LOS ANGELES
Daily Journal
www.dailyjournal.com
THURSDAY, MAY 8, 2014

The death of the civil jury trial

By Mark P. Robinson, Jr.

"The institution of the jury, if confined to criminal causes, is always in danger, but when once it is introduced into civil proceedings it defies the aggressions of time and of man." — Alexis de Tocqueville

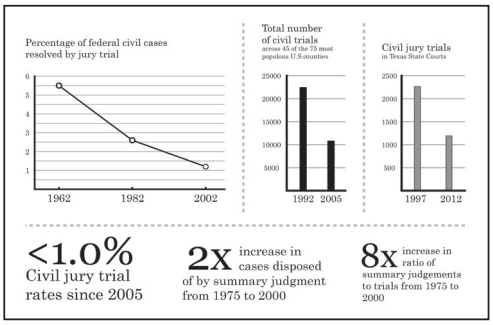
It has been estimated that the United States, with 5 percent of the global population, holds 90 percent of the world's criminal trials and almost all of its civil jury trials. There is no doubt that the right to trial by jury is deeply ingrained in our sense of justice. Thomas Jefferson called trial by jury "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." And William Rehnquist noted that "[t]he founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a 'safeguard too precious to be left to the whim of the sovereign.'" Nevertheless, over the last several decades, the right to a jury trial in civil cases has been silently and slowly eroded.

In 1962, a jury resolved 5.5 percent of federal civil cases. By 1982, that number had fallen to 2.6 percent, and by 2002 it was 1.2 percent. The rate has been below 1 percent since 2005. A sampling by the Bureau of Justice Statistics of state courts in 45 of the 75 most populous U.S. counties shows that the total number of civil trials fell 52 percent between 1992 and 2005, from 22,451 to 10,813. Individual states show similar trends. In 1997 there were 3,369 civil jury trials in Texas state courts, yet in 2012 there were fewer than 1,200. Some counties in Oregon go years without having a single civil jury trial.

Theories as to the causes are varied. Some believe there has been an ongoing shift in ideology which promotes the view that jury trials are a wasteful failure of the system, and that alternative dispute resolution should be the new paradigm. They argue that this has been the result of broader judicial discretion in the disposition of civil cases through enforcement of arbitration agreements, heightened pleading requirements, and case law encouraging summary adjudication. According to the Federal Judicial Center, the percentage of cases disposed of by summary judgment doubled from 1975 to 2000, and the ratio of summary judgments to trials rose from.44 to 3.5 percent, and eightfold increase.

Others point to the fact that the decline has been mirrored by a corresponding rise in the complexity, length and cost of trials. Between 1962 and 2002, the percentage of civil trials lasting more than four days nearly doubled, from 15 percent to 29 percent. In California the problem is even more acute. We have the longest civil jury trials in the country, averaging 8.9 days, while the national average is 3.6 days. Combine this with the cold fact that due to budgetary constraints, California's court system has lost over $1 billion in funding, forcing the closure of 51 courthouses and 205 courtrooms, resulting in what has been aptly described as "rationing justice."

Despite the improving economy, the Legislature and governor do not appear to be ready to restore funding any time soon. As Chief Justice Tani Cantil-Sakauye recently remarked, it would take a $266 million increase just for the courts to "tread water" in 2014-2015.



Of course, some of the damage is self-inflicted. Lawyers are partly to blame for burdening the court system with excessively lengthy trials and protracting proceedings unnecessarily. We keep witnesses on the stand for entire days, present duplicative evidence and testimony, and engage in endless disputes regarding admissibility of evidence. And perhaps some of the blame should also be shared by judges who sometimes acquiesce in the squandering of scarce judicial resources.

Irrespective of the reasons behind the decline in jury trials, concerns have been raised as to its consequences. While some see this as a positive sign, suggesting that the legal system is working as it should, this view is shortsighted and misguided. As a number of renowned jurists, legal scholars and various organizations which have examined this phenomenon have concluded, the decline of the civil jury trial has had a number of subtle but serious adverse effects, which could cause permanent and irreparable long term damage to our justice system.

Fewer civil jury trials produce fewer appeals. With fewer civil cases reaching the courts of appeal, the natural development of current, relevant and useful common law will become stunted. As Nathan L. Hecht, chief justice of the Texas Supreme Court commented, "it's a detriment if we lose the development of the common law through cases and appeals that have been the [basis of the] rule of law in this country since its founding."

Moreover, with fewer civil jury trials, citizens are becoming less involved in government, and the public is becoming increasingly removed from the judicial process. In a chapter of his classic "Democracy in America," titled "Causes Mitigating Tyranny in the United States," Alexis de Tocqueville wrote that "[t]he jury, and more especially the jury in civil cases, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions." However, this singular opportunity for ordinary members of the public to participate in government is slowly vanishing.

There is also the possibility that if the civil jury trial continues to be gradually phased out, it may suffer the same fate it has elsewhere. In the few countries where civil jury trials are still available, their use is increasingly limited in scope and severely restricted by law. In Canada, where courts have broad discretion to order a bench trial, jury trials in civil cases are rare, and it is generally accepted that cases involving complex disputes are more appropriately decided by a judge. In England, where jury trials used to predominate, they have been all but abolished, now accounting for less than 1 percent of all civil trials. There is only a qualified right to a jury trial, and only in cases involving libel, slander, fraud, malicious prosecution or false imprisonment.

If we allow the civil jury trial to wither and die here, we could be losing more than we know. As Judge Patrick Higginbotham of the 5th U.S. Circuit Court of Appeals explained, "We need trials, and a steady stream of them, to ground our normative standards — to make them sufficiently clear that persons can abide by them in planning their affairs — and never face the courthouse — the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement."

In an effort to address the problem, several states have been experimenting with novel methods to reduce the time and expense of trying a case to a jury. California's expedited jury trial program, which became effective in 2011, utilizes an eight-person jury with the goal of completing the trial in a single day. Each side is allocated three hours for presentation of their case. However, the program is voluntary and has not been widely embraced. Apprehension on the part of attorneys may stem from fear of change, or the perception that their evidence and their case will not get the attention they deserve. Regardless, we cannot keep doing business as usual and hope the problem will resolve itself.

States must move to faster, shorter civil jury trials, and encourage the adoption of expedited trial programs. These programs work, but they will not make a difference if attorneys and judges maintain the status quo. Bench and bar need to work together to find ways to increase participation. There also has to be a cooperative effort to streamline more complex trials. Courts have inherent supervisory powers over their proceedings, and should impose reasonable limits on trial time to avoid excessive and cumulative argument and evidence. But the courts cannot do it alone. We lawyers are part of the problem and we have to be part of the solution.


MARK P. ROBINSON
Robinson Calcagnie

Mark P. Robinson, Jr. *is the national president of the American Board of Trial Advocates, and the senior partner at Robinson Calcagnie Robinson Shapiro Davis Inc. CaptionSources: A sampling by the Bureau of Justice Statistics, Federal Judicial Center*