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JURY BIAS IN HUDSON AND BERGEN COUNTIES: A VIEW FROM THE BENCH

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Trial by jury is a constitutionally protected right in New Jersey,[1] and the jury's verdict is sanctified and shielded in various ways. Not only is the jury's verdict presumed to be valid and obedient to the court's charge,[2] but "all reasonable intendment will be indulged in its support."[3] Thus, every effort is made to reconcile seemingly inconsis-

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1 N.J. CONST. art. 1, ¶ 9 provides:

> The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons when the matter in dispute does not exceed fifty dollars. The Legislature may provide that in every civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

The right to trial by jury "is the right as it existed at common law *and* remained on July 2, 1776," when the first state constitution was adopted. Town of Montclair v. Stanoyevich, 6 N.J. 479, 485, 79 A.2d 288, 291 (1951).

2 Fitzmaurice v. Van Vlaanderen Mach. Co., 110 N.J. Super. 159, 167, 264 A.2d 740, 745 (App. Div. 1970), *aff'd*, 57 N.J. 477, 273 A.2d 561 (1971); Moore v. Public Serv. Coordinated Transp., 15 N.J. Super. 499, 510, 83 A.2d 725, 731 (App. Div. 1951). Other jurisdictions are in accord. Henninger v. Southern Pac. Co., 250 Cal. App. 2d 872, 59 Cal. Rptr. 76 (Dist. Ct. App. 1967); Stanley v. Squadrito, 107 Ga. App. 651, 131 S.E.2d 227 (1963); Hedge v. Midwest Contractors Equip. Co., 53 Ill. App. 2d 365, 202 N.E.2d 869 (1964); Abel v. Dodge, 261 Iowa 1, 152 N.W.2d 823 (1967); Staggers v. United States Fidelity & Guar. Co., 496 P.2d 1161 (Mont. 1972); Memphis Street Ry. v. Cooper, 203 Tenn. 425, 313 S.W.2d 444 (1958); Patranella v. Scott, 370 S.W.2d 922 (Tex. Ct. Civ. App. 1963).

3 Malinauskas v. Public Serv. Interstate Transp. Co., 6 N.J. 269, 277, 78 A.2d 268, 272 (1951); *accord*, Rossman v. Newbon, 112 N.J.L. 261, 170 A. 230 (Ct. Err. & App. 1934); Bree v. Jalbert, 87 N.J. Super. 452, 209 A.2d 836 (L. Div. 1965), *aff'd*, 91 N.J. Super. 38, 219 A.2d 178 (App. Div. 1966); Lampert v. Mikos, 22 N.J. Super. 155, 91 A.2d 577 (App. Div. 1952). Similar principles prevail in other jurisdictions. *See* Bagley v. Green, 277 Ala. 118, 167 So. 2d 545 (1964); Smith v. Lamb, 103 Ga. App. 157, 118 S.E.2d 924 (1961); Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487 (1970); Spargur v. Dayton Power & Light Co., 109 Ohio App. 37, 163 N.E.2d 786 (1959); Higginbotham v. Hartman, 465 P.2d 478 (Okla. 1970); Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1965).

tent verdicts in order to sustain a jury's conclusion.[4] Furthermore, rules have been adopted to prevent prying into the behavior and thought processes of the individual jurors.[5]

Nevertheless, these factors have not allayed doubts about the quality of jury verdicts. There is perennial debate over the competence of jurors as well as the extent to which jury verdicts are based on irrelevant considerations or prejudices. The presumption of validity has been regarded by some as a sublime delusion indulged in to defend a questionable system of justice. "[C]ivil jury justice" has been described as "essentially a lottery."[6] Erwin Griswold, former Harvard Law School Dean, has criticized the jury trial as "the apotheosis of the amateur."[7]

A more favorable appraisal, however, has been expressed by Professor Harry Kalven, Jr., who, with Professor Hans Zeisel and others, conducted the *University of Chicago Jury Project*.[8] Their work is the

4 *See* Grassi v. Pennsylvania R.R., 86 N.J. Super. 48, 205 A.2d 895 (App. Div. 1964); Brendel v. Public Serv. Elec. & Gas Co., 28 N.J. Super. 500, 101 A.2d 56 (App. Div. 1953).

Also, where a general verdict is received, accompanied by the jury's answers to interrogatories, "'[e]very reasonable intendment should . . . be indulged in favor of the general verdict in an effort to harmonize it with the answers to the interrogatories,'" even where conflict seemingly exists. Bree v. Jalbert, 87 N.J. Super. 452, 465, 209 A.2d 836, 843 (L. Div. 1965), *aff'd*, 91 N.J. Super. 38, 219 A.2d 178 (App. Div. 1966) (quoting from 5 J. MOORE, FEDERAL PRACTICE ¶ 49.04, at 2211 (2d ed. 1964)).

5 N.J.R. 1:16-1 provides:

> Except by leave of court granted upon good cause shown, no attorney or party shall himself or through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to the verdict or deliberations of the jury in any action.

The purpose of the rule is to insure a fair trial since

> [f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.

State v. LaFera, 42 N.J. 97, 106, 199 A.2d 630, 635 (1964) (quoting from Clark v. United States, 289 U.S. 1, 13 (1933)).

The federal courts, through a series of decisions, have fashioned a number of rules pertaining to the competency of jurors testifying about jury improprieties and the permissibility of subsequent investigation into the jury's deliberations. Northern Pac. Ry. v. Mely, 219 F.2d 199, 201 (9th Cir. 1954). Specifically, there are few situations when a juror will be considered competent to testify as to any misconduct in the jury room. McDonald v. Pless, 238 U.S. 264, 267-68 (1915); Womble v. J.C. Penny, Inc., 47 F.R.D. 350, 352-53 (E.D. Tenn. 1969), *aff'd*, 431 F.2d 985 (6th Cir. 1970). The federal courts have also held that neither the trial court nor the appellate court has the authority to inquire into the jury's decisional processes. Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1247 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971), and that it is improper and unethical for lawyers and others to interview jurors to discover the course of their deliberations. Northern Pac. Ry. v. Mely, *supra* at 202; Womble v. J.C. Penny Co., *supra* at 352; Primm v. Continental Cas. Co., 143 F. Supp. 123, 126-27 (W.D. La. 1956).

6 Editorial, *For Quality Verdicts*, 89 N.J.L.J. 548 (1966).

7 Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1068 (1964) (quoting from 1962-63 HARVARD LAW SCHOOL DEAN'S REP. 5-6).

8 H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966), *reviewed*, Kaplan, 115 U. PA.

best and most ambitious study to date on jury behavior and jury verdicts. Although the first volume published thus far deals with criminal cases, it includes some references to civil trials.[9] This data shows that in 78 percent of approximately 4,000 civil trials studied, the results on liability probably would not have changed if the decision had been rendered solely by a judge.[10] Professor Kalven found this "reassuring"[11] and concluded that where judge-jury disagreement occurs the explanation may be found in the jury's "sense of equity, and not its relative competence,"[12] and that juries act with an impressive sense of "humanity, strength, sanity, and responsibility."[13]

Intertwined with the question of competence—the ability of jurors to understand, remember and apply both evidence and law[14]—is the issue of jury bias. Every individual has some bias, some prejudice or predilection, some attitude or viewpoint based upon his experience, outlook and belief. This premise is probably as true as it is tautological. "Bias in adjudication" denotes that even an open-minded person, seeking to be impartial, whether in the jury box or on the bench, has some attitude—sympathy, skepticism, generosity, frugality, leniency or strictness—which may affect his view of a case.[15] Is there any reason to believe that bias would not be a factor when people judge other people, their credibility and their disputes? Studies of jury behavior have confirmed the suspicion that the juror's bias is taken into the jury room.[16] The question is, to what extent does the bias of jurors affect their verdicts? Do conflicting attitudes among jurors tend to cancel out bias as a factor, or is there a group bias that operates, as if by consensus?

There are difficulties involved in evaluating the quality of jury verdicts and the extent to which bias is an influence. The most ob-

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L. REV. 475 (1967). The preliminary findings of this project appear in other works. *E.g.*, Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965); Kalven, *The Jury, the Law and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958); Kalven, *supra* note 7.

9 H. KALVEN & H. ZEISEL, *supra* note 8, at 63-65.

10 *Id.* at 63-64.

11 Kalven, *supra* note 7, at 1064.

12 *Id.* at 1065.

13 *Id.* at 1075.

14 Erlanger, *Jury Research in America—Its Past and Future*, 4 LAW & SOC'Y REV. 345, 346 (1970).

15 H. BURTT, LEGAL PSYCHOLOGY, 162 (1931); *see* Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734; Erlanger, *supra* note 14.

16 *See* authorities cited note 15 *supra*. *See also* H. KALVEN & H. ZEISEL, *supra* note 8, at 104-17; Broeder, *Occupational Expertise and Bias as Affecting Jury Behavior: A Preliminary Look*, 40 N.Y.U.L. REV. 1079 (1965).

vious is the lack of an accurate measuring rod.[17] Nevertheless, the experience of presiding over jury trials for five years in Bergen County, and for the past three years in adjacent Hudson County, has afforded me the opportunity to collect data which may shed some light on the subject.

Jury Bias in Verdicts

While in Bergen County, without intending to conduct a study for any purpose other than the curiosity of comparing my views with those of juries, I began to record the jury verdicts in civil actions (primarily negligence cases) as well as my own "verdicts." To avoid taint, I recorded my "verdict" before the jury's verdict was received;[18] and I kept a short summary of each case. This data allowed comparison of a judge's "verdict" with the actual jury verdict. Later, being assigned to Hudson County afforded me the interesting opportunity of comparing verdicts there with those in Bergen County. My "verdict" was, of course, theoretical. I tried not to be influenced by what I thought the jury would do, and the results were not analyzed until more than 100 cases had been recorded. Thus, notwithstanding my own bias, whatever it might be, I served as the "constant" in both counties.

A statistical analysis provides the framework for assessing jury bias. Whether the jurors or I decided in favor of plaintiffs or defendants with such regularity as to suggest a plaintiff-bias or a defendant-bias is an obvious starting point. **Table I** shows the results in the combined group of 113 Bergen and Hudson cases, and compares them with nationwide results in personal injury trials reported by *The Chicago Jury Project*.[19] **Table II** shows the results in the cases separated by county—56 in Bergen and 57 in Hudson.

Table I

	Bergen & Hudson Counties		*National*	
Verdict	Jury	Judge	Jury	Judge
For Plaintiff	55 = 49%	57 = 50.4%	56%	54%
For Defendant	58 = 51%	56 = 49.6%	44%	46%

[17] A more detailed discussion on drawbacks in methodology can be found at pp. 13-14 *infra*.

[18] H. Kalven & H. Zeisel, *supra* note 8, at 52.

[19] *Id.* at 64.

Table II

Verdict	*Bergen County*		*Hudson County*	
	Jury	Judge	Jury	Judge
For Plaintiff	31 = 55%	37 = 66%	24 = 42%	20 = 35%
For Defendant	25 = 45%	19 = 34%	33 = 58%	37 = 65%

The first superficial impression to be drawn corresponds to that reached by the authors of the *Chicago Study*: that jurors are not especially plaintiff-minded, and that the popular notion that juries vote for plaintiffs with disproportionate frequency is unfounded. National figures show that plaintiffs prevail in 56 percent of personal injury trials and lose in the remaining 44 percent. The Bergen and Hudson combined figures show a closer division: plaintiffs won 55 trials and lost 58, 49 percent and 51 percent respectively. My own verdicts came out with almost perfect evenhandedness—for plaintiffs in 57 cases and for defendants in 56, or 50.4 percent to 49.6 percent.

However, the separate breakdown of the Bergen County and Hudson County results raised alarms. To start with, the division in each county was less balanced. In Bergen, juries found for plaintiffs in 55 percent of the cases and in favor of defendants in 45 percent, a result almost identical with the national average. But in Hudson the tendency was reversed. There, plaintiffs won only 42 percent of all jury trials. This was not only in conflict with the Bergen County results, but was a significant departure from the national average. Most surprising, however, is that the separate Hudson and Bergen results belied the impression held by many lawyers that Hudson County jurors are plaintiff-minded.

The first tentative conclusion, then, is that broad averages are just that—averages. They balance and blur significant deviations. Perhaps absolute results do not conclusively prove or disprove the bias of a judge or jury. The real test is how *should* the cases have come out as opposed to how they *did* come out. The answer is elusive because of the absence of a precise measuring rod. Who knows how the cases *should* have come out?

Some studies have used mock trials, with the case controlled in a way that favors a given result which can be compared with the verdict of the experimental jury.[20] In the *Chicago Study*, reports were collected from 600 participating judges who recorded how they would have decided the case without a jury, and these results were compared with the jury verdicts. This is the only method I could employ, and its

[20] For examples of the use of experimental juries, *see* Boehm, *supra* note 15; Erlanger, *supra* note 14.

validity is no better than the ability of one judge to decide cases accurately and justly.

The *Chicago Study* produced the reassuring conclusion that not only do judges and juries agree on liability in 78 percent of all civil cases, but in the remaining 22 percent, the plaintiff was favored by the jury in 12 percent of the cases and by the judge in 10 percent.[21] This suggests that judges and juries have no appreciable bias for or against plaintiffs. But does this near-perfect division merely reflect an averaging effect? Is the bias of a judge or jury in a particular case or location merely offset by a contrary bias by another judge or jury elsewhere? Let us examine the Hudson and Bergen verdicts when compared with those rendered by the presumed constant, a single judge, to see if this sheds some light on the inquiry.

Bergen County juries decided in favor of plaintiffs in 55 percent of the cases studied, but Hudson County juries found in favor of plaintiffs only 42 percent of the time. It is the combining of these results that produces the balanced 49 percent figure shown in **Table I.** More startling are the judge "verdicts." The remarkably even division—50.4 percent of verdicts found for plaintiffs and 49.6 percent for defendants —simply masks the fact that great imbalance exists when viewing Bergen and Hudson results separately. In Bergen County, judge verdicts in favor of plaintiffs were recorded in 66 percent of the cases, but only in 35 percent of the cases tried in Hudson County. Thus, unless these disparate results can be reconciled, the appearance of even-handed justice suggested by the combined results may be illusory.

Some insight into the disparity is gained by separating the cases in which judge and jury agree from those in which they disagree. My own results show agreement in 83 of 113 trials, or 78 percent. This figure may signify that there is no apparent bias or mistake affecting the result in a large proportion of cases. Perhaps, where there is agreement, the jury's bias and the judge's bias simply coincided. Additionally, often the issue of liability was quite clear. For example, some of the cases involved automobile passenger claims in which plaintiff *had* to recover. Similarly, cases of very "doubtful" liability were tried. Thus, in those instances, judges and juries could readily agree on a verdict for plaintiff, or a verdict of no cause for action. Judges participating in the *Chicago Study* rated 85 percent of the cases as "easy."[22] I did not attempt to rate the cases in this manner, although many were not difficult to decide as to liability. If the judge and jury disagree in an "easy"

21 H. KALVEN & H. ZEISEL, *supra* note 8, at 64.

22 Kalven, *supra* note 7, at 1066 n.22.

case, something other than the facts and law is probably controlling. In an "easy" case, mistake is less likely to occur, and an "erroneous" verdict is more likely to be attributed to bias.

The key to the puzzle is, in any event, to be found in the cases where the judge and the jury disagree.[23] Of the 30 cases in which the jury's verdict differed from mine, I decided 53 percent in favor of plaintiffs and 47 percent for defendants. Again, the apparent balance depends on combining Hudson and Bergen cases. There is sharp divergence when the cases are separated by county, as **Table III** illustrates.

Table III

Cases of Judge-Jury Disagreement

Bergen & Hudson Counties

Verdict	Jury	Judge
For Plaintiff	14 = 47%	16 = 53%
For Defendant	16 = 53%	14 = 47%

	Bergen County		*Hudson County*	
Verdict	Jury	Judge	Jury	Judge
For Plaintiff	4 = 29%	10 = 71%	10 = 62%	6 = 38%
For Defendant	10 = 71%	4 = 29%	6 = 38%	10 = 62%

The number of cases of judge-jury disagreement is relatively small for statistical purposes. However, the divergence is so wide between counties, and there is such a strong trend within each county, that it seems reasonable to attach significance to the results. In Bergen County, the jury shows a strong tendency—in 71 percent of the cases of judge-jury disagreement—to find for defendant, while the judge would have found for plaintiff. In Hudson County, the strong tendency—in 62 percent of these cases of disagreement—is to find for plaintiff, while the judge would have found for defendant. Thus, although Bergen County plaintiffs prevailed in 55 percent of all trials (**Table I**, *supra*), the incidence of judge "verdicts" for plaintiffs was even greater, to wit, 66 percent of the cases. On the other hand, Hudson County juries found for the defendant in 58 percent of all trials (**Table I**, *supra*), as opposed to judge "verdicts" for defendants in 65 percent of all trials. These differences represent the strong pro-defendant leaning of Bergen County juries, and the strong pro-plaintiff stance of Hudson County juries in instances where judge and jury disagree.

[23] H. KALVEN & H. ZEISEL, *supra* note 8, at 55.

A detailed analysis of the cases of judge-jury disagreement would reinforce the finding of pro-plaintiff bias in Hudson County and pro-defendant bias in Bergen County. Several brief examples may be persuasive. In one auto accident case tried in Bergen, the defendant left 75 feet of skid marks before striking the plaintiff's vehicle in the rear. Nevertheless, the jury returned a verdict of no cause for action. The plaintiff had been injured to some extent, and the real issue was whether or not he had suffered a herniated disc. By contrast, in a rear-end collision case tried in Hudson, the plaintiff recovered a verdict against the defendant although it was the plaintiff who struck the defendant's truck in the rear. In that case I found no appreciable fault attributable to the defendant and clear negligence on the plaintiff's part. In another case tried in Hudson, the plaintiff came out of a side street which was governed by a stop sign onto a major highway and into the path of the defendant's oncoming car. The plaintiff recovered. I had found contributory negligence on the plaintiff's part; furthermore, proof of the defendant's negligence was unclear. In each of these cases there was a frail factual basis for the jury's verdict, but bias was probably the main influence.

The verdict in the Bergen rear-end collision case may have been influenced by the jury's suspicion that the plaintiff's injury was exaggerated; moreover, plaintiff was represented by a New York attorney who endeavored to present the case so impressively that the jury may have sympathized with defense counsel who had little to work with. Immediately after the verdict, defense counsel recognized that it would be set aside, and the case was promptly settled. In another case tried in Bergen, involving the death of a 12-year-old girl, the jury returned a verdict of no cause for action. The verdict may have been influenced by the fact that the jury knew that a co-defendant had made a settlement of the claim,[24] and did not want to give additional money to the girl's surviving family. The jury may have considered that the principal claim was for pain and suffering of the girl during her lifetime, and not the claim of her heirs for wrongful death.

Jury Bias in Damage Awards

The direction of jury bias in each county is further demonstrated by comparing the amount of damages awarded by juries with the amount which I recorded in trials where both the jury and I found *for* plaintiffs. In Bergen County there were 23 such trials. In six of

24 *See* Theobold v. Angelos, 40 N.J. 295, 191 A.2d 465 (1963).

these, jury and judge awards were substantially equal; in five, the jury's award was substantially higher ($18,000 versus $7,600 on the average); but in 12, the jury's award was substantially lower ($1,800 versus $3,750, on the average). In fact, in three Bergen cases I found it necessary to increase the award on plaintiff's motion because of gross inadequacy, but in only one case was the verdict reduced on motion of defendant.[25] It is significant to note, as indicated above, that in the 12 trials where the jury returned an award that was lower than what I had recorded, the jury award averaged approximately one-half of the amount I would have awarded.

The results in Hudson County are the converse of those in Bergen County. In Hudson, a pro-plaintiff trend appears not only on the issue of liability, but in the damage award as well. There, the jury and I agreed on a verdict for plaintiffs in 17 of 57 trials. Of these, there were five in which the jury's award and my recorded award were substantially equal. In three cases the jury's verdict was substantially lower than mine ($2,000 versus $3,300; $1,000 versus $2,500; and $85,000 versus $150,000).[26] But in the remaining cases the jury's award was substantially higher than the sum I would have awarded. In those nine cases the jury's award averaged $9,500 as compared with an average award of $4,900 that I recorded.

Thus, where the jury and I disagreed as to liability or damages, Bergen County showed a marked bias against plaintiffs, but in Hudson County there was a marked pro-plaintiff bias. There is one seeming inconsistency that needs to be explained. It was shown in **Table II** that Hudson County juries find for defendants in 58 percent of the cases tried to completion. This absolute number gives the appearance that Hudson County juries are defendant-oriented. In my view, however, cases of *doubtful* liability are more often *tried* in Hudson County: carriers are more likely to settle cases of *good* or even *fair* liability because the pro-plaintiff bias poses a greater threat on the issue of damages. By contrast, carriers will litigate more willingly in Bergen County because of the defense-minded bias of Bergen jurors. Thus, in Bergen, proportionately more cases of good liability are tried to completion, producing the finding in **Table II** that in Bergen County plaintiffs prevail in 55 percent of the cases.[27]

25 That verdict was in a medical malpractice wrongful death action in which the jury awarded the plaintiff $55,000. The verdict appeared to be a spite verdict. Evidence was offered that hospital records were "doctored." I reduced the verdict by $12,500.

26 The jury verdict of $85,000 may have been a compromise in which the jury discounted damages because of the possibility of contributory negligence.

27 A very recent study provides further statistical information. INSTITUTE OF JUDICIAL

DEMOGRAPHIC DATA—A BASIS FOR BIAS*

An examination of the socio-economic characteristics of Bergen and Hudson counties may account for the divergent jury bias. These adjacent counties in northern New Jersey are a part of the New York metropolitan area. Yet, there are marked differences between them. Hudson County, of which Jersey City is the county seat, can be viewed as an aged, urban area with considerable industrial development and high population density. There are 12 municipalities in Hudson County in an area of 44 square miles, with a total population (in 1970) of 610,000.[28] The population of Jersey City alone was 260,000.[29] Another 300,000 people were concentrated in six of the other municipalities: Bayonne, Union City, North Bergen, Hoboken, West New York and Kearny.[30]

Bergen County, by contrast, with a much greater area of 235 square miles, is composed of seventy relatively non-industrial suburban communities, totaling 900,000 inhabitants in 1970.[31] The Township of

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ADMINISTRATION, A COMPARISON OF SIX- AND TWELVE-MEMBER JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972). The report examines civil cases tried in 11 counties during a two and one-half month period in early 1972. The report shows that juries returned verdicts for plaintiffs in approximately 58 percent of 391 cases analyzed. *Id.* at 22. I have since been advised by a staff member that plaintiffs recovered in 55.4 percent of the 92 cases analyzed in Bergen County and 57.5 percent of the 40 cases analyzed in Hudson County. While this shows a higher recovery rate for plaintiffs in Hudson County as compared with the cases tried before me, the difference may be explained in part by the fact that the figures compiled by the Institute include an unknown number of cases tried on damages only, with liability either admitted or separately determined. Cases tried on damages only were excluded from my own study. Moreover, there can be no error in this portion of my study since it deals with actual jury verdicts. The proportion of Bergen County plaintiffs' verdicts reported by the Institute is identical to the results I recorded in Bergen County. The difference in the proportion of pro-plaintiff verdicts in Hudson County may also result from a difference in the rate of settlement of cases sent to me for trial as compared with other judges sitting in Hudson County. My experience is that cases of only fair liability can be settled more readily in Hudson County, leaving a higher proportion of poor liability cases to be tried. I am informed that of the cases sent out for trial in this period approximately 40 percent were settled in Hudson County and 26 percent in Bergen County.

* The statistics provided herein, which have been rounded off, do not purport to adhere to the highly technical requirements of a true demographic study, but rather, are a sample of significant differences between the counties which may demonstrate a reason for the bias as indicated by the study.

28 U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, GENERAL POPULATION CHARACTERISTICS, Final Report PC(1)-B32 New Jersey 32-186 [hereinafter cited as POPULATION CHARACTERISTICS].

29 *Id.* at 32-178.

30 *Id.*

31 *Id.* at 32-183.

Teaneck was the largest with 42,000,[32] and Hackensack, the county seat, was third with a population of 36,000.[33]

Housing characteristics—homeowners or tenants—may be significant from the viewpoint of jury composition. In Hudson County, in 1970, there were less than 30,000 one-family homes (13 percent of total dwelling units), but there were 185,000 dwelling units in multiple dwellings (87 percent of total units).[34] Of the total population, 204,000 (35 percent) lived in owner-occupied units, and almost 400,000 (65 percent) were tenants.[35] By contrast, 62 percent of the dwelling units in Bergen County in 1970 were one-family homes (175,000) and 38 percent of total units were located in multi-family structures (108,000 units).[36] Moreover, 670,000 (75 percent) of the 1970 population lived in owner-occupied dwellings, and only 225,000 (25 percent) were tenants.[37]

Economic differences appear significant. In 1970, the total annual effective buying income per Hudson County family was $10,139, in Bergen County, $14,764.[38] In Hudson, there are approximately 50,000 people (8.3 percent) on welfare, in Bergen, 15,000 (1.7 percent).[39] An average of 18,000 people per month, approximately three percent of the population, received unemployment compensation in Hudson County in 1971, as opposed to an average figure of approximately 13,200 per month (1.4 percent) in Bergen County.[40] The combined unemployment and welfare recipients in Hudson constitute 11.3 percent, and in Bergen 3.1 percent of the total county population. In 1971 the average per capita market value of real property in Hudson County was $5,400; and in Bergen County it was $11,600.[41]

Educational differences may also be noted. In 1970, of the population over 25 years of age, one-third in Bergen County had completed four years of high school, compared with approximately one-fourth in Hudson County.[42] Also, 16 percent of those over 25 years of age in

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32 *Id.* at 32-176.

33 *Id.*

34 STATE OF NEW JERSEY DEP'T OF LABOR & INDUS., DIV. OF PLAN. & RESEARCH, 1970 CENSUS OF HOUSING.

35 *Id.*

36 *Id.*

37 *Id.*

38 SALES MANAGEMENT, July 10, 1971, at D-90, D-88.

39 Computed from unofficial estimates received from State of New Jersey Dep't of Institutions & Agencies.

40 Computed from unofficial estimates received from State of New Jersey Dep't of Labor & Indus., Div. of Plan. & Research.

41 Extrapolated from data in Robinson v. Cahill, 118 N.J. Super. 223, 282-83, 287 A.2d 187, 218-19 (L. Div. 1972) (App. A).

42 Extrapolated from U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970,

Bergen had completed four or more years of college, compared with less than six percent in Hudson.[43] In 1971, the average market value of real property per pupil enrolled in public school was $60,000 in Bergen and $35,000 in Hudson.[44] It is from real property taxes that the bulk of revenue is derived for public education and municipal services. As a consequence, in 1971-72 the average expenditure per public school pupil in Hudson County was $922 as compared with $1,227 in Bergen County, a fact that may reflect a difference in the quality of education in these two counties.[45]

Other characteristics in jury composition may be noted, although verifying data from official sources is not readily available. For example, there are many more non-drivers on juries in Hudson County than in Bergen County. In one extreme case, 9 of the first 12 veniremen selected did not drive an automobile. Nothing comparable occurred in my Bergen County experience. I have also noticed proportionately more retired and elderly single people among Hudson County jurors, including not only widows and widowers, but many older males and females who have never been married, or who are divorced or separated. Presumably, this is because there are relatively more tenants in Hudson County, and single or retired people tend to live in areas where there are apartments available in multi-family structures. This is confirmed by census figures for 1970 which show that unmarried persons over age 14 in Hudson County comprise 27.8 percent of the total population as compared with 24 percent of the population in Bergen County.[46] Also, there are 20,350 males over age 65 not in the labor force in Hudson County, or 3.3 percent of total population, compared with 22,000 in Bergen County, or 2.4 percent of the total population of that county.[47] Additionally, racial differences exist. There were 61,000 blacks recorded in the 1970 census for Hudson County, or 10 percent of the population, but only 25,000 in Bergen County, or less than three percent of the total Bergen County population.[48] Similarly more Spanish-speaking people reside in Hudson County than in Bergen County. Finally, for what it is worth, Hudson County traditionally votes Democratic, and Bergen County, Republican.

GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C32 New Jersey 32-551 [hereinafter cited as SOC. & ECON. CHARACTERISTICS].

43 *Id.*

44 Robinson v. Cahill, 118 N.J. Super. 223, 282-83, 287 A.2d 187, 218-19 (L. Div. 1972) (App. A).

45 *Id.*

46 Extrapolated from POPULATION CHARACTERISTICS, *supra* note 27, at 32-192.

47 Extrapolated from SOC. & ECON. CHARACTERISTICS, *supra* note 42, at 32-553.

48 Extrapolation from POPULATION CHARACTERISTICS, *supra* note 27, at 32-186, 32-183.

To summarize, Hudson County residents have lower incomes than those of Bergen County, live in poorer communities as measured by real property values, and have less formal education. In Hudson County, 65 percent of the population are tenants, but the vast majority of the heads of households in Bergen County are homeowners. Relatively more people in Bergen County drive automobiles. Thus, the juror in Bergen County is likely to be more conscious of insurance costs (on homes and automobiles) and less hostile to propertied interests or insurance companies. However, in an area where blue-collar workers and tenants predominate, a juror may be less concerned with business interests than an executive, and may be more inclined to be generous with other people's money, perhaps in sympathy with his own condition, needs or hopes.

I am certain that the contrast in jury bias in nearby counties is not unique. The phenomenon of conflicting bias among counties may be inferred from findings in a study reported in 1937 by Professor Edson R. Sunderland.[49] Examining cases in Michigan, Professor Sunderland noted that in Wayne County, where Detroit is located, jurors and judges found for plaintiff in approximately 70 percent of 794 civil cases studied. In "outlying counties," however, including three rural counties, the jury favored the plaintiff in only 57 percent of the cases, while judges in those counties found in favor of the plaintiff in 79 percent of all cases decided without a jury.[50] These findings suggest the same direction of bias that was found in "urban" Hudson County as compared with "suburban" Bergen County. However, Professor Sunderland, in seeking to determine whether there was a significant difference in the proportion of plaintiff verdicts in cases decided by juries as compared with judges, did not focus upon county-by-county bias.

DRAWBACKS IN METHODOLOGY

My primary purpose here has been to present my findings as they are. In so doing, some shortcomings in method must be acknowledged. First, the Bergen County figures do not include all of the cases over which I presided. However, a more fundamental problem is that a judge's theoretical verdict is not a real verdict. A judge presiding in a civil case which is to be decided by a jury, who goes on to another case while the jury is deliberating, may not analyze the case with the same care or energy that he would apply in actually deciding a non-jury

49 Report, *Trial by Jury*, 11 U. CIN. L. REV. 119, 120-30 (1937).

50 *Id.* at 123.

case. Recording a verdict with relative haste is not the same as deciding a case in open court, without a jury, with findings of fact and reasons for the findings and the decision. The real life situation may produce some results that are different from the judge's unannounced verdict. Moreover, a judge who presides over a jury trial is often acquainted with or involved in settlement negotiations. This may affect his verdict. For example, in one case decided in Hudson County, plaintiff had made a settlement demand of $3,000 which was rejected by defendant. The jury gave plaintiff $9,500. I had recorded a verdict of $3,500. Conceivably, my verdict was influenced by the negotiations. It is for this reason that in non-jury cases judges shun knowledge of settlement offers or demands. Still, despite these qualifications, I believe the data and conclusions have value. The opposite paths of bias in Hudson and Bergen counties are too marked to be accidental or mistaken. They correspond to the views of trial lawyers and insurance carriers with experience in both counties. Not only is it easier for a plaintiff to recover in Hudson County, particularly in a small case, but the jury verdicts often exceed even plaintiff's settlement demand. It was the rare case in Bergen County that produced a verdict significantly larger than expected. In the majority of trials in Bergen County, from 1964 to 1969, there were very few cases in which the jury verdict was substantially higher than the range of plaintiff's demand. In both counties, however, juries appear to demand clearer proof of liability in cases of serious injury. Although such cases are too few to use for statistical proof, jurors in both counties have found for defendant more often than for plaintiff in heavy cases, and in both counties this tendency conflicts with the judge's findings.

CONCLUSION

It has not been my purpose here to argue the merits of the jury system. Useful comment on that subject is vast.[51] I subscribe to much that has been said in favor of retaining the jury system, even in civil cases. The jury is not just a means of determining facts for the purpose of adjudicating particular disputes. The American jury is a political institution—a symbol of liberty and democracy—as much as it is a part of our judicial process. The jury contributes to our confidence in government and in the impartial administration of justice. Proving that

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51 J. FRANK, COURTS ON TRIAL (1949); C. JOINER, CIVIL JUSTICE AND THE JURY (1962); A.T. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION (1956).

jury verdicts are affected by bias for or against a plaintiff in negligence cases does not mean that individual judges are less biased in their views. Despite shortcomings, attorneys for plaintiffs as well as defendants in both Bergen and Hudson counties show a distinct preference for taking their chances with a jury than with a judge. It is as though lawyers would rather risk the anarchy of jurors than the possible tyranny of a single judge. Their preference might change if they knew in advance which judge it would be. This suggests that lawyers know whether a particular judge has a pro-plaintiff or pro-defendant bias, or a conservative or liberal attitude toward damages in a personal injury case.[52]

In some cases of disagreement the jury verdict seemed reasonable although different from my own. It was only in relatively few cases that I felt the jury verdict was clearly wrong.[53] Both the *Chicago Jury Project* and my own results show that the judge and jury verdicts did coincide in 78 percent of the cases. The jury may very well have been correct in many of the remaining cases where judge-jury disagreements occurred. Even if some jury verdicts are "erroneous," but not so obviously wrong as to permit the granting of a new trial, this may be simply the price we have to pay for the jury system. There is no way of knowing what margin of error occurs in cases decided by a judge alone. Particularly in personal injury cases, there can be more than one "correct" verdict depending on one's view of the evidence and concept of "reasonable care." Unfortunately, however, the potential for error in a jury trial has an influence that extends beyond those cases in which the jury actually errs. It is this potential that often motivates the settlement of other cases.

Of course, the judge in New Jersey has the power to grant a new trial[54] or to add to, or detract from, a damage awarded in the case of

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52 It has been noted that

> [e]ach judge has his own pattern of reaction and it tends to be a predictable constant. The commitment of the civil tort calendar to single judges rather than jurors would not entirely deflate the lottery characteristic of litigation; it might however engender a competition for the selection of judges.

Editorial, *supra* note 6.

53 *See* Hartshorne, *Jury Verdicts: A Study of Their Characteristics and Trends*, 35 A.B.A.J. 113 (1949). Judge Hartshorne of the Essex County Court of Common Pleas in Newark, New Jersey, analyzed the jury verdicts he received over an eleven-year span prior to 1949. He felt the jury's verdict to be "unquestionably right on the criminal side in 89 per cent of the cases, and on the civil side in 85 per cent." *Id.* at 114. He considered civil verdicts wrong if the damage award was substantially different from his own opinion.

54 N.J.R. 4:49-1(a) provides in part:

> A new trial may be granted . . . as to all or part of the issues on motion made to the trial judge. . . . The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of

clear error.[55] However, this corrective power may not be enough. Perhaps the trial judge should more freely use his discretion in commenting on the evidence to assist the jury in difficult cases, or in cases where the judge perceives that bias is likely to affect the verdict. In this way the margin of jury "error" may be reduced.

At present in New Jersey a judge has discretion to comment on the evidence during his charge to the jury.[56] It is not altogether clear how far the discretion to comment on the evidence carries.[57] However, by

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the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.

A new trial may be ordered if the verdict is against the weight of the evidence, although the evidence may not have justified the direction of a verdict.

The object is to correct clear error or mistake by the jury. Of course, the judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror.

Dolson v. Anastasia, 55 N.J. 2, 6, 258 A.2d 706, 708 (1969).

55 Remittitur or additur may be employed only in cases in which a new trial may be ordered as to damages only. Epstein v. Grand Union Co., 43 N.J. 251, 252, 203 A.2d 257-58 (1964). When an additur is granted, the order denying plaintiff's application for a new trial is conditioned on defendant's acceptance of the judge's increase in the jury's award; in remittitur, the plaintiff has the option to accept the reduced amount or a new trial. Fisch v. Manger, 24 N.J. 66, 72, 130 A.2d 815, 818 (1957); *see* Bitting v. Willett, 47 N.J. 6, 9, 218 A.2d 859, 861 (1966).

56 The authority for this judicial discretion existed at common law. 9 J. WIGMORE, EVIDENCE § 2551, at 503 (3d ed. 1940). This right has been expressly preserved in the CAL. CONST. art. 6, § 10, which provides:

> The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

Furthermore it has been enforced by that state's case law. *E.g.*, People v. Friend, 50 Cal. 2d 570, 327 P.2d 97 (1958); People v. Shannon, 260 Cal. App. 2d 320, 67 Cal. Rptr. 207 (Dist. Ct. App. 1968); People v. Player, 161 Cal. App. 2d 360, 327 P.2d 83 (Dist. Ct. App. 1958). Other states have recognized the right through court rule, MICH. R. 516.1, or case law without accompanying constitutional support. Mancaniello v. Guile, 154 Conn. 381, 225 A.2d 816 (1966); Commonwealth v. Helwig, 184 Pa. Super. 370, 134 A.2d 694 (1957). *But see* Commonwealth v. Archambault, 448 Pa. 90, 290 A.2d 72 (1972).

On the other hand, states have enacted specific constitutional prohibitions against such a right. The ARIZ. CONST. art. VI, § 27 provides in part that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *See also* DEL. CONST. art. IV, § 19; S.C. CONST. art. 5, § 26. Likewise, the same prohibition has been effected by statute alone. GA. CODE ANN. § 81-1104 (1956); N.C. GEN. STAT. § 1-180 (Supp. 1971) (criminal proceedings) and § 1A-1, Rule 51 (Repl. 1969) (civil trials); as well as by case law alone. Bennett v. Staten, 229 Ark. 47, 313 S.W.2d 232 (1958); People v. Smith, 63 Ill. App. 2d 369, 211 N.E.2d 456 (1965).

57 In Skupienski v. Maly, 27 N.J. 240, 247, 142 A.2d 220, 224 (1958), the court held that "the trial judge had the right to comment upon the deficiencies inhering in the expert's opinion, but it was not within his province to negate such evidence completely." In Hare v. Pennell, 37 N.J. Super. 558, 117 A.2d 637 (App. Div. 1955), the court stated that comments of the court during its charge casting doubt as to the good faith of plaintiffs went too far, although upholding the right of a judge to comment on the testimony and to

> intimate his opinion as to the weight of the evidence whenever he thinks it is

practice and tradition, judges tend to avoid expressing their opinion on the weight of evidence and the credibility of witnesses, and the trial judge's opinion on the ultimate issues is never conveyed to the jury. Trial judges have been rebuked and reversed where they have failed to maintain the appearance of impartiality and have taken a partisan attitude.[58]

On the other hand, judges are admonished not to charge the jury in a manner that is too general, that is, insufficiently anchored to the evidence of the case.[59] Here is an area where the limits of the law and the skills of trial judges can be sharpened. Consideration should be given to an expansion of the judge's role in helping the jury analyze the evidence and apply it to the law of the case. Perhaps judges have restricted themselves too much in the trial of the case. Perhaps it would not be a mistake to let a judge *try* to replace bias and prejudice as the "thirteenth juror."

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required or necessary for the promotion of justice, so long as he leaves it to the jury to determine the facts and draw their own conclusions.

Id. at 566, 117 A.2d at 641. A greater reach has been suggested in Botta v. Brunner, 42 N.J. Super. 95, 106-07, 126 A.2d 32, 39 (App. Div. 1956), *modified on other grounds*, 26 N.J. 82, 138 A.2d 713 (1958), where the court said that comment is allowed

even to the extent of strongly influencing the jury, so long as it is left to the jury . . . to rely upon its own recollection of the testimony and to draw its own conclusions in arriving at a verdict.

However, it has also been said that the trial judge cannot make "remarks that might prejudice a party or which are calculated to influence the minds of the jury." Cestero v. Ferrara, 110 N.J. Super. 264, 273, 265 A.2d 387, 392 (App. Div. 1970).

[58] *See, e.g.*, Village of Ridgewood v. Sreel Inv. Corp., 28 N.J. 121, 132, 145 A.2d 306, 313 (1958); Bands Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 550-51, 163 A.2d 465, 480 (App. Div. 1960); Hare v. Pennell, 37 N.J. Super. 558, 567, 117 A.2d 637, 641-42 (App. Div. 1955).

Furthermore judges are cautioned about intervening in trials:

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind his undue interference, impatience, or participation in the examination of witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

ABA CANONS OF JUDICIAL ETHICS No. 15.

[59] State v. Abbott, 36 N.J. 63, 73-75, 174 A.2d 881, 886-87 (1961).