

The Odd Way We Instruct Jurors to Decide Civil Cases: A Study in Overprecision

By Nelson P. Miller

This is not a typical Plain Language article. But it's thoughtful and provocative, and we have often noted the overprecision and complication that law is prone to—what one report on plain English called “unnecessary concepts.” Here is one case in point that has probably not occurred to most of us. See what you think.

—JK

“Things that are true and things that are just have a natural tendency to prevail over their opposites, so that if decisions of Judges are not what they ought to be, the defeat must be due to the speakers themselves, and they must be blamed accordingly.”

—Aristotle

An inappropriate language of pseudo-science assumes a place at the very core of our civil jury instructions. Our civil jury instructions describe the critical event of deciding a case by using an abstract and pseudo-scientific analogy—as if our jurors should be calculating clinicians without heart, soul, sense, or judgment.

Our first definitional civil jury instruction, SJI2d 16.01, states that “the proposition on which [a] party has the

burden of proof” must be established “by evidence which outweighs the evidence against it.” An alternative form of SJI2d 16.01 defines the higher “clear and convincing evidence” standard (which is applied in fraud cases, among others) by dictating that “the evidence must more than outweigh the evidence against it” and must be established “with a high degree of probability.”

Some form of SJI2d 16.01 is read in every civil case tried to a jury in Michigan—and we use its pseudo-scientific analogy in other, equally ubiquitous jury instructions. The instruction on the credibility of witnesses, SJI2d 4.01, tells jurors that they “must determine which witnesses you will believe and what weight you will give to their testimony.” The instruction on weighing conflicting testimony, SJI2d 4.07, which by its self-contradiction seems an odd exercise in superfluity, states that “when [jurors] weigh the evidence as to a particular fact,” they may consider the number of witnesses testifying on one side—but need not do so if the lesser number of witnesses is more convincing.

This “burden of proof” language, which reappears in a host of other instructions, will not seem peculiar to the practitioner who is steeped in legal jargon. But the point here is that the use of terms like “prove,” “burden,” “weigh” or “outweigh,” and “degree of probability” can only be figurative when one is describing a cognitive event—a loose analogy for some indecipherable race of impulses through a juror’s cranium. One cannot “prove” a law case (as a scientist would “prove” a theory), so that the same result can be replicated by and for others under the same conditions. Indeed, by our directed ver-

dict and JNOV standards, there must be juror discretion to choose for either side before there can even be a jury decision, so that a law case susceptible of “proof” in the plain meaning of that word would not even reach a jury.

And whatever a juror does in reaching a decision, in the literal sense it is not to “weigh” anything. To say that a jury decided because the “weight” of the evidence “proved” each proposition says nothing more tautologous than that the jury decided because it decided; insofar as evidence has no literal weight, the weighing of evidence is purely imaginary, and jury decisions are by definition discretionary rather than certain.

But more so, our idea that jurors will, even in a conceptual sense, accord “weight” to evidence and then balance evidence in an incremental fashion does not describe what typically happens. Studies instead show that juries reach their decisions by “faction-forming”¹—that is to say, individual jurors sharing the same view of the outcome quickly take sides before meaningful deliberation (before any collective “weighing” of evidence), and a verdict is reached when one side recruits enough like-minded jurors. Researchers have concluded on the basis of jury interviews that as many as 80% of jurors decide during opening statements,² a finding which suggests even more clearly that few jurors decide in the incremental “weighing” manner of our “burden of proof” instructions. Or perhaps we should be even more concerned with the anecdotal evidence that non-lawyer jurors do not, despite our instructions and exhortations, even understand the burden of proof concept so as to apply it during deliberation.³

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Apparently, such a piecemeal, abstract process of weighing and summing conflicting testimony is unsatisfying and lends little authority to a decision. Exactly where there should be a compelling reason for a decision there are instead pluses and minuses and so, almost inevitably, a narrow margin which does not lend itself to an authoritative decision. The decision-making analogy that we force on jurors has too little intellectual content and not even a visceral appeal, and leaves no satisfaction in the outcome.⁴

It sometimes takes too much resolve and insight, as an advocate, to convey to jurors the fantastically human behavior of our clients. In our confidences, we lawyers know that an imagined world—a soap opera, for instance—has nothing on day-to-day reality. It is truly ironic that outside of

the courtroom (though not in it) lawyers make wonderful storytellers, so moved, entertained, and informed as we are by the escapades of our clients. It must then be some combination of insecurity, lack of imagination, or cultural artifact that causes us to use this odd language of science both in our jury instruction and in our closing arguments.

It is true that science and technology have wrought a fundamental change in all of modern culture. Scholar and scientist O. B. Hardison, Jr., has argued that fields which we traditionally regard as the antithesis of pure science (for example, art, architecture, and poetry) have in this century been influenced more by science than by imagination.⁵ Indeed, Hardison's view has been that history, language, art, and, ultimately, the very idea of what

it is to be human are disappearing with the blind and rushing advance of science and technology.

The problem is that law seems an acutely inappropriate place to employ the language and forms of science. Yes, there is a place in our civil trials for the use of forensics and the experimental methods of science. Testimony and jury decisions should be rational, based on observation, and consistent with the physical laws of the natural world. But science is, almost by definition, without that self-critical capacity to direct its methods to the better of two ends. Science provides a model "in which the bomb would be as welcome as the discoveries of the physician,"⁶ that is, a model without values. The language and forms of science are unable to communicate that human life is, by its very capacity for self-examination,

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uniquely subjective and value-laden. To apply the language of science to the act of judging is to miss the most essential aspect of a civil trial, which is to make a community judgment about the wisdom of certain conduct.

The root of the problem lies in a presumption that science is distinct from humanity—that arts and letters are apart from (and somehow less than) science, when in fact all of our disciplines are fatally and richly human. Naturalist Loren Eiseley described this false division between science and arts and letters as “the illusion of two cultures,” arguing that achievement in science is due as much to imagination (even playfulness) as to objectivity, and that science has over the course of centuries described the same phenomena using an array of differing schemes, without appreciating the irony in its having done so.⁷ Why should we presume in our courtrooms to employ a scientific method which is somehow divorced from human judgment, and in doing so honor a false division?

Lon Fuller observed that “one sometimes gains the impression that certain writers expect us to accomplish the impossible feat of reasoning without concepts.”⁸ But given that disclaimer, Fuller immediately went on to observe that

[t]he trouble with the law does not lie in its use of concepts, nor even in its use of “lump concepts.” The difficulty lies in part in the fact that we have sometimes put the “lumps” in the wrong places,



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*and in part in the fact that we have often forgotten that the “lumps” are the creations of our own minds.*⁹

It seems that the idea of “proof” by the “weight” of evidence has reached Fuller’s point of our forgetting that that particular fiction, like all others, is a creation of our own minds. Unfortunately, we are true believers in our own litany—that it is possible, logical, and laudable to “weigh” testimony.

If jurors are literally and cognitively unable, and in practice unwilling, to “weigh evidence,” we should be instructing them differently. One alternative would be to rewrite these preliminary, pseudo-scientific procedural instructions, SJ12d 4.01, SJ12d 4.07, and SJ12d 16.01, replacing the “weights and burdens” analogy with some more suitable exhortation. Instead of encouraging jurors to “weigh” evidence to see in which direction it preponderates, perhaps we should be telling them to decide in a manner that is consistent with the substantive law that they are about to hear, and to decide wisely and justly.

But a better alternative may be to simply abandon these preliminary procedural instructions, SJ12d 4.01, SJ12d 4.07, and SJ12d 16.01, altogether, because jurors are already committed by oath and circumstance to reaching a decision that will appear just, wise, fair, and authoritative. Why substitute any decision making analogy, scientific or otherwise, for the essential point that jurors are there to exercise authority, in a way that is consistent with the law and community values? Why, especially, should we take jury instructions which are already too long and hard to follow, and include in them an unnatural and unworkable pseudo-scientific formula for deciding?

Our ultimate concern should be that by using an inappropriate scientific fiction as a metaphor for decision making, we are not fulfilling the promise of our profession or of the trials which are our most essential institution. A trial should be a place to define

proper conduct—as a means to reach a deeper understanding for those who are differently situated.¹⁰ By suggesting that decision making should be accomplished by weights and measures, we disguise the humanity of our clients and deprive our jurors of the chance to reach an authoritative decision. By choosing a language of science, we not only misunderstand and fail to carry out our proper role as advocates for good sense and justice, but we also fail to fulfill the promise that a trial holds, as a place to define in a coherent manner, and to change for right reasons, the conduct of our clients and their opponents. ■

Footnotes

1. “Faction size is the most important determinant of the outcome of deliberation.” R. Hastie, S. Penrod, and N. Pennington, *Inside the Jury* 106 (1983) (citations omitted) (citing and summarizing many jury studies).
2. Shoss, *Beyond the Locked Door: A Lawyer's Perspective on Jury Duty*, 33 *For the Defense* 2, 4-5 (June 1991).
3. Shoss, *supra*, at 3, 5 (“the concept of burden of proof is so elusive for the average juror” that even bright and logical jurors are likely to emerge from the trial without a clear grasp of the concept).
4. Without speaking specifically of jury instructions, Joseph Vining has with special insight linked law's conception of the mind as functioning in an incremental sense, with the conclusion that the conception of law as process is unsatisfactory: “The metaphor of mind as a taking into account of weighted factors, and all the other perceptions of law as process, leave a hole at the center where the substance should be, and regress away when they are grasped at . . .” J. Vining, *The Authoritative and the Authoritarian* 172 (1986).
5. O. B. Hardison, Jr., *Disappearing Through the Skylight* xi (1989).
6. L. Eiseley, *The Star Thrower* 276 (1978).
7. See Loren Eiseley's essay “The Illusion of the Two Cultures,” which has most recently been reprinted as a chapter in the posthumous collection, L. Eiseley, *The Star Thrower* 267-279 (1978), but which first appeared in 1964 in the periodical *The American Scholar*.
8. L. Fuller, *Legal Fictions* 136 (1967).
9. *Id.*
10. J. B. White, *When Words Lose Their Meaning* 274 (1984).