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
For my parents,
Francis L. and Daisy R. Sward
# Contents

## Preface

### Introduction

- I. Civil and Criminal Juries Compared
  - A. Societal Interest
  - B. The Parties
  - C. Burdens of Proof
  - D. Relief
  - E. Sources of the Rights to Civil and Criminal Juries
  - F. Powers of the Civil and Criminal Juries
  - G. Summary
- II. The Use of the Civil Jury
- III. Criticism of the Civil Jury
- IV. The Plan of the Book

## Chapter 1 Why the Civil Jury?

- I. Modern Justifications for the Civil Jury
- II. The Dispute-Settling Role of the Civil Jury
  - A. Why a Jury for Resolving Civil Cases?
    - 1. The Public Nature of Criminal and Civil Dispute Resolution
    - 2. The Jury as Equalizer
    - 3. Summary and Conclusion
  - B. Inherent Limits on the Civil Jury’s Competence
  - C. Summary
- III. The Law-Making Role of the Civil Jury
  - A. Jury Nullification
  - B. The Regulatory Role of the Civil Jury
  - C. Summary
- IV. The Political Role of the Civil Jury
  - A. Participation
    - 1. The Rise and Fall of Participatory Democracy
    - 2. Modern Ideas About Participation

vii
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
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
CONTENTS

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
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.