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A RECENT PERSONAL INJURY CASE involving two seriously injured plaintiffs has shed new light upon a seemingly well established rule concerning the exhibition of the plaintiff's person to the jury in a personal injury case. In the cases of *Beal v. Southern Union Gas Co.* and *Rix v. Southern Union Gas Co.*,[1] the court, in hearing the two cases together, permitted one of the plaintiffs, who was disfigured to such an extent as to be considered gruesome, to remove the covering about his head in the presence of the jury. The record disclosed that the plaintiffs had been working in a pit dug in the street, correcting some difficulty in the exterior of a gas junction box. Gas had leaked into the junction box, and a spark from the work caused it to explode, hideously and permanently destroying Rix's ears, nose, arms, and eyes, and causing total disfigurement.

While the trial court refused to permit the prospective jurors to view the plaintiff upon the *voir dire,* the court did permit the plaintiff to remove the covering from his head during the trial for the purpose of allowing the jury to view the extent of the injury. While it might appear that such an exhibition to the jury would go beyond the usually accepted bounds of decency, and should have therefore been excluded, or that such exhibition should have been excluded on the ground that it would unduly prejudice the jury, the trial court and the appeals court refused to exclude such exhibition.

The exhibition of the person before a jury is not at all a recent concept in the law. At the common law, the writ of *de ventra inspeciendo* (inspection of the body) was recognized.[2]

The exhibition of the plaintiff's person to the jury is, of course, recognized to the extent that it is evidence of a *relevant* fact in issue. The allowance of the exhibition of personal injuries, as a part of the real or demonstrative evidence, is one method by which a court may properly acquire knowledge on which to base

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1 66 N. M. 424, 349 P. 2d 337 (1960).

2 8 Wigmore on Evidence, Sec. 2220 (3rd ed. 1940).

its decision,[3] and "where the existence or the external quality or conditions of a material object is in issue or is relevant to the issue, the inspection of the thing itself, produced before the tribunal, is always proper." [4]

It is to be admitted that the proof of injury, which is directed to the senses, is a most convincing means of proof, and is the best evidence of a material fact, but it is not the fact that such exhibition is material that comes into dispute when such an exhibition is sought to be admitted, rather it is the claimed prejudicial effect of such exhibition, or the possibility that it might be indecent that raises the objection to this form of evidence.

Viewing exhibitions of the plaintiff's person from the standpoint that the plaintiff wishes to get it into evidence, as it would tend to benefit his monetary recovery, such an exhibition often is sought to be excluded on the basis that: (1) it is not relevant; (2) that it is unduly prejudicial to the defendant; or (3) that it is indecent or immoral. The legal encyclopedias[5] and many cases unquestionably recognize that it is within the discretion of the trial judge to admit or exclude such proffered exhibition. The test of the exclusion or admission arises on appeal, when the overruling of objection to such proffer is sought to be reversed as error. At this point we must begin to consider upon just what basis the plaintiff's claim that he *may* offer the exhibition is founded.

It has been suggested that to deny a party the right to prove his case by an exhibition of his injuries is to deny him the right to prove his case by his clearest evidence.[6] Such thinking perhaps is augmented by those courts which seem to allow the jury to see the injury on the basis that it is a part of the *res gestae*.[7]

One of the frequent objections to an exhibition of the plaintiff's person is that such exhibition may be indecent.[8] But it may be pointed out that the fact that the exhibition may be indecent is no real basis for refusing to allow it, for "where justice and

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[3] 4 Wigmore on Evidence, Sec. 1150 (3rd ed. 1940).

[4] Ibid, Sec. 1151.

[5] 21 Ohio Jur., Evidence, Sec. 508; 20 Am. Jur. 602, Evidence, Sec. 720; 30 C. J. S. 459, Evidence, Sec. 610.

[6] 4 Wigmore on Evidence, Sec. 1158 (3rd ed. 1940); Dictz v. Aronson, 279 N. Y. S. 66 (1935); Shell Petroleum Co. v. Perrin, 107 Okla. 142, 64 P. 2d 309 (1936).

[7] 2 Jones, Law of Evidence in Civil Cases, Sec. 358 (4th ed. 1958).

[8] Leonard v. Hume, 5 Cal. App. 2d 42, 42 P. 2d 965 (1935); Dunkin v. City of Hoquiam, 56 Wash. 47, 105 P. 149 (1909); Cincinnati N. O. & T. P. R. Co. v. Nolan, 161 Ky. 205, 170 S. W. 650 (1914).

the discovery of truth are at stake, the ordinary canons of modesty and delicacy of feelings cannot be allowed to impose prohibitions upon necessary measures." [9] We must also consider that the crux of this discussion is the desire of a plaintiff to make such a proffer, which does not take into account the defenses of privacy or self-incrimination.

Where the question as to the admissibility of exhibitions which could be considered indecent has arisen, the courts seem to have been liberal in allowing such exhibitions. No error was found in a 1909 case in which the plaintiff was allowed to exhibit an artificial anus.[10] In an even earlier case, a female was permitted to strip to the waist.[11] It should be noted that in the last cited case, the female was approximately 14 years old, which very likely had a bearing upon the admissibility of the exhibition. However, the bounds of decency would certainly seem to have been exceeded in a 1927 case in which the jury, although outside the court room, were permitted an exhibition of a male organ when the issue of the presence of a scar thereon became a very material fact.[12]

After considering the above noted early cases, it is difficult to conceive that as late as 1959 a question could arise over the exhibition of a declivity in the plaintiff's back of about three and a half inches in diameter and about the depth of a shallow ashtray, when it unquestionably was relevant.[13]

Even though the exhibition may tend to excite sympathy for the plaintiff,[14] such exhibition may, while arousing sympathy, at least clearly indicate to the jury the extent of the injury, whereas expert medical testimony may arouse the same or even a greater degree of sympathy without the jury knowing exactly what the extent of the plaintiff's injury is. Because the injury, if exhibited, is vividly real and tangible, the jury may feel that the defendant is to blame, and that because the plaintiff is in such bad shape, that he should be compensated, especially in those cases where the defendant is a corporation.[15] However,

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[9] 4 Wigmore on Evidence, Sec. 1159 (3rd ed. 1940).

[10] Dunkin v. City of Hoquiam, 56 Wash. 47, 105 P. 149 (1909).

[11] McGuff v. State, 88 Ala. 147, 7 S. 35 (1889).

[12] Sullivan v. Minneapolis, St. P. & S. St. M. R. Co., 55 N. D. 353, 213 N. W. 841 (1927).

[13] Hendricks v. Sanford, 337 P. 2d 974 (Ore., 1959).

[14] Landro v. Great Northern R. R. Co., 117 Minn. 306, 135 N. W. 991 (1912).

[15] 4 Wigmore on Evidence, Sec. 1159 (3rd ed. 1940).

proper advocacy on the part of defense counsel should eliminate abuse in this area, as exhibition of the plaintiff's injury is admissible as a means of determining damages, and not for the purpose of imposing or determining liability.

There is a line of decisions indicating that the plaintiff has an absolute right to exhibit his injuries, and that it is reversible error to refuse to allow such an exhibition.[16] Such a line of thinking is obviously not that of the majority of the courts, as most courts have taken the position that the plaintiff's exhibition of his personal injuries is discretionary, but always controlled by the trial judge.

Even more surprising than the recognition of exhibition as a right of the plaintiff are the cases in which the exhibition involves a physical touching of the plaintiff by the members of the jury. In an Ohio case,[17] the court permitted the jury to touch and manipulate the skull of the plaintiff, as the injury, being a skull depression, was concealed by hair. One would think that suggesting that the jury touch the injured part would be cause for greater objection than would be the case in merely offering to the jury the opportunity to view the injury, as in the latter case those jurors who might not wish to avail themselves of such viewing, could discreetly, and without notice, not take part in the observation.

Other cases have permitted more than mere exhibition of personal injuries. Courts have allowed an actual examination of the plaintiff's person by members of the jury as follows: jurors permitted to examine plaintiff's scars with their fingers;[18] jurors felt coldness of plaintiff's hands caused by injury resulting in abnormal circulation of his blood;[19] plaintiff was permitted to enter the jury box to allow jurors to feel a lump on his arm.[20]

Conclusion

In view of the result of the principal case, it would seem that mere shocking exhibition would no longer be an objection to permitting a plaintiff to exhibit to the jury the extent of his

[16] Villagas v. Kercher, 11 Ill. App. 2d 282, 137 N. E. 2d 92 (1956); Stegall v. Carlson, 61 Ill. App. 433, 128 N. E. 2d 352 (1955).

[17] Bluebird Baking Co. v. McCarthy, 19 Ohio L. A. 466, 3 Ohio Op. 490, 36 N. E. 2d 801 (1935).

[18] Kubiatowsvi v. Henry Pratt Boiler & Machinery Co., 205 Ill. App. 560 (1917).

[19] Sampson v. St. Louis & S. F. R. Co., 156 Mo. App. 419, 138 S. W. 98 (1911).

[20] Grubaugh v. Simon J. Murphy Co., 209 Mich. 551, 177 N. W. 217 (1920).

injuries, recognizing, of course, that a question of court room propriety may cause the exhibition to occur outside the court room. Earlier cases, and even those prior to 1900, indicate that matters of delicacy, and even those that might be thought to be indecent exhibitions, may be properly handled by the court without being objectionable. Both the matters of arousing the sympathy of the jury, and going beyond the area of decency have come before the courts, with the result that a way has been found to get into evidence exhibitions that would, at first blush, appear to be of questionable admissibility. The primary rule developed is that the exhibition be necessary to a relevant issue in the plaintiff's case. Beyond this point, and without question, it becomes the duty of the trial judge to allow the exhibition unless his sound discretion indicates the contrary. At present, it would appear that a trial judge can allow any exhibition, either in the court room, or if such exhibition would disturb the decorum thereof, in some other place where the jury may privately avail themselves of the exhibition. The discretion would appear to be very broad, and reversible error difficult to prove.