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to its indicated destination, public employees could divulge heinous wrongdoing and then "thumb their noses" at the public who had hired them while asserting freedom from dismissal due to granted immunity.[60] The *Addonizio* court concluded by saying that in all rectitude the doctrine of immunity could not be carried to this extreme and that it would be proper to hold public employees accountable for answering questions related to their employment.[61] This does not mean that the public employee has been deprived of any constitutional rights by virtue of his chosen employment. It does mean, however, that society has a right to demand an accounting from its employees. Due to the high degree of trust placed in these individuals, they cannot either refuse an accounting or give an unsatisfactory accounting and claim continued right to employment based on an immunity statute under which they had testified. This would be too great a burden to require society to bear. It seems unfortunate that the Florida court did not confront this inevitable constitutional issue instead of using the "dictionary approach" and trying merely to define what is and what is not a "penalty or forfeiture." They appear to have reached the right result in *Baron* but they could have confronted the issue more directly in reaching their decision.

ROBIN PHILIPS HARTMANN

VOTE DISTRIBUTION IN NON-UNANIMOUS JURY VERDICTS

The right to trial by jury in civil cases is guaranteed by the seventh amendment to the United States Constitution.[1] It has long been held, however, by both state[2] and federal[3] courts, that this quarantee refers

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[60] *Id.* at 547 n.3.

[61] *Id.* at 545-47.

[1] The seventh amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

[2] *E.g.*, Jehl v. Southern Pac. Co., 66 Cal. 2d 821, 427 P.2d 988, 59 Cal. Rptr. 276 (1967); Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969 (1933); Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192 (1915); Wooten v. Dallas Hunting & Fishing Club, 427 S.W.2d 344 (Tex. Civ. App. 1968).

[3] *E.g.*, Southern Ry. v. City of Durham, 266 U.S. 178 (1924); Minneapolis & St. L.R.R. v. Bombolis, 241 U.S. 211 (1916); Iacaponi v. New Amsterdam Cas. Co., 258 F. Supp. 880 (W.D. Pa. 1966), *aff'd.*, 379 F.2d 311 (3d Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); *see* Maxwell v. Dow, 176 U.S. 581 (1900).

only to suits in the federal courts, and that it is not binding on the several states,[4] who may prescribe particular procedures to be followed in their own courts.[5]

One such procedure which has been widely instituted by the states provides for non-unanimous jury verdicts in civil trials.[6] Although this procedure varies in form, its primary purposes have been to avoid unjust verdicts resulting from dishonest and recalicitrant jurors, to prevent the economic loss of mistrials, to relieve court congestion, and to avoid unfair delay in the administration of justice.[7] However, such provisions have recurrently raised the question of how the individual jurors must distribute their votes on all the issues raised by the evidence in order to constitute a valid verdict. For example, in a state allowing five-sixths of the jury to return a valid verdict, the question is whether any ten jurors may decide any issue presented by the evidence, or whether the same ten must agree on every issue presented.

In the case of *Ward v. Weekes*,[8] the Superior Court of New Jersey

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[4]Cases cited notes 2 & 3 *supra*.

[5]Morin v. Becker, 6 N.J. 457, 79 A.2d 29 (1951). *See* State *ex rel* Simmons v. American Surety Co., 210 S.W. 428 (Mo. 1919). These cases have sustained the validity of the state procedural provisions for non-unanimous jury verdicts. It has been repeatedly held, however, that their validity can derive only from an enabling provision in the state constitution. *See* Ewing v. Duncan, 209 Ind. 686, 197 N.E. 901 (1935); New York Cent. R.R. v. Hazelbaker, 101 Ind. App. 414, 199 N.E. 425 (1936). *See also* Gabbert v. Chicago, R.I. & Pac. Ry., 171 Mo. 84, 70 S.W. 891 (1902).

[6]Eight jurisdictions permit a verdict by five-sixths of the jury. ALASKA CODE CIV. PRO. § 09.20.100 (1962); HAWAII REV. STAT. § 635-20 (1968); KY. REV. STAT. § 29-340 (1969) (if court below circuit court); MICH. STAT. ANN. § 512.1 (Supp. 1970); N.J. STAT. ANN. § 2A:80-2 (1952); N.M. STAT. ANN. § 21-1-1(48)(b) (1954); N.Y. CIV. PRAC. LAW § 4113 (McKinney 1963); WIS. STAT. ANN. § 270.25(1) (1957). Twelve jurisdictions permit a verdict by three-fourths of the jury. ARIZ. REV. STAT. ANN. § 21-102(B) (1956); CALIF. CIV. PRO. §§ 613, 618 (West 1955); CONN. GEN. STAT. ANN. § 52-222 (1960); IDAHO CODE ANN. § 10-217 (1948); LA. CODE CIV. PRO. ANN. art. 1795 (West 1961); MISS. CODE ANN. § 1801 (Recomp. 1957); MO. ANN. STAT. § 494.210 (Vernon 1952) (2/3 in courts not of record); OHIO REV. CODE ANN. §§ 2315.09, 2315.11 (Baldwin 1964); ORE. REV. STAT. § 17.355 (Repl. Vol. 1969); S.D. CODE ANN. §§ 15-14-27, 15-14-29 (1967); UTAH R. CIV. PRO. 47(q) (1953); WASH. REV. CODE § 4.44.380 (1959). One state permits a verdict by two-thirds of the jury. MONT. REV. CODE § 93-5105 (Repl. Vol. 1964). Two states allow five-sixths of the jury to return a verdict after specified periods of deliberation. MINN. STAT. ANN. § 546.17 (Supp. 1970) (after six hours of deliberation). Five jurisdictions permit a verdict by a majority of the jury if both parties consent. IOWA R. CIV. PRO. 203(a) (1951); MD. R. CIV. PRO. 544 (1957); N.C. GEN. STAT. § 1A-1, R. 48 (Repl. Vol. 1969); W.VA. R. CIV. PRO. 48 (1966); WYO. R. CIV. PRO. 48 (1957).

[7]Ward v. Weekes, 107 N.J. Super. 351, 258 A.2d 379, 381 (App. Div. 1969); State v. M., 96 N.J. Super. 335, 233 A.2d 65, 69 (App. Div. 1967).

[8]107 N.J. Super. 351, 258 A.2d 379 (App. Div. 1969).

held that the constitutional[9] and statutory[10] provisions for a valid verdict by five-sixths of the jury in a civil trial permitted any ten jurors to agree on any issue raised. Plaintiff Ward was injured in an automobile accident involving a taxi owned by defendant Weekes and driven by defendant Bell. A verdict was returned against both defendants and judgment was rendered thereon. A poll of the jury revealed that two jurors agreed with the finding of liability but disagreed on the amount of damages, and two different jurors agreed with the damages but disagreed with the finding of liability. The result was a ten-two (five-sixths) verdict for Ward, but only eight of the jurors (two-thirds) agreed with the verdict as a whole. Ward was granted a new trial on the ground that the verdict was fatally defective as it was rendered by less than five-sixths of the jury.

The issue presented by the appeal was whether a verdict is valid where the same ten jurors fail to agree on all the issues embodied in it. The superior court reversed the decision setting aside the verdict. The court reasoned that had the legislature intended the same five-sixths to agree on all issues it would have so provided.[11] There was no evidence that any of the dissenting jurors had acted in violation of his oath to render a true verdict according to the evidence. Furthermore, to require the same five-sixths to agree on every issue would be in derogation of the policies upon which the provision was based.[12]

The *Ward* decision stands contrary to the rule (hereinafter referred to as the Wisconsin rule)[13] established by an almost uninterrupted line of cases[14] holding that the same fractional group of jurors must concur

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[9]"The legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury." N.J. CONST. art. 1, par. 9.

[10]"In any civil cause wherein a jury of 12 shall be impanelled, a verdict may be rendered by 10 or more of the jury agreeing, and, if 6 be impanelled, then by 5 or more of the jury agreeing." N.J. STAT. ANN. § 2A:80-2 (1952).

[11]The court's argument was based partially on the fact that the state of Wisconsin did specifically add the rule to its statute.

> A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same cause of action, the same five-sixths of the jurors must agree on all such questions.

WIS. STAT. ANN. § 270.25(1) (1957). Wisconsin has been the most influential jurisdiction in the development of the rule, and its decisions have uniformly followed that rule, both before and since its codification in 1951. *See* Wisconsin cases cited note 14 *infra*. For this reason it seems appropriate to refer to the rule as the "Wisconsin rule."

[12]See text accompanying note 7 *supra*.

[13]Note 11 *supra*.

[14]Schoenbach v. Key Sys. Transit Lines, 168 Cal. 2d 298, 335 P.2d 725 (Dist. Ct. App. 1959); Nelson v. Superior Court, 26 Cal. App. 2d 119, 78 P.2d 1037 (Dist. Ct. App. 1938); Balero v. Littell, 124 Cal. App. 190, 12 P.2d 41 (Dist. Ct.

on each issue to be resolved. There have been several theories suggested as a basis for this rule. One of the earliest of these drew an analogy to the unanimity required in jury verdicts at common law.[15] It was necessary not only that the jury unanimously agree upon the general result articulated in the verdict, but also that there be unanimous agreement on the essential facts upon which the general result was based.[16] It has therefore been argued that to allow different fractional sets of jurors to agree upon the various issues embodied in the verdict "would make a much more substantial encroachment upon the common-law jury of 12 than can be held to be effected . . ."[17] by the statutes providing for non-unanimous verdicts.

Another basis which has been used to justify the Wisconsin rule is the interpretation of the verdict as a non-fragmentable totality.[18] "A verdict is the expression of the concurrence of individual judgments, rather than the product of mixed thoughts."[19] The verdict is a whole and separate entity and represents one ultimate finding on the

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App. 1932); Earl v. Times-Mirror Co., 185 Cal. 165, 196 P. 57 (1921); Baxter v. Tankersley, 416 S.W.2d 737 (Ky. 1967); Plaster v. Akron Union Pass. Depot Co., 101 Ohio App. 27, 137 N.E.2d 624 (1955); Sprinkle v. Lemley, 243 Ore. 521, 414 P.2d 797 (1966); Munger v. State Indus. Acc. Comm'n, 243 Ore. 419, 414 P.2d 328 (1966); Shultz v. Monterey, 232 Ore. 421, 375 P.2d 829 (1962); Clark v. Strain, 212 Ore. 357, 319 P.2d 940 (1958); Freeman v. Wentworth & Irwin, Inc., 139 Ore. 1, 7 P.2d 796 (1932); Devoni v. Department of Labor and Indus., 36 Wash. 2d 27, 217 P.2d 332 (1950); Strupp v. Farmers Mut. Auto. Ins. Co., 14 Wis. 2d 158, 109 N.W.2d 660 (1961); Hupf v. State Farm Mut. Ins. Co., 12 Wis. 2d 176, 107 N.W.2d 185 (1961); Fleishhacker v. State Farm Auto. Ins. Co., 274 Wis. 215, 79 N.W.2d 817 (1956); McCauley v. International Trading Co., 268 Wis. 62, 66 N.W.2d 633 (1954); Augustin v. Milwaukee Elec. Ry. & Transp. Co., 259 Wis. 625, 49 N.W.2d 730 (1951); Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 199 (1948); Haase v. Employers Mut. Liab. Ins. Co., 250 Wis. 422, 27 N.W.2d 468 (1947); Stylow v. Milwaukee Elec. Ry. & Transp. Co., 241 Wis. 211, 5 N.W.2d 750 (1942); Fraundorf v. Schmidt, 216 Wis. 158, 256 N.W. 699 (1934); Guth v. Fisher, 213 Wis. 323, 251 N.W. 223 (1933); Biersach v. Wechselberg, 206 Wis. 113, 238 N.W. 905 (1931); Lefebvre v. Nickolai, 205 Wis. 115, 236 N.W. 684 (1931); Larson v. Koller, 198 Wis. 160, 223 N.W. 426 (1929); Christensen v. Petersen, 198 Wis. 222, 222 N.W. 231 (1928); Will v. Chicago, M. & St. P. Ry., 191 Wis. 247, 210 N.W. 717 (1926); Hobbs v. Nelson, 188 Wis. 108, 205 N.W. 918 (1925); Bentson v. Brown, 186 Wis. 629, 203 N.W. 380 (1925); Kosak v. Boyce, 185 Wis. 513, 201 N.W. 757 (1925); Dick v. Heisler, 184 Wis. 77, 198 N.W. 734 (1924). *See* Stokdyk v. Schmidt, 190 Wis. 108, 208 N.W. 941 (1926); Stevens v. Montfort State Bank, 184 Wis. 621, 198 N.W. 600 (1924); *cf.* Carlin v. Prickett, 81 Cal. App. 2d 688, 184 P.2d 945 (Dist. Ct. App. 1947).

[15]Will v Chicago, M. & St. P. Ry., 191 Wis. 247, 210 N.W. 717 (1926).

[16]Barker v. Missouri Pac. Ry., 89 Kan. 573, 132 P. 156 (1913).

[17]Hobbs v. Nelson, 188 Wis. 108, 205 N.W. 918, 921 (1925).

[18]Earl v. Times-Mirror Co., 185 Cal. 165, 196 P. 57 (1921); Clark v. Strain, 212 Ore. 357, 319 P.2d 940 (1958).

[19]State v. Bybee, 17 Kan. 462, 467 (1877).

basis of the several issues. This view is historically represented by the rule that inconsistent findings in special verdicts are ineffective[20] and perceives the verdict as representing in total all the individual issues presented by the evidence. The "totality" view of the verdict was manifested in *Earl v. Times-Mirror Co.*,[21] where the plaintiff sought both compensatory and punitive damages. The court asked the jury for a special finding as to each but pointed out that the verdict was not thereby fragmented. The two issues were segregated merely to facilitate determination of the basis upon which the jury acted, and in fact the verdict represented an indivisible whole.[22]

The totality theory has been impliedly recognized in the consistent application of the Wisconsin rule to cases involving special verdicts.[23] These cases have repeatedly held that the same fractional group of jurors must agree on the answer to each question essential to the verdict.

The only qualification which has been placed on the Wisconsin rule is that the same fractional set of jurors need agree only on those issues essential to the verdict, rather than on every issue presented by the evidence. In other words, "questions not essential to judgment because immaterial[24] or because rendered immaterial by the answers found to other questions[25] by all or ten agreed jurors may be disagreed to by three or more jurors."[26] Therefore, for example, in a verdict representing findings on negligence, contributory negligence, and amount of damages, the concurrence of the necessary fraction of

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[20]*See* Drewry's Ltd., U.S.A. v. Crippen, 113 Ind. App. 120, 44 N.E.2d 1006 (App. Ct. 1942); Larrissey v. Norwalk Truck Lines, Inc., 155 Ohio St. 207, 98 N.E.2d 419 (1951); Pearson v. Doherty, 143 Tex. 64, 183 S.W.2d 453 (1944).

[21]185 Cal. 165, 196 P. 57 (1921).

[22]In a lucid dissent, Judge Olney pointed out the inconsistency of the majority opinion which went on to split up the verdict for the purposes of remand. *Id.* at 71.

[23]*See* Nelson v. Superior Court, 26 Cal. App. 2d 119, 78 P.2d 1037 (Dist. Ct. App. 1938); Munger v. State Indus. Accident Comm'n, 243 Ore. 419, 414 P.2d 328 (1966); Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 199 (1948); Guth v. Fisher, 213 Wis. 323, 251 N.W. 223 (1933); Larson v. Koller, 198 Wis. 160, 223 N.W. 426 (1929). *See also* Will v. Chicago, M. & St. P. Ry., 191 Wis. 247, 210 N.W. 717 (1926).

[24]*See* Will v. Chicago, M. & St. P. Ry., 191 Wis. 247, 210 N.W. 717 (1926).

[25]*See* Augustin v. Milwaukee Elec. Ry. & Transp. Co., 259 Wis. 625, 49 N.W.2d 730 (1951); Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 199 (1948); Biersach v. Wechselberg, 206 Wis. 113, 238 N.W. 905 (1931); Lefebvre v. Nickolai, 205 Wis. 115, 236 N.W. 684 (1931); Larson v. Koller, 198 Wis. 160, 223 N.W. 426 (1929). *See also* Will v. Chicago, M. & St. P. Ry., 191 Wis. 247, 210 N.W. 717 (1926).

[26]Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 199, 202 (1948) (footnotes added).

jurors on the issue of contributory negligence will render immaterial the findings and patterns of jurors' votes on the other two issues.[27]

Prior to the *Ward* decision only one case, *Bullock v. Yakima Valley Transportation Co.*,[28] had held that it was immaterial how the required fraction of jurors was constituted on each issue to be resolved. The basis for this decision was apparently the *Bullock* court's interpretation of the word "verdict," which was not consonant with the totality theory. The applicable Washington statute[29] provided that any ten jurors could agree on a verdict. The case was submitted to the jury by interrogatories, with instructions that any ten of their number might agree upon any one of the interrogatories. The same ten jurors did not agree with each answer returned, but the court held that the interrogatories were special verdicts, and extended the word "verdict" as used in the statute to include such special verdicts. It was therefore impliedly held that the jury returned as many verdicts as it answered interrogatories. Other jurisdictions have criticized this decision, primarily on the basis of its failure to take cognizance of the verdict as a totality[30] and a later Washington case has followed the Wisconsin rule.[31]

The *Ward* decision represents a very substantial shift in judicial reasoning and invites close scrutiny of its rationale and ramifications. As one basis for its decision, the New Jersey court argued that the state constitution and statute refer only to the term "verdict", and the legislature therefore did not intend to require that each decision within the verdict be agreed upon by the same ten jurors. It is argued that "[t]he failure to do so indicates they realized that trials consist of many issues . . . ."[32] This assumption would seem to suggest that the legislature of New Jersey rejects the totality theory of the verdict. The statute provides that "[i]n any civil cause wherein a jury of 12 shall

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[27]Larson v. Koller, 198 Wis. 160, 223 N.W. 426 (1929); Will v. Chicago, M. & St. P. Ry., 191 Wis. 247, 210 N.W. 717 (1926). This applies only to those jurisdictions in which the contributory negligence of the plaintiff is a bar of his recovery.

[28]108 Wash. 413, 184 P. 641 (1919).

[29]"In all trials by juries of twelve in the superior court... when ten or more jurors agree upon a verdict... the verdict shall stand as the verdict of the whole jury." *Id.* at 648, citing WASH. REM. CODE § 658.

[30]Plaster v. Akron Union Pass. Depot Co., 101 Ohio App. 27, 137 N.E.2d 624, 627 (1955); Munger v. State Indus. Accident Comm'n, 243 Ore. 419, 414 P.2d 328, 331 (1966).

[31]Devoni v. Department of Labor & Indus., 36 Wash. 2d 227, 217 P.2d 332 (1950). The court did not distinguish the *Bullock* decision and there is no citation to it in the *Devoni* opinion.

[32]258 A.2d at 380.

be impaneled, a verdict may be rendered by 10 or more of the jury agreeing . . . ."[33] However, the court simultaneously relied on the interpretation of *Andres v. United States*[34] by assuming the legislature intended "verdict" to be "a single final decision of a jury on all the factual issues submitted to it by a court for determination."[35] This interpretation would appear to indicate that the legislature did in fact intend to follow the totality theory. These two assumptions of legislative intent are decidedly inconsistent. Had the New Jersey court not introduced the "single final decision" interpretation of *Andres,* but instead rested on its initial assumption that by ommission the legislature intended that any ten jurors be permitted to resolve any issue, the ultimate result reached in *Ward* would have been reasonable and logically consistent. The statute, which is ambiguous on its face, would fairly support the ultimate decision in *Ward.* But the introduction of *Andres,* a criminal case dealing with unanimous verdicts and therefore questionable authority for the *Ward* problem, creates a conflicting premise which renders the logical framework supporting the final decision in *Ward* of doubtful validity. When the *Andres* interpretation of a verdict was imputed to the legislature, the court seemingly bound itself to adopt the Wisconsin rule. If the law allows a verdict to be rendered by ten of twelve jurors, and a verdict is a single final decision, the same jurors concurring on all issues ought to be necessary to validate the verdict. The only way to resolve the inconsistency is to assume that, having posited the *Andres* interpretation, the court ignored it and proceeded on the assumption that the legislature intended by omission to suggest the verdict to be something other than a single final decision.

The *Ward* court reasoned that the alternative to its rule would be to disqualify from voting on damages the two jurors dissenting from liability. Since there was no evidence that the jurors in question were prejudiced in their votes on damages by their finding of no liability, disqualification would be improper. In the absence of evidence to the contrary, the court assumed that the jurors had respected their oath

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[33]N.J. STAT. ANN. § 2A:80-2 (1952).

[34]333 U.S. 740 (1948).

[35]258 A.2d at 380. Andres v. United States, 333 U.S. 740 (1948), was cited as authority for this proposition. *Andres* involved a first degree murder conviction in which the jury was unable to agree unanimously as to the addition to the verdict of the words "without capital punishment." In the absence of such qualification, the death sentence is mandatory. The Court ruled that unanimity, either for or against the addition of the phrase, was necessary, and that the verdict was incomplete and invalid without a unanimous finding on both guilt and punishment. The case was remanded for a new trial.

to render a true verdict according to the evidence. The Wisconsin rule assumes the possibility that a juror who is convinced that the defendant was not negligent will not and perhaps cannot completely ignore his convictions and honestly assess the damages to be awarded to the plaintiff. By accepting this possibility, the Wisconsin rule presupposes that votes cast for damages but against liability may represent less than a fair evaluation of the evidence. Because the Wisconsin rule views the verdict as a totality, the question is not simply whether the defendant is liable, but rather to what extent he is liable. Under this reasoning, liability by itself is empty and becomes meaningful only when coupled with a determination of the monetary extent of the liability. The *Ward* rule posits a rebuttable presumption that the jurors acted fairly, whereas the Wisconsin rule asserts the possibility of unfairness in each case.

Ward assumes that the Wisconsin rule would disqualify those jurors dissenting on liability from participating in the determination of damages. However, the cases following the Wisconsin rule have consistently allowed dissenters to participate in the deliberation of other essential issues.[36] It is reasoned that if these jurors were not allowed to participate, the litigants would be denied their right to a jury trial.[37] As the nonunanimous vedict statutes refer to the common law jury of twelve,[38] they do not permit deliberation by ten or eleven. The five-sixths non-unanimous provision means five-sixths of the jury of twelve, but the provision does not excuse the necessity of deliberation by twelve jurors.[39] "Even though [a fraction of the jury] can decide a civil case, parties are entitled to have that decision, whether for them or against them, based on the honest deliberations of twelve qualified men."[40]

The Wisconsin rule allows the dissenters to continue participating in the deliberations. However, it must be recognized that these jurors are effectively disenfranchised on all other issues, as their votes are not allowed to be a prerequisite to satisfying the fractional minimum.[41]

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[36]Carlin v. Prickett, 81 Cal. App. 2d 688, 184 P.2d 945 (Dist. Ct. App. 1947); Fraundorf v. Schmidt, 216 Wis. 158, 256 N.W. 699 (1934); Guth v. Fisher, 213 Wis. 323, 251 N.W. 223 (1933); *see* Sprinkle v. Lemley, 243 Ore. 521, 414 P.2d 797 (1966).

[37]*See* cases cited note 38 *infra.*

[38]*See* Minnequa Cooperage Co. v. Hendricks, 130 Ark. 264, 197 S.W. 280 (1917); *cf.* Johnson v. Holzemer, 263 Minn. 227, 116 N.W.2d 673 (1962).

[39]Johnson v. Holzemer, 263 Minn. 227, 116 N.W.2d 673 (1962); Lee v. Baltimore Hotel Co., 345 Mo. 458, 136 S.W.2d 695 (1939); Measeck v. Noble, 9 App. Div. 2d 19, 189 N.Y.S.2d 748 (1959).

[40]Lee v. Baltimore Hotel Co., 345 Mo. 458, 136 S.W.2d 695, 698 (1939).

[41]*See* cases cited note 14 *supra.*

They are powerless to cast an effective vote, and they cannot themselves hang the jury. Their only alternative is to practice verbal persuasion on their fellow jurors. They may try to convince other jurors that the damages proposed are too high, and perhaps succeed in getting the same ten to make a smaller award. If they convince only one or two others, they may at least succeed in hanging the jury. Under the Wisconsin rule, it is not mandatory that juries reach verdicts that will validly support judgment. They are permitted to disagree by individually making inconsistent findings, and thereby return a verdict that will not support judgment.[42] The Wisconsin rule therefore assumes that to disqualify the dissenters would be to deny this right to disagree. However, if the theory behind the rule is to prevent the activity of dissenters, this rule would seem to be less than totally effective. It removes the ability of the dissenter to return a verdict, but leaves him with the possibility of influencing other jurors in the verdict returned.

Rather than disenfranchise any member of the jury, the New Jersey court elected to allow full participation by all jurors. The difference appears to lie in the interpretation of the juror's proper role in jury deliberations. The court might have believed that the two jurors dissenting from liability were willing to accept the reasoning of the other ten when it became clear that they were heavily outvoted. If this were the case and the dissenters were honestly willing to accept the liabiltiy of the defendant, they would need only to change their vote on liability and then their vote as to damages would be effective under the Wisconsin rule for a valid verdict. It can be argued that by failing to change their vote, the dissenters do not fully accept the finding of the other ten, and that even while voting on damages they believe the defendant is not liable. Following this reasoning, the verdict "is reached only by the surrender of conscientious convictions upon one material issue by some jurors . . . ."[43]

But perhaps the dissenters proceeded in the deliberations without making this surrender. It might be argued that after ten jurors determine liability, the other two can accept that determination as a hypothesis and proceed to determine the extent to which the plaintiff has been damaged. In this situation, the dissenter could still maintain his belief that the defendant was not negligent, relying on the

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[42]Fraundorf v. Schmidt, 216 Wis. 158, 256 N.W. 699 (1934); Guth v. Fisher, 213 Wis. 323, 251 N.W. 223 (1933).

[43]James Turner & Sons v. Great N. Ry., 67 N.D. 347, 272 N.W. 489, 502 (1937). At common law, if such a surrender was made in return for a similar surrender by other jurors on another issue, the verdict was invalid as a compromise. *Id.*

determination of the other ten only as a vehicle by which to reach the question of damages. Accepting liability as a hypothesis also negates any question of whether the dissenter was prejudiced in his deliberation of damages.

There exists the further possibility that a juror could believe that the plaintiff had been damaged to a definable extent without believing the defendant to be liable for that damage. As the evidence determining liability might well be totally different from that defining the extent of the plaintiff's injury, the juror could proceed to make independent determinations on the two issues. In this situation, the concept of juror consistency would appear to be irrelevant, as the finding on one issue would not, and perhaps should not, relate to the other in any way.

The *Ward* rule would readily encompass both of these possibilities, but they are not countenanced by the Wisconsin rule. The Wisconsin rule could only urge that, as to the first, the verdict cannot be based on hypothetical assumptions, for it must determine the issues and it therefore resolves, not hypothesizes, that the defendant is liable. As to the second possibility, the Wisconsin rule might only rely on its concept of verdict totality, and argue that in the total scheme of the verdict all essential issues are necessarily related.

A problem arises under the Wisconsin rule in the ability of the courts to enforce their requirements. If a special verdict, or a general verdict with interrogatories, is returned by the jury, the determination of juror consistency as defined by the rule is relatively easy. These variants of the verdict are in fact primarily directed at illuminating the mental processes followed by the jury in making its determinations.[44] The general verdict, however, does not reflect these mental processes but is "a compound made by the jury which is incapable of being broken into its constituent parts."[45] If an inconsistency occurs in the voting, it might well be immue from detection since the "constituents of the compound cannot be ascertained."[46] Therefore, to poll the jury on a general verdict as to separate issues would destroy the character of the verdict itself. In a case where a special verdict was prohibited, such a poll would seem to be error.[47]

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[44]F. JAMES, JR., CIVIL PROCEDURE 296-97 (1965); Sunderland, *Verdicts, General and Special,* 29 YALE L.J. 253 (1920); *See* L. GREEN, JUDGE AND JURY, 353, 354 (1930).

[45]Sunderland, *Verdicts, General and Special,* 29 YALE L.J. 253, 258 (1920).

[46]*Id.*

[47]To question the jury as to their findings on specific issues embodied in the general verdict would seem to render that general verdict a special verdict. If the special verdict is prohibited, such action would appear to be erroneous. *See* Sunderland, *Verdicts, General and Special,* 29 YALE L.J. 253, 261 (1920).

It would appear that the only possible means by which Wisconsin rule jurisdictions could ascertain inconsistencies, while protecting the indivisible nature of the general verdict, would be to instruct the jury as to the totality of the verdict. If a poll were necessary, the judge might then instruct the jury that, because of the totality doctrine, disagreement with any issue of the verdict constitutes disagreement with the whole. More than two negative responses from the jury on the poll would then require a mistrial, as it would inevitably indicate an inconsistency as defined by the rule. No inquiry would be needed to ascertain the source of the inconsistency; it would be sufficient merely to determine its existence.

Although *Ward* is not specific as to much of the policy determining its result, it may have reasoned that the change from the common law requirement of unanimity impliedly recognizes that juries do not engage in finding "truth", but rather formulate opinions representing factual probabilities which the legislature felt sufficient to sustain a verdict. Therefore, five-sixths of the jury would be a sufficient indication of probability on any issue, and would satisfy the legislative purpose. It can be argued that, in dispensing with the common law unanimity requirement, the legislature meant to excuse all unanimity, and therefore unanimity of the fractional minimum should not be required.

Ward seems to be based essentially on the policy reasons which are used to justify non-unanimous verdicts.[48] The first of these is "to avert unjust verdicts resulting from one or two recalcitrant or dishonest jurors holding out . . . ."[49] The *Ward* rule seems to dismiss the possibility of such jurors as at most inconsequential,[50] assuming rather that the jurors are basically fair, or perhaps that fairness, in the sense of consistency, is not a relevant concept. The Wisconsin rule, on the other hand, considers that dishonest and recalcitrant jurors might, on the damages issue, vote unfairly as to how much the defendant whom they find faultless will be required to pay.

The court also recognizes the policy considerations of preventing economic loss to the public, the parties, the attorneys, and the witnesses. The *Ward* rule would clearly reduce the incidence of mistrials to a significantly greater extent than would the Wisconsin rule, which

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[48]Note 7 *supra.*

[49]258 A.2d at 381.

[50]*Id.* The court reasons that there is no basis for assuming a juror would violate his oath to render a true verdict according to the evidence presented to him. It argues, rather, that a juror who is outvoted on one issue will probably go along with the finding of the other ten or eleven jurors.

would necessitate a trial in this very action. If the dominant policy to be served is a reduction of mistrials, surely the *Ward* rule is the more functional, as it would also alleviate court congestion and unfairness from undue delay. The Wisconsin rule puts dominant emphasis on consistency in jury findings, under the assumption that this concept is relevant to the verdict and the determination made by jurors. The two rules are designed to serve essentially different policies.

The foundation of the Wisconsin rule is its particular concept of verdict totality. Where this view of totality is not recognized, consistency of jury findings has no relevance. However, as the verdict is the final resolution of the conflict, it must encompass all the issues, and represent findings on each. Perhaps these issues can be segregated for individual determination, but no issue exists in a vacuum, and the determination of each is meaningful to the conflict and its resolution only as it relates to the others. The Wisconsin rule does not insure consistency in every case (in some instances an inconsistency might pass undetected), but it does affirm the principle of consistency as a viable concept. Although jurors may hypothesize in their deliberations, a litigant should be entitled to a verdict based on the jurors' convictions.

Ward places the individual juror in the curious position of sustaining damages against a defendant he does not recognize as a wrongdoer. Despite the fact that the Wisconsin rule suffers from problems of enforcement, by retaining the necessity of unanimity within the fractional group of jurors required for a valid non-unanimous verdict, it perceives the verdict to be a final and complete resolution of the conflict, and insures that resolution will be consistent and essentially fair.

H. WILLIAM WALKER, JR.