

The “CSI Effect”: Popular Culture’s Effect on Civil Juries

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INTRODUCTION

Thanks to the Popular Press, the catchy sound bite dubbed “CSI Effect” has become virtually a household word although until recently a Google search on this topic pulled only up a few mainstream articles. In a short span of less than two years, university studies and conflicting findings have appeared. While there is research that suggests that the “CSI Effect” is more anecdotal than proven, much of this research is early, and it focuses on lab experiences and verdicts rather than on decision-making during the deliberative process.

What is the “CSI Effect”? How is it affecting jurors’ decision-making and the justice system as a whole? How is it manifesting in civil cases? What does a litigator need to understand about this very real phenomenon?

What is the “CSI Effect”?

The term “CSI Effect” has been used to describe a purported phenomenon whereby high-tech, forensic science dramatized in television crime dramas theoretically promotes unrealistic expectations among jurors of how conclusively forensic evidence determines innocence or guilt, or from the perspective of the civil litigator, causation, or liability. Accordingly, because jurors are recalibrating the way they consider evidence, this is also impacting the way they contemplate the burden of proof. Rather than “beyond a reasonable doubt” many prosecutors argue that jurors are applying a “beyond any doubt” standard, completely dependent on forensic, scientific evidence.

Once the cornerstone of the justice system, proponents of the existence of the “CSI Effects” contend the use of deductive reasoning is being replaced with the need for absolute “scientific proof” of guilt or liability. Anecdotally, some lawyers, other professionals and law enforcement authorities complain that jurors have lost all ability to make assessments of credibility or weigh evidence but, instead, jurors have expectations that attorneys present impossibly conclusive evidence like that often seen on “CSI”.

POPULARITY OF CSI AND OTHER CRIME DRAMAS

The Neilson ratings for July of 2006 demonstrated that three of the top ten shows that week were of the CSI franchise. Law and Order, Law and Order: Criminal Intent and Cold Case were also in the top ten, making a full 60% of the top ten shows crime solving mystery and courtroom drama broadcasts.

During the week of January 15-21, 2007, CSI shows, including "CSI: Crime Scene Investigation", "CSI: NY" and "CSI: Miami had a combined viewer ship of over 47 million viewers. Five additional shows in the top ten for that same week were also crime solving or related shows. List of Top 20 Prime-Time TV Shows. (2007, January 23). [Electronic version]. *San Francisco Chronicle*. Retrieved January 30, 2007, from <http://www.sfgate.com/tvradio/neilsens/>

HOW DOES THE "CSI EFFECT" IMPACT JURORS?

Defense lawyers argue CSI and similar shows cause jurors to rely too heavily on scientific findings and seize on the seemingly "objective" science issue to the point that they are unwilling to accept that those findings can be compromised by human or technical errors. They also generally argue that most forensic evidence cuts for the prosecution. Indeed, there is statistical evidence to suggest that at least with regard to federal prosecutions, jurors find in favor of the prosecution in light out of the verdicts.

Prosecutors contend the shows factually can make it more difficult for them to win convictions in the large majority of cases in which scientific evidence is irrelevant or absent. They argue that a lack of forensic evidence, even if irrelevant, lead to acquittal.

Max Houck, director of the Forensic Science Initiative at West Virginia University, and who presented a paper on the CSI effect at the American Association for the Advancement of Science annual conference said, "Prosecutors tend to fear the "CSI Effect" on juries, because juries now have an unrealistic expectation of what the laboratory will do. They wonder why everything wasn't tested, when in fact not everything needs to be tested. Defense attorneys now worry about the CSI effect as well, because they think that the jurors come in and have this view of science as this juggernaut, this infallible objective method that is always right and spells doom for their client." Boyle, Alan. (2005, February 20). Crime Sleuths Cope With CSI Effect. Retrieved January 30, 2007 from <http://www.msnbc.msn.com/id/7003715>

SOME ANECDOTAL STORIES

What do jurors expect?

Jurors expect the criminal justice system to work better than it does. They are used to seeing such far fetched technology as: pouring caulk into knife wounds to make a cast of the weapons. They expect machines that can identify cologne from scents on clothing. A criminal charged based on "neuro-linguistic programming" – detecting lies by the way a person's eyes shift. They expect DNA sequencers, mass spectrometers, photometric fingerprint illuminators, scanning electron microscopes.

Probably the most famous apparent "CSI Effect" case to date was the Robert Blake trial. The foreman of the jury defended the decision to acquit Blake arguing that the physical evidence presented by the prosecution was "flimsy." Jurors decided that the prosecution had failed "to put the gun in Blake's hand" and that neither

Blake's skin nor clothes were marked with a single particle of the residue that might have been expected had he been the man who fired the gun that killed his wife. Consensus: Evidence Blake's Savior. (2005, March 17). *CBS News*. Retrieved July 5, 2006, from <http://www.cbsnews.com/stories/2005/03/17/earlyshow/>

High-profile gunshot residue expert Steve Dowell -- who provided expert testimony for the prosecution in the Robert Blake murder trial -- alluded to "the 'CSI' effect" and the role it may have played in the case. According to Dowell, seven of the 12 jurors watched "CSI" and expected the trial to "be more CSI-like," a fact he found significant and that could have implications for future criminal trials. Blankstein, Andrew and Guccione, Jean. (2005). 'CSI Effect' hinted by Blake jurors. *Los Angeles Times*. Retrieved June 2, 2005, from <http://www.postgazette.com/pg/05079/473831.stm>

Does Research Support a "CSI EFFECT?"

While there is much conversation about the "CSI Effect", there is very little empirical evidence that the effect exists. Tyler, Tom R. (2006). Viewing *CSI* and the threshold of guilt: managing truth and justice in reality and fiction [Electronic version]. *The Yale Law Journal*, 115, 1050-1085.

In fact several new university studies have found no "CSI Effect" but these studies assumed that the effect hurt prosecutors and only measure outcomes, or verdicts, not processes, or decision matrixes- which are more important from a civil perspective. One could argue that although a discernable, measurable "CSI Effect" that actually causes verdicts to go one way or another would be difficult to prove, the fact that it is not replicable in a research setting does not mean it is not a *contributing* factor in many cases. There is simply too much anecdotal and qualitative data to suggest otherwise.

So the question remains, is there a "CSI Effect" and is it causing verdicts to swing a particular way?

While there is very little empirical research on the "CSI Effect", there is research on related topics that informs us that the "CSI Effect" may be affecting juror decision-making. For example, research on multiple fronts supports the notion that pre-trial publicity shapes verdicts. As a general rule, participants exposed to negative pretrial publicity were significantly more likely to find a defendant guilty than those exposed to either positive pretrial publicity or no pre-trial publicity. (Tyler, 2006)

Another study found that previous exposure to a media presentation altered the type of evidence that participants indicated that they would find plausible. (Tyler, 2006) And, CSI may have a similar effect. Rather than carefully weighing credibility, arguably the investigators often seem to ignore the problem of determining whether or not someone is lying by instead going after "real" evidence like micro fibers. (Tyler 2006)

How does the "CSI Effect" manifest in civil cases?

Trial Consultant Rich Matthews makes the point: "It has been documented that prosecutors are offering scientific evidence that they wouldn't have even a few years ago -- either because it is on a point that isn't really that important or because managing the resources and priorities of a crime lab would have led to not producing it. They must do it now, lest a jury wonder where the CSI stuff was, and assume that **an absence of proof is a proof of absence.**" Matthews, Richard. (2006, July 9). The CSI Effect in Civil Cases As Well As Criminal Ones. *Juryology.com*

“And really, that is the linchpin of the danger of the “CSI Effect”; a lack of evidence which is expected by an amateur leads to the assumption that if the evidence existed anywhere in the universe, the prosecutor would have offered it, which he or she did not, so therefore it doesn't exist and the claimed event never happened.” (Matthews, 2006)

It is well-known that the differing standards of proof between criminal and civil cases have tended to confuse jurors. Jury Consultants and lawyers frequently see a mock juror lecturing the others on “beyond a shadow of a doubt” in a civil case. The “CSI Effect” in civil cases is a continuation of this already ongoing confusion.

For example, in a product liability case dealing with a pediatric Ambu Bag, during a routine tonsillectomy the child patient went without air for 17 minutes. During the course of the litigation against the doctor, plaintiffs found out that the ambu bag had been recalled so they filed a claim against a manufacturer. The bag was recalled because on some of the bags, the valve would stick, cutting off air that should have flowed freely through the bag. The issue in this case was whether or not THIS particular bag contributed to the injury. The plaintiffs had clear circumstantial evidence through the testimony of those on the scene who saw a rise and fall in the chest during mouth to mouth, a rise in fall when the intubation tube was inserted and mouth to intubation tube was used, but no rise and fall when the Ambu bag was used. Yet a central criticism of the plaintiffs case by many of the jurors was that the plaintiffs did not take a microscopic picture of the valve to see there was a smooth or fissured surface, indicating that the valve had been stuck together, stopping the flow of air.

In another civil case against a fast food chain where the plaintiff alleged that she would not have been raped by the employee had there been better security, mock jurors said, “we believe that the company was negligent, and should be responsible, but we just don't believe she was raped because there was not a DNA test done.”

From Rich Matthews of Juryology.com:

“In a federal suit in the western U.S., a plaintiff alleged sexual discrimination and violations of the Equal Pay Act. Part of the dispute was over who saw which emails and when. The ability of either side to offer any hard evidence about this was meager. In short, this was a standard, run of the mill civil lawsuit. While the fight was over how much the plaintiff had been paid during certain years, whether others had been paid more for improper reasons, whether her pay had been affected by her complaints about certain things, it had escaped the notice of counsel on both sides that they were handling a technical lawsuit.”

“How can a standard issue pay dispute be a technical lawsuit?” During a focus group on the case out of nowhere, one participant said: “What do they mean they can't tell who got which emails and who didn't? The FBI can find hard drives from computers that have been blown up or burned, and they can put them under microscopes to see if the individual bit is a one or a zero, and can visually reconstruct the contents of the hard drive. That's how they've caught a bunch of terrorists. So why aren't we seeing that evidence? Because they don't want us to see it. Or they aren't sure of their case.” (Matthews, 2006)

STRATEGY IMPLICATIONS

The prior examples show how the “CSI Effect” can manifest in civil cases, blindsiding the trial team as to its role in the way jurors may view the evidence. Lawyers tend to lose some perspective after living with a case

often for years before it goes to trial. It is essential that trial counsel view a case through fresh eyes. A good starting point may be to have a consultant review it for CSI issues.

Jury Research

The best of all scenarios is to test case theories and try to identify any "CSI Effect" issues. Now, more than ever it is important to understand how a lay jury will problems solve the case. Focus group or mock trial research can be done effectively and efficiently- saving time and money down the road. Also, this allows for identifying whether the potential "CSI Effect" issues are the unrealistic expectations of one or two rogue jurors, or an easily accepted expectation embraced by the panel as a whole. Clearly, the distinction here bears on how the case is ultimately presented and the steps that are taken to mitigate these factors. If the potential CSI factors are not identified, it is impossible to be prepared for them at trial.

Voir Dire/Jury Selection:

If dealing with a possible "CSI Effect" issue, it may be important to identify jurors who can think in shades of grey. Finding out what jurors do for a living, what they do in their spare time, and whether they consider themselves easygoing, or a disciplinarian can all give provide insight as to how they think in general and how they will problem solve the dispute at hand. Jurors with a more classical education, those who understand deductive reasoning need to be identified, as do those who think in terms of black and white.

How educated are they? A less educated person may be more affected by the "CSI Effect" than a more highly educated person. Again, a person with a classical education may be less affected by the "CSI Effect". What is their age? Younger jurors will almost always be more affected by "CSI Effect" issues in a case given their reliance on technology.

Educating the jury about the lack of forensic evidence in a civil case may be particularly important. Again, recalling the typical confusion of a juror on the proper burden in a civil case, it will be important to realize that the same juror may assume that all the resources that are brought to bear in a terrorism case are also available in a discrimination case. For the litigator this strains common sense, but the average juror has no education on this issue and largely forms impressions from television. If a "CSI Effect" issue is identified through jury research, it may be helpful to address the lack or forensic evidence up front. It is likely much better for a juror to have a reasonable explanation for why something is missing, than to formulate their own conclusions for the reason.

Supplemental juror questionnaires are an excellent way to get a mountain of information on a particular juror's habits. Jurors love to list in great detail all the television shows they watch, and it's no surprise that high on the list in questionnaire after questionnaire is- CSI.

Witnesses

If a case is identified as having "CSI Effect" issues, choose experts carefully. And be prepared to question experts directly about the lack of forensic evidence. In Arizona, Illinois and California,

prosecutors now use "negative evidence witnesses" to try to assure jurors that it is not unusual for real crime-scene investigators to fail to find DNA, fingerprints, and other evidence at crime scenes.

This may begin to carry over to civil cases as well.

ABOUT THE PRESENTER

Tara Trask

Tara Trask is President and founder of Tara Trask, LLC, a full service litigation strategy, jury research and trial consulting practice. She has 13 years experience in the field of jury research, and has debriefed thousands of jurors both mock and actual. She has been involved in over 150 jury trials across the country, including assisting Oprah Winfrey in *Texas Beef Group. v. Winfrey* and Exxon in their excess coverage suit against Lloyd's of London over the Valdez spill. Her practice includes all types of complex litigation including intellectual property, contract disputes, oil and gas, products liability, medical and legal malpractice, employment, and securities. Ms. Trask is a frequent author and lecturer on juror psychology and other trial science topics. She serves on the Board of Directors for the American Society of Trial Consultants, and she is a member of the American Bar Association, and the American Psychology-Law Society. She is an avid fundraiser, serving on the Board of Directors for Raphael House, San Francisco's first family shelter, and on committees for Global Green San Francisco, and the International Women's Museum. She has competed in over 125 triathlons in the last 18 years, most recently Ironman New Zealand. She can be reached at tara@taratrask.com.