Washington Law Review

Volume 40 | Number 2

6-1-1965

Serving Substantial Justice—A Dilemma

Philip A. Trautman
University of Washington School of Law

SERVING SUBSTANTIAL JUSTICE—A DILEMMA

PHILIP A. TRAUTMAN*

In an article written three years ago,[1] this author introduced the subject with the observation that, of the several grounds for a new trial in Washington, one in particular had created considerable difficulty for the supreme court, trial judges, and counsel. This was the rule permitting a new trial when "substantial justice has not been done,"[2] and followed by the provision that, "In all cases wherein the trial court grants a motion for a new trial, it shall, in the order granting the motion, give definite reasons of law and facts for so doing." At that time I stated:

> The problem has been one of determining the degree of discretion resting with the superior courts under the above provisions, the scope of review by the supreme court, and for counsel, the criteria for the drafting of new trial orders to avoid reversal on appeal.[3]

In the intervening period the Washington Supreme Court has had several occasions to comment upon the question. It is the purpose of this article to re-evaluate the problem in light of those decisions.

The Washington Supreme Court early recognized an inherent power in the trial courts to grant new trials for failure of substantial justice.[4] A difficulty arose, however, when the court concluded that a statement by a trial court that substantial justice had not been done was sufficient to preclude any review by the supreme court of an order granting a new trial, except to determine if there was a case for the jury. Further limiting the supreme court's power was a presumption that the reasons for a new trial rested upon matters that could not be made part of the record.

In 1950, in *Coppo v. Van Wieringen*,[5] the court expressed concern that "an iron curtain" had been created, "cutting off any adequate review whether or not there was any reason for the trial judge to set

* Professor of Law, University of Washington

[1] Trautman, *New Trials for Failure of Substantial Justice*, 37 WASH. L. REV. 367 (1962).

[2] WASH. R. PLEAD., PRAC. & PROC. 5904W(9).

[3] Trautman, *supra* note 1, at 367.

[4] Brammer v. Lappenbusch, 176 Wash. 625, 30 P.2d 947 (1934); Clark v. Great No. Ry., 37 Wash. 537, 79 Pac. 1108 (1905).

[5] 36 Wn.2d 120, 217 P.2d 294 (1950).

aside the verdict of the jury and grant a new trial."[6] The court did not disapprove of granting new trials on the ground of failure of substantial justice nor did it disapprove of the limitation on review when the basis for the trial court's conclusion rested upon reasons outside the record, which could not be made a part thereof.

> The reason may be outside the record—'the lights and shadows' of the trial, the very atmosphere of the courtroom, those things which are manifest to the trial judge but which cannot be captured for the record—and in that event we agree that our review should be limited to the questions of whether there is a case for the jury and whether the verdict is the only one possible as a matter of law.[7]

What the court did disapprove of was limitation upon its review when the basis for the trial judge's action was entirely within the record or could be made a part of the record.

> There is no desire to interfere with the inherent right of a trial judge to grant a new trial, subject only to the limited review now possible, where the reasons for granting the new trial cannot be made a part of the record. On the other hand, there should be some way of securing a review of such an order when the trial judge's action is actually based upon the record. Any rule adopted, to be effective, would require that the trial judge state his reason or reasons for granting a new trial and, also, whether the order is based upon the record or upon facts and circumstances outside the record which could not be made a part thereof.[8]

With this background, Rule of Pleading Practice & Procedure 59.04W was adopted in 1951 including as a ninth ground for a new trial "That substantial justice has not been done." In addition, a provision was adopted which now reads, "In all cases wherein the trial court grants a motion for a new trial, it shall, in the order granting the motion, give definite reasons of law and facts for so doing."

Prior to 1951 and the adoption of the rule, the supreme court seldom reversed an order granting a new trial for failure of substantial justice. In twenty-six cases decided between January 1951, and May 1962, in which a new trial was granted in whole or in part for failure of substantial justice, nineteen were reversed and only seven affirmed.[9] In 1950 the supreme court had indicated that by its anticipated new rule requiring reasons it did not intend to interfere with a trial judge's discretion in granting new trials for failure of substantial justice when

[6] *Id.* at 123, 217 P.2d at 297. The court noted that a change might be implemented in the new rules of court then under consideration.
[7] *Id.* at 140, 217 P.2d at 305-06.
[8] *Id.* at 142, 217 P.2d at 306.
[9] These cases are reviewed in Trautman, *supra* note 1, at 375-95.

based upon matters outside the record.[10] The effect of the court's decisions in the following ten years, however, was to considerably limit the trial judge's powers by requiring him to state with particularity what factors outside the record influenced his decision. The trial judge was directed to describe in detail the atmosphere of the courtroom which supported his conclusion.

In this author's earlier article, criticism was directed at the strict construction of the rule in requiring statements of reasons by the trial judge. It was stated that the court's interpretation was not in accord with the original intent of the rule. Further, in balancing the powers, merits, and defects of trial and appellate courts, their respective opportunities to judge the need for a new trial, and the practical ability of the trial judge to adequately describe the atmosphere of the trial and other extra-record factors, it was concluded that the supreme court was demanding too much in the way of detail.

It was noted, however, that in the then two most recent cases,[11] decided in 1962, the court had given in dictum some indication of a willingness to allow for greater discretion in the trial judge than had been true in earlier post-rule decisions. The language of the court evidenced some willingness to allow for broader statements of reasons. The hope was expressed that there would be greater liberality in future decisions by construing the rule in favor of the trial court. There have been additional cases and a reappraisal of the problems is appropriate.

In *Sullivan v. Watson*,[12] the trial judge had denied a motion for new trial and the supreme court affirmed. The appellants' brief quoted oral statements by the trial judge suggesting that he would have granted the motion on the ground of failure of substantial justice since the verdict was overwhelmingly contrary to the weight of the evidence, but he concluded that trial judges no longer had such power. Judge Hill stated in an extended footnote that this was not the meaning of the supreme court's decisions. To the contrary, a trial judge had a duty to grant a new trial under such circumstances. What the decisions meant was that the supreme court had been carefully reviewing the reasons for granting new trials and that there had been a tendency to reverse. The hope was expressed, however, that trial judges would continue to grant new trials when they felt substantial justice was lacking, and if a reversal should

[10] Coppo v. Van Wieringen, 36 Wn.2d 120, 217 P.2d 294 (1950).
[11] State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962); Martin v. Foss Launch & Tug Co., 59 Wn.2d 302, 367 P.2d 981 (1962).
[12] 60 Wn.2d 759, 375 P.2d 501 (1962).

then result, any error therein would rest with the supreme court rather than the trial court.

The *Sullivan* case is of particular consequence not only for what was said, but for the tenor of the opinion. At least some trial judges had concluded that new trials should not be granted upon the ground of lack of substantial justice. *Sullivan* was an attempt to dispel this belief and to encourage trial judges to exercise their discretion, and to state reasons in the best possible manner. The difficulty is that while trial judges were encouraged to continue to grant new trials, it is doubtful whether the superior courts will be receptive of the supreme court's encouragement if reversals of such rulings are to continue. While *Sullivan* should have the effect of encouraging trial judges to grant new trials where the reasons are based upon the record and can be readily detailed, it is submitted that little change will occur in trial court rulings in those cases where the prime factor is the non-record prevailing atmosphere of the courtroom. The trial judge may have not only the power but the duty to grant new trials even though he is unable to detail his feelings and impressions, but the power is not likely to be exercised nor the duty enforced, if a reversal appears probable.

In four cases decided in 1963 and 1964 the supreme court reversed the grant of a new trial because the trial judge failed to state any reasons, or because the reasons stated did not support the conclusion.[13] Since there was either a complete failure to abide by the rule or a lack of proper record factors to justify a new trial, with no indication that

[13] Durkan v. Leicester, 62 Wn.2d 77, 381 P.2d 127 (1963); Coleman v. George, 62 Wn.2d 840, 384 P.2d 871 (1963); Nakanishi v. Foster, 64 Wn.2d 647, 393 P.2d 635 (1964); Knecht v. Marzano, 65 Wash. Dec.2d 272, 396 P.2d 782 (1964).

In *Durkan* the stated reason by the trial judge for granting a new trial was that the verdict was inadequate. Judges Hill and Ott concurred in the reversal, but objected to the reliance in the majority opinion upon Powell v. Continental Baking Co., 49 Wn.2d 753, 306 P.2d 757 (1957) as the standard for reviewing the trial judge's reasons. Judge Hill stated that, "If that case is to be the criterion by which we judge, we will affirm very few cases in which a new trial has been granted on discretionary grounds." 62 Wn.2d at 82, 381 P.2d at 130. The *Powell* case is commented upon in Trautman, *supra* note 1, at 387-88.

In *Coleman* the trial judge granted a new trial on four grounds, one of which was that substantial justice had not been done. The reasons given for the conclusion were a summary of the other three grounds. The supreme court reviewed each of the other three grounds independently and found that there was no error committed. Therefore, "they do not constitute a sufficient reason for granting a new trial," on the ground of failure of substantial justice. This was an instance in which the rule was complied with insofar as a statement of reasons was concerned, but in which the reasons did not support the conclusion. It is to be noted that this was not a case in which there was an accumulation of small errors, no one of which would justify a finding of failure of substantial justice, but a combination of which might justify that result. See State v. Boddo, 63 Wn.2d 176, 385 P.2d 859 (1963).

In *Nakanishi*, among other grounds, the trial judge stated that there were excessive damages, resulting from passion and prejudice. Since no reference was made to circum-

non-record considerations were controlling, these reversals were correct. Four other cases granting a new trial, based in whole or in part on a failure of substantial justice, were affirmed by the supreme court.[14] In each instance the new trial was based upon record considerations, or if non-record factors were of consequence, they were of a nature susceptible of rather exact description by the trial judge.

The last pertinent case, decided in 1964, was *Baxter v. Greyhound, Corporation*.[15] The trial court's grant of a new trial was based in part upon the ground that substantial justice had not been done. The supreme court modified this to provide for a new trial, unless the plaintiffs assented to a remittitur. In so doing, the supreme court recognized the necessity of according considerable deference to the trial judge's discretion, "particularly when it involves the assessment of occurrences during the trial which cannot be made a part of the record, other than

stances which could not be made part of the record, the supreme court properly concluded that any justification for the order must be found in the record.

The trial judge in *Knecht* granted a new trial upon the ground "that substantial justice was not done. The Court is unable to point to any precise or specific matter of law or fact on which to base its ruling, but the Court has the strong feeling that substantial justice was not done based upon its whole impression of the trial." The written order clearly did not comply with the requirement of a statement of reasons. In an oral decision the trial judge assigned two reasons for his conclusion of a lack of substantial justice. One related to certain evidence favorable to the plaintiff which the jury ignored and the other to a doubt respecting the reliability of the defendant's testimony. The supreme court considered the reasons, though they were not in the formal order. As the evidentiary reason related solely to the record, the supreme court properly restricted its review thereto and simply concluded that there was evidence to support the jury's verdict. As to the second reason, the supreme court found the statement of reason about credibility to be too indefinite. Had the trial judge attempted an explanation of why he doubted the defendant's credibility, one wonders how strict the supreme court would have been in construing that explanation.

Although the supreme court in the *Knecht* case reviewed the reasons stated by the trial judge in his oral decision, the opinion suggests that this will not be done except in rare instances. One may anticipate a justifiable hesitancy of the supreme court to review other than written reasons. Counsel obtaining a new trial should therefore make every effort to encourage the trial judge to put his reasons in writing. Although the rule speaks in terms of the reasons being in the order itself, reference in the order to a definite, filed, written opinion, which states the reasons, constitutes compliance with the rule. See Bensen v. South Kitsap School Dist. No. 402, 63 Wn.2d 192, 386 P.2d 137 (1963).

[14] Rock v. Rock, 62 Wn.2d 706, 384 P.2d 347 (1963); Dipangrazio v. Salamonsen, 64 Wn.2d 720, 393 P.2d 936 (1964); Cyrus v. Martin, 64 Wn.2d 810, 394 P.2d 369 (1964); Worthington v. Caldwell, 65 Wash.Dec.2d 251, 396 P.2d 797 (1964).

In *Rock*, the trial judge set forth in much detail both record and non-record considerations to support his order.

In *Dipangrazio*, the trial judge gave detailed reasons relating to the exclusion of certain evidence and the admission of other evidence of an experiment.

The trial judge in *Cyrus* granted a new trial limited to damages upon the basis that the jury had ignored certain evidence concerning the plaintiff's loss of earnings, with the result that the verdict was inadequate and substantial justice was not done. The supreme court affirmed, though ordering a new trial on all issues including liability.

In *Worthington*, the supreme court concluded that the record justified a new trial. Substantial justice was found to be lacking because of an accumulation of errors at the trial.

[15] 65 Wash.Dec.2d 405, 397 P.2d 857 (1964).

through the voice of the trial judge in stating reasons for the action taken."[16]

The conclusion to be drawn from these cases is that the trial judges and the supreme court have endeavored to reach a middle ground in contrast to the extremes of no review, as was the situation before 1951, or an overly strict requirement of reasons, as was the case in the decade following 1951. Within more recent years, there is an indication that at least some trial judges are attempting to do more in the way of clarifying their reasons, while at the same time at least some members of the supreme court are more aware of the problem confronting the trial judges and consequently more willing to accept a good faith attempt at compliance with the rule.

The most difficult situation is presented when the trial judge is convinced that the general atmosphere of a trial is such that substantial justice has not been done and yet he is unable to describe with particularity the basis for his conviction, other than to indicate that non-record considerations are controlling. If a trial judge so states, is the balancing to be in favor of his opportunity to determine the effect of the trial's atmosphere upon the jury, or the supreme court's need for reasons for review purposes? In my judgment, when there is doubt on the point, the scales tip in favor of the trial judge for reasons discussed in my earlier article.[17] On the basis of *Knecht v. Marzano*,[18] it appears that the supreme court views the problem differently.

In the *Knecht* case, the supreme court properly reversed the grant of a new trial because the record did not support the trial judge's conclusion of a failure of substantial justice and no extra-record considerations were asserted to explain the new trial order.[19] However, the court indicated in dictum that doubtful cases will continue to be resolved against the trial court.

> We can foresee and understand occasions when a trial judge may say, "The jury verdict is supported by sufficient evidence, but X and Y extra-

[16] *Id.*, at 424, 397 P.2d at 869. The court also stated, "We are not satisfied, however, that our evaluation of the factors alluded to by the trial court, for the purpose of determining whether passion and prejudice were present, fully answers the question of whether substantial justice has been accorded to defendants upon the issue of damages. In this area it is impossible for us to gauge the impact of the appearance and attitude of the witnesses, the atmosphere prevailing in the court room, the conduct or statements of counsel, and the responsiveness of the jurors. We must, to a great extent, be guided by the evidence, the reactions of the trial judge, as recorded in his oral decision and order, and a tipping of the balance between the factor of the latitude offered the jury and the factor of our conscience."

[17] Trautman, *supra* note 1, at 397-403.

[18] 65 Wash.Dec.2d 272, 396 P.2d 782 (1964).

[19] See note 13 *supra*.

record factors, singly or in combination, caused the jury to give far too much consideration to that evidence, which resulted in an unfair trial, and consequently a new trial must be granted because substantial justice had not been done." In other words, on rare occasions, it might be *possible for a trial to be derailed,* resulting in the *failure of substantial justice,* when, *on appellate review* and under the *present application of the rule,* we would *affirm the jury verdict.* In any event, what we must insist on, and what Rule 59.04W requires, is an adequate explanation of the various extra-record factors which caused the jury to make a gross error. If these reasons are present in the order granting a new trial, then this court will undertake its duty to accord a fair review to the determination of the trial judge who witnessed the derailing of the normally adequate trial system.[20] (Emphasis added.)

While this language is perhaps suggestive of some greater deference to the trial judge than was true in the decade beginning with 1951, it also suggests that a rather strict construction of Rule 59.04W will continue. This construction is clearly more stringent than that stated by the court in 1950 in *Coppo v. Van Wieringen,* which provided the setting for the rule.

There is no desire to interfere with the inherent right of a trial judge to grant a new trial, subject only to the limited review now possible [whether there is a case for the jury and whether the verdict is the only one possible as a matter of law], where the reasons for granting the new trial cannot be made a part of the record.[21]

The court supports its strict construction, in part, upon the fact that without detailed reasons, appellate review is not possible. This is certainly true. But there is also the fact that occasions may arise when the trial judge is unable to be specific in his reasons, and if the supreme court ignores this, simply reversing or reviewing only the record, then the court is not fulfilling its function of reviewing the trial as it actually occurred. The nature of the problem is such that neither alternative is completely satisfactory. On balance, it seems to this author that it is better to err on the side of no review and allow a new trial than it is to err on the side of an inadequate review and deny a new trial.

However, Judge Finley, speaking for the court in *Knecht,* introduces another consideration. The problem is not just to be one of balancing trial and appellate court relationships, but it also involves the place of the jury in our judicial system.

On occasion, we have had the conviction that a trial judge was disguising a personal disagreement (possibly subconscious) with a jury

[20] 65 Wash.Dec.2d at 277, 396 P.2d at 785.
[21] 36 Wn.2d 120, 142, 217 P.2d 294, 306 (1950).

result in his conclusion that substantial justice was not done. We have thought that this was a clear invasion of the province of the jury, and we have not hesitated to guard and to attempt to delineate clearly the boundary beween the factual decision-making functions of the jury and the distinguishable functions of both the trial judge and the appellate court.[22]

And again, in explaining the need for a continued strict construction of the rule:

In this way we will recognize and give proper effect to the functions of the trial and appellate courts and the jury. Most importantly . . . our fears that trial courts could attenuate or water down the jury function will be reasonably obviated by reasonably operable appellate review, and the trial court and this court will not be parties to "jury shopping"; rather we will be giving the parties litigant their just due—a fair trial. Since a jury must still make the ultimate determination, the judge will not be invading the jury box in granting a new trial for failure of substantial justice *upon proper and stated reasons.*[23] (Emphasis that of the court).

Insofar as the opinion is critical of my earlier observations because they did not specifically treat jury consideration, the opinion is clearly correct. However, care must be taken in evaluating the weight to be given to the jury's determination when reviewing the exercise of a trial judge's discretion in ordering a new trial.

A trial by jury at common law had reference not just to twelve men deciding facts, but also encompassed, as an essential ingredient, a judicial officer to supervise the laymen. The presence of a trial judge with power to set aside a verdict was an essential part of the jury system. The United States Supreme Court has stated the concept as follows:

"Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion.[24]

---

[22] 65 Wash.Dec.2d at 277, 396 P.2d at 785.
[23] 65 Wash.Dec.2d at 278, 396 P.2d at 785.
[24] Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899).

Although the United States Supreme Court made the above statement in a case involving the meaning and application of the seventh amendment to the United States Constitution, which does not apply to the states, and the Washington position relating to commenting upon the evidence is much more restrictive of the trial judge than is true in the federal courts or at common law, the point to note is that the position of the jury in our judicial system historically encompassed a trial judge with much power in relation to the jury. Allowance of considerable discretion to a trial judge in determining the necessity for a new trial is not inconsistent with the doctrine of trial by jury. On the contrary, the trial judge's power to grant new trials has been declared to be inherent by the Washington court as well as others, and its exercise recognized as not being in derogation of the right of trial by jury, but as one of the historic safeguards of that right.[25]

In resolving the new trial problem, the court in the *Knecht* case placed considerable importance upon the jury's function because of the constitutional provision[26] and the decisional law[27] in this state which prohibit the trial judge from commenting upon the evidence. The constitutional provision is not directly in point, however. This provision means that a judge is forbidden to convey or indicate to a jury, by word or act, his personal opinion as to the truth or falsity of any evidence introduced at the trial.[28] The fear is that the judge's opinion will have great influence upon the jurors' decision. A grant of a new trial by a trial judge in no way conveys to a jury the judge's opinion. Such action by the judge does not directly impinge upon the constitutional provision.

The court's reference in the *Knecht* case to the constitutional provision probably did not have in mind the thought that there was a direct conflict, but rather that the provision was illustrative of the philosophy of both the constitution and the decisional law in Washington in protecting the jury's function. It is important to note, however, that in speaking of the right to trial by jury, the reference is to the jury as an institution and not to any particular jury composed of any particular twelve persons. Thus, it has been held that if one party is allowed more than the maximum number of peremptory challenges provided for by

---

[25] See Trautman, *supra* note 1, at 367-71.

[26] WASH. CONST. art IV, § 16. "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

[27] State v. Crotts, 22 Wash. 245, 251, 60 Pac. 403, 405 (1900). "There is no other constitution that we have been able to find that is as prohibitive of the action of the court in this respect as ours."

[28] State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949).

statute, the other party is not deprived of his right to a jury trial so long as the final jury is impartial.[29] No one has a right to have any particular jurors decide his case. Likewise, in granting a new trial, the judge is not taking away the right to a jury trial, so long as an impartial jury eventually decides the matter.

One might raise the question of whether this means that the trial judge should be allowed to grant multiple new trials for failure of substantial justice until he gets a verdict that satisfies him. Quite clearly, if errors of law occur, i.e., incorrect instructions, multiple trials are a possibility. The Washington court has also sustained the grant of multiple new trials to a party based on the ground of insufficiency of the evidence to sustain the verdict.[30] Likewise, it is possible that the trial judge might properly conclude that more than one new trial is required on substantial justice grounds. Of course, the fact that one new trial had already been granted might be considered by the supreme court in reviewing a second new trial order to determine whether there had been an abuse of discretion. The point is that the mere possibility of multiple new trials should not in itself preclude the granting of new trials on substantial justice grounds.

As Judge Finley states in the *Knecht* case, the jury's function must be considered along with the proper distribution of powers between the trial judge and the supreme court in resolving the new trial problem. On balance, it still seems to the author that in the event of doubt it is better to decide in favor of a trial judge's conclusion that there was a failure of substantial justice. It may very well be that the trial judge has committed error or has abused his discretion, but there will be a new trial with another opportunity for a jury to decide the matter and with the possibility of appellate review again if it is necessary. On the other hand, it may be that the trial judge has not abused his discretion and that one party has not had a fair trial. To deny a new trial perpetuates that error. In short, there is greater harm in erring on the side of denying a new trial than in granting a new trial. The following statement of the court in *Baxter v. Greyhound Corporation*[31] merits repeating:

> In approaching the issues thus raised, we start with the principle that, except where the order is predicated upon a ruling as to the law, an order granting or denying a new trial is not to be reversed unless it be

[29] Creech v. City of Aberdeen, 44 Wash. 72, 87 Pac. 44 (1906).
[30] McCobe v. Lindberg, 99 Wash. 430, 169 Pac. 841 (1918). *Cf.* Thomas & Co. v. Hillis, 70 Wash. 53, 126 Pac. 62 (1912).
[31] 397 P.2d 857, 867 (1964).

> for an abuse of discretion, and that a much stronger showing of an abuse of discretion will be required to set aside an order granting a new trial than one denying it. . . .
>
> The reason for the foregoing principle is quite patent. The granting of a new trial places the parties where they were before, while a denial of a new trial concludes their rights. The trial judge, by virtue of his favored position, should be accorded room for the exercise of sound discretion. He sees and hears the witnesses, the jurors, the parties, counsel, and any bystanders. He can evaluate first hand candor, sincerity, demeanor, intelligence, and any surrounding incidents; whereas, the reviewing court is tied to the written record.

Prior to 1951 too great a deference was paid to the trial judge. In the decade following 1951, the supreme court in several instances was too strict. Within the past two or three years, there is an indication of an attempt to reach a middle ground, with the trial judges stating their reasons in more detail and the supreme court showing a greater awareness of the difficulties confronting the trial judges in specifying their reasons.

There is still evidence of hesitancy by the supreme court to resolve doubts in favor of the trial judge, however. Thus, the final observation in the *Knecht* case must be particularly noted, namely, that the granting of new trials for lack of substantial justice should be relatively rare. It is said that this is especially true since Rule 59.04W gives eight other grounds for granting new trials, the implication being that such other grounds should usually suffice. The court did not mention that the ninth ground is intended to serve as a catch-all provision and that by its very nature it is often more difficult for the trial judge to assign specific reasons. Though the necessity for the use of Rule 59.04W(9) may be relatively rare, when the trial judge concludes that such an occasion is present, his judgment should be accorded considerable deference.

Perhaps a better conclusion is that the grant of new trials for lack of substantial justice without detailed reasons should be rare, if not completely absent. Seldom will non-record factors which cannot be articulated be controlling. If they are, counsel and the trial judges had best forget them and attempt to fit within one of the other eight grounds. Unless and until a new rule is adopted or a less strict construction of the present rule prevails, a reversal of the new trial order may be expected.