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EXCLUSION OF PLAINTIFFS FROM THE COURTROOM IN PERSONAL INJURY ACTIONS: A MATTER OF DISCRETION OR CONSTITUTIONAL RIGHT?

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Courts facing the issue of exclusion of litigants from civil trials have differed on the nature of the litigants right to be present, and on whether the exclusion decision lies primarily within the discretion of the trial or appellate court. The author suggests a two-step analysis for the exclusion decision. The first step recognizes a constitutionally protected right to be heard, belonging to the litigant, which limits the trial court's discretion. This right should be examined in terms of the function that the litigant's presence at trial would serve in protecting his "due process" rights. If the litigant is unable to meaningfully participate in the trial then the second step requires an assessment of probable jury prejudice which lies squarely within the discretion of the trial court.

INTRODUCTION

IN THE TYPICAL civil action, the right of a litigant to be present in the courtroom during trial is unquestioned. If asked to explain this right, many judges and lawyers would no doubt echo the sentiments of an Ohio appellate judge who in 1931 declared that "[t]he plaintiff below was entitled to be in the courtroom if she so desired; she being the plaintiff in the case at bar."[1] Like the Ohio judge, we

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1. East Ohio Gas Co. v. Van Orman, 41 Ohio App. 56, 61, 179 N.E. 147, 149 (1931) (Defendant argued that it was misconduct by plaintiff's attorney to bring plaintiff into court. Plaintiff was unable to testify as a result of injuries sustained when her house exploded due to a gas leak).

simply tend to assume that parties to an action will be present during trial proceedings. If we thought about the issue, we might even sense that litigants have a right to be present at trial. Few of us, however, would be able to articulate the nature of that right. Still less would we be able to think of circumstances in which parties might be excluded from their own trials.

In recent years, courts have been willing to entertain challenges to a litigant's presence in the courtroom. Most often this issue has been raised in personal injury cases in which the plaintiff's mere presence in the courtroom threatened to result in significant jury prejudice to the defendant.[2] Typically these have been cases in which the plaintiff suffered from grievous and debilitating injuries. It is in this context that courts have begun to ask whether, and under what circumstances, plaintiffs may be excluded from their own trials. At least one court has responded, in dicta, "never."[3] But the trend is clearly the other way. The highest courts of two states have held that party exclusion is appropriate during the liability phase of a bifurcated trial when plaintiffs are in a comatose condition[4] or are so severely injured that they are unable to express themselves and are wholly unable to comprehend trial proceedings.[5] The Sixth Circuit has approved exclusion of an autistic minor in a similar setting.[6] Most recently, an Indiana appellate court has found the trial court's exclusion of a seven year old quadriplegic child from the liability phase of a trial to be harmless error.[7]

Courts that have grappled with the exclusion issue in recent years have uniformly held that litigants should not be excluded from the courtroom unless they are unable to comprehend trial proceedings or to assist counsel, and their presence at trial would materially increase the risk of jury prejudice.[8] Agreement on the

2. *See, e.g.*, Helminski v. Ayerst Laboratories, 766 F.2d 208 (6th Cir. 1985) (exclusion from liability phase of plaintiff who is unable to understand trial proceedings is harmless error); Morley v. Superior Court of Ariz., 131 Ariz. 85, 638 P.2d 1331 (1981) (en banc) (plaintiff in coma should have been excluded from liability but not damages phase of trial); Gage v. Rozarth, 505 N.E.2d 64 (Ind. Ct. App. 1987) (exclusion from liability phase of trial of seven-year-old quadriplegic plaintiff upheld); Dickson v. Bober, 269 Minn. 334, 130 N.W.2d 526 (1964) (plaintiff who is unable to comprehend trial may be excluded to prevent jury prejudice). *See also* notes 50-64, 67-91 and accompanying text.

3. Carlisle v. County of Nassau, 64 A.D.2d 15, 18, 408 N.Y.S.2d 114, 116 (N.Y. App. Div. 1978) (Trial court's refusal to allow the plaintiff, a paraplegic, to be present during jury selection was held to be reversible error).

4. *See* Morley v. Superior Court of Ariz., 131 Ariz. 85, 638 P.2d 1331 (1981) (en banc).

5. *See* Dickson v. Bober, 269 Minn. 334, 130 N.W.2d 526 (1964).

6. *See* Helminski v. Ayerst Laboratories, 766 F.2d 208 (6th Cir. 1985).

7. Gage v. Bozarth, 505 N.E.2d 64, 65, 69 (Ind. Ct. App. 1987).

8. *Id.*

appropriate standard has come about because courts have generally taken a functional approach to the problem: They have viewed exclusion in terms of the purposes served by the litigant's presence in the courtroom. Courts have moved toward this functional approach almost intuitively. After all, there is something both intuitive and rational about requiring that a litigant's presence serve some legitimate purpose and not merely serve to prejudice an opponent. But the same courts that have agreed on the conditions precedent to exclusion have been unable to agree on the more basic jurisprudential issues which arise in this context. What is the nature of the plaintiff's right to be present at trial? Is it within the trial court's discretion to order a party excluded? Are there any constitutional rights involved in such a decision? If so, what are these rights and to whom do they belong? Does the defendant have a right to go to trial without the plaintiff being present in appropriate cases?

Unable to articulate which rights are at stake, courts have also been unable to agree on the extent of such rights. In some measure, the analytical difficulty is a result of courts coming at the problem from a variety of perspectives. A court might look at the entire exclusion problem essentially as a matter of fairness—a matter to be determined by trial judges on the basis of their supervisory authority over the conduct of the proceedings. From this perspective, a trial court might be willing to tolerate a certain amount of jury sympathy or disruptiveness generated by a party because the court still regards the overall proceedings as fair. In some cases, however, the court could regard the fairness of the proceedings as seriously at risk. In such cases the court could use its supervisory power to restore the balance of fairness. This approach, expressly or implicitly, recognizes that the trial court is in the best position to insure that a trial is conducted free from unnecessary bias and disruption. The focus of this view is on the integrity of the proceedings from the standpoint of overall fairness. In this view constitutional considerations play little part.

However, other courts could look at the problem from a different perspective. These courts, more apt to find constitutional issues, may wish to preserve the traditional model of a trial, which presupposes the presence of a plaintiff, defendant, and counsel. Accordingly, they may find that the right to be present is protected by constitutional provisions, such as the right to due process. Under a due process rationale, a litigant ordinarily should not be excluded without a hearing designed to insure that the litigant's presence in

the courtroom would serve no legitimate purpose.[9] Not surprisingly, this second approach tends to vest supervisory responsibility in the appellate court rather than in the trial court; it is intended more as a check on the trial court's discretion than as a recognition of that court's discretion.

Still other courts could regard a litigant's presence in the courtroom as an essential part of the jury trial. From this perspective, the right to trial by jury embraces the intangibles which traditionally have been incidents of the jury trial—intangibles which go beyond merely evidentiary matters.

This Article explores some of the jurisprudential questions which arise in the context of exclusion, and suggests a coherent approach to the problem. It is the author's contention that a two step analysis is appropriate where the presence of the plaintiff in the courtroom may jeopardize the fairness of the proceedings.[10] The first step requires recognition that a litigant has a constitutionally protected right to be heard. This right derives from the constitutional guarantee of due process. Recognition of this right should prevent a trial judge from arbitrarily acting to exclude a litigant or from ordering exclusion without evaluating whether the litigant can meaningfully participate in the trial. If the litigant is unable to participate in the trial proceedings in a meaningful way, the decision whether or not to exclude the litigant turns on an assessment of probable jury prejudice. This determination does not involve a constitutional issue and consequently should lie squarely within the discretion of the trial judge. By recognizing that the exclusion question has both a constitutional and a discretionary component, courts should be able to fashion a coherent and consistent approach to the problem.

I. THE JURISPRUDENCE OF EXCLUSION

If a litigant is entitled to be present in the courtroom during trial, this entitlement cannot be traced to any express constitutional provision. Several courts have attempted to relate the plaintiff's right to be present to a specific constitutional guarantee, such as the seventh amendment to trial by jury[11] or the fifth or fourteenth

9. *See infra* text accompanying notes 85-88, 94-99.

10. *See, e.g.*, Helminki v. Ayerst Laboratories, 766 F.2d 208 (6th Cir. 1985). Discussed *infra* notes 76-91 and accompanying text.

11. *See* Carlisle v. County of Nassau, 64 A.D.2d 15, 18, 408 N.Y.S.2d 114, 116 (N.Y. App. Div. 1978).

amendments' due process clause.[12] These attempts have not been altogether satisfactory. Assertions of a right based on the seventh amendment find little or no support in constitutional jurisprudence.[13] Due process, on the other hand, is a more likely source of the right to be present in the courtroom, but without further exploration it is too fluid a concept to be of much use.[14] Without more, the abstract assertion of due process tells us little or nothing about the nature of the plaintiff's right or the way in which due process enters the picture from an analytical standpoint. In addition to the arguments based on the fifth, seventh or fourteenth amendments, constitutional or quasi-constitutional arguments have been made, based on the right of access to the courts, in prisoners' civil rights cases.[15] Courts have had no trouble rejecting such arguments, however, and have consistently distinguished the right of access to the courts from the right to be present in the courtroom.[16] Finally, arguments based on particular state statutes have been advanced with similar effects.[17]

While the United States Supreme Court has identified a "right to be heard" in trial proceedings,[18] the nature and extent of this right is revealed only upon consideration of a number of cases in which neither a party nor his counsel was present at possibly crucial points in the trial. In *Hopt v. Utah*,[19] decided in 1884, Hopt had been convicted of murder and sentenced to death by a then terri-

12. *See Helminski*, 766 F.2d at 213.

13. *See infra* text accompanying notes 15-16, 27-33.

14. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."); *see also* Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.").

15. *See, e.g.*, Pollard v. White, 738 F.2d 1124, 1125 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985).

16. In the context of prisoners' claims under § 1983, courts have held that "[a] prisoner's right of access to the courts does not necessarily guarantee him the right to be present at the trial of his civil suit." Dorsey v. Edge, 819 F.2d 1066, 1067 (11th Cir. 1987) (citing *Pollard*). The *Dorsey* court affirmed the trial judge's requirement that the plaintiff present his testimony by deposition. Although the court encouraged the Department of Corrections to authorize the plaintiff's transfer for trial, the court was unwilling to order the Department to do so.

17. *See* Preston v. Goldman, 164 Cal. App. 3d 1135, 210 Cal. Rptr. 913 (1985), *rev'd on other grounds*, 42 Cal. 3d 108, 720 P.2d 476, 227 Cal. Rptr. 817 (1986) (Ruling that brain-damaged quadriplegic child had right to be present in courtroom during liability trial under California Evidence Code § 777, but holding that exclusion was harmless error in view of child's inability to understand proceedings or cooperate with counsel).

18. *See infra* text accompanying notes 19-42.

19. 110 U.S. 574 (1884).

torial Utah court. Because the Supreme Court review was by writ of error, the Court had power to review the trial proceedings for errors of law.[20] At issue was whether the jurors who were challenged by the defendant for bias should have been examined in open court rather than in a secretive fashion in another room. Relying primarily on a provision in the Utah Criminal Code of Procedure, which stated that a defendant accused of a felony "must be personally present at the trial," the Court overturned the conviction.[21]

Rejecting the argument that the defendant had waived his right to be present because his counsel had failed to object at the appropriate time, the Court held that it was not within the power of the defendant or his counsel to waive the defendant's right to be present.[22] This holding derived from a view of punishment set forth in Blackstone's *Commentaries*.[23] The Court, quoting Blackstone, wrote that "[t]he great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind."[24] From this deterence principle the Court found that the interest of the public superseded the interest of any individual criminal defendant; the legislature having expressed its determination that the right to appear was essential for the protection of the accused, this right could not be waived.[25]

While this reasoning may not be satisfactory to the modern lawyer, it does illustrate a number of important points. First, the Court's reasoning stems from notions about the purpose of criminal law and thus the rule is logically restricted to criminal cases. Second, the rule appears to operate only if there has been a legislative pronouncement. Under the Court's reasoning, the legislature is the voice of the public and expresses the values which the public deems to be important in securing the rights of the individual. In marked contrast to the expansive interpretation of due process which the Court had begun to develop in contemporaneous civil cases involving liberty of contract,[26] the analysis of *Hopt* reflects a more restrictive application of the due process clause to procedural rights. By

20. *Id.* at 575.

21. *Id.* at 576-78.

22. *Id.* at 579.

23. W. BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND (1783) [hereinafter COMMENTARIES].

24. *Hopt*, 110 U.S. at 579 (quoting 4 COMMENTARIES 11).

25. *Id.*

26. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 589-90 (1897); Frisbie v. United States, 157 U.S. 160, 165-66 (1895).

clear implication, if the legislature had been silent, the Court would not have imposed the rule *sua sponte*.

In a case decided in 1919, *Fillippon v. Albion Vein Slate Co.*,[27] the Supreme Court was presented with a civil case involving what it termed "an important question of trial practice."[28] At issue was whether the trial judge erred by responding to a written inquiry from the jury in the absence of the parties and their counsel. The Court held:

> We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.[29]

The *Fillippon* rule is that a party or his counsel has a right to be present at all proceedings. The use of the disjunctive word "or" makes it clear that the Court was not concerned about the rights of a litigant to be present in the courtroom *per se*; rather, the concern was that there be someone present to assert and protect the litigant's interests. This is especially clear given the facts of the case. The jury had requested that the trial court clarify a point of law. In essence, the jury wanted to know whether the plaintiff was guilty of contributory negligence as a matter of law under the facts which had been presented.[30] Had the attorney been present, the Court reasoned, he could have excepted to the trial court's proposed instruction and the trial court could have reconsidered.[31]

While it is easy to state the rule in *Fillippon*, it is not as easy to isolate the rights which the Court felt were at issue. This problem is compounded because the opinion appears to have both a constitutional and a nonconstitutional dimension.

The Court apparently derived the right to be present from two sources. First, "the orderly conduct of a trial by jury;"[32] and second, the Court's reference of the "right to be heard."[33] The first phrase has seventh amendment overtones, but also suggests that the Court was relying on some notion of a trial judge's supervisory responsibilities over the proceedings. The second right, which seems to have its roots in due process, was the central theme of the case.

27. 250 U.S. 76 (1919).
28. *Id.* at 77.
29. *Id.* at 81.
30. *Id.* at 80.
31. *Id.* at 82.
32. *Id.* at 81.
33. *Id.*

To a jury, a trial judge's words may quite literally have the force of law. By communicating privately with the jury, the trial judge was imposing his own view of the law upon the jurors and depriving the parties of any right to be heard.

Seven years after *Fillippon*, the Supreme Court granted certiorari in *Shields v. United States*,[34] another case in which a judge had communicated with the jury in the absence of the parties and counsel. Interestingly, the Court applied only the supervisory responsibility prong of *Fillippon*.

In *Shields*, the petitioner was indicted and tried with eight or nine others for conspiracy to violate the Prohibition Act and for direct violations of that Act.[35] After the case was submitted to the jury, counsel for the defendants and the prosecuting attorney visited the trial judge in chambers and requested the jury be held in deliberation until they agreed upon a verdict. Sometime thereafter, the jury sent a note to the judge in chambers saying that they had reached a verdict with respect to a number of defendants but had failed to reach a verdict with respect to other defendants, including the petitioner. The judge sent a note back to the jury room informing the jurors that they would have to reach a verdict as to all defendants. As a result, the defendant petitioner was convicted of conspiracy.[36]

The Supreme Court reversed the conviction, relying upon two of the grounds urged by the petitioner. First, the Court agreed with the petitioner that the request that the jury be held in deliberation until they reached a verdict could not be construed as a blanket consent for the court to communicate with the jury out of court and in the absence of the defendants and their counsel.[37] Second, the Court held that the conviction was in conflict with *Fillippon*. The Court interpreted the *Fillippon* decision as announcing a rule derived from a concern for the orderly conduct of a jury trial.[38] The Court refused to pass on a third argument raised by petitioner, who had urged that the action of the district court in communicating with the jury was a denial of due process of law.[39] *Shields* thus demonstrated that the exclusion of parties and counsel may not amount to a constitutional deprivation.

34. 273 U.S. 583 (1927).
35. *Id.*
36. *Id.* at 584-85.
37. *Id.* at 586-87.
38. *Id.* at 588-89.
39. *Id.* at 586, 587.

The first case of precedential importance expressly to hold that constitutional due process protects a civil litigant's right to be present during all phases of a trial was the Third Circuit's decision in *Arrington v. Robertson*.[40] The facts in that case were virtually identical to the facts in *Fillippon*. A jury, in the course of its deliberations, requested additional instructions on a point of law. The trial judge responded from chambers in the absence of the defendant or the defendant's counsel. Upon these facts, the Third Circuit could have issued a memorandum opinion reversing and remanding the case on the authority of *Fillippon*. Rather than doing so, however, the court announced a rule of its own making. Citing *Hopt*, *Fillippon*, and *Shields*, the court held that "[t]he due process clause of the Fifth Amendment to the Constitution requires that a defendant be accorded the right to be present in person or by counsel at every stage of his trial."[41] The court said "orderly procedure" required that *Hopt* be applicible to civil actions, and emphasized the due process underpinnings of *Fillippon*.[42]

Taken as a whole, these cases suggest the existence of a constitutional "right to be heard." The right to be heard certainly prohibits a trial judge from arbitrarily excluding a litigant from the courtroom. Moreover, it reasonably appears to derive from notions of due process. But what if the litigant is incapable of "speaking?" What if the plaintiff is comatose or a very young child? In these instances, the right to be heard can only be satisfied by the presence of counsel or a guardian; it cannot require the plaintiff to be personally present. Of course, the plaintiff's presence may be necessary to assist the jury in assessing damages. Here one may say that the plaintiff does in fact "speak" through his or her mere presence.

However, the right to be heard should not include the right to prejudice the jury. Indeed, unnecessary jury prejudice may itself violate due process if it infringes upon the right to a fair trial.[43] There may be times when jury prejudice is inevitable; but the right

40. 114 F.2d 821 (3d Cir. 1940).

41. *Id.* at 823.

42. *Id.*

43. In *In re* Murchison, 349 U.S. 133 (1955), the Supreme Court stated: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the possibility of unfairness. *Id.* at 136. *See, e.g.*, *In re* Japanese Electronic Prod. Antitrust Litig., 631 F.2d 1069, 1084 (3d Cir. 1980) ("[D]ue process precludes trial by jury when a jury is unable to perform [its] task with a reasonable understanding of the evidence and the legal rules."). *Cf.* Illinois v. Allen, 397 U.S. 337, 346-47 (1970) (holding that the trial court had discretion to remove a criminal defendant from his own trial after repeated instances of disruptive conduct by the defendant).

to prejudice the jury is not constitutionally protected and trial courts have traditionally made an effort to minimize the level of prejudice.

The assessment of jury prejudice calls for an evidentiary determination. It is therefore a matter which properly lies within the discretion of the trial court.[44] While the power to supervise trial proceedings is not unlimited; it is vested in the trial court,[45] and reasonably should extend to the decision to exclude a party to a civil action, permitting the trial court to evaluate the probable prejudice which would be caused by a plaintiff's presence in the courtroom.

In *Cavendish v. Sunoco Service of Greenfield*,[46] the Seventh Circuit affirmed the trial court's decision to exclude the plaintiff's four year old son from the courtroom even though the child was a potential beneficiary of the decendent's estate and therefore could have been regarded as a party in interest.[47] The child was playing with a toy windmill during closing argument; the trial judge, observing the effect this was having on the jury, ordered the child excluded.[48] Plaintiff argued on appeal that the child, being a party, had a right to be present in the courtroom.[49]

The Seventh Circuit held that the trial court had discretion to maintain the dignity of the courtroom and to conduct the trial in an orderly manner.[50] Exclusion was therefore held to be justified. The court refused to find that any "substantial" or constitutional right of the plaintiff's son was implicated.[51]

Of course, *Cavendish* was a case involving exclusion because of disruption and not exclusion because of potential jury prejudice. At a minimum, however, the decision illustrates that a trial judge must have some measure of control over the courtroom and also that the trial judge is in the best position to make a determination on matters which may affect the jury's performance of its duties.[52]

II. THE EMERGENCE OF A FUNCTIONAL APPROACH

A litigant's presence at trial may serve a number of important

44. *See, e.g.*, Rosales-Lopez v. United States, 451 U.S. 182, 183 (1981) (the obligation to impanel an impartial jury lies in the first instance with the trial judge).

45. *Id.*

46. 451 F.2d 1360 (7th Cir. 1971).

47. *Id.* at 1368.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See supra* text accompanying notes 44-45.

functions. The litigant's presence may assist counsel in at least two ways. First, the litigant generally has superior knowledge of the facts underlying the dispute and may be in a position to educate counsel, both before and during trial. This is the litigant's "educative" role.[53] Second, the litigant may be able to assist counsel in formulating trial strategy. This is the litigant's "strategic" role.[54] Additionally, the litigant's presence may have a moral effect on opposing witnesses and serve as a deterrent to untruthful statements. This is the litigant's "moral" role.[55] The presence of a litigant may also be directly relevant to evidentiary questions such as the litigant's actual condition and the extent of his or her injuries. This is the litigant's "evidentiary" role.[56] Finally, one may speak of the litigant's "proprietary" role in that the litigant is in some sense the owner of the dispute,[57] as well as the litigant's "public" role in that the litigant has an interest shared with the public at large in being able to observe the proceedings.[58]

The first case to view the question of exclusion in essentially functional terms was *Dickson v. Bober*.[59] *Dickson* was also the first case in which a court recognized the relationship between functional analysis and the availability of bifurcating the trial into liability and damages segments under that state's equivalent to Rule 42(b) of the Federal Rules of Civil Procedure.[60]

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53. *See* Anderson v. Snyder, 91 Conn. 404, 408, 99 A. 1032, 1034 (1917).

54. *See* Helminski v. Ayerst Laboratories, 766 F.2d 208, 214 (6th Cir. 1985); Carlisle v. County of Nassau, 64 A.D.2d 15, 18, 408 N.Y.S. 114, 117 (N.Y. App. Div. 1978) (Right of a party not only to be an interested and concerned observer of a proceeding which ultimately affects him, but to help plan and plot the trial strategy is in no way denigrated by the presence of retained or assigned counsel).

55. *See Anderson*, 91 Conn. at 408, 99 A. at 1034.

56. *See* Morley v. Superior Court of Ariz., 131 Ariz. 85, 88, 638 P.2d 1331, 1334 (1981) (en banc) (plaintiff should have been allowed into court to show condition as evidence of damages); Talcott v. Holl, 224 So. 2d 420, 421-22 (Fla. Dist. Ct. App. 1969) (no error in permitting plaintiff to be brought into courtroom on stretcher).

57. The rule that a suit must be maintained by the real party in interest (the plaintiff must have a personal stake in the outcome) is suggestive of this proprietary role.

58. *See* United States *ex rel.* Mayberry v. Yeager, 321 F. Supp. 199, 203-05 (D.N.J. 1971) (Sixth amendment right to public trial is for benefit of accused "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions." (quoting 1 COOLEY CONSTITUTIONAL LIMITATIONS (8th ed. 1927))). *Cf.* Craig v. Harney, 331 U.S. 367, 374 (1947) ("What transpires in the courtroom is public property.").

59. 269 Minn. 334, 130 N.W.2d 526 (1964).

60. *Id.* at 338 n.3, 130 N.W.2d at 530 n.3. The Minnesota rule provided that "[t]he court, in furtherance of convenience or to avoid prejudice, . . . may order a separate trial of any claim." *See* 48 MINN. STAT. § 4202 (1979). This language parallels that of FED. R. CIV. P. 42(b).

The plaintiff in *Dickson* was a minor who was severely injured when the motorcycle he was riding collided with an automobile. As the Minnesota Supreme Court remarked, "[t]he accident changed Allan Dickson from a vital, intelligent, healthy youth to one unable to sustain himself, helpless and entirely dependent on others, and wholly unable to comprehend trial proceedings."[61] Thus the plaintiff was unable to perform any of the functions which might justify his presence in court during the liability phase of the trial. The trial judge had observed the plaintiff before ordering that he be excluded from the courtroom. This was a "trial test" and it left the judge with little doubt as to the impact which the plaintiff's presence would have on the jury.[62]

The state's highest court affirmed the order of exclusion, holding that a plaintiff who is unable by reason of his injuries to contribute to or understand the trial proceedings could be excluded from the courtroom in order to preserve an atmosphere of fairness.[63] The court made reference in a footnote to the possibility of bifurcating the proceedings in order to allow plaintiffs to be present during the damages phase, when their appearance would be relevant as evidence of their injuries.[64] Rejecting a constitutional challenge to the order of exclusion, the court held that the plaintiff's due process rights were satisfied by the presence of counsel and a guardian *ad litem* during the trial proceedings. Due process did not require that the plaintiff be present in the courtroom.[65]

The *Dickson* opinion is noteworthy precisely because of the functional approach taken by the Minnesota Supreme Court. By examining the issue with an eye toward the functions which a litigant's presence serves at trial, the court was able to draw a distinction between litigants who could participate in the proceedings in some meaningful manner and those whose injuries made them unable to do so. Once this distinction was articulated, the court was able to reject a concept of due process which was essentially abstract and without content.

The court's suggestion that a trial court should examine the exclusion issue in terms of the overall fairness of the proceedings reflects an awareness that the exclusion issue requires the trial court to engage in a balancing operation. How much prejudice is likely to

61. *Dickson*, 269 Minn. at 336, 130 N.W.2d at 529.
62. *Id.*
63. *Id.* at 337-38, 342, 130 N.W.2d at 530, 533.
64. *Id.* at 338 n.3, 130 N.W.2d at 530 n.3.
65. *Id.* at 337 n.2, 130 N.W.2d at 530 n.2.

result if the plaintiff is present in the courtroom throughout the trial? What harm will result to the plaintiff's case if exclusion is ordered? The court held that these are determinations which lie within the particular competence of a trial judge, reviewable by higher courts for abuse of discretion.[66]

Morley v. Superior Court of Arizona[67] followed the *Dickson* approach and was even more explicit in recognizing the trial court's responsibility to strike a balance between the competing considerations which enter into a decision about exclusion. *Morley* involved claims for personal injuries sustained by a plaintiff who was left in a coma following an automobile accident.[68] In a series of pretrial rulings the trial court had severed the liability and damages issues pursuant to Rule 42(b) of the Arizona Rules of Civil Procedure and had ordered the plaintiff excluded from the trial of both issues.[69] The Arizona Supreme Court noted that the trial court's rulings "reflect[ed] a concern for the prejudicial impact Paul Morley's appearance would have on the jury."[70] The court then affirmed the decision to bifurcate the trial but held that the plaintiff should not have been preemptorily excluded from the damages trial.[71] The *Morley* opinion comes close to holding that it would have been an abuse of discretion if the trial court had allowed the plaintiff to be present during the liability phase; however, the opinion notes that the balance was different during the damages phase because the plaintiff's own physical condition was the most direct evidence available on the extent of his damages,[72] and supports the use of a functional analysis.

Perhaps because it followed the *Dickson* opinion in all material respects, *Morley* does not even pay lip service to the plaintiff's due process interests. In fact, the only constitutional concern which the

66. *Id.* at 337, 130 N.W.2d at 530.

67. 131 Ariz. 85, 638 P.2d 1331 (1981) (en banc).

68. *Id.* at 86, 638 P.2d at 1332. ("This vegetative state, which will probably last the remainder of his life, requires a tracheostomy for him to breathe, and he is fed from a tube inserted in his stomach.").

69. *Id.* The Arizona rule 42 is the same as the Minnesota rule and the federal rule. *See* ARIZ. REV. STAT. ANN. R. CIV. P. 42(b); *supra* note 60.

70. *Id.* at 86-87, 638 P.2d at 1332-33.

71. *Id.* at 86-87, 638 P.2d at 1333, 1334. The court noted that even during the damages trial the plaintiff's right to appear was not absolute. The plaintiff could "waive his right to be present" if his presence became "disruptive to the conduct of the trial." *Id.* at 88 n.1, 638 P.2d at 1334 n.1. Under these circumstances, his right to appear could be limited to "the brief period when his presence is necessary to show his injuries to the jury." *Id.*

72. *Id.* at 87, 638 P.2d at 1334. "The plaintiff should be allowed to prove damages by the most direct evidence available—the plaintiffs own physical condition."

Morley opinion did address was the defendant's right to an unbiased jury.[73]

A feature of the *Dickson-Morley* approach which deserves some discussion is the link between the severity of the plaintiff's condition and the appropriateness of exclusion. An objection on policy grounds may be raised at this point. The argument may be made that the defendant reaps an unfair benefit at trial if the plaintiff has been seriously injured. After all, the more serious the injury the more likely it is that the plaintiff will be unable to comprehend the proceedings or to assist counsel. Construing the exclusion of the plaintiff as a benefit to the defendant, however, merely begs the question: If the defendant's conduct was innocent, the exclusion of the plaintiff will not be a "benefit" to the defendant. Rather, it will protect the defendant's right to a fair trial. After all, the more serious the plaintiff's injury, the greater too is the likelihood of jury prejudice. Since the law does not erect a presumption in favor of liability in civil actions, the defendant is not impermissibly benefited by a requirement that the plaintiff prove his or her case in a setting as free as possible from prejudice. Of course, as a practical matter a plaintiff may have a harder time linking a defendant's conduct to the plaintiff's injury when the plaintiff is not present in the courtroom. One reason for this added burden, however, is that the plaintiff is prevented from relying on jury prejudice as a link in the liability chain.

A second objection is that exclusion in effect punishes plaintiffs for their mere appearance. In part, this objection focuses on the fact that courts are more likely to exclude a plaintiff whose physical condition is pitiable rather than one whose appearance is "normal," since a disfigured plaintiff is more likely to inspire jury sympathy. On point, a series of Florida cases have held that physical appearance is not a basis for excluding a plaintiff from the courtroom.[74]

Arguments based on appearance tend to treat the factor of jury

73. *Id.*

74. *See* Florida Greyhound Lines, Inc. v. Jones, 60 So. 2d 396, 397 (Fla. 1952) (Defendant not denied right to fair trial although trial court allowed plaintiff into courtroom on stretcher, since "[o]ne who institutes an action is entitled to be present when it is tried."); Freeman v. Rubin, 318 So. 2d 540, 544 (Fla. Dist. Ct. App. 1975) ("[E]ven though [plaintiff] was represented by a guardian, we hold that in the absence of a showing that he was so incapacitated that he could not comprehend trial proceedings, the trial judge erred in excluding [plaintiff's] physical presence from the courtroom."); Purvis v. Inter-County Telephone & Telegraph Co., 203 So. 2d 508, 511 (Fla. Dist. Ct. App. 1967) (Plaintiff could not be excluded from trial of his case, even though he was "argumentative, somewhat irrational and of such mental attitude and physical appearance that the jury might be influenced.").

sympathy as if it were the exclusive criterion for exclusion. These arguments ignore the necessary assessment of a litigant's mental condition (or maturity) as a condition precedent. Under the *Dickson-Morley* approach a court must look at both factors. Once it has been determined that a litigant is unable to comprehend the proceedings or to assist counsel, the court must determine the likelihood of prejudice by evaluating the jury's probable reaction to the presence of the plaintiff in the courtroom. This is not a task foreign to trial judges; Rule 403 of the Federal Rules of Evidence requires the same sort of evaluation.[75]

In *Helminski v. Ayerst Laboratories*,[76] the Sixth Circuit adhered to the same basic standard as in *Dickson* and *Morley* but there was a shift in emphasis. *Helminski* was a drug product liability action in which it was alleged that the minor plaintiff's severe developmental disabilities were a result of his mother's exposure to the defendant's product while she was pregnant with the plaintiff.[77] Prior to trial, plaintiff's counsel had agreed to present the plaintiff to the jury by means of a videotape which had been prepared for that purpose.[78] Despite this arrangement, plaintiff's counsel during trial announced his intention to call the plaintiff as a witness.[79] In response to the defendant's objection, the trial judge ordered the proceedings bifurcated into separate trials on the liability and damages issues, and ordered the plaintiff excluded from the liability phase.[80]

After affirming the trial court's decision to bifurcate the proceedings even though the trial was already underway,[81] the United States Court of Appeals for the Sixth Circuit addressed the exclusion issue. Contrary to *Dickson* and *Morley*, the Sixth Circuit determined that the plaintiff's right to be present in person during trial proceedings was protected by the due process clause of the fifth

75. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

76. 766 F.2d 208 (6th Cir. 1985).

77. *Id.* at 210. The severity of plaintiff's disabilities is illustrated by the following passage in the opinion: "Eventually, physicians determined that Hugh was autistic. As a result of this condition, Hugh requires 24-hour a day care; he does not speak, is not toilet trained, and has an extremely low I.Q. Hugh's arrested neurological development is permanent and irreversible." *Id.*

78. *Id.* at 211.

79. *Id.*

80. *Id.* at 212.

81. *Id.* ("The late bifurcation of a trial does not constitute reversible error in the absence of a showing of prejudice.").

amendment.[82] The court summarily rejected the argument that due process was satisfied when the plaintiff was represented by counsel and a guardian, holding that an attorney is merely the representative or agent of the litigant and not the litigant's "alter ego."[83]

The court's review of existing authority led it to conclude that due process generally required that a litigant be allowed to be present unless the litigant was unable to comprehend the proceedings or to assist counsel.[84] In effect, the Sixth Circuit thereby constitutionalized the rule announced in *Dickson* and *Morley*. But the court went one step further: It held that due process also applied to the trial court's determination of likely jury prejudice.[85] Consistent with its due process rationale, the court held that a hearing would be required before a litigant could be excluded. At the hearing, the party seeking exclusion had the burden of showing that the opposing party's physical and mental condition would prejudice the jury if he or she were allowed to be present in the courtroom.[86] The court defined prejudice in this context rather stringently: Would the presence of the litigant prevent or impair the jury from performing its duties in accordance with its instructions and its oath?[87] If this showing was made, the trial judge could order an involuntary exclusion of the litigant.[88]

The Sixth Circuit noted that in *Dickson*, the trial court had observed the plaintiff before ordering that he be excluded from the courtroom, but the *Helminski* trial court based its decision to exclude the plaintiff on the basis of the uncontradicted testimony of his mother and brother.[89] The trial judge apparently did not observe the plaintiff first hand, and certainly did not conduct a hearing of the type the Sixth Circuit felt was appropriate.[90] Hence, it could be argued that due process was not a major issue in *Dickson* but became so in *Helminski*. However, in the *Morley* opinion there is no indication that the trial judge held a full hearing or observed the plaintiff before ordering his exclusion. Faced with abundant evi-

82. *Id.* at 213 ("[A] court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment.").

83. *Id.* at 213.

84. *Id.* at 216.

85. *Id.* at 217.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 218.

90. *Id.* (The decision to exclude the plaintiff can be made only upon observation by the court).

dence about the plaintiff's condition, it is doubtful that the trial court in *Helminski* would have gained any appreciable insight after a hearing. Indeed, it is arguable that only if the plaintiff's counsel contends that the plaintiff's condition is not sufficiently grave to warrant exclusion should such a hearing be held.

Apparently convinced that a hearing would not have changed the trial judge's mind on the exclusion question, the Sixth Circuit held that no reversible error had been committed by the trial court.[91] In light of the opinion's repeated reference to due process, this seems a rather strange result. It suggests that the right to a hearing in which the judge can observe the plaintiff's condition is not an absolute one, and does not extend to cases in which the trial court is fully aware of the inability of the plaintiff to meaningfully participate in the proceedings. It also suggests that a judge may make a factual determination about the probability of jury prejudice based upon uncontradicted testimony or other information without the need to actually observe the plaintiff.

In *Gage v. Bozarth*,[92] an intermediate appellate court in Indiana adopted *Helminski* in ruling upon an interlocutory appeal challenging an order of exclusion. The plaintiff was severely injured at the age of three when he was hit by an automobile. He was seven years old at the time of trial, a quadriplegic, and dependent on a ventilator in order to breathe.[93]

After successfully moving to bifurcate the trial, the defendants moved to exclude the child from the liability phase. The court held a hearing at which the defendants presented evidence of the risk of prejudice, and evidence that the child's presence in the courtroom was not needed to aid the presentation of his case.[94] The trial court granted the motion to exclude.

In affirming the ruling, the appellate court reviewed much of the case law regarding plaintiff exclusion from other jurisdictions, including *Helminski*.[95] The appellate court then turned to a number of principles of Indiana law which it regarded as well-settled. Among those principles were the trial court's discretion to control trial proceedings so as to keep the jury from being misled into an improper verdict,[96] the duty of the trial court to protect both par-

91. *Id.*
92. 505 N.E.2d 64 (Ind. Ct. App. 1987).
93. *Id.* at 65.
94. *Id.*
95. *Id.* at 67.
96. *Id.* (citing Huntington v. Hamilton, 118 Ind. App. 88, 97, 73 N.E.2d 352, 355 (Ind.

ties' rights to due process,[97] and the duty of the trial court to scrupulously guard the right to trial by jury established in the state Constitution.[98] In light of these principles, the court went on to reject a challenge to the exclusion order based on the state Constitution's right to trial by jury, noting that that constitution "guarantees the plaintiff in a civil proceeding a right to a fair and impartial jury, but it does not guarantee that plaintiff a right to a sympathetic jury."[99] The court also rejected a challenge based on equal protection.[100]

There is one rather strange twist to the *Gage* decision which raises a question as to whether the court was really following *Helminski* or was only purporting to do so. In a footnote the court of appeals noted that the trial judge did not observe the child at the exclusion hearing. Rather, evidence was presented of widespread media coverage in which the child was depicted sympathetically.[101] The child's deposition was read, in which he stated that he did not know the difference between the truth and a lie and that he could not remember the accident.[102] Ultimately, then, the *Gage* decision appears to turn on the child's age and incompetence as a witness rather than just on the standards articulated in *Helminski*.

It is precisely because neither *Dickson*, *Morley*, *Helminski*, nor *Gage* fully explores the nature of the rights involved in party exclusions that these decisions remain less than satisfactory from a jurisprudential standpoint. *Dickson* and *Morley* focus on the risk of jury prejudice; their primary concern is to protect the defendant's right to an unbiased jury. By contrast, *Helminski* treats the entire analysis as a matter of the plaintiff's due process rights. The correct approach lies somewhere in between.

As we have seen, due process considerations enter the picture on two levels. First, included within the notion of due process is the

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Ct. App. 1947) (Judge must not let the jury "be confused or led into the consideration of false or sham issue, that could not be the basis of a legitimate verdict.")).

97. *Id.* (citing Kaiser Aluminum & Chem. Sales v. Dickerhoff, 136 Ind. App. 258, 261, 199 N.E.2d 719, 721 (Ind. Ct. App. 1964) (Trial court has duty "to see that fundamental rights of due process are not improperly denied.")).

98. *Id.* (citing Kettner v. Jay, 107 Ind. App. 643, 645, 26 N.E.2d 546, 547 (Ind. Ct. App. 1940) (Court must scrupulously guard the right of trial by jury)).

99. *Id.* at 67-68.

100. *Id.* at 68. The court also noted that "[t]he presence of counsel for the plaintiff and the opportunity to present evidence and argument in support of his claim keeps a plaintiff's right to a jury trial meaningful, while the inclusion of an injured plaintiff unable to assist counsel or understand the proceedings adds nothing to that right." *Id.*

101. *Id.* at 69 & n.1.

102. *Id.* at 69.

right to be heard or participate. This right protects a plaintiff from arbitrary exclusion. Second, due process includes the right to an unbiased jury. This right permits the trial judge to order exclusion in certain circumstances.

Analytically, the trial judge should determine whether the plaintiff is meaningfully able to contribute to or comprehend trial proceedings. Once this determination has been made, the trial court must evaluate the likely prejudice which the plaintiff's presence would have on the jury. This second determination is a matter which falls within the discretion of the trial judge and generally does not present a constitutional issue.

In some cases, such as those which involve comatose or severely retarded plaintiffs, the determination of the plaintiff's capabilities is relatively easy. In other cases the determination may be more difficult. The trial judge should make an inquiry sufficient to be satisfied that the plaintiff cannot meaningfully contribute to the trial proceedings. Some sort of hearing should ordinarily be held. Whether the party must be present at the hearing will necessarily depend upon the circumstances of the case. Due process is intended to protect against the erroneous deprivation of a right[103] and if the trial court has any residual doubts about whether the correct determination has been made, it is probably a good idea to make video and telephone connections available to the excluded party.[104] Of course, if the trial judge has sufficient confidence that the plaintiff can comprehend the proceedings or assist counsel, exclusion is probably not proper.

The assessment of likely jury prejudice is within the particular competence of the trial judge and is not properly viewed as a constitutional issue. To regard it otherwise, as the Sixth Circuit appears to do in *Helminski*, is to extend the notion of due process beyond its proper scope. The major error of the *Helminski* approach is the court's conclusion that due process reaches the determination of the likelihood of jury prejudice as well as the determination of whether the plaintiff can contribute to the proceedings. By making the calculation of jury prejudice a constitutional standard, the court of ap-

103. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 259-60 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation, of life, liberty or property.").

104. This was the approach taken by Chief Judge Carl B. Rubin in a consolidated trial involving the drug Bendectin pursuant to 28 U.S.C. § 1407 (1982). *See In re* Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation, 624 F. Supp. 1212, 1224 n.9 (S.D. Ohio 1985) (plaintiffs' appeal pending).

peals intrudes on what should be the sphere of the trial court. The trial court is best equipped to determine what effect the plaintiff's appearance will have on the jury. In this regard, it may be instructive to consider the treatment which so-called "Day in the Life" films have received.

"Day in the Life" films are intended to provide some of the details of a plaintiff's daily life so that the jury may more completely assess the extent of the plaintiff's injuries.[105] These films have become a mainstay of personal injury cases in which the plaintiff is confined to a wheelchair or a bed. A film may show the activities of a "typical" day in the plaintiff's life or may show a specific activity, such as a physical therapy session.[106] The chief advantage of "Day in the Life" films is their ability to dramatically impress upon the jury the reality of a plaintiff's medical condition. The dangers of such films are, first, that they provide a golden opportunity to elicit jury sympathy, and second, that they are highly resistant to effective cross-examination.[107]

The admission of "Day in the Life" films is committed to the sound discretion of the court,[108] and courts generally rely on Rule 403 of the Federal Rules of Evidence or its equivalent if they decide to exclude such films.[109] The same type of analysis appears to be appropriate to the determination of whether a plaintiff's presence in the courtroom during the liability phase would unduly prejudice the defendant. The balancing called for by Rule 403 is a discretionary function of the trial court. The rule recognizes the trial judge's ability to make a judgment call about the relative risk of prejudice or other factors extraneous to proper adjudication. Similarly, the assessment of the risk of prejudice should be analyzed in the same manner in the exclusion context. It should fall squarely within the discretion of the trial court.

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105. *See generally* Preiser & Hoffman, *"Day-in-the-Life" Films—Coming of Age in the Courtroom*, TRIAL, Aug. 1981, at 26.

106. *See* Note, *Beyond Words: The Evidentiary Status of "Day in the Life" Film*, 66 B.U.L. REV. 133 (1986).

107. *Id.* at 135 nn.16-17. The author argues that "day in the life" films present a hearsay danger which is concealed by the medium of expression. *See id.* at text accompanying notes 117-121.

108. *See* Bolstridge v. Central Maine Power Co., 621 F. Supp. 1202, 1203 (D. Me. 1985). (Videotape held not admissible, since plaintiff could "demonstrate to the jury in open court activities similar to those depicted in the videotape.").

109. *See id.* at 1204; *see also* Thomas v. C.G. Tate Construction Co., 465 F. Supp. 566, 569-71 (D.S.C. 1979) (Court held that since both doctor who performed physical therapy on plaintiff and plaintiff himself were available to testify at trial, the tape's "probative value is substanially outweighed and over-shadowed by the danger of unfair prejudice.").

III. CONCLUSION

The Supreme Court has recently taken an overtly functional approach to the confrontation clause of the sixth amendment in a case involving a criminal defendant's exclusion from a competency hearing involving two minor children.[110] In that case, the Court identified the "function" of the confrontation clause as the protection of the right of cross-examination and found that the opportunity existed for meaningful cross-examination at trial notwithstanding the defendant's exclusion from the preliminary hearing. The Court's willingness to adopt a functional approach to the confrontation clause in a criminal case involving a question of exclusion is possibly significant to the future development of the law involving the question of exclusion in civil cases. It is hoped a similar approach will be taken in such cases.

This Article has advocated the recognition of a "right to be heard" derived from the constitutional guarantee of due process. It has argued that the right to be heard is the basis for a litigant's entitlement to be present in the courtroom. It has also argued that the right to be heard should be examined in terms of the functions which a litigant's presence in the courtroom serves. Viewed in these terms, a two-step analysis is appropriate in cases involving the question of exclusion. The first step involves assessment of the constitutional right; the second step involves the exercise of discretion. This two step approach satisfactorily accommodates the rights of both defendant and plaintiff.

110. Kentucky v. Stincer, 107 S. Ct. 2658, 2662-64 (1987) (Right to cross-examine is "essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial.").