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# Photographic Evidence

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# PHOTOGRAPHIC EVIDENCE

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One of the most noticeable trends in modern trials is the increasing use of photographs to illustrate or supplement direct oral testimony. The persuasion induced by such visual aids cannot be overestimated. As Tennyson says, it is a case of "things seen being mightier than things heard."

It is the purpose of this article to indicate the various situations in which photographic evidence may be availed of, to point out necessary predicates to admissibility, and to venture some practical observations for its more effective presentation.

Photographs of the victims of murder and manslaughter, of wounds in prosecutions for assault and battery and mayhem, of various organs and parts of the human body, of premises destroyed by fire or explosion, and of the scenes of crimes, are commonplace in criminal trials.[1]

Photographs have been similarly used in a wide variety of civil cases.[2]

To be admissible, a photograph must be shown to mirror correctly what it purports to represent.[3] In still photographs, taken with the ordinary black and white camera, it is not necessary that the person who took the picture be called to establish its verity; the testimony

[1] Ryan v. United P.S., Inc., 205 F. 2d 362 (C.A. 2d, 1953) (photograph of dead body admitted); State v. Jones, 233 Iowa 843, 10 N.W. 2d 526 (1943) (photomicrograph to show presence of semen on garments admitted); Commonwealth v. Sheppard, 318 Mass. 590, 48 N.E. 2d 630 (1943) (photograph of deceased in murder prosecution admitted).

[2] Cunningham v. Fairhaven & W. R. Co., 72 Conn. 244, 43 Atl. 1047 (1899) (photograph of scene of traffic accident admitted); Springer v. City of Chicago, 135 Ill. 552 (1891) (photograph of injured person admitted); Herndobler v. Goodwin, 310 Ill. App. 267, 34 N.E. 2d 8 (1941) (photograph of weight and pulley on leg to show treatment of fracture admitted).

[3] Thompson v. DeLong, 267 Pa. 212, 110 Atl. 251 (1920); State v. Tyree, 143 Wash. 313, 255 Pac. 382 (1927).

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of any person that the photograph correctly portrays the scene shown will qualify it for admission.[4]

The fact that a photograph is gruesome is no bar to its introduction;[5] but the fact that it is offensive may be.[6]

If changes in the scene or subject have occurred between the time of the action involved and the taking of the picture, such changes should be explained; the admissibility of the picture then is within the sound discretion of the court.[7]

Legends or markings on photographs such as notations of the scene shown, direction arrows, etc., if not self-serving and misleading, will not render a picture inadmissible,[8] but experience suggests that the better practice is to offer photographs which are free of such markings.[9]

If a photograph is shown to be inaccurate, distorted, or misleading, it is properly rejected,[10] but slight inaccuracies or variations from original conditions which do not alter or confuse the main features of the scene will ordinarily not operate to exclude the photograph otherwise qualified.[11] The fact that a photograph is under or overexposed, or blurred or "light-struck," will not invalidate it as evidence, provided it is decipherable and in the court's judgment will aid the jury.[12] The fact that a photograph has been colored or retouched will not render it inadmissible if the fact is disclosed and the photograph is a correct representation and not misleading.[13]

[4] Podolski v. LaForge, 92 F. 2d 954 (C.A. 1st, 1937); Berkowitz v. American River Gravel Co., 191 Cal. 195, 215 Pac. 675 (1923).

[5] Hawkins v. State, 219 Ind. 116, 37 N.E. 2d 79 (1941); Commonwealth v. Clark, 292 Mass. 409, 198 N.E. 641 (1935).

[6] Birmingham Baptist Hospital, Inc. v. Blackwell, 221 Ala. 225, 128 So. 389 (1930); Cincinnati, N. O. & T. P. Ry. Co. v. Nolan, 161 Ky. 205, 170 S.W. 650 (1914).

[7] Harris v. City of Quincy, 171 Mass. 472, 50 N.E. 1042 (1898); Lake Erie & W. R. R. Co. v. Wilson, 87 Ill. App. 360 (1899); rev'd on other grounds, 189 Ill. 89, 59 N.E. 573 (1901).

[8] People v. Crandall, 126 Cal. 129, 57 Pac. 785 (1899); Robinson v. American Ice Co., 292 Pa. 366, 141 Atl. 244 (1928); Clegg v. Metropolitan S. R. Co., 37 N.Y. Supp. 130 (1896) aff'd, 159 N.Y. 550, 54 N.E. 1089 (1899).

[9] Kleinschmidt v. Scribner, 54 Idaho 185, 30 P. 2d 362 (1934).

[10] Chicago & A. R. Co. v. Carson, 198 Ill. 98, 64 N.E. 739 (1902); Sellick v. Janesville, 104 Wis. 590, 80 N.W. 944 (1899).

[11] Illinois S. Ry. Co. v. Hayner, 225 Ill. 613, 80 N.E. 316 (1907).

[12] Greene v. Denver, 111 Colo. 390, 142 P. 2d 277 (1943); McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E. 2d 289 (1940).

[13] State v. Dunne, 161 La. 532, 109 So. 56 (1926) writ of error dismissed, 273 U.S. 656 (1927).

Properly authenticated enlargements of photographs, designed to present scenes and objects more clearly than the smaller originals, are generally held admissible.[14] A practical argument for the use of photographic enlargements is that they make possible numerous markings by witnesses to indicate where they were or to indicate the objects in controversy and their positions. The case of *U.S. v. Hiss*[15] provided a dramatic example of the use of enlargements. The government's principal witness, Chambers, had produced forty-seven typewritten and four handwritten documents and identified them as copies of official secret State Department information which had been given to him by Hiss. The typewritten copies were charged to have been written on a typewriter owned by Mrs. Hiss. This was denied by both Mr. and Mrs. Hiss. The four handwritten documents were admittedly in Hiss's handwriting. Hiss denied that he had given any of the documents to Chambers. It was necessary, therefore, to prove that the documents produced by Chambers as having come to him from Hiss were copies of original, official, secret state documents. To do this the experienced and skillful prosecutor[16] had the Chambers copies photographed and enlarged into pictures five feet high and four feet wide, and had them placed on an easel of even larger dimensions. Two witnesses—the Assistant Secretary of State's private secretary and the Chief of the State Department of Records Branch—were called to the stand. The Assistant Secretary of State's private secretary identified the original State Department records.

The Chief of the Records Branch then took the stand. Beginning with the enlargement on the top of the pile, the witness was handed a document identified as an original from the State Department files and asked to read it aloud as the jurors followed and compared it with the enlarged copy on the easel. This course was pursued until all of the Chambers copies had been compared. It took the better part of a day and a half to demonstrate that the papers produced by Chambers were substantially exact copies of the government's original secret files, but the technique employed held the jurors' attention until the last line had been read and the proof was incontestible.

Another procedure frequently attempted on direct examination in

[14] Appelby v. State, 221 Ind. 544, 48 N.E. 2d 646 (1943); City of Louisville v. Dahl, 170 Ky. 281, 185 S.W. 1127 (1916); State v. Hause, 82 N.H. 133, 130 Atl. 743 (1925).

[15] 185 F. 2d 822 (C.A. 2d, 1950).

[16] Honorable Thomas F. Murphy (later appointed to the Federal District Bench).

both criminal and civil cases is the qualification and offer of "posed photographs"; e.g., a picture taken some time after the occurrence at the scene of an automobile collision with the two automobiles placed in positions similar to those testified to by a party's witness. The obvious objections to such posed photographs are that they are ex parte and self-serving and, if the underlying facts are in dispute, misleading. The weight of authority seems to be against the admissibility of such photographs,[17] but there are many cases where the action of a trial court in admitting them for illustrative purposes has been held not to be an abuse of judicial discretion.[18]

Properly authenticated motion pictures have generally been held admissible in civil actions usually for personal injuries damages, both to establish such injuries[19] and to disprove specific claims of disability, or to prove malingering.[20] They have also been held to have been properly received in criminal cases; usually to reinact the scene of a crime,[21] or to reproduce the conditions surrounding the making of a confession.[22]

Motion sound pictures (movietones) have also been admitted in evidence in many cases. In a much cited Pennsylvania case,[23] the court, speaking of sound motion pictures, said:

> The principles that underlie their admissibility into evidence . . . differ in no way from those governing the admissibility of still pictures and photographic records. It would seem, therefore, that objection to the introduction of sound pictures to supplement, clarify and authenticate verbal testimony of witnesses must be based upon lack of authenticity of the particular picture rather than on the ground of the general unreliability of the process by which such pictures are produced.[24]

[17] Chicago & E. I. R. R. Co. v. Crose, 214 Ill. 602, 75 N.E. 865 (1905); Fabbio v. Diesel O.S. Co., 1 Wash. 2d 234, 95 P. 2d 788 (1939); Margevich v. Chicago & N. W. R. R. Co., 1 Ill. App. 2d 162, 116 N.E. 2d 914 (1954); Grant v. Chicago & N. W. R. R. Co., 176 Ill. App. 292 (1913).

[18] Square Deal Cartage Co. v. Smith's Adm'r., 309 Ky. 135, 210 S.W. 2d 340 (1948); Lewis v. Chicago & G. W. R. Co., 155 Minn. 381, 193 N.W. 695 (1923); Paden v. Rockford P. F. Co., 220 Ill. App. 534 (1921), cert. denied 257 U.S. 645 (1921).

[19] Rogers v. Detroit, 289 Mich. 86, 286 N.W. 167 (1939).

[20] Kortz v. Guardian Life Ins. Co. of America, 144 F. 2d 676 (C.A. 10th, 1944); Snyder v. American Co., 322 Mo. 147, 14 S.W. 2d 603 (1929); McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E. 2d 289 (1940).

[21] People v. Dabb, 32 Cal. 2d 491, 197 P. 2d 1 (1948).

[22] People v. Hayes, 21 Cal. App. 2d 320, 71 P. 2d 321 (1937).

[23] Commonwealth v. Roller, 100 Pa. Super. Ct. 125 (1930).

[24] Ibid., at 127, 128.

In a recent California case, however, the court directed attention to the possibilities of abuse in the taking of motion pictures for use as evidence. The court said:

> Motion pictures should be received as evidence with caution because the modern art of photography and the devices of an ingenious director frequently produce results which may be quite deceiving. . . . Telescopic lenses, ingenious settings of the stage, the elimination of unfavorable portions of the film, an angle from which a picture is taken, the ability to speed up the reproduction of the picture and the genius of a director may tend to create misleading impressions.[25]

But while there are numerous cases where motion pictures have been excluded as misleading, or where it has been shown that they were not taken so as to secure accurate reproduction,[26] the definite trend of the authorities would seem to be that, except in cases of obviously intended deception, or in cases where the accurate reproduction of the actual scene or event in controversy is impracticable, the objection goes to the weight rather than to the competency of the evidence.[27]

To properly qualify a motion picture for admission, the technician who took the picture should be called.[28] His experience and competency should be inquired into; the camera and equipment used, the camera's position and the light condition should be described; the exposure (usually 16 frames of 16 millimeter film per second) should be shown; all possible tampering with the film such as adding, cutting, splicing, change of sequence and other artificial reconstruction, should be negatived; and, when the picture is run, it should be established for the record that it is being run at the identical rate at which it was taken.[29]

Stereoscopic pictures which reveal depth (third dimension) and the relative positions of objects not accurately indicated by the ordi-

[25] Harmon v. San Joaquin Light & Power Corp., 37 Cal. App. 2d 169, 98 P. 2d 1064, 1067 (1940).

[26] Pacific Mut. Life Ins. Co. of California v. Marks, 230 Ala. 417, 161 So. 543 (1935); State for use of China v. United Ry. & Electric Co. of Baltimore, 162 Md. 404, 159 Atl. 916 (1932); Gibson v. Dunn, 206 App. Div. 464, 202 N.Y. Supp. 19 (2d Dep't., 1923).

[27] Massachusetts Bonding & Ins. Co. v. Worthy, 9 S.W. 2d 388 (Tex. Civ. App., 1928).

[28] Kortz v. Guardian L. I. Co., 144 F. 2d 676 (C.A. 10th, 1944)); Mow v. People, 31 Colo. 351, 72 Pac. 1069 (1903).

[29] Baker v. United States, 115 F. 2d 533 (C.A. 8th, 1940); Morris v. E. I. duPont de Nemours Co., 346 Mo. 126, 139 S.W. 2d 984 (1940); McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E. 2d 289 (1940); Gibson v. Dunn, 206 App. Div. 464, 202 N.Y. Supp. 927 (2d Dep't., 1924).

nary "flat" picture are finding increasing use in the courts. Like motion pictures, these usually require special qualifying proof.[30]

X-ray photographs, when properly authenticated, are admissible in both criminal and civil cases. Such authentication must be by a person skilled in the art of taking such pictures.

The alert trial lawyer will tax his ingenuity to the utmost to illustrate or supplement his oral direct examination with photographic evidence. He is aware of the many court decisions which have declared the peculiar value of such evidence, and that verdicts contrary to the actual physical facts, as disclosed by properly authenticated and unimpeached photographs, have not infrequently been set aside.[31] He realizes the impact of this visual evidence on the lay mind and will study his case for possibilities of the use of challenging photographs. An example: A noted Chicago trial lawyer, in an address to a section of the American Bar Association at its annual 1953 meeting in Boston, told of a personal trial experience which realized such possibilities.[32] He was defending a municipality in a suit against it to compel a variation under its zoning law which would permit the conversion of a residence in a residentially zoned neighborhood into a three-apartment building. To show the uniform residential character of the neighborhood, the lawyer had individual photographs taken of all the houses on both sides of the street within two blocks on either side of the residence which it was proposed to convert into an apartment building. In all there were about three hundred separate photographs of postcard size. These were mounted with pliable plastic hinges, leaving small intervening spaces upon which to note individual addresses. The pictures were then folded and fastened between two stiff-backed binders. By simply stretching out and thumbing through the pictures, the jurors could see the neighborhood almost as well as though they visited it, and, what is more, unlike an actual view of what the jury might have seen, this view was made a part of the record for use in the event of an appeal. Another example: This action was for damages for personal injuries sustained by the driver of an automobile when its front wheel dropped into a deep hole in

[30] German Theological School v. Dubuque, 64 Iowa 736, 17 N.W. 153 (1883); see also, Gardner, The Camera Goes to Court, 24 N.C.L. Rev. 233 (1946).

[31] Hartley v. A. I. Rodd Lumber Co., 282 Mich. 652, 276 N.W. 712 (1937); Mobile & O. R. Co. v. Bryant, 159 Miss. 528, 132 So. 539 (1931); Lessig v. Reading Transit & Light Co., 270 Pa. 299, 113 Atl. 381 (1921).

[32] Hinshaw, The Use and Abuse of Demonstrative Evidence, 40 A.B.A.J. 479 (1954).

a public street and caused the car to turn over. It had been raining and the hole, like the rest of the street, was covered with water. To show the depth of the hole, a photograph was taken shortly after the accident when the street was dry with a three-foot wooden ruler standing upright in the hole. The photograph showed unmistakably that the hole was over thirty inches deep.

Care should be taken before the offering party rests his case, to see that all photographs, including especially motion picture films and sound accompaniments, are given identifying marks and formally offered and received in evidence; if it is not practicable to offer all of the equipment, that which is used should be identified and carefully described in the record, so that an appellate court can have before it on review everything which was offered or displayed in the trial court.

When photographs are offered and received in evidence, it is good practice to have a sufficient number of copies in hand so that, in addition to the one presented to the court, one can be given to opposing counsel and several (six preferably) made available to the jury. In this way there will be one picture for each two jurors, and this will insure a much closer study of the photograph than would be the case if there was but one photograph passed first to the court, then to opposing counsel and then, hastily, to each of the twelve triers.

Unless enlargements are indicated, a photograph 8 × 10 inches is an ideal size for use in a trial. The detail in a picture this size is usually sharp and complete, and its significant features readily grasped by the viewer.

Some courts have permitted small (bantam) photographic slides to be projected in enlargement upon a screen. This is dramatic and calculated to capture the fixed attention of the jurors. No reason is perceived why a trial court, exercising its discretion considering the situation in the particular case, should not permit this procedure.

The production of preliminary testimony to lay the foundation for the introduction of photographic evidence should be so conducted as to impress the jury with the skill and fairness of the photographer (if he is produced as a witness) and the fidelity of the picture taken as reflecting conditions exactly as the jurors might have seen them with their own eyes.