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EVIDENCE - PHOTOGRAPHS - ADMISSION TO SHOW PHYSICAL CONDITION OF PERSON

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EVIDENCE — PHOTOGRAPHS — ADMISSION TO SHOW PHYSICAL CONDITION OF PERSON — Plaintiff's daughter was killed by the wrongful act of defendant. In a suit to recover for pecuniary injury through loss of financial aid, a photograph of decedent (a pretty girl) was introduced and admitted over objections of defendant that the photograph could serve no purpose relative to the issues, but would excite the sympathy of the jury to the prejudice of the defendant. *Held*, that no error was committed in admitting the photograph since the decedent's probable contributions for the benefit of her parents depended largely upon "the kind of a girl she was" and the photograph was some evidence to aid the jury in determining that fact. *Drinon v. Wilson*, (C. C. A. 2d, 1940) 113 F. (2d) 654.

The admissibility of photographs¹ to show physical condition depends on preliminary considerations of accuracy and verification,² the general attitude of

¹ For a general discussion of photographic evidence, see 3 WIGMORE, EVIDENCE, 3d ed., §§ 792-798a (1940).

² A photograph must be authenticated by oral testimony before it may have any standing as evidence. *Ashland Sanitary Milk Co. v. Messersmith's Admr.*, 236 Ky. 91, 32 S. W. (2d) 727 (1930); *McGar v. Borough of Bristol*, 71 Conn. 652, 42 A. 1000 (1899); *Cincinnati, N. O. & T. P. R. R. v. Nolan*, 161 Ky. 205, 170 S. W. 650 (1914). This fact mitigates the force of the frequent objection that photographs may be made to exaggerate or misrepresent the person or his condition. The danger of

the court toward such evidence, the purpose of the introduction, relevancy to the question before the court, and the particular circumstances of each case. There is much authority for the view that photographic evidence is secondary—to be resorted to only when the description of the condition by oral testimony or personal appearance before the court is impracticable,³ but the modern tendency is toward finding justification for admission where photographs merely clarify or corroborate primary evidence.⁴ Moreover, many courts recognize the superiority of photographs over mere oral testimony in conveying a concept of physical condition to the jury.⁵ Over and above the attitude of the court, the objective intent of the party introducing a photograph in evidence is often a controlling factor in determining admissibility. When introduced with an apparent intent to excite the sympathy of the jury, admission is at least technical and sometimes reversible error.⁶ Closely related to this consideration is the relevancy or probative value of the photograph to the question before the court. This, of course, is the most important factor in determining admissibility.⁷ In addition to considerations of law, the particular circumstances of the case play a large part in determining not only when a photograph is admissible, but when an error is of such moment as to warrant a reversal. Thus a court may refuse to reverse a decision because the main issue was clear and the erroneous admission did not result in an excessive judgment.⁸ The decisions indicate a marked reluctance to reverse on the sole ground of an improper admission of photographic evidence.⁹ In the principal case it is not clear on just what grounds the

misrepresentation therefore lies in the oral verification alone, and thus, such objections apply only as objections to oral testimony. 3 WIGMORE, EVIDENCE, 3d ed., § 792 (1940).

³ *Gilbert v. West End Street Ry.*, 160 Mass. 403, 36 N. E. 60 (1894); *Baxter v. Chicago & N. W. R. R.*, 104 Wis. 307, 80 N. W. 644 (1899); *Cirello v. Metropolitan Express Co.*, (S. Ct. App. Term 1904) 88 N. Y. S. 932.

⁴ *Smith v. Territory*, 11 Okla. 669, 69 P. 805 (1902); *Pritchard v. Austin*, 69 N. H. 367, 46 A. 188 (1898); *Davis v. Seaboard Air Line R. R.*, 136 N. C. 115, 48 S. E. 591 (1904); *Cincinnati, H. & D. R. R. v. De Onzo*, 87 Ohio St. 109, 100 N. E. 320 (1912); *Greenwood Cafe v. Walsh*, 15 Ala. App. 519, 74 So. 82 (1917).

⁵ See cases cited in note 4, *supra*.

⁶ *Smith v. Lehigh Valley R. R.*, 177 N. Y. 379, 69 N. E. 729 (1904); *Fearon v. New York Life Ins. Co.*, 162 App. Div. 560, 147 N. Y. S. 644 (1914); *Cirello v. Metropolitan Express Co.*, (S. Ct. App. Term 1904) 88 N. Y. S. 932.

⁷ Many courts have adopted the rule that the trial court's discretion is final, unless arbitrarily exercised, as to preliminary questions of verification and questions of probative value. *Carey v. Inhabitants of Hubbardston*, 172 Mass. 106, 51 N. E. 521 (1898); *Gilbert v. West End Street Ry.*, 160 Mass. 403, 36 N. E. 60 (1894); *Jameson v. Weld*, 93 Me. 345, 45 A. 299 (1899).

⁸ *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334 (1928); *Ashland Sanitary Milk Co. v. Messersmith's Admr.*, 236 Ky. 91, 32 S. W. (2d) 727 (1930).

⁹ Only one case has been found where this ground alone was the basis for reversal. Motion pictures were introduced which made a farce of the trial and resulted in an excessive verdict. *Gibson v. Gunn*, 206 App. Div. 464, 202 N. Y. S. 19 (1923). Errors were held nonreversible in the following cases: *Ashland Sanitary Milk Co. v. Messersmith's Admr.*, 236 Ky. 91, 32 S. W. (2d) 727 (1930), where photograph

court upheld the admission of the photograph. If by "the kind of a girl she was" the court was thinking of her appearance, which might be in some degree indicative of her probable earning capacity, it would seem that her occupation, present or intended, would be an important factor in appraising the probative value of such photograph.¹⁰ Yet neither age nor occupation is mentioned in the opinion. If it was thought that the photograph had some probative value in showing the extent to which she appeared the type that would be solicitous of her parents' welfare, it would seem that the court had adopted a rather tenuous and speculative ground for supporting the admission and that the danger of prejudicing the jury would outweigh the possible value as relevant evidence. In the absence of a more complete analysis by the court, it is difficult to see any substantial justification for not holding the admission to be at least technical error.

of deceased, a very beautiful young girl, was introduced with intent to excite sympathy and prejudice and without proof of accuracy; *Nolte v. Chicago, R. I. & P. Ry.*, 165 Iowa 721, 147 N. W. 192 (1914), where photograph of deceased wife in uniform of trained nurse was introduced; in *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334 (1928), a photograph of deceased son given to mother (on witness stand), who wept over it with no apparent purpose but to prejudice the jury. Cases in which erroneous introduction of photographs was in part the basis for reversal are: *Smith v. Lehigh Valley R. R.*, 177 N. Y. 379, 69 N. E. 729 (1904); *Fearon v. New York Life Ins. Co.*, 162 App. Div. 560, 147 N. Y. S. 644 (1914); *Selleck v. City of Janesville*, 104 Wis. 570, 80 N. W. 944 (1899). No case has been found holding the exclusion of a personal photograph to be error, but see *Dederichs v. Salt Lake City R. R.*, 14 Utah 137, 46 P. 656 (1896), where improper exclusion of photographs of the scene of an accident was held the sole ground for reversal.

¹⁰ *Smith v. Lehigh Valley R. R.*, 177 N. Y. 379, 69 N. E. 729 (1904).