Section of Litigation Mass Torts

Are Juries Really Such a Wildcard Compared with Judges?

By Leslie Ellis – July 16, 2015

Jury trials are becoming rarer and rarer. The National Center for State Courts' Court Statistics Project found that there was a 32 percent decline in the number of civil jury trials (0.6 percent of all civil dispositions) during 1976 through 2002 in 22 states. However, bench trials declined by only 7 percent during the same time period. *See* Thomas G.Munsterman, "Jury News," 19 *Court Manager* 50 (2004). Time hasn't helped—in 2012, Wisconsin state courts saw only 0.23 percent of cases decided by juries. The numbers look very similar in the federal courts. The American Bar Association found that, despite a five-fold increase in the number of civil cases filed in the federal courts from 1962 through 2002, the rate of civil jury trials dropped from almost 12 percent of cases filed to fewer than 2 percent. *See* Patricia L. Refo, Opening Statement, "The Vanishing Trial," 30 *Litig.* 2 (Winter 2004).

There are many possible reasons for this: Most observers and scholars cite a combination of a fear of juries, the unpredictability and high cost of a trial versus the certainty of a settlement, and a rise in the number of cases being resolved through alternative dispute resolution. Another possibility is an increase in the number of cases being resolved at the summary judgment stage. *See, e.g.*, Stephen B. Burbank, "Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?," 1 *J. Empirical Legal Stud.* 591 (2004) (a University of Pennsylvania study finding that the number of cases resolved on summary judgment increased from 2.2 percent in 1960 to 7.7 percent in 2000).

This means that judges and arbitrators, rather than juries, are resolving an ever larger number of cases. Moreover, judges have a large impact on the ultimate outcome in jury trials, through several dispositive and evidentiary decisions leading up to trial. Those who characterized juries and jurors as unpredictable, irrational, too emotional, and too easily influenced by extralegal information might think the vanishing jury trial is not such a bad thing. These criticisms, however, assume that other triers of fact, such as judges and arbitrators, are none of those things and that they are rational and render decisions based purely on the law and admissible evidence. We also tend to believe judges are either all-knowing or can immediately understand complex testimony, regardless of their background or familiarity, and are divorced from other stressors such as busy dockets, long days, and issues in their personal lives that affect them as much as anyone else.

However, a growing body of research supports what many of us have always known—judges are people, too, and are subject to many of the same unconscious influences and decision-making shortcuts as jurors. Regardless of background, education, and occupation, we are all remarkably bad at understanding what influences us when we make decisions. *See, e.g.*, Amos Tversky et al., "Judgment under Uncertainty: Heuristics and Biases," 185 *Sci.* 1124 (1974); Ruud Custers et al., "The Unconscious Will: How the Pursuit of Goals Operates Outside of Conscious Awareness," 329 *Sci.* 47 (2010). We think we know why we made certain decisions and what we relied on when doing so, but we often discount factors that had a larger impact on us than we thought. Judges are not immune to this either. Pertinent research on judicial decision making indicates that biases and errors occur both unconsciously and unintentionally. What can be done to address this concern?

Who We Are Affects What We Do

Dozens of research studies have looked at how a juror's demographics might affect his or her view of a case. While a vast majority of those studies show little to no relationship between juror demographics and verdict preference, there is some evidence that juror demographics can affect decision making when the demographic is relevant to the issue in dispute. For example, female mock jurors are more likely than male mock jurors to perceive behavior as sexual harassment. *See, e.g.*, Richard L. Weiner et al., "The More You See It, the More You Know It: Memory Accessibility and Sexual Harassment Judgments," 53 *Sex Roles* 807 (2005). Judicial decision-making studies have yielded similar results. For example, studies have found female judges were more likely to find in favor of plaintiffs in sex discrimination cases, and appellate panels that included at least one female judge were

more likely to rule in favor of such plaintiffs than panels that were all male. *See, e.g.*, Jennifer L. Peresie, "Female Judges Matter," 114 *Yale L.J.* 1759 (2005).

Another study looked at race discrimination cases in six federal circuits from 1981 to 2003. Although plaintiffs prevailed in only 22 percent of those cases overall, researchers found that plaintiffs were more than twice as likely to prevail with an African American judge (a 46 percent success rate) than with a white judge (a 21 percent success rate). *See* Pat K. Chew et al., "The Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases," 86 *Wash. U. L. Rev.* 1117 (2009).

It is important to note that the effects of judge race and gender on outcome are small and not predictive of outcome; for judges as for juries, the evidence is much more important in determining outcome. The demographic is a proxy for experience with or exposure to behaviors like those at issue and causes judges and jurors to interpret that evidence differently.

How We Think Affects What We Do

Another more pervasive impact on both juror and judicial decision making is a function of how our brains work. The impact is more pervasive because it influences how we make decisions regardless of type of case, person, and setting. Our brains use a number of mental shortcuts, or "cognitive heuristics," that help us make decisions more quickly and efficiently by operating in a matter of milliseconds, without our realizing that it is happening. Daniel Kahneman and others have called it "System 1 and System 2 processing." *See* Daniel Kahneman, *Thinking Fast, Thinking Slow* (2011). System 1 is quick, unconscious, and emotional, while System 2 is slow, analytical, and deliberative. System 1 arrives at decisions more quickly than System 2, and that is when the mental shortcuts come into play.

We are also more likely to use the mental shortcuts and let System 1 do more of the work when we have to use a lot of mental effort (called "cognitive load"). *See, e.g.*, Katherine L. Milkman et al., "How Can Decision Making Be Improved?," 4 *Persps. on Psychol. Sci.* 379 (2009). Judges and juries are under a constant high cognitive load, which comes in many forms (e.g., a lot of new and complex information, time pressures, or the importance of their decision).

Two other factors that can increase the chances of over-relying on System 1 processing are evidence that causes an emotional or visceral reaction in the judge (e.g., particularly graphic injuries or egregious corporate behavior) and individual differences. *See* Jack B. Soll et al., "A User's Guide to Debiasing," *in Wiley-Blackwell Handbook of Judgment and Decision Making* (Gideon Keren & George Wu eds., forthcoming). Decisions made in the heat of strong emotions are made more quickly and thoughtlessly than those made when calm, which opens the door to more error-prone shortcuts. Furthermore, some people are either more motivated or simply more able to deal with complex information. Individuals who cannot or are not interested in making more deliberative decisions are more likely to take the less effortful System 1 path to a decision.

Recent research has shown that judges are prone to some of the same cognitive shortcuts as jurors. For example, in a series of studies, judges who were privy to inadmissible information—such as settlement offers, a victim's sexual history, or remedial measures—rendered different verdict preferences than judges who did not have that information. Furthermore, judges who were told the cost of incarceration recommended shorter sentences than those who were not. *See, e.g.*, Andrew J. Wistrich et al., "Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding" (Cornell Law Faculty Publications, Paper No. 20, 2005); Chris Guthrie et al., "Blinking on the Bench: How Judges Decide Cases," 93 *Cornell L. Rev.* 1 (2013). In another study, judges were more likely to evaluate a mental illness patient as being violent when the chances of violence were described as "8 in 100" versus "8%"—seeing the same probability in the form of a frequency rather than a percentage had a larger impact. *See* John Monahan et al., "Judicial Decision Thresholds for Violence Risk Management," 2 *Int'l J. Forensic Mental Health* 1 (2003).

One very robust heuristic is called "anchoring and adjusting." When asked to estimate the value of something (e.g., the number of jellybeans in a jar), we often rely on anchors to help us. Anchoring and adjusting occurs in many instances and is very difficult to undo. Specific to the courtroom, a large body of research shows that a plaintiff's ad damnum request greatly affects jurors' damages awards. *See, e.g.*, Mollie Marti et al., "Be Careful What You Ask For: The Effect of Anchors on Personal-Injury Damages Awards," 6 *J. Experimental Psychol.: Applied* 91 (June 2000). Basically, the more the plaintiff asks for, the more the plaintiff receives.

Judges are as susceptible to anchoring as other individuals. Wistrich and his colleagues found that judges' estimated damage awards were influenced by the amounts the parties had exchanged in settlement negotiations. While some anchors (such as ad damna) could be relevant to the decision at hand, arbitrary anchors produce similar effects because our brains process and immediately incorporate the anchor into the evaluation without our knowledge. For example, judges who were told that the defendant filed a motion to dismiss, based on the jurisdictional argument that the claims did not meet the minimum of $75,000 in damages, awarded less in damages than jurors not exposed to the motion to dismiss rationale and $75,000 number. In a test of completely arbitrary anchors, German legal experts were given a pair of dice loaded to roll either three or nine, then asked to recommend a sentence for a shoplifter. The legal experts who rolled nine recommended longer probationary periods than those who rolled three. *See* B. Englich et al., "Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making," 32 *Personality & Soc. Psychol. Bull.* 188 (2006).

It is important to note that the judges in the Wistrich et al. and Guthrie et al. studies were, in some instances, able to set aside information procured through unconstitutional means, such as an impermissible search or confession, so this is not to suggest that judges are often unduly influenced in all of their decision-making tasks. Rather, the research suggests that judges are people, too, and can be subject to the same unconscious shortcuts as everyone else.

What Can You Do about It?

While it is very difficult to counter the effects of our backgrounds and cognitive heuristics, attorneys can incorporate strategies into how they present their case to judges to help minimize those effects. *See* Jeffrey J. Rachlinski, "Judicial Psychology" (unpublished manuscript); Soll et al., *supra*; Jennifer S. Lerner at al., "Accounting for the Effects of Accountability," 125 *Psychol. Bull.* 255 (1999). For parties that would benefit from a more analytically based decision, the goal is to give System 2 an opportunity to override System 1. Merely identifying a bias or error and calling attention to it are not sufficient; rather, we need to shut down the opportunities for the cognitive bias or error to be activated. The underlying theme to all of these strategies is to simplify, clarify, and specify. Do what you can to reduce the load on judges so that judges will make more deliberative decisions. As one judge put it during a mock *Markman* study, "Judges are human, and they only have so much of an attention span."

The following are some tactical recommendations (some of which also apply to juries):

> Elicit clear and straightforward witness testimony so the judge or arbitrators can understand it. This is one of the easiest things counsel can control.
>
> When possible, request full written opinions rather than short orders or orders from the bench. This will allow the judge time to consider all of the arguments and perspectives before ruling.
>
> Incorporate decision trees, schedules, or checklists into case management orders so the judge has smaller pieces of the case to consider at a time and is less able to make big-picture, impressionistic decisions.
>
> If expert testimony will include an extensive amount of statistical or probabilistic evidence, consider having your expert provide a brief statistical tutorial at the beginning of his or her testimony.
>
> Because external accountability can also increase deliberative processing, call attention to the fact that the decision will draw scrutiny, for example, through press coverage or an appellate review. While risky, it could be effective if handled delicately.

On a more strategic level, use a narrative to tell a story in briefs, in opening statements, and through witness testimony. Having judges consider alternative explanations leads to more deliberative analysis, and simply attacking the adverse party's story does not provide that alternative. Provide your own story that includes an alternative cause, motive, narrative, etc., so the judge has to consider both versions rather than just the strengths and weaknesses of only one.

An assessment of the judge's inclination to tackle complex information can also help guide the complexity of the presentation. A judge who exhibits an inclination to make sure he or she understands complex evidence will inherently be more likely to make more deliberative decisions. However, if a judge is more prone to quick decisions, then counsel should make extra use of tools like simple visuals, decision trees, and tag lines to create a less effortful path to a favorable decision.

A final recommendation involves minimizing the impact of demographics on decision making. The previous recommendations for encouraging deliberative decision making still apply, but they do not address the amount of exposure to particular events or behaviors. If a party is worried about a judge who may not have experienced harassing or discriminatory behaviors, educate him or her about how prevalent it is in a particular setting. If you are worried that a judge might be overly prone to seeing inappropriate behavior, point out how rare it has been in that particular setting. It would be nearly impossible to change the judge's overall opinion about how rare, or prevalent, these types of behaviors are in general, but you can present your case as the exception to the rule.

Conclusion

Many people assume that, with a complicated, high-stakes, or emotionally driven case, they are better off with a judge than with a jury. The research indicates that might not be the case. In fact, a group of people are more likely to identify and correct each other's errors than is an individual who is wholly unaware of his or her own biases and errors. The trick is understanding what to look out for and having at your disposal methods of reducing the impact of such biases and errors, in any setting.

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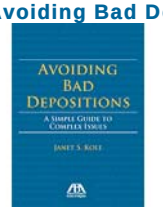

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