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Courts: Jurors Dissenting on Special Verdict Issue Excluded from Subsequent Deliberations

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On June 12, 1971, while trimming trees with his father's help, Scott Ferguson came in contact with an uninsulated 8000 volt power line which ran along an easement at the rear of their back yard. Scott and his father brought suit against Northern States Power Company (NSP) seeking to recover for Scott's personal injuries and his father's consequential damages. The case was submitted to the jury on a special verdict asking them to make findings on theories of negligence[1] and strict liability based on trespass. Both theories were ultimately rejected, that of trespass unanimously, and that of negligence with some dissension. In answering the questions submitted on the issue of negligence,[2] the jury unanimously found both plaintiffs causally negligent, but only ten of the twelve jurors agreed that NSP had been causally negligent. The jury then unanimously apportioned the negligence, finding both Scott and his father substantially more at fault than NSP.[3] On the plaintiff's appeal from a verdict in favor of defendant,[4] the Minnesota supreme court reversed and remanded for a new trial, *holding, inter alia*,[5] that:

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1. Because of the severe economic consequences the abrupt imposition of such a rule would have on small electric utilities, the court declined to decide whether maintenance of an uninsulated high-voltage power line through a residential area constituted an ultra-hazardous activity. The court did, however, call upon the legislature to consider the problem. Ferguson v. Northern States Power Co., 239 N.W.2d 190, 194 (Minn. 1976).

2. The court never explicitly set out the contents of the interrogatories, but the gist of the questions was nevertheless plain. With respect to negligence, the jury was asked to decide first, whether each party was causally negligent; second, if more than one was causally negligent, what percentage of negligence was assignable to each; and third, what damages were suffered. 239 N.W.2d at 193.

3. Instead of apportioning the total negligence between the three parties, the jury, per instructions which the Supreme Court found erroneous, *see* note 5 *infra*, first compared the negligence of Scott alone to that of NSP and found Scott 70 percent negligent and NSP 30 percent negligent; then it compared Mr. Ferguson's negligence to NSP's and found Mr. Ferguson 75 percent negligent and NSP 25 percent negligent.

4. The Minnesota comparative negligence statute, MINN. STAT. § 604.01 (1976), requires that, in order for plaintiff to recover, his negligence must not be "as great as that of [defendant]." Since both plaintiffs herein were found substantially more negligent than the defendant, they were not entitled to recover.

5. In addition to the issue of juror participation in deliberations discussed in this comment, the court found three other improprieties.

> [T]he jury should be instructed, in the event of a five-sixths verdict, that those jurors who dissent from a finding of causal negligence on the part of one or more of the parties are disqualified from participating in the apportionment of causal negligence.

Ferguson v. Northern States Power Company, 239 N.W.2d 190, 196 (Minn. 1976).

A substantial majority of the states presently have constitutional and/or statutory provisions allowing non-unanimous jury verdicts.[6] Such provisions are designed to limit the power of individual jurors to hang juries and thereby alleviate the burden of multiple trials on courts and litigants.[7] Though in theory simple and straightforward, non-unanimous jury rules have created new problems that courts, seeking at once to implement

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First, the court held that the procedure by which the apportionment question was submitted, *see* note 2 *supra*, was inconsistent with both the comparative negligence statute and the interpretive case law set out in Winge v. Minnesota Transfer Ry., 294 Minn. 399, 201 N.W.2d 259 (1972). The court held that the jury should have apportioned 100 percent of the causal negligence among all three parties, rather than comparing the defendant to each plaintiff individually. Second, the court held that the jury should have been instructed that, "in a case such as this, involving a dangerous instrumentality and a great disparity in risks, they should, in order to fairly and accurately apportion causal negligence" give special consideration to this disparity. 239 N.W.2d at 195. Specifically, the court held that since transmission of high voltage electricity is a highly dangerous activity, the power company must be held to a high degree of care while the layman need only exercise ordinary care. As a consequence, plaintiffs could not be deemed contributorily negligent unless defendant could show that they were "negligent in the face of danger." *Id.* at 194. Third, the court found that certain elements of defense counsel's summation were beyond the bounds of propriety and not conducive to a fair trial. *Id.* at 196-97.

6. The allowable proportions vary substantially including simple majority, *e.g.*, WYO. R. CIV. P. 48 (by stipulation of the parties), two-thirds, *e.g.*, MONT. REV. CODES ANN. § 93-5105 (1964), three quarters, *e.g.*, CAL. CONST. art. 1 § 7, CAL. CIV. PRO. CODE § 613 (West 1967), and five-sixths, *e.g.*, N.J. STAT. ANN. § 2A:80-2 (1952). Although Minnesota, MINN. STAT. § 546.17 (1976), and Nebraska, NEB. REV. STAT. § 25-1125 (1943), allow a verdict to be rendered by five-sixths of the jury, they require that such verdicts can only be accepted after six hours of deliberation.

7. *See* Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (Ct. App. 1970); State (F) v. M., 96 N.J. Super. 335, 233 A.2d 65 (1967); Kronzer & O'Quinn, *Let's Return to Majority Rule in Civil Jury Cases*, 8 HOUS. L. REV. 302 (1970); Siddens, *Smaller Juries and Non-unanimity: Analysis and Proposed Revision of the Ohio Jury System*, 43 U. CINN. L. REV. 583 (1974).

the rules and yet preserve the integrity of the jury system,[8] have been hard pressed to resolve.

These problems typically arise when a case is submitted to a jury on a special verdict or on a general verdict with interrogatories. In such cases the jurors must consider and agree upon answers to a series of questions, each of which is critical to, and perhaps independently determinative of, the final outcome.[9] If a unanimous verdict is required, no confusion arises, for if the jurors fail to agree unanimously on the answer to any question essential to the general verdict, the jury is hung, and the case must be retried. But if a non-unanimous verdict is permitted, two jurors may dissent from the majority finding on one issue while two others dissent on another. Thus, though the answer to each question has the avowed support of ten jurors, only eight jurors have agreed on all the answers necessary to a particular general verdict. The question then is whether a verdict so rendered is acceptable under a five-sixth jury verdict provision.[10]

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8. Though it has long been settled that there are no federal constitutional bars to non-unanimous verdicts, *see, e.g.*, Southern Ry. v. City of Durham, 266 U.S. 178 (1924), it has often been argued that non-unanimity itself is a serious threat to the integrity of the jury system. *See, e.g.*, Frank, *The Case for the Retention of the Unanimous Civil Jury*, 15 DEPAUL L. REV. 403 (1966).

9. For example, a negative answer to the question of whether defendant was causally negligent determines the entire verdict. Similarly, under a statute that requires that defendant be found "more" negligent than plaintiff in order for plaintiff to recover, a finding that defendant was "less" negligent is also determinative. On the other hand, certain answers are not independently determinative of the general verdict but are nevertheless critical to it. For example, a finding that defendant was 80 percent negligent will not by itself determine the verdict, but it is clear that the amount of plaintiff's recovery is directly dependent on it and that any other proportion would, given a certain amount of damages, produce a different general verdict.

10. There are at least three conceptually distinct forms in which this problem can arise:

Type A. Both plaintiff and defendant are found causally negligent by votes of 10 to 2, but jurors A and B dissent with respect to plaintiff, and C and D dissent with respect to defendant. The concurrence of any of these four jurors in an apportionment of that negligence gives rise to an insoluble inconsistency. Moreover, the answers are not only inconsistent with each other but also with the general verdict: one supports it and one derogates it.

Type B. Both plaintiff and defendant are unanimously found causally negligent, but jurors A and B dissent from the apportionment, and C and D dissent from the amount of damages. In this situation the inconsistency is more subtle. There is no reason why a juror could not, quite consistently, agree to a proportion of negligence and disagree on the

The courts that have faced this issue have reached various conclusions.[11] Only two states, Washington[12] and New Jersey,[13] have adopted, without reservation,[14] the rule that such verdicts

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amount of damage or vice versa. Yet, there remains an inconsistency with the general verdict. For example, suppose the majority found plaintiff 20 percent negligent, defendant 80 percent negligent, and that plaintiff's damages were $10,000.00. Where the comparative negligence statute dictates that the general verdict shall be computed by reducing plaintiff's recovery by the percentage of negligence attributed to him, varying either the percentage or the amount of damages will change the verdict. Thus, none of the four jurors can be said to support the general verdict: for A and B would have altered the proportion of negligence attributable to each party and C and D would have altered the base figure of damages.

Type C. This situation involves the converse of type B, where the answers to interrogatories are inconsistent with each other but nevertheless *support* the general verdict. Both plaintiff and defendant are found causally negligent, but jurors A and B would have found *no* causal negligence on the part of defendant. Jurors C and D dissent from an apportionment scheme allocating 20 percent negligence to defendant and 80 percent to plaintiff. It is plain that the concurrence of A and B in the apportionment contradicts their dissent from the finding of causal negligence on the part of the defendant. Yet, assuming this case arose in a jurisdiction that has a comparative negligence statute requiring that plaintiff be *less* negligent than defendant in order to recover, both of the answers given by A and B support a general verdict in favor of defendant.

11. Conflicting cases arise even within the same jurisdiction. *Compare, e.g.*, Fleischhacker v. State Farm Mutual Auto. Ins. Co., 274 Wis. 215, 79 N.W.2d 817 (1956) *and* Hupf v. State Farm Mutual Ins. Co., 12 Wis. 2d 176, 107 N.W.2d 185 (1961) *with* Vogt v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 35 Wis. 2d 716, 151 N.W.2d 713 (1967) *and* Lobrecki v. King, 40 Wis. 2d 226, 182 N.W.2d 226 (1971). *Compare also* Simpson v. Springer, 74 Ohio App. 142, 57 N.E.2d 517 (1943) *with* Plaster v. Akron Union Passenger Depot, 101 Ohio App. 27, 137 N.E.2d 624 (1955).

12. Bullock v. Yakima Valley Transp. Co., 108 Wash. 413, 184 P. 641 (1919).

13. Ward v. Weekes, 107 N.J. Super. 351, 258 A.2d 379 (App. Div. 1969).

14. The position of the Washington supreme court on this point is unequivocal. In Johnson v. Mobile Crane Co., 1 Wash. App. 642, 463 P.2d 250 (1970), two jurors dissented from a finding which was necessary but not sufficient to hold the defendant liable. Two different jurors voted against the general verdict in favor of plaintiff, but the necessary ten votes were achieved when the first two dissenters joined the majority. Despite the fact that there were no grounds for finding defendant liable without a ruling favorable to plaintiff on the first issue, the court upheld the verdict and in so doing explicitly countenanced inconsistent voting. *Id.* at 651, 463 P.2d at 256. Washington apparently stands alone in this position.

The issue of how to handle inconsistent votes is not as clear in New Jersey, however. The court in Ward v. Weekes, 107 N.J. Super. 351, 238 A.2d 379 (App. Div. 1969), faced with a type B verdict, *see* note 10

are valid.[15] New Mexico[16] and Arkansas[17] have upheld such verdicts in cases where two jurors dissented from a finding of causal negligence on the part of one party and two other jurors dissented on the amount of damages. Both, however, have explicitly reserved the possibility that votes by a single juror that stand in fundamental contradiction to each other might be unacceptable.[18] Since neither of these states has been presented with a situation wherein two jurors dissent from a finding of negligence and then agree with the finding on apportionment,

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supra, wherein two jurors dissented on negligence and two others dissented on damages, concluded that homogeneity in jury voting was not necessary. Although the court had never ruled on a type A verdict, *see* note 10 *supra*, no reservation was made for the possibility of disallowing truly inconsistent votes. *Compare* the Arkansas and New Mexico rules described in the text accompanying notes 16-18 *infra*. It is possible, however, that when a type A verdict arises, the New Jersey court may retreat from its present position. For a discussion of why such a retreat might be advisable, see note 49 *infra*.

15. The rationale for this view is based on judicial interpretation of the word "verdict" in statutes authorizing a fraction of the jury to return a verdict. The jury is viewed solely as a fact finder, and the answer to each question of fact therefore becomes "a verdict." Thus each interrogatory is treated as a separate and distinct issue. Having rendered its verdict, the jury reforms and considers the next issue. Each juror is permitted to examine this new issue without regard to his vote on the preceding questions. *See* Ward v. Weekes, 107 N.J. Super. 351, 258 A.2d 379 (App. Div. 1969); Bullock v. Yakima Valley Transp. Co., 108 Wash. 413, 184 P. 641 (1919); Comment, *Vote Distribution in Non-Unanimous Jury Verdicts*, 27 WASH. & LEE L. REV. 360, 365 (1970).

16. Naumburg v. Wagner, 81 N.M. 242, 465 P.2d 521 (1970).

17. McChristian v. Hooten, 245 Ark. 1045, 436 S.W.2d 844 (1969).

18. Both courts have implied that they might require consistency in a juror's votes. In *Naumburg* the court noted that "[we construe] Rule 48(b) to mean that any ten jurors are necessary and sufficient to agree on any issue, *so long as none of these jurors has voted inconsistently.*" 81 N.M. at 245, 465 P.2d at 524 (1970) (emphasis added). Similarly in *McChristian* the court stated:

> We shall not attempt a fine distinction between the . . . laws of Wisconsin and those of Arkansas for the reason that the difference in the language used makes the distinction obvious; *and for the further and primary reason that we find no conflict between the findings of the jurors . . . .*

245 Ark. at 1052, 436 S.W.2d at 848 (1969) (emphasis added). The *McChristian* opinion is more than a little confusing on this point. The Arkansas statute provided that a valid verdict would be reached when "as many as nine jurors" agree to an answer. The case involved a type B verdict, *see* note 10 *supra*, where the answers of the juror in question were not inconsistent. At the outset the court said that this lack of inconsistency was the "primary" reason for holding the verdict valid, *id.*, but later in the opinion it said that the language of the statute merely required the assent of *any* nine jurors to each question. 245 Ark. at 1053, 436 S.W.2d at 849.

it is possible that such contradictory votes would be deemed invalid.

All other courts that have considered the question have held that if the same ten jurors do not agree on all issues necessary to a verdict, the verdict is invalid as contrary to the legislative intent underlying the non-unanimous jury statutes.[19] These states require that a quorum[20] composed of the same jurors agree to the answer to each question necessary to the general verdict.[21]

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19. *See* State Highway Dep't v. Pinner, 531 S.W.2d 851 (Tex. App. 1975); Murphy v. Roger Sherman Transfer Co., 62 Misc. 2d 960, 310 N.Y.S.2d 891 1970); Baxter v. Tankersley, 416 S.W.2d 737 (Ky. App. 1967); Clark v. Strain, 212 Ore. 357, 319 P.2d 940 (1958); Plaster v. Akron Union Passenger Depot, 101 Ohio App. 27, 137 N.E.2d 624 (1955); Dick v. Heisler, 184 Wis. 77, 108 N.W. 734 (1924); Earl v. Times-Mirror Co., 185 Cal. 165, 196 P. 57 (1921); Barker v. Missouri Pac. Ry. Co., 89 Kan. 573, 132 P. 156 (1913). *But see* Simpson v. Springer, 74 Ohio App. 142, 57 N.E.2d 517 (1943).

Again, as in the case of the minority view, *see* note 15 *supra*, the rationale for this rule derives from an interpretation of the word "verdict." The majority position, however, is based upon the idea that the most important item is the final verdict; it is the function of a jury to settle a dispute between two parties. This rationale therefore requires that a final verdict have the support of the statutorily mandated quorum of jurors. Any particular general verdict implies particular answers to each of its elements. *See* notes 9 & 10 *supra*. In order to say that any particular juror supports that verdict he must have agreed to the majority answer to all of the elements. *See* Murphy v. Roger Sherman Transfer Co., 62 Misc. 2d 960, 310 N.Y.S.2d 891 (1970); Dick v. Heisler, 184 Wis. 77, 198 N.W. 734 (1924); 3 WIS. L. REV. 51 (1924).

Thus, this is basically a problem of statutory construction; the issue would be best resolved by legislatures since they, and not the courts, are equipped to consider the competing policies and to clarify their own intentions. Both Wisconsin and Texas have taken steps in this direction. The Wisconsin five-sixths jury statute itself requires that the same ten jurors agree to the answer to each question necessary to the general verdict. WIS. STAT. ANN. § 270.25(1) (West 1957). Texas has accomplished the same thing in a court promulgated rule of civil procedure which reads: "A verdict may be rendered in any cause by concurrence, as to each and all answers made, of the same ten members of an original jury of twelve . . . ." TEXAS RULES ANN. 292 (Veron Supp. 1976). While it may be more desirable for the legislature to resolve such an issue, the state supreme court in its rule-making capacity can at least weigh the competing interests involved independent of the facts of a particular case, and this is probably a better alternative than to rely solely on decisional law.

20. The size of the required "quorum"—whether seven, eight, nine, or ten jurors—will, of course, vary depending upon whether the applicable statute requires a simple majority or two-thirds, three-fourths, or five-sixths of the jurors. *See* note 6 *supra*.

21. The key phrase in this rule is "necessary to support the general verdict." Such a caveat would logically imply that only verdicts of types A and B, *see* note 10 *supra*, wherein votes in question do not support the general verdict, would be subject to attack. Type C verdicts,

This rule in effect disenfranchises any juror who dissents from a finding necessary to the verdict. Although such jurors are not actually forbidden to vote, their votes will not be counted when the court examines the record to determine if the necessary number of jurors supported the general verdict.[22]

An interesting problem arising out of this disenfranchisement, which has received remarkably little consideration,[23] concerns the nature of the role such disenfranchised jurors are to play in subsequent *deliberations*. If they are deprived of an effective vote, must they also be deprived of the right to deliberate?[24] The Minnesota court in *Ferguson* was the first court of record to answer this question in the affirmative. Although Minnesota adopted a five-sixths jury rule in 1913,[25] the issues of homogeneity in voting and participation in deliberations first arose in *Ferguson*.[26] Nevertheless, the court bypassed the issue of homogeneity in *voting* and held that a juror

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wherein both answers to the interrogatories, though they contradict each other, nevertheless support the general verdict, would be immune. The better reasoned decisions have observed these conceptual differences. *See, e.g.*, Lorbecki v. King, 40 Wis. 2d 226, 182 N.W.2d 226 (1971); Vogt v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 35 Wis. 2d 716, 151 N.W.2d 713 (1967). *See generally* Comment, *Vote Distribution in Non-Unanimous Jury Verdicts*, 27 WASH. & LEE L. REV. 360 (1970). But the presence in even the best decisions of the statement that "the same ten jurors must agree to every question" has led some courts into an overly mechanistic application of the rule in which the importance of these conceptual distinctions is lost. *See* note 33 *infra*. *See also* Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 199 (1948) (all jurors agreed that defendant was negligent, but the verdict was held to be defective because the same ten jurors did not agree as to the particular act of negligence).

22. *See* text accompanying note 33 *supra*.

23. *But see* Ward v. Weekes, 107 N.J. Super. 351, 258 A.2d 379 (App. Div. 1969); Comment, *Vote Distribution in Non-Unanimous Jury Verdicts*, 27 WASH. & LEE L. REV. 360 (1970).

24. Such a question can only arise, of course, in a jurisdiction which is willing to disallow at least some inconsistent votes. It would be illogical to bar a juror from participating in deliberations on a question when his vote may be counted to achieve the statutory number of assents on that issue. Thus, in a jurisdiction which ignores inconsistency in voting, a juror would never be precluded from participating in any phase of the deliberations.

25. Minnesota Laws 1913, ch. 63. The present text of the statute reads as follows:

> In any civil action or proceeding in any court of record the jury therein may return a verdict after six hours of deliberation, upon an agreement by five-sixths of its number. The jury's deliberation commences when the officer in charge of the jury is sworn. The clerk records that time.

MINN. STAT. § 546.17 (1976).

26. 239 N.W.2d at 196.

dissenting from a finding of causal negligence was precluded from participating in the *deliberations* on apportionment.

In *Ferguson* the issues of the plaintiffs' causal negligence and apportionment were decided unanimously, and only two jurors dissented from the finding of causal negligence on the part of the defendant. Thus, each of the findings necessary to the general verdict for defendant[27] clearly had the support of the same ten jurors, and the voting pattern was completely unobjectionable under the five-sixths jury verdict statute. It is clear, therefore, that the court's purpose in disqualifying dissenting jurors from "participation in the apportionment of causal negligence"[28] was not to require homogeneity in jury *voting*, but rather to exclude jurors who dissent from a finding of causal negligence from participation in *deliberations* on the question of apportionment. The court stated that "[i]n the give and take of jury deliberations, the participation of two jurors inclined to attribute only minimal negligence to [defendant] would appear to be prejudicial to the plaintiff."[29]

The court based this ruling solely on a Wisconsin decision, *Fleischhacker v. State Farm Mutual Automobile Insurance Co.*[30] The *Fleischhacker* jury found both the plaintiff and the defendant causally negligent, but a different pair of jurors dissented from each finding. Causal negligence was unanimously apportioned 20 percent to defendant and 80 percent to plaintiff, and judgment was entered for the defendant.[31] On defendant's appeal from the grant of plaintiff's motion for a new trial, the plaintiff argued that, since four jurors had found *no* causal negligence on the part of one party or the other, only eight jurors could be said to have agreed to assign *some* causal negligence to each party. Therefore, plaintiff argued, the apportionment, upon which the verdict was based, did not have the support of the required number of jurors. The Supreme Court of Wisconsin agreed, holding that "jurors who dissent from a finding of negligence or its causality . . . are disqualified from *answering* the question of comparative negligence."[32]

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27. *See* note 4 *supra.*
28. 239 N.W.2d at 196.
29. *Id.* at 196 n.9.
30. 274 Wis. 215, 79 N.W.2d 817 (1956).
31. The Wisconsin comparative negligence statute in effect when *Fleischhacker* was decided, WIS. STAT. ANN. § 895.045 (West's 1966), required that plaintiff be found less negligent than defendant in order to recover.
32. 274 Wis. at 220, 79 N.W.2d at 820 (1959) (emphasis added).

It was upon this language that the *Ferguson* court rested its conclusion that jurors who dissent from a finding of causal negligence should be excluded from the *deliberations* on the apportionment issue. Clearly, however, the rule laid down in *Fleischhacker* relates only to the propriety of counting fundamentally inconsistent votes in determining whether the final verdict has the support of ten jurors, and does not address the issue of participation. The court ruled only that if, in the final analysis, a juror retained his belief that a party had not been causally negligent, then his vote on apportionment could not be counted.[33]

Only three cases from other jurisdictions deal explicitly with the problem of excluding jurors from participation in deliberations,[34] and they hold that jurors should not be excluded. Two,

33. Since all four of the dissenting *Fleischhacker* jurors had found either one party or the other *not* causally negligent, the apportionment aspect of the verdict could only have the support of eight jurors. Thus, the verdict was not supported by five-sixths of the jurors and could not stand.

While the logic of the Wisconsin position may well have merit, in most instances, *see* note 19 *supra*, its relevance to the particular findings in the case may be fairly questioned. The Wisconsin comparative negligence statute permitted the plaintiff to recover only if he was found less negligent than the defendant, WIS. STAT. ANN. § 895.045 (West 1966). Eight members of the jury found plaintiff 80 percent negligent. Two of the dissenting jurors, by finding that the defendant was free of causal negligence, in effect said that plaintiff was 100 percent negligent. Thus, it is clear that 10 of the jurors found facts that precluded plaintiff's recovery. In such a situation it seems illogical to insist that the plaintiff has been denied a fair trial. If the dissenting jurors had found him 20 percent *less* negligent than they did, the verdict would unquestionably have been valid. It is perverse to suggest that a plaintiff should be able to bring a second action because two jurors found him *excessively* negligent.

Moreover, this aspect of *Fleischhacker* has apparently been overruled *sub voce*. In Lorbecki v. King, 49 Wis. 2d 463, 182 N.W.2d 226 (1971), the court stated:

> [J]uror Mouton would have gone further than the rest of the jury and found the defendant not causally negligent at all. Since the verdict as a whole was in favor of the defendants, the dissent as to defendant-King's negligence and causation can only be interpreted as evincing juror Mouton's belief that the verdict should have been for the defendants "only more so," . . . . Excluding [Mouton's] answer to the comparison [wherein she agreed to an apportionment of some negligence to defendant] would result in the anomaly of allowing the plaintiff to secure a new trial because of a failure which was not prejudicial to him.

Id. at 468, 182 N.W.2d at 229. *See also* Vogt v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 35 Wis. 2d 716, 151 N.W.2d 713 (1967).

34. In Sprinkle v. Lemley, 243 Ore. 521, 414 P.2d 797 (1966), the Court was asked to pass on the trial court's failure to give the following instructions:

Naumburg v. Wagner[35] and *Ward v. Weekes*,[36] arose in jurisdictions following the minority position that a juror's dissent does not preclude his voting on subsequent issues.[37] The refusal of these courts to exclude jurors from deliberations is not surprising, for such an exclusion would be irreconcilable with the position that inconsistent votes may be counted.[38] The third case was decided in California, where courts have consistently held that the votes of jurors who dissented from a finding on any issue essential to the verdict could not be counted as supporting the verdict.[39] In *Schoenbach v. Key City Transit Lines*[40] an intermediate California appeals court explicitly approved a jury instruction stating that "until nine or more of the jurors have agreed upon a verdict which includes both liability and the amount of damages, all twelve of you should continue to participate in the deliberations."[41]

> Each of you should deliberate and vote on each issue to be decided. For example, let us assume that against your own personal judgment and vote, nine or more jurors might decide that plaintiff is entitled to recover damages. Even though that decision would have been against your personal vote, you will have both the right and duty to deliberate and vote on the question of the amount of damages.

Id. at 531, 414 P.2d at 801. The court held that the refusal to give the instruction was not improper—but it did so *only* on the ground that a juror's *vote* on damages would be superfluous had he voted for no liability. The court refused to address the issue of whether the dissenting juror(s) could participate in the discussions.

35. 81 N.M. 242, 465 P.2d 521 (1970).

36. 107 N.J. Super. 351, 258 A.2d 379 (App. Div. 1969). It is interesting to note that the court in *Ward* was seeking to illustrate that adherence to the majority rule would be ill-advised. The court reasoned that if it disenfranchised certain jurors it might be forced also to eliminate them from deliberations. Such an idea seemed so entirely "unwarranted" that the court felt it was a good argument against adopting the majority rule.

37. *See* notes 11-17 *supra* and accompanying text.

38. *See* note 24 *supra*.

39. Nelson v. Superior Court, 26 Cal. App. 2d 119, 78 P.2d 1037 (1938); Earl v. Times-Mirror Co., 185 Cal. 165, 196 P. 57 (1921).

40. 168 Cal. App. 2d 302, 335 P.2d 725 (1959).

41. 168 Cal. App. 2d at 305, 335 P.2d at 726-27. The court did not give a rationale for its decision, but relied upon Carlin v. Prickett, 81 Cal. App. 2d 688, 184 P.2d 945 (1947), an appeal from a jury instruction that only the nine people who found for plaintiff could participate in fixing the amount of the verdict. The supreme court in *Carlin* never ruled on whether such an instruction was erroneous, but relied instead on the fact that the trial judge had subsequently altered his instruction to allow all 12 members to participate in the deliberations. The court held that even if the original instruction was erroneous, the error was cured by the subsequent revision. The *Schoenbach* court reasoned that the supreme court *would have held* the exclusion of the dissenting jurors

Thus, every court that has explicitly addressed the issue has rejected the conclusion of *Ferguson*. Moreover, since all jurors are almost certain to participate in all phases of the deliberations absent a specific instruction to the contrary, it weighs heavily against the *Ferguson* holding that none of the courts applying the statutory requirement of voting homogeneity in a non-unanimous verdict have felt it necessary to advise the lower courts that dissenting jurors should be excluded from some of the deliberations once they have cast a certain vote. Only in Minnesota does a "no" vote on the issue of one party's causal negligence operate to exclude a juror from the deliberations on apportionment.

The *Ferguson* holding also runs directly contrary to the rationale of the Minnesota supreme court's own decision in *Johnson v. Holzmer*.[42] In that case a juror became ill during the deliberations and had to be excused. The court held that the five-sixths jury rule did not authorize the court, absent consent of the parties, to accept a verdict rendered with only eleven jurors participating in the deliberations, despite the fact that the remaining eleven jurors were unanimous on every question. The court emphasized the importance of having all twelve jurors participate in the deliberations and pointed out that, depending upon the powers of logic and persuasion of the juror who was dismissed, the outcome of the deliberations might have been entirely altered had that juror participated.[43] It is equally possible that if those jurors who dissent from a finding of causal negligence participate in the apportionment deliberations a very different verdict will result.

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to be improper, but the language of *Carlin* does not compel such a result.

42. 263 Minn. 227, 116 N.W.2d 673 (1962).

43. While it is true that [under MINNESOTA STATUTES § 546.17 (1964)] the court may accept the concurring opinion of five-sixths of the members of the panel . . . , this does not mean that the deliberations of the panel leading up to such a verdict may be conducted by less than a jury of 12. It is not too unreasonable to contemplate that in the instant case if the panel of 12 jurors had continued its deliberations the five-sixths verdict might never have been reached; or even that a verdict entirely opposite in effect might have ultimately been returned by the full panel. This would be entirely dependent upon the powers of logic and persuasion possessed by any one of the panel of 12.

Id. at 235, 116 N.W.2d at 678. *Accord*, Measeck v. Noble, 9 App. Div. 2d 19, 189 N.Y.S.2d 748 (1959); *cf.* Florzak v. Hempstead Bus Corp., 29 N.Y.S.2d 271 (Sup. Ct. 1941).

Not only was the conclusion reached in *Ferguson* unnecessary to a disposition of the case[44] and unsupported by any precedent, but the two rationales relied upon by the court were seriously defective. The first of these rationales was that to allow a juror who believes one party to be innocent of causal negligence to participate in the apportionment deliberations would be "prejudicial" to the other party.[45] While it is no doubt true that allowing jurors who feel that defendant is less at fault than plaintiff to participate in deliberations will be disadvantageous to the plaintiff, the term prejudicial, in the judicial sense, means more than disadvantageous.[46] The essence of "prejudice" is that it works a substantial *injustice*. It cannot be seriously contended that the participation of jurors who support one party over the other works a substantial injustice against the disfavored party. Moreover, the court failed to recognize the obvious prejudice the defendant would suffer by the exclusion of the jurors most inclined to favor him.

The court's second theory was that the existence and apportionment of causal negligence actually represents a unitary issue;[47] that is, a juror's finding of no causal negligence would necessarily incorporate his views on apportionment. This rationale does provide a logical, if not unassailable,[48] basis for resolving the question of whether the final verdict has the support of the statutorily mandated quorum of jurors. When a juror votes in

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44. The court cited three other improprieties that together would certainly have been sufficient to warrant a reversal without even considering the question of deliberations. *See* note 5 *supra*.

45. 239 N.W.2d at 196 n.9.

46. Though "prejudicial" has often been defined simply as disadvantageous, harmful, hurtful or injurious, *see, e.g.*, Allstate Ins. Co. v. Grillon, 101 N.J. Super. 322, 331, 244 A.2d 322, 326 (1968), *rev'd on other grounds*, 105 N.J. Super. 254, 251 A.2d 777 (App. Div. 1969), the essence of the term is that an act or ruling is *unjustly* harmful. In State v. McCarthy, 130 Conn. 101, 31 A.2d 921 (1943), defendant claimed that a joint trial with a co-defendant would be prejudicial to his cause. The court, in rejecting this claim said that "the phrase 'prejudicial to the rights of the parties,' means something more than that a joint trial will probably be less advantageous to the accused . . . . The controlling question is whether it appears that a joint trial will probably result in a substantial injustice." *Id.* at 103, 31 A.2d at 923. The concept of "substantial injustice" is the core of "prejudice" in the judicial sense. Thus, it can hardly be said with any force that the participation by a juror inclined to favor defendant works a prejudice against plaintiff. The exclusion of such jurors may, however, work a true injustice to the defendant.

47. 239 N.W.2d at 196.

48. *See* note 49 *infra*.

favor of finding a party not causally negligent, he cannot, consistently, vote to allocate some proportion of negligence to him. Only one of those two votes can represent the juror's finding on the issue of liability, and without inquiring, it is impossible for the court to know exactly how that juror felt about the situation.[49] But extending that rationale to exclude a juror from the apportionment deliberations ignores the fact that, until the court accepts the verdict and dismisses the jury, nothing is final. Each juror has the prerogative, even the duty, to change his answer to any question if convinced that his initial impression was incorrect.[50] Perhaps even more important, that juror, especially if he represents a minority position, also has the right and

49. A plausible argument can be made for ignoring the inconsistency between a negative vote on the question of the existence of causal negligence and a vote in favor of an apportionment. It is rooted in the conception of the "existence" question as being merely a part of the unitary apportionment question. Much of the debate surrounding type A verdicts, *see* note 10 *supra*, could be vitiated by a rule that would, in the case of conflict between answers to the existence and apportionment questions, consider the vote on apportionment as controlling. The rationale for such a rule lies in the fact that the apportionment question is answered only after more extensive debate among the jurors; that the juror in question voted in favor of the apportionment; that the most likely explanation is that he changed his mind after benefit of full deliberations; and that to require a juror, having changed his mind, to go back and alter his answer to the existence question (which is not in fact independent of the apportionment question) is excessively mechanistic and exalts, without reason, form over substance.

The flaw in this argument, however, lies in the assumption that the juror truly agreed that the apportionment for which he voted was a fair estimate of the actual relative fault. It is at least possible that his vote represents not so much agreement as an effort to minimize the proportion of negligence attributed to the party he favors. That is, assuming the juror remained unconvinced that one party is guilty of any causal negligence, it is possible that he "agreed" to a particular apportionment since it was the lowest one his fellow jurors were willing to accept. The juror, thinking that allocation of some negligence to the party he favors is inevitable, opts for the lowest available figure in order to forestall the possible imposition of a higher one. It would be impossible for a court to rule out this possibility, and to the extent that we still require some sort of intellectual agreement among jurors and reject pure compromise, the existence of this possibility precludes a court from saying with assurance that the verdict has the actual support of that juror.

Probably the best way to deal with these cases is for trial judges and lawyers to watch for these discrepancies when examining the verdict; it is relatively easy to point out the problem to the jury and to explain to those jurors who voted inconsistently that they must resolve the contradiction one way or the other.

50. *Cf.* Shultz v. Monterey, 232 Ore. 421, 375 P.2d 829 (1962); Marsero v. Public Service Interstate Transp. Co., 8 N.J. Super. 268, 74 A.2d 328 (App. Div. 1950); Cullen v. Minneapolis, 201 Minn. 102, 275

duty to make his views known and to attempt to persuade other jurors to adopt them.[51]

As a practical matter, *Ferguson's* extension of the *Fleischhacker* rationale may have several deleterious effects. First, it will tend to inflate artificially the proportion of causal negligence attributed to the party favored by the excluded jurors. Should those jurors participate in the allocation deliberations they can be expected to adduce most strongly the arguments tending to minimize that party's responsibility,[52] regardless of whether their final votes are to be counted. Second, instructing the jury that voting against a party's causal negligence means exclusion from subsequent apportionment deliberations may discourage jurors from taking an absolute view of the relative negligence. Third, the *Ferguson* decision produces the anomaly of allowing a juror who believes a party to be one percent negligent to participate fully in the discussion while completely barring another juror, who would reduce the percentage only negligibly.[53] Fourth, the rule exacerbates the confusion over the unity or severability of the questions comprising the issue of liability that it was purportedly designed to avoid. Despite its protestations that the question of the existence of causal negli-

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N.W. 414 (1937); Coveleski v. Thomas, 229 App. Div. 413, 242 N.Y.S. 174 (1930); Craven v. Skobba, 108 Minn. 165, 121 N.W. 625 (1909).

51. *See* Ehalt v. McCarthy, 104 Utah 110, 138 P.2d 639 (1943), *cf.* Johnson v. Holzemer, 263 Minn. 227, 116 N.W.2d 673 (1962); Decker v. Schumacher, 312 Mich. 6, 19 N.W.2d 466 (1945).

52. A party might well be better off if the jurors who favor him find some causal negligence on his part than none. At least then, since those jurors could continue to participate in the deliberations, that party would have the benefit of arguments tending to minimize his fault which might otherwise not be adduced.

53. One additional problem which the court wholly overlooked is the relationship between the exclusion of jurors from a material portion of the deliberations and the right of the parties to participate, through the voir dire examination, in the selection of the jury. Though the principal purpose of voir dire is undoubtedly to protect parties from biased jurors, each party, through this examination, seeks to install jurors most inclined to favor his cause. Such a proceeding is an integral and respected part of the adversary system. The effect of the court's ruling in *Ferguson* is to eliminate the extremes, that is, those jurors most inclined to favor one party or the other. The only reason to eliminate extremes, however, is to prevent a juror's bias from having prejudicial effects. And if true bias exists, the place for it to be recognized and corrected is the voir dire. But once both parties *and* the court have agreed that these particular 12 people are to be the ones to decide the truth of the matter at hand, there appears to be no justifiable reason for preventing some jurors from expressing their ideas on every matter presented simply because their views are somewhat more extreme than those of the majority.

gence is inseparable from the question of apportionment,[54] the court seems to have been misled by the form in which the questions were submitted. By its own standard the court was incorrect when it said that "the question of apportionment is never reached . . . until one plaintiff and one defendant have been found causally negligent."[55] When the jurors find only one party causally negligent, they certainly have "apportioned" the liability. By barring from the deliberations the one or two jurors who do not agree that a particular party is liable the court necessarily creates two questions where there should be only one. Such a rule requires the jury to pass on the existence of causal negligence as a separate question so that those jurors who are to be excluded from the apportionment deliberations may be identified.

These problems seem to have arisen from the court's confusing form with substance and its shortsightedness as to the purpose behind separating, in special verdicts, the question of the existence of causal negligence from its allocation. Theoretically a single question is asked with respect to liability: "Taking the total negligence of all parties which contributed as a proximate cause of the accident as 100 percent, how much of that total do you allocate to each of the parties?"[56] The reasons for breaking that question down into several steps are purely practical,[57] and in any real sense the question of the existence of causal negligence is only a part of the apportionment question. By answering each of the interrogatories relating to the existence of causal negligence in the affirmative, the jury merely rejects

54. 239 N.W.2d at 196.

55. *Id.*

56. Although the "existence" question is not logically distinct from the apportionment question, there is an intuitive appeal for separating the two—the question of whether a party was negligent may be easier to answer than the question of how negligent he was. The first question is easier, however, only when the degree of negligence is substantial. It is not at all clear, for instance, that it is easy to distinguish between no negligence and one percent or five percent. Whatever beneficial effects separating these questions might have for the jury, however, the distinction is all too emphemeral to warrant its use as a basis for substantive rulings by a court.

57. *See* Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, 58 MINN. L. REV. 903 (1974). These practical uses include checking jury prejudice and ignorance of the law and assisting the jury to resolve complicated issues by presenting each of the elements upon which a finding must be made in a logical sequence. Special verdicts also serve to localize error and eliminate the need for long, complex instructions.

three of the potentially infinite apportionment ratios.[58] Thus, the question of liability, at least with respect to the jury's deliberations, is unitary, and the proper role of each juror is to contribute his own perceptions and experiences to the search for an estimate of who was at fault and how that fault should be apportioned. The fact that one or two jurors initially believe the apportionment should be 0-100 percent should make no more difference that that others believe that it should be 20-80 percent, 40-60 percent, or any other ratio.

The task of the jury in assessing liability in a negligence action is to reach an apportionment that at least ten jurors agree is a fair approximation of the degree of fault attributable to each party. When ten jurors so agree, the issue is settled. If the other two jurors feel firmly convinced that the proportion should be some figure other than that decided upon by the majority, they may dissent, and indeed they are duty bound to do so. But until that time, it is the right of the parties to have each juror retain the ability to participate, express her own views, consider the views of others, change her mind, and attempt to change the minds of others. This basic duty of all twelve jurors to participate in the discussion should never be foreclosed merely because, in the first instance, a small minority took an absolute view of relative fault.[59]

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58. The three eliminated ratios would be: 0-100 percent, 100-0 percent and 0-0 percent.

59. The court apparently wanted to reverse the lower court decision in *Ferguson* because the verdict seemed fundamentally unreasonable given the tremendous danger to the unsuspecting public caused by high voltage power lines and the disparity in knowledge of the danger between the plaintiffs and defendant. *See* 239 N.W.2d at 193-95. The court was forced to reject the plaintiffs' ultra-hazardous activity theory for practical reasons, *see* note 1 *supra*, and found that the jury's verdict was not so clearly against the weight of the evidence as to warrant an outright reversal on that ground. As a result, the court cast about for other grounds upon which to base a reversal, and unfortunately did not consider these grounds as carefully as it did the ultra-hazardous activity issue. That lack of care gave rise to a fundamentally ill-considered decision, which may well have serious and unwarranted consequences for future litigants.

It appears that the court can repair the damage it caused only by overruling that portion of *Ferguson* dealing with the juror exclusion issue. Though the holding on this issue was clearly unnecessary to reversing the case, *see* note 44 *supra*, it is nevertheless a holding. It cannot be construed as a decision on voting homogeneity, for the facts make it clear that the voting was unobjectionable. The court must face up to the fact that in trying to do indirectly that which it was reluctant to do directly—that is, reverse a jury verdict as unreasonable—it established a rule that may prove far more prejudicial than the situation it was designed to eliminate.