

CASE UPDATES



Decades of strategic case development and trial experience.

SUBSTITUTE JUROR MUST ENGAGE IN FULL DELIBERATION PROCESS OR VERDICT IS INVALID

3.7.22

The New York State Supreme Court's failure to give proper jury instructions regarding the substitution of an alternate juror as well as its failure to require that deliberations resume from the beginning after the alternate juror joined the jury, resulted in an invalid verdict which deprived the defendants of their constitutional and statutory rights.

BACKGROUND FACTS

Plaintiff was a passenger in a vehicle when it was involved in a collision with a New York City Transit Authority bus. She sustained injuries in the crash. During the trial, the jury found that the defendants were 100% at fault. The controversy emerged during the damages phase of the trial. The jury was asked to determine whether the plaintiff's injuries met the no-fault serious injury threshold and, if the threshold was met, the jury was to provide an amount as to award the plaintiff for monetary damages.

As jury deliberations began on this issue it became clear that Juror Six would not be able to complete the deliberations in their entirety due to a prior disclosed school commitment. Plaintiff's counsel asserted that under New York Civil Practice Law and Rules (CPLR) Section 4106, the court was permitted to substitute a juror even after deliberations had commenced. The court allowed the substitution of an alternate juror and initially was going to advise the jurors that they would have to begin their deliberations from the beginning. Plaintiff's counsel disagreed with this instruction and said that starting deliberations all over was not required under the law. In the end, the court allowed Juror Six to be replaced by an alternate juror and did not require the jurors to begin their deliberations from the beginning.

Shortly after the Court's decision to not require the jurors to begin their deliberations from the beginning, the jurors sent word to the court that they had reached a verdict. The court read the verdict into the record and revealed how many jurors had voted yes or no on each question presented to them. After the

PROFESSIONALS

Margaret "Maggy" Mazlin

James P. Tyrie

CASE UPDATES

defense requested polling of the jurors, it was discovered that the alternate juror, who took the place of Juror Six, had not voted on several of the questions because the alternate juror was not present when those questions were discussed by the other jurors. Defense counsel objected to the verdict based upon the fact that the alternate juror was not present during a portion of the deliberations, however, the court found the objection unavailing and stated that the fact that they had the verdict sheets was sufficient to understand how the jurors voted and that only one dissenting juror would not change the outcome of the case.

DOES SUBSTITUTING A JUROR AFTER DELIBERATIONS HAVE COMMENCED DENY A PARTY THEIR CONSTITUTIONAL AND STATUTORY RIGHTS?

CLPR Section 4104 requires that juries consist of at least six people. Article 1, §2 of the New York State Constitution and CPLR Section 4113(a) also provide that a verdict will not be valid unless it is agreed upon by at least five of the six jurors. “Where the parties have not agreed to a trial by fewer than six jurors, a valid verdict requires that all six jurors participate in the underlying deliberations.” *Sharow v. Dick Corp.*, 86 N.Y. 2d at 59-60.

In essence, both parties are entitled to jurors who deliberate fully on all issues. Part of the deliberation process necessarily involves the weighing of various issues and listening to other jurors’ points of view. Under New York law, a verdict cannot be perfected until it has been announced and recorded in open court. If one party seeks a poll this also must be conducted and recorded. Failure to honor a party’s request for a poll will always be considered error.

The court here did not err in allowing the alternate juror to substitute for Juror Six but failed to follow the law in its instructions regarding the method of deliberation once the substitution was made. The court should have instructed the jurors to begin deliberations from the beginning when the alternate juror was seated so that all jurors had the opportunity to review the evidence and discuss and deliberate the facts of the case together.

IF ALL JURORS DO NOT HAVE THE OPPORTUNITY TO DELIBERATE ON EVERY ISSUE, THE VERDICT IS INVALID

In order to preserve the constitutional and statutory rights of the parties, certain conditions must be present relative to the jury and throughout deliberations. First, a jury must consist of six people unless the parties have agreed otherwise. Parties also have the right to poll each juror to determine how they cast their vote on each count in the complaint. In the case that is the subject of this article, the defendants asserted that the deliberations were tainted because the substitute juror had not voted on all of the counts. This was the basis upon which the defendants argued that the verdict was defective.

The court found, “[e]ven assuming that the defendants’ protests were insufficient to preserve all arguments raised on appeal, given the fundamental errors committed by the Supreme Court, we could reach defendant’s contentions in the interest of justice.” The court went on to note that the verdict sheets could not be used in place of polling the jurors.

The jury poll is used to allow the jurors to confirm their votes and also to give them a last opportunity to express a different view than was reported in the verdict. The court found that in this case, the purpose of the juror polling was essentially thwarted because juror six did not participate in the deliberations or voting for several counts and the juror who did participate in those counts was not present or part of the jury for consideration of several other counts. A group of the same, requisite six jurors did not deliberate or vote on all the counts which the court found to be error.

CASE UPDATES

THE AMENDMENT TO CPLR SECTION 4106

In 2013, CPLR Section 4106 was amended so as to allow a regular juror to be replaced with an alternate juror after deliberations began. This is only permitted if the regular juror is for some reason unable to complete their duties as a juror. The court should conduct “whatever inquiry is necessary” to determine whether the juror requesting to leave should be discharged and replaced by an alternate. Failure to conduct this inquiry can result in fatal, reversible error.

In enacting this amendment the legislature was trying to reduce the number of mistrials by providing another way to complete deliberations when one or more of the original jurors is unable to complete deliberations. It allows for alternate jurors to join the jury after deliberations have begun but the jury must receive the following instructions when this situation arises:

- When a juror has been discharged and replaced with an alternate juror.
- The parties are entitled to a verdict only after full participation of the six jurors, who will ultimately return the verdict, and
- In order to assure the parties of that right, the jury must begin their deliberations on each issue from the beginning and must set aside and disregard all prior deliberations.
- If the court has provided the jurors with a verdict sheet, the court should substitute it with a brand new verdict sheet to guarantee that prior deliberations do not taint the new deliberation process.

The Supreme Court’s failure to give the jury these instructions in the current case resulted in an invalid verdict because it included the votes of a discharged juror on some counts and did not include the replacement juror’s votes on other counts. Given that there was a dissenting juror on several of the counts, this would mean that there were only four votes in favor of the plaintiff. A verdict cannot be reached without at least five of the six jurors voting the same way. See, CPLR Section 4113. This leaves the court with no alternative but to conclude that a true verdict was never reached in this case.

The Supreme Court’s failure to follow these rules and give the jury the proper instruction about starting deliberations from the beginning for the benefit of the substitute juror resulted in a tainted and invalid verdict that may not stand. The judgment was reversed and remitted to the Supreme Court, Kings County for a new trial on the damages claims.

KEY TAKEAWAYS

- Jury must consist of at least six jurors, unless both side agree to five.
- If any juror cannot complete their duties, a substitute juror may be used but the entire jury must start the deliberations from the beginning.
- Past discussions and thoughts must be set aside and new discussions had with the viewpoint of the substituted juror included.
- The substitute juror must vote on all counts and fully participate in the entire process.
- The court is required to give the jury the instructions laid out by statute if a substitute juror is used after deliberations have begun.
- Both parties have a right to poll the jurors and ascertain what their vote was on each count