

April 1989

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Recommended Citation

Stephen J. Wenderoth, *The Summary Jury Trial and Toxic Tort Litigation*, 6 Pace Envtl. L. Rev. 565 (1989)

DOI: <https://doi.org/10.58948/0738-6206.1503>

Available at: <https://digitalcommons.pace.edu/pelr/vol6/iss2/8>

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The Summary Jury Trial and Toxic Tort Litigation

I. Introduction

Alternative dispute resolution (ADR) is an increasingly popular tool of the courts for solving the growing problem of increased case loads, and the delays and costs inherent in today's litigation. Moreover, ADRs play an important role in attorney interactions, permitting them to save their clients the substantial costs of time, money and publicity that attend protracted litigation. Their continued use should be encouraged.

The popularity of ADR can be attributed to its easy adaptation to a variety of situations. An ADR may consist of private arbitration, a mini trial, the use of a special expert or master, and since 1980, the summary jury trial.

Unlike the voluntary use of arbitrators, the summary jury trial is a court-ordered means of dispute resolution. Utilized to bring about settlement on the eve of a big trial, the "trial" begins by the judge ordering the parties to present their respective arguments to a six member jury empaneled by the judge. After a brief preparation period, each attorney presents his or her case in a one-hour presentation. Following the presentations, the jury deliberates and renders a verdict. Immediately afterward, the parties are required to enter into negotiations, hopefully resulting in settlement of the case and thus avoiding the long, complex and costly trial, which is the hallmark of toxic tort litigation.¹

Part II of this paper will set out the history of the summary jury trial, its procedural underpinnings, and the procedure itself; initially as defined by Judge Lambros and then as modified by other district court judges. Part III will define a

1. For a complete discussion of the summary jury trial procedure, see *infra* notes 19-26 and accompanying text.

toxic tort, focusing on what distinguishes a "toxic" tort from a garden variety tort. Part IV of this paper will then discuss the summary jury trial's utility in effecting settlement between toxic tort litigants, paying particular attention to the peculiarities of toxic tort litigation raised in Part III. This paper will conclude that the summary jury trial is a practicable and effective means to facilitate settlement between toxic tort litigants.

II. The Summary Jury Trial

A. *The History of the Summary Jury Trial*

The summary jury trial was the creation of Judge Thomas D. Lambros, District Judge of the Northern District of Ohio.² Confronted with a caseload of over three thousand cases, Judge Lambros sought a means to reduce this burden while concurrently dealing with the attorney's imminent question: How will a jury view my case? He found the solution in the summary jury trial.

From the beginning, Judge Lambros did not envision the summary jury trial replacing a full trial. Rather, its purpose is to facilitate a settlement between parties, where the only impediment to effecting such a remedy is the disparity between attorneys as to how a jury would view their case.³ If, following a summary jury trial an attorney refuses to settle and insists on a full trial, the request will be granted with a *de novo* review of all materials. It would be as if the summary jury trial never took place. Such instances have been rare,⁴ however, reinforcing the utility of the summary jury trial as a reliable alternative to classic dispute resolution.

B. *Procedural Grounds for the Summary Jury Trial*

As a court-ordered device to effect settlement, the summary jury trial has its roots firmly planted in the Federal

2. JACUBOVITCH & MOORE, SUMMARY JURY TRIAL IN THE NORTHERN DISTRICT OF OHIO 1 (1982).

3. *Id.* at 3.

4. *Id.* at 7.

Rules of Civil Procedure.⁵ Federal Rule of Civil Procedure 1 states that the rules of procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action."⁶ In the effort to accomplish this, Rule 16(a) provides that "[i]n any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; . . . [and] (5) facilitating settlement of the case."⁷ Furthermore, pursuant to Rule 16(c)(7) "[t]he participants at any conference . . . may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . and (11) such other matters as may aid in the disposition of the action"⁸ Taken literally, Rules 1 and 16 not only authorize, but encourage development of ADRs such as the summary jury trial. Indeed, the Northern District of Ohio has adopted this interpretation by enacting Local Rule 17.02 which states "[a] Judge may, in his or her discretion, set any appropriate civil case for Summary Jury Trial or other alternative method of dispute resolution, as he or she may choose."⁹ Because the use of ADRs often dramatically reduce the time necessary to bring a controversy to resolution, their application clearly advances the dictates of the Federal Rules; to "secure the just, speedy and inexpensive determination of every issue."¹⁰

In addition to Federal Rule 16, Judge Lambros further justifies the summary jury trial by analogizing its concept to that of the advisory jury, Federal Rule of Civil Procedure

5. Summary Jury Trial, 103 F.R.D. 461, 469-70 (1984).

6. FED. R. CIV. P. 1.

7. FED. R. CIV. P. 16(a)(1), (5).

8. FED. R. CIV. P. 16(c)(7), (11).

9. Summary Jury Trial, 103 F.R.D. at 470 (quoting Northern District of Ohio Local Rule 17.02). See also Gwin, *Summary Jury Trial: An Explanation and Analysis*, KY. BENCH & BAR 16, 58, 58 n.33 (Wntr. 1988) (noting that Joint Local Rules for the United States District Court of the Eastern & Western Districts of Kentucky, Rule 23 and Rules of the United States District Court for the Southern District Court of Indiana, Rule 33, also have provisions for using the summary jury trial).

10. FED. R. CIV. P. 1.

39(c).¹¹ He maintains that the purpose behind the federal rule is to give the court and counsel the opportunity to "utilize a jury's particular expertise and perceptions when a case demands those special abilities."¹² The summary jury trial, therefore, closely parallels the advisory jury because it also assists the parties and the court in anticipating how a jury will perceive the facts of a case. Lastly, Judge Lambros defends the summary jury trial procedure as being part of a judge's inherent power to manage his or her own docket.¹³

This rationale establishing a judge's power to order a summary jury trial is not, however, without criticism. In 1987, the United States Court of Appeals for the Seventh Circuit held that Federal Rule of Civil Procedure 16 did not convey upon a court the power to order a summary jury trial.¹⁴ The court construed Federal Rule 16(c) as intending "to foster settlement through the use of extrajudicial procedures, . . . [but] not . . . to require that an unwilling litigant be sidetracked from the normal course of litigation."¹⁵ The court ruled that Federal Rule 16 was not coercive in nature, and thus a court could not order parties to submit to a summary jury trial. The court did not rule, however, on the propriety of a court ordering a summary jury trial pursuant to its own local court rules.

Nevertheless, despite this ruling, the summary jury trial continues to be actively used in several jurisdictions.¹⁶ Some districts, such as Ohio, have local procedural rules which give a judge discretion to order a summary jury trial,¹⁷ while others

11. FED. R. CIV. P. 39(c) states "(c) ADVISORY JURY AND TRIAL BY CONSENT. In all actions not triable of right by a jury the court upon motion of its own initiative may try any issue with an advisory jury" *Id.* See also Summary Jury Trial, 103 F.R.D. at 470.

12. JACOUBOVITCH, *supra* note 2, at 41.

13. *Id.*

14. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988). See also Maatman, *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 J. MARSHALL L. REV. 455 (1988).

15. Strandell, 838 F.2d at 888.

16. See Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 377 (1986) (listing the following states whose district court judges use the summary jury trial: Massachusetts, Pennsylvania, Oklahoma, Michigan, and Ohio).

17. See *supra* note 9.

continue to rely on Judge Lambros' rationale.¹⁸ Regardless of the source of authority, the summary jury trial continues to be practiced as a form of alternative dispute resolution.

C. *The Summary Jury Trial Procedure*

The summary jury trial procedure most often employed by judges is the one first articulated by Judge Lambros. While individual judges have adapted the procedure to meet their particular needs, their basic format is derived from the one first set out by Judge Lambros.¹⁹

The summary jury trial is initiated by a judge and presided over by the judge or a magistrate of the court. Unless the parties have been excused from the proceeding, they must appear with their counsel in court.²⁰ The judge then presents a ten member jury venire to counsel for consideration. Counsel are provided with a short character profile of each juror which has been completed by the jurors individually.²¹ The profile includes such information as the juror's name and occupation, the name and occupation of the juror's spouse and children, the juror's previous knowledge of any of the parties or counsel in the case as well as the nature of the case, and any adverse attitudes the juror has toward the nature of the action. Each attorney is permitted two challenges to arrive at a final six member jury for the proceeding.²²

Once the jury is selected, each attorney is given approximately one hour to describe to the jury his party's view of the circumstances of the action.²³ The time allotment for the attorney's presentation may be modified in multiparty cases, however, so that presentations can be offered by more than

18. Other district judges who use Judge Lambros' rationale are Judge McNaught in Massachusetts, Judge West in Oklahoma, Judges Enslen and Newblatt in Michigan and Judge Shapiro in Pennsylvania, to name a few.

19. The following procedure is adapted from the Jacoubovitch discussion of the same. See JACUBOVITCH, *supra* note 2, at 1-2.

20. *Id.* at 1. The presence of a court reporter at the summary jury trial is optional. *Id.*

21. *Id.* at 1-2.

22. *Id.* at 2.

23. *Id.*

one attorney. In addition, plaintiff's counsel may reserve a portion of the hour for a statement of refutation following the presentation by defense counsel.²⁴

In the summary jury trial, the evidentiary and procedural rules are few and flexible. Counsel may adduce exhibits for the jury and may describe the testimony of the witnesses, but only short passages of depositions may be read aloud.²⁵ Furthermore, no witness's testimony may be referred to unless the reference is based either on the product of a discovery procedure; on a written, sworn statement of the witness; or on a sworn affidavit of counsel that the witness would not sign an affidavit, "that the witness would be called in the event of a full trial, and that counsel has been told first hand of the substance of the testimony."²⁶

Following the attorneys' presentations, the presiding judge or magistrate delivers a brief statement of the applicable law to the jury, who then retire to deliberate. Although the jury is encouraged to return a consensus verdict, it may return a special report listing each juror's findings on liability and damages.²⁷ In complex cases, the jury may also be called upon to make rulings on separate issues. After the verdict or special report has been rendered, counsel may then meet with the presiding judge to discuss the verdict and establish a timetable for settlement negotiations.²⁸

While Judge Lambros' procedure continues to be the one followed by other judges on the federal circuit, some judges have begun experimenting with the procedure to make it more amenable to their particular case load. For example, when Judge Enslen was confronted with a complicated toxic tort case in the *Stites*²⁹ summary jury trial, he found it useful to convene two juries in the hope of giving counsel a better feel

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Enslen, *Alternative Dispute Resolution: Summary Jury Trial in a Toxic Tort Case*, 2 TOXICS L. REP. (BNA) 1015 (Feb. 17, 1988). See *infra* note 76 and accompanying text.

for the worth of their arguments. Another modification he instituted was permitting the lawyers to argue for up to four hours each instead of the sixty minute maximum. It was his belief that the extra time was necessary due to the complexity of the subject matter. He also permitted the use of videotaped witnesses as evidence.³⁰

There have been other modifications of the summary jury trial procedure. Judge McNaught firmly enforces the sixty minute maximum on presentations.³¹ He also places a thirty minute deadline on jury deliberations, and does not allow a lawyer any challenges to the jury he selects. However, he does permit a lawyer to utilize his sixty minutes any way he chooses, including permitting counsel to present witnesses.³² Of course, as with all summary jury trials, there is no cross examination. Of particular interest is Judge McNaught's practice of encouraging the attorneys to meet individually with the jurors after the summary jury trial to ask them questions as to why they voted the way they did.³³ This practice can be extremely useful in assisting lawyers in examining the quality of their cases, and focusing the direction of the settlement conference. All judges require parties with settlement authority to attend the summary jury trial and then enter into settlement discussions immediately afterward.

Judge Speigel, who sits with Judge Lambros in the Northern District of Ohio, has closely adopted Judge Lambros' procedure with one interesting deviation: he asks the jury to render three verdicts - one on liability, one on damages, and one on who wins and how much.³⁴ Such an approach is beneficial to counsel in helping her to understand exactly

30. *Id.* at 1017.

31. Telephone interview with Judge McNaught's law clerk (December 2, 1988) [hereinafter McNaught interview].

32. *Id.*

33. *Id.*

34. Speigel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829, 829 (1986). The third test setting forth who wins and how much, is distinct from the damages test. This third test asks the juror to perform his traditional role: render a verdict based on the evidence, and if you find for the plaintiff, determine how much he should be awarded. The question on damages asks the juror to assume that the defendant is already liable and then render an opinion solely on the amount to be awarded the plaintiff.

where the strengths of her case lie. It can also be helpful in the settlement discussions.³⁵

Although some of the current adaptations, such as the three verdicts used by Judge Speigel and the juror/lawyer meetings advocated by Judge McNaught, are especially significant in assisting in settlement and should be encouraged, others, such as extending the time allowed for presentations, are best left to those individual cases which require the additional discussion. Nevertheless, it is apparent that the summary jury trial procedure is easily amenable to a variety of situations and settings. The ease with which a judge can manipulate the time element, the presentation of evidence, and the degree of juror contact, suggest that the summary jury trial procedure can be readily adapted to complex toxic tort litigation.³⁶

III. The Toxic Tort

The concept of tortious conduct³⁷ and one of its later derivatives, product liability law, developed from principles of early English common law.³⁸ Although product liability law was not significantly practiced until the 1960s,³⁹ two decades later it would become the means by which an individual, harmed from contact with a chemical substance, would be afforded recovery. This is known today as the toxic tort.⁴⁰

Although the toxic tort is easily defined as "injuries caused by toxic substances,"⁴¹ this definition raises more questions than it answers. Difficult problems of causation, novel recovery theories, the awesome complexity of the scientific evidence presented, the long latency periods between ex-

35. See *infra* text following note 101.

36. See *infra* notes 72-73 and accompanying text.

37. A "tort" is defined as a "legal concept possessing the basic elements of a wrong with resultant injury and consequential damage which is cognizable in a court of law." 86 C.J.S. *Torts* § 1 (1954).

38. See *Winterbottom v. Wright*, 10 M & N 109, 152 Eng. Rep. 402 (1842).

39. See 1 SEARCY, A GUIDE TO TOXIC TORTS § 1.01 (1988). See also, Hollenshead, *Historical Perspective on Product Liability Reform*, 1 J. Prod. L. 75, 79-83 (1982).

40. SEARCY, *supra* note 39, at § 1.01.

41. *Id.*

posure and symptom, and intense governmental regulation, make the toxic tort infinitely more than merely just another products liability or personal injury case.

A. *Recovery Theories*

The field of toxic torts has evolved to encompass a wide variety of causes of action.⁴² In addition to personal injury, damage from toxins can be used to recover property and economic losses, and can be instituted against a manufacturer, distributor and an end user of the toxin.⁴³

The prevalent cause of action in toxic tort litigation is, however, negligence.⁴⁴ In the toxic tort, negligent conduct is conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm."⁴⁵ The conduct is focused on the increased standard of care to be applied to the *use* of toxic chemical substances.⁴⁶

Furthermore, this standard of care extends not only to manufacturers of the chemical, but the distributors, and third party applicators of the toxins as well.⁴⁷ Moreover, this duty

42. See *infra* notes 44-53 and accompanying text. See also DORE, *THE LAW OF TOXIC TORTS* § 2.02 (1987), and SEARCY *supra* note 39, at §§ 3.01-3.11; Alcorn, *Liability Theories for Toxic Torts*, 3 NAT. RESOURCES & ENV'T 3 (Spr. 1988).

43. See *infra* note 46.

44. Other toxic tort causes of action can be found by using federal statutes. See *supra* note 48. Toxic substances present a potentially grave hazard both to individuals and property, and have been the subject of heavy regulation. See SEARCY *supra* note 39, at § 3.11. Toxic tort causes of action include toxic trespass [see *J. H. Borland v. Sanders Lead Co. Inc.*, 369 So.2d 523 (Ala. 1979) and SEARCY note 39, at § 3.05.], nuisance [see *Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes*, 90 N.J. 582, 449 A.2d 472 (1982) and SEARCY *supra* note 39, at § 3.06], express and implied warranties (see *Drayton v. Jiffie Chemical Corp.*, 395 F.Supp. 1081 (N.D. Ohio 1975) and SEARCY *supra* note 39, at § 3.08), and strict liability. The theory of strict liability as applied to toxic tort cases emanates from the doctrine of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), which held that one who engages in ultrahazardous activity is strictly liable for the consequences of that activity. W. PROSSER, *THE LAW OF TORTS* § 78 (4th ed. 1971). See also *Cities Service Co. v. State*, 312 So.2d 799 (Fla. App. 1975) and SEARCY *supra* note 39, at § 3.07.

45. SEARCY *supra* note 39, at § 3.02 (quoting RESTATEMENT (SECOND) OF TORTS § 282 (1965)).

46. *Id.* at § 3.02[1].

47. See, e.g., *Knabe v. Nat'l Supply Div. of Armco Steel Corp.*, 592 F.2d 841 (5th Cir.) (negligent discharge); *Johns Manville Sales Corp. v. Janssens*, 463 So.2d 242

of care applies to the manufacturing, labelling, and disposing of the chemical.⁴⁸ This widespread accountability means that a typical toxic tort action could involve a negligence suit against a manufacturer, its distributor, and possibly the end user not only for failing to warn the public of any possible deleterious affects associated with the chemical, but also for negligence in the use and eventual disposal of the chemical.⁴⁹

Nevertheless, while this plethora of actions clearly assists the attorney in getting his client into court, it is, however, only the most elementary step in achieving a judgment. Ingenious as an attorney may be in developing the cause of action, there still remains the formidable burden of showing causation.

B. Causation

Proving causation in a toxic tort case involves demonstrating that there is a redressable injury and determining who caused it. These simple words belie, however, the enormous difficulties a toxic tort victim has in proving who injured him. This is due to a variety of factors including the long latency periods involved between exposure and injury,⁵⁰ the

(Fla. Dist. Ct. App. 1984), *cert. denied*, 467 So.2d 999 (1985) (negligent manufacture). See also FREEDMAN, HAZARDOUS WASTE LIABILITY § 11.1 (1987).

48. The scope of this far-reaching duty is exemplified by the breadth of federal legislation in this area. The federal government, recognizing the importance of regulating all phases of a chemical's life, has promulgated several statutes to deal with this proliferation of toxic substances. Some statutes, such as the Resource Conservation Recovery Act 42 U.S.C. §§ 6901-6991 (1984) are so called cradle-to-grave statutes designed to regulate the manufacturer § 6922, the labeling § 6924(r), and the disposal § 6924, of toxins. Others, such as the Toxic Substances Control Act 15 U.S.C. §§ 2601-2654 (1976) are directed at a specific phase of the chemical's life.

49. The litigation surrounding that manufacture and use of asbestos is an excellent example. One of the earliest toxic tort cases, it grew to involve over 16,000 plaintiffs in 12,000 cases against more than 250 defendants ranging from corporate giants like Johns-Manville Corp., to small distributors. These claims were lodged against manufacturers, *Johns-Manville Sales Corp.*, 463 So.2d 242; sellers, *Hammond v. North American Asbestos Corp.*, 454 N.E. 2d 210 (Ill. 1983); and distributors *Thomas v. Kaiser Agricultural Chemicals*, 81 Ill.2d 206, 407 N.E.2d 32 (1980). See also, Levy, *The Manville Bankruptcy-Its Special Effect on the Asbestos Industry*, SPECIAL PROBLEMS IN TOXIC SUBSTANCE LITIGATION AFTER MANVILLE 1983 9, 11.

50. See *infra* notes 58-64 and accompanying text.

multiplicity of plaintiffs and defendants,⁵¹ etiological concerns,⁵² and the morass of conflicting scientific data on the over 50,000 chemicals currently in use nationwide.⁵³

Injury due to exposure to a toxic substance is rarely immediate.⁵⁴ Typically, an individual comes into contact with a substance repeatedly over a number of years,⁵⁵ and then, several years after the contact ends, develops a disease, notoriously cancer. The problems this protracted latency period presents are readily apparent. Frequently, defendants have gone out of business or have merged with other companies,⁵⁶ or the toxin was manufactured by a host of companies and distributed by twice that number. For example, people can usually determine who built the car they were riding in when the gas tank exploded,⁵⁷ or what company's soda was in the bottle that exploded.⁵⁸ Contrast this with the fact that over two hundred companies manufactured diethylstilbestrol (DES),⁵⁹ and that hundreds of industries have used and disposed of polychlorinated biphenyls (PCBs).⁶⁰ In a toxic tort suit it is not atypical for defendants to consist of manufacturers, distributors, and users, with the number of potential defendants running into the hundreds.

51. See *infra* notes 61-64 and accompanying text.

52. See *infra* notes 64-66 and accompanying text.

53. See *infra* notes 66-69 and accompanying text.

54. However, a tragic example of an "immediate effect" resulting from a toxic spill is exemplified by the Bhopal, India disaster involving a leak of the chemical methyl isocyanate by a Union Carbide plant.

55. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740 (E.D.N.Y. 1984) (where Vietnam veterans, exposed to a herbicide containing dioxin from 1962-1971, brought a toxic tort suit against the government and manufacturers of dioxin in 1979 for injuries manifesting themselves several years after leaving Vietnam.)

56. See, e.g., *SEARCY supra* note 39, at § 24.04[2] (discussing this problem relative to the extensive litigation surrounding the use of diethylstilbestrol (DES)).

57. See *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974).

58. See *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944).

59. See *Martin v. Abbott Labs.*, 102 Wash.2d 581, 589, 689 P.2d 368, 374 (1984).

60. Polychlorinated biphenyls (PCBs) are hydrocarbon chemicals useful in many industrial processes and are highly toxic to a wide variety of species, including man. For a complete discussion of PCBs and its legal involvement, See *SEARCY supra* note 39, at §§ 33.01-33.99.

In addition to the problems of latency and multiple parties, there is also the etiological uncertainty surrounding the alleged harm. For example, there is the question of degree of exposure: How many times does an individual have to come in contact with the defoliant Agent Orange before they contract dioxin poisoning?⁶¹ Moreover, there is the uncertainty surrounding the actual injury itself. The relative paucity of medical information on cancer generally, coupled with the more specific problem of whether a particular chemical can actually cause the particular type of cancer exhibited by the plaintiff, highlight the etiological difficulties attendant toxic tort litigation.⁶²

A corollary to the etiological issue is the overwhelming scientific hurdle which must be overcome to show a nexus between a chemical substance and the alleged harm. Integral to demonstrating this nexus is the attorney's ability to clearly interpret and explain a morass of very complicated evidence.

Complex data is not, of course, unique to chemical substance litigation. Products liability and medical malpractice claims also place the practitioner in the role of a science teacher to the jury. The distinction in a toxic tort case, however, is that the theories involved are frequently on the cutting edge of scientific knowledge and investigation.⁶³ Thus, when counsel presents his case, it typically involves not only utilizing a host of experts from a dozen different disciplines, but requires them to explain everything from simple physics to the latest epidemiological study.⁶⁴

61. See "*Agent Orange*", 597 F.Supp. at 787-799.

62. See SEARCY *supra* note 39, at § 10.02[3].

63. See, e.g., *Society of Plastics Indus. Inc. v. OSHA*, 509 F.2d 1301, 1308 (2d Cir.), cert. denied 421 U.S. 992 (1975).

64. Epidemiological studies are defined as "the study of the distribution and the determinants of disease frequency and occurrence in humans." DORE, *supra* note 42, at § 25.01. Each of these studies involve a variety of methods, analytical techniques and valuate schemes, and can be disturbed by confounding, selection, information, or reporting biases. *Id.* at § 25.02[4]. See also Wong, *Using Epidemiology to Determine Causation in Disease*, 3 NAT. RESOURCES & ENV'T 20 (Spr. 1988).

This problem of dealing with complex scientific data which often results from esoteric, conflicting, and unestablished principles of science, highlights the manifest importance of the expert on the witness stand and the need to have him present

The toxic tort case then can be summed up as a host of actions, brought by many plaintiffs against multiple defendants, involving difficult issues of causation, to prove a vaguely defined and understood harm, from a mass of complex, conflicting often recently discovered data.⁶⁵ Accordingly, once the practitioner has amassed all her information over years of discovery, she is then ready to proceed to trial, against a defense counsel equally well prepared to show that his client is innocent of any wrongdoing. It necessarily follows that the resulting trial will involve significant expenditures of resources of time and money from the attorneys, their clients, and the court. Logic dictates that any effort to avoid this protracted litigation should be explored, in an attempt to bring about a settlement, including the summary jury trial.

IV. The Summary Jury Trial and Toxic Torts

A. *Considerations of Time and Experts and the Need to Balance*

Inevitably, toxic tort litigation is protracted and expensive.⁶⁶ Primary testimony generally involves a myriad of experts, including physicians, epidemiologists, toxicologists, and pathologists. Moreover, the nature of the evidence presented by these witnesses is typically complex scientific theories and hypothesis. Because it is difficult to simplify this testimony into language a lay jury can understand, often weeks of expert testimony are necessary to convince the jury of the soundness and logic of a particular viewpoint.⁶⁷

testimony of the most reliable and believable nature.

65. The above discussion is only a brief outline of what exactly is a toxic tort. For an exhaustive study of the subject, see Margie Searcy's three volume treatise cited repeatedly throughout this section. SEARCY *supra* note 39.

66. See, e.g., *United States v. Reserve Mining Co.*, 380 F.Supp. 11 (D.C. Minn. 1974), *stayed* 498 F.2d 1073 (8th Cir.), *modified* 514 F.2d 492 (8th Cir. 1975) (120 days of trial); *Scenic Hudson Preservation Conf. v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) and 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), followed by 330 N.Y.2d 71 (1972), 498 F.2d 827 (2d Cir. 1974), 499 F.2d 127 (2d Cir. 1974), 587 F.2d 549 (2d Cir. 1978).

67. *Id.* See also SEARCY *supra* note 39, at § 32.01, discussing the case of *Bogges v. Monsanto Co.*, which was at trial for eleven months.

The summary jury trial limits this plethora of scientific gobbledegook to approximately one-half day of testimony. This results in savings to all parties in terms of time and money. Most importantly for the court, jury expenses are significantly reduced, and valuable court time is made available to affect the speedy trial of those cases more deservedly requiring a full trial.⁶⁸ Moreover, if the summary jury trial results in settlement, the plaintiffs can be compensated more immediately for an injury which has in all likelihood gone unredressed for several years.⁶⁹

As for the defendant corporation, settlement means management can stop using its valuable time preparing for litigation and get back to the business of running the company. Moreover, management saves the huge costs, sometimes in the millions of dollars, that accompany long toxic tort litigation; the company is able to release previously tied up resources, such as other personnel and facilities, that were involved in assisting in the defense of the corporation; and the corporation avoids much of the publicity, usually unfavorable, which attends a toxic tort claim. Bad publicity cannot only result in additional claims, but can also manifest itself in the marketplace as consumers react against the alleged "big bad conglomerate."

The time constraints are not, however, all positive. The major criticism is that in the interests of time, witnesses are generally not used. The only evidence presented is that which is summarized in the attorney's statement to the jury. Problems with this aspect of the summary jury trial are readily apparent. In a toxic tort case, the evidence that will be presented is primarily complex scientific data.⁷⁰ Moreover, the nature of this testimony by scientists and doctors runs the gamut from established theories to relatively untested epidemiological studies. Central to the jury's accurately interpret-

68. See generally JACUBOVITCH, *supra* note 2.

69. The alternative, lengthy trials coupled with multiple appeals and remands, can be so overwhelming as to suggest the summary jury trial (or another form of ADR) should be mandatorily imposed upon the parties before embarking on a full trial.

70. See *supra* notes 59-64 and accompanying text.

ing this evidence is the paramount need for the jury to assess the credibility of the experts, and of having all this complex material clearly explained to the jury in lay terms.⁷¹

Credibility of the experts is paramount to a toxic tort litigant's case. Because so many of the scientists' findings are on the frontier of medical and scientific technology, theories which the jury determines are most credible are the ones they will most likely accept as scientific fact. Accordingly, the party who puts forth the most trustworthy experts stands the clearest chance of winning. One can readily see how important the ability to call these witnesses is, as well as allowing the "testing" of their demeanor, clarity, and strength under cross examination. Attorneys have argued it is this absence of cross examination in the summary jury trial which prohibits a party from carrying forth its burden and prevents the jury from accurately resolving the dispute.⁷²

In addition to credibility is the need to clearly explain the complex data inherent in all toxic tort suits. There are questions about a chemical's makeup, its properties in its various states, its ability to move through the environment, and its effect if ingested, breathed, or absorbed into the human body. Medical recoveries for cancerphobia and enhanced risk belie the simple analysis of whether the plaintiff has suffered a cognizable injury. Information relative to these issues, pivotal to counsel's case, are normally presented by a myriad of experts using language from a dozen different disciplines. Critics of the summary jury trial argue that it is unlikely that the average jury can accurately understand, interpret and extrapolate a liability determination from this information without first, hearing it, and then second, having it carefully dissected and explained by the lawyers and their experts during a full trial.⁷³

Admittedly the abbreviated procedures of the summary jury trial will never permit the detailed analysis and examination that a full trial presents, and, perhaps on very compli-

71. Zatz, 2 TOXICS L. REP. 929 (BNA) (Jan. 27, 1988).

72. BNA Analysis, *Summary Jury Trial Assailed as Inaccurate and Ineffective*, 2 TOXICS L. REP. 1189, 1190 (BNA) (Mar. 30, 1988) [hereinafter Analysis].

73. See *supra* note 72, at 1190.

cated issues, a neutral master/expert may be more appropriate.⁷⁴ However, when the facts and issues of a case can be sufficiently narrowed to a question of proximate causation⁷⁵ or one of damages, the summary jury trial is an acceptable alternative to classic dispute resolution.

A good example is the *Stites*⁷⁶ summary jury trial engineered by Judge Enslen of the Eastern District of Michigan. The parties in that case had agreed prior to the summary jury trial that the contamination emanated from the defendant. The issues were narrowed to that of proximate causation and to the amount of damages to be afforded the plaintiffs.⁷⁷ Due to the complexity of the material, Judge Enslen held the summary jury trial over a two day period, with two separate juries.⁷⁸ The juries reached opposite conclusions. Nevertheless, the summary jury trial resulted in settlement, saving the parties an estimated six months to one year of trial and over three million dollars in litigation fees; as well as saving the court one-half of its calendar time and significant jury expenses.⁷⁹

It must be noted that some of the jurors polled afterward said that they had difficulty in distinguishing among the many experts and understanding the highly complex data. However, one must also ask whether after one hundred days of this kind of testimony, would the lay person in a full trial be any better

74. See *infra* note 93, 105.

75. For example, where the defendants are known and a chemical has been isolated so that the issue boils down to whether this chemical caused the plaintiff's injury.

76. See Enslen, *supra* note 29. In 1984, the defendant, Sundstrand Heat and Transfer Co., located near Dowagiac, Michigan was sued by 29 individuals for allegedly contaminating their wells with tetrachlorethylene. The complaints generally consisted of dizziness, cramping, skin rashes, learning disabilities, and cancerphobia. The company was self-insured and wanted to settle the case, but could not come to terms on the amount of damages. Defense counsel had already spent two full years on case and \$2.5 million, while plaintiffs noted that they had spent \$750,000. Both parties anticipated spending over a year in actual litigation and incurring costs in excess of \$3 Million. Faced with this daunting prospect, and having already spent two years on the case, both parties requested Judge Enslen to hold a summary jury trial.

77. *Id.* at 1016.

78. *Id.*

79. *Id.* See also Zatz, *supra* note 71.

at understanding such esoteric concepts as man rem's per cancer and mutagenicity⁸⁰ or distinguishing between animal bioassays and cohort studies.⁸¹ Furthermore, it can be realistically argued that presentation of this material in a summary jury trial, although brief, provides a *more* realistic appraisal of the evidence because all the emotional, opinion-laden testimony typical of a full trial, which can just as easily confuse as clarify, is absent.

Engaging in time honored cost-benefit analysis, on the one hand there are the benefits of saving huge amounts of time and money, on the other hand, is the abbreviated presentation of evidence and the loss of extended live witness testimony. Though the latter can be very important (and in some cases involving multiple parties and novel issues of causation and recovery indispensable) it is submitted that most cases can be adequately summarized within the summary jury trial's allotted time. After all, the summary jury trial is not a replacement for a full trial; it is a device to effect settlement. Accordingly, it is only essential that the jury have a basic understanding of the parties' positions, and not a formidable grasp of geophysical properties and chemical structure.

B. Continued Cost-Benefit Analysis in Support of the Summary Jury Trial

A corollary to the expert-credibility dilemma is that in the interest of time, no witnesses are presented. Plaintiffs' counsel have complained of the sterility of the proceeding and the loss of their ability to present witnesses and cross examine others.⁸² The short answer to this problem is that the summary jury trial is only designed to achieve settlement. If the jury comes back with a liability verdict in favor of the plaintiff, for example, a skillful plaintiff's attorney, by comparing her case to similar cases, can present evidence during subse-

80. Wilson & Crouch, *Risk Assessment and Comparisons: An Introduction*, 236 Sci. 267, 270 (Apr. 1987).

81. Lecture by Professor Jeffrey Miller, Pace Univ. Sch. of Law (Jan. 31, 1989).

82. This is not surprising in that the amount of damages awarded frequently depends heavily on the emotional impact witnesses make upon the jury.

quent negotiation to suggest approximately how much the injury is worth.⁸³

Defense counsel were also concerned about the inability to object and cross examine. They maintained that it "gave the plaintiffs carte blanche to present whatever arguments and versions of the facts they chose, regardless of whether they would have been admissible at trial."⁸⁴ They argued that this loss of the right to object resulted in there being no break in the momentum of the trial. Plaintiffs, they contend, were thus afforded four hours of uninterrupted closing before defense could say a word.⁸⁵ As a result, defendant's counsel "feared that it was too late to restore . . . [their] credibility."⁸⁶ Although this is a realistic concern, it should not overshadow the fact that defendants also have the same four hours. Moreover, defense counsel is the last to argue. Thus, their rebuttal is fresh in the minds of the jury when the jury begins to deliberate.

Another criticism of the summary jury trial is that lawyers, for fear of revealing their trial strategy, will hold back from fully developing their case.⁸⁷ This philosophy of "hedging one's bet" should not, however, be a bar to the summary jury trial. A lawyer who practices this deception is from the start ignoring the settlement potential of the summary jury trial. This attitude does a disservice not only to the lawyer's client, by making a protracted, expensive trial inevitable, but also to the bar by openly flouting judicial attempts to manage their docket so as to be able to hear more cases.

Attorneys are not the only critics of the summary jury trial. Judge Richard Posner feels the summary jury trial is a "lavish" technique because the judge spends one entire day

83. Judge Spiegel has addressed this concern in his paper on the summary jury trial. He counsels that the jury should return three verdicts: one on liability, another on damages, and a third on who wins and how much. Of course it must be noted that a verdict for defendant may give plaintiff's counsel no choice but to go to trial on the merits if defendant then refuses to settle. However, such cases have rarely occurred. See generally Spiegel, *supra* note 34.

84. Zatz, *supra* note 71, at 933.

85. *Id.* at 934.

86. *Id.*

87. See Analysis, *supra* note 72, at 1191.

settling a case.⁸⁸ This analysis weakens considerably, however, when one considers not only the vast amount of time taken up if these cases go to trial, but also the ability of a magistrate to hear a summary jury trial in place of a judge. On the contrary, rather than being "lavish," the summary jury trial frees the judge to hear more of those cases which truly warrant a full trial.⁸⁹

C. *Is the Summary Jury Trial Appropriate for the Toxic Tort*

Judge Posner's criticism does, however, reflect the common tendency to compare the summary jury trial to a full fledged trial. The summary jury trial is not meant to replace the full trial; it is one device among many designed to affect settlement between parties.

1. *Other Choices*

The oldest form of ADR, and coincidentally the most universally accepted, is mediation. Defined as "bring[ing] . . . parties together to discuss settlement under the auspices of a neutral third party,"⁹⁰ mediation is more than an independent ADR method; its mechanism for dispute resolution — presentation of a case before a neutral third party — is central to almost all ADRs. This is not to imply, however, that all ADRs are the same. They are distinguishable first, by the circumstances surrounding the appointment of the neutral advisor, and second, by the rules which guide the mediator. For example, the mini trial⁹¹ and private judging⁹² are initiated and

88. *Id.* at 1189.

89. Ranii, *Summary Jury Trials Gain Favor*, NAT'L L.J. (June 10, 1985) 1, 30. Judge Posner's criticism of the summary jury trial is not shared by several of his brethren sitting on district courts. Judge Lambros reported that as of April, 1985, all but seven of 131 cases he assigned for summary jury trial have settled. Judge West of Oklahoma shares this enthusiasm. Of the 30 summary jury trials that he has held, only four did not settle. *Id.* at 30.

90. Summary Jury Trial, 103 F.R.D. 461, 466 (1984).

91. *Id.* at 467. The mini trial, used primarily by corporate litigants involved in commercial disputes, is a private trial conducted by a neutral mediator, hired by the parties. The action is voluntary, held outside of court and can take a variety of forms,

controlled by the individual parties involved in the litigation. However, a neutral expert/master⁹³ or a summary jury trial⁹⁴ are initiated and monitored by the court pursuant to court-fashioned rules. Regardless of the method chosen, all are intended to result in settlement, thereby eliminating the need for a long, protracted and costly trial. The particular advantage the summary jury trial has over other methods in accomplishing this, is that the summary jury trial most nearly duplicates an actual trial. Because of this feature, though the arguments marshalled against its use in a complex toxic tort suit are formidable, they fail to remove the summary jury trial as one of a judge's most useful alternatives to classic dispute resolution.

2. *The Toxic Tort and Summary Jury Trial Revisited*

This paper has outlined primarily four arguments against using the summary jury trial in toxic tort litigation. First, the toxic tort case is extremely complex from the viewpoint of the evidence presented. Typically experts are attempting to explain a chemical's makeup, its use in agriculture or industry, its properties in its discarded state, and its effects on the human body. Furthermore, there are the issues of whether the company knew of the hazards of the toxin when it was released into the environment and whether the company conformed to government regulations in the manufacture or disposal of the toxin. Finally, there are often novel issues of causation and injury. As discussed earlier, both sides to the dispute will typically engage a myriad of experts in an effort to answer these questions. Thus the role of the jury becomes pivotal in deciding which set of experts are more believable,

including utilization of a private jury.

92. *Id.* at 466. Private judging is another voluntarily undertaken ADR. Parties hire a third party and then present an abbreviated version of their cases to the private judge.

93. *Id.* at 467. Neutral experts/masters are generally appointed by the court to hear complex cases involving detailed scientific evidence. They are touted for their ability to accurately sift through the mass of technological data to determine liability and damages.

94. *See supra* notes 18-29 and accompanying text.

and hence, who is liable.⁹⁵

Second, it is suggested that where a case depends so heavily on the testimony and credibility of witnesses, the abbreviated procedures of the summary jury trial are inappropriate. Indeed, Judge Lambros reinforces this conclusion when he notes that where the credibility of witnesses are central to the determination of a case, use of the summary jury trial is inappropriate.⁹⁶

Third, toxic tort cases rarely involve only one plaintiff. The rule appears to be multiple plaintiffs with varying injuries — both in type and degree. This not only exacerbates the problems of causation and scope of liability, but presents the added problem of apportioning the damages if there is a settlement.⁹⁷

Lastly, there is the issue of active governmental involvement in the area of toxins.⁹⁸ Because of the heavy regulation in this area, any litigation is bound to involve important matters of public policy. Problems arise where a manufacturer's defense may lie in its alleged conformance to government requirements. More significantly, a court may have to make a threshold determination of whether a government provision is constitutional or not before deciding whether liability exists.⁹⁹

Although the aforementioned criticisms represent viable concerns to the practitioner, they are not adequate reasons for throwing out the summary jury trial as a settlement device. The summary jury trial's usefulness is in facilitating settlement. It is designed to afford counsel and their clients a brief glimpse into the minds of the jury, and how lay persons will view their arguments, not replace a full trial. As a result, counsel must approach the summary jury trial with an eye to-

95. See *supra* notes 60-63 and accompanying text.

96. JACOBOWITZ, *supra* note 2, at 3; see *supra* text following note 70.

97. See *supra* notes 55-61 and accompanying text. See, e.g., In re "Agent Orange" Product Liability Litigation, 597 F.Supp. 740 (E.D.N.Y. 1984); Snyder v. Hooker & Plastics Chemical Corp., 104 Misc. 2d 735, 429 N.Y.S.2d 153 (1980).

98. See *supra* note 48. See also Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV 668 (1986).

99. See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (finding a New Jersey statute prohibiting the import of toxic waste unconstitutional).

ward settlement, not trial. If one views the summary jury trial in this fashion, one finds that many of the criticisms offered against the summary jury trial can be accommodated by the summary jury trial's adaptable procedures. For example, the problems of complexity¹⁰⁰ and multiple parties can be dealt with by adopting extended time for the presentations and using video and live testimony.

Another change in procedure which would alleviate criticism is widespread implementation of Judge Spiegel's three verdict requirement. This technique provides a lawyer with a clearer picture of the strength of her argument. For example, if a summary jury finds a defendant liable, but awards the plaintiff minimal damages, this puts the plaintiff on notice that while the facts may be on her side, there are important elements, possibly of scienter or scope of injury that are aligned against her. Likewise, this finding makes defense counsel wary of the vulnerable position he could be placed in when surrounded by all the emotional trappings inherent in a full trial. Clearly it would be in the best interest of both parties to settle. Of course, if one party overwhelmingly wins on both counts, the loser will be appreciably more receptive to the winner's offers in the settlement discussions following the summary jury trial.

Thus, it is apparent that the criticisms are not sufficient to justify throwing out the summary jury trial as an alternative to traditional dispute resolution. While the summary jury trial lacks a great deal of the emotion and classic courtroom confrontation, it does permit parties, with a minimal effort, to see how a jury will view their case. This is true even when faced with the complex issues and evidence inherent in most toxic tort litigation. The summary jury trial is still an appropriate alternative to traditional dispute resolution.

V. Conclusion

So where does this leave us? One cannot dispute the fact

100. For a detailed discussion of the complexity issue, see *supra* notes 61-65 and accompanying text.

that settlement saves the parties valuable time and money, compensates the victims more quickly, and reduces a court's already unmanageable docket.

When the toxic tort action before the court involves not only complex and novel theories of causation and recovery, but also multiple defendants and plaintiffs, there are valid reasons for resorting to a neutral expert/master to get a third party opinion. Appointed by the court pursuant to Federal Rule of Evidence 706, Federal Rule of Civil Procedure 53, or through the inherent power of the court,¹⁰¹ the mediators selected are experts in their fields. Accordingly, as experts, they can analyze the vast amounts of conflicting scientific evidence to determine causation amongst defendants and calculate the damages arguably more efficiently than a lay jury. Judge Lambros has used special masters to assist him in establishing effective case management for approximately 100 asbestos related actions in his district.¹⁰²

However, complexity alone does not remove a toxic tort case from the purview of a summary jury trial. There is very little reason to suggest that one hour of scientific presentation will be any more confusing than 120 days of it.¹⁰³ Furthermore, techniques such as Judge Spiegel's request that a jury give three verdicts - one on liability, one on damages, and a third on who wins and how much - enables counsel to quickly and accurately assess how his evidence has been viewed objectively by a jury. Combining this with Judge Enslen's expanded time for presentation and Judge McNaught's use of live witnesses, will hopefully reduce an attorney's skepticism concerning the reliability of the jury's verdict.¹⁰⁴

101. Summary Jury Trial 103 F.R.D. 461, 466 (1984). FED. R. EVID. 706, FED. R. CIV. P. 53.

102. *Id.* at 467.

103. Enslen, *supra* note 29.

104. The strength of the summary jury trial lies in its ability to accurately predict the outcome of a real trial. For example, in Chicago, Illinois in 1985, Judge Kocoras of the United States District Court conducted a summary jury trial in an antitrust case that resulted in a verdict of \$27 million for the plaintiff. The two sides were not able to reach a settlement and the case went to trial. After a seven week trial, the jury returned a verdict of \$24 million. Furthermore, Judges West and Russell each have had two cases that went to trial after an SJT and, in all four instances,

There are no bright line answers to the questions and problems raised in this paper. As a tool to facilitate settlement, the summary jury trial procedure can be extremely helpful where settlement discussions are stagnated because of counsels' uncertainty as to how a jury will view their case.

Although there are instances owing to the uniqueness of the fact pattern where a summary jury trial may not be appropriate, its proven effectiveness in complex cases support its continued use. This is especially true in the toxic tort arena where trials often extend over many months. Surely expending one-half to two days in an effort to affect a settlement and thus save the court, counsel, and client the tremendous outlay of resources a full trial would warrant, is worthy of the attorney's and judge's cooperation. It is hoped that the use of summary jury trials will be continued and promoted.

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the advisory verdicts were entirely consistent with the juries' dispositions following full-scale trials. . . .

Such experiences, Judge Russell says, lend 'a lot of credibility to the ability of a [SJT] jury to assess a case in a short period.' Ranii, *supra* note 89, at 30.