*Vicki Waye**

VIDEO TAPE RECORDING OF CUSTODIAL INTERROGATION

1 Introduction

The typewriter, notepad and pen, traditionally regarded as the tools for recording police interrogations in South Australia, will soon be superseded by the videotape recorder. The South Australian Police Force plans to implement videotape recording of interviews with persons suspected of having committed serious offences[1] when the interview would normally be conducted on police premises. A fixed videotaping unit has been installed in Police Central Headquarters at Adelaide. There is also a plan to install a portable unit at Holden Hill and, as more financial resources become available, videotape recording will be phased in in other parts of the State. Although videotape recording has been designated the preferred mode of recording interviews, because of financial constraints, some remote police stations may only be provided with audiorecording technology.

Whilst the South Australian Police Force's plans are consistent with recommendations made by various committees both here and overseas,[2] the implementation of the new policy to videotape custodial interrogations has proceeded largely at the forces' own initiative. According to David Hunt, South Australian Commissioner of Police, the police recognise confessional evidence as an integral component of the criminal justice system. Thus it is incumbent upon the force to ensure public confidence in that system is maintained[3] through the provision of confessional evidence that is recorded as accurately and completely as possible. At a recent seminar given to the Law Society of South Australia,[4] it was sadly noted that trial judges and juries are more likely to be persuaded that a police interview was conducted unfairly or simply fabricated than they were twenty years ago. Indeed, concern regarding the dangers of police verballing has even been expressed by members of the High Court in *Carr v R*[5] and *Duke v R.*[6] The introduction of videotaping protects the police from false claims that confessions were fabricated and to a degree lessens the temptation to extract confessions illegally or unfairly.

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1 For a definition of 'serious offence' see s78a Summary Offences Act.

2 Eg, South Australia, The Criminal Law and Penal Methods Reform Committee Second Report, *Criminal Investigation* (1974); Victoria, Shorter Trials Committee, *Report on Criminal Trials* (1985); Australian Law Reform Commitee Report No 38, *Evidence* para 163 (1987); Canada, Law Reform Commission of Canada Report No 23, *Questioning Suspects* (1984); E Wozniak *The Tape Recording of Police Interviews with Suspected Persons.* A Final Report to the Working Party, Central Research Unit, Scottish Home and Health Dept (1985); Willis, McLeod and Naish *The Tape-Recording of Police Interviews with Suspects: a second interim report* Great Britain, Home Office Research Study No 97 (1988).

3 DA Hunt, Video Recording Police Interviews, (1986) 8 *Law Society Bull* 88-90.

4 Law Society of South Australia, Continuing Legal Education Committee, *Videotaped Confessions* 19 September 1989 per Chief Superintendant John Murray, Police Prosecutions Department.

5 (1988) 62 ALJR 568.

6 (1989) 63 ALJR 139.

Videotaping of confessions has already been successfully tested in a number of overseas jurisdictions. A study undertaken by the Canadian Law Reform Commission[7] concluded that the advantages involved in videotaping far outweighed any perceived disadvantages. Apart from protecting police from unwarranted allegations of misconduct, videotaping introduced an element of accountability into the police interrogation process by lifting the shroud of mystery normally associated with the interview room. In addition, the number of disputes regarding the admissibility of confessions was significantly decreased following pretrial conferences where a joint viewing of the videotape was held between Crown and defence counsel. Videotaping also proved useful in providing a means by which the accused's state of mind or factors tending to aggravate or mitigate sentence could be assessed more readily by courts traditionally impaired by the essentially ex post facto nature of their inquiries.[8] Another welcome side effect was an improvement in police interviewing techniques. Videotaping also helped reduce the number of officers required to interview a suspected person.

Contrary to expectations, suspected persons were not inhibited from making incriminatory statements. Of the 901 people studied who consented to be videotaped, 71.6 per cent admitted commission of offences. Moreover, as a result of technological advances there was little risk of equipment malfunction or deliberate tampering.

The Canadian study found that the capital costs of introducing video-technology to the interview room were low compared to overall police budgets. For example, it estimated that the cost of introducing videotaping force-wide to the Halton Regional Police Force was equivalent to less than one per cent of the force's vehicle budget.

One issue raised by the study was that the advent of videotaping would encourage those police who continue to verbal or use unfair tactics to do so outside the interview room. Fears were expressed that suspects would be taken for extraordinarily long vehicle rides on the way to the police station or that confessions might be extracted in the watchhouse. Although the Canadian study found that some police 'rehearsed' interviews before videotaping, when this was raised by defence counsel at trial it was admitted by the officers. Nevertheless, the trial judge concerned held it did not raise doubts about the voluntariness of the videotaped statement. This indicated that the officers were merely dry-running the interview and did not engage in oppressive tactics.

The prevalence of these types of evasive techniques seems to depend much upon police attitudes to public scrutiny of their activities and their attitudes to the technology itself. In one early study conducted in Scotland,[9] for

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7 Canada, Law Reform Commission, *The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force* (1988).

8 Prior to the introduction of videotaping in Victoria, one member of the Victorian Bar, Mr Brian Barke complained:

> 'This seems to be a projection of the trial to another place; part and parcel of the trial is now taking place in the police station, and that is anathema to everything that our system stands for.'

quoted from Walker T, 'Video and audio on trial for police interviews' (1986) 60(6) *Law Institute Journal* 508, 510.

9 Scottish Home and Health Department, *Tape Recording of Police Interviews: Interim Report - The First 24 Months* (1982). This study was confined to the recording of interviews by audiotape.

example, it was discovered that police were initially highly suspicious of the idea of tape recording, which suspicion manifested itself in a marked drop in the number of suspects formally interviewed at the police station and a decrease in the length of time normally taken to conduct interviews. However, a later study conducted in England[10] found that the police in their field trials were more likely to carry out formal tape recorded interviews at the police station than before the introduction of tape recording. Taped interviews were still shorter than untaped ones, but the study concluded that this was due more to the time taken making contemporaneous notes rather than a reluctance to use tapes.

In South Australia, a pilot study looking at the operation of video technology has been running since February 1986. Consequently there has been sufficient time to overcome any initial police suspicion, to hone interview techniques and to develop a recording system best suited to the needs of the force. The South Australian Police Force should also be encouraged by the favourable reaction to electronic recording experienced by interstate police forces, in particular Victoria where evidentiary electronic recording is now mandatory.[11] To assuage suspicions over pre-interview conduct, it has been intimated that officers will be required to read back prior admissions to suspects at the beginning of the taped interview giving suspects the opportunity to adopt, deny or explain any admissions allegedly made at the crime scene or on the way to the police station.[12]

Furthermore, it is proposed that interviews with all persons charged with serious offences whose interviews would normally be conducted at the police station must be video recorded. Failure to record will not be condoned except where there are no video recording facilities available, the suspect refuses to co-operate or equipment breakdown occurs. It is envisaged that these exceptional circumstances will have to be verified independently of the officers conducting the interview.[13] Hence, although there is no common law rule excluding non-tape recorded admissions from evidence, it may be anticipated that as video technology is implemented on a wider scale the courts will be scrutinising manually recorded interviews much more carefully.

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10 Willis, MacLeod and Naish, *The Tape-Recording of Police Interviews with Suspects: a second interim report* Great Britain, Home Office Research Study No 97 (1988). Again this study was confined to the recording of interview by audiotape.

11 See Sections 464G and 464H Crimes Act 1958 (as amended). Audio recording is mandatory for less serious offences whilst videotape recording is required for more serious offences. In a letter to the author dated 18 August 1989, Detective Inspector PL Fleming, Staff Officer to the Assistant Commissioner (Crime), indicated that since the introduction of videorecording for homicide offences in 1985, confessions on video had not been challenged as such. It was found that videorecording was cost effective, allowing police to be deployed elsewhere than in lengthy interviews. The Victorian police had encountered no technical or procedural difficulties nor had they experienced any adverse criticism from the judiciary.

12 At the Law Society seminar on videotaping (supra n 4), Chief Superintendant John Murray stated that this requirement would be included in an instruction manual to be issued to officers on videotape recording of confessions. Ultimately, it is expected that this instruction will be elevated to the status of a Commissioner's order, and hence failure to observe it ought to be treated in the same manner: *R v Williams* (1976) 14 SASR 1. In Victoria, pre-recorded admissions are inadmissible at trial unless adopted by the accused during the taped interview: s464H Crimes Act 1958.

13 Ibid per Chief Superintendant John Murray. (Under s78 SOA suspect in custody has right to presence of solicitor as well.)

2. How will it work?

The system of video recording interviews for South Australia is a hybrid of the Western Australian portable video unit and Victorian audio recording system. The camera, video recording and audio recording components have been integrated into a sealed unit measuring about 2 metres x 2 metres. Recording can commence simply by pushing a single button. There is no need to employ a trained video camera operator. Whereas Victoria's videotaping system is operated through a mirrored window by a qualified technician, the South Australian recorder is located within the interview room and can be clearly seen by the suspect.

The fixed video unit at Adelaide Police Central Headquarters comprises a Video 8 Camcorder, linked up to a VHS video recorder and an audio recorder. The Video 8 recorded tape becomes the master tape. Once the interview is terminated this tape will be placed into a sealed 3M exhibit bag and is not intended to be used or touched until tendered in court.

A copy of the master tape is made simultaneously by the VHS video recorder which picks up the video signal from the Camcorder and the audio signal from a table-mounted microphone which concurrently feeds the audio recorder. The VHS tape forms the working copy of the interview for use by the police whilst the audio tape is primarily intended to be used to transcribe the interview if required.[14]

The Holden Hill portable unit differs from the fixed unit at Adelaide in that 2 copies of video tape will be recorded simultaneously with a master tape. Many defence counsel would argue that this is an improvement since accused persons at Adelaide will not be automatically supplied with copies of their taped interviews.[15] A further copy of an Adelaide interview tape will be made upon request of legal counsel and arrangements can be made to view videos in a pre-trial conference format. However, concern has already been expressed by the legal profession over delays in supplying copies of tapes.[16] The police argue automatic supply of tapes to suspects is wasteful as it is their experience that tapes are frequently lost or thrown away. Perhaps if another copy was made on the spot then offered to suspects at a small charge this problem might be overcome. Certainly the supply of tapes to the accused will enable defence counsel to advise clients of their legal liability more quickly and speed up the negotiating process with police prosecutors or Crown counsel.

At this stage, the police force is very reluctant to produce transcripts of tapes because of prohibitive cost. The police estimate that one minute of tape takes ten minutes of typing time. But it has been recognised that for the purposes of committal proceedings and voir dire hearings in the superior courts (where the jury is generally the factfinding body) transcripts ought to be provided to counsel and the trial judge. Having to stop, start and replay a tape during a voir dire hearing or waste time during a declaration

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14 For an indepth discussion of the technical aspects of videorecording see Jones P, *Evidentiary Tape Recordings - Their Management and Control* (1988) Forensic Science Technology International Pty Ltd.

15 Under s464(H)(3) Crimes Act 1959 (Vic) accused persons must be supplied with copies of their tapes within 7 days and if a transcript of the tape is prepared must also be supplied with a copy of the transcript.

16 These concerns were expressed by some practitioners at the Law Society seminar on videotaping (supra n 4).

committal[17] to replay a tape is simply unacceptable to the judiciary. An arrangement has therefore been made with the South Australian Court Services Department to transcribe audio tapes of interviews in all superior court matters for a three month trial period. The police will be responsible for editing the transcripts. Unless defence counsel consents, the transcript is not intended to be used as a piece of evidence but merely a working tool for magistrates, counsel and the trial judge. In summary court matters, however, the police do not plan to supply transcripts of the taped interview. The police prosecutor will simply tender the master tape in the normal way.

In addition to the recording components of the South Australian system, a time and date generator has been incorporated into the sealed unit which records on the tape the time and date the tape is started, stopped or paused. A clock has also been mounted on the wall behind the table at which the interview will take place. According to Police Organisational Services only the manufacturer (GEC) knows how to interfere with the timing mechanism. Consequently, they feel their unit is 'tamper-proof' or at least tampering will be easily detectable. However, that view is not shared by Peter Jones formerly Inspector-in-charge of the Audio-Visual Division of the Victorian Police Force[18] who believes that any magnetic recording tape can be tampered with. Jones contends that rigid exhibit control guidelines are far more important than expensive anti-tampering devices. Once a gap has been found in the chain of custody between recording and court, authenticy can be undermined, although Jones concedes that this is unlikely to occur under the South Australian system which will operate within a highly controlled environment. At the moment both the Adelaide and Holden Hill Units will be used in specifically designated interview rooms within police stations. There are no plans to use video technology at the scene of the crime or otherwise in the field. The South Australian units cannot be battery operated and must run off a source of power. When the interview is terminated, tapes are immediately placed within exhibit bags and sealed. Presumably the seal will not be broken until the master tape is tendered in court.

During the pilot study it was the police practice to focus the video camera on all participants at the interview equally. A triangular table was employed. The accused sat on one side of the triangle and 2 interviewing officers sat on the opposite side. Exhibits were placed closest to the hypotenuse. The view of all participants was clear, but facial expressions were hard to distinguish because of the distance of the camera from the participants. An added advantage of video recording in this manner was that the video could record exhibits being produced to the suspect, identified and marked in the suspect's presence.

Whether or not the police will continue to focus the video camera on all participants equally, however, remains to be determined. At an interview between the author, Andrew Ligertwood, Senior Lecturer, Law School, University of Adelaide, and Sergeant Jackson and Inspector Thompson of the Organisational Services Division, Police Department,[19] it was stated that,

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17 Under s106 Justices Act (SA) defence counsel can elect not to have called and cross-examined prosecution witnesses at the committal proceeding.

18 Jones PA, *Evidentiary Tape Recordings - Their Management and Control* (1988) Forensic Science Technology International Pty Ltd, 46.

19 This interview took place at the Organisational Services Division, Police Department on Friday, 28 July 1989. However contrary advice was given at the Law Society Seminar by Superintendant John Murray supra n 4.

in the future, the police plan to place the video camera behind the investigating officer's shoulder so that the camera can focus on the accused's face. Apparently this proposed change in practice has been prompted by a member of the judiciary who, having seen an example of a tape recording which showed dialogue between an interviewer and an accused, requested close-up views of the accused. Not willing to be charged with the unfair practice of zooming in on an accused's face during a normal interview, the police seemed to feel that if the judiciary wanted close up views of the accused's face it was better to focus the camera solely on the accused throughout the interview.

There has been a study undertaken in America which suggests that if the video camera is focused solely on the suspect, the interview will appear less coercive to the viewer than if the camera is focused on all participants equally, primarily because any admissions made will appear to emanate entirely from the suspect.[20] This occurs despite the tendency of viewers to identify more sympathetically with the suspect who becomes the camera's sole source of focus. The authors of the study, Lassiter and Irvine, conclude that since jurors only tend to react against confessions extracted with a high degree of coercion, it would be unfair to accused persons to continue to focus the video camera uniquely upon them. The authors felt that observers should be placed in a position where they are able to detect any external pressures on the confessor. When the camera is directed only to the accused external pressures are extremely difficult to detect.
Consequently the authors state,

> '(f)ocusing only on the suspect could have the detrimental effect of increasing the number of coerced confessions that are admitted as evidence in courts of law.'[21]

When the author of this article raised these objections with the Organisational Services Division, the police replied that if something suspicious was occurring out of camera range it would be reflected in the accused's body language. Chief Superintendant John Murray head of the Prosecutions Division at Adelaide Police Headquarters has subsequently indicated, however, that the practice undertaken during the field studies of focussing upon all participants at the interview will be continued. In view of the objections raised by Lassiter and Irvine that practice is to be commended.

At the moment the police intend using videotaping to record testimonial material only. It is not intended to use videotaping during identification parades, when accused persons are charged or to record performance of motor skill tests and other tests which require independent expertise. However, accused persons may be invited to engage in role play and may be asked to act out their version of events. In *Li Shu-Ling v R*,[22] the Privy Council held that if accused persons are invited to re-enact a crime, to meet the suggestion that lack of acting skill may produce a distorted picture, the accused should be shown the video recording immediately following its completion and be given the opportunity of commencing upon the film. It

20 Lassiter, GD and Irvine, AA 'Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion' (1986) 16 *Journal of Applied Social Psychology* 268.
21 Ibid 275.
22 [1988] 3 All ER 138.

was further directed that the accused's comments should then be recorded on the tape too.

To deal with initial problems of acceptance by the courts, pro forma statements are being issued to technicians who will testify as to the technical capabilities and the procedures employed in recording with the unit developed by the South Australian Police Force. Given the wide acceptance of video technology throughout the community, it is not expected that this problem will remain for very long.

There may, however, be problems in the provision of playback facilities at court. In a manual prepared by the Federal Judicial Center, Washington DC[23] it was recommended that the sound and picture of the tape be fed from a video cassette recorder (VCR) to four monitors: a small 20cm monitor on the judge's bench, a small 20cm monitor on the associate's desk (sited next to the VCR), and two large 60cm or 70cm monitors for the jury and counsel. Alternatively, if the courtroom comes equipped with a public address system, the sound portion of the video can be fed into that system. To save money the police have suggested the Court Services Department might build a special video playback room which could be booked and used as required. Otherwise they agreed that at least four monitors will be required to ensure the jury, judge, lawyers and accused all obtain a good view of the video as it is played back at each trial. One issue to be determined is whether the jury should be allowed access to the tape and playback facilities during their deliberations. It seems that the Chief Justice is opposed to automatically providing juries with these facilities[24] since there may be a tendency on their part to rely too heavily on such graphic evidence as compared with other evidence given during the trial. But if these facilities were requested by foremen, the courts may feel obliged to supply them.

3. Evidentiary issues

Subject to any objections regarding voluntariness or fairness, under the traditional method of tendering confessions, provided the accused acknowledges or adopts the written record of interview, that record is admissible in evidence[25] as an exception to the hearsay rule. If the written record is not adopted by the accused, it is documentary hearsay and inadmissible. But the written record may be referred to under the rules which allow police to refresh their memories from their notes during oral testimony.

There is some doubt, however, as to whether audio or videotape recordings will be treated on the same footing. In some cases photographs, films and videotapes are treated as real evidence lying outside the ambit of the hearsay rule.[26] Hence admissibility was determined on the basis that the photograph, film or videotape was evidence of the pictorial scene recorded on it. A majority of the High Court in *Butera v DPP*[27] noted that tape recordings of conversations were different from oral testimony and documentary evidence of those conversations, holding that the tapes themselves were not

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23 The Federal Judicial Center, Washington DC *Guidelines for Pre-Recording Testimony on Videotape Prior to Trial* 2nd ed (1974) pp4-5.

24 Law Society Seminar supra n 4 per The Hon Justice Duggan.

25 *Driscoll v R* (1977) 137 CLR 517.

26 Eg, *Sapporu Maru v Statue of Liberty* [1968] 1 WLR 239, 240; *R v Thomas* [1986] Crim LR 682; *Kajala v Noble* (1982) 75 Cr App R 149.

27 (1987) 164 CLR 180, 184-186 per Mason CJ, Brennan and Deane JJ.

admissible objects but the sounds (and by implication sights) they recorded were evidence when the tapes were played back in court. In *Butera*, the tape recorded conversations were admissible against the applicant for appeal upon the basis that they took place in furtherance of a conspiracy between the applicant and the applicant's co-accused. Had the conversations not been admissible as an exception to the hearsay rule, the mechanical recording of those conversations would also have been inadmissible.

A confession is by its very nature 'testimonial' in character in that the listener is invited to find that the confessor committed the crime alleged.[28] Once, therefore, evidence of a confession is admissible as an exception to the hearsay rule, the accurate mechanical observation of such a confession will also be admissible when played back in court. Consequently it is submitted that it would be inappropriate to admit a videotape of a confession as real evidence alone since the viewer is not only being asked to treat the recording as evidence that the alleged conversation between the police and the accused took place but is also being asked to rely on the recording as evidence that the accused has committed the crime to which the confession was made. Even where no sound is recorded and the accused re-enacts the crime, it is arguable that the accused is making a pictorial assertion of guilt which the listener is invited to rely upon as true.[29] To be admissible as an exception to the hearsay rule, the confession must be voluntary, and not extracted by illegal or unfair means. Thereafter the tape recording of that confession must be authenticated by a witness and the persons recorded in it clearly identifiable. Under the South Australian system, one would expect that the investigating officer who commences the recording and who is present throughout the accused's interview will be able to authenticate the tape. In Victoria, where tapes are recorded by special video camera operators, they too ought to be able to testify that the videotape recording displayed in court was in fact what they saw and recorded at the time of the interview. There have also been cases where videotapes recorded by automatic surveillance cameras have been authenticated by experts testifying as to the operation of the surveillance equipment.[30]

Classifying actions on a video as testimonial in character is not entirely free of difficulties. In America where video technology is more widespread and has been used for criminal investigation over a long period, the courts distinguish between instances where the video contains testimonial and non-testimonial material.[31] Where the material recorded on video is presented to depict the accused's physical characteristics or demeanor only, American courts do not regard the material as testimonial and have held that as such there is no privilege against self-incrimination applicable. Accordingly, Fifth and Sixth Amendment rights to silence and to counsel do not apply either.

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28 An out-of-court statement will be classified as hearsay when it is tendered to prove the facts asserted in it, in other words, when it is relied upon for its testimonial nature: *Ratten v R* [1972] AC 378; *Subramaniam v Public Prosecutor* [1956] 1 WLR 965.

29 See *R v Tookey and Stevenson* (1981) 58 CCC (2d) 421; *Li Shu-Ling v R* [1988] 3 All ER 138; *R v Lowery and King (No 3)* [1972] VR 939, cases admitting re-enactment on film or videotape into evidence.

30 Eg, *R v Caughlin* (1987) 18 BCLR (2d) 186; *US v Taylor* 530 F 2d 639 (1976); *R v Schaffner* [1988] 44 CCC (3d) 507.

31 Eg, see *State of New Jersey v Nece* 501 A 2d 1049 (1985); *Commonwealth v Carey* 526 NE 2d 1329 (1988); *Commonwealth v Mahoney* 510 NE 2d 759 (1987); *Garcia v State of Texas* 726 SW 2d 231 (1987); *Shephard v State of Texas* 749 SW 2d 283 (1988).

For example, in *Garcia v State*,[32] videotaped recordings of a person suspected of driving under the influence of alcohol were regarded as similar in character to the breath test itself. Likewise, videotaped recordings of physical co-ordination tests[33] and recordings of questioning that took place during the booking process which related solely to the defendant's name, address and age[34] were also treated as real evidence not subject to the requirement of voluntariness or the normal *Miranda* warnings.[35]

If applied in South Australia, the distinction may become important if the police expand the use of video technology and film material other than the formal interview with the accused. Under the American distinction, this other material will not have to be voluntary if it is classified as non-testimonial. And although the rights contained in s 78 Summary Offences Act 1954 (SA) will still have to be read to a suspect once placed in custody, presumably the right to silence will not extend as far as physical coordination tests and the like are concerned. Accordingly there may be serious implications for the civil liberty of the subject arising out of such tests which will be compounded by the graphic nature of their videotape recording. Given that the determination of whether material is testimonial or non-testimonial may not always be clear, perhaps this is a matter which should be addressed by the legislature.

Assuming, however, that the court has been asked to consider the admissibility of a formal interview recorded upon video, will the rules concerning original and secondary evidence apply to the video-tape as they do to ordinary documents? These rules were recently considered by the High Court in *Butera v DPP*[36] with respect to audio recordings. By analogy, the comments of various members of the High Court should apply to videorecordings. *Butera* concerned the admissibility of an English translation made of conversations in Punjabi, English, Thai and Malay recorded by audiotape. In part some of the conversation was also muffled or indistinct. Thus apart from considering the admissibility of a written translation, the High Court also considered the principles governing the admissibility of transcripts or written copies (as opposed to translations) of audiotapes.

The majority, Mason CJ, Brennan and Deane J, held that a recorded conversation is proved by the playing of the audiotape in court. Secondary evidence of the video tape such as the testimony of a person who heard the audiotape played out of court is not admissible unless the tape is unavailable and its absence is satisfactorily explained. Copy tapes are, however, admissible provided the copying process is accurate and the integrity of the copy tape proved satisfactorily.

Transcripts are only receivable 'as a means of assisting in the perception and understanding of the evidence tendered by the playing of the tape'.[37] As long as the jury are directed that the transcript can be regarded as an aid to the listener and not as independent evidence of the conversation, and that they must find that the transcript correctly sets out the conversation recorded

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32 Ibid.
33 *Commonwealth v Carey* ibid.
34 *Commonwealth v Mahoney* ibid.
35 Under *Miranda v Arizona* 384 US 436 (1966) suspects are entitled to be cautioned as to their constitutional rights to silence and to counsel before they are questioned by police.
36 (1987) 164 CLR 180.
37 Ibid, 187 per Mason CJ, Brennan and Deane JJ.

by the audiotape, the transcript is admissible. The tendering and playing of the audiotape provided the foundation for the translation of the conversation recorded in *Butera's case* by experts into English. Generally, translation evidence should be given orally rather than tendered in documentary form. However, the departure from ordinary practice was justified in *Butera's case* because of the complex nature of the cross-examination of the translations.

Dawson J agreed with the majority albeit by a different route stating that where the audiotape is unintelligible or records language other than English, a transcript compiled by an expert will be the best evidence of the contents of the conversation recorded.[38] Accordingly there should be no objection to the admissibility of a written translation.

Gaudron J, who delivered a dissenting judgment, felt that the written translation of the audiotape should have been excluded from evidence and that the evidence given by the expert interpreters should have been confined to oral testimony.

Under *Butera* the playing of the videotape, if recorded clearly and in English, will be the only admissible evidence of the mechanical record of an accused's confession. Having established a threshold of admissibility, what specific matters might be raised with respect to voluntariness, fairness and illegality?

(a) Voluntariness

Whilst videorecording of custodial interrogations cannot be regarded as a total panacea against the dangers of threats, promises or physical abuse, it may go some way towards preventing those practices which, in the past, have failed to be recorded on the typewriter or handwritten confession. The police would be reluctant to film an accused person with evident injuries, for example, unless those injuries could be innocently explained on tape. Similarly police would be unlikely to risk reference to a prior threat or inducement whilst a tape was recording an interview. By requiring all interviews for serious offences to be videotaped and by requiring prior admissions to be put to an accused during the recording session, there is less scope for abuse of suspects than under the present system. Moreover, because the jury are able to view what actually occurred during the interview and note the body language and tone of the participants they will be able to form a much clearer picture of the presence or lack of coercion. An overly submissive tone of voice, facial contortions manifesting stress and cowering would cause the viewer to be suspicious.

Related to the issue of voluntariness of the confession is whether the accused should specifically consent to be videotaped. In America, the videotaping procedure itself has been held not to violate the privilege against self-incrimination.[39] Thus, the accused's consent to be taped is not necessary. It is only necessary to establish that what was said by the accused and recorded by the tape was voluntary. The High Court seemed to take the same view of a secretly tape recorded confession in *Van Der Meer v R.*[40] Mason CJ stated that the use of a secret tape recorder did not amount to an inducement which entrapped or misled the accused into making

38 Ibid, 197 per Dawson J.

39 *Hendricks v Swenson* 456 F 2d 503 (1972); *People v Heading* 197 NW 2d 325 (1972); *State v Paul* 703 P 2d 1235 (1985).

40 *Van Der Meer v R* (1988) 62 ALJR 656, 660 per Mason CJ and 664 per Wilson J, Dawson and Toohey JJ.

incriminating statements. In a joint judgment, Wilson, Dawson and Toohey JJ, also stated that no principle or authority was offered to the court which rendered secretly tape recorded interviews inadmissible or subject to exclusion in the exercise of the trial judge's discretion. However Deane J, who delivered a dissenting judgment, did comment that in the circumstances of the case there was an element of unfairness by secretly tape recording the defendants' interviews. Apart from the fact that the taped conversations consisted largely of the accused being 'bombarded with accusatory allegations', the tape recorder was 'selectively used' in that the tapes tended to be used to record the police version of prior unrecorded conversations and confrontations.[41]

Under the South Australian system secret videotaping is unlikely to be a problem as the recording unit is in plain view of the accused throughout the interview. Nevertheless video technology is mobile and if audiotape is the sole recording device it can be easily hidden. Perhaps it would be wise if the interviewing officer made it clear at the beginning of the taped interview that the accused specifically consented to be taped.

(b) Fairness

In *Butera v DPP*,[42] the High Court was called upon to consider the effect of permitting a jury access to transcripts of incriminating audiotapes during their deliberations. One of the arguments made by appellant's counsel was that providing the jury with a written transcript lent undue weight and credibility to that evidence in comparison to the general body of evidence given orally. Whilst accepting the tenor of the appellant's argument, the majority concluded that in the circumstances of the case convenience dictated that the jury receive a written translation of the audiotapes.

There is no doubt, given the graphic nature of a videotape, that the same argument can be readily made with respect to the videotape of the confession. Consequently it is submitted that the courts and the police should endeavour to ensure that standards of fairness are maintained as scrupulously as possible. Even though made voluntarily a videotape of an accused re-enacting a crime, for example, may not fairly depict the version of events the accused is trying to portray. In *Li Shu Ling v R*[43] the Privy Council stated that there may be some crimes which cannot be effectively re-enacted on videotape. A killing committed during the course of an affray was cited as an obvious example where an attempted re-enactment might be 'dangerously misleading'.[44] A taped interview which began by listing an accused's prior convictions ought also be treated with great care according to Pidgeon J, in *Mandzij*[45] even where the accused had lost his protective shield under the Western Australian equivalent of s18 Evidence Act 1929 (SA). Pidgeon J observed that where the videotape was introduced to rebut an allegation of physical abuse, perhaps the sound portion of the tape should be edited out in sensitive areas.

This was the solution adopted by the Superior Court of Pennsylvania in *Commonwealth v Conway*[46] where the defendant was filmed performing a number of sobriety tests including counting from 1001 to 1030 while

41 Ibid, 672 per Deane J.
42 Supra n 36.
43 Supra n 29.
44 Ibid, 143.
45 (1983) 11 A Crim R 209, 215.
46 534 A 2d 541 (1987).

balancing on one leg. During the performance of these tests the defendant asked the investigating officer questions seeking clarification of the officer's instructions. The Superior Court of Pennsylvania found that these questions were 'arguably incriminating' and the jury might have been led to conclude that they were caused by the defendant's intoxication rather than 'the equally plausible nervousness generated by the arrest'. Moreover, when the sound portion of the video was played it appeared the defendant was crying which the court also regarded as misleading since the defendant could well have been humiliated by the nature of the tests he was required to perform rather than unable to control bodily functions because of intoxication. The court concluded that the prejudical impact of the audio portion of the tape outweighed its probative value and dismissed an appeal by the Commonwealth of Pennsylvania against the suppression of this evidence by the trial judge. It was intimated that if the video portion of the tape had also been challenged it might have been suppressed too.

On the other hand, it has been held that a videotape showing a defendant acting in a 'belligerent, unco-operative and antagonistic manner' was admissible. According to the Superior Court of New Jersey in *State v Bottomly*,[47] '(s)uch evidence is the most graphic and accurate representation of the defendant's condition at the time of his arrest'. This ruling may be both advantageous and disadvantageous to defence counsel in South Australia. If, for example, the defendant appears drunk or under the influence of drugs, there will be a better foundation for raising intoxication as an issue at the trial or in mitigation. Similarly apparent intoxication may effect the trial judge's determination that a confession was involuntary or unfairly obtained.[48] Unfortunately the appearance of an aggressive drunk is hardly likely to engender sympathy from the jury. Nor are ordinary members of the public likely to be favourably impressed with an accused interrogated in a state of undress such that tattoos and nasty looking scars are clearly visible. Unless security requires it, it may also be detrimental to question the accused in handcuffs.[49] If any of these circumstances arise it would be fairer for the police to film but refrain from questioning a suspect until after the suspect has sobered up and is able to dress adequately. The police may even consider providing suspects with clothing for their video interviews.

(c) Illegality

The statutory rules governing custodial interrogation set out in the Summary Offences Act 1954 (SA) will apply where an accused has been 'apprehended' within the meaning of s79a Summary Offences Act.[50] Provided the accused has been placed in police custody, the accused must be informed of the right to silence, the right to an interpreter and the right to counsel and be warned that anything said may be used in evidence. Failure to give such warnings will probably render the confession extracted inadmissible.[51] As it is intended that the videotaped confession form a complete record of an accused's

47 504 A 2d 1223, 1225 (1984).

48 See *R v Bradshaw* (1978) 18 SASR 83.

49 In *Commonwealth v Hodgkins* 520 NE 2d 145 (1988) a re-enactment of a murder by the accused at the crime scene was not rendered prejudicial by showing him in handcuffs as the location of the crime scene demanded that reasonable security precautions be taken.

50 See *R v Conley* (1982) 30 SASR 226 and *R v Leecroft* (1987) 134 LSJS 160 on the meaning of apprehended'.

51 *R v Bennett and Clark* (1986) 44 SASR 164.

interrogation, the police ought to ensure that all of these rights are spelt out to the accused at the commencement of the taped interview. Omission of these rights from the record must create some doubt as to the legality of the interview. Furthermore if an accused has not been apprehended within the meaning of s79a, a caution informing the accused of the right to silence will still be required at common law[52] and ought to be included within the videotape recording too.

4. Editing videorecordings

Apart from excluding the whole videotape for breach of a rule of evidence[53] there are, as with written records of interview, opportunities for editing out irrelevant, prejudicial or inaccurate material. An example has already been outlined where the audio portion of a videotape was excluded on the ground of fairness.[54] Particularly gruesome colour videotapes can also be toned down by showing them to the jury in black and white.

The South Australian police have stated that where a portion of a videotape is excluded by the trial judge on the voir dire they have the facilities to electronically edit a copy tape so that once the trial commences the jury sees a 'clean' version of the interview. For appeal purposes the master tape should be left intact. Whilst editing out certain portions of a tape may be misleading and cause the jurors concern, provided the remaining material is intelligible and probative this concern can be answered simply by explaining to the jury that the edited portions were inadmissible.

As well as editing out material from tapes, where the sound track is of dubious quality there are technical facilites available enabling tapes to be made audible. Altering voice frequencies with panametric equalisers and compressor-limiters can 'fix up' a poorly recorded soundtrack which can then be cross-dubbed from audio to videotape.[55] To improve the visual portion of a videotape, slow motion playback may be permissible provided time is not a significant factor and the distortion is satisfactorily explained to the jury.[56] Of course if the videotape is so damaged that it is completely unintelligible to the jury it ought to be wholly excluded.

5. Conclusion

The South Australian Police Force's initiative in relation to the implementation of videorecording is both welcome and timely. Videorecording is clearly a more effective recording method than pen and paper, and should reduce the unnecessary length and expense of criminal trials. Initially there may be a problem proving accuracy and authenticity but since the South Australian system has been developed over two years, in the hindsight of experience in other jurisdictions, one would not expect this problem to be of great concern. Evidential issues such as voluntariness, fairness and illegality will remain and, in fact, the use of videotape may cause peculiar problems arising from the graphic nature of the record it represents. Nevertheless, the jury will be privy to more information than has been available before. Hopefully, more information will lead to fairer and more just results.

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52 *R v Buckskin* (1974) 10 SASR 1; *R v Stafford* (1976) 13 SASR 392.

53 In *Murphy & Anor v R* (1989) 63 ALJR 422 a videotape of an accused showing him in the company of police officers at a crime scene was excluded entirely because there was no undertaking that the film would be authenticated.

54 See *Commonwealth v Conway* supra n 46.

55 Jones, PA supra n 14, 39.

56 *R v Maloney (No 2)* (1976) 29 CCC (2d) 431.