



Outside Counsel

Using Demonstrative Evidence To Prove Damage

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Demonstrative evidence can be the most important and powerful evidence in a trial.

Demonstrative evidence can help the plaintiff win his or her case, and can help them win a larger verdict than would otherwise be obtained. Demonstrative evidence can be costly or cost-effective.

Demonstrative evidence is sometimes referred to as real evidence and may be directly perceived by the trier of fact. It is the most natural and satisfactory process of proof. *Harvey v. Mazal Amer. Partners*, 79 N.Y.2d 218 (1992), on remand, 179 A.D.2d 1 (1st Dept. 1992).

It is a common practice in the courts of this state, and probably throughout the Union, to furnish such assistance to jurors by the employment of maps, diagrams, drawings, and photographs, as well as by models; the purpose being to enable the jury to use their eyes as well as their ears in order to gain an intelligent comprehension of the case. Nothing short of an exact representation to the sight, said Chief Justice Tenney in *State v. Knight*, 43 Me. 132, can give with certainty a perfectly correct idea to the mind. Of course, in actual practice these accessories to the understanding must often be only approximations to the actualities; but it is enough to render a model receivable for purposes of illustration if it fairly represents the original object. *People v. Del Vermo*, 192 N.Y. 470, 482-483 (1908).

A model or diagram may be used for demonstrative or illustrative purposes and not entered into evidence, even though there is no proof of its accuracy or that it is a correct representation. *Knop v. Dechart*, 7 App. Div. 390 (4th Dept. 1896). To assist the admission of the demonstrative exhibit into evidence, and to reduce the chance of reversible error, the trial court should

give appropriate limiting instructions. See, *Calkins v. City of Plattsburgh*, 11 A.D.2d 153, 155 (3rd Dept. 1960); See, PJI 1:65.

Injured Portions of Body

It is one of the oldest and most well established tenets of evidentiary trial practice law that where the question in issue is the nature and extent of the plaintiff's injuries, notwithstanding the danger of prejudice to the defendant, the exhibition of the plaintiff's injuries is generally allowed. *Harvey v. Mazal Amer. Partners*, 165 A.D.2d 242, 243 (1st Dept. 1991), aff'd as modified, 79 N.Y.2d 218, 223 (1992), on remand, 179 A.D.2d 1, 6-7 (1st Dept. 1992). We have in past cases recognized the importance of demonstrative evidence and have allowed parties to exhibit their injuries to the members of the jury. 79 N.Y.2d at 223.

In *Mulhodo v. Brooklyn City R.R.*, 30 N.Y. 370, 372 (1864), the plaintiff was allowed to exhibit his injured arm to the jury. In *Clark v. Brooklyn Hgts. R.R. Co.*, 177 N.Y. 359 (1904), the plaintiff was properly allowed to drink water and write his name before the jury to show tremors that he sustained. In *Perry v. Metropolitan St. Ry. Co.*, 68 App. Div. 351 (2nd Dept. 1902), the plaintiff's body was properly allowed to be exhibited to the jury, and the plaintiff's doctor was properly permitted to point out the injuries to the plaintiff's ribs.

In *Harvey*, supra, the plaintiff, who sustained brain and spinal cord damage, was wheeled into the courtroom and while not under oath, was questioned before the jury. The questions did not involve disputed issues in the case. The plaintiff himself was an exhibit whose condition was an issue at trial and was properly before the jury. Allowing the plaintiff to be an exhibit, represents a valuable and reliable method of proof, and although such demonstrative evidence may inflame the passions of the jury or incite extreme sympathy, that itself does not serve as a basis for exclusion. 165 A.D.2d at 243; 179 A.D.2d at 7. See, *Carlisle v. County of Nassau*, 64 A.D.2d 15 (2nd Dept. 1978).

In *Sutherland v. County of Nassau*, 109 A.D.2d 664 (2nd Dept. 1993), lv. to app. den., 81 N.Y.2d 710 (1993), the plaintiff was permitted to partially disrobe and

redress in the presence of the jury to demonstrate the limiting affect of his disabled arm and hand.

In *Dietz v. Aronson*, 244 App. Div. 746 (2nd Dept. 1935), the court held it was error not to permit the jury to examine an infant plaintiff's throat to determine the results of the operation by comparison with a diagram in evidence of a normal throat.

In *Riddle v. Memorial Hosp.*, 43 A.D.2d 750 (3rd Dept. 1973), a witness was allowed to testify and demonstrate his observations as to the plaintiff's limitations.

However, in *Weinstein v. Daman*, 132 A.D.2d 547, 548-549 (2nd Dept. 1987), the trial court committed reversible error when it granted the defendant's application to conduct an experiment in order to test the credibility of the plaintiff, and allowed the jurors to sit in the witness chair and cover his or her right eye and determine whether they could see the defense attorney with their other eye. The plaintiff claimed that because of the loss of vision in his right eye, he was unable to see defense counsel when he rose to make an objection. The Appellate Division held this procedure to be highly prejudicial, clearly improper and inadmissible.

It is long and well established that pictures showing the plaintiff's injuries are admissible. *Alberti v. N.Y. L.E. & W.R.R.*, 118 N.Y. 77, 88 (1899) (photograph showing manner in which plaintiff's limbs were contracted). As stated in *Axelrod v. Rosenaum*, 205 A.D.2d 722, 722-723 (2nd Dept. 1994):

with respect to the issue of damages, we find that the trial court improperly refused to permit the introduction of a photograph of the plaintiff taken shortly after the accident while the plaintiff was in the hospital. Photographs that fairly and accurately represent the plaintiff shortly after an accident are admissible when they aid the jury in their assessment of the medical testimony and plaintiff's pain and suffering. In the case at bar, the photograph of the plaintiff was not inflammatory and could have aided the jury in determining the amount of damages to be awarded to the plaintiff.

In *Gallo v. Supermarkets Gen. Corp.*, 112 A.D.2d

345 (2nd Dept. 1985), the Appellate Division upheld the admission of multiple photographs of unsightly injuries and plaintiff's third degree burns from hot tar. The hot tar caused the plaintiff to suffer third-degree burns over a significant portion of his body, including his face, head, neck, chest, arms and waist. He was hospitalized for nearly two months, was subject to debridement and skin grafting procedures and had 75 percent of one ear removed. He had permanent, extremely disfiguring facial scars. 112 A.D.2d at 346.

The court concluded that the photographs were not prejudicial. While the photographs reveal some rather unsightly injuries, they were introduced only during the damages phase of the trial, where they were clearly relevant to the jury's assessment of Mr. Gallo's pain and suffering, and helped the jury to understand the medical testimony relating to Mr. Gallo's treatment. 112 A.D.2d at 349.

In *Rivera v. City of New York*, 160 A.D.2d 985 (2nd Dept. 1990), the Appellate Division upheld the admission of photographs of infant's burned feet taken a few days after the accident were not inflammatory and aided the jury in its assessment both of the medical testimony and the plaintiff's pain and suffering. She was unable to grow toenails, her toes were permanently malpositioned, and her left leg was smaller than the right. See, *Morinia v. N.Y.C.H.A.*, 250 A.D.2d 657 (2nd Dept. 1998).

In *Salazar v. B.R. Fries and Associates, Inc.*, 251 A.D.2d 210 (1st Dept. 1998), the Appellate Division upheld the admission of five photographs taken of plaintiff shortly after her accident, where her middle finger was severed and was subsequently reimplanted.

In *Colon v. N.Y.C.H.A.*, 248 A.D.2d 254, 255 (1st Dept. 1998), photographs depicting a serious laceration to the infant plaintiff's thigh were not unduly inflammatory, and were properly admitted to help the jury evaluate the medical testimony and assess plaintiff's pain and suffering.

In *Krueger v. Frisenda*, 218 A.D.2d 685 (2nd Dept. 1995), the court properly admitted into evidence pictures of plaintiff's abdomen with extensive scarring from multiple surgeries and absence of muscles in abdomen properly admitted into evidence. See also, *Martin v. Maintenance Co. Inc.*, 588 F.2d 355 (2nd Cir. 1978).

Photographs showing injuries may be admissible in evidence notwithstanding their being partially obliterated with ink. In *Re T-B. Children*, 168 A.D.2d 396 (1st Dept. 1990).

Pictures of Treatment

Photographs of treatment are similarly admissible. In *Caprara v. Chrysler Corp.*, 71 A.D.2d 515, 522 (3rd Dept. 1979), *aff'd*, 52 N.Y.2d 114, *rearg. den.*, 52 N.Y.2d 1073 (1981), the court properly

admitted into evidence color photographs of the plaintiff lying on a Stryker frame with Churchfield tongs attached to his scalp because they assisted the jury in understanding the medical evidence.

In *New v. Cortright*, 32 A.D.2d 576 (3rd Dept. 1969), photographs taken in hospital and depicting lacerations and sutures upon plaintiff's face were properly admitted into evidence. See, *Conkey v. New York Central R. Co.*, 206 Misc. 1077 (Sup. Monroe 1954); *Whelan v. Penn Central Co.*, 503 F.2d 886 (2nd Cir. 1974).

Day in the life videotapes of the plaintiff that depict their injuries and struggle for existence are admissible. *Caprara v. Chrysler Corp.*, *supra*; *Sullivan v. LoCastro*, 178 A.D.2d 523, 527 (2nd Dept. 1991), *lv. den.*, 81 N.Y.2d 701 (1992).

In *McNaier v. Manhattan Ry. Co.*, 51 Hun. 644 (2nd Dept. 1889), *aff'd*, 123 N.Y. 664 (1890), the court held that the sight of a skull and surgical instruments used to operate on it is not inflammatory. In *Bellevue-Santiago v. City Ready Mix, Inc.*, *N.Y.L.J.* April 20, 2001, P. 1. Col. 1 (Sup. Kings), the Court held that the plaintiff could properly place into evidence a videotape that was taken of the surgical procedure performed on the plaintiff by her treating physician/surgeon.

The general rule is that photographs of the deceased are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered Where they are otherwise properly admitted as having a tendency to prove or disprove some material fact in issue, photographs of a corpse are admissible even though they portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury There are many cases in which photographs of a homicide victim have been held admissible to show, for example, the position of the victim's body, the wounds of the victim, or to illustrate expert testimony Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant. *People v. Poblner*, 32 N.Y.2d 356, 369-370 (1973), *cert. den.*, 416 U.S. 905 (1974).

Foundation

Properly authenticated photographs are admissible whenever they are relevant to describe the physical characteristics of a person, place, or thing. *People v. Webster*, 139 N.Y.73, 83 (1893); *Bornt v. Pittstown*, 248 A.D.2d 854 (3rd Dept 1998), *lv. den.*, 92 N.Y.2d 854 (1998). Photographs are properly authenticated by the testimony of any witness familiar with the subject portrayed that the picture is a correct representation of the person, place, object or condition depicted. *Moore v. Leaseway Transp.*, 49 N.Y.2d 720 (1980); *Saporito v. City of New York*, 14 N.Y.2d 474 (1964); *People v. Brown*, 216 A.D.2d 737 (1995).

The witness does not have to be the photographer.

People v. Byrnes, 33 N.Y.2d 343 (1974); *Archer v. N.Y.H.R.R.*, 106 N.Y. 589, 603 (1887); *New York Laser Sign, Inc. v. Ausable Communications, Inc.*, 42 A.D.2d 830 (4th Dept. 1973), *app. dis.*, 33 N.Y.2d 687 (1973); *Isler v. Starke*, 18 A.D.2d 1077 (2nd Dept. 1963); *Muffoletto v. Rivera*, 54 Misc. 2d 114 (Sup. Erie 1967); *Kleveland v. United States*, 345 F.2d 134 (2nd Cir. 1965).

In *Gallo v. Supermarkets Gen. Corp.*, 112 A.D.2d 345, 348-349 (2nd Dept. 1985), the court properly admitted into evidence photographs of the injured plaintiff taken while he was undergoing treatment at the hospital. There was evidence that plaintiff looked at himself in the mirror prior to undergoing the skin graft surgery, and was able to testify that the photographs in question accurately portrayed his appearance at that time.

Such testimony suffices to establish the admissibility of the photographs, since any discrepancies which may exist between his portrayal therein and what other people observed is properly addressed to the weight which the jury might ascribe to the pictures and not to their admissibility.

A party may also use a Notice to Admit as foundation for the admission of photographs into evidence. CPLR 3123.

Enlargements

Enlargements are admissible to assist the jury or for their use to more intimately detail items, such as the accident scene. In *Salzano v. City of New York*, 22 A.D.2d 656 (1st Dept. 1964), the court erred in failing to admit into evidence an enlargement of a photograph showing the hole that the plaintiff fell in. Enlargements may be made of virtually anything, and are properly admitted into evidence. *Jarvis v. Long Island R. Co.*, 50 Misc. 2d 769, *aff'd*, 25 A.D.2d 617 (1st Dept. 1966) (aerial pictures); *Hoffman v. Prussian National Ins. Co.*, 181 App. Div. 412 (2nd Dept. 1918) (bill of sale); *Frank v. Chemical National Bank*, 37 N.Y.S. (1874) (checks that were allegedly forged); *People v. Jones*, 257 App. Div. 5 (4th Dept. 1939) (fingerprints).

A slide projector may be used to display color enlargements. *Conkey v. New York Central R. Co.*, 206 Misc. 1077 (Sup. Monroe 1954).

Conclusion

Seeing is believing. We live in a material world, so it behooves counsel to bring their demonstrative materials to court in order to have a full and visual trial to properly educate the jury.