

The Joan Clarke Case

Briefing Note on background to the case of *Joan Clarke v. Galway County Registrar, the Courts Service, Ireland and the Attorney General*

The High Court, Record No. 1338JR /2006

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Introduction

Joan Clarke is a working mother of two young children and lives in Loughrea, Co. Galway. When she received a Jury Summons in April 2006, she could have done what so many others do and found an excuse to get out of doing jury service. Instead she wanted to do her civic duty and got a friend to contact the Galway Circuit Court office to tell them so.

But Joan was not allowed to serve on the jury. She is profoundly deaf and the Juries Act, 1976 contains a list of people who are ineligible for jury service. Under the heading of “*Incapable Persons*”, it includes persons “*who because of insufficient capacity to read, deafness or other permanent infirmity [are] unfit to serve on a jury*”.

Joan would have needed a sign language interpreter to enable her to follow the trial and the staff in the Circuit Court office had been helpful and had arranged for an interpreter until they were told by the Courts Service that no deaf person could serve.

Joan Clarke was shocked and upset. She had worked for years in a factory with hearing people and she had frequent contacts with the (hearing) staff at her daughters’ school. She had no problem in communicating with hearing people and she was proficient in lip reading and sign language. In fact she was doing a course with a view to qualifying as a sign language teacher. But this rejection made her feel demeaned and undermined.

She contacted Free Legal Advice Centres and after correspondence with the Courts Service, in November 2006 she started High Court proceedings challenging the decision to exclude her from the jury. FLAC represented her.

Ironically, the Juries Act, 1976 was brought in to end the exclusion from juries of women and people who did not meet a property qualification. It followed a successful Supreme Court challenge by Mairin de Burca and Mary Anderson¹. The Supreme Court had held in that case that juries should be representative of the community and should not exclude significant groups of people. But deaf and blind people were still regarded as in some way inadequate.

¹ *De Burca and Anderson v. The Attorney General* [1976] I.R. 38

Changing Attitudes

The Irish Juries Act was similar to the legislation in the UK and most of the Common Law world at the time, but views were beginning to change elsewhere. In the US the Supreme Court had struck down laws excluding black people from juries in 1972² and then laws excluding women in 1975³. And in 1973 the US Rehabilitation Act had provided that no-one should be excluded from any activity receiving Federal funding solely because s/he was disabled.

In a ground-breaking case in 1984, *People v. Guzman*, the New York State Supreme Court held that a deaf person should not be excluded from jury service just because s/he was deaf. In a ringing statement the Court declared: *"The deaf are not poor creatures to be patronised by us, congratulated on their individual efforts to overcome their handicaps and summarily brushed aside ... the deaf are part of our community and must be considered, evaluated and finally either accepted or rejected for service as individuals just as any other citizen. The grounds for exempting the deaf from jury service have vanished"*⁴.

In 1990 the Americans with Disabilities Act was passed, which strengthened the provisions of the Rehabilitation Act and laid down that no-one with a disability should be excluded from or discriminated against by a public entity, which was taken to include the courts. Since then deaf and blind jurors have been empanelled throughout the US.

In New Zealand a provision very like the one in the Irish Juries Act was repealed in 2000 and the first deaf person was empanelled on a jury in 2005 and was promptly made the foreman⁵. He was an American working at a university in New Zealand and had twice served on juries in the US before he left there. The first blind person served on a jury in New Zealand in 2006⁶.

Canada also allows deaf and blind persons to serve on juries. And in Australia the New South Wales Law Reform Commission⁷ recommended in 2006 that the law there should be changed so that deaf and blind persons should serve on juries except where it could be shown that they were not actually able to do so. This has not been acted upon yet, however.

The position in the UK

² *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163

³ *Taylor v. Louisiana*, 419 U. S. 522 (1975)

⁴ *People v. Guzman*, 555 N. E. 2d. 259

⁵ 'First Deaf person to Serve on Jury', 'Resource', Newsletter of Disability Resource Centre, Auckland, Issue No. 12, 2005

⁶ National Centre for State Courts: 'Jur-E Bulletin' (2006)

⁷ New South Wales Law Reform Commission: Report 114: Blind or Deaf Jurors, Sydney 2006

The UK has not changed yet, though the UK courts have moved away from arguments that deaf or blind persons could not perform their duties adequately. Instead they have focused more on the “stranger in the jury room” or the “13th juror” argument, based on a common law rule that no-one other than actual jury members should be allowed into the jury room, lest they influence the jury’s consideration of their verdict. This has been taken to include sign language interpreters.

This view was upheld in the case of *R v. A Juror*⁸ in November 1999, where Jeffrey McWhinney, the Northern Ireland-born head of the UK National Organisation of Deaf Persons challenged his exclusion from a jury.

The judge, Ms Justice Anwyl, was sympathetic. She stated that Mr McWhinney would have no difficulty following the case with the assistance of an interpreter and she said: *“It is quite plain from the experience of the American courts, where deaf people have been allowed to sit on juries and be aided by a 13th person in the jury room, that far from being a hindrance, it has been felt in many cases to be of assistance”*. But she still held that she was bound by the common law rule about ‘strangers’ in the jury room.

The US courts had considered this issue in a number of cases and had held as far back as the *Guzman* case that sign language interpreters were trained professionals whose sole task was to assist the deaf juror and that if properly instructed and required to take an oath to obey those instructions, they would not affect the jury’s deliberations.

And even in Britain the courts have relaxed the ‘stranger in the jury room’ rule a little. In 2005 a deaf woman called Joanne Bamber served on a coroner’s jury in Derbyshire⁹ and the coroner was very satisfied with the outcome. And in 2006 the UK Court of Appeal rejected a challenge to a conviction based on the fact that a police officer involved in the investigation of the case had shown video recordings to the jury when they began their deliberations. The court held that there was no real possibility that the jury had been influenced where the police officer had simply operated the video recorder¹⁰.

⁸ *Regina v. A Juror (Jeffrey McWhinney)*, Woolwich Crown Court, U19990078, 9 November 1999, Smith Bernal Reporting Ltd.

⁹ “Account of a Deaf Juror”, *Sign Matters, News from the Deaf Community*, July 2005

¹⁰ *R v. Simeon Szypusz & David Anthony Gaynor [2006] EWCA Crim. 1552*

A Review of the Criminal Courts of England and Wales by Mr Justice Auld in 2001¹¹ suggested that accredited interpreters should be allowed to assist deaf jurors in the jury room but no action has been taken on that suggestion so far.

Since the landmark *Guzman* case in New York in 1984 there have been huge advances in technology which can help deaf people to follow court proceedings: loop systems to assist hearing impaired persons; Computer Aided Real Time Transcription (CART) to provide almost instantaneous transcription of spoken words, close-up closed circuit TV screens to assist in lip-reading etc. And the training of sign language interpreters has become much more professional and strict codes of ethics have been developed for legal translators. And there have been similar developments to assist blind people to take part in trials.

Deaf and blind people practice as lawyers and even sometimes sit as judges with the anomalous result that they could address juries in court but would not be allowed to sit on them.

The court hearing

All this was argued before Mr Justice O’Keeffe over four days in the High Court in May/June 2008 with much of the discussion focusing on two issues: whether a deaf juror could pick up the signals sent by the inflection and tone of voice of a witness; and the ‘13th person in the jury room’ rule.

On the first point, Joan Clarke’s legal team pointed out that sign language does not provide a purely literal translation of what was said. The signer tries to convey the expression and the tone of voice as well, while the deaf person’s life experience will have taught her/him to pick up signals from facial expressions and movements as well. And on the second point the legal team stressed that highly trained sign language interpreters are already used in very confidential and sensitive family law and sexual assault cases and they have developed stringent training and codes of conduct to deal with such situations.

Judgment was reserved in the case.

Conclusion

Around the time the case was heard, the Juries Act, 1976 was amended by the Civil Law (Miscellaneous Provisions) Act, 2008 to remove the upper age limits for jurors and the section excluding deaf persons was replaced by a new wording saying that those ineligible for jury

¹¹ *Lord Justice Auld, “Review of the Criminal Courts of England & Wales”: Report, Chapter 5, paragraph 46*

service included “Persons who have – (a) an incapacity to read, or (b) an enduring impairment, such that it is not practicable for them to perform the duties of a juror”.

Evidently there was some awareness of the crude and demeaning wording of the previous provision but it appears that the change is cosmetic as it is still being maintained that deaf people cannot serve on juries and that the ‘stranger in the jury room/13th juror’ rule still applies.

On the other hand, since the case was heard the Law Reform Commission here has issued a Consultation Paper on Jury Service in which they firmly reject the ‘13th juror’ argument. The Report says:

“The Commission does not consider that the presence of a sign language interpreter or CART operator would be an intrusive presence in the courtroom or at jury deliberations. The Commission does not consider that the presence of an interpreter is restricted by the 12 person rule for jury deliberations. A sign language interpreter properly trained and accredited, working to agreed professional standards, should not be prevented from being present to assist a hearing impaired or deaf person during jury deliberations. As such, it is the Commission’s view that the presence of an interpreter will not impinge upon the secrecy of jury deliberations”¹².

The Commission provisionally recommended that the Juries Act be amended to ensure that “no person is prohibited from jury service on the basis of disability alone and that capacity be recognised as the only appropriate requirement for jury service”. And they recommended the provision of assistance to deaf and hearing impaired and visually impaired persons to enable them to carry out the duties of jury members.

Time has moved on substantially since 1976 and attitudes to persons with disabilities have changed radically and for the better. It is time to end this pointless and hurtful ban on deaf and blind persons serving on juries and move forward towards a genuinely inclusive society.

¹² *Law Reform Commission: “Consultation Paper – Jury Service”, March 2010, Chapter 4, paragraph 4.56*