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James S. Campbell  
*WilmerHale*

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# THE CURRENT UNDERSTANDING OF THE SEVENTH AMENDMENT: JURY TRIALS IN MODERN COMPLEX LITIGATION\*

JAMES S. CAMPBELL\*\*

In the 1970s a number of major U.S. corporations found themselves embroiled in private civil litigation so complex and protracted that juries seemed unable to understand the issues and decide them accurately. This was the experience of the IBM Corporation in several cases, most notably in *ILC Peripherals Leasing Corp. v. International Business Machines Corp.* (the *Memorex* case).<sup>1</sup>

Memorex, a manufacturer of IBM-compatible computer equipment, had brought an antitrust action challenging IBM's development, pricing, and marketing of modern electronic data processing systems and certain peripheral devices included within those systems. Memorex complained that its ability to compete with IBM was damaged by several of IBM's business practices, among them: (i) changing interfaces between its products without adequate technological justification, (ii) lowering prices below legitimate competitive levels, and (iii) prematurely announcing new products. These claims raised many extraordinarily difficult issues of computer technology, corporate finance, and antitrust economics, all of which the jury was expected to resolve:

— Was IBM's decision to make certain modifications in a particular disk drive control unit technologically justified, or were there technologically superior alternative modifications that could have been made without damaging Memorex's ability to sell a competing product?

— Were IBM's prices under its fixed term rental plan justified by

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\* The lecture upon which this article is based was delivered on September 15, 1987, at a Washington University School of Law conference on "Original Intent and the Sixth and Seventh Amendments." This conference was the seventh in a series of eight conferences, sponsored by the Center for Judicial Studies, exploring the original intent and current interpretation of key provisions in the Bill of Rights. The article is printed here with the permission of the Center for Judicial Studies, Washington, D.C.

\*\* Partner, Wilmer, Cutler & Pickering, Washington, D.C. and London.

1. *ILC Peripherals Leasing Corp. v. International Business Mach. Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. International Business Mach. Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

financially sound projections of revenues and costs for particular computer products at particular prices and by appropriate allocations of overhead costs to the products in question?

— Was it appropriate, given the economic determinants of a market, such as demand and supply substitutability and barriers to entry, to treat IBM-compatible disk drives as a separate market, considering the functions performed by the drives, the alternatives actually or potentially available for performing those functions, and the price/performance characteristics of those alternatives?

To help the jury resolve such issues, the parties staged a ninety-six day trial. There were eighty-three witnesses, including seventeen experts. There were 19,000 pages of transcript and 2,300 trial exhibits. The judge required over eighty pages to instruct the jury on the law. The jury then deliberated for nineteen days—and failed to reach a decision.

The judge declared a mistrial and directed a verdict for IBM. Based on his familiarity with the case and his observations during the trial, the judge stated that if a retrial were necessary, he would strike the plaintiff's jury demand: "the magnitude and complexity of the present lawsuit render it, as a whole, beyond the ability and competency of any jury to understand and decide rationally."<sup>2</sup>

Even before the *Memorex* trial, some of us involved in the IBM cases had begun to ask ourselves whether the plaintiff in such complex and protracted cases was really entitled to insist upon a jury trial. To be sure, the seventh amendment requires that "[i]n Suits at common law . . . the right of trial by jury shall be preserved," and antitrust and securities damage actions had always been considered suits at common law within the meaning of the amendment. But in view of the many advantages of trying such cases to the court rather than to a jury, we thought that perhaps the whole subject might be reopened.

The spark that first touched off what became an explosion of professional, judicial and scholarly interest in jury trials of complex cases was a 1976 ruling by a district judge in the state of Washington. He struck a jury demand in a complex securities case,<sup>3</sup> relying on an enigmatic footnote in a 1970 Supreme Court decision, *Ross v. Bernhard*.<sup>4</sup> There the Court had indicated that whether a claim was to be treated as a suit at

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2. 458 F. Supp. at 448.

3. *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (W.D. Wash., 1976).

4. 396 U.S. 531 (1970).

common law for seventh amendment purposes was to be determined by three considerations. First, whether it would have been regarded as legal or equitable before the merger of law and equity. Second, what kind of remedy was being sought. Third—and here was the new ray of hope—by considering “the practical abilities and limitations of juries.”<sup>5</sup>

It could not be claimed that *Ross* made any radical break with the traditional historical test for determining the scope of the jury trial right preserved by the seventh amendment. This test looks to the English common law at the time the seventh amendment was adopted and inquires whether the case at bar is “more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty.”<sup>6</sup> Indeed, the historical approach to applying the seventh amendment is nearly as old as the amendment itself, having been unchallenged since Judge Story wrote in 1812 that the common law to which the amendment refers is “the common law of England, the grand reservoir of all our jurisprudence.”<sup>7</sup> Accordingly, the potentially promising line of inquiry suggested by the *Ross* footnote was whether in 1791 an English Chancellor would have considered the “practical abilities and limitations of juries” and taken into equity a case that he regarded as too complex for jury resolution.

IBM commissioned the Right Honorable Lord Devlin, a Lord of Appeal in England and a leading authority on the role of the jury in English law, to make this inquiry. The results of his prodigious research are recorded in the January 1980 *Columbia Law Review*.<sup>8</sup> Devlin found that in England in the 18th century the Lord Chancellor, as the voice of equity and supreme head of the law, took litigation into the jurisdiction of his own Court of Chancery, even though it might already be pending in the law courts, whenever, as the leading treatise put it in 1780, the procedures of the law courts were inadequate or the law courts themselves were being made instruments of injustice. Carefully examining the wide variety of instances in which the Chancellor exercised the authority, Devlin argued that “law” and “equity” were not precisely defined, mutually exclusive categories to which lawsuits were assigned by the accidents of history.

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5. *Id.* at 538 n.10.

6. *Tull v. United States*, 107 S. Ct. 1831, 1835 (1987).

7. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (Story, J.).

8. Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980).

Instead, Devlin found the Chancellor had always to decide, if asked by one of the parties in a particular case, whether the action could be justly decided by the procedures of the common law courts—namely, by procedures that sharply restricted joinder of parties and claims; that did not provide discovery; that refused to take testimony from the parties themselves; and that used juries to decide disputed questions of fact. Devlin concluded:

[T]he bounds of a common law action were not more precise than the bounds of an equitable suit. The two were separated, not by a line, but by a borderland under the dominion of the Chancellor. It is the spirit in which he exercised his dominion that is important. I am sure that the practical abilities and limitations of juries would have been a factor very much in the mind of a Chancellor in 1791. Further, if in any particular case he had thought the 'practical abilities' not up to the complexities of the case, he would have had the power to stop the suit at common law.<sup>9</sup>

Devlin's conclusions, if accepted, raised a second question that needed attention: even if the English had a rather energetic view of the powers of a court of equity, might not the framers of the seventh amendment have wanted to protect the sacred right of jury trial against such equitable encroachments? This inquiry fell to some of the American lawyers on the IBM team, and the results of our somewhat less prodigious research are recorded (and disputed) in the April, 1980 *University of Pennsylvania Law Review*.<sup>10</sup> Our conclusion was that although the seventh amendment was an attempt to meet American concerns to use juries in some civil cases, the amendment did not abandon, but instead carefully maintained, the traditional English understanding as to the location and nature of the borderland between law and equity.

While most of our energies were devoted to the proper interpretation of the seventh amendment, we naturally did not overlook the due process clause of the fifth amendment. Modern Supreme Court decisions have established that the primary value promoted by due process in fact-finding procedures is "to minimize the risk of erroneous decisions."<sup>11</sup> We argued that trying an extraordinarily complex and protracted case to a jury unacceptably increased the risk of an erroneous decision as com-

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9. Devlin, *supra* note 8, at 107.

10. Campbell & LePoidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980). See Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Arnold, *A Modest Replication To A Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980).

11. *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979).

pared with the readily available alternative of a bench trial. We never regarded the due process clause as our main avenue of attack, in part because we were unsure whether the courts would accept our due process argument if it flew in the face of a clear command from the seventh amendment.

Now, how did we fare in the courts with our effort to remove from juries cases that we believed were wholly unsuited for that mode of resolution? Several district courts struck jury demands in complex cases, and several others did not. At the court of appeals level, with IBM either as a party or an amicus, we had one loss,<sup>12</sup> one win,<sup>13</sup> and two decisions in which the court didn't reach our issue.<sup>14</sup>

In our winning case, *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*,<sup>15</sup> our victory was less than complete because the court relied solely on our due process argument in holding that trial by jury may be refused in a case of such complexity that the jury cannot likely achieve a reasonable understanding of the relevant evidence and applicable legal rules. The court carefully examined our seventh amendment analysis and found it wanting. The Court said that we had departed from the traditional historical test, in that we were attempting to determine the legal or equitable nature of a modern antitrust action by inquiring into what would have been "the likely reaction of the English chancellor to a hypothetical complex suit filed at law in 1791," rather than limiting ourselves to "comparing it with suits actually tried in courts of common law or equity."<sup>16</sup> We could not, the court said, clearly place a complex antitrust case within one of "the categories of suits specifically recognized as within" the jurisdiction of equity.<sup>17</sup>

Not long after *Zenith* was decided in 1980, IBM had either won or settled on satisfactory terms all the private damage actions that had been brought against it in the wake of the government's monopolization case.<sup>18</sup> As a result, we no longer had a litigating interest in the issue we

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12. *In re United States Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980).

13. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 631 F.2d 1069 (3d Cir. 1980).

14. *Rosen v. Dick*, 639 F.2d 82 (2d Cir. 1980); *Memorex Corp. v. International Business Mach. Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

15. 631 F.2d 1069 (3d Cir. 1980).

16. *Id.* at 1083.

17. *Id.*

18. The government's monopolization complaint, initially brought on January 17, 1969, was dismissed by the government itself on January 8, 1982, the government having come to the conclu-

had worked so hard to reopen, and as it turned out, little further progress was made in the courts either in addressing the seventh amendment argument we had developed or in resolving the direct conflict between the Third and the Ninth Circuits on the ultimate question of whether judges have the power to refuse jury trials in extraordinarily complex cases.

Several of us continued to have a considerable intellectual interest in our subject, however, and IBM was generous enough to continue funding the Devlin project even after it was no longer a matter of practical importance to the company. The results of our further inquiries are displayed in Devlin's second major article on jury trials in complex cases, this one appearing in the June 1983 *Michigan Law Review*.<sup>19</sup> The article is an extended dialogue with Chief Judge Seitz's opinion in *Zenith*. In my view, Devlin successfully establishes at least three critical points against the *Zenith* court's rejection of our seventh amendment argument.

There is, Devlin urges, no way to avoid asking what an English Chancellor would have done with a "hypothetical complex suit filed at law in 1791," because for the amendment to preserve trial by jury as it existed in 1791, it must necessarily preserve it subject to the intervention of equity as it existed in 1791. Moreover, it misreads English legal history to see equitable intervention as confined to certain sharply defined categories of cases. Equity, says Devlin, was above all a set of principles, one of which was that a suit at common law would not be permitted to proceed at law if the procedures of the law courts were inadequate to its just resolution. Finally, if we must have a specific example of equity intervening on the ground of complexity, we have that in several cases, but above all in *O'Connor v. Spaight*.<sup>20</sup> This was a common law action of ejectment for nonpayment of rent that the Chancellor took into equity because the accounting required to determine the amount of rent due (if any) was more complex than could be readily handled by the procedures for taking an account at common law.

Looking back on the jury trial debate of the late 1970s and early 1980s, I find that two basic conclusions stand out in my mind.

First, I believe that we cannot rely on the due process clause to solve the practical problems created by our current interpretation of the sev-

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sion that its case was "without merit." See *In re United States v. Int'l Business Mach. Corp.*, 1982-2 Trade Cas. (CCH) para. 64,899 (2d. Cir. 1982).

19. Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571 (1983).

20. 1 Sch. & Lef. 305 (Ire. Ch. 1804).

enth amendment. If judges fear that a jury trial will not accurately and efficiently resolve a complex, protracted case, they will naturally seek to satisfy due process by “improving” the jury’s performance. Juries will be instructed and re-instructed on the law before and during the trial; they will be allowed to take notes and ask questions; and they will be given background lectures on economics, electronics, accounting and any other disciplines necessary to understand the case. The result, as I have argued elsewhere, will be to turn the jury into something it was never meant to be, abandoning its virtues of common sense decision-making based on community values, but without thereby enabling it to handle extraordinarily complex commercial cases nearly as well as judges can.<sup>21</sup>

My second conclusion is that what is now called the “traditional historical test” is in fact profoundly unhistorical. It over-simplifies history and thus falsifies it. The traditional historical test fails to capture the richness of the historical reality, for it maintains a narrow focus on two issues only: the resemblance of the plaintiff’s claim to traditional actions at law or suits in equity, and the typically legal or equitable nature of the relief sought. In fact, as the recent case *Tull v. United States*<sup>22</sup> makes clear, the historical test boils down to the nature of the relief alone: injunction equals equity, damages (especially punitive damages) equals law.

Devlin’s broader historical perspective is far more illuminating: regardless of the nature of the action or the relief sought, one did not get a jury in 1791 if the Chancellor believed that the case could not be reliably and efficiently resolved by the procedures of the common law courts, including the procedure of jury fact-finding. There is nothing magical about the relief sought, for the Chancellor awarded money damages in the form of compensation or an account,<sup>23</sup> and he did not refuse to enforce all penalties.<sup>24</sup> As Devlin has shown, if there was an equity in the case requiring the Chancellor to intervene, he would not have been prevented from doing so by his supposed inability to order forms of relief customarily available in the courts of common law.

I am confirmed in my opinion that the traditional historical test is unhistorical by the most interesting piece of writing on the subject that I have seen since Devlin put down his pen. A student at the Chicago Law

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21. Campbell, *A Historical Basis for Banning Juries*, NAT’L L.J. Feb 11, 1980, at 17.

22. *Tull v. United States*, 107 S.Ct. 1831 (1987).

23. Devlin, *supra* note 19, at 1623-28; see also Devlin *supra* note 8, at 71-72.

24. Devlin, *supra* note 8, at 85-95.



School analyzed all the reported cases in law and equity in England during the years 1789, 1790, and 1791, for the purpose of determining the comparative complexity of suits at law and proceedings at equity.<sup>25</sup> Examining the number of parties, amounts in controversy, and the nature of the claims, he found that

‘[C]omplex’ cases, as we understand that term today, simply did not occur in the common law system known to the framers. Insofar as analogies based on complexity are appropriate, complex modern litigation bears much closer resemblance to equitable actions in 1791, heard without a jury, than to common law actions.<sup>26</sup>

The author concludes that the traditional historical test, with its exclusive focus on rights and remedies, wrongly requires jury trial of complex cases bearing “no resemblance whatsoever to suits heard in the English common law system.”<sup>27</sup>

The traditional historical test for applying the seventh amendment is a fiction. The reality is that nothing in the seventh amendment prevents judges from striking jury demands in complex and protracted civil litigation.

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25. Note, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984).

26. *Id.* at 611.

27. *Id.* at 613.