Civil Jury Project October 2018

Jury Matters

The Newsletter for the Civil Jury Project at NYU School of Law

October 2018, Vol. 3, Issue 10

Upcoming Events

10.3 Jury Improvement Lunch; Los Angeles, CA

10.4 Jury Improvement Lunch; Tucson, AZ

10.23 Jury Improvement Lunch; New York, NY

11.1 Jury Improvement Lunch; Fort Lauderdale, FL

12.7 Jury Improvement Lunch; Palm Beach, FL

3.1 Jury Improvement Lunch; Oakland, CA

3.12 Jury Improvement Lunch; Des Moines, IA

Opening Statement

Dear Readers,

Welcome to the October edition of the Civil Jury Project's monthly newsletter. We have started the fall semester at NYU with terrific momentum—having already brought successful Jury Improvement Lunches to Miami, Oklahoma City, and Las Vegas for the first time. I also had the opportunity to deliver presentations on jury innovations at a bench/bar conference in Idaho and a judicial conference in Colorado to lively and engaged audiences. Judge Thomas Marten and I give an overview of the Colorado presentation on the last page of the newsletter.

This edition includes an article by a legal scholar who observed an innovative approach to jury trial consolidation meant to saves time and resources: having *two* juries hear evidence at the same time. A second article, authored by one of our Judicial Advisers, highlights the importance of teaching civil jurors about the perils of "implicit" biases they might harbor in excessive use of force and employment discrimination cases—both of which dominate civil federal dockets.

Thank you for your support of the Civil Jury Project. You can find a full and updated outline of our status of projects on our website. In addition, we welcome op-ed proposals or full article drafts for inclusion in upcoming newsletters and on our website either by email or here.

Sincerely,
Stephen D. Susman

A TWO-JURY TRIAL CAN SAVE TIME AND MONEY

Professor Richard Daynard spent a month over the summer watch *two* juries hear evidence in tobacco cases involving two plaintiffs. Read his account of this fascinating innovation in this month's newsletter!

Implicit Racial Bias in the American Justice System: A Civil Jury Perspective

By Hon. Robert S. Lasnik

The history of racial bias in the American justice system is a shameful story. It starts with the adoption of a United States Constitution which embraced slavery as a right of the states that could not be abolished by Congress before 1808 at the earliest and provided that runaway slaves must be returned to their masters even if they managed to escape to a state where they were considered "free". Judicial decisions upheld "separate but equal" segregation laws in the South for scores of years after the Civil War. Since Brown v. Board of Education in 1954 and the passage of landmark civil rights legislation in the 1960s, overt racial bias in our justice system has diminished—although it has not disappeared.

The Supreme Court confronted the problem of black jurors being the subject of disproportionate numbers of peremptory challenges in criminal cases in 1986 in Batson v. Kentucky where the Court held that the 14th Amendment's equal protection clause prohibited prosecutors from using a peremptory challenge against a juror on the basis of that juror's race. That Batson ruling was later applied to all use of peremptory challenges in both criminal and civil cases. The key question on a Batson challenge is was race of the juror "a substantial motivating factor" in the use of the peremptory strike. That calls for a judge to make basically a finding of intentional discrimination by the attorney.

Yet there is another form of racial bias that remains in our justice system that is only now being acknowledged—implicit racial bias. In the realm of jury selection we can see the effect of such implicit bias and we have begun to create tools for addressing how to eliminate it in our courts.

Implicit bias is difficult to detect because it is largely unconscious and is often at odds with what we consciously believe. Social scientists have used an Implicit Association Test (IAT) to demonstrate that it is widely prevalent among all groups—white and black, young and old, men and women.

There is a line of thinking that says the only place where racial bias—explicit or implicit—rears its ugly head is in the realm of criminal cases. Statistics clearly show that black jurors are the subject of peremptory challenges by prosecutors at far greater rates than white jurors. However the same dynamic is at work in the civil courts where the plaintiff is an African-American who has been subjected to illegal arrest or police use of force or who has been denied employment or terminated from employment because of racial discrimination. These are the types of civil cases most likely to go to trial in our federal district courts.

We in the Western District of Washington decided a few years ago to develop our own jury video on implicit bias. We formed a committee chaired by Judge Jack Coughenour which consisted of academics, social scientists, civil and criminal lawyers and judges. We used funds from our Bench Bar account (from pro haec vici fees paid by lawyers from out of the district) to produce a professional video utilizing local lawyers and one of our judges. The link is here. www.wawd.uscourts.gov/jury/unconscious-bias. The video is 11 minutes long and is shown in the jury assembly room directly after the 19-minute orientation video developed by the 9th Circuit Court of Appeals (and starring Justice Sandra Day O-Connor). The judges of the Western District of Washington voted to show it in all civil and criminal cases. We have made it available to all courts and a number of state and federal courts

have started to show the video or are developing their own version of the video.

In addition, we believed that we needed to develop jury instructions that addressed implicit bias (or as we call it unconscious bias) to be read to prospective jurors at the outset of voir dire, at the inception of the trial before the seated jury as well as made a part of the final Court's Instructions that go to the jury room at the start of deliberations.

It was very shortly after our court adopted the video and the instructions as our district policy that one of us faced a very highly emotional and racially charged civil case. Judge Barbara Rothstein presided over a civil rights lawsuit brought by the family of Leonard Thomas, a 30-year old father and unarmed black man who was killed by police in 2013 in his home after a four-hour standoff at Thomas' home in the nearby city of Fife.

Attorneys for the city and the police argued against allowing the implicit bias video to be shown to prospective jurors alleging it would flame the passions of the jurors against the defense and make THEM the victims of racial bias. Judge Rothstein made the difficult decision not to show jurors the implicit bias video (which caused HER to be sharply criticized) and the case proceeded with an all-white jury.

The jury deliberated for several days and returned a $15M verdict in favor of the Thomas Family. In post-verdict motions the city argued that IT was the victim of racial prejudice claiming that the all-white jurors "weren't going to go back to their individual communities and tell the people that they associate with, we found in favor of cops that shot an unarmed black man."

Judge Rothstein was clearly not impressed with this argument. In her ruling she said "Without any evidence—without any factual foundation whatsoever—defendants have chosen to malign one of this country's most sacred civic institutions, the impartially selected petit jury…The suggestion that this jury flouted its charge and colluded to hold government officials liable merely to advance the jurors' individual reputations is not simply frivolous; it is insulting to our constitutional order." The parties recently settled the case for $13 million and the appeal was dismissed.

Who is better positioned to speak to the jurors about implicit bias, the judge or the attorneys? The simple answer is both. But there is evidence to support what Judge Mark Bennett has advocated: Attorney voir dire on implicit bias is better suited than all-judge voir dire. The 9th circuit Jury Trial Improvement Committee recommends that "lawyers have a better understanding of the facts of the case and can assist in focusing voir dire on identifying potential biases." Studies show that jurors seem to feel more pressure to tell the judge what she wants to hear than give candid answers. Voir dire in this area should not be done to condition jurors to be fair and impartial by requiring them to recite a pledge to that goal. Instead attorney voir dire done effectively will get jurors to identify the biases that we all have and see if jurors can be alert to these unconscious biases and take them into account when deciding the case.

Hon. Robert Lasnik is a is a Senior United States District Judge of the Western District of Washington. He sits on the 9th Circuit Fairness Committee and chairs it's Implicit Bias Subcommittee.

Two Plaintiffs, Two Juries, One Trial

By Richard A. Daynard

For a month this past summer two juries sat – sometimes together, sometimes separately – in the third floor courtroom of Virgin Islands Superior Court in St. Thomas to consider two cases brought by since-deceased Newport cigarette smokers Patrice Brown and Lucien England against R.J. Reynolds Tobacco Company, as successor in interest to Newport manufacturer Lorillard Tobacco Company. In each case the estate was seeking compensation for the cigarette-caused addiction, disease and death of the decedent, plus punitive damages; in one case the smoker's son was seeking loss-of-consortium compensation as well. Each jury consisted of 6 jurors and 3 alternates: with a few added chairs, they could all just fit in the jury box when considering the common evidence against the defendant. When case-specific testimony was being offered, the 9 jurors in the other jury were either retired to their jury room, told to come in later than usual, or even given the day off, depending on how long the testimony was expected to take. Both juries heard opening arguments on common issues, followed by separate openings for each jury; closing arguments and jury instructions were just plaintiff-specific.

So how did this come to be? Plaintiffs' counsel had urged the court to consolidate the two cases, since the majority of the evidence would be identical and there would be large savings in trial time and expert witness expenses. Though the cases had been consolidated by agreement of the parties for pre-trial motions and discovery, the defendant asserted that the potential for jury confusion if consolidated for trial was too great. Presiding Superior Court Judge Michael C. Dunston came up with this innovative approach, which obtained the benefits in saved jury time and expert costs, without providing the defendant with an appellate issue.

It played out as follows: plaintiffs' marketing, addiction, and historical experts gave common testimony. Plaintiffs' medical experts gave common background and general disease testimony in the combined proceeding and then separate testimony on each plaintiff's individual injury. The plaintiffs also played videotaped depositions of the decedents in their respective cases, and of witnesses to the marketing of cigarettes to children in the Bronx, where Lucien England began smoking after free sample four-cigarette packages were left on doorknobs in his building. The defendant's position was that they had never marketed to children, that the plaintiffs did not die from tobacco-caused diseases, and that the plaintiffs made a choice to smoke with every puff they took. Hence, defendant's testimony was entirely focused on the individual cases. Defense had videotapes of depositions of former Lorillard sales managers from the New York area who swore that the marketing Lucien and others fact-witnesses testified to never occurred; defense medical experts testified that Patrice Brown's lung cancer was not small cell but an extremely rare cancer of unknown etiology, that Lucien England's laryngeal cancer was caused not by smoking but by drinking or the HPV virus, and that his bladder cancer (which actually killed him) was caused not by smoking but by the contamination of an aquifer on the island; and defendant had a historian give common testimony that the fact that smoking was addictive and caused cancer was common knowledge by the 1950's (that is, known to everyone but the tobacco executives who testified in Congress to the contrary in 1994). Each side then had one expert give common testimony in the punitive damage phase of the cases.

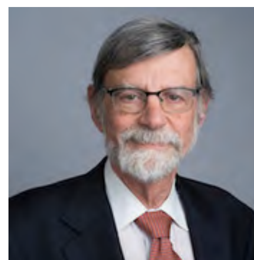
The fact that the cases were tried together saved 7 - 8 days of trial on the plaintiffs' case, perhaps two days on the defendant's case, and another day during the punitive phase, or roughly 2 full weeks of trial time. It saved 10 round-trip flights for experts, and 10 extra hotel bookings that would have been necessary for the second plaintiff's trial. It saved plaintiffs $75,000 to $100,000 in expert fees and expenses. And there were no perceptible downsides: no jury confusion, no additional time for

plaintiff-specific testimony beyond what would have been needed in individual or combined cases. The juries swiftly learned the drill, moving quickly and good-naturedly between jury box and jury rooms as the presentations transitioned between generic testimony and testimony in the two specific cases.

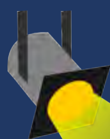
Evaluation: there is no obvious reason for a court not to follow this procedure in any case where the liability evidence is largely common, and where the courtroom logistically can fit the required jurors. But there is also no obvious reason not to consolidate such cases where there are more than two plaintiffs, or the logistics are otherwise impractical. Juries routinely decide criminal conspiracy cases involving several defendants, each of whom has many potential years of lost freedom riding on the jury not confusing their behavior, motivations, etc. with those of their co-defendants.

The tobacco companies oppose such consolidations for the reason powerfully articulated by an R.J. Reynolds Tobacco Company attorney in a 1988 memo, quoted in Haines v. Liggett Group Inc., 814 F.Supp. 414 (D.N.J. 1993): "to paraphrase General Patton, the way we won these cases is not by spending all of Reynolds' money, but by making that other son of a bitch spend all his". Courts, by contrast, have the obligation, stated in Rule 1 of the Federal Rules of Civil Procedure, to make every effort to "secure the just, speedy, and inexpensive determination of every actions and proceeding." Tobacco cases can be litigated and tried with judicial efficiency. However, a judge must take a more proactive stance on reducing and streamlining discovery and motion practice. Failing to do so will create ever-increasing work for the court, and unfortunately for the plaintiffs, usually an insurmountable burden: "As long as any Court is willing to sit back and merely watch as the parties in tobacco litigation engage in a battle of attrition, the plaintiff will always run out of ammunition before the defendants even begin to notice a diminution of their resources." Id. 420–21. Nothing proves this point more than the current posture of tobacco litigation in Florida. Over 3,000 tobacco case pend in Florida state courts. These cases have been pending over twelve years (24 years since 1994 when the original class action was filed). About 30-50 tobacco trials occur each year in Florida. At this pace, 60-100 years will be required to try all of the pending cases. Of course, this delay has a substantially lesser impact on a corporation which has no mortal lifespan. But for the actual litigants, many original plaintiffs have long since died, leaving their children's loss-of-consortium claims. However, when the adult child dies, Florida's law recognized no successor in interest. Thus, the case is dismissed simply by operation of the courts' own delay, richly rewarding the tobacco defendants' tactic to delay and not settle.

Even where the cases are not entirely extinguished, "justice delayed is justice denied." Consolidation of tobacco trials would promote efficient and timely resolution, and should be considered by all courts as an important tool in the judicial toolbox.



Richard A. Daynard is University Distinguished Professor of Law at Northeastern University, and President of the Public Health Advocacy Institute, which assisted the plaintiffs' trial team in the cases.



New Advisors Spotlight

Hon. Sandra Widlan
King County Superior Court

Hon. Kelly Mahoney
Magistrate, US District Court for the Northern District of Iowa

Hon. Jesse Furman
US District Court for the Southern District of NY

Hon. Robert Conrad
US District for the Western District of North Carolina

Colorado State Courts are Among the Most Innovative in the Country

By Steve Susman and Hon. Thomas Marten

At the annual Colorado State Judicial Conference held in Vail on September 24, the CJP learned that Colorado state trial judges have been using many of the innovations that we are advocating. We conducted a discussion on how to make jury trials "Shorter, Faster and Better." After noting that the average Colorado district trial judge only tried 1.25 civil jury cases last year, we learned that Colorado judges already allow lawyer participation in voir dire, the use of pre-voir dire questionnaires tailored to particular cases, jurors to submit questions to witnesses, time limits in some cases and jurors to discuss the evidence before final deliberations. The judges reported no problems with any of these practices and that jurors liked them all. A handful of the judges had given complete substantive instructions at the start of cases and the only objection identified was that it was extra work to instruct on claims that dropped out of the case during trial and that the judges were too rushed to prepare final instructions at the start. None had required the lawyers to fully open before rather than after jury selection, but many seemed open to trying this.

As the CJP travels around the country urging sometimes dubious trial judges to adopt these practices, and as those judges demand empirical evidence of their effectiveness in improving trials, the best answer may be testimonials from hundreds of Colorado state trial judges. We had previously found that the overwhelming majority of lawyers who have tried cases using one or more of the proposed modifications have responded positively to them. We now have seen that judges who are required by law to use certain modifications (e.g., jury discussions during the trial) are discovering the benefits. Where not mandated by law, judges generally have broad discretion in the conduct of trials, but are reluctant to impose changes for any number of reasons.

In an effort to address those concerns, the CJP will be intensifying its efforts to reach the judiciary, both state and federal, from training new judges to programs for experienced ones.

Hon. Thomas Marten is a United States District Judge and Judicial Advisor to the Civil Jury Project.

Steve Susman is the Executive Director of the Civil Jury Project

Status of Project: Spring 2018

The Civil Jury Project looks forward to continuing its efforts throughout 2018 with the following objectives:

- Continue with our efforts to enlist and involve judicial, academic, and practitioner advisors around the country
- Identify and study those judges who are trying the most jury cases, endeavoring the understand their techniques
- Develop plain language pattern jury instructions
- Encourage public discussion and debates about the pros and cons of public dispute resolution, particularly through the use of social and traditional media

This is but a sampling of our objectives for the coming year. A comprehensive list is available on our website here.

Thank you for your involvement in this important project. By working together we can reach a better understanding of how America's juries work and how they can be improved.

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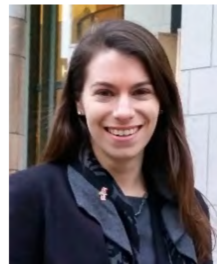

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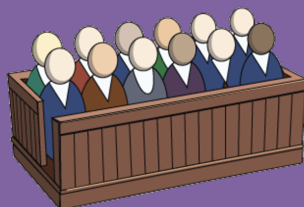
Preview of Future CJP Newsletter Content . . .



Hon. Elizabeth Feffer offers insight into actual prospective jurors' attitudes toward voir dire.

Professor Janet Randall of Northeastern University describes research showing the effect of Plain English instructions on juror comprehension.