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## COMMENT

# SETTLING FOR A JUDGE: A COMMENT ON CLERMONT AND EISENBERG

Samuel R. Gross†

*Trial by Jury or Judge: Transcending Empiricism*,<sup>1</sup> by Kevin Clermont and Theodore Eisenberg, is not only an important article, it is unique. To most Americans, trial means trial by jury. In fact, over half of all federal trials are conducted without juries<sup>2</sup> (including 31% of trials in cases in which the parties have the right to choose a jury<sup>3</sup>), and the proportion of bench trials in state courts is even higher.<sup>4</sup> And yet, while there is a large literature on the outcomes of jury trials and the factors that affect them,<sup>5</sup> nobody else has systematically compared trials by jury to trials by judge. Apart from Clermont and Eisenberg's work, the only published data in the area are in Kalven and Zeisel's classic survey of trial judges in the 1950s, and that study compares the judges' views to jurors' verdicts in *jury* trials over which the respondents presided; it includes no information on bench trials.<sup>6</sup>

Clermont and Eisenberg examine federal trials of cases in which the parties had the right to a jury from 1979 through 1989. They find that the proportion of jury trials varies greatly from one category of cases to another, and that for some types of cases the outcomes of bench trials are significantly different from the out-

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† Professor of Law, University of Michigan. Theodore Eisenberg and Kent Syverud gave helpful comments on an earlier draft of this article.

<sup>1</sup> 77 CORNELL L. REV. 1124 (1992) [hereinafter *Jury or Judge*].

<sup>2</sup> *Id.* at 1127 n.7.

<sup>3</sup> *See id.* app. B, at 1177.

<sup>4</sup> VICTOR E. FLANGO ET AL., *THE BUSINESS OF STATE TRIAL COURTS* 51-53, 130-39 (1983); *see Jury or Judge, supra* note 1, at 1127 n.7.

<sup>5</sup> *E.g.*, VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986); REID HASTIE ET AL., *INSIDE THE JURY* (1983); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (2d ed. 1971); MARK A. PETERSON, *CIVIL JURIES IN THE 1980s: TRENDS ON JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS* (1987); Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS., Autumn 1989, at 205; Samuel R. Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

<sup>6</sup> KALVEN & ZEISEL, *supra* note 5, at 55-65.

comes of jury trials. In particular, they find that among products liability and medical malpractice trials, plaintiffs won considerably more often before judges than before juries.<sup>7</sup>

What explains these findings? Clermont and Eisenberg consider two possible explanations, neither of which can account for their data. *First*, one might attempt to explain differences in the outcomes of judge and jury trials by looking to differences between the two types of tribunals. Clermont and Eisenberg call this the “popular view,” that juries treat cases differently than judges. Specifically, most Americans seem to believe that juries are likely to be more favorable to plaintiffs, especially in personal injury cases.<sup>8</sup> In practice, however, personal injury plaintiffs do no better with juries than with judges, and sometimes considerably worse.<sup>9</sup>

*Second*, we may be able to understand the patterns of trial outcomes by unraveling the selection processes that determine which few litigated cases actually go to trial, and how those cases are tried. Several researchers have studied selection effects in litigation.<sup>10</sup> A common finding of this research is that the overall likelihood of winning across an entire set of claims does not determine the proportion of victories in the subset of cases that are tried. As the easier cases are settled, the filtering process of party selection transforms the initial mix into a different and more homogeneous blend. According to Clermont and Eisenberg, this suggests that the parties’ choices will also produce similar rates of plaintiff success in jury trials and in bench trials, regardless of any underlying differences in the predispositions of these two types of fact finders. But that prediction, which they call “the academic view,”<sup>11</sup> is also false, conspicuously for products liability and medical malpractice cases.

Clermont and Eisenberg’s explanation for their findings is a synthesis of these two rejected points of view. In essence, they say that the differences in outcomes are caused primarily by selection effects, but that the selection process is skewed by pervasive misconceptions about differences in predisposition between judges and juries.<sup>12</sup> This is an intelligent explanation, and it is based on a careful and thorough analysis of the data. I agree that selection effects

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<sup>7</sup> *Jury or Judge*, *supra* note 1, at 1141 tbl. 4.

<sup>8</sup> *Id.* at 1126-28.

<sup>9</sup> *Id.* at 1141 tbl. 4.

<sup>10</sup> *E.g.*, Eisenberg, *supra* note 5; Gross & Syverud, *supra* note 5; George L. Priest, *Reexamining the Selection Hypothesis*, 14 J. LEGAL STUD. 215 (1985); Priest & Klein, *supra* note 5; J. Mark Ramsayer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989); Donald Whitman, *Is The Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985).

<sup>11</sup> *Jury or Judge*, *supra* note 1, at 1128-30.

<sup>12</sup> *Id.* at 1156-62.

probably explain most of the differences between the outcomes of judge trials and jury trials. I also agree that misperceptions about the behavior of judges and juries may color the parties' choices, but that seems less clear. I add this comment only to suggest that it might be easier to understand the forces at play if we reconsider the issue from a different angle.

Clermont and Eisenberg treat their study as an occasion to re-examine the familiar selection effects that operate in litigation. That is a mistake. The process of selecting a judge over a jury is categorically different from the process of choosing to go to trial rather than to settle. As a result, the extensive body of research on the selection of cases for trial has no direct implications for this new and previously unexamined topic.

Trial (prototypically, trial by jury) is the residual method of resolving a dispute. Pretrial settlement is the preferred and dominant method of dispute resolution; trial is what happens when settlement negotiations fail.<sup>13</sup> Either party, unilaterally, can force a trial by refusing to come to terms with the other. (Or, strictly speaking, either party can force the other side to choose between going to trial and giving up.) The literature on case selection for trial examines the circumstances that drive one party (or both) to this sort of intransigence, despite the joint savings in process costs that both sides can always obtain by settling. Some researchers argue that parties usually fail to settle because they make divergent predictions of the outcome at trial.<sup>14</sup> Others claim that the major reason for trials is that settlements are thwarted by strategic bargaining ploys of one sort or another.<sup>15</sup>

A bench trial, on the other hand, if it is not mandatory,<sup>16</sup> requires the parties' mutual consent. In the cases with which Clermont and Eisenberg are concerned, each side has a right to a jury trial, and both must choose to waive it. In other words, the choice to try such a case before a judge represents a limited agreement between the parties—in effect, a partial settlement. The forces that produce this type of cooperative selection are very different from those that produce the antagonistic selection that drives cases to trial rather than settlement.

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<sup>13</sup> See Gross & Syverud, *supra* note 5, at 320.

<sup>14</sup> E.g., Priest, *supra* note 10; Priest & Klein, *supra* note 5; Ramsayer & Nakazato, *supra* note 10.

<sup>15</sup> E.g., Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>16</sup> See *Jury or Judge*, *supra* note 1, at 1135-36. I am ignoring (in this context) these categories of cases, for which bench trials are mandatory.

Clermont and Eisenberg realize that bench trials require the consent of both sides,<sup>17</sup> but they do not systematically explore the implications of this requirement. On some issues, they seem to miss the distinction between these two types of selection. For example, they argue that previous theories of case selection for trial imply that plaintiffs should succeed at roughly equal rates in both types of trials.<sup>18</sup> In fact, there is no reason why the impasses that produce trials rather than settlements should have selection effects similar to those created by the partial agreements that channel some trials to judges instead of juries.

I will develop this distinction briefly by discussing two of Clermont and Eisenberg's most interesting findings: (1) the low frequency of bench trials among personal injury cases, compared to all other cases; and (2) the high plaintiff success rate in bench trials of products liability and medical malpractice trials compared to jury trials.

## I

### TYPE OF TRIAL, BY TYPE OF CLAIM

Clermont and Eisenberg show that the world of federal trials can be divided in two: personal injury cases, which are tried primarily by juries, and other lawsuits, which are tried primarily by judges.<sup>19</sup> They argue that prevailing perceptions of judge and jury bias explain this division. Specifically, according to Clermont and Eisenberg, most lawyers and litigants believe that juries are pro-plaintiff in personal injury litigation (as compared to judges),<sup>20</sup> but comparatively neutral in other types of cases.<sup>21</sup> These stereotypes may be generally accurate, or they may be misleading; what matters to Clermont and Eisenberg is simply that they are widely shared.<sup>22</sup> I find this argument perfectly plausible. Most lawyers and parties probably do view a bench trial as a pro-defense choice in a personal injury case and as a roughly neutral procedure in most other contexts.

Since bench trials are comparatively cheap, both sides can save money by waiving a jury. Not surprisingly, trial by judge has become the common form of adjudication for those categories of cases in which the participants generally agree that such trials do not systematically disadvantage either side. Once such a pattern is estab-

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<sup>17</sup> *Id.* at 1160.

<sup>18</sup> *Id.* at 1130-33.

<sup>19</sup> *Id.* at 1140-41.

<sup>20</sup> *Id.* at 1167.

<sup>21</sup> *Id.* at 1169.

<sup>22</sup> *Id.* at 1170-74.

lished, it gathers social and institutional inertia. Judges too prefer bench trials—they are cheaper, less formal and more flexible, take less court time, and allow the judge to exercise greater power. In an area of litigation in which bench trials are the rule, judges may be quick to frown upon a party that insists on a jury. A costly procedure that is not customary often seems unnecessary; at a minimum it is an upsetting surprise. In addition, litigators become habituated to particular forms of practice. A contract lawyer who is accustomed to bench trials may feel reluctant or unqualified to conduct a jury trial, even when she thinks that a jury would be a better bet than the judge.

The common use of jury trials in personal injury litigation is even easier to explain. Personal injury plaintiffs' attorneys (we assume) generally believe that juries tend to favor their side; therefore, they will usually choose jury trials. If a plaintiff's lawyer fails to do so, the defense attorney will interpret that choice, correctly, as a judgment by her opponent that in this case the judge will likely be more favorable to the plaintiff. More often than not, the defense attorney will reach the same conclusion, and the defense will demand a jury trial. Mutual jury waivers will be rare. Moreover, since jury trials of personal injury cases are common and expected events, courts and lawyers will gear up for them with little friction.

But while Clermont and Eisenberg find that each set of cases is tried primarily by a different type of tribunal, the relationship between type of case and type of trial is not symmetrical. In the largest category of non-personal injury cases, general contract, only a slight majority of trials, 58.7%, were conducted by judges alone.<sup>23</sup> By comparison, in the two largest categories of personal injury cases, products liability and motor vehicle, 87.9% and 85.3% of the trials were by jury.<sup>24</sup> The highest rate of bench trials for a category of non-personal injury cases, negotiable instruments, is only 75.8%.<sup>25</sup> The highest rates of jury trials among personal injury cases, for federal employer liability and medical malpractice claims, are over 90%.<sup>26</sup>

This asymmetry should be no surprise, because choosing a bench trial requires the concurrence of both sides. In non-personal injury cases both sides usually do agree, because of the savings and because of institutional pressures, but a defection by either will break the pattern. On the other hand, both parties must agree before a personal injury case can deviate from the general practice

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<sup>23</sup> *Id.* at 1137 tbl. 3; *id.* at 1141 tbl. 4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1141 tbl. 4.

<sup>26</sup> *Id.*

of jury trials. Predictably, deviations from the normal procedure are much more rare in personal injury litigation.

## II

### BENCH TRIALS OF PRODUCTS LIABILITY AND MEDICAL MALPRACTICE CLAIMS

Perhaps the most striking finding in Clermont and Eisenberg's study is the difference in outcomes between bench trials and jury trials of products liability and medical malpractice cases. On the jury side, the story is familiar. Juries tried the vast majority of such claims (89%), and plaintiffs won fewer than 29% of those jury trials.<sup>27</sup> This success rate is consistent with data from other studies, which also show that medical malpractice and products liability plaintiffs lose the great majority of the cases they take to jury trials.<sup>28</sup> Economics, rather than the partiality of juries, probably explain plaintiffs' poor record in these trials. In many products liability and medical malpractice cases, the defendants, (for strategic reasons), offer little or nothing in pretrial settlement negotiations. In such cases, it is perfectly rational for plaintiffs and their attorneys to go to trial even if the probability of victory is much lower than 50%, since a single victory will pay the trial costs of several losses.<sup>29</sup> Clermont and Eisenberg, however, add a fascinating new finding to this familiar pattern: in the 11% of malpractice and products liability cases tried by *judges*, plaintiffs do much better. They win 48% of products liability suits and 50% of malpractice cases.<sup>30</sup>

What causes this disparity? Possible differences in predisposition between judges and juries are not a promising explanation. Clermont and Eisenberg are undoubtedly correct when they say that most people think that juries, not judges, are more receptive to such claims. The high jury-trial rate in these categories of cases suggests that plaintiffs' lawyers share this view. Could it be that this popular stereotype is not only false, but diametrically opposed to reality? Moreover, if judges were in fact much more likely than juries to favor plaintiffs in products liability and malpractice cases, the lawyers who work in these areas would surely have noticed. Plaintiffs' lawyers would regularly waive jury trials, (except in unusual cases),

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<sup>27</sup> *Id.* at 1137 tbl. 3.

<sup>28</sup> *E.g.*, Patricia M. Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345, 348 (1983); Gross & Syverud, *supra* note 5, at 335, 360; Priest & Klein, *supra* note 5, at 38.

<sup>29</sup> *See* Gross & Syverud, *supra* note 5, at 342-52, 360-66. On their own, most plaintiffs could not afford to risk losing the costs of a trial, and those who could somehow bear the costs might be very reluctant to do so. Personal injury plaintiffs' lawyers, however, assume this risk through the institution of the contingent fee. *Id.*

<sup>30</sup> *Jury or Judge*, *supra* note 1, at 1137 tbl. 3.

and defense lawyers would regularly demand them (except in a similar set of unusual cases). If this were happening, (which is most unlikely), the impact on trial outcomes would be anything but obvious. It would depend primarily on *which* "unusual" trials end up before judges. This brings us to selection effects.

Selection effects can easily account for the difference in outcomes between bench and jury trials of malpractice and products liability cases. Since a bench trial requires agreement between the parties on an important issue—in effect, a partial procedural settlement—it should not be surprising to find that cases tried by judges are more similar to settled cases than are cases tried by juries. The difference in the proportion of plaintiff victories may simply reflect this relationship. Clermont and Eisenberg classify a trial as a "win" if the plaintiff gets a judgment in any amount.<sup>31</sup> This happens in roughly 28% of the jury trials in these two categories.<sup>32</sup> Plaintiffs, however, recover *some* money in nearly 100% of settlements.<sup>33</sup> Bench trials fall in between, with plaintiffs recovering something in about 50% of the cases.<sup>34</sup>

This explanation implies that a sizeable fraction of the bench trials of malpractice and products liability claims resemble settlements in some respect that is related to the defendants' liability. Some of these quasi-settlements might simply be cases that almost settled. Others might be cases in which a partial pretrial adjudication (typically, partial summary judgment), or a partial pretrial agreement, resolved some of the pending issues. Sometimes the upshot is an explicitly limited trial, such as a trial on the issue of damages only.<sup>35</sup> Other times, there may be no formal restrictions either on the trial or on the outcome. For example, the defendant might concede in negotiations that a finding of liability is a foregone conclusion, but go to trial on all issues when bargaining over money breaks down. In yet other cases, the parties may reach partial agreements that narrow the range of possible outcomes, but have no visible effects at trial. One increasingly common device is the "high-low agreement"—a pretrial deal (frequently secret) under which the

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<sup>31</sup> *Id.* at 1133-34.

<sup>32</sup> *Id.* at 1137 tbl. 3.

<sup>33</sup> There may be some settlements in which the plaintiffs agree to dismiss cases in return for nothing more than a waiver of the defendants' right to collect some of the costs of the litigation from losing plaintiffs, or in return for some similar concession. See generally Gross & Syverud, *supra* note 5, at 391-93, app. B.

<sup>34</sup> *Jury or Judge*, *supra* note 1, at 1137 tbl. 3.

<sup>35</sup> For example, Gross & Syverud, *supra* note 5 at 340 n.57, report that in 18 of 529 1985-1986 California Superior Court jury trials that they studied, the defendant explicitly conceded liability before trial.

plaintiff is guaranteed at least a specified “low” award, but no more than a specified “high” award, regardless of the verdict.<sup>36</sup>

Whatever its cause, this sort of convergence between the sides has a predictable effect on trial outcomes. A case that nearly settled is a case in which the defendant almost agreed to make a cash payment to the plaintiff. Such willingness to pay (or near willingness) undoubtedly reflects a judgment by the defense that the plaintiff can probably prove liability. When these near-settlements end up in trial, it should come as no surprise that defendants are ordered to pay damages more often than in run-of-the-mill products liability and medical malpractice trials, which defendants win outright by better than two to one.<sup>37</sup> Therefore, if such cases are more common among bench trials than among jury trials, the proportion of plaintiff victories in bench trials will be higher.

Is it true that bench trials of medical malpractice and products liability claims include a higher proportion of quasi-settlements than do jury trials? Clermont and Eisenberg’s data do not answer this question, but it makes sense to suppose that bench trials will tend to resemble settlements more than jury trials do simply because a bench trial cannot occur without at least a modicum of cooperation between the parties. In addition, a couple of specific mechanisms might produce this effect.

#### A. Risk Aversion

Risk aversion by the parties may channel a large number of quasi-settlements to bench trials. Clermont and Eisenberg discuss this possibility, but miss some of its implications. They argue that most litigants in products and malpractice cases believe that juries are (1) more likely than judges to favor the plaintiffs, (2) likely to award higher damages, and (3) less predictable.<sup>38</sup> As a result, plaintiffs almost always choose jury trials, “except in those few cases, very strong on liability, where the risk-averse plaintiff sees the jury’s unpredictability as just too great a risk to run.”<sup>39</sup> Such cases probably are few at trial, but they are the stuff of settlements: strong claims that risk-averse plaintiffs are willing to compromise in order to avoid the danger of no recovery. On the other side, in a case that is strong on liability the defense has its own settlement-like reason to prefer a bench trial (if the claim is not settled altogether): it may be willing

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<sup>36</sup> See John L. Shanahan, *The High Low Agreement*, FOR THE DEFENSE, July 1991, at 25.

<sup>37</sup> *Judge or Jury*, *supra* note 1, at 1137 tbl. 3.

<sup>38</sup> From the point of view of litigants, judges may be more predictable than juries even if their decisions are equally variable, because parties contemplating a jury waiver in a particular case usually know in advance who the judge will be and how that judge has handled previous cases.

<sup>39</sup> *Jury or Judge*, *supra* note 1, at 1163.

to give up a better shot at an aberrant defense verdict in return for increased protection against a runaway damage award.

These motivations are ubiquitous in personal injury litigation. The plaintiff is almost always an individual, one-shot player. On the one hand, a defense judgment may devastate her. On the other, the remote chance of a mega-award has little value to her since it is unlikely to happen in her one case. The defendant, by contrast, is typically a large, repeat player—a manufacturer, a hospital, or an insurance company. It can afford to pay damages, but if it takes risks in cases that might produce vast verdicts, sooner or later it will get hit. Because of this configuration of the parties, cases that are strong on liability usually settle.<sup>40</sup> When, for some reason, that fails to happen, a bench trial may be the next-best mutual choice.

### B. Cost

Cost saving as well as risk aversion may cause the parties in some cases to choose bench trials. A jury may be a plaintiff's advantage in general, but the value of this advantage decreases as the judgment becomes more predictable. When a compromise outcome is highly likely, the litigants may choose a trial by judge simply to save some of the process costs of a jury trial. This may be a particularly compelling motivation when the outcome of a case has been bracketed in advance, as, for example, when the parties have entered into a high-low agreement.

## III CONCLUSION

I can offer no more than a preliminary discussion of some of Clermont and Eisenberg's findings. It might be interesting to test my explanation by applying it to other comparisons between bench trials and jury trials, both within their data and with new data. Beyond that, the choice of judge over jury is just one of several contexts in which both parties to a dispute may both choose a tribunal that either is entitled to reject. Why do the litigants in some cases agree to voluntary arbitration or voluntary mediation? In California (and perhaps elsewhere) they sometimes hire private judges.<sup>41</sup> In what sorts of cases are they likely to do so? These are interesting questions that have received no attention. If that changes, I predict

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<sup>40</sup> Gross & Syverud, *supra* note 5, at 384. A plaintiff might also be willing to waive a jury in some personal injury cases, even at the cost of a lower expected judgment, in order to get an earlier trial date.

<sup>41</sup> See Philip Carrizosa, *Judicial Council Wants Near Study of Private Judges*, L.A. DAILY J., Nov. 19, 1990, at 1; Richard Chernick, *The Rent-a-Judge Option: A Primer for Commercial Litigators*, 12 L.A. LAW. 18 (1989).

future investigation will show that the factors that motivate parties to agree on a voluntary tribunal are not similar to those that cause some cases to end in trial. On the contrary, parties make such choices because of risk aversion and to save process costs—the same forces that lead them to settle most cases with no adjudication at all.