

June 2012

CPLR 4111: Special Verdict Answers Do Not Require Concurrence by the Same Five Jurors

Michael J. McVicker

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

McVicker, Michael J. (1985) "CPLR 4111: Special Verdict Answers Do Not Require Concurrence by the Same Five Jurors," *St. John's Law Review*. Vol. 59 : No. 3 , Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol59/iss3/12>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

context, the need to protect his right to rely on the statute of frauds as a defense is eliminated, because neither the defendant nor the court can be defrauded by the plaintiff.³⁰ Moreover, a judicial admission does not bar the defendant from contesting the validity or terms of the contract on other grounds.³¹ It is submitted that the purposes of the statute would be better served, and judicial efficiency more effectively promoted, by giving full effect to the judicial admissions exception to the statute of frauds.³²

Colleen M. McIntosh

CPLR 4111: Special verdict answers do not require concurrence by the same five jurors

Since 1937, New York has permitted verdicts in civil trials to be rendered by five-sixths of the jury.¹ The authorizing statute

gill Inc., *Commodity Mktg. Div. v. Hale*, 537 S.W.2d 667, 669 (Mo. Ct. App. 1976). Defendants should not be allowed to avoid admitted obligations in the name of preventing plaintiffs from perpetrating non-existent frauds. *See Stevens, supra* note 18, at 378.

³⁰ *See supra* note 24 and accompanying text. "Undeniably, the purpose of the statute was to give assured protection against the risk . . . of convincing proof through perjured testimony of an agreement that had never actually been entered into." *Stevens, supra* note 18, at 360. A defendant will not admit the existence of a contract that he did not make, and, therefore, it is suggested, once the contract is admitted the defendant should not be protected by the statute.

³¹ *See* N.Y. U.C.C. § 2-201, official comment 7, at 119 (McKinney 1964); Comment, *U.C.C. 2-201(3)(b): The Search for the "Bargain-in-Fact" Through the Use of the Oral Admissions Exception of the U.C.C. and its Impact on Other Contract Areas*, 3 J. L. & Com. 167, 176 (1983); *see also* *Packwood Elevator Co. v. Heisdorffer*, 260 N.W.2d 543, 547 (Iowa 1977) (plaintiff has burden of proving contract actually exists); *Dehahn v. Innes*, 356 A.2d 711, 719-23 (Me. 1976) (litigating tender of delivery, acceptance, revocation, and damages); *Oregon Ridge Dinner Theatre, Inc. v. Hamlin*, 253 Md. 462, 467-68, 253 A.2d 382, 384 (1969) (litigating validity of transfer of assets).

³² The history of the statute of frauds clearly indicates that its purpose was to prevent the enforcement of fraudulent claims. *See Stevens, supra* note 18, at 355-71. It is suggested that because a party does not ordinarily admit a contractual obligation to which he was not a party, it is reasonable to hold the party bound, to the extent that he admits the obligation. "[S]ince the statute of frauds was intended to provide justice by reducing frauds, doing away with the judicial admission exception to discourage perjury achieves justice in the same way as legalizing criminal activities in order to reduce crime." *Shedd, supra* note 24, at 28 n.144.

¹ *See* CPLR 4113(a) (1963). The statute provides: "A verdict may be rendered by not

does not distinguish between special verdicts² and general verdicts.³ Neither the New York Court of Appeals nor the legislature

less than five-sixths of the jurors constituting a jury." *Id.* Traditionally, most state constitutions required unanimous jury verdicts and had to be amended to permit less-than-unanimous verdicts. See Note, *Civil Juries: Recent Legislation Allowing Nonunanimous Verdicts*, 18 WASHBURN L.J. 269, 271 (1979). By 1970, a majority of the states had abolished the unanimous-jury requirement. See Kronzer & O'Quinn, *Let's Return to Majority Rule in Civil Jury Cases*, 8 Hous. L. Rev. 302, 302 & n.1 (1970). New York amended its constitution to permit non-unanimous jury verdicts in civil cases in 1935. See N.Y. CONST. art. I, § 2; FIRST ANN. REP. N.Y. JUD. COUNCIL 41 (1935). Two years later, the New York legislature enacted legislation to effect this change. See Ch. 120, [1937] N.Y. Laws 177 (codified at CPLR 4113(a)(1963)). One of the primary justifications for the non-unanimous verdict is the reduction of court congestion and the resultant delays. See *Ward v. Weekes*, 107 N.J. Super. 351, 356, 258 A.2d 379, 381 (1969); *Measeck v. Noble*, 9 App. Div. 2d 19, 21, 189 N.Y.S.2d 748, 750 (3d Dep't 1959); C. JOINER, CIVIL JUSTICE AND THE JURY 82 (1962); Comment, *Vote Distribution in Non-Unanimous Jury Verdicts*, 27 WASH. & LEE L. REV. 360, 361 (1970). Non-unanimous verdicts also serve to minimize the risk of compromise verdicts. See Bounds, *Civil Jury Verdicts—Let the Majority Rule*, 30 ALA. L. REV. 227, 231 (1969). Additionally, the use of non-unanimous verdicts helps to "avoid unjust verdicts resulting from dishonest and recalcitrant jurors." Comment, *supra*, at 361; accord Kronzer & O'Quinn, *supra*, at 307-08.

² See CPLR 4111(a) (1963). A special verdict is defined as "one in which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereon." *Id.* This definition was substantially the same at common law. See *Carr v. Carr*, 52 N.Y. 251, 255 (1873); *Anderson v. Anderson*, 103 Misc. 427, 428, 170 N.Y.S. 612, 613 (Sup. Ct. N.Y. County 1918).

Special verdicts were originally created to allow the jury to leave all determinations of law to the court, and thus avoid "the danger of punishment arising from [juror] mistakes in dealing with [the] law." See Note, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 485 (1964). The special verdict has been retained in modern procedures in order to give the court more control over the application of legal principles. *Id.* at 486. Special verdicts are particularly useful in cases in which the jury fails to consider a material issue of fact. See 8 CARMODY-WATT, *New York Practice*, § 58:11 (2d ed. 1966). CPLR 4111(b) allows the court to resolve omitted issues of fact in accordance with the jury's answers. See CPLR 4111(b) (1963); SIEGEL § 399, at 522-23 (1978). The court should phrase legal questions underlying special verdicts narrowly to reduce the risk that jurors will fail to understand the issues. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 259 (1920) (juror "who has never studied . . . [the law] cannot understand or appreciate its intricacies").

³ See CPLR 4111(a) (1963). The trial court may request a special or general verdict from the jury. See *id.*; *Johnson v. Art Kraft Strauss Sign Corp.*, 45 App. Div. 2d 482, 483, 359 N.Y.S.2d 773, 774 (1st Dep't 1974). A general verdict is defined as "one in which the jury finds in favor of one or more parties." CPLR 4111(a) (1963). It becomes a conclusory finding by the jury in favor of a party, see SIEGEL § 399, at 522, and is not subject to division or examination of its component parts, see *Murphy v. Roger Sherman Transfer Co.*, 62 Misc. 2d 960, 961, 310 N.Y.S.2d 891, 892 (Sup. Ct. App. T. 1st Dep't 1970); Sunderland, *supra* note 2, at 258; Comment, *supra* note 1, at 363-64.

To reach a general verdict, the jury must apply the law to the facts. See 4 WK&M ¶ 4111.02. To make such an application, the jury receives detailed instructions on the law. See *id.* The underlying assumption that the jury comprehends the law and is capable of applying it correctly is the subject of much criticism. See Finz, *Does the Trend in Our Substan-*

has yet addressed the question of whether a special verdict containing more than one answer requires the concurrence of the same five jurors upon each answer.⁴ Recently, in *Schabe v. Hampton Bays Union Free School District*,⁵ the Appellate Division, Second Department, addressed this issue, holding that the concurrence of any five jurors is sufficient to answer special verdict questions.⁶

In *Schabe*, a junior high school student was injured on school property when she was struck by a school bus.⁷ The student com-

tive Law Dictate an Expanded Use Of the Special Verdict, 37 ALB. L. REV. 229, 235 (1973); Sunderland, *supra* note 2, at 258-59. Even if the trial court properly charges the jury as to the law, the charge may be "erroneous" if not understood by the jury. Finz, *supra*, at 235.

To ensure proper consideration of the issues by the jury, the court may invoke its discretionary authority to require the jury to return written answers to interrogatories along with its general verdict. See CPLR 4111(c) (1963); *Sherman v. Leicht*, 238 App. Div. 271, 275, 264 N.Y.S. 492, 496 (4th Dep't 1933); 4 WK&M ¶ 4111.09. The answers to interrogatories may facilitate more efficient appellate review. See *Cid v. Bombardier Ltd.*, 91 App. Div. 2d 913, 913, 457 N.Y.S.2d 538, 539 (1st Dep't 1983); *Quigley v. Suffolk County*, 75 App. Div. 2d 888, 889, 428 N.Y.S.2d 46, 47 (2d Dep't 1980).

Several problems arise when the jury returns written answers to interrogatories with its general verdict. See 4 WK&M ¶¶ 4111.10-12. Because general verdicts are deemed conclusory, see SIEGEL § 399, at 522, all material issues are deemed to have been resolved in favor of the successful party, see *Elfeld v. Burkham Auto Renting Co.*, 299 N.Y. 336, 342, 87 N.E.2d 285, 288 (1949); *Barker v. Cunard S.S. Co.*, 91 Hun 495, 498, 36 N.Y.S. 256, 258 (1st Dep't 1895), *aff'd*, 157 N.Y. 693, 51 N.E. 1089 (1898). If one or more of the written answers is inconsistent with the general verdict, see *Aiello v. Wenke*, 118 Misc. 2d 1068, 1079, 462 N.Y.S.2d 949, 955 (Sup. Ct. Cattaraugus County 1983), the trial judge is authorized to enter judgment consistent with the jury's answers rather than with the verdict, see CPLR 4111(c) (1963). Alternatively, the court may allow the jury to reconsider the verdict. See CPLR 4111(c); *Oakley v. City of Rochester*, 71 App. Div. 2d 15, 17, 421 N.Y.S.2d 472, 474 (4th Dep't), *aff'd*, 51 N.Y.2d 908, 414 N.E.2d 966, 434 N.Y.S.2d 977 (1979).

⁴ See *Schabe v. Hampton Bays Union Free School Dist.*, 103 App. Div. 2d 418, 423, 480 N.Y.S.2d 328, 332 (2d Dep't 1984). The question of whether the same jurors must agree to all of the special verdict responses arises in negligence cases. See *Fordes v. Ames*, 93 Misc. 2d 723, 724, 401 N.Y.S.2d 965, 966 (Sup. Ct. Nassau County 1978); CPLR 4113, commentary at 131 (McKinney Supp. 1984-1985). An apparent inconsistency may arise when a juror votes against imposing liability on a party but concurs in an apportionment of damages that includes the party. See *Juarez v. Superior Court of Los Angeles County*, 31 Cal. 3d 759, 762, 647 P.2d 128, 129, 183 Cal. Rptr. 852, 853 (1982); *Fordes*, 93 Misc. 2d at 724, 401 N.Y.S.2d at 966. New York trial courts have disagreed as to whether unanimity is required by the same five jurors on each answer to the special verdict questions. Compare *Aiello v. Wenke*, 118 Misc. 2d 1068, 1074, 1076, 462 N.Y.S.2d 949, 952, 954 (Sup. Ct. Cattaraugus County 1983) (any five jurors can comprise majority on each answer) with *Cohen v. Levin*, 110 Misc. 2d 464, 468, 442 N.Y.S.2d 851, 854 (Sup. Ct. Queens County 1981) (unanimity required to prevent "internally inconsistent voting"). Such conflicting holdings have occurred due to the lack of an authoritative determination on this issue. See *Schabe v. Hampton Bays Union Free School Dist.*, 103 App. Div. 2d 418, 423, 480 N.Y.S.2d 328, 332 (2d Dep't 1984).

⁵ 103 App. Div. 2d 418, 480 N.Y.S.2d 328 (2d Dep't 1984).

⁶ *Id.* at 427, 480 N.Y.S.2d at 335.

⁷ *Id.* at 419-20, 480 N.Y.S.2d at 330. Upon dismissal from school, the plaintiff was wait-

menced a negligence action against the school district, the high school, the bus company, and the bus driver.⁸ At the close of trial, the jury was given seven written questions and directed to find a special verdict.⁹ The trial judge instructed the jury that each question of the special verdict required the vote of a five-sixths majority, but that this majority could be comprised of any five jurors.¹⁰ *Inter alia*, the jury found the school district negligent and the plaintiff contributorily negligent, and apportioned fault between them.¹¹ Subsequent polling of the jury revealed that one juror who had dissented on an issue of liability had nevertheless concurred in the apportionment of fault.¹² On appeal, the school district challenged the trial court's "any five" instructions.¹³

In a unanimous decision, the Second Department upheld the "any five" rule.¹⁴ Writing for the court, Presiding Justice Lazer examined the legislative reasons behind the abolishment of the unanimous jury requirement,¹⁵ and concluded that the adoption of the

ing to board one of several buses parked in the school driveway. *Id.* at 419, 480 N.Y.S.2d at 331. Plaintiff slipped while running across the driveway and was struck by a bus which had been "waved on" by another driver. *Id.* at 419-20, 480 N.Y.S.2d at 331.

⁸ *Id.* at 419, 480 N.Y.S.2d at 330. Prior to trial, the plaintiff settled with the bus company and the bus driver. *Id.* Though the settling parties did not participate in the trial, their negligence remained at issue for the allocation of damages. *Id.*; see GOL § 15-108 (1978).

⁹ *Schabe*, 103 App. Div. 2d at 420, 480 N.Y.S.2d at 331. The first six special verdict questions submitted to the jury addressed the negligence of each party and the related issue of causation. *Id.* The seventh question required the jury to apportion the fault among the parties. *Id.*

¹⁰ *Id.* The judge apparently relied on the New York pattern jury instructions, which provide: "[f]ive of the six of you must agree on the answer to any question, but the same five persons need not agree on all of the answers." 1 NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 1:97 (2d ed. Cum. Supp. 1983).

¹¹ See *Schabe*, 103 App. Div. 2d at 420-21, 480 N.Y.S.2d at 331.

¹² *Id.* Juror number one dissented to the majority's determination that the plaintiff was contributorily negligent, but approved the answer to the seventh question, which attributed 41% of the fault to the plaintiff. *Id.* at 421, 480 N.Y.S.2d at 331.

¹³ See *id.* at 419, 480 N.Y.S.2d at 330.

¹⁴ *Id.* at 427, 480 N.Y.S.2d at 335. In addition to the "any five" issue, the court determined that a verdict based on an instruction that requires a juror who dissents on one issue to be bound by the majority's answer when analyzing subsequent issues is fatally deficient. *Id.* at 428-29, 480 N.Y.S.2d at 336. The court emphasized "[t]he paramount importance of maintaining the independence and intellectual integrity of each juror." *Id.* at 427-28, 480 N.Y.S.2d at 335.

¹⁵ *Id.* at 423, 480 N.Y.S.2d at 332-33. The court resolved the "any five" issue by interpreting CPLR 4113 "in light of the legislative reasons that brought about [its] enactment." *Id.*, 480 N.Y.S.2d at 332. The court found that the unanimous jury requirement was abolished in order to reduce court congestion and the risk of unjust verdicts, and to discourage compromise verdicts. *Id.*, 480 N.Y.S.2d at 333; accord FIRST ANN. REP. N.Y. JUD. COUNCIL 41

"any five" rule furthers the legislative intent.¹⁶ The court emphasized the different roles played by general and special verdicts in jury trials,¹⁷ explaining that unlike general verdicts, in which the focus rests on the outcome of the case,¹⁸ special verdicts focus only on the resolution of specific questions.¹⁹ Therefore, the court held that although the requisite number of jurors must agree with the entire result of a general verdict,²⁰ nothing mandates that jurors agree upon all of the separate and distinct issues presented in a special verdict.²¹ The court noted that although the "validity of a special verdict may depend on the jury's answers being consistent enough for the entry of judgment . . . it does not depend upon the consistency of individual juror voting patterns."²² Finding nothing in the law mandating such consistent voting on all issues,²³ the court concluded that in the interest of "public policy and fairness," such a requirement should not be imposed.²⁴

The *Schabe* decision represents the most comprehensive evaluation by a New York court of the "any five" issue. It is submitted that by ascertaining the legislative reasons behind abolishing the

(1935).

¹⁶ See *Schabe*, 103 App. Div. 2d at 425, 480 N.Y.S.2d at 334.

¹⁷ See *id.* at 425-26, 480 N.Y.S.2d at 334.

¹⁸ *Id.* at 425, 480 N.Y.S.2d at 334; accord *Murphy v. Roger Sherman Transfer Co.*, 62 Misc. 2d 960, 961, 310 N.Y.S.2d 891, 892 (Sup. Ct. App. T. 1st Dep't 1970). In *Murphy*, the then requisite number of 10 of 12 jurors had agreed upon a general verdict. 62 Misc. 2d at 961, 310 N.Y.S.2d at 892. Because the same 10 jurors had not agreed on the issues of liability and damages, see *id.*, the trial judge invalidated the verdict, *id.* The *Murphy* case can be distinguished from *Schabe* in that *Murphy* involved a general, rather than a special, verdict. See *id.* See generally *supra* notes 2-3 (noting differences between general and special verdicts).

¹⁹ *Schabe*, 103 App. Div. 2d at 425, 480 N.Y.S.2d at 334. The *Schabe* court stressed the limited function of the special verdict, reasoning that "a special verdict [is] not merely a reflection of a general verdict split into parts, but [is] a device for returning the facts only." *Id.*; see *supra* note 2.

²⁰ *Schabe*, 103 App. Div. 2d at 425, 480 N.Y.S.2d at 334; see *supra* note 3.

²¹ *Schabe*, 103 App. Div. 2d at 425, 480 N.Y.S.2d at 334. The court found no support in either the legislative history of CPLR 4111 or the statute itself compelling adherence to the "identical five" rule. *Id.* at 425-26, 480 N.Y.S.2d at 334.

²² *Id.* at 426, 480 N.Y.S.2d at 334. The court reasoned that if the votes of each individual juror were scrutinized, the function of the special verdict would be frustrated, since the number of mistrials and retrials would increase. *Id.*

²³ *Id.*

²⁴ *Id.* at 427, 480 N.Y.S.2d at 335. The *Schabe* court rejected the argument that the "any five" rule permits inconsistent voting. *Id.* at 426, 480 N.Y.S.2d at 334. As long as any five jurors agreed on each issue, there was no reason to seek "some greater symmetry on the individual juror voting patterns." *Id.*, 480 N.Y.S.2d at 335.

unanimous jury requirement²⁵ and applying them to the "any five" rule,²⁶ the court effected the true goal of the New York Legislature.

The abandonment of the unanimous-jury requirement manifested the desire of the legislature to reduce court congestion and produce fairer verdicts.²⁷ After research and deliberation,²⁸ the legislature decided that the concurrence of five out of six jurors would serve these policy objectives without sacrificing fairness.²⁹ It is submitted that this degree of jury concurrence is achieved whenever "any five" jurors agree upon an answer to a question within a special verdict.

It is submitted that the "any five" rule is consistent with the present bifurcated trial procedures.³⁰ In bifurcated trials, the liability and damages issues are often decided by different jurors.³¹ Accordingly, the votes needed to sustain each verdict need not be

²⁵ See *id.* at 423, 480 N.Y.S.2d at 332-33; *infra* notes 27-29 and accompanying text. A statute should be interpreted in accordance with the intentions of the legislature and applied in accordance with its general purpose. See *Petterson v. Daystrom Corp.*, 17 N.Y.2d 32, 38, 215 N.E.2d 329, 331, 268 N.Y.S.2d 1, 4 (1966). Such intent and purpose may be ascertained from the legislative history of the statute. See *Kruger v. Page Management Co.*, 105 Misc. 2d 14, 24, 432 N.Y.S.2d 295, 303 (Sup. Ct. N.Y. County 1980).

²⁶ See *Schabe*, 103 App. Div. 2d at 424-26, 480 N.Y.S.2d at 333-35; *infra* notes 27-29 and accompanying text.

²⁷ See FIRST ANN. REP. N.Y. JUD. COUNCIL 41 (1935). To support the proposed amendment to the New York Constitution, the Council wrote:

The Council agrees with the argument that this proposed law, if enacted, will have two beneficial effects: (1) it will lessen the economic loss of jury disagreements; (2) it will result in a fairer expression of the jury's belief than under the unanimous verdict requirement.

Id. Once the amendment was adopted, see N.Y. CONST. art. I, § 2, the Judicial Council supported legislation to effect this change, see THIRD ANN. REP. N.Y. JUD. COUNCIL 34-35 (1937), again, for the "economic saving to the State," *id.* at 35. The practical considerations of reducing delays and mistrials are just as important today. See *Aiello v. Wenke*, 118 Misc. 2d 1068, 1076, 462 N.Y.S.2d 949, 954 (Sup. Ct. Cattaraugus County 1983) (adoption of practical rule necessary to alleviate congested calendars); *Desmond, Juries in Civil Cases—Yes or No?*, in THE JURY, SELECTED READINGS 17 (G. Winters ed. 1971) (problem with current court congestion is "urgent").

²⁸ See FIRST ANN. REP. N.Y. JUD. COUNCIL 41 (1937) (legislature considered "exhaustive statistical and theoretical study").

²⁹ See *id.* Before choosing the exact number of jurors necessary to reach a verdict, the legislature examined constitutional, statistical, and theoretical issues. See *id.*

³⁰ See CPLR 603 (1976) (allowing "bifurcation," or separate trials, of individual claims or issues at court's discretion). Bifurcation saves time and money. See SIEGEL § 130, at 514-15. Typically, courts bifurcate the liability and damages issues in personal injury cases. *Id.*

³¹ See *Mercado v. City of New York*, 25 App. Div. 2d 75, 76, 265 N.Y.S.2d 834, 836-37 (1st Dep't 1966) ("[t]he liability issue and the damage issue in an action, grounded in negligence . . . represent distinct and severable issues which may be tried and determined separately").

rendered by the same five jurors.³² Therefore, the "any five" rule ensures that the same degree of jury concurrence required in bifurcated trials will be attained in special verdict answers.³³

A frequent argument against the "any five" rule is that it allows individual jurors to cast irreconcilable votes.³⁴ However, if the same five jurors are required to agree on special verdict answers, the dissent of a juror in one question requires the remaining five jurors to agree unanimously on all other issues.³⁵ Thus, many of the problems with the unanimous jury requirement would be reintroduced, thereby frustrating the purpose of the less-than-unanimous verdict statute.³⁶

³² See *Murphy v. Roger Sherman Transfer Co.*, 62 Misc. 2d 960, 961, 310 N.Y.S.2d 891, 892 (Sup. Ct. App. T. 1st Dep't 1970). In *Murphy*, the court noted:

if the issues of liability and damages had been . . . tried separately (see CPLR 603) . . . any 10 jurors making for a valid verdict need not be the same with respect to each of their votes on the separated issues of liability and damages.

Id. At the trial level, however, the issues were tried together, and because the court found that the same jurors had not agreed on the issues of liability and damages, a new trial was ordered. *Id.* This distinction has often been criticized as overtechnical. See *Tillman v. Thomas*, 99 Idaho 569, 572, 585 P.2d 1280, 1283 (1978); *Reed v. Cook*, 103 N.Y.S.2d 539, 541 (Sup. Ct. Onondaga County 1951); CPLR 4113, commentary at 131 (McKinney Supp. 1984-1985)

³³ See *Aiello v. Wenke*, 118 Misc. 2d 1068, 1077, 462 N.Y.S.2d 949, 954 (Sup. Ct. Cattaraugus County 1983); *Forde v. Ames*, 93 Misc. 2d 723, 725, 401 N.Y.S.2d 965, 967 (Sup. Ct. Nassau County 1978); see also *Fields v. Volkswagen of Am., Inc.*, 555 P.2d 48, 55 (Okla. 1976) (same reasons justifying inconsistent jury votes in special verdict answers apply to bifurcated trials).

³⁴ See, e.g., *Cohen v. Levin*, 110 Misc. 2d 464, 469, 442 N.Y.S.2d 851, 854 (Sup. Ct. Queens County 1981). In *Cohen*, a medical malpractice suit was brought against two defendants. *Id.* at 464, 442 N.Y.S.2d at 851. When the jury was polled, it was found that one juror who had dissented from a finding of liability as to one defendant had agreed to an apportionment of damages which included that defendant. *Id.* at 464-65, 442 N.Y.S.2d at 851-52. The court reasoned that "[t]hese votes cannot be reconciled, and the court cannot choose between them and sustain one of them. In the court's view, they must both be eliminated from consideration." *Id.* at 469, 442 N.Y.S.2d at 854.

³⁵ See *Ward v. Weekes*, 107 N.J. Super. 351, 355-56, 258 A.2d 379, 381 (1969); *Fleischhacker v. State Farm Mut. Auto. Ins. Co.*, 274 Wis. 215, 219-20, 79 N.W.2d 817, 820 (1956). A rule that renders a juror's votes impotent, "[is] an unwarranted and unreasonable construction of the . . . Constitution, [and] statute." *Ward*, 107 N.J. Super. at 356, 258 A.2d at 381. A rule requiring the same five jurors to agree can invalidate an otherwise proper verdict. See, e.g., *Juarez v. Superior Court of Los Angeles County*, 31 Cal. 3d 759, 768, 647 P.2d 128, 133, 183 Cal. Rptr. 852, 857 (1982) ("same five" rule undermines purposes of less-than-unanimous verdict requirement); *Measeck v. Noble*, 9 App. Div. 2d 19, 21, 189 N.Y.S.2d 748, 750 (3d Dep't 1959) ("same five" rule fosters outdated unanimity requirement).

³⁶ See *Naumberg v. Wagner*, 81 N.M. 242, 245, 465 P.2d 521, 524 (N.M. Ct. App. 1970). In *Naumberg*, the court criticized the "same five" rule because it reinstates a characteristic of a unanimous verdict by requiring the same jurors to agree to each issue, *id.*, and because

The failure of New York courts to consider the legislative history of the "any five" issue in prior decisions had resulted in inconsistent holdings.³⁷ The *Schabe* court properly resolved the issue by focusing on the legislative intent surrounding the creation of section 4113, and, therefore, to avoid future inconsistencies, its decision should be adopted by either the New York Court of Appeals or the legislature.

Michael J. McVicker

it attempts "to maintain the semblance of unanimity after the requirement of unanimity ceases to exist," *id.* Similarly, New York courts have adopted the "any five" rule because it supports the five-sixths jury rule. *See, e.g.,* *Aiello v. Wenke*, 118 Misc. 2d 1068, 1076, 462 N.Y.S.2d 949, 954 (Sup. Ct. Cattaraugus County 1983) (determining inconsistencies in votes of individual jurors would undermine five-sixths rule); *see also supra* notes 26-28 and accompanying text (discussion of legislative intent behind abandonment of unanimous-jury rule).

³⁷ *Compare* *Cohen v. Levin*, 110 Misc. 2d 464, 467-68, 442 N.Y.S.2d 851, 852 (Sup. Ct. Queens County 1981) (without addressing legislative history, court eliminated verdict that "depend[ed] on a juror's internally inconsistent votes") *with* *Aiello v. Wenke*, 118 Misc. 2d 1068, 1076, 462 N.Y.S.2d 949, 954 (Sup. Ct. Cattaraugus County 1983) ("any five" rule is practical and essential in light of congested court calendars). The courts of other states that have considered the legislative purpose behind less-than-unanimous jury verdicts consistently have adopted the "any five" rule. *See, e.g.,* *Tillman v. Thomas*, 99 Idaho 569, 572-73, 585 P.2d 1280, 1283-84 (1978); *Ward v. Weekes*, 107 N.J. Super. 351, 356, 258 A.2d 379, 380 (1969); *Naumberg v. Wagner*, 81 N.M. 242, 245, 465 P.2d 521, 524 (N.M. Ct. App. 1970).