Volume 62 | Issue 4 Article 20

June 1960

Trial--Unintended Courtroom Influence--When New Trial Warranted

O. A. J.
West Virginia University College of Law

subjective interpretation of good faith be preserved, he also would permit the Board to continue to utilize all relevant acts by the parties as inferences of good faith, or the lack of it, in bargaining.

C. H. H., II

TRIAL—UNINTENDED COURTROOM INFLUENCE—WHEN NEW TRIAL WARRANTED.—In the trial of an action under the Federal Employers' Liability Act by an employee against the railroad for the loss of an eye suffered in the course of employment, a blind man, carrying a cane and a cigar box, entered the courtroom near the close of *D*'s case, and took a seat immediately behind one in which *P* was seated. The blind man entered the courtroom of his own volition and was not intentionally brought there for the purpose of influencing the jury's verdict. *Held,* reversing judgment for *P* and remanding the case for retrial, that in order to warrant a new trial it is not necessary that such courtroom episodes be deliberately contrived for the purpose of creating sympathy for *P* or prejudice towards *D*, nor is it necessary that it be conclusively shown that members of the jury were actually influenced thereby. *Fitzpatrick v. St. Louis-San Francisco Ry.*, 327 S.W.2d 801 (Mo. 1959).

A "fair trial" contemplates that no outside influences shall be brought to bear upon the jury and that no evidence shall be considered by it other than that presented and admitted at trial. *Hinton v. Gallagher*, 190 Va. 421, 57 S.E.2d 131 (1950).

Where extrinsic factors are present, the effect of which may be to affect unduly the course of the jury's deliberation, the courts have acknowledged the wholly subjective nature of the problem and have granted considerable latitude to the discretion of the trial judge to control the incidents of the trial and his sound exercise thereof will not be disturbed unless clearly abused. *Boecking Constr. Co. v. Callen*, 321 P.2d 970 (Okla. 1958); *Plank v. Summers*, 203 Md. 598, 102 A.2d 262 (1954).

The courts have often been confronted with a dilemma in such circumstances in weighing the importance of the factors surrounding the prejudicial incident. Where the jury has been influenced by irrelevant events, injustice may result from allowing the verdict to stand, but, conversely, a miscarriage of justice to the successful party may result from setting aside the verdict. The latter is especially true where the reprehensible act was without the knowledge or beyond the control of the prevailing party in the action.

The courts have been loathe to attempt to construe the delicate niceties inherent in these situations, and a great majority of the individual cases reflect an approbation of the trial court's considered judgment. The bulk of the decisions appear to be liberal and, where the successful litigant is untainted with involvement, the verdict will generally stand.

The older cases were prone to place infinitely more confidence in the integrity of the jurors than did the instant case. In *Price v. Lambert,* 3 N.J.L. 122 (Sup. Ct. 1809), a constable entered the jury room while the jurors were debating and wrote on a piece of paper "that it was a clear case." The jurymen all contended that the paper had no effect on their verdict, although one juror had some hazy recollection of additional words having been written on the paper. The court observed that the conduct of the constable was reprehensible, but there was no reversible error, for the paper did not indicate for which side it was a clear case.

This line of thought was more clearly defined some years later in *Bishop v. Williamson,* 11 Me. 495 (1834), which held that there is no legal ground for disturbing a verdict where one of the jury has been tampered with unless the acts complained of be done by one of the parties or his agent, or by his consent and arrangement.

Another aspect of this rule was developed in *Clay v. City Council of Montgomery,* 102 Ala. 297, 14 So. 646 (1894), where a juror was offered a bribe by someone not an agent of the prevailing party. The court held that, where it appears from the juror's affidavit that he was not influenced thereby, such act is not ground for a new trial.

The trial court's judgment in denying a new trial has been affirmed in acknowledgment of a wise exercise of discretion where *P* fainted before the jury in the course of the trial, *Jefferson Dry Goods Co. v. Stoess,* 304 Ky. 73, 199 S.W.2d 994 (1947); where *P* broke down and cried on the witness stand, *Schuttler v. Reinhardt,* 17 N.J.Super. 480, 86 A.2d 438 (1952); where decedent's widow, who had no interest in the suit, sat at counsel table with attorney for decedent's administrator, *Phillips v. Creighton,* 211 Ore. 645, 316 P.2d 302 (1957); and where an investigator employed by *P*'s attorney sat a counsel table, *Florida Greyhound Lines, Inc. v. Jones,* 60 So.2d 396 (Fla. 1952).

In a recent case, *Texas Eastern Transmission Corp. v. Allen,* 282 S.W.2d 338 (Ky. 1955), a person disinterested in the outcome of the

trial, doubtless a charitable soul, served soft drinks to the jury during a recess. The court expressed concern that "the personal comfort and convenience of the jurors should always have careful consideration," and held that there was no cause for reversal inasmuch as the event was not instigated by anyone connected with the trial.

This standpoint is well defended in *Dwight v. Ichiyama*, 24 Hawaii 193 (1918), where the court observed that to set aside a proper verdict because a stranger has requested a juror to find a certain way would be an injustice not authorized, and no punishment to the offender who should be proceeded against for contempt of court.

Other courts have avoided this view for fear of losing the proper perspective of the jury's prime function: to render a fair and impartial verdict, the source of its obstruction notwithstanding. In *Atlantic Coast Line Ry. v. Hardwick*, 239 Ala. 58, 193 So. 730 (1940), it was held that, whether the motive was innocent or sinister, any interference with the jury was improper and judgment was reversed and the case remanded for new trial.

The most unequivocal statement of this viewpoint was expressed in *Lynch v. Kleindolph*, 204 Iowa 762, 216 N.W. 2 (1927), which held, in reversing for retrial, that tampering with a juror during the progress of a trial, by anyone, is prejudicial error. The court observed that "all our court proceedings should be like Caesar's wife, 'above suspicion.'"

The line of demarcation between the two views is elucidated in the case of *Texas & New Orleans R.R. v. Underhill*, 234 F.2d 620 (5th Cir. 1956), where an outsider voiced his opinions and observations to the jury during the trial, concluding with the statement that he was thinking about suing *D* himself. *D*'s motion for a new trial was denied and the Circuit Court of Appeals reversed, adding that the trial court's judgment will be reversed only for an abuse of discretion.

It follows that the rule, in its broad implications, is followed almost universally, in that the trial court is given broad discretionary power, the exercise of which will rest undisturbed unless abused. The jurisdictions differ only in the extent to which this discretion is given unbridled freedom before the courts will declare that it has been abused. The majority of courts afford the trial judge a greater degree of latitude.

This curious situation, the divergence of concepts based upon the same general premise, has been the provocation of a somewhat questionable state of the law in West Virginia. This state was first confronted with the problem in *Dower v. Church,* 21 W. Va. 23 (1882), where a juror overheard a casual conversation between a witness in the trial and a stranger, neither of whom knew he was a juror, in which comments were made concerning the case. On appeal, it was held that the trial court did not err in refusing to grant a new trial, but it was observed that, had any of the parties or their friends interferred with any juror with a view of promoting their interests in any way, the verdict would be set aside without a look into its merits.

This case, both in its holding and in its dictum that recognized the possible limitations of the court's discretion under certain circumstances, was entirely consistent with the prevailing view. The broad discretion afforded the trial court was echoed many years later in *Farley v. Farley,* 136 W. Va. 598, 68 S.E.2d 353 (1951).

However, this state of affairs took an unexpected turn some threescore years after the *Dower* case in a decision that defies comprehension by those who adhere to a strict code of courtroom demeanor. In *Legg v. Jones,* 126 W. Va. 757, 30 S.E.2d 76 (1944), a juror and his wife, on the day of the trial, were invited to stay overnight at the home of the wife's girlhood friend, due to a night session of the jury. They accepted, it occurring to no one at the time that the hostess was the wife of a defense attorney in the very case that was in progress. After the verdict was returned that night, the juror and his wife availed themselves of the hospitality. The juror's home was ten miles away. *P* appealed the jury's verdict for an unsubstantial amount. Inasmuch as *P* failed to bring this to the judge's attention until shortly after the verdict was rendered, the court affirmed the judgment below, with a heroic defence of the trial court's latitude of freedom, in this manner:

> "The attorney was placed in an embrassing position, in that he could not request the wife of the juror to go elsewhere, nor could he countermand the invitation given by his wife without violating the rules of courtesy and hospitality. We do not think that he is subject to serious criticism for the above-mentioned reasons."

It is not meet to say that justice miscarried here, nor is it proper to intimate that such a precedent is dangerous to have upon the books. It is sufficient to note that West Virginia is possibly among the more liberal jurisdictions respecting jury conduct and courtroom

decor. Such freedom of conduct may be considered in contravention to Canon 23 of the West Virginia Code of Professional Ethics which provides: "All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional." 128 W. Va. *xx, xxix* (1946).

It is not anticipated that this decision will be followed to the extent of allowing or encouraging further indiscretion of this sort in this state. However, the liberal attitude that was expressed here, in itself, appears to be more desirable than the improbable holding of the principal case, in which the latitude given to the trial judge's discretion was severely restricted and the matter was approached objectively with disregard to the judge's interpretation of the situation.

The parties who are charged with the considerable expense and responsibility of preparing and presenting their case in a court of law should not be shouldered with the unreasonable burden of being held accountable for the physical and moral shortcomings of every chance spectator who enters the courtroom. This view would be practicable only if trials were all conducted in the seclusion of closed chambers.

Merely on the pretext that a blind man cared to attend the trial, where by a coincidence the loss of an eye was the basis for the action, where no advantage or prejudice would likely result from the inauspicious act, to wrest from a party a verdict, obtained after long and expensive litigation, is scarcely compatible with the due administration of justice.

O. A. J.