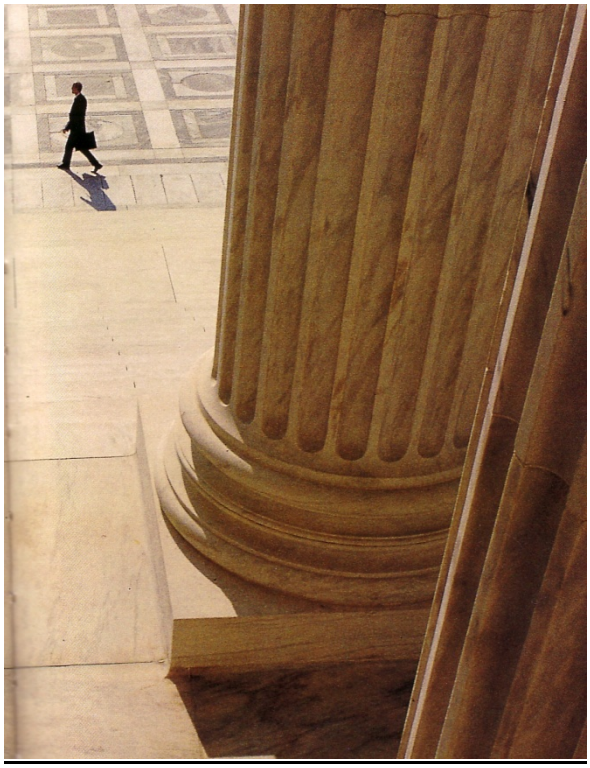
Juror Perceptions About Lawsuits and Tort Reform



By
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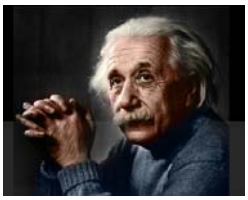
"Confusion of goals and perfection of means seems, in my opinion, to characterize our age."



Albert Einstein (1879-1955)

If you pay attention to all of the conflicting information about civil justice reform or tort reform, you are probably quite confused. There are so many different constituencies who have their own agendas in making public statements that it is hard to separate fact from fantasy.

A number of reliable studies have indicated that between 65% and 85% of jury eligible people in the United States believe that there are too many frivolous lawsuits filed. Between 35% and 50%, believe that jury awards are too high.

The prevalence of these beliefs may be due, in part, to the activities of people and groups who support civil justice reform. According to the Web site[1] of the American Tort Reform Association, a bipartisan coalition of more than 300 businesses, tort reform proponents have been able to accomplish a number of changes in state laws.

- 45 states and the District of Columbia have enacted tort reform changes in their laws;

[1] www.atra.org.

- 30 states have modified the law of punitive damages;
- 33 states have modified the law of joint and several liability;
- 21 states have modified the collateral source rule;
- 29 states have penalized parties who bring frivolous lawsuits;
- 7 states have enacted comprehensive product liability reforms; and
- Medical liability reforms have also been enacted in most states.

But, what effects, if any, has the promotion of tort reform or civil justice reform had on the attitudes of everyday jurors in the average court trial?

Discussions about the McDonald's coffee case seem to work their way into most voir dire proceedings. According to a nationwide poll of jury eligible adults commissioned by the National Law Journal, 44.6 percent of respondents believed that the jury's decision in that case was a bad decision. Only 6.7 percent of respondents agreed with the jury's decision.

But what about the attitudes of the jurors who actually sat in the McDonald's case? Were these jurors mindless, pro-plaintiff, Robin Hood jurors who were willing to award millions of dollars in damages at the drop of a hat?

Part of the answer is contained in an interesting article written by Andrea Gerlin, a writer with the Wall Street Journal. [2] Ms. Gerlin reported interviews with the actual jurors in the case.

In these interviews, the jurors stated that at the beginning of trial they did not understand why they should have to sit for case that involved a coffee spill. However, during the trial the evidence indicated that the plaintiff, Ms. Liebeck, had suffered severe burns and that McDonald's had received hundreds of complaints of coffee burns in the previous 10 years, many of which been settled.

The jurors also mentioned their concerns that McDonald's company executives admitted that they were aware of the possibility of severe burns, but that they had not consulted any experts about how to deal with the issue, had no plans to warn customers, and had no plans to change the temperature or methods by which the coffee was made.

At trial, McDonald's trial team argued that the severity of the burns was due to the plaintiff's age and frailty as well as contributory negligence on her part. They argued that she should have immediately removed her coffee soaked clothing in order to take the heat away from her skin. They argued that because she was an older person, that her skin was thinner than that of a younger person, and thus more vulnerable to injury. They argued, therefore, that it was not their fault that she was injured.

As you might suspect, the jurors did not agree with McDonald's defense. They believed that the company had a "callous disregard" for the welfare and safety of its customers. They felt that in light of the company's defense that the best way to send a message to the company that their behavior would not be tolerated should involve awarding $2.9 million.

Knowing more about the details of the trial in the McDonald's case helps us to better understand why the jurors in the case made the decision that they made. However, few people are aware of the details of the case, only the sensational results.

Fortunately, a number of researchers followed the course of media

[2] Gerlin, Andrea (1994, Sept. 1), "How A Jury Decided That A Coffee Spill Is Worth $2.9 Million?", *Wall StreetJournal,*p. A1.

coverage of the case. One study, conducted by researchers at the University of Washington and the University of Puget Sound discovered that once the verdict was announced, most other media accounts and commentary disregarded the details of the case and simply continued to discuss the sensational verdict.[3] The result of this limited discussion has been that many people have disagreed with the jury's decision in the case.

In 1996, researchers conducted a content analysis of 249 articles from Time, Newsweek, Fortune, Forbes, and Business Week between 1980 in 1990 to examine the media coverage of tort litigation.[4] In their analysis, the researchers compared the frequency of various types of tort lawsuits reported in court system statistics with those reported in the media. They learned that the magazine articles consistently overstated the relative frequency of some forms of litigation, such as product liability and medical malpractice, overstated the proportion of disputes resolved by trial (as opposed to settlement), and overstated the plaintiff victory rates and average jury award.

In addition to general media coverage, there are documented accounts of tort reform advocates sponsoring specific advertising campaigns designed to affect public opinion. One such situation occurred in 1997, when the Dow Chemical Company sponsored an advertising campaign in Louisiana to promote its corporate image. Coincidental with this advertising campaign was another campaign sponsored by the American Tort Reform Association which promoted the positive aspects of silicone. This campaign was highlighted by photographs of a young woman with a silicone shunt in her brain. In the ads for this campaign, the young woman's mother stated "Silicone is not the problem. The personal-injury lawyers and their greed is the problem."[5]

The more interesting question is whether juror decisions have been affected by the discussions regarding tort reform and civil justice reform. We know from many years of social psychology research that one's decisions are highly influenced by their attitudes about the issues involved in those decisions. We discussed how powerful attitudes which seem to be more directly related to specific circumstances will usually prevail over less powerful attitudes which are too general in nature or which are not perceived to be related to the specific circumstances. We also discussed how attitudes or perceptions that have been recently uppermost in the mind of the decision maker may be more available than, perhaps, other not-so-recently considered attitudes and that if a situation is sufficiently vague or ambiguous, the decision maker might apply his or her most recently considered attitudes.

Researchers have discovered that attitudes toward tort reform can sometimes predict verdicts, but that jurors will more often continue to try to formulate decisions that they believe are appropriate, regardless of tort reform laws. In one important study, researchers studied the attitudes about tort reform of 785 potential jurors and compared these attitudes to their verdicts in four

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[3] Aks, Judith H., William Halton, & Michael W. McCann (1997, May 31), Media coverage of personal-injury lawsuits and the production of legal knowledge, Paper presented at the annual meeting of the Law and Society Association, St,. Louis; Haltom, William (1998), *Reporting on the Courts: How the Mass Media Cover Judicial Actions,* Chicago: Nelson-Hall Publishers (p. 223-229).

[4] Bailis, Daniel S. & MacCoun, Robert J., (1996) "Estimating Liability Risks With the Media As Your Guide: A Content Analysis of Media Coverage of Tort Litigation," 20 Law & Human Behavior 419-429.

[5] Schmitt, Richard B. (1997, March 3), "Can Advertising Sway Juries?", *Wall Street Journal*, pp. B1, B3.

different types of cases.[6] The researchers found that there was a significant relationship between attitudes toward tort reform and verdicts. As a result, it appears that these attitudes may be useful in jury selection.

One imminent jury research team conducted an exhaustive study of the relationship between attitudes about tort reform and verdicts under a grant from the National Science Foundation.[7] In this study, the researchers conducted interviews with hundreds of jurors who were divided into 34 groups, 10 of which considered versions of a case in which liability evidence was strong and 24 groups where liability evidence was ambiguous. Each of the participants was asked questions about their perceptions of the state of litigation in the nation.

Their responses allowed the researchers to create a score for each juror on a rating scale known as the "Litigation Crisis Scale" and an average score for each jury group. After responding to these questions, the jurors were exposed to the evidence in their cases. At the end of the evidence, the jurors reached a verdict. The researchers then compared the scores in the "Litigation Crisis Scale", to the verdicts.

After completing the comparison, the researchers found that there was a statistically significant relationship between the scores and verdicts. This relationship suggests that attitudes about civil litigation influence how a juror interprets evidence and decides a lawsuit. It is also likely that attitudes about the civil litigation would be more influential in cases where the evidence and arguments presented at trial created an ambiguous situation.

Other researchers have looked at the behavior of jurors when faced directly with court instructions reflecting the effects of tort reform laws. Two independent studies analyzed potential jury behavior when faced with either a law capping punitive damages or being prohibited from awarding them at all.[8] In essence, the researchers were trying to determine the extent to which jurors could successfully compartmentalize compensatory and punitive damages.

Both studies were conducted at a time when tort reform advocates had made great strides in reforming laws relating to damage awards. In both studies, however, jurors were more likely to inflate compensatory damages when the defendant's conduct was egregious, especially when they were not given an option of awarding punitive damages. On the other hand, jurors moderated their punitive damages awards when they were instructed that the law capped punitive damages.

The jurors' comments in each of the studies revealed their thinking. Even though the jurors may have had some disagreements about particular amounts of damages, they all tended to agree that the extent of their compensatory award was intended to (a) make up for the losses incurred by the plaintiff, (b) punish the defendant, and (c) deter the defendants and other similarly situated people.

The bottom-line results of these and other scientific research studies suggest

[6] Moran, Gary, Cutler, Brian L. & De Lisa, Anthony, (1994) Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials." 18 *Law & Psychology Rev.* 309-328.

[7] Hans, Valerie P. (2000) *Business On Trial: The Civil Jury & Corporate Responsibility,* New Haven, CN: Yale University Press.

[8] Anderson, Michelle C. & MacCoun, Robert J., (1999) "Goal Conflict in Juror Assessments of Compensatory and Punitive Damages," 23 *Law & Human Behavior* 313-330; Greene, Edith, Coon, David, & Bornstein, Brian, (2001) "The Effects of Limiting Punitive Damage Awards," *25 Law & Human Behavior 217-234.*

that regardless of jurors' exposure to tort reform information, jurors tend to award similar total amounts of money whether they include the compensatory and punitive damages or just compensatory damages alone. These findings also seem to be supported by statistical reports of verdicts indicating that the number of plaintiff verdicts appears to be diminishing somewhat (arguably the result of judicial intervention) while the average jury award has not changed, and might even be increasing.

All of the studies indicate that there is a pervasive belief among many jurors that there is a litigation crisis. For those of us who are involved in jury selection and preparing cases for trial, it would be helpful to know which people believe that there is a litigation crisis and what it means to us in terms of their decision-making processes in the courtroom. This issue is important regardless of whether you represent a plaintiff or a defendant because we need to know when the litigation crisis attitude will be relevant to a case and how to address it most effectively in jury selection.

To suggest that those jurors who believe that there is a litigation crisis came to have their attitudes because of media influence is not helpful and begs a fundamental insight into human nature. Those jurors who adhere to tort reform beliefs and will apply them to achieve a more conservative verdict are also more likely to believe that individuals have a great deal of responsibility for their own conduct and outcomes. Those jurors are also less likely to hold a corporation or anyone else responsible for someone's injuries absent clear evidence and strong arguments. However, these same jurors will hold someone responsible for causing injuries to someone else when the evidence and arguments are powerful enough to motivate them to decide for a plaintiff.

In essence, much of the public discussion and legislation concerning tort reform has occurred in the absence of empirical research. In other words, laws appear to be created, eliminated or changed without the benefit of truly knowing the effects they will have on jury verdicts. The research which has been conducted suggests that efforts to influence jury verdicts using changes in the law may have unintended consequences.

Until more research has been conducted to study the effects of tort reform on jury verdicts, the author suggests that trial lawyers and clients focus their attention on developing the most powerful and persuasive case to a judge or jury. In those rare instances where tort reform is directly relevant to the specific issues in a case, the presentation at trial can be fashioned to incorporate an appropriate argument. Otherwise, the only time the subject of tort reform is likely to be relevant is during jury selection when we are trying to determine whether certain jurors will lean for or against one party when perceiving the evidence.

Some Final Thoughts

Rather than rely on a political outcome, experience and research have indicated that parties are better off relying on their own ability to persuade judges, jurors and arbitrators. Attorneys and their clients generally obtain much better results when they spend the time and energy to understand the perceptions of the judges, jurors and arbitrators in their case and use that information to develop and present a compelling case presentation.

About the Authors

Dr. Richard Waites is a board certified civil trial lawyer and is the chief trial psychologist and CEO for Advocacy Sciences, Inc. and **The Advocates**, the nation's leading trial and advocacy consulting firm.

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The Advocates is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The t**rial consultants** and **jury consultants** with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

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The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, ***Courtroom Psychology and Trial Advocacy***, published by American Lawyer Media.

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