

A plaintiff, who had been injured in an automobile collision, sued for damages. The defendant denied negligence and denied that the plaintiff's injuries were severe.

At trial, the plaintiff has offered in evidence a color photograph of himself made from a videotape taken by a television news crew at the scene of the collision. The plaintiff has demonstrated that the videotape has since been routinely reused by the television station and that the footage of the plaintiff was erased. The photograph shows the plaintiff moments after the collision, with his bloodied head protruding at a grotesque angle through the broken windshield of his car.

Should the photograph be admitted over the defendant's objection?

- A. No, because the plaintiff has failed to establish that a duplicate could not be found.
- B. No, because the plaintiff has failed to produce the original videotape or a duplicate.
- C. Yes, because a photograph that establishes a disputed fact cannot be excluded as prejudicial.
- D. Yes, because it tends to prove a controverted fact.

## Explanation:

**Relevant evidence**—ie, evidence that tends to make a material fact more or less probable—is **admissible unless** otherwise provided by law or other evidentiary rules. For example, Federal Rule of Evidence (FRE) 403 bars the admission of relevant evidence if its **probative value** is **substantially outweighed** by its **danger of unfair prejudice**. This rule applies even when the proffered evidence establishes a disputed fact (**Choice C**).

Here, the photograph offered by the plaintiff poses a danger of unfair prejudice because it shows the plaintiff's bloodied head protruding at a grotesque angle through the windshield. But the photograph has a *high* probative value because it goes to a controverted material fact—ie, that the plaintiff's injuries from the collision were severe. As a result, the photograph would likely pass FRE 403's balancing test and should be admitted.

Relevant evidence may also be barred by the **best evidence rule**. This rule generally requires that an **original be produced** to prove the contents of a **writing, recording, or photograph**. An original photograph includes the negative and any prints made from it. Therefore, the photograph would be considered an original that satisfies the best evidence rule if it is found to be a print from the negative of the videotape.

But even if the photograph was a **duplicate**, it would be **admissible to the same extent as an original unless** (1) a question is raised about the original's authenticity or (2) circumstances make it unfair to admit the duplicate. Since no such questions or circumstances appear here and the plaintiff need not show that other duplicates are unavailable, the photograph should be admitted over the defendant's objection (**Choices A & B**).

## Educational objective:

Relevant evidence is inadmissible if its probative value is substantially outweighed by its danger of unfair prejudice. And under the best evidence rule, relevant evidence in the form of a writing, recording, or photograph can be excluded if an original or reliable duplicate is not produced.

## References

Fed R. Evid. 401 (defining relevant evidence).

Fed R. Evid. 403 (test for excluding relevant evidence for certain dangers).

Fed R. Evid. 1001–04 (best evidence rule).

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**Excluding relevant evidence  
(FRE 403)**

