Jury Review after Reeves v. Sanderson Plumbing Products, Inc.: A Four-Step Algorithm

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PROFESSOR Dorsaneo called me soon after the Supreme Court decided *Reeves v. Sanderson Plumbing Products, Inc.*[1] He said it was an important decision. He wanted to make sure that we inserted it into our casebook.[2] I hope he was right.

The trouble is, the significance of *Reeves* depends upon the eagerness of trial and appellate judges to follow it. Review of jury findings is fact specific, and a judge of either the right or the left who finds the result of a jury trial distasteful easily can bury his idiosyncratic preferences under logical-sounding rhetoric.[3] This, in fact, is one reason my approach differs slightly from that of Professor Childress, whose otherwise interesting critique does not resolve this human problem.[4] The temptation toward abuse of power can only be overcome by a degree of humility that is not characteristic of all judges. Appellate decisions that violate the *Reeves* holding will not look like the stuff of Supreme Court review, and as a practical matter, it will be impossible for the Court to enforce its decision in *Reeves*.[5]

There is no question, however, that *Reeves* gives a more coherent statement of the principles governing jury review than what we had before it was decided. In our casebook, *Reeves* takes the place of two less clear decisions: *Pennsylvania Railroad Co. v. Chamberlain*,[6] which reaches an ostensibly correct result but is miserably reasoned, and *Lavender v. Kurn*,[7] which also reaches a satisfactory result (while telling a wonderful story) but does not illustrate the proper use of a judgment as a matter of law or tell us how to analyze one.

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    1. 530 U.S. 133 (2000).
    2. David Crump, William V. Dorsaneo, III, & Rex R. Perschbacher, CASES AND MATERIALS ON CIVIL PROCEDURE (4th ed. 2001) [hereinafter cited as Casebook].
    3. *See infra* note 10 and accompanying text.
    4. *See infra* notes 22-28 and accompanying text.
    5. The Supreme Court's role is not to correct errors in individual cases (particularly not factual ones) but uniformly to resolve important questions of federal law. *See* Casebook at 658.
    6. 288 U.S. 333 (1933).
    7. 327 U.S. 645 (1946).

Chamberlain is a particularly troublesome decision because the Court justifies its result by three types of reasoning, two of which are dubious. The Court's first line of analysis is that plaintiff's evidence was circumstantial, and therefore, said the Court, it must give way to clear direct evidence.[8] This is a careless statement. Strong circumstantial evidence, such as a fingerprint, can stand up even against clear direct evidence, such as the fingerprint owner's insistence upon alibi. Reasonable people would agree that a jury could credit the fingerprint. Still today, however, appellate decisions contrary to credible circumstantial inferences remain a problem. The Court of Appeals decision in *Reeves* itself is an example.[9]

The second reason that the Court gave for its decision in *Chamberlain* was the equal inferences rule.[10] Professor Dorsaneo has given us an excellent analysis of this problematic device.[11] The equal inferences rule invites misapplication because it is a truism, a principle that follows as a matter of definition. If two inferences are exactly equal, it follows logically that neither is proven by a preponderance. Thus, in a case in which the judge can confidently say, to a mathematical certainty, that the two possibilities that will decide the case are in precise numerical balance, so that neither is preponderant, and that no inferences depending upon human experience are useful, the equal inferences rule theoretically can resolve the outcome. But this kind of case must be extremely rare, and if it arises at all, it probably will be the product of contrivance by the parties, grown as artificially as an orchid in a greenhouse. The difficulty with the equal inferences rule is that it does not easily confine itself to this odd situation, and judges, if they wish to, can misapply the rule by using it to resolve cases that depend upon human experience.[12] In summary, the trouble with the equal inferences rule is that it rarely is applicable but easily transforms itself into a tool for illegal interference with proper jury decisions.

Efforts to formulate a sound example of the equal inferences rule are the best proof of its limitations. In *Lozano v. Lozano*,[13] Justice Nathan Hecht gave us a (characteristically) well-crafted illustration: If the only evidence we have is that the sun is at the horizon, we cannot know whether it is sunrise or sunset. This example does indeed justify applica-

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8. *Chamberlain*, 288 U.S. at 338.

9. 197 F.3d 688 (5th Cir. 1999).

10. *Chamberlain*, 228 U.S. at 339.

11. William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. Rev. 1695 (2001).

12. For example, in *Chamberlain* itself, the Court used the equal inferences rule to resolve the question whether a "loud crash" came from the railroad cars at issue or from somewhere else. *Id.* at 340-41. These two inferences, however, were not equal. The possibility that the crash came from the cars at issue might have been considered more probable or less probable because of the circumstances, including the ostensibly credible testimony that these cars were moving. The Court's reasoning might have been more sound if it simply had labeled this inference too weak to aid substantially in reaching a preponderance.

13. 52 S.W.3d 141, 157 (Tex. 2001).

tion of the equal inferences rule, because there are only two possibilities, each with an exact, mathematically precise probability of one-half.

Here is my problem with this (sound) example. Maybe there are some cases like Justice Hecht's hypothet that arise in real courts, but few of us have ever seen one. In real life, the jury usually will have more information because the witness will have seen the sun for a period of time, or will have observed that heavy traffic was proceeding away from the city rather than toward it, or will have watched half-awake people drinking coffee. These items of information give rise to useful inferences that depend on human experience, and they show how the equal inferences rule dissolves into a house of cards in the circumstances of actual litigation. At the same time, judges can fudge to reach desired results in cases that actually are within the competence of the jury by citing this rarely useful rule even though it really does not apply.

Lavender v. Kurn furnishes a better answer, as Professor Dorsaneo explains. The jury there had to decide between two causes of death for plaintiff's decedent: either the railroad's mail hook hit him, or he was killed by robbers.[14] There was evidence to support both conclusions, but neither was overwhelmingly proved. A sloppy analysis, such as that in *Chamberlain*, might have declared the two inferences equal. And in a way they are "equal," in the sense that each is believable, and there is no logical means by which to separate them. But this is not what is meant by the equal inferences rule, because whenever assessing varying degrees of believability on the basis of different human experiences, it is necessary to resolve the balance of probabilities. The inferences in fact are not equal.[15]

The Supreme Court dealt effectively with these problems in *Lavender*. "It is no answer," said the Court in its famous statement, "to say that the jury's verdict involved speculation and conjecture."[16] A measure of these ingredients, based upon the jurors' collective experience, is precisely what we expect the jury to add to the process. Paradoxically, unless some measure of conjecture is required to resolve the case, there is no role for a jury.[17] If the case can be resolved from uncontested facts and logic alone, if all that is required, for example, is to add together two items of admitted damages, then this is the type of case in which a judgment as a matter of law most clearly may be granted.[18]

The third rationale given by the Supreme Court in *Chamberlain* was the only one that was useful. The testimony of the linchpin witness was "simply incredible," if it was taken to mean that he saw the collision

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14. *Lavender*, 327 U.S. at 654.

15. *See supra* note 13 for an example.

16. *Lavender*, 327 U.S. at 654.

17. *See* Casebook at 610.

18. *See, e.g.*, Dittberner v. Bell, 558 S.W.2d 527 (Tex. Civ. App.–Amarillo 1977, writ ref'd n.r.e.) (rendering judgment as a matter of law on the basis of uncontested fact and mathematical calculation).

which the plaintiff claimed had occurred.[19] With no particular reason to observe the movement, in darkness and heavy mist, looking at a narrow angle over the distance of three football fields, the witness would have found his vision obscured by the nearer of the lines of railway cars that he claimed came into contact.[20] If an inference is logically precluded, or if it may be discarded by reference to human experience that is not individual but universal, a proper case arises for a judgment as a matter of law. The useful part of *Chamberlain*, therefore, boils down to the idea that a judge may set aside a jury's verdict only if reasonable minds cannot differ. But then, we already knew this much, and the principle provides us with only the most general guidance.[21]

Professor Dorsaneo does well at explaining how full record review can be made compatible with deference to the jury after *Reeves*.[22] Perhaps it is useful to translate his reasoning into a set of steps for the judge to follow, or an algorithm:[23]

1. Indulge every reasonable credibility decision in favor of the jury's verdict.

2. Credit every reasonable inference that the jury could have drawn in support of the verdict.

3. Next, using the whole record, consider the evidence and possible inferences against the verdict, but *ignore every piece of evidence that the jury was not required to believe and every inference that the jury was not forced to draw.*

4. Credit only those (rare) inferences against the verdict that must be drawn because universal human experience makes them the only reasonable inferences.

This is the gist of *Reeves v. Sanderson Plumbing Co.*, and it condenses Professor Dorsaneo's explanation of that case.[24]

The hardest task, of course, is contained in the italicized portion of step 3 above. Unfortunately, it is not a requirement that is emphasized in *Boeing Co. v. Shipman*,[25] and it is troublesome that the Fifth Circuit has continued to cite *Boeing*, as Professor Dorsaneo shows, rather than relying upon the more complete statement contained in *Reeves*.[26] Only time will tell whether that court and others will exercise the self-restraint that the Supreme Court now has required, and even then all we can do is hope.

It follows that I find myself in the unhappy circumstance of disagreeing, in at least one particular, with Professor Childress's carefully written

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19. *Chamberlain*, 288 U.S. at 342.
20. *Id.*
21. This concept is so basic that it is expressed in Fed. R. Civ. P. 50.
22. *See supra* note 14, at 1719.
23. *See* Reeves 530 U.S. pt. III(A), at 149-51.
24. *See supra* note 14.
25. 411 F.2d 365, 374 (5th Cir. 1969) (en banc).
26. *See supra* note 14, at 1724.

response to Professor Dorsaneo.[27] Professor Childress is a prodigious and able scholar, especially in the area of standards of review, making my quibbles with his theory doubly uncomfortable. I believe, however, that the Court got it right in *Reeves* when it quoted Wright and Miller,[28] and I believe Professor Dorsaneo got the Court right when he treated that quotation as important.[29] If the jury reasonably could have disregarded a part of the movant's evidence, reviewing judges must disregard it also. I am concerned that what Professor Childress calls unrelenting whole-record review[30] would make judges into super-jurors, as might the power that Fifth Circuit judges have assumed under *Boeing* to balance, infer, credit, and make choices among reasonable inferences.[31] Instead, it is worth emphasizing, as the algorithm above does, that the first step in a judge's duty is restraint: to do the hard work of disregarding evidence that the jury did not have to credit and of rejecting inferences that the jury did not have to draw. The Wright and Miller quotation from Reeves emphasizes this duty, and I think Professor Childress understates the Supreme Court's deliberateness when he suggests that it does not express a true limitation[32] on whole-record review.

According to Professor Childress's critique, a court reviews the whole record, and it evaluates the jury's verdict for "reasonableness."[33] That is fine so far as it goes. But I am sure the Court of Appeals thought it was doing exactly that in *Reeves*. And I am equally sure the lower court in *Lavender v. Kurn* thought it was doing exactly that when it invalidated the proper jury verdict in that case. Although I doubt Professor Childress intends this, I worry that his approach might come across to courts of appeals as a loosey-goosey standard that tells the court, "Roll it all up in a ball and decide in a holistic way what you think is 'reasonable'." My concern is that such a communication would not have furnished the *Reeves* or *Lavender* judges with any meaningful guidance about the duty not to interfere with the jury's function in the myriad of credibility determinations and inferences it typically must make. The Wright and Miller quotation supplies at least a basis for this discipline. This is why I do not think its inclusion by the Supreme Court was an accident.

Professor Childress also suggests that this limit might be "inconsistent" with whole-record review.[34] Respectfully, I confess that I cannot perceive the inconsistency. The reviewing court must credit all testimony and inferences that the jury was "required to believe," say Wright and Miller.[35] The reviewing court thus looks to the whole record to find those

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27. Steven Alan Childress, *Taking Jury Verdicts Seriously*, 54 SMU L. Rev. 1739 (2001).
28. Reeves, 530 U.S. at 151.
29. *See supra* note 14.
30. *Childress, supra* note 29, at 1740.
31. Again, *Reeves* itself is an example.
32. *Childress, supra* note 29, at 1742.
33. *Childress, supra* note 29, at 1747.
34. *Childress, supra* note 29, at 1742.
35. *Reeves*, 530 U.S. at 151.

(rare) inferences that the jury was *forced* to draw. Yes, this approach limits the judicial role. Yes, it disallows wide-ranging fact balancing by the judiciary. But the Supreme Court in *Reeves* did not intend for the judicial role to be "unqualified" or "unrelenting," even in whole-record review. Instead, it meant for that role to be sharply limited, consistently with the purpose of the Seventh Amendment.

In many other countries, the judge fulfills a much greater role in finding the facts. The civil law countries of the Americas and Europe are examples. The civil law system has many benefits to commend it, and perhaps we should consider whether to adopt ideas from it. But if we were to adopt such a system, we would want our judges selected in a very different way than we select them now. And the change should make us first rethink the role of the jury. Jury trial, with its enormous expense, followed by the kind of evidence-balancing by politically selected judges that has resulted under *Boeing*, would give us the worst of both worlds.