

## POSED PHOTOGRAPHS: ADMISSIBILITY

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Considering the prevailing widespread use of photographs in the courtroom, it is not surprising that the courts have frequently been faced with the question whether a party may introduce photographs which, as the proffering party contends, reproduce the scene existing at the time in question, *i.e.*, *posed photographs*. The number of decisions on the admissibility of such photographs and the difference in the results the courts have reached indicate that this is a matter worthy of consideration.

In this discussion of posed photographs it will be necessary to separate certain types and purposes of such pictures. At the outset, it is necessary to distinguish pictures of reproduced scenes offered as independent evidence which is intended to stand alone and have its own probative value.<sup>1</sup> Such photographs stand in their own right as separate evidence, and do not involve the same considerations as our question here. This comment is concerned solely with the use of "posed photographs" to illustrate other evidence in the case, not as independent evidence.

Having given this limitation to "posed photographs," it may be well to summarily dispose of two types of cases pertaining to such photographs where the courts are in general agreement. Where a photograph of a hypothetical situation is not verified by any witness as being a true representation of the scene as the witness saw it, but is a mere possibility of what the scene might have been, the photograph is clearly inadmissible.<sup>2</sup> But where a photograph is illustrative of a witness' testimony, and the opposing party does not deny its accuracy as to any relevant matter or object, it is equally settled that the photographs are admissible.<sup>3</sup>

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<sup>1</sup> See, for example, *Riggs v. Metropolitan Street Ry. Co.* 216 Mo. 304, 115 S.W. 969 (1908); *Lewis v. Chicago Great Western R. Co.*, 155 Minn. 381, 193 N.W. 695 (1923).

<sup>2</sup> "A map, picture, or diagram is, for evidential purposes simply *nothing*, except so far as it has a human being's credit to support it." 3 WIGMORE, EVIDENCE § 790, at p. 174 (3rd ed. 1940). *Sellers v. State*, 91 Ark. 175, 120 S.W. 840 (1909), *aff'd* 93 Ark. 313, 124 S.W. 770 (1910); *Colonial Refining v. Lathrop*, 64 Okla. 47, 166 Pac. 747 (1917); *Barnes v. Scott*, 243 S.W.2d. 133 (Tenn. Ct. of App. 1950).

<sup>3</sup> *Wilson v. State*, 53 S.2d 559 (Ala. 1951); *Commonwealth v. Carelli*, 181 Pa. 602, 127 Atl. 305 (1925); *People v. Jackson*, 111 N.Y. 362, 19 N.E. 54

The conflict in authority occurs where a posed photograph is merely used by a witness to illustrate his testimony as to the position of objects or persons at a relevant place, such position being one of the contested issues at the trial or at least having bearing on a contested point. This question has often arisen, and various reasons have been given for both admitting and excluding photographs of this nature.

#### Rationale

Probably the strongest reason for the refusal to admit such photographs is the fear that they will tend to speak for themselves and weigh too heavily with the jury, instead of being taken as merely illustrating one witness' testimony of what happened.<sup>4</sup> But, as Wigmore himself points out, there is this same danger attached to all non-oral testimony.<sup>5</sup>

A second important reason against admitting such photographs is the strong danger of fraud or suggestion involved. There is a well-recognized danger that any photograph may be taken with such use of angles, lighting, etc., as to be deceptive and not a fair representation of the objects portrayed.<sup>6</sup> With posed photographs, there is the added danger that the party making up such pictures can persuade the witness who will testify to them to remember the scene in the manner most favorable to his theory. The opponents of this argument would answer that there is this danger present in any evidence, and that the danger is only slightly enhanced in these photographs.

A third reason, given at least by the Kentucky Court, is that these photographic re-creations are "self-serving."<sup>7</sup> Of course, the mere fact that evidence is self-serving alone has never been deemed sufficient reason for excluding it. And the argument, at least as advanced by the Kentucky cases, seems to make the fallacious assumption that such photographs are intended to corroborate witnesses, not merely to illustrate their testimony.

That posed photographs will raise certain collateral issues and will take up the trial judge's time in examination is beyond ques-

(1888). This is provided, of course, that the photographs meet the other general requirements for admissibility of photographs.

<sup>4</sup> Wigmore, *op. cit. supra* note 2, § 798a. *People v. Dabb*, 197 P.2d 1 (Calif. Snp. Ct. 1948). *Fore v. State*, 75 Miss. 727, 23 So. 710 (1898).

<sup>5</sup> Wigmore, *op. cit. supra* note 2, § 790.

<sup>6</sup> Gardner, *The Camera Goes to Court*, 24 N. C. L. REV. 233, 235 (1946).

<sup>7</sup> *Welch v. Louisville & N. R. Co.*, 163 Ky. 100, 173 S.W. 338 (1915); *Nunnelley's Adm'r v. Muth*, 195 Ky. 352, 242 S.W. 622 (1922).

tion. But this argument against admission is no truer of posed photographs than of any other type, and has not prevailed against the acceptance of photographs in general.

A final objection is that photographs do register strongly in the minds of jurors. Permitting one party to bring in photographs to indicate his version of the scene in question may, as a practical matter, require the other party to make up similar pictures or stand in an inferior position in its presentation of the case. This would tend, of course, to increase the cost of litigation. While this alone has never been a reason for excluding evidence, at least one court has considered the point in discussing posed photographs.<sup>8</sup>

Courts admitting posed photographs often start with the long established rule that a witness may use maps, plats, or diagrams to illustrate his testimony.<sup>9</sup>

“It would be folly to deny ourselves on the witness stand those effective media of communication commonly employed at other times as a superior substitute for words.”<sup>10</sup>

A large number of courts admitting posed photographs do so by analogizing the use of such photographs to the use of plats, etc., under this rule. That photographs are as effective as these other documents, and a “superior substitute for words,” is beyond question.<sup>11</sup> Moreover, the analogy seems logically correct. If a witness may indicate the positions of various parties on a map, why may he not use a photograph showing these parties in the same position to illustrate his testimony? Or, if a witness is allowed to mark a map so as to indicate his version of the position of cars involved in an accident, why may he not use a photograph of the cars posed in that position? Courts are increasingly recognizing the importance and usefulness of photographs. They present to the court an understanding which prolonged oral testimony often will not give. There is no reason why posed photographs are not equally valuable in illustrating the testimony of a witness, by presenting that testimony in such a way that it may actually be visualized by the jury.

<sup>8</sup> Nunnelley's Adm'r v. Muth, *supra* at note 7.

<sup>9</sup> *Wigmore, op. cit. supra* note 2, § 790.

<sup>10</sup> *Ibid.*

<sup>11</sup> Gardner, *op. cit. supra* note 6, makes this point quite well in the introduction to his subject.

In final analysis, the increased danger of fraud peculiar to posed photographs must be weighed against their communicative value. Only the additional danger of fraud or suggestion separate this question from that of the admissibility of ordinary photographs. Though this additional danger is certainly a factor, and will give rise to additional problems for the trial judge which will be discussed later, it seems insufficient reason for completely barring this helpful aid to the presentation of evidence.

#### Majority View Favors Admissibility

There can be no doubt that the majority of states having decisions on the admissibility of posed photographs prefer the view that such photographs are admissible to illustrate testimony.<sup>12</sup>

<sup>12</sup> *Alabama*: Wilson v. State, —Ala.—, 53 S.2d 559 (1951).

*Arkansas*: Sellers v. State, 91 Ark. 175, 120 S.W. 840 (1909) *aff'd* 93 Ark. 313, 124 S.W. 770 (1910). *Washington v. Stato*, 181 Ark. 1011, 28 S.W.2d. 443 (1930).

*California*: People v. Sliscovich, 193 Cal. 544, 226 Pac. 611 (1924). People v. Dabb, 32 Cal.2d 491, 197 P.2d 1 (1948).

*Florida*: Baston v. Shelton, —Fla.—, 13 S.2d. 453 (1943).

*Georgia*: Shaw v. State, 83 Ga. 92, 9 S.E. 768 (1889); Rose v. State, 184 Ga. 451, 191 S.E. 426 (1937).

*Michigan*: Harrison v. Green, 157 Mich. 690, 122 N.W. 205 (1909); Pearce v. Rodell, 283 Mich. 19, 276 N.W. 883 (1937).

*Montana*: Fulton v. Chouteau County Farmers' Co., 98 Mont. 48, 37 P.2d 1025 (1934).

*New York*: People v. Jackson, 111 N.Y. 362, 19 N.E. 54 (1888); People v. Veld, 154 App.Div. 752, 139 N.Y.Supp. 788 (2d. Dep't. 1913).

*Nevada*: State v. Williams, 50 Nev. 271, 257 Pac. 619 (1927).

*North Carolina*: State v. Matthews, 191 N.C. 378, 131 S.E. 743 (1926).

*South Carolina*: State v. Kelley, 46 S.C. 55, 24 S.E. 60 (1896).

*Tennessee*: Hughes v. State, 126 Teun. 40, 148 S.W. 543 (1912).

*Virginia*: Moore v. Commonwealth, 186 Va. 453, 42 S.E.2d. 871 (1947).

And admissible at the discretion of the trial judge:

*Colorado*: Reed v. Davidson Dairy Co., 97 Colo. 462, 50 P.2d. 532 (1935).

*Indiana*: City of Huntington v. Lusch, 33 Ind. App. 476, 70 N.E. 402 (1904); Central Indiana Ry. Co. v. Mitchell, 102 Ind.App. 121, 199 N.E. 439 (1936).

*Iowa*: State v. Ebelsheiser, 43 N.W.2d. 706, 242 Iowa 49 (1951).

*Maryland*: Kirsch v. Ford, 170 Md. 90, 183 Atl. 240 (1936).

*Minnesota*: O'Neil v. Potts, 130 Minn. 353, 153 N.W. 856 (1915); Lentz v. Minneapolis & St. Paul Suburban R. Co., 135 Minn. 310, 160 N.W. 794 (1917).

*Texas*: Richardson v. Missouri-Kans.-Texas R. Co., 205 S.W.2d. 819 (Tex. Civ. App. 1947).

*Vermont*: Hutchinson v. Knowles, 108 Vt. 195, 184 Atl. 705 (1936). Huckabee v. Montgomery, 113 Vt. 75, 29 A.2d. 810 (1943).

*Washington*: Fabbio v. Diesel Oil Sales Co., 1 Wash. 2d. 234, 95 P.2d. 788 (1939).

*Federal*: Chicago G. W. R. Co. v. Robinson, 101 F.2d. 994 (8th Cir. 1939).

There is, however, a substantial minority group to the contrary,<sup>13</sup> though even some of these courts say that admission may be error but not reversible error.<sup>14</sup> Further, a number of the cases generally cited for the proposition that such photographs are inadmissible for any purpose must be examined before the true strength of the minority line of authority may be evaluated.

One of the cases most frequently cited for the proposition that posed photographs are inadmissible is *Welch v. Louisville N. R. Co.*<sup>15</sup> In that case the plaintiff was struck by flying parts from a wreck of defendant's train and handcar. Since the court felt that it was too late for defendant's employees to avoid the wreck after plaintiff's danger was discovered, the only question was whether defendant was under a duty to be on the lookout for the safety of plaintiff. The answer to this question depended on whether plaintiff was on a public road adjacent to defendant's railway. The plaintiff offered in evidence a posed photograph of herself standing in the middle of the roadway. But on direct examination plaintiff persisted in answering her own counsel's question as to her position by stating that she was *just off* the roadway. No other witness testified as to plaintiff's position. The picture was excluded, and the Kentucky Court of Appeals sustained this exclusion, affirming a judgment for defendant. Though the Court only intimated this reason, it is clear that the photograph did not illustrate the testimony of any witness, but was, in fact, contrary to the introducing

<sup>13</sup> *Illinois*: *Ellis v. Flannagan*, 253 Ill. 397, 97 N.E. 696 (1912); *People v. Crowe*, 390 Ill. 294, 61 N.E.2d. 348 (1945).

*Kentucky*: *Welch v. Louisville & N. R. Co.*, 163 Ky. 100, 173 S.W. 338 (1915); *Nunnolley's Adm'r v. Muth*, 195 Ky. 352, 242 S.W. 622 (1922). But see also *Square Deal Cartage Co. v. Smith's Adm'r*, 307 Ky. 135, 210 S.W.2d. 340 (1948); and *Hillman v. Hall*, 311 Ky. 790, 225 S.W.2d. 667 (1949).

*Maine*: *Babb v. Oxford Paper Co.*, 99 Me. 298, 59 Atl. 290 (1904). *Rodick v. Maine Central R. Co.*, 109 Me. 530, 85 Atl. 41 (1912).

*Mississippi*: *Fore v. State*, 75 Miss. 727, 23 So. 710 (1898).

*Missouri*: *Lynch v. Missouri-Kans-Texas R. Co.*, 333 Mo. 89, 61 S.W.2d. 918 (1933).

*New Jersey*: *Kingsley v. Delaware, L. & W. R. Co.*, 81 N.J.L. 536, 80 Atl. 327 (1911).

*North Dakota*: *Wyldes v. Patterson*, 31 N.D. 282, 153 N.W. 630 (1915).

*Oklahoma*: *Massey v. Ivester*, 168 Okla. 464, 33 P.2d. 765 (1934); *Defiance Oils, Inc. v. Hardzog*, 178 Okla. 6, 61 P.2d. 572 (1936).

*Pennsylvania*: *Buck v. City of McKeesport*, 223 Pa. 211, 72 Atl. 514 (1909).

<sup>14</sup> *Ellis v. Flannagan*, 253 Ill. 397, 97 N.E. 696 (1912); *Hillman v. Hall*, 311 Ky. 790, 225 S.W.2d. 667 (1949); *Rodick v. Maine Central R. Co.*, 109 Me. 530, 85 Atl. 41 (1912); *Patrick v. Siliskis*, 105 Okla. 51, 222 Pac. 543 (1924).

<sup>15</sup> 163 Ky. 100, 173 S.W. 338 (1915).

party's own testimony. Under these circumstances, the photograph was not relevant, since it did not aid the presentation of the actual evidence bearing upon plaintiff's position, and it could not, therefore, have been admitted. It is true that the Kentucky Court itself has later taken the *Welch* case to stand for the general proposition that posed photographs are inadmissible.<sup>16</sup> But clearly the case on its facts does not stand for the general proposition that posed photographs are never admissible to illustrate a witness' testimony.

*Riggs v. Metropolitan Street Ry. Co.*<sup>17</sup> is another leading case frequently cited in favor of excluding posed photographs. An examination of the case shows that in the photographs plaintiff was shown in a sitting position. The only witness testifying that this was the actual position of plaintiff was plaintiff himself, who, as the court points out, was admittedly unconscious at the time, and could not have known the condition of the scene. Too, the photographs were not offered as mere illustrations, but were intended as evidence tending to show that the driver of defendant's trolley should have seen plaintiff upon the track in time to avoid injuring him. Thus, the photographs were part of an experiment in which, as pointed out above, the conditions were not shown to be similar to those actually existing at the relevant time. While it is true that the Missouri Court has cited the *Riggs* case in one later decision wherein a posed photograph was held inadmissible without discussion,<sup>18</sup> both the opinion in the *Riggs* case and in the later case seem to ignore an earlier Missouri decision admitting posed photographs.<sup>19</sup>

The Oklahoma Court has long been firmly aligned with states refusing to admit photographs of re-created scenes to illustrate witnesses' testimony. That the court has often applied this rule to exactly such situations is beyond question.<sup>20</sup> But the first case in the jurisdiction in which this rule was laid down<sup>21</sup> involved photographs of hypothetical situations which the defendant claimed were possible, and did not attempt to represent the actual situation as described by the testimony of any witness to the scene. Moreover,

<sup>16</sup> *Nunnelley's Adm'r v. Muth*, 195 Ky. 352, 242 S.W. 622 (1922); *Square Deal Cartage Co. v. Smith's Adm'r*, 307 Ky 135, 210 S.W.2d. 340 (1948).

<sup>17</sup> 216 Mo. 304, 115 S.W. 969 (1908).

<sup>18</sup> *Lynch v. Missouri-Kansas-Texas R. Co.*, 333 Mo. 89, 61 S.W.2d. 918 (1933).

<sup>19</sup> *State v. O'Reilly*, 126 Mo. 597, 29 S.W. 577 (1895).

<sup>20</sup> *Massey v. Ivester*, 168 Okla. 464, 33 P.2d. 765 (1934); *Defiance Oils, Inc. v. Hardzog*, 178 Okla. 6, 61 P.2d. 572 (1936).

<sup>21</sup> *Colonial Refining Co. v. Lathrop*, 64 Okla. 47, 166 Pac. 747 (1917).

recent cases indicate that the Oklahoma Court is at times ill at ease under the rule.<sup>22</sup>

It is not suggested, nor could it properly be, that the scant discussion above of a few particular cases shows generally that the whole line of decisions holding posed photographs inadmissible is based upon false precedents. Such is not the case. However, the fact remains that some of the leading cases cited as authority for the inadmissibility of posed photographs do not actually stand for the proposition that such pictures are to be excluded where they are offered as mere illustration of a witness' testimony.

#### Preferable Approach

Supported, then, by both the sounder reasoning and the weight of authority, our conclusion must be that the better rule admits posed photographs. These photographs must always, of course, meet the rules pertaining to admissibility of photographs in general.<sup>23</sup> Most courts say the determination of whether a photograph meets these standards is largely a question for the trial judge.<sup>24</sup>

“Whether it is sufficiently verified, whether it appears to be fairly representative of the object portrayed, and whether it may be useful to the jury, are preliminary questions addressed to the trial judge.”<sup>25</sup>

As has been previously suggested, the trial judge should consider additional issues when determining the admissibility of posed photographs. Beyond the ordinary questions he must determine whether the photograph is merely being used to illustrate testimony, whether the photograph is a fair illustration of what the witness actually testifies to, and whether the usefulness to the jury of the particular photograph is sufficient to offset any possibility of fraud in its inception. To decide the first two of these questions, the trial judge will need only a brief preliminary examination. The third question is not so easy of ascertainment, but will depend on the complexity or simplicity of the fact situation involved, the extent to which that situation and the claims of each party have already been made clear to the jury, and the trial judge's own determination of the danger of fraud involved.

<sup>22</sup> *Montgomery Ward & Co. v. Curtis*, 199 Okla. 525, 188 P.2d. 199 (1947); *Langley v. State*, 90 Okla. Cr. Rep. 310, 213 P.2d. 886 (Cr. Ct. of App. 1950); *Patrick v. Siliskis* 105 Okla. 51, 222 Pac. 543 (1924).

<sup>23</sup> *Wigmore, op. cit. supra* note 2, § 792.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Babb v. Oxford Paper Co.*, 99 Me. 298, 302, 59 Atl. 290, 292 (1904).

Having weighed these various considerations and reached a conclusion, the trial judge should be careful to properly instruct the jury on the matter. Before the posed photographs are admitted, and again in the final instruction, the point should be made clear that such photographs are not evidence and have no probative weight, but are mere pictorial representations of the testimony of one witness, credible only to the extent that the particular witness is considered credible by the jury. Counsel for the introducing party can be of service here by making clear to the court that photographs are intended to be merely illustrative of testimony.<sup>20</sup>

So handled by counsel and the courts, posed photographs will be a valuable aid in presenting testimony, and may help to present to the jury a more comprehensible view of the theories and contentions advanced by the parties to an action.

<sup>20</sup> An excellent illustration of this is found in *Pearce v. Rodell*, 283 Mich. 19, 276 N.W. 883 (1937).