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# Editorial Board/Comments

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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVE WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

# Comments

## THE USE OF DEMONSTRATIVE EVIDENCE IN MISSOURI

*Man Does Not Communicate by Words Alone*[1]

Demonstrative or real evidence consists of tangible things which enable the judge or jury to use their senses to perceive facts.[2] Many have written articles advocating the use of such evidence; likewise, there are those who oppose its use.[3]

1. WIGMORE ON EVIDENCE § 789 (3d Ed. 1940).
2. MCCORMICK, EVIDENCE 384 (1954).
3. An example of opposing arguments about demonstrative evidence can be found in the October and November issues, 42 ILL. BAR J. (1953).

It is argued that demonstrative evidence is favorable to the plaintiff's side of the case, and that it unfairly harms the defendant's side. This is not true; demonstrative evidence may be used beneficially by either side.[4] The main objection to the admission of demonstrative evidence is that it has a tendency to inflame and unduly prejudice the trier of fact. It is the judge's duty not to admit evidence which would tend to be of that sort. A large discretion in such matters is left to the trial court.[5] It is not the purpose of this paper, however, to set forth and weigh the arguments concerning demonstrative evidence, but rather it is designed to summarize its use in this state.

## Exhibition of Wounds and Other Injuries

A witness' own body or a member of his body may be used to illustrate and explain evidence to the judge or jury. McCormick, in his text on evidence, states:

> "Ordinarily, the mere exhibition of the injured part of the body of the plaintiff in a personal injury action is allowable as being the best and most direct evidence of a material fact."[6]

In *Smith v. Thompson*,[7] the plaintiff was allowed to strip to the waist while a medical expert witness pointed out certain nerves, and had the plaintiff make certain movements of his injured arm and shoulder. It was argued by the defendant that this showing and demonstration was calculated to inflame the jury. However, as there were no expressions of pain, which would elicit sympathy, the evidence was held to be properly admitted.[8] But in *Taylor v. Kansas City So. Ry.*[9] a demonstration on plaintiff of how an operation was performed by a medical expert witness, after the witness had identified a surgeon's scalpel, was held to be reversible error. In so holding, the court quoted from Judge Ellison's opinion in *Willis v. City of Browning*:[10]

> "A defendant, in an action for damages for personal injury, suffers many unavoidable disadvantages, which make it only the more necessary to shield him from those which may be avoided. The maimed, the widow, and the orphan draw strongly enough on the hearts of jurymen with-

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4. However, it may be conceded that in personal injury cases, a showing and demonstration of the injured portion of the body will be more of an aid to a plaintiff. The mere fact that there are injuries is *always* favorable to a plaintiff.

5. Nelson v. Wabash R.R., 194 S.W.2d 726 (Mo. App. 1946); Perringer v. Lynn Food Co., 148 S.W.2d 601 (Mo. App. 1941); Carlson v. Kansas, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037 (Mo. 1926).

6. McCormick, *supra* at page 30.

7. 142 S.W.2d 70 (Mo. 1940).

8. In Meyer v. Johnson, 224 Mo. App. 565, 30 S.W.2d 641 (1930), the court states that a demonstration of a person's movements accompanied by expressions of pain were prejudicial.

9. 266 S.W.2d 732 (Mo. 1954).

10. 161 Mo. App. 461, 464, 143 S.W. 516, 517 (1912).

> out affirmative effort to arouse sympathy. Human nature needs no artificial aid in this respect."

The court states a narrower rule in *Riepe v. Green*[11] than in the *Smith* case, *supra*, saying that a mere exhibition of an injury was proper, but that a demonstration of that injury was improper. Thus, the *Riepe* case allows only a display of the plaintiff's injury. A more recent case, *Happy v. Walz*,[12] follows the proposition set forth in the *Smith* case. It states the rule in its broader application saying that a mere demonstration of the nature and extent of plaintiff's injuries is not prejudicial, and that it is improper only when demonstration exceeds legitimate purposes and would unduly elicit sympathy in plaintiff's favor to a degree that would tend to minimize other considerations of the jury. The broader rule of allowing both a viewing and a demonstration as stated in the *Smith* and *Happy* cases seems to govern the question concerning the exhibition of injuries to the trier of fact. This rule is clearly the better of the two. The main purpose of an injured plaintiff in bringing a law suit is to recover his lawful compensation, namely, *money* damages. The jury has the duty of determining the dollar and cent value of the injury. This duty is less difficult to reach and less speculative when the jury is aided by a view of the injury and a demonstration of the nature and extent of the disability. A jury has been permitted to feel a plaintiff's hands which were cold due to abnormal blood circulation.[13] A jury has been allowed to see demonstrations of how nearly a plaintiff could shut his injured hand;[14] also a jury has been shown the extent of use in a plaintiff's hand and fingers.[15] Thus, seeing a demonstration of an injury, if unaccompanied by inflammatory acts, is clearly helpful to the jury in arriving at a just verdict.

A question that has not been discussed in a Missouri appellate court opinion is whether the exhibition of injured private parts is permissible. This involves the matter of indecency. Other jurisdictions have been helpful in setting a precedent as to the admission of such evidence. A North Dakota case,[16] in allowing a plaintiff's scarred male organ to be exhibited, said that there may be much indecency involved in such a case, but the scarred organ furnished the best evidence. The court in its opinion went further to say that it was not prepared to say that this exhibition went beyond the legitimate bounds for placing before the jury the vital facts in the case. A Washington case[17] allowed an injured artificial anus exhibited to the jury. A woman stripped to the waist has been sanctioned in Alabama.[18] The only Missouri case that has bearing on

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11. 65 S.W.2d 667 (Mo. App. 1933).
12. 244 S.W.2d 380 (Mo. App. 1951).
13. Sampson v. St. Louis & S.F. R.R., 156 Mo. App. 419, 138 S.W. 98 (1911).
14. Lyon v. St. Louis I.M. & S. R.R., 6 Mo. App. 516 (1879).
15. Mahmet v. Am. Radiator Co, 294 S.W. 1014 (Mo. 1927).
16. Sullivan v. Minneapolis, St. Paul & S.S. M. R.R., 55 N.D. 353, 213 N.W. 841 (1927).
17. Dunkin v. City of Hoquiam, 56 Wash. 47, 105 Pac. 149 (1909).
18. McGruff v. State, 88 Ala. 147, 7 So. 35 (1889).

this question is *Petty v. Kansas City Public Service Co.*,[19] in which a photograph of a young girl in the nude, showing her injuries, was held to be properly admitted. Such a decision might lead the Missouri courts in the future to allow the nude body itself or injured private parts exhibited before the jury as the above mentioned jurisdictions have done.

It can be said, after regarding the Missouri cases in point, that this state follows the general rule of allowing the trier of fact to view an injury and a demonstration of the injury, if not inflammatory and unduly prejudicial. Such demonstrations, though, are under the court's discretionary control.

### Articles Connected with the Controversy

Our courts have allowed articles that are the subject of or connected with controversies to be admitted into evidence in order to help the juries reach a verdict. In *Stallman v. Robinson*,[20] an action against operators of a private mental hospital for the death of plaintiff's wife who hanged herself, the court allowed to be introduced into evidence strips of cloth with which the patient had fastened herself to a water pipe. The court did so over the objection that such evidence was unduly inflammatory and that the cloth was not sufficiently identified. *Atkinson v. Coca-Cola Bottling Co.*[21] involved the introduction of the remaining contents in the Coca-Cola bottle. The court held that the admission of this evidence was not error. However, in *Drew and Company v. Brooks Supply Co.*,[22] the court said that it was within the sound discretion of the trial judge to refuse an attorney permission to open a keg of washing compound for the first time in the presence of the jury, three years after its delivery. This was practically admitted to be an exploration for evidence.

Even the introduction of clothing of an injured passenger showing rents and blood stains,[23] and a blood spotted shirt worn by an assaulted person, corroborating the violence of the assault,[24] were held to have been properly admitted. It has also been held that clothing worn by a deceased child, in an action for his wrongful death, was properly admitted to help prove the manner in which he was killed.[25]

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19. 354 Mo. 823, 191 S.W.2d 653 (1945).
20. 260 S.W.2d 743 (Mo. 1953).
21. 275 S.W.2d 41 (Mo. App. 1955).
22. 243 S.W.2d 621 (Mo. App. 1951).
23. Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., *supra* note 5.
24. Keen v. St. Louis I.M. & S. R.R., 129 Mo. App. 301, 108 S.W. 1125 (1908).
25. Senn v. So. Railway, 108 Mo. 142, 18 S.W. 1007 (1891).

A limb removed from a tree,[26] weeds,[27] a rock,[28] a golf ball,[29] and samples of marble,[30] have been subjects of controversies that have been held admissible.

Thus, in regard to articles that are connected with or are the subject of controversies, the Missouri courts have been quite free in allowing their introduction into evidence. However, there have been no cases that have caused the courts to place a limit on the types of articles admissible. For instance, would it be within the sound discretion of the trial court to admit a dismembered portion of the body into evidence? Cases of this sort have arisen in other jurisdictions.[31] The general tendency is to allow such evidence only if there is a legitimate reason for doing so—but if there is such reason, then it will be admitted regardless of how horrible or gruesome it may be.

### EXPERIMENTS, DUPLICATES AND MODELS

There are only a few cases in Missouri concerning the use of experiments, duplicates, and models as aids in the trial of law suits. In *Bloecher v. Duerbeck*,[32] which involved an explosion of a hot water heating system, a demonstration put on by an expert witness with an improvised model of the heater was held not to present any error. A model of a supporting wooden bent, which was one-sixth the size of the original, was held to have been properly admitted in *Carver v. Missouri-Kansas-Texas R.R.*[33] However, in *Perringer v. Lynn Food Co.*[34] the court ruled that exclusion from evidence of a gunny sack similar to the one used to wipe up water where plaintiff slipped and fell was proper. *State v. Richetti*[35] allowed into evidence cartridges that had been fired from a pistol for the comparison of markings found at the scene of the crime. In *State v. Pinkston*[36] a firearms expert fired a bullet into water and a comparison of the markings on it with the markings on the bullet taken from the body of the deceased was held not to be error. Fingerprints "lifted" from the scene of the crime

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26. Morrow v. Mo. Gas & Electric Service Co., 315 Mo. 367, 286 S.W. 106 (1926).

27. Dudley v. Wabash R.R., 167 Mo. App. 647, 150 S.W. 737 (1912); Connor v. Wabash R.R., 149 Mo. App. 675, 129 S.W. 777 (1910).

28. Holzemer v. Metropolitan St. Ry., 261 Mo. 379, 169 S.W. 102 (1914).

29. Page v. Unterreiner, 106 S.W.2d 528 (Mo. App. 1937).

30. Ashbury v. Fidelity Nat. Bank & Trust Co., 231 Mo. App. 437, 100 S.W.2d 946 (1936).

31. Anderson v. Seropian, 147 Calif. 201, 81 Pac. 521 (1905).

32. 338 Mo. 535, 92 S.W.2d 681 (1935).

33. 362 Mo. 897, 245 S.W.2d 96 (1952).

34. *Supra* note 5.

35. 119 S.W.2d 330 (Mo. 1938).

36. 79 S.W.2d 1046 (Mo.1935). Also see: State v. Couch, 341 Mo. 1239, 111 S.W.2d 147 (1938); State v. McKeever, 339 Mo. 1066, 101 S.W.2d 22 (1936); State v. Markel, 336 Mo. 129, 77 S.W.2d 112 (1922).

and compared to prints of a defendant were held to have been properly admitted in *State v. Johnson.*[37]

From these cases it can be determined that our courts would not be adverse to the admission of experiments, duplicates, or models that would enable a jury to more fully understand the points in issue. However, as Missouri appellate courts have had the opportunity to decide only a few cases, prediction in every instance might prove difficult. For instance, whether the use of parts of a human skeleton, or even the entire skeleton, would be admissible as a model is yet to be decided upon. It is this writer's understanding, though, that some Missouri trial courts have allowed such exhibits into evidence. But no appellate court has approved or disapproved of this practice as yet. The use of skeletons in connection with medical expert witnesses has been approved in other jurisdictions.[38] Undoubtedly, the use of such models showing the structural makeup of the human anatomy would, in many cases, make the expert's testimony more intelligible. Permission might well be granted to use a skeleton in order to aid a jury to understand the nature and extent of an injury.

Experiments, models, and duplicates are beyond a doubt advantageous in helping a jury reach its decision. Evidence of this sort often can do the job of a thousand words.

### Photographs and Motion Pictures

Photographs are used to a large extent in the trial of law suits. They are treated as being in the same class of evidence as maps, diagrams, and drawings.[39] The admissibility of photographs is within the discretion of the trial court; the ruling of the trial judge is not error unless there is an abuse of this discretion.[40] The purpose of admitting photographs is to be instructive and to assist the court and jury in understanding the case.[41] Photographs of an injured person's physical appearance have been admitted.[42] Pictures showing the condition of premises

37. 174 S.W.2d 139 (Mo. 1943). Also see: State v. Hampton, 274 S.W.2d 356 (Mo. 1955). Photographic comparison of fingerprints was held admissible in State v. Richetti, *supra.*

38. Dameron v. Ansboro, 39 Cal. App. 289, 178 Pac. 874 (1919). C. & A. R.R. v. Walker, 217 Ill. 605, 75 N.E. 520 (1905).

39. State *ex rel.* Terminal R.R. Ass'n. of St. Louis v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (1953).

40. Philippi v. New York C. & St. L. R.R., 136 S.W.2d 339 (Mo. App. 1940); Hutchison v. Moerschel Products Co., 234 Mo. App. 518, 133 S.W.2d 701 (1939).

41. Gignoux v. St. Louis Public Service Co., 180 S.W.2d 784 (Mo. App. 1944).

42. Pictures showing a person's condition before injuries were sustained was allowed in Gray v. St. Louis-San Francisco Ry., 363 Mo. 864, 254 S.W.2d 577 (1952). Photographs showing conditions after injury were held admissible in Boulos v. Kansas City Public Service Co., 359 Mo. 763, 223 S.W.2d 446 (1949).

are admissible if they are properly authenticated and identified.[43]

X-ray photographs are admissible, if proved to be correct, to assist an expert witness in testifying as to plaintiff's condition.[44] In many trial courtrooms an X-ray shadow box is standard equipment.

A question arises in connection with the possible use of positive X-ray pictures. It is customary for the negative X-rays to be used, but wouldn't it be more realistic and helpful for a jury to see the positive print of the X-ray? A bone would thus be white, rather than dark. Ordinary photographs are not introduced in their negative form, so shouldn't X-ray photographs be introduced in like manner? If positive X-rays are so used, it becomes unnecessary to use the cumbersome shadow box to illustrate the medical testimony. The positive X-ray prints may thus be passed among the jury like other photographic evidence, making it possible for the members to get a closer view of the fracture or injury.

Another matter that hasn't been decided in the Missouri appellate courts is whether colored photographs are admissible. The admissibility of such photographs has been passed upon by several other state courts.[45] Such photographs, if accurate, are much more beneficial in aiding a jury to see the object just as it actually appears. Often a slight unavoidable misrepresentation occurs due to the mere black and white context of a picture. Just because a group of people sit on a jury is no reason to make them color blind as to pictorial exhibits.

Whether infrared photographs would be admitted might be difficult to say. In such photographs the witness who took them could not verify that they are accurate representations of what he saw with his own eyes. Some jurisdictions have had occasion to allow them into evidence.[46] The same might hold true for the use of the ultraviolet ray.[47]

Third dimensional pictures may be another way of allowing a jury to view the scenes in a more realistic manner. Missouri has not, as yet, been confronted with this type of photographic evidence. However, cases from other states may be cited to back this three dimensional evidence.[48]

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43. Home Ins. Co. of New York v. Savage, 231 Mo. App. 569 (1937).

44. Bledsoe v. Capital City Laundry Co., 256 S.W. 1076 (Mo. App. 1923); Dean v. Wabash R.R., 229 Mo. 425, 129 S.W. 953 (1910).

45. Harris v. Snider, 223 Ala. 94, 134 So. 807 (1931); Green v. Denver, 111 Colo. 390, 142 P.2d 277 (1943); Richardson v. Missouri K.-T. R.R., 205 S.W.2d 819 (Tex. Civ. App. 1947).

46. Kauffman v. Meyberg, 59 Cal. App. 2d 730, 140 P.2d 210 (1943); State v. Cunningham, 174 Ore. 25, 144 P.2d 303 (1943).

47. State v. Thorp, 86 N.H. 501, 171 Atl. 633 (1934).

48. German Theological School v. Dubuque, 64 Iowa 736, 17 N.W. 153 (1883); see also 2 BELLI, MODERN JURY TRIALS 1223 (1954).

The use of motion pictures in evidence has been sanctioned in this state.[49] But a greater degree of caution is required in admitting them because there is greater danger of fabrication existing than in admitting still pictures. In *Morris v. E.S. Du Pont de Nemours & Co.*[50] the court said:

> "We conclude that the basic principles which govern the admission of still pictures govern the admission of motion pictures also; for after all, the motion picture is but a series of still pictures."

However, to be admissible, motion pictures should be edited in the absence of the jury. Excluding motion pictures because they contain irrelevant sequences has been done. Thus, it is within the trial court's discretion to admit motion pictures just the same as if they were still pictures.

### BLACKBOARDS

The use of blackboards has not, as yet, been approved by the Missouri appellate courts; but the trial courts have allowed their use from time to time. There are two possible ways in which the blackboard can be used in a trial. One possible use is the sketching of diagrams,[51] the other is the writing of facts and figures to aid the jury in gaining more of an over-all picture of the whole case. Undoubtedly, the former use would be sanctioned. In *Collins v. Leahy*,[52] the court permitted a rough pencil sketch made by plaintiff's counsel to be shown to the jury. The witness indicated the occurrences on this diagram. The court said in regard to the drawing: "It would tend to clarify and give the jury a better understanding of the witness' testimony." In view of the *Collins'* case, it would seem that a sketch on a blackboard would be admissible as well. The second use of the blackboard might be admissible for the same reason. The writing of the names of witnesses, the amount of damages and other pertinent facts would aid the jury in recalling all of the facts in the case. In school we were all taught to remember and understand things from the use of the blackboard. It would seem quite proper to allow its use in a matter as important as a law suit. Other jurisdictions have seen fit to allow its use.[53]

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49. Morris v. E. I. Du Pont de Nemours & Co., 346 Mo. 126, 139 S.W.2d 984, 129 A.L.R. 352 (1940); Philippi v. New York, C. & St. L. R.R., 136 S.W.2d 339 (Mo. App. 1940).

50. *Supra* note 49.

51. If the evidence goes up on appeal, the diagram should be made part of the record by photograph. Paden v. Morris & Co., 251 S.W. 424 (Mo. App. 1923).

52. 102 S.W.2d 801 (Mo. App. 1937).

53. State v. Ryno, 68 Kan. 348, 74 Pac. 1114 (1904); Dryer v. Brown, 52 Hun. 321, 5 N.Y. Supp. 486 (4th Dep't. 1889); Birks v. East Side Transfer Co., 241 P.2d 120 (Ore. 1952).

### SOUND RECORDINGS

Missouri has allowed the use of sound recordings as evidence in *State v. Perkins*.[54] Here, a criminal confession of one accused of rape was played back for the jury. In reaching the decision, Judge Leedy, speaking for the court, stated that the principle involved here is the same as involved in admissibility of talking motion pictures. His opinion further stated that as the proper foundation had been laid by proof of the use of the method of recording the accused's voice, the recording was properly received. Other states sanction the use of recordings in court.[55]

### CONCLUSION

Demonstrative evidence is undoubtedly a valuable asset to the trial lawyer, to the court, and to the jury. Its use should be advocated so that a clearer understanding of the facts can be had by all concerned. Melvin Belli, in speaking of the value of demonstrative evidence stated:

*"We want a verdict of fact and not a verdict of confusion."*[56]

IKE SKELTON, JR.

54. 198 S.W.2d 704 (Mo. 1946).
55. People v. Dabb, 32 Cal. 2d 491, 197 P.2d 1 (1948); Boyne City G. & A. R.R. v. Anderson, 146 Mich. 328, 109 N.W. 429 (1906); State v. Genemer, 235 Minn. 72, 51 N.W.2d 680 (1951); State v. Slater, 36 Wash.2d 357, 218 P.2d 329 (1950).
56. From an address by Melvin Belli before the Idaho State Bar, July 11, 1952.