



# THE JURY BOX

A Publication of  
Edward P. Schwartz Consulting  
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Vol. 3, No. 1, January, 2007



Welcome to another year of **THE JURY BOX**. This one promises to be our hottest yet! That's right, it's the global warming edition of **THE JURY BOX**. So far, up here in Boston, we have had one day with high temperatures below freezing. My brother-in-law's investment in a snow-blower is looking a little silly about now. I'm sure the blizzards must be right around the corner. At least George Bush is willing to admit that global warming actually exists.

The legal climate is changing, too. The President has agreed to submit his domestic wire taps to a judge, albeit a secret one, employing an expedited, yet complex, procedure that Alberto Gonzales seems unwilling (or unable) to explain to Congress. A member of the administration urged companies and law firms not to hire attorneys who defend detainees at Guantanamo Bay, essentially calling them traitors. Check out Daniel Coquillette's excellent op-ed in the Boston Globe, drawing parallels to the lawyers who defended British officers after the Boston Massacre of 1770.

Medical malpractice awards are falling and people are finally coming to grips with the possibility that the torts crisis might never have existed in the first place. Several states have adopted significant jury reforms in the past year (plain English instructions, jury questions, note-taking, etc.), while others re-examine their commitment to capital punishment. I'll try to help you keep up with the changing tides.

— Edward P. Schwartz

Much ink has been spilled about the "vanishing jury trial." (See e.g. Massachusetts Lawyers Weekly, November 27, 2006.) It seems strange to talk about a dearth of jury trials when the backlogs at most courthouses are longer than ever. Of course, if there are more lawsuits than ever, and they typically take longer to try, the dockets can get crowded while the percentage of cases going to a jury actually declines. For this discussion, I will take it as given that fewer cases (as a percentage) are going to jury trial. I want to review some of the suggested causes for this decline and then discuss some implications.

## The Devil You Know...

While many cases avoid going to trial because of the use of alternative dispute resolution techniques, the primary reason for the reduction seems to be that more cases are being settled before trial. Some have suggested that the evolution of a highly-skilled and experienced industry of professional mediators has increased settlement rates, largely by providing the parties with an expert and objective evaluation of how a jury is likely to react to a case. Along similar lines, as more litigants employ jury consultants, they enter settlement discussions with realistic expectations of how their cases will

play before a jury. The basic hypothesis here is that as litigants' expectations about the outcome of a trial converge, it is easier to achieve settlement.

At the opposite end of the spectrum lie the doomsayers, who claim that lawsuits get settled because litigants are terrified of the arbitrariness of jury verdicts. The logic goes that if a jury trial is a complete crap-shoot, almost any settlement is preferable to going to trial. While the potential downside of trial is clearly worse for defendants (since the sky's the limit for damage awards), plaintiffs (who are more likely to be individuals) tend to be more risk-averse. The combined result is a desire by both sides to settle rather than go to trial.

These explanations for increased settlement rates seem to be at odds with one another. Are jury trials becoming more predictable or less so? I would argue that the answer is "both." To understand this seemingly paradoxical answer, it is important to focus on the kind of uncertainty at issue in each hypothesis.

As Rummy would say, "We know what we don't know."

We seem to have made great strides in evaluating cases with respect to which party is likely to win on the question of liability. Both statistical models of case outcomes and mock jury studies have shown good predictive power with respect to liability verdicts. When I have run multiple focus group or mock trial panels for the same case, almost never do two panels from the same treatment reach different verdicts on liability. It is possible, of course, to affect the verdict by changing the treatment. A big part of my job is to help a lawyer find the presentation strategy that maximizes the likelihood that the jury will find for her client. A particularly good strategic shift can "flip" a case from a loser to a winner. The point here, however, is that, given a fixed case presentation (and jury selection technique), most juries will hand down the same verdict on liability.

Both mediators and jury consultants provide cover for the lawyer who does not want to admit to her client that her case is a likely loser. The lawyer can save face if a neutral expert breaks the bad news. This facilitates settlement since the client has received an accurate assessment of her chances in court, even if said assessment did not come from her own lawyer.

Knowing which party is likely to win on liability does not resolve all of the uncertainty of a jury trial, however. The devil's in the damages. Empirical research has made significantly less headway in predicting jury damage awards. The problem seems to lie in the translation of juror objectives into dollar amounts. Even when two mock juries seem to completely agree on what they want to compensate the plaintiff for, and the extent to which they want to punish the defendant, they can arrive at wildly divergent dollar amounts.

As I have discussed in an earlier issue of **THE JURY BOX**, juries tend to adopt an "anchor and adjust" strategy for arriving at damage awards. Anchors tend to be very malleable

and juries typically have little guidance (and even less experience) in translating "harm and deterrence" into "dollars and cents."

So, we live in a world in which parties can often agree about how likely the plaintiff is to win on liability, but they can have wildly differing estimates of the likely damage award. In addition, neither party will have much confidence in her estimate of that award. Each party can derive comfort from a fixed settlement or an arbitration award with a predetermined high-low agreement.

### You can Always Hire a Professional

In addition to settlement, which always remains an option, many cases avoid jury trial by opting for a bench trial or binding arbitration. Either of these options can be agreed to by the parties, or, in the case of arbitration, might be stipulated in a pre-existing contract between the parties. Given the increasing popularity of these jury-free options, it is interesting to examine whether they perform any more reliably than jury trials.

Setting aside criminal trials, case outcomes from juries, arbitrators and judges are remarkably similar. Juries actually find defendants liable slightly less often than judges. On the other hand, juries very occasionally hand down enormous damage awards that one would never see from a judge. If one were to eliminate the top 1% of jury awards, one would find that judges and juries tend to compensate plaintiffs at similar rates.

In light of the growing insistence on arbitration by large companies in contracts of adhesion (read the tiny print on the back of your credit card statement), it is surprising to see that arbitrators are actually more likely to find for the plaintiff than are juries. (See Wittman 2003 for automobile accident cases and Delikat 2000 for employment discrimination cases).

The main lesson from these findings is that the increased avoidance of jury trials (via settlement, bench trial or ADR) seems to be driven mostly by a fear of the unpredictability of jury damage awards. Several recent, and ongoing, developments should serve to mitigate that fear. First, research continues to show that other decision-makers, such as arbitrators and judges, are subject to many of the same heuristic foibles as are jurors. Second, empirical studies show that these "professional" fact finders do not seem to decide cases very differently than do juries. Third, most "outlier" damage awards are adjusted down by judges, either immediately or upon appeal. Fourth, the line of US Supreme Court cases including *BMW* and *State Farm* have effectively capped punitive damages at ten-times their compensatory counterparts. Finally, more and more attorneys are choosing to focus their pre-trial jury research on the question of damages, rather than liability. As such, I anticipate that we may see a rebound in the use of jury trials in the next few years.

I have argued for some time that it is unfair to evaluate the desirability of the jury system until we have a system in place

that maximizes the ability of jurors to do their jobs. This means treating them with proper respect, instructing them in language they can understand, and adopting procedural rules that maximize juror comprehension of both the law and the facts. After almost a thousand years of jury trials, we are inching our way closer to implementing such a system.

### Meanwhile, back in criminal court...

In their seminal work, *The American Jury* (1966), Kalven and Zeisel reported on a study comparing jury verdicts in criminal cases with what the presiding judges would have done in the same cases. The basic result was that judges agreed with virtually all convictions, *but disagreed with more than half of jury acquittals*. This study was replicated in 2005 by Ted Eisenberg and others, using data from modern trials. It is remarkable how closely the modern results mirror those from more than fifty years ago.

Perhaps even more remarkable are the results reported by Andrew Leipold in his study of federal juries and judges. It turns out that while the conviction rate before federal juries was 84% over a fifteen-year span, it was only 51% before federal trial judges. In light of these numbers, (being in contrast to the studies using state data), Leipold asks the sensible question, "Why are Federal Judges so Acquittal Prone?" (2005)

This discrepancy has not always existed. While conviction rates for federal juries have been climbing steadily since at least the 1940s, the precipitous decline in judicial convictions really began in the 1980s. The greatest puzzle in the data is that the percentage of federal defendants choosing jury trials has been rising along with juridical conviction rates. So, why are defendants increasingly choosing to go before juries that are likely to convict them? Before you start citing Federal Rule 23, consider that Leipold found that virtually no federal jury trials resulted from a prosecutor denying the defendant a bench trial.

Unlike in the two other studies, here, judges and juries heard different cases. As such, it is important to correct for selection effects. That is, certain types of cases likely go to juries more often than others. In order to compare "apples to apples," Leipold had to account for these effects in his statistical model. He found that "public order" crimes have particularly low conviction rates, with a wide disparity between juries and judges, and these cases make up *more than two-thirds* of federal bench trials. Exploring further, Leipold discovered that a full 50% of bench trials were for misdemeanor traffic offenses. Absent these, the conviction gap was 84% to 60%.

The most compelling explanation that Leipold uncovered was the chilling effect of the Federal Sentencing Guidelines. As judges were required to impose harsher sentences for relatively minor offenses, they exhibited an increasing reluctance to convict. It will be interesting to see how the holding in *Booker*, making the guidelines entirely advisory, will affect future conviction rates for federal judges.

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