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DEFENSE VERDICT VACATED WHERE TRIAL COURT REFUSED TO PERMIT A POLL OF THE JURY

The Court of Appeals holds that the right of a party to poll the jury following a verdict is sacrosanct. As a result, a defense verdict is over-turned because the trial Court refused the plaintiff's request to poll the jury (*Duffy v Vogel*, 12 NY3d 169 [2009]).

Talk about snatching victory from the jaws of defeat. The verdict sheet clearly exonerated two (2) physicians in a malpractice case. However, since liability and damages were tried together, the verdict sheet called for answers to damage questions notwithstanding that the "NO" responses to the liability questions made a damage finding irrelevant. The obviously confused jury awarded \$1.5 million in damages (the trial Court apparently failed to instruct the jury that they were not to reach the damage portions of the verdict sheet if there was no liability).

The Court of Appeals determined that even though it was unlikely that the jury would have repudiated their verdict if polled, the opportunity was never afforded. Thus, plaintiff was deprived of a fundamental right. This error is deemed never to be harmless. The verdict was not deemed "final or perfected" until it has been recorded, with recording depending upon whether a duly requested poll was conducted.

Obviously, the Court of Appeals takes the approach that even through a poll very rarely, if ever, results in jury repudiation, there is "no harm in asking."

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