THE USE OF VIDEOTAPE EVIDENCE IN CIVIL CASES*

BRUCE P. ELMAN**

The author discusses the role of videotape evidence as testimonial proof and as demonstrative evidence. He surveys the leading cases in the area as well as relevant statutory provisions. The potential hazards associated with the use of videotape evidence are followed by recommended measures to ensure accuracy and objectivity. The author suggests that where these safeguards are taken, a "first-hand" view of the evidence used to prove a civil case may aid the court in reaching a sound decision.

I. INTRODUCTION

A common criticism of the legal profession is that it responds slowly to technological advances.[1] Little has changed in the mode of administering justice since Blackstone's day. The casual visitor to a Canadian courtroom would find little to suggest that we live in an age of space exploration, world-wide instantaneous communication, and computer printouts. This failure to keep pace with modern technology has led to an overtaxing of the administrative systems of our courts, resulting in crowded court calendars and long delays prior to trial or between trial and appeal. Furthermore, our reluctance to make use of modern technology has proved to be a drain upon the limited resources of the practising lawyer. This in turn has precipitated higher costs for party litigants as well as for society generally. Because of these factors, clients may be prejudiced when pursuing their legal rights.[2] Enter the videotape recorder. "The videotape recorder threatens to contest the continued devolution of this tranquil heritage."[3]

II. THE VIDEOTAPE RECORDING: ITS HISTORY AND USE

Before examining the use to which videotape recorders may be put in the trial process, some background information is in order. A videotape recording is the electronic recording of both audio and visual signals on a magnetic tape similar to the audiotape with which we are all familiar. The videotape recorder is far more flexible than the motion picture camera. It can record and develop a moving picture instantly. Therefore, by connecting the videotape recorder to a television set one can produce a full colour reproduction, with sound, of what was seen and heard immediately after it has taken place. Furthermore, the videotape may be erased and re-

---

* This paper was originally presented at the Annual Law Refresher of The Legal Education Society of Alberta, April 22, 1980 at Banff, Alberta. The author acknowledges the support of the Legal Education Society of Alberta.

** Of the Faculty of Law, University of Alberta.

1. For example, *see* McCrystal, "Videotape Trials: Relief for Our Congested Courts" (1973) 49 *Denver L.J.* 463 at 463-464.

2. For a discussion of the failure to keep abreast of technological developments *see* Salvan, "Videotape for the Legal Community" (1975) 59 *Judicature* 222 at 222, and Blankenship, "Videotape Depositions: An Analysis of Use in Civil Cases" (1978) 9 *Cumberland L. Rev.* 193.

3. Loftus, "The Role of Videotape in the Criminal Court" (1976) 10 *Suffolk U. L. Rev.* 1107 at 1108.

recorded upon at once. A tape may be used hundreds of times before there is any disruption in the quality of the tape. Copies of the tape may be made instantly and the tape itself may be easily edited without damaging the original tape as neither cutting nor splicing is necessary. Finally, it is as easy to make a transcription from the audio track of a videotape as it is from an audiotape. The technology is still developing and further advancements are inevitable.[4]

Videotape was invented in 1956 by the Ampex Corporation and first used by CBS News in a broadcast on November 30th, 1956. In 1963, portable video recorders were developed and were in wide consumer circulation by the mid-seventies.[5]

One of the first uses of a videotape recording in the courtroom occurred in the case of *State* v. *Kidwell*.[6] In that case a recording of a convicted murderer recreating his crime under the influence of drugs administered by the Menninger Clinic, was used on appeal to quash the conviction. The appellate court ordered a retrial on the reduced charge of manslaughter.[7] The first use of videotape to take depositions occurred in a Florida case in 1971 and in the same year in Ohio, an entire civil trial was put on videotape for a jury to view.[8]

As one can readily observe, the United States has pioneered the use of videotape in the legal system. Indeed, Canada has lagged far behind in using this technology in the administration of justice. The potential uses to which videotapes may be put appear to be limited only by one's imagination and the *Rules of Court*.[9] Videotapes have been used in the United States in the following instances: recording the confession of the defendant in order to show that it was voluntarily given,[10] recording a lineup in a criminal case to demonstrate that there was no prejudice in the lineup,[11] recording the behaviour, at the time of arrest, of a suspected impaired driver,[12] recording the testimony of a dying witness in order to preserve it for trial,[13] recording the testimony of a witness unavailable to testify at trial,[14] and recording for the jury the scene of a crime or accident.[15] Further, videotapes have been used to demonstrate the operation of a piece of heavy machinery,[16] to provide an appeal record for criminal

4. For a discussion of the technology of videotape recordings, *see* Loftus, *supra* n. 3 at 1109, and Peters and Wilkes, "Videotaping of Surgery for Use as Demonstrative Evidence in Medical Malpractice Litigation" (1977-78) 16 *Duquesne L. Rev.* 359 at 360.
5. For a discussion of the history of videotape recordings, *see* Salvan, *supra* n. 2 at 222-224, and Blankenship, *supra* n. 2 at 193-194.
6. 434 P. 2d 316 (1967).
7. Eliot, "The Video Telephone In Criminal Justice: The Phoenix Project" (1978) 55 *Journal of Urban Law* 721 at 722.
8. *Id.* at 723.
9. This topic will be discussed *infra* at 229-233.
10. *Hendricks* v. *Swenson* 456 F. 2d 503 (1972); *Paramore* v. *State* 229 So. 2d 855 (1969).
11. *State* v. *Newman* 484 P. 2d 473 (1971).
12. Loftus, *supra* n. 3 at 1110.
13. *People* v. *Moran* 39 Cal. App. 3d 398.
14. Blankenship, *supra* n. 2 at 196.
15. *People* v. *Mines* 270 N.E. 2d 263 (1971).
16. *Zollman* v. *Symington Wayne Corporation* 438 F. 2d 28.

and civil trials,[17] as demonstrative evidence of the facts in issue in a particular case,[18] and even to take the deposition of a President of the United States in a criminal trial.[19]

In the remaining portions of this paper, the use of videotape recordings as demonstrative evidence will be examined and their suitability as a replacement for the taking of a view discussed. Further, the use of videotape recordings as a substitute for stenographically produced transcripts of commission evidence, including *de bene esse* evidence and depositions, will be investigated. This will be analyzed in light of the *Alberta Rules of Court.*

III. VIDEOTAPES AS DEMONSTRATIVE EVIDENCE

A. *The Admissibility of Still Photographs and Motion Pictures*

It has long been held that still photographs are admissible as evidence provided they are relevant and accurately represent the subject matter of the photograph.[20] As was pointed out in *Regina* v. *Tolson*, a photograph "is only a visible representation of the image or impression made upon the mind of the witnesses by the sight of the person or object it represents".[21] Consequently, the photograph must be verified on oath by a person capable of doing so, i.e. either the person who took the photograph or another individual familiar with the subject matter of the photograph.[22]

Motion pictures have been admitted as evidence on the same principle as still photographs; i.e., they are visible representations of what the witness has observed. For example, in *Chayne* v. *Schwartz*[23] the plaintiff leased certain commercial premises from the defendant while they were still under construction. After the lease was signed, the defendant began an excavation in the sidewalk in front of these premises to construct another store under the one leased by the plaintiff. In so doing, the defendant, according to the plaintiff, diminished the appearance and value of the plaintiff's premises, kept customers away and delayed completion of her store. The defendant produced two motion pictures taken in front of the plaintiff's premises. These films indicated that the effect of the excavation was not as serious as the plaintiff suggested. The plaintiff objected to this evidence but the objection was overruled. The court held that the motion pictures were admissible on the following basis:[24]

> Motion pictures are merely a series of related still photographs which are projected on a screen one after the other so quickly that an illusion of motion is achieved. Still photographs are received in evidence everyday in the courts of this province and I can see no reason why accurate motion pictures should not be so received.

The same result was reached in *Niznick et al* v. *Johnson*,[25] a personal injury action in Manitoba. In this case there was no dispute regarding the

---

17. Eliot, *supra* n. 7 at 723.
18. Stewart, "Videotape: Use in Demonstrative Evidence", 21 *Def. L. J.* 252.
19. *United States* v. *Fromme* 405 F. Supp. 578.
20. Schiff, *Evidence in the Litigation Process* (1978), at 757.
21. (1864) 4 F. & F. 103, 176 E.R. 488.
22. Sopinka and Lederman, *Evidence in Civil Cases* (1974), at 439. *Also see Rex* v. *Bannister* [1936] 2 D.L.R. 795, 10 M.P.R. 391.
23. [1954] C.S. 123.
24. *Id.* at 127-128. In accord, *see* 3 *Wigmore* s.798a (1970-Chadbourn Revision).
25. (1961) 28 D.L.R. (2d) 541, 34 W.W.R. 101.

defendant's liability and the bulk of the three day trial centered on the defence's contention that the plaintiff was exaggerating her injuries. To support this contention the defendant introduced an edited tape to show that the plaintiff's activity level was at odds with her testimony. The trial judge admitted the evidence and assessed damages at an amount somewhat reduced from what the plaintiff was seeking. *Nag* v. *McKellar et al*[26] was a civil jury trial based upon facts materially identical to those in *Niznick* v. *Johnson*. In *Nag* v. *McKellar*, the trial judge dismissed the jury after the movie was shown in the courtroom, later explaining:[27]

> In my view the introduction of visual evidence in the form of motion pictures to a jury is a dangerous and unacceptable form of demonstrative evidence.

The defendant appealed from the judgment in the plaintiff's favour claiming that the trial judge erred in discharging the jury. The Court of Appeal of Ontario ordered a new trial stating " . . . the evidence proposed to be tendered was relevant and admissible in the circumstances of this case".[28]

Some debate has arisen as to the status of still photographs and motion pictures once received in evidence. In the case of *Army & Navy Department Stores Western Ltd.* v. *Retail, Wholesale & Department Store Union, Local 535 et al*,[29] Farris C.J.B.C. refused to allow the motion pictures as evidence of the matters contained therein but received them for assistance in understanding and clarifying the oral testimony. He stated:[30]

> I refused to allow the pictures to be introduced as proof of the matters sought to be proved thereby but did admit them in the same manner as I would "still" photographs, i.e. solely for the purpose of clarifying the oral testimony being given.

However, Farris C.J.B.C. did see a possible future expansion of this narrow rule of use. He went on to acknowledge[31]

> the possibility that with modern inventions, old rules should not necessarily remain static. It did appear to me that it might well develop in a case in the future that moving pictures themselves might be tendered and admitted as evidence . . . there might arise, in the future an action when pictures themselves . . . would be the very best evidence of what occurred.

These *obiter* remarks were adopted in *Chayne* v. *Schwartz* wherein it was stated: " . . . the production of the movies is permitted not only to clarify oral evidence but as evidence in and of itself . . . ".[32]

Furthermore, the cases of *Nizick* v. *Johnson* and *Nag* v. *McKellar*, by their results, indicate that the motion pictures were used as real evidence and not only for illustrative purposes. On this issue, we must examine the Supreme Court of Canada decision in *Draper* v. *Jacklyn et al*.[33] It is important to note that the divergence of opinions on the proper use of still photographs and motion pictures was not argued in this case. However, included in the judgment of Spence J. is the following *obiter* comment:[34]

---

26. [1968] 1 O.R. 797.
27. *Id.* at 799.
28. [1969] 1 O.R. 764 at 765.
29. (1950) 97 C.C.C. 258, [1950] 2 D.L.R. 850, [1950] 2 W.W.R. 999.
30. *Id.* at 97 C.C.C. 261.
31. *Id.* at 261-262.
32. *Supra* n. 23 at 128.
33. (1970) 9 D.L.R. (3d) 264.
34. *Id.* at 269.

> ... if there was some photographic material which would *illustrate that treatment* without being overly prejudicial in its effect, then the material should be available to the jury. [emphasis added]

And in the concurring judgment of Ritchie J. we find the following:[35]

> The photographs in the present case serve to *illustrate the nature of the treatment* to which the appellant was subjected and in this sense form a part of the narrative of his illness and recovery and are both relevant and admissible. [emphasis added]

The issue of whether photographs and movies are real evidence or merely illustrative of oral testimony is not definitively settled by this group of cases. It strikes the author that this debate is similar to the one regarding the purpose of taking a view. Courts in Alberta (indeed, in most provinces except Ontario) have held that information gained from a view is real evidence and may be used by the trier of fact as such.[36] In so saying, they have denied the Ontario position that the purpose of taking a view is only to better understand the *viva voce* evidence.[37] To say that still photographs and motion pictures have only illustrative value is as much a psychological fiction[38] as it is to say that the purpose of taking a view is only to better understand the evidence.

As Sopinka and Lederman point out, photographs, even if relevant to a material issue in the case, will not be received as evidence where the prejudicial nature of the photograph outweighs the potential probative force.[39] This was affirmed by the Supreme Court of Canada in *Draper* v. *Jacklyn* when Spence J. stated, "the photographs were admissible and should go to the jury unless their prejudicial effect is so great that it would exceed their probative force".[40]

B. *The Admissibility of Videotapes*

What, then, of videotapes as demonstrative evidence? A videotape was admitted into evidence in the case of *Teno et al* v. *Arnold et al.*[41] This was an action for damages for personal injuries sustained by the plaintiffs as a result of the defendants' negligence. To demonstrate the extent of the injuries suffered by the infant plaintiff, Diane Teno, the plaintiffs produced a one and one-half hour videotape, with soundtrack, of a typical day in the life of Diane Teno. This evidence was introduced after a proper foundation had been laid as to the technical aspects of the equipment. Furthermore, the tape was played into the courtroom by use of closed circuit television, with occasional commentary by doctors familiar with Diane Teno's condition.[42] The trial judge, Keith J., was most impressed with this method of presenting evidence, stating:[43]

> I would be remiss, if I failed to acknowledge the assistance that I received from her counsel in the presentation of evidence ... in a most imaginative and, I believe, unique way in trials to date in Canada.

---

35. *Id.* at 265-266.
36. *Clark* v. *City of Edmonton* [1928] 1 W.W.R. 553.
37. *Chambers* v. *Murphy* [1953] O.W.N. 399.
38. *Carter* v. *Parson* 286 N.W. 696. Also to the same effect, *see Power* v. *Winter* (1952) 30 M.P.R. 131, *Carpenter* v. *Carpenter* 101 A. 628, and McCormick, *Evidence* (2d ed. 1972) at 539.
39. Sopinka and Lederman, *supra* n. 22 at 440.
40. *Supra* n. 33 at 269.
41. (1974) 55 D.L.R. (3d) 57.
42. *Id.* at 78.
43. *Id.*

Keith J. went on to comment: "I cannot conceive of a more graphic portrayal of what I must try to express in words".[44] It should be noted, however, that all counsel in this case conceded that the videotape was properly admitted into evidence.[45] Commenting upon this aspect, Keith J. stated that " . . . it is only a marked improvement on ordinary motion pictures which have been used at trial for many years".[46]

The question of whether the videotape had been properly admitted into evidence was apparently not raised on appeal to either the Ontario Court of Appeal[47] or the Supreme Court of Canada.[48] Videotapes have also been used in at least two criminal cases:[48a] *Regina* v. *Maloney (No. 2)*[49] and *Regina* v. *Williams.*[50] Both cases arose out of altercations during Toronto Maple Leaf hockey games at Maple Leaf Gardens in Toronto. In *Regina* v. *Maloney (No. 2)*, the defendant, then a member of the Detroit Red Wings, was charged with assault causing bodily harm for an attack upon Brian Glennie, then a member of the Toronto Maple Leafs. During the course of the trial a question arose as to the admissibility of some videotape material made by television cameramen during the course of the game. The videotape was divided into two segments, each with two parts. The first segment was a reproduction of portions of the videotape recorded by a television camera crew during the game. The first part of the first segment showed, at actual speed, the incident in question and was ruled admissible by the trial judge.[51] The second part of the first segment began with a slow motion body check by Glennie on Detroit player Dennis Hextall and goes on, at normal speed, to show the altercation between Glennie and Maloney. Some editing had been done in the United States and parts of the film were out of sequence. This part was ruled inadmissible because of the editing. It was not in proper sequence and it was partially in slow motion.[52]

The second segment was a portion of a movie film taken during the game. The movie film was developed, transferred to a two inch videotape, and subsequently transferred to a three-quarter inch videotape cassette for use at the trial. The first part of this segment showed at normal speed the latter part of the incident between Glennie and Maloney. It was complete, unedited, and in proper sequence. It was admissible in evidence.[53] The second part of the second segment was an exact reproduction of part one, only in slow motion. This part was ruled inadmissible as it did not ac-

---

44. *Id.* at 78-79.
45. *Id.* at 79.
46. *Id.*
47. *Teno et al* v. *Arnold et al* (1976) 67 D.L.R. (3d) 9.
48. *Arnold et al* v. *Teno et al* (1978) 83 D.L.R. (3d) 609, 3 C.C.L.T. 272.
48a. Most recently in *R.* v. *Tookey* (Alta. Q.B.), Bracco J. admitted a videotaped confession into evidence in the accused's trial for first degree murder. Interestingly, the videotaped confession included a re-enactment of the murder by the accused. *See* the *Edmonton Journal*, February 18, 1981, at A1, A3.
49. (1976) 29 C.C.C. (2d) 431.
50. (1977) 35 C.C.C. (2d) 103.
51. *Supra* n. 49 at 435.
52. *Id.*
53. *Id.* at 436.

curately depict the dimension of time.[54] In the case of *Regina* v. *Williams*, the defendant, then a member of the Toronto Maple Leafs, was charged with assault causing bodily harm and possession of a weapon dangerous to the public peace, i.e. a hockey stick. The victim of the alleged assault was Dennis Owchar, a defenseman who, at the time, was employed by the Pittsburgh Penguins. The defendant was discharged at the preliminary hearing and the Crown applied for consent to prefer an indictment following this discharge. Allen Co. Ct. J. granted the application and endorsed the indictment. In reaching his decision, Allan Co. Ct. J. held that a videotape of the incident at regular speed was receivable in evidence. However, the same tape reproduced in slow motion was rejected.[55] In reaching his decision, the learned County Court Judge adopted the reasons of Lesage Co. Ct. J. in the *Maloney* case.

C. *Issues Raised by the Cases*

These cases raise certain questions for consideration, namely:

1. *What is the basis for the admissibility of videotapes as demonstrative evidence?*

At the outset of this section, it was explained that still photographs have been admitted as evidence because they accurately represent the subject matter of the photograph.[56] Therefore, motion pictures were admissible as they were only a series of related still photographs.[57] There is a danger, however, in equating videotape recordings with motion pictures. The two are not similar at all as videotapes are not a series of still photographs speeded up to provide the illusion of motion. As was pointed out earlier,[58] a videotape recording is an electronic recording of both audio and visual images on a magnetic tape. There are no visible pictures or audible sounds until the tape is played back. Therefore, it is not a series of still photographs.

Should this difference in processing be important in determining the admissibility of videotape evidence? It is argued that it should not. The question should be whether the tape is a fair and accurate representation of the incident; i.e., whether it is authentic and not how it was processed. This same point was made by Scott in his book *Photographic Evidence* when he stated:[59]

> The process by which a motion picture is produced should have no bearing upon its admissibility as long as it can be verified as a *fair representation of its subject.* Accordingly, videotape recordings should be admitted in evidence . . . on the same basis as ordinary motion pictures on film, subject only to the usual showing of relevance and materiality and to proper verification. [emphasis added]

Once it has been determined that videotapes are useful in their own right and admissible on the basis that they are accurate representations of the subject matter, the next question is what requirements must be met as preconditions to their admissibility.

---

54. *Id.*
55. *Supra* n. 50 at 106.
56. *Supra* at p. 217.
57. *Supra* at p. 217.
58. *Supra* at p. 215.
59. Cited in Stewart, *supra* n. 18 at 254.

2. *What are the prerequisites to admissibility of videotapes as demonstrative evidence?*

In many respects a videotape is like an audiotape. Indeed sounds and voices can be dubbed onto videotape after the picture is made, with no damage to the picture whatsoever.[60] This leads to the question of the ease with which the sound track on a videotape may be altered. Such an alteration may give the incident depicted on the tape a meaning entirely different from the original one. In order to provide proper safeguards to ensure the integrity of the tape, a proper foundation should be laid for its admissibility. Evidence should be adduced that:

(a) the tape was played prior to recording and was found to be clean;
(b) the machine was working properly at the time of recording;
(c) the operator of the equipment was qualified;
(d) the tape is an accurate representation of the subject matter;
(e) there was continuity of possession of the tape and, therefore, the tape has not been tampered with; and
(f) a witness played the tape and can identify the voices on the tape.[61]

These safeguards would ensure that there has been no tampering and that the tapes are reliable.

3. *For what purpose may the videotape be used once it is received in evidence?*

As stated earlier,[62] there has been no definitive statement as to the use to which still photographs and motion pictures may be put once they are admitted into evidence. However, it is the opinion of the author that there is no reason in law or logic why a videotape recording is not real evidence which may be used fully by the trier of fact in reaching his decision in the case.

4. *Does the trial judge have a residual discretion to exclude a videotape where its prejudicial effect outweighs its probative value?*

Subject to the effect of *The Queen* v. *Wray*,[63] there does not appear to be any reason why the trial judge should not exclude an otherwise admissible videotape if he views it as inflammatory and if its prejudicial nature outweighs its potential probative force. He has such power *vis-a-vis* still photographs and motion pictures and certainly videotape recordings should be treated no differently.

5. *In what other ways may videotapes be used as demonstrative evidence?*

---

60. *Id.* at 255.
61. Salvan, *supra* n. 2 at 224. For a discussion of the requirements which must be met prior to the introduction of a tape recording into evidence, *see* MacWilliams, *Canadian Criminal Evidence* (1974) at 82-91.
62. *Supra* at pp. 218-219.
63. [1971] S.C.R. 272. In this case the Supreme Court of Canada held that the trial judge has a residual discretion to exclude relevant and otherwise admissible evidence only if the evidence is gravely prejudicial to the accused, of tenuous admissibility, and, in relation to the main issue, of trifling probative value (at p. 293). It should be noted that this case involved illegally obtained evidence. However, some academics, among them Professor Schiff (see, *supra* n. 20 at 69-70) suggest some qualification on the traditional role of the trial judge to exclude prejudicial evidence might be necessary as a result of *The Queen* v. *Wray*.

Some examples of the use of videotapes as demonstrative evidence have already been mentioned.[64] Two other uses are suggested in the literature and are worthy of mention.

In their article "Videotaping of Surgery for Use as Demonstrative Evidence in Medical Malpractice Litigation",[65] Professors Peters and Wilkes state that "the documentation of surgery by videotape should become part of the hospital records, available to both attorneys".[66] They suggest that the traditional hospital records are not very useful in surgical malpractice cases, that a large percentage of malpractice cases involve surgical procedures and that the use of videotape recordings as the hospital's records for surgical cases would be an advantage to all parties.[67] Finally, in an article entitled "Innovative Developments in Demonstrative Evidence Techniques and Associated Problems of Admissibility",[68] M. A. Dombroff discusses the use of videotape in aviation cases. He points out that two types of videotapes have been used in aviation cases: one which he classifies as a "travelogue" and a second, as an "animation".[69] The first type, the travelogue, takes the trier of fact to a particular location without the need for actually going there.[70] The second type of videotape, the animation, is somewhat more complicated and appears to be a simulation of the moments prior to the crash of an airliner. It combines in one graphic the tape or transcript of the air-ground communications, the readout of the flight data recorder, aviation charts applicable to the circumstances of the flight, and a flight path reconstructed from the personal observations of witnesses as well as computer projection.[71] This type of videotape has been received in evidence in two cases: *In Re: Charlotte Air Crash Disaster* and *In Re: Pago Pago Air Crash.*[72]

As can be seen, the number of applications of videotape to demonstrative proof are limitless. As the adage goes: "a picture is worth a thousand words".

IV. VIEWS BY VIDEOTAPE

It has long been recognized that when an object or place can not be brought into the courtroom, the natural procedure is to go to the place or object and view it there. McCormick defines the taking of a view as the "venturing forth to observe places or objects which are material to the litigation, but which cannot feasibly be brought, or satisfactorily reproduced within the courtroom".[73] The power to order a view has always been a discretionary one. The *Criminal Code of Canada* provides in s. 579(1):

---

64. *Supra* at pp. 216-217.
65. Peters and Wilkes, *supra* n. 4.
66. *Id.* at 361.
67. *Id.* at 361-362.
68. Dombroff, "Innovative Developments in Demonstrative Evidence Techniques and Associated Problems of Admissibility", 45 *Journal of Air Law and Commerce* 139.
69. *Id.* at 141.
70. *Id.*
71. *Id.* at 143.
72. *Id.* at 143; n. 14.
73. McCormick, *supra* n. 38 at 536.

> The judge may, where it appears to be in the interests of justice, at any time after the jury has been sworn in and before they give their verdict, direct the jury to have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom the place, thing, or person shall be shown to the jury, and may for the purpose adjourn the trial.

Similarly, Rule 252 of the *Alberta Rules of Court* provides:

> A party to an action may apply to the court for an order for the inspection by the jury of any real or personal property, inspection of which may be material to the proper determination of the question in dispute.

And Rule 253 provides:

> The judge by whom any action is tried with or without a jury or before whom any action is brought by way of appeal may inspect any property or thing concerning which any question arises in the action.

Rule 517 provides for the taking of a view on appeal in any case where the trial judge took a view. Earlier in this paper[74] certain situations were outlined in which videotapes were used as demonstrative evidence: showing the trier of fact the scene of a crime or accident, demonstrating the use of a piece of heavy equipment, and showing the scene of an air crash in aviation cases. It is true that one alternative mode of proof to videotapes in these instances is testimonial evidence. However, it is more realistic to consider these situations as ones wherein the videotape evidence substitutes for the taking of a view.

The question, therefore, becomes: should the courts allow views to be taken by videotape? The main contrary argument is that the technician recording the view may not provide the trier of fact with the same perspectives or perceptions he might obtain from personally viewing the scene. This argument carries great weight. When personally inspecting the *locus in quo* of a certain crime or accident, the trier of fact sees it with his own eyes. When viewing a videotape of the *locus* the trier of fact sees it through the eyes of another, i.e. the cameraman. The opportunity for slanting the videotape increases if experiments or demonstrations are conducted at the scene. However, the cameraman may be cross-examined on these matters and the trier of fact may judge the weight of the videotape in accordance with this cross-examination.

On the other hand, allowing the videotaping of the scene will provide the trier of fact with "views" in many more cases than it is practicable to conduct them at present. A case in point is *In Re: Pago Pago Air Crash* mentioned in the Dombroff article.[75] There the trier of fact was able to have a better understanding of the structure and location of the airport at Pago Pago than he would have been able to obtain from oral testimony or models. At the same time, the parties avoided the high cost of moving the entire court to American Samoa to take a view of the scene (regardless of how pleasant that might have been). Secondly, there will be no problem in preserving the view in case of appeal. At the present time, if the *locus in quo* changes between the delivery of judgment at trial and the hearing of the appeal, that view will not be available to the appellate court. The use of videotape will correct this difficulty.

---

74. *Supra* at pp. 216-217 and 223.
75. Dombroff, *supra* n. 68.

There is no doubt that the potential exists for abuse in the videotaping of a view. To ensure that the procedure will not be abused, certain safeguards should be employed:[76]

(a) It is essential that the subject matter of the view not be altered materially between the date of the incident and the date of the videotaping.

(b) A view should not be taken without, at least, notice being given to all parties. It is preferable, in civil cases, that all parties be present. In criminal cases, it should be mandatory that the accused be present.

(c) The videotape recording should not be shown at the conclusion of the trial. Rather there should be full opportunity for further testimony with cross-examination after the videotape is shown and prior to the closing statements by counsel.

(d) Experiments and demonstrations may be conducted at the *locus* of the view and videotaped as long as they are not prejudicial in nature. If a party disagrees with the method used in these experiments he should have the opportunity to place his own demonstrations and experiments on the videotape.

If the reader is concerned with the potential abuses in the videotaping of views, he may take heart from the following quotation of Norbert Wiener: " . . . the machine's danger to society is not from the machine itself but from what man makes of it."[77]

V. VIDEOTAPES OF TESTIMONIAL PROOF[78]

To this point we have focused our attention on the use of videotapes as demonstrative evidence. We now turn to the use of videotape recordings in the taping of commission or *de bene esse* evidence and depositions. In the United States, the first videotaped depositions were accepted as evidence in the early 1970's and the first fully videotaped trial took place in Ohio in 1971.[79] Today, videotaped testimony has been used quite extensively in American courts. This has not been so in Canada.

A. *Advantages of videotape recordings*

The advantages in using a videotape to record testimonial evidence have been well documented.[80] The most obvious and probably most significant advantage of videotaped commission evidence is that it allows the trier of fact to observe the demeanor of the witness. The importance of demeanor was noted by Wigmore:[81]

---

76. The following are adapted from Elman, "The Taking of A View", 6 *Ansul* (Pt. 2) 10 at 11.

77. Cited in Eliot, *supra* n. 7 at 721.

78. By the term testimonial proof, we mean evidence which is testimonial in nature but presented outside the courtroom, such as commission evidence or *de bene esse* evidence.

79. "First Videotape Trial: An Experiment in Ohio: A Symposium by the Participants" (1972) 21 *Def. L.J.* 266.

80. McCrystal, *supra* n. 1 at 469-478; McCrystal, "Videotaped Trials: A Primer" (1978) 61 *Judicature* 250 at 253-254; Salvan, *supra* n. 2 at 227-229; Blankenship, *supra* n. 2 at 197-203; Murray, "Use of Videotapes in Preparation and Trial of Lawsuits", 11 *Forum* 1152 at 1157; Murray, "Videotaped Depositions: The Ohio Experience", 61 *Judicature* 258 at 261.

81. 3 *Wigmore* s. 276 (1970 — MacNaughton Revision).

> The witness' personal appearance is desirable because the jury may well be influenced in judging his credibility by seeing and hearing him in person. [It enables the jury] to note the readiness and promptness of a witness' answers or the reverse; the distinctness of what he related or lack of it; the directness or evasiveness of his answers; the frankness or equivocation; the responsiveness or reluctance to answer questions; the silences; the explanations; the contradictions; and the apparent intelligence or lack of it.

Therefore videotaped commission evidence is most important in those cases in which the credibility of the witness is critical. Furthermore, a videotape recording would relieve the boredom associated with listening to the reading of the transcript of the commission evidence.

Another advantage of videotaped evidence is that it provides judge, jury, and counsel with a considerable saving of time. In the first pre-recorded videotaped trial five days of testimony was condensed into two hours and forty minutes. Rulings on evidentiary matters can be done in advance, thereby eliminating interruptions during the testimony.

There is less chance of reversible error in the conduct of the trial at least in regard to those portions which are pre-recorded. The trial judge will be able to ponder any objections prior to the trial and will not be forced to make hasty rulings. Furthermore, the fact that the tape can be edited without cutting or splicing means that when an objection is overruled the trier of fact need never see or hear the objection. Similarly when an objection is sustained, the impugned evidence may be removed so that the jury will not be exposed to it. Finally, as the jury will not hear anything they are not supposed to, there will be no need for complicated jury instructions requesting them to carry out superhuman psychological gymnastics.

As well, there may be a cost saving, in having an expert testify on videotape rather than in person. Although it is true that more people will have to travel in order to obtain the evidence of the expert, the extra costs will be made up in the amount saved by not having the expert travel to the city of the trial and wait until he is called to testify. In some cases the court will take the testimony of the expert whenever he is available. Videotape may assist in this regard as well. Videotape will allow the court to use the expert's testimony at the most appropriate time, thereby keeping the evidence in logical order and making the jury's task that much easier. Finally, as the cost of videotape equipment becomes more reasonable, it may be less expensive to videotape commission evidence than to have it stenographically recorded.

With videotapes there is no need to wait a lengthy period of time for a transcript. The tape is ready for instant playback. Testimony taken in the evening can be played for the court the next morning. This provides counsel with greater flexibility in presenting the case.

A major advantage of videotaping commission evidence is that the witness may make effective use of x-rays, graphs, charts, maps, or demonstrations during his testimony. All of these aids to testimony are recorded for the trier of fact with the commission evidence. With stenographically recorded commission evidence, of course, this would be virtually impossible. Furthermore, by using a zoom lens, the trier of fact may be better able to appreciate an x-ray on videotape than if it were presented in the courtroom.

The greater number of witnesses that are pre-recorded, the easier is the lawyer's task in preparing his opening and closing statements. Fur-

thermore, if a good deal of the evidence in a particular case is pre-recorded, the lawyer will have an easier time in preparing his client to testify. Indeed, lawyers are making use of videotape recorders to prepare their clients to testify in court. The client is examined and cross-examined by the lawyer and this is recorded on videotape. Then it is played back for the client and the lawyer points out the errors he has made in his testimony.

There is little chance of altering the videotape recording. This is so because the tape can be time coded by always having a digital date and time clock in the picture. Furthermore, as copies can be made almost instantaneously, all parties can have their own copy of the tape prior to any tampering being possible.

A tape of good quality will actually cut down on jury distractions and focus attention more closely on the evidence presented in the case.

B. *Disadvantages of videotape recordings*

Videotape is not without its detractors, however. In the author's view, the criticisms may be divided into three categories. The first is composed of those criticisms which center on the production and presentation of the videotape. The playing of the tape results in eye-strain for the trier of fact. The remedy for this is to have periodic recesses so that jurors can rest their eyes. Bad camera work is distracting. Therefore, do not use incompetent cameramen. When the film is made with one camera it is boring. Consequently, two cameras should be used, alternating shots or employing split screens or insets. Extraneous noises can be distracting. The answer to this problem is to ensure that there is no distracting sound during the production or presentation of the videotape. Finally, there is always the possibility of mechanical failure. This is easily remedied by ensuring that the equipment is checked regularly and that a backup unit is available.

The second group of criticisms center on the possibility that the tape will not be an accurate representation of the subject matter. This could occur through camera bias, either conscious or unconscious, at the time of making the recording, or through the malicious altering of the tape following its production but prior to its use at trial. As was pointed out earlier,[82] the potential for abuse is present but safeguards may be taken to cut down on the potential risk. Furthermore, these criticisms apply mostly to the use of videotapes as demonstrative evidence and not to the use of videotapes as pre-recorded testimonial evidence. In the latter case, much of the potential for abuse is eliminated when copies are made immediately for all parties. Time coders also lessen the possibility of abuse.

The third category of criticisms centers on arguments about the necessity of maintaining the litigation process in its present form because of some inherent value or values in the system. These arguments run something like this: the traditional dignity of the courtroom will be disrupted, the role of the trial judge will be usurped, our present system promotes confidence in the decisions of our courts so that individuals are willing to submit themselves to these judgments.[83] It should be noted that

82. *Supra* at pp. 222, 225.

83. For a more complete discussion of this category, *see* Kosky, "Videotape in Ohio: Take 2" (1975) 59 *Judicature* 230.

these criticisms apply mostly to pre-recorded videotape trials and not to the use of videotapes to take commission evidence in what are otherwise live trials. Secondly, it should be noted that if the use of videotape does detract from the dignity of the court then it could possibly be damaging to the system. This point was made by Professor Tribe in discussing the accuracy, appropriateness, and possible dangers of utilizing mathematical methods in the litigation process. Professor Tribe points out that:[84]

> . . . rules of trial procedure in particular have importance largely as expressive entities and only in part as means of influencing independently significant conduct and outcomes. Some of those rules, to be sure, reflect only "an arid ritual of meaningless form", but others express profoundly significant moral relationships and principles — principles too subtle to be translated into anything less complex than the intricate symbolism of the trial process. Far from being either barren or obsolete, much of what goes on in the trial of a lawsuit . . . is partly ceremonial and partly educational as well; procedure can serve a vital role as conventionalized communication among a trial's participants, and is something like a reminder to the community of the principles it holds important.

However, there is no evidence that the use of videotapes in place of stenographically produced transcripts will hold such dire consequences for the litigation process. None of the articles written by those having experience with videotaped evidence indicate such a result from the use of these tapes.

One criticism which must be noted is that it takes much more time to review a videotape than a stenographic transcript. This would provide a major obstacle to the use of videotape to record and preserve trial proceedings for appellate review, but is much less significant in the occasional use of videotape recordings as a substitute for stenographically transcribed commission evidence. The literature is almost unanimous in its support for at least the limited use of videotaped commission evidence and is strongly in support of putting as much of the trial on tape as is possible. If, then, it would be advantageous for the trial lawyer to pre-record commission evidence, what authority exists in Alberta for the use of videotapes in such a manner?

VI. STATUTORY AUTHORITY FOR ADMISSION OF VIDEOTAPE RECORDINGS OF COMMISSION OR *DE BENE ESSE* EVIDENCE

Rule 261(1) of the *Alberta Rules of Court* provides as follows:

> In the absence of any agreement between the parties and subject to these Rules and *The Evidence Act* and any other enactment relating to evidence, any fact required to be proved at the trial of an action by evidence of witnesses shall be proved by examination of witnesses orally in open court.

This Rule must be read in conjunction with Rule 270 which provides for testimonial evidence to be taken out of court. Rule 270 states:

> (1) The court may, in any cause or matter where it appears necessary for the purposes of justice, order a person to be examined upon oath before an officer of the court, or any other person, and at any place whether within or without the jurisdiction.

Therefore, provision is made for the taking of commission and *de bene esse* evidence in any situation where it appears necessary for the purposes of justice. What conditions will satisfy this latter requirement so as to permit a deviation from Rule 261(1)? No indication is given in the *Rules* as to what such a situation might be. However, a number of generally accepted reasons are conveniently summarized in Rule 38(2) of the *British Columbia Supreme Court Rules.* Rule 38(2) states:

---

84. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process", 84 *Harv. L. Rev.* 1329 at 1391-2.

> In exercising its discretion to order an examination under subrule (1) [the same as Alberta Rule 270(1)], the court may take into account
>
> (a) the convenience of the person sought to be examined,
>
> (b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness, or absence,
>
> (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial, and
>
> (d) the expense of bringing the person to the trial.

Rule 275 of the *Alberta Rules of Court* specifies the method by which the recording of this evidence shall be carried out. It states:

> Unless otherwise directed by the order or commission the examination of witnesses shall be by oral questions and the oral questions and the answers thereto shall be reduced into writing and returned with the order or commission.

This Rule is similar to those in existence in other Canadian provinces. For example, Rule 279(1) of the *Ontario Rules of Practice* provides that:

> Unless otherwise directed, the examination shall be upon oral questions to be reduced into writing and returned with the commission; . . .

In Nova Scotia, Rule 32.05(2) of the *Civil Procedure Rules* is almost identically worded:

> Unless otherwise directed by the order or commission the examination of witnesses shall be by oral questions and the oral questions and the answers thereto shall be reduced into writing and returned with the order or commission.

Consequently, the first obstacle which must be overcome by a party in Alberta (and in most other Canadian provinces) wishing to use videotape to record commission or *de bene esse* evidence is the requirement in Rule 275 that the testimony be "reduced to writing". The key to overcoming this problem may be found in the phrase "unless otherwise directed by the order or commission . . . " at the outset of Rule 275. The phrasing of the Rule contemplates the possibility that this type of evidence may be recorded in some other fashion than by reducing it to writing. The Rule also implies that cogent reasons must be offered to the court before it will order the evidence be preserved in some fashion other than by reduction to writing. This, then, is a second obstacle: what arguments must be made to convince the court to allow a deviation from the normal requirements of Rule 275?

One argument comes immediately to mind: if the parties to an action agree that the evidence shall be recorded on videotape, there appears to be no reason why the court should refuse an application for such an order. However, in many cases an application for such an order will be vigorously contested by the opposing party litigant. Under these conditions, what arguments can be made to support an application to take commission or *de bene esse* evidence by videotape? The author offers the following suggestions:

(i) One may argue that the case in question turns upon the credibility of the witness and that demeanor is most important in evaluating that credibility. In these circumstances, it is in the interests of justice that the evidence be recorded on videotape.

(ii) In a case involving commission evidence of an expert, one may argue that certain graphs, charts, x-rays, or demonstrations are an integral part of the expert's testimony and a written transcript would not adequately reflect the importance of this evidence.

(iii) The argument might be made that the commission or *de bene esse* evidence will be quite lengthy. If the trier of fact (particularly a jury) is forced to listen to a long and monotonous reading of a transcript of examination, they will become bored and will undoubtedly cease paying close attention to the evidence. Their boredom will be lessened by a videotape and they will be more likely to determine the case on the merits of the evidence.

(iv) If pressures of time are involved, the argument might be made that a videotape can be replayed immediately while a stenographic record would have to be transcribed. Therefore, in certain instances a videotape recording will save time and avoid the necessity of an adjournment.

Although these are some arguments that might be made in support of an application to have commission or *de bene esse* evidence recorded on videotape, there is a preferable solution to the problem, i.e. to change the rules to provide for videotape recordings of out-of-court testimony. An example of a jurisdiction in which this has been done is British Columbia. Rule 38(10) of the *British Columbia Supreme Court Rules* states:

> Unless otherwise ordered, the deposition shall be recorded by the Official Reporter in the form of question and answer and may be recorded on videotape or film.

The substantial difference between this rule and the Alberta Rule 275 is that, whereas the Alberta Rule possibly allows for the use of videotape recording as a result of the use of the phrase "unless otherwise directed . . . ", the British Columbia Rule expressly authorizes its use. For this reason, the British Columbia Rule is preferable to Rule 275 of the *Alberta Rules of Court.*

At this stage in the discussion, readers may be interested in some of the American rules authorizing videotaped depositions. In the *Federal Rules of Civil Procedure,* Rule 30 (b)(4) provides:

> The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

The rule in Michigan[85] goes further than the Federal rule. Under Rule 315, no motion is required but notice must be given and such notice must state what deposition is to be visually recorded. The Ohio rule[86] goes even further than the Michigan rule in providing for completely pre-recorded trials with agreement of all parties, or, in special circumstances, upon order of the court. In such a case the use of the taped testimony does not depend upon showing the unavailability of the witness. In fact, witnesses are not permitted to testify in person at such a trial. The Michigan rule requires a split screen with a digital clock in the picture.[87] This is to ensure the integrity of the tape and to provide easy reference to parts of the videotape recording as page numbers do in a book.

85. Michigan Court Rule 315.
86. Ohio Superintendant Rule 15.
87. Michigan Court Rule 315.3(2).

All of the literature[88] canvassed by the author indicates that the most liberal rules on this subject are those found in the states of Ohio and Michigan.

Another obstacle to the introduction of videotaped testimonial evidence is found in Alberta Rule 281(1) which provides:

> Unless the examination is taken in shorthand, the deposition shall be signed by the witness and by the examiner or commissioner; but if the witness refuses to sign the deposition, the commissioner or examiner shall sign it.

The following is clear from this rule. First, the witness and/or the commissioner must sign the deposition. Second, videotapes cannot be signed. How to overcome this problem? It cannot be said that videotaped depositions are not subject to Rule 281(1) because nowhere do we find such an exemption for non-stenographic depositions. The reasons for requiring the witness to sign a deposition are two-fold: the witness should verify that the deposition is an accurate transcription of his testimony, and acknowledge the deposition as completed and as his own. The very nature of videotapes negates the first reason for verification. However, an unviewed and unsigned videotape does not eliminate the requirement that the witness must adopt the deposition as complete and as his own. Therefore, in logic as well as in law, some method must be found to put a signature on the videotape. Kornblum suggests that a videotape "can be signed by a witness by placing his signature on a sticker which is affixed to a sealed videotape reel or cassette".[89]

One final matter must be dealt with under this section of the paper. Rule 282 of the *Alberta Rules of Court* states:

> (2) Unless the court otherwise orders, when the examination is taken pursuant to a commission, the examination or certified copies thereof shall be given in evidence, saving all just exceptions.
> (3) Unless the court otherwise orders, when examination is taken pursuant to Rule 270(1), the examination or certified copies thereof may be given in evidence upon proof of the unavailability of the witness examined, or upon any other just cause being shown.

The author submits that one must assume that where an order has been made pursuant to Rule 275 to have the evidence recorded on videotape, Rule 282(2) and (3) will apply to such videotape recordings as it does to a stenographically produced transcript and no question should be raised as to its admissibility at trial, save for "all just exceptions".

British Columbia has expressly provided for the admissibility at trial of videotaped depositions. Rule 40(20) of the *British Columbia Supreme Court Rules* states:

> A transcript, videotape, or film of a deposition under Rule 38 may be given in evidence at the trial of any party. Notwithstanding that the deposition of a witness has or may be given in evidence, the witness may be called to testify *viva voce* at trial.

Rule 40 goes on to provide:

> (21) Where a videotape or film of a deposition is given in evidence pursuant to subrule (20), a transcript of the deposition may also be given.
> (22) ... A videotape or film of a deposition may be presented as evidence without proof of its accuracy or completeness but the court may order such investigation as it thinks fit to verify the accuracy or completeness. A videotape or film given in evidence shall become an exhibit at trial.

---

88. *See for example*, Blankenship, *supra* n. 2; Brennan, "Videotape—The Michigan Experience" (1972) 24 *Hastings L.J.* 1; Kornblum, "Videotape in Civil Cases" (1972) 24 *Hastings L. J.* 9.

89. Kornblum, *supra* n. 88 at 25.

Although the author is not in entire agreement with all of the specifics in these provisions, he does support the proposition that the rules should expressly provide for the reception into evidence of videotaped depositions.

VII. CONCLUSION

Two other cases may be of interest to the reader. The case of *Kansas City* v. *McCoy*[90] was a largely unremarkable prosecution for a violation of a municipal ordinance prohibiting the possession of marijuana. What distinguishes this case is that it utilized closed circuit television to take the testimony of a chemist in a laboratory twelve miles away from the courthouse where the rest of the evidence was heard.[91] The judge, counsel, and defendant were, quite naturally, located in the courtroom and from there examined, cross-examined, watched and listened to the witness. The defendant appealed his conviction on the basis that the chemist's testimony violated the defendant's constitutional right to confront the witness. In denying his appeal, the Missouri Supreme Court held:[92]

> While Dr. Yoong was not physically in the courtroom, his image and his voice were there; they were there for the purpose of examination and cross-examination of the witness as much as if he were there in person; they were there for the defendant to see and hear and, by the same means, simultaneously for him to be seen and heard by the witness; they were there for the trier of fact to see and hear and observe the demeanor of the witness as he sat miles, but not much less than a second, away, responding to questions propounded by counsel.

The case of *Merritt-Chapman & Scott Corporation* v. *United States*[93] involved a routine contract dispute in the United States Court of Claims. However, the intriguing aspect of this case is that "it was the first remote video argument of an appellate case . . . ".[94] In this case the counsel were located in New York while the court sat in Washington, D.C., approximately 200 miles away. The argument took place over a video telephone, a regular commercial service between the two cities.

In Phoenix, Arizona a network using video telephone was set up to serve the criminal justice system. Units were set up in the courtrooms, judges' chambers, prosecutor's and public defender's offices, holding cells, police stations, and probation offices.[95] The network is used for arraignments, pre-sentence interviews with persons in the cells, conferences between accused and public defender's office, oral argument on pre-trial motions, prosecutor's conferences with police witnesses, testimony in both preliminary hearings and the trial proper.

As the above clearly demonstrates, the possibilities for the use of video recorders and closed circuit television in the justice system are

---

90. 525 S.W. 2d 336 (1975).

91. It should be remembered that closed circuit television was apparently used in *Teno* v. *Arnold* to show the tape of Diane Teno's daily existence. *See supra* n. 41 and accompanying text.

92. *Supra* n. 90 at 339. For an interesting comment on this case *see* Tussey, "Propriety of Allowing Absent Witnesses to Be Examined Over Closed Circuit Television", 80 *A.L.R.* (3d) 1212.

93. 528 F. 2d 1392 (1976).

94. Weis, "Electronics Expand Courtroom's Walls" (1977) 63 *A.B.A. Journal* 1713.

95. Eliot, *supra* n. 7.

limitless. One can readily envision chambers applications utilizing video telephones, appeal arguments directed to the Court of Appeal by lawyers in rural areas on closed circuit television, arraignments in criminal matters, speaking to the list, applications for leave to appeal to the Supreme Court of Canada and so forth. The usefulness of these devices in the administration of justice cannot be seriously questioned.

Video technology has advanced rapidly in the past twenty years. Courts in the United States have adopted this technology and are using it quite extensively at this time. The mixed media trial is no longer a fantasy of the future. It is a reality of today. Lawyers in Canada will no longer be able to ignore this revolution. They will either join it or be swept away by it.