Federal district judges are justified in overturning verdicts which are unsupported by evidence, and in ordering new trials when verdicts fly in the face of the established evidence at trial. [FN3] However, Oregon trial judges do not have the same amount of responsibility and discretion for jury verdicts. In some circumstances, Oregon trial judges may overturn jury verdicts or order a new trial following a jury's verdict, but Oregon's justice system favors trust in the jury over judicial discretion. Unlike federal judges, Oregon trial judges may only overturn jury verdicts or order new trials upon finding a complete lack of any evidence supporting the verdict. [FN4]

The Oregon Rules of Civil Procedure (ORCP) complicate trial judges' use of discretion by blurring the line between motions for a new trial and motions for judgment notwithstanding the verdict (JNOV) when the evidence presented to the jury is either insufficient or too minute to support the jury's verdict. These rules have removed a large amount of judicial discretion from Oregon's trial judges. This Comment will address the inconsistent and arguably unnecessary provisions of ORCP 63 and 64. It will further address how Oregon's rules fail to guide judges when parties thereby move for both JNOV and a new trial. Part I will analyze the ORCP and examine how Oregon's rules differ from the Federal Rules of Civil Procedure. Part II will analyze case law from both Oregon and federal courts in an effort to explain how Oregon's rules have been interpreted in comparison with the federal system's "differential" scheme for granting JNOV or new trials. Finally, Part III will indicate potential consequences and rationales in Oregon for not incorporating a similar differential scheme into the ORCP.

I

Overview of the Federal and Oregon Procedural Rules Governing Judgment
Notwithstanding the Verdict and New Trial Motions

Oregon's rules governing whether a trial judge may grant a *589 motion for a new trial or JNOV differ significantly from the federal rules. Part II will address the differential scheme under the federal system that distinguishes the two motions. [FN5] Conversely, Oregon's rule-makers do not distinguish between the motions

themselves. Before understanding how federal and state trial judges determine which motion is appropriate, however, it is essential to address the language and means by which these rules are applied to their respective systems.

A. Federal Rules

1. Federal Standard for Granting Judgment as a Matter of Law

At its foundation, "[a] motion for judgment as a matter of law is a means of obtaining a judgment in the movant's favor prior to the close of trial." [FN6] Pursuant to the Federal Rules of Civil Procedure (FRCP), a losing party may renew a motion for judgment as a matter of law (JMOL) [FN7] following a jury verdict, so long as the motion is filed within ten days after entry of judgment. [FN8] The moving party is entitled to JNOV when the court is convinced that reasonable persons could not, in the light of the evidence, have found the facts necessary to support the jury's verdict. [FN9] Nonetheless, courts exercise "great care" in deciding when such motions should be granted so as "not to intrude improperly into the jury's domain" because the result of a successful motion is to overturn the jury's decision. [FN10] In other words, a motion for JNOV may be granted "only if the evidence, viewed from the perspective most favorable to the nonmovant, is so one-sided that the movant is plainly entitled to judgment, for reasonable *590 minds could not differ as to the outcome." [FN11] The effect of this standard upon federal district judges is to prevent the grant of JNOV motions unless no substantial evidence exists to support the jury's verdict. [FN12]

2. Federal Standard for Granting a Motion for New Trial

In addition to assessing whether or not a JNOV should be granted to a moving party following a jury's verdict, judges are often responsible for rendering judgment on motions for a new trial in the same case. Under FRCP 50(b), in addition to a motion for JNOV, a party may move alternatively for a new trial. [FN13] By the alternative motion, the party will ask the court to grant a new trial in the event that he is not entitled to JNOV. [FN14] Thus, upon receiving such a double motion, a judge may do one of three things: (1) allow the judgment to stand, (2) direct entry of JNOV, or (3) order a new trial. [FN15]

The language of FRCP 59(c) gives federal district court judges wide latitude in granting new trials. [FN16] The "loose language" of FRCP 59 has led many courts to consider a motion for a new trial to be at "the sound discretion of the court." [FN17] Although FRCP 59 does not specify the grounds for which a new trial may be ordered, essentially two reasons exist for granting new trials: *591 either the verdict is incorrect in light of the evidence presented, or a procedural flaw occurred during trial which prevented the jury from considering only the appropriate evidence. Procedural irregularities which allow for new trial result from mistakes made by the judge, jury, attorneys, or the parties themselves. Alternatively, new trial motions may also be granted if the jury's verdict directly conflicts with the weight of the evidence. Thus, federal district judges maintain within their broad discretion the ability to grant a new trial for procedural errors, or if the evidence presented at trial does not support the verdict of the jury. [FN18] At the very least, this discretion allows federal district judges to assess the evidence in the case at bar and rationalize a jury's verdict with respect to that evidence.

B. Oregon Rules

1. Oregon Standard for Granting Judgment Notwithstanding the Verdict

An Oregon trial judge's ability to grant JNOV is governed by ORCP 63. [FN19] Under Oregon law, a JNOV is granted only when there is insufficient evidence to support the verdict and a court must review the evidence in the light most favorable to the opposing party. [FN20] For evidence to be insufficient, there must be no evidence which supports the jury's verdict. [FN21] This standard is supported by Oregon's Constitution, which states that "no fact tried by a jury shall be otherwise re-examined . . . [u]nless the court can affirmatively say there is no evidence to support the verdict." [FN22] Thus, as opposed to the federal standard which requires a lack of substantial evidence to grant JNOV, [FN23] Oregon's Rule and case law mandate that JNOV may be granted only if there is no evidence exists to support the jury's verdict. [FN24]

*592 2. Oregon Standard for Granting a Motion for New Trial

A party before an Oregon court may join a motion for JNOV with a motion in the alternative for a new trial.

[FN25] Thus, as is the case in federal district courts, an Oregon judge may be presented with a combination of motions in which a party seeks either a JNOV or a new trial. ORCP 64 governs a court's ability to grant a motion for a new trial. [FN26] Pursuant to ORCP 64, a trial judge may grant a new trial and set aside a judgment for a variety of reasons, including "[i]nsufficiency of the evidence to justify the verdict." [FN27] Based upon this language, it would appear that both federal and Oregon courts would employ a similar procedure to guide judges deciding whether to grant either a motion for JNOV or a new trial. However, as discussed in the following section, Oregon's Constitution and case law have prevented this procedure from developing in Oregon courts. Rather, in cases involving insufficient evidence, a potential situation exists where an Oregon trial judge might arbitrarily grant either JNOV or a new trial. However, an Oregon trial judge's discretion to grant either motion is severely constrained compared to judges at the federal level. This constraint of judicial discretion may indicate Oregon's devotion to the jury verdict or a lack of confidence in placing increased deferential power in the hands of trial judges.

*593 II

State and Federal Law Guiding Trial Judges Confronted With Motions for Judgment Notwithstanding the Verdict and New Trial

Oregon and federal courts differ substantially in their application and interpretation of the procedural rules which govern motions for JNOV and new trial. Analyzing cases from Oregon and federal courts indicates two striking differences between the systems: (1) federal courts have a long line of case law establishing a reliable road map to assist federal judges in determining the appropriate motion to be granted, [FN28] and (2) federal judges are given much more discretion than Oregon judges to decide these motions.

A. Federal Cases: The Creation of a Differential Scheme

In a federal district court, when a party makes a FRCP 50(b) motion for JNOV, or in the alternative for a new trial, judges are forced to weigh the sufficiency, and potentially the credibility, of the evidence. The First Circuit has held that a court should grant a motion for JNOV "only upon a determination that the evidence could lead reasonable men to but one conclusion, a determination made without evaluating the credibility of witnesses or the weight of the evidence at trial." [FN29] Similarly, the Supreme Court stated long ago that "judgment cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case. . . ." [FN30] Thus, only upon finding a clear lack of any substantial evidence may a trial court grant a JNOV motion following a jury verdict. In the interest of preserving the credibility of the American legal system and its faith in juries, such a standard is understandable.

In contrast to motions for JNOV, federal district judges are afforded great discretion when ruling on a motion for a new trial. The Supreme Court has stated that "[t]he authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." [FN31] This enhanced discretion is further evidenced by the federal circuit courts' narrow scope of *594 review for new trial motions. An order granting a new trial at the federal level is not immediately appealable. [FN32] Moreover, an order granting a new trial will be reviewed only for "an abuse or failure to exercise discretion." [FN33]

When a federal district judge is confronted with a motion for a new trial, the motion generally alleges one of two potential scenarios: either the moving party believes that some sort of procedural irregularity has occurred at trial which is sufficient to justify a new trial, or the moving party believes that the verdict was substantively irrational and against the evidence. Procedural errors, such as improper instructions to the jury, evidentiary mistakes, and party or jury misconduct, are often sufficient to warrant a new trial. However, "the most common ground for a new trial is simply the judge's belief that the jury verdict is 'against the weight of evidence.'" [FN34] It is this situation which requires the trial judge to address and weigh the evidence presented, and determine whether the verdict is consistent with the evidence. [FN35]

"In reviewing the jury's verdict," upon a motion for a new trial, "it is the role of the [federal] trial judge to ensure that justice is carried out." [FN36] This role is evidenced by a federal judge's duty to determine if the facts and evidence presented at trial are sufficient to support the jury's verdict. Contrary to considering a motion for JNOV, a federal judge may weigh the facts and evidence against the jury's verdict when considering motions for a new trial. Further, the evidentiary standard which allows judges to grant a new trial is less stringent than motions for JNOV [FN37] and it is generally accepted that, "[u]nlike a motion for judgment notwithstanding the verdict, a new trial motion may be granted even if there is substantial evidence to support the verdict. The *595 trial judge is free to

weigh the evidence himself." [FN38] Thus, a differential scheme is established at the federal level. This differential scheme may be summarized as follows: upon the motion for JNOV or, in the alternative, for new trial, the federal district judge may grant JNOV only if no substantial evidence exists. However, the same judge may also review the jury's verdict against the weight of evidence and order a new trial.

Federal district judges are therefore given sizeable discretion in their ability to grant new trials as opposed to JNOV. This enhanced discretion does present problematic questions: at what point does the judge become the thirteenth juror, or worse, at what point does a judge begin substituting his judgment and policy beliefs for those of the jury? This concern was voiced by the Third Circuit in *Klein v. Hollings*. [FN39] In *Klein*, the court re-emphasized that when a motion for a new trial based on the weight of the evidence is granted, the court has:

to some extent at least, substituted [its] judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts. [FN40]

This concern, however, has done little to reduce the discretion which is placed upon trial judges. Rather, some courts have broadened judicial discretion for granting a new trial. For example, the Ninth Circuit Court of Appeals directs its federal district judges to grant new trials in order to prevent "a miscarriage of justice." [FN41] Other courts have concluded that "the granting of a new trial involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all reasons which inhere in the integrity of the jury system itself." [FN42]

***596** Finally, perhaps the biggest indication of the breadth of federal judicial discretion is the apparent ability of a district judge to order a new trial on his own volition to further the interests of justice. While discussing FRCP 50(b) in *Cone v. West Virginia Pulp & Paper Co.*, [FN43] the Supreme Court stated that:

there are circumstances which might lead the trial court to believe that a new trial . . . would better serve the ends of justice [T]he rule does not compel a judge to enter a [JNOV] instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. [FN44]

More importantly, this discretionary grant is aided by a differential scheme which serves as a road map for evidence sufficiency when dual motions are presented. If a court finds that reasonable persons could not have found the facts necessary to support the jury's verdict, the trial court may grant JNOV. As the Supreme Court stated in *Montgomery Ward & Co. v. Duncan*, "[t]he motion for judgment cannot be granted unless . . . the opponent of the movant failed to make a case and, therefore, a verdict in the opponent's favor should have been directed." [FN45] If, however, there appears to be some evidence to support the jury's verdict, but the verdict is contrary to the weight of the evidence, the judge may use his discretion and grant a new trial to prevent a miscarriage of justice.

B. Oregon Cases: Curtailing Judicial Discretion

Oregon law grants considerably less discretion to its trial judges than that delegated to federal judges. This is particularly apparent with respect to the granting of new trials for verdicts contrary to the weight of the evidence. Moreover, Oregon trial courts confronted with ORCP 63C motions for JNOV, or for a new trial, are left in a state of uncertainty as to which motion to grant. An analysis of Oregon case law indicates that, unlike the federal system, there is no differential scheme to guide trial judges and virtually no discretion has been placed in the hands of judges.

Compared to the federal system of justice, Oregon employs a more stringent standard for granting JNOV. As articulated by ***597** the Oregon Supreme Court in *Hill v. Garner*, [FN46] "[a] judgment n.o.v. ought not to be granted if there is any evidence to support the verdict." [FN47] Further, appellate courts reviewing a JNOV must determine whether, in viewing the evidence in the light most favorable to the opposing party, there is any evidence supported by the jury's verdict. [FN48] Thus, a trial judge in Oregon faces a more demanding standard when considering the validity of a motion for JNOV. An Oregon judge may take the verdict from the jury only upon finding a complete lack of any evidence.

The differences between Oregon's rules of civil procedure and the federal rules are even more apparent when analyzing the responsibilities and discretion bestowed upon trial judges with respect to motions for new trials. It is true that one of the purposes of allowing Oregon judges to grant a new trial is "to enable the trial judge to correct

errors and to cure miscarriages of justice." [FN49] In this sense, an Oregon trial judge does have "much greater authority to grant a new trial . . . than [he] has to grant a judgment notwithstanding a verdict." [FN50] However, it is apparent that judicial discretion in the Oregon court system is confined only to procedural errors which occurred in the trial court.

In Oregon, trial judges may grant motions for a new trial upon finding the same procedural errors which may be the basis for granting new trial motions at the federal level. Misconduct of the jury, error of law, and errors of the court are all examples of valid grounds in which a trial court may grant a motion for new trial. [FN51] However, the Oregon Supreme Court has made it clear that any discretion which is allocated to judges is confined to the assessment of whether such error was prejudicial. [FN52] The Beglau court explained that "when error has been committed[,] this court, in determining . . . whether such error was so prejudicial as to prevent a party from having a fair trial, usually defers to the discretion of the trial court." [FN53] Other decisions have likewise concluded that a new trial may be granted when there is a substantial *598 chance of prejudice to the moving party from asserted error during the trial, and the decision to grant a new trial is committed to the discretion of the trial court. [FN54] Thus, in a case of error by the court, or prejudicial behavior by the parties or attorneys, a court may grant a new trial under ORCP 64 and "'wide latitude' will be accorded to the trial court" to determine if the error is prejudicial. [FN55]

The divergence from the federal standard becomes apparent, however, when a motion for a new trial (or new trial in the alternative upon the denial of JNOV) is based on "insufficiency of the evidence." [FN56] Unlike the federal standard which focuses on the weight of the evidence while considering a motion for new trial, in Oregon the decisive issue is the sufficiency of the evidence. [FN57] The question then becomes, what is considered sufficient evidence in Oregon courts so as to prevent a new trial motion from being granted?

Both the language of Oregon's Constitution, and the existing Oregon case law interpreting the rules for granting new trial, indicate that to meet the sufficiency of the evidence standard a party must only demonstrate that any evidence exists. Put another way, a new trial should be granted for insufficiency of evidence only if there is no evidence supporting the judgment. [FN58] Practically speaking, even if a jury verdict directly contradicts the evidence presented at trial, a new trial may not be granted. This standard is in sharp contrast to the federal standard which allows a judge to weigh the evidence and use its strength against the verdict of the jury.

The foundation of the rule of law in Oregon which disallows trial judges' discretion to grant a new trial originates from Oregon's Constitution. According to the provisions of Article VII, "[i]n actions at law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." [FN59] Effectively, this constitutional *599 provision bars granting any motion for a new trial, grounded on the sufficiency of the evidence, if any evidence can be said to support the verdict of the jury. Perhaps even more remarkable, the requirement of a total absence of any evidence is also the standard by which motions for JNOV are considered in Oregon. By barring both JNOV and new trial motions unless no substantial evidence exists, Oregon's system is in direct opposition to the federal courts' differential scheme.

Various Oregon decisions specifically note that Oregon law does not provide an equivalent to the federal differential scheme allowing judges to utilize discretion. For example, in 1935, the Oregon Supreme Court stated that "Article VII, § 3, Constitution of Oregon . . . controls. In the light of this constitutional amendment, the court cannot concern itself with the weight of the evidence, as that is a matter within the exclusive province of the jury." [FN60] In 1964, the Oregon Supreme Court clarified this issue. The Court in *Foxton v. Woodmansee* [FN61] stated that:

it is not correct to say . . . that the trial court in this state has discretion to set aside the verdict of a jury regardless of error. That is the rule in other jurisdictions, but not in Oregon where the constitution prohibits the re-examination by any court of a fact tried by a jury. It is an erroneous notion that the circuitcourts of this state have discretion to order a new trial because the presiding judge thinks that a jury has returned an unjust verdict or one which is against the weight of the evidence. [FN62]

Finally, in 1977 in the *Daskalos v. Kell* decision, the Court held that:

it does not follow . . . that the trial court may properly order a new trial when there was no error in the admission of evidence, instructions to the jury, or otherwise in the conduct of the trial, and when the sole contention was that

the case should not have been submitted to the jury, in spite of conflicting evidence, because there was 'substantial evidence in the record to support the trial court's granting of a new trial.' [FN63]

From these decisions, it is readily apparent that no discretion exists for an Oregon trial judge to weigh evidence when considering a motion for a new trial. Rather, a trial judge must follow the same standard as required for granting a motion for JNOV and grant such motion only when there is a lack of any evidence.

***600** The lack of discretion in granting a new trial presents an interesting dilemma for Oregon trial judges. Because there is no differential scheme that allows a judge to grant JNOV when no evidence exists and grant a new trial when the verdict goes against the evidence, the court must choose between the two motions using the same analysis if both are brought under ORCP 63C. If there is insufficient evidence, the question becomes whether to grant the JNOV or a new trial. No Oregon court has addressed this ambiguity and prior court decisions offer little explanation for which motion should be granted.

III

Potential Consequences and Implications of Oregon's Deviation From the Federal Standard

As the above analysis indicates, there is a sharp contrast between Oregon and the federal system with respect to post trial motions. A number of rationales could explain these contrasting standards. More important, however, is the effect that each standard has on its respective system. In Oregon, the absence of judicial discretion for weighing evidence seems to (1) make the decision of whether the trial judge should grant JNOV or a new trial arbitrary and (2) indicate that Oregon has extreme faith in the ability and competency of its juries. Each of these consequences warrants its own analysis. While Oregon courts appear to have ignored these potential effects, it is possible to speculate on their plausible ramifications and rationales.

A. Determining Whether to Grant JNOV or New Trial in Oregon

It appears that the absence of a differential scheme has gone relatively unnoticed or unchallenged in Oregon courts. Although there has been occasional reference to other jurisdictions, which allow judges to assess the jury's verdict against the weight of the evidence, [FN64] Oregon judges appear to simply address motions for new trials when they are brought and apply the standard that has been set forth. If the state of the evidence does not warrant either motion, the trial judge will simply deny both motions. ***601** An interesting dilemma arises, however, when the state of the evidence could warrant the granting of both motions. No Oregon court has addressed this dilemma, making it difficult to predict which motion a judge will grant.

When a motion for a new trial is based on procedural error, misconduct, or other occurrences in the courtroom that prejudice the moving party, it is rational to grant a new trial rather than the JNOV. In these procedural cases, there are no grounds to grant JNOV. Although evidence was presented to support the claims of each party, the trial was resolved unfairly due to prejudicial error. In such a case, the motion for new trial in the alternative, under ORCP 63C, works to perfection and satisfies its main purpose. However, if there is no procedural error and the moving party's claim is based solely on insufficiency of the evidence, it is unclear which motion the court should grant.

In cases where the evidence may be insufficient, the party that moves for both JNOV and a new trial will almost certainly prefer the former. JNOV prevents the further cost of litigation whether it be financial, time spent, or the potential to lose the case. The moving party believes that the opposing party has no evidence to support his claim. If true, the moving party has a persuasive argument that there is no reason to re-try the case. If the non-movant has been granted an opportunity to put forth his or her best case, but has been unable to establish substantial evidence to support his or her position, it seems rational that a trial judge should grant judgment and the complete lack of evidence should preclude any potential re-trial.

The moving party's argument is extremely persuasive. Taken to its extreme, this argument might indicate that ORCP 64B(5) is unnecessary. If a trial discloses that no evidence exists to substantiate a claim, then arguably granting a JNOV would always be a more appropriate decision because the standard for JNOV and a new trial is identical. Thus, ORCP 64B(5) would be obsolete because ORCP 63 controls. [FN65] As such, a new trial would be granted only upon a trial court procedural error that satisfies the ***602** remaining sections of ORCP 64. However, because the insufficiency of evidence standard has deep roots in Oregon law, it is unlikely, if not

impossible, to believe that ORCP 64B(5) will be repealed.

Today, in both the Oregon and federal system, the initial decision on whether to grant the JNOV or motion for a new trial lies in the hands of the trial judge. It is apparent that without a differential scheme, Oregon trial judges lack discretion in weighing evidence, but are given the unguided ability and discretion, to choose whether to grant a new trial or JNOV when no sufficient evidence has been produced by one party. Thus, although discretion is removed from the judge in one setting, the potential for an arbitrary decision exists in the future where a party's motion is grounded solely on insufficiency of the evidence. No Oregon cases have granted a new trial based solely on insufficiency of the evidence. Further, all JNOVs which have been subsequently overturned by the appellate court, but remanded for a new trial, were done so because of some sort of procedural error in the trial court. However, it is not inconceivable that a situation could arise where a motion is based solely on the grounds of insufficient evidence and the trial judge must arbitrarily determine whether to grant a new trial or JNOV. This arbitrary potential goes directly against the benefits of eliminating judicial discretion. Further, allowance for arbitrary discretion calls into question Oregon's rationale for eliminating a trial judge's ability to weigh evidence in the first place.

B. Faith in the Jury and Eliminating Judicial Discretion

Perhaps the most convincing argument for why Oregon has chosen not to include a differential scheme within their rules of civil procedure is the state's faith in its juries. As all first-year law students learn, trial by jury is grounded in the ideal that a panel of impartial peers can rationalize and evaluate all types of legal claims and controversies together. When this process is subverted for any reason, it must be looked upon with a careful eye. Trial by jury serves as a protection against the individual who may be biased, motivated by policy goals or other potential self-interest objectives which might influence his or her ability to decide a case. When a state or government gives a judge the power to overturn a jury's verdict, or grant a new trial, individual decision eliminates the benefits of the jury as a collective body. *603 Without constraints, this discretionary power poses great consequences because judges could impose their own policies and personal beliefs rather than seeking true justice.

Most motions for JNOV are denied based on a underlying rationale: if an entire jury finds for the non-moving party, it is not the position of the judge to become the enforcer of his own belief and reverse the decision. This rationale could be characterized as a fear of overuse, or abuse, of judicial discretion. The potential for overuse, or abuse, of discretion appears to be much more of a threat in a jurisdiction with a differential scheme. Where a judge has the ability to weigh the evidence in his own mind against a verdict of a jury, the threat of utilizing discretion beyond its intent is apparent. However, federal courts have addressed this point and nevertheless concluded that a system which allows for a new trial only if a JNOV might have been granted "puts the new trial standard far too high." [FN66]

It is clear that Oregon has eliminated a great deal of judicial discretion with respect to a judge's ability to grant a new trial motion based only on insufficient evidence. [FN67] Judges cannot weigh evidence and thus have no opportunity to substitute their belief or policies for that of a jury's. Arguably, this brings increased legitimacy to Oregon's procedure and shows great faith in the competency of Oregon juries. However, judicial discretion is often necessary to prevent irrational decisions from being made by juries who are overly influenced by emotion, sympathy, and factors other than the evidence presented. Further, it appears that Oregon merely deflects its judicial discretion by making both JNOV and new trial motions allowable by the same standard. This could potentially lead to arbitrary decisions by judges who could be equally influenced by factors other than evidence and procedure.

Conclusion

The faith Oregon puts in its juries is a double-edged sword. While bringing legitimacy to the trial process, it runs the risk of allowing confused or sympathetic juries to inappropriately consider the evidence. Eliminating a judge's ability to weigh evidence on motions for a new trial effectively gives judges the choice of whether to grant a new trial or JNOV. Common sense *604 and economics would generally dictate granting a JNOV. However, this decision appears arbitrary without the grounding of a set scheme to guide judges.

On the contrary, a differential scheme places its faith in trial judges, and their extensive experience in all areas of the law. Of course, such use of judicial discretion is subject to the traditional assertions that policy choices of the individual and self-interest will have the potential to play in the decision making process. However, the appellate courts guard against these potential abuses by trial judges. Placing discretion in the hands of our most intellectual

and scholarly individuals does not seem irrational, or an overly substantial risk. Such a differential scheme appears to be sensible from virtually all angles of analysis.

Oregon's stubborn commitment to allowing all jury verdicts to stand which are supported by only the most minute amount of evidence appears to give little credit to trial judges and even less faith in their objectivity. Further, an equivalent standard for granting a new trial or JNOV calls into question the value of ORCP 64B(5). The true villain in Oregon's overall judicial process may be the Oregon Constitution and its mandate that no fact be re-tried unless no evidence exists to support the verdict. Unfortunately, it is hard to imagine that Oregon voters would ever unite to repeal Article VII § 3 of the Oregon Constitution. Thus, to bring harmony to the Oregon Rules, efforts should be concentrated on the repeal of ORCP 64B(5).

[FN1]. Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 *Creighton L. Rev.* 683, 684 (1995).

[FN2]. See *infra* Part II.

[FN3]. See *Fed. R. Civ. P.* 50.

[FN4]. See *infra* Part II.B.

[FN5]. See *infra* Part II.A.

[FN6]. 9 James Wm. Moore et al., *Moore's Federal Practice P 50.02[1]* at 50- 8 (3d ed. 1997).

[FN7]. Prior to the 1991 amendments, a motion under FRCP 50(b) was called a motion for judgment notwithstanding the verdict (JNOV). The amendments adopted the common terminology of "judgment as a matter of law" (JMOL) for sections 50(a) and 50(b) which refer to directed verdicts. The committee noted that the standards for granting JNOV and a directed verdict were identical, and thus JMOL was sufficient terminology to encompass both motions. See 5A James Wm. Moore et al., *Moore's Federal Practice 50-74 to 50-75* (2d ed. 1996). For the purposes of this Comment, the difference in terminology between a federal JMOL and an Oregon JNOV has no relevance. To avoid potential confusion in this Comment, judgments in both the state and federal systems are referred to as JNOV.

[FN8]. *Fed. R. Civ. P.* 50(b).

[FN9]. See *Railroad Dynamics Inc. v. A. Stucki Co.*, 727 F.2d 1560 (Fed. Cir. 1984).

[FN10]. Jack H. Friedenthal et al., *Civil Procedure* § 12.3, at 544 (2d ed. 1993).

[FN11]. *Gibson v. City of Cranston*, 37 F.3d 731, 735 (1st Cir. 1994); see also *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 148-49 (5th Cir. 1995); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 613 (3rd Cir. 1995); *Tuck v. HCA Health Servs.*, 7 F.3d 465, 469 (6th Cir. 1993); *Ehrhardt v. Penn Mut. Life Ins. Co.*, 21 F.3d 266, 269-70 (8th Cir. 1994).

[FN12]. Substantial evidence is considered to be more than a scintilla for determining whether or not to grant JNOV. The question is not if "there is literally no evidence ... but whether there is evidence upon which the jury properly could find a verdict." 9A *Wright and Miller*, *infra* note 14, at 252- 54. Further, the adjective "substantial," in and of itself, has been said to add little value and is defined in terms that would lead reasonable people to different conclusions. See *id.* at 264-65.

[FN13]. *Fed. R. Civ. P.* 50(b).

[FN14]. 9A *Charles Alan Wright & Arthur R. Miller*, *Federal Practice and Procedure* § 2539 at 360 (2d ed. 1995). The party may ask for a new trial on any of the grounds that would support a motion for new trial under FRCP 59 and the new trial segment of the joint motion will be tested by the same standards as would be applied if the motion were made under FRCP 59. *Id.* at 360-61.

[FN15]. *Fed R. Civ. P.* 50(b)(1)(a)-(c).

[FN16]. "A new trial may be granted ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a).

[FN17]. William L. Anthony, Jr. et al., *The Written Aspects of Jury Patent Practice, Including Charge Conference Practice*, in *414 Winning Strategies in Patent Litigation* 397, 423 (1995).

[FN18]. 12 James Wm. Moore, *Moore's Federal Practice* § 59.25[1], at 59-46 (3d ed. 1997) (citing *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962)).

[FN19]. See Or. R. Civ. P. 63.

[FN20]. *Hill v. Garner*, 277 Or. 641, 643, 561 P.2d 1016, 1017 (1977).

[FN21]. See *Jacobs v. Tidewater Barge Lines, Inc.*, 277 Or. 809, 811, 562 P.2d 545, 547 (1977).

[FN22]. Or. Const. art. VII, § 3.

[FN23]. See *supra* note 12 and accompanying text.

[FN24]. Consequently, it follows that a mere scintilla of evidence may not prevent a federal judge from granting JNOV, however, this same scintilla will prevent an Oregon trial judge from taking the verdict from the jury.

[FN25]. Or. R. Civ. P. 63 C.

[FN26]. Or. R. Civ. P. 64.

[FN27]. Or. R. Civ. P. 64 B(5). ORCP 64 B provides that

A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury ... [f]or any of the following causes materially affecting the substantial rights of such party:

B(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

B(2) Misconduct of the jury or prevailing party.

B(3) Accident or surprise which ordinary prudence could not have guarded against.

B(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B(5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B(6) Error in law occurring at the trial and objected to or excepted to by the party making the application.

[FN28]. See discussion *infra* part II.A and accompanying notes.

[FN29]. *Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196, 199 (1st Cir. 1980) (emphasis added).

[FN30]. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

[FN31]. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

[FN32]. *Id.* at 34 (order granting new trial is interlocutory in nature and not immediately appealable). In contrast, Oregon law has diverged from the federal standard of review and allows immediate appeal from judicial orders which set aside a judgement and grant a new trial. Or. Rev. Stat. § 19.205(1)(d) (1997).

[FN33]. 12 Moore, *supra* note 18, § 59.25[2] at 59-47 (emphasis added).

[FN34]. *Martin*, *supra* note 1, at 691 (citing Jonathan M. Landers et al., *Civil Procedure* 807, 810 (2d ed. 1988)).

[FN35]. See generally, *Martin* *supra*, note 1 at 689-691. Weighing evidence applies only to motions for new trial based on insufficient evidence to justify jury verdict. A trial judge does not weigh evidence sufficiency if the

motion for new trial is based upon a procedural flaw in the trial court.

[FN36]. 12 Moore, *supra* note 18, § 59.25[1] at 59-46.

[FN37]. See *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 594-95 (4th Cir. 1985), modified, 788 F.2d 1042 (4th Cir. 1986).

[FN38]. *Bevevino v. Saydjari*, 574 F.2d 676, 683-84 (2d Cir. 1978) (citing 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2806, at 43 (1973) (emphasis added)); see also 9A Wright & Miller, *supra* 14, at 361-62 (trial judge might grant a new trial even though constrained to refuse to order JMOL); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 735-36 (3d Cir. 1988) (new trial may be granted even if JNOV is inappropriate if verdict is contrary to the great weight of the evidence); *Rousseau v. Teledyne Movable Offshore, Inc.*, 812 F.2d 971, 972 (5th Cir. 1987) (affirming grant of new trial although there was legally sufficient evidence to foreclose the JNOV).

[FN39]. 992 F.2d 1285 (3d Cir. 1993).

[FN40]. *Id.* at 1290 (citing *Lind v. Schenley Indus. Inc.*, 278 F.2d 79, 90 (3d Cir. 1960)).

[FN41]. See *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir. 1957).

[FN42]. *Tidewater Oil Co. v. Waller*, 302 F.2d 638, 642 (10th Cir. 1962); see also *Bevevino*, 574 F.2d at 686; 11 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2806 at 49.

[FN43]. 330 U.S. 212 (1947).

[FN44]. *Id.* at 215.

[FN45]. 311 U.S. 243, 251 (1940).

[FN46]. 277 Or. 641, 643, 561 P.2d 1016, 1017 (1977).

[FN47]. *Id.* at 643, 561 P.2d at 1017.

[FN48]. *Caldwell v. Pop's Homes, Inc.*, 54 Or. App. 104, 106-07, 634 P.2d 471, 473 (1981) (citing *Jacobs v. Tidewater Barge Lines*, 277 Or. 809, 811, 562 P.2d 545 (1977)).

[FN49]. *Strandholm v. General Const. Co.*, 235 Or. 145, 152, 382 P.2d 843, 846 (1963).

[FN50]. *German v. Kienow's Food Stores*, 246 Or. 334, 337, 425 P.2d 523, 525 (1967).

[FN51]. See Or. R. Civ. P. 64.

[FN52]. See *Beglau v. Albertus*, 272 Or. 170, 179-82, 536 P.2d 1251, 1256- 58 (1975).

[FN53]. *Id.* at 181, 536 P.2d at 1257.

[FN54]. See *Fischer v. Kombol*, 90 Or. App. 398, 400, 752 P.2d 349, 350 (1988) (citations omitted).

[FN55]. *Daskalos v. Kell*, 280 Or. 531, 533, 571 P.2d 141, 143 (1977).

[FN56]. Or. R. Civ. P. 64B(5).

[FN57]. *Daskalos*, 280 Or. at 534, 571 P.2d at 143.

[FN58]. *Huston v. Trans-Mark Servs., Inc.*, 45 Or. App. 801, 810-11, 609 P.2d 848, 853-54 (1980).

[FN59]. Or. Const. art. VII, § 3 (emphasis added).

[FN60]. *Arthur v. Parish*, 150 Or. 582, 588, 47 P.2d 682, 684 (1935) (emphasis added).

[FN61]. 236 Or. 271, 388 P.2d 275 (1964).

[FN62]. *Id.* at 284-85, 388 P.2d at 276 (internal citation omitted).

[FN63]. *Daskalos*, 280 Or. at 534, 571 P.2d at 143 (emphasis added).

[FN64]. See *Arthur*, 150 Or. at 588, 47 P.2d at 684; *Daskalos*, 280 Or. at 533, 571 P.2d at 143; *Foxton*, 236 Or. at 271, 388 P.2d at 275.

[FN65]. Arguably, ORCP 64B(5) might retain validity because it allows for new trial upon finding that the verdict "is against law." However, no Oregon courts have reflected upon what this language means. Further, upon interviewing several Oregon trial judges, Professor Maurice Holland of the University of Oregon School of Law concludes that this language is inconsequential. Interview with Maurice J. Holland, Professor, University of Oregon School of Law, in Eugene, Oregon (Mar. 9, 1998).

[FN66]. See 11 *Wright et al.*, *supra* note 42, § 2806 at 64.

[FN67]. See *supra* Part II.B.

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