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Should Trial by Jury be Eliminated in Complex Cases?

The Honorable Hugh H. Bownes*

Introduction

The origins of the jury system are cloaked in mystery. It goes back at least to the assizes of Henry II, a means of taking census and collecting taxes. It gradually evolved into a means of doing justice. In the early days the jurors not only knew the litigants, they also knew something about the dispute. They were there to settle a quarrel between neighbors and friends. Today, however, any knowledge of the dispute or familiarity with the litigants is cause for disqualification.

Another thing we must recognize is that we are the only nation¹ that still uses the jury system in civil cases. England started to do away with it prior to World War II, the manpower shortage during the war accelerated its demise. The only type of civil case in which jurors are still used in England is in libel suits. The question is therefore asked, and it is a legitimate question — if the home of the jury system, England, can function without jurors in civil cases, why should we not do the same thing, at least in complex and protracted litigation. There are several good arguments for doing so, it saves time, saves money and a judge is better equipped by training and experience to cope with the nuances and complications of complex issues. Any judge will attest to that. Yet to understand whether trial by jury should be eliminated in

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¹ With the possible exception of Canada or Australia.

complex civil cases, we first have to look at what the purpose of a civil trial is and the function of the jury in it.

Determining "Truth"

Most lawyers and judges, when asked the purpose of a jury trial, say proudly, "To determine the truth." That pat answer has a noble ring to it and it ennobles judges and lawyers to be part of such a basic and important process — determining the truth makes us part of a sacred priesthood — or so we like to think.

I suggest to you, however, that determining the truth is only part of the trial process and that trial by jury is primarily a means of settling disputes between individuals as fairly as possible. When the facts are in dispute, the truth of what happened may be determined — but we do not ask the jurors to find what the facts actually were, only to find on the balance of the probabilities what happened. The legal phrase is *preponderance of the evidence* — a mouth-filling impressive sounding phrase that really means all you have to do is decide whether it is a little more probable than not that the accident happened as the plaintiff claims. If it did, then the plaintiff wins. If it did not, then verdict for the defendant. And the scales of justice have to tip only ever so slightly in favor of the plaintiff for her to prevail. So what the jury is determining is not the absolute truth, but whether it believes the evidence to a degree of slightly more than 50 percent. The jury determines what probably happened, which may not be the same at all as what actually happened. But we recognize that many disputes would never be settled if we had to determine the absolute truth.

And then there are the cases in which the facts are not important. In a contract case for example, the parties, both with advice of competent counsel, have entered into a lengthy and complicated agreement. Then something happens that neither side has foreseen and the question becomes what was the intent of the parties. Did they intend that the contract should cover this unforeseen happening? So the jury is asked

to determine on the basis of letters and conversations written and spoken prior to or at the time the contract was signed, what the intent of the parties was as to an event not foreseen by the parties or their attorneys. The truth has little to do with this problem. The jury is really deciding what would be fair under the circumstances. Thus I suggest that a civil jury trial is first and foremost a dispute settling process in which the truth may or may not be determined.

Arguments for Keeping Jury Trials

The Seventh Amendment

There are several good arguments for not eliminating juries in complex cases. The first, of course, is the seventh amendment to the Constitution which states:

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

The seventh amendment was an assertion of what was considered to be a basic right. A capsulized history of the right to a jury trial in civil cases is stated as follows:²

The right to jury trial arrived on the shores of this country with the first English colonists. The original Jamestown charter guaranteed all the rights of Englishmen to the colonizers, including trial by jury. During the next two hundred years of the development in colonial America, the right to jury trial continued to expand. The principles embodied in jury trials found a receptive atmosphere in the egalitarian principles of the colonists. By 1776, the right to jury trial existed, in one form or another, in each of the thirteen colonies. In fact, one of the primary grievances against England at the time of the Declaration of Independence was the restriction on the right to jury trial. Colonial administrators had been circumventing the right by

² *In Re U.S. Financial Securities Litigation*, 609 F.2d 441, at 419-20 (9th Cir. 1979).

trying various cases, both criminal and civil, in the vice-admiralty courts.

When the Constitution was finally drafted, there was limited debate as to whether the civil right to jury trial should be included. The lack of this guarantee formed one of the primary arguments against the adoption of the new Constitution. The right to jury trial in civil cases, embodied in the Seventh Amendment, then became one of the chief reasons supporting the Bill of Rights.

It is not surprising that the court in that case refused to read a complexity exception into the seventh amendment.

The opposite result was reached in a case out of the Third Circuit.³ The issue as posed by the majority opinion, was: "In an action for treble damages under the antitrust and antidumping laws do the parties have a right to a trial by jury without regard to the practical ability of a jury to decide the case properly?" In finding that the seventh amendment did not apply to a complex case that a jury could not decide properly, the court relied on another Constitutional guarantee, the right to due process of law. It held in effect that the due process guarantee trumps the seventh amendment because trial by jury is but one specific way of seeing to it that all parties receive due process of law.

Another argument that may be used to circumvent the seventh amendment was stated by Justice Harlan dissenting in *Ross v. Bernhard*.⁴ The majority (Justice White) held that the right to trial by jury preserved in the seventh amendment extends to a stockholder's derivative suit with respect to those issues to which the corporation, had it been suing in its own right, would have been entitled to a jury trial. Justice Harlan took the position that the seventh amendment, by its terms, does not extend but merely preserves the right to a jury trial "in suits at common law." This means, he said, that the seventh amendment is limited to those actions that were tried to a jury in 1791, when the

³ *In Re Japanese Electronics Products Antitrust Litigation*, 631 F.2d 1069 (3rd Cir. 1980).

⁴ 396 U.S. 531 (1970).

amendment was adopted.

Under this approach, complex litigation would not come within the protection of the seventh amendment because such type of case did not exist in 1791. Harlan's argument, of course, depends on using the original "intent doctrine" as a means of Constitutional interpretation. A doctrine with which I do not agree. Let us look now at the arguments which I think militate against eliminating the use of a jury in complex trial.

The Sixth Amendment

There is no suggestion that the right to a jury should be curtailed in criminal cases because of complexity in cases involving, for example, organized crime or securities fraud. Why a jury is competent to decide a complex case where a person's life or liberty are at stake, but is incompetent to decide the same case where that same person's property is at stake, is not clear to me.

The Assumption that Jurors Can't Understand Complicated Issues is False

"The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation."⁵ Even assuming that the anticipated length of an extremely complex trial might lead to juries which do not have professionals or other highly educated people on them,⁶ juries are still, in general, as capable as judges at discerning the facts and applying them to the law as enunciated by the judge. With respect to factual issues, it is unlikely that one judge has any special competence that makes him superior to the collective ability of twelve jurors.⁷

⁵ *U.S. Financial*, *supranote 2*, at 429-430.

⁶ *Japanese Electronic Products*, *supranote 3*, at 1086.

⁷ *See, e.g., U.S. Financial*, *supranote 2*, at 431: "Whether a case involves computer technology, aircraft design, or accounting, attorneys must still educate the

What distresses me about the assumption of juror ignorance is that it takes the resolution of disputes out of the hands of the people and turns it over to experts, and we all know that an expert is a person with a briefcase more than a hundred miles from home. Modern life is complex. There are forces at work that we do not understand, but I am reluctant to turn over the basic decisions that are part of our form of government to a judge who may or may not himself understand the issues in a complicated case. It demonstrates a lack of faith in the citizenry to do justice.

Federal Rules and Joinder

Many complex and lengthy trials are the product of the federal rules which allow for joinder. By encouraging the joinder of claims and the consolidation of suits, the rules create the monster that threatens to overwhelm both juries and judges. Rather than allow this rule-created complexity to deprive parties of their Constitutional right, the rules should be forced to bend to the dictates of our Constitution. Cases that create undigestably large trials should be broken down into the component parts from which they were formed.⁸ While this separation of issues may cause our judicial system to lose some of its rule-created efficiency, "the provisions of the Bill of Rights . . . are designed to promote values other than efficiency."⁹ Efficiency in the saving of time and money is not the goal of our system of justice. It is fairness and the resolution of a dispute in a manner that enhances our societal aims. Efficiency is not a hallmark of our democratic form of government. Democracy, as Winston Churchill once observed, is the worst form of government except for all others. The same reasoning

uninitiated about the matters presented in their case." Cf. *id.*, at 427: "In fact, [Judge Higginbotham] has suggested attorneys may do a better job of trying complex cases to a jury than to a judge." (Footnote omitted).

⁸ See generally *Japanese Electronic Products*, *supra*note 3, at 1091-28 (Gibbons, J., dissenting).

⁹ *Id.*, at 1091.

applies to jury trials.

Much Can be Done to Improve and Simplify Complex Cases

Federal Rule of Civil Procedure 53 allows for the use of masters to aid a jury.¹⁰ Rule 49 allows for the use of special verdicts, which can focus juries on the salient legal and factual analyses. Furthermore, in cases involving vast amounts of documents, F.R.Evid. 1006 provides for the use of summaries of documents.¹¹

In addition to rules already in place, if litigation is becoming too complex, the rules should be modified in order to give full force to the Constitutional mandate. For example, jurors could be given a power, analogous to the power a judge has to reopen a bench trial under Fed. R. Civ. P. 59(a), to reopen the trial if during deliberations it is determined that juror confusion could be thus eliminated. Also, jurors could be encouraged to take notes to submit questions to the judge to be asked of witnesses from the bench.¹²

One Last Question

By what criteria shall a judge decide that a case is too complex for a jury to understand? If the judge can understand the issues, he should, with the help of the attorneys, be able to explain them to a jury. If he can't understand the issues, does it necessarily follow the jurors are as stupid as he is.

The civil jury system is part of the fabric of our way of life. Before we abandon it, even partially, we should understand fully what we are giving up.

¹⁰ See *U.S. Financial*, *supra*note 2, at 428: "The use of a master is constitutional, and certainly is preferable to a denial of the Seventh Amendment right altogether."

¹¹ See generally, *U.S. Financial*, *id.*, at 428-429.

¹² See *MANUAL FOR COMPLEX LITIGATION* 2d, §22.42 (West 1985).

