

## “SHOULDN’T WE CONSIDER . . . ?” Jury Discussions of Forbidden Topics and Effects on Damage Awards

Edith Greene, Kari Hayman, and Matt Motyl  
University of Colorado—Colorado Springs

The Federal Rules of Evidence prohibit disclosure to civil jurors of information that is arguably related to their decision-making (e.g., that either party is insured). The basis for so-called “blindfolding” is that a jury might be biased by this information to alter its appraisal of the evidence to reach a desired verdict. The purpose of this study was to examine the extent to which mock juries in an automobile negligence case discuss several “silent factors” during deliberation (viz., insurance carried by the parties, the payment of attorneys’ fees, and previous settlements between the plaintiff and other defendants) and the effects of such discussion on their compensatory damage award. We presented summaries of the evidence that varied in the severity of the plaintiff’s injuries and the reprehensibility of the defendant’s conduct. These variables influenced judgments of liability and damage awards. Analysis of the content of jury deliberations regarding damages showed that, although nearly all juries talked about silent factors, the size of their damage awards was unrelated to the frequency of these discussions and that such discussion accounted for only a very small portion of the variance in awards.

*Keywords:* jury blindfolding, juror bias, forbidden topics

It has been 50 years since Harry Kalven, a pioneer in the field of jury studies, asked a pointed question about juries and their assessments of liability and damage awards: “To what degree do [jury] instructions fail to control because they remain silent?” (Kalven, 1958, p. 162). In fact, judges in civil trials are silent on whole categories of information that are potentially relevant to jurors’ decision making. This process, called blindfolding the jury (Green, 1954), is based on the premise that certain types of information will bias jurors and impair their ability to analyze complex evidence in a logical and predictable manner.

Blindfolding fits with the traditional view that a jury’s role is one of a fact-finding tribunal and that jurors should have no interest in the consequences of their decisions or ultimate resolution of the case. According to this perspective, jurors need only the information that is relevant to trying the facts, so denying them access to information that is not directly related to fact-finding will, in theory, reduce the potential for bias

---

Edith Greene, Kari Hayman, and Matt Motyl, Department of Psychology, University of Colorado—Colorado Springs.

This research was supported by Grant No. SBR 9617270 from the National Science Foundation to Edith Greene and formed the basis of a master’s thesis submitted to the University of Colorado by Kari Hayman.

Correspondence concerning this article should be addressed to Edith Greene, Department of Psychology, P. O. Box 7150, University of Colorado, Colorado Springs, CO 80933. E-mail: [egreene@uccs.edu](mailto:egreene@uccs.edu)

because jurors will be forced to base their decisions on “appropriate” evidence only (Diamond, Casper, & Ostergren, 1989).<sup>1</sup>

The rationale for blindfolding is encompassed in Article IV of the Federal Rules of Evidence, which disallows reference to evidence that might influence jurors’ judgments in legally inappropriate ways. The general tenet is that, even if relevant, certain evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or if it would confuse or mislead the jury. For example, Rule 411 states that “Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.” Among the other topics on which jurors are blindfolded are several that are central to their assessments of liability and damages; for example, that the defendant may have taken remedial measures subsequent to an accident (Federal Rule of Evidence 407), that the defendant offered to pay medical expenses subsequent to an injury (Rule 409), and that settlement offers were rejected during pretrial negotiations (Rule 408).

Implicit in Kalven’s (1958) question (“To what degree do [jury] instructions fail to control because they remain silent?”) is a concern that judicial silence may not assist jurors, that judges’ silence may decrease rather than increase the likelihood of appropriate or accurate decision-making by juries. In fact, without more specific guidance on topics they deem relevant, jurors may be forced to rely instead on their suppositions and suspicions about how certain factors operate behind the scenes in a case. Thus, in some circumstances, blindfolding may invite, rather than restrain, speculation and paradoxically lead to the inconsistent and unpredictable verdicts and uncontrolled decision making that it was intended to curtail. Consider, for example, the consequences of blindfolding the jury to the fact that plaintiffs’ lawyers are typically paid on a contingency fee basis from the damages awarded to the plaintiff. Conceivably, two people with identical injuries could receive vastly different sums of money as compensation if one blindfolded jury understood this arrangement and factored attorneys’ fees into their computation of the award and the other blindfolded jury did not (Wissler, Kuehn, & Saks, 2000).

This article examines the effects of blindfolding jurors to four categories of information that are arguably relevant to their determinations of damage awards:

---

<sup>1</sup> Others take a different position, viewing the jury as an institution that should reflect the conscience of the community and argue that jurors should be allowed to ponder the consequences of their decisions (including the economic effects of their verdicts and awards), even if that leads to derogation or nullification of the law (see, e.g., Abramson, 1994; Leibman, Bennett, & Fetter, 1998). One commentator questions whether factual issues are truly distinguishable from legal issues or whether they should more appropriately be viewed as “mixed questions that jump the artificial law/fact boundary” (Abramson, 1994, p. 91). Still others argue that blindfolding rules will, in many cases, exclude information that may be useful to jurors: “Asking jurors who may be deprived of key facts to determine liability and a fair damage award is like asking colorblind people to describe the exact hue of the sky before a tornado. It is likely that they will lack key facts necessary to make an informed determination” (Hantler, Schwartz, Silverman, & Laird, 2005, p. 50). They advocate abrogation of hard and fast rules that disallow jury access to potentially relevant information and suggest that jurors can be trusted to reach reasonable and equitable decisions. It is not our intention to comment on or attempt to resolve this long-standing difference of opinion; empirical data may be of limited value in addressing these disputes. Rather, our goal is to examine the willingness of jurors to abide by rules that limit their discussion of certain topics and to assess whether the extent of rule breaking, if any, is related to juries’ verdicts.

(a) the insurance status of the plaintiff, (b) the insurance status of the defendant, (c) the payment of attorneys' fees, and (d) the fact that the plaintiff previously settled with other parties to the case. It extends existing research in this area by using quantitative research methods to examine the relationship between discussions of these forbidden topics and mock jury damage awards. In addition, it uses a systematic qualitative methodology to describe the content of mock jurors' discussions.

### Legal Background

Blindfolding rules have emanated both from common law and legislative actions intended to ensure that juries base their decisions on "legitimate" grounds rather than on improper or biased beliefs. We describe the legal genesis of the blindfolding rules examined in this study.

#### *Insurance Status of the Parties*

The insurance exclusionary rule prohibits information pertaining to whether a party is insured from being admitted into evidence. It was created by common law during the late 19th century and is now codified in the rules of evidence (Federal Rules of Evidence 411). Nearly every state has some variant on the rule (e.g., Cal. Evid. Code § 1155; N.J. R. Evid. 411; Tex. R. Civ. Evid. 411).

An assumption underlying the insurance exclusionary rule is that a jury confronted with a sympathetic plaintiff and informed that a well-healed defendant is insured may, despite lack of evidence of wrongdoing, find the defendant liable and impose a large award to provide for the plaintiff (*Causey v. Cornelius*, 1958). The Texas Supreme Court clearly articulated this position in *Barrington v. Duncan* (1943): "This court takes judicial knowledge of the fact that a jury is more apt to render a judgment against a defendant, and for a larger amount, if it knows that the defendant is protected by insurance" (p. 516). Alternatively, jurors who learn that a defendant lacks insurance may opt not to find liability or assess only a small award despite evidence of wrongdoing so as not to bankrupt defendants or saddle them with debt. In both examples, jurors' knowledge of the insurance status of the defendant biases their judgments of liability and damages; hence, the protection offered by the blindfold.

The exclusion from trial of insurance-related evidence has generated significant debate. In fact, according to one commentator, "few doctrines in the law have been subject to the type of vituperation heaped upon the insurance exclusionary rule" (Calnan, 1991, p. 1177). Some commentators have argued that the disclosure of insurance-related evidence is not prejudicial and that forthright disclosure may actually enhance fairness to jurors and to the parties involved:

"On the issue of damages the ability to pay is a highly significant fact, as it is in all affairs of life . . . . Lawyers, doctors, engineers and others who render professional services take into account the economic status of a client, patient or other patron. If an adequate recovery for the plaintiff in a personal injury case would wipe the defendant out financially, can it be said that this fact is not relevant? Why should an insurance carrier get the benefit of the jury's thinking the defendant is unable to pay at all or to pay full damages? Why should a plaintiff in such a case be denied his full remedy if the insured has paid for protection against his negligence?" (Green, 1954, pp. 162–163)

Others suggest that, given the prevalence of insurance, jurors already assume that the parties carry liability insurance, thus obviating the need for the protections afforded by the insurance exclusionary rule (Barkey, 1969; Fannin, 1963). Indeed, data gathered by Guinther (1988) showed that nearly two thirds of jurors made that assumption, although few said that it had an impact on their awards. Still others (e.g., Gross, 1998) have suggested that the question of “Who pays?” may not matter much to jurors who should be able to determine what happened and how much compensation is appropriate without regard to that question.

### *Payment of Attorneys’ Fees*

The vast majority of personal injury litigation in the United States is conducted on a contingency fee basis whereby an injured person provides a percentage share of the judgment or settlement to his or her attorney. This arrangement, which allows injured people to pursue claims without concern about their ability to pay and without risking their assets (*Model Roles of Professional Responsibility, EC-5-7*, 1980), theoretically aligns the interests of client and attorney (thereby providing incentives to the latter) and democratizes access to the courts (Melamed, 2006). Reference to contingency fee arrangements during trial is generally eschewed under Federal Rule of Evidence 403 and state variants that preclude parties from introducing evidence with a probative value that is substantially outweighed by the danger of unfair prejudice or confusion of the issues.

Although jurors are never informed of the nature of contingent fee structures during the trial, many have general knowledge about them. According to Guinther (1988), 84% of jurors knew that plaintiffs typically pay a percentage of the award to their attorneys. Widespread media attention to apparent litigiousness of the past 25 years may have focused public attention on contingency fee arrangements. (Indeed, whereas early opposition to contingency fees was voiced primarily by members of the legal profession and focused on overzealous representation by plaintiffs’ attorneys and resulting violations on restraint appropriate to professionals, more recent and public criticism cites contingent fee arrangements as an ingredient of the so-called litigation explosion [Galanter, 1998].)<sup>2</sup> It has also been widely suspected that jurors take attorneys’ fees into account in determining damage awards, and data from several studies (described in more detail later in this article) confirm that suspicion (e.g., Diamond & Vidmar, 2001; Goodman, Greene, & Loftus, 1989; Guinther, 1988).<sup>3</sup>

---

<sup>2</sup> Public opinion about contingency fees is divided: On the one hand, it is perceived as encouraging the filing of frivolous lawsuits and requests for inflated awards; on the other hand, it is also credited with allowing ordinary (and especially poor) citizens to pursue legitimate claims (Roper Center, 1985).

<sup>3</sup> Anecdotal evidence from actual cases also shows that juries consider attorney fees. For example, Utah jurors’ concern about attorneys’ fees was a crucial determinant of their \$19.25 million award to the Procter & Gamble Company in a 2007 trial against four Amway distributors. Although the jury decided that Procter & Gamble suffered no damage from an Amway voice mail system rumor that Procter & Gamble’s logo (a bearded man-in-the-moon) symbolized Satan, it wanted to compensate the plaintiff for out-of-pocket legal expenses, including attorneys’ fees. Accordingly, jurors counted the number of Procter & Gamble lawyers in the courtroom and guessed how many hours each of them had worked over the decade in which the case was litigated. Estimates ranged from \$0 (from a juror who said he “stuck with zero” because he heard no evidence about attorneys’ fees) to \$50 million, averaging out to \$19.25 million (Foy, 2007).

### *Settlement Negotiations*

Significant controversy exists about what evidence should be admitted and how jurors should be instructed in lawsuits in which one or more jointly liable defendants have settled with the plaintiff. Rule 408 of the Federal Rules of Evidence prohibits the admission of evidence concerning the acceptance of “a valuable consideration” to either prove or invalidate a claim. Evidence concerning conduct or statements made in settlement negotiations is likewise excluded.

State courts have generally followed one of three approaches that vary in the transparency of the blindfold, although all have the goal to reduce prejudice to both the plaintiff and defendant (Sharo, 1987). Courts in some states inform the jury of the existence of a settlement without disclosing its amount (e.g., *Theobald v. Angelos*, 1963), reasoning that this strategy reduces speculation about why some defendants are absent. In a very few states, the blindfold is completely removed and jurors are informed about both the settlement and its amount (e.g., *Steele v. Hash*, 1963). The majority of state courts opt to blindfold jurors to evidence concerning both the existence of settlements and their amount, reasoning that access to this information could result in prejudice to either the plaintiff or the remaining defendant (e.g., *Brewer v. Payless Stations, Inc.*, 1982; *Peck v. Jacquemin*, 1985). The former may be harmed if jurors view the settlement as an admission of liability and assume that the responsible party has already settled; the latter may be harmed if jurors assume that settlement with one party implies that the nonsettling defendant is also liable (*Brewer v. Payless Stations, Inc.*). The amount of the settlement could have a similarly prejudicial effect on either the plaintiff or the defendant. A large settlement could suggest that the plaintiff has already received adequate compensation and cause jurors to return a smaller award than they otherwise might have. On the other hand, it could signal that the plaintiff’s claim is a substantial one and result in an augmented award (*Brewer v. Payless Stations, Inc.*).

### *Does Blindfolding Invite Speculation?*

Rules prohibiting reference to insurance, attorneys’ fees, and previous settlements, like the other prohibitions, are intended to remove from jurors’ purview information that lacks probative value and that may bias their judgments and waste their time. Although these rules have the potential to make trials more efficient and improve the accuracy of fact-finding, such distortion of reality (Gross, 1998) may work only if jurors refrain from speculating about topics not discussed during the trial or if they have accurate expectations and knowledge of the way that these factors might play out in the case.

In fact, during deliberations, jurors sometimes do remind their colleagues not to speculate about issues not presented as evidence (Diamond & Vidmar, 2001). Although these reminders may rein in public discussion of forbidden topics, it is unlikely that they can influence the internal thought processes of any particular juror. Jurors come equipped with expectations, values, and beliefs about the matters discussed at trial, and these preconceptions influence and alter the ways in which they react to the evidence (Carlson & Russo, 2001). In the absence of judicially provided information, jurors may rely on inconsistent or inaccurate knowledge or beliefs about the relevant legal rules. In addition, they may actively

engage in biased search strategies that favor reliance on information that is consonant with their initial, possibly flawed beliefs (Kunda, 1990; Kunda & Sinclair, 1999) and have difficulty setting aside these biases (Moran & Cutler, 1991). In such instances, blindfolding may have unintended negative consequences. Indeed, there is a certain irony inherent in attempts to blindfold the jury: Information is withheld from jurors to prevent it from adversely affecting their decisions, yet blindfolding is effective only if jurors desist from speculation and inference—and given the lack of clarity on many complex legal issues and jurors' natural tendencies to make sense of these complexities, both speculation and inference are likely.

### *Empirical Evidence of Discussion on Forbidden Topics*

Do jurors ruminate about the issues on which judges are typically silent? Empirical research on jury decision making conducted since Kalven's time has documented the fact that, when blindfolded, jurors are indeed likely to discuss so-called "silent" or "forbidden" factors (Greene, 1989; MacCoun, 1993). For example, in a posttrial analysis of juries in 38 civil trials, Guinther (1988) discerned that 29% of jurors discussed the plaintiff's insurance and 13% said that they lowered their awards to reflect the fact that the plaintiff was insured. In interviews with 269 jurors from 36 different cases involving at least one business or corporate party, Mott, Hans, and Simpson (2000) ascertained that 85% of jurors reported discussion of attorneys' fees during their deliberations and 33% acknowledged that these discussions influenced their award decision making in some way. (Even this high percentage may underestimate the role of insurance in assessments of damages, because some jurors who do not share their beliefs with other jurors could still be influenced by their own sentiments and preconceptions about this issue.) In addition, Mott et al. found that 35% of jurors said they discussed the possibility that the defendant was insured, that some jurors increased their awards as a result, and that 15% mentioned discussing the plaintiff's insurance—all topics about which the evidence and the instructions were silent.

Mock jury research paints a similar picture. For example, Goodman et al. (1989) found that, when asked about the factors they considered in assessing damages, 20% of mock jurors in a wrongful death case said that they considered that attorneys' fees would need to be paid, and 12% mentioned that the plaintiff would need to pay taxes on the amount awarded in damages. Raitz, Greene, Goodman, and Loftus (1990) found that mock jurors who thought attorneys' fees were an important factor in assessments of damages (despite the absence of relevant information in the judge's instructions) said they augmented their preferred awards to offset payment to the attorney. After being exposed to an accident vignette, registered voters in Illinois were asked to assess damages (Diamond et al., 1989), and nearly one quarter of them spontaneously mentioned something about insurance.

In the most ambitious study to date, Diamond and Vidmar (2001) analyzed videotaped jury discussions and deliberations in actual trials as part of the Arizona Jury Project (an extraordinary research effort designed to test the implications of several jury-related reforms) and were able to determine not only how often these

silent factors were discussed but also exactly what jurors said about them.<sup>4</sup> For example, they determined that, in cases in which insurance was not mentioned during trial, jurors spontaneously raised that issue in 25 of 31 cases studied (80%). A common concern among these jurors was the desire to prevent double recovery in situations in which the plaintiff's medical costs may have already been covered. In addition, jurors often made pronouncements about the role of insurance in the case based solely on their own previous experiences with casualty insurance.

In terms of attorneys' fees, Diamond and Vidmar's (2001) data indicate that they were discussed in 33 of 40 deliberations studied (83%) and in an additional three cases were commented on after the jury had reached its verdict. In most instances, however, comments were brief and perfunctory, and jurors did not indicate how their verdict preferences would be affected by their thoughts about attorney fees.

Lacking instruction about insurance and attorneys' fees, jurors in the Arizona Jury Project were often unable to know how to consider the proclamations and speculations of their fellow jurors on these issues. Should they accept them, reject them, or pay them no heed? Obviously, this question is answered differently by different jurors and points to an underlying concern about blindfolding: When jurors make different assumptions about the role of these factors in assessing damages, the blindfold they wear may cause disparity across verdicts and damage awards in comparable cases.

Although these studies provide evidence that at least some jurors talk about matters on which they receive neither evidence nor instruction, the previously cited studies raise other important questions as well. For example, to what extent are the discussions of silent factors related to the jury's ultimate damage award? Do they influence the resulting damage awards in any meaningful way, or are they merely throwaway comments that do not contribute substantively to jurors' analyses and judgments? Previously conducted studies are not able to answer these questions. Although jurors questioned by Mott et al. (2000) reported that their juries talked about a particular issue, we have no way to assess how or whether that discussion affected their judgments. (Even members of the same jury did not always agree about the importance of specific factors in guiding their group's decision making.) Also, although videotaped analyses of actual midtrial discussions and deliberations conducted as part of the Arizona Jury Project were able to document the prevalence and content of jury discussions on particular topics, they provide no quantifiable data to gauge the impact of these discussions on the resulting damage awards. Although past studies have provided highly useful data on the frequency of jurors' discussions on silent factors and important insights into the nature of these discussions, no research to date has quantified the relationship between the frequency of discussions about silent factors and the resulting jury damage awards. The present study was conducted with this objective in mind.

---

<sup>4</sup> In 1995, the Arizona Supreme Court instituted a policy that allowed jurors to discuss the evidence among themselves before the conclusion of the trial. An evaluation of that reform is presented elsewhere (Diamond, Vidmar, Rose, Ellis, & Murphy, 2003; Hannaford, Hans, & Munsterman, 2000). The data reported by Diamond and Vidmar (2001) describe jury references to silent factors made during these midtrial discussions as well as during deliberations.

### The Present Study

The specific purposes of this study were to (a) assess the frequency and nature of mock jurors' comments about four issues that received no mention in the trial of an automobile negligence case but that were likely to be on jurors' minds (viz., insurance carried by the plaintiff, insurance carried by the defendant, attorneys' fees, and previous settlements with other defendants);<sup>5</sup> (b) determine correlations between the frequency of those comments and the jury's damage award; (c) compute the amount of variance in jury damage awards attributable to discussions of these forbidden topics; and (d) determine whether the frequency of discussion of forbidden topics is affected by the nature of the evidence presented during the trial.

Although discussion of so-called forbidden topics can undoubtedly affect liability decisions as well as damages (e.g., jurors may be more likely to find in favor of a sympathetic plaintiff if they believed that the defendant was insured and could compensate the plaintiff for his or her injuries), we opted to examine their influence only on jury damage awards. We did so for two reasons. First, some data suggest that these topics are more likely to emerge in discussions of damages than of liability. For example, Diamond and Vidmar's (2001) analyses of actual deliberations showed that talk of insurance occurred almost exclusively in discussions of damages rather than liability. Damage awards are obviously more variable than yes–no liability judgments, so deliberations on the former are more wide ranging and speculative than on the latter and, apparently, also more likely to include mention of forbidden topics. Second, because our main concern was in assessing the relationship between discussion of forbidden topics and the resulting verdict (rather than documenting the existence of discussion), we felt justified in

---

<sup>5</sup> These particular issues were chosen for various reasons, including the presence of ongoing debate about the appropriateness of jurors' hearing about these categories of evidence, researchers' previous assessment of the frequency of discussion of these topics, and the particular facts inherent in the case we simulated. Thus, we examined jurors' discussions about insurance because although nearly all judges seem to agree that this issue has no probative value and could bias jurors' decision making, some commentators criticize that view, positing that mention of insurance may have little direct effect (Gross, 1998). In addition, many researchers (e.g., Broeder, 1959; Diamond & Vidmar, 2001; Guinther, 1988; Hans, 2000; Hans & Ermann, 1989) have examined jurors' willingness to discuss insurance issues, but none has associated those discussions with resulting damage awards. We opted to include attorneys' fees in our analysis because it has been widely presumed that jurors consider attorneys' fees (Diamond & Vidmar, 2001) and because many other researchers have assessed the frequency of discussion on this topic (e.g., Diamond & Vidmar, 2001; Guinther, 1988; Goodman et al., 1989; Hans, 2000; Raitz et al., 1990), although not the impact of those discussions on subsequent awards. Finally, we considered discussions about prior settlement with other parties to the case because of the particular facts of our simulation (i.e., we wondered to what extent mock jurors would focus on the role of defendants that previously settled with the plaintiff in an automobile negligence case—a construction company that had established a work site and the highway department that directed motorists through a construction zone where the accident occurred—rather than on the role of the defendant truck driver whose actions resulted in a collision with the plaintiff's vehicle). Other issues on which jurors are blindfolded—including the facts that personal injury awards are typically not subjected to taxation (Stewart, 1997) and that damage awards in antitrust cases are commonly trebled (*Pollock & Riley, Inc. v. Pearl Brewing Co.*, 1974)—could also influence their determinations of damages, of course.

focusing only on that part of deliberations—namely, the decision about damage awards—that would generate the most discussion of these topics.

The present study, of which the analysis of deliberations was a crucial part, involved the simulation of an automobile negligence trial (based on facts of an actual case). In addition to the content of the deliberations, it examined the effects of variations in the evidence presented at trial on damages verdicts (whether compensatory damages should be awarded to the plaintiff and, if so, in what amount). In particular, it asked whether jurors could correctly compartmentalize their use of trial-related evidence so that their decisions about damages are informed, as the law intends, only by evidence relevant to the nature and severity of the plaintiff's injuries and not by the nature of the defendant's conduct. Accordingly, we manipulated the severity of those injuries and the reprehensibility of the defendant's behavior and evaluated jury verdicts on damages, as well as the content of their jury deliberations. In terms of the damage awards themselves, on the basis of previous research showing that judgments about compensation are strongly related to the nature of the plaintiff's injuries and losses (Bovbjerg, Sloan, Dor, & Hsieh, 1991; Vidmar, Gross, & Rose, 1998) but that jurors also consider the blameworthiness of the defendant (Chapman & Bornstein, 1996; Feigenson, Park, & Salovey, 1997), we suspected that awards would be affected by both the severity of the plaintiff's injuries and the reprehensibility of the defendant's conduct.

Mock jurors heard an audiotaped presentation of opening statements, trial testimony that included the variations in evidence, closing arguments, and jury instructions. They were instructed to assess the liability of the defendant truck driver and, if appropriate, to determine a damage award for the plaintiff injured in the accident. The jury deliberations were videotaped and subjected to content analysis.

### *Hypotheses*

There were four specific hypotheses about the relationship between the frequency of jurors' discussions of forbidden topics and their subsequent damage awards. The hypotheses were predicated either on existing empirical findings or on assumptions underlying legal rules.

*Hypothesis 1: The more frequent the discussions concerning the plaintiff's insurance status, the lower the jury's damage award.* According to Diamond and Vidmar's (2001) analysis, the insurance issue that most concerned Arizona jurors was whether some or all of a plaintiff's medical costs had already been covered. Jurors frequently voiced concern that the plaintiff may have already received compensation for his or her injuries and should not be overcompensated. In nearly 40% of the Arizona cases, at least one juror spontaneously mentioned the prospect of double recovery or argued that the plaintiff should not be awarded full compensation because insurance had probably already covered some costs. Considering these findings along with data showing that jurors are skeptical about plaintiffs' motives in suing and generally suspicious about the legitimacy of their claims (Hans & Lofquist, 1994), we hypothesized that they would want to avoid double recovery for

the plaintiff and thus would likely advocate for a smaller award when they believed that the plaintiff was insured.

*Hypothesis 2: The more frequent the discussions concerning the defendant's insurance status, the higher the jury's damage award.* In theory, a jury's damage award should be unrelated to the defendant's insurance status. However, the insurance exclusionary rule exists because it is assumed that jurors will render larger damage awards when they believe that defendants are protected by insurance. Some researchers (e.g., Bornstein, 1994; Hans, 2000) have discerned that jurors' preconceptions and expectations concerning defendants' ability to pay do, indeed, influence jurors' assessments of damages, and Diamond and Vidmar's (2001) filmed jury deliberations showed that jurors will raise their awards in response to others' observations that the defendant's insurance company would pay. Given that most jurors assume that civil defendants are insured (Guinther, 1988), we suspected that, as the frequency of talk about the defendant's insurance status increased, so too would mention of the presumptions that he was insured and that his insurance policy would compensate the plaintiff, resulting in little financial damage to the defendant himself. Larger awards would result.

*Hypothesis 3: The more frequent the discussions of attorneys' fees, the higher the jury's damage award.* Diamond and Vidmar (2001) found that many jurors are familiar with contingency fee arrangements that lawyers make with plaintiffs and, although jurors work to avoid overcompensating plaintiffs, they also strive to provide full and fair compensation to plaintiffs whom they believe are deserving (Greene & Bornstein, 2003). Fully compensating a deserving plaintiff can require augmenting an award to pay to cover the cost of that person's attorney. Diamond and Vidmar described deliberations in which jurors were explicit in justifying a higher award because of the fee that the plaintiff's attorney would extract. Raitz et al.'s (1990) simulation data showed that jurors who considered attorneys' fees also increased their awards to cover these fees. Thus, we reasoned that the more often jurors discussed these fees, the more successful they would be at persuading fellow jurors that the plaintiff's attorney would need to be paid from the damages awarded and that to provide full compensation to the plaintiff, the award would need to be augmented to offset this expense.

*Hypothesis 4: The more frequent the discussions about the plaintiff's previous settlements with other defendants, the lower the damage award.* As noted, jurors are often suspicious of plaintiffs and work fervently to avoid overcompensating them (Hans, 2000). Thus, we reasoned that, to the extent that jurors believed the plaintiff had already received some compensation from another source, they would feel less compelled to impose a large damage award against the remaining defendant.

There was also a hypothesis about the cumulative effect of these discussions on the final award:

*Hypothesis 5: References to forbidden topics explain only a small portion of the variance in jury damage awards.* We suspected that references to forbidden topics—revealing, as they do, how jurors grapple with legally inappropriate concepts they deem relevant—would nonetheless explain only a small part of the variance in damage awards. As Diamond and Vidmar (2001) noted, jurors in their study spent only a small fraction of their time talking about these issues. The vast majority of their discussion focused on sorting out competing theories presented during the trial and applying the jury instructions to their interpretations of the evidence.

Finally, although we examine whether discussion on forbidden topics is influenced by evidence of injury severity and defendant conduct, we were not able to formulate a priori predictions about how those variations in the evidence would affect the likelihood of discussion. One possibility is that, when the damage award is likely to be high (i.e., injuries are severe and the defendant has acted reprehensibly), jurors may talk about ways to legitimize a large compensatory damage award by tacking on additional monies and may ponder the forbidden topics in that analysis. On the other hand, their attention to the severity of the plaintiff's injuries and the reprehensibility of the defendant's conduct may essentially trump concerns about lower order variables such as insurance and attorney fees.

## Method

### *Participants*

Participants were 561 jury-eligible adults drawn from the population of a moderately sized city in the western United States. The sample included a nearly equal number of men (51%) and women (49%), with an age range of 18–87 years ( $M = 45.42$ ;  $SD = 7.22$ ). Participants were recruited through both print and radio advertisements. Ads were placed in local newspapers, periodicals, and weekly entertainment guides and were also broadcast as public service announcements on local radio stations. Respondents volunteered to participate by contacting our office. They were screened for jury eligibility and selected if they met three criteria: (a) They were either registered to vote or had a valid state driver's license, (b) they were able to write and understand English, and (c) they were at least 18 years old. Participants were paid \$25 for their involvement in the study.

There were 90 juries in this study. Liability judgments and damage award assessments were collected and are reported from each jury as a whole, not from individual jurors; therefore, the initial sample size was 90. However, for reasons previously mentioned, we were interested in whether discussion of forbidden topics affects the determination of damages rather than liability judgments, so we opted to conduct detailed deliberation analyses of only those juries that found the defendant liable and deliberated to a verdict on damages ( $n = 69$ ). Unfortunately, because of technical problems related to videotaping, we were unable to analyze the complete deliberations of 13 of those juries. Thus, we report quantitative data regarding liability and damage awards from all 90 juries but the content of jury deliberations regarding damages in only 56 juries.

### *Design*

This was a 2 (injury severity: mild vs. severe)  $\times$  3 (defendant conduct: highly reprehensible, mildly reprehensible, no conduct evidence) between-subjects design. There were initially 15 juries in each of six conditions.

### *Materials*

We presented a 10-page, single-spaced trial summary, along with audiotaped testimony from an actual automobile negligence case, *Jeansonne v. Landau* (1997). The case was chosen for its typicality, and it involved: (a) only one plaintiff, (b) a noncorporate defendant, and (c) a plaintiff who did not bear any responsibility for the accident (i.e., no comparative negligence). The trial summary described a situation in which an automobile driver (plaintiff) sued the driver of a semitruck (defendant) for negligence and requested compensatory damages.

The facts of the case are as follows: While driving on a busy interstate highway on the outskirts of a large urban city, the truck driver was forced to negotiate difficult road conditions created by a construction area. The construction zone forced drivers in four lanes of the highway to merge into two lanes, and those lanes were diverted around the construction site. In this area of the highway, the defendant lost control of his truck and crashed through a guardrail. The cab of the semitruck crossed into the oncoming lanes of traffic and struck the plaintiff's automobile, causing injuries to the plaintiff.

There were two versions of evidence concerning the severity of injury to the plaintiff. In the mild injury condition, the plaintiff had sustained minor brain trauma resulting from a concussion, soft tissue injuries to the neck, and bruised ribs. No significant cognitive impairment was present. The plaintiff missed 2 months of work recovering from this injury. In the severe injury condition, the plaintiff had sustained a closed head injury with subdural hematoma and cerebral edema, left femur fracture, two fractured left ribs, posttraumatic aortic perforation, and pneumonia and adult respiratory distress syndrome. Although no significant cognitive impairment was noted at discharge, the plaintiff missed 7 months of work recovering from his injuries.

There were three versions of evidence concerning the reprehensibility of the defendant's conduct. In the summary that conveyed high reprehensibility on the part of the defendant, an accident reconstructionist testified that the defendant had been traveling approximately 10 miles per hour (MPH), or approximately 16.10 kilometers per hour (KPH) over the speed limit before and after entering the construction zone and that he failed to utilize his available engine retarder. An eyewitness testified that she had seen the defendant make two abrupt lane changes just before entering the construction zone. The defendant's blood alcohol level was measured at .06. In the low-reprehensibility condition, the accident reconstructionist testified that the defendant had been going approximately 2 MPH (about 3.22 KPH) over the speed limit; the eyewitness reported seeing one lane change, and the blood alcohol test results were negative. A third version of the reprehensibility manipulation made no mention whatsoever of the defendant's conduct and served as a control condition. This situation would arise both in trials when liability is stipulated and in bifurcated cases when the jury's task is solely

to award damages and liability-relevant evidence is absent. Pretest data showed that the manipulations were perceived as intended. Theoretically, jurors with no evidence regarding the defendant's behavior would, in comparison with those who had such evidence, be unable to factor aspects of the defendant's behavior into their calculation of damages.

The trial summary was scripted, and different actors were recruited to play various roles (i.e., police officer, eyewitnesses, plaintiff, defendant, expert accident reconstructionists, and medical experts) for recording purposes. Demonstrative evidence shown to jurors included photographs of the vehicles and accident site taken just after the accident occurred, a diagram of the accident scene, and a "day-in-the-life" videotape that showed the plaintiff's condition several months after he was released from the hospital. None of the forbidden topics that interested us—insurance, attorneys' fees, and settlement issues—were mentioned during the trial. Neither the plaintiff nor the defendant presented a proposal or counterproposal for damages because such recommendations can have a variety of uncontrolled effects on jurors, serving as a standard for comparison, anchoring the award, and altering perceptions of the severity of the injury and of the range of acceptable values (Marti & Wissler, 2000).

At the conclusion of the trial, the judge presented standard jury instructions on the burden of proof, negligence, and compensatory damages, along with a jury verdict form. The jury instructions were presented in both audiotaped and written format.<sup>6</sup> As in an actual trial, jurors were instructed about what information constituted evidence and what did not; they did not receive a separate instruction forbidding them from discussing information that had not been presented. The audiotaped version of the case facts lasted approximately 30 min.

The jury verdict form asked juries to reach a unanimous decision on this question concerning liability for negligence: "Was the defendant negligent?" (yes/no). (We did not ask this question of participants who received no evidence concerning the reprehensibility of the defendant's conduct.) If the defendant was deemed negligent, juries were then asked whether damages should be awarded and, if so, in what amount. The latter question read: "On a scale from 1–11, state the total amount of damages that the plaintiff should receive." Because neither the plaintiff nor the defendant offered proposals for damage awards, we provided dollar amounts on a scale that was approximately intervallic when converted to logarithmic

---

<sup>6</sup> The jury instructions were as follows: Negligence means a failure to do an act that a reasonably careful person would do, or the doing of an act that a reasonably careful person would not do, under the same or similar circumstances to protect others from bodily injury. The burden of proof is on the plaintiff to establish his case by a preponderance of the evidence. A fact or proposition has been proved by a "preponderance of the evidence" if, considering all the evidence, you find it to be more probably true than not. If a party fails to meet his or her burden of proof or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party. In determining damages, you should consider the following: any noneconomic losses or injuries incurred to the present time or that will probably be incurred in the future, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life; any economic losses incurred to the present time or that will probably be incurred in the future, including loss of earnings or impairment of earning capacity; and reasonable and necessary medical, hospital, and other expenses.

values (1 = *nothing*; 2 = *\$1–\$12,000*; 3 = *\$12,001–\$25,000*; 4 = *\$25,001–\$50,000*; 5 = *\$50,001–\$100,000*; 6 = *\$100,001–\$250,000*; 7 = *\$250,001–\$500,000*; 8 = *\$500,001–\$1 million*; 9 = *\$1 million–\$2 million*; 10 = *\$2 million–\$4 million*; 11 = *more than \$4 million*; Stevens, 1958). Jurors were asked nothing about the forbidden topics on their verdict form.

### *Procedure*

As participants arrived at the research office at their appointed time, they were given an informed consent form to complete, alerting them to the fact that their deliberations would be videotaped. During the evidence phase of the study, all the mock jurors heard the trial summary and viewed the evidence as a group. After the trial evidence had been presented, participants were randomly assigned to a jury. (Although jury size varied from 5 to 8 individuals, there were no effects of jury size on any of the reported analyses.) The juries met in conference rooms behind closed doors. Videocameras were mounted on the walls of the conference rooms and microphones were placed on the tables. Jurors were instructed to deliberate for up to 1 hr, reach unanimous decisions on the issues of liability<sup>7</sup> and damages, and record those decisions on the jury verdict form.

## Results

We first report quantitative jury verdict data related to judgments of liability and damages.<sup>8</sup> We then provide quantitative analyses of the deliberation content and of the relationship between discussion of forbidden topics and damage awards. We end this section by describing a qualitative analysis of the content of the discussions about forbidden topics.

### *Jury Verdicts on Liability and Damages*

Damage awards are assessed only by juries who had previously determined that a defendant is liable for negligence. On that latter issue, 50% (15 of 30) of the juries with evidence of mildly reprehensible conduct by the defendant and 93% (28 of 30) of juries with evidence of highly reprehensible conduct deemed him negligent. The data related to damage awards thus come from these 43 juries, along with the 30 juries who had no evidence related to the defendant's conduct. Of these, 95% (69 of 73 juries) determined that it was appropriate to award damages (including all juries who had evidence related to the defendant's conduct and 26 of 30 juries who did not).

The mean damage award from these 69 juries was 6.59 on an 11-point scale, which translates to between \$100,000 and \$500,000 ( $SD = 2.06$ ). We analyzed the impact of the variable manipulations on the amount of damages awarded to the plaintiff using a  $2 \times 3$  analysis of variance (ANOVA) and found effects of injury

---

<sup>7</sup> Jurors without evidence related to the defendant's conduct were obviously not asked to determine liability; their deliberations focused exclusively on damages. This condition was included as a control, providing a way to assess how strongly the conduct evidence influenced damage awards when it was provided in other conditions of the study. The absence of deliberation about liability could potentially affect the way that forbidden factors are mentioned in deliberations about damages.

<sup>8</sup> A more detailed treatment of these data is provided by Greene, Johns, and Smith (2001).

severity:  $F(1, 64) = 54.92, p < .01, \eta^2 = .47$ ; and defendant's conduct,  $F(2, 64) = 8.32, p < .01, \eta^2 = .21$ ; as well as a significant Injury  $\times$  Conduct interaction,  $F(2, 64) = 3.63, p < .05, \eta^2 = .10$ . These data are shown in Table 1.

Post hoc analyses (using honestly significant difference pairwise comparisons) showed that, although awards were highest in the severe-injury condition, there were no differences in mean awards as a function of the defendant's conduct in the severe-injury conditions. Instead, the effects of the defendant's conduct were apparent in the mild-injury conditions; here, jurors with no evidence regarding the defendant's actions awarded approximately \$25,000 in damages, whereas jurors who heard evidence about the defendant's conduct (regardless of its nature) awarded approximately \$100,000 in damages. These data suggest that any information whatsoever connecting the defendant's actions to the plaintiff's injuries establishes justification in jurors' minds for a moderately substantial damage award.

### *Quantitative Analyses of Deliberation Content*

All of the juries included in analyses of the deliberations had determined that the plaintiff was entitled to compensatory damages. The average length of deliberation was 27.50 min ( $SD = 16.50$ ); the shortest deliberation lasted only 5 min and the longest lasted 71 min. No correlation was found between the length of the deliberation and the amount of damages awarded.<sup>9</sup>

Videotapes of the jury deliberations were first viewed and coded by one of three trained coders who worked independently. Initial coding involved scoring the number of times that each of the following topics was mentioned: attorneys' fees, plaintiff's insurance coverage, defendant's insurance coverage, and pretrial settlements. As in other studies (Ellsworth, 1989; Horowitz & Kirkpatrick, 1996), we used a study-specific coding scheme to render our analysis more objective. In particular, we used the concept of an "idea unit": an entire utterance spoken by one juror on one topic. If a second juror interrupted the first juror, then the second jurors' utterance would count as a second idea unit. If the first juror responded, his or her response would be counted as a third idea unit. The utterances could be of any length as long as they focused on only one topic and were spoken by only one juror. To eliminate issues of interpretability, only explicit comments about the four factors were counted. Implicit or unclear comments that may (or may not) have been referring to one of the four topics were not included. (Using this criterion, we undoubtedly underestimated the number of references to the topics of interest. Jurors could have alluded to any of these four topics or used terminology that was slightly different from what we used, and in neither case would we have counted their comments.) Each idea unit was attributed to a specific juror. The damage award amounts resulting from each jury deliberation were also noted on the coding form.

A subset of the deliberations was coded by two coders to allow assessment of consistency. We conducted duplicate coding of 9 of the 56 jury deliberations (16%) and then calculated Guttman-Cronbach's alphas. This analysis revealed alphas of 0.85 for plaintiff's insurance issues, 0.98 for defendant's insurance issues, 0.83 for attorneys' fees, and 0.78 for pretrial settlements. These high

---

<sup>9</sup> However, as a cautionary measure, we covaried length of deliberation out of the hierarchical multiple regression model (explained later) to correct for the range in length of deliberations.

Table 1  
*Mean Jury Damage Awards (and Standard Deviations) as a Function of Evidence Presented*

Injury severity	<i>M</i> (and <i>SD</i> ) for defendant's conduct		
	No conduct	Mildly reprehensible	Highly reprehensible
Severe ( <i>M</i> = 7.92)	7.79 <sub>a</sub> (1.12)	7.33 <sub>a, b</sub> (1.03)	8.64 <sub>a</sub> (1.39)
Mild ( <i>M</i> = 5.25)	3.83 <sub>d</sub> (2.04)	5.78 <sub>b, c</sub> (1.39)	6.14 <sub>b, c</sub> (1.23)
Total ( <i>M</i> = 5.96)		6.40	7.39

*Note.* Adapted from "The Effects of Defendant Conduct on Jury Damage Awards," by E. Greene, M. Johns, & A. Smith, 2001, *Journal of Applied Psychology*, 86, 228-237. *N* = 69 juries. Ratings were on an 11-point scale on which 1 = *nothing* and 11 = *more than \$4 million*. Means with subscripts in common are not significantly different,  $p < .01$ .

numbers suggest that coders were quite consistent in noting the instances of discussion on topics of interest to the study.

### *Frequency of Discussion of Forbidden Topics*

Taking the idea unit as the standard of measurement, we calculated (per deliberation) the mean number of references to each of four forbidden topics, along with the standard deviation and range. For plaintiff's insurance, the mean was 6.61 ( $SD = 5.92$ , range = 0–25). Defendant's insurance was discussed an average of 4.61 times ( $SD = 6.48$ , range = 0–30). The mean for attorneys' fees was 4.95 ( $SD = 8.35$ , range = 0–40), and pretrial settlements were discussed 1.27 times on average ( $SD = 3.34$ , range = 0–11).<sup>10</sup>

Another way to quantify jury discussion is to determine the percentage of juries that discussed each topic: 84% of juries mentioned something about plaintiff's insurance, 75% discussed the defendant's insurance, 48% talked about attorneys' fees, and 23% talked about pretrial settlements. Only two juries (4%) avoided discussion of any of these factors during their deliberations. These data provide more evidence that jurors do indeed discuss forbidden topics when we expect them not to.

It was not uncommon for a jury to discuss multiple factors during the course of their deliberations. Summing across the four factors and looking at the 54 juries in which these issues were raised, we found that 9% of juries discussed only one forbidden topic, 24% discussed two topics, 54% discussed three topics, and 13% discussed all four factors.

### *Relationships Between Forbidden Topic Discussions and Damage Awards*

The novel contribution of this study is its assessment of the extent to which discussion of forbidden topics is related to and predictive of the jury's verdict on

<sup>10</sup> Discussions of these forbidden topics were positively skewed and significantly non-normally distributed (Kolmogorov–Smirnov test statistics  $< 0.43$ ,  $ps < .01$ ). These distributions did not become normalized by inverse, logarithmic, or square-root transformations. Thus, the non-normally distributed forbidden topics were used in the subsequent analyses.

damages. Thus, in this set of analyses, we examined the extent to which discussions about these topics correlated with the size of juries' compensatory damage awards after controlling for the effects of the independent variables and for the length of time spent in deliberation. We also examined whether discussions of these topics were predictive of the final award.

Pearson product-moment correlation analyses examined relationships between the number of comments made by jurors on each of the four silent factors and the amount of their jury's compensatory award. Results are shown in Table 2.

We predicted that the more frequent the discussions about the plaintiff's insurance status (Hypothesis 1) and about his settlements with other defendants (Hypothesis 4), the lower the damage awards. We had also predicted that the more frequent the discussions about the defendant's insurance status (Hypothesis 2) and attorneys' fees (Hypothesis 3), the higher the award. Three of the four correlations were in the predicted direction and were of modest size: The more frequent the references to plaintiff's insurance, the lower the award (partial  $r = -.18$ ,  $p = .20$ ). The more frequent the references to attorneys' fees and defendant's insurance, the higher the awards (partial  $r = .23$ ,  $p = .11$ , for attorneys' fees; and partial  $r = .18$ ,  $p = .20$ , for defendant's insurance). None of these correlations was statistically significant, however. The other factor we examined—references to pretrial settlements—also did not correlate significantly with the jury's damage award (partial  $r = -.01$ ,  $p = .96$ ).

The final hypothesis was that discussion about forbidden topics would explain only a small portion of the variance in damage awards (Hypothesis 5). To assess this possibility, we conducted a hierarchical multiple regression to examine the extent to which discussion of the forbidden topics could predict the size of the jury award, after controlling for the manipulated variables, their interaction, and the length of the deliberation.

The manipulated variables and length of time juries spent deliberating were entered into the first block of the regression. Taken together, these variables explained a significant amount of the variance in award size, adjusted  $R^2 = .55$ ,  $F(4, 50) = 15.17$ ,  $p < .001$ . Evidence of the plaintiff's injury, the defendant's conduct, and time deliberating accounted for 55% of the variance in award size. The interaction terms

Table 2  
*Mean Jury Damage Award, No. of Times per Jury Silent Factors Were Discussed (and Standard Deviations), and Partial Correlations*

Variable	<i>M</i>	<i>SD</i>	1	2	3	4	5
1. Damage award	6.85	2.05	—				
2. Attorney fees	4.95	8.35	.23	—			
3. Plaintiff insurance	6.61	5.92	-.18	.11	—		
4. Defendant insurance	4.61	6.48	.18	-.06	-.05	—	
5. Pretrial settlements	1.27	3.34	-.01	.08	-.12	.09	—

*Note.*  $N = 56$  juries whose deliberations were analyzed. No correlations were statistically significant ( $p < .05$ ). Ratings for damage award were made on an 11-point scale ranging from 1 = *nothing* to 11 = *more than \$4 million*. Partial correlations are between size of damage award and frequency of discussion about silent factors after controlling for injury severity, defendant conduct, and length of jury deliberation.

for the manipulated variables were entered into the second block of the regression. After controlling for main effects and deliberation length, we found that the interaction terms did not significantly affect award size,  $\Delta R^2 = .04$ ,  $F(2, 48) = 2.38$ ,  $p = .10$ . Next, the forbidden topics were entered into the third block of the regression. After controlling for the manipulated variables, the interactions between them, and time spent in deliberation, we found that the forbidden topics did not significantly affect award size,  $\Delta R^2 = .03$ ,  $F(4, 44) = 0.81$ ,  $p = .52$ . They accounted for only 3% of the variance in award size after controlling for the plaintiff's injury, the defendant's conduct, and deliberation length. The only factor that approached statistical significance was reference to the plaintiff's insurance ( $\beta = -0.14$ ,  $p = .16$ ).<sup>11</sup> Last, three-way interaction terms between the manipulated variables and forbidden topics were computed and entered into the fourth block of the regression. After controlling for the manipulated variables, the interactions between them, time spent in deliberation, and the forbidden topics, we found that the three-way interactions between the forbidden topics, plaintiff injury, and defendant conduct did not significantly affect award size,  $\Delta R^2 = .05$ ,  $F(8, 36) = 0.61$ ,  $p = .76$ .

### *Exploratory Analyses*

Post hoc considerations led us to examine whether jurors were more likely to discuss the four forbidden topics as a function of the severity of the plaintiff's injury and the reprehensibility of the defendant's conduct. Because of the exploratory nature and the number of analyses being conducted, the alpha level was lowered to 0.01 to correct for possible Type I errors.

We conducted 2 (injury severity: mild, severe)  $\times$  3 (defendant conduct: highly reprehensible, mildly reprehensible, no conduct information) ANOVAs comparing the number of references to attorneys' fees, insurance, and previous settlements across conditions. The mean number of references to the forbidden topics in each of the six conditions is shown in Table 3. Only one ANOVA yielded a significant result: Injury severity affected references to attorneys' fees,  $F(1, 49) = 6.34$ ,  $p = .01$ ,  $\eta^2 = .12$ . Participants who had evidence of mild injuries ( $M = 8.19$ ,  $SD = 8.29$ ) discussed attorneys' fees more often than participants with evidence of severe injuries ( $M = 2.86$ ,  $SD = 5.13$ ). Similar ANOVAs for each of the other three forbidden topics were conducted, and none reached statistical significance. This finding suggests that the nature of the evidence did not affect references to pretrial settlements or the insurance status of either party.

### *Qualitative Analysis of Deliberation Content*

Our method of qualitative analysis was based on a grounded theory approach (Corbin & Strauss, 1990; Strauss, 1987). Although commonly used by sociologists, to our knowledge only one team of researchers has relied on grounded theory techniques to evaluate jurors' responses to trial-relevant evidence.<sup>12</sup>

---

<sup>11</sup> These statistically nonsignificant findings could be a by-product of insufficient statistical power (.53) and, thus, a Type II error.

<sup>12</sup> Ivkovic and Hans (2003) used it to describe jurors' responses to questions about their reliance on expert witnesses in civil trials and the factors that influenced their judgments of the experts' credibility.

Table 3  
*Mean No. (and Standard Deviations) of References to Four Forbidden Topics in Each Defendant Conduct × Injury Severity Condition*

Condition	<i>M (and SD) for defendant conduct</i>		
	No conduct	Mildly reprehensible	Highly reprehensible
Attorney fees			
Mild	0.91 (1.22)	13.17 (10.87)	10.50 (12.79)
Severe	2.83 (4.49)	3.25 (6.07)	2.50 (4.84)
Plaintiff insurance			
Mild	7.63 (4.06)	3.33 (3.93)	8.81 (6.68)
Severe	4.17 (1.94)	7.37 (5.92)	6.07 (7.86)
Defendant insurance			
Mild	1.91 (2.70)	5.50 (5.96)	4.36 (7.07)
Severe	5.17 (7.91)	5.62 (6.02)	5.71 (8.22)
Pretrial settlements			
Mild	0.27 (0.90)	4.00 (8.00)	0.50 (1.58)
Severe	0.00 (0.00)	2.25 (3.41)	1.43 (2.62)

We used the grounded theory approach to qualitatively analyze the comments jurors made during deliberations. This technique essentially “grounds” the coding and categorization scheme on participants’ own utterances, rather than relying on a set of preordained categories. Thus, we transcribed all idea units on each of the four relevant topics and then clustered all of the transcriptions on a given factor (e.g., attorneys’ fees), loosely categorizing and then recategorizing them several times according to the predominant theme of each passage. Conceptually similar comments were grouped together to form categories, allowing us to derive a variable number of mutually exclusive categories, on the basis of jurors’ own comments, as the preferred categorization scheme.

Using these procedures, we identified five categories of statements regarding the plaintiff’s insurance, one category about the defendant’s insurance, three categories of statements about attorneys’ fees, and two categories regarding pretrial settlement issues. Even with repeated attempts at reclassification, we were unable to categorize a small number of idea units for each silent factor, so we clustered those statements into a miscellaneous category. Here we describe each of the categories or themes that emerged on these four forbidden topics, detail how many responses fell into each thematic category, and provide examples.

*Statements about plaintiff’s insurance.* Jurors had many different views of the possibility that the plaintiff was insured and had already been compensated for his losses. We were able to group 61% of these comments into one of five categories; despite repeated attempts at categorization, a relatively large percentage (39%) was unclassifiable. Of the comments that could be categorized: 43% advocated a reduction in the size of the damage award to avoid windfall profits to the plaintiff; 24% voiced a desire to be more fully informed about the plaintiff’s insurance so as to be able to render a more equitable damage award; 20% pertained to suggestions to increase the damage award to ensure that the plaintiff would be fully compensated (notwithstanding the likelihood of insurance); 8% included a statement about the societal costs of large damage awards on insurance companies and on other insured people and argued,

on this basis, for keeping the award in check; and 5% made some mention of a desire to increase the award to acknowledge the plaintiff's deservingness (notwithstanding the likelihood of insurance).

Representative examples of suggestions to decrease the award to reflect the plaintiff's own insurance (windfall avoidance) are as follows:

Juror 5: That was my question. How much does insurance pay for all these things. We're considering how much has already been paid.

Juror 4: Well, if he [plaintiff] has insurance, his insurance will cover it. If the defendant has insurance, the defendant's insurance will cover it so either way he's covered medically.

Juror 5: I want to change mine down then, because I was thinking about a coma, being hospitalized, and I was not thinking that insurance paid for that.

(Jury B3)

Juror 5: I'm sure he's [the plaintiff] probably insured.

Juror 8: Yeah.

Juror 5: So I'd hate to award him too high.

(Jury E2)

Statements expressing a desire to have more information about the plaintiff's insurance situation included these examples:

Juror 4: Yeah, they didn't say if he [plaintiff] was insured or not. That makes a big difference, if the insurance picks it up or if you have to pay for it out of your pocket.

(Jury G8)

Juror 6: You know what I don't like about this though, they never said if his [the plaintiff's] expenses are paid [by insurance]. That's not fair to us as a jury.

(Jury D8)

Comments representative of the desire to increase the award to ensure that the plaintiff would be fully compensated include:

Juror 2: I still think he [the plaintiff] should be compensated for his medical bills. Now, if insurance is going to pay for medical bills, then no; but if he has to pay his own medical bills . . . a lot of people don't have insurance.

(Jury J6)

Juror 2: Who knows what this guy is up against, he may not have adequate insurance to cover this accident, or even if he does, we know that he is probably going to pay for it in higher premiums later . . .

Juror 5: So I guess I'm assuming worst case that nobody's [insurance is] paying for anything.

Juror 2: I could go with five [on the damage scale]. I'm a little hesitant, but because it is so vague, we don't know what kind of insurance the plaintiff has, so we'll give him the benefit of the doubt.

(Jury J3)

Among the comments about societal effects of large damage awards (i.e., the possibility that insurance companies raise their rates to recover these losses) was the following:

Juror 2: As years go by, people get awarded more and more and more. And insurance rates go up to accommodate that.

(Jury G6)

Finally, a small percentage of comments argued for increasing the damage award to reflect the plaintiff's deservingness and an associated lack of sympathy for insurance companies. For example:

Juror 1: He [the plaintiff] deserves a lot. I could care less about the insurance company.

Juror 5: I don't have sympathy for the insurance companies. I have sympathy for the average person that has to pay these astronomical medical bills and high insurance company premiums.

Juror 8: Let's face it, insurance companies are out to make money. In the meantime, they have to compensate somebody. Like with my stolen jeep. I was getting so sick of them because you could tell all they cared about was making money. They want to make money. Maybe it's time for them to pay out a little bit.

(Jury A3)

*Statements about defendant's insurance.* One theme predominated discussions about the possibility that the defendant was insured; namely, that he would not be personally responsible for paying the damages awarded to the plaintiff (72% of comments about the defendant's insurance were of this nature). A representative example is as follows:

Juror 4: Who's gonna pay that [award settlement]?

Juror 2: The insurance company.

Juror 5: He [the defendant] is not going to pay. His insurance will probably have to pay . . . whoever he's insured through with the truck.

Juror 6: As it were, it's more than likely that Mr. Landau's not gonna pay that out of his own pocket, being a trucker.

Juror 2: We don't know. We're assuming he has insurance.

Juror 5: Yeah, I'm sure he would. He wouldn't be uninsured if he was driving a rig.

(Jury G6)

Among the unclassifiable comments (28% of the references to defendant's insurance) were questions about caps on liability insurance coverage and the possibility that, if the plaintiff had already been compensated by his own insurance policy, his company would try to recoup its losses by going after the defendant's insurance.

*Statements about attorneys' fees.* Three themes emerged from our analysis of comments about attorneys' fees, and 88% of all statements about this topic were attributed to one of these themes: suggestions to increase the award to cover attorney's fees (58% of classifiable statements), statements and questions about what percentage of an award goes to the attorney (33% of classifiable statements), and recommendations to not consider attorney fees in determination of damages (9% of classifiable statements). Twelve percent of statements that mentioned attorneys' fees could not be included in any of these categories.

A large percentage of statements about attorneys' fees argued for increasing the amount of the award to cover these fees. For example:

Juror 4: Well, what you have to consider, too is that the lawyer gets a third. So you have to add on to really award him [the plaintiff].

Juror 7: Like I said, if we want the plaintiff to get the full \$100,000, we have to award him a lot higher than that, so he will get the complete award himself, you know? And the lawyer will get his part.

Juror 6: I was much lower, but these people persuaded me to go higher because I didn't take into consideration who else gets their hands in there before the poor guy gets anything at all.

(Jury G8)

Juror 4: Shouldn't we factor in also what his lawyer's going to get? . . . If we're saying . . . compensate him justly, you do have to consider that.

Juror 4: The lawyer gets a percentage of everything he [the plaintiff] wins.

Juror 5: And it's generally about 30%.

Juror 1: Did you want to increase yours then?

Juror 4: Yeah. I want mine up at least a thousand . . . \$150,000.

(Jury G4)

Representative examples of statements about how much (or what percentage) of the award is paid to attorneys are as follows:

Juror 6: Well, first of all, you gotta halve what we give him because his lawyers get half right off the top.

Juror 4: No, they don't get half. They get one third.

Juror 6: I think lawyers get half.

Juror 4: No. One third.

Juror 1: I think it depends on the lawyer, because I work for a company where a lot of people sue, and they usually say the lawyer gets like 40%. But I was always under the impression 50% myself.

Juror 6: Well, let's just say at least 40%. So he [the plaintiff] is not going to see 40% of whatever we give him anyway.

(Jury G6)

Fewer comments suggested that attorneys' fees should not be considered when assessing damages because that could lead to an excessive award. For example:

Juror 5: I felt like the \$50,000 to \$100,000 option [was reasonable] because I wasn't going to consider any attorney fees. I don't think we should try to factor that into our award . . . I don't think we should add more money on the award.

(Jury J5)

*Statements about pretrial settlements.* Pretrial settlements were discussed less often than the other factors we examined. When they were mentioned, discussion tended to focus on one of two concerns (61% of comments could be classified into one of these categories and 39% were unclassifiable): either that previous settlements were irrelevant to the task at hand—namely, determining a damage award to fully and fairly compensate the plaintiff (65% of classifiable comments were of this nature)—or that the award should be reduced because jurors assumed that the plaintiff had already been compensated by another party (35% of classifiable comments).

An example of the former:

Juror 7: We were not really given information one way or the other [regarding any pretrial settlements] so we have to decide on the information we have.

Juror 8: You are talking about there should be a straight settlement regardless [of any pretrial settlements].

(Jury A1)

An example of the latter:

Juror 4: I do think it makes a difference what he has been paid by the other companies, only because, to be fair to him is one thing. However, you don't turn around and turn him [the plaintiff] into king of the hill.

Juror 1: Right.

(Jury F5)

## Discussion

This study assessed the extent to which jury damage awards in a simulated automobile negligence case are influenced both by topics on which the court and the attorneys are silent and by the evidence to which jurors are exposed. In terms of the latter, mock juries heard evidence that a plaintiff's injuries were either mild or severe, and either they heard evidence about a defendant's conduct before the accident (i.e., conduct was either highly reprehensible or mildly reprehensible) or they heard no evidence about the defendant's conduct. We surmised that juries would, as is appropriate, determine damage awards in light of the severity of the plaintiff's injury, reasoning that more severe injuries entail higher costs to the injured party. We also reasoned that, although not instructed to do so, juries would consider the nature of the defendant's conduct in their assessment of damages.

Compensatory damage awards were generally higher in conditions involving severe injuries to the plaintiff and in conditions in which the defendant was depicted as acting in a highly reprehensible manner. When the plaintiff's injuries were only mild, jury damage awards were influenced by the nature of the defendant's conduct, however; here, any evidence of the defendant's wrongdoing resulted in higher awards than when no evidence was presented about his conduct. Thus, at least in some situations, the blameworthiness of the defendant is considered by juries in their determinations of damages.

With regard to the influence of topics on which judges and attorneys are largely silent, the study examined whether jurors might speculate about the role of the plaintiff's insurance, the defendant's insurance, the payment of fees to the plaintiff's attorney, and the fact that the plaintiff had previously settled with another defendant in their deliberations about compensatory damages. It also assessed the extent to which such speculation would inform the resulting damages verdict.

Analysis of 56 jury deliberations on damages indicated that these so-called silent factors were apparently relevant to many jurors and were indeed topics of discussion. Only 2 of the 56 jury deliberations did *not* include reference to any of these factors, and two thirds of the deliberations included reference to at least three of the four factors. These data challenge the assumption that if a judge is silent about a particular issue, jurors will also be silent. In fact, if jurors deem those topics relevant to their decision making or if they want to contemplate the potential relevance to their verdicts, they may raise these issues spontaneously.

What follows is typically some attempt to discern the relevant legal rule and, as illustrated by analysis of the content of the deliberations, the ensuing discussion sometimes involves speculation and proclamation by jurors who may or may not have accurate knowledge about that rule.

Most of the previous research on this topic has examined whether jurors discuss certain factors during their deliberations and what they tend to say about those factors. As in previous research, we examined and categorized the content of jury discussions regarding damages. We found, as did Diamond and Vidmar (2001), that mock jurors were more likely to discuss issues related to the plaintiff's insurance status than other forbidden topics (i.e., the defendant's insurance, attorneys' fees, and previous settlements). Indeed, 84% of the jury deliberations we examined made mention of the plaintiff's insurance status in discussions about damage awards. Three quarters of the jury deliberations included reference to the defendant's insurance status, nearly half mentioned something about fees that the plaintiff would need to pay his attorney, and nearly one quarter included comments about the existence of previous settlements between the plaintiff and other defendants.

Unlike other studies, the present effort was also able to quantify the relationship between these conversations and the resulting jury damage awards. We predicted that the more frequent the discussion about the plaintiff's insurance (Hypothesis 1) and previous settlements (Hypothesis 4), the lower the damage award; and the more frequent the discussion about the defendant's insurance (Hypothesis 2) and the need to pay attorneys' fees (Hypothesis 3), the higher the award.

After controlling for the effects of injury severity, defendant conduct, and deliberation length, we found that, although three of the four correlations between the frequency of discussion of a given factor and the size of the jury award were in the predicted direction, none was statistically significant. These results were somewhat surprising, given that approximately three fifths of the "idea units" expressed about attorneys' fees suggested that the award should be augmented to reflect the contingency fee agreement between the plaintiff and his attorney, and more than two fifths of comments about the plaintiff's insurance advocated for a reduction in damages to avoid providing a windfall profit to the plaintiff. We determined that discussion of attorneys' fees had the strongest correlation with awards and that discussion of previous settlements had the weakest correlation with damages.

Further analysis of the relationship between the independent variables of injury severity and defendant conduct, the four forbidden topics, and the resulting damage awards reveals a clearer picture of our data: We found that a relatively large percentage (55%) of the variance in damage awards was explained by the independent variables and, after controlling for these effects, that the forbidden topics accounted for only an additional 3% of the variance in damage awards. These findings suggest that, although nearly all of the juries in our study discussed at least one (and many discussed three or four) silent topics, these discussions were, by and large, not crucial to their damage award verdicts. The findings also fit with previous research documenting the impact of the evidentiary information on jurors' verdicts (Givelber & Farrell, 2008; Reskin & Visher, 1986; Visher, 1987).

One may surmise that the frequency of discussion of forbidden topics would be affected by the nature of the evidence presented in the trial. For example, when

a plaintiff is seriously injured or a defendant has acted especially reprehensibly (and particularly, when both situations occur), jurors may want to give a sizeable damage award. To justify that amount, they may refer frequently to the defendant's insurance and the necessity to pay the attorney as support for their largess. Conversely, however, when the sustained injury is severe and the defendant's conduct reprehensible (and particularly, when both situations occur), jurors may feel no need to ponder extraneous ways to augment their award; the evidence itself justifies a large award. We examined the extent to which the severity of the plaintiff's injury and the reprehensibility of the defendant's conduct influenced jurors' references to insurance, attorney fees, and previous settlements and found that the frequency of discussion of these silent factors was not, in general, influenced by variations in evidence concerning injury severity or defendant reprehensibility. The sole exception was the finding that jurors with evidence of mild injuries had more to say about attorney fees than did jurors with evidence of severe injuries, a finding contrary to our hypothesis.

Diamond and Vidmar (2001) discerned that discussion of forbidden topics tended to occupy a relatively small part of their juries' total deliberation time. Findings from the present study further suggest that such discussions may have little impact on the resulting jury damage awards. Diamond and Vidmar's data showed that jurors spend more time during deliberations attending to the evidence, sorting out the parties' competing claims, and attempting to apply jury instructions to their interpretations of the facts than they do to discussing forbidden topics. Apparently our jurors' assessments of damages were also more strongly influenced by the nature of the evidence than by their attention to and discussion of forbidden topics. Even though jurors commented on these silent factors as they deliberated, their ruminations were apparently not crucial to determining the final award.

This study has several limitations. The ideal test of the effects of blindfolding would involve random assignment of jurors to comparable cases in which half of the juries are blindfolded to a particular legal rule and the other half receive full disclosure. This arrangement could test the proposition that, because discussion of forbidden topics seems to have little impact on verdicts (at least according to our data), judges should remove the blindfolds and tell jurors what they already surmise about who pays what to whom behind the scenes. However, because existing Rules of Evidence prohibit this change, alternative methodologies must be used.

Our method of choice, jury simulation, allows for systematic qualitative and quantitative analysis of the consequences of blindfolding. It also has several drawbacks, however, including the fact that the presentation of evidence and opportunity to deliberate were artificially condensed, as well as the fact that the consequences of mock jurors' decision making were moot. Also, as in all mock jury studies, the present findings may be affected by the particular facts that were presented (or hidden). Our findings may generalize to some types of cases (e.g., other negligence cases) better than to others (e.g., class action, corporate wrongdoing) in which massive amounts of money are at stake.

There are also some ways in which our analyses might have been improved. For example, we could have examined comments about silent factors in jury discussions of liability, as well as damages. Under certain circumstances, jurors

may deem these factors to be relevant to their determination of liability (e.g., a defendant who is insured may be more likely to be found liable than one who is not). In addition to examining the frequencies of comments about silent factors and their relationship to the size of damage awards, we could have analyzed whether and how the content of the discussions, namely the categories we identified in the grounded-theory analysis, may have affected juries' verdicts. We opted not to do so because this approach to clustering jurors' responses resulted in some categories with too few comments for reliable statistical comparisons. Finally, had we had greater statistical power (i.e., more filmed deliberations to evaluate), we might have observed a stronger influence of jury discussion on resulting awards.

Despite these limitations, simulation research and content analyses such as those reported here may cast the results of interview studies in a slightly different light. For example, although Mott et al. (2000) reported that 80% of the jurors they interviewed had either discussed or used attorneys' fees in calculating their awards, the present findings suggest that, even if these jurors discussed that topic, such discussions were unlikely to affect significantly their assessments of damages. Furthermore, although Kalven (1958) suggested that discussion about attorneys' fees is often used as a bargaining tool among jurors who disagree on award amounts, our analyses of the content of the deliberations did not show that this occurs regularly.

The Rules of Evidence that place blindfolds on jurors are based on the assumption that the blindfolds effectively limit attention to and discussion of topics about which no evidence has been introduced at trial. Data from the present study (and from Guinther [1988] and Diamond and Vidmar [2001], showing that most jurors assume the existence of insurance and discuss it during deliberations) cast doubt on that assumption. Even with blindfolds in place, nearly all of the juries in the present study talked about factors that seemed relevant to the awarding of damages but about which the evidence, the court, and the attorneys were silent. Despite jurors' frequent references to factors on which they were blindfolded and their unguided, and sometimes misguided, attempts to understand how these silent factors might affect the outcome of the case, the present data show that, in the end, their discussions of forbidden topics apparently had little impact on their determination of compensatory damages. Thus, our findings lend empirical support to Gross's (1998) contention that, because the exclusionary rule (at least in the realm of insurance) "generates manipulation, argument, error, and reversal" (p. 855), it would make more sense for jurors to simply hear about insurance. According to Gross and to our data, mentioning this silent factor (or others) may not do much harm.

## References

- Abramson, J. (1994). *We, the jury*. New York: Basic Books.
- Barkey, B. M. (1969). Relevancy and its limits in the proposed Federal Rules of Evidence [Author comment]. *Wayne State Law Review*, 16, 167-194.
- Barrington v. Duncan, 140 Tex. 510 (1943).
- Bornstein, B. (1994). David, Goliath, and Reverend Bayes: Prior beliefs about defendants' status in personal injury cases. *Applied Cognitive Psychology*, 8, 233-258.
- Bovbjerg, R., Sloan, F., Dor, A., & Hsieh, C. (1991). Juries and justice: Are malpractice

- and other personal injuries created equal? *Law and Contemporary Problems*, 54, 5–42.
- Brewer v. Payless Stations, Inc., 316 N. W. 2d 702 (1982).
- Broeder, D. W. (1959). The University of Chicago jury project. *Nebraska Law Review*, 38, 744–760.
- Calnan, A. (1991). The insurance exclusionary rule revisited: Are reports of its demise exaggerated? *Ohio State Law Journal*, 52, 1177–1244.
- Carlson, K. A., & Russo, J. E. (2001). Biased interpretation of evidence by mock jurors. *Journal of Experimental Psychology: Applied*, 7, 91–103.
- Causey v. Cornelius, 330 P. 2d 468 (1958).
- Chapman, G., & Bornstein, B. (1996). The more you ask for the more you get: Anchoring in personal injury verdicts. *Applied Cognitive Psychology*, 10, 519–540.
- Corbin, J., & Strauss, A. (1990). Grounded theory research: Procedures, canons, and evaluative criteria. *Qualitative Sociology*, 13, 3–21.
- Diamond, S., Casper, J., & Ostergren, L. (1989). Blindfolding the jury. *Law and Contemporary Problems*, 52, 247–267.
- Diamond, S., & Vidmar, N. (2001). Jury room ruminations on forbidden topics. *Virginia Law Review*, 87, 1857–1915.
- Diamond, S., Vidmar, N., Rose, M., Ellis, L., & Murphy, B. (2003). Juror discussions during civil trials: Studying an Arizona innovation. *Arizona Law Review*, 45, 1–81.
- Ellsworth, P. (1989). Are twelve heads better than one? *Law and Contemporary Problems*, 52, 205–224.
- Fannin, P. (1963). Disclosure of insurance in negligence trials—The Arizona rule. *Arizona Law Review*, 5, 83–93.
- Feigenson, N., Park, J., & Salovey, P. (1997). Effects of blameworthiness and outcome severity on attributions of responsibility and damage awards in comparative negligence cases. *Law and Human Behavior*, 21, 597–617.
- Foy, P. (2007, April 2). *Jurors' courtroom tally of lawyers led to improper award to P & G, say Amway sellers*. The Associated Press. Retrieved April 2, 2007, from <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1175245440121>
- Galanter, M. (1998). Anyone can fall down a manhole: The contingency fee and its discontents. *DePaul Law Review*, 47, 457–478.
- Givelber, D., & Farrell, A. (2008). Judges and juries: The defense case and differences in acquittal rates. *Law and Social Inquiry*, 33, 31–52.
- Goodman, J., Greene, E., & Loftus, E. (1989). Runaway verdicts or reasoned determinations: Mock juror strategies in awarding damages. *Jurimetrics Journal*, 29, 285–309.
- Green, L. (1954). Blindfolding the jury. *Texas Law Review*, 33, 157–167.
- Greene, E. (1989). On juries and damage awards: The process of decision making. *Law and Contemporary Problems*, 52, 225–246.
- Greene, E., & Bornstein, B. (2003). *Determining damages: The psychology of jury damage awards*. Washington, DC: American Psychological Association.
- Greene, E., Johns, M., & Smith, A. (2001). The effects of defendant conduct on jury damage awards. *Journal of Applied Psychology*, 86, 228–237.
- Gross, S. (1998). Make-believe: The rules excluding evidence of character and liability insurance. *Hastings Law Journal*, 49, 843–860.
- Guinther, J. (1988). *The jury in America*. New York: Roscoe Pound Foundation.
- Hannaford, P., Hans, V., & Munsterman, T. (2000). Permitting jury discussions during trial: Impact of the Arizona reform. *Law and Human Behavior*, 24, 339–382.
- Hans, V. (2000). *Business on trial: The civil jury and corporate responsibility*. New Haven, CT: Yale University Press.
- Hans, V., & Ermann, M. (1989). Responses to corporate versus individual wrongdoing. *Law and Human Behavior*, 13, 151–166.

- Hans, V., & Lofquist, W. (1994). Perceptions of civil justice: The litigation crisis attitudes of civil jurors. *Behavioral Sciences and the Law*, 12, 181–196.
- Hantler, S., Schwartz, V., Silverman, C., & Laird, E. (2005). Moving toward a fully informed jury. *Georgetown Journal of Law and Public Policy*, 3, 21–51.
- Horowitz, I., & Kirkpatrick, L. (1996). A concept in search of a definition: The effects of reasonable doubt instructions on certainty of guilt standards and jury verdicts. *Law and Human Behavior*, 20, 655–670.
- Ivkovic, S., & Hans, V. (2003). Jurors' evaluations of expert testimony: Judging the messenger and the message. *Law and Social Inquiry*, 28, 441–482.
- Jeansonne v. Landau et al. [Unreported Denver County District Court case that was resolved by settlement before judgment was reached]. (1997).
- Kalven, H. (1958). The jury, the law, and the personal injury damage award. *Ohio State Law Journal*, 19, 159–178.
- Kunda, Z. (1990). The case for motivated reasoning. *Psychological Bulletin*, 108, 480–498.
- Kunda, Z., & Sinclair, L. (1999). Motivated reasoning with stereotypes: Activation, application, and inhibition. *Psychological Inquiry*, 10, 12–22.
- Leibman, J., Bennett, R., & Fetter, R. (1998). The effect of lifting the blindfold from civil juries charged with apportioning damages in modified comparative fault cases: An empirical study of the alternatives. *American Business Law Journal*, 35, 349–402.
- MacCoun, R. (1993). Getting inside the black box: What empirical research tells us about civil jury behavior. In R. E. Litan (Ed.), *Verdict: Assessing the civil jury* (pp. 137–180). Washington, DC: Brookings Institution.
- Marti, M., & Wissler, R. (2000). Be careful what you ask for: The effect of anchors on personal injury damages awards. *Journal of Experimental Psychology: Applied*, 6, 91–103.
- Melamed, P. (2006). An alternative to the contingent fee? An assessment of the incentive effects of the English conditional fee arrangement. *Cardozo Law Review*, 27, 2433–2463.
- Model Roles of Professional Responsibility EC-5-7*. (1980). Available online at [www.abanet.org/cpr/ethics/mcpr.pdf](http://www.abanet.org/cpr/ethics/mcpr.pdf)
- Moran, G., & Cutler, B. L. (1991). The prejudicial impact of pretrial publicity. *Journal of Applied Social Psychology*, 21, 345–367.
- Mott, N., Hans, V., & Simpson, L. (2000). What's half a lung worth? Civil jurors' accounts of their award decision making. *Law and Human Behavior*, 24, 401–419.
- Peck v. Jacquemin, 419 A. 2d 1043 (1985).
- Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F. 2d 1240 (1974).
- Raitz, A., Greene, E., Goodman, J., & Loftus, E. (1990). Determining damages: The influence of expert testimony on jurors' decision making. *Law and Human Behavior*, 14, 385–395.
- Reskin, B., & Visher, C. (1986). The impacts of evidence and extralegal factors in jurors' decisions. *Law and Society Review*, 20, 423–438.
- Roper Center. (1985). Do you think the present method of paying lawyers in personal injury cases is a good thing, or a bad thing, or doesn't it matter? Available in WESTLAW, Poll Database.
- Sharo, C. (1987). Knowledge by the jury of a settlement where a plaintiff has settled with one or more defendants who are jointly and severally liable. *Villanova Law Review*, 32, 541–574.
- Steele v. Hash, 212 Cal. App. 2d 1 (1963).
- Stevens, S. S. (1958). Problems and methods of psychophysics. *Psychological Bulletin*, 55, 177–196.

