

Washington Law Review

Volume 38
Number 2 *Washington Case Law—1962*

7-1-1963

Practice and Procedure—Impeachment of Verdicts by Jurors' Affidavits

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Recommended Citation

Richard E. Keefe, *Washington Case Law, Practice and Procedure—Impeachment of Verdicts by Jurors' Affidavits*, 38 Wash. L. Rev. 339 (1963).

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PRACTICE AND PROCEDURE

Impeachment of Verdicts by Jurors' Affidavits. *Gardner v. Malone*,¹ presents this problem: In what circumstances and by what evidence may a jury verdict be impeached for alleged misconduct in the jury-room?

As an original proposition it would seem that, consonant with our notions of a fair trial, an improperly reached verdict should be subject to timely impeachment in every case. And further, there is no more logical means of proving such misconduct than by the testimony or affidavits of the jurors themselves. This, however, is not the law. Most American jurisdictions will not admit the testimony or affidavits of jurors to impeach their verdicts under any circumstances.² This rule has two bases. The first is *Vaise v. Delaval*,³ written by Lord Mansfield in 1785. Premised on the idea that testimony of a juror regarding his own misconduct is inadmissible, while that of an eavesdropper to the same act may be heard, *Vaise* is obviously an historic anomaly.⁴

The second basis is both substantial and contemporary. It is the policy favoring stable and certain verdicts. The considerations manifested therein include: rapid and conclusive termination of litigation, hopefully with verdict and judgment; preventing harassment of jurors by disappointed litigants; discouragement of jury tampering; and maintaining the secrecy of deliberation to encourage frank and free discussion by all jurors. This public interest in stability and certainty must be balanced against that of the individual litigant in a fair trial.⁵

¹ 160 Wash. Dec. 840, 376 P.2d 651 (1962).

² See 8 WIGMORE, EVIDENCE § 2354 nn.1 & 2 (McNaughton Rev. 1961) (hereinafter cited as WIGMORE), where it is asserted that the exclusionary rule prevails in all but eleven states, and possibly the federal courts. As will be discussed, *infra*, those states which have relaxed the rule, including Washington, follow variants of the so-called "Iowa" rule, as set forth in *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866).

³ 1 Term. Rep. 11, 99 Eng. Rep. 944 (K.B. 1785). The brief report reads: "Vaise against Delaval 1785. Affidavit of a juror that the jury, having been divided, tossed up, and that the plaintiff had won, rejected.

"Upon a motion by Law for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won, in which was cited, *Hale v. Cove*, 1 Stra. 642.

"Per Lord Mansfield, Ch. J. The Court cannot (a) receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor (b); but in every such case the Court must derive their knowledge from some other source: such as some person having seen the transaction through a window, or some other means. Rule refused." (Footnotes omitted.)

⁴ Indeed, it is doubtful whether *Vaise* was a proper statement of the law in England when written. See WIGMORE § 2352.

⁵ The policies pro and con are summarized in WIGMORE § 2353. Another reason suggested by that author (§ 2348) is that allowing such affidavits would be a violation of the "parol evidence rule." But, this rule has no intrinsic significance, being only a

Considering these conflicting and substantial interests, the majority position—excluding *all* testimony of jurors concerning their misconduct—seems indefensible, because it excludes what must normally be the only evidence of misconduct, thereby denying the losing party a fair trial. Indeed, this exclusionary rule has been severely criticized.⁶ A minority of American courts have adopted a compromise approach, which allows the testimony or affidavits of jurors to impeach their verdict so long as the misconduct does not “inhere” in the verdict.⁷ But, as one commentator has pointed out, drawing the line between matters which do and do not “inhere” has been a difficult task, especially without reasoned consideration of the problem in the light of a jury’s proper function.⁸ Lacking also have been empirical data on how juries actually arrive at verdicts and comparative studies showing the

result of the other policies. Probably the leading judicial expression of the majority view is *McDonald v. Pless*, 238 U.S. 264, 267 (1915). The minority position is stated in *Wright*, note 2 *supra*, and *State v. Kociolek*, 20 N.J. 92, 98, 118 A.2d 812, 815 (1955). A succinct statement of this more liberal approach is found in *Perry v. Bailey*, 12 Kan. 415, 419 (1874): “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. . . . But as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining twelve can deny. One cannot disturb the action of twelve. It is useless to tamper with one, for the eleven may be heard.”

⁶ See, e.g., WIGMORE §§ 2345, 2353; Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958); Note, 37 VA. L. REV. 849 (1951); Comment, *New Trial: Use of Testimony of Jurors to Set Aside Verdicts*, 47 MICH. L. REV. 261 (1948); UNIFORM RULES OF EVIDENCE 41 & 44; MODEL CODE OF EVIDENCE rule 301 (1942), set out in note 7 *infra*. Another possible defect of the exclusionary rule is that it may work a denial of due process of law in some circumstances. See Note, 14 OKLA. L. REV. 533 (1961).

⁷ WEBSTER’S THIRD INTERNATIONAL DICTIONARY (1961) defines “inhere”: “to be inherent: to be a fixed element or attribute”; and “inherent”: “structural or involved in the constitution or essential character of something: belonging by nature or settled habit.” Clearly the word “inhere” (or “inherent”) of itself has no particular significance. Rather, it is only after a court has made a policy decision and determined what matters *should* be held “inherent” that it becomes meaningful. Thus it is not surprising that even the American courts which allow affidavits in some circumstances are often juxtaposed as to what matters do and do not “inhere.” For example, in *Kansas “quotient verdicts”* do not, and are subject to impeachment by juror testimony. *Kirkpatrick v. Wickmire*, 138 Kan. 230, 25 P.2d 371 (1933). In Washington, on the other hand, they do “inhere” in the verdict, and are impeachable only due to a specific Rule of Pleading, Practice and Procedure (59.04W). *Gardner v. Malone*, note 1 *supra*; *Goodman v. Cody*, 1 Wash. Terr. 329, 34 Am. Rep. 808 (1871). Rule 301, MODEL CODE OF EVIDENCE (1942), is probably as good a general statement of the impeachable types of misconduct as can be found: “Whenever any act, event or condition known to a member of a petit or grand jury is a subject of lawful inquiry, any witness, including every member of the jury, may testify to any material matter, including any statement or conduct or condition of any member of the jury, whether the matter occurred or existed in the jury room or elsewhere, and whether during the deliberations of the jury, or in reaching or reporting its verdict or finding, or in any other circumstances, except that upon an issue as to the validity of a verdict or indictment no evidence shall be received concerning the effect which anything had upon the mind of a juror as tending to cause him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was reached.”

⁸ Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958).

effect on this process of permitting impeachment for various types of misconduct.

Washington's minority stand on juror testimony has recently been treated at some length by Judge Weaver in *Gardner v. Malone*.⁹ The core of the opinion is:

[W]e believe a workable rule has evolved from our decisions. The crux of the problem is whether that to which the juror testifies (orally or by affidavit) in support of a motion for a new trial, inheres in the verdict. If it does, it may not be considered; if it does not it may be considered by the court. . . .¹⁰

Before considering the facts and significance of *Gardner*, a brief survey of the earlier cases is in order.

In 1871, the Supreme Court of Washington Territory upheld the setting aside of a "quotient verdict" by means of jurors' affidavits.¹¹ While the method of computation "inheres" in the verdict,¹² a territorial statute specifically permitted jurors' affidavits to show alleged misconduct as a ground for a new trial, if the verdict was arrived at by "chance or lot."¹³ The court construed this to include a "quotient verdict." This statute has survived various reenactments and codifications, and now appears substantially unchanged as Rule of Pleading, Practice and Procedure 59.04W.¹⁴ It should be noted that to come within the "chance or lot" requisite of the Rule, a "quotient verdict" must be the result of an agreement to accept it as binding before the average is calculated.¹⁵ Thus, when an average award is computed and

⁹ 160 Wash. Dec. 840, 376 P.2d 651 (1962).

¹⁰ 160 Wash. Dec. at 844, 376 P.2d at 654.

¹¹ *Goodman v. Cody*, 1 Wash. Terr. 329, 34 Am. Rep. 808 (1871).

¹² This is the Washington view, but some other jurisdictions are *contra*; see note 7 *supra*.

¹³ Laws of Washington Territory, Ch. 21, § 278(2) (1869).

¹⁴ The history of Rule 59.04W is traced in footnote 2 of *Gardner*, 160 Wash. Dec. at 842, 376 P.2d at 653. The Rule provides, in part: "The former verdict . . . may be vacated and a new trial granted . . . for any one of the following causes . . . : (2) Misconduct of . . . jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors; . . ."

¹⁵ *Conover v. Nehr-Ross Co.*, 38 Wash. 172, 80 Pac. 281 (1905); *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596 (1903); *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647 (1896). A more recent and rather curious case which was held to come within the "chance or lot" criteria is *Vogt v. Curtis*, 200 Wash. 692, 94 P.2d 761 (1939). There the jury had reached a nine-to-three impasse after almost eleven hours of deliberation. To resolve this the three agreed to cut cards, with the "loser" to join the nine. The agreement was carried out and a ten-to-two verdict returned, which was successfully impeached. A Note in 15 WASH. L. REV. 124 (1940), argues that the case does not come within the statute (now Rule 59.04W), since it was actually a unanimous agreement to render a ten-to-two verdict, as a face-saving device, which inhered in the verdict and was not the result of "chance or lot."

later adopted by the jury as its verdict, there is no misconduct.¹⁶

While the statute provided but a narrow exception to the common law rule against impeachment by jurors, Washington judicially rejected this strict rule in *State v. Parker*,¹⁷ in 1901. There, a conviction for grand larceny was set aside on the affidavits of a juror showing remarks made by another juror during the deliberations. These remarks were that the other juror knew the defendant was guilty because he was a member of a "gang of toughs" who had committed other crimes. The curious feature of *Parker* is that the court apparently assumed that the common law rule of *Vaise* was not the law in Washington, and that the statutory grounds for granting a new trial were not exclusive. The court adopted this position:

In considering the affidavits filed, *we entirely discard those portions which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself.* It is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine what was the probable effect upon the verdict. (Emphasis added.)¹⁸

Although this passage has become the test of admissibility in Washington (and, indeed, was held "dispositive" of *Gardner*¹⁹), its language is inconsistent and has caused no little confusion in the cases. As Judge Weaver wrote in *Gardner*: "Our decisions are replete with the statement that 'a juror's testimony or affidavit is not receivable to impeach his own verdict.'"²⁰ But, like *Parker*, many of these cases then allowed non-inhering misconduct to be shown and the verdict to be set aside. This is nothing more or less than impeaching the verdict

¹⁶ *Oliver v. Taylor*, 119 Wash. 190, 205 Pac. 746 (1922); *Loy v. Northern Pac. R. Co.*, 77 Wash. 25, 137 Pac. 446 (1913); *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, 119 Pac. 810 (1911). See also Note, 9 WASH. L. REV. 235 (1934).

¹⁷ 25 Wash. 405, 65 Pac. 776 (1901).

¹⁸ 25 Wash. at 415, 65 Pac. at 779. While the court did cite cases from Iowa, Kansas, Tennessee and Texas, there was no mention of *Vaise v. Delaval*, or the rule in the majority of American jurisdictions—nor were the apposite policies on either side discussed.

¹⁹ 160 Wash. Dec. at 844, 376 P.2d at 653. Query: *Should* the same rule control civil and criminal cases? The Washington court apparently thinks it should, since criminal and civil cases have been cited indiscriminately without discussion in *Gardner* and earlier cases. However, it would seem that the interest of the criminal defendant in liberty should receive greater protection than that afforded the civil litigant's property. This follows from the premise that liberty is beyond monetary valuation, a premise evinced, *e.g.*, in the procedure that requires guilt to be proved beyond a reasonable doubt, whereas evidence in a civil action need only preponderate. Therefore, while it is probably justifiable to exclude all evidence of the *effects* of misconduct in order to preserve stability, it is submitted that in criminal cases *any fact* of misconduct (whether "inherent" or not) should be subject to impeachment by a juror's affidavit or testimony.

²⁰ 160 Wash. Dec., at 844, 376 P.2d at 654.

by the juror's evidence. Thus, the italicized part of the above passage is ambiguous, since if the court did "entirely discard those portions which may tend to impeach the verdict," there would be nothing left with which to show misconduct.

In addition to the ambiguities raised by *Parker*, there are several other considerations which permeate and cloud the cases in this area: Granting that the affidavit is properly admissible, has the party requesting a new trial carried his burden to show that the misconduct actually occurred, *e.g.*, in the face of counter-affidavits?²¹ Does the alleged misconduct show prejudice, as a matter of law?²² If so, has the requesting party shown that the trial judge's refusal to grant a new trial was such an abuse of discretion as to demand a reversal?²³ These complications, together with the regrettably frequent opinions which fail to make clear on which of the bases the decision rests,²⁴ tend to obscure the question and render difficult both analysis and prediction of future results.

Notwithstanding the above difficulties, it is probably true, as *Gardner* states, "that a workable rule has evolved from" the Washington cases.²⁵ Thus, affidavits of jurors have been held properly admissible to show

²¹ *Brant v. Sweet Clinic*, 167 Wash. 166, 8 P.2d 972 (1932); *Stevens v. Depue*, 151 Wash. 641, 276 Pac. 882 (1929).

²² *State v. Knapp*, 194 Wash. 286, 77 P.2d 985 (1938); *Hafner v. United States Fid. & Guar. Co.*, 126 Wash. 670, 219 Pac. 16 (1923). In *Mulka v. Keyes*, 41 Wn.2d 427, 249 P.2d 972 (1952), the court stated that misconduct is either prejudicial or not—and if not, it is improper to include the misconduct as grounds for a new trial due to "lack of substantial justice" (now under Rule 59.04W [9]).

²³ *Nelson v. Placanica*, 33 Wn.2d 523, 206 P.2d 296 (1949). If a new trial was granted below, it will take an even greater showing to secure a reversal than to upset a denial. *O'Brien v. Seattle*, 52 Wn.2d 543, 327 P.2d 433 (1958); *Dibley v. Peters*, 200 Wash. 100, 93 P.2d 720 (1939).

²⁴ *State v. Nicely*, 171 Wash. 439, 18 P.2d 503 (1933); *Taylor v. Kitsap County Transp. Co.*, 158 Wash. 404, 290 Pac. 996 (1930); *Davidson v. Clow*, 149 Wash. 414, 271 Pac. 78 (1928); *Lander v. Shannon*, 148 Wash. 93, 268 Pac. 145 (1928); *State v. McMullen*, 142 Wash. 7, 252 Pac. 108 (1927); *State v. Adamo*, 128 Wash. 419, 223 Pac. 9 (1924); *State v. Cook*, 113 Wash. 391, 194 Pac. 401 (1920); *Wagoner v. Warn*, 88 Wash. 688, 153 Pac. 1072 (1915); *Lindquist v. Pacific Coast Coal Co.*, 86 Wash. 408, 150 Pac. 619 (1915).

²⁵ 160 Wash. Dec. at 844, 376 P.2d at 654. However, there are a few particularly murky areas where even a "workable rule" is not evident. In *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440 (1913), after an item of damages was improperly submitted to the jury, the court refused to consider (in order to preserve the verdict) a juror's affidavit that the item was not considered in reaching the verdict, since the matter "inherited" in the verdict. But, in *DeHoney v. Gjarde*, 134 Wash. 647, 236 Pac. 290 (1925), the court held there was no prejudicial error, when an exhibit was improperly sent to the jury, for the reason that jurors' affidavits showed the exhibit was not examined until after agreement on the verdict. *Herndon v. Seattle*, 11 Wn.2d 88, 118 P.2d 421 (1941), appears to involve the same inconsistent use of affidavits evinced in *DeHoney*.

Improper consideration of liability insurance by the jury is another confused problem. While *Lloyd v. Mowery*, 158 Wash. 341, 290 Pac. 710 (1930) and *Brant v. Sweet Clinic*, 167 Wash. 166, 8 P.2d 972 (1932), seem to allow this matter to be raised by a juror's affidavit, *Martin v. Monk*, 173 Wash. 134, 22 P.2d 51 (1933), asserts

that matters not in evidence were considered by the jury,²⁶ that jurors made an unauthorized view of the place in litigation,²⁷ and that the bailiff or others improperly participated in the jury's deliberations.²⁸ On the other hand, misconduct held inadmissible includes: errors in calculating the verdicts;²⁹ failure to use, understand, or correctly interpret evidence properly before the jury;³⁰ failure to read or understand the court's instructions;³¹ or making other erroneous assumptions as to the applicable law;³² and following improper procedures in reaching the verdict.³³

such to be "inherent" in the verdict and inadmissible (while citing *Brant* with approval!) The latest case on this point, *Kellerher v. Porter*, 29 Wn.2d 650, 664, 189 P.2d 223, 230 (1948), adds nothing but confusion: "Assuming that the 'talk about insurance' during the deliberations of the jury was improper, we think that the affidavits themselves fairly show that such talk had no effect upon the jury in arriving at its verdict. We are therefore unable to say that the trial court abused its discretion in its ruling." (Emphasis added.)

²⁶ *Dibley v. Peters*, 200 Wash. 100, 93 P.2d 720 (1939) (juror made independent investigation of certain matters in issue, and related his conclusions to panel); *Lyberg v. Holz*, 145 Wash. 316, 259 Pac. 1087 (1927) (juror related his personal knowledge that plaintiff had refused settlement, supposedly to lay foundation for criminal prosecution); *State v. Burke*, 124 Wash. 632, 215 Pac. 31 (1923) (jurors obtained magnifying glass—not in evidence—in order to conduct experiments on certain exhibits); *State v. McChesney*, 114 Wash. 113, 194 Pac. 551 (1921) (juror related personal knowledge regarding other crimes defendant supposedly had committed, implying he was thereby guilty of the present charge); *Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 143 Pac. 146 (1914) (jurors examined pamphlet containing state forest laws); *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064 (1910) (juror stated he knew place to be house of ill repute, when contrary testimony was in evidence).

²⁷ *Woodruff v. Ewald*, 127 Wash. 61, 219 Pac. 851 (1923). *Maryland Cas. Co. v. Seattle Elec. Co.*, 75 Wash. 430, 134 Pac. 1097 (1913), also involved an unauthorized view. While stating that juror affidavits would be proper to show this misconduct, the court held that the statute (now Rule 59.04W) providing that misconduct "may" be shown by affidavit, meant "must" be shown by affidavit. Thus, the granting below of a new trial not based on affidavits was reversed. The curious thing about this is that the case did not come within the statutory grounds of misconduct ("chance or lot") in the first place. Further, the affidavits, whether by jurors or third parties, must be of personal knowledge, not information or belief—and hearsay is obviously not competent. *Aliverti v. Walla Walla*, 162 Wash. 487, 298 Pac. 698 (1931); *Johnson v. Smith*, 118 Wash. 146, 203 Pac. 56 (1921); *State v. Murphy*, 13 Wash. 229, 43 Pac. 44 (1895).

²⁸ *O'Brien v. Seattle*, 52 Wn.2d 543, 327 P.2d 433 (1958); *State v. Rose*, 43 Wn.2d 553, 262 P.2d 194 (1953).

²⁹ *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131 (1901).

³⁰ *Henslin v. Pratt*, 119 Wash. 443, 205 Pac. 867 (1922); *State v. Lyle*, 105 Wash. 435, 178 Pac. 468 (1919); *Allen v. Farmers & Merchants Bank*, 76 Wash. 51, 135 Pac. 621 (1913); *Ralton v. Sherwood Logging Co.*, 54 Wash. 254, 103 Pac. 28 (1909).

³¹ *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960); *Hosner v. Olympia Shingle Co.*, 128 Wash. 152, 22 Pac. 466 (1924); *State v. Whipple*, 124 Wash. 578, 215 Pac. 14 (1923).

³² *Eyak River Packing Co. v. Huglen*, 143 Wash. 229, 255 Pac. 123 (1927); *State v. Gay*, 82 Wash. 423, 144 Pac. 711 (1914); *State v. Holmes*, 12 Wash. 169, 40 Pac. 735 (1895).

³³ *Bender v. White*, 199 Wash. 510, 92 P.2d 268 (1939) (jury allegedly rendered verdict even though deadlocked on issue of contributory negligence); *Hamilton v. Snyder*, 182 Wash. 688, 48 P.2d 245 (1935) (immediately upon entering jury-room foreman took informal poll, and finding eleven-to-one vote, he signed the verdict, refused to read the instructions and marched protesting jurors back into court); *Collins v. Barmon*, 145 Wash. 383, 260 Pac. 245 (1927) (allegedly biased foreman);

Two recent cases, *Johnston v. Sound Transfer Co.*³⁴ and *Smith v. American Mail Line, Ltd.*,³⁵ further confused the picture. In *Johnston*, which was an action for personal injuries sustained in being thrown from a horse, the court rejected affidavits showing that two jurors related their personal riding experiences to the panel. The opinion stated "the *only* instance in which a juror's affidavit may be used to impeach the verdict is pursuant to . . . (now Rule 59.04W) The present rule . . . has long been construed to prohibit a juror from impeaching the verdict by affidavit." (Emphasis added.)³⁶ In *Smith*, appellant offered jurors' affidavits to the effect that the damage award had been increased to offset the Jones Act deduction for contributory negligence, and to provide fees for the respondent's attorney. After recognizing the majority view that juror affidavits are never admissible, the court stated:

However, in this state, by court rule, an exception has been made to the prevailing common-law rule. Rule of Pleading, Practice and Procedure 59.04W. . . . Since there is no allegation in either of the two affidavits that the verdict was arrived at by means of chance or lot (*the only instance where such affidavits would be admissible*), the affidavits cannot be considered. (Emphasis added.)³⁷

The language from these cases suggests that the grounds for a new trial in Rule 59.04W are exclusive, and that the "chance or lot" proviso therein is the only deviation from the common law rule in Washington. However, in both cases the court referred the reader to *Dibley v. Peters*,³⁸ where affidavits were offered showing that a juror made an independent investigation of certain matters in issue and related his conclusions to the jury. These affidavits were held to be admissible, since they dealt with facts which did not "inhere" in the verdict. Thus, it seems fair to state that after *Smith* the Washington position on juror affidavits was not altogether clear.

*Gardner v. Malone*³⁹ was an action for personal injuries arising out of an automobile accident. Plaintiff appealed, following a verdict for

State v. Aker, 54 Wash. 342, 103 Pac. 420 (1909) (allegedly coerced consent to verdict). The earlier cases concerned admissibility of jurors' affidavits are summarized in Note, 4 WASH. L. REV. 78 (1929).

³⁴ 53 Wn.2d 630, 335 P.2d 598 (1959).

³⁵ 58 Wn.2d 361, 363 P.2d 133 (1961).

³⁶ 53 Wn.2d at 631, 335 P.2d at 599.

³⁷ 58 Wn.2d at 369, 363 P.2d at 137.

³⁸ 200 Wash. 100, 93 P.2d 720 (1939).

³⁹ 160 Wash. Dec. 840, 376 P.2d 651 (1962). On March 11, 1963, the court corrected the opinion in *Gardner* by deleting the following language, which originally appeared in 160 Wash. Dec. at 849, 376 P.2d at 657: "Since this type of speculation could not have been introduced on the trial of the instant case, it is proper to brand its consid-

the defendant and denial of a new trial, offering affidavits of jurors alleging four types of misconduct. The supreme court rejected, without discussion, the implications of *Johnston* and *Smith* that Rule 59.04W is exclusive, and reasserted the earlier Washington position that affidavits showing facts of misconduct which do not "inhere" in the verdict may be received.⁴⁰ However, affidavits showing that the jurors did not understand the meaning of "imputable" in the trial judge's instructions were summarily rejected, since the alleged misconduct "inherited" in the verdict.⁴¹ Secondly, the affidavits showed that a juror, who had denied knowing the defendant on voir dire, stated during the deliberations that he "had traded wheat and stock with" him.⁴² Since the juror in question later denied this under oath, the court accepted the trial court's finding, implicit in the denial of a new trial, that the misconduct did not occur. The affidavits also related that three members of the jury had made an intentional visit to the scene of the accident. This was held admissible and the misconduct prejudicial. The final alleged item of misconduct was that some of the jurors (during deliberations) discussed the probable effects of a judgment for the plaintiff, including: "If we give a judgment for \$100,000.00 and the other boys' fathers will sue Malone, and they will take his whole wheat ranch. . . . You bet, that is exactly what will happen. . . . We don't want anything like that to happen."⁴³ This consideration of matters not in evidence was held to be misconduct. Having found the two described items of misconduct to be the kind provable by juror's affidavits, the court prescribed the following test to determine whether the matters were sufficiently prejudicial to constitute an abuse of discretion:

"If, upon a consideration of the whole of the pertinent record, it is *reasonably doubtful* whether or not the improper conduct affected the amount of the verdict or the decision of any other material issue, the verdict should be set aside by the trial judge; if, in such a case, a new trial is not granted, there is an abuse of discretion by the trial judge. . . ."⁴⁴

eration as misconduct of the jury. It had the same prejudicial effect as if it had been introduced at the trial." The correction, which has no bearing on this Note, is reported in 60 Wn.2d at _____, 379 P.2d at 218.

⁴⁰ 160 Wash. Dec. at 844, 376 P.2d at 654. See the text accompanying notes 10 and 19 *supra*.

⁴¹ The court did not set out this allegation, but it may be found in Brief for Appellant, at pp. 17-18.

⁴² 160 Wash. Dec. at 847, 376 P.2d at 655.

⁴³ 160 Wash. Dec. at 849, 376 P.2d at 655.

⁴⁴ 160 Wash. Dec. at 850, 376 P.2d at 657, quoting *Lyberg v. Holz*, 145 Wash. 316, 320, 259 Pac. 1087, 1088 (1927), which in turn quoted *Moore v. Ivey*, 277 S.W. 106 (Tex. 1925).

On its facts, *Gardner* is not a particularly significant case. Rejecting affidavits showing misunderstanding of instructions, or upholding the trial judge's finding that affidavits were rebutted, or reversing because of a prejudicial view is not a departure from prior Washington cases.⁴⁵ Whether consideration of matters not in evidence may be shown by affidavits is not as clear. There are, however, significant differences between *Gardner* and preceding instances where such matters have been found "inherent" (or non-prejudicial or not an abuse of discretion).⁴⁶ Thus, on its facts *Gardner* seems consistent with earlier Washington decisions. But *Gardner* is of moment in at least three respects. First, it clarifies the frequent statements in Washington opinions that "a juror's testimony or affidavit is not receivable to impeach his own verdict,"⁴⁷ by showing that the court has been using the word "impeach" in a narrow context. Specifically, "impeach" has *only* been used to denote attempted showings of misconduct which "inhere" in the verdict. When "non-inhering" misconduct is offered, the court receives the affidavits to *set aside* the verdict, but scrupulously avoids labeling this as *impeachment*. Clearly, they are one and the same process, but once the magic words are appreciated the puzzling language of the cases makes more sense. Thus, it is *literally* true in Washington that (except for the "chance or lot" provision) jurors cannot testify to "impeach" their verdict, but can do so to "set it aside."

Secondly, *Gardner* removes any doubt as to the construction of Rule 59.04W. It is not exclusive. Thus, what the court apparently meant

⁴⁵ See *re:* instructions, cases cited note 30 *supra*; affidavits rebutted, cases cited note 21 *supra*; and prejudicial views, cases cited note 27 *supra*. It should be noted that the court distinguished *Brennan v. Seattle*, 46 Wash. 427, 90 Pac. 434 (1907), on the grounds that the view there was unintentional, the juror disclosed his misconduct in court during the trial, and the jury was instructed to disregard it. In *Gardner*, three jurors made an intentional detour to visit the scene, where the conditions had changed, and related this in secret to the panel. Thus, unlike *Brennan*, the view in *Gardner* was held prejudicial.

⁴⁶ Thus, while the statements made by a juror in *Lindquist v. Pacific Coast Coal Co.*, 86 Wash. 408, 150 Pac. 619 (1915), are essentially similar to those in *Gardner*, the decision in *Lindquist* upholding the refusal to grant a new trial, appears to have been based on either successful contradiction by counter-affidavits, or no abuse of discretion by the trial judge. Likewise, *Nelson v. Placanica*, 33 Wn.2d 523, 206 P.2d 296 (1949), apparently rests on the trial judge's discretion or no finding of prejudice, rather than inadmissibility due to "inhering" in the verdict. *Johnston v. Sound Transfer Co.*, 53 Wn.2d 630, 335 P.2d 598 (1959), differs in one significant aspect. There, the juror's personal knowledge of horseback riding was not related to the facts of the specific case. It was general in nature, and probably not unlike what most jurors think they know about the subject matter of every case. Considered in this sense, the court apparently decided that, every juror having some degree of general knowledge in most areas, to admit such affidavits would destroy the stability of too many verdicts. This sort of misconduct was called "inherent," in order to separate it from such situations as *Gardner*, where the interest of the litigant in a fair trial prevails due to the improper consideration of knowledge peculiar to the particular case.

⁴⁷ 160 Wash. Dec. at 844, 376 P.2d at 654.

in *Johnston* and *Smith* is that when a fact "inheres" in the verdict (*Johnston*) or relates to the effect of misconduct (*Smith*), then, in those instances, the *only* exception to the common law exclusionary rule is that provided by Rule 59.04W concerning "chance or lot." However, when the matter relates to neither "inherent" facts nor effects of misconduct on the jury, affidavits are admissible.

Finally, the court distinguished among questions of admissibility, burden of proof, prejudice and abuse of discretion—and set forth the "reasonably doubtful" standard (quoted above) to determine whether there has been an abuse of discretion. *Gardner* still leaves one major problem: This is the question of what "inheres." The opinion states:

One test is whether the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him; if so, the statements cannot be considered for they inhere in the verdict and impeach it. . . . *Another test* is whether that to which the juror testifies can be rebutted by other testimony without probing a juror's mental processes. (Emphasis added.)⁴⁸

The court further quotes language from *Maryland Cas. Co. v. Seattle Elec. Co.*,⁴⁹ setting forth yet a third test, which would permit *any facts* to be shown by jurors' affidavits, while excluding only evidence of effects. Thus, the first test would bar all effects, and those facts which are "linked to the juror's motives, intent or belief." The second test would exclude effects and those facts which are not rebuttable "without probing a juror's mental processes." The third is a simple fact-effect distinction. Clearly, these tests are not the same. Indeed, the third test is repudiated on the same page of *Gardner* when the court speaks of "eliminating allegations . . . of *facts* that we believe inhere in the verdict." (Emphasis added.)⁵⁰ While the second test may be used in some other jurisdictions,⁵¹ neither it nor the third is consistent with the Washington cases. For example, the affidavits in *Johnston* (as to jurors' horseback riding experiences) would surely be permissible under either of these tests.⁵² Therefore, it would seem that the first test is controlling

⁴⁸ *Ibid.*

⁴⁹ 75 Wash. 430, 134 Pac. 1097 (1913); quoted at 160 Wash. Dec. 846, 376 P.2d 655.

⁵⁰ 160 Wash. Dec. at 847, 376 P.2d at 655.

⁵¹ See, e.g., *Hackaday v. Brackelsburg*, 248 Iowa 1346, 85 N.W.2d 514 (1957); *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866); *Kirkpatrick v. Wickmire*, 138 Kan. 230, 25 P.2d 371 (1933); *Perry v. Bailey*, 12 Kan. 415 (1874) (see note 5 *supra*); *State v. Kociolek*, 20 N.J. 92, 118 A.2d 812 (1955); UNIFORM RULES OF EVIDENCE 41 & 44; MODEL CODE OF EVIDENCE rule 301 (1942), set out in note 7 *supra*.

⁵² See the discussion of *Johnston* in note 46 *supra*. Another recent case which is contrary to the second and third tests is *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960).

as to what "inheres" in Washington verdicts. Hence, all effects are to be excluded, as are those facts which are "linked to the juror's motive, intent or belief."

The nebulousness of the Washington test, and indeed, of the whole logical quagmire of "effects" and "inherent facts," is but symptomatic of a second and more fundamental problem: What is the real basis of the "inherent fact" concept? While a fact-effect distinction has some basis in reason, to speak of facts which do and do not "inhere" has no logical significance, save as a conclusion. It is pure sophistry to say that such statements by a juror as,⁵³ *We don't want D to lose his ranch* or *I know D is guilty because he is a member of that gang*, are any less "linked to the juror's motive, intent, or belief" than *I rode horses for years and that accident was the rider's fault* or *I will not read the court's instructions, because the law is . . .* or *plaintiff's damages are \$2000 plus \$2000, which equals \$5000*. Whether each statement was or was not made is a fact. The "linking" test prescribed by the court cannot separate these facts into two distinct categories—"inhering" and "non-inhering"—nor can any other verbal shorthand. At best, such tests may aid in classifying the results and predicting future decisions. The real question for the court in each case is whether this is the sort of fact which *should* be allowed to impeach the verdict. This is simply a policy decision. The Washington court has tried to formulate a workable rule in light of the conflicting interests of stability and justice in the individual case. Absent meaningful data showing how juries actually reach verdicts and the effect on this process of allowing impeachment—and looking to what the cases decide, not what they say—one cannot say that the Washington court has not developed a salutary and workable compromise.

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TORTS

Assumption of the Risk. In *Siragusa v. Swedish Hospital*¹ the Washington Supreme Court abolished the assumption of risk defense in suits brought by employees against their employers. Overruling prior decisions that were inconsistent, the court held that an employer has a duty to exercise reasonable care to provide his employees with a rea-

⁵³ These statements are paraphrases of the affidavits in various Washington cases rather than quotes, since in many of the cases the exact language of the affidavits has not been set out.

¹ 160 Wash. Dec. 314, 373 P.2d 767 (1962).