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CPLR 4111: Retrial Necessary in Cases Involving Multiple Theories of Liability When General Verdict Is Used and One or More Theories Are Unsupported by Evidence

Gerard A. Hefner

wherein the Court held that a defendant who is not apprised of the risks of joint representation may withdraw a guilty plea only if he can demonstrate a significant possibility of a conflict of interest. Notably, the Court emphasized that although courts must conduct an inquiry when there is joint representation, the failure to do so will not result in reversal of a conviction subsequent to a plea bargaining agreement unless a conflict of interest is shown.

It is hoped that the discussion of these and other significant cases will help keep the practitioner aware of developments in New York law.

CIVIL PRACTICE LAW AND RULES

Article 41—Trial by a Jury

CPLR 4111: *Retrial necessary in cases involving multiple theories of liability when general verdict is used and one or more theories are unsupported by evidence*

CPLR 4111 provides that a trial judge, in his discretion, "may direct the jury to find either a general verdict or a special verdict."[1] If ordered to render a special verdict, the jury must decide

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[1] CPLR 4111(a) (1963). This provision replaced sections 458 and 459 of the Civil Practice Act and is based upon the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 49. The discretionary power of trial courts to select either a general verdict or a special verdict has been established in New York law since 1934. Ch. 552, [1934] N.Y. LAWS 1195; *see, e.g.*, Johnson v. Artkraft Strauss Sign Corp., 45 App. Div. 2d 482, 483, 359 N.Y.S.2d 773, 774 (1st Dep't 1974). *See generally* WK&M ¶ 4111.04.

In instructing a jury to render a general verdict, a trial judge may require that written answers to written interrogatories on one or more issues of fact be returned. *See* CPLR 4111(c) (1963). Formerly, the written answers to such written interrogatories were termed "special findings," *see* ch. 552, [1934] N.Y. LAWS 1195, but the term was changed to its present form to avoid confusion with "special verdicts." *See generally* Anderson v. Anderson, 103 Misc. 427, 170 N.Y.S. 612 (Sup. Ct. N.Y. County 1918). Such a qualified general verdict "clarifies the jury's constituent findings" and "enables the jury to draw the conclusions they believe the findings justify." SIEGEL § 399, at 523. The special verdict and the general verdict accompanied by interrogatories have been recognized by the judiciary as providing essentially the same factual advantages and, as a result, have been referred to interchangeably. *See, e.g.*, Forman v. Davidson, 74 App. Div. 2d 505, 506, 424 N.Y.S.2d 711, 712 (1st Dep't 1980); Killeen v. Reinhardt, 71 App. Div. 2d 851, 853, 419 N.Y.S.2d 175, 178 (2d Dep't 1979); Brandt v. Warren Automatic Controls Corp., 37 App. Div. 2d 563, 563, 322 N.Y.S.2d 291, 293 (2d Dep't 1971); Dore v. Long Island R.R., 23 App. Div. 2d 502, 502, 256 N.Y.S.2d 425, 427 (2d Dep't 1965); Hartnett v. Home Life Ins. Co., 18 App. Div. 2d 281, 284, 239 N.Y.S.2d 308, 312 (4th Dep't 1963). For purposes of this analysis, therefore, the general verdict accompanied by interrogatories will be treated as a special verdict.

As with most judicial matters of discretion, the trial court's choice of the type of verdict

specific issues presented to it by the court without making any general determination as to liability.[2] Conversely, a general verdict requires the jury to fix the rights and liabilities of the litigants without making specific findings.[3] In cases involving alternative theories of liability, a defect in any one of these bases for recovery will render a general verdict dubious, because an appellate court will be unable to ascertain whether the jury's decision had been based upon a defective theory.[4] Recently, in *Davis v. Caldwell*,[5] the

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is not disturbed, absent a showing of an abuse of discretion. *See, e.g.*, Lagzdins v. United Welfare Fund—Sec. Div. Marriott Corp., 77 App. Div. 2d 585, 586, 430 N.Y.S.2d 351, 353 (2d Dep't 1980); Quigley v. County of Suffolk, 75 App. Div. 2d 888, 889, 428 N.Y.S.2d 46, 47 (2d Dep't 1980).

[2] CPLR 4111(b) (1963); *see* Alton, *Special Verdicts In the State Courts*, 27 INS. COUNS. J. 390, 390 (1960); Note, *Trial Procedure—The Special Verdict in Civil Cases*, 48 KY. L.J. 440, 440 (1960). Since the trial judge applies the appropriate principles of law when a special verdict is used, the jury need only be instructed to the extent necessary for it to determine each factual issue presented. *See* McBride, *Instructions in Special Verdict Cases*, 59 Ohio Op. 381, 385 (1956). The special verdict also requires the framing of appropriate questions for jury submission, a task for which counsel is usually sought. *See* 4 WK&M ¶ 4111.09. When the response to the questions submitted to a jury are inconsistent, the court may either resubmit the questions for further jury deliberation or order a new trial. *See* Nallan v. Helmsley-Spear, Inc., 67 App. Div. 2d 719, 721, 412 N.Y.S.2d 650, 653 (2d Dep't 1979), *rev'd on other grounds*, 50 N.Y.2d 507, 407 N.E.2d 451, 429 N.Y.S.2d 606 (1980). Similarly, when a general verdict is used in conjunction with interrogatories and the answers are consistent with each other but not with the verdict, the court is required to direct judgment according to the answers, direct further deliberations, or order a new trial. *See* Oakley v. City of Rochester, 71 App. Div. 2d 15, 17, 421 N.Y.S.2d 472, 474 (4th Dep't 1979); Bruto v. George Herman & Assoc., Inc., 64 App. Div. 2d 844, 845, 407 N.Y.S.2d 331, 333-34 (4th Dep't 1978), *aff'd*, 47 N.Y.2d 941, 393 N.E.2d 1042, 419 N.Y.S.2d 970 (1979); CPLR 4111(c) (1963). If the answers are inconsistent with the verdict and conflict among themselves, the court is not permitted to direct the verdict, but must direct the jury to deliberate further or order a new trial. *See* Marine Midland Bank v. John E. Russo Produce Co., 50 N.Y.2d 31, 40, 405 N.E.2d 205, 209-10, 427 N.Y.S.2d 961, 966 (1980); SIEGEL § 399, at 523-24.

[3] The CPLR defines a general verdict as "one in which the jury finds in favor of one or more parties." CPLR 4111(a) (1963). Since the general verdict disposes of the legal and factual issues in a case, the jury must be instructed as to the appropriate legal principles to be applied to the facts at trial. Indeed, a failure to instruct the jury sufficiently may result in an order for a new trial. *Cf.* Johnson v. Artkraft Strauss Sign Corp., 45 App. Div. 2d 482, 483-84, 359 N.Y.S.2d 773, 774-75 (1st Dep't 1974) (failure to instruct the jury as to the appropriate standard of care); Jasinski v. New York Cent. R.R., 21 App. Div. 2d 456, 461-62, 250 N.Y.S.2d 942, 947-48 (4th Dep't 1964) (failure to instruct the jury as to the "last clear chance doctrine"). This aspect of general verdicts has been criticized because it assumes that the jury is able to understand the principles of law presented and then apply them to the facts of the case. *See* Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 259-60 (1920). *But see* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.02 (2d ed. 1981) (extolling the value of the jury in general).

[4] *See, e.g.*, Gurney, Becker & Bourne, Inc. v. Benderson Dev. Co., 47 N.Y.2d 995, 996, 394 N.E.2d 282, 283, 420 N.Y.S.2d 212, 213-14 (1979); Killeen v. Reinhardt, 71 App. Div. 2d 851, 853, 419 N.Y.S.2d 175, 177 (2d Dep't 1979); Mulligan v. Shuter, 71 App. Div. 2d 669,

Court of Appeals held that a new trial is required in cases involving multiple theories of liability when a general verdict is used and any one of the theories is found to be unsupported by the evidence.[6]

In *Davis,* the plaintiff underwent a mastectomy, thinking that such an operation was necessary to remove a suspected cancerous condition.[7] After learning that the tissue was benign,[8] the plaintiff sued her surgeon and the hospital in which the operation was performed, alleging five separate acts of medical malpractice.[9] After receiving the evidence, the trial court instructed the jury to resolve the issues pertaining to each of the five theories of liability,[10] but to return a single general verdict only.[11] The jury found for the plaintiff, awarding a substantial sum in money damages.[12] The Appellate Division, Fourth Department, affirmed without opinion,[13] and the defendants appealed.

On appeal, the Court of Appeals reversed,[14] holding that there was insufficient evidence to support two of the five theories.[15]

669, 419 N.Y.S.2d 13, 14 (2d Dep't 1979); Ferrarra v. Levanthal, 56 App. Div. 2d 490, 498, 392 N.Y.S.2d 920, 925 (2d Dep't 1977); Ward v. Kovacs, 55 App. Div. 2d 391, 395, 390 N.Y.S.2d 931, 934 (2d Dep't 1977); Hamilton v. Presbyterian Hosp., 25 App. Div. 2d 431, 431, 267 N.Y.S.2d 656, 657 (1st Dep't 1966) (per curiam); Dore v. Long Island R.R., 23 App. Div. 2d 502, 502, 256 N.Y.S.2d 425, 426 (2d Dep't 1965); Jasinski v. New York Cent. R.R., 21 App. Div. 2d 456, 462, 250 N.Y.S.2d 942, 948 (4th Dep't 1964); Hartnett v. Home Life Ins. Co., 18 App. Div. 2d 281, 284, 239 N.Y.S.2d 308, 311 (4th Dep't 1963).

[5] 54 N.Y.2d 176, 429 N.E.2d 741, 445 N.Y.S.2d 63 (1981).

[6] *Id.* at 183-84, 429 N.E.2d at 745, 445 N.Y.S.2d at 67.

[7] *Id.* at 178, 429 N.E.2d at 742, 445 N.Y.S.2d at 64.

[8] *Id.* at 178-79, 429 N.E.2d at 742, 445 N.Y.S.2d at 64. Postoperative pathological and x-ray studies, performed on a limited portion of the tissue removed, indicated that a malignancy was not present. *Id.*

[9] *Id.* at 179, 429 N.E.2d at 742, 445 N.Y.S.2d at 64. Although the trial court referred to the plaintiff's five claims as "causes of action," the Court of Appeals labeled them "theories of liability." *Id.* at 179 & n.2, 429 N.E.2d at 743 & n.2, 445 N.Y.S.2d at 65 & n.2.

[10] *Id.* at 179, 429 N.E.2d at 743, 445 N.Y.S.2d at 65. The five theories of liability comprising the plaintiff's case were erroneous diagnosis, failure to perform a biopsy prior to surgery, unnecessary performance of an operation, failure to follow accepted community standards of medical care, and failure to obtain informed consent prior to surgery. 54 N.Y.2d at 179, 429 N.E.2d at 742-43, 445 N.Y.S.2d at 64-65.

[11] 54 N.Y.2d at 179, 429 N.E.2d at 743, 445 N.Y.S.2d at 65. The jury was instructed that although a finding for the plaintiff on any one of the claims would permit an award of damages, they were not to reveal the claim or claims upon which they based the award. *Id.*

[12] *Id.*

[13] Davis v. Caldwell, 79 App. Div. 2d 1088, 437 N.Y.S.2d 952 (4th Dep't 1981).

[14] 54 N.Y.2d at 184, 429 N.E.2d at 745, 445 N.Y.S.2d at 67. Judge Jones authored the unanimous opinion. *Id.*

[15] *Id.* at 178, 429 N.E.2d at 742, 445 N.Y.S.2d at 64. The Court observed that the record did not contain any evidence that the plaintiff's doctor "ever made a diagnosis or was ever

Moreover, the Court found that a new trial was necessary because there was no means to ascertain whether the finding of liability had been predicated upon one of these unsubstantiated grounds for recovery.[16] The Court suggested, however, that "[s]ignificantly different legal consequences" would have obtained if the trial judge had not presented the case as involving five separate theories of recovery, but had marshalled the plaintiff's evidence so as to permit a finding that the defendants had breached a general standard of care.[17]

The use of general verdicts in cases involving multiple theories of liability often has been problematical. Indeed, New York courts consistently have held that the use of a general verdict is erroneous in such cases[18] and that the special verdict is a more appropriate procedural tool when multiple theories are asserted.[19] The *Davis* Court appears to have offered a solution to the problems posed by general verdicts in negligence cases by observing that the need for a retrial can be obviated through an alternative method of present-

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called upon to do so." *Id.* at 180, 429 N.E.2d at 743, 445 N.Y.S.2d at 65. Thus, the Court reasoned that the plaintiff's theory predicated upon misdiagnosis never should have been submitted to the jury. *Id.* at 181, 429 N.E.2d at 744, 445 N.Y.S.2d at 66. Similarly, the Court found that no evidence supported the plaintiff's claim that the operation was unnecessary. *Id.*

[16] *Id.* at 179-80, 429 N.E.2d at 743, 445 N.Y.S.2d at 65. The Court stated that "[a]t the new trial, the jury may not consider the two theories of liability for which the evidence was insufficient on the first trial but may consider those theories as to which sufficient evidence was introduced at the previous trial to have warranted a verdict favorable to plaintiffs." *Id.* at 180, 429 N.E.2d at 743, 445 N.Y.S.2d at 65 (citation and footnote omitted).

[17] *Id.* at 180 n.4, 429 N.E.2d at 743 n.4, 445 N.Y.S.2d at 65 n.4 (citing Food Pageant, Inc. v. Consolidated Edison Co., 54 N.Y.2d 167, 429 N.E.2d 738, 445 N.Y.S.2d 60 (1981)).

[18] *See, e.g.*, Lagzdins v. United Welfare Fund-Sec. Div. Marriott Corp., 77 App. Div. 2d 585, 586, 430 N.Y.S.2d 351, 353 (2d Dep't 1980); Quigley v. County of Suffolk, 75 App. Div. 2d 888, 889, 428 N.Y.S.2d 46, 47 (2d Dep't 1980). *See also* Fein v. Board of Educ., 305 N.Y. 611, 613, 111 N.E.2d 732, 733 (1953) (per curiam); Frozzitta v. Incorporated Village of Freeport, 57 App. Div. 2d 827, 827, 394 N.Y.S.2d 64, 65 (2d Dep't 1977); Hartnett v. Home Life Ins. Co., 18 App. Div. 2d 281, 284, 239 N.Y.S.2d 308, 312 (4th Dep't 1963).

[19] *See, e.g.*, Forman v. Davidson, 74 App. Div. 2d 505, 506, 424 N.Y.S.2d 711, 712 (1st Dep't 1980); Killeen v. Reinhardt, 71 App. Div. 2d 851, 853, 419 N.Y.S.2d 175, 178 (2d Dep't 1979); Brandt Corp. v. Warren Automatic Controls Corp., 37 App. Div. 2d 563, 563, 322 N.Y.S.2d 291, 293 (2d Dep't 1971); Corbett v. Brown, 32 App. Div. 2d 27, 32, 299 N.Y.S.2d 219, 224 (3d Dep't 1969); M.W. Zack Metal Co. v. Federal Ins. Co., 28 App. Div. 2d 1109, 1110, 284 N.Y.S.2d 582, 584 (1st Dep't 1967) (per curiam); Finkle v. Zimmerman, 26 App. Div. 2d 179, 181, 271 N.Y.S.2d 820, 822 (3d Dep't 1966); Dore v. Long Island R.R., 23 App. Div. 2d 502, 502, 256 N.Y.S.2d 425, 427 (2d Dep't 1965); Coastal Commercial Corp. v. Samuel Kosoff & Sons, Inc., 10 App. Div. 2d 372, 378, 199 N.Y.S.2d 852, 858 (4th Dep't 1960); Martin Fireproofing Corp. v. Maryland Casualty Co., 45 Misc. 2d 354, 360, 257 N.Y.S.2d 100, 106-07 (Sup. Ct. Erie County 1965), *aff'd*, 26 App. Div. 2d 910, 275 N.Y.S.2d 375 (4th Dep't 1966).

ing the plaintiff's case to the jury. It is submitted, however, that the *Davis* Court's suggestion bears little practical significance. Although the explicit factual determinations revealed through special verdicts are rendered unnecessary when the plaintiff's evidentiary contentions are presented to the jury under a single theory of negligence,[20] it appears that this "marshalling" approach will not be available in cases implicating discrete theories, such as strict products liability, breach of warranty, and intentional tort.

Notwithstanding that the alternative evidentiary presentation suggested in *Davis* may permit the use of general verdicts in cases limited to negligence theories, trial judges nevertheless should consider the collateral benefits offered by special verdicts. Indeed, the special verdict will be preferable in many instances since it focuses the jury's attention on precise factual questions[21] and diminishes the possibility of jury bias[22] by requiring the trial court to draw the legal conclusions dispositive of the case.[23] Additionally, the special

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[20] *See* Food Pageant, Inc. v. Consolidated Edison Co., 54 N.Y.2d 167, 174-75, 429 N.E.2d 738, 741, 445 N.Y.S.2d 60, 63 (1981); *cf.* Elfeld v. Burkham Auto Renting Co., 299 N.Y. 336, 342, 87 N.E.2d 285, 288 (1949) (material factual determinations implicitly are found in favor of party who prevails through general verdict). In *Food Pageant*, the plaintiff brought suit to recover damages sustained when the defendant's electrical power system failed. 54 N.Y.2d at 170, 429 N.E.2d at 739, 445 N.Y.S.2d at 61. The plaintiff alleged that the blackout was caused by the defendant's failure to maintain and inspect equipment properly, its negligent placement of unqualified personnel in critical positions, and its failure to keep several power sources in operable condition. *Id.* at 171, 429 N.E.2d at 739, 445 N.Y.S.2d at 61. A general verdict was rendered in the plaintiff's favor, and the appellate division affirmed. *Id.* at 172, 429 N.E.2d at 740, 445 N.Y.S.2d at 62.

Refusing to reverse the judgment, the Court of Appeals rejected the defendant's contention that "[b]ecause not all of [the plaintiff's] discrete 'theories of liability' . . . were . . . supported by legally sufficient evidence, the rendering of a general verdict require[d] a new trial." *Id.* at 174, 429 N.E.2d at 741, 445 N.Y.S.2d at 63. Examining the record, the Court observed that the trial judge did not present the case to the jury by focusing upon distinct theories of recovery. *Id.* at 175, 429 N.E.2d at 741, 445 N.Y.S.2d at 63. Rather, the Court noted, the jury was given "a summary of [the] plaintiff's evidentiary contentions," and was told to decide whether the defendant's conduct rose to the level of gross negligence. *Id.* The Court concluded that this method of presentation was not erroneous, and the jury's verdict was supported by the evidence. *Id.*

[21] *See, e.g.*, Wilson v. Homestead Valve Mfg. Co., 217 F.2d 792, 800-01 (3d Cir. 1954), *cert. denied*, 349 U.S. 916 (1955); Pache v. Boehm, 60 App. Div. 2d 867, 867-68, 401 N.Y.S.2d 260, 261-62 (2d Dep't 1978); *cf.* CPLR 4111(b) (1963) (court must submit questions "susceptible of brief answer" when directing jury to render special verdict). *See generally* 4 WK&M ¶ 4111.05.

[22] Skidmore v. Baltimore & O.R. Co., 167 F.2d 54, 66 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948); *see, e.g.*, Cartagena v. P. & F. Trucking, Inc., 73 App. Div. 2d 490, 493-94, 426 N.Y.S.2d 486, 488 (1st Dep't 1980).

[23] *See* CPLR 4111(a) (1963) (when special verdict is used, court decides which party is entitled to judgment). When a special verdict is used, the court instructs the jury with re-

verdict aids subsequent review by presenting an explicit adjudication of each issue to an appellate court reviewing the merits[24] or another trial court considering the collateral estoppel effect of the judgment.[25] Finally, such verdicts appear to satisfy automatically the statutory requirements that elements of damages be itemized in medical malpractice awards[26] and that fault be apportioned among multiple tortfeasors in other negligence actions.[27]

Gerard A. Hefner

DOMESTIC RELATIONS LAW

Visitation of adopted child by natural grandparents properly may be sought under DRL § 72

Section 72 of the Domestic Relations Law accords grandparents a procedure to secure visitation with a minor grandchild when "either or both of the parents of a minor child . . . is or are deceased."[28] Once a child is adopted, however, the legal relationship

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spect to the law only to the degree reasonably necessary to answer the questions presented. *See* note 2 *supra*. In such cases, the jury is less able to predict the legal effect of its factual conclusions. Skidmore v. Baltimore & O.R. Co., 167 F.2d 54, 66 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948).

[24] *See, e.g.*, Quigley v. County of Suffolk, 75 App. Div. 2d 888, 889, 428 N.Y.S. 2d 46, 47 (2d Dep't 1980); notes 18 & 19 and accompanying text *supra*. The factual determinations rendered incident to special verdicts are readily available to appellate courts since the clerk of the court must "make an entry in his minutes specifying . . . the general verdict and any answers to written interrogatories, or the questions and answers or other written findings constituting the special verdict." CPLR 4112 (1963).

[25] *See generally* CPLR 4111(d), commentary at 95-96 (McKinney Supp. 1981-1982).

[26] *See* CPLR 4111(d) (McKinney Supp. 1981-1982). Subsection (d) requires that a verdict in a medical malpractice action "specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element." *Id.*

[27] *See, e.g.*, Noga v. Monroe Medi-Trans, 78 App. Div. 2d 988, 988, 433 N.Y.S.2d 927, 928 (4th Dep't 1980); SIEGEL § 399, at 522; 4 WK&M ¶ 4111.05, at 41-195 to 41-196. *See generally* CPLR 1401-04, 1411 (McKinney Supp. 1981-1982).

[28] DRL § 72 (1977) (original version at ch. 631, § 1 [1966] N.Y. Laws 1391, *amended by* ch. 431, § 1 [1975] N.Y. Laws 620 (McKinney)); *see* Lo Presti v. Lo Presti, 40 N.Y.2d 522, 526-27, 355 N.E.2d 372, 375, 387 N.Y.S.2d 412, 414-15, *aff'd on remand*, 54 App. Div. 2d 582, 387 N.Y.S.2d 153 (2d Dep't 1976). Section 72 of the Domestic Relations Law provides:

> Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court for a writ of habeas corpus to have such child brought before such court; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody,