



9-1-1979

Allocation of Peremptory Challenges among Multiple Parties.

Daniel J. Sheehan Jr.

Cynthia C. Hollingsworth

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Civil Procedure Commons](#), [Constitutional Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Daniel J. Sheehan Jr. & Cynthia C. Hollingsworth, *Allocation of Peremptory Challenges among Multiple Parties.*, 10 ST. MARY'S L.J. (1979).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol10/iss3/6>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

ALLOCATION OF PEREMPTORY CHALLENGES AMONG MULTIPLE PARTIES

DANIEL J. SHEEHAN, Jr.* & CYNTHIA C. HOLLINGSWORTH**

The right to peremptorily challenge members of a jury panel is of crucial importance in obtaining a fair and impartial trial. Because it is often difficult to establish grounds for excusing a juror for cause,¹ the peremptory challenge is a critical tool for rejecting prospective jurors who are least likely to be entirely impartial. Peremptory challenges are intended as an exercise in rejection of jurors, not selection.² For that reason, a limited number of challenges is allowed.³ In a law suit with only one plaintiff and one defendant, the system is simple to administer and works well. But more often than not, lawsuits involve multiple parties.⁴

This article will analyze the law regarding allocation of peremptory challenges in multiple party lawsuits. While case law on the subject has settled certain principles, other areas of conflict remain. This conflict is especially evident since the enactment of article 2151a in 1971.⁵ Intended to inject a degree of flexibility into the allocation of peremptory challenges, article 2151a has proven to be difficult to apply. It is clear, however, that article 2151a has not nullified the controlling principles in this area of law, but has only added a new element. First, the controlling principles will be identi-

* B.A., University of Iowa; J.D., St. Mary's University; Practicing attorney, Dallas, Texas.

** B.A., University of Texas at Austin; J.D., St. Mary's University; Associate Director, Southern Methodist University School of Law Legal Clinic, Dallas, Texas.

1. The reason it is difficult to show grounds for having a juror excused for cause is that it requires complete candor from a juror which can seldom be expected. This statement is not to suggest that prospective jurors are dishonest in revealing the existence or extent of a particular bias or prejudice. It is, rather, a recognition that everyone regards objectivity in the resolution of legal disputes as a virtue and tend to give themselves the benefit of the doubt. The end result is prospective jurors who will identify certain predispositions but understandably refuse to make the concrete assertion that those predispositions will render them unable to be fair and impartial. See generally *Swap Shop v. Fortune*, 365 S.W.2d 151, 154 (Tex. 1963).

2. See *United States v. Marchant & Colson*, 25 U.S. (12 Wheat.) 480, 481 (1827); *Ross v. State*, 157 Tex. Crim. 371, 374, 246 S.W.2d 884, 885, cert. denied, 343 U.S. 969 (1952).

3. See TEX. R. CIV. P. 233.

4. Multiple parties in lawsuits are common for several reasons. Vicarious liability is not unusual and typically means multiple defendants. Product liability cases are almost never restricted to a single defendant. Furthermore, a plaintiff's attorney is not likely to sue only one defendant when factual or legal complicity offers others. Nor is a single defendant likely to remain so when other potentially liable parties exist.

5. See 1971 Tex. Gen. Laws, ch. 421, § 1, at 1560 (current version at TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1978-1979)).

fied and discussed. Then an argument focused on how article 2151a is to be applied will be presented and, finally, the burden of demonstrating harm from an improper allocation of strikes will be discussed.

THE QUESTION OF ANTAGONISM

Rule 233 of the Texas Rules of Civil Procedure states simply that "Each party to a civil suit shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court."⁶ It has long been established that the word "party" does not mean individual persons or litigants, but refers to those groups of litigants having essentially common interests.⁷ Whether each defendant is to be considered a separate party within the terms of rule 233 depends upon whether their interests are, at least in part, antagonistic in a matter in which the jury is to be concerned.⁸ Therefore, the threshold question in allocating peremptory challenges among multiple litigants is whether any of the litigants on the same side of the docket are antagonistic with respect to a question that the jury will resolve. The problem of recognizing antagonism is itself very difficult and raises several subsidiary issues.

Existence of Antagonism

Antagonism between persons on the same side of the docket sufficient to entitle them to separate sets of challenges does not mean mere lack of completely identical interests, although in certain cases, it can mean just that. In the context of awarding jury challenges, the term "antagonism" has become a technical one. In fact, it is quite possible that multiple defendants may not be antagonistic within the commonly accepted meaning of the word and yet sufficiently fall within the legal meaning to allow them separate challenges to be jointly exercised against their true and common enemy, the plaintiff. A discussion of several cases will help generate an understanding of the meaning of antagonism.

In *Perkins v. Freeman*⁹ the mother of a child alleged a material

6. TEX. R. CIV. P. 233.

7. See, e.g., *Perkins v. Freeman*, 518 S.W.2d 532, 533 (Tex. 1974); *Tamburello v. Welch*, 392 S.W.2d 114, 116 (Tex. 1965); *Lipshy v. Lipshy*, 525 S.W.2d 222, 224 (Tex. Civ. App.—Dallas 1975, writ dismissed). See generally 11 TEXAS L. REV. 373, 374 (1933).

8. See, e.g., *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 744 (Tex. 1973); *Greiner v. Zinker*, 573 S.W.2d 884, 885 (Tex. Civ. App.—Beaumont 1978, no writ); *Retail Credit Co. v. Hyman*, 316 S.W.2d 769, 771 (Tex. Civ. App.—Houston 1958, writ refused).

9. 518 S.W.2d 532 (Tex. 1974).

change of conditions and sought to have custody changed from the defendant father to herself. The paternal grandparents filed a petition in intervention and sought custody for themselves alleging that both parents were unfit. The intervenors subsequently amended their pleadings to allege that the father was fit but that the mother was not and it would be in the best interest of the child to leave custody unchanged. The intervenor's prayer for relief, however, requested that if custody were changed, it be awarded to intervenors. Prior to trial, the intervenors amended their pleadings once more alleging only that the mother was unfit and seeking custody for themselves. The Supreme Court of Texas held that the pleadings themselves demonstrated a lack of antagonism between intervenors and the defendant father.¹⁰ The intervenor's petition did not allege that the father was unfit nor did it allege a material change of conditions. Under this state of facts, the defendant father and intervenors were both primarily seeking to have custody maintained in the father. The trial court's award of six peremptory challenges to the intervenors and six to the father, while awarding only six to the mother, was held to be reversible error because of the lack of antagonism.¹¹

In *Shell Chemical Co. v. Lamb*¹² the plaintiff was seeking recovery for the wrongful death of her husband. Shell Chemical Co. was constructing a new plant and employed H.K. Ferguson Co. as the general contractor. Ferguson, in turn, contracted with Fisk Electric Co. to provide the electrical services for the project. The plaintiff's husband, Lamb, was an employee of Fisk. Lamb was killed while working at the construction site after receiving an electrical shock which caused him to fall from a ladder. The plaintiff brought suit against Shell Chemical Co., Shell Oil Co., and H.K. Ferguson Co. Shell Chemical Co. filed a cross-action seeking contractual indemnity from H.K. Ferguson Co. H.K. Ferguson Co. brought Fisk Electric Co. into the suit as a third party defendant seeking contractual indemnity against Fisk. The trial court instructed a verdict in favor of Ferguson. Based upon the jury verdict, judgment was also entered that plaintiff take nothing from Shell Chemical Co. and Shell Oil Co. Finally, judgment was entered that Shell take nothing against Ferguson and that Ferguson take nothing against Fisk.

The court of civil appeals reversed the judgment of the trial court

10. See *id.* at 534.

11. See *id.* at 534.

12. 493 S.W.2d 742 (Tex. 1973).

in favor of Shell on the basis that the trial court had erred in allowing Fisk six peremptory jury challenges.¹³ The Supreme Court of Texas disagreed and held that Ferguson and Fisk were antagonistic with respect to a matter with which the jury was to be concerned.¹⁴ Ferguson's cross-claim against Fisk was based upon a provision of the subcontract by which Fisk agreed to indemnify Ferguson against all claims resulting from injury sustained by any employee of Fisk in performance of the subcontract. One of the essential elements of Ferguson's cause of action against Fisk was establishing that Fisk was performing its contract with Ferguson at the time that Lamb was killed. Fisk responded to Ferguson's cross-claim for indemnity by filing a general denial. The supreme court stated that the general denial raised the issue whether Fisk was performing its contract at the time that Lamb was killed.¹⁵ Therefore, considering all factors that were before the trial court at the time of jury selection, there appeared to be antagonism between Ferguson and Fisk.¹⁶

Furthermore, Shell's first amended answer alleged that if Lamb exercised ordinary care, the accident was caused solely by the negligence of a third party or parties over whom Shell had no control. The supreme court held that this pleading was sufficient to raise an issue whether Lamb's accident was caused solely by the negligence of Fisk or Ferguson.¹⁷ Shell was not seeking any affirmative relief against Fisk, but if Shell were successful in establishing its allegation that the accident was caused solely by the negligence of a third party, considering the indemnity agreement, the result could have been ultimate liability to Fisk.¹⁸

The supreme court's opinion in *Shell* should be minutely scrutinized because it illustrates the proper method of determining whether antagonism exists. First, the court properly considered the circumstances as they existed immediately prior to jury selection. This consideration follows the logical rule that the trial court's decision is tested by the factors known at the time it must make the decision.¹⁹ It ultimately developed that Ferguson and Fisk were not

13. *Shell Chem. Co. v. Lamb*, 476 S.W.2d 885 (Tex. Civ. App.—Houston [1st Dist.] 1972), *rev'd*, 493 S.W.2d 742 (Tex. 1973).

14. *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 745 (Tex. 1973).

15. *See id.* at 745.

16. *See id.* at 745.

17. *See id.* at 745.

18. *See id.* at 745.

19. *See, e.g., Lipsy v. Lipsy*, 525 S.W.2d 222, 224 (Tex. Civ. App.—Dallas 1975, writ *dism'd*); *City of Amarillo v. Reed*, 510 S.W.2d 624, 629 (Tex. Civ. App.—Amarillo 1974, writ *ref'd n.r.e.*); *Brown & Root, Inc. v. Gragg*, 444 S.W.2d 656, 659-60 (Tex. Civ. App.—Houston

antagonistic on any matter with which the jury was concerned since a directed verdict was rendered in favor of Ferguson.²⁰ The important point, however, is that at the time of jury selection Ferguson and Fisk appeared antagonistic.²¹

The doctrines of indemnity and contribution are frequently the basis of cross-claims between defendants. If the question of indemnity requires that fact issues be resolved before the right to indemnity can be determined, the defendants are antagonistic.²² On the other hand, if the right to indemnity presents a pure question of law, then the defendants are not antagonistic in spite of the existence of a cross-claim by one against the other.²³

Nor does the mere filing of a cross-action by one defendant against another itself establish antagonism between them.²⁴ In *Turner v. Turner*²⁵ the plaintiff sued the wife of her former husband

[1st Dist.] 1969, writ ref'd n.r.e.). The facts in *Brown & Root, Inc. v. Gragg* are a good example of antagonism apparent at the time of jury selection that failed to materialize during presentation of evidence. The court stated that "[w]e know of no Texas authority for reversing the judgment in a cause by reason of its having developed during trial that the allegations in the parties petition indicating antagonisms as to fact issues were not substantiated." *Id.* at 659-60.

20. See *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 744 (Tex. 1973).

21. Attempts to eliminate the appearance of antagonism should begin during discovery. In *Retail Credit Co. v. Hyman*, 316 S.W.2d 769 (Tex. Civ. App.—Houston 1958, writ ref'd) the plaintiff sought damages for injuries he received in a collision between an automobile driven by him and one driven by the defendant. Nelson was an employee of Retail Credit Company and liability of Retail Credit Company was based solely upon the doctrine of respondeat superior. Retail Credit Company filed a cross-action against Nelson alleging that it did not own the automobile driven by Nelson at the time and seeking indemnity for any liability imposed against it because of Nelson's negligence. The trial court refused both defendants' motions for separate sets of peremptory challenges and required the two defendants to share six challenges.

In the court of civil appeals, the defendants argued that they should have been awarded separate sets of challenges because of the existence of the cross-action between them. The court held that the mere existence of a cross-action between defendants does not demonstrate antagonism. See *id.* at 771. Concerning the question whether Nelson was in the course and scope of his employment, it was demonstrated to the trial court that in response to requests for admissions, both defendants had admitted that Nelson was acting within the course and scope of his employment at the time of the accident. As a result, there was no fact issue regarding the scope of employment and, therefore, no antagonism. *Id.* at 772.

22. See *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 744 (Tex. 1973). Obviously, if the defendants seeking indemnity or contribution between each other settle prior to jury selection, they are not antagonistic and awarding them separate sets of challenges is reversible error. *Greiner v. Zinker*, 573 S.W.2d 884, 885 (Tex. Civ. App.—Beaumont 1978, no writ).

23. See *Ogle v. Craig*, 456 S.W.2d 778, 781 (Tex. Civ. App.—Amarillo 1970), *rev'd on other grounds*, 464 S.W.2d 95 (Tex. 1971). *But see Robinson v. Lovell*, 238 S.W.2d 294, 297-98 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.).

24. See *Turner v. Turner*, 385 S.W.2d 230, 238 (Tex., 1964); *Retail Credit Co. v. Hyman*, 316 S.W.2d 769, 771 (Tex. Civ. App.—Houston 1958, writ ref'd).

25. 385 S.W.2d 230 (Tex. 1964).

for alienation of affection. She also joined the former husband of the defendant in order to reach his portion of the community property in satisfaction of any judgment she might obtain. The former husband of the defendant Mrs. Turner filed a cross-claim against Mrs. Turner alleging that he had no liability for her conduct and was entitled to indemnity for his attorneys' fees. The trial court awarded judgment to the plaintiff against Mrs. Turner and awarded judgment to Mrs. Turner's former husband also against Mrs. Turner for \$30,000 in attorneys' fees which he was required to pay in defending his suit.

On appeal, the defendant Mrs. Turner complained of the trial court's decision requiring her to share six peremptory challenges with her former husband. She alleged that she and her former husband were antagonistic because of the existence of the cross-claim for indemnity filed by her former husband against her. The Supreme Court of Texas noted that Mrs. Turner's former husband was not a joint tortfeasor and his liability was limited to his part of the community property which had belonged to him and his wife.²⁶ The court held that merely because two defendants might have actions against each other regarding their own liability would not entitle them to have six peremptory challenges each as against the plaintiff's cause of action.²⁷ The question of Mr. Turner's right to indemnity from his former wife presented a pure question of law. There being no antagonism between the two defendants with respect to any issue with which the jury was to be concerned, the trial court's award of six peremptory challenges to be shared by both defendants was held proper.²⁸

Another case decided by the Supreme Court of Texas makes it equally clear that antagonism of interest may exist between two defendants even in the absence of a cross-claim by one against the other. *Tamburello v. Welch*²⁹ arose out of a three car collision. The plaintiff sued the drivers of two other automobiles involved in an accident in which the plaintiff was injured. The defendants did not file a cross-action against each other, but one of the defendants alleged in his answer that the accident was caused solely by the negligence of the other defendant. Because of this pleading, the interests of the defendants were clearly antagonistic with respect to an issue which would be submitted to the jury. Accordingly, the

26. *Id.* at 232.

27. *See id.* at 238.

28. *See id.* at 238.

29. 392 S.W.2d 114 (Tex. 1965).

Supreme Court of Texas held that both defendants were entitled to separate peremptory challenges even though no affirmative relief was sought by one against the other.³⁰

The decisions in *Tamburello*, *Turner*, and *Shell Chemical Co.* are correctly decided and clearly demonstrate the antagonism required to be entitled to separate sets of peremptory challenges. It can be seen from those cases that the mere existence or absence of a cross-action by one defendant against the other is not determinative.³¹ In each case, there was separate justification for either permitting or denying separate sets of peremptory challenges to multiple defendants. In a number of cases, however, the question whether antagonism existed is not as clear.

Certain courts have misinterpreted the degree of antagonism required. A court should take considerable care in scrutinizing the positions of the defendants vis-à-vis each other and avoid being misled by the position of the plaintiff vis-à-vis each of the defendants. The case of *Cruse v. Daniels*³² provides a good example. In that case, the plaintiff was injured in an automobile accident which he alleged was caused by the negligence of two separate defendants. One of the defendants had parked his truck on the side of the road with the bed of the truck extending two to three feet over the edge of the road. The other defendant truck driver was traveling in the opposite direction and was in the process of making a right hand turn. The plaintiff was traveling east in the lane in which the first defendant's truck was parked. The plaintiff collided with the first defendant's truck and was injured.

The trial court awarded each of the defendant truck drivers six peremptory challenges and restricted the plaintiff to only six challenges. The jury found that the plaintiff had been contributorily negligent. The plaintiff complained on appeal of the trial court's awarding the two defendants a total of twelve peremptory challenges. While the opinion does not indicate whether either defendant alleged that the accident was caused solely by the negligence of the other defendant, the court of civil appeals held that the trial court properly awarded each of the defendants six peremptory challenges.³³ The court justified its decision by noting:

30. *See id.* at 116.

31. *Compare* *Turner v. Turner*, 385 S.W.2d 230, 238 (Tex. 1964)(defendants shared strikes even though cross-action existed) *with* *Tamburello v. Welch*, 392 S.W.2d 114, 116 (Tex. 1965)(separate sets of strikes allowed in absence of cross-actions).

32. 293 S.W.2d 616 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.).

33. *See id.* at 623.

Each party was required to defend against separate alleged acts of negligence pleaded against them respectively and they did so by filing separate answers and were represented by separate counsel, who filed separate briefs in this court. Consequently, their interests were not identical but there was a diversity of interest and they were each, as separate party defendants, entitled to six jury challenges under the provisions of Rule 233 and the authorities heretofore cited.³⁴

The court of civil appeals in *Cruse* misinterpreted the degree of antagonism that must be demonstrated between the defendants. Just because the plaintiff may succeed against one defendant and fail to establish liability against another is not justification for awarding each defendant separate sets of peremptory challenges. The decision of the court is really grounded upon its finding that the defendants were not united in a totally common defense; each defendant had its own separate acts of negligence to defend against.³⁵ Under the controlling principles as set forth by the Supreme Court of Texas, it is submitted that the court of civil appeals' considerations in the *Cruse* case were immaterial. The essential consideration is whether the defendants are antagonistic with respect to each other.³⁶ Considerations such as filing separate answers, representation by separate counsel, and filing separate briefs in the court of civil appeals are not factors that demonstrate antagonism between the defendants. *Cruse* differs substantially from *Tamburello* because of the allegation in *Tamburello* by one defendant that the plaintiff's injuries were caused solely by the negligence of the other defendant.³⁷ The sole proximate cause pleading in *Tamburello* expressly aligned one of the defendants with the plaintiff with respect to the negligence of the other defendant. This antagonistic alignment did not occur in *Cruse*.

This point is further illustrated by the case of *M.L. Mayfield Petroleum Corp. v. Kelly*.³⁸ In that case, the plaintiff had agreed to purchase thirteen oil wells for \$210,000. In negotiating the purchase the seller represented to the plaintiff that each of the wells was making its allowable production. The same representation was

34. *Id.* at 623.

35. *See id.* at 623.

36. *See, e.g.,* *Perkins v. Freeman*, 518 S.W.2d 532, 533 (Tex. 1974); *Greiner v. Zinker*, 573 S.W.2d 884, 885 (Tex. Civ. App.—Beaumont 1978, no writ); *Lipshy v. Lipshy*, 525 S.W.2d 222, 224 (Tex. Civ. App.—Dallas 1975, writ dismissed). *See generally* Jones, *Peremptory Challenges—Should Rule 233 Be Changed?*, 45 TEXAS L. REV. 80, 84 (1966).

37. Compare *Tamburello v. Welch*, 392 S.W.2d 114, 116 (Tex. 1965) with *Cruse v. Daniels*, 293 S.W.2d 616, 623 (Tex. Civ. App.—Amarillo 1956, writ refused n.r.e.).

38. 450 S.W.2d 104 (Tex. Civ. App.—Tyler 1970, writ refused n.r.e.).

made to the plaintiff by an employee of the seller who operated the wells. Finally, the seller's bookkeeper was also alleged to have made the representation regarding the production of the wells. Shortly after purchasing the wells, it became apparent that the wells were not capable of meeting the production levels which had been represented to the plaintiff.

The purchaser filed suit against the seller and against each of the seller's employees who had independently made representations regarding the production capabilities of the wells. The trial court awarded each of the three defendants six peremptory challenges and restricted the plaintiff to six peremptory challenges. On appeal, the plaintiff complained of the trial court's award of a total of eighteen peremptory challenges to the defendants. The court of civil appeals cited *Tamburello* for the proposition that when each of the defendants are charged with different acts of negligence, each is entitled to its own set of peremptory challenges.³⁹ Analogizing *Tamburello* to the case before them, the court of civil appeals held that:

In the instant case, the plaintiffs alleged false representations against each defendant at different times and places, and the jury might have found each defendant, separately, was guilty of fraud independently of the others. We believe the trial court was correct in allowing six challenges to each defendant here where plaintiffs prayed for a joint and several judgment under these circumstances.⁴⁰

Mayfield was decided upon essentially the same considerations that guided the court in *Cruse*.⁴¹ Since the defendants in *Mayfield* were entitled to exercise eighteen peremptory challenges as against the plaintiff's six, they were in a position to use their challenges to select a jury rather than merely to reject certain jurors. Therefore, the plaintiff in *Mayfield* was required to go to trial with a jury selected by the defendants. The important point, however, is that there was no controversy among the defendants. The court confused the antagonism issue by concentrating on the position of each defendant as against the plaintiff rather than focusing on the positions of the defendants against each other.

Tamburello, however, does contain a statement that the plaintiff charged each of the defendants in that case with different acts of

39. See *id.* at 107.

40. *Id.* at 107.

41. Compare *M.L. Mayfield Petroleum Corp. v. Kelly*, 450 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.) with *Cruse v. Daniels*, 293 S.W.2d 616, 623 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.).

negligence, and the jury by its answers might have acquitted one defendant of negligence and found that the other was responsible for the collision.⁴² It is apparently this particular statement that has caused confusion. That statement appears to be only a predicate or explanation for the ultimate holding that antagonism existed because of the sole proximate cause pleading between the defendants. It was the sole proximate cause pleading, and not because the defendants were charged with separate acts of negligence, that resulted in the holding in *Tamburello*.⁴³

Another decision in which a court appears to have misinterpreted *Tamburello* is *Tuloma Gas Products Co. v. Lehmborg*.⁴⁴ The plaintiff was injured when his automobile collided with a bull which was lying in the middle of a highway because it had already been struck by another defendant. The plaintiff sued the owner of the bull for negligence in allowing the bull to be on a public road. The plaintiff also sued the driver of the automobile that had struck the bull just a few minutes prior to the plaintiff's collision with the bull. The allegation against the defendant driver was that he failed to keep a proper lookout and that his negligence was the cause of the bull lying in the middle of the highway at the time the plaintiff struck it. The trial court required the owner of the bull and the defendant driver to share six peremptory challenges.

On appeal, the court of civil appeals held that the trial court erred in not awarding each of the two defendants six peremptory challenges.⁴⁵ The opinion does not indicate whether either defendant pleaded that the plaintiff's injuries were caused solely by the negligence of the other defendant. In any event, the court of civil appeals' opinion does not rest upon that justification. Rather, the court cited *Tamburello* and held that since each defendant was charged with a different act of negligence, each defendant was entitled to a separate set of challenges.⁴⁶

As the court in *Cruse*, the court in *Tuloma Gas Products Co.* was apparently of the opinion that defendants are antagonistic to each other when the plaintiff's causes of action are such that one defendant may be found liable and another defendant exonerated.⁴⁷ In

42. *Tamburello v. Welch*, 392 S.W.2d 114, 116 (Tex. 1965).

43. *See id.* at 116-17.

44. 430 S.W.2d 281 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.).

45. *See id.* at 284.

46. *See id.* at 284.

47. *Compare Tuloma Gas Prods. Co. v. Lehmborg*, 430 S.W.2d 281, 284 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.) with *Cruse v. Daniels*, 293 S.W.2d 616, 623 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.).

fact, both opinions are clearly grounded upon the position of each defendant against the plaintiff. Part of the justification offered by the courts in awarding defendants separate sets of peremptory challenges when the plaintiff has charged them with separate acts of negligence is that one defendant may be looking for a different type of juror than the other defendant.⁴⁸ Under that justification, a defendant is given six peremptory challenges to reject the type of juror which he considers unfavorable to his position. The plaintiff, on the other hand, has only three challenges to exercise in this regard. His other three challenges, presumably, must be devoted to a different type of juror for the purpose of establishing the other act of negligence. In effect, the defendants are awarded twice the number of peremptory challenges than is the plaintiff. A different justification exists, however, when one of the defendants essentially sides with the plaintiff in alleging that the other defendant was entirely negligent. Under that pleading, it can be presumed that the defendant who has aligned himself with the plaintiff will exercise certain of his peremptory challenges in much the same manner the plaintiff will in seeking a particular type of juror.

Determination of Antagonism

Implicit in the finding that antagonism exists is the determination of what the trial court can and should consider in arriving at its decision regarding antagonism. At least one court has held that the trial court's decision is to be based solely upon review of the pleadings.⁴⁹ The rule is now well established, however, that antagonism is to be determined not only from the pleadings, but also from information disclosed by pretrial procedures.⁵⁰ Furthermore, the burden is clearly on the parties to demonstrate to the trial court those factors which shed light on the true positions of the litigants.⁵¹ If a defendant believes he is entitled to separate peremptory chal-

48. See *Tuluma Gas Prods. Co. v. Lehmsberg*, 430 S.W.2d 281, 284 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.); *Cruse v. Daniels*, 293 S.W.2d 616, 623 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.). When a different type of juror is desired for one act of negligence than is desired for another, the plaintiff must also be concerned with this problem.

49. See *M.L. Mayfield Petroleum Corp. v. Kelly*, 450 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.).

50. See, e.g., *Perkins v. Freeman*, 518 S.W.2d 532, 534 (Tex. 1974); *Lipshy v. Lipshy*, 525 S.W.2d 222, 225 (Tex. Civ. App.—Dallas 1975, writ dism'd); *Retail Credit Co. v. Hyman*, 316 S.W.2d 769, 772 (Tex. Civ. App.—Houston 1958, writ ref'd).

51. See *Perkins v. Freeman*, 518 S.W.2d 532, 534 (Tex. 1974); *O'Day v. Sakowitz Bros.*, 462 S.W.2d 119, 122-23 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.).

lenges, he must rely upon the circumstances peculiar to his case to convince the trial court that he is so entitled. Conversely, if the pleadings of several defendants indicate that they are antagonistic, the plaintiff must demonstrate otherwise.⁵²

For example, in *O'Day v. Sakowitz*⁵³ the plaintiff was injured as a result of a malfunction of an escalator upon which she was riding. She brought suit against Sakowitz, the owner of the store in which she was injured and Elevator Maintenance Co. which had contracted to maintain the escalators for Sakowitz. Sakowitz and Elevator Maintenance Co. were each allowed six jury strikes. On appeal, the plaintiff asserted that the court erred in awarding each defendant six jury strikes because there was no factual antagonism between them. The plaintiff pointed out that the owner of Elevator Maintenance Co. admitted in a deposition that the maintenance contract between Elevator Maintenance and Sakowitz obligated Elevator Maintenance to maintain the escalator in question. The court of civil appeals stated that the record did not reflect that the deposition testimony was called to the attention of the trial court.⁵⁴ The court specifically stated that it would place an unreasonable burden upon the trial judge to require him to examine all depositions on file in determining how many peremptory challenges to allow.⁵⁵ The case demonstrates the importance of establishing the factors which were called to the attention of the trial court.

The importance of not restricting the trial court's inquiry to the pleadings alone is demonstrated by the case of *Lipshy v. Lipshy*.⁵⁶ That case concerned a question of child custody. The plaintiff mother and defendant father each sought custody. The paternal grandparents intervened and sought custody in themselves. Looking solely at the pleadings, it appeared that the defendant father and the paternal grandparents were antagonistic because both sought custody against each other. The trial court awarded the father and the paternal grandparents six peremptory challenges each and

52. See *O'Day v. Sakowitz Bros.*, 462 S.W.2d 119, 122 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.). It may also occur that the plaintiff and one of the defendants are not antagonistic. In *Council v. Bankers Commercial Life Ins. Co.*, 558 S.W.2d 487 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.), the court of civil appeals held that the trial court's award of six strikes to the plaintiff and six strikes to the defendant who was in complete collaboration with plaintiff against the other defendants was reversible error. *Id.* at 487.

53. 462 S.W.2d 119 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

54. See *id.* at 122.

55. See *id.* at 122.

56. 525 S.W.2d 222 (Tex. Civ. App.—Dallas 1975, no writ).

awarded the mother only six challenges.

The court of civil appeals specifically followed the rule that the trial court was not confined to examination of the pleadings in determining antagonism.⁵⁷ Among the matters which had developed from the pretrial procedures and which were called to the attention of the trial court was the deposition of the grandmother in which she testified that she only wanted custody if her son was not able to get custody. The reason given was that if she had custody, it would be just as if her son had custody because he could be with the children at all times. Furthermore, the defendant husband had testified that he wanted custody of the children but if that was not possible, he wanted his parents to have custody. It also was pointed out that the attorney for the intervenors had previously been one of the defendant husband's attorneys in the case. Finally, in a discussion with the trial court about whether the defendant and intervenors should be required to exercise their strikes separately, it was made clear by statements by those two parties that they were united in a common cause against the plaintiff. Considering all those factors, the court of civil appeals held that there was no antagonism between defendant and intervenors.⁵⁸ The significance of the decision is that the factors which developed during pretrial and which were specifically called to the attention of the trial court essentially contradicted the ultimate relief sought by the defendant and intervenors in their pleadings. If the law required that the trial court be confined to the pleadings in determining antagonism, a different result would have obtained.

THE EFFECT OF ARTICLE 2151a

Prior to 1971, the only considerations used in awarding peremptory challenges were those which have just been discussed—the trial court had to determine whether the defendants were antagonistic toward each other with respect to a matter with which the jury was to be concerned. If the court determined that the defendants were antagonistic, each would be entitled to six peremptory challenges because rule 233 entitles each party in district court to six peremptory challenges.⁵⁹ Under rule 233, however, a completely unfair re-

57. *See id.* at 225.

58. *See id.* at 225.

59. *See, e.g.*, *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 745 (Tex. 1973); *Tamburello v. Welch*, 392 S.W.2d 114, 116 (Tex. 1965); *Turner v. Turner*, 385 S.W.2d 230, 238 (Tex. 1964).

sult could be reached even by correctly applying the existing law.⁶⁰

Consideration of a hypothetical three car collision is illuminating. In the hypothetical the plaintiff accuses the other two drivers of negligence. Since both drivers were operating a vehicle owned by their employers, the plaintiff files suit against both drivers and both employers. In defense, the two employers deny that their employees were acting within the course of their employment at the time of the accident. Further, one or both of the drivers allege that the accident was caused solely by the negligence of the other driver. In that circumstance, there is an antagonism of interest between each employee and his employer and antagonism of interest between the drivers, even though none of the defendants has filed a cross-action against any of the others. The result would be to award the plaintiff six peremptory challenges and the defendants a total of twenty-four peremptory challenges. While this result is consistent with established principles under the Texas practice for awarding peremptory challenges, it is obviously unfair to the plaintiff.⁶¹

Article 2151a appears to have been designed to attempt to eliminate this inherent unfairness which can result even from proper application of the established rules regarding allocation of peremptory challenges. Article 2151a provides:

After proper alignment of parties, it shall be the duty of the Court to equalize the number of peremptory challenges provided under Rule 233, Texas Rules of Civil Procedure, Annotated, in accordance with the ends of justice so that no party is given an unequal advantage because of the number of peremptory challenges allowed that party.⁶²

The question regarding article 2151a is whether it has changed

60. For example, the antagonism that would exist between a negligent employee and an employer who is a defendant solely by virtue of the doctrine of respondeat superior is somewhat illusory. If the employer has alleged that the negligent employee was not acting within the course and scope of his employment at the time of the occurrence, both defendants will be entitled to six peremptory challenges. See, e.g., *J.W. Hill & Sons, Inc. v. Wilson*, 399 S.W.2d 152, 154 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.); *Retail Credit Co. v. Hyman*, 316 S.W.2d 769, 772 (Tex. Civ. App.—Houston 1958, writ ref'd); *Ralston v. Toomey*, 246 S.W.2d 308, 310 (Tex. Civ. App.—Amarillo 1951, writ ref'd n.r.e.). Of course, the principal concern of both defendants is the plaintiff's claims against them. Both will be united in attempting to establish that the plaintiff's complaint is groundless. Obviously, if the two defendants are united in that common cause and are successful in establishing that the plaintiff's claim is without merit, the issue whether the employee was acting within the course of his employment is moot.

61. The unfairness that can arise under the pre-article 2151a practice has been thoroughly discussed in an excellent article, Jones, *Peremptory Challenges—Should Rule 233 Be Changed?*, 45 TEXAS L. REV. 80 (1966).

62. TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1978-1979).

existing law concerning the awarding of peremptory challenges or merely codified it. This is precisely the question which was considered by the court in *Austin Road Co. v. Evans*.⁶³ Although the opinion does not make the respective positions of the parties entirely clear, Mrs. McEneny was driving near road construction where trucks were spreading lime in preparation for pouring concrete. The wind was blowing the lime in the direction of the highway upon which she was traveling. Her vision became obscured and she reduced the speed of her car. She was being followed by the Carsons who, in turn, were followed by Mrs. Evans. The Carsons, like Mrs. McEneny, reduced their speed because of poor visibility. Apparently; however, Mrs. Evans failed to reduce her speed and collided with the rear of the Carsons' automobile which then collided with Mrs. McEneny. Mrs. McEneny brought suit against Austin Road Co., the general contractor on the road construction project. While it is not clear from the opinion whether Mrs. McEneny charged both of the other drivers with negligence, the court of civil appeals treated the case as one of actions by all the motorists against each other and actions by all the motorists against Austin Road Co.⁶⁴ Without further detail about the exact positions of the parties vis-à-vis each other at the time of jury selection, it is impossible to state accurately the number of peremptory challenges to which each person would be entitled under the laws as they existed prior to the passage of article 2151a. In any event, the trial court awarded six peremptory jury challenges each to Mrs. Evans, the Carsons, and Mrs. McEneny; Austin Road Co. was awarded nine challenges.

Mrs. Evans appealed the trial court's judgment and complained of the allocation of jury strikes. Her complaint was that Austin Road Co. was awarded nine strikes and she was awarded only six. The court of civil appeals specifically stated that the question before them was whether the provisions of rule 233 were changed by the

63. 499 S.W.2d 194 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).

64. See *id.* at 197.

[W]e may treat this case as one where the parties suffering injuries and property damage sued one another under every theory common to cases of rear-end collision. Additionally, they all sued Austin Road Company upon every conceivable theory possible under the circumstances for negligent acts and omissions in violation of duty owed the injured and damaged parties.

Id. at 197. The opinion does state, however, that Mrs. Evans sued Austin Road Co. for indemnity as applied to the suits against her by Mrs. McEneny and the Carsons. Furthermore, Austin Road Co. sued Mrs. Evans for indemnity from the suits against it by Mrs. McEneny and the Carsons. *Id.* at 197.

enactment of article 2151a.⁶⁵ The court of civil appeals held that article 2151a had changed the law:

Our holding is that, perforce the provisions of the 1971 Statute as applicable to the instant question there has been an effective change in the law so that, except there be an abuse of discretion in the allotment of peremptory challenges by the trial court in his discharge of the duty to equalize the number of peremptory challenges permitted the parties litigant there should be no reversal even though one party be allowed to make more than six peremptory challenges. Here there was no abuse of discretion warranting reversal.⁶⁶

The change in the law which the court of civil appeals perceived as occurring by virtue of article 2151a was to grant the trial court discretion in deciding the number of peremptory challenges that each party will be awarded. It seems clearly correct that article 2151a was intended to add this element of flexibility which previously was unavailable under the strict terms of rule 233 and the cases which have interpreted it.⁶⁷ The statement by the court that, except for the change in the law effected by article 2151a, it would have to reverse the judgment of the trial court is probably based on the lack of any authority of the trial court prior to article 2151a to assign any number of peremptory challenges other than six.

It seems clear that article 2151a was intended to allow the trial court to choose a number of peremptory challenges other than six when the circumstances of the case make it equitable to do so. Clearly this power would be a discretionary function of the trial court. Although it will be discussed in the following section which deals with the burden of demonstrating harm, it is well to point out now that article 2151a should not be read to grant the trial court discretion in determining whether antagonism exists among parties on the same side of the docket. Its discretion is invoked only after properly deciding the relative positions of the parties and applies only to the number of challenges it awards each party based on that decision. It would be a misinterpretation of both article 2151a and *Austin Road Co.* to say that the trial court now has discretion in all decisions relating to the allocation of challenges.

65. *Id.* at 202. The question was of considerable importance because the court stated that under the decisions prior to the enactment of article 2151a, they would be required to reverse the trial court's judgment as it affected Mrs. Evans and the Austin Road Co.

66. *Id.* at 202-03.

67. See *King v. Maldonado*, 552 S.W.2d 940, 944 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Austin Road Co. v. Evans*, 499 S.W.2d 194, 203 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).

One case that would apparently give the trial court that type of discretion is *Dean v. Texas Bitulithic Co.*⁶⁸ The plaintiff brought suit against Texas Bitulithic and the City of Dallas for personal injuries suffered when his car collided with construction barriers on a street in Dallas. Texas Bitulithic was performing the construction work under a contract with the City of Dallas. The trial court awarded the plaintiff six peremptory challenges and awarded the defendants a total of nine peremptory challenges. After a judgment in favor of both defendants, the plaintiff appealed on the single point that the trial court's assignment of peremptory challenges was reversible error. The plaintiff had charged the defendants with thirteen acts of negligence relating to the placement of warning signs and barricades at the construction site. In defense, both defendants denied all of the plaintiff's allegations and asserted that the plaintiff was contributorily negligent. The court summarily stated that the defendants were adverse to each other with respect to the plaintiff's claim of negligence concerning the placement of the warning signs⁶⁹ although no indication was given that the defendants were anything but united in the defense against the plaintiff. The court then stated that the trial court awarded the peremptory challenges in its discretion and no abuse of discretion had been shown.⁷⁰

The rationale behind the *Dean* decision is not readily apparent. The court concluded that there was antagonism of interest between the defendants, without discussion in exactly those terms.⁷¹ If the court's holding is that the trial court correctly determined that there was antagonism of interest and then, in its discretion, awarded defendants nine peremptory challenges and the plaintiff six peremptory challenges, the court's opinion is correct. On the other hand, if the court means to suggest that the trial court exercised its discretion in determining whether the defendants were antagonistic, the opinion is incorrect.⁷² The discretion of the trial court should apply only to determining the number of challenges to be awarded after determining whether the defendants are antagonistic. From the facts stated in the opinion, the defendants did not appear to be antagonistic and, consequently, the defendants should have been required to share six peremptory challenges.⁷³

68. 538 S.W.2d 825 (Tex. Civ. App.—Waco 1976, no writ).

69. *Id.* at 826.

70. *Id.* at 826.

71. *See id.* at 826.

72. As a practical point, antagonism either exists or it does not. It is not to be determined in the discretion of the trial court judge but from the facts presented to the judge.

73. *Cf. Dean v. Texas Bitulithic Co.*, 538 S.W.2d 825, 826 (Tex. Civ. App.—Waco 1976,

Meaning of Equalize

Another case which has considered the effect of article 2151a in the allocation of peremptory challenges is *King v. Maldonado*.⁷⁴ The case concerned a three vehicle collision in which the plaintiff, King, was injured allegedly by the negligence of the driver of a truck, Maldonado, which collided with plaintiff. The plaintiff sued Maldonado and his employer, who leased the truck from the owner. The plaintiff also sued the owner of the truck and a third driver in the accident, Mrs. Braselton, alleging that she was negligent in causing the truck driven by Maldonado to swerve and collide with the plaintiff. Maldonado filed a cross-action against Mrs. Braselton for indemnity and contribution and Mrs. Braselton filed a third party action against Maldonado, Maldonado's employer, and the owner of the truck. Under the pleadings of the parties, it was clear that Maldonado, his employer, and the owner of the truck were not antagonistic with respect to each other. All three were antagonistic, however, with respect to Mrs. Braselton's claim against them. In allocating peremptory challenges, the trial court allowed the plaintiff six strikes, Mrs. Braselton four strikes, and the remaining defendants were required to share four strikes.

The plaintiff appealed maintaining that the trial court erred in awarding the defendant a total of eight peremptory challenges. The plaintiff conceded that Mrs. Braselton was antagonistic to the other three defendants and did not question the correctness of the trial court's alignment of the parties. The sole point argued by the plaintiff was that the trial court did not have authority to award the defendants eight peremptory challenges, while restricting the plaintiff to six peremptory challenges. The question squarely presented to the court was whether article 2151a requires a complete equalization of the number of challenges awarded each side of the docket. The court stated:

We hold that in multiple party cases, Article 2151a does not require, as a matter of law, that each side, after alignment, is entitled to the same number of peremptory challenges as that allowed the opposite

no writ) (nine peremptory challenges awarded). It appears from the opinion that the plaintiff may have sued both defendants because he did not know which of the two defendants was responsible for placement and maintenance of the warning signs and barricades. If either defendant had pleaded that the duty was that of the other defendant, then antagonism existed. The opinion, however, does not indicate whether such a pleading was made. See *id.* at 826.

74. 552 S.W.2d 940 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

side. If the Legislature, in enacting the statute, had intended in all such cases for each side to have the same number of peremptory challenges following proper alignment of the parties, the statute would have so stated. Since it did not do so, the matter is left to the sound discretion of the trial court.⁷⁵

The completely contrary holding was reached in the recent case of *Dunn v. Patterson Dental Co.*⁷⁶ In *Dunn*, the plaintiff using products liability and negligence theories sued four defendants after a piece of his dental office equipment exploded and injured him. The defendants were the manufacturer of a component of the equipment, the seller, the assembler, and the company which serviced the equipment. Each defendant alleged specific acts of negligence against the other defendants and filed cross-claims for indemnity and contribution. On the basis of apparent antagonism, the trial court awarded the plaintiff and each defendant six peremptory challenges. The jury findings were against the plaintiff and a take nothing judgment was entered.

The plaintiff challenged the trial court's award of twenty-four peremptory challenges to the defendants on the ground that the award did not comply with article 2151a. The court of civil appeals was squarely confronted with the intent and interpretation of that statute. The court held that the statute required that the plaintiff receive the same number of strikes as the total number awarded defendants:

There is considerable disagreement as to the meaning of Article 2151a and its effect on Rule 233, but we interpret the statute as requiring the trial court to equalize the number of challenges between the plaintiff's side and the defendant's side after the necessary alignment has been made to identify those sides. For example, if there are multiple defendants who are antagonistic, each is entitled to a complement of challenges, but the plaintiff is entitled to a number equaling the total allowed the defendants. Construing the statute in that manner is the only way to give effect to its plain language and to render its enactment meaningful.⁷⁷

The effect of the decision in *Dunn* is to remove the concept of antagonism from the law of peremptory challenges. Any inquiry into antagonism among parties on one side is now essentially academic because regardless of its existence, the other side will be awarded

75. *Id.* at 944.

76. 578 S.W.2d 428 (Tex. Civ. App.—Texarkana 1979, no writ).

77. *Id.* at 431.

an equal number of strikes. It seems to make little difference if that number is twenty-four for each side or only six. The important point is that the numbers are equal. Under existing case law, the only circumstance when both sides receive an equal number of strikes is when no antagonism exists. But the court in *Dunn* has now held that an equal number of strikes must always be awarded.⁷⁸

Because the effect of the *Dunn* decision is essentially to abolish antagonism the case does not square with precedent. Rather than interpreting the statute to reach a modicum of fairness to both sides, the court has entirely shifted the unfairness to the side that has multiple parties. It can truly be said that the cure is worse than the disease.⁷⁹

In spite of the confusing language of the statute, it seems logical that the legislature intended for the statute to allow the trial court to "proportionalize" the number of strikes rather than accept a literal construction of the term "equalize." Little advantage over the former practice is provided by the statute if it is interpreted to mean that if each of two defendants who are antagonistic with respect to each other are awarded four challenges, then the plaintiff should also be awarded four. Nor is it logical to construe it to mean that if two defendants are antagonistic with respect to each other and each is awarded four challenges, the plaintiff should be awarded eight challenges. This reasoning would nullify the entire rationale for awarding antagonistic defendants separate challenges, that rationale presumably being that certain of their challenges must be exercised in selecting the jury for the case against the other defendant, rather than against the plaintiff. The only possible logical interpretation is that the trial court has discretion to award each of several defendants who are antagonistic a number of peremptory challenges less than six. Allocation of a lesser number would mitigate the situation when a plaintiff sues four defendants, all of whom

78. *Id.* at 431.

79. If the court's decision in *Dunn* is wrong, it cannot be harshly criticized. The question before the court was the interpretation of a statute which states that the trial court shall "equalize" the number of peremptory challenges. The court held that equalize means "equalize," not "proportionalize." The intention of the legislature, however, must be to equalize the *positions* of the parties by adjusting or "proportionalizing" the number of challenges. Nevertheless, the statute states that "it shall be the duty of the court to equalize the number of peremptory challenges." TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1978-1979) (emphasis added).

Interestingly, the dissenting opinion in *Austin Road Co. v. Evans*, 499 S.W.2d 194, 203 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (dissenting opinion) reached a similar conclusion to that expressed in *Dunn*.

are antagonistic under the cases construing rule 233, but who also have a common interest in defeating the plaintiff's claim.⁸⁰ It is simply unfair to restrict the plaintiff to six challenges and allow the defendants twenty-four challenges permissible under the former practice.⁸¹ In effect, this allocation would give the defendants an unequal advantage over the plaintiff. A more logical construction would allow the trial court to award each of the four defendants three or possibly four peremptory challenges, while awarding the plaintiff eight challenges. This division would be more consistent with the relative positions of all parties to the case.

To correctly interpret the legislature's intent, article 2151a must be construed in the light of the existing law which it purports to effect. Moreover, in the interpretation of all statutes the court should keep the old law in view in construing the statutory remedy.⁸² If a court understands that even completely correct application of the law of allocation of strikes can result in an unfair advantage to one party, then it can be seen clearly that article 2151a was enacted to allow that unfairness to be minimized. Therefore, article 2151a should be regarded as supplying the flexibility that was previously unavailable by allowing a trial court to respond to the peculiar circumstances of the case before it.

Consideration of the circumstance when a defendant employer and defendant employee are antagonistic because the employer has denied that the employee was acting within the scope of his employment is instructive. The court may be aware of a general collaboration of the two defendants throughout discovery. It may also be obvious from facts brought to the court's attention that, while the court cannot state as a matter of law that the employee was acting within the scope of his employment, the evidence is overwhelming that he was. Additionally, it may be learned from questioning counsel that the defendants intend to exercise their strikes together.⁸³

80. In *Roy L. Martin & Assocs. v. Renfro*, 483 S.W.2d 845 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.), the court of civil appeals reversed the trial court judgment on the basis that the jury selection had resulted in a materially unfair trial for appellants. *See id.* at 851. At trial appellants were given six peremptory challenges as opposed to the twenty-four awarded appellees. The tremendous advantage this gave appellees is exemplified by noting that in the first twenty-four jurors, appellees exercised a total of fourteen peremptory strikes while appellant exercised only three. *Id.* at 851.

81. *See Roy L. Martin & Assocs. v. Renfro*, 483 S.W.2d 845, 851 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

82. *See TEX. REV. CIV. STAT. ANN.* art. 10, § 6 (Vernon 1969). Article 10, section 6 states: "In all interpretation, the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy."

83. *See King v. Maldonado*, 552 S.W.2d 940, 944 (Tex. Civ. App.—Corpus Christi 1977,

Finally, it may be clear that the employer's liability is entirely vicarious and not based on any conduct of his own. Under these circumstances, the trial court could, in its discretion, award the plaintiff six strikes and award each defendant four strikes.

No attempt will be made here to illustrate the variety of situations that could result in the trial court changing the standard number of six challenges to some other number. Since the efficacy of the statute increases with the number of parties, the statute can be very effectively used in the multiple party lawsuit. On the other hand, the statute does not grant the trial court the right to tamper with the standard number of challenges in a single-plaintiff against a single-defendant case. Therefore, the procedural remedy provided by the statute is flexibility to deal with the unique circumstances of multiparty actions.

BURDEN OF DEMONSTRATING HARM

The right to exercise peremptory challenges is unique in that its very foundations are intangible perceptions and intuitive reactions that a party may well be hard-pressed to explain.⁸⁴ It is often difficult to convince an appellate court to reverse a judgment because the limited number of peremptory challenges to which a party was erroneously restricted required him to accept as a juror the scowling lady in the second row, whose scowl was momentarily less prominent upon the court's introduction of the opposite party. Be that as it may, the appellant must show not only error but reversible error in order to obtain a reversal.⁸⁵ Reversible error is error that was

writ ref'd n.r.e.). It is settled that in a multiple party lawsuit parties may confer in making peremptory challenges. See, e.g., *Hoover v. Barker*, 507 S.W.2d 299, 304 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.); *Brown & Root, Inc. v. Gragg*, 444 S.W.2d 656, 660 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); *City of San Antonio v. Reed*, 192 S.W. 549, 553 (Tex. Civ. App.—San Antonio 1917, writ ref'd). The *King* case considered this rule in light of the enactment of article 2151a and determined that in allocating peremptory challenges, the trial judge should consider that the parties will confer. See *King v. Maldonado*, 552 S.W.2d 940, 944 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

84. See *Tamburello v. Welch*, 392 S.W.2d 114, 117 (Tex. 1965); *Lipshy v. Lipshy*, 525 S.W.2d 222, 226 (Tex. Civ. App.—Dallas 1975, writ dismissed); 3 R. McDONALD, TEXAS CIVIL PRACTICE § 11.12.1, at 162 (1970). *But cf.* *People v. Wheeler*, 583 P.2d 748, 765, 148 Cal. Rptr. 890, 907 (1978) (peremptory challenge made on basis of group bias denies right to impartial jury). See generally Comment, *The Right of Peremptory Challenge*, 24 U. CHI. L. REV. 751, 759-62 (1957).

85. TEX. R. CIV. P. 434, 503; see, e.g., *Sendejar v. Alice Physicians & Surgeons Hosp. Inc.*, 555 S.W.2d 879, 889 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Bell v. Mitchell Energy Corp.*, 553 S.W.2d 626, 633 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); *Vega v. Royal Crown Bottling Co.*, 526 S.W.2d 729, 732 (Tex. Civ. App.—Corpus Christi 1975,

reasonably calculated to and probably did cause rendition of an improper judgment.⁸⁶ This standard is unwieldy, however, in the context of the often entirely subjective motivations for striking a particular juror. The courts have recognized the difficulty and have formulated a still vague set of guidelines that are distinct from the harmless error rule.

The leading case in this area is *Tamburello v. Welch*.⁸⁷ In *Tamburello* two defendants were erroneously required to share six peremptory challenges in spite of antagonism between them. The defendants argued that they would have struck three members of the jury had they been given the additional strikes to which they were entitled. They did not give their reasons for wanting to strike those jurors nor did they detail any factors which would tend to show that the jurors were not impartial. The Supreme Court of Texas held that their reasons were not required:

The decision to strike is, in the last analysis, a matter of personal judgment usually based in large measure upon intangibles not susceptible of precise description and which cannot be fairly appraised by a trial or appellate court. A litigant who is denied the right to challenge on that basis is deprived of a valuable means, guaranteed him by law, of insuring that the controversy is decided by a jury whose members are not predisposed by reason of temperament or prior experience to look with disfavor upon his side of the case.⁸⁸

While the court did state that "[t]he harmless error rule undoubtedly applies where a party is denied the number of peremptory challenges to which he is entitled,"⁸⁹ the entire opinion makes it clear that the court was merely saying that the concept of harm is applicable. It cannot be construed to mean that literal application of the harmless error doctrine is required. In fact, *Tamburello* plainly applies a different doctrine of harm:

If defendants must establish that the error in denying them additional challenges probably caused the rendition of an improper judg-

no writ). See generally Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEXAS L. REV. 1, 8-15 (1952).

86. TEX. R. CIV. P. 434, 503; see, e.g., *Holmes v. J.C. Penny Co.*, 382 S.W.2d 472, 473 (Tex. 1964); *Smith v. State*, 523 S.W.2d 1, 7 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); *Horn v. Atchison, T. & S. F. Ry.*, 519 S.W.2d 894, 899 (Tex. Civ. App.—Beaumont 1975, no writ).

87. 392 S.W.2d 114 (Tex. 1965). See generally Jones, *Peremptory Challenges—Should Rule 233 Be Changed?*, 45 TEXAS L. REV. 80, 82-83 (1966).

88. *Tamburello v. Welch*, 392 S.W.2d 114, 117 (Tex. 1965).

89. *Id.* at 117.

ment, the matter of peremptory challenges will rest almost entirely in the uncontrolled discretion of the trial judge. It is not realistic, moreover, to let affirmance or reversal turn on the attorney's reasons for wanting to strike a particular member of the panel. The right to eliminate a prospective juror for any reason that seems adequate to counsel is the very essence of the peremptory challenge.

We think this is the proper approach to the question of harm in the present case. If a party is improperly denied a single challenge to which he is entitled, the trial may not be so unfair as to warrant a reversal in the absence of some additional showing of prejudice. On the other hand a judgment could not be permitted to stand where one of the litigants has been allowed no peremptory challenges at all.⁹⁰

The standard applied by the court, then, is that of the "presumed harm rule." Rather than demonstrating that the error was reasonably calculated to and probably did result in an improper judgment, the burden on the complaining party is to show that the error resulted in a materially unfair trial.⁹¹ While this standard is necessarily nebulous, guidance will ultimately be offered by the precedents which have dealt with it. *Tamburello*, for example, held that restricting two antagonistic defendants to a total of six challenges resulted in a materially unfair trial.⁹² The court also has held, in *Perkins v. Freeman*,⁹³ that the award of twelve peremptory challenges to two defendants who were not antagonistic resulted in a

90. *Id.* at 117-18.

91. What factors should be used to demonstrate that a trial was rendered "materially unfair" are not clear. *Longoria v. Atlantic Gulf Enterprises, Inc.*, 572 S.W.2d 71, 80 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.), citing *Tamburello*, held:

The harmless error rule applies where a party is denied the number of peremptory challenges to which he is entitled. [citations omitted] The burden is on the plaintiffs to show that the allowance of a total of twelve peremptory challenges to the defendants and the allowance of only six such challenges to them resulted in a trial that was materially unfair to them. The plaintiffs have failed to show that they used all of their peremptory challenges, or that they were forced to accept undesirable veniremen on the jury panel. There is nothing in the record to indicate that any of the 12 jurors who made up the jury were disqualified; that any of them were prejudiced against the plaintiff; or that any of the jurors were unfair in reaching the verdict that was returned. We, therefore, hold that the plaintiffs failed to show that the trial court's error, if any, caused or probably caused the rendition of an improper judgment.

The language of the court clearly indicates that it was applying the harmless error rule in the same fashion that the rule is generally applied. In other words, the aggrieved party must affirmatively demonstrate harm. *Tamburello* has specifically held otherwise. The "materially unfair" standard allows the appellate court to presume harm in the absence of any showing of harm. See *Tamburello v. Welch*, 392 S.W.2d 114, 118 (Tex. 1965).

92. See *Tamburello v. Welch*, 392 S.W.2d 114, 118 (Tex. 1965).

93. 518 S.W.2d 532 (Tex. 1974).

materially unfair trial for the plaintiff.⁹⁴ Both decisions have been specifically followed in subsequent cases.⁹⁵

One caveat should accompany any intended reliance on the precedents indicating what constitutes a materially unfair trial. Each case must be separately considered under its own given set of circumstances. While *Tamburello* holds that restricting two antagonistic defendants to six challenges may result in a materially unfair trial,⁹⁶ that holding arose out of the circumstances peculiar to that case. Clearly the same result should not automatically be reached in all cases.⁹⁷

The holding in *Tamburello* may be viewed as establishing a kind of spectrum. At one end of the spectrum, when a party has been denied a single challenge, he will be required to carry the burden of some additional showing of prejudice.⁹⁸ At the other end, when a party has been permitted no challenges at all, that fact alone establishes the harm.⁹⁹ The question arises, however, when a party is relieved of demonstrating harm and is entitled to rely on a presumption of harm. In *Tamburello*, the defendants fell in the middle of the spectrum—each was awarded three challenges, although each was entitled to six. The court clearly presumed harm because the opinion notes that the defendants did not provide any reasons for wanting to strike additional members of the panel.¹⁰⁰

Article 2151a has significant impact on this entire issue because it imposes new variables upon the spectrum. Until passage of article 2151a, the most commonly encountered circumstance was restricting two parties to a set of six strikes, or awarding two litigants on the same side of the docket a total of twelve strikes against the opposing party's award of six. Established case law has presumed harm in both circumstances, without additional showing of prejudice.¹⁰¹ It is still uncertain, however, what elements are required to

94. *Id.* at 534.

95. See *Lipshy v. Lipshy*, 525 S.W.2d 222, 226 (Tex. Civ. App.—Dallas 1975, writ *dism'd*)(following *Perkins*); *Tuloma Gas Prod. Co. v. Lehmborg*, 430 S.W.2d 281, 284 (Tex. Civ. App.—San Antonio 1968, writ *ref'd n.r.e.*) (following *Tamburello*).

96. See *Tamburello v. Welch*, 392 S.W.2d 114, 118 (Tex. 1965).

97. An example of a case in which the *Tamburello* result would not be warranted would be an instance when the antagonism between the parties was based upon a claim for indemnity. If the defendant during trial fails to raise a fact issue on the indemnity claim, no antagonism exists. Therefore, the sharing of six peremptory challenges could not result in a trial that was materially unfair.

98. See *Tamburello v. Welch*, 392 S.W.2d 114, 118 (Tex. 1965).

99. See *id.* at 118.

100. See *id.* at 117.

101. See *Perkins v. Freeman*, 518 S.W.2d 532, 533-34 (Tex. 1974); *Tamburello v. Welch*,

demonstrate harm when the trial court, using the flexibility provided by article 2151a, awards the parties a different number of strikes other than six or some multiple of six. The clean lines of demarcation previously drawn have been obliterated.

To the already complicated formula must be added another element: abuse of discretion. If the proposition is accepted that article 2151a was intended to add an element of flexibility to allow a trial court to respond to the unique circumstances of a given case, then surely the court's choice of the number of challenges is discretionary. It should be reiterated that the trial court's discretion bears certain restrictions. It does not extend to the basic question whether antagonism exists. This fact is determined by established tests of whether the litigants are in disagreement concerning a fact issue with which the jury will be concerned.¹⁰² Once antagonism is found, however, the trial court does have discretion to deal with the particular extent to which antagonism exists in a given case.

It is in considering the effect of article 2151a on the question of harm that the purpose of the statute becomes clear. It can be used to deal with the extent and nature of the particular antagonism. The determination of antagonism no longer carries with it an automatic award of six challenges for each party. The statute has greatest use, however, in those cases when a single party is on one side of the docket and several antagonistic parties are on the other. In any event, if the trial court has discretion in selecting the number of challenges to be awarded, then is abuse of discretion the standard on appeal? Has the burden of showing abuse of discretion been superimposed on the standard of whether the trial was materially unfair? It seems that a finding that the trial was rendered materially unfair by the award of challenges still controls. If the trial was materially unfair, abuse of discretion is necessarily assumed.

The ends of the spectrum established in *Tamburello* certainly still persist. The discretionary considerations, however, should significantly affect the middle-of-the-spectrum cases. While the considerations used in wanting to strike a particular juror are too imprecise and subjective to measure, the considerations used in determining the extent of antagonism are not.¹⁰³ The trial court's reasons for awarding each antagonistic defendant four challenges instead of six

392 S.W.2d 114, 117 (Tex. 1965).

102. See, e.g., *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 744 (Tex. 1973); *Greiner v. Zinker*, 573 S.W.2d 884, 885 (Tex. Civ. App.—Beaumont 1978, no writ); *Retail Credit Co. v. Hyman*, 316 S.W.2d 769, 771 (Tex. Civ. App.—Houston 1958, writ ref'd).

103. See notes 9-31 *supra* and accompanying text.

are susceptible to review. If the trial court's reasons are immaterial, that can be demonstrated to the appellate court. In short, the trial court should have certain justifications for tampering with the basic number of challenges to which a party is entitled. It is the validity of those justifications that are tested by the abuse of discretion standard.

In final analysis, the ultimate issue is still whether the trial was materially unfair because of the allocation of challenges. This decision, however, is somewhat less mechanical than it has been in the past. Fewer and fewer cases will fit the molds of *Tamburello*, when two defendants were improperly restricted to a total of six strikes, and *Perkins*, when two defendants were improperly awarded six strikes each. The appellate courts will now be more concerned with the intermediate step—whether the particular circumstances justified the trial court's decision to award some number of strikes other than six. These circumstances, of course, have important bearing on the issue whether the trial was materially unfair.

CONCLUSION

Proper allocation of peremptory challenges can be a very complex task. The seminal question whether antagonism exists often presents considerable difficulty. Prior to article 2151a, this question was the beginning and end of any inquiry. With the passage of article 2151a, however, several subsidiary questions follow a finding of antagonism. These issues impose additional burdens upon the litigants and the court. The litigants will want to develop every factor that shows the true situation of the parties' relative positions. The trial court must weigh these factors in balance and award challenges accordingly.

Article 2151a is an effective tool in providing flexibility which prior practice has shown is needed. Properly applied, it will allow an approximation of fairness to all parties. The language of the statute, however, does not offer clear guidance of its intended application. Therefore, as with any rule of law written to cover an almost infinite variety of circumstances, it must seek definition and refinement from the appellate courts.