Resume of
SAM SPARKS

Sam Sparks was born on September 27, 1939, in Austin, Texas. In 1957, he graduated from Austin High School in Austin where he was president of his senior class, a member of the National Honor Society, and he participated in varsity athletics.

Judge Sparks entered the University of Texas at Austin in the fall of 1957. He obtained a Bachelor of Arts degree in 1961 and a Bachelor of Law degree in May of 1963. His university activities included varsity athletics and student government as well as being elected Foreman (president) of the Texas Cowboys.

In 1963, Judge Sparks moved to El Paso and began the practice of law as law clerk to the Honorable Homer Thornberry, who at that time was a United States District Judge for the Western District of Texas, El Paso Division. Judge Sparks entered private practice in June 1965 as an associate with the law firm of Hardie, Grambling, Sims & Galatzan, now Grambling & Mounce. He was admitted to practice in the United States District Court for the Western District of Texas, the United States Court of Appeals for the Fifth and Tenth Circuits, and the United States Supreme Court. When he left Grambling & Mounce in 1991, Judge Sparks was the Executive Officer.

After accepting the appointment of United States District Judge for the Western District of Texas, Austin Division, on October 1, 1991, Judge Sparks took the oath of office on December 7, 1991, and thereafter returned to Austin.

Judge Sparks married Melinda Echols of Fort Worth in 1995. Judge Sparks' marriage to Arden Reed of Houston, Texas, from 1962 until her death in 1990, produced four sons. Judge and Mrs. Sparks now enjoy a blended family of six children and eight grandchildren.

Since 1978, Judge Sparks has been certified in the fields of Civil Trial Law and Personal Injury Trial Law by the Texas Board of Legal Specialization. His professional associations include the American College of Trial Lawyers (Judicial Fellow), the American Board of Trial Advocates (Advocate), Texas Bar Foundation (Life Fellow), and membership in the State Bar of Texas and the Fifth Circuit District Judges Association.
DISAPPEARING JURIES AND JURY VERDICTS.
By Honorable Sam Sparks and George Butts

SOME HISTORY ABOUT JURY TRIALS

By the time John, “. . . by the Grace of God, King of England, Lord of Ireland, Duke of Normandy and Aquitane and Count of Anjou” signed the Magna Carta in 1215 in order to appease the insubordinate Scot, French, and English barons arrayed against him, the right of trial by jury, or judgment by one’s peers, was already centuries old. It developed in Europe during feudal times and was brought to England with the Norman Conquest in 1066. The Magna Carta provided that “…no 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.”

GREAT BRITAIN’S PROVOCATIONS

More than five hundred years later when the British set about to deprive the rebellious colonials of their right to trial by a jury of their peers, they met strong resistance. By 1764 every American colony provided for a right to jury trial. At that time the jury’s prerogative extended not only to deciding controlling facts, but also to determining what law should be applied. This power residing in juries resulted in the practical inability of British officials to enforce, among other things, certain navigation acts designed to lay heavy tariffs on some commodities and to impose severe fines on violators. One Massachusetts governor complained that “a trial by jury here is only trying one illicit traitor by his fellows, or at least by his well wishers.” The Crown reacted to this inability to obtain either collections or convictions by, among other things, the creation of vice-admiralty courts in the colonies; that is, courts without juries.

Passage of the Sugar Act of 1764, further inflamed the colonists by assigning the trials of those accused of a violation of the act to a vice-admiralty court in Halifax, Nova Scotia, irrespective of where the offense occurred. This compounded the denial of a right to a jury trial by removing the trial of the accused from his vicinage, or locale.

The Sugar Act was followed closely by the Stamp Act of 1765 which required that revenue stamps be affixed to many kinds of legal papers. Violations of the act could be tried in the vice-admiralty courts, thereby greatly extending the power of those courts to cases involving violations of the revenue laws having nothing to do with maritime commerce.

THE COLONISTS’ RESPONSES

These actions, and others denying colonials the right to trial by jury in their vicinage, resulted in a series of escalating responses. The Stamp Act Congress of 1765 declared “trial by jury is the inherent and valuable right of every British subject in these colonies.” Further, “the said act, and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits have a manifest tendency to subvert the rights and liberties of the colonists.”
The dispute between the king’s government and the colonials escalated further with the passage of the Administration of Justice Act in 1774. That act authorized the trial of cases brought by the government for the collection of revenues to be held in Great Britain, an infringement of rights so egregious that it prompted British political writer and statesman Edmund Burke to protest: “[B]rought hither in the dungeon of a ship’s hold … he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence.”

The First Continental Congress responded directly to these constrictions on the right of jury trial in its Declaration of Rights in 1774, stating, in part:

> Resolves, N.C.D. 2. That our ancestors, who first settled these colonies, were at the time of their immigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England….

> …

> Resolves, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law.

The Continental Congress went on to decry these and other actions of the Crown as “grievous acts and measures” to which “Americans cannot submit.”

These laws drew negative comments even in the British House of Commons and outrage in the American colonies. The Provincial Congress of North Carolina resolved in 1774 “that trial by juries of the vicinity is the only lawful inquest that can pass upon the life of a British subject and that it is a right handed down to us from the earliest ages, confirmed and sanctified by the Magna Carta itself.”

South Carolina issued a declaration against Parliament’s action “declaring that the people of Massachusetts Bay are liable for offenses or pretended offenses done in that colony to be sent to and tried for the same in England, or in any colony, where they cannot have the benefit of a jury of the vicinage.” Similar declarations of protest were mounted throughout the colonies.

The Virginia legislature also passed a resolution, later known as the Virginia Resolves, protesting Parliament’s action. The Virginia Resolves were adopted by the assemblies of every American colony.

Clearly, the several attempts on the part of the British government to enforce their revenue gathering laws through the restriction of the colonists’ rights to trial by jury were contributing causes of the American Revolution. Among the “facts” complained of in the Declaration of Independence of July 4, 1776, were violations of both the colonials’ rights to jury trial and that of the community to try British citizens for crimes committed in the colonies. It described the Administration of Justice Act as one of “pretended Legislation”, “foreign to our constitutions” that protected the King’s armed troops “by a mock trial, from punishment for any
murders which they should commit on the inhabitants of these states” and “for depriving us in many cases of the benefits of jury trial”, “for transporting us beyond seas to be tried for pretended offenses.”

The importance of the right of trial by jury was consistently emphasized by the declarations of the Stamp Act Congress of 1765, the Declaration of Rights of 1774, by the first Continental Congress, the Declaration of Independence of 1776, and the Northwest Ordinance of 1787. It was the only right secured in all state constitutions subsequent to the Declaration of Independence.

The United States Constitution, as originally drafted by the Constitutional Convention and submitted to the states for approval, did not assure the right to trial by jury. This omission was pointed out continually by Patrick Henry and Thomas Jefferson. In his speech against the federal constitution at the Virginia Constitutional Convention, Henry decried the lack of guarantees of personal liberty, generally, and the absence of a right to trial by jury:

Is it necessary for your liberty that you should abandon those great rights by the adoption of this system? Is the relinquishment of the trial by jury and the liberty of the press necessary for your liberty? Will the abandonment of our most sacred rights tend to the security of your liberty? Liberty, the greatest of all earthly blessings. Give us that precious jewel, and you may take everything else!

How does your trial by jury stand? In civil cases gone – not sufficiently secured in criminal – this best privilege is gone. But we are told that we need not fear; because those in power, being our representatives, will not abuse the power we put in their hands.

I am not well versed in history, but I will submit to your recollection, whether liberty has been destroyed most often by the licentiousness of the people, or by the tyranny of rulers. I imagine, sir, you will find the balance on the side of tyranny.

Thomas Jefferson was succinct in his statement of the importance of trial by jury:

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.

While the Federalists and anti-Federalist factions contended over the appropriate allocation of power to the federal government and the states, the general agreement of the importance of trial by jury was stated by Alexander Hamilton, himself a Federalist:

The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the
trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.23

As all know, those contending for constitutional assurance of the right to trial by jury prevailed. The right to jury trial in criminal and civil cases is ultimately guaranteed in the Sixth and Seventh Amendments of the Constitution. To refresh recollections, the Seventh Amendment states:

In suits of common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried to a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

At great personal risk, with no assurance of the ultimate success of their rebellion, American colonists defied the far greater wealth and power of the British Empire to preserve, inter alia, our ancient and fundamental right to trial by jury. The leaders who formed our Constitution and, with it, the underlying structure of our government and judicial system, literally fought, wrote, and debated to assure that trial by jury survived in the new nation. They were unwilling to accept any other outcome on this issue. The question finally comes: are we? What are we doing with this long held and hard won right? As to both the extent to which the right is being utilized and the degree of deference given to jury verdicts by our appellate courts, the clear answer unfortunately seems to be, not much.

WHERE HAVE ALL THE JURIES GONE?

Judge Patrick Higginbotham gathered statistics indicating that in the 30-year period from 1970 through 1999, the total number of civil cases filed in federal courts increased by 152% while the number of cases tried during that same period decreased by 20%. While it has always been true that a small percentage of cases are tried, the decline in the relative number of cases tried has been from 12% in 1970 to 3% in 1999.24 By 2002 that number decreased to 1.8%.25

In 1962, each sitting federal district judge tried an average of 39 cases per year. That number dropped to 35.3 by 1987, then plummeted to 13.2 by 2002.26 In 1962, there were 2,765 jury trials and 3,037 bench trials in federal civil cases. In 2002, there were 3,006 jury trials and only 1,563 bench trials in federal civil cases. During that period total cases disposed of in our federal courts increased from 50,320 in 1962 to 258,876 in 2002, an amazing increase of 514% while total trials diminished by 1,233, or about 21%.27

Empirical data aside, the decline in trials and jury trials, in particular, is well known in the legal profession. Ask the next experienced trial lawyer you see and they will tell you that they don’t try as many cases as they once did. A relatively newer lawyer is very likely to tell you that they have very little trial experience.
Commentators have sought to identify the reasons for the decline in trials. Common among the litany of causes are high costs, delay, crowded dockets, and perceptions that the system is random and unpredictable. Judge Higginbotham identifies as a further reason the expectation that cases will settle, “. . . an expectation largely being fulfilled by the new class of lawyers, called litigators, few with substantial trial experience.” Alternative dispute resolution methods, such as arbitration and mediation, have in many instances replaced the resolution of issues through trial.

Some commentators have suggested that the flight from the courthouse is a flight from the jury itself, with the attendant costs, perceived randomness of verdicts, inability to understand and apply the court’s instructions, and general inability to comprehend complex evidence lying behind this reticence. However, the data gathered by Judge Higginbotham indicates the relative decline in trials applies to bench trials, as well as to jury trials.

There is marked disagreement about the importance of jury trials. While supporters revere trial by jury as “the most transcendent privilege which any subject can enjoy” and “the lamp that shows that freedom lives,” critics have reviled the jury as a “dozen dimwits gathered at random” and “the stupidity of one brain multiplied by twelve.”

Judge Higginbotham denies a jury collectively has less ability than does a single judge. The Ninth Circuit has stated: “no one has yet demonstrated how one judge can be a superior fact finder to the knowledge and experience that citizen jurors bring to bear on a case. We do not accept the underlying premise . . . that a single judge is better than the jurors collectively functioning together.”

An early twentieth century commentator distinguished between the perceptions of a judge and jury as follows:

Strictly, judges do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop. Therefore, the instinct of Christian civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policemen and professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a ballet hitherto unvisited.

Whatever the final decision may be as between these contending perceptions, at least one true thing can be said: for every case resolved by means other than trial to a jury, there is a guaranteed and fundamental right left unexercised. It is an ancient right that has been fought for and clung to for hundreds of years. In the Virginia Constitutional Convention, Patrick Henry often shouted to the Federalists, “Why is the trial by jury taken away?” A better question for our current state is “Why is the trial by jury given away?”
WHERE HAVE ALL THE JURY VERDICTS GONE?

Confounding the problem of the diminishing role of jury trials in our civil justice system is a disturbing pattern; a seeming willingness on the part of judges of the Fifth Circuit Court of Appeals and the Texas Supreme Court to substitute their preferred resolution of disputed fact issues for those made by trial juries. In instances where this is done, it risks being contrary to the “re-examination” provision of the Seventh Amendment to the United States Constitution and Section 15 of article one of the Texas Constitution which provides that the right of trial by jury shall remain inviolate.

Professor Dorsaneo contends that in legal analysis of court opinions the issue of “who should win” often overshadows the more important question of “who should decide”. In simple and obvious terms, the willingness of appellate courts to substitute their view of contested fact issues for those of the jury renders the right to trial by jury decidedly less meaningful. Since at least the early ‘90s, decisions by the Fifth Circuit and the Texas Supreme Court have undermined the constitutional authority of the jury to determine the factual issues in trial. A few examples are illustrative.

FIFTH CIRCUIT CASES

Some examples can be found by looking only at the Fifth Circuit opinions issued in January, 2005. The first case we call to your attention is Brown v. Parker Drilling Offshore Corp. In this case, the plaintiff Brown applied for work with Parker Drilling Offshore Corporation. He checked “no” when asked whether he had “present or past back and neck trouble” and was hired. Approximately eighteen months into his employment, he had a back injury and made a claim. Background information established that in 1998 he injured his back while lifting a sack of corn, was treated in the emergency room and issued a wheelchair and walker. In 2000, while working for another employer, he was fired for falsely reporting an on-the-job accident and failing to disclose the 1998 back injury. Brown testified the 1998 and 2000 injuries resulted from a “muscle pull,” that he did not think he had suffered any “past back and neck trouble,” and he didn’t believe the problems he had in the past were the types of problems the employer was inquiring about. The case went to trial, and the jury failed to find for the employer on its factual defense that Brown had intentionally misrepresented or concealed medical facts which were material to the decision to hire and which had a casual connection to the injury complained of in the lawsuit.

The jury returned its verdict in favor of Brown, and the district court remitted the jury’s award regarding medical expenses. The district judge, apparently aware of the potential for scrutiny of the facts on appeal, wrote a detailed opinion specifically setting out the evidence the jury could have relied on in denying the defendant’s defenses. Having reviewed the evidence that the jury heard and the trial court’s detailed marshalling of the facts supporting the jury’s decision, the circuit reversed and rendered for the employer, concluding “the jury’s finding that Brown did not willfully conceal his back injuries was a clear error.” The significance of the decision is emphasized by the circuit panel when it states:
This Court reviews factual findings of a jury for clear error… under a clear error standard, this Court will reverse ‘only if on the entire evidence, we are left with a definite and firm conviction that a mistake has been made.’

The Fifth Circuit simply admits what it has been doing for some time. If at least two of three judges on a panel are left “with a definite and firm conviction that a mistake has been made” by the jury, then they assume the authority to disregard entirely the jury’s factual findings and make their own findings—whether as to liability or damages.

The issue of the court’s usurpation of the jury’s privilege was plainly exposed by the dissenting judge, who wrote:

Following a three-day jury trial in this hotly contested maintenance and cure lawsuit, the jury deliberated for five hours over all the competing claims of the parties and then returned a verdict in favor of Brown in the amount of $150,000. Having remitted the verdict to $100,000, the trial court fully discussed the facts and law pertaining to Parker’s post-trial motions and then denied them. Despite this context, the panel majority sifts through the evidence, essentially declares Brown to be unworthy of belief by the jury, and then substitutes its appellate judgment for that of the jury. The majority discards the plaintiff’s verdict and summarily renders a substitute verdict for Parker, the employer. Because I decline to participate in the majority’s usurpation of the jury’s function, I respectfully dissent.

On rehearing, the panel’s patently unsustainable first opinion in this case was withdrawn. Brown’s recovery under the Jones Act for the employer’s negligence was reinstated, the circuit panel indicating that its prior denial of this recovery was based on an error of law. The panel again denied Brown’s recovery for cure and maintenance on the basis that, as a matter of law, he intentionally misrepresented he had no prior “back trouble,” despite the existence of a great deal of evidence during the trial explaining why Brown answered the question the way he did. The same judge who dissented from the original opinion did so again on the basis that the majority of the panel continued to substitute the conclusions that they would have reached in resolving conflicting evidence in place of those reached by the jury.

Subsequently, a petition for rehearing en banc was filed. It was denied by the majority of the court, but still drew a spirited dissent from Judge Stewart, the same judge who dissented from the circuit panel’s prior opinions. Five other judges joined him in stating:

The panel majority, under the guise of correcting errors of law, usurped the jury’s Seventh Amendment function, replacing the jury’s verdict with a verdict of its own. Brown’s petition for hearing en banc was not an invitation for the full court to retry this case for a third time, but an opportunity to correct the lamentable
message that the panel majority’s decision sent to the bench and bar throughout the Fifth Circuit—no jury verdict is invulnerable before this court. The panel majority’s decision commandeered the jury’s role as fact finder and it is principally for this reason that I vehemently dissent from the full court’s refusal to hear this case en banc. 48

Judge Stewart has allies on the court. 49 After wholly agreeing with Judge Stewart’s dissenting opinion, Judge Wiener authored a concurring dissenting opinion further critiquing the circuit panel’s impermissible “appellate review of the facts.” 50 He states, in part:

. . . I write only to supplement Judge Stewart’s latest dissent with a more detailed explication of where, with respect, I perceive my colleagues of the panel majority (and those who failed to vote to rehear it en banc) to have violated our venerable precedent, thereby – unintentionally, I am sure – doing damage to the federal courts’ civil jury system and thus to the Seventh Amendment to the United States Constitution. . . .This is precisely the kind of civil jury case in which the verdict (and the refusal of the district court to supplant it) should not have been overturned on appeal. Otherwise, as Judge Stewart pointed out in his panel dissents and again in his dissent from denial of rehearing en banc, we do irreparable harm to the civil jury system in this circuit when we allow the panel majority’s jury reversal to stand. . . .

The present status then in the Fifth Circuit is Circuit Judges Stewart, Higginbotham, Wiener, Benavides, Dennis, and King honoring the Constitutional mandate while Circuit Justices Jones, Jolly, Davis, Smith, Barksdale, Garza, DeMoss, Clement, Prado, and Owen either not understanding the Constitutional authority of the jury or simply ignoring it.

Still looking only at the month of January, 2005, an additional example of circuit judges disregarding a jury verdict is found in Carboni v. General Motors Corp. 51 There, Carboni was driving his General Motors vehicle when an unidentified vehicle swerved into his lane, causing him to take evasive action and his car slammed into a guard rail. The driver’s side air bag did not deploy upon impact and he struck his head on the steering wheel sustaining brain damage. The jury returned its verdict for Carboni. A final judgment based on the jury’s verdict was entered.

The circuit panel held there was more than adequate evidence in the record that the failure of the air bag to perform violated the express warranty given by General Motors. The evidence was undisputed the air bag should have deployed, but didn’t; that Carboni’s head hit the steering wheel, resulting in brain injury; and that Carboni’s head would not have hit the steering wheel had the air bag deployed properly. The trial judge excluded testimony from one of the plaintiff’s experts regarding causation and enhancement injuries because of the Daubert standard. The circuit judges noted that no expert testified what injuries Carboni would have suffered in the event the air bag operated properly and what injuries he suffered as a result of the
air bag not deploying. Consequently the court vacated the judgment, rendering a take-nothing judgment against Carboni, because there was no evidence that his injuries were enhanced because of the failure of the air bag.

While the court is correct in stating that there was no expert testimony specifically stating that Carboni suffered more severe injuries than he would have received had the air bag deployed, there is evidence in the record that was sufficient to uphold the jury’s finding. It was undisputed Carboni suffered head injuries when he hit the steering wheel and there was expert testimony to that effect. There was also expert testimony that Carboni’s head probably would not have hit the steering wheel had the defective air bag deployed properly. Finally, there was evidence Carboni suffered a brain injury as a result of his head hitting the steering wheel. While there was no specific testimony that Carboni’s head injury was worse from having hit the steering wheel than if he had not hit the steering wheel, that is an obvious and reasonable inference the jury was entitled to draw. Moreover, given the testimony in this case, it is an entirely logical conclusion Carboni’s head would have not hit the steering wheel had the air bag deployed and, therefore, he would have not suffered the brain injuries which the expert testimony established resulted from hitting the steering wheel. In this instance, the circuit panel has denied the plaintiff a recovery based upon the jury’s logical inference that the specific injuries Carboni suffered would not have occurred had the air bag deployed and, instead, have substituted their own far less logical inference that there was no proof Carboni’s brain injury that resulted from striking the steering wheel was enhanced by the failure of the air bag to deploy.

Fact findings by trial judges suffer no better fate in the Fifth Circuit. In *Mumblow v. Monroe Broadcasting, Inc.*, the Fifth Circuit panel reversed the factual findings of the trial judge in a non-jury case, holding, “[b]efore we will disturb the trial court’s factual findings, we must be ‘left with a definite and firm conviction that a mistake has been made.’ Because we have thoroughly reviewed the record and are left with such a conviction, we reverse.”

Therefore, presently in the Fifth Circuit, any judgment entered on factual issues found by a jury or a judge can be reversed by two circuit judges who believe the fact finder made a mistake.

**THE “MAXIMUM RECOVERY RULE”**

This discussion would not be complete if we failed to remind you of the Fifth Circuit doctrine of the “maximum recovery rule” created over the last several years. This theory limiting damages found in a jury’s verdict started in Jones Act cases, but today is applied across the board in personal injury cases. Simply stated, the rule is that if the circuit judges believe the damages determined by the jury are too large, they research the thousands of published opinions for similar facts with a lesser award of damages and then hold the “maximum recovery” cannot be greater than some percentage of the lesser award. It makes no difference that the verdicts were based on different evidence, determined by different juries in different places at different times with different witnesses, tried by different lawyers, and presided over by different judges making different rulings on different motions and objections in different procedural contexts.
However, exactly what the “maximum recovery rule” is has never been decided by the Fifth Circuit *en banc*. Various panels have concluded that the benchmark against which a verdict is to be measured for excessiveness is either 0%, 133%, or 150%, take your pick.

While the cases recite that similar cases with similar injuries are used to assure comparative uniformity and fairness from one case to another, the reality is sometimes different. In *Dixon v. International Harvester Co.*, the jury award of $2.8 million to a man who was punctured by a sapling and pinned to the interior of a tractor cab resulting in severe pain and mental anguish and the loss of both testicles was reduced to $890,000. The case used for determining the “maximum recovery” involved victims of a grain mill explosion who suffered severe burn injuries over 38% and 60% of their bodies, respectively.

That the “maximum recovery rule” is imprecisely stated and applied is clear, but the underlying casualties of its application are fundamentally more serious. The first of these is the principle, often espoused by the Fifth Circuit, that each case is determined by its own facts. Second to fall is the deference traditionally afforded the fact finder. Also lost is the limitation imposed by the “re-examination clause” of the Seventh Amendment itself. It is obvious that the Fifth Circuit has decided that it is better at deciding damages than are the juries who heard the evidence. Unfortunately, their actions are sometimes contrary to the letter and spirit of the Seventh Amendment.

**TEXAS SUPREME COURT CASES**

The Supreme Court of Texas may be guilty at times of this same too ready willingness to disregard jury verdicts. On January 10, 2005, in *Volkswagen of America, Inc. v. Ramirez*, the Court reversed and rendered a judgment based on a jury verdict. In this case, two vehicles were proceeding in the same direction on U.S. 83 when they bumped each other, resulting in a Volkswagen Passat’s crossing the median and colliding head-on with a Ford Mustang. There were deaths and substantial injuries in this accident. There was no dispute that the wheel separated from the Passat, but there was a dispute over when the wheel assembly detached and whether the detachment caused the accident. Each side had expert witnesses. The plaintiff’s expert testified that the left rear wheel detached from the axle as the Passat entered the median and fishtailed across the grass and concrete and further testified that the “laws of physics” explain how the wheel was able to remain pocketed in the rear wheel well throughout this turbulent accident. Volkswagen’s expert testified the wheel separated as a result of the impact between the two vehicles going in opposite directions. The Supreme Court held the two experts for the plaintiff failed to present sufficient evidence that a defect in the Volkswagen caused the accident. The opinion is long, but Chief Justice Jefferson’s dissenting opinion succinctly focuses on the obvious problem with the majority’s reasoning:

The Court concludes that Cox’s testimony amounts to ‘no more than a mere scintilla’ of evidence on causation…. To the contrary, Cox testified that the Passat experienced a ‘catastrophic failure of the wheel bearing assembly’ while it was traveling in the eastbound lane of U.S. Highway 83, before, the Passat entered the median. He both tested and rejected Volkswagen’s alternative
theory — that damage to the wheel bearing assembly occurred after the Passat’s collision with the Mustang. Reasonable jurors could have accepted Volkswagen’s theory and rejected Cox’s…, or accepted Cox’s and rejected Volkswagen’s…, but unlike the jury, this Court lacks constitutional authority to weigh conflicting evidence. Accordingly, I respectfully dissent from the Court’s rendition of judgment for Volkswagen.61

In Southwestern Bell Telephone Co. v. Garza,62 the Supreme Court reversed a jury verdict awarding punitive damages by announcing a new rule for evaluating the quality of evidence in instances where the case involves an enhanced burden of proof. “Clear and convincing” evidence was necessary to sustain the jury’s finding of malice that supported its award of punitive damages. A Supreme Court majority explained its ruling, in part, as follows:

[W]hen proof of an allegation must be clear and convincing, even evidence that does more than raise surmise and suspicion will not suffice unless it is capable of producing a firm belief or conviction that the allegation is true. Evidence of lesser quality is, in legal effect, no evidence. . . in reviewing a finding that must be proved by clear and convincing evidence, it makes no sense for an appellate court to determine whether the supporting evidence amounts to more than a scintilla. Even if it does, the finding is invalid unless the evidence is also clear and convincing. In such a case, the review required by the ‘scintilla’ rule is wholly irrelevant and, thus, no review at all. Thus, as a matter of logic, a finding that must meet an elevated standard of proof must also meet an elevated standard of review.63

Justice O’Neill concurred in the result, but argued in her concurring opinion that the majority overreached “the constitutional limitation that the factual conclusivity clause imposes upon our jurisdiction, yet proceeds to weigh the evidence unfettered by any such constraint. Because the court usurps the factual sufficiency review power that our Constitution reserves to the court of appeals, I cannot join in its opinion.”64

Another case in which the Texas Supreme Court set aside a large jury verdict is Diamond Shamrock Refining Co. v. Hall,65 where the plaintiff’s decedent died of burns he suffered in a refinery explosion. The widow sued Diamond Shamrock for gross negligence to recover exemplary damages. The explosion was the result of complex facts, but basically a hydrocracker unit was being restarted following a routine maintenance shutdown and it began to overheat causing excessive vaporization of liquid hydrocarbons. The vapor turned to liquid when it cooled and the suction drum began to fill with the liquid, a potentially explosive situation. Recognizing the danger of explosion from sending liquids into a compressor, the operator requested instructions to change the flow of liquid, but his request was refused. Notwithstanding, the operator disobeyed his instructions and diverted the flow to storage. The automatic shut-off switch on the suction drum failed to operate, and finally, the compressor was shut down manually. At that point there was a crew change and, unfortunately, the plaintiff’s
decedent came on shift. Ultimately there was a fire resulting in him being fatally burned. The jury awarded $32.5 million in exemplary damages. The trial judge ordered a remittitur, but overruled all of the defendant’s motions on liability, holding there was sufficient evidence to justify the jury’s verdict. The Court of Appeals affirmed, specifically describing the evidence and holding it sufficient for the finding of gross negligence supporting the jury’s verdict. The majority of the Supreme Court writes for pages, reviewing voluminous evidence, but basically holds that while there was clear evidence of negligence, there was no clear and convincing evidence “Diamond Shamrock was unconcerned.” Of course, the difference between evidence of negligence and gross negligence is in the eye of the beholders, whether the judges in Austin or the jury that heard the evidence. This appears to be a case where the “who should win” part of the dichotomy suggested by Professor Dorsaneo trumped the “who should decide” consideration. We submit that proper application of the Seventh Amendment’s “reexamination” clause might change the result.

It is obvious the Texas Supreme Court regularly reverses judgments based upon jury findings. In some instances that is the court’s proper function. Unlike the Fifth Circuit where some judges reverse jury findings without reticence if they determine “clear error” has occurred, the Texas Supreme Court appears to carefully analyze the evidence to determine whether it is legally adequate to support the jury’s verdict. But, having done so, in some instances it appears the court ultimately reverses the jury’s verdict based upon the court’s preferred interpretation of the facts or by recharacterizing the issues in the case in order to avoid the effect of the jury’s verdict. Other recent cases that are subject to this interpretation are:

1. *Haggar Clothing Co. v. Hernandez.* Hernandez sued her former employer, Haggar Clothing Co., alleging she was fired in retaliation for filing a worker’s compensation claim after an injury on the job. The jury found in her favor on her retaliation claim, found that Haggar acted with actual malice, and awarded compensatory and exemplary damages. The Court of Appeals affirmed, holding the evidence was legally and factually sufficient to support the jury’s findings, but the Supreme Court in a *per curiam* opinion reversed and rendered. After reciting evidence in the record that seems to support the jury’s findings, the court cited its own prior authority in holding that Haggar, the employer, terminated Hernandez pursuant to the uniform enforcement of a reasonable absence-control provision, and, therefore, was not subject to the charge of retaliatory discharge, as a matter of law, the specific facts of the case and the jury’s verdict based on them notwithstanding.

2. *Southwest Key Program, Inc., et. al. v. Gil-Perez.* An employee of Southwest Key took Gil-Perez to a sports stadium to participate in athletic activities. An impromptu football game occurred in which the Southwest Key employee allowed Gil-Perez to participate so long as tackling was “only below the waist.” None of the players wore any football equipment. Gil-Perez was tackled and suffered a dislocated knee. He sued Southwest Key, alleging negligence in allowing him to play tackle football without providing protective gear or equipment. Despite jury findings of negligence and proximate cause, the Supreme Court reversed on the basis that there was no evidence of “cause in fact” that the lack of protective equipment resulted in the knee injury.
3. *U.S. Silica Co. v. Tompkins.* Tompkins sued U.S. Silica claiming that he contracted silicosis from using its flint products in abrasive blasting work. The jury found for plaintiff and the Court of Appeals affirmed. The Supreme Court reversed and remanded for a determination of the issue of whether if warnings had been given, they could have effectively reached the employees who used the silica products.

4. *Military Highway Water Supply Corp. v. Morin.* This case arises out of a unique set of facts in which a motorist driving lawfully on a highway struck a horse causing him to lose control of his vehicle and to swerve all over the road and areas adjacent to the road until he struck an excavation left uncovered by a contractor. After having skidded and swerved around for more than 500 feet from the point of impact with the horse, hitting the excavation tripped the car and killed the plaintiffs’ decedent. The excavation work was done by a contractor for Military Highway Water Supply Corporation. The evidence was that since the Texas Department of Transportation had an easement over the area, Military Highway was required to fill in the excavation after it completed the work of installing a water meter. Evidence indicated that the uncovered hole was 21 to 25 feet from the edge of the road. The work occurred on June 3, 1996. In July, 1996, a neighboring landowner notified Military Highway that the excavation had not been filled, but no action was taken to fill it. The accident occurred on August 1, 1996. The jury found Military Highway and the driver were respectively 52% and 48% responsible and awarded damages to the plaintiffs.

The Texas Supreme Court reversed and rendered, holding Military Highway owed no duty to the plaintiffs under *Restatement (2nd) of Torts* § 368 which provides in relevant part:

> A possessor of land who creates or permits to remain thereon an excavation. . . so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who . . . (a) are traveling on the highway, or (b) foreseeably deviate from it in the ordinary course of travel.

The court concluded, as a matter of law, that leaving the highway as a consequence of striking a horse was not in the “ordinary course of travel” and, therefore, Military Highway owed no duty to plaintiffs’ decedent. Obviously, whether a duty existed was ultimately a question of law for the court. However, it is difficult to understand how it is a question of law as to whether or not striking a horse wandering at night on a farm to market road in a rural area in a county without local stock laws while operating a vehicle at legal speed is in the “normal course of travel.” The court clearly assumed the answer to the fact issue underlying its “no duty” decision, a fact issue that apparently was never submitted to the jury.

5. *Excel Corp. v. Apodaca.* The Supreme Court reversed a judgment based upon a jury verdict for injuries sustained in the workplace because there was no specific proof that any negligence of the employer was a “but for” cause-in-fact of the plaintiff’s injuries. In this case, the court recites an extensive amount of evidence about the repetitive nature of the work that the
plaintiff performed and injuries he sustained as a consequence of his work. In addition, there was testimony about recommended changes to work procedures, recommended, but not instituted changes in ergonomics, OSHA recommendations about recommended changes to the work site, the use of surveys to identify work-related symptoms, and medical testimony linking the plaintiff’s injuries to his job. However, the court concluded, unlike the jury, there was no evidence any negligence on the part of the employer was a “but for” cause of the plaintiff’s injuries.

While the Texas Supreme Court does on the surface appear to engage in traditional “no-evidence” analyses of the factual support for jury verdicts, in actual practice it has a hard time letting them stand. In the several cases cited in this paper, the court has:

1) found that evidence of a specific defect was inadequate, thereby disallowing the jury’s inference that a defect existed (*Ramirez*);

2) created a new standard for the review of evidence necessary to support issues involving an enhanced burden of proof, thereby reversing a judgment based on a jury’s verdict because the proof was inadequate when compared to the newly announced standard (*Garza*);

3) weighed evidence about a defendant’s conduct and concluded that the jury was not entitled to draw an inference that a defendant was indifferent to the risk of explosion (*Hall*);

4) found an employer was merely enforcing a reasonable absence-control provision, rather than discriminating against the plaintiff, when the jury was never asked that question (*Hernandez*);

5) concluded that the jury could not infer “cause in fact” of a knee injury that resulted while playing tackle football without protective equipment (*Gil-Perez*);

6) reversed and remanded a judgment based on a jury verdict in order to obtain a finding on an additional fact that was not submitted to the jury (*Tompkins*);

7) determined, as a matter of law, that leaving a highway after striking an object was not a part of the “ordinary course of travel”, when that question was never submitted to the jury, thereby deciding that the defendant had no duty to avoid the negligence that the jury found was a cause of a death (*Morin*); and

8) disallowed the jury’s inference that defendant’s negligence was a “cause in fact” of plaintiff’s injury where there was extensive evidence about the nature of the plaintiff’s work and no apparent dispute that the plaintiff’s injuries resulted from it (*Apodaca*).

All of these decisions resulted in reversal of jury verdicts. All save one resulted in rendition of judgments contrary to the lower courts’ holdings based on jury verdicts. It can be
credibly argued that some of these cases were correctly decided. It might be argued that the Texas Supreme Court does not systematically overturn jury verdicts in favor of plaintiffs. At a minimum, it seems clear that the Texas Supreme Court often fails to give appropriate deference to jury verdicts in cases where the court disagrees with the result reached below.

COMPELLING ARBITRATION

One of the forms of alternative dispute resolution that frequently supplants jury trials is compulsory arbitration. The Texas Supreme Court has recently decided two cases that evidence the court’s strong preference for arbitration over litigation.

_in re Weekley Homes, L.P._, 72 was a case of first impression, in which the Texas Supreme Court conditionally granted an application for writ of mandamus to require a trial judge to compel arbitration. The unusual aspect of the case is that the person resisting arbitration was not a party to the contract containing the arbitration clause sought to be enforced. Rather, she was the adult daughter of the owner of the house that was the subject of litigation. She did not assert any claims under the contract between her father and the homebuilder, nor did she sue as either trustee or beneficiary. However, the court justified its conclusion to compel arbitration by pointing out that the plaintiff had taken advantage of the benefits of the contract, was in fact the equitable owner of the house, and, therefore, under the “direct-benefits estoppel” theory, should be bound by the contract’s arbitration clause, as well. 73

_in re Dillard Department Stores, Inc._ 74 is another example of the Texas Supreme Court’s strong policy favoring arbitration. In _Dillard_, Garcia was discharged from her job as a sales associate at a Dillard’s store. She filed a retaliatory discharge suit. Dillard’s filed an original mandamus proceeding in the Texas Supreme Court seeking to enforce an arbitration policy adopted by the company that it claims covers most employment disputes, including that of Garcia. She claimed she had never agreed to an arbitration policy and, in fact, had specifically refused to sign a form that required arbitration. Dillard’s was unable to produce anything in writing whereby Garcia acknowledged receipt of the arbitration policy. Despite that fact, the court concluded Garcia attended a meeting at which she received an acknowledgement form advising employees of Dillard’s policy requiring arbitration of employment disputes. Ultimately, the Supreme Court concluded that both the trial court and the court of appeals abused their discretion by not granting Dillard’s motion to compel arbitration. The effect of the Supreme Court’s holding is that Garcia lost her Seventh Amendment right to a jury trial when she elected to continue her employment with Dillard’s after having received a form stating Dillard’s requirement that employment disputes be arbitrated.

SHOULD THE CIVIL JURY BE ABOLISHED OR REFORMED?

So, what is our point? Obviously, there is ample room for fair debate about whether our use of juries in our civil justice system should be changed, reformed, or improved. It may be true that juries are unable to make reasoned decisions in complex cases. It may be the case that jury trials are too expensive for many purposes. It could be decided that the use of juries in the civil justice system is fairly subject to all the myriad arguments and complaints that have been catalogued against it. 75 But, all of those ample criticisms must be balanced against the benefits
that juries add to the administration of justice. They import community values into the process of adjudication. De Toqueville observed in his commentaries, that the American jury is a “political institution . . . one of the forms of the sovereignty of the people.” The jury’s role in this regard has been generally recognized as “an organ of the people’s original sovereignty.”

In the plainest terms, without juries all decisions either imposing or relieving civil or criminal liability, whether from the executive, legislative, or judicial branch, come from people who are, in one capacity or another, employees of governmental entities. Juries not only bring community values to the process of adjudication, they provide a vital and important buffer between the all-powerful government and the individual before the court, whether in civil or criminal cases. It does not require a long memory or a sophisticated understanding of history to conclude that the deposition of all forms of decision making affecting civil and criminal rights in the government, and only in the government, is undesirable. Our founders clearly understood this and fought against it.

If there is need for improvement, change or reform of our civil jury system, then proponents of that change should make their case in appropriate and public settings with due provision for notice, discussion, and debate. It should not be done by individual judges or courts deciding individual cases, most of which cannot receive meaningful review. Any efforts at reform can only begin with the Sixth and Seventh Amendments to the United States Constitution and the constitutions of each of the United States that guarantee all citizens the right of trial by jury. Perhaps, after thorough consideration and open discussion and debate, our citizens will choose to amend our constitutions and give up their right of trial by a jury of their peers. However, until that happens it is unconstitutional for courts to disregard jury decisions that are supported by sufficient and competent evidence. We, as lawyers, are sworn to uphold the Constitution of our country and our states. As lawyers, we should identify those instances where proper jury verdicts are discarded. We must tell the guilty judges that it must stop because it upsets the balance between the rights of the people and the power of the judiciary.

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ENDNOTES

1 Sam Sparks is a United States District Judge for the Western District of Texas, Austin Division. Judge Sparks has written and spoken extensively about the importance of preserving jury trials and jury verdicts. This paper is based on his prior speeches and writings. George Butts is an Advocate in the Austin Chapter of the American Board of Trial Advocates. Mr. Butts assisted Judge Sparks in researching and writing this paper.

The authors recognize that many scholarly books, articles, and studies relevant to the topic of juries and jury trials already exist. Many such valuable sources are cited in this paper. We acknowledge that our efforts here do not rise to the level of serious scholarship as compared to numerous publications on this subject. Rather, it is hoped that what we have written will serve as (1) a reminder of what we have and how we got it; (2) a caution against the too ready relinquishment of basic rights; (3) a challenge to stand up for jury trials and jury verdicts; and (4) a lament for the diminished importance of “this best right.”

Part of this article is a critique of Fifth Circuit Court of Appeals and Texas Supreme Court cases in which those courts reversed judgments based on jury verdicts. Obviously, there are cases in which juries render improper verdicts, whether due to excessive damage awards, failure to follow the court’s charge, or lack of sufficient evidence to support their findings, among leading possible reasons. This article does not address instances in which courts exercise their discretionary power to order remittitur of excessive verdicts that are unsupported by evidence or order new trials as the alternative. Neither is this article about instances where courts appropriately conduct “no evidence” reviews to determine whether jury verdicts are supported by probative evidence. Rather, this article deals with the reversal of judgments based on jury verdicts that are supported by competent evidence.


3 Magna Carta, ¶ 39 (emphasis added). Paragraphs 52 and 56 contain further guarantees of a person’s rights to be judged by their peers in England and Wales. See also Duncan v. Louisiana, 391 U.S. 145, 151–52 (1968).


5 Bruce H. Mann, Neighbors and Strangers 71 (1987).

6 Harrington, supra at 162.

7 Id. at 164

8 See Harrington, supra at 165–66.


11 Id. at Art. VIII.


13 Declarations and Resolves, Continental Congress (1774) (emphasis added).

14 Parliamentary History, Volume XVI., p. 479–94. “Those in opposition commented forcibly on the cruelty and injustice of dragging an individual 3,000 miles from his family, his friends, and his business, from assistance, countenance, comfort and counsel necessary to support a man under such trying circumstances in order that . . . he might be put to peril of his life before a panel of twelve Englishmen, in no true sense of the word his peers.”


16 Id. at 208.

17 Id.

18 Id.; see Brian Kalt, Crossing Eight Mile: Juries Of The Vicinage And County-Line Criminal Buffer Statutes, 80 WASH. L. REV. 271 (2005) for a more detailed discussion of the importance of trials in the vicinage.


26 Id. at 5.

27 Id.

28 See Higginbotham, supra at 1412.

29 Id. at 1417.

30 The use and enforcement of ADR, particularly where compelled by contract provisions, is another topic worthy of discussion; however, it is not the main subject of this paper.


32 Higginbotham, supra at 1422; see also American College of Trial Lawyers, supra, for detailed discussion and analysis.

33 Devlin, supra at 164.


36 In Re United States Fin. Sec. Litigation, 609 F.2d 411, 431 (9th Cir. 1979); see also Smith, supra at 469–97 for a discussion of the advantages and disadvantages of jury trials.


38 CONSTITUTIONAL AMENDMENTS (1789-present) 170 (Kris Palmer ed., Gale Group).

39 See William v. Dorsaneo, Reexamining the Right to Trial by Jury, 54 SMU L. REV. 1695 (2001) for a thorough explication of the limitations imposed on reviewing courts by the reexamination clause.

40 See also Article V, §10 and §6 of the Texas Constitution, providing for the right to trial by jury and making the courts of appeals the final arbiters of the sufficiency of factual evidence.

41 Dorsaneo, supra at 1697.

42 Dorsaneo, supra at 1699.

43 396 F.3d 619 (5th Cir. 2005); opinion withdrawn and judgment vacated, 410 F.3d 166 (5th Cir. 2005). See n. 42, infra.

44 Id. at 622.

45 Id. at 626 (emphasis added).

46 Brown v. Parker Drilling Offshore Corp., 410 F.3d 166 (5th Cir. 2005).

47 Id.

48 Brown v. Parker Drilling Offshore Corp., No. 03-30782, reh’g en banc denied (5th Cir. 2006).

49 Circuit judges Higginbotham, Benavides, Dennis, and King joined in both Judge Stewart’s dissent and Judge Wiener’s concurring dissenting opinion.

50 Emphasis in original.

51 398 F.3d 357 (5th Cir. 2005)

52 401 F.3d 616 (5th Cir. 2005).

53 Lebrón v. United States, 279 F.3d 321, 326–27 (5th Cir. 2002).


56 A fact never discussed is that the damages awarded in the cases used for comparison were not determined to be the maximum amount that the evidence would sustain, only the amount awarded by the jury in that case. It is illogical to use such an award, never tested against the “maximum” standard, as a basis for deciding the permissible maximum in a different case.

57 754 F.2d 573 (5th Cir. 1985).


59 Id.

60 159 S.W.3d 897 (Tex. 2004).
Implicit in this dissent is that the Texas Supreme Court is prohibited by the state’s constitution from determining the factual sufficiency of evidence to support any jury finding that authority being reserved to the Courts of Appeals by Article 5, §6 of the Texas Constitution.

The court’s original opinion in this case published at 48 Tex. Sup. Ct. J. 354 (Tex. Jan. 21, 2005) was withdrawn and the court’s opinion cited in footnote 51, supra, issued in its place. While the court reversed and rendered the judgment of the Court of Appeals based on a jury verdict in both opinions, the court’s reissued opinion cited its prior decision in La.-Pacific Corp. v. Andraid, 19 S.W.3d 245 (Tex. 1999) for analogous support. In Andraid, the plaintiff’s decedent was ordered to operate a crane immediately adjacent to a high-power line and was told the power had been cut off. He was electrocuted when he sat down. The evidence at trial was that different employees thought others had cut off the power, but no one ever checked. The Supreme Court held since no one knew that the power was on, the employees could not have been consciously indifferent. The court applied the same logic in Shamrock, i.e., since no employee testified he knew there was explosive gas present (because no one checked), there could be no evidence of conscious indifference. Of course, all employees in both cases knew that if the power was on or if the gas was present, either of which could have been easily checked, there would be a disaster probably leading to a death. Nonetheless, the Supreme Court held this evidence was simple negligence and the jury, the trial court, and the Court of Appeals were wrong in believing otherwise.


See, e.g., Smith, supra at 490.

Id. at 470.

Id. at 480 et. seq.; see also Smith, supra at 470–74 and authorities cited therein.