Tulsa Law Review

Volume 12 | Number 3

1977

Seeing is Believing--Most of the Time: Lay Observation vs. Proving the Obvious

Ralph C. Thomas

SEEING IS BELIEVING—MOST OF THE TIME: LAY OBSERVATION vs. PROVING THE OBVIOUS

Ralph C. Thomas*

> *For this Court to reverse the judgment . . . on a technicality is to indulge in the kind of judicial antics which so exasperate the tax-paying public and promotes public dissatisfaction with the judicial system.*[1]

Read out of context it is impossible to guess whether the above statement stemmed from the writer's immersion in Bentham;[2] from fear of proving Mr. Bumble's famous dictum that the "law is an ass",[3] or whether he is the prototype of Fuller's Judge Handy who intended nothing more or less than his decision should mirror the public will.[4]

Study discloses that this was not an exasperated jeremiad, but rather a realistic and honest reaction to recurring appellate frustration. The quote is taken from *Sumpter v. State*,[5] where the defendant had been convicted of prostitution, despite the absence of evidence that she was a female. The Indiana Court of Appeals reversed[6] and the state petitioned for transfer to the Indiana Supreme Court. This court, although recognizing the correctness of the reversal under "existing law,"[7] constructed a new rule to be followed on remand in this case, premised on the belief that recognition of a human's sex is attended with a high degree of certainty. This certainty makes justifiable the taking of judicial notice as to sex, the court ruled, and the construction of a rebuttable presumption in accord. In cases where sex is an ele-

* Professor of Law, The University of Tulsa College of Law; B.A., University of Tulsa; LL.B., University of Oklahoma; LL.M., New York University.

1. Sumpter v. State, 306 N.E.2d 95, 99 (Ind. 1974).
2. 7 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 196 (Bowring ed. N.Y. 1838-43).
3. C. DICKENS, OLIVER TWIST 644 (Lancer Books ed. 1948).
4. L. FULLER, THE PROBLEMS OF JURISPRUDENCE 22 (temp. ed. 1949).
5. 306 N.E.2d 95 (Ind. 1974).
6. 296 N.E.2d 131 (Ct. App. Ind. 1973).
7. 306 N.E.2d 95, 98 (Ind. 1974).

ment to be proven, the defense may respond with countervailing evidence, thus forcing the state to prove affirmatively the sex of the accused. In the absence of countervailing proof, the judicial notice will supply a prima facie case.

This procedure, stemming from the belief that recognition of adult human sexual characteristics is one of the talents possessed by other adult humans, should indeed be satisfying to a layman. It seems fair to say that it is an absurd judicial antic to negate an entire trial for the failure on the part of the party having the burden of proof to assert the obvious. Whether the failure stemmed from inadvertence or naïveté, the layman would view it correctly as a matter of gamesmanship for courts to participate in the useless expenditure of effort attendant on another trial just to see to it that the game is played according to the rules.

The doctrine expounded in this case is found in the pronouncements of a number of cases to the effect that inasmuch as the formulation of opinions about such matters open to observation as sex,[8] age, race, and the like is so common and so constantly indulged in by mankind in the pursuit of its manifold non-courtroom activities, it may be allowed as lay opinion testimony and need not depend upon the production of experts. Logically, it follows, as many cases hold, that if a witness who demonstrates no more than ordinary discernment can, from the stand, assert his opinion as to age, sex and other matters of common experience, jurors possessed of no lesser capabilities can likewise form opinions and act upon them.

If the jury, using its powers of observation, formulates an opinion and acts on it, this leads to several points of tension. These points are of greater or lesser gravity depending upon the facts of the individual case and its nature. Analysis leads to the realization that creation of an all-embracing rule would not suffice. Whatever its configuration, the result would be to sweep at least some of the problems under the rug.

The difficulties besetting this area of fact finding are found in cases which question the jury's perceptive powers despite the existence of the centuries-old belief, hardened into a rule of evidence, that mankind

8. No attempt will be made in these pages to deal with the problems inherent in sex cases dealing with transexuals, transvestites and other sex-centered anomalies. It is obvious that, if appropriate at all, jury opinion would be dependent upon the issue being tried.

has these abilities. Argument is made against the practice, because, it is asserted, human perception and powers of delineation are not that fine. A point of tension, and one of considerable gravity is jury usage of these powers of perception in the criminal case.[9]

It is in the fields of race identification and age recognition that most cases lie. *Sumpter* perhaps stands alone because of the manifest silliness of the appellate complaint or because such ineptitude on the part of the prosecution is rare. As these pages disclose, only in cases involving age is the desperate plea for another chance in which to lose so clearly seen.

RACE

The dangerously deceptive potential for error in racial recognition is perhaps best shown by the language of a North Carolina court in 1876[10] and the guarded caution urged by its counterpart in South Carolina thirty years before. The North Carolina trial court, proceeding from the premise that the issue of a white couple must perforce be white and that evidence of other racial strains is admissible on the legitimacy of a child born during the continuance of the marriage, allowed witnesses to describe the disputed heir and give opinions with respect to whether she had mixed blood but refused to let the child be exhibited to the jury for their scrutiny and determination. The supreme court, in reversing, said:

> [I]t would seem that when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury. The eyes of members of the jury must be presumed to be as good as those of medical men. Why should a jury be confined to hearing what other men think they have seen and not be allowed to see for themselves?"[11]

The South Carolina court dealt with the argument that the relators should escape the capitation tax imposed on free Negroes, mulattoes and mestizoes who claimed to be white. In disposing of the issue, the court said:

---

9. It is to be noted that reference is made to observations of jurors. The thrust of this study is the ability of finders of fact to discern physiological characteristics as a prelude to the finder's action. Jurors are singled out for clarity. Tribunals sitting without juries are subject to the same infirmities and blessed with the same powers of perception.

10. Warlick v. White, 76 N.C. 166 (1876).

11. *Id.* at 169.

> The disqualification arises from descent from one of the African race; and the various degrees in which the physical peculiarities are transmitted in descent, makes those peculiarities a very uncertain criterion of caste. It may happen that persons, in equal degree from the African stock, may present such different complexions and features that they would readily be assigned to different castes.[12]

An even earlier case justifying the lay delineation of race by observation was *Gentry v. McMinnis*,[13] which rises almost to the dignity of a philosophical defense. The court stated:

> To a rational man of perfect organization, the best and highest proof of which any fact is susceptible, is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. He who denies or doubts the evidence of his own proper senses, will, of course, deny or doubt the existence of matter, and be an universal sceptic; and to such a mind, there can be no such thing as proof; for if he distrust his own senses, he will be much more distrustful of the testimony of others, as to the evidence of their senses. Hence autopsy, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty, of the existence of any sensible fact.[14]

It must be understood in *Gentry*, as in other cases discussed under this heading, that status, rather than the appearance of status, is the issue. Thus it was that, following the forceful and rational defense of the practice of allowing the jury to rely on their sense of observation, the court went on to say that appearance would only give a prima facie showing of status which was capable of being destroyed by evidence of a life which indicated slavery, sales, involuntary servitude, etc. The importance of the quotation above is that it states with clarity the foundation stone of the practice in this and other areas: there is little purpose in calling witnesses to categorize from observable physical characteristics a human condition. Feeling bound, perhaps, to ground its decision on something other than pure logic, the Kentucky court took authority for the practice from an 1811 Virginia case, which allowed the jury to listen to witnesses describing the subject as a person of color and then disregard the testimony and decide the case on their own observation. In this case the court said:

12. White v. Tax Collector, 37 S.C.L. (3 Rich.) 136, 139 (Ct. Law 1846).
13. 33 Ky. (3 Dana) 382 (1835).
14. *Id.* at 386. A modern case to the same effect is White v. Holderby, 192 F.2d 722 (5th Cir. 1951), a libel case where the defamation consisted of characterizing plaintiffs as Negroes.

> If the plaintiff Nanny had not been before the jury, they must have found their verdict upon the testimony of others, which would have amounted only to a probability. But here they have the highest evidence, the evidence of their own senses; and upon that they find a verdict: in other words, the jury find a verdict upon their own knowledge.[15]

Perhaps the clearest exposition of the court's conception of the visible indicia of race, at least where blacks were concerned, is found in *Hudgins v. Wrights*[16] where the court, after disclaiming an intimate acquaintance with the natural history of the human species, said:

> Nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all: and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians; giving to the jet black lank hair of the Indian a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native Americans.[17]

Even more lay expertise was claimed in a later Arkansas case, *Daniels v. Guy*,[18] where a point of controversy in a lawsuit over the freedom of plaintiffs was solved in part by the court allowing plaintiffs to uncover and show their bare feet to the jury. The court, noting that physicians had testified in the case that one of the indicia of Negro blood or descent was the appearance of their feet, went on to observe that those familiar with the physiology of the Negro would recognize the truth of the testimony and then added, "No one, who is familiar with the peculiar formation of the *negro foot*, can doubt, but that an inspection of that member would ordinarily afford some indication of the race . . . ."[19]

The cases to this point have dealt with lay recognition of those who bear characteristics of the black race.[20] With the exception of oc-

15. Hook v. Pagee, 16 Va. (2 Munf.) 500, 502 (1811).
16. 11 Va. (1 Hen. & M.) 71 (1806).
17. *Id.* at 73.
18. 23 Ark. 50 (1861).
19. *Id.* at 52.
20. Scholarly clarity in the racial cases demands that terms and theories be faithfully recorded even though they may have vanished from the American scene. The writer prays the indulgence of those to whom the reappearance of these anachronisms is distasteful.

casional dicta found in cases dealing with slavery, which purported to describe the physical indicia of American Indians and persons of the Caucasian race, most energy has been expended toward scrutiny of cases of racial recognition; black vis-a-vis white. However, it may be seen that no precise boundaries are laid out. Controversy has arisen in cases of illegitimacy upon the propriety of allowing the jury to be advised of the appearance of the putative father when in one case he was said to be Spanish,[21] and in another when the subject was reputed to be Italian.[22] Neither case contains a good discussion but both apparently proceed upon the belief that a person of either ancestry would have a swarthy or olive complexion which would appear in the child born of union with one not of that ancestry.

What perhaps may be discerned as the beginning of the swing of the pendulum is to be found in *Almeida v. Correa*,[23] where, in an issue of paternity, the court said: "Contrary to widely accepted thinking, the identification of 'racial characteristics' and their relevance to paternity are not matters of common knowledge but subjects of expert testimony."[24] Just how far this judicial disparagement of the age-old concept of race identification may be carried is open to question. The opinion in *Almeida* does not indicate the precise problem before the court, but perhaps a hint of the genesis of such a wide sweeping pronouncement is found in the court's recognition that the decision is handed down in a state noted for its interracial mixtures. One cannot resist speculation that the anthropological experts for which the court signals a need may take the stand and describe the racial characteristics that have surfaced in opinions discussed heretofore. Assuming for the sake of discussion that certain races have genetic differences that find their expression in identifiable bodily characteristics, few would argue that experts are needed to supply information not within the lay domain. However, one suspects that an across the broad application of this concept will result in the absurdity decried more than one hundred years ago, the taking of the stand by a witness to describe that which all can see.

21. Peters v. Campbell, 345 P.2d 234 (Wyo. 1959). *See also* State v. Saidell, 70 N.H. 174, 46 A. 1083 (1900), holding the jury could determine that the subject child was Jewish by looking at him.

22. Morrison v. People *ex rel.* Richard, 52 Ill. App. 482 (1893).

23. 465 P.2d 564 (Hawaii 1970). *But see* United States v. Hung Chang, 134 F. 19, 23 (6th Cir. 1904). The trial court in this case had anticipated *Almeida* by forty-six years. The Sixth Circuit reversed, holding that the suspected alien looked like a Chinaman (the court's wording) "to any person of common knowledge and information."

24. 465 P.2d at 570 n.9.

AGE

When attention is turned to age, some relief from the sordid catalog of man's degradation is found, if only by contrast. The bulk of the cases deal with sexual misconduct involving the inroads on chastity that the law has proscribed because of the youth of one of the participants. Some involve non-sexual activity prohibited to preserve the innocence of those beneath the permitted age. Lacking, for the most part, moral issues, are cases involving minors' contracts.

In a case which, if handled differently, would properly draw the appellation of judicial antics by Judge Hunter, the defendant in *State v. Thompson*,[25] charged with embezzlement, raised the defense that in the absence of proof as to his age the state had failed in its prima facie case, which required that he be shown to be over sixteen years of age. He had testified he was a graduate of the University of Michigan law department, was licensed to practice law in the courts of Illinois and the federal courts in Chicago, was admitted to the bar in Texas, and had represented various insurance companies in St. Louis for four or five years. The court said this testimony, plus his appearance on the stand, justified the jury in convicting him.[26]

Another resort to what the layman would condemn unhesitatingly as a technicality is found in *State v. Dorathy*,[27] which would be amusing were it not laced with such pathos. Defendant, accused of taking indecent liberties with an eight year old girl, was alleged by the indictment as being of the age of 74 years. No evidence was offered as to his age, but the Maine Supreme Judicial Court, disposing of his argument that injustice was done by allowing the jury to decide an element of his case unaided by testimony, said: "[T]he inference is unavoidable that every alert and intelligent juror sworn then must have seen respondent, whom probably to know aright as to age was but to see."[28] Almost the same wording would have sufficed to dispose of defendant's argument in *Torres v. State*,[29] where his conviction for unlawful intercourse with a fourteen year old girl was challenged on the basis that no proof had been introduced that defendant was over sixteen years of age. Although the source of the information is not clear, the su-

25. 155 Mo. 300, 55 S.W. 1013 (1909).

26. To the same effect is State v. Gebhardt, 219 Mo. 708, 119 S.W. 350 (1909), where the defendant, who had been a candidate for city attorney, faced the same charge and raised the same argument with the same result.

27. 132 Me. 291, 170 A. 506 (1934).

28. *Id.* at —, 170 A. at 508.

29. 521 P.2d 386 (Alas. 1974).

preme court knew in fact that Torres was forty-four years old and that the prosecutrix had testified that he was twenty-eight.

Two cases dealing with the immigration of Orientals into the United States disclose the sometimes inescapable usage of these perceptive faculties by the trier of fact. In *United States ex rel. Fong On v. Day*,[30] an issue of parentage was tried. It was established that if the alien youth seeking entrance into the United States in 1929 was not an imposter he must perforce be about twelve years of age, because it was known the man claiming fatherhood had not been in China since 1916. Testimony was offered that the applicant was twelve and one-half years old. The immigration board before which he appeared found him to be at least twenty years old and a public health surgeon certified that he was at least sixteen years of age. Judge Swan, noting the possibility of difficulty occasioned by having occidentals estimate the age of orientals, nonetheless held that the defendant's mature appearance before the board and the certificate of the surgeon justified the board's order of exclusion. In *United States ex rel. Soo Hoo Hong v. Tod*,[31] the relator sought to establish that he was twenty years of age. He was excluded by the immigration board on its finding that he was well over twenty-one years old. This case is marred somewhat by the inclusion of testimony that he was twenty-four years old; although recanted and not accorded controlling weight by the court, it casts a shadow on the holding that the exclusion was based on the board's finding from personal scrutiny that the relator was well over twenty-one years of age.

It seems self-evident that if determination of age is within the lay domain, some determinations are of more ease than others. In short, inexpert and untrained eyes could tell, barring the occasional anomalous case, whether the subject of their scrutiny was a boy of less than thirteen or a youth of sixteen. It might be asserted that the difference in appearnce is that which obtains between a child and a man. On the other hand, in the case of *Soo Hoo Hong*, the difference perceived is between that of a young man and that of a young man a little older. Surely this is a more questionable discrimination.

Soo Hoo Hong serves to introduce the cases which comprise the principal areas of tension in this sector of trial. Few would contest the ability of ordinary human perception to distinguish between the vari-

30. 54 F.2d 990 (2d Cir. 1932).
31. 290 F. 689 (2d Cir. 1923).

ous stages in the growth of the human, classifying them as babyhood, childhood, adolescence, youth and, within a larger framework, adulthood which lasts until old age or senescence. Within these groups, few are perceptive enough, it is submitted, to define confidently their opinion in years. Certainly it seems that most could accurately distinguish between an infant and a kindergarten child; a kindergartner and one ready to enter high school. Accuracy could expectably diminish when distinction is asserted between one chronologically of the age to leave high school and one chronologically in his mid-years of college. As the measuring device is broadened, accuracy returns. Distinction with certainty is again possible between one of the chronological age for graduation from college and one who is ten or fifteen years older. Almost absolute certainty should be accorded to lay recognition as the difference between different age groups broadens. To accord youth to one past sixty, or senility to one in his thirties, is to err badly or to be honestly mistaken because the objective signs are misleading.

In the field of age, as in the field of race, there is room for the insight of the Hawaii court in *Almeida*.[32] Without any attempt in this study to draw on authoritative sources, it nonetheless would seem that physicians and others skilled in physiology should best be able to define with precision the age of the subject of inquiry, buttressing their testimony by reference to certain expectable and almost unvarying indicia, such as the growth of teeth, hair, and attrition of the body, including the acquisition of the normal earmarks of age. One advantage, if we accord to the expert the critical faculty that should be his atrribute, is that the expert would not be deceived by one indicator alone, grey hair for example, but would look for other indicia of age, which, if present, would tell him the extent of the aging process or, if absent, would alert him to the presence of the false sign. Suspicion is ready that the expert lacks such powers of discrimination and classification within the subgroups suggested here. It may be argued that he could tell whether the subject of his scrutiny is an adolescent or a youth, but still be unable to define in terms of precise years the age of the youth. It is probable that only on the infantile end of the human spectrum could one skilled in physiology be expected to estimate with reasonable certainty one's month of existence.

Assuming for discusion that even experts would experience the above described difficulty, courts generally have not drawn back from

32. 465 P.2d 564 (Hawaii 1970).

arrogating to themselves, or delegating to the jury, these precise categorizations. Perhaps one of the most striking cases allowing such jury activity is *Schnoor v. Meinecke*,[33] a personal injury action in which defendant wished to confine plaintiff to his action under workmen's compensation with its attendant protection to the employer of limited damages. Plaintiff testified that he falsified his age at the time he made application for work and, at sixteen, was too young to be covered under the workmen's compensation act at the time of his injury. He was corroborated by his parents and by a certified copy of his birth certificate. The jury, responding to an interrogatory, found that he was seventeen, the age he had claimed to be at the time of employment and thus found in favor of defendant.

Although it may be suspected that there was more of rough justice in the jury answer to the interrogatory than there was of innate skill in determining age, it is noteworthy that the North Dakota court took the stand that the credibility of witnesses was an issue for the jury. Noting his statements to his employer that he was seventeen at the time of hiring and when first making a workmen's compensation claim, the court said, "These statements *together with plaintiff's physical appearance* constitute the evidence upon which the jury made its finding that he was seventeen years of age at the time of the accident. . . ."[34]

As may be seen in the discussion that follows, jury resolution of the question of age often is allowed where there is a dearth of testimony with respect to age. In *Schnoor* it is well not to be distracted by the fact that the plaintiff's testimony and that of his parents were from interested parties and that a birth certificate in North Dakota is only prima facie evidence of its contents. Nor is it important that plaintiff's prior inconsistent statements were lies. The important factor is that the jury was allowed to take the position that they could tell whether a teenager was sixteen or seventeen by looking at him. Surely if the theory of the Hawaii court in *Almeida* is to invade the field of age estimation, this is fertile ground for scrutiny.

Schnoor may give rise to justifiable suspicion that the jury allowed plaintiff to suffer the disabilities attendant upon an age adopted by him in order to avoid otherwise expectable disadvantages. In the time-honored phrase, they may well have expressed by their verdict that hav-

33. 40 N.W.2d 803 (N.D. 1950).

34. *Id.* at 807 (emphasis added). The court relied on JONES ON EVIDENCE and WIGMORE in allowing physical appearance to be utilized to resolve conflicting testimony.

ing made his bed he could lie in it. However, cases abound where the jury's perception, deduced from their verdict, gives no hint of punishing the person whose age is in question but, indeed, hints at just the opposite.

Clarity demands division of the following cases into two principal categories; either the litigated activity is not of criminal character if both parties are consenting and below a certain statutory age, or the punishment may vary depending upon the age of one or both of the parties. In either instance, many cases turn on the jury's usually inarticulated opinion that the subject is of a certain age. The opinion is expressed in their verdict which, in the absence of the formation of such an opinion would have been one of no guilt. These cases are striking because few make the distinction that the youthful subject is either one year older or younger than the statutory line of demarcation.

A question arises as to the reason for these verdicts. Do they stem from agreement with the accolade of perception bestowed on the jury in the instructions? Do jurors believe they have these perceptive faculties without being told? Have they disregarded the stern admonition that the charge is not evidence and therefore failed to demand proof that the allegation of age be proven? Or have they realized that this fact remains unproven, at least in the formal sense, but assumed that the charge would never have been brought if the state had lacked the proof? Lastly, have they accomplished with lay simplicity that which the Indiana court wrought with legal erudition in *Sumpter*?[35] Have they ruled that if the party who stands to lose because of an adverse finding as to age can refute the charge, and thus avert the loss, he will do so? Stripped of its judicial cloak, that is exactly what Judge Hunter did.[36] The significance of a jury utilizing the same basic mental processes as that of an appellate judge is that, unlike him, they may not know what they do.

It is to be suspected that a high percentage of the laity see nothing wrong in creating in the defendant the hazard of not speaking when circumstances demonstrate that to speak would acquit him. If, indeed, the defendant has the means to disprove the charge it is unnatural, in lay eyes, for him to remain mute. This idea is not one alien to the law; most of the thrust of the law of presumptions is to cast upon one side or the other the duty to speak.[37] A presumption may make the

35. *See* notes 1-7 *supra* and accompanying text.
36. 306 N.E.2d at 103.
37. C. MCCORMICK, EVIDENCE § 342, at 803 (2d ed. 1972).

party speak because it is obvious that he is the only one possessed of the requisite knowledge.[38] Nor is this concept confined to the civil field. Many a criminal defendant has found himself offering evidence about alibi, insanity, self-defense and the like simply because the state does not have a duty to initiate proof on these matters.[39] Courts hasten to add, in most instances, that the defendant need prove nothing and that the burden of proof does not shift, but the cold fact is that if the jury is to hear his side he must provide the testimony, or suffer the chance of conviction.

Strange conceits surface where opinion based on visual contact is given sway, but seldom are they as strange as in *Kieth v. New Haven & N. R.*[40] The issue presented by the case was whether the proximate cause of plaintiff's injuries was the failure of defendant railroad employee to inspect properly and thus detect defects in cars from other roads hooked onto New Haven trains. No evidence was offered as to the inspector's competence. The trial court refused defendant's request to take from the jury the issue of the inspector's qualifications and intelligence. On appeal, the court said:

> The jury was permitted to consider the appearance and conduct of the inspector who was called as a witness, to aid them in determining whether he was a person of suitable qualifications and of sufficient intelligence to be entrusted with so responsible a duty. It is impossible for us to say that . . . his appearance and conduct in the presence of the jury might not be legally sufficient to satisfy them that he was an incompetent person.
>
> . . . It may well have been that the jury did acquire a knowledge of material facts as to the intelligence of the inspector by his examination as a witness.[41]

Perhaps more dangerous because of the gravity of the decision was *Jones v. State*,[42] a rape case where the court instructed the jury that consent was possible between the ages of ten and fourteen if the female's mental and physical development was such as to render consent possible. Defendant was convicted and argued on appeal that the girl was within the defined years and capable of consent. The Georgia court said:

> The girl was the main witness for the state, and as such was

38. *Id.* § 343.
39. *Id.* § 341.
40. 140 Mass. 176, 3 N.E. 28 (1885).
41. *Id.* at —, 3 N.E. at 29.
42. 106 Ga. 365, 34 S.E. 174 (1899).

> examined and cross-examined in the presence of the jury. The jury had the right, in forming an opinion with reference to her capacity or want of capacity to consent to sexual intercourse, to take into consideration facts discovered by their own observations of the girl herself, her apparent physical development, her manner of testifying, and the degree of intelligence manifested by her while being examined as a witness.[43]

A case with considerably less damaging potential is *Orscheln v. Scott*,[44] a personal injury case where an absence of evidence fixing the age of plaintiff rendered the award of future damages less than certain. The appellate court, in what is submitted is a model of judicial reason, found no error in submitting the case for the jury's consideration of this part of the award:

> In cases of this character, it is of no practical importance to know the *precise* age . . . . It would make no appreciable or substantial difference in the jury's estimate of probable future damages, whether the injured party was ten, or twelve years of age; or, whether he was forty or forty-one, two, three or four years old. . . . It seems to me, therefore, that the observation of plaintiff by the jury was sufficient as a basis from which to estimate the damages.[45]

Although the court relied on cases involving statutory rape and the like, it would seem that there is manifest good sense in its decision. Reflection discloses that there is a high element of prophecy in the personal injury damage award for future damages.[46] As prophecies are subject to the infirmities of man's judgment, the court does no more than to admit that error on the near end of the projection, for lack of precise information, is not likely to harm more than error on its far reach. It is clear that what is offered is at best an informed prognosis and at worst a wild guess. It is true that in this day of major damage verdicts an error of several years may be measured in the tens of thousands of dollars; however honesty compels the admission that this risk obtains if the prognosis premised on the informed (by hypothesis) prophecy does not prove out. In a similar case, the court, instructing the jury on the same issue, said that plaintiff was fifty-seven years of age. On motion for new trial, the court said with reference to the instruction:

> I gave it, of course, with the conception that there was testi-

43. *Id.* at —, 34 S.E. at 175.
44. 90 Mo. App. 352 (Ct. App. 1901).
45. *Id.* at 361, 362.
46. *See* Thomas, *Medical Prophecy and the Single Award: The Problem and a Proposal*, 1 TULSA L.J. 135 (1964).

> mony in this record as to plaintiff's age and Mr. Bassett seems still to think there is. I don't know positively, but plaintiff was here before this jury. It was evident to every one of us that he was a man well in middle age . . . .[47]

Another defensible case is *First National Bank v. Casey*.[48] Here the statute dealing with infancy deprived the infant of his power of disaffirmance where through the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting. The merchants he dealt with took his appearance as evidence of maturity. The court noted that the jury could see the minor defendant and could consider whether plaintiff was justified in failing to question the defendant's adulthood. The appearance of the minor was a proper matter for the jury to consider in determining the truth of the assertion that the other party to the contract had good reason to believe him an adult.

One of the major stumbing blocks to usage of this evidence is the procedural inhibition, real or imagined, raised when reliance on it is sought. Perhaps the most basic obstacle and the one most deserving of attention is that which stems from the universally acknowledged duty of the state to prove every element of the offense in the criminal prosecution. Indeed, in *Sumpter v. State*,[49] the case which provided the keynote for these pages, one judge registered an indignant dissent reaffirming the duty of the state and characterized the majority opinion as an abrogation of this time-honored protection.[50] As is often true, general rules do not comfortably govern particular cases and, the dissent notwithstanding, it would be a judicial farce (assuming no physiological anomaly) to send the case back to establish that which the defendant would be powerless to conceal, her femininity.

It is in the field of subtle discriminations, such as whether the subject is seventeen or eighteen, twenty or twenty-one, that perhaps more attention to compelling proper presentation of the case should be required. Cases may arise where the age of the subject is not known. In such a case, the passage or lack of one day may well mean guilt or innocence in the criminal case and liability or non-liability in the civil case. Sexual intercourse with a girl on the eve of her statutory maturity is criminal. The same act a day later is perhaps no less reprehensible in the field of morals, but is outside the ambit of the criminal law.

47. Shepherd v. Smith, 198 Wash. 395, —, 88 P.2d 601, 604 (1939).
48. 158 Iowa 349, 138 N.W. 897 (1912).
49. 306 N.E.2d 95 (Ind. 1974).
50. *Id.* at 104 (DeBruler, J., dissenting).

Such cases, although few depend on such narrow margins, test our system of justice. If the state does not furnish proof of non-age in these close cases and courts wink at this demonstrated inability or ineptitude, our articulated rules of procedure are abandoned for no justifiable societal gain.

With perhaps discernible pride, it may be pointed out that, for the most part, our reports of decisions contain few examples of such knife-edge decisions in the criminal field.[51] Most cases where jury judgment prevails over testimony, or the lack of it, deal with much wider margins than are suggested.[52] It is to different issues that appellate objection is raised in cases of non-enunciated proof. Many objections deal with the inability of the reviewing court to evaluate the correctness of the jury's determination.[53] A few perceptive courts have pointed out that objections of this nature ignore the familiar appellate dilemma of review in cases containing views by the jury.[54] An even more common instance is that of jury evaluation of a plaintiff's complaints by observing his physical condition and the tiresomely common appellate refusal to denigrate the testimony of one or more witnesses because the triers of fact had the unique opportunity to observe and form an opinion as to their probity. Lastly, and fittingly so, are those few opinions that would credit the jury with capricious opinions as their prerogative.[55]

51. One such case is State v. Robinson, 32 Ore. 43, 43 P. 357 (1897), where the court excluded opinion testimony by the defense concerning the defendant's age, saying that the jury could determine whether she was older than her asserted age of fifteen merely by observing her. *See also* People v. Meade, 10 N.Y.S. 953 (Ct. Gen. Sess. 1890), allowing jurors to inspect and determine the age of children suspected of being under sixteen, the statutory minimum age for employment; Stiles v. State, 39 Okla. Crim. 173, 264 P. 226 (1928), allowing jury appraisal of a girl to determine whether she was fifteen or eighteen years of age.

52. *See* Hermann v. State, 73 Wisc. 248, 41 N.W. 171 (1888), where a jury was allowed to determine that a sixteen year old girl was not twenty-one years of age by observing her physical appearance.

53. *See* Wistrand v. People, 213 Ill. 72, —, 72 N.E. 748, 751 (1904); People v. Kielczewski, 269 Ill. 293, —, 109 N.E. 981, 983 (1915). Both cases involved a determination of the defendant's age by the trial court, although the choices offered differed by only one or two years. The trial courts were reversed and the cases remanded for this reason. *See also* First National Bank v. Casey, 158 Iowa 349, —, 138 N.W. 897, 899 (1912). *Cf.* Watson v. State, 140 N.E.2d 109 (Ind. 1957) (where defendant did not take the stand to testify as to his age, it was erroneous for the jury to estimate his age, even though he had been properly identified in their presence).

54. *See* Orscheln v. Scott, 90 Mo. App. 352, 365 (Ct. App. 1901).

55. *See* State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951). Although not a recognition case, *Lawrence* expresses this view with stark clarity. Reversing the trial court for having taken judicial notice that a two year old Ford in good condition was worth more than the $50.00 minimum required for grand larceny, the appellate court said, "However, under our jury system, it is traditional that in criminal cases juries can, and sometimes do, make findings which are not based on logic, nor even common sense." *Id.* at —, 234 P.2d 603.

What then is the correct solution? It would seem that correctness lies in treating as immaterial error the failure to assert and prove that which it would be futile to deny: that an obvious toddler is incapable of giving consent; that a person of middle years is not an adolescent; that one possessing certain recognizable sexual characteristics is not of a different sex. Whether clothed in procedural formalities or viewed as a fact of life, as most courts have done, the essential commonsense bursts through. It is the duty of the judge to see to it that the public will does not override the collective wisdom of the ages when man tries man for liberty, life or property. It should be seen as a misreading of these duty orders when justice is delayed, made more expensive or thwarted by the order of a court that sees its duty in the simplistic command to so control the administration of justice that the rules are observed no matter how absurd the consequences.

It is not wrong to insist on intelligent adherence to the rules. Justice is produced, in our concept, when the court insists on the prosecution carrying its burden in the case of the hairline decision where the passage of a day, a month or a year may well mean conviction and ruin or exoneration and honor for the person whose fate depends on that determination. It is not subversive of human liberty or property rights to put forward the view that it is only the finely drawn determinations that should be accorded the procedural niceties fashioned as safeguards, but often claimed in the obvious issue determinations for unmerited advantage.