The Woburn Case: Is There a Better Way?

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The intense public interest in the best seller novel, *A Civil Action*, and the subsequent film should be directed less to Academy Awards nominations and more toward ways to improve the methods that our legal system employs to resolve complex and important disputes.

One thing is certain form the Woburn case. Despite six months of trial in which evidence was presented by competent and well-financed attorneys, the finders of fact—the jury—were virtually clueless as to how they should decide the case. Consequently, after seven days of deliberation in which they could not agree whether the plaintiffs had proven their case against either W.R. Grace or Beatrice Foods, the jury compromised by exonerating Beatrice and finding Grace liable in such a way that the judge threw that verdict out and ordered a new trial.

All of which might not be too serious—and merely the making of a good book—were it not for the fact that this result manifests a massive failure of our legal system. The failure is that in our society the only vehicle to resolve the types of serious claims involved in the Woburn case is a court of law, a very flawed institution for matters as complex as those presented in the Woburn case.

I am not suggesting that we abandon the court of law as the place to resolve these issues or that we substitute the judge for the jury in deciding cases. The tradition of the jury's role is too ingrained in our culture to be abandoned. I do believe, however, that we could do much to improve the way the court process works to promote greater understanding by the fact-finder, and, particularly, the jury.

Look at the Woburn trial by way of illustration. The evidence took over six months to present. Although the jurors were permitted to take notes, they were forbidden to discuss amongst themselves what they heard until the end of the trial. The only time they heard the

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lawyers explain what they hoped to prove and what they had proved or what any of the evidence meant was at the beginning and end of the trial. Several experts testified about extremely technical subjects with diametrically different conclusions. There was no way—other than what may have been revealed in cross-examination—for the jury to know which expert to believe, other than to conclude that even the experts could not agree on the complicated matters. Finally, the jurors were confronted with complicated special questions amidst unfamiliar jury instructions, purportedly to help them navigate the thickets of assessing responsibility.

Whenever lawsuits involve parties seeking to resolve private disputes, the scenario described above undoubtedly interferes with thoughtful understanding by the jury, to the detriment of the individual parties. Trial lawyers say "you never know what a jury will do," and this is one reason why this adage is true. However, when highly visible cases like the Woburn action are decided, there are serious issues of public policy at stake. Many people believed that had the Woburn case ultimately gone to verdict, and had this jury determined that "it was more probable than not" that specific solvents had caused childhood leukemia, it is quite likely (and was thus perceived by medical researchers at the time of the trial) that research dollars would have begun to chase the conclusions of this jury, rather than accepted scientific evidence. Do we really want questions of this importance to be settled in such a way?

It is time that our judicial system recognized that we must find better ways to assist the jury in reaching its conclusions than the archaic system we presently employ. Perhaps in a simple case—where credibility or the jury's "common sense" is the most important factor in the jury's decision—our present system works. In today's society, however, virtually every important issue gets litigated, and many of these issues are litigated in front of juries. The results of the jurors' deliberations are often widely publicized and, in many cases, have serious social consequences. The Woburn case is one example, but there are many others: Rodney King, O.J. Simpson, and the Oklahoma bombing trial, to cite recent examples. The results of these important cases may influence public policy (as the Woburn result might have) but these cases always impact upon the public's confidence in the judicial system, which is critical to our political system.

An additional factor that is present in virtually all major cases today is the heavy reliance on expert testimony, particularly on subjects of technical complexity. Try as attorneys might, it is difficult to break down the expertise to information that one can be confident a

juror understands—particularly when it is impossible to assess whether the juror comprehends the information you are transmitting. Can you imagine any other similar forum in which one attempts to transmit information where you do not have the opportunity to assess by questions or otherwise whether you are successful or not?

We now have available to us a wealth of data on how jurors actually make decisions. This information has been gathered by the sophisticated jury consultants who have examined the jurors' decision-making processes in a scientific and highly revealing way. Presently, that information is only used by trial lawyers, who attempt to perfect the manner in which they communicate with jurors. The information has great value to persons who would like to see jurors function more intelligently. Many of our practices—the format of the trial, the order of examination, the timing of the opening and the closings, the judge's role—may well interfere with, rather than assist, the jurors in understanding the matters before them.

Take opening statements, for instance, thought by most jury consultants to be a critical phase in the jury's decisionmaking process. The reason that the plaintiff goes first is obvious: the plaintiff will present its case first and the opening provides the proverbial "road map." The reason that the defendant will typically open immediately after the plaintiff instead of waiting until its case is presented—perhaps weeks later—is to counter the impression left by the plaintiff's opening. Perhaps the defendant should be permitted two openings.

Similarly, why are counsel limited to an opening and a closing, which are widely separated in time? What would the jury consultants tell us would be the effect of permitting multiple statements by the attorneys? Would it assist the jurors' understanding of the issues and, if so, what is so sacred about the traditional way counsel's statements are handled?

One other example, also well understood by jury consultants, is the way people today receive most information, which is through television or other visual devices. As one consultant put it, we are approaching a "postverbal era" in our society. How sensitive (or insensitive) is our trial format to this phenomena? Take jury instructions, for instance. If few people today are familiar with absorbing and understanding information in sessions where they are talked to for ninety minutes, should we not find ways to transmit that information in a manner with which the jury is familiar—perhaps by using some visual aids that a juror will more easily understand? This is not a suggestion to "dumb down" the court processes, but it is a recognition that we place tremendous reliance upon the jury and we must under-

stand that our processes have to adapt to their needs.

One further example: does it assist the jury and the performance of their function to herd them from place to place, have court hours extending to late afternoon, make them sit through endless bench conferences, and provide a minimum of creature comforts? Several courts are thinking about this problem and are experimenting with techniques to help jurors. The Massachusetts Superior Court has adopted a pilot project entitled "Innovative Jury Trial Techniques," which encourages judges to utilize certain identified techniques designed to enhance jury comprehension, understanding, and participation in the trial process. These include permitting jurors to take notes, furnishing jurors with notebooks that contain exhibits or other trial documents, preinstructing the jury on legal issues in the trial, permitting the jurors to ask questions of witnesses, permitting the lawyers to make "mini-openings" and commentary during the trial, permitting the jurors to discuss the evidence amongst themselves during the trial, simplifying the jury instructions, permitting the jury to ask questions about the final instructions, and furnishing the jurors with written copies of the jury instructions. The Superior Court intends to track the results of these techniques, with the assistance of the jurors who will be debriefed after trial, and adopt the more successful techniques. There is a need for this willingness to take a fresh look at what we are doing.

Turning to Woburn, any, and perhaps all, of the above-referenced techniques would have assisted the jury. An available procedure that is not frequently used—the appointment of an expert witness by the court—might have been particularly useful in a case where the scientific evidence was very complex and the opinions of the parties' experts in sharp contrast with each other. An independent expert—who would be subject to cross-examination like any other expert—might have assisted the jury in understanding the evidence from a nonadversarial perspective. This may have assisted the jurors, who felt that if these experts cannot agree on these things, how can we expect to find the correct answer?

If we are to preserve the unique role of jurors in our society, we must do more to understand how we can make their role a more intelligent one. This calls, in my opinion, for a full examination of the format in which the jurors play such a critical role, so that the format can truly serve the needs of the jury and the judicial system. We should bring into that examination not only experienced judges, lawyers, and jurors, but also social scientists who understand perceptions and decision-making. We may even make a good system a much better—and more useful—one.