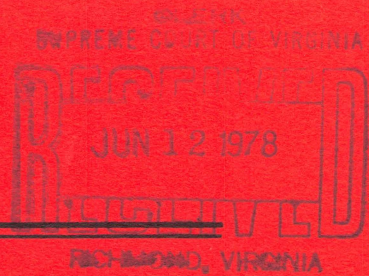


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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

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RECORD NO. 771852

---

PEGGY ARMSTEAD,

.....Appellant

v.

EDGAR JAMES,

.....Appellee

---

JOINT APPENDIX

---

William M. Macali  
James T. Wood  
STONE, BLAND AND WOOD  
Drawer H B  
Williamsburg, Virginia 23185

Counsel for Appellant

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## TABLE OF CONTENTS

	Page
MOTION FOR JUDGMENT	1
GROUND'S OF DEFENSE	2
PLAINTIFF'S INSTRUCTIONS:	
1	3
5	4
6	5
DEFENDANT'S INSTRUCTIONS:	
A	6
B	7
C	8
D	9
E	10
F	11
TESTIMONY:	
A. Testimony of Nelson Hall, M. D.	12
B. Testimony of Paul Armstead	31
C. Testimony of Peggy Armstead	34
D. Argument of Counsel on Instructions	47
FINAL JUDGMENT	55
ASSIGNMENTS OF ERROR	57

MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF THE AFORESAID COURT:

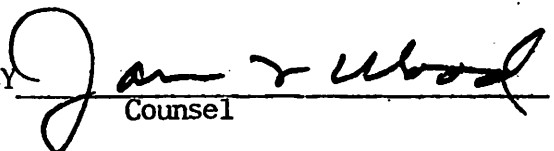
Plaintiff moves this Court for judgment on the grounds and in the amounts hereinafter stated:

- 1) That heretofore, on or about the 19th day of July, 1975, the Plaintiff was a passenger in the vehicle being operated by Harold Berkley, which was travelling west on Richmond Road in the City of Williamsburg, Virginia.
- 2) That at the time and place aforesaid, the defendant was operating a motor vehicle in an easterly direction on Richmond Road in the City of Williamsburg, Virginia.
- 3) That at the time and place aforesaid, the defendant did then and there so carelessly and negligently operate his motor vehicle so that the same was caused to collide with that of Harold Berkley with great force and violence.
- 4) That as a direct and proximate result thereof, the plaintiff was caused to sustain serious and permanent injuries; has been prevented from transacting her business; has suffered and will continue to suffer great pain of body and mind; has incurred and will incur in the future doctors and related bills in an effort to be cured of said injuries.

WHEREFORE, plaintiff demands judgment of the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS (\$25,000.00) plus costs incident hereto.

PEGGY ARMSTEAD

James T. Wood, p.q.  
STONE, BLAND AND WOOD  
Drawer HB  
Williamsburg, Virginia, 23185

BY   
Counsel

*Signed 1/7/77  
J. T. Wood, Clerk*

**ANSWER AND GROUNDS OF DEFENSE**

Now comes the defendant, by counsel, and for his answer and grounds of defense in the above-styled matter, deposes and says:

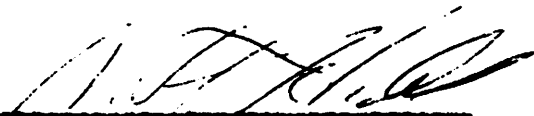
1. That he admits the allegations contained in paragraphs 1 and 2 of the plaintiff's motion for judgment.
2. That he denies the allegations contained in paragraphs 3 and 4 of said motion for judgment.
3. That he denies he is indebted to the plaintiff in the sum of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) or in any other sum.

WHEREFORE, the defendant prays that the plaintiff's motion for judgment be dismissed with the defendant's costs.

EDGAR JAMES

By

  
Of Counsel

  
Martin, Hicks & Ingles, Ltd., p.d.  
Attorneys at Law  
Gloucester, Virginia 23061

I certify that the foregoing answer and grounds of defense was served on the plaintiff by mailing a copy thereof by first class mail this 28th day of January, 1977, to James T. Wood, Esquire, Stone, Bland and Wood, Attorneys at Law, Drawer HB, Williamsburg, Virginia 23185, counsel of record for the plaintiff.

  
Counsel

INSTRUCTION NO. 1

The Court instructs the jury that the function of the jury is to determine the facts from the evidence and to reach a verdict by applying thereto the law as it is contained in the instructions of the Court. It is the duty of the jury to consider the instructions of the Court as a whole and in the light of the evidence applicable to the issues presented

INSTRUCTION NO. 5

The Court instructs the jury that ~~if from the evidence and other instructions of the Court, you find your verdict in favor of the~~ Plaintiff, Peggy Armstead, then in assessing the damages to which she is entitled you may take into consideration any of the following which you believe from the evidence to have resulted from the accident.

1. Any bodily injuries sustained and the extent and duration thereof;
2. Any effect of any such injuries upon her health according to its degree and probable duration;
3. Any physical pain and mental anguish suffered by her in the past, and any which may be reasonably expected to be suffered by her in the future;
4. ~~Any disfigurement or deformity resulting to her and any humiliation and embarrassment associated therewith;~~
5. Any inconvenience and discomfort caused in the past and any which will probably be caused in the future;
6. Any doctors, hospital, medical expenses incurred in the past, ~~and any which may be reasonably expected to occur in the future;~~
7. Any loss of earnings in the past by reason of being unable to work at her calling;

8. ~~Any loss of earnings and for the future which may be reasonably expected to result from the accident.~~

and from these as proven by the evidence your verdict should be for such sum as will fully and fairly compensate Peggy Armstead for the damages sustained by her as a result of the accident.

INSTRUCTION NO. 6

The Court instructs the jury that the life expectancy of a female person 27 years of age is 48.9 years.

# **INSTRUCTION A**

**The Court instructs the jury that a verdict must not be based in whole or in part upon surmise, conjecture or sympathy for either of the parties, but must be based solely upon the evidence and the instructions of the Court.**



## INSTRUCTION B

The Court instructs the jury that a doctor has testified in this case as an expert and his testimony consists of conclusions drawn by him from facts which he has assumed to be true and which are expressed in hypothetical questions. The weight of such testimony is dependent entirely upon the truth of the facts stated to him in the hypothetical question, and the Court warns the jury that before accepting the testimony of any such expert, it is the duty of the jury to examine carefully all of the facts stated to the expert in the hypothetical question to determine whether such facts have been proven to be true.

### INSTRUCTION C

The Court instructs the jury that the mere fact that there has been an accident and that as a result thereof the plaintiff has been injured, does not of itself entitle the plaintiff to recover. In order to recover against the defendant the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that any such negligence was a proximate cause of the collision.

And if the jury are uncertain as to whether any such negligence has been thus proven by a preponderance of the evidence, or if you believe that it is just as probable that the defendant was not guilty of any such negligence as it is that he was, then you shall return your verdict in favor of the defendant.

#### INSTRUCTION D

The Court instructs the jury that the burden is on the plaintiff to prove by a preponderance of the evidence that the defendant had drunk enough alcoholic beverages to so affect his manner, disposition, speech, muscular movements, general appearance or behavior, as to be apparent to observation. And unless you believe that the plaintiff has proven the foregoing by a preponderance of the evidence then you cannot find that the defendant was driving under the influence of intoxicants.

### INSTRUCTION E

The Court instructs the jury that damages are not presumed nor may they be based upon speculation, but must be proven; and the burden is upon the plaintiff to prove by a preponderance of the evidence or with reasonable certainty any item or element of damage claimed and that it is properly attributable to the accident; and unless such item or element of damage is thus proven by a preponderance of the evidence or with reasonable certainty, then the plaintiff cannot recover for such item or element.

#### INSTRUCTION F

The Court instructs the jury that it is the duty of one who claims to have been injured by the wrongful or negligent act of another to exercise reasonable care and diligence to avoid loss and to minimize or lessen the resulting damage, and to the extent that her damages are the result of her active and unreasonable enhancement thereof or are due to her failure to exercise such care and diligence, she cannot recover.

And if you believe from the evidence that the plaintiff, after she was injured, failed to exercise reasonable care and diligence in an attempt to lessen the resulting damage to her, and that such failure enhanced her damages, then she cannot recover for such enhanced or increased damage.



A. Testimony of Doctor Nelson Hall

(TR 29) Q. Doctor Hall, state your full name, where your practice is located and what specialty that practice is.

A. Nelson Hall. I'm in practice here in Williamsburg at my office, 135 Second Street.

Q. What is your medical background, Doctor Hall?

A. Completed medical school at North Western University and internship at Portsmouth Naval Hospital and I've completed an orthopedic surgery residency and I'm a member of the Board Certified Orthopedic Surgeon and a member of the American Academy of Orthopedic Surgeons.

Q. And how long have you been practicing orthopedic surgery here, in Williamsburg and other places, sir?

A. Since I completed my residency in 1968. I was first at Bethesda Naval Hospital on the staff, and I've been in Williamsburg for almost five--almost six years, in practice.

Q. All right sir. In your practice of orthopedic surgery, did you have an occasion to see Miss Peggy Armstead, here seated to my left--

A. Yes, I did.

Q. In regards to injuries?

A. I did.

Q. What history did you obtain from her, at that time, Doctor?

A. When I first saw her on July the 23rd, of 1975, and she had reportedly been in an automobile accident four days prior to this. And according to the history I received, she was in the back seat of a car, which was sideswiped by another car, and she was thrown presumedly to the left and had sudden pain in the right elbow, as well as a bump on her head.

Q. All right, sir.

A. And she had been treated in the emergency room at Community

Hospital, the same day and been released after X-rays, which included--released after examination, which included X-rays of her elbow.

Q. Did you have an occasion to examine her then on the 23rd of July?

A. I did.

Q. And what did your examination reveal?

A. Well, she had generalized tenderness about the right elbow and both below and above the elbow, in the soft tissue areas. She had some limitation of motion of the elbow. She lacked twenty degrees of being able to straighten it all the way out and was able to flex it up to one hundred twenty-five degrees. And--

Q. What is the normal flexion, sir?

A. The opposite elbow, which we assume is normal, measured from zero to one hundred and fifty-five degrees. So she lacked twenty degrees extension and lacked thirty degrees of flexion.

Q. What else did your examination reveal, at that time, Doctor Hall?

A. That was all but it related in relation to the elbow. She did have tenderness over the left side of her face, below the orbit.

Q. Did she have a bruise on the left side of her face, swelling?

A. Let's see. There was minimal swelling and no discoloration. I didn't record anything about discoloration. Minimal swelling and tenderness about this area.

Q. Did you have occasion to take any X-rays, at that time?

A. Yes, I did. I took--I reviewed the hospital--no, wait a minute. I--I reviewed the hospital's X-rays, which were normal and I -- because of the trouble she was having, I even repeated them in my office, and they were also negative. And I included X-rays of the forearm.

Q. What does that mean, Doctor, when you said that the X-rays were negative?

A. Well, the X-rays did not reveal any bony abnormality. There was no structural deformity. No evidence of any fractures or dislocation of the elbow. In other words, it was normal elbow.

Q. Does tendon and ligament damage show up on X-rays--

A. No, they do not.

Q. Of this particular area?

A. No, you only see the bone structure. Occasionally, you can identify a soft tissue swelling. But it does not show up any muscle or tendon or ligament damage, which might be present.

Q. After your exam of her, sir, on July the 23rd, did you diagnose what the difficulties were, at that time?

A. Well, in view of any--anything beyond what I've already told you, I had to assume that she had a contusion of the elbow and a contusion of the left cheek, which merely means soft tissue damage from a direct blow.

Q. Did you have a--did you prescribe any treatment for her, at that time, or any medications?

A. I prescribed some daily warm soaks to the elbow and encouraged her to do range of motion exercise. In other words, trying to straighten out as far as she could and bringing it up as far as she could, several times daily. I prescribed some mild medication for some headaches that she was having and that was all, at that time.

Q. Did you have occasion to see her then, later on?

A. I saw her again two weeks later on August the 6th of 1975. At that time, she had a slight decrease of the pain in the elbow and she did show improved motion. She was able to flex it all the way up, but still

lacked the twenty degrees of extension. So, she was still limited in twenty degrees of extension in the elbow. There was less swelling and tenderness about the left cheekbone. And, at that time, I advised her that she could return to her regular work, which was the following day and arranged for her to come back again in a month, if she had not made a complete recovery.

Q. Did in fact, she return to your office, sir?

A. Yes, I saw her again on the third of September, 1975, which was approximately one month later. She reported that she was tolerating her work satisfactorily but still discomfort in the elbow and was unable to straighten it out.

Q. Did you have--did you examine her, then, on the third of September?

A. Yes. At this time, she showed--again she showed full flexion and lacked about fifteen degrees extension. So she actually had made some improvement in extension, at that time.

Q. Did you have any reason at that point in time to change your diagnosis ?

A. No.

Q. Did you prescribe any treatment for her, at that time?

A. I advised her to again continue stretching exercises and range of motion exercises to the elbow. And other than that, there was no recommendations.

Q. At that point in time, then, Doctor Hall, everything looked like it was progressing well and there would be no difficulties, is that correct?

A. That's correct. I--although, I could have--might have thought, at that time, that this small amount of limitation of motion might be permanent because often we do see about the elbow--not--it's not uncommon

to have some persistent limitation of extension, even with a fairly mild injury.

Q. This is a common occurrence with elbow-type injuries, is that correct?

A. That's true.

Q. All right, sir. And then what occurred after that?

A. After that, I didn't see the patient for almost--for a year because I, you know, I had not instructed her to come back unless she was-- I hadn't--I hadn't made any further appointment for her to come back.

Q. All right, sir. And the last time you saw her, then, you thought there may be a limitation of motion there, that it wouldn't exist in the future and you had not given any instructions for her to come back to see you at all, is that correct?

A. That's true I--I wrote on my note, I stated that she had already gained maximal function of use of the elbow, which I would consider pretty functional, so no further follow-up exam was required, at that time.

Q. And then did you have occasion to see her later on and what did your examination reveal then?

A. Yes, I did. I saw her on August the 27th, 1976, a year later. At this point, she stated that she still had aching in the right elbow and felt some numbness and tingling in the right arm at times. She'd not been able to straighten the elbow out, but had been able to perform most of her usual activities. Examination, at that time, revealed some generalized tenderness about the forearm and the elbow. She was able to flex the elbow completely, as she had been except for the first day of my examination. But at this point, she had actually--she had even worse motion of the elbow and was--and lacked a complete forty degrees of being able to straighten it out. In other words, it was a forty degree angle from an extended position



of the upper arm to the position of her elbow, in this direction (indicating). So, she had--she was worse by twenty-five degrees from my examination a year prior to that.

Q. Would you tell the members of the jury how you go about determining this degree of--of lack of flexion--extension, I'm sorry?

A. You mean, as far as measurement of the--

Q. Right; yes sir. How do you go about that in regards to--what --what do you do with the patient's arm or what did you do with Mrs. Armstead's?

A. Well, I have a little instrument called a goniometer, which is like a, you might say a movable arm protractor, and in the standard orthopedic literature, zero degrees is considered all the way out (indicating). And to bring it up ninety degrees would be a right angle (indicating). And of course, beyond that to one hundred and fifty-five degrees, which I mentioned is full flexion (indicating). So, it's a matter of just measuring --considering the extended portion of the upper arm as zero degrees and when she brought it down as far as she could, then you measure this angle in here, to determine this forty degree limitation of motion (indicating). I hope that's correct.

Q. Did you make any observations in regards to her--to the joint itself, the tendons, the ligaments, as to what they appeared like when the arm was stretched as--as it was stretched, to determine that angle?

A. Well, the only thing that could be observed is that the biceps tendon, which this is the biceps muscle up here, which is the muscle that pulls the arm up, was very tight in the front portion of the elbow (indicating). It's like a tight band, extending out here (indicating). This was even more evident later on.

Q. And what--what did you diagnose Miss Armstead's injury, at

that point in time?

A. Well, at this point, it was my impression that instead of just a contusion, that she had-- probably had some more severe capsule or ligament injury of the elbow, which had resulted in this developing contracture of her arm; contracture meaning inability to move it completely.

Q. All right, sir. And this contraction that occurs, can you describe that and how it occurs, to the members of the jury?

A. Well, it's--if you can imagine the scar tissue on the skin over a joint that would--and sometimes this happens too, although she didn't have any obvious scar tissue on the outside. But occasionally, scar tissue will cause the skin to contract and if you have enough scar tissue, it will prevent motion. And the same is true deep down in the arm where there's sort of a sac-like capsule or joint lining. And if this joint lining becomes scarred or contracted, then that will prevent motion, just like if it were on the skin. In fact, even more so.

Q. All right, sir. Did you have any occasion to rate her disability, at that point in time?

A. Yes, I did. It was my impression that just that she had approximately an eight per cent permanent partial disability of her elbow, at that time.

Q. And that was approximately over a year ago, is that correct?

A. That's right.

Q. And have you had occasion to see her since that time?

A. Yes, I did. I saw her again last Friday, which is September the 16th of this year.

Q. And what--did you have a chance to examine her?

A. Yes, I did.

Q. And what did your examination reveal?

A. Well, I was surprised to find that she had even more limitation of extension and at this time, she was able to--she could get it out no further than sixty degrees from--in relation to that horizontal or plane of the upper arm, instead of the forty degrees, which it was a year ago. So she's developed another twenty degrees of contracture of that elbow.

Q. And what has caused this contraction?

A. Well, it's more of the same. I think that we have to--at least in my opinion, she has some deep scar tissue of the capsule or joint lining, which has contracted even further and it's preventing her from straightening it out. I think in retrospect that, as I mentioned, she had more severe ligament injury and I think there's a possibility that she--in fact, a good probability that she had a momentary dislocation of the elbow. It probably popped back into the joint before she was ever seen in the emergency room or at the hospital or before I ever saw her. Occasionally, you can have a dislocation of a joint, which will spontaneously reduce. Maybe it didn't even go all the way out.

Q. "Reduce", you mean go back in, is that correct?

A. Go back into position. Subluxation, what might be a better term, which means a partial dislocation. But at any rate, we know that she had some deep ligament injury, or capsule injury supporting the joint.

Q. What can you observe about her, sir, by the naked eye, if you will, in regards to that joint from the inside of her arm.

A. At the present time, as of last Friday, there--here again, it's more obvious that she has tightening of this biceps tendon, as it crosses the joint in front.

Q. Doctor, could you pull your sleeve up and show--that's fine, and show them exactly which tendon area you're talking about?

(At this time, the witness complied with the

request of Mr. Wood)

A. Well, this is the biceps muscle (indicating). As you pull your arm up against resistance, this muscle tightens (indicating). And I can't demonstrate it, but this right here, this band of tissue, which extends from the muscle to--down to the bone of the forearm, right in there (indicating). And in her case, there's a rather tight contracted band. As you push down, the resistance, it stands out quite prominent. The only other finding is that she has a half inch biceps atrophy as measuring the circumference of both arms. This one is a half inch smaller (indicating). And ordinarily, you would expect it to be at least equal, since she's right-handed. In fact, often right-handed people would have a slightly larger biceps muscle than they will on the opposite side. So, she does have at least measurable atrophy or muscle loss. She has good strength of grip, slightly better on her right, actually, than on the left, since she is right-handed.

Q. The grip muscles are those that you use in the forearm, is that correct?

A. That's right. And the circumference of these muscles measures the same on both sides.

Q. But in bending, you use the biceps muscle?

A. That's correct; right.

Q. The upper arm muscle. And this is the muscle that has degenerated, is that correct?

A. That's right.

Q. And that's what atrophy is, in fact, degeneration of the muscles?

A. That is correct.

Q. Do injuries like this, sir, these--the capsule that you're talking about, about the tissue there that goes over the bone and over that

joint, does that show up on X-rays at all?

A. No, it does not

Q. Is there any way of telling that on X-rays?

A. As a matter of fact, we had new X-rays last Friday and they are, again, are normal. They do not show any--any changes.

Q. Any changes in the bone, is that correct?

A. That's right, the bone structure.

Q. Doctor, do you have a prognosis in Mrs. Armstead's case?

A. If you'd asked me a year ago, I would have told you that I-- I thought it was--that that was probably the end of it, that she had reached her maximum disability. But, to my surprise--

MR. HICKS: I would have to ask that this be prefaced with a reasonable medical certainty.

COURT: Can you say so with a reasonable degree of medical certainty from your experience and training, Doctor?

A. Well, as I started to say, a year ago, I would have said that the probability of increasing deformity, it would have been unlikely.

COURT: Doctor, can you say this based on a reasonable degree of medical certainty, based on your training and diagnosis and so on of this patient? Is this what it's based on or is this just an impression?

A. I was about to preface my statement here.

COURT: All right, sir. Well, go ahead. You've testified before.

A. At this particular time, I would say with reasonable medical certainty that she probably will have more contracture of that elbow. In view of the fact that it has shown progression from two years, to last year to the present time, and I believe that she probably will have some further



contracture. It may not be severe, but probably will be some.

Q. And what is the degree or lack of use that she has of it now? Did you rate her in regards to the percentage of disability, as of last Friday?

A. It's my professional opinion that she has a permanent partial impairment of fifteen per cent of that elbow of the right arm.

Q. Is there any way at all Doctor, that you can say when this worsening effect will take place, whether it will be next year or five years from now? Is there any way at all that you can say that?

A. No.

Q. How about the--the atrophy, that is the degeneration of the muscle, of the biceps? What will happen in regard to that with the more disability in regards to the use of it?

A. Well, it will be a combination--I could not say with reasonable probability that she will have increasing atrophy of the muscle, unless it--unless the contracture becomes severe. I doubt if it will become severe.

Q. How about the possibility of--probability, sit, of arthritic changes, things like that, in that joint as a result of the lack of use?

A. There again, you need the reasonable probability. This is a very difficult thing to predict and I could not state that she will probably have an arthritis of that joint.

Q. All right, sir. Is there anything, Doctor, that can be done in regards to Mrs. Armstead's injury, any surgical procedure or anything like that, that can be done to alleviate this--this problem?

A. I would state that a surgical procedure is unadvisable; to go in and try to take out the contracted scar tissue of the elbow most likely would cause increased bleeding and increased scar tissue or contracture. So, I would--in my professional opinion, no, there's no surgical procedure to be

suggested or that should be done.

Q. In your opinion, then, she won't be cured of this injury, Doctor, is that correct?

A. That's correct.

Q. Doctor, do you have a bill for your services in regards to this particular case?

A. I wrote out the bill, which is purely for the medical treatment involved.

MR. WOOD: All right, sir.

(At this time the witness handed the document to Mr. Wood.)

(At this time, Mr. Wood exhibited the document to Mr. Hicks, after which they conferred.)

MR. WOOD: Judge, we would like to introduce this, I understand Mr. Hicks has no objection to that bill.

(At this time, the bill was received and marked as Plaintiff's Exhibit Number One-A.)

BY MR. WOOD:

Q. Doctor, over the period of the last two years that you've seen Mrs. Armstead, has there been any report to you at all that there was a re-injury to this elbow or anything like that?

A. No, I have no knowledge of any re-injury.

Q. And the information that you obtained was that she had no arm injury at all of that right arm prior to this automobile accident, is that correct?

A. That's correct.

Q. Doctor, in view of the history that you obtained and the examination, do you have an opinion as to how Mrs. Armstead suffered this in-

jury of the elbow, as well as the contusion of the face?

A. Well, I didn't take--you know, I don't have a detailed, accurate history, as far as the accident but apparently she was in the back seat and thrown to the left. So, it would seem that she probably brought the left arm over to protect herself and sustained this partial dislocation.

In other words, it was more of an impact, which probably drove the forearm backwards in relation to the upper arm and injured these--this anterior capsule muscle, which probably was a partial dislocation, in that it wasn't far enough to stay dislocated.

Q. It's your opinion that these injuries were sustained in this automobile accident, is that correct?

A. Yes, it is.

MR. WOOD: I have no further questions of Doctor Hall. Thank you. Answer Mr. Hicks.

COURT: You did not put the amount of the bill in, Mr. Wood. Ladies and gentlemen of the jury, the amount of Doctor Hall's bill, at this time, is ninety dollars. The Court is going to be in recess for about five minutes. I'll admonish you not to discuss this case in anyone else's presence nor permit anyone to discuss it with you. And we'll be back in about five minutes.

(At this time, the jury left the Courtroom.)

(At this time, the Court declared a recess, after which the Court reconvened.)

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

COURT: Allright, you may cross examine Mr. Hicks.

CROSS EXAMINATION

BY MR. HICKS:

Q. Doctor Hall, as I understand when you first saw this young lady, it was about four days after the accident and the bruise on her face was on the left side of her face?

A. That's correct.

Q. And she was complaining about pain in her--in her right elbow. And you said you found a contusion. Did you see any discoloration or anything like that in the--in the elbow, I mean in the--in the--around the elbow, not in the elbow itself, but was there--

A. No, I didn't.

Q. And at the time you first saw her, she could extend it so that there was a forty degree limitation on extension?

A. No, the first time I saw her, there was only a twenty degree limitation on extension.

Q. Four days after the accident?

A. That's right.

Q. And--but there was--

A. But she also had a thirty degree limitation of flexion, that's right.

Q. Flexion, of bending it up. And then when you saw her a couple of weeks later, she could--had the normal flexion?

A. Flexion.

Q. And the extension had improved also, hadn't it?

A. Well, at that time, it was the same.

Q. Same?

A. But a month later, it had improved five degrees.

Q. It had improved five degrees in extension. So a month later,

the only thing you found was that she had about a fifteen degree limitation in--

A. That's correct.

Q. In extension. And you gave her instructions to use a warm bath or soak on it, and also to exercise it, isn't that correct?

A. That's right.

Q. And Doctor, you said that you didn't make any further appointments for her, but she was supposed to have an appointment with you in April of 1976, and did not come in, isn't that correct?

A. Let's see.

Q. I refer you to your letter of April 16, 1976.

(At this time, the document was handed to the witness, by Mr. Hicks, for his perusal.)

A. Well, that's undoubtedly correct, then. I didn't make that statement but--that's correct.

BY MR. HICKS:

Q. So, in April of '76, you--she was supposed to come in and she did not. And then finally in August of '76, she did come in?

A. That's correct.

Q. You found that there was a limitation--this limitation in extension had increased, at that time?

A. That is correct.

Q. As I understand now, a year later, you say it has increased -- limitation has increased some more. And you also say there is now atrophy in that muscle. Did you measure that muscle at any time prior to--

A. No, I did not.

Q. Atrophy is caused by failing to use a muscle, isn't that-- isn't that the general--



A. That's correct.

Q. In other words, if you take a well person and put their elbow like this and leave it like this for several months, you would have atrophy in the muscle (indicating)--

A. Correct.

Q. From lack of use? And isn't it true that--first, let me back up. Can you tell whether this injury she had is caused by capsulitis, which is inflammation inside the joint or whether it's caused by the scar tissue to the tendons on the outside?

A. Well, it's --it certainly--if it were mere capsulitis, I would expect that you could just slowly stretch it on out more completely. In other words, just an irritation of the capsule. Whereas from scar tissue, I would expect that it comes to a sudden stop, which it does. That's the only way to distinguish it.

Q. Now, in both of these cases, in other words, in your opinion it's caused from scar tissue to the tendon?

A. That's correct.

Q. And isn't the best treatment for that therapy and just making yourself use that--use that muscle?

A. Stretching and range of motion exercises is about the only thing there is to do for it.

Q. And if you don't stretch it and exercise it, it's going to get worse rather than better, isn't that correct?

A. Yes, I would say that's correct.

Q. And also the atrophy of the muscle shows that you just are not using that muscle?

A. True; but when you--when you have reduced excursion of the muscle, you are going to use it less because you're not going to get it all

the way out and this contributes to it.

Q. Doctor, if a person within a month or six weeks after the accident, it's shown that there has been a continuous improvement and then in over a year later, shows that there is now this limitation and then the limitation is increasing, isn't this an indication that the person is just not exercising that arm, as you instructed?

A. It certainly suggests that they-- that more exercise would have been of benefit, yes. I would have to say that.

MR. HICKS: No further questions.

COURT: Any redirect?

#### REDIRECT EXAMINATION

BY MR. WOOD;

Q. Doctor, even if--assuming that all--in an injury of this type, all the exercises that you gave to the person were completed, the arm can still or the muscle can still contract atrophy, is that correct, even if you exercise that arm as you directed the person to do?

A. Well, as I mentioned, I think when you do have a contracture, you're not going to be able to exercise it through the full excursion in motion. Therefore, it's going to be used less, even doing the same activities and you're going to develop atrophy of that muscle.

Q. And the exercises that you gave Mrs. Armstead to do, is there any indication to you, medical--within a medical--reasonable medical degree of certainty, that she did not perform the exercises that you prescribed?

A. I have no knowledge that she did not, that's correct.

Q. And even if she did do the exercises that you asked her to do, the arm could very well get worse as well, even if you do the exercises, is that correct?

A. It could, yes sir.

MR. WOOD: All right, sir. No further questions

COURT: Any further need of Doctor Hall?

RE: CROSS EXAMINATION

BY MR. HICKS:

Q. Doctor, you said it could. As I understand on cross examination, you said the suggestion is that by this arm getting worse, is that she was not exercising it much?

A. I stated that more exercise would have been beneficial to the point where possibly, we should even send her to a physical therapist over a period of time. But not realizing that it was going to be a progressive deformity, this was not done.

MR. HICKS: Thank you.

COURT: Doctor, if she had visited you in April as she was supposed to, would you have been able then to determine the course of treatment for her that might have been more beneficial?

A. It's difficult to say, because that--even that would have been, what, almost eight months later, and I think that she probably would have continued developing a contracture of that elbow by that time.

She would have shown, even though it increased twenty degrees in a year, it probably would have shown a good part of that by then.

MR. HICKS: Well, just one other.

BY MR. HICKS:

Q. You did, though, when you last saw her in September of 1975, tell her that if she continued to have trouble or if this got worse, to come back and see you, didn't you, if I remember correctly?

A. Well, I'll dictate from my note. Let's see, September the

third. "it's my impression that she has made as much improvement as can be expected. She was advised to continue with the warm soaks and stretching exercises to the right elbow, as she may achieve some further extension over the next few months. She has already gained maximal function of use of the elbow, so no further follow-up examination will be required." In other words, I would have considered it almost maximal function. There are very few things that we do with the elbow in full extension. As you get more deformity, you have more limitation of motion; in the first five or ten degrees, there's essentially no disability at all. But as it gets more, then the disability goes up.

Q. In fact, as your notes indicate, you told her that--well you indicate from your notes that if she did exercise it, you expected to even get more extension?

A. I would have thought that she might, at that point.

MR. HICKS: No further questions.

#### REDIRECT EXAMINATION

BY MR. WOOD:

Q. Doctor--when you say that you had an appointment in April with her, did you make that appointment, sir?

A. I probably did not. As I recall, the appointment was made for the purpose of evaluating her for a medical-legal letter. So, it was not an appointment that I had told her to make or--and I'm not sure or have the--

Q. To let Mr. Hicks and I know how much disability she had at that point, is that correct?

A. That's correct.

Q. Doctor, in the future, do you anticipate recommending professional physical therapy for her at all?

A. Well, I--I have spoken to her again about continuing stretching exercises and increasing the--the frequency of these exercises, but I do not think that really physical therapy, at this stage, is going to be of that much benefit.

MR. WOOD: No further questions, Doctor.

COURT: Any further need for Doctor Hall?

MR. WOOD: No sir.

COURT: All right, Doctor you may be excused or you may have a seat in the Courtroom. Next witness.

MR. WOOD: Call Paul Armstead

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B. Testimony of Paul Armstead

(TR 59) Q. Mr. Armstead, you are the husband of Peggy Armstead, the Plaintiff in this case, is that correct?

A. Yes, I am.

Q. Prior to the accident that she was involved in, on July the 19th, 1975, do you have any knowledge of any injuries to--or that she may have had to her right arm, prior to that accident, before the accident?

A. No.

Q. How about after the automobile accident, were there any injuries to her right arm?

A. After the accident?

Q. Yes sir.

A. I don't quite understand.

Q. After the automobile accident occurred, sir, within the last two years, has she injured her right arm at all, other than in the automobile accident?

A. No.

Q. Mr. Armstead, after this accident occurred, tell the Court what your wife's apparent condition was at that point in time; that is, how she could move about and do her normal household functions and things such as that?

A. Well, she couldn't function properly.

Q. And how long was it, sir, that she could not function?

A. Well, I took off a week.

Q. Where did you work, at that time, sir?

A. Eastern State Hospital.

Q. Where do you all live, Mr. Armstead?

A. Toano.

Q. How long have you all lived in Toano?

A. Six, seven years.

Q. All right, sir. And what did you do in regards to taking off a week, sir? What--what did you do to assist, if anything?

A. Well, I did housecleaning. I got my youngest boy ready for kindergarten.

Q. How old are your children, now, sir?

A. One is five, one is eight.

Q. And at that point, then, they were approximately three and six, is that correct?

A. Right.

Q. Did she--is there anything that she doesn't do now with the children that she used to do with the children?

A. Well, we used to play a little ball. She can't throw it now, because she's right-handed.

Q. How about her household functions in regards to now, clean-

ing the house and things like that? Do you assist her now or does she do all of that, now?

A. Yes, I assist her, as far as vacuuming the floors.

Q. What--what do you do?

A. Vacuum, scrub.

Q. Why do you do those chores?

A. Well, I feel it's my duty.

Q. Is your wife able to or does she complain when she does these things?

MR. HICKS: Your Honor, I have to object to leading the witness. This witness is not an expert witness--

COURT: It is right leading, Mr. Wood, I ask you to--

BY MR. WOOD:

Q. Well, why do you feel it's your duty, Mr. Armstead?

A. Because she can't do the things now she could normally do at first.

Q. How long was your wife out of work, as a result of this accident?

A. I would say about twenty-one or twenty-two days.

MR. HICKS: What was the answer to that, Judge?

COURT: Twenty-one or twenty-two days.

MR. HICKS: Thank you.

BY MR. WOOD:

Q. After she went back to work, she later quit her job at Colonial Williamsburg, is that correct?

A. Yes.

Q. That wasn't as a result of her not being able to perform those duties, but because she had sick children at home, at that time, is that correct?

A. That's correct.

MR. WOOD: I have no further questions of Mr. Armstead.

Answer Mr. Hicks.

COURT: Any questions?

#### CROSS EXAMINATION

BY MR. HICKS:

Q. As I understand, Mr. Armstead, about three-three weeks or three or four weeks after the accident, she did go back to work at Colonial Williamsburg, at the job she was working at before the accident, is that correct?

A. True.

Q. And then because of illness among your children and all, she stopped working and started staying at home with the children, is that correct?

A. Right.

MR. HICKS: Thank you.

MR. WOOD: No further questions.

COURT: All right, Mr. Armstead, you may stay in the Courtroom or you may leave. Next witness.

MR. WOOD: Call Mrs. Armstead.

COURT: All right.

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C. Testimony of Peggy Armstead

(TR 64) Q. You're Peggy Armstead, the Plaintiff in this case, is that right, Peggy?



A. Yes.

Q. Peggy, where do you reside?

A. Toano, James City County.

Q. How long have you and your husband lived in Toano?

A. For about six or seven years.

Q. Do you have any children, Peggy?

A. I have two.

Q. And what are their ages, now?

A. Five and eight.

Q. In July 19th, 1975, were you involved in an automobile accident?

A. Yes, I was.

Q. Okay. What occurred to you when the impact occurred to that vehicle? What happened to you at that point in time?

A. I had injuries to my right arm and the left cheekbone  
(indicating)

Q. What--do you know what you hit inside the vehicle?

A. No.

Q. I mean, what happened to you after--immediately after the accident? Were you transported anywhere?

A. I was taken to the hospital.

Q. And what hospital were you taken to?

A. Williamsburg Community.

Q. How long did you stay at Williamsburg Community Hospital?

A. I was released later on that evening.

(At this time, Mr. Wood exhibited a document  
to Mr. Hicks.)

BY MR. WOOD:

Q. Did you have X-rays taken at Williamsburg Community?

A. Yes.

Q. Were these bills submitted to you from Williamsburg Community Hospital for your treatment there, the radiology bill and the Williamsburg Community Emergency Room bill (indicating)?

A. Yes.

MR. WOOD: Judge, we'd like to ask those be marked as Plaintiff's Exhibits. I believe that's Two and Three.

COURT: I mark the radiology bill as Plaintiff's Exhibit Two and the Hospital bill is Plaintiff's Exhibit Three.

(At this time, the documents were received and marked as Plaintiff's Exhibits Number Two and Three.)

MR. WOOD: And the Emergency Room Summary, outpatient record.

COURT: Mark it as Four.

(At this time, the document was received and marked as Plaintiff's Exhibit Number Four.)

BY MR. WOOD:

Q. How were you transported to Williamsburg Community, Mrs. Armstead?

A. By rescue squad.

Q. And what did they do to you? What complaints did you make, at that time, when the rescue squad came on the scene there, at that accident?

A. I told them I was having a lot of pain in my right arm.

Q. Where was the pain?

A. The whole arm was paining.

Q. And what other injuries did you notice, at that time?

A. This part of my face was very sore and swelling (indicating).

And I had two cuts on my left hand.

Q. Those cuts didn't leave any scarring on your left hand?

You didn't have any stitches in your hand, is that correct?

A. No.

Q. And what did they do to your right arm on the scene of the accident?

A. They put it in an air splint.

Q. An air splint. It's one of those blow-up bag things that immobilizes the arm?

A. Yes.

Q. And then they took you by ambulance, is that correct, to Williamsburg Community Hospital?

A. Right.

Q. After you were discharged from Williamsburg Community Hospital, did you seek other medical assistance?

A. Yes, I did.

Q. And who did you see first of all, after you were discharged?

A. I went back to the hospital but they told me to, you know, they didn't mean for me to come back there if I got worse. So, I went to see Doctor Wise and he recommended Doctor Hall.

Q. And Doctor Hall is an orthopedic surgeon who testified here previously, is that correct?

A. Right.

Q. And did you see Doctor Hall?

A. Yes, I did.

Q. And he tested your arm and made X-rays of it, is that correct?

A. That's correct.

Q. And after that, did he prescribe any treatment for that arm?

A. He told me to exercise it and give it warm baths.

Q. And did you do that?

A. Yes.

Q. Did you do that regularly as he had prescribed it?

A. Yes.

Q. After you saw him, then in September of 1975, did he ask you to come back at all after that period of time?

A. No.

Q. Did you continue the exercises that he had prescribed and the other treatment for your arm that he had prescribed?

A. Well, he prescribed a medicine for headaches and I took that, but it made me sick, so, you know, I stopped taking that.

Q. It made you sick to your stomach.

A. Right.

Q. And did you continue your exercises even after you saw him in September?

A. Right.

Q. In fact, do you still do your exercises?

A. Yes.

Q. How often do you do those exercises, Mrs. Armstead

A. About three or four times a day.

Q. Would you show the members of the jury what you do to exercise your arm?

A. A lot of times I just work on it, you know, up and down

or I'll catch something and you know, hold on and push up, from the bottom (indicating).

Q. Mrs. Armstead, could you come down here a minute, please?

(At this time, the witness approached the jury box.)

MR. WOOD: I notice you're holding your arm to your side. Why do you hold--

COURT: Don't comment, Mr. Wood, on what she's doing or not doing.

BY MR. WOOD:

Q. Why do you hold your arm in a position that it's in now?

A. Because when I let it go down as far as I can, when I walk it bounces and causes it to swing.

Q. Would you put your elbow up--up here and your arm up here and show the members of the jury how far you can stretch your arm out?

(At this time, the witness complied with the request of Mr. Wood.)

A. This is as far as I can get it (indicating).

BY MR. WOOD:

Q. And these ligaments in here, are they always like that when you stretch your arm out like that (indicating).

A. Yes.

Q. How do you walk normally now, with your right arm?

A. I walk like this (indicating).

Q. And how about your left arm, you leave that to your side?

A. Right (indicating).

MR. WOOD: Have a seat back up on the witness chair, if you will, Mrs. Armstead.

(At this time, the witness resumed her seat in

the witness box.)

BY MR. WOOD:

Q. After you returned home from the hospital and during this time that you were seeing Doctor Hall until September of 1975, what--how much time--or where did you work at that point in time and what were your duties there?

A. I worked for Colonial Williamsburg as a housekeeper.

Q. And what were your duties as a housekeeper, Mrs. Armstead?

A. I would clean rooms for the guests.

Q. How long was it before you were able to go back to work and perform your duties there at Colonial Williamsburg?

A. I think I was out of work about five, four weeks; four--a little over four weeks.

Q. A little over four weeks?

A. Um hum.

Q. What was your salary at Colonial Williamsburg, at that time?

A. I was getting two fifteen an hour.

Q. Two fifteen per hour?

A. Right.

Q. And how many days a week were you working?

A. Five days a week.

Q. Five days per week; and how many hours per day?

A. Seven and a half.

Q. After you went back to work and--first of all, what duties at home were you able to perform or not able to perform as a result of this elbow injury, during that period of time, that four to five week period?

A. Oh, I wasn't doing much of anything while I was at home.

Q. Who was taking care of your family and cleaning your house

for you and doing your chores, and things like that, that you normally do?

A. My husband.

Q. After you went back to work, would you tell the ladies and gentlemen of the jury, first of all, before you went back to work, during that same period of time, what kind of--what were you experiencing in regards to pain or if there was any, tell them what it felt like, at that point in time?

A. I was experiencing a lot of pain.

Q. Where was the pain?

A. In the elbow.

Q. And after you went back to work, tell me, was this--this five week period, was that continuous or was that intermittent? That is, did it come ever once in a while or was there pain all the time?

A. It pained all the time.

MR. WOOD: How about after you did--

MR. HICKS: I have to object to Mr. Wood doing all of this leading. I feel that the--

COURT: Mr. Wood, you are leading. You've been leading the witness right down the line. I haven't --Mr. Hicks hasn't objected. But when he objects, I have to sustain his objection, because you certainly are leading.

MR. WOOD: Judge, if it please the Court, she's testified that she had pain--

COURT: Mr. Wood, you're leading the witness and you know better than to ask questions on cross examination or any other examination to lead a witness. Ask your questions so they're not leading, please.

MR. WOOD: All right, sir.

BY MR. WOOD:

Q. What were you experiencing in regards to your elbow, Mrs. Armstead, after you did go back to work?

A. I was experiencing a lot of pain.

Q. When was it and how long was it?

A. It was all the time.

Q. For how long a period of time?

A. While I was doing the work, it was all day long. You know, I was lifting.

Q. How about after that? How about after work, when you rested your arm? Was there any pain or not?

A. Mostly aches. It ached then.

Q. How long a period time did this last?

A. For about an hour.

Q. Was this after you worked or during your work?

A. The pains while I was working, lasted all day. Like, when I'm at home, sitting down, it aches for about an hour, then you know, it stops.

Q. How about now, Mrs. Armstead? Do you perform your regular household functions?

A. Most of them.

Q. What can you not do now that you did before this accident and before you contracted this disability? What can you not do now that you did before?

A. Well, I used to play ball with the two boys. I don't play anymore. And I used to swing them around. I don't do that.

Q. What do you mean, "swing them around"? You mean, swing them



around like this (indicating)?

A. Yes.

Q. How about any other things that you--that you can't do?

How about your cleaning chores and things--

MR. HICKS: Your Honor, I have to object. It's leading and putting words in the Plaintiff's mouth.

MR. WOOD: I withdraw the question.

BY MR. WOOD:

Q. Are there any other things that you can't do?

A. Well, my husband does the scrubbing and he vacuums; and if I do the dusting or anything, I use my left arm and I don't use the right arm.

Q. Is there anything else that you normally could do before that you don't do now?

A. He does the dishes most of the time.

Q. Anything else that you can think of?

A. No. I can do other things, but you know, it gives me trouble doing it.

Q. What do you mean, it gives you trouble?

A. Like, when I drive and when I go to change the gear, I have to sit up and lean over or when I start the ignition--

Q. What kind of gear shift do you have?

A. It's the one in the floor.

Q. On the floor board?

A. Right.

Q. Is it automatic or stick?

A. Automatic.

Q. What--how do you do that differently than you did before?

A. Before I would just kind of sit up straight and reach over for it. But now, I ahve to sit up and lean over to one side, over the right side.

Q. So that you can reach it?

A. Right.

Q. How about any other things that you can think of offhand?

A. Dressing is hard because, you know, I have to reach. It's just a lot of little things, like dressing and putting the car in gear, I have to sit up; I lean forward when I start the car.

Q. What do you experience, if anything, in your elbow area, after you do any type of work at all, now or in the house?

A. I still experience pain.

Q. How often do you experience pain now?

A. Four or five times a day.

Q. Would you tell the members of the jury when?

A. Well, whenever I'm doing any kind of work, it pains and if I just sit down and like, at night, if I sit down, it doesn't pain, but it aches. It's like a dull ache.

Q. Does it bother you any other time of the day?

A. Yes, it's mostly anytime, you know, No special time it aches. If I do my work, it pains. If I sit down and relax, it aches then.

Q. Have you worked since you left your job at Colonial Williamsburg?

A. Yes, I worked at Howard Johnsons.

Q. And what type of duties did you perform there?

A. It was cashier.

Q. How was that in regards to your disabilities, being a cashier?

A. It wasn't too bad. My arm--I still had trouble with my arm. When I went to take the guest's money, I would use my left arm to reach, you know, across the cash register.

Q. Do you have any educational background other than high school, Mrs. Armstead?

A. No.

Q. Do you have any training other than day work type work and cashier work and things like that?

A. No.

MR. WOOD: I have no further questions.

Answer Mr. Hicks' questions.

#### CROSS EXAMINATION

BY MR. HICKS:

Q. Mrs. Armstead, as I understand, you were sitting in the back of the car on the left side, on the left hand side?

A. Yes.

Q. And Mr. Berkley said there--his recollection, there were six people in the car, is that correct?

A. That's correct.

Q. Three in the front and three in the back?

A. Right.

Q. And you don't know what your left cheek struck on do you or--

A. No.

Q. You don't--you don't know what happened, just the accident happened suddenly and you experienced this bruise to your cheek and experienced pain in your right elbow?

A. That's right.

Q. And as I understand, you say you still exercise your arm?

A. Right

Q. And show us, how you exercise it?

A. I catch up under something and push with this hand and I work it back and forth (indicating).

Q. Just work it back and forth like this (indicating)?

A. Um hum.

MR. HICKS: No further questions.

MR. WOOD: No further questions.

COURT: Have a seat by your attorney,

Mrs. Armstead.

MR. WOOD: Your Honor, the Plaintiff rests its case.

MR. HICKS: Your Honor, the defense doesn't wish to put any evidence on. The Defense has no evidence to put on.

COURT: All right; I guess you've got some instructions.

MR. WOOD: Yes sir.

COURT: Members of the jury, I will take a recess for about fifteen or twenty minutes.

Again, you may walk around the Courthouse or whatever you care to do. I would admonish you again not to discuss this case in the presence of anyone else or permit anyone else to discuss it in your presence, until such time as you're all in the jury room together. All right, be back in about fifteen minutes.

(At this time, the jury left the Courtroom.)

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I-N-S-T-R-U-C-T-I-O-N-S

PLAINTIFF'S INSTRUCTION NUMBER ONE (GRANTED):

COURT: Well, first, is there any objection to Instruction One?

MR. HICKS: No sir, your Honor. I don't have any.

COURT: All right.

PLAINTIFF'S INSTRUCTION NUMBER FIVE (GRANTED AS AMENDED):

COURT: On Five.

MR. HICKS: On Five, your Honor, the Doctor has testified that he has not prescribed any future--

COURT: Well, let's go down them as they've got them. "Any bodily injuries sustained and the extent and duration thereof." Any objection to that?

MR. HICKS: No sir.

COURT: "Any effect of any such injuries upon her health according to its degree and probable duration."

MR. HICKS: No sir, no objection.

COURT. All right. "Any physical pain and mental anguish suffered by her in the past, and any which may be reasonably expected to be suffered by her in the future."

MR. HICKS: She has testified that she's still having--

COURT: Still having pains and--

MR. HICKS: Yes sir.

COURT: All right. "Any disfigurement or deformity." I don't-- I haven't heard of any disfigurement, Mr. Wood.

MR. WOOD: That's a deformity, I would submit to the Court rather that disfigurement. I don't know I--

MR. HICKS: I don't think it's a deformity. I just think it's--

MR. WOOD: Well, Judge, she--she walks like this or she has to hold her hand like that (indicating). She has--she can't bend her arm straight. That is not normal and I would submit it's a deformity and a disfigurement or both.

COURT: I'm going to strike four and note your exception. There's certainly no testimony of humiliation or embarrassment or anything of that kind even associated with carrying her arm, as she says she has. "Any inconvenience and discomfort caused in the past and any which will probably be caused in the future."

MR. HICKS: I don't object to that. There is evidence--

COURT: All right. Any doctors--she got doctor's bill, hospital bill, medical expenses incurred in the past.

MR. HICKS: Now, your Honor, I do object to future because the doctor--

COURT: There's no testimony Mr. Wood, that there would be any incurred in the future.

MR. WOOD: I agree--I agree with the Court and would ask that the Court delete, "and any which may be reasonably expected to occur in the future."

COURT: "Any loss of earnings in the past by reason of being unable to work at her calling."

MR. HICKS: No objection to that, Judge.

COURT: "Any loss of earnings and/or lessening of earning capacity she may reasonably be expected to sustain in the future."

MR. HICKS: No evidence of that, your Honor.

COURT: I haven't heard any.

MR. WOOD: Judge, I--I think it's an arguable point. That is, that she has a lessening of an earning capacity, because the doctor says

that this arm is going to get worse. Obviously, if it gets worse, it's certainly arguable that she's not going to be able to do any type of work. If that arm draws up to--to--all the way, then she's not going to be able to be a cashier, if she punches with the right hand. And she's testified to that. Nor will she be able to do housecleaning.

MR. HICKS: There wasn't any question of the doctor saying that based on the fact that she worked as a cashier or worked as--did maid work at the Colonial Williamsburg, that this would have any effect in the future. No testimony to support that, your Honor.

COURT: I have not--Mr. Wood, I'm willing to listen again. But I haven't--

MR. WOOD: I have nothing else to say about that other than what I said.

COURT: She went back to work--she went back to work, which she says, four or five weeks later. Apparently did her job satisfactorily except left because of some problem with her children.

MR. WOOD: Yes sir, that's correct.

COURT: No indication that she left at all because of any--any--any reason she couldn't do the job.

MR. WOOD: No sir.

COURT: She went back to work as cashier and apparently did an all right job there. And I must admit, I didn't follow whether she's still was with that job or whether she left that one too. The only difficulty she said with that job was that she had to handle money with her left hand sometimes, instead of her right.

MR. WOOD: Judge--

COURT: I haven't heard anything else about--

MR. WOOD: The only evidence that I would submit that is argu-

able is that the doctor says the arm is going to get worse in regards to drawing up. Well, obviously, if the arm does draw--

COURT: Well, it's certainly going to get worse if she doesn't exercise it. It isn't any question about that.

MR. WOOD: Well, there's no evidence that in fact she hasn't exercised it. If it please the Court, the point is that if it does draw all the way up, she's not going to be able to be a cashier or anything else.

COURT: Let me say from a football player's experience of twelve--almost eight years, I would suggest to you that exercise is one of the greatest healers for that type of injury that ever were--ever was. But be that as it may, I'm going to strike out eight and note your exception.

Now, are these the only two or have you got another one?

PLAINTIFF'S INSTRUCTION NUMBER SIX (GRANTED):

MR. HICKS: Number Six, your Honor, life expectancy. I--

COURT: Well, there is some evidence, Mr. Hicks that she's got a fifteen per cent disability in her--in her arm. That's what the doctor said and certainly at the age of--that she was at this accident, this is the table. I think it's--

MR. HICKS: I agree, it's proper, Judge.

COURT: I think it's proper to give the instruction. You certainly can argue about it.

MR. WOOD: Thank you, Judge.

COURT: All right. What have you got, Mr. Hicks?

DEFENDANT'S INSTRUCTION "A" (GRANTED):

MR. WOOD: No objection.

COURT: No objection to "A".

DEFENDANT'S INSTRUCTION "B" (WITHDRAWN):

MR. WOOD: I would object to "B", if it please the Court.



COURT: I don't recall any hypothetical question put to him,  
Mr.--Mr. Hicks.

MR. HICKS: I don't think so, your Honor. I withdraw that one.

COURT: All right.

DEFENDANT'S INSTRUCTION "E" (GRANTED):

MR. WOOD: No objection.

COURT: "E", no objection.

MR. WOOD: Judge, I don't--you didn't submit "C", is that  
correct?

COURT: He withdrew "C".

MR. WOOD: That's right. "D" is withdrawn. And "E"--

COURT: "E" is the one you said you approved of. It certainly  
is the law, Mr. Wood.

MR. WOOD: Yes sir. No objection to that.

DEFENDANT'S INSTRUCTION "F" (GRANTED):

MR. HICKS: Your Honor, I offer "F" because that's--

MR. WOOD: Judge, I would object to "F" on the grounds that  
there has been no such evidence that she did not exercise reasonable care  
and diligence to avoid loss and minimize or lessen the resulting damage. I  
know in anticipation what Mr. Hicks is going to offer--argue, but--he's  
going to say, of course, that this meeting that she was supposed to have in  
April, she didn't keep an appointment. Well, that wasn't a meeting. I  
think the doctor testified--.

COURT: A little more than that, Mr. Wood. The testimony that  
Doctor Hall gave and answered on cross examination was that--the question  
put to him that if she had done these exercises and so on, would he expect  
this to be as bad as it was when she came back to him on Friday. And he said  
no.

MR. WOOD: No sir, I don't believe that was the evidence.

COURT: Would you read back please of Doctor Hall's testimony.  
The first--the second question on cross examination.

(At this time, the Court Reporter read back.)

COURT: Using the elbow when she came back to him, when--he first testified that her degree of injury was lessened and the second time she came back it had--the degree of injury had gotten worse. And Mr. Hicks asked the question, as I remember it, about the exercising . And he hesitated before he even answered about whether or not if she had done these exercises, would he expect it to be as bad as it was and I think his answer was "no", that he would not expect it--

MR. HICKS: Then he also said or rather suggested that she had not exercised it.

COURT: That was--he didn't say but he said he did not expect that--as I recall, that he did not--would not expect it to have been as bad if she had exercised it.

MR. WOOD: Well, what he expects--certainly if a doctor prescribes exercises--he also testified that even if she the exercises, it could have gotten worse, first of all. Secondly, he said that there was no indication to him that in fact she did not do the exercises, because even if she did them--

COURT: Except that he said that as--he's an expert witness. He's presented here by you, and he's testified that he would expect if she had done them, to have lessened the degree, Mr. Wood. That's his testimony.

MR. WOOD: Yes sir, Judge. I--I understand that was his testimony.

COURT: It certainly indicates to him that she had not done the exercises.

MR. WOOD: No sir, Judge. That isn't what he said. He said there was no evidence at all to him--

COURT: I'm going to give "F" anyway. Note your exception.

MR. WOOD: All right, sir.

COURT: Anything else?

MR. WOOD: No sir.

COURT: All right, Mr. Dutton, if you want to--if the jury is out there and ready, we'll--

MR. WOOD: Can we take about five minutes, Judge?

COURT: All right, all right, all right.

(At this time, the Court declared a recess, after which the Court reconvened.)

(At this time, the jury returned to the Courtroom and resumed their seats in the jury box.)

COURT: Now ladies and gentlemen of the jury, you have heard all of the evidence in the case and as I told you in the beginning, the only verdict to bring in is for the Plaintiff, since the Defendant has admitted that this is his responsibility. There are certain instructions, however, that the Court will give you as to the law in this case and which you should give consideration to in making your award. Now, these instructions simply tell you what the law in this case is and that if you believe certain things, then you should do certain things. If you believe other things, then you will do as directed.

(At this time, the Court then read the Instruc-

tions to the jury.)

COURT: You may address the jury.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG AND  
THE COUNTY OF JAMES CITY. SEPTEMBER 19, 1977

PRESENT: HONORABLE RUSSELL M. CARNEAL, JUDGE

PEGGY ARMSTEAD

PLAINTIFF

vs.

LAW FILE #2779

EDGAR JAMES

DEFENDANT

This day came the parties in person and by counsel, and the defendant having heretofore filed his grounds of defense herein, issue is joined.

Whereupon came a jury, to-wit: Harriet H. Oliver, Ivan Johnson, Frazier Hoover, Norma Linkous, George Hitchens, Shelton R. Adams and Thomas H. Smith, who were sworn to well and truly try the issue joined and a true verdict give according to the evidence and the law.

The evidence of the plaintiff was presented and at the conclusion thereof the defendant by counsel moved to strike the evidence of the plaintiff on grounds stated in the record, which motion was overruled and to which ruling of the Court counsel for the defendant excepted.

Thereupon, the evidence of the defendant was presented and at the conclusion of all of the evidence, the defendant by counsel renewed his motion to strike the plaintiff's evidence, on the same grounds, which motion was overruled and to which ruling of the Court counsel for the defendant excepted.

After receiving instructions from the Court and hearing arguments of counsel, the jury retired to their room to consult of their verdict and after some time returned into Court with the following verdict:

"We, the jury, on the issues joined find in favor of the Plaintiff and assess her damages at \$2,000."

(Signed) George V. Hitchens, Foreman

*Judg. Bk. 2 p. 138*

The plaintiff by counsel, moved to set aside the verdict as being contrary to the law and evidence, which motion was overruled and to which ruling of the Court counsel for the plaintiff excepts.

It is therefore ordered that the plaintiff recover and have judgment against the defendant in the amount of \$2000.00, with legal interest thereon from this date until paid and the costs.

Russell M. Carnall Judge

The following persons having served as jurors this day are allowed as follows: Harriet H. Oliver, \$14.40; Ivan Johnson, \$13.50; Frazier Benjamin Hoover, \$13.05; Norma Linkous, \$17.10; George V. Hitchens, \$14.40; Shelton Ray Adams, \$14.40; Thomas H. Smith, \$14.20; Nancy Sturgeon Luzar, \$15.00; Frank Lee Crump, \$12.90; Edward E. Jones, \$13.20 which is ordered certified for payment out of the funds of the City of Williamsburg and County of James City.

## ASSIGNMENTS OF ERROR

### I

"The trial court committed error in refusing to grant the jury instruction regarding disfigurement or deformity resulting to the Plaintiff and any humiliation and embarrassment associated therewith."

### II

"The trial court committed error in failing to instruct the jury on loss of earnings and/or lessening of earning capacity the Plaintiff may reasonably be expected to sustain in the future."

### III

"The trial court committed error in instructing the jury regarding the Plaintiff's duty to exercise reasonable care and diligence to avoid loss and minimize or lessen the resulting damage."

### IV

"The trial court committed error in overruling the Plaintiff's motion to set aside the verdict as grossly inadequate to cover the damages reflected by the evidence."