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Right to a Jury Trial

RIGHT TO A JURY TRIAL

N.Y. CONST. art. I, § 2:

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

N.Y. CONST. art. VI, § 18:

Trial by jury is guaranteed as provided in article one of this constitution. The legislature may provide that in any court of original jurisdiction a jury shall be composed of six or of twelve persons and may authorize any court which shall have jurisdiction over crimes and other violations of law, other than crimes prosecuted by indictment, to try such matters without a jury, provided, however, that crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one of this constitution.

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

COURT OF APPEALS

Sharrow v. Dick[1]
(decided June 14, 1995)

The issue in this case was whether the appellant's constitutional right to a trial by jury[2] had been violated because the trial court erred in denying his counsel's request to conduct a limited inquiry to determine whether all six jurors participated in the deliberation of the issues submitted to them.[3] The court of appeals held that "where the parties to a civil case have not

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1. 86 N.Y.2d 54, 653 N.E.2d 1150, 629 N.Y.S.2d 980 (1995).

2. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." *Id.* N.Y. CONST. art. I, § 2. This section states:

> Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

Id. N.Y. CONST. art. VI, § 18. This section states:

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Id.

3. *Sharrow*, 86 N.Y.2d at 56-57, 653 N.E.2d at 1150, 629 N.Y.S.2d at 980.

agreed to a trial by fewer than six jurors, a valid verdict requires that all six jurors participate in the underlying deliberations."[4] The court held that, in the absence of any inquiry regarding juror participation, the possibility remains that the defendant's constitutional right to trial by a six-member jury was compromised and, accordingly, a new trial was ordered.[5] The court granted this relief because parties are entitled to a process in which each juror deliberates on all the issues and then, with his or her individual judgment and persuasion, attempts to influence the reasoning of the other five.[6] If a juror disagrees with the remaining five on one issue, he must still participate in the deliberations or the jury will not meet the constitutional requirements necessary for a valid verdict.[7]

Lyndon Sharrow, plaintiff, was an iron worker employed by G & H Steel, a third party defendant.[8] Sharrow was injured while using a Genie Hoist during construction of the Southport Correctional Facility.[9] He brought this action against the general contractor, Dick Corporation, and Southern Steel Corporation, the subcontractor, alleging a violation of New York Labor Law section 241(6)[10] and common law negligence.[11] The Dick Corporation and Southern Steel successfully moved for summary judgment against G & H Steel for common law and contractual

4. *Id.* at 59-60, 653 N.E.2d at 1152, 629 N.Y.S.2d at 982.

5. *Id.* at 62, 653 N.E.2d at 1153, 629 N.Y.S.2d at 983.

6. *Id.* at 60, 653 N.E.2d at 1152, 629 N.Y.S.2d at 982.

7. *Id.*

8. *Id.* at 57, 653 N.E.2d at 1150, 629 N.Y.S.2d at 980.

9. *Id.*

10. N.Y. LAB. LAW § 241(6) (McKinney 1986). Section 241(6) provides that:

> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The board may make rules to carry into effect the provisions of this subdivision, and the owners of one and two family dwellings who contract for but do not direct or control the work, shall comply therewith.

Id.

11. *Sharrow*, 86 N.Y.2d at 57, 653 N.E.2d at 1151, 629 N.Y.S.2d at 981.

indemnification and, thus, the remaining issue at trial was whether defendants had violated the Labor Law.[12]

When the jury foreperson announced the verdict "finding defendants' violation of the statute the proximate cause of plaintiff's injuries and awarding him damages in the amount of $430,000[,] [c]ounsel for G & H Steel requested that the jury be polled."[13] Normally, the jury verdict is read to the jury and then each juror is questioned as to whether that verdict is his or her verdict.[14] In the instant case the court clerk departed from the usual practice and polled the jury "by reading each question on the verdict sheet and then asking each juror in turn to state his or her verdict on the question."[15] When the clerk asked the first question--"whether there was a violation of the Labor Law for which the defendants were liable -- juror No. 5 stated that her answer was 'No.'"[16] The clerk then followed with the second question--"whether the Labor Law violation was the proximate cause of plaintiff's injuries."[17] The following excerpt from the transcript indicates juror No. 5's response:

> JUROR NUMBER FIVE: I had no--
>
> THE CLERK: Your verdict is no?
>
> THE COURT: Well, she didn't make a determination because she did not move on.[18]

With regard to the third question the transcript indicates that juror No. 5 did not respond immediately.[19] The question involved the "total amount of damages necessary to compensate plaintiff."[20] The transcript indicates juror No. 5's reply:

> THE CLERK: Number 5? No response?

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12. *Id.*
13. *Id.*
14. *Id.* n.1 (citation omitted).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 58, 653 N.E.2d at 1151, 629 N.Y.S.2d at 981.
20. *Id.*

JUROR NUMBER FIVE: No.[21]

Juror No. 5 also replied "No response" to the remaining three questions which involved "specific items of damages and plaintiff's possible negligence."[22]

Prior to the jury being discharged and after the polling, counsel for G & H Steel suggested that juror number five's responses could indicate that she had not participated in any of the deliberations after the first question.[23] Counsel further suggested that G & H Steel may have been deprived of its constitutional right to a jury trial ause of this non-participation, and requested that the trial court conduct a limited inquiry to determine the extent of juror No. 5's participation in the verdict.[24] The trial court denied this request and judgment was entered for plaintiff.[25]

The primary issue before the court of appeals in *Dick v. Sharrow* involved the question of whether a unanimous verdict rendered by five jurors is as valid as a verdict rendered by five-sixths of a six member jury.[26] In deciding this question, the court

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 58, 653 N.E.2d 1153, 629 N.Y.S.2d at 982. The court, in considering appellant's claim, examined the historical development of the right to a trial by jury from the common law to its present form. *Id.* at 59-60, 653 N.E.2d at 1152, 629 N.Y.S.2d at 982. *See* N.Y. CONST. art. I, § 2 (stating that in New York, as provided by the New York State Constitution, a five-sixth jury verdict in a civil case is permissible); N.Y. CIV. PRAC. L. & R. 4104 (McKinney 1992) (stating that a civil "jury shall be composed of six persons"); N.Y. CIV. PRAC. L & R. 4113(a) (McKinney 1992) (providing that in a civil action "a verdict may be rendered by not less than five-sixths of jurors constituting a jury"). *See also* Patton v. United States, 281 U.S. 276, 288 (1930) (stating that the constitutional right to trial by jury at common law requires "(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial shall be in the presence of and under the superintendence of a judge having power to instruct [the jury] as to the law and advise them in respect of the facts; and that the verdict shall be unanimous"); Cancemi v. People, 18 N.Y. 128, 135 (1858) (stating that "[a] legal jury, according to the common law, consists of twelve persons"(citation omitted)).

first addressed appellant's claim that the trial court erred in declining to conduct a limited inquiry to determine whether juror No. 5 participated in the verdict process.[27] In determining whether a unanimous verdict rendered by five jurors is as valid as a verdict rendered by five-sixths of a six-member jury, the appellate courts have consistently held that, absent the express consent of the parties, an individual's right to a jury of six persons sworn to try the issues must not be diminished, and that all six jurors must participate in the deliberations leading to the verdict.[28]

Finding that the constitutional right to a jury trial had been violated, the *Sharrow* court held that:

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27. *Sharrow*, 86 N.Y.2d at 56, 653 N.E.2d at 1150, 629 N.Y.S.2d at 980.

28. *See* Waldman v. Cohen, 125 A.D.2d 116, 512 N.Y.S.2d 205 (2d Dep't 1987). In a civil suit where the number of jurors available for deliberations fell to five on the morning of summations and defendants did not consent to the five-person jury, the appellate court ruled that the verdict rendered by the jury was void. *Id.* at 117, 512 N.Y.S.2d at 206. The *Waldman* court further stated that "[i]n a civil case, a verdict rendered by a jury consisting of fewer than six jurors is a nullity in the absence of consent by all parties." *Id. See also* Schabe v. Hampton Bays Union Free Sch. Dist., 103 A.D.2d 418, 480 N.Y.S.2d 328 (2d Dep't 1984). The appellate court determined that in a case involving a special verdict all answers approved by a five-sixths vote need not have the concurrence of the identical five jurors. *Id.* at 427, 480 N.Y.S.2d at 335. The court also held that where a juror has dissented from the answer to a special verdict question he or she is not bound by the answer as further questions are considered. *Id* at 429, 480 N.Y.S.2d at 336; Measeck v. Noble, 9 A.D.2d 19, 189 N.Y.S.2d 748 (3d Dep't 1959). In *Measeck*, the Third Department stated that:

> In the absence of stipulation or consent on the record to receive a verdict of less than the constituted number (12), the verdict of the jury was a nullity. . . . [T]he addition of Section 463-a was never intended to amend or alter this basic principle. This amendment made by the 1938 Constitutional Convention that "a verdict may be rendered by not less than five-sixths of the jurors *constituting a jury in any civil case*" was to overcome the number of disagreements in civil actions. It did not change the quantum as to what constitutes a legal jury but only the quantum as to the rendering of a verdict not unanimous by a legally constituted jury.

Id. at 21, 189 N.Y.S.2d at 750 (emphasis supplied).

> [W]here the parties to a civil case have not agreed to a trial by fewer than six jurors, a valid verdict requires that all six jurors participate in the underlying deliberations. The parties are entitled to a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five.[29]

The court further stated that although a juror may disagree with the remaining five regarding the issue of liability, he or she must still participate in the deliberations.[30] If the juror were to cease this involvement, the jury would become a body of five which is one less than the required six and the verdict would, therefore, be void.[31]

The *Sharrow* court further concluded that the request for a limited inquiry of the jury should have been granted by the trial court in order to resolve the doubts raised by the juror's response to the poll.[32] The limited inquiry would have assisted the court in determining if juror No. 5 had participated in all of the jury deliberations in order to decide if the verdict was flawed.[33]

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29. *Sharrow*, 86 N.Y.2d at 59-60, 653 N.E.2d at 1152, 629 N.Y.S.2d at 982. *See* Arizmendi v. City of New York, 56 N.Y.2d 753, 437 N.E.2d 274, 452 N.Y.S.2d 15 (1982) (finding that appellants were effectively deprived of their constitutional guarantee of a jury of six persons when, after a poll, a juror revealed that he had neither voted nor deliberated on the issue of damages because he was the sole dissenter on the issue of liability; however, the court also found the objection was waived by defendants because the issue was first raised in a post trial motion); *see also* Schabe v. Hampton Bays Union Free School Dist., 103 A.D.2d 418, 427-28, 480 N.Y.S.2d 328, 335 (2d Dep't 1984) (discussing the importance of juror participation in the decision-making process of jury deliberations regardless of whether the juror opposes or agrees with the majority decision).

30. *Sharrow*, 86 N.Y.2d at 60, 653 N.E.2d at 1152, 629 N.Y.S.2d at 982.

31. *Id.* (citation omitted).

32. *Id.*

33. *Id. See* Porrett v. City of New York, 252 N.Y. 208, 211, 169 N.E. 280 (1929) (stating that where the jury verdict appears to be "imperfect or incomplete" the court may order the jurors to retire and consider the matter again); Pogo Holding Corp. v. New York Prop. Ins. Underwriting Ass'n, 97 A.D.2d 503, 467 N.Y.S.2d 872, *aff'd*, 62 N.Y.2d 969, 468 N.E.2d 291, 479 N.Y.S.2d 336 (2d Dep't 1983) (citing *Porret* and finding that "judicial intervention is authorized where there is substantial confusion or ambiguity in the verdict").

Moreover, if there had been a questionable verdict the inquiry would have allowed the trial court the option of either correcting the inadequacy before discharging the jury or ordering a new trial if no other remedy was available.[34] In granting a limited inquiry, the court distinguished between conducting such an inquiry prior to discharging the jury from one done post-trial.[35]

New York and federal law are similar in recognizing the right of the trial court to conduct some form of inquiry into the validity of a verdict or indictment.[36] In most jurisdictions, a post-trial inquiry into the validity of a jury verdict is subject to the provisions of Rule 606(b) of the Federal Rules of Evidence.[37] However, in New York, despite the consistency of the case law with these provisions, a similar statute has not been adopted.[38]

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34. *Sharrow*, 86 N.Y.2d at 60, 653 N.E.2d at 1152, 629 N.Y.S.2d at 982. *See* Barry v. Manglass, 55 N.Y.2d 803, 806, 432 N.E.2d 125, 127, 447 N.Y.S.2d 423, 425 (1981) (stating that had the court been aware of the possibility of an inconsistent verdict prior to discharging the jury, the trial court could have taken a corrective action such as directing the jury to reconsider its decision).

35. *Id.* at 60, 653 N.E.2d at 1153, 629 N.Y.S.2d at 983.

36. *Id.* at 61.

37. *Id.* at 60; FED. R. EVID. 606(b). Rule 606(b) provides that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id.

38. *Sharrow*, 86 N.Y.2d at 60, 653 N.E.2d at 1153, 629 N.Y.S.2d at 983. *See* Kaufman v. Lilly & Co., 65 N.Y.2d 449, 460, 482 N.E.2d 63, 70, 492 N.Y.S.2d 584, 591 (1985) (applying the policy reasons stated by the Supreme Court in *McDonald*, *see infra* note 40, and denying a request to depose jurors from several prior related cases); People v. DeLucia, 20 N.Y.2d 275, 277-80, 229 N.E.2d 211, 213-14, 282 N.Y.S.2d 526, 528-30 (1967) (discussing the differences between the applicability of the traditional common law rule and

Rule 606(b) provides that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations except in cases when an inquiry into external influences on the jury is necessary."[39] The policy considerations underlying this rule were first expressed by the United States Supreme Court in *McDonald v. Pless*.[40] The *Sharrow* court identified three factors that the Supreme Court, in *McDonald*, recognized as pertinent in making a post-trial determination of the admissibility of juror evidence impeaching a quotient verdict: "ensuring the finality of verdicts, preventing juror harassment by disappointed litigants or their attorneys, and encouraging 'frankness and freedom of discussion and conference' among the jurors."[41]

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the constitutional protection provided in the federal courts and concluding that the rule against impeachment of jury verdicts is necessary to prevent the harassment of jurors and to prevent the potential for "chaos" an alternative rule may cause); People v. Redd, 164 A.D.2d 34, 36-40, 561 N.Y.S.2d 439, 440-42 (1st Dep't 1991) (applying policy considerations established by the Supreme Court regarding juror testimony in order to impeach a verdict); Russo v. Jess R. Rivkin, 113 A.D.2d 570, 574-75, 497 N.Y.S.2d 41, 44-45 (2d Dep't 1985) (citing prior case law on the issue of jury impeachment to support the court in its decision to rule against the admission of juror testimony to impeach a verdict); Gamell v. Mount Sinai Hosp., 40 A.D.2d 1010, 1011-12, 339 N.Y.S.2d 31, 33-34 (2d Dep't), *appeal dismissed*, 32 N.Y.2d 678, 296 N.E.2d 256, 343 N.Y.S.2d 359 (1972) (citing previous Supreme Court holdings in its condemnation of the practice of post-trial investigations conducted in order to impeach a jury verdict).

39. FED. R. EVID. 606(b).

40. 238 U.S. 264 (1915). In *McDonald*, the Supreme Court stated that:

> When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis or a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

Id. at 267.

41. *Sharrow*, 86 N.Y.2d at 60, 653 N.E.2d at 1153, 629 N.Y.S.2d at 983 (citing *McDonald*, 238 U.S. at 267-68). *See* Tanner v. United States, 483 U.S. 107, 119-20 (1987) (supporting the Court's holding in *McDonald* and noting the importance of protecting jury deliberations from public scrutiny); Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L.

The *Sharrow* court concluded that none of these policies is threatened when prior to discharging the jury the trial court allows an inquiry into "an inconsistency or ambiguity in the jury's verdict that is apparent from the juror's responses during polling."[42] Therefore, the court concluded that in the instant case there existed an ambiguity which correctly led defense counsel to request a limited inquiry to resolve the issue of whether juror No. 5 participated in the jury verdict.[43] The court further held that the failure of the trial court to grant such an inquiry leaves open the possibility that the defendant's constitutional right to a trial by a full six-member jury was compromised and, therefore, a new trial was ordered.[44]

REV. 57 (1993) (discussing the origin, application of, and alternatives to the no impeachment rule).

42. *Sharrow*, 86 N.Y.2d at 61, 653 N.E.2d at 1153, 629 N.Y.S.2d at 983. *See* People v. Pickett, 61 N.Y.2d 773, 461 N.E.2d 294, 473 N.Y.S.2d 157 (1984). The *Pickett* court established guidelines for conducting a juror inquiry as follows:

> [The trial judge should address] the juror out of the presence of the other jurors, instructing her that communications among the jurors that were a part of their deliberative process in attempting to reach a verdict on the issues they were charged to decide (including their efforts by permissible arguments on the merits to persuade each other) were secret and not to be disclosed to him.

Id. at 774, 461 N.E.2d at 295, 473 N.Y.S.2d at 158. *See* State v. Browne, 602 A.2d 540, 543-44 (R.I. 1992) (adopting the guidelines set forth in *Pickett* and further requiring that "only the trial justice in the presence of opposing counsel examine the juror, and that in no circumstances should counsel be allowed to question the juror").

43. *Sharrow*, 86 N.Y.2d at 60, 653 N.E.2d at 1153, 629 N.Y.S.2d at 983.

44. *Id.*