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Civil Procedure—Judge's Remarks Not Coercive When Jury Which Previously Declared Itself Deadlocked Returns Verdict Soon After Hearing Judge's Supplementary Instructions

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CIVIL PROCEDURE—JUDGE'S REMARKS NOT COERCIVE WHEN JURY WHICH PREVIOUSLY DECLARED ITSELF DEADLOCKED RETURNS VERDICT SOON AFTER HEARING JUDGE'S SUPPLEMENTARY INSTRUCTIONS

Plaintiff, administrator of his deceased wife's estate, brought action against defendants for personal injuries sustained by his wife in a fall which took place in a building owned by defendants. After the trial, the jury retired to deliberate at 12:15 P.M., went to lunch at 1:00 P.M., and resumed deliberation at 2:15 P.M. At 3:00 P.M. the jury returned to the courtroom in order to hear certain testimony read from the record and again retired at 3:22 P.M. At 4:20 P.M. the jury sent a note to the Trial Judge saying it was deadlocked. At 4:25 P.M. the judge sent a court officer ". . . to tell [the jurors] that they had to deliberate further . . ." and that they ". . . hadn't deliberated long enough. . . ."[1] At 4:32 P.M. the jury returned a verdict in favor of defendants, two of twelve jurors dissenting. The Trial Judge set aside the verdict and granted a new trial, stating that it was impossible for the jurors to deliberate maturely in the amount of time they were out.[2] The Appellate Division[3] reversed on the grounds that the message to the jury to continue deliberations was not coercive, that it could not be determined from the record that the verdict was not the result of mature deliberation, and that the shortness of time between the jury's message and its verdict was not enough to justify judicial interference with the verdict. The Court of Appeals *held*, affirmed, without opinion, reiterating the Appellate Division opinion. *Carolan v. Altruda*, 15 N.Y.2d 1010, 207 N.E.2d 614, 260 N.Y.S.2d 21 (1965) (Memorandum Decision).

The Appellate Division opinion, as adopted by the Court of Appeals in its memorandum decision, treats the problem in the instant case as one of coercion. There are several grounds upon which a judge's instructions to the jury may be found coercive.[4] For example, a judge may never instruct the jury that the minority of jurors must agree with the majority,[5] but, as long as he reminds the minority that they need not yield their personal convictions, he may strongly urge such an agreement.[6] Telling the jury that much expense

1. Carolan v. Altruda, 15 N.Y.2d 1010, 1011 (1965) (Quote does not appear in 207 N.E.2d 614, 260 N.Y.S.2d 21 (1965)).

2. *Ibid.* ". . . it becomes very obvious to me that all this jury was interested in was getting out. It would be impossible to maturely deliberate in the space of time that this jury was out."

3. Carolan v. Altruda, 17 A.D.2d 211, 233 N.Y.S.2d 539 (1st Dep't 1962).

4. For an introduction to the area of coercion see, Annot., 93 A.L.R. 2d 627 (1964); Bowers, Judicial Discretion of Trial Courts §§ 371-80 (1931); 1 Reid, Instructions to Juries § 45 (3d ed. 1936).

5. See, *e.g.*, Field v. Field, 283 App. Div. 372, 128 N.Y.S.2d 217 (1st Dep't 1954); Acunto v. Equitable Life Assur. Soc'y, 270 App. Div. 386, 60 N.Y.S.2d 101 (1st Dep't 1946); Twiss v. Lehigh Valley R.R., 61 App. Div. 286, 70 N.Y. Supp. 241 (3d Dep't 1901).

6. Allen v. United States, 164 U.S. 492 (1896); see Lehigh Valley R.R. v. Allied Mach. Co., 271 Fed. 900 (2d Cir. 1921); State v. Williams, 39 N.J. 471, 189 A.2d 193 (1963); People v. Faber, 199 N.Y. 256, 92 N.E. 674 (1910); State v. Thomas, 63 Wash.2d 59, 385 P.2d 532 (1963). *But see* Mead v. City of Richland Center, 237 Wis. 537, 297 N.W. 419 (1941) (The jury reached its verdict one half hour after receiving such instructions.)

has been incurred during the trial and that much time will have been wasted if no verdict is reached is usually not considered coercive,[7] while informing a jury which is unable to reach a verdict that for the past several years there has not been a hung jury in that court or in that area is considered an attack on the intelligence and integrity of the jurors and is therefore coercive.[8] Keeping the jury in deliberation for long periods of time after it has indicated that it cannot reach a verdict may also be coercive.[9] Instructing a jury that it must reach a verdict and that it will not be discharged until it does, constitutes coercion,[10] but when the judge tells the jury that it has a certain time in which to agree and will be discharged if it fails to agree within that time limit, the courts generally hold no coerion.[11] In a case where the jury, under threat of discharge, was given five minutes within which to agree on a verdict, the reviewing court held that the jury, in effect, had been asked to surrender its convictions and conclusions in order to agree on a verdict.[12]

Generally, it is within the discretion of the court to decide when a deadlocked jury should be discharged, and the failure to release such a jury, even when the verdict is arrived at very soon after the jury has declared itself deadlocked, is rarely considered coercive. The New York Code of Criminal Procedure authorizes the discharge of jurors "When after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree."[13] Declaration, even by a minority of the jurors, that, in their opinion, further deliberation would lead to agreement requires that the court send the jury back for such further deliberation.[14] When the jury notifies the court that it has been unable to agree but does not ask to be discharged, the courts generally hold no coercion even when the jury reaches a verdict a short time after being sent back for further deliberation.[15] In most cases, even though the jury has declared itself deadlocked and has asked to be discharged, the court may keep sending the jury back until it is satisfied that it is unable to agree

7. Railway Express Agency v. Mackay, 181 F.2d 257 (8th Cir. 1950); People v. Becker, 215 N.Y. 126, 109 N.E. 127 (1915). *But see* McCarthy v. Odell, 202 App. Div. 784, 195 N.Y. Supp. 80 (4th Dep't 1922). A good collection of cases on this point is contained in Orr v. State, 40 Ala. App. 45, 111 So. 2d 627 (1958).

8. See People v. Josey, 19 A.D.2d 660, 241 N.Y.S.2d 620 (3d Dep't 1963); People v. Dixon, 118 App. Div. 593, 103 N.Y. Supp. 186 (4th Dep't 1907); Green v. Telfair, 11 How. Pr. 260 (N.Y. Sup. Ct. 1853).

9. People v. Sheldon, 156 N.Y. 268, 50 N.E. 840, 41 L.R.A. 644 (1898); see People v. Riley, 20 A.D.2d 599, 245 N.Y.S.2d 439 (3d Dep't 1963). *But see* United States v. Rosso, 58 F.2d 197 (2d Cir. 1932).

10. Katsidras v. Weber, 199 N.Y. Supp. 30 (Sup. Ct. 1923); Slater v. Mead, 53 How. Pr. 57 (N.Y. Sup. Ct. 1876); see Twiss v. Lehigh Valley R.R., 61 App. Div. 286, 70 N.Y. Supp. 241 (3d Dep't 1901).

11. People v. Randall, 9 N.Y.2d 413, 174 N.E.2d 507, 214 N.Y.S.2d 417 (1961); Hill v. Edinger, 281 App. Div. 1052, 121 N.Y.S.2d 125 (3d Dep't 1953).

12. Wilkins v. Abbey, 168 Misc. 416, 418, 5 N.Y.S.2d 826, 828 (Sup. Ct. 1938).

13. N.Y. Code Crim. Proc. § 428(2).

14. People v. Ketcham, 45 Misc. 2d 802, 257 N.Y.S.2d 681 (Sup. Ct. 1965).

15. See People v. Presley, 22 A.D.2d 151, 254 N.Y.S.2d 400 (4th Dep't 1964); People v. Koerner, 117 App. Div. 40, 102 N.Y. Supp. 93 (1st Dep't 1907).

on a verdict.[16] The court held there was no coercion in *Wheeler v. Rabine*[17] when the jury notified the court that it was deadlocked, received supplementary instructions, and eighteen minutes later returned a verdict. Other jurisdictions have held similarly.[18] But in certain jurisdictions other than New York, two methods have been used to impose limitations upon this discretionary action of the court. There are some states which have statutes prohibiting the court from sending the jury back after it has reported for the second time that it is unable to agree on a verdict, unless it gives its consent to further deliberation or unless it comes into the court only to ask for further explanation of the law.[19] These statutes are designed to prevent the problem of coercion from arising and to assure that the jury's verdict is the result of mature deliberation.[20] The second method, corrective in nature, is a judicially developed rule used to determine whether the verdict is coerced or is actually the result of mature deliberation. According to this rule, which is based on the principle that an instruction is coercive if it merely forces agreement but is not coercive if it forces deliberation which results in agreement,[21] a holding of coercion is required if the supplementary instruction is followed by a verdict after a period of time which is considered short in comparison to the amount of time spent in deliberation prior to the allegedly coercive remarks of the judge, on the theory that this brief period indicates that the jury did not reach its verdict as the result of mature deliberation.[22]

The Appellate Division,[23] whose opinion was adopted by the Court of Appeals, based its reversal of the Trial Judge's order on the ground that the

16. Mills v. Tinsley, 314 F.2d 311 (10th Cir. 1963); United States v. Novick, 124 F.2d 107 (2d Cir. 1941); United States v. Rosso, 58 F.2d 197 (2d Cir. 1932); People v. Companaro, 223 App. Div. 248, 228 N.Y. Supp. 24 (1st Dep't 1928). *But see* People v. Sheldon, 156 N.Y. 268, 50 N.E. 840, 41 L.R.A. 644 (1898).

17. 15 A.D.2d 407, 224 N.Y.S.2d 483 (3d Dep't 1962).

18. See People v. Goldberg, 110 Cal. App. 2d 17, 242 P.2d 116 (1952) (1 hour and 2 minutes); Character v. State, 212 Misc. 30, 53 So. 2d 41 (1951) (10 minutes); Commonwealth v. Moore, 398 Pa. 198, 157 A.2d 65, 93 A.L.R.2d 616 (1959) (1 hour and eight minutes); State v. Hilman, 84 R.I. 396, 125 A.2d 94 (1956) (38 minutes); Foreman v. Texas Employer's Ins. Ass'n, 150 Tex. 468, 241 S.W.2d 977 (1951), 30 Texas L. Rev. 642 (1952).

19. Fla. Stat. Ann. § 54.22 (1943); S.C. Code Ann. § 38-303 (1962); Wis. Stat. Ann. § 270.23 (1957).

20. La Vallie v. General Ins. Co. of America, 17 Wis. 2d 522, 117 N.W.2d 703 (1962).

21. State v. Peirce, 178 Iowa 417, 159 N.W. 1050 (1916); Abbot v. Commonwealth, 352 S.W.2d 552 (Ky. 1961). There is coercion if the jurors merely decide on a verdict arbitrarily or by majority vote, while there is no coercion if the jurors discuss the case on its merits and as a result of this discussion agree on a verdict. For a general discussion of this theory see 53 Am. Jur. *Trial* § 952 (1945); 26 Ind. L.J. 86 (1950).

22. De Jarnette v. Cox, 128 Ala. 518, 523, 29 So. 618, 619 (1900): "The fact that a verdict was very soon thereafter rendered, notwithstanding the jury had stated to the court that it was impossible to come to a verdict after an effort of more than a day, we think reasonably and satisfactorily shows that the verdict was not uninfluenced by what the court had said." Meadows v. State, 182 Ala. 51, 55, 62 So. 737, 738 (1913): ". . . from the speedy verdict which followed the [judge's] remarks we are of the opinion that the verdict was probably influenced by the said remarks of the presiding judge." See State v. Voeckell, 69 Ariz. 145, 155, 210 P.2d 972, 978 (1949) (dissent); State v. Peirce, 178 Iowa 417, 159 N.W. 1050 (1916).

23. Carolan v. Altruda, 17 A.D.2d 211, 233 N.Y.S.2d 539 (1st Dep't 1962).

verdict of a jury is entitled to the strongest presumption of regularity in its resolution and formulation. The court assumed that deliberation continued from the time that the jury first reported itself deadlocked (4:20) until it stated its verdict (4:32). The court reasoned that within this last ten or twelve minutes one or more of the jurors may well have been convinced that the verdict returned was the right one. The opinion also stated that the verdict was entirely consistent with the weight of the evidence.

The instant case presents a somewhat unusual problem in that the judge's message to the jury, taken by itself, does not appear coercive, yet, when looked at in light of the hasty verdict which followed, it seems to have forced the jury to reach a verdict based more on the fear of non-discharge than on mature deliberation. It is not unreasonable to assume from the facts appearing in the record that the jury stopped deliberating when it first sent its message to the judge and did not resume deliberation until the court officer returned with the judge's message. If the time it takes the jury to assemble in the court-room and state its formal decision is also taken into account, it is, then, possible that the jury reached its verdict one or two minutes after receiving the supplementary instructions. It is quite likely, therefore, that the jury, not knowing how long it would be forced to deliberate, simply reached a verdict in order to put an end to its work. It would appear that the Appellate Division, in reversing the trial court's decision, was guided by the overriding policy consideration of putting all litigation to an end. The court seems to have found comfort in its determination that the jury's verdict was supported by the weight of evidence, a point irrelevant to the question of coercion. Despite this support, it seems clear that the jury's verdict was strongly influenced by the Trial Judge's admonition to continue deliberation.[24] There is an obvious conflict in policy considerations presented by the trial court's desire to assure a fair trial by a maturely deliberating jury and the Appellate Division's desire to put all litigation to an end. A combined use of the two methods referred to above would provide a significant step in the direction of resolving this conflict, in that a verdict would be allowed to stand except in cases such as the instant one where it is evident that the jury's verdict was not the result of mature deliberation. The mere enactment of a statute which stipulates that a jury which has declared itself deadlocked may be sent back only twice for further deliberation, although it might be helpful in cases similar to this one, would not be enough. This is evident in that such a statute would not have affected the trial court's procedure in the instant case because the jury notified the court only once that it was unable to reach a verdict. In order to prevent further decisions like this the courts must turn to the time comparison rule used in other jurisdictions. By applying this rule, the two minutes

24. It is within the power of the Appellate Division to render a judgment which the Trial Judge could have rendered, thus leaving matters of discretion exercised by the Supreme Court judges open to complete review, O'Connor v. Popertsian, 309 N.Y. 465, 131 N.E. 883, 56 A.L.R.2d 206 (1956), but query whether it is a proper situation for the exercise of such power where the trial judge, as in the instant case, has peculiar knowledge of the facts?

it took the jury to reach its verdict would clearly indicate that the judge's instructions forced agreement rather than mature deliberation, and provided sufficient grounds for vacating the jury's verdict.

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CONFLICT OF LAWS—COLORADO GUEST STATUTE PRECLUDED RECOVERY BY GUEST-PASSENGER FROM HER HOST, WHERE BOTH WERE NEW YORK RESIDENTS TEMPORARILY RESIDING IN COLORADO

Plaintiff and defendant, domiciled in New York state, were summer students at the University of Colorado and had arrived at separate times in the city of Boulder. At the time of leaving New York, plaintiff and defendant had not arranged to meet in Colorado, nor had they planned that plaintiff would ride in defendant's automobile at any time. On August 11, 1959 plaintiff entered defendant's automobile with his consent, for the purpose of being driven to Longmont, Colorado. Both parties had intended that plaintiff be driven only to that destination, and they had made no plans for any other trips. During the short ride to Longmont, plaintiff received injuries as a result of a collision with another car, registered in Kansas, and sought to recover damages from her host for his negligence. Colorado, unlike New York (whose policy allows recovery by the guest for the host's negligence), has a guest statute which precludes recovery by a guest in the absence of showing gross negligence on the part of the host.[1] The trial court,[2] invoking the conflict of laws rule recently defined in *Babcock v. Jackson*,[3] decided as a matter of law that New York law was applicable. The Appellate Division[4] unanimously reversed the trial court and held that Colorado law must apply. The Court of Appeals *held*, affirmed, three judges dissenting. Since the parties were dwelling in Colorado when the host-guest relationship was formed, the place of the accident was not "entirely fortuitous," and hence applying the "contacts" test of *Babcock*, Colorado law must apply. *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

The choice of law rule, that the place of the injury furnishes the law applicable to a tort, was embodied in the original *Restatement, Conflict of Laws*,

1. Colo. Rev. Stats. Ann. § 13-9-1 (1963): "No person transported by the owner or operator of a motor vehicle as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss in case of accident, unless such accident shall have been intentional on the part of such owner or operator or caused by his intoxication, or by negligence consisting of a willful and wanton disregard of the rights of others. . . ."

2. Dym v. Gordon, 41 Misc. 2d 657, 245 N.Y.S.2d 656 (Sup. Ct. 1963).

3. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (Plaintiff and defendant, both residents of New York, set out from Rochester on a trip that took them to Ontario, Canada. Plaintiff was a guest in defendant's automobile at his invitation. While in Ontario, plaintiff was injured when the automobile collided with a stone wall. When plaintiff sued in New York, defendant invoked the Ontario guest statute and moved to dismiss the complaint. *Held*, motion to dismiss complaint denied; New York law applied.) See Note, 13 Buffalo L. Rev. 138 (1964).

4. Dym v. Gordon, 22 A.D.2d 702, 253 N.Y.S.2d 802 (2d Dep't 1964).