

# **THE VANISHING JURY: A VIEW FROM THE BENCH**

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Craig Smith is Judge of the 192<sup>nd</sup> District Court in Dallas. Before taking the bench, Judge Smith spent over 25 years as a civil trial lawyer. He is “Board Certified” by the Texas Board of Legal Specialization in both Civil Trial Law and Personal Injury Law. He is a former President of the Dallas Trial Lawyers Association. He has served on various State Bar Committees and currently serves on the State Bar Court Administration Task Force Committee and the Bench Book Committee. He is also the Dallas District Court Representative to the Texas Association of District Judges.

He is an “Advocate” member of the American Board of Trial Advocates. Prior to taking the bench, he was also a member of the Executive Committee and a National Board Member of ABOTA (2003-2006). He is a Life Fellow at the Texas Bar Foundation. He was named as “Texas Super Lawyer” in 2003-2006.

As a practicing attorney, he was a frequent lecturer at continuing legal education events on various trial topics including Direct Examination, Cross Examination, Voir Dire and Depositions. As a Judge he is a frequent lecturer on a variety of subjects including the “Vanishing Jury” and “Voir Dire”.

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## THE VANISHING JURY: A VIEW FROM THE BENCH

### HISTORY OF TRIAL BY JURY IN THE U.S.

Though the jury trial was several centuries old, in 1215, the Magna Carta provided that “[N]o free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him or send upon him except by the lawful judgment of his peers or by the law of the land.”

By 1764, all of the American colonies provided for a right to trial by jury in civil and criminal matters.

The United States Constitution as originally drafted did *not* provide for the right to jury trial. The omission was pointed out by both Thomas Jefferson, James Madison and Patrick Henry. Jefferson’s speech to the Continental Congress is succinct on the subject, “I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution”.

The State of Texas has long recognized in importance of trial by jury, as evidenced by the Texas Declaration of Independence:

The Mexican government has failed and refused to secure, on a firm basis, the right to trial by jury, that palladium of civil liberty and only safe guarantee for the life, liberty and property of the citizen.<sup>1</sup>

The Texas Constitution has always guaranteed the right to trial by jury.

On March 17, 1836, ten days before the massacre of Goliad and just over one month before the war for independence was decisively won at the battle of San Jacinto, the Constitution of the Republic of Texas was ratified. It contained explicit protections for the right to trial by jury. Subsequent constitutions for the state of Texas - adopted after (1) annexation by the United States in 1845, (2) secession from the Union in 1861, (3) the close of the Civil War in 1866 and (4) the end of Reconstruction in 1876 - all contained jury trial and open court guarantees identical to those found in the original declaration of rights.<sup>2</sup>

### “TRENDING DOWN” OF JURY TRIALS

Justice Nathan Hecht, a member of the Texas Supreme Court, has written an article recently about the “trending down” of jury trials in Texas civil cases<sup>3</sup>. Published in the Texas Bar Journal, here are some of the statistics cited by Justice Hecht in support: The number of Texas civil jury verdicts have decreased by 45% from 1986-2005

The percentage of jury verdicts to total cases disposed of from 1986-2005 has fallen by 44%

The percentage of jury verdicts in federal cases closely matches the trend in state court cases

Justice Hecht attributes the decrease in civil jury verdicts to several factors, including among others the

cost of pretrial discovery, public perception of juries, arbitration, mediation, and changes in both substantive and procedural law.

Hecht opines that “if it continues, the need for trial lawyers, trial judges, appellate judges, and even the common law system will diminish.”<sup>4</sup> Justice Hecht believes the dwindling jury system to be a negative development. “I think it’s bad,” says the jurist.<sup>5</sup>

There are many reasons for this downward trend, some of which include public perception of lawsuits.

### MEDIA INFLUENCE

A powerful lobby of those interested in the “reform” or complete elimination of the jury system has successfully transmitted its messages through media sources whether by direct advertising or through more subtle methods of message presentation or talking points.

The “reformers” argue that the system is rife with runaway juries. As discussed in last Spring’s Baylor Law Review, “It seems that much of what has been written in favor of a need for tort reform is premised upon anecdotal horror stories, surveys of public opinion or analysis of jury verdicts that employs qualitative second guessing of jury verdicts by someone who was not present at trial to actually see and assess the evidence first hand.”<sup>6</sup>

One of the tools used by jury “reform” advocates is the litigation anecdote. A good analysis of examples of the litigation anecdote is contained in the Baylor Law Review article, “Straight From the Horse’s Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform.”<sup>7</sup>

“These stories typically include ones such as the burglar falling through a skylight who recovered damages, the well traveled and inaccurate story of the medical malpractice claimant who claimed she had lost her powers of extrasensory perception as a result of a botched CAT scan, and the overweight man who suffered a heart attack while starting a Sears lawnmower and sued claiming a defective product. All true in part – yet each story leaving out important clarifying information.”<sup>8</sup>

The point of the stories suggests that juries can no longer be trusted to find the truth. “While one would not believe that any serious social scientist would place much emphasis on such stories, they continue to persist in the media with the most outlandish stories being repeated often in the media.”<sup>9</sup>

### PUBLIC PERCEPTION CONCERNING JURY AWARDS

One reason for the dearth of jury trials may be that the parties do not wish to place their fate in the hands of juries given the perception either that juries may be

too apt to award exceedingly high verdicts or that they are likely to do the opposite. What then is the truth?

In January 2005, a survey was completed by 303 of Texas' district court judges at the request of a group of Baylor Law School professors.<sup>10</sup> The survey was intended to address the question of whether there was, indeed, a "tort crisis" in the state of Texas.

The district court judges were asked a series of questions about their observations of jury trials in their courtrooms and the verdicts rendered by the juries. The judges were asked several questions concerning the frequency with which they had observed runaway juries. They were asked whether they had granted relief based upon their determination that a jury verdict was excessive.

The judges were also asked whether they had observed jury verdicts that were *disproportionately low* and whether they believed there were instances where juries refused to award exemplary damages when the evidence appeared to warrant those damages. Finally, they were asked if they had experienced *frivolous* litigation in their courtroom and to what degree.

Not too surprising to those of us who actually spend time at the courthouse, the findings of the survey suggest that there is no "tort crisis" in Texas. The vast majority of Texas district judges have observed no significant evidence of a need for tort reform.<sup>11</sup>

Looking at cases tried in the previous 48 months from their completion of the survey, 83% of the judges believed that there had been *no* instance in their courtroom of a *disproportionately high compensatory damages award*.<sup>12</sup> A similar percentage was found in response to a similar question regarding *exemplary damages*.

The judges who did believe that there had been an instance of a *disproportionately high award* usually did not believe that the award warranted any relief and did not give any. The numbers then may actually have exaggerated even that small number of *excessive verdicts*.<sup>13</sup>

Equally revealing is the number of *disproportionately low* verdicts on compensatory damages. The survey showed that *42% of the judges had seen instances, sometimes in over 50% of their jury trials, where the jury awarded disproportionately low compensatory damages* compared with the evidence presented.<sup>14</sup>

86% of the judges surveyed believed there was *no need for further legislative tort reform*.<sup>15</sup> It seems that juries, bombarded with misinformation from the popular media as well as through tort reform groups, have created their own kind of tort reform and may then have hastened their own demise.

## CAUSES HAVE BEEN ABOLISHED OR SEVERELY LIMITED BY RECENT LEGISLATION AND JUDICIAL DECISIONS

It is amid this background that the Texas legislature has gotten involved in the jury reform movement itself, and in the past several years has enacted some of the most significant legislation to limit the jury trial in history. Likewise, recent Texas Supreme Court decisions have made significant changes limiting jury trials.<sup>16</sup>

### WORKER'S COMPENSATION

The Texas Worker's Compensation system underwent a complete overhaul in 1990, and since that time there have been very few cases that are tried. Most of those involve "old law" cases that are still on the docket and it is likely that those will soon be gone completely.

### HEALTHCARE LIABILITY

Like worker's compensation, this area of the law has been changed so completely that few new cases are being filed. This legislation has had the effect of shutting the door to case previously considered meritorious. The reason is simple. A \$250,000 cap on non-economic damages put in place in September 2003 has made it virtually impossible for lawyers to afford the expense necessary to pursue even the most worthy claims. Unless the victim of malpractice is a high wage earner or has the potential to become one, or unless there are large medical costs associated with the case, it is unlikely that a victim or family member will be able to find representation. This legislation also created additional requirements that make pursuing a medical malpractice case more difficult and expensive.

### RESPONSIBLE THIRD PARTY DESIGNATION

This law has likely affected the filing of otherwise meritorious cases but that involve criminal conduct by a tortfeasor.<sup>17</sup> An example would be an instance of alleged negligent security where the victim sues the business, apartment complex, grocery store, etc. for failing to provide adequate security or other preventative measures. Given that a defendant may now designate a third person not a party to the case as a responsible person, the attacker, shooter, or otherwise criminally responsible party will be placed on the jury form and their "negligence" or criminal actions weighed against the other defendant[s]. One can see that such a designation might make near impossible a claim against another defendant given current statutes concerning cases involving criminal responsibility.

## CLASS ACTIONS

Both Federal and State legislation has been enacted to curtail and or restrict the filing of class actions. Forum restrictions, restrictions on attorneys fees and stringent certification standards have all made this area much more difficult, effectively eliminating certain class actions.

## TEXAS SUPREME COURT RULINGS

Generally individuals who have been injured physically or those who have claims arising from property damage, plaintiffs appear in recent years to have taken a beating at the Texas Supreme Court. The result of that beating is the further elimination of the jury trial. Given that trial by jury requires a cause of action, the further disappearance of long standing causes of action through the actions of the Texas Supreme Court necessarily lessens any opportunity for a jury trial. If you then consider the assertion that the Texas Supreme Court may be biased, there will be a continuing erosion of trial by jury.

David Anderson, a law professor at the University of Texas School of Law, researched the opinions written by the Texas Supreme Court in 2004 and 2005 as well as other data available to him regarding petitions filed with the supreme court.<sup>18</sup> Noting that the impartiality of the Texas Supreme Court has been in controversy for many years, Anderson (along with several of his law students) took to the daunting task of reviewing the data, looking to see if there truly was a disparate result in tort cases, and trying to make sense if there was such a result. Even noting a joke told amongst the supreme court's law clerks about the alleged bias of the court,<sup>19</sup> Professor Anderson sought to determine the possible reasons why the court has ruled as it has and whether its actions fit within any of those sustainable bases. In other words, if the court has generally ruled against plaintiffs, is there some logical and reasonable basis (other than bias) that the court did so?

The Texas Supreme Court "massively favor[s]" the defense side of the tort docket.<sup>20</sup> Defendants won 87% of the tort cases decided by the Texas Supreme Court in 2004 and 2005.<sup>21</sup> In the years 1998 through 2005, Walmart won all 12 cases it had before the court (compared to 56% of its cases in similar courts around the country).<sup>22</sup> Is there a reasonable explanation for this result?

Anderson first looked at those petitions denied by the supreme court. Maybe that would account for the disparity of result. In other words, had the supreme court made more equal the numbers by granting relief to plaintiffs at this level of the process? The answer was just the opposite. In fact, three out of four petitions denied by the supreme court during the relevant time period resulted in *defense* verdicts.<sup>23</sup>

Anderson looked at whether the disparate results occurred because the supreme court was simply redressing the mistakes of what would be considered pro-plaintiff courts of appeals misapplying the law. This was found not to be the case given an analysis of those opinions coming out of those courts, and the resulting opinions of those lower courts of appeals.<sup>24</sup>

The Texas Supreme Court's finding of "no evidence" to support a plaintiff's verdict is, indeed, one of the most controversial ways the court finds against tort plaintiffs, seemingly going out of its way to find "no evidence" where the trial judge, appellate courts, and juries have all found evidence to support an award. Justice James Baker, a Republican justice from 1995-2002, has written that what the court is now doing "cannot be reconciled with the Texas Constitution's prohibition of the Texas Supreme Court weighing evidence and judging credibility."<sup>25</sup> There is no reasonable basis for the overwhelming percentage of time the court sustains no evidence appeals.

Numerous examples of procedural decisions are outlined by Professor Anderson which directly benefitted the defendant in cases determined by the Texas Supreme Court.<sup>26</sup> Simply stated, Professor Anderson concludes the Texas Supreme Court has adopted procedural rules that benefit defendants.<sup>27</sup>

Professor Anderson's article appears to provide detailed evidence that the Texas Supreme Court is biased against tort plaintiffs, with no other sustainable explanation for the approximate 9 out of 10 times it finds against them in cases before it.

## EXPENSES ASSOCIATED WITH LITIGATION

Given recent developments in the legal requirements of scientific opinion testimony, litigation costs have skyrocketed. After *Daubert*<sup>28</sup> and its progeny<sup>29</sup>, the courtroom has even more become the battle of the experts. And the battle requires more from the expert both in supporting her opinions scientifically and in presenting them to a jury. The cost has gone up for the preparation and trial of many cases, both simple and complex.

The costs of discovery have increased as the requirements of open discovery have become more stringent. Some of us can remember trying a case where no depositions were taken, were rarely available, and without any written discovery. That half inch file of a case years ago has become multiple banker's boxes full of discovery. The *ease* of copying and pasting and printing documents seems to have had the opposite effect of what should be a money and time saver. Now, it seems, the ease of punching a button has increased the likelihood that a desk full of discovery will arrive in a lawyer's office in the morning.

Simply put, the cost of going to trial in many cases is too burdensome while the benefits of actually trying a case to a jury have gone down – whether you represent a plaintiff or a defendant.

**ARBITRATION**

Arbitration originated in England with the introduction of the Arbitration Act of 1697. Through the centuries international trade necessitated arbitration as disputes between merchants required resolution. In the 20<sup>th</sup> century, the United States passed many laws intended to increase the use of arbitration. The most important of these has been the Federal Arbitration Act, first enacted in 1925. In 1984, the U.S. Supreme Court announced, “In enacting the [Federal Arbitration Act] Congress declared a national policy favoring arbitration.”<sup>30</sup> Court decisions have almost uniformly allowed arbitration. The Texas Supreme Court has pronounced “Arbitration of disputes is strongly favored under federal and state law.”<sup>31</sup>

Historically arbitration agreements were created to assist commercial entities, through mutual agreement, and arm’s length negotiations, resolve disputes outside the established civil justice system. These “arm’s length” agreements allowed the parties to pursue a process thought to be faster and less expensive, as well as keeping matters within any dispute confidential and hidden from public view.

This “traditional” purpose has certainly been expanded to the point that many common consumer contracts contain a waiver of this fundamental right to trial by jury. Apparently waiver of this constitutionally protected right as well as contracts of adhesion are no longer viewed with scepticism by our Texas Supreme Court. As the Court affirmed last year, “Adhesion contracts are not automatically unconscionable, ...”<sup>32</sup>

**CONCLUSION**

If my contribution to this conference does nothing else, I hope that it will encourage each and everyone of you to take time to think about the importance of the jury to our concept of a free society, governed by the people. I ask each of you to consider the significance of our system which embraces the right of its citizens directly participate in the administration of justice.

I join with fellow jurist, U.S. District Court Judge William G. Young of the District of Massachusetts, who, far more eloquently than I, encourages every lawyer to go back to the court room to observe a jury as it returns with a verdict. Judge Young challenges us feel the emotions running through court as the parties watch the jurors return, knowing their quest for justice now rests in the hands of their peers.

The Judge asks the foreman “Have reached a verdict?” - “Yes” - the charge is passed to the Judge and . . .

At that moment, if you ever have been there, and when next you go, you will know, with an incontrovertible shudder down your spine, that you are witnessing the purest form of democracy known to humankind.<sup>33</sup>

We simply cannot afford to let the right to trial by jury vanish from our courts.

*I wish to thank Judge William G. Young for his inspiring speech in support of the jury system.*

**END NOTES**

1. THE TEXAS DECLARATION OF INDEPENDENCE (March 2, 1836).
2. James L. Wright, Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards, 45 S. Tex. L. Rev. 449, 453-54 (2004) [Citations omitted].
3. Nathan L. Hecht, Jury Trial Trending Down in Texas Civil Cases, 69 Tex.B.J. 854 (October 2006).
4. Id. at 856.
5. Id. at 854.
6. Larry Lyon, Straight from the Horse’s Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform, 59 Bay. L. Rev. 419, 420 (Spring 2007).
7. Id.
8. Id. at 421.
9. Id. at 422.
10. Id. at 426-27.
11. Id. at 431.
12. Id. at 427-28.
13. Id.
14. Id. at 429-30.
15. Id. at 433.
16. A thorough review of legislative and judicial changes limiting causes of actions and jury access is available in Paula Sweeney’s paper presented of the SBOT Advanced Evidence and Discovery Course, April 24, 2008, “Attacks on the Seventh Amendment in Texas.”
17. See, TEX. CIV. PRAC. & REM. CODE § 33.004.
18. David A. Anderson, Judicial Tort Reform in Texas, 26 Rev. Lit. 1 (Winter 2007).
19. Id. at 45 n. 186 [“I am told the supreme court's law clerks have a joke: ‘When can a plaintiff win in the Texas Supreme Court? When one insurance company sues another.’”]
20. Id. at 7-9.
21. Id. 7.
22. Id. at 11.
23. Id at 13-14.
24. Id. at 14-16.
25. Id. at 23 citing, James A. Baker, The End of Trends in the No-Evidence Standard of Review, (paper delivered Sept. 12, 2006, to The Mahon Inn of Court, Fort Worth,

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Texas).

26. Id. at 28-34.

27. Id. at 28.

28. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9<sup>th</sup> Cir. 1995).

29. *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

30. *Southland Corporation v. Keating*, 465 U.S. 1, 10 (1984).

31. *Prudential Securities, Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995).

32. In re US Home Corp. \_\_\_\_\_ S.W. 3<sup>rd</sup> \_\_\_\_\_ (Tex 2007) (No 03-1080, 10-12-07).

33. Judge William G. Young, Speech delivered on June 28, 2007 at the Judicial Luncheon for the Florida Bar's Annual Convention in Orlando, Florida.