



# A Trial at Trial

A look at *voir dire*s for determining the admissibility of surveillance videotapes

By Elliott Goldstein

**Q** What is a *voir dire* and how does it relate to the use of surveillance tapes as evidence in a court of law?

**A** A *voir dire* is a "trial within a trial" whereby the admissibility of potential evidence is determined. Whether the trial is a jury trial or a non-jury trial, the trier of law (always the judge) must decide what evidence should be given to the trier of fact (the jury, or the judge if there is no jury).

*Voir dire*s are always held with the jury absent from the courtroom. If the evidence is not admitted, the jury never gets to see it or hear it. Its existence cannot be the subject of comment in open court or a mistrial will be declared.

For example, in the Just Desserts Café<sup>1</sup> case, on *voir dire*, the court considered the admissibility of a timelapse surveillance videotape taken of the facial images and movements of the four perpetrators of the homicide of Georgina Leimonis and the related robberies at the Just Desserts Café in Toronto, Ontario. The homicide was not shown on the tape, but the tape did show the perpetrators entering the restaurant and "the events leading up to and following the shooting of Ms. Leimonis and the departure of the perpetrators. A 24-hour clock is superimposed on the tape to display the time of each aspect of the transaction in hours, minutes and seconds. This videotape was seized during the investigation and examined and copied by the ... Toronto Police Service, the Canadian Security Intelligence Service, the Federal Bureau of Investigation, the Ontario Provincial Police and Pathlight Video Inc."

The Crown intended to tender at trial all of these tapes and some related still photographs generated from them to prove the identity of the perpetrators as Lawrence Augustus Brown, O'Neil Grant and Gary Francis. The evidence was also offered for use by the jury in its comparison of the images of the perpetrators shown on the videotapes with the appearances of the accused in court. The Crown attorneys also intended to call witnesses familiar with the accused who would, after seeing the tapes, identify them as the perpetrators.

During the *voir dire*, the defence objected to the admission of the tapes and still photographs to prove the identity of the perpetrators on the basis that the tapes were, allegedly, of poor quality. Also, the defence wanted the videos, photos and opinion evidence (of witnesses identifying the accused as the perpetrators) excluded because "the prejudicial effect of this evidence exceeded its probative value."

The defence argued the opinion evidence alone should not be admitted because the witnesses cannot state "with particularity the physical features of the accused relied upon in the formulation of their opinions. Nor, it is said by the defence, can these (opinion) witnesses show where and how any such features are shown on the videotape or still photographs."

Justice Brian Trafford of the Ontario Court of Justice considered the following issues at the *voir dire*:

Firstly, what is the test governing the admissibility of the videotapes and the still photographs?

"The videotapes are admissible if they accurately and fairly present the information they purport to convey. Ordinarily, the verification of the videotapes may be proven by the testimony of a person who was present during the events and who testifies the videotape accurately depicts them. It may also be established by testimony relating to the installation of the camera,

the recording process, the continuity of the original tape and the processes subsequently used to render the informational component more visible and to prepare the still photographs. See Goldstein, *Visual Evidence: A Practitioners Manual*, Volume 1 at pages 2-3 to 2-14, Carswell, Toronto, 1991.

"Accordingly, in the circumstances of the Just Desserts Café case, the testimony concerning the installation of the camera and the attempts by persons to improve the quality of the images of the perpetrators shown on the videotapes is admissible. Similarly, the testimony of Professor Mann, an expert on image processing concerning the incidence of tonal, spatial and temporal distortion in these videotapes is admissible at the initiative of the defence. All of this evidence may be called as *viva voce* (that is, oral) testimony.

"However, as the critical issue on the *voir dire* is the clarity and fairness in the presentation of the images of the perpetrators on the videotapes, I decline to hear the testimony of ... patrons in the restaurant. Their testimony relates to the entry of the perpetrators, the movement of persons in the restaurant, the use of a gun, the robberies of the patrons, the shooting of Ms. Leimonis and the departure of the perpetrators. It is of slight probative value on the critical issue for the court on the *voir dire* — the accuracy and fairness of the videotapes insofar as they are tendered on the issue of identity....

"The frailty of the opinions of the patrons or anyone else who identifies the accused as the perpetrators is not otherwise relevant on the *voir dire*. The calling of this evidence either as *viva voce* evidence or in the form of witness statements, 'will-say' statements or prior testimony would proliferate legal and factual issues and lead to an undue consumption of court time. The testimony of the patrons and lay opinion witnesses is, accordingly, not admissible on the *voir dire*."

Secondly, is the evidence of the frailty of the opinion witnesses, including the testimony of the identification witnesses, the forensic anthropologist, the expert on image processing and the witnesses who have identified third persons as the perpetrators, admissible on the *voir dire* at the initiative of the defence?

"The evidence preferred by the defence on its application to prove the frailty of the videotapes — ... an expert in forensic anthropology, ... an expert on image processing, and ... an employee of the MTPS who could not perform a computerized comparison between the videotapes and the known photographs of the accused because of the diminished quality of the videotapes — is admissible.

"It may be called as *viva voce* testimony. Similarly, the frailties of the testimony of the witnesses who, after looking at the videotapes, identify the accused as the perpetrators may

be proved. This evidence may be tendered through witness statements, 'will-say' statements or transcripts of prior testimony of these witnesses — they may not be called to give *vi-va voce* testimony, as, in my opinion, it is not necessary for the proper presentation of the application by the defence. However, the testimony of other witnesses for the defence who have looked at the videotapes and identified persons other than the accused as the perpetrators is not admissible. Their opinions are not relevant to a determination of the potential probative value of the evidence called by the Crown. While such evidence may be admissible at trial for the purposes of raising a reasonable doubt on the identification of the accused or otherwise diminishing the weight to be given to the evidence tending to identify such an accused, it does not have a sufficient logical nexus to the issues of the application to warrant its admissibility on the application."

So the critical issue for a court on the *voir dire* is the accuracy and fairness of videotapes as they are tendered on the issue of identity. Therefore, the court may hear defence evidence on a *voir dire* to prove the frailty of the tapes, including the frailties of the testimony of witnesses who, after looking at the tapes, identified the accused as the perpetrators. 🍁

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### Author's Note

- 1 This and all quotes taken from *R. v. Brown* [1999] O.J. No. 4864 and *R. v. Brown* [1999] O.J. No. 4865 (Ont. Crt. J. per Trafford, J.).

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# Contents

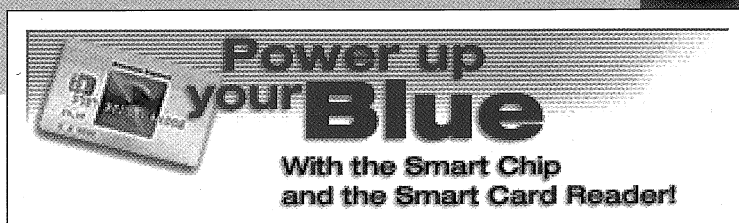
March 2001 Volume 23 Number 2

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**Security**  
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- 16**      **Turning Blue**  
A look at the new BLUE smart card that has been introduced by American Express  
*By Bonnie Toews*
- 18**      **Disaster Recovery**  
How emergency services providers deal with the aftermath of tragedy witnessed while on the job  
*By Stacey Hunt*
- 22**      **2001 Showcase of New Products**  
The results of *Canadian Security's* 17th annual Showcase of New Products event



page 18



page 16

## In Each Issue

- |   |   |   |
|---|---|---|
| <b>4</b> <b>Editor's Notebook</b><br>Maintaining Staying Power  | <b>14</b> <b>On Course</b><br>An Issue of Credibility<br><i>By Matthew L.O. Certosimo</i> | <b>34</b> <b>Literature Request Directory</b>   |
| <b>6</b> <b>Industry Updates</b><br>Combating retail theft; new risk reporting and management tool; employee fraud survey results; and more                                       | <b>28</b> <b>Advertisers' Index</b>   | <b>35</b> <b>Product Marketplace</b>  |
| <b>12</b> <b>Alarm Industry News</b><br>New chip and Web transmitter hit market; benefiting hospitality and entertainment; advanced access control and alarm monitoring; and more | <b>30</b> <b>CCTV and the Law</b><br>A Trial at Trial<br><i>By Elliott Goldstein</i>      | <b>36</b> <b>People on the Move</b>   |
|   | <b>32</b> <b>The Law in Brief</b><br>Assault With a Catch 22                              | <b>34</b> <b>Q&amp;A</b><br>Reading the Cards<br>A frank discussion with Smart Card Project Director of Policy and Stakeholder Relations Barry Goodwin on the Ontario government's new initiative |