Laws Affecting the Deaf and Hearing-Impaired

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LAWS AFFECTING THE DEAF AND HEARING-IMPAIRED

BY

PATRICIA ELAINE MARTIN
B.S.B.A., Florida Technological University, 1972

THESIS

Submitted in partial fulfillment of the requirements for the degree of Master of Communication in the Graduate Studies Program of Florida Technological University, 1973

Orlando, Florida
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Chapter 1

INTRODUCTION

Numerous incidents are coming to light wherein the deaf are being deprived of the basic rights guaranteed to all citizens in this country. Many Americans are being denied the rights to communicate, to travel freely, to obtain an adequate education, to acquire respectable employment or to maintain custody of their children. In addition, they are often deprived of their basic right to due process of law as guaranteed by the Fourteenth Amendment.¹

Our legal system seems to be unaware of the plight of the deaf in communicating with the hearing world, as evidenced by the prevalence of cases involving injustices to the hearing-handicapped.²

Brutality of deaf people is more widespread than is commonly known. The September 18, 1967, Newsweek reported that a deaf mute was shot by National Guardsmen during the Detroit riots after warnings were reportedly shouted at him. On February 14, 1969, the Chicago Sun-Times described an incident in which two policemen arrested and then allegedly beat four youths who came to the rescue of a 17-year-old deaf-mute being clubbed by one of the policemen because he was unable to hear the policeman's instructions. ¹
On June 13, 1969, the Chicago Daily News told of a young man who, as a result of his speech impairment, was shot and killed by two policemen.

Little has been written for the deaf that may serve as a guide for them in handling the complexities of everyday living. Myers presented an accounting of laws which affect the deaf and reviewed areas which create the most consternation for them.3

Myers reported that suit was filed on behalf of 184 deaf members of the Illinois Association for the Deaf against the Chicago Superintendent of Police due to increasing police brutality involving the hearing-impaired population of that city.4 Although it was realized that the police would naturally experience some difficulties in interrogating such individuals, their apparent lack of understanding of this physical handicap and its imposed communicative limitations often led to the deaf person's inability to understand being interpreted as apparent unwillingness to cooperate. Although some significant attempts were made by Superintendent of Police James B. Conlisk, very few alterations in policy seemed to filter down to the level of actual practice. As a result of such injustices Myers presents a simplified version of instructions for the deaf to follow if confronted by the police.5

The data for this publication was compiled from newspaper reports, personal contacts and court proceedings.

Brett reported a case in which a deaf man was
convicted of murder on what appeared to be insufficient evidence compounded by his inability to effectively communicate at the trial due to his handicap.\textsuperscript{6}

Myers cautions the deaf about possible underhanded business methods including high-pressure tactics, threats, fraud and forgery which are not uncommonly reported in dealings with the hearing-impaired.\textsuperscript{7}

\textit{Consumer Reports} cited the case where an individual was convicted of mail fraud in a federal court for selling hearing aids to deaf people at prices as high as 10 times those suggested by the manufacturers.\textsuperscript{8}

Under ancient common law, a person born deaf was considered incapable of making a valid contract, the theory being that such a person would be unable to comprehend the true nature of the contract and could be easily duped. To protect these people, the courts refused to enforce contracts made by them. Although this viewpoint offered some protection from harmful contracts, it also served to limit their freedom in economic transactions. They could not enter into business, purchase land, obtain credit or even make a will.\textsuperscript{9}

A person not born deaf but who later became so afflicted, was often the subject of litigation, this litigation being an attempt by others to have such a person adjudged incompetent.

Due to the severe language deficiency of the deaf individual, the everyday vocabulary of the hearing world
requires translation as well as interpretation in order to be fully comprehended by the deaf. 10 This need has led to laws being instituted in some states insuring the use of an interpreter in criminal proceedings involving a deaf defendant. The national Registry of Interpreters for the Deaf, recognizing its responsibilities to the deaf, has established procedures for educating its members through the use of simulated trials involving both deaf litigants and attorneys. Recently the Florida Registry of Interpreters for the Deaf has taken the lead in implementing this program in that state.

STATEMENT OF THE PROBLEM

The amount of data currently available for use by attorneys in preparation of cases for hearing-impaired clients is seriously limited. A compilation of precedent-setting cases involving deaf citizens would be invaluable to the conscientious legal counselor. Such an up-to-date compendium of legal information is presently nonexistent.

There is an apparent need for the deaf population of our country to be made aware of the problems they face in everyday living. No recent publications are available which inform the deaf of these problems or of how others have overcome similar predicaments.

In addition, no significant publications exist which expose the apparent inequities perpetrated upon the deaf population of this country. The general public is ignorant
of these injustices in an era of unequaled civil rights awareness.

STATEMENT OF PURPOSE

The lack of information concerning these injustices is identified as the problem; the purpose of this study is to compile information intended to alleviate the problem. Such data will be of considerable value to the attorney preparing cases for the deaf, for the deaf individual himself so that he might be fully acquainted with his rights and limitations and, finally, for the American public so that they might be informed of the present status of our aurally handicapped.

METHODOLOGY

All legal cases in the United States which have affected deaf or hearing-impaired persons were reviewed to determine their judicial history and interpretation. This was accomplished through the extensive utilization of Shepard's Citations, Corpus Juris Secundum and American Jurisprudence. Through the use of these legal digests this researcher was able to obtain the primary source of every case reported that involves deaf individuals.

All such cases conducted in the U.S. Supreme Court and all federal and state courts were a part of that review. Also included were cases found in the National Reporter System, articles in legal periodicals and
annotations in the Annotated Reports System.

All such cases reviewed that seemed to be of significance to the purpose of this research now comprise an up-to-date compendium of virtually every court case in the United States affecting deaf or hearing-impaired people. These have been assembled under such divisions as "Wills," "Competency as Witnesses," "Capacity to Marry" and "Child Custody and Adoption."
Chapter 2
DEAF PERSONS IN THE COURTROOM

Competency as Witnesses

The presumption of law in ancient times was that deaf mutes, so born, were idiots which, of course, would render them incompetent to testify [Lord Hale in his Pleas of the Crown, 1 (Hale) P.C. 34, 9 A.L.R. 482 (1795)]. Later, deaf persons were considered to be of limited intelligence and, therefore, were still not permitted to testify as witnesses.12

This former legal presumption of idiocacy has largely, if not entirely, disappeared or at least has been so far modified as to merely require that the party calling a deaf mute as a witness show certain qualifications, such as an understanding of the nature of an oath and sufficient intelligence to permit receiving and communicating ideas regarding fact and controversy [State vs. Howard, 118 Mo. 127, 24 S.W. 41 (1893)].

The presumption that a person deaf and mute from birth should be deemed an idiot does not seem to prevail in modern practice. Now, deaf mutes are considered competent witnesses when they have sufficient knowledge to understand and appreciate the sanctity of an oath, to comprehend the facts regarding their testimony and are capable
of communicating their ideas with respect thereto [Dobbins vs. Little Rock R. & Elec. Co., 79 Ark. 85, 95 S.W. 794, 9 A.L.R. 484 (1906); Ritchey vs. People, 23 Colo. 314, 47 Pac. 272 (1896); State vs. DeWolf, 8 Conn. 93 (1830), 20 Am. Dec. 90; People vs. Weston, 236 Ill. 104, 86 N.E. 188 (1908); Snyder vs. Nations, 5 Blackf. 295 (1840); Skaggs vs. State, 108 Ind. 53, 8 N.E. 695 (1886); State vs. Butler, 157 Iowa 163, 138 N.W. 383 (1912); State vs. Burns, 78 N.W. 681 (1899)].

In order for a deaf person to be a competent witness, there are fundamental requirements to be fulfilled:

1. The witness must be able to understand the questions that are put to him, and he must be able to answer in some effective manner. That is, he must have some practical system of communication.

2. The witness must understand the obligation of his oath to tell only the truth.

In the 1884 case of Territory vs. Duran, 3 N.M. 189, 3 Pac. 53, a deaf mute eight or nine years of age was offered as a witness. The court held he was not a competent witness in that he had never been educated and could not be made to understand the nature of an oath, and, in fact, could not make himself understood except as to most ordinary everyday wants, and then only through limited gestures understood by his family. In the court's dissenting opinion, it was stated that the boy, who was the only eyewitness to a murder, had clearly and unmistakably through
the use of signs and pictures identified the murderers and showed how they had committed the crime. Initially, the court allowed the testimony, although it was demonstrated that the youth could not and did not comprehend the nature of an oath. Due to this situation, an appeal resulted in the dropping of all charges against the defendants [Quinn vs. Halbert, 55 Vt. 229, reprint 16 Vt. 74 (1900)].

Another similar example is cited in the case of Pruitt vs. State, 232 Ala. 421, 168 So. 149 (1936), in which a 14-year-old deaf girl was an eyewitness to a murder committed by her father. Upon examination through an interpreter it was found that she knew who God was, she knew what it was to pray and that she knew what it was to tell the truth. She did not know what sin was, did not know where hell was nor did she know what becomes of bad little girls. The defendant objected, stating that under these circumstances she did not know the meaning and obligation of an oath and, therefore, should not be permitted to testify. The Alabama Supreme Court held that there was no error in permitting her to testify and that she was a competent witness.

When a deaf witness has an adequate method of communication and understands the obligation of an oath, it is now firmly established that the witness is competent to testify.

The Supreme Court of Iowa said in the case of State vs. Butler, 157 Iowa 163, 138 N.W. 283 (1912):
The suggestion that the deafness of Mrs. Atherton rendered her incompetent to testify is without merit. Even a deaf mute, if of sufficient mental capacity and able to communicate his ideas by signs or in writing, is a competent witness. (Cases cited.)

The fact that difficulty accompanies the examination of a deaf mute is no reason for excluding his testimony [Ritchey vs. People, 23 Colo. 314, 47 Pac. 272 (1896); Burgess vs. State, 256 Ala. 5, 53 So. 2d 568 (1951)]. In the latter case, the defendant, Burgess, had been dating a deaf girl. The girl's father objected, and Burgess murdered the father in the presence of the girl. The girl testified at the trial as an eyewitness against Burgess, using a system of signs that were understood only by her brother. The defendant objected, saying he would be unable to cross-examine the witness properly under these circumstances, but the Alabama Supreme Court held against him, citing the opinions of two experts plus several cases.

The general rule regarding evidence of the good reputation of a witness for truth and veracity is that it is inadmissible for the purposes of supporting his testimony. The rule has been held inapplicable in at least one instance, where the witness was a deaf mute [Kirby vs. State (Okla.), 220 Pac. 74 (1923), 33 A.L.R. 1212, 58 Am. Jur. 742, Evidence, Sec. 812]. In this case, evidence attesting to the good reputation of a deaf and mute witness was found to be acceptable.
Methods of Testifying

It has been held that the testimony of a deaf person may be obtained by any means that are necessary to that end [State vs. Howard, 118 Mo. 127, 24 S.W. 41 (1893)].

There are generally two methods that can be used to take the testimony of a deaf person in court: (1) by submitting the questions to the witness in writing and having the witness answer them in writing, and (2) by using the sign language of the deaf and having an interpreter to translate the signs. (Language of signs in this context means natural and arbitrary gestures plus the manual alphabet or fingerspelling.)

If no interpreter is available, it may be necessary to have the questions and answers put in writing. However, this is a very time-consuming process, and the courts are usually reluctant to spend the required hours to conduct this type of examination. This method of examination also gives the witness an unusually large amount of time to consider his answers to the questions. For this reason, it is particularly unsuitable for cross-examination. Moreover, a deaf person's ability to express himself in writing may be very limited.

For all of these reasons, it is generally considered preferable to conduct the examination in the language of signs through the use of an interpreter. This method of examination is much faster and, if a properly qualified interpreter is used, it almost always produces
better results.

In English law, it has been said that it would seem to be better, in the case of a deaf and mute witness who can read and write, to conduct his examination in writing [Morrison vs. Lennard, 3 Car. and P. (Eng.) 127, (1827)].

It is within the discretion of the trial court whether the testimony of deaf mutes shall be taken through an interpreter, by means of signs or by means of written question and answer [Dobbins vs. Little Rock R. & Elec. Co., 79 Ark. 85, 95 S.W. 794 (1906), 9 A.L.R. 484, 53 Am. Jur. 44, Trial, Sec. 29; Skaggs vs. State, 108 Ind. 53, 8 N.E. 695 (1886)].

For example, in the case of State vs. Dewolf, 8 Conn. 95 (1850), 20 Am. Dec. 90, it was shown that the witness was able to express himself well in signs, but very poorly in writing. It was held, therefore, that it was correct and proper to take his testimony in the language of signs.

The courts have also held that in the absence of a showing as to what constituted the best method of taking a deaf mute's testimony, it will be presumed on appeal that the trial court adopted the best method [Cleveland P. & E. Railway Co. vs. Pritschau, 69 Ohio 43, 8 N.E. 663 (1886), 9 A.L.R. 480].

The court in the case of Bugg vs. Houlka, 122 Miss. 400, 84 So. 387 (1920), arrived at a general rule, that deaf mutes who are competent to testify may give evidence by
signs, through an interpreter or in writing, The court further determined that once testimony is given, such testimony is not considered hearsay.

More specifically, it has been held that a deaf mute who can read and write may testify through that medium, per the case of Ritchey vs. People, 23 Colo. 314, 47 Pac. 272 (1896), in which a deaf mute was examined by submitting to him written questions to which he replied in writing. The questions and answers were then read to the jury.

The New York case of People vs. McGee, 1 Denio (N.Y.) 19 (1874), however, stated it is not necessary that a deaf witness be able to read and write.

The general rule is that evidence of a deaf mute who can be communicated with by signs may be taken through an interpreter who understands such signs and can interpret them to the court [Snyder vs. Nations, 5 Blackf. (Ind.) 295 (1840); Skaggs vs. State, 108 Ind. 53, 8 N.E. 695 (1886); State vs. Burns (Iowa), 78 N.W. 681 (1899); State vs. Smith, 203 Mo. 695, 102 S.W. 526 (1907); Bugg vs. Houlka, 122 Miss. 400, 84 So. 387 (1920), 9 A.L.R. 480; People vs. McGee, 1 Denio (N.Y.) 19 (1874); State vs. Weldon, 39 S.C. 318, 24 L.R.A. 126, 17 S.E. 688 (1893)].

It has been held that it is permissible to take the testimony of a deaf mute through an interpreter by signs, although the witness may be proven capable of testifying via written responses [Dobbins vs. Little Rock R. & Elec.
This is at least where there is no showing that the interpretation by signs is not the better method [Dobbins vs. Little Rock R. & Elec. Co., 79 Ark. 85, 95 S.W. 794 (1906), 9 A.L.R. 484].

Bugg vs. Houlka, 122 Miss. 400, 84 So. 387 (1920), 9 A.L.R. 480, states the evidence of a deaf mute given through an interpreter is admissible if the interpreter understands the signs usually employed by the witness and can properly interpret the meaning. This was later modified somewhat in Hudson vs. Augustine's, Inc., 72 Ill. App. 2d 225, 218 N.E. 2d 510 (1966), 31a C.J.S. 224, which held that a statement made by a deaf mute in sign language to a person not an expert in sign language was inadmissible.

Rights in Criminal Cases

The use of interpreters in criminal cases has special importance in view of the constitutional principle that a person accused of a criminal offense has the right to be confronted by the persons who are to testify against him. The right of confrontation has always been construed to mean that the accused person has a right to hear the testimony of the witnesses against him. For example, when a defendant with normal hearing was required to sit so far from the witness box that he could not hear the testimony, it was held to be a violation of his constitutional rights [State vs. Weldon, 91 S.C. 29, 74 S.E. 43 (1893); State vs. Mannion, 19 Utah 505, 57 Pac. 542 (1899)].
In some jurisdictions the accused may be entitled to have the testimony interpreted to him or to have his own testimony interpreted, but, in general, the use of and the right to an interpreter is a matter of a trial court's discretion [23 C.J.S. 864, Criminal Law, Sec. 965].

The right of the accused to make a statement in his behalf is a personal privilege. However, there are instances in which the only means of making the statement would be through the voice of another, where the accused is aurally impaired [Smithwick vs. State, 199 Ga. 292, 34 S.E. 2d 28 (1945), 23 C.J.S. 1109, Criminal Law, Sec. 1026].

It has been held that a defendant who is deaf is entitled to have the testimony against him translated for his benefit as in the case of Terry vs. State, 21 Ala. App. 100, 105 So. 386 (1925). A deaf mute was found guilty of manslaughter in a trial where the request to appoint an interpreter was denied because the defendant was not able to furnish one. On appeal, the court held that the defendant's right under the state constitution providing that in criminal prosecutions the accused had a right to be heard by himself and counsel, to demand the nature and cause of the accusation and to be confronted by the witnesses and that he was not to be deprived of life, liberty or property except by due process of law, was violated in not providing the necessary means for communicating to the defendant the nature and cause of the accusation and also the testimony of the witnesses against him. The court continued, the
physical infirmity of the defendant could not lessen his constitutional right, and the state had to accord the means by which he should receive all the rights, benefits and privileges which the constitution provided.

Similarly, in the case of Ralph vs. State, 124 Ga. 81, 52 S.E. 298 (1905), the Supreme Court of Georgia said:

The constitutional right of one accused of an offense against the laws of this State to be confronted with the witnesses contemplates that they shall be examined in his presence and be subject to cross-examination by him. Where a defendant is deaf and cannot hear the evidence of the witnesses for the State, the presiding judge should permit some reasonable mode of having their evidence communicated to him.

The same rule was set forth in the case of Mothershead vs. King, 112 F. 2d 1104 (1940), wherein a deaf man brought a petition in the federal courts complaining that 10 years previously, at the time of his criminal trial, he had pleaded guilty to the charge against him without knowing the nature of the charge, due to the lack of an interpreter and the lack of an attorney to defend him. The man claimed he had never waived his right to an attorney and that, due to the lack of an interpreter, he was not able to understand what was being done to him.

The federal court held that if this was true he was entitled to relief by the courts, even though a long period had elapsed since the time of his trial.

A deaf person has a constitutional right to have an interpreter at his criminal trial, but this constitutional
right can be waived by the deaf person. It has been held that where a deaf person did not request such an interpreter at the time of his trial, he was deemed to have waived it and he could not later complain about the absence of such an interpreter. In the case of Felts vs. Murphy, 201 U.S. 123, 50 L. Ed. 689 (1906), the court said that although it was regrettable that the testimony was not read nor repeated to the defendant, such omission did not result in the defendant's having been deprived of liberty without due process of law in violation of the Fourteenth Amendment. [See also Field vs. State, 155 Tex. Crim. 137, 232 S.W. 2d 717 (1950).]

Although the deaf defendant must be afforded the opportunity to have testimony of witnesses communicated to him, the exact manner of communication depends upon the circumstances of the case and the discretion of the trial judge [Ralph vs. State, 124 Ga. 81, 52 S.E. 298 (1905)]. Further, the appeals court stated that the defendant, knowing of his infirmity, had to make provision for his own assistance and could not require the court to destroy an orderly proceeding. It was noted that the trial judge in this case had allowed time and opportunity for the accused's counsel to take down and exhibit the testimony to the accused, and no harm had been shown to have resulted from the method adopted.

In the case of People vs. Guillory, 178 Cal. App. 2d 854, 3 Cal. 415 (1960), 80 A.L.R. 2d 1077, where a
deafened defendant, in appealing conviction for bribery, alleged he was denied due process because he could not hear the proceedings of the trial. The court held that here the defendant was allowed to sit in the jury box in order to be able to hear all comments. The court also said that when the defendant appeared in court without live batteries in his hearing device, any handicap he might have suffered from his hearing loss was self-imposed and gave no ground for complaint.

In State vs. Gayton, 221 La. 1115, 61 So. 2d 890 (1952), the defendant claimed that his deafness rendered him incapable of understanding the nature of the proceedings against him and of assisting his counsel. The court held that there was no merit for his contention since at the arraignment the judge wrote the charge on a piece of paper, showed it to the defendant who could read, and the defendant pointed to the words "not guilty" in response to a request to plead. The court based its findings on the assumption that the defendant's hearing was sufficiently corrected with the use of a hearing aid and since it appeared that he and his counsel conversed in whispers without difficulty during the trial.

A deaf mute petitioner to the Court of Appeals of the State of Oklahoma was deemed not entitled to relief on the contention that failure of the sentencing court to afford him an interpreter resulted in denial of his Sixth Amendment right to effective assistance of counsel.
Communication between the petitioner and his counsel was allowed by submitting written questions to the accused who answered such questions in his own handwriting [Stevens vs. Page, 420 F. 2d 933 (1969)].

Thus far, only three states, Tennessee, Oklahoma and Illinois, have enacted statutes which provide an interpreter to be furnished at the cost of the court in any criminal action involving a deaf mute defendant. ¹³

Who Can Act as an Interpreter

It frequently happens that a deaf person involved in litigation will want to have a friend or relative act as interpreter. When such a person is about to act as interpreter in a case, the opposing party has been found to usually object, stating that the person is not a proper individual to act as interpreter because he is a friend of the deaf person and, therefore, may not be impartial. This issue was raised in the case of State vs. Burns (Iowa), 78 N.W. 681 (1899), and the Iowa Supreme Court said, "... There is not a thing to show unfairness or prejudice from the use of (this) interpreter. Mere friendship will not raise a presumption of prejudice."

Similarly, in the case of Morse vs. Phillips (Miss.), 128 So. 336 (1930), which involved a deaf man who had been shot by a constable without apparent reason, the deaf man had his daughter act as his interpreter. It was objected to by the other party, claiming it was improper for a daughter to act as interpreter for her father,
particularly in view of the fact that the daughter herself was also a witness in the case. The Mississippi Supreme Court said, in its lengthy ruling on the question:

The simple fact that an interpreter is a relative of a party to the proceeding, or of the one whose evidence he interprets, will not render such interpreter incompetent.... That an interpreter, otherwise unobjectionable, has testified or will testify in the same case, does not render him incompetent.... To reject her as an interpreter was to reject the most nearly perfect way or means of interpreting the testimony of the witness....

This general rule was later evident in the case of Burgess vs. State, 256 Ala. 5, 53 So. 2d 568 (1951), wherein the brother of a deaf mute witness was allowed to be the interpreter and such was held not to be in error upon appeal.

The matter is discussed in Corpus Juris Secundum as follows:

Furthermore, an interpreter has been held not to be disqualified or rendered incompetent merely because he is interested in the outcome of the particular suit of prosecution*, or because he is related to a party or witness in the proceeding*, or has had friendly relations with the parties*, or because he has been subpoenaed as a witness*, has listened to the testimony of other witnesses in the case*, or has, himself, testified or will testify*, or because, in a criminal case, he is a member of the police force.14

Where the court has approved the use of an interpreter who is an interested party, and the opposing side fears the interpreter may falsely interpret the testimony, the proper procedure is for the opposite party to secure
their own interpreter who will be able to tell them if any mistakes are made in the translations.

Additional Criminal Matters

Criminal Responsibility

Generally speaking, physical handicaps such as deafness or blindness do not, per se, affect the legal capacity to commit a crime [40 Am. Jur. 2d 315, Criminal Responsibility, Sec. 23]. It has been held that the fact the defendant was a deaf mute is simply a circumstance to be considered by the jury in connection with other evidence in determining whether he was mentally capable of committing the crime [Belcher vs. Commonwealth, 165 Ky. 649, 117 S.W. 455 (1915), 21 Am. Jur. 2d 111, Criminal Law, Sec. 26].

Capacity to Stand Trial

In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel in his defense [State vs. Buchanan, 94 Ariz. 100, 381 Pac. 2d 954 (1963); People vs. Merkouris, 52 Cal. 2d 672, 344 Pac. 1, cert. den. 361 U.S. 943, 4 L. Ed. 2d 364, 80 Sup. Ct. 411 (1960); People vs. Bender, 20 I11. 2d 45, 169 N.E. 2d 328 (1960); People vs. Burson, 11 I11. 2d 360, 143 N.E. 2d 239 (1957); 21 Am. Jur. 2d 144, Criminal Law, Sec. 63].

This has its roots in an 1868 case wherein the court held that the ordinary presumption of criminal
responsibility is reversed in the case of a deaf mute; it is incumbent on the prosecution to prove the accused had the capacity and reasoning sufficient to enable him to distinguish between right and wrong as to the act at the time it was committed [State vs. Draper, 1 Del. (Houst.) 291 (1868)].

**Failure to Reply**

Failure of a defendant to reply to a statement of fact cannot be deemed an admission unless the statement was made in his hearing presence. Such a statement, or lack of it, is not admissible where the party was unable to hear it as where he was deaf [Tufts vs. Charlestown, 70 Mass. (4 Gray) 537 (1855)]. The mere fact that the party was within hearing distance of the speaker is not sufficient unless the situation was such that the individual must necessarily have heard it made [Ruth vs. Rhodes, 66 Ariz. 129, 185 Pac. 2d 304 (1947); Jackson vs. Builders' Woodworking Co., 91 Hun. 435, 36 N.Y.S. 227 (1895); Josephi vs. Furnish, 27 Ore. 260, 41 Pac. 424 (1915), 31a C.J.S. 1035, Evidence, Sec. 295b].

**Leading Questions**

The rule against asking one's own witness leading questions is not absolute. When the witness is a deaf mute, the allowance of such questions on direct examination is within the discretion of the trial judge [State vs. Burns, 78 N.W. 681 (1899)]. In the case of Alabama & Vicksburg Ry. Co. vs. Kelly, 126 Miss. 276, 88 So. 707 (1921)
regarding the use of leading questions, the court stated,
"...we think the record shows that (leading questions were)
necessary in order that their minds might be directed to
the question."

Because the deaf often have a habit of saying "yes"
to questions they do not fully understand, the use of lead­
ing questions has been objected to in nearly every instance.
Deaf persons should be encouraged to testify in their own
words, not merely say "yes" or "no" to leading questions,
in order to avoid possible errors due to limited language
abilities on their part.

Jury Instructions

When preparing jury instructions that apply to the
particular facts of the case, a question often arises as to
whether or not the court should instruct the jury in a case
involving a deaf person that they must not sympathize with
the deaf person solely because he is deaf. This question
was passed upon by the Michigan Supreme Court in the case
of Jakubiec vs. Hasty, 337 Mich. 205, 59 N.W. 2d 385
(1953). In this case the plaintiff was a deaf woman who
was struck by a taxicab. The attorneys for the taxicab
company appealed on the basis the trial judge refused to
give these instructions to the jury. The appellate court
held the failure to give such instructions was not a re­
versible error and upheld the judgment for the deaf woman.

Hearing-impaired Prosecutor

A solicitor who was hard of hearing was permitted
to stand near the witness box so long as there was no threatening nor intimidating contact with them on his part [Powell et al vs. State, 33 Ala. App. 323, 33 So. 2d 399 (1948), 23a C.J.S. 122, Criminal Law, Sec. 1087].

**Hearing-impaired Juror**

A new trial will not be granted because of the deafness of a juror where the accused failed to examine him for such when he was empaneled [U.S. vs. Baker (N.Y.) D.C.N.Y., 24 F. Cas., para. 14,499, 3 Ben. 68; Higgins vs. Commonwealth, 287 Ky. 767, 155 S.W. 2d 209 (1941); Drake vs. State, 5 Tex. App. 649].

The same is true where the juror admitted a slight deafness but was very definite that he heard all the testimony per Parish vs. State, 77 Okla. Cr. 436, 142 Pac. 2d 642 (1943); 24 C.J.S. 99, Criminal Law, Sec. 1446(4).

Where the jury's verdict has been questioned because of the admitted deafness of a juror, an appellate court has ordinarily not disturbed the verdict and the juror has not been declared incompetent [Commonwealth vs. Gronito, 326 Mass. 494, 95 N.E. 2d 539 (1950), 24a C.J.S. 999, Criminal Law, Sec. 1884 (2)].
Chapter 3

THE DEAF AND HEARING-IMPAIRED IN CIVIL MATTERS

Competency, In General

A common question used by psychiatrists to judge insanity is the question "Do you hear voices or noises in your head?" A person using this question may be unaware of the common medical condition among deaf persons termed tinnitus. Tinnitus results in deaf persons having head noises similar to that of ringing bells, whistles, buzzing or other types of noises. A deaf person suffering from tinnitus will probably answer such a question in the affirmative, and the psychiatrist may conclude that the deaf person has hallucinations, a serious sign of mental illness.

The deaf are much in need of proper protection against mistaken commitments to mental institutions, and at present there is very little adequate protection.

If the only unusual conduct observed is that a person appears to be deaf and does not speak, this does not in any way indicate the person is mentally incompetent or ill [Challiner vs. Smith, 397 Ill. 106, 71 N.E. 2d 324 (1947)].

Incompetency and Guardianships

The physical condition of a person alleged to be incompetent may be considered only insofar as it affects
his mental condition [Fiala vs. Tomek, 164 Nebr. 20, 81
N.W. 2d 691 (1957); 41 Am. Jur. 2d 679, Incompetent Persons,
Sec. 145]. Thus the element of physical disability is in-
sufficient evidence of mental infirmity to justify appoint-
ment of a guardian unless the disabilities may be directly
concluded as being responsible for the person's inability
to manage his property or person [39 Am. Jur. 2d 23,
Guardian and Ward, Sec. 21].

The test established in the case of In re Coburn,
165 Cal. 202, 131 Pac. 352 (1913), dealt with whether or
not the person in question is able, unassisted, to properly
manage to take care of himself and his property, and by
reason thereof would be likely to be deceived or imposed
upon by artful or designing persons. The court upheld the
constitutionality of this definition of incompetency,
stating that in the final analysis, a person's mental dis-
ability must be based upon his conduct, actions and state-
ments in connection with surrounding circumstances and
conditions.

In the case of In re Guardianship of Eleanor Frank,
137 N.W. 2d 219 (1965), 9 A.L.R. 3d 764, the question of
the woman's incompetency was based partly on the fact that
her IQ was tested and shown to be 67, which is just below
borderline mental retardation and is within the range of
educable mentally retarded. In her physical examination
it was found she was suffering from some physical infirmi-
ties incident to her advanced years, such as deafness, but
there was nothing to show that the clearness of her mind had been impaired to any substantial degree by any of these infirmities. The issue was brought because the woman, an elderly widow, had sold some of her property to a favorite son for a price below that offered by one of her daughters. Because the woman had deliberately refused the larger amount of money, the daughter attempted to prove her mother incompetent to handle her affairs. The court relied on the established definition of competency, stating that incompetency is not shown by the refusal of an offer of more money if the seller's preference is to deal with another individual, regardless of the price.

It was specifically held by the New York courts in the case of Brower vs. Fisher, 4 Johns Ch. 441 (1805), that the fact a person is a deaf mute is insufficient grounds in itself for the appointment of a guardian.

**Capacity to Make Contracts**

Under ancient common law a deaf mute was considered incapable of making a valid contract, on the theory that such a person would be unable to comprehend the true nature of the contract and could be easily deceived into entering into contracts harmful to him.

The courts have since adopted the opposite theory, and now hold that contracts entered into by such persons are valid, as in the case of Alexier vs. Matzke, 151 Mich. 36, 115 N.W. 251 (1908). Here, a man 27 years old, who had been deaf since the age of three, entered into a written
contract in which he agreed to do manual labor in exchange for room, board and other services, but without monetary remuneration. After working many years, the deaf man brought suit against his employer for the value of the work he had done, claiming he had not really understood the terms of the contract. The jury found in his favor, and the employer appealed to the Michigan Supreme Court on the ground the contract was binding upon the deaf man. The appellate court held the man had ordinary intelligence and the terms of the contract had been made reasonably clear to him before he signed it. He was, therefore, bound by the contract and was not allowed to recover from the employer.

Such persons may also make a valid conveyance of property where the nature of the transaction and the instrument signed are understood by the individual, per Brown vs. Brown, 3 Conn. 299 (1820).

In the case of Selanak vs. Selanak, 150 Ill. App. 399 (1909), a deaf man worked for many years for a close relative without pay except for his room and board. After a number of years, he sued for the value of the work he had done. The court explained that where a person does work for a member of the family, there is a presumption that the work was done free of charge, as a gift.

But in this case, the deaf man had not been treated as a member of the family, having been made to sleep in the barn among other ill-treatment accorded him. The Illinois
Appellate Court, therefore, held that the usual rule did not apply and the man was entitled to recover the value of the work he had done.

The fact a deaf person cannot hear nor speak does not in itself prevent him from entering into a legally binding contract. In the case of Russell vs. Rutledge, 158 Ill. App. 259 (1910), the court held that a valid contract could be made through the action of a deaf individual merely nodding his head in consent.

The case of Fewkes vs. Borah, 376 Ill. 596, 35 N.E. 2d 69 (1941), dealt with a man of 75 years who had been deaf all his life and had lived alone. Two men came to his house and induced him to sign an oil lease on certain real estate that he owned. In court, he testified he could read the lease but not the small print, that he did not understand what he was signing and that he signed only because he was afraid of the men.

The Illinois Supreme Court ruled in favor of the deaf man, stating, "There is, however, sufficient evidence of plaintiff's infirmity to require that those dealing with him use utmost good faith." This case established the principle still in use today requiring persons engaged in business with the deaf to use "utmost good faith."

In the case of Collins vs. Trotter, 81 Mo. 275 (1889), the Supreme Court of Missouri set a different precedent in an effort to protect deaf persons from the consequences of contracts entered into by them. In this case
two deaf persons had signed a promissory note, and when sued on the note, contended they were incompetent to defend themselves in court due to their disabilities. A petition was filed to have a guardian appointed for them to defend them in the litigation. The court stated the burden of showing the defendants' competency was on the plaintiffs, and, since the plaintiffs had failed to prove this at the trial, the note was held to be invalid.

These cases show there are three different viewpoints applied by courts to the issue of contracts made by deaf persons:

1. That deaf persons are fully competent and will be held to the contracts in the same manner as those possessing normal hearing.

2. That those dealing with a deaf person must use good faith.

3. That those suing a deaf person have the burden of proving the deaf person was competent to enter into a contract.

The first viewpoint is the one followed most frequently. It would appear that contracts cannot be voided merely because the person is deaf.

It is generally not a defense for a deaf person to say that he looked over a contract but did not actually read it. If the contract was put before him and he knew how to read, it is his responsibility to read it before signing.
Moreover, it is generally not a defense for a deaf person to say he read a document and does not understand it. As in the case of normal-hearing persons, it is assumed that when a person reads a document and does not understand it, it is his responsibility to obtain legal advice before signing.

Most persons who are deaf from early childhood are educated at special state schools for the deaf, wherein they spend most of their time in a carefully protected environment where fair and proper treatment is the rule. Upon completion of their education, and upon their entrance into the outside business world, such persons are apt to assume the same kind of considerate treatment will still prevail. It is important, therefore, that their education include some special counseling, advising them never to sign an important document without observing utmost caution in so doing.

It is extremely doubtful that, at the present time, a court would impute incompetency to a deaf mute in view of the remarkable achievements recorded by persons thus afflicted and the vast strides in technology in perfecting aids for lessening the disabilities incidental to deafness as well as to muteness [41 Am. Jur. 2d 612, Incompetent Persons: Contracts and conveyances, Sec. 73]. It has been stated, however, that a mental disability coupled with both physical disability, such as deafness, and advanced age can constitute sufficient proof of lack of
capacity to make a contract per Kvale vs. Keane, 39 N.D. 560, 168 N.W. 74 (1918), 9 A.L.R. 972.

Capacity to Marry

The court in Johnson vs. Johnson (N.D.) 104 N.W. 2d 8 (1916), 82 A.L.R. 2d 1029, adopted the rule that the best accepted test as to whether there is mental capacity sufficient to contract a valid marriage in the case of deaf persons, is whether or not there is a capacity to understand the nature of the contract and the duties and responsibilities which it creates.

In the case of In re Smith, 27 Ohio 533 (1927), the marriage was considered valid so long as both parties had the understanding and mental capacity to realize what was being done and consenting thereto.

This standard has its roots in an early English case [Harrod vs. Harrod, 1 Kay and J. 4, 69 Eng. Reprint 344 (1854), 52 Am. Jur. 2d 879, Marriage, Sec. 18], wherein the woman who was alleged mentally incompetent to contract marriage had been deaf and mute from childhood. The court commented, "This person was deaf and dumb and that her mind was, in that sense, dull, even perhaps more so than the minds of persons who are afflicted by these calamities generally are, it seems not to have been in any degree unsound. It is clearly the law that the presumption is always in favor of sanity, and there is no exception to this rule in the case of a deaf and dumb person. But the onus of proving the unsoundness of the mind of such a
person must rest on those who dispute her sanity. There is nothing in our experience which would lead us to conclude that the deaf and dumb are generally of unsound mind."

It has since been said that the mental strength required for the transaction of business is not necessary to enable the party to contract a marriage, although he must be capable of understanding the nature of the contract [Flynn vs. Troesch, 373 Ill. 275, 26 N.E. 2d 91 (1940)]. The court further stated that if a person has sufficient mental capacity to enter into general contracts, it seems he has sufficient mental capacity to enter into a contract to marry. It was thus declared by the court that it need not determine the issue of whether less mental capacity is required to enable a person to enter into a contract of marriage than is required to contract generally.

The ruling of the court in Forbis vs. Forbis (Mo. App.), 274 S.W. 2d 800 (1955), established that no greater mental capacity is required to make binding a matrimonial contract than other business contracts.

Wills

Capacity to Make

The general principle regarding the capacity of deaf persons to make wills is that they make a valid will [Potts vs. House, 6 Ga. 324 (1849), 50 Am. Dec. 329].

This is generally based on the fact so much has been accomplished in the education of the blind, deaf and mute, and such important positions in science, industry,
commerce and statesmanship are filled by men and women who are deficient or entirely devoid of the sense of sight, hearing or speech that a court would cast reproach upon itself to hold that they are incapable of making wills merely because of the deficiency [57 Am. Jur. 86, Wills, Sec. 72].

There are, however, at least three cases on record in which wills made by deaf persons were declared invalid because of the physical handicap of the deaf person. In the case of Payton vs. Shipley, 80 Okla. 145, 195 Pac. 125 (1921), the deaf person had never attended school and had only very crude methods of indicating his ideas. It had been held in an earlier case that this particular man was incapable of making a deed. The Oklahoma Supreme Court held that under the circumstances he lacked capacity to make a will and, therefore, the document he had executed was declared invalid.

In a similar case, Rollwagen vs. Rollwagen, 63 N.Y. 504, the New York Supreme Court held invalid a will made by an illiterate, partly paralyzed man whose speech was so defective that only one person claimed to be able to understand him, and where the circumstances surrounding the execution of the will were suspicious.

In the case of In re Ferris' Will, 115 N.J. Eq. 115, 169 Atl. 697, aff. 117 N.J. Eq. 20, 174 Atl. 708 (1934), a lawyer wrote a will for an elderly deaf woman and asked her in written questions if she agreed to the will and if she wished the witnesses to attest it. She nodded
her head affirmatively, and the witnesses then signed the will. However, the written questions had been shown only to the woman and not to the witnesses. The New Jersey courts held the will was invalid because the witnesses did not fully understand what the woman was agreeing to. The court held that the written questions should have been shown to the witnesses.

In general, courts rule that deaf persons are usually capable of making valid wills. The courts may require more proof than usual to show that the deaf individual understood what he was doing and that he executed the will of his own free choice [Lane vs. Lane, 95 N.Y. 494].

Capacity to Witness

It was held in the case of Succession of Beattie, 163 La. 831, 112 So. 802 (1927), that a deaf person is not a competent witness to the signing of a will of another person. The reason in this case was that the law required the person making the will acknowledge to the witnesses that he intended the document to be his will, and the deaf person is unable to hear this statement.

In view of all other principles of law which have been established regarding the capacity of deaf persons, it would reasonably follow that a deaf person would be a competent witness to a will if the acknowledgment by the person making the will were communicated to the deaf witness in writing or in some other manner.

The State of Louisiana is the only state having a
statute specifically stating that deaf persons are incompetent witnesses to wills.\textsuperscript{16}

**Injuries by Automobiles and Highway Traffic to Deaf Persons**

A considerable number of cases involving deaf pedestrians who were struck by automobiles or other vehicles have been litigated in various state supreme courts. These generally involve deaf persons who failed to hear an automobile horn and were struck from behind.

The case of Crawley vs. Jermain, 218 Ill. App. 51 (1920), involved a woman who could not hear and who also had a severe visual problem. While walking along a sidewalk, she crossed the defendant's driveway. The defendant had been backing his car out of the driveway and had honked his horn to warn pedestrians. The woman did not hear the horn and was struck and injured. The driver contended he was not responsible for her injuries because he had blown his horn, and he had no way of knowing that the woman was deaf. The court held that the woman had a perfect right to assume the sidewalk was safe for her to walk upon and that it was as safe for a deaf and nearsighted person as it was for those whose faculties of sight and hearing were normal, and, additionally, it was incumbent upon the driver to proceed across the sidewalk cautiously so as to avoid running over pedestrians rightfully proceeding upon it.

In the case of Furtado vs. Bird [26 Cal. App. 152, 146 Pac. 58 (1915)], a deaf man was riding a horse along a road. A man driving his car down the road honked his horn
when he was a short distance away from the deaf man, who did not hear the horn. The horse and deaf rider were struck by the automobile, and the driver claimed that the deaf man was partly responsible because he failed to look in both directions.

The California Appellate Court said:

(The driver) contends that (the deaf man) was guilty of contributing to his injury because, being hard of hearing, it was his duty to look back as well as forward, and that, if he had been doing so, this accident would not have occurred. We do not think it was (the deaf man's) duty to be constantly looking back. Both parties had an equal right to the use of the road, but (the driver) was in a better position to avoid a collision, and, when he observed that (the deaf man) appeared not to hear the horn, it was (the driver's) duty to slow down, and even to stop his car if necessary to avoid running against (the deaf man's) horse.

In a number of cases in which verdicts in favor of deaf pedestrians were issued, the courts pointed out a deaf pedestrian is called upon to use those unimpaired senses with a higher degree of alertness than would be the case if his senses were all normal [Foster vs. Cumberland County Power & Light Co., 116 Maine 184, 100 Atl. 833 (1917), L.R.A. 1917e 1044].

In the case of Wilson vs. Freeman, 271 Mass. 438, 171 N.E. 469 (1930), the court held in favor of a deaf pedestrian who was struck from behind by a truck. In discussing the degree of care required by the deaf man, the court stated:

The deafness of the plaintiff did not
deprive him of the rights of a traveler. That infirmity required increased and commensurate circumspection on his part in order to attain the standard of conduct established by the law for everybody.

Similarly, in the case of Robb vs. Quaker City Cab Co., 283 Pa. 454, 129 Atl. 331 (1925), the court, in holding in favor of a deaf man hit by a cab while crossing the street, said:

Plaintiff was a deaf mute requiring more care on his part but did not of itself convict him of negligence in attempting to cross the street. A citizen's right upon the public highway does not depend upon his ability to hear, so long as he makes proper use of his sight.

A number of cases adjudicated in state supreme courts have also been decided against deaf pedestrians.

In the case of Kerr vs. Connecticut, 107 Conn. 304, 140 Atl. 751 (1928), a 58-year-old hard-of-hearing male was walking down a street that had no sidewalks. He walked close to trolley tracks in the street and was struck by a trolley car from behind. The Connecticut Supreme Court held that he could not recover because he had not exercised proper care for his own safety. He knew he was deaf and would not be able to hear a trolley bell, and, therefore, he should not have walked near the tracks.

Similarly, in the case of Hizam vs. Blackman, 103 Conn. 547, 131 Atl. 415 (1926), a deaf man crossing the street at night was struck by an automobile which he had neither seen nor heard. The court held that he could easily have seen the car if he had looked, and since he
had failed to do so, he could not recover damages.

Where a deaf pedestrian is struck by an emergency vehicle such as an ambulance, police car or fire truck, it is generally held to be a question for the jury as to whether the deaf person was exercising proper care for his own safety in view of his handicap [McCullough vs. Lalumiere, 156 Maine 479, 166 Atl. 2d 702 (1960) (police car); Goodrich vs. Cleveland, 15 Ohio App. 15 (1875), Fink vs. New York, 206 Misc. 79, 132 N.Y.S. 2d 172 (1954), (fire truck)].

The general principles are well summarized in The Handbook on the Law on Torts, which states:

The man who is... deaf... is entitled to live in the world, and cannot be required to do the impossible by conforming to any physical standards.... At the same time, his conduct must be reasonable in the light of his knowledge of his infirmity.17

Driving Privileges

Deaf persons frequently use their automobiles even more than persons of normal hearing since a deaf person may not be able to use a telephone, causing him to do much of his business in person.

Deaf drivers have been found to have better driving records than hearing motorists. The driving records of 100 Colorado deaf drivers were compared with two groups each of 100 average-hearing drivers of that state, and it was found there were 54 per cent fewer moving violations in the deaf population than in Group A of the hearing drivers and 113 per cent fewer violations than in Group B.18
In Kentucky, motor vehicle administrators indicated that during a five-year period, no deaf drivers had been called for a hearing preliminary to revocation of a driver's license. 19

A survey of hearing-impaired drivers in Wisconsin found they had a comparatively low rate of accident involvement and that no deaf person in the seven years prior to the survey had been involved in a fatal traffic accident. 20

A survey undertaken by the National Association of the Deaf disclosed that, compared to overall accident rates, drivers who were not deaf had more than four times as many accidents per year as deaf drivers. 21

An article in Redbook indicated that studies of 1/2 million drivers revealed that the deaf driver is likely to be the safest and most careful driver. 22

It has been specifically held that licensed drivers with impaired hearing have a right to drive, per Dillenschneider vs. Campbell (Mo.), 350 S.W. 2d 260 (1961), 60a C.J.S. 115, Motor Vehicles, Sec. 692. This case also established that the motorist was not guilty of negligence as a matter of law simply because he was a deaf mute, nor was his passenger guilty of contributory negligence simply because she rode as a passenger in an automobile driven by a deaf mute.

The operator of a motor vehicle cannot claim exemption from the consequence of an accident caused by his
unskillfulness in handling his vehicle upon the ground that his physical deficiencies handicapped him [Roberts vs. Ring, 143 Minn. 151, 173 N.W. 437 (1919), 8 Am. Jur. 2d 243, Automobiles, Sec. 692; Atkinson vs. Cardinal State Lines Co., 148 Kan. 244, 80 Pac. 2d 1073 (1938)].

In the Atkinson vs. Cardinal State Lines Co. case, the question of contributory negligence was again considered. It appeared that a bus driver who attempted to overtake an auto driven by the plaintiff, a deaf mute, attempted to apply his air brakes when he saw two cars approaching his bus from the opposite direction. When the brakes failed to respond, he sounded his horn repeatedly, but the plaintiff made no response to the sound of the horn. The plaintiff's car was hit twice by the bus, causing the plaintiff to lose control of his car and resulting in injury to the deaf man. Upon appeal, the court affirmed the judgment for the plaintiff. The court made a point, however, of stating that the question of whether the plaintiff's failure to hear the horn was the cause of the accident was an issue to be determined by a jury and that this decision for the plaintiff did not necessarily set a precedent in favor of deaf drivers.

If a driver's hearing is impaired, he is nevertheless required to hear, at his peril, that which a normal driver would hear, per Bull vs. Drew, 286 App. Div. 1138, 146 N.Y.S. 2d 85, reh. denied 1 App. Div. 2d 793, 149 N.Y.S. 2d 235 (1956).
If the driver is deaf, there is an increased duty upon him to keep a sharp lookout as in approaching railroad crossings upon which he knows trains often pass [Penn vs. Pearce, 121 Fla. 3, 163 So. 288 (1935)].

Contributory negligence of a partially deaf person was held to exist in Dardenne vs. Texas & Pacific Ry. Co., 13 La. App. 262, 127 So. 458 (1930), wherein the plaintiff's partial deafness caused him not to hear the whistle and sound of the bell of an approaching railroad train, and the court held that he clearly contributed to the accident by his carelessness in not exercising more care in crossing the railroad tracks. The court said that the fact he suffered with this infirmity demanded the exercise of care of commensurate degree.

Many states have a question on the driver's license application form similar to "Do you have any physical handicap which would affect your ability to drive safely?" Deaf persons sometimes read this question as if it said "Do you have any physical handicap?," omitting the qualifying phrase "...which would affect your ability to drive safely." If the question is misread in this manner, the deaf person may answer "yes," and be automatically disqualified from obtaining a driver's license.

The State of Florida enacted a law in 1971 which allows deaf persons the right to have an interpreter with them at the time of application for a driver's license.23
Applications for Insurance

When an application for an insurance policy is being filled out, the insurance agent generally asks questions of the person to be insured and then writes the answers on the application form. After completing the forms, the client is asked to sign the application. If the client involved is deaf, the agent may misunderstand the answers to his questions and thus write down something incorrect; similarly, the deaf person may misinterpret the agent's questions and give an incorrect response.

In the case of Colanieri vs. General Accident Assurance Corp., Ltd., 126 App. Div. 591, 110 N.Y.S. 678 (1888), the New York Supreme Court ruled in favor of the insurance company. In this case, a deaf man who could not read, filled out the application form with the help of the insurance agent. The papers contained the statement "the applicant has never received any injury or suffered from any disease or sickness of any kind." Actually, the insured had suffered from ear trouble prior to that time. After the policy was issued, he again suffered from the ear pathology and filed a claim on his health insurance policy which the company refused to pay due to the false statement on his application.

The case of Inter-Ocean Casualty Co. vs. Ervin, 229 Ala. 352, 156 So. 844 (1934), involved a deaf woman who took out an insurance policy naming her brother, who was also deaf, as beneficiary. Soon after, she had an accident
and died. The insurance company refused to pay on the policy because the application form contained the statement, "Neither my hearing nor vision is impaired." At the trial it was proven that neither of the deaf persons was able to read, and they did not know the agent had allowed this statement to remain in the application form. The Alabama Supreme Court held the beneficiary was entitled to recover on the policy in spite of the incorrect statement in the application. This falls back to the principle regarding contracts wherein those dealing with deaf persons are required to use utmost good faith.

In the case of Follete vs. Mutual Accident Insurance Co., 110 N.C. 377, 14 S.E. 923 (1892), a deaf man bought an accident policy in which the insurance agent failed to put the fact of deafness down on the application form. When the man was later injured, the company refused to pay. The North Carolina Supreme Court refused to allow the insurance company to escape liability in this manner and included in its ruling a strongly worded opinion regarding the questionable business practices of the company.

The conclusion that can be drawn from these cases is that a deaf person should be careful to see that the insurance application clearly states that he is deaf, and that no incorrect statements appear in the application which may have been caused by any misunderstanding. Where a false statement is discovered, the insurance company should be immediately informed of the error so that it
cannot later be used as a defense for not paying a claim on the policy.

Where a false statement has been made in an insurance application, the courts frequently hold that the insurance company cannot avoid making payment that is due on the policy unless they can show that the false statement materially affected the risk that was assumed by the company. In other words, the court may hold that the misstatement must be proven to be material and significant in character.

**Libel and Slander**

Libel and slander are the main branches of the law of defamation of character. They consist of false, malicious statements about a person which tend to injure that person in his reputation or his business and which must be overheard and understood by a third party to be considered defamation [50 Am. Jur. 2d, Libel and Slander, Sec. 1].

It has been argued that a defamatory statement made in the language of signs should be classified as a libel rather than a slander. Since it has been held that a motion picture may be considered to create a libel [Brown vs. Paramount Picture Corp., 270 N.Y.S. 544, 240 App. Div. 520 (1934)], it is argued that the use of signs, which consist of actions or pictures, should likewise be classified as libel. This line of argument follows the theory that a libel is something visual that can be seen by the human eye [50 Am. Jur. 2d, Libel and Slander, Sec. 4]. Therefore, since the language of signs is visual in nature, it should
be considered a libel. The general principles on this subject are still in a state of flux.  

Child Custody and Adoption

It has been held that deafness may prevent a woman from obtaining the custody of her children, and that they may be better off in a public institution than living with their mother. This unusual decision was reached in the case of Howard vs. Ragsdale (Ky.), 249 S.W. 2d 154 (1952). In this case, a husband and wife had three children, all under the age of 10. When the parents separated, the children were placed in a public institution. The deaf mother later brought a legal proceeding to secure their release from the institution and to obtain custody. The court stated the children had lived in the institution for five years, that they were doing well there and that the mother was a deaf mute who lived with other deaf mutes. The court held it would not return these children to their mother because they would be placed in a completely different and strange environment and would have great difficulty in living and communicating with deaf mutes. The children were, therefore, left in the public institution.

It would seem that a great deal of effort must be made to educate the courts as to the capabilities of deaf parents. This can be done through the testimony of expert witnesses who are familiar with the education and upbringing of children by deaf parents. Experts on this subject can be located through such organizations for the deaf as
Gallaudet College in Washington, D.C. (the only institution of higher learning in the world exclusively for the deaf), the American Hearing Society, the National Association of the Deaf, the Association of American Instructors of the Deaf, the Council of Organizations Serving the Deaf and the U.S. Department of Health, Education and Welfare.

A long and bitter battle by a deaf couple for the adoption of a newborn infant began in 1966 in the California case of In re Adoption of Scott James Richardson, 251 Cal. App. 221 (1966).

The deaf couple, Wayne and Madeline Christensen, had been married 17 years, and the husband had been employed at the same job for 11 years; they had ample insurance, a large equity in a new three-bedroom home, two automobiles and a savings account. The husband had been a licensed driver for 28 years, and both were active members and officers of their church. In due course, a baby from an unwed mother was placed in the Christensen home; the Adoption Bureau investigated and approved the home and the parents. The medical report on the child was in order. Without warning, the judge in the Los Angeles County Superior Court questioned whether the court was doing right by giving a healthy, normal child to handicapped people, and therefore would not allow the adoption proceedings to continue.

A continuance was obtained to a new court date at which time 17 expert witnesses testified in favor of the
adoption, all to no avail. Hundreds of affidavits, letters and newspaper articles favored the adoption. The only opposition came from the judge, who subsequently was discovered to have written, five months prior to the court hearing, "I believe...this adoption should be nipped in the bud....In my opinion, we are not doing right in...approving an adoption to 'deaf-mutes' (sic)." 25

The Christensens appealed and eventually won a new adoption hearing, the appellate court saying the judge (1) was biased and prejudiced because of the deafness of the parents, (2) grossly abused his discretion, (3) acted beyond the jurisdiction of a statute, and (4) violated the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment to the U.S. Constitution. The new judge approved the adoption of the infant, after 18 months of litigation.

A sidelight in this case is that the infant has since been diagnosed as having a severe hearing loss in one ear and some impairment in the other ear. This condition had existed since birth, but only recently was discovered. 26
Chapter 4

SUMMARY

It has been shown through extensive research that there is a serious deficiency in the amount of available data concerning the many difficulties encountered by the deaf and hearing-impaired. Such data, if made available, could be utilized by attorneys in preparation of cases for clients so afflicted. The deaf population of our country has also displayed an apparent need for information of this kind, containing advice and counseling for them in how to cope with everyday problems. Moreover, no significant publications exist which expose the many inequities perpetrated upon the deaf population of this country. The ignorance of the public is certainly one of the reasons for these apparent injustices.

The purpose of this study was to accumulate information, which could be transposed into any of the above three informational formats. The research which achieved this objective was accomplished through the utilization of three legal digests, Shepard's Citations, Corpus Juris Secundum and American Jurisprudence. The attempt was made to review every legal case in the United States' judicial history which has affected or involved deaf or hearing-impaired individuals.
The researched cases were divided into two main categories, courtroom matters and civil matters, with several subheadings such as competency as a witness, methods of testifying, incompetency and guardianships and capacity to make contracts.

Although only three states have enacted statutes guaranteeing the furnishing of an interpreter at the cost of the court in criminal action involving a deaf litigant, it would appear that a deaf person in any state requesting this service would be accorded the same right. This supposition is based upon two areas of established law.

First, where a person who speaks a foreign language to the exclusion of a clear understanding of English, appears in a court action, an interpreter of that foreign language is provided by the court.

Additionally, there is a steady trend toward broadening the rights of indigent persons appearing before the bench. It has been determined that indigents, in the constitutional guarantee of due process, may be represented by legal counsel, provided a complete copy of the transcript of trial proceedings for appeal purposes and even offered investigative services, again for appeal purposes, all at no cost to such individuals. It logically follows that indigent deaf persons have the same rights to due process including, in their case, interpreters in judicial proceedings.

The outrageous mistreatment of hearing-handicapped
persons described herein in Chapter 1 serves as proof that such persons are commonly discriminated against in the everyday world. If such individuals attempt to seek legal recourse for these abuses, their hands are, in effect, tied at the door to the courthouse as evidenced by the information found in Chapter 2 regarding courtroom matters. The civil matters detailed in Chapter 3 offer further support of the charges claiming unfair practices in matters involving deaf persons.

Upon final review of the cases cited herein, it is concluded that because of the severe communication problems of the deaf and hearing-impaired, these persons have suffered unfairly in spite of the courts generally declaring them as competent individuals. It is important that these hardships be exposed to the general public in an effort to lessen their occurrence, that the deaf themselves be better educated in how to handle many of the dilemmas they may encounter and that the legal proceedings involving these persons be more equitably regulated.
Appendix A
LIST OF CASES CITED

Alabama vs. Vicksburg Ry. Co.
Atkinson vs. Cardinal State Lines Co.
Beattie, In re succession of
Belcher vs. Commonwealth
Brower vs. Fisher
Brown vs. Brown
Brown vs. Paramount Picture Corp.
Bruce vs. State
Bugg vs. Houka
Bull vs. Drew
Burgess vs. State
Challiner vs. Smith
Cleveland P. & E. Ry. Co. vs. Pritschau
Coburn, In re
Colaneri vs. General Accident Assurance Corp., Ltd.
Collins vs. Trotter
Commonwealth vs. Gronito
Crawley vs. Jermain
Dardenne vs. Texas & Pacific Ry. Co.
Dillenschneider vs. Campbell
Drake vs. State
Felts vs. Murphy
Ferris' Will, In re
Fewkes vs. Borah
Fiala vs. Tomek
Field vs. State
Fink vs. New York
Flynn vs. Troesch
Forbis vs. Forbis
Follette vs. Mutual Accident Insurance Co.
Foster vs. Cumberland County Power & Light Co.
Frank, In re Guardianship of Eleanor
Furtado vs. Bird
Goodrich vs. Cleveland
Harrod vs. Harrod
Higginvs. Commonwealth
Hizam vs. Blackman
Howard vs. Ragsdale
Hudson vs. Augustine's, Inc.
Inter-Ocean Casualty Co. vs. Ervin
Jackson vs. Builders' Woodworking Co.
Jakubiec vs. Hasty
Johnson vs. Johnson
Josephi vs. Furnish
Kerr vs. Connecticut
Kirby vs. State of Oklahoma
Kvale vs. Keane
Lane vs. Lane
Lord Hale, Pleas of the Crown
McCullough vs. Lalumiere
Morrison vs. Lennard
Morse vs. Phillips
Mothershead vs. King
Parish vs. State
Payton vs. Shipley
Penn vs. Pearce
People vs. Bender
People vs. Burson
People vs. Guillory
People vs. McGee
People vs. Merkouris
People vs. Weston
Potts vs. House
Powell et al vs. State
Pruitt vs. State
Quinn vs. Halbert
Ralph vs. State
Ritchey vs. People
Robb vs. Quaker City Cab Co.
Roberts vs. Ring
Rollwagen vs. Rollwagen
Russell vs. Rutledge
Ruth vs. Rhodes
Selanak vs. Selanak
Skaggs vs. State
Smith, In re
Smithwick vs. State
Snyder vs. Nations
State vs. Buchanan
State vs. Burns
State vs. Butler
State vs. DeWolf
State vs. Draper
State vs. Gayton
State vs. Howard
State vs. Mannion
State vs. Smith
State vs. Weldon
Stevens vs. Page
Territory vs. Duran
Terry vs. State
Tufts vs. Charlestown
U.S. vs. Baker

[Signature]

Wilson vs. Freeman
FOOTNOTES


2 Peter Brett, The Beamish Case (Melbourne, Australia: University of Melbourne Press, 1965); and


Lawrence, Is Justice Deaf?; and

Edwin Stacey Oakes and George S. Gulick, eds., American Jurisprudence (Rochester, New York: Lawyers Cooperative Publishing Company, 1943); and

Oscar C. Sattinger, ed., American Jurisprudence (2d series; Rochester, New York: Lawyers Cooperative Publishing Company, 1963); and


3 Myers, The Law and the Deaf.

4 Lowell J. Myers, How to Stop Policemen from Killing Deaf People by Mistake (Chicago: By the Author, 1060 West North Shore Avenue, 1969).

5 Lowell J. Myers, Some of the Problems that Deaf People Meet (Chicago: By the Author, 1969).

6 Brett, The Beamish Case.

7 Myers, Some of the Problems that Deaf People Meet.


9 Lawrence, Is Justice Deaf?; and

Myers, The Law and the Deaf; and

Statement by George Thomas, personal interviews, April and May, 1972.

11 Shepard's Citations (Colorado Springs, Colorado: Shepard's Citations, Inc., 1972); and
   Oakes and Gulick, eds., American Jurisprudence; and
   Sattinger, ed., American Jurisprudence; and
   Ludes, Corpus Juris Secundum.


14 21 C.J.S. 217, Courts, Sec. 141, *cases cited.


16 Louisiana, Civil Code, Sec. 1591 (1870); and
   57 Am. Jur. 73, Wills, Sec. 72.


19 Finesilver, Traffic Safety.

20 Finesilver, Traffic Safety.

21 Finesilver, Traffic Safety.


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Myers, Lowell J. How to Stop Policemen from Killing Deaf People by Mistake. Chicago: By the Author, 1060 West North Shore Avenue, 1969.


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