

B&A

Expert Demonstrative



Eviden

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Demonstrative Evidence is essential to:

- Explain
- Illustrate
- Summarize



Demonstrative Evidence is essential to:

- Simplify technical / legal issues
- Improve juror comprehension / retention

Demonstrative Evidence

Amendments to Rule 53.03

Rules of Civil Procedure

Promote expert evidence that is fair,
objective, and non-partisan



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Admissibility of Demonstrative Evidence

Completely within the discretion of the trial judge

Admissibility of Demonstrative Evidence

- Relevant
- Accurate and fair
- Probative value must outweigh prejudicial effect
- Must not offend any exclusionary rule
- Be of assistance to the court

Admissibility of Demonstrative Evidence

Admissible UNLESS:

- Caught by exclusionary rule
- Prejudicial effect outweighs probative value

Admissibility of Demonstrative Evidence

Sopinka, Lederman & Bryant:

The Law of Evidence in Canada, 3rd ed.

(Markham: Lexis Nexis, 2009, authors Bryant,
Lederman, Letterman & Fuerst , s. 12.126



Admissibility of Demonstrative Evidence

To be admissible,
the expert evidence that it exists to explain and
illustrate must also be admissible

Admissibility of Demonstrative Evidence

Supreme Court of Canada

R. v. Mohan (1994), 114 D.L.R. (4th) 419

Pre-conditions for admission of expert evidence:

- Relevance
- Necessity in assisting the trier of fact
- Absence of any exclusionary rule
- Properly qualified expert

Admissibility of Demonstrative Evidence

R. v. Abbey, [2009] O.J. No. 3534

- evidence must meet 4 prerequisites of admissibility of expert evidence as identified in *R. v. Mohan*
- trial judge must determine that expert evidence is beneficial to the trial process

Demonstrative Evidence

Rule 53.03

Requirements for expert report:

- a. Expert's name, address, area of expertise
- b. Expert's qualifications, employment, educational experiences
- c. Instructions provided to the expert
- d. Nature of opinion being sought
- e. Expert's opinion respecting each issue
- f. Expert's reasons for his/her opinion
- g. Acknowledgement of expert's duty under Rule 4.1 signed by expert

Demonstrative Evidence

- Probative potential of evidence
- Significance of issue to which evidence is directed

Cost Benefit Analysis



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Demonstrative Evidence

Reliability Concerns:

- Subject matter of evidence
- Methodology used by expert in arriving at opinion
- Expert's expertise
- Language used in explaining opinion
- Extent of impartiality / objectivity



Demonstrative Evidence

Risks

“consumption of time, prejudice and confusion”

Binnie J. in J.-L.J., para. 47

Demonstrative Evidence

McCormick on Evidence, (5th) ed.,
Volume 2 at pp. 17-19



EVIDENCE



INADMISSIBLE

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Photographs/Videotapes



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Cost Benefit Analysis



**Expert
Opinion**

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Cost Benefit Analysis



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Cost Benefit Analysis



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Demonstrative Evidence

Jenkyns v. Kassam (2006), Carswell Ont. 8890 (S.C.J.)

- Expert's testimony is relevant and admissible; demonstrative aid relates to evidence
- Expert whose testimony the demonstrative aid depicts is familiar with it
- Demonstrative aid fairly and accurately reflects expert's evidence
- Demonstrative aid will aid trier of fact

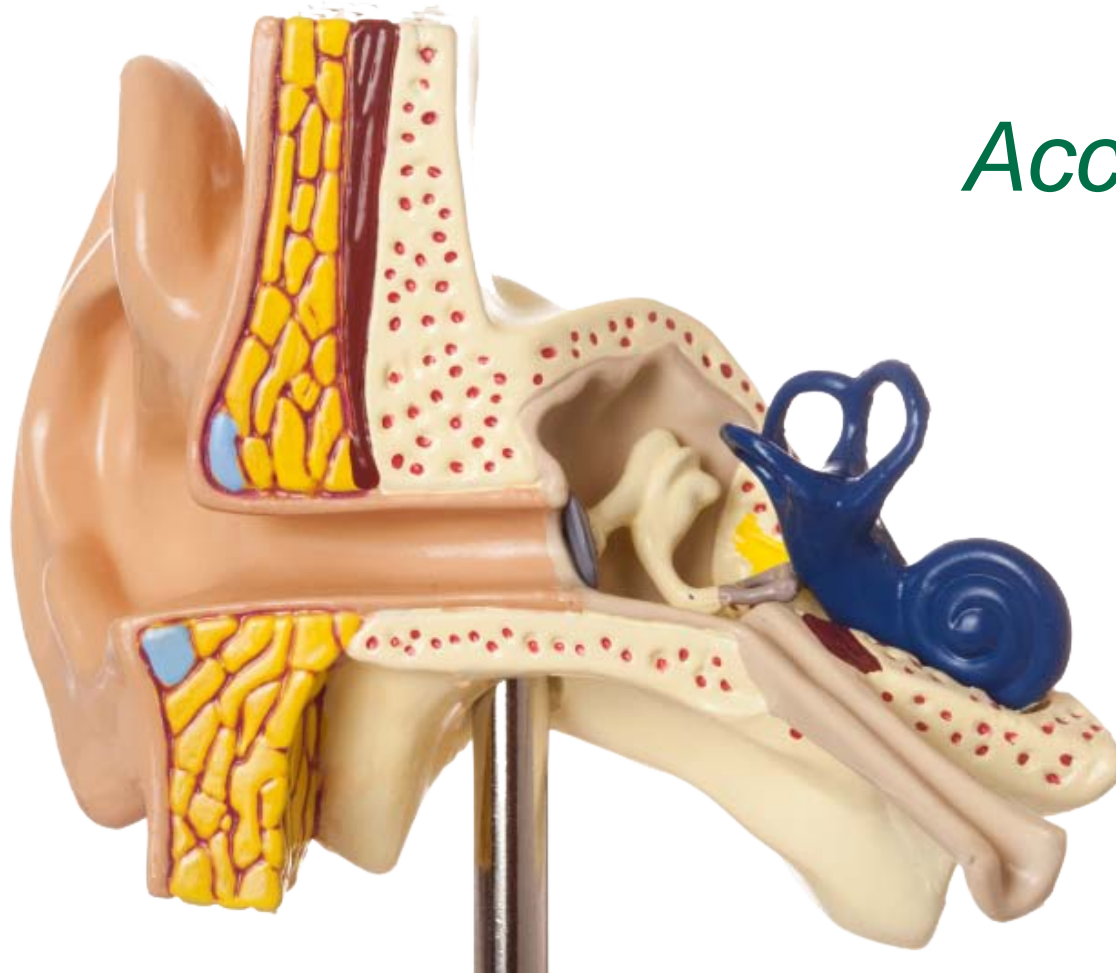


Integrity of Evidence

The introduction of demonstrative evidence must be done in a manner that will ensure the integrity of the evidence so tendered.

Greer (Litigation Guardian of) v. Kurtz, [2008]
O.J. No. 2925 at para. 10.

Integrity of Evidence

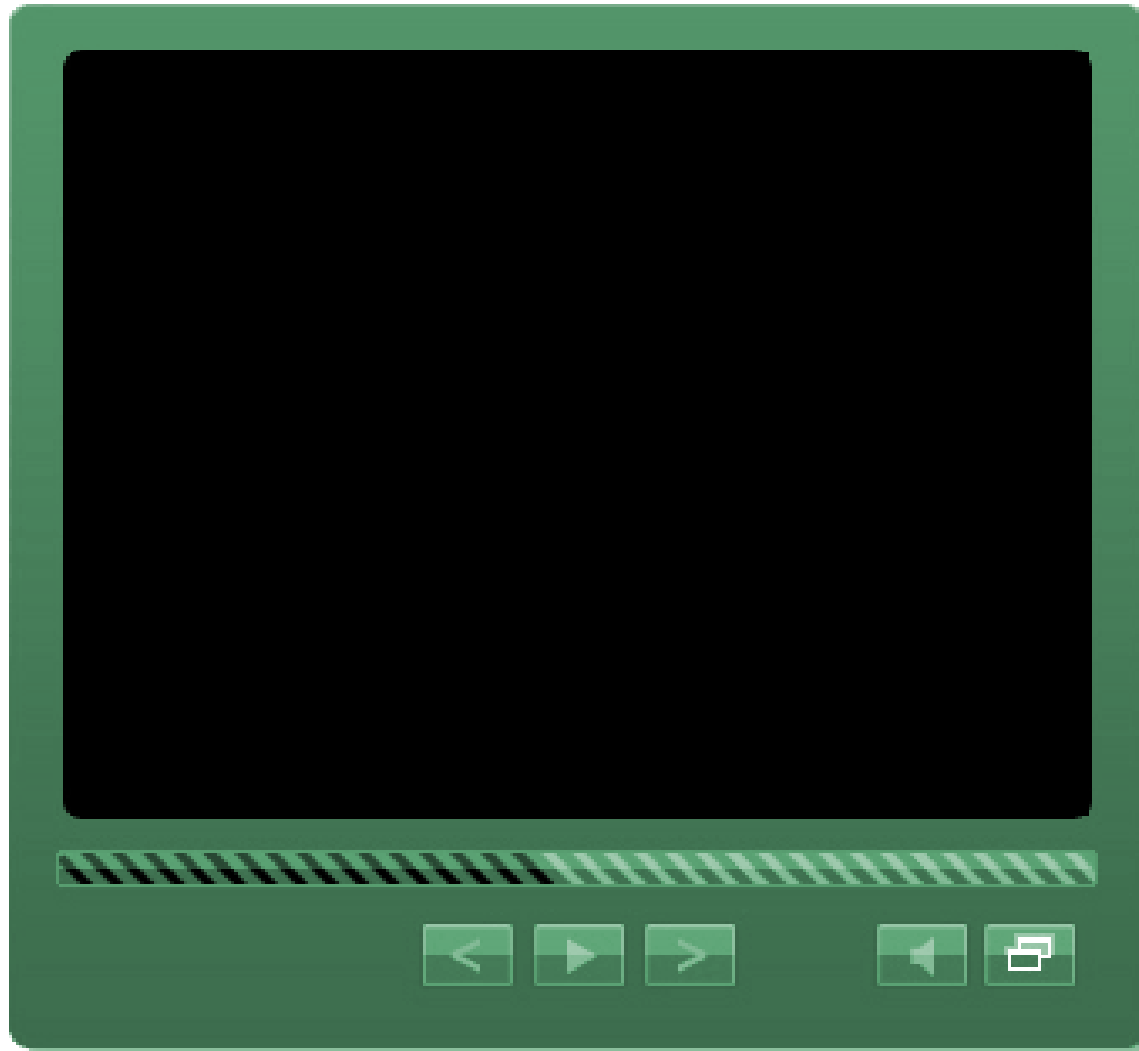


Accurate?

Fair?

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Integrity of Evidence

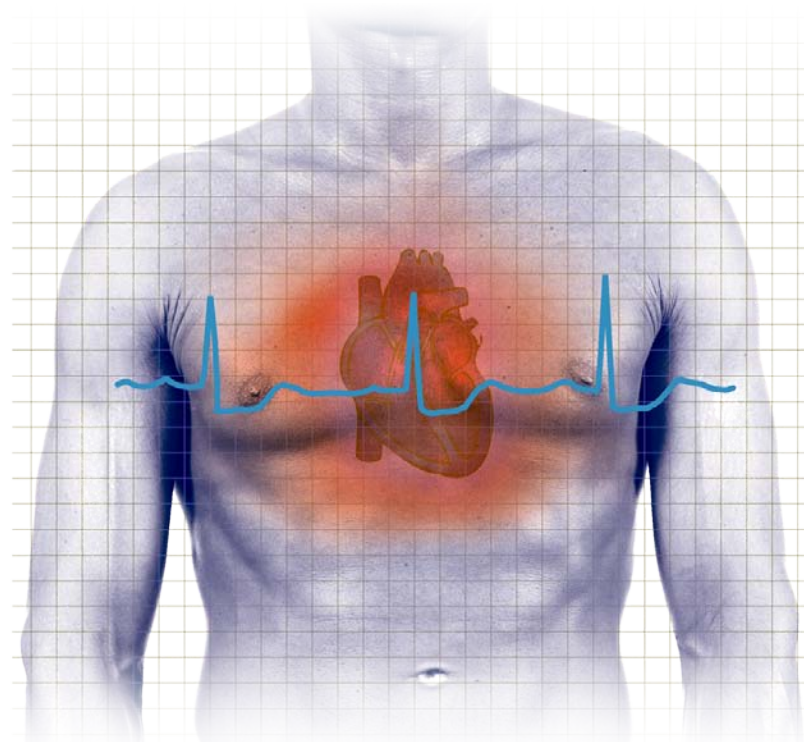


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Integrity of Evidence

Admissibility of computer-generated reconstruction animation

Owens (Litigation Guardian of)
v. Grandell [1994] O.J. No. 496,
46 A.C.W.S. (3d) 796 (Gen. Div.)



Admissibility

Computer-generated reconstruction animation

- Testimony from A.R. expert: data points measured at accident were accurate
- Testimony from data entry person: data entered correctly
- Algorithms used in form and motion software:
 - » Validly apply law of physics
 - » Validly render accurate images of scenes depicted

Admissibility

Computer-generated reconstruction animation

- Testimony from A.R. expert: additional modifications to exhibit after first renderings are valid
- Testimony from experts that they are familiar with demonstrative exhibit
- Exhibit will aid the trier of fact in understanding testimony

Admissibility

Lancaster (Litigation Guardian of) v. Santos,
[2011] O.J. No. 3706

- Engineer's calculations not provided to court
- Data not proven reliable or accurate



INADMISSIBLE

Admissibility

Greer (Litigation Guardian of) v. Kurtz

- Both reconstruction engineer / forensic animator testified to accuracy of animations

Justice B.H. Matheson: *“all the safeguards had been met.”*

Guidelines

Uses and Abuses of Demonstrative Evidence

(Geoffrey D.E. Adair)

- Place reasonable limit on number of demonstrative aids employed
- Avoid undue use of aids
- Use professional looking aids
- Employ sign-message demonstrative aids
- Use in the natural flow of the case
- Make copies of visual material available
- Use only where truly effective

Conclusion

Demonstrative Evidence

- Persuasive
- Simplifies complex subjects
- Memorable
- Reduces boredom / renews interest
- Enhances ability to come to conclusion

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Appendix

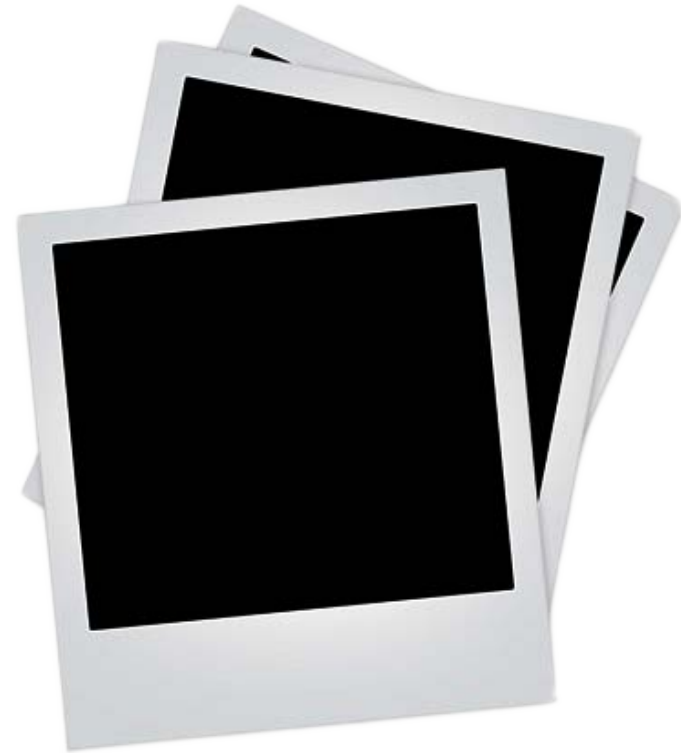
Forms of Demonstrative Evidence

Photographs

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

Photographs may be admitted if:

1. they are relevant;
2. they assist the jury's understanding of the treatment and condition of the plaintiff;

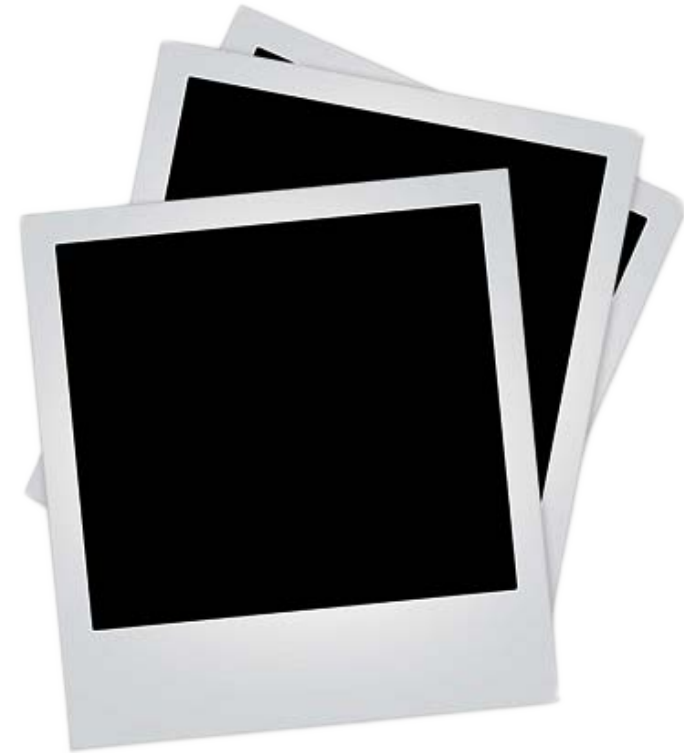


Photographs

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

Photographs may be admitted if:

3. the photographs are accurate; and
4. the prejudicial effect of the photographs is not so great that it would exceed the probative value



Video Tapes

Teno v. Arnold (1974), 7 O.R. (2d) 276:
“day in the life” video

The test to be applied in considering the admission of videotape and photographs is the same:

Rodger v. Strop (1992), 14 C.P.C. (3d) 289.



Video Tapes

R. v. Nikolovski (1994), 19 O.R. (3d) 676 (Ont. C.A.)
approved following test for admissibility of video tapes:

1. the accuracy of the tapes in truly representing the facts
2. their fairness and absence of intention to mislead; and
3. their verification on oath by a person capable of doing so



Treatment Chronologies

Calic v. Aitchison et al, [1996] O.J. No. 154 (Gen. Div.).

Justice Hockin stated, “Mr. Calic’s medical history since the accident is lengthy and complicated. Counsel for Mr. Calic usefully summarized the history by tracing Mr. Calic’s five year journey from one specialist to another in documentary form (Exhibit 5).”



Computer Generated Animations

Owens v. Grandell, [1994] O.J. No. 496 (see above)

McCutcheon v. Chrysler Canada Ltd., [1998] O.J. No. 5818
stated criteria for admissibility:

1. the computer animation is relevant to the issues in the proceeding;
2. the hardware and software methods employed by the animator are verified by the animator;

Computer Generated Animations

3. the computer animation does not contain editorial comments other than the usual headings;
4. the computer animation accurately represents the plaintiff's condition;
5. the computer animation is necessary considering that it would be difficult for a witness to describe the effects of the injury and the jury's understanding of the issues would be greatly assisted by the animation;

Computer Generated Animations

6. the prejudicial value does not outweigh the probative value considering that the animation is presented in a way very simple straightforward manner, without sound or editorializing and with few headings; and
7. the presentation was not misleading or unfair to the defendant.

Computer Generated Animations

Cejvan v. Blue Mountain Resorts Limited, [2008]

O.J. No. 5443:

Three-dimensional computer model of the ski run used by the plaintiff.

The animation was accepted only for the limited purpose of showing the general topography of the area.

L.C. Templeton J. was critical of the animation because it lacked accuracy, relied upon too many unknown factors and was prejudicial.

Anatomical Illustrations or Models

Majencic v. Natale, [1968] 1 O.R. 189 (H.C.J.)

Jenkyns v. Kassam, [2006] O.J. No. 5494



Power Point Presentations

R. v. Sandham (2009), Carswell Ont 6592 (S.C.J.):
admissible

R. v. Paul (2004), Carswell Ont 1256: inadmissible

