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## **Jurors Aren't Necessarily More 'Plaintiff-Friendly'**

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TRIAL GRAPHIX.

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The decisions of jurors have often been subject to criticism by legal commentators. One suggested tort reform has been replacing jury trials with more bench trials, a reform apparently based on the assumption that judges' decision making would result in significantly "improved" case outcomes (i.e., more defense verdicts/lower damages). That assumption is questionable. Jurors are not always more plaintiff-oriented than are judges. They do not always award higher damages than do judges. Judges may be no better than jurors at disregarding inadmissible evidence. Case outcomes by judges rather than jurors may not differ as much as expected.

## Some Studies

Jurors and judges do not differ in their decision making as much as perceived. In a classic 1966 comparison of judges and juries in civil trials, researchers found that, across 4,000 civil cases, judges and juries agreed 78 percent of the time regarding defendant liability. (Kalven & Zeisel, "The American Jury," Little, Brown (1966)). A more recent comparison of plaintiff verdicts and recoveries in civil cases tried before judges versus juries found that plaintiffs had greater likelihood of success before judges in some types of cases: medical malpractice, motor vehicle, and product liability. (Clermont & Ehmsberg, "Trial By Jury Or Judge: Transcending Empiricism," 77 *Cornell Law Review* 1124 (1992)).

And, according to a Bureau of Justice Statistics survey from 1996, of 10,278 state-court trials in the 75 largest U.S. counties, juries found for the plaintiff 48 percent of the time, while judges found for the plaintiff 57 percent of the time.<sup>1</sup> The same demographic characteristics (age and political orientation) sometimes associated with verdict preferences among jurors in cases of sexual harassment were also associated with verdict preferences among judges.

A study conducted this year selected an initial sample of 786 cases heard by US. courts between 1981 and 1996, identified by a Lexis/Nexis search using the key words "hostile environment" paired with either "sexual harassment" or "sex discrimination." (Kulik, Peny & Pepper, "Here Comes The Judge: The Influence Of Judge Personal Characteristics On Federal Sexual Harassment Case Outcomes," 27 *Law and Human Behavior* 69 (2003)).

From this initial sample, the researchers eliminated the following types of cases: those not filed under the Civil Rights Acts of 1964-1991 (e.g., cases filed under state law); cases not directly pertaining to sexual harassment (e.g., wrongful-discharge cases brought by individuals accused of sexual harassment); cases that did not go to

trial (e.g., pending cases, dismissed cases, cases decided by summary judgment); and cases involving quid pro quo harassment only (i.e., no claim of hostile environment). This ruling reduced the initial sample to 292 cases. Next, the researchers eliminated circuit-level cases (105 cases), cases decided by juries (7), and cases decided by magistrate judges (10).

Next, the researchers eliminated cases if corresponding cases with later decision dates appeared in the original sample (e.g., district-level cases would be eliminated if later corresponding circuit-level cases also appeared in the sample) (18 cases) and cases in which the judicial decisions were mixed (4).

Finally, the researchers eliminated five cases involving male plaintiffs. This process of elimination left a final sample of 143 cases.<sup>2</sup> After statistically controlling for effects of relevant case characteristics (e.g., severity of harassment), the researchers found that age and political affiliation of the judge significantly affected case outcome.

Younger judges and judges appointed by Democratic presidents were more likely to decide cases in favor of the plaintiff than were older judges and judges appointed by Republican presidents.

The likelihood that a decision would favor the plaintiff was 16 percent when the case was heard by an older judge, but 45 percent when the case was heard by a younger judge.

The likelihood that a decision would favor the plaintiff was 18 percent when a case was heard by a Republican-appointed judge, but 46 percent when heard by a Democrat-appointed judge.

The researchers found no effect of judge gender or ethnicity on case outcome. It should be noted, however, that women judges heard only 10 percent of the cases in the sample and ethnic minority judges heard only 13 percent of the cases in the sample. Thus lack of gender and ethnicity differences may have been due to low statistical power, given the small subsamples involved.

## Damage Awards

In the Bureau of Justice Statistics survey from 1996, judges were more than twice as likely as juries (8 percent versus 3 percent) to award punitive damages. The median punitive damages award by judges (\$75,000) was almost three times the median award by juries (\$27,000).

Last year, a study compared the damages awards of jury-eligible citizens and judges. This researcher's sample of 140 jury-eligible citizens was recruited in Alabama,

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Arizona, Texas, and Virginia. The sample of 87 judges was obtained by mail from lists of state and federal judges. (Robbennolt, "Punitive Damage Decision Making: The Decisions Of Citizens And Trial Court Judges," *26 Law and Human Behavior* 315(2002)).

Both types of research participants read a written case vignette (about 1,000 words) concerning the side effects of a medication prescribed by an HMO physician. The plaintiff's attorneys were described as having discovered an internal memo outlining the HMO's policy of prescribing a particular medication for depression rather than providing counseling services and indicating that the HMO knew about potential side effects of the medication. The case vignette was followed by a summary of each side's closing argument.

The participants read one of six versions of the case vignette. The defendant HMO was described as having low wealth (\$11 million) or high wealth (\$611 million). The outcome severity for the plaintiff was described as low potential/low actual harm (known side effects were nausea and vomiting, and the plaintiff's outcome was nausea and vomiting), high potential/low actual harm (known side effects were heart attacks, and the plaintiff's outcome was nausea and vomiting), and high potential/high actual harm (known side-effects were heart attacks, and the plaintiff's outcome was a heart attack).

Both types of participants were told that liability and economic damages had already been determined. They were to determine damages for pain and suffering and for punitive damages, if appropriate. They were presented with a set of standard jury instructions on damage awards.

There were no differences in the likelihood that punitive damages would be awarded or in the amount of punitive damages awarded by judges versus jury eligible citizens. Judges' compensatory damages awards were somewhat more influenced by defendant wealth than were citizens' compensatory damages awards.

## **Disregarding Inadmissible Evidence**

In 1994, a survey was published that was conducted of 88 state and municipal judges in Ohio and 104 prospective jurors of a Court of Common Pleas in one Ohio county. (Landsman & Rakos, "A Preliminary Inquiry Into The Effect Of Potentially Biasing Information On Judges And Jurors In Civil litigation," *12 Behavioral Sciences and the Law* 113 (1994)).

The research participants in this study read one of three versions of a product liability case vignette: a con-

trol condition of no biasing evidence unfavorable to the corporate defendant; exposure to the biasing evidence (an internal corporate memo) with a judicial decision to exclude the evidence; or exposure with a judicial decision to admit the evidence.

The verdict pattern of the judges and jurors did not differ from each other. Perceptions of judges and jurors of defendant liability were lowest when the biasing information was absent. Perceptions of defendant liability did not differ by judicial ruling on the biasing information; their verdict patterns were related to mere exposure to the biasing information. But both judges and jurors were equally confident that a judge trying a lawsuit would be able to disregard inadmissible information.

## **Surrogate Jurors vs. Surrogate Judges**

The only direct comparison of decisions by jurors versus decisions by judges on an actual case was offered by a mock summary trial research exercise (sample size of 47) and a mock bench trial research exercise (sample size of 8).<sup>3</sup>

The two research exercises were conducted for a dispute involving a construction project. The company that had managed the construction project alleged nonpayments by the corporate owner of the manufacturing facility. The property owner alleged massive cost overruns on the construction project due to errors for which it blamed the construction manager.

The surrogate jurors were recruited to match the demographic characteristics of the prospective jurors in the trial venue. The surrogate judges were senior attorneys with considerable trial experience before judges in the trial venue (the clients declined the typical practice of recruiting retired judges of the state venue at issue). The dispute was presented with the construction management company as the plaintiff, with the property owner's allegations presented as the counterclaim.

The attorneys tried their cases before the surrogate jurors in a one-day research exercise. The attorneys tried their cases before a panel of surrogate judges in two separate, one-day exercises in a panel of four different surrogate judges in each exercise).

Among the surrogate jurors, 72 percent favored the construction manager in the case-in-chief. The mean award for compensatory damages was \$5.5 million; the mean award for punitive damages was \$3.7 million. In the counterclaim, 21 percent of the surrogate jurors favored the property owner, with a mean award lot compensatory damages of \$7.1 million.

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Among the surrogate judges, five of the eight judges (or 63 percent) favored the construction manager in the case-in-chief. Their mean award for compensatory damages was \$5.8 million. No punitive damages were awarded. In the counterclaim, half of the judges favored the property owner, with a mean award of \$13.8 million in compensatory damages.

The surrogate jurors focused on the following factors in the dispute: the property owner's decision to change from direct-hire to a construction manager arrangement; the property owner's selection of the construction manager after a competitive bid process; the property owner's decision to put the project on fast-track mode; the property owner's failure to fire the construction manager while firing others; the property owner's claims of thousands of errors and omissions by the construction manager although it had failed to catch any of the errors and omissions on a contemporaneous basis; the property owner's signed approval to invoices and work orders as they were presented; and the property owner's withholding of payments to the construction manager totaling \$6 million.

Not surprisingly, the surrogate judges focused on the contract provision: a clause interpretable as a \$10 million liability cap; a termination clause, which the property owner failed to invoke against the construction company; the property owner's failure to give the construction company notice about its alleged dissatisfaction with design errors; and the property owner's failure to give the construction company an opportunity to correct its work.

In comparing the case perceptions of the surrogate jurors with those of the surrogate judges, both types of decision makers were influenced by much the same evidence although the judges placed the evidence within the legal context of the contract.

The jurors were also more negatively swayed by the property owner's nonpayment, which struck them as unreasonable and high-handed since it had assured the construction manager it would be paid if it continued working on the project. The jurors apparently identified with the construction management company as an employee of a particularly difficult employer, which had promised to pay them and then stiffed them. Jurors who had themselves placed funds in escrow accounts in analogous business disputes were especially likely to favor the construction manager.

The judges were influenced by the sheer number of errors and omissions alleged by the property owner, a number difficult for the construction manager to explain away. They also noted that the property owner ended up

with a facility with fewer features than it had wanted.

To sum up the findings from the separate research exercises, the construction manager was likely to prevail in the case-in-chief if the dispute went to a jury or to a judge; the property owner stood a slightly better chance of prevailing before a judge (a 50-50 coin flip gamble) than before a jury (21 percent likelihood) in its counterclaim.

The key outcome in both research exercises was the low damages regardless of whether the case went to a jury or a judge – nowhere near the client's expectations in re-couping its costs. The corporate client had previously ignored this predicted outcome when the opinion had come from its outside counsel, but it gave more credence to the predicted outcome when it came from different triers of fact – a cost savings when compared with rejecting settlement negotiations, taking the dispute to trial, and then discovering the low-damages outcome.

## Conclusion

If judicial decision making is held to be the standard against which to evaluate juror decision making, then decisions by jurors do not fall that short. Although decisions by judges are more likely to be framed within the context of legal roles and principles, the outcomes of cases – whether tried before judges or before jurors – may not differ as much as expected.

## Endnotes

<sup>1</sup>The BJS publication of the 1996 survey was published in 1998 and can be found at [www.ojp.usdoj.gov/lgi](http://www.ojp.usdoj.gov/lgi).

<sup>2</sup>Case characteristics and case outcomes were obtained from: Lexis/Nexis; Bureau of National Affairs' Fair Employment Practices Cases; the *Federal Supplement*; the *Federal Reporter*; and *Employment Practices Decisions*. Judge characteristics were obtained from: *Judicial Staff Directory*; *Who's Who in American Law*; *Judicial Yellow Book*; *Almanac of the Federal Judiciary*; and *Directory of Minority Judges of the United States*.

<sup>3</sup>This comparison was conducted by myself and a fellow researcher for a client.

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