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Joseph T. Karcher

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THE CASE FOR THE JURY SYSTEM

JOSEPH T. KARCHER*

FOR YEARS the jury system has been under attack. The tempo of that attack is increasing today. Avowed opponents of the system are marshalling their forces for the battle. They believe that the time for a successful attack has arrived. The rapid growth in population, particularly in our urban centers; the mechanization and speed-up of all our activities; the heavy increase in taxes due to the cost of government; a general dissatisfaction with anything and everything that smacks of "the old order"; are all considered factors which favor a change. Basic concepts in almost every field of endeavor are at present under attack. Even God, country, motherhood and morality are not immune. Hence it is not surprising to find the jury system also included as "suspect" or "decedent." A careful analysis of "the Case for the Jury System" would seem to be in order.

JURY SYSTEM BROUGHT TO ENGLAND 1066

The name "Jury" is derived from the French word "Juré," meaning "sworn." Contrary to common belief, it did not originate with the Magna Carta in 1216. And this is true even though England is known as the "Cradle of the Jury System." History records that the jury was in use in one form or another as early as 800 A.D. by the Normans. It was brought to England with the Norman Conquest in 1066. Prior thereto the English system of resolving disputes included such proceedings as trial by combat and trial by ordeal. In fact, trial by ordeal existed concurrently with trial by jury for over a century. It was not until 1214 that Pope Innocent III condemned trial by ordeal. It was 1272, at the end of the reign of Henry III, before jury trials were permitted in England for civil as well as criminal cases, thus wiping out entirely the system of feudal procedures which had been in effect for centuries before.

* LL.B. 1927 Rutgers University.

MAGNA CARTA CONFIRMS RIGHT TO TRIAL BY JURY

The background of Magna Carta is interesting. King John had become progressively more tyrannical. So much so that even the Barons, upon whom he depended to maintain his throne, were being deprived of some of their prerogatives by the Sovereign. To protect themselves and their own supporters (the small landowners), these Barons joined together in what today would probably be called a revolution and threatened to depose the King by force of arms unless their rights as freemen were guaranteed. Finally, after years of controversy, King John and the Barons met on the meadows of Runnymede in 1216 and the King reluctantly signed one of the most famous documents of all times, Magna Carta. Its pertinent provisions so far as guarantees of trial by jury are concerned were as follows:

> *39.* No freeman shall be taken or imprisoned, or outlawed or exiled or in any way harmed, nor will we go upon him nor will we send upon him, except by the legal judgment of his peers or by the law of the land.
>
> *40.* To none will we sell, to none deny or delay, right or justice.

This phraseology indicates in some small measure what the average man had to contend with before the document was signed. While it was originally intended to protect the nobility, by its terms it was so framed as to protect all freemen, *i.e.*, landowners. Still later, all the tenant farmers working for the landowners were also included.

Centuries later, Blackstone in his famous eulogium paraphrased the rights of trial by jury guaranteed every Englishman as follows:

> The founders of the English Laws have with excellent forecast, contrived that no man should be called to answer to the King for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the Grand Jury; and that the truth of every accusation whether preferred in the shape of indictment, information, or appeal should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.

While the phraseology may seem a little awkward in our day, the intent is clear. The Grand Jury grew out of the basic general

idea of a trial by jury and as a preliminary to it. As originally brought to England, a jury consisted of neighbors and residents of the very neighborhood in which the incident complained of occurred. Hence their decision was based originally on what they *knew* of their own knowledge about a case rather than what they heard from witnesses. Today this procedure is prohibited. Juries decide fact questions based only upon the sworn testimony of witnesses who are subject to confrontation and cross-examination before them. They then decide the issue solely on that evidence. Extraneous evidence is not permitted or considered.

Colonists Protest Denial in Declaration of Independence

When the American colonists came to America they brought with them the sacred right of trial by jury. To them it was the safest and surest bulwark against the tyranny of the sovereign state. Prominent in their list of grievances against King George III, as set forth in the Declaration of Independence, was the fact that they were being deprived of this right of trial by jury.

The struggle of the so-called average man, the man on the street, to secure the protection of his individual rights to life, liberty and property had been dearly fought. It had not been easily won. The fight had been long and bitter. He had suffered for centuries under the tyranny of despotic Kings. It had taken a revolution and almost a miracle to secure these rights. The memory of the cruel injustices he had suffered prior to the advent of the jury system were still fresh in his mind three or four centuries later. The rights were not to be given up lightly. It was only logical that he should cling to these precious rights and fight a war, if necessary, to secure them for himself and his descendants.

And when the American Revolutionary War was over, the right of trial by jury in all criminal matters was incorporated in the United States Constitution. Later, as part of the Seventh Amendment, the right of trial by jury was expanded to all civil matters involving twenty dollars or more, and under the Common Law. Thus it is, that for almost eight centuries, and despite an occasional miscarriage of justice, trial by jury still remains the best, safest, surest and perhaps the *only* bulwark to the average citizen

to protect him in the enjoyment of his basic rights as a free man and a citizen.

Symbol Only or Key to Liberty?

There is a growing school of thought that contends that the benefits from jury trials are more or less sentimental, illusory, or fictional. This school contends that the administration of justice, the preservation of law and order, and the ordinary processes of society would not be greatly disturbed if the jury system were abolished. Not so! Just as we are inclined to take for granted or to place little value on our health—until we lose it—so it is with the jury system. We cannot begin to conceive the extent to which this loss would injure our freedom. Government is an instrument of the law. The law presumably is made for the benefit of the people. It is also made *by* the people through their representatives. It is axiomatic that the law as made should therefore reflect the will of the people. It is well enough to say that changes in the law should be made through the election process, but this is a long, drawn-out process. In the meantime, an Establishment, once in power, and with full control over the courts, would have the wherewithal to thwart the will and the wishes of the public at every turn, if it so desired. Free speech, free press, freedom of assembly and all the other rights are enforced and protected and assured through the judicial process. The only part of that judicial process which the public itself participates in is the jury system. That is why those thoughtful persons who realize its significance cling so tenaciously to the jury system. It is more than a symbol of their liberty. It is in fact the key to the preservation of their liberties.

Growth of United States Keyed to the Judicial System

In the opinion of many knowledgeable persons, the jury system has played a large part in America's growth and strength and development. No nation in history has gone as far, or grown as great or strong or rich in such a short span of less than 200 years. England grew to be the leading world power during the period in which she had a similar system for the administration of justice and the enforcement of law and order.

It is true that to a large extent England has now abandoned trial by jury in civil cases. Since 1933 only a few isolated types of civil matters, amounting to less than 5% of her civil calendar, have been tried by jury. But this system was abandoned unwillingly and regretfully. World War I weakened England. The great depression weakened her still further. It is noteworthy that there has been a steady decline in the power and prestige of England, not only economically and militarily, but politically, socially and morally as well, ever since. Thus we see that England barely survived World War II—and then only with the tremendous material and military aid of the United States. She has liquidated her empire. She readily admits that she is now barely a second-rate power. Certainly, this decline is not attributable solely to the abandonment of the jury system. But it is pointed out as evidence of the rapid decline of a once great nation, lest someone suggest that we follow suit in the abolition of the jury system in civil matters because England in effect has done so.

10 Basic Criticisms of Jury System

The most frequently heard criticisms of the jury system can be roughly summarized under these ten headings, *viz:* (1) It is too cumbersome; (2) It is too time-consuming; (3) It is too expensive; (4) It delays justice and clogs the court calendars; (5) "Wrong" verdicts are rendered in some criminal cases; (6) "Wrong" verdicts are rendered in some civil cases; (7) Some civil verdicts are grossly excessive; (8) Average jurors are not competent to adequately comprehend the law and the facts in the average case; (9) The public is unwilling to serve as jurors; (10) Finally, there *must* be a better way of administering justice.

If these points were valid the jury system would be in a bad way indeed and deserve any fate meted out to it. The fact of the matter is, however, that few, if any, of these points can stand critical analysis.

System is not Cumbersome, Time-Consuming or Too Costly

The first three of these objections can be treated together. The basic answer is that assuming *arguendo* that the allegations are true,

they are still insufficient to justify the abolition of the system. They may call for corrections, reformations and improvements—but not its abandonment. Justice is a precious commodity. It should not be sacrificed or compromised merely to save time, trouble or expense. When you compromise with truth you get untruth. When you compromise with justice you usually get injustice. Justice is always worth all it costs.

But there is a grave question as to whether the charges are sound in the first place. Handled properly by competent, efficient, dedicated public officials on a business-like basis, the calling, selection and impanelling of a jury would not be either cumbersome, time-consuming or expensive. In many instances these functions are still being performed in a manner reminiscent of the horse-and-buggy days. The modern mechanical facilities such as electronic computers for programing, screening, selecting, rejecting, segregating and notifying jurors have not as yet been adopted in most jurisdictions. The antiquated method in use may very well account for any excessive costs in the operation of this system. The per diem fees paid to jurors certainly do not. In many cases jurors are still being paid at 1918 wage rates. This literally forces them into involuntary servitude. It actually forces them to personally subsidize a branch of government, and this at a time when the government is subsidizing everything from idleness to illegitimacy. Some of these funds might well be spent on higher fees for jurors. This increase is now more than a quarter of a century overdue.

The Jury System is not the Prime Cause of Delay or Calendar Congestion

Nor is there any validity to the charge that the system delays justice unduly and clogs the court calendars. A nationwide study, it is submitted, will reveal that the conditions complained of exist primarily in the highly congested urban areas where there has been an abnormal increase in population in recent years. In more than 80% of the country these conditions do not exist. It is conceded that records do indicate that in such places as Cook County, Illinois, Los Angeles County, California, and Nassau and a few other counties in New York, it does take as much as several years for a case to

reach trial. But nationwide the average is estimated at only 12 to 15 months. Even in the congested states the average is estimated at between 30 and 35 months. Incidentally, in the case of suits for personal injury, which take up most of the court calendars, in the case of major physical injuries it may take that long for medical experts to determine the true end results of such injuries. Hence, an earlier trial would be premature and perhaps harmful to the cause of justice.

Alternate Speed-Up Methods Available

New Jersey is a good illustration of what a heavily populated state, in the metropolitan area, can do to bring court congestion and trial delays within reasonable limits. Back in 1948, prior to the surge in population, it completely revised its court system. Thus, it has managed to keep pace with the growth of the state and the tremendous increase in litigation. Of 21 counties, only 3 or 4 of the most heavily populated ones have serious calendar congestion. Additional judges, court rooms (even if rented) and additional trial lawyers ready to try their cases may very well be the answer in these counties. Acceleration in disposition of the criminal calendars in recent months has added to the problem in these same counties, but this is considered only a temporary condition. Meanwhile, the Chief Justice and the Administrative Director of the Courts are vigorously attacking the problems as they arise and introducing modern methods which promise to keep the conditions reasonably in hand for the foreseeable future. It is undoubtedly true that many more reforms and improvements are desirable and actually required. There is every assurance that they will come.

Included among the possible alternate methods of clearing the trial calendars are the following: (a) Separate trials as to liability only in all cases (which are usually followed by prompt settlements); (b) Revival of the pretrial system in automobile cases in more than a perfunctory manner; (c) Compulsory settlement conferences; (d) Separate trial lists for cases where the asserted defenses appear purely technical (such as passenger, pedestrian and rear end collision cases); (e) Imposition of the jury costs on the losing party: (f) Imposition of interest on the amount of judgment retroactive

to the day of the accident; (g) Changing the non-unanimous verdicts in civil cases to 9 to 3 or even 8 to 4 volume of trials increase. But abolition of the jury system does not seem to be among the remedies to be considered. Both the plaintiff and defense bars would oppose such a recommendation almost to a man. Even the so-called "corporation lawyer" regards the jury system with too much reverence to stand idly by and see it perish in the name of efficiency or economy or speed.

Occasional Miscarriage of Justice in Criminal Cases Not Due to Jury System

It is undoubtedly true that in some criminal cases the verdict rendered represents a miscarriage of justice. Nothing is perfect. But closer scrutiny will probably reveal that the "wrong" verdict was not the fault of the jury or of the system. The case may not have been properly investigated, prepared or presented by the State. It is easy enough to obtain an indictment, but a conviction by unanimous verdict is something different.

Then again, the Prosecutor's proofs, such as an alleged confession, may have been obtained in violation of some of the defendant's constitutional rights. Or some of the recent rulings of our higher courts may have imposed more stringent restrictions on the law enforcement agency than they had anticipated or for which they were prepared. Obviously, all of these facts have nothing to do with the effectiveness or capacity of the jury.

The State, or Prosecutor, may very well have failed to utilize the jury system effectively. Perhaps he did not examine the jurors with sufficient care on their *voir dire*. Perhaps he did not discover and excuse those jurors who were clearly biased against any conviction. Perhaps he did not exercise the peremptory challenges permitted him by law to excuse summarily those jurors he suspected of being biased. Or worse still, he may have permitted jurors to be impanelled who by their very answers on *voir dire* indicated a *laissez faire* attitude toward law enforcement or that they were willing to wink at violation of the moral code in their own lives as well as in the lives of those accused of crime. If so, neither the jury nor the jury system can be criticized for any miscarriage of justice.

Incidentally, there are many built-in protections in the law to prevent a miscarriage of justice against the defendant. If, at the end of the State's case, the presiding Judge does not believe that the State has made out a sufficient case to warrant a jury in convicting, he may, on motion of the defense counsel or on the court's own initiative, take the case from the jury's consideration and direct a verdict of acquittal. This occurs more frequently than most critics of the jury system realize. Even on appeal, the Appellate Courts have a right to review the evidence upon which a defendant was convicted and if they find that the verdict was against the weight of the evidence they may reverse the conviction.

Occasional "Wrong" Verdicts in Civil Cases due to Causes Other than the Jury

In civil matters as well, it is also conceded that there are occasional miscarriages of justice through improper jury verdicts. This is not surprising when all of the variables and imponderables are taken into consideration. The point is that they do not occur as a matter of course or with great frequency. They are the exceptions rather than the rule. Once again, on closer analysis it will be found that when they do occur they are usually due to causes other than the jury itself. Once again, as in criminal matters, the case may not have been properly investigated, prepared or presented. Counsel may not have examined the jury with the care, caution and circumspection he should have exercised to see that a truly fair and impartial and competent jury was impanelled to try the case. This could have occurred through counsel's failure to exercise properly either his peremptory challenges or his challenges "for cause."

In any event, if the verdict rendered is obviously the result of mistake, partiality, prejudice or passion on the part of the jury, the court has the power, on proper motion, to set aside the verdict and award a new trial to the aggrieved party. The court does not hesitate to exercise this prerogative. Here is a built-in protection against the miscarriage of justice in civil matters as well.

Grossly Excessive Verdicts Can Be Remedied by Court

The charge that in some civil cases the jury brings in verdicts that are grossly excessive is true. What is overlooked is that this is

once again the exception rather than the rule. In the vast majority of cases the verdicts are not excessive, but these seldom appear in the headlines of the daily press. It is only the exceptional case which is considered so newsworthy. The result is that the public gets the false impression that all or most verdicts are grossly excessive, which is entirely contrary to the facts.

Even in the isolated cases where the jury exceeds its normal bounds and renders an excessive verdict, the error can be and usually is promptly corrected by the trial court. Every aggrieved party has the right to have his counsel make timely application for a new trial on the grounds that the verdict is excessive. The trial judge who heard all the evidence (and saw all the witnesses) has the right and the duty to review that evidence. If he comes to the conclusion that the verdict was in effect so excessive as to "shock the conscience of the court," he has the power to set aside the verdict or reduce it to a fixed figure which he believes to be fair and just. If the prevailing party does not accept the reduction a new trial is held. Sometimes the trial judge limits the new trial to the question of damages only, if the question of liability was not "tainted" by the excessive verdict.

Composite Acumen, Competence and Virtue of the Jury Equals That of Single Judge

The charge that the average juror is not competent to determine the facts or to comprehend and apply the law properly is likewise without foundation. The jurors usually represent a true cross-section of the community, of average intelligence, capacity and virtue. They bring a fresh, alert, unbiased approach to each and every case upon which they sit. If the judge alone were to try the case there is no guarantee that any better grade of justice would be administered. Judges are also human. Some are weak, while others are strong. Some are emotionally stable—others are equally susceptible to emotional appeals. And while most judges are undoubtedly honest and honorable and impartial and capable, there have been some exceptional cases where a few of them have been found not to be.

It would therefore appear that a composite of the intelligence

and fairness and balance and dedication of the average juror is at least as good a guarantee that a correct verdict will be rendered as if the jury were dispensed with. Extensive surveys show that the collective recall of evidence and the collective intelligence of 12 jurors is at least equal to, if not superior to, the same capacities of a single jurist. The judges themselves, when polled on their views as to the accuracy of jury verdicts, agree, even among themselves, that in over 80% of the cases at which they had presided the jury brought in the same verdict which they would have brought in themselves had they been sitting alone.

Public Enjoys Jury Service when Treated Properly

Anyone who contends that the general public is opposed to serving as jurors is mistaken. It is not the "serving" as jurors which they dislike, it is being called to jury duty and then being made to sit around twiddling their thumbs while they are shunted around from one jury assembly room to another; made to wait interminably until they are called; excluded from the courtroom every time a motion is argued; immobilized for hours after they are selected to sit on a case while the judge and the lawyers and the parties negotiate settlements which should have been negotiated before they were drawn and impanelled.

Talk to any juror who has served and he will tell you (1) That it was a new experience for him; (2) That he enjoyed it; (3) That it gave him a new insight into how government operated, particularly the judicial branch; (4) That he had a feeling of pride and satisfaction that he was able to play an integral part in the administration of justice.

It is true that large segments of the population are excused from jury duty and that many others ask to be excused for reasons of personal hardship when they are called. But it is also true that there is never a scarcity of public spirited citizens still ready, willing and able to serve. And this is true although they are still being paid only $5.00 per diem in many states—the amount Henry Ford was paying his laborers 50 years ago! If there is any unwillingness on the part of the general public to serve as jurors the reasons are obvious. The remedies are also obvious.

JURY SYSTEM HAS STOOD THE TEST OF ALMOST 8 CENTURIES

Is there a better way to administer justice than through the jury system? If there is, no one has yet found it. The jury's function is primarily to consider the evidence; determine the weight and credibility to be given to it; decide what the *facts are*; apply the law as given by the court to those facts; and then decide which side should prevail. The charges that it is cumbersome, time-consuming and expensive cannot be sustained. Nor can the suggestion that the jury system is the prime cause of delay in the courts and the calendar congestion be proven by the facts. While it is true that there are some erroneous verdicts rendered in both criminal and civil matters, these are both few and far between. They are usually due to causes other than the jury system. Moreover, there are built-in protections in the law to remedy such errors when they occur. As to excessive verdicts, these, too, are infrequent and can be reduced or set aside by the court and a new trial ordered.

As to the competency and capacity of the average juror to understand a case and render a just verdict, even the judges themselves concede the jurors' decisions in over 80% of the verdicts rendered conform with their own determination of what the verdict should have been. The composite intelligence, dedication, comprehension, evidence recall, and the emotional balance and ability to render a just, fair and impartial verdict is at least equal to, if not superior to, that of a single judge. The public is ready, willing and able to serve as jurors if treated properly and compensated adequately. For most of them it is their single opportunity to participate in the workings of their government and in the processes of democracy. Moreover, it is the most sensitive and telling area of government—the administration of justice and the maintenance of law and order. They apparently sense the importance of this function to themselves, to the litigants and to the government as a whole.

It is the considered judgment of most members of the Bench and Bar that the right to trial by jury is as good, as useful, as sacred as it ever was. It is still a bulwark against tyranny. It is still the surest guarantee of the protection of the average citizen to life, liberty and property. It is still the "Lamp of Liberty." It is still worth every cent that it costs. It can be and it should be strength ened and improved. But it must be preserved—not abolished.

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