

*The Decline of
the Civil Jury*

The Decline of the Civil Jury

Ellen E. Sward

PROFESSOR OF LAW
UNIVERSITY OF KANSAS

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2001 Ellen E. Sward
All Rights Reserved

ISBN 0-89089-948-7
LCCN 2001092013

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

*For my parents,
Francis L. and Daisy R. Sward*

CONTENTS

PREFACE	xiii
INTRODUCTION	3
I. Civil and Criminal Juries Compared	3
A. Societal Interest	5
B. The Parties	6
C. Burdens of Proof	6
D. Relief	7
E. Sources of the Rights to Civil and Criminal Juries	9
F. Powers of the Civil and Criminal Juries	10
G. Summary	12
II. The Use of the Civil Jury	12
III. Criticism of the Civil Jury	14
IV. The Plan of the Book	17
CHAPTER 1 WHY THE CIVIL JURY?	23
I. Modern Justifications for the Civil Jury	23
II. The Dispute-Settling Role of the Civil Jury	25
A. Why a Jury for Resolving Civil Cases?	25
1. The Public Nature of Criminal and Civil Dispute Resolution	26
2. The Jury as Equalizer	30
3. Summary and Conclusion	32
B. Inherent Limits on the Civil Jury's Competence	32
C. Summary	40
III. The Law-Making Role of the Civil Jury	40
A. Jury Nullification	41
B. The Regulatory Role of the Civil Jury	47
C. Summary	50
IV. The Political Role of the Civil Jury	51
A. Participation	52
1. The Rise and Fall of Participatory Democracy	52
2. Modern Ideas About Participation	56

B. Deliberation	59
C. Summary and Conclusion	62
V. The Socializing Role of the Civil Jury	63
VI. Summary and Conclusion	64
CHAPTER 2 THE EARLY HISTORY OF THE CIVIL JURY TRIAL	67
I. The Civil Jury in England	67
A. The Origins and Growth of the Civil Jury in England	68
1. Common Law Courts and the Jury	68
2. The Shape of the Jury	76
3. Summary and Conclusion	78
B. Control of the Civil Jury in England	78
1. Early Methods: Attaint and Fines	78
2. The New Trial	80
3. Law and Fact	81
4. Rules of Evidence	82
5. Summary	84
C. Courts of Equity	84
1. The Need for Equity	85
2. Equitable Rights and Remedies	86
3. Equitable Procedures	88
4. Summary and Conclusion	89
D. Summary	89
II. The Civil Jury in the United States	90
A. The Origins of the Civil Jury in the United States	90
B. The Development of Jury Control	95
III. Summary	98
CHAPTER 3 RECENT CHANGES IN THE CIVIL JURY'S ENVIRONMENT	101
I. Procedural Changes	101
A. Common Law and Equity Under the Federal Rules of Civil Procedure	102
1. The Path to the Federal Rules	102
2. The Common Law and the Federal Rules	104
a. The Writ System	105
b. Single-Issue Pleading Rules	107
c. The Jury	108
3. Equity and the Federal Rules	109
4. Summary	112
B. The Decline of the Adversary System	113
1. The Adversary System Defined	113
a. Characteristics	113
b. Justification	115

2. The Adversary System Under the Federal Rules	119
a. The Role of the Judge	119
b. The Role of the Parties	126
c. Continuous Trial	128
C. The Effect of These Procedural Changes on the Jury	129
II. Systemic Changes	130
A. The Rise of the Administrative State	130
1. The Use of Administrative Agencies	130
2. Reasons for Administrative Adjudication	131
a. Efficiency	132
b. Expertise	133
c. Uniformity	134
d. Control	134
3. Effect on Jury	135
B. The Litigation Explosion	136
C. The Knowledge Explosion	137
D. Summary	138
III. Substantive Legal Changes	138
A. Background: The Substantive Side of the Common Law	139
B. The Need for Certainty	141
C. The Rise of Statutes	142
D. Summary	143
IV. Political Change: The Diversification of America	144
V. Conclusion	145
Appendix 1 — Rule 16, 1938 Version	146
Appendix 2 — Rule 16, 1983 Version	146
Appendix 3 — Rule 16, 1993 Version	148
Appendix 4 — Civil Justice Reform Act	151
 CHAPTER 4 THE CONSTITUTIONAL RIGHT TO A CIVIL JURY TRIAL	 157
I. Modern Procedural Developments and the Seventh Amendment	157
A. The Historic Relationship Between Law and Equity	158
B. The Impact of Changing Procedures on the Right to a Jury Trial in Civil Cases	161
1. Twentieth Century Procedural Development	161
a. The Federal Rules of Civil Procedure	161
b. The Declaratory Judgment	161
2. The Right to a Jury Trial Under the New Procedures	162
C. Summary	168
II. The Impact of New Statutory Actions	169
A. The Evolution of the Two-Step Approach	170
B. Summary	177

III. Legislative Courts and the Seventh Amendment	178
A. Administrative Agencies	179
1. Justifying Non-Article III Adjudication	180
a. Article III Values: Separation of Powers and Judicial Independence	180
b. Origins of the Public Rights Doctrine	181
c. Recent Developments in the Justification for Agency Adjudication: The Balancing Test	185
2. The Public Rights/Balancing Test and the Seventh Amendment	190
3. Summary and Conclusion	195
B. Other Non-Article III Courts	196
1. Adjuncts	197
2. Courts for Claims Against the Government	199
3. Territorial Courts	201
IV. Other Seventh Amendment Interpretations	205
A. Waiver	205
B. Applicability of the Seventh Amendment to the States	206
IV. Summary and Conclusion	207
 CHAPTER 5 DEFINING THE CIVIL JURY	 209
I. The Structure of the Civil Jury	209
A. Number of Jurors	210
B. The Decision Rule: Unanimity	218
C. Summary and Conclusion	223
II. Composition of the Jury	223
A. The Inclusive Jury	224
B. The Peremptory Challenge	227
C. Threats to Jury Diversity	237
1. Special Juries	238
2. Exemptions	239
3. Jurors and Civic Responsibility	240
III. Summary and Conclusion	241
 CHAPTER 6 CONTROLLING THE EVIDENCE	 243
I. Exclusion of Evidence	243
A. The Rules of Evidence and the Jury	244
B. The Professionalization of Proof	251
1. Admission of Evidence in Complex Cases	251
a. Expert Evidence	252
b. Probabilistic Evidence	254
2. Expert Witnesses	257
C. Summary and Conclusion	259

II. Instructions to the Jury	260
A. Law and Fact	261
B. Burdens of Proof	262
C. Making Instructions Understandable	263
D. Structuring the Deliberations	264
E. Summary	267
III. Judges Commenting on the Evidence	267
IV. Summary and Conclusion	269
CHAPTER 7 CONTROLLING THE JURY'S DECISION-MAKING	271
I. Controls Based on the Law/Fact Distinction	271
A. The Law/Fact Distinction	272
B. Motion to Dismiss for Failure to State a Claim	274
C. Summary Judgment	275
D. Judgment as a Matter of Law	285
1. Origins of the Judgment as a Matter of Law	285
2. Modern Developments	288
a. Seventh Amendment Issues	288
b. The Standard for a Granting a Judgment as a Matter of Law	290
E. Summary	294
II. New Trial: Shades of the Common Law	294
III. Structuring Jury Decision-Making: Special Verdicts	299
IV. Removing Cases and Issues from the Jury	301
A. Jurisdictional and Substantive Legislation	301
B. Limiting Jury Discretion: Damage Caps	302
1. Legislative Caps	302
2. Supreme Court Action	305
3. Damage Caps and the Right to a Jury Trial	309
C. Conclusion	310
V. Preclusion	311
VI. Summary and Conclusion	316
CHAPTER 8 AVOIDANCE OF TRIAL	319
I. Incentives to Settle	319
A. Inherent Incentives	319
1. Cost of Litigation	320
2. Uncertainty	321
3. Time	322
4. Individual Factors	322
5. Summary and Conclusion	323
B. Judicial Management and Settlement	323
C. Summary and Conclusion	326

II. Alternative Dispute Resolution	326
A. “Voluntary” ADR	328
B. Court-Annexed ADR: The Newest Manifestation	334
1. Forms	334
2. Effectiveness of Court-Annexed Alternative Dispute Resolution	336
3. Constitutional Issues	337
C. Summary	337
III. Summary and Conclusion	338
CONCLUSION	341
Step 1: Understanding What Has Happened	341
Step 2: Defining the Essence of the Right to a Civil Jury Trial	345
Step 3: Accomplishing Real Jury Reform	349
BIBLIOGRAPHY	353
INDEX	385

PREFACE

This book started out several years ago as an article, but I soon learned that the topic is simply too big to be constrained within the pages of a single article. I also observed that, while much has been written about the civil jury, no one had written a book-length study of it that seeks to bring together all the disparate strands of jury analysis. There are book-length empirical studies of various aspects of the civil jury; there are books that constitute collections of essays or empirical studies on the civil jury; and there are books on the criminal jury, or on “the jury” more generally, with little effort to differentiate the civil from the criminal jury. But there are no recent overviews of the civil jury. Thus, this book fills a niche in jury analysis that is currently unoccupied.

Many people have helped in the production of this book, and I thank all of them for their contributions—which does not make them responsible for any errors I have made. Michael Hoeflich read the book through three times, at various stages of completeness. Other colleagues who read parts of it and offered helpful comments include Bob Casad, David Gottlieb, Rick Levy, Dennis Prater, Paul Schumaker, Sid Shapiro, Jan Sheldon, Tom Stacy, and Larry Wrightsman. I also benefited from comments from participants in a faculty colloquium at the University of Kansas. I had numerous research assistants over the years, including Mike Benkowitz, Suzanne Carey, Brandee Caswell, Amy Fowler, Terri Goodman, Peter Johnston, David McGhee, Jack Mercer, Jason Roth, Nicole Roths, Jan Sandoval, and Rob Vaught. I gratefully acknowledge the support of the University of Kansas General Research Fund and of funding from the University of Kansas School of Law. Finally, I thank my family and friends, who have kept me grounded and helped me become the person I am today.

