



1997

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### **Recommended Citation**

Grinblat, Edie C. (1997) "Gasperini in Line with Erie: New York Law Determines Excessiveness of Verdict in Diversity Cases," *Touro Law Review*. Vol. 13 : No. 3 , Article 7.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol13/iss3/7>

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## **GASPERINI IN LINE WITH *ERIE*: NEW YORK LAW DETERMINES EXCESSIVENESS OF VERDICT IN DIVERSITY CASES**

The *Erie* doctrine, announced in 1938 by the United States Supreme Court in *Erie Railroad Company v. Tompkins*,<sup>1</sup> holds that the state law of the forum state shall be applied to all substantive issues in cases whose appearance in federal court is based solely on the parties' diversity of citizenship.<sup>2</sup> The *Erie*

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1. 304 U.S. 64 (1938). On July 27, 1934, Harry J. Tompkins was walking in a northerly direction along a beaten pathway which ran next to the Erie Railroad's tracks in Hughestown, Pennsylvania. *Tompkins v. Erie R.R. Co.*, 90 F.2d 603 (2d Cir. 1937), *rev'd.*, 304 U.S. 64 (1938). The narrow pathway ran two feet or closer to the tracks in the unlit area in which Tompkins was travelling. *Id.* at 604. At about 2:30 a.m., a whistle and headlight announced the approach of a freight train from a curve to the north. *Id.* As the moving train passed him, Tompkins was struck on the head by an object protruding from one of the cars. *Id.* Knocked off balance, Tompkins' right arm fell under the wheels of the train. *Id.* Tompkins brought a personal injury suit against the Erie R.R. Co. in New York since Erie R.R. was a New York corporation. *Erie*, 304 U.S. at 69. The Erie R.R. Co. asserted that, under Pennsylvania law, its duty to Tompkins was merely that which is owed to a trespasser - - no liability is imposed absent wanton or willful negligence. *Id.* at 70. Tompkins argued, unsuccessfully, that no such rule had been promulgated by the Pennsylvania legislature or its courts, and thus, federal common law should control. *Id.*

2. *Erie*, 304 U.S. 64. The Court overruled its holding in *Swift v. Tyson*, 41 U.S. 19 (1842) (holding that a federal court exercising jurisdiction based on diversity of citizenship does not have to apply the unwritten law of the State's highest court; rather the federal court is free to exercise independent judgment in determining the applicable common law of that State). *Id.* at 72. The *Erie* Court, reinterpreting § 34 of the Judiciary Act of 1789 (28 U.S.C.A. § 1652 (1994)), held that a federal judge sitting in a diversity case may not disregard the common law decisions of the state courts. *Id.* at 71. Thus, federal courts would no longer be empowered to create state law judicially, since state law was a forum in which Congress was prohibited from acting legislatively. *Id.* at 72. In holding that there was no "federal general common law," the Court

Court, pursuant to its reading of section 34 of the Judiciary Act of 1789, the Rules of Decision Act,<sup>3</sup> stated, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State.”<sup>4</sup> While *Erie* served to settle the “choice of law” question of federal civil procedure, the actual application of the *Erie* doctrine has proven to be quite perplexing. From *Erie* and its progeny, the Court in *Hanna v. Plumer*<sup>5</sup> fashioned a workable, “outcome-affective” test with which the *Erie* Doctrine could be adeptly applied in a federal diversity case faced with the issue of “whether or not to apply state law.”<sup>6</sup> The *Hanna* test, conceding that the state rule is “indeed relevant,”<sup>7</sup> simply asked whether application of that rule would so greatly affect the outcome of the litigation that “failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose federal court.”<sup>8</sup>

The Supreme Court recently applied the *Erie* doctrine in *Gasperini v. Center for Humanities, Inc.*<sup>9</sup> In *Gasperini*, a case

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ruled that state law, including its common law decisions, is the law to be applied in a diversity case heard in federal court. *Id.* at 72-73.

3. Section 34 of the Judiciary Act of 1789, the Rules of Decision Act, now contained in 28 U.S.C. § 1652 (1994), provides in pertinent part, “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” *Id.*

4. *Erie*, 304 U.S. at 78.

5. *Hanna v. Plumer*, 380 U.S. 460 (1965).

6. *Id.* at 468.

7. *Id.*

8. *Id.*

9. 116 S. Ct. 2211 (1996). In *Gasperini*, a journalist contracted to lend 300 original color transparencies to the Center for Humanities, Inc. on the condition that they were returned when the project was completed. *Id.* at 2215. The Center lost the transparencies and Gasperini sued. *Id.* at 2216. After trial, the jury awarded compensatory damages to Gasperini in the amount of \$450,000, since the “industry standard” value for each transparency was \$1,500. *Id.* The Second Circuit reversed, applying New York Civil Practice

originating in the Southern District of New York,<sup>10</sup> the Court resolved the *Erie* conflict of whether to apply the state statute or the judicially-created federal policy “to measure the alleged excessiveness of a jury’s verdict in an action for damages based on state law.”<sup>11</sup> The Supreme Court held that, in diversity cases, state law supersedes federal law in establishing the standard by which the court determines whether a money verdict is excessive.<sup>12</sup>

In addition, pursuant to the restrictions of the Seventh Amendment, issues of fact determined by a jury may only be re-examined pursuant to the common law of the forum state.<sup>13</sup> While state law governs substantive issues, federal sources of law

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Law and Rules § 5501(c), which instructs that when a jury returns an itemized verdict, the New York Appellate Division “shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.” *Id.* at 2216. The Second Circuit vacated the judgment entered on the jury’s verdict and ordered a new trial, unless Gasperini agreed to an award of \$100,000. *Id.* at 2216-17. Certiorari was granted to resolve the question of what standard a federal court should use to determine the excessiveness of a jury’s verdict in an action based on state law. *Id.* at 2217.

10. *Gasperini v. Center for Humanities, Inc.*, 66 F.3d 427 (2d Cir. 1995), *vacated*, 116 S. Ct. 2211 (1996). The Court of Appeals for the Second Circuit, interpreting New York law, held that while the jury applied the correct “industry standard” to compute the value of the lost transparencies, the jury should have discounted the value of some of the transparencies because they were not equally original and because Gasperini’s earnings from his photography yielded a mere \$10,000 from 1984 to 1993. *Id.* at 429.

11. *Gasperini*, 116 S. Ct. at 2217.

12. *Id.* at 2219. The *Gasperini* Court stated:

[f]ederal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, *but it does not carry with it generation of rules of substantive law*. As *Erie* read the Rules of Decision Act: ‘[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State.’

*Id.* at 2219 (emphasis added) (quoting *Erie*, 304 U.S. at 78).

13. U.S. CONST. amend. VII. The Seventh Amendment provides in pertinent part: “[i]n suits at common law . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” *Id.* (emphasis added).

continue to govern procedural issues.<sup>14</sup> Federal courts are not expected to tailor their procedures to accommodate cases merely because they are based on the parties' diversity of citizenship.<sup>15</sup>

The significance of *Gasperini* is two-fold. First, it brings the federal standard for determining the excessiveness of a jury's damage award in line with the current New York standard. Prior to 1986, the common law New York standard utilized to determine whether a money verdict is excessive or inadequate is whether it "shocked the conscience of the court."<sup>16</sup> In 1986, the New York state legislature codified a new and less demanding standard of judicial review for examining the amount of jury awards. Placed in New York's Civil Practice Law and Rules Section 5501(c), the revised standard provides in pertinent part:

[i]n reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it *deviates materially* from what would be reasonable compensation.<sup>17</sup>

As a result of this change to Section 5501(c), the New York standard was more favorable to defendants than the federal "shocks the conscience" standard, which thereby encouraged forum shopping and permitted inequitable administration of the

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14. *Gasperini*, 116 S. Ct. at 2219 (stating that under *Erie*, "federal courts sitting in diversity apply state substantive law and federal procedural law").

15. *See id.*

16. *Id.* at 2217. "More rigorous comparative evaluations attend application of § 5501(c)'s 'deviates materially' standard." *Id.* at 2220. *See Consorti v. Armstrong World Industries, Inc.*, 64 F.3d 781, *superseded by* 72 F.3d 1003, 1012 (2d Cir. 1995) (discussing the ambiguity of the traditional "shocks the conscience" test). *See also* *Matthews v. CTI Container Transport Int'l Inc.*, 871 F.2d 270, 278 (2d Cir. 1989); *Neal v. Rainbow House Fruits*, 87 A.D.2d 511, 447 N.Y.S.2d 487, 488 (1982); *Jiuditta v. Bethlehem Steel Corp.*, 75 A.D.2d 126, 428 N.Y.S.2d 535, 543 (1980); *Petosa v. City of New York, Dep't of Sanitation*, 63 A.D.2d 1016, 406 N.Y.S.2d 354, 355 (1978).

17. N.Y. CIV. PRAC. L. & R. 5501(c) (McKinney 1995) (emphasis added).

law.<sup>18</sup> *Gasperini* served to end the inequity between state and federal awards. Further, by requiring federal courts to apply the New York standard, it helped secure the aims of *Erie*.

Second, *Gasperini* endeavored to resolve another traditional *Erie* dilemma: determining whether the issue is substantive or procedural when it really seems to fall in between. As the Court stated, “[c]lassification of law as ‘substantive’ or ‘procedural’ for *Erie* purposes is sometimes a challenging endeavor.”<sup>19</sup> To determine whether the issue was one or the other, the Court in *Guaranty Trust Company v. York*<sup>20</sup> set forth an “outcome-determination” test: the outcome of an action in federal court, based on diversity of citizenship, “should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”<sup>21</sup>

Thus, the crucial issue in *Gasperini* arose: was application of Section 5501(c) of New York’s Civil Practice Law and Rules<sup>22</sup> procedural, “in that [Section] 5501(c) assigns decision making authority to New York’s Appellate Division,”<sup>23</sup> or was it substantive, since the “deviates materially” standard essentially seeks to cap damages by controlling “how much a plaintiff can be awarded.”<sup>24</sup>

The Court found that the crux of the *Gasperini* issue, specifically, the application of the New York standard for determining excessiveness of a verdict,<sup>25</sup> was tantamount to applying a principle of substantive law because resolving the question of whether a jury’s award is excessive would have a significant effect on the outcome of the litigation. The Court stated that “[p]arallel application of [Section] 5501(c) at the federal appellate level would be out of sync with the federal system’s division of trial and appellate court functions, an

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18. See *Gasperini*, 116 S. Ct. at 2221.

19. *Id.* at 2217.

20. 326 U.S. 99 (1945).

21. *Id.* at 109.

22. N.Y. CIV. PRAC. L. & R. 5501(c) (McKinney 1995).

23. *Gasperini*, 116 S. Ct. at 2219.

24. *Id.*

25. N.Y. CIV. PRAC. L. & R. 5501(c) (McKinney 1995).

allocation weighted by the Seventh Amendment.”<sup>26</sup> Thus, the *Erie* doctrine would be violated if a federal court sitting in a diversity case was allowed to disregard the New York standard because a greater judgment would result than a New York state court would permit.<sup>27</sup>

Moreover, upon finding that New York’s Civil Practice Law and Rules Section 5501(c), while facially containing a procedural instruction, is, in essence, a substantive state goal,<sup>28</sup> the Court held that the “deviates materially” standard can be given effect without violating the Seventh Amendment’s re-examination clause<sup>29</sup> if (1) that statutory standard is applied by the federal trial court judge and (2) the appellate courts’ review of the trial court ruling is limited to review based on “abuse-of-discretion.”<sup>30</sup> In reaching its decision, the Court

address[ed] the question of whether New York’s ‘deviates materially’ standard, codified in [Civil Practice Law and Rules Section] 5510(c), is outcome-affective in this sense: [w]ould ‘application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court?’<sup>31</sup>

The Court concluded that “[j]ust as the *Erie* principle precludes a federal court from giving a state-created claim ‘longer life . . . than [the claim] would have had in the state court,’ [it also] precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.”<sup>32</sup> Moreover, the Court views New York’s “deviates materially” standard as implicating what the Court considers are

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26. *Gasparini*, 116 S. Ct. at 2219.

27. *See id.*

28. *Id.*

29. U.S. CONST. amend. VII.

30. 116 S. Ct. at 2224.

31. *Id.* at 2220 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

32. *Id.* at 2221 (quoting *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949)).

*Erie's* "twin aims:"<sup>33</sup> "'discouragement of forum shopping and avoidance of inequitable administration of the laws.'"<sup>34</sup> Thus, the Court in *Gasperini* upheld New York's "deviates materially" standard as the standard with which to test the excessiveness of the jury's verdict.<sup>35</sup>

In his dissent, Justice Stevens declared that, while the federal court should apply the New York standard,<sup>36</sup> since the court of appeals corrected the error of the district court,<sup>37</sup> he "would not require the District Court to repeat a task that has already been performed by the reviewing court."<sup>38</sup> Moreover, he argued that *Gasperini* did not implicate the Seventh Amendment because such appellate review is permissible since mixed questions of law and fact "require courts to construe all record inferences in favor of the factfinder's decision" and then determine, based upon the facts below, whether "the legal standard has been met."<sup>39</sup> He further asserts that even if the re-examination clause was implicated, such appellate review was consonant with the Seventh Amendment because the review of the Court of Appeals was "according to the rules of common law."<sup>40</sup>

Until *Gasperini*, the only other *Erie*-line case to threaten to tread upon Seventh Amendment ground was *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*,<sup>41</sup> a distinguished Court

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33. *Id.* at 2221.

34. 116 S. Ct. at 2220 (quoting *Hanna*, 380 U.S. at 468).

35. 116 S. Ct. at 2225.

36. *Id.* at 2225-26 (5-4 decision) (Stevens, J., dissenting). See *Leading Cases*, 110 HARV. L. REV. 135, 260 (1996).

37. *Id.* at 2226. Justice Stevens notes that the Court of Appeals corrected the District Courts error after "drawing all reasonable inferences in favor of" the petitioner, the Center for Humanities, Inc. *Id.*

38. *Id.*

39. *Id.* at 2227.

40. *Id.*

41. 356 U.S. 525 (1958). The Blue Ridge Rural Electrical Coop. provided electric power to rural areas of South Carolina. *Id.* at 526. R.H. Bouligney, Inc., pursuant to a \$334,300 contract, was extending Blue Ridge's power lines by 24 miles, upgrading another 88 miles of power lines and building two new substations and a breaker station. *Id.* at 526-27. James Earl Byrd, a North Carolina resident, was employed by R.H. Bouligney, Inc. as a linesman for one of the construction crews on the project. *Id.* at 526. While connecting



decision on the intractable *Erie* doctrine. *Byrd* involved the same type of *Erie* conflict: whether to apply the state statute or the judicially-created federal policy. However, unlike *Gasperini's* fray with the Seventh Amendment's re-examination clause, *Byrd* invoked the Amendment's first clause regarding preservation of the right to trial by jury.<sup>42</sup> In that case, Blue Ridge Rural Electrical Cooperative, Inc., upon being sued for personal injuries, asserted that its invocation of a state statutory defense could only be decided upon by a judge rather than a jury.<sup>43</sup> The *Erie* Doctrine would support that contention, requiring the federal court to invoke the state rule rather than the judicially-created federal policy favoring the jury as the arbiter of factual issues.<sup>44</sup>

However, in *Byrd*, the Court rejected the use of the "outcome determinative test" in cases where it would interfere with an essential character of the independent federal court system.<sup>45</sup> Instead, their inquiry involved a balancing of the competing state and federal interests.<sup>46</sup> Inevitably, the Seventh Amendment safeguard prevailed over *Erie's* pressure. In squaring with the Amendment's robust trial-by-jury clause, the Court held that the federal policy favoring the use of a jury to decide factual issues, such as whether Blue Ridge Rural Electrical Cooperative, Inc. was entitled to immunity from *Byrd's* damage suit, outweighed the State's interest in having the question decided by a judge.<sup>47</sup>

The Court reasoned that, while outcome was not its sole consideration, there was no certainty that different results would

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power lines at one of the new substations, *Byrd* suffered severe injuries, including the loss of both arms. *Byrd*, 215 F.2d 542, 543 (1954). *Byrd* brought suit for damages stemming from Blue Ridge's negligence in supplying electrical power. *Id.*

42. U.S. CONST. amend. VII. The Seventh Amendment provides in pertinent part, "[i]n suits at common law . . . the right of trial by jury shall be preserved . . ." *Id.* (emphasis added).

43. *Byrd*, 356 U.S. at 527-28. "A State may, of course, distribute the functions of its judicial machinery as it sees fit." *Id.* at 536.

44. *See id.* at 538.

45. *Id.* at 537.

46. *Id.* at 538.

47. *Id.*

be obtained in federal court given the procedural safeguards available.<sup>48</sup> Moreover, the Court observed that an essential characteristic of the independent federal system “is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury *and, under the influence - if not the command - of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.*”<sup>49</sup>

However, instead of applying *Byrd*'s more recent balancing test, the *Gasperini* Court utilized the “outcome-determination” test set forth in the earlier *Guaranty Trust Company*.<sup>50</sup> This only served to further confuse this already obscure realm of *Erie* jurisprudence, not only since *Byrd* was the more recent *Erie* precedent, but because it involved the most similar *Erie*-line conflict to *Gasperini*.

As in *Byrd*, the Seventh Amendment in *Gasperini* did escape unscathed, but not without subtle maneuvering on the part of the *Gasperini* majority.<sup>51</sup> To avoid violating the re-examination clause while upholding the use of the “deviates materially” standard to test the jury’s verdict, the *Gasperini* Court merely circumvented the Amendment’s constraints by differentiating between the functions of federal trial judges and federal appellate judges. The Court observed that trial judges “have the ‘unique opportunity to consider the evidence in the living courtroom context,’<sup>52</sup> while appellate judges see only the ‘cold paper record.’”<sup>53</sup> Moreover, the Court noted that, case after case, it reaffirmed the federal trial judges “discretion to grant a new trial if the verdict appears to the judge to be against the weight of the evidence.”<sup>54</sup> That discretion includes reversing verdicts and

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48. *Id.* at 539-40.

49. *Id.* at 537 (emphasis added).

50. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945).

51. *Gasperini*, 116 S. Ct. at 2225. Justice Ginsburg, writing for the majority, was joined by Justices O’Connor, Kennedy, Souter, and Breyer. *Id.*

52. *Id.* (quoting *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir. 1969)).

53. *Id.* (quoting *Gasperini*, 66 F.3d at 431).

54. *Id.* at 2222 (quoting *Byrd*, 356 U.S. at 540).

ordering a new trial on the basis of excessiveness.<sup>55</sup> Hence, this trial court discretion was found to predate, and thus, preempt the Seventh Amendment.

In contrast, an appellate judge did not have the same discretion to review a federal trial court's denial of a motion to set aside a jury's verdict because that was seen as "a relatively late and less secure, development."<sup>56</sup> Thus, such appellate review was deemed incompatible with the Seventh Amendment's re-examination clause.<sup>57</sup> However, that does not mean that the Court had not implicitly approved such review in the past.<sup>58</sup> Previously, courts of appeals have reviewed district court excessiveness determinations by applying "abuse of discretion" as their standard.<sup>59</sup> Further, the *Gasperini* Court found that:

appellate review for abuse of discretion is *reconcilable* with the Seventh Amendment as a control necessary and proper to the fair administration of justice: '[w]e must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.'<sup>60</sup>

Thus, since review based on "abuse of discretion" is compatible with the Seventh Amendment, the *Gasperini* Court expressly approved appellate review of the trial court's denial of a motion to set aside a jury's verdict as excessive where "abuse of discretion" is the standard upon which the review is based.<sup>61</sup>

At its core, *Gasperini* comports with the *Erie* doctrine and squares with the Seventh Amendment. Under the *Erie* analysis, which presses for state law application, the "deviates materially" standard attached because the statute in question had a state

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55. *Id.*

56. *Id.* at 2223.

57. *Id.*

58. *Id.*

59. *Id.* See also *Grumenthal v. Long Island R.R. Co.*, 393 U.S. 156, 157 (1969).

60. *Id.* (quoting *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961)) (emphasis added).

61. *Id.* at 2223-24.

substantive goal - capping damages. Further, the federal trial court's power to reverse a verdict and order a new trial on the basis of excessiveness was found to be consonant with the Seventh Amendment. Moreover, the *Gasperini* Court explicitly approved appellate review of a district court's denial of a motion to set aside a verdict as excessive.<sup>62</sup>

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62. *Id.* at 2224.

