Cornell Law Review

Volume 48
Issue 2 *Winter 1963*

Article 2

The Jury and the Namnd: Some Observations on Judicial Control of Lay Triers in Civil Proceedings in the United States and Sweden

Ruth Ginsburg

THE JURY AND THE NÄMND: SOME OBSERVATIONS ON JUDICIAL CONTROL OF LAY TRIERS IN CIVIL PROCEEDINGS IN THE UNITED STATES AND SWEDEN*

Ruth Ginsburg†

Participation of laymen in the trial and decision of civil as well as criminal actions has been a traditional aspect of the legal process in both Sweden and the United States. Under the common law jury system prevailing in the United States the adjudicative function is divided between the judge and twelve lay triers. In general, questions of law fall within the province of the judge, while exclusive competence to determine the facts is reserved to the jury.[1] Jurors are chosen at random from among the varied social and economic groups of the community and seldom serve more than two to three weeks in any one year. They deliberate in camera, announcing in open court only the ultimate result of their deliberations. By contrast, the body of lay triers in Sweden, known as the nämnd, shares with the professional judge, the function of determining all questions presented, whether of fact or law. Chosen for six year terms by the local representative councils from among the local citizenry, nämndemän sit in panels of seven to nine members and generally serve at two one-day sessions each month. Deliberating together with the presiding judge, nämndemän cast a collective vote on all issues presented for decision.

In both countries, before the democratization of political processes, lay service on judicial tribunals satisfied yeoman desires for protection against judges appointed by and susceptible to the pressures of a sovereign executive.[2] However, the advent of representative government

* This paper was presented at the Sixth International Congress of Comparative Law of the International Academy of Comparative Law meeting in Hamburg, Germany, August, 1962.

† A.B., Cornell University, 1954; LL.B., Columbia Law School, 1959; Member of the New York Bar; Associate Director, Columbia Law School Project on International Procedure.

[1] Jurors are conventionally told that "the judge determines the law to be applied in the case while the jury decides the facts," Handbook for Jurors Serving in the United States District Courts (Judicial Conference of the United States 1959), reprinted in 26 F.R.D. 545, 549 (1961). However, in almost every litigated controversy, a multitude of fact questions must be determined by the judge. Frequently, decisions concerning the admissibility of evidence require preliminary fact findings by the judge. See, e.g., Maguire & Epstein, "Preliminary Questions of Fact in Determining the Admissibility of Evidence," 40 Harv. L. Rev. 392 (1927). Moreover, although denominated "questions of law" to indicate that they are decided by the judge, certain fact questions directly at issue in a case, for example, questions of the construction of written documents, traditionally have been reserved to the judge. See Devlin, Trial by Jury 61-125, especially at 103 (1956) ("empirical division between fact and law"); Thayer, Preliminary Treatise on Evidence 202 (1898).

[2] Compare Vanderbilt, Judges and Jurors: Their Functions, Qualifications and Selection 56-58 (1956), with 1 Ekelöf, Rättegång 91 (Stockholm 1957).

did not diminish popular preference for the traditional systems. Today, despite domestic criticism and curtailed resort to similar systems abroad,[3] lay participation in the judicial process, albeit in substantially different forms, continues to be an enduring characteristic of the administration of justice in both Sweden and the United States.

When community representatives participate in the hearing and adjudication of civil controversies,[4] the problem of evolving appropriate standards of supervision and control for the trial judge has two principal focal points: the relationship of the judge to the parties and the relationship of the judge to the lay associates with whom he shares responsibility for the outcome of the case. In this paper, attention will be given to the latter point, with particular reference to the role of the Swedish judge who occupies the dominant position both at the hearing and during the deliberations, and to that of the American judge whose influence is considerably less pervasive.

Preliminarily, a brief account will be given of the origins of the common law jury and the Swedish nämnd and of the methods by which jurors and nämndemän are selected. Thereafter, the discussion will be centered on the different ways in which the lay mind complements that of the trained jurist in the United States and in Sweden.

I. The Origin of the Jury System

A. *The British Jury*

The jury originated in medieval England as a device used by the Norman kings to obtain information needed for administrative purposes. Jurors were men of the neighborhood summoned before the King's coroner to declare upon their oath what they knew of a matter under investigation. Use of the jury as an instrument for the administration of justice commenced in the latter half of the twelfth century. By royal ordinance, a landholder whose title was challenged could, in lieu of trial by battle, elect to have the controversy resolved by a jury. The jury consisted of twelve neighbors sworn to declare, upon personal knowledge, which of the two disputants had the better right to the land. Early in the thirteenth century, when the Church withdrew its approbation of trial by ordeal as a method of determining guilt or innocence, English judges, lacking recourse to a developed body of legal

[3] See Devlin, supra note 1, at 129-33; Vanderbilt, supra note 2, at 74-75 (decline in facilities and demand for jury trial in England); 1 Ekelöf, supra note 2, at 104-05.

[4] Although the discussion in this paper will concentrate on civil proceedings, in describing the functions of the nämnd and the jury, some reference will be made to procedure in criminal cases. See particularly note 63 infra.

rules and procedures, turned to the jury as an available means of resolving both criminal and civil actions.

Through an evolutionary process, occasionally aided by legislation but for the most part uncharted by landmark events, the jury was transformed from a body acting upon its own knowledge to one enjoined to exclude from its consideration information obtained outside the courtroom. Similarly, the law-fact separation of authority between judge and jury developed without pilot legislative or judicial pronouncement.

B. *The Jury in the United States*

When the jury was imported to America by the British colonists, tradition and case law had established the essential characteristics of the system. The jury was to consist of twelve impartial persons drawn indiscriminately from the freemen of the neighborhood. Guided by the judge's instructions as to the law and his advisory comments as to the relevance and value of the evidence, jurors were to deliberate in camera until they reached a unanimous verdict or reported themselves hopelessly deadlocked. Jury verdicts had to take the form of categorical responses to the questions submitted by the judge; jurors had neither the obligation nor the right to furnish reasons explaining the basis of their responses.[5]

The United States itself as well as each of the fifty states of the United States has its own court structure and its own procedural system.[6] In the federal courts trial by jury, in both criminal and civil actions, follows the pattern established in England and employed in this country

[5] This brief summary of the origin and development of trial by jury is based upon the more elaborate and precise historical accounts contained in 1 Holdsworth, A History of English Law 312-50 (rev. ed. 1956); Maitland, The Constitutional History of England, 120-32 (1908); Plucknett, A Concise History of the Common Law, 104-31 (4th ed. 1948); Thayer, supra note 1, at 47-182 (1898). These sources also describe the evolution of the grand jury as a procedural device for presenting criminals, a subject which will not be examined in this paper. For reference to other source material concerning the origin of trial by jury, see Klein, "Bibliography," prepared for The Jury System in the Federal Courts, Report of the Judicial Conference Committee on the Operation of the Jury System (1960), in 26 F.R.D. 409, 525, 534 (1961).

Consideration of the separate provinces of law and equity and the traditional but still troublesome limitation of the right of trial by jury to claims cognizable in actions at law exceeds the scope of this discussion. For historical accounts of the development of the complementary systems of law and equity, see 1 Holdsworth, supra at 395-476; Plucknett, supra at 168-88. A review of some of the problems that have survived the abolition of separate courts of law and equity and the advent of a unitary form of civil action appears in 5 Moore, Federal Practice ¶¶ 39.12, 39.13 (2d ed. 1951, Supp. 1961); Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176 (1961).

[6] The allocation of judicial business between the state courts and the federal courts is a matter of some complexity: some claims are cognizable only by the federal courts; others only by the state courts; still others by either federal or state courts. For a review of the principles and rules determining the respective provinces of the state and federal courts, see 1 Moore, Federal Practice ¶¶ 0.6, 0.7 (2d ed. 1961); 1A id. 0.201, 0.202. See also Hart, "The Relations Between State and Federal Law," 54 Colum. L. Rev. 489 (1954).

at the time the Federal Constitution was adopted. In the state courts state constitutional and legislative provisions established the applicable rules as to trial by jury. While the states are free to adopt innovations respecting the use of juries and, although none of them have done so, may even dispense with jury trials altogether, state procedure must conform to standards of fairness demanded by the provision of the Federal Constitution that no state shall "deprive any person of life, liberty or property without due process of law."[7]

II. The Origin of the Nämnd System

During its early history, Sweden was composed of a number of essentially independent communities, each governed by a popular assembly known as the ting. The ting exercised both legislative and judicial authority, rendering decisions on all aspects of life and work in the community. At judicial sessions occurring before the ting, a contending party took the required form of oath and stated his claim or defense in accordance with a prescribed formula, often calling oath helpers (edgärdsmän) to vouch for his position. When the customary rules of the local legal order so permitted or required, fact witnesses might also be heard. The applicable law was declared, at first from memory and later from written compilations, by a ting leader who functioned as presiding judge. Finally, applying the law as declared by the ting leader, the men gathered at the assembly determined the outcome of the controversy.[8]

In the thirteenth century, a method of determining disputes on the basis of oral reports made to the ting by a board of community residents known as a nämnd began to assume increasing importance. Originally, the nämnd consisted of twelve men of the community, six of them chosen by each party, charged with the duty to investigate and report to the ting facts within their personal knowledge acquired either prior to, or in the course of their investigation. In time, the nämnd became a permanent institution composed of the same group of community representatives holding regular sessions at which witnesses were heard and evidence

[7] See U.S. Const. art. 3, § 2; amend. VI, Patton v. United States, 281 U.S. 276, 288-90 (1930) (criminal cases in federal courts); amend. VII, Baltimore & C. Line v. Redman, 295 U.S. 654, 657 (1935) (civil cases in federal courts); amend. XIV, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (state "due process" clause). See generally Busch, Law and Tactics in Jury Trials §§ 16-50 (1949). For a sample of the problems created by dissimilar federal and state court rules concerning jury trials when a claim based upon federal substantive law is presented in a state court or, conversely, when a claim based upon state substantive law is presented in a federal court, compare Dice v. Akron C. & Y.R.R., 342 U.S. 359 (1952), with Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958). See also Note, 66 Harv. L. Rev. 1516 (1953).

[8] For further details concerning the administration of justice in Sweden during the early medieval period, see Engelmann & Millar, A History of Continental Civil Procedure 203-24 (1927); The Law of the Westgoths 7-15 (Bergin introd. 1906); Andersson, "Early Democratic Traditions in Scandinavia," Scandinavian Democracy 71-78 (Lauwerys ed. 1958).

examined. Instructed and guided by the leader of the ting, the nämnd began to determine controversies outside the assembly. Initially, the joint decision of the nämnd and the ting leader who served as judge were submitted to the men of the assembly for ratification. By the beginning of the seventeenth century, however, in most of Sweden's provinces and districts, the nämnd and the judge had emerged as a wholly independent tribunal—the district court (häradsrätten)—which exercised in full the former judicial authority of the ting.[9]

Thus, the nämnd and the jury originated as similar institutions.[10] Initially both were composed of community representatives impanelled for a particular case to serve as fact witnesses rather than as triers. As the systems developed, however, fundamental differences emerged. Nämnd commissions became long-term assignments, while jurors continued to serve for brief periods. The jury, although obliged to accept the legal rules as declared by the judge, became the exclusive trier of the factual issues in a case.[11] In contradistinction, the nämnd acquired competence to consider legal as well as factual issues but, with respect to both kinds of questions, nämndemän performed their functions together with and, collectively, as partner of the presiding judge.[12]

The participation of nämndemän has been traditional in Sweden's district courts (häradsrätter), the courts of first instance for rural and smaller urban areas. However, the city courts (rådhusrätter), courts of first instance for larger urban areas, historically have had collegiate professional benches. The city courts, still financed by the municipal units rather than by the state, succeeded to the judicial authority of the medieval town councils. Unlike district court judges, who are members of a national judicial civil service, city court judges, at least since the early part of the eighteenth century, have been nominees of the municipal representative councils. The control by the citizens of urban communities over the selection of their own judges may account for the absence of popular demand in the cities for an institution corresponding to the nämnd.[13]

Today, the use of a single judge and a nämnd in both civil and

[9] For brief historical accounts of the origin of the nämnd, see Engelmann & Millar, supra note 8, at 224-32; Munktell, Det Svenska Rättsarvet 80-93 (1943).

[10] It appears that neither institution was the model for or affected the development of the other. See Plucknett, supra note 5, at 105-06.

[11] But cf. note 1 supra.

[12] The precise stages of the metamorphosis of the nämnd from a method of proof to a trier of fact and law are uncertain. Nor is it clear whether the nämnd became competent to share in the adjudication of questions of law at the same time as it acquired competence to participate in the determination of questions of fact. See Engelmann & Millar, supra note 8, at 836-37; Munktell, supra note 9, at 86-87.

[13] 1 Ekelöf, supra note 2, at 91; Engelmann & Millar, supra note 8, at 838-39.

criminal cases remains characteristic of Sweden's district courts.[14] In civil cases the historic three judge composition of the city courts has been preserved.[15] In criminal cases, however, as a result of an innovation in Sweden's Code of Judicial Procedure of 1948, the city court bench, like that of the district court, consists of a single judge sitting without a nämnd for petty offenses, a judge and a nämnd of three for lesser offenses as to which imprisonment is within the range of possible sanctions, and a full nämnd of seven to nine members for major offenses.[16]

III. The Selection and Assignment of Jurors

The recruitment of laymen representing a cross-section of the various social and economic groups of the community is the principal purpose of the various devices employed in the United States for the selection of jurors. Intentional exclusion from jury lists for the federal or state courts of any class of persons solely on the basis of race or color runs afoul of the "due process" guarantee of the Federal Constitution. Apart from "due process" limitations, however, each state is free to determine for itself both the sources of names of qualified persons and the methods of selecting jurors from among those listed as qualified.[17]

The following summary, although based on the rules and practices of jury selection in the federal courts, fairly describes the rules generally prevailing in the United States.

Any citizen who has attained the age of twenty-one and has resided within a judicial district for a period of one year is eligible for jury service within the district provided that he meets certain literacy, mental, and physical health requirements and has not been convicted of a crime punishable by imprisonment for more than one year.[18] In each district, staff officers of the court establish and periodically revise lists of qualified persons from sources such as voting rosters, telephone directories, tax rolls, association membership lists, and recommendations

---

[14] Rättegångsbalk (RB) [Code of Judicial Procedure, effective January 1, 1948] 1:4.

[15] RB 1:11.

[16] RB 1:4, 5 (district courts); RB 1:11, 12 (city courts).

Juries specially impanelled for particular litigation and permitted to deliberate in camera are used in Sweden only in press libel cases. For a description of Sweden's sweeping constitutional guarantee of a free press and the special procedure applicable in press libel cases, see Eek, "Protection of News Sources by the Constitution," 5 Scandinavian Studies in Law 18 (Schmidt ed. 1961).

[17] See text at notes 6-7 supra; The Jury System in the Federal Courts, supra note 5, 26 F.R.D. at 425-31, and cases cited therein; see also 18 U.S.C. § 243 (rendering exclusion of jurors in any court of the United States or of any state on account of race or color a criminal offense). Compare Thiel v. Southern Pac. Co., 328 U.S. 217 (1946), with Fay v. New York, 332 U.S. 261 (1947) (economic screening, although invalid in federal court jury selection, may be permitted in state court jury selection). With respect to exemptions granted to women, see Hoyt v. United States, 368 U.S. 57 (1961); Rudolph, "Women on Juries—Voluntary or Compulsory," 44 J. Am. Jud. Soc'y 206 (1961).

[18] 28 U.S.C. § 1861; cf. Vanderbilt, supra note 2, at 62-67.

of community leaders.[19] For good cause, any person or class of persons may be excluded or excused by the court.[20] The use of volunteers for jury service, although not prohibited, is viewed with disfavor.[21]

At regular intervals during the court's term, the names of persons to be summoned for jury duty are publicly drawn from a box containing the names of citizens who have been listed as qualified. In most districts, thirty-five to seventy-five persons are summoned simultaneously. Before the commencement of a trial, the panel to be seated in the jury box is selected, again by lot, from among those summoned for jury duty.[22] Questions are addressed to the prospective panel members, generally by the judge, to make certain that each of them is qualified and impartial. The parties may challenge any juror "for cause," that is, upon grounds of partiality or lack of qualification. In addition, each party may exercise three peremptory challenges for which no reason need be assigned.[23] The group finally impanelled must include twelve regular jurors and may include up to two alternates.[24]

In approximately half of the federal districts, two to three weeks is generally the maximum period for jury service.[25] If the trial to which a juror is assigned is concluded before his term expires, the juror may be assigned to another trial. If a protracted trial is anticipated, prospective jurors are generally given some estimate of its length so that they can advise the court of any undue hardship or extreme inconvenience warranting excuse from service.

Jurors receive a per diem fee, generally regarded as token payment for the performance of a patriotic duty rather than as reasonable compensation for time served. An allowance for transportation to and from

---

19 See The Jury System in the Federal Courts, supra note 5, 26 F.R.D. at 469-79. See also United States v. Greenberg, 200 F. Supp. 382 (S.D.N.Y. 1961).

20 28 U.S.C. § 1863. Classes of persons normally excused include physicians, school teachers during the school term, pharmacists, funeral directors, and lawyers in active practice. See The Jury System in the Federal Courts, supra note 5, 26 F.R.D. at 443-45, 453-54. See also 28 U.S.C. § 1862 (exemption for members of the armed forces, fire and police department employees, and public officers in the executive, legislative, or judicial branches of federal, state, or territorial governments).

21 The possibility of political or economic motives has rendered the so-called "professional juror" somewhat suspect. See The Jury System in the Federal Courts, supra note 5, 26 F.R.D. at 431-32. At the request of either party, a prospective juror will be excused if he has served as a juror at the court within a year of the date of trial. 28 U.S.C. § 1869.

22 28 U.S.C. §§ 1864, 1867; see The Jury System in the Federal Courts, supra note 5, 26 F.R.D at 479-81.

23 See Fed. R. Civ. P. 47(a), Fed. R. Crim. P. 24(a) (authorizing the judge to conduct the "voir dire" examination or to allow the attorneys or the parties to do so); Vanderbilt, supra note 2, at 73 (variant state practices); 28 U.S.C. § 1870 (three peremptory challenges in civil cases); Fed. R. Crim. P. 24(b) (peremptory challenges in criminal cases).

24 Fed. R. Civ. P. 47(b) (one or two alternates in civil cases); Fed. R. Crim. P. 24(c) (up to four alternates in criminal cases).

25 See The Jury System in the Federal Courts, supra note 5, 26 F.R.D. at 485.

the court and a subsistence fee, paid to jurors required to remain in the vicinity of the court overnight, are also authorized.[26]

IV. The Selection and Assignment of Nämndemän

A full nämnd panel, under the currently effective procedural rules, consists of at least seven but not more than nine members. Sweden's Code of Judicial Procedure requires the designation of at least eighteen nämndemän, in other words, two complete nämnd panels, for each of the district courts. Authority to increase the number of lay representatives when an increase in the population or in the judicial business of a district so warrants resides in the cabinet. The cabinet also has authority to determine the number of nämndemän for each of the city courts.[27]

Nämndemän are elected for six year terms by the district and city representative councils[28] from the roster of eligible local citizens—male and female residents over twenty-five years of age, financially solvent, and not employed as professional judges, prosecutors or policemen or engaged in the representation of private litigants in judicial proceedings.[29] Because service on the nämnd is considered a public duty as well as an honor, the right to decline designation by the local representative council or to relinquish an accepted commission is limited: Members who have served for two years or persons who have attained the age of sixty are entitled to exemption; others may be released by the court only upon showing good cause.[30] Elections take place as vacancies occur.[31] Most nämndemän are re-elected for consecutive terms, and it is not uncommon for members to retain their positions for more than twenty years.

Nämndemän elected by the local councils are divided by the court into panels of seven to nine members.[32] Generally, each panel sits for one full day every second week during the term of court. Depending upon the length of trial proceedings and the condition of the court calendar, however, the same panel may be required to sit for several

---

26 28 U.S.C. § 1871 ($7 per diem fee; 10 cents per mile transportation allowance; $7 per day subsistence payment).

27 RB 1:5, 12.

28 RB 4:5. Members of the representative council are popularly elected by citizens registered in the community served by the council. Kommunallagen, December 18, 1953, 1953 Svensk Författningssamling (SFS) 753, § 6. Council members are designated pursuant to a system of proportional representation; nämndemän are elected by majority vote. See 1 Ekelöf, supra note 2, at 68.

29 RB 4:6 para. 1. The court is required to examine the qualifications of elected nämnd representatives on its own initiative. However, the validity of the election procedure is not judicially examined in the absence of a specific challenge thereto by a person entitled to vote for members of the representative council. RB 4:7.

30 RB 4:6 para. 2; 4:8.

31 RB 4:5 para. 4.

32 RB 1:5, 12.

consecutive days, weeks, or even months.[33] Nämndemän are not salaried officers. Like jurors, they receive a per diem payment and a food and board allowance for periods of attendance at court; they are also reimbursed for travel expenses.[34]

When a panel member is unable to attend a proceeding or is disqualified from participating in a particular case,[35] the court, if it fails to find a substitute among the other regular nämndemän, may appoint as a temporary member a local citizen who meets the eligibility requirements for election to the nämnd.[36]

V. The Distribution of Functions Between Judge and Jury

Whether the judge presiding at a jury trial should function as "governor of the trial" or merely as referee of an adversary contest has been a favored topic of discussion among lawyers and legal scholars in the United States.[37] In many of the states, legislative limitations have resolved the issue for the judge by depriving him of the power to assume the dominant role.[38] In the federal courts and in the courts of some of the states, however, the common law concept of the position and authority of the judge has not been subjected to legislative diminution; in his relationship to the jury, the judge in these courts has a variety of control devices at his command. In this section, consideration will be given to some of the control devices available to the judge, as reflected in the procedural rules and practices applicable in the federal courts, and to some of the factors affecting his determination whether to use them.

---

[33] RB 1:5 para. 2; 1:12 para. 3; 1:15.

[34] The per diem payment is $9 (45 kronor) per day of travel and court attendance. Food and board allowance varies from $4-8 per day. See Kungl. Kungörelse (KK) April 30, 1953, as amended, in 1961 Sveriges Rikes Lag (SRL) at p. 1049, concerning the nämndeman's daily wage and allowances for travel, food, and board.

[35] Nämndemän are subject to the same rules of disqualification as those applicable to judges. See RB 4:12-15 (relation to parties or subject matter, personal bias or prejudice, conflict of interests).

[36] RB 4:10; cf. 28 U.S.C. § 1866(a) (summoning of talesmen from bystanders when sufficient jurors are not available).

[37] See, e.g., Vanderbilt, supra note 2; Wyzanski, "A Trial Judge's Freedom and Responsibility," 65 Harv. L. Rev. 1281 (1952).

[38] Today, the relationship between judge and jury in the United States accords substantially with the principles developed during the nineteenth century. In the federal courts and in roughly one quarter of the states, the common law power of the judge to advise and guide the jury has not been curtailed by legislation. In most states, legislative injunctions against judicial expressions of opinion as to the strength or value of the evidence are operative. A sizeable minority of the states leave the task of presenting and summarizing the respective contentions of the parties entirely in the hands of the attorneys, confining the judge's function to rulings on evidence and unelaborated declarations to the jury of relevant legal principles. For an account of the considerations leading the states to depart from the common law distribution of functions among attorneys, judges and juries, see Pound, "The Judicial Office in America," 10 B.U.L. Rev. 123 (1930). For a summary of current state practices see Wright, "Instructions to the Jury: Summary Without Comment," 1954 Wash. U.L.Q. 177.

A. *Control Devices Available to the Judge*

1. The Pre-trial Conference

To expedite the trial of an action, a federal judge may summon the attorneys for the contending parties to a pre-trial conference. Conference agendas may encompass items such as the disposition of undisputed issues through admissions or stipulations, the resolution of threshold questions through pre-trial judicial determinations, and the treatment of evidentiary problems such as those relating to means of proving economic or technical facts and methods of handling documentary evidence.[39]

Similar in design to the preparatory work that is a standard part of the processing of a case in Sweden,[40] the pre-trial conference can effect a considerable saving of trial time and expense and facilitate the presentation of a controversy to a jury in a clear and continuous sequence. In so-called protracted cases, cases involving a multiplicity of parties or complex economic or technical issues, a number of pre-trial conferences, carefully plamied by the judge and requiring extensive advance preparation by the attorneys, are likely to occur.[41] In ordinary civil actions, there is seldom more than one pre-trial conference. Depending upon the degree of preparation of the judge and the attorneys, a pre-trial conference in an ordinary civil action may be an effective instrument in controlling the subsequent course of the action or it may amount to little more than an informal discussion having scant effect upon the trial.[42]

2. Separate Trials

"In furtherance of convenience or to avoid prejudice," the federal judge, either upon his own initiative or upon the request of a party, may order a separate trial of any claim or issue.[43] Courts and legal scholars generally agree upon the efficacy of separate trials in a variety of situations, among them cases presenting threshold questions such as the validity of a release or the application of a time bar to the plaintiff's claim. However, there has been considerable controversy as to the propriety of using the separate trial device to sever the issue of liability from the issue of damages in accident cases. Proponents of severance urge its advantages in simplifying and streamlining the presentation

---

39 Fed. R. Civ. P. 16; "Proceedings of the Seminar on Protracted Cases," 23 F.R.D. 319-634, especially at 328-34, 360-67, 412-26 (1959).

40 See text at notes 64-66 infra.

41 See Handbook of Recommended Practices for the Trial of Protracted Cases: Report of the Judicial Conference Study Group on Procedure in Protracted Litigation (1960).

42 See Proceedings of the Seminar on Protracted Cases, Part One: Pre-Trial Procedure in Ordinary Civil Actions, 23 F.R.D. 319, 328-75 (1959).

43 Fed. R. Civ. P. 42(b).

of a case. Those who oppose severance fear that the procedure will revitalize strict application of the legal doctrine denying any recovery to a plaintiff who is not free from contributory fault—a doctrine currently discounted by the jury with the tacit approval of the trial judge.[44]

3. Control over the Reception of Evidence

In almost every jury trial, the attorneys frequently call upon the judge to apply elaborate rules of evidence designed to exclude from the consideration of the jury irrelevant, remote, and prejudicial matters.[45] Beyond this, in his discretion, the judge may address questions to the witnesses during or after the examinations conducted by the attorneys and may suggest to the parties, out of the hearing of the jury, the advisability of calling additional witnesses or submitting additional documentary proof. Although in theory the judge may call a witness on his own initiative, this form of judicial intervention seldom occurs in a jury trial.[46]

4. Directed Verdicts

If, after hearing the evidence and upon application by a party, the judge finds that reason will tolerate only one result, he has authority to "direct a verdict," that is, to refuse to submit the case to the jury at all and to direct the entry of judgment in accordance with his finding. In practice, because the standards to be employed in determining whether to direct a verdict are somewhat elusive, the judge will usually prefer to defer his decision until the jury has reported its conclusion. In most cases, the jury verdict will obviate the necessity for a judicial ruling on the matter. In cases in which the jury verdict does not have this result, the judge may disregard the verdict and direct the entry of a contrary judgment.[47]

5. Instructions to the Jury

The determination of a civil controversy has been described as a three-fold process: identification of the relevant facts, declaration of

[44] Compare Zeisel, "The Jury and the Court Delay," 328 Annals 46, 51-52 (1960), with Weinstein, "Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power," 14 Vand. L. Rev. 831 (1961). See text at note 57 infra; cf. Grönfors, "Apportionment of Damages in the Swedish Law of Torts," 1 Scandinavian Studies in Law 93 (Schmidt ed. 1957) (contributory fault reduces but does not bar a recovery).

[45] See James, "Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict," 47 Va. L. Rev. 218, 228-31 (1961).

[46] See Vanderbilt, supra note 2, at 6-7; Wyzanski, supra note 37, at 1283-90; cf. McCormick, Evidence 533-36 (1954) (counseling against comment on nonproduction of evidence in the absence of special circumstances). But cf. Johnson v. United States, 333 U.S. 46, 54 (1948) (dissenting opinion) (trial judge has an obligation to call and examine witnesses if necessary to elicit the truth "particularly in a case where he himself is trier of the facts").

[47] Fed. R. Civ. P. 50; James, supra note 45, at 232-35.

the relevant legal rules and principles, and application of the declared rules and principles to the identified facts. In jury trials, fact identification is the responsibility of the jury, while law declaration is the responsibility of the judge. The third function, law application, although generally performed by the jury, may be narrowed or broadened by the judge depending upon the generality or specificity of his instructions.[48]

In the federal courts, the judge speaks last; his charge to the jury is made after counsel have completed their summations. In his instructions, the judge generally summarizes the disputed issues, the respective contentions of the parties, the evidence adduced at trial, and the governing legal doctrines. He may also comment on the evidence, indicating dispassionately his opinions as to the value and reliability of particular items of proof. In undertaking this type of analysis, however, the judge must make it clear to the jury that they are not bound to follow his view of the facts or of the credibility of witnesses.[49]

Instructions presented in one dose and only at the end of the trial, however carefully phrased, often fail to accomplish their intended purpose. Lacking education in law or experience in court procedure, jurors may be unable to comprehend or apply the legal concepts outlined by the judge.[50] Particularly in lengthy or complex cases, judges have been urged to instruct continuously throughout the trial—to outline the issues at the commencement of the proceeding and to advise the jury as to the purpose and significance of the evidence at the time it is introduced.[51] The distribution of written copies of the judge's instructions for use during jury deliberations has also been proposed as a means of reducing the risk of confusion and misunderstanding.[52] In practice, however, particularly in the courts in which case loads are heaviest, judges seldom have sufficient time in advance of trial to engage in the extensive preparation necessary for effective utilization of these methods of clarification.

6. Forms of Verdict

In addition to the choice between explicit and general instructions, the judge may control the bounds within which the jury functions through the form of verdict that he requires them to return. A federal judge has discretion to select one of three forms of verdict: the general verdict,

[48] See Hart & Sacks, The Legal Process 373-80 (tentative ed. 1958).
[49] See James, supra note 45, at 235-37; cf. id. at 237-41 (variant state practices).
[50] See Frank, Courts on Trial 116 (1949).
[51] See United States v. O'Connor, 237 F.2d 466 (2d Cir. 1956).
[52] Recommendation & Study Relating to Taking Instructions to the Jury Room (Cal. Law Rev. Comm'n 1956); Wyzanski, supra note 37, at 1289. But see Broeder, "The University of Chicago Jury Project," 38 Neb. L. Rev. 744, 750-51 (1959).

the special verdict, and the general verdict accompanied by answers to interrogatories. The general verdict is an unelaborated finding for the plaintiff or for the defendant. In returning such a verdict the jury is called upon to determine the facts, apply the law, and announce only its ultimate conclusion as to the disposition of the action. The special verdict consists of a series of categorical answers to questions framed by the judge defining the disputed factual issues. It is a device used to limit the province of the jury to fact identification and to reserve for the judge the function of law application. The intermediate form of jury submission, the general verdict accompanied by interrogatories, permits the jury to return its ultimate conclusion as to the outcome of the case, but also requires it to focus attention on the key issues and to report specifically its findings thereon. If the answers to the interrogatories cannot be reconciled with each other or with the ultimate conclusion, at least two courses are available to the judge: He may explain the inconsistencies, and request that the jury deliberate further or he may order a new trial. If the answers to the interrogatories are consistent with each other but one or more is inconsistent with the ultimate conclusion, the judge has an additional alternative: He may disregard the ultimate conclusion and enter judgment in accordance with the answers, in effect, treating the jury's responses as a special verdict.[53]

7. New Trials

If the judge determines that the jury verdict is "contrary to the weight of the evidence," he may decline to enter judgment on the verdict and, instead, order a new trial.[54] In determining whether a verdict is "contrary to the weight of the evidence," the judge takes into account his own impressions of the credibility of witnesses to a greater extent than he does in determining whether to direct a verdict. However, he may not properly put himself in the place of a thirteenth juror, exercising a veto power over the verdict merely because he would have reached an opposite conclusion.

As in the case of the standards for directing a verdict, the standards for deciding when a verdict is "contrary to the weight of the evidence" are not susceptible of precise definition. Among the variables that may enter into the determination are the length and complexity of the trial and the familiarity of laymen with the subject matter of the controversy.[55]

---

[53] Fed. R. Civ. P. 49; see James, supra note 45, at 242-48. Compare Morris v. Pennsylvania R.R., 187 F.2d 837, 840-41 (2d Cir. 1951), with id., 187 F.2d at 843-44 (concurring opinion).

[54] Fed. R. Civ. P. 59.

[55] See James, supra note 45, at 218-27.

8. Remittitur

If the judge finds that the evidence supports the conclusion of the jury as to liability but does not warrant imposition of the full amount of damages indicated by the verdict he may grant a remittitur, that is, he may pare down the monetary award, specifying that if the plaintiff declines to accept the reduced sum a new trial will be directed, either of the entire claim or of the issue of damages. If the judge finds that the amount of damages awarded by the jury is inadequate, however, he does not have authority to require the defendant to choose between an increased sum or a new trial. In this situation, if the judge is unwilling to enter judgment on the verdict, his order directing a new trial of the claim must be unconditional.[56]

B. *The Role of the Judge in a Civil Jury Trial: Governor or Referee*

Normally, the type of case presented for adjudication is the principal determinant of the extent to which the federal trial court judge will utilize his powers to guide and control the jury. Leaving to one side variations arising from the special features of particular cases, a judge will generally regard his function in commercial disputes as substantially different in character from his function in tort litigation.

In most commercial situations, prevailing legal rules and standards operate as guides to private action. When controversies arise, the judge, cognizant of the importance to the business community of uniform and predictable results and of the difficulty faced by the average juror in dealing with unfamiliar and often complex or technical issues, will incline toward full exercise of his supervisory powers.

On the other hand, the encounters that form the basis of most tort claims occur without reference to possible legal consequences. Because private activity in this area is less frequently motivated by the expectation that certain legal principles will apply, the need for uniform results is less urgent. Moreover, as to questions of liability turning upon standards of reasonable or moral behavior and as to questions of damages for intangible items such as pain and suffering, the generality of the legal measuring rod invites individualized common sense judgments. Finally, with respect to the stream of accident cases brought to the courts, the avoidance of meticulous judicial guidance has served a special purpose. For some time, many lawyers, legal scholars, and judges have

[56] Dimick v. Schiedt, 293 U.S. 474 (1935) (required practice in federal courts under seventh amendment); cf. Napolitano v. New York Cent. R.R., Civ. No. 143-190, S.D.N.Y., April 11, 1961, May 1, 1961.

shared the view that the traditional legal principles, predicating liability upon fault and the right to recover damages upon freedom from contributory fault, are no longer consonant with prevailing community opinions of justice. Instead of encouraging a result reflective of the traditional principles, judges may prefer to facilitate a resolution that accords with popular notions of fairness by relaxing their efforts to direct the jury along the time-worn legal path.[57]

VI. The Joint Authority and Responsibility of the Judge and the Nämnd

In Sweden, although the 1948 Code of Judicial Procedure looks toward increased procedural activity on the part of the litigants or their representatives, the judge, in his relationship to the parties as well as to the nämnd, remains the "governor of the trial." With respect to the presentation of evidence, the judge has discretion to permit the examination-in-chief and cross-examination of witnesses by the parties or their representatives or to reserve to himself the role of principal interrogator.[58] With respect to the decision of a controversy, the judge has the controlling voice: The opinion of the nämnd will not prevail over the contrary opinion of the judge unless at least seven nämndemän agree upon both the decision and the rationale therefor.[59]

Because the nämnd deliberates with the judge, taking part in the decision of questions of law as well as of fact, there are few parallels in Swedish procedure to the formal control devices available to the federal judge presiding at a jury trial in the United States. Instead, flexibility and informality characterize the cooperative effort of the judge and the nämnd. Moreover, at the pre-trial stage, before lay triers are summoned to serve on the court, the two systems reflect differences in approach.

1. The Preparatory Stage and the Main Hearing

Swedish judicial proceedings are generally divided into two distinct parts: the preparatory stage (förberedelsen) and the main hearing

[57] For comprehensive treatment of the manner in which the nature of the controversy affects the function of the trial judge, see Wyzanski, supra note 37. See also James, supra note 45, at 244-48; 1 Ekelöf, Rättegång 97 (Stockholm 1957).

[58] RB 36:17. It was the intention of the drafters of Sweden's 1948 Code of Judicial Procedure that, as attorneys and judges acquired experience under the revised procedural system, questioning of witnesses would be entrusted primarily to the attorneys. See Brodin, "En advokats funderingar över domaruppgifterna i den muntliga processen," 1962 Tidskrift för Sveriges Advokatsamfund 192; Gärde, Engströmer, Strandberg & Söderlund, Nya Rättegangsbalken 509 (1949).

[59] RB 16:3 para. 1 (district courts); 29:3 para. 1 (city courts). But cf. Administration of Justice in Norway: The Royal Norwegian Ministry of Justice 34, 41 (1957) (the vote of each Norwegian lay judge has the same weight as that of the presiding professional judge).

(huvudförhandlingen). During the preparatory stage, preliminary objections are entertained and, after disclosure by the parties of their respective positions, the order and scope of the main hearing are established.

In both the district and city courts, a single judge unassisted by nämndemän presides at the preparatory stage.[60] Main hearings in civil cases occur in the district court before a judge and a nämnd of seven to nine members[61] and in the city court before a bench of three or four professional judges.[62] At main hearings in criminal cases, a nämnd is used in the city court as well as in the district court.[63]

Normally, matters urged during the course of the preparatory work may not form the basis of the ultimate disposition of a claim; as a general rule, final judgment upon the merits must be predicated exclusively upon testimony and other evidence adduced at the main hearing.[64] However, in almost every case, at the conclusion of the preparatory stage, the dimensions of the main hearing—the evidence and arguments urged by the contending parties in support of each of the disputed issues—will be outlined with a fair degree of precision.

In sum, in the ordinary civil action, pre-trial preparation under the direct supervision of the judge is generally more extensive in Swedish courts than in courts of the United States.[65] On the other hand, Swedish procedure does not offer to the litigant the pre-trial discovery devices

---

[60] Participation of nämndemän at the preparatory stage is required only when the court conducts a view of the locus in quo (syn å stället). When such a view is taken in lower court criminal proceedings or in district court civil proceedings, a nämnd of three may be used. RB 1:4, 5, 12.

Often, the judge presiding at the preparatory stage will also preside at the main hearing. See Lagergren, "The Preparatory Proceeding and the Hearing-in-Chief," 82 Ir. L.T. 165, 166 (1948).

[61] RB 1:4. In specified classes of cases, the main hearing may occur before a judge and a nämnd of three and in others, by a judge sitting without a nämnd.

[62] RB 1:11.

[63] RB 1:4, 5 (district courts); 11, 12 (city courts).

As originally promulgated, the 1948 Code of Judicial Procedure required the use of nämndemän in city courts only for crimes punishable by two years or more at hard labor. See 1943 Nytt Juridiskt Arkiv (NJA) II, 22. An amendment effective January 1, 1959 (Lag of June 10, 1958) prescribed the present uniform composition of the district court and the city court in criminal cases. Certain lesser offenses may be tried by a judge sitting without a nämnd and others, by a judge and a nämnd of three. Major offenses must be tried before a judge and a full nämnd of seven to nine members. Compare RB 1:4 with RB 1:11.

In criminal cases, the nämnd participates in the decision as to the appropriate punishment as well as in the determination of guilt or innocence. See 1 Ekelöf, supra note 57 at 97, 99, 103; cf. Wyzanski, supra note 37, at 1290-93 (sentencing is the exclusive and most important function of the federal judge in criminal jury trials).

[64] RB 17:2; 30:2. But see RB 42:18, 20 (decisions in specified classes of cases may be made during the preparatory stage or at a main hearing held in "immediate conjunction" with the preparatory work by a judge sitting without a nämnd). See Lagergren, supra note 60, at 165-66.

[65] See text at note 42 supra.

through which a litigant in the United States, largely without court intervention, may obtain information as to his opponent's case.[66]

2. The Order of Trial and the Reception of Evidence

The authority of the Swedish judge to order separate preparation or hearing of one or more of the issues presented for adjudication is similar to that of his counterpart in the courts of the United States.[67] As to the receipt of evidence, formal exclusionary rules no longer limit the items of proof that may be submitted to a Swedish court. The judge has discretion to accept any relevant material and look to any relevant source that might assist the court in eliciting the truth.[68] Because formal restraints on the receipt and evaluation of evidence are not operative, the obligation of the judge to clarify for the nämnd his views of the value and strength of the various items of proof is of particular importance.

3. "Instructing" the Nämnd

Because the nämnd participates in the determination of all questions presented, the judge does not deliver a formal charge delineating the authority of the lay triers and the principles and rules pursuant to which it should be exercised. During deliberations, the judge and the members of the nämnd have equal freedom to express their opinions and observations. However, the judge has a duty to clarify for his lay partners the essential issues of the case and the applicable legal considerations so that irrelevant matters and popular misconceptions will not obscure the judgment of the nämndemän.

Constant association in a cooperative effort carries with it the danger of direct conflicts between the judge and the lay triers, a danger that is absent in a jury system premised on divided responsibility. To achieve the proper balance, the judge must explain the relevant legal concepts in a manner comprehensible to the nämnd, but he must also evaluate and comment with care upon the questions and views of his lay partners. In short, the effectiveness of the system depends upon the patience and tolerance of the judge—he must command the respect of the nämndemän so that they will not ignore his guidance and, at the same time, he must

[66] See Fed. R. Civ. P. 26-33, 36 (depositions, interrogatories, requests for admissions).

[67] Compare RB 17:4, 5, with Fed. R. Civ. P. 42(b). Cf. Orfield, The Growth of Scandinavian Law 288 (1953).

[68] RB 35:1, 7; see Orfield, supra note 67, at 288-89. In accepting the principle of free evaluation of evidence, Sweden followed the pattern established at the end of the nineteenth century in the procedural codes of Germany and Austria. See Kaplan, von Mehren & Schaefer, "Phases of German Civil Procedure I," 71 Harv. L. Rev. 1193, 1244 (1958); Lenhoff, "The Law of Evidence—A Comparative Study Based Essentially on Austrian and New York Law," 3 Am. J. Comp. L. 313, 334 (1954).

be willing to elaborate upon the diverse facets of each controversy so that he may reap optimum benefit from the opinions of his lay associates.[69]

4. Responsibility for Judgment on the Merits

Although in theory a decision supported by seven nämndemän prevails over the contrary opinion of the judge,[70] in practice such disagreements seldom occur. As to questions of liability turning upon standard of reasonable or moral behavior and as to questions of damages for intangible items such as pain and suffering, the views of the nämnd, like those of the jury, appear to be particularly valued by the judge. On the other hand, as to questions arising in more complex or technical areas of the law, the nämnd is likely to defer to the views of the judge.[71] In addition to their respect for the education and training of the judge, nämndemän may be expected to take into account at least two other factors. First, a decision in which the judge dissents may not survive an appeal to the collegiate, wholly professional bench of the court of second instance.[72] Second, when the nämnd overrides the vote of the judge, the members who concurred in the decision will be held personally accountable for the result if they failed to satisfy the standards of good faith and diligence required of all those holding positions of public trust in Sweden.[73]

VII. Conclusion

This paper presents a description rather than a critique of the relationship between judge and lay triers in Sweden and the United States, two countries in which laymen have traditionally participated in the adjudication of civil as well as criminal controversies. Both the nämnd system in Sweden and the jury system in the United States have displayed remarkable qualities of endurance and, despite their critics, appear to have grown more venerable with age.

The basic difference in the two systems is apparent: In Sweden, the

---

[69] See 1 Ekelöf, supra note 57, 90-109.

[70] See note 59 supra.

[71] See note 69 supra.

With respect to tort litigation and Sweden's somewhat complex rules concerning apportionment of damages, see Grönfors, supra note 44.

[72] But cf. Administration of Justice in Norway: The Royal Norwegian Ministry of Justice 40-41 (1957) (participation of lay judges in Norwegian appellate proceedings in court's discretion or upon request of a party).

[73] As to the liability of persons holding positions of public trust, see generally Herlitz, "Swedish Administrative Law," 3 Scandinavian Studies in Law 87, 118-24 (1959); Jägerskiöld, "The Swedish Ombudsman," 109 U. Pa. L. Rev. 1077 (1961).

When the decision of the judge prevails, the members of the nämnd are not held responsible for their votes. RB 16:7; 29:7. In such cases, dissenting views of panel members are not even noted in the court record. RB 6:3 para. 8.

power of decision does not reside in the hands of laymen only, while in the United States laymen have exclusive authority with respect to the questions assigned to them. In addition, because of the unique position of the nämndemän, a further distinction, implicit in the first, may be discerned.

Chosen for his general knowledge of community affairs and mores rather than for his technical knowledge, the Swedish nämndemän, serving a long term and publicly esteemed commission,[74] may be described as a hybrid between the common law juror and the expert lay member of a specialized tribunal. As a result of the length of the nämndemän's assignment, the staggered election system, and the practice of re-electing members for consecutive terms,[75] stability and continuity have been characteristic of the lay influence in Sweden's lower courts.

Past trial experiences of the nämndemän coupled with constant guidance and control by the presiding judge provide a check against disparate results in similar cases that rarely can be achieved in a jury system in which lay triers serve for brief periods and do not share their function with the judge.[76] Thus in Sweden, a country that has never adopted a formal rule of stare decisis, the method of trial by judge and nämnd tends to favor consistency at the stage of law application. By contrast, in jury trials in the United States, although the declared law must conform to the pronouncements of appellate tribunals, the application of the law in particular cases may vary substantially.

SUMMARY

In both Sweden and the United States, laymen have traditionally participated in the adjudication of civil as well as criminal controversies. The role of the judge in directing civil proceedings in these countries must be approached from two vantage points: the relationship of the judge to the parties and the relationship of the judge to the laymen with whom he shares responsibility for the outcome of the case. This paper is concerned with the latter point; it compares the position of the Swedish judge, who occupies the dominant position at the hearing and during the deliberations, with that of the judge of a federal court in the United States, whose authority is considerably less pervasive.

74 Nämndemän and professional judges take the same oath of office. See RB 4:11. The title "Nämndeman" is used as a form of address even outside the courtroom. The member designated by the court to serve as chairman of the nämnd, generally the oldest and most experienced lay representative, is addressed by the special title "häradsdomare," see 1 Ekelöf, supra note 57, at 67, n.7.

75 See text at notes 28-31 supra.

76 But see text at note 53 (special verdicts). See also Hart & Sacks, supra note 48, at 370-80.

The common law jury and the body of lay triers in Sweden, known as the nämnd, originated as similar institutions. Both were composed of community representatives impanelled for a particular case to serve as fact witnesses rather than as triers. As the systems developed, however, fundamental differences emerged. Nämnd commissions became long-term assignments while jurors continued to serve for brief periods. The facts of a case and not the legal rules remained the subject of the jury's concern but, within this sphere, the jury became the exclusive trier. The nämnd acquired competence to consider legal as well as factual issues but, with respect to both kinds of questions, nämndemän performed their functions together with and, collective, as partners of the presiding judge.

Today, juries in the federal courts of the United States are composed of twelve persons chosen at random from among the various economic and social groups of the community. Seldom serving for more than two to three weeks in any one year, jurors deliberate in camera, announcing in open court only their ultimate and unanimous fact finding or findings.

Members of the nämnd are chosen for six year terms by the local representative councils from among the local citizenry. Nämndemän sit in panels of seven to nine members and generally serve at two one-day sessions each month. From the commencement of a hearing until a decision has been reached, nämndemän remain with the judge. Moreover, the judge has the principal voice in determining the result of the litigation. The opinion of the nämnd will not prevail over the contrary opinion of the judge unless at least seven nämndemän agree upon both the decision and the rationale therefor.

In supervising the conduct of a jury trial, the judge has recourse to a number of control devices. These include rulings on the admissibility of evidence and instructions to the jury delineating the authority of the lay triers and the manner in which it should be exercised. To avoid the risk of misunderstanding or lack of comprehension, the judge may submit written questions to the jury calling for categorical responses with respect to each of the issues in the case. Further, the judge has authority to enter judgment without referring the case to the jury at all if he finds that reason will tolerate only one result, or to order a new trial if he finds that the jury determination is contrary to the weight of the evidence.

In practice, the extent to which the judge utilizes the control devices available to him is largely dependent upon the type of case presented for adjudication: In tort cases, the judge will be inclined to allow con-

siderable latitude for jury discretion; in commercial cases, he will attempt to hold the jury by a tighter rein.

Because the nämnd deliberates with the presiding judge, flexibility and informality rather than formal control devices characterize the relationship between the judge and the lay triers in Sweden. Constant association in a cooperative effort carries with it the danger of direct conflicts between the judge and the lay triers, a danger that is absent in a jury system premised on divided responsibility. To achieve the proper balance, the judge must clarify for his lay partners the essential issues of the case and the applicable legal considerations, but he must also evaluate and comment with care upon the questions and opinions of his lay partners. In short, the effectiveness of the system depends upon the tolerance and patience of the judge—he must command the respect of the nämndemän so that they will heed his direction and, at the same time, he must encourage expression of the observations of the nämnd so that he will reap optimum benefit from the views and reactions of his lay associates.

Under the nämnd system, past trial experiences of the laymen coupled with constant guidance and control by the presiding judge provide a check against disparate results in similar cases that rarely can be achieved in a jury system in which lay triers serve for brief periods and do not share their function with the judge. Thus, in Sweden, a country that has never adopted a formal rule of stare decisis, the method of trial by judge and nämnd tends to favor consistency at the stage of law application. By contrast, in jury trials in the United States, although the declared law must conform to the pronouncements of appellate tribunals, the application of the law in particular cases may vary substantially.