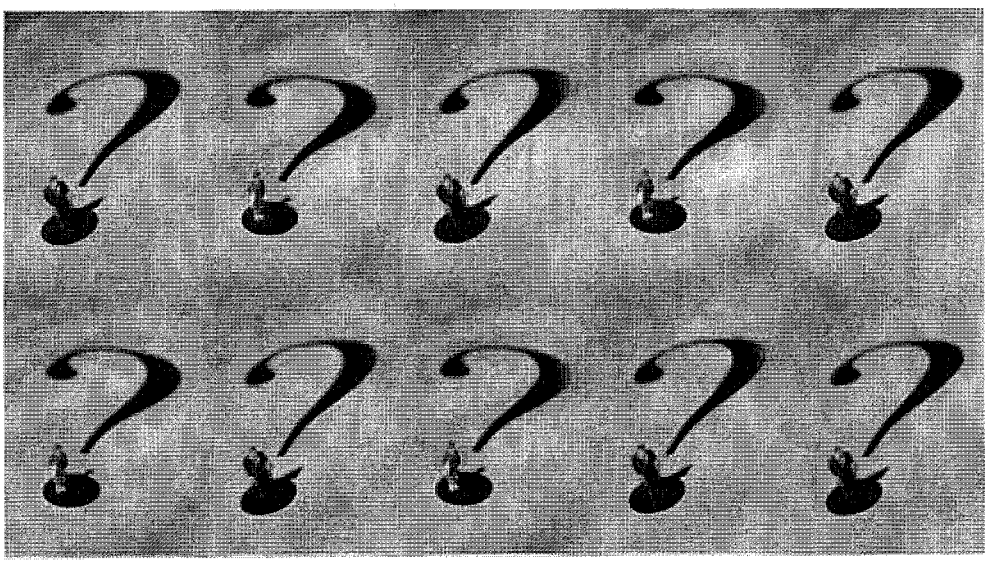
THE ADVANTAGE BLOG

JURY SELECTION IN TEN QUESTIONS OR LESS

September 30, 2014 | By Tsongas Litigation Consulting | Jury Selection



How much can you learn about a person in 10 questions? Can you learn enough to know whether he or she can be a fair and impartial juror? If you could, what questions would you need to ask?

An article in the *New York Times* asked the question, "Will you be seated on a jury?" To answer that question, they posed 14 questions. Each answer would move the needle closer to either the plaintiff's or defense's end of the scale, and provide the rationale for the direction of the needle's movement as well as why the defense or plaintiff attorney would strike you from the panel. The hypothetical case involved a woman suing an investment manager for $200,000 and punitive damages, claiming the manager mismanaged her investments.

As a Jury Selection Consultant, I've helped with jury selections all over the country, and as I watch attorneys and judges ask their questions, I am intrigued not only by the questions that are asked, but by those that aren't. How many questions are asked simply because it's habit and "that's what I

duty versus the question being tied to finding a high-risk juror? What questions should have been asked? Often there's far too much time wasted on questions that don't "move the needle," and not enough time on those that do. That's part of the reason I found the *New York Times* piece so interesting—it made me wonder if it's possible to uncover high-risk jurors in 14 questions. I believe that not only is the answer yes, but (as the title of this blog suggests), I think we can do it in fewer questions. However, to do so one has to let the old habits go; one has to stop asking questions that are designed to argue your case, and instead do the work of creating the high-risk profile ahead of time, then writing questions which uncover those attitudes and experiences.

In the *New York Times* article, the 14 questions covered five areas: 1) Demographics (blue or white collar job, employment status, age, and income); 2) Experiences (Knows someone working in finance industry? Volunteers for specific kinds of organizations?); 3) Attitudes (Believes there are too many frivolous lawsuits? Thinks investing is similar to gambling?); 4) Personality type (Likes crossword puzzles or other games that require concentration? Agrees/disagrees with the phrase, "everything happens for a reason"?); and 5) Leadership potential (Would try to get out of jury duty? Manages employees? Relationship to other jurors – keeps to self or chats with them? Works alone or in groups?).

I don't want to quibble with the list or address whether or not I agree with their assessment of which way the answer moved the needle. You should take the test yourself to see how you fare. Instead, I want to suggest – make that "strenuously" suggest – that you re-think how you plan for jury selection: What are 10 things you absolutely need to know? Can you ask one question instead of five on the same topic? Are there any questions that you should ask EVERY time? And can you simply and directly ask the question? If you're guided by these questions as you plan your next voir dire, what 10 questions would be on your list? Try it, and send me your lists – I'll do a follow-up blog in a few months and anonymously share some of the best lists.

Here are 10 of my favorite go-to questions, and they aren't just for Jury Selection Consultants, you can use them to great effect too. These won't apply in every situation, and these are primarily written from a defense perspective, but if I'm going to make you do the exercise then I will as well.

> Tell me about your job/occupation, including your primary responsibilities and whether or not you manage anyone.

How would those who know you best describe you?

How many of you have served on a jury before? Were you the foreperson? Did your jury reach a verdict? In favor of which party? [I know – I just cheated – but these were follow-ups!]

How many of you think that if a lawsuit makes it all the way to trial, it must be a really strong case?

How many of you would have difficulty NOT awarding money to someone who has been injured?

How many of you think that large damage awards are one of the best ways to hold corporations accountable for their wrongdoing?

Have you heard of "Company X" – and if so, have you ever had any kind of association with the company and/or what is your opinion of the company?

How many of you believe that large corporations put profits above everything else [or amend by stating "employees," "safety," etc.]?

How many of you strongly agree with the phrase, "Bad things don't 'just happen – usually someone or something is to blame?"

After hearing everything you have heard to this point, is there any reason you think you could NOT be a fair or impartial juror on a case involving these issues [be specific], and these parties [be specific]?

PORTLAND OFFICE
One S.W. Columbia,
Suite 600
Portland, Oregon 97258
Toll Free (888) 452-8019

SEATTLE OFFICE
701 Fifth Avenue, Suite 2450
Seattle, Washington 98104
Toll Free (888) 452-8019

BARZELLONE v. PRESLEY

2005 OK 86
126 P.3d 588
Case Number: 102427
Decided: 11/29/2005
THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2005 OK 86, 126 P.3d 588

TIMOTHY M. BARZELLONE, on behalf of himself and all others similarly situated, Plaintiff/Appellant,
v.
PATRICIA PRESLEY, in her capacity as the Oklahoma County Court Clerk, Defendant/Appellee.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

¶0 The plaintiff/appellant, Timothy M Barzellone, filed a class action lawsuit challenging the constitutionality of the $349.00 jury fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7). Barzellone and the defendant/appellee, Patricia Presley (court clerk), each filed motions for summary judgment. The trial court determined that the statute was constitutional and granted summary judgment in favor of the court clerk. We hold that: 1) the collection of jury fees, as a prerequisite to accepting the first motion to enter for filing and docketing in a pending action, is constitutional under art. 2, §§6 and 19 of the Oklahoma Constitution; 2) the amount of the jury fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7), $349.00, is reasonable when considered with the minimum average costs of providing either six or twelve-person juries; and 3) if jury services are not utilized, the $349.00 jury fee collected pursuant to 28 O.S. Supp. 2004 §152.1(A)(7) is not refundable.

AFFIRMED.

David L. Thomas, Oklahoma City, Oklahoma, for plaintiff/appellant,
Richard N. Mann, Assistant District Attorney, Oklahoma City, Oklahoma, Timothy E. Rhodes, Oklahoma County Court Clerk's Office, Oklahoma City, Oklahoma, for defendant/appellee
Kenneth G. Cole, Burch & George, P.C., Oklahoma City, Oklahoma, for *amicus curiae*, Oklahoma Trial Lawyers Association.

WATT, C.J.:

¶1 Three issues are presented on appeal. The first is whether the imposition of a jury fee violates the Okla. Const. art. 2, §19[1] providing that the **right to jury trial** shall be and remain inviolate or the guarantee of access to courts found in the Okla. Const. art. 2, §6.[2] If a jury fee is constitutionally permissible, we are asked whether the $349.00 fee provided by 28 O.S. Supp. 2004 §152.1(A)(7)[3] is excessive. Finally, we must determine whether the $349.00 jury fee imposed is refundable if no jury is called.

¶2 We determine that the collection of jury fees, which may be charged as a prerequisite to accepting the first motion to enter for filing and docketing in a pending action, is constitutional under art. 2, §§6 and 19 of the Oklahoma Constitution. This holding conforms with the teachings of Barnes v. Smith, 1937 OK 26, 64 P.2d 1217, Royalpark-Moore v. Hubbard, 1973 OK 10, 508 P.2d 1064, Naylor v. Petuskey, 1992 OK 88, 834 P.2d 439 and Mehdipour v. State *ex rel.* Dept. of Corrections, 2004 OK 19, 90 P.3d 546 aligning Oklahoma with the majority position. It is also consistent with 28 O.S. 2001 §12[4] allowing court clerks to require deposits for anticipated costs.

¶3 The Constitution was never intended to guarantee the right to litigate entirely without expense to the litigants, nor to impose upon the public the entire burden of the expense of the maintenance of the courts.[5] The minimum average costs of providing six and twelve-person juries are $480.00 and $840.00,[6] respectively. The $349.00 fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7) is clearly inadequate to cover all the expenditures necessary in empaneling a jury. Therefore, we hold that the $349.00 jury fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7) is reasonable and not excessive. It does not limit the access to justice guaranteed by the Okla. Const. art. 2, §6 nor does it violate art. 2, §19's promise of an inviolate **right to jury trial**.

¶4 The highest courts in three states have addressed the issue of whether jury fees must be returned where jury service is not ultimately required. The sole decision requiring a refund has been limited by subsequent opinions and by the general practice of the state.[7] The other opinions hold in favor of retention and are well-reasoned.[8] They are also consistent with *In re* Lee, 1917 OK 458, 168 P. 53 and the expressed legislative intent found in the interplay between 28 O.S. Supp. 2004 §152.1(A)(7) and 10 O.S. Supp. 2002 §7110.1.[9] We determine that the $349.00 jury fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7) is not subject to refund if jury services are not utilized.

UNDISPUTED FACTS

¶5 On March 5, 2004, Barzellone filed a class action challenging the constitutionality of the $349.00 jury fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7) . He sought a declaratory judgment barring the defendant/appellee, Patricia Presley (court clerk), from collecting the jury fee in future causes.

¶6 Barzellone moved for summary judgment. In response, the court clerk filed an objection to the motion and filed for summary judgment. The court clerk argued that the fee statute was not unconstitutional and that she was required to collect the fee both under the statutory provision and pursuant to Administrative Directive 2003-79 issued on October 20th, 2003.[10]

¶7 On July 14, 2005, after a hearing, the trial court overruled Barzellone's motion and granted the court clerk summary judgment. Barzellone filed his petition in error and motion to retain on August 12, 2005. The motion was granted on the 30th and the parties were ordered to file briefs. The order setting the briefing schedule also notified the Attorney General of the filing of the appeal attacking the constitutionality of state statutes. The order informed the Attorney General[11] and any interested *amici curiae*[12] that, if briefs were filed in the cause, they would be held to the same briefing schedule as the parties. The Attorney General declined briefing of the issues. The parties and the *amicus curiae*, Oklahoma Trial Lawyers Association (Association), filed their briefs-in-chief on October 12, 2005. The briefing cycle was completed on November 1, 2005, with the filing of simultaneous reply briefs.

DISCUSSION

¶8 a. The collection of jury fees is constitutional under the Oklahoma Constitution, art. 2, §§6 and 19.

¶9 Although Barzellone seems most concerned with the amount of the jury fee, he also argues that the guarantee of art. 2, §19[13] that the right to a jury trial "shall be and remain inviolate" and art. 2, §6's[14] promise that "justice shall be administered without sale, denial, delay, or prejudice" are rendered meaningless when **any fee** is imposed for the empaneling of a jury. Therefore, he asserts that the fee included within 28 O.S. Supp. 2004 §152.1(A)(7)[15] is unconstitutional. The assertions of the *amicus curiae* are substantially similar.

¶10 The court clerk did not address the constitutional arguments in the brief in chief or in the reply. Nevertheless, we presume her position to be in opposition to that of Barzellone and the Association.[16] Jury fees set by statute cannot be circumvented by procedural nicety. It is the duty of the court clerk to charge and collect the fee[17] prescribed by 28 O.S. Supp. 2004 §157.1(A)(7).

¶11 As early as 1917, the Court determined that the collection of a $25.00 docketing fee to be deducted from a non-refundable advance payment to the Supreme Court Clerk of $40.00 dollars in appellate cases was not a sale or denial of justice[18] within the meaning of art. 2, §6. By 1932, it was recognized that the right to reasonable court fees was so generally accepted that its discussion seemed unnecessary. Rather, the imposition of such fees was determined not to be a denial or sale of justice within the meaning of art. 2, §6 provided they were uniform, reasonable and related to the services provided. The language of the constitutional provision was deemed to mean simply that justice could not be bought, nor that litigation expenses, in the nature of costs and disbursement, be so exorbitant and onerous as to virtually close the courthouse doors.[19]

¶12 The controversy in Barnes v. Smith, 1937 OK 26, 64 P.2d 1217 involved the prior collection of a fee, to be posted with the court clerk, intended to defray the *per diem* of the eighteen jurors summoned. The Barnes Court determined that a statute allowing a collection of $50.00 in causes, not involving contracts, from parties seeking a jury trial when court funds were exhausted was not prohibited by the inviolate **right of jury trial** guaranteed by the Oklahoma Constitution. In doing so, the Court rejected an argument that the charge was an illegal restraint on the **right of jury trial**. To the contrary, it determined that the statute carried out the spirit of art. 2, §6 and imposed no burden. Rather, litigants were offered an opportunity to voluntarily assume a charge which would otherwise have been borne by the public. Finally, the Barnes Court opined that "[i]t is by no means certain that such a charge, **even if made obligatory**, would violate constitutional inhibitions." [Emphasis provided.] Last year, relying on Barnes, we issued an order holding that, in civil cases where litigants are entitled to a jury trial, the party demanding the jury trial is obligated to prepay the cost[20] required in 28 O.S. Supp. 2004 §152.1(A)(7).

¶13 Royalpark-Moore v. Hubbard, 1973 OK 10, 508 P.2d 1064 addressed the necessity of the pre-payment of jury fees in small claims actions. The Court held that litigants must timely take certain steps before being entitled to a jury trial. These requirements, including the prepayment of a $25.00 jury fee, were found to be constitutional under the Okla. Const. art. 2, §19. In reaching this determination, the Hubbard Court reasoned that the constitutional provision did not preclude legislative action in prescribing a procedure to be followed in obtaining a jury trial.[21]

¶14 This Court has upheld a variety of fees, either collected by the court clerk or taxed as costs, against constitutional challenge.[22] In Naylor v. Petuskey, 1992 OK 88, 834 P.2d 439 involving 28 O.S. 1991 §152.1[23] -- a statute identical to 28 O.S. Supp. 2004 §152.1(A)(7) except for the difference in the amount of jury fees to be collected -- was considered. There, the court clerk had been charging multiple jury fee costs with the filing of each document indicating a jury trial was anticipated. Although the authority to collect a jury fee was limited to a one-time instance in Naylor, we held that the statute authorized the various court clerks to charge the jury fee prior to the commencement of each jury selection process, collected as a prerequisite to accepting the first motion to enter for filing and docketing in a pending action.[24]

¶15 Most recently, in Mehdipour v. State *ex rel.* Dept. of Corrections, 2004 OK 19, 90 P.3d 546, we upheld a statute[25] requiring inmates to prepay filing fees in civil proceedings if they had previously filed three or more meritless civil lawsuits against a constitutional attack based on art. 2, §6 and the due process clauses of the Oklahoma and United States Constitutions.[26] In upholding the fee collection, the Court acknowledged that art. 2, §6 was not intended to guarantee utilization of the courts entirely without expense to the litigants, nor to impose upon the public the entire monetary burden of the maintenance of the courts.[27]

¶16 Almost uniformly, courts faced with the issue of the constitutionality of jury fee collection statutes have upheld the collections.[28] Considering the majority position along with the teachings of Barnes v. Smith, 1937 OK 26, 64 P.2d 1217, Royalpark-Moore v. Hubbard, 1973 OK 10, 508 P.2d 1064, Naylor v. Petuskey, 1992 OK 88, 834 P.2d 439 and Mehdipour v. State *ex rel.* Dept. of Corrections, 2004 OK 19, 90 P.3d 546 and 28 O.S. 2001 §12 allowing

court clerks to collect anticipated costs, we hold that the collection of jury fees, as a prerequisite to accepting the first motion to enter for filing and docketing in a pending action, is constitutional under art. 2, §§6 and 19 of the Oklahoma Constitution.

¶17 b. The amount of the jury fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7), $349.00, is reasonable when considered with the minimum average costs of providing either six or twelve-person juries.

¶18 Having determined that the imposition of a jury fee is not unconstitutional, we now address Barzellone's and the Association's contentions that the $349.00 fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7)[29] is too high. They argue that the fee unreasonably limits the access to justice guaranteed by the Okla. Const. art. 2, §6[30] and art. 2, §19's[31] promise of an inviolate **right to jury trial**.[32]

¶19 Historically, the pre-payment of jury fees ranging from $6.00 to $100.00 has been upheld against constitutional attack.[33] Over ten years ago, Maine's highest court ruled that the imposition of a $300.00 jury fee did not unreasonably restrict the right to a civil jury trial, violate due process or deny the parties equal protection.[34]

¶20 The constitutional requirement to waive court fees in civil cases is the exception, not the general rule.[35] In determining what is reasonable within the realm of assessments for jury fees, a court may presume that the amount set is to be determined by the legislative branch and that the amount, so promulgated, is fair unless it is so high that it operates as a practical prohibition of the right.[36] A commonly used practice for determining the reasonableness of jury fees is to compare the fee charged with the jury compensation expended in an average length civil proceeding.[37] It is also generally understood that the payments for the jury's time are only one of the costs of conducting a jury trial.[38] Statutory jury fees also cover the time of the court personnel, the judge, the clerk, and the court reporter, among others. Office machines and supplies must be made available and utilities must be paid. These are only some of the many expenses involved in running a courtroom and these costs are constantly on the rise.[39]

¶21 Several studies indicate that the median length of jury trials averages three days[40] and that jury proceedings last forty percent (40%) longer than non-jury trials.[41] Furthermore, the failure to impose substantial fees systematically results in the overuse of jury dockets.[42] Finally, there is no requirement that the courts calculate whether a specific individual has suffered burdens in excess of the benefits of government services.[43] By imposing a fee for the empaneling of a jury, clearly the Legislature intends the fee to defray generally the cost of the jury system and not just the expense of a particular jury's services provided to the party **paying** the fee.[44]

¶22 Oklahoma jurors are entitled to $20.00 for each day's attendance before any court of record.[45] They also receive reimbursement for mileage going to and returning from jury service as well as either free parking or reimbursement for paid parking.[46] In limited situations, juries in Oklahoma are composed of six persons. However, where the amount in controversy exceeds $10,000.00, twelve jurors are seated.[47] When a cause is tried before a six-person jury, a minimum of twelve jurors must be called for *voir dire* at an initial cost of $240.00. Because in twelve-person juries at least eighteen prospective jurors are called, the cost of jury examination is $360.00. These costs go up when the trial court determines that there is a serious conflict of interest between two parties requiring additional jurors to be summoned for questioning.[48] When the length of an average jury trial -- 3 days -- is considered, estimates for jury fees in a six-person trial are $480.00 and for a twelve-person trial, $840.00.[49] These estimates do not take into account parking fees or the current mileage reimbursement rate of 48.5 cents per mile.

¶23 In Oklahoma, the purpose of the jury fee is to reimburse the state for the expenses incurred in providing and maintaining all of the officers and other facilities of the court, and is intended as compensation to the state for services rendered -- not by the clerk only, but by the entire court.[50] Clearly, the fee of $349.00, required as a prerequisite for calling a jury, cannot be considered excessive when compared with the average length trial at estimated costs of $480.00 for a three-day, six-person jury trial or $840.00 for a three-day, twelve-person jury trial.

¶24 The right to obtain justice does not mean that litigation may be conducted free of reasonable fees.[51] One should not be entitled to exercise constitutionally protected rights at the expense of others. There would be no justice in a system which penalized persons settling claims outside of court or those who utilized the less expensive avenue of a trial before a judge as fact-finder to furnish the legal luxury entirely to a litigious citizen demanding jury services.[52] Surely, one exercising the freedom of speech is not constitutionally entitled to the free use of printing presses or communications media. Similarly, one demanding a jury trial is not entitled to avoid **paying** any of the costs of the proceeding.[53]

¶25 Fees which are not unduly burdensome cannot be said to abridge the otherwise fundamental **right to jury trial**.[54] The fact that the fees for empaneling a jury were low and remained constant for the majority of the State's history is not supportive of a position that they should remain so[55] -- the costs of running a courtroom have soared and even a $349.00 jury fee will not avoid the necessity of a legislative supplement to the district court's budget.[56] The imposition of such a fee is not a denial or sale of justice within the meaning of art. 2, §6, where, as here, they are uniform, reasonable and related to the services provided.[57] We determine that the jury fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7) is reasonable and not excessive; and, therefore, it does not limit the access to justice guaranteed by the Okla. Const. art. 2, §6 or art. 2, §19's promise of an inviolate **right to jury trial**.

¶26 We note that on September 23, 2005, the Court of Civil Appeals issued an opinion destined for publication by order of that court,[58] in which it reversed a trial court's ruling providing that a pleading filed with the heading, "ATTORNEY LIEN CLAIMED JURY TRIAL DEMANDED" did not necessitate the court clerk's collection of the jury fee provided in 28 O.S. Supp. 2004 §152.1(A)(7). To the extent that Baptist Foundation of Oklahoma v. Lowe, 2005 OK CIV APP 78, 122 P.3d 61 is inconsistent with the teachings herein, it is expressly overruled.

¶27 c. The $349.00 jury fee collected pursuant to 28 O.S. Supp. 2004 §152.1(A)(7) is not refundable.

¶28 Title 28 O.S. Supp. 2004 §152.1(A)(7)[59] is silent on the issue of retaining the $349.00 jury fee where jury services are not required.[60] Fairly comprised within Barzelone's arguments is an assertion that the Legislature did not intend for retention of the fee when no jury trial occurs. We disagree.

¶29 Barzellone relies primarily on State v. Graf, 72 Wis.2d 179, 240 N.W.2d 387, 391 (1976). Graf was charged with operating a motor vehicle while under the influence of an intoxicant. He entered a plea of not guilty and demanded a jury trial. The Wisconsin Court determined that Graf was entitled to a jury trial and that prepayment of jury fees and other costs as a condition for a jury trial in a civil forfeiture action was not a violation of the constitutional preservation of the **right to jury trial**. Nevertheless, the Graf Court held that retention of the fees and costs against a successful defendant was unconstitutional. It reached this result because jury fees were a cost assumed by the unsuccessful prosecution in criminal and quasi-criminal actions prior to Wisconsin's statehood.

¶30 Graf is distinguishable both on the law and on the facts. The genesis of Barzelone's suit does not center on a claim involving a criminal or quasi-criminal action. Rather, he seeks a declaration that the Oklahoma Constitution forbids the retention of the $349.00 jury fee charge imposed by 28 O.S. Supp. 2004 §152.1(A)(7)[61] **in civil**

actions. Furthermore, Graf has been overruled on the issue of the constitutional right to a jury trial in forfeiture actions.[62] Finally, despite the Wisconsin Court's pronouncement, as a matter of practice, fees are not refunded in that state.[63]

¶31 *In re* Lee, 1917 OK 458, 168 P. 53 involved the issue of whether the collection of a $25.00 docketing fee to be deducted from a non-refundable advance payment to the Supreme Court Clerk of $40.00 in appellate cases was a sale or denial of justice within the meaning of art. 2, §6.[64] In determining that such fees did not violate Oklahoma's Constitution, the Lee Court took an even longer historical view than was applied in Graf. Lee considered the Magna Carta in explaining that provisions similar to art. 2, §6 were not intended to prohibit the collection of reasonable fees. Rather, the provision prohibited practices of the Exchequer Madox where fines were paid for the purpose of speeding up or slowing down litigation or to guarantee the outcome of a cause.

¶32 Research reveals two other well-reasoned opinions that have addressed the issue of whether a party who has paid a jury-demand fee is entitled to a refund of the fee when the case is terminated without the services of a jury. Neither of these courts aligned themselves with Graf.

¶33 In Fried v. Danaher, 46 Ill.2d 475, 263 N.E.2d 820, *appeal dismissed,* 402 U.S. 902, 91 S.Ct. 1382, 28 L.Ed.2d 643 (1971), the Illinois Supreme Court noted that the practice of retaining jury demand fees was consistent, long-continued and reasonable. The Illinois statute, like 28 O.S. Supp. 2004 §152.1(A)(7), made no provision for a refund and did not speak to retention of the fee. Nevertheless, the Fried Court determined that the most reasonable interpretation of the statutory language was recognition of a legislative intent that the fee be utilized to defray generally the cost of the jury system and not just the expense of a particular jury's services to a denominated party **paying** the fee. At all times, the party submitting the fee was entitled to a jury trial. Whether those services were ultimately utilized was based on the party's conscious decision.

¶34 Maine's highest court applied strict scrutiny in Butler v. Supreme Judicial Court, 611 A.2d 987 (1992) in holding that requiring civil litigants who demanded, but did not use juries, to **pay** the same fee as those who did use the jury system did not violate equal protection. The Butler Court reasoned that: 1) providing a civil jury trial system was a compelling state objective; 2) requiring absolute equivalence between the fee charged and the benefit received was impractical; and 3) the act of requesting a jury trial caused administrative and maintenance costs to the system. Applying the rational basis standard of review, the Maine Court found no constitutional barrier to collection of the fee from all who demanded a jury trial -- but who did not use the procedure -- did not violate equal protection because payment of a reasonable fee for the service was a rational method of maintaining the civil jury system.

¶35 Unlike its counterpart, 28 O.S. Supp. 2004 §152,[65] which specifically provides that none of the flat fees charged in civil cases "shall ever be refundable," §152.1 is silent on the issue of whether fees collected may be refunded or, if so, the circumstances which would allow their disbursement. However, subsection (B) of §152.1[66] requires, in clear and mandatory language,[67] that a portion of the jury fee collected be forwarded to the credit of the Child Abuse Multidisciplinary Account (Account). The Legislature's intent that the jury fees collected not be refundable is made clear by statutory provisions governing the Account -- 10 O.S. Supp. 2002 §7110.1(A)(3) and subsection (B)(2),[68] respectively, provide that: 1) all monies accruing to the Account are appropriated, budgeted and expended by the Department of Human Services (DHS); and 2) the monies shall at no time become monies of the state, part of the DHS's or any other Department or state agency's budget, or be transferrable to any other state agency or account of the Department, **or be utilized to reimburse any other state agency for any expense**. The Court Clerk has no avenue to retrieve the portion of the fee transferred to the Account. If the Legislature had intended a refund, it would be a full, not a partial, return of the fees collected.

¶36 Graf's efficacy has been limited both by a subsequent decision of the Wisconsin court and by the general practice in the state. Additionally, it does not coincide with the Lee Court's determination that a non-refundable filing fee passed constitutional muster. The better reasoned opinions in Fried and Danaher are more consistent with both Lee and the expressed legislative intent found in the interplay between 28 O.S. Supp. 2004 §152.1(A)(7) and 10 O.S. Supp. 2002 §7110.1 that jury fees be non-refundable.

¶37 It would be unreasonable to require the return of jury fees, especially when a number of cases are "settled on the courthouse steps" and after potential jurors have been called to service. To do so would create a bookkeeping nightmare for court clerks and thereby increase the administrative costs associated with handling of causes set for jury trial. There is no legislative avenue available to retrieve the portion of the fees forwarded to the Child Abuse Multidisciplinary Account.[69]

¶38 The Legislature is never presumed to have acted vainly or uselessly in enacting laws.[70] Clearly, in requiring the pre-payment of jury fees, the Legislature intended to defray governmental costs rather than to create a system which would increase revenue outlays. We determine that the $349.00 jury fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7) is not subject to refund if jury services are not utilized.

CONCLUSION

¶39 This opinion should not be read as a rubber stamp for any decision the Legislature might make on the amount of fees levied in association with jury trials. The Oklahoma Constitution does not anticipate that litigants will be burdened with the entire bill for maintenance of the court system.[71] Our research indicates that Oklahoma's jury trial charges may be the highest in the nation to have been put to the "reasonableness test".[72] The constitutional right to a jury trial is a personal right[73] which the Legislature cannot waive[74] through creating a fiscal barrier so unreasonable as to eliminate the right itself. When comparing the jury fee charge with a jury proceeding utilizing 6 jurors, it would appear that the $349.00 fee charge approaches the barrier beyond which the charge could not survive constitutional scrutiny.

¶40 Nevertheless, we recognize that a statute is the solemn act of the Legislature.[75] Although the Supreme Court is the protector of the constitution,[76] in construing the constitutionality of a statute we are not authorized to consider its propriety, wisdom, or practicability as a working proposition. Those questions are clearly and definitely established by our fundamental law to a certainty as functions of the legislative department.[77] This Court has a duty to interpret statutes to make their application constitutional rather than unconstitutional.[78] We uphold legislative enactments unless the statute is clearly, palpably and plainly inconsistent with the constitution.[79]

¶41 Applying these principles, considering Oklahoma jurisprudence and the majority position, we hold that the collection of a jury fee, as contemplated by 28 O.S. Supp. 2004 §152.1(A)(7),[80] is constitutional under art. 2, §§6[81] and 19 of the Oklahoma Constitution. We also determine that the amount of the fee, $349.00, is reasonable when compared with the costs incurred in conducting jury proceedings generally. Finally, we determine that the $349.00 jury fee is not subject to refund if jury services are not utilized.[82]

AFFIRMED.

WATT, C.J., WINCHESTER, V.C.J., LAVENDER, OPALA, EDMONDSON, TAYLOR, COLBERT, JJ. - concur.

KAUGER, J. - concurs in result.

HARGRAVE, J. - concurs in part, dissents in part.

FOOTNOTES

[1] The Okla. Const. art. 2, §19 provides in pertinent part:

"The right of trial by jury shall be and remain inviolate . . . Juries for the trial of civil cases, involving more than Ten Thousand Dollars ($10,000.00), and felony criminal cases shall consist of twelve (12) persons. All other juries shall consist of six (6) persons. However, in all cases the parties may agree on a lesser number of jurors than provided herein. . . ."

The **right to jury trial** in the federal realm is guaranteed by the 7th Amendment to the United States Constitution. The amendment is inapplicable to state court proceedings. Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 116 S.Ct. 2211, 2222, 135 L.Ed.2d 659 (1966). The United States Const. amend. 7 provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

[2] The Okla. Const. art. 2, §6 provides:

"The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

[3] Title 28 O.S. Supp. 2004 §152.1(A)(7) provides:

"A. In civil cases, the court clerk shall collect and deposit in the court fund the following charges in addition to the flat fee:

(7) When a jury is requested .....$349.00."

[4] Title 28 O.S. 2001 §12 provides:

"No fees allowed by law shall be due or demanded until the services for which such fees are chargeable shall have been performed, provided, however, that the court clerk may require a deposit for anticipated costs."

Petuskey v. Cannon, see note 10, infra.

[5] Medipour v. State Dept. of Corrections, see note 27, infra.

[6] See ¶22 and accompanying footnotes, infra.

[7] State v. Graf, 72 Wis.2d 179, 240 N.W.2d 387, 391 (1976) [Graf has been overruled on some points and is inefficacious as it relates to the refund of fees. See, ¶30, infra].

[8] Fried v. Danaher, see note 33, infra; Butler v. Supreme Judicial Court, see note 34, infra.

[9] Title 10 O.S. Supp. 2002 §7110.1, see note 68, infra.

[10] Administrative Directive 2003-79, effective November 1, 2003, provides in pertinent part:

"CIVIL FILING FEES . . . Other fees . . .

When a jury is requested (civil only).....$350.00. . .
." [Emphasis in original.]

A court clerk is given no discretion in collecting the statutorily imposed jury fees. Title 28 O.S. 2001 §12, see note 4, supra; Petuskey v. Cannon, 1987 OK 74, ¶31, 742 P.2d 1117.

[11] Title 12 O.S. Supp. 2003 §1653(C). On October 7, 2005, the Attorney General filed a notice with the Court

declining to participate in the appeal.

[12] Rule 1.12, Rules of the Supreme Court, 12 O.S. 2001, Ch. 15, App. 1.

[13] The Okla. Const. art. 2, §19, see note 1, supra.

[14] The Okla. Const. art. 2, §6, see note 2, supra.

[15] Title 28 O.S. Supp. 2004 §152.1(A)(7), see note 3, supra.

[16] Although the court clerk was directed by our order of September 22, 2005, to address the constitutional arguments, the briefs filed present a jurisdictional question which is unconvincing. The gist of the court clerk's position is that, because Barzellone did not contest the filing fee in previous litigation, he is barred from bringing a declaratory judgment action. Title 12 O.S. Supp. 2004 §1651 provides that "[D]istrict courts may, in cases of actual controversy, determine rights . . . including but not limited to a determination of the construction or validity . . . of any statute . . .". The declaratory judgment statutes are to be liberally construed to obtain the objective of expediting and simplifying the ascertainment of uncertain rights. An action for declaratory relief is an appropriate cause to be brought by a person adversely affected by a statute. Furthermore, the person need not violate the questioned law to obtain a declaration of its validity. State v. Lawton, 1974 OK 69, ¶¶8 and 9, 523 P.2d 1064. Finally, the question of whether we should grant declaratory relief is not a question of power or jurisdiction but the appropriateness of that particular procedure or remedy. Ethics Comm'n v. Cullison, 1993 OK 37, ¶6, 850 P.2d 1069. This Court has jurisdiction to provide declaratory relief so as to afford a party a means to vindicate a judicially cognizable interest. Ethics Comm'n v. Cullison, this note, supra; Conoco, Inc. v. State Dept. of Health, 1982 OK 94, ¶18, 651 P.2d 125. Furthermore, the issue of jury fee collections is a matter of *publici juris,* warranting consideration by this Court. Naylor v. Petuskey, see note 24, infra.

[17] Naylor v. Petuskey, see note 24, infra; Petuskey v. Cannon, see note 10, supra.

[18] *In re* Lee, 1917 OK 458, ¶0, 168 P. 53.

[19] Howe v. Federal Surety Co., see note 22, infra.

[20] Colley v. Harbour, 2004 OK 90, ¶2, 104 P.3d 584 [The cause did not address the constitutional questions raised here; therefore, it is not dispositive of the cause.].

[21] In 1987, the Court was asked to determine whether an administrative law judge exceeded his authority in issuing an order forbidding the court clerk from collecting the prepayment of jury fees from landowners in condemnation cases. We held that the administrative law judge had exceeded his authority in Petuskey v. Cannon, see note 10, supra. Furthermore, the Court concluded that the order was discriminatory and that it constituted unequal protection to assess a prepayment fee for a jury trial for parties in certain causes, while not requiring it in others. Petuskey is inapposite to the issue presented here as the $349.00 fee imposed by 28 O.S. Supp. 2004 §152.1(A)(7), see note 3, supra, applies to all parties equally who file jury trial demands.

[22] Thayer v. Phillips Petroleum Co., 1980 OK 95, ¶15, 613 P.2d 1041 [Taxing a reasonable attorneys fee in small claims procedure transferred to district court does not violate the 14th Amendment or section of constitution providing for ready access to courts.]; Matter of Rich, 1979 OK 173, ¶8, 604 P.2d 1248 [Indigent state prisoner was not entitled to a free trial transcript on a civil appeal from order in proceeding and failure to provide transcript was not a denial of constitutional rights to due process and equal protection.]; Howe v. Federal Surety Co., 1932 OK 730, ¶0, 17 P.2d 404 [Twenty-five dollar deposit in causes filed in the Supreme Court held not in violation of constitutional provision prohibiting sale or denial of justice and right.]; Ardmore Hotel Co. v. J.B. Klein Iron & Foundry Co., 1924 OK 734, ¶0, 230 P.576 [Statute permitting recovery of attorney's fee held valid under the Okla. Const. art. 5, §59 and the United States Const. Amend. 14.]. To the same effect see, Baker v. Farmers' &

Merchants' State Bank, 1926 OK 265, ¶0, 245 P. 555; Keaton v. Branch, 1924 OK 919, ¶0, 231 P. 289; Hutchison Labor Co. v. Scrivener, 1923 OK 540, ¶0, 217 P. 854; Scott v. Iman, 1918 OK 620, ¶8, 176 P. 81. See also, Clarady v. State, 1913 OK CR 140, 132 P. 691 [Constitutional right of appeal does not contemplate an appeal for delay or at the expense of the people except in the case of paupers.]. Fees not general in nature have been struck as unconstitutional. See, Chicago, R.I.&P. Railroad Co. v. Mashore, 1908 OK 95, ¶19, 96 P. 630.

[23] Title 28 O.S. 1991 §152.1 provides in pertinent part:

"In civil cases other than those in the small claims division, the court clerk shall collect and deposit in the court fund the following charges in addition to the flat fee:

. . . 6. When a jury is requested ..... $50.00 . . ."

[24] Constitutional issues were not reached in Naylor v. Petuskey, 1992 OK 88, ¶9, 834 P.2d 439 because the Court concluded that the clerks were not authorized to collect multiple fees prior to jury trial.

[25] Title 57 O.S. 2001 §566.2.

[26] Due process protections encompassed within the two constitutions are coextensive. Presley v. Board of County Comm'rs, 1999 OK 45, ¶8, 981 P.2d 309. Furthermore, there may be situations in which the Oklahoma provision affords greater due process protections than its federal counterpart. Turner v. City of Lawton, 1986 OK 51, ¶10, 733 P.2d 375, *cert. denied,* 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987). The Okla. Const. art. 2, §7 provides:

"No person shall be deprived of life, liberty, or property, without due process of law."

The United States Const. Amendment 14, §1 provides in pertinent part:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[27] Mehdipour v. State *ex rel.* Dept. of Corrections, 2004 OK 19, ¶20, 90 P.3d 546; Howe v. Federal Surety Co., see note 22; *In re* Lee see note 18, supra.

[28] Annot., "Validity of Law or Rule Requiring State Court Party who Requests Jury Trial in Civil Case to **Pay** Costs Associated with Jury," 68 A.L.R.4th 343 (1989-2004).

[29] Title 28 O.S. Supp. 2004 §152.1(A)(7), see note 3, supra.

[30] The Okla. Const. art. 2, §6, see note 2, supra.

[31] The Okla. Const. art. 2, §19, see note 1, supra.

[32] Also fairly comprised within Barzelone's and the Association's arguments is that collection of the fee from indigents is unconstitutional. However, Barzellone does not assert his status or the class's status as indigent. Therefore, we do not address the issue. Generally, this Court does not address a party's asserting vicariously the constitutional rights of others. Forest Oil Corp. v. Corporation Comm'n, 1990 OK 58, 807 P.2d 774. Furthermore, it is questionable that such an argument would withstand the teachings of Mehdipour v. State *ex rel.* Dept. of Corrections, see note 27, supra.

[33] Phelps v. Physicians Ins. Co., 2005 WI 85, ¶31, 698 N.W.2d 643 [Upholding pre-payment of $72.00 jury fee.]; Fox v. Hunt, 619 So.2d 1364, 1367 (Tex. 1993) [Upholding pre-payment of $50.00 fee.]; Christie v. People, 837 P.2d 1237, 1243 (Colo. 1992) [Upholding pre-payment fee of $25.00.]; County of Portage v. Steinpreis, 104 Wis.2d 466, 312 N.W.2d 731, 733 (1981) [Finding jury fee of $19.00-$24.00 insignificant.]; Robertson v. Apuzzo, 170 Conn,. 367, 365 A.2d 824, 831 (1976), *cert. denied,* 429 U.S. 852, 97 S.Ct. 142, 50 L.Ed.2d 126 (1976) [Upholding pre-payment of jury fees of $30.00-$100.00.]; Fried v. Danaher, 46 Ill.2d 475, 263 N.E. 2nd 820-821 (1970), *appeal dismissed,* 402 U.S. 902, 91 S.Ct. 1382, 28 L.Ed.2d 643 (1971) [Upholding pre-payment of $50.00 fee.]; People *ex rel.* Flanagan v. McDonough, 24 Ill.2d 178, 180 N.E.2d 486 (1962) [Upholding pre-payment of jury fees ranging from $50 to $100.00.]; Better Home Furniture Co. v. Baron, 243 N.C. 502, 91 S.E.2d 236, 239 (1956) [Upholding pre-filing of $25.00 bond required for calling jury in small claims action.]; Huber v. Van Schaack-Mut., Inc., 368 Ill. 142, 13 N.E.2d 179-80 (1938) [Upholding pre-payment of jury fees ranging from $6.00 to $12.00.]; Hung v. Rosenbaum Grain Corp., 355 Ill. 504, 189 N.E. 907, 909 (1934) [Upholding pre-payment of $8.00 jury fee.]; Flour City Fuel & Transfer Co. v. Young, 150 Minn. 452, 185 N.W. 934, 936 (1921) [Upholding pre-payment of $5.00 removal fee and $3.00 jury fee for total cost of $8.00.]; Reliance Auto Repair Co. v. Nugent, 159 Wis. 488, 149 N.W. 377 (1914) [Upholding pre-payment of $12.00 jury fee.]; Williams v. Gottschalk, 231 Ill. 175, 83 N.E. 141-42 (1907) [Upholding pre-payment of $6.00 fee.]; State v. Neterer, 33 Wash. 535, 74 P. 668-69 (1903) [Upholding pre-payment of $12.00 jury fee.]; Conneau v. Geis, 73 Cal. 176, 14 P. 580-81 (1887) [Upholding pre-payment of $24.00 fee.]; Venine v. Archibald, 1877 WL 359, 3 Colo. 163 (1877) [Upholding $20 jury fee.]; Steele v. Central R.R. of Iowa, 1876 WL 490, 43 Iowa 109 (1876) [Upholding pre-payment of jury fee of $24.00 per day.]; Copp v. Henniker, 1875 WL 4743, 55 N.H. 179 (1875) [Upholding pre-payment of $5.00 fee.]; Bailey v. Frush, 1873 WL 992, 5 Or. 136 (1873) [Upholding pre-payment of $12.00 fee.]; Bachor v . City of Detroit, 49 Mich.App. 507, 212 N.W.2d 302-03 (1973) [Upholding pre-payment of $20.00 fee]; Walker v. Parkway Cabs, 50 Ohio App. 250, 197 N.E. 921 (1935), *error dismissed,* 130 Ohio St. 139, 197 N.E. 923 (1935) [Upholding pre-payment of $25.00 fee.]; Andres v. Chillow, 1934 WL 2729, 273 Ill.App. 251 (1934) [Upholding pre-payment of $8.00 fee.]; Asbestolith Mfg. Co. v. Howland, 67 Misc. 429, 123 N.Y.S. 180 (1910), *aff'd,* 143 A.D. 418, 128 N.Y.S. 173 (1911) [Upholding jury fee ranging between $6.00 and $8.00.].

See also, United States v. Sperry Corp., 493 U.S. 52, 110 S.Ct. 387, 395, 107 L.Ed.2d 290 (1989) [Fee charged for reimbursement for costs incurred in the operation of the United States Claims Tribunal did not violate due process nor was it an unconstitutional taking without just compensation.]; State v. Boober, 200 W.Va. 66, 488 S.E.2d 66, 71 (1997) [Assessing jury fee against criminal defendant did not unreasonably burden **right to jury trial**.]; Weber v. Lynch, 473 Pa. 599, 375 A.2d 1278, 1281 (1977) [Constitution not violated by requirement of pre-payment of jury fees following arbitration proceeding.]; All v. Danaher, 47 Ill.2d 231, 265 N.E.2d 103-04 (1970) [Upholding the collection of $1.00 for county law library fees.]; Warren v. Scudder-Gale Grocery Co., 96 Tenn. 574, 36 S.W. 383 (1896) [Jury trial waived by failure to **pay** statutorily required jury fee.]; Adams v. Corriston, 1862 WL 1291, 7 Minn. 456 (1862) [Upholding prepayment of jury fee without disclosing amount to be advanced.]; State v. Wright, 1850 WL 4107, 13 Mo. 243 (1850) [Upholding jury fee taxed as costs against defendant in criminal proceeding.]; Byram v. Superior Court, 74 Cal.App.3d 648, 141 Cal.Rptr. 604-05 (1977) [Upholding prepayment of jury fee without disclosing amount to be advanced.]; Still v. Plaza Marina Commercial Corp., 21 Cal.App.3d 378, 98 Cal.Rptr. 414, 418 (1971) [Failure to post jury fees constituted valid waiver of jury trial.].

But see, Hammer v. Justice Court, 222 Mont. 35, 720 P.2d 281-82, 68 A.L.R.4th 335 (1986) [Statute requiring prepayment of jury fees for civil cases in justice courts unconstitutionally violated the guarantee that **right to jury trial** should remain inviolate.]; Labowe v. Balthazor, 180 Wis. 419, 193 N.W. 244, 32 A.L.R. 862-63 (1923) [Striking jury fee of $2.00 per jury member empanelled.]; Wassenich v. City & County of Denver, 67 Colo. 456, 186 P. 533, 538 (1919) [Charge of jury fee in condemnation proceeding could not be taxed as costs.]; Gooch v. State, 685 N.E.2d 152, 155 (Ind.App. 1997) [Cannot impose costs of jury trial absent statutory authorization.]; Story v. Walker, 71 N.J.L. 256, 58 A. 349-50 (1904) [Pre-payment of jury fees may not be required absent

statute.]; Board of Comm'rs of Pitkin County v. First Nat'l Bank of Aspen, 24 Colo. 124, 48 P. 1043 (1897); Reece v. Knott, 3 Utah 451, 24 P. 757 (1861) [Cannot require pre-payment of jury fees in criminal case.]; Christie-Lambert Van & Storage Co., Inc. v. McLeod, 39 Wash.App. 298, 693 P.2d 161, 167 (1984) [Payment of greater than $50.00 jury fee was too large in light of controversy involving $250.00.].

[34] Butler v. Supreme Judicial Court, 611 A.2d 987, 990 (Me. 1992). Maine litigants may also be taxed up to $500.00 for the cost of exhibits in a jury trial. Title 14 M.R.S.A. §1502-C(3) (1969).

[35] Higgins v. Carpenter, 258 F.3d 797 (8th Cir. 2001), *cert. denied,* 535 U.S. 1040, 122 S.Ct. 1803, 152 L.Ed.2d 659 (2002); Medipour v. State *ex rel.* Dept. of Corrections, see note 27, supra.

[36] Venine v. Archibald, see note 33, supra.

[37] Fox v. Hunt, see note 33, supra; Butler v. Supreme Judicial Court, see note 34, supra; Portage County v. Steinpreis, see note 33, supra; People *ex rel.* Flanagan v. McDonough, see note 33, supra; Williams v. Gotschalk, see note 33, supra; Walker v. Parkway, see note 33, supra; Annot., "Validity of Law or Rule Requiring State Court Party Who Requests Jury Trial in Civil Case to **Pay** Costs Associated with Jury", see note 28, supra. See also, Carey v. Elrod, 49 Ill.2d 464, 275 N.E.2d 367, 471 (1971), *appeal dismissed,* 408 U.S. 901, 92 S.Ct. 2488, 33 L.Ed.2d 327 (1972); Hamilton v. Ceasar, 218 Ill.App.3d 268, 161 Ill.Dec. 94, 578 N.E.2d 221-22 (1991), *appeal denied,* 142 Ill.2d 653, 164 Ill.Dec. 917 (1991), *cert. denied,* 505 U.S. 1207, 112 S.Ct. 2999, 120 L.Ed.2d 875 (1992).

[38] County of Portage v. Steinpreis, see note 33, supra.

[39] *Id.*

[40] Bureau of Justice Statistics Bulletin (Aug. 2000). See also, People *ex rel.* Flanagan v. McDonough, note 33, supra [Average length of jury trial, 2.5 days); C. McLarney, C. Silverman, "Fulfilling the Promise of a Representative Jury," 59 J.Mo.B. 172 (2003) [Average length of jury trials, something less than 3 days.]; J. Weinstein, "The Restatement of Torts & the Courts," 54 Vand.L.Revc. 1439 (2001) [Average length of jury trials, 23 hours.]; P. Longan, "The Case for Jury Fees in Federal Civil Litigation," 74 Or.L.Rev. 90-9 (1995) [Average length of jury trials, 4-5 days.]; M. Seigel, "Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion," 22 Hofstra L.Rev. 567 (1994) [Average length of jury trials, 3-4 days].

[41] Note, "Practice & Potential of the Advisory Jury," 100 Harv.L.Rev. 1363 (1987).

[42] Maryland Community Developers v. State Roads Comm'n, 261 Md. 205, 274 A.2d 641, 45 (1971), *appeal dismissed,* 404 U.S. 803, 92 S.Ct. 62, 30 L.Ed.2d 35 (1971); Houston v. Lloyd's Consumer Acceptance Corp., 241 Md 10, 215 A.2d 192, 194 (1965); P. Longan, "The Case for Jury Fees in Federal Civil Litigation", see note 40, supra. In 1995, the United States Judicial Conference approved a recommendation from its Committee on Long Range Planning that "Congress should include budget appropriations for the constitutionally-mandated functions of federal courts as part of the non-discretionary budget". Judicial approval of the recommendation appears at 60 Fed.Reg. 30,317 (1995).

[43] United States v. Sperry Corp., see note 33, supra.

[44] Fried v. Danaher, see note 33, supra.

[45] It should be noted that when a trial runs for more than 10 days, jurors may be paid up to $200.00 per day beginning on the 11th day of jury service. Rule B, Rules for the Operation of the Lengthy Trial Fund, 28 O.S. Supp. 2005, Ch. 1, App. 1.

[46] Title 28 O.S. Supp. 2005 §86 provides in pertinent part:

"A. Jurors shall be paid the following fees out of the local court fund:

1. For each day's attendance before any court of record, Twenty Dollars ($20.00); and

2. For mileage going to and returning from jury service, pursuant to the provisions of the State Travel Reimbursement Act.

B. The Court Fund Board of the district court may contract for or provide reimbursement for parking for district court jurors to be paid from the Court Fund. Parking so provided to jurors shall be in lieu of any reimbursement to jurors for parking fees. . . ."

[47] Title 12 O.S. 2001 §556.1 provides in pertinent part:

". . . (b) In actions for forcible entry and detainer, or detention only, of real property and collection of rents therefor a jury shall consist of six (6) persons.

(c) . . . [A]ctions for the recovery of money or specific real or personal property or both shall be tried to a jury of twelve (12) persons (1) if a party requests the recovery of money in the sum of at least Ten Thousand Dollars ($10,000.00) or (2) if a party files an affidavit that the action involves at least Ten Thousand Dollars ($10,000.00) and the adverse party does not controvert the affidavit, or (3) if the adverse party controverts such an affidavit, if one is filed, and the court finds that the action involves at least Ten Thousand Dollars ($10,000.00) . . .

If there be more than one defendant in the case, and the trial judge determines on motion that there is a serious conflict of interest between them, he may, in his discretion, allow each defendant to strike three names from the list of jurors seated and passed for cause. In such case he shall appropriately increase the number of jurors initially called and seated in the box for voir dire examination."

[48] *Id.*

[49] Costs are estimated according to the following:

1) For a six-person jury: 12 jurors called x $20.00 = $240.00 (Day of *voir dire*) + 6 jurors serving x 2 (the average length of trial being 3 days) x $20.00 (a cost of $240.00) = $480.00 incurred in jury service fees; and

2) For a 12-person jury: 18 jurors called x $20.00 = $360.00 (Day of *voir dire)* + 12 jurors serving x 2 (the average length of trial being 3 days) x $20.00 (a cost of $480.00) = $840.00 incurred in jury service fees.

[50] *In re* Lee, see note 18, supra. See also, Naylor v. Petusky, note 24, supra.

[51] Sanko v. Carlson, 69 Ill.2d 246, 13 Ill.Dec. 678, 371 N.E.2d 613-14 (1978), *appeal dismissed,* 439 U.S. 804, 99 S.Ct. 59, 58 L.Ed.2d 97 (1978).

[52] Howe v. Federal Surety Co., see note 22, supra. Jury fees are no more a burden on the litigation process than are other fees collected to ensure that courtrooms remain open and available to the public. Conneau v. Geis, see note 33, supra.

[53] County of Portage v. Steinpreis, see note 33, supra. The jury system is not a necessary component of accurate fact finding. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 1985, 29 L.Ed.2d 647 (1971); Robertson v. Apuzzo, see note 33, infra.

[54] Christie v. People, see note 33, supra.

[55] See, Copp v. Henniker, 1875 WL 4743, 35 N.H. 179 [In considering the reasonableness of a jury fee, must keep in mind that factors such as the contrast in compensation of juries, the changed value of money and all the pecuniary views of the subject. The questions then becomes whether what was reasonable in 1792 is reasonable in 1875].

[56] Court fees compensate the state for the expenses incurred in providing and maintaining all of the court officers and facilities. Although the fees collected may be sufficient to reimburse the state for the expense of maintaining the court clerk's office, generally, they are less than the amount appropriated to **pay** the salaries of the court clerks, their assistants and the judges. *In re* Lee, see note 18, supra. In fiscal year 2005, records indicate that the court clerks collected approximately $38,000,000.00 for deposit in the Judicial Fund. Despite the collection of these monies, the Legislature appropriated an additional $7,000,000.00 to the District Courts.

[57] Howe v. Federal Surety Co., see note 22, supra.

[58] Opinions released for publication by order of the Court of Civil Appeals, are persuasive only, and lack precedential effect. Rule 1.200, Supreme Court Rules, 12 O.S.2001, Ch. 15, App. 1; 20 O.S. 2001 §§30.5 and 30.14.

[59] Title 28 O.S. Supp. §152.1(A)(7), see note 3, supra.

[60] Title 28 O.S. Supp. 2004 §106 has no application to those costs collected pursuant to 28 O.S. Supp. 2004 §152.1(A)(7), see note 3, supra. The statute provides in pertinent part:

"It shall be the duty of the court clerk receiving any costs or fees belonging to any other person, to deposit the same in the court fund subject to the order of the person entitled thereto . . ."

The statute contemplates the disbursal of costs and fees deposited by one party for the benefit of another. See, *e.g.* 28 O.S. 2001 §105 making it the duty of the sheriff or other officer collecting costs on executions to **pay** the costs collected to the clerk of the court or to the justice.

[61] Title 28 O.S. Supp. 2004 §152.1(A)(7), see note 3, supra.

[62] See, State v. Ameritech Corp., 185 Wis.2d 686, 517 N.W.2d 705, 709 (1994), *review granted,* 524 N.W.2d 138 (1994), *aff'd,* 193 Wis.2d 150, 532 N.W.2d 449 (1995).

[63] C. Wiseman, N. Chiarkas, D. Blinka, Wisconsin Practice Series, §12.41 (2005).

[64] The Okla. Const. art. 2 §6, see note 2, supra.

[65] Title 28 O.S. Supp. 2004 §152(A) provides in pertinent part:

"In any civil case filed in a district court, the court clerk shall collect, at the time of filing, the following flat fees, none of which shall ever be refundable, and which shall be the only charge for court costs, except as is otherwise specifically provided by law . . ."

[66] Title 28 O.S. Supp. 2004 §152.1(B) provides:

"Of the amounts collected pursuant to the provisions of paragraphs 1, 2 and 7 of subsection A of this section, the sum of Ten Dollars ($10.00) shall be deposited to the credit of the Child Abuse Multidisciplinary Account."

Paragraph 7 of §152.1(A), see note 3, supra, is the paragraph requiring the collection of jury fees of $349.00.

[67] Generally, the use of "shall" signifies a legislative command. Cox v. State *ex rel.* Oklahoma Dept. of Human Services, 2004 OK 17, ¶21, 87 P.3d 607; United States through Farmers Home Admin. v. Hobbs, 1996 OK 77, ¶7, 921 P.2d 338. Nevertheless, there may be times when the term is permissive in nature. Cox v. State *ex rel.* Oklahoma Dept. of Human Services, this note, supra; Minie v. Hudson, 1997 OK 26, ¶7, 934 P.2d 1082; Texaco, Inc. v. City of Oklahoma City, 1980 OK 169, ¶9, 619 P.2d 869.

[68] Title 10 O.S. Supp. 2002 §7110.1 providing in pertinent part:

"A. There is hereby created in the Department of Human Services a revolving fund to be designated the 'Child Abuse Multidisciplinary Account'. . . .

3. All monies accruing to the credit of the fund are hereby appropriated and shall be budgeted and expended by the Department for the purposes provided in Sections 7110 and 7110.2 of this title. . . .

B. The account shall be administered by the Department for the benefit of children of Oklahoma . . .

2. The monies deposited in the Child Abuse Multidisciplinary Account shall at no time become monies of the state and shall not become part of the general budget of the Department or any other state agency. Except as otherwise authorized by this section, no monies from the Account shall be transferred for any purpose to any other state agency or any account of the Department or be used for the purpose of contracting with any other state agency or reimbursing any other state agency for any expense."

None of the exceptions contemplated in subsection (B)(2) are applicable here.

[69] The interplay between 12 O.S. 2001 §942, giving judges discretion to award as costs any fees assessed by the court clerk, and 12 O.S. Supp. 2004 §2011.1, mandating that judges "shall", upon granting a motion to dismiss an action or motion for summary judgment against a non-prevailing party whose claims are frivolous, award the prevailing party costs, is also instructive. Conceivably, at the time the of motion's granting, the prevailing party could already have paid the jury fee cost imposed by 28 O.S. 152.1(A)(7), see note 3, supra. Under those facts, a refund of the fee paid coupled with the award of costs could result in a double recovery -- the prevailing party would profit by having pre-paid the jury fees -- a result not anticipated in the statutory scheme.

[70] Strong v. Laubach, 2004 OK 21, ¶11, 89 P.3d 1066; Hill v. Board of Educ., 1997 OK 107, ¶12, 994 P.2d 930; Curtis v. Board of Educ. of Sayre Public Schools, 1995 OK 119, ¶9, 914 P.2d 656, *rehearing denied* (1996).

[71] Medipour v. State *ex rel.* Dept. of Corrections, see note 27, supra.

[72] See ¶19, supra, and accompanying footnotes.

[73] Massey v. Farmers Ins. Group, 1992 OK 80, ¶16, 837 P.2d 880; Jenkins v. State, 912 OK CR 8, 120 P. 298.

[74] Massey v. Farmers Ins. Group, see note 73, supra.

[75] Chicago, R.I. & P. Ry. Co. v. Mashore, see note 22, supra.

[76] Wyatt-Doyle & Butler Engineers, Inc. v. City of Eufaula, 2000 OK 74, ¶8, 13 P.3d 474.

[77] Matter of University Hospitals Auth., 1997 OK 162, ¶11, 953 P.2d 314, *rehearing denied* (1998).

[78] Local 514 Transport Workers' Union of America v. Keating, 2003 OK 110, ¶15, 83 P.3d 835; Unit Petroleum Co. v. Oklahoma Water Resources Bd., 1995 OK 73, ¶6, 898 P.2d 1275.

[79] Jaworsky v. Frolich, 1992 OK 157, ¶16, 850 P.2d 1052.

[80] Title 28 O.S. Supp. 2004 §152.1(A)(7), see note 3, supra.

[81] The Okla. Const. art. 2, §6, see note 2, supra.

[82] Federal jurisprudence and an examination of federal procedures supports our holdings. See, United States v. Sperry Corp., note 33, supra; P. Longan, "The Case for Jury Fees in Federal Civil Litigation," note 31, supra. Nevertheless, this Court's determinations with regard to the state constitutional questions are based on Oklahoma law which provides *bona fide,* adequate and independent grounds for our decision. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983).

Citationizer© Summary of Documents Citing This Document

Cite	Name	Level
Oklahoma Attorney General's Opinions		
2007 OK AG 22,	Question Submitted by: The Honorable Roger Ballenger, State Senator, District 8	Discussed
2008 OK AG 12,	Question Submitted by: Suzanne McClain Atwood, Executive Coordinator, District Attorneys Council	Cited
Oklahoma Court of Civil Appeals Cases		
2007 OK CIV APP 35, 157 P.3d 1185,	THOMAS v. BARROW	Discussed
2012 OK CIV APP 105, 292 P.3d 58,	DEAN v. STATE ex rel. DOAK	Discussed at Length
Oklahoma Supreme Court Cases		
2006 OK 1, 130 P.3d 244,	DORETY v. HILBURN	Cited
2006 OK 42, 142 P.3d 390,	MCCLURE v. CONOCOPHILLIPS COMPANY	Discussed
2006 OK 58, 152 P.3d 165,	GILBERT v. SECURITY FINANCE CORP OF OKLAHOMA, INC.	Discussed
2006 OK 78, 145 P.3d 1097,	DEAN v. MULTIPLE INJURY TRUST FUND	Discussed
2006 OK 98, 152 P.3d 861,	ZEIER v. ZIMMER, INC.	Discussed at Length
2007 OK 47, 192 P.3d 286,	BURRELL v. BURRELL	Discussed
2008 OK 5, 177 P.3d 565,	GENS v. CASADY SCHOOL	Discussed
2010 OK 2, 236 P.3d 61,	FENT v. STATE ex rel. DEPT. OF HUMAN SERVICES	Discussed
2011 OK 68, 267 P.3d 838,	OKLA. PUBLIC EMPLOYEES ASSOC. v. STATE ex rel. OKLA. OFFICE OF PERSONNEL MANAGEMENT	Discussed
2011 OK 85, 264 P.3d 1229,	KIMBLE v. KIMBLE	Discussed
2013 OK 36, 302 P.3d 775,	WALL v. MAROUK	Discussed at Length

Citationizer: Table of Authority

Cite	Name	Level
Oklahoma Court of Criminal Appeals Cases		
1912 OK CR 8, 120 P. 298, 6 Okl.Cr. 516,	Jenkins v State	Cited
1913 OK CR 140, 132 P. 691, 9 Okl.Cr. 552,	Clarady v State	Discussed
Oklahoma Court of Civil Appeals Cases		
2005 OK CIV APP 78, 122 P.3d 61,	BAPTIST FOUNDATION OF OKLAHOMA v. LOWE	Discussed
Oklahoma Supreme Court Cases		
1986 OK 51, 733 P.2d 375, 57 OBJ 1904,	Turner v. City of Lawton	Discussed
1987 OK 74, 742 P.2d 1117, 58 OBJ 2238,	Petuskey v. Cannon	Discussed
1990 OK 58, 807 P.2d 774, 61 OBJ 1765,	Forest Oil Corp. v. Corporation Com'n of Oklahoma	Discussed
2000 OK 74, 13 P.3d 474, 71 OBJ 2580,	WYATT-DOYLE & BUTLER ENGINEERS, INC. v. CITY OF EUFAULA	Discussed
1992 OK 80, 837 P.2d 880, 63 OBJ 1635,	Massey v. Farmers Ins. Group	Discussed
1992 OK 88, 834 P.2d 439, 63 OBJ 1834,	Naylor v. Petuskey	Discussed at Length

Cite	Name	Level
1992 OK 157, 850 P.2d 1052, 63 OBJ 3411,	Jaworsky v. Frolich	Discussed
1993 OK 37, 850 P.2d 1069, 64 OBJ 978,	Ethics Com'n of State of Okl. v. Cullison	Discussed
1937 OK 26, 64 P.2d 1217, 179 Okla. 71,	BARNES v. SMITH	Discussed at Length
1997 OK 26, 934 P.2d 1082, 68 OBJ 909,	Minie v. Hudson	Discussed
1997 OK 107, 944 P.2d 930, 68 OBJ 2775,	HILL v. BOARD OF EDUCATION	Cited
1917 OK 458, 168 P. 53, 64 Okla. 310,	In re LEE	Discussed at Length
1918 OK 620, 176 P. 81, 74 Okla. 13,	SCOTT v. IMAN	Discussed
1932 OK 730, 17 P.2d 404, 161 Okla. 144,	HOWE v. FEDERAL SURETY CO.	Discussed
1908 OK 95, 96 P. 630, 21 Okla. 275,	CHICAGO R. I. & P. R'Y. CO. v. MASHORE	Discussed
1923 OK 540, 217 P. 854, 91 Okla. 293,	HUTCHINSON LUMBER CO. v. SCRIVENER	Discussed
1995 OK 73, 898 P.2d 1275, 66 OBJ 2221,	Unit Petroleum Co. v. Oklahoma Water Resources Bd.	Discussed
1995 OK 119, 914 P.2d 656, 66 OBJ 3478,	Curtis v. Board of Educ. of Sayre Public Schools	Discussed
1973 OK 10, 508 P.2d 1064,	ROYALPARK-MOORE v. HUBBARD	Discussed at Length
1974 OK 69, 523 P.2d 1064,	STATE ex rel. BOARD OF EXAMINERS IN OPTOMETRY v. LAWTON	Discussed
2003 OK 110, 83 P.3d 835,	LOCAL 514 TRANSPORT WORKERS UNION OF AMERICA v. KEATING	Discussed
2004 OK 17, 87 P.3d 607,	COX v. STATE ex rel. DEPT. OF HUMAN SERVICES	Discussed
2004 OK 19, 90 P.3d 546,	MEHDIPOUR v. STATE ex rel. DEPT. OF CORRECTIONS	Discussed at Length
2004 OK 21, 89 P.3d 1066,	STRONG v. LAUBACH	Discussed
2004 OK 90, 104 P.3d 584,	COLLEY v. HARBOUR	Discussed
1996 OK 77, 921 P.2d 338, 67 OBJ 2242,	U.S. Through Farmers Home Admin. v. Hobbs	Discussed
1924 OK 734, 229 P. 420, 100 Okla. 260,	OKLAHOMA N. M. & P. RY. CO. v. H. M. S. DRILLING CO.	Cited
1924 OK 919, 231 P. 289, 104 Okla. 287,	KEATON v. BRANCH	Discussed
1980 OK 95, 613 P.2d 1041,	Thayer v. Phillips Petroleum Co.	Discussed
1979 OK 173, 604 P.2d 1248,	MATTER OF RICH	Discussed
1980 OK 169, 619 P.2d 869,	Texaco, Inc. v. City of Oklahoma City	Discussed
1997 OK 162, 953 P.2d 314, 69 OBJ 59,	IN THE MATTER OF THE PETITION OF UNIVERSITY HOSPITALS AUTHORITY	Discussed
1982 OK 94, 651 P.2d 125,	Conoco, Inc. v. State Dept. of Health	Discussed
1926 OK 265, 245 P. 555, 117 Okla. 93,	BAKER v. FARMERS & MERCHANTS STATE BANK	Discussed
1999 OK 45, 981 P.2d 309, 70 OBJ 1669,	Presley v. Board of County Commissioners	Discussed

Title 10. Children

Cite	Name	Level
10 O.S. 7110.1,	Renumbered as 10A O.S. § 1-9-103 by Laws 2009, HB 2028, c. 233, § 295, emerg. eff. May 21, 2009	Discussed at Length

Title 12. Civil Procedure

Cite	Name	Level
12 O.S. 2011.1,	Required Findings Upon Dismissal or Adjudication of Action	Cited
12 O.S. 556.1,	Consistency of Juries in Civil Actions - Trial Without Jury in Certain Cases	Cited
12 O.S. 942,	Costs the Court Judge May Award	Cited
12 O.S. 1651,	Determination of Rights, Status or Other Legal Relations - Exceptions	Cited
12 O.S. 1653,	Declaratory Relief - Venue - Parties	Cited

Title 20. Courts

Cite	Name	Level
20 O.S. 30.5,	Opinions - Publications	Cited

Title 28. Fees

Cite	Name	Level
28 O.S. 152.1,	Civil Actions - Charge in Addition to Flat Fee	Discussed at Length
28 O.S. 86,	Jurors' Fees - Parking - Lengthy Trial Fund	Cited
28 O.S. 152, 28 O.S. 152,	Flat Fee Schedule - Forma Pauperis	Discussed
28 O.S. 12,	Fees Due When Service Rendered - Deposit For Anticipated Costs	Discussed at Length
28 O.S. 105,	Collection on Execution	Cited

Cite	Name	Level
Cite Name	**Level**	
28 O.S. 106,	Clerk to Hold Costs or Fees For Person Entitled - Time For Filing Claims	Cited
Title 57. Prisons and Reformatories		
Cite	Name	Level
57 O.S. 566.2,	Frivolous or Malicious Appeals - Registry	Cited

BURKE v. McKENZIE

1957 OK 155
313 P.2d 1090
Case Number: 37474
Decided: 06/25/1957
Supreme Court of Oklahoma

Cite as: 1957 OK 155, 313 P.2d 1090

E.J. BURKE, PLAINTIFF IN ERROR,
v.
BILLY McKENZIE AND MAY P. McKENZIE, DEFENDANTS IN ERROR.

Syllabus by the Court.

¶0 1. Jurors who returned a verdict against defendant in an action involving an essential question of fact were disqualified to sit in a succeeding case against the same defendant where the same question of fact was involved.
2. The discretion vested in trial courts is a judicial discretion, to be exercised under fixed legal principles, and with due regard to what is right and equitable under the circumstances.
3. Where, under facts such as disclosed herein, it appears some of the jurors would require evidence to be presented to change preconceived opinions, the trial court's action in overruling defendant's objections and qualifying such jurors as competent to serve was an abuse of discretion necessitating reversal.

Appeal from the District Court of Sequoyah County; E.A. Summers, Judge.

Suit for damages alleged to have resulted from defendant's negligence in conducting certain aerial spraying operations. Judgment for plaintiff and defendant appeals. Reversed and remanded for new trial.

Roy Frye, Sr., Roy Frye, Jr., Sallisaw, for plaintiff in error.

J. Fred Green, Fred D. Green, W.S. Agent, Sallisaw, for defendants in error.

CORN, Vice Chief Justice.

¶1 This is an appeal from a judgment rendered upon a jury verdict, in an action brought by plaintiff to recover damages alleged to have resulted from the negligence of defendant and his employees in the conduct of certain aerial spraying operations. The present case was the second of a series of five cases successively tried against this defendant at the same term of court. The issues presented by the pleadings are identical with those in Burke v. Thomas, Okl., 313 P.2d 1082. The factual matters disclosed by the testimony, adduced principally from the same witnesses, are the same except for variation in items of damage and amounts claimed therefor, so that the evidence in the present case requires no further elaboration. However, an additional and decisive question is presented by this appeal, which necessitates recitation of matters which occurred during the trial.

¶2 When this case was ready for trial, November 29, 1955, the defendant announced not ready, objected to going to trial and asked a continuance. The motion for continuance was for the reason the jury panel consisted of only 23 jurors, twelve of whom had participated in the previous case (Thomas v. Burke) involving identical questions of

fact, wherein such jurors had returned a verdict finding the defendant liable; that such jurors were not impartial but were prejudiced against this defendant. Defendant's objection and motion were overruled and the trial proceeded with voir dire examination of the prospective jurors.

¶3 Voir dire examination disclosed that of the twelve jurors called to the jury box seven were jurors in the trial of the previous case. One of them (Webster) disclaimed any knowledge of the purported facts of the case, but admitted he felt had it not been for defendant "the spraying wouldn't have gone on," and it would require presentation of evidence to change his mind as to this fact. Defendant's request to excuse this juror was denied. The trial court then inquired whether the juror had an opinion whether defendant sprayed plaintiff's property and, upon receiving a negative answer, asked if it was true that since he had no idea whether defendant sprayed plaintiff's property then the juror could not know or have an opinion whether plaintiff suffered damage. Upon again re-receiving a negative answer the court ruled the juror not to be disqualified.

¶4 Another prospective juror (O'Neal) had heard the testimony in the previous case, and upon being asked whether such evidence would influence his judgment in the case being tried, stated that if the evidence showed plaintiff was damaged by the spraying he would think defendant was responsible. The request to excuse such juror on the ground he was no longer impartial was refused.

¶5 Others of the empaneled jurors, who sat in the trial of the previous case, admitted knowledge of the facts concerning defendant's activities in the spraying operations, but stated such knowledge would not influence their judgment in the trial of this case. At the conclusion of the voir dire examination defendant moved to excuse all jurors who sat in the case of Thomas v. Burke, supra, because the facts were the same and such jurors had returned a verdict determining defendant's liability. The motion was denied.

¶6 Thereupon plaintiff's counsel inquired of the six jurors then empaneled, who participated in the first case whether that testimony would influence their decision in the case to be tried. These jurors indicated that they would not be influenced, and that plaintiff would have to prove defendant's responsibility for plaintiff's damage before they would hold defendant liable.

¶7 Defendant then examined another juror (Treat) who sat in the first case, and who stated that he had knowledge of the facts relating to the time and place of the spraying and resulting damages. This juror admitted that if the evidence disclosed plaintiff had suffered some damage he would consider defendant responsible therefor because of what he heard in the other case, and stated it would take evidence on defendant's part to show he was not responsible. After defendant's motion to excuse this juror for cause the following occurred.

> "The Court: In this case would you just assume that because you rendered a verdict in the first case that Burke is liable in this case, or would you require the plaintiff McKenzie to prove that Burke actually sprayed his land and did him the damage?
>
> "Juror: That's right. That's the way I see it.
>
> "The Court: All right then; overruled.
>
> "Mr. Frye: Exception.
>
> "The Court: I'll say to the jury the mere fact that Burke might have sprayed the land of somebody else and might be liable in damages doesn't mean he is liable to everybody who might sue him, but the plaintiff must prove that Burke actually sprayed his land and what his damages are."

¶8 Following these proceedings the jury was sworn and the trial proceeded. After hearing the evidence, and under oral instructions from the trial court, the jury returned a verdict in plaintiff's favor ($1,500), upon which the judgment appealed from was rendered.

¶9 The various assignments of error are presented under five propositions. However, it is unnecessary to consider other than the first of these since the case must be reversed and remanded for new trial. The question raised on appeal is asserted by the following proposition:

> "That the court erred in overruling the defendant's motion for a continuance and in forcing the defendant to try the case before the same panel of jurors who had, during the same term of court, heard all or practically all of the evidence of the defendant and plaintiffs and who had rendered a verdict against this defendant in similar cases brought by other plaintiffs. The court erred in overruling the defendant's challenges to the individual jurors who tried similar cases against this defendant."

¶10 Defendant points out that the right of trial by jury is a fundamental right recognized and guaranteed under our Constitution. Const. art. II, Sec. 19. And, further, the need for matters to be tried only before impartial jurors is recognized in our statute, 12 O.S. 1951 § 572 [12-572], which provides:

> "Causes for challenging jurors. - If there shall be impaneled, for the trial of any cause, any petit juror, who shall have been convicted of any crime which by law renders him disqualified to serve on a jury; or who has been arbitrator on either side, relating to the same controversy; or who has an interest in the cause; or who has an action pending between him and either party; or who has formerly been a juror in the same cause; or who is the employer, employee, counselor, agent, steward or attorney of either party; or who is subpoenaed as a witness; or who is of kin to either party; or any person who shall have served once already on a jury, as a talesman on the trial of any cause, in the same court during the term, he may be challenged for such causes; in either of which cases the same shall be considered as a principal challenge, and the validity thereof be tried by the court; and any petit juror who shall be returned upon the trial of any of the causes hereinbefore specified, against whom no principal cause of challenge can be alleged, may, nevertheless, be challenged on suspicion of prejudice against, or partiality for either party, or for want of competent knowledge of the English language, or any other cause that may render him, at the time an unsuitable juror; but a resident and taxpayer of the State or any municipality therein shall not be thereby disqualified in actions in which such municipality is a party. The validity of all challenges shall be determined by the court. R.L. 1910, § 4997."

¶11 Defendant's position is that the law generally recognizes that jurors must be impartial, and bias or prejudice in a case disqualifies one as a juror thereon and provides cause for a challenge. See 31 Am.Jur., Jury, Sec. 133. Defendant recognizes the general rule, that whether a juror's state of mind is such as will prevent his acting with complete impartiality is a matter largely within the discretion of the trial court. In 31 Am.Jur., Jury, Sec. 162, the rule is stated as follows:

> "Jurors who have acted in a case involving an essential question of fact have been held incompetent to sit in a subsequent case where such question of fact is one of the material issues; this is on the ground that the juror is biased in that he has formed or expressed an opinion, and in some cases the rule has been adhered to even though the juror declared on his voir dire that he was unbiased. This rule has been applied where one of the parties was the same in both cases."

¶12 Defendant, however, urges the situation disclosed by this record, reflects the lack of impartiality on the part of these jurors, since seven of them sat in the previous case, made a determination of the fact question, and expressed their opinion thereon by a written verdict which established defendant's liability.

¶13 This court has had no occasion to consider the identical question heretofore. However, the general rule, that jurors called for trial and who have tried the same defendant on a similar charge at the same term of court cannot be considered as impartial, applies in criminal cases in this jurisdiction. Scrivener v. State, 63 Okl.Cr. 418, 75 P.2d 1154. And, where the impartiality of a juror is questioned the court must be satisfied such juror is impartial, and it is the trial court's duty to resolve any doubt on the question in favor of the defendant. Although the rules applied in criminal cases are not binding upon this court, both the reasoning and the rule based thereon may be considered persuasive.

¶14 We are called upon to determine whether jurors who participated in trial of a case where one party was the same and which involved an essential question of fact are incompetent to serve upon a jury in another case where the question of fact is a material issue. Satisfactory determination of this question necessitates consideration of two issues:

¶15 1. Did previous consideration of the essential fact questions serve to cause bias, prejudice or partiality in the minds of these jurors?

¶16 2. When it appeared that some of the jurors already had some opinion in the matter (concerning the nature of defendant's acts and his responsibility therefor) by reason of having heard the evidence relative to the facts, was it a proper exercise of judicial discretion for the trial court to hold them qualified to serve?

¶17 The basic issue to be presented in this case involved defendant's liability for damage to the property of plaintiff for acts allegedly committed by defendant's employee. In the previous case the jury determined plaintiff's property had been sprayed with poison from a plane piloted by defendant's employee, and the damage to the property resulted from such spraying and not from the drouth as contended by the defendant. These questions decided by the jurors, and expressed by their verdict in the previous case, were the questions the jury was to be called upon to decide in this action. Admittedly certain of the jurors' minds were settled as to such facts. This was true at least to the point they felt defendant would have to produce evidence to remove such opinion. And the source of the information upon which such opinions were founded was the sworn testimony of certain witnesses who were to testify again in the case these jurors were being impaneled to try.

¶18 The rule recognized as expressing the weight of authority upon this question is stated in 68 L.R.A. 873 (II) as follows:

> "Jurors who have acted in a case involving an essential question of fact are held incompetent to sit in a subsequent case where such question of fact is one of the material issues. This is on the ground that the juror is biased, that he has formed or expressed an opinion; and in some cases this rule was held notwithstanding the juror on his voir dire declared that he was unbiased."

¶19 Most of the decisions supporting the rule quoted were decided many years ago. However, it may be assumed that general recognition and application of the rule have precluded presentation of the question in more recent years. Judicial expressions of the rule vary, but in every instance the underlying reasoning is that a juror who has participated in determination of a question has been so influenced by the evidence as to have formed opinions which prevent him from being fair and impartial in another trial where one of the parties is the same, and the same question of fact is involved.

¶20 In Baker v. Harris, 60 N.C. 271, Winst. 277, the action was for fraudulent removal of a debtor, thereby damaging a creditor. In deciding that a juror, who sat in a case involving a suit between another creditor and the same defendant, was incompetent and subject to removal for cause the court said:

> "It is a well-established and ancient usage not to allow a juror to sit a second time on the same cause, and it matters not whether the same only, or other additional or different, witnesses are to be examined. The juror is alike unfit. This does not differ substantially from the case now before us. Then the corpus to be proved is precisely the same that it was on the trial at the suit of the other creditor. It is in the nature of a criminal information in which the allegation is that defendant removed, or assisted to remove, the debtor from the county with intent to defraud creditors. If he did so in respect to one creditor, he did so in respect to all. The juror has decided the case under oath as to one, and, if the conclusion to which he came in that case is true, it is equally true of all the others, however they may happen to appear on divers trials. It is not in the nature of man, even in the most conscientious of the race, to devest himself altogether of prepossession or bias in favor of a judgment so solemnly formed; and it is difficult to perceive how the bias can be less in the special case before us than in the case of a juror called to try the same cause a second time. It is indeed substantially a requirement of the latter class, and is a strain which the law does not allow to be put upon the conscience of a juror. It is important, in order to preserve the trial by jury as a safeguard for rights, that the juror should not only be intelligent and of sound moral sense, but free from all prejudice."

¶21 In Butler v. Greensboro Fire Ins. Co., 196 N.C. 203, 145 S.E. 3, it was held:

> "Jurors who returned first verdict against defendant, on whose motion it was set aside for surprise and excusable neglect of counsel, who was not present during trial, were disqualified to serve on second trial, and defendant was entitled to new trial after second verdict for plaintiff."

¶22 In McDonough v. Blosson, 1012, 109 Me. 141, 83 A. 323, 324, that court quoted from Garthwaite, Grinnin & Co. v. Tatum, 21 Ark. 336, 76 Am.Dec. 409, as follows:

> "By their verdict in the other case, the jurors had formed and expressed their opinion upon this case, and the fact that it was done on oath, after hearing all the facts and after full deliberation thereof, amid the solemnities and under the direction of judicial proceedings, could have no other effect than to incline them to render such verdict as they had rendered before. The law presumes them to have been under a disqualifying bias."

That court reached the same conclusion, based upon the decision in the Tatum case, supra.

¶23 In Morris v. McClellan, 169 Ala. 90, 53 So. 155, 156, the court said:

> "If a juror has acted in a previous case, whether the parties are identical or not, but which involved the controverted facts in the present case, whether there was a verdict or mistrial, he cannot be considered an impartial juror upon the consideration of the same facts in a succeeding trial and should be excluded, notwithstanding these facts did not give a special statutory ground of challenging."

¶24 Numerous cases have dealt with the question upon the basis of the bias or partiality of a juror who admits to having a fixed opinion, but who testifies, nevertheless, that he can render a fair, impartial verdict. In Coughlin v. People, 144 Ill. 140, 33 N.E. 1, 12, 19 L.R.A. 57, in considering the competency of a juror who expressed prejudice, but testified this would not affect his verdict, that court quoted from Winnesheik Ins. Co. v. Schueller, 60 Ill. 465, as follows:

> "A juror should stand indifferent between the parties. No bias should influence his judgment, and swerve him from strict impartiality. * * * It is not necessary that his unfavorable impressions should be so strong that they could not be shaken by evidence. It is sufficient if proof be necessary to restore his impartiality. A party should never be compelled to produce proof to change a preconceived opinion or prejudice which may control the action of the juror."

In the case of Edwards v. Griner, 42 Ga. App. 282, 155 S.E. 789, it was said:

> "Jury should be free from suspicion of fixed opinion on any material fact in issue as to parties, subject-matter, or credibility of witnesses."

In Barnett v. St. Francis Levee Dist., 125 Mo. App. 61, 102 S.W. 583, Syll. 1, states:

> "Veniremen, who had heard all the testimony in another case involving the same issues presented in the case in which they were called, and who had formed an opinion regarding its merits, were disqualified, though they stated they thought they could try the case impartially according to the evidence."

And, in the body of the opinion, the court said:

> "An opinion once formed from listening to the testimony of a cause cannot, presumably, be removed or altered, except on proof of a different state of facts."

This reasoning was considered valid even though the jurors "thought" they could try the case impartially according to the evidence.

¶25 The foregoing sufficiently disclose the basic reasoning which supports the rule to be applied herein. Too much precaution cannot be observed to guard against improper influence and preserve the purity of jury trials. Strictness is necessary to give due confidence to the parties in the results of their cases. Due regard to careful protection of the rights of litigants, which should actuate trial courts, requires that they scrupulously confine the proceedings wherein these rights are to be settled, within recognized boundaries providing for determination by impartial trials.

¶26 Plaintiff defends the correctness of the trial court's ruling upon the ground that determination of whether a juror is affected by bias or partiality rests within the sound discretion of the trial court, whose ruling thereon is not to be disturbed unless an abuse of discretion is shown. Plaintiff cites Wilkes v. United States, 6 Cir., 291 F. 988; United States v. 662.44 Acres of Land, D.C., 45 F. Supp. 895; and Dew v. McDivitt, 31 Ohio St. 139, to support the argument that determination of the matter is within the trial court's discretion, under the rule stated in 31 Am.Jur., Jury, Sec. 142.

¶27 Examination of the Wilkes case, supra, reflects that decision involved a criminal case, and that the rule applied differs from the rule in criminal cases in this jurisdiction. United States v. 662.44 Acres of Land, supra, involved condemnation proceedings. Clearly the rule in such cases could not apply generally, for the reason that there would be no essential question of fact to be tried out in each case, and the evidence relative to value in each case necessarily would be different.

¶28 The Dew case, supra, would seem to support plaintiff's argument. However, careful reading of the reported case reflects that the Ohio statute in force at the time (1876) provided no grounds for what is referred to as "principal challenge." The only challenge allowed against such juror was referred to as a challenge "for favor" upon the grounds of suspicion of prejudice or partiality, among other causes. The court stated it was not enough that some matter necessarily involved in the issue may have been prejudged by an opinion formed or expressed,

unless the court, in exercising the wide latitude of discretion allowed, should find such opinion disabled the challenged juror from delivering an impartial verdict. The court then stated there was a limit beyond which the discretion should not be allowed to go, i.e. where a juror formed or expressed opinion on merits of whole issue and the allegation of prejudice was not clearly rebutted. The court then said, "* * * it is a great mistake to suppose that our statute was intended to enlarge or extend the causes of challenges for favor, or to narrow the discretion of the trier of their validity; * * *."

¶29 Recognition by this court of the general rule, relative to the trial court's discretion in determining the competency of jurors, may be observed in Meier v. Edsall, 192 Okl. 529, 137 P.2d 926. However, recognition of the rule decrees necessity for examination of the trial court's action to determine if there has been an abuse of discretion.

¶30 A trial court's discretion to do, or to refuse to do something, in certain instances is a legal discretion, to be exercised in accordance with fixed principles of law. The term (judicial discretion) is the subject of many definitions, though generally recognized as being synonymous with judicial power. In Kidd v. Commonwealth, 255 Ky. 42, 74 S.W.2d 944, "Judicial Discretion" was said to be an impartial discretion, guided and controlled by fixed legal principles; a discretion to be exercised in conformity with the spirit of the law (an equitable decision as to what is proper and just under the law) and in a manner to subserve and not defeat the substantial ends of justice.

¶31 And in Chicago, R.I. & P. Ry. Co. v. Pickett, 169 Okl. 123, 36 P.2d 284, 286, we recognized this principle in the following statement:

> "There are many definitions of judicial discretion. As said in Deeds v. Deeds, 108 Kan. 770, 196 P. 1109, 1110:
>
> `"Judicial discretion" implies the liberty to act as a judge should act, applying the rules and analogies of the law to the facts found after weighing and examining the evidence'; and as stated in Smith v. Hill [3 Cir.], 5 F.2d 188: `Judicial discretion is not the indulgence of a judicial whim, but is the exercise of judicial judgment based on facts and guided by law'; and in Conway v. Minnesota Mutual Life Insurance Co., 62 Wash. 49, 112 P. 1106, 40 L.R.A., N.S., 148: `The term "judicial discretion" may be defined generally as a discretion which is sound and guided by fixed principles of law.'"

¶32 Examination of this record discloses the trial court assumed to exercise judicial discretion by determining the competency of the challenged jurors solely upon the basis that from their own testimony that they considered themselves able to render an impartial verdict. And, this was done without reference to other known factors, or equitable considerations as to what was just and proper under the circumstances.

¶33 We are of the opinion the trial court erred in holding, over defendant's objection, that all of the challenged jurors who sat in the previous trial involving the same questions of fact, were competent to sit in the present case, particularly when it appeared upon examination that certain of such jurors had preconceived opinions which could have only been removed, if at all, by the introduction of evidence.

¶34 The judgment is reversed and the case remanded for new trial.

Citationizer© Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Supreme Court Cases	
Cite	Name	Level
1993 OK 80, 883 P.2d 158, 64 OBJ 2178,	Parrish v. Lilly	Cited
1957 OK 156, 313 P.2d 1097,	BURKE v. POINDEXTER	Cited

Cite	Name	Level
1957 OK 157, 313 P.2d 1098,	BURKE v. HARDIN	Cited
1957 OK 158, 313 P.2d 1099,	BURKE v. GARDENHIRE	Cited
1973 OK 148, 519 P.2d 1346,	McALESTER URBAN RENEWAL AUTHORITY v. LORINCE	Cited

Citationizer: Table of Authority

Cite Name	Level
Oklahoma Court of Criminal Appeals Cases	
Cite	Name
1938 OK CR 9, 75 P.2d 1154, 63 Okl.Cr. 418,	Scrivener v State
Oklahoma Supreme Court Cases	
Cite	Name
1957 OK 154, 313 P.2d 1082,	BURKE v. THOMAS
1934 OK 487, 36 P.2d 284, 169 Okla. 123,	CHICAGO R. I. & P. R. CO. v. PICKETT
1943 OK 210, 137 P.2d 926, 192 Okla. 529,	MEIER v. EDSALL

Clarence Darrow, "How to Pick A Jury" (1936)

Whether a jury is a good one or a bad one depends on the point of view. I have always been an attorney for the defense. I can think of nothing, not even war, that has brought so much misery to the human race as prisons. And all of it so futile!

The audience that storms the box-office of the theater to gain entrance to a sensational show is small and sleepy compared with the throng that crashes the courthouse door when something concerning real life and death is to be laid bare to the public.

Everyone knows that the best portrayals of life are tame and sickly when matched with the realities. For this reason, the sophisticated Romans were wont to gather at the Colosseum to feast their eyes on fountains of real blood and await breathlessly the final thrust. The courtroom is a modern arena in which the greatest thrills follow closely on each other. If the combat concerns human life, it presents an atmosphere and setting not unlike those cruel and bloody scenes of ancient Rome. The judge wears the same flowing robe with all the dignity and superiority he can command. This sets him apart from his fellow-men, and is designed to awe and intimidate and to impress the audience with seeming wisdom oftener than with kindliness and compassion.

One cannot help wondering what happens to the pomp and pretense of the wearer while the cloak is in the wash, or while changing into a maturer, more monarchial mantle, as his bench becomes a throne, or when he strolls along the street in file with the "plain clothes" people.

When court opens, the bailiff intones some voodoo singsong words in an ominous voice that carries fear and respect at the opening of the rite. The courtroom is full of staring men and women shut within closed doors, guarded by officials wearing uniforms to confound the simple inside the sacred precinct. This dispels all hope of mercy to the unlettered, the poor and helpless, who scarcely dare express themselves above a whisper in any such forbidding place.

The stage, the arena, the court are alike in that each has its audience thirsting to drink deeply of the passing show. Those playing the parts vie for success and use whatever skill and talent they possess. An actor may fumble his lines, but a lawyer needs to be letter-perfect; at least, he has to use his wits, and he may forget himself, and often does, but never for a moment can he lose sight of his client.

Small wonder that ambitious, imaginative youths crowd the profession of law. Here, they feel, they themselves will find the opportunity to play a real part in the comedies as well as the tragedies of life. Everyone, no matter how small his chance may be, tries to hold the center of some stage where the multitudes will scan his every move. To most lads it seems as though the courts were organized to furnish them a chance to bask in the public eye. In this field the adventure of life will never pall, but prove interesting, exciting and changeful

to the end. Not only will he have the destinies of men to protect and preserve, but his own standing and success to create.

If it is a real case, criminal or civil, it usually is tried by a jury with the assistance and direction of the judge. In that event, every moment counts, and neither the lawyers nor the audience, or even the court, goes to sleep. If it is a criminal case, or even a civil one, it is not the law alone or the facts that determine the results. Always the element of luck and chance looms large. A jury of twelve men is watching not only the evidence but the attitude of each lawyer, and the parties involved, in all their moves. Every step is fraught with doubt, if not mystery.

Selecting a jury is of the utmost importance. So far as possible, the lawyer should know both sides of the case. If the client is a landlord, a banker, or a manufacturer, or one of that type, then jurors sympathetic to that class will be wanted in the box; a man who looks neat and -trim and smug. He will be sure to guard your interests as he would his own. His entire environment has taught him that all real values are measured in cash, and he knows no other worth. Every knowing lawyer seeks for a jury of the same sort of men as his client; men who will be able to imagine themselves in the same situation and realize what verdict the client wants.

Lawyers are just as carefully concerned about the likes and dislikes, the opinions and fads of judges as of jurors. All property rights are much safer in the hands of courts than of jurors. Every lawyer who represents the poor avoids a trial by the court.

Choosing jurors is always a delicate task. The more a lawyer knows of life, human nature, psychology, and the reactions of the human emotions, the better he is equipped for the subtle selection of his so-called "twelve men, good and true." In this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man; all of these qualities and experiences have left their effect on ideas, beliefs and fancies that inhabit his mind. Understanding of all this cannot be obtained too bluntly. It usually requires finesse, subtlety and guesswork. Involved in it all is the juror's method of speech, the kind of clothes he wears, the style of haircut, and, above all, his business associates, residence and origin.

To the ordinary observer, a man is just a man. To the student of life and human beings, every pose and movement is a part of the personality and the man. There is no sure rule by which one can gauge any person. A man may seem to be of a certain mold, but a wife, a friend, or an enemy, entering into his life, may change his views, desires and attitudes, so that he will hardly recognize himself as the man he once seemed to be.

It is obvious that if a litigant discovered one of his dearest friends in the jury panel he could make a close guess as to how certain facts, surrounding circumstances, and suppositions would affect his mind and action; but as he has no such acquaintance with

the stranger before him, he must weigh the prospective juror's words and manner of speech and, in fact, hastily and cautiously "size him up" as best he can. The litigants and their lawyers are supposed to want justice, but in reality there is no such thing as justice, either in or out of court. In fact, the word cannot be defined. So, for lack of proof, let us assume that the word "justice" has a meaning, and that the common idea of the definition is correct, without even seeking to find out what is the common meaning. Then how do we reach justice through the courts? The lawyer's idea of justice is a verdict for his client, and really this is the sole end for which he aims.

In spite of the power that the courts exercise over the verdict of the jury, still the finding of the twelve men is very important, sometimes conclusive. It goes without saying that lawyers always do their utmost to get men on the jury who are apt to decide in favor of their clients. It is not the experience of jurors, neither is it their brain power that is the potent influence in their decisions. A skillful lawyer does not tire himself hunting for learning or intelligence in the box; if he knows much about man and his malting, he knows that all beings act from emotions and instincts, and that reason is not a motive factor. If deliberation counts for anything, it is to retard decision. The nature of the man himself is the element that determines the juror's bias for or against his fellow-man. Assuming that a juror is not a half-wit, his intellect can always furnish fairly good reasons for following his instincts and emotions. Many irrelevant issues in choosing jurors are not so silly as they seem. Matters that apparently have nothing to do of the personality and the man. There is no sure rule by which one can gauge any person. A man may seem to be of a certain mold, but a wife, a friend, or an enemy, entering into his life, may change his most vital views, desires and attitudes, so that he will hardly recognize himself as the man he once seemed to be.

It is obvious that if a litigant discovered one of his dearest friends in the jury panel he could make a close guess as to how certain facts, surrounding circumstances, and suppositions would affect his mind and action; but as he has no such acquaintance with the stranger before him, he must weigh the prospective juror's words and manner of speech and, in fact, hastily and cautiously "size him up" as best he can. The litigants and their lawyers are supposed to want justice, but in reality there is no such thing as justice, either in or out of court. In fact, the word cannot be defined. So, for lack of proof, let us assume that the word "justice" has a meaning, and that the common idea of the definition is correct, without even seeking to find out what is the common meaning. Then how do we reach justice through the courts? The lawyer's idea of justice is a verdict for his client, and really this is the sole end for which he aims.

In spite of the power that the courts exercise over the verdict of the jury, still the finding of the twelve men is very important, sometimes conclusive. It goes without saying that lawyers always do their utmost to get men on the jury who are apt to decide in favor of their clients. It is not the experience of jurors, neither is it their brain power that is the potent influence in their decisions. A skillful lawyer does not tire himself hunting for learning or intelligence in the box; if he knows much about man and his making, he knows

that all beings act from emotions and instincts, and that reason is not a motive factor. If deliberation counts for anything, it is to retard decision. The nature of the man himself is the element that determines the juror's bias for or against his fellow-man. Assuming that a juror is not a half-wit, his intellect can always furnish fairly good reasons for following his instincts and emotions. Many irrelevant issues in choosing jurors are not so silly as they seem. Matters that apparently have nothing to do with the discussion of a case often are of the greatest significance.

In the last analysis, most jury trials are contests between the rich and poor. If the case concerns money, it is apt to be a case of damages for injuries of some sort claimed to have been inflicted by someone. These cases are usually defended by insurance companies, railroads, or factories. If a criminal case, it is practically always the poor who are on trial. The most important point to learn is whether the prospective juror is humane. This must be discovered in more or less devious ways. As soon as "the court" sees what you want, he almost always blocks the game. Next to this, in having more or less bearing on the question, is the nationality, politics, and religion of the person examined for the jury. If you do not discover this, all your plans may go awry. Whether you are handling a damage suit, or your client is charged with the violation of law, his attorney will try to get the same sort of juror.

Let us assume that we represent one of "the underdogs" because of injuries received, or because of an indictment brought by what the prosecutors name themselves, "the state." Then what sort of men will we, seek? An Irishman is called into the box for examination. There is no reason for asking about his religion; he is Irish; that is enough. We may not agree with his religion, but it matters not, his feelings go deeper than any religion. You should be aware that he is emotional, kindly and sympathetic. If he is chosen as a juror, his imagination will place him in the dock; really, he is trying himself. You would be guilty of malpractice if you got rid of him, except for the strongest reasons.

An Englishman is not so good as an Irishman, but still, he has come through a long tradition of individual rights, and is not afraid to stand alone; in fact, he is never sure that he is right unless the great majority is against him. The German is not so keen about individual rights except where they concern his own way of life; liberty is not a theory, it is a way of living. Still, he wants to do what is right, and he is not afraid. He has not been among us long, his ways are fixed by his race, his habits are still in the making. We need inquire no further. If he is a Catholic, then he loves music and art; he must be emotional, and will want to help you; give him a chance.

If a Presbyterian enters the jury box and carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in John Calvin and eternal punishment. Get rid of him with the fewest possible words before he contaminates the others; unless you and your clients are Presbyterians you probably are a bad lot, and even though you may be a Presbyterian, your client most likely is guilty.

If possible, the Baptists are more hopeless than the Presbyterians. They, too, are apt to think that the real home of all outsiders is Sheol, and you do not want them on the jury, and the sooner they leave the better. The Methodists are worth considering; they are nearer the soil. Their religious emotions can be transmuted into love and charity. They are not half bad; even though they will not take a drink, they really do not need it so much as some of their competitors for the seat next to the throne. If chance sets you down between a Methodist and a Baptist, you will move toward the Methodist to keep warm.

Beware of the Lutherans, especially the Scandinavians; they are almost always sure to convict. Either a Lutheran or Scandinavian is unsafe, but if both in one, plead your client guilty and go down the docket. He learns about sinning and punishing from the preacher, and dares not doubt. A person who disobeys must be sent to hell; he has God's word for that.

As to Unitarians, Universalists, Congregationalists, Jews and other agnostics, don't ask them too many questions; keep them anyhow, especially Jews and agnostics. It is best to inspect a Unitarian, or a Universalist, or a Congregationalist with some care, for they may be prohibitionists; but never the Jews and the real agnostics! And do not, please, accept a prohibitionist; he is too solemn and holy and dyspeptic. He knows your client would not have been indicted unless he were a drinking man, and anyone who drinks is guilty of something, probably much worse than he is charged with, although it is not set out in the indictment. Neither would he have employed you as his lawyer had he not been guilty.

I have never experimented with Christian Scientists; they are much too serious for me. Somehow, solemn people seem to think that pleasure is wicked. Only the gloomy and dyspeptic can be trusted to convict. Shakespeare knew: "Yon Cassius has a lean and hungry look; he thinks too much; such men are dangerous." You may defy all the rest of the rules if you can get a man who laughs. Few things in this world are of enough importance to warrant considering them seriously. So, by all means, choose a man who laughs. A juror who laughs hates to find anyone guilty. Never take a wealthy man on a jury. He will convict, unless the defendant is accused of violating the anti-trust law, selling worthless stocks or bonds, or something of that kind. Next to the Board of Trade, for him, the penitentiary is the most important of all public buildings. These imposing structures stand for capitalism. Civilization could not possibly exist without them. Don't take a man because he is a "good" man; this means nothing. You should find out what he is good for. Neither should a man be accepted because he is a bad sort. There are too many ways of being good or bad. If you are defending, you want imaginative individuals. You are not interested in the morals of the juror. If a man is instinctively kind and sympathetic, take him.

Then, too, there are the women. These are now in the jury box. A new broom sweeps clean. It leaves no speck on the floor or under the bed, or in the darkest comers of life. To these new jurors, the welfare of the state depends on the verdict. It will be so for many years to come. The chances are that it would not have made the slightest difference to the

state if all cases had been decided the other way. It might, however, make a vast difference to the unfortunates facing cruel, narrow-minded jurors who pass judgment on their fellow-men. To the defendants it might have meant the fate of life rather than death.

But what is one life more or less in the general spawning? It may float away on the tide, or drop to the depths of oblivion, broken, crushed and dead. The great sea is full of embryo lives ready to take the places of those who have gone before. One more unfortunate lives and dies as the endless stream flows on, and little it matters to the wise judges who coldly pronounce long strings of words in droning cadence; the victims are removed, they come and go, and the judges keep on chanting senseless phrases laden with doom upon the bowed heads of those before them. The judge is as unconcerned about the actual meaning of it all as the soughing wind rustling the leaves of a tree just outside the courthouse door.

Women still take their new privilege seriously. They are all puffed up with the importance of the part they feel they play, and are sure they represent a great step forward in the world. They believe that the sex is co-operating in a great cause. Like the rest of us, they do not know which way is forward and which is backward, or whether either one is any way at all. Luckily, as I feel, my services were almost over when women invaded the jury box.

A few years ago I became interested in a man charged with selling some brand of intoxicant in a denatured land that needed cheering. I do not know whether he sold it or not. I forgot to ask him. I viewed the case with mixed feelings of pity and contempt, for as Omar philosophized, I wonder often what the vintners buy one-half so precious as the stuff they sell." When I arrived on the scene, the courtroom looked ominous with women jurors. I managed to get rid of all but two, while the dismissed women lingered around in the big room waiting for the victory, wearing solemn faces and white ribbons. The jury disagreed. In the second trial there were four women who would not budge from their seats or their verdict. Once more I went back to the case with distrust and apprehension. The number of women in the jury box had grown to six. All of them were unprejudiced. They said so. But everyone connected with the case was growing tired and skeptical, so we concluded to call it a draw. This was my last experience with women jurors. I formed a fixed opinion that they were absolutely dependable, but I did not want them.

Whether a jury is a good one or a bad one depends on the point of view. I have always been an attorney for the defense. I can think of nothing, not even war, that has brought so much misery to the human race as prisons. And all of it so futile!

I once spent a winter on the shores of the Mediterranean Sea. In front of my windows, four fishermen were often wearily trudging back and forth, and slowly dragging a long net across the sand. When it was safely landed, a few small flopping fish disclosed the results of their labors. These were scattered dying on the beach, while the really worth-while fishes were left in the sea. It somehow reminded me of our courts and juries, and other aims and efforts of optimistic men, and their idle undertakings and disheartening results.

Judges and jurors are like the rest of humans. Now and then some outstanding figures will roll up their sleeves, as it were, and vigorously set to work to reform the courts and get an efficient administration of justice. This will be ably seconded by the newspapers, lashing courts and jurors, past, present and prospective, into a spasm of virtue that brings down the innocent and guilty together, assuming always that there are innocent and guilty. Then, for a time, every defendant is convicted; and soon the campaign reaches the courts; after ruining a few lives and reputations, the frenzy is over, and life goes on smoothly and tranquilly as before.

When I was a boy in the country, one of the standard occupations was whittling. It became as mechanical as breathing. Since then I have decided that this is as good a way to live as any other. Life depends on the automatic taking in and letting out of breath, but in no way is it lengthened or made happier by deep thinking or wise acting. The one big word that stands over courts and other human activities is FUTILITY.

The courts may be unavailing, lawyers stupid, and both as dry as dust, but the combination makes for something interesting and exciting, and it opens avenues that seem to lead somewhere. Liberty, lives, fortunes often are at stake, and appeals for assistance and mercy rend the air for those who care to hear. In an effort to help, often a casual remark may determine a seemingly vital situation, when perhaps the remark, of all the palaver, was the least important one breathed forth. In all questions men are frequently influenced by some statement which, spoken at the eventful time, determines fate. The most unforeseen, accidental meetings sometimes result in seemingly new and strangely fateful family lines. In fact, all that occurs in life is an endless sequence of events resulting from the wildest chance.

Amongst the twelve in a jury box are all degrees of alertness, all sorts of ideas, and a variety of emotions; and the lawyers, too, are important factors in the outcome. They are closely observed by the jurors. They are liked or disliked; mayhap because of what they say, or how they speak, or pronounce their words, or part their hair. It may be that a lawyer is disliked because he talks too little or too much, more often the latter. But a lawyer of subtlety should know when to stop, and when to go on, and how far to go. As a rule, he must not seem to be above the juror, nor below him. He must not too obviously strive for effect. He often meets baffling situations not easily explained. Sometimes it is better for him to talk of something else. Explanations must not be too fantastic or ridiculous. It does no harm to admit the difficulty of the situation, to acknowledge that this circumstance or that seems against him. Many facts point to guilt, but in another light these facts may appear harmless.

Lawyers are apt to interpret deeds and motives as they wish them to appear. As a matter of fact, most actions are subject to various inferences, sometimes quite improbable, but nonetheless true. Identifications show common examples of mistakes. Many men are in prison and some are sent to death through mistaken identifications. One needs but recall the countless errors he himself has made. How many have met some person whom they

believed to be an old-time friend, and have found themselves greeting a total stranger? This is a common mistake made in restaurants and other public places. Many identifications in court are made from having seen a person but once, and under conditions not critical. Many are made from descriptions and photographs, and urged on by detectives, lawyers, and others vitally interested in the results. From all of this it is easy to see that many are convicted who are guiltless of crime. In situations of strong agitation, acquittals are rare, and sentences made long and barbarous and inhuman.

The judge is, of course, an important part of the machinery and administration of the court. Like carpenters and lawyers, brick-layers and saloon-keepers, they are not all alike. No two of them have the same fitness for their positions. No two have the same education; no two have the same natural understanding of themselves and their fellow-man, or are gifted with the same discernment and balance.

Not that judges are lacking in knowledge of law. The ordinary rules for the administration of law are rather simple and not difficult to follow. But judges should be students of life, even more than of law. Biology and psychology, which form the basis of understanding human conduct, should be taken into account. Without a fair knowledge of the mechanism of man, and the motives and urges that govern his life, it is idle to venture to fathom a situation; but with some knowledge, officers and the public can be most useful in preserving and protecting those who most need such help. The life of almost any unfortunate, if rightly understood, can be readjusted to some plan of order and system, instead of left to drift on to ruin, the victim of ignorance, hatred and chance.

If the physician so completely ignored natural causes as the lawyers and judges, the treatment of disease would be relegated to witchcraft and magic, and the dungeon and rack would once more hold high carnival in driving devils out of the sick and afflicted. Many of the incurable victims of crime are like those who once were incurable victims of disease; they are the product of vicious and incompetent soothsayers who control their destinies.

Every human being, whether parent, teacher, physician, or prosecutor, should make the comfort and happiness of their dependents their first concern. Now and then some learned courts take a big view of life, but scarcely do they make an impression until some public brainstorm drives them back in their treatment of crime to the methods of sorcery and conjury.

No scientific attitude toward crime can be adopted until lawyers, like physicians and scientists, recognize that cause and effect determine the conduct of men.

When lawyers and courts, and laymen, accept the scientific theory which the physicians forced upon the world long years ago, then men will examine each so-called delinquency until they discover its cause, and then learn how to remove the cause. This requires sympathy, humanity, love of one's fellow-man, and a strong faith in the power of knowledge and experience to conquer the maladies of men. The forum of the lawyers may

then grow smaller, the courthouse may lose its spell, but the world will profit a thousandfold by a kindlier and more understanding relation toward all humankind. **(Esquire Magazine, May, 1936.)**

CLARENCE DARROW PAGE

A Historical Overview of Jury Selection:
Myths, Stereotypes, Mysticism, and Practical Tips

Rick R. Fuentes, Ph.D.

R & D Strategic Solutions LLC

29440 Ono Boulevard
Orange Beach, AL 36561
(251) 981-3664
rfuentes@rd-ss.com

RICK R. FUENTES, Ph.D., is a founding partner of R&D Strategic Solutions, LLC. He has specialized in jury behavior and decision-making and the evaluation of complex evidence for over 25 years. Dr. Fuentes has a Master's Degree in Counseling Psychology from the University of Georgia, and a Master's Degree and Ph.D. in Applied Psychology from Texas A&M University. He has worked with trial teams on hundreds of civil and criminal cases involving issues of tort, contracts, anti-trust, intellectual property, product liability, and professional malpractice. Through the use of focus groups, mock trials and surveys, he assists trial attorneys and in-house counsel in the development of persuasive jury messages and themes, witness preparation, jury selection and case valuation. He has provided testimony as an expert for change of venue motions. He has authored numerous professional articles on the topics of jury behavior and jury decision-making and he has appeared on numerous legal forums including CNN's Talk-Back Live, The Phil Donahue Show, and Court Television's series "The Art and Science of Jury Persuasion." He has been quoted in the Wall Street Journal and by NBC News. Dr. Fuentes has been on the University of Montana Law School NITA Faculty where he lectured on jury selection and persuasion. He has delivered dozens of CLE programs around the country and is a regular speaker for the Georgia Institute of Continuing Legal Education, as well as at other local and National Bar Associations.

A Historical Overview of Jury Selection:
Myths, Stereotypes, Mysticism, and Practical Tips

Table of Contents

A Historical Overview of Jury Selection:
Myths, Stereotypes, Mysticism, and Practical Tips

I. Introduction

"Never forget, almost every case has been won or lost when the jury is sworn" – Clarence Darrow (defense attorney), 1936.

There is more voodoo, stereotyping, myths, mysticism and missed opportunities in jury selection than in any other phase or aspect of a trial. Why does this happen? As Dr. Dan Jacks, trial consultant, puts it "jury selection is a brief period of time when one attempts to predict the future behavior of strangers in the context of future and unknown group dynamics based on present behavior exhibited in an unfamiliar setting under abnormal conditions and time constraints." To say that jury selection is challenging is an understatement. The term itself – jury selection or picking a jury – is inaccurate! The process is one of de-selection. Many a defense lawyer would be thrilled at the idea of actually deciding which jurors would serve on their jury. But that's not the process. Rather it's a process of eliminating risk. The jurors that you want on your jury are likely those the plaintiff lawyer wants off hers. So what you have is a process of elimination where each side removes the jurors they believe to be most dangerous.

There is no doubt that jury selection, particularly in criminal cases, is one of the most, if not the most important phases of a trial. The prevailing wisdom after O.J. Simpson's acquittal in his criminal trial was that "the verdict was determined when the jury was seated," nearly a year before the closing arguments. So why does this critical phase of the trial continue to plague us with errors, inaccuracies and guesswork? Even when there are intelligent, skilled and experienced lawyers in the courtroom? A brief walk through the history of jury selection illustrates the inherent challenges involved in trying to predict human behavior while also underscoring how far we have come in developing both the art and science of jury selection.

II. You've Come a Long Way Baby: A Historical Overview

Consider the following list of potential juror characteristics for consideration during jury selection:

- NO Scandinavians – "too aloof"
- NO Mediterraneans – "hot blooded and emotional"
- NO wealthy people – "too careful with money"
- NO poor people – "too tightfisted with money"
- NO women – "they do not know which way is forward and which is backward"

Would you be surprised to learn that the above list appeared in a Forbes Magazine article on the issue of jury selection in the 1930's? Would you be further surprised to learn that the article was authored by Clarence Darrow, one of the most highly respected and well known defense lawyers of that era? In fairness, Darrow viewed jurors through the prism of many social, ethnic stereotypes, during a time when communities were primarily identified through their ethnic and religious orientation and before any intervention by social/behavioral science.

Equally as interesting is that despite his evolution on ethnic, religious and body type stereotypes, Darrow was astute and ahead of his time and offered sage advice on other aspects of jury selection such as:

- Remember to look at jurors "entire environment" when evaluating jurors who will relate to and empathize with your client.
- Don't rely on a single quality of any jurors.
- Experiences trump stereotypes.

Here are a few entertaining samples of his broad brush typing of certain "kinds" of jurors.

> "An Irishman is called into the box for examination. There is no reason for asking him about his religion...he is Irish; that is enough...You should be aware that he is emotional, kindly and sympathetic...You would be guilty of malpractice if you got rid of him except for strongest reasons."
>
> "An Englishman is not so good as an Irishman, but still, he has come through a long tradition of individual rights, and is not afraid to stand alone; in fact he is never sure that he is right unless the great majority is against him." "The German is not so keen about individual rights except where they concern his own way of life...his ways are fixed by his race...We need inquire no further. If he is Catholic then he loves music and art; he must be emotional and will want to help you; give him a chance."
>
> "If a Presbyterian enters the jury box and carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in John Calvin and eternal punishment. Get rid of him with the fiercest possible words before he contaminates others; unless you and your clients are Presbyterian you are probably a bad lot, and even though you may be Presbyterian, your client most likely is guilty."
>
> "If possible, the Baptists are more hopeless than the Presbyterians...and the sooner they leave the better." "The Methodists are worth considering; they are nearer the soil." "Their religious emotion can be transmitted into love and charity. They are not half bad; even though they will not take a drink."
>
> "Beware of Lutherans, especially the Scandinavians; they are almost always sure to convict. Either a Lutheran or Scandinavian is unsafe, but if both in one, please our client guilty and go down the docket" "He believes a person who disobeys must be sent to hell; he has God's word for that."
>
> "As to Unitarians, Universalists, Congregationalists, Jews and other agnostics, don't ask them too many questions; keep them anyhow, especially Jews and agnostics."
>
> "By all means choose a man who laughs."

On a lighter note, one well known lawyer comments about jury selection epitomized the tendency to rely on stereotypes. "Never accept a juror whose occupation begins with a P. This includes pimps, prostitutes, preachers, plumbers, procurers, psychologists, physicians, psychiatrists, printers, painters, philosophers, professors, phonies, parachutists, pipe smokers, or part time anythings." – William Jenning Bryan (US Congressman, Democratic Presidential nominee and former Secretary of State), 1973.

Understandably one might see how these types of stereotypes and myths were the dominant approach for "picking" juries in the 1930's and 1940's. It is also remarkable that there was a time when you could make statements like this in public and publish them in writing! Amazingly, reliance on stereotypes and widely held "myths" in jury selection and voir dire continues on today.

In a recent 2nd circuit case involving a Batson charge by the defendant for the plaintiff's use of a race based strike, the state claimed the following as its race neutral reason: "Heavy set people tend to be very sympathetic toward any defendant." Talk about body type stereotyping!

Stereotypes, myths and folklore continue despite the fact that in the past 20-30 years empirical research has demonstrated that many of the beliefs about jury behavior that attorneys cherish actually are not true. Many of these myths and stereotypes are not based on observations or discussions with jurors about their though process. Instead these beliefs are based on law school lore and myths passed down in law practices and among those in the legal profession. Reliance on widely accepted folklore can lead to poor decisions when it comes to effectively utilizing preemptory challenges during voir dire.

In the 1950's body type analysis, became vogue. This "pseudo science" of predicting prospective jurors' predispositions by assigning them to one of three body types. Ectomorphs (short and thick physiques) endomorphs (tall and thin physiques) and mesomorphs ("athletic" physiques).

The 1960's ushered in body language analysis. When it comes to interpreting body language, many people believe they have the insight and ability to accurately interpret the meaning behind another person's non-verbal behavior. When it comes to the way potential jurors behave in the courtroom, it is best not to assume you know what's going on inside their heads...unless they tell you. You don't have to be a mind reader to figure out that many prospective jurors don't want to be there – whether they have their arms folded, are glancing constantly at their watches, "looking" annoyed or whether they are just sitting there doing nothing. The biggest problem with posture, eye contact and other non-verbal behavior is that interpreting it is fraught with error. It is simply too easy to read almost anything into it. More scientifically, there is no empirical evidence that anyone, trained jury consultant or not, can tell you how a juror will decide a case based on non-verbal behavior. You have to ask whether a non-verbal assessment of prospective jurors tells you anything of value. It almost never does, and in fact, multiple observers of the same non-verbal behavior often reach very different conclusions about what it all means.

Of course there are a few exceptions. In several cases I (and everyone else in the courtroom) have observed jurors giving clear non-verbal signals that he/she did not like the defendant. The message was clear and obvious to everyone in court, including the judge who addressed the issue directly. Be wary of anyone who claims to be an "expert" in reading body language. If body language is sending a clear message, you don't need an expert to read it. Any other interpretations of subtle, non-verbal cues are likely to result in error and misinterpretation.

The latest rave: reading jurors' handwriting. Although handwriting analysis is considered by some to be a useful forensic tool (for example it has been used as a means for identifying criminal suspects) you should be more than skeptical about whether handwriting analysis can increase the ability to predict how a juror will decide a case. Here is how it is supposed to work: Handwriting/jury consultant analyzes jurors' handwriting from juror information cards on supplemental juror questionnaire and they use this information to infer various personality traits such as whether the potential juror is generous or stingy, leaders or followers, pro-structure law/order or anti-government. Next this information is used to make predictions about how jurors will respond to a particular case. So can this approach be an effective supplemental strategy? Absolutely not! The reason is that you have to assume that a particular writing style correlates with some personality trait and there is no empirical evidence to support such a premise. So handwriting interpretation, just as with earlier "strategies" of the past such as body type analysis, body language analysis and ethnic gender stereotyping are ineffective approaches. While all of these may make for good theatre, strategies simply add more error into a process already fraught with error.

So where are we today? It is probably clear by now that you should have cause for concern when jury selection strategies such as these discussed in previous section are offered.

III. Where Do You Stand???

Before we move further into scientific jury selection, its time for some self-assessment. Let's take a self quiz to assess your starting point on general jury selection and voir dire practices. The purpose of the quiz is to assess our own views and reflect on possible stereotypes and myths regarding "picking" a jury. The goal is to stimulate your thought process on topics that we will be subsequently covering and to attempt to dispel ineffective approaches to voir dire. The correct answers are identified with, or followed by, a brief discussion on the first question given its significance. So let's begin:

A. Pop Quiz

Question 1: In most cases, demographics information such as race, sex and age is useful in predicting a juror's behavior.

A. True

B. False

Question 2: Questions designed to commit jurors to a position during voir dire are usually effective.

A. True

B. False

Question 3: Jurors first impressions of attorneys play a significant role in their verdict decisions.

A. True

B. False

Question 4: Questions that may produce negative responses should be avoided to guard against one juror contaminating the thinking of others.

A. True

B. False

Question 5: One main goal of any good voir dire is to get the jury to like you.

A. True

B. False

Question 6: Stereotypes and myths actually are very effective tools for classifying jurors.

A. True

B. False

Question 7: The key to jury selection is identifying your best jurors.

A. True

B. False

Question 8: When conducting voir dire in another town, it is best to try to tailor your appearance and demeanor to fit in with the community.

A. True

B. False

Question 9: Jury consultants are better then lawyers at guessing juror orientation.

A. True

B. False

B. Pop Quiz Answers

Question 1: In most cases, demographics information such as race, sex and age is useful in predicting a juror's behavior.

A. True

B. False

While a particular demographic may indeed predict juror orientation in a specific case in a particular venue, demographics are generally not effective predictors of juror orientation in criminal cases across the board. The exception is in cases where there are class and/or race issues, particularly if there is a race issue interacting between the defendant and the alleged victim. An example of a case where a case predicted jurors' verdicts was the O.J. Simpson criminal defense. African American females were significantly more likely to find for the defendant. Interestingly, there was no significant difference between African American males and non-African American males. Also of note is that if the lawyers for the defense had relied on race alone, they would have been correct on only 2/3 of their strike decisions as the community surveys conducted by both sides revealed that approximately ½ of all citizens believed O.J. Simpson was guilty. The best predictors are attitudes, followed by life experiences (which influence the formation of attitudes), and demographics are the least predictive of the 3 major types of juror characteristics. The reason demographics are generally poor predictors of juror behavior is that profiles of good/bad jurors are venue and case specific!

IV. The Age of Scientific Jury Selection

Scientific jury selection is the strategy of employing social/behavioral science knowledge, tools and techniques to the process of jury selection. For example, **tools** such as community surveys, focus groups, trial simulations are frequently used by trial consultants and lawyers to determine profiles of favorable and unfavorable jurors in a given venue for a specific case (or type of case). **Techniques** such as statistical analysis (simple correlational analyses and more complex multiple regression models such as what was employed by the parties in the O.J. Simpson criminal trial) are commonly employed to analyze data obtained in surveys, focus groups and trial simulations. Social science **knowledge** is the empirical evidence supporting the relationship between juror characteristics (*e.g.*, attitudes, beliefs, personality types) and a juror's subsequent verdict orientation. There is a plethora of evidence which supports the strategy of scientific jury selection. For example, studies show that attitude towards women predicted verdicts in rape cases (Weir & Wrightsman, 1990), attitudes toward psychiatrists and the insanity defense predicted verdicts in criminal cases where the insanity defense was involved (Cutler, Moran and Narby, 1992), and attitudes toward the death penalty was related to jurors' verdict in capital punishment cases (Wetzel, McCarthy & Kern, 1999). I have personally worked on hundreds of cases, civil and criminal, where significant statistical relationships have been found between jurors' attitudes, beliefs, experience and their verdict predispositions as measured in community surveys, focus groups and/or trial simulations. Post-trial interviews with actual jurors further buttress the relationship between jurors' characteristics (attitudes, experiences and demographics in some instance) and their case verdicts.

V. Taking the Science and Making It Practical

So how do you, a defense lawyer, apply the scientific approach to jury selection? You simplify. Let's look at the skills required of you to be effective in voir dire and jury selection. These skills are:

- Prioritizing your goals
- Predicting future behavior
- Probing jurors for information

A. The First Skill: Prioritizing Your Goals

Ask yourself, what are you trying to accomplish in voir dire? As we briefly touched in the pop quiz, the primary goal of jury de-selection is to identify dangerous jurors. This is the only time in the trial dedicated to this critical endeavor.

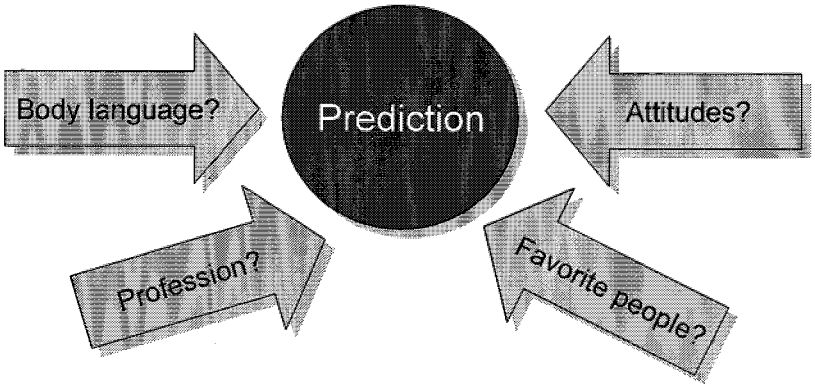
B. The Second Skill: Predicting Future Behavior

Predicting future behavior is challenging because our own biases, stereotypes and preconceptions can and do affect the way in which we interpret available information about prospective jurors. Also, as I touched on earlier, not all information is created equal.

Practically speaking, how do you weigh the various types of information available to the defense lawyers? As mentioned earlier, attitudes, beliefs and experiences are good predictors of the way a juror will decide a case. In my twenty years of practice, I have repeatedly and successfully used this case related attitudes and experiences as a way to prioritize dangerous jurors. Think about this: isn't it logical if you are trying to predict

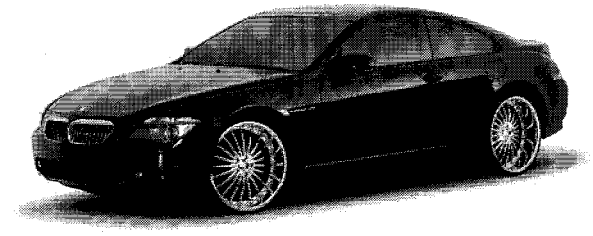
The Second Skill: Predicting

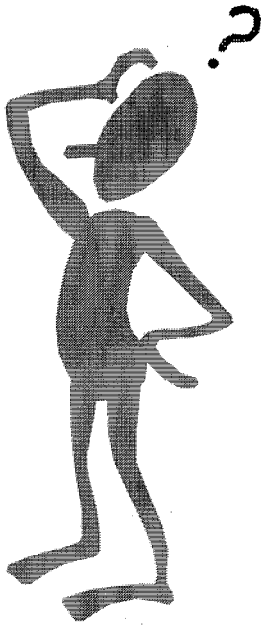
Not all information is created equal.



how someone will view your case to ask them questions that are directly related to issues in your case or the story you will be presenting in your case? Despite this logic, we often consider and disproportionately weigh other types of information that is readily available such as a juror's profession, readily observable demographics and yes, body language!

Consider this example. Assume you were selling a car to an impatient prospective customer and you could only ask a couple of questions to predict what vehicle choice they would make. Would you ask questions about their favorite, most admired people, type of books they read, profession or would you want to know what vehicles they have owned in the past (experiences) and what vehicle features they care most about (attitudes) such as performance, safety, color/design? Knowing the answers to the latter would give you information about how the customer would choose.





So why do lawyers so often pay attention to information in voir dire that is two, three or more times removed from a direct relationship to the way a juror will see your case? Because predicting behavior is difficult and speculating can be fun. But speculating involves imposing our own stereotypes and views on jurors' information and then extrapolating...

C. The Third Skill: Probing Jurors for Information

We all know that even the most biased jurors often think that they are fair-minded, unbiased individuals. There are two techniques that help you when you try to get biased jurors to admit that they are not impartial. One is to list all the responses they gave. If you make a list of all the biased responses that the juror gave in a written questionnaire and read them all back to the juror, the juror would want to stay consistent in front of the Court and lawyers and would be reluctant to say that he/she is impartial. Jurors often do not remember what they wrote, and hearing their own statements would often force them to admit their bias. Another technique is to have a few different questions to address the bias issue using leading questions. "Would you agree that we are starting a little behind the plaintiff (or the government)?" "Would you agree that given your experiences and/or views, this case hits too close to home for you?" "Don't you think you would be better serving on a jury in a different case—in a case that does not involve these issues? You have feelings about these issues, right?" "If you were sitting here in my seat and trying to select a jury for X [client], would you want someone with the views like you expressed about X?" Each one of these questions has the potential of offending a juror, so it is good to have different ways of asking the same thing and try to choose the right one and not to give up when the first one fails.

158 P.3d 1051
Supreme Court of Oklahoma.

Dustin Heath JARVIS, Petitioner,
v.
The Honorable James R. WOLFE, Associate District Judge of the District Court of Choctaw County, Oklahoma, Respondent.

No. 104,376.
|
April 16, 2007.

Synopsis
Background: Action was brought against judge, seeking order compelling judge to grant petitioner's request for jury trial in underlying case.

Holdings: The Supreme Court held that:

[1] real parties in interest, as the parties who initially demanded a jury trial in underlying action, were presumed to stand as obligors for payment of jury fee, and

[2] failure to pay the jury trial fee in accordance with deadline did not amount to a waiver of constitutional right to a jury trial.

Ordered accordingly.

West Headnotes (3)

[1] **Jury** ⇐ Payment or Deposit of Jury Fees

Real parties in interest, as the parties who initially demanded a jury trial in underlying action and indicated nothing to the contrary throughout the litigation until after the pretrial conference, and then only by inaction, were legally presumed to stand as the obligors for payment of the jury fee.

Cases that cite this headnote

[2] **Jury** ⇐ Payment or Deposit of Jury Fees

Failure by the real parties in interest in underlying action to pay the jury trial fee in accordance with order setting a deadline for its payment, coupled with petitioner's failure timely to pay it, did not amount to a waiver of the petitioner's constitutional right to a jury trial. U.S.C.A. Const.Amend. 7.

Cases that cite this headnote

[3] **Jury** ⇐ Form and Sufficiency of Waiver

The law disfavors implied waivers of the right to trial by jury based on local custom, procedure, practice and rule. U.S.C.A. Const.Amend. 7.

1 Cases that cite this headnote

***1051** *ORDER*

¶ 1 Original jurisdiction is assumed. Art. 7 § 4, Okla. Const. After a hearing before the referee, the court finds that:

(1) The real parties in interest had initially demanded a jury trial. The pre-trial conference order indicates that jury trial was *not* waived;

***1052** (2) an order "governing pre-trial conference" required payment of the jury trial fee on or before the date of the pre-trial conference, otherwise "the case will be stricken from the jury trial docket and set for a non-jury trial;"

(3) as the fee was not paid on time by any party, the case was scheduled for a bench trial;

(4) petitioner, who had not earlier demanded a jury trial, immediately moved for "reconsideration," demanded a jury trial, and tendered the required fee;

(5) the trial court directed the clerk to return the check to petitioner's counsel, finding that the right to a jury trial had been waived based on the failure to pay the fee on or before the governing order's deadline;

(6) the real parties in interest opposed the petitioner's demand for jury trial and the motion to reconsider, acceding to the court's finding of waiver.

[1] [2] ¶ 2 The Court concludes and holds that:

(1) As the parties who initially demanded a jury trial and indicated nothing to the contrary throughout the litigation until after the pretrial conference, and then only by inaction, the real parties in interest were legally presumed to stand as the obligors for payment of the jury fee, *Colley v. Harbour,* 2004 OK 90, ¶ 1, 104 P.3d 584;

(2) failure by the real parties in interest to pay the fee in accordance with the order setting a deadline for its payment, coupled with petitioner's failure timely to pay it, ***do not amount to a waiver of the petitioner's constitutional right to a jury trial;***

(3) the trial court was clearly in error when it (a) imputed constructive notice to the petitioner of the fee's nonpayment by the parties who had earlier demanded a jury trial and (b) found that the petitioner who had not paid the fee, thereby waived his right to a trial by jury.

[3] ¶ 3 ***The law disfavors implied waivers of the right to trial by jury based on local custom, procedure, practice and rule.***

¶ 4 Respondent, or any other judge assigned to this cause, is hereby commanded to grant the petitioner's request for a jury trial in Cause No. CJ–2005–249 on the docket of the District Court, McCurtain County.

¶ 5 DONE BY THE ORDER OF THE SUPREME COURT SITTING IN CONFERENCE THIS 16TH DAY OF APRIL, 2007.

¶ 6 All justices concur.

All Citations

158 P.3d 1051, 2007 OK 23

Parrish v. Lilly

1993 OK 80
883 P.2d 158
64 OBJ 2178
Case Number: 75964
Decided: 06/06/1993
Supreme Court of Oklahoma

Cite as: 1993 OK 80, 883 P.2d 158

TEDDY JUNE PARRISH, CATHERINE HAGGARD, SANDRA SUE CRAHAN AND THELMA PARRISH, APPELLANTS,
v.
DR. CHARLES LILLY, APPELLEE.

Certiorari to the Court of Appeals, Temporary Division No. 47.

¶0 Appellants, the surviving family of June Parrish, sued appellee, Dr. Charles Lilly, alleging that he was negligent in not timely diagnosing and treating Mr. Parrish's lung cancer. After the jury had been impaneled and sworn, but prior to the introduction of evidence, appellants moved to strike a juror who, at that time, questioned his ability to impartially serve as a juror. The trial court denied the motion, the trial was conducted and the jury returned a unanimous verdict in favour of the doctor. Appellants appealed and the Court of Appeals affirmed. On certiorari, appellants contend that the trial court abused its discretion in refusing to strike the juror in question.

CERTIORARI PREVIOUSLY GRANTED. OPINION OF THE COURT OF APPEALS VACATED. JUDGMENT OF THE TRIAL COURT REVERSED AND CASE REMANDED FOR NEW TRIAL.

Murray E. Abowitz & Janet S. Legg, Abowitz & Welch, Oklahoma City, for appellants.

Galen L. Brittingham and Michael P. Atkinson, Thomas, Glass, Atkinson, Haskins, Nellis & Boudreaux, Tulsa, for appellee.

WATT, Justice:

[883 P.2d 159]

SUMMARY OF FACTS AND PROCEDURAL HISTORY

¶1 Teddy June Parrish, Catherine Parrish Haggard, Sandra Sue Crahan and Thelma Parrish, appellants, are the surviving children and wife of June Parrish, who died of lung cancer. Appellants brought this medical malpractice action against appellee, Dr. Charles Lilly, alleging that he was negligent in not timely diagnosing and treating Mr. Parrish's lung cancer.

¶2 The trial in this action commenced on June 18, 1990, in Tulsa County District Court Case No. CJ-85-7480, before the Honorable David L. Peterson, District Judge. After a jury panel was seated, the court and both parties conducted voir dire. One line of questioning posed to the jury panel involved the jurors' reactions to probable testimony that Mr. Parrish had smoked a pack of cigarettes a day for over forty years. Thereafter, a panel of twelve jurors and one alternate were selected, impaneled and sworn.

¶3 Prior to opening statements, the court delivered preliminary instructions to the jury. When the court asked if there were any questions, one juror said he had been thinking about the voir dire questions and indicated he had already formed an opinion prejudicial to the case. The juror stated:

> I'm not sure I know exactly how to phrase this, but in the area of smoking. It strikes me with what we've learned over the last 20 years in the area of smoking, that, if a person were smoking a pack a day, a pack a day for the last 20 years -

The trial judge interrupted the juror and asked him whether he had any questions *concerning the preliminary instructions*. The juror stated that he had none and the court completed its preliminary instructions.

¶4 During the ensuing recess, plaintiffs' counsel moved the court to hear further comments from the juror, suggesting that the juror was having second thoughts about his impartiality. The court denied the motion. Shortly thereafter, the court received the following note from the juror:

> To Honorable Judge Peterson,
>
> I am of the opinion that a person who smokes a pack of cigarettes each day runs a higher risk of sickness than one who does not, & that if this is the case, I feel that a portion of evidence may have already been presented to alter a totally fair opinion on my part. I leave the decision as to whether I am still a valid juror in your hands. Thank you. . . .

¶5 At this point, the court summoned the juror to the judge's chambers and questioned him before counsel for both parties. In what appellants characterize as "intimidation," the judge expressed amazement over the note because, as he reminded the juror, the panel had been asked several times whether there was any reason why they could not serve as jurors. After pointing out that the jury had already been sworn, the judge reread one of [883 P.2d 160] the preliminary instructions which explained that the statements, remarks and arguments of counsel do not constitute evidence. The juror then attempted to express his concerns about his impartiality as a juror; concerns which were apparently triggered by opening statements regarding Parrish's prolonged smoking. During the discussion which followed, the judge twice more reread the instruction regarding attorneys' statements and pointedly reiterated that no evidence had been introduced. The discussion ended when the juror responded that he could fairly and impartially judge the evidence after it was introduced.

¶6 After the juror was excused from chambers, appellants moved the court to strike the juror and replace him with the alternate. Defense counsel resisted the motion because he did not particularly like the alternate juror, but suggested that a new jury be impaneled. Appellants objected to impaneling a new jury on the grounds that their expert witnesses were scheduled to appear on that particular day only. They also opposed the court's proposal that the juror be stricken and only eleven jurors be used. After discussions were had concerning the estimated length of trial and the availability of a new jury panel, the court decided to continue with the twelve impaneled jurors and one alternate.

¶7 The trial was conducted and the jury returned a unanimous verdict in favor of the doctor. Appellants appealed. The temporary panel of the Court of Appeals affirmed, holding that the trial court did not abuse its discretion in refusing to strike the questioned juror. We granted appellants' Petition for Writ of Certiorari on January 11, 1993.

ISSUE

¶8 The issue presented in this case is whether the trial court abused its discretion in refusing to strike the juror at issue. We hold that it did.

DISCUSSION

¶9 The Oklahoma Constitution provides that the "right of trial by jury shall be and remain inviolate. . . ." Okla. Const. art. 2, § 19 . It is generally recognized that "jurors must be impartial, and bias or prejudice in a case disqualifies one as a juror thereon and provides cause for a challenge." Burke v. McKenzie, 313 P.2d 1090, 1093 (Okl. 1957). See also 12 O.S. 1981 § 572 . Although determining the validity of a challenge for cause is left largely to the discretion of the trial court, Burke at 1093, this Court will reverse a ruling on such matter where abuse of that discretion is shown. McAlester Urban Renewal Authority v. Lorince, 519 P.2d 1346, 1348 (Okl. 1973).

¶10 The Oklahoma Court of Criminal Appeals has held that whenever the fairness and impartiality of a juror is questioned, the trial court must be clearly satisfied that such juror is fair and impartial. Scrivener v. State, 63 Okl.Crim. 418, 75 P.2d 1154, 1156-57 (App. 1938). The court has also held that it is the duty of the trial court to resolve all doubts regarding juror impartiality in favor of the defendant. Id.[1] While recognizing that criminal trial procedure is not binding on this Court, we have cited Scrivener with approval, noting that "both the reasoning and the rule based thereon [were] persuasive." Burke, 313 P.2d at 1093-94.

¶11 In determining whether a trial court abused its discretion in failing to disqualify a juror who expressed bias, the Burke Court held:

> Too much precaution cannot be observed to guard against improper influence and preserve the purity of jury trials. Strictness is necessary to give due confidence to the parties in the results of their cases. Due regard to careful protection of the rights of the litigants, which should actuate trial courts, requires that they scrupulously confine the proceedings wherein these rights are to the settled, within recognized boundaries providing for determination by impartial trials.

[883 P.2d 161]

Burke, 313 P.2d at 1096. We find equally compelling a similar sentiment expressed by State v. Smith, 320 P.2d 719, 726 (Okl.Crim. App. 1958):

> [T]rial courts [should] exercise meticulous care in the matter of inquiry into jurors' qualifications on either grand or petit juries. To do otherwise invites injustice, results in needless expense, waste of time, and sometimes a total failure of justice. . . . There are too many citizens free from the taint of bias and prejudice for our courts to indulge in speculation on such matters and gamble with justice.

See also Jackson v. General Finance Corp., 208 Okl. 44, 253 P.2d 166, 168 (1953), where we stated, "Courts have a duty to enforce strict observance of the constitutional and statutory provisions designed to preserve inviolate, right to, and purity of jury trial."

¶12 In the present case, the questioned juror suggested in open court before the other jurors and explicitly expressed in a note to the court that he had formed a preconceived opinion which was prejudicial to the case. The juror's comments also indicated that, even before any evidence was presented, he had lost sight of the real issue in this case and focused his attention on a non-issue. The issue was not whether Mr. Parrish's prolonged smoking had caused his cancer, but whether the doctor was negligent in not detecting the cancer sooner.

¶13 It is apparent from the record that the juror at issue possessed an opinion which adversely reflected on his ability to render an unbiased verdict. Indeed, he repeatedly attempted to inform the court that he had reservations about his impartiality. It is also apparent that not only appellants, but both the court and opposing party had serious concerns about the questioned juror's impartiality. Those concerns were manifested when the doctor suggested, and the court considered, impaneling a new jury, and when the court suggested striking the juror and conducting the trial with only eleven jurors. The record demonstrates that the trial judge was not clearly satisfied the juror could render a fair and impartial verdict. Such doubt should have been resolved in appellants' favor. A

party should not be "compelled to produce proof to change a preconceived opinion or prejudice which may control the action of the juror." Burke, 313 P.2d at 1095. For these reasons, we hold that the trial court abused its discretion in refusing to dismiss the juror for cause.[2]

¶14 Dr. Lilly argues that since the jury returned a unanimous verdict when only nine concurring jurors were needed to render a verdict, any error occasioned by allowing the challenged juror to remain on the panel was harmless. We disagree. Because this civil action involved more than $10,000.00, appellants were constitutionally guaranteed a trial by a twelve member jury. Okla. Const. art. 2. § 19. See also 12 O.S. 1981 § 556.1 (c). Implicit in this constitutional assurance is the right to a jury composed of twelve impartial jurors.[3]

[883 P.2d 162]

¶15 Contrary to the views of the doctor and the dissent, the number of concurring jurors required to render a verdict is not germane to this proceeding. As the Supreme Court of Missouri held:

> The right of trial by jury guaranteed by our Constitution, if it is to be worth anything, must mean, as this court has said, "the right to a fair and impartial jury." . . . Certainly also a party is entitled, unless he waives it, to a jury of twelve impartial qualified [individuals]. *Even though three-fourths of them can decide a civil case, parties are entitled to have that decision, whether for them or against them, based on the honest deliberations of twelve qualified* [individuals].

Lee v. Baltimore Hotel Co., 345 Mo. 458, 463, 136 S.W.2d 695, 698 (1939) (emphasis added). Accord Beggs v. Universal C.I.T. Credit Corp., 387 S.W.2d 499, 503 (Mo. 1965); Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578, 586 (Mo. 1954); McNally v. Walkowski, 85 Nev. 696, 462 P.2d 1016, 1018 (1969). We find the above rule of law applies to this case. Each and every person who sits on a jury, regardless of the number of jurors required to render a verdict, must satisfy the constitutional and statutory requirements of impartiality. Subjecting a party to anything less than twelve impartial jurors, where twelve jurors are guaranteed, will not survive judicial scrutiny. Furthermore, this Court will not engage in speculation regarding the influence a biased juror may or may not have had upon the other members of a jury. In the present case, we have no way of determining what impact the questioned juror, his preconceived opinion or his preoccupation with the non-issue of causation had upon the outcome of this case.

CONCLUSION

¶16 We hold that the trial court abused its discretion in failing to strike the questioned juror, where the juror repeatedly attempted to express that he had formed a preconceived opinion that was prejudicial to the case, and where the record reveals that the trial judge himself was not clearly satisfied the juror could be fair and impartial. Such error cannot be considered harmless because appellants were guaranteed a jury of twelve impartial jurors and this Court cannot speculate what effect the biased juror had upon the trial.

¶17 Certiorari previously granted. The opinion of the Court of Appeals is VACATED. The judgment of the district court is REVERSED, and this cause is REMANDED for a new trial.

¶18 OPALA, ALMA WILSON, KAUGER and SUMMERS, JJ., concur.

¶19 HODGES, C.J., LAVENDER, V.C.J., and SIMMS and HARGRAVE, JJ., dissent.

Footnotes:

[1] See also Hawkins v. State, 717 P.2d 1156, 1158 (Okl.Crim.App. 1986); Allison v. State, 675 P.2d 142, 153 (Okl.Crim.App. 1983).

[2] We acknowledge that qualified jurors need not be totally ignorant of the facts and issues involved in a case, and that ordinarily a juror is considered impartial if he testifies that he can render an impartial verdict upon the evidence. Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975); Sinclair Oil & Gas Co. v. Crane, 51 P.2d 711, 713 (Okl. 1935). However, a juror's assurances that he is equal to this task are not dispositive of the rights of the objecting party. Murphy, 421 U.S. at 800, 95 S.Ct. at 2036. Although the juror at issue said he could render a fair and impartial verdict, he did so only after the court expressed dismay over his comments and lectured him in chambers. More importantly, the juror's comments raised a serious question regarding his fitness to impartially serve and the court should have resolved such doubt in favor of appellants.

[3] See Embry v. Weeks, 421 P.2d 232, 234 (Okl. 1966) (a party is entitled to have his or her case tried by a fair and impartial jury composed of competent, disinterested jurors); Wiggins v. Sterne, 293 P.2d 603, 606 (Okl. 1955) (selection of a new panel is required where any portion of jury is disqualified); State v. Smith, 320 P.2d at 724 (an accused is entitled to not one, nor eleven, but twelve unbiased and qualified jurors); Tapia v. Barker, 160 Cal. App.3d 761, 206 Cal. Rptr. 803, 805 (1984) (litigant in a jury trial has a constitutional right to a fair trial by twelve impartial jurors); Wright v. Bernstein, 23 N.J. 284, 129 A.2d 19, 25 (1957) (parties are entitled to have each of the jurors who hears the case impartial, unprejudiced and free from improper influences); State v. McFall, 67 N.M. 260, 354 P.2d 547, 549 (1960) (if any juror is biased, the jury upon which he serves is thereby deprived of its quality of impartiality); Shaver v. State, 162 Tex.Crim. 15, 280 S.W.2d 740, 742 (1955) (the presence of one partial juror on a jury destroys the impartiality of the body and renders it partial).

SIMMS, Justice, dissenting:

¶1 I respectfully dissent. Plaintiffs brought their action for medical malpractice against the doctor for his alleged negligence in failing to properly diagnose lung cancer in his patient which ultimately led to the patient's death. The lawsuit was not predicated on the theory that smoking could lead to lung cancer or have an adverse effect on a person's health.

¶2 The colloquy between the juror in question, the trial judge, and the attorneys reveals only that the juror did have an opinion that a person who smokes a pack of cigarettes a day runs a higher risk of sickness than one who does not. Causation of the cancer in the patient is not an issue in the case; only the failure of the doctor to timely and properly diagnose the cancer is at issue. The juror expressed absolutely no opinion as to any matter which would touch upon the alleged negligence of the doctor. I do not believe the trial judge abused his discretion in refusing to strike the juror. A large discretion is vested in the trial court in determining the competency and qualifications of jurors and its action should never be disturbed by an appellate court, unless an abuse of such discretion is clearly apparent. Agee v. Gant, 412 P.2d 155, 162 (Okl. 1966): Kansas City Southern Railway Company v. Norwood, 367 P.2d 722, 726 (Okl. 1961).

[883 P.2d 163]

¶3 Great reliance is placed upon criminal law by the majority in reaching its conclusion the trial judge erred by refusing to strike the juror in question from the trial panel. While the civil courts of this state often look to the Court of Criminal Appeals for guidance in answering questions involving criminal law, I submit the cases from the Criminal Court of Appeals are of little assistance in this case.

¶4 Oklahoma Const., Art. II, § 19, provides that in all criminal cases where imprisonment for more than six (6) months is authorized, the verdict must be unanimous, that is agreed to by its entire number; while in civil cases, three-fourths (3/4) of the entire number, nine, shall have power to render a verdict. The verdict in this case was *unanimous*. That is, there were eleven jurors whose qualifications to try this cause were unchallenged who returned a verdict for the defendant; two jurors more than the constitution requires for a lawful verdict.

¶5 The majority states that the number of jurors required to render a verdict is not germane to this proceeding, relying upon cases from Missouri and Nevada. Analysis of those cases however, shows that the Court's reliance is misplaced. In Lee v. Baltimore Hotel Co., 345 Mo. 458, 136 S.W.2d 695 (1939), a Missouri trial judge, on his own motion, granted plaintiff a new trial because one of the jurors who sat in the case and was one of eleven jurors who signed the verdict, was an imposter who had practiced fraud upon the court to serve on the jury. The imposter juror, Herbert Daniel, who had not been served to appear on the venire, appeared using the name of W.M. Bennett who had been summoned, and continued to impersonate Bennett throughout the trial. The Missouri Supreme Court affirmed the action of the trial court in granting new trial because a litigant was entitled to a jury of "twelve *qualified* men". (Emphasis supplied) In case at bar, there is no contention the juror was not qualified, only that he had an opinion about smoking, and its potential hazards.

¶6 In Beggs v. Universal C.I.T. Credit Corp., 387 S.W.2d 499 (Mo. 1965), the Supreme Court of Missouri addressed the propriety of the trial court overruling a motion for new trial in which four prospective jurors were unequivocally asked if they had in the past been a plaintiff or defendant in a lawsuit. None of the four jurors named made any response. It later developed each of the four jurors had been defendants in civil litigation, which placed the issue of their impartiality in question. This would leave but eight clearly impartial jurors to enter the verdict. The Missouri high court properly reversed the trial judge. It was clearly demonstrated in Beggs, there was a nexus between their prior experiences as defendants in civil actions and their ability to act as impartial jurors. No nexus exists in this case between the juror's opinion about smoking and the issue of the alleged failure of the doctor-defendant to properly diagnose the lung cancer.

¶7 In Moore v. Middlewest Freightways, Inc., 266 S.W.2d 578 (Mo. 1954), the Missouri Supreme Court reversed a plaintiff's verdict because one of the jurors admitted bias against the defendant on voir dire, and the trial court refused to excuse him for cause. The Missouri court recognized that "[t]he trial judge is and should be vested with broad discretion in determining the qualifications of veniremen to sit as jurors and his rulings thereon should not be disturbed unless they are clearly and manifestly against the evidence." 266 S.W.2d at 585. In light of the facts, the court stated that it was convinced the juror should not have been permitted to remain on the panel.

¶8 In McNally v. Walkowski, 85 Nev. 696, 462 P.2d 1016 (1969), the Supreme Court of Nevada relaxed Lord Mansfield's Rule, that a juror's statement may not be admitted to impeach a verdict in which the juror participated. There a 9-3 verdict was returned in the trial court for the defendant. Plaintiff obtained the affidavits of five of the jurors which demonstrated actual bias on the part of "several" of the jurors who deliberated in the case. The court held: "We conclude therefore, that the jurors' affidavits were admissible for the limited purpose of showing *concealment of actual bias* by several of the jurors on their voir dire examination." 462 P.2d at 1019.

¶9 The Nevada high court said the trial judge erred in excluding the affidavits of the jurors, [883 P.2d 164] and therefore abused his discretion in the matter.

¶10 While it is true the cases cited by the majority hold for the general rule that a litigant is entitled to a jury composed of twelve impartial jurors, there is nothing in the record in this case which demonstrates anything other than impartiality in this medical malpractice case. The fact the verdict was unanimous does demonstrate the twelve jurors who tried this case were of one mind.

¶11 It is interesting to note that in Smith v. Maker, 84 Okl. 49, 202 P. 321 (1921), one of the assignments of error was the refusal of the trial court to excuse a juror for cause because of his announced friendship with of the parties litigant. In reversing the judgment of the trial court because of the totality of errors in the record, this Court wrote with regard to the assignment of error regarding the questioned juror:

> "It is sufficient to say in reference to this assignment of error that, this being a civil action not requiring a unanimous verdict, and if this was the only error complained of and the record disclosed that the judgment of the court entered upon the verdict of was, in our judgment, substantially correct, we would deem any error committed in overruling the challenge for cause of the plaintiff to this juror insufficient to reverse the cause upon, ..."

The Court then went on to hold that because other, more significant, errors were committed during trial, the challenge for cause should have been sustained.

¶12 The majority does not call our attention to any other prejudicial error in the trial, and we believe the verdict to be substantially correct. We emphasize the error, if any there be, in the trial judge permitting the questioned juror to sit in the case at bar, is at most, harmless error.

¶13 I would deny the petition for certiorari in this case, thereby affirming the judgment entered upon the jury verdict.

¶14 I am authorized to state that Chief Justice HODGES, Vice Chief Justice LAVENDER, and Justice HARGRAVE join with me in the views expressed herein.

Citationizer© Summary of Documents Citing This Document

Cite	Name	Level
Oklahoma Court of Criminal Appeals Cases		
2008 OK CR 15, 185 P.3d 397,	STATE v. HALL	Discussed
Oklahoma Court of Civil Appeals Cases		
2006 OK CIV APP 20, 132 P.3d 619,	NBI SERVICES, INC. v. WARD	Discussed
2012 OK CIV APP 32, 275 P.3d 161,	IN THE MATTER OF THE STATE IN THE INTEREST OF K.P.	Discussed
2015 OK CIV APP 83, 361 P.3d 533,	WATSON-SANTIN v. ST. JOHN MEDICAL CENTER, INC.	Discussed
Oklahoma Supreme Court Cases		
1996 OK 99, 928 P.2d 291, 67 OBJ 2798,	Dominion Bank of Middle Tennessee v. Masterson	Cited
2012 OK 17, 278 P.3d 577,	FIELDS v. SAUNDERS	Discussed at Length

Citationizer: Table of Authority

Cite	Name	Level
Oklahoma Court of Criminal Appeals Cases		
1958 OK CR 6, 320 P.2d 719,	STATE v. SMITH	Cited
1938 OK CR 9, 75 P.2d 1154, 63 Okl.Cr. 418,	Scrivener v State	Cited
1983 OK CR 169, 675 P.2d 142,	ALLISON v. STATE	Cited
1986 OK CR 58, 717 P.2d 1156,	HAWKINS v. STATE	Cited
Oklahoma Supreme Court Cases		
1953 OK 22, 253 P.2d 166, 208 Okla 44,	JACKSON v. GENERAL FINANCE CORPORATION	Cited
1955 OK 371, 293 P.2d 603,	WIGGINS v. STERNE	Cited
1957 OK 155, 313 P.2d 1090,	BURKE v. McKENZIE	Cited
1935 OK 873, 51 P.2d 711, 175 Okla. 198,	SINCLAIR OIL & GAS CO. v. CRANE	Cited
1961 OK 238, 367 P.2d 722,	KANSAS CITY SOUTHERN RAILWAY COMPANY v. NORWOOD	Cited
1966 OK 31, 412 P.2d 155,	AGEE v. GANT	Cited
1966 OK 241, 421 P.2d 232,	EMBRY v. WEEKS	Cited
1973 OK 148, 519 P.2d 1346,	McALESTER URBAN RENEWAL AUTHORITY v. LORINCE	Cited

Cite Name	Level	
Title 12. Civil Procedure		
Cite	Name	Level
12 O.S. 556.1,	Consistency of Juries in Civil Actions - Trial Without Jury in Certain Cases	Cited
12 O.S. 572,	Challenging Jurors - Causes	Cited

5055 Oakwood Avenue
La Canada, CA 91011
Los Angeles and Nationwide

HARRY PLOTKIN

JURY CONSULTANT

(626) 975-4457
YourNextJury.com
harry@yournextjury.com

July 2015 Jury Tip: "Persuasion in voir dire that actually works"

Pre-conditioning during jury selection is a controversial subject; technically forbidden, but practiced in some form or another by most trial lawyers (in my observation, at least). Don't blame me if you get admonished by a particularly strict judge for pre-conditioning, because some judges won't allow even the slightest hint of pre-conditioning. However, the reality is that most judges do allow voir dire questions that subtly persuade, as long as the questions genuinely ask jurors for information about themselves. But here's the point: not only are questions that start out "would you agree that..." and require only "yes" or "no" answers much more likely to be shut down by a judge, they're also incredibly ineffective at persuading jurors. The most effective way to being persuading jurors during jury selection involves asking perfectly appropriate voir dire questions that are the least obvious form of pre-conditioning. Win-win. The only downside? Asking voir dire questions that persuade jurors is much more challenging and requires much more creativity than simply lecturing your trial themes to your jurors.

So before we discuss how to effectively persuade jurors with voir dire questions, set aside your worries about getting objections and upsetting the court. Believe me, I've seen plenty of judges who won't stop an aggressive lawyer from basically giving their opening statement during jury selection. Realize that, technically speaking, voir dire questions that persuade aren't automatically forbidden. In most venues, voir dire is only improper if preconditioning is the "dominant purpose" of the question. If persuasion happens to be the side-effect of a legitimate question that elicits information from jurors, it's okay to pre-condition.

But for now, let's set aside the ethics and legality of pre-conditioning and focus on how and when it can be effective. Remember that in my last jury tip, I warned against the dangers of overt pre-conditioning; specifically, sharing the facts of your case in direct or barely-veiled "hypothetical" ways. But I also wrote that "a good jury selection should absolutely include some pre-conditioning, as long as it's subtle persuasion. You do need to ask questions that get jurors thinking about your case issues in ways that match the themes of your case, and there are ways to do that without sharing any facts from your case." So how can you influence your jurors during voir dire, without even hinting at the facts of your case? There are two key ingredients to persuasive voir dire: make your questions about the themes and principles of your case, not the facts, and design your questions so that your jurors' answers are what persuades them.

Write this down, because it's important: nothing you say during jury selection will change anyone's mind; only your jurors can change their own minds. What you can do is to ask questions that help your jurors remind themselves of how they really feel about issues involved in your case. You can ask questions that force them to think about things that they wouldn't otherwise realize until they remind themselves: experiences they've had, approaches they've taken to similar situations, lessons they've learned.

This may sound obvious, but I can't stress how frequently during my jury selections I hear opposing counsel ask questions like "wouldn't you agree that teamwork and getting along with your co-workers is important?" or "don't you think it's possible for a lawyer to put his own financial interest before their client's best interest?" In a vacuum, who wouldn't agree that something is "possible" or "important?" Don't assume that just because all of your jurors nod and say they agree means you've made some progress or begun to persuade them. They certainly know what you'll be arguing, but they won't be more likely to believe it. And worst, they haven't internalized your theme: you haven't found a way for your jurors to make your points important or real or probable to them.

Instead, your voir dire questions have to remind jurors to think about what they've actually done or how they actually feel... and only when your jurors make that personal connection will they begin thinking about the case in the ways you want them to think. In a recent medical malpractice trial, I wanted jurors on-board with the thinking that "early detection is the best protection" against cancer. Without being reminded that they've heard that maxim over and over from the medical community, our jurors were vulnerable to believing that discovering cancer too late to fix can happen even with good health care. So I had my client ask our jurors if they had heard about the importance of early detection... and if anyone had put that idea into action. One by one, the jurors reminded themselves that they got preventative tests like mammograms, routine medical tests, or annual checkups. "Even without any signs or symptoms of a medical problem" we asked? "Of course, my doctor expects me to" they realized. Reminding them of what they'd heard and what they'd practiced as patients persuaded them to think differently (and along our lines) than they would have otherwise.

The best persuasion in voir dire involves lawyers tailoring questions to the unique experiences of their jurors, and showing jurors that they apply the same approaches in their jobs or lives that the lawyer hopes they apply to their client. This isn't easy to do and involves some improvisation, but can be planned if you understand the principles you're trying to demonstrate. Let's say that you're suing a professional for making a negligent mistake through lack of diligence, like a doctor failing to double-check a medical chart or an accountant missing a red flag in financial statements. Pick out a few jurors with jobs that you understand and tailor questions to their jobs that basically ask the juror "what do you do to make sure you're being extra careful and not making mistakes?" Ask a plumber "after you've fixed a pipe, do you check a second time to make sure the leak is gone, just to be careful? Why?" Ask an accountant "when do prepare a customer's tax return, do you go over anything more than once, just to be sure you didn't make any mistakes? Why?" And follow up with "now, in your job, if you make a mistake, what's the worst thing that could happen? OK, so let me ask you this: do you think it's less important for a surgeon operating on a sick patient to double-check things than someone who does your job? Why not?"

Now I realize that improvising voir dire by tailoring questions on the spot to your jurors' unique experiences can be tough, so luckily there are some short-cuts that can be effective. My war story about early prevention illustrates one easy-but-effective method:

asking your jurors if they've ever heard of a concept that is essentially a trial theme of yours, and then asking "has anyone here ever practiced that idea in your life?" The more your jurors connect the dots between your theme and their lives, the stronger your jurors will become an advocate for that theme because they'll internalize it. Never assume that your jurors will connect the dots themselves. For example, asking your jurors specific questions like "do you wear a seatbelt when you drive? Do you check your mirrors frequently? Do you slow down when you're driving in fog?" doesn't necessarily remind your jurors that they live out the concepts of defensive driving or personal responsibility; unless reminded, they may assume they do those things out of custom or the rules of the road. Instead, ask them "when you drive, what precautions do you take to make sure you're keeping yourself, and other drivers, as safe as possible?"

For many reasons, jury selection is the most important phase of trial when it comes to your ability to influence the success of your case. Once discovery ends and trial begins, you can't change the facts of your case, you can't stop the other side from hammering on your worst facts, you can't control how many bad jurors get called into your courtroom, and you can only get rid of a small handful of them with peremptory strikes. But one thing you can do is to make your entire jury pool more receptive to your case by showing them ways that they already agree with the themes and principles in your case. No matter how compelling you think your case will be, it never hurts to make sure your jurors already agree and to get them on-board. So even though the primary goal of jury selection should be to remove the most unreceptive jurors, you should always set aside some time and effort on persuasion, because unlike peremptory strikes, there is no limit on the number of jurors you can persuade and make more receptive during jury selection.

5055 Oakwood Avenue
La Canada, CA 91011
Los Angeles and Nationwide

HARRY PLOTKIN

JURY CONSULTANT

(626) 975-4457
YourNextJury.com
harry@yournextjury.com

May 2015 Jury Tip: "Don't share your good facts until your opening"

Some lawyers subscribe to the school of thought that good lawyers should try to argue their case as early as possible: during jury selection, or by crafting an aggressively-worded statement of the case, during a mini-opening if your judge lets you give one, and even in the jury assembly room, if you were allowed in there. And while I agree that lawyers should never waste a golden opportunity to subtly persuade your jurors, overt pre-conditioning backfires more often than it helps.

First let me differentiate between "overt pre-conditioning" and "subtle persuasion" so that we're clear about what I'm advocating and what I'm cautioning against you doing. When I say "overt pre-conditioning," what I mean is sharing specific, good facts about your case with your jurors, and even suggesting or implying what your good facts are going to be, before your jury is seated and you give your opening statement. Overt pre-conditioning also includes any thinly-veiled "hypothetical" facts and scenarios that you present to the jury during voir dire. Your jurors can read between the lines and understand that you're really feeding them facts about the case. There is a world of difference between overt pre-conditioning and "subtle persuasion," which involves using lines of questioning in voir dire that get jurors thinking about the eventual issues and facts that they'll later hear in trial your way, without actually sharing any specifics or connecting the dots between their experiences and your facts out loud. When a lawyer tells the jury in voir dire "the school district left the students unsupervised for an hour, does anyone think that's okay?" that is overt pre-conditioning. But when a lawyer asks the jury "for those of you who have young children, what steps do you take to make sure your child is always safe?" that is subtle pre-conditioning.

So besides being technically inappropriate in court, what's wrong with advocating as early as possible and trying to win over your jurors at the first opportunity? The answer lies in the fact that your jurors haven't yet been selected and sworn yet. The problem with overt pre-conditioning is that, no matter how many times you or your judge instructs the jurors that they haven't heard any facts or evidence until it comes from the witness stand, 90% of jurors don't differentiate. Once you've told them what you say the facts will show, your jurors will be convinced that they've heard some evidence. That's why drawing objections and the wrath of your judge aren't the only reasons that you shouldn't overtly pre-condition your jurors during jury selection, or even the best reason. Losing your best jurors (likely to cause challenges) is that best reason.

I've seen it countless times during jury selections; once jurors start believing they know what the facts are, they start expressing opinions about the facts and merits of the case, not just the issues involved. And once they start forming and expressing opinions during voir dire, it's incredibly easy for the other side to get them excused for cause. Essentially, the better you've pre-conditioned your jurors, the more you've done the other side's work for them: identified your best jurors, and brought their biases to the surface. If only you

had waited until your jurors were seated and sworn to convince them, those great jurors might still be on your panel.

Now I realize that this advice may seem obvious, but the reality is that many lawyers don't realize that they're engaging in dangerous pre-conditioning. Sometimes the pre-conditioning is obvious and intentional: for example, prefacing voir dire questions with facts about the case simply to get those facts in front of the jury. But sometimes the pre-conditioning is inadvertent, accidental, or meant to be subtle. So give some serious thought to whether you've been guilty of doing any of these things:

Have you ever crafted a "neutral" statement of the case to be read to the jury that included allegations of facts, not just your causes of action or defenses?

Have you ever been allowed to give a "mini-opening" to your jury before voir dire that you tried to make convincing? I've written on the dangers of giving a convincing mini-opening before (read it if you haven't already), but I'll summarize my advice: the purpose should be to make it easier to identify your bad jurors in voir dire by highlighting your bad facts, not your good ones. Don't try to "win" your mini-opening. Instead, tell your jurors what you are alleging without sharing your good facts; instead of sharing those specifics, tell your jurors "we'll show you evidence on that" without tipping your hand. Save it for your actual opening; you'll be surprised how well jurors respond when they realize that your case is stronger than they imagined.

Have you ever tried to be subtle and asked jurors about "hypothetical" scenarios in voir dire that were identical to what your good facts will be? Jurors are smart; they know what you're trying to do, and they are fully aware that you're telling them actual facts in your case. Many judges will get upset and sustain objections to these fact-loaded hypotheticals, but that obscures the main point: no matter how you disguise your facts, your jurors will be convinced they've heard "evidence" and express pre-judgments if they were moved by it.

Long story short, keep your good facts to yourself until your opening statement, after your jurors have been selected and seated. It's dangerous for both sides, but let me also say that it's especially dangerous for plaintiff's lawyers, because the other side gets to go last in voir dire and has the opportunity to sweep out the jurors you've convinced too strongly. Plaintiff lawyers have double the reasons not to do it, and defense counsel should absolutely use it to their advantage when a plaintiff has gone too far.

Don't worry about losing a golden opportunity to win over your jurors; your jurors will wait until at least your opening statement to pass judgment on your case. They won't expect you to prove anything before then. In reality, the only way you can "lose" your case before opening statement is by losing personal credibility: by coming across poorly, not listening to them, and forcing the law and attitudes down their throats. Trying your case too early is actually the worst example; jurors don't like to feel manipulated. Don't worry about leaving your facts for later and simply promising them that "we'll show you evidence on that" whenever you tell them what you're alleging.

With all that said, a good jury selection should absolutely include some pre-conditioning, as long as it's subtle persuasion. You do need to ask questions that get jurors thinking about your case issues in ways that match the themes of your case, and there are ways to do that without sharing any facts from your case. My apologies if you're going to trial this month or next, because I'm going to save that topic for the next jury tip.

10 Tools of Highly Effective Voir Dire

1. Develop your case strategy, case narrative and themes ahead of voir dire.
2. Ask questions of jurors that internalize your theme and principles – not the facts – in a way that the jurors can relate your themes to their lives and ultimately agree with your themes.
3. Elicit information about the potential juror's background and experiences in areas of education, employment, age, experiences (direct and indirect). Have a dialogue with every prospective juror.
4. Listen to the jurors and understand jurors' views who are hostile to you – don't devalue their position.
5. Ask "how do you feel about" questions.
6. Questions like "wouldn't you agree" or "don't you think" or "can you promise me" are sometimes perceived as forcing your point of view upon jurors.
7. Don't develop preconceived notions about a demographic or age groups.
8. Follow up, follow up, follow up.
9. Don't tell jurors that you are looking for "fair and impartial jurors" because then they might give fair and impartial responses vs. honest responses.
10. Don't share your good facts until opening.