"well-established and recognizable diagnostic tools," such as MRIs, and therefore, this expert testimony was admissible and met the *Frye* standard.[26]

Over ten years later, the issue resurfaced in *Brouard v. Convery*, a Suffolk County motor vehicle accident matter in which plaintiff suffered a TBI.[27] The court reviewed the previous decision in *LaMasa v. Bachman*. However, in this case, it was held that DTI did *not* meet the *Frye* standard because it did not have the general acceptance of the scientific and medical community for use in the medical treatment of patients with TBIs.[28] The court was guided by the decision in *Dovberg v. Laubach,* which allows scientific writings to demonstrate general acceptance of a scientific principle or procedure in the field.[29] In 2014, a "white paper" entitled *Imaging Evidence and Recommendations for Traumatic Brain Injury: Advanced Neuro and Neurovascular Imaging Techniques*, was published in the American Journal of Neuroradiology, and was widely supported by the medical community.[30] It stated that the data from DTI is confined to use in "the research arena of group comparisons," and that insufficient evidence existed to conclude that DTI can be used routinely in medical treatment of the individual patient.[31] The court held that this "white paper" cast significant doubt upon the reasoning in *LaMasa*, and reflected updated research and medical opinion on DTI.[32] Plaintiff thereafter made a motion to reargue the matter, based upon the issue that DTI was not only to be used in this case to prove TBI, but also to prove causation.[33] Here, the court considered the decisions made in the federal court regarding DTI, but ultimately declined to accept them as they are persuasive and not binding.[34]

In contrast, in *Siracusa v. City Ice Pavillion, L.L.C.*, a Queens County personal injury matter involving a plaintiff who suffered a TBI from an ALS ice bucket challenge, the court held that DTI was accepted as a reliable means of diagnosing TBI, and that it was accepted in the medical community.[35] The court based this decision largely on the precedent from the *LaMasa* case.

Most recently, in December 2021, Westchester County rendered another contrasting decision regarding the admissibility of DTI in TBI cases.[36] In this case, plaintiff was involved in a motor vehicle accident in which plaintiff was a passenger in a vehicle that was struck from behind.[37] The motion work done by both sides was voluminous. Plaintiff submitted nine clinical expert affirmations, while defendant provided expert affirmations and scholarly articles on the topic. The court felt the plaintiff established that there is a general acceptance of DTI in the medical and scientific community, and therefore took judicial notice of the reliability of DTI without conducting a *Frye* hearing.[38]

Conclusion

Although slow to gain recognition in New York, challenges to DTI imaging in federal courts have generally been rejected. As the technology continues to evolve, much like CT scans and traditional MRIs, DTI imaging is likely to gain traction in New York courts in the future.

1. https://www.ninds.nih.gov/Disorders/All-Disorders/Traumatic-Brain-Injury-Information-Page
2. *Id.*
3. *Id.*
4. *Id.*
5. Shenton ME, Hamoda HM, Schneiderman JS, et al. *A Review of Magnetic Resonance Imaging and Diffusion Tensor Imaging Findings in Mild Traumatic Brain Injury*, Brain Imaging Behav. June 2012 6(2): 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3803157/
6. https://www.cdc.gov/traumaticbraininjury/index.html.
7. Shenton ME, Hamoda HM, Schneiderman JS, et al., *supra* note 5, at 7 -9.
8. Shenton ME, Hamoda HM, Schneiderman JS, et al., *supra* note 5.
9. *Andrew v. Patterson Motor Freight, Inc.*, No. 6:13CV814, 2014 U.S. Dist. LEXIS 151234 (W.D. La. Oct. 23, 2014).
10. *Id.* at 22.
11. *Id.*
12. Shenton ME, Hamoda HM, Schneiderman JS, et al., *supra* note 5, at 3.
13. Shenton ME, Hamoda HM, Schneiderman JS, et al., *supra* note 5, at 2.
14. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
15. *Id.*
16. *Marsh v. Celebrity Cruises, Inc.*, No. 1:17-cv-21097-UU, 2017 U.S. Dist. LEXIS 216486 (S.D. Fla. Dec. 15, 2017).
17. *Id.* at 6.
18. *Id.*
19. *Roach v. Hughes*, No. 4:13-CV-00136-JHM, 2016 U.S. Dist. LEXIS 192835 (W.D. Ky. Mar. 9, 2016).
20. Id. at 8.
21. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).
22. *Dovberg v. Laubach*, 154 A.D.3d 810, 813 (2d Dept. 2017).
23. *LaMasa v. Bachman*, 56 A.D..3d 340 (1st Dept. 2008).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Brouard v. Convery*, 59 Misc.3d 233 (Sup. Ct., Suff. Co. 2018).
28. *Id.*
29. 154 A.D.3d 810 (2d Dept. 2017).
30. http://www.ajnr.org/content/36/2/E1.
31. *Id.*
32. *Brouard*, supra note 27, at 237.
33. *Brouard v. Convery*, 2019 Trial Court Order.
34. *Id.*
35. *Siracusa v. City Ice Pavilion, L.L.C.*, 57 Misc.3d 267 (Sup. Ct., Queens Co.. 2017).
36. *Blake v. New York Central Mutual Fire Insurance Company*, Westchester County, Index No.: 60727/2018.
37. *Id.*
38. *Id.*

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FOCUS: TRIAL PRACTICE

Trial Practice in 2022—Preparing for the Unpredictable

Brian Gibbons

"If you don't like the weather in New England, just wait a few minutes." – Mark Twain

This saying refers to weather patterns, which seem to change by the minute. The same can be said about news related to COVID-19, in that the "trends" related to vaccination rates, infection rates, and the overall state of the pandemic seem to change by the day. Although some information in this article may become stale before publication, the goal is to give some practical insight about how trials can be expected to proceed in greater New York City in 2022. While this article is being published in *Nassau Lawyer*, its scope extends beyond Mineola and Hempstead.

For the day-to-day professional lives of trial attorneys in Greater New York City, COVID-19 has hit "pause." Before March 2020, personal lives were also literally planned around one's trial calendar.

"Honey, how about a long weekend in the Catskills in mid-July?"

"Don't book anything—I may be on trial then."

Sound familiar?

Since March 2020, jury trials have been largely on hold.[1] Some places in the United States have gotten creative to keep the trial calendars moving, like conducting virtual trials with remote jurors. These efforts have received mixed reviews, at best.[2] Thankfully, the New York Unified Court System has consistently geared its efforts toward in-person jury trials, with masks and social distancing in mind, and reserved remote practices to conferences and motion arguments.

Putting aside the unpredictable nature of COVID variants, and their impact on trials in the short term, attorneys should be prepared for 2022 trial practice in the Greater New York City area. This article incorporates experience and advice from attorneys who have tried cases in the second half of 2021 in Nassau and Suffolk Counties, each of the five boroughs, Westchester, and the Eastern District of New York in Central Islip. The goal of this article is to help prepare for 2022 trial practice, from a tactical perspective.

Jury Selection Logistics

Trial attorneys who have not tried a case in the past year have been most curious about the jury selection process. Depending on the venue, some court clerks have been pre-screening the jurors to gauge COVID-19 concerns. Along those lines, an attorney who has tried several civil matters in New York City in 2020-21 noted that not a single juror he questioned voiced any concern about COVID-19, and more importantly, no juror expressed an inability to be fair because of COVID-19. This dynamic suggests the clerk's offices are doing an admirable job pre-screening the jury pool. Without pre-screening a large percentage of the jurors would be likely to cite COVID concerns as a basis to be excused, which could result in several days to select a jury. To the extent court clerks have been pre-screening jurors, that practice should continue for the next several months.

Jury selection logistics seem to depend largely on the venue and the type of case. For example, in Suffolk County, jury selection this fall was proceeding "as usual," in that the litigants and the jurors utilized a jury selection room, while fully masked, and the attorneys questioned the jurors as they would have before March 2020. Also, additional space was mandated between jurors, to ensure social distancing. To that end, other than masked and distancing, the jury selection process was largely familiar to the attorneys. Conversely, in New York City venues and in Nassau County Supreme Court, jury selection has been conducted in either large courtrooms or in a central jury room, also to ensure social distancing. The courts have been instructing the jurors and the litigants to always remain masked, with the exception of litigants being permitted to briefly "unmask" to introduce himself/herself at the start.

Also, New York City courts have used smaller jury pools to ensure proper distancing—particularly if a larger courtroom is not available.

In the Eastern District, a criminal trial this past fall (which, of course, requires 12 jurors plus alternates) utilized pools of roughly 150 jurors—far more than a typical civil trial. There, the juror being questioned by the litigants, and by the judge, would approach a podium, alone, and would remove his/her mask while being questioned. All other jurors would remain masked and seated until the clerk drew his/her name.

Good trial attorneys use the jury selection process to endear themselves to the jury, and to develop allies. The jury "endearment" process has become much trickier since there is much less gauge of facial expressions. This dynamic leads to more uncertainty about whether the attorney has picked a "good" jury or not. The "unchartered waters" of reading masked jurors' facial expressions tends to bleed into the trial itself. If trial attorneys never really know what jurors are thinking, now they REALLY don't know what they're thinking.

Trial Logistics

During trial, attorneys often look to "take charge" of the courtroom by moving around the room, speaking directly to jurors, approaching witnesses at appropriate times, and using facial expressions, inflection, and body language throughout the course of the trial. COVID-era trials limit opportunities to take control of the courtroom. For example:

- Obviously, jurors are masked throughout trial—this is consistent across greater New York City venues. As a result, just as during jury selection, attorneys' ability to read jurors' facial expressions is diminished throughout trial. Moreover, "reading the eyes" of masked jurors with any degree of predictability remains an ambitious goal.

- To ensure social distancing, jurors are often spread out such that three jurors are placed in the jury box, with the rest (plus alternates) in the gallery behind the litigants. As a result, the attorney cannot look at most of the jurors while questioning a witness, thereby making it more difficult to gauge how the jurors perceive that witness. The value of perceiving a juror's smirk, or furrowed brow, while a witness is testifying can affect strategy. Attorneys are now less able to perceive those facial expressions.

- Attorneys are often instructed to remain seated at their respective tables, or stationary at a podium, even while questioning the witnesses, since allowing an attorney to roam the courtroom would tend to violate social distancing guidelines. As a result, a trial attorney has less capacity to "own" the courtroom for dramatic effect, for example, while cross-examining a witness or delivering a summation.

- In many cases, witnesses testify unmasked, but behind plexiglass, to allow jurors to see their facial expressions during testimony.

- Depending on the venue, and even the judge, additional attendees are permitted to be observe trials, but with differing protocols. In Queens, for example, a risk manager was permitted to attend trial, the back row of the courtroom, as far away from the jurors as possible. Conversely, Kings Supreme Court has utilized a live stream of a trial, which allowed attendees to observe the trial from an adjacent courtroom in the same building.

Jury Deliberations and Damages

In recent years, even before COVID-19, jury polarization has been a topic of concern.[3] [4] Whether due to the current political divide in the United States, media reporting on more extreme verdicts, or other facts, there has been a recent trend for jurors to be more "dug in," in that plaintiff jurors are more plaintiff-friendly, whereas defense jurors have been more skeptical of plaintiffs. (Of course, this is a very broad generalization, but much has been written on this topic in recent years, well before COVID.)

Many attorneys have not noticed any increased jury polarization during COVID, as compared to a few years earlier, at least based on the verdicts rendered. That said, given the hardships over the past two years, jurors have been less receptive to non-economic damages in the personal injury context, particularly when the claimed injury is relatively modest. Conversely, jurors have been more receptive to economic damages—when an injury renders a plaintiff unable to work. Again, this generalization is based on a limited sample size, but is nevertheless worth relaying.

Given the recent surge in Omicron cases in New York and around the United States, judges are aware of the increased risk of infection, and in one case, asked deliberating jurors to work overtime to reach a verdict before an infection (and potential mistrial) comes to pass.[5] Interesting times, to be sure.

Little else is known about what is discussed—COVID or otherwise—in jury deliberations during COVID-era trials—but that's the idea. Jury deliberations were and are sacrosanct, and whether COVID concerns are truly impacting the deliberation process is unknown.

Difficulty Reducing Trial Backlog

As of late December 2021, there were over 1900 cases pending on the DCM jury trial calendar in the Nassau County Supreme Court, not including the over 400 medical malpractice cases. Trial practice is essential to clear this backlog since the tougher cases to settle often need the proverbial "courthouse steps" to incentivize both parties to reach a settlement—even a begrudging one. The problem has been logistics. Specifically, amidst current COVID spacing requirements, the maximum number of jury trials (in Nassau County Supreme Court) can be expanded to five at one time with a maximum of three attorneys. For cases with more than three attorneys the CCP Courtroom is being used for jury selection and trial. This limits such multi-attorney jury trials to one at a time on cases which can take multiple weeks to complete.

Reducing trial backlog, with trial practice so limited right now by settlements is not as simple as it sounds. First, the cases that currently remain on the trial calendar, in many instances, are there for a reason. That is, they are tough cases to settle, where each side is entrenched in a position. Second, along the same lines, many plaintiffs may be inclined to say, "I have waited this long for a trial date and should not have to settle for a discount now." Third, many may have read about "The Great Resignation" during COVID, which refers to significant turnover in the workforce. The insurance/risk management industry has experienced its share of turnover, and newly hired risk managers' first priority is to "make their mark," and not to pay out big money on inherited claims. These factors make reducing the trial backlog an arduous task.

Eventually, the trial "floodgates" will open, and for trial attorneys on both sides of the aisle, the incentive to resolve to cases now should be evident. Because once those floodgates do open, courts will be more likely to send inexperienced attorneys out to select juries, out of necessity. Clients should be advised of this likelihood now, identifying cases that can be settled, and utilizing various ADR programs—such as the one implemented by Hon. Vito M. DeStefano in Nassau Supreme[6]—whenever possible.

Conclusion—The Craft of COVID Trial Practice

Trying a case is a craft, meaning that the skills involved in trial practice incorporate both art and science. As trial attorney Stephen Barry aptly puts it, "The science of trial is the same, but the art is completely different right now."[7]

In terms of the science being the same, in a personal injury context, the plaintiff still has the burden of proof as to both liability and damages. The plaintiff still must convince the jury that the defendant is liable for plaintiff's accident, and that the accident proximately caused plaintiff's injury, leading to damages. The defendant may still present witnesses on liability and damages, cross-examine plaintiff's witnesses, and present an alternative theory to the jury. None of that is changed.

But the *art* of the trial has changed, in the following significant ways:

- Jurors are masked, and in many cases, behind the trial attorneys during witness testimony, thereby making it more difficult to "read" jurors as trial progresses;

- Attorneys are not permitted to roam the courtroom, approach witnesses, or in some instances, to even leave their respective tables or podiums; and

- Multiple-attorney trials are even more problematic since multiple attorneys also means multiple clients—and many courthouses simply do not have the resources to conduct these trials in a socially distanced environment right now.

Trial attorneys are tasked with the same job as before—to convince a jury of the client's position. The goal remains the same, but the pathway to that goal is completely different than it has been in the past—hopefully, just in the short term.

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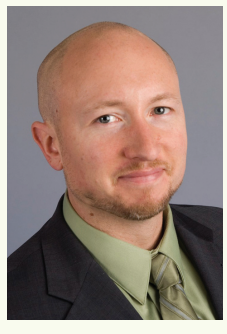
3. Robert A. Clifford, "Polarized Juries?" National Law Review (March 6, 2018), https://www.natlawreview.com/article/polarized-juries.
4. Claire Luna and Jack Oliver, "Juror Perspectives in the Post-COVID Era," For the Defense (Nov. 2021), https://digitaleditions.walsworth.com/publication/?i=729352&ver=html5&p=42.
5. https://www.audacy.com/krld/news/national/citing-covid-judge-prods-maxwell-jury-to-work-longer-hours.
6. Commercial Division, Nassau County, Rules of the Alternative Dispute Resolution Program, http://ww2.nycourts.gov/courts/comdiv/nassau_ADR_Rules.shtml.
7. Telephone interview with Stephen Barry (Jan. 7, 2022).



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