Jury Verdicts: The Whole Greater Than Pieces

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STANDARDS of review do matter and they are not always mere semantics. Take, for instance, the erstwhile "academic" debate over whether a federal court that is reviewing a jury verdict should look to both sides of the evidence.[1] To be sure, in very many cases the point is moot because the same review decision would be made regardless of which test—both sides or only the evidence supporting the verdict—is applied.[2] In most such cases, the verdict is affirmed under either test. In others, though less often, the verdict is reversed as unreasonable, again under either test.

Explicit examples of this "mooting" strategy abound in the *Erie* situation,[3] in which some federal circuits have applied the relevant state's standard, in cases brought under diversity jurisdiction, to review a jury's verdict for sufficiency of the evidence to support it.[4] Because such a rule forces the federal appeals court to apply a different review rule than it would in an ordinary civil action (at least where the state's standard differs), such cases present, roughly speaking, a deviation from the usual "control" of a generic *reasonableness* review test used in federal civil appeals (which may look to both sides of the evidence). For example, an appeals court may apply Tennessee law, which provides the stricter *complete absence* jury review standard.[5] Therefore, the use of the state stan-

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1. *See* Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009 (1982) (White, J., dissenting from denial of certiorari) (urging majority to resolve circuit split on differing jury review tests used in federal appeals because the standard applied "will often be influential, if not dispositive," so the conflict "is of far more than academic interest").

2. *See, e.g.*, Dace v. ACF Indus., Inc., 728 F.2d 976, 977-78 (8th Cir. 1984) (on rehearing); Gold v. National Sav. Bank, 641 F.2d 430, 434 n.3 (6th Cir. 1981).

3. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (denying general federal rule requiring application of state law in diversity cases, but apparently allowing federal courts to determine and apply their own procedures).

4. *See* Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. REV. 271, 290-308 (1994) (collecting cases). Although the Seventh Circuit has since adopted a federal standard for such diversity cases, see Mayer v. Gary Partners & Co., 29 F.3d 330 (7th Cir. 1994), some circuits continue to apply the state jury review test, and the issue still deserves Supreme Court resolution. *See* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 3.08, at 3-68 (3d ed. 1999).

5. *See, e.g.*, Truan v. Smith, 578 S.W.2d 73, 74 (Tenn. 1979); Kaley *ex rel.* Lanham v. Union Planters Nat'l Bank, 775 S.W.2d 607, 611 (Tenn. Ct. App. 1988); *Gold*, 641 F.2d at

dard may vary results in that court. Some such applications appear so inconsistent with the predictable federal result that they serve to illustrate, or at least suggest, the viable influence of review standards.[6]

Consider the Sixth Circuit's 1987 decision in *Finch v. Monumental Life Insurance Company*.[7] The court specifically applied Tennessee's *any material evidence* standard to review a jury verdict in favor of a life insurance beneficiary.[8] The insured husband had failed to pay his premium, but his widow testified that he regularly did so when he received a notice. The insurer sent four such notices to several people in its files; the insured was in its files; notices were mailed. Yet no direct proof was offered that notice was specifically sent to or received by the insured. The court found that this raised a sufficient inference that he did not receive notice. Thus, the judgment entered on the verdict was affirmed.[9] With the evidence presented in that way, it may be unsurprising that the panel majority affirmed. And those were indeed the record facts.

Or some of them. As the dissent countered, other record facts made unlikely the jury's inference that the husband had failed to pay due to lack of notice rather than his own deliberate choice. In fact, within only a few months before the nonpayment, the husband had written to the defendant insurer an angry letter in which he threatened to "discontinue coverage" because he had just received a 30% rate hike. Yet the jury's finding assumed that the husband did not follow through and discontinue payment. Instead, the story was that he failed to receive four separate notices sent by computer in four batches to a file of names which included his own (while others in the file were shown to have received them).[10] The jury's inference that all four letters were misdirected was "a truly extraordinary coincidence,"[11] said the dissent, not sufficient to support a plaintiff's verdict.

434; TENN. R. APP. P. 13(d). Under a *complete absence* test, of course, any evidence supporting a verdict requires affirmance, even if contrary evidence appears to overwhelm that result. Tennessee's *any material evidence* standard, which affirms a jury verdict even short of "substantial" evidence (the usual threshold in most federal courts), echoes the *complete absence* standard used in older Supreme Court opinions and modern Jones Act and F.E.L.A. appeals. *See generally* CHILDRESS & DAVIS, *supra* note 4, §§ 3.03, 3.07 (discussing older cases using the *any evidence* test, and restrictive Jones Act and F.E.L.A. review). Several states still apply some form of the restrictive test or look to one side of the evidence. *See id.* § 3.03, at 3-23 n.14.

6. For example, using the *complete absence* test, the Sixth Circuit reversed a directed verdict granted to plaintiffs on rather slender evidence of arson. *See* Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1252 (6th Cir. 1984) (Kennedy, J., dissenting) ("the circumstantial evidence here was simply insufficient"). The choice of a state jury test may have affected this controversial result. *See also* Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 878 (5th Cir. 1967) (emphasizing clear differences in state standards in deciding particular cases).

7. 820 F.2d 1426 (6th Cir. 1987).

8. *See id.* at 1430 (citing Tennessee law).

9. *See id.* at 1430-31 (affirming denial of judgment *n.o.v.*).

10. *See id.* at 1433-34 (Nelson, J., dissenting).

11. *Id.* at 1433 (adding that jury inference was speculation).

Nevertheless, that might be the inevitable result of *any evidence* review on such facts, whereas the usual federal review would demand reversal. The dissenting judge did not say so, but affirmance would seem unthinkable under a less strictly stated test such as *reasonableness* or *substantial evidence*, or especially if the reviewer were allowed to look to both sides of the evidence and truly consider the reasonable inferences to be drawn. To the extent affirmance can be justified at all, it appears to follow from an application of Tennessee's unusually generous (to the plaintiff) standard. At the least, the *Finch* case, in its juxtaposed factual presentations, illustrates the decision-making potential of a standard of review as applied.[12]

To me, *Finch* not only illustrates that review tests count, but also represents the clearest real-world example of why it is both important and fair to look to both sides of the evidence when performing the review function. Trials are stories. The jury's decision is a search for "truth." At least, it is some courtroom version—somewhat stylized and finalized—of the truth.[13] Truth-finding is generally the jury's job and it is not to be lightly interfered with. Even a reviewing scrutiny that has substance and looks to all the evidence should nonetheless be made with great pause and be highly deferential. And it is: most jury verdicts are routinely affirmed under federal circuit precedent that looks to both sides of the evidence in reviewing the jury's truth-finding process and product.

I think an incomplete picture is drawn when the jury's truth-finding function is conceptualized in terms of individual inferences, facts, conclusions, or "pieces" of truth. Juries do sift through the evidence, in lots of pieces, and may well use a piecemeal perspective when approaching their finding. And they should. But ultimately, I suspect that the jurors' final rendering process is more of a gestalt, more of a global and foresty approach to the case before them, than just an assessment of trees. The trial strategy employed to speak to the jury was all about story-telling in a broader sense, and I think the jury ultimately must decide which story is right.

If trials are stories, then the courtroom search for "truth" is more about true and false stories than about true and false facts (or individual units of fact). The verdict then resolves a conflict in the larger stories, perhaps by resolving factual and inferential disputes too, but finally to accept one truth, one presentation.

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12. This point, that *Finch* exemplifies the view that standards of review matter, was first noted in Childress, *supra* note 4, at 302.

13. *See* Milner S. Ball, *Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz*, 1983 AM. B. FOUND. RES. J. 565, 569-70 (1983) ("this does not mean that we lose the notion of truth[; r]ather, truth becomes a creative relational act, an adventure" and "to litigate is to participate in the creation or performance of truth"); Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 THE REC. 534, 543 (1975) ("courtroom truth is a unique species of the genus truth, and . . . it is not necessarily congruent with objective or absolute truth, whatever that may be").

It is fitting, I conclude, that the *review process*, which checks and balances this trial process, also be about resolving the larger truth—the warring stories—and likewise use battles of facts and inferences to play out the conflict. Yet the battles over facts and units of fact should on appeal, even more so than at trial, be seen as mere battles and not the war itself. Still there is only one result to be given and one conclusion to be drawn.

Viewed in this way, the appeal (or any jury review) must necessarily take account of all the evidence admitted at trial and potentially considered by the jury. Stories are not sensibly believed or discounted without viewing the larger factual array. Facts and individual inferences may be important in isolation but become meaningful to the larger story—the one true story, as courtroom truth goes—only in a complex interweaving with other information developed below. If that is how ordinary people like jurors sensibly make decisions, I believe that it follows that the institutions that pass on their judgment calls should likewise view the case as a whole without perceiving facts or even conclusions unto themselves.

Some juries, of course, fail to be sensible. They have made decisions by mere emotion, prejudice, or wealth-shifting motives unsupported by accepted law. If so, their renderings should not stand. *Finch* was such a case. It seems that only an unrelenting one-side-only viewpoint justifies accepting the strained story that this jury "bought" (or, more likely, that it *imposed* on the facts for obvious sympathetic motives). The true story, when both sides of the evidence are viewed, must be that the husband angrily canceled his policy as he said he would. That story should have been binding under accepted law. That it was not remains a testament to the potentially decisive force of a virulent one-side-only perspective.

That such an isolationist perspective is flawed, to me, is shown by the dramatic but skewed process of inference which results when one learns only one side of the facts and, sensibly but wrongly, concludes that the husband may well have failed to receive any notice. Once the other facts (including the husband's angry letter) are pureed into the mix, any reasonable mind would have an epiphany of the true story. She would roll her eyes partly in feeling a little sheepish about jumping to a conclusion too quickly. If the other facts were not revealed before the final result is tallied, she would feel cheated or tricked into drawing the wrong conclusion. The limited perspective of facts has led to the wrong story being believed. Even in a system built on a notion of courtroom truth that is understandably more artificial and reductionist than is real truth (whatever that is), it would venture too far from any acceptable courtroom truth to ignore competing parts of the story. That process would simply be *too* artificial in an admittedly artificial process. No one settling disputes naturally thinks that way: tell me only "your" story. Nor should appellate courts.

The U.S. Supreme Court now seems to recognize this for the federal courts it oversees—though without engaging in any serious discussion of the appellate process, the role of juries, or a philosophy of what it means

to find or review facts. The unanimous decision in *Reeves*[14] is bare of this. The opinion picked a rule, but gave no guidance to courts as to why this rule is right and how it can play out in important applications to real cases. Instead, much of the important but skipped debate is relegated to being called a mere "semantic" ploy.[15]

Justice O'Connor must know better than that. Yes, it is mere semantics when the case *sub judice* may be resolved under either view of the evidence. Most cases may be mooted that way. But not all may be, or else there was no need to take *certiorari* on the issue. And Mrs. Finch would not have received insurance benefits.

For the relatively few cases in which hearing one story only would lead to a different reasonable conclusion than hearing a fuller story or competing stories, the review rule is crucial and not a matter of semantics. The Supreme Court recognized this in 1951 for administrative review, in Justice Frankfurter's landmark opinion in *Universal Camera Corporation v. National Labor Relations Board.*[16] The issue may be no less potentially decisive in jury cases. Likewise, in the much-cited 1979 decision setting the sufficiency standard to review criminal convictions on habeas, the Court indicated that evidence sufficient if considered in isolation might not be reasonable to support a conviction when swamped by the entire body of evidence.[17] At bottom, the *Reeves* Court gave short shrift to the import and depth of the issue before it, but fortunately it did seem to pick the right rule for federal courts.

Professor Dorsaneo has, of course, given much more careful attention to the issue for federal courts and, especially, for Texas appellate courts reviewing tort cases. The jury review issue—one side versus both sides—needed current attention, and still has no explicit resolution in Texas courts. Our disagreement may in fact be mere semantics. Professor Dorsaneo supports looking to the evidence as a whole in initially reviewing whether a particular inference is reasonable.[18] Only reasonable inferences should be upheld, and their reasonableness—beyond mere conjecture or speculation—is apparently a function of the whole record. More significantly, equally valid inferences belong to the jury, not to second-

14. Reeves v. Sanderson Plumbing Prods., Inc., ___ U.S. ___, 120 S. Ct. 2097 (2000) (per O'Connor, J.) (discussed in Professor Dorsaneo's article).

15. *See id.* at ___, 120 S. Ct. at 2110 ("On closer examination, this conflict seems more semantic than real."). Nor did the Court even mention the constitutional issue involved in the review over civil juries in federal courts under the Seventh Amendment. A constitutional resolution, and more policy discussion of why review should consider the whole record, was thoughtfully and more fully offered in the Fifth Circuit's landmark decision in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-77 (5th Cir. 1969) (en banc) (since then, partly overturned on other [application to maritime cases] grounds).

16. 340 U.S. 474, 488 (1951) (holding that agency fact-findings are reviewed for substantial evidence on the record considered as a whole).

17. *See* Jackson v. Virginia, 443 U.S. 307, 319-22 n.15 (1979).

18. William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1503 n.21 (2000).

guessing appellate judges. I certainly agree with that.[19]

To be sure, I would emphasize that appellate courts perform their review function most responsibly and sensibly when they account for all the evidence in drawing such inferences and measuring the juror's choices. As above, I would say that everyday decision-making is done that way, and thus the review process should not be too far divorced from that reality. Although we seem to disagree about the extent to which (or at which stage of the process) the record as a whole is properly reviewed, our views do overlap significantly. And we no doubt agree that it is time for the Texas courts to take a serious look at the issue and move beyond their conflicting precedent, loose language, and mystifying applications. Hopefully, the Texas courts will give the matter more scrutiny than did the U.S. Supreme Court.

Nonetheless, Professor Dorsaneo openly sorts out the final review step of making a decision among competing inferences, and on this step he would urge Texas courts to reaffirm the state's traditional rule of ignoring those inferences that oppose the jury's finding. On this level, he supports a one-side-only review and empowers the jury and the jury alone to do the conclusion-making within the forest of inferences. I would prefer adoption of the federal *Reeves* rule instead, for the reasons stated above, but I recognize that at this point the matter is hairsplitting. I think it crucial that all of the evidence be used to review juries, but it seems sufficient that such be done in the inference-checking phase of the review process, antecedent to the larger and final conclusion. For example, on the facts of *Finch* it is apparent that the review process Professor Dorsaneo suggests would allow the reviewer to consider larger record facts in checking the inference that the insured husband received no cancellation notice. The reasonable inference on these facts is that he did. The appellate court should not have allowed the jury to speculate otherwise. It makes little difference that, ultimately, the final conclusion is for the jury to make (on only plaintiff's evidence) if it is not permitted (as I say it should not be) to preliminarily believe—contrary to record facts and reasonable inference—that the husband was not notified at least one of the four times.

Recognizing the power and duty of reviewing inferences for their reasonableness, on whatever evidence the jury might have considered, is enough to protect the process and has support, Professor Dorsaneo shows, in Texas precedent. Because his approach does not venture far from the unique Texas review jurisprudence, it has the advantage of being traditional and modern in one fell swoop.

At the least, the recent turmoil among Texas cases and Texas justices, Professor Dorsaneo rightly suggests, demands some thoughtful judicial crafting of a firm and predictable review process. Whether or not the

19. *See generally* CHILDRESS & DAVIS, *supra* note 4, § 3.05, at 3-43 (criticizing and noting rejection of the federal rule, in old railroad cases, that a reasonable inference cannot stand in the face of an equally plausible inference).

review rule is drawn fully into line with the new federal rule, I would say that it should account for the reality that inference-drawing is done (whether initially or finally) by having warring stories fight it out in one's mind.[20] At some point this review should consider all the admitted evidence, as surely the jurors themselves did at trial.

20. *See* Dorsaneo, *supra* note 18, at 1514 ("[s]easoned appellate lawyers know that appellate judges try to determine in their own minds 'what really happened'"). Yet, Professor Dorsaneo reminds the courts that "jury findings grounded on probative evidence" should be affirmed regardless of the "what happened" hunch. *Id.*