

11.11. Person's Appearance or Capability

When a person's appearance, condition, or capability is relevant to an issue in a proceeding, the appropriate aspect of the person's appearance, condition, or capability may, subject to the discretion of the court, be exhibited to the trier of fact.

Note

This rule is derived from long-standing Court of Appeals precedent (*Harvey v Mazal Am. Partners*, 79 NY2d 218, 223-228 [1992] [exhibiting brain-damaged plaintiff, who was not sworn as witness, and asking him questions to show his condition]; *de Baillet-Latour v de Baillet-Latour*, 301 NY 428, 433-434 [1950] [in annulment action wife was allowed to exhibit conspicuous scars on her body, the existence of which her husband had denied]; *Clark v Brooklyn Hgts. R.R. Co.*, 177 NY 359 [1904] [no error present where trial court permitted the plaintiff, who had been injured in a collision, to leave the witness stand assisted and to exhibit himself to the jury in the act of writing his name and taking a drink of water as the display was designed to illustrate the plaintiff's testimony that he was afflicted by a tremor and could use his hands only with difficulty]; *Mulhado v Brooklyn City R.R. Co.*, 30 NY 370, 372 [1864] [exhibition of injured arm "tended to make the description of the injury more intelligible"]; compare *People v Scarola*, 71 NY2d 769, 778 [1988] ["(T)he trial courts did not abuse their discretion in denying defendants permission to give the proposed exemplars (of their voice). In neither case did the victim rely on defendant's voice to identify him. Moreover, the foundation for the admission of the evidence, in each case did not rule out the possibility that defendants could feign the existence of a speech defect"]).

In *Harvey*, the Court was concerned that an exhibition of a party's injuries "when ill-designed or not properly relevant to the point at issue, instead of being helpful" could "mislead, confuse, divert or otherwise prejudice the purposes of the trial" (*Harvey* at 224). In that instance, the Court instructed that "the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for prejudice" (*id.*).

The trial court in *Harvey* permitted the plaintiff, who was not sworn, to appear before the jury and answer a series of questions that were designed to demonstrate the plaintiff's loss of cognitive abilities. Most of the questions asked of the plaintiff were of a general nature and did not touch upon any of the issues involved at trial. The plaintiff's answers did illustrate the extent to which the underlying accident had affected his cognitive abilities. In deciding to permit the questioning, the trial judge noted that she had balanced the value of showing the

jury the plaintiff's injuries against the potential for prejudice and emotional response. The Court of Appeals held that this balancing was without question an exercise of judicial discretion, and there was no basis to disturb that decision. "Although . . . the preferred practice would have been for the Trial Judge to examine the plaintiff in camera, outside the presence of the jury, before permitting the questioning," the failure to do so did not constitute an abuse of discretion in *Harvey* (*id.* at 227).

Critically, as stated in the rule, before a person's appearance, condition, or capability may be exhibited, that appearance, condition, or capability must be "relevant" to an issue in the proceeding (*see* Guide to NY Evid rule 4.01; *People v Rodriguez*, 64 NY2d 738, 741 [1984] [where an eyewitness apparently did not describe the perpetrator as having tattooed hands, the defendant's request to display tattooed hands was properly denied in the absence of proof that he had the tattoos on day of crime]).