WHAT HAPPENS WHEN JURORS ASK THE JUDGE FOR A CALCULATOR?

I. Let me start with some history. By the time our forefathers decided to break from England, the right to trial by jury in both criminal and civil cases was firmly enshrined in the constitutions of every state. The King's effort to deprive us of that right was one of the main grievances listed in the Declaration of Independence and the right to trial by jury is the only right mentioned in 4 places in our Constitution and Bill of Rights. Indeed, it is clear we would not have had a constitution or nation without the promise by those who signed the constitution that they would almost immediately amend it with a Bill of Rights to protect trial by jury in civil cases. Those who made that demand and those who acceded to it, fully understood that civil jury trials would normally favor the individual plaintiff against the

Government, the debtor against the creditor, the victim against the wrongdoer. While the jury in civil cases went the way of the powdered wig in your country, it is part of the American DNA: there is a jury box in every courtroom of our country.

II. Given this history, it should be no surprise that when it comes to damages, juries were expected to be more generous than judges. The surprise is how this expectation has continued while the reality has changed over the last 20 years.

A. During the first half of my career, when the jury asked the judge for a calculator, I began calculating in my mind how big my contingent fee would be.

B. Today, while such a request emanating from the jury room during deliberations still normally signals that

the jury has decided against the defendant on liability, it gives little guidance on the likely size of the verdict.

C. Yet it is still widely held that the amount of damages awarded by a jury will greatly exceed what a judge would award in a bench trial.

D. I would like to suggest that this is today largely a myth.

II. In 1966, two University of Chicago professors, Kalvin and Ziesel, who studied judge-jury agreement in thousands of civil jury trials, reported that with regard to damages, judges would have awarded more in 39% of cases and less in 52% of cases, resulting in an overall tendency for judges to favor smaller awards. Nothing like that study has been replicated in the last 50 years.

A. Yet the lawsuit abuse/tort reform movement that began in the US in 1980 found it convenient to

perpetuate the perception of juror generosity and unpredictability. From John Gresham's novel *The Runaway Jury* to the publicity given to the McDonald's Hot Coffee verdict, the American public has been brainwashed to believe that all lawsuits are frivolous and that there is indeed a litigation explosion.

B. American lawyers have to spend an inordinate amount of time during jury selection trying to identify this implicit anti-lawsuit bias.

C. As a result, there is a growing recognition by repeat users of the courthouse that in certain types of cases, jurors are likely to award lower damages than judges.

1. A 1992 study by Clermont & Eisenberg found that product liability and medical malpractice plaintiffs were more likely to win, and recovered

more in damages, when their cases were decided by a judge rather than a jury. In Harris County, state judges report that in every medical malpractice case, it is the defendant doctor that pays the jury fee. Juries, it seems, have high regard for doctors.

2. State judges around the country are reporting that insurance companies are more frequently than not insisting upon jury rather than bench trials. Juries give nothing or virtually nothing for pain and suffering in low impact soft tissue personal injury suits.

3. A recent study of over 5000 material business-to-business contracts entered into by public companies and thus filed with the SEC, shows

that only 43% contain jury waivers or mandatory arbitration clauses.

4. Interviews with GC's of firms whose contracts do not contain such terms suggests that corporate America is becoming less enamored with arbitration as a means of resolving disputes between corporate equals and more willing to trust 12 jurors rather than a single judge whose identity is not known in advance.

5. The prevalence of arbitration clauses in employment and consumer contracts is explained by the desire of businesses to avoid class actions, not to avoid jury verdicts.

6. A 2011 article by Hans & Eisenberg, called The Predictability of Juries, argues that there is "a rich and continually expanding literature"

revealing "substantial relationships between the strength of the trial evidence and jury verdicts, powerful linear relationships between the severity of a plaintiffs injury and the eventual jury damage award, and strong ... relationships between compensatory damage awards and punitive damage awards." The authors add that there is "a broad pattern of vertical equity in jury awards (that is, more serious injuries that reliably result in greater awards), yet at the same time the persistence of some horizontal inequity (that is, injuries that are comparable but that receive differing awards)."

III. But even assuming the jury goes bonkers in awarding damages, sophisticated business are increasing aware of devices that limit the damage:

A. First, there are more and more statutory caps on damages that the juries cannot be informed of:

   1. Medical malpractice cases

   2. Non-economic damages in all cases

B. Second, there are constitutional due process limits on punitive damages

C. Third, in many states, like mine, Texas, there are appellate courts whose judges are exclusively Republican and have never seen a plaintiff's verdict they approve of. And on a national level, President Trump is rapidly transforming the federal courts of appeals.

D. Fourth, whenever a forum is identified as place where juries sock it to defendants, appellate courts or legislatures step in to reduce forum shopping. Examples in my state include changes in the state

venue rules to limit access to juries along the Rio Grande or in federal venue rule to limit access in patent cases to juries in East Texas.

E. So just because the jury asks for a calculator doesn't mean that there is going to be a substantial damage award.

IV. The paradox of this is: just as juries are becoming more dependable determiners of damages, there are fewer and fewer jury trials in civil cases.

A. A few charts will illustrate the situation in federal courts. And the pattern in state courts is the same.

B. There are lots of reasons for this decline, but the one most pertinent to the subject of damages, is that plaintiffs lawyers no longer perceive the upside to trying a case to jury verdict. The risk of not being able to strike jurors who harbor anti-lawsuit biases and

the caps on damages, make taking the case to trial too risky for the reward.

C.