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PRACTICE AND PROCEDURE IN MISSOURI*

JOHN S. DIVILBISS**

I. PLEADINGS

A. *Affirmative Defense—Imputed Negligence*

Petitions and answers are normally filed months before trial and often before the lawyers have completed their investigations. Going to trial without re-examining the pleadings has its perils.

In *Siemes v. Englehardt*,¹ plaintiff, an employee of Union Electric, was a passenger in a company truck being driven by a subordinate. The truck collided with defendant's automobile and plaintiff sued for his personal injuries. Defendant denied negligence and alleged the affirmative defense of contributory negligence. After a verdict for plaintiff, defendant appealed, complaining that plaintiff's verdict-directing instruction ignored the defense of *imputed* negligence. Defendant argued that the truck driver was negligent and, since the truck driver was plaintiff's subordinate, his negligence should be imputed to plaintiff.

The court held that defendant's answer did not put *imputed* negligence in issue, and therefore an instruction ignoring this defense was not error.

Missouri Rule of Civil Procedure 55.10 specifies twenty separate defenses which must be raised affirmatively; it also requires an affirmative plea as to "any other matter constituting an avoidance or affirmative defense." Imputed negligence, though not one of the twenty enumerated affirmative defenses, is included in this residual clause.

Defendant's affirmative plea of contributory negligence was directed at plaintiff's conduct and not that of the truck driver. Defendant's denial likewise failed to put imputed negligence in issue. A general denial

puts in issue all the material allegations necessary to support the plaintiff's case, [and] the defendant may prove any fact which goes to show that the asserted cause of action never had legal existence.

*This article contains a discussion of selected cases appearing in Volumes 345-356, South Western Reporter, Second Series.

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1. 346 S.W.2d 560 (St. L. Ct. App. 1961).

In other words, if the fact is one which tends to refute what the plaintiff himself is bound to prove in the first instance, it is competent to be shown as a general denial; . . . where the defendant intends to rest his defense on some fact not included in the allegations necessary to support plaintiff's case . . . he must plead the same specifically or affirmatively in his answer as a condition to the admissibility of such evidence at the trial.²

Plaintiff's case required no proof concerning the truck driver's conduct. If defendant wanted to inject the truck driver's negligence as an issue, an affirmative plea was required. Such a defense, if successful, would "avoid" liability as distinguished from destroying an element of plaintiff's prima facie case.

B. Striking Pleadings

A judge may sometimes strike the answer of a misbehaving defendant, but non-payment of attorney fees and child-support *pendente lite* is not such behavior as to justify this harsh action. Such was the holding in *Richman v. Richman*.³

The reluctant defendant, who suffered a default judgment after his answer was stricken, raised the cry that due process of law had been denied, and the Missouri Supreme Court agreed. The principle is neither new nor novel,⁴ but the decision prompted a *Missouri Bar Journal* comment that, "[T]he reasoning is broad enough to cast doubt upon Civil Procedure Rule 61."⁵

Rule 61 authorizes a court to strike the pleading of a party who fails to: (1) answer interrogatories, (2) appear before one who is to take his deposition, (3) produce documents for inspection, (4) permit inspection of books or premises, or (5) submit to a physical examination. The fear that the *Richman* case has cast doubt on the validity of Rule 61 seems unfounded, for the right to strike pleadings depends on the offense.

One of the earliest cases touching the due-process question was *Hovey v. Elliott*,⁶ decided by the United States Supreme Court in 1897. There the defendant refused to pay a fund of money into court and the trial judge struck his answer. The Supreme Court said that this denied defend-

2. *Farley v. Farley*, 181 S.W.2d 671, 673 (St. L. Ct. App. 1944).

3. 350 S.W.2d 733 (Mo. 1961).

4. See Annot., 62 A.L.R. 660, 667 (1929).

5. 18 J. Mo. B. 64 (1962).

6. 167 U.S. 409 (1897).

ant due process of law, for although defendant was in contempt of court, he was entitled to offer evidence on the merits of his case.

Striking the pleadings of a party who refuses to permit discovery is entirely different. In *Hammond Packing Co. v. Arkansas*,⁷ the defendant failed to produce required witnesses and records for pre-trial discovery. The trial judge struck his answer and entered a default judgment. Defendant, citing *Hovey v. Elliott*, argued that due process was denied. The Supreme Court said:

Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey v. Elliott*, and the power exerted in this, is as follows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.⁸

The Court continued:

As the power to strike an answer out and enter a default . . . is clearly referable to the undoubted right of the lawmaking authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation.⁹

The due process problem has never created much difficulty in Missouri. The issue was raised in 1912 when a trial judge struck the answer

7. 212 U.S. 322 (1909).

8. *Id.* at 350.

9. *Id.* at 353.

of a defendant who refused to give his deposition.¹⁰ Defendant argued that this action violated the due process provisions of both the federal and Missouri constitutions. The Missouri Supreme Court, quoting from *Hammond v. Arkansas*,¹¹ said: "[T]he power exerted below was like the authority to default or take a bill for confessed because of a failure to answer based upon a presumption that the material facts alleged or pleaded were admitted by not answering"¹²

This principle has been repeated in other opinions,¹³ and seems to be in no danger of being overturned at this time.¹⁴ The *Richman* case neither expressly nor by implication limits the right of a court to strike the pleadings of a party who refuses to permit discovery.

C. Special Damages

Rule 55.21 of the Missouri Rules of Civil Procedure states: "When items of special damages are claimed, they shall be specifically stated." The lawyer who fails to plead special damages will, on proper objection, be denied the right to introduce evidence of those damages.¹⁵ Just what damages are "special damages" has been a source of confusion, particularly in the personal injury field.

Two 1962 cases demonstrate the problem. In *Swan v. Stewart*,¹⁶ plaintiff, suing for personal injuries, tried to introduce proof that "traumatic

10. *Miles v. Armour*, 239 Mo. 438, 144 S.W. 424 (1912).

11. *Supra* note 7.

12. *Miles v. Armour*, *supra* note 10, at 448, 144 S.W. at 426.

13. In *State ex rel. Williams v. Buzard*, 354 Mo. 719, 190 S.W.2d 907 (1945) (en banc), the court said: "The right to examine the adverse party . . . and to compel him to answer, either in court or on depositions, both by penalties for contempt and by striking his pleadings . . . has long been established in this state." *Id.* at 724, 190 S.W.2d at 909.

In *Franklin v. Franklin*, 365 Mo. 442, 283 S.W.2d 483 (1945) (en banc), the court said: "The law is that upon oral or written interrogatories being properly propounded to discover relevant and material facts peculiarly and exclusively within the knowledge of the party, his refusal to answer justifies striking his pleadings." *Id.* at 447, 283 S.W.2d at 486.

See also *State ex inf. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909), *aff'd*, 224 U.S. 270 (1912); *Putney v. Du Bois Co.*, 240 Mo. App. 1075, 226 S.W.2d 737 (Spr. Ct. App. 1950).

14. A refusal to answer interrogatories going only to the issue of damages does not justify striking the answer, although it would justify excluding testimony on the secreted matter. See *Mitchell v. Watson*, 58 Wash.2d 206, 361 P. 2d 744 (1961), 37 WASH. L. REV. 175 (1962).

15. *Chawckley v. Wabash Ry. Co.*, 317 Mo. 782, 297 S.W. 20 (1927) (en banc); *Conner v. Kansas City Ry. Co.*, 298 Mo. 18, 250 S.W. 574 (1923); *Walquist v. Kansas City Ry. Co.*, 292 Mo. 34, 237 S.W. 493 (1922).

16. 353 S.W.2d 805 (K.C. Ct. App. 1962).

arthritis" and a "rheumatic condition" were caused by defendant's negligence. Defendant made timely objection but was overruled. On appeal the Kansas City Court of Appeals restated the time-worn rule that "the test as to whether or not plaintiff can introduce evidence of 'rheumatism' or 'traumatic arthritis' turns upon the question of whether or not those complaints are shown to be 'the inevitable and necessary result of the injuries alleged.' . . . It must be shown that the injuries not pleaded are the *necessary* result of the injuries alleged."¹⁷

Since plaintiff's petition had not alleged the arthritic and rheumatic conditions, and since those conditions do not *necessarily* result from the injuries plaintiff had alleged, the trial court erred in admitting proof of arthritis and rheumatism.

One week later the supreme court dealt with the same problem in *Erbes v. Union Electric Co.*¹⁸ Plaintiff, burned by a severe electrical shock, sued Union Electric and received a verdict. Defendant appealed alleging that the trial court erred in admitting medical testimony that "plaintiff suffered a lung 'blowout' which followed a pulmonary embolism and caused death to a certain part of the right lung, for the reason that said evidence was outside the scope of the pleadings."¹⁹ Plaintiff's petition does not appear in the decision, but the court said that "among other things the petition alleged that plaintiff's 'internal organs and body' were permanently injured."²⁰

For those who have floundered in the quagmire of "special damage" law, it is comforting to find the court confessing that "the decisions of the appellate courts of this state do not appear to be in strict harmony. . . ." To prove its point the court cites a long list of cases supporting plaintiff's argument, followed by a nearly equal list of cases supporting defendant's argument.

The court concluded that evidence of the lung damage was admissible under the broad plea of permanent injury to the "internal organs." Three reasons were given: "1. The petition alleged that plaintiff's 'internal organs' had been permanently injured and, of course, his lung is an internal organ; 2. no motion to make more definite and certain was filed by defendant; and 3. other evidence of the injury in question was admitted without ob-

17. *Id.* at 806.

18. 353 S.W.2d 659 (Mo. 1962).

19. *Id.* at 668.

20. *Ibid.*

jection prior to the admission of the evidence of which complaint is now made."²¹

The court's first reason is somewhat difficult to follow. If a plea of damaged "internal organs" permits proof of an injured lung because the lung is an internal organ, a plea of injury merely to the body should also suffice. The difficulty is that special damages are required to be "specifically stated" and a broad claim of injured internal organs is simply not very specific. The answer apparently lies in the court's second reason—defendant failed to request a more definite statement and thus waived the protection offered by rule 55.21.

The requirement that special damages be "specifically stated" is said to be to protect defendants from surprise at trial, but even an "unsurprised" defendant may on occasion keep out evidence of special damages not pleaded.

In *Ziervogel v. Royal Packing Co.*,²² decided by the St. Louis Court of Appeals in 1949, the plaintiff offered proof that her injury had caused high blood pressure. The defendant objected because the condition was not specifically pleaded. But the defendant was not surprised. Defendant's doctor had discovered the condition when he examined plaintiff, and plaintiff had reported the malady to defendant's claim agent long before trial. The trial judge admitted the evidence, but was reversed on appeal, the court holding that evidence of the high blood pressure was inadmissible, surprise or no surprise, because it had not been pleaded.

The court hinted that the outcome might have been different had plaintiff, at trial, requested leave to amend her petition to include the claim of high blood pressure. Missouri rule 55.53 permits a party to amend belatedly "by leave of court" and says that such "leave" shall be freely given when justice so requires.²³ As defendant was not "surprised," he was probably prepared to meet the issue. If so, justice would seem to have required that the amendment be permitted even though trial had begun.

Though the law is in a state of some confusion, lawyers may avoid most of the special damage problems. Plaintiffs can go over their medical reports before trial, making certain that every injury on which they will offer proof is specifically spelled out in the petition. If each injury is detailed, the plaintiff will not thereafter need to argue that some injury "naturally and necessarily" follows from something else. If some item of special dam-

21. *Ibid.*

22. 255 S.W.2d 798 (St. L. Ct. App. 1949).

23. Mo. R. Civ. P. 55.33.

age is accidentally omitted, plaintiff should ask leave to amend his petition to include it. Unless it is clear that defendant will be prejudiced by the late amendment, it should be granted.²⁴

Defendants should make liberal use of the motion for a more definite statement.²⁵ When a plaintiff pleads injuries to "internal organs," defendant should demand that plaintiff state precisely what internal organs were injured and the extent of the injury. Defendant can thereby get full notice of the claims plaintiff will make at trial.

II. DISCOVERY—SURVEILLANCE MOVIES

One thing certain to elevate the blood pressure of a trial lawyer is the subject of pre-trial discovery. Such terms as "sporting theory of justice," "trial by ambush," and "concealment to expose perjury" are tossed about with some emotion. And nothing produces the cry of "foul" more quickly than the surveillance photographer who stalks his prey in the hope of finding and filming some vigorous activity which belies the claimed injury. Counsel for both plaintiff and defendant recognize that the case of a little old lady, freshly bruised by a locomotive and claiming total paralysis, will be weakened by a surveillance movie showing her riding a bicycle.

Are plaintiffs entitled to know whether such "gum shoe" productions have been filmed? The Missouri Supreme Court recently said no.²⁶ The precise interrogatory under attack not only asked whether any photographs or movies had been made, but also demanded copies. The trial judge

24. Federal rule 15a and Missouri rule 55.53 both provide that when a party seeks leave to amend his pleading, "leave shall be given when justice so requires." In speaking of the federal rule, Moore says:

"[I]f objection is made to the trial of an issue not raised by the pleadings, an amendment is to be allowed to raise the issue, unless the objecting party can show that he would be *actually prejudiced*, and even in that case the court may permit the amendment and grant a continuance, so that the objecting party can meet the new issue, and thus obviate the prejudice which he would suffer if obliged to litigate the issue at that time."

3 MOORE, *FEDERAL PRACTICE* ¶ 15.02, at 805 (2d ed. 1948). The same philosophy appears in *Simpson v. Kansas City Connecting Ry. Co.*, 312 S.W.2d 113 (Mo. 1958) (en banc), *cert. denied*, 358 U.S. 825 (1958).

25. The courts on several occasions have said that if defendants do not think plaintiffs have pleaded their damages precisely enough, defendants should move for a more definite statement. See *Price v. Metropolitan St. Ry. Co.*, 220 Mo. 435, 119 S.W. 932 (1909); *Van Cleve v. St. Louis M. & S. E. Ry. Co.*, 124 Mo. App. 224, 101 S.W. 632 (St. L. Ct. App. 1907); *Fuchs v. St. Louis Transit Co.*, 111 Mo. App. 574, 86 S.W. 458 (St. L. Ct. App. 1905). In each of these cases plaintiffs successfully introduced evidence of injuries which did not *necessarily* result from the injuries pleaded.

26. *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22 (Mo. 1961) (en banc).

ruled that plaintiff could not have copies but was entitled to know whether photographs or movies had been taken. A preliminary rule in prohibition was then issued by the supreme court.

Defendant argued that the information requested was the attorney's work product, long protected.²⁷ The court agreed, saying:

Where the sole purpose of an inquiry is to procure the production of material which, if it is in existence at all, is privileged, we see no legitimate purpose in permitting the inquiry and prolonging the controversy. We have held that such photographs as are inquired about here would be privileged. We further hold that the inquiry as to whether defendant had taken photographs or movies of plaintiff during a seven year period was not a permissible inquiry.²⁸

The case is one of first impression in Missouri, and there is scant authority from other jurisdictions. The court acknowledged that two federal cases, *McCall v. Overseas Tankship Corp.*²⁹ and *Harris v. Marine Transp. Lines, Inc.*,³⁰ were "contrary in principle" to its decision. In the *McCall* case, plaintiff took the deposition of the third party defendant's attorney. The lawyer was required to tell whether he had any statements of witnesses and to identify certain documents under his control. There the court said: "The 'work product' doctrine does not apply to information sought as to whether there was such 'work product' but only to the information, if any, contained therein."³¹

In the *Harris* case, plaintiff requested copies of statements taken, and photographs of the accident scene and the equipment involved. The controversy centered on the right to examine. Plaintiff's right to determine the *existence* of these materials was apparently not in issue.

A related problem arose in Florida in 1960.³² There plaintiff was aware that a surveillance movie had been taken and at the pre-trial conference moved for its production.³³ Defendant refused, the trial judge ordered the

27. See for example *Hickman v. Taylor*, 329 U.S. 495 (1947); *State ex rel. Terminal Ry. Ass'n v. Flynn*, 363 Mo. 1065, 257 S.W.2d 69 (1953) (en banc).

28. *Supra* note 26, at 25.

29. 16 F.R.D. 467 (S.D.N.Y. 1954).

30. 22 F.R.D. 484 (E.D.N.Y. 1958).

31. *Supra* note 29, at 469.

32. *Collier v. McKesson*, 121 So.2d 673 (Fla. App. 1960).

33. Plaintiff relied on *Burton v. Weyerhaeuser Timber Co.*, 1 F.R.D. 571 (D.Ore. 1941). In that case plaintiff claimed an injury from muriatic acid negligently left in a carboy by defendant. A new trial was granted because defendant failed to disclose at the pre-trial conference his plan for a jury demonstration

movie delivered, and the appellate court granted certiorari. The Florida Court of Appeals, noting the absence of "any controlling authorities bearing directly on" the problem before it, ruled that the movie was a work product which need not be produced.

Courts have, on occasion, ordered the production of photographs for inspection by opposing counsel, but not surveillance pictures.³⁴ In general the photographs ordered produced were those taken shortly after an accident, giving one party information not available to his opponent from any other source. The surveillance movie is an entirely different problem. A plaintiff, better than anyone else, knows the degree of his disability. He needs no preview of coming attractions to make out his case. Not all "surprise" frustrates justice. It is a weapon available to both plaintiffs and defendants to expose exaggeration and fabrication.

showing that muriatic acid could not burn human flesh. The trial judge said: "Parties are expected to disclose all legal and fact issues which they intend to raise at trial, save only such issues as may involve privilege or impeaching matter. As to these two exceptions disclosure may be made to the judge conducting the pre-trial hearing without disclosure to opposing counsel, and a ruling will be made on the exception claimed." *Id.* at 572.

34. In *Lacoss v. Town of Lebanon*, 78 N.H. 413, 101 Atl. 364 (1917), plaintiff was injured by the breaking of a hoisting apparatus which was shortly thereafter photographed by defendant. The court held that plaintiff was entitled to discover defendant's photograph, although it was taken in preparation for trial. The court said: "The test . . . is to inquire whether the facts they evidence are relevant to the plaintiff's cause of action or whether they are merely matters of defense." *Id.* at 365. Under such a test surveillance movies could not be discovered.

In *De Vito v. New York Cent. Ry. Co.*, 146 N.Y.S.2d 545 (Sup. Ct. 1955), *aff'd*, 159 N.Y.S.2d 468 (App. Div. 1957), defendant's railroad train collided with plaintiff's decedent. Defendant purchased photographs of the accident scene from a third party. The court held plaintiff was entitled to discover these photographs.

In *Howe v. McBride*, 193 Misc. 271, 84 N.Y.S.2d 283 (Sup. Ct. 1948), the plaintiff was involved in an auto accident with defendant. All occupants in plaintiff's car were immediately taken to a hospital where they remained for a long period. Before the vehicles were moved, defendant had photos taken of the scene. Plaintiff was permitted to examine the photos because "the opportunity to secure such photographs will never again exist." *Id.* at 273, 84 N.Y.S.2d at 284-85.

In *Shields v. Sobelman*, 64 F. Supp. 619 (E.D.Pa. 1946), plaintiff was injured by a winch. Defendant's attorney, anticipating litigation, took a photographer to the scene and supervised the photographing of certain parts of the machine which had a bearing on liability. Plaintiff asked permission to inspect the photos, and the court, with some hesitancy, granted his request. The court said: "In so holding, I am not ruling generally that photographs taken by a lawyer, or under his direction and supervision, are never subject to privilege." *Id.* at 620.

In *Cogdill v. Tenn. Valley Auth.*, 7 F.R.D. 411 (E.D.Tenn. 1947), plaintiff was permitted to examine and copy photographs taken by defendant at the scene of an auto accident, because due to "the circumstances of the accident and events immediately following, defendant was in an advantageous position to take photographs . . ." *Id.* at 415.

III TRIAL-ARGUMENT

One of the most effective ways to argue damages for pain and suffering is to request an hourly or daily rate of compensation. A modest allowance of fifty cents an hour produces \$175,000 in damages for the plaintiff with a forty year life expectancy. It is the very effectiveness (or over-effectiveness) of the argument which causes some courts to prohibit its use.⁸⁵

The first Missouri decision on the subject came in 1958, in *Faught v. Washam*.⁸⁶ There, counsel for plaintiff asked the jury to suppose they were offered a lifetime job, working seven days a week, twenty-four hours a day, with no vacations, and pay of three dollars a day. The job, counsel said, was simply "to suffer [plaintiff's] disability." On appeal, the supreme court said:

Whatever may be the cold logic or academic theory of the matter, the ungilded reality is that such argument is calculated and designed to implant in the jurors' minds definite figures and amounts not theretofore in the record (and which otherwise could not get into the record) and to influence the jurors to adopt those figures. . . . *If an argument* of this character is permissible and proper, it would be just as logical, and equally as fair, to permit "expert witnesses" to evaluate pain and suffering on a per diem or per hour basis⁸⁷

Defendant also complained of the admission of several colored photographs of plaintiff's injuries and of the argument about the high salaries paid baseball players—the point being somewhat irrelevant, defendant said, as plaintiff was a service station attendant. In reversing plaintiff's judgment, the court said: "Without undertaking to determine whether any single

35. The Supreme Court of New Jersey, in *Botta v. Brummer*, 26 N.J. 82, 101, 138 A.2d 713, 724 (1958), said:

Can defense counsel argue that pain and suffering are worth only \$2.50 per day or \$1 or any lesser sum? By doing so, he fortifies his adversary's implication that the law recognizes pain and suffering as having been evaluated and as capable of being evaluated on such basis When the inequity of such trial procedure is considered along with the obvious impropriety of attempting to substitute unproven, speculative and fanciful standards of valuation for evidence, the duty to adjudge the illegality of the proposal in its entirety is plain.

Among the jurisdictions which have ruled on the question, about half permit such arguments. See 45 MARQUETTE L. REV. 289 (1961); 23 OHIO ST. L. J. 573 (1962); Annot., 60 A.L.R.2d 1347 (1958).

36. 329 S.W.2d 588 (Mo. 1959).

37. *Id.* at 603.

matter of which we have treated, standing alone, would constitute reversible error, . . . we are firmly of the opinion that, in their totality, they do.”³⁸

The mathematical formula argument was discussed in such strong terms as to leave little doubt that it would have produced a reversal in itself. Despite this warning, plaintiffs still make occasional excursions into this dangerous but appealing area.

The recent cases of *Corley v. Andrews*³⁹ and *Willis v. Rivermines IGA Supermarkets*⁴⁰ represent rather ingenious efforts to avoid the effect of the *Faught* case, while enjoying the benefits of a mathematical formula argument. In the *Corley* case plaintiff asked a thousand dollars for past pain and suffering and another thousand dollars for future pain and suffering. Then came the mathematical formula. Plaintiff's attorney produced a large cardboard on which he wrote plaintiff's life expectancy multiplied by fifty cents a day for "disability to plaintiff's thumb," fifty cents a day for "inability to use his wrist," and two dollars a day "for his bad heart and inability to do a full day's work."

Defendant objected to the cardboard display, but not the mathematical formula, and his objection was overruled. The decision points out that while the cardboard figures totaled \$26,000, the jury awarded only \$10,000, and defendant did not complain that the verdict was excessive. Under these circumstances, the court said, there was no prejudicial error in permitting the use of the cardboard calculations.

One month after the *Corley* case the problem arose again in *Willis v. Rivermines IGA Supermarkets*.⁴¹ Again the mathematical formula was applied to physical disability rather than pain and suffering. Plaintiff alleged that her injuries prevented or interfered with her housework and ability to dress herself. Plaintiff had a life expectancy of eighteen years, or 6,570 days, and her lawyer argued that the jury should award at least two dollars a day for plaintiff's disability. Defendant objected that the argument was improper and requested that the jury be discharged. The request was denied. The jury awarded plaintiff \$2,400, or less than one-fifth the computed figure.

Defendant, relying on the *Faught* case, appealed because of the mathematical formula argument. But again there was no protest that the verdict

38. *Id.* at 604.

39. 349 S.W.2d 395 (St. L. Ct. App. 1961).

40. 350 S.W.2d 437 (St. L. Ct. App. 1961).

41. *Ibid.*

was excessive. The court said: "[T]he argument, complained of by defendant, could have affected the issue of damages only and if we assume the court erred in its ruling it was harmless."⁴²

If it is improper to use a mathematical formula for computing pain and suffering, it seems equally improper to use such a formula for computing damages for the physical disability of a thumb, wrist or other anatomical member, except where special expenses or lost earnings can be shown. The *Corley* and *Willis* cases leave this question unanswered, but the risk of reversal is such that plaintiffs may hesitate to test the issue further.

42. *Id.* at 444.