



***Video Evidence in Local
Court Hearings –
Considerations and Possible
Objections***

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TOPICS

1. BWV as DVEC
2. BWV of Admissions
3. CCTV Footage
4. Mobile Phone Footage

BODY WORN VIDEO AS DVEC – OBJECTIONS

○ Hearsay

- Prior out of court representation made by the complainant
- Adduced for its truth
- Prima facie inadmissible (s 59 EA)
- If no exception applies, it should not be admitted

BODY WORN VIDEO AS DVEC – OBJECTIONS

○ Form

- DVEC procedure governed by ss 289D and 289F *CPA*
- DVEC recording occurs as soon as practicable after the commission of the event
- DVEC recording must be made with informed consent
- DVEC must contain statements as to complainant's age, as to the truth of the representation, and any other matter required by the rules

BODY WORN VIDEO AS DVEC

○ Final Note

- DVECs were designed to by Parliament to be a powerful exemption to evidentiary requirements under the *Evidence Act 1995* and *Criminal Procedure Act 1986*
- DVECs are an exemption to the hearsay and opinion rules
- There are very limited circumstances where a complainant or witness is permitted to give evidence in chief via a pre-recorded statement
- Therefore, legislated requirements should be closely enforced

BODY WORN VIDEO OF ADMISSIONS

○ Scenario

- Interview with suspect in custody recorded on BWV where admissions made
- Affected by substances
- Given opportunity to decline participating in the recording
- Able to leave
- Caution given
- Exercising right to remain silent but questions continued
- Formal interview refused

BWV OF ADMISSIONS - OBJECTIONS

○ Section 84 – Oppressive Conduct

- Conduct may be “oppressive” if the exercise of authority or power occurs in a burdensome, harsh or wrongful manner: *R v Sumpton* [2014] NSWSC 1432 at [129]
- In *Sumpton* reasons to exclude admissions included:
 - The incriminating interview occurred in the accused’s cell after the termination of the ERISP
 - The incriminating interview occurred in a small, confined space
 - The custody manager played no role in the interview
 - Accused had clearly and repeatedly sought to exercise his right to silence
 - Accused was denied access to a lawyer despite repeatedly asking for one
 - Accused was subject to psychological and emotional pressure to change his version of events

BWV AS ADMISSIONS - OBJECTIONS

○ Section 85 – Unreliable Admissions

- Relevant factors in determining exclusion due to drug and/or alcohol affectation may include:
 - The absence or presence of signs such as slurred speech when interviewed: *R v Moffat* at [52]
 - If the accused's answers to questions were lucid and responsive: *R v Moffat* at [54].
 - If the accused's alcohol or drug consumption exacerbated any cognitive impairment or vulnerable mental condition: *R v McNiven* at [71]
 - If the alcohol or drug-affectation impaired the accused's capacity to understand his or her legal rights - For example, an accused's inability to appreciate the ramifications of a caution: *R v Taylor* at [14] and [31]; or legal advice: *R v McNiven* at [72]
 - Conversely, an accused's answers to police questions can favour inclusion (for example, the telling a police officer "I'm not going to incriminate myself" which demonstrated an awareness of legal interests, sophisticated reasoning, and an understanding of his position: *Severino v R* at [76])

BWV AS ADMISSIONS - OBJECTIONS

- Section 90 - Unfairness

- Section 90 does not call for an assessment of the probative value of the evidence: *R v Burton* at [89]; *R v Em* at [110]
- Nor is the seriousness of the offence relevant to its application: *R v Em* at [113]

- Section 138 – Improperly or Illegally Obtained

- Any issues with the arrest or detention

- Section 135/137

- If all else fails...

CCTV FOOTAGE

- Relevance (s 55)
- Hearsay (s 59)
- Business Record Exception (s 69)
- Providence

MOBILE PHONE FOOTAGE

- Relevance (s 55)
- Hearsay (s 59)
- Providence
- Maker Unavailable (s 65)