

FIND Request: 37 N.Y.2d 639

Court of Appeals of New York.
 Warren USS, an Infant, by John P. Uss, his father and
 natural guardian, et al., Appellants,
 v.
 TOWN OF OYSTER BAY et al., Respondents. (And
 a Third-Party Action.)


Oct. 30, 1975.

Action was brought for injuries sustained when a dual street sign at an intersection fell on the plaintiff's head after being dislodged from stop its supporting metal pole when the plaintiff's companion struck the pole with his hand. The Supreme Court, Kings County, Mario Pittoni, J., rendered judgment for the defendant town and the Supreme Court, Appellate Division, 44 A.D.2d 853, 355 N.Y.S.2d 806, affirmed. Plaintiff appealed. The Court of Appeals, Jones, J., held that where the defendant offered in evidence a pole similar to that involved and on which was mounted the original street sign involved, the trial court did not err in permitting defense counsel to strike the pole sharply with his hand to demonstrate that the sign did not fall off, in light of the plaintiff's opportunity for cross-examination which permitted the plaintiff to point out differences between the courtroom model and the actual sign and pole involved in the accident.

Affirmed.

Cooke, J., filed a dissenting opinion in which Breitell, C.J., concurred.

West Headnotes

Trial 388 

388 Trial

388III Course and Conduct of Trial in General
388k27 k. Experiments and Tests. Most Cited

Cases

In action for injuries sustained when dual street sign at intersection fell on plaintiff's head after being dislodged from atop its supporting metal pole when his companion struck pole with his hand, in which defendant offered pole in evidence similar to that involved upon which was mounted original street sign, trial court did not err in permitting defense counsel to strike pole sharply with his hand to demonstrate that sign did not fall off, in light of plaintiff's opportunity for cross-examination which permitted plaintiff to point out differences between courtroom model and actual sign and pole involved in accident.

*639 ***449 **148 Stanley F. Meltzer, Westbury, for appellants.

*640 Morris Zweibel and Emmet J. Agoglia, New York City, for respondents.

***450 JONES, Judge.

We are asked to set aside a jury verdict for defendants on the ground that the trial court erroneously permitted defense counsel to conduct an in-court demonstration employing a physical exhibit introduced by plaintiffs and a model introduced by defendants.

While walking home from a high school double date, infant plaintiff was injured when a dual street sign at an intersection fell on his head. It was his claim that the street sign had been dislodged from atop its supporting metal pole when his companion struck the pole with his hand.

On trial, the street sign in question (which had been promptly recovered by the infant plaintiff's father and thereafter remained in counsel's custody) was introduced and received as part of plaintiffs' case. In its turn defendant town offered a model metal pole similar to that on which the sign had been mounted. The model pole was some four feet shorter than the original pole and was imbedded in a movable concrete block rather than in stationary blacktop as at the sidewalk intersection. Plaintiffs objected to any courtroom demonstration making use of the model pole. After inviting the jury's attention to differences between the model and the original, the court re-

ceived the model pole as an exhibit and the dual street sign was placed on the pole.

During his direct examination of the Superintendent of the Town's Sign Bureau, counsel for defendant town struck the model pole sharply with his hand. The sign was not unseated. Plaintiffs' objection to the particular demonstration was overruled, and without restriction plaintiffs' counsel proceeded to cross-examination with reference to the installation of the *641 street sign, the physical details of its assembly and the possibilities of its being dislodged when struck by a 'human blow'. Without objection the street sign and the model pole were later taken into the juryroom.

In the circumstances of this case we cannot say as a matter of law that there was an abuse of discretion by the trial **149 court. The thrust of plaintiffs' objection is directed at the subsequent demonstration by defendants' counsel rather than at the admission of the model pole in evidence. In matters of this sort a broad but sound discretion is properly vested in the trial court. The court here might have been justified in forbidding a demonstration since it can be argued that the conditions in the courtroom were not substantially similar to those at the scene of the accident. On the other hand it was not error as a matter of law for the court, after the demonstration had taken place, to determine that plaintiffs' legitimate interests could be sufficiently protected by affording plaintiffs' counsel unrestricted opportunity for cross-examination. By effective exploitation of the dissimilarities ***451 between the model and the original it was thus open to counsel to minimize the significance to be attached to the demonstration.

The physical features of the sign assembly as well as the principles of mechanics involved in this demonstration were well within the experience and comprehension of an average juror. Thus its probative worth could be independently weighed by the jurors themselves. Nor was the demonstration deceptive, sensational, disruptive of the trial, or purely conjectural. (See 21 N.Y.Jur., Evidence, s 377, p. 504.)

The order of the Appellate Division should be affirmed.

COOKE, Judge (dissenting).

Demonstrations are permitted in court to show

that an object behaves in a certain way provided the conditions under which they are performed are identical or substantially the same as those existing at the time of the event to which they relate (People v. Fiori, 123 App.Div. 174, 185-187, 108 N.Y.S. 416, 424-426; Fisch, New York Evidence, s 145). Since there were substantial dissimilarities regarding the actual pole and the model employed, both as to height and embedment, and in the absence of proof that the severity of the force applied in the courtroom even approximated that expended at the time in question, the demonstration was not relevant to the issue and should have been excluded as a matter of law (Yates v. People, 32 N.Y. 509, 511-512; *642 Kratche v. New York Cent. R.R. Co., 228 App.Div. 820, 240 N.Y.S. 443; People v. Neupert, 190 App.Div. 929, 179 N.Y.S. 941; 4 Wigmore, Evidence (3d ed.), s 1154a; Richardson, Evidence (Prince-10th ed.), s 199). In the frame of this case, the demonstration was sufficiently prejudicial to plaintiffs so as to warrant a reversal and new trial.

JASEN, GABRIELLI, WACHTLER and FUCHSBERG, JJ., concur with JONES, J.

COOKE, J., dissents and votes to reverse in a separate opinion in which BREITEL, C.J., concurs.

Order affirmed, with costs.

N.Y. 1975.

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