THE LAW OF EVIDENCE IN CANADA

THIRD EDITION

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2. *Judicial Discretion in Civil Cases*

§2.63 A judicial discretion to exclude admissible evidence is also recognized in civil cases, if, in the judge's view, its prejudicial effect outweighs its probative value.

§2.64 The discretion normally applies when an attempt is made to introduce real or demonstrative evidence in the court room.[124] In personal injury actions, counsel may attempt to show the trier of fact a graphic photograph of or the actual bodily injury that the plaintiff has incurred. The advantage of exhibiting such injury or photograph is that it constitutes a preferable form of proof to the testimonial evidence of those who have perceived the injury. It may be the very best evidence available. Testimonial evidence, after all, is one step removed from viewing the injury itself and the exposure of it would seem to be the most natural and efficient process of proof. The trier of fact would not have to concern himself or herself with questions of credibility or possible error in the observation of a witness. Other considerations, however, militate against the use of such evidence:

(1) Exhibited injuries cannot be recorded so that an appellate court is deprived of such evidence should there be an appeal.
(2) The nature and extent of the injury and its treatment could be just as readily explained by medical witnesses giving oral testimony.[125]
(3) Its prejudicial effect could far outweigh any probative value that it may have.

Questions then arise as to whether the court will ever refuse to admit real evidence even if it is relevant to an issue in dispute; and, if the court does have such a discretion to exclude this kind of evidence, on what occasions will it do so?

§2.65 An early statement of the trial judge's discretion, though expressed in inclusionary terms, was made by Chancellor Boyd in *Sornberger v. Canadian Pacific Railway Co.*, after reviewing a number of American authorities, as follows:

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little probative value, there was almost no potential for prejudice because the jury had already heard a significant amount about the victim's propensity for violence. Accordingly, the principle that defence evidence should be excluded only where its prejudicial effect substantially outweighs its probative value dictated that the evidence should have been admitted.

[124] See B.A. MacFarlane, "Photographic Evidence: Its Probative Value at Trial and the Judicial Discretion to Exclude it from Evidence" (1973) 16 Crim. L.Q. 149, at 173-74.

[125] See *Gray v. LaFleche*, [1950] 1 D.L.R. 337, [1949] M.J. No. 58 (Man. K.B.).

> . . . it is within the discretion of the Court to allow the plaintiff to exhibit to the jury his injured limb or body for the purpose of being examined thereon by a physician.[126]

Shortly thereafter, the other division of the same Ontario appellate court, in stronger language, suggested that the possible prejudicial effect of injuries displayed to a jury might be considered by a trial judge in her or his deliberation as to whether the exhibition should be permitted or not.[127] Some later cases seemed to concentrate on whether the part of the body exposed was normally covered,[128] although this would appear to be a rather artificial basis for the analysis.

§2.66 Although an early case[129] suggested that the injuries in question should not be shown to the jury on the ground that it might induce an exaggerated award of damages, other cases that have been cited up to this point considered the prejudicial effect of the injuries as bearing upon liability rather than damages.[130] A later Saskatchewan case, however, indicated that such a display cannot arouse prejudice if liability is not in issue.[131] The Court intimated, however, that a trial judge may forbid the exhibition of corporeal injuries, even when the issue is only quantum, if the viewing of the injury might result in an exaggerated impression of the damage to, or the suffering of, the plaintiff.

§2.67 In *Draper v. Jacklyn*,[132] a case where quantum of damages but not liability was in issue, Spence J. of the Supreme Court of Canada held that graphic photographs of the plaintiff's face during the course of his surgical treatment should have been put before the jury unless their likely prejudicial effect on the jury was so great as to exceed their probative value. The Supreme Court of Canada felt that the photographs were relevant because they portrayed the nature of the treatment that the plaintiff had to undergo. In this way, they were relevant

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126 (1897) 24 O.A.R. 263, at 270, [1897] O.J. No. 30 (Ont. C.A.).

127 *Laughlin v. Harvey* (1897), 24 O.A.R. 438, at 440, [1897] O.J. No. 50 (Ont. C.A.). To the same effect, see *Richardson v. Nugent* (1918), 45 N.B.R. 331, 40 D.L.R. 700 (N.B.C.A.). For a more detailed discussion of this discretion, see J. Sopinka & S.N. Lederman, *The Law of Evidence in Civil Cases*, Canadian Legal Text Series (Toronto: Butterworths, 1974), at 348 ff.

128 *Yachuk v. Oliver Blais Co.*, [1944] 3 D.L.R. 615, [1944] O.J. No. 168 (Ont. H.C.J.), revd on other grounds, [1945] O.R. 18, [1944] O.J. No. 482 (Ont. C.A.), revd on other grounds [1946] S.C.R. 1, [1945] S.C.J. No. 41, revd on other grounds and judgment of C.A. restored, [1949] A.C. 386, [1949] J.C.J. No. 5 (U.K.P.C.); *Gray v. LaFleche*, [1950] 1 D.L.R. 337, [1949] M.J. No. 58 (Man. K.B.).

129 *Yachuk v. Oliver Blais Co.*, *ibid.*

130 *Laughlin v. Harvey* (1897), 24 O.A.R. 438, at 440, [1897] O.J. No. 50 (Ont. C.A.); *Richardson v. Nugent* (1918), 45 N.B.R. 331, 40 D.L.R. 700 (N.B.C.A.).

131 *Hansen v. Saskatchewan Power Corp.* (1962), 31 D.L.R. (2d) 189, at 192, [1961] C.C.S. No. 1291 (Sask. C.A.).

132 [1970] S.C.R. 92, [1969] S.C.J. No. 70 (S.C.C.).

to the question of damages because the jury could take into account the pain and discomfort and the unattractive nature of the plaintiffs face during the period of convalescence. Moreover, the Court agreed with the trial judge's view that the photographs themselves were not overly inflammatory. The Court did, however, lay down the principle that evidence may be excluded, even though it is relevant, if it is prejudicial to the party against whom it is led, in the sense of having slight probative value to a fact in issue in relation to its prejudicial effect. Justice Spence put it this way:

> The occasions are frequent upon which a judge trying a case with the assistance of a jury is called upon to determine whether or not a piece of evidence technically admissible may be so prejudicial to the opposite side that any probative value is overcome by the possible prejudice and that, therefore, he should exclude the production of the particular piece of evidence. In the case of photographs, this occurs more frequently in the trials of criminal offenses and more usually in murder trials. The matter is always one which is difficult for the trial judge and in itself essentially a decision in which the trial judge must exercise his own carefully considered personal discretion.[133]

Justice Spence held that the trial judge is in the best position to determine whether the photographs would shock the jury and that an appellate court should not be quick to interfere with the exercise of this discretion.

§2.68 It is interesting to note that although the Ontario Court of Appeal, in enunciating the principle, indicated that the prejudicial effect of the photographs had to "far outweigh"[134] their potential probative value for the trial judge to exercise his or her discretion, Spence J. did not use equivalent language. He did not suggest that before the judge may invoke his or her discretion to exclude the photographs, the prejudicial effect had to "far outweigh" or be "considerably greater" than the probative worth of the photographs. He merely placed it on the basis that if the prejudicial effect "would exceed their probative value",[135] then the discretion may be exercised. Accordingly, the test appears to be an evenly balanced one: if the prejudicial effect of the photographs, and by analogy, the exposure of bodily injuries, is greater than the probative or evidentiary value of such evidence, a trial judge has a discretion to forbid its introduction into evidence. It would also appear that Spence J. thought that this rule was applicable to both civil and criminal cases. This is apparent by his reference to the use of photographs in criminal proceedings, particularly murder trials, and also by his review of many criminal authorities on this point. One would expect that the circumstances in which a judge in a civil case would exclude evidence

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[133] *Ibid.*, at 96-97 (S.C.R.).

[134] *Draper v. Jacklyn*, [1968] 20 O.R. 683, at 685, [1968] O.J. No. 1219 (Ont. C.A.); see also *R. v. Gallant* (1965), 47 C.R. 309, [1965] P.E.I.J. No. 5 (P.E.I.S.C.).

[135] [1970] S.C.R. 92, at 98, [1969] S.C.J. No. 70 (S.C.C.).

because of its inflammatory nature would be rare. People today, because of their exposure to television and motion pictures, can be expected to be much less sensitive to graphic displays of injuries than the average 19th or early 20th-century citizen. In *R. v. Wade*,[136] a murder case, the Ontario Court of Appeal acknowledged that the exercise of the discretion enunciated in *Draper v. Jacklyn*,[137] that is, assessing the potential probative value of the photographs against their potential prejudicial effect, applies equally to criminal cases. In holding that the exercise of discretion by the trial judge to admit the photographs was proper in the circumstances, Doherty J.A. stated: "Certainly, the jurors would routinely see much more graphic pictures and photographs in the popular media."[138]

§2.69 This particular discretion applies, as well, to other types of potentially prejudicial evidence. In *Anderson v. Maple Ridge (District)*,[139] the British Columbia Court of Appeal, recognized that a judge trying a civil case in Canada had a discretion to exclude relevant evidence on the ground that its prejudicial effect outweighed its probative value. In issue in that case was the admissibility of evidence of repairs, alterations or improvements by the defendant after the incident which gave rise to the cause of action. The Court stated that the exact scope of the discretion was a complex question but declined to define it, as the Court was satisfied that any potential prejudice to the defendant resulting from the admission of the evidence could be neutralized by an appropriate limiting instruction by the judge to the jury.

3. Appellate Review of Discretion

§2.70 In *R. v. B. (C.R.)*,[140] McLachlin J. stated, that where the law accords a broad discretion to a trial judge, appellate courts are reluctant to interfere with how the trial judge exercised that discretion, in the absence of a demonstrated error of law or jurisdiction.[141]

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[136] (1994), 18 O.R. (3d) 33, [1994] O.J. No. 543 (Ont. C.A.), revd on other grounds, [1995] 2 S.C.R. 737, [1995] S.C.J. No. 51 (S.C.C.).

[137] [1970] S.C.R. 92, [1969] S.C.J. No. 70 (S.C.C.).

[138] (1994), 18 O.R. (3d) 33, at 41, [1994] O.J. No. 543 (Ont. C.A.), revd on other grounds [1995] 2 S.C.R. 737, [1995] S.C.J. No. 51 (S.C.C.).

[139] (1993), 10 C.P.C. (3d) 258 (*sub nom. Anderson (Guardian ad litem of) v. Erickson*), [1992] B.C.J. No. 1860 (B.C.C.A.).

[140] [1990] 1 S.C.R. 717, 76 C.R. (3d) 1, [1990] S.C.J. No. 31 (S.C.C.).

[141] *Ibid.*, at 9 (C.R.). This is consistent with the review of a trial judge's discretion under s. 24(2) of the *Charter*: *R. v. Grant*, [1993] 3 S.C.R. 223, at 256, [1993] S.C.J. No. 98 (S.C.C.).