Motions Testing the Sufficiency of Evidence

Philip A. Trautman

University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Evidence Commons

Recommended Citation

Available at: https://digitalcommons.law.uw.edu/wlr/vol42/iss3/22

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
MOTIONS TESTING THE SUFFICIENCY OF EVIDENCE

PHILIP A. TRAUTMAN*

Professor Trautman, long a student of Washington's adjective law, analyses and compares the various motions a Washington attorney may invoke to challenge the sufficiency of an opponent's evidence during and after trial. In comparing the motion for new trial on evidentiary grounds and the motion for judgment n.o.v., he notes and deplores the recent decisions which have made the tests for the two motions identical. Prior to this change, the trial judge could weigh all the evidence and in his discretion grant a new trial if the evidence preponderated against the jury's verdict. Today, he may only determine whether, as a matter of law, there is substantial evidence to support the verdict. In effect, these decisions have eliminated one of the previously available methods for testing the sufficiency of an opponent's evidence without demonstrating any reason for doing so.

I. Introduction

Determining which of several potential motions to invoke to test the sufficiency of the opponent's evidence may present a perplexing procedural problem to younger counsel. The alternatives include a motion challenging the [legal] sufficiency of the evidence, motions for directed verdict, for nonsuit, for judgment, to dismiss, for judgment notwithstanding the verdict, for new trial on evidentiary grounds, and perhaps even a demurrer to the evidence. While the choice of a motion may present little difficulty to experienced trial practitioners, a more difficult problem may be formulated. In ruling on a motion for directed verdict made by defendant at the close of all the evidence, which of the following will the court look to: (a) only the evidence introduced by plaintiff?; (b) all the evidence whether introduced by plaintiff or defendant?; (c) all the evidence introduced by plaintiff and that evidence introduced by defendant which is favorable to plaintiff?; (d) only evidence favorable to plaintiff, whether introduced by plaintiff or defendant?; (e) some other alternative? These are examples of but a

few of the problems that arise in relation to motions testing the sufficiency of evidence.

The initial problem is what motion, or at least what terminology, to use. Confusion exists because of the multiplicity of names and forms found in the cases. The preferable terms for motions made during a trial are motion for directed verdict, motion for nonsuit, or motion challenging the sufficiency of the evidence. However, authority can be found supporting the use of such nebulous labels as a motion for judgment, or a motion to dismiss. There is even authority supporting a demurrer to the evidence.\(^1\) Apparently the language chosen is not critical. The cases on appeal suggest that the important consideration is the nature of the relief sought, not the label chosen. So long as counsel makes clear what he seeks and his grounds, little consequence is attached to what the motion is called.

This suggestion that the name of the motion is of little concern must be tempered with a few qualifications. By statute a distinction is drawn between a judgment of nonsuit and other judgments. A nonsuit may be rendered for the defendant when the plaintiff fails to prove facts necessary to sustain his action.\(^2\) Such a judgment does not bar another action for the same cause, whereas other judgments are on the merits.\(^3\) Thus, if the defendant at the close of the plaintiff's evidence or at the close of all the evidence, successfully challenges the legal sufficiency of the plaintiff's evidence, the judgment is a bar.\(^4\)

One may question why the defendant does not always challenge the

---


\(^2\) The United States Supreme Court has explained the difference between a demurrer to the evidence and a request for a directed verdict as follows: "if on such a demurrer properly joined in and allowed, judgment is not given for the demurrant, it is necessarily given for his opponent, while if a request for a directed verdict is denied, the party making the request may yet receive the jury's verdict and a judgment thereon. And when a judgment on the demurrer to the evidence is reversed because given for the wrong party, the error is corrected by ordering a judgment for the other party, whereas when a judgment is reversed for error in granting or refusing a request to direct a verdict, judgment is not ordered for either party, but a new trial is awarded." Slocum v. New York Life Ins. Co., 228 U.S. 364, 395 (1913). See also Galloway v. United States, 319 U.S. 372 (1943).

\(^3\) WAsh. Rev. Code §4.56.120(8) (1956).

\(^4\) WAsh. Rev. Code § 4.56.150 (1956). This statute applies only to jury cases.
sufficiency of the evidence, rather than move for a nonsuit. It must first be noted that even if the defendant makes a challenge, a judgment of nonsuit may be entered if the court decides that the plaintiff's case is insufficient merely for failure of proof of some material facts and there is reasonable ground to believe such proof can be supplied in a subsequent action. Further, the court may be more willing to grant a nonsuit than to allow a challenge for the reason that one is a bar and the other is not. As discussed below, the same test is applied to both motions, but it is broad enough to allow for this possibility. Clearly nothing of this sort is stated in the cases; however, insofar as there is truth in this suggestion, it might at times call for a motion for a nonsuit. This is even more clearly so if the statute of limitations on the claim will have run at the time of the dismissal so that for all practical purposes the nonsuit is on the merits. Where these considerations are not present, it would seem that a defendant should challenge the sufficiency of the evidence rather than move for a nonsuit, making clear that the judgment sought is on the merits and with prejudice.

A distinction must also be drawn between a directed verdict and a statutory challenge to the sufficiency of the evidence. Although there is no statute expressly allowing for a directed verdict, and only cursory reference to it is made in the rules of court, a mass of case authority supports its use. If a motion for directed verdict is granted, the jury will be instructed to return the appropriate verdict upon which a judgment will be entered. Granting a challenge to the sufficiency

---

Defendant's motion for judgment of dismissal upon the ground of "insufficiency of the evidence and that the plaintiff failed to establish certain material facts" is in effect a motion for judgment of nonsuit. Linton v. State, 185 Wash. 97, 52 P.2d 1239 (1936).

6 See Alberg v. Campbell Lumber Co., 60 Wash. 533, 111 Pac. 775 (1910), to the effect that plain recitals in a judgment of nonsuit cannot be controverted by a later showing that it was in fact on the merits.

7 There is presently before the supreme court a proposal by the state judicial council to adopt most of Federal Rules of Civil Procedure 41(b) and 50(a) and thereby supersede Wash. Rev. Code § 4.56.150 (1962). See Washington Proposed Civil Rules for Superior Court, 1964. Proposed rule 41(b) (3) relates to non-jury trials and proposed rule 50(a) to jury trials.


10 The jury must comply with the direction. See Trumbull v. School Dist. No. 7, 22 Wash. 631, 633, 61 Pac. 714, 715 (1900). The judgment is on the merits. In 1963 Federal Rule of Civil Procedure 50(a) was amended to add the following sentence: "The order of the court granting a motion for a directed verdict is effective without any assent of the jury." The reason given for the amendment was that the prior federal practice of requiring the jury to express assent to a verdict it had not reached by its own deliberations was deemed to serve no useful purpose
of the evidence, however, results in discharge of the jury and entry of judgment in accord with the decision. Ordinarily this distinction is of no particular consequence since the judgment rendered will be the same. While these two motions differ in terminology, they serve the same function in testing the opponent’s evidence and result in the same type of judgment on the merits. They are alternatives available to the movant at his election.

In one situation the election is not available. If the plaintiff should prevail as a matter of law on the issue of liability, but there is a factual issue as to damages, the proper motion is for a directed verdict on liability, leaving the damage issue for the jury. A challenge to the legal sufficiency of the evidence is technically improper as it calls for discharge of the jury. However, in this situation, a challenge might well be treated as a motion for a directed verdict.

Generally then, it does not matter what label is attached to these motions attacking the sufficiency of the evidence. However, to avoid unnecessary confusion it is best to use the term motion for nonsuit when referring to a request for judgment without prejudice and either a challenge to the legal sufficiency of the evidence or motion for a directed verdict when referring to a request for judgment with prejudice. In this article the problems posed and the discussion thereof, unless otherwise indicated, apply to all three regardless of the label attached. Following the discussion of these three trial motions, the two post-trial motions, for a judgment notwithstanding the verdict and for new trial on evidentiary grounds, will be examined separately, as they raise peculiar problems.

II. Trial Motions

A. Who May Obtain a Directed Verdict?

Ordinarily a motion for a directed verdict is made by the party not having the burden of proof (normally the defendant). Usually the defendant will introduce evidence contradicting that of the plaintiff,
or attack the credibility of plaintiff's witnesses, or there will be circumstances raising the possibility of a reasonable doubt about the plaintiff's case, so that the plaintiff will seldom be in a position to obtain a directed verdict. The question may be posed whether a directed verdict is even possible for the party with the burden of proof (usually the plaintiff). Three approaches have been taken in answering this question.\textsuperscript{2}

Under the first approach, the party with the burden of proof may never obtain a directed verdict, on the theory that there is always a credibility issue which must be resolved by the jury. Assume a case where the plaintiff has the burden of proof and the defendant introduces no contradictory evidence. The plaintiff's motion for a directed verdict would be denied because the jury may, and is entitled to, disbelieve all the evidence introduced by the plaintiff, whether the defendant has attacked the credibility of the plaintiff's witnesses or not. If the defendant, without the burden of proof, moves for a directed verdict, the evidence may be interpreted in favor of the plaintiff, and the question posed whether the plaintiff has made his case. If not, a directed verdict is proper. However, if the plaintiff is the moving party, it is improper to assume that he has made his case.\textsuperscript{3}

The second approach distinguishes between cases resting in whole or in part on oral testimony and those resting entirely on written evidence. Where there is oral evidence, the credibility issue is for the jury; where all the evidence is written, there is no such issue to be determined.

Under the third approach, a verdict may be directed in favor of the party with the burden of proof, irrespective of the character of the

\textsuperscript{2}See Sunderland, \textit{Directing a Verdict for the Party Having the Burden of Proof}, 11 Micn. L. Rev. 198 (1912), for citation and discussion of cases supporting all three approaches. See also Note, 30 Micn. L. Rev. 474 (1931).

\textsuperscript{3}Even under this strict approach, the result is not that the plaintiff cannot have a directed verdict, but rather that the party with the burden of proof cannot. If the defendant has the burden of proof, a directed verdict for the plaintiff is possible. Certainly this is so in Washington as illustrated by Shields v. Schorno, 51 Wn. 2d 737, 321 P.2d 905 (1958). Plaintiff sued on a promissory note. Defendant's answer admitted execution and delivery of the note to plaintiff as payee, but interposed affirmative defenses of fraud and lack of consideration. At the close of all the testimony, the trial court granted plaintiff's motion for directed verdict on the ground that, as a matter of law, defendant had not made a prima facie showing on the affirmative defenses. The supreme court affirmed.

Of course, the nature of the evidence must allow withdrawal of the defense as a matter of law. See Smith v. Keating, 52 Wn. 2d 391, 326 P.2d 60 (1958) (suit on a note; reversed trial court's withdrawal of defense of payment from jury and direction of verdict for plaintiff); Rolland v. Wittman, 28 Wn. 2d 367, 183 P.2d 175 (1947) (suit arising out of automobile collision in which defendant's negligence was admitted; reversed trial court's withdrawal of defense of contributory negligence from jury and direction of verdict for plaintiff).
evidence, on either of two theories. If there is no countervailing evidence, no conflict in the evidence given, and no impeachment of plaintiff's witnesses, the jury cannot be permitted to find for defendant because such a verdict would be based on caprice, conjecture or prejudice. Alternatively, defendant's failure to controvert the facts or attack the credibility of plaintiff's witnesses may be considered an implied admission of both.

Washington appears to take an approach falling somewhere between the second and third approaches. In *Clancy v. Reis*, the court sustained the grant of a directed verdict for the plaintiff where defendant failed to introduce any proof, indicating that the oral nature of the evidence was irrelevant. Although this case would seem to put Washington in the third category, a qualification was added by *Gibson v. Chicago, Milwaukee & Puget Sound Railway*.

In *Gibson*, both parties submitted evidence on the question of defendant's negligence. At the close of all the evidence, defendant's motion for a directed verdict was granted. On appeal, the supreme court treated the burden of proof as resting on defendant for purposes of determining whether the motion was properly granted. The court concluded that the motion should not have been granted because defendant's only evidence was that of an interested witness, stating that:

> When the burden of proving some disputed fact in a jury case rests upon a party, and such fact is sought to be proved by no other evidence than the testimony of a single interested witness, a trial court is not warranted in determining, as a matter of law, that such fact has been proven. This rule, we apprehend, is subject to few, if any, exceptions.

In *Ireland v. Scharpenberg*, another case involving interested testimony, a directed verdict for the plaintiff was reversed. The only evi-

---

14 5 Wash. 371, 31 Pac. 971 (1892).
15 See also Stevens v. Selvidge, 103 Wash. 683, 175 Pac. 294 (1918); Pacific Nat'l Bank v. Aetna Indem. Co., 33 Wash. 428, 74 Pac. 590 (1903); Green v. Tidball, 26 Wash. 338, 67 Pac. 84 (1901). In *Green*, the court affirmed grant of directed verdict for plaintiff where there was some conflict in the testimony of plaintiff's witnesses, but not as to a material point. The oral nature of the proof was not mentioned.
16 61 Wash. 639, 112 Pac. 919 (1911).
17 Instead of viewing the establishment of defendant's negligence as part of plaintiff's case, the court treated the establishment of no negligence as part of the defendant's case. At the present time the question would be stated differently: as a matter of law had plaintiff established a prima facie case?
19 54 Wash. 558, 103 Pac. 801 (1909).
dence on a critical point was given by the plaintiff and the credibility of his testimony was held to be for the jury. While there was no direct evidence contradicting the plaintiff, there were circumstances worthy of consideration by the jury calling for weighing the evidence. But what if the only evidence for the plaintiff is that of the plaintiff or an interested witness and there is in no way a contradiction of the facts or an attack upon credibility? Read literally, *Gibson* suggests that even there a directed verdict should be denied.

What conclusions may be drawn? Clearly a verdict may be directed for the party with the burden. This should be done only if his evidence is uncontradicted and there is no attack on credibility. If either is present, the matter should go to the jury. If the evidence is uncontradicted and no attack is made, a verdict may be directed for the reason that it is often unreasonable not to believe uncontradicted evidence, whether written or oral. Under the circumstances of a particular case, it may be as unreasonable not to believe uncontradicted testimony of interested witnesses as of other witnesses, if their credibility is not attacked. Contrary to the literal reading of *Gibson*, it is submitted that the fact of interested testimony should not be controlling. It is only one factor in determining whether a jury would be justified in not believing the uncontradicted evidence of the party with the burden of proof.20

**B. When to Request a Directed Verdict**

A motion for a directed verdict may be made either at the close of plaintiff's opening case or at the close of all the evidence. Since the motion is directed against the sufficiency of the opponent's evidence, it cannot properly be made before the plaintiff rests at the conclusion of his opening case.21 A challenge to the sufficiency of the pleadings is not

---

21 A motion made earlier should be denied. MacRae v. Fidelity & Deposit Co., 142 Wash. 565, 253 Pac. 785 (1927). If the plaintiff fails to appear at the time of trial or if he abandons the case before its conclusion, a nonsuit may be entered against the plaintiff. See Gnash v. Saari, 40 Wn. 2d 59, 240 P.2d 930 (1952). Such a dismissal is without prejudice. Wash. Rev. Code § 4.56.120 (1956).

There are times when counsel and the courts talk in terms of a directed verdict at an earlier stage of the proceedings. Counsel may request that a verdict be directed on the basis of what has been said in the opening statement of opposing counsel. Actually the proper motion under such circumstances is to withdraw the case from the jury and enter a judgment. But since the cases sometimes speak of it as a directed verdict, the occasion for its invocation should be noted.

A motion for judgment based on the opening statement by opposing counsel will be granted only when such statement shows affirmatively that there is no claim, or that there is a full and complete defense thereto, or when it is expressly admitted that the facts stated are the only facts which the party expects or intends to prove
a prerequisite to a motion for a directed verdict.\textsuperscript{22} Nor is a motion for a directed verdict at the close of plaintiff’s opening case a prerequisite to grant of a similar motion at the close of all the evidence.\textsuperscript{23}

Denial of an earlier motion for directed verdict likewise does not preclude granting a later one.\textsuperscript{24} Ordinarily, if the evidence is sufficient to carry the plaintiff past a nonsuit or a directed verdict at the close of his case, it will also prevent a directed verdict at the close of all the evidence. However, if a mistake was made in the first ruling, the court may correct it the second time the issue is presented. Furthermore, as a practical matter, the court, if at all in doubt, may allow the case to proceed the first time to see what develops when all the evidence is in.

If defendant’s first motion is denied, he is presented with the problem whether to proceed with his own case. If he does, he runs the risk of filling in the plaintiff’s case or of waiving any error in the court’s refusal to grant his motion. If he does not, the determination will be made without any direct evidence on his behalf. If the jury finds for plaintiff, and the supreme court on appeal finds there was no error in the denial of his motion, he is left with a determination made solely on the plaintiff’s evidence.

\textit{Alkire v. Myers Lumber Co.}\textsuperscript{25} presents an excellent example of the risk of filling in the plaintiff’s case. Under his complaint seeking damages for personal injuries resulting from the breaking of a cable, it was necessary for plaintiff to establish that defendant had not replaced the cable after plaintiff had informed it of the cable’s defective condition. At the close of plaintiff’s evidence, no change in the cable had been shown. Defendant’s motion for a nonsuit was denied. In presenting its case, defendant submitted evidence that a substitution had been made in the cable. On rebuttal, plaintiff introduced evidence showing that the replacement was made without his knowledge and they are insufficient. The fact that the statement is general and does not say enough to establish a claim does not justify the entry of a judgment thereon. Counsel need not make any opening statement at all, and thus the fact that the one he makes is informal and does not encompass all the elements he must prove is of no consequence. Redding v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 Pac. 308 (1905).

\textsuperscript{22} Nor does the fact that defendant has made such an attack, which has been waived or denied, preclude granting the motion for directed verdict. Lee v. Gorman Packing Corp., 154 Wash. 376, 282 Pac. 205 (1929); Crane Co. v. Aetna Indem. Co., 43 Wash. 516, 86 Pac. 849 (1906).

\textsuperscript{23} It is necessary, however, to move at some point in order to assign error, since a defect of this sort cannot be raised for the first time on appeal. See Agranoff v. Morton, 54 Wn. 2d 341, 340 P.2d 811 (1959). A motion for judgment notwithstanding the verdict, discussed infra, is another possibility for raising the question.

\textsuperscript{24} Toutle Logging Co. v. Hammond Lumber Co., 78 Wash. 568, 139 Pac. 625 (1914).

\textsuperscript{25} 57 Wash. 300, 106 Pac. 915 (1910).
that it was defective. At the close of all the evidence, defendant moved for a directed verdict which was denied.

The supreme court affirmed the denial of both motions, stating that defendant at the close of plaintiff's opening case, had the option to stand on its motion for nonsuit or to submit its own evidence. Having elected the latter, the case stood on all the evidence, not on the pleadings and plaintiff's evidence alone. Thus, insofar as defendant's evidence supplied a necessary element in plaintiff's case, it was considered. Whenever defendant goes ahead with his case after denial of a motion for nonsuit or directed verdict, he assumes the risk of supplying proof without which plaintiff could not recover.

Whether by proceeding with his case defendant waives any error in the first ruling, necessitating a second motion at the close of all the evidence, is a more difficult question. There are inconsistent lines of authority in Washington. However, the more recent cases find a waiver in this situation. Thus, to protect his record, the defendant should always make a second motion at the close of all the evidence.

The position of the earlier cases is well stated in a 1908 decision where the Washington Supreme Court said:

The rule of practice in this state is that, by proceeding with its evidence, the appellant waived its motion for a nonsuit. If, however, at the time the motion was interposed and denied, the proofs were insufficient to sustain a verdict for respondent, the appellant's waiver only went to the extent of allowing the respondent the benefit of any evidence thereafter introduced. If, on consideration of such additional evidence, it appears that the defects in respondent's case have not been cured, the motion without any renewal thereof may, on a proper assignment of error, be sustained and a nonsuit granted on appeal.

State v. Thomas exemplifies the more recent position of the court.

See also Olsen v. Peerless Laundry, 111 Wash. 660, 191 Pac. 756 (1920), in which the court denied defendant's motion for a nonsuit at the close of the plaintiff's case. The defendant presented his own evidence and then requested a directed verdict which also was denied. On appeal, defendant contended that no negligence on his part was shown. The supreme court pointed out that defendant's own testimony was sufficient to take the case to the jury on the question of negligence.

Dimuria v. Seattle Transfer Co., 50 Wash. 633, 634, 97 Pac. 657, 657 (1908) (Emphasis added.) Other cases support the view that defendant waives his motion for a nonsuit by proceeding with his defense only to the extent of allowing the plaintiff to benefit by any evidence introduced in defense or rebuttal. Fraser v. Home Tel & Tel. Co., 91 Wash. 253, 157 Pac. 692 (1916); Linck v. Matheson, 63 Wash. 593, 116 Pac. 282 (1911); Matson v. Port Townsend So. R.R., 9 Wash. 449, 37 Pac. 703 (1894).

52 Wn. 2d 255, 324 P.2d 821 (1958). Other cases in this line of authority include Guyton v. Temple Motors, Inc., 58 Wn. 2d 828, 365 P.2d 14 (1961); Fossum v. Tim-
Defendant proceeded to introduce testimony on his own behalf after
denial of his motion to dismiss at the close of plaintiff's case. Although
he presented another challenge to the sufficiency of the evidence at the
close of all the evidence, he did not assign error to its denial. The
court held that in criminal cases, as in civil cases, defendant waives his
challenge to the sufficiency of the evidence made at the close of plain-
tiff's case if he proceeds with his own case after the motion has been
denied. The same rule has been applied where the court fails to rule or
reserves its ruling and the defendant thereafter submits his evidence.

Thus, to protect his record, the defendant should always make a
second motion for directed verdict at the close of all the evidence,
recognizing that the court will consider any defects in the plaintiff's
proof remedied by defendant's evidence or the plaintiff's rebuttal.
The defendant does not waive any error in the ruling on his second
motion by participating in the consideration of instructions or in mak-
ing a closing argument. He has done everything necessary to assign
error.

As a practical matter, the defendant's motion for a directed verdict
at the close of plaintiff's case is usually denied. An excellent example
is Sellenberger v. Zeman, in which the defendant's motion for an
involuntary nonsuit was denied. Thereupon, defendant rested without
presenting any evidence and again challenged the sufficiency of the
evidence to warrant recovery by the plaintiff. Despite the fact that both
motions were directed at the same evidence and raised the same ques-
tion, the second was granted.

However, if the judge still harbors any doubt at the close of all the
evidence, a motion at that time will also be denied with the thought
that it is better to go to the jury. If the jury reaches the result the
court thinks correct, the matter is resolved. If not, the judge may cor-
rect the error by granting a judgment notwithstanding the verdict.
This procedure is also desirable on appeal since if a verdict has been
entered, the supreme court can enter a judgment on the verdict if it
reverses the grant of a judgment n.o.v. If, however, the trial judge has
granted a directed verdict, a new trial is necessary.

Although usually denied, a motion for directed verdict at the close of
plaintiff's case may be advisable. The earlier the litigation is ter-

31 48 Wn. 2d 885, 297 P.2d 247 (1956).

32 See 2 ORMANN, WASHINGTON PRACTICE §§282-83 (2d ed. 1965).
minated the better. If the motion is granted, the possibility of filling holes in the plaintiff's case is avoided. Finally, the motion calls the judge's attention to possible defects which can be pressed again later. Of course the plaintiff will also be informed of his defects and will seek to overcome them in cross-examining defendant's witnesses or by rebuttal. Alternatively, he may seek a voluntary nonsuit, which not being on the merits will allow him to institute a new action later.

C. Test Applied

In challenging the sufficiency of the opponent's evidence, the moving party, for the purpose of the motion, admits the truth of the opponent's evidence and all reasonable inferences arising therefrom. Interpreting the evidence most favorably to the opponent, the court, without exercising any discretion, is to determine as a matter of law whether there is sufficient evidence to take the case to the jury. Difficult problems arise in determining how much evidence the opponent must have produced and which evidence will be considered.

In determining how much evidence must have been produced, one approach is that if there is any evidence to support the essential elements of the opponent's case, the matter must go to the jury. A scintilla of evidence will defeat the motion. There are Washington cases, some very recent, in which loose language by the court suggests an

---

22 A motion for directed verdict, whenever made, should specifically state the grounds and reasons for the relief requested. While a general statement that the evidence is insufficient to support a verdict may at times be enough to convince the trial judge to grant a motion, his failure to do so under such conditions will not constitute reversible error. It is necessary to point out with particularity the defects in the opponent's case. Otherwise, there is a failure to lay an adequate foundation for review. Allen v. Blyth, 173 Wash. 409, 23 P.2d 567 (1933). Compare Fick v. Jones, 185 Wash. 365, 55 P.2d 334 (1936).

23 Since the plaintiff will have rested at the close of his case, he would not be entitled to a nonsuit as a matter of right, but it might be granted in the trial court's discretion. WASH. R. PLEAD., PRAC., PROC. 41.08W.

24 Unlike a demurrer to the evidence at common law, a motion for a directed verdict does not constitute a waiver of right to a jury trial. The admission of the truth of the opponent's evidence is solely for the purpose of getting a ruling on the motion. There is no waiver even if all parties move for directed verdicts. WASH. R. PLEAD., PRAC., PROC. 50.

25 In ruling on the challenge, the court's attention will be directed to what is contained in the evidence, not in the pleadings. Meyers v. Syndicate Heat & Power Co., 47 Wash. 48, 91 Pac. 549 (1907).


27 The same approach is followed regardless of which party makes the motion. Smith v. Keating, 52 Wn. 2d 391, 326 P.2d 60 (1958).

28 For resolution of these problems throughout the country, see Cavitch, Federal Courts—Directed Verdicts in Civil Actions, 47 MICH. L. REV. 974 (1949).

Since the trial court granted a motion for a directed verdict \ldots and a motion for dismissal of the principal action and cross complaint \ldots we must view the evidence most strongly against the moving parties. It is only when the court can say that there is \textit{no evidence at all} to support the party opposing the motion that such a motion can be granted. (Emphasis added.)

Read literally, such a statement means that if any evidence is produced, the motion must be denied.

However, when actually confronted with the issue, the court has repudiated the scintilla rule in clear terms, substituting the requirement that to be sufficient, the evidence must be "substantial."\footnote{Knight v. Trogdon Truck Co., 191 Wash. 646, 71 P.2d 1003 (1937); McCowan v. Northeastern Siberian Co., 41 Wash. 675, 84 Pac. 614 (1906).} Substantial evidence is that which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed,\footnote{Artburs v. National Postal Transp. Ass'n, 49 Wn. 2d 570, 304 P.2d 685 (1956).} or that which will convince reasonable men. Direct evidence is not necessary; circumstantial evidence may be sufficient.\footnote{Nelson v. West Coast Dairy Co., 5 Wn. 2d 284, 105 P.2d 76 (1940); Thomson v. Virginia Mason Hosp., 152 Wash. 297, 277 Pac. 691 (1929).} Neither is it necessary that the opponent's evidence compel a verdict in his behalf; it need only be such as reasonably to justify a verdict in his favor.\footnote{Gentry v. Greyhound Corp., 46 Wn. 2d 631, 283 P.2d 979 (1955).} This test places a greater burden on the non-moving party, allowing the court to grant directed verdicts more often than does the scintilla rule. Clearly something may constitute a scintilla of evidence without being sufficient to convince a reasonable man.\footnote{See Shellenberger v. Zeman, 48 Wn. 2d 885, 297 P.2d 247 (1956).}

In determining what evidence will be considered in ruling on a motion for a directed verdict, two approaches have been used. The court may consider only that evidence favorable to plaintiff, using what is designated the "reasonable man" or "reasonable inference" rule; or the court may consider all the evidence introduced, using the "new trial" test.

Under the new trial test, the question for decision is whether, looking at all the evidence, there would be a duty to set aside a contrary verdict as against the weight of the evidence. This does not allow the judge to direct a verdict simply because he would grant a new trial on the ground a contrary verdict was against the weight of the evidence;
only when there would be a duty to do so may a verdict be directed.\(^\text{46}\)
The new trial test places a greater burden on the non-moving party because a reasonable man might be able to find for the non-movant considering only part of the evidence, but could not if all the evidence was considered, even in the light most favorable to the non-movant.

The weight of Washington authority seems to favor application of the reasonable man test. There is authority that a motion challenging the sufficiency of plaintiff's evidence, whether made at the close of plaintiff's opening case, or at the close of all the testimony, is to be considered solely in light of the plaintiff's evidence.\(^\text{47}\) There is also authority that the court will consider evidence favorable to plaintiff whether introduced by plaintiff or defendant,\(^\text{48}\) and that it will ignore evidence unfavorable to plaintiff.\(^\text{49}\) Even if the plaintiff's evidence is in part unfavorable, he is entitled to go to the jury if the favorable evidence is substantial.\(^\text{50}\) Of course, if the only evidence on an essential point is unfavorable, a directed verdict is proper.\(^\text{51}\) All of this supports the reasonable man test.

\(^{46}\) In \textit{Weir v. Seattle Elec. Co.}, 41 Wash. 657, 84 Pac. 597 (1906), a verdict was directed for the defendant at the close of all the evidence. The plaintiff appealed and the defendant sought to sustain the directed verdict on the ground that the preponderance of the testimony was so strong in its favor that it would have been the duty of the court to set aside a verdict in favor of the plaintiff and therefore the court was justified in directing a verdict in the first instance. The supreme court seemed to misconstrue the defendant's argument, stating, \textit{id.} at 661-62, 84 Pac. at 598:

\textit{Doubtless, in some jurisdictions the rule prevails that if the court would set aside a verdict in favor of one of the parties as against the evidence, it may direct a verdict or judgment in favor of the adverse party, but that rule does not obtain in this state. We have uniformly held that the granting of a new trial rests in the discretion of the trial court, and if we concede to the trial courts the same power or discretion in directing judgments, the right of trial by jury will be practically abrogated.}

The court thus changed the defendant's argument from one which said that a verdict could be directed, if there was a duty to grant a new trial, to one which said a verdict could be directed, if there was discretion to grant a new trial. Obviously the latter argument should not prevail. If a new trial is granted, another jury will hear the case, but if a directed verdict is granted, no jury decision will be had. Different tests should apply.

See also \textit{Odalovich v. Weir}, 132 Wash. 57, 231 Pac. 170 (1924); \textit{Morris v. Warwick}, 42 Wash. 480, 85 Pac. 42 (1906).


\(^{48}\) \textit{Wold v. Jones}, 60 Wn. 2d 327, 373 P.2d 805 (1962) (the court considered "all the evidence in attempting to find that favorable to plaintiff"); see cases cited notes 25-27 supra, in which defendant filled in essential parts of the plaintiff's case.

\(^{49}\) See \textit{Arnold v. Sanstol}, 43 Wn. 2d 94, 260 P.2d 327 (1953), where, in ruling on motion for judgment n.o.v., made by defendant, the court disregarded the testimony of the only witness producing direct testimony since it was unfavorable to plaintiff. The plaintiff's circumstantial evidence was held insufficient to justify a verdict in her behalf.


\(^{51}\) \textit{Jamieson v. Taylor}, 1 Wn. 2d 217, 95 P.2d 791 (1939); \textit{Hair v. Old Nat'l Ins.}
However, there are suggestions in two cases which indicate that the possibility of applying the new trial test cannot be completely discounted in Washington. In *Weir v. Seattle Elec. Co.* the court stated:

Cases may arise in which a plaintiff’s prima facie case is so fully explained and controverted as to leave no substantial conflict in the testimony, but ordinarily testimony which is sufficient to carry a case beyond a nonsuit will carry it to the jury at the close of the testimony.

A similar point is made in *Hill v. Parker,* where the court stated the usual rule that the evidence would be considered in the light most favorable to the plaintiff and that, if, in some respects, it was unfavorable, plaintiff was not bound by it. However, the court added this qualification: “at least in so far as it does not, in some fundamental way, absolutely negative her right of recovery.” These cases thus suggest that situations might arise in which it would be proper to consider all the evidence and direct a verdict, whereas if only part of the evidence was considered, a directed verdict would not stand.

The basic rule is that upon a motion for a directed verdict, the evidence and all reasonable inferences therefrom are to be considered in the light most favorable to the non-movant. A problem arises if the evidence is such that reasonable inferences can be drawn either way. Is that sufficient to get the plaintiff past the defendant’s motion and to the jury? Or must the reasonable inferences for the plaintiff be more probable than those for the defendant?

In *Gardner v. Seymour,* a wrongful death action, defendant’s employee was found at the bottom of an elevator shaft. No evidence was

---

*Footnotes:


41 Wash. 657, 662, 84 Pac. 597, 598 (1906).

12 Wn. 2d 517, 122 P.2d 476 (1942). The court stated that “a challenge to the sufficiency of the evidence should be made either at the close of the plaintiff’s case or after all the evidence has been presented, including any rebuttal which the plaintiff may have introduced.” The court’s emphasis on “all” can be interpreted to mean that if all the evidence is in, it should be considered. However, defendant had been permitted to introduce part of his case during plaintiff’s opening case. The court reasoned that the defendant’s motion at the close of the plaintiff’s case was directed at the plaintiff’s evidence only and that the defendant should not be entitled to support his motion with some of his own case which the trial judge had permitted to be introduced out of order. The italicized word “all” can as easily be interpreted as deriving from the court’s concern with the proper order of presentation of evidence (a party’s right to present his own case in the order of his own choosing) as from an affirmation of the new trial test.

It is proper for the trial court to view the premises while deliberating on whether to grant the motion. Aldredge v. Oregon-Washington R.R. & Nav. Co., 79 Wash. 349, 140 Pac. 550 (1914). Although the case suggests that what is seen during the view may be considered evidence, today it is more appropriate to treat what is seen as an aid to understanding the evidence produced in court. Cole v. McGhie, 59 Wn. 2d 436, 361 P.2d 938 (1961).

27 Wn. 2d 802, 180 P.2d 564 (1947).
introduced to explain why he had fallen. Two inferences could have been drawn: that he stepped through already open doors because there was not adequate safety equipment; or that he forced the doors open. The supreme court reversed a judgment entered on a verdict for plaintiff, holding that defendant's motion challenging the sufficiency of the evidence should have been granted. Since neither inference was more probable than the other, the verdict was merely the result of guess or conjecture. 66

In Lambert v. Smith, 57 plaintiff sought damages for personal injuries sustained in an automobile accident in which she was a passenger in a car driven by the defendant, who allegedly was intoxicated. The plaintiff testified that she had been unable to leave the car after she learned that defendant was going to drive. An apparently hostile witness called by the plaintiff testified that the driver stopped the car on an army camp road, after dark, and offered to let the plaintiff out. This was not denied by the plaintiff. The trial court granted a nonsuit at the close of plaintiff's evidence on the ground that she was contributorily negligent as a matter of law in having failed to get out of the car. Reversing, the supreme court stated that "the jury would have been entitled to infer that the appellant then had no opportunity to escape, and, in fact, was a captive." 3 The court further stated that "Even where the evidence is without conflict, if reasonable people can draw different inferences the case is for the jury and not for the court, and it is only when the facts are such that all men must reach the same conclusion that the question is one of law for the court." 39

Is Lambert inconsistent with Gardner in precluding a directed verdict if there are different reasonable inferences even though one is no

---

66 In Arnold v. Sanstol, 43 Wn. 2d 94, 99, 260 P.2d 327, 329-30 (1953), the rule implicit in Gardner was stated as follows:

Such evidence [substantial evidence] may be direct or circumstantial. When reliance is placed upon the latter type of evidence, there must be reasonable inferences to establish the fact to be proved. No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, without further showing that reasonably it could not have happened in any other way. The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability upon him, a jury will not be permitted to conjecture how the accident occurred.

57 54 Wn. 2d 348, 340 P.2d 774 (1959).

58 Id. at 352, 340 P.2d at 777. The court also stated, id. at 350, 340 P.2d at 775, that "the fair inference from the appellant's testimony is that she then had no opportunity to escape."

59 Id. at 353, 340 P.2d at 777.
more probable than the other? In Lambert, there was direct contradictory testimony as to whether the plaintiff had an opportunity to get out of the car. In speaking of different inferences, the court referred to the fact that the jury could believe or disbelieve either or both witnesses. In a case of this sort, it is for the jury to determine the credibility of the witnesses and a directed verdict should not be entered. On the other hand, in Gardner there was no direct testimony as to why the decedent had fallen into the elevator shaft. The plaintiff's case depended solely on circumstantial evidence. Although inferences could be drawn either way, neither was more probable than the other; any result by the jury would have been based on conjecture. In such a situation the jury will not be permitted to guess; rather a verdict will be directed for the defendant.

D. Challenging the Evidence in Nonjury Cases

In ruling on a challenge to the sufficiency of the evidence by the defendant at the close of the plaintiff's evidence in a jury case, the trial court may not exercise discretion but must determine as a matter of law whether there is sufficient evidence to go to the jury. In ruling on a similar motion in a nonjury case, the trial court has an option: it may treat the plaintiff's evidence as true and rule as a matter of law as in a jury case; or it may rule as a matter of fact after weighing the evidence. Under the second approach, the trial court may grant the motion if, after weighing the evidence, it concludes either that the evidence supporting plaintiff's case is not credible, or that plaintiff's credible evidence establishes facts that prevent him from recovering. Since the court decides as a matter of fact, findings are necessary.

An example of the possible difference in approach as between a jury and a nonjury case is Totem Equip. Co. v. Critchfield Logging Co. The trial court dismissed the defendant's counterclaim. On appeal the defendant contended that it had established a prima facie case of breach of warranty and negligence at the close of its case and therefore the counterclaim should not have been dismissed. It was noted that if the trial judge had granted a dismissal in a jury case after a

---

62 No findings are necessary. Likewise, no findings are required in a jury case when a trial judge grants the defendant's motion challenging the sufficiency of the plaintiff's evidence. Bidlake v. Youell, Inc., 51 Wn. 2d 59, 315 P.2d 644 (1957).
64 62 Wn. 2d 175, 381 P.2d 738 (1963).
prima facie case had been established, a reversal would have been directed with a remand for retrial on the issues raised by the counterclaim. However, a prima facie showing meant nothing in a case tried to the court where the trial court had weighed the evidence and found that the counterclaim was not established. Since the trial judge had decided the case from a factual standpoint, the supreme court's review was limited to ascertaining whether there was substantial evidence to support the findings.65

A difficulty in the nonjury case is often that of determining whether the trial judge has ruled as a matter of law or of fact. Jacobs v. Brock,66 a 5-4 decision in 1965, illustrates this and other problems. At the close of the plaintiff's evidence, the trial court granted the defendant's motion to dismiss. The majority on appeal examined the trial court's oral opinion and concluded that rather than weighing the evidence, the lower court had treated the plaintiff's evidence as true and found it insufficient to establish a prima facie case. The majority found it was sufficient and reversed.

Four judges dissented. First, they felt that the trial court had


66 If a trial judge decides a case on a factual basis he must make findings of fact. Wash. R. Plead., Prac., Proc. 52.04W and 52.08W (second paragraph). From 1893 to 1951 there was a de novo review by the supreme court of the evidence in nonjury cases. The supreme court independently determined the facts when the evidence had been preserved in the record and the trial court's findings had been properly excepted to. See the discussion by Judge Foster in his dissenting opinion in Crofton v. Lawngreen, 53 Wn. 2d 243, 332 P.2d 1081 (1958). In the 1950's the supreme court adopted the test of asking whether the evidence preponderated against the findings. Johnson v. Harvey, 44 Wn. 2d 455, 268 P.2d 662 (1954). In the 1960's the court has applied a substantial evidence test. Hughes v. Stusser, 68 Wash. Dec. 2d 701, 415 P.2d 89 (1966); Hewitt v. Spokane, P. & S. Ry., 66 Wn. 2d 285, 402 P.2d 334 (1965); Ocean View Land, Inc. v. Wineberg, 65 Wn. 2d 952, 400 P.2d 319 (1965); Rice v. Johnson, 62 Wn. 2d 591, 384 P.2d 383 (1963). Thus, over a period of years the supreme court has lessened its review and, concurrently, increased the power of the trial judge. Obviously findings will be allowed to stand more often under a preponderance of the evidence test than under a de novo review. Likewise, findings will be allowed to stand even more often under a substantial evidence test. Under one test, the supreme court inquired whether the evidence preponderated against the findings. Under the other, it asks whether a reasonable man could have reached the result of the trial judge. A reasonable man, the trial judge, might well conclude that something is true even though another reasonable man, a supreme court judge, believes the evidence preponderates the other way.

In reviewing the grant or denial of a motion challenging the sufficiency of the evidence in a jury case, the supreme court likewise has applied a substantial evidence test. Allen v. Fish, 64 Wn. 2d 665, 393 P.2d 621 (1964).

The question posed by all this is whether the substantial evidence test applied by the supreme court in the stated instances is the same as the substantial evidence test applied by the trial court in ruling on a motion for a directed verdict in a jury case or in deciding a case as a matter of law upon a motion to dismiss on evidentiary grounds in a nonjury case. The opinions give no indication of any difference in meaning.

weighed the plaintiff's evidence,7 and thus the test on review should be that of determining whether there was substantial evidence to support the trial judge's findings rather than whether the plaintiff had made a prima facie case. Secondly, even assuming that the trial court had accepted the plaintiff's evidence as true, the test would be whether there was substantial evidence to support the plaintiff's case. The dissent felt there was not and that the majority had applied too lenient a test in favor of the plaintiff and in overturning the findings of the trial court. The dissent concluded there was not even a scintilla of evidence to support the plaintiff, let alone substantial evidence.

There were findings of fact by the trial court which suggest a weighing of the evidence as contended by the dissent. Why make findings if the case is being decided as a matter of law? On the other hand, findings might be made by the trial judge even if he then decides to rule as a matter of law, in which case such findings should be ignored on appeal. Evidently this is what the majority thought had happened.

Conceivably, the majority might have reached the same result even if it had concluded that the trial court had weighed the evidence. The majority might have found that there was not substantial evidence to support the trial court's findings. Upon the record as discussed by the dissent, however, it would appear difficult to reach that conclusion. This poses an interesting problem of what might happen if on the new trial the trial judge definitely weighed the evidence and reached the same result. Would the majority reverse on the basis of there not being substantial evidence to support the findings for the defendant? This appears doubtful in view of the dissent's conclusion that there was not even a scintilla of evidence to support the plaintiff. Thus, on the merits, the position of the dissent probably eventually prevailed.

The case well illustrates the problems which confront the supreme court in reviewing dismissals made on evidentiary grounds. The tests are nebulous at best. The task is made doubly difficult in nonjury cases when the trial judge does not clearly indicate the basis for his ruling. Thus in the Jacobs case, five supreme court judges decided the dismissal was made on a legal basis and reviewed accordingly, while

---

7 There is some ambiguity in the dissenting opinion on this point. The dissent first says, "When the trial court's findings are read in the light of its oral opinion, it is clear to me that the court weighed the plaintiffs' evidence and drew all favorable inferences therefrom." This indicates a belief that the trial court ruled as a factual matter. Immediately thereafter, the dissent states, "The court sustained defendant's challenge to the sufficiency thereof to make out a prima facie case ...." which suggests a ruling as a matter of law. 66 Wn. 2d at 889, 406 P.2d at 23.
the other four judges treated the dismissal as a factual one and applied a different test. Even applying the same test as the majority, the dissent would have reached a different result. In a jury case the supreme court's problem would have been partially lessened in that the review would have been that of determining whether the dismissal was correct as a matter of law since the trial judge would have had no power to decide the case on a factual basis upon the defendant's motion to dismiss at the close of the plaintiff's case.

III. POST-TRIAL MOTIONS

A. Judgments Notwithstanding the Verdict

Two other means of attacking the sufficiency of the opponent's evidence remain to be considered, a motion for a judgment notwithstanding the verdict and for a new trial. At common law the former of these motions was available only to the plaintiff and then only as a means of claiming judgment on the basis of the jurisdictional papers and the pleadings. The motion could not be used to attack the sufficiency of the evidence.8 The defendant's counterpart was a motion to arrest the judgment.9 These common law motions have been considerably changed in Washington.

A motion for judgment n.o.v. is now the common method of raising the issue of the sufficiency of the evidence after a verdict has been rendered. The test is the same as that in a motion for a directed verdict. The evidence must be viewed in the light most favorable to the party against whom the motion is made, and all material evidence favorable to the contention of the party benefited by the verdict must be taken as true. Viewing the evidence in that light, the trial judge may not exercise discretion, but must determine as a matter of law whether there is substantial evidence to support the verdict.70 The whole record will be looked to for the purpose of finding evidence to support the verdict. If indispensable testimony is, in effect, retracted or completely negated by inconsistencies and contradictions in the testimony of a witness, that fact should be considered in ruling upon the motion. There is to be no weighing of the evidence on each side.71

The person who has received the verdict is entitled to the benefit of all inferences that can reasonably be drawn from the direct evidence

---

8 Joiner, Trials and Appeals 474-75 (1957).
presented. It is for the jury to resolve the conflict in the inferences.\textsuperscript{72} However, this does not allow the jury to speculate in the event of circumstantial evidence. Such evidence is sufficient if it affords a basis to conclude that there is a greater probability that an occurrence happened in one way than in another.\textsuperscript{73} Where there is nothing more substantial to proceed upon than two or more conjectural theories, the jury will not be allowed to guess; rather a judgment n.o.v. will be entered.\textsuperscript{74}

A second change from the common law is that a motion in arrest of judgment is no longer used in civil proceedings, but is restricted to criminal actions.\textsuperscript{75} Thus, whereas only a plaintiff could seek a judgment n.o.v. at common law, either party may now make the motion.\textsuperscript{76} The court has at times stated an exception that a judgment n.o.v. cannot be entered for the plaintiff when he is seeking unliquidated damages.\textsuperscript{77} The idea in such cases is that, even though the defendant may be liable as a matter of law, the jury must still determine the damages. The proper order in such circumstances is not a judgment n.o.v., but rather an order for a new trial limited to damages. Conceivably a situation might arise where even though damages are unliquidated, the

\textsuperscript{72} Smith v. Leber, 34 Wn. 2d 611, 209 P.2d 287 (1949).

\textsuperscript{73} Grange v. Finlay, 58 Wn. 2d 528, 364 P.2d 234 (1961). In an action by the owners of a boat moorage for damages resulting from a fire which originated on the defendant's boat, the only explanation offered as to how the fire started was that it resulted from the defendant's failure to extinguish completely an earlier fire. The trial court erred in granting a judgment n.o.v. for the defendant since the jury had not been asked to choose between two conjectural theories, but was offered one reasonable and probable expansion with no substantial alternative suggested.

\textsuperscript{74} Conie v. Local 1849 United Bhd. of Carpenters, 51 Wn. 2d 108, 316 P.2d 473 (1957). In ruling on a motion for judgment n.o.v. in an action where it is sought to establish a conspiracy by circumstantial evidence, the test of the sufficiency of the evidence is that the facts and circumstances relied upon to establish the conspiracy must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy.

Arnold v. Sanstol, 43 Wn. 2d 94, 260 P.2d 327 (1953). A judgment n.o.v. should have been entered for the defendant where the plaintiff relied upon circumstantial evidence to establish that the defendant crossed the center line of a highway and it could not be said that that was the only conclusion that could fairly and reasonably be drawn.

\textsuperscript{75} See Wash. R. Plead., Prac., Proc. 101.04W(3), (4), 101.08W. The same test is applied to a motion in arrest of judgment on evidentiary grounds as to a motion for judgment n.o.v. in civil proceedings. State v. Reynolds, 51 Wn. 2d 830, 322 P.2d 356 (1958).

\textsuperscript{76} The same is true of a motion challenging the sufficiency of the evidence at the close of the state's case in a criminal action. The trial judge does not have to be satisfied that the evidence establishes the guilt of the defendant beyond a reasonable doubt. That is for the jury to decide. The judge need only be satisfied that there is substantial evidence to support the state's case. If there is, the motion must be denied. State v. Cranmer, 30 Wn. 2d 576, 192 P.2d 331 (1948).

\textsuperscript{77} Bobst v. Hardisty, 199 Wash. 304, 91 P.2d 567 (1939).

\textsuperscript{78} Weih v. Watson, 32 Wn. 2d 625, 203 P.2d 350 (1949); Richey & Gilbert Co. v. Northwestern Natural Gas Corp., 16 Wn. 2d 631, 134 P.2d 444 (1943).
evidence would be such as to require a finding for the plaintiff for a specific amount as a matter of law. Generally this is not so, however, and the plaintiff, if seeking damages, should get a judgment n.o.v. only if the damages are liquidated. It was noted in conjunction with a motion for a directed verdict that there is no waiver of the right to jury trial even if both parties join in the motion. While there is no rule of court in point with respect to judgments n.o.v., the same result has been reached.

By statute in Washington a motion for judgment n.o.v. must be made within two days after return of the verdict. The statutory two-day period has been held mandatory, even in an instance where both parties stipulated to its extension. Although in a few recent cases the supreme court has recognized the possibility of extending the comparable two-day period for making a motion for a new trial if "good cause" is shown, no such extension has yet been approved for a motion for a judgment n.o.v. However, since the conditions justifying greater time to request a new trial might also apply to a judgment n.o.v., the establishment of "good cause" should have like effect upon both. Because of the hardship created by the present two-day limit, the state judicial council has proposed a new rule of court whereby the motion could be made not later than ten days after the entry of judgment. This would considerably extend the time without any affirmative requirement of establishing cause.

The fact that an earlier motion for a nonsuit, or a directed verdict, or both, were made and then waived, or denied, does not preclude the later grant of a motion for a judgment n.o.v. As noted above, it is not uncommon for the trial judge to deny the former motions and

---

73 Sunset Oil Co. v. Vertner, 34 Wn. 2d 268, 208 P.2d 906 (1949).
75 Hinz v. Crown Willamette Paper Co., 175 Wash. 315, 27 P.2d 576 (1933). A motion for a new trial was timely filed within the two day period. Later the parties stipulated that the motion might be amended to include a request for judgment n.o.v. This was not allowed.
77 Washington Proposed Civil Rules for Superior Court 1964, Rule 50(b).
79 Beck v. International Harvester Co. of America, 85 Wash. 413, 148 Pac. 35 (1915); Paich v. Northern Pac. Ry., 82 Wash. 581, 144 Pac. 919 (1914). However, where a nonsuit was reversed on appeal because the evidence made out a prima facie case for the jury, it was error on the retrial, after refusing a nonsuit because the evidence was substantially the same as on the former trial, for the trial court to grant a judgment for the defendant notwithstanding a verdict for the plaintiffs. The trial judge was limited to granting a new trial. O'Conner v. Force, 58 Wash. 215, 108 Pac. 454, 109 Pac. 1014 (1910).
then grant the later one. This allows for a jury determination on the matter which may remove the necessity for the motion. Even if not, the fact that a jury verdict has been rendered is desirable in that if on appeal the supreme court decides that the judgment n.o.v. was wrong, it can allow the verdict to stand without remanding for a new trial.

A potentially more difficult problem is whether a motion for a directed verdict, or some other challenge to the sufficiency of the evidence, is a prerequisite to a motion for a judgment n.o.v. In the federal courts one may not make a motion for a judgment n.o.v. without having first moved for a directed verdict. This results from the fact that at common law a motion for a judgment n.o.v. went to the pleadings, not the evidence. The evidence could not initially be attacked after the verdict was rendered. The right to trial by jury in the federal courts, guaranteed by the seventh amendment to the United States Constitution, has been held to require the same result, namely, an original motion asking for a judgment on the evidence contrary to the verdict is not allowed. However, there was a practice at common law of reserving a ruling on a motion attacking the evidence before the verdict, and taking the verdict subject to a later ruling on the question reserved. This has been implemented by a federal rule of procedure in that, whenever a motion for a directed verdict is made at the close of all the evidence and is denied or for any reason not granted, the court is deemed to have submitted the action to the jury, subject to a later determination of the question raised by the motion. The party whose motion for a directed verdict was denied, may within ten days after the entry of judgment, move to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for a directed verdict. In short, a motion for a directed verdict is a prerequisite to a motion for a judgment n.o.v. in the federal courts.

In Washington a contrary result has been reached, permissible because the seventh amendment's guarantee of the right to jury trial is not applicable to the states. A party is not precluded from moving for judgment n.o.v. because he did not make a motion for a nonsuit, a motion for a directed verdict, or a challenge to the sufficiency of the evidence. It is to be noted that the proposed rule recommended to the supreme court by the state judicial council does not adopt that part

---

68 Kieburtz v. Seattle, 84 Wash. 196, 146 Pac. 400 (1915).
of the federal rule making a directed verdict motion a prerequisite. Rather the proposed rule allows for a motion for a judgment n.o.v. whether or not the party has previously moved for a directed verdict. Thus the proposed Washington rule adopts the desirable feature of the federal rule, extending the time for making the motion, while retaining the desirable feature of the present state practice, permitting an original motion.

B. New Trial on Evidentiary Grounds

The principal problem presented by a motion for a new trial on the ground of inadequate evidence to support the verdict is to determine the test to be applied. At one time it was clear that the test was different from that used in the prior motions that have been discussed. As has been noted, if a motion is made for a nonsuit, a directed verdict or a judgment n.o.v., the trial judge cannot weigh the evidence. He must rule as a matter of law whether there is substantial evidence to support the party opposing the motion. With a motion for a new trial, however, it was clear for many years that the trial judge could weigh all the evidence, regardless of who introduced it and regardless of whether it was favorable or unfavorable to the party opposing the motion. If he concluded that the evidence preponderated against the verdict of the jury, he could, in his discretion, grant a new trial. This did not abridge the right to a jury trial, since there would again be a jury determination on the issues. The Washington Supreme Court, on the other hand, even from earliest times, lacked the power to weigh the evidence and grant new trials on the ground that the verdict was against the weight of the evidence. This resulted from the fact that the supreme court did not have the opportunity to feel the atmosphere of the courtroom, see the witnesses and evaluate their credibility as did the trial judge. Thus the supreme court could determine only whether there was substantial evidence. If there was, the verdict stood even though the supreme court, if it had the power to consider the evidence originally in place of the jury, might have reached a contrary result.

Some doubt about the propriety of the broad discretionary power resting with the superior courts was cast in 1947 in the first hearing

---

89 Washington Proposed Civil Rules for Superior Court 1964, Rule 50(b).
of *State v. Brent*, a criminal proceeding. The trial court, after saying, "The court being further of opinion that on the facts the case was very close, and a jury composed of conscientious and reasonable minds might well conclude that the homicide was justified," granted a new trial on the grounds that "the verdict is contrary to the law and evidence." The supreme court reversed on the basis that the wording of the statute setting forth the grounds for a new trial had been changed in 1933 from "Insufficiency of the evidence to justify the verdict or the decision, or that it is against the law," to "That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." The supreme court stated that it was impossible for the judge to say that "the case was very close" and then conclude that there was no evidence or reasonable inference from the evidence to justify the verdict, implying that the 1933 amendment to the statute had considerably reduced the power of the trial court.

The case provoked a note in the *Washington Law Review* pointing out that the supreme court had relied upon the wrong statute, one in the civil code rather than the criminal code, and further that the court in several prior cases had concluded that the 1933 amendment had not lessened the powers of the superior courts. The note concluded: The effect of this decision would be to greatly limit the trial court's discretionary power to grant a new trial. However, in view of the application of the wrong statute and, in effect, the overruling of... decisions without mentioning them or discussing the prior Washington rule, the authority of the instant case is weak and might not be followed when the question is properly presented and considered.

On rehearing en banc, it was held that since the prior departmental opinion had looked to the wrong statute, the opinion, insofar as it spoke of the powers of the trial judge to grant a new trial under the 1933 statute, was not relevant. The court then reviewed all the cases in point, civil and criminal, and concluded that the trial judge had discretion to rule on a motion for a new trial on evidentiary grounds. On the facts of the immediate case, the majority held that, while it

---

63 This is the present wording of *WASH. R. PLEAD., PRAC., PROC. 59.04W(7)*.
64 Note, 23 *WASH. L. REV. 148* (1948).
65 Id. at 149.
66 30 Wn. 2d 286, 191 P.2d 682 (1948).
did not believe the verdict was contrary to the evidence, it could not say that the trial judge had abused his discretion in granting a new trial on that ground.

Although the second Brent decision spoke of the civil statute only in dicta, the case indicates the position of the court until the 1950's. The statutory language providing for a new trial if "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision," was interpreted to allow the trial court to exercise discretion and weigh all the evidence.99

In 1951 a rule of court was adopted setting forth nine grounds for a new trial and requiring the trial judge to give definite reasons of law and fact when granting a new trial.100 This requirement, directed primarily at granting new trials on the ground of failure of substantial justice, has had the effect of considerably curtailing the power of the trial courts in that regard.101

A comparable restrictive effect has occurred with respect to the evidentiary ground. In 1955 the Washington Supreme Court said, "...it is not within the competency of the trial court (nor of this court) to invade the province of the jury and substitute its judgment for that of the jury in weighing the evidence."102 In 1960 the court said:103

Since the adoption of that portion of . . . Rule of Pleading, Practice & Procedure 59.04W . . . requiring that definite reasons of law and fact be stated by a trial court in support of an order granting a new trial, our review of such an order which is grounded on inadequacy of the verdict has been directed to whether there was sufficient evidence to sustain the verdict of the jury . . . . If there was sufficient evidence for that purpose, the trial court abused its discretion in granting a new trial on the ground of inadequacy of the verdict.

If the word "substantial" were substituted for "sufficient," the same

---

100 The rule is now WASH. R. PLEAD., PRAC., PROC. 59.04W.
102 Johnson v. Dep't of Labor & Indus., 46 Wn. 2d 463, 466, 281 P.2d 994, 996 (1955).
103 State v. McKenzie, 56 Wn. 2d 897, 903, 355 P.2d 834, 837 (1960). The supreme court's language was directed to two grounds stated by the trial court, "error in the assessment of the amount of recovery" and "insufficiency of evidence to justify the verdict." The trial judge did not have reference to any finding of passion or prejudice as affecting the amount of recovery or any error of arithmetic by the jury in calculating the amount. Thus the trial judge's ground was an evidentiary one and while the supreme court spoke of "an order which is grounded on inadequacy of the verdict," it apparently had in mind an order grounded on an evidentiary finding.
test would be applied to a motion for a new trial as to a directed verdict or judgment n.o.v. In 1963 the substitution was made in *Davis v. Early Constr. Co.*\(^\text{104}\) in the following language:

We have oft repeated the rule that a challenge to the sufficiency of the evidence, or a motion for nonsuit, dismissal, directed verdict, *new trial*, or judgment notwithstanding the verdict, admits the truth of the opponent’s evidence and all inferences which can reasonably be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in a light most favorable to the opponent. No element of discretion is involved. Such motions can be granted only when the court can say, as a matter of law, that there is no substantial evidence to support the opponent’s claim. (Emphasis added.)

The “oft repeated rule” had never been so stated. Four cases were cited as authority, but in none of them had the rule been applied to new trials. The “oft repeated rule” was dictum in 1963;\(^\text{105}\) in 1964 it became the law.

In *Haft v. Northern Pac. R.R. Co.*,\(^\text{106}\) following a verdict for the plaintiff, the superior court granted the defendant’s motion for judgment n.o.v. and in the alternative for a new trial. The supreme court reversed both orders, stating:\(^\text{107}\)

In considering the question of whether the trial court correctly granted defendant’s motion for judgment notwithstanding the verdict or in the alternative for a new trial, we are mindful of the oft stated rule that in passing upon such motions the evidence, and all reasonable inferences therefrom, must be viewed in a light most favorable to the nonmoving party, and if there is substantial evidence supporting the verdict of the jury, the verdict must stand.

Again no authority was cited which supported the application of this “oft stated rule” to a motion for new trial.\(^\text{108}\)

The most recent decision in point is *Bunnell v. Barr*,\(^\text{109}\) in which the supreme court again reversed the trial court’s grant of a new trial. The

---


\(^{105}\) In *Cyrus v. Martin*, 64 Wn. 2d 810, 812, 394 P.2d 369, 370 (1964), the court, in sustaining the trial judge’s grant of a new trial on damages and in ordering a new trial on liability, said, “We do not have in this case an order entered by a trial judge who merely disagreed with the jury’s findings on the amount of damages.” Whether the court’s phrase, “merely disagreed,” had reference to “weight of the evidence,” “sufficient evidence,” or “substantial evidence” is not clear. In any event, the court spoke of the trial judge’s power to grant a new trial in the exercise of his discretion.

\(^{106}\) 64 Wn. 2d 957, 395 P.2d 482 (1964).

\(^{107}\) Id. at 960, 395 P.2d at 484.

\(^{108}\) Though not cited in the *Haft* case, Judge Mallery, in dissent, had advocated this twenty years before in *Bond v. Ovens*, 20 Wn. 2d 354, 147 P.2d 514 (1944).

supreme court stated, "It is axiomatic that we, as is the trial court, are bound to the rule that in considering the issues raised by a motion for new trial the evidence of the nonmoving party must be accepted as true and, together with all reasonable inferences that may be drawn therefrom, be interpreted in a light most favorable to that party." As authority, the court cited the dictum quoted above from *Davis v. Early Constr. Co.* Further, the court said that the fact that the trial judge disagreed with the jury as to the credibility and interpretation of evidence did not support the granting of a new trial "when the verdict of the jury is otherwise supported by substantial evidence."

The result of all this is that for practical purposes trial judges no longer have the power to grant new trials upon evidentiary grounds. It no longer makes sense for counsel, after an adverse verdict, to move for a new trial on the ground of insufficiency of the evidence. The motion will be granted only if there is not substantial evidence to support the verdict. But if there is not substantial evidence, a judgment n.o.v. can be had. Why then ask for a new trial and take a chance with another jury when a favorable judgment can be obtained immediately? If counsel does move for a new trial, and the test now required by the supreme court is applied and found to be met, the trial judge ought to give a judgment n.o.v. If there is not substantial evidence, the movant is entitled to judgment as a matter of law.

There is, in short, no longer any allowance for the exercise of discretion by the trial judge. He either must allow the verdict to stand or find there is not substantial evidence, in which case a judgment contrary to the verdict ought to be entered. Perhaps it is more correct to say "must be entered," since if there is not substantial evidence, the movant prevails as a matter of law.

What has happened is that the ground stated in the rule for a new trial, "that there is no evidence or reasonable inference from the evidence to justify the verdict or the decision," is now being applied strictly.\(^\text{110}\) Applied strictly, it is the same test as that for a judgment n.o.v. If there is "no evidence or reasonable inference from the evidence to justify the verdict or the decision," there ought to be a contrary judgment. This shift in tests was not due to a change in the wording of the ground for a new trial. To the contrary, the *Brent* litigation

---

\(^{110}\) The rule is not being applied literally. A literal reading would seem to encompass the scintilla rule. A new trial could not be granted unless "there is no evidence or reasonable inference from the evidence." A scintilla of evidence would defeat the motion. This would make it more difficult to obtain a new trial on evidentiary grounds than to obtain a judgment n.o.v.
pointed up that the change in the statute in 1933 did not affect the power of the superior courts. The change occurred after the enactment of the 1951 rule adding the requirement of the statement of reasons by the trial judge.

It has been pointed out elsewhere that the present construction of this requirement has for practical purposes eliminated the trial judges' power to grant new trials on the basis that substantial justice has not been done. Likewise, for practical purposes the supreme court has removed the trial judges' power to grant new trials on the basis of insufficiency of the evidence. In part this has come about because of the supreme court's strict requirement of a statement of reasons. But just as it may be impossible for the trial judge to state explicitly why substantial justice has not been done, it may also be impossible to state why he believes the evidence is contrary to the verdict.

Apparently, even if he did so state, that would not be enough. Even if he related in detail why he believed witnesses A and B and disbelieved witnesses C and D, a new trial could not be granted. He can no longer weigh the evidence. While not enunciated in the cases stating the present test, the reason for this result must be to give what is thought to be proper weight to the jury's role and to the parties' right to a jury trial.

The right to a jury trial does not include a right to any particular twelve jurors, but only to a determination by an impartial body. That is provided by the grant of a new trial. Although the trial judge may be wrong in weighing the evidence and in granting the new trial, this can be corrected by the new jury. However, if the jury is wrong in weighing the evidence, to deny the trial judge any power to set aside the verdict removes any possibility of correction. The supreme court cannot adequately correct any error since it has not seen and heard the witnesses, nor has it had the opportunity to feel the atmosphere of the trial. Only the trial judge and the jury have had this opportunity.

It should not be forgotten that the effect of the grant of a new trial is much different than the grant of a directed verdict or a judgment n.o.v. When the latter are granted, the jury as an institution is removed from the case. This is not so with the grant of a new trial. The different results call for different tests, contrary to the position presently taken by the supreme court. Until recently there were different tests and no reason has been stated by the court for changing them.

111 Trautman, supra note 101.
The question may be raised whether there must not be an end to litigation and whether the end should not come when the jury has weighed the evidence and once decided. Otherwise, is it not possible that the trial judge might grant multiple new trials on the ground of insufficiency of the evidence until he gets the verdict he thinks proper? The supreme court has sustained the grant of more than one new trial on evidentiary grounds. There is the limitation that if more than one jury reaches the same result, it is likely that this will affect the trial judge in the exercise of his discretion, and it might properly be considered by the supreme court in reviewing to determine whether the trial judge has abused his discretion. While it is appropriate, and necessary, to allow some room to the trial judge to correct errors by the exercise of discretion, there is no need to create an endurance contest between the judge and jury.

C. Joining of Motions for Judgment N.O.V. and New Trial

While the power of the trial court to grant a new trial on evidentiary grounds has been drastically curtailed, if not in effect eliminated, it is possible that losing counsel will continue to combine motions for a new trial on evidentiary grounds and for judgment n.o.v. Of course, if the new trial motion is based on other than evidentiary grounds, the motion will be made at the same time as the motion for judgment n.o.v. because of the very short filing period. If both are not made jointly, by the time one is ruled upon, it will be too late to file and serve the other. As a matter of practice then, the two are joined.

A rule of court specifically covers the procedure to be followed in this instance. When motions for a judgment n.o.v. and, in the alternative, for a new trial are submitted and the court enters an order granting the motion for judgment n.o.v., the court is directed to rule at the same time upon the motion for a new trial. The latter is not effective unless the order granting the motion for judgment n.o.v. is there-

---

115 The state judicial council has recommended the extension of time for the making of a motion for a new trial to ten days after judgment, the same as for a motion for judgment n.o.v. Washington Proposed Civil Rules for Superior Court 1964, Rule 59(b). At the present time only two days are allowed after the verdict or findings of fact. Wash. Rev. Code §§ 4.64.0'0' (1957), 4.76.060 (1956).
116 Wash. R. Plead., Prac., Proc. 59.08W, Washington Proposed Civil Rules for Superior Court 1964, Rule 50(c), would supersede Wash. R. Plead., Prac., Proc. 59.08W and adopt the comparable federal rule. While there is a change in wording, the procedure remains the same.
after reversed, vacated or set aside. The rule also provides that an appeal from the grant of the motion for a judgment n.o.v. shall, without the necessity of a cross-appeal, bring up for review the ruling on the motion for a new trial. If the supreme court reverses the judgment n.o.v., it is to review the validity of the new trial order.

The purpose of the rule is to avoid the necessity of two appeals. If the new trial motion were not ruled upon initially, a reversal of the judgment n.o.v. by the supreme court would necessitate a remand for a ruling by the trial court on the new trial motion, which might occasion a second appeal. By virtue of the rule, both matters can be disposed of at the same time if necessary.\textsuperscript{117}

If the alternative motion for a new trial is not made, a foundation for review is not laid. In \textit{Smith v. Leber},\textsuperscript{118} a judgment n.o.v. granted by the trial court was reversed on appeal. The appellant contended that certain evidence had been improperly admitted at the trial. It was held that any error in this regard should have been raised by a motion for a new trial, in which case it would have been considered under the above rule. Since this was not done, the supreme court could only review to determine if there was sufficient evidence to go to the jury; since there was, a judgment in accordance with the verdict was directed.

Another possibility in the event of alternative motions is that a judgment n.o.v. may be denied and the new trial granted. If this occurs, the party who obtained the verdict may appeal. On that appeal the respondent may raise the issue whether a judgment n.o.v. should have been granted.\textsuperscript{119} Otherwise, if the case were remanded for a new trial and the evidence introduced and the verdict were the same, the present respondent might appeal at that time contending that there was not sufficient evidence to go to the jury. While no rule governs the matter, the court has permitted that issue to be raised on the first appeal to avoid the necessity of two appeals.\textsuperscript{120}

\textsuperscript{117} Day \textit{v. Frazer}, 59 Wn. 2d 659, 369 P.2d 859 (1962), illustrates the application of WASH. R. PLEAD., PRAc., PROC. 59.08W. The trial court granted both motions. On appeal the supreme court reviewed both and reversed both.

\textsuperscript{118} 34 Wn. 2d 611, 209 P.2d 297 (1949).


\textsuperscript{120} Other procedural questions that may arise in the event of the denial of the alternative motions are dealt with in \textit{WASHINGTON PROPOSED CIVIL RULES FOR SUPREME COURT 1964}, Rule 50 (d).