PHOTOGRAPHIC EVIDENCE: ITS PROBATIVE VALUE AT TRIAL AND THE JUDICIAL DISCRETION TO EXCLUDE IT FROM EVIDENCE

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Introduction:

> (Gruesome) photographic evidence is an item of real proof allegedly used analogously to the employment of the victim's bloody clothing to show position of the wounds but which is in reality introduced primarily for its effect upon the jury.[1]

Almost since the inception of the photographic process, there has been, in some quarters, a certain degree of resistance towards the use of photographs as evidence in trials, both criminal and civil.[2] The reasons for such non-acceptance have varied widely but of late they have revolved largely around the picture's alleged effect upon the jury. It has been said that the Crown (in criminal cases) or the plaintiff (in civil trials) will attempt to introduce photographs which, though they fairly represent the scene as it appeared at the relevant moment, have a tendency to exaggerate or overly-emphasize gruesome aspects of the setting. Thus it is said that the trial judge has the power to exclude such photographs from evidence, even though they may pass the strict tests of legal admissibility. It is this area of the law of evidence with which this article intends to deal. However, a brief introduction and short examination of the probative value of photographs generally will also be made in order to shed some light on the very controversial subject of inflammatory photographic evidence.

The Basis of Admissibility of Photographs in Evidence

During the infancy of photography, photographic evidence was fairly well limited to the issue of proving identity. For example, to prove, in a bigamy case, that a man was a particular woman's first husband, a witness to the marriage swore under oath that the man shown in the picture was indeed the woman's first husband.[3]

> . . . the photograph was admissible because it is only a visible representation of the image or impression made upon the minds of the witnesses by

1. E. J. Carney, Jr., "Gruesome Photographs — Admissibility in Murder Trials" (1958) 3 **Villanova L.R.** 568.
2. See "Photographs in Evidence" (1874) 10 **Albany L.J.** 61.
3. **R. v. Tolson** (1864) 176 E.R. 488 (Surrey Assize).

> the sight of the person or the object it represents: and, in reality, is only another species of the evidence which persons give of identification, when they speak merely from memory.[4]

It should be noted at this time that this case, probably one of the first on the issue of photographic evidence, emphasizes the relationship between the photograph and the testifying witness, especially with respect to the witness' mind and memory. This judicial attitude was the beginning of the establishment of what is now probably the most widely accepted rule regarding admissibility of photographs — the "Illustrative Rule."[5]

In yet another very early case[6] wherein there was no proof adduced as to the photo's authenticity, the court was forced to make a statement regarding the reliability of photographs in general. The Court said:

> It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this . . . must depend upon the judicial cognizance we may take of photographs as an established means of providing a correct likeness . . . its principles are derived from science; the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eyes. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses.[7]

The reference by Agnew, Ch. J., (in the above) to the sun's rays as being the primary source of the image is an interesting one. Early judges, undoubtedly impressed with a Victorian outlook of natural justice and with the importance of nature in the worldly scheme of things, seemed to rely heavily upon the fact that the image was a "natural one" — one created by the sun (as opposed to a man-made painting), in an effort to justify its admission into evidence:

> . . . we cannot conceive of a more impartial and truthful witness than the sun, as its light stamps and seals the similitude of the wound on the photograph put before the jury; it would be more accurate than the memory of witnesses, and as the object of all evidence is to show the truth, why should not this dumb witness show it?[8]

While nineteenth-century judges were pre-occupied justifying the admission of photographs on the basis of scientific reliability, twentieth-century courts have, as a rule, had little discussion regarding the *basis* of admissibility. Modern courts simply admit the photos if they bear a reasonable likeness to the scene which they purport to depict. However, several jurists have discussed these theories of admissibility in some detail.[9]

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4. **Ibid.**
5. See a fuller discussion of this point later in this article.
6. **Udderzook v. Commonwealth,** Penn. Sup. Ct., Agnew, Ch. J., as quoted in (1874) 10 **Albany L.J.** 61.
7. **Ibid.,** at p. 62.
8. **Franklin v. State** (1882) 69 Ga. 36 at p. 43 (Ga. Sup. Ct.).
9. J. E. Mouser and J. T. Philbin, "Photographic Evidence — Is There a Recognized Basis for Admissibility?" (1957) 8 **Hastings L.J.** 310.

Nelson E. Shafer, writing in the Kentucky Law Journal (1958),[10] stated what is clearly the classic rule of admissibility:

> A photograph . . . is simply nothing except so far as it has a human being's credit to support it . . . as a preliminary foundation for the admission of photographs, they must be "verified" by a testimonial sponsor as correctly expressing his observation and recollection of the data in question. In addition, it must be relevant . . . and assist a witness in explaining his testimony so that the jury may better understand the case.[11]

However, it would seem that if photographs were strictly illustrative of oral testimony, they would often be repetitious of the oral testimony. Yet, though it may be said that the photos are cumulative in nature, in many cases, photographs would be more accurate than the primary testimonial evidence. If such photos were to be excluded from evidence due to their cumulative nature, allegedly "gruesome" photographs (but ones with substantial probative value) might be forced to give way to the less accurate oral testimony simply because they would be unnecessarily cumulative, and thus, prejudicial.[12]

On the other hand, there is another school of thought – that photographs, as "Demonstrative Evidence", are independent of any oral testimony, and are proof of the matters which they depict. Being substantive evidence *per se*, some authors maintain that they cannot be excluded from evidence for "shocking" the jury any more so than vivid oral descriptions of the same event.[13]

Wigmore has been of the opinion that a photograph is a "witnesses' pictured expression of the data observed by him."[14] Therefore it would seem that in order for such a "pictured expression" to be admissible, it must be a part of some witness's testimony. Wigmore so confirms the assumption: "it must appear that there is a witness who has competent knowledge, and that the picture is affirmed by him to represent it."[15] However, he continues, the objection that the photograph does *not* fairly represent the scene goes only to *weight* and credibility, not to admissibility.[16]

On the other side of the coin, the Demonstrative Rule would seem to indicate that a photograph can "tell its own story". A fairly recent U.S. decision lends itself well to this proposition. In *People* v. *Doggett*,[17] a husband and wife were convicted under s. 288(a) of the California

10. N. E. Shaffer, "The Use of Posed Photographs of Moveable Objects or Persons at the Time of an Accident" (1958) 47 **Kentucky L.J.** 117.
11. **Ibid.**, at p. 117-118.
12. See a later discussion of this point, **infra.**
13. Rex B. Stratton III, "The Use of Gruesome Photographs in Criminal and Civil Cases in Montana" (1969) 30 **Montana L.R.** 247.
14. Wigmore, **Evidence**, (3rd ed., 1940) no. 792.
15. **Ibid.**, at no. 793.
16. 3 Wigmore, **Evidence**, (1970) — Chadbourne Rev., no. 792.
17. **People v. Doggett** (1948) 188 P. (2d) 792 (Calif. Dist. Ct. of App.).

Penal Code, which made illegal all acts of oral sexual intercourse. The only evidence available was a photograph of the husband and wife during the commission of the alleged offence. The photograph had been found within the couple's apartment. Expert testimony was given to the effect that the photographs were not composites or fakes, and were probably taken by one of the parties to the act. A positive identification of the two persons in the photographs as the accused was made by the landlord of the apartment block. The latter further testified that the photographs were fair and faithful representations of the interior of the couple's apartment, and of certain furniture and articles therein at the time in question. However, neither the landlord nor anyone else was able to testify that the scene depicted on the photograph was a fair representation *of what actually took place when the photographs were taken.* As the proper foundation as to the accuracy and authenticity of the photographs was established, and, notwithstanding the fact that the photographs were not illustrating the testimony of a witness, but rather were the substantive evidence themselves, the pair were found guilty and were convicted on the charge.

As one author, D. S. Gardner,[18] points out, there is an apparently illogical distinction that most courts have drawn between X-ray photographs and other types of photographs. The X-ray photograph, he notes, cannot be checked for accuracy by human vision, as it has no perceiving witnesses inside the body. Nevertheless, it is welcome in court as the very highest form of substantive evidence. The normal photograph, however, whose accuracy can be independently verified, is often coldly turned aside, or is severely limited in its use as illustrative of oral testimony only.[19] The fallacy of limiting the use of photographs for the purpose of illustrating the testimony of witnesses is clearly presented by Gardner in an oft-quoted passage:

> If a defective eye with a damaged optic nerve conveys an impression (gained in twilight or under other deceptive visual conditions) to a diseased brain, even after the eroding effects of weeks have advanced the process of forgetting, the owner of the eye — though he may be a simple soul of limited intelligence and an even more limited vocabulary — will be permitted to describe in Court what he *thinks* that he *remembers* that he saw; but, if a camera with cold precision and absolute fidelity records the view permanently and with minute accuracy, that view is kept from the jury, perhaps . . . or its use is sharply circumscribed (under the illustration rule). Such strange logic has a baffling, Alice-in-Wonderland quality far removed from the realistic directness of the man-in-the-street. Perhaps only the logic of the law, wrought from centuries of philosophic inbreeding and tortured at times by the real and apparent need of stretching or confining the implications of precedent, could arrive at such a result.[20]

It would appear that the Illustrative Rule has found a certain amount

18. D. S. Gardiner, "The Camera goes to Court" (1946) 24 N.C.L.R. 235.
19. Ibid., at p. 244.
20. Ibid., at p. 245.

of support in the Canadian courts. Although few judges have expressly endorsed any one particular basis of admissibility, an examination of the language used inevitably leads one to the conclusion that the courts feel photographic evidence and the witness are inextricably linked. Perdue, C.J.M. said (in 1928);

> The trial judge says in his judgment that he could see the corrugation plainly in the photograph and could see that it was worn . . . His judgment appears to be founded on this observation . . . and it would be dangerous to base a finding of negligence upon that appearance in that photograph only.[21]

Even Fullerton, J.A., in his dissenting opinion, concurred with the majority on the question of the reliability of the photographs, referring to them as being the "uncertain testimony of photographs."[22] However, it would be unfair to say that the Manitoba Court of Appeal rejected any notion that photographs might have some probative value, independent of any oral testimony. In fact, the photographs in question here had been taken over a year after the material time. Thus, the majority were saying, in effect, that the photographs were admissible, but were to be assigned *little weight*, due to the circumstances. Fullerton, J.A., on the other hand, was of the opinion that the photographs did not even pass the admissibility test of a faithful representation. As a consequence, the question remains open that if the pictures had been taken immediately after the material time, and had been a faithful representation, would the court still have dismissed them in such a summary manner?[23]

In one of the few Canadian cases which makes any reference to the status of a photograph once accepted into evidence, Farris, C.J.S.C., speaking of moving pictures, noted:

> I refused to allow the pictures to be introduced as proof of the matter to be proved thereby, but did admit them in the same manner as I would "still" pictures, i.e., solely for the purpose of clarifying the verbal testimony being given.[24]

From the above language, it would seem clear that the Learned Trial Judge subscribed wholeheartedly to the "Illustrative Rule". However, he went on, in *obiter*, to note that:

> (there is) the possibility that with modern inventions, old rules should not necessarily remain static. It did occur to me that it might well develop in a case in the future that moving pictures themselves might be tendered and admitted in evidence . . . there might arise, in the future, an action when the pictures themselves, properly proved, would be the very best evidence of what occured.[25]

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21. **Chippendale v. Winnipeg Electric Co.** (1928) 1 W.W.R. 238 at 241 (Man. C.A.).
22. **Ibid., at p. 244.**
23. In this respect, see the 1972 decision of the Manitoba Court of Appeal, **R. v. Hutt**, infra.
24. **Army and Navy Department Stores Ltd. v. Retail Wholesale, etc.,** (1950) 2 D.L.R. 850 at 853 (B.C. Sup. Ct.).
25. **Ibid.**

Thus, while Farris did *foresee* a time when photographs might well be assigned a probative value of their own, he was not prepared to so hold in the case before him.

Three years later, however, a Quebec court of first instance was prepared to adopt the observations in the B.C. case as part of its judgment. In *Chayne* v. *Schwartz*,[26] a lessee brought an action against his lessor for diminution of the rent and damages for allegedly constructing an unsightly addition to the premises in question. In order to show the court the condition of the new portion, a motion picture was introduced into evidence over the objection of the defendants. The court, in following the judgment of Farris, C.J.S.C., held that as motion pictures were merely a series of related still photographs projected one after another to give the illusion of motion, such evidence should be treated in the same vein as still photographs. The court further held that as long as the pictures were a fair representation of the scene in question, and were not posed, they could be admitted into evidence not merely to clarify oral testimony, but as evidence in themselves. Clearly, this court was prepared to go much further than any other Canadian case — before or since — in holding that photographic evidence may be treated as substantive evidence. Nevertheless, it should be noted that the court was prepared to so hold only when they had been satisfied by oral evidence that the scene portrayed in the photograph was a fair representation of the location at the time in question. Thus, it would appear that the film, to a certain extent at least, was forced to rely upon oral testimony to determine its accuracy. If there had been no perceiving witness able to testify as to its fairness in representing the scene, it would appear that the photograph in this case would have been totally excluded from evidence.

The most recent decision in Canada on the admission of photographs into evidence would appear to be a judgment of the Supreme Court of Canada in *Draper v. Jacklyn*.[27] In this case, the basis of admissibility *per se* was not discussed, but an examination of the language used does shed some light on this issue. Spence, J. who delivered the majority opinion, skirted neatly around this question, but at one point noted that:

> the difficulty, of course, was not whether the learned trial judge would understand the treatment and the type of pin but whether members of the jury would, and if there was some photographic material which would ILLUSTRATE that treatment without being overly prejudicial in effect . . .[28]

In his concurring judgment, Ritchie, J. indicated more fully that the correct basis of admissibility (at least in this case) was one of secondary, strictly illustrative status:

26. (1954) C.S. 123 (Que. S.C.).
27. (1970) 9 D.L.R. 264 (Can. Sup. Ct.).
28. Ibid., at p. 269 (emphasis added).

> The photographs in the present case serve to illustrate the nature of the treatment to which the appellant was subjected and in this sense they form a part of the narrative of his illness and recovery and are both relevant and admissible.[29]

It would appear from the above series of cases that the Canadian courts are quite undecided as to the probative value of a photograph once introduced into evidence.

It would appear that other jurisdictions have by no means reached a concensus on this point either. In an early British case, A. L. Smith, L.J. felt that photographs *per se,* without any sponsorship, were no evidence at all.[30] Nevertheless, in 1967, the British Court of Appeal refused to follow this earlier view of the evidentiary status of photographs. In *R. v. Lambert,*[31] the accused was charged with the indecent assault of two young girls. The prosecution's case rested on four rolls of film belonging to the accused which showed his indecent acts with the girls. Neither the girls, nor the photographer, nor any other witness to the assault were available at the trial. There was, however, evidence adduced as to the identity of the girls, the time of the taking of the photographs and conclusive evidence that the accused was the man in the photographs. The accused was convicted and appealed to the Court of Appeal on the grounds, *inter alia,* that the photographs had not been proved in the proper manner — i.e., by calling someone at the scene to give evidence that the photographs showed what in fact took place. Lord Parker, C.J., however, in direct opposition to A. L. Smith's position held that the photographs did not need to become a part of someone's oral testimony. It appears that since the films were found in the possession of the accused (which the court felt was sufficient to indicate that the accused was a party to the taking of the photographs), this was tantamount to an admission dispensing with proof of the circumstances surrounding the taking of the photograph. As such, the court treated it as substantive proof of the offence with which the accused was charged.[32]

In 1968, another British court refused to accept the view that a photograph must necessarily form a part of a witness's oral testimony. In *The Statue of Liberty,*[33] two ships, proceeding down a river in opposite directions, somehow collided in mid-stream. Within a station located on shore near the site of the accident, a radar set was located. This radar unit was designed to record on photographic film the echoes of all vessels within its range. It was said that a film taken this particular day was able to indicate the time and the circumstances surrounding the accident

29. **Ibid.,** at p. 265-6.
30. **Hindson** v. **Ashby** (1896) 2 Ch. 1 at 21 (C.A.).
31. (1967) CR. LR. 480; 111 S.J. 472 (C.A.).
32. This case has been followed recently by the Canadian courts: see **R.** v. **Davis** (1970) 3 C.C.C. 260 (Alta. S.C. App. Div.).
33. (1968) 2 All E.R. 195 (P.D.A. Div.).

in question. Normally, the radar set was operated by human agency, but on this particular occasion, it was not. The sole issue that arose in the case was the admissibility of such a piece of evidence to prove such facts as could be deduced from it, in light of the fact that it had been produced purely mechanically and without any human intervention. The defendants resisted the introduction of the film, on the ground that it could not be treated as substantive evidence, but required human agency to verify and explain what it recorded. In holding that it was admissible without such human explanation, Sir Jocelyn Simon, P. stated that:

> I am clearly of the opinion that the evidence is admissible and could, indeed, be a valuable piece of evidence in the elucidation of the facts in dispute . . . It is in the nature of real evidence . . . It would be an absurd distinction that a photograph should be admissible if the camera were operated manually by a photographer, but not if it were operated by a trip or clock mechanism. Similarly, if evidence of weather conditions were relevant, the law would affront common sense if it were to say that those could be proved by a person who looked at a barometer from time to time, but not by producing a barograph record . . . The law is bound these days to take cognizance of the fact that mechanical means replace human effort.[34]

The modern Common Law position with respect to the evidentiary status to be ascribed to photographs is far from certain. In Britain, it appears clear that the courts are beginning to recognize the full probative value of photographic evidence and have accordingly held that in appropriate circumstances, a photograph is capable of providing direct, substantive and independent proof of a fact in issue. In the U.S., the generally accepted view has been that of Professor Wigmore:[35]

> . . . the use of maps, models, diagrams and photographs as testimony to the objects represented rests fundamentally on the theory that they are pictorial communications of a qualified witness who uses this method of communications instead of, or in addition to, some other method. It follows, then, that the map or photograph must first, to be admissible, be made a part of some qualified person's testimony . . .[36]

However, during the interval between the writing of this proposition in 1940 and the present time, several U.S. cases[37] and text writers[38] have taken issue with Wigmore's position in this area of the law. As a result, it should be noted that in the next edition of Wigmore in 1970, a noticeable change in the learned author's position had taken place:

> (The Illustrative Rule) was advanced in prior editions of this work as the only theoretical basis which could justify the receipt of photographs in evidence. With later advancements in the art of photography, however, and with increasing awareness of the manifold evidentiary uses of the products of the art, it has become clear that an additional theory of admissibility of photographs is entitled to recognition . . .

34. **Ibid.**, at p. 196.
35. Wigmore, **Evidence** (1940) 3rd ed., Vol. III, no. 793.
36. **Ibid.**
37. See **State** v. **Tatum** (1961) 360 P. (2d) 754 (Wash. Sup. Ct.); **People** v. **Bowley** (1963) 31 Cal. Reptr. 471 (Calif. Sup. Ct.).
38. See McKelvey, **Evidence**, (1944 5th ed.) at p. 670; see also Scott on **Photographic Evidence** (1969) 2nd ed., Vol. II at p. 330.

> Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which "speaks for itself."[39]

The most recent edition of Scott on Photographic Evidence[40] contains what is probably the most succinct statement of what appears to be the modern Anglo-American position:

> Under the circumstances of a given case a photograph may be used merely as something in the nature of a map or sketch illustrating the testimony of a witness, but this is probably the least important use of photographic evidence. The true rule is that photographs are admissible in evidence not merely as diagrams or maps representing things about which a witness testifies from his independent observation, but as direct evidence of things which have not been described by any witness as being within his observation.[41]
>
> At its weakest, photographic evidence usually either corroborates or contradicts human testimony instead of merely illustrating it or explaining it, and at its best, photographic evidence may constitute an irrefutable demonstration of physical facts.[42]

While a somewhat positive trend can be seen in the British and American cases and writings, the Canadian position has yet to be clearly enunciated. Only two cases[43] have dealt with the issue in any sort of direct manner. Both of these judgments appeared to indicate that the current Anglo-American position is correct. However, the balance of the cases appear to couch their language in terms of the traditional Illustrative Rule. Although the use of such language could clearly be as a result of the particular use for which counsel who adduced the evidence intended it in each particular case, this will certainly not assist future courts in the determination of this issue. Until a *Doggett*-type situation arises before a high court of the land, one can only surmise as to the true evidentiary status of the photograph in Canada. Nevertheless, it is submitted that should such an occasion arise, a Canadian court would in all probability adopt the current line of authority as outlined above. In doing so, it would be assigning the evidentiary status which is long overdue the photograph: that once accepted into evidence after having been properly verified, it is not restricted in its use merely to illustrate oral testimony, but may also provide direct, substantive and independent proof of a fact in issue.

Limitations on Admissibility

a) *Cumulative*

Regardless of the bases upon which photographic evidence is admitted, the courts have always enjoyed a certain degree of judicial discretion to exclude such evidence in certain circumstances.

39. Wigmore, **Evidence** (1970) — Chadbourne Rev., Vol. III, no. 790.
40. **Scott on Photographic Evidence** (1969) 2nd ed., Vol. II.
41. **Ibid.**, at pp. 298-9.
42. **Ibid.**, at p. 330.
43. **Chayne** v. **Schwartz and Army and Navy Stores, supra,** footnotes 26 and 24.

First of all, photographs must be properly verified as to authenticity and be relevant to a fact in issue.[44] However, the most significant restrictions, to the extent that they exist, relate first of all to the necessity for admitting the photographs at all, and secondly to the allegedly prejudicial effect which they will have upon the jury if admitted.

One of the more common objections to the tendering of such evidence is that its introduction is simply unnecessary and superfluous.[45] It is said that in many cases, when the defendant has expressly *admitted* certain facts, for example, such admission into evidence of photographic material which is of a cumulative nature should be denied. The underlying theory rests upon the belief that as the photographs are not necessary to prove the already-admitted facts, such evidence should be excluded from the jury, especially if they are of an inherently prejudicial nature. The chance of depriving the defendant of a fair trial, it is advanced, should not be unnecessarily taken.

In the U.S.A., it seems that even if the defendant has expressly admitted the facts sought to be proved by the photographs, the prosecution is allowed to prove its case to the fullest (if a plea of not guilty stands) subject only to the standards of fair play and the rules of evidence.[46] However, a few more recent U.S. decisions have added a qualification on to this principle. It seems that if the defendant makes a "full" and "complete" written confession, admitting the charge in "intricate detail," the court can correctly exclude such unnecessary evidence:

> . . . there was no issue nor controversy as to the cause of death. The defendant admitted the crime in detail. The photos could not possibly lend assistance in the determination of the defendant's guilt. It was admitted . . . the whole procedure seems to have been so unnecessary and was highly prejudicial and forces a reversal.[47]

One prominent American author, who feels strongly that photographic evidence should be of a preferred type, (as, he says, it is often clearer and more easily understood than other evidence) proposes that the true test for determining admissibility is not whether it is necessary or cumulative in nature, but simply whether or not the evidence is relevant to a fact in issue.[48]

On this point, Wigmore[49] notes that:

> A fact that is judicially admitted needs no evidence from the party benefitting by the admission. But his evidence, if he chooses to offer it, may even be excluded; first because *it is now immaterial to the issues as though the pleadings had marked it out of the controversy* . . .

44. See **Draper** v. **Jacklyn, supra,** footnote 27.
45. See A. Maloney, Q.C. "The Admissibility of Photographs in Criminal Cases and Resultant Prejudice to an Accused's Fair Trial" (1968) 1 C.R. (N.S.) 167. (Annotation).
46. **State** v. **Leland** (1951) 343 U.S. 790 (U.S. Sup. Ct.).
47. **Oxendine** v. **State** (1958) 335 P. (2d) 940 at 943 (Okla. Cr. Ct.).
48. S. L. Morris, "The Admissibility of Photographs of the Corpse in Homicide Cases" (1966) 7 **William and Mary L.R.** 137 at 141.
49. Wigmore, **Evidence,** 3rd ed. Vol. IX, para. 2591.

> *Nevertheless . . . a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases) so as to be technically but not practically a waiver of proof.*[50]

In Canada, however, the situation with respect to this issue remained uncertain until very recently. A. Maloney, Q.C., in writing on the topic of photographic evidence in 1968,[51] noted that authority was lacking in Canada on this point, and suggested that s. 562 (now s. 582) of the Criminal Code[52] may or may not solve the problem. Section 582 reads:

> Where an accused is on trial for an indictable offence he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

On a plain interpretation of this section (assuming that photographs can aid in the proof of an alleged fact), it would seem that an accused could waive the necessity for proving a particular fact by means of photographs by simply admitting certain material facts. However, as is noted above, and especially as Wigmore points out, this can lead to tremendous difficulties for the Crown — indeed, it could conceivably prevent a conviction from being obtained in some limited circumstances.

However, in 1970, this very issue came before the Supreme Court of Canada.[53] In an unanimous decision of a full court, Chief Justice Cartwright held, (in interpreting s. 582) that while the Crown's case is being put forward, the defence does not have the right to make an admission *unless the crown is willing to accept it.* The Court noted that as there are no pleadings in a Criminal action, there are no formal allegations of fact which the defence can categorically admit. The court added that:

> An accused cannot admit a fact alleged against him until the allegation has been made. When recourse is proposed to be had to section (582), it is for the Crown, not for the defence, to state the facts which it alleges against the accused and of which it seeks admission. The accused, of course, is under no obligation to admit the fact so alleged but his choice is to admit it or decline to do so. He cannot form the wording of the allegation to suit his own purposes and then insist on admitting it . . . The idea of the admission of an allegation involves action by two persons, one who makes the allegation and another who admits it.[54]

In so emphasizing the lack of formal pleadings and the consequent lack of any allegations before trial, the Chief Justice then concluded that before any admission can be made, the *allegation* must be made by the Crown. In so doing, the defence would be forced categorically to admit this *specific* allegation — not a quasi — admission that simply suits the purposes of the defence.

In so holding, it would seem that the Court has followed the general

50. **Ibid.** (emphasis added).
51. A Maloney, Q.C., **supra**, footnote 45.
52. R.S.C. 1970, cap. C-34, s. 582.
53. **Castellani v. R.** (1970), 71 W.W.R. 147 (Can. Sup. Ct.).
54. **Ibid., at p. 150.**

train of thought of the U.S. Courts and of Wigmore. Just how the Canadian courts will now apply this general principle to specific fact situations remains to be seen, but it does appear to overcome several very great problems, and is a judicial pronouncement to be praised.

b) *Prejudicial Nature*

The introduction of a somewhat gruesome photograph into evidence is often accompanied by an objection from the defendant's counsel. The reasons for the objections vary with the facts of each case, but it is usually based on the proposition that the photograph is so highly prejudicial in nature that admission will inflame the minds of the jurors to such an extent that the defendant will be deprived of a fair trial. If the photograph lacks *any* probative value, the courts have generally found no problem; if the primary purpose of attempting to introduce it is to prejudice the jury, it will simply be excluded.[55] If the photograph possesses *some* probative value, however, the courts have been forced to reconcile two conflicting principles of law: 1) Evidence that has probative value and would assist the jury in reaching a just decision should be admitted; 2) evidence that will, by its very nature, unfairly prejudice the defendant should be excluded. If the evidence in question contains *both* elements the most reasonable choice has to be made.

In this respect, it would appear that the Canadian stand, as laid out by the Supreme Court of Canada in *Draper v. Jacklyn*[56] is that, at least in criminal cases,

> . . . where the sole issue is the guilt or innocence of the accused, such photographs (having trifling weight and being prejudicial towards the accused) should be excluded unless they can be shown to contain some evidence directly connecting the accused with the commission of the crime with which he is charged."[57]

However, an inference can reasonably be drawn from this statement that the courts should possibly be a bit more tolerant towards admitting such photos in the case of a criminal trial which is *not* focussing on the issue of guilt, but on some collateral matter. One might also infer from the language above that there might be a similarly lenient test used in civil proceedings, presumably where the issue of damages might be quite important. Such a case in point is the *Draper* v. *Jacklyn* decision itself.

On the issue of the exclusion of allegedly prejudicial photographs from evidence, a brief survey of some of the more recent Canadian cases may shed some light on the general judicial thought in this area.

In *R.* v. *O'Donnell*[58] the Ontario Court of Appeal dealt with a rape-

55. See **R. v. Gallant** (1966), 47 C.R. 309 (P.E.I. S.C.) and **Draper v. Jacklyn**, supra footnote 27, per Ritchie, J.
56. **Supra**, footnote 27.
57. **Ibid.**, at p. 266.

murder case in which several photographs of the victim were introduced into evidence. An analysis of the facts would indicate that the condition of the pictured victim was certainly such as would likely inflame the jury: the body was lying face up, the clothes were above the victims waist, the sweater was tightly twisted about the neck. A silk cloth, covering her entire head, was saturated with blood, and several wounds were visible over her body. The defence acknowledged the death, but alleged that O'Donnell was not the guilty party.

In a judgment that has been severely criticized by academics,[59] Masten, J.A. stated:

> With respect to the admissibility of photographs on the ground that they tended to inflame the minds of the jury, I think that the ground put forward *is nihil ad rem*. The only question to be considered is were they admissible under the rules of evidence. If they are, the effect which they may have on the jury cannot interfere with their admission.[60]

While this would seem to be the most inflexible view taken in any reported Canadian decision,[61] its effect is somewhat softened by the Chief Justice's concurring judgment:

> The photographs in question served the useful purpose of corroborating the evidence as to the treatment to which Ruth Taylor was subjected by her assailant. *It is not believable that the sight of these photographs prejudiced the jury against the accused.*[62]

It seems that this latter quotation might serve to indicate that the case is no authority for the proposition that such photos can go in without qualification. It appears that, had the Chief Justice felt that the photographs *would* have prejudiced the jury, his decision to uphold the admission might have been otherwise.

In a New Brunswick appelate decision of the same year,[63] *R. v. Bannister*, Chief Justice Baxter of the New Brunswick Supreme Court held, *inter alia*, that photographs of the charred remains of a human body in a murder case were admissible. The Chief Justice seemed to indicate that the appropriate test was "Could the evidence lead the jury to *associate* the accused with the crime?" In this case, it was held that the jury would have made no such association, and that consequently the photographs were properly admitted.[64]

In one judgment of somewhat dubious value, an Alberta trial judge[65] held that certain allegedly inflammatory photographs were admissible

58. (1936) 2 D.L.R. 517 (Ont. C.A.).
59. See A. Maloney, Q.C., supra, footnote 45; see also "Admission of Photographs" (1940) 18 C.B.R. 813 at 814.
60. **Supra**, footnote 58 at p. 532.
61. But for a somewhat similar view see **R. v. Sim** (1954) 11 W.W.R. 227 (Alta. S.C.).
62. **Supra**, footnote 58 at p. 529 (emphasis added).
63. **R. v. Bannister** (1936) 2 D.L.R. 795 (N.B.S.C. App. Div.).
64. **Ibid.**, at p. 798.
65. **R. v. Sim** (1954) 11 W.W.R. 227 (Alta. S.C.).

in evidence. Relying very heavily, and obviously very impressed by Chief Justice Mulock's decision in *R. v. O'Donnell,* the Alberta court decided that the only test was whether or not the photographs tendered in evidence assist the jury to assess the witness's oral evidence. He then agreed with Masten, J's. statement, holding that the effect which photographs may have on a jury cannot interfere with their admission. With respect to the *Bannister* case and its purported test of association, all that Boyd, J. could say was:

> There are other cases on the point under discussion . . . which I have considered on other occasions, but I have not got them before me here at the moment."[66]

While the above could hardly be considered a strong authority for anything, it is further weakened by Boyd, J., as he adds this qualification to his findings:

> I am not overlooking what may be a qualification or exception. If I were satisfied that a photograph tendered in evidence was of trivial probative value and at the same time was certain or quite likely to prejudice substantially some party to a case . . . then I am of opinion that I might be entitled to exercise a discretion to reject it . . .[67]

In time, this "exception" would closely resemble the position taken by the Supreme Court of P.E.I. in a later case, *R. v. Gallant.*[68] In that instance, Chief Justice Campbell ruled that photographs tendered by the Crown of the victim's body were inadmissible as there did not seem to be any advantage to be gained by their admission. In fact, he added, they:

> . . . might tend to overemphasize certain features which they portray and therefore might create impressions in the mind of the jury which would not be borne out by the oral testimony . . .[69]

In rejecting those prejudicial photographs, the Court also curiously excluded those which were *not* open to such an objection, for he stated that he was "inclined to deal with all these pictures as a group and to give the accused the benefit of any doubt."[70]

It is unfortunate that the Nova Scotia Supreme Court (Appellate Division) in *R. v. Creemer and Cormier*[71] did not see fit to consider that recent *Gallant* case. In the Nova Scotia decision, a new trial was sought on the grounds, *inter alia,* that a color photo of the complainant revealed her in a pose that was calculated to arouse a "sympathetic reaction". In rejecting this submission, the court stated: "Admissibility depends on 1) their accuracy in truly representing the facts, 2) their fairness and absence of any intention to mislead, 3) their verification on oath . . . the

66. Ibid., at p. 230.
67. Ibid.
68. (1966) 47 C.R. 309 (P.E.I. S.C.).
69. Ibid., at p. 310.
70. Ibid.
71. (1968) 1 C.C.C. 14 (N.B.S.C. App. Div.).

defendant does not contend that this photograph was inaccurate or that it was introduced with an intention to mislead, but that it was calculated to arouse a sympathetic reaction. For the reasons noted, I would dismiss (it)."[72]

With all due respect, it would appear that the case wrongly implies that if the three requisite factors are present, no discretion is vested in the trial court judge with respect to the admissibility of such photographs into evidence. This particular point in the *Creemer* decision was disapproved of by the Supreme Court of Canada in the *Draper* v. *Jacklyn*[73] case:

> Although . . . the photographs (in the *Creemer* case) exhibited were what might well be regarded as horrible . . . the prejudicial effect was regarded as no bar to their admission. It might well be that those views are too inflexible and that they fail to reflect the balancing of the probative value as against the prejudicial effect.[74]

The trial judge's alleged inherent power to exclude normally admissible evidence has recently come under extensive discussion by the courts. As this topic alone could fill many hours of heated argument, it is not the intention of this article to pursue this question to any great extent. Suffice it to say that cases such as *O'Donnell*[75] and *Creemer*[76] should now be read in the light of at least two recent decisions of the Supreme Court of Canada: *R.* v. *Wray*,[77] and *Draper* v. *Jacklyn*.[78]

On this issue, Spence, J. stated in the *Draper* case:

> It is my respectful opinion that the decision as to what and what would not shock members of a jury can best be determined by the Trial Judge who sits in the Court-room with them.[79]

As to the extent of this discretion, it was maintained by the Supreme Court of Canada in *R.* v. *Wray*,[80] that the admission of relevant evidence with *some* substantial value might operate *unfortunately* for the accused, but not unfairly. It would only be unfair to an accused if the evidence admitted was of a *gravely* prejudicial nature and if its probative value, in relation to the main issue before the court, was trifling. As can be seen, the limits set up by the Supreme Court in *Wray* within which the trial judge has a discretion to exclude evidence are quite narrow indeed.

The most recent statement of the law with respect to this entire area of prejudicial photographic evidence was handed down by the Supreme

72. **Ibid.**, at p. 22.
73. **Supra**, footnote 27.
74. **Ibid.**, at p. 271.
75. **Supra**, footnote 58.
76. **Supra**, footnote 71; yet the **Creemer** decision was expressly followed subsequent to the **Draper** case in **R.** v. **Green** (1973), 9 C.C.C. 289 (N.S.C.A.).
77. **R.** v. **Wray** (1970) 11 D.L.R. 673 (Can. Sup. Ct.).
78. **Supra**, footnote 27.
79. **Draper** v. **Jacklyn**, supra footnote 27 at pp. 269-270.
80. **Supra**, footnote 77.

Court of Canada in 1970.[81] Spence, J. neatly summarized the correct test to be applied in all cases where an allegedly inflammatory photograph was being introduced into evidence:

> . . . photographs (are) admissible and should go to the jury unless the prejudicial effect was so great that it would exceed the probative value.[82]

Bearing in mind both the narrow limits of the judicial discretion to exclude otherwise admissible evidence and the test of admissibility regarding allegedly inflammatory photographs as noted above, it is not surprising that decisions subsequent to 1970 have shown a marked reluctance to exclude photographic evidence on these grounds.

In *R. v. Green*,[83] the Nova Scotia Supreme Court (App. Div.) reaffirmed its previous position taken in the *Creemer*[84] case. In this case, the Crown attempted to introduce certain black and white photographs of the dead victim as found at the murder scene. In addition, however, colour photographs of substantially the same thing were also introduced into evidence. The accused appealed on the grounds, *inter alia*, that the colour photographs were unnecessarily cumulative and highly prejudicial in nature and thus were improperly received into evidence. The court held that the photographs were properly admitted. There was no discussion in this case of the recent Supreme Court decision in *Draper v. Jacklyn*, nor of that high court's express disapproval of the rather rigid test applied in the *Creemer* case. Although the criticism of the *Creemer* decision as outlined elsewhere in this article would appear to apply equally well to the *Green* decision, there arose in the latter case one point which merits further discussion. In *Green*, the court appeared to be of the opinion that although the colour photographs were merely *duplicating* what was already available in the black and white photographs, this fact alone was no bar to their inclusion in evidence. In holding all of the photographs admissible, the court seemed to emphasize their overall value in being able to show to the jury the actual scene in question:

> "(The colour photographs were) certainly more vivid than the black and white photographs . . . and . . . also more natural but to produce these four is in order to give a clear indication to the jury of the scene that is to be considered by them and, in my opinion, there is nothing about the coloured photographs which would in any way mislead the jury or be unduly inflammatory."[85]

In 1972, the Manitoba Court of Appeal similarly indicated a reluctance to accede to this objection.[86] In an appeal against a conviction for manslaughter, the accused directed her argument solely against the ad-

81. **Draper v. Jacklyn**, supra footnote 27.
82. **Ibid.**, at p. 269.
83. **R. v. Green** (1973) 9 C.C.C. 289 (N.S.S.C. App. Div.).
84. **Ibid.**, at pp. 298-299.
85. **Ibid.**, at p. 299.
86. **R. v. Hutt**, as yet unreported; delivered on Nov. 7, 1972 (Man. C.A.).

mission of certain photographs into evidence. On the question of the admissibility of these allegedly prejudicial photographs, Guy, J.A. stated:

> "Unless photographs are tendered with the direct purpose of inflaming members of a jury or the court trying the issue, they should be admissible. Photographs are corroborative of the testimony of witnesses and provide a pictorial aspect of the evidence. In this day and age – 1972, to be exact – photographs should generally be admitted as exhibits in criminal cases without difficulty, subject to reasonable control by the court.[87]

While the judgment gives no indication of the tests which should be employed in determining the admissibility of such evidence, it appears quite clear that while the court can exercise some degree of "control" in the matter, in virtually all cases the evidence should be admitted. The only qualification to this principle appears to arise when the Crown tenders the evidence solely to inflame the passions of the trier of fact. While this statement could be construed to indicate the existence of a new exclusionary test – that the onus rests on the accused to show that their introduction was designed solely to prejudice his position – it is submitted that such a meaning was not intended by the court. The better interpretation would appear to be that only in circumstances where there is so little probative value that could be attached to the evidence that its very introduction would seem to indicate an ulterior motive on the part of the Crown can the photographs be properly excluded. Such a line of reasoning would be no more than a basic re-statement of the law in this area as laid down by the Supreme Court in *Draper* and *Wray*.[88]

The potential effect on the jury that prejudicial evidence might have appears to be of paramount importance in this conceptual framework as set up by the courts.[89] In this regard, there seems to be two main streams of thought.

On the one hand, a line of cases holds what appears to be the more widely accepted judicial view:

> Men and women of standing to be jurors . . . are not so weak and untutored that they would be influenced to return a verdict of guilty by reason of the photographs. Surely the average man and woman is not so far removed from pain and sorrow, from gruesomeness, from scenes of death and violence and the like, that photographs such as these would turn the reasoning mind into dislike or prejudice against a respondent defending himself in the halls of Justice.[90]

Essentially, this group considers the jury as a rational body of men and women who are able to separate the purposes for which the photographs are put into evidence from any impression they may have on first seeing them.

87. **Ibid.**, at pp. 2 and 3 of the original judgment.
88. See Spence, J. in **Draper** v. **Jacklyn**, supra footnote 27, and **R.** v. **Wray**, supra footnote 77.
89. See Spence, J. in **Draper** v. **Jacklyn**, at pp. 269-270.
90. **State** v. **DuGuay** (1962) 178 A. (2d) 129 at 131 (Maine Sup. Ct.).

On the other hand, the second group of cases asserts that:

> Human feelings are easily excited by the description of great bodily injury of ghastly wounds, or the exhibition of objects which appeal to the senses. Sympathy or indignation once aroused in the average juror readily become enlisted to the prejudice of the person accused as the author of the injury.[91]

While the latter group are quick to point out the possible psychological implications of the introduction of such photographs, it would appear that the reasoning used by this group may be a bit suspect. The argument by this group appears to maintain, in short, that as inflammatory evidence cannot be viewed without arousing a considerable degree of indignation, the juror is bound to consider the accused as the "author of the injury." However, it would seem that although certain members of the jury may become overcome by what appears to be a ghastly piece of evidence, it does not logically follow that such an impression should necessarily associate the accused with the guilty party. Indeed, to assume that the trier of fact does make this association is to assert that he initially *believed* the accused to be guilty. All that the demonstrative evidence serves to do, following this train of thought, is to make the accused now "more guilty" of what is now viewed as a "deplorable crime". To make such an assumption of the jurors' state of mind runs contrary to the basic philosophy of our criminal law. If one is to accept the jury system as we know it, we must have faith that the juror honestly believes the accused innocent until proven guilty. Given such a state of affairs, it would appear illogical to presume that the accused would be denied a fair trial merely as a result of the introduction of somewhat gruesome photographs.

On a more practical level, it is submitted that a properly authenticated and verified photograph of the scene in question will invariably be one of the most valuable pieces of evidence that could be adduced at trial. As was pointed out in the first part of this article, the general trend in the law of evidence is to attach a very high probative value to the photograph, and it would seem to run contrary to this judicial trend to allow such otherwise admissible evidence to be excluded merely because of its allegedly inflammatory nature. Unquestionably, the camera's lens is able to capture in a mirror-like appearance, and with absolute fidelity, a permanent record of the scene exactly as it was viewed at the moment in question. As this procedure is undeniably more accurate and reliable than that of a human witness (especially after a passage of time), the photograph can present to the court an irrefutable demonstration of physical facts. In fact, it is further submitted that it is not improbable that some future court will be willing to assign such a high probative value to a photograph in relation to the oral testimony concerning the same facts in issue, that the latter could be subject to exclusion under the

91. **Louisville & N.R. Co. v. Pearson** (1892) 97 Ala. 211 at 219.

Best Evidence Rule. Certainly, as the distance between the actual occurence of the event in question and the final date set down for trial becomes enlarged, it is quite conceivable that certain issues, such as distances, relative positions, nature and extent of the wounds, etc. could best be determined by photographic evidence. The time has come when the courts should give recognition to the fact that the human capacity to remember varies greatly, the mind is sometimes subject to illusion, and it is invariably clouded and distorted by the passage of time. A properly verified photograph is subject to none of these shortcomings. In fact, it is capable of giving as accurate and precise a recitation of the facts fifty years from the event as it is at the time of initial developing.

Summary and Conclusions:

It appears clear that relevant and properly verified photographs are generally admissible into evidence for various purposes. While early recognition of the basis of admissibility focussed largely on its reliability and relation to the physical sciences, recent writers have developed two theoretical formulae respecting such bases. The Illustrative Rule, which has been the most widely-accepted basis, states that a photograph is inextricably linked with the witness's testimony regarding it. It thus forms a "pictured expression" of his oral testimony. The Demonstrative Rule, on the other hand, proposes that photographs are capable of having an independent probative value of their own, and are proof *per se* of matters which they depict. Although most Canadian courts appear to couch their judgments in the terms of the traditional "Illustrative Rule", only two reported cases in Canada have dealt directly with the issue. Both of these favored treating photographic evidence as being at least *capable* of providing direct and substantive evidence of a fact in issue. Both the American and British courts have recently departed from the Traditional Rule, and appear to be headed in the same direction as regards the probative value to be attached to photographic evidence.

One of the more common objections to the admission of a photograph is that it is cumulative in nature. If, however, the accused admits to certain facts, it appears that the Crown must *accept* such an admission before it can go into evidence. Thus, it appears that the effect of s. 582 of the Criminal Code on the issue of judicial admissions made at trial with respect to facts sought to be proved by the Crown's tendering of photographic evidence, is that the photograph *can* go into evidence to prove a fact, but that such facts can *later* be admitted by the accused. On the other hand, if the admission by the accused is made *before* the photograph is put in, the option to accept or reject the admission rests with the Crown.

It appears that the limitation upon admission of prejudicial photo-

graphs is the most substantial restriction. The courts are faced with having to decide between two conflicting legal principles – to allow as much helpful evidence in, but to exclude unnecessary, highly prejudicial matters from admission. The Canadian courts have taken the position that in criminal cases, with guilt as the issue, photographs are admissible unless their prejudicial effect is so great that it exceeds their probative value. It further seems that not only must there be a simple overbalance, but that the probative value must be "tenuous", while the nature of the photographs must be "gravely prejudicial". In such a case, the trial judge has a discretion to exclude them from evidence. In determining whether or not they will prejudice the jury, the courts have developed two schools of thought. One school asserts that the psychological importance of gruesome evidence cannot be minimized, and that it is inevitable that this shock will affect the decisions of the jury. The other body of thought maintains that the jury is competent enough to disallow any feeling of shock from colouring their reasoning processes, and that to maintain that the jury will automatically associate the accused with the element of guilt by the mere introduction of such evidence is incongruent with certain basic principles of our legal system.

In addition, however, in support of the latter school of thought, it is submitted that the recent judicial trend of placing a very high probative value upon properly verified photographic evidence indicates that the courts have finally recognized that the camera is capable, in the proper circumstances, of reproducing a view of the scene that constitutes an irrefutable demonstration of physical facts. As such, the photograph would often be the very best evidence of certain facts in issue. As a consequence, it is submitted that the courts should be very loathe to exclude such photographs from evidence. The narrow restrictions which have been placed by the courts upon the trial judge's discretion to exclude such evidence are submitted to be correct in view of recent developments in this area of the law. Indeed, it is further submitted that the probative value of such photographs will invariably be so substantial that it will be the rare case indeed where their potentially prejudicial nature will outweigh their value in court.[92]

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92. For the most recent example of the court's marked reluctance to exclude photographs from evidence, see **R. v. Salmon**, (1973) 10 C.C.C. 184 (Ont. C.A.).

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