

USING VIDEOTAPE TO PRESENT EVIDENCE IN CIVIL PROCEEDINGS

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A. Introduction

The use of videotape to present evidence in Canadian civil proceedings is steadily increasing. This increased use is due to advances in video technology which have decreased the size,

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weight, and cost of video equipment, and the adoption of new rules of court which permit the recording of evidence on videotape.

In Canada, videotapes have been tendered in civil cases¹ to present depositions of witnesses,² day-in-the-life documentaries of disabled plaintiffs,³ surveillance of suspected malingering plaintiffs,⁴ views,⁵ and medical demonstrations.⁶

The purpose of this article is to discuss the various uses for videotape in the presentation of evidence and the legal issues arising therefrom.⁷

B. Admissibility and Weight

The admission of a videotape is governed by the same rules that apply to a photograph or motion picture film. The admissibility depends upon its:

- (1) relevancy and materiality to the issue in the case;
- (2) accuracy in truly representing the facts;
- (3) fairness and absence of any intention to mislead; and
- (4) verification on oath by a person capable to do so.⁸

The accuracy and fairness of a videotape can be proved by anybody who is able to attest to those qualities.⁹ The authenticating witness need not be the video-camera operator. He may be (a) a person present at the time the videotape was recorded (e.g., an eye-witness), (b) a person qualified to state that the representation is accurate, or (c) an expert witness.¹⁰ Who is called to

¹ Its use in criminal cases is discussed in E. Goldstein, "Video-tape in criminal courts: A review and update", 6 *Criminal Lawyers' Association Newsletter* 6 (Dec. 1984).

² *Quinn v. Hurford* (1978), 5 B.C.L.R. 375, 6 C.P.C. 216 (S.C.).

³ *Teno v. Arnold* (1974), 7 O.R. (2d) 276, 55 D.L.R. (3d) 57 (H.C.J.), *var* 11 O.R. (2d) 585, 67 D.L.R. (3d) 9 (C.A.), *var* [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 3 C.C.L.T. 272.

⁴ *Guy v. Trizec Equities Ltd.* (1978), 85 D.L.R. (3d) 634, 26 N.S.R. (2d) 1, 40 A.P.R. 1 (S.C. App. Div.), *revd* [1979] 2 S.C.R. 756, 99 D.L.R. (3d) 243, 32 N.S.R. (2d) 345 and *Smith v. Avis Transport of Canada Ltd.* (1979), 35 N.S.R. (2d) 652, 62 A.P.R. 652 (S.C. T.D.).

⁵ *Short v. Canada Life Assurance Co. of Canada*, Action No. C81-2397, New Westminster Registry, a trial before Hinds J. in New Westminster, B.C., commencing October 24, 1983.

⁶ *Lunnon v. Reagh* (1978), 25 N.S.R. (2d) 197, 36 A.P.R. 197 (S.C. App. Div.).

⁷ The technical factors affecting admissibility are discussed in E. Goldstein, "The admissibility of and weight given to motion picture and videotape evidence in Canadian courts", 45 *Sask. L. Rev.* 319 (1981).

⁸ *R. v. Maloney (No. 2)* (1976), 29 C.C.C. (2d) 431 (Ont. Gen. Sess. Peace).

⁹ *R. v. Lorde and Johnson* (1978), 33 N.S.R. (2d) 376 (Co. Ct.).

¹⁰ *R. v. Bannister* (1936), 66 C.C.C. 38, [1936] 2 D.L.R. 795, 10 M.P.R. 391 (N.B.S.C.).

authenticate a videotape goes to the issue of its weight, not the admissibility of the videotape.¹¹

In addition, the probative value of the videotape's contents must outweigh its prejudicial effect; otherwise it may be excluded even though relevant.¹² If the videotape tendered is of little probative value and would serve only to inflame the mind of the jury, the trial judge may, in his discretion, exclude it.¹³

When reading the next two sections it is very important to distinguish between videotape as a *form of demonstrative evidence* (e.g., day-in-the-life documentary) and videotape as *used to record testimony* (e.g., deposition). In the former case, "the 'rules' to be observed are the well-settled principles of appropriate foundation and probative value. In the latter, its use is generally dictated by statute or court rule, and as such has taken on a quilt pattern as courts and legislatures try to discover what safeguards have to be observed in its use."¹⁴

C. Videotape as Demonstrative Evidence

The most common use of videotape as demonstrative evidence is to record *ex parte* events which have happened by design (e.g., reconstruction, experiment, demonstration), or by chance (e.g., accident). Examples of events in the former category, which can be recorded, include a day-in-the-life of a disabled plaintiff, the operation of industrial equipment, and the testing of allegedly defective consumer products. Examples of events in the latter category which can be recorded include the actual occurrence or aftermath of an accident (e.g., automobile, rail, aircraft or marine) or natural disaster (e.g., fire or flood).

Ex parte events are those in which only one party to the litigation is involved. When a recording is made of an *ex parte* event it may or may not contain the narrative of a witness to that event. There is no cross-examination of that witness on the videotape. Instead the witness is called to testify at trial and is then cross-examined by opposing counsel.

App. Div.) and *R. v. Taylor* (1983), 10 W.C.B. 303 (Ont. Prov. Ct.).

¹¹ *Lorde, supra*, footnote 9, at p. 378.

¹² See "bibliography", *infra*, for articles on the judicial discretion to exclude photographic evidence.

¹³ *Draperv. Jacklyn*, [1970] S.C.R. 92, 9 D.L.R. (3d) 264.

¹⁴ Personal letter from Fred Heller, dated August 6, 1984. Mr. Heller edited a handbook on video techniques for the Practising Law Institute: see "Bibliography," *infra*.

If the contents of the videotape recording are self-explanatory, counsel might simply call the video-camera operator who recorded the videotape to authenticate its contents as a true and accurate reproduction of what he saw. However, if the videotape's contents are complex or technical and would be confusing to the trier of fact, expert witnesses might also be called to explain and interpret the events depicted. An *ex parte* videotape can be used not only to illustrate the testimony of a witness but also as the basis upon which an expert could form an opinion and make conclusions.

1. Views

The taking of a "view" by videotape has the potential for being its most popular use because there are so many scenes which cannot be reproduced within the court-room.¹⁵ Videotape can be used to record a "view" of physical objects which, because of their size, weight or immobility, cannot be brought into a court-room.

If the site to be viewed is located in an area accessible only to those specially trained to reach it (*e.g.*, the top of a mountain or the bottom of an ocean), it is unlikely to be viewed unless recorded by a specially trained and equipped video-camera operator. Instead of incurring the high costs and great inconvenience which frequently arise when the entire court is taken to view a scene, a video-camera operator can be dispatched to the scene with instructions to record on videotape the conditions existing at that location thereby saving much time and expense.

A view by videotape minimizes cost, time delay and inconvenience (*i.e.*, scheduling problems) associated with the taking of a view by the trier of fact. It provides a permanent record, enables repeated viewings if necessary, and affords an appellate court the same access as had the trier of fact to the view. In this way videotape "preserves" the view in case of appeal.

An objection could be raised to the admission of a videotape used for the purpose of taking a view on the grounds that it does not accurately portray what it purports to depict and what it portrays is not sufficiently similar to the circumstances existing at the pertinent time as to be relevant.¹⁶ "Even if the changes are not

¹⁵ According to *McCormick on Evidence*, 2nd ed. (St. Paul, West Publishing Co., 1972), p. 536, the taking of a view involves "venturing forth to observe places or objects which are material to the litigation".

¹⁶ G. P. Joseph, "Videotape evidence in the courts", in F. I. Heller, *Video Technology: Its*

so great as to warrant exclusion, they may be revealed and emphasized through cross-examination and are matters for the jury to consider in assessing the weight to be given the videotape evidence."¹⁷

(a) *By land — terrain view*

Views by land (terrain), sea (marine) and air (aerial) are now possible with videotape. A recent example of a terrain view occurred in the case of *Short v. Canada Life Assurance Co. of Canada*¹⁸ wherein the jury viewed a videotape of a seven-mile logging road and steep mountain knoll used for 4 x 4 driving and hill climbing. The hill claimed the life of the plaintiff's husband. At issue was whether the death was caused "solely by an accident". The case was resolved in favour of the plaintiff, partially on the strength of the videotape.

(b) *By sea — marine view*

Views are not restricted to what may be seen on land. Videotape equipment, in a water-tight housing, can also be used underwater. A recent example of a marine view arose out of an incident in the fall of 1981 when heavy rains caused a bridge to wash out along British Columbia's scenic Squamish Highway and the "M" Creek disaster occurred. A commercial diving company was retained to locate the bodies of the victims believed to be in Howe Sound at the mouth of the Creek. Using a remote-controlled underwater tractor equipped with lights and a video camera, technicians scanned the ocean floor and were able to locate and identify the missing truck and its deceased occupants.¹⁹

A videotape recording was produced using a video feed from the underwater camera. This videotape, which contained a digital display of the depth and location (compass-heading) of the tractor and the time and date the recording was made, was shown at the coroner's inquest into the "M" Creek disaster.

It would have been almost impossible to take the inquest jury to an underwater depth of 65m to see firsthand the scene recorded so easily by the video camera remotely controlled from the safety of a

Use and Application in Law, PLI Handbook #252 (1983), at p. 121.

¹⁷ *Ibid.*, e.g., *Lampley v. Waygood*, 57 Tenn. App. 610, 422 S.W. 2d 708 (1967): accident scene changes go to weight of the evidence.

¹⁸ *Supra*, footnote 5.

¹⁹ See newspaper article entitled "Camera Finds 3 Bodies" which appeared in the November 16, 1981 edition of *The Province*.

launching barge. This underwater application of video technology could easily be used to supply the court with detailed underwater pictures in a marine accident case.

(c) *By air — aerial view*

Videotape can also be used to provide an aerial "view" such as of an aircraft crash site. For example, in the case of *Re Pago Pago Air Crash of January 30, 1974*,²⁰ an airplane crash occurred on the island of American Samoa and it was not possible to have the court or jury view the airport and its facilities.

A videotaped tour of the airport facilities, navigational aids, weather facilities, air traffic facilities, airport layout, surrounding terrain and aerial views was prepared and shown at trial after it was viewed by counsel. The videotape was used in connection with a model of the airport. By freezing the videotape and pointing out the appropriate facility, location or other feature on the model, the jurors were, in effect, walked through the airport and surrounding area.²¹

Sophisticated colour and infra-red video and still cameras mounted inside an airplane or helicopter can record on videotape activities and conditions on the ground under its flight path. Aerial "views" of fire or flood damage sites, pollution sites, and accident scenes can be recorded on videotape and later tendered in evidence to aid the trier of fact in "visualizing" the scene.

2. Day-In-The-Life Documentaries

"Day-in-the-life" documentaries depict injured plaintiffs dealing with various situations in order to illustrate the effect that their injuries have had on their lives.²² These films or videotapes, tendered by the plaintiff, show the nature and extent of his disabilities and treatment as it exists during a "typical day".²³ "The film's purpose is to illustrate the tedium, frustration and effort that accompanies such basic activities as dressing, washing and eating."²⁴ Such films or tapes are usually composed of shots of

²⁰ MDL No. 176 (C.D. Cal., judgment entered Oct. 6, 1978). Boeing and United States found free of negligence; Pan Am guilty of wilful misconduct in causing crash.

²¹ M. A. Dombroff, "Innovative Developments in Demonstrative Evidence Techniques and Associated Problems of Admissibility", 45 *Journal of Air Law and Commerce* 139 (1979), at p. 141.

²² R. E. Nielsen, "Admissibility of Day in the Life Films in Personal Injury Litigation" 32 *Federation of Insurance Counsel Quarterly* 235 (1982).

²³ J. R. Hobbs, "Plaintiffs' Use of 'Day in the Life' Films: A New Look at the Celluloid Witness", 49 *U.M.K.C. L. Rev.* 179 (1981).

²⁴ *Ibid.*, at p. 181.

scenes ("narrative units") such as waking-up, eating, transportation, medical therapy, occupational-recreational activities, bowel-bladder care and going to bed.²⁵

The first reported use of a "day-in-the-life" videotape in a Canadian trial was in the case of *Teno v. Arnold*,²⁶ wherein the trial judge made the following comments about the manner in which evidence of damages suffered by the plaintiffs was presented:

As trial Judge, I was afforded the utmost opportunity to see the dreadful extent of such disabilities in her daily life and in this connection I would be remiss, if I failed to acknowledge the assistance that I received from her counsel in the presentation of the evidence with respect to this in a most imaginative and, I believe, unique way in trials to date in Canada. Arrangements had been made by counsel to have the technical crew of a local television station in Windsor, attend at the Teno home in August, 1973, and record on video tape with sound track about one-and-a-half hours of Diane's daily life with her mother and brothers and sister. This evidence was introduced after a proper foundation had been laid as to the technical aspects of the equipment, by use of closed circuit television, with commentary from time to time of doctors who were familiar with the child. I cannot conceive of a more graphic portrayal of what I must try to express in words. I should also mention that all counsel conceded that the evidence was properly admitted. After all, it is only a marked improvement on ordinary motion pictures which have been used at trial for many years.²⁷

The decision in *Teno v. Arnold* to admit the videotape is in contrast to that in *Nag v. McKellar*²⁸ wherein the trial judge refused to permit a "day-in-the-life" film to be presented to a jury. However, on appeal, the Ontario Court of Appeal held that:

In our view, the evidence proposed to be tendered was relevant and admissible evidence in the circumstances of this case, the circumstances being that the plaintiff complained of physical injuries that were such that they incapacitated him and prevented him from using his left arm, as well as other injuries, and the motion pictures taken of him subsequent to the accident and prior to trial would be relevant to the issue, particularly in this case where there was conflicting medical evidence as to the extent of his injuries and as to whether he was malingering in respect of some of his injuries.²⁹

²⁵ R. G. Begam and R. J. Begam, "A Day in the Life of a Quadriplegic" *Personal Injury Annual* 694 (1978); 14 *Litigation*, 25 (1978), at p. 26. This article contains a detailed discussion of what should be recorded in each scene.

²⁶ (1974), 7 O.R. (2d) 276, 55 D.L.R. (3d) 57 (H.C.J.).

²⁷ *Ibid.*, at pp. 297-8 O.R., pp. 78-9 D.L.R.

²⁸ [1968] 1 O.R. 797 (H.C.J.), revd [1969] 1 O.R. 764, 4 D.L.R. (3d) 53 (C.A.).

²⁹ *Ibid.*, at p. 765 O.R., p. 54 D.L.R. and see also *Dupuis v. Melanson* (1978), 24 N.B.R. (2d) 312, 48 A.P.R. 312 (in French), wherein movies of an infant plaintiff were tendered to prove his disability.

Defence counsel have successfully objected to the admission of "day-in-the-life" films or videotapes on the grounds that they are irrelevant, selective, non-continuous, cumulative, prejudicial, offered solely to arouse the sympathy and passions of the trier of fact, and contain hearsay.³⁰

In *Butler v. Chrestman*³¹ the plaintiff offered a film depicting his efforts to get from his bed to a wheelchair and then to the physical therapist and his physical therapy sessions. During the film, the camera zoomed in on the plaintiff's face to show him grimacing in pain. This film was held inadmissible because it was too inflammatory. The court noted that it depicted excruciating pain and suffering rather than merely attempting to reveal the actual state of the plaintiff's injuries.

In *Grimes v. Employers Mutual Liability Insurance of Wisconsin*³² the United States District Court ruled that the picture portion of a film (or videotape) can constitute hearsay if it shows "assertive conduct". The audio portion (soundtrack) of a videotape can also be objected to on the ground that it contains hearsay. However, the presence and availability of the narrator for cross-examination can cure the objection.³³

All these objections can be forestalled by scene-by-scene planning of the production of the film or videotape. This involves giving careful consideration to, for example, selecting the right camera person, obtaining the assistance of the plaintiff's doctors and physical therapists, and securing permission to enable the recording of scenes in the rehabilitation centre or hospital at which the plaintiff is a patient.

"Day-in-the-life" documentaries powerfully demonstrate a client's vital need for special nursing care and professional therapy — two of the major areas for which recoverable damages are awarded. The need to recover for lost wages, pain and suffering, is pictorially developed. In addition, the graphic representation of a plaintiff's injuries on videotape strengthens the credibility of the liability case, the injury evaluation, the economist's testimony and counsel's request for full recovery of damages.

³⁰ These objections are discussed and met in J. Moody, "Day in the Life Films: New Limitations on Admissibility", 4 *American Journal of Trial Advocacy* 357 (1980) and the journal articles by Nielsen, *supra*, footnote 22 and Hobbs, *supra*, footnote 23.

³¹ 264 So. 2d (Miss. 1972).

³² 73 F.R.D. 607 (D. Alaska, 1977).

³³ See *Richardson v. Missouri-K.-T. Railway Co. of Texas*, 205 S.W. 2d 819 (Tex. Civ. App. 1947) and *Wilson v. Piper Aircraft Corp.*, 282 Ore. 61, 577 P. 2d 1322 (1977).

3. Surveillance of Suspected Malingering Plaintiffs

Surveillance videotapes are usually recorded surreptitiously by private investigators employed by a defendant's insurance company and used for the purpose of refuting a plaintiff's disability claim. They are often tendered by a defendant's counsel to impeach an allegedly injured plaintiff who is discovered performing a strenuous task or engaging in intense physical activity. They can be extremely effective if directly contrary to the plaintiff's claim of injury³⁴ but effective cross-examination of the authenticating witness(es) by plaintiff's counsel can lessen their effect.³⁵

In *Smith v. Avis Transport*³⁶ the defendant car-rental agency submitted videotapes of the plaintiff on the issue of the plaintiff's injuries. The videotape showed the plaintiff carrying out various tasks, working under the hood of his car on several occasions, driving on the highway and placing things in the trunk of his car; but, the portion of the videotape upon which the defendant relied most heavily was that which showed the plaintiff carrying out a garbage bag down his driveway and placing it for collection at the side of the street.

On its face, this portion appeared quite damaging to the plaintiff because the videotape showed him carrying this bag with apparent ease. However, under cross-examination the private investigator who made the recording admitted that he had not picked up and weighed the garbage bag subsequent to its being placed for collection so there was no evidence as to whether it was heavy or light.

The presiding judge allowed the videotapes to be shown after first giving counsel for the plaintiff an opportunity to view them in the judge's absence and after assuring them that, at their request, he was prepared to adjourn the trial in order to give them full opportunity to prepare rebuttal evidence.

The learned judge stated that, even with these safeguards, he had reservations as to whether the (video) tapes should have been admitted in evidence, "especially since counsel for the defendants

³⁴ E.g., *Niznick v. Johnson* (1961), 34 W.W.R. 101, 28 D.L.R. (2d) 541 (Man. Q.B.).

³⁵ E.G., *Smith v. Avis Transport of Canada Ltd.* (1979), 35 N.S.R. (2d) 652 (S.C.T.D.).

³⁶ *Ibid.* See also *Guy v. Trizec Equities et al.* (1978), 85 D.L.R. (3d) 634, 26 N.S.R. (2d) 1, 40 A.P.R. 1 (S.C. App. Div.).

stated that the tapes were deliberately introduced in this manner to achieve surprise".³⁷

In his judgment, the trial judge admitted that his general reaction to surveillance videotapes of plaintiffs "is that evidence of this kind must be received with definite reservations". His Lordship was careful to point out that:

... the tape was taken by persons who were paid to gather evidence tending to discredit the plaintiff and who have more than an immediate interest in obtaining that kind of result. It should also be remembered that evidence of this kind is subject to a high degree of manipulation.³⁸

In addition, the learned trial judge felt himself bound to say that in its over-all effect the videotape did moderate his impression of the plaintiff's disabilities as compared with the impression left by the plaintiff's testimony. However, that effect was in "degree or emphasis" and "the plaintiff's basic credibility was not negated by the representation of the tape nor did it contradict the medical evidence".

Of importance in this case is the manner in which plaintiff's counsel was able to lessen the effect of potentially damaging evidence through the effective use of cross-examination. This cross-examination brought out the fact that the weight of the garbage bags was unknown.

D. Deposition, Commission and De Bene Esse Evidence

Videotape may be used to record depositions of witnesses unable to attend and testify at trial because of illness or infirmity, injury, disability, age, imprisonment, absence from the jurisdiction, or previous commitment.

In this procedure the deposing witness gives his testimony in advance of trial at a time and place convenient to himself and both counsel. The advantage of recording a deposition on videotape, as opposed to simply having it transcribed and then read at trial by a third party, is that the videotape recording allows the trier of fact to actually see and hear the witness.

By observing the witness' manner, appearance, candour, sincerity, demeanour and responsiveness to questions, the trier of fact can determine the witness' credibility and the weight to be afforded his testimony.

³⁷ *Supra*, footnote 35, at p. 673.

³⁸ *Supra*, footnote 35, at pp. 673-4.

Presenting the testimony of an expert witness on videotape does not detrimentally affect the weight afforded it. In *Eiermann v. Kannegiesser*³⁹ a deposition of the plaintiff's family physician presented on videotape was accepted over the evidence of the defendant's expert witness who testified at trial in person. The court's decision was based on the content of the plaintiff's witness' testimony, not its method of presentation (*i.e.*, live *versus* videotape).

In some jurisdictions, a videotape deposition may be taken at any place consented to by the parties and need not be recorded under the court's supervision; in other jurisdictions a court officer, usually a court reporter, is in charge of making the recording.

1. Alberta and Nova Scotia Rules

Some Canadian provinces have civil procedure rules which allow for the taking of deposition, commission or *de bene esse* evidence in any situation where it "appears necessary for the purposes of justice".

Alberta and Nova Scotia have similar rules which specify the method by which the recording of this evidence shall be carried out. These rules state that: "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 ..."⁴⁰

The phrasing "unless otherwise directed by order or commission" reflects the potentiality of this type of evidence being recorded other than by reducing it to writing. However, good reasons for doing so must be given to the court before it will make such an order.

To support an application to take commission or *de bene esse* evidence by videotape under such rules, counsel could argue that:

1. Where the credibility of a particular witness may decide the case, a videotape recording affords the trier of fact a much better opportunity to assess the demeanour and candour of that witness than does a typewritten transcript.
2. Where time is of the essence, a videotape recording offers the

³⁹ Action No. C82-0326, New Westminster Registry, June 29, 1984, Reasons For Judgment of MacKinnon J.

⁴⁰ See Rule 275 of the Alberta Rules of Court, and in Nova Scotia, Rule 32.05(2) of the Civil Procedure Rules.

advantage of immediate playback unlike a stenographic record which must be transcribed, sometimes at great expense. Thus, using videotape to record commission or *de bene esse* evidence saves time and money.

3. Where an expert gives testimony, a videotape can also record any demonstrative evidence (*e.g.*, models, maps, plans, charts, graphs, diagrams, drawings, slides, photographs, thermograms or x-rays) used to illustrate that testimony.

These are only a few of the points that can be raised in support of an application for a court order to allow commission or *de bene esse* evidence to be recorded on videotape.⁴¹

2. British Columbia Rules

In British Columbia, Supreme Court Rule 38(10) permits a deposition to be recorded on videotape or film. In this rule, the word "deposition" is used to refer to an examination of a witness before trial, held (ordinarily) so that a record of that witness' evidence may be tendered at trial rather than having the witness attend in person.

Rule 38(10) of the Supreme Court Rules allows for the examination on oath of a person before trial by consent of the parties or by order of the court. However, at recent depositions, counsel insisted upon the right to videotape the proceedings *without* court order, relying upon Rule 38(10). In support of that position the court's attention was drawn to the case of *Berdan v. Greenwood*⁴² where the court noted that the reading of a transcript into evidence is a grossly inadequate substitute for the presence of a witness:

In such a case as this it is, in my opinion, eminently important that the demeanour and precise answer of the witness to the questions put to him should be seen and heard by the Judge, or Judge and jury, who have to decide the case, and that there should be the fullest opportunity given to the Defendants to cross examine him, they being really only able to do so effectively when the witness is in court, and his demeanour, and the way in which he answers questions, can be judged of by the Judge and jury.⁴³

The recording of a deposition on videotape or film overcomes the problem of the trier of fact being deprived of the opportunity of actually seeing and hearing the witness testify.

⁴¹ For others see B. Elman, "The use of videotape evidence in civil cases", 19 Alta. L. Rev. 215 (1981).

⁴² *Berdan v. Greenwood* (1882), 46 L.T. 524 at p. 525, cited in *Haynes v. Haynes* (1962), 35 D.L.R. (2d) 602 (B.C. Co. Ct.), at p. 603.

The case of *Quinn v. Hurford*⁴⁴ contains a discussion of the questions a judge should address himself to when deciding whether to grant leave to depose witnesses outside British Columbia under Supreme Court Rule 38(5).

3. Ontario Rules — Former and New

In *Wright v. Whiteside*⁴⁵ decided under Rule 270 of Ontario's former Rules of Practice⁴⁶ the High Court of Justice ordered that an examination *de bene esse* be conducted on videotape so that:

... the trial judge will be able to see the demeanour of the witness when being examined and cross-examined, pursuant to [the] order, and he will therefore have an advantage furnished to him as close as possible to the actual attendance of the witness before him for the purpose of assessing her credibility.⁴⁷

On the issue of costs it was further ordered that:

... in addition to a written transcript of the evidence which counsel agrees should be prepared, the costs of the video taping or filming, whichever party sees fit to pay them initially, shall be taxable as proper expenses of the proceedings before the master in due course.⁴⁸

Ontario recently revised and amended its civil court rules relating to oral examinations and the taking of evidence before trial.⁴⁹ Rule 34.19(1) of Ontario's new Rules of Civil Procedure⁵⁰ reads:

On consent of the parties or by order of the court, an examination may be recorded by videotape or other similar means and the tape or other recording may be filed for the use of the court along with the transcript.

This rule applies to all out-of-court oral examinations including, *inter alia*, oral examinations for discovery, the taking of evidence before trial under rule 36.01, and examinations in aid of execution.⁵¹ The phrase "or other similar means" probably refers to the use of motion picture film or audio tape.

⁴³ See *The Verdict*, Issue 22 (Dec. 1983).

⁴⁴ (1978), 5 B.C.L.R. 375, 6 C.P.C. 216 (S.C.).

⁴⁵ (1983), 40 O.R. (2d) 732, 34 C.P.C. 91 (H.C.J.).

⁴⁶ Rule 270 reads: "The court may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination upon oath before an officer of the court or any other person and at any place, of any person, and may permit such deposition to be given in evidence."

⁴⁷ *Supra*, footnote 45, at p. 736 O.R., p. 95 C.P.C.

⁴⁸ *Supra*, footnote 45, at p. 736 O.R., pp. 95-6 C.P.C.

⁴⁹ See G. D. Watson, "The effect of the New Rules of Civil Procedure on evidence in civil cases" in *Law in Transition: Evidence*, Special Lectures of the Law Society of Upper Canada (Toronto, Richard De Boo, 1984).

⁵⁰ See G. D. Watson, and M. McGowan, *Ontario Supreme and District Court Practice* (Toronto, Carswell, 1984), pp. 368-85.

⁵¹ Rule 34.01 of the Rules of Civil Procedure.

The taking of evidence prior to trial, both in and outside the province of Ontario, for later use at trial is now governed by Rule 36 of the new Rules of Civil Procedure. A witness whose evidence is taken under this rule is not called to testify live at trial. The former practice of taking evidence *de bene esse* (Rule 270) or on commission (Rules 276-289) has been supplanted by this rule. Although Rule 34 regulates the procedure for the examination, the manner of examining a witness is the same as that used at trial.⁵²

Rule 36.04(1) permits any party to use at trial, as the evidence of a witness, the transcript and a videotape (or other recording) of an examination under rule 36.01 or 36.03.⁵³ The court can order otherwise on the ground that the witness ought to give evidence at the trial or for any other sufficient reason.

Rule 36.04(2) prohibits a witness whose evidence is taken under rule 36.01 or 36.03 being called to give evidence at trial, except with leave of the trial judge.

Rule 36.04(3) reserves to the trial judge the discretion to make rulings on the admissibility of the evidence taken under rule 36.01 or 36.03.

Rule 36.04(4) allows the transcript and a videotape (or other recording) to be filed with the court at the trial and does away with the necessity of reading or playing them at trial unless a party or the trial judge requires it.

Ontario's new rules place it at the forefront of the movement to adapt modern (video) technology to the evidence-gathering process. As more cases are decided under these rules, the value of videotape as an evidentiary tool will expand and become more apparent. Hopefully, other provinces will soon follow the excellent example set by Ontario, and adopt similar rules permitting the use of videotape to record evidence for trial.

4. Federal Rules

The Federal Court Rules which apply in actions involving federal matters such as taxation, immigration, copyright and patent infringement, and lawsuits against the Crown, contain

⁵² See Rule 36.02 of the Rules of Civil Procedure.

⁵³ Rule 36.01 sets out the factors the court shall take into account when deciding whether to exercise its discretion to order an examination. Rule 36.03 deals with examinations outside Ontario and the issuing of a commission.

provisions for the taking of deposition evidence. Rule 477 deals with pre-trial and pre-action orders for evidence to be used at trial, including an order for the issue of a commission. The resulting deposition is filed in court and used in evidence.⁵⁴ Videotape has been used to record commission and *de bene esse* evidence under Rule 477 of the Federal Court Rules as illustrated by the cases which follow.⁵⁵

In *J. D. MacDonald Engineering Co. Pty. Ltd. v. The Ship "Everray"*⁵⁶ the defendant applied for an order pursuant to Rule 477 of the Federal Court Rules that the evidence of a witness be taken *de bene esse*. The Federal Court, Trial Division, granted the order and further ordered that, "in addition to the written transcript of the evidence, a video tape or film of the evidence may be taken, the costs of such video taping or filming to be borne initially by the defendant ... and then to be costs in the cause".⁵⁷

In *Apsassin v. The Queen*⁵⁸ the plaintiffs applied for an order, pursuant to Rule 477 of the Federal Court Rules, that commission evidence be taken at Indian reserves. The Federal Court, Trial Division, granted the order, defined guidelines for the conduct of the examination, and issued instructions to the examiner. The said order permitted the evidence to be videotaped by a person on his oath being first taken, such person to be agreed upon by the parties. The evidence taken, and the videotapes were to be read in or shown at the trial of the action, subject always to any direction or ruling of the trial judge. The costs of and incidental to the order and of the taking of the said examination are costs in the cause.

In *Standal v. Mainland Industries Inc.*⁵⁹ the court gave permission to videotape an examination on commission, subject to the following conditions: (a) that the examination of the plaintiff on commission may be videotaped by a person on his oath first being taken, such person to be agreed upon by the parties, (b) that the videotapes not be shown at the trial of this action unless the trial judge so orders; and (c) that the costs of the taking and

⁵⁴ See R. T. Hughes, *Federal Court of Canada Service* (Toronto, Butterworths, 1984), pp. 7611 and 7614.

⁵⁵ Examination for discovery outside Canada, see Rule 465(12) of the Federal Court Rules, C.R.C. 1978, c. 663.

⁵⁶ (1980), 50 C.P.R. (2d) 1 (Fed. Ct. T.D.).

⁵⁷ *Ibid.*, at p. 2.

⁵⁸ (1980), 50 C.P.R. (2d) 2 (Fed. Ct. T.D.).

⁵⁹ (1980), 50 C.P.R. (2d) 5 (Fed. Ct. T.D.).

showing of these videotapes and all costs incidental thereto shall be borne by the plaintiff.

Commenting on the use of videotape to record examinations *de bene esse*, Henry J., of the Ontario High Court of Justice, said:

... it is time that the use of this [videotape] device be made available to the court in proper cases.⁶⁰

Hopefully, this enlightened, positive attitude will be adopted and shared by other learned Canadian jurists.

E. Conclusions

Videotape is fast becoming an important evidentiary tool for Canadian civil litigators. The court-room purposes for which videotape can be used are limitless, bounded only by the imagination of counsel. As video technology continues to develop, the potential uses of videotape will expand further. Canadian lawyers should follow the example set by their American colleagues and take advantage of videotape's usefulness for presenting evidence at trial.

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⁶⁰ *Wright v. Whiteside* (1983), 40 O.R. (2d) 732 at p. 736, 34 C.P.C. 91 at p. 95.

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