



# Videotaped re-enactments of Crimes

by Elliott Goldstein B.A., LL.B.

*The accused made two inconsistent statements to the police about the way in which his late wife met her untimely death at his hand. The inconsistencies caused confusion; should a charge of murder or manslaughter be laid? The police cleverly suggested videotaping the accused re-enacting the events leading up to the death. On advice of his lawyer, the accused consented to the videotape.*

One officer videotaped the scene while the other officer played the part of the accused's wife. The accused directed the action, telling the story of the incident and motioning to the officer how and where he should stand. The accused's lawyer was present at the re-enactment.

After viewing the videotaped re-enactment, the Crown laid the lesser charge of manslaughter. The videotape was admitted and shown at trial on consent of both Crown and defense counsel. All of the police officers involved in the re-enactment testified at trial. The officer in possession of the videotape testified at trial that there was no tampering with the videotape and that the safety tab on the cassette was removed so that the videotape could not be erased, edited, or otherwise tampered with.

The accused was convicted of manslaughter and sentenced to four years<sup>2</sup>.

Videotaped re-enactments of crimes have been admitted in numerous Canadian criminal cases. For example, in *R. v. Simeon*<sup>3</sup>, the accused, charged with the murder of his nephew, claimed that he was acting in self-defence when he killed his attacker. The accused agreed to re-enact the killing on videotape to support his defence. Prior to the re-enactment, the police gave the accused a Charter warning as well as a modified police warning encompassing the re-enactment wherein the accused was told that he need not participate in the re-enactment if he did not want to do so. The police videotape showed the accused acting out his movements and directing a police officer to move and react as did the victim. At Simeon's trial the videotape was admitted as part of a series of statements that formed the accused's confession.

Some videotaped re-enactments include a view of the crime scene. In *R. v. Duffy*<sup>4</sup>, the accused, charged with "dangerous driving" tendered a videotape that he prepared shortly before his trial. The videotape contained the accused's reconstruction of the events surrounding the motor vehicle accident. The videotape was admitted by the trial judge who commented, "when a witness testifies to past events, he is, in fact, describing those events as they appear pictorially in his memory. If those same events can be captured pictorially on a video tape, reflecting faithfully those pictures which the memory retains, then the former (i.e., the videotape), it seems to me, are but a physical extension of the latter (i.e., the memories)."

The trial judge was quick to caution that such videotape evidence "must be received only extremely cautiously. The Court must be satisfied that all that is illustrated in the pictorial reconstruction or seen in the video tape is a true and accurate representation of events as they are purported to have occurred, having regard particularly to speeds, distances, weather conditions, topographical peculiarities, to say nothing of season of the year, and all those other factors which bear on the event in question. Furthermore, such evidence cannot be considered as being conclusive of the events depicted, since it is merely a reflection thereof, just as is a viva voce memory recall."

It is extremely important that the accused be advised of his right to counsel [Charter section 10(b)] prior to the videotaping. This is well illustrated in the 1987 case of *R. v. Nugent*<sup>5</sup>. The accused was convicted, at trial, of second degree murder. At that trial, a videotape of an alleged re-enactment of the killing by Nugent was admitted into evidence. This videotape, prepared by the police, became the basis of the Crown's case against Nugent and, ultimately, the basis of his conviction.

On May 10, 1988, in a four-to-one decision, the Nova Scotia Court of Appeal allowed Nugent's appeal of his conviction, set the conviction aside, and entered an acquittal. The majority of the Appeal Division ruled that the video evidence was not obtained freely and voluntarily from Nugent, that it was obtained in violation of his right to counsel, and therefore, its admission into evidence brought the administration of justice into disrepute.

In conclusion, videotaped re-enactments are very effective tools for the prosecution for the following reasons:

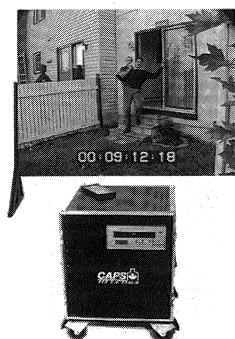
1. The trier of fact (i.e., jury or judge, if sitting alone) is able to observe the accused and assess his or her demeanour as he or she discusses the crime.
2. The re-enactment may demonstrate the accused's complete recall of events and therefore, make it difficult for him or her to recant any part of his statement at a later date.
3. The re-enactment may show the methodical way in which the crime was committed and this includes the demonstration as to how the accused killed his or her victim.
4. The re-enactment may assist the prosecution's theory by showing the impossibility of some of the accused's claims when they are considered in light of other physical evidence.

Like other forms of videotape evidence, videotaped re-enactments are becoming more popular. Future articles will discuss other uses for videotape evidence including videotaped sobriety tests of suspected impaired drivers. Stay tuned!

## Foot Notes

2. See *R. v. Steen*, (June 6, 1984, New Brunswick Q.B.) unreported decision of Hoyt, J., briefed in *Visual Evidence: A Practitioner's Manual* (Toronto: Carswell, 1991), at 21-11.
3. *R. v. Simeon* (March 1986, Alta. Q.B.) unreported decision of O'Leary, J., appeal by Crown dismissed (1987), 75 A.R. 161 (Alta. C.A.).
4. (1987), 49 M.V.R. 214 (P.E.I. S.C.).
5. 63 C.R. (3d) 351, 84 N.S.R. (2d) 191, 213 A.P.R. 191, 42 C.C.C. (3d) 431.

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Elliott Goldstein, B.A., LL.B. is a Toronto area lawyer who practices civil and commercial litigation and consults to the security industry.

Mr. Goldstein's latest book entitled *Visual Evidence: A Practitioner's Manual* was published in 1991

by Carswell Legal Publishers. It is now two volumes and contains chapters on the law of video surveillance of criminal suspects, casino surveillance, and video conferencing.

For more information or feedback call  
(905) 709-3936; fax (905) 709-3844  
email: elgold@shaw.wave.ca.  
Web site: www.tor.shaw.wave.ca/~elgold/

**- Editor / Publisher -**

Morley S. Lymburner

Phone (905) 640-3048 - Fax (905) 640-7547

E-mail: [blueline@blueline.ca](mailto:blueline@blueline.ca)WEB PAGE: [www.BlueLine.ca](http://www.BlueLine.ca)**- News Editor -**

Blair McQuillan

**General Manager**

Mary K. Lymburner, M.Ed.

**- Advertising -**

Mary Lymburner (Director)

Phone (905) 640-3048 Fax (905) 640-7547

Helen Stoesz

Phone (519) 251-9625 Fax (519) 251-9626

**- Illustration -**

Tony MacKinnon Steffon Sepa

**- Production -**

Del Wall Blair McQuillan

**- Contributing Editors -**

Ballistics & Firearms      Manfred Benton  
Police Leadership      Robert Lunney  
Survival Tactics      Joel Johnston  
Tactical Firearms      Dave Brown  
Case Law      Gino Arcaro  
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**- Contributing Writers -**

Christor Lundmark      Hal Cunningham  
Lori Chalmers Morrison      Blair McQuillan  
Paul Henry Danylewich      Dave Brown  
Elliott Goldstein

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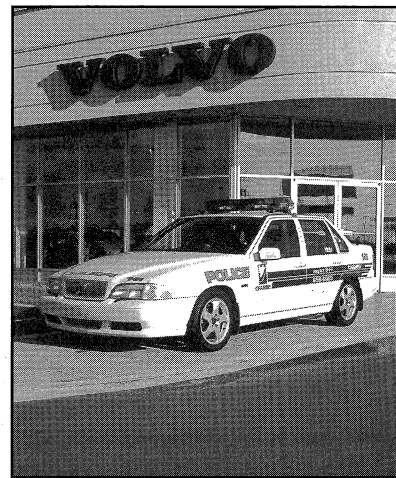
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# BLUE LINE

Canada's National Law Enforcement Magazine

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This month is our annual automotive edition and thanks to the people at VehiTech we have one of the more innovative police vehicles in Canada gracing our front cover.

When first introduced to the Canadian law enforcement community the European designed Volvo was seen as a curiosity piece. Due to the efforts of VehiTech this vehicle, well known for its style, durability and safety record, has now become an operationally functional state-of-the-art police vehicle.

Long recognized by police forces in Europe the Volvo is coming on strong in popularity with many Canadian and U.S. police agencies. This vehicle was presented for comparative testing at the Michigan State Police trials held outside Detroit last September and it surprised everyone with its results on the track. It was the only vehicle in its class that consistently came within the top two ratings of every category tested.

In this issue you will read more about the Volvo on page 6 and the patrol vehicle results of the Michigan State Police trials can be found on page 8.

All of us here at Blue Line Magazine would like to thank our readers for their loyal support over the past 10 years and we would like to wish you all a Merry Christmas and a Happy New Year.

