

## Features

# Using Bench Trials to Resolve Cases

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*“Adaptability is about the powerful difference between adapting to cope and adapting to win.” —Max McKeown*

**In the third year of the COVID-19 pandemic, the courts, judges, and lawyers have shown an amazing ability to adapt to our sudden change of circumstances, and, in many ways, made the practice of law better and more efficient. Many of the changes**

many ways, made the practice of law better and more efficient. Many of the changes, like Zoom depositions, came quickly and have allowed us to practice law more efficiently.

But, what about that penultimate jury trial? It is a widely held belief amongst trial lawyers that the jury trial is the end-all-be-all for a plaintiff in a civil case, but what if that is not necessarily true in all cases? What if we can “adapt to win” and use bench trials to resolve our cases?

## **The Data on Bench Trials vs. Jury Trials**

In 2005, the U.S. Department of Justice Office of Justice Programs, Bureau of Statistics, conducted a survey of state courts across the country to determine the types of civil cases being adjudicated by trials.<sup>1</sup> I was unable to find a more recent survey of jury trials vs. bench trials, but the 2005 study provides significant insight into considerations for when a bench trial could be beneficial for the resolution of tort cases.

The data showed that, in 2005, the majority of civil cases in the survey that went to trial were decided by juries, with 18,404 jury trials and 8,543 bench trials. Interestingly, plaintiffs in tort cases had a better record in bench trials: They won 56.2 percent of bench trials, but only 51.3 percent of jury trials. Trials overall accounted for 3.5 percent of dispositions in tort cases. However, according to an American Bar Association study released in 2020, the percentage of federal lawsuits decided by jury trial dropped from 5.5 percent in 1962 to 0.8 percent in 2013.<sup>2</sup>

The majority of motor vehicle, medical malpractice, and premises liability cases were resolved with jury trials. Specifically, 92.1 percent of motor vehicle cases, 98.7 percent of medical malpractice cases, and 93.8 percent of premises liability cases went to juries instead of judges. In motor vehicle cases, plaintiffs won 64 percent of the time, whereas plaintiffs won premises liability cases 38.4 percent of the time and medical malpractice cases 23 percent of the time. Plaintiffs in the cases surveyed were most likely to win animal attack cases, with a 75 percent success rate. Other tough wins for plaintiffs included product liability wins 19.6 percent of the time and false imprisonment wins 15.5 percent of the time. Products liability cases were tried in front of a jury 93.5 percent of the time, and false arrest and imprisonment cases were tried in front of a jury 63.9 percent of the time.

The median award in tort cases was similar for jury and bench trials. Juries awarded an average of \$24,000, while judges awarded an average of \$21,000. The median award in motor vehicle cases was \$15,000, compared to a median award of \$700,000 in asbestos cases. In tort cases where plaintiffs were awarded \$1 million in damages or more, 5.7 percent of the verdicts were from juries, whereas 3.7 percent of the verdicts were from judges. The idea that the system is plagued by “runaway juries” is grossly inaccurate. Looking only at cases in which plaintiffs prevailed, only 4 percent of those cases involved awards totaling \$1 million or more. Finally, in cases where plaintiffs sought punitive damages, 33.6 percent of cases where punitive damages were awarded involved jury trials, and 19.5 percent involved bench trials. Overall, only 5 percent of plaintiffs were awarded punitive damages. Medical

bench trials. Overall, only 3 percent of plaintiffs were awarded punitive damages. Medical malpractice cases had the highest median punitive damages award of \$2,800,000.

On average, jury trials lasted two days longer than bench trials, with jury trials going for an average of four days vs. two days for bench trials. From the filing to disposition of the cases, the mean time for resolution of cases for jury trials was 26.6 months and for bench trials was 20.8 months.



### **Recent Bench Trial Results**

Recently, many of our members have had great success with bench trials. In November 2021, Tyler Bridgers and Joe Wilson obtained a \$632,000 verdict in a rear-end tractor-trailer case in front of Judge Amy Totenberg in the Northern District of Georgia. The case had been pending for more than three years when Mr. Bridgers and Mr. Wilson and defense counsel agreed to opt for a bench trial. In Mr. Bridgers and Mr. Wilson's case, the defense denied causation, claiming that the plaintiff had pre-existing knee injuries and would have needed knee replacement surgery even absent the wreck. Mr. Bridgers and Mr. Wilson decided to forego a jury trial in favor of a bench trial because their client was ready to resolve the case speedily. Prior to agreeing to the bench trial, Mr. Bridgers and Mr. Wilson did their research on Judge Totenberg and concluded that she is a very fair judge. It was not difficult to come to an agreement with defense counsel to resolve the case using the bench trial because Mr. Bridgers and Mr. Wilson had a good relationship with defense counsel. The parties stipulated to all evidence in advance, gave brief openings and closings, and did not object as much as they normally would during a jury trial, and the case took a day and a half to try. They tried the case in June 2021, and Judge Totenberg issued the verdict five months later.

In January 2022, Tedra Cannella, Jim Butler, and Rory Weeks obtained a \$127 million verdict in a products liability case in front of Judge Steve Jones in the Northern District of Georgia. The parties were able to try a case with 11 experts in just 5½ days. That's less time than jury selection can sometimes take in a complex trial.

My own experience was in November 2021, when I tried a case with co-counsel Bethany Schneider. Our bench trial involved a motor vehicle collision that resulted in a \$336,630 verdict. Judge Stephen Bradley in Greene County, Georgia, presided. The auto wreck occurred when my client, a college dean and professor from Atlanta, was headed to the Ritz Carlton at Reynolds Plantation for a university retreat. My client suffered from neck injuries from the wreck and spent more than one year seeking conservative care such as chiropractic treatment, physical therapy, massages, and acupuncture. He ultimately had to have several rounds of radiofrequency ablations in order to find relief, and his doctor testified the injury was permanent.

The venue in our case was a significant factor in deciding on a bench trial. After reviewing the census information for Greene County, it was clear that the jury pool would be conservative. Thus, I hired Alex Hoffspiegel to focus the case before a conservative group. The focus group jurors questioned the conservative care and an alleged "gap" in treatment by a medical doctor. In addition, there was concern about how a conservative jury from rural Georgia would perceive my client, who is a highly educated dean and college professor from Atlanta.

Prior to the bench trial, I argued against the defense's motion for summary judgment on issues of bringing independent negligent hiring and retention claims against the at-fault driver's employer and punitive damages, and the judge ruled in our favor. This gave us another reason to seriously consider a bench trial.

The bench trial took about a day and a half from start to finish. We did full opening statements, called several witnesses, including the police officer live, treating doctor via video, our client's wife via Zoom, a witness on the scene via Zoom, a treating chiropractor via Zoom, and a damages witness live, and did first and second closing arguments. As we were in a smaller county, there was not any courtroom technology, so we brought our own. All of the Zoom witnesses appeared on my laptop, and it went smoothly. In the end, it took the judge about 20 minutes to deliver a verdict in our favor that was 10 times the pre-trial offer.

From the data gathered from the 2005 study and from the anecdotal information gathered from GTLA members, we know bench trials can be both efficient and fair, but how do we determine the right case to try in front of a judge instead of a jury?

### **Benefits of a Bench Trial**

Some positive attributes of bench trials include:

- Quicker more efficient way to get to trial, especially during the pandemic;

- Less or no motions in limine;
- No jury charges to prepare;
- Less room for legal error and less likelihood for appeal;
- Evidentiary rules are more relaxed;
- Judges know legal issues;
- In some venues, there is a better chance of obtaining a just verdict.

*THE LEGAL ISSUES IN A RUN-OF-THE-MILL CAR WRECK ARE USUALLY SIMPLE AND EASY FOR A JURY TO UNDERSTAND WHEREAS A COMPLEX PRODUCTS LIABILITY CASE WITH MANY EXPERTS, DOCUMENTS, AND WITNESSES MAY BE MORE SUITED FOR A JUDGE TO DIGEST.*

### **Considerations for Bench Trial vs. Jury Trial**

In addition to the data above, when considering whether your client's case is a good candidate for a bench trial, many factors come into play, including the age of the case, type of case, the complexity of the case, special evidentiary or legal issues, appellate issues, who the judge is, the jurisdiction, opposing counsel's behavior, the history of litigation in the case, and your client's wishes and circumstances.

Perhaps the most obvious reason to choose a bench trial over a jury trial, especially during the pandemic, is speed and efficiency. That data clearly shows that using a bench trial to resolve a case decreased the disposition time of a civil case in 2005 by six months. If you and your client are ready for a resolution, then a bench trial eliminates delays caused by the COVID-19 pandemic, resolving objections, motions in limine, and waiting your turn in line on a long civil jury trial calendar. If the facts and circumstances of your case support the use of a bench trial, then not only will you spend less time waiting to get to trial, the trial itself will take fewer days than a jury trial, as the need for motions in limine, jury selection, and jury charges are obviated.

Is your case a simple car wreck, a complex products liability or medical malpractice case, or something in between? The legal issues in a run-of-the-mill car wreck are usually simple and easy for a jury to understand whereas a complex products liability case with many experts, documents, and witnesses may be more suited for a judge to digest. Given some of the 2005

data from the Department of Justice showing the low success rate of medical malpractice cases, which were largely tried before juries, perhaps bench trials should be considered for medical malpractice cases?

Of course, every case is different, and your simple car wreck could involve defenses designed to confuse a jury, such as apportionment, sudden emergency, pre-existing injuries, or contributory negligence. In cases involving such defenses, having a judge who understands their legal complexities and effects could be more beneficial than allowing the defense to muddy up the waters for a jury. In addition, in a bench trial, a judge can ask questions of witnesses, which could help clear up any confusing or complex issues. Of course, it is important to note that when the judge questions that witness, you cannot control the testimony in the same way you can during a jury trial.

The more complex a case is, the more room for appealable issues to arise in a jury trial. It is more difficult to appeal a bench verdict because the judge is presumed to have followed the law and only considered relevant and admissible evidence.

Before you commit to a bench trial, do your research on the judge in your case. What is the judge's reputation for fairness? What is their experience in private practice? Are there any past case results in front of this judge?

Equally important to your decision as the judge is the venue. In a conservative venue, a judge may be better than a jury. One way to determine how a jury may view your case is the use of focus groups. Do not let the idea of the cost of a focus group scare you. There are some affordable options out there, and you can always conduct your own focus group inexpensively by posting ads on Craigslist and conducting the focus group via Zoom.

The history of litigation in your case could also help determine whether a bench or jury trial is appropriate. For example, has there been bad behavior from the defendant that the judge has witnessed or sanctioned? Has the judge already decided issues in your favor on summary judgment? Or, have you lost motion after motion in the case?

Finally, when deciding on a bench trial versus a jury trial, consider your client. Does your client want a resolution quickly, or is your client willing to wait for a jury trial? Is your client in a situation that requires a quick resolution? Will your client present better to a judge or a jury? Factors of your client's race, gender, socioeconomic status, and religion in comparison to your potential jury pool could all come into play for this analysis.

### **Tips for Conducting a Bench Trial**

Although there may be less pressure of performing for a jury, the preparation required for a bench trial is nonetheless considerable and important. Judges recognize and appreciate preparation and hard work.

You do not have to select a jury, file motions in limine, or prepare jury charges. But, prepare an opening statement and closing argument, use demonstratives, think about your order of

proof, and choose and prepare your witnesses the same way you would do so for a jury trial.

You can also consider calling witnesses via Zoom rather than in person. Most courtrooms have the technology to accommodate Zoom witnesses, and many judges do not have a problem with Zoom witnesses, so long as the defense agrees.

Note that a bench trial will move a lot more quickly than a jury trial. With less evidentiary issues or the need to bring a jury in and out of the courtroom, you will have to be prepared for witness examinations to move fast.

Finally, if you have a trial that should be bifurcated if it is tried in front of a jury, such as a situation where you are seeking punitive damages, the trial can be unified if it is a bench trial.

### **A Bench Trial Is Not a Unilateral Decision**

Even if you conclude a bench trial is desirable (or worth the risk) in your case, there is one factor you cannot control: whether the defendant will agree to a bench trial. A defendant may have a knee-jerk negative reaction to a plaintiff who raises the idea of a bench trial, even though there are clearly potential benefits for the defendant as well. The ideal situation is to seize the opportunity if a judge suggests a bench trial. It is therefore important to analyze the question of a bench trial in all your cases, so that if the judge raises the possibility, you are ready to agree if possible. This puts the maximum pressure on the defendant to agree as well.

Regardless of whether the issue of a bench trial is raised by the court sua sponte or by you as plaintiff's counsel, put your election for a bench trial on the record. You can do this orally at a transcribed hearing or by filing something, like a "Plaintiff's Notice of Consent to a Bench Trial." The defendant will likely respond and be forced to take a position. Regardless of whether it agrees or refuses, there will be benefits to the plaintiff.

### **Conclusion**

As we continue to adapt to the changes that the pandemic has forced us to make, the data show that bench trials are another way in which we can obtain justice for our clients.



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