



VIDEO EVIDENCE: A FUZZY PICTURE?

The use of CCTV footage is becoming increasingly common before licensing boards, deployed by police forces in support of complaints under Section 31 of the 1976 Act and objections to renewal and regular extension applications. Advocate SCOTT BLAIR examines the complicated issues which it raises.

The 1976 Act is of course a creature of the pre-CCTV age. There is nothing in the Act which deals with video evidence. Moreover the Scottish courts have yet to consider any issues arising from the use of such material in licensing board proceedings.

The use of such material has therefore developed uninhibited by any agreed or imposed regulatory framework. CCTV is not a form of surveillance which is caught by the Regulation of Investigatory Powers (Scotland) Act 2001.

The situation is made more complicated by the fact that different police forces take different approaches to the use of such material. No attempt has been made to agree a Scotland wide protocol to provide clarification as to the procedure that the police will follow.

The pros and the cons of CCTV

On one view CCTV footage could be seen to be a 'good thing'. We are all familiar with it, if not from our own professional experience, at least from watching any of the 'real life crime' programmes with which our broadcasters seem keen to fill our TV screens with.

CCTV is commonly used in the criminal courts to assist the jury. Surely it is also a good thing to help assist lay members of a licensing board in their comprehension of an event or incident?

There are however differences between the criminal courts and proceedings before a licensing board.

In the criminal courts the defence will have an opportunity to view the material in advance of any trial. They will often be provided with a copy of the tape by the Crown to watch using their own facilities and in their own time. If needs be defence experts can examine the tape to assist in any question of interpretation of what - or more often than not, who - it portrays.

The defence will have an opportunity to discuss with the Crown in advance of the hearing the extent to which the tape can be played in full to the jury. There may be parts of the footage which are unfairly prejudicial to an accused person and the defence may wish to secure agreement from the Crown that those parts will not be played to the jury. Often the Crown will agree to this.

There are other differences from the criminal courts. Video evidence in court is spoken to by witnesses. Witnesses will speak to the circumstances in which the video evidence was obtained. Witnesses who were involved in the incident or saw it happen 'for real' can also be asked questions about what is seen on the tape. Such

evidence is meant to assist the evidence of the witness to the event in question but not to supplant it.

In contrast a typical board hearing will proceed on the basis of ex parte material.

Instead of first hand evidence which explains the tape a commentary may or may not be provided by the police representative as to their interpretation of what is shown on the tape. A lack of commentary might be thought objectionable if it encourages the police to seek to discharge any onus on them, eg as to unfitness by simply playing a tape and 'letting the board decide'.

Equally it can perhaps be seen how the provision of a police commentary may bring with it further problems. Commentary by the representative for the licensee might also cause difficulty. Some representatives might feel understandably reluctant to make comments about individuals shown on tape particularly where court proceedings might be pending.

Issues of sub judice and possible contempt of court might arise. The extent to which privilege attaches to comments made by a legal representative in licensing board hearings for the purpose of the law of defamation is also not entirely clear although it is at least arguable that such proceedings would attract qualified privilege.

How can a board deal with submissions on admissibility? To deal with such submissions the board may feel it has to view the material in question.

In a solemn criminal trial a judge will view the material in the absence of the jury and rule on admissibility. The jury do not get to see any inadmissible evidence. In a summary trial the Sheriff may have to view the material and then rule on admissibility. If inadmissible then it is assumed - in the absence of indications to the contrary - that the Sheriff as a professional judge can put the inadmissible evidence out of their mind. Can a lay licensing board really be expected to do that?

Another danger arises where a member of the board on seeing the tape on perhaps on only one occasion takes something from it (rightly or wrongly) which a representative may not see or may interpret in a different manner.

This danger is heightened by the lack of witnesses who can actually speak to the tape and who can provide it with an evidential context. On one view playing a tape back to a board in these circumstances might be thought to move very close to treating the board as itself to be a witness to the incident in question and to blur the line between that and the proper role of the board as fact finder.

The problem is aggravated because how does a representative know what view a board member takes of footage? A witness giving evidence can be asked about their interpretation of events on a tape. A board member being under no obligation to say anything about anything may give no indication of matters that are causing them concern in what they see or interpret as having been seen.

Such concerns may not even surface in any statement of reasons but may still influence a board member to reach an adverse decision.

Another difficulty about the use of CCTV evidence is that technical limitations may make it difficult for members of the public to see the evidence in question. In a large venue playing back a fuzzy tape on a standard size TV screen might be felt to offend against the spirit of the 1976 Act insofar as proceedings are to be held in public.

Although it is suggested that these are powerful arguments against the use of such material in licensing board proceedings it must be anticipated that the response of the court would be that it must be doubted if there is an objection in principle to the use of CCTV evidence on grounds of fairness. Board proceedings are administrative in nature. Boards are not bound by the rules of procedure or evidence that might be followed in the criminal or civil courts. What matters is whether the use of CCTV evidence in a particular case was unfair in the circumstances of a particular case.

Editing

One of the main problems associated with the use of CCTV footage in licensing board hearings and which tends not to feature in criminal proceedings is that of the use of editing.

The problem with licensing board hearings is that the editor will often be the police. The police may not feel constrained to act in the way in which a prosecutor might in criminal proceedings and yet editing can be crucial to the understanding of the meaning of CCTV footage.

Representatives should be alive to the problems associated with editing. These may go to fairness.

Poor editing can rob the footage of any real weight. At worst editing can be positively prejudicial as where for example a fight is shown but not the 'lead up' to it or indeed the aftermath, both of which might be of crucial factors. Editing can also confuse what is shown by the use of cutting from one camera angle to another or by moving back in time for a period to show an event (again) from a different angle.

Other problems which have been encountered in practice include incidents other than those detailed in the objection or complaint letter being shown on the tape, or where the tape shown at the hearing differs to some extent from that which has been supplied by way of any preview.

A right to a pre pre-view or a copy?

In suspension proceedings or where an objection is lodged eg to a renewal, then in strict terms it might be argued that all that has to be done is to give notice of the complaint but that there is no obligation to give notice of the evidence which supports that complaint: *Tennent Caledonian Breweries Ltd v City of Aberdeen Licensing Board* 1987 SLT (Sh Ct) 2. On that basis there is no legal obligation to provide a copy of any video evidence in advance of a hearing or indeed to even offer a preview of it.

That approach is perhaps more understandable in the context of a hearing which might turn on a written police report supported by a narrative provided by the police representative and perhaps written statements.

It is however arguable that video evidence brings with it difficulties all of its own which might make it unfair for use to be made of such material without some opportunity being afforded for it to be properly examined before the hearing.

The attitude of different police forces varies as to whether the evidence will be released before the hearing for a preview. Much seems to depend on individual officers.

Some forces will only permit a viewing on their premises which may not of course be convenient or desirable. Even such a viewing might not be enough. After all the chances are that those acting for a licensee would wish to have their own copy to view again and again and not to be limited to a viewing at the police station and on conditions laid down by the police.

A representative landed with video evidence on the day of the hearing should certainly make a motion for an adjournment, if not object outright to its introduction at that stage. A representative could rely on natural justice or remind the board of their duty under section 6 of the Human Rights Act 1998 and Article 6 of the ECHR to ensure fairness in the conduct of proceedings which is determinative of civil rights and obligations as would clearly be the case in a suspension hearing. If nothing else this will preserve the position for any future appeal.

Handling video evidence

Whether or not a representative gets a copy of the tape in advance of the hearing or has to be content with a preview, representatives should continue to be alive to

the limitations of the video dimension and should make sure that the board are equally alive to this.

The question of editing has been examined. A representative should make it clear to the board that if they are being presented with an edited tape that they understand the significance of that in the context the instant case.

There are however other aspects of the video dimension which representatives might want to consider. For example:

- Technical quality of the tape-is it acceptable? What is the point of blurred fuzzy images?
- Might the position of the CCTV camera be an important consideration? After all the camera angle might help or hinder a proper understanding of what is going on.
- Does the time shown on the footage tally with the time of the alleged incident? It is amazing how often the times are materially inconsistent. Are you looking at the incident libelled in the complaint?
- Make sure the Board understands the context of what they are viewing. Video has the ability to make a drama when in truth there is none. A 'typical' busy scene from a night club emptying out patrons at closing time may look more dramatic to a board member than it really is. A board member might have already begun to form an adverse impression of premises even before they get to the 'incident in question'.
- The lack of sound leads to the loss of an important dimension. That may not be without significance. What was said at the time may be just as important in the comprehension of an incident as what might be seen a few months later at a board hearing.
- There is a danger that in giving their interpretation of events the police will introduce comments which go beyond expanding on the complaint of which notice has been given and into matters which might properly be seen as the basis for a new complaint or objection of which no notice has been given.
- Can you be satisfied that the tape played is the tape that was removed from the CCTV camera or a verifiable copy thereof? Whilst the 'best evidence rule' may not apply with rigour to administrative proceedings this point should not be overlooked. The board may still have to be satisfied that there is an adequate explanation for the original not being available or as to the acceptability of any copy provided.
- Is the evidence in fact exculpatory? Do not be afraid to seek to use the evidence to your advantage. Can a favourable interpretation be placed on the events shown?
- A representative should not be afraid to object to the use of video evidence if in all the circumstances of the instant case it would be unfair to the licensee to have that evidence played. A tape as evidence has no higher call on the board to be received in evidence than any other form of evidence which it might be asked to consider.

CCTV and ECHR

The ECHR may have some relevance to all of this. The police and boards are of course public authorities for the purpose of Section 6(1) of the Human Rights Act 1998. They act unlawfully if they act or fail to act in a manner which is incompatible with Convention rights. CCTV systems are in general installed and maintained by local authorities and monitored by the police.

In the recent case of *Peck v. United Kingdom* (App No. 00044647/98, 13 BHRC 669), the applicant, tried to commit suicide by cutting his wrists. He did so in front of CCTV cameras operated by the local authority. The actual attempt had not been caught on camera but the operator seeing a man with a knife called the police.

Mr Peck was treated by a doctor and released without charge. A few months later stills from the incident featured on a local news broadcast, in local authority publication and in two newspapers as part of a promotion of CCTV to prevent and detect crime. Although his face was masked in one of the broadcasts that was held to be inadequate when Peck complained to the ITC and the Broadcasting Standards Commission. His complaint of breach of privacy was upheld.

His other complaint about the newspapers was rejected on the basis that the incident had occurred in a public place. Judicial review proceedings relative to the disclosure of the material by the local authority were unsuccessful.

Peck applied to the European Court of Human Rights under Article 8 ('the right to respect for privacy') and Article 13 (the right to an effective national law remedy for breach of a Convention right). The Court upheld his complaints and awarded him 11,800 euros for the significant distress and frustration arising from the interference with his private life as well as 18,705 euros in legal expenses. These awards are not small by the standards of Strasbourg and perhaps emphasises the view taken by the Court of the seriousness of the violation.

In relation to Article 8 the Court held that the interference was lawful under Section 111 of the Local Government Act 1972 and Section 163 of the Criminal Justice and

Public Order Act 1994 which gives power to a local authority to provide CCTV as relating to the discharge of local authority functions. The interference was not however 'necessary in a democratic society'. The decision was disproportionate. The consent of Peck should have been sought. The local authority also failed to take steps to control the way in which the media used the images so as to mask his identity. Although his face had been pixelated that had not been done in a way which prevented those who knew him from identifying him. The council should have obtained a written undertaking from the media. Overall the lack of safeguards made the decision to disclose disproportionate.

There was also a violation of Article 13 the Court found that at the relevant time the ECHR had not been part of domestic law and judicial review and recourse to the regulatory bodies were not effective remedies. Nor did he have an actionable claim for breach of confidence.

The case departs from previous case law on Article 8. In *Friedl v Austria* (1995) 21 EHRR 83, the taking of photographs or images in a public place did not breach the Article. In *Friedl* photographs taken by the police of a person taking part in a public demonstration did not breach Article 8.

In *Peck* the Court seems to have held that different sets of public circumstances could raise different issues based on whether it was foreseeable that an image might be taken or used by the authorities. This appears to shift the boundaries of what is private life under Article 8. This is an elastic approach and whilst it does not follow that all use of CCTV images of public events will always engage Article 8, it cannot be the case that since *Peck* that licensing boards and the police can therefore assume that filming using CCTV in a public place can never engage private life considerations under Article 8.

Arguments might be advanced in a number of cases: where for example someone is shown in a drunken and disinhibited state. It can be imagined that such a person might well be ashamed and embarrassed to realise that his image would be used at a later date in a public licensing board hearing. The issue might become more acute where no criminal proceedings are to be brought against that person and so he will never be given a chance to put his position. Could the use of CCTV footage at a board hearing be regarded as foreseeable by that person?

Cases which involve the sale of alcohol to under age persons might also raise privacy issues. Cases which involve persons who might be considered to be

vulnerable for other reasons (perhaps because of health problems such as alcoholism) might also raise Article 8 issues.

In the Scottish context a number of issues arise. If in a particular case it can be maintained that Article 8 might be engaged the first question which arises is whether the interference is prescribed by law as is required by Article 8.

This raises the question as to the precise legal basis upon which CCTV footage is taken and used. The 1976 Act is of course silent but it is likely that a similar basis as found in *Peck* could be made out if it could be maintained that power existed under Scottish local government legislation to create and use such a system.

Such a power exists under Section 69 of the Local Government (Scotland) Act 1973 (which is the broad equivalent of Section 111 of the Act) considered in *Peck* and read along with Section 163 of the 1994 Act relied on in *Peck*.

The aim of such an interference could no doubt often be justified in terms of the need to prevent disorder, an aim recognised by Article 8(2). The remaining question would be whether in the particular circumstances of a given case the aim sought to be achieved was met by means that were proportionate or necessary.

That will of course depend on the circumstances of a particular case but it is suggested that relevant factors would include the expectation of privacy of the person involved, their age, health and vulnerability, whether effective steps have been taken to avoid identification when the footage is shown (such as pixillation), whether any attempt to obtain the consent of identifiable persons has been made and whether there is other evidence which could be used without reliance on CCTV images.

It will be for the board to then determine whether in the whole circumstances of a particular case it was, as a matter of law, proportionate to allow the footage to be shown.

Conclusion

CCTV footage is here to stay and it is predicted that it will be increasingly relied upon by the police. The challenge for boards must be to ensure that this potentially powerful medium is not used in a way which is unfair to those who may be affected by it whether licensee or the unwitting third party whose image might be shown in a very public forum.

The law often has to react to advances in technology and the common law concept of fairness should be elastic enough to ensure that licensees are not prejudiced by the use of such material. Human rights considerations are also now potentially relevant although the exact reach of those considerations is at present unclear.

Elasticity is however a cause of uncertainty. Given the sensitive issues and the piecemeal approach of boards and police to the use of such material it may be desirable that the whole issue be looked at afresh with a view to the proper and comprehensive regulation of such material.

Other forms of surveillance have been subjected to legislative control. Whether the Scottish Parliament can be persuaded that this is a subject worthy of consideration when it comes to debate the reform of our licensing laws remains to be seen.