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# Federal Procedure--Court Congestion--Discretionary Severance of Issues of Liability and Damages in Personal Injury Cases

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# Recent Decisions

## FEDERAL PROCEDURE — COURT CONGESTION — DISCRETIONARY SEVERANCE OF ISSUES OF LIABILITY AND DAMAGES IN PERSONAL INJURY CASES

*Hosie v. Chicago & Northwestern Railway Company, 282 F.2d 639 (7th Cir. 1960)*

In *Hosie v. Chicago & Northwestern Railway Company*,[1] the plaintiff brought a suit alleging that he had been negligently struck by one of defendant's trains. The trial court, upon its own motion, ordered separate jury trials of the issues of liability and damages pursuant to Northern District of Illinois Civil Rule 21.[2] This motion was ordered over the objection of both parties. On appeal from an adverse judgment on the issue of liability, the plaintiff contended that the application of local Rule 21 to the trial below abridged and modified his right to a jury trial as guaranteed by the seventh amendment. He charged that such procedure changed the ancient and long-established manner of conducting trials of civil cases at common law. The court of appeals affirmed the judgment of the lower court. The court held that the essential character of a trial by jury was preserved: the seventh amendment of the federal constitution does not require the retention of all the old forms of procedure; nor does it prohibit the introduction of new methods for ascertaining what facts are in issue.

Rule 21 reads as follows:

> Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counter-claim or third-party claim.
>
> In the event liability is sustained, the Court may recess for pre-trial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem met.
>
> The Court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation.[3]

1. 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 81 Sup. Ct. 695 (1961).
2. 2 FED. RULES SERV. 2d 1048 (1959).
3. *Ibid.*

District courts are authorized both by acts of Congress and by the Federal Rules of Civil Procedure to promulgate rules of procedure.[4] Rule 21 was promulgated for the express purpose of speeding up the administration of justice without depriving litigants of any substantive or procedural benefits.[5] The rule is supported by the sound principle that the decision on liability may dispose of the entire case.

Since between seventy and eighty per cent of trial time is consumed by presentation of evidence pertaining to the issue of damages,[6] it is apparent that if the consideration of this issue were deferred until after there had been a determination of the defendant's liability, substantial saving of trial time would result.

Calendar congestion is a growing problem resulting from our rapidly-growing population and the ever-increasing number of mechanical devices which have the potential of inflicting injuries.[7] The problem has produced substantial concern on numerous occasions.

Mr. Chief Justice Warren spoke out strongly on the subject:

> [T]he delay and the choking congestion in the federal courts today have created a crucial problem for constitutional government in the United States. . . . [for] it is compromising the quantity and quality of justice available to the individual citizen and, in so doing, it is leaving vulnerable throughout the world the reputation of the United States . . . .[8]

Delay is an evil which causes many hardships. It produces erosion of evidence through loss of witnesses, death of parties, and forgetful memories. It reduces considerably the likelihood that justice will be done when a case comes up for trial. It brings the courts into disrepute. Honest claims are prejudiced; the "nuisance value" of doubtful claims is enhanced.

The merit of the common law has been its flexibility to meet changing conditions in a dynamic society. The present calendar congestion presents a sufficient reason for the courts to utilize any device conforming with basic justice that will tend to alleviate it. If in the court's discretion, a separate trial of the issue of liability would alleviate this congestion

4. 28 U.S.C. § 2071 (1958); FED. R. CIV. P. 83.

5. Miner, *Court Congestion: A New Approach,* 45 A.B.A.J. 1265, 1268 (1959).

6. ZEISEL, KELVEN & BUCHOLZ, DELAY IN THE COURT 99 (1959).

7. Miner, *Court Congestion: A New Approach,* note 5 *supra,* at 1266. A special committee appointed by the American Bar Association to study the problem of court congestion has found the following figures as illustrative of the problem facing our courts: the Superior Court of Cook County (Chicago), Illinois, was 57.3 months behind; the Supreme Court, Queens County (New York City), New York, was 38 months behind; and the courts of Cleveland, Ohio, were delayed over two years. These figures were compiled in 1958. The figures are based upon the delay between "at issue" and judgment. Obviously, if the time of filing were considered, the delays would appear even greater. The average delay in the United States District Courts has likewise increased.

8. Warren, *Delay and Congestion in the Federal Courts,* 42 J. AM. JUD. SOC'Y 6-7 (1958).

and preserve all substantial rights of the parties, the court should not hesitate to order the separate trial of the issue of liability.

Mr. Justice Brandeis pointed out in *Ex Parte Peterson* that:[9]

> New devices may be used to adapt the ancient institution [right of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the [Seventh] Amendment[10] is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with.

Because Rule 21 tends to prevent compromise verdicts and to reduce the jury's ability to mitigate harsh consequences resulting from a strict application of the law, it has been argued that it violates the seventh amendment.[11] However, courts have indicated that the significant part of the right of trial by jury is that issues of fact are submitted for determination with such instructions and guidance by the court as will afford opportunity for a fair consideration by the jury.[12] Beyond this, the seventh amendment does not exact the retention of antiquated forms of procedure.[13] The seventh amendment guarantees the *substance* rather than the *form* of a jury trial.[14]

There have been many instances where the federal courts have exer-

9. 253 U.S. 300, 309-310 (1920).

10. "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 reexamined in any court in the United States, than according to the rules of the common law."

11. Although the court in the *Hosie* case did not consider the possibility of violation of due process of law under the fifth amendment, the decision of the case was consistent with the requirements of due process. It has been defined in *Ex parte Wall:* "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." 107 U.S. 265, 289 (1883). Due process in state courts, under the fourteenth amendment, guarantees no particular form or method of procedure. See Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908); Hurtado v. California, 110 U.S. 516 (1884). The substance of "procedural due process" seems to be *fairness.* See Cassell v. Texas, 339 U.S. 282 (1950); Norris v. Alabama, 294 U.S. 587 (1935); Tumey v. Ohio, 273 U.S. 510 (1927); Moore v. Dempsey, 261 U.S. 86 (1923).

12. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 498 (1931). In *Ex Parte Peterson,* 253 U.S. 300, 310 (1920), the substance of the right guaranteed by the seventh amendment seems to be only "that the ultimate determination of issues of fact by the jury be not interfered with."

13. Walker v. New Mexico & So. Pac. R.R., 163 U.S. 593, 596 (1897); Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 498 (1931).

14. Galloway v. United States, 319 U.S. 372 (1943). At pages 390 to 392, the Court said: "The [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were 'the rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England."

cised their discretion and have confined trial to a single issue in order to expedite litigation under the authority of Rule 42(b), Federal Rules of Civil Procedure.[15] The issues so litigated have included: incapacity,[16] release,[17] existence of a contract,[18] laches,[19] validity of patents,[20] existence of fraud,[21] and jurisdiction.[22]

Furthermore, it appears that there is a growing trend to separate the issue of liablity from the issue of damages under Rule 42(b).[23] But it must be remembered that such severance is discretionary with the trial judge.[24]

It will be noted that in all of the instances referred to in the two preceding paragraphs, the severance came under Rule 42(b) and without the benefit of a local rule such as Rule 21 of the Civil Rules of the Northern District of Illinois. This fact strongly suggests that authority to sever need not be implemented by a local rule. Furthermore, Rule 83 of the Federal Rules of Civil Procedure[25] specifically authorizes district courts to promulgate their own rules to ". . . regulate their practice in any manner not inconsistent with these rules." Such regulation by the district courts should be encouraged for it would assure more uniformity among the various district judges.

It is interesting to note that the German Civil Code makes it possible (although not mandatory) for the issues of liability and damages to be severed. Section 304 of the German Law on Civil Procedure[26] provides (as translated): "If a claim is contested with respect to the cause [of action, *i.e.*, the issue of liability] as well as to the amount [*i.e.*, the issue

15. Rule 42(b) provides: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

16. Karolkiewicz v. City of Schenectady, 28 F. Supp. 343 (N.D.N.Y. 1939).

17. Bowie v. Sorrell, 209 F.2d 49 (4th Cir. 1953); Bedser v. Horton Motor Lines, Inc., 122 F.2d 406 (4th Cir. 1941); Lorsen v. Powell, 117 F. Supp. 239 (D. Colo. 1953).

18. Canister Co. v. National Can Corp., 163 F.2d 683 (3d Cir. 1947).

19. Seven-Up Co. v. O-So Grape Co., 177 F. Supp. 91 (S.D. Ill. 1959).

20. Zenith Radio Corp. v. Radio Corp. of America, 106 F. Supp. 561 (D. Del. 1952).

21. Drake v. Ming Chi Shek, 155 F. Supp. 345 (D.N.J. 1957).

22. Carr v. Beverly Hills Corp., 237 F.2d 323 (9th Cir. 1956), *rev'd on other grounds*, 354 U.S. 917 (1957).

23. Nettles v. General Acc. Fire & Life Assur. Corp., 234 F.2d 243 (5th Cir. 1956); O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577 (N.D. Ill. 1960); Hassett v. Modern Maid Packers, Inc., 23 F.R.D. 661 (D. Md. 1959); Rickenbacher Transp., Inc. v. Pennsylvania R.R., 3 F.R.D. 202 (S.D.N.Y. 1942).

24. That severance is discretionary is shown by the following instances in which the court, in its discretion, refused to sever the issues of liability and damages: McClain v. Socony-Vacuum Oil Co., 10 F.R.D. 261 (S.D. Mo. 1950); United States *ex rel.* Rodriguez v. Weekly Publications, Inc., 9 F.R.D. 179 (S.D.N.Y. 1949).

25. See also 28 U.S.C. § 2071 (1958).

26. Z.P.O. — Zivilprozessordnung.

of damages], the Court may first render a judgment as to the cause of action." This method has been applied frequently. Of course, where the cases are relatively simple, the court will deal with both issues simultaneously. Experience has shown that in most cases where liability has been ascertained, the parties will settle the remaining litigation concerning the amount of damages.[27]

The application of the separate-trial rule would result in many advantages to our court system, although the rule does have some defects. The application of the rule would facilitate the introduction of evidence, with fewer and simpler issues to be submitted to the jury.[28] This simplification would probably aid the jury in rendering a more accurate verdict and would tend to eliminate compromise verdicts. However, such an elimination might tend to increase the number of hung juries. To this extent the rule's primary purpose of decreasing the time spent trying personal injury suits would be hindered. Nevertheless, the application of the rule will probably decrease the time consumed in trying the average personal injury case, because, as previously mentioned, the presentation of evidence on the issue of damages in such cases consumes seventy to eighty per cent of the trial time.[29] Furthermore, it appears that a large number of cases may be disposed of on the liability question for two reasons. First, thirty to forty per cent of negligence cases result in verdicts for the defendant.[30] Second, Rule 21 will induce defendants to settle in the event of a finding of liability. The application of the rule will also tend to eliminate so-called "nuisance" cases in which liability is doubtful. However, it should be recognized that the simultaneous trial of the issues of liability and damages does result in some minimal benefit to society in that it tends to distribute the losses to those who can best bear them.

A closely related problem that is not in issue in the present case is whether a person is deprived of a jury trial as contemplated by the seventh amendment when some of the issues are submitted to one jury and other issues to a second jury. The court in the *Hosie* case specifically reserved judgment as to whether such separation would be within the substantive meaning of the seventh amendment. In a case decided by the same court (but with a different judge presiding[31]) the jury was dismissed after a verdict of liability.[32]

27. Baeck, *Some Questions Concerning the Law on Damages for Torts in Germany*, 12 OKLA. L. REV. 265, 269 (1959).

28. Miner, *Court Congestion: A New Approach*, note 5 *supra*, at 1333.

29. ZEISEL, KELVEN & BUCHOLZ, DELAY IN THE COURT 99 (1959).

30. *Ibid.*

31. United States District Judge Julius M. Miner presided over this case. He is the author of *Court Congestion: A New Approach*, note 5, *supra*.

32. O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577 (N.D. Ill. 1960). Since no