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CASES NOTED

THE ADMISSIBILITY OF EVIDENCE TO IMPEACH JURY VERDICTS

A judgment was rendered for the plaintiffs in a negligence action. The defendant moved for a new trial, presenting the signed statements of the jury foreman and three other jurors (out of six) indicating that their verdict was arrived at by means which would make it a quotient verdict.[1] The motion for new trial was denied. On appeal to the District Court of Appeal, Third District, *held,* affirmed: Overruling the defendant's motion for a new trial based on the allegation that jurors had arrived at an improper quotient verdict did not constitute an abuse of the trial court's discretion where the evidence was unclear.[2] *Pix Shoes, Inc. v. Howarth,* 201 So.2d 80 (Fla. 3d Dist. 1967).

Although it is clear that the use of a quotient verdict will result in the setting aside of that verdict, it is less certain how resort to the quotient method is to be proved. Undoubtedly the most significant (and often the only) source of evidence whereby the use of a quotient verdict might be proved is the jurors themselves. However, in most jurisdictions, statements, affidavits or testimony offered by jurors for the purpose of impeaching their own verdict are inadmissible.[3]

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1. At a hearing before the trial judge on the motion, three of the jurors testified: one testified unequivocably that the verdict was a quotient verdict; the testimony of another juror was inconclusive; the testimony of the third juror contradicted his previously signed statement.

2. A quotient verdict is defined as a verdict arrived at by adding together the amounts the several jurors think should be awarded and dividing the sum thus obtained by the total number of jurors; where the jurors agree in advance to be bound by the quotient so determined it constitutes misconduct of the jury requiring a new trial. *See* 66 C.J.S. *New Trial* § 59 (1950).

3. McDonald v. Pless, 238 U.S. 264 (1915); Fleming v. Knowles, 272 Ala. 271, 130 So.2d 326 (1961); Wilson v. Wiggins, 54 Ariz. 240, 94 P.2d 870 (1939); Norton v. Hickingbottom, 212 Ark. 581, 206 S.W.2d 777 (1947); Ison v. Stewart, 105 Colo. 55, 94 P.2d 701 (1939); Valentine v. Pollak, 95 Conn. 556, 111 A. 869 (1920); Croasdale v. Tantum, 11 Del. 218 (1880); Smoky Mountain Stages v. Wright, 62 Ga. App. 121, 8 S.E.2d 453 (1940); Kelley v. Call, 324 Ill. App. 143, 57 N.E.2d 501 (1944); Houk v. Allen, 126 Ind. 568, 25 N.E. 897 (1890); Klein v. Medical Bldg. Realty Co., 147 So. 122 (La. App. 1933); State v. Pike, 65 Maine 111 (1876); Brimsfield v. Howeth, 101 Md. 520, 73 A. 289 (1909); Boston & W.R.R. v. Dana, 67 Mass. (1 Gray) 83 (1854); Ballance v. Dunnington, 246 Mich. 36, 224 N.W. 434 (1929); Index Drilling Co. v. Williams, 242 Miss. 775, 137 So.2d 525 (1962); Chrum v. St. Louis Pub. Serv. Co., 242 S.W.2d 54 (Mo. 1951); Kaltenborn v. Bakerink, 80 Nev. 16, 388 P.2d 572 (1964); Clark v. Manchester, 64 N.H. 471, 13 A. 867 (1887); Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941); Sena v. Sanders, 54 N.M. 83, 214 P.2d 226 (1950); Davis v. Lorenzo's, Inc., 258 App. Div. 933, 16 N.Y.S.2d 624 (1939); Campbell v. High Point, T. & D.R.R., 201 N.C. 102, 159 S.E. 327 (1931); Stadium Cab Co. v. Shawd, 36 Ohio Law Rep. 456 (Franklin County Ct. App. 1932); Allen v. City of Tulsa, 345 P.2d 443 (Okla. 1959); Hendricks v. Portland Elec. Power Co., 134 Ore. 366, 289 P. 369 (1930), *aff'd on rehearing,* 134 Ore. 376, 292 P. 1094 (1930); Rice v. Bauer, 354 Pa. 544, 59 A.2d 885 (1948); Luft v. Lingane, 17 R.I. 420, 22 A. 942 (1891); Carpenter v.

The proposition that no evidence of misconduct was competent that came from the jurors themselves had its origin in the often quoted language of Lord Mansfield in *Vaise v. Delaval.*[4] Having no sound basis of policy,[5] it also had no basis of precedent. But with the prestige of the great Chief Justice behind it, the principle of *Vaise v. Delaval* soon prevailed in England, and its authority became almost unquestioned in the United States,[6] including Florida.[7]

The policy most frequently relied on to support the *Delaval* rule was best expressed by the U.S. Supreme Court in *McDonald v. Pless*[8] wherein the court stressed the possibility of harassment of jurors and the inviolability of solemnly made verdicts.[9]

However, the rule against impeachment of verdict by jurors has been abrogated by statutes in a number of states.[10] Moreover, in a few jurisdictions, it has been held permissible, without statutory authorization, for a juror's statements to be received in evidence for the purpose of showing that a quotient verdict has been rendered.[11]

The present status of Florida law as to the admissibility of jurors' statements impeaching their verdict as a quotient verdict appears un-

Willey, 65 Vt. 168, 26 A. 488 (1893); Washington Luna Park Co. v. Goodrich, 110 Va. 692, 66 S.E. 977 (1910); Kelly v. Rainelle Coal Co., 135 W. Va. 594, 64 S.E.2d 606 (1951); Brophy v. Milwaukee Elec. Ry. & Transp. Co., 251 Wis. 558, 30 N.W.2d 76 (1947); Pullman Co. v. Finley, 20 Wyo. 456, 125 P. 380 (1912).

4. 99 Eng. Rep. 944 (K.B. 1785).

5. 8 J. WIGMORE, EVIDENCE § 2352 (McNaughton rev. 1961).

6. *Id.* at 696.

7. One of the earliest Florida cases to recognize the *Delaval* rule was *Coker v. Hayes*, 16 Fla. 368 (1878). The court's opinion indicated an acute understanding of the policy behind the rule:

> It is needless to discuss the reasons for the rule. The oath of a juror is not admissible to impeach his verdict.

Id. at 395.

8. 238 U.S. 264 (1915). (The court refused to allow jurors to testify that they reached a quotient verdict.)

9. In the language of the court:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding.

Id. at 267.

10. CAL. CODE CIV. P. ANN. § 657(2) (Deering 1959) is typical:

> Misconduct of the jury; and whenever . . . the jurors . . . resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

Cf. Monroe v. Lashus, 170 Cal. App. 2d 1, 338 P.2d 13 (1959). *See also*, IDAHO CODE ANN. § 10-602(2) (1947); REV. CODES OF MONT. ANN. § 93-5603(2) (1947); N.D. R. Civ. P. 59(b)(2) (1957); TEXAS CIV. STAT. ANN. art. 2234 (1964); REV. CODE OF WASH. ANN. § 4.76.020(2) (1962).

The MODEL CODE OF EVIDENCE rule 301 (1942), would permit jurors' testimony on matters which would serve to vitiate or uphold the verdict, but stops short of permitting testimony on the "mental processes' of the jurors' and the effect on the verdict.

11. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1886); Hukle v. Kimble, 172 Kan. 630, 243 P.2d 225 (1952); Scherz v. Platte Valley Pub. Power & Irrigation Dist., 151 Neb. 415, 37 N.W.2d 721 (1949); East Tenn. & W.N.C.R.R. v. Winters, 85 Tenn. 240, 1 S.W. 790 (1886).

clear. In the early case of *McMurray v. Basnet*,[12] the Supreme Court of Florida held such affidavits inadmissible. *McMurray* has never been overruled, nor has it been distinguished in any recent Florida case. The apparent conclusion is that it has been simply abandoned. Perhaps the void left by the abandonment of *McMurray* has been filled by subsequent cases which seem to have made inroads into the *Delaval* rule.[13] The case that has gone the furthest in altering the common law "settled rule" is *Marks v. State Road Department*,[14] which aligned Florida with those jurisdictions adhering to the rule[15] stated by the Iowa Supreme Court in *Wright v. Illinois & Mississippi Telephone Co.*:[16]

> [A]ffidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room which *does not essentially inhere in the verdict itself* . . . ; that the verdict was determined by aggregation and average or by lot . . . or other . . . improper manner.[17]

The rule in *Marks* has been given lip service in subsequent cases purporting to apply it, but these cases have almost invariably found some basis on which to distinguish *Marks*.[18] If the courts had clearly adhered to the *Delaval* rule or clearly rejected it in deference to the *Marks* rule

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12. 18 Fla. 609 (1882):

> This affidavit the court very properly ruled out for the reason that a juror could not be heard upon what transpired within the jury room, especially to prove any irregularities upon the part of such jury. . . . The affidavit of a juror is not admissible to impeach his verdict on a motion for a new trial. *Id.* at 627.

13. Perhaps the earliest such inroad was Orange Belt Ry. v. Craver, 32 Fla. 28, 13 So. 444 (1893), wherein a juror's testimony was admissible to consider if the verdict had been arrived at in such a manner as to make it an improper verdict. The court said:

> [W]e have . . . considered [the evidence admissible] because no objection . . . seems to have been insisted upon at the time it was offered. The settled rule at the common law excluded a juror as a witness to impeach his verdict . . . . *Id.* at 36, 13 So. at 447.

However, as late as 1943, the Fla. Supreme Court strictly applied the *Delaval* rule in Dempsey-Vanderbilt Hotel v. Huisman, 153 Fla. 800, 15 So.2d 903 (1943).

14. 69 So.2d 771 (Fla. 1954).

15. The rule in the *Wright* case (which the Iowa Supreme Court would, no doubt, be happy to learn is now characterized as the "true rule" by the Florida courts, albeit 100 years late) was stated (though perhaps not so lucidly as in Marks) or alluded to in earlier Florida cases. *cf.* Linsley v. State, 88 Fla. 135, 101 So. 273 (1924).

See City of Miami v. Bopp. 117 Fla. 532, 158 So. 89 (1934), wherein a motion for new trial supported by jurors' affidavits was granted. The Supreme Court indicated that all those matters lying outside the personal consciousness of the individual juror, *i.e.* matters which are "accessible to the testimony of others and subject to contradiction," may be shown by the affidavits of a juror; however, matters in the personal consciousness of one juror should not be received to overthrow the verdict.

16. 20 Iowa 195 (1866).

17. Marks v. State Rd. Dep't, 69 So.2d 771, 774 (Fla. 1954) (emphasis supplied). The reason for that policy being that:

> [T]o receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot . . . or the like, is to receive his testimony as to a fact, which, if not true can be readily and certainly disproved by his fellow jurors . . . . *Id.*

18. *Cf.* Jackson Grain Co. v. Hoskins, 75 So.2d 306 (Fla. 1954) (distinguishing *Marks* on the basis that in the latter case the improper procedure was discovered before the jury was discharged); Magid v. Mozo, 135 So.2d 772 (Fla. 1st Dist. 1961) (there should be clear evidence of improper procedure independent of the affidavits of the jury).

there would not be so much doubt as to the Florida position. Unfortunately, the courts have consistently avoided the basic issue, that is, the initial admissibility of the jurors' affidavits, preferring instead to base their decisions on a variety of specious distinctions.[19] Most frequently, the courts have fallen back on the almost unassailable conclusion that the evidence was not "sufficient" to warrant a new trial,[20] as was done in the principal case.[21]

This case is a perfect example of the less than perfect approach to the problem typically taken by the Florida courts. Such a decision does a disservice by skirting the issue. The policy consideration underlying the *Delaval* rule is stated by the court in its opinion. While acknowledging that there may be cases in which post-trial investigations may be appropriate, the instant case, stated the court, does not warrant such investigation, primarily because:

> It is difficult enough, in our modern complex society, to secure good jurors. It will be even more difficult if jurors are to be subjected to harassment, investigation and interrogation subsequent to each time they perform their public duty.[22]

What seemed to bother the court considerably was the resort to the "reprehensible" and "unethical" practice by attorneys of having investigators approach and interrogate jurors, after trial, regarding their reasons for arriving at their verdict.[23] The court indicated that the proper procedure for an attorney to take would be to seek the consent of the trial court if "he has reason to believe that ground for . . . challenge may exist."[24] If, however, this is to be the only basis on which jurors' testimony will be accepted, it is likely that the court has overlooked the great difficulty that will necessarily be encountered in proving misconduct on the part of the jurors. How can an attorney show "he has reason to believe that ground for . . . challenge" exists if he may not inquire of the jurors as to what actually transpired in the jury room? Does this not represent a step backward from *Marks?*

Although the court cited the "public policy [which] protects a juror in the legitimate discharge of his duty, and sanctifies the result obtained thereby,"[25] they did clearly indicate that proof of the manner in which a jury reached its verdict is admissible, and, by implication, affidavits of jurors may supply that proof. In the principal case however, the court made a weak distinction, namely, that statements of the jurors were

19. *See* note 18 *supra. See also* State v. Smith, 183 So.2d 34 (Fla. 2d Dist. 1966) (statements of jurors were as to matters which "inhered in the verdict.")

20. Magid v. Mozo, 135 So.2d 772 (Fla. 1st Dist. 1961).

21. Pix Shoes, Inc. v. Howarth, 201 So.2d 80 (Fla. 3d Dist. 1967).

22. *Id.* at 83.

23. *Id.*

24. *Id.*

25. Marks v. State Rd. Dep't, 69 So.2d 771, 775 (Fla. 1954).

secured without the formality needed in order to consider them affidavits.[26] Unfortunately, in light of that distinction, the court was of the opinion that the evidence here was not so "clear and convincing . . . that a verdict was in fact arrived at in such fashion as to be a quotient verdict."[27] The court stated:

> At best, only one live witness was before the trial court who testified that the verdict was arrived at by means which would make it a quotient verdict. If this be sufficient to overturn an adverse verdict, as urged by the appellant, then all a losing defense counsel will need to secure a new trial is *one* juror to claim that the verdict was a quotient verdict.[28]

Indeed, should not the affidavit of any one juror[29] be a sufficient "claim" that the verdict was arrived at improperly? As the dissent accurately pointed out, the testimony that the quotient process was used was uncontradicted, the only disputed element being the presence of a prior agreement to be bound.[30]

In the principal case, the court failed to meet the problem head on, thereby ignoring Wigmore's plea for the unequivocable adoption of the *Wright* (Iowa) rule as an alternative to *Delaval* that: "If there cannot be any principal in this rule, it should at least possess logic."[31] Wigmore dismissed the *Delaval* rule as follows:

> [O]f the usual rule [excluding jurors' testimony upon the point] it may be said that since a determination by lot can hardly ever be established by other than jurors' testimony, it becomes a mere pretense to declare a certain irregularity fatal and yet to exclude all practical means of proving it . . .[32]

Clearly, while it is doubtful whether more than one in a hundred verdicts would stand the test of absolute perfection,[33] the proper rule appears to be to allow the introduction of the statements of jurors to prove misconduct of the jury in arriving at their verdict, with a limitation on the

26. Pix Shoes, Inc. v. Howarth, 201 So.2d 80, 82 (Fla. 3d Dist. 1967).

27. *Id.*

28. *Id.*

29. In all the states that have statutory authorization for the admissibility of jurors' affidavits as evidence of misconduct of the jury the statutes provide the "affidavit of any one of the jurors" may be used to prove such misconduct. *See* statutes cited at note 10 *supra.*

Cf. Orange Belt Ry. v. Craver, 32 Fla. 28, 13 So. 444 (Fla. 1893) (testimony of one juror considered); City of Miami v. Bopp, 117 Fla. 532, 158 So. 89 (1934) (two jurors); Malone v. Marks Bros. Paving Co. 168 So.2d 753 (Fla. 3d Dist. 1964) (two jurors).

30. Pix Shoes, Inc. v. Howarth, 201 So.2d 80, 83 (Fla. 3d Dist. 1967) (Dissent).

There is, however, some authority in Florida in support of the position that even if the jurors did not agree in advance to be bound by the quotient, use of the quotient process may nevertheless constitute grounds for invalidating the verdict. *See* Jackson Grain Co. v. Hoskins, 75 So.2d 306 (Fla. 1954).

31. 8 J. WIGMORE, EVIDENCE § 2353, at 699 (McNaughton rev. 1961).

32. *Id.* § 2354, at 711.

33. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir. 1947).

rule excluding testimony as to the mental processes of the jurors. It is hoped that the Florida courts will soon resolve the present uncertainty with a clear and precise pronouncement liberalizing the rules on reception of jurors' testimony.

ALAN S. BECKER

TORTS — LIABILITY FOR CONCUSSION DAMAGES FROM BLASTING

Plaintiffs brought an action to recover for damage to their property allegedly caused by concussion from defendant's blasting operations. Count Two of the amended complaint, which sought recovery under a theory of strict liability, was dismissed. On appeal from final judgment for the defendant, the Second District Court of Appeal, *held,* reversed and remanded: "[O]ne lawfully engaged in blasting is liable, irrespective of negligence, for personal injuries or property damage sustained either as a result of casting material on adjoining land or as a result of concussion." *Morse v. Hendry Corp.,* 200 So.2d 816, 817 (Fla. 2d Dist. 1967).

It is almost unanimously held that one who by exploding dynamite causes rocks to be thrown upon neighboring land is absolutely liable on the basis of trespass to land.[1] However, where the damage is caused, not by flying debris, but by concussion of the atmosphere or vibration of the earth, there is a split of authority. The instant case, one of first impression in Florida as to the issue of liability for concussion damage,[2] places Florida among the solid majority of jurisdictions holding the defendant strictly liable.[3]

Two arguments have been advanced to support the minority position that there be a showing of negligence. The first is that no cause of action may be recognized by the courts unless it is one for which some form of action was available at the common law.[4] At the common law, the only two forms of action that would have been available for recovery for damage to real property caused by blasting were trespass and trespass on the case.[5] However, concussion was not considered to be a physical invasion of the real property.[6] Rather, damage caused by such incursions

1. 2 HARPER AND JAMES, THE LAW OF TORTS, § 14.6 at 813 (1956).

2. The court had another issue to consider. Count one of the amended complaint, seeking recovery on a third-party beneficiary theory, was also dismissed by the trial court. That dismissal was likewise reversed.

3. For an exhaustive treatment of the subject see Annot., 20 A.L.R.2d 1372 (1951).

4. *See* J. SMITH, LIABILITY FOR SUBSTANTIAL PHYSICAL DAMAGE TO LAND BY BLASTING. THE RULE OF THE FUTURE. 33 HARV. L. REV. 542 (1920).

5. *See* W. PROSSER, THE LAW OF TORTS, § 7 at 28 (3d ed. 1964).

6. J. SMITH, *supra* note 4.