

# The Case for the Retention of the Unanimous Civil Jury

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provisions do not guarantee trial by jury in all cases. The Supreme Court of Pennsylvania ruled that in cases falling within a class where trial by jury was not a matter of right when the Constitution was adopted, the constitutional provision that trial by jury shall be as heretofore enjoyed has no application.<sup>27</sup> The right to a jury trial guaranteed by the several constitutions is not applicable to new statutory proceeding. The guarantee specifically refers to proceedings which were in accord with the common law. Thus, there is no limitation on the power of the legislature, which can prevent the court from adopting new modes of redress for civil wrongs.<sup>28</sup>

Finally, in 1919, the United States Supreme Court ruled that neither the constitutional guarantee of the seventh amendment, nor the constitutional guarantees of the several states, prohibits the adaptation of trial by jury to the needs of the administrative system.<sup>29</sup>

Such decisions opened the way to modification of the "jury" as it was known at common law. Many states today have departed from the unanimity requirement, requiring some form of a majority vote. Others have reduced the size of the civil jury and still others have adopted both measures.<sup>30</sup>

These modifications in the common law concept of the jury are indicative of the struggle that modern court systems face in attempting to adapt the institution of the civil jury trial to the increasing demands of a complex, urban society. However, these modifications have failed to solve the problems created by the civil jury system and there continues to be agitation for further, more drastic modification, and even abolition of the civil jury system in its entirety.

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<sup>27</sup> Fleming's Est., 265 Pa. 399 at 407, 408 (1832).

<sup>28</sup> Rhiner v. Clark, 51 Pa. 96 (1865), *Hurtado v. People*, 110 U.S. 516 (1884).

<sup>29</sup> *Ex parte* Peterson, 253 U.S. 300 (1920).

<sup>30</sup> See McCART, TRIAL BY JURY 195-98 (1964); JOINER, CIVIL JUSTICE AND THE JURY 220-21 (1962).

## THE CASE FOR THE RETENTION OF THE UNANIMOUS CIVIL JURY

### INTRODUCTION

The history of the jury system dates back as far as the time of the Normans.<sup>1</sup> It is part of our heritage and was one of the things fought for in the

<sup>1</sup> For a detailed analysis of the historical background of the jury system, see 15 DE PAUL L. REV. 398 (1966).

Declaration of Independence. The Illinois Constitution provides that "[t]he right of trial by jury as heretofore enjoyed, shall remain inviolate, but the trial of civil cases before justices of the peace by a jury of less than twelve men, may be authorized."<sup>2</sup>

This provision guarantees the right to trial by jury. This right has been guaranteed in Illinois ever since the state was organized. There have been several constitutions in Illinois, and this right has been carried forward in each of them. And yet, never has the right of trial by jury been defined. The provisions in each do, however, mean the same thing. The right of trial by jury is as it existed at common law, and as it was enjoyed at the adoption of each of the respective constitutions.<sup>3</sup> This means a jury of twelve people with the requirement of unanimity.

The common law civil jury, with the unanimity requirement, should be maintained primarily because it provides protection of the minority viewpoint and will result in a greater acceptance by the people than will any alternative method.

In recent years, there has been a great deal written in favor of the abolition of the civil jury system.<sup>4</sup> There also has been much written suggesting a modification of this system. It is the purpose of this discussion to bring out the necessity of the retention of the unanimous civil jury. In so doing, many of the criticisms that have been leveled against the civil jury will be entertained. Many of these criticisms bring out disadvantages of the jury system which, as will be shown, have already been corrected in Illinois by various statutory reforms. Criticism of the jury system should not be sufficient to warrant a change. Before any change is made, there should be an alternative system which is better than the jury. It is the position of this discussion that despite these criticisms, the advantages of the civil jury outweigh the advantages of the alternative systems which have been proposed to replace the jury.

#### DEFINITION AND FUNCTION

A jury can be defined as "a temporary body, constituted for the purpose of deciding in the administration of civil and criminal justice, such disputed facts as may arise in cases brought before it."<sup>5</sup> A jury determines facts for final adjudication. Mr. Justice Maxwell, in the case of *Ney v. Yellow Cab Co.*,<sup>6</sup> discusses the jury and states:

<sup>2</sup> ILL. CONST. art. II, § 5.

<sup>3</sup> *Stephens v. Kasten*, 383 Ill. 127, 132, 48 N.E.2d 508, 510 (1943).

<sup>4</sup> Goldman, *Substitute and Supplement for Civil Juries*, 28 ALBANY L. REV. 204 (1964). See also, Sarpy, *Civil Juries, Their Decline and Eventual Fall*, 11 LOYOLA L. REV. 243 (1962-63); Duane, *Civil Jury System Should Be Abolished*, 12 J. AM. JUD. SOC. 137 (1929).

<sup>5</sup> MOSCHZISKER, A TRIAL BY JURY 5 (2d ed. 1930).

<sup>6</sup> 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

The right of trial by jury is recognized in the Magna Charta, our Declaration of Independence, and both our State and Federal Constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues, such as negligence and proximate cause, the fact that fair minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its function.<sup>7</sup>

The jury ideally consists of twelve men. After determining the facts in issue, the jury applies the law to the facts thus determined in accordance with the trial judge's instruction in that regard. The jury thus arrives at a final verdict for one side or the other on every controversy.<sup>8</sup>

It has been said that the "jury injects the compassion of the community so as to mollify the harshness and fragmentary experience of the coldly professional judge."<sup>9</sup> It has also been said that "over the years, [the] bulwark of liberty has been the right to trial by jury."<sup>10</sup>

#### UNANIMITY

The common law jury required a unanimous verdict, and this requirement has not been changed in Illinois. Some states require a ten-twelfths vote,<sup>11</sup> others nine-twelfths,<sup>12</sup> and some eight-twelfths.<sup>13</sup> Still others require a mere majority.<sup>14</sup>

Controversy exists as to the origin of the requirement of unanimity.<sup>15</sup> Most believe the true origin of unanimity was from the "afforcing" of the jury. Under this practice, where members were not unanimous, new members were added until twelve agreed. It was a natural step from the "afforcing" of the jury to the unanimity rule of today.<sup>16</sup>

In most instances, the first ballot of the jury results in a majority of the jurors being united.<sup>17</sup> A system that allows for a verdict with less than unanimity could result in a hasty decision.

<sup>7</sup> *Id.* at 84, 117 N.E.2d at 80.

<sup>8</sup> MOSCHZISKER, *op. cit. supra* at 6.

<sup>9</sup> Note, 21 U. PITT. L. REV. 52, 55 (1959-60).

<sup>10</sup> Lambert, *Shall We Stand by Jury Trial*, 17 NACCA L.J. 23, 23 (1956).

<sup>11</sup> McCART, TRIAL BY JURY—A COMPLETE GUIDE TO JURY SYSTEM 195-98 (1964). Among the states requiring a ten-twelfths vote are Minnesota and New Jersey.

<sup>12</sup> *Ibid.* Among the states requiring a nine-twelfths vote are New Mexico and Arkansas.

<sup>13</sup> *Ibid.* Among the states requiring an eight-twelfths vote are Virginia and Montana.

<sup>14</sup> *Ibid.* Among the states requiring a majority are Wyoming and Iowa.

<sup>15</sup> For a detailed discussion of the origin of the jury see 15 DE PAUL L. REV. 398 (1966).

<sup>16</sup> MOSCHZISKER, *op. cit. supra* note 5 at 297.

<sup>17</sup> *Id.* at 300.

The real advantage of the unanimity requirement is seen in the protection it gives to the minority viewpoint. Where a unanimous verdict is required, the minority cannot be ignored. Each point they make will have to be considered by members of the majority side who must necessarily try to understand the position of the minority and also the reason behind the minority position. The requirement of unanimity allows the minority to speak and have its point well taken and understood by all jurors. In a system where some majority is required, since the minority rights are jeopardized, the views of one or two jurors could well be ignored, and often an improper decision could be rendered. But with unanimity, intelligent discussion in the jury room could well lead to the majority changing their position. The result of a unanimous position should be the resolution of all possibilities. The result should leave no doubt in the minds of any juror. Intelligent jury deliberation should achieve this result.

This leads to what Judge Moschzisker called the biggest factor for the unanimity rule. The unanimity rule will bring a "greater degree of general satisfaction and public contentment than could be obtained through any other system."<sup>18</sup> Also, it apparently will be unquestioned that a unanimous decision by a jury of twelve members who are representative of the community will be more readily accepted than a decision by a jury majority or a decision by a single judge. According to Judge Moschzisker, this "more than any other reason accounts for the origin and long continuance of the unanimity rule."<sup>19</sup>

Primarily, the objections to unanimity are couched in terms of time. That less than twelve men will agree before all twelve could do so, cannot be disputed. It has not been shown however, how much time is saved by a majority-jury system. Consequently, such savings cannot be argued to displace the advantages of the unanimity system.

Although it has been suggested that people do not like jury trials, there has never been general public criticism of the system.<sup>20</sup> Even if this were true and people do not like the jury, the following statement is worthy of consideration:

But, is it not also true that the polling places on registration day are sometimes the loneliest places in town? And on primary days, yes, even on election day, the voting booth sometimes sees fewer customers than the telephone booth. The fact that the citizen is not always anxious to exercise his democratic rights and prerogatives is hardly an argument in favor of their abolition. . . .<sup>21</sup>

<sup>18</sup> *Id.* at 299.

<sup>19</sup> *Id.* at 300. See Hogan, *Joseph Story on Juries*, 37 ORE. L. REV. 234, 254 (1958), wherein it is stated that the unanimity rule "gives a satisfaction and confidence to the public mind" which could hardly be attained from a majority verdict.

<sup>20</sup> THE DEFENSE RESEARCH INSTITUTE, INC., TRIAL BY JURY—PRESERVE IT 11 (1965).

<sup>21</sup> Edelstein, *A Kind Word for the Civil Jury*, 17 NACCA L.J. 302, 312 (1956).

One study revealed that 70% of those polled favored jury trials, and only 9% were in favor of non-jury trials.<sup>22</sup> Of those who had served as jurors, 77% approved jury trials.<sup>23</sup> To eliminate the jury system is to take away the one link the people have with the judiciary. Apparently, people do like the jury system and do want to serve as jurors.

#### CIVIL JURY SYSTEM

There have been many criticisms leveled against the jury system in recent years. These criticisms can be grouped in three categories: competency, time and miscellaneous criticisms.

In considering all criticisms, it is important to note that the most popular alternative to the jury is the judge sitting as the trier of the facts. One other oft-mentioned alternative to the jury system is the arbitration board. An arbitration board consists of a definite number of attorneys who serve for a definite period of time. Therefore, in many respects, the board and the judge are similar, and except where specifically mentioned to the contrary, any reference to the judge can be considered as equally applicable to the arbitration board.

#### COMPETENCY

The criticisms which fall within this category are that the jury is incompetent to perform the task, that their verdicts are often inconsistent, that jurors are easily swayed by courtroom dramatics and are sympathetic towards an injured plaintiff, and that the jury is not bound by law.

It is generally accepted that no individual can act completely impartially. Every decision of every individual is influenced to some degree by a bias or prejudice, regardless of how objectively that person attempts to act. The words bias or prejudice, as used here, have reference, of course, to one's subconscious. Each juror will be influenced in making his decision by his own personal bias. This is not to infer that an individual would intentionally allow his personal feelings to dictate a decision, but the element of bias does exist. This brings out the real advantage of the jury. The jury as a whole is composed of a body of twelve. Each of the twelve member's bias will be balanced by the other members. If one makes a mistake, it is not fatal. In discussion among the jurors, the mistake of one may be discovered and corrected, and the net result will be a balancing of the twelve.

Where the judge is the trier of the facts, however, he sits before case after case continuously. Although no two cases are identical, the cases could begin to fall into a pattern and most likely will become categorized in the judge's mind.

<sup>22</sup> THE DEFENSE RESEARCH INSTITUTE, *op. cit. supra* note 20 at 11.

<sup>23</sup> *Ibid.*

The occupational hazard of the judiciary is hardening of the categories and when a judge sees similar situations before him, time and time again, year after year, they may, unconsciously on his part, merge into one. . . . Obviously, I do not mean to imply that jurors are less subject to influence by personal idiosyncracies and value standards. But, that is precisely the point. With twelve of them, it seems to me there is less likelihood that a verdict may be distorted by the personality factor of any one juror, and that there is more likelihood of a qualitatively better verdict based on the reconciliation of twelve varied temperaments and minds.<sup>24</sup>

Soon, after hearing only a part of a case, the instant case might fall into a predetermined category, and for all practical purposes, the case would be decided at that point. This result is, of course, highly undesirable, and brings out one of the primary disadvantages of the proposed alternatives to the jury.

Each and every case deserves individual consideration, and to categorize is to deprive the parties of a just hearing on their rights. Regardless of the efforts of a judge to avoid categorizing, it would most probably occur.

If the judge is the sole trier of the facts, his decision will be unchallenged. A mistake by the judge would be fatal. There would be nothing to counterbalance his bias. His mistake cannot even be considered on appeal, since the appellate court will not look into a question of fact. It has been said that, even among judges, some are plaintiff-oriented and others favor the defendant.<sup>25</sup> Seldom do jurors know either of the lawyers in large metropolitan areas. However, "judges often know one or both of the lawyers and impartiality becomes more difficult."<sup>26</sup>

Due to the presence of innocent judicial bias, lawyers, in a search to find a sympathetic trier of the facts, are led to the practice of judge-shopping. The growth of judge-shopping could increase public criticism of the judicial system and would warp the search for truth.<sup>27</sup> Moschzisker, a former judge, stated

as judges of the creditability of witnesses, the weight of evidence in the average case, or the guilt or innocence of those charged with criminal offenses, and for the ascertainment of unliquidated damages, my experience convinces me that jurors, through the general verdict, can render better service than is possible by any fixed tribunal composed of one or more members with professionally trained minds.<sup>28</sup>

The disadvantage of the judge or arbitration board as the trier of the facts brings out another primary advantage of the jury system.

The jury is dismissed at the close of the case. Each new trial has a new

<sup>24</sup> Edelstein, *supra* note 21 at 307.

<sup>25</sup> THE DEFENSE RESEARCH INSTITUTE, INC., *op. cit. supra* note 20 at 6.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> MOSCHZISKER, *op. cit. supra* note 5 at 68.

jury. The jurors are selected<sup>29</sup> in such a way that its members represent people from all walks of life and of widely divergent interests. There is not any apparent chance for a case to fall into a category or fit into a pattern, since the jury is not affected by precedent.

The very advantage of the jury system is to provide a cross section of jurors representative of the community standards, rather than a certain class. If the jury selection process does not achieve this, the fault lies in the method of selection and not in the jury system. A proper method of juror selection will result in jurors who are competent to undertake the task of finding the facts, receiving the law from the court and putting the law and the fact together.<sup>30</sup>

Consistency should not be expected from juries. Each case is different and is heard before a new jury. The only way we could measure inconsistency would be to have the same case tried twice in front of two different juries.

Closely related to this area of bias and composition of the jury is the allegation that it is influenced by "courtroom dramatics" and often is sympathetic towards an injured plaintiff. This is merely one factor that could influence the jurors' decision. Not all jurors will be affected and not all who are affected will react in the same manner. The end result hinges on the same basic safeguard. The jury decision is entrusted to twelve people, and the effect of trial techniques on any one individual hopefully will be balanced by the effect on the other jurors. This should be accomplished by the corrective factor of intelligent discussion among the jurors during the period of deliberation.

The judge, as well, could be affected by various trial techniques. Another possibility is that the judge will subconsciously "bend over backwards" to avoid such a result. The judge's decision as to the facts is final, regardless of how it is reached.

The Honorable David Edelstein, United States District Court Judge for the Southern District of New York, said there are two primary elements to the jury's job, determination of facts and a decision based on these facts. He further stated, "it is my opinion that twelve jurors can do their jobs better in the long run than one judge."<sup>31</sup>

Judge Edelstein continued, stating that judicial opinions rendered in all courts, to a certain extent, represent the personal impulses of the judge in relation to the situation before him. These impulses are based on the various things that happen to the judge during his lifetime. "I do not mean

<sup>29</sup> Each state has its own statute governing the selection of jurors.

<sup>30</sup> Green, *Juries and Justice—The Jury's Role in Personal Injury Cases*, 1962 U. ILL. L. F. 152, 157 (1962).

<sup>31</sup> Edelstein, *supra* note 21 at 307.

to imply that judges are peculiarly subject to the influences of their backgrounds and value standards. But, background and value standards are not altered when one puts on a judicial robe."<sup>32</sup>

There is no problem in making the jury feel they should be bound by the law,<sup>33</sup> since the jury really has nothing to do with the law. The jury determines the facts and applies the facts to the instructions given by the court. There is criticism, however, that the jury disregards the instructions of the judge on points of law<sup>34</sup> and applies, what amounts to, a doctrine of comparative negligence. Safeguards, as provided in the Illinois Civil Practice Act, prevent the possibility of the jury reaching an improper verdict based on this doctrine commonly referred to as comparative negligence. The Illinois act, states that

the jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact stated to them in writing. . . . When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may render judgment accordingly.<sup>35</sup>

For example, assume the plaintiff is guilty of a very slight degree of negligence. The defendant, however, is guilty of a great deal of negligence. The defendant could request the jury to find specially on the following material question: Was the plaintiff driving in excess of a reasonable speed? In Illinois, any negligence by the plaintiff will defeat his action. If the jury found the plaintiff was driving in excess of a reasonable rate of speed, the jury would answer affirmatively to this special interrogatory. While the verdict based on comparative negligence would be in favor of the plaintiff, it would be inconsistent with the answer to the special interrogatory, and the act provides that the latter will prevail. Hence, the defendant is protected.

#### TIME

Perhaps the primary factor that has caused the recent interest in the jury system is the current backlog of jury cases in Illinois, particularly Cook County. For example, the total number of jury cases over \$5,000 pending in the Circuit Court of Cook County at the end of December, 1965, was 48,707.<sup>36</sup>

Some of the more common criticisms relating to time are the following: length of jury instructions; length of time involved in selection of a jury; cases that would result in settlement except for anticipation of the jurors'

<sup>32</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>33</sup> Hogan, *supra* note 19 at 253.

<sup>35</sup> ILL. REV. STAT. ch. 110, § 65 (1965).

<sup>36</sup> *Bulletin by the Supreme Court Office of the Deputy Court Administration for Cook County* [hereinafter cited as *Deputy Court Administrator*], 65 SB 13 (1965).

generosity; hung juries; changes in venue; objections to testimony; explanation by the judge on the admissibility of evidence; and translation of arguments from legal terminology to language the jury can understand.<sup>37</sup>

"Justice delayed is justice denied." This phrase is often repeated in reference to the backlog problem. The inference is that the jury is the primary cause of the backlog, and elimination of the jury would mean elimination of the backlog.

Population has been increasing constantly. The automobile industry, likewise, has experienced enormous growth. A natural consequence of these two factors is an increase in the number of personal injury cases. It appears logical that the same number of courts and judges that were in operation twenty years ago could not adequately handle today's quantity of cases. It would be desirable for the judicial system to keep pace with the population by increasing the number of courts and judges. Florida, for example, has no backlog due, primarily, to a constitutional provision that requires a circuit judge in every judicial district for each 50,000 in population.<sup>38</sup>

The state legislature apparently recognized the problem in Illinois as being the basic court structure and the inadequate number of judges, rather than the civil jury. A new court system became legally effective in Illinois on January 1, 1964.<sup>39</sup> Before this new judicial article was passed, Cook County had a circuit court, a superior court, a probate court, a county court, a family court and a criminal court. All of these courts have now been consolidated into one Circuit Court of Cook County.<sup>40</sup>

The success of the judicial reform was expressed in the following terms: "In less than one year, progress under the new Article has transformed an archaic court system with branches literally running off in all directions into a model streamlined system designed for highly efficient service to the people of Illinois."<sup>41</sup> This new court structure eliminated overlapping of courts. In addition, in 1964, eighteen more judges were elected to staff this newly created Circuit Court of Cook County. An immediate decrease in the backlog was apparent in 1964. There was a slight increase in backlog in 1965, but that seems to be attributable to two factors entirely unrelated to the jury system. There was a shortage of available judges because of sickness, and there was a certain degree of confusion growing from the move to the new Civic Center.<sup>42</sup>

<sup>37</sup> See *supra* note 9 at 52.

<sup>38</sup> THE DEFENSE RESEARCH INSTITUTE, INC., *op. cit. supra* note 20 at 8.

<sup>39</sup> ILL. CONST. art. 6 (1964).

<sup>40</sup> ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 29 (1964).

<sup>41</sup> *Id.* at 32.

<sup>42</sup> *Deputy Court Administrator, supra* note 36 at 65 SB 5.

In 1963, some of the pending cases were ten years old. In 1964, the average delay from time of filing of a law suit to date of verdict was approximately five years, down from approximately 6½ years from July 1, 1962.<sup>43</sup> The loss in "currency"<sup>44</sup> in this category in 1963 was 13.6% (2109 cases), whereas the loss in currency in 1964 in the new Circuit Court was merely 4.9% (838 cases).<sup>45</sup> "Overall reduction of law jury backlog cannot reasonably be expected before completion of the new Civic Center Courthouse with its additional and much needed jury facilities."<sup>46</sup> In 1965, it was said that when all concerned are well settled in the new court house, the courts will be able to try many more cases.<sup>47</sup>

Backlog implies delay. Most states do not add a case to backlog until the case is declared ready for trial. In Illinois, however, the total backlog represents the sum of all cases filed that have not been terminated. The total number of jury cases over \$5000 pending in the Circuit Court of Cook County, as of November 30, 1965, was 48,754.<sup>48</sup> If the number of cases which were filed during 1965 was to be deducted from this figure, the result would be that 83% of the 48,754 cases pending were filed in 1962, 1963 and 1964.<sup>49</sup> As of November 30, 1965, there were only 753 pending jury cases over \$5000 which were filed before 1960.<sup>50</sup> Many of these are on appeal or are being delayed by the parties. A corresponding figure for November, 1964, was 4731 cases.<sup>51</sup> These figures indicate that regardless of the reason for the backlog, the total is not as shocking as might first appear.

Hopefully, the state legislature has solved the problem. Laws should be flexible to meet changing times. Jury abolition apparently is not needed to answer the backlog problem. The action taken by the state legislature should prove to be the solution.

The *Illinois Pattern Jury Instructions* were drafted to alleviate the problem of lengthy jury instructions. Supreme Court Rule 25-1<sup>52</sup> provides that [W]henver Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject,

<sup>43</sup> ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, *op. cit. supra* note 40 at 69.

<sup>44</sup> The loss in currency is the difference between the total number of cases filed (and reinstated) and the number of cases terminated. If the former figure is greater, there is a gain in currency.

<sup>45</sup> ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, *op. cit. supra* note 40 at 69.

<sup>46</sup> *Ibid.*

<sup>47</sup> THE DEFENSE RESEARCH INSTITUTE, INC., *op. cit. supra* note 20 at 8.

<sup>48</sup> *Deputy Court Administrator, supra* note 36 at 65 SB 12.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Supreme Court Rule 25-1, ILL. REV. STAT. ch. 110, § 101.25-1 (1965).

the IPI shall be used, unless the court determines that it does not accurately state the law. Whenever IPI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial and free from argument.<sup>53</sup>

It has often been said that attorneys abuse the right to select the jury, in that a skilled attorney could practically try the case in the *voir dire* examination. Supreme Court Rule 24-1<sup>54</sup> eliminates this possibility. It provides that

the judge shall initiate the *voir dire* examination of jurors in civil and criminal cases by identifying the parties and their respective counsel and he shall briefly outline the nature of the case. The judge shall then put to the jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination, but shall not directly or indirectly examine jurors concerning matters of law or instructions.<sup>55</sup>

It has been argued that there are two reasons for a jury request, when a party has a bad case and hopes to prevail on the sympathy of the jury, and where the litigant seeks a higher amount of damages.<sup>56</sup> This is normally followed by the statement that more jury demands are made by the plaintiff than by defendant. It seems apparent that more jury demands would be made by the plaintiff, since section 64 of the Illinois Civil Practice Act provides that "a plaintiff desirous of a jury trial must file a demand therefore with the clerk at the time the action is commenced."<sup>57</sup> The only chance a defendant would have to demand a jury is if the plaintiff fails to do so.

Proper use of the summary judgment<sup>58</sup> could defeat the attempt of a litigant to obtain a jury trial when in fact he does not have a valid claim or defense. For example, the pleadings might appear to present an issue of fact and thus, upon demand, the litigants would be entitled to a jury trial. But, if one party knows his opponent really has no case, he can move for summary judgment. The party motioning must then establish a *prima facie* case. The burden then shifts to the other side. The motion for summary judgment can be defeated by attacking the sufficiency of the opponents evidence or by counter affidavits. If no issue of fact is presented, a summary judgment will be rendered as a matter of law and there will be no jury trial.

<sup>53</sup> *Ibid.*

<sup>54</sup> Supreme Court Rule 24-1, ILL. REV. STAT. ch. 110, § 101.24-1 (1965).

<sup>55</sup> *Ibid.* See also, Comment, 15 DE PAUL L. REV. 117 (1965).

<sup>56</sup> Sarpy, *supra* note 4 at 250.

<sup>57</sup> ILL. REV. STAT. ch. 110, § 64 (1965).

<sup>58</sup> ILL. REV. STAT. ch. 110, § 57 (1965).

Section 41 of the Illinois Civil Practice Act, provides a further safeguard to these fraudulent claims. Section 41 provides that allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.<sup>59</sup>

Although this section has, in the past, been neglected, it is a powerful weapon. The use of section 41 "would dispose of much litigation and pleading, which is filed for nuisance and delay."<sup>60</sup> "The time has come for the bench and bar to eliminate the problem of allegations and denials made in bad faith. . . ."<sup>61</sup>

The use of several remedial measures can aid in decreasing the backlog problem.<sup>62</sup> One of these is the pre-trial conference, which

by requiring the stipulation of facts wherever possible, abolished the lengthy endeavors to prove the facts through witnesses or documentary evidence. Also, the disclosure of the opponent's case eliminates the need for time taking exploratory questioning. Calling witnesses to authenticate documents can be disposed of during pre-trial. Medical reports relevant to any injuries to the parties, if submitted, present surprise delays during the jury trial.<sup>63</sup>

Today's modern discovery practices practically have the same effect.

In the Federal Court of Pennsylvania, Western District, the use of the pre-trial conference produced these results: forty per cent of the cases brought to pre-trial were settled before or at the conference; ten to twelve per cent after the conference; and forty per cent after the jury was selected. Less than ten per cent went to trial because the pre-trial conference showed the realities of the case and diminished areas of disagreement in the settlement conference.<sup>64</sup>

There are several other suggested remedial measures. Lawyers must not encourage those who obviously have no case. The assertion of exorbitant claims and intricate legal maneuvers which try to establish that which is not factual should be eliminated. Plaintiff's attorneys must understand and

<sup>59</sup> ILL. REV. STAT. ch. 110, § 41 (1965).

<sup>60</sup> Levine, *Section 41 of the Civil Practice Act—The Sleeper Awakes*, 54 ILL. B.J. 388, 388 (1966).

<sup>61</sup> *Ibid.*

<sup>62</sup> It is recognized that these areas of reform are also applicable in non-jury cases. They are mentioned here to point out that the jury can be retained at the same time the backlog is being reduced. It is quite possible that many cases will be terminated through the use of these measures.

<sup>63</sup> Lambert, *supra* note 10 at 312.

<sup>64</sup> *Ibid.*

realize that a favorable settlement will be more easily gained without trial if demands are based on reality.<sup>65</sup>

One final element to consider in this area is the hung jury. The statistics on hung juries are confidential and are not published.<sup>66</sup> However, the hung jury is a rare occurrence, as is the situation of a juror becoming incapacitated after the jury retires, both of which necessitate a new trial. Neither of these events occur often enough to be a determining factor favoring change in the civil jury system.

Some of these time-consuming factors are admitted as true, but even if a jury trial is slower, this in itself is meaningless, unless it is known how much slower the jury trial is. This cannot be answered due to the fact that comparative statistics are not readily available.<sup>67</sup> No two cases are identical. It is not uncommon that a jury case will consume less time than a non-jury case. The only way statistics would be meaningful is if an identical case could be tried twice, once with a jury and once without. In 1956, the New York State Bar Association conducted a symposium in which a participant was of the opinion that the extra time involved in a jury case was only eighty-five minutes per case.<sup>68</sup>

Perhaps the jury trial does take longer than the non-jury trial. It might be minutes longer or hours longer. But, this element of time must be contrasted with all the advantages of the jury system. It would appear that the advantages of the jury system far outweigh deterring factors of time.

#### MISCELLANEOUS

This last general category is comprised of minor criticisms. They are generally recognized as afterthoughts to the primary criticisms which have previously been discussed.

One criticism not previously discussed, but often raised, is that the United States should follow those other countries which have abolished the civil jury system. This criticism is unfounded. The United States is the only major country which retains the civil jury and is also the only country with the problem of serious delays in civil cases. Our country's history shows that one of the issues that gave rise to the Declaration of Independence and the Revolutionary War was the right of trial by jury. In our age, the United States is recognized as the keystone for the preservation of

<sup>65</sup> THE DEFENSE RESEARCH INSTITUTE, INC., *op. cit. supra* note 20 at 16.

<sup>66</sup> This information was obtained from the Office of the Administrator of the Courts.

<sup>67</sup> Green, *supra* note 30 at 160.

<sup>68</sup> *Id.* at 161. A University of Chicago jury project, based on the Supreme Court of New York County, concluded that jury trials are roughly forty per cent longer than bench trials, but did admit, however, that this was not a valid index.