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BLIND JUSTICE OR JUST BLINDNESS?

JAMES G. MCCONNELL*

A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning.

—Vaughn, C.J., *Bushell's Case*
1 Vaug. 135, 148 (1670)

The right to trial by jury is not a right of the members of the general public to service on juries; rather it is the right of litigants to submit their disputes to juries for determination. It is only the litigants, not the jurors or prospective jurors, who may complain about the exclusion of a particular person or class of persons from jury service.1

This paper will examine Professor Kaiser's hypothesis that a blind juror can provide the same contribution to the deliberations of a jury in reaching its verdict, based on the law, the evidence, and the observations and experiences of the jurors in the affairs of life,2 as a sighted juror. Careful consideration of the role of each juror in receiving, weighing and deliberating over all the evidence presented by both parties at a trial demonstrates that the perceptually handicapped juror cannot bring the same independence of reflection and judgment to his task as the juror who can see and hear.

HISTORICAL PERSPECTIVES

The Magna Carta3 and the constitutions of the United States4 and of every state5 provide for the preservation of the right to trial by jury.

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3. MAGNA CHARTA REGIS JOHANNIS XXXIX.29 (1215):
   No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.
4. U.S. CONST. amends. VI, VII.
5. ALA. CONST. art. 1, §§ 6, 11; ALAS. CONST. art. 1, §§ 11, 16; ARIZ. CONST. art. 2, § 23; ARK. CONST. art. 2, § 7; CAL. CONST. art. 1, § 16; COLO. CONST. art. II, § 23; CONN. CONST. art. 1, §§ 8, 19; DEL. CONST. art. 1, §§ 4, 7; FLA. CONST. art. 1, §§ 16, 22; GA. CONST. art. 1, § 1, ¶ 11; HAWAII CONST. art. I, §§ 13, 14; IDAHO CONST. art. I, § 7; ILL. CONST. art. I, § 13; IND. CONST. art. I, §§ 13, 20; IOWA CONST. art. I, §§ 9, 10; KAN. CONST. BILL OF RIGHTS §§ 5, 10; KY. CONST. §§ 7, 11; LA. CONST. art. 1, § 17; ME. CONST. art. I, §§ 6, 20; MD. CONST. DECLARATION OF RIGHTS arts. 5, 21; MASS. CONST. pt. I, art. XV; MICH. CONST. art. I, §§ 14, 20, art. 4, § 44; MINN. CONST. art. I, §§ 4, 6; MISS. CONST. art. 3, §§ 26, 31; MO. CONST. art. 1, §§ 18(a), 22(a); MONT.
Varying interpretations of the meaning of "trial by jury" have led to provisions for juries of fewer than 12 members, as well as verdicts by fewer than all the jurors. Nevertheless, several states still require a unanimous verdict of 12 jurors. Certain jurisdictions permit less than unanimous verdicts only after deliberations have continued for a specified period of time. These provisions are designed to insure that the verdict is the result of consensus following mature deliberation, rather than a hasty popular vote on the issues.

Contrary to popular mythology, jurors did not evolve out of witnesses who were to decide cases based upon their personal knowledge of the facts. Jurors were not eye-witnesses to the events in question but were to bring in a verdict based on the evidence received from those who did have knowledge of the facts. The only time a juror could rely on his own personal knowledge was in defense of a bill of attainder for returning a false verdict. Once the procedure of attainder was replaced with the procedure of a new trial in cases where ver-

6. ALAS. CONST. art. 1, §§ 11, 16; ARIZ. CONST. art. 2, § 23; IDAHO CONST. art. 1, § 7; IOWA Const. art. 1, § 8; LA. CONST. art. 1, § 17; Mich. Const. art. 4, § 46, art. 6 § 28; Mo. Const. art. II, § 28; MONT. Const. art. III, § 23; N.J. Const. art. 1, § 9; N.M. Const. art. II, § 12; N.D. Const. art. I, § 13; OKLA. Const. art. 2, § 19; S.D. CONST. art. VI, § 6; WASH. CONST. art. 1, § 10; Wash. Const. art. 1, § 23; Wyo. Const. art. 1, § 9.

7. ALAS. Const. art. 1, §§ 11, 16; ARIZ. Const. art. 2, § 23; Ark. Const. art. 2, § 7; CAL. Const. art. 1, § 7; Hawaii Const. art. 1, § 13; Idaho Const. art. 1, § 7; LA. Const. art. 1, § 17; Mich. Const. art. 1, § 14; Minn. Const. art. I, § 4; Mo. Const. art. II, § 28; Mont. Const. art. III, § 23; Nev. Const. art. 1, § 3; N.J. Const. art. 1, § 9; N.M. Const. art. II, § 12; Ohio Const. art. 1, § 5; Okla. Const. art. 2, § 19; S.D. Const. art. VI, § 6; Utah Const. art. 1, § 10; Wash. Const. art. 1, § 21; Wis. Const. art. 1, § 5.


10. See Pollock and Maitland, The History of the English Law, 139-40, 622, 628-29 (2d Ed. 1898).

11. See id. at 627.

12. Id. at 627-28.

dicts were against the manifest weight of the evidence, all reliance upon personal knowledge by jurors disappeared.\textsuperscript{14}

\textit{Rights of Litigants}

The litigant who owns the right to submit his case to a jury for determination also has the right to insist that the prospective jurors called to serve are chosen from among a body of people which is a reasonable cross section of the community in which the trial takes place.\textsuperscript{15} This "cross section" requirement applies only to the group or groups from which prospective jurors are chosen, however. There is no requirement that every jury contain a cross section of the community within its twelve or fewer members.\textsuperscript{16} Once a body of prospective jurors has been called, each litigant has the right to remove from the group those individuals whose bias,\textsuperscript{17} interest\textsuperscript{18} or prejudice\textsuperscript{19} would prevent them from being fair to both sides. In addition to these challenges for cause, each litigant has a limited number of peremptory challenges which can be used to remove prospective jurors who, in his private opinion, cannot or will not be fair to him.\textsuperscript{20} Thus the process of jury selection strives to assure not only fairness in fact but also the appearance of fairness to the litigants. No citizen has the right to insist that he be selected to sit on a particular jury.

Any examination of the question whether perceptually handicapped jurors should be forced upon litigants who do not want them must begin with the understanding that the right to trial by jury is a right of the litigants, \textit{not} a right of prospective jurors to serve. Since citizens generally have no right to insist on being included in a jury panel, why should any particular class of citizens have such a right?

\textit{Perceptual Deficiencies And The Presentation of Evidence}

One main goal of the trial lawyer in presenting his case to a jury is to have each juror retain as much as possible of the evidence he presents until the jury deliberations are concluded by the return of a

\textsuperscript{14} \textit{Id.} at 375.
\textsuperscript{15} Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Neal v. Delaware, 103 U.S. 370 (1881); Strauder v. West Virginia, 100 U.S. 303 (1880).
verdict. In order to accomplish this result, civil and criminal trial lawyers since the time of Earl Rogers have presented evidence both through the spoken word and through exhibits which can be seen and even handled by the jurors. In spite of Professor Kaiser's assertions that a blind or deaf juror can perceive and retain evidence as well as jurors without perceptual handicaps, the fact is that the perceptually handicapped juror is much less likely to retain any major portion of the facts presented through the end of jury deliberations.

Research shows that when information is presented through the spoken word alone, seventy percent of the information can be recalled after three hours, but only ten percent can be remembered after three days. When the same information is presented through visual means alone, retention increases slightly to seventy-two percent after three hours, and only twenty percent after three days. Remarkably, however, when the information is presented through both spoken and visual means, retention rises dramatically to eighty-five percent after three hours, and to a startling sixty-five percent after three days. Thus, the juror who can perceive the evidence only through hearing it, or only through seeing it, is at a demonstrable disadvantage not only in his initial ability to assimilate all the evidence presented, but also in his ability to retain any significant portion of what he has perceived until the jury retires at the end of the case to deliberate.

Perceptual Deficiencies And Deliberation Of The Jury

When all the evidence, argument and instructions have been presented, the jurors retire for private deliberations before voting on a verdict in the case. During these deliberations, each juror is supposed to express to the others his views on the evidence, and how the law applies to it. Each juror must consider his own views in light of the views expressed by the others in voting on the verdict to be returned.

Professor Kaiser emphasizes what he claims to be a blind person's ability to judge credibility of testimony in spite of the impossibility of

23. Id.
24. Id.
25. See, e.g., Illinois Pattern Jury Instructions—Civil 1.01, 1.02.
26. Allen v. United States, 164 U.S. 492, 501 (1896); United States v. Furlong, 194 F.2d 1, 2-3 (7th Cir. 1952), cert. denied, 343 U.S. 950 (1952); Tomoya Kawakita v. United States, 190 F.2d 506, 521-28 (9th Cir. 1951), aff'd, 343 U.S. 717 (1952); Hoagland v. Chestnut Farms Dairy, Inc., 72 F.2d 729, 732 (D.C. Cir. 1934); Hill v. Wabash R. Co., 1 F.2d 626, 631-33 (8th Cir. 1924).
observing the demeanor of the witness on the stand. Even if we believe this can be done, the use of sight to watch a witness while testifying is only one small aspect of the visual perception of evidence in a modern trial. Nearly every case tried before a jury involves physical or demonstrative evidence which must be seen to be understood—from the simple photograph to the elaborate, three dimensional moving model of two aircraft colliding. Professor Kaiser asserts that he, as a blind juror, can arrive at an understanding of this kind of visual evidence through descriptions and arguments provided by counsel, witnesses, the court and other jurors. He uses the example of fingerprint comparison evidence.

Taking Professor Kaiser's own example, let's examine in detail the position of the blind juror during deliberations in that case. Suppose the defendant whose fingerprint is in question is being tried by twelve jurors in a jurisdiction where nine jurors may return a verdict of conviction. The prosecution has offered a complete fingerprint taken from the defendant, and a partial print taken from the gun. The prosecution has argued that the prints are identical, and has pointed out six areas of specific similarity. Defense counsel has argued that the prints are different, and has pointed out six areas of incongruity.

Upon retiring, electing a foreman, and some preliminary discussion about the case, eight jurors conclude that the prints are the same, while three are persuaded that they are different. It is up to the blind juror to decide the prisoner's fate. Given a reasonable difference of opinion among the sighted jurors over the question whether the fingerprints are the same, how does the blind juror decide which way to vote? Does he merely count heads?

If so, then the parties have been deprived of the twelfth juror's independent resolution of the disputed issue. If not, whom does the blind juror ask? Both sides have presented fingerprint experts who disagree in their conclusions. Eleven unbiased jurors have drawn different inferences from the same evidence, which they were all able to see themselves. How can the one juror who cannot see the disputed fingerprints resolve this controversy?

It is impossible for him to do so without relying either on another juror, or on a thirteenth person who is not a member of the jury. Thus, instead of the jury of twelve provided by law, we have a decision by eleven or by thirteen—something neither party sought when asking for trial by jury.

Professor Kaiser also relies heavily upon the argument that blind
jurors must be forced upon the parties because some jurisdictions have blind judges. Yet the right to trial by jury protects the litigants from being compelled to submit their dispute to a blind trier of fact. No one can be compelled to have a bench trial before that blind judge, yet Professor Kaiser would compel the litigants to go to trial before a jury which could conceivably include twelve blind jurors—for if one blind person must be allowed to sit, how can we then exclude the second, third and fourth?

CONCLUSION

Military service is one of the highest forms of service a citizen can perform for his country, yet few would argue that the blind person has a right to enlist. It seems safe to say that a blind person is unqualified to serve, for example, as an artillery spotter—he could not see what he was shooting at. The perceptually handicapped juror is at exactly the same disadvantage in the trial of a modern lawsuit.

The right to trial by jury belongs to the litigants. There is no right of individuals to insist they be called for jury duty, or to insist that they be seated once they are summoned. If the parties to a lawsuit can be forced to accept perceptually handicapped jurors then their constitutional right to trial by jury has been fundamentally altered.