



## **13th Annual BILETA Conference: '*The Changing Jurisdiction*'**

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### **Usage of video recordings in surveillance, the value of such as evidence and potential problems which can arise.**

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#### **Where Video Recordings can Assist Court Proceedings**

Video camera surveillance is proving to be a useful aid to the courts. It is used in a variety of ways to overcome problems relating to the obtaining of evidence. The motorways and other highways, city centres, banks, building societies and stores are nowadays places where we expect to find video cameras being used for surveillance purposes. Beyond this, video recordings can be used to replace the conventional identification parade. Here film of various people including the accused can be prepared. Code D of the Code of Practice Paras 2.10 - 2.12 and Annex B allow this. Problems such as intimidation see *R v Creamer* (1984) 80 Cr App Rep 248 or confusion see *R v Osbourne and Virtue* (1973) QB 678, and also the difficulty in recruiting volunteers for an identification parade can be overcome. Further, video recordings of the evidence of children can assist the court, where the "ordeal" for the child of the court room environment, and also the issue of competence to give evidence may be overcome.

#### **Recordings and Relayed Pictures as Evidence in Civil Actions**

Whilst principally the usage of video recordings may be seen of value in criminal proceedings, the civil courts have considered the admissibility of video and instantaneous recordings being relayed to the public. Recordings can clearly be of value in civil actions where for example negligence or trespass are alleged. The video could reveal evidence which served to clearly establish or remove the merits of such a claim. The very limited use of the jury in civil actions also can be seen of relevance when determining admissibility of the evidence. Particularly noteworthy for the emphasis placed on relayed pictures of events was the Hillsborough disaster. Liability for nervous shock arising due to events being relayed by television had to be considered. Lord Wilberforce far from ruled out shock arising from simultaneous television pictures when he said in *Mc Loughlin v O'Brien* (1983) 1 AC 410 in relation to a nervous shock claim - "The shock must come through sight or hearing of the event or of the immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered". Doubt was expressed in *Alcock v Chief Constable of South Yorkshire* (1992) 1 AC 416 as to the watching of a normal television programme displaying events as they happen as satisfying the proximity test. Compliance with television broadcasting guidelines would prevent shocking pictures being transmitted.

Events filmed deliberately or accidentally, and whether relayed to the public or not may be of assistance in any criminal action or civil action to determine actual events occurring. Video recordings are of value in showing events, and so the commission of crime where this occurs. Also, they can be of assistance in the identification of a wrongdoer. Beyond this, video footage of events unrelated to the charge before the court can be admissible as evidence and serve as character evidence.

#### **The Eye Witness and Video Recording Compared**

Whilst the video camera is an extra aid available to the courts, and it does in some instance provide unquestionable assistance, and will generally be of some, if limited value to juries, a need for caution exists. Evidence on film can serve to overcome weaknesses or failings which relate to the person. Poor sight, a crime if witnessed will be an unexpected event so recognition that the witness will be taken by surprise, lack of concentration can be alleged bearing in mind the likelihood of surprise or alarm at what is being witnessed. Further, with the passing of time, a witness can unwittingly, vary the emphasis of what was seen and possibly convince themselves of events which vary notably from reality. With the video footage certainty exists as to the actual events occurring. Beyond this, a witness at the scene of a crime has only the one sight of the incident, a video recording can be played over many times. The use of slow motion playbacks, freeze frames and photographs taken from the recording can also be of assistance. On the negative side however, it may be that the recording is of such poor quality that it is of no value to the court.

### **General Approach to Video Recording as Evidence**

To an ever increasing extent video recordings are being put before courts as providing evidence. When tendered, video evidence is real evidence. In determining the admissibility of the recording judicial discretion will be exercised and consideration will be given to the applicability of any exclusionary rules of evidence. Any recording must be authentic, and sufficiently intelligible to be put before a jury. A copy, so long as it is authentic, can be admissible as evidence and no obligation exists to explain the absence of the original, (Kajala v Noble (1982) Cr App Rep 149). Where only part of an original is tendered, this can reduce the likelihood of the evidence being deemed admissible. (R v Curran and Tomey (1983) 2 VR 133. This willingness to allow video recordings as evidence was again shown in R v Dodson and Williams (1984) 79 Cr App Rep 220, (1984) 1 WLR 971. In this case the Court of Appeal held that a photograph taken by a video camera being operated at a branch of a building society was admissible as evidence.

A more vital factor then and now is the issue of how much weight should attach to such evidence. Up to the mid 1980's the usage of video recording evidence had been relatively limited, but support for its admissibility had been strong, and with passing of time this strength has grown. Relevance, quality of film and judicial discretion with application of evidential rules dominate in determining admissibility.

Numerous rules of evidence are of significance in considering the usage of video recordings in the courts. In R v Caldwell, R v Dixon (1993) 99 Cr App Rep 73, it was acknowledged that the usage of automatic recordings had become sufficiently common that a judicial request for authoritative regulations to govern the procedure for its usage was made.

### **Video Recordings and "Identification Evidence".**

In a criminal action video recording evidence may show an incident, but also assist as a means of identifying a wrongdoer. Clearly it is this issue which can be crucial in determining the innocence or guilt of a party, therefore caution and clarity in determining admissibility, relevance and weight that should attach to such evidence are important. Rules in relation to identification evidence appropriate where an eye witness is to testify, can be equally applicable to video recording evidence. The Turnbull direction is famous in the area of identification evidence. In R v Turnbull (1976) 63 Cr App Rep 132, (1977) QB 224 requirements introduced were that:- a judge should warn a jury of the special need for caution before convicting on identification evidence. Such a warning is clearly appropriate with testimony of an eye witness or when video recording evidence is introduced. A further requirement was that the jury should be instructed as to the reasons for such need, - again a factor applicable to the different types of video evidence.

The needs to guide the jury to closely examine the circumstances in which the identification was made and also inform the jury of any specific weaknesses in the identification evidence identified in Turnbull again have a part to play in relation to video evidence. It was further stated in the Turnbull case that "Where in the judgement of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a long observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

Whilst literally the "fleeting glance" and "difficult conditions" may not be applicable to the video recording, quite simply a poor quality video would necessitate the judge directing the jury in this same way. Video recording evidence in R v Pattinson and Exley (1996) 1 Cr App Rep 51 was of such poor quality that it was

useless for the purposes of identification. Technology will not always be of assistance just as an eye witness may for any number of reasons not provide evidence carrying weight when the jury come to consider all the evidence. The recording did however show that the robbers carrying out the crime in a jeweller's shop were actually in the shop for only 32 seconds. Of sixteen eye witnesses who came forward, nine actually gave evidence. Whilst the poor quality of the recording limited greatly its worth as evidence, possibly what it did reveal as to the duration of the criminal act assisted in allowing the jury to attach appropriate weight to the identification evidence which was introduced.

The quality of film is a potential problem when considering admissibility of such as evidence. Recordings made covering a significant area and so where individuals filmed are shown in the distance and so somewhat unclear may well be of limited evidential value. If such evidence is admissible the prejudicial effect can be highlighted. As shown in *R v Pattinson and Exley* (1996) 1 Cr App Rep 51 (see also *R v Downey* (1995) 1 Cr App Rep 547), admissibility of video recordings to show events must be looked at with great caution in consideration of identification of the individual. Video recording evidence may be of value of course in adding weight to other evidence introduced. Where a party is not directly recognised from a video recording, it may serve to support the evidence of an eye witness, who has also been aided by photographs and photo-fits. In this context it may add weight to the identification evidence of the witness.

### **"Opinion" - Based on Video Recording Evidence**

Rules applicable to opinion evidence are relevant when considering the role of video evidence in the courts. Opinion here is an inference from observed facts. The general rule relating to identification and opinion evidence is that witnesses should only speak on that which was directly observed by them. The jury is then being asked to rely upon the opinion of the eye witness. Where no testimony of eye witnesses is available and a jury are shown video evidence for the purposes of identification of a person or persons, rules applicable with opinion evidence normally applied to the eye witness have some application to the jury. After all the jury are expressing an opinion when deciding whether or not the accused party(ies) are those same persons as shown on the video film. If the video camera footage replaces the eye witness, then the jury themselves express an opinion. The broad view is that witnesses provide fact, the judge and jury make inferences on the basis of those facts. Statements concerning identity are however, indissoluble made up of fact and opinion.

### **Expert and Non Expert Opinion Evidence**

Whilst the opinion of the jury on identification is validly regarded as non-expert, opinion of police officers, security guards or others who have significant experience of using video recordings for identification purposes may be seen as giving expert opinion evidence. A possible danger exists here in that a jury might be too willing to accept this evidence, which in some instances may be alleged to be prejudicial on the basis that the identification arose from recognition. A jury might reasonably see such evidence as the best available and would be "unwilling" to disagree with the experts. The evidence of the expert may be seen in some instances as the crucial feature when determining innocence or guilt. Can and should a police officer with experience of viewing video recorded crime ever be deemed an expert witness and so have notable weight attached to the evidence they give?.

### **Canada and New Zealand Cases**

In the New Zealand case of *Howe* (1982) 1 NZLR 618, the phrase "expert ad hoc" was used in relation to a police officers identification evidence arising from seeing a tape, and on that basis recognition of the party being qualified to give opinion evidence was found. The court further provided that identification made from tapes and films was no more secondary evidence than oral identification made from photographs. Police officers do have an advantage when formulating opinions relating to identification using video recordings in that they can study the film watching it over numerous times, seeing stills and using slow motion.

Lord Justice General Clyde in *Hopes and Lavey v H.M. Advocate* (1960) SC (J) 104 acknowledged how inappropriate it would be for the jurors to see numerous replays of an incident in the courtroom or be allowed to do so elsewhere without counsel being present. Lord Hope made reference to this statement in *Steele and Forbes v H. M. Advocate* (1992) JC 1. here the judge at first instance directed the jury that they could rely on both the video evidence and evidence of witnesses "as to what they believe they saw on the tape". This direction was supported on appeal.

## "Identification" and "Recording"

Further case law from overseas has assisted our courts on issues relating to video evidence. The views of the courts have not always been uniform when considering specific issues. Notably, a difference has been identified on the question of the relevance which should attach to whether or not those observing the video and giving evidence of opinion as to identity actually knew the accused prior to the video recorded incident. In the Canadian case of *Leaney and Rawlinson* (1988) 38 CCC 263, it was held on appeal that the evidence of police officers who had viewed the relevant video should not have been admitted because they did not previously know the accused. Could one not however take the view that previous knowledge of a party leading to recognition could be alleged to have a prejudicial effect? Could those observing crime on video be prejudiced by knowledge of parties whose physical characteristics and demeanour are similar to a person filmed on video?

In *R v Clare and Peach* (1995) 2 Cr App Rep 333 it was acknowledged that as technology develops, evidential practice would have to develop to ensure that juries gain full assistance from technology, but equally recognise the need to avoid an element of unfairness resulting.

## "Prejudicial Effect - Probative Force"

The prejudicial effect of the evidence of police officers and their purported recognition of the accused parties when they watched a video of the offence in question was the basis for appeal in *R v Caldwell and Dixon* (1994) 99 Cr App Rep 73. This previous knowledge of the accused came from an awareness of the accused's previous criminal acts. The appeal was dismissed, the court providing that the prejudice was no greater than that in any case of police recognition without video evidence. The danger here principally exists perhaps where the video recording is not particularly clear and doubt is heightened.

Evidence was again admitted in *R v Fowden and White* (1982) Crim L R 588 where witnesses recognised the individual on film. The conviction was however quashed on appeal as the relevant witnesses who had identified the accused, by the time of the trial knew him from a further shoplifting matter occurring a week after the incident before the court. It was accepted that prejudice would result if the defence were to test the accuracy of this identification. The issue of prejudicial effect being weighted against probative force, significant throughout the law of evidence, is undeniably a factor upon which the judge must exercise discretion when considering admissibility. Note how an eye witness, being shown photographs as a means of establishing identity will again be introducing an element of comparison in the mind, and recognition again plays a part.

Recognition deriving from knowledge of an individual socially might possibly be of greater reliability than such recognition by officers of known criminals. Certainly in *R v Grimer* (1982) Crim LR 674 the jury were "assisted" by identification evidence deriving from knowledge of a person through social gatherings. A security officer who recognised a thief shown on video in the act of stealing, as a person he knew socially, was allowed to give evidence of such. The admissibility of this evidence was approved on appeal. The jury had also seen the recording, and so were in a position to make a judgement.

Common problems relating to video recording value were found in *R v Clare and Peach* (1995) 2 Cr App Rep 333, but equally in the main these were problems which would likewise be recognised were an eye witness able to testify. The quality of the film was poor, but beyond that, the incident was brief, the scene depicted was confusing and many of the people depicted on the film were similarly dressed. The accused therefore had a number of factors that could be highlighted on seeking an appeal. The video evidence was shown to the jury but in itself it was acknowledged as having little value. Identification was very difficult to achieve and events shown required close study. Police officers had viewed the film many times before the trial in slow motion and frame by frame. Assistance was given the jury through one police officer in particular guiding them through the events and pointing out the offence. Here the relevant police officers did not know the accused. Issues of weight, reliance and prejudicial effect can be considered in relation to the absence of recognition and the different situation of officers previously knowing the accused.

The police officer's evidence of opinion as to the identity of the accused was put to the jury. The court took the view that the officer was not an expert witness. The jury were here asked principally to accept the officer's evidence rather than satisfy themselves of the parties' innocence or guilt through their own observation and

identification. Note here that in the absence of a recognised expert witness, in general the jury should exercise their opinion rather than be asked to accept non-expert opinion from others. Bearing in mind the time the officers had spent looking at the video and the advantages they had in using freeze frame and slow motion, the non-expert opinion evidence of the officers (albeit acknowledging such evidence has been seen as "ad hoc expert" evidence by other courts) is perhaps preferable to the non-expert opinion of the jury.

### **Police Officer Opinion Evidence "Replacing" Recording Evidence**

Bearing in mind instances where a jury may derive little of value from a poor quality recording and so rely on police officers evidence as in *R v Fowden and White* (1982) Crim LR588 is it not logical to accept that the evidence of the officers without any video recording assistance can be valid? In *Taylor v Chief Constable of Cheshire* (1987) 1 ALL ER 225. no exercising of judicial discretion was needed where a video recording of a theft occurring in a shop had been mistakenly erased. The video had been viewed by three police officers. The court accepted that the evidence of the officers was admissible. However, the court stated that in such circumstances the jury had to be carefully guided on the issues of reliability and weight.

### **Value of Video recording Where Identification is Impossible**

A potential difficulty which compounds the problems attaching to a poor quality recording, is an attempt by persons to hide their faces or alter their appearance when they commit crime. An alteration to appearance can be made of course at the time of trial in order to make more difficult the task of proper identification. In *R v Caldwell and Dixon* ((1994)99 Cr App Rep 73 men shown on film committing the crime had covered substantial parts of their faces. A black stocking mask was used by a robber in *R v Downey* (1995) 1 Cr App Rep 547. The problem created is no different in relation to recording usage or availability of an eye witness.

The recording perhaps will invariably be of greater assistance to the court than an eye witness in that build, demeanour and skin colour may clearly be identifiable. Also, as in the *Downey* case, where the same type of offence is committed at different places, both being video recorded, similarities might well be identified that lead to an acceptance that the perpetrator of one of the crimes is likewise guilty of the other.

### **Can Recording Quality be Improved?**

Where the quality of recording is poor, a desire may exist to, if not improve the quality, obtain a print or photograph from it which is of greater assistance. In the *Grose* case (unreported), video enhancement was used to improve the likelihood of achieving a better identification of those committing crime. Two men were caught on video camera robbing a building society. A policeman thought he recognised one of the men. A company involved in computer image comparison work compared the video recording with news footage showing the man the police officer thought had been caught on camera. The height of the face, position of the nose, ear and forehead lines looked conclusive. Doubt was cast on the accuracy of this method adopted and the effect of shadow on an image causing a change in shape and thereby change in distance in relation to features can be found. An enhancer may make an image more like the image in a photograph. No intent to distort may exist, but the possibility of making things fit certainly could not be eliminated. The role of mathematics and statistics in providing assistance in such circumstance, may in the main be limited. Experience rather than necessarily scientific study was needed where opinion of police officers could validly be put to a jury- see *R v Silverlock* (1894) 2 QB 766.

### **Character Evidence**

Whilst in the main one might look to the video camera revealing commission of crime and assisting in the identification of wrongdoers, in some instances footage showing events removed from the matter before the court can be of evidential value. One area of value can relate to character evidence. Evidence on film may serve to diminish or even destroy a defence of the accused. Beyond this it may have a bearing on the weight attached to other evidence. The application of character evidence rules had a bearing in *R v Ramjat Singh Sidhu* (1994) 98 Cr App Rep 59. The prosecutor wished to bring in video recording evidence not of the crime with which the party was charged, but showing him as a member of a group of heavily armed people practising the usage of weapons and also singing songs supportive of a Liberation Force. The accused did

also address the camera. The accused had informed the court that he was not a member of a terrorist organisation, was law abiding and did not believe in violence. The court accepted that the video, which was one and a half hours in length was admissible. It was deemed not too remote and revealed a background of relevant history. The video content was deemed to be of probative force. It certainly had a bearing on the character of the accused, and also was of significance when considered alongside the evidence of the accused.

### **Future Trends for Video Surveillance, Evidence and the Courts**

Technological developments in surveillance equipment may further assist the courts in future not merely with improvement in the present capabilities of equipment used. One particular instance of a development on from original equipment is being tried in America and England. This equipment films traffic, identifies the speed of vehicles and flashes a warning notice on a screen further along the highway/motorway, which shows the car owner's first name and car registration. The computerised camera used has been developed to change the registration number into a digital code in order to identify the name of the vehicle owner.

Generally in the law of Evidence, perhaps judicial discretion will continue to be of greater significance than the introduction of rules. Identification evidence, opinion evidence, character evidence, weight, relevance and the prejudicial effect/probative force issue will doubtless require consideration and application subject to the features of the particular cases before the court. General rules relating to admissibility and guidance given the jury may however continue to develop.

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