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CPLR 4402: Mistrial Motion Must Be Made Before Verdict

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On the basis of its inherent power to apply principles of law to a jury's findings where the "jury just simply refuses to render the required verdict; so long as in so doing the Court does not . . . substitute findings of its own for those of the jury,"[139] the Supreme Court, New York County, amended the jury verdicts in actions one and three. In court-completed verdicts in actions one and three, P1 and P3 recovered against D1, D2 and D3 for the amounts the jury had previously awarded P1 and P3. All other motions, with the exception of D2's motion in action two to dismiss D1's complaint, were denied.[140]

At first glance, *Welborn* is a noteworthy example of judicial enterprise since the decision logically interprets the jury's findings of liability. It may be argued, however, that the court should have followed the usual practice of giving the jury a second opportunity to follow its instructions and thereby render the completed verdicts itself.[141]

CPLR 4104: The six-person jury.

This section, which had permitted a party demanding a jury trial in civil cases to specify a jury composed of twelve or six persons, has been repealed.[142] The new CPLR 4104 limits to six the number of persons who shall compose a jury in civil actions. In keeping with this change, CPLR 4105 has been amended to specify that the first six persons who are approved must constitute the jury. Similarly, under CPLR 4109, the number of peremptory challenges has been reduced from six to three, and, under CPLR 8020(c), the jury fee has been reduced.

Six-person juries will "result in a substantial saving of time and money to the state, to litigants, and to jurors and their employers, without any substantial reduction in the quality of justice."[143] In New York County, it will ease the currently acute problem of obtaining qualified jurors.

ARTICLE 44 — TRIAL MOTIONS

CPLR 4402: Mistrial motion must be made before verdict.

Failure by trial counsel to make a timely objection to the court's rulings precludes review of the issue on appeal unless the appellate

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139 68 Misc. 2d at 857, 328 N.Y.S.2d at 137.

140 *Id.* at 858, 328 N.Y.S.2d at 138.

141 *See* 4 WK&M ¶ 4404.22, *citing* Note, *Inconsistent Jury Verdicts in Civil Actions*, 37 NEB. L. REV. 596 (1956); *cf.* Jacquin v. Syracuse Auto Rental & Taxicab Corp., 263 N.Y. 53, 188 N.E. 154 (1933).

142 L. 1972, ch. 185, at 402, eff. May 28, 1972.

143 4 WK&M ¶ 4104.06.

division, in the exercise of its discretion, finds that facts warrant review in the "interests of justice."[144]

Reaffirming this rule in *Schein v. Chest Service Co.*,[145] the Appellate Division, First Department, conditionally reversed,[146] on the law and the facts, an order setting aside a jury verdict in favor of the plaintiff and granting a new trial. The Supreme Court, New York County, had made the order on the basis of certain prejudicial testimony by the plaintiff. Noting that the record indicated that the defendants' counsel had not objected to the admission of this testimony, the court held that the defendants had waived their objection by not timely moving for a mistrial.[147]

The strict, but not inflexible, mandate of CPLR 4017[148] and decisional law requiring an immediate objection to prejudicial rulings prevents the unfairness to the court and to the opposing party of unnecessary re-trials.[149]

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5004: Interest on judgments fixed at 6%.

CPLR 5004 has been amended to fix the maximum interest rate payable on judgments at 6% instead of at the "legal rate."[150] Difficulties arose under the former CPLR 5004 as to whether the "legal rate" meant the established 6% rate or the legal interest rate established by the State Banking Board pursuant to General Obligations Law section 5-501. The Banking Board had set the rate at 7.25%, and then at 7.5%, and most courts had held that the rate established by the Banking Board was the proper interest rate payable on judgments.[151]

It is hoped that this amendment will not "have the incidental effect of making it harder to collect judgments since the judgment debtor

144 7 WK&M ¶ 5501.11. Note that the instant court disagreed with the trial court's finding that the "interests of justice" mandated a new trial. Schein v. Chest Serv. Co., 38 App. Div. 2d 929, 330 N.Y.S.2d 147, 148 (1st Dep't 1972) (mem.).

145 *Id.*, 330 N.Y.S.2d 147.

146 The court concurred in the lower court's finding that the verdict in the instant case was excessive. It therefore held that the jury verdict would be set aside and a new trial ordered unless plaintiff stipulated to accept $5,000 in lieu of the verdict of $15,000 within twenty days of service of the instant order. *Id.*, 330 N.Y.S.2d at 148.

147 *Id., citing* Hough v. Doersch, 257 App. Div. 842, 12 N.Y.S.2d 50 (2d Dep't 1939), *appeal dismissed*, 282 N.Y. 675, 26 N.E.2d 807 (1940); Collins v. Ward, 240 App. Div. 985, 268 N.Y.S. 142 (2d Dep't 1933).

148 CPLR 4017 states that "[f]ailure to so make known objections may restrict review upon appeal. . . ."

149 *See* 4 WK&M ¶ 4017.03.

150 L. 1972, ch. 358, at 790, eff. Sept. 1, 1972.

151 Trimboli v. Scarpaci Funeral Home Inc., 37 App. Div. 2d 386, 326 N.Y.S.2d 227 (2d Dep't 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 577 (1972); Rachlin & Co. v. Tra-Mar, Inc., 33 App. Div. 2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970).