



PROGRAM MATERIALS

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Justice Behind a Mask

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Andrew is a founding partner who represents health care providers in virtually all medical specialty fields as well as many of the most prestigious hospitals in the New York metropolitan area. He also represents a number of well-known medical device and pharmaceutical manufacturers. Over the past thirty years Andrew has tried more than one hundred cases to verdict, including numerous cases of multimillion-dollar exposure. He has lectured at the New York State Bar Association, the Greater New York Hospital Association, Yale University School of Medicine, Memorial Sloan Kettering Cancer Center, Westchester County Medical Center and a number of major metropolitan hospitals and is a former Trial Advocacy Instructor at Benjamin N. Cardozo School of Law.

Andrew has published on topics including medical malpractice, risk management, long term care liability, negotiating techniques and settlement strategies and drugs and medical devices liability litigation in The New York Law Journal, Medical Malpractice Law and Strategy, The Journal of the American Society of Healthcare Risk Management, The PLUS Journal, and The American Journal of Forensic Psychiatry.

Andrew is the past President of the New York State Medical Defense Bar, and was a keynote speaker at the American Bar Association Section on Law and Medicine annual convention. Andrew is the Chairperson at the NYSBA biannual seminar on Medical Malpractice Litigation and he has been named one of the top rated Medical Malpractice attorneys by Super Lawyers magazine. Andrew has been selected to the New York Metropolitan Super Lawyers list for the years 2006-2019. Each year, no more than 5% of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor.



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Jacqueline is a partner and the Team Leader of the Firm's Appellate Practice Department. She has had significant appellate success in the New York State Court of Appeals and in the intermediate appellate courts in medical, legal, dental, psychiatric and chiropractic malpractice actions

as well as general liability matters. Jacqueline also has extensive experience in complex motion practice defending health care practitioners and hospitals as well as landlords and security companies.

Jacqueline has obtained numerous appellate decisions favorable to the defense bar including a noteworthy ruling in the Court of Appeals concerning the enforcement of conditional orders of preclusion, along with a landmark decision on informed consent in the First Department and the first decision issued by the Second Department on the utilization of Frye hearings.

Jacqueline is a contributing author to the treatise New York Medical Malpractice. She is also a contributing author to the Outside Counsel section of the New York Law Journal and she conducts CLE lectures.

JUSTICE BEHIND A MASK

ANDREW S. KAUFMAN, ESQ.
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THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

See,

In Re The Matter of Jury Trials During TheCOVID-19
Pandemic

Supreme Court of Wisconsin, March 22, 2020,
Dissenting opinion of Judge Rebecca G. Bradley,
concluding, *inter alia*, that,

“Nothing in the Constitution permits the judiciary to limit the fundamental rights secured under the Sixth Amendment.”

- Court closures have resulted in the suspension of all trials
- Unless all trials are live streamed, or courts provide public on line access, virtual trials will not be “public”
- In a virtual trial, the attorney is physically separated from his client

JURIES

THE SEVENTH AMENDMENT OF THE U.S. CONSTITUTION

“In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”

HOW MANY JURORS MUST BE EMPANELED?

NEW YORK CPLR 4104:

“A jury shall be composed of six persons.”

Waldman v. Cohen, 125 A.D.2d 116 (2nd Dept. 1987):

A verdict rendered by a jury composed of fewer than six jurors is a nullity in the absence of consent by all parties.

Sharrow v. Dick Corporation, 86 N.Y.2d 54 (1995)

Where parties to a civil case have not agreed to trial by fewer than six jurors, a valid verdict requires that all six jurors participate in underlying deliberations.

NEVADA REVISED STATUTES 16.030:

The parties may consent to any number of jurors not less than four.

UTAH RULES OF CIVIL PROCEDURE, RULE 48:

The parties may stipulate that the jury shall consist of any number less than eight or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

SOCIAL DISTANCING MAY EXCLUDE CERTAIN CLASSES OF PROSPECTIVE JURORS

Thiel v. Southern Pac, Co., 66 S.Ct.984 (1946).

The American tradition of trial by jury contemplates an impartial jury drawn from a cross-section of the community, but every jury need not contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community.

THE CRITICAL IMPORTANCE OF THE JURY'S ABILITY TO ASSESS WITNESS CREDIBILITY

JURY INSTRUCTIONS

- New York Pattern Jury Instruction 1:41, Weighing Testimony

In your everyday affairs you decide for yourselves the reliability or unreliability of things people tell you. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of the case, the bias or prejudice of a witness, if there be any, the age, appearance, the manner in which the witness gives testimony on the stand ... are all items to be considered by you in deciding how much weight, if any, you will give to that witness' testimony.

- Utah CV 1.12: Believability of Witnesses

Jurors are instructed to consider a number of factors in evaluating witness credibility including:

5. “You may consider the demeanor of the witness. By that I mean the way the witness acted, the way the witness talked, or the way the witness reacted to certain questions.”

- Michigan Civil Jury Instruction 4.01: Credibility of Witnesses:

“You are the judges of the facts in this case, and you must determine which witnesses to believe and what weight to give to their testimony. In doing so you may consider each witness’s ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony considered in light of all the evidence.”

APPELLATE COURTS GIVE GREAT DEFERENCE TO JURY ASSESSMENTS OF WITNESS CREDIBILITY.

NEW YORK:

People v. Lane, 7 N.Y.3d 888 (2006)

“... although defendant was convicted following a bench trial, the appropriate standard for evaluating a weight of the evidence argument on appeal is the same regardless of whether the finder of fact was a judge or a jury ... because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record.”

Peters v. Wallis, 135 A.D.3d 922 (2nd Dept. 2016)

“... it is for the jury to make determinations as to the credibility of the witnesses, and great deference is this regard is accorded to the jury, which had the opportunity to see and hear the witnesses.”

Also see, Feldman v. Knack, 170 A.D.3d 667 (2nd Dept. 2019).

NEW JERSEY:

Risko v. Thompson Muller Automotive Group, Inc., 206 N.J. 506 (Supreme Court of New Jersey 2011)

“It is axiomatic that a motion for a new trial should be granted only after having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses ...”

MICHIGAN:

Ellsworth v. Hotel Corporation of America, 236 Mich.App. 185 (Court of Appeals of Michigan 1999)

“When a party claims that a jury’s verdict was against the great weight of the evidence, we may overturn that verdict only when it was manifestly against the clear weight of the evidence. This Court will give substantial deference to a trial court’s determination that the verdict is not against the great weight of the evidence. The trial court cannot substitute its judgment for that of the factfinder, and the jury’s verdict should not set aside if there is competent evidence to support it. This Court gives deference to the trial court’s unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice.”

OUTSIDE INFLUENCE ON THE JURORS

JURY INSTRUCTIONS

- New York Pattern Jury Instruction 1:12

“Please do not permit any person who is not a juror to discuss this case in your presence, and if anyone does so despite your telling the person not to, report that to me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact or any other fact you feel necessary to bring to my attention.”

- Montana: MCA 25-7-403

“When the case is finally submitted to the jury, it may decide in court or retire for deliberation. If the jurors retire, they must be kept together in some convenient place, under charge of an officer, until at least two-thirds of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having the jurors under the officer’s charge may not allow any communication to be made to the jurors and the officer may not make any communication, except to ask the jurors if they or two-thirds of them are agreed upon a verdict. The officer may not, before the jurors’ verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.”

- Utah CV 1.01: General Admonitions (in pertinent part)

“... you must not be exposed to any other information about the case...”

First, ... you must not try to get information from any source other than what you see and hear in this courtroom. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the Internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, iPhones, Smartphones, or any social media or electronic device...

Second, ... you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. You may not communicate about the case by any means, including by emails, text messages, tweets, blogs, chat rooms, comments, other postings, or any social media.

... these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information.

... we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.”

- Michigan Civil Jury Instruction 2.04: Jury Must Only Consider Evidence; What Evidence Is / Prohibited Actions by Jurors (in pertinent part)

“... I will now describe some of the things you may not consider from outside of the courtroom:

(a) Newspaper, television, radio and other news reports, emails, blogs and social media posts and commentary about this case are not evidence. Until I discharge you as jurors, do not search for, read, listen to, or watch any such information about this case from any source, in any form whatsoever.

(b) ... You are not to discuss or share information, or answer any questions, about this case at all in any manner with anyone – this includes family, friends or even strangers – until you have been discharged as a juror. Don’t allow anyone to say anything to you or say anything about this case in your presence. If anyone does, advise them that you are on the jury hearing the case, ask them to stop, and let me know immediately.

(4) To avoid even the appearance of unfairness or improper conduct on your part, you must follow the following rules of conduct:

(a) While you are in the courtroom and while you are deliberating, you are prohibited altogether from using a computer, cellular telephone or any other electronic device

capable of making communications. You may use these devices during recesses so long as your use does not otherwise violate my instructions.”

THE SIXTH AMENDMENT

The Sixth Amendment of the U.S. Constitution

*"In all criminal prosecutions, the accused shall enjoy the right to a **speedy** and **public** trial, by an **impartial** jury of the **State and district** wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be **confronted** with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the **Assistance of Counsel** for his defence."*

SUPREME COURT OF WISCONSIN

IN RE THE MATTER
OF JURY TRIALS DURING
THE COVID-19 PANDEMIC

FILED

MAR 22, 2020

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

WHEREAS Governor Evers has declared a public health emergency for the State of Wisconsin in connection with the COVID-19 pandemic; and

The United States Centers for Disease Control and Prevention has issued guidance related to the COVID-19 pandemic recommending, inter alia, that organizations develop and implement flexible attendance policies that allow employees to stay home when sick, to remain home to care for sick household members, and to work from home when possible; and

The Wisconsin Department of Health Services has issued a series of Emergency Orders that prohibit public or private gatherings of 10 or more people in a single room or confined space. Although the Emergency Orders have contained an exemption for the Wisconsin court system, the orders nonetheless urge all residents of the state to avoid such gatherings and to practice social distancing (maintaining six feet between individuals and avoiding all direct physical contact). The President has issued similar guidelines encouraging all citizens to work from home and to avoid gatherings of 10 or more people. The reason for these orders and guidelines is to avoid or decrease the transmission of COVID-19 from one person to another, as the disease may cause serious health consequences for the individual and may place undue strain on the health systems of this state and the country. In addition, there is a consensus among health providers and government health officials that certain categories of people are most at risk of suffering severe health consequences, including a higher risk of mortality, from COVID-19. Those higher-risk categories include older individuals and persons with pre-existing health conditions; and

The Supreme Court has administrative and superintending authority over the courts and judicial system of this state and a duty to promote the efficient and effective operation of the state's judicial system, Wis. Const. Art. VII, § 3; In re Kading, 79 Wis. 2d 508, 519-20; 235 N.W.2d 409 (1976); and

In light of the existing public health emergency, the Supreme Court makes the following findings:

1. Maintaining current court operations in the courts of this state, especially jury trials, presents substantial health risks to the public, to jurors, to witnesses, to law enforcement personnel, to litigants, to lawyers, to judges, and to court employees;

2. To protect the health of the public and the individuals who work for the courts of this state, it is necessary to limit temporarily the number of individuals who are physically present within the courts of this state and to temporarily modify certain procedures to ensure that the essential operations of the courts continue in an appropriate manner during the present public health emergency;
3. Continuing to have jury trials would put members of the public, jurors, witnesses, law enforcement personnel, lawyers, judges, and court employees at an unacceptable level of risk to their health and for some at an unacceptable level of risk for the loss of their lives;
4. Given the need to excuse jurors who are in high risk categories in order to protect them from exposure to this potentially deadly pandemic, the effect of such wide-ranging excusal from jury service could potentially raise challenges to the validity of a jury's verdict or result in a miscarriage of justice. The increasing potential for a juror to become ill with COVID-19 during a trial, which would require isolation of all other remaining jurors and other participants in the trial, also creates an unacceptable potential for mistrials;
5. Those individuals who are healthy enough to serve on a jury would likely be distracted by, and anxious about, the physical environment of the trial and their deliberations. There is a substantial risk that jurors compelled to report for jury duty would not be able to "examine the evidence with care and caution," and to "[a]ct with judgment, reason, and prudence," as instructed by Wis. JI-Crim 140, or to "be very careful and deliberate in weighing the evidence," as instructed by Wis. JI-Crim 460. In addition, jurors may be so affected by their anxiety from being in contact with other jurors and court staff that they cut short their deliberations so that they can be dismissed and leave the courthouse;
6. While this court cannot make findings as to particular cases (regarding whether their nature and complexity make it unreasonable to expect adequate preparation within the time periods established by Wis. Stat. sec. 971.10), the court finds that the nature of individual cases is a factor that is of greatly less significance than the global factors it has identified and found in this order;
7. Victims will also be subject to increased risk of contracting COVID-19 if they attend a jury trial during the public health emergency and they may be unable to attend a jury trial during the COVID-19 public health emergency because they are in a high-risk health category, which outweighs the impact on victims of the temporary delay in jury trials as a result of this order;
8. The risks identified above may be significantly mitigated by temporarily modifying court operations, including a temporary suspension of jury trials. Indeed, failing to temporarily suspend jury trials in the courts of this state would create an unacceptable risk of a miscarriage of justice;
9. The health risks from the COVID-19 pandemic constitute good cause to implement temporary changes to court procedures, including the temporary suspension of jury trials;
10. The delay in conducting a jury trial that results from the temporary suspension of jury trials provided in this order is not due to the actions of the government, but is due to factors beyond the government's control;

March 22, 2020

In re the Matter of Jury Trials during the COVID-19 Pandemic

11. Consequently, the ends of justice served by temporarily suspending jury trials in the courts of this state outweigh the interest of the public and the defendant in a speedy trial under Wis. Stat. sec. 971.10(3)(a);

NOW THEREFORE, IT IS HEREBY ORDERED that although the courts of the State of Wisconsin remain open, effective immediately through and including May 22, 2020, all civil and criminal jury trials scheduled to begin before May 22, 2020, are continued and will be rescheduled by the presiding judge to a date after May 22, 2020; and

IT IS FURTHER ORDERED that circuit courts or parties may file a motion with this court seeking an exception to this order. Any such motion should be identified as an "EMERGENCY" motion on its face, and shall be filed as soon as possible.

The provisions of this order shall be subject to further modification or extension by future orders of this court.

The State Bar of Wisconsin shall take all reasonable steps to notify its members of the contents of this order.

¶1 REBECCA GRASSL BRADLEY, J. (*dissenting*). The Wisconsin Supreme Court suspends the constitutional rights of Wisconsin citizens, citing the exigency of a public health emergency. The Constitution does not countenance such an infringement. "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934) (emphasis added).

¶2 The Sixth Amendment to the United States Constitution commands: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial[.]" U.S. Const. amend. VI. Wisconsin's highest court says a public health emergency justifies a blanket 60-day suspension of a constitutional right. If that is true, then the following constitutionally enumerated rights of the people (among others) are also subject to suspension by judicial decree:

- The free exercise of religion

- The freedom of speech
- The freedom of the press
- The right of the people to peaceably assemble
- The right of the people to petition the Government for a redress of grievances
- The right of the people to keep and bear Arms
- The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.

¶3 Informed by the lessons of history, the Constitution was established to safeguard the rights of the people even under the most exigent circumstances. The framers "foresaw that troubulous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority. Ex parte Milligan, 71 U.S. 2, 120-21 (1866) (emphasis added).

¶4 The Sixth Amendment's Speedy Trial Clause enshrines an ancient liberty. The Assize of Clarendon, an English code of legal procedure established in 1166, mandated speedy trials for the accused, "without delay." In 1215, following the English barons' revolt against tyrannical rule, the Magna Carta promised "[t]o no one will we sell, to no one deny or delay the

right or justice." See Patrick Ellard, Learning From Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters, 44 Am. Crim. L. Rev. 1207, 1209-10 (2007) (quoted source omitted).

¶5 The right to a "trial by jury" is "a valuable safeguard to liberty" and "the very palladium of free government." The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "[T]he Speedy Trial Clause's core concern is impairment of liberty." Doggett v. United States, 505 U.S. 647, 660 (1992) (Thomas, J., dissenting) (quoting United States v. Loud Hawk, 474 U.S. 302, 312 (1986)). "The public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges." Strunk v. United States, 412 U.S. 434, 439 n.2 (1973). With respect to the rights guaranteed by the Sixth Amendment, "so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified." Ex parte Milligan, 71 U.S. at 120. "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now . . . sought to be avoided." Id. (emphasis added; emphasis omitted).

¶6 Nothing in the Constitution permits the judiciary to limit the fundamental rights secured under the Sixth Amendment. "[T]here is only one instance in the Constitution where the government is expressly permitted to suspend a fundamental right[.]" Mitchell F. Crusto, State of Emergency: An Emergency Constitution Revisited, 61 Loy. L. Rev. 471, 504 & n.189 (2015); see U.S. Const. art I, § 9, cl. 2. Article I, § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." If the framers had contemplated suspension of Sixth Amendment rights or any other liberties, they would have said so in the text.

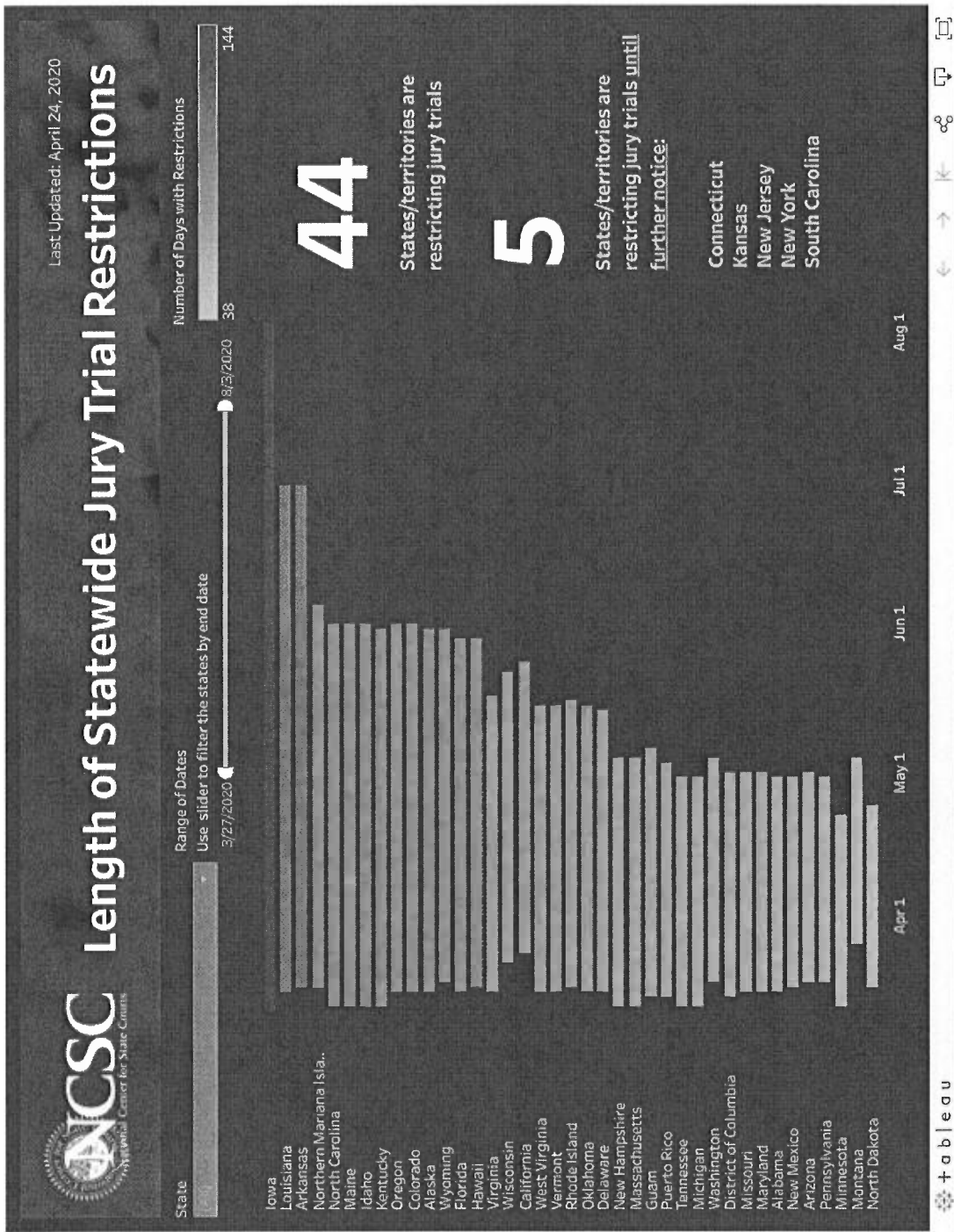
¶7 The court's order not only overrides the United States Constitution, it flouts the Wisconsin Constitution, which mandates: "In all criminal prosecutions, the accused shall enjoy the right . . . to a speedy public trial[.]" Wis. Const. Art. I, § 7. While utterly ignoring the supreme law of the land, the court expressly refuses to follow statutory law. The court says "the ends of justice served by temporarily suspending jury trials in the courts of this state outweigh the interest of the public and the defendant in a speedy trial under Wis. Stat. sec. 971.10(3)(a)." Under that statute, criminal trials in Wisconsin "shall commence" within specified periods of time, depending on the nature of the charges. See Wis. Stat. § 971.10(1)-(2). Continuances are statutorily permissible, provided a circuit court considers multiple case-specific factors. See Wis. Stat. § 971.10(3). The broad sweep of the court's order precludes every circuit court in the state from exercising its discretionary power to weigh various statutory factors—including the interests of the victim—before granting a continuance. See Wis. Stat. § 971.10(3)(b)(3).

¶8 The all-encompassing nature of the court's order postponing every criminal jury trial in the state of Wisconsin for a minimum of two months cannot comport with the Sixth Amendment's speedy trial mandate, which, although not strictly construed so as to forbid any delay whatsoever, "necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972) (emphasis added; footnote omitted). The court's blanket order dispenses with both constitutional and statutory requirements to consider, on a case by case basis, the rights of the accused, the interests of victims, and the best interests of the public. Under Wisconsin law, "[e]very defendant not tried in accordance with this section shall be discharged from custody." Wis. Stat. § 971.10(4). Violations of the Constitution's Speedy Trial Clause require dismissal of the charges against the accused: "In light of the policies which underlie the right to a speedy trial,

dismissal must remain, as Barker noted, 'the only possible remedy.'" Strunk, 412 U.S. at 440 (citing Barker, 407 U.S. at 522).

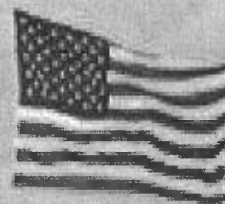
¶9 "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure . . . when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting). Justifying the suspension of the people's constitutionally guaranteed rights based on a public health emergency nullifies our Constitution. Justice Antonin Scalia once explained that "every tinpot dictator has a Bill of Rights which he casually ignores. What was debated in 1787 and what insures our freedom is our structure of government which holds each branch (and in turn by its people) to account." If the people's constitutional rights may be suspended by the judicial branch in the name of a public health emergency, our freedom is in peril; our republic is lost. More than one million Americans have died defending our liberty from external threats. The liberty for which so many have laid down their lives should not be cast aside even in "troubled times." If the government will not protect constitutional rights designed to preserve our freedom, it is up to the people to reclaim them.

¶10 I am authorized to state that Justice Daniel Kelly joins this dissent.



JURIES

We the People



UNITED STATES CONSTITUTION

AMENDMENT VII

BILL OF RIGHTS

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 41. Trial by a Jury (Refs & Annos)

McKinney's CPLR § 4104

§ 4104. Number of jurors

Currentness

A jury shall be composed of six persons.

Credits

(Added L.1972, c. 185, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

By David D. Siegel

The original § 4104 offered the parties a choice of six or 12 jurors. A 1972 amendment set the figure at a straight six for civil actions. This made the six-person jury novel to the CPLR, but not to the court system. A six-person jury had been mandated in the New York City Civil Court since 1971 (N.Y.C.Civ.Ct.Act § 1305), in the city courts outside New York City since 1964 (Unif. City Ct. Act § 1305), and in the town and village courts as governed by the Uniform Justice Court Act (§ 1305) from its outset. Legislation in 1972 accompanying the CPLR 4104 amendment also mandated a six-person jury in the district courts in § 1305 of the Unif. Dist. Ct. Act.

LEGISLATIVE STUDIES AND REPORTS

Sections 118 and 120 of the former Municipal Court Code of the City of New York are the source of this section. The six-man jury has worked well in the Municipal Court, as is evidenced by the fact that twelve-man juries are rarely demanded.

A comprehensive discussion by the Revisers of the jury system in the State of New York appears in the Second Report to the Legislature. Therein it is said that the six-man jury has a long history in New York. In 1737, the Colonial Legislature gave justices of the peace jurisdiction of causes of forty shillings or less, and provided that either plaintiff or defendant could demand a jury of six men. 2 Laws of the Colony of New York, c. 656. Legislation providing for a six-man jury in cases involving small amounts, was in effect on April 19, 1775. 5 Laws of the Colony of New York, c. 1532. Therefore, as provided by section XXXV of the first New York State Constitution in 1777, it became part of the common law of the new state. The present Justice Court Act developed from these early statutes, and requires a six-man jury, although the parties may agree to trial by less than that number. Justice Court Act § 230.

The use of a six-man jury in the Municipal Court of the city of New York developed separately from the six-man jury in the Justice Courts of the rest of the state. In 1813, the use of a six-man jury was authorized by the Legislature in the Assistant

Justices Court of the City of New York. 2 Revised Laws of 1813, c. 86, §§ 85, 95. That court, eventually replaced by the Justices Court in the City of New York (later called the District Courts of the City of New York), was the predecessor of the Municipal Court, established by the Greater New York Charter of 1897. Laws 1897, c. 378, §§ 1350 et seq. It was provided that the preexisting procedure in the District Courts as to “trials, jurors and drawing of jurors” would be continued. However, in actions where the amount in controversy exceeded § 100 (the court had jurisdiction of actions for amounts up to \$500), the defendant could demand a jury of twelve.

Section 120 of the former Municipal Court Code provided for a mandatory six-man jury in actions not exceeding \$250 and an optional six-man jury in actions involving greater amounts. The former provision is constitutional, since a six-man jury had been used in actions of \$250 and less at the time of the enactment of the 1894 Constitution. See *Knight v. Campbell*, 62 Barb. 16 (N.Y.Sup.Ct.1872). The present constitutional guarantee of trial by jury extends to those cases in which trial by jury was used prior to the enactment of the 1894 Constitution. In *re Leary's Estate*, 175 Misc. 254, 23 N.Y.S.2d 13 (Surr.Ct.1940), *aff'd sub nom. Werner v. Reid*, 260 A.D. 1000, 24 N.Y.S.2d 383 (1st Dep't 1941).

The optional six-man jury provided in the Municipal Court for actions exceeding \$250, and provided for all civil actions in this section, is constitutional, for the Constitution provides that “a jury trial may be waived by the parties in all civil cases in the manner prescribed by law.” Const. Art. 1, § 2. Under the waiver, it has been held that the parties may agree to a trial by eleven jurors. *Newmann v. Kurek*, 175 Misc. 238, 22 N.Y.S.2d 950 (Sup.Ct.1940), *aff'd without opinion*, 264 A.D. 751, 35 N.Y.S.2d 264 (1st Dep't 1942). There appears to be no reason why the parties may not also agree to a six-man jury; indeed the constitutionality of the Municipal Court procedure has not been challenged.

Outside New York, sixteen states and the Federal courts, in civil actions tried in courts of general jurisdiction, authorize juries consisting of fewer than twelve men upon the consent of the parties. Three other states require juries consisting of fewer than twelve men in such cases.

Six-man juries would result in a substantial saving of time and money to the state, to litigants, and to jurors and their employers, without any substantial reduction in the quality of justice. In New York County it would ease the problem of obtaining qualified jurors, which is currently acute.

Apart from the obvious saving in time due to a shortened voir dire and a saving to the state in jurors' fees there would be a substantial saving to business firms whose employees are called for jury service.

It is contemplated by this section that the party first demanding a jury trial shall pay the fee, if any, for a jury of the size demanded. For those areas where a jury fee is charged, the provisions relating to fees will prescribe--parallel to the Municipal Court practice--one fee for a jury of six and a higher fee for a jury of twelve. If a party has demanded and paid the fee for a jury of six another party who then demands a jury of twelve must pay the difference between the fee for a jury of six and the fee for a jury of twelve. No change is made by the CPLR in the provisions that no jury fee is payable in most areas of the state.

In the original draft of this section, the Revisers proposed to require a jury of six where the party has not specified the number of jurors, however, they changed this provision in the final draft, and under this section where a party has not specified the number of jurors, he shall be deemed to have demanded a jury of twelve.

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 223.

5th Report Leg.Doc. (1961) No. 15, p. 524.

6th Report Leg.Doc. (1962) No. 8, p. 367.

Notes of Decisions (3)

McKinney's CPLR § 4104, NY CPLR § 4104

Current through L.2019, chapter 758 & L.2020, chapters 1 to 28, 30 to 41, 43, 44, 50 to 55, 59. Some statute sections may be more current, see credits for details.

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125 A.D.2d 116, 512 N.Y.S.2d 205

Sandra M. Waldman, Appellant,
v.
Maurice Cohen et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
4754 E
February 23, 1987

CITE TITLE AS: Waldman v Cohen

SUMMARY

Appeal from a judgment of the Supreme Court in favor of defendants, entered October 4, 1984 in Queens County, upon a verdict rendered at a Trial Term (Eugene J. Berkowitz, J.).

HEADNOTES

Jury

Number of Jurors

Party's Consent to Proceed with Five Jurors in Civil Action

(1) In a civil case, a verdict rendered by a jury consisting of fewer than six jurors is a nullity in the absence of consent by all parties; the request of plaintiff's attorney that the case proceed with a five-person jury when one of the remaining six jurors, the two alternates having been excused, suffered a heart attack on the morning of summations and charge did not mean that plaintiff could not successfully move to set aside the unanimous verdict of the five-person jury in favor of defendants, since defendants did not consent to the five-person jury and had moved for a mistrial when the juror became ill. At the moment when defendants refused to consent to the five-person panel, the trial, for all intents and purposes, had come to an end, and whatever occurred after the erroneous and meaningless continuation and verdict was ineffectual and a nullity. Plaintiff had no legally cognizable right to agree to a verdict rendered by an impermissibly constituted jury unless defendants also consented; plaintiff could not waive her right to a six-person jury without a concomitant waiver by defendants.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Jury, § 133.

Carmody-Wait 2d, Selection and Impanelment of Jury § 55:3.

ANNOTATION REFERENCES

Proper procedure upon illness or other disability of civil case juror. 99 ALR2d 684.

Sufficiency of waiver of full jury. 93 ALR2d 410.

APPEARANCES OF COUNSEL

Levy, Phillips & Konigsberg (Steven J. Phillips and Diane Paolicelli of counsel), for appellant.
Ivone, Devine & Jensen (Robert Devine of counsel), for respondents. *117

OPINION OF THE COURT

Spatt, J.

In a civil case, a verdict rendered by a jury consisting of fewer than six jurors is a nullity in the absence of consent by all parties.

I

This medical malpractice suit arises from the defendants' alleged negligent treatment of the 27-year-old, childless plaintiff for a cancerous cyst on her ovary resulting in a total hysterectomy. The trial lasted in excess of three weeks. Unfortunately, the six-person jury had only two alternate jurors who were both excused during the course of the trial. * On April 9, 1984, the morning of summations and charge, one of the remaining six jurors suffered a heart attack. The trial court then consulted both attorneys as to how to proceed. The plaintiff's attorney requested that the case "proceed with a five person jury requiring a unanimous verdict rather than a five-sixths verdict". The defendants' counsel refused to join in this application and moved for a mistrial. The Trial Judge denied the motion for a mistrial and directed that the trial proceed with five jurors who would be instructed to render a unanimous verdict.

The summations and charge followed. The jury then began its deliberations which continued until the following day. Late that afternoon, counsel were advised that the jury had reached a verdict. Just before the verdict was taken in open court, the plaintiff's attorney made the following statement on the record:

"MR. PHILLIPS [plaintiff's attorney]: Before the jury comes in, I would like to put one thing on the record.

"THE COURT: Before the verdict?

"MR. PHILLIPS: Yes, before the verdict. Your Honor, in making the application which I did at the time that we lost the sixth juror, I made that application because I believe that a complete record should be made including the verdict.

"In light of the defendant's [sic] unwillingness to go along with my application, I want to state on the record that I am *118 not waiving, on my client's behalf, any rights that she might have on this record with respect to the constitution of the jury.

"THE COURT: You are saying because defendant [sic] did not go along with the limited jury that you did not consent to the limited jury.

"MR. PHILLIPS: I am not waiving her rights. I have asked for the limited jury but I am not waiving whatever rights my client may have, whatever they may be".

The five-person jury returned a unanimous verdict in favor of the defendants. The plaintiff moved to set aside the verdict on the ground that the jury was improperly constituted and that "without the opportunity to perform any type of research *** as to what the state of the law was I made an application" and that he had placed his client in a "heads-I-lose, tails-you-win" situation. The Trial Judge denied the plaintiff's motion to set aside the verdict holding, in effect, that the plaintiff consented to the five-person unanimous jury and "cannot now contend that the procedure she herself advocated was improper". In addition, the court ruled that counsel's statement on the record prior to the verdict was ineffectual since the "plaintiff cannot have it both ways".

We reverse and grant a new trial.

II

In a civil case, “[a] jury shall be composed of six persons” (CPLR 4104). A verdict may be rendered by not less than five sixths of the jurors constituting a jury (NY Const, art I, §2; CPLR 4113 [a]). The issue before us is the effect of the five-person unanimous verdict in the absence of consent by both parties. Stated otherwise, could the plaintiff’s attorney effectively unilaterally consent to the five-person unanimous jury?

In the seminal appellate decision to date, it was earlier determined by the Appellate Division, Third Department, in *Measeck v. Noble* (9 AD2d 19, 21), that “[i]n the absence of stipulation or consent on the record to receive a verdict of less than the constituted number *** the verdict of the jury was a nullity”. In *Measeck*, after the 12-person jury recessed to deliberate, one of its members became ill and left the jury room. Some hours later when the jury returned to the courtroom to report their verdict, only 11 jurors were present. Although some off-the-record conferences between the court and counsel took place, the court received the verdict in favor *119 of the plaintiff without objection by either party. After the verdict was rendered, the defendants’ counsel objected to its receipt and unsuccessfully moved for a mistrial. The Third Department held that the verdict of less than 12 jurors was a nullity absent consent by all parties, stating that “we have no authority to change a basic constitutional right such as here present” (*Measeck v. Noble*, supra., at p 21).

The statutorily mandated minimum number of six jurors, with a requirement of at least a five-sixths vote is based, in part, on the traditional freedom to disagree accorded to a minority juror. In *Schabe v. Hampton Bays Union Free School Dist.* (103 AD2d 418, 427-428), Justice Lazer enunciated our concern with the sanctity of the six-person jury, as follows: “The paramount importance of maintaining the independence and intellectual integrity of each juror is underscored by cases holding that all of the statutory number of jurors must participate in the decision-making process so that nonparticipation by a juror--whether due to illness or other cause--is destructive to a verdict, even where unanimity is not a requisite (see, e.g., *Measeck v. Noble*, 9 AD2d 19; *Johnson v. Holzemer*, 263 Minn 227; *City of Flat River v. Edgar*, 412 SW2d 537 [Mo]). These cases illustrate the principle that participation by less than all of its members deprives the jury of the reflections and judgment of an individual who might have opposed the verdict and might have persuaded one or more of the other jurors of the wisdom of his position (see Comment, Courts: Jurors Dissenting on Special Verdict Issue Excluded From Subsequent Deliberations, 61 Minn L Rev 151, 161; 4 Weinstein-Korn-Miller, NY Civ Prac, par 4113.03)”.

From our examination of the New York State Constitution and the statutes and cases interpreting these provisions, it is clear that absent the consent of all parties, unanimity of five jurors is not interchangeable with a five-sixths verdict of six jurors.

The rule that the statutory minimum number of jurors must decide the case is accepted in most jurisdictions in this country. Illustrative of this well-settled precept is the following statement in *Brame v. Garwood* (339 So 2d 978, 979 [Miss]): “The action of the trial court in ordering the trial to continue (over the Brames’ objection) with eleven jurors exceeded his constitutional authority even though he may have felt compelled to take such action in order to salvage the trial that had already consumed several days at great expense. The exigencies of the situation, though unusual and weighty, do *120 not constitute grounds sufficient to relieve trial courts of the requirement to accord litigants a full twelve member jury under our present constitution and statutory law. Accordingly, the case must be reversed and a new trial granted”.

Also, in *Hartgraves v. Don Cartage Co.* (27 Ill App 3d 298, 301-302, 326 NE2d 461, 463, *affd* 63 Ill 2d 425, 348 NE2d 457), it was stated: “Without the consent of the parties, a verdict may not be properly rendered by a jury of any number other than 12. (*Povlich v. Glodich* (1924) 311 Ill. 149, 142 N.E. 466.) We find that the defendant herein did not waive its right to a trial by 12 jurors, and that any verdict rendered by the jury of 11 persons was a legal nullity. Without 12 jurors and without a stipulation to proceed with less than 12, defendant was entitled to a mistrial. (See *State ex rel. Polk v. Johnson* (1970) 47 Wis.2d 207, 177 N.W.2d 122.) We hold that under the record on appeal in this case, the trial court erred by denying defendant’s motion for a mistrial and that this cause should be remanded to the trial court for a new trial” (see also, *Johnson v. Holzemer*, 263 Minn 227, 116 NW2d 673; *State ex rel. Polk v. Johnson*, 47 Wis 2d 207, 177 NW2d 122; *McNally v. Walkowski*, 85 Nev 696, 462 P2d 1016; *City of Flat Riv. v. Edgar*, 412 SW2d 537 [Mo]; *Lee v. Baltimore Hotel Co.*, 345 Mo 458, 136 SW2d 695).

III

Although the constitutional and statutory provisions guaranteeing a jury trial require a minimum jury of six persons, it is well settled that, in a civil case, the parties may stipulate to proceed with less than the minimum number (see, *Maiello v. Johnson*, 24 AD2d 914 [3d Dept 1965], *mod* 18 NY2d 826 [new trial directed when one juror had to be disqualified because of relationship to one plaintiff]; *Neumann v. Kurek*, 175 Misc 238 [Sup Ct, NY County 1940], *affd* 264 App Div 751 [1st Dept 1942] [both parties agreed to accept a jury verdict of 9 out of 10 remaining jurors]; *Giovanniello v. Germeroth*, 243 App Div 624 [2d Dept 1935] [all parties stipulated to proceed with 11 jurors]; *Florzak v. Hempstead Bus Corp.*, 29 NYS2d 271 [Sup Ct, Nassau County 1941] [the case was tried by consent before 11 jurors]).

IV

While the above rules are clear and well established, we now turn to the crucial issue in this case, namely, whether *121 the plaintiff's attorney consented to proceed with five jurors and, if so, whether his unilateral consent, over the objection of the defendants' counsel, bound the plaintiff to a verdict of less than six persons. Stated otherwise, can one party unilaterally consent to a lesser number of jurors than the statutory number, over the objection of another party, and then, after a verdict against her, move to set aside that verdict on the ground that it was less than the statutory minimum? We hold that, based on the constitutional and statutory mandates prescribing a civil jury in this State to be at least six persons with a five-sixths vote, that any verdict rendered by a jury of less than six persons without the consent of all parties is a nullity.

Initially, the plaintiff's contention that her counsel did not consent to a unanimous five-person verdict is unsupported by the record. On the morning of the summations and charge, after both attorneys were advised that the sixth juror was ill, the plaintiff's attorney clearly and unequivocally made an application to proceed with five jurors, and maintained this position even after the defendants' counsel refused to consent and moved for a mistrial. After he had an opportunity to research the subject, and after counsel were notified that the jury had reached a verdict, which was still unannounced, the plaintiff's counsel stated, in a vague manner, that he was not waiving his client's rights. Nevertheless, he did not object to the rendering of the verdict, nor did he ask for a mistrial. This attempted reservation of rights was ineffectual and inadequate. A withdrawal of a prior consent that is merely strategic--made solely to secure some procedural advantage--need not be honored (see, *People ex rel. Rohrlisch v. Follette*, 20 NY2d 297, 301). In this case, the plaintiff's counsel's attempted withdrawal evidenced far more concern with strategy--attempting to preserve the issue for appeal--than with the validity of the five-member panel. We therefore find that the plaintiff did attempt to waive her right to a six-person jury and consented to be bound by a unanimous five-person jury verdict.

The right to trial by jury is a fundamental one, and the courts indulge every reasonable presumption against waiver (*Aetna Ins. Co. v. Kennedy*, 301 US 389). This basic right guaranteed by the State Constitution and implemented by statutory mandate is one of substance and not mere form or procedure. Where the error is "fundamental" and the resultant injustice is "egregious", we have, even in the absence of *122 objection, considered the error and granted a new trial (see, *Ferreira v. New York City Tr. Auth.*, 79 AD2d 596; *Caceres v. New York City Health & Hosps. Corp.*, 74 AD2d 619, 620; *DiGrazia v. Castronova*, 48 AD2d 249).

A waiver is the "voluntary and intentional relinquishment or abandonment of a known existing legal right *** which except for such waiver the party would have enjoyed" (see, *Davison v. Klaess*, 280 NY 252, 261; 57 NY Jur 2d, Estoppel, Ratification, and Waiver, §74, at 105). Although waiver and estoppel are sometimes used interchangeably, a waiver is an intentional abandonment of a right without need to show reliance or detriment to the asserting party, while estoppel is an equitable doctrine wherein a party is induced to act in reliance of the conduct of the other party, to his detriment. Not only must the party claiming an estoppel have relied upon the words or conduct of the other party, but he must have been induced to change his position or suffer injury or prejudice therefrom (see, *Central N.Y. Realty Corp. v. Abel*, 28 AD2d 50, *affd* 22 NY2d 963; *Five Platters v. Williams*, 81 AD2d 534; *Diamond v. Wasserman*, 8 AD2d 623; *Friedman v. Libin*, 4 Misc 2d 248, *affd* 3 AD2d 827). Here, there was no reliance or change of position or prejudice of any kind on the part of the defendants as a result of the plaintiff's

attempted waiver or consent, and the doctrine of equitable estoppel is not applicable to the facts in this case (*see, Glenesk v. Guidance Realty Corp.*, 36 AD2d 852).

Further, the plaintiff's alleged waiver or consent involved more serious consequences than a waiver of her right to trial by a jury of six. The purported "waiver" really constituted a consent to be bound only by an unfavorable verdict. As to the defendants, since they themselves moved for a mistrial and sought a new trial, it cannot be said that they were prejudiced by the erroneous rendering of a void verdict.

As stated above, a waiver can only occur when a party relinquishes a right which, except for such waiver, the party would have enjoyed. The plaintiff's consent to proceed with five jurors was an abandonment of nothing and a relinquishment of no right. By doing so, the plaintiff placed herself in a "no-win" situation and agreed to a procedure which, absent the consent by the defendants, was barred by statute and was in violation of a fundamental right. Thus, the plaintiff had no legally cognizable right to agree to a verdict rendered by an impermissibly constituted jury unless the defendants also consented. The plaintiff's "waiver" was, in effect, a concession *123 of certain defeat and not a relinquishment of a known right. In sum, the plaintiff could not have waived her right to a six-person jury without a concomitant waiver by the defendants. Only if all parties to the lawsuit consented to the five-person panel, would there be a valid verdict.

The defendants contend that the decision of the Appellate Division, Fourth Department, in *Ashdown v. Kluckhohn* (90 Misc 2d 618, *aff'd* 62 AD2d 1137) supports their position that a party may validly, unilaterally agree to accept a verdict of less than six jurors. In *Ashdown*, while deliberating, the jury, about to decide a liability verdict in favor of the plaintiffs by a vote of 5 to 1, asked whether the dissenting juror should be permitted to participate in the damage phase of the verdict. The plaintiffs' attorney requested that the dissenting juror should not be permitted to participate in the damages verdict, and the attorney for the defendants urged that the dissenting juror be permitted to participate. The court adopted the plaintiffs' position and instructed the jury that the dissenter as to liability should not take part in the damages portion of the verdict. Thereafter, the jury returned a verdict in favor of the plaintiffs by a vote of 5 to 1. One of the plaintiffs moved to set aside the verdict because of the unlawfully constituted jury and for inadequacy. The court (p 1137) sustained the verdict on the ground that a party who requests a certain procedure during trial "which appears to be to his advantage, is not to be permitted to seek a change in the ruling *** because it has turned out to be to his disadvantage" (citing 21 NY Jur, Estoppel, Ratification, and Waiver, § 55, now 57 NY Jur 2d, Estoppel, Ratification, and Waiver, §49, at 75-76, and three cases dealing with the equitable doctrine of estoppel not specifically involving the subject of the statutory minimum number of jurors, namely, *Matter of Grainger [Shea Enters.]*, 286 App Div 802, *rearg denied* 286 App Div 845, *mod on other grounds* 309 NY 605; *Matter of Adoption of Brundage*, 134 NYS2d 703 [Sup Ct, Orange County 1954], *aff'd* 285 App Div 1185 [2d Dept 1955], *lv denied* 286 App Div 1013; and *Long Is. R. R. Co. v. City of New York*, 64 NYS2d 391 [Sup Ct, Kings County 1946]).

In *Ashdown* (*supra.*), the plaintiffs hoped to obtain an advantage by excluding from deliberations on damages a juror who had already found no liability, and the plaintiffs were responsible for the fact that only five jurors ruled on damages. Therefore, it can be argued that they waived a right from which they could have benefited. In the case at bar, the *124 plaintiff's alleged "waiver" gave her no advantage or rights; by so consenting, her fate was sealed. If *Ashdown* stands for the rule that a party may unilaterally agree to a jury composed of less than the statutory minimum, we respectfully decline to concur. The doctrine of estoppel is inapplicable where there has been no reliance, change of position or prejudice to the defendants. On the contrary, the defendants in this case had what is known in the litigation field as a "free ride"; they could not lose the case, since any verdict against them would have to be set aside.

V

While the temptation to a Trial Judge to salvage a nearly four-week trial one day from the end with the ancillary saving in judicial time and expense is understandable, in the absence of a consent by all parties, a jury made up of less than six persons cannot render a valid verdict. At the precise point in time when the defendants' counsel refused to consent to a five-person panel, the trial, for all intents and purposes, had come to an end. Under those circumstances, the court should have declared a mistrial and discharged the jury. Whatever occurred after the erroneous and meaningless continuation and verdict by the five-

person jury was ineffectual and a nullity, and either side can move to set aside such a void verdict. In effect, with the defendants' objection to the composition of the jury, it ceased to exist as a functioning unit. This rule, which has, generally, been the accepted practice in the trial courts, not only conforms to the constitutional and statutory mandates but is a simple and workable uniform trial procedure which is fair to all parties.

Accordingly, the judgment based on the verdict in favor of the defendants should be reversed, and a new trial granted, with costs to abide the event.

Ordered that the judgment is reversed, on the law and in the exercise of discretion, and a new trial is granted, with costs to abide the event.

Weinstein, J. P., Rubin and Eiber, JJ., concur. *125

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Footnotes

- * We note that in cases where there is a possibility of a long trial, it is the responsibility of the Trial Judge to insure that a sufficient number of alternates are impaneled. In a case such as this, four or even six alternate jurors should have been selected (*see*, CPLR 4106).

86 N.Y.2d 54
Court of Appeals of New York.

Lyndon P. SHARROW, Respondent,

v.

DICK CORPORATION et al., Defendants and Third-Party Plaintiffs—
Respondents; G & H Steel Service, Inc., Third-Party Defendant—Appellant.

June 14, 1995.

Synopsis

Action under statute requiring safety measures at construction, excavation or demolition sites was brought. The Supreme Court, Erie County, Joslin, J., held for plaintiff. Defendants appealed. The Supreme Court, Appellate Division, 204 A.D.2d 966, 612 N.Y.S.2d 537, affirmed as modified. The Court of Appeals, Simons, J., held that: (1) trial court should have conducted limited inquiry to determine whether juror participated in verdict process, and (2) new trial was required.

Reversed.

West Headnotes (5)

[1] **Trial** ↔ Polling Jurors

Trial court should have conducted limited inquiry to determine whether juror participated in verdict process, where juror's answers to poll indicated that she might not have participated in deliberations on any issue other than that of liability. McKinney's Const. Art. 1, § 2; Art. 6, § 18.

9 Cases that cite this headnote

[2] **Trial** ↔ Deliberations in general

Where parties to civil case have not agreed to trial by fewer than six jurors, valid verdict requires that all six jurors participate in underlying deliberations. McKinney's Const. Art. 1, § 2; Art. 6, § 18.

5 Cases that cite this headnote

[3] **Trial** ↔ Deliberations in general

Parties in jury trial are entitled to process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five. McKinney's Const. Art. 1, § 2; Art. 6, § 18.

[4] **Trial** ↔ Deliberations in general

A juror, having disagreed with remaining five on liability, must still participate in deliberations; otherwise jury becomes one of five members only, less than required number, and no valid verdict results. McKinney's Const. Art. 1, § 2; Art. 6, § 18.

2 Cases that cite this headnote

[5] **Appeal and Error** ➡ Conduct and Deliberations of Jury

Possibility that constitutional right to trial by full six-member jury was compromised required new trial, in action under statute requiring safety measures at construction, excavation, or demolition sites. McKinney's Const. Art. 1, § 2; Art. 6, § 18; McKinney's Labor Law § 241, subd. 6.

3 Cases that cite this headnote

Attorneys and Law Firms

***980 *55 **1150 Hurwitz & Fine, P.C., Buffalo (Theodore J. Burns, of counsel), for appellant.

Kevin J. Bauer, Brown & Kelly and O'Shea, Reynolds & Cummings, Buffalo, for defendants and third-party plaintiffs-respondents.

*56 Walsh, Roberts & Grace, Buffalo (Gerald Grace, Jr., of counsel), for respondent.

OPINION OF THE COURT

SIMONS, Judge.

The dispositive issue in this appeal is whether the trial court erred in refusing to conduct a limited inquiry to determine whether six jurors participated in the deliberations on *57 all the issues submitted to the jury. Because one juror's responses during the poll of the jury suggested she may not have participated in all of the jury's deliberations, we conclude that the order of the Appellate Division must be reversed, the judgment vacated, and a new trial ordered.

Plaintiff Lyndon Sharrow, an iron worker employed by third-party defendant G & H Steel, was injured while using a Genie hoist to move a metal lockbox during construction of the Southport Correctional Facility. He brought this action against defendant Dick Corporation, the general contractor, and defendant Southern Steel Corporation, the subcontractor for the project, alleging common-law negligence and violations of sections 200, 240(1) and 241(6) of the Labor Law. Defendants ***981 **1151 in turn brought a third-party action for contribution and indemnification against G & H Steel, plaintiff's employer. Prior to trial, Dick and Southern successfully moved for summary judgment against G & H Steel for common-law and contractual indemnification. At trial, plaintiff withdrew all his claims except that for violation of Labor Law § 241(6) and the action proceeded on that claim alone.

At the conclusion of the jury's deliberations, the foreperson announced that five members of the jury had agreed to a verdict finding defendants' violation of the statute the proximate cause of plaintiff's injuries and awarding him damages in the amount of \$430,000. Counsel for G & H Steel requested that the jury be polled. Departing from the usual procedure, the court clerk conducted the poll by reading each question on the verdict sheet and then asking each juror in turn his or her verdict on the question.¹ When the first question was asked—whether there was a violation of the Labor Law for which defendants were liable—juror No. 5 stated that her answer was “No.” The clerk then read the second question—whether the Labor Law violation was a proximate cause of plaintiff's injuries—and again asked each juror “[w]hat is your verdict?” The transcript reflects juror No. 5's reply:

“juror number five: I had no—

“the clerk: Your verdict is no?”

the court: Well, she didn't make a determination because she didn't move on [*sic*].”

*58 When the poll on the third question—concerning the total amount of damages necessary to compensate plaintiff—reached juror No. 5, she apparently did not immediately answer. The transcript contains this exchange:

“the clerk: Number 5? No response?

“juror number five: No.”

To the remaining three questions, involving specific items of damages and of plaintiff's possible negligence, juror No. 5 replied “No response.”

At the conclusion of the polling and before the jury was discharged, counsel for G & H Steel asked to approach the Bench and the court temporarily excused the jury. Counsel identified what he believed to be an inconsistency in the damage amounts stated by the foreperson. He also raised the separate question whether juror No. 5's answers indicated that she had not voted on any of the questions after the first and may not have participated in the deliberations on any issue other than that of liability. Contending that G & H may have been deprived of a trial by a full jury of six members, counsel requested that the trial court conduct a “very limited questioning of this juror” to determine the extent of her participation in the deliberations. After discussion with all counsel, the trial court denied the request, and judgment was subsequently entered for plaintiff.

The Appellate Division, with two Justices dissenting, modified, by ordering a new trial on the question of damages for pain and suffering, unless defendants stipulated to an additur increasing the amount of that component of the award from \$13,000 to \$150,000 (204 A.D.2d 966, 612 N.Y.S.2d 537). The majority of the court rejected the contention that defendants and third-party defendant G & H Steel had been deprived of the constitutional right to trial by six jurors, contending there was no evidence that juror No. 5 had refused to participate, or been prevented from participating, in the deliberations. In addition, the majority declined to review as unpreserved the argument that plaintiff's allegations of a Labor Law § 241(6) violation were insufficient to meet the standard laid down in *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 601 N.Y.S.2d 49, 618 N.E.2d 82, decided by this Court after plaintiff's trial but before the appeal came on to be heard. Third-party defendant G & H Steel and defendant Southern appealed on the basis of the two-Justice dissent at the Appellate Division. Because defendants Dick and Southern had stipulated to the additur, we granted plaintiff's motion to *59 dismiss Southern's appeal on the basis of nonaggravement (84 N.Y.2d 976, 622 N.Y.S.2d 905, 647 N.E.2d 110). Defendant ***982 **1152 Dick took no appeal. Thus, G & H Steel is the sole appellant before the Court.

[1] We agree with the Appellate Division dissenters that the trial court erred in refusing to conduct a limited inquiry to determine whether juror No. 5 participated in the verdict process, an error that implicates the constitutional right to a trial by a six-member jury and mandates a new trial.

The common law required a jury of 12 members, and a unanimous verdict (*see, Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854; *Cancemi v. People*, 18 N.Y. 128). In 1935, however, article I, § 2 of the New York Constitution was amended to authorize a legislative enactment permitting five-sixths jury verdicts in civil cases. The right to a jury trial was constitutionalized in its present form in 1938, and by then the Legislature had already enacted former Civil Practice Act 463—a (now CPLR 4113[a]), authorizing the five-sixths verdict (*see generally*, 4 Weinstein–Korn–Miller, N.Y.Civ.Prac. ¶ 4113.01 *et seq.*). When the Legislature subsequently provided, in 1972, that a civil jury “shall be composed of six persons” (*see*, CPLR 4104), the question arose whether a unanimous verdict rendered by five jurors was as valid as a verdict rendered by five-sixths of a six-member jury. The intermediate appellate courts addressing the question were uniformly of the view that, absent the express consent of the parties, CPLR 4104 did not diminish a party's right to a jury of six sworn to try the issues, and that all six jurors must participate in the deliberations leading to the verdict (*see, Schabe v. Hampton Bays Union Free School Dist.*, 103 A.D.2d 418, 480 N.Y.S.2d 328; *see also, Waldman v. Cohen*, 125 A.D.2d 116, 512 N.Y.S.2d 205; *Measeck v. Noble*, 9 A.D.2d 19, 189 N.Y.S.2d 748).

[2] [3] [4] In *Arizmendi v. City of New York*, 56 N.Y.2d 753, 452 N.Y.S.2d 15, 437 N.E.2d 274 we suggested our agreement with the view that the constitutional right to a jury trial contemplates that all six jurors participate in the deliberative process.² Because we determined that the defendants had waived their objection to a juror's nonparticipation by failing to raise it before the trial court, we did not directly address the issue then, but today we confirm that view and hold that where the parties to a civil case have not *60 agreed to a trial by fewer than six jurors, a valid verdict requires that all six jurors participate in the underlying deliberations. The parties are entitled to a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five (see, *Schabe v. Hampton Bays Union Free School Dist.*, 103 A.D.2d 418, 427–428, 480 N.Y.S.2d 328, *supra*). A juror, having disagreed with the remaining five on liability, must still participate in the deliberations. Otherwise, the jury becomes in essence one of five members only, less than the required number, and no valid verdict results from the deliberative process.

Plaintiff urges that there is “no evidence” here that juror No. 5 did not participate in all the deliberations in this case. That, however, is precisely the reason that the trial court should have conducted the limited inquiry requested, to resolve the doubts engendered by her answers during the poll. The court had the power to inquire into an “imperfect or incomplete” verdict before discharge of the jury (see, *Porret v. City of New York*, 252 N.Y. 208, 211, 169 N.E. 280) or if there was substantial confusion or ambiguity in the verdict (see, *Pogo Holding Corp. v. New York Prop. Ins. Underwriting Assn.*, 97 A.D.2d 503, 505, 467 N.Y.S.2d 872, *aff'd*, 62 N.Y.2d 969, 479 N.Y.S.2d 336, 468 N.E.2d 291) and it should have done so. A contemporaneous inquiry would have provided it with the opportunity to remediate the problem, or, if necessary, to order a new trial if no other permissible remedy was available (see, *Barry v. Manglass*, 55 N.Y.2d 803, 806, 447 N.Y.S.2d 423, 432 N.E.2d 125).

***983 **1153 An inquiry to clarify a verdict before discharging a jury must be distinguished from an attempt to impeach a jury's verdict after discharge. In considering the propriety of any posttrial inquiry into the validity of a verdict or indictment, the majority of jurisdictions have adopted, either by statute or in case law, the rule embodied in rule 606(b) of the Federal Rules of Evidence. It directs that a juror may not testify “as to any matter or statement occurring during the course of the jury's deliberations” except in cases when an inquiry into external influences on the jury is necessary. The policy considerations underlying this rule were first expressed by the United States Supreme Court in *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 when it addressed the admissibility of juror evidence impeaching, posttrial, a quotient verdict. In rejecting the use of the evidence, the Court identified three important policies to be furthered: ensuring the finality of verdicts, preventing juror harassment by disappointed litigants or their attorneys, *61 and encouraging “frankness and freedom of discussion and conference” among the jurors (*id.*, at 267–268, 35 S.Ct. at 784–785; see also, *Tanner v. United States*, 483 U.S. 107, 120, 107 S.Ct. 2739, 2747–48, 97 L.Ed.2d 90; see generally, Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U.Colo.L.Rev. 57 [1993]). Although New York has not adopted a statute similar to rule 606(b), our case law is consonant with its underlying principles (see, *Kaufman v. Lilly & Co.*, 65 N.Y.2d 449, 460, 492 N.Y.S.2d 584, 482 N.E.2d 63; *People v. De Lucia*, 20 N.Y.2d 275, 278, 282 N.Y.S.2d 526, 229 N.E.2d 211; *People v. Redd*, 164 A.D.2d 34, 561 N.Y.S.2d 439; *Russo v. Jess R. Rifkin, D.D.S., P.C.*, 113 A.D.2d 570, 497 N.Y.S.2d 41; *Gamell v. Mount Sinai Hosp.*, 40 A.D.2d 1010, 339 N.Y.S.2d 31, *appeal dismissed* 32 N.Y.2d 678, 343 N.Y.S.2d 359, 296 N.E.2d 256).³ None of the policies enumerated in *McDonald* is compromised when the trial court itself, prior to discharge of the jury and entry of the verdict, undertakes a limited inquiry into an inconsistency or ambiguity in the jury's verdict that is apparent from the jurors' responses during polling.

The polling process here revealed such an ambiguity. Even if “no response” is considered the equivalent of “no award” in reply to the questions on damages, juror No. 5 also offered “no response” to the question whether plaintiff had been negligent. Her answers raised a legitimate question whether juror No. 5 had participated in the jury's discussion of issues other than liability, and defense counsel appropriately requested a limited inquiry to clarify that juror No. 5 had participated in the deliberative process.

In *People v. Pickett*, 61 N.Y.2d 773, 473 N.Y.S.2d 157, 461 N.E.2d 294, we concluded that it was error for a trial court to refuse to conduct such an inquiry, to the extent that it could be carried out without infringing upon the secrecy or integrity of the jury's deliberations. Here, a simple inquiry by the trial court into whether juror No. 5 had deliberated on all the questions before the jury would have been well within permissible bounds (*cf.*, *State v. Drowne*, 602 A.2d 540 [RI] [adopting *Pickett* guidelines for

conducting the inquiry, but ruling Trial Justice's inquiry into juror's "uncertain" verdict was improper where juror discussed the specific factors she considered in arriving at her verdict and defense counsel was permitted to question juror]).

*62 [5] Because a Trial Judge has wide discretion in determining whether to send the jury back for further deliberations, had juror No. 5 revealed that she had indeed failed to take part in the entirety of the jury's deliberations, the trial court could have directed her to do so in a new round of jury deliberations. However, in the absence of any inquiry, the possibility remains that defendants' constitutional right to trial by a full six-member jury was compromised. Accordingly, we see no remedy but to order a new trial. Moreover, because third-party defendant G & H Steel's liability is entirely derivative, a new trial must be ordered with respect ***984 **1154 to the nonappealing defendants as well in order to afford complete relief to the appealing third-party defendant (*see, Cover v. Cohen*, 61 N.Y.2d 261, 473 N.Y.S.2d 378, 461 N.E.2d 864).

Accordingly, the order of the Appellate Division should be reversed, with costs, the judgment vacated and a new trial ordered.

KAYE, C.J., and TITONE, BELLACOSA, SMITH, LEVINE and CIPARICK, JJ., concur.

Order reversed, with costs, and a new trial ordered.

All Citations

86 N.Y.2d 54, 653 N.E.2d 1150, 629 N.Y.S.2d 980

Footnotes

- 1 Customarily, the reported verdict is read to the jury and then each juror is asked: "Is that your verdict?", to which the juror responds yes or no (*see*, Supreme and County Court Operations Manual, State of New York, published by Office of Court Administration [Jan. 1991]).
- 2 Although *Arizmendi*, like this case, involved a unitary trial, the Committee on Pattern Jury Instructions subsequently applied *Arizmendi* to the more complex bifurcated trial as well, commenting that "[i]f there is a 5-1 vote on liability after the first stage of a bifurcated trial, all jurors, including the liability dissenter, are required to participate in the assessment of damages" (*see*, 1 N.Y. PJI 2d 32-33 [1995 Supp]).
- 3 The Appellate Division majority also relied on the proscription against posttrial juror questioning embodied in Civil Rights Law § 14. However, this statute is generally interpreted as a protection against subjecting a juror to civil or criminal liability for his or her conduct during deliberations or in rendering a verdict (*see, Matter of Cochran*, 237 N.Y. 336, 143 N.E. 212).

West's Nevada Revised Statutes Annotated
Title 2. Civil Practice (Chapters 10-22)
Chapter 16. Date of Trial; Trial by Jury; Masters (Refs & Annos)
Trial by Jury (Refs & Annos)

N.R.S. 16.030

16.030. Drawing and examination of jurors; administration of oath or affirmation

Currentness

1. Except when the jurors are drawn by a jury commissioner, in preparing for the selection of the jury, the clerk, under the direction of the judge, shall place in a box ballots containing the names of the persons summoned who have appeared and have not been excused. The clerk shall mix the ballots and draw from the box the number of names needed to complete the jury in accordance with the procedure provided either in subsection 3 or subsection 4, as the judge directs.
2. Whenever the jurors are drawn by the jury commissioner, the judge may also direct the jury commissioner to draw, in advance, the names of additional jurors in the order they would be used to replace discharged or excused jurors pursuant to subsections 3 and 4.
3. The judge may require that eight names be drawn, and the persons whose names are called must be examined as to their qualifications to serve as jurors. If any persons are excused or discharged, or if the ballots are exhausted before the jury is selected, additional names shall be drawn from the jury box and those persons summoned and examined as provided by law until the jury is selected.
4. The judge may require that the clerk draw a number of names to form a panel of prospective jurors equal to the sum of the number of regular jurors and alternate jurors to be selected and the number of peremptory challenges to be exercised. The persons whose names are called must be examined as to their qualifications to serve as jurors. If any persons on the panel are excused for cause, they must be replaced by additional persons who must also be examined as to their qualifications. The jury must consist of eight persons, unless the parties consent to a lesser number. The parties may consent to any number not less than four. This consent must be entered by the clerk in the minutes of the trial. When a sufficient number of prospective jurors has been qualified to complete the panel, each side shall exercise its peremptory challenges out of the hearing of the panel by alternately striking names from the list of persons on the panel. After the peremptory challenges have been exercised, the persons remaining on the panel who are needed to complete the jury shall, in the order in which their names were drawn, be regular jurors or alternate jurors.
5. Before persons whose names have been drawn are examined as to their qualifications to serve as jurors, the judge or the judge's clerk shall administer an oath or affirmation to them in substantially the following form:

Do you, and each of you, (solemnly swear, or affirm under the pains and penalties of perjury) that you will well and truly answer all questions put to you touching upon your qualifications to serve as jurors in the case now pending before this court (so help you God)?

6. The judge shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted.

Credits

Added by CPA (1911), § 262. NRS amended by Laws 1971, p. 344; Laws 1977, p. 417; Laws 1979, p. 917; Laws 1981, pp. 329, 556.

Notes of Decisions (16)

N. R. S. 16.030, NV ST 16.030

Current through the end of the 80th Regular Session (2019)

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West's Utah Code Annotated
State Court Rules
Rules of Civil Procedure (Refs & Annos)
Part VI. Trials

Utah Rules of Civil Procedure, Rule 48

Rule 48. Juries of Less than Eight--Majority Verdict

Effective: January 1, 2019
Currentness

The parties may stipulate that the jury shall consist of any number less than eight or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Notes of Decisions (4)

Rules Civ. Proc., Rule 48, UT R RCP Rule 48
Current with amendments received through January 1, 2020

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66 S.Ct. 984
Supreme Court of the United States

THIEL
v.
SOUTHERN PAC. CO.

No. 349.
|
Argued March 25, 1946.
|
Decided May 20, 1946.

Synopsis

Personal injury action by Gilbert E. Thiel against the Southern Pacific Company. A judgment for defendant was affirmed, 149 F.2d 783, and the plaintiff brings certiorari.

Reversed.

Mr. Justice FRANKFURTER and Mr. Justice REED dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

West Headnotes (10)

[1] **Jury** ⇐ Representation of community, in general

The American tradition of trial by jury contemplates an impartial jury drawn from a cross-section of the community, but every jury need not contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community.

200 Cases that cite this headnote

[2] **Jury** ⇐ Representation of community, in general

Prospective jurors must be selected by court officials without systematic and intentional exclusion of any of the economic, social, religious, racial, political, and geographical groups of community, since jury competence is an individual rather than a group or class matter.

175 Cases that cite this headnote

[3] **Jury** ⇐ Representation of community, in general

Jury ⇐ Nature and form of proceeding in general

The choice of means by which unlawful distinctions and discriminations in selection of prospective jurors are to be avoided rests largely in sound discretion of trial courts and their officers, but the discretion must be guided by pertinent statutory provisions. Jud.Code §§ 275–278, 286, 288, 28 U.S.C.A. §§ 411–413, 415, 423, 426; 50 U.S.C.A. § 57.

28 Cases that cite this headnote

[4] **Jury** ⇌ Eligibility in general

Jury ⇌ Competency for Trial of Issues in General

The qualifications and exemptions in regard to federal jurors, for the most part, are to be determined by laws of state where federal court is located, but a state law creating an unlawful qualification is not binding and should not be utilized in selecting federal jurors. Jud.Code § 275, 28 U.S.C.A. § 411.

7 Cases that cite this headnote

[5] **Jury** ⇌ Particular Groups, Inclusion or Exclusion

Jury ⇌ Affidavits and other evidence

In passenger's action against railroad for personal injuries, evidence established that those who worked for a daily wage and who might suffer financial loss by serving on juries at rate of \$4 a day and would be excused for that reason were deliberately and intentionally excluded from jury list. Jud.Code, §§ 275–278, 286, 288, 28 U.S.C.A. §§ 411–413, 415, 423, 426; 50 U.S.C.A. § 57.

27 Cases that cite this headnote

[6] **Jury** ⇌ Eligibility in general

Under California law, a daily wage earner may be fully competent as a juror. Code Civ.Proc. §§ 198–201.

5 Cases that cite this headnote

[7] **Jury** ⇌ Excusing and Discharging Jurors from Attendance

A federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship.

37 Cases that cite this headnote

[8] **Jury** ⇌ Excusing and Discharging Jurors from Attendance

Jury service is a duty as well as a privilege of citizenship, and it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power, but only when financial embarrassment is such as to impose a real burden and hardship, does a valid excuse exist.

36 Cases that cite this headnote

[9] **Federal Courts** ⇌ Particular cases

Jury ⇌ Particular Groups, Inclusion or Exclusion

In passenger's action for personal injuries against railroad, the deliberate and intentional exclusion from jury list of all persons who worked for a daily wage was improper, and denial of motion to strike jury panel was error requiring reversal of judgment in exercise of Supreme Court's power of supervision over administration of justice in federal courts. 28 U.S.C.A. § 1861 et seq.; 50 U.S.C.A. § 57.

73 Cases that cite this headnote

[10] **Federal Courts** ➡ Particular cases

The deliberate and intentional exclusion of daily wage earners from jury list required reversal regardless of whether plaintiff was prejudiced by the wrongful exclusion, or whether he was one of the excluded class, and even though jury which actually decided the factual issues was found to contain at least five members of the laboring class. 28 U.S.C.A. § 1861 et seq., 22 Stat. 31, 36 Stat. 1166; 50 U.S.C.A. § 57.

60 Cases that cite this headnote

Attorneys and Law Firms

****985 *218** Mr. Allen Spivock, of San Francisco, Cal., for petitioner.

Mr. Arthur B. Dunne, of San Francisco, Cal., for respondent.

Opinion

Mr. Justice MURPHY delivered the opinion of the Court.

Petitioner, a passenger, jumped out of the window of a moving train operated by the respondent, the Southern ***219** Pacific Company. He filed a complaint in a California state court to recover damages, alleging that the respondent's agents knew that he was 'out of his normal mind' and should not be accepted as a passenger or else should be guarded and that, having accepted him as a passenger, they left him unguarded and failed to stop the train before he finally fell to the ground. At respondent's request the case was removed to the federal district court at San Francisco on the ground of diversity of citizenship, respondent being a Kentucky corporation. Several vain attempts were then made by the petitioner to obtain a remand of the case to the state court; petitioner was also restrained from attempting to proceed further in the state court.¹

After demanding a jury trial, petitioner moved to strike out the entire jury panel, alleging inter alia that 'mostly business executives or those having the employer's viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service.' Following a hearing at which testimony was taken, the motion was denied. Petitioner then attempted to withdraw his demand for a jury trial but the respondent refused to consent. A jury of twelve was chosen. Petitioner thereupon challenged these jurors upon the same grounds previously urged in relation to the entire jury panel and upon the further ground that six of the twelve jurors were closely affiliated and connected with the respondent. The court denied this challenge. The trial proceeded and the jury returned a verdict for the respondent.

***220** Petitioner renewed his objections in his motion to set aside the verdict or, in the alternative, to grant a new trial. In denying this motion the court orally found that five of the twelve jurors 'belong more closely and intimately with the working man and employee class than they do with any other class' and that they might be expected to be 'sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class.' The Ninth Circuit Court of Appeals affirmed the judgment in its entirety, 149 F.2d 783, and we brought the case here on certiorari 'limited to the question whether petitioner's motion to strike the jury panel was properly denied.' 66 Stat. 472.

[1] [2] The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 165 85 L.Ed. 84; *Glasser v. United States*, 315 U.S. 60, 85, 62 S.Ct. 457, 471, 86 L.Ed. 680. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition ****986** must be

given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

[3] [4] The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers. This *221 discretion, of course, must be guided by pertinent statutory provisions. So far as federal jurors are concerned, they must be chosen 'without reference to party affiliations,' 28 U.S.C. s 412, 28 U.S.C.A. s 412; and citizens cannot be disqualified 'on account of race, color, or previous condition of servitude,' 28 U.S.C. s 415, 28 U.S.C.A. s 415. In addition, jurors must be returned from such parts of the district as the court may direct 'so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service,' 28 U.S.C. s 413, 28 U.S.C.A. s 413. For the most part, of course, the qualifications and exemptions in regard to federal jurors are to be determined by the laws of the state where the federal court is located, 28 U.S.C. s 411, 28 U.S.C.A. s 411.² *Pointer v. United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208. A state law creating an unlawful qualification, however, is not binding and should not be utilized in selecting federal jurors. See *Kie v. United States*, C.C., 27 F. 351, 357.

[5] The undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage. They generally used the city directory as the *222 source of names of prospective jurors. In the words of the clerk, 'If I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for \$10 a day and cannot afford to work for four, the Judge has never made one of those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out. * * * Where I thought the designation indicated that they were day laborers, I mean they were people who were compensated solely when they were working by the day, I leave them out.' The jury commissioner corroborated this testimony, adding that he purposely excluded 'all the iron craft, bricklayers, carpenters, and machinists' because in the past 'those men came into court and offered that (financial hardship) as an excuse, and the judge usually let them go.' The evidence indicated, however, that laborers who were paid weekly or monthly wages were placed on the jury lists, as well as the wives of daily wage earners.

It was further admitted that business men and their wives constituted at least 50% of the jury lists, although both the clerk and the commissioner denied that they consciously **987 chose according to wealth or occupation. Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of \$4 a day and would be excused for that reason.

[6] This exclusion of all those who earn a daily wage cannot be justified by federal or state law. Certainly nothing in the federal statutes warrants such an exclusion. And the California statutes are equally devoid of justification for *223 the practice. Under California law a daily wage earner may be fully competent as a juror. A juror, to be competent, need only be a citizen of the United States over the age of 21, a resident of the state and county for one year preceding selection, possessed of his natural faculties and of ordinary intelligence and not decrepit, and possessed of sufficient knowledge of the English language. California Code of Civil Procedure, s 198. Cf. s 199. Nor is a daily wage earner listed among those exempt from jury service. s 200. And under the state law, 'A juror shall not be excused by a court for slight or trivial causes, or for hardship, or for inconvenience to said juror's business, but only when material injury or destruction to said juror's property or of property entrusted to said juror is threatened * * *.' s 201.

Moreover, the general principles underlying proper jury selection clearly outlaw the exclusion practiced on this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid \$3 a day may be as fully competent as one who is paid \$30 a week or \$300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day,

constitute a very substantial portion of the community,³ a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low *224 economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do.

[7] [8] It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship.⁴ But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of \$4 a day. All were systematically and automatically excluded. In this connection it should be noted that the mere fact that a person earns more than \$4 a day would not serve as an excuse. Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear. Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted **988 among those tendencies which undermine and weaken the institution of jury trial. 'The the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by *225 one, lead to the irretrievable impairment of substantial liberties.' *Glasser v. United States*, supra, 315 U.S. 86, 62 S.Ct. 472, 86 L.Ed. 680.

[9] [10] It follows that we cannot sanction the method by which the jury panel was formed in this case. The trial court should have granted petitioner's motion to strike the panel. That conclusion requires us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See *McNabb v. United States*, 318 U.S. 332, 340, 63 S.Ct. 608, 612, 87 L.Ed. 819. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. See *Glasser v. United States*, supra; *Walter v. State*, 208 Ind. 231, 195 N.E. 268, 98 A.L.R. 607; *State ex rel. Passer v. County Board*, 171 Minn. 177, 213 N.W. 545, 52 A.L.R. 916. It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER, with whom Mr. Justice REED concurs, dissenting.

This was a suit brought by the petitioner, a salesman, against the Southern Pacific Company for injuries suffered by him while a passenger on one of the Railroad's trains, and attributed to the Company's negligence. The trial was in the United States District Court sitting in San Francisco. The jury rendered a verdict against the petitioner. *226 The District Court found no ground for setting it aside and entered judgment on the verdict. Upon full review of the trial, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment. 149 F.2d 783. Thus, a verdict arrived at by a jury whose judgment on the merits the District Court has found unassailable, which the Circuit Court of Appeals has affirmed on the merits, and which this Court has refused to review on the merits, 326 U.S. 716, 66 S.Ct. 472, is here nullified because of an abstract objection to the manner in which the district judges for the Northern District of California have heretofore generally discharged their duty, with the approval of the reviewing judges of the Ninth Circuit, to secure appropriate jury panels.

The process of justice must of course not be tainted by property prejudice any more than by race or religious prejudice. The task of guarding against such prejudice devolves upon the district judges, who have the primary responsibility for the selection of jurors, and the circuit judges, whose review of verdicts is normally final. It is embraced in the duty, formulated by the judicial

oath, to 'administer justice without respect to persons, and to equal right to the poor and to the rich * * *.' 1 Stat. 73, 76, 36 Stat. 1087, 1161, 28 U.S.C. s 372, 28 U.S.C.A. s 372. But it is not suggested that the jury was selected so as to bring property prejudice into play in relation to this specific case or type of case, nor is there the basis for contending that the trial judge allowed the selective process to be manipulated in favor of the particular defendant. No such claim is now sustained. Neither is it claimed that the district judges for the Northern District of California, with the approval of the circuit judges, designed racial, religious, social, or economic discrimination to influence the makeup of jury **989 panels, or that such unfair influence infused the selection of the panel, or was reflected in those who were *227 chosen as jurors in this case. Nor is there any suggestion that the method of selecting the jury in this case was an innovation. What is challenged is a long standing practice adopted in order to deal with the special hardship which jury service entails for workers paid by the day. What is challenged, in short, is not a covert attempt to benefit the propertied but a practice designed, wisely or unwisely, to relieve the economically least secure from the financial burden which jury service involves under existing circumstances.

No constitutional issue is at stake. The problem is one of judicial administration. The sole question over which the Court divides is whether the established practice in the Northern District of California not to call for jury duty those otherwise qualified but dependent on a daily wage for their livelihood requires reversal of a judgment which is inherently without flaw.

Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. Since the color of a man's skin is unrelated to his fitness as a juror, negroes cannot be excluded from jury service because they are negroes. E.g., *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839. A group may be excluded for reasons that are relevant not to their fitness but to competing considerations of public interest, as is true of the exclusion of doctors, ministers, lawyers, and the like. *Rawlins v. Georgia*, 201 U.S. 638, 26 S.Ct. 560, 50 L.Ed. 899, 5 Ann.Cas. 783. But the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility. See *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84.

Obviously these accepted general considerations must have much leeway in application. In the abstract the Court acknowledges this. 'The choice of the means by *228 which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers.' Congress has made few inroads upon this discretion. Its chief enactment underlines the importance of avoiding rigidities in the jury system and recognizes that ample play must be allowed the joints of the machinery. The First Judiciary Act adopted for the federal courts the qualifications and exemptions, with all their diversities, prevailing in the States where the federal courts sit. 1 Stat. 73, 88. That has remained the law. 36 Stat. 1087, 1164, 28 U.S.C. s 411, 28 U.S.C.A. s 411. (For a collection of federal statutes regulating the composition and selection of jurors, see 37 Harv.L.Rev. 1010, 1098—1100.) We would hardly have taken this case to consider whether the federal court in San Francisco deviated from the requirements of California law, and nothing turns on that here. But it is not without illumination that under California law all those belonging to this long string of occupations are exempted from jury service: judicial, civil, naval, and military officers of the United States or California; local government officials; attorneys, their clerks, secretaries, and stenographers; ministers; teachers; physicians, dentists, chiropodists, optometrists, and druggists; officers, keepers, and attendants at hospitals or other charitable institutions; officers in attendance at prisons and jails; employees on boats and ships in navigable waters; express agents, mail carriers, employees of telephone and telegraph companies; keepers of ferries or tollgates; national guardsmen and firemen; superintendents, engineers, firemen, brakemen, motormen, or conductors of railroads; practitioners treating the sick by prayer. California Code of Civil Procedure, s 200.

Placed in its proper framework the question now before us comes to this: Have the district judges for the Northern District of California, supported by the circuit judges of *229 the Ninth Circuit, abused their discretion in sanctioning a practice of not calling for jury duty those who are **990 dependent upon a daily wage for their livelihood?

The precise issue must be freed from all atmospheric innuendoes. Not to do so is unfair to the administration of justice, which should be the touchstone for the disposition of the judgment under challenge, and no less unfair to a group of judges of long experience and tested fidelity. If workmen were systematically not drawn for the jury, the practice would be indefensible. But concern over discrimination against wage earners must be put out of the reckoning. Concededly those who are paid weekly or monthly wages were placed on the jury lists. And that no line was drawn against the wage earners because they were wage earners, and that there was merely anticipatory excuse of daily wage earners, is conclusively established by the fact that the

wives of such daily wage earners were included in the jury lists. As to any claim of the operation of a designed economic bias in the method of selecting the juries, the Circuit Court of Appeals rightly found 'no evidence that the persons whose names were in the box, or the persons whose names were drawn therefrom and who thus became members of the panel, were 'mostly business executives or those having the employer's viewpoint.'" 9 Cir., 149 F.2d 783, 786.

'When the question is narrowed to its proper form the answer does not need much discussion. The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission, no doubt, was that pointed out by the state court that the business of the persons omitted was such that either they *230 would have been entitled to claim exemption or that probably they would have been excused.' So this Court speaking through Mr. Justice Holmes answered a related question in *Rawlins v. Georgia*, 201 U.S. 638, 640, 26 S.Ct. 560, 50 L.Ed. 899, 5 Ann.Cas. 783. And the justification for the answer applies to the present situation.

It is difficult to believe that this judgment would have been reversed if the trial judge had excused, one by one, all those wage earners whom the jury commissioner, acting on the practice of trial judges of San Francisco, excluded. For it will hardly be contended that the absence of such daily wage earners from the jury panel removed a group who would act otherwise than workers paid by the week or the wives of the daily wage earners themselves. The exclusion of the daily wage earners does not remove a group who would, in the language of Mr. Justice Holmes, 'act otherwise than those who are drawn would act.' Judged by the trend of census statistics, laborers paid by the day are not a predominant portion of the workers of the country. See Sixteenth Census of the United States, 1940, Population, Vol. III, The Labor Force, Part 2, pp. 290 et seq. It certainly is too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically and economically than those who earn weekly wages. In the language of Mr. Chief Justice Hughes, 'Impartiality is not a technical conception. It is a state of mind.' *United States v. Wood*, 299 U.S. 123, 145, 57 S.Ct. 177, 185, 81 L.Ed. 78. And American society is happily not so fragmentized that those who get paid by the day adopt a different social outlook, have a different sense of justice, and a different conception of a juror's responsibility than their fellow workers paid by the week. No doubt the insecurities of a system of daily earnings, or generally of wages on less than an annual basis, raise serious problems as does, of course, also the question of guaranteed wage plans. See the letter of President Roosevelt to the Director of War Mobilization, James F. Byrnes, on the date of **991 March 20, 1945, carrying out the suggestion of a report to the President by the War Labor Board for the creation of a Commission to study the *231 question of guaranteed wage plans. And see *Basic Steel Case*, 19 W.L.B. 568, 653 et seq.; N.W.L.B. Research and Statistics Report No. 25, *Guaranteed Employment and Annual Wage Plans* (1944). But these are matters quite irrelevant to the problem confronting district judges in dealing with the present plight of daily wage earners when called to serve as jurors and the power of the judges, as a matter of discretion, to excuse such daily wage earners from duty.

For it cannot be denied that jury service by persons dependent upon a daily wage imposes a very real burden. Judge John C. Knox, Senior District Judge of the Southern District of New York, thus described the problem:

'* * * when jurors' compensation is limited to \$4 per day, and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition on them of extreme hardship.

'With respect to the item last-mentioned, it is easy to say that jury duty should be regarded as a patriotic service, and that all public-spirited persons should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship. With that statement I am in full accord, but it does not solve the difficulty. Adequate provision for one's family is the first consideration of most men. And if, with this thought predominant in a man's mind, he is required to perform a public service that means a default of an insurance premium, the sacrifice of a suit of clothes, *232 or the loss of (t)his job, he will entertain feelings of resentment that will be anything but conducive to the rendition of justice. In other words, persons with a grievance against the Government or who serve under conditions that expose them to self-denial are not likely to have the spiritual contentment and mental detachment that good jurors require.' Hearings before H.R. Committee on the Judiciary on H.R. 3379, H.R. 3380, H.R. 3381, 79th Cong., 1st Sess. (1945) 8.

No doubt, in view of the changes in the composition and distribution of our population and the growth of metropolitan areas, a reexamination is due of the operation of the jury system in the federal courts. Just as the federal judicial system has been reorganized and administratively modified through a series of recent enactments (see Act of September 14, 1922, 42 Stat. 837, 838, 28 U.S.C. ss 218 et seq., 28 U.S.C.A. s 218 et seq.; Act of February 13, 1925, 43 Stat. 936, 28 U.S.C. ss 41 et seq., 28 U.S.C.A. s 41 et seq.; Act of August 7, 1939, 53 Stat. 1223, 28 U.S.C. ss 444 et seq., 28 U.S.C.A. s 444 et seq., the jury system, that indispensable adjunct of the federal courts, calls for review to meet modern conditions. The object is to devise a system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice without operating too harshly upon any section of the community, and is duly regardful of the public interest in matters outside the jury system. This means that the many factors entering into the manner of selection, with appropriate qualifications and exemptions, the length of service and the basis of compensation must be properly balanced. These are essentially problems in administration calling for appropriate standards flexibly adjusted.

Wise answers preclude treatment by rigid legislation or rigid administration. Congress has devised the appropriate *233 procedure and instrument for making these difficult and delicate adjustments by its creation, in 1922, of the Conference of Senior Circuit Judges. The Conference, under the presidency of the Chief Justice of the United States, is charged with the duty of continuous oversight of the actual workings of the federal judicial system and of meeting disclosed needs, either through practices formulated by the Conference, or, when legislation is necessary or more appropriate, **992 through proposals submitted to Congress. See 40 Harv.L.Rev. 431. That is precisely the course that has been followed in regard to the inadequacies in the operation of the federal jury system. In September, 1941, the late Chief Justice brought the matter before the Conference. As a result, Mr. Chief Justice Stone appointed a committee of experienced district judges, see Report of the Judicial Conference (1941) 16, under the chairmanship of Judge Knox who, because of the length and richness of his experience in the busiest district of the country, brought unusual equipment for devising appropriate reforms. In September, 1942, the Committee reported, Report to the Judicial Conference of the Committee on Selection of Jurors (1942) 1, and submitted proposals for legislation. Id. at 44, 62, 107. Bills to carry out these recommendations were introduced in the Senate on January 11, 1944, S. 1623, 1624, 1625, 78th Cong., 2d Sess., and in the House on June 5, 1945, H.R. 3379, 3380, 3381, 79th Cong., 1st Sess. Hearings were had upon the House Bills on June 12 and 13, 1945, and action on them is now pending.

The Court now deals by adjudication with one phase of an organic problem and does so by nullifying a judgment which, on the record, was wholly unaffected by difficulties inherent in a situation that calls for comprehensive treatment, both legislative and administrative. If it be suggested that until there is legislation this decision will be *234 the means of encouraging the district judges to uncover a better answer than they have thus far given to a lively problem, an appropriate admonition from the Court would accomplish the same result, or common action regarding the practice now under review may be secured from the Conference of Senior Circuit Judges. To reverse a judgment free from intrinsic infirmity and perhaps to put in question other judgments based on verdicts that resulted from the same method of selecting juries, reminds too much of burning the barn in order to roast the pig.

I would affirm the judgment.

All Citations

328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181, 166 A.L.R. 1412

Footnotes

- 1 The injunction against petitioner proceeding in the state court was affirmed upon appeal. *Thiel v. Southern Pacific Co.*, 9 Cir., 126 F.2d 710; certiorari denied, 316 U.S. 698, 62 S.Ct. 1295, 86 L.Ed. 1767.
- 2 Federal statutes prohibit the service by any person as a petit juror 'more than one term in a year,' 28 U.S.C. s 423, 28 U.S.C.A. s 423, exempt from jury service artificers and workmen employed in the armories and arsenals of the United States, 50 U.S.C. s 57, 50 U.S.C.A. s 57, and set up disqualifications for service as a juror or talesman 'in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States,' 28 U.S.C. s 426, 28 U.S.C.A. s 426.

See, in general, Blume, 'Jury Selection Analyzed: Proposed Revision of Federal System,' 42 Mich.L.Rev. 831; Report to the Judicial Conference of Senior Circuit Judges of the United States of the Committee on Selection of Jurors (1942); Report of the Commission on the Administration of Justice in New York (1934).

3 In the San Francisco-Oakland industrial area in 1939 there were 76,374 wage earners employed by manufacturers out of a total population (as of 1940) of 1,412,686. Sixteenth Census of the United States: 1940, Manufactures 1939, Vol. III, p. 80.

4 See statement of Judge John C. Knox in Hearings before the House Committee on the Judiciary, 79th Cong., 1st Sess., on H.R.3379, H.R.3380 and H.R.3381, Serial No. 3, June 12 and 13, 1945, p. 4. 'When jurors' compensation is limited to \$4 per day, and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition upon them of extreme hardship.' Id., p. 8.

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ASSESSING WITNESS CREDIBILITY

N.Y. Pattern Jury Instr.--Civil 1:41

New York Pattern Jury Instructions--Civil December 2019 Update
Committee on Pattern Jury Instructions Association of Supreme Court Justices

Division 1. General Charges

B. Charge After Trial

2. Where Pre-Trial Charge Has Not Been Given

PJI 1:41 Weighing Testimony

The law does not, however, require you to accept all of the evidence I admit. In deciding what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses, and decide how much weight you choose to give to that testimony. The testimony of a witness may not conform to the facts as they occurred because he or she is intentionally lying, because the witness did not accurately see or hear what he or she is testifying about, because the witness' recollection is faulty, or because the witness has not expressed himself or herself clearly in testifying. There is no magical formula by which you evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you decide for yourselves the reliability or unreliability of things people tell you. The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which the witness gives testimony on the stand, the opportunity that the witness had to observe the facts about which he or she testifies, the probability or improbability of the witness' testimony when considered in the light of all of the other evidence in the case, are all items to be considered by you in deciding how much weight, if any, you will give to that witness' testimony. If it appears that there is a conflict in the evidence, you will have to consider whether the apparent conflict can be reconciled by fitting the different versions together. If, however, that is not possible, you will have to decide which of the conflicting versions you will accept.

[Where the particular case calls for a charge concerning admission against interest (PJI 1:55, PJI 1:56), the effect of presumption on burden of proof (PJI 1:63), evidence admitted for a limited purpose (PJI 1:65, PJI 1:66), circumstantial evidence (PJI 1:70), failure to produce evidence (PJI 1:75, PJI 1:77), privilege (PJI 1:76), interested witness (PJI 1:91, PJI 1:92), the appropriate pattern charge should be inserted at this point. Then follow with PJI 1:22 through PJI 1:23.]

Comment

A juror may consider his or her everyday experiences in weighing testimony, *Selzer v New York City Transit Authority*, 100 AD3d 157, 952 NYS2d 26 (1st Dept 2012) (citing PJI). The jury need not accept testimony offered by a party simply because the opposing party offered no contrary testimony, *Brennan v Bauman & Sons Buses, Inc.*, 107 AD2d 654, 484 NYS2d 25 (2d Dept 1985). "If everything or anything had to be believed in court simply because there is no witness to contradict it, the administration of justice would be a pitiable affair," *Punsky v New York*, 129 App Div 558, 114 NYS 66 (2d Dept 1908); see *Matter of Nowakowski's Estate*, 2 NY2d 618, 162 NYS2d 19, 142 NE2d 198 (1957). The *Brennan* case held that the jury verdict in favor of defendant should not have been set aside as against the weight of the evidence merely because defendant offered no contrary testimony.

1.12 GENERAL PROVISIONS FOR STANDARD CHARGE
(Approved 11/98)

L. Credibility (*long version*)

In deciding the facts of this case, you will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says or only part of it or none of it.

In deciding what to believe here are some factors you may want to consider.

1. Does the witness have an interest in the outcome of this case?
2. How good and accurate is the witness' recollection?
3. What was the witness' ability to know what he/she was talking about?
4. Were there any contradictions or changes in the witness' testimony?

Did the witness say one thing at one time and something different at some other time? If so, you may consider whether or not the discrepancy involves a matter of importance or whether it results from an innocent mistake or willful lie. You may consider any explanation that the witness gave explaining the inconsistency.

5. You may consider the demeanor of the witness. By that I mean the way the witness acted, the way the witness talked, or the way the witness reacted to certain questions.

6. Use your common sense when evaluating the testimony of a witness.
If a witness told you something that did not make sense, you have a right to reject that testimony. On the other hand if what the witness said seemed reasonable and logical, you have a right to accept that testimony.
7. Is the witness' testimony reasonable when considered in the light of other evidence that you believe?

M Civ JI 4.01 Credibility of Witnesses

You are the judges of the facts in this case, and you must determine which witnesses to believe and what weight to give to their testimony. In doing so you may consider each witness's ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony considered in the light of all the evidence.

Comment

Instructions including the credibility factors in this instruction have been approved in numerous cases by the Michigan Supreme Court. See, e.g., *Hitchcock v Davis*, 87 Mich 629; 49 NW 912 (1891); *Lovely v Grand Rapids & I R Co*, 137 Mich 653; 100 NW 894 (1904); *Foley v Detroit & M R Co*, 193 Mich 233; 159 NW 500 (1916); *Vinton v Plainfield Twp*, 208 Mich 179; 175 NW 403 (1919).

History

M Civ JI 4.01 was SJI 2.01. Amended January 1993.

7 N.Y.3d 888
Court of Appeals of New York.

The PEOPLE of the State of New York,
Respondent,
v.
Bobby LANE, Appellant.

Nov. 21, 2006.

Synopsis

Background: Defendant was convicted following a bench trial in the Supreme Court, New York County, Eduardo Padro, J., of fourth-degree grand larceny. Defendant appealed. The Supreme Court, Appellate Division, 25 A.D.3d 517, 808 N.Y.S.2d 225, affirmed and defendant appealed.

Holdings: The Court of Appeals held that:

[1] defendant failed to preserve for appeal his challenge to the sufficiency of the evidence;

[2] trial court did not abuse its discretion by precluding defendant's testimony that he allegedly refused to cash additional checks; and

[3] appellate division applied correct legal standard in rejecting defendant's argument that his conviction was against the weight of the evidence.

Affirmed.

West Headnotes (5)

[1] **Criminal Law**—Renewal of Motion

Defendant failed to preserve for appeal his challenge to the sufficiency of the evidence supporting his grand larceny conviction; at the close of the People's case, defendant moved to dismiss on ground that evidence did not establish prima facie case, but, after denial of motion, defendant presented his own evidence

and did not renew his earlier argument.

60 Cases that cite this headnote

[2] **Criminal Law**—Exclusion of Evidence

Where defendant did not raise, in trial court, his constitutional claims, namely, that trial court's evidentiary ruling violated defendant's constitutional rights to a fair trial and to present a defense, such claims were unpreserved for review by Court of Appeals.

52 Cases that cite this headnote

[3] **Criminal Law**—Hearing, Ruling, and Objections

Trial court did not abuse its discretion during grand larceny prosecution by precluding defendant's testimony that he allegedly refused to cash additional checks at behest of codefendant; court advised defense counsel that it wanted to "see how the questioning goes" to determine whether foundation could be established, and court did not indicate that evidence was irrelevant or inadmissible.

11 Cases that cite this headnote

[4] **Criminal Law**—Sufficiency of Evidence to Convict

Appellate division applied correct legal standard in rejecting defendant's argument that his grand larceny conviction was against the weight of the evidence; although defendant was convicted by bench trial, and appellate division allegedly relied on case involving jury trial, appropriate standard for evaluating a weight of the evidence argument on appeal was the same.

22 Cases that cite this headnote

- ^[5] **Criminal Law** → Sufficiency of Evidence to Convict
Criminal Law → Weight of Evidence in General

The appropriate standard for evaluating a weight of the evidence argument on appeal is the same regardless of whether the finder of fact was a judge or a jury.

9 Cases that cite this headnote

Attorneys and Law Firms

***599 Office of the Appellate Defender, New York City (Richard M. Greenberg of counsel), and Sullivan & Worcester LLP (Mary Cecilia Sweeney of counsel) for appellant.

Robert M. Morgenthau, District Attorney, New York City (Tracy L. Conn and Susan Gliner of counsel), for respondent.

***600 *889 **62 OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division should be affirmed.

^[1] Defendant failed to preserve his challenge to the sufficiency of the evidence supporting the conviction. At the close of the People's case, defendant moved to dismiss on the ground that the evidence did not establish a prima facie case of grand larceny in the fourth degree. The trial court promptly denied that motion. After defendant presented his own evidence, he did not renew his earlier argument. Consequently, whether the trial evidence was sufficient to support each element of the

crime is not a question of law that this Court may review (see e.g. *People v. Payne*, 3 N.Y.3d 266, 273, 786 N.Y.S.2d 116, 819 N.E.2d 634 [2004]; *People v. Hines*, 97 N.Y.2d 56, 61, 736 N.Y.S.2d 643, 762 N.E.2d 329 [2001]).

^[2] ^[3] Defendant next contends that the trial court's evidentiary ruling violated his constitutional rights to a fair trial and to present a defense. While defendant was testifying, defense counsel sought to elicit defendant's alleged refusal to cash additional checks at the behest of a codefendant. Since defendant did not raise these constitutional claims in the trial court, they are unpreserved for our review (cf. *People v. Lee*, 96 N.Y.2d 157, 163, 726 N.Y.S.2d 361, 750 N.E.2d 63 [2001]; *People v. Kello*, 96 N.Y.2d 740, 743, 723 N.Y.S.2d 111, 746 N.E.2d 166 [2001]). Nor can it be said that the trial court abused its discretion as a matter of law by precluding the proposed testimony. The court advised defense counsel that it wanted *890 to "see how the questioning goes" and determine whether a foundation could be established for the inquiry; the court did not indicate that the evidence was irrelevant or inadmissible. On these facts, it cannot be said that the court's only reasonable course of action was to allow the proposed testimony to be admitted at the time it was offered.

^[4] ^[5] Also unpersuasive is defendant's claim that the Appellate Division's reliance on *People v. Gaimari*, 176 N.Y. 84, 68 N.E. 112 (1903) indicates that the Court utilized an erroneous rule of law in rejecting his contention that the verdict was against the weight of the evidence (see *People v. Romero*, 7 N.Y.3d 633, 645–646, 826 N.Y.S.2d 163, 859 N.E.2d 902 [2006]). In fact, the Appellate Division also cited *People v. Bleakley*, 69 N.Y.2d 490, 515 N.Y.S.2d 761, 508 N.E.2d 672 (1987) and thereby clearly indicated that defendant had received the appellate scrutiny to which he was entitled (see *Romero*, 7 N.Y.3d at 646). Moreover, although defendant was convicted following a bench trial, the appropriate standard for evaluating a weight of the evidence argument on appeal is the same regardless of whether the finder of fact was a judge or a jury (see *Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [if "the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict"]) because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record.

Chief Judge KAYE and Judges CIPARICK,

People v. Lane, 7 N.Y.3d 888 (2006)

860 N.E.2d 61, 826 N.Y.S.2d 599, 2006 N.Y. Slip Op. 08641

ROSENBLATT, GRAFFEO, READ, SMITH and
PIGOTT concur.

Order affirmed in a memorandum.

All Citations

7 N.Y.3d 888, 860 N.E.2d 61, 826 N.Y.S.2d 599, 2006
N.Y. Slip Op. 08641

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135 A.D.3d 922
Supreme Court, Appellate Division, Second
Department, New York.

Sylvia PETERS, appellant,
v.
Lynne F. WALLIS, respondent.

Jan. 27, 2016.

Synopsis

Background: Plaintiff brought negligence action against defendant, seeking to recover damages for personal injuries. The Supreme Court, Orange County, Onofry, J., granted defendant's motion to set aside jury verdict as contrary to weight of the evidence and declared mistrial. Plaintiff appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[¹] jury's verdict was not contrary to weight of the evidence, and

[²] mistrial was warranted.

Affirmed as modified.

West Headnotes (4)

[¹] **New Trial**—Weight of Evidence

A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence. McKinney's CPLR 4404(a).

1 Cases that cite this headnote

[²] **New Trial**—Negligence and torts in general

Jury's verdict, in negligence action, finding that defendant was negligent and that her negligence was substantial factor in causing accident, was not contrary to weight of the evidence, as required for verdict to be set aside; verdict was supported by fair interpretation of the evidence and was not inconsistent with respect to issue of whether plaintiff was comparatively at fault, in that jury could have reasonably come to conclusion that plaintiff was negligent but that her negligence was not a substantial factor in causing the accident. McKinney's CPLR 4404(a).

1 Cases that cite this headnote

[³] **New Trial**—Negligence and torts in general

On a motion to set aside a verdict as contrary to the weight of the evidence, where there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view. McKinney's CPLR 4404(a).

1 Cases that cite this headnote

[⁴] **Trial**—Reference to protection of party by insurance or other indemnity

Mistrial in negligence action was warranted, where repeated references by plaintiff and her attorney as to nature of plaintiff's injuries and her lack of medical insurance at the time of the accident could have influenced the jury to be more sympathetic toward her, resulting in prejudice toward the defendant.

Attorneys and Law Firms

****179** Sacks and Sacks, LLP, New York, N.Y. (Scott N. Singer of counsel), for appellant.

Burke, Gordon & Conway, White Plains, N.Y. (Stephen Falvey of counsel), for respondent.

MARK C. DILLON, J.P., THOMAS A. DICKERSON, SYLVIA O. HINDS-RADIX, and JOSEPH J. MALTESE, JJ.

Opinion

***922** In an action to recover damages for personal injuries, the plaintiff appeals from so much of an order of the Supreme Court, Orange County (Onofry, J.), dated December 12, 2013, as granted those branches of the defendant's motion which were pursuant to CPLR 4404(a) to set aside a jury verdict as contrary to the weight of the evidence, declare a mistrial, and, in effect, to direct a new trial on the issue of liability.

ORDERED that the order is modified, on the facts, by deleting the provision thereof granting that branch of the defendant's motion which was pursuant to CPLR 4404(a) to set aside the jury verdict as contrary to the weight of the evidence, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the defendant.

[1] [2] [3] ***923** A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (see *Das v. Costco Wholesale Corp.*, 98 A.D.3d 712, 950 N.Y.S.2d 396; *Coma v. City of New York*, 97 A.D.3d 715, 949 N.Y.S.2d 98; *DeSalvo v. Kreymin*, 95 A.D.3d 819, 942 N.Y.S.2d 890). Moreover, "it is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" (*Verizon N.Y., Inc. v. Orange & Rockland **180 Utils., Inc.*, 100 A.D.3d 983, 984, 954 N.Y.S.2d 641 [internal quotation marks

omitted]); see *Vaccarino v. Mad Den, Inc.*, 100 A.D.3d 867, 955 N.Y.S.2d 122; *Jean-Louis v. City of New York*, 86 A.D.3d 628, 928 N.Y.S.2d 310). Here, the jury's findings that the defendant was negligent and that her negligence was a substantial factor in causing the accident were supported by a fair interpretation of the evidence. Moreover, contrary to the trial court's determination, the jury's verdict was not inconsistent with respect to the issue of whether the plaintiff was comparatively at fault. "[W]here there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view." (*Moffett-Knox v. Anthony's Windows on the Lake, Inc.*, 126 A.D.3d 768, 768-769, 5 N.Y.S.3d 486, quoting *Bonomo v. City of New York*, 78 A.D.3d 1094, 1095, 912 N.Y.S.2d 601; see *Henry v. Town of Hempstead*, 119 A.D.3d 649, 990 N.Y.S.2d 79; *Coma v. City of New York*, 97 A.D.3d 715, 949 N.Y.S.2d 98). Under the circumstances of this case, the jury could have reasonably come to the conclusion that the plaintiff was negligent but that her negligence was not a substantial factor in causing the accident. Therefore, the trial court should have denied that branch of the defendant's motion which was pursuant to CPLR 4404(a) to set aside the jury verdict as contrary to the weight of the evidence.

[4] However, the trial court providently exercised its discretion in granting those branches of the defendant's motion which were to declare a mistrial, and, in effect, direct a new trial on the issue of liability. The repeated references by the plaintiff and her attorney to the nature of the plaintiff's injuries and her lack of medical insurance at the time of the accident could have influenced the jury to be more sympathetic toward her, resulting in prejudice toward the defendant (see *Grogan v. Nizam*, 66 A.D.3d 734, 735, 887 N.Y.S.2d 607; *Frankson v. Philip Morris Inc.*, 31 A.D.3d 372, 373, 818 N.Y.S.2d 772; *Weinberg v. Remyco, Inc.*, 9 A.D.3d 425, 426, 780 N.Y.S.2d 625).

All Citations

135 A.D.3d 922, 24 N.Y.S.3d 178, 2016 N.Y. Slip Op. 00489

170 A.D.3d 667
Supreme Court, Appellate Division, Second
Department, New York.

Noelle FELDMAN, Respondent,
v.
William KNACK, Appellant.

2017-04891
|
2017-08972
|
(Index No. 69747/14)
|
Argued—September 4, 2018
|
March 6, 2019

Synopsis

Background: Patient brought personal injury action against her former psychotherapist alleging that he sexually assaulted her in his office during a therapy session. The Supreme Court, Westchester County, Terry Jane Ruderman, J., 56 Misc.3d 1209(A), 63 N.Y.S.3d 305, denied psychotherapist's motion for judgment as a matter of law, and entered a verdict in favor of psychotherapist. Psychotherapist appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] genuine issue of material fact as to whether the alleged rape occurred precluded summary judgment;

[2] trial court acted within its discretion in admitting into evidence two audio recordings of telephone conversations;

[3] awards of \$250,000 for past pain and suffering and \$200,000 for future pain and suffering did not deviate materially from what would be reasonable compensation; and

[4] punitive damages award of \$500,000 was appropriate and not excessive.

Affirmed.

West Headnotes (10)

[1] **Judgment**—Tort cases in general

Genuine issue of material fact as to whether the alleged rape occurred precluded summary judgment in patient's personal injury action against former psychotherapist.

[2] **Evidence**—Sound records in general

Trial court acted within its discretion in admitting into evidence two audio recordings of telephone conversations between patient and former psychotherapist in patient's personal injury action against psychotherapist alleging forcible rape, although psychotherapist's voice in the first nine minutes of one of the recorded conversations was inaudible, where psychotherapist acknowledged the authenticity of his voice on the recordings and both parties testified about the conversations at issue, including the inaudible portion.

[3] **Trial**—Insufficiency to support other verdict; conclusive evidence

A motion for judgment as a matter of law may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party. N.Y. CPLR §§ 4401, 4404.

1 Cases that cite this headnote

[4] **Trial**—Hearing and determination

In considering a motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant.

1 Cases that cite this headnote

[5] **New Trial**—Weight of Evidence

A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence.

1 Cases that cite this headnote

[6] **Damages**—Injuries to the Person
Damages—Questions for Jury

The amount of compensation to be awarded to an injured person is a question of fact to be resolved by the trier of fact and will only be disturbed when it deviates materially from what would be reasonable compensation.

[7] **Assault and Battery**—Aggravation and mitigation of damages

Awards of \$250,000 for past pain and suffering and \$200,000 for future pain and suffering did not deviate materially from what would be reasonable compensation in judgment against former psychotherapist in patient's personal injury action for forcible rape.

[8] **Damages**—Grounds for Exemplary Damages

Punitive damages are recoverable where the conduct in question evidences a high degree of moral culpability, or the conduct is so flagrant as to transcend mere carelessness, or the conduct constitutes willful or wanton negligence or recklessness.

[9] **Damages**—Measure and Amount of Exemplary Damages

Damages—Discretion as to amount of damages
Damages—Exemplary damages

Whether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the jury, and such an award is not lightly to be disturbed.

[10] **Assault and Battery**—Amount awarded

Punitive damages award of \$500,000 was appropriate and not excessive in patient's personal injury action against former psychotherapist for forcible rape, where the psychotherapist's actions were particularly heinous given his fiduciary relationship to patient as her treating psychotherapist and his knowledge that patient, who had previously been the victim of sexual assault, was a vulnerable client.

Attorneys and Law Firms

****308** Miller & Lee LLP, Scarsdale, N.Y. (Joseph Miller and Marcy Blake of counsel), for appellant.

Bleakley Platt & Schmidt, LLP, White Plains, N.Y. (John P. Hannigan, Peter F. Harrington, and Justin M. Gardner of counsel), for respondent.

MARK C. DILLON, J.P., COLLEEN D. DUFFY,
FRANCESCA E. CONNOLLY, LINDA
CHRISTOPHER, JJ.

DECISION & ORDER

***667** In an action, inter alia, to recover damages for personal injuries arising from an alleged forcible rape, the defendant appeals from (1) a judgment of the Supreme Court, Westchester County (Terry Jane Ruderman, J.), dated April 12, 2017, and (2) an order of the same court dated July 19, 2017. The judgment, upon the denial of the defendant's motion pursuant to CPLR 4401, made at the close of evidence, for judgment as a matter of law, and upon a jury verdict in favor of the plaintiff on the issue of liability and awarding the plaintiff the principal sums of \$ 250,000 for past pain and suffering, \$ 200,000 for future pain and suffering, and \$ 500,000 for punitive damages, is in favor of the plaintiff and against the defendant in the principal sum of \$ 950,000. The order denied the defendant's motion pursuant to CPLR 4404(a) to set aside the verdict and for judgment as a matter of law or, in the alternative, to set aside the verdict as contrary to the weight of the evidence or in the interest of justice and for a new trial or, in the alternative, to set aside, as excessive, the verdict on the issue of damages.

ORDERED that the judgment and the order are affirmed, with one bill of costs.

The plaintiff commenced this action, inter alia, to recover damages for personal injuries she alleged she sustained when the defendant, her former psychotherapist, sexually assaulted her in his office during a therapy session. The defendant moved for summary judgment dismissing the complaint, and the plaintiff cross-moved for leave to amend her bill of particulars to allege a violation of Penal Law § 130.35, forcible rape. In an order dated September 20, 2016, the Supreme Court (Lewis J. Lubell, J.), among other things, granted the plaintiff's cross motion and, in effect, denied that branch of the defendant's motion

which was for summary judgment dismissing the cause of action alleging forcible rape.

Following a jury trial, the jury returned a verdict in favor of the plaintiff on the issue of liability and awarding the plaintiff the principal sums of \$ 250,000 for past pain and suffering, ***668** \$ 200,000 for future pain and suffering, and \$ 500,000 for punitive damages. A judgment was entered (Terry Jane Ruderman, J.) in favor of the plaintiff and against the defendant in the ****309** principal sum of \$ 950,000. Thereafter, the defendant moved, inter alia, pursuant to CPLR 4404(a) to set aside the verdict and for judgment as a matter of law or, in the alternative, to set aside the verdict as contrary to the weight of the evidence and for a new trial or, in the alternative, to set aside, as excessive, the verdict on the issue of damages. In an order dated July 19, 2017, the Supreme Court (Terry Jane Ruderman, J.) denied the defendant's motion. The defendant appeals from the judgment and the order dated July 19, 2017.

^[1]The defendant failed to establish his prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging forcible rape, as he did not eliminate triable issues of fact as to whether the alleged rape occurred (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Although the defendant raised issues of credibility, he did not establish that the plaintiff was incredible as a matter of law (*see Zalewski v. MH Residential 1, LLC*, 163 A.D.3d 900, 901, 82 N.Y.S.3d 40; *Zapata v. Buitriago*, 107 A.D.3d 977, 979, 969 N.Y.S.2d 79). Since the defendant failed to sustain his prima facie burden, it is unnecessary to consider the sufficiency of the plaintiff's opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). Accordingly, we agree with the Supreme Court's determination, in effect, denying that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging forcible rape.

^[2]The Supreme Court providently exercised its discretion in admitting into evidence at trial two audio recordings of telephone conversations between the parties. Contrary to the defendant's contention, although the defendant's voice in the first nine minutes of one of the recorded conversations was inaudible, the jury was not left to speculate as to what transpired, as the defendant acknowledged the authenticity of his voice on the recordings and both the plaintiff and the defendant testified about the conversations at issue, including the inaudible portion (*see People v. McCaw*, 137 A.D.3d 813, 815, 27 N.Y.S.3d 574; *People v. Griffin*, 98 A.D.3d 688, 689, 950 N.Y.S.2d 161). Thus, any infirmities in the

recordings pertain to the weight of the evidence and not to its admissibility (see *People v. McCaw*, 137 A.D.3d at 815, 27 N.Y.S.3d 574; *People v. Lewis*, 25 A.D.3d 824, 827, 806 N.Y.S.2d 317).

[3] [4] “A motion for judgment as a matter of law pursuant to CPLR 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid *669 line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party” (*Hiotidis v. Ramuni*, 161 A.D.3d 955, 956, 77 N.Y.S.3d 442, quoting *Tapia v. Dattco, Inc.*, 32 A.D.3d 842, 844, 821 N.Y.S.2d 124). “In considering such a motion, ‘the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant’” (*Hiotidis v. Ramuni*, 161 A.D.3d at 956, 77 N.Y.S.3d 442, quoting *Hand v. Field*, 15 A.D.3d 542, 543, 790 N.Y.S.2d 681 [internal quotation marks omitted]). Here, viewing the evidence in the light most favorable to the plaintiff, and affording her every inference which may properly be drawn from the facts presented, a rational jury could have found that the defendant forcibly raped the plaintiff (see *Hiotidis v. Ramuni*, 161 A.D.3d at 956, 77 N.Y.S.3d 442; *Hand v. Field*, 15 A.D.3d at 543, 790 N.Y.S.2d 681).

***310** [5] To the extent that the defendant argues that the verdict was contrary to the weight of the evidence, “a jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence” (*Shellkopf v. Bernfeld*, 162 A.D.3d 1086, 1086, 79 N.Y.S.3d 668; see *Lolik v. Big V Supermarkets*, 86 N.Y.2d 744, 746, 631 N.Y.S.2d 122, 655 N.E.2d 163). “Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors” (*Shellkopf v. Bernfeld*, 162 A.D.3d at 1086–1087, 79 N.Y.S.3d 668; see *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145; *Nicastro v. Park*, 113 A.D.2d 129, 133, 495 N.Y.S.2d 184). “It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses” (*Shellkopf v. Bernfeld*, 162 A.D.3d at 1087, 79 N.Y.S.3d 668, quoting *Jean-Louis v. City of New York*, 86 A.D.3d 628, 629, 928 N.Y.S.2d 310 [internal quotation marks omitted]). Here, we agree with the Supreme Court’s determination that the jury’s verdict was based on a fair interpretation of the

evidence.

[6] [7] “The amount of compensation to be awarded to an injured person is a question of fact to be resolved by the trier of fact and will only be disturbed when it deviates materially from what would be reasonable compensation” (*Munzon v. Victor at Fifth, LLC*, 161 A.D.3d 1183, 1185–1186, 78 N.Y.S.3d 205). Contrary to the defendant’s contention, the awards of \$ 250,000 for past pain and suffering and \$ 200,000 for future pain and suffering did not deviate materially from what would be reasonable compensation.

***670** [8] [9] [10] “Punitive damages are recoverable where the conduct in question evidences ‘a high degree of moral culpability,’ or ‘the conduct is so flagrant as to transcend mere carelessness,’ or ‘the conduct constitutes willful or wanton negligence or recklessness’” (*Morton v. Brookhaven Mem. Hosp.*, 32 A.D.3d 381, 381, 820 N.Y.S.2d 294, quoting *Lee v. Health Force*, 268 A.D.2d 564, 564, 702 N.Y.S.2d 108). “Whether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of ... the jury, and such an award is not lightly to be disturbed” (*Nardelli v. Stamberg*, 44 N.Y.2d 500, 503, 406 N.Y.S.2d 443, 377 N.E.2d 975 [citations omitted]; see *Solis-Vicuna v. Notias*, 71 A.D.3d 868, 871, 898 N.Y.S.2d 45; *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52, 59–60, 559 N.Y.S.2d 336, *aff’d* 77 N.Y.2d 981, 571 N.Y.S.2d 907, 575 N.E.2d 393). Contrary to the defendant’s contention, the award of punitive damages was appropriate because the defendant’s acts were particularly heinous (see *Solis-Vicuna v. Notias*, 71 A.D.3d at 871, 898 N.Y.S.2d 45) given his fiduciary relationship to the plaintiff as her treating psychotherapist and his knowledge that the plaintiff, who had previously been the victim of a sexual assault, was a vulnerable client (see *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d at 58–59, 559 N.Y.S.2d 336; see generally *Aliano v. Lusterman*, 287 A.D.2d 473, 474, 731 N.Y.S.2d 738). The award of \$ 500,000 for punitive damages was not excessive (see *Solis-Vicuna v. Notias*, 71 A.D.3d at 871, 898 N.Y.S.2d 45).

DILLON, J.P., DUFFY, CONNOLLY and CHRISTOPHER, JJ., concur.

All Citations

170 A.D.3d 667, 95 N.Y.S.3d 306, 2019 N.Y. Slip Op. 01566

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206 N.J. 506
Supreme Court of New Jersey.

Peter RISKO, individually and as Administrator Ad Prosequendum of the
Estate of Camille M. Risko, a/k/a Carmela Risko, Plaintiffs–Respondents,

v.

THOMPSON MULLER AUTOMOTIVE GROUP, INC., t/
a Hammonton Chrysler Jeep Dodge, Defendant–Appellant.

Argued March 29, 2011.

|
Decided June 7, 2011.

Synopsis

Background: Surviving spouse of customer who died after fracturing her hip by slipping and falling at automobile dealership, individually and as administrator of customer's estate, brought negligence action against dealership. Following a jury verdict awarding surviving spouse \$1,750,000, dealership moved for a new trial, primarily on the basis of comments by surviving spouse's counsel in summation. The Superior Court, Law Division, Atlantic County, granted a new trial. Surviving spouse appealed. The Superior Court, Appellate Division, 2011 WL 6139, reversed. Dealership filed motion for leave to appeal.

The Supreme Court, Stern, J., temporarily assigned, held that surviving spouse's counsel's summation warranted a new trial as to damages only.

Judgment of Appellate Division affirmed in part, reversed in part, and remanded for a new trial on damages only.

Rivera–Soto, J., concurred in part, dissented in part, and filed opinion.

Attorneys and Law Firms

****1125** William C. Carey argued the cause for appellant (McElroy, Deutsch, Mulvaney & Carpenter, attorneys; Mr. Carey, Loren L. Pierce and William A. Cambria, Morristown, on the briefs).

Rudolph C. Westmoreland argued the cause for respondents (Westmoreland Vesper & Quattrone, attorneys; Mr. Westmoreland and Kathleen F. Beers, West Atlantic City, on the briefs).

Opinion

Judge STERN (temporarily assigned) delivered the opinion of the Court.

***510** Pursuant to leave granted, plaintiff Peter Risko, individually and as administrator of the estate of his late wife, Camille Risko (decedent),¹ appealed to the Appellate Division from a June 30, 2009 order of the Law Division setting aside a jury verdict in their favor in this wrongful death and survivorship action, and granting a new trial to defendant Thompson Muller Automotive Group, Inc., t/a Hammonton Chrysler Jeep Dodge (dealership). The Appellate Division reversed the grant of a new trial on both liability and damages, over Judge Carchman's dissent, which would have granted a new trial on damages only.

We thereafter granted defendant's motion for leave to appeal from the Appellate Division's judgment.² *Risko v. Thompson Muller Auto. Group, Inc.*, 204 N.J. 34, 6 A.3d 439 (2010). We cannot allow the award of damages to stand in light of plaintiff's summation and the trial judge's perception that a new trial was required. Accordingly, we reverse the Appellate Division in part, and order a new trial as to damages only, essentially for the reasons expressed in Judge Carchman's dissent.

***511 I.**

We recount the relevant facts as developed in the Appellate Division's unpublished opinion.

****1126** On November 21, 2005, sixty-nine-year-old Camille Risko slipped and fell in defendant's automobile showroom. According to her husband, who accompanied her to the dealership, a plastic runner lying on top of the carpet was waterlogged at the time. Plaintiff's retail premises safety expert, Bill Julio, concluded that defendant allowed an area of the carpet in its showroom to become rain-soaked during a rainstorm and also allowed water to accumulate on its tiled floor. Julio opined that improper placement of the carpet and the black plastic runner over the carpet, leaving some wet and exposed tile, and the lack of adequate inspections created a "false sense of security," and an unreasonably hazardous and dangerous condition, which violated the standard of care. The condition of the floor was disputed by defendant's sales manager, Raymond Hall, who denied that the carpet was wet or that there were any plastic runners on top of the carpet.

Plaintiff alleged that as a result of the fall, Camille sustained a fractured arm and hip. The hip injury required surgery, and thereafter she spent several weeks in a rehabilitation center where she contracted C-difficile colitis, a severe inflammation of the colon. When the condition developed into septic shock, Camille was rushed to the hospital, where she died on January 1, 2006.

Plaintiff's medical expert, Dr. Donald Jason, a forensic pathologist, presently a medical examiner in North Carolina and Associate Professor at the Wake Forest Medical School, and also an attorney, concluded that Camille's hip fracture was caused by the "slip and fall," and her subsequent death from septic shock was ultimately the result of the injuries she sustained from the accident. Specifically, the doctor found that the decedent died from septic shock complicating her C-difficile colitis due to antibiotic therapy for a urinary tract infection. The infection, in turn, was caused by a urinary bladder catheterization that was necessitated by the fracture of decedent's hip caused by her slip and fall. Dr. ***512** Jason believed that the slip and fall, as decedent had described it, caused the fractured hip.

Although defendant contested the connection between the carpet's condition and decedent's fall, between the fall and decedent's hip fracture, and between the fracture and her death, defendant produced no contrary medical proof or expert testimony.³ As related to economic damages, plaintiff called economic expert, Dr. Robert P. Wolf, who opined that decedent would have lived for sixteen more years, during which she would have supplied emotional support for plaintiff, and that for 10.68 of those years, decedent would have been able to provide household services and physical support to her spouse. Dr. Wolf calculated that, based on these projections, plaintiff suffered economic loss in the amount of \$143,988 in household services, \$328,012 in "advice, counsel, support and companionship," and \$562,307 in "passive security" constituting "sleep time [and] on-call services"⁴ that a spouse provides. Dr. Wolf concluded that the sum of these figures, \$1,034,307, represented the discounted value of plaintiff's economic loss. Defendant vigorously disputed the quantification and legitimacy of the "sleep time" calculations by plaintiff's expert.

****1127** At the close of evidence and following the court's final instructions, the jury returned a verdict finding defendant solely negligent, that its negligence was the proximate cause of Camille's fall and injuries, and that her left hip fracture was the cause of her death. The jury awarded plaintiff \$1,210,319 for "financial losses sustained by the [decedent's] survivors" and \$539,681 for pain and suffering before her death, for a total amount of \$1,750,000.

Defendant moved for a new trial, primarily on the basis of comments by plaintiff's counsel in summation. Defendant urged *513 that the summation was "completely inappropriate," unduly prejudicial and produced an "unjust result" because it suggested that the jury had to find more than \$1,000,000 in damages and directed jurors to report to the judge any of their members who could not do so because "they were violating the law" if they did. Moreover, defendant asserted that "a strong and effective curative instruction [should have been] given to the jury." The trial court agreed, and granted a new trial.

On appeal, plaintiff claimed the trial court erred in its grant of a new trial, and a majority of the Appellate Division reversed the decision. Judge Carchman dissented believing that a new trial on damages was warranted, as the trial judge had ordered, but agreed with the majority that a new trial as to liability was unnecessary. He would have limited the new trial to damages only.

II.

Because plaintiff's counsel's summation was the exclusive basis for the trial court's decision to set aside the verdict and grant a new trial, we set it out at some length:

[PLAINTIFF'S COUNSEL]: [T]he Eighth Amendment of the Constitution of the United States in the Bill of Rights says even prisoners of war, people we hate, are not supposed to be tortured. What [the decedent] went through was torture. They didn't intend to put her through that. But now they have to pay for that.

...

I have ... concerns. And this is from talking to other jurors and judges. And [the trial] judge.... When you go to deliberate if someone for some reason has not disclosed that they have a prejudice about awarding money in a death case please tell the judge because that would not be following the law. If someone starts to say I have a case or my uncle has a case, that has nothing to do with this case. Nothing.... And if someone goes into the jury room and says ... I don't believe in damages of over a million dollars, because there are people that believe that, you can never have a million dollar case. Well why? Well because I just don't believe that, it's what's called an arbitrary cap on damages. If someone says that in the jury room please knock, tell [the jury attendant], ask for the judge. Because what they're doing is ignoring the law.

The trial judge interrupted, and called counsel to sidebar, where the following exchange occurred:

*514 [Plaintiff's counsel]: Yes, Your Honor.

THE COURT: I'm going to mistry this case right now.

[PLAINTIFF'S COUNSEL]: Why?

THE COURT: Why? You know damn well that those are instructions that I give.

[PLAINTIFF'S COUNSEL]: There's no caps on damages—

THE COURT: It doesn't matter whether there's caps.

[PLAINTIFF'S COUNSEL]: I'm telling them there's no caps.

**1128 THE COURT: It doesn't matter whether there's caps. That's an improper instruction to give this jury at this point.

[PLAINTIFF'S COUNSEL]: To tell them to tell you if someone does that?

THE COURT: Yes, absolutely. That's their own individual view. That's your own individual view.

....

THE COURT: You don't tell them to knock on the door. That's the point. That's the deal you don't get here. That's my job. You don't tell them when they knock on the door. I'm furious to say the least.

[PLAINTIFF'S COUNSEL]: I'm sorry, Your Honor. I believe it is proper for me to ask them if someone's not following the law, I know this was—

THE COURT: You finish this and I'm going to decide tonight whether I mistry this case.

[PLAINTIFF'S COUNSEL]: Yes, sir.

The following then was stated in the presence of the jury:

[PLAINTIFF'S COUNSEL]: May I finish the comment, Judge, about the law that there's no caps in New Jersey? His Honor, I'm not telling you what the law is. His Honor will tell you what the law is. I'm simply saying there are no caps in the state of New Jersey in the law.

THE COURT: I will see counsel in chambers. Ladies and gentlemen of the Jury, we will see you tomorrow morning at 9 o'clock. Thank you.

Immediately thereafter a long off-the-record discussion was conducted in chambers between the court and both counsel. Both sides agree the following took place, as developed by defense counsel during the argument on the motion for a new trial:

[Defense counsel]: [I] just want to remind Your Honor of what took place after you had calmed down and after we were discussing things. [T]he indication ... from the [c]ourt to counsel was to get to [c]ourt at approximately 8:45, [the next morning], and we would go over a curative instruction or we would see how further, at the very least, it may not have been that strong ... there's obviously not a record to it, but ... we were going to talk about what we needed to do further.... [Plaintiff's counsel] and I were both here at 8:45. And Your Honor came out at approximately 9:15, after the jury had been called. And [plaintiff's counsel] was told to continue.

*515 Upon receiving the judge's instruction to continue summation, plaintiff's counsel apologized to the court and to the jury for his conduct and statements, and proceeded to complete his closing arguments. There were no objections by defense counsel. The judge did not request argument on whether to mistry the case and never asked the attorneys for suggested curative instructions. The judge did not give a specific cautionary instruction designed to address the concerns he voiced the previous afternoon and made no comment to the jury on the matter.

In his final instructions to the jury, however, the judge did explain, among other things, that statements by counsel as to damages were to be disregarded and the amount of damages, if any, was to be decided by the jury alone. He instructed:

[K]eep in mind [that] by instructing you on damages [that] does not mean that I am ordering you to find damages. That's something that again you're the determiners of fact, that's entirely up to you. The amount of damages is entirely up to you ... That's something that is your province to deal with. It's not mine, it's not counsel's province. It's **1129 yours. You are the determiners of fact in this case.

The judge reiterated that the attorneys' remarks were not evidence, that the jury should consider only the evidence presented, and that the jury's recollection of the evidence controlled.

Following entry of the verdict, defendant moved for a new trial on all issues. In support of its motion, defendant argued, among other things, that plaintiff's summation created "uncertainty amongst jurors of a free and fair deliberation that someone may be in the jury room looking to see if there was some type of undue bias." Plaintiff disagreed with defendant's characterization of his remarks as informing the jury that "the verdict in this case ... can't be[,] as a matter of law[,] less than a million dollars" and challenged defendant's failure to object or request a curative instruction when the court reconvened the next morning. Specifically, plaintiff's counsel argued it was unfair for defendant to "hope" for a "no cause" and then "come back and say well ... the judge should have ruled a mistrial.... If ... the defense position now is ... you didn't give an instruction at all, you gotta say something then. We could have argued then."

*516 The trial judge rejected all the evidential issues raised by defendant as not "sufficient to constitute grounds ... to grant a mistrial." However, the judge found "the crux of the matter" to be plaintiff's summation, which, as previously noted, he believed to warrant a new trial on both liability and damages. Acknowledging that he should have either declared a mistrial or given immediate cautionary instructions, the judge said: "I was hoping that based on the verdict that perhaps we would come up with a fair and equitable verdict or we might come up with one, quite frankly, as hoped by the defense, which would be moot." The judge then explained the rationale for his grant of a new trial:

[W]hat concerns me with this trial is two things; [plaintiffs' counsel's] conduct and my lack of response to that. I don't think [defense counsel] needed to have an objection based upon my reaction when it was stated to the jury that there was an issue of caps. Certainly my reaction would indicate that the world was ready to explode. And I think most judges would have declared a mistrial right there. But I don't lightly declare mistrials.... And it wasn't until my instructions weren't followed a second time that I thought well, it's now 4:30 in the afternoon, let's go back and punt, everybody cool down and let me send the jury home anyway.... But it's obvious that my first rebuke didn't work because when [plaintiffs' counsel] turned and said to me should I continue to tell them about caps, obviously nothing that I said got through.... [W]hat [defense counsel] said here is absolutely correct at least to the best of my memory, that [I said] we would consider instructions the next day. So let me go back and look at those two elements.... I'm trying to create an atmosphere in which [the jury] can decide a case fairly and objectively knowing that what they do in that jury room is inviolate. It's something that is their decision at that point. And I think with what was said to them in the last closing arguments, the last moments of plaintiff's closing argument violated that rule. Now what rule did it violate? Very simply put, to tell the jury that if one person doesn't believe in the million dollar case despite the fact that there is a law in New Jersey that we don't have caps created what I'm going to describe as a vigilante atmosphere. We had a member of a jury or members of a jury who if somebody was disagreeing with them as to an amount

**1130 were being instructed by plaintiff's counsel to let [the jury attendant] know so that [she] could let the judge know. In other words, let's find out who the tattle-tale is in this process. I don't think that creates the type of atmosphere that we want in jury decisions.... [T]he message that was sent to that jury was if someone doesn't believe in the million dollar case that somehow they should be turned in, that somehow they should be excised from the group. And that's not what we do when juries are deciding.... [I] think that's the atmosphere that was created. Should I have instructed them that that's not the case? Yes. Did I do it? No. Why? Because I was hoping that based upon the verdict that perhaps we would come up with a fair and equitable verdict or we might come up with one, quite frankly, as was hoped by defense, which would be moot. We wouldn't have to get to that.

*517 [(Emphasis added).]

The judge concluded that he was "compelled," based on "the interest of fairness," the "conduct" of plaintiff's counsel, and his own "lack of an inhibiting instruction" to grant a new trial. The judge further explained his order included a new trial as to liability because he had to "assume all of it," "the entire process was tainted."

III.

In reversing the award of a new trial, the Appellate Division majority noted it was “unclear whether the judge's objection was to the substantive content” of the summation or the “perceived usurpation of the court's charging prerogative” and if the former, that the trial court failed to strike the “offending remark[s]” or issue a curative instruction, as would be expected if the court truly found portions of plaintiff's summation objectionable. The majority similarly highlighted defendant's lack of objection to the summation and failure to request a mistrial or offer a corrective jury charge. The lack of action by both the trial court and defendant, according to the majority, “bespeaks the benign nature of the remarks that later formed the exclusive basis for the grant of a new trial.”

The majority was careful to emphasize its displeasure with plaintiff's suggestion of a \$1 million damages floor and commentary on how the jurors should conduct their deliberations, but declined to characterize those comments as “inflammatory” or “unfairly prejudicial.” Rather, the majority, viewing plaintiff's remarks “in context,” found them to be “brief and fleeting,” stating:

We do not view such commentary as either blatant bullying of the jury or a deliberate attempt to abrogate the court's charging function. Nor do we agree with the trial judge's harsh characterization that counsel's remarks created a “vigilante atmosphere” in the jury room. While counsel's comment to the jury about communicating with the court was clearly inappropriate, we do not discern any of the dire consequences attributed to it by the judge. The reference, just as reasonably, may be construed as a call to the jury to follow the law, consult with *518 the court for clarification if any confusion arises, and avoid basing its decision merely on an arbitrary dislike for damage awards over \$1 million.

The panel also found mitigating conduct in the form of an apology by plaintiff's counsel and the court's final instructions to the jury on the day after the summation, approvingly quoting those instructions as follows:

keep in mind [that] by instructing you on damages [that] does not mean that I am ordering you to find damages. That's something that again you're the **1131 determiners of fact, that's entirely up to you. The amount of damages is entirely up to you.... That's something that is your province to deal with. It's not mine, it's not counsel's province. It's yours. You are the determiners of fact in this case.

Additionally, the panel found curative the court's emphasis in its instructions on the “dignity and sanctity of the jury room, and the wide latitude within which it operates,” as well as “general language to the effect that statements by the attorneys were not evidence, and were to be disregarded if they conflicted with a juror's recollection of the testimony. In light of the seemingly benign nature of the summation remarks and the mitigating instructions issued in response, the panel stated:

We are satisfied that the trial judge's “clear and firm” jury charge cured any potential for prejudice created by plaintiff's counsel's summation remarks. *City of Linden v. Benedict Motel Corp.*, 370 N.J.Super. 372, 398 [851 A.2d 652] (App.Div.), *certif. denied*, 180 N.J. 356 [851 A.2d 650] (2004). The isolated lapses in closing argument alone were not sufficient to constitute a “miscarriage of justice,” as evidenced by a jury verdict supported by the trial proofs.

Finally, after citing the role of the trial judge and its scope of review, the majority concluded:

We find that the jury verdict is supported by the record. We, therefore, are not “clearly and convincingly” persuaded that it would be manifestly unjust to sustain the award because of counsel's claimed lapses. They were neither flagrant, multiple, or continuing. Moreover, the court's jury instructions were sufficient to ameliorate any prejudicial effect arising from counsel's isolated comments in closing argument. After all, “[w]hile a [litigant] is entitled to a fair trial, he is not entitled to a perfect trial.” *State v. Swint*, 328 N.J.Super. 236, 261 [745 A.2d 570] (App.Div.), *certif. denied*, 165 N.J. 492 [758 A.2d 651] (2000) (citing *State v. Feaster*, 156 N.J. 1, 84 [716 A.2d 395] (1998), *cert. denied sub nom. Kenney v. New Jersey*, 532 U.S. 932, 121 S.Ct. 1380, 149 L.Ed.2d 306 (2001)). Accordingly, we conclude the judge abused his discretion in granting defendant's motion for a new trial.

*519 Judge Carchman's partial dissent was “of the view that [the summation] exceeded the boundaries of proper advocacy, warranting a new trial as to damages.” According to the dissent:

During his summation, counsel misquoted the Eighth Amendment of the Constitution of the United States as referring to prisoners of war and stated that “even prisoners of war, people we hate, are not supposed to be tortured. What [decedent] went through was torture.” He did qualify his comments by stating “They didn't intend to put her through that[,]” but then added “[b]ut now they have to pay for *that*.” (Emphasis added.) This case did not involve prisoners of war or torture but was an action for damages resulting from a slip and fall on a rug in an auto dealership resulting in multiple fractures. This was followed by complications in the hospital and, ultimately, death. No one can argue that plaintiff's injuries were not substantial or painful, but counsel's suggestion, linking and equating defendant's conduct to torture as well as invoking some conjured protection under the Bill of Rights, was neither fair commentary on the evidence nor an argument free from the potential for injustice. *Jackowitz v. Lang*, 408 N.J.Super. 495, 505 [975 A.2d 531] (App.Div.2009). **1132 These arguments were designed to inflame the jury and were unwarranted.⁵

Judge Carchman continued with reference to the inappropriate comments relating to what the trial judge called “vigilantism” if a \$1,000,000 verdict was not returned:

Eager to impress the jury with the proper argument that there are no caps on damages, counsel presented the jury with hypothetical examples of conduct by jurors that, according to counsel, necessitated the jury reporting such conduct to the judge. Counsel alluded to a hypothetical juror suggesting that the juror did not believe in damages over a million dollars or talking about a reference to “my case or my uncle has a case,” and then instructed the jury to “ask for the judge. Because what they're doing is ignoring the law.”

As the majority recognizes, the jury room, during deliberations, must be a sanctuary for free and open discussion among jurors without a scenario of juror's overtly policing the conduct and comments of other jurors. There are instances when jurors may say and act inappropriately, injecting inappropriate racial or bias commentary that has no place in deliberations, and those comments should be brought to the judge's attention. But where the issue is the quantum of damages, and the judge properly instructs the jury as to the elements and factors relevant to a jury award, we assume jurors follow the law as instructed. We entrust and leave to the other jurors the obligation to counsel those jurors who might misunderstand or suggest award biases that the judge has instructed otherwise, and the verdict *520 must be rendered within the framework of the judge's instructions. Counsel cannot advise jurors during summation that they are obligated to report to the judge any comments or colloquy they might hear as part of the deliberative process that might be interpreted as limiting damages.

But there is a more troublesome context at play here. Counsel's constant references to the million dollar verdict as a threshold for reporting on a fellow juror violates a basic principle of our jurisprudence regarding damage summations. Embedded in our rules is the clear prohibition against suggesting a verdict. *Botta v. Brunner*, 26 N.J. 82, 99 [138 A.2d 713] (1958). Counsel's comments, in the guise of an admonition to the jury, involved a repeated reference to a million dollars as the threshold verdict. I acknowledge that the proofs “on the board” exceeded that amount, and counsel was at liberty to comment on the proofs presented by his economic experts, yet he was not free to suggest to the jury that a verdict less than a million dollars was

in some way the imposition of a cap on damages or malfeasance on the part of a fellow juror. The argument was carefully conceived and crafted to suggest a minimum award to plaintiff in violation of well-established jurisprudence.

The cumulative impact of these comments was such as to so taint this damage verdict and warrant a new trial as to damages.

IV.

We likewise conclude that a new trial on damages is warranted based on the “cumulative” effect of the summation **1133 notwithstanding the final instructions to the jury. Stated differently, we cannot tolerate the suggestion to jurors that they would be violating the law, and will be reported to the judge, if they reject the notion that plaintiff’s case could be worth more than \$1,000,000. Moreover, the trial judge concluded that a new trial was warranted, and he is entitled to deference on that subject.

While there was no dissent on the reversal of the new trial as to liability, it is before us on leave to appeal. But there is no need to address it at length, *see Caldwell v. Haynes*, 136 N.J. 422, 443, 643 A.2d 564 (1994) (granting new trial on damages without discussion of need for new trial as to liability), because defendant has not demonstrated that the summation concerning damages somehow affected the findings as to liability. *Cf. Ahn v. Kim*, 145 N.J. 423, 434, 678 A.2d 1073 (1996) (explaining that “issues in negligence cases should be retried together unless the issue unaffected by error is entirely distinct and separable from the other issues”); *521 *Conklin v. Hannoch Weisman, P.C.*, 145 N.J. 395, 411, 678 A.2d 1060 (1996) (ordering retrial of both proximate causation and negligence because the issues were not “distinct and separable”). *Accord Ogborne v. Mercer Cemetery Corp.*, 197 N.J. 448, 461, 963 A.2d 828 (2009) (holding that issues of proximate causation and comparative negligence were “intertwined” with issue of duty, thereby requiring retrial on all three issues).

It is axiomatic that a motion for a new trial should be granted only after “having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.” R. 4:49–1(a). A jury verdict is entitled to considerable deference and “should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice.” *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 597–98, 379 A.2d 225 (1977). That is, a motion for a new trial “should be granted only where to do otherwise would result in a miscarriage of justice shocking to the conscience of the court.” *Kulbacki v. Sobchinsky*, 38 N.J. 435, 456, 185 A.2d 835 (1962). In fact, in *Carey v. Lovett*, 132 N.J. 44, 66, 622 A.2d 1279 (1993), we expressly stated that a “trial court should not disturb the amount of a verdict unless it constitutes a manifest injustice....” Thus, a trial judge is “not [to] substitute his [or her] judgment for that of the jury merely because he [or she] would have reached the opposite conclusion....” *Dolson v. Anastasia*, 55 N.J. 2, 6, 258 A.2d 706 (1969).

A “miscarriage of justice” has been described as a “‘pervading sense of “wrongness” needed to justify [an] appellate or trial judge undoing of a jury verdict ... [which] can arise ... from manifest lack of inherently credible evidence to support the finding, obvious overlooking or undervaluation of crucial evidence, [or] a clearly unjust result....’ ” *522 *Lindenmuth v. Holden*, 296 N.J. Super. 42, 48, 685 A.2d 1351 (App.Div.1996) (quoting *Baxter*, *supra*, 74 N.J. at 599, 379 A.2d 225).

The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge—whether there was a miscarriage of justice under the law. *Bender v. Adelson*, 187 N.J. 411, 435, 901 A.2d 907 (2006); *Diakamopoulos v. Monmouth Med. Ctr.*, 312 N.J. Super. 20, 36–37, 711 A.2d 321 (App.Div.1998). However, in deciding that issue, an appellate court must give “due deference” to the trial court’s “feel of the **1134 case.” *Jastram v. Kruse*, 197 N.J. 216, 230, 962 A.2d 503 (2008); *see also* R. 2:10–2; *Carrino v. Novotny*, 78 N.J. 355, 360, 396 A.2d 561 (1979).

In granting the new trial, the judge focused on the portion of plaintiff’s summation which, according to the court, suggested a damages floor of \$1,000,000 and encouraged jurors to report those of its members who disagreed with the ability to return a verdict. Summations must be “fair and courteous, grounded in the evidence, and free from any ‘potential to cause injustice.’ ”

Jackowitz v. Lang, 408 N.J.Super. 495, 505, 975 A.2d 531 (App.Div.2009) (quoting *Geler v. Akawie*, 358 N.J.Super. 437, 463, 818 A.2d 402 (App.Div.), *certif. denied*, 177 N.J. 223, 827 A.2d 290 (2003)). Where they cross the line beyond fair advocacy and comment, and have the ability or “capacity” to improperly influence the jury’s “ultimate decision making,” *Bender*; *supra*, 187 N.J. at 416, 435, 901 A.2d 907, the trial judge must take action. But here he did nothing immediately—at a time when he could have remedied the problem.

Certainly “ ‘counsel is allowed broad latitude in summation....’ ” *Bender*, *supra*, 187 N.J. at 431, 901 A.2d 907 (quoting *Colucci v. Oppenheim*, 326 N.J.Super. 166, 177, 740 A.2d 1101 (App.Div.1999), *certif. denied*, 163 N.J. 395, 749 A.2d 369 (2000)). “Counsel’s arguments are expected to be passionate, ‘for indeed it is the duty of a trial attorney to advocate.’ ” *Jackowitz*, *supra*, 408 N.J.Super. at 504–05, 975 A.2d 531 (quoting *523 *Geler*; *supra*, 358 N.J.Super. at 463, 818 A.2d 402). “There is no harm in seeking to maximize a recovery, even when incidental benefit is thereby achieved.” *Geler*, *supra*, 358 N.J.Super. at 463, 818 A.2d 402. “Moreover, the ‘[f]ailure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made,’ and it ‘also deprives the court of the opportunity to take curative action.’ ” *Jackowitz*, *supra*, 408 N.J.Super. at 505, 975 A.2d 531 (quoting *State v. Timmendequas*, 161 N.J. 515, 576, 737 A.2d 55 (1999), *cert. denied*, 534 U.S. 858, 122 S.Ct. 136, 151 L.Ed.2d 89 (2001)). “Where defense counsel has not objected, we generally will not reverse unless plain error is shown.” *Ibid.* (quoting *R. 2:10–2*).

We have previously discussed the sanctity of the deliberation room and the need for it to be free from extraneous influence so that the jury can fulfill its duty as fact finder. *Williams v. James*, 113 N.J. 619, 632, 552 A.2d 153 (1989); *State v. Corsaro*, 107 N.J. 339, 346, 526 A.2d 1046 (1987) (referring to criminal prosecution). “The key to the proper discharge of this duty by the jury is the deliberative process, which must be insulated from influences that could warp or undermine the jury’s deliberations and its ultimate determination.” *Corsaro*, *supra*, 107 N.J. at 346, 526 A.2d 1046 (citing *State v. Czachor*, 82 N.J. 392, 413 A.2d 593 (1980); *State v. Simon*, 79 N.J. 191, 398 A.2d 861 (1979)). A jury verdict must be “based solely on legal evidence ... and entirely free from the taint of extraneous considerations and influences.” *Panko v. Flintkote*, 7 N.J. 55, 61, 80 A.2d 302 (1951). Additionally, “the [deliberative] process [] is the vehicle for the collective mutual decision-making that reflects community views.” *Williams*, *supra*, 113 N.J. at 632, 552 A.2d 153 (citing *Corsaro*, *supra*, 107 N.J. at 349, 526 A.2d 1046). “It is therefore necessary to structure a process and create an environment so that the mutual or collective nature of the jury’s deliberations is preserved and remains intact until a final determination is reached.” *Corsaro*, *supra*, 107 N.J. at 349, 526 A.2d 1046.

****1135 *524** Counsel’s instruction to the jury that they should knock on the door and inform the judge hindered this “collective mutual decision-making.” A juror who dissented from, or even questioned, the quantum of damages that was being discussed may have been discouraged from voicing his or her thoughts out of fear of being reported to the judge. Although it is true that some biases should be reported to the judge, such as racial bias, *see generally State v. Scherzer*, 301 N.J.Super. 363, 489–90, 495–96, 694 A.2d 196 (App.Div.1997) (differentiating racial and religious biases from other types of influences), disagreement as to the quantum of damages does not require such action. That appeal to vigilantism, as perceived by the judge, crossed the line and introduced an “extraneous consideration[] [or] influence []” which requires a new trial as to damages. *Panko*, *supra*, 7 N.J. at 61, 80 A.2d 302. *See also Bender*; *supra*, 187 N.J. at 431, 901 A.2d 907; *Jackowitz*, *supra*, 408 N.J.Super. at 504–05, 508–09, 975 A.2d 531. Further, given the standard of review and “due deference” owed to the trial judge’s “feel of the case,” *see Jastram*, *supra*, 197 N.J. at 230, 962 A.2d 503, we agree that a new trial on damages is warranted. In the absence of an articulated basis by the trial judge for going beyond that, we agree with the entire Appellate Division panel that nothing further need be retried.

A new trial is the appropriate remedy here, in the absence of an immediate curative instruction, because of the “miscarriage of justice.” *Johnson v. Scaccetti*, 192 N.J. 256, 280, 927 A.2d 1269 (2007). *See also Bender*, *supra*, 187 N.J. at 433, 435, 901 A.2d 907; *Geler*, *supra*, 358 N.J.Super. at 471, 818 A.2d 402 (“[T]he absence of curative instructions heightened the already damaging effect of counsel’s ill-considered words and increased the likelihood that the jury believed counsel’s remarks to have been proper.”); *Krohn v. NJ Full Ins. Underwriters Assoc.*, 316 N.J.Super. 477, 484–85, 720 A.2d 640 (App.Div.1998), *certif. denied*, 158 N.J. 74, 726 A.2d 937 (1999); *Diakamopoulos*, *supra*, 312 N.J.Super. at 35–37, 711 A.2d 321.

*525 V.

As leave to appeal was granted by the Appellate Division, other evidentiary issues were raised before that court. While we also granted leave to appeal, it was to consider whether a new trial as to damages was warranted and, if so, whether a new trial as to liability was also necessary. The evidentiary issues were not addressed by the Appellate Division which obviously found no basis for upsetting the verdict on those grounds. We also find no basis for addressing them prior to the new trial.

We therefore reverse the Appellate Division in part and remand for a new trial as to damages only.

Justice RIVERA–SOTO, concurring in part and dissenting in part.

The majority “conclude[s] that a new trial on damages is warranted based on the ‘cumulative’ effect of the summation notwithstanding the final instructions to the jury.” *Ante* at 520, 20 A.3d at 1132–33. It limits the relief to be afforded defendant “because defendant has not demonstrated that the summation concerning damages somehow affected the findings as to liability.” *Ibid*. Because that conclusion is based in equal parts on an incorrect recital of the trial court's determination and an inappropriately expansive view of the scope of appellate review applicable here, I must dissent from so much of the majority's opinion that grants a new trial limited to damages only. In my view, the better and more correct result is the **1136 one reached by the trial court: the grant of a new trial on both liability and damages.

After the unnecessary flights of rhetoric contained in plaintiff's summation, the trial court's palpably adverse reaction thereto, the later self-admitted failure of the trial court to address those concerns, and the return of the jury's verdict in plaintiff's favor, all as described in the majority's opinion, *ante* at 513–15, 20 A.3d at 1127–29, defendant moved for a new trial. The trial judge, after explaining he was granting defendant's motion for a new trial based on two independent but intertwined reasons—the comments *526 of plaintiff's counsel in summation, and the trial court's failure to address them through a contemporaneous limiting instruction—engaged in the following exchange with plaintiff's counsel:

[PLAINTIFF'S COUNSEL]: You're ordering a new trial on all issues?

THE COURT: Yes.

[PLAINTIFF'S COUNSEL]: And the reason for the new trial on the liability issue would be?

THE COURT: I think *the entire process was tainted*. And obviously *I can't go to that jury now and find out how they were influenced*, that's something we don't do, so *I have to assume that all of it was tainted*. *I don't want to. I would love to be able to cut this down, but I don't think I can....*

[(emphasis supplied).]

In making that determination, the trial judge, as he is duty-bound to do, clearly was relying on “the intangible ‘feel of the case’ which he has gained by presiding over the trial.” *Dolson v. Anastasia*, 55 N.J. 2, 6, 258 A.2d 706 (1969); *see also Pellicer ex rel. Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22, 58, 974 A.2d 1070 (2009) (explaining that “[o]rdinarily we rely on trial courts and their firsthand ‘feel of the case’ as it bears on an analysis of whether the jury's verdict was motivated by improper influences. *Baxter [v. Fairmont Food Co.]*, 74 N.J. [588,]600[, 379 A.2d 225 (1977)] (acknowledging trial court's ‘feel of the case’ is advantageous as compared with appellate court's dependence on cold record); *see Fritsche v. Westinghouse Elec. Corp.*, 55 N.J. 322, 330 [261 A.2d 657] (1970) (‘[a]n appellate court ... lacks the opportunity to observe and hear the witnesses who appear before the trial judge and jury’”).

In *Dolson*, *supra*, this Court explained that the relevant question on a motion for a new trial is “ ‘whether the result strikes the judicial mind as a miscarriage of justice,’ ” 55 N.J. at 6, 258 A.2d 706 (quoting *Kulbacki v. Sobchinsky*, 38 N.J. 435, 459, 185

A.2d 835 (1962) (Weintraub, C.J., and Jacobs and Francis, J.J., dissenting)), and that “[t]he standard governing an appellate tribunal’s review of a trial court’s action on a new trial motion is essentially the same as that controlling the trial judge.” *Id.* at 7, 258 A.2d 706 (citing *Hager v. Weber*, 7 N.J. 201, 212, 81 A.2d 155 (1951)); *527 see also *City of Long Branch v. Liu*, 203 N.J. 464, 492, 4 A.3d 542 (2010) (noting that “[a]n appellate court’s review of a trial court’s ruling on ... a motion for a new trial is similarly limited. See *Jastram v. Kruse*, 197 N.J. 216, 230, 962 A.2d 503 (2008) (noting that appellate ‘inquiry requires employing a standard of review substantially similar to that used at the trial level, except that the appellate court must afford due deference to the trial court’s feel of the case’ (citation and internal quotation marks omitted))”).

In light of those authorities, then, the majority’s opinion begs the question of how one can reach the conclusion it does—granting a new trial on damages only—without referencing and of necessity deferring to the trial judge’s unequivocal “feel of the case,” one which compelled him, **1137 albeit most reluctantly, to grant a new trial on both liability and damages. In the context of this appeal, there is no reason to second-guess the trial judge, particularly one who no doubt was haunted by his failure to deal contemporaneously with what everyone agrees are inappropriate summation comments. Therefore, respecting the deference appellate courts owe to a trial judge in these circumstances, I would reverse the judgment of the Appellate Division in its entirety and reinstate the order of the trial court that granted a new trial on both liability and damages. To the extent, then, that the majority reverses the judgment of the Appellate Division only insofar as to granting a new damages trial but not as to liability, I respectfully dissent.

For affirmance in part/reversal in part/remandment—Chief Justice RABNER, Justices LONG, LaVECCHIA, ALBIN, HOENS and Judge STERN (temporarily assigned)—6.

For concurrence in part/dissent in part—Justice RIVERA—SOTO—1.

All Citations

206 N.J. 506, 20 A.3d 1123

Footnotes

- 1 Risko and his wife’s estate will hereinafter be referred to jointly as “plaintiff.”
- 2 Because the matter came to the Appellate Division on an interlocutory basis by leave granted, a motion for leave to appeal to this Court was properly filed before final judgment was entered. *R. 2:2–5(a)*. Here the Appellate Division judgment may have permitted an appeal to us because there was no need for further proceedings in the trial court. See *R. 2:2–5(a)*. See also *Shah v. Shah*, 184 N.J. 125, 132–33, 875 A.2d 931 (2005); *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 514, 263 A.2d 129 (1970). Defendant has the right to appeal based on the dissent following the entry of final judgment and review of the final judgment by the Appellate Division. *State v. Marrero*, 148 N.J. 469, 479–80, 691 A.2d 293 (1997). However, even when an appeal as of right may be taken because of a dissent in the Appellate Division, it may address only the portion of the judgment addressed in the dissent, see *Khan v. Singh*, 200 N.J. 82, 90–91, 975 A.2d 389 (2009); *State v. Allegro*, 193 N.J. 352, 371, n. 9, 939 A.2d 754 (2008). Here the dissent related only to the damage award.
- 3 The jury was advised that “the defense has stipulated that the death is causally related to the fracture[s].”
- 4 Dr. Wolf defined “sleep time [and] on-call services” as the time decedent “was there and available to [plaintiff] for any specific needs that may have arisen.”
- 5 The dissent did not see a need for a new trial as to liability stating, “For reasons that are not clearly articulated in the trial record, the trial judge ordered a new trial as to liability as well as damages. I concur in the majority’s conclusion that a new trial as to liability was not warranted.”

236 Mich.App. 185
Court of Appeals of Michigan.

Elaine ELLSWORTH, Plaintiff–Appellant,
v.

HOTEL CORPORATION OF AMERICA, d/b/a Livonia–West Holiday Inn, Defendant–Appellee.

Docket No. 203893.

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Submitted Nov. 18, 1998, at Lansing.

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Decided June 11, 1999, at 9:15 a.m.

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Released for Publication Oct. 1, 1999.

Synopsis

Visitor brought negligence action against hotel operator to recover for injuries sustained when she tripped on sidewalk on hotel premises. Jury returned verdict of no cause of action, and the Wayne Circuit Court, Susan Bieke Neilson, J., entered judgment for operator. Visitor appealed. The Court of Appeals, Saad, P.J., held that: (1) sidewalk renovation was not a subsequent remedial repair that visitor could use to impeach engineer's denial that repair work had been done at accident site; (2) defense counsel's comments about defunct "two-inch rule" were not prejudicial; (3) operator's failure to produce its management service contract with hotel owner did not support an inference that contract was adverse evidence against operator; and (4) verdict was not against great weight of the evidence.

Affirmed.

Attorneys and Law Firms

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Before: SAAD, P.J., and MICHAEL J. KELLY and BANDSTRA, JJ.

Opinion

SAAD, P.J.

Plaintiff filed this premise liability action against defendant, alleging that she was injured as a result of defendant's negligence. A jury returned a verdict of no cause of action, and the trial court dismissed plaintiff's case. Plaintiff now appeals, and we affirm.

FACTS AND PROCEEDINGS

In October 1994, plaintiff went to the Livonia–West Holiday Inn to attend a miniature show. She says that she fell and injured her hand after she tripped on an uneven portion of sidewalk on the hotel premises. Plaintiff sued on a negligence theory. The case proceeded to trial, and a jury returned a verdict of no cause of action.

I

Plaintiff's first issue involves the impeachment exception to the bar in MRE 407 on evidence of subsequent remedial measures. Plaintiff claims that the trial court should have allowed her to impeach defendant's witness with evidence that defendant renovated the hotel's sidewalks after plaintiff's fall. We disagree, because the sidewalk renovation was not actually a subsequent remedial measure and would have been irrelevant as impeachment.

Because Kevin McAndrew, the chief engineer of the Livonia–West Holiday Inn, was unavailable to testify at *188 trial, plaintiff read excerpts from his deposition into the record. After plaintiff completed the reading, defendant read into the record another part of the deposition in which McAndrew was asked whether “the area that you were discussing in particular [i.e., where plaintiff fell] has not had any repair work done either before or after the time we're talking about, October of '94.” McAndrew responded “No.” Plaintiff later tried to introduce as impeachment the deposition **132 testimony of Steve Carter, the hotel manager, who testified that there had been work on the sidewalks in 1995 and 1996. The trial court excluded this evidence because plaintiff failed to object to McAndrew's testimony. Plaintiff claims this decision was in error.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Szymanski v. Brown*, 221 Mich.App. 423, 435, 562 N.W.2d 212 (1997). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *Id.*, at 431, 562 N.W.2d 212; *Gore v. Rains & Block*, 189 Mich.App. 729, 737, 473 N.W.2d 813 (1991). Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of the party is affected. MCR 2.613(A); MRE 103(a); *Chmielewski v. Xermac, Inc.*, 216 Mich.App. 707, 710–711, 550 N.W.2d 797 (1996), *aff'd*, 457 Mich. 593, 580 N.W.2d 817 (1998).

“Relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Generally, all relevant evidence is admissible, *189 and irrelevant evidence is not admissible. MRE 402; *Szymanski, supra*, at 435, 562 N.W.2d 212. Furthermore, MRE 407 provides:

When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The purpose of MRE 407 is to encourage, or at least not to discourage, people from taking steps in furtherance of added safety. *Palmiter v. Monroe Co. Bd. of Road Comm'rs*, 149 Mich.App. 678, 685–686, 387 N.W.2d 388 (1986).

Plaintiff argues that Carter's testimony should have been permitted under the impeachment exception of MRE 407. It is well established that evidence of a subsequent remedial measure is admissible as impeachment when the opposing party has denied making a repair. *Id.*, at 690, 387 N.W.2d 388; *Cody v. Marcel Electric Co.*, 71 Mich.App. 714, 722–723, 248 N.W.2d 663 (1976); *Little v. Borman Food Stores, Inc.*, 33 Mich.App. 609, 611–614, 190 N.W.2d 269 (1971). The contradictory evidence may be either direct or circumstantial. *Palmiter, supra*, at 690, 387 N.W.2d 388.

Here, the trial court concluded that plaintiff was required to object to McAndrew's testimony as a prerequisite to introduce evidence to impeach that testimony. We have not found any authority to support this ruling, nor do we see any ground plaintiff would have had for objecting. The rule prohibits introduction *190 of evidence that a repair was made after an accident; it

does not bar evidence that no repair was made. Accordingly, we do not believe that objection to this portion of the deposition was a prerequisite to the introduction of impeachment evidence.

However, we will not reverse the decision of a trial court if it reached the right result, albeit for the wrong reason. *Yerkovich v. AAA*, 231 Mich.App. 54, 68, 585 N.W.2d 318 (1998). Here, plaintiff's evidence of postaccident repairs to the sidewalks should have been excluded because the renovation does not qualify as a subsequent remedial measure. Consequently, it was irrelevant as impeachment of McAndrew's testimony that the hotel made no postaccident repairs. As part of an extensive renovation project, defendant replaced three thousand feet of sidewalk, **133 which necessarily included the area where plaintiff fell. At the earliest, the work began in May 1995, seven months after plaintiff's accident, and continued into 1996. This was not a "subsequent remedial repair" as described in MRE 407. The construction was too remote in time from plaintiff's accident and covered too large a territory to be considered a "repair" to the accident site. Any "repair" to the sidewalk where plaintiff fell was simply incidental to this construction project. There was no evidence to suggest that this large-scale construction project was prompted by or otherwise related to plaintiff's fall. Accordingly, this is not the sort of "repair" that may be used to impeach testimony that no repair was made after the plaintiff's accident.¹ Because this major renovation cannot realistically *191 be considered a repair to the sidewalk where plaintiff was injured, Carter's testimony was not actually in conflict with McAndrew's testimony. Consequently, Carter's testimony did not qualify as relevant impeachment, either direct or circumstantial, and was properly excluded.

II

Plaintiff contends that the cumulative effect of alleged trial errors denied her a fair trial. We disagree.

First, plaintiff argues that her right to a fair trial was violated by the trial court's exclusion of the evidence of repairs to the sidewalk after plaintiff's fall. However, as already discussed, the evidence was properly excluded.

Second, plaintiff asserts that she was prejudiced by defense counsel's reference to the "two-inch rule" during his closing argument. Defense counsel commented that "in the old days a generation ago," the court would find negligence if the sidewalk elevation was two inches or greater and not find negligence if the elevation was less. He explained that the rule was thrown out in favor of allowing jurors to decide the question of negligence based on the particular circumstances.

When reviewing claims of improper conduct by a party's lawyer, this Court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal. *Hunt v. Freeman*, 217 Mich.App. 92, 95, 550 N.W.2d 817 (1996). A lawyer's comments will usually not be cause for reversal *192 unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. *Id.* This issue has not been preserved for review because plaintiff did not object to defense counsel's reference to the "two-inch rule" during his closing argument. *King v. Taylor Chrysler-Plymouth, Inc.*, 184 Mich.App. 204, 217, 457 N.W.2d 42 (1990). However, even if not preserved, this Court will review the issue to determine whether defense counsel's comments " 'may have caused the result or played too large a part and may have denied the party a fair trial.' " *Id.*, quoting *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 103, 330 N.W.2d 638 (1982).

The "two-inch rule" refers to the now-defunct doctrine that a municipality cannot be held liable for negligence because of a discontinuity of two inches or less in a sidewalk. *Rule v. Bay City*, 387 Mich. 281, 283, 195 N.W.2d 849 (1972). Our Supreme Court abolished the "two-inch rule" in 1972. *Id.* In any event, the two-inch rule would have been irrelevant here because defendant is not a municipality. Nonetheless, defense counsel's comments regarding the rule accurately stated the current law. Furthermore, defense counsel **134 explained to the jury the reasons for the abolition of the rule, noting that "two inches in one case might have meant nothing whereas a half inch in another case would have been very significant." Defense counsel went on to explain, correctly, that whether the uneven sidewalk was unreasonably dangerous was a question of fact for the jury to decide. *193 Under these circumstances, defense counsel's comments were not improper.

III

Plaintiff asserts that the trial court erred in refusing to give SJI 6.01 with respect to defendant's failure to produce its management service contract with the owner of the hotel. We review claims of instructional error for an abuse of discretion. *Joerger v. Gordon Food Service, Inc.*, 224 Mich.App. 167, 173, 568 N.W.2d 365 (1997).

SJI2d 6.01 states that where a party fails to produce evidence under its control, and gives no reasonable excuse for the failure to produce the evidence, a jury may infer that the evidence would have been adverse to that party. SJI2d 6.01 should be given only where (1) the evidence was under the control of the party who failed to produce it and could have been produced by that party, (2) no reasonable excuse for the failure to produce the evidence has been given, and (3) the evidence would have been material, not merely cumulative, and not equally available to the opposite party. See Note on Use of SJI2d 6.01.

Here, the management contract was not material to a determination of defendant's negligence. Because plaintiff was visiting the hotel in response to a public invitation to a show, she was a "public invitee" and entitled to the duty of care an invitor owes to invitees. *Stitt v. Holland Abundant Life Fellowship*, 229 Mich.App. 504, 506–509, 582 N.W.2d 849 (1998). As an invitor, defendant owed a duty to plaintiff to maintain the premises in a reasonably safe condition and to exercise ordinary care to keep the premises safe. *Anderson v. Wiegand*, 223 Mich.App. 549, 553, 567 N.W.2d 452 (1997); *Schuster v. Sallay*, 181 Mich.App. 558, 565, 450 N.W.2d 81 (1989). *194 Any specific duties defendant owed to the hotel owner pursuant to the management contract would not be material to determining defendant's liability to plaintiff for negligence. Therefore, the trial court did not abuse its discretion in refusing to read SJI2d 6.01 to the jury.

IV

Finally, plaintiff argues that the trial court should have granted her motion for a new trial because the jury's verdict of no cause of action was against the great weight of the evidence. We disagree.

When a party claims that a jury's verdict was against the great weight of the evidence, we may overturn that verdict "only when it was manifestly against the clear weight of the evidence." *Watkins v. Manchester*, 220 Mich.App. 337, 340, 559 N.W.2d 81 (1996). This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. *Id.* The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *King, supra*, at 210, 457 N.W.2d 42. This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. *Heshelman v. Lombardi*, 183 Mich.App. 72, 76, 454 N.W.2d 603 (1990).

To prove negligence, plaintiff was required to prove (1) that defendant owed a duty to plaintiff, (2) that defendant breached that duty, (3) causation, and (4) damages. *Schultz v. Consumers Power Co.*, 443 Mich. 445, 449, 506 N.W.2d 175 (1993). *195 Generally, a business invitor owes **135 a duty to its customers to maintain its premises in a reasonably safe condition and to exercise ordinary care and prudence to keep the premises reasonably safe. *Anderson, supra*, at 553, 567 N.W.2d 452; *Schuster, supra*, at 565, 450 N.W.2d 81. This duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee can be expected to discover them himself. *Williams v. Cunningham Drug Stores, Inc.*, 429 Mich. 495, 500, 418 N.W.2d 381 (1988).

Plaintiff testified that she fell because her toe hit a raised portion of the sidewalk. Plaintiff presented the testimony of Duane Van Camp and Nancy Van Camp that there was a 1– to 1 1/2–inch height difference between two concrete sections of the sidewalk at the site of plaintiff's fall. In addition, the jury viewed photographs of the sidewalk admitted into evidence by plaintiff. Defendant did not dispute that the sidewalk was uneven and presented no evidence that the height variation was not 1 to 1 1/2

inches. However, defendant presented McAndrew's testimony that he inspected the sidewalks on a weekly basis and had not noticed a dangerous condition at the site of plaintiff's fall at any time before her fall. Furthermore, Carter testified that he did not believe the uneven sidewalk was a hazard and noted that there was no indication in defendant's records that anyone else had ever fallen on the sidewalk.

Whether the uneven sidewalk presented an unreasonable danger was a factual question for the jury to decide. The jury's verdict was supported by competent testimony of defendant's employees that they knew of the height variation and did not believe it to *196 be a hazard and that there were no reports of anyone else ever having fallen on the sidewalk. Furthermore, the jury viewed photographs of the sidewalk. On the basis of this evidence, we cannot conclude that the trial court abused its discretion in denying plaintiff's motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence.

The jury's verdict is affirmed.

All Citations

236 Mich.App. 185, 600 N.W.2d 129

Footnotes

- 1 For example, in *Little, supra*, at 613–614, 190 N.W.2d 269, testimony that a witness saw rock salt on an entranceway two hours after the plaintiff had fallen on the entranceway was permitted to impeach defense witness testimony that no salt had been applied to the entranceway where the plaintiff had fallen.

OUTSIDE INFLUENCE ON JURORS

N.Y. Pattern Jury Instr.--Civil 1:12

New York Pattern Jury Instructions--Civil December 2019 Update
Committee on Pattern Jury Instructions Association of Supreme Court Justices

Division 1. General Charges

A. Charge Prior to Trial

PJI 1:12 Discussion by Others

Please do not permit any person who is not a juror to discuss this case in your presence, and if anyone does so despite your telling the person not to, report that to me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact or any other fact you feel necessary to bring to my attention.

Comment

Such conduct by a juror may be punished as a civil contempt, Judiciary Law § 753(6); see Annot: 41 ALR2d 288; 64 ALR2d 158.

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West's Montana Code Annotated
Title 25. Civil Procedure
Chapter 7. Trials
Part 4. Conduct of Jury

MCA 25-7-403

25-7-403. Conduct of jury after case submitted to it

Currentness

When the case is finally submitted to the jury, it may decide in court or retire for deliberation. If the jurors retire, they must be kept together in some convenient place, under charge of an officer, until at least two-thirds of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having the jurors under the officer's charge may not allow any communication to be made to the jurors and the officer may not make any communication, except to ask the jurors if they or two-thirds of them are agreed upon a verdict. The officer may not, before the jurors' verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

Credits

Enacted Bannack Statutes, p. 71, § 138; reenacted by Laws 1867, p. 165, § 166; reenacted Codified Statutes 1871, p. 68, § 206; reenacted by Laws 1877, p. 103, § 256; reenacted 1st Div. Revised Statutes 1879, § 256; reenacted 1st Div. Compiled Statutes 1887, § 265; amended Code of Civil Procedure 1895, § 1084; reenacted Revised Code 1907, § 6750; reenacted Revised Code of Montana 1921, § 9353; California Code of Civil Procedure § 613; reenacted Revised Code of Montana 1935, § 9353; Revised Code of Montana 1947, 93-5105. Amended by Laws 2009, ch. 56, § 409, eff. Oct. 1, 2009.

Notes of Decisions (12)

MCA 25-7-403, MT ST 25-7-403

Current through the 2019 Session. Statutory changes are subject to classification and revision by the Code Commissioner.

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Model Utah Jury Instructions, Second Edition (MUJI 2d)

CV101 General admonitions.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, although it may seem natural to want to investigate a case, you must not try to get information from any source other than what you see and hear in this courtroom. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the Internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, iPhones, Smartphones, or any social media or electronic device. You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, although it may seem natural, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. You may not communicate about the case by any means, including by emails, text messages, tweets, blogs, chat rooms, comments, other postings, or any social media.

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me. These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References

CACI 100

MUJI 1st Instruction

1.1; 2.4.

Committee Notes

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., *Mistrial by iPhone: Juries' Web Research Upends Trials*, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:

9/2011, 3/2020

M Civ JI 2.04 Jury Must Only Consider Evidence; What Evidence Is / Prohibited Actions by Jurors

(1) Your determination of the facts in this case must be based only upon the evidence admitted during the trial. Evidence consists of the sworn testimony of the witnesses. It also includes exhibits, which are documents or other things introduced into evidence.

*(It may also include some things which I specifically tell you to consider as evidence.)

(2) There are some things presented in the trial that are not evidence, and I will now explain what is not evidence:

(a) The lawyers' statements, commentaries, and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge. However, an admission of a fact by a lawyer is binding on [his / her] client.

(b) Questions by the lawyers, you or me to the witnesses are not evidence. You should consider these questions only as they give meaning to the witnesses' answers.

(c) My comments, rulings, [summary of the evidence,] and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

(3) In addition, you are not to consider anything about the case from outside of the courtroom as it is not evidence admitted during the trial. Under the law, the evidence you consider to decide the case must meet certain standards. For example, witnesses must swear to tell the truth, and the lawyers must be able to cross-examine them. Because information obtained outside of the courtroom does not have to meet these standards, it could give you incorrect or misleading information that might unfairly favor one side, or you may begin to improperly form an opinion on information that has not been admitted. This would compromise the parties' right to have a verdict rendered only by the jurors and based only on the evidence you hear and see in the courtroom. So, to be fair to both sides, you must follow these instructions. I will now describe some of the things you may not consider from outside of the courtroom:

(a) Newspaper, television, radio and other news reports, emails, blogs and social media posts and commentary about this case are not evidence. Until I discharge you as jurors, do not search for, read, listen to, or watch any such information about this case from any source, in any form whatsoever.

(b) Opinions of people outside of the trial are not evidence. You are not to discuss or share information, or answer questions, about this case at all in any manner with anyone—this includes family, friends or even strangers—until you have been discharged as a juror. Don't allow anyone to say anything to you or say anything about this case in your presence. If anyone does, advise them that you are on the jury hearing the case, ask them to stop, and let me know immediately.

(c) Research, investigations and experiments not admitted in the courtroom are not evidence. You must not do any investigations on your own or conduct any research or experiments of any kind. You may not research or investigate through the Internet or otherwise any evidence, testimony, or information related to this case, including about a party, a witness, an attorney, a court officer, or any topics raised in the case.

(d) Except as otherwise admitted in trial, the scene is not evidence. You must not visit the scene of the occurrence that is the subject of this trial. If it should become necessary that you view or visit the scene, you will be taken as a group. You must not consider as evidence any personal knowledge you have of the scene.

(4) To avoid even the appearance of unfairness or improper conduct on your part, you must follow the following rules of conduct:

(a) While you are in the courtroom and while you are deliberating, you are prohibited altogether from using a computer, cellular telephone or any other electronic device capable of making communications. You may use these devices during recesses so long as your use does not otherwise violate my instructions.

(b) Until I have discharged you as a juror, you must not talk to any party, lawyer, or witness even if your conversation has nothing to do with this case. This is to avoid even the appearance of impropriety.

(5) If you discover that any juror has violated any of my instructions about prohibited conduct, you must report it to me.

(6) After you are discharged as a juror, you may talk to anyone you wish about the case. Until that time, you must control your natural desire to discuss the case outside of what I've said is permitted.

Note on Use

*Use the sentence in parentheses if it is applicable.

If a fact is admitted by a lawyer, this shall be explained to the jury as binding on his or her client to the extent of the admission, regardless of evidence to the contrary.

If a specific admission, such as negligence or contributory negligence, is made, then the court should explain that particular admission to the jury when giving the instructions on that subject.

Comment

Occasionally lawyers argue on matters that are within their personal knowledge but are not of record, or in the heat of forensic attack will make statements not based on the evidence. Ordinarily this is objected to and a request is made to instruct the jury to disregard the statement, but it is impossible or impractical to object to every such statement. It is therefore proper to inform the jury that arguments and statements of counsel not based on the evidence should be disregarded. *Dalm v Bryant Paper Co*, 157 Mich 550; 122 NW 257 (1909).

For admissions on the pleadings, see MCR 2.111(E); for admissions by a lawyer in the course of trial, see *Ortega v Lenderink*, 382 Mich 218; 169 NW2d 470 (1969).

Subsection (2)(c) is so worded to inform the jury that comments the judge might make on the evidence are not binding on them. *Cook v Vineyard*, 291 Mich 375; 289 NW 181 (1939).

Since the remarks and rulings of the trial judge may erroneously be interpreted by the jury as comments on the evidence, this instruction is proper. *Mawich v Elsey*, 47 Mich 10; 10 NW 57 (1881).

The bracketed language reflects the amendment to MCR 2.513(M) effective September 1, 2011. This amendment permits the court to sum up the evidence under certain conditions. Any summary of the evidence by the court should be immediately preceded by M Civ JI 3.17.

History

Amended January 1993, September 2007, January 2014.

MISCELLANEOUS ARTICLES

New York Law Journal

Analysis

A Look Ahead at Personal Injury Litigation in the Wake of the Pandemic

As the pandemic continues, there will no doubt be increasing pressure to conduct various proceedings, formally (such as court conferences) or informally (such as meetings with clients and experts).

By Andrew S. Kaufman | April 15, 2020 at 11:00 AM

As a result of COVID-19, there have been dramatic changes to our civil litigation system. While many courthouses have closed completely or to a great extent, efforts have been made to conduct remote or virtual depositions as well as court conferences in some venues. Recognizing these obstacles, the Gov. Andrew Cuomo issued Executive Order No. 202.8, suspending statutes of limitations, and Chief Administrative Judge Lawrence Marks issued administrative order AO/78/20, suspending the filing of papers in all but the most essential matters. Indeed, a cottage industry offering virtual depositions and conferences is in the process of developing, and the use of virtual technology for meetings via Zoom and Skype is becoming more commonplace. As the pandemic continues, there will no doubt be increasing pressure to conduct various proceedings, formally (such as court conferences) or informally (such as meetings with clients and experts). With respect to personal injury litigation and particularly in the medical malpractice arena, a “double whammy” of sorts has occurred, as it is more difficult not only to conduct depositions, but to gain access to medical professionals, particularly in certain specialties such as internal medicine, emergency medicine and infectious diseases.

We can foresee the plaintiff’s bar pressing to conduct discovery and depositions in an effort to continue to pursue their clients’ litigation rights and to pursue potential recovery, while the defense bar may feel that the inability to meet with their clients in person is an impediment to appropriate preparation. In New York, where there are no depositions of experts and current technology is rarely utilized in depositions, preparing for and conducting depositions by video may present a novel and uncomfortable proposition. We have already seen objections to video depositions of defendants on the ground that they may deprive the defendant of the ability to have an attorney at his or her side during the proceeding. It has been argued that there is a potential for abuse during video depositions (such as counseling the witness during the deposition) and that video depositions would unfairly limit an attorney’s ability to have a private discussion with a witness (although the technology would likely permit that). In general, the pandemic has resulted in a fast-forward of sorts in many areas of society that may have already been slowly heading in a virtual direction, from fields such as banking and investment to more pedestrian areas such as grocery and other shopping and leisure communications. Indeed, the segments of society that had already started to serve their audiences virtually are the ones that have best been able to weather the pandemic, and companies like Amazon and Fresh Direct have actually prospered as a result. Similarly, in the legal arena, courts may recognize that in-person conferencing is not always essential and move toward virtual conferencing, a development that

likely would have met with significant resistance and taken years to become accepted had it not been for the pandemic.

In New York, where litigation has by and large been suspended, the issue of a party refusing to participate in a particular discovery proceeding has not yet come to a head. Currently, there is no obligation to participate in a video deposition under CPLR 3113. One can envision that landscape changing when discovery deadlines are placed back into effect or before that point in time as the prejudice resulting from delays becomes more profound.

The area in which the right to certain procedural safeguards in the post-pandemic society may face the greatest tension is in the right and ability to conduct trial by jury. The right to trial by jury in New York civil litigation derives in part from CPLR 4104, titled “Number of Jurors,” which states: “A jury shall be composed of six persons.” While there is no requirement that jury trials be conducted in person as opposed to virtually, it would seem that much of the essence of what a jury trial is would be lost without the jurors’ physical presence in the courtroom. The ability of a jury to evaluate credibility, the impact of demonstrative evidence and the ability of jurors to interact with each other would be lost or impaired in a virtual setting. Once the pandemic abates to some extent, there may nonetheless be jurors who need or want to comply with social distancing protocols. There may be particular groups with age or health concerns or both, who prefer or insist that they not be present in a courthouse at all, particularly if the immunity conferred by having the virus turns out to be short lived. These individual concerns may conflict with the societal concern about the sanctity of the jury trial system.

There are several possible options that may present themselves, each with its own set of disadvantages. One possibility would be to conduct a jury trial remotely or virtually. Theoretically, one might argue that procedural safeguards are preserved by such a process, although one could envision objections to a virtual jury trial on a number of logistical and legal bases. Certainly on a practical level it would be difficult for a court to ensure that jurors are giving their full and undivided attention to the proceedings. There is case law to the effect that the lack of attention given to a proceeding by a juror may vitiate a verdict. *See People v. Herring*, 19 N.Y.3d 1094 (2012); *People v. Franqui*, 123 A.D.3d 512 (1st Dept. 2014). Another possible approach would be to reduce the requirement for participation as it applies to jurors over a certain age, although exclusion of a segment of the population older than 50 or 60 years old would seem to be antithetical to the notion that a jury should be representative of a cross-section of the community, not to mention that sections of the jury pool would be deprived of their right to participate in the process. *See, e.g., Thiel v. Southern Pac. Co.*, 328 U.S. 217 at 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”). Perhaps for jurors over a certain age or those with health concerns there could be a waiver of in-person presence if the juror preferred that, but the interaction of jurors who were not participating in person might be ameliorated. A third approach might involve reducing the number of jurors to 5 or 4. As it stands, a court may allow a five-person jury on consent of all parties to a litigation. (“[W]here the parties to a civil case have not agreed to a trial by fewer than six jurors, a valid verdict requires that all six jurors participate in the underlying deliberations.” *Sharrow v. Dick Corp.*, 86 N.Y.2d 54 at 59-60 (1995)). Some states require only the vote of 4 as opposed to 5 or 6 jurors for a verdict, implying that a smaller number of jurors than 6 would suffice and there is no magic to New York’s requirement of 5 out of 6. *See Montana Code* §25-7-403; *Nevada Revised Statutes* 16.030(4); *Utah Rules of Civil Procedure* Rule 48. One more

aggressive approach would be to grant a trial preference or some type of expedited resolution mechanism in exchange for a plaintiff's agreement to waive certain procedural rights, such as agreeing to proceed with a fewer number of jurors. Such an approach would no doubt result in a challenge by the defense on the ground that the right to a jury trial has been abrogated or impaired.

The COVID-19 pandemic has disrupted many aspects of our society. Just as novel approaches such as social distancing have been required to combat the medical risk to the population, novel adaptations designed to combat the effect of the virus on our legal system may be suggested in an effort to preserve the basic structural framework for the resolution of civil disputes given the challenges that the pandemic has created. The right to a jury of one's peers is a hallmark of our legal system if not of the American way of life. While it may be tempting to sacrifice various procedural safeguards to expedite justice, we must be cognizant of the threats this poses to the rights of litigants and to what we have come to refer to as "justice".

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Expert Analysis

What Online Jury Trials Could Look Like

Law360 (March 26, 2020, 2:56 PM EDT) - Federal and state courts in all 50 states have postponed jury trials and are struggling to try and maintain court functions and access to the justice system in light of the COVID-19 pandemic and public health concerns. As a result, there is a provision in Congress' new \$2 trillion proposed COVID-19 relief bill that allows for remote proceedings, such as video and teleconferencing in some court hearings.

Also, starting this week, the U.S. District Court for the Southern District of New York will give grand jurors the option of convening and deliberating via a videoconference system. Rule 6 of the Federal Rules of Criminal Procedure does not mandate that the grand jury must all congregate or deliberate in the same room. While there are jury instructions and statutes that speak of "open court," "the jury room," and that "jurors must be present," there are also no rules in the federal or state courts that explicitly state that trial participants must be physically present during a trial proceeding.

Last week, U.S. District Judge Alison Nathan in Manhattan allowed one of the 11 jurors in the trial of an Iranian banker to deliberate by FaceTime because the juror reported feeling unwell. In light of coronavirus concerns, Judge Nathan stated the court was under "extraordinary circumstances" and in "untested waters." After being assured the juror would be secluded in their apartment, Judge Nathan stated to the juror, "You must think of yourself as present in the jury room."

At the same time in California, all jury trials have been stayed for 60 days to comply with the state's COVID-19 lockdown rules. But the statewide order by Chief Justice Tani G. Cantil-Sakauye also stated, "Courts may conduct such a trial at an earlier date, upon a finding of good cause shown or through the use of remote technology, when appropriate."

How could jury trials be conducted online? First, a trial is fundamentally an oral advocacy forum where evidence is communicated through verbal testimony and shown documentary and demonstrative evidence. Legal instruction is also given verbally. As long as all jurors are present, can hear and see witnesses and evidence, listen to instructions, and all deliberate, there is nothing operationally in a trial that would not lend itself to an online function. So, what would a hypothetical model for online jury trials look like?

1. First, jurisdictions would contract with a videoconferencing service like Zoom, Adobe Connect, Google Hangouts Meet, GoToMeeting or Webex as their technology platform. These platforms would handle all pretrial conferences and motion practice. Judges, courtroom staff, court administrators, attorneys and witnesses would be given tutorials to view to help them use the technology more seamlessly and to help with camera placement, sound levels and lighting to make their presentations more uniform.

2. In pretrial conferences, the judge and the parties would establish the trial schedule and the basic rules for using the videoconferencing technology. As jurors would be sitting in front of a computer watching the trial, human-factor studies that discuss technology attention spans should

be considered. Taking more frequent but shorter breaks to ensure jurors are tracking and retaining the testimony and evidence might be helpful.

3. In a jury summons, jurors would also be asked whether they have a working computer with a camera and functioning internet access. If they do not have one or both, they could be directed to a government office or cubicle with appropriate social distance to log on to a designated computer with a camera and internet access.

4. For jury selection, jurors would be sent a link to an online questionnaire via Survey Monkey, Google Forms, Qualtrics or SurveyGizmo. They would fill out this questionnaire under oath.

5. The judge and attorneys would review the juror questionnaires and in a pretrial videoconference, would make preliminary determinations about hardship or cause challenges.

6. Jury selection could be undertaken in two possible scenarios: Jurors can log on at scheduled times and be individually interviewed by the judge and attorneys, or an entire jury panel can log onto a webinar type of interface.

In the second scenario, the judge and attorneys can ask questions of the entire panel. Jurors who have responses can identify themselves through chat responses or virtual hand raises on the site and can then be individually questioned by activating their cameras. Based on their responses, attorneys can exercise cause and peremptory challenges until they have a jury panel.

7. Once the jury is selected and sworn, they would log onto a separate initiated meeting or videoconference call. They would be given preliminary legal instructions by the judge as well as instructions about using the technology in their service as jurors. They would be instructed to isolate themselves in a part of their homes so that others in their household could not view or listen to the trial. They would be instructed not to do any internet research or discuss the case, as they would be instructed in an in-person trial.

If needed, a court clerk or bailiff could monitor the browser of the juror that is logged on to the videoconferencing platform to make sure they are not conducting their own research or scrolling through news or social media feeds during the trial sessions. During the trial, the juror's camera would be turned on so that the judge, attorneys, court personnel and witnesses could also see the jury.

8. Because there is a First Amendment right to view public trials, the specific trial's login information can be posted on a court website.

9. Many of these videoconferencing platforms allow for the documents or video to also be shown during presentations, which would let attorneys or witnesses show exhibits and video deposition clips, and use PowerPoint, Trial Director, TrialPad or other presentation software during their opening statements, direct and cross-examinations, and closing arguments.

10. Witnesses would also log onto the videoconferencing platform and be sworn in and examined by the attorneys. Objections would be handled similar to how they are normally handled in trial.

11. A court reporter would also be able to transcribe the proceedings, or a LiveNote Stream of the trial can also be recorded. These platforms also allow the recording of the entire proceeding.

12. If the court typically allows juror questions during the witness examinations, jurors can simply submit those questions with the appropriate chat tool during or after each of the witnesses. Jurors could also take notes on their computers or on a separate pad, with an admonition to keep their notes away from others in their household and not to review their notes outside of court hours.

13. After closing arguments, jurors would be given jury instructions by the judge and instructions on downloading a single verdict form once they have chosen a foreperson. They would also be given some guidelines on how to make sure that all the jurors can have the opportunity to speak and be heard during their online deliberations. They would then log onto a separate videoconferencing meeting from the trial site in order to preserve the confidentiality of their deliberations.

The jurors would make sure all jurors (except the alternates unless allowed) were present and that all of the jurors could see and hear each other. If jurors have questions for the court or would like to hear readbacks or see exhibits, they could communicate with the clerk or the judge via a secure channel. If need be, they could be sent relevant exhibits, or even hear playbacks of the testimony. Jurors would then deliberate to a verdict, fill out an electronic verdict form, and send it to the clerk or judge.

14. On the original trial site, all of the parties and the jury would reconvene for the reading of the verdict. The parties could poll the jury, if needed.

By no means is this a perfect system. Last week, closing arguments were held via Zoom in a voting rights case and encountered numerous glitches as U.S. District Judge Cathy Seibel and the attorneys tried to operate the new technology. There will always be inevitable challenges of all technology — including power outages, slow internet speeds, comprehension problems, and user error — and the need for the judge, attorneys, witnesses and jurors to be present for prolonged periods online.

Every court would need a help line and computer-savvy personnel to make sure these systems run relatively smoothly. There also may be statutory hurdles that need to be addressed by state legislatures in order to allow these types of trials to proceed, especially for criminal cases. Civil trials would more readily accommodate these flexible trial solutions through the parties entering into a stipulation agreement or by proceeding as private jury trials through mediation or arbitration services.

These trial technology solutions could also accommodate more traditional dispute resolution practices such as mediation, arbitration and jury mediation but would probably not work as well for long and complex cases. The parties would have to be more organized and efficient in presenting cases. These trials would tend to disfavor surprise trial strategies or personality-driven advocacy where some attorneys count on persuasive argumentation over case facts to influence a jury.

But, in a strange way, online trials would accomplish what the courts have always aspired to be — a forum where fact-finders objectively and analytically evaluate the evidence in a case while minimizing the extraneous influence of attorney, witness, judicial and even other jury personalities.

We live in unprecedented times, but these challenges can also give us opportunities to create innovative solutions to solve seemingly insurmountable problems in order to preserve our system of justice and constitutional rights.

Richard Gabriel is president of Decision Analysis Inc., co-author of "Jury Selection: Strategy and Science" and the inventor of Jury Mediation, an alternative dispute resolution tool.

Law.com

Commentary

Hello? Do You See Me? Litigating in the Age of Zoom

When U.S. District Judge Cathy Seibel of the Southern District of New York presided over online closing arguments in a Voting Rights Act case, the result was somewhere between painful and Abbott-and-Costello funny.

By Jenna Greene | March 25, 2020 at 12:27 AM

“Can you hear me?”

That was the oh-so-fitting first sentence uttered in closing arguments in a high-profile Voting Rights Act case conducted via videoconference on Tuesday before U.S. District Judge Cathy Seibel of the Southern District of New York. The suit pits lawyers from Morgan, Lewis & Bockius led by senior counsel David Butler against a pro bono team starring associates from Latham & Watkins.

The main portion of the bench trial kicked off in person on Feb. 10, back when coronavirus was a distant overseas illness and Judge Seibel (who was appointed to the bench in 2008) presided over orderly in-person hearings.

Not anymore.

This is a sample of what the first 20 minutes of closing arguments via Zoom sounded like, with the judge, court staff and counsel all flummoxed in varying degrees by the technology.

“Which one is Mr. Butler? I don’t see Mr. Butler.”

“Can you hear us now?”

“We can now hear you but we can’t quite see you.”

“Did that work, or no?”

“WA7D, that’s our video connection. Mr. Walton, can you find that?”

“We’re still not seeing Washington7D.”

“Mr. Butler, are you sure you have your camera on?”

“Go to the laptop and reconnect.”

“The big part of the screen just says ‘user.’ I don’t know who that is.”

“Go to speaker view.”

“I see two icons but I hit the wrong one.”

“I see Mr. Butler in the little box but not the big box.”

“Oh, can you hear me now?”

“You need to share your screen, Mr. Butler. It’s the green button at the bottom.”

“I see Mr. Butler’s slide, but I still see myself.”

“You need to x out of the full screen and go back to the gallery view.”

“Can you hear us?”

The result was somewhere between painful and Abbott-and-Costello funny.

On the plus side, Seibel noted there were 126 participants on the call. Almost surely, the Zoom format opened the proceedings up to more people than if it had been in person—including me. They just need to get the hang of using it.

As the court reporter said, “It doesn’t seem as easy as it was before.”

Still, once Butler finally started with “May it please the court,” the hearing went along well enough for a while. The Morgan Lewis litigator argued that his client, the East Ramapo Central School District Board of Education in Rockland County, New York, did not violate the Voting Rights Act.

The district was sued by the Spring Valley NAACP and seven black and Latino voters in 2017. Represented by the New York Civil Liberties Union and Latham, the plaintiffs challenged the at-large method of electing school board members, claiming that it unlawfully denies black and Latino citizens in the district an equal opportunity to elect candidates of their choice.

They allege that the white community—in this case, mainly Orthodox Jews—“organized to elect its preferred candidates to the board to implement a policy agenda that increased support for private school students and decreased public school expenditures.”

As Butler argued that people in the community voted for board members based on their policy positions, not their race, that minority candidates have in fact been elected, and that there is “no similar Voting Rights Act case brought in the history of the act,” Seibel’s clerk interrupted him to let him know the judge was no longer on the line.

When her connection was restored, Seibel told Butler that she hadn’t heard anything he’d said for the last five minutes. “Somehow I was put on mute,” she said. “You guys have been going on and I haven’t been able to get your attention.”

Butler backtracked, and then forged onward. As he worked up to a crescendo, “The plaintiffs presented no evidence to show at any time...” he was suddenly gone mid-sentence.

“Did we lose Mr. Butler? Mr. Butler, can you hear us?” Seibel asked. “I can see him but I can’t hear him. Mr. Butler, I can’t hear you. How do we get Mr. Butler’s attention?”

Someone—court staff? Opposing counsel? It wasn’t clear—called Butler on his cell phone, and the court recessed for a three-minute break while he got back online.

He spoke for another 15 minutes before noticing, “Judge, I think you’re frozen.”

Yes. Sorry. So where were we?

When it was time for Latham associate Corey Calabrese to deliver the closing for the plaintiffs, the worst of the glitches had been resolved. (Plus the Latham tech team seemed to be on top of their game).

Seibel theorized that some of the earlier problems stemmed from using the court’s VPN connection—judges aren’t allowed to use their home wifi for security reasons—which was overloaded with users. But as the hearing dragged on past 5 pm, Seibel theorized that fewer colleagues were still online.

Still, Calabrese did have one classic video conference obstacle to reckon with—her dog barked. “I apologize,” she said. “That’s OK,” Seibel responded, adding that the only reason we didn’t hear her dog was because he was in another room.

Law360

Texas Court Pioneers Trial By Zoom In Atty Fee Dispute

Law360 (April 22, 2020, 10:05 PM EDT) -- A Texas state court judge charted a new path for trials during the coronavirus pandemic Wednesday when he held a one-day bench trial through videoconferencing service Zoom, overcoming technical difficulties to hear a dispute over roughly \$96,000 in attorney fees stemming from an insurance case.

Harris County Judge Beau Miller made the move to hold the trial online after the Texas Supreme Court issued a pair of emergency orders mandating that all hearings be conducted remotely for the time being. Courts across the country have suspended in-person proceedings to comply with social distancing requirements from public health authorities.

On Wednesday morning, the Zoom conference included Judge Miller; attorneys Richard Daly and John Black of Daly & Black PC, who represented plaintiff Adil Ahmed; James Old of Hicks Thomas LLP, representing insurer Texas Fair Plan Association; and Dwayne Newton, an expert called by the TFPA.

Judge Miller opened the proceedings by acknowledging that the bench trial had an audience, as it was being separately livestreamed on the court's website.

"The cat is out of the bag and we have some observers around the state and around the country maybe. Welcome to the 190th," he said, referring to the 190th District Court of Harris County.

The trial stems from an insurance dispute after Ahmed's house suffered damage during a hailstorm in in 2015 but TFPA refused to pay for repairs, saying the damage fell under the \$9,506 deductible in his policy.

Ahmed sued, and an appraisal panel found that the damage was actually almost \$23,000. TFPA paid Ahmed the roughly \$13,000 owed under his policy but failed to pay any interest or attorney fees, which Ahmed contends were due because of its initial refusal.

Ahmed's attorneys argued to Judge Miller on Wednesday that TFPA should pay roughly \$96,000 in attorney fees, with Daly saying during a brief opening statement that the fee amount was driven by TFPA's own choices in the suit.

"The defense chose a path of relentless litigation even after their people admitted they had improperly failed to pay the claim," he said. "We're going to ask you to award our client \$96,000 in attorneys fees. That's the price of the bed TFPA made, and it's about time they lied in it."

Old countered during his opening statement that there was no question Daly's firm had put "a lot of effort and a lot of paper" into contesting motions in the suit, but Ahmed was not a prevailing party under the law and thus is not entitled to fees.

"All the fees were generated on claims that they did not win, cannot win, and in fact which they withdrew," Old said.

He noted that Ahmed had dropped the claims for breach of contract and bad faith denial of coverage that were in his complaint.

"TFP did everything it conceivably could do to make this case be efficient, make it cost effective and put whatever money was owed, if any, to Mr. Ahmed in his pockets," Old added.

The trial then proceeded with Black examining his partner Daly about the work they had put into their case and the data underlying the fee request.

TFPA's expert Newton — who said he usually practices in Harris County but had been stuck in California since early March — then testified that he believed Daly and Black were using too high an hourly rate in their calculations.

Judge Miller closed the day of testimony by asking the parties to submit proposed findings of fact and conclusions of law within two weeks, saying he would issue a written ruling after that.

Throughout the trial there were sporadic interruptions involving Zoom, most notably the several times the court reporter told the parties she could no longer hear what they were saying. At one point message notifications could be heard coming from Black's computer, which he attributed to his "family group chat" before turning the sounds off.

Judge Miller noted that more than 2,000 viewers had watched portions of the trial throughout the day.

All of the attorneys were wearing suits — the court's website had highlighted the need for counsel to wear professional attire, which has been a problem for some attorneys who have attended teleconference hearings during the pandemic.

Ahmed is represented by Richard Daly, John Black and Maria Gerguis of Daly & Black PC.

TFPA is represented by James Old and Maggie Neusel of Hicks Thomas LLP.

The case is Ahmed v. Texas Fair Plan Association, case number unavailable, in the 190th District Court of Harris County, Texas.

--Editing by Adam LoBelia.

Analysis

Civil Jury Trials and COVID-19: How Civil Litigants Can Reach Resolution in the Wake of a Global Pandemic

When the trial courtrooms do re-open, what options will litigants have to see their cases to resolution? And as important, when jury trials recommence, what will they look like?

By Rob Shwartz and Diana Fassbender | April 22, 2020 at 11:03 AM

Our court system, especially our trial courts, has been severely impacted by the COVID-19 crisis, where jury trials are largely frozen. In California, for example, jury trials in state court are suspended until at least late May 2020. And most federal district courts throughout the country have suspended trials until June. Realistically, litigants should expect that the hold on trials likely will continue past anticipated dates in many jurisdictions.

When the trial courtrooms do re-open, what options will litigants have to see their cases to resolution? And as important, when jury trials recommence, what will they look like?

It is already becoming clear that once trials do resume, courts will need to focus on high priority matters first, such as criminal cases, unlawful detainer suits, and cases with state statutory deadlines. Courts then will have to re-set at least a three-month backlog of civil cases originally scheduled for trial during the COVID-19 closures. The likely result is that cases slotted for trial in the second half of 2020 are certain to get pushed further down in the queue. The overall result? The majority of civil trial dates that were on the books for 2020 are likely to get re-set for some time in 2021.

Civil litigants now face a decision about litigation strategy. For some litigants, particularly defendants, the delay may be welcome. Slowing down a case can cause a plaintiff to lose momentum and allow more time to fully develop defenses. A delay also may help pace out legal spend, a consideration that may become all the more important to corporations whose businesses have been financially impacted by the COVID-19 shutdowns.

First, for those parties who wish to maintain their right to a jury trial, albeit delayed, it begs the question of not only when but how civil trials can resume. Even in a world where social distancing measures still prevail, it is easier to imagine federal court jury trials resuming more efficiently. First, under Fed. R. Civ. Pro. 48, the court may proceed with six jurors (and can proceed with less than twelve by stipulation in a criminal trial). A smaller jury can keep spacing in the box and in the deliberation room. Second, as important, most federal courtrooms have ample space to allow the attorneys, courtroom personnel and jurors to maintain adequate spacing. Third, federal courts are technology-friendly, allowing most of the evidence to be displayed on screen for the court and jury.

State courts may have more of a dilemma. In state courts that require 12 jurors (or near that number) to reach a verdict, temporary modifications to state law may be needed to allow a smaller number of jurors to hear a case, so as to respect the desire for social distancing to continue. Further, many state courtrooms are far tighter than their federal counterparts (Los

Angeles Superior comes to mind). Court administrators may have to consider limiting the number of people in a particular courtroom, or even modifying the seating in courtrooms to allow people to maintain comfortable spacing.

In both federal and state court, administrators will have to address logistics of jury selection. Courts will have to limit the number of jurors called each day, then bring them to the courtroom in smaller numbers during jury selection in order to allow everyone to maintain social distance. The tradeoff will be in fewer available jurors for trial and a slower jury selection process.

This, of course, presumes that our fellow citizens will be comfortable appearing for jury duty at all, even with modifications put in place. Will the courts require testing before entering the courthouse? Will court administrators allow people to avoid jury service due to concerns about the virus? Will individuals in high risk populations be exempt from service? The venire may well not be a representative cross section of the community; at minimum, it will be a very different venire than the parties would have seen absent the pandemic.

It is also conceivable that courts may begin to rely more on technology in conjunction with jury trials. Certain aspects of proceedings could be conducted remotely or by video. Litigants will want to consider whether any technological modifications reduce any advantages to going forward with a jury trial or make the process more frustrating for jurors.

One final consideration for parties who are inclined to insist on their jury rights: will jurors be hostile to being required to serve on a jury while fears of the COVID-19 virus loom? If so, is it possible that their annoyance may come out (subconsciously) in the verdict or any damages award? This is a particularly valid concern for litigants involved in a fairly standard commercial dispute that does not implicate life-or-death or liberty issues. Business litigants need to keep in mind that many people in the U.S. may continue to feel traumatized by the COVID-19 pandemic and do not see the country being back to business as usual. “Forcing” jurors to resolve a business matter under these circumstances may redound to the detriment of one or both parties.

The prospective delays in getting to a jury trial, or the practical and tactical concerns outlined above, may force litigants to consider alternatives to jury trials. First, parties may decide to waive their right to a jury trial and agree instead to a bench trial (although crowded calendars may still delay those as well). Second, arbitration or alternative dispute resolution may be a viable option, again if both sides agree. To the extent that social distancing guidelines continue to guide our behavior, both bench trials and arbitration provide a feasible setting to conduct evidentiary hearings while maintaining social distancing measures.

A bench trial or arbitration as an alternative to a jury trial may have certain appeal to both sides of a case. For a defendant, especially in a complex civil case or in a matter where there is advantage to avoiding emotion in the ruling, removing the jury from the equation may be smart. There also may be business reasons why it is preferable to obtain resolution soon, conclude the litigation, and move on.

For a plaintiff who under normal circumstances would be inclined to have a jury hear its case, pursuing an alternative would of course require foregoing the jury element. But the decision ultimately may come down to how quickly the plaintiff wishes to obtain justice—and importantly—damages. If a plaintiff originally anticipated having its case resolved within the next year, then a compromise to a jury trial will be necessary in order to achieve that timing.

The COVID-19 virus has upended most aspects of the world as we know it. That holds true for our justice system. Civil litigants especially will need to show flexibility and assess their values and motivating principles in making litigation strategy determinations with counsel for the foreseeable future.

Rob Shwartz, a partner in the San Francisco office of Orrick, Herrington & Sutcliffe, has handled dozens of trials and arbitrations and heads the firm's trade secrets practice group and the firm's practice management committee. Diana Fassbender is of counsel in Orrick's Washington, D.C. office and a member of the firm's IP litigation practice).

NewsRoom

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April 21, 2020

No Going Back

Molly McDonough

(Image via Getty)

If you're a legal professional looking for predictions about when courts will ramp back up and legal work return to normal, you've still not come to grips with reality.

Courts have largely closed to the public, literally slamming the door on access to justice to millions of citizens.

This is institutional failure. As Jordan Furlong argues in his pandemic and the law series , "Institutions need resilience in a crisis, just like people do. If your institution was forced to shut down because of the pandemic, then it failed its resilience test. It wasn't there for us when we needed it."

The hand-wringing and denial in pre-COVID-19's overburdened, underfunded justice system, has shifted to crisis and triage. Or worse, total standstill.

But is there a silver lining?

"This crisis might not have been the disruption we wanted, but it's the disruption we needed," Michigan Supreme Court Chief Justice Bridget McCormack said to more than 450 lawyers, judges, advocates, and others gathered Monday for a Legal Services Corporation briefing on the state of access to justice.

McCormack voiced plainly what many others on the call said was happening in California, Tennessee, Washington, and areas with large legal aid service agencies such as Detroit, New York City, New Orleans, and Miami. Courts are scrambling to adopt technology solutions to get operations back online and to increase services during the pandemic.

McCormack's comment also signals that there is no going back. Now that courts are seeing how new processes that don't require a physical court presence can provide access to more people, it's going to be impossible to justify returning to the status quo ante.

Legal futurist Richard Susskind has long advocated for a shift in thinking with the courts, one he and Furlong predict most certainly is changing during this global crisis: Courts aren't a place, but a service.

When we think about courts as a service rather than a place, it's much easier to conceptualize technology-driven or facilitated dispute resolution.

In fact, it's hard to think about returning to the status quo, with a rigid expectation for physical presence and an overly complex process built serving a place rather than serving justice.

But even Susskind, whose book "Online Courts and the Future of Justice" was presciently released in December, couldn't have predicted such a rapid shift to technology-facilitated court access.

"Rather than perhaps the decade I was anticipating, in a fortnight we have seen huge numbers of courts around the world shutting, and we have seen correspondingly large numbers of cases being held by video conference and telephone conference too," Susskind told legal technology expert Bob Ambrogi during a recent interview.

These aren't seamless proceedings. Nor should they be expected to be. Instead, this is a massive experiment that we can expect will yield enormous data points and anecdotes about what works and what needs adjusting to adequately conduct legal business and uphold the rule of law in a digital environment.

Still, it would be shortsighted and a mistake to think that things will return to "normal." Things shouldn't return to normal for the justice system.

Well before the pandemic triggered court closings and the ceasing of jury trials for some indeterminate period, courts were grappling with an access to justice crisis. Courts have long been underfunded and equal access out of reach for the majority of Americans.

What we should expect from our institutions at this point is continued testing while they scramble to bring operations back online.

On Monday's call, the number one fear for heads of legal aid agencies around the country: funding.

The economic impact will most certainly hit already stretched court systems hard. Agency heads and chief justices indicated they are bracing for what could be an overwhelming number of cases from the neediest populations, especially in areas of housing, employment, medical debt collection, and domestic violence.

"We know that a tidal wave of legal needs is headed our way, and we have to be ready to respond," said ABA President Judy Perry Martinez, who appointed a national task force to assess and respond to COVID-19-related legal needs.

Callers were assured by Rep. Joe Kennedy III, D-MA, and Rep. Fred Upton, R-MI, that there is an awareness of and bipartisan support for front line legal services for those particularly hit hard by the pandemic.

The only way forward is to find new ways of doing business for the courts.

Molly McDonough is a longtime legal affairs writer and editor. Before launching McDonough Media, she was editor and publisher of the ABA's flagship magazine, the ABA Journal. She writes about access to justice at A Just Society.

---- Index References ----

News Subject: (Arbitration & Mediation (1AR68); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33))

Industry: (Accounting, Consulting & Legal Services (1AC73); Legal Services (1LE31))

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April 20, 2020

Section: NEWS

Juries might see changes. Infection worries could affect post-pandemic trials

Bridget Murphy/bridget.murphy@newsday.com

Each time criminal defense attorney Marc Agnifilo delivers a closing argument in front of a jury box where panelists sit shoulder to shoulder, he'll say something to remind them that his client's right to be judged by peers comes from "the epicenter of our Constitution."

Then after the 12 jurors also hear from the prosecution, they deliberate on the defendant's fate in closed quarters - rooms that can be cramped spaces.

"We have been having trials the same way for 230 years. A trial is one of the only things that hasn't become 'virtual,' " said Agnifilo, who represented now-late Town of Oyster Bay Supervisor John Venditto in his federal corruption acquittal.

"Being all together in a public place with the press and the community is what makes it a trial," the Manhattan-based lawyer added.

But the new age of social distancing during the coronavirus pandemic has forced many courts, including state courts in New York, to transition at least temporarily to virtual operations to carry out priority matters.

Legal experts say the mechanics of future jury trials in New York and across the country could be different when court operations fully resume and concerns about infections linger.

Experts agree that among post-pandemic challenges awaiting participants in the court system will be the difficulties of convincing potential jurors to take part in trials and protecting the health of the panelists and others who will share the same spaces.

Adapting to the new reality "may mean differences in our procedures" or even instituting more of a delay in jury proceedings after most court operations resume, Agnifilo said.

Nassau Administrative Judge Norman St. George, in a virtual Town Hall meeting the county's Bar Association hosted for members Wednesday, said he didn't know when trials - all postponed in New York state courts - would restart.

But the county's top judge said he personally didn't "see anything happening before the fall."

St. George also said state court officials are "starting to discuss how the physical courts will be able to recommence with social distancing" and "if we are going to be able to conduct jury trials with social distancing."

After the pandemic, some of the trouble filling jury panels will be related to financial hardship, said Jo-Ellan Dimitrius, a jury consultant who worked for the defense in O.J. Simpson's criminal acquittal and for the government during its successful prosecution of Enron's chief executives.

"Their first concern is going to be 'Is my employer going to pay for my jury duty when ... I just came out of either being furloughed or being unemployed for a period of two to three months?' " Dimitrius said of millions of potential jurors who have faced lost wages or layoffs during the pandemic.

The jury consultant also said judges will have to make it clear to potential jurors that courtrooms have been sanitized.

Besides that, court officials will have to consider other changes focused on safety and hygiene - such as putting would-be panelists in every other seat instead of right next to each other, the Nevada-based consultant said.

But Dimitrius added that the concept of an "online jury" or a jury serving remotely wouldn't work because those panelists' service could be corrupted too easily by outside influences.

Mineola defense attorney Nancy Bartling said she believes that relocating jurors from courtrooms to bigger courthouse spaces to watch trials remotely in real time also wouldn't work because defendants could argue the jury physically did not see the evidence.

Bartling, who practices law in state and federal courts and handles cases that include allegations of fentanyl trafficking and corruption, said she could foresee judges asking potential jurors to sign health affidavits guaranteeing they're COVID-19-free.

She also speculated about the addition of glass partitions between juror seats - shields like some groceries stores recently put up at checkout lines to separate customers and employees.

"Practically speaking, you can't have these people on top of each other ... Will they only allow jury trials in rooms that the jurors can be spread ... six feet apart?" Bartling said. "That is going to completely stall the entire system."

Judges, the attorney said, also will have to deal with new claims about why potential panelists feel they can't serve as jurors.

"It's not about whether or not they can get to pick up their kids after school or they're going to lose time at their job. You're dealing with their health," Bartling said.

A recent survey by Los Angeles-based jury consultancy firm DecisionQuest asked questions about coronavirus of about 900 participants identified as potential jurors living in six major metropolitan areas that included New York City, said Bob Bettler, a psychologist who leads the company's Atlanta office.

The survey found a large majority of participants had high levels of concern about becoming infected, with 51% saying they were "very concerned" and 33% "somewhat concerned."

The pattern was essentially the same across locations, genders, education levels, family incomes and ethnic groups, according to survey, which also found older participants were slightly more concerned about contracting coronavirus than younger ones.

Bettler said the quality of potential jurors could be a huge issue post-pandemic, with senior citizens in general becoming "almost barred" because of health concerns.

The psychologist said he could picture potential jurors undergoing temperature screenings or even coronavirus tests.

Coronavirus testing for potential jurors will be a must, according to Pace Law School Professor Bennett Gershman.

"If you didn't do that, how could you be sure that the jury that they're selecting might not pose a serious danger in terms of health to everybody else in the courtroom?" he added.

The pandemic, the professor said, will impact every facet of the court system, including when it comes to trying to select a fair cross-section of the community for a jury and making sure panelists can focus "without worrying about who's sitting next to them in the jury box."

---- Index References ----

Company: EOG RESOURCES INC

News Subject: (Crime (1CR87); Criminal Law (1CR79); Fraud (1FR30); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Social Issues (1SO05))

Industry: (Coronavirus (1CV19); Healthcare (1HE06); Infectious Diseases (1IN99); Viral (1VI15))

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Other Indexing: (DecisionQuest) (Marc Agnifilo; Norman St. George; Jo-Ellan Dimitrius; Bob Bettler; John Venditto; Nancy Bartling; Bennett Gershman; O.J. Simpson)

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Juror Attitudes in the Age of Coronavirus:

Overview Summary of the March 2020 Survey



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Will the psychological and economic effects of a pandemic impact juror decision making? Certainly, other social and economic crises have impacted jurors' evaluation of cases. DecisionQuest saw an uptick in hostility towards large corporate defendants after the Enron scandal. The economic crash of 2008-2009 was followed by a dramatic shift in pro-plaintiff, high-award verdicts, both in our research and in reported verdicts.

For decades DecisionQuest has been collecting data on Americans' attitudes toward issues such as large corporations, employment issues, toxic tort, insurance, litigation, and government agencies. We compare this crisis survey data to that collected in our past research to identify shifts in litigation-relevant attitudes and assess possible regional differences in those attitudes. We also examined attitudinal and demographic differences that may predict jurors' verdict preferences.

To understand the impact of the pandemic on juror decision making, DecisionQuest surveyed 896 jury-eligible residents of six metro areas: Los Angeles, New York, San Francisco, Chicago, Miami, and Middlesex County, NJ, about their experiences and views related to the novel coronavirus (COVID-19), as well as other issues we typically ask in our juror surveys. Since our focus is on decision making, our respondents were given three case scenarios to review. They were then asked to render decisions on three case types: asbestos, sexual harassment, and talc. Data from this initial survey was collected between March 27 to March 31, 2020 using CaseXplorer,™ a web-based survey research tool created in 2013 by DecisionQuest consultants to provide trial teams with cost-efficient juror attitude surveys.

Crisis Survey 2020: Overview Findings on Juror Decision Making

- Concern about COVID-19 is significantly related to verdicts.
 - The more concerned people are that they or a loved one will contract COVID-19, the more pro-plaintiff they are, the higher the damages they award, and the stronger the punitive sentiments they express towards the defendant.
 - On the other hand, men who express "little" or "no concern" about catching COVID-19 were consistently pro-defense in verdicts, damages, and punitive feelings.
- Life disruption is also related to damages: the more people report their lives have been disrupted, the higher the damages they award.
- Openness to being virus-tested if a test was readily available is potentially predictive of verdicts: people who said "yes" to getting tested were more pro-plaintiff; and, people who said "no" were relatively pro-defense.
- There are very few demographic differences in how people are reacting to the crisis, and there were no significant differences in how people in the six venues responded to our case scenarios.

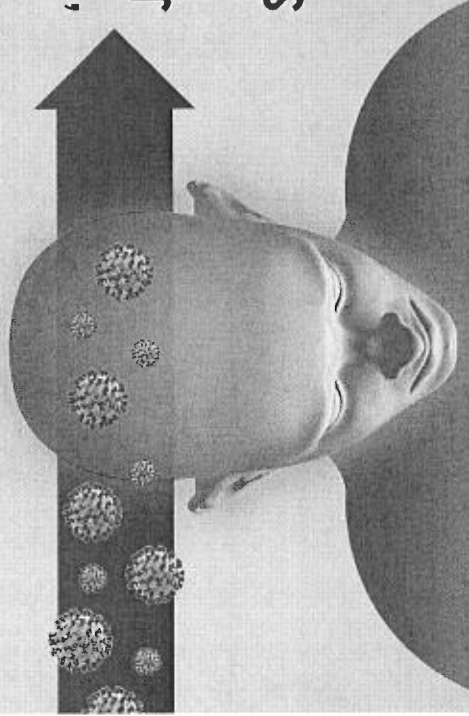
Crisis Survey 2020: Impact and Reactions to the Pandemic

- A large majority (84%) of respondents expressed concern about being infected. When asked, "How concerned are you that you or someone you know will be infected with the coronavirus?" 51% responded "very concerned," 33% indicated they were "somewhat concerned," 11% were "a little bit concerned," and 5% were "not at all concerned."
 - Younger respondents (18 to 24) were slightly less concerned about getting the disease than were older respondents (all other ages): 26% of respondents between the ages of 18 to 24 were only "a little bit concerned" or "not at all concerned," whereas 0% to 14% of respondents in all other age groups expressed little to no concern.

- Slightly more than half (52%) of the respondents felt that reporting on the seriousness of the virus has been “generally correct,” 22% believed it was “generally exaggerated” and 26% believed it to be “generally underestimated.”
- When asked whether coronavirus has disrupted their life at all, 55% of the respondents indicated that it had disrupted their life “very much,” 35% indicated it had disrupted their life “somewhat,” 8% indicated it had disrupted life “a little bit,” and only 2% indicated it had “not at all” disrupted their lives.
 - Slightly more women (5%) reported that their lives were disrupted than did men.
- Nearly one third (32%) of respondents indicated that they or their significant other had lost their job because of the coronavirus.
- Sixteen percent of the respondents or their loved ones have contracted the virus, 12% of respondents indicated that they were unsure whether they had contracted the virus, and 72% indicated that they had not.
 - New Yorkers reported a slightly higher percentage of experience with the illness (21%) than people in Chicago (19%), Miami (16%), San Francisco (15%), Los Angeles (12%), and Middlesex County (12%).
- Most of the respondents were heeding the “stay at home” warnings, with 57% of the respondents only going out when they absolutely need to, while 11% indicated that they were living normally, 18% were still going out but careful in doing so, and 14% were not leaving home at all.
- Nearly half of the respondents (49%) disapproved of the way Donald Trump is handling the response to the coronavirus, 37% approved, and 14% held no opinion.
- When asked how confident they were in the government’s ability to control the coronavirus pandemic, 18% expressed that they were “very confident,” 35% indicated they were “somewhat confident,” 27% were “a little bit confident” and 20% were “not at all confident.”
 - A greater percentage of men (24%) were “very confident” about the government’s ability to deal with this crisis than women (11%).
- When asked how confident they were of their own ability to control how the coronavirus will affect their own life, 26% expressed that they were “very confident,” 44% indicated they were “somewhat confident,” 21% were “a little bit confident” and 9% were “not at all confident.”
 - A greater percentage of men (31%) were “very confident” about their own ability to control how the coronavirus pandemic will affect their own lives compared to women (20%).
- Additionally, in comparing this new data to our existing database, there were several indications of changing views about public policies to aid the poor. There is a shift in the percentage of Americans in favor of government programs to aid the poor today, during the pandemic, as compared to the past few years.
 - There is an increase in percentage of respondents who believe impoverished individuals today have hard lives because government benefits do not go far enough to help them live decently, from 45% in 2016 and 52% in 2018, to 59% in 2020.
 - There is also an increase in percentage of respondents who believe government aid to the poor does more good than harm because people cannot get out of poverty until their basic needs are met, from 51% in 2016 and 54% in 2018, to 62% in 2020.

In conclusion, it is important to understand prospective jurors’ experiences and reactions to the novel coronavirus as it may impact their perceptions about parties and issues involved in certain cases. DecisionQuest will continue to monitor the impact of the health crisis on juror decision making to determine which beliefs and attitudes are reinforced or challenged, how they interact with jurors’ demographics, and their verdicts. If you have an upcoming jury trial and have questions about how COVID-19 might impact jurors’ perceptions of your case, please contact us to discuss how we can assist you in trial preparation.

In the meantime, stay safe, healthy and keep a positive outlook.



“Social Crisis: Social Values”: Juror Attitudes in the Age of Coronavirus

Survey Results

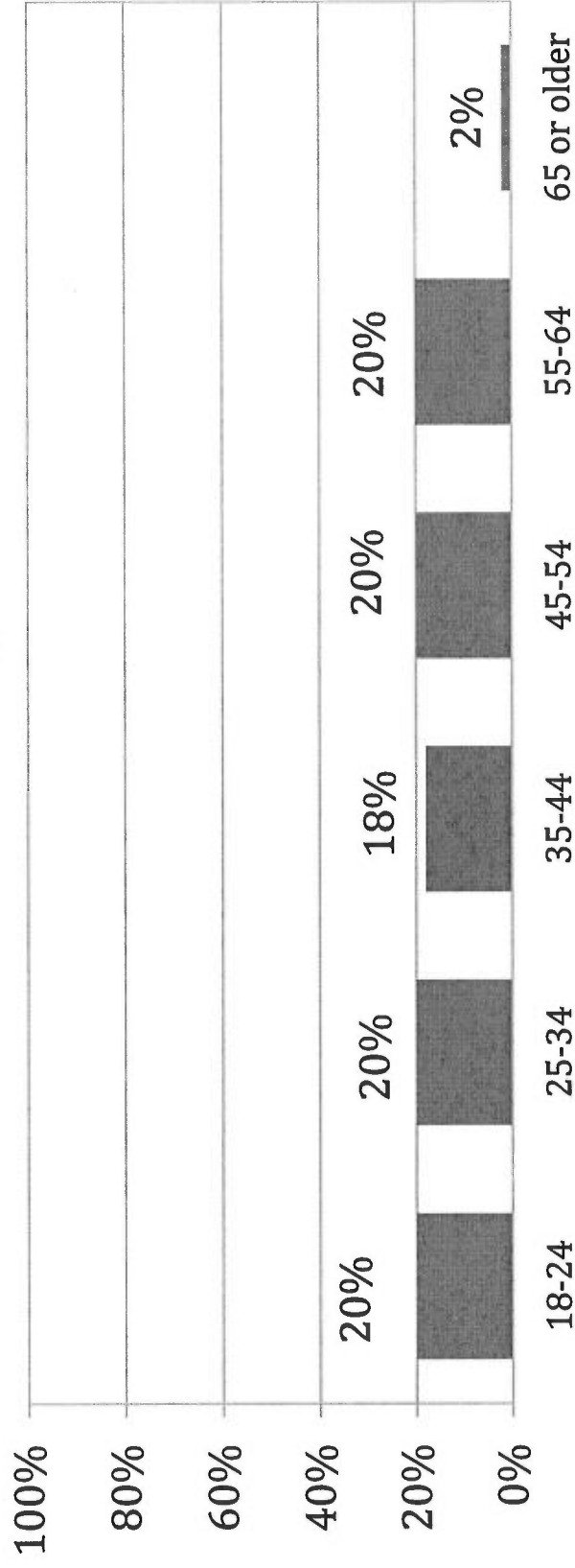


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What is your age?

Sample Characteristics

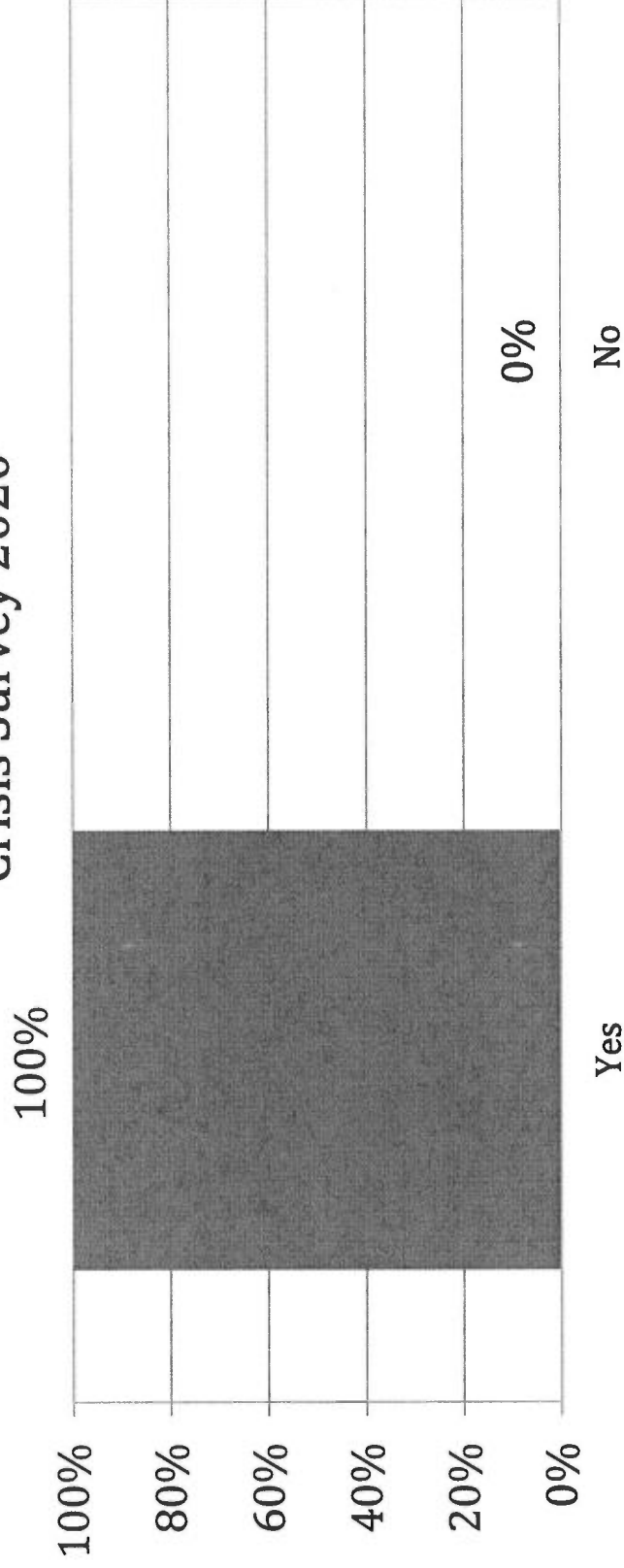
Crisis Survey 2020



Are you registered to vote
or have a driver's license?

Sample Characteristics

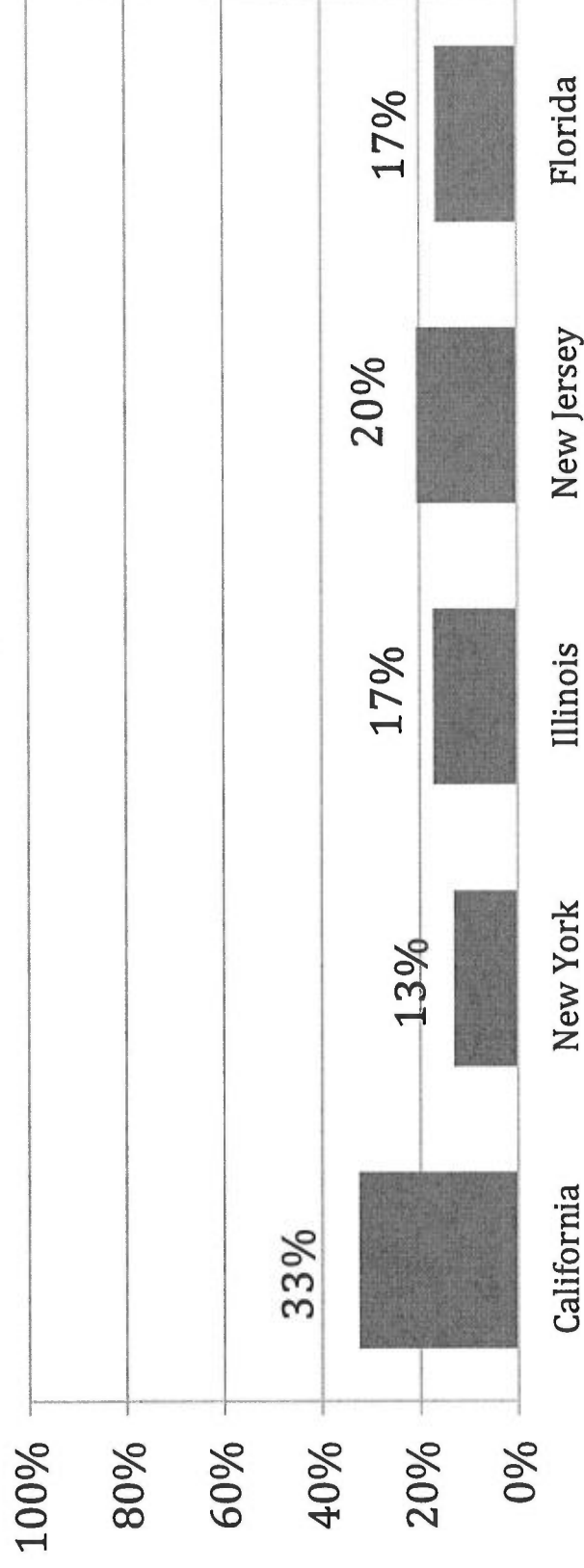
Crisis Survey 2020



What state do you live in?

Sample Characteristics

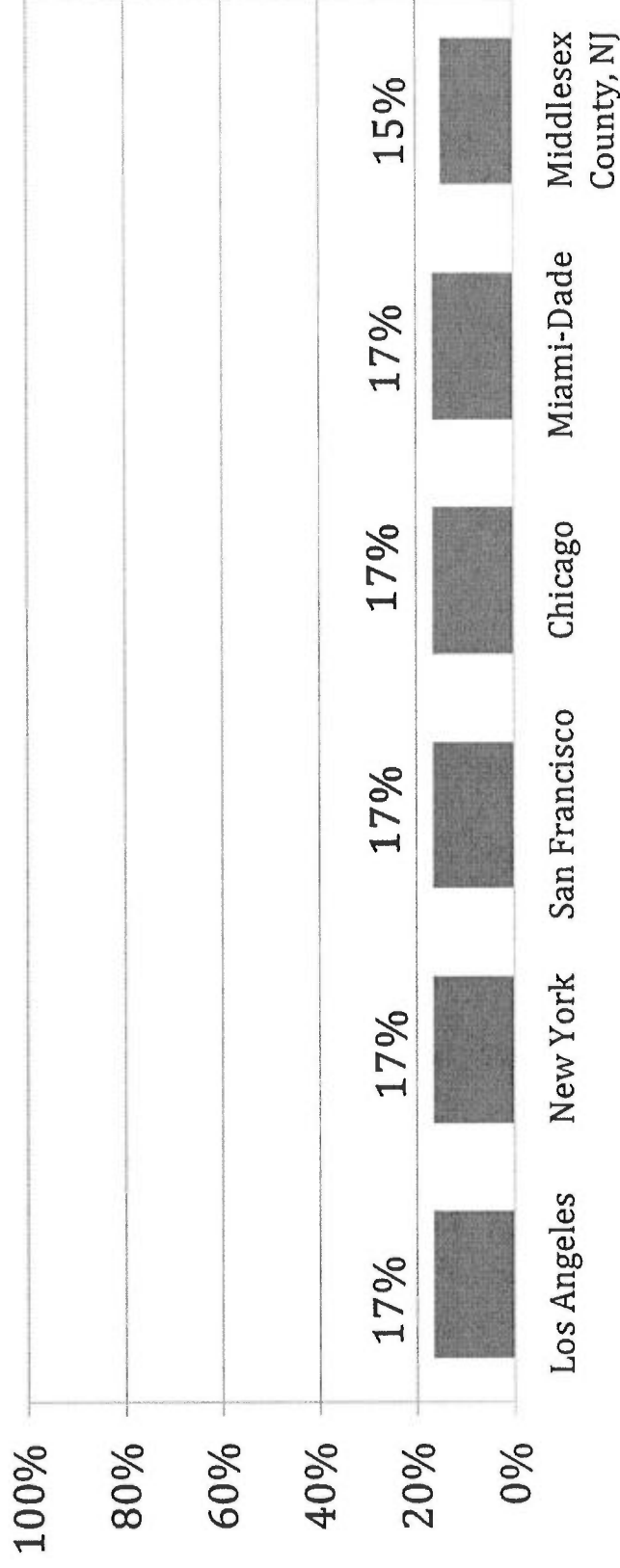
Crisis Survey 2020



What city or county do you live in
(or nearest to)?

Sample Characteristics

Crisis Survey 2020

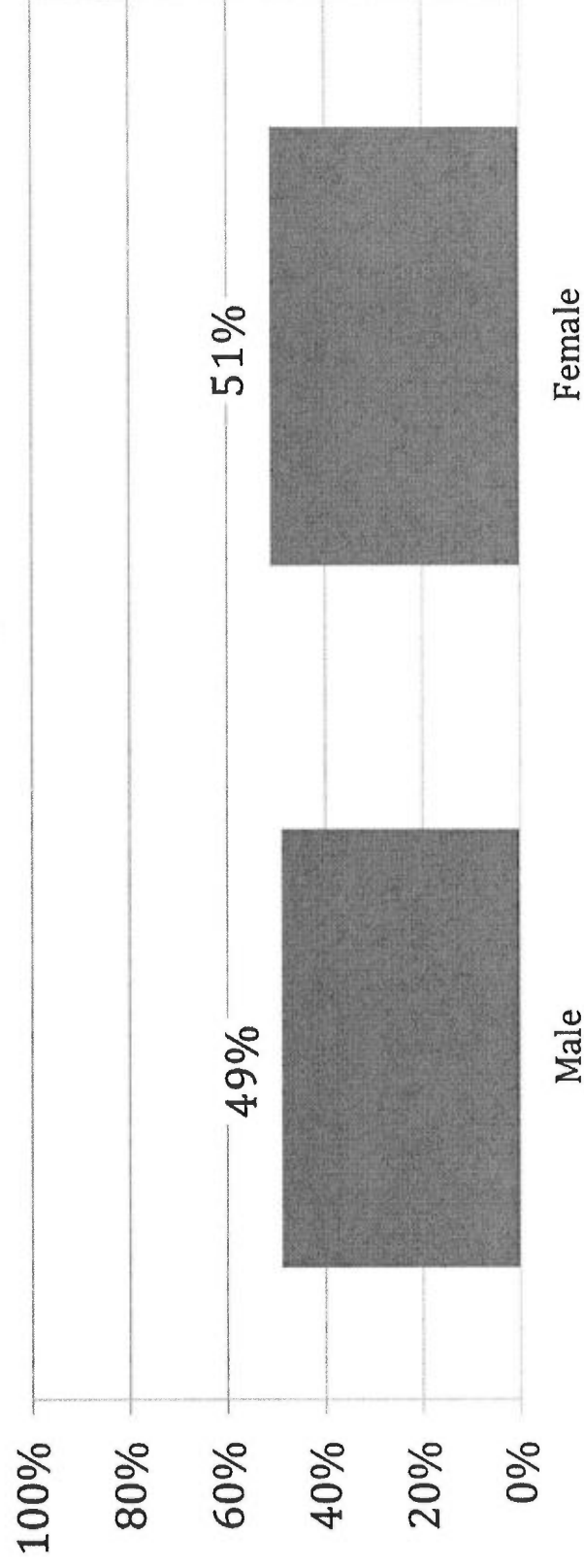


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What is your gender?

Sample Characteristics

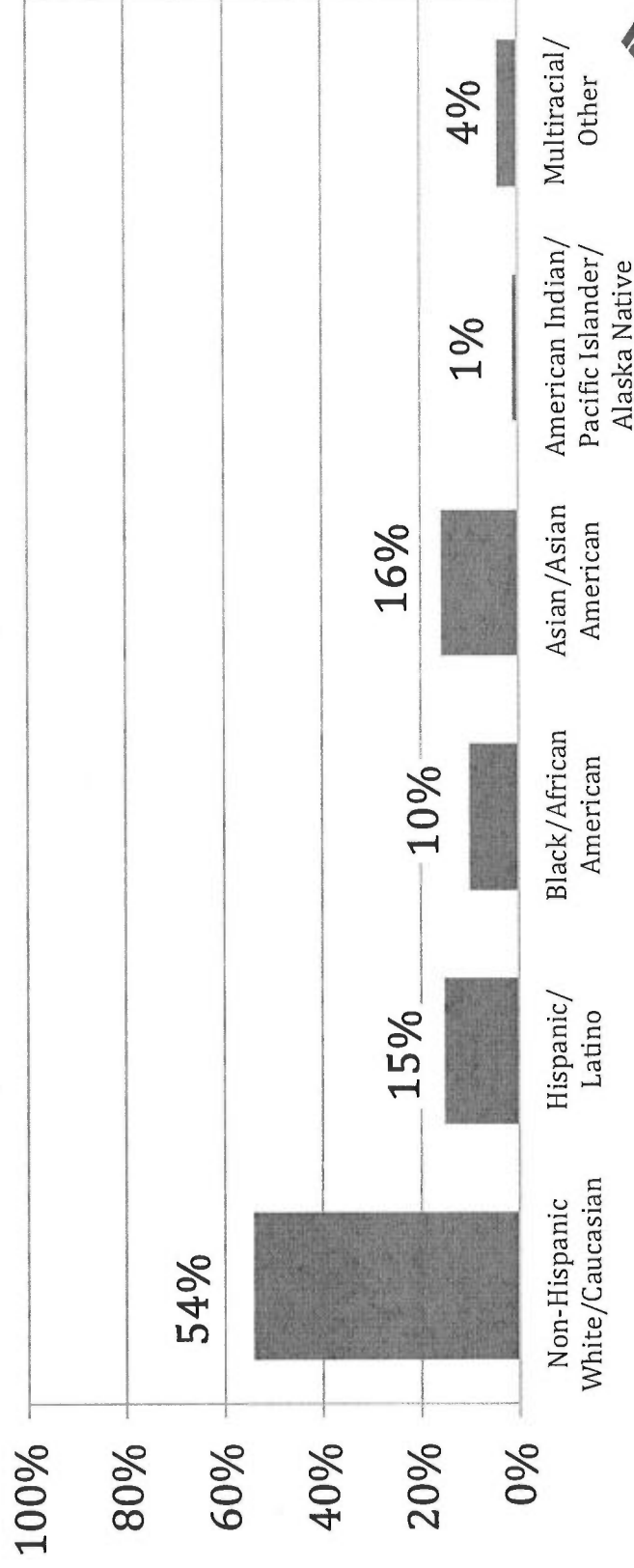
Crisis Survey 2020



How would you best describe your race/ethnicity?

Sample Characteristics

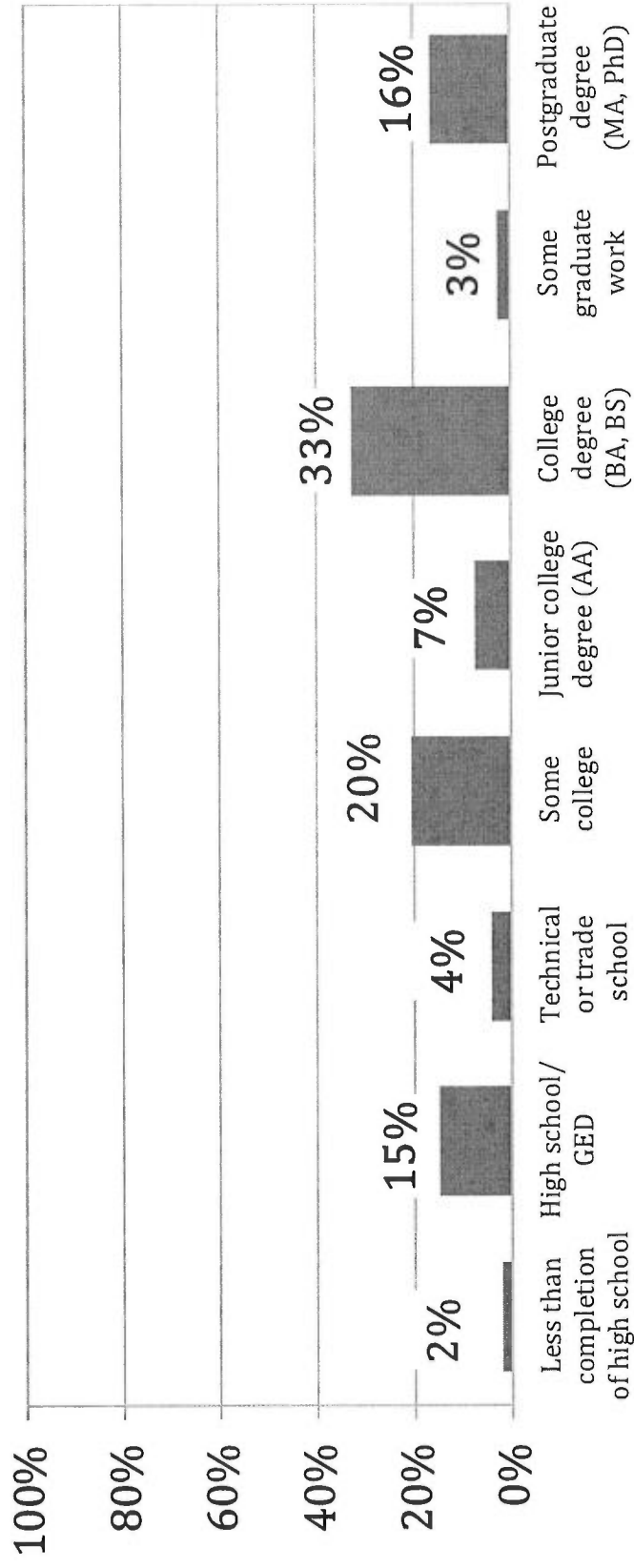
Crisis Survey 2020



What is the highest level of education you have completed?

Sample Characteristics

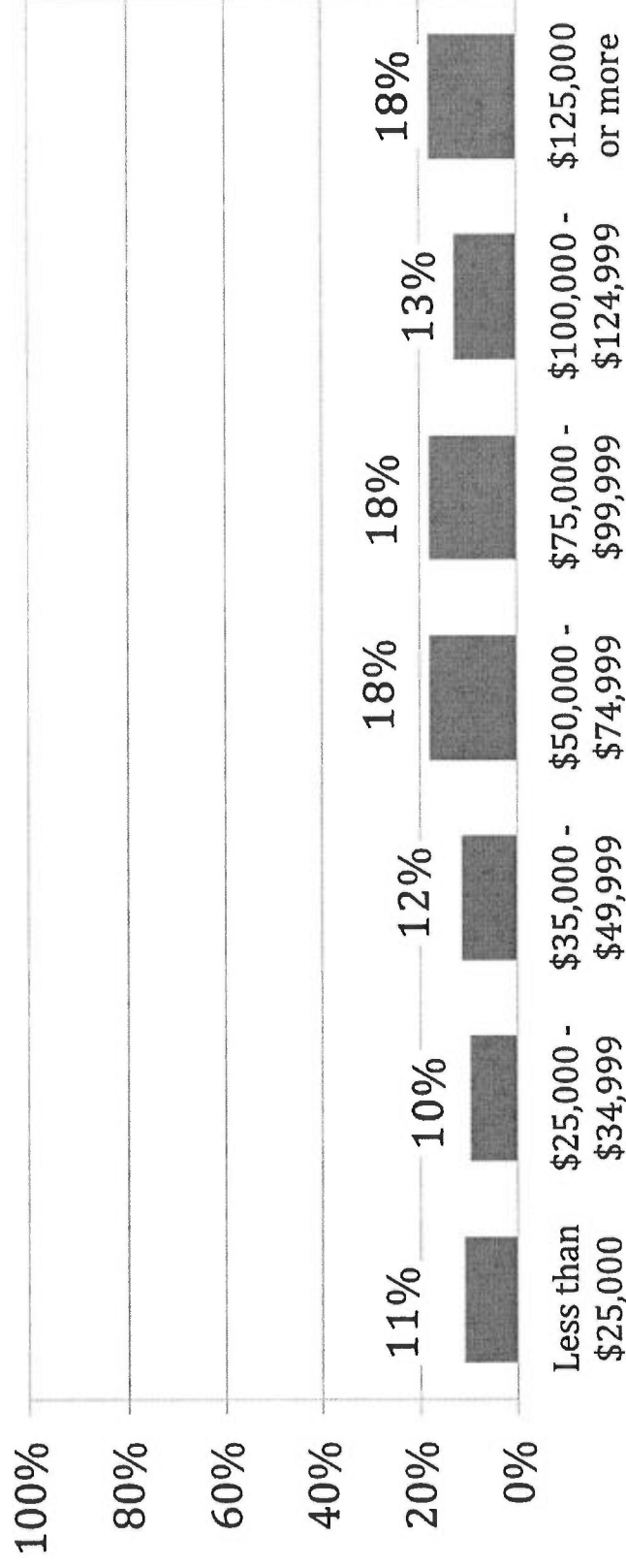
Crisis Survey 2020



What is your annual household income, before taxes?

Sample Characteristics

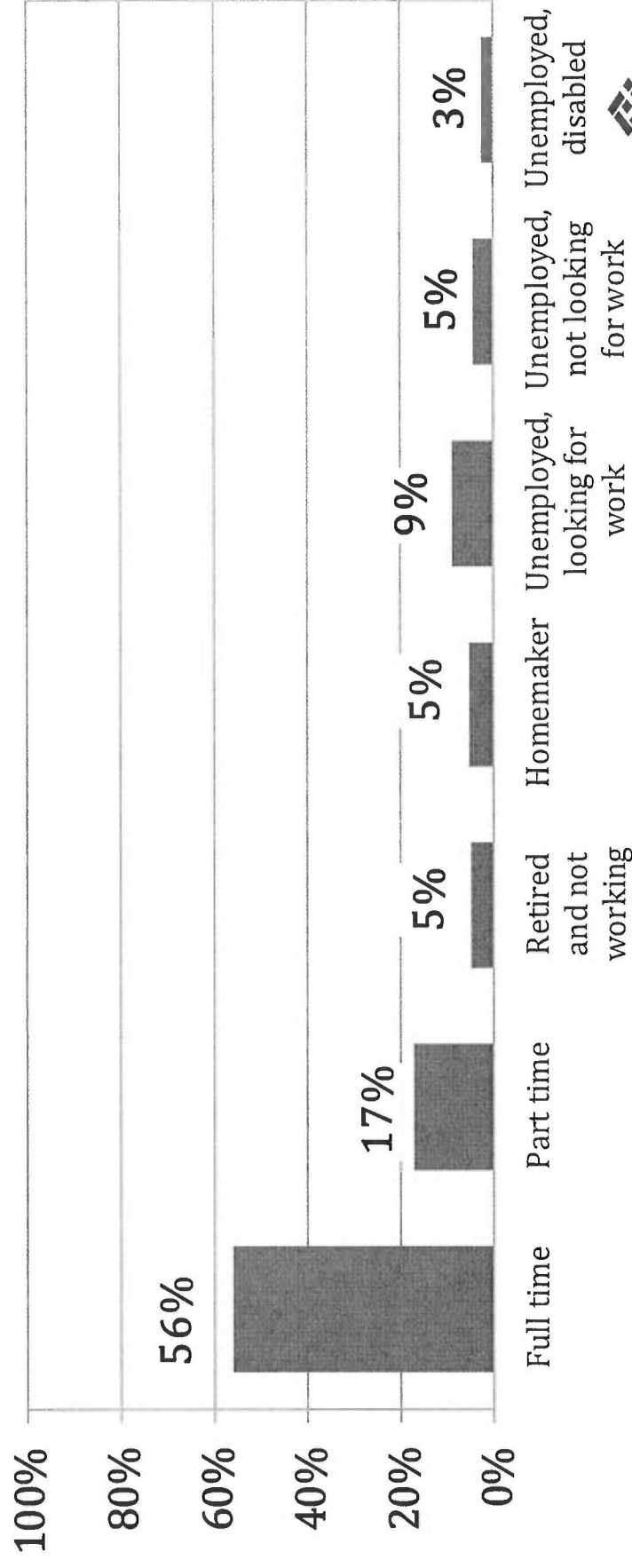
Crisis Survey 2020



What is your current employment status?

Sample Characteristics

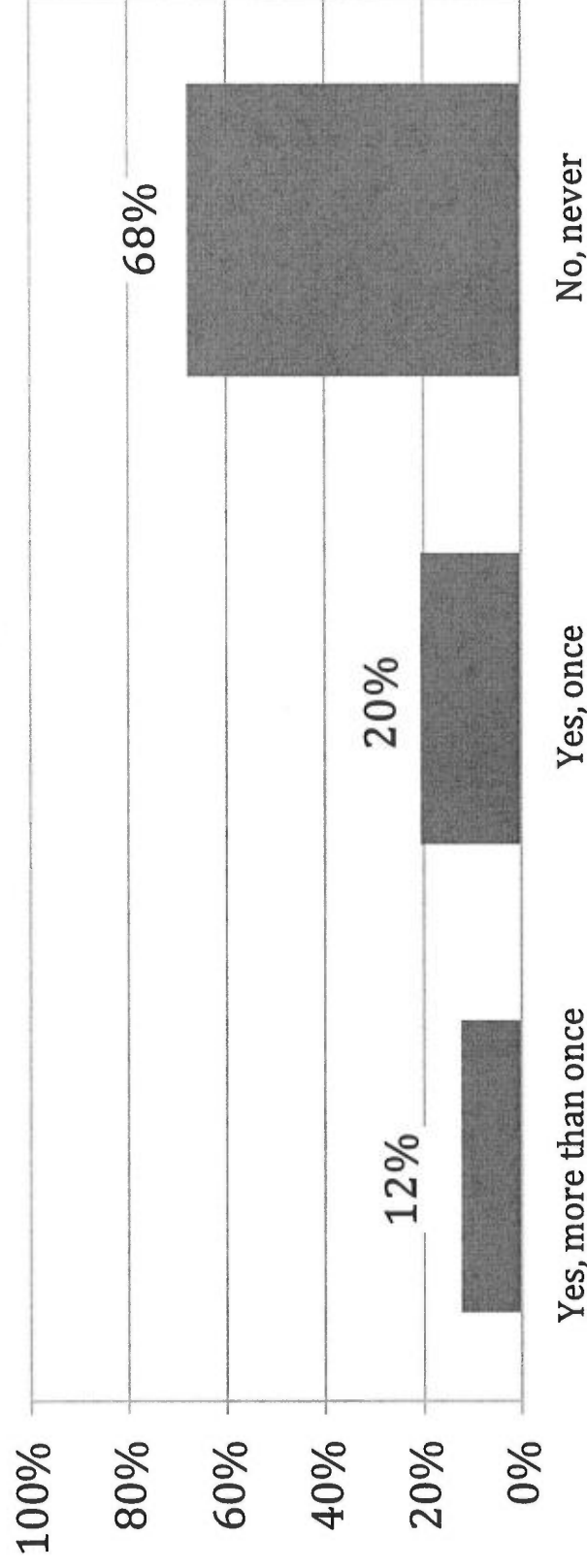
Crisis Survey 2020



Have you ever served on a jury in a civil case in a lawsuit?

Sample Characteristics

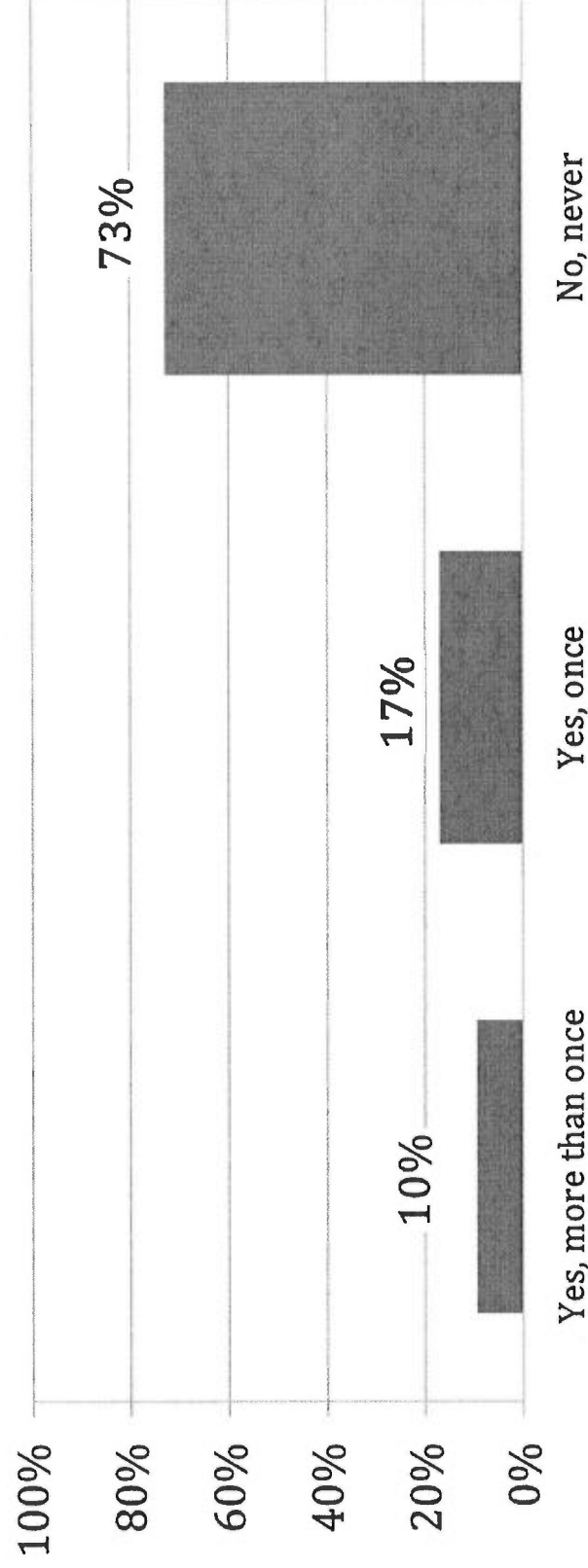
Crisis Survey 2020



Have you ever served on a jury in a criminal case?

Sample Characteristics

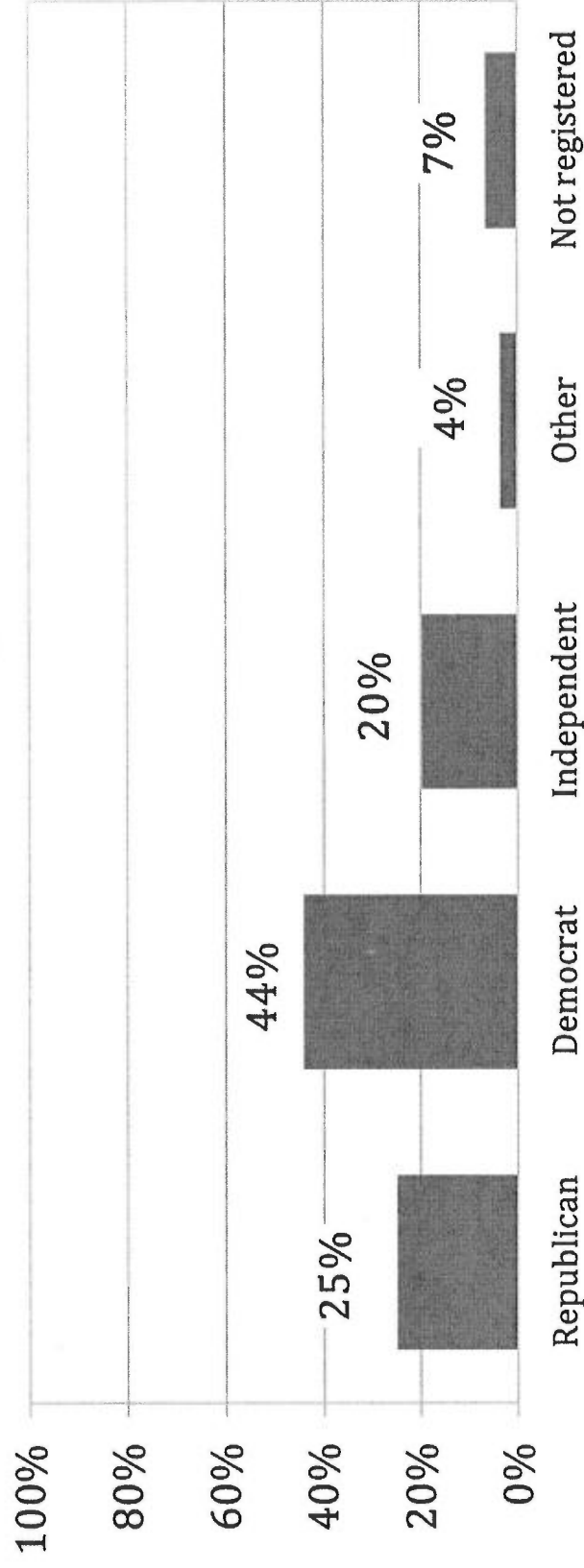
Crisis Survey 2020



Are you registered to vote as a...

Sample Characteristics

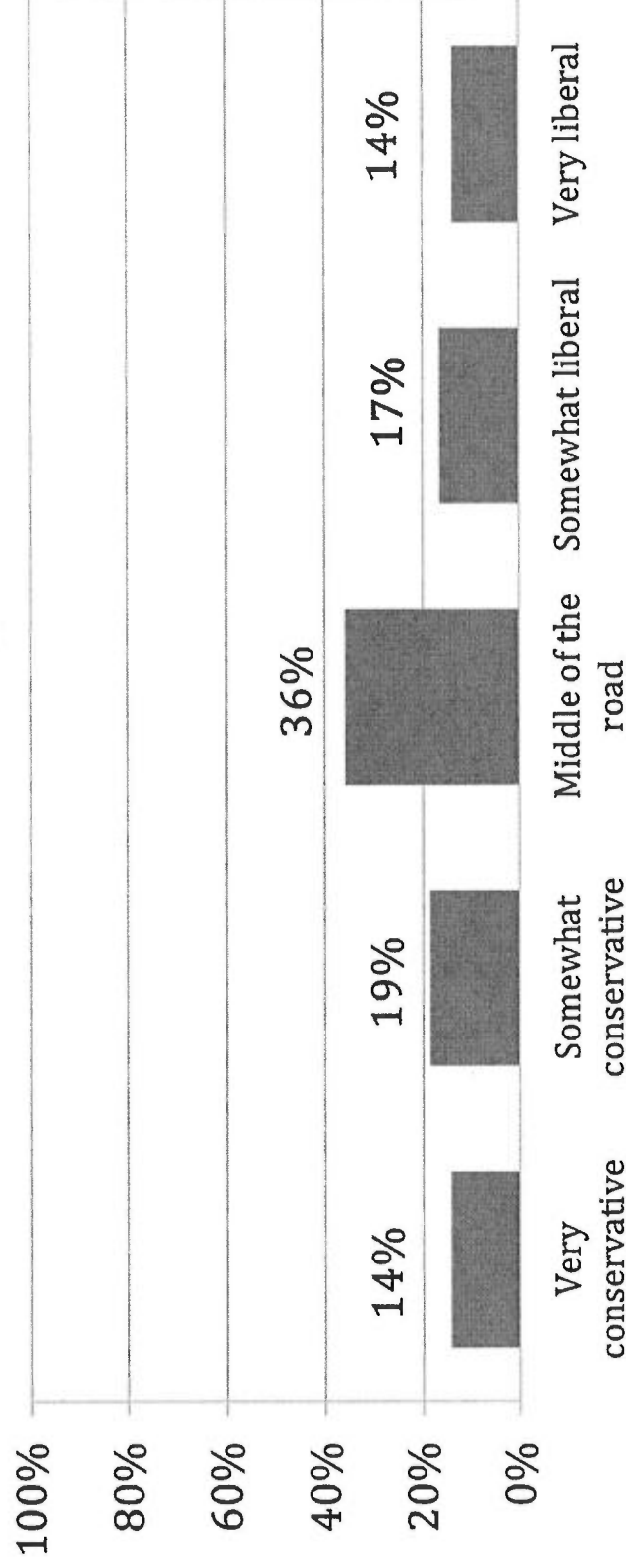
Crisis Survey 2020



How would you describe yourself politically?

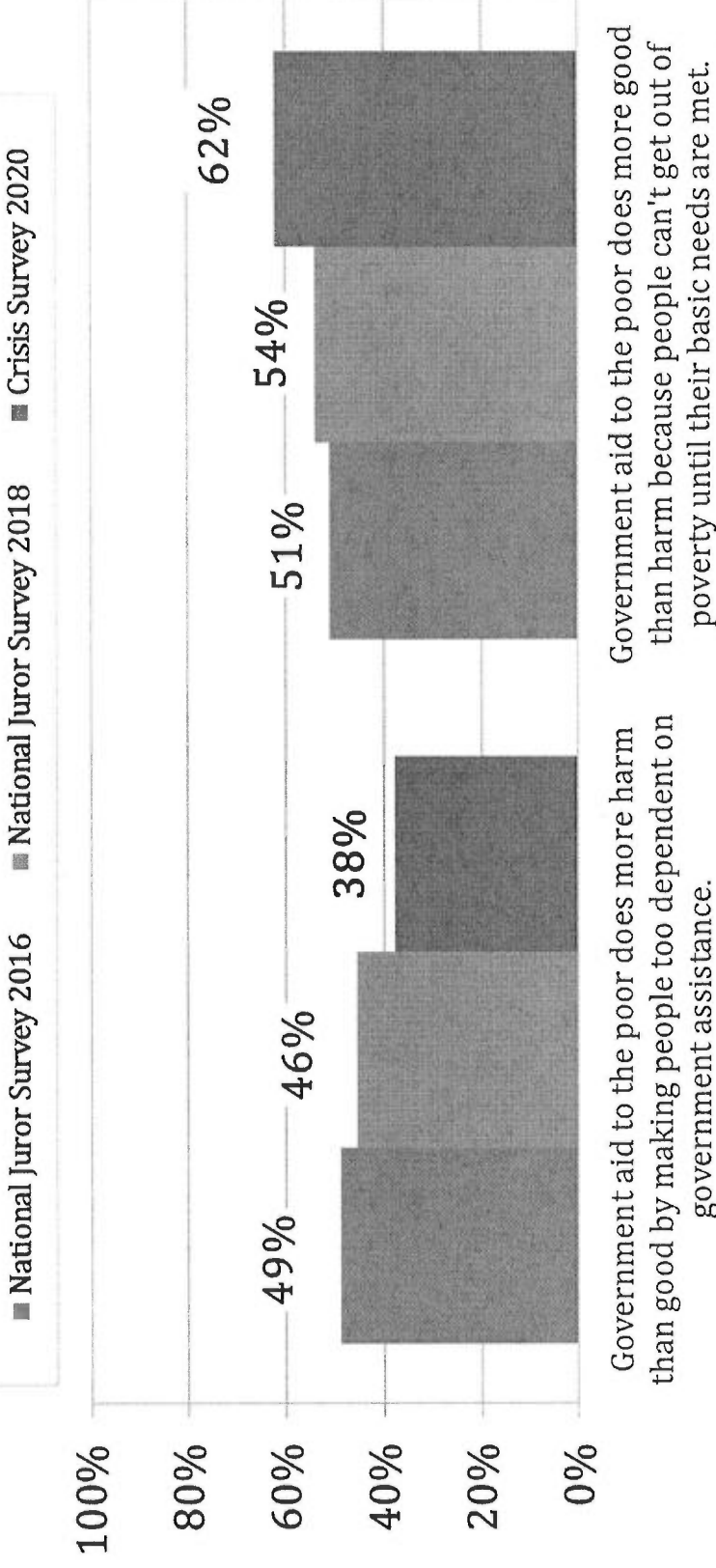
Sample Characteristics

Crisis Survey 2020



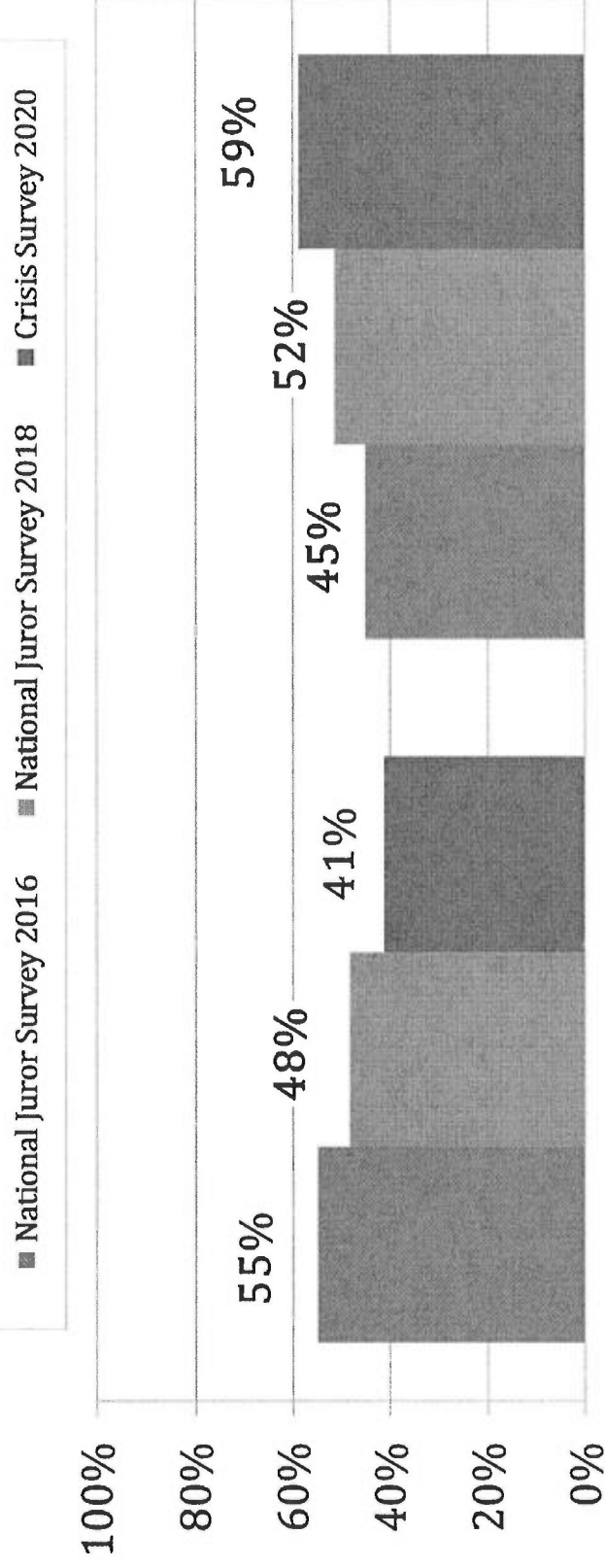
Which of the following statements comes closest to your view?

General Opinions



Which of the following statements comes closest to your view?

General Opinions



Poor people today have it easy because they can get government benefits without doing anything in return.

Poor people today have hard lives because government benefits don't go far enough to help them live decently.

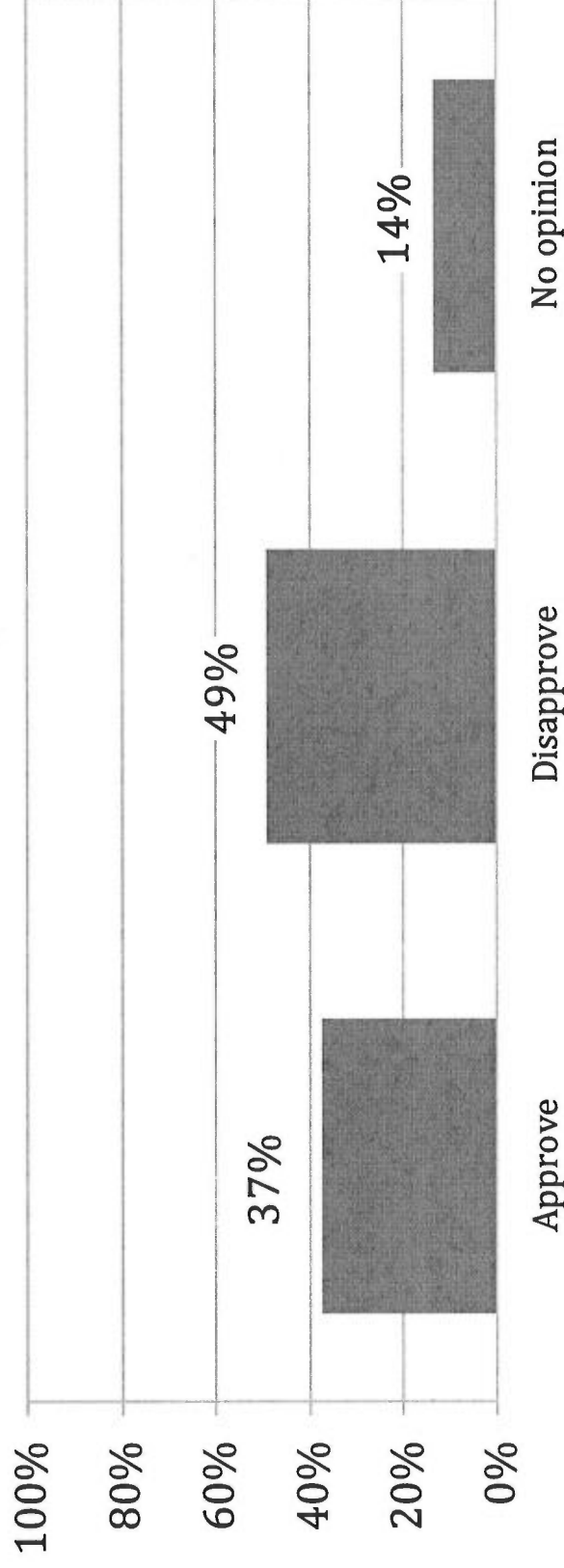


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Do you approve or disapprove of the way Donald Trump is handling the response to the coronavirus (COVID-19)?

Effects of COVID-19

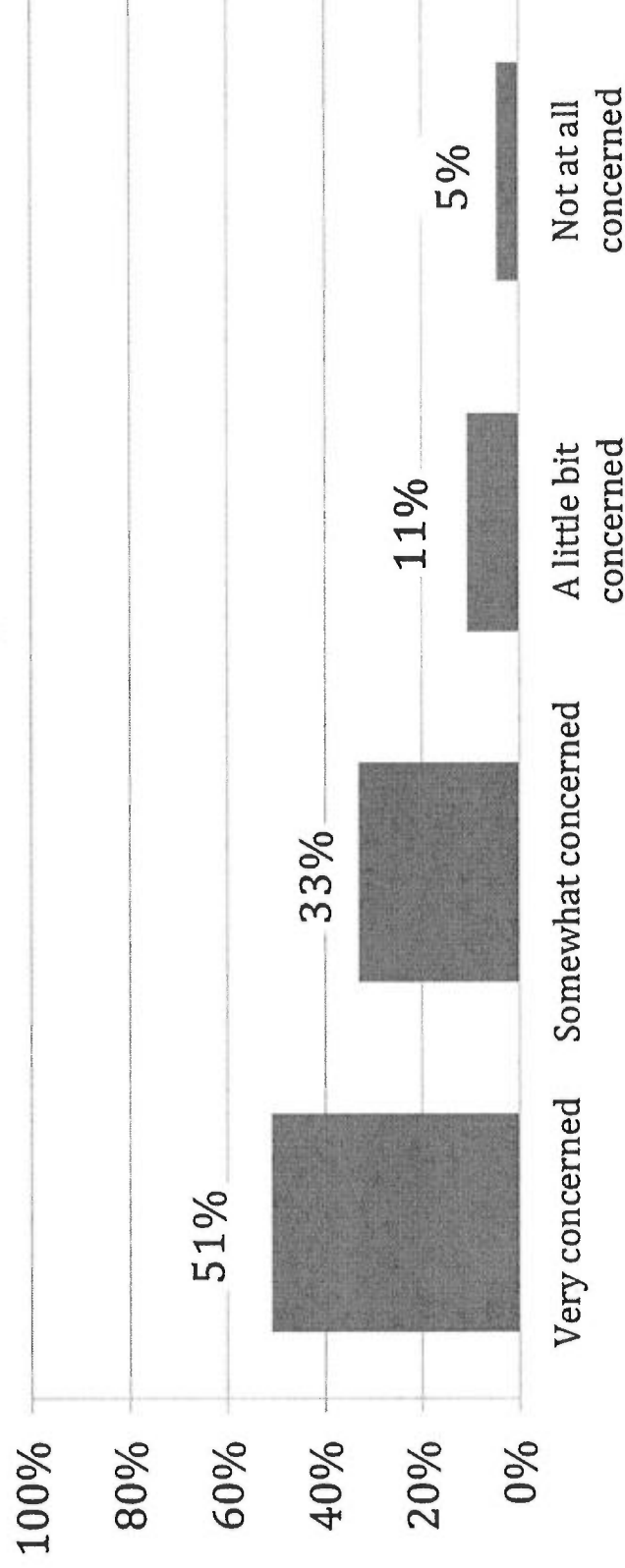
Crisis Survey 2020



How concerned are you that you or someone you know
will be infected with the coronavirus?

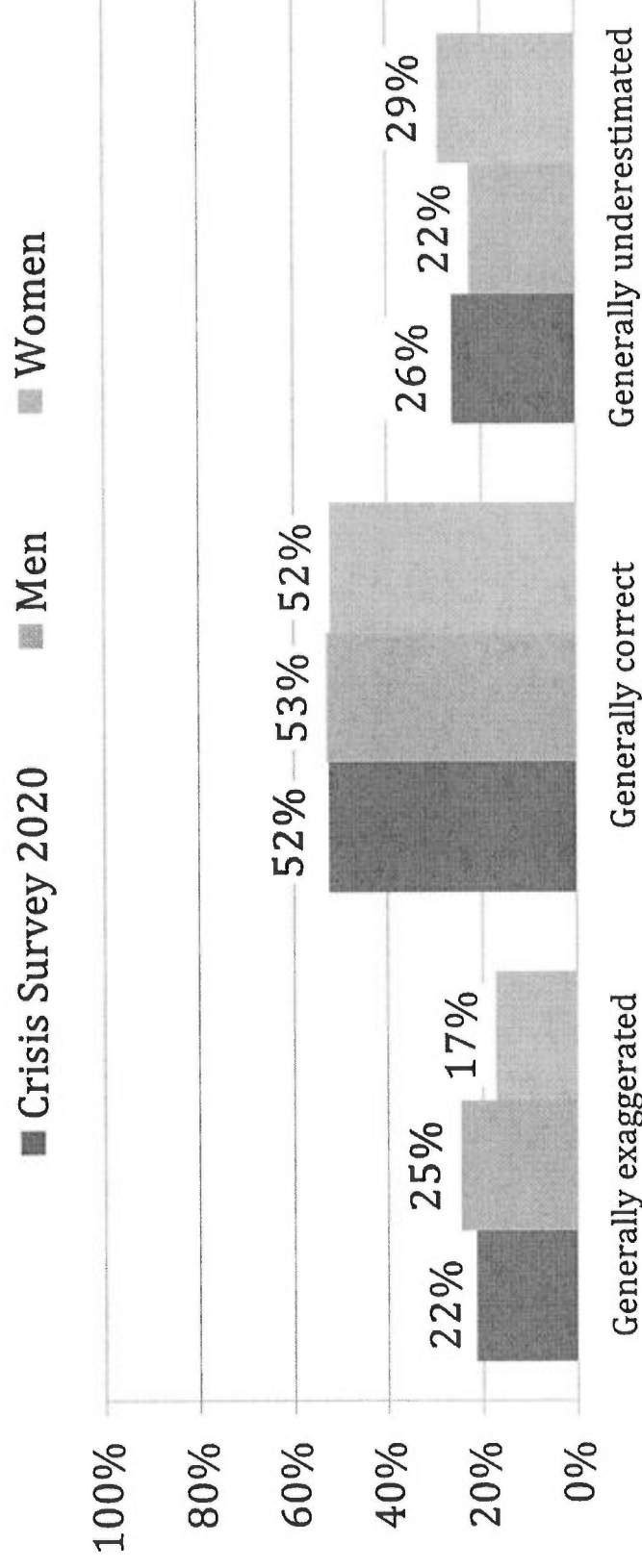
Effects of COVID-19

Crisis Survey 2020



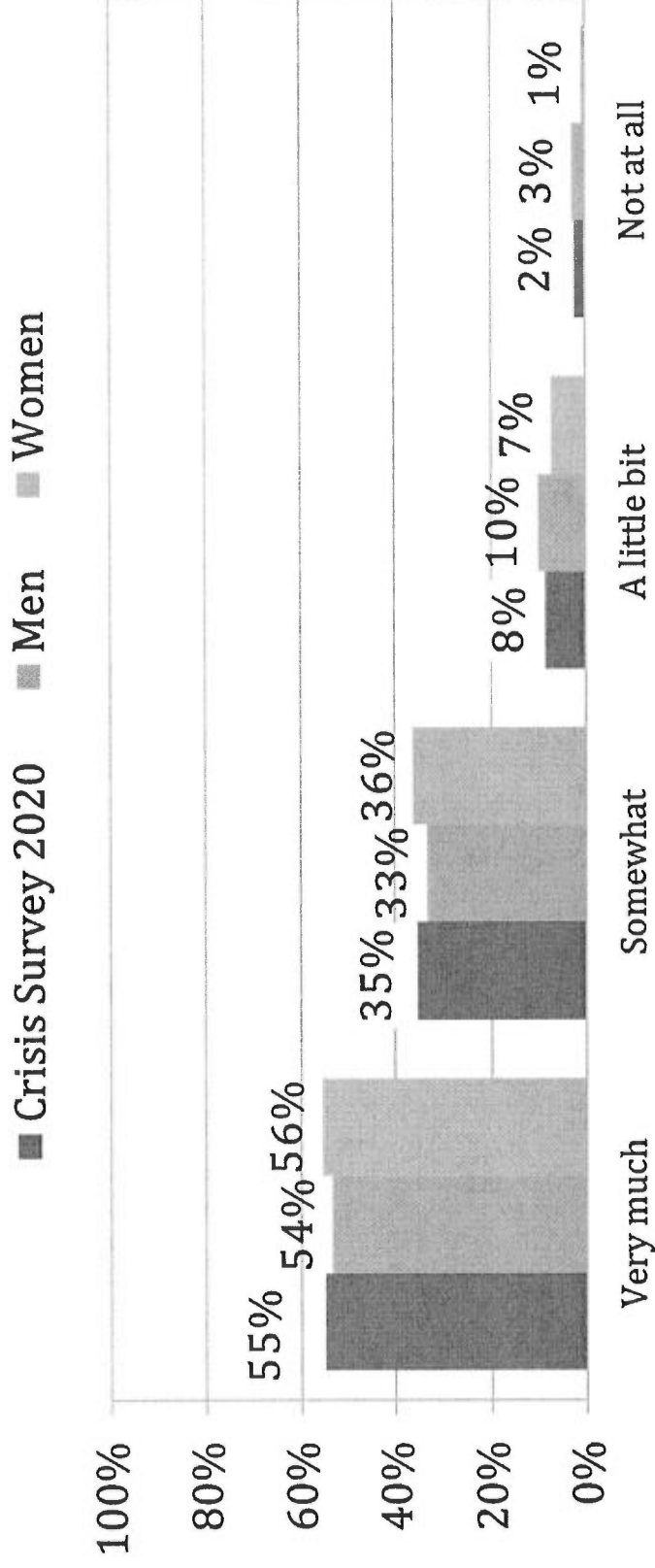
Do you think the seriousness of coronavirus is generally exaggerated, generally correct, or generally underestimated?

Effects of COVID-19



How much has coronavirus disrupted your life, if at all?

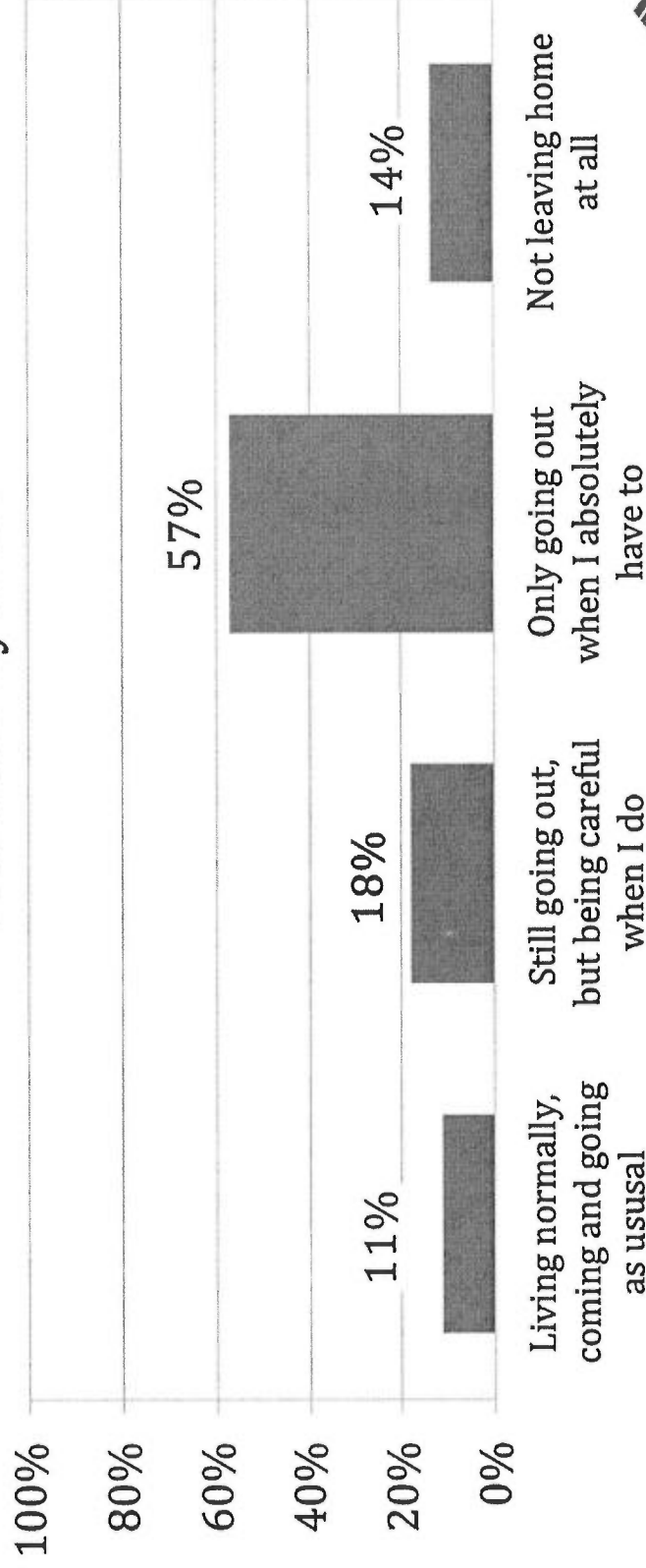
Effects of COVID-19



As you may know, many Americans have been told to stay home if they can because of the pandemic. Which of these best describes you these days?

Effects of COVID-19

Crisis Survey 2020



Have you or your spouse/significant other lost your job because of the coronavirus?

Effects of COVID-19

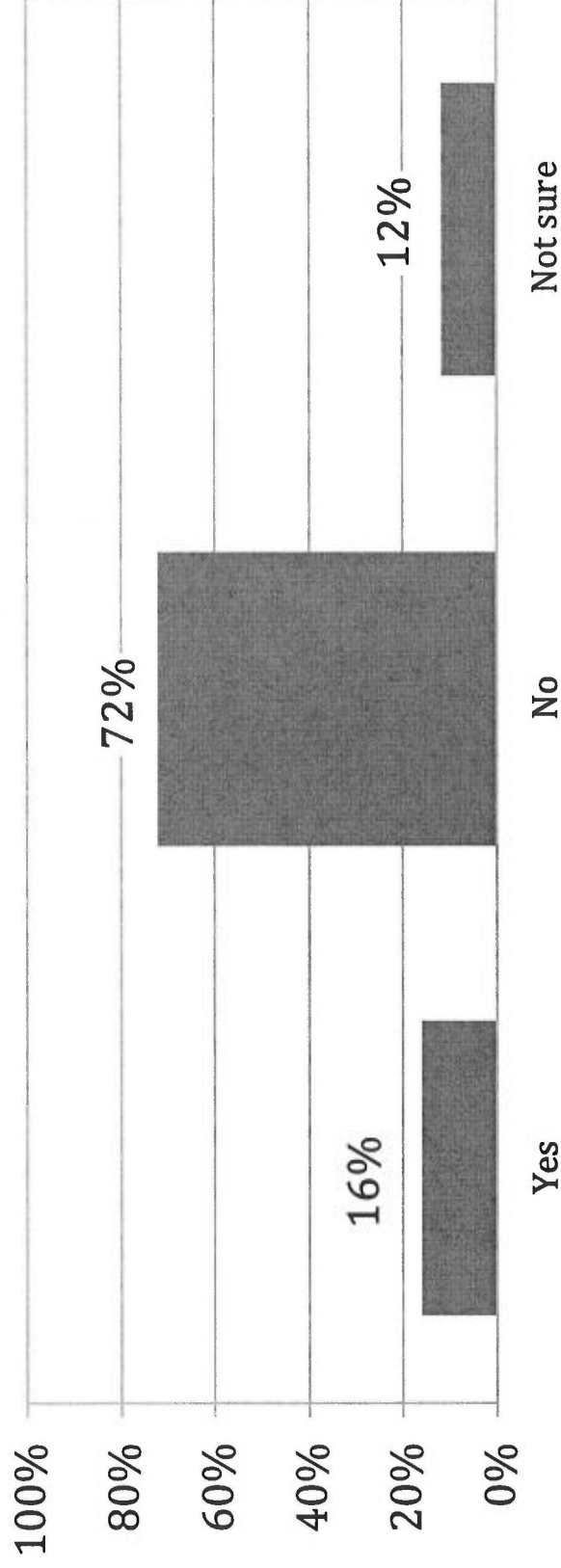
Crisis Survey 2020



Have you or anyone close to you
gotten the virus?

Effects of COVID-19

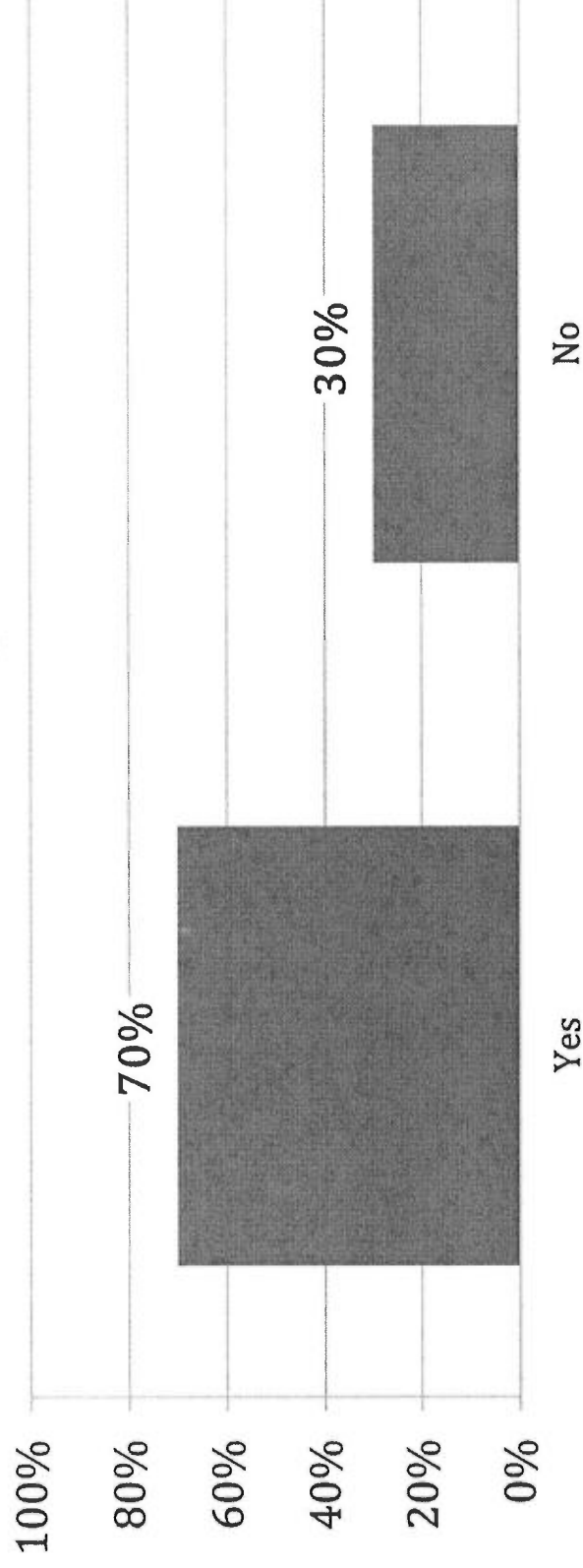
Crisis Survey 2020



If a test for the coronavirus were easily available
and free, would you get one now?

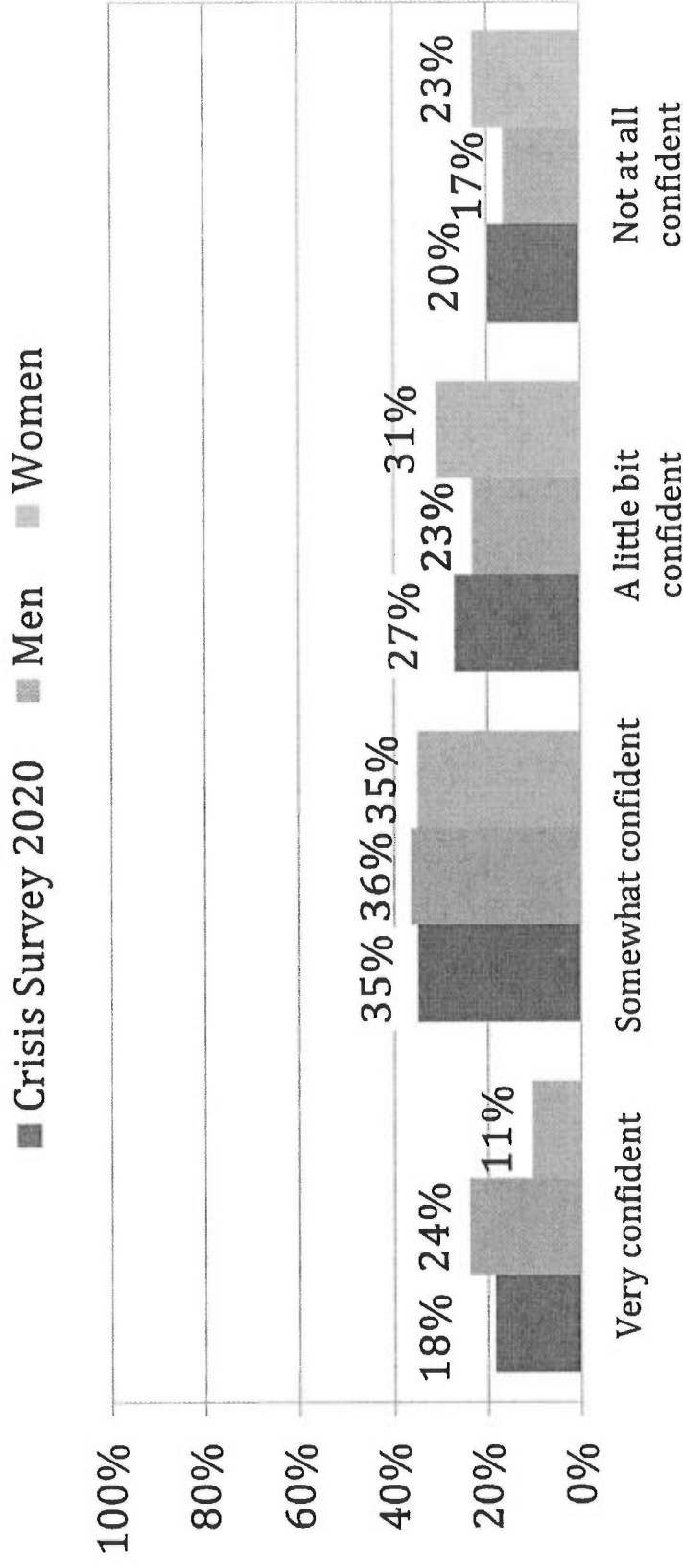
Effects of COVID-19

Crisis Survey 2020



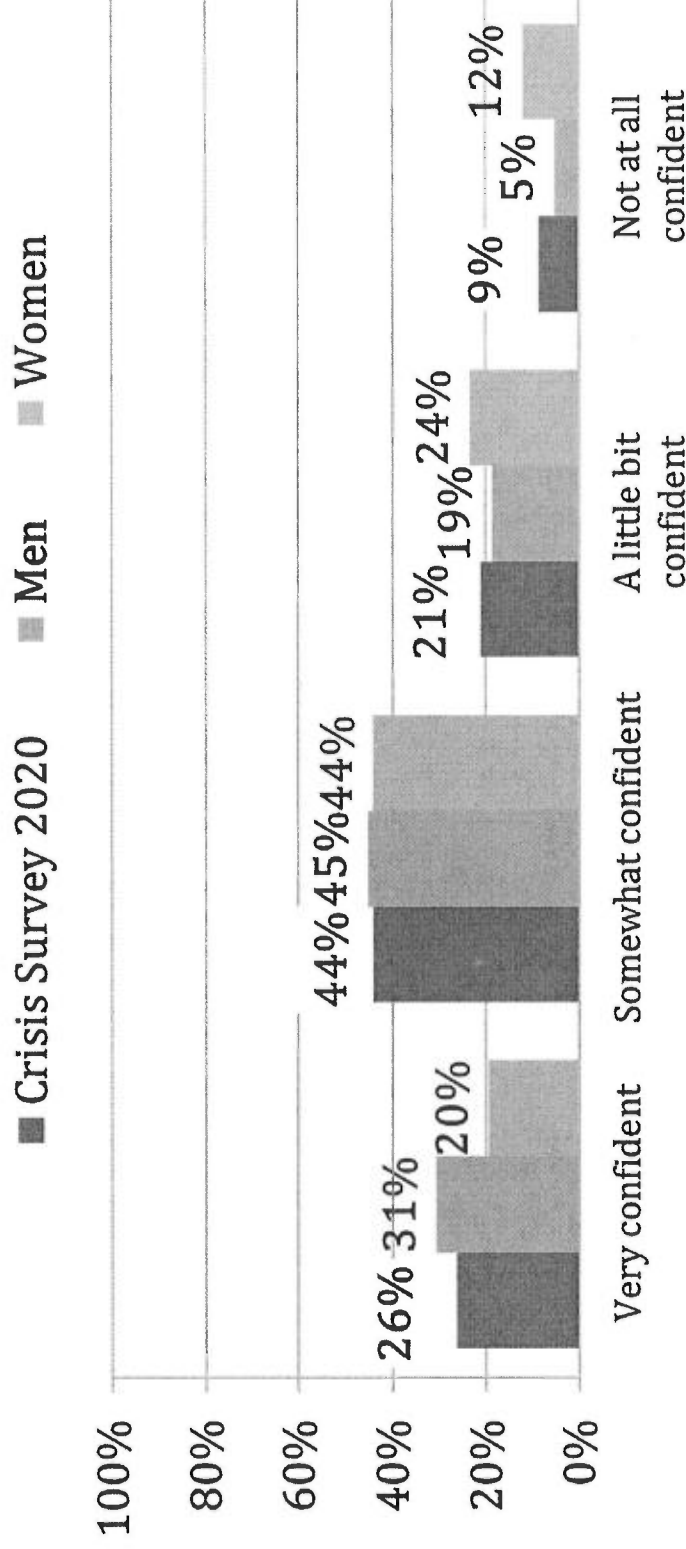
How confident are you of the government's ability to control the coronavirus pandemic?

Effects of COVID-19



How confident are you of your own ability to control how the coronavirus pandemic will affect your own life?

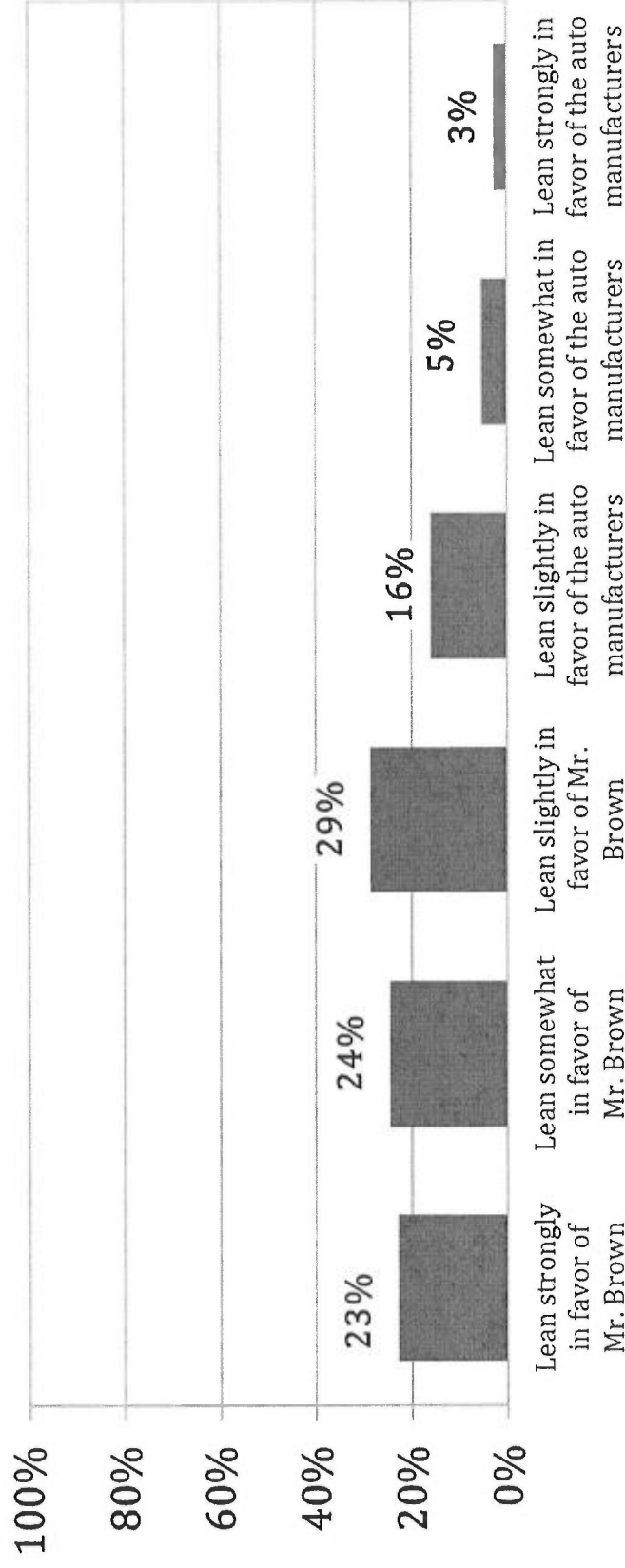
Effects of COVID-19



In a case like this, would you...

Asbestos Vignette

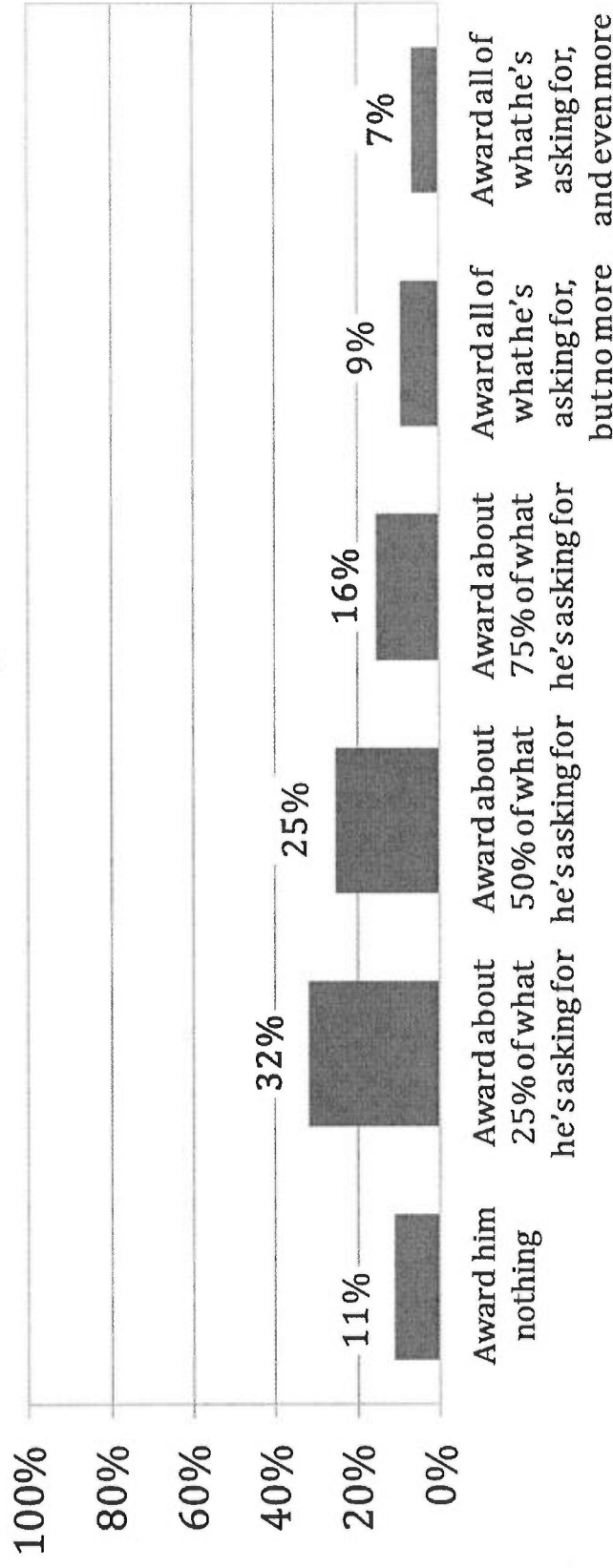
Crisis Survey 2020



Mr. Brown is asking for \$10 million
to compensate him for his pain and suffering.
Do you think a jury should...

Asbestos Vignette

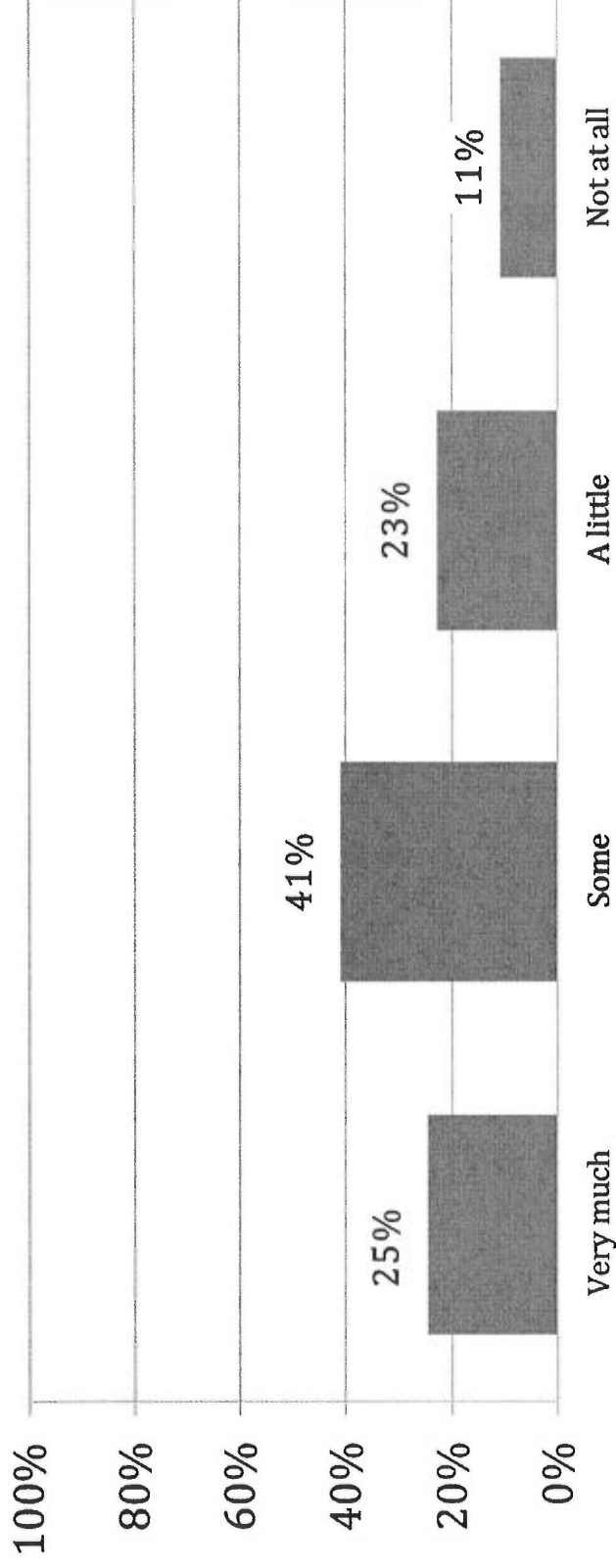
Crisis Survey 2020



To what extent do the auto manufacturers deserve to be punished?

Asbestos Vignette

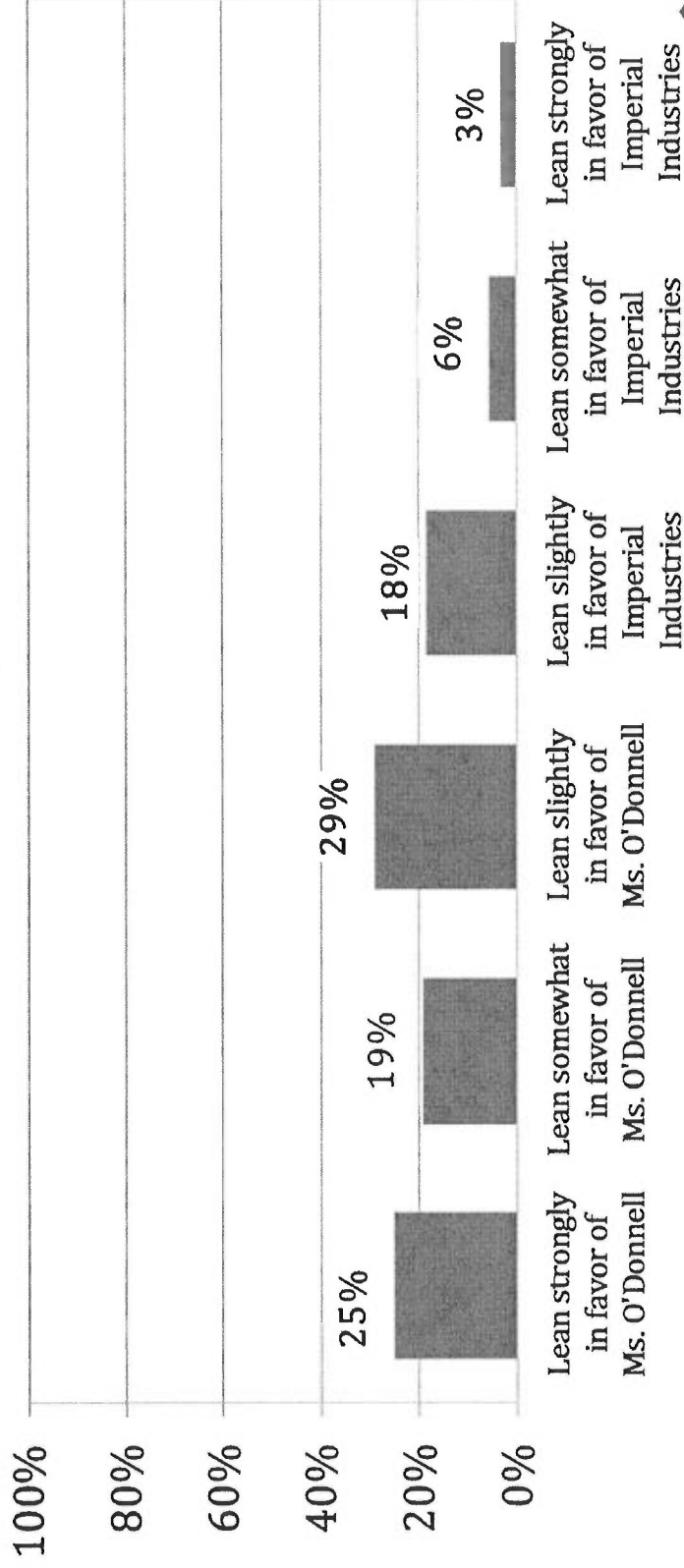
Crisis Survey 2020



In a case like this, would you...

Labor & Employment Vignette

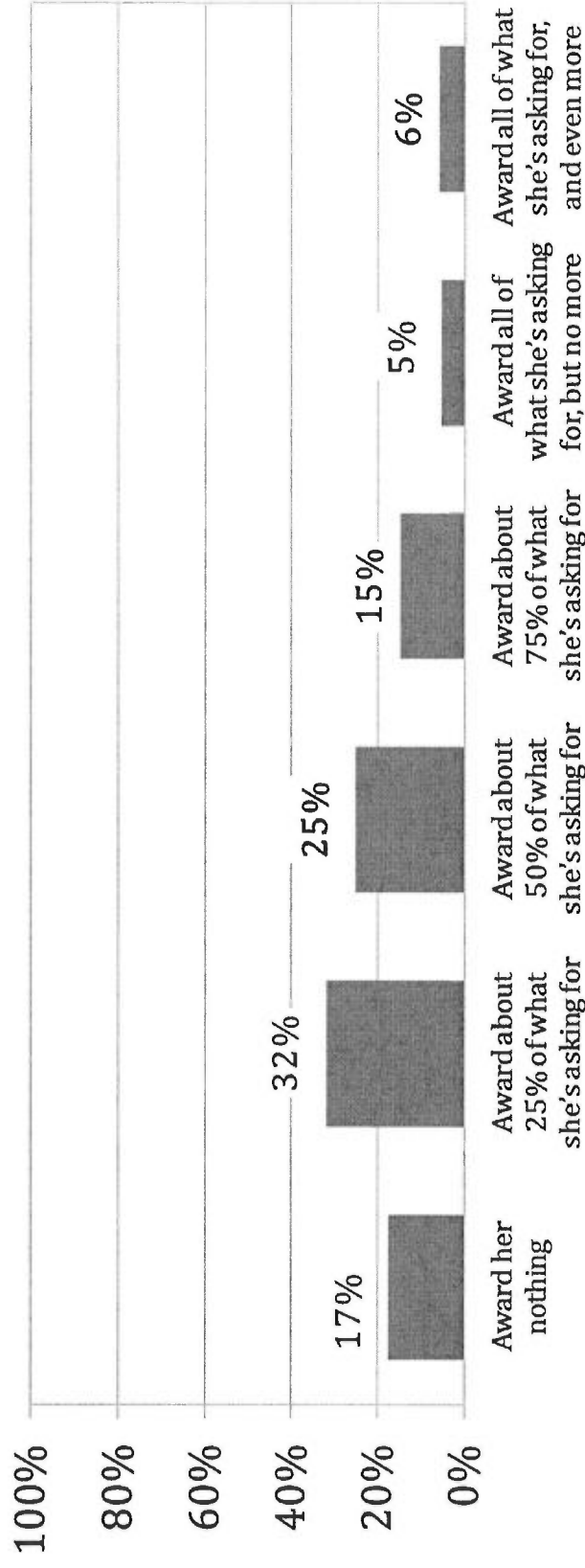
Crisis Survey 2020



Ms. O'Donnell is asking for \$10 million
to compensate her for her pain and suffering.
Do you think a jury should...

Labor & Employment Vignette

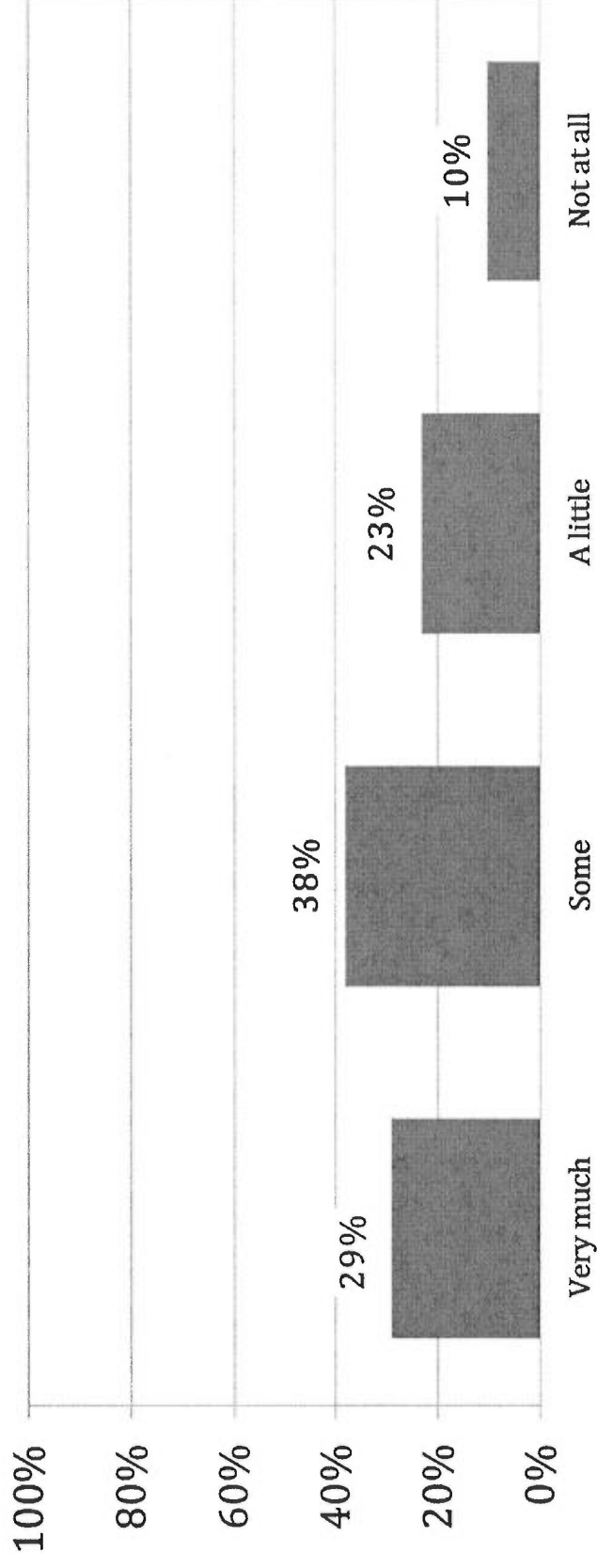
Crisis Survey 2020



To what extent does Imperial Industries deserve to be punished?

Labor & Employment Vignette

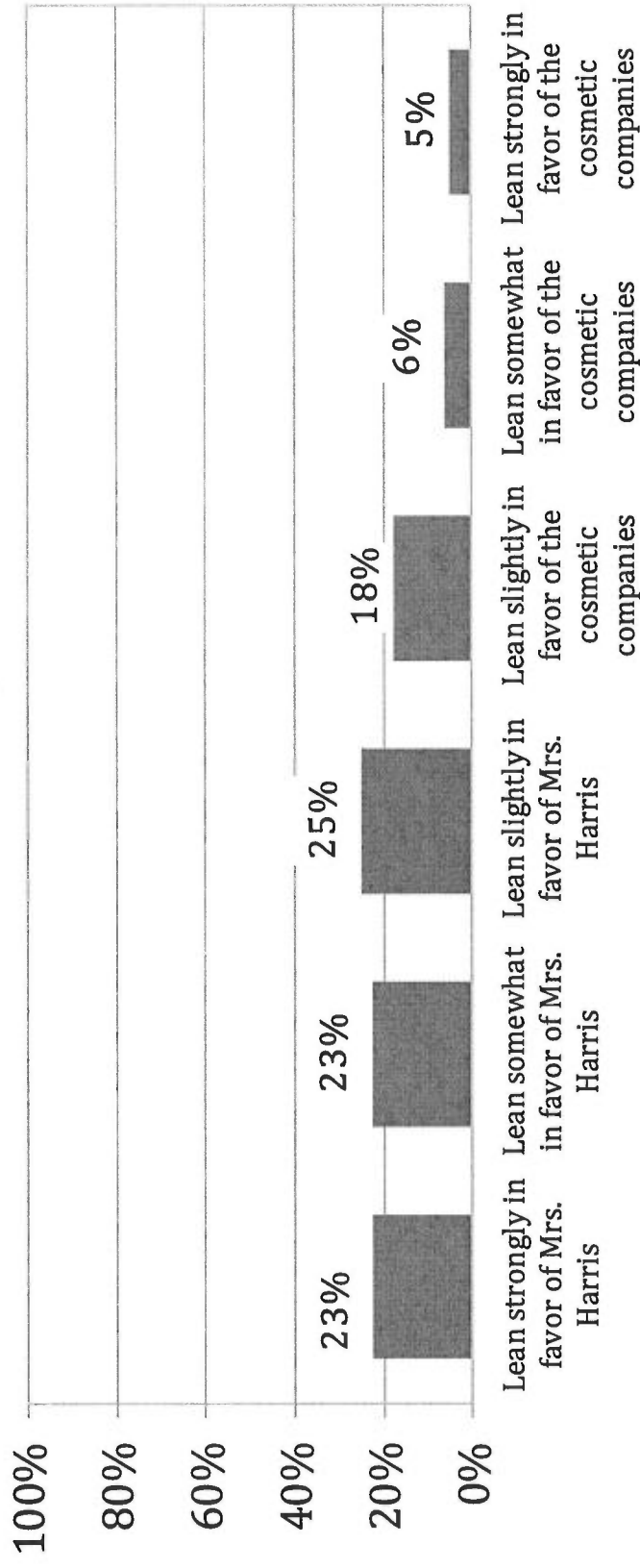
Crisis Survey 2020



In a case like this, would you...

Talc Asbestos Vignette

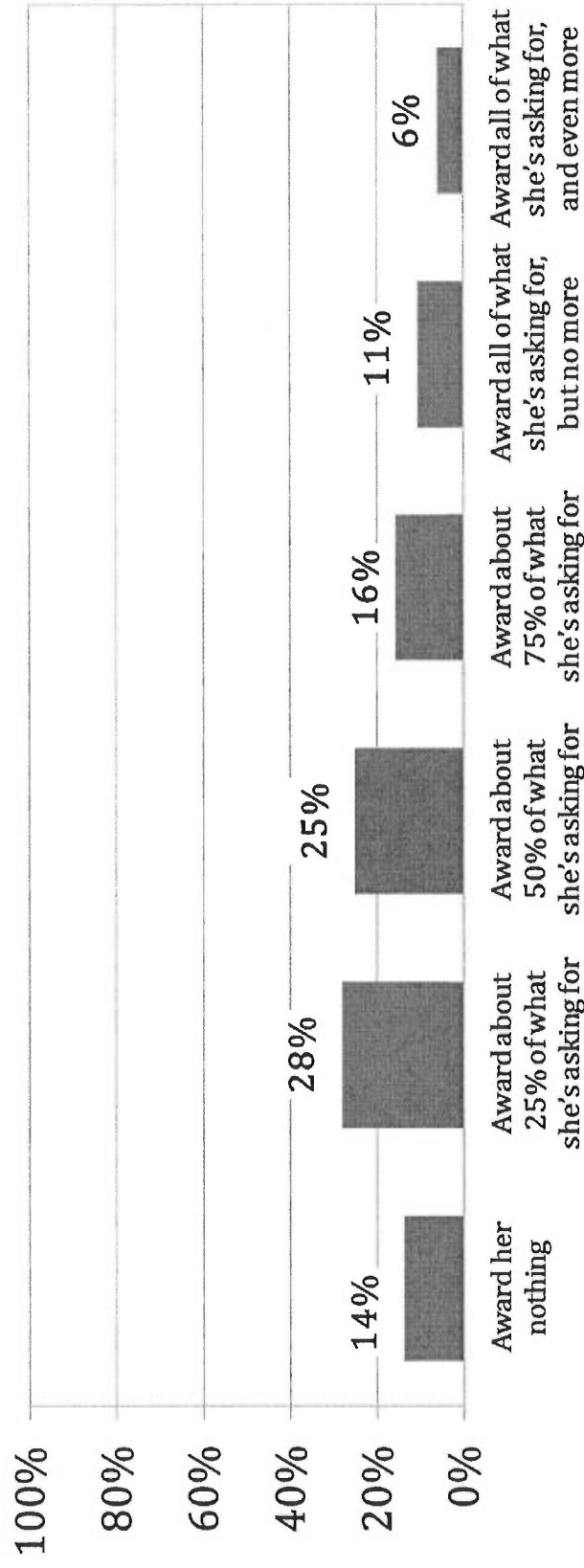
Crisis Survey 2020



Ms. Harris is asking for \$10 million
to compensate her for her pain and suffering.
Do you think a jury should...

Talc Asbestos Vignette

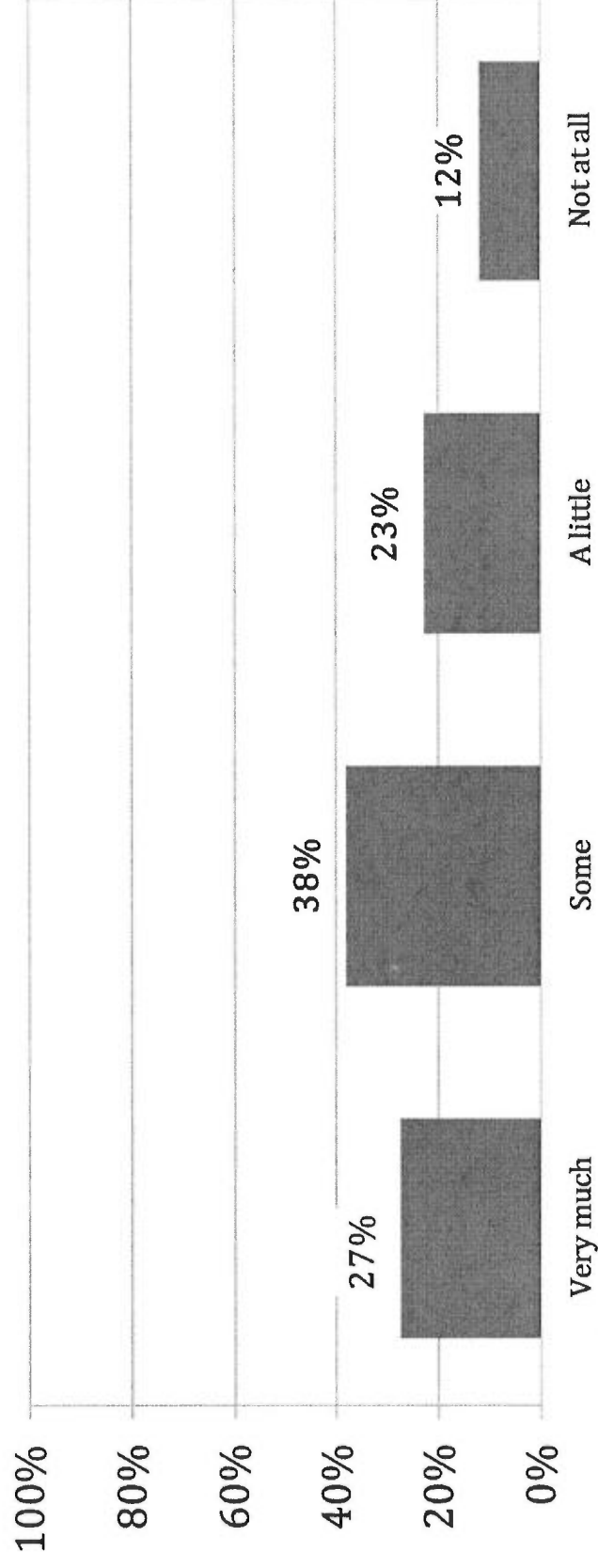
Crisis Survey 2020



To what extent do the cosmetic companies deserve to be punished?

Talc Asbestos Vignette

Crisis Survey 2020



COVID-19 AND SOLEMN CRIMINAL TRIALS SCOTTISH GOVERNMENT DISCUSSION DOCUMENT – APRIL 2020

Introduction

“The most important duty of any Government is to keep its citizens safe and maintain public order.”

Cabinet Secretary for Justice, Humza Yousaf MSP, Scottish Parliament, 1 April 2020

Scotland’s justice system underpins our basic rights and freedoms and protects communities and individuals from harm. Those vital rights and freedoms must continue during the COVID-19 outbreak. The Scottish Government and justice agencies are committed to ensuring continuing fair and effective justice. Moves have already been made to enhance digital systems and capability across the justice system and to scale back activity, where appropriate. However, our justice system relies heavily on physical attendance at court, and on physical evidence including for the most serious criminal cases that are heard in the High Court and Sheriff Court.

Purpose of this document

The purpose of this document is to provide a basis for upcoming discussions between the Cabinet Secretary for Justice and key stakeholders on the most effective approach to manage the impact that the COVID-19 outbreak will inevitably have on the operation of court business in Scotland. Ensuring all parts of our court system can operate effectively as soon as possible continues to be an important priority; including all civil, family and tribunal cases as well as those criminal cases currently heard at a summary level. We will continue to consider with our justice sector partners any necessary and appropriate steps we can take in regard to those matters. The focus for this paper and the subsequent discussions is, however, very much centred on the most serious cases (solemn cases). This is in order to be able to identify as quickly as possible some potential solutions to enable those cases to progress effectively if possible, during as well as in the aftermath, of the COVID-19 emergency.

Our approach

The Cabinet Secretary for Justice will have a number of focussed discussions on a range of potential options to manage the impact that the COVID-19 outbreak will have on solemn criminal business in Scotland. These options are set out in part 2 of this document. Part 1 of this document provides:

- An assessment of the current **operating context** – why might change be required just now and in the coming months and what **criteria** should we use to assess whether any change would be beneficial?
- An overview of solemn business – the current **arrangements and caseloads**; and a recap of steps taken to date – leading to the publication of this document.

PART 1 – CURRENT OPERATING CONTEXT

This paper is only necessary due to the impact that COVID-19 is having (and will have) on the operation of the solemn criminal justice system in both the short and medium term. All jury trials are currently suspended – this is the only responsible approach that could be taken in view of the social distancing guidance that is in place. When considering changes to the way in which the system operates it is important to bear in mind that we will, most likely, experience a phased return to normality and that, during each phase, the ability to conduct business as usual will depend on the public health requirements in place at that time.

Whilst it is not feasible to provide anything other than indicative timescales at this point it is possible to describe three distinct phases that we will most likely experience before the solemn criminal justice system can fully return to the position it was in ahead of the onset of COVID-19 outbreak. The impact on the operation of the system will vary in each – and there is the potential to cycle between these periods. This must be borne in mind when the options in this document are being considered.

- **“Lockdown” period** – this is the period that we currently find ourselves in. Precise timings cannot be confirmed, but it may continue for a period of weeks or up to a short number of months, based on public health advice. The assessment of the Scottish Courts and Tribunals Service (SCTS) is that, during this period, no jury trials can be commenced and only a limited number of summary custody trials may be possible.
- **Phased /Societal recovery period** – we anticipate that, for a period of months beyond the end of the current period, enhanced public health and social distancing requirements may remain in place. During this period jury citation will prove difficult and take longer, in a country recovering from high sickness rates, schools and public services re-commencing, businesses recovering after lengthy staff absences and people taking missed holidays after lengthy restrictions.
- **Business as usual recovery period** – once all public health restrictions are lifted it will be possible to fully recommence the operation of the normal solemn criminal justice system. However, pressures will be evident across all elements of the justice system; criminal, civil, tribunal and administrative. Care will be required to ensure that a recovery programme is established at a sustainable pace and matched to the resources available in justice organisations, the legal profession and voluntary sector. The precise length of that system recovery period will vary depending on the length of the preceding two periods, but it is already apparent that there will be a period of this nature.

Any options for change in the short to medium term should be appraised against those varying periods in which they would need to operate. They should also be appraised against clear **criteria** of what we are aiming to achieve by making changes to the system. Scottish Ministers are of the view that those criteria are:

- **To protect the life, health and safety of all those using the system;**
- **To maintain, so far as possible, an effective system of criminal justice;**
- **To maintain public confidence in the delivery of justice during this period;**

- **To facilitate the most effective long term system recovery.**

Solemn criminal business – Current arrangements and caseloads

Serious criminal cases are dealt with under solemn procedure in Scotland. The Crown will generally prosecute under solemn procedure where the sentence on conviction is expected to exceed 12 months of imprisonment or detention. It includes the most serious crimes which may only be prosecuted in the High Court, such as murder and rape. All solemn cases are heard in the High Court or the Sheriff Court by a judge sitting with a jury of 15 people. In the context of the COVID-19 outbreak, it is recognised that it is not appropriate to expect members of the public to undertake this civic duty in the normal way, as it would require them to travel to the court and to be in close contact with a number of other individuals, both in the context of empanelling the jury and during jury service.

Following Scottish Government and Public Health Scotland guidance, as of 17 March 2020 the SCTS confirmed that no new criminal jury trials would be commenced or new juries empanelled until further notice. The SCTS confirmed that the position would be regularly reviewed, but the effect is that until it is safe to convene a jury there will be no solemn trials in Scotland.

Further measures introduced by Scottish Government directed the public to stay at home to protect the NHS and save lives. While these measures are in place the SCTS cannot cite potential jurors, empanel new juries or commence jury trials. England & Wales, Northern Ireland and Republic of Ireland have similarly ceased all jury trials at this time. With an additional 551 new solemn cases being indicted each month (High Court and Sheriff Court), and many cases already awaiting trial when the restriction on jury trials was introduced, it is clear that the number of cases waiting for trial will very quickly increase.

Coronavirus (Scotland) Act 2020

The Coronavirus (Scotland) Act 2020, which was passed unanimously by the Scottish Parliament on 1 April 2020, included a range of emergency measures to ensure that justice can continue to take place and to provide flexibility during the current outbreak. The supporting documents for the Act acknowledged that during the COVID-19 outbreak, given the impact of significant staff absences and social isolation and distancing advice, it is inevitable that there will be large numbers of cases that are delayed for various reasons. The Act includes provisions that extend certain time limits applicable for criminal proceedings, including for solemn proceedings in the High Court and Sheriff Courts.

The provisions in the Act allow for time limits to be extended, but do not resolve the inability for the most serious cases to proceed without being able to empanel juries. In other words, the new extended time limits allow cases to be indicted and call for trial at a later stage than would normally be possible but do not allow cases to conclude while it is unsafe to bring a jury to court. Proposals within the Bill, as introduced, to allow Ministers - if they were satisfied that it was necessary and proportionate to do so - to provide by subordinate legislation for trials without juries on a temporary basis during the outbreak and its immediate aftermath were

withdrawn. Instead, Scottish Ministers confirmed that they would work with relevant stakeholders to consider any practical or legislative solutions to this issue, with a view to seeking to maintain an effective system of criminal justice whilst upholding the rights of accused persons, victims and witnesses, including the obligation to bring cases to a conclusion within a reasonable time. These discussions are being approached with an open mind by Ministers.

This paper describes the nature and scale of the challenge. It discusses various possible options for mitigating that challenge. Ministers are open to considering any other option which may be suggested to them. In addition to the substantive merits and demerits of the various options, Ministers will wish to discuss with stakeholders whether it is correct that any temporary solution should only be for the time period of the outbreak and the immediate aftermath. We are aware of concerns that, notwithstanding any measures which might be taken to enable cases to continue to be brought to trial during that period, there will still be a very significant backlog of cases to be addressed when it comes to an end. As well as the discussions focussing on each option we would also want to discuss what time period it would be appropriate for any changes to be in force for.

The Scottish Government also recognises that at least some of the options considered would require legislative change. Ultimately it would be a matter for the Scottish Parliament to scrutinise the proposals and to determine whether it supports them. Other proposals are matters that fall within the responsibility of the senior judiciary for the efficient conduct of business through the courts and of the SCTS who are responsible for the health and safety of court users. The purpose of this discussion paper and subsequent discussions is to establish not only which of the options would best prevent, mitigate or remedy the negative impacts outlined below but also the degree of consensus as to the merits or otherwise of any particular proposed measure. This will help to inform the Scottish Government decision on whether it is appropriate to propose further legislation and when this would best come into effect.

Scottish Ministers' continuing commitment to trial by jury

Scottish Ministers are committed to the principle of trial by jury. During 2017-2019 the Scottish Government commissioned ground-breaking research, using mock trials, into how juries reach decisions to help inform how the jury system could be strengthened¹. During early 2020, the Scottish Government hosted a series of engagement events across the country to seek views from the legal profession, third sector, and people with experience of the justice system, on the potential for criminal justice reforms, again with the aim of further strengthening Scotland's system of trial by jury. This included considering how the three unique elements of our jury system interact – the simple majority, size of jury and the three verdicts and whether all (or any) of those elements should be reformed. That work is paused during the period of the current outbreak and is therefore not directly linked to the work we are now considering on how our justice system can effectively react to the COVID-19 outbreak.

¹ <https://www.gov.scot/news/scottish-jury-research/>

The proposed change to the system of trial by jury envisaged in the Coronavirus (Scotland) Act 2020, in the context of the COVID-19 outbreak – namely, to allow solemn trials to take place before a judge sitting without a jury – was intended to be a temporary measure, for the immediate period following the outbreak and its aftermath until any excessive backlog was under control and the jury system was capable of fully functioning again. Any change would not have provided a precedent for removing jury trials in future. The change would have required subordinate legislation by Ministers, with the approval of Parliament. It would have required Ministers, following consultation with relevant stakeholders, to conclude that the change was necessary and proportionate in response to the negative effects that COVID-19 was having or was likely to have by preventing solemn cases from being heard and concluded. Ministers also recognise that, in response to this proposal, a number of other options have been suggested. Before bringing forward any further proposal, they wish to discuss a full range of potential options for addressing the problem. Whilst the proposal to temporarily change the trial by jury system is still included amongst these options, it is not the Scottish Government's favoured option to address this emergency situation.

This paper therefore sets out information about the potential scale and nature of those negative effects and seeks views on a range of options that have been suggested to mitigate these effects. Subject to the agreement of the Parliamentary Bureau, Scottish Ministers aim to report back to MSPs on next steps as soon as possible after recess.

Impact of pause on solemn jury trials – Scale of the potential backlog

"We will be facing a monumental backlog of solemn criminal trials once the current restrictions are lifted and trials can recommence. Unless action is taken to mitigate the impact of this, there will be substantial delays in bringing accused persons to trial. These are likely to stretch into years rather than months. The delays will be unprecedented in Scottish legal history."

Lord Justice General, statement in response to the Coronavirus (Scotland) Bill, 31 March 2020

Over the past decade, levels of both violent and property crime in Scotland have fallen significantly. However, over recent years, there has been a very significant increase in the most serious crimes brought to court, in particular to the High Court. This reflects increases in particular in the prosecution of historical and new sexual crimes and measures to tackle serious and organised crime. The nature of these cases is also more complex, involving for example forensic or digital evidence, adding to the timescales for cases to be investigated and brought to court.

Table 1: Solemn crime – Indictments registered and trials led, 2017-2021²

	2017/18	2018/19	2019/20	2020/21 [Projected by SCTS]
High Court				
<i>Indictments Registered*</i>	718	911	1125	1275
<i>Trials Called**</i>	689	717	870	995
<i>Trials Evidence Led***</i>	461	507	521	620
Sheriff Court Solemn				
<i>Indictments Registered</i>	4,979	5,182	5508	5900
<i>Trials Called</i>	2,833	2,848	3030	3245
<i>Trials Evidence Led</i>	1,041	1,119	1230	1300

*'Indictments registered' is the formal decision point for criminal proceedings in serious cases. This can be seen as the point when the Crown Office decide a prosecution will be taken forward.

** 'Trial called' is the point at which after an indictment is registered that a trial is arranged.

*** 'Trial evidence led' is the point at which after an indictment is registered and a trial is arranged that a trial with evidence is progressed. If an accused pleads guilty, then there will be no trial with evidence led and instead the case will proceed to sentencing.

The Scottish Government has committed additional resources in recent years to both the SCTS and the Crown Office and Procurator Fiscal Service (COPFS) to help support measures to address the duration of these cases, notwithstanding the increase in volume and complexity. Prior to the current outbreak there were around 390 High Court solemn trials outstanding (with a scheduled trial date) and around 500 Sheriff Court solemn trials outstanding (i.e. registered with the SCTS but not yet disposed of).

As the Lord Justice General has made clear, the current pause in jury trials as a result of the restrictions in place to control the COVID-19 outbreak will inevitably lead to a substantial increase in the backlog of trials awaiting progress through the courts.

Based on the projections for 2020/21, for each five month period in which solemn jury trials cannot proceed, there would be an additional backlog of over 250 additional High Court trials and 540 Sheriff Court solemn trials that would otherwise have proceeded. In five months, the additional backlog could total around 790 serious cases. If the halt on the progress of cases were to continue over the summer the scale of the backlog, on top of those cases already awaiting trial prior to the outbreak, would be prodigious. The total number of outstanding trials could exceed 1600 cases.

Current justice capacity was only recently expanded to seek to cope with the growth in the number of the most complex and serious cases. There is no simple or quick way to expand further the capacity of the solemn courts to absorb and reduce a backlog. This would be the case in normal times, but is especially the case during the COVID-19 outbreak, which creates substantial difficulties for the normal operation of the courts. The impact of the backlog on the progress of, and timescales for, criminal cases could stretch over a number of years and impact on the justice

² <https://www.scotcourts.gov.uk/official-statistics>

system for years to come. That impact on the justice system translates, in turn, into impacts on and for individual accused persons (whether on remand or on bail) and for individual victims of crime, which we describe further below.

One way in which the High Court has met increasing demands in recent years has been to draw on resources from the Sheriff Courts, for example reallocating Sheriff Courts for High Court business and having experienced sheriffs act as temporary judges. This of course takes those sheriffs away from hearing solemn Sheriff and Jury cases. Furthermore, Sheriff and Justice of the Peace (JP) summary business is, at this time, only progressing on an exceptional basis. Therefore, although it is anticipated that some summary cases may still be brought to trial (particularly with the enhanced flexibility in the way that evidence can be made available to the court, provided for in the Coronavirus (Scotland) Act 2020), there will also be a substantial backlog of summary criminal business, which will require to be accommodated within the Sheriff Court, following the outbreak.

Implications of a significant backlog for victims, accused persons, etc.

“People who have experienced the most serious crimes, including families who have been bereaved, are already experiencing lengthy delays in their cases coming to trial. Many have expressed their concern that, while the restrictions to reduce the spread of coronavirus are necessary, these will result in further delays as well as a great deal of additional stress and anxiety.”

Victim Support Scotland, letter to MSPs, 31 March 2020

In her thematic review of the management of criminal justice time limits, the previous Chief Inspector of Prosecution in Scotland noted that serious consequences flow from delays in the progress of criminal prosecution. The implications include:

- For victims of the most serious crimes, and their families, there is the distress and uncertainty of waiting for an extended period for their case to be resolved.
- For vulnerable witnesses there is the ongoing trauma involved when there is a delay in giving evidence. The Inspectorate identified the adverse impact of delay, in particular, on the willingness of victims of crime to continue to engage with the criminal justice process.
- For people accused of serious crimes there is the uncertainty of awaiting justice. Accused persons on bail have a criminal charge hanging over them, and may be subject to conditions of bail, for an extended period.
- For those people accused of crime who are held on remand in prison the negative implications are especially acute. Without the ability for cases to progress to trial, an accused person could be held on remand for an extended period with no certainty about when their case will come to trial. Prior to the COVID-19 outbreak, there were 156 people in custody awaiting trial for solemn crimes in the High Court and 115 people in custody awaiting solemn trial in the Sheriff Court.

There may be opportunities to mitigate, to some extent, some impacts of the delay. For accused persons held on remand for solemn crimes, bail reviews can determine whether it is appropriate for them to remain in custody. However, there is already a presumption in favour of bail. Accused persons will therefore currently be remanded in custody for good reasons, including protection of the public. Therefore bail reviews are likely to be an option for and to be successful for only a limited number of individuals.

For vulnerable witnesses, there may be the opportunity to provide evidence by pre-recorded video. However, the capacity for pre-recording evidence well ahead of a trial taking place is still limited and, in the context of the current outbreak, there may be practical considerations in organising suitable arrangements for pre-recording, for example through evidence by commissioner hearings.

There are also wider consequences for the criminal justice system. Long delays may undermine public confidence in the operation and effectiveness of the justice system in tackling the most serious crimes, including murder, serious sexual offences and serious and organised crime.

Practical requirements for jury trials

“Without your essential contribution, it would not be possible for the Scottish legal system to maintain the high standards which have been achieved over the years.”
SCTS, Guide to Jury Service in the High Court and Sheriff Court, February 2019

There are a range of practical considerations that need to be addressed when exploring arrangements for, or alternatives to, trial by jury in the context of the COVID-19 outbreak and health advice:

- Prospective jurors are selected at random from information supplied from the electoral register. Whilst certain people are excluded, for example those employed in certain roles in the justice system, the aim is to ensure a representative and random sample of people to act as jurors.
- Prospective jurors are currently required to travel to and physically attend at the High Court or a named Sheriff Court. People who have not been excused who fail to attend can be fined.
- Prospective jurors will generally be brought together in a waiting room in the court before the jury is empanelled. Rules of Court require that a jury cannot be balloted where there are less than 30 people named on the list of jurors present in court, so the empanelling of a jury of 15 requires at least double that number to be present, and sufficient numbers of potential jurors to be cited to allow for excusals.
- Courts will generally set down several trials to be heard during the week, so the number of potential jurors cited to attend at court will allow for more than one jury to be chosen. Unless good reasons are given, or an objection to a balloted juror is allowed, the first 15 jurors balloted will make up the jury for each trial.

- Jurors are required to listen to all of the evidence as well as any instructions given by the judge. They must not make any investigations or enquiries of their own into the case or discuss the case with anyone except their fellow jurors, in the privacy of the jury room. A court clerk will carry any messages and ensure the security of the jury's deliberations. The role of the jury is to discuss the case together and to reach a verdict in the case. Throughout this time, the court has a responsibility for ensuring the privacy of the jury discussions and the protection of the jury; and it is essential that the integrity of the jury is maintained.

Jury service is an important civic duty. There are well established arrangements that allow people to be excused from jury service on medical grounds, provided they have a medical certificate. However, jurors are not expected to contradict health advice or to place themselves at personal risk in fulfilling their civic duty. The courts have a general responsibility to ensure the safety and wellbeing of those selected for jury service, whilst also ensuring that those accused of serious crimes can receive a fair trial.

PART 2 – OPTIONS FOR ADDRESSING DELAYS IN SOLEMN TRIALS IN THE CONTEXT OF COVID-19 HEALTH ADVICE

“The SCBA believes there are workable alternatives and welcomes the opportunity of working with the Scottish Government and the Justice Secretary in attempting to find a temporary solution to this temporary problem.”

Scottish Criminal Bar Association (SCBA), 2 April 2020

A wide range of options have been proposed by stakeholders, either to allow trial by jury to continue to take place during the current outbreak, or to assist in dealing with the inevitable backlog of cases during the recovery phase. Scottish Ministers are open to considering any feasible options that can help to address the difficulties to progress jury trials to deal with the most serious criminal cases. The potential benefits and limitations of the options which have been suggested are discussed below. In relation to some of the options we have indicated a provisional view; we are, though, open to reconsidering that view in the light of the discussions.

OPTION ONE: Having a smaller number of jurors

Scotland is unusual in requiring a jury to include 15 jurors (although this can reduce to 12 if, in the course of a trial, jurors become unwell or otherwise unable to continue their role). As noted by the SCBA in their response to the Coronavirus (Scotland) Bill, during World War II the number of jurors required to constitute a jury in Scotland was reduced. Section 3 of the Administration of Justice (Emergency Provisions) (Scotland) Act 1939 provided that all juries, whether civil or criminal, should consist of “seven persons of whom two shall be special jurors” (s3(1)). At the same time, the maximum age for jury service was raised from 60 to 65 (s3(4)). The reduction in the size of the jury did not apply to trials for treason or murder, or in any High Court case where the court, on the application of one of the parties, directed that the “gravity of the matters in issue” required a jury of 15.

Depending on the current and future health advice, smaller juries might also assist in securing sufficient jurors willing and able to serve and to assist with enforcing social

distancing in the court. Following the immediate period of the outbreak, smaller juries could also assist in securing more juries from the same number of prospective jurors currently brought to court – assuming there was sufficient court capacity – but would not on its own help to address the backlog of cases.

However, during the period of the current health advice, the use of smaller juries would not address the following issues: it would still involve sufficient numbers attending at court to empanel the jury (though likely smaller numbers than those required to empanel a jury of 15); it would require jurors to travel to court (or other venues); it would involve the jury members attending together during the trial; and it would run the risk that if any jury member were to become unwell, the jury would require to be discharged and the trial collapse (and restart, in due course, before another jury). Having a smaller number of jurors also raises some more fundamental issues. Lord Bonomy's independent review of safeguards within the criminal justice system (2015)³ emphasised that issues of jury size, the majority required to convict and the number of verdicts available to a jury are "inextricably linked", when considering the potential for miscarriages of justice.

If this proposal were to be considered as one which could be utilised beyond the immediate aftermath and therefore during the recovery period, the public health concerns may have reduced. There would, however, still remain decisions to be made regarding what would be the appropriate size for a smaller jury and the majority required for conviction as well as whether smaller juries are appropriate for the most serious cases.

OPTION TWO: Holding jury trials in larger non-court locations to facilitate social distancing

During the debate in Parliament on the Coronavirus (Scotland) Bill, the suggestion was raised that trials could be held in alternative, larger venues, such as cinemas or theatres.

It is not unprecedented for justice processes to be undertaken outwith courts. For example, the recent Clutha Fatal Accident Inquiry was held at Hampden Park Stadium in Glasgow, to facilitate attendance by families, etc. Larger venues, such as cinemas or theatres could more easily facilitate social distancing between jurors and others who have to be present in court.

There are, however, significant practical issues with using non-court venues for the most serious criminal cases. Most significantly, alternative venues do not have custody facilities for holding those accused of serious crimes safely and securely and for transferring them to and from the courtroom. Potential jurors would still need to be willing to fulfil their service and to travel to the proposed venue. There would be significant conversion required for criminal trial purposes in order to meet requirements for jurors, victims, witnesses and a wide range of professional court users. The need to introduce secure technology facilities for evidence presentation, pre-recorded evidence and productions would add to the challenges. There would

³ <https://www2.gov.scot/Resource/0047/00475400.pdf>

also still require to be staffing of security and court officials for these additional venues alongside the continued use of current court facilities.

Equipping an entirely new venue to accommodate all the requirements of the court process would take some time (particularly when those installing the facilities will need to observe social distancing). New facilities are unlikely to be up and running in less than a number of weeks at best and potentially longer.

Even if workable, the use of larger venues would not enable jury trials to commence during the lockdown period and would be of little value during the societal recovery period. At best if it was possible to create three larger venues, then the throughput of trials would potentially be nine per month across all three venues. This would have little impact on the estimated potential 1,600 outstanding cases. As soon as jury trials were recommenced the effort and cost involved in creating the three venues would be lost.

Our provisional view is that the practical difficulties with this proposal may make it unworkable.

OPTION THREE: Retain current court facilities but enable social distancing during jury trials

Section 92(3) of the Criminal Procedure (Scotland) Act 1995 provides that “from the commencement of the leading of evidence in a trial for rape or the like the judge may, if he thinks fit, cause all persons other than the accused and counsel and solicitors to be removed from the court-room”. This is to allow the public to be cleared from the court.

Potentially a similar power could allow the judge to clear the court in all cases in order to allow the jury to sit, appropriately distanced, in the public gallery. This option would not however address one of the concerns about the use of juries during the period of public health restrictions – namely the numbers of individuals who require to attend court to empanel the jury, and how this could be achieved whilst abiding with public health guidelines and the requirement for social distancing.

There are also a number of other issues that would need to be considered. Firstly the court is likely to require to allow certain other persons (in particular, members of the press) to remain in the court room. Secondly, there is the question of whether there are suitable facilities in the particular court room to allow jurors to be able to hear the evidence, especially if a higher number of witnesses are giving evidence by live TV link or pre-recorded evidence. We understand that, at the moment, there can be limited audibility from the public gallery. Finally, jurors would require to be brought together for their deliberations and it is more difficult to see how that could be done whilst abiding by social distancing requirements.

Our provisional view is that this option would not allow jury trials to commence during the lockdown period but that it may have advantages during the phased/societal recovery period, in terms of building confidence in juror safety. In itself this would not make any significant impact in reducing the backlog, but could be a useful approach to deploy, during that stage, in conjunction with option 9 (maintain the status quo).

OPTION FOUR: Having jurors in remote locations video-linked to court

It was also suggested during the debate in Parliament on the Coronavirus (Scotland) Bill, that juries could consider the case via remote television link from an alternative site, either individually or collectively.

Video links are used extensively within the criminal courts, for example for vulnerable witnesses giving evidence from remote sites or prisoners attending proceedings remotely by video link from prison or custody. Video links would avoid prospective jurors having to travel to court buildings.

However, there would be significant legal, technical and operational challenges in juries viewing court proceedings remotely. Once a jury is empanelled no communication with any person outwith the jury is permitted regarding the trial. Jurors must be secluded after the case has closed and they have been asked by the court to deliberate on their verdict. The jurors retire to a room by themselves and are not permitted to leave the room other than to receive or seek a direction from the sheriff/judge or to make certain requests. Nobody is permitted to enter the room or to communicate with the jurors unless authorised by the sheriff/judge. This includes the bar officer. If jurors require a direction or wish to make a request, this should be dealt with by a sheriff/judge in open court in the presence of the prosecutor and defence agent. The court officer may exercise minimum access only to ensure transmission of such requests to the court.

These rules are in place because of the need to secure the integrity of the jury system. If any unauthorised person contravenes the rules regarding the seclusion of the jury, the accused must be acquitted (section 99(5) Criminal Procedure (Scotland) Act 1995).

As a minimum such a system would require 15 secure video links to 15 secure locations, where each juror could be seen by the court and from which the juror would be able to view all court proceedings and evidence presentation. This assumes that the 15 jury members have been empanelled by some other, as yet unidentified, process from a much larger pool of remote potential jurors. Each juror would require a member of the SCTS staff to be present at the location and the 15 jurors would then need to be able to securely join together to take part in juror deliberations, without any risk of others accessing those deliberations.

To achieve these requirements and secure legislative provisions for a remote video solution would not be achievable within the time constraints available. For example, the courts would need time to:

- Select and procure an entirely new technology (cloud hosted secure videoconferencing) which has not been used to date;
- Design, build, test and implement entirely new equipment, processes and procedures; and
- Prepare and issue online guidance.

Even if achievable this would only facilitate a very small number of criminal trials which would have virtually no impact on the backlog. As soon as jury trials were

recommenced the effort and cost involved in creating a remote video solution would be lost.

If jurors were to call from home there would be security and safety concerns as well as issues with the quality and reliability of internet links. It is also unlikely that it would be acceptable for a juror to be alone during any remote access as it would be important to ensure at all times that they are acting appropriately, in terms of attending to the evidence without distraction, and are not subject to any influence from others. Jurors would also need to be able to engage with each other securely during their deliberations.

OPTION FIVE: Test jurors / other court attendees for COVID-19

Testing for COVID-19 (or for those who have been shown to have had it and recovered) is clearly a matter of importance. But the focus must be on testing for our health and care providers and other key workers. It is therefore unlikely that we will be able to move quickly to a position where everybody who may be involved in a criminal court case (be that judiciary, lawyers, court staff, security, accused and witnesses) can be tested in advance. Even if that were possible it may be that a potential juror who has tested negative for COVID-19, in advance of the trial, could become exposed to the virus before the trial commences, including by travelling to any court venue, or, indeed, during the trial. If any single juror were to become unwell during the trial, that would have implications for the ability of the remaining jurors to continue to serve, and would be liable to result in the jury being discharged and the trial collapsing and having to restart before another jury.

In the event it becomes possible for individuals to show that they have some immunity to the virus then it is unknown whether that could potentially change the diversity of current jurors who hear cases. It also needs to be determined whether it should be the key focus for any individuals who may be immune to undertake this role. The priority will rightly continue to be on our health, care sector and emergency services, as well as other key workers. We are also aware of the financial hardship that many individuals may now be facing, and the impact on their willingness to undertake this civic duty, particularly immediately after the COVID-19 outbreak.

So whilst we do not rule out this option we do have a number of concerns as to whether it will be practicable.

OPTION SIX: Deal with the backlog with faster progress of jury trials at the end of the current health restrictions

In their response to the Coronavirus (Scotland) Bill, the SCBA suggested a range of measures that could be adopted to help address the backlog of cases at the end of the current pandemic and health restrictions. The suggestions included increased use of temporary or recently retired judges; the restoration of previously closed court venues or enhanced use of existing court venues; a return to the previous High Court "circuit" to locations across Scotland; etc.

Regardless of the mitigating actions that are taken during the current pandemic, the SCTS have made clear that whilst following the essential health advice, there will be

reduced capacity to conduct criminal trials. It is inevitable, therefore, that a significant backlog of cases will arise and that a wide range of actions will be required to seek to mitigate this. The Scottish Government will support the Courts and the Crown, as appropriate, in taking these necessary actions at that time.

While the exact timescale of the current outbreak and the associated health restrictions is not known, at this time a likely indication of the scale of the backlog may be in excess of 1,600 cases, double what would be classed business as usual.

While resources will be made available to put a robust recovery programme in place it has to be appreciated that pressures will be evident across all elements of the justice system; criminal, civil, tribunal and administrative. It will not be possible, therefore, to divert significant resource from one area of the system to accelerate progress in another. During the recovery period the civil courts, for example, will play a key role in supporting business to return to normality. The ability for people and businesses to assert rights and enforce remedies will be crucial. The role played by the courts in settling contract disputes and ensuring that debts can be recovered will be critical to the recovery of the economy.

The restoration of previously closed courts is not considered to be a viable option. The majority of these courts were closed as they were in more rural locations and the vast majority would not meet minimum modern jury standards. Equally, seeking to recreate a High Court circuit system across multiple Sheriff Court venues would reintroduce inefficiencies, which the current concentration of High Court work on particular courts removed, and would, by taking up space in Sheriff Court locations, add to the pressure on the Sheriff Courts. Increasing the number of judicial officers, on its own, would not enable additional courts to run – other staff, including clerks and macers, are also necessary. The best approach to maximise progress seems likely to be to consider how to make the greatest utilisation of existing jury accommodation, considering radical options such as seven day courts and longer sittings, including, possibly, early evening shifts.

Extreme care will be required to ensure that the recovery programme is set at a sustainable pace and is matched to the resources available in justice organisations, the legal profession and the voluntary sector.

OPTION SEVEN: Judge only solemn trials

Following dialogue between the Scottish Government, COPFS, the SCTS, victims groups and a number of other stakeholders, the Coronavirus (Scotland) Bill as introduced to the Scottish Parliament included provisions that would have allowed Scottish Ministers to make regulations (subject to the scrutiny of the Scottish Parliament) to enable trials on indictment to be conducted by the High Court and Sheriff Court by a judge without a jury.

If progressed, these provisions would have meant that judges would have considered and decided the verdict in the most serious solemn cases and provided reasons for their verdict. Professional judges (whether in the High Court or the Sheriff Court) act independently and impartially and possess the skills to deal objectively with evidence and to assess the credibility and reliability of witnesses. In

Scotland, sheriffs already undertake this role in summary criminal trials (which comprise the great majority of criminal trials in Scotland), which means they can determine whether an accused is guilty or not and sentence up to 12 months in custody upon conviction. Trial by a judge without a jury does not affect the right of the accused to a fair trial, or otherwise affect the trial process.

Most jurisdictions in mainland Europe which have inquisitorial or hybrid criminal justice systems do not use juries, but rather panels of judges, or of judges and lay assessors. Those jurisdictions with more comparable adversarial systems usually have provision allowing for the use of juries to be suspended – this tends to be on a case-by-case basis, i.e. where a jury trial could not be held in a particular individual case, where, for example, it is considered that pre-trial publicity has been so adverse that a fair trial before a jury could not be assured or where the nature of the case is such that the security and integrity of the jury cannot be assured.

The key advantage of this option was that (along with the measures in the Coronavirus (Scotland) Act 2020 allowing for greater flexibility in the ways in which evidence could be provided to the court), it would have allowed some solemn cases dealing with the most serious crimes to proceed during the current outbreak, including for at least some of those individuals held on remand in prison. In the immediate aftermath of the outbreak, judge only trials would allow for the faster progress of cases, with no need to empanel or instruct jurors. It is estimated by the SCTS that the use of judge-only trials could have shortened the length of each trial, and the programming gap between trials to empanel new juries, to such an extent that the throughput of trials could have been doubled. This would have been particularly valuable in the phased/societal recovery period, immediately following the lifting of restrictions, when it will be difficult to cite jurors at a time when businesses are trying to return to normal operation, many people will wish to take holidays, and there will still be some caution over behaviours that might reintroduce the risk of further widespread infection.

At the same time, the Scottish Government acknowledges and respects the strength of the concerns raised by some about this temporary measure. The primary objection to this option were set out by, amongst others, the SCBA and the Law Society of Scotland. In particular, they argued that any changes introduced in response to the current outbreak, however temporary, should not erode an important principle of the Scottish legal system or undermine the right of those charged with the most serious crimes to a trial in front of a jury of their peers.

In response to the proposal to make provision for judge-only solemn trials, a number of possible safeguards or adjustments have been explored and/or suggested:

Reasons

A key safeguard in any system of judge-only trial is the requirement on the judge to give reasons for the decision. This was provided for in the proposal which was contained in the Coronavirus (Scotland) Bill. The requirement on a judge to give reasons ensures transparency, is a protection against arbitrary decision-making, and, if the judge makes an error, provides a basis for an appeal.

Panel of judges

Consideration was given to whether a panel of judges rather than a single judge should sit in solemn cases, for example with three judges considering the case rather than one. In practice, the composition of judicial benches is a matter for the senior judiciary, not Scottish Ministers. There were also practical considerations against this option, for example about the number of judges who would have to sit to consider an appeal against a judgement or sentence by a three judge panel.

Appeal procedure

In their response to the Coronavirus (Scotland) Bill the SCBA noted that for judge in trials proceeding under the “Diplock” procedure, introduced in Northern Ireland in the 1970s, there was an added safeguard of an absolute right of appeal, and that right of appeal extended to both matters of fact and law. In Scotland, an appeal may be brought, with leave, on the grounds that there has been a miscarriage of justice. A “miscarriage of justice” is already capable of including a wide range of specific criticisms of the trial process. In the context of an appeal against a reasoned decision of a trial judge, it could include a variety of criticisms of the judge’s reasoning. Where an appeal is marked, leave is considered by a judge other than the trial judge, with a right of appeal against refusal of leave to a bench of three judges. This opportunity for an appeal against an initial refusal of leave makes it unlikely that any substantial ground of appeal against the decision of the trial judge would not be considered.

Jury trial waiver

In some jurisdictions, including the United States, it is possible for a jury trial waiver to be issued. This arises when a defendant chooses to forego a jury trial and have a judge hear and decide the case. The prosecution and court must also agree to the waiver. During the deliberations on the Bill, concern was raised about giving accused persons influence over how their case is progressed. Questions were also raised about how willing accused persons would be to take on this option, even if it was available.

The Scottish Government still considers it is worthy of discussing this option alongside these additional safeguards but as set out earlier in this paper given the concerns raised it is not considered to be the preferred option of the Scottish Government to address the problems created by the COVID-19 emergency.

OPTION EIGHT: Adjust the sentencing power of Sheriff Courts (summary and solemn)

As noted above, the High Court deals with the most serious criminal cases, including all cases involving accusations of murder or rape, and can sentence a convicted person up to life imprisonment. In solemn cases, the Sheriff Court can sentence an accused person to up to five years in prison or impose a fine of any amount. On some occasions the sheriff may, following conviction in solemn cases, remit the matter to the High Court for sentencing, if it considers that a five year sentence is insufficient to appropriately deal with the offence. In a summary case, heard by a sheriff without a jury, the Sheriff Court can sentence a convicted person to up to 12 months in prison or a maximum fine of £10,000 (though some offences can carry higher maximum summary fines as provided for in statute). These sentencing

powers are subject to the overall legal framework including the maximum sentence set for any individual offences.

Other than for cases that must be heard in the High Court as a matter of law, it is for the prosecutor to decide what level of court a case will be heard in, informed by the nature of the alleged offence, the impact of the offence on any victims and the wider community, the relevant potential sentence, the circumstances of the accused and the court's sentencing powers.

As can be seen, trials without jury are a common and long-established feature of the Scottish justice system with the vast majority of criminal cases proceeding to court having been heard in a summary court. For example, in 2018-19, 94% of people convicted in court were prosecuted in summary courts which includes the JP courts. These are of course less serious cases where a custodial sentence of up to and including 12 months is possible as noted above (60 days or less for the JP courts).

Given the current situation, it is appropriate to consider whether changes to these sentencing powers may aid an effective system of criminal justice during this period. This period covers both peak of the COVID-19 outbreak and the recovery that will be necessary in respect of the backlog of cases to be dealt with.

The sentencing powers of different levels of court have previously been subject to revision. For example, the sentencing powers of the Sheriff Courts in solemn cases were increased from three to five years through reforms implemented in the early 2000s which switched on provisions in the Crime and Punishment (Scotland) Act 1997. In 2007, changes were included in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 which increased the sentencing powers of the summary courts (excluding JPs) from three months to 12 months. At the time these changes were proposed, they were justified as reflecting the view that professional judges were capable of dealing with all aspects of cases for more serious types of offending (i.e. decisions about guilt or otherwise of an accused and decisions about sentencing) with such changes aiding the general effectiveness of how cases could be dealt with through the criminal courts.

From around the time of those reforms in the early to mid-2000s, it is worth noting that average sentence lengths overall and the profile of cases going through the criminal courts have changed significantly. Although the impetus for consideration of changes now is very clearly the need to respond to the impact of the COVID-19 outbreak, there may be wider and longer-term issues that could drive consideration of change forward in the longer-term (this is very briefly discussed further below).

For the purposes of the COVID-19 outbreak, consideration could be given to amending the sentencing powers of the Sheriff Court in summary cases. For example, this could look at considering a change in the maximum custodial sentence of 12 months and exploring higher levels such as two or three years. This would allow some cases that would otherwise require to be heard before a jury to be considered by a judge alone. Unlike the proposal for judge only courts, this change would limit the maximum sentence that a convicted person could receive from a judge sitting alone and would extend the long-established precedent for the summary courts to deal with both matters of guilt or otherwise of the accused and if

convicted, sentencing of the offender for cases at the less serious end of the spectrum.

A change to the sentencing powers could only allow a proportion of additional cases to proceed without the need for a jury. In 2018-19, around 1,500 people in Scotland received a custodial sentence of over a year up to and including two years (12% of all custodial sentences), although, clearly, it was not certain in advance what the final sentence would be in these cases. A change from 12 months to three years would have increased the potential for cases to 2,000 people who in 2018-19 received sentences of over a year up to and including three years (17% of all custodial sentences).

A change to the sentencing powers of the Sheriff Court in solemn cases from, for example, five to eight years, may not be seen as such a significant move as a jury would of course still be involved in determining guilt or otherwise of the accused. The Sheriff Court would continue to be able to remit convicted accused persons to the High Court for sentence where appropriate. This option would not address the immediate issue of the inability to hold jury trials. However, this option could provide useful additional flexibility during the recovery phase. The option may allow some cases currently heard in the High Court to be considered by the Sheriff Court before a jury.

It must be borne in mind that this flexibility may be limited as the Sheriff Courts face their own backlog of summary and solemn trials and will face significant continuing pressure to deliver both civil and criminal justice during the recovery period. With this in mind however, while a sheriff solemn court trial is of course a significant undertaking, there are administrative benefits in the use of such trials when compared with High Court trials e.g. there are more sheriffs than High Court judges so prioritisation of judicial resourcing in this way in the recovery period could allow High Court judges to focus only on the most serious criminal cases as backlogs of cases are dealt with.

If progressed, it must be emphasised that any such changes would be a temporary measure relevant only to the period and aftermath of the current pandemic. The exact timeframe for the application of the changes would depend on the estimated length of the recovery time for the criminal courts to deal with the impact of the COVID-19 outbreak, but these would not be longer-term changes.

OPTION NINE: Retain the status quo

If none of the above options is considered to be feasible or practicable, or indeed to have sufficient support, there continues to be the option that we do not adopt any of these temporary measures but instead retain the status quo through not only this outbreak and aftermath but also the recovery period.

We consider it to be important for everyone to be clear on the consequences of this approach. It would give rise to an extensive backlog that, even adopting some of the options above, would take a significant time to address. This would result in potentially very substantial delays for many who are awaiting their trial or who are due to give evidence. It would set back for a very long time the work which is being

done to seek to address the duration of the most serious cases within our criminal justice system, in the context of the very substantial increase which we have seen in the number of those cases in recent years. The size of the backlog and the additional delays which would ensue would depend, of course, on the length of time before the jury system was able to return to normal operation, but they are likely to be very significant.

CONCLUSIONS & QUESTIONS

"We want to continue to work positively with the Scottish Government around the changes which are necessary to our justice system to deal with the spread of Covid-19. The past few weeks have proved that we need to be flexible and responsive to emerging situations and creative in our solutions."

John Mulholland, President of the Law Society of Scotland, statement on the Coronavirus (Scotland) Bill, 1 April 2020

Like all public services, Scotland's justice system must comply with public health measures intended to reduce social interaction and the spread of COVID-19. However, the current circumstances also raise fundamental issues and questions for Scotland's justice system in the context of the state's responsibility to maintain an effective system for the investigation and prosecution of crime:

- What are the implications for justice and confidence in the rule of law if the most serious criminal cases are not able to progress?
- What are the implications for victims, witnesses and accused, in particular those held in prison on remand, when they have no certainty when their case might progress?
- Is it possible to ask members of the public to take on the civic duty of jury duty without exposing them, or their family members to some level of health risk?
- Are there technological or practical measures that could be introduced to mitigate these risks?
- Is it possible to maintain the random selection of jurors from across the eligible adult population?
- What is required to maintain compliance with ECHR and in particular the right to a fair trial?
- Are there additional safeguards that could be applied to help balance any move away from the current system of trial by jury?
- Is there a point at which the scale of backlog of serious criminal cases would justify a review of the balance between these issues? How would that point be assessed?

The Scottish Government will now engage with key stakeholders and representatives of other political parties on all the options set out in this paper. Subject to the agreement of the Parliamentary Bureau, the Scottish Government intends to update the Scottish Parliament on the progress of discussions as soon as possible after recess.

Scottish Government

April 2020