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COMMENTS

SURGEONS' LIABILITY AND THE CONCEPT
OF CONTROL

On December 17, 1957, Professor Israel Abrams was admitted to the Einstein Medical Center, Philadelphia, on the surgical service of Dr. Benjamin Lipschutz for elective gall bladder surgery. Professor Abrams was placed in room 807. On the same day another patient, also named Israel Abrams, was admitted and placed in room 342. On December 18, Dr. Peter Chodoff, the hospital anesthesiologist, and Albert Kohn, head technician in charge of the hospital's blood bank, working independently of each other, checked the operating schedule for the following morning, the date set for Professor Abrams' operation. Dr. Chodoff ordered the blood bank to set aside two bottles of blood for Professor Abrams. Kohn checked the hospital census and found Israel Abrams registered in room 342. Kohn ordered a blood specimen taken. About mid-afternoon on the same day Kohn was informed that there were two Israel Abrams in the hospital. Kohn discovered that Professor Abrams was in room 807 and ordered a specimen of his blood taken. Professor Abrams' blood was Type O, Rh-positive while the other Israel Abrams' blood was Type A, positive.

On the morning of December 19 a bottle of blood was placed in the operating room for Professor Abrams' surgery as ordered. The label on the bottle read "342 A Positive, Israel Abrams." Kohn was responsible for the labeling. During the course of the operation Dr. Lipschutz severed an artery and blood was required immediately. Kohn was summoned to the operating room and asked by Dr. Chodoff about the apparent mislabeling. Kohn stated that there had been a clerical error and that the blood was the correct type to give Professor Abrams. Dr. Chodoff spoke to Kohn through the operating room door. Kohn was standing about five feet away in the adjacent scrub room. Professor Abrams died on January 4, 1958 as a direct result of the transfusion of the wrong type blood.

After a trial on the merits¹ the jury found that Dr. Lipschutz was not individually negligent; that Dr. Chodoff was not individually negligent; that employees of the Einstein Medical Center, other than Dr. Chodoff, were negligent. Motions for a new trial against Einstein Medical Center and Dr. Chodoff were dismissed but the court remanded for a new trial on the liability of Dr. Benjamin Lipschutz stating that:

. . . Pennsylvania would countenance another basis of liability for Dr. Lipschutz, that of vicarious liability for his agent Dr. Chodoff,

1. *Mazer v. Lipschutz*, 327 F.2d 42 (3d Cir. 1964).

whose sub-agent (Kohn) was negligent, all in the scope of their respective employments . . . there is enough (evidence) here to permit the question of whether Kohn became the agent of either doctor or both of them, to go to the jury under proper instructions.²

The case of *Mazer v. Lipschutz*³ is but one example of the application of the principles of agency in the field of medicine. Agency law is not, of course, a new concept. Its major premise is that one individual may be responsible for the negligent and/or intentional harm caused by another.⁴ Generally the basis of this liability is the control and power the responsible party has over the injuring party.⁵ These parties are designated as "master and servant" or "principal and agent"⁶ and often the ambit of liability will depend upon which of these categories the parties come under.⁷ The nomenclature of the several jurisdictions is unimportant. Whether it be called, "respondeat superior,"⁸ "vicarious liability"⁹ or, as in Pennsylvania, "captain of the ship"¹⁰ the terminology denotes the same thing. The principal, the party in direct charge, is responsible for all acts performed by his agents in the course of carrying out the orders of, or furthering the interests of the principal.¹¹ Physicians and surgeons are principals like other persons and as such are subject to the laws of agency.¹² In the operating room the surgeon is in exclusive control of every activity and every duty performed by the assisting staff. Most litigation concerns acts performed either before, during or after an operation and courts are divided as to the liability of the operating surgeon in these several areas.

I.

PRE-OPERATIVE LIABILITY

Whether a surgeon should be responsible for the negligent acts performed by nurses, interns and other physicians in preparing the patient and the operating room for surgery is perhaps the most controversial of the three stages of operative liability. Support can be found to sustain either a negative or positive position.¹³

In the case of *Benedict v. Bondi*¹⁴ the court held that a nurse's activities in preliminarily cleaning the operating room, placing clean sheets on the operating table, preparing gowns and gloves, sterilizing instruments and

2. *Id.* at 57.

3. 327 F.2d 42 (3d Cir. 1964).

4. RESTATEMENT (SECOND), AGENCY § 265 *et seq.* (1958).

5. *Id.* § 243 *et seq.*

6. *Id.* §§ 1 & 2.

7. It is not necessary to explore the distinctions that courts make between each and the corresponding liabilities.

8. *Yorston v. Pennell*, 397 Pa. 28, 153 A.2d 255 (1959).

9. *Ibid.*

10. *Mazer v. Lipschutz*, 327 F.2d 42 (3d Cir. 1964).

11. *Supra*, note 4.

12. *Yorston v. Pennell*, 397 Pa. 28, 153 A.2d 255 (1959).

13. 27 INS. COUNSEL J. 156 (1960); 5 VILL. L. REV. 290 (1959); 7 VILL. L. REV. 283 (1961); See Annotation 60 A.L.R. 147 (1929).

14. 384 Pa. 574, 122 A.2d 209 (1956).

placing the patient on the operating table were administrative or ministerial acts performed as an employee of the hospital and not of the surgeon. This case arose when a patient sustained burns from hot water bottles placed under his feet while on the operating table and partly under an anesthetic. Here Dr. Bondi successfully contended that he had no control over the pre-operative preparation. On the other hand, in *Rockwell v. Stone*¹⁵ two physicians were held liable under the following circumstances. Defendant Dr. Kaplan was to remove a bursa from plaintiff's left arm. Under Dr. Kaplan's instruction plaintiff was placed in a hospital in which defendant Dr. Stone was the chief anesthetist. Dr. Kaplan advised Dr. Stone that a general anesthesia be administered for the operation. Dr. Stone advised his staff of the type of anesthesia to be used and was not in the induction room when the plaintiff received the injection. Due to the negligence of the anesthesiology staff in this regard plaintiff lost his left arm. The Supreme Court of Pennsylvania affirmed the judgment of the trial court in favor of the plaintiff against Dr. Kaplan, holding the surgeon responsible as principal for the negligence of the doctor in charge of administering the anesthesia to the patient. It is noteworthy that in this case Dr. Kaplan was not present in the induction room, nor was Dr. Stone, and aside from prescribing the type of anesthesia to be used he was not involved in the pre-operative activity.

The foregoing are Pennsylvania cases, the latter case representing the current position of that state. Though it seems that the cases are prima facie similar, the court in *Stone* made no reference to the *Bondi* decision. In both cases the injury was inflicted during preparation for surgery, in both cases the surgeon was not in the immediate area, and in both cases the injury was inflicted by permanent members of the hospital staff. Any conflict that could be raised by these cases, however, has since been resolved by the Pennsylvania Supreme Court in *Mazer v. Lipschutz*.¹⁶ Pennsylvania has taken a broad view of the liability of a surgeon for pre-operation mishaps.

Although many cases similar to *Bondi* in other jurisdictions have been decided in favor of the defendant surgeons, the current trend is to broaden liability in keeping with *Lipschutz*.¹⁷ As early as 1952 a North Carolina court¹⁸ reversed its former position, holding that an operating surgeon was liable under respondeat superior for the negligence of a hospital nurse. The nurse had improperly administered the anesthetic which caused the patient's death. The extreme of this trend can be found in the celebrated California case of *Ybarra v. Spangard*.¹⁹ Though this case more properly falls into the second category, negligence during the operation, it still serves as a prime example of this trend. Here the plaintiff sustained an injury to a healthy part of his body while undergoing an operation. As the patient was under anesthesia when the injury was inflicted, and thus unable to

15. 404 Pa. 561, 173 A.2d 48 (1961).

16. 327 F.2d 42 (3d Cir. 1964).

17. *Supra*, note 13.

18. *Jackson v. Joyner*, 236 N.C. 259, 72 S.E.2d 589 (1952).

19. 25 Cal. 2d 486, 154 P.2d 687 (1944).

determine who was responsible, the California court permitted the plaintiff to invoke the doctrine of *res ipsa loquitur* in an action against the doctors and nurses participating in the operation and in his subsequent care. In justification of its position the *Ybarra* court stated that the *res ipsa loquitur* rule is based on the circumstances that the chief evidence of the true cause of the injury is practically accessible to the defendant, whether culpable or innocent, but inaccessible to the injured person. Although the plaintiff in *Ybarra* was unconscious at the time of the injury, other jurisdictions have allowed invocation of the doctrine in such instances as where the surgeon has failed to remove glass,²⁰ a surgical sponge,²¹ or forceps²² from the body of a patient following an operation. Nonetheless many states have denounced the applicability of this doctrine in cases involving medical malpractice.²³

An examination of *Mazer v. Lipschutz*,²⁴ and its companion case *Yorston v. Pennell*²⁵ will provide a certain amount of predictability on the future impact this trend will have on the practice of medicine. It will be remembered that in *Mazer* the defendant surgeon could have been held responsible for the mislabeling of a bottle of blood by the head of the hospital blood bank. In *Yorston* the surgeon was likewise held for negligent acts taking place prior to the operation. A junior intern, at the direction of the surgeon, negligently took the case history of the plaintiff. It was established that the intern was qualified to take the case history. Nonetheless, due to this negligence, the report failed to show the patient's allergy to penicillin. The injury was caused by repeated injections of the drug after the operation. As we parallel these two cases we find several facts in common; the negligent acts giving rise to the injury were performed outside the operating room, the acts were performed by permanent employees of the hospital, the acts were more clerical in nature than medical, the defendant surgeon was not present at the time the acts were committed and had no direct control over the persons acting, and the negligent personnel in both cases were competent to otherwise perform the acts giving rise to the litigation. From these facts we can conclude that a surgeon cannot reasonably rely on hospital personnel to perform their several functions capably.

II.

OPERATIVE LIABILITY

With regard to the question whether an operating surgeon should be liable for the negligent acts of those assisting him done in the course of an

20. *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932).

21. *Funk v. Bonham*, 204 Ind. 170, 183 N.E. 312 (1932).

22. *Passey v. Budge*, 85 Utah 37, 38 P.2d 712 (1934).

23. *McKinnon v. Polk*, 219 Ala. 167, 121 So. 539 (1929); *McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870 (1912); *Wimpy v. Rogers*, 58 Ga. App. 67, 197 S.E. 656 (1938); *Williams v. Tarter*, 286 Ky. 717, 151 S.W.2d 783 (1941); *Barker v. Heaney*, 82 S.W.2d 417 (Tex. Civ. App. 1935).

24. 327 F.2d 42 (3d Cir. 1964).

25. 397 Pa. 28, 153 A.2d 255 (1959).

operation, a more unified answer can be found with an overwhelming majority answering the question affirmatively.²⁶ A typical example can be found in *Aderhold v. Bishop*,²⁷ wherein an Oklahoma appellate court upheld a judgment by a lower court against an operating surgeon for the negligence of nurses assisting in the operation. Here the plaintiff received severe burns when hospital nurses placed a pan of hot water too close to the patient's feet during the course of the operation. In its affirmation the court stated:

. . . While the head nurse and her assistants were general employees of the El Reno Sanitarium, they were nevertheless, during the time required for the actual operation, under the direction and supervision of the operating surgeons, and were the servants of the operating surgeons in respect to such services as were rendered by them in the performance of the operation, and for any negligence on the part of such employees in the performance of such services the operating surgeons are liable.²⁸

Pennsylvania formally adopted this view in 1949 in the case of *McConnell v. Williams*,²⁹ wherein the operating surgeon was held liable for the negligence of an intern in placing an overdose of chemical in a baby's eye following delivery of the baby by the defendant. This court held that the surgeon had complete control of the operating room and that such supreme control is essential in view of the high degree of protection to which an unconscious patient is entitled. It could be argued from the words of the decision in *McConnell* that the "supreme control" being so essential, it will be attributable to the operating surgeon whether he has it at the time of the injury or not. Indeed Mr. Justice Stern stated in his opinion that the operating surgeon is in the same complete charge of those who are present and assisting him as the "captain of a ship over all on board."³⁰ In those minority jurisdictions not imputing liability to the surgeon during the operation, the injury is generally caused by a nurse, as in *Covington v. Wyatt*.³¹ Here the surgeon held a new-born baby while the nurse placed a silver nitrate solution of unsafe quantity in the baby's eyes. The court concluded that the nurse was acting as an employee of the hospital and affirmed a non-suit in favor of the surgeon. It should be noted, however, that this case was decided in 1928 and the jurisdiction has since reversed its position.³² This turn towards liberal liability is presently the trend in most jurisdictions and cases denouncing the liability of surgeons for the negligent acts of assistants during the operation are becoming increasingly rare.

26. 27 INS. COUNSEL J. 156 (1960); See Annotations 46 A.L.R. 1454 (1927); 60 A.L.R. 147 (1929).

27. 94 Okla. 203, 221 Pac. 752 (1923).

28. *Id.* at 206, 221 Pac. 754.

29. 361 Pa. 355, 65 A.2d 243 (1949).

30. *Id.* at 362, 65 A.2d 246.

31. 196 N.C. 367, 145 S.E. 673 (1928).

32. See *Jackson v. Joyner*, 236 N.C. 259, 72 S.E.2d 589 (1952).

III.

POST-OPERATIVE LIABILITY

The third category, responsibility for the negligent acts of assistants after the operation, is the one area where courts are least willing to impose liability. Again we may look to Pennsylvania as representative of the liberal view.³³ Two cases relating to this problem reached the Supreme Court of Pennsylvania in 1950. In the first case, *Shull v. Schwartz*,³⁴ the court held that the liability of a surgeon does not apply, after the operation is concluded, to treatment administered by floor nurses and interns in the regular course of services ordinarily furnished by a hospital. Here the injury was inflicted by an intern while removing the stitches pursuant to the instructions of the surgeon but when the surgeon was absent. The second case, *Scacchi v. Montgomery*,^{34a} provided a somewhat closer question, but the court did not deviate from its former position. The plaintiff had been operated on by the defendant in the afternoon. The operation was concluded by 2:30 p.m. At 4:30 p.m. the patient began to hemorrhage and the defendant again operated. About 11 o'clock that evening the patient developed pulmonary manifestations. The defendant was called but before he could reach the hospital the patient died. The court held that the evidence was insufficient to establish negligence on the part of the hospital nurse or intern in their post-operative treatment of the patient, and that even if the plaintiff had met his burden of proof, under the facts of this case the defendant could not be held responsible. The general reason given for not imposing liability for post-operative injuries is that the surgeon does not have the same control or charge as he has over acts and duties performed in the operating room³⁵ or in the preparatory stages of the operation.³⁶ This is not to be confused with the fact that the surgeon can still be liable for his own negligence in failing to detect acts injurious to the patient inflicted by hospital personnel during post-operative recovery.³⁷

The reluctance of courts to impose post-operative liability is not confined to acts occurring in the patient's room, however. The court in *Hunner v. Stevenson*,³⁸ held that the surgeon would not be liable for the negligence of hospital surgeons, nurses and interns who left gauze in a wound while dressing it after the operation proper had been concluded. Another situation³⁹ found the operating surgeon working over the patient just after the operation to save him from heart failure. At the same time

33. See 7 VILL. L. REV. 283 (1961), for a survey of the Pennsylvania cases and their position in contrast with the other states.

34. 364 Pa. 554, 73 A.2d 402 (1950).

34a. 365 Pa. 377, 75 A.2d 535 (1950).

35. *Harris v. Fall*, 177 Fed. 79 (7th Cir. 1910); *Hunner v. Stevenson*, 122 Md. 40, 89 Atl. 418 (1913); *Reynolds v. Smith*, 148 Iowa 264, 127 N.W. 192 (1910); *Malikowski v. Graham*, 169 Wis. 398, 172 N.W. 785 (1919).

36. *Ibid.*

37. See *Hale v. Atkins*, 215 Mo. App. 380, 256 S.W. 544 (1923).

38. 122 Md. 40, 89 Atl. 418 (1913).

39. *Marchand v. Bertrand*, Qué. B.R.; 39 Qué. C.S. 49 (1910).

a nurse burned the patient with overheated bricks. The court held that the emergency required the surgeon's attention and he must leave minor details to the nurse. But note that this case was decided in 1910 in a foreign, though common law, jurisdiction. It serves to point out that there are such cases reported, but in view of the present trend they should not be relied upon as substantial authority.

The current trend toward increasing vicarious liability in the area of medicine does not stop with the surgeon. The following survey will show a tremendous increase in the liability of both public and private hospitals for the negligent acts of those employed by the hospital.

Whether a hospital can be vicariously liable for the torts of doctors has been the subject of a great deal of litigation during the past few decades. It has generally been held in most jurisdictions that the relationship of master and servant does not extend to hospitals and its doctors.⁴⁰ The reason most commonly offered for this proposition is that doctors have such a high degree of skill in their field that they must necessarily exercise discretion in the performance of their duties and are therefore sufficiently free of hospital control to be independent contractors.⁴¹ This time honored position is now in a state of change.

To digress momentarily to the federal level, Federal District Courts in Pennsylvania in 1958⁴² and New York in 1954⁴³ have included physicians within the meaning of the term "employees" in the Federal Employers Liability Act and have recognized the imputation of their torts. On the state level the following cases evidence the growing tendency of those courts to impose liability for the torts of physicians. In *Andrews v. Youngstown Osteopathic Hospital Ass'n*,⁴⁴ the negligent acts of an intern could be imputed to the hospital that employed him. In the last fifteen years California,⁴⁵ Minnesota,⁴⁶ Mississippi,⁴⁷ Wisconsin,⁴⁸ and New York⁴⁹ have either partially or completely rejected the position that a doctor can never be considered a servant. The one saving factor in this expansion of liability is that most courts still hold that a hospital cannot be held accountable for the negligent acts of surgeons⁵⁰ and hospital personnel⁵¹ assisting surgeons during the course of an operation.

If courts are so willing to impose liability on hospitals the next question raised is concerned with the status of the cherished doctrine of charit-

40. *Pearl v. West End St. R.R.*, 176 Mass. 177, 57 N.E. 339 (1900); *Moore v. Lee*, 109 Tex. 391, 211 S.W. 214 (1919); an extensive annotation setting forth the position of the majority appears in 19 A.L.R. 1183 (1922).

41. *Ibid.*

42. *Dunn v. Conemaugh & Black Lick R.R.*, 162 F. Supp. 324 (W.D. Pa. 1958).

43. *O'Donnell v. Pennsylvania R.R.*, 122 F. Supp. 899 (S.D.N.Y. 1954).

44. 77 Ohio L.Abs. 35, 147 N.E.2d 645 (1956).

45. *McGuigan v. Southern Pac. R.R. Co.*, 129 Cal. App. 2d 482, 277 P.2d 444 (1954).

46. *Moeller v. Hauser*, 237 Minn. 368, 54 N.W.2d 639 (1952).

47. *Knox v. Ingalls Shipbuilding Corp.*, 158 F.2d 973 (5th Cir. 1947).

48. *Treptau v. Behrens Spa, Inc.*, 247 Wis. 438, 20 N.W.2d 108 (1945).

49. *Bing v. Thunig*, 2 N.Y.S.2d 656, 143 N.E.2d 3 (1957).

50. *Beadles v. Metayka*, 135 Colo. 366, 311 P.2d 711 (1957).

51. *Jordan v. Touro Infirmary*, 123 So. 726 (La. 1922).

able immunity. Alas, this age old defense is currently in a state of deterioration. It would be beneficial to note here that the defense of charitable immunity has never, except in unusual cases, been applicable to privately owned and operated hospitals and sanitariums.⁵²

The general reasons advanced for allowing charitable immunity were recently stated in the Michigan State Court opinion in *Parker v. Port Huron Hospital*.⁵³ In its review of the doctrine, the court stated that it was based on the theory that the doctrine of respondeat superior is inapplicable to charitable institutions because: (1) they are entitled to governmental immunity, (2) there is an implied waiver of assumption of the risk, and (3) simply on the grounds of public policy. The Wisconsin Supreme Court evidenced this basis for the immunity in the noted case of *Kojis v. Doctor's Hospital*,⁵⁴ wherein it stated that the doctrine was originally based on the public policy of Wisconsin to encourage such quasi-public institutions which could not function without immunity. However, this same court went on to say that times have changed, the hospitals "are now larger in size, better endowed, and on a more sound economic basis."⁵⁵ The immunity had been abolished in Wisconsin. The abolition of the doctrine, however, can be traced back to 1942 and the case of *President and Directors of Georgetown College v. Hughes*,⁵⁶ and what Dean Prosser has referred to as a "devastating" opinion⁵⁷ by Judge Rutledge. Prior to the *Kojis* case charitable immunity had been revoked in eighteen states.⁵⁸ A study of these cases, their facts and opinions would be unduly long and of little value. What is of significance is the fact that courts are abolishing it at an alarming rate, although it is interesting to note that Pennsylvania has left any change in the position of that state regarding charitable immunity to the legislature.⁵⁹

Our final question must necessarily be: What recourse is available to physicians and hospitals held responsible for the negligent acts of others on the basis of respondeat superior?

The *Restatement of Agency 2d*⁶⁰ provides that when a principal is subjected to suit by a third person for the negligent or other wrongful acts of his agent, said agent is liable to the principal for the loss which results therefrom. This will include payment of fines to the state for a crime as well as damages paid to third persons by the principal. "Thus, a servant who, while acting within the scope of employment, negligently injures a third person, although personally liable to such person, is also subject to

52. 124 A.L.R. 186 (1940).

53. 361 Mich. 1, 105 N.W.2d 1 (1960).

54. 12 Wis. 2d 367, 107 N.W.2d 131 (1961).

55. *Id.* at 372, 107 N.W.2d 134.

56. 130 F.2d 810 (D.C. Cir. 1942).

57. PROSSER, *TORTS* 784 (2d ed. 1955).

58. 45 MARQ. L. REV. 128 (1960).

59. *Knecht v. St. Mary's Hosp.*, 392 Pa. 75, 140 A.2d 30 (1958).

60. § 401, comment d (1958).

liability if the principal is thereby required to pay damages."⁶¹ Regarding those cases holding the principal responsible for the actions of subagents, the *Restatement* imposes liability on the agent as well as the subagent for any payments required of the principal for the injurious conduct of the subagent.⁶² The foregoing rules have been adopted in the Federal District Courts⁶³ as well as in Pennsylvania,⁶⁴ New Jersey,⁶⁵ Massachusetts,⁶⁶ and New York.⁶⁷ The *Restatement* indicates that this is a majority view as it well should be.

IV.

CONCLUSION

We must conclude by going beyond the cases and examining the possible repercussions that can result from this broad concept of liability.

We have seen cases imposing a high degree of care and liability upon surgeons. Their effect might well be to limit the number of operations a surgeon would undertake, in that much of his time would have to be spent in checking and cross-checking the preparatory acts of assistants and hospital personnel in order to protect himself from liability. Although quackery, unwarranted surgery and lack of due care will be curbed, one might validly ask whether these problems have proved so great that this heavy burden should be placed upon the operating physician. This imposition does not engender any greater standard of care required of hospital employees, and although it provides greater assurance to the patient, should not the legal remedy heighten the burden of care on those who have acted negligently and who often work beyond the effective perimeter of the surgeons' control?

We have also seen the decline and fall of the defense of charitable immunity, heretofore a much used avenue of escape for public hospitals. With ever increasing contributions of cash and services to such hospitals and the advent of Blue Cross, Blue Shield and Major Medical Insurance the defense has little chance for survival. Hospitals, as well as physicians, will now have to carry increased malpractice insurance. As the trend continues, the cost of such insurance will rise. Hospital personnel must likewise be covered. Their premiums might often be paid by the employer as a condition precedent to employment. The cost of maintaining a hospital will increase, the cost of practicing medicine will increase, and ultimately

61. RESTATEMENT (SECOND), AGENCY § 240 (1958).

62. RESTATEMENT (SECOND), AGENCY § 406 (1958).

63. *Hornstein v. Kramer Bros.*, 133 F.2d 143 (3d Cir. 1943); *Standard Brands, Inc. v. Bateman*, 184 F.2d 1002 (8th Cir. 1950), *cert. denied*, 340 U.S. 942, 71 S.Ct. 505 (1951).

64. *Muldowny v. Middleman*, 176 Pa. Super. 75, 107 A.2d 173 (1954); *Klein v. May Stern & Co.*, 144 Pa. Super. 470, 19 A.2d 566 (1941).

65. *Burns Bros. v. Central R.R. of New Jersey*, 202 F.2d 910 (N.J. 1953).

66. *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 331 Mass. 366, 119 N.E.2d 169 (1954).

67. *O'Maire, Inc. v. The Yaka*, 79 F. Supp. 659 (S.D.N.Y. 1948). For a survey of the case law in this area see RESTATEMENT (SECOND), AGENCY APPENDIX (1958).

this will leave our patient with a higher hospital bill, a higher doctor's bill, higher premiums on Blue Cross, Blue Shield and Major Medical Insurance.

We have left all parties concerned paying higher costs and have engendered a vicious circle of insurance, compensation, indemnification, contribution and a false sense of security. Ultimately the entire business may become so hopelessly complicated that socialized medicine may seem refreshing.

Albert P. Massey, Jr.

QUANDARY IN THE LAW: THE NOT SO IMPARTIAL PENNSYLVANIA JUROR

Discussions for and against the abolition of trial by jury have been waged since the beginning of this century, and defects have been shown to inhere in the system. So far no plan has been developed to take its place that will meet public approval, and so long as the Constitution provides for a jury as a fact-finding medium, our efforts must be directed to keep this part of our judicial system above reproach. The jury's efficiency and integrity must be maintained on the highest plane if we are to prevent its forced abandonment and the embarking upon an unchartered course of experimentation with other untried methods. It is the duty of jurors to so act that their conduct will not bring the administration of justice into disrepute and to perform with fidelity their duties as fact finders in accordance with the evidence presented, uncorrupted by external influences, and free of all bias and prejudice, especially that arising from sympathy.¹

I.

INTRODUCTION

The right to trial by jury in Pennsylvania is embodied in two sections of the state² Constitution: Article I, Section 6, providing that "Trial by jury shall be as heretofore, and the right thereof remain inviolate"; and Article I, Section 9, affirming the right in criminal prosecutions to "a speedy public trial by an impartial jury of the vicinage." By the former section, the right is preserved intact as it existed at common law at the time of adoption of the Constitution,³ and, while the latter is qualifiedly

1. Mr. Chief Justice Kephart, in *Hostetler v. Kniseley*, 322 Pa. 248, 253-54, 185 Atl. 300, 303 (1936).

2. The provisions of the United States Constitution governing jury trials are not binding on the states. *Gaines v. Washington*, 277 U.S. 81, 48 S.Ct. 468 (1928); *Pearson v. Yewdall*, 95 U.S. 294, 24 L.Ed. 436 (1877); *Commonwealth v. Reilly*, 324 Pa. 558, 188 Atl. 574 (1936).

3. *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, 173 A.2d 59 (1961); *Watson's Appeal*, 377 Pa. 495, 105 A.2d 576 (1954); *Commonwealth v. Wesley*, 171 Pa. Super. 566, 91 A.2d 298 (1952). As to what characteristics are protected, see *Commonwealth v. Fugmann*, 330 Pa. 4, 29-30, 198 Atl. 99, 111 (1938). For an interesting history of the applicable provisions, see *Commonwealth v. Reilly*, 324 Pa. 558, 566-75, 188 Atl. 574, 578-81 (1936).

phrased to embrace only criminal actions, it is merely declaratory of the common law and the elements embraced within it apply to civil actions as well.⁴ Whatever criticism may be directed at the jury,⁵ it remains a perennial and seemingly irreplaceable fixture in the common law. The system justifies its existence as an instrument for the resolution and interpretation of conflicting factual presentations solely through its presumed objectivity and indifference to the ultimate result. This comment will examine the judicial controls, procedural and substantive, on the impartiality of the juror in Pennsylvania law.

II.

HISTORY

The jury system is best understood when studied against the background of its historical development. It is generally agreed that early juries were selected from among persons living in the area where the transaction in question took place and presumably familiar with it.⁶ The verdict was originally supposed to be a sworn statement as to what actually had occurred.⁷ Contrary to being impartial, the juror was in reality a witness, permitted to influence his verdict by private knowledge and, in fact, able to return a verdict although no evidence be offered on behalf of either litigant.⁸ While a witness is no longer competent to be a juror and the present day verdict must be based on evidence presented in court,⁹ the contemporary unanimous verdict may be traced directly to the juror-witness concept. Originally, the rule required literally that twelve jurors had to agree in order to bring in a verdict. If the selected panel did not succeed in this, additional persons were added until twelve were found to agree, a procedure known as "afforcing the assize" and amounting really only to the procurement of a quantum of proof.¹⁰

Until the late seventeenth century, a party who felt he was aggrieved by a verdict could test it only by the process of attain, whereby a second panel of twenty-four members was called to rehear the evidence and render a verdict. If this second verdict differed from the first, the members of the

4. See *Commonwealth v. Flanagan*, 7 W.&S. 415, 422 (Pa. 1844).

5. See, e.g., Andrews, *Legal Realism and the Jury*, 1961 CRIM. L. REV. 758; Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953); Note, *A Condemnation of the Jury System and a Possible Alternative*, 21 U. PITT. L. REV. 52 (1959). For an article favoring the uninterrupted perpetuation of the jury system, see Fuchsberg, *A Brief for the Jury in Civil Cases*, N.Y. Times, Mar. 1, 1964, § 6 (magazine), p. 34.

6. FORSYTH, TRIAL BY JURY 134-35 (2d ed. 1875); MOSCHZISKER, TRIAL BY JURY § 59 (2d ed. 1930).

7. The word "verdict" is derived from the Latin "veredictum," literally a true declaration. BLACK, LAW DICTIONARY (4th ed. 1951).

8. FORSYTH, *op. cit. supra* note 6, at 134-37; MOSCHZISKER, *op. cit. supra* note 6, at § 59.

9. *Commonwealth v. Joliffe*, 7 Watts 585 (Pa. 1838). See also PA. STAT. ANN. tit. 17, § 915 (1962).

10. FORSYTH, *op. cit. supra* note 6, at 197-98; MOSCHZISKER, *op. cit. supra* note 6, at § 61.

former jury would be fined, arrested and imprisoned, or suffer land forfeiture on the theory that they had sworn falsely and were in contempt of court.¹¹ While this sanction undoubtedly acted as an incentive to objectivity, it was abolished; and the first modern new trial, granted in 1665,¹² laid the cornerstone for the modern procedural methods employed to test the verdict of the jury.

III.

GENERAL PUBLIC BIAS

The selection of an impartial jury necessarily rests on the presupposition that the populace from which it must be chosen is not so inflamed as to make it impossible to draw such an array. Also, public opinion, indignation, or hysteria may reach such a point, particularly in this era of mass news media, that it becomes difficult for a chosen panel to render a just but unpopular decision without fear of approbation from their neighbors.¹³ The motions for continuance¹⁴ and for change of venue¹⁵ are proper to remedy this situation. While the constitutional right to a jury trial includes the right to have the jury selected from the "vicinage,"¹⁶ the meaning of this term is qualified by the impartiality requirement, as clearly enunciated by the Supreme Court in *Commonwealth v. Reilly*.¹⁷ The *Reilly* case involved the trial of a number of law enforcement officials for the alleged felonious assault on a prisoner. Since the district attorney was a defendant, the Attorney General entered the case as prosecutor and petitioned the Supreme Court to change venue¹⁸ because of a concerted public movement

11. FORSYTH, *op. cit. supra* note 6, at 149-55; MOSCHZISKER, *op. cit. supra* note 6, at §§ 290, 364.

12. MOSCHZISKER, *op. cit. supra* note 6, at § 364. There is some dispute as to whether the attaint verdict actually resulted in reversal of the original verdict. See FORSYTH, *op. cit. supra* note 6, at 149-50.

13. While this problem occurs most frequently in criminal cases, particularly sex crimes and murders, fear of a biased populace is not unknown in civil litigations, notably those involving large corporations and insurance companies.

Even patently guilty criminals have a right to a trial in a fair and impartial atmosphere. A conviction will be reversed if the trial judge permits spectator demonstrations. *Commonwealth v. Hoover*, 227 Pa. 116, 75 Atl. 1023 (1910). *But see Commonwealth ex rel. Sleighter v. Banmiller*, 392 Pa. 133, 139 A.2d 918 (1958).

There is now a statutory penalty imposed on demonstrations in or near court-rooms, in addition to the power of punishment for contempt. PA. STAT. ANN. tit. 18, § 4327 (1963).

14. See *Commonwealth v. Balles*, 160 Pa. Super. 148, 50 A.2d 729 (1947).

15. *Commonwealth v. Karmendi*, 328 Pa. 321, 195 Atl. 62 (1937); *Commonwealth v. Reilly*, 324 Pa. 558, 188 Atl. 574 (1936). See PA. STAT. ANN. tit. 19, § 551 (1964). See also note 18, *infra*.

Where there is an objection to the form or manner of selecting the panel, without regard to the qualifications of the individual jurors, a challenge to the array is proper. *Commonwealth v. Zell*, 81 Pa. Super. 145 (1923).

16. PA. CONST. art. I, § 9. "Vicinage" is a historical concept directly traceable to the ancient juror-witness idea. *Supra*, text accompanying nn.6-8. See MOSCHZISKER, *op. cit. supra* note 6, at § 395.

17. 324 Pa. 558, 188 Atl. 574 (1936).

18. The Supreme Court has the power to change the venue of a case on a petition of certiorari. This is a common law power and remains unaffected by statutes or constitutional changes. *Commonwealth v. Reilly*, 324 Pa. 558, 188 Atl. 574 (1936); *Commonwealth v. Ronemus*, 205 Pa. 420, 54 Atl. 1095 (1903).

on behalf of the defendants, involving newspaper articles, fund raising campaigns, political and social influence, and even threats of violence against Commonwealth witnesses. Stating that the Constitution does not give a right to a trial before a partial jury, the Court held that "vicinage" must be interpreted flexibly, unlimited by political boundaries such as county lines, so as to encompass whatever area is necessary to secure impartiality, and granted the change of venue. The area of the impartial vicinage having been delineated, any jurisdiction from within it may be selected for venue purposes.

Objections based solely on a prevailing public sentiment must be promptly raised or waiver will result.¹⁹ As early as 1844 a new trial motion, based on the prejudicial atmosphere in the area, was refused where counsel knew or could have known through due diligence of the public hostility but made no motion for change of venue or continuance, despite the fact that the Court acknowledged that public opinion was in such a state that either motion would probably have been granted.²⁰ It was stated that a new trial would be granted in such circumstances only on the presentation of "strong and unexceptionable evidence, free from all suspicion," of subjective, immutable prejudication on the part of the jurors themselves.²¹ Later cases have been in accord in requiring that post-trial objections to the influence of public feeling on a verdict be supported by clear proof of actual effect on the jury itself.²²

IV.

THE INDIVIDUAL

In seating the individual juror the law neither expects nor requires literal impartiality in the sense of absolute indifference or ignorance of the pending case.²³ The vicinage requirement obviates the fact that many jurors will have received some information, and they may have formed an opinion or predisposition to one side founded upon that information. However, a prospective juror is not automatically disqualified because he declares that he has formed an opinion regarding the case on which he will sit, provided he further convinces the court that his opinion is not fixed and that he will render a verdict according to the evidence presented in court.²⁴ An exception to the general rule is the potential juror in a

19. *Commonwealth v. Flanagan*, 7 W.&S. 415 (Pa. 1844).

20. *Ibid.*

21. *Id.* at 421.

22. *United States ex rel. Darcy v. Handy*, 130 F. Supp. 270 (M.D. Pa. 1955), *aff'd*, 224 F.2d 504 (3d Cir. 1955), *aff'd*, 351 U.S. 454, 76 S.Ct. 965 (1956); *Commonwealth ex rel. Sleighter v. Banmiller*, 392 Pa. 133, 139 A.2d 918 (1958).

23. The literal definition of "impartial" is: "Not partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just." WEBSTER, *NEW INTERNATIONAL DICTIONARY* (2d ed. 1959).

24. *Commonwealth v. Richardson*, 392 Pa. 528, 140 A.2d 828 (1958); *Commonwealth v. DePalma*, 268 Pa. 25, 110 Atl. 756 (1920); *Commonwealth v. Nye*, 240 Pa. 359, 87 Atl. 585 (1913); *Commonwealth v. Eagan*, 190 Pa. 10, 42 Atl. 374 (1899).

In *Commonwealth v. DePalma*, 268 Pa. 25, 110 Atl. 756 (1920), a juror was accepted for service, although he said that he felt that persons of defendant's ancestry

criminal case who has formed an opinion after hearing or reading the evidence presented at a former trial of the same defendant, rendering him incompetent to serve even though his opinion may not be fixed.²⁵

The distinction between a disqualifying fixed opinion and one which will yield to contradicting evidence is narrow, and the ultimate determination of the competence of the juror lies in the discretion of the trial judge.²⁶ On some occasions, a juror who originally professed to having made a firm prejudgment of the case was admitted to the panel after probing questions by the judge elicited a different and more objective response, no objection apparently being found with this practice²⁷ despite its seemingly prejudicial nature.

The prohibition against fixed opinion is not limited to the prospective juror but extends throughout the trial. A juror may form an opinion during the trial and before all the evidence and argument has been presented, but it is cause for disqualification if the opinion becomes fixed and unamenable to subsequent proof.²⁸

In criminal cases the Commonwealth extends the right to an impartial jury in what might be abstractly stated as the same degree to which it is granted the defendant. Questions of unpopularity of a prosecution aside,²⁹ the state may be further troubled by individual scruples in matters of proof and punishment. Not so strangely, in view of the continual emotional

were prone to murder, where he also stated that he thought he could be guided by the evidence. *But see* Commonwealth v. Thompson, 328 Pa. 27, 195 Atl. 115 (1937). A fixed opinion automatically disqualifies the juror. Commonwealth v. Pasco, 332 Pa. 439, 2 A.2d 736 (1939).

If a juror has misled a party on voir dire questioning and evidence discovered later shows that he had an opinion which would have justified a challenge, a new trial will be granted. Commonwealth v. McCloskey, 273 Pa. 456, 117 Atl. 192 (1922).

Even a statement that some evidence will be required to change the juror's opinion is insufficient to require rejection. Commonwealth v. McGrew, 375 Pa. 518, 100 A.2d 467 (1953). *But see* Commonwealth v. Sushinskie, 242 Pa. 406, 89 Atl. 564 (1913).

25. *Staup v. Commonwealth*, 74 Pa. 458 (1874). But the juror's opinion must be formed from reading all of the testimony and not merely fragments of it. Also, hearing or reading the evidence at a preliminary examination does not satisfy the disqualification, since it is not a trial within the rule. *Allison v. Commonwealth*, 99 Pa. 17 (1881). Reading the evidence of the trial of a coconspirator does not render the juror subject to challenge. *Commonwealth v. Taylor*, 129 Pa. 534, 18 Atl. 558 (1889). See also *Commonwealth v. House*, 3 Pa. Super. 304 (1897) (owner of newspaper whose editorials had repeatedly declared defendant guilty disqualified).

26. *Commonwealth v. Schoenloeber*, 96 Pa. Super. 76 (1929); *Commonwealth v. Bentley*, 287 Pa. 539, 135 Atl. 310 (1926); *Commonwealth v. Gelfi*, 282 Pa. 434, 128 Atl. 77 (1925).

27. See, e.g., *Commonwealth ex rel. Ryan v. Rundle*, 411 Pa. 613, 616-17, 192 A.2d 362, 364 (1963); *Clark v. Commonwealth*, 123 Pa. 555, 16 Atl. 765 (1889).

28. *Curley v. Commonwealth*, 84 Pa. 151 (1877); *Commonwealth v. Sallagher*, 3 Clark 127, 4 Pa. L.J. 511 (1839); *Goodright v. McCausland*, 1 Yeates 372 (Pa. 1794).

An extreme example of this rule's invocation is *Schonhardt v. Pittsburgh*, 340 Pa. 155, 16 A.2d 421 (1940), where a new trial was granted because a juror had nodded her head vigorously in response to a rhetorical question posed by the trial judge during his charge to the jury. The judge had given the charge relating to burden of proof but had not as yet reviewed the evidence when he asked: "Has plaintiff met that burden?" The court said that the reaction made it clear that the defendant could not receive an impartial trial at the hands of the juror.

29. In *Commonwealth v. Reilly*, 324 Pa. 558, 188 Atl. 574 (1936), the right of the Commonwealth to secure a change of venue when public opinion is so heavily on the side of the defendants as to make it impossible to secure an impartial jury or enable the jury to act without fear of recrimination was established.

opposition to the death penalty, the bulk of the problems arise in capital cases. Since the fixed opinion prohibition applies to every main issue of a case and is not dependent upon a prejudgment of the overall outcome, the conscientious objector to capital punishment may be challenged for cause.³⁰ Likewise, a juror may be disqualified if he states he will refuse to follow the rules of law for personal reasons. Instances of this have arisen where the prospective juror has maintained that he could not convict of a capital crime on circumstantial proof,³¹ or could not apply in such a case the ordinary rule as to reasonable doubt but must be convinced beyond any doubt,³² or could not apply the felony-murder rule to a conspirator.³³

Several procedural technicalities relating to the disqualification of a prospective juror are worth mentioning at this point. The primary responsibility for the selection of the neutral panel rests with the trial judge and he may reject a juror on his own motion, although no objection is raised by either party.³⁴ A challenge for cause requires a discretionary ruling by the trial court, but if it is refused, the juror may still be removed through the exercise of a peremptory challenge.³⁵ The exercise of the peremptory challenge in this situation is important, since error in overruling the challenge for cause will be waived unless peremptory challenges are exhausted.³⁶

That the courts are anxious to keep the jury system as far removed from criticism as is practically possible is evident. An area of serious concern and difficult control in this regard is the overt conduct of the juror during trial. It has been indicated that certain actions performed in the public eye may in themselves be sufficient to warrant the disqualification of a juror or the granting of a new trial, based solely on the fact that the proscribed activity might bring the processes of justice into disrepute though not amounting to a manifestation of a fixed judgment or prejudice.³⁷ In *Schankweiler v. Pennsylvania Light Co.*,³⁸ a wrongful death action, plaintiff incidentally testified as to a bookkeeping method she employed in her business. As she left the witness stand, a juror was heard to remark

30. *Commonwealth v. Pasco*, 332 Pa. 439, 2 A.2d 736 (1939); *Commonwealth v. Leshner*, 17 S.&R. 155 (Pa. 1827). See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1105 *et seq.* (1953). On the problem of conscientious scruples concerning other issues, see *Commonwealth v. Zoltowski*, 246 Pa. 406, 92 Atl. 496 (1914).

31. *Commonwealth v. Sushinskie*, 242 Pa. 406, 89 Atl. 564 (1913).

32. *Commonwealth v. Gelfi*, 282 Pa. 434, 128 Atl. 77 (1925).

33. *Commonwealth v. Bentley*, 287 Pa. 539, 135 Atl. 310 (1926). For an article condemning the "issue approach" with reference to the death penalty challenges, see McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 PA. B.A.Q. 252 (1959).

34. *Commonwealth v. Henderson*, 242 Pa. 372, 89 Atl. 567 (1913). See also *Commonwealth v. Cleary*, 148 Pa. 26, 23 Atl. 1110 (1892).

35. *Commonwealth v. McGrew*, 375 Pa. 518, 100 A.2d 467 (1953). *Commonwealth v. Pasco*, 332 Pa. 439, 2 A.2d 736 (1938). See PA. STAT. ANN. tit. 19, §§ 811-13 (1930).

36. *Commonwealth v. McGrew*, 375 Pa. 518, 100 A.2d 467 (1953); *Commonwealth v. Bibalo*, 375 Pa. 257, 100 A.2d 45 (1953). See *Commonwealth ex rel. Ryan v. Rundle*, 411 Pa. 613, 617, 192 A.2d 362, 364 (1963).

37. *Schankweiler v. Pennsylvania Light Co.*, 275 Pa. 50, 118 Atl. 562 (1922). See also cases dealing with juror separation, *infra* notes 45-52.

38. 275 Pa. 50, 118 Atl. 562 (1922).

to her: "I like your way of doing business." The juror was reproved by the trial judge but not removed. On appeal, a new trial was granted on grounds that the remark tended to show a sympathy for plaintiff, even though it did not bear on the material issues of the case or indicate a fixed predisposition toward the ultimate findings.

In other cases, where the trial considered in its entirety was a fair one and the evidence amply supported the verdict reached, the court has been somewhat reluctant to overturn for juror misconduct of this type, thereby treating the verdict as curative of the error.³⁹ Important in this area is the rule that a party discovering misconduct is obliged to bring it to the attention of the trial judge immediately and may not wait until a verdict is reached, gambling on a favorable decision.⁴⁰ By waiting, the right to object is waived and a motion for new trial will be denied. When charges of prejudicial conduct are brought to the attention of the judge, he must halt the trial to investigate them, declaring a mistrial if they are substantiated and proceeding if they are not.⁴¹

In the area of controlling juror conduct, the courts do not seem unmindful of the fact that they are dealing for the most part with laymen, untrained in the law and subject more often to ignorant mistakes than to culpable ones.⁴² For example, although jurors are instructed to discuss their case with no one during the frequent intermissions in a trial, something more than the mere proof of a few offhand remarks is necessary to get more than a reprimand for the wayward talesman.⁴³ Gossip, while reprehensible, is not alone sufficient to require a new trial if the remarks do not evidence bias or are not of such a character as to bring scandal on the administration of justice.⁴⁴

The only area in which the courts have exerted any stringent personal control over the movements and contacts of jurors has been with regard to separation during the trial of a capital case or during deliberations in other cases,⁴⁵ and there appears to be a trend to relax even this practice. Originally, even though the defendant might not object, jurors in felony cases were not permitted to separate for any reason, and if separation occurred, this was sufficient grounds for a new trial.⁴⁶ The inflexibility of this early rule was soon modified to permit separation in non-capital cases⁴⁷ and even in capital cases, but only so far as was necessary to permit

39. *Commonwealth v. Hurd*, 177 Pa. 481, 35 Atl. 682 (1896); *Commonwealth v. Cummings*, 45 Pa. Super. 211, 216 (1911). See *Goodright v. McCausland*, 1 Yeates 372 (Pa. 1794) (even though juror bet on the outcome, must prove this biased his verdict).

On the other hand, juror misconduct is a factor to be considered in reviewing the overall fairness of the trial. *Mix v. No. Am. Co.*, 209 Pa. 636, 59 Atl. 272 (1904).

40. See *Commonwealth v. Clay*, 56 Pa. Super. 427 (1914).

41. *Mix v. No. Am. Co.*, 209 Pa. 636, 59 Atl. 272 (1904).

42. See *Hostetler v. Kniseley*, 322 Pa. 248, 254-55, 185 Atl. 300, 302-03 (1936).

43. See Leavitt, *The Jury At Work*, 13 HASTINGS L.J. 415, 432-36 (1962).

44. *Commonwealth v. Hurd*, 177 Pa. 481, 35 Atl. 682 (1896). See also *Heiss v. Lancaster*, 18 Lanc. L. Rev. 289 (Pa. C.P. 1898).

45. See *Mix v. No. Am. Co.*, 209 Pa. 636, 59 Atl. 272 (1904).

46. *Peiffer v. Commonwealth*, 15 Pa. 468 (1850).

47. See *Commonwealth v. Tenbroeck*, 265 Pa. 251, 108 Atl. 635 (1919).

the jurors to perform their duties,⁴⁸ including separation for sleeping quarters⁴⁹ and medical care.⁵⁰ In contrast to the usual rule that prejudice must be shown to gain a new trial, separation of the jury in a capital case creates a rebuttable presumption of prejudice to the defendant which the Commonwealth must overcome by clear evidence.⁵¹ Presence of court officers during the separation has proven of some importance in ruling on similar fact situations, apparently with a tendency to give the official supervision itself evidentiary value in refutation of the prejudice presumption.⁵²

An attempt to examine the activities apart from the juror's own attitudes and conduct which the law proscribes in attempting to maintain impartiality would be beyond the scope of this comment. It may be noted, however, that the law does not expect that the influences of exposure to normal everyday living will cease for the duration of a juror's service.⁵³ Aside from normal conversation, perhaps the most serious problem faced is the effect on the juror attributable to publicity of the litigation.⁵⁴ Human error again plays a part in the applicable rules and, without proof of actual prejudice, a verdict will not be overturned simply because a juror has heard or read reports of the proceedings, or has even recounted and commented on the testimony.⁵⁵ Embodied in this is the recognition that the principles of freedom of speech and of the press make it impossible to control the source of the information and results in a dependence somewhat upon the responsibility of journalism.⁵⁶ Should it appear that this responsi-

48. *Commonwealth v. Kosh*, 305 Pa. 146, 157 Atl. 479 (1932).

49. *Commonwealth v. Manfredi*, 162 Pa. 144, 29 Atl. 404 (1894).

50. *Goersen v. Commonwealth*, 106 Pa. 477 (1884); *Commonwealth v. Lamattina*, 51 Berks Co. L.J. 125 (Pa. O.&T. 1959).

51. *Commonwealth v. Eisenhower*, 181 Pa. 470, 37 Atl. 521 (1897); *Moss v. Commonwealth*, 107 Pa. 267 (1884).

52. *Compare Moss v. Commonwealth*, 107 Pa. 267 (1884), with *Commonwealth v. Fisher*, 226 Pa. 189, 75 Atl. 204 (1910).

53. By ancient common law, jurors were kept as prisoners of the court. The practice today in non-capital and civil cases is to let them move freely. *Commonwealth v. Cummings*, 45 Pa. Super. 211, 215 (1911). In view of the freedom they have, attempts to influence juries are either very infrequent or largely unreported. While an attempt to bribe a juror is a misdemeanor, accepting a bribe is a felony. PA. STAT. ANN. tit. 18, § 4303 (1963). When a bribery attempt is made known, it poses the double-edged problem to the trial judge of whether to continue, and risk prejudicing the cause of a party innocent of complicity, or to dismiss the jury and thereby encourage the practice. His decision hinges on an immediate investigation and appraisal of the effect of the attempt on the entire panel. *Commonwealth v. Deutsch*, 72 Pa. Super. 298 (1919); *Commonwealth v. Tilly*, 33 Pa. Super. 35 (1907). In *Mix v. No. Am. Co.*, 209 Pa. 636, 59 Atl. 272 (1904), the failure to investigate was held to be cause for a new trial, since it left the jury with an unfavorable impression of the party to whose benefit the attempt was directed.

54. Only the Supreme Court has the power to change venue due to inflammatory newspaper reporting. *Commonwealth v. Sacarakis*, 196 Pa. Super. 455, 175 A.2d 127 (1961).

55. *Commonwealth v. Schwartz*, 178 Pa. Super. 434, 115 A.2d 826 (1955); *Commonwealth v. Cummings*, 45 Pa. Super. 211 (1911); *Commonwealth v. Helwig*, 40 Erie Co. L.J. 64 (Pa. O.&T. 1956). The usual rule applies that a juror will not be excluded from service merely from having read newspaper reports, provided he has not formed a fixed opinion. *Commonwealth v. Richardson*, 392 Pa. 528, 140 A.2d 828 (1958); *Myers v. Commonwealth*, 79 Pa. 308 (1875). *But see* note 25, *supra*, and accompanying text.

56. See *United States ex rel. Darcy v. Handy*, 130 F. Supp. 270, 285-89 and nn.43-47 (M.D. Pa. 1955), *aff'd*, 224 F.2d 504 (3d Cir. 1955), *aff'd*, 351 U.S. 454, 76 S.Ct. 965 (1956).

bility has been abandoned and that harm has been done or that resulting harm is but the natural and probable inference from the publication complained of, it is the duty of the trial judge to grant a new trial.⁵⁷

V.

CONCLUSION

In dealing with problems of impartiality of the jury the law is faced with a dilemma. It must seek on one hand to preserve relentlessly the ideals of a legal system in which the jury is both keystone and trademark. On the other, it must meet the problems posed by using laymen for the delicate task of resolving disputes, without employing burdensome structures that could only serve to defeat their own purpose by alienating the people. It is ironic that as our society has increased in both material affluence and education, the law, instead of being able to maintain rigid standards of selection and conduct, has had to make significant concessions: from the juror of no opinion to the juror of no fixed opinion, from the inseparable jury to something less than that. To the credit of jurisprudence the changes that have been made are founded on rational concessions to human nature and changing times. But in the answer to one problem it cannot help but be conjectured that others have been created. If a juror may enter the box with a predisposition, however slight, doesn't this theoretically result in a corresponding shift in the burden of proof, decreasing it for the favored party and increasing it for his opponent?

Again, some fault must be found with the practice of judges interrogating prospective jurors who profess initially to have a fixed belief bearing on the issues of the case. The rationale of permitting anything more than a cursory inquiry in such circumstances must rest on either of two grounds: that the jurist does not believe the opinion to be unshakeable, or he feels the panelist is attempting to evade duty. If the former is true, then the question of qualification becomes a difficult one of degree of mental fixation; if the latter, it should be more easily remedied than by saddling the litigant. In either event, it is unlikely that the situation recurs frequently enough to justify the coercion involved and the possible prejudice to an impartial trial.

Michael B. Kean

57. *Commonwealth v. Deutsch*, 72 Pa. Super. 298 (1919). But, on review, the grant or refusal of the new trial is treated as a matter of discretion and will not be reversed in the absence of a clear abuse. *Commonwealth v. Crotefund*, 85 Pa. Super. 7 (1925); *Commonwealth v. Valverdi*, 32 Pa. Super. 241 (1906), *aff'd*, 218 Pa. 7, 66 Atl. 877 (1907).