

...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE &
DEMOCRACY
NEWS

Dear Friends,

The Center for Justice & Democracy is keeping you up-to-date on some of the hottest blogs around.

First is our own blog, of course: ThePopTort.com. Each day, our blog covers the latest news on product defects, asbestos, corporate cover-ups, opposition front groups, arbitration, health care and medical malpractice, including hot topics in your state. Become a PopTort fan on Facebook, follow us on Twitter, or simply click on ThePopTort.com as often as you like. We welcome your comments!

I have also started to blog for the Huffington Post, one of the most widely read – and influential – sites around. Here are some of my latest posts: Memo to Corporate America and Organized Medicine: No One Likes a Hypocrite!; For Veterans Day, Let's Fix a Great Military Injustice - Repeal the Feres Doctrine; Medical Malpractice Tort Reform - We Are Already Suffering and Don't Need More; and Boehner's Big Gift to the Drug Industry. I invite all comment to my Huff Post blog, and become a fan if you like what you see.

As the ancient Chinese proverb goes, "May you live in interesting times." Who would have guessed that these times would be quite so interesting. But luckily, we have blogs to explain it all!

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: CIVIL JURIES

THE FUNDAMENTAL NATURE OF JURIES

The civil jury has been a cornerstone of our democracy. In 1791, during its first session, Congress enshrined the right to civil jury trial in the Bill of Rights. It became the Seventh Amendment to the U.S. Constitution.

The Founders believed not only that ordinary citizens had the common sense, life experience and values to make reasoned decisions on the facts in civil cases but also that the civil jury was vital for the protection of individual liberties

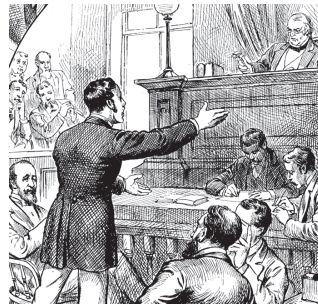
against injustice. Two centuries later, U.S. Supreme Court Justice William Rehnquist wrote in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." Rehnquist added, "Trial by a jury of laymen, rather than by the sovereign's judges, was important to the founders because juries represent the layman's common sense, the 'passionate elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community."

This form of direct citizen participation in the administration of justice remains just as vital today. American civil juries serve as indispensable watchdogs over official or arbitrary misuse of power that threatens the public welfare. It is well recognized that jury verdicts in civil cases, or even the mere prospect of them, have forced manufacturers, hospitals, automakers, drug companies and other industries to make their products and prac-

tices safer, saving countless lives from injury or death (*see, e.g., Lifesavers: CJ&D's Guide To Lawsuits That Protect Us All*). Civil juries also even the playing field by helping victims hold accountable individuals, institutions and corporations who misuse their authority. Access to the civil jury system is often the only means of redress in civil liberties, civil rights or violent crime cases when the criminal justice system has failed.

Equally important, civil juries express the conscience of the community, injecting shared values into their decisions about society's tolerance for certain types of behavior. In this way, civil juries perform a norm-setting or signaling function that deters potential wrongdoers from dangerous conduct. Civil juries also help develop community acceptance of tort law, since they are continuously called upon to define what is a "reasonable person," "reasonable conduct" and other evolving precepts of tort law. And sometimes, through civil jury nullification, verdicts have set in motion significant legislative changes to civil law standards, such as the statutory repeal of contributory negligence and the adoption of comparative negligence rules.

In addition, the civil jury system educates the public about civic virtues, democratic values and the law itself. French political scientist and historian Alexis De Tocqueville championed this aspect of our justice system in his 1835 book, *Democracy in America*, hailing the civil jury as an institution essential to the success of every free society. De Tocqueville wrote, "Juries, especially civil juries, instill some of the habits of the judicial mind into



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WHAT THE JURY DATA SHOW

Contrary to corporate propaganda, civil juries are competent, responsible and rational, and their decisions reflect continually changing community attitudes about corporate responsibility and government accountability. Here's what the data show:

It is difficult for victims to win cases before civil juries. In 2005, the most recent year studied by the U.S. Department of Justice (DOJ), plaintiffs won only 53.2 percent of state civil cases tried before juries, compared to 65.7 percent of bench trials (i.e., cases decided by a judge). In state tort cases, juries were equally conservative, with plaintiffs prevailing in only 51.3 percent of jury trials. Moreover, the DOJ found no statistically significant difference in win rates between bench and jury trials for tort cases.

Regarding medical malpractice cases, it was especially difficult for victims to win cases before state juries. DOJ data show that in 2005 med mal plain-

tiffs won only 22.7 percent of jury-tried cases, while prevailing before judges 50 percent of the time. Plaintiffs also had a low rate of success before state juries in non-asbestos product liability trials, winning in just 20.7 percent of cases.

State juries were equally reluctant to award tort victims punitive damages, which are imposed to punish and deter egregious misconduct. According to the DOJ, approximately 2.7 percent of plaintiff winners received punitive damages awards from tort juries.

And even when victims do win before juries, their verdicts are far lower than commonly believed. The DOJ reports that the median damage award in state civil jury trials in 2005 was \$30,000. The median in state civil bench trials, \$24,000, was statistically similar. Regarding state tort cases, the median jury award in 2005 was \$24,000, an amount statistically similar to the median award in bench trials — \$21,000.

In medical malpractice cases, the median jury award totaled \$400,000, an amount far below the numbers cited by "tort reformers" and the media. In contrast, judges handed down a significantly higher median damage award to medical malpractice victims, \$631,000. As for non-asbestos product liability awards, the median jury-decided verdict totaled \$456,000, a number substantially lower than commonly believed.

Jury-decided punitive damages awards were also far from outrageous in 2005, with the median award in state tort trials equaling \$100,000. This amount, according to the DOJ, was not statistically different from the median punitive damage award of \$54,000 in tort bench trials.

In addition, after examining long-term award data from the nation's 75 most populous counties, the DOJ found that the overall median jury awards in state civil cases had declined by 40.3 percent since 1992. More specifically, "[when] adjusted for inflation, the median dam-

ages awarded in general civil jury trials declined from \$72,000 in 1992 to \$43,000 in 2005...." There was also a steep decline in jury-decided tort awards during that time: The median damage amount decreased by 53.5 percent, from \$71,000 in 1992 to \$33,000 in 2005.

DOJ statistics from the nation's 75 most populous counties also show that civil juries rarely award punitive damages to victorious state tort plaintiffs. In 2005, plaintiff winners received punitive damages in about 5 percent of civil jury trials; the percentage ranged from 4 percent in 1996 to 6 percent in 1992 and 2001.

What's more, empirical studies consistently show juries to be capable, effective and fair decision-makers who can handle complex cases. This was the finding of Cornell University Law professor Valerie P. Hans and Duke University Law professor Neil Vidmar, leading experts in the field of jury research, after reviewing their own work and relevant scholarship. As Hans and Vidmar reported in the March–April 2008 issue of *Judicature*, "Jurors' individual and collective recall and comprehension of evidence are substantial. Jurors critically evaluate the content and consistency of testimony provided by both lay and expert witnesses, and do not appear to rubber stamp expert conclusions." Moreover, "[m]ost members of the public adhere to an ethic of individual responsibility, and many wonder about the validity of civil lawsuits. A skeptical approach is reflected in civil jurors' initial stances as they evaluate the testimony and form narrative accounts from the conflicting adversary presentation of evidence." Hans and Vidmar determined that "strength of the evidence presented at the trial is the major determinant of jury verdicts. Similarly, civil jury damage awards are strongly correlated with the degree of injury in a case. These reasonable patterns in jury decisions go a long way toward reassuring us that juries, by and large, listen to the judge and decide cases on the merits of the evidence rather than on biases and prejudice."

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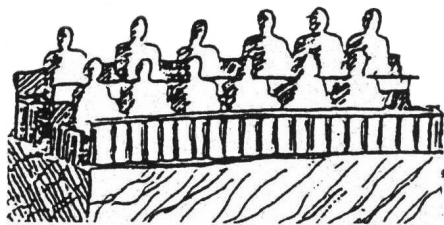
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WHAT THE JURY DATA SHOW

Hans and Vidmar found this was equally true when evaluating arguments that juries are anti-business. “We have explored the claims of doctors and business and corporate executives about unfair treatment by juries, but the empirical evidence does not back them up. The notion of the pro-plaintiff jury is contradicted by many studies that show both actual and mock jurors subject plaintiffs’ evidence to strict scrutiny.” The professors explained that “[a]lthough the research finds that juries treat corporate actors differently, the differential treatment appears to be linked primarily to jurors setting higher standards for corporate and professional behavior, rather than to anti-business sentiments or a ‘deep pockets’ effect. Members of the public, and juries in turn, believe that it is appropriate to hold corporations to higher standards, because of their greater knowledge, resources, and potential for



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impact.” Hans and Vidmar concluded that the “distinctive treatment that businesses receive at the hands of juries is a reflection of the jury’s translation of community values about the role of business in society.”

There is also a consensus among judges that the civil jury system works extremely well. A recent survey of Texas state district court judges by Baylor University Law School faculty, the dean of Baylor’s Graduate School and the president of Mercer University found overwhelming support of juries. According to the 2007 study, over 83 percent of respondents had not observed a single instance of juries awarding excessive compensatory or punitive damages in the four years before the survey. In addition, during the preceding four years, more than 86 percent had never or only in one instance granted relief to a defendant because a jury awarded excessive compensatory damages. Moreover, “no judge in the entire sampling had granted such relief during the prior four years in more than three cases.”

Similarly, after examining systematic studies spanning five decades, Profes-

sors Hans and Vidmar found that judges agree with jury verdicts in most cases. According to their 2008 article in *Judicature*, “Most judges say that jurors make a serious attempt to apply the law, and they do not see jurors relying on their feelings rather than the law in deciding on a verdict.”

Government statistics and legal studies clearly show that civil juries are incredibly evenhanded, not “out of control.” What is out of control is the extent to which corporations and their allies have sought to turn public sentiment against the civil jury. As nationally renowned legal scholar and NYU Law Professor Arthur Miller said during an interview at the American Constitution Society’s 2009 National Convention, “We’re a victim of, a lot of, I think, unfortunate propaganda about jurors being stupid and the system being a lottery. The Founders of our nation felt that to put the hands of fact-finding into twelve good citizens who had common sense and life experience and listened to the evidence was the best way to decide whether you were lying or I was lying. And somehow I think we’ve lost our way.” We couldn’t agree more.

JURY HYPOCRITES

When you look at corporate attacks on the U.S. jury system, there is no suggestion that juries are too unsophisticated, arbitrary or emotional to decide intellectual property disputes, or criminal cases involving organized crime, securities fraud or even the death penalty. Instead, the rhetoric has been limited to complaints about verdicts in personal injury suits. Why? Because corporations recognize that juries do a good job and are only threatened by this fact when it means they will rightly be held financially accountable for dangerous behavior.

This was the finding of a 2008 study by Cornell Law Professors Theodore Eisenberg and Emily Sherwin and Professor Geoffrey P. Miller of NYU Law School, who, after examining contracts from 21 financial and telecommunications com-

panies, discovered that corporations were far more likely to keep their right to jury trial in contracts with one another than with consumers. The researchers found mandatory arbitration clauses in over 75 percent of consumer agreements but in less than 10 percent of their negotiated non-consumer, non-employment contracts.

“[O]ur hypothesis that companies would routinely flee juries was not confirmed,” explained the authors. “Consistent with Eisenberg & Miller’s earlier study, our results suggest that the companies we studied do not, in fact, view juries as undesirable factfinders for many disputes....Our data are thus consistent with the view that another advantage of mandatory arbitration clauses, from the standpoint of companies, is that they allow companies to avoid juries while

disguising the fact that they are doing so in the form of an ostensibly consumer-oriented arbitration clause.”

Other sources confirm corporate confidence in the civil jury. For example, as reported by NCSC’s Center for Jury Studies director Paula Hannaford-Agor, during the ABA’s October 2008 Jury Symposium, corporate counsel for Ford Motor Company and Estée Lauder both “expressed their belief that juries do a good job of deciding cases at costs similar to or less than arbitration.” Ford’s counsel added that, “in his experience, juries rarely ‘get it wrong,’ and when they do, it is usually because the trial judge did not follow the ABA principles in a misguided effort to achieve ‘judicial efficiency,’ especially in jury selection.”

THE FUNDAMENTAL NATURE OF JURIES continued...

every citizen, and just those habits are the very best way of preparing people to be free. ... I think that the main reason for the practical intelligence and the political good sense of the Americans is their long experience with juries in civil cases. ...I regard it as one of the most effective means of popular education at society's disposal."

Despite its historic and current importance, the American civil jury system has been under attack. For over 30 years, the insurance, tobacco, pharmaceutical, chemical, oil and auto industries have waged a relentless lobbying and PR campaign against civil juries. Many states have passed laws that undermine the power and authority of civil juries. Caps on damages are one example. A damages cap is an arbitrary, "one-size-fits-all" ceiling on the amount an injured party can receive in compensation. Damages caps usurp one of the jury's crucial fact-finding responsibilities: Determining compensation based on the specific evidence presented at trial.

Moreover, by forcing victims to accept judgments in disregard of the jury's verdict, such legislation turns the right to trial by jury into a hollow right. Courts across the country continue to strike down caps for this very reason. In February

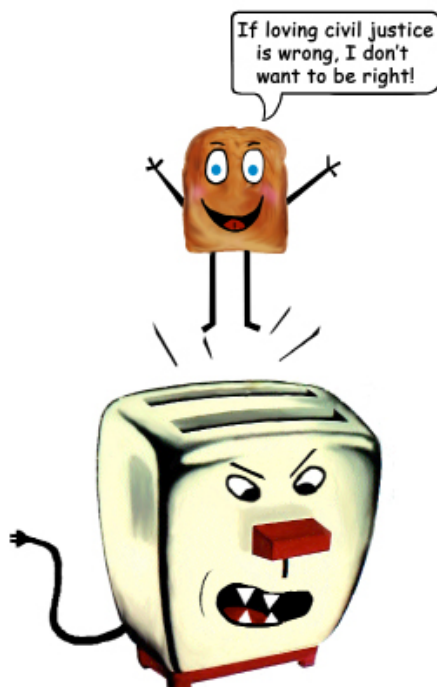
2009, Georgia state court judge Diane Bessen declared the state's \$350,000 cap on non-economic (*i.e.*, quality of life) damages in medical malpractice cases unconstitutional, reasoning in part that the cap "so interferes with the determination of the jury that it renders the right of a jury trial wholly unavailable." The case is now pending before the Georgia Supreme Court.

Other business-led efforts seek to remove juries from certain types of civil cases altogether. One of the more talked about recent proposals, "health courts," is supported by a group founded by corporate lawyers, called Common Good, which would, among other things, bar juries from hearing all medical malpractice claims. Under Common Good's "health court" scheme, decision-making authority would be put in the hands of either the hospital or insurer involved, or "experts" appointed and commissioned by a panel heavily weighted toward health industry representatives, with compensation for injuries determined by a "schedule" developed by political appointees (*e.g.*, a certain amount for a lost eye or severed limb) rather than decided by juries on a case-by-case basis.

Mandatory binding arbitration clauses in contracts between businesses and

ordinary Americans represent a more covert attempt to dismantle the civil jury system. These forced arbitration provisions, usually buried in the fine print and written in legalese that is incomprehensible to most people, abolish jury trials, replacing them with a single arbitrator or a panel of arbitrators who need not follow the law, may be biased or have a financial incentive to side with corporate repeat players who generate most of the cases they handle. Many standard purchase agreements, employment contracts and medical insurance agreements include mandatory binding arbitration clauses, so if you've bought a car, had a credit card, purchased a computer, used a cell phone, invested in stocks, had insurance, saw a doctor or worked for a large corporation during the last decade, chances are you unwittingly forfeited your constitutional right to trial by jury.

Given the vital role juries play in advancing democracy and safeguarding our freedoms, Congress, state legislatures and courts must ensure that their authority is not crippled in any respect. Failure to do so would not only jeopardize a fundamental feature of our civil justice system but also leave ordinary citizens vulnerable to the unchecked power of corporate America.



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