MASSACHUSETTS Lawyers Weekly

Functional imparity, limits of inherent powers: the right to a jury of 12 in the Superior Court

By: Tory A. Weigand October 28, 2021

As we remain in the throes and reverberating aftershocks of an unprecedented pandemic, it may seem out of place to defend and exalt any right to a jury of 12 in the Superior Court, or to question the authority of the Supreme Judicial Court to suspend such a right in civil cases.

After all, the SJC's most recent and "seventh order" — including its continued and mandatory directive that Superior Court civil cases are to proceed with juries of six "with or without the consent of the parties" — is unquestionably well-intentioned in seeking to reduce the size of venires, make social distancing easier, and provide a means of health protection as well as perceived facilitation of judicial administration.

Yet this may be the perfect, if not critical, time and circumstance to pause and remind ourselves as to why a jury of 12 in the Superior Court has always been the standard and so essential; why it is vital to the fundamental task of quality decision-making and consequential judgments through a meaningful collaborative process and as to the diverse, complex and important matters that come before the Superior Court.

To be sure, both the U.S. Supreme Court and the SJC, in the early '70s, respectively proclaimed that since the size of the jury was not specified in the Constitution or the Massachusetts Declaration of Rights, and the framer's intention could not be divined, a jury of 12 was deemed a "historical accident" and an unessential attribute to the constitutional right to a jury trial.

The dispositive constitutional inquiry was deemed one of functional equivalency measured by the effectuation of the purposes behind the fundamental right. The resulting notion that the fundamental right to a jury trial is as to substance not mode, as well as demarcating between what is indispensable to the purpose and what is not, remains.

Leaving aside the powerful dissents, the eschewing of longstanding precedent, and the long tradition and understanding going back centuries that a jury meant a jury of 12, the fundamental premise that juries of six are the functional equivalent of juries of 12 or that jury size is not indispensable has not remotely withstood the test of time.

The functional equivalency determination of six- and 12-person juries made by the courts in the 1970s was premised on "scant evidence of any standards" and has, in the ensuing 50 years, been soundly discredited.

Indeed, the Supreme Court subsequently relied on the lack of functional equivalency between juries of six and 12 to hold that a jury of five violates the Constitution. How the reduction of a jury of six to five violates the Constitution, but a reduction from 12 to six does not, remains dubious.

Regardless, the myriad of modern social science studies addressing the question of whether reducing jury size affects jury function have found, virtually unanimously, that larger and smaller juries are not functionally equivalent.

Smaller juries increase the reluctance of minority viewpoints; reach different results from that of larger juries; fail to serve as to cross sections of the community; do not deliberate as long; and have a reduced capacity to fulfill the democratic role for which the civil jury was created.

It remains — particularly pertinent to the important, diverse and more complex matters of the Superior Court — that juries of 12 allow more total, vigorous discussion as well as bring more human resources to bare upon the judgment to be made, enhancing the quality of decision-making that is so central to the matters that come within the Superior Court's jurisdiction.

The seventh order, including the mandatory suspension of juries of 12 in civil cases, is based on the SJC's inherent powers that are broad and deemed necessary to protect the fundamental functioning of the judiciary.

There remain limits, however. The inherent powers are available only in extraordinary circumstances and only where necessary to preserve the very function or existence of the judiciary and its ability to operate. They likewise must give way to express constitutional commands, like the dictates of Article 29 of the Declaration of Rights relegating to the Legislature the sole authority to suspend laws, as well as the need for judicial deference required by the separation of powers both generally and more particularly as to matters of social policy.

The SJC's order suspending juries of 12 for civil cases is indeterminate. There is no indication when such juries will return and certainly, at the very least, it tests the limits of the SJC's inherent powers.

The order raises equal protection concerns as it suspends the right to a jury of 12 in civil cases but maintains the right in criminal cases, with a rational basis for the distinction based on pandemic concerns hard to identify.

The seventh order likewise rubs against the need for deference to the Legislature in matters of important policy determinations, Article 29, and the separation of powers generally.

Since its inception in 1859, the Superior Court has always operated with a jury of 12 for both civil and criminal cases, with the Legislature enacting and repealing legislation applicable to the establishment, make-up and jurisdiction of the courts — but never once altering the jury of 12 standard of the Superior Court.

This longstanding legislative presence and sanction raising separation of powers concerns as to the SJC's order, as well as the paramount need for quality decision-making demanded by the nature, complexity and diversity of matters that fall within the jurisdiction of the Superior Court, cannot be ignored.

These palpable limits and concerns otherwise loom against not only the imperceptible divide between substance and form as to the longstanding and imbedded jury of 12 in the Superior Court, but the judiciary's obligation always to "sedulously" guard the right to jury "against every encroachment," and the recognition that it is the judiciary, particularly in times of social stress, that must remain the most vigilant in the protection of rights and justice.

Tory A. Weigand is a partner at Morrison Mahoney, with an appellate and trial practice in a variety of areas. He practices in the Boston and Springfield offices.

Issue: NOV. 1 2021 ISSUE

YOU MIGHT ALSO LIKE

Judge boots suit by pedestrian hit by postal truck

October 29, 2021

Auto insurer subject to IDV damages

October 29, 2021

Lawyer vindicates ATV riders' rights over beachfront easement

October 29, 2021