

DETECTING PHOTOGRAPHIC MISREPRESENTATION
and OVERCOMING OBJECTIONS TO THE ADMISSION OF PHOTOGRAPHS

OUTLINE and CASE LIST
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I. INTRODUCTION

A. Criteria for admission:

1. RELEVANCY AND MATERIALITY - the contents of the photograph must be relevant and material to the issues at trial.

2. ACCURACY IN TRULY REPRESENTING THE FACTS - this goes to the related issues of accuracy and reliability. To be admissible, a videotape must contain a true and accurate reproduction of what it purports to portray and what its authenticating witness saw.

3. FAIRNESS AND ABSENCE OF ANY INTENTION TO MISLEAD - the chain of custody and continuity of possession of the videotape must be proven to the satisfaction of the court. These requirements insure that the videotape has not been altered, in any way, between the time of its recording and its playback in court.

4. VERIFICATION ON OATH BY PERSON CAPABLE OF DOING SO - this requirement goes to the issue of authentication. There must be testimony, by a witness who has seen the subject or event depicted, that the videotape "accurately represents the subject or event at the relevant point in time." In Canada, the authenticating witness must be an eye-witness or someone who has personal and direct knowledge of what is being shown.

5. PROBATIVE VALUE OUTWEIGHS PREJUDICIAL EFFECT - the probative value of the videotape's contents must outweigh its prejudicial effect otherwise it may be excluded, even though relevant.

R. v. Creemer and Cormier (1967), 1 C.R.N.S. 146.

Assuming that a videotape has met the first four requirements, a trial judge, in his discretion, may still exclude it from evidence if its contents are of little, or no, probative value and would only serve to inflame the minds of the jury or arouse a sympathetic reaction in them.

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The trial judge's discretion to exclude evidence which is highly prejudicial to one party, (e.g. evidence which is inflammatory or gruesome), is discussed in the case of:

Draper v. Jacklyn, [1970] S.C.R. 92, 9 D.L.R. (3d) 264 (S.C.C.).

There photographs of the plaintiff's face showing Kirshner pins sticking out of his cheeks were relevant because they portrayed the nature of the treatment that the plaintiff had to undergo. This was relevant to the question of damages (liability have been admitted by the defendants) because the jury could take into account the pain and discomfort and unattractive nature of the plaintiff's face during the period of convalescence.

In a more recent case, gruesome photographs of a murder scene and a subsequent autopsy of the victim were admitted into evidence over defence counsel objections. On appeal, the Alberta Court of Appeal commented that the photographs accurately depicted the premises though which the accused walked or ran and the physical arrangements depicted in the photographs had a bearing on the accused's ability to make his way to the scene of the killing notwithstanding his consumption of alcohol. The Court held that there was no prejudice resulting from the admission of the photographs.

R. v. Davis (No. 2), 35 C.C.C. (2d) 464.

R. v. Conkie, [1978] 3 W.W.R. 493 (Alta. C.A.).

R. v. Wildman (1981), 60 C.C.C. (2d) 689 (Ont. C.A.).

B. Detecting Photographic Misrepresentation

1. Examine original negative - note any discrepancies between it and the photographic prints made from it. Any retouching (etching-out, painting-in, or airbrushing) of a negative may be detected by holding the negative up to a light and examining the negative's surface.
2. Examination of the original negative will also disclose whether it has been properly printed. Reversal (printing the negative backwards - reversed left-to-right) and inversion (printing the negative upside down - reversed top-to-bottom) are immediately apparent when the negative is compared to the print.
3. If the print contains a combination of two or more images resulting from multiple exposures (composite pictures) then each image may be found on a separate negative.

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C. Overcoming Objections to the Admission of Photographs

To forestall an objection that:

(a) a photograph has been retouched - bring the original negative to court and permit its examination;

(b) a photograph has been tampered with between the time it was taken and brought to Court - direct your photographer to keep careful records of the chain of custody of the negatives and the photographs and store both in a secure place (e.g. safety deposit box in a bank vault) prior to trial.

(c) a photograph does not truly and accurately represent the colour of the scene - direct your photographer to include a Kodak gray card, gray scale and colour control patches in the scene so that they receive the same illumination as the subject. The colour patches can be compared with their appearance on the photograph to prove the faithfulness of colour reproduction. Also, the reproduction of the gray scale permits a visual evaluation of the exposure and differentiation between successive gray patches shows that the colour negative is well-exposed.

(d) a photograph does not truly and accurately represent the visual perspective, depth and spatial relationships of the original scene because of optical distortion and exaggeration - direct your photographer to use a "normal" lens, not a wide angle lens (which distorts by creating an extreme feeling of depth and making distances in the picture appear greater than they are) or a telephoto lens (which distorts action taking place in a plane perpendicular to the axis of the camera).

D. Directing the Photographer

Direct the photographer to place a ruler, or metre stick, or tape measure or surveyor's rod beside relevant objects in a scene being photographed. This will aid the Court in determining the size of objects depicted in the photograph. These instruments allow one to measure the size of the object and determine its distance from other objects in the scene. Place a level in the picture and center the bubble in the liquid to establish the horizon.

Direct the photographer to use a camera equipped with a databack which can optically imprint the date (year, month, day) or exposure information (F/stop, shutter speed, frame number) on each frame of the negative.

Direct the photographer to place a PHOTO DATA sheet in the scene to be photographed. On this sheet should be recorded information about the camera, lenses, filters and film used; the location of the scene; the date and time the photograph was taken; the distance of the camera from the object or scene; the direction the camera was pointed, and any important notes about the event.