

The So-Called “Right” to a Civil Jury Trial During a Pandemic

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and
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May a civil litigant's demand for a trial by jury which is effectively impossible for an indeterminable, possibly lengthy, period of time outrank the opposing party's right to a timely resolution in accord with due process?

The right to a jury trial in a criminal case is clear. No concomitant right exists in Louisiana civil law.

The Louisiana Constitution of 1974 specifically removed all references to a constitutional right to a civil jury trial. *Scott v. American Tobacco Co., Inc.*¹ *Scott* effectively holds, *inter alia*, that a plaintiff's constitutional right to access the courts and due process may, in appropriate circumstances, supersede a civil defendant's assertion of a statutory "right" to trial by jury.

In late December 2019, word came from China about a coronavirus (COVID-19) that might cause a worldwide pandemic. As COVID spread worldwide and in Louisiana, the Louisiana Supreme Court suspended all jury trials until at least April 17, 2020, and later extended that suspension until after June 30, 2020. Then on Feb. 11, 2021, the Court issued the following order:

Jury Trials: No civil or criminal jury trial shall commence in any Louisiana state court before April 1, 2021. Civil and criminal jury trials that are in progress as of the date of this Order may continue to conclusion, in the discretion of the local court.

Speedy Trial Computations: Given the public health concerns and the necessity of taking action to slow the spread of the disease, the continuances occasioned by Section 1 of this Order serve the ends of justice and outweigh the best interest of the public and the defendant in a speedy trial. Therefore, the time periods of such continuance shall be excluded from speedy trial computations pursuant to law, including, but not limited to, those set forth in the Louisiana Code of Criminal Procedure and the Louisiana Children's Code, and presumptively constitute just cause.

William Gladstone, a 19th century Prime Minister of the United Kingdom, once observed, "Justice delayed is justice denied." Delay almost always runs in favor of the defendant. Louisiana courts have noted that neither the due process requirements of the federal nor state constitutions

require a jury for a civil defendant.² See, *Scott*, holding no requirement exists under the Louisiana Constitution for a jury trial in civil personal injury matters.

In a civil case, the Louisiana Constitution affords a person the right to "an adequate remedy" without "unreasonable delay" for an injury to his person or property.³ La. Const. Art. I, § 22. While a person in a civil case has a privilege, *not a right per se*, to a trial by jury, that privilege is merely statutory. La. C.C.P. art. 1731. Numerous exceptions exist with respect to the privilege of having a civil case heard by a jury. *Melancon v. McKeithen*⁴ discusses the history of jurisprudence of the lack of a federal constitutional right to a jury trial in civil cases as the 7th Amendment of the U.S. Constitution has never been incorporated to require a jury trial in a state civil proceeding. See also, La. C.C.P. art. 1732-1734.1, enumerating situations in which a person is not entitled to a jury, or where a party has waived the right to a jury.

The practical requirements of physical "social distancing" and finding a courtroom with adequate spacing for the safety of jurors, counsel, the judge, the judge's staff, witnesses and others in the courtroom make a jury trial nearly, if not actually, impossible. It is reasonable to expect prospective jurors summoned to the courthouse to be concerned about exposure to the disease and one would expect that those concerns will continue for some time. Jury trials in Louisiana may be restricted or cancelled for some time to come.

A ruling that no case may proceed to verdict until an unknowable future date allows one side to essentially halt our entire judicial system, thereby concurrently violating another party's constitutional rights.

Hornbook law tells us that when a federal constitutional right and a state statutory right come into conflict, the federal right must be honored, and the statutory right ceded way. *Buras v. Board of Trustees*⁵ (invalidating a statute that limited an appellant's right to access courts under La. Const. Art. I, § 22).

In the COVID pandemic, the operation of justice mandates that a litigant's privilege to demand a civil jury trial may be suspended. A court may find that it has the power and authority to strike the jury trial under La. Const. Art. V, § 21 and La. C.C.P. art. 1631.2.

The Louisiana Constitution establishes certain "plaintiff's due process rights," chief amongst them being timely and meaningful access to courts to redress personal damages. *Everett v. Intorbus of New Orleans*.⁶

Section 22 of Article V of the 1974 Louisiana Constitution mandates: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."

When statutory provisions impinge upon a party's Louisiana constitutional due process right, courts have found the statutory provisions invalid either facially or as applied to the situation at hand. See, *Buras, supra*, *Everett, supra*.

It is impossible to predict when civil juries will again be able to be empaneled. Once jury trials recommence, because of speedy trial considerations in criminal cases, it is logical to expect that most, if not all, juries for the foreseeable future will be criminal in nature. A party's due process rights in such extraordinary circumstances require a court to take action, if warranted, and devise a solution that would normally balance each party's interest.

The Louisiana 4th Circuit Court of Appeal has noted: "We contrast the right to a trial by jury under Louisiana law with the right to jury trial endowed by the Seventh Amendment under federal law to underscore that the Louisiana right is not so absolute in quality." *Scott, supra*.

The privilege to jury trials in civil cases has diminished over the history of Louisiana's Constitution. This is in stark contrast to the criminal context where the rights of defendants to juries are increasingly sacred both by Louisiana and federal law. As noted previously above, the drafters of the 1974 Louisiana Constitution omitted any reference to a civil jury trial, albeit such mention did exist in the Constitution's prior version.

Throughout Louisiana law, numerous illustrations exist where the right to a civil jury trial is limited or curtailed by the Louisiana Constitution, statutes, or courts to facilitate the orderly administration of justice and ensure a person's access to courts. Given these unprecedented situations, the selective suspension of the

statutory privilege to a civil jury should be a tenable solution.

Inherent direct conflicts exist. For example, the Code of Civil Procedure that grants juries requires expedited trials for those over 70 years of age or with terminal illnesses. La. C.C.P. art. 1573. Where in this scheme would one party's need to access justice be checkmated by the opponent's insistence on a jury?

The waiver of a jury trial by a party for mere failure to comply with procedural limitations is implicit and explicit in Louisiana law. If a party does not both request and timely post a jury bond, the right to trial by jury is waived. *Manuel v. Shell Oil Co.*⁷ The failure to request a jury within the time periods of La. C.C.P. art. 1733 waives the right to a civil jury trial. *Cooper v. City of New Orleans*.⁸ That our law allows parties to forfeit a civil jury trial for missing deadlines is proof it is a *privilege* and not a fundamental right.

The specific provisions of the Louisiana Code of Civil Procedure that confers the "right" to a jury trial in some civil cases also establishes no such right exists in others. La. C.C.P. art. 1732. Some examples:

- If the amount in controversy is under \$50,000, a litigant has no right to a civil jury. La. C.C.P. art. 1732A(l). *See also*, La. Acts 2020, 1st Ex. Sess. No. 37, eff. 1/1/21.

- No matter the amount of damages, civil jury trials are prohibited in maritime actions and Louisiana courts have held no violation of due process exists as a result because the ship owner still had access to courts. *Palmer v. Blue Water Marine Catering Co.*⁹

- The state has the statutory right to preclude a jury in all cases where it is sued. La. R.S. 13:5105.

- An employee's only recourse against his employer for torts suffered during the course and scope of his employment is workers' compensation rather than a jury trial. La. R.S. 23:1032.

Even when a party has been otherwise entitled to a jury, Louisiana courts have affirmed the award of a judgment against that party in a judge trial because due process was otherwise served. *Scott, supra*.

Unlike other states, the Louisiana Constitution allows an appellate court to alter a jury's factual findings in a civil case. La. Const. Art. V, § 10(B). An appellate court in Louisiana may review *de novo* a civil jury's verdict. Jurisprudence of the

Louisiana Supreme Court, rather than the Louisiana Constitution or statute, has directed that appellate courts not alter jury verdicts unless manifestly erroneous or clearly wrong. *See, Canter v. Koehring*.¹⁰ (Most states and the federal system do not permit review of a jury's finding of fact due to the heightened value those systems have chosen to place on civil juries and their findings.) While giving great deference to the jury's decision, the Louisiana Constitution does allow for facts to be assessed by judges in accordance with European civil law tradition.

Appellate courts have consistently held that a person's federal and state due process and equal protection rights are not violated when a party is denied a jury trial. In a myriad of cases covering virtually every context where a jury trial is not offered by statute or constitution, parties have urged that the limitations on civil jury trials violate their rights to due process and equal protection of law under the federal and Louisiana constitutions. Every time the issue has been raised, it has been rejected. *Brewton v. Underwriters Ins. Co.*¹¹ held that "the right to jury trials in civil cases is *not* so fundamental to the American system of justice to be required of state courts by the due process clause of the Fourteenth Amendment." *See also, Scott, supra*, finding no violation of Louisiana Constitution's due process rights exists by denial of a civil jury.

When normalcy will return is unknown and unknowable. It is reasonable that, until both criminal and civil jury trials can be resumed in the regular course of a court's business, conducting a civil bench trial may ensure another party's constitutional right to court access and the orderly administration of justice under Article V of the Louisiana Constitution.

The constitutional right to access the courts supersedes the statutory privilege of a civil jury in an appropriate emergency. The COVID pandemic is one of those emergencies. When a constitutional right, as opposed to a privilege, conflicts with statutorily created ones, a court must honor and enforce the constitutional right. *West Feliciana Parish Government v. State*¹² ("[w]hen a legislative instrument conflicts with a constitutional provision, the legislative instrument must fall.") *Beer Indus. League v. City of New Orleans*.¹³

In normal circumstances, a party in a civil case would have the *privilege* of en-

joying a jury, but the opposing party cannot insist upon a legislative creation when it would violate a constitutional right, as well as preclude the efficient and orderly operation of the state's court system. *See, Sands v. State*¹⁴ (holding that La. Const. Art. I, § 22 precludes a party acting so as to "close the courts to his adversary"). While a privilege to a jury is normally favored, exceptional circumstances require exceptional remedies, and the judge should have the right to assert the judge's authority and docket control.

Courts have found that certain litigant's rights must be suspended in light of emergency situations. For example, generally, when a criminal jury is sworn, a defendant's double jeopardy rights attach to that jury precluding a mistrial being declared over the objection of a criminal defendant. *Oregon v. Kennedy*.¹⁵ However, in the event of "manifest necessity" — for example, a hung jury or a trial being halted due to an emergency — "the public's interest in fair trials designed to end in just judgments" supersedes the defendant's double jeopardy rights, allowing a retrial. *See also, Wade v. Hunter*.¹⁶ The Louisiana Code of Criminal Procedure reflects this rule in the event of a disaster or emergency, providing a trial court the ability to declare a mistrial over a defendant's objection when "[i]t is physically impossible to proceed with trial in conformity with law." La. C.Cr.P. art. 775(5). In that case, the interest of justice and operations of a court allow the suspension or abridgement of a defendant's constitutional right — far more severe than a case when only statutory rights are involved.

In a pandemic, a criminal defendant's right to a speedy trial has been suspended because, *inter alia*, the ability to empanel a jury is essentially an impossibility. *Kimbrough v. Cooper*¹⁷ (holding post-Katrina delays in La. C.Cr.P. art. 701 speedy trial rights were justified in the public interest justified the state's delay). Otherwise, a criminal defendant in a crisis could manipulate the system by demanding both his right to a speedy trial and his right to a jury trial be enforced. This could result in a disregard for the victim, and the society's interest in justice, so the court allows the exception.

Since no constitutional right exists to a civil jury trial, a party's constitutional right to due process has been held to be protected through bench trials. A court may fix a

trial date for determination of the case by the judge and not by the jury.

To a lesser extent, but no less as meaningful, the separation of powers doctrine mandates that a case proceed as a bench trial if necessary. Our constitution sets up the three distinct branches of government — legislative, executive and judiciary. La. Const. Art. II. Precluding meaningful access to the courts until juries resume and are available to hear both criminal and civil cases violates the separation of power doctrine in two ways.

La. Const. Art. I, § 22 requires an open court system that a party can access and receive remedies. Legislation that blocks that citizen's access to courts is void. *Buras, supra*. Ordinarily, La. C.C.P. art. 1731 providing for civil juries does not violate any state constitutional provision, and a litigant need not seek to have the statute declared facially invalid. However, where access to the courts is functionally closed by the statutory right to civil jury trials, such situation becomes unconstitutional.¹⁸ Since the drafters of the 1974 Louisiana Constitution as well as the Legislature have curtailed the right to civil jury trials previously for the sake of justice and efficiency, a court may order, *if necessary*, that a case proceed as a bench trial. Orders from the executive branch of government and municipal orders restricting movement create constitutional conflicts with the right to access of courts. The executive branch has the constitutional power and authority to protect citizens. Concomitantly, the judiciary has the constitutional responsibility to provide open access to the courts without unreasonable delay. The reasonable remedy is to both honor the Governor's and local governments' power to declare states of emergency, and a citizen's right to access to courts with a bench trial.

La. Const. Art. V, § 2 empowers a judge to utilize "all other needful writs, orders, and process in aid of jurisdiction of his court." *State v. Umezulike*¹⁹ ("under the inherent powers doctrine, a court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law.") Similarly, La. C.C.P. art. 1631 provides that, "[t]he Court has the power to require that the proceedings shall be conducted with dignity and in an orderly and *expeditious* manner, and to control the proceedings as the trial, so that justice is done." [Emphasis supplied.]

These provisions were made for unpredictable situations such as a pandemic or natural disaster of uncertain duration — where the third branch of government needs flexibility to enforce its jurisdiction under the Louisiana Constitution and La. C.C.P. art. 1 to ensure a citizen's constitutional rights are honored in a previously unforeseen (*force majeure*) predicament. The Louisiana Constitution and statutes have provided a court with the authority to order an extraordinary but necessary remedy when one cannot know when the civil jury system will be able to function. Otherwise, the entire civil justice system can be in abeyance. Justice may demand that a court order a bench trial in a matter if necessary and appropriate, for no person should be able to avoid responsibility by voluntarily insisting on a procedural right.

The state alone controls the process: La. R.S. 13:5105. This right given to the state alone, to insist on a mode of trial, was never intended to be used as shield for the state to prevent total access to the courts for its own citizens. Think on this, the state as tortfeasor is compelled to follow safety mandates by the executive and so avoids redress from its citizens by the roadblock of La. R.S. 13:5105.

Even if a litigant has requested a jury trial, when unpredictable circumstances warrant action, that litigant ought to be able to waive the jury and have the case determined by the judge alone.

FOOTNOTES

1. *Scott v. American Tobacco Co., Inc.*, 09-0461 (La. App. 4 Cir. 4/23/10), 36 So.3d 1046, 1052, writ denied, 10-1358, 10-1361 (La. 9/3/10), 44 So.3d 686 (Mem) 44 So.3d 707 (Mem).

2. *See, Scott, supra*, 36 So.3d at 1050-55.

3. Presumptively, the word "person" includes individuals and entities without any distinction between a plaintiff or defendant.

4. *Melancon v. McKeithen*, 345 F.Supp.2d 1025, 1036-1037 (E.D. La. 1973).

5. *Buras v. Board of Trustees*, 360 So.2d 572, 574-75 (La. App. 4 Cir. 1978).

6. *Everett v. Intorbus of New Orleans, LLC*, 17-0643, 17-0644, 17-0645 (La. App. 4 Cir. 12/19/18), 262 So.3d 332, 335.

7. *Manuel v. Shell Oil Co.*, 94-590 (La. App. 1 Cir. 10/18/95), 664 So.2d 470.

8. *Cooper v. City of New Orleans*, 96-0243 (La. App. 4 Cir. 9/18/96), 680 So.2d 1259.

9. *Palmer v. Blue Water Marine Catering Co.*, 95-342 (La. App. 5 Cir. 10/18/95), 663 So.2d 780, 782-84.

10. *Canter v. Koehring*, 283 So.2d 716 (La. 1973).

11. *Brewton v. Underwriters Ins. Co.*, 02-2852 (La. 6/27/03), 848 So.2d 586, 588.

12. *West Feliciana Parish Government v. State*, 19-0878 (La. 10/11/19), 286 So.3d 897, 994.

13. *Beer Indus. League v. City of New Orleans*, 18-0280 (La. 6/27/18), 251 So.3d 380, 387.

14. *Sands v. State*, 458 So.2d 960 (La. App. 4 Cir. 1984).

15. *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

16. *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949).

17. *Kimrough v. Cooper*, 05-2335 (La. 11/22/05), 915 So.2d 344, 344-45.

18. Arguably, jurisprudence exists that could be said to delay indefinitely, maybe in perpetuity, a trial of a case. In the buried jurisprudence is the case of *Roucher v. Asbestos Corp., Ltd.*, 19-1583 (La. App. 1 Cir. 2/18/20), that reinstated a jury trial when the parties had all agreed in writing to strike the jury. *Roucher* cites *Alkazin v. City of Baton Rouge*, 97-0738 (La. App. 1 Cir. 11/7/97), 705 So.2d 208, 211, which a careful reading thereof discloses that it does not absolutely support the issue that in all circumstances the right of a party to a civil jury trial must be upheld. If it is unknowable if and when a civil jury can be held, *Roucher* literally would mean that parties will never have their day in court. Such is a violation of La. Const. Art. V, § 22 if the courts are not open to redress grievances within a reasonable period of time; a single party cannot insist upon a jury trial regardless of how long it will take to have one.

19. *State v. Umezulike*, 03-1404 (La. 2/25/04), 866 So.2d 794.

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