


New York Jurisprudence, Second Edition
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Evidence and Witnesses

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Jr., Ph.D., J.D.XII. Real or Demonstrative Evidence
A. In General
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§ 397. Laying foundation for admission in evidence

West's Key Number Digest

West's Key Number Digest, Evidence  188

In addition to meeting the requirements as to the rules of relevancy,[64] for real or demonstrative evidence to be admissible, it must be properly identified with respect to the question in issue[65] and it must be shown that it has not sustained any substantial change by reason of lapse of time, or otherwise, since the time in issue.[66] Thus, photostatic and microscopic slides of portions of a human body, made following an autopsy, are inadmissible in evidence in the absence of proof of their possession during the time which elapsed between the autopsy and the microscopic examination; the improper admission of such slides is a ground for setting aside a verdict.[67] A party seeking to introduce as an exhibit a document or record, must satisfy either the requirements of the statute governing the admissibility of business records[68] or, failing that, comply with the general requirement that real or demonstrative evidence be properly authenticated and identified.[69]

Even though a witness cannot positively identify the objects sought to be introduced in evidence as the same as those in issue, the connection between the witness and the objects may be so close as to render the objects competent evidence, since the absence of direct and positive proof goes to the weight, not to the competency, of the evidence.[70]

CUMULATIVE SUPPLEMENT

Cases:

On motion for summary judgment in an action for personal injuries sustained in an attack against customer outside nightclub/restaurant premises, nightclub bookkeeper's affidavit stating that bouncer was in the nightclub on the night of the attack "solely as a patron" did not lay the foundation necessary for the admissibility of the purported employment records and the computer printout submitted to show what employees were on duty on the date of the attack; bookkeeper did not state that she was in charge of employment or employment records or otherwise had firsthand knowledge bouncer's employment status, or that she prepared those documents and knew what they were and that they were prepared in the regular course of business. Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 875

N.Y.S.2d 20 (1st Dep't 2009).

Expert's review of and reliance on evidence reports in reaching opinion on cause of fire in lift station tank of cheese plant owner's septic system did not make those reports admissible as a matter of law, without proper foundation, in action brought by contractor's employee who was injured in the fire. N.Y. Lab. Law § 241(6); N.Y. Comp. Codes R. & Regs. title 12, §§ 12-1.9, 23-1.7(g). Neumire v. Kraft Foods, Inc., 291 A.D.2d 784, 737 N.Y.S.2d 457 (4th Dep't 2002).

[END OF SUPPLEMENT]

[FN64] §§ 176 et seq.

[FN65] Andross v. Trustees of Columbia University in City of New York, 260 A.D. 941, 23 N.Y.S.2d 285 (2d Dep't 1940); Riddle v. Memorial Hospital, 43 A.D.2d 750, 349 N.Y.S.2d 855 (3d Dep't 1973).

Treatises and Practice Aids

Trial Handbook for New York Lawyers (3d ed.) § 19:2.

[FN66] American Multigraph Sales Co. v. Fred R. Jones & Co., 119 N.Y.S. 1087 (App. Term 1909).

[FN67] Weinstein v. Prostkoff, 23 Misc. 2d 376, 191 N.Y.S.2d 310 (Sup. Ct. 1959), order rev'd on other grounds, 13 A.D.2d 539, 213 N.Y.S.2d 571 (2d Dep't 1961).

Where the doctor who drew blood sample from injured fireman gave it to fire department chauffeur, whose name he could not recall and who was not produced at trial, and sample given to the chauffeur was not delivered for at least 36 hours and no testimony was adduced to indicate who received the sample at the laboratory, its condition on receipt and other pertinent facts concerning care of the sample, the trial court properly excluded the laboratory report on the blood sample in the fireman's personal injury action because of inadequate foundation; there could be no reasonable assurance of the unchanged condition of the blood sample, as against the argument that there was no indication that the sample was tampered with while it was in the chauffeur's possession and that it ought to be admitted for that reason. Amaro v. City of New York, 40 N.Y.2d 30, 386 N.Y.S.2d 19, 351 N.E.2d 665 (1976).

[FN68] N.Y. C.P.L.R. 4518, discussed generally at §§ 463 et seq.

[FN69] Cameras for Industry, Inc. v. I. D. Precision Components Corp., 30 A.D.2d 526, 290 N.Y.S.2d 525 (1st Dep't 1968); Dipace v. Hertz Corp., 30 A.D.2d 515, 290 N.Y.S.2d 124 (1st Dep't 1968).

[FN70] People v. Levia, 3 A.D.2d 42, 158 N.Y.S.2d 448 (3d Dep't 1956).

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