Jury Trial - Demand as Condition Precedent to Right

Frances M. Ryan

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RECENT DECISIONS

Jury Trial — Demand as Condition Precedent to Right —Upon petition of attorneys the Supreme Court of Wisconsin abrogated the recently enacted rule of court, incorporated in the 1945 Wisconsin Statutes as Section 270.32, which provided that parties to an action must affirmatively ask for a jury trial. At the same time the Court reinstated the former rule which gives the right to trial by jury as a matter of course unless affirmatively waived. The rule now ousted had provided that any of the litigants might demand a jury by serving upon the other parties to the action, and filing with the court, a demand therefor in writing at any time after the commencement of the action, and not later than ten days after service of the last pleading directed to the issue. Unless such demand was made, the right was deemed waived, subject to the discretion of the court. Once a jury had been requested however, the parties could withdraw such request only by written stipulation filed in court or by an oral stipulation made in open court and recorded in the minutes. The considerations which influenced the Court to abrogate this rule were: (1) That the rule put an undue procedural burden on the constitutional right of trial by jury; (2) That in practice the rule effected little economy in either time or money saved, as the practice of asking for a jury at the commencement of each action, and later waiving the right by stipulation of the parties at the time of trial was consistently used. Consequently the court was in no better position to judge the number of cases that would require a jury trial than under the former procedure; (3) That since the court still had power to allow a jury to be called at its discretion, regardless of waiver, the rule had little finality. In re Doar, 21 N.W. (2d) 1, (1945, Wis.)

The right to trial by jury was one of the privileges most zealously guarded by the American colonists, and preserved in the Seventh Amendment to the Constitution. A similar statement is contained

1 Wis. Stats., (1943) Sec. 270.32. "Trial by jury may be waived by the several parties to an issue of fact by failing to appear at the trial; or by written consent filed with the clerk; or by consent in open court entered in the minutes.

2 Wis. Stats., (1945), Sec. 270.32. Jury Trial. (1) Demand for Jury. (a) Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties and filing with the court a demand therefor in writing at any time after commencement thereof and not later than ten days after the service of the last pleading directed to such issue . . . (3) Waiver of Jury. The failure of a party to serve and file a demand therefor constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided cannot be withdrawn without the consent of the parties. (4) Trial by jury. The trial of issues so demanded shall be by jury unless the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or the court finds that a right of trial by jury of some or all of those issues does not exist. (5) Trial by Court. Issues not demanded for trial by jury shall be tried by the court; but,
in nearly every state constitution, and these provisions determine the limits beyond which no legislature may go in regulating trial by jury. However, the Federal Constitution and those of the states preserve only the right of trial by jury, and do not make such a trial a necessity, unless one of the parties desires it. In recent years the trend has been toward a trial of issues by the court alone, as evidenced by the passage of statutes similar to the recently repealed Wisconsin rule of court in many jurisdictions; and by the provisions of the Federal Rules of Civil Procedure, which are almost identical with the now abrogated Wisconsin rule in this matter. However, it is now well settled that if the requirements which the parties must meet to save their right are reasonable, the law is not unconstitutional.

This was forcefully pointed out by the Wisconsin Supreme Court in the instant hearing, the Court stating in its opinion that the Wisconsin rule was not only constitutional, but eminently fair and reasonable in its demands.

In urging the passage several years ago of the former rule, petitioners before the Court urged: (1) That in all the courts of Wisconsin, except the circuit court, a party waived a jury trial in a civil action unless he demanded one; (2) That the rule would bring about greater conformity with the practice in the federal courts under the new Federal Rules; (3) That economy would result from

notwithstanding the failure of a party to demand a jury in an action or special proceeding in which such demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.”

3 United States Constitution, Amendments, Art. VII. “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.”

4 Conn. Constitution, Art. I, Sec. 21; Constitution of Indiana, Art. I, Sec. 13; Constitution of the State of Iowa, Art I, Sec. 9; Constitution of Minnesota, Art. I, Sec. 4; The Constitution of the State of New York, Art I, Sec. 2; Wisconsin Constitution, Art. I, Sec. 6.

5 Lewis v. Garrett’s Adm’rs., 5 Howard *434, (Mississippi, 1840).

6 Illinois Revised Statutes, (1937), Ch. 110, Sec. 188; Iowa Code, (1935), Sec. 1074; Mich. Courth Rules Ann., (Searl, 1933), Rule 33. (For comparison of provisions of various state statutes, see 16 U.S. Supreme Court Digest 282, Notes.)

7 16 U.S. Supreme Court Digest 282.

8 McKay v. Fair Haven & W. Ry. Co., 775 Conn. 608, 54 Atl. 923, (1930); Sutton v. Gunn, 86 Ga. 652, 12 S.E. 979, (1891). Compare La Bove v. Balthazor, 180 Wis. 419, 193 N.W. 244, (1923). Here a $24 jury fee in a municipal court having a maximum civil jurisdiction of $1000.00 was held unreasonable and unconstitutional.

9 In re Doar, 21 N.W. (2d) 1 at 4, (Wis., 1945), in which the Court says, “Indeed it would be difficult to maintain such an argument, since under the rule all that a party needs to do to get a jury trial is to ask for it, and since the rule further provides that if he does not ask for it at the proper time, he may renew his request later, and the court may disregard the waiver and call in a jury. The latter provision leaves virtually nothing even of the contention that a party who wants a jury trial may occasionally be deprived of it by the negligence of his counsel.”
apprising a judge in advance of the number of cases which were to be tried by jury, thus avoiding the expense of calling that body whenever possible.\textsuperscript{10}

Additional reasons for the adoption of the rule, as set forth by students of the problem, are: (1) The procedure of the court is simplified;\textsuperscript{11} (2) “The question of mode of trial is eliminated in all jury-waived cases at an early stage of the proceedings.”\textsuperscript{12}

The rule that a person must make an affirmative demand for a jury has been interpreted under the federal practice as a mere procedural change, which in no way enlarges or curtails the abstract right of the submission of a cause to a jury. If the party formerly had the right to such a trial, it still exists; but it does not give a person the privilege of a jury in a case in which equitable relief is demanded or where the issues have been customarily decided by the court.\textsuperscript{13} The same is true under the various state rules on this question. It is obvious however that the automatic waiver provision requires alertness on the part of the attorney to save the right of his client to a jury trial, and that by slight neglect or misunderstanding of the requirements of the law, he may find that he has waived such trial to the detriment of the party he represents.\textsuperscript{14}

However even the attorney who understands the requirements of the waiver provision may experience difficulty in deciding whether or not to enter a demand for a jury because: (1) He may not yet have a complete picture of the suit, as all of the pleadings may not be before him when the period of demand expires; and (2) Under the blended system of law and equity, he may find it hard

\textsuperscript{10} Ibid., p. 3.
\textsuperscript{11} See Sunderland, “Findings of Fact and Conclusions of Law in Cases Where Juries Are Waived”, 4 U. of Chic. L. Rev. 218 at 219, (1937), in which the author states; “When, accordingly, waiver of juries in law actions was authorized, there was no necessity, from the point of view of trial convenience, for retaining any counterpart of the mechanism by which court and jury communicated with each other. By combining both functions in the judge he could proceed directly to decide the case, without, as judge, expressly informing himself, as jury, what legal principles should be employed in reaching a general decision, or as jury, expressly informing himself, as judge, what facts had been found.”


\textsuperscript{14} See Gunther v. H. W. Gossard Co., 27 Fed. Supp. 995, (N.Y., 1939), in which demand for trial was filed with the answer to the counter-claim and more than ten days after the filing of the answer to the complaint. A jury trial was allowed only on the issues raised by the counterclaim, and not on those set forth in the complaint, as the time for demanding a jury to hear the main controversy had elapsed.
to determine whether his client's case is one in which there could be a jury as a matter of right.\textsuperscript{15}

Consequently it appears that experienced attorneys, not wishing to accept the burden of determining this question, have made a practice of leaving it to the court, upon whom it rested before the revision of the rule, by making a demand in all cases. That this has evidently been the tendency in Wisconsin is indicated by the statement of the Court in the instant case:

"It will not accomplish the results hoped for by the Advisory Committee . . . It appears that the practice of lawyers has already become established to put a demand for a jury trial in all pleadings without regard to the appropriateness of the case for a jury trial, leaving to a later ruling of the court or a stipulation of the parties the final determination whether the case will be tried by the court or by the jury."\textsuperscript{16}

Theoretically the arguments in favor of the demand requirement are strong. However most of them appear to have been predictions or generalizations as to the beneficial results of the automatic waiver rule. Moreover the real basis for judging its value is by considering its actual effect on court procedure. Since the courts and lawyers of this state have not found it either practical or acceptable, and have refused to make use of the provisions as it was intended to be used, it is evident that it has no value as a rule of court in Wisconsin, and was rightly repealed.

\textbf{Frances M. Ryan}

\textsuperscript{15}McCaskill, "Jury Demands in the New Federal Procedure", 88 U. of Pa. L. Rev. 315, (1940), at 317; where the author says of Federal Rule No. 38, which was the foundation of the Wisconsin rule in question; "The Rule does not purport to state what issues are properly triable to a jury. It is assumed that this is known. A party knowing the extent of his right is given the privilege of claiming the whole or any part of it. A party who does not know whether he has a right, or who is uncertain of its extent, is permitted to experiment, demanding what he wishes. Presumably what he will get will be measured by what he should have, if the trial court can determine it any better than he can, unless what he may have is more than what he has wished for, in which event the wish governs. If he does not want to run the risk of asking for too little, and this seems to be characteristic of careful practitioners, he may gamble on the court's knowledge. If the court is in doubt, and wishes to play safe, he may get more than he is entitled to." And again at 329; "Distinctions between actions at law and suits in equity are so thoroughly abolished that in many cases it will be impossible to determine the proper scope of jury trial, and jury demands under Rule 38 will be arrows shot in the dark. The wishes of the parties, or the guesses of the trial judges, rather than the Constitution, will determine what is obtained."

\textsuperscript{16}In re Daar, 21 NW (2d) 1, (1945, Wis.), at p. 4.