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COMMENTS

JURY MISCONDUCT IN PERSONAL INJURY LITIGATION IN TEXAS — A NEED FOR FURTHER REFORM

by Robert B. Davis

I. THE ADMISSIBILITY OF A JUROR'S TESTIMONY TO UPSET THE JURY'S VERDICT

In 1785 Lord Mansfield announced to an unsuspecting legal profession that neither the affidavits nor the testimony of a juror could be received to impeach his verdict.¹ Evidence of jury misconduct could be received only from another source such as a person who overheard the misconduct or saw it through an open window. Based on the now archaic reason that a juror should not be allowed to allege his own turpitude, Mansfield's rule as announced in *Vaise v. Dalaval*² has survived nearly two centuries of attack and remains the rule in the vast majority of jurisdictions.³ It has been stated that one reason for the rule's deep entrenchment and continued vitality was the prestige of Lord Mansfield.⁴ However, other considerations of more contemporary significance are relied on to justify adherence to the rule. It is argued both that parol evidence should not be allowed to vary the final written manifestation of the jurors' prior deliberations⁵ and that inter-juror communications are privileged.⁶ The most cogent reason for retaining the Mansfield rule stems from its policy of insuring certainty and conclusiveness of verdicts which outweighs the policy of attempting to obtain perfect justice in the individual case.⁷ Practically, it would be a rare case in which each juror fully understood and completely performed his theoretical functions and obligations.⁸ Opening the jury-room to public and official scrutiny either would destroy most verdicts, or would raise embarrassing questions as to the extent to which the law should tolerate deviation from the performance of the ideal juror.⁹ The

¹ A juror's affidavit or testimony in regard to misconduct was received, at least to a limited extent, prior to 1785. See *McDonald v. Pless*, 238 U.S. 264 (1915). See also McCORMICK & RAY, TEXAS LAW OF EVIDENCE § 393 (2d ed. 1956).

² 1 Term Rep. 11, 99 Eng. Rep. 944 (Q.B. 1785).

³ 8 WIGMORE, EVIDENCE § 2354 (McNaughton rev. ed. 1961), states that all but thirteen United States jurisdictions follow the Mansfield rule with only slight variations. The thirteen jurisdictions are listed as follows: federal (perhaps, see text accompanying notes 15-19 *infra*), Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio (to corroborate), Oregon, Tennessee, Texas, Washington, Wisconsin (outside jury room).

⁴ JAMES, CIVIL PROCEDURE § 7.19 (1965).

⁵ WIGMORE, *op. cit. supra* note 3; McCORMICK & RAY, *op. cit. supra* note 1; See also Note, 10 HASTINGS L.J. 319 (1959).

⁶ This principle must be limited in at least one respect. A juror who is willing to offer an affidavit or testimony in regard to his own misconduct appears to effectively waive this privilege. See Note, *supra* note 5.

⁷ *McDonald v. Pless*, 238 U.S. 264 (1915). See also, Comment, 21 TEXAS L. REV. 794 (1943).

⁸ JAMES, *op. cit. supra* note 4.

⁹ *Ibid.* As a part of the University of Chicago Jury Project, an attempt was made to tape-record jury deliberations. When this became public it was quickly halted. See KALVEN & ZEISEL, Preface to THE AMERICAN JURY at vi (1966). See also the bibliography of articles produced by this project. *Id.* at 541.

fact that the Mansfield rule also works to protect jurors from post-verdict harassment,¹⁰ and the court from a multitude of excess litigation—a trial upon a trial¹¹—adds further support to its retention.

Some jurisdictions have grafted limited exceptions on the Mansfield rule by statute or by judicial decision. Probably the most common exception allows jurors to testify that the verdict was reached by lot, chance, quotient, or some other improper means.¹² Other jurisdictions allow jurors to testify concerning acts done pursuant to a criminal design, *e.g.*, bribery, fraud, or intimidation.¹³ Another exception allows a juror to testify about misconduct once a predicate has been laid by evidence presented by one other than a juror.¹⁴

The federal rule has been uncertain since 1915 when *McDonald v. Pless*,¹⁵ the leading Supreme Court decision considering the admissibility of a juror's testimony, first reaffirmed the Mansfield rule but then condoned departure from the rule in "extreme" cases. It is interesting to note that the Court rejected testimony that would have shown that the verdict was determined by quotient. The lower federal courts, hindered not in the least by Judge Learned Hand's opinion allowing jurors to testify that they returned a quotient verdict (although refusing to grant a new trial on this ground)¹⁶ have split as to what constitutes an extreme case.¹⁷ And in some instances *McDonald* either has been distinguished sarcastically¹⁸ or completely disregarded.¹⁹

¹⁰ *McDonald v. Pless*, 238 U.S. 264 (1915).

¹¹ Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958). The author refers to the Texas rule as substantiating this argument to some degree.

¹² See, *e.g.*, CAL. CIV. PRO. CODE § 657(2) (Deering Supp. 1966) (verdicts obtained by chance); *Kollert v. Cundiff*, 50 Cal. 2d 768, 329 P.2d 897 (1958), and other jurisdictions collected in 8 WIGMORE, *op. cit. supra* note 3, § 2354.

¹³ See, *e.g.*, LA. REV. STAT. ANN. § 15:470 (1967); *Spielter v. North German Lloyd S.S. Co.*, 249 N.Y. Supp. 358 (1931) (browbeating jurors).

¹⁴ *Pratt v. Coffman*, 33 Mo. 71 (1862); *Wicker v. City of Cleveland*, 150 Ohio St. 434, 83 N.E.2d 56 (1949), 10 OHIO ST. L.J. 262.

¹⁵ 238 U.S. 264 (1915). Justice Lamar stated:

[I]t would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without "violating the plainest principles of justice." This might occur in the gravest and most important cases; and without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict.

Id. at 268-69.

¹⁶ *Jorgensen v. New York Ice Mach. Corp.*, 160 F.2d 432 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947), 47 COLUM. L. REV. 1373.

¹⁷ Compare *Fabris v. General Foods Corp.*, 152 F.2d 661 (2d Cir. 1945) (evidence that verdict was determined by majority vote was excluded), with *Ft. Worth & D. Ry. v. Thompson*, 216 F.2d 790 (5th Cir. 1954) (evidence of overt acts or extraneous matters can be heard but this does not allow evidence that a juror's misstatement of the law of contributory negligence influenced the verdict) and *Fried v. McGrath*, 135 F.2d 833 (D.C. Cir. 1943). For a collection of the cases which best illustrate the conflict in the federal courts see MOORE, FEDERAL PRACTICE § 59.08(4) (1966).

¹⁸ *Aluminum Co. of America v. Loveday*, 273 F.2d 499 (6th Cir. 1959). In holding that a juror who made an independent investigation of the cattle in issue and reported his observations to the other jurors, disqualified himself and polluted the jury the court stated: "We are aware of the splendid contributions made to due process of law by . . . *McDonald*," but found the case distinguishable.

¹⁹ See *Jorgensen v. New York Ice Mach. Corp.*, 160 F.2d 432 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947), 47 COLUM. L. REV. 1373.

Many commentators and a few jurisdictions question whether the Mansfield rule is truly the lesser of two evils not only because it renders inadmissible what is often the only available evidence of misconduct, but also because the danger of post-verdict harassment of jurors is imaginary.²⁰ While the courts almost unanimously agree that a juror's mental processes are embodied in the verdict and therefore not open to inquiry due to the parol evidence rule, jurisdictions rejecting the Mansfield rule distinguish matters which are extraneous or conduct which can be termed an overt act. This is the basis of the "Iowa Rule" enunciated in *Wright v. Illinois & Miss. Tel. Co.*²¹ The rule and its rationale is illustrated by the following language:

Public Policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the express conclusions of twelve; its tendency is to induce bad faith on the part of the minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of twelve; it is useless to tamper with one, for the eleven may be heard.²²

Both the Model Code of Evidence and the Uniform Rules of Evidence have adopted this liberal view.²³ Texas likewise follows *Wright* and no better laboratory for an examination of the merits of the "Iowa Rule" exists than the law which has developed from the hundreds of cases which have gone before the Texas appellate courts.

II. THE TEXAS PRACTICE—A WIDE OPEN RULE

In 1905 the Texas legislature quite unexpectedly announced²⁴ the adoption of a statute which freely admitted a juror's testimony upon a motion for a new trial in regard to jury misconduct. The enactment²⁵ provided that the court could hear testimony of jurors about misconduct of the jury or the officer in charge, communications made to the jury, and other testimony received by the jury. With the question of the admissibility of a juror's testimony solved by the legislature, the courts began struggling with the problem of whether to award a new trial simply be-

²⁰ See authority cited by McCORMICK & RAY, *op. cit. supra* note 1. See also Comment, 25 U. CHI. L. REV. 360 (1958) where the author questions whether Mansfield's rule inhibits harassment because: (1) a verdict is purportedly unanimous, thus each juror's vote is known to the public; (2) jurors are free to disclose to the public what went on in deliberations; (3) in spite of the rule, post verdict interviews with jurors by newsmen and attorneys are widespread; and (4) jurors would rarely be aware that their deliberations may later be disclosed and probably would not be inhibited during deliberations. *Accord*, generally, Note, 10 OHIO ST. L.J. 262 (1949); Note, 31 NOTRE DAME LAWYER 484 (1956).

²¹ 20 Iowa 195 (1866).

²² *Perry v. Bailey*, 12 Kan. 415, 419 (1874).

²³ MODEL CODE OF EVIDENCE rule 301 (1942); UNIFORM RULE OF EVIDENCE 44.

²⁴ *St. Louis S.W. Ry. v. Ricketts*, 96 Tex. 68, 70 S.W. 315 (1902). Comment, 15 TEXAS L. REV. 101 (1936).

²⁵ Former art. 2582, Tex. Rev. Civ. Stat. (Acts 29 Leg. ch. 18) (1805), recodified as art. 2021, Tex. Rev. Civ. Stat. (1911), recodified as art. 2234, Tex. Rev. Civ. Stat. (1925). Now, as amended, TEX. R. CIV. P. 327.

cause misconduct was shown. The statute provided that if the misconduct was proven or if the testimony or communication made was material, a new trial could be granted in the discretion of the trial court.²⁶ Early decisions expressed fear that the statute had made jury trials impractical.²⁷ To defend against such a result, the trial court's discretion was construed to be absolute since the trial judge could observe the demeanor of the jurors and was familiar with the record of the case.²⁸ This "savings clause"²⁹ gave the appellate courts a sense of security which was short-lived because in 1925 the legislature deleted all mention of the trial court's discretion.³⁰ The amended statute required the trial court to grant a new trial³¹ if the misconduct was material, and it was construed by appellate courts as placing the burden of proof on the appellee, *i.e.*, where misconduct was shown, the verdict had to be set aside if there was a reasonable doubt in the minds of the reviewing court as to whether the misconduct adversely affected the complaining party.³² For all practical purposes the courts *presumed harm* upon a showing of misconduct, reasoning that jury misconduct was a matter of public concern and therefore a matter about which the legislature could speak arbitrarily. The result was that often a new trial was granted because of trivial misconduct.

It is interesting to note that a statistical survey published in 1936 showed that while most of the judges and attorneys polled preferred the Texas practice of free admission of juror's testimony to the Mansfield rule, most who favored the Texas rule advocated giving the trial judge wide discretion to decide if a new trial was warranted.³³ In 1941 the supreme court, while refusing to concede that discretionary power should be reinserted, adopted rule 327³⁴ to remedy the undesirable result of a new trial due to trivial misconduct. The purpose of the rule was to shift the burden

²⁶ The statute was construed to allow testimony in open court with the right to cross-examine afforded, but did not allow proof of misconduct by mere affidavit. *San Antonio & P. Ry. v. Wells*, 146 S.W. 645 (Tex. Civ. App. 1912). *Cf.*, *Granstaff v. T. E. Mercer, Teaming & Trucking Contractor*, 227 S.W.2d 372 (Tex. Civ. App. 1950) *error ref. n.r.e.* (it is within the trial court's discretion to refuse to hear testimony referred to in the motion but not in the jurors' affidavit). Also, affidavits have been analogized to pleadings and deemed necessary in order for jurors' testimony to be admitted, *Milwaukee Mechanical Ins. Co. v. Frosch*, 130 S.W. 600 (Tex. Civ. App. 1910) *error ref.*

²⁷ *Kalteyer v. Mitchell*, 110 S.W. 462 (Tex. Civ. App. 1908), *aff'd*, 102 Tex. 390, 117 S.W. 792 (1909); *Foley v. Northrup*, 105 S.W. 229 (1907) *error ref.*; *Dallas Ry. & Terminal Co. v. Horton*, 119 S.W.2d 122 (Tex. Civ. App. 1938).

²⁸ *Missouri K. & T. Ry. v. Blalack*, 128 S.W. 706 (Tex. Civ. App. 1910), *aff'd*, 105 Tex. 296, 147 S.W. 559 (1912); *Wolfe Co. v. St. Louis & Sw. Ry.*, 144 S.W. 347 (Tex. Civ. App. 1912) *error ref.*

²⁹ *Dallas Ry. & Terminal Co. v. Horton*, 119 S.W.2d 122 (Tex. Civ. App. 1938).

³⁰ TEX. REV. CIV. STAT. art. 2234 (1925).

³¹ TEX. R. CIV. P. 329b(1) requires that in all district and county courts a motion for a new trial must be filed within ten days after judgment or after the order complained of is rendered.

³² *Sproles Motor Freight Lines v. Long*, 140 Tex. 494, 168 S.W.2d 642 (1943); *Moore v. Ivey*, 277 S.W. 106 (Tex. Comm'n App. 1925). See also Pope, *Jury Misconduct and Harm*, 12 BAYLOR L. REV. 355 (1960); McCORMICK & RAY, *op. cit. supra* note 1, § 394.

³³ Comment, *New Trial—Misconduct of Jurors*, 15 TEXAS L. REV. 101 (1936). Approximately one-eighth of those answering favored a return to the common law rule. Other significant suggestions of reform were: requiring that the movant make a strict showing of harm; allowing the trial judge more latitude in warning jurors as to what they should avoid; and requesting jurors to communicate matters which transpired in the jury room only to the judge.

³⁴ TEX. R. CIV. P. 327.

of proof to the complaining party,³⁵ so that even if the misconduct were material, a new trial could be granted only if it reasonably appeared from the record as a whole that injury probably resulted to the complaining party.³⁶ The rule, which has survived unaltered for twenty-six years, has been construed to mean that if the verdict of one juror is affected by the misconduct, probable injury entitling the complaining party to a new trial has been shown.³⁷

Some skepticism has been expressed over the years as to whether rule 327 has shifted the burden to the complaining party. However, as will be discussed in detail later, in most cases probable injury must be shown before a verdict will be overturned. With one exception, situations involving "tampering" with the jury,³⁸ the pre-1941 presumed harm doctrine is not applied.³⁹ Moreover, two judicially created principles act to insure that the complainant meet his burden of proving that material acts of misconduct probably resulted in injury to him. These principles may be referred to as the mental process-overt act distinction and the implied finding rule.

III. REFINEMENTS OF THE WIDE OPEN RULE

A. *The Overt Act—Mental Processes Distinction*

Texas courts attempt to adhere to the previously mentioned aspect of the "Iowa Rule" that jurors' testimony may be received for the purpose of showing overt acts or extraneous matters, but no inquiry can be made into the mental processes of a juror or the grounds for the jury's verdict.⁴⁰ The reasons against inquiring into a juror's mental processes are that: (1) jurors are probably more influenced by the total situation which confronts them while assuming the obligations of a juror than they care to realize; (2) self-analysis, particularly when a great length of time has passed since the trial, is unreliable; (3) a juror's thought processes are often secret and inaccessible to testimony by others, and if a juror in bad faith acquiesced in the verdict of eleven other jurors, his secret thought process could be used to destroy the verdict; (4) to allow inquiry would induce tampering; and (5) the effect of misconduct on a jury's mind (probable injury) is a matter of law to be decided by the court.⁴¹ For these reasons the courts cannot inquire into a juror's erroneous or faulty reasoning, his doubts or misgivings about the verdict, or his misunderstanding of the evidence, the charge, or the effect of answers to special issues.⁴² In sum, a juror may not

³⁵ *Opinions of Subcommittee on Interpretation of Rules*, 5 TEXAS B.J. 168, 170 (1942); 8 TEXAS B.J. 16 (1945).

³⁶ *Trousdale v. Texas & N.O.R.R.*, 154 Tex. 231, 276 S.W.2d 242 (1955).

³⁷ *St. Louis & Sw. Ry. v. Gregory*, 387 S.W.2d 27 (Tex. 1965).

³⁸ See text accompanying notes 68-75 *infra*.

³⁹ *Barrington v. Duncan*, 140 Tex. 510, 169 S.W.2d 462 (1943) is the case which prompted the most skepticism. See text accompanying notes 95-102 *infra*.

⁴⁰ *Putnam v. Lazarus*, 156 Tex. 154, 293 S.W.2d 493 (1956); *Trousdale v. Texas & N.O.R.R.*, 154 Tex. 231, 276 S.W.2d 242 (1955); *Bradley v. Texas & Pac. Ry.*, 1 S.W.2d 861 (Tex. Comm'n App. 1928); *Griffith v. Hudspeth*, 378 S.W.2d 153 (Tex. Civ. App. 1964).

⁴¹ Pope, *The Mental Operations of Jurors*, 40 TEXAS L. REV. 849 (1962).

⁴² *Ibid.* *Putnam v. Lazarus*, 156 Tex. 154, 293 S.W.2d 493 (1956) presents an excellent illustration of jurors' mental processes which are not the proper subject of inquiry. The court considered jurors' testimony that insurance was mentioned and possibly discussed (although there was

destroy nor preserve the verdict by testifying that he was or was not influenced by the misconduct in question.⁴³

While a court is not allowed to probe juror's mental processes or the grounds for their verdict, material acts of misconduct and their effect as manifested by the verdict may be shown. Rule 327 allows the court to consider the record as a whole to determine if injury probably resulted from any material misconduct. This has been construed to allow inquiry into: (1) the nature and subject matter of the misconduct; (2) whether an offending statement was made as a fact or opinion; (3) who made the statement and who heard or probably heard it; (4) whether the misconduct was discussed and, if so, the extent of discussions; (5) if and when the misconduct was rebuked and the success of any rebuke; (6) the length of deliberations and the stage during which the misconduct occurred; (7) how largely the misconduct loomed in the considerations; (8) if all the jurors were present during the deliberations; (9) how the jurors stood as to voting on issues before and after the misconduct; (10) whether the jury agreed to commit the misconduct; and (11) the content of notes and communications between the judge and the jury.⁴⁴ The difficulty in applying the mental process-overt act dichotomy is evident. Speech is an overt act; thought is not—yet speech is thought.⁴⁵ This difficult distinction in itself has been considered sufficient inducement to make courts leery of overturning verdicts on speculation that improper discussions or arguments caused a miscarriage of justice.⁴⁶ The Texas Supreme Court, realizing that testimony as to a juror's mental process will often enter the record, has recognized that while it is not reversible error to receive this inadmissible evidence,⁴⁷ it is reversible error to give it weight.⁴⁸

evidence that the foreman rebuked the discussion) but refused to consider testimony that the jurors awarded the plaintiff \$5,000 because they felt the defendant's insurer would pay that amount or that the mention of insurance did not influence the verdict. See also *Triangle Cab Co. v. Taylor*, 144 Tex. 568, 192 S.W.2d 143 (1946); *Blaugrund v. Gish*, 142 Tex. 379, 179 S.W.2d 266 (1944); and in *Trousdale v. Texas & N.O.R.R.*, 264 S.W.2d 489 (Tex. Civ. App. 1953), *aff'd*, 154 Tex. 231, 276 S.W.2d 242 (1955), the court of appeals stated:

Jurors while deliberating may take tentative or contingent positions, assume hypotheses, make concessions for purpose of argument, think out loud, think illogically, and change from one position to another many times. Jurors, within their province, even have the right to be wrong. Our faith in the system rests upon our confidence that other jurors will make the better reason prevail. But to permit courts to hear testimony about a statement made during deliberations not itself misconduct, but revealing the status of thought or changing thought, and to use it as a predicate to show that a juror 'ought' to have voted a certain way at a given point in the deliberations would be an intrusion into the affairs of jurors that has never been tolerated. The effect of such procedure is that a judge casts a vicarious vote for the juror at some point in the deliberations.

Id. at 492-93.

⁴³ *Mrs. Baird's Bread Co. v. Hearn*, 157 Tex. 159, 300 S.W.2d 646 (1957).

⁴⁴ *Trousdale v. Texas & N.O.R.R.*, 154 Tex. 231, 276 S.W.2d 242 (1955).

⁴⁵ See note 41 *supra*.

⁴⁶ *McCORMICK & RAY*, *op. cit. supra* note 1, § 396.

⁴⁷ *Trousdale v. Texas & N.O.R.R.*, 154 Tex. 231, 276 S.W.2d 242 (1955). In recognizing that the record contained mixed evidence, the court stated that it was not surprising "because of the oftentimes difficulty in distinguishing between an overt act and a mental process and the natural tendency on the part of counsel to bring out everything which he thinks will help his case. A somewhat more careful application of the rule, however, would avoid inquiry into the mental processes of the jurors and confine the testimony to overt acts." *Id.* at 243.

⁴⁸ *White Cabs v. Moore*, 146 Tex. 101, 203 S.W.2d 200 (1947).

B. *The Implied Finding Rule*

Whether misconduct occurred is a fact question, but whether the misconduct resulted in injury is a question of law.⁴⁹ The implied finding rule, an appellate rule, comes into play in a surprising number of jury misconduct cases and encourages an end to litigation. If no express findings of fact or conclusions of law are requested or filed,⁵⁰ the appellate court will presume that all controverted facts and questions of law were found in favor of the appellee, *e.g.*, in support of the trial court's judgment overruling the motion for a new trial.⁵¹ Further, if the evidence introduced as to misconduct is conflicting, the decision of the trial court is binding on the appellate courts,⁵² and, if a juror's testimony is contradictory and inconsistent, the rule recognizes that the trial court, in exercising its privilege to pass on the credibility of the witnesses, may disregard it completely.⁵³ An inconsistency or conflict can be shown by comparing witnesses' testimony on direct and cross-examination.⁵⁴ While the trial judge may have believed that the preponderance of the evidence established misconduct and denied a new trial only because he did not feel that probable injury was shown, the rule effectively precludes the appellate court from reviewing this question of law because, by implication, no misconduct was shown.

Although the implied finding doctrine is consistently applied, if the rebutting evidence establishes only that jurors do not remember whether the alleged misconduct occurred, the evidence is conclusive that misconduct did occur, *i.e.*, the presumption has not been put into effect.⁵⁵ Also, if the only conflict is created by evidence of a juror's mental processes in reaching the verdict the implied finding rule is without force and effect.⁵⁶ Naturally, if the appellate court is unable to find a conflict in the testimony, it will not hesitate to reject the implied finding rule.

C. *A Call For Reform*

Although the construction of rule 327 has shifted the burden of proving *fatal* jury misconduct, there never has been an attempt to re-define

⁴⁹ *Trousdale v. Texas & N.O.R.R.*, 264 S.W.2d 489 (Tex. Civ. App. 1953), *aff'd*, 154 Tex. 231, 276 S.W.2d 242 (1955); *City of Houston v. Quionnes*, 142 Tex. 282, 177 S.W.2d 259 (1944); *Rodman Supply Co. v. Jones*, 370 S.W.2d 951 (Tex. Civ. App. 1963). See generally Pope, *Jury Misconduct and Harm*, 12 BAYLOR L. REV. 355 (1960).

⁵⁰ TEX. R. CIV. P. 296 provides that upon request, filed within ten days of the order overruling the motion for new trial, the court shall state in writing its conclusions of fact separate from its conclusions of law. It is curious that the request is not automatically made because, in the absence of express findings, any conflict in the evidence will result in a presumption that the court found the complaining party's witnesses less credible than his adversary's. This presumption precludes the appellate court from considering the question of probable injury.

⁵¹ *Brawley v. Bowen*, 387 S.W.2d 383 (Tex. 1965); *Putnam v. Lazarus*, 157 Tex. 154, 293 S.W.2d 493 (1956); *Barrington v. Duncan*, 140 Tex. 510, 169 S.W.2d 462 (1943); *Kaufman v. Miller*, 405 S.W.2d 820 (Tex. Civ. App. 1966); *Dobbins v. Klinke*, 395 S.W.2d 845 (Tex. Civ. App. 1965); *Dallas Transit Co. v. Newman*, 380 S.W.2d 818 (Tex. Civ. App. 1964) *error dismissed*; *Aetna Cas. & Sur. Co. v. Perez*, 360 S.W.2d 157 (Tex. Civ. App. 1962).

⁵² *Ibid.*

⁵³ *Ibid.* *Maryland Cas. Co. v. Hears*, 144 Tex. 317, 190 S.W.2d 62 (1945).

⁵⁴ *Heflin v. Ft. Worth & D.C. Ry.*, 207 S.W.2d 114 (Tex. Civ. App. 1947) *error ref. n.r.e.*

⁵⁵ *Rodman Supply Co. v. Jones*, 370 S.W.2d 951 (Tex. Civ. App. 1963).

⁵⁶ *Heflin v. Ft. Worth & D.C. Ry.*, 207 S.W.2d 114 (Tex. Civ. App. 1947) *error ref. n.r.e.*

what acts constitute misconduct.⁵⁷ Thus, despite the court's increasingly strict adherence to rule 327, attorneys continue to make frequent attempts to garner a new trial, apparently relying on Texas' liberal definition of misconduct.⁵⁸ One commentator, breaking a long spell of complacency, recently called for reform in the Texas practice in order to improve the administration of justice.⁵⁹ Prompted by complaints from attorneys and his belief that courts disfavor the present practice, the author indicates various pitfalls in the practice, *viz*: it prompts strong aversion to jury service; it promotes lay displeasure with the legal profession; and often, due to inevitable time lag, it results in courts hearing testimony which can be nothing more than good faith guesswork as to whether misconduct occurred. The argument that grave miscarriages of justice would accompany a change in the Texas practice was rejected for two reasons: (1) most cases reported find either no misconduct or, if misconduct, no harm; and, (2) nothing indicates that the Texas practice affords more justice than jurisdictions which recognize that "perfect" justice is not obtainable and continue to follow the common law rule. It was suggested that the grounds for a new trial due to misconduct be limited "to some species of fraud,"⁶⁰ and that the trial court be allowed to give express instructions defining what has been considered improper conduct and informing a panel that a guilty juror would be susceptible to punishment for contempt.⁶¹

IV. MISCONDUCT FREQUENTLY ARISING IN PERSONAL INJURY LITIGATION

Supreme court rule 226a,⁶² effective from January 1, 1967, requires that certain admonitory instructions be given to a jury panel prior to *voir dire* and to the jury eventually chosen from that panel.⁶³ Certainly one purpose of the instructions—which mention in general terms virtually every type of misconduct which might occur in personal injury litigation—is to make the jurors cognizant of what constitutes jury misconduct and the consequences which may result if any misconduct occurs.⁶⁴ Generally the

⁵⁷ See, e.g., *Missouri Pac. R.R. v. Kennedy*, 403 S.W.2d 909 (Tex. Civ. App. 1966); *Phillips v. Texas & Pac. Ry.*, 223 S.W.2d 258 (Tex. Civ. App. 1949) *error ref. n.r.e.*

⁵⁸ See, e.g., cases cited in notes 79-82 *infra*. The tenacity of the practicing attorney is not surprising, and in fact justifiable when it is considered that the attorney is frequently sure he can, and often does prove his case, *i.e.*, that material misconduct occurred.

⁵⁹ Bell, *Restricting Grounds of Jury Misconduct*, 25 TEXAS B.J. 275 (1962).

⁶⁰ *Id.* at 331. This would include all extraneous influences such as bribery or attempts to influence other than by open court advocacy, concealment of facts on *voir dire* which would indicate that a juror was biased or prejudiced, and communication of independent views of the scene of the accident to other jurors.

⁶¹ This proposed reform was criticized as suggesting that the present practice would thereby be traded "for a veil of secrecy in order to gain popular acclaim and support . . .," and for its imposition of a threat of contempt. Crawford, *Should We Air-Condition Jury Misconduct?*, 25 TEXAS B.J. 957, 958 (1962).

⁶² TEX. R. CIV. P. 226a.

⁶³ TEX. CONST. art. V, § 25 empowers the supreme court to adopt rules of procedure to insure the expedient dispatch of business.

⁶⁴ TEX. R. CIV. P. 226a. The rule requires that certain oral instructions which may be modified as a particular case might require, shall be given to all jurors after they are sworn and before *voir dire*. The jurors are to be instructed that Texas law allows proof of any violation of proper jury conduct by testimony of jurors or others in open court and are to be cautioned that failure to follow the court's instructions may result in the necessity of a new trial which causes great waste of time and expense. More specifically the jurors are to be instructed orally: to avoid all contact with lawyers, witnesses, parties, or anyone connected with the case (except for casual

instructions contained in rule 226a are a codification of instructions which have received judicial approval in the past.⁶⁵ However, in some instances the instructions bring into the open certain matters which previously were not allowed to be mentioned in the jury's presence.⁶⁶ For this reason the rule in its entirety shows progress, yet it expressly recognizes Texas' broad and oftentimes criticized definition of jury misconduct.⁶⁷ This section will analyze some of the improper acts or omissions mentioned in rule 226a, as they arise in personal injury litigation, and the consequences of such misconduct. In light of this analysis, a later section will attempt to de-

greetings) and not be concerned when they are treated in a like manner; not to accept "any favors however slight" from any person connected with the case; not to discuss the case with anyone nor allow anyone to discuss it in their presence, and if someone attempts to discuss the case, to report it to the judge; and to answer any question asked on *voir dire* truthfully and completely whether directed to an individual or to the jurors as a group.

Immediately after the jurors have been selected for the case, both oral and written instructions are to be given them. The jurors are to be told orally that they shall determine fact issues, but the judge will determine matters of law. Each juror is to be handed a copy of the written instructions which is to be read to them by the court. The first three written instructions are a repetition of the first three oral instructions given prior to *voir dire*. By the other written instructions the jury is to be told: not to make a private investigation of any facts in the case or obtain information contained in law books, dictionaries or accessible records because all evidence should be presented in open court where both sides have an opportunity to question the witnesses or object to statements made; and, in the event that one of the jurors learns of matters not presented in open court, he should tell the judge immediately; not to personally investigate or view "premises, things or articles" not before the court, nor to allow another to do so for them; not to relate personal experiences or special knowledge that he might have; and not to discuss or consider attorneys' fees or insurance of any kind unless evidence of these matters has been introduced. The jury is then to be instructed that, while they will be requested to answer special issues, they will not be asked, and therefore should not consider, who should win the law suit. The instructions called for re-emphasize the fact that evidence of jury misconduct may be admitted in open court.

Further written instructions are required to be given as part of the charge. The jurors are cautioned not to let bias, prejudice, or sympathy influence them; to consider only the evidence admitted under oath; to answer each issue as all are important and no juror should state otherwise; not to try to determine who should win and answer the issues accordingly as they should not be concerned with the effect of their answers; not to decide an issue by a method of chance, agree to a quotient verdict, or trade answers on particular issues; and not to agree to an answer by majority vote as all answers must be unanimous.

At this time further emphasis is to be given of the fact that a juror's violation of the instructions is misconduct which could necessitate a new trial with an entirely new jury, thereby rendering all time and effort wasted. The foreman, who is instructed to read the charge aloud upon entering the jury room, or any other juror who becomes aware of any misconduct is requested to rebuke the activity.

After the jury returns its verdict, rule 226a requires that further instructions be given. The jury is to be told that after their discharge they are released from secrecy and can discuss the case and their deliberation with anyone or, if they desire, refuse to discuss the whole or any part of the case. The jurors are also told that the attorneys may question them about their conduct and may ask a juror to give an affidavit about any violations of the instructions. Again, the jurors are to be told they have an option and can refuse to give an affidavit if they do not wish to do so.

One form of misconduct which the instructions do not recognize is coercion. Coercion of a jury by a judge or third person, e.g., the bailiff, may constitute misconduct. The decisions, of necessity, are made on an *ad hoc* basis and few guidelines have been delineated. But it is clear that it is not improper for the court to poll a seemingly hung jury to determine how many jurors feel that they can eventually reach a verdict. The supreme court has allowed this procedure even though one juror did not think the jury could ever agree when polled, and shortly thereafter a verdict was returned. The attitude evidenced by the court has effectively eliminated problems arising from previous opinions expressing a more restrictive attitude toward trial courts employing persuasion in order that a unanimous verdict be returned. See Pope, *The Judge-Jury Relationship*, 18 Sw. L.J. 46 (1964).

⁶⁵ As a general rule, whether admonitory or cautionary instructions should be given was left to the sound discretion of the trial judge. *J. H. Robinson Truck Lines v. Ragan*, 204 S.W.2d 662 (Tex. Civ. App. 1947). See also Pope, note 64 *supra*.

⁶⁶ See Pope, note 64 *supra*. Cf., *Stein v. Boehme*, 302 S.W.2d 663 (Tex. Civ. App. 1957) (concerning an instruction in regard to liability insurance).

⁶⁷ JAMES, CIVIL PROCEDURE § 7.19, at 311 (1965); Bell, *supra* note 59; Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958).

termine if re-definition of Texas' concept of misconduct is feasible or necessary from a standpoint of effective administration of justice.

Contact With Persons Interested in the Litigation—Tampering. In spite of rule 327, the supreme court has intentionally shifted the burden of going forward with the evidence to the appellee when the act or occurrence amounts to tampering with the jury. The court's basis is the Texas Constitution provision that the right of trial by jury be inviolate—meaning to the court a trial unaffected by bribes, promises of rewards and improper requests. This doctrine is illustrated by *Texas Employers' Ins. Ass'n v. McCaslin*⁶⁸ where the supreme court held that probable injury was shown by evidence that, while the case was on trial, the plaintiff went to the office of a female juror and beseeched her to do all she could to help the plaintiff's cause. The court concluded that proof of the overt act may in itself be the most significant factor in establishing prejudice and added:

Rule 327 does not preclude the drawing of logical inferences of prejudice and unfairness from the overt act itself for an action or occurrence may be so highly prejudicial and inimical to fairness of trial, that the burden of going forward with proof of harm is met, prima facie at least, by simply showing the improper act and nothing more.⁶⁹

Further, the court felt that the inference of unfairness and prejudice attending the conduct was of such a compelling nature that it was rebuttable only by a showing that the plaintiff was entitled to judgment as a matter of law. As would be expected, this broad language, re-adopting the presumed harm test in this area and establishing an almost irrebuttable presumption, has been argued as controlling precedent for virtually every misconduct case since *McCaslin*.⁷⁰ This argument has not been without success;⁷¹ however, the better-reasoned opinions recognize that extending *McCaslin* into areas other than tampering, or even beyond the facts of the case, would amount to a universal re-adoption of the "discarded" presumed harm rule.⁷² This danger is illustrated by the recent case of *McBroom v.*

⁶⁸ 159 Tex. 273, 317 S.W.2d 916 (1958). See also *Cloudt v. Henderson*, 175 S.W.2d 643 (Tex. Civ. App. 1943) *error ref. w.o.m.* (where counsel for appellee played golf with two or three jurors on two separate occasions, probable injury shown). For cases decided prior to 1941 see Comment, 27 TEXAS L. REV. 708 (1949).

⁶⁹ 159 Tex. 273, 279, 317 S.W.2d 916, 921 (1958).

⁷⁰ *Bowen v. Redlin*, 389 S.W.2d 539 (Tex. Civ. App. 1965) (agent of defendant's insurer made statements to defendant's attorney, in the hall while the jurors were not far away, to the effect that most claims were trumped up, *McCaslin* distinguished); *Texas & N.O.R.R. v. Perez*, 346 S.W.2d 369 (Tex. Civ. App. 1961) *error ref. n.r.e.* (while juror was returning to jury box after lunch, plaintiff, who was uneducated, handed him a picture of a group of people which the juror merely glanced at and handed back, *McCaslin* distinguished); *Great Am. Indem. Co. v. Chriceol*, 337 S.W.2d 404 (Tex. Civ. App. 1960) *error ref. n.r.e.* (unknown person called deceased's employee who was neither a witness nor a party and asked if he wanted to know a sure way of winning the case, *McCaslin* distinguished); *Davis v. Dange*, 328 S.W.2d 203 (Tex. Civ. App. 1959) (juror consulted a dictionary, *McCaslin* distinguished).

⁷¹ *McBroom v. Souther*, 410 S.W.2d 303 (Tex. Civ. App. 1966) (twice during trial plaintiff's mother who brought the action as the best friend of her injured son, stated to the only woman juror that she needed money for her son); *Occidental Life Ins. Co. v. Duncan*, 404 S.W.2d 52 (Tex. Civ. App. 1966) *error ref. n.r.e.* (plaintiff's pain was a matter in issue and during recess he asked a juror for aspirin).

⁷² *St. Louis & Sw. Ry. v. Gregory*, 387 S.W.2d 27 (Tex. 1965); *Aetna Cas. & Sur. Co. v. Perez*, 360 S.W.2d 157 (Tex. Civ. App. 1962). Justice, then Judge, Pope stated in regard to the rule of *McCaslin*:

This is the rule and a good one, but its extension into new areas flirts with the

*Souther*⁷³ where a court of appeals found a new trial necessary because the plaintiff-mother, told the only woman juror twice during the trial that she needed money for her injured son. The court felt this misconduct was strikingly similar to the misconduct in *McCaslin* and reversed and remanded because it could not be said that plaintiff was entitled to judgment as a matter of law. During the trial the court had inquired about this contact, and the juror had referred to it as only a "passing comment in the hall." It is difficult to consider the statements more than casual comments stating the obvious. While *McBroom* might seem to be an unwarranted extension of *McCaslin*, a recent holding that proof that the plaintiff had asked a juror for an aspirin during a recess, when the plaintiff's pain and suffering was a matter in issue, was sufficient misconduct to allow a new trial is more reconcilable.⁷⁴

Certainly a juror's contact with someone interested in the litigation is a type of misconduct which a party should be allowed to raise upon a motion for a new trial. But the *McCaslin* doctrine of presumed harm and reversal unless the appellee can show he was entitled to judgment as a matter of law is appropriate only in the most extreme cases. Cases, unlike *McBroom*, which consider the content of the remarks or the nature of the act as well as the personalities of the people involved and determine whether there was probable injury under rule 327,⁷⁵ clearly display the preferable approach.

New Evidence in the Jury Room. Rule 327 expressly provides that if probable injury is shown a new trial shall be granted when the evidence shows that a juror either failed to answer or answered falsely any question presented to the panel on *voir dire*. It is at this stage of the proceeding that a juror's special knowledge of the matters in issue or of the parties or witnesses should be disclosed.⁷⁶ Moreover, a juror's disclosure to his fellow jurors of his "special knowledge," undiscovered on *voir dire*, is considered to be jury misconduct and can necessitate a new trial when it is shown that probable injury resulted.⁷⁷ The rationale is that the policy of allowing cross-examination of all "witnesses" outweighs the disadvantages of the additional time and expense of a new trial.⁷⁸

As rule 226a indicates, it is improper to interject into jury deliberations new matters derived from private investigations of individuals or published materials. In determining whether probable injury has resulted to the complaining party, the courts of appeals have wrestled with cases when the evidence showed that jurors looked up and related or brought into the

re-adoption of the discarded rule of presumed harm in misconduct cases. In our opinion, the casual comment by the bailiff is not in the same class as that of a party who seeks out and asks a juror to help him win his case. Proof of probable harm by something more than proof of the misconduct itself was therefore necessary in this case.

Id. at 160.

⁷³ 410 S.W.2d 303 (Tex. Civ. App. 1966).

⁷⁴ *Occidental Life Ins. Co. v. Duncan*, 404 S.W.2d 52 (Tex. Civ. App. 1966) *error ref. n.r.e.*

⁷⁵ See, e.g., *Texas & N.O.R.R. v. Perez*, 346 S.W.2d 369 (Tex. Civ. App. 1961) *error ref. n.r.e.*

⁷⁶ Pope, *The Mental Operations of Jurors*, 40 TEXAS L. REV. 849 (1962).

⁷⁷ See notes 79 and 81 *infra*.

⁷⁸ *Ibid.*

jury room legal definitions⁷⁹ or newspaper reports⁸⁰ about the litigation, or mentioned similar injuries and treatment they had received⁸¹ or similar accidents in which they were involved or of which they were aware.⁸² On the other hand, there exists pre-rule 226a authority that the jury may be told in the charge that it may weigh and discuss the evidence in light of its own experience and common knowledge.⁸³ One commentator has defined the concept to mean elemental experiences of human nature, community affairs, and every day life as affected by local conditions, and draws an analogy, in a limited sense, to matters susceptible of judicial notice.⁸⁴ Rule 226a omits any reference to a juror's reliance on his common knowledge apparently attempting to avoid the mention of what may seem to a juror to be common knowledge, but what is in fact personal or special knowledge.

In 1951 the supreme court in *Crawford v. Detering Co.*⁸⁵ laid down some guidelines as to what distinguishes special knowledge from common knowledge. The suit involved a collision between an automobile and a truck. One juror, a busdriver, describing reaction and stopping time tests required by his employer, had told his fellow jurors that they would be surprised as to how long it takes to stop a bus, and that it takes a longer time to stop a truck. On the next vote the jury had answered the issue in favor of the truckdriver. Noting that only one other juror was familiar with the tests mentioned, the court found that this was personal knowledge and its injection into the deliberations was prejudicial to the driver of the automobile. Despite a strong dissent,⁸⁶ the court of appeals, which had reasoned that because all jurors drove automobiles the information consti-

⁷⁹ Kaufman v. Miller, 405 S.W.2d 820 (Tex. Civ. App. 1966) (a juror looked up the dictionary definitions of "proximate," "neurosis," and "negligence," but the court found no probable injury); Davis v. Dange, 328 S.W.2d 203 (Tex. Civ. App. 1959) *error ref. n.r.e.* (several jurors looked up "proximate" in the dictionary and one referred to Dean Prosser's book—he stated that he did not learn much—but the court found no probable injury). Travelers Ins. Co. v. Carter, 298 S.W.2d 231 (Tex. Civ. App. 1956) *error ref. n.r.e.* (the court was of the view that the dictionary definitions of "total" and "incapacity" were more favorable to the appellant than the charge and found no probable injury because a juror returned from lunch with them). Compare, Gulf States Equipment Co. v. Toombs, 288 S.W.2d 203 (Tex. Civ. App. 1956) *error ref. n.r.e.*

⁸⁰ Taylor v. Dallas Transit Co., 351 S.W.2d 554 (Tex. Civ. App. 1961) *error ref. n.r.e.*

⁸¹ Johnson v. Mitchell, 395 S.W.2d 87 (Tex. Civ. App. 1965) (mention of a similar injury and treatment did not result in probable injury); Travelers Ins. Co. v. Carter, 298 S.W.2d 231 (Tex. Civ. App. 1956) *error ref. n.r.e.* (mention of a similar injury and of the consequent difficulty of getting a job without signing a waiver of disability resulted in probable injury).

⁸² Dobbins v. Klinkle, 395 S.W.2d 845 (Tex. Civ. App. 1965); St. Paul Mercury Co. v. Bearfield, 296 S.W.2d 956 (Tex. Civ. App. 1956) *error ref. n.r.e.*; Texas Employers Ins. Ass'n v. Phillips, 255 S.W.2d 364 (Tex. Civ. App. 1953) (the misconduct in combination with improper argument of counsel resulted in a new trial). Cf., the interesting case of Barwell v. Evans, 326 S.W.2d 17 (Tex. Civ. App. 1959). Several jurors testified that one juror, a busdriver, confessed in the jury room that he had gained a legal expertise due to the numerous cases he had handled, and that his fellow jurors should know that the Workman's Compensation Law of Texas entitled a man who was injured to \$25.00 per week for 400 weeks or \$10,000. Almost unanimously, the jurors testified at the hearing that but for the busdriver's statements they would have awarded the plaintiff only the medical expenses he incurred due to the injuries he received in the automobile collision in question (approximately \$250), rather than the amount of the verdict—\$10,250.

⁸³ Gillette Motor Transp. Co. v. Whitfield, 145 Tex. 571, 200 S.W.2d 624 (1947) (a juror may be instructed that he can rely on his common knowledge, but it is not desirable to do so); Akers v. Epperson, 141 Tex. 189, 171 S.W.2d 483 (1943); Killen v. Stanford, 170 S.W.2d 792 (Tex. Civ. App. 1943) *error ref. w.o.m.*

⁸⁴ Note, 30 TEXAS L. REV. 630 (1952).

⁸⁵ 150 Tex. 140, 237 S.W.2d 615 (1951).

⁸⁶ *Id.* at 620.

tuted common knowledge, was reversed. In deciding *Crawford*, the court apparently was unconcerned with whether the matter brought out during deliberations could have been disclosed by an effective *voir dire*.⁸⁷ The holding also indicated that the number of jurors actually familiar with the new matter prior to its disclosure controls, regardless of the likelihood that in the typical jury it would not be surprising to find a person with such special knowledge. The court thus seemed to adopt a subjective rather than an objective test. The dissenting opinion, abhorring the fragility of jury verdicts under the liberal Texas view and calling for reform,⁸⁸ indicated that the strength of the jury system lies in allowing the jurors to use their common knowledge—which includes all knowledge other than knowledge of the very transaction in issue.

It appears in general that the dissenting opinion in *Crawford* has had at least sub silentio effect.⁸⁹ In its two most recent decisions, the supreme court has refused to allow a new trial due to a juror's discussion of personal knowledge. In *Brawley v. Bowen*,⁹⁰ a case purportedly controlled by the implied finding rule, the court was not swayed by uncontradicted testimony that one of the jurors, a mechanic, told the others the "true story" of the cause and amount of damage to plaintiff's car. At the hearing the evidence clearly conflicted as to three alleged acts of misconduct, but all jurors called seemed to agree that the juror-mechanic related his experience in regard to automobile damage. If the court felt that this was merely common knowledge, and thus not misconduct, then the subjective test of *Crawford* was ignored. Further support for a stricter position can be found in the court's latest decision in which the special knowledge issue clearly was raised. In *St. Louis & Sw. Ry. v. Gregory*⁹¹ the plaintiff had been struck by a train while perched aloft a railroad crossing. After a judgment for the defendant, the trial court heard evidence that a juror had (1) communicated to one other juror that he had heard that the plain-

⁸⁷ *Accord*, *City of Houston v. Quiones*, 142 Tex. 282, 177 S.W.2d 259 (1944) (juror had operated similar mowing machine); *Texas & Pac. Ry. v. Gillette*, 125 Tex. 653, 83 S.W.2d 307 (Tex. Comm'n App. 1935) (juror owned same make and model car and knew how fast it could go); *Lincoln v. Stone*, 59 S.W.2d 100 (Tex. Comm'n App. 1933); *Hobrecht v. San Antonio & A.P. Ry.*, 141 S.W. 579 (Tex. Civ. App. 1911) (ex-railroad fireman was a juror when the issue was whether tracks are wet at night).

⁸⁸ 150 Tex. 140, 156, 237 S.W.2d 615, 625 (1951) (Wilson, J., dissenting):

The practice now is for the winning party [as well as the losing party] to make an equally lengthy examination of ex-jurors in an effort to raise an issue of fact as to what happened within the jury room. . . . Thus we have developed due to lengthy hearing and record on motion a 'trial upon a trial' and have added one more hazard to the progress of a litigant toward justice. . . . The scope of the inquiry should be limited to matters truly going to the integrity of the verdict—fraud, tampering, prejudicial and inflammatory statements, statements of new evidence of the very transaction in issue and similar matters. This court should narrow rather than broaden the limits of the scope of inquiry into jury conversation constituting misconduct.

⁸⁹ Many recent cases concerned with matters not in evidence can be explained because of the implied finding rule or because a juror's mention of his personal experiences was promptly rebuked. See, e.g., *Brawley v. Bowen*, 387 S.W.2d 383 (Tex. 1965) (implied finding rule); *Dobbins v. Klinke*, 395 S.W.2d 845 (Tex. Civ. App. 1965) (implied finding rule); *Rash v. Ross*, 371 S.W.2d 109 (Tex. Civ. App. 1963) (rebuke); *Davis v. Damge*, 328 S.W.2d 203 (Tex. Civ. App. 1959) *error ref. n.r.e.* (implied finding rule); *St. Paul-Mercury Indem. Co. v. Bearfield*, 296 S.W.2d 956 (Tex. Civ. App. 1956) *error ref. n.r.e.* (rebuke).

⁹⁰ 387 S.W.2d 383 (Tex. 1965).

⁹¹ 387 S.W.2d 27 (Tex. 1965).

tiff had had carburetor trouble the day before his car was struck, and (2) asked the person whom he had heard had made the statement if he had in fact done so. The juror testified that the person, when asked, merely laughed the question off. The evidence did not show that these matters were communicated beyond one other juror, but the court of appeals reversed and remanded for a new trial. The supreme court, noting that ten jurors gave the same answers without being aware of this "hearsay" could not find probable injury and refused to presume that it existed. Justice Greenhill dissented⁹³ because he could find no other explanation for the jury's answers to the special issues other than the belief that, due to engine trouble, the car stopped on the tracks and argued that the *McCaslin* doctrine of presumed harm should control.

Gregory displays the most critical form of "special knowledge" misconduct. The knowledge was acquired after *voir dire*; therefore, it cannot be argued that the complainant's failure to elicit the special knowledge on *voir dire* should constitute a waiver of his objection. The majority's refusal to award a new trial despite (1) the rule that probable injury is shown if the verdict of one juror is affected by the misconduct and (2) the lack of a rational explanation for the answers to the issues other than influence derived from the misconduct illustrates the heavy burden faced by the complaining party in this area.

Discussion of Liability Insurance and Attorneys' Fees. Closely akin to the special-common knowledge dichotomy is the issue posed by mention of liability insurance or attorneys' fees. As jurors become more and more sophisticated, it becomes increasingly difficult to assume that if neither item is mentioned during trial, neither will be mentioned during deliberation. In fact it was recognized at an early date that insurance easily can be classified as a matter of common knowledge,⁹⁴ but the adage that "justice and an insurance company cannot occupy the court room at the same time"⁹⁵ has controlled. *Barrington v. Duncan*,⁹⁶ the first supreme court decision construing or applying rule 327, involved casual mention by a juror that the defendant trucker was required to carry \$10,000 worth of liability insurance and the jury returned a verdict for the plaintiff for \$10,000. The court ruled that the mention of insurance was injurious misconduct, presumably because the amount of the verdict was equal to the amount of insurance mentioned. The totality of the circumstances of *Barrington* was unfortunate. The court construed rule 327 as shifting the burden of proof but left considerable doubt as to whether the change would be applied,⁹⁷ since superficially the holding showed a greater tendency to order a new trial than cases decided prior to rule 327.⁹⁷ It has since become clear that *Barrington* is limited to its particular facts, even though

⁹² *Id.* at 34.

⁹³ *Galveston, H. & S.A. Ry. v. Harling*, 260 S.W. 1016 (Tex. Comm'n App. 1924).

⁹⁴ Comment, *Reversible Error in Texas Civil Procedure*, 27 TEXAS L. REV. 708 (1949).

⁹⁵ 140 Tex. 510, 169 S.W.2d 462 (1943).

⁹⁶ Comment, Stout, *Misconduct of the Jury—Rule 327*, 21 TEXAS L. REV. 794 (1943). See also MCCORMICK & RAY, TEXAS LAW OF EVIDENCE § 394 (1956).

⁹⁷ See, e.g., *Bradley v. Texas & Pac. Ry.*, 1 S.W.2d 861 (Tex. Comm'n App. 1928) (casual mention of attorney's fees held not sufficient to entitle complaining party to a new trial).

the court judicially noticed "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."⁹⁸ In *Putnam v. Lazarus*⁹⁹ the supreme court distinguished *Barrington* and held that a mere casual mention of insurance followed by a prompt rebuke without further discussion does not show probable injury. This clarification of *Barrington* has resulted in a wealth of authority against reversal due to mention of insurance.¹⁰⁰ Various reasons are given for holding that injury probably did not result from the mention of insurance, the most frequent of which is that prompt rebuke by a fellow juror cured any error. Then too, if, as often occurs, the mention of insurance was prompted by the complaining party, any error is frequently considered to be waived.¹⁰¹ There is also authority for the proposition that the mention of insurance can be favorable to the complaining party,¹⁰² e.g., where the jury discusses the belief that large verdicts result in increased insurance rates.

Courts seem to apply virtually the same arguments to hold harmless most mention of attorneys' fees, i.e., only in extreme cases¹⁰³ should a new trial be awarded. Most jurors realize that a party has hired an attorney or most likely carries liability insurance¹⁰⁴ and an instruction pursuant to rule 226a that neither should be considered hardly seems prejudicial, particularly in light of what seems to be contemporary juror knowledge.¹⁰⁵

⁹⁸ 169 S.W.2d 462, 465 (1943). See also *Griffith v. Casteel*, 313 S.W.2d 149 (Tex. Civ. App. 1958) *error ref. n.r.e.*; *Gillespie v. Rossi*, 238 S.W.2d 547 (Tex. Civ. App. 1951) *error ref. n.r.e.*

⁹⁹ 156 Tex. 154, 293 S.W.2d 493 (1956).

¹⁰⁰ *Benton v. Walker Truck Line*, 410 S.W.2d 822 (Tex. Civ. App. 1967); *Johnson v. Mitchell*, 395 S.W.2d 87 (Tex. Civ. App. 1965); *Dallas Transit Co. v. Newman*, 380 S.W.2d 818 (Tex. Civ. App. 1964) *error dismissed*; *Rodman Supply Co. v. Jones*, 370 S.W.2d 951 (Tex. Civ. App. 1963) (The evidence showed that the jury discussed insurance, attorneys' fees, and improper elements of damages. Also three jurors visited the scene of the collision. The cumulative effect of the acts of misconduct showed probable injury and required reversal.); *Lassman v. Mueller*, 315 S.W.2d 325 (Tex. Civ. App. 1958) *error ref. n.r.e.* (the jury stood seven-to-five prior to the mention of insurance); *Stein v. Boehme*, 302 S.W.2d 663 (Tex. Civ. App. 1957); *Plains Creamery v. Denny*, 277 S.W.2d 755 (Tex. Civ. App. 1954) *error ref. n.r.e.* (jury stood six-to-six prior to the mention of insurance). *Accord*, *Waits v. Hogan*, 220 S.W.2d 915 (Tex. Civ. App. 1949) *error ref. n.r.e.* See also, *Roy L. Jones Truck Line v. Johnson*, 225 S.W.2d 888 (Tex. Civ. App. 1949) *error ref. n.r.e.*

¹⁰¹ *Hoffman v. French, Ltd.*, 394 S.W.2d 259 (Tex. Civ. App. 1965) *error ref. n.r.e.*; *Dallas Transit Co. v. Newman*, 380 S.W.2d 818 (Tex. Civ. App. 1964) *error dismissed*. Compare the pre-*Putnam* case of *Gillis v. Rossi*, 238 S.W.2d 547 (Tex. Civ. App. 1951) *error ref. n.r.e.* Insurance had been mentioned several times before the jury found the plaintiff-policeman negligent for not timely sounding his siren before entering the intersection where the accident ensued. Relying on *Barrington's* statement that the court can judicially notice that a jury is more apt to render a judgment against the defendant and for a larger amount if it believes that the defendant has insurance, the court ordered a new trial for the plaintiff because the jury probably was influenced by a discussion that the defendant did not have insurance. This holding was made despite the fact that the plaintiff brought before the jury evidence that he was receiving compensation benefits.

¹⁰² *Dallas Transit Co. v. Newman*, 380 S.W.2d 818 (Tex. Civ. App. 1964) *error dismissed*.

¹⁰³ *White Cabs v. Moore*, 146 Tex. 101, 203 S.W.2d 200 (1947) (the cumulative effect of the jury's discussing attorney's fees, insurance and improper evidence prejudicial to the defendant required reversal). See also *Missouri & Pac. R.R. v. Kennedy*, 403 S.W.2d 909 (Tex. Civ. App. 1966) *error ref. n.r.e.* (jury decided the plaintiff was entitled to \$50,000 damages and awarded \$75,000 to cover what they felt would be the attorneys' fees). *Accord*, *Rodman Supply Co. v. Jones*, 370 S.W.2d 951 (Tex. Civ. App. 1963).

¹⁰⁴ *Benton v. Walker Truck Line*, 410 S.W.2d 822 (Tex. Civ. App. 1967); *Dallas Transit Co. v. Newman*, 380 S.W.2d 818 (Tex. Civ. App. 1964) *error dismissed*; *Texas & N.O.R.R. v. Perez*, 346 S.W.2d 369 (Tex. Civ. App. 1961); *Roy L. Jones Truck Line v. Johnson*, 225 S.W.2d 888 (Tex. Civ. App. 1949) *error ref. n.r.e.*

¹⁰⁵ See, e.g., *Missouri & Pac. R.R. v. Kennedy*, 403 S.W.2d 909 (Tex. Civ. App. 1966) *error ref. n.r.e.*; *Dallas Transit Co. v. Newman*, 380 S.W.2d 818 (Tex. Civ. App. 1964) *error dismissed*.

Improper Views. The frequency with which jury misconduct is alleged because a juror or jurors took it upon themselves to visit the scene of an accident or make independent investigation of the premises or objects involved in the litigation¹⁰⁶ strengthens the argument that Texas should align itself with all other jurisdictions and expressly recognize the evidentiary value of allowing a trial court to conduct a jury view of the scene in a proper case.¹⁰⁷ Texas law does not prohibit supervised views, but they have received no express sanction, and judges, unfortunately, are hesitant to allow them. Rule 327 has done an effective job of avoiding reversals in the numerous cases¹⁰⁸ in which jurors took improper views, but the administrative inconvenience created by continually refusing to allow a supervised view and then recognizing an improper view as misconduct deserves consideration.¹⁰⁹ Certainly, in the long run less time and expense would be wasted by simply allowing a supervised view. An addition to rule 226a instructing the jury that, upon request, a supervised view may be allowed in a proper case is warranted.

Amplification of the Problem—The Special Issue Practice. When confronted with Texas' special issue practice, jurors are likely to find themselves involved in acts of misconduct because they attempted to answer the issues so as to achieve a particular result.¹¹⁰ The legal consequences of a similar form of misconduct were tested in *Trousdale v. Texas & N.O.R.R.*¹¹¹ The supreme court decided in a five-to-four decision that no probable injury was shown by testimony indicating that jurors were influenced by statements, made during deliberations, that the answers to negligence and unavoidable accident issues were immaterial after the damage issue had been answered. The court reasoned that mere discussion of the effect of answers without a showing that the jury "designedly attempted to frame answers to the issues so as to accomplish . . . [plaintiff's recovery] . . . was insufficient to show probable harm."¹¹² The same test has been applied

¹⁰⁶ See, e.g., *Rodman Supply Co. v. Jones*, 370 S.W.2d 951 (Tex. Civ. App. 1963) (Three jurors visited the scene of the collision and one drove through the intersection and reported back the visibility under a clocked speed. This act of misconduct, *inter alia*, resulted in a new trial being awarded.); *Ballinger v. Herren*, 332 S.W.2d 131 (Tex. Civ. App. 1960) (no probable injury was shown by evidence that a juror who was previously familiar with the scene which was described well at the trial visited the scene and reported his observations to the jury); *Texas Elec. Ry. v. Wooten*, 173 S.W.2d 463 (Tex. Civ. App. 1943) *error ref. u.o.m.* (an improper view plus the discussion of attorneys' fees resulted in a new trial).

¹⁰⁷ *Wendorf, Some Views on Jury Views*, 15 BAYLOR L. REV. 379 (1963). The author contends that the reason for Texas' backward position is that, because courts frequently refer to unauthorized views as improper conduct, they are hesitant to recognize the propriety of an authorized view.

¹⁰⁸ *Martinez v. H. E. Butt Grocery Co.*, 379 S.W.2d 94 (Tex. Civ. App. 1964); *Allen v. Materials Transport Co.*, 372 S.W.2d 744 (Tex. Civ. App. 1963); *Rodman Supply Co. v. Jones*, 370 S.W.2d 951 (Tex. Civ. App. 1963); *Ballinger v. Herren*, 332 S.W.2d 131 (Tex. Civ. App. 1960); *Weathers v. Renshaw Bros. Well Servicing Co.*, 307 S.W.2d 640 (Tex. Civ. App. 1957) *error ref. n.r.e.*; *Bunker v. Johnson*, 282 S.W.2d 884 (Tex. Civ. App. 1955); *S. H. Kress & Co. v. Selph*, 250 S.W.2d 883 (Tex. Civ. App. 1952); *Texas Elec. Ry. v. Wooten*, 173 S.W.2d 463 (Tex. Civ. App. 1943) *error ref. u.o.m.*

¹⁰⁹ *Wendorf*, note 107 *supra*.

¹¹⁰ *Maryland Cas. Co. v. Hears*, 144 Tex. 317, 190 S.W.2d 62 (1945). See also, in this issue, Comment, *A Special Issue Quandary—Submitting "Partial Incapacity" in Workmen's Compensation*, text accompanying notes 1 and 5-9.

¹¹¹ 154 Tex. 231, 276 S.W.2d 242 (1955).

¹¹² *Id.* at 244 (quoting from *Maryland Cas. Co. v. Hears*, 144 Tex. 317, 190 S.W.2d 62 (1945)).

when the jury agreed on the amount of damages before answering the special issues.¹¹³ This test together with the restriction on probing a juror's mental processes and the implied finding rule have successfully squelched any recent attempts to achieve a new trial because improper methods were used to answer the special issues. While *Trousdale* and cases following it¹¹⁴ may seem to be in direct conflict with the rule that a new trial is required if the verdict of one juror is affected,¹¹⁵ the line of decisions is desirable because of the inflexible attitude toward probing the mental processes of jurors that it evidences.

Bias or Prejudice of a Juror. Article 2134, section 4¹¹⁶ provides that if a juror is biased or prejudiced against a party he is disqualified from serving as a juror and this has constituted sufficient jury misconduct to warrant a new trial. Recently courts have been unwilling to grant a new trial because a juror, during deliberations, expressed bias or prejudice toward the type of suit involved. In *Compton v. Henrie*¹¹⁷ a juror had mentioned several times that he did not believe in suits for personal injury and property loss as a result of a collision between two vehicles; that he had been injured in an accident and, although times were hard, he did not sue anyone; and that he would not want anyone to "bleed" him. Recognizing that bias and prejudice exists in all jurors to an extent, the supreme court construed article 2134 as requiring for a new trial a showing of a state of mind which leads to the natural inference that a party will not or did not act with impartiality. To show prejudice it must be evident that the juror prejudged the case concerning either a party or the type or subject matter of the suit. An extremely heavy burden of proof was placed on the complaining party when it was stated: "In our opinion the [juror's] statements do not conclusively establish a state of mind that could disqualify him as a matter of law."¹¹⁸ Apparently the court was of the view that since the juror was not disqualified as a matter of law, there was no point in discussing whether the aforementioned statements probably injured the complaining party. In discussing jury misconduct the court limited its opinion to whether or not the same juror's advocating that the jury adopt a "beyond a reasonable doubt" testing of the evidence, rather than the preponderance of the evidence test set out in the court's charge was material misconduct. The court found that the evidence did not show that the jury adopted its own rule of law, but showed only that the court's definition was misconstrued, which does not constitute misconduct. The strictness of the holding becomes more evident when it is considered that on *voir dire* the juror failed to answer when asked whether any of the jurors were biased against this type of suit and that prior to the juror's dissertation on the burden of proof, two jurors had voted against finding

¹¹³ See, e.g., *Soap Corp. of America v. Balis*, 223 S.W.2d 957 (Tex. Civ. App. 1949) *error ref. n.r.e.*

¹¹⁴ See, e.g., *Kaufman v. Miller*, 405 S.W.2d 820 (Tex. Civ. App. 1966); *Heflin v. Ft. Worth & D.C. Ry.*, 207 S.W.2d 114 (Tex. Civ. App. 1947) *error ref. n.r.e.*

¹¹⁵ *St. Louis & Sw. Ry. v. Gregory*, 387 S.W.2d 27 (Tex. 1965).

¹¹⁶ TEX. REV. CIV. STAT. ANN. art. 2134, § 4 (1964).

¹¹⁷ 364 S.W.2d 179 (Tex. 1963).

¹¹⁸ *Id.* at 182.

the plaintiff negligent. Further, there was only slight evidence as to rebuke of the jurors' actions during deliberation. Even in the absence of a conflict in the evidence of misconduct, a literal reading of *Compton* would indicate that an insurmountable burden of proof has been placed on the complaining party, and for all practical purposes bias or prejudice against the nature or subject matter of the suit has been eliminated from the concept of misconduct.¹¹⁹

V. CONCLUSION

Except for isolated exceptions, rule 327 has successfully shifted the burden of proving probable injury due to jury misconduct to the complaining party. Strict enforcement of the rule is desirable, but there is merit in the argument that the Texas practice can be even further improved. The admonitory instructions contained in rule 226a certainly are a step in this direction. Increasing the jurors' awareness of what constitutes improper conduct and admonishing the jury not to allow nor consider improper conduct will have a more pronounced effect on jurors than would mere rebuke by a fellow juror.¹²⁰ And educating the jury as to the possible consequences of improper conduct is a more desirable practice than threatening the jury with contempt proceedings for engaging in improper conduct because the former will be less likely to stifle free and independent discussion in the jury room.

Post-verdict harassment of jurors, a very real problem in Texas according to one commentator, is another factor pointed to as stifling free and independent discussion in the jury room because potential jurors are becoming increasingly aware of the unpleasant after-effects experienced by those called to serve before them.¹²¹ The present instructions called for by rule 226a have a pronounced shortcoming in that they do nothing to reduce this practice. While the jurors are told that they can choose not to discuss the case with anyone, they are aware that the court condones the attorneys' investigation of what occurred in or out of the jury room. Some federal courts have successfully avoided harassment¹²² by an instruction that post-verdict investigation by an attorney is improper and unethical and that a juror should report to the judge any knowledge of this practice as well as any matter of jury misconduct. Rules 327 and 226a tend to increase the problem of juror harassment because the shift in the burden of proof necessitates extra zeal, certainly not discouraged by rule 226a in building

¹¹⁹ *Doran v. Eaton*, 376 S.W.2d 367 (Tex. Civ. App. 1964) *error ref. n.r.e.* indicates *Compton's* influence in this area. Jurors testified that a juror, who did not admit prejudice or bias on *voir dire*, stated during deliberations that he did not think that a child struck by a car while in the street should ever recover. The juror accused of the misconduct denied it and another testified that he did not remember the discussion. The trial court made no findings or conclusions and the court of appeals found sufficient conflict in the evidence to apply the implied findings rule and deny a new trial.

¹²⁰ See, e.g., cases cited in note 89 *supra*. See also Pope, *Jury Misconduct and Harm*, 12 BAYLOR L. REV. 355 (1960).

¹²¹ Bell, *Restricting Grounds of Jury Misconduct*, 25 TEXAS B.J. 275 (1962).

¹²² *Primm v. Continental Cas. Co.*, 143 F. Supp. 123 (W.D. La. 1956). See also *Northern Pac. Ry. v. Mely*, 219 F.2d 199 (9th Cir. 1954); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708 (N.D. Cal. 1962).

a case of jury misconduct. The rule seems to invite an unethical practice. It seems entirely conceivable that a juror who discusses the case with an attorney and relates improper conduct may be reminded by opposing counsel that he is under no obligation to submit an affidavit or testify in regard to the misconduct and thereby be the subject of a virtual tug-of-war.

The current Texas practice appears to substantiate the often-expressed fear that a rule of liberal admission of jurors' testimony as to jury misconduct opens a floodgate to litigation. Much time and expense is wasted because of the definition of misconduct followed by the Texas courts. By redefining "misconduct" the criticism of the Texas practice could be greatly reduced. Limiting the misconduct of discussing matters not in evidence to a juror's communicating personal or special knowledge of a fact or facts *in issue* is desirable. A juror's special knowledge of an aspect of the "situation" presented by the litigation should not be grounds for impeachment of the verdict for two reasons: (1) an effective *voir dire* should elicit a juror's special knowledge, and if a question which would bring the information forward is not asked, the party should be held to have waived his objection; (2) special knowledge of the situation presented by the litigation can be argued to be present in any jury representative of the community.¹²³

Allowing the trial court to order remittitur to avoid *any* excess which might have resulted directly from the discussion of attorneys' fees would aid in the administration of justice.¹²⁴ Remittitur cannot be used to avoid excess litigation when insurance is discussed because a discussion of insurance, unlike a discussion of attorneys' fees, has a tendency to affect the determination of answers to issues other than those concerned with damages.¹²⁵

The Texas special issue practice itself creates one form of misconduct—jurors' discussing the effect of their answers. This category is absent in jurisdictions which, by general verdict, allow the jury to achieve the result

¹²³ Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958). An obvious rebuttal to this argument is that an attorney cannot exhaust the extent of a juror's special knowledge during *voir dire*.

¹²⁴ The established rule is that if the tainted portion of the verdict is capable of definite and accurate ascertainment, and the jury acted without passion or prejudice, remittitur of the tainted portion will cure any error and allow the verdict to stand despite the misconduct. *El Paso Elec. Co. v. Whitenack*, 1 S.W.2d 594 (Tex. Comm'n App. 1928); *International-Great N. Ry. v. Cooper*, 1 S.W.2d 578 (Tex. Comm'n App. 1928); *United Fid. Life. Ins. Co. v. Holliday*, 226 S.W.2d 139 (Tex. Civ. App. 1949) *error ref. n.r.e. Cf., City of Waco v. Darnell*, 35 S.W.2d 134 (Tex. Comm'n App. 1931); *Parris v. Jackson*, 338 S.W.2d 280 (Tex. Civ. App. 1960) (the court felt that the contention that to allow remittitur to cure the defect in the verdict was appealing, but that the amount resulting from the misconduct was uncertain and therefore *City of Waco, supra*, controlled).

¹²⁵ In *International-Great N. Ry. v. Cooper*, note 124 *supra*, the court stated that where misconduct goes to the question of liability or where the part of the verdict affected is uncertain or if it is uncertain whether passion or prejudice was a factor, the entire verdict must be set aside. In *City of Waco v. Darnell*, note 124, *supra*, the court refused to allow remittitur of all but the lowest amount of damages favored by some jurors during deliberations because to do so would result in a presumption that a split jury would have reached a verdict eventually and at least for the smallest amount favored. The reasoning of the court is questionable as it seems unlikely that a jury, split only as to the damage issue, would not render any verdict nor agree to some amount of damages at least equal to the lowest amount favored by some of the jurors.

of the litigation; however, a discussion of the relative merits of the two practices is beyond the scope of this article.¹²⁶ While quotient or majority verdicts are rarely alleged as grounds of misconduct in Texas, the better view would be to eliminate these methods of calculation from the definition of jury misconduct since they presuppose initial deliberation and, for all practical purposes, are probably no different from most other verdicts where the proof would not allow such a label to attach. The same cannot be said of a verdict determined by lot or chance and this should continue to be jury misconduct of the most serious form.

Two significant areas remain to be discussed. Bribery, jury tampering, or any contact by an outsider which involves a juror should continue to constitute misconduct. Not only should jurors be free from extraneous influences which may occur outside the jury room, but they should also be free from the presence during deliberations of a fellow juror who maintains a biased attitude toward the parties, witnesses, or the type of litigation involved. The presumed harm doctrine of *McCaslin* deserves consideration in this area because the juror who does not truthfully and completely answer the *voir dire* questions has in effect perpetrated a fraud upon the court. Evidence of a juror's special knowledge of a fact in issue having been discussed, or evidence that the verdict was determined by chance should also be admissible. By restricting the definition of misconduct to "tampering," bias and prejudice, and personal knowledge of a fact in issue, the effective administration of justice, albeit not "perfect" justice, will be served.

¹²⁶ See FRANK, LAW AND THE MODERN MIND 181 (1936); Farley, *Instructions to the Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194 (1932). See also, in this issue, Comment, *A Special Issue Quandary—Submitting "Partial Incapacity" in Workmen's Compensation*, text accompanying notes 1 and 5-9.