

Courts and the Making of Public Policy

Complexity and the US Civil Jury

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Executive Summary

- As the nature of civil litigation becomes more complex, particularly in cases involving sophisticated parties, complicated technologies, or complex financial products or arrangements, it is an increasingly common perception among litigants in US courts that a civil jury comprising ordinary citizens cannot fully understand, let alone decide, the claims and issues presented to them. That perception informs, and sometimes dictates, the conduct of litigants, encouraging settlement over the risk of trial, or leading to a choice of arbitration before a sophisticated, specialized adjudicator in place of traditional proceedings in court.
- But is there any truth to that perception? Are civil juries today incapable of understanding the complex issues presented to them? Are the results obtained through civil jury trials unfair, ill-informed or tainted? Should the United States move instead toward specialized juries, or trial before specialized judges, in place of the present system? In the authors' view, the answer to those questions is 'no'. Even putting aside the fact that trial before a jury is a constitutionally protected right for most civil claims in the United States, civil juries comprising ordinary citizens are perfectly capable of understanding the complexities inherent in modern litigation – *if* those complexities are explained to them clearly.
- Increased complexity demands better advocacy, and better communication skills generally, from the lawyers charged with presenting a case. The civil jury system can work extremely well, but careful attention needs to be given by the lawyers to the way that complex technologies or financial arrangements are presented at trial, particularly through the use of techniques designed to facilitate comprehension, such as (i) demonstratives, graphics, and animations; (ii) tutorials for the jury on complex issues during the trial, presented either by expert or fact witnesses; or (iii) presentation (and reinforcement) of the evidence in a thematic, as opposed to chronological, way.
- In summary, increased complexity in modern litigation is certainly a challenge for juries, but it is a greater challenge for litigants and their counsel. Ultimately, if a jury fails to understand the issues in a case, that should be viewed not as a failure of the court or the civil jury system, but as a failure on the part of the lawyers and the litigants to present their case in a clear and understandable way.

Complexity and the US Civil Jury

The impact of complexity on litigants' confidence in civil juries

It is beyond dispute that civil litigation in US courts is becoming increasingly complex. Claims and defences often turn on the application of complicated new technologies (particularly in the intellectual property field, or in cases involving internet, computing, biotech, or pharmaceutical companies) or on complex financial arrangements and products (as evidenced by the wave of litigation surrounding the current credit crisis). Witnesses and experts are often highly qualified, and are called to testify about complicated issues or economic theories using extremely technical language specific to their industry or profession. Numerous documents introduced into evidence at trial contain similarly technical language or analyses, which are difficult for a layperson to understand. And yet, who does the US legal system rely upon to absorb all that evidence, to assess the credibility and veracity of the witnesses and evidence, to act as a 'fact-finder', and to adjudicate the claims at issue? A jury composed of ordinary citizens, from all walks of life, drawn from the community in which the court is physically located.

The right to a civil jury is constitutionally protected in the United States, but it is not without controversy. Litigants, usually defendants, regularly complain that civil juries are not competent to decide issues in complex, lengthy trials, because they believe that jurors either will not understand everything put before them, or lack the skills and experience to distinguish between competing witnesses and experts on highly technical issues. Those concerns are not based upon empirical or factual evidence, but instead are perceptions, fuelled by stories of jurors playing sudoku during trials, or of mock jurors falling asleep during mock jury exercises or struggling to discuss the facts of a case during mock deliberations. But even perceptions are important, for two principal reasons.

First, to the extent that those perceptions, whether fair or not, reduce the confidence that litigants have in the legal system – and, specifically, in their ability to obtain a fair ruling through that system – they are a cause for real concern. Second, those perceptions also have real-life consequences, in that they can influence a litigant's decision making; for example, choosing to settle a complex case early in order to avoid the perceived 'risk' of a jury trial, or choosing to proceed outside the court system altogether (where permitted), through arbitration before a specialized arbitrator rather than a civil jury.

So is there any basis for those criticisms?

Are civil juries sufficiently competent and capable to adjudicate complex claims at trial? In attempting to answer those questions, this policy brief describes the current civil jury system in US federal courts, looks at commonly advanced criticisms and defences of the civil jury system, and asks what can be done to address, and hopefully change, any perception that civil juries are not up to the task before them.

The current system in US federal courts

Constitutional right to a trial by jury

The Seventh Amendment to the United States Constitution, ratified on 15 December 1791, guarantees the right to trial by jury in certain civil cases. It 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 re-examined in any Court of the United States, than according to the rules of the common law.

While the precise scope of the right afforded by the Seventh Amendment has been debated at length over the years, the US Supreme Court, beginning

with an 1830 decision in *Parsons v. Bedford*,¹ has held the guarantee of a jury trial applicable to all suits that fall within the federal courts' jurisdiction over suits at law (including suits based on a statutorily created cause of action), as opposed to suits in equity or admiralty. Trial before a jury in qualifying cases is not mandatory, however: it can be waived by the parties.

The importance of the jury to the US legal system is evident from an examination of the Bill of Rights. Of the ten original amendments to the Constitution, two amendments guarantee the right to a jury trial: the Seventh Amendment and the Sixth, which guarantees a jury trial in criminal cases.

Juror qualifications

Although individual federal courts are each responsible for establishing their own criteria for juror eligibility, generally speaking, only minimal qualifications are required. There is no requirement that jurors possess any particular level of education, be employed, or have any knowledge about the subject matter of the trial that they are to adjudicate, and there are no other measures of competency that a juror must satisfy.

Once eligible, prospective jurors then need to be selected to serve on a jury. Federal law makes it clear that 'all litigants in Federal courts entitled to trial by jury shall have the right to ... juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes', meaning that courts may not systematically exclude one particular group from the jury pool (28 U.S.C. § 1861).

As the foregoing makes clear, a civil jury in US federal court will usually include the full spectrum of people living in the community. Indeed, it is this very mix of skills, backgrounds, experience and education that is the source of both criticism, and also strident defenses, of the civil jury system in its current form.

Criticisms of the civil jury system

Jurors' understanding of the evidence and legal rules

As Judge Jerome Frank of the United States Court of Appeals for the Second Circuit famously observed, 'while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour' (*Skidmore v. Baltimore & Ohio R.R. Co.*, 167 F. 2d 54, 60 [2d Cir. 1948], *cert. denied* 335 U.S. 816 [1948]).

That view is at the heart of the argument that civil juries cannot render competent judgments in complex cases. Proponents of that view argue that ordinary jurors cannot understand (or, indeed, be expected to understand) complicated technologies, or scientific or medical principles, or accounting or economic theories, of the kind that underlie many modern suits. Critics ask: why is it that we turn to ordinary citizens, with no experience or knowledge of a particular industry, science or discipline, to resolve highly technical differences of opinion between extremely qualified experts with doctoral degrees in their specialties? Indeed, jurors themselves sometimes feel that too much is being asked of them. As the jury foreman in a 1978 California case stated: 'If you can find a jury that's both a computer technician, a lawyer, an economist, knows about all that stuff, yes, I think you could have a qualified jury, but we don't know anything about that'.²

Those who criticize civil juries argue that these problems threaten the very operation of the civil legal system. As the Third Circuit Court of Appeals observed in a 1980 decision:

If judicial decisions are not based on factual determinations bearing some reliable degree of accuracy, legal remedies will not be applied

1. 28 U.S. (3 Pet.) 433, 446-47, 7 L. Ed. 732 (1830).

2. *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 447 (N.D. Cal. 1978), *aff'd sub. nom. Memorex Corp v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied* 452 U.S. 972 (1981).

*consistently with the purposes of the laws. There is a danger that jury verdicts will be erratic and completely unpredictable, which would be inconsistent with evenhanded justice. Finally, unless the jury can understand the evidence and the legal rules sufficiently to rest its decision on them, the objective of most rules of evidence and procedure in promoting a fair trial will be lost entirely. We believe that when a jury is unable to perform its decisionmaking task with a reasonable understanding of the evidence and legal rules, it undermines the ability of a district court to render basic justice.*³

That concern has, in the past, led to calls for a 'complexity exception' to the Seventh Amendment right to a jury trial, and also to the assertion that the due process clause of the Fifth Amendment to the US Constitution prohibits trial by jury of a suit that is too complex for a jury (on the grounds that if the jury does not comprehend the evidence before it, it will be incapable of reaching a rational decision). While those arguments generally have not found favour with the courts, the latter argument did have some influence with the Third Circuit Court of Appeals in the 1980 case referenced above: a complex case in which multiple Japanese corporations were accused of violations of 'the antitrust laws and the laws governing competition in international trade'.⁴ The Court ruled that a jury trial *could* be denied on due process grounds, but only in 'exceptional cases when the court, after careful inquiry into the factors contributing to complexity, determines that a jury would be unable to understand the case and decide it rationally'.⁵ While that decision technically remains good law in the Third Circuit, it has not been applied in practice in the twenty-nine years since it was issued. In addition, other courts have strongly rejected the idea of any contraction of the Seventh Amendment

right to a jury trial. For example, in responding to criticisms about the abilities of jurors, the Ninth Circuit Court of Appeals has written:

*The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complex matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation. We do not accept such an assertion. Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom and dedication to their tasks, which is rarely equaled in other areas of public service.*⁶

Undue deference shown by jurors to experts

Critics of the civil jury system also argue that jurors lack the skills, education, or knowledge to deal with highly qualified experts such as scientists, doctors, or economists who are routinely retained in complex cases. Because, those critics contend, jurors cannot understand the testimony or opinions of those experts, they either disregard that testimony entirely, or they decide which expert to believe based on assessments unrelated to the subject matter at issue, such as the expert's appearance, mannerisms, or personal credibility or persuasiveness as a testifying witness. Alternatively, jurors are also accused of giving undue weight to expert testimony over factual evidence, simply because it is presented as the *expert* opinion of a supposedly impartial specialist in the area.

Jurors' lack of suitability for lengthy trials

As anyone who has served on a jury knows, the shorter the trial, the better. Jurors struggle with a lengthy trial, because of the intrusion it represents into their normal lives. As the Third Circuit Court of Appeals has observed:

3. *In re Japanese Elec. Products Antitrust Litigation*, 631 F.2d 1069, 1084 (3rd Cir. 1980).

4. *Id.* at 1071.

5. *Id.* at 1089.

6. *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 429-30 (9th Cir. 1979), *cert denied* 446 U.S. 929 (1980).

The long time periods required for most complex cases are especially disabling for a jury. A long trial can interrupt the career and personal life of a jury member and thereby strain his commitment to the jury's task. The prospect of a long trial can also weed out many [jurors] whose professional backgrounds qualify them for deciding a complex case but also prohibits [sic] them from lengthy jury service.⁷

The fear is that jurors forget evidence, or become distracted or even resentful, as a lengthy trial progresses. Even worse, critics contend, if jurors feel that their time is being wasted, they may try to 'punish' that party when it comes to their deliberations.

Jurors' susceptibility to be unduly influenced by emotion

Another common criticism of civil juries is that they are too susceptible to being swayed by emotion – for example, sympathy for an injured plaintiff – which can lead juries to disregard the evidence presented during the trial, in favour of righting what they perceive as a wrong or 'sending a message' by ruling against an unpopular defendant. Biases of this kind, driven by popular sentiment or contemporaneous events, are sometimes depicted as an inevitable consequence of the civil jury system. For example, critics of the civil jury would argue that if you are a bank that has received bail out funds, or a US auto manufacturer, then now is not a good time to be a defendant in a jury trial, given the extent of public anger at those companies.

Judges are better than juries in complex, lengthy trials

Not surprisingly, many critics of civil juries conclude that the solution to these problems is for complex trials to be heard by judges alone. Once again, advocates of that view turn to the writings of the Third Circuit Court of Appeals for support:

A long trial would not greatly disrupt the professional and personal life of a judge and should not be significantly disabling ... Although we cannot presume that a judge will be more intelligent than a jury or more familiar with technical subject matters, a judge will almost surely have substantial familiarity with the process of civil litigation, as a result of experience on the bench or in practice. This experience can enable him to digest a large amount of evidence and legal argument, segregate distinct issues and the portions of evidence relevant to each issue, assess the opinions of expert witnesses, and apply highly complex legal standards to the facts of the case.⁸

Defences of the civil jury system

Despite those criticisms, however, there are many defenders of the civil jury system, including the authors of this policy brief, who believe that civil juries can, and do, work well, and are competent to handle complex litigation.

Civil juries reflect societal values

Allowing juries a role in the judicial system ensures that the verdicts obtained from trials reflect societal values, in addition to strict legal precedent, in a manner that is also consistent with democratic principles. Though the parties to a suit have the most direct interest in its outcome, society has an enduring interest in seeing that justice is indeed just. As Thomas Jefferson wrote to Thomas Paine in 1789, 'I consider [trial by jury] as the only anchor ever yet imagined by man, by which government can be held to the principles of its constitution'. Juror participation also affords citizens, who may otherwise feel excluded from the process of governing, the opportunity actively to engage in civic duty.

The relative competency of judges and civil juries

A district court judge, while teaching an oral advocacy course at the University of Chicago, once observed that ordinary citizens will never be smarter,

7. *In re Japanese Elec. Products Antitrust Litigation*, 631 F.2d at 1086.

8. *Id.* at 1087.

more dedicated, more curious or more motivated to do a good job and get to the right answer, than when they serve on a jury. In large part, the authors' experiences confirm that fact. The remarkable thing about juries is that they are more than the simple sum of their parts, for while it is true that each juror brings different strengths and weaknesses to the jury table, it often seems that the individual weaknesses are cancelled out by the group, while the diverse strengths of different jurors combine to make the empanelled jury, as a whole, more perceptive, less biased, and more focused on the evidence than any individual alone could be.

On occasion, courts have echoed those sentiments. As the Ninth Circuit Court of Appeals has stated:

It does not necessarily follow that the parties would be any better off trying the case to a judge rather than a jury. Although judges are lawyers, they generally do not have any more training or understanding of computer technology or economics than the average juror. Whether a case involves computer technology, aircraft design, or accounting, attorneys must still educate the uninitiated about the matters presented in their case. While we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case. We do not accept . . . that a single judge is brighter than the jurors collectively functioning together.⁹

In the authors' opinion, the Ninth Circuit is exactly right. Shortcomings shown by a jury in deciding complex disputes are not evidence of a structural defect in the legal system, but instead mean only that jurors did not *understand* what they were being asked to decide, which means the lawyers, witnesses, and experts did not do a good enough job of communicating their case, and explaining its

complexities. And that is the point to be taken from this policy brief: as cases become more complex, the onus is on lawyers and litigants to explain those complexities in different, and more effective, ways. That is always the challenge of good advocacy, but in complex cases it is crucial. The civil jury system can handle almost anything put before it, as long as the jurors have, and *understand*, the information necessary to render a fair verdict on the evidence.

The challenge for lawyers and litigants: communicating complexity

Properly explained, there is no issue a lay jury simply cannot understand. The more complex and multi-faceted the case, the more the lawyer must work to make the information accessible to a jury. Experience shows that there is no concept beyond the reach of ordinary people, given the right teaching and analytical framework. There was a time, not so long ago, when the operation of a VCR was complex and daunting. Now, it would be hard to find someone who does not view the VCR as a somewhat simple relic, overtaken by the internet, online movie downloads, and streaming video to portable devices such as iPhones. The point is that normal people can learn technology, science, accounting, or economics, *as long as they are taught properly*. And that is the challenge facing today's trial lawyers: how to teach complex issues to a jury as quickly and concisely as possible, within the often rigid framework of the applicable rules of evidence and civil procedure.

This is not the place for a lengthy discussion of that topic, but suffice to say it can be easy for a lawyer to get lost in his or her own case: blind to the forest for the trees. Successful trial lawyers think about the case not so much from the perspective of their client, but from the perspective of the jury, starting with an assessment of what normal people know (or think they know) about the particular technology, science, accounting rule or economic theory in question. From there, a good lawyer can plan a presentation at trial – through fact witnesses, expert witnesses, and documents – that not only clears up any confusion about the matters at issue, but explains them in a way that demonstrates why his or her client should prevail.

9. *In re U.S. Financial Securities Litigation*, 609 F.2d at 431.

Technological advances have made it easier to compile and present complex, technical information in a way that will assist the jury. Graphical demonstratives, such as animations, movies, and diagrams, can be of great assistance in distilling relevant information into a digestible medium. Similarly, lawyers should also be encouraged to depart from rigid, chronological presentations of the evidence, in favour of thematic presentations that jurors can understand and use as an analytical framework when deliberating. By giving jurors themes, and then explaining how the evidence matches those themes, and reiterating those themes throughout the case, lawyers increase the likelihood that the jury, as a whole, will understand their client's position, if not rule in their favour.

Conclusion

The civil jury does work in complex suits. Like much of the modern-day legal system, it is imperfect, but it is far from clear that the mandate of the Seventh Amendment should be ignored as a matter of policy in complex cases, in favour of judge-alone trials. To the contrary, civil juries can deal with complex issues, as long as they are adequately equipped to do so by the lawyers and the litigants. It is incumbent upon lawyers, therefore, to gain the skills necessary not just to advocate, but also to teach.

The Foundation

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