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# The University of Chicago Jury Project

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## I. INTRODUCTION

The purpose here is briefly to set forth some of the tentative conclusions and findings of the University of Chicago jury project. In the main the work reported out is the property of others; the writer's own reflects but a small segment of the total. Some errors in reporting the data therefore are bound to have crept in. For them of course the writer accepts full responsibility.

The jury project was initially financed out of a $400,000 grant by the Ford Foundation to the University of Chicago Law School. Not all of this money was spent on the jury project; there were other projects, too, chief among them a study of arbitration. The broad purpose of the grant was to further research in the law and behaviorial sciences. Social science techniques, in other words, were to be used in studying legal phenomena. But in 1956 the money gave out. Research of this kind is very expensive and so back the law school went to the foundation which suspiciously wanted to see how we had been doing. They sent some very distinguished men to find out—judges, lawyers, social scientists and, it is to be hoped not significantly, at least one psychiatrist. As a result of the reports made by these men, one of the projects, a study of public attitudes towards our federal tax laws, was knocked out. The jury and arbitration projects, however, were given additional money, enough to carry them through to September, 1959, which is the target date for final publication.

Confining ourselves to the jury project, now, how is it organized and composed? From the beginning we have had about an equal number of lawyers—several with years of actual jury trial experience—and social scientists. Final responsibility, however, rests with a lawyer-academician, Professor Harry Kalven, Jr. Working very closely and on a policy level with Professor Kalven have been two distinguished social scientists—Professor

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Hans Zeisel, former president of the American Statistical Society, and Professor Fred Strodtbeck, an expert on the behavior of small groups. Even with such capable men at the helm, however, there were many difficulties. The lawyers could not always understand the social scientists and the opposite was also true. These difficulties unfortunately have never wholly been overcome but much progress has been made and the experience of just trying has been rich and rewarding.

Doubtless much of the credit for this is due to the institution under study. It is a fascinating and important institution and one deeply rooted in our traditions. Each year in the United States there are more than 100,000 jury trials and more than one million persons are called upon to report for jury duty. Furthermore, the jury is and long has been a controversial institution, particularly in relation to civil cases. There is a vast literature debating the merits of the jury and it is pertinent to add in this connection that for every charge leveled against the jury in this debate there is likewise to be found a vigorous defense. Of course, much of the debate has necessarily been conducted in a vacuum; we know precious little about the jury.

## II. CONVENTIONAL RESEARCH

Perhaps it is best to begin with the place of conventional legal research in the project. We first thought of writing a sort of Wigmore on the jury. This however proved too big a job and one which did not urgently need doing anyway. Much of the writing in the field is excellent. A substantial number of original research memoranda, however, have been prepared and all published field studies will be supported by studies of the directly relevant law. A comprehensive bibliography of the existing literature on the jury has been compiled and a limited number of studies in comparative law have been undertaken, including one on the lay judge under German law, one of the Scottish jury and one on the awarding of lawyer fees. A study has also been done on the notable decline of the civil jury in England. This decline, it should be noted, long antedates the recent Parliamentary legislation drastically limiting the number of civil cases in which a jury trial is available in England. It is a striking fact that the country which gave us our jury now has less than 200 jury trials per year.

The debate about the merits of trial by jury has been carefully reviewed and has served in part as a source of hypotheses for study. This undertaking has likewise provided us with a unit

scheduled for inclusion in our report on the public's image of the jury.

One aspect of the law will receive special emphasis. There is good reason to believe that although we inherited the jury from England it has developed in many respects into a distinctive American institution. The changes in the various rules defining the respective spheres of judge and jury, for example, can be traced against other developments in American politics over the past century and a half. Such a study has been undertaken and will form an integral part of the final project publication.

Midway between our own field research and the more or less orthodox research just described is the work we have done in collecting and refining the jury trial statistics gathered by others. There is, for example, a large body of statistics on the extent to which defendants charged with felony waive jury trials in favor of bench trials. Historically, of course, waiver was never permitted in such cases even with the consent of the government and the trial judge and this is still the rule in a few jurisdictions. In many states, however, a defendant is entitled to a bench trial in a felony case either absolutely upon request or with the consent of the government and/or the trial judge. The data from such states are interesting and exhibit a marked disparity in the extent of jury trial waiver from one state to another. Thus in New York practically no one accused of felony ever waives a jury while in Chicago almost two-thirds of the felony trials are bench trials. And in Maryland the percentage of jury trial waiver is even higher. Unfortunately the reasons for such wide regional disparities are still very obscure.

We also have figures on jury trial waiver in civil cases and have conducted a series of intensive interviews with lawyers as to why they waived the jury in particular cases. Such data contribute importantly to any statement of the lawyers' image of the jury. More broadly, of course, our interest in waiver stems from a desire to make a meaningful statement about the extent to which the jury is currently used.

We have likewise gathered data on the percentage of hung juries in civil cases in various states. Overall the picture is encouraging. Hung juries are rare, occurring in only four and one-half percent of the cases. The interesting finding however is that the percentage of hung juries is only slightly lower in jurisdictions where the verdict does not have to be unanimous. Three percent of the juries hang in non-unanimity jurisdictions and only six percent in jurisdictions requiring unanimity. Abolition

of the unanimity requirement, it would appear, is not going to have much effect in reducing the number of hung juries which, statistically speaking, are not much of a problem anyway.

A final example of our use of available statistics is in connection with our study of congested court dockets. Much of this congestion has in many areas been blamed solely on the jury. This has particularly been true in New York City where various people with little affection for the jury have compiled statistics purporting to show that civil jury trials take from two and one half to three times as long as bench trials. Hence, these people say, the civil jury should be done away with. We have taken those statistics and refined them, grouping the various cases according to the nature and complexity of the issues involved. The result is a quite different picture. We find that juries, at least in New York City, are on the average given more difficult cases to try than are judges and that for comparable cases jury trials require only slightly more time than bench trials. Preliminary analysis of similar statistics from Chicago indicate that this is likewise the situation there.

## III. VARIED FIELD STUDIES

So much then for our analysis and refinement of the statistics of others. Let us now turn to certain of our own field research. One thing we wanted to know was the importance of deliberations in criminal cases. How often is it, for example, that a minority of jurors persuade the majority to change their votes? In order to find out we interviewed more than 1500 jurors who served on 213 different criminal cases in Chicago and Brooklyn. They were asked for certain information concerning their backgrounds, how they voted on the first ballot, the results of the first ballot, when the first ballot was taken and the final verdict. The results were as follows. In virtually all of the cases a ballot was taken immediately. In thirty percent of the cases the first ballot was unanimous and that ended it. In seventy percent of the total cases, however, there was some division of opinion on the first ballot. And the striking fact about such cases is that the majority on the first ballot almost always won. The majority won in approximately ninety percent of such cases. Furthermore, it did not make any difference who comprised the minority—wealthy persons, poor persons, men or women. Being in the minority was the determinative factor. The broad point suggested, of course, is that most criminal cases are decided during the trial and not during the deliberations.

There is, of course, ten percent of the cases left over. In six percent of the cases the jury hanged and in four percent of the cases the initial minority prevailed. In almost all of the cases where the minority prevailed, however, it was a large minority—three or more jurors. To return now to the cases where the jury hanged. Hung juries, it is often assumed, are generally due to a supposed single stubborn juror. The data, on the contrary, suggest that the hung jury results from the closeness of the case itself and perhaps also from the moral support that a man feels when his minority view has at least several other supporters. Thus of the twenty hung juries in the sample, constituting, it will be recalled, but six percent of the total cases studied, not a single jury hung with a minority of less than three.

A second aspect of this survey has been to give information relevant to one of the central questions about the jury: "How much do jurors differ from one another as decision makers?" A couple of illustrations will have to suffice. Persons with German and British backgrounds were more likely to favor the government whereas Negroes and persons of Slavic and Italian descent were more likely to vote for acquittal. Probably this comes as no surprise. Certainly it was in accord with the expectations of a large number of lawyers we interviewed on the subject.

One final illustration. The interview also asked the three questions used in New York to qualify "blue ribbon" jurors, jurors used in serious and sensational criminal cases: 1) Do you have scruples against the death penalty?; 2) Would you convict on circumstantial evidence?; and 3) Would you draw a negative inference if the defendant failed to take the stand? One by-product was the discovery of how few jurors understood what circumstantial evidence was. But the main point was to compare the first ballot votes of the jurors who "qualified" under these three questions and thus could have become blue ribbon jurors with the first ballot votes of the jurors who would not have qualified. The finding was that the blue ribbon jurors were considerably more prone to convict. Such a finding, of course, by no means decides the difficult policy questions raised by the blue ribbon jury.

Another study is an effort to get more systematic knowledge about the regional variations in jury awards throughout the United States. It is, of course, well known that there are high and low award areas but the problem has been to get an accurate measurement of the variations. The study uses the estimates of liability insurance adjusters as circumstantial evidence of the level of jury awards in their immediate areas. Six model cases have been

submitted to the adjusters of three large insurance companies doing a national business. These adjusters, approximately 600 in all, were asked to indicate the most likely verdict for each of the six cases in a particular local court which we specify. The results were as follows. Taking the average award as 100, ten percent must be aded to the award if the court is located either on the Eastern or Western seaboard and an additional ten percent if the court is situated in a large city. If, on the other hand, the court is situated in the South or the Midwest, ten percent must be subtracted from this average award of 100 and another ten percent subtracted if the court is located in a rural as contrasted with an urban community. To put it in another way: The award in a court situated in an Eastern metropolis will be from forty to fifty percent higher than if the court is situated in a rural community in either the Midwest or the South.

A more significant block of research is designed to cast light on the question: "What difference would it make if we had no jury trials and all of our trials were bench trials?" Five hundred trial judges throughout the nation cooperated in the research by filling out a questionnaire for each jury trial over which they presided. There were many questions on the questionnaire but the one of greatest interest here requested them to say how they would have decided the case had there been no jury, had the trial instead been a bench trial. It should be noted that the judges were asked to do this prior to the rendition of the verdict. In all, we received back some 3,000 questionnaires, 1500 criminal cases questionnaires and an equal number of personal injury case questionnaires.

The criminal cases are less involved and better dealt with first. In eighty-one percent of the cases the judge and jury agreed. In only nineteen percent of the cases was there a disagreement. Now, what was its nature? Did the judges want to convict when the jury acquitted or was it the other way around? The answer is that the judges were considerably more prone to convict. If all the defendants in our 1500 cases had been tried by a judge, the number of acquittals in such cases would have been cut almost in half, from approximately 500 to approximately 250.

The nature of the cases where the judge and jury disagreed is perhaps also of interest. The greatest percentage of disagreement came in the statutory rape cases. Here the judge and jury disagreed forty percent of the time. And when they did disagree, the jury acquitted in ninety percent of the cases where the judge would have convicted. On the other hand, the judges and juries saw eye to eye in the narcotic cases. In not one of such cases did

the judge and jury disagree. One further point. In the first offense drunk-drive cases juries frequently acquitted where the judge would have convicted. Juries, in other words, were willing to give such defendants another chance whereas the judges would have felt obliged to uphold the law. Interestingly, several of the judges commented on their questionnaires in such cases that they were pleased the jury had acquitted notwithstanding that they themselves would have found it necessary to convict. The picture is different when one turns to the second or third offense drunk-drive cases. Here the judge and jury practically never disagreed. The suggestion, of course, is this: Juries, while frequently willing to give a drunk-drive defendant one break, think that the second and certainly the third offense deserves punishment.

The personal injury case questionnaires found the judge and jury agreeing on the question of liability in eighty-three percent of the cases. Disagreement occurred on this question then in only seventeen percent of the cases. In nine percent of the cases where there was disagreement the jury found for the plaintiff, the judge for the defendant. But in eight percent of the cases where the judge found for the plaintiff the jury found for the defendant. The message, of course, is that so far as the question of liability is concerned and looking at the data as a whole there was hardly any difference. The judge found for the plaintiff in fifty-seven percent of the cases and the jury in fifty-eight percent. This means that the jury found for the defendant in forty-two percent of the cases, an important point and one which goes far to dispel the popular idea that juries are forever holding the defendant liable and returning a reduced award.

When the cases are classified as to the type of defendant involved however and the question of damages is examined the result is a slightly different picture. If the defendant is an individual, the judge and jury practically never differ on the question of liability but the jury's award where the verdict is for plaintiff is approximately ten percent higher than that of the judge. If the defendant is a corporation there begins to be a difference even on the question of liability. The jury finds against corporations two percent more often than does the judge. And if the defendant is a city or state, the jury finds liability in eight percent more of the cases. The situation on the damage side is similar. Where the defendant is a corporation or a city or state and the verdict is for plaintiff, the jury awards approximately twenty-five percent more than does the judge. Railroad defendants are even more poorly situated. If the jury finds a railroad liable, the award is about thirty percent higher than that of the

judge. The central finding seems very clear: Juries find against wealthy defendants more often than do judges and adjust their awards according to the defendant's ability to pay. The more wealthy the defendant, the higher the verdict will prove to be. Judges, on the other hand, seem not to pay as much attention to the ability-to-pay factor.

The data were run for state and federal judges separately and show no significant change in the amount of agreement and disagreement. The percentage of agreement likewise remains almost constant whether or not written instructions are given the jury, whether or not the judge summarizes the evidence; and whether or not the judge comments on the weight of the evidence. These have been highly controversial issues in recent years but the data strongly suggest that at least in personal injury cases these procedural controls make the jury neither more nor less like the judge.

Another segment of the study is concerned with attitudes toward jury service. Briefly, the results show that of the jurors who actually sat on a case and suffered no economic hardship, some eighty percent would like to serve again. However, of the jurors suffering economic hardship and who did not get to serve, only forty-eight percent would like to serve again. These figures, then, generally indicate an affirmative response to jury service and point up the two well known burdens of such service: the waste of time of the person who is called but repeatedly challenged and the economic loss that jury duty involves for some persons.

There are additional data on this question. One source has been an intensive public opinion survey of attitudes toward the court and jury in a moderately-sized city. A sample of those who had had jury service in the last year and a sample of the general population were interviewed. The survey discloses that some six percent of the general population had had jury service at some time during their lives and that three percent had their only direct contact with the courts as a result of jury service. On the other hand, some fifty-five percent of the public had known someone who had been a juror. It would appear from this that jury service is no longer, if ever it was, a major source of direct citizen contact with the courts but that it is an important source of indirect contact.

The study also provides data on the impact of jury service. Among those who had never served, only thirty-six percent said they would like to serve, sixteen percent were undecided and some forty-eight percent said they would not like to serve. How-

ever, among those who had served within the last year ninety-four percent said they would like to serve again, three percent were willing to serve again as a duty and only three percent said they would dislike it. Our tentative conclusion from this is that though in many communities people notoriously seek to avoid jury service, once they serve they like it and want to serve again.

The respondents were also asked: "Which do you think is the better way to have a case decided, by a judge or by a jury?" Among the general public some seventy percent favored the jury, twenty-one percent were undecided, and only nine percent favored trial by judge alone. Among those who had had jury service within the past year seventy-seven percent favored jury trial while those favoring bench trial rose to fifteen percent.

The respondents showed a tendency to discriminate the type of case in which they preferred a jury. Thus when asked specifically, only ten percent of the sample of the general public preferred a judge in criminal cases as against twenty-eight percent in contract cases. And for those with recent jury service, five percent preferred a judge in criminal cases as against fifty-five percent in contract cases. These refinements, of course, suggest that the general question about preference for judge or jury trial may frequently be understood as a question about criminal trials and further that jury service tends to make one more enthusiastic about the jury in a criminal case and less enthusiastic about it in the contract case.

Finally, there is some evidence coming from our use of experimental juries which will be dicussed momentarily. The jurors who were given an experimental negligence case to decide were asked whether they would prefer judge or jury trials in a negligence case first if they were the plaintiff and then if they were the defendant. Those who would prefer trial by judge in both situations favored an average award in the experimental case of $14,000. Those who would prefer trial by jury in both situations favored an average award of $38,000. Liking the jury, then, makes for a plaintiff's juror, disliking it for defense juror.

Two other studies concern jury selection. Without pausing for details, it might be noted that the population of those who actually serve differs considerably from the population initially contacted for jury duty. There is a marked increase of women over men, a marked reduction in both those with much and those with little education, and some increase in the relative percentage of lower income groups as against middle income groups.

An intensive study has also been made of the voir dire examinations for twenty cases and lawyers have been interviewed concerning their detailed reasons for challenging particular jurors and for retaining others. An attempt was also made to determine the amount of time the lawyer spends indoctrinating jurors as compared with sifting out unfavorable jurors. Sixty percent of the lawyer's voir dire time, it was found, was spent in indoctrining jurors and only forty percent in asking questions designed to separate the favorable from the unfavorable jurors. A study has also been done on the extent to which lawyers conduct pre-voir dire investigations into the backgrounds of the veniremen. In some sections of the country this practice is widespread. Indeed, there is a commercial agency in Los Angeles which supplies its lawyer subscribers with detailed information on the backgrounds of veniremen.

## IV. EXPERIMENTAL JURIES

Let us now turn to the most important facet of the project, the development of the experimental jury. Tape recordings of mock trials based on actual trials have been prepared and with the consent of the court and of the jurors themselves—these are persons actually on jury duty at the time—have been played to the jurors. By means of this experimental technique we are able to repeat the same trial before several juries and by comparing the verdicts and the deliberations of groups which have heard different versions of the same trial to test the effects of a given change. In addition, and with the consent of the jurors, the experimental jury has made possible the full recording of the deliberations. Finally the set-up has enabled us to interview the jurors at various stages of the case. Thus they have been asked for their individual decisions at the end of the trial and just before the deliberations and again after the deliberations. Four moot cases have been developed thus far and have been played to over 100 juries.

Only a few illustrations will be attempted from the data and these are drawn from the first experimental case. The case involved an auto-accident in which plaintiff, a forty year old stenographer, was injured when the car in which she was riding as a passenger collided with a car driven by defendant.

The design permitted us to test the effect of several variables at the same time. In three treatments, defendant's liability was very clear; in three it was a little doubtful. These versions were then combined with three different treatments of defendant's liability insurance. In the first, defendant reveals he has

no insurance but there is no objection or further attention paid to the disclosure; in the second, the defendant reveals that he has insurance, defense counsel objects and the court directs the jury to disregard; in the third treatment, the defendant again discloses insurance but there is no objection and no further notice is taken. The tapes were then played to sets of juries operating under the unanimity rule and to sets of juries operating under the three-fourths majority rule. In all, the experiment was given to thirty juries.

Here briefly are some of the results. First, twenty-eight verdicts were for plaintiff, one jury hung on the damage issue and one jury found for the defendant. Second, the average award of all verdicts where liability was very clear was $41,000; the average award of all verdicts where liability was somewhat ambiguous was $34,000, $7,000 less. This, of course, supports the suspicion long entertained by the bar that the weaker the proof on liability the lower the verdict is apt to be. However, no significant difference in award level resulted between juries operating under the unanimity rule and juries operating under the three-fourths majority rule.

Then there are the results of the three insurance treatments. Where the defendant disclosed that he had no insurance the average award of all verdicts was $33,000. Where defendant disclosed that he had insurance but there was no objection the average award rose to $37,000. Where, however, the defendant said he had insurance and there was an objection and an instruction to disregard, the average award rose to $46,000, $13,000 more than when the defendant said he was not insured, and $9,000 more than when he said he was insured but where there was no objection or instruction to disregard. The conclusion appears to be two-fold: First, that juries tend to award less when they know that an individual defendant is not insured; and, second, that where they know defendant is insured and a fuss is made over it the verdict will be higher than when no such fuss is made. The objection and the instruction to disregard, in other words, sensitize the jurors to the fact that defendant is insured and thereby increase the award. However, the instruction to disregard at least served the purpose of keeping the jurors from talking about insurance during the deliberations.

As previously noted four experimental cases have been developed thus far. A second involves the defense of insanity in a prosecution for housebreaking and the facts of the case are substantially identical with those of *Durham v. United States,* 214 F.2d 862 (App. D.C. 1954), the now famous decision by the

Court of Appeals for the District of Columbia. *Durham* of course holds that the test for criminal insanity is not only whether defendant knows the difference between right and wrong or even whether he was irresistibly impelled to commit the act but simply whether his act resulted from a mental disease or defect. The basic purpose of the experiment was to test the difference in jury response to these varying legal tests of insanity. The central finding can be stated simply: Varying the instruction made almost no difference. In fact, the supposedly harsh "right and wrong" test produced a few more acquittals than the supposedly more liberal "mental disease" or "mental defect" test.

A third case involves question of manufacturer and retailer liability where a vaporizer allegedly causes a fire and severely burns a young child. The principal variable sought to be tested here is the effect of the special verdict procedure. In one set of runs the jury operates under the conventional general verdict procedure; in a second set the special verdict is employed and the jury is given sixteen interrogatories; while in the third the jury, again operating with a general verdict, is given no instruction at all other than the instruction to do justice and equity.

Finally, we have a case where the plaintiff is injured due to defendant's alleged negligence in leaving his car keys in the ignition. The car is stolen by a thief who negligently runs into plaintiff. The case was chosen chiefly in order to get a set of deliberations where the jury would be forced to concentrate primarily on what constitutes negligence. One tentative finding will have to do: The experimental jurors were on the whole prone to find the defendant liable. The jury verdicts in this regard form an interesting contrast to the numerous appellate court opinions holding either that defendant is not negligent as a matter of law or that his negligence, if any, is not proximately connected with the theft of the car and the resulting injury to plaintiff. The experimental jurors thought the connection was very direct. This particular experimental case has been played to two sets of jurors, one set operating under a comparative negligence instruction, the other under conventional contributory negligence instructions.

## V. INTENSIVE JURY INTERVIEWS

Finally there is the work for which the writer had the principal responsibility, the observation of a series of twenty jury trials and the intensive court-approved interviewing of the jurors who served in them. These interviews were conducted as soon as possible after the trial. The average interview lasted about

one and one-half hours and a considerable number lasted for three hours or more. In all, 225 different jurors were interviewed. There were thirteen civil cases, all of them personal injury actions, and seven criminal cases. The central problem with such an undertaking, of course, is that all of these cases are different; and, further, that twenty cases is not very many cases. Obviously one cannot produce findings from such data which are statistically significant. But while no conclusive answers can be provided by the technique it has at least given us some worthwhile insights.

Approximately fifty essays have been written on points common to several or all of the cases, the jurors' use of their out-of-court knowledge and experiences, for example, the effectiveness of the voir dire, the impact of the lawyers and of the judge, the extent to which jurors consider defendant's wealth or insurance protection, the effect of a criminal defendant's failure to take the stand and many others. Aside from this, one of the civil cases has been written up in full, trial and all, and an effort made to reconstruct the sequence of events occurring during the deliberations. The case chosen was a wrongful death action brought for the benefit of a young trucker's widow and two baby girls. Throughout, of course, all names have been changed as well as anything else which would readily identify a person or place.

Perhaps the intensive interview data is best illustrated by giving a brief account of one of the cross-case essays. The essay chosen concerns the effect of the sum plaintiff's counsel requests as damages which, in some places at least, is called the ad damnum. Does its size make a difference and, if so, why? The question was studied in eleven of the thirteen negligence cases in the series. Plaintiff prevailed in seven cases, defendant in four.

In brief, plaintiff's damage request did yeoman service as a kind of damage jumping-off place for the jurors. Thus damages were to some degree determined with reference to it in six of the seven cases where it was necessary for the jury to assess damages. The only exception was a case where the jurors sharply divided on liability and where plaintiff's counsel had apologized to the jury for requesting "as much as $50,000."

The ad damnum had its greatest impact as a determinant of damages in a case we will call the *Landis* case. Plaintiff sought $2,400 for the "loss of use" of his tractor while it was being repaired and $50,000 for personal injuries. Defense counsel did not argue damages. After agreeing on liability the jurors'

attention was first directed to the "loss of use" item the assessment of which was entirely given over to one juror, the owner of a large auto-truck agency and garage whose exposed expertise in the premises had been made the subject of a closing argument reference by plaintiff's counsel. This juror possessed expertise, all right, but there were certain difficulties and he therefore proposed that the jury cut the $2,400 figure in half and agree on a verdict for $1,200. The reason for this, he said, was because lawyers always ask for about twice what they really expect. There was instant agreement and the foreman promptly recorded $1,200 on the appropriate line of the verdict-form. The precedent thus established with regard to "loss of use" was later to prove of great significance.

But this is to anticipate. When the jurors turned to the question of personal injury damages, attention first focused upon a $37,500 figure which was generally but mistakenly regarded as the lowest aggregate sum plaintiff's counsel had requested for personal injuries. Actually, $37,500 was merely the suggested compensation for plaintiff's "future pain and suffering" and only constituted a part of counsel's overall damage request, which, as previously noted, was $50,000. For some reason, however, the jurors did not so understand him and the $37,500 figure was accordingly regarded as an outside limit upon recovery. And there was an immediate concensus that this was too much. Plaintiff was not that sick and lawyers always ask for much more than they expect.

Considerable discussion of the evidence followed and an oral ballot on damages which revealed marked differences of opinion. It was now almost 10:00 p.m., seven hours from the start of the deliberations. Everyone was exhausted. Solution came however with the resurrection of counsel's abused $37,500. A juror who favored about $25,000 referred again to the well-known practice of attorneys asking for twice what they expect and to the deliberation precedent already established by halving the amount counsel had requested for "loss of use" of the tractor. Why not, then, divide $37,500 by two and return that as the verdict? There was almost immediate agreement and the foreman announced that the deliberations had ended.

A slightly different twist on the jurors' use of the ad damnum in calculating damages is presented by the wrongful death action mentioned previously. Plaintiff asked for $168,000, counsel arguing that the widow and children would have received such sum during deceased's lifetime. Defense counsel hardly referred to the question of damages. Unfortunately the jurors were not

systematically questioned concerning their use of the $168,000 figure. In passing, however, two of them stated that the $168,000 request was a reliable index of the legitimate damage expectations of plaintiff and her cousel. This was on the theory that $168,000 really meant $75,000, as one of the jurors thought, or $100,000, as the other thought, and that a verdict for any small sum would be interpreted by everyone as a victory for defendant which would mar the reputation of plaintiff's counsel whom they very much admired. Accordingly, they strongly pressed for $75,000 and $100,000 awards during the deliberations. The theory's underpinning, of course, was the thought that lawyers always ask for considerably more than they expect, one of them said "twice what they expect."

In FELA cases, of course, the law requires a percentage calculation of plaintiff's contributory negligence in relation to the combined negligence of himself and defendant and a corresponding percentage reduction in plaintiff's damages. Thus if ten percent of the total causal negligence of the parties is found to be attributable to plaintiff and plaintiff's actual damages are found to be $10,000, the verdict would be for $9,000. The understanding of the jurors serving in the two FELA cases studied, however, was quite different. And plaintiff's ad damnum was in each case a material factor in leading them astray.

Plaintiff in the first case requested $50,000. Defendant did not argue specific amounts. In the deliberations, the jurors rapidly agreed on defendant's negligence, though there was some dispute on whether plaintiff was contributorily negligent.

There was however general agreement among the jurors that plaintiff's damages had to be reduced "somewhat" on account of his contributory negligence and that plaintiff's $50,000 ad damnum was legally the basis from which such amorphous deductions were to be made. The following reconstructed deliberations' comments seem to have been typical: "He isn't entitled to the full $50,000 because he was to some extent to blame and the law requires us to make a reduction from the $50,000." "I think each one of them had just half a case, (i.e., as to liability), and that we should just split it in two and give him $25,000." The Foreman, who seems to have made the latter remark, even read the Act aloud in order to buttress his position. The $50,000 figure was the focal point of the entire two-hour deliberation and there seems little doubt that the verdict of $25,000 which resulted was in no small degree its progency.

The other FELA case is similar. Plaintiff's counsel asked for $39,000 in his closing argument; the amount asked for in the

complaint, however, was $50,000, a fact which was reported in the local newspapers and known of and discussed by the jurors during the trial. Defense counsel did not argue specific amounts.

Of the eight jurors initially voting for recovery, six felt that plaintiff was contributorily negligent, and, in attempted compliance with the FELA's comparative negligence provision, accordingly and amorphously reduced damages from the $50,000 requested in plaintiff's complaint. This figure, as noted, came from the newspapers. Plaintiff's $39,000 closing argument request was never mentioned during the deliberations.

On the question of damages, therefore, the ad damnum was clearly of importance. But this was only as it turned out. Suppose defense counsel, instead of ignoring the question of damages or discussing it generally, had instead argued specific amounts to the jury. None of them did so. This points up a very serious limitation of the data, for if the ad damnum makes a difference, so should defendant's suggestion of a specific amount. Especially is this true in the light of what probably constitutes the basic explanation of the ad damnum's importance—the difficulties involved in assessing damages and the consequent need felt by many jurors for a concrete dollar basis from which to begin. If defendant fails to supply an alternative basis, such jurors must of necessity rely exclusively on plaintiff's.

Seemingly implicit in all this is the suggestion that the higher the ad damnum the higher the verdict. And, to a degree, this seems to have been the case. But common sense tells us that there are limits. Indeed, an ad damnum thought by the jurors to be excessive may under some circumstances even become an important factor in causing a verdict for the defendant.

Plaintiff's counsel in the *Landis* case at one point mentioned $75,000 as a reasonable award for his client's future pain and suffering though he later cut such figure in half. Defense counsel, it will be recalled, completely ignored the question of damages. All four of the jurors originally voting against liability indicated that they did so in part on account of the $75,000 figure. First of all was the notion that plaintiff and his lawyer were simply out to line their pockets without regard to the evidence and other important consideraions, such as defendant-employer's insurance costs and the truck-driving reputation of defendant's employee. In sum, the $75,000, regarded by the minority jurors as excessive, made them mad and thus less willing to find liability.

More important however was the impact of the request in exciting their fears that the other jurors would favor a verdict

for $75,000 in the event liability was agreed to. Rather than "risk" later having to assent to a verdict for $75,000, they voted against liability. It must be remembered that defense counsel had not argued damages. Furthermore, there appears to have been no pre-deliberation discussion of damages among the jurors. Consequently, plaintiff's damage figures—and for some reason only the $75,000 figure stuck in the minds of the minority—was, as stated by one juror, "all we had to go on until somebody said something." Ultimately the majority did say something, namely, that they did not favor $75,000 and this eventually brought about agreement on liability.

There are other facets to the data but what has been said will have to suffice as a sample both of the ad damnum essay and of what has been done with the data obtained through intensive interviewing of jurors. There is just one caveat: Most of the other essays and most of the project's findings show the jury in a far more favorable light.

## VI. CONCLUSION

A conclusion will be foregone except to note that, in addition to the studies mentioned, we are currently engaged in the brief interviewing of several hundred civil case jurors as to various aspects of their behavior—their first ballot votes on liability and damages, for example, and whether and to what extent they considered the defendant's ability to pay. We also plan to conduct a public opinion survey of judges, lawyers and law teachers concerning their respective images of the jury and to do a content analysis of the way the jury is spoken of in various of our leading newspapers and periodicals.