Jury Trial and the Principles of Transnational Civil Procedure

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Table of Contents

I. Summary

The Principles of Transnational Civil Procedure are compatible with jury trial, as in the American common law system, and also with the nonjury trial procedures in other common law systems and in the civil law systems. From a comparative law perspective, it is instructive to consider the procedural virtues of the jury system, which are often ignored, while also considering the off-voiced criticisms of the jury system. These procedural virtues include ones that are "mechanical" but nevertheless important.

II. Introduction

The Principles of Transnational Civil Procedure recognize that jury trial is generally a matter of right in civil litigation in the United States, but is unheard of in civil litigation in the civil law systems and is used

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only in limited circumstances in other common law systems. This circumstance poses many interesting issues, some of a technical nature and others of more fundamental character. The Principles therefore provoke academic and professional consideration of important issues concerning administration and adjudication in civil justice. This essay is a partial introduction to these issues.

III. Jury Trial with Comprehensive Pretrial Discovery

American lawyers of the present generation presuppose that comprehensive pretrial discovery is available in jury cases. This presupposition rests on the following propositions:

- The Federal Rules of Civil Procedure provide for discovery through party and witness depositions, disclosure of documents, and interrogatories including demand for admissions.[1]

- The scope of discovery under the Federal Rules is not limited to admissible evidence, but extends to matter "reasonably calculated to lead to the discovery of admissible evidence."[2]

- The pleading requirements under the Federal Rules include a very broad definition of relevance,[3] thereby placing only broad limits on the issues regarding which evidence might be admissible.

- The prevailing judicial attitude in administration of the federal discovery rules has been latitudinarian, allowing discovery without much external restraint.

- Under the Federal Rules, no differentiation is made between jury cases and nonjury cases so far as breadth of discovery is concerned.

- The same general pattern exists in most all states, inasmuch as most have adopted discovery rules patterned on the Federal Rules.

There is restraint in use of discovery in most civil cases in American litigation.[4] However, restraint evidently is a function of cost

1. *See* Fed. R. Civ. P. 26.
2. *See* Fed. R. Civ. P. 26(b)(1).
3. *See* Fed. R. Civ. P. 8(a)(2).
4. *See* Thomas E. Willging, *An Empirical Study of Discovery and Disclosure*

considerations taken into account by the advocates, particularly in cases involving limited amounts. In most "routine" cases, discovery will address only a few witnesses and a few documents. In "big cases," those having high monetary or socio-political stakes, extensive discovery is the norm.

IV. Jury Trial with Very Limited Discovery

Comprehensive discovery was not the norm in previous generations. Prior to adoption of the Federal Rules in 1938, discovery was tightly limited.[5] In many states depositions were permitted only of immediate parties or of witnesses who would be unavailable for trial, for example, because of terminal illness. In some states the restrictions on party depositions were even tighter. Discovery of documents was generally limited to documents clearly relevant to the dispute and which could be specifically identified. Moreover, in most jurisdictions a distinction was maintained between actions at law (in which jury trial was guaranteed) and suits in equity (in which jury was not generally available). Within that ancient framework, the procedure of discovery was associated with suits in equity, whereas the tradition in actions at law was that of no discovery. Statutes permitting discovery were interpreted against that tradition.

Perhaps equally important, the bench and bar of the pre-1938 era considered that discovery was exceptional. Indeed, disclosure of evidence before trial was generally considered an invasion of privacy, or, worse, an invasion of the lawyer-client relationship or the lawyer's professional identity. A residue of that orientation is evident in the famous case of *Hickman v. Taylor*[6] where the courts were startled to confront the implications of the broad scope of Rule 26(b)(2). The response was invention of the work product evidentiary privilege.

Very limited pretrial discovery was thus the American procedural norm in jury triable cases prior to the Federal Rules. And it was in that legal milieu that the constitutional guaranties of jury trial were adopted.

The federal jury trial guaranty was established in the Seventh Amendment, adopted in the Bill of Rights in 1791. The counterpart state guarantees were adopted at various dates, some prior to the Seventh Amendment, others still later as the states in the West were settled and then brought into the Union. However, as far as I have been able to

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Practice Under the 1993 Federal Rule Amendments, 39 B.C. L. REV. 525 (1998).

5. *See generally* James Fleming, Jr., *Discovery*, 38 YALE L.J. 746 (1929); FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE (5th ed. 2001).

6. *See* Hickman v. Taylor, 329 U.S. 495 (1947).

determine, all of the states except Hawaii and Alaska adopted their constitutional guaranties of jury trial when their contemporary procedural regimes were based on the old tradition of very limited discovery. And, prior to 1938, the federal courts employed those state procedures under the mandate of the Conformity Act.[7] Thus both state and federal courts prior to 1938 conducted jury trials on the basis of very limited discovery.

V. The Propriety of Discovery in Modern Civil Litigation

This is not to say that the old pre-1938 regime was as things should be.

Substantial pretrial discovery is, in my opinion, a necessary and proper element of modern civil litigation. One of the notable features of the Principles of Transnational Civil Procedure is recognition of this element, through procedures for pretrial "disclosure" of evidence.[8] "Disclosure" is a less intimidating term than "discovery," because the latter can signify the wide-open variety experienced in some litigation in this country.

In particular, substantial scope for discovery of documents is justified by the fact that typical transactions in today's world involve bureaucratic (or legal entity) interactions: individuals dealing with government agencies and officials, or with bureaucratized business enterprises; bureaucratized business enterprises dealing with government agencies, or dealing with each other; etc. Documents are the manifestations of the bureaucratic process, government and private entities. In modern commercial litigation, depositions ordinarily supplement and illuminate the documents.

Hence, the Principles of Transnational Civil Procedure contemplate and provide for substantial pretrial discovery in all commercial civil litigation, whether the ultimate trial is before a jury (as in the American system) or before a judge or judges without a jury, as in virtually all other modern legal systems.

VI. The Significance of Jury Trial

So what is the special significance of jury trial in civil cases, if any?

The response to this question can be considered as an exploration of a peculiar American procedural trope. It can also be considered as a comparison of the various presuppositions about procedural justice that prevail in modern legal systems. Such a comparison fully pursued would

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7. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

8. Principle 16. "Access to Information and Evidence." *ALI/UNIDROIT Principles of Transnational Civil Procedure* (2004).

lead to the depths, or height, of jurisprudence. Almost a half-century ago Professors Harry Kalven and Hans Zeisel pursued that inquiry in their monumental study, *The American Jury*.[9]

Probably the most basic issue concerning jury trial is the issue that Kalven and Zeisel put front and center: What difference is there between verdicts reached in jury trials and the determinations that were or would be made by a judge addressing the same evidence?

Kalven and Zeisel gave an exquisite performance in responding to this interrogatory. Their basic finding was that juries resolve most cases about the same way as would a judge, but tend to be more liberal toward plaintiffs in civil cases and more lenient toward defendants in criminal cases.[10] We may well wonder whether that pattern would still hold today, particularly in criminal where contemporary juries may be more "judgmental" toward defendants.

That there are differences between the intellectual apparatus with which juries address and resolve disputed forensic issues, and that with which judges address them, seems obvious. Indeed, if there were not such differences, the whole point of the constitutional guaranties of jury trial would be moot. Moreover, the substantial unease with which jury trial is viewed outside the United States would be incoherent. But the constitutional issue is not moot and neither, in my opinion, is the unease about jury abroad incoherent.

Adequately exploring the issue of jury-judge difference would require consideration of differences between juries and judges in education, professional training, experience in life generally, class and economic differences, perhaps regional and religious differences, and experience in encounters with legal disputation. The latter difference points to the fact that most judges are veterans in dealing with conflicting testimony and disputed interpretations of events, and accordingly somewhat hardened, while jurors almost always are novices in such matters. Perhaps it is this difference that is most significant. But measuring any one of these dimensions almost defies social-scientific method, as Kalven and Zeisel recognized.

In this essay I have a much more modest agenda: To identify an important "mechanical" difference between jury trial and trial to a professional judiciary.

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9. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966). *See also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986); ROBERT E. LITAN, VERDICT: ASSESSING THE CIVIL JURY SYSTEM (1993); Nancy J. King, *Jury Research and Reform: An Introduction*, 79 JUDICATURE 214 (1996).

10. *See* Kalven, *supra* note 9.

VII. The Mechanical Significance of Jury Trial

Employing juries to decide questions of fact entails at least three mechanical effects on the conduct of civil litigation. At least one of these has long been noted: Jury trials typically require more trial time than the same case would require if tried in the same way to a judge. Some estimates indicate that the jury trial requires about one and a half to two times as long as the same trial before a judge.[11] The difference arises from the need to conduct jury selection, including voir dire examination of prospective jury members; to provide more extensive preliminary statements by the judge, and perhaps also by the advocates, describing the case to the prospective and empanelled jurors; to afford more extensive opening statements and summations by the advocates; and to permit more methodical, perhaps laborious, presentation of testimony and exhibits.

However, the comparison here is between a trial to a jury and "the same trial" before a judge. In fact, it would be unusual that there be "the same trial." The very measures outlined above that make for a longer trial in a jury case would not, at least ordinarily, be entailed in a nonjury case. Hence, the comparison is more or less "apples to oranges."

VIII. More Methodical Presentation

Nevertheless, it seems clear that the same underlying adjudication typically would require more time if presented to a jury than if presented to a judge. It is by no means clear, however, that this is a loss of efficiency or the incursion of additional cost. The more methodical presentation may simply be a better adaptation of forensic technique.

In particular, a more expedited presentation to the court may be made on the assumption of a quicker and deeper comprehension on the judge's part, compared to a jury. But that assumption could be mistaken. There is an old adage in the common law tradition that a judge often is essentially a thirteenth juror. Traditionally, this signifies that a judge understand facts the same way as an ordinary person, and not in any peculiar "judicial" way. But the adage can also signify that a judge could misunderstand the facts in the same way as a juror. That interpretation would dictate that a presentation to a judge should be as methodical as to a jury.

IX. The Concentrated Hearing

In any event there are at least two other mechanical aspects of jury trial that warrant attention. These aspects flow from the fact that the jury

11. *See id.*

is not constituted of professional judicial officers, but is instead recruited ad hoc from the other employments. As a concomitant of their service being part-time and "amateur," members of a jury generally want to get done with their service. Most jurors regard their service important and are pleased to have participated, at least if the procedure for summoning and empanelling them is reasonably efficient.[12] But they have other things going in their lives.

Hence, the evidence to be presented in a jury trial must be in what is called in the common law a "trial" and in the civil law a "concentrated hearing." The typical jury trial lasts about three days, although there are salient exceptions: Some trials have taken weeks and months, a few perhaps even a year. However, even long trials generally proceed continuously and without recess, except for weekends. This model of continuous hearing governs typical nonjury proceedings in common law systems. Even when held before a jury without a judge, a common law plenary hearing is a "trial."

In contrast, the classic civil law proceeding consists of a series of short hearings, each of which could be, for example, reception of testimony from one witness. These hearings will be spaced apart temporally, week to week, or more commonly, month to month. Institutional memory traditionally is secured by memoranda to the case file. If the tribunal is constituted of several judges, that record may be the only source of evidence available to non-scrivener members of the panel. If the issues are relatively complex, it may be months or years before everything in evidence has been received. And the further task remains of preparing a decision, written up by a judge as sole arbiter or as amanuensis for a panel.

The mechanic of a common law trial is quite different. In a jury trial, or a judicial trial modeled on such a trial, all the evidence is received before any of it is subject to official evaluation. Institutional memory for a jury is the collective recollection of its several members, and "oral" and "aural" process because jurors by tradition were not permitted even to keep notes. Institutional memory during a trial before a judge in the common law system is whatever the judge decides to employ, such as taking notes. In American procedure there is no requirement of a reasoned decision, by either jury or judge. A jury simply provides its result, in the form of a verdict. A judge is required to provide only a formal set of "findings of fact and conclusions of law."[13]

In the common law trial, the trier of fact has the "whole picture" prior to proceeding to judgment. This different appreciation of the

12. *See id.*
13. Fed. R. Civ. P. 52.

evidence must have perceptual, intellectual and normative significance. Reflection on those dimensions must await another day.

X. The Imperative to Go Home

After submission of the evidence in the concentrated hearing, the members of the jury want to adjourn and go home. To obtain their release from official duty, they must reach a decision, after due deliberation to be sure, but decision for sure. A hung jury is distressing to the litigants, or at least one of them, but it is a complete waste as far as most of the jurors are concerned: If they are unable to reach decision, their service has been in vain.

The contrast with some judicial proceedings is substantial, even stark. Efficient judges, and there are many, want to receive a case in compact and focused form, and will rule promptly and firmly. But some judges in many systems, and many judges in some systems, are not thus efficient. Rather, they receive the evidence in leisurely and meandering fashion, strung out over months or even years. And thereafter they may take the case, in the American legal phrase, "under advisement." I am told that in some civil law systems this period of official inaction, supposedly one of deliberation, often persists for months or even years.

Lawyers in this country unfortunately have similar experience in aspects of American procedure that do *not* involve a trial or concentrated hearing on the merits, but rather some pretrial matter of limited scope. In contemporary American procedure, a civil dispute resulting in an actual trial is a relatively infrequent occurrence. Something over 95% of civil cases, federal and state, are resolved short of trial.[14] Instead, most civil litigation consists of pretrial maneuvering and chaffering by the advocates, and pretrial motions and requests presented to the court. These pretrial maneuvers typically involve issues of law concerning procedure or the substantive law governing the merits, particularly disputes over discovery. Discovery disputes in turn often involve both procedure and the merits.

In fact, as reported by many lawyers and judges, contemporary American civil litigation tends to be focused on a pivotal procedure, the Motion for Summary Judgment.[15] The issue in summary judgment is having regard for all the discovery which has been obtained, whether there is a "genuine issue of fact" remaining for determination. In simpler terms, the issue is whether there is disputed evidence that must be

14. *See* The Honorable Patrick J. Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REV., Vol. 28, No. 2 (2004), *available at* http://www.rand.org/publications/randreview/issues/summer2004/28.html.

15. *See* Fed. R. Civ. P. 56.

submitted to a jury for determination. If the summary judgment motion is resolved in a determination that there is no such issue, judgment follows accordingly. If it is resolved in a determination that there is such an issue, the case theoretically will go to trial. In fact, most such cases then are resolved by settlement. Only a small residue will actually go to trial.

In light of this pattern, American lawyers often suffer the same experience as their civil law counterparts: serial hearings, not a concentrated hearing, followed by long intervals before a judicial resolution is obtained.

XI. Conclusion

The mechanism of jury trial has attractive mechanical features. In a jury trial the issues and the evidence must be presented clearly and simply, because jurors are amateurs in their adjudicative task. The evidence must be presented to a jury in a concentrated hearing because the jurors, being amateurs, have other vocations and personal affairs to which they must return. The jury must reach a decision immediately after the hearing because their adjudicative authority continues only while they function together as such. Thereafter they adjourn *sine die.*

These mechanics continue to be attractive features of jury trial. At the same time, the tendency in contemporary American civil litigation is toward disposition through pretrial motion practice, in serial hearings dealing with subcategories of the dispute, which foreclose jury trial in a high fraction of the cases. In this respect, American civil procedure appears to be losing such mechanical advantage as jury trial affords, and is converging toward the model in nonjury systems.[16] The Principles of Transnational Civil Procedure accommodate both.

16. *Compare* John H. Langbein, *The German Advantage In Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).