



Where have all the jury trials gone?

Without being willing to lose at trial, you can never really win

BY CRAIG PETERS

The Veen Firm, PC

Exhilarating, frustrating, terrifying, satisfying, exhausting, distressing, thrilling. It's a jury trial. Many of us went to law school not just to become lawyers, but to become trial lawyers. Despite this, the number of jury trials in this country and in this state is rapidly declining. In 2002, the litigation section of the American Bar Association completed a study regarding the number of cases that actually went to a jury trial. Its findings are startling.¹

From the time period of 1962 until 2002, the number of filings in federal court for tort cases increased fivefold. During that same time period, the number of cases that went to jury trial dropped from 11.5 percent down to 1.8 percent. For tort cases in 1962, one in six cases went to jury trial. In 2002, that number shrank down to one in forty-six. Even if we assume that the number of trials has decreased at a slower rate than what was seen from 1962 to 2002, it still means that at the beginning of 2015, the number of cases that will go to jury trial will be less than one percent of those filed.

Why has this happened?

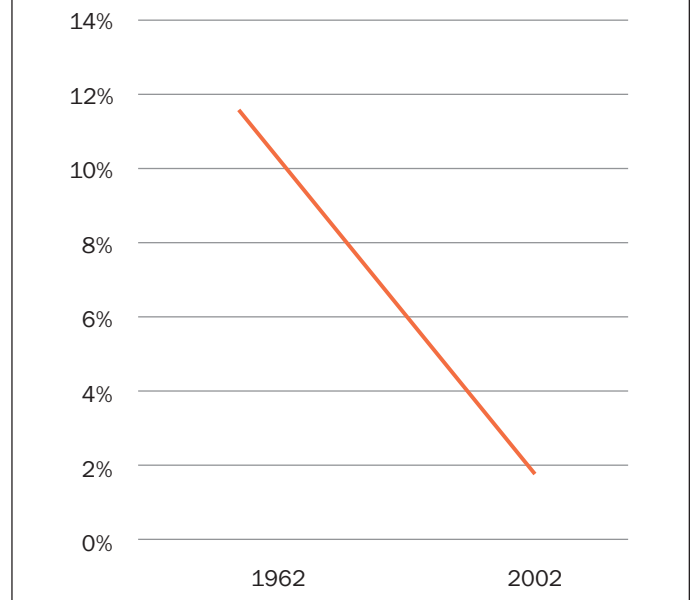
Formidable special interests have methodically waged an ongoing war on plaintiff's attorneys over the past 30 years, effectively driving down verdicts and causing the public to look on personal injury cases with great skepticism. Some of these same forces have resulted in significant obstacles that impede a plaintiff's willingness to go to trial, such as "loser pay" rules; or ability to go to trial, such as mandatory arbitration and MICRA. The realities of trying to run a plaintiffs' firm, such as keeping the lights on and making payroll, profoundly discourage trial and promote settlement. Then, as if we need a constant reminder of the myriad impediments to going to trial, at every mediation we hear the dire warnings:

"This is a chance for certainty."

"You can avoid the additional costs of litigation."

"Resolving this now will give you time to work on your other matters and ensure that you are not wrapped up in an appeal years from now."

Jury trial decline over 40 years



Should we care?

Why should we care that the number of jury trials has dropped so dramatically over the past 50 years? The simple answer is that they play a critical role in the protection of our democratic system of government. Recall that our founders designed the judicial branch and its unique set of rules, specifically to create a level playing field between the powerful and the weak. While the wealthy and strong might be able unfairly to influence the legislature, the courts were a place for justice, not subject to the blowing winds of majority rule or the weight of political power. James Madison said, "In suits at common law, ...the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."



Taking the long view

One day in late summer, an old farmer was working in his field, with his old, sick horse. The farmer felt compassion for the horse and let his horse loose, to go to the mountains and live out the rest of its life. Soon after, neighbors from the nearby village visited, offering their condolences, and said, "What a shame. Your only horse is gone. How unfortunate you are. You must be very sad. How will you live, work the land and prosper?"

The farmer replied, "Who knows? We shall see."

Two days later, the old horse came back. It was rejuvenated after meandering in the mountainsides and came back with twelve new, younger and healthier horses, which followed the old horse back into its corral. Word of the old farmer's good fortune got out to the village, and it wasn't long before people stopped by to congratulate the farmer on his good luck. "How fortunate you are," they exclaimed. "You must be very happy."

Again, the farmer softly said, "Who knows? We shall see."

At daybreak on the next morning, the farmer's only son set off to attempt to train the new wild horses, but was thrown to the ground and broke his leg. One by one, the villagers arrived during the day to bemoan the farmer's latest misfortune. "What a tragedy! Your son won't be able to help you farm with a broken leg. You'll have to do all the work yourself. How will you survive? You must be very sad."

Calmly going about his usual business, the farmer answered, "Who knows? We shall see."

Several days later, a war broke out. The emperor's men arrived in the village, demanding the young men come with them to be conscripted into the emperor's army. As it happened, the farmer's son was deemed unfit because of his broken leg. "What good fortune you have," the villagers said to the farmer, as their own young sons were marched away. "You must be very happy."

"Who knows? We shall see," replied the old farmer as he headed off to work his field alone.

As time went on, the broken leg healed, but the son was left with a slight limp. Again the neighbors came to pay their condolences. "What bad luck! Too bad for you."

But the old farmer simply replied, "Who knows? We shall see."

As it turned out, the other young village boys had died in the war, and the old farmer and his son were the only men capable of working the farms in the village. The old farmer became wealthy, and was very generous to the villagers. They said to him, "How fortunate we are! You must be very happy."

To which the old farmer replied, "Who knows? We shall see."

Democratic governance relies upon the resolution of disputes between people in the public courts, for all to see. Confidential settlements inure to the benefit of the insurance companies and big corporations that are able to aggregate this information for their own advantage. Fewer and fewer opportunities for the public to be a part of a jury trial means fewer chances to participate in direct democracy, and to witness firsthand the good that the courts do in serving the average citizen. By taking our cases to trial, we help to ensure the safety of the community and the vitality of our judiciary. If jury trials were a greater part of the

average citizen's experience, and they witnessed the important role that the judiciary plays in the everyday lives of citizens, the citizens of California would hold their legislature and the executive branch more accountable. Those branches of state government would not be able to get away with putting the financial stranglehold on our judiciary that they have, by withholding funds from them.

What is our role in this?

We, as plaintiffs' lawyers, need to look at ourselves and share in the responsibility for the rapidly disappearing jury trial. A big reason why we do not go to

trial is because we fear losing. Our legal organizations exalt and extol the exploits of winning trial lawyers. In some cases, these winning trial lawyers have achieved mythic status. And the appearance, to those with less experience or fewer resources, is that these "great" lawyers never lost a case. But here's a secret: they have lost cases. Without being willing to lose, you can never win. The mere act of going to trial and representing your client to the best of your ability is a win, regardless of the decision of the jury. It makes public that which might have otherwise been private (due to a confidentiality clause in a settlement agreement). It gives our clients a chance to tell their story. It gives the public a chance to meaningfully participate in their democracy. Perhaps most significantly, it gives plaintiffs' lawyers and plaintiffs, a chance to show the public the importance of our judicial system and its ability to level the playing field.

How can we revive the disappearing jury trial?

We must start with a change in our attitudes. Winston Churchill famously said, "Success is never final, failure is never fatal, courage is what counts." We should never get comfortable with losing, or expect it as an outcome for our trials. But there is no skill more important to being a good advocate for our clients than the ability to handle defeat, to not be paralyzed by its possibility, to wear the result of a loss as a badge of honor. Failure is not falling down, but refusing to get back up. I experienced long ago that little is learned from trial victories; the education comes from trial disappointments.

Every event is part of a larger whole

Most lawyers spend our lives competing. And we become used to winning. What tends to happen, however, is that our definition of "winning" is rather narrow. We look at a trial as good or bad (a "win" or a "loss") based on a straightforward analysis of the result at the end of



the case. While this is certainly fair, it lacks an appreciation for what we have accomplished in the larger context. It is important for all of us, as advocates for the people in our communities, to think about our cases in the context of the bigger picture.

It is difficult to take a long view and not be daunted by the prospects of the immediate result of our efforts in trial. However, as plaintiffs' lawyers, if we can let go of our fear of losing we can engage in the critical act of trying. Failure is not an unsatisfactory verdict; failure is abdicating our responsibility to try our cases.

The many reasons we oft hear repeated about why not to go to trial, will always be there. But, if we don't protect the right to a civil trial by jury by exercising that right on a regular basis, who will?

Corporations and insurance companies would like nothing more than to see us give in and give up, because they have added to the chorus of voices telling us that going to trial is just too hard and the chance of failure too great. This is a challenge that we must meet head on. If, as plaintiffs' attorneys, we can't accept failure, we can't succeed. Basketball great Michael Jordan said, "I missed more than nine thousand shots in my career. I have lost almost three hundred games. Twenty-six times I have been trusted to take the game winning shot, and missed. I have failed over, and over, and over again in my life. And that is why, I succeed."

Craig M. Peters is a trial attorney and the team leader of the Peters Trial Team at The Veen Firm. His team litigates complex



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cases involving wrongful death as well as those with catastrophic life- or career-changing injuries.

Mr. Peters is often asked to associate in on a wide variety of cases at the time of trial. A member of ABOTA, and a finalist in both 2013 and 2014 for SFTLA Trial Lawyer of the Year, Mr. Peters' first career was as a public defender in San Francisco.

Endnotes

¹ Litigation, The Journal Of The Section Of Litigation, American Bar Association, Vol. 30, No. 2, Winter 2004.

