Seton Hall Law Review

Vol. 3 Spring 1972 No. 2

SIX-MEMBER JURIES IN CIVIL ACTIONS IN THE FEDERAL JUDICIAL SYSTEM

*Anthony T. Augelli**

On May 28, 1971, the United States District Court for the District of New Jersey, adopted a general rule, effective September 1, 1971, limiting the number of jurors in civil actions to six.[1] This action was taken, after some study, in the firm belief that a six-member rather than a twelve-member jury in the trial of civil cases would result in speedier trials, relieve calendar congestion and yield other benefits to lawyers and litigants alike.

Currently, there is a growing trend in the federal courts to reduce the number of jurors used in civil trials from twelve to six. No magic is inherent in the number six, nor is there any historical or mystical reason for the selection of this number. It was chosen arbitrarily by halving the traditional jury of twelve, thus providing a jury that is smaller in number but still large enough to constitute a deliberative body. The move to reduce the number of jurors is prompted by facts tending to indicate that six-member juries would decrease costs, save court time, thus reducing trial delays, and yet retain the traditional virtues of trial by jury. The trend toward using juries of less than twelve members in civil cases is relatively new in the federal system but not so among the states, where provisions for juries of less than twelve have

* Chief Judge, United States District Court for the District of New Jersey.

1 Pursuant to 28 U.S.C. § 2071 (1970), the United States District Court for the District of New Jersey enacted the following rule:

> In all civil jury actions, except as may be otherwise expressly required by law, the jury shall consist of six members.

D.N.J.R. 20(F) (May 28, 1971).

Although, FED. R. CIV. P. 48 provides that parties may stipulate that the jury shall consist of any number less than twelve, this article deals solely with the six-man juries in civil actions pursuant to D.N.J.R. 20(F) (May 28, 1971).

It is important to note at this time that the right to trial by jury as declared by the seventh amendment to the United States Constitution, although preserved to the parties inviolate, may be waived by the failure of a party to serve a demand for trial by jury. FED. R. CIV. P. 38.

been in effect since the colonial era. A report utilized by Judge Tamm to support his position for the reduced civil jury revealed that " 'at least 36 states [had] constitutional and statutory provisions for juries of less than 12 in one or another of their courts.' "[2] It would thus seem that juries of less than twelve have adequately functioned in a number of states and that state experiments with six-member juries in certain civil cases have attained a degree of success.[3]

In the federal court system the usual civil jury consisted of twelve members, though such number is not required by any federal statute or rule. Rule 48 of the Federal Rules of Civil Procedure, which is rarely used, allows parties to stipulate to a jury of less than twelve members. In the past few years a growing number of federal districts have enacted local rules concerning jury size for all or selected types of civil cases. As of March 9, 1972, thirty-eight districts have adopted such rules reducing the size of civil juries and all but one district (the Eastern District of Pennsylvania, which provides initially for 8 jurors) have made provision that the jury shall consist of six members, either in all civil cases or those specified.[4]

It is interesting to trace the history of the jury trial in order to ascertain how this system originated and evolved, and also why the number twelve became an almost sacred characteristic of the jury. Legal historians, reaching back into antiquity, analyzed the tribunals of ancient Greece, Rome and Scandinavia, in order to discover the jury system's origin. In ancient Greece there was the dikast, which was composed of 500 citizens chosen by lot, and in ancient Rome, the comitia, a representative body which examined disputed facts; and finally in ancient Scandinavia, small district committees administered the law. These historians stated that the aforementioned tribunals presented a close analogy to our modern trial by jury.[5] The similarity was found in the transfer of judicial power from the state to laymen, in the selection of citizens from general lists of men in the city or district, and in

---

2 Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 134-35 (1962) (quoting from Herndon, *The Jury Trial in the Twentieth Century*, 32 LOS ANGELES B. BULL. 35, 47 (1956)).

3 *New Jersey Experiments with Six-Man Jury*, 9 OYEZ! OYEZ!, A.B.A. SECT. JUD. ADMIN. BULL. 6 (May 1966) (a study of the use of the six-man jury in Monmouth County Court in civil cases); ILL. JUD. CONF., EXEC. COMM., 1962 ANN. REP. [hereinafter cited as ILLINOIS REPORT] (the experience of the Municipal Court of Chicago in the use of six-man juries with consent of parties); Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. 27 (April 1958) (experiment in Worcester District Court with six-man juries).

4 For a list of the federal district courts that have adopted general rules providing for six-member juries in civil cases, *see* Devitt, *The Six Man Jury in the Federal Court*, 53 F.R.D. 273, 277 (1971).

5 J. PROFFATT, A TREATISE ON TRIAL BY JURY 11 (1877).

the fact that the participants were often sworn to give a true verdict. However, later legal historians determined that this procedure, whereby laymen participated in civil disputes, lacked certain vital elements of the present-day jury, since the laymen were judges of both law and fact. Additionally, their deliberations were not supervised by a trained judicial officer and their number varied from a handful of people to several hundred.[6]

Thus, while earlier historians sought the origin of trial by jury in ancient popular custom, it is now generally acknowledged that the origin of the jury is to be found in royal privilege.[7] It was from the Normans who invaded England in 1066 that the "germ of the jury" had its origin in the Frankish "inquisitio."[8] Prior to the introduction of the "inquisitio" into England, trial by battle and the ordeals of fire and water were used to resolve disputes. A trial, dealing with questions of fact in anything like the modern sense, did not exist in England prior to the Norman conquest.[9]

The "inquisitio" was an institution by which the oldest and wisest men in each district were compelled by royal officials to answer, upon their oath, questions addressed to them in the name of the King. Rather than a judicial proceeding, the inquest was initially used as a procedure to aid the King in the administration of the kingdom.[10] It was in the twelfth century, under Henry II, that the royal procedure of the inquest was made available to the people, in an attempt by the King to create a monopoly in the Crown for the administration of justice. Disputes were submitted to a jury, called an assize, consisting of twelve persons who had knowledge of the facts in dispute and it was the jury's responsibility to resolve these questions of fact. The impetus thus given to trial by jury was further strengthened by the prohibition of Pope Innocent III in 1215, which provided that clergy could not participate in trials by ordeal. It was due to these reforms in judicial administration that the jury, by the thirteenth century, became the typical procedure utilized in civil and criminal cases. Most historians agree that the ordinances of Henry II and the resulting developments under them "produced the modern institution of the trial jury."[11]

Another interesting question is why the number twelve became

---

6 F. BUSCH, LAW AND TACTICS IN JURY TRIALS 5 (1949).

7 F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 6 (1951); E. JENKS, A SHORT HISTORY OF ENGLISH LAW 47 (2d rev. ed. 1920).

8 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 74 (2d ed. 1898).

9 *Id.* at 38.

10 F. HELLER, *supra* note 7, at 6.

11 F. BUSCH, *supra* note 6, at 9.

such an essential component of the modern jury. Some historians trace the use of the number twelve as far back as Alfred the Great or the ancient Scandinavians who, we are told, "venerated the number twelve."[12] Other historians look to the Anglo-Saxon procedure whereby men of the local district who had knowledge of the relevant facts in a dispute were compelled to answer, under oath, which of the two men was in the right. Though the number of persons required to swear varied, it was generally accepted that a party prevailed when he obtained twelve votes in his favor.[13] Still other explanations, Biblical in nature, have been proposed to account for the selection of the number twelve. Among these are included the Twelve Tribes of Israel, the Twelve Officers of Solomon recorded in the Book of Kings, and the Twelve Apostles. After considering many of the reasons posed for the number twelve, Sir Patrick Devlin came to the conclusion that

> what was wanted was a number that was large enough to create a formidable body of opinion in favour of the side that won; and doubtless the reason for having twelve instead of ten, eleven or thirteen was much the same as gives twelve pennies to the shilling and which exhibits an early English abhorrence of the decimal system.[14]

Thus, it would seem that while the number twelve became fixed as the size of the common law jury sometime by the fourteenth century, the selection of this particular number rather than any other number cannot be attributed to any specific reason, but rather it "appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place."[15]

While selection of the number twelve has thus been shown to be a historical accident, nonetheless the twelve-member jury has been a part of American jurisprudence since colonial days. Though each of the Thirteen Original Colonies evolved into a unique economic and political entity with marked differences in the manner and scope in which each utilized the jury trial, it is generally accepted that by 1776 the place of the jury trial in colonial America was firmly established in both civil and criminal cases, and was considered a valuable right.[16] The fact that the colonists placed such a high value upon the right of trial by jury is evidenced by the strict guarantees incorporated into

12 Thompson, *What Is the Magic of '12'?*, 165 N.Y.L.J. 1 (Feb. 1, 1971) (quoting from Clark, *The American Jury: A Justification*, 1 VALPARAISO U.L. REV. 1, 2 (1966)).

13 P. DEVLIN, TRIAL BY JURY 8 (1956); *see* F. BUSCH, *supra* note 6, at 5-6.

14 P. DEVLIN, *supra* note 13, at 8.

15 Williams v. Florida, 399 U.S. 78, 89-90 (1970).

16 F. BUSCH, *supra* note 6, at 17.

almost all of the state constitutions of that period. As an example, in the first Constitution of New Jersey it was declared that the " 'inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever.' "[17]

The high regard that the colonists had for jury trials was also evidenced by the fact that two sections in the Bill of Rights of the United States Constitution were specifically devised to protect the right of jury trial, the sixth amendment being applicable in criminal cases, and the seventh amendment in civil cases.[18] It is important to note that neither article III of the Constitution nor the sixth and seventh amendments specify the number that is required to constitute a lawful jury.

The requirement that a civil jury be composed of twelve members has been read into the Constitution by the Supreme Court, which endowed the term "jury," as used in the Constitution, with the common law characteristics of the jury that prevailed at the time of the ratification of the Constitution. Upon considering the issue of the size of the jury, the Court, on several occasions, has reasoned that the twelve-member panel was an essential element of the guarantee of trial by jury.[19] These cases, however, should now be evaluated in light of the Supreme Court's decision in *Williams v. Florida*,[20] which held that a Florida statute providing for a six-member jury in a criminal case was constitutional and did not violate defendant's sixth amendment guarantee of trial by jury, as applied to the states through the fourteenth amendment. *Williams* recounts several of the theories that have been suggested as to why the number twelve was regarded as an essential element of a jury. Here we will briefly review the more generally accepted explanations in an effort to reveal that no magic attaches to the number twelve, and that no valid reasons exist to warrant its continuance as an essential component of a jury.[21]

17 *Id.* at 18.

18 C. JOINER, CIVIL JUSTICE AND THE JURY 44 (1962).

19 *See* Williams v. Florida, 399 U.S. at 90-92; Maxwell v. Dow, 176 U.S. 581, 586 (1900); American Publishing Co. v. Fisher, 166 U.S. 464, 468 (1897).

20 399 U.S. 78 (1970). The Court in Duncan v. Louisiana, 391 U.S. 145 (1968), held that trial by jury in criminal cases is a fundamental right, and the fourteenth amendment guarantees a jury trial to a defendant in a state court where the sixth amendment would require a jury trial if he were in a federal court. *Id.* at 149.

21 Attention is directed to footnote 30 in *Williams*, which makes reference to the civil jury trial provisions of the seventh amendment. It is noted of course, that on the jury issue, *Williams* decided only that a state law, providing for a lesser number than twelve jurors for the trial of a criminal case, was not violative of any federal constitutional rights. However, the general observations made by the Court regarding juries and their composition, indicate that trials in civil cases in the federal courts by juries of less than

The *Williams* Court proceeded with an examination of the origins of the jury, the evolution of the number twelve (as the required jury size), and the intent of the framers of the Constitution. The result of this examination revealed that there was no indication in constitutional history of "an explicit decision to equate the constitutional and common law characteristics of the jury."[22] Therefore, the Supreme Court reevaluated earlier cases which held that a twelve-member jury was a constitutionally required element of trial. The leading case in point, *Thompson v. Utah*,[23] which decided that a jury must consist of twelve members, was dismissed as precedent. The Court in *Williams* noted that the reference to jury size made in the case was unnecessary to the holding, and that the *Thompson* Court failed to determine whether the use of the term "jury" in the Constitution included all common law features such as jury size.[24] Therefore, having decided that twelve-member juries were not historically compelled, the Court next focused on the question of what function the twelve-member juries performed and their relation to the purposes of the jury trial. Once again the Court concluded that the requirement of a twelve-member jury "cannot be regarded as an indispensable component of the Sixth Amendment."[25] The primary purpose of the jury was seen as the prevention of oppression by the government. This purpose, the Court determined, was fulfilled as well by a jury of six members as by a jury composed of twelve.[26]

The approach utilized by the Court in reaching its conclusions has been questioned. In the *Williams* case, the burden was placed upon the defendant to present evidence that would justify retention of the traditional jury size. Obviously, this burden was not met, for the Court concluded that there was no rational basis for retaining the rigid twelve-member jury rule and abandoned the requirement for such juries in sixth amendment cases. Recognizing the lack of empirical data available, the Supreme Court utilized the results of several opinion studies to buttress its own perception that the justice rendered by the two different sized juries does not vary to any significant extent. These studies dealt generally with civil cases, and reliance upon

twelve members will be upheld. 399 U.S. at 92. *Accord*, Colgrove v. Battin, No. 71-2546 (9th Cir., Mar. 6, 1972) (upheld validity of D. MONT. R. 13 (d)(1), providing for six-member juries in civil cases, and relying on *Williams*, held that neither the seventh amendment nor the Federal Rules of Civil Procedure require twelve-member juries).

22 399 U.S. at 99.

23 170 U.S. 343 (1898).

24 399 U.S. at 90-91.

25 *Id.* at 100.

26 *Id.*

them left the Court open to criticism for utilizing data that was not focused on criminal jury trials. However, these studies (and others like them) do have probative value in considering the question before us of the relative comparability of twelve- and six-member civil jury results, for if the verdicts rendered by the two juries are similar, then reduction of the civil jury from twelve to six members should not impair the effectiveness of the jury in civil cases.

Regardless of the relative similarity found in the verdicts of twelve- and six-member juries, such does not preclude a questioning of the effectiveness of the entire civil jury system. Attacks upon the jury system are nothing new and there has scarcely been a time when elimination or reformation of the civil jury system has been far from the minds of its critics.[27] Generally, criticism can be classified into some broad objections, namely, that the jury system is an unwarranted waste of money, that court delays result from the inherent slowness of the jury trial, and that the jury is ineffective in its function as a fact-finder. Many critics of the jury system point to the fact that it costs more to conduct a trial by jury than a trial before a judge sitting alone. It is obvious that this is true, for each juror is paid a per diem sum plus mileage, and a subsistence allowance if it is not practicable for jurors to return home each day.[28] Added to the expense of the jurors themselves is the salary of court personnel needed in connection with the handling of jury panels. Here we will merely summarize these objections and then consider alternatives proposed to cure jury defects, such as the abolition of the civil jury altogether, and the other more practical plan, whereby the present twelve-member civil jury is reduced to six members.

A great deal has been written about court delays and calendar congestion, and it has generally been acknowledged to be a very serious problem that continues to plague our federal and state courts. A lengthy study commissioned by the University of Chicago Law School stated that the reasons why delay in the courts is considered so "unqualifiedly bad" is because it deprives citizens of a basic public service, and the lapse of time frequently causes deterioration of evidence and makes it less likely that justice will be done when the case is finally tried.[29] In

---

27 J. FRANK, COURTS ON TRIAL 124 (1949); Clapperton, *Some Thoughts on the Usefulness of Trial by Jury*, 5 CANADIAN B. REV. 478 (1927); Corbin, *The Jury on Trial*, 14 A.B.A.J. 507 (1928); Duane, *Civil Jury Should be Abolished*, 12 J. AM. JUD. SOC'Y 137 (1929); Seitzinger, *The Jury System—Elimination, Modification or Improvement*, 15 FED'N INS. COUNSEL Q. 8 (1965).

28 *The Jury System in the Federal Courts*, 26 F.R.D. 409, 487-91 (1961).

29 H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT at xxii (1959) [hereinafter cited as ZEISEL, KALVEN & BUCHHOLZ].

addition, delay may cause severe hardship to some parties and may cause a loss of public respect and confidence in the entire judicial system.[30] Some people blame the congestion and delay in whole or in part on the jury system.[31] Though providing a caveat that no comparison of the time differential between cases tried before a judge and those tried before a jury is possible, it has been estimated that a bench trial would be approximately 40 percent shorter than a jury trial of the same (personal injury) case.[32] In jury trials additional time is spent on voir dire, opening statements, and closing arguments, tending to lengthen the proceedings. Critics of the jury system also point to the "inherent slowness" of trial by jury where, for example, lawyers use various rhetorical and other types of devices that are calculated to impress the jury but which accomplish nothing more than lengthening trial time.[33]

Still another criticism leveled at the civil jury system is the capability of the jury to function as an impartial fact-finder. Juries have been branded inefficient, unqualified to make decisions, unable to sift through irrelevant facts and incapable of weighing evidence.[34] Some commentators claim that the composition of juries, with the numerous exemptions allowed, is part of the reason for the jury's inability to function properly.[35] In addition, it has been alleged that those serving on civil juries are too easily swayed by emotion or prejudice and are too susceptible to legal rhetoric.[36] The very fact that jurors have no prior knowledge of law or experience as jurors is another aspect of the jury under attack. This particular criticism of the jury system is really the only one, as one federal judge has suggested, that relates to deficiencies inherent in the civil jury system, and that defies correction by a reduction in the number of jurors used.[37]

Alternatives to the present civil jury system have been advanced, ranging from a proposal to reduce the number of jurors, to the extreme of abolishing the jury altogether in some or all civil cases.[38] Though advocated, it is unlikely that total elimination of the jury in civil cases will become a reality in the near future, since the jury is still too much

---

30 *Id.*; *See also* Warren, *Delay and Congestion in the Federal Courts*, 42 J. AM. JUD. SOC'Y 6 (1958).

31 Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455 (1956); Comment, *Abolition of Jury Trial in Civil Cases*, 5 ORE. L. REV. 185, 191 (1926).

32 ZEISEL, KALVEN & BUCHHOLZ, *supra* note 29, at 78.

33 Peck, *supra* note 31, at 455.

34 Comment, *supra* note 31, at 190-91.

35 P. DEVLIN, *supra* note 13, at 20-21.

36 J. FRANK, *supra* note 27, at 121.

37 Tamm, *supra* note 2, at 122.

38 *See* authorities cited note 27 *supra*.

an integral part of our judicial system, even in civil cases. Those who urge that the system be abandoned or sharply modified point to the numerous types of civil cases where a jury is never used and to the British experience where civil jury trials have all but been eliminated.

In many types of civil cases there is no right to trial by jury. The reason why certain disputes are not entitled to jury trial is a matter of historical accident. When the common law developed in England, the writ system was utilized as the method by which various wrongs were redressed. As England evolved into a commercial state and the law became more complex, new and different rights were asserted before the common law courts, which recognized few rights and granted few remedies. As a result, those in difficulty appealed to the King through the chancellor and it was from this beginning that the Court of Chancery evolved. The procedure for determining rights or the availability of a remedy, unlike the procedure of the common law courts, made no use of jurors as the triers of fact. Ultimately, this handling of certain civil disputes by the chancellor without a jury became formalized in courts of equity.[39]

This dual court system of equity and common law was brought to the colonies by English settlers and is evidenced by the distinctions made between various types of civil disputes. Litigants in civil disputes, classified as equitable, are not constitutionally entitled to trial by jury since the seventh amendment preserves the right to jury trial only in suits at common law.[40] Thus, the extent of the right to a jury trial in federal courts is determined by this equity-common law distinction. For example, proceedings under the Bankruptcy Act[41] are equitable in nature and usually do not fall within the constitutional provision relating to jury trials.[42] Similarly, trials in admiralty are ordinarily held before a judge alone, even though an admiralty court may call for the advice of a jury.[43] Likewise, under the Federal Tort Claims Act,[44] federal district courts, sitting without a jury, have jurisdiction over all claims for personal injury or property damage caused by government employees acting within the scope of their employment. Furthermore, in litigation under the Patent Act,[45] the author's experience indicates that the jury is rarely invoked. In these and many other areas of federal

39 C. JOINER, *supra* note 18, at 41-42.
40 F. BUSCH, *supra* note 6, at 47.
41 11 U.S.C. §§ 1 *et seq.* (1970).
42 *See* 11 U.S.C. § 42(a) (1970).
43 2 AM. JUR. 2d *Admiralty* § 141 (1962).
44 28 U.S.C. § 2402 (1970).
45 35 U.S.C. §§ 1 *et seq.* (1970).

law, the fact-finding function of the jury is performed by the court without any outcry that such nonjury decisions mandate a retention of the jury system.[46]

While the controversy concerning the fate of the American jury continues, it would appear that the British have almost totally abandoned trial by jury in all but a few select types of civil cases. This evolution has taken place in the last one hundred years, for until 1854 almost all civil actions were resolved by means of a trial by jury in common law courts. Beginning with the Judicature Acts and the Common Law Procedure Act of 1854, which provided for trial by a judge alone with the consent of both parties, the use of the jury in civil cases became more restricted.[47] The Administration of Justice (Miscellaneous Provisions) Act of 1933[48] marked the major decline of the civil jury, in that it established the general rule that a court had discretion as to whether or not to grant a jury trial in a particular case. Section 6 of the Act limited the right to a trial by jury to certain cases, namely, those of libel, slander, false imprisonment, seduction, malicious prosecution, or breach of promise of marriage, on the application of either party or on the application of a party against whom fraud was alleged. Even in these cases, however, the court retained the power to refuse to grant a trial by jury if it was considered that such a trial would involve a prolonged examination of documents or accounts or a scientific or local investigation which could not be conveniently tried with a jury. As to the remaining types of civil cases, the Act specified that, "save as aforesaid, any action to be tried in that Division may, in the discretion of the Court or a judge, be ordered to be tried either with or without a jury . . . ."[49] Figures show that until 1913 there were still jury trials in more than half of the civil cases tried in the High Court.[50] The number of civil cases tried before a jury has now decreased to a present low of approximately 2 percent of all civil cases tried, and thus, for all practical purposes, trial by jury in civil disputes has virtually disappeared in England.[51]

The civil jury trial has also lost favor in most of the other countries which had adopted it. For example, in Germany and France its use has become so limited as to be almost nonexistent, while Scotland, which abolished non-criminal juries in the sixteenth century and re-

46 Comment, *supra* note 31, at 194.

47 R. Walker & M. Walker, The English Legal System 189 (2d ed. 1970).

48 23 & 24 Geo. 5, c. 36.

49 *Id.* § 6; *See* also Ward v. James, [1965] 1 All E.R. 563, 568 (C.A.) (opinion of Lord Denning, M.R.).

50 P. Devlin, *supra* note 13, at 132.

51 1 All E.R. at 568.

instituted them in the nineteenth century, has all but eliminated such juries entirely.[52] In fact, the United States is one of the very few countries that still retains jury trials in most civil cases. This action of eliminating civil juries taken by many other nations, supports the contention that civil cases can be litigated effectively outside of the jury framework.

Until total elimination of the civil jury system in the federal courts is accepted, reduction in the size of the jury from twelve to six members should result in substantial economic savings. Based on 1970 fiscal year figures, the total expenditure for petit jurors in the federal courts in that year, for all districts, was $12,191,122, of which $5,647,950 represented civil jury costs.[53] It is estimated that the use of six-member juries in selected civil cases, such as those based on diversity of citizenship or arising under the Jones Act[54] or the Federal Employers' Liability Act,[55] will result in potential savings of $1,356,200, and if such juries are used in all types of civil cases the savings will amount to $1,799,600.[56] A breakdown of the figures for the same year for the District of New Jersey shows that civil jury costs amounted to $130,280. Using the same projection as that contained in the national figures, it is estimated that the use of six-member juries in the same selected cases as previously mentioned will result in a savings of $31,650, and if such juries are used in the trial of all civil cases, the savings will increase to $38,870.[57]

Another major benefit that would obtain from the use of six-member juries in civil cases is the reduction of trial time. In one survey it was pointed out that the two primary stages of trial, where reduction in the size of the jury would make a difference, are the voir dire examination of jurors and the time consumed in deliberation.[58] Taking 22.1 hours as the average time required to try a civil case with a twelve-member jury, it was estimated that the average time devoted to the voir dire was 2 hours and the average time devoted to deliberation amounted to 3.6 hours. The Illinois Judicial Conference, in research conducted on the reduction of civil juries to six members and trial time saved thereby, concluded that a benefit of trial by six-member

---

[52] J. FRANK, *supra* note 27, at 109.

[53] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUROR UTILIZATION IN UNITED STATES COURTS D-5 (August 13, 1971).

[54] 46 U.S.C. § 688 (1970).

[55] 45 U.S.C. §§ 51 *et seq.* (1970).

[56] JUROR UTILIZATION IN UNITED STATES COURTS, *supra* note 53, at D-5.

[57] *Id.*

[58] Comment, *With Love in Their Hearts but Reform on Their Minds: How Trial Judges View the Civil Jury*, 4 COLUM. J.L. & SOC. PROB. 178, 192 (1968).

juries was that "[i]t required approximately 40% less judge and lawyer time to select a jury of six compared to a jury of twelve."[59] Time savings greater than the 40 percent mentioned in the Illinois study have been suggested, but no data is presently available to show any substantial increase over that figure. Similarly, it has been suggested that the time it would take a six-member jury to reach a verdict would be less than the time required by the traditional twelve-member jury. No statistical evidence on the subject is yet available, though judges who have worked with six-member juries have reported such findings.[60] With the increased use of the six-member jury and the progress of studies being conducted on the subject, it should soon be possible to firmly demonstrate the important time saving factor resulting from the use of six-member juries.

Other, much smaller, time factors could be reduced by the use of six-member juries. Although each of these items would tend to be thought insignificant standing alone, totaled together they could represent the saving of much trial time.[61] Among these factors are: the shorter roll call of only six jurors; the assembling, processing and supervision of the lesser number of jurors; the showing of exhibits and documents during trial to one-half the conventional number of jurors; and the shorter amount of time it takes six jurors to move in or out of the jury box as opposed to twelve. Also, time outside of the actual trial time is saved by the reduced jury size. With smaller juries to be selected, fewer notices would have to be sent to the prospective jurors, thus resulting in less paper work and a saving of administrative time.[62]

Besides contributing to cost and time efficiency, six-member juries have been found to retain the traditional merits of trial by jury. One prime function of the jury is to determine the facts of a case. The Supreme Court indicated in *Williams* that it believes a jury of less than twelve members is as capable of performing this vital fact-finding function as a twelve-member jury. What is needed for a jury is a number

---

59 ILLINOIS REPORT, *supra* note 3, at 64.

60 Judge Thomas J. Smith of the Monmouth County Court noted that the smaller jury was drawn in less time, and took less time to deliberate and reach a verdict. So, too, Chief Judge Edward Devitt of the United States District Court for the District of Minnesota, whose district was one of the first to enact a local rule for six-member civil juries, has commented that "[i]t is also likely, but difficult to substantiate, that six can come to a unanimous decision more quickly than twelve." Devitt, *supra* note 4, at 276. In the District of New Jersey, Judge Lacey has been using six-member juries in the trial of civil cases and reports not only a considerable time-saving factor, but also general acceptance of the smaller jury by trial counsel.

61 Tamm, *supra* note 2, at 132.

62 *Id.* at 134.

large enough to promote group deliberation combined with a likelihood of obtaining a representative cross section of the community. One judge's long experience with five-member juries in condemnation trials led him to conclude that the five-member jury possessed all of the essential elements of the twelve-member jury. He contended that if the smaller jury were drawn at random from the ranks of disinterested citizens who represented a cross section in the community they would continue to bring into the courtroom diversity of viewpoint, objectivity, and a spirit of justice.[63]

It has also been pointed out by proponents of the six-member jury that the verdicts it renders are not substantially different than those reached by twelve-member juries. While there is not enough empirical data available on this subject, experiments with six-member civil juries have shown that the verdicts reached by the smaller juries are as carefully considered as, and comparable to, those reached in similar cases by twelve-member juries. In fact, the Illinois Judicial Conference Committee stated one of the benefits it found resulting from the use of a six-man jury as follows:

> Most importantly, in the thoroughly considered opinion of the judges with experience in depth with the use of a six man jury, the plaintiffs and defendants receive as good composite justice from a six man jury as they do from a twelve man jury.[64]

In the federal court system, Judge Devitt, of the United States District Court for the District of Minnesota, found that the

> verdicts of smaller juries are just as reasoned and sound, and are based on the same care and consideration of the evidence and faithful subscription to the Court's charge as are the verdicts of the traditional twelve-man jury.[65]

It can thus be seen that objections to the use of six-member juries in civil cases cannot be based on the argument that reduction of the traditional jury size has an adverse effect on verdicts rendered by the smaller jury.

CONCLUSION

The adoption of six-member civil juries by an ever-increasing number of federal district courts is a positive first step toward the

---

63 *Id.* at 137-38.

64 ILLINOIS REPORT, *supra* note 3, at 64.

65 Devitt, *supra* note 4, at 276.

effectuation of a solution to the complex and conflicting problems facing the courts, such as trial delays and calendar congestion. But a meaningful resolution of the current court crisis cannot result from a mere reduction in the size of juries. The ultimate answer to the problems plaguing the federal courts is to be found in the elimination, rather than modification, of the civil jury system.

Our federal courts can no longer afford the luxury of providing jury trials for most federal civil litigation. Surely the fact that Great Britain has all but eliminated civil jury trials, as have most other European countries, and that many important and complex civil cases are tried without a jury, are factors that should weigh strongly in favor of the ultimate adoption of this alternative to the jury system. These examples reveal that the proposal of nonjury civil trials in most cases is not only judicially sound, but has been successfully utilized in various other countries. Until such time as abolition of the civil jury system becomes generally accepted, however, use of the six-member civil jury will remain the most effective and viable alternative to the traditional civil jury of twelve.