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TORTS IN MISSOURI*

GLENN A. MCCLEARY**

In reviewing the decisions in the area of Torts by the Missouri Supreme Court, appearing in the South Western Reporter beginning with Volume 357 and extending through Volume 370, it seems to the writer that there was a larger number of hard fought cases than usual, causing much re-examination of what previously had been considered rather well-settled law applicable to the subject-matter, and resulting in vigorous concurring and dissenting opinions. Furthermore, the end of the rope has been reached in the use of certain expressions in instructions on the burden of proof, so that lawyers should re-examine their files on this instruction to avoid the possibility of reversible error in submitting them. These general observations will be considered more specifically in their application to a brief analysis of the cases which follow.

I. WIFE'S ACTION FOR LOSS OF CONSORTIUM

Legislation enacted in Missouri in the nineteenth century to give married women full legal status did not fully achieve this purpose until 1963, in *Novak v. Kansas City Transit, Inc.*,¹ when the supreme court (en banc) held that a wife could maintain an action for the loss of consortium caused by defendant's negligent injury of her husband. At common law, the husband had a right of action to recover for the loss of the consortium of his wife due to injuries negligently caused to the wife, and our courts had held that the Married Women's Act² had not affected his interest. However, not until 1950 did the courts of this country begin to recognize that in providing by legislation for the full legal status of married women, and equal rights as between husband and wife, the wife had a corresponding interest in the society of her husband which may be invaded by a negligent defendant in injuring her husband. The tide of judicial decision is now

*This article contains a discussion of selected decisions of the Missouri Supreme Court which appear in Volumes 357 to 370, inclusive, of the South Western Reporter, Second Series.

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1. 365 S.W.2d 539 (Mo. En Banc 1963).

2. Sections 451.250-300 RSMo 1959.

sweeping away this inequality. Courts had long recognized the interest of the wife in her husband's society and comfort where the defendant had alienated her husband's affections, but the law has always given more protection against intentional acts of a defendant.

This is not the place for an extensive review of the reasons given by the common law for recognizing the husband's legally protected interest in the consortium of the wife and for denying a corresponding interest in the wife, for injuries negligently caused to the other spouse. These are reviewed in the *Novak* opinion and were extensively considered by the court in 1918, in the case of *Bernhardt v. Perry*,³ also en banc, which had declared the law in Missouri on this point until the recent opinion. In *Bernhardt*, there was a strong dissenting opinion in which another member of the court joined. Of this case, the majority opinion in *Novak* says, "We are of the view that the majority opinion in the *Bernhardt* case is clearly erroneous and manifestly wrong and should no longer be followed."

In the *Novak* decision three judges dissented. The dissenting opinion contended that this equality between the spouses should be achieved by extinguishing the husband's action for loss of consortium, as a consequence of the emancipation of women by the Married Women's Act. Fears were expressed that recognition of this interest of the wife to recover for negligently produced injuries to her husband "would loosen a flood of litigation, that eventually the same rights would undoubtedly be accorded to children, parents, and other relatives," and that holders of liability insurance policies will pay higher premiums.

The case evidently was hard fought throughout and, in re-examining the problem, the prevailing opinion shows that loss of consortium to the society of the husband means more than loss of support. The obstacles to the wife's action were in the first place judge-made in their earlier interpretation of the Married Women's Act. Thirty-five years later the conviction of the majority of the court is that the former interpretation was wrong. It is a significant decision, too, in that it shows that judge-made law can adapt itself to changing times and circumstances without the interposition of legislation. In weighing and balancing all the arguments for and against

3. 276 Mo. 612, 208 S.W. 462 (En Banc 1918). For the reasons advanced by courts in denying the wife this right of action, see Lewis, *Three New Causes of Action? A Study of the Family Relationship*, 20 Mo. L. REV. 107 (1955); and the annotation "Wife's right of action for loss of consortium," 23 A.L.R.2d 1378 (1952).

following the law as pronounced in the *Bernhardt* case, the majority opinion frankly states that, "It seems to us that less harm would result from overruling the *Bernhardt* case than from further withholding a wife's right to recover for loss of consortium due to the negligent injury of her husband."

The opinion recognizes that where the husband recovers full compensation for his own injuries, his wife shares to an extent in the benefits of his recovery and should not recover any of the same damages that he has recovered, but further observes that, "Such result may be avoided by delineating accurately the items properly includable in the husband's damages and by permitting the wife in her separate action to recover for the loss of only those elements in consortium which, under the facts of a particular case, represent separate and distinct losses to her." The dissenting opinion shows concern for the ability of trial judges to instruct on the items of damages properly recoverable in the wife's action, so as to avoid damages recoverable by the husband for his own personal injuries, and thus the danger of double damages: "The judge who is able to avoid double damages by 'accurately delineating' the items that the husband has recovered or will recover in another action in another court, and correctly instruct the jury on the items of damages properly recoverable in this particular case will indeed need the wisdom of a Solomon, not to mention the utter confusion of the juries."

II. NEGLIGENCE

A. *Duties of Persons in Certain Relations*

1. Possessors of land

In two cases an effort was made by the plaintiffs to extend the scope of the attractive nuisance doctrine in Missouri. In *Cox v. Gros*,⁴ the injuries were sustained by a trespassing five-year-old boy "on a piece of cut, sharp, pointed and jagged marble, created and maintained by defendant." In

4. 360 S.W.2d 691 (Mo. 1962). The case did not come within the attractive nuisance doctrine for the reason that the plaintiff did not plead that the thing which caused the injury (the marble) was the thing which attracted him onto the defendant's premises, and for the further reason that the doctrine in Missouri is limited to instrumentalities and artificial conditions which are inherently dangerous, as contrasted to dangers created by mere casual negligence. Neither did the case come within the hard-by exception as applied to dangers to trespassing children hard-by public alleys and lanes.

Baker v. Praver and Sons, Inc.,⁵ a four and one-half year old child drowned in a pool of water which had been formed by bull-dozing and grading "raw farm land" for a subdivision which the defendant was developing. In the former case the complaint was dismissed for failure to state a cause of action and in the latter case there was a directed verdict for the defendant. Both cases were affirmed on appeal. The two opinions, by Commissioner Barrett, when read together show the present theories in Missouri for recovery by trespassing children for injuries received, with their limitations. Any search in the Missouri law on this problem may well begin with these two cases, and much time saved. A survey article is not the place to set forth these various theories of liability or comment upon them, but these two decisions should be noted because they do review the present Missouri law in this area.

In *Boll v. Spring Lake Park, Inc.*,⁶ the action was by a patron against the proprietor of a swimming pool for injuries received when he dived straight down into the pool from the side, but within the area roped off around the end of the pool where the diving board was located. At this place the water was approximately three feet deep and so dirty that the bottom could not be seen. The plaintiff's neck was broken, resulting in permanent paralysis from his shoulders down through his body. The negligence alleged was the failure to warn of the danger of diving in the pool at the place he did when the water was so dirty and unclear that he could not see the bottom. It was held that the proprietor who charged admission to use the diving pool had a duty to see that the water was of sufficient depth to make it reasonably safe for the purpose, or where it was not safe, to warn the patrons of the hazard where there was a latent condition of danger. Whether the plaintiff was contributorily negligent under the attendant circumstances was held to be a jury question.

2. Automobiles

In an en banc decision, in *Miles v. Gaddy*,⁷ the court reversed a judgment for the plaintiff for injuries received in a collision of two automobiles, where plaintiff's instruction submitted the failure to control a motor vehicle

5. 361 S.W.2d 667 (Mo. 1962). The attractive nuisance doctrine in Missouri is not applicable to ordinary water hazards, such as ponds, water-filled quarries, pools of water in creeks and natural water courses.

6. 358 S.W.2d 859 (Mo. 1962).

7. 357 S.W.2d 897 (Mo. En Banc 1962).

as a ground of specific negligence. The court held that this was a charge of general negligence and constituted a roving commission. The opinion also observed that although an instruction submitting the failure to control a motor vehicle as a ground of specific negligence has been criticized and condemned for many years, "Nevertheless, the use of this form of submission persists and seems to be increasing." The court held that the essential fact which should be hypothesized in the verdict-directing instruction is the antecedent act or omission which caused the loss of control of the motor vehicle. The cause was remanded.⁸

Although Section 301.250(3) RSMo 1959, forbids dealer license plates to be displayed on any motor vehicle loaned to others, it was held, in *Brown v. Wooderson*,⁹ that the violation of this statute does not make the dealer vicariously liable for the negligence of one to whom a car with the dealer's license plate has been loaned. The car involved in the accident had been supplied to a customer of the defendant's garage while the customer's car was being repaired, so that he might drive to and from his work in another town. It seems clear that this statute was not designed to prevent injuries of this nature to such persons as the plaintiff, so as to establish negligence on the part of the supplier.

3. Carriers

In *Vanacek v. St. Louis Public Service Co.*,¹⁰ the plaintiff, a police officer, sustained injuries when the motorcycle he was riding struck a depression in the street, causing him to lose control and fall off. The depression in the surface of the street between the rails had existed before the streetcar company had abandoned service and trackage, and before the city had taken over the tracks and had assumed responsibility for the resurfacing of the abandoned tracks. The agreement with the city provided that the title to the tracks, including the rails, ties, and other track fixtures, were vested in the city and "the City assumes full possession and control thereof (this agreement being construed as a quitclaim deed thereto), and from said date forward the Company and its successors and assigns are relieved

8. In *Treon v. City of Hamilton*, 363 S.W.2d 704 (Mo. 1963), the action of the trial court in granting plaintiff a new trial after verdict for the defendant, where there was a submission of issue of failure of motorist to keep automobile under control without specifying details, was affirmed. This case was tried before the opinion in *Miles v. Gaddy*, *supra* note 7, was handed down.

9. 362 S.W.2d 525 (Mo. 1962).

10. 358 S.W.2d 808 (Mo. En Banc 1962).

of all future liability of the maintenance, repair or removal of said tracks, and all paving obligations incidental thereto. . . ." The court (en banc) held that the relationship between the carrier and the public had come to an end, and the defendant no longer owed a duty to anyone to repair the street along the streetcar tracks: "It no longer owned or used the tracks and had no right, authority or duty to make any alteration, change or repair in the pavement of the street where they were. The city had taken over the tracks, become the owner of the rails, and it alone had the right, authority and duty to repair the street and keep it in good condition." The analogous principles relating to the liability of a vendor of land after conveying title to the vendee, as to conditions of disrepair existing at the time of the conveyance, were considered applicable to the situation presented in the instant case.¹¹

4. Landlord and tenant

In *Begley v. Adaber Realty & Investment Co.*,¹² the lessor corporation agreed to lease a food store which was to be built by a general contractor, organized as a partnership. A subcontractor had installed the overhead heating duct according to the plans of the general contractor. Three years later, the duct fell on the plaintiff while he was a customer in the store. For the injuries sustained, plaintiff brought this action against the construction contractors, on the theory that the ducts were so defectively attached to the ceiling of the structure as to be dangerous to the safety of customers on the premises, and that the defects were so latent that a reasonably careful inspection by the lessee would not have disclosed them, but were known to the construction contractor, as one of the partners was an architect and had closely supervised the subcontractor's work. Against the lessor, the plaintiff's theory of liability was that, with constructive knowledge of the insecure installation, it had permitted the lessee to open the store to the public without informing the lessee of the dangerous condition, a condition which was not known or discoverable by the lessee. A verdict was affirmed against both defendants. The lessor was

11. To hold the vendor liable for injuries resulting from conditions of disrepair after the vendee has taken possession, it must be shown that the vendor knows of the conditions of disrepair and the vendee does not have this knowledge, and the vendor conceals it or fails to warn the vendee when there is reason to believe that the vendee will not discover it, or realize the risk if he does discover it, by the inspection which he is held to make in buying the premises.

12. 358 S.W.2d 785 (Mo. 1962).

charged with notice of the latent danger due to the total blending of the corporate interests of the contractor partnership and the lessor corporation which owned the building. The evidence showed that the two sole members of the contractor partnership were the controlling and principal stockholders and president and secretary-treasurer of the lessor corporation.

Violation of a statute designed to prevent injuries of the kind that occurred to persons in the plaintiff's position is usually interpreted by courts to establish a standard of conduct, the breach of which is negligence per se. In *Edwards v. Mellen*,¹³ the plaintiff had sustained injuries from a fall on the stairway of the defendant's apartment building, allegedly due to faulty lighting. The evidence showed that the bulb which supplied lighting of the stairway landing, in compliance with a city ordinance requiring lighting of a stairway landing in the building, was burning shortly before the plaintiff fell. Daily inspections of the stairway lighting were made by the defendant. An inspection at four o'clock in the afternoon (the fall occurred shortly before 7:30 o'clock in the evening of the same day) showed the bulb was burning and there was evidence that it was burning within fifteen minutes before plaintiff fell. The trial court had given an instruction for the plaintiff that the failure to comply with the minimum requirements of the ordinance constituted negligence as a matter of law (per se). On appeal by the defendants, the question presented was whether there can be implied exceptions for failing to comply with an ordinance requirement, or whether the duty created by the ordinance is an inflexible, hard and fast rule, for which there is no excuse for violation. The court held that the burning out of a light bulb under these circumstances was wholly without defendant's fault and made compliance with the ordinance impossible at the moment of the injury. Therefore, it was prejudicially erroneous to instruct that violation of the ordinance constituted negligence as a matter of law, it being a jury question whether or not the defendant was negligent under these circumstances. The opinion finds support in the tendency to construe statutes, so worded as to appear universally applicable, as containing implied exceptions where obedience becomes substantially impossible.

5. Municipal corporations

In *Taylor v. Kansas City*,¹⁴ the plaintiff, a child of seven years and

13. 366 S.W.2d 317 (Mo. 1963).

14. 361 S.W.2d 797 (Mo. En Banc 1962).

nine months, sustained injuries when he accidentally fell into a dry wading pool in a city park. While playing ball on an adjacent playground of a public school, he walked backward to catch a ball which was batted or thrown in his direction but over his head. After stepping over the curb-line of the school grounds, he walked backward at least 19 feet until he bumped against the wall of the pool and tumbled backward into it, his head striking the bottom. The pool and that portion of the top wall extending above the level of the paved area surrounding it was made of white cement, which made the pool readily distinguishable from the darker pavement surrounding it. The question was whether the plaintiff had made a submissible case of negligence on the part of the city in maintaining the empty wading pool in a municipal park without a "guard, wall or fence around said pool." The trial court, on motion of the defendant, set aside a judgment for the plaintiff, on the ground that error was committed in overruling defendant's motion for a directed verdict filed at the close of all the evidence, and entered judgment for the defendant. The court en banc in affirming this judgment observed: "The fact that the school was located adjacent to the park is of no significance, nor did that fact enlarge the city's duty. The park itself carried an open invitation to all children to use its facilities. But to hold the city liable under the facts shown in this case would, in effect, make it an insurer of the safety of all children in the park irrespective of how they get hurt, whether in climbing a fence, falling from a swing, a tree, down a decline, tripping over a curb, or colliding with any obstacle while walking or running backward, if an inventive pleader and a sympathetic jury could conceive of a means by which the casualty could have been prevented, however impracticable it might be."

6. Humanitarian negligence

The decisions predicated on the humanitarian doctrine are not included in this survey, since it is believed that a closer study of the humanitarian cases should be made in a subsequent article in the *Review* devoted solely to the administration of that doctrine.

B. *Res ipsa loquitur*

In two of the three en banc decisions in the area of *res ipsa loquitur* law within the year under review, the court reconsidered some of its previous rulings.

In *Fairley v. St. Louis Public Service Co.*,¹⁵ the plaintiff while a passenger on defendant's bus, in sliding over from the inside of the seat to the aisle in preparing to leave the bus at the next stop, came in contact with the jagged edge of a metal strip supporting the bus seat, causing a cut on her leg. The plaintiff's evidence being specific on the question of what caused the injury, it was held by the court en banc that the trial court had erred in submitting the case on the theory of the *res ipsa loquitur* doctrine. This decision follows well settled Missouri law on this point.

Seemingly sensitive to substantive federal case law that any demonstrated negligence of the defendant which "played a part" in the injury is sufficient to make a submissible case under the Federal Employers Liability Act, the court may have injected some confusion into what have heretofore been considered well established principles of pleading, proving and submitting instructions under the *res ipsa loquitur* doctrine, where the plaintiff has pleaded and proved specific negligence and has even tendered an instruction on specific negligence. In *Marquardt v. Kansas City Southern Ry. Co.*,¹⁶ the action under that Act was for injuries sustained by the plaintiff who was injured while engaged in servicing a diesel locomotive. When plaintiff released an exhaust valve, a horizontal bleeder pipe started to whirl around rapidly, making a sound like a jet plane. In starting to run from this frightening situation, plaintiff slipped and fell due to wet, slick clay. In his petition he alleged negligence under the *res ipsa loquitur* doctrine and in another paragraph pleaded a separate and additional act of negligence in furnishing an unsafe place to work. Plaintiff offered instructions on both theories, but the trial court refused his instruction on specific negligence in failing to furnish a safe place to work by reason of the presence of the wet and slippery clay, and gave plaintiff's instruction based upon the *res ipsa loquitur* theory.

In affirming the trial court's refusal of the offered instruction on specific negligence, the majority opinion recognized that "The difficulty posed in this case is that the totality of the facts involved two successive acts or occurrences of alleged negligence, each separate and distinct from the other" and that "the problem is not free of difficulty," but held that "the allegations of specific negligence in failing to furnish plaintiff a safe place to work (and referring to wet, slick clay) should not and do not

15. 362 S.W.2d 549 (Mo. En Banc 1962).

16. 358 S.W.2d 49 (Mo. En Banc 1962).

affect his right to submit a *res ipsa* theory on the already completed negligence alleged in the sudden and violent revolving of the pipe." The opinion carefully limits its affirmance of the action of the trial court to the peculiar facts of this case, while still making a decided effort not "to impair in any way the general rule that the pleading or precise proof of specific negligence constitutes a bar to the submission of general negligence as to the same act or occurrence or as to an occurrence which the specific negligence explains."

To appreciate fully the problem involved, it is highly instructive to read the carefully reasoned dissenting opinion of Judge Dalton which vigorously criticises the majority opinion: "We believe that the writing of such an exception into the established law of this state will result in unlimited confusion and misunderstanding; and that it will cause the members of the Bar of this state an unending amount of grief and difficulty. In our opinion the record of this case provides no basis for such an exception to the general rules."

Speculation may be indulged that the so-called exception to well settled principles in this phase of *res ipsa loquitur* law in Missouri, as applied in this case by the majority opinion, will be restricted to situations under the Federal Employers Liability Act.

The court en banc decided, in *Wise v. St. Louis Public Service Co.*,¹⁷ "in the interest of the proper administration of justice," to eliminate, from an instruction on the burden of proof in a case submitted on the *res ipsa loquitur* theory, the clause "you should not find the defendant was negligent from the mere fact of the occurrence shown by the plaintiff's negligence" or language to that effect (*italics added*). The court states that this phrase in a burden of proof instruction tends to confuse, since "The *res ipsa loquitur* doctrine is based upon the theory that a plaintiff is entitled to have his case submitted to the jury on the theory that the occurrence justifies the inference of negligence." The case was reversed and remanded for the reason that the trial court was in error in refusing to give the offered burden of proof instruction on another ground. Earlier cases approving this instruction or similar instructions were overruled and are no longer to be followed, although the names and citations of these overruled cases were not given. The ruling in this case becomes effective from the date of

17. 357 S.W.2d 902 (Mo. En Banc 1962). Also see *Thompson v. Vatterott Northwest Investment Co.*, 367 S.W.2d 532 (Mo. 1963).

the publication of this opinion but does not affect cases tried prior to this publication.

The full effect of this holding may be somewhat weakened by the division of the court: the opinion was written by Chief Justice Westhues; Judge Eager concurs; Judge Storkman concurs in a separate opinion; Judge Leedy and Judge Hollingsworth concur in the result; Judge Hyde concurs in the result in a separate opinion; and Judge Dalton concurs in the result and concurs in the separate opinion by Judge Hyde. Judge Hyde suggests that it might be better, to express the intended meaning, to use such language as "from *only* the fact of the occurrence" in place of the term "mere fact" as used in the questioned instruction (*italics added*). He also suggests other expressions such as "solely" or "from the fact alone" for the word "only."

C. *Burden of Proof*

After much admonition and patience in previous cases, the court, in *Bell v. Pedigo*,¹⁸ held that after this opinion shall have been printed in the advance sheets in the South Western Reporter, it will constitute reversible error to include in burden of proof instructions in civil cases "either the phrase indicating that one's burden is to prove his case or defense by the preponderance, that is, the greater weight of the credible evidence 'to the satisfaction of' or 'to the reasonable satisfaction of,' the jury (or any combination of those phrases or words of similar meaning). . . ." The opinion reviews a number of cases to show that many warnings have been given in the past in condemning instructions which contained either or both of these phrases.

III. GOVERNMENTAL IMMUNITY

With governmental agencies expanding in all directions and employing thousands of persons to carry out their powers and responsibilities, would not every member of the public feel that some means must be found for compensating persons injured by these agencies of government in carrying out their duties? The doctrine of governmental immunity is being increasingly attacked as an archaic doctrine and as having no rightful place in modern day society. The modern theory of liability is that there should

18. 364 S.W.2d 613 (Mo. 1963).

be compensation for injuries resulting from fault, and even where there has been no fault, as in workmen's compensation, the expense of compensating injured workmen has been passed on to the public in the increased cost of the goods or the services rendered by the employer. Why should there be a different theory of compensation where the employer is a governmental agency?

Assuming that all would agree that the time has come for some form of protection in this area of tort law, there still arises the question of the appropriate method for accomplishing the desired protection. Merely to abolish the defense of governmental immunity does not necessarily carry with it compensation, since this involves the disbursement of public funds. To be balanced with the interest in protecting the individual members of the public, who may be injured by agents of government in carrying out their duties, is the public interest in the collection and wise disbursement of funds to effect this protection.

Should the abolition of governmental immunity in the tort field be abrogated by the courts or should it be taken care of by the legislature? This was the question in *Fette v. City of St. Louis*.¹⁹ The widow of a city fireman brought the action for the wrongful death of her husband incurred while fighting a fire in a building. The trial court sustained the motion by the city to dismiss for failure to state facts upon which relief could be granted. On appeal, the court decided the case on the issue of governmental immunity, as no contention was made that fire fighting was not a governmental function. In reaffirming its earlier position, that only the legislature can adequately abrogate this doctrine of law and provide for the proper use of public funds to pay claims, the court in an opinion by Judge Hyde points out the difficulties which have arisen in other jurisdictions where the court has made this abrogation.²⁰ He rather succinctly, yet convincingly, points up the means for accomplishing this protection: "It will be necessary to use public funds to settle claims or pay judgments and only the legislature can properly provide for their collection by taxation, authorize expenditures for liability insurance, create methods of payments similar to workmen's compensation or establish other safeguards

19. 366 S.W.2d 446 (Mo. 1963).

20. For the problems created in other states where the court has abrogated the doctrine of sovereign immunity, the opinion cites *Spanel v. Mounds View School Dist. No. 621*, 118 N.W.2d 795 (Minn. 1962); noted in 47 MINN. L. REV. 1124 (1963).

suggested in the opinion of the Minnesota Supreme Court. Our governmental units are all now operating financially on the basis of our long established precedents and our conclusion is that we should not abolish the doctrine by judicial fiat."

Should not the organized bar assume this responsibility in showing the legislature the way?

IV. LIBEL AND SLANDER

The effect of consent by the plaintiff in an action for defamation was the issue in *Hellesen v. Knaus Truck Lines, Inc.*²¹ The plaintiff-employee was a member of a union which had negotiated a labor contract with the defendant-employer requiring that a warning notice of complaint against an employee be given before any discharge or suspension, with a copy to the union. Such warning notice had been given to the plaintiff in writing and a copy of this notice sent to the union office where it became a part of plaintiff's union record. The trial court dismissed the plaintiff's petition with prejudice. The plaintiff contended that he was entitled to a trial to show an abuse of a privileged occasion by the showing of malice. The analysis of the opinion by the supreme court on appeal seems to be based on the theory that where there is consent, there is no actionable publication, or that the publication is absolutely privileged (though not in the technical sense of absolute privilege). It seems to the writer that where the plaintiff has consented to the sending of a letter containing what otherwise would be considered actionable libel, it is not a matter of publication or of privilege, for the consent negatives the existence of any tort in the first instance. If no public interest is involved, the law should leave the individual to work out his own folly in permitting others to harm his reputation. In the torts based upon intentional interference with the person or property, consent is not even a defense, but goes to negative the existence of any civil wrong at all. In effect, this is the holding of the opinion.

Before the invention of printing, the interest in a good reputation was protected first in the local seigniorial courts and at a later period in the ecclesiastical courts, in an action of slander. In the effort by the common law courts to wrest this jurisdiction from the church courts, which had treated defamation as a sin, the reason given was that where temporal damage was done, the harm should be redressed in the king's courts.

21. 370 S.W.2d 341 (Mo. 1963).

The consequence was that oral defamation, or slander, became actionable where special damage of a pecuniary character was proved or assumed. The other form of action for defamation, that of libel, developed at a later time as a result of the invention of printing and, due to the need to suppress seditious publications, it was first punished as a crime. Thus libel was considered as a more serious offense since it was embodied in more or less permanent physical form as compared to the oral word. When libel was recognized as a tort, other differences were noted by the common law courts in differentiating libel as a tort from slander. Because of this difference libel was considered *per se*, i.e. without pleading or proving actual damage. The early cases considered all libel as *per se*, in contrast to the slander action where actual damage had to be shown, or, in certain categories, was assumed.

However, libel may appear in a form other than upon the face of the publication itself. The words used may become injurious to the reputation because of extrinsic facts and circumstances known to the reader. In more recent times, this form of libel has become known as libel *per quod*. Some courts have confused the early meaning of libel *per se*, in the sense of damages being unnecessary, with an effort to distinguish it from libel *per quod*. Thus the conclusion by many courts, where the libel does not appear on the face of the publication and is shown only by the extrinsic facts and circumstances, that it is not libel *per se*, making it necessary to plead and prove special damages.

*Langworthy v. Pulitzer Publishing Company*²² has terminated any uncertainty which may have existed in the law of Missouri as to which interpretation is to be given to libel *per se*. In this case the plaintiff did not plead special damages and the words published were defamatory only by showing of extrinsic facts and circumstances. It was held that the petition did not state a cause of action for libel where special damages were not alleged.²³

22. 368 S.W.2d 385 (Mo. 1963).

23. The *Langworthy* case has been followed in two later decisions: *Otto v. Kansas City Star Co.*, 368 S.W.2d 494 (Mo. 1963); *Hellesen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341 (Mo. 1963). For a more complete study of Missouri cases dealing with this problem before *Langworthy* see 28 Mo. L. Rev. 660 (1963).