

## What Civil Law Attorneys Should Know About the Common Law – Part II

■ *by Larry D. White\**

One of the most distinguishing features of the common law is the concept of the lay jury – ordinary people deciding the portions of the case. The function of the jury is two-fold: to decide the facts of the case based on their common sense and to decide whether or not certain behavior is rationale or not based on their experience in society.

One of the most asked questions is how jury members are selected. Although it varies from place to place, it often involves a double random process and then a third phase to root out any biases. Some jurisdictions will start with a list of citizens – like the voting list or the driver license list – and select people randomly to report for jury duty. Once at the courthouse, they are again randomly selected for individual trials. By the way, the document ordering a person to the courthouse for jury duty is called a “summons” or a “subpoena” (“under penalty”). If the person ordered does not show, they can be brought by the police and jailed or otherwise punished. Jury duty is a serious civic duty and must be performed in accordance with the law; deviations from jury duty standards are punished by the judge in the case.

Once in the courtroom, potential jurors are questioned individually about potential bias in a process called “voir dire” (“to speak the truth”). If they know anyone connected with the case – the judge, defendant, prosecutor/plaintiff attorney or defense attorney – they may be excused for cause (valid reason). Otherwise, they are asked questions to determine if they have any bias that would affect the case. If such bias is shown, they are again dismissed for cause. As a final

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step, each side may dismiss a number of jurors until the jury is the right number – normally 12. No bias is required to be shown to be dismissed at this stage and the choice of jurors to select for removal can be a matter of strategy for the attorneys.

In the end, the jury will normally be composed of non-legal professionals. In fact, attorneys in a case will often dismiss a lawyer who may have been randomly selected because they fear that the jury members will automatically defer to the lawyer rather than making up their own minds. However, it is not necessary to have legal training to be a jury member for two reasons: the judge will tell them all the law they need to know and the judge will ensure that only reliable evidence is shown to the jury.

The rules of evidence in a common law jurisdiction need to be fairly stringent because of the jury. In a non-jury jurisdiction, the judges are well-trained in the evaluation of evidence so a lot of the decisions regarding the credibility of evidence can be left to the discretion of the judge. However, for the jury, we need to make sure that the evidence they see is reliable. For that reason, a fairly detailed set of rules of evidence are used to control the types of evidence that the jury sees.

Generally, any evidence that bears on the case can be admitted – relative evidence has the ability to either prove or disprove an element of the case – its “probative value.” However, if the evidence can be unfairly prejudicial, and if the prejudicial value outweighs the probative value, then the judge may exclude (not admit) the evidence.

One particular type of evidence can be excluded because it is considered to be inherently unreliable – and that is “hearsay” evidence. It is called hearsay because it is relayed from a third person – the witness “heard” it and now “says” it in court. The inherent reliability of such testimony (did the witness hear it right and remember it right?) led to the creation of a double-tiered use – if it is to be used to prove the content – it is not generally admissible – but if it is to be used for any other reason, it could be admissible.

Any adult is considered to be competent to be a “lay witness” (ordinary witness) to testify as to something that they personally sensed – saw, heard, tasted, smelled, or felt. However, an expert witness is allowed upon the request of one party, and approved by the judge, after the other party has had a chance to object. Unlike civil law jurisdictions where the court will select the experts, normally both sides bring their own experts. The jury believes whichever one they want.

The ultimate control of the trial is the responsibility of the judge who is there to make sure that the trial is fair. The admission of evidence is one way he or she does this so that the jury can make a sound decision based on reliable evidence.