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THE AMERICAN JURY: A STUDY IN SELF-GOVERNING AND DISPUTE RESOLUTION

*Mark Curriden**

IN 1996, I sat in a Jacksonville, Florida courtroom watching as six people stood to announce their verdict. For two weeks they had heard evidence that the tobacco industry conspired for decades to lie about the dangers and addictive nature of smoking.

The allegations certainly weren't new. In fact, scores of juries before had examined similar charges and each had found in favor of the cigarette companies. As a result, the industry had never lost a case, never settled a lawsuit and never paid out a dime in damages to any sick smoker.

For decades, public health advocates unsuccessfully fought the tobacco companies in Congress and state legislatures across the land. To them, the issues were economics and health care. But legislators—either because they disagreed or due to the millions of dollars in campaign contributions from the industry—were unwilling to place any meaningful regulations on the manufacture and sale of cigarettes.

But all that changed on a steamy August afternoon in North Florida. The six-person jury found that cigarettes were “unreasonably dangerous and defective” and ordered Brown & Williamson Tobacco Company to pay \$750,000 to Grady Carter, who developed lung cancer after 44 years of smoking Lucky Strike cigarettes. After more than four years of appeals, the British-owned company paid that judgment to Carter in March 2001 after the Florida Supreme Court upheld the jury's decision.

The jury's verdict resonated throughout the corporate offices of the nation's big tobacco companies. Six regular citizens who had never before met, who were not elected by the masses, who were not doctors or lawyers or social scientists, achieved something that had evaded Congress, presidents, state legislatures, governors and public health leaders: They forced a \$50 billion industry to change how it does business.

True, the dollar amount was anything but monumental. But it was the statements of the jurors after the verdict that the cigarette makers had deceived the American public about the health effects of smoking that sounded the alarm bells. The jurors were noticeably angry.

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“It was definitely a wake up call,” Philip Morris vice president Steve Parrish told me in an interview. “It was an indication of possibly more jury verdicts to come.”

Indeed, the major tobacco companies entered into historic settlement talks with state attorney generals, trial lawyers and public health officials. Those discussions eventually led the industry to pay the state \$246 billion for smoking-related health care expenses, plus the elimination of certain kinds of cigarette advertising.

“The power and independence of the American jury,” then U.S. Food and Drug Administration director David Kessler told me in 1996, “isn’t it a wonderful thing?”

As the legal affairs writer for *The Dallas Morning News*, I have long been fascinated with the role of the jury in our society. When other law school students were mesmerized by the First or Second or Fourteenth Amendments to our Constitution, I obsessed over the Sixth and Seventh Amendments. After all, the “benefit of trial by jury” is one of those rights or “truths” that Thomas Jefferson in the Declaration of Independence held to be self-evident.

As a journalist with law school training, I have monitored scores of jury trials. Many of them have been ordinary disputes over property or alleged criminal conduct. But others have been truly historic. In the late 1980s, for example, I watched a jury in Chattanooga, Tennessee, determine if city leaders could prevent the play *Hair* from being performed in the municipal auditorium. City leaders thought the play was obscene, violating community standards. A dozen local citizens thought otherwise, and the show went on. As a result, a dozen other small southern towns ended their bans on *Hair*.

Then there were jury verdicts on asbestos, Mapplethorpe’s exhibit, Manuel Noriega, O.J. Simpson (criminal and civil), tobacco, guns, HMOs, and the list goes on.

In the summer of 1999, I decided to do a series of newspaper articles examining the role of the American jury in our society. There had been numerous complaints that the jury system was broken. Business leaders felt juries were too quick to hand out huge damage awards. Consumer groups claimed that there were too many laws restricting the ability of jurors to dispense justice. Prosecutors argued that jurors had gotten weak on crime. Defense attorneys said the opposite was true.

However, I quickly realized that the scope of the project was too overwhelming for one person. So, I approached Southern Methodist University Dedman School of Law Dean John Attanasio about being a partner on the project. It was agreed that the best resource at me for the law school was the *SMU Law Review* and its staff. Ted Eades, the editor of the law review at the time, quickly adopted the project idea as his own. His successor, Thomas Chandler, adopted it as his priority. Their staffs combined with my colleague at *The Dallas Morning News*, Allen Pusey,

to spend sixteen months researching, analyzing and investigating the jury system.

From the start, we knew which key questions required answers. For example, is the American jury merely a dispute resolution mechanism or is it more? Is it a fact-finding body designed to determine truth? Is it the conscience of the community, deciding which moral standards apply? Or is it a political institution, a means by which ordinary people safeguard our rights and liberties from those more powerful—be it government or corporate America or the wealthy and influential?

Why is the jury system under attack from so many quarters? Is it because it's broken? Are our rights to have juries decide our disputes stronger today than before? Do juries really have power? Or are they merely pawns in the hands of lawyers and judges who use trial techniques to manipulate decision-making?

Who serves on juries, anyway? Throughout college, law school, and newspaper jobs in Atlanta, Chattanooga and Dallas, I have never received a summons. Yet, I know friends who get called every year to serve. Why is that?

To seek answers, the *SMU Law Review* and *The Dallas Morning News* established extensive research mechanisms. First, we sent surveys to every state trial judge in Texas and every U.S. District Court judge in the United States. Those surveys queried the judges on their opinions and experiences involving juries. Nearly 1,000—or about 67 percent—of those jurists responded.

With the help of Dallas County District Judges David Godbey, Bill Rhea and Merrill Hartman and Dallas County District Attorney Bill Hill, we obtained a copy of the Dallas County jury summons database for March 2000. From that, we were able to determine the demographics of each person called for jury duty, who showed and who didn't. We then tracked down those who ignored their jury summons to find out why.

Finally, we examined thousands and thousands of court decisions, newspaper and magazine articles, and anything in publication having to do with the American jury. Scores of experts—law professors, social scientists, legal historians and activists—were interviewed.

Here is a sample of what we found:

Bit by bit, case by case, state by state, Americans' celebrated right to trial by jury is quietly eroding. How? The study found three primary culprits. First, it identified 41 states that during the past 12 years have passed laws either restricting people's access to juries or limiting the power of juries in certain kinds of cases. Second, it identified dozens of state and federal appellate court decisions that shifted power away from juries into the hands of judges. Third, private binding mandatory arbitration agreements have taken hundreds of thousands of disputes that previously could have been heard by juries and moved them into private, more limited dispute resolution programs.

Despite the oft-repeated claim that Texas juries are generous to plaintiffs, the median jury verdict in the state has actually been on the decline since 1993. In fact, the study found that judges agree with jury verdicts 98 percent of the time.

Like no time before, the 12 people seated in the jury box regularly demonstrate an increasing willingness—even a clamoring—to force basic American institutions, such as government, business and private social organizations, to change how they operate. The study identified more than 700 cases since 1990 in which jurors stated publicly that they intended their verdicts to have impact beyond their individual cases. Between 1970 and 1990, there were less than 100 such cases. In addition, the survey of nearly 1,000 trial judges in Texas and federal judges nationwide found that nearly half have had cases in which jurors used their verdict to send a message about a broader political or social issue.

Jury verdicts do have an impact. The study identified more than 250 specific cases in which jury verdicts led to some change. Those changes ranged from corporations recalling potentially dangerous products and manufacturers modifying their waste disposal methods, to businesses reforming treatment of employees and police departments rewriting their rules on car chases and use of excessive force.

In order for jurors to “get it right,” they need to have the appropriate tools. The study examined reforms instituted in Arizona that allow jurors to take notes, ask questions and discuss the case amongst themselves during breaks.

Finally, the study found that record numbers of people are ignoring their legal duty regarding jury service. In communities such as Dallas, Houston and Austin, only about one in five recipients of jury duty summons actually show up. And it's worse in other communities, such as Los Angeles. Those not showing are disproportionately Hispanic, young adults and people from low-income households. The result is that the people showing up for jury service do not represent a cross section of the community, as required by the Supreme Court of the United States. Why is this happening? Texas pays jurors only \$6 a day, doesn't require employers to pay workers who attend jury duty, and doesn't enforce summonses among those who ignore their jury summons. The conclusion of experts, such as SMU Dedman School of Law Dean John Attanasio, is that state laws may be unfairly requiring certain classes of people to endure severe financial hardship in order to fulfill a constitutional right.

The articles published by *The Dallas Morning News* are available on the Internet at www.dallasnews.com/juries/. The project represents one of the most significant examinations ever conducted of the American jury system. But it also marks the first time that a law school, a law review and a news organization teamed its resources to take a serious look at a historical institution.

We hope you enjoy reading our findings as much as we enjoyed the research.