

**THE MAXIMUM RECOVERY RULE:
THE OBJECTIVITY DILEMMA IN REVIEWING SUBJECTIVE DAMAGES**

**RUSSELL S. POST
Beck, Redden & Secrest, L.L.P.
One Houston Center
1221 McKinney Street, Suite 4500
Houston, Texas 77010-2010
(713) 951-3700
rpost@brsfirm.com**

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TABLE OF CONTENTS

I.	Introduction: Law and Longitude	1
II.	History of the Maximum Recovery Rule	3
	A. Origins of the Maximum Recovery Rule	3
	B. The <i>Caldarera</i> Revolution	5
	C. <i>Douglass</i> and the Emergence of the Mathematical Cap	9
III.	The Current Debate Over the Maximum Recovery Rule	11
IV.	The Hidden Significance of the Debate	14
V.	Prospects for Adoption of the Maximum Recovery Rule in State Appeals	16
VI.	Conclusion	17

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I. Introduction: Law and Longitude

For centuries, the longitude problem stumped ancient mapmakers. Whereas lines of latitude can be determined by an objective, scientific calculation—measured by degrees from the equator, a scientific problem navigators had conquered before the days of Ptolemy—meridians of longitude cannot be objectively defined. Among the infinite meridians connecting the north and south poles, no scientific benchmark defines any meridian as the “true” center. “Here lies the real, hard-core difference between latitude and longitude—beyond the superficial difference in line direction that any child can see: The zero-degree parallel of latitude is fixed by the laws of nature, while the zero-degree meridian of longitude shifts like the sands of time.” Dava Sobel, *LONGITUDE* 4 (1995).

Because there was no objective, scientific benchmark against which all navigators could measure their longitude, the definition of longitude became a reflection of the mapmaker’s ideology. “As the world turns, any line drawn from pole to pole may serve as well as any other for a starting line of reference. The placement of the prime meridian is a purely political decision.” *Id.* at 4. Ptolemy located the prime meridian (0° longitude) in the Canary islands; later mapmakers located their own prime meridians in Rome, Jerusalem, St. Petersburg, and Paris—just to name a few. Throughout the Age of Exploration, the governments of Europe offered grand prizes for a solution, and the greatest minds of the age (including Galileo, Christian Huygens, and Sir Isaac Newton) devoted themselves to the search for an objective measure for longitude. Not until the late 1700s, when a British clockmaker named John Harrison developed a new clock (the marine chronometer) that could keep perfect time as ships traveled across the oceans, was the longitude problem solved. Not coincidentally, the prime meridian then became permanently located in England—at Greenwich. *Id.* at 166-68. But even today, its location remains a political decision—the prime meridian is “prime” simply because a conference of nations voted to make it so. *Id.*

Although we prefer to think of law in terms of latitude—characterizing it as a scientific application of fixed, neutral criteria to known facts—appellate judging is often more like longitude. Appellate judges, like navigators, must chart their courses based on their knowledge of their own position and the position of their objective. Rather than the compass and the chronometer, however, judges use authority and precedent to fix their positions. In some situations, appellate judges can look to precedent for objective guidance. Pure questions of law often are controlled by precedent, and even when they are not, there are accepted protocols for deciding a question of first impression. These pure legal questions most closely approach the “latitude” norm of objective, neutral criteria. On the other hand, review of most discretionary trial rulings and factual findings is guided simply by general norms—the abuse of discretion and sufficiency standards of review—that require judges to exercise more discretion in their decisionmaking. Although judges may vary in their application, these standards strive to emulate the “latitude” norm of neutral decisionmaking as much as possible. Amid these objective tools of the appellate trade, however, there is one aspect of appellate judging that defies the “latitude” norm: excessiveness review in cases involving “subjective” damage awards (*e.g.*, pain and suffering, mental anguish, emotional distress). Here, law is longitude.

By definition, reviewing the “excessiveness” of a damage award that cannot be quantified by any objective standard requires appellate judges to navigate without their traditional tools. Excessiveness determinations cannot truly be based on precedent, because every case is different. And resorting to standards of review is tautological; no objective standard can be articulated. Thus, appellate courts have invoked a variety of formulations to explain this highly subjective process. As Judge Alvin Rubin of the Fifth Circuit summarized the various formulations of the inquiry:

We do not reverse a jury verdict for excessiveness except on “the strongest of showings.” The jury’s award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to “shock the judicial conscience,” “so gross or inordinately large as to be contrary to right reason,” so exaggerated as to indicate “bias, passion, prejudice, corruption, or other improper motive,” or as “clearly exceed[ing] that amount that any reasonable man could feel the claimant is entitled to.”

Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983) (citing cases).

As the shifting verbal formulations make plain, any attempt to define the excessiveness test is a tautological exercise. By definition, the excessiveness inquiry defies any objective criteria. Nevertheless, appellate judges cannot abdicate their duty to exercise appellate review:

The loss of a loved one is not measurable in money. Human life is, indeed, priceless. Yet the very purpose of the lawsuit for wrongful death is to fix damages in money for what cannot be measured in money’s worth. Unless we are to accept any verdict, in whatever amount, as a legally acceptable measure, we must review the amount a jury or a trial court awards. Reassessment cannot be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation. The sky is simply not the limit for jury verdicts, even those that have been once reviewed.

Id. at 784.

This unique challenge represents the objectivity dilemma in reviewing subjective damages. Judges committed to applying the law uniformly, a process that ordinarily depends on the use of objective, neutral standards, must perform their judicial function without any objective benchmarks. They are like navigators before the longitude problem was solved, who must rely on experience and intuition to guide them. And like ancient navigators selecting their own personal prime meridians, the benchmarks they choose are dictated primarily by their basic philosophical convictions.

Over the last two years, a debate has emerged in the Fifth Circuit over the proper application of the “maximum recovery rule,” a judicially-created rule for deciding excessive damage complaints. Until very recently, the maximum recovery rule had been characterized as “loosely defined.” *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990). Over the last two years, however, some members of the Fifth Circuit have been applying an especially strict, comparative approach to the maximum recovery rule, which has provoked controversy within the court.

In these cases, two divergent philosophies have emerged about the maximum recovery rule. One philosophy interprets the maximum recovery rule as a mathematical formula which looks to prior awards in reported cases as a “cap” on subjective damages. The opposing philosophy regards comparisons with prior awards as nothing more than a guideline, one variable to be used by the court in the case-specific determination whether the damages are excessive.

This debate warrants careful attention because it is an area of appellate procedure where the Fifth Circuit appears to be divided and where there is room for future development. More important, the two philosophies reflect two fundamentally different views about the “art” of appellate judging, and the debate promises to teach students of the Fifth Circuit even more about the judges than it does about the maximum recovery rule itself.

II. History of the Maximum Recovery Rule

As an abstract principle, the existence of the “maximum recovery rule” is not controversial. The Fifth Circuit has applied it for years to review complaints about the excessiveness of damages. In its simplest form, the rule states no more than the tautological conclusion that a plaintiff cannot recover more than the maximum amount that a reasonable jury could award for the plaintiff’s injury. If the damage award is excessive, the Fifth Circuit may suggest a remittitur. The controversy is not over the validity of the principle, but about its application in practice.

A. Origins of the Maximum Recovery Rule

The “maximum recovery rule” was adopted in *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970). At the time, there was a debate about the extent to which a trial court could order remittitur. The Supreme Court had made it plain that remittiturs did not violate the Seventh Amendment, *Dimick v. Schiedt*, 293 U.S. 474 (1935), but serious questions remained about the proper procedure. Some courts and commentators argued that an excessive verdict should be reduced to the minimum amount supported by the evidence; others contended that the trial court should order a remittitur in an amount it felt was reasonable; and still others insisted that deference to the jury demanded that the plaintiff recover the maximum amount permissible. The Fifth Circuit resolved that debate by holding “the proper test of excessiveness” would be “the maximum which the jury could reasonably find.” *Gorsalitz*, 429 F.2d at 1046. As the court explained its rationale:

“There are some differences of opinion as to the standard by which the court should be guided in determining the amount of the remittitur. One theory is that an excessive verdict should be reduced to the minimum amount which the jury might have awarded, since award of any greater sum deprives the defendant of his right to a jury trial. Other courts have felt free to reduce the verdict, by remittitur, to that amount which the court itself considers the jury should have allowed. A final theory is that the jury by its excessive verdict intended to award the maximum and defendant cannot complain of any judgment within the permissible limits. This theory permits reduction only to the highest amount which the jury could properly have awarded. It is the only theory which has any reasonable claim of being consistent with the Seventh Amendment.”

Id. at 1046-47 (quoting 3 Barron & Holtzoff, FED. PRAC. & PRO. (Wright ed.) § 1305.1, p. 376).

This conclusion had been anticipated by District Judge (later Circuit Judge) Alvin Rubin. In *Glazer v. Glazer*, 278 F. Supp. 476 (D. La. 1968), Judge Rubin had traced the origins of this rule all the way back to Judge Learned Hand, and had concluded that it best comported with the dictates of the Seventh Amendment. *Id.* at 478-82. According to Judge Rubin:

In proceeding to fix the remittitur, then, the Court will be guided by the principle that the plaintiff who has been awarded an excessive amount by one jury should have the option of taking the maximum amount that the jury could properly have awarded or of taking a new trial before another one. In determining this, it appears proper first to fix the amount that this Court thinks a properly functioning jury would have awarded, and this may be merely another way of saying that the starting point is the amount of damages the Court itself thinks proper on the record under the mandate of the Court of Appeals. After that, the maximum recovery rule requires the Court to determine the maximum amount of deviation from that verdict that could be allowed without requiring a new trial.

Id. at 482. In *Gorsalitz*, the Fifth Circuit expressly adopted Judge Rubin's approach to remittitur. Soon after *Gorsalitz*, Chief Judge John R. Brown named this method the "maximum recovery rule." *United States v. 1160.96 Acres of Land*, 432 F.2d 910, 913 (5th Cir. 1970).

Thus, the original adoption of the maximum recovery rule resolved a debate about *ends*, holding that plaintiffs would be entitled to the maximum recovery permissible under the evidence, but it did not address the *means* to achieve that end. By failing to adopt any formal methodology to calculate the "maximum recovery rule," the Court left a great deal of latitude in the rule.

In the years after *Gorsalitz*, the maximum recovery rule was rarely cited by the Fifth Circuit. And when it appeared, the rule was cited for the non-controversial proposition that the test for a proper remittitur was the maximum amount a jury could reasonably award under the evidence. Because that abstract principle did not include any formal methodology to calculate the remittitur, it resulted in extreme deference to district judges in practice. As Judge Thomas Gee summarized the maximum recovery rule at this time:

Once it has been determined that the trial court has not abused its discretion in demanding some remittitur, then the appellate court must determine whether the amount of the award which remains after the remittitur reflects the maximum award which the evidence will support or whether it merely represents the trial court's opinion of what the proper award should have been. At this point deference will be given to the trial court's determination since he, and not the appellate court, was present during the ebb and flow of the trial, and it will be presumed that the amount which he has chosen is the amount which will reduce the jury's verdict to the "maximum possible" award unless the party opposed to the remittitur can point to credible evidence which would support a greater recovery.

Bonura v. Sea Land Service, Inc., 505 F.2d 665, 670 (5th Cir. 1974). Thus, the rule remained an end without a means—resulting in extreme deference to the district courts.

B. The Caldarera Revolution

In the 1980s, as jury verdicts began to rise significantly, the maximum recovery rule began appearing with greater frequency in Fifth Circuit opinions. But because of the tradition that the rule required deference to the trial judge, the Fifth Circuit was reluctant to fix the amount of remittiturs. In those occasions where the Fifth Circuit found subjective damage awards excessive, it invariably remanded the determination of the remittitur to the trial judge “because the district judge, having had the opportunity to observe the trial, is in a better position than we to evaluate the subjective elements of damage.” *Keyes v. Lauga*, 635 F.2d 330, 336 (5th Cir. 1981); *see also Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1035 (5th Cir. 1984) (citing *Keyes*).¹

In 1983, however, an unusual case foreshadowed the future of the maximum recovery rule. *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983) was a wrongful death case arising out of an airplane crash that resulted in the death of a young boy, his mother, and his grandmother. The plaintiffs were the boy’s father (who sued for the loss of his son, his wife, and his own mother) and another son (who sued for the loss of his mother). The appeal arose in a very unusual posture: Because the United States conceded that partial responsibility for the crash was attributable to the negligence of air traffic controllers, the plaintiffs sued both Eastern Airlines and the United States. The claim against Eastern Airlines was tried to a jury, while the claim against the United States was simultaneously tried to the court. Thus, two fact-finders heard the same damages evidence.

The jury returned a verdict against Eastern Airlines of \$937,500 for each plaintiff, most of which was attributable to subjective emotional damages. By contrast, the district judge who heard the same evidence arrived at a damage award of \$797,480 against the United States for the father, and \$400,000 against the United States for the son. *Id.* at 781. The district court refused to order a remittitur of the jury’s award to the father, but reduced the son’s award to \$600,000. *Id.* Therefore, the matrix of damages (based on the same damages evidence) was as follows:

	Father	Son
Judge	\$797,480	\$400,000
Jury	\$937,500	\$937,500 (remitted to \$600,000)

Judge Alvin Rubin authored the opinion. As a district judge, Judge Rubin had laid the foundation for the maximum recovery rule in *Glazer v. Glazer*, 278 F. Supp. 476 (D. La. 1968). Now, as a member of the Fifth Circuit, Judge Rubin took the next major step in the rule’s evolution.

¹ On the other hand, the Fifth Circuit has always used the maximum recovery rule to justify ordering remittiturs in cases where expert testimony established a range of permissible recoveries, and the verdict exceeds the range. *Carlton v. H. C. Price Co.*, 640 F.2d 573, 581-82 (5th Cir. 1981); *Enterprise Refining Co. v. Sector Refining, Inc.*, 781 F.2d 1116, 1120 (5th Cir. 1986); *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 169-70 (5th Cir. 1990); *Brunnemann v. Terra Int’l, Inc.*, 975 F.2d 175, 178-79 (5th Cir. 1992). In those cases, the range of financial testimony in the record provides an objective basis for the court to calculate the maximum recovery rule.

Judge Rubin began by reciting the traditional mantra about the maximum recovery rule, explaining that the rule “prescribes that the verdict must be reduced to the maximum amount the jury could properly have awarded.” *Caldarera*, 705 F.2d at 784. But then, he took the next step and suggested a *means* to accomplish that abstract end.

First, Judge Rubin reviewed the award of damages to the father, using the district court’s calculation of damages as a benchmark to compare the jury’s award (based on the same evidence). Judge Rubin found all of the district court’s separate damage findings to be reasonable except one: The district court had awarded \$400,000 to the father for the subjective damages associated with the loss of his wife, but Judge Rubin found that award inconsistent with awards in other reported cases and reduced it to \$250,000. On the other hand, Judge Rubin found the other subjective damages to be within the reasonable range, and he established a 50% multiplier to reach a maximum award: “These awards are generous, but they cannot be viewed as excessive. If we add 50% to each, however, we arrive at an amount that appears to us to be a maximum.” *Id.* at 784-85. As a result, the total award by the district court (including both permissible and excessive awards) roughly approximated the maximum amount that Judge Rubin believed a reasonable fact-finder could award, and the district court’s award of damages to the father (against the United States) was affirmed. *Id.* This 50% multiplier—which was not the centerpiece of the opinion, and which was not supported by any authority—planted an important seed in the jurisprudence of the Fifth Circuit.

Using the district court’s damage award as the benchmark of the maximum recovery rule, Judge Rubin then found the jury’s award to the father (based on the same evidence) was excessive. Therefore, the Fifth Circuit suggested that the jury’s award to the father (against Eastern Airlines) be remitted to the same amount as the district court’s award. *Id.*

Turning to the son, Judge Rubin found both the district court’s award (\$400,000) and the jury’s award (\$937,500 remitted to \$600,000) were excessive. Without any comparison to other reported cases or application of any other methodology, Judge Rubin declared: “The verdict, even as reduced by the remittitur, exceeds any amount that a reasonable person could have awarded him. Our judgment is that his award should not exceed \$300,000, which is equivalent to an annuity of \$24,986 a year for each year of his mother’s full life expectancy.” *Id.* at 786. Thus, *Caldarera* used at least three separate methodologies to calculate remittiturs: comparisons to prior reported awards, application of multipliers to calculate a maximum award, and case-specific reductions based solely on the facts of the case under review. Each of these methods would recur in the future.

Although *Caldarera* did not adopt a precise mathematical formula to calculate remittiturs, it did signal a sea change in the Fifth Circuit’s approach to excessiveness review. After *Caldarera*, the Fifth Circuit became increasingly willing to suggest a remittitur itself, rather than remanding cases to the district courts for calculation of the proper remittitur. *E.g.*, *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1046-47 (5th Cir. 1984); *Haley v. Pan American World Airways, Inc.*, 746 F.2d 311, 318-19 (5th Cir. 1984); *Dixon v. International Harvester Co.*, 754 F.2d 573, 589-90 (5th Cir. 1985); *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151, 1156-57 (5th Cir. 1985) (*Air Crash I*); *In re Air Crash Disaster Near New Orleans*, 795 F.2d 1230, 1236-37 (5th Cir. 1986) (*Air Crash II*); *Pinner v. Schmidt*, 805 F.2d 1258, 1265 (5th Cir. 1986); *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 919-21 (5th Cir. 1987). Accompanying this philosophical shift, it became necessary for the Fifth Circuit to fashion rules to guide its calculation of remittiturs.

