Videotapes, Films, and Photographs: Rules of Civil Procedure¹

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Introduction

ntario leads the nation in applying audio-visual technology to the litigation process. Its civil court rules provide Ontario lawyers with many opportunities to use videotapes, motion-picture films, and photographs to present evidence at trial. In fact, visual evidence is used more often in the civil courts of Ontario than in any other Canadian province.

The effectiveness of audio-visual technology in communicating ideas is reflected in a recent American study, which found that

people remember what they hear better when visual displays accompany the spoken word; after seventy-two hours, people remember only 10% of what they are told but 20% of what they are shown. When visual displays are used in the courtroom, however, the retention factor is 65%.²

The aforementioned study suggests that judges and juries are more likely to remember visual evidence than viva voce or documentary evidence. Other studies reveal that jurors remember more trial-related information when it is presented on in black-and-white (monochrome format), but witnesses seen in colour are perceived as being more credible by jurors.3 An explanation offered for this finding is that the monochrome format eliminates non-verbal cues (e.g., flushed or pale skin, perspiration, etc.) used by jurors for assessing witness demeanour.4

This article, which reviews the use of videotapes, films, and photo-

graphs under Ontario's Rules of Civil Procedure, begins with a brief history of the use of photographic evidence in commonwealth courts and a short discussion of its admissibility and weight.

Use in Commonwealth Courts

The common-law rules governing the admission of photographs into commonwealth courts have developed over the past 126 years.⁵ In 1862, an English court decided that photographs were admissible to provide the trier of fact with a view of the crime scene.⁶ Since then, photographs have been tendered in English, Irish, Scottish, and Australian civil courts to prove, inter alia, identity,7 paternity,8 copyright infringement,9 the existence of a libellous letter,10 handwriting,11 the forgery of documents,12 the authenticity of wills,13 and how collisions occurred. 14

In Canada, the first reported case in which photographs were used is *Re Cochran's Trusts*, ¹⁵ a dispute over a will. Enlarged photographs of delicate, partially torn documents were tendered to prove that certain persons were relatives of the deceased testator and entitled to a share of his estate.

The case was eventually appealed to the Supreme Court of Canada, where the appellate judges

examined and passed upon the physical evidence in its original form, and also in the form of enlarged photographs, and were thus able themselves to weigh the conflicting testimony of the witnesses on this particular subject.¹⁶

Since 1919, Canadian civil courts have seen photographs tendered of,

inter alia, public documents,¹⁷ lost documents,¹⁸ defective steps on a street car,¹⁹ scenes of motor-vehicle accidents,²⁰ bodily injuries,²¹ property evaluations,²² substandard conditions existing in rental accommodations,²³ and experiments.²⁴

Admissibility and Weight

The common-law rules of evidence that apply to the admissibility of photographs also apply to motion-picture films and videotapes. This principle was most recently reaffirmed in the case of *Simpson Timber Co. (Sask.) Ltd. v. Bonville et al.*, ²⁵ where the Saskatchewan Court of Queen's Bench ruled that

[t]he admissibility of videotape film is governed by the same rules which apply to the admission of photographs and motion picture films. . . . At the heart of the admissibility of these videotape films is whether [the court] is satisfied that there is some evidence upon which [it] might reasonably be certain that they are an accurate reproduction of what they purport to reproduce and that they are of a content and quality that they will not mislead or prejudice but rather assist in providing relevant evidence. Any controversy as to accuracy goes to weight and not admissibility.

From this and other cases there arises the principle that photographs, films, and videotapes are admissible in Canadian civil courts if relevant and material, true and accurate, fair and not misleading, and verified on oath by a capable witness. ²⁶ If their prejudicial effect outweighs their probative value, they will be excluded. ²⁷

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