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THE PRO AND CON OF INTERJECTING PLAINTIFF INSURANCE COMPANIES IN JURY TRIAL CASES: AN ISOLATED JURY PROJECT CASE STUDY

DALE W. BROEDER*

What follows is an abbreviated analysis of only one of a series of twenty-three consecutively observed jury trials tried in a single federal district court in the Midwest in the late 1950's. Originally, the data which follow were intended to serve as a "jumping off place" for a discussion of all facets of the twenty-three trials in question. This proved impractical. However, since the case in question possessed more "insurance aspects" than any other case studied, and since its "insurance aspects" are fully supported by additional Jury Project data, it is felt that even a brief look at only this case would be profitable.

Of course, this article was generated by what is now familiarly known as the University of Chicago Jury Project.[1] The author's own contribution to the Project was slight. It consisted mostly of

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1. For other Jury Project data, see Kalven, Report on the Jury Project of the University of Chicago Law School (Conference on Legal Research, Univ. of Mich. Law School 1955); Kalven, *A Report on the Jury Project of the University of Chicago Law School,* 24 Ins. L.J. 364 (1957). See also Meltzer, *A Projected Study of the Jury as a Working Institution,* 287 Annals 97 (1953).

For this author's other published Jury Project work, see Broeder, *The Impact of Vicinage Requirement: An Empirical Look,* 45 Neb. L. Rev. 99 (1966); Broeder, *Plaintiff's Family Status as Affecting Juror Behavior: Some Tentative Insights,* 14 J. Pub. L. 131 (1965); Broeder, *Voir Dire Examination: An Empirical Study,* 38 So. Cal. L. Rev. 503 (1965); Broeder, *The Negro in Court,* 1965 Duke L.J. 19; Broeder, *Previous Jury Trial Service Affecting Juror Behavior,* 506 Ins. L.J. 138 (1965) (reprinted by Matthew Bender in 1965 *Personal Injury Journal*); Broeder, *University of Chicago Jury Project,* 38 Neb. L. Rev. 744 (1959); Broeder, *The Jury Project,* 26 S.D.B.J. 133 (1957); and Broeder, *Functions of the Jury: Facts or Fictions?,* 21 U. Chi. L. Rev. 386 (1954). See also Broeder, *Jury,* 13 Encyclopedia Britannica 205 (1963 ed.).

For other Jury Project publications, see Zeisel, Kalven & Buchholz, Delay in the Courts (1959); Kalven, *A General Analysis of and Introduction to the Problem of Court Congestion and Delay,* ABA Sect. Ins. N. & C. L. 322 (1963); Kalven, Zeisel & Buchholz, *Delay in the Court,* 15 Record of N.Y.C.B.A. 104 (1960); Kalven, Zeisel & Buchholz, *Delay in the Court,* 8 U. Chi. L. Rev. 23 (1959); Kalven, *The Jury, the Law and the Personal Injury Damage Award,* 19 Ohio St. L.J. 158 (1958), reprinted in 7 U. Chi. L. Rev. 6 (1958); Zeisel & Callahan, *Split Trials and Timesaving: A Statistical Analysis,* 76 Harv. L. Rev. 1606 (1963); Zeisel, *Splitting Liability and Damage Issue Saves 20 Per Cent of the Court's Time,* ABA Sect. Ins. N. & C. L. 328 (1963); Zeisel, Kalven & Buchholz, *Is the Trial Bar a Cause of Delay?,* 43 J. Am. Jud. Soc'y 17 (1959).

the observation of the aforementioned twenty-three jury trials and interviewing 225 jurors who served in them. The jurors were interviewed at their homes or places of business as soon as possible after trial. The average juror interview lasted two and one-half hours. Necessarily, the actual names of the parties, lawyers, jurors and witnesses, as well as the location of the accident with which this particular article is concerned, have been changed.[2]

The case in question was tried twice, once in 1953, and again in 1956. The second trial was necessitated because the United States Court of Appeals held that the first jury had inconsistently answered certain defense interrogatories.

However, we are here concerned only with the second *Phillips* trial. This trial produced a general verdict on behalf of the plaintiffs in the form and amounts indicated below:

Joseph E. Phillips, Eastern Insurance Company, Transit Insurance Company, Triangle Insurance Company, Richmond Insurance Company,
PLAINTIFFS
vs.
Robert Rogers, William Fox, East-West Express Company,
DEFENDANTS

We, the jury, find in favor of the plaintiffs and award damages as follows:

1. To the Transit Insurance Company (for damages to the tractor)	$4,473.31
2. To the Triangle Insurance Company (for damages to the trailer)	$ 449.64
3. To the Eastern Insurance Company (for workmen's compensation payment)	$1,940.88
4. To the Richmond Insurance Company (for damages to the cargo)	$1,421.50
TOTAL	$8,285.33
5. To Joseph E. Phillips	
a. For excess of damages to tractor over insurance payment by the Transit Insurance Company	$1,450.
b. For excess of damages to trailer over insurance payment by the Triangle Insurance Company	$ 350.
c. For excess of damage relating to personal injuries over workmen's compensation insurance payments by the Eastern Insurance Company	$18,000.
TOTAL:	$19,800.

2. It should be noted, however, that all names and places referred to in the author's various Jury Project articles, while fictitious, are nevertheless held constant.

For the reader's convenience, a table indicating the background characteristics of the *Phillips II* jurors will be found in the appendix.[3] It should also be stressed that there are many facets of the *Phillips II* case and that the primary concern here is with its "insurance aspects." Additional facets of the case are dealt with in the author's other Jury Project publications.

I
THE ACCIDENT

The *Phillips* case was an action to recover for personal injuries to the plaintiff, Joseph E. Phillips, and for damage to his tractor and trailer and the cargo contained therein, resulting from a collision with a tractor-trailer unit operated by defendant William Fox and owned by defendant East-West Express Company. Defendant Robert Rogers was the operator of a 1948 Studebaker owned by his wife, which was also involved in the accident. The plaintiff insurance companies are involved because of payments made on account of injuries to Phillips and damage to his vehicle and cargo. These insurance companies were brought into the case as involuntary party-plaintiffs. Their interests in the controversy (which are reflected in the verdict reproduced above) were made clear to the jury at the outset of the trial.

The accident occurred on the night of February 28, 1951, one and one-half miles west of Middletown, Ames, on U.S. Highway 97. The highway, which runs in an east-west direction, was of concrete and at the time consisted of three lanes, each ten feet wide. The surface was straight and level at the accident scene and for a material distance in each direction. A dirt shoulder extended to the north from three to seven feet and then sloped gradually to a ditch. The south shoulder, which was covered with gravel, was thirty inches wide and level.

At the time of the accident, the shoulders were crested with snow. The highway was icy in spots and a freezing rain had begun to fall a short time before. Defendant Rogers, while driving west, had stopped to assist a woman whose car was in the ditch north of the highway with its headlights shining up out of the ditch toward the east or southeast. In doing so, he drove onto the north shoulder. Because of the soft condition of the shoulder, and to avoid sliding into the ditch, he accordingly left a portion of his automobile re-

3. Appendix, page 286 *infra*.

maining on the pavement. Approximately one foot of the outside lane was obstructed by Rogers' car. Rogers testified that when he stopped all of his lights were on and that although he did not know how far to the rear the taillights were visible, he thought one should have been able to see them for "at least a city block or about 400 feet maybe."

While the Rogers car was parked partly on the highway, defendant Fox, driving a tractor and trailer, approached the scene from the east travelling in the outside lane. Plaintiff Phillips, driving in the southernmost lane, approached from the left. The center lane remained clear. Both vehicles were traveling at a moderate rate of speed. Fox saw the headlights of Phillips' tractor and also those of the automobile in the ditch north of the highway. The lights from the automobile in the ditch were "very bright." Fox testified that although he was not blinded by these lights, he could not see the automobile behind the lights. He stated that he did not see the Rogers' car until he was within ten or fifteen feet of where it was parked. He then swerved to the left in an effort to avoid a collision, but the tractor struck the Rogers automobile on the left side. Fox's vehicle then went out of control, glanced diagonally across the highway toward the south shoulder and into the path of the tractor-trailer driven by Phillips.

As Phillips approached from the west he observed the headlights of Fox's tractor. He likewise noticed the lights of the car in the ditch on the north and saw Rogers' car parked along side. He reduced speed, intending to stop. It appeared that there had been an accident and he wished to see whether there was anything he could do. Phillips was nearly upon the scene when Fox's tractor struck the parked automobile and shot across the road directly in his path. Phillips had no opportunity to avoid a collision and his tractor struck the right side of the Fox tractor-trailer. The collision resulted in the injuries and damage complained of.

The plaintiffs alleged that defendant Fox was negligent in failing to maintain a proper lookout, in failing to have his tractor-trailer under control and in failing to avoid the collision with Rogers' car. The plaintiffs further alleged that defendant Rogers was negligent in parking his vehicle on a portion of the roadway and in failing to have his lights lighted. The defendants denied any negligence and asserted the plaintiff's contributory negligence. While the jury was instructed on contributory negligence in the first trial, the court

refused to do so in the second, ruling that plaintiff Phillips was free from contributory negligence as a matter of law.

II
THE INDIVIDUAL PLAINTIFF: JOSEPH E. PHILLIPS

A. The Jurors' Reactions in General

While many of the *Phillips II* jurors did not have very strong feelings about Joe one way or the other, enough was said to suggest the existence of a relationship between such feelings as they did have and the way they felt about liability and damage questions.

Thus, the defendant-prone juror trio of Stillman, Ring and Butz was wholly unsympathetic. Stillman described Joe as "an ignorant workman trying to take the insurance company for a fast buck." Joe reminded Stillman of some of his own employee-troublemakers, "always complaining, always exaggerating their on-the-job injuries, always trying to get something they're not justly entitled to."

Mrs. Ring "didn't like . . . Joe at all . . . He took the witness stand and perjured himself [about] . . . the extent of his injuries. He seemed like a dumb truck driver." Other than remarking that Joe exaggerated the extent of his injuries, however, Mrs. Ring would not talk about him during her personal interview, although she clearly aligned herself with her defendant-prone colleagues by squinting her face as a sign of general disapproval and lack of sympathy.

But the jurors favoring damages in excess of $15,000 expressed strikingly different sentiments. For them, Joe was a "good guy," "honest, sincere, conscientious and hardworking," "a fellow who does all he can to provide a decent living for his family." Juror Scott's (over $25,000) remarks were typical: "I was greatly impressed by him. I liked his demeanor. I thought he was very straightforward and honest . . . I also think that he is probably a good workman and that he does all he can to provide a good living for his family."

Mrs. Martin ($18,000-$20,000), Mr. Garland ($20,000-$25,000), and Mrs. Adler (over $20,000), all of whom felt "very sorry for him," went further, glimpsing reflections of what they saw as Joe's above-average intelligence and sensitivity. He was certainly "not just an ordinary truck driver." Indeed, to hear Mrs.

Martin and Mrs. Adler talk, one would have thought him a genius. Mr. Helmut (over $25,000) and Mrs. Landon ($18,000) were also very impressed. None of the jurors whose "personal awards" were in excess of $15,000 thought that any of Joe's testimony was biased.

Mrs. Bonham ($5000) took a stand midway between the pro-defendant and pro-plaintiff groups, seeing Joe as an "ordinary truck driver . . . not very intelligent . . . and inclined to exaggerate . . . his injuries. [Yet] . . . he seemed to be reasonably honest . . . [and] more or less of a family man. But he was sloppy. He never dressed up during the trial. I didn't feel sorry for him at all."

Foreman Barker ($7500) echoed these sentiments. Mr. Smith, ($10,000), however, took a view very close to Mrs. Adler, describing Joe as a "higher-type individual," "much better than an ordinary truck driver."

B. Phillips' Family Status

If Joe had been a bachelor, there seems no doubt that the case would have gone differently. But Joe was "a family man," a "hard worker," a "good provider." And his family, this wife and young boy, had to be taken care of. "And what would happen to them if Mr. Phillips lost his job or had to have an operation?" Helmut, Scott, Adler and Garland made the argument during the deliberations and it went unchallenged, and with reason. For it was obvious that family life, family solidarity and security ranked high in the values of all *Phillips II* jurors.

Unfortunately, the data available on the influence of Joe's family on the jurors' behavior, while considerable, is not complete. However, it is known that six jurors—Stillman, Ring, Butz, Bonham, Barker and Martin—who were more or less "defendant-prone," never adverted to the subject in the juryroom.

Of the remaining six jurors, all of whom favored a large (over $18,000) damage award, juror Scott was probably the most strongly influenced by Joe's family and by what he felt was the necessity of awarding enough to take care of them. Scott's unusually strong feelings were closely bound up with sympathy for the economic plight of his nephew's family resulting from the nephew's illness. But the other five jurors were also influenced to award large damages out of sympathy for the situation in which the family might find itself if Joe could no longer work. Their uniform query regarding "what the family would do if he lost his job or had to submit to an

operation" leaves very little doubt about this, especially as the matter was not specifically investigated.

C. Phillips' Ability To Withstand Loss

Joe was not a rich man but had considerable insurance protection. He received weekly unemployment compensation insurance payments of $30 immediately after the accident, and there were $250-deductible collision insurance policies on both his tractor and trailer, as well as the workmen's compensation insurance which netted him a lump sum payment of nearly $2000. Did such insurance protection help or hurt him?

III
THE JUROR'S REACTIONS TO THE PLAINTIFF'S WORKMEN'S COMPENSATION SETTLEMENT

Did the jurors' knowledge of Joe's insurance protection, described in Section II-C *supra*, help or hurt him? The answer is clear regarding the unemployment compensation payments. None of the jurors considered them for the purpose of making a deduction from the loss of wages Joe was entitled to recover. They were completely ignored for this purpose, not only in the deliberations proper, but in the jurors' private thinking as well. Mrs. Adler was the only juror who thought of the payments in any connection whatever. Mrs. Adler remembered that Joe had not received any unemployment compensation payments while out of work immediately following the accident (as, of course, he did) and felt that the absence of such payments for such period meant that he was "dogging it" at that time and should not therefore receive any reimbursement for his current wage losses. However, Mrs. Adler failed to advance this argument during the deliberations. All things considered, it seems apparent that the failure of plaintiffs' counsel to avail themselves of the collateral benefits rule[4] to keep out evidence that Joe received unemployment compensation benefits was almost wholly immaterial.

It is almost certain, too, that Joe's receipt of a workmen's compensation insurance settlement of nearly $2000 failed to affect him adversely. Indeed, it seems to have had an opposite effect. For while all of the jurors were aware that Joe had been paid $2000—and to

4. See generally Gregory & Kalven, Cases and Materials on Torts 476-83 (1959).

that extent had already been compensated for his injuries—all but five jurors stated that they did not seriously consider the payment from this standpoint and that its effect in reducing damages was remote. So far as these seven jurors were concerned, the major effect of the $2000 payment was to convince them that Joe was seriously injured. This was because they felt workmen's compensation notoriously inadequate and that an award as large as $2000 could only mean that a "Board of Experts" had determined that Joe was seriously injured. Nor was any juror's reasoning in this fashion deterred, for they knew nothing of the proceedings before "the Board," knew nothing of the basis such "Board" used in arriving at the $2000 figure, and plaintiff's counsel failed to haul the "experts" into court. In this connection, it is interesting that the question of whether the above argument should be advanced to the jury had been discussed at length among Phillips' counsel, having been earnestly pressed by a young associate of plaintiff's lawyer Goldberg. Plaintiff's lawyer Roth, however, finally decided against it, desiring to avoid an almost certain interruption from defense counsel. And, as things turned out, his choice proved correct; the jurors thought of the argument by themselves.

Of course, not all of the jurors agreed with the argument. Stillman and Ring thought "it was just plain silly." Nor did Barker, Bonham and Smith approve. These jurors could only see that Joe had already received $2000, and that this was a good reason for holding down damages. Such sentiments, however, did not prevail for the jury as a whole.

IV

THE JUROR'S KNOWLEDGE OF THE INTERESTS OF THE PLAINTIFF INSURANCE COMPANIES AND ITS EFFECT ON THE INDIVIDUAL PLAINTIFF'S DAMAGE AWARD

Aside from the damage-increasing effect of the compensation insurance settlement described in Section III *supra*, there is reason to believe that the jurors' knowledge of the interests of *all* the plaintiff insurance companies increased damages. This, it should be noted, was the theory of Phillips' counsel. For while Joe's lawyers vigorously opposed the defendants' motion to join the plaintiff insurance companies as involuntary party-plaintiffs, they soon experienced a change of heart and made no attempt to prevent defendants from

referring to the insurance companies during the trial, even though their chances for success were excellent. They soon became convinced that Joe's personal award would be larger if the interests of the insurance companies were fully disclosed.

The wisdom of such strategy can best be determined by considering what the situation would have been if the insurance companies' interests had not been disclosed. There would be the ever-present danger that defense counsel might obscure the plaintiff's case by oblique references to "the real parties involved in the case," from which the jury would infer that Joe would not receive any benefits from a verdict in his behalf. But, assuming that the jury actually believed that Joe would personally benefit from every cent awarded, what was "only adequate compensation" in his lawyers' eyes might seem to the jury too much money for a single individual. Especially would this be true if the jury was not required to make separate awards for each of the various elements of damages.

Counsel for the plaintiffs reasoned that selling the jury on large damages was just like selling anything else—if the "costs" could be separated it would seem that less money was changing hands. Itemization of the various elements of damages might help, but it would be more helpful if the amounts paid by the insurance companies were divorced from Joe's personal award altogether. And bringing the insurance payments into the open would have the added advantage of ensuring that *any* award would minimally cover the insurance company payments plus Joe's out-of-pocket property damages not covered by insurance. Finally, the very fact that the insurance payments were so large could itself be expected to have the effect of increasing the amount of Joe's take-home award, for after being forced to pay the insurance companies, the jury would consider themselves pikers unless they gave Joe a substantial sum.

During the interviews, each juror was asked his opinion "on the strategy of the defendants' lawyers in bringing the insurance companies into the case. Did it have any effect on the amount of damages the jury awarded to Mr. Phillips?" If a juror said anything at all, he was encouraged to discuss the matter fully. If not, the subject was dropped.

The results are interesting. Five jurors—Adler, Butz, Smith, Helmut and Scott—said they had no opinion, though two, Adler and Butz, expressed surprise in learning that the defendants' lawyers were responsible for the companies' presence! They were under the impression that Joe's counsel were responsible, but when pressed on

this point they could not (or at least would not) explain what had given them this impression. However, four of the remaining jurors—Ring, Garland, Barker, and Bonham—were certain that the presence of the insurance companies caused the damages to be larger than they would have been if the companies' interests had not appeared and it had looked as if Phillips would receive all damages awarded. This is true even though Ring and Bonham, like Adler and Butz, thought that Joe's rather than defendants' counsel were responsible for the insurance companies' presence.

Nevertheless, these four jurors all subscribed to the notion privately expressed by Joe's counsel that $30,000 would probably have seemed "like too much money," though none of the jurors ventured to state what the verdict might have been in such a case, or even what he (as an individual) would have done. In discussing the matter, each of these four jurors made some reference to the rapidity with which the stipulated damages had been assessed. "Those damages were automatic and when we reached the personal injury damages we ignored the fact that we had already given a lot of money."

Stillman and Landon flatly disagreed, stating that some of the jurors were undoubtedly prejudiced against Joe's claims because of the presence of the insurance companies. While Landon denied that her thinking had been thus affected, Stillman freely admitted that his had been.

Mrs. Martin's response is more interesting, however. It shows the risk inherent in disclosing the insurance companies' interests (a matter discussed below) and it sheds light on the validity of the plaintiff's theory that the jurors would feel like pikers unless they awarded Phillips substantial damages after paying the insurance companies. Certainly Mrs. Martin so viewed the situation. The only other juror making a similar comment was Mrs. Bonham: "I think we awarded more damages because of the presence of the insurance companies than we otherwise would . . . We really began with our verdict just as if that initial $7,000 or $8,000, whatever it was, had never been involved. And when you have already awarded that much to insurance companies, you have to give the individual something, too."

Aside from this, the point that the presence of the insurance companies probably increased rather than reduced damages seems justified. Thus all jurors, regardless of their views about the effect of the insurance companies' presence in raising Joe's damages, clearly regarded Joe as "The Plaintiff," as if he were the only one.

The question was whether Joe should recover and how much, not whether the insurance companies should.

But what might have happened? There was a risk attached to disclosing the insurance company interests. As viewed by plaintiff's counsel, the risk was that the jurors might be so distressed with awarding substantial damages to the companies before they could award anything to Phillips (assuming they would want to) that they might find for defendants. This was why the plaintiff's counsel originally opposed defendants' motion to join the companies as involuntary party-plaintiffs. And, essentially, there is no doubt that their view was correct. Such risk, as it turned out, was present at all times. And it almost materialized.

But there is much more to the story than simple juror prejudice against plaintiff insurance companies. It is also a story about the nature and size of the insurance companies' damages, the damage value of Joe's injuries, misunderstanding of the term "negligence," and Fox's family and his reputation as a truck driver, to mention only the more significant factors. It is chiefly in terms of these apparently disconnected considerations that the net risk of informing the jurors of the insurance companies' interests must be determined.

The extent to which the jurors regarded Joe as *the* plaintiff and the insurance companies as but hangers-on has already been noted. However, certain jurors, among them three of the four persons originally siding with defendants, were also acutely conscious of the fact that a verdict for Joe would automatically entail a large damage award to the insurance company plaintiffs. Mrs. Bonham's above-quoted comment is illustrative but her view was even more clearly articulated by Mrs. Ring: "[T]he insurance payments and property damages which had to be awarded if I favored plaintiffs were just too large in relation to the hairline nature of the case. Those damages were automatic, even before you turned to his personal injuries." Mrs. Butz and Stillman expressed a similar view.

Two points are involved. The first is that the jurors in general, and probably Martin, Ring, Butz and Stillman in particular, had no sympathy because the insurance companies were required to pay large damages, and Phillips was the *only plaintiff* whose damages were worth considering. The second point is that at least Martin, Ring and Butz were extremely concerned with the "automatic" nature of the insurance company damages and thought them "extremely large." By "automatic" was meant that they were stipulated property damages. If liability was conceded there would be

no room for compromise later on. The phrase "exeremely large," however, was employed in different senses by these jurors. Mrs. Martin used the term in its absolute sense; $8,000 was simply a lot of money. But Butz and Ring meant large not so much as to amount (though they also were worried about this), but large in relation to the amount of damages they felt Joe was entitled to by reason of his injuries.

And this is where the money-damage value of Joe's injuries was significant, for, with the exception of Mrs. Martin, the jurors originally siding with the defendants all thought that very little, if anything, was seriously wrong with Joe, and that the only parties who would benefit from a liability-finding were the insurance companies, about which, as previously noted, these jurors cared nothing.

Another factor shaping the risk of informing the jurors of the plaintiff insurance company interests was sympathy for Fox. His reputation as a truck driver must be considered. A young man with a wife and children to support cannot have a black mark on his driving record. This consideration seems to have weighed heavily with Butz and Ring; for Stillman and Martin it was not as important.

The final major consideration involved was the nature of Fox's "negligence." He was not charged with anything reckless, like speeding or driving through a red light, but with having made a simple mistake in judgement, by failing to notice a parked car which, *as a matter of fact,* he had no reason to anticipate. And so far as Ring, Martin and Butz were concerned, negligence was a question of degree. You could be "slightly negligent" and still not be held liable. These three jurors all referred to the "slight degree" to which Fox was negligent and to the "hairline nature of the case." A related notion, which was clearly expressed only by Mrs. Martin, but which probably influenced Mrs. Ring also, was that a given degree of negligence should occasion only limited damage consequences, and that Fox had not been "negligent enough" to warrant the imposition of the damages required by reason of the insurance company payments: "After all, Fox was only slightly negligent and those insurance companies had paid over a lot of money. But if the payments had not been so large and there had not been Mr. Phillips to worry about . . . I would have voted differently. If only a total of three or four thousand dollars had been involved, there would have been no question of liability so far as I was concerned."

Juror Stillman, however, emphasized that Fox had not been negligent and Stillman clearly understood the legal meaning of

"negligence." Of the various other factors mentioned, Stillman admitted being influenced only by a "slight concern" over Fox's reputation as a truck driver, by the fact that Phillips had "already been paid off," and by what he felt to be the minor nature of Phillips' personal injuries. However, Stillman cared nothing about the interests of Phillips' insurance companies.

In summary, then, the four jurors originally siding with Fox viewed the question of "liability" as an equation in which their feeling that Phillips' insurance companies were unimportant was only one significant factor on the defendant's side. This feeling, however, was complimented by other considerations also thought to militate against recovery. First, the insurance company damages were stipulated and a liability finding necessarily entailed an award for such amount. And damages were large both absolutely and in relation to the amount of damages three jurors felt Philips should recover. So far as Stillman, Butz and Ring were concerned, nothing was seriously wrong with Joe. Accordingly, his net-damage award (after lawyer's fees) would not be large and plaintiff insurance companies would be the ones primarily benefitting. And the companies, of course, were unimportant. It was their business to absorb losses just as they reaped profits from their policyholders' premiums.

Mrs. Martin's thinking is an interesting variation on that of the other three jurors. Not that she cared more about the insurance companies having to pay; indeed, she could not have cared less. But she was extremely concerned with the total damages the defendant (or its insurance company) would have to pay if liability were determined because of her feeling that a certain degree of negligence should result in a limited amount of damage-consequences. While she was willing to award plenty to Phillips, she did not want to award large damages to the insurance companies because this would make the total award unjustifiably high. Yet she had to do so in order to give Joe anything. It was a dilemma and she originally resolved it by voting "no liability." Of course, additional considerations likewise affected her decision.

When the question of liability is viewed as an equation in which pro-defendant factors form one side and the pro-plaintiff factors the other, and the factors chosen for inclusion are those above mentioned, a verdict for defendants should result. This is not unreasonable, either, except in terms of the legal straitjacket we use to contain juror thinking in traditional channels. On the contrary, the "plus-minus" approach seems eminently well constructed and thought

out. So much so, in fact, that it is probably a reliable juror-behavior rule by which to assess the risk of informing jurors of plaintiff-insurance company interests in similar cases. If one of the pro-defendant factors is weakened or eliminated, or if a pro-plaintiff factor is strengthened, the risk involved is reduced.

Thus, if the insurance company damages are unliquidated instead of liquidated; or if the insurance company damages tend to be smaller (rather than larger) in relation to what a jury is likely to feel the policyholder-plaintiff is entitled to for his non-insurance covered losses; or if the defendant or the defendant's employee (like Fox) tends to be a bad man instead of a good one; or if the act of negligence relied upon is more, rather than less, culpable, the chances for a defendant's verdict are reduced. It is obvious, of course, that the one constant in the equation is juror feeling against recovery by insurance company subrogees hanging on to their policyholders' coattails.

Suppose, on the other hand, that the defendant's side of the equation is strengthened, that the policyholder is unable to show himself entitled to large damages (in relation to insurance company damages)—his medical case is weaker than in the second *Phillips* trial—the chances for a defendant's verdict are then enhanced. This, it is felt, is the basic explanation for the difference in verdicts in the two *Phillips* trials. In the first trial, Joe's attorneys did not demolish the defendant's chief medical witness and show him to be a cross between a fool and a liar. Nor was it shown in the first trial that Joe might have to undergo a costly and painful spinal fusion operation. Nor had he yet developed his traumatic neurosis condition, or been forced to go to the hospital on account of his nerves. Thus, even though the medical testimony in the second trial was (by the writer's standards) none too strong, it was even more flimsy in the first. In all other important respects, however, the two trials were identical.

V
THE INSURANCE COMPANIES AS INVOLUNTARY PLAINTIFFS

As the "peculiar characteristics" of the insurance company plaintiffs affected Phillips' damage claim, they have already been considered in detail. However, as the point of view of the previous discussion was the effect of the jurors' knowledge of Joe's insurance protection on *Joe's claim*, a few remarks are in order concerning the

effect of these "peculiar characteristics" on the companies' own claims.

First, as things actually turned out, the insurance companies were in no worse position for having been brought into the open. Of course, they ran the risk, as Joe did, of receiving nothing and, as one-third of the jury originally took such a stand, three of them retaining it for some time, the risk was substantial. So far as is known, however, the manner in which the insurance company plaintiffs were dragged into the case—by defendants' motion to join them as involuntary parties—did not adversely affect their interests, or Joe's either, for that matter, in the only way that it conceivably might have. For according to Garland, Ring, Scott and Stillman, who were the only jurors questioned on the subject, no juror even considered that the companies had originally refused to sue because they thought the chances for success poor and that the defendants were not liable.

Informing the jury of the plaintiff insurance company interests in a suit by Phillips, of course, was not nearly as risky as direct actions by such companies, at least if the theory of juror behavior above outlined is accepted. At the same time, such disclosure was certainly not as attractive to the companies as remaining in the background to collect out of Joe's damage award.

The insurance company making the workmen's compensation payment stands on somewhat different footing in this regard, but it seems probable that any award also would have been sufficient to cover its loss. Of course, the insurance company carrying the policy on the cargo could not have kept itself from view unless Phillips' employer had seen fit to sue. In a suit between Joe and the defendants it would obviously be impossible to give the impression that the cargo really belonged to Joe.

VI
THE DEFENDANTS

A. Robert Rogers

Robert Rogers—"good Samaritan," "Korean War veteran," "hard-working," "conscientious and forthright,"—really never came close to being held liable. Thus, little would be gained by making a detailed consideration of the jurors' reactions to his personality, background, ability to pay and similar factors. Needless to say, Bob was a popular defendant and jurors regarded him highly.

The only point worth noting is that as late as the outset of the *Phillips* deliberations, at least five jurors were more or less inclined to hold this "good Samaritan" liable. Adler, Bonham, and Landon were less inclined, but Garland and Helmut seemed positively eager. This is interesting because seldom does an individual motorist defendant possess a "better case," not only from the viewpoint of his own individual equities—Bob's chief one, of course, was trying to assist a thankless damsel in distress—but from a legal view.

The attitudes of these aforementioned five jurors were in significant part attributable to pre-trial legal misconceptions with reference to parking on the highway. But this is simply the beginning. For, by their own admissions, such jurors were also considerably influenced by a feeling that Rogers was insured. Indeed, the latter consideration was more significant than the former. For these jurors all agreed that they would "never have considered" the possibility of finding Rogers negligent if they thought he was uninsured. Interestingly enough, however, the possibility that Rogers' insurance coverage might not have reached $25,000 never occurred to them.

B. William Fox

The jurors were even more favorably impressed by Fox than with Rogers. Fox was "honest," "forthright, conscientious and hard-working." He "wasn't the kind to run around," "didn't seem like the truck driver type at all." He "was neat and well-dressed throughout the trial." These were typical comments. No one had a bad word to say. All was praise—and sympathy.

Sympathy because the jurors—all of them save Garland (who felt that Fox wanted Joe to recover)— thought that Fox's reputation as a truck driver was at stake. The impact of this consideration upon the thinking of the four jurors originally voting against liability has already been noted. But it was a consideration affecting the thinking of all jurors save Garland. Of course, it was not Fox's driving record in a vacuum that was involved but the effect that a "black mark" would have upon his earning power. What would his family do if he lost his job? After all, he had a wife and three children to support. Similar thinking seems to have taken place in the minds of the jurors in the first trial.

However, no juror was of the opinion that Fox might have to pay damages out of his own pocket. Indeed, this possibility never occurred to any juror. Even more striking is the fact, that, with the exception of Scott and Garland, no juror paused to consider why Fox

was joined as a defendant. And Garland and Scott "merely wondered about it." They did not conclude anything and certainly could not have "wondered" very much. Fox's defendant status, if it was thought of at all, was simply regarded as "normal" negligence-case procedure.

Thus there was really no "ability-to-pay" problem so far as Fox was concerned. The jurors simply assumed that Fox's employer was insured and that his insurance company. would pay whatever damages were awarded.

However, in order to determine the effect which would have been created had the jurors felt that Fox might possibly be required to pay part of the judgement, and to shed some light on the subject of how defense paying ability is likely to affect the size of plaintiff's damages, a questionnaire was distributed to the jurors by mail shortly after the interviews.

The answers obtained from the eleven jurors responding are presented below in the second column of a two-column table, the first column showing "what verdict (the juror) would have rendered if it was entirely up to (him)." The jurors' "personal verdicts," of course, were secured during the interviews and given on the assumption that Fox would not have to pay any part of the judgment.

NAME	*If entirely up to juror on assumption Fox would not have to pay anything*	*If entirely up to juror on assumption Fox would have to pay some part of judgment*
Mrs. Ring	voted not liable	voted not liable
Mrs. Butz	voted not liable	voted not liable
Mr. Stillman	voted not liable	voted not liable
Mrs. Bonham	$5,000	$3,000-5,000
Mrs. Landon	$18,000	voted not liable
Mrs. Adler	over $20,000	$10,000-15,000
Mr. Garland	$20,000-25,000	voted not liable
Mr. Scott	over $25,000	$10,000-15,000
Mr. Helmut	over $25,000	voted not liable
Mrs. Martin	$18,000-20,000	$10,000-15,000
Mr. Smith	$10,000	$5,000-10,000
Mr. Barker	$7,500	no reply

Obviously the juror's assumption that Fox would not have to pay had a significant effect upon their thinking. Three of the jurors—Garland, Landon and Helmut, who "personally" favored award-

ing "over $25,000," "$18,000," and "over $25,000" respectively—would have completely reversed themselves if they had thought Fox would have to pay. The Helmut and Garland reversals are particularly significant, for these two men were extremely popular with their fellow jurors and, along with Scott, were principally responsible for Phillips' $19,800 award. If Garland and Helmut had taken the position that Fox was not liable, perhaps a defendants' verdict would have resulted.

While the other juors originally siding with Phillips would not have completely reversed themselves if they thought Fox would have to pay, all would have favored less damages than they actually did.

APPENDI

List of Selected Characteristics c

Name	*Age*	*Sex*	*Race*	*Religion*	*Attend Church Regularly*	*Birth Place*	*Mar. Stat.*	*No. of Children*
Mrs. Ring	45-54	F	White	Cong.	No	Ohio	M	1
Mrs. Butz	25-34	F	White	Prot.	No	Ind.	M	0
Mr. Stillman	35-44	M	White	——	—	Ohio	M	4
Mrs. Bonham	35-44	F	White	Presby.	Yes	Chgo.	M	2
Mrs. Landon	45-54	F	White	Roman Cath.	Yes	Ohio	M	2
Mrs. Adler	45-54	F	White	Prot.	Yes	Ohio	M	1
Mr. Garland	45-54	M	White	Episc.	Yes	Chgo.	M	1
Mr. Scott	35-44	M	White	Prot.	Yes	Ohio	M	1
Mr. Helmut	45-54	M	White	Prot.	No	Ohio	M	1
Mrs. Martin	55-64	F	White	Prot.	Yes	Ohio	M	2
Mr. Smith	55-64	M	White	Prot.	Yes	Ohio	M	1
Mr. Barker	25-34	M	White	?	?	?	M	1

C. *East-West Express Co., Inc. (Fox's Employer)*

Nothing is known about the jurors' feelings with reference to Fox's employer except that everyone assumed that it was insured and that the damages would be paid by an insurance company. Unfortunately, no attempt was made to determine what, if any, difference it would have made had the jurors thought that the company in question was self-insured.

A formalized conclusion will be forgone. This article's purpose will be well served if the reader has gained only a few additional insights concerning the jury.

Jurors in the Second Phillips Trial:

No. of Family	*Education*	*Present Occupation*	*Past Occupation*	*Spouse's Occupation*	*Individual Income*	*Family Income*	*Political Affiliation*
3	4 yrs. Coll.	H.W.	H.W.	Physician	10,000 & over	10,000 & over	Democrat
2	½ yr. Coll.	H.W.	Typist	Elem. Teacher	4,000 4,999	4,000 4,999	Either
7	4 yrs. H.S.	Mgr. Wreck-ing Co.	?	H.W.	4,000 4,999	?	Republican
4	2 yrs. H.S.	H.W.	Gen. Off.	Banker	10,000 & over	?	Republican
3	8 yrs. G.S.	H.W.	Sec.	Serv. Mgr. Roy. Typ.	?	4,000 4,999	Republican
5	4 yrs. H.S.	H.W.	H.W.	Farmer	?	——	Republican
3	?	Br. Mgr. Finance Co.	Asst. Mgr.	Sec.	6,000 6,999	7,000 9,000	Democrat
3	4 yrs. H.S.	Auto Dlr.	Auto & Svc. Mgr.	Cashier	10,000 & over	10,000 & over	Republican
3	8 yrs. G.S.	Owner Mfg. Plant	Mechanic	H.W.	7,000 9,999	——	Republican
3	8 yrs. G.S.	Sec.	H.W. Sec.	Supr. in Aircraft	Less than 2,000	2,000 3,999	——
2	4 yrs. H.S.	Farmer	Mech.	Bookpr.	2,000 3,999	4,000 4,999	Republican
3	4 yrs. Coll.	Ins. Slsmn.	Prof. Football Player	H.W.	?	?	?