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The Use of Gruesome Photographs in Criminal and Civil Cases in Montana

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THE USE OF GRUESOME PHOTOGRAPHS IN CRIMINAL AND CIVIL CASES IN MONTANA

PHOTOGRAPHS—THE DOCTRINES OF ILLUSTRATIVE AND DEMONSTRATIVE EVIDENCE

Historically, there have been two rules governing the admissibility of gruesome photographs. One rule held that photographs were merely "illustrative evidence" and were part of the witness's oral testimony. Accordingly, appellate courts ruled that a trial court judge had discretion of admitting photographs into evidence. To determine admissibility, the court balanced the probative value against the prejudicial effect.

The other more liberal rule adopted by the courts recognized photographs as "demonstrative evidence," independent of oral testimony, and evidence in themselves of what they depict. Under this assumption, if photographs were competent, relevant, and material, they were admissible and were not excluded merely because they were prejudicial. Apparently, the first branch of the rule gained greater acceptance, limiting the application of the second branch.[1]

The first of the rules considered oral evidence to be primary evidence[2] and illustrative photographs were held to be secondary evidence.[3] Therefore, photographs were repetitious of the oral testimony. As a result of accepting oral testimony to be the best evidence, photographs, though more accurate evidence, were cumulative. This branch of the rule presents a curious conflict because photographs are in fact better, more accurate evidence than oral testimony of the object depicted. They are "an eye witness who cannot forget and whose memory cannot be distorted."[4] Consequently, on the basis of the doctrine, gruesome photographs would give way to the less exact oral testimony because they would be unnecessarily cumulative and, thus, prejudicial.

On the other hand, if photographs were considered to be demonstrative evidence, not only were they independent of oral testimony, but they were primary rather than secondary evidence.[5] Montana's rules of evidence

[1]Dillard S. Gardner, *The Camera Goes to Court*, 24 N.L. L. REV. 233 (1936) [hereinafter cited as GARDNER, *Camera*].

[2]REVISED CODES OF MONTANA 1947 [hereinafter cited as R.C.M. 1947] § 93-301-7 states: "primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest degree certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents."

[3]R.C.M. 1947 § 93-301-8 states: "Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secdary evidence of the instrument and its contents.

[4]Gardner, *Camera* 235.

[5]R.C.M. 1947 § 93-301-5 states: There are fourt kinds of evidence: 1. The knowledge of the Court; 2. testimony of witnesses; 3. Writings; 4. Other material objects presented to the senses. Photographs, when considered to be demonstrative evidence, would fall under subsection 4. R.C.M. 1947 § 93-301-6 states: There are several degrees of evidence: 1. Primary and secondary. *See*, R.C.M. 1947 § 93-301-7, note 2, *supra.*

have preferred no one type of evidence over another within the same degree;[6] therefore, no repetition conflict has occurred when both oral testimony and photographs were admitted to describe the same object. Considered to be demonstrative evidence, photogrgaphs were primary or substantive evidence of what they depicted and were admissible if competent. As a form of real evidence, they were not otherwise inadmissible as being shocking to the sensibilities of the jurors.

Montana has adopted the first branch of the doctrine and has treated photographs as merely illustrative evidence. More recently, however, cases have begun to acknowledged photographs to be demonstrative evidence. Interpreting these cases pose three problems: 1. What is the rule presently in Montana? 2. Is the case law moving toward the more liberal doctrine and accepting photographs as substantive evidence? and 3. Is treating photographs as demonstrative evidence the preferable rule?

II. ADMISSIBILITY OF PHOTOGRAPHS GENERALLY

The first important question is whether photographs are appraised to be demonstrative or illustrative evidence. Wigmore has defined photographs as a "witness's expression of the data observed by him and therein communicated to the tribunal more accurately than words."[7] In Montana, the rule governing the admissibility of photographs has been that they stand upon the same footing as maps, plans, or diagrams;[8] "whenever relevant to describe a person, place, or thing, they are admissible for the purpose of explaining and applying the evidence and assisting the court and jury in understanding the case."[9] This statement clearly has placed Montana as adopting the illustrative evidence branch of the doctrine.

Nevertheless, the rule controlling admissibility in Montana has been growing more liberal. The rule as originally established in *Stokes v. Long*[10] required that 1. the person who took the picture to be shown to have possessed the skill and knowledge to take such pictures accurately and 2. that the picture in question be a fair representation of the situation or condition which was the subject of inquiry. The Court further said a "photograph is competent evidence to prove a condition which can be shown by a presentation of that sort."[11] In the *Stokes* case, it was shown that practicing physicians who took the x-ray photographs understood

[6] *Id.*

[7] JOHN H. WIGMORE, 3 WIGMORE ON EVIDENCE § 792, at 178 (3d ed. 1940) [hereinafter cited WIGMORE ON EVIDENCE].

[8] Stokes v. Long, 52 Mont. 470, 483, 159 P. 28, 33 (1916).

[9] Fulton v. Chouteau County Farmer's Co., 98 Mont. 48, 61, 37 P.2d 1025, 1029 (1934).

[10] 52 Mont. at 485, 159 P. at 33. The plaintiff was suing the defendant, a doctor, for malpractice in the treatment of a broken leg. The complaint alleged that the leg was temporarily set so that it was shorter than before and also the plaintiff was caused pain and suffering.

[11] *Id.*; State v. Jones, 48 Mont. 505, 139 P. 441 (1919). *See,* WIGMORE ON EVIDENCE § 790, at 893 (3d ed. 1940).

and were accustomed to using x-ray equipment; therefore it was not error to allow the x-ray plates in evidence.[12]

In the most recent Montana case, *Pickett v. Kyger*,[3] the court ruled that the only positive requirement to establish the foundation for admitting the picture is that it correctly represent the scene it purports to depict as viewed by the witness and that any changes in the picture be pointed out.[14] Certainly, this rule has been properly updated to require only a foundation showing the photograph's competency.

However, the Montana Supreme Court has adopted the following position concerning the accuracy of photographs.

> [I]t is not even necessary that the situation or condition should be precisely the same, but it is sufficient that if the situation is substantially unchanged, and even if the fact that there have been changes in conditions, will not necessarily exclude a photograph where the changes can be and are explained, so that the photograph, as explained, will give a correct understanding of the condition existing at the time to which the controversy relates.[15]

In *Teesdale v. Anchutz Drilling Co.*, the Court allowed photographs of a water tank from which the plaintiff fell to be admitted in evidence. The photographs were taken one year after the accident, after the water tank had been moved to a different location and the alleged cause of injury corrected.[17] Because the water tank was difficult to visualize, the pictures enabled the court and jury to understand the conditions existing at the time of the accident. Following a precedent set in *McNair v. Berger*,[18] the Court ruled that the photographs were admissible because the change in conditions could be explained. The decision in *Teesdale*

[12]52 Mont. at 486, 159 P. at 33 (1916).

[13]25 St. Rptr. 218, 439 P.2d 57 (1968). *Accord*, Toole v. Paumie Parisan Dye House, 98 Mont. 91, 39 P.2d 965 (1944); McNair v. Berger, 92 Mont. 441, 15 P.2d 834 (1932).

[14]The requirement that the photograph is a fair representation of what it purports to depict is, in fact, a requirement for establishing competency. One author has noted that because the courts' have followed the general rule that photographs are merely illustrative, the competency requirement has been overlooked or neglected. The fact that Montana makes this a requirement indicates that its rule contains parts of both doctrines, and that the court has not followed one doctrine or the other completely. *See,* Gardner, *Camera* 235.

[15]McNair v. Berger, note 3, *supra;* 92 Mont. at 459, 15 P.2d 828. As quoted in Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 439, 357 P.2d 4, 10 (1960). *Accord*, Hackley v. Waldorf Hoerner Paper Products, 149 Mont. 286, 425 P.2d 712 (1967); Gobel v. Rinio, 122 Mont. 235, 200 P.2d 700 (1948).

[16]138 Mont. 427, 357 P.2d 4 (1960).

[17]The plaintiff was hauling water to the drilling site of the defendant. The defendant maintained and had exclusive control over a water tank and that tank was equipped with a ladder on the side so that one might reach the top of the tank. The tank had no water level gage so that the plaintiff in delivering water was required to climb up the ladder and look through a hole on top to check the water level. The defendant had painted the tank and left loose a metal coupling to a rubber hose. While climbing to the top of the tank the plaintiff took hold of the coupling to swing himself up to the top. The coupling and hose parted and the plaintiff fell to the ground suffering serious injuries.

[18]Note 13, *supra.*

applied the liberal, or the demonstrative, branch of the doctrine. The Court not only allowed testimony pointing out the changes in condition of the tank notwithstanding possible prejudice to the defendent, but also the photographs were admitted as evidence in themselves of what they depicted. The Court stated:

> Therefore, the testimony which was presented as a foundation for admission of the photographs was properly received. Even if such testimony would tend to show antecedent negligence on the part of the defendant this court is committed to the rule that evidence may be admissible for one purpose but not for another, but if admissible for any purpose, it may not be excluded. Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P. 2nd 637.[19]

On the basis of the liberal doctrine being recognized in *Teesdale,*[20] it was not unreasonable to conclude that the Court, in civil cases, has begun to follow a more liberal policy toward admitting photographic evidence. The fact that the Court used the language that "if evidence is admissible for any purpose it may not be excluded."[21] indicates that it had appraised photographs to be demonstrative evidence. Had the photographs been illustrative evidence, they would have been admissible only as part of the oral testimony and would not have been evidence in themselves of the condition of the water tank.

It may be inferred from the language in *Teesdale* that photographs which are competent, relevant, and material are admissible, and possible prejudice to the adverse party will not make them in admissible. Applying this rule to gruesome photographs, if the picture were relevant, material, and a proper foundation were laid to show its competency, the fact that it was particularly shocking or inflamatory would not affect its admissibility.

The second important question is the influence of the trial court's discretion on the admissibility of gruesome photographs. The Montana rule is still that the admissibility of gruesome photographs is within the discretion of the trial court.[22]

An interesting study was made concerning the reaction of judges to repulsive or gruesome evidence at the 1967 Indiana Judicial Conference.[23] The report attempted to categorize the responses of the judges to the grusome exhibits shown to them. The reason given for this categorization was:

> . . . [B]ecause in this species of law-making the immediate response of a trial judge is almost always the last word on what the law it.

[19]138 Mont. at 440, 357 P.2d at 11.

[20]*Id.*

[21]*Id.*

[22]Fulton v. Chouteau County Farmer's Co., *supra*; Picket v. Kyger, *supra*. *See also*, 9 PROOF OF FACTS 147-152 (1961).

[23]Thomas L. Shaffer, *Judges, Repulsive Evidence and Ability to Respond,* 43 NOTRE DAME LAWYER 503 (1968). The Conference was in the Continuing Education Center of the University of Notre Dame, October 18-21, 1968 [hereinafter cited as Shaffer, *Repulsive Evidence*]. *See, id.* 503 n. 2.

> Rulings on demonstrative evidence is more closely related to immediate response . . . than to intellectual rationalization that characterizes appellate law. This relationship is especially important bceause rulings on demonstrative evidence are probably as immune from appellate interference as any that a trial judge is likely to make.[24]

The first hypothesis of the Report was, "*the terms in which evidence rulings are made—particular evidence rulings on repulsive real and demonstrative evidence—have less to do with prejudice than with accuracy.*[25] It was noted that though the appellate law was couched in terms of balancing the prejudicial effect against the probative value, and though the trial judges also talked in terms of balancing, they looked in fact at the evidence more in terms of its accuracy. If the evidence accurately represented a fact, that is, was competent, the judges regarded it as admissible despite the horror it evoked in them.[26]

Two points should be emphasized from this report: 1. that the judges did not balance the probative value against the prejudicial effect and 2. that the test applied for determining admissibility was one of competency. Therefore, the judges treated the photographs as demonstrative evidence and not as illustrative evidence.

III. ADMISSION OF GRUESOME EVIDENCE IN CRIMINAL CASES

Although the Montana Court has held categorically in *Fulton v. Chouteau County Farmer's Co.*[27] that photographs stand upon the same footing as maps, plans and diagrams, one writer has contended that this statement is "over simplified."[28] It was his argument that photographs stand on the same footing as maps or diagrams in that the preliminary foundation required that they be verified by some witness. Otherwise, photographs differ from maps, diagrams and models in three distinct ways:

> First, it is recognized that while the average juror will accept any photograph as correct, he will not have the same faith in a drawing because he knows that it is entirely the creation of some man's mind and hand. Therefore, because of the average juror's blind faith in photography, a small degree of inaccuracy in a photograph may justify its exclusion from evidence. . . .
>
> Second, the vital mirror-like appearance of a photograph makes it capable of inciting passion and prejudice in the jury, whereas a lifeless map or drawing of the same subject will rarely be excluded because of its prejudicial nature . . . there are hardly any conditions under which a map or drawing could be said to arouse passion or prejudice.

[24]Shaffer, *Repulsive Evidence* 503.
[25]*Id.*, at 504.
[26]*Id.*
[27]Fulton v. Chouteau County Farmer's Co., note 9, *supra.*
[28]Charles C. Scott, *Medicolegal Photography*, 18 ROCKY MT. L. REV. 173, 189, n. 8 (1946).

> Finally, photographs frequently are recognized by the courts as a kind of eyewitness, whereas hand-drawn maps or pictures are never given this attribute . . . after the proper foundation has been laid by showing that a photograph is an accurate representation of the thing in question, it speak swith a certain probative force in itself.[29]

For the above reasons, courts have probably ruled more narrowly on admitting photographic evidence where there was questionable competency, materiality, relevancy, or insufficient probative value.

The leading criminal case in Montana discussing the admissibility of gruesome evidence was *State v. Bischert*.[30] The Bischerts were tried and convicted for manslaughter of their five-month old child. The cause of death was proved by expert testimony to be starvation. During the trial several black-and-white photographs and one colored picture were shown to the jury on a screen in the darkened courtroom. The pictures portrayed "ghastly and gruesome looking sores or scars,"[31] alleged to have been caused by dermatitis burns which in no way went to the proof of starvation. Furthermore, the pathologist was able to testify as to the starvation of the child without use of photographs. The question of providing medical care was not in issue. Therefore, the photographs were neither relevant, nor material, to ths issues before the court.

The Court, in *Bischert*, reaffirmed its doctrine established in *Fulton*[32] that:

> . . . photographs stand on the same footings as diagrams, maps, plans, and the like, and as a general rule, whenever relevant to describe a person, place, or thing, they are admissible for the purpose of explaining and applying the evidence as assisting the court and jury in understanding the case.[33]

The Court, however, qualified this statement by acknowledging that "photographs that are calculated to arouse the sympathies of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions."[34] The Court concluded that because the pathologist was fully able to present his testimony without the use of photographs, "their purpose could only arouse the human feelings of the jury without aiding them in further understanding the crime charged."[35]

The rule the Court seemingly contemplated was that photographs

[29] *Id.* at 189-190.

[30] 131 Mont. 152, 308 P.2d 969; 131 Mont. 608, 308 P.2d 973 (1957).

[31] *Id.* at 159, 308 P.2d at 973.

[32] Note 9, *supra.*

[33] State v. Bischert, 131 Mont. 159, 308 P.2d at 973. Quoted from Fulton v. Chouteau County Farmer's Co., 98 Mont. at 61, 37 P.2d at 1029. Both Fulton and Stokes v. Long, note 8, *supra*, are leading cases in Montana. The rule cited in these cases is found in 22 C.J. *Evidence* §1115 at 913 (1920). *See also*, 20 AM. JUR. *Evidence* §729, at 609 (1939).

[34] 131 Mont. at 159, 308 P.2d at 973. 20 AM. JUR. *Evidence*, note 33, *supra.*

[35] 131 Mont. at 160, 308 P.2d at 973.

which were neither relevant nor material, nor which in any way are substantially necessary for the understanding of the court and jury, should be excluded if they were gruesome and calculated to inflame the jury. Nevertheless, the rule advanced by the Court was clouded by quoting from *20 Am. Jur. Evidence,* Section 729,[36] the last sentence of the paragraph. The paragraph discussed the relevancy and materiality requirements of photographic exhibits and stated that only where they were neither material or relevant and tended to divert the minds of the jury to improper considerations should they be excluded.[37] In comparison, the last sentence from that paragraph discussed gruesomeness which was calculated to arouse the sympathies or prejudices of the jury. As excised, the quotation overemphasized the prejudicial results of the photographs and ignored the questions of materiality and relevancy.

The Court's decision in *Bischert* is open to two conflicting constructions. On the one hand, the Court looked to the photographs as merely illustrative evidence of the part of the pathologist's oral testimony. The Court found that the pathologist was "fully able to explain his findings without the use of photographs.[38] This language clearly indicated an adoption of the illustrative evidence doctrine. Even if the photographs had been useful in the oral testimony, they would have been prejudicial because of the cumulative effects.

On the other hand, the Court also used language showing their intent to treat the photographs as demonstrative evidence. It noted that the photographs were neither relevant or material to the issues before them. The charge was the failure to provide food.

> "It should be pointed out that there was no charge of failure to provide medical care. . . . They [the photographs] show ghastly and gruesome looking sores or scars alleged to have been caused by dermatitis burns which in no way go to the proof of starvation. When the purpose is to inflame the minds of the jury or excite feelings rather than to enlighten the jury as to any fact, it should be excluded.[39]

Speaking in this manner, the Court recognized that the photographs themselves had independent substantive value. The language implied that, had they been material and relevant, they would have been admissible.

[36]Note 34, *supra.* The full text reads: "Relevancy of Photographs: Prejudicial Character. It is always essential to the right to introduce a photograph in evidence that it have a relevant and material bearing upon some matter in controversy at the trial, and the party offering such evidence should give proof of its relevancy to the issue before the jury. A photograph which is entirely irrelevant and immaterial to and issue in the cause and which is of such a character as to divert the minds of the jury to improper or irrelevant considerations should be excluded from evidence. The determination of relevancy and materiality is left to the sound discretion of the trial judge. Photographs that are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are not substantially necessary or instructive to show material facts or conditions."

[37]*Id.* CF., 29 AM. JUR. 2d *Evidence* §§ 787-788, at 861-862 (1967).

[38]131 Mont. at 160, 308 P.2d at 973.

[39]*Id.* at 159-160, 308 P.2d at 973.

In *Bischert,* the Court did not recognize photographs as either illustrative or demonstrative evidence, but excised rules applicable to each doctrine and applied them separately to the facts of the situation. Because of this application of mutually inconsistent rules, the *Bischert* case left uncertainty as to which doctrine would control the admission of photographic evidence in criminal cases.

Following *Bischert* was *State v. Campbell.*[40] There, the defendant was charged with first degree murder. A photograph was taken of the deceased victim on the mortuary table and showed the wounds causing death. The Court construed the rule established in *Bischert* to mean that a photograph is properly excluded "when the purpose of an exhibit is to inflame the minds of the jury or to excite their feelings rather than to enlighten the jury as to any fact. . . ."[41]

The Court held that there was no evidence that the photograph complained of was calculated "to inflame the minds of the jury.[42] The purpose for admitting the photograph was to show the position of the wounds.

Two points are embodied in this construction of the rule in *Bischert.* The first point is that the photographs were admitted as real evidence of the facts which they portrayed—an application of the demonstrative evidence doctrine. The second point is that the Court used the demonstrative type language from *Bischert* when discussing the rule. The *Campbell* case indicated that the Court was adopting a doctrine treating photographs as real evidence.

In *State v. Rollins,*[43] the Montana Supreme Court reaffirmed their decision in *Bischert,* but held that it had no application in the instant case. In *Rollins,* the defendant assaulted his former wife and another man and his wife who were with her. It was alleged that the defendant hit the other man in the cheek with a rifle, knocked him to the ground, and then shot him in the neck. Rollins alleged that the rifle accidentally discharged when he struck him. The pictures sought to be admitted showed the neck wound after it had been cleaned and dressed.

Not only did the Court find the photograph to be neither gruesome nor particularly distasteful, but it also held that *Bischert* did not apply because the photographs were both relevant and material to the issue in question. Because the photographs clearly showed powder burns on the neck—burns which were not visible at the time of trial—they were pertinent to the issue of whether, as alleged by Rollins, the gun discharged at the time of striking the other man.

However, the Court expanded the rule to require judges, in passing

[40]146 Mont. 251, 405 P.2d at 978 (1967).
[41]*Id.* at 261, 405 P.2d at 984.
[42]*Id.*
[43]149 Mont. 481, 428 P.2d at 962 (1967).

on admissibility to weigh the probative value against the prejudicial effects.[44] Again, the contradiction recurred as to which doctrine the Court was applying for determining the admissibility of gruesome photographs. The Court appeared to admit the photographs as real evidence of the wound and the powder burns which existed at the time of the assault. Nevertheless, the Court used the balancing language associated with a doctrine of illustrative evidence.[45]

The most recent decision following the precedent established in *Bischert* is *State v. Warrick.* In that case, photogrpahs were taken of the defendant's wife shortly after her admission to the hospital. It was alleged that she had been beaten by her husband. The defendant objected to the admission of the photographs because they were technically defective in coloration and because the court had permitted the testifying doctor to voice the opinion that the injuries were actually worse than depicted in the exhibits. The appellant urged that the doctor's testimony allowed the jury to speculate on the extent of the actual injuries.

The Court in *Warrick* made an important observation which clarified the rule in *Bischert*:

> This court held in State v. Rollins that color photographs that have probative value are admissible. The case of State v. Bischert relied on by the appellant is not in point. In that case the photographs did not support the State's theory that the child starved to death, but tended to support a collateral issue not in the case, i.e. that the parents failed to provide medical attention. The photographs showed 'ghastly and gruesome' looking sores that in no way went to the proof of starvation. [citations omitted.][47]

This is probably the clearest statement made by the Court which indicated its intention that the rule in Montana should be that where photographs are material, relevant, and compenent, they are admissible even though they may be gruesome and tend to inflame the passions or prejudices of the jury. In other words, Montana had adopted the demonstrative evidence doctrine for determining the admissibility of photographic evidence.

In *Warrick,* not only did the language evidence the adoption of the more liberal substantive doctrine, but also the fact that the Court allowed gruesome photographs into evidence which were clearly repetitive of the oral testimony. On the other hand, they would have been prejudicial if the illustrative evidence doctrine had been applied. On the basis of *War-*

[44] *Id.* at 484, 428 P.2d at 464.

[45] The Court referred to weighing of the probative value against the prejudicial effects only in the *Rollins* case. Nor did the Court refer to the test in the subsequent case of *State v. Warrick, infra.* Because the reference to the balancing test was isolated, its importance is diminished. And, to the contrary, the Court in *Rollins,* treated the photographs have demonstrative evidence.

[46] 25 St. Rptr. 701, 446 P.2d at 920 (1968).

[47] *Id.* at 705, 446 P.2d at 920.

rick, along with the other cases construing *Bischert,*[48] it is reasonable to conclude that presently accepted doctrine in Montana is that photographs are demonstrative evidence and are admissible when proved to be competent, relevant, and material; the mere fact that they are gruesome does not render them inadmissible.[49]

It should be noted that Montana case law has been, in terminology but not substance, in accord with the decisions in California which have held that gruesome photographs are inadmissible where: 1. they are neither relevant nor material; 2. the prejudicial effect outweighs the probative effect; and 3. the principal effect of the photograph is to arouse the passions and prejudices of the jury.[50]

Although Montana has apparently recognized the demonstrative evidence doctrine, the statement of the rule still remains obscured by the conflicting language used to state the rule. Presently, the rule as stated tends to sound as though Montana law is consistent with the doctrine of illustrative evidence.

The better statement of the rule was found in the Colorado decisions. Their rule expressed that photographs were not inadmissible in evidence merely because they present vividly to jurors details of a shocking crime or tend to arouse passion or prejudice.[51] The correlative to the rule stated that photographs were inadmissible only when they did not illustrate or make clear some issue of the case and were of such character as to prejudice the jury.[52] The Colorado rule expressed the doctrine clearly that photographs were treated as substantive evidence. They were denied admission only when they were neither material nor relvant. As expressed, this rule eliminated the uncertainty caused by the discretionary judgment of the trial court in applying the balancing test of probative value against prejudicial effect.

Finally, in the area of criminal application, it should be pointed out that there appears to be a distinct difference between the attitudes of civil court judges and criminal court judges toward admitting gruesome photographs.[53] The study of the Conference[54] indicated that even though the issues may have been the same in a criminal trial or in a civil case, constitutional due-process of law and a relatively more intense level of review imposed a stricter standard of admissibility in criminal cases.

[48]*See,* State v. Campbell and State v. Rollins, *supra.*

[49]3 AM. JUR. TRIALS § 30, at 36 (1965).

[50]People v. Kemp, 11 Cal. Rptr. 361, 55 C.2d 458, 359 P.2d 913 (1961); People v. Love, 53 C.2d 843, 3 Cal. Rptr. 665, 350 P.2d 705 (1960); People v. Carter, 48 C.2d 737, 312 P.2d 665 (1957); People v. Scarborough, 171 C.A.2d 186, 340 P.2d 76 (1959).

[51]Martinez v. People, 124 Colo. 170, 235 P.2d 810 (1951).

[52]Potts v. People, 124 Colo. 253, 158 P.2d 739 (1945). Claxton v. People, 434 P.2d 407 (1967). *See,* 29 AM. JUR.2d *Evidence* § 787, at 760-761 (1967).

[53]Indiana Trial Judges' Conference, Shaffer, *Repulsive Evidence,* note 23, *supra.*

[54]Shaffer, *Repulsive Evidence* 504.

However, some of the judges felt that the only difference between civil and criminal cases was in the character of the factual issues involved.[55]

IV. ADMISSION OF GRUESOME PHOTOGRAPHS IN CIVIL CASES

Montana has not yet faced the question of admissibility of gruesome evidence in civil litigation. However, the Montana Supreme Court, in *Fulton* and subsequent cases including *Teesdale*,[56] indicated an intention to follow the more liberal demonstrative evidence doctrine toward the admissibility of photographs. Further support for this position may be found in *Graham v. Helean*[57] where the claimant in a workman's compensation case offered to the Industrial Accident Board colored photographs taken of his injuries. Part of the injuries was facial anesthesia. The court found that the Board properly refused admission of the pictures which only served to portray the extent of the injuries visible in the photograph and the type of treatment applied at the time the pictures were taken. To this extent, the photographs were irrelevant to determine the extent of the disability.[58] The decision in *Graham* was in accord with the demonstrative evidence rule that photographs which are neither relevant nor material are inadmissible. In this case, the court accepted the fact that photographs were substantive evidence but noted that these particular photogrgaphs had no relevant probative value.

Generally, the rule governing civil cases is the same as the one governing criminal cases:

> If photographs which disclose gruesome aspects of an accident or incident are not relevant or material, nor aid the jury's understanding and solely serve to inflame or prejudice the minds of the jurors, they are properly inadmissible.[59]

A recent Colorado decision shows the proper application of the rule in civil cases. In *Jensen v. South Adams County Water and Sanitation District*,[60] the court held that pictures of an injured party in a hospital bed had no probative value and were properly excluded. But, it was held that photographs of the pelvic region of the injured plaintiff which were offered to show the extent of the plaintiff's injuries were improperly excluded. The exclusion had been on the grounds that they might have had emotional overtones or might have been embarrassing to the jurors.

On the other hand, it is without question that lurid photographs, paraphernalia, and other trappings of showmanship should not be used to enhance the verdict.[61] It has been suggested by one writer that where

[55] *Id.* at 512 n. 19.
[56] Notes 7 and 8, *supra.*
[57] 143 Mont. 552, 393 P.2d 46 (1964).
[58] *Id.* at 559, 393 P.2d (1962).
[59] 29 AM. JUR.2d *Evidence* § 787, at 760-761 (1967).
[60] 149 Colo. 102, 368 P.2d 209 (1962).
[61] Jenkins v. Associated Transport Co., 330 F.2d 706 (6th. Cir. 1964).

gruesome evidence is received it should be the duty of both sides to submit precautionary instructions.[62] At the 1967 Indiana Trial Judges' Conference, most of the judges agreed that they should try, "*even on their own motion,* to prepare jurors for the experience [of viewing repulsive evidence] by warning them, or asking if any had a weak stomach."[63] The article went on to say:

> (This was an expression of two facts, I thought:
> (1) Judges are probably more hardened to the revulsion of death in the courtroom than jurors are, or at least judges think that this is true. (2) The threshold of revulsion in the average man is not the test of the 'law' of real and demonstrative evidence; these judges were willing to attempt to prepare jurors for an unpleasant experience; they were not, however, willing to relieve them of the experience.)[64]

The courts which rely on the balancing effect between probative value and prejudicial effect as a test for admitting photographs have stated that photographs may be excluded because they produce undue prejudice or confuse the jury, or for some other policy reason; the harm which results from its reception outweighs its probative value.[65]

The difficulty with the balancing rule is that the determination of gruesomeness and the weighing of value is left solely to the discretion of the trial court judge. The rule is subjective rather than objective, and its application will vary, therefore, from court to court according to the different judge's view of gruesomeness. Since there is no certainty as to which gruesome photograph any one judge will allow into evidence, this balancing rule has the effect of being no rule at all. A practicing attorney will have no means of determining whether his photographs will be deemed admissible.

On the other hand, the doctrine that gruesomeness does not render inadmissible real evidence which otherwise has probative value[66] and is competent lends certainty to a rule of admissibility. This liberal doctrine eliminates the instability which the subjective trial judge's discretion created. From this standpoint, treating photographic evidence as demonstrative or real evidence, rather than illustrative evidence, is the better view.

Two benefits accrue from applying the more liberal doctrine. One benefit is that the rule presents an objective standard for determining admissibility. The other benefit is that the best evidence is admitted rather than the less accurate oral testimony.

[62]MELVIN M. BELLI, MODERN TRIALS, § 312 at 687 (Abr. ed. 1963).
[63]Shaffer, *Repulsive Evidence. See,* Shaffer, *Bullits, Bad Florins and Old Boots,* 39 NOTRE DAME LAWYER 20, 1963).
[64]*Id.* at 504.
[65]Rich v. Cooper, 234 Or. 300, 380 P.2d 613 (1963).
[66]Herwitz v. Massachusetts Bay Transport Authority, 233 N.E. 2d 726 (1968).

The doctrine, in contradistinction to the restrictiveness of the more conservative illustrative doctrine, places before the court and jury the greatest amount of probative evidence. In this way, the demonstrative doctrine of admissibility falls within the spirit of the Rules of Civil Procedure by providing full and fair disclosure of all probative facts.

The rule for admissibility in Montana should, therefore, follow the criminal law rule set forth in *Bischert* and construed in *Warrick*. Based on the Court's decision in *Teesdale*, the rule should be stated that photographs are deemed to be demonstrative or substantive evidence and that if they are admissible for any purpose they may not be excluded.[67]

V. CONCLUSION

In *State v. Bischert*, the Montana Supreme Court did not clearly and decisively establish a rule for determining the admissibility of gruesome evidence. However, subsequent cases have developed the rule, specially in *State v. Warrick*, to the extent that a reasonable conclusion of the rule is that photographs are admissible as demonstrative evidence and are not excluded merely because they are shocking to the sensibilities of the jurors. Photographs, like other real evidence, may be inadmissible where they are neither competent, relevant, or material, or where the principal effect of the photographs is calculated to arouse the passions or prejudices of the jury.

The rule as stated does not preclude the possibility that photographs may be prejudicial where there is abuse. Even though photographs are not cumulative of the oral testimony, they may be cumulative in their own right. If the photographs depict a particularly gruesome scene, too many photographs may have a cumulative effect which will be prejudicial, and some of the photographs which are repetitious should be excluded.

Because Montana has no case law governing admissibility of gruesome evidence in civil cases, it may be concluded that the rule will follow the doctrine established in the criminal cases.

The doctrine and rule should be stated affirmatively. The better expression of the rule is that photographs are admissible as real evidence of what they depict and that they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime.

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[67] 138 Mont. at 440, 357 P.2d at 11.