

# Videotaped Sobriety Tests

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

Videotaping sobriety tests of suspected impaired drivers has occurred for many years in Canada<sup>1</sup>. As early as 1976, police were videotaping sobriety tests of accused persons at police headquarters<sup>2</sup>. For example, in *R. v. Gooder*<sup>3</sup> the British Columbia Provincial Court viewed a videotape recording of a sobriety test performed by an allegedly impaired driver. When convicting the accused, the trial Judge said that the videotape evidence was "the frosting on the cake." In the 1978 British Columbia case of *R. v. Dunn*<sup>4</sup> a videotape of the sobriety test of a suspected intoxicated suspect was admitted to supplement the evidence of the arresting officer as to the condition of that suspect at the time of the alleged driving offence.

The videotape of the accused's sobriety test was tendered in court to supplement the arresting officer's evidence as to the condition of the accused at the time of the alleged offence. The videotape showed the accused "performing" some basic balance tests (e.g., walking a straight line). The presiding Judge ruled as follows:

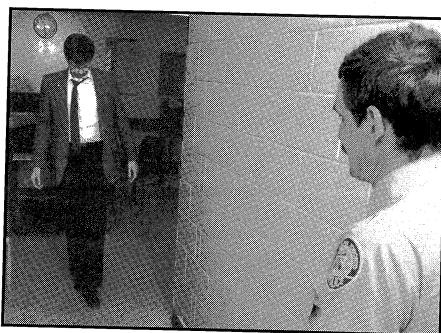
"First of all I would like to deal with Count 1, the impaired driving charge. I must say that the video tape that was introduced in this case was of great assistance to me. From listening to the evidence in totality and from observing Mr. Dunn (the accused) on the video tape, I have come to the conclusion that his ability to drive a motor vehicle was not impaired within Section 234 and I therefore dismiss Count 1 ..."

On the issue of voluntariness, the judge remarked<sup>5</sup> "I can only say that the presence of the videotape equipment is not oppressive and the fact that this conversation took place in a long hallway, which is not very wide, the officer gave me the dimensions in the course of the hearing, I think he said something like five to six feet wide. It is not oppressive and I find that the conversation is a voluntary one even though it was videotaped."

The trial judge treated the sound (*audio*) portion of the videotape as if it contained the accused's confession. The trial judge focused on the issue of the voluntariness of the accused's statement and determined whether there was any oppression — a ground for rejecting a confession. The Court held that neither the presence of the videotape equipment nor the environment in which the conversation took place was oppressive.

The *Dunn* case demonstrates that playing a videotape recording of the accused's sobriety test at trial does not always result in a conviction. The Judge may acquit on the basis that the accused's judgment does not appear impaired.

This is well illustrated in the 1980 British Columbia case of *R. v. Layton*<sup>6</sup>, wherein the Crown tendered a videotaped sobriety



test of an allegedly impaired driver with the consent of his defence counsel.

"It was the Christmas season and the accused, a 'businessman', dined at a Vancouver restaurant where he consumed three glasses of wine with his dinner. Just after midnight on December 22, 1979, while on his way home, he was stopped by police at a "CounterAttack" roadblock<sup>7</sup>. The police took him to the police station and demanded he take a breathalyzer test but the accused refused because he was "tired and annoyed at the long delay" (seventy minutes since he was stopped by the police). Instead, he performed some sobriety tests — walking heel to toe down a line, touching his finger to his nose, and standing on one foot — for a videotape camera. The accused was charged with having care and control of a vehicle while impaired and with failing to blow into the breathalyzer."

Defence counsel explained his reason for consenting to the admission of the videotaped sobriety test at trial<sup>8</sup>:

"It is unique that video evidence was used and your Honour had the benefit of seeing for yourself how my client acted at the time. The fact is that the video was most beneficial to my case. Not only is there no evidence of impairment, there is abundant evidence of sobriety."

The trial judge commented<sup>9</sup>:

"The case commenced yesterday with the testimony of Constable Kleeband, who is a credible witness, as well as the video evidence that was tendered. [The accused] completed certain physical tests, both at the scene and at 312 Main Street (i.e., the Vancouver Police Station), and he did some of them reasonably well, and he did some of them poorly. There is no way I can find a consistency, or a constant threat of impairment running through that unless I just allow my subjective bias to decide the issue. That is, just look at him, as I might, for this first occasion, including yesterday, and the view of him on video. He performed on the video reasonably well, not, certainly, as well as the police officer, who performed meticulously all of the physical tests that he asked the gentleman (the accused) to do, but nevertheless, he was cogent, he spoke with the officer. He was civil, co-operative. Those are not generally the *indicia* of intoxication.

"I think Mr. Layton is a very able adversary in the system and very able to cope with

exigencies (i.e., needs or necessities) as they arise, and not like most people who will generally allow their condition to expose itself.

"What I'm saying is, although I may be very suspicious that Mr. Layton was impaired at the time and probably over .08, my views are only suspicions and Mr. Layton was one of the rare individuals who can perform adequately in an emergency and he certainly stood himself in good stead on this occasion, and was supported by the good luck that the roadblock was being moved at the time and the BATmobile<sup>10</sup> was being taken elsewhere. For those fortuitous reasons, I am obliged to dismiss both counts.

This case clearly demonstrates that a videotape of a sobriety test of an impaired driver is a double-edged sword: it can be used by the prosecution to prove impairment or by the defence to prove sobriety.

Future articles will discuss other uses for videotape evidence including recording views of crime scenes. Stay tuned!

1. Section 253 of the Canadian Criminal Code makes it an offence to "operate a motor vehicle or vessel or operate or assist in the operation of an aircraft or of railway equipment or have care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not, (a) while the person's ability to operate the vehicle, vessel, or aircraft or railway equipment is impaired by alcohol or a drug;."
2. *R. v. Thibeau*, February 26, 1976, (B.C. Prov. Ct.), unreported decision of Cliffe, J., cited in Goldstein, E., "Visual Evidence: A Practitioner's Manual" (Toronto: 1991, Carswell Legal Publications), at section 29.8 (hereinafter VEPM).
3. *R. v. Gooder* (November 3, 1978, B.C. Prov. Ct.) Vernon Registry No. 78- 02102, unreported decision of Ellis, J. cited in VEPM.
4. (1978, B.C. Prov. Ct.), Vernon Registry No. 78- 02047, unreported decision of Behncke, J. cited in VEPM.
5. *Ibid.* 6. (May 17, 1980, B.C. Prov. Ct.), Vancouver Registry No. 94242, unreported decision of Craig, Prov. Ct. J. cited in VEPM.
6. British Columbia's CounterAttack Program was instituted to combat drinking driving.
7. Needham, P., "Videotape helps clear driver of charges" (May 17, 1980), *The Vancouver Sun*.
8. Excerpt from Proceedings at Trial, May 16, 1980.
9. BATmobile - Breath Alcohol Tester mobile.



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