

The Full Picture or Too Much Information? Evidential Use of Body-Worn Camera Recordings.

Andrew Roberts and David Ormerod¹

It is increasing likely that professionals responding to incidents that result in criminal and other forms of legal proceedings will be equipped with a body-worn video camera (BWV). It seems that adoption of this technology by the police has been driven - at least in part - by a desire to ensure transparency in encounters with the public, and that those who engage in misconduct can be held to account.² Much of the concern that has been expressed over the use of BWVs relates to the implications for privacy. There is now a substantial body of writing on these issues,³ including: the implications for GDPR and Data Protection, along with Freedom of Information Act requests to access the data; concerns regarding the combination of facial recognition evidence with BWV; and with other regulatory regimes dealing with CCTV and surveillance.⁴ In contrast, surprisingly little attention has been paid to issues relating to the evidential use of BWV recordings. While there are, as far as we are aware, no large-scale studies of the extent to which BWV recordings are being relied upon in criminal prosecutions, a growing number of reported cases reveal that they are being used in the trials of those accused of a range of offences.

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³ On the effect of these devices on interactions between police and public see, for example, B. Ariel, A. Sutherland, and D. Henstock, "'Contagious Accountability': A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens' Complaints Against the Police", (2017) 44 *Criminal Justice and Behavior* 293. On privacy, K. Freund, 'When Cameras are Rolling: Privacy Implications of Body-Mounted Cameras on Police', (2015) 49 *Columbia Journal of Law and Social Problems* 91; T. Bud, 'The Rise and Risks of Police Body-Worn Cameras in Canada', (2016) 14 *Surveillance and Society* 117; D-K. Kipker, 'Transparency Requirements for the Use of Body Cams', (2017) 3 *European Data Protection Law Review* 98..

⁴ M. Fan, 'Body Cameras, Big Data, and Police Accountability', (2018) 43 *Law and Social Inquiry* 1236; Privacy International, "[Real-time facial recognition should never be coupled with body-worn cameras](https://privacyinternational.org/news-analysis/3028/real-time-facial-recognition-should-never-be-coupled-body-worn-cameras)", 7th July 2019, <https://privacyinternational.org/news-analysis/3028/real-time-facial-recognition-should-never-be-coupled-body-worn-cameras> (accessed 14th March 2021).

As the number of BWV deployed increases, so will the volume of recordings that contain material that is relevant to matters in dispute in criminal trials, and we can expect the prosecution to make greater use of them. Their value was endorsed in the Leveson Report, which recommends greater use be made of BWVs for the collection of evidence: "The defence cannot object to the production of good quality evidence and the guilty plea, and discontinuance, rates are likely to increase."⁵ But the use of BWV recordings is a significant departure from the sources of information that have traditionally been relied upon in criminal trials – witnesses, documents, and photographic images.

In recent decades, a proliferation of publicly- and privately-operated CCTV systems, and the use of mobile phones to record incidents that result in criminal proceedings, has required courts to consider the admissibility of the images they produce.⁶ It might be thought that the principles that determine the admissibility of these forms of evidence could simply be applied to BWV recordings. But we suggest that recordings made using BWVs will almost always be qualitatively different. BWVs are portable, events will often be filmed at close range, are exclusively under the control of the police, capture much more detail than CCTV cameras, and will record what can be heard as well as seen. These facts do not permit a simple answer to questions regarding the admissibility of BWV recordings.

It is well known that memory deteriorates over time, and we can reasonably suppose that a recording of events and things that are said during those events and soon afterwards, will be more accurate and complete than an account later obtained and based on the memory of the person who has provided it.⁷ But BWV recordings are also capable of undermining rational fact-finding. They will contain a large amount of information that is not relevant to the matters in dispute in the proceedings, and which would be withheld from fact-finders were evidence to be presented in more traditional ways. There is a risk of some of this additional information being used as a basis for flawed reasoning. The use of this medium to present some information - whether relevant or not - is also likely to have a stronger emotional impact on fact-finders than

⁵ B. Leveson, *The Review of Efficiency in Criminal Proceedings* (2015: Judiciary of England & Wales), para 53. The second author was a member of the Review committee.

⁶ *Taylor v Chief Constable of Cheshire* [1986] 1 WLR 1479.

⁷ That is already recognised implicitly in s. 139 of the Criminal Justice Act 2003, regulating the use of memory refreshing documents at trial.

would likely be the case were it to be provided in different forms. The law has long-considered emotion to be the antithesis of rational fact-finding. Greater reliance on BWV recordings might mean that courts have to confront the issue of emotion more frequently.

These issues ought to prompt critical evaluation of the current legal framework regulating the evidential use of BWV recordings. This is our aim in what follows. The breadth of the issues relating to the evidential use of BWV recordings requires us to adopt a necessarily selective approach. Given the lack of attention this form of evidence has attracted, we have chosen those that appear to us to be the most pressing. In the first part of the article, we give brief consideration to recordings of the alleged crime as it occurs. In the second part, we consider the admissibility of recordings in which assertions are made by witnesses. Here there is a distinction drawn between (i) statements that are made during or in the immediate aftermath of the alleged crime, and (ii) the use of BWV to record statements made some time later in an investigation.

In respect of recordings of the first category of statements, we consider the application of the hearsay rule and exceptions under the Criminal Justice Act 2003.⁸ When we turn to the second category, our perspective differs. Current practice is for a written statement to be taken - usually drafted by a police officer and signed by the witness (a section 9 CJA 1967 statement).⁹ Empirical studies have established that the way in which a witness is questioned about an event can influence recollection of that event. In most cases,¹⁰ the only record of a police interview with a witness is the witness's written statement, and any attempt to ascertain whether the witness's account might have been distorted by the process in which it was generated, will depend on the ability of those involved to recall the details of that process. But the idea that they will be able to do so with any degree of accuracy during a trial that takes place weeks, months - in some cases years - after the statement was produced is implausible.

The use of BWV to record witness statements has the potential to provide the tribunal of fact with more relevant evidence: more accurate accounts by the witness, as well as evidence of the manner in which that account was reported by the witness and

⁸ There may be other rules of admissibility engaged if, for example, the statements relate to a party's character. See below text accompanying nXXX.

⁹ See recently *Drummond* [2020] EWCA Crim 267. See more generally the hearsay provisions of the CJA 2003, discussed below.

¹⁰ In some investigations there are more likely to be video recorded interviews with suspects and witnesses. Such interviews with suspects are governed by PACE Code F.

about the process of the statement taking itself. If one of the functions of the law of evidence is to serve this truth-seeking objective by ensuring that the tribunal of fact is presented with the best evidence,¹¹ then there are good grounds for thinking that BWVs ought to be routinely used to record witness statements. We will argue that this ought to be required, and that there would be considerable epistemic benefits were they to be made available to fact-finders. There is a provision in the Criminal Justice Act 2003 that would facilitate this, but almost 20 years after the Act received Royal Assent, it is yet to be brought into force.¹²

Implementing such a provision could have other impacts including: incentivising guilty pleas by defendants once aware of the compelling nature of the evidence to be presented; reducing the duration of trials which are contested; relieving the stress for witnesses who feel that their account is based on an independently recorded account. We do not explore these potential impacts here.

The argument that BWV recordings ought to be admissible as a witness's evidence in chief - in whole or in part - comes with caveats. These are set out in the final two parts of the article.

In the final part of the article, we consider an issue that intersects with those considered in each of the preceding sections - the effect of emotion on the fact-finding process. Empirical studies suggest that BWV recordings are likely to have a greater emotional impact on fact-finders than testimony, documentary evidence, and still images. Greater reliance on BWV evidence, ought to prompt reflection on the way in which emotion is understood and dealt with in criminal trials. The law currently takes the view that emotion is inimical to rational fact-finding, and requires that fact-finders be directed to set their emotions aside when considering the evidence.¹³ This is a rather blunt approach. What we currently know about the role of emotion in fact-finding is sufficient to conclude that they cannot be 'set aside'. There is a need for empirical research on fact-finders' emotional responses to various types of BWV evidence, and the effect of those responses on reasoning. However, we will suggest that on the basis

¹¹ We are not using that term in the sense of the now moribund "best evidence" rule (see *Phipson* 19th ed Ch 9.7).

¹² S. 137 Criminal Justice Act 2003.

¹³ As with commonplace directions given to juries about putting emotion aside in traumatic cases of homicide etc See Judicial College, *Crown Court Compendium* – (2020), ch. 4 <https://www.judiciary.uk/wp-content/uploads/2020/07/Crown-Court-Compendium-Part-I-December-2020.pdf>

of what is already known, there are grounds for the adoption of a jury warning that acknowledges that emotion will affect reasoning, explains how it is likely to do so, and suggests to the jury how it might counteract this.

I. Events

The most obvious use of BWV recordings is as direct evidence of the commission of a crime, related events, or the physical setting in which it occurred. This could arise spontaneously, as where, for example, an officer records a brawl outside a club as he is seeking to stop the fight and arrest the perpetrators. It could, at the other end of the spectrum, involve the recording of a carefully planned police operation - as, for example, where a firearms team intercept and arrest someone under surveillance for being in possession of firearms or controlled drugs.

At trial, there are few evidential rules impeding admissibility of such recordings. They may prove to be of the highest value in resolving factual disputes about the events.¹⁴ The evidence is of visual images and assuming there is no reliance on statements being made by those filmed, no hearsay issue arises. The recordings are the equivalent of any other CCTV footage.¹⁵ If the evidence is relied on to prove the identity of a suspect then the specific rules on identification evidence will be engaged.¹⁶ In extreme circumstances it might be argued that the images depict material that is reprehensible such that admissibility ought to be subject to the bad character provisions of the Criminal Justice Act 2003. This would, we suggest, occur only in rare cases, such as, for example, where officers recording an arrest of a person suspected of racially aggravated offences film the interior of his house with far-right insignia and memorabilia in clear view.¹⁷ More commonly such evidence will be treated as evidence "to do with the facts of the offence" and admissible without reference to the bad character regime.¹⁸

¹⁴ See e.g. *Ngoie v R* [2020] EWCA Crim 292 on the disputed role of a suspected drug dealer in the rear of the vehicle when the alleged drug deal was recorded by officers.

¹⁵ *Taylor v Chief Constable of Cheshire* [1986] 1 WLR 1479.

¹⁶ See eg *Dodson and Williams* (1984) 79 Cr. App. R. 220, CA.

¹⁷ See *Kinsella* [1995] Crim. L.R. 731 (photo of D with IRA memorial admitted when D denied support). See generally on the risks of prejudice from graphic images; D W Elliott, 'Video Tape Evidence: The Risk of Over-persuasion' [1998] Crim. L.R. 159.

¹⁸ S. 98 Criminal Justice Act 2003.

There are, of course, other issues that merit regulation to ensure the quality of the evidence of recordings of incidents and places. These include: clear rules about the criteria which govern when officers start filming and cease filming; how the recordings are stored, what criteria govern third party access, and how the continuity of the evidence is guaranteed; whether particular rules governing disclosure are required, given that an incident may result in separate recordings by each attending officer leading to a large volume of digital data.

Although in terms of admissibility the BWV footage generates few if any novel issues in this regard, the discussion in part III on the impacts on jurors and necessary safeguards is highly pertinent.

II. Witness Statements

Where a BWV is used to make a record of an event or incident, it is possible that those involved or present might make assertions relevant to matters that are the subject of dispute in subsequent proceedings. But body-worn cameras can, and we will suggest *should*, also be used to make video-recordings of formal witness statements; an analogue of the traditional documentary record of witness statement.

The issue of admissibility where a BWV has been used to record statements made by persons is less straightforward than those relating to recordings that merely depict places and events. One of the principal difficulties is that such statements are likely to constitute hearsay. The hearsay rule and its exceptions are now defined in the Criminal Justice Act 2003. Section 115 treats as hearsay any statement made, otherwise than in testifying in the proceedings, where that statement is relied on for the matters stated, and it was one (of the) purpose(s) of the maker to cause someone to believe or act on the matter stated. That rule applies irrespective of whether the witness is subsequently absent from the trial or is present giving oral evidence. There are of course numerous exceptions to the hearsay rule, now also contained in the 2003 Act, and BWV recordings of statements may well satisfy one or more of those.

For ease of exposition, we deal separately with (i) the cases in which the witness statement was made as the crime was being perpetrated or in its immediate aftermath, and (ii) cases in which the witness statement is recorded subsequently in substitution for a written witness statement.

Before considering these two categories of case it is worth noting, briefly, that some of the well-established overarching dangers of hearsay evidence are diminished

or eliminated with reliance on video-recorded statements. The classic hearsay dangers are accepted to be - ambiguity, insincerity, misperception and faulty memory.¹⁹ Although these are not factors that are explicit in the decision-making process on admissibility, they underpin the statutory exceptions and their criteria which do govern admissibility. Recent cases have also recognised the need to draw these risks to the attention of the jury, in appropriate language, so that they feature in their consideration of what weight to attach to admissible hearsay.²⁰ Where the hearsay statements that a party seeks to adduce are video recorded these risks are clearly reduced. The jury viewing the recording see and hear an account given closer in time to the occurrence of the relevant events when the witness's memory would have been more complete. Consequently, the account is likely to contain a greater amount of accurate detail and fewer errors. The jury also see the witness and their demeanour,²¹ so have a similar opportunity to assess possible insincerity as with a witness testifying live.

(i) Initial Statements Recorded at the Scene

The prevalence of BWV use by officers attending incidents of suspected crime suggests that the admissibility of the recordings must have become commonplace in criminal trials. It seems unlikely that these recordings are generally limited to depictions of the scene with no witnesses making any oral statements. There are, however, few reported cases in which the admissibility of statements recorded using BWV have been challenged. In this section we examine the potential barriers to admissibility, beginning with the hearsay provisions.

Almost all of the statements recorded on a BWV by an officer attending the crime scene will be hearsay within the definition in s. 115 of the 2003 Act.²² It can, however, be safely predicted that in most cases they will be admissible under one of the many exceptions in the Act.

¹⁹ E. Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' (1948) 62 Harv. L. Rev. 177, 192-196; A Choo, *Hearsay and Confrontation in Criminal Trials* (1996: OUP), Ch 2.

²⁰ See *QD* [2019] NICA 7; *Kizilitan* [2017] EWCA Crim 1461; and *Wilson* [2018] EWCA Crim 1352. See generally the *Crown Court Compendium* (2020), ch 14.

²¹ We would suggest that demeanour is a very poor indicator of veracity (as scientific studies have demonstrated over decades), but the courts seem wedded to the idea of the importance of oral evidence so from the perspective of the orthodox legal position the jurors are not disadvantaged.

²² Because they will be being relied on for some matters stated in them which it was the speaker's purpose to cause someone to believe or act on see s. 115(3). For comment on this tortuous definition see *Twist* [2011] Crim. L.R. 793; J R Spencer, *Hearsay Evidence in Criminal Proceedings*, 2nd ed (2013: Hart Publishing), p.321.

Where the statement maker is absent or unavailable by the time of the trial then admissibility will be governed by ss. 114-118. Most commonly relied on will be s. 116 which renders admissible any first-hand hearsay statement from an identified witness who was competent at the time of making the statement, and is absent for one of reasons provided in s. 116(2).²³ The jurisprudence on these exceptions is well known, and the case of *Riat*²⁴ provides clear guidance on the approach judges should adopt. In some instances, there may be particular difficulties, e.g. in establishing the identity of a witness where in a recording of the aftermath of a pub brawl one spectator confidently identifies the attacker but then disappears into the crowd. But, there is nothing peculiar to statements recorded at the scene on BWV that would render them any more difficult to admit under s. 116. In fact, given that the evidence is video recorded it may be more likely to be admitted under s. 116. In addressing the various statutory requirements for admissibility, as *Riat* confirms, one of the issues for the judge is whether the evidence is capable of being relied on safely by a jury. As the Court recognised in that case, with a video recorded statement the jury has the advantage of seeing the witness's demeanour and that affords some compensation for not seeing their live evidence.²⁵

Since all recordings of statements on police BWV are “created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office”, they would all be potentially admissible under s. 117 of the Act.²⁶ However, there seems little advantage in relying on s.117 in preference to s.116. All statements recorded on BWV at the scene of the crime or its immediate aftermath would seem to be “prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation.”²⁷ Under s.117 such statements become admissible only if the person who supplied the information contained in the statement is unavailable for one of the statutory reasons. Those reasons largely replicate the reasons in s. 116. The only cases in which s. 117 has a potential advantage²⁸ is where the supplier of the information (i.e. the person whose statement is recorded on BWV) “cannot reasonably be expected to have any recollection of the matters dealt with in the

²³ Dead, unfit to appear as a witness, outside the UK and it is not practicable to secure attendance, cannot be found after reasonable efforts or is in fear and it is in the interests of justice to admit the statement.

²⁴ [2012] EWCA Crim 1509; see [2013] Crim. L.R. 60.

²⁵ Ibid, para [36]. See also *Saxon* [2016] EWCA Crim 598, [40].

²⁶ See *Grazette v DPP* [2012] EWHC 3863 (Admin) (statements added to PNC).

²⁷ S. 117(1).

²⁸ One other technical advantage is that W need not be identified as is required for s. 116.

statement (having regard to the length of time since he supplied the information and all other circumstances)".²⁹ On this basis, for example, the BWV recorded statement of a club doorman made as the aggressor was fleeing the scene may be admissible - provided the incident was one that was so commonplace for a busy club doorman that by time of trial, (years later), he could not reasonably be expected to recall it.

In the event that none of the reasons for absence in ss. 116 or 117 of the Act are applicable, the BWV recording may nevertheless be admissible under the general discretion to admit any hearsay statement in the interests of justice.³⁰ The case law on s. 114 is extensive, and the discretion has been interpreted widely. This discretionary power of inclusion would allow for hearsay beyond the s. 116 criteria (e.g. where W is not compellable because she is too young,³¹ or is D's spouse and the offence is not one within s. 80 of the Police and Criminal Evidence Act 1984 (PACE)³²). Unlike s. 116, it may allow for the recorded statement of an unidentified witness to be admitted where there is no suggestion that the witness was seeking anonymity.³³ Even statements made by one co-accused which incriminate another may be admissible under s. 114(1)(d).³⁴ The courts have, of course, recognised limits, particularly where there is a risk that reliance on s. 114(1)(d) could undermine the thresholds set by Parliament in other sections (and of s. 116 in particular³⁵).

In determining admissibility, a court is to have regard to the nine factors in section 114(2) of the Act and the other statutory safeguards following the framework set out in *Riat*. Again, there are no obvious reasons for thinking that BWV recordings made at the time of the offence or in its immediate aftermath will face particular difficulties in admissibility under s. 114. The fact that the evidence is video-recorded by a police officer and proximate in time to the incident will be highly relevant when the judge is considering s. 114(2) "(d) the circumstances in which the statement was

²⁹ S. 117(5)(b).

³⁰ S. 114(1)(d).

³¹ See *C* conjoined with *Riat* [2012] EWCA Crim 1509; *JS* [2009] EWCA Crim 1869.

³² Making the spouse compellable against her spouse or vice versa: see *Horsnell* [2012] EWCA Crim 227; *L* [2008] EWCA Crim 973.

³³ See *Nico Brown* [2019] EWCA Crim 1143.

³⁴ See *Y* [2008] EWCA Crim 10. See also the discussion below of confessions admissible under s. 76 of PACE.

³⁵ See *Z* [2009] 1 Cr App R 34 at [18]; *ED* [2010] EWCA Crim 1213 at [14] - [21]; *Ibrahim* [2010] EWCA Crim 1176; *Freeman* [2010] EWCA Crim 1997.

made; (e) how reliable the maker of the statement appears to be; (f) how reliable the evidence of the making of the statement appears to be.”

The existence of an unlimited³⁶ discretion to admit such statements under s. 114(1)(d) indicates how readily any BWV recording should overcome a hearsay challenge if the statement maker is absent at trial. It is, therefore, perhaps surprising to find that the courts have also given a new lease of life to yet another route to admissibility, particularly in cases of family and intimate partner violence. Section 118 of the 2003 Act preserves various common law exceptions including that for *res gestae* by spontaneous exclamation. The Act codifies the common law in *Andrews*³⁷ in which the House of Lords had treated as central to the question of reliability, and hence admissibility, whether the incident was so unusual and powerful as to dominate the statement maker’s mind such that there was no risk of concoction or fabrication.

In *Barnaby v DPP*³⁸ the Divisional Court accepted that s. 118(4) of the 2003 Act, which preserves the *res gestae* exception, rendered admissible recorded evidence from a complainant in a domestic abuse attack. The evidence included three 999 calls from W within 16 minutes alleging that D had just attacked her. The final call made just as he left the property prompted the police to arrive within 6 minutes. W immediately confirmed her allegation of assault to the attending officers. She also reported that D had previously been violent and that she did not want him to know she had reported him. W refused to give a statement or sign an entry in the police officer’s notebook because she said that she had done so on a previous occasion and D had exacted violent revenge. At trial W was not called but the prosecution sought to adduce *res gestae* evidence in the form of the edited transcript of the 999 calls. They also sought to rely on evidence she had given to the police. The Divisional Court upheld the conviction. In addition to being satisfied that the *Andrews* threshold was satisfied, the judge had to be sure that the *res gestae* doctrine was not being used as a device to avoid calling the maker of the statement when he or she was available, which would deprive the defence of the opportunity to cross-examine him or her and which would not be consistent with the fundamental duty of the prosecution to place all the relevant material

³⁶ Admittedly, multiple hearsay becomes admissible only if the further criteria in s. 121 are satisfied.

³⁷ [1987] AC 281.

³⁸ [2015] EWHC 232 (Admin).

facts before the court, so as to ensure justice was done.³⁹ That was held not to be inconsistent with *Andrews*,⁴⁰ although in that case Lord Ackner had "strongly deprecate[d] any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, where he is available, the maker of the statement." In the subsequent case of *A-G's Ref (No. 1 of 2003)*,⁴¹ the court held that the fact that the witness was available was not necessarily a reason to exclude the *res gestae* statement she had made. *Barnaby* has been followed repeatedly.⁴² It demonstrates that *res gestae* can be used as a route even where the witness is available - unlike s. 116 - provided the *Andrews* criteria are met.⁴³

Recordings on BWV of the incident/immediate aftermath, including statements made by witnesses, could, it seems clear, be adduced under s. 118 even if the evidence would not be admitted under s. 116 (e.g. because W is not in fear). The Court of Appeal for Northern Ireland has addressed this directly in *McGuinness v Northern Ireland Public Prosecution Service*.⁴⁴ D was convicted of assaulting his girlfriend, V. She had called police at 04.53 alleging that the appellant had grabbed her, throttled her and smashed a glass over her head. Both of them had been drinking. Police arrived at 05.05. One of the responding officers activated his body-worn video camera at 05.07. V was filmed in her hallway where she was attempting to sweep up broken glass, and was noted to have red marks around her neck. She said that the assault had occurred ten minutes before she made the emergency call and described the assault in a highly emotive way. D was arrested on the premises. V withdrew her complaint and refused to give evidence at trial. The trial judge admitted the statement captured by the police officer's body-worn video camera. The evidence amounted to hearsay, but was admitted under the Northern Irish provision identical to s. 118 of the Criminal Justice Act 2003.

D's appeal was dismissed. Under the *res gestae* exception, the issue was whether the recording was a statement made by a person "so emotionally overpowered" by an event that the possibility of concoction or distortion could be disregarded. The Court

³⁹ The case has attracted academic interest: see Ormerod [2015] Crim LR 729 and K Laird, [2020] July *Archbold Review*.

⁴⁰ [1987] AC 281.

⁴¹ [2003] 2 Cr App R 453.

⁴² *Morgan v DPP* [2016] EWHC 3414 (Admin); *Ibrahim* [2016] EWHC 1750 (Admin). Cf *Wills v CPS* [2016] EWHC 3779 (Admin).

⁴³ For analysis, see Laird above (n.41).

⁴⁴ [2017] NICA 3.

noted the value of the factors in the identical provision to s. 114(2) as useful aide-memoires in considering the exercise of discretion.

Here, the call placed the injury at 04.43 and the video report was timed from 5.07. However, the issue was not simply a matter of timing, but of spontaneity, where delay was a factor. The judge had been satisfied that V's statement was an instinctive reaction to the event, giving no real opportunity for reasoned reflection. The judge had been entitled to take into account the factors she had in determining the spontaneity of the statement on the bodycam footage, including: V's emotive language in giving her account; that V did not care about the possibility of injury to her unshod feet from the broken glass; that V made unfavourable remarks about herself and that she said she loved D.⁴⁵ The judge had been entitled to conclude that V's intoxication did not prevent her articulating the details of her complaint.

Again, we conclude that the admissibility of assertions made by witnesses and complainants that happen to be recorded by a camera being worn by a police officer under the *res gestae* exception raises no contentious issue of principle. Use of body-worn cameras will provide a better foundation for determining the reliability and admissibility of such evidence. It is likely to provide record of what was said by whom, the timing of assertions relative to events, the tone adopted by the speaker, and other matters that might be relevant to an assessment of reliability, which is more accurate than a record that takes the form of a handwritten witness statement that might have been produced some time after the event.

Where the witness whose statement recorded at the scene, or shortly after, gives evidence at trial their recorded statement on a BWV may be admissible under ss. 119 or 120 of the CJA 2003. It is surprising that there is relatively little case law on the use of these sections, and there is anecdotal evidence that the investigators have not maximised the opportunities they offer to adduce earlier accounts from witnesses whether they go on to confirm or reject those accounts at trial.

Where at trial a witness gives evidence consistent with their account on the BWV recording, that recording is admissible as evidence of its truth where, inter alia, W is challenged that their testimony is fabricated,⁴⁶ or where W has refreshed their memory from the recording and is cross examined on that.⁴⁷ More importantly, the

⁴⁵ See paras [17]-[19].

⁴⁶ S. 120(2). See *Athwal* [2009] EWCA Crim 789.

⁴⁷ S. 120(3). See *Chinn* [2012] EWCA Crim 501; *Pashmfourth* [2006] EWCA Crim 2330.

recording also becomes admissible as evidence of its truth where: (i) W testifies that the account is their own and true to the best of their belief and that the recording identifies or describes a person, object or place;⁴⁸ or (ii) that statement was made when the matters stated were fresh but W does not and could not reasonably be expected to remember them by the time of trial.⁴⁹ Those would seem to be routes by which a great deal of BWV recorded evidence could be admitted to support trial testimony. Finally, in cases where the witness is a complainant, the BWV recording would become admissible if the recording included the complaint and W testifies that the account is their own and true to the best of their belief. That presents clear opportunities for the use of BWV recorded evidence of statements made by complainants in family and intimate violence cases to be admitted.

Sometimes a witness who has made statements in a BWV recording at the scene or in the immediate aftermath goes on to testify at trial but resiles from those statements. Where this occurs, it is possible that the recordings will be admitted as evidence of their truth, not merely to challenge their credibility, subject to s. 119 of the Act. If W admits having made the statement but at trial, although not hostile, does not adopt it, the recorded statement is admissible under s. 119(b). If the witness is declared hostile, at trial, adopting the long-established test of hostility,⁵⁰ then the earlier statement becomes admissible as evidence of its truth. In the light of the fact that it has been recognized as permissible for the Crown to call a witness anticipating that they may become hostile,⁵¹ there is significant scope for the jury to see the contemporaneous video-recorded account.

Two further points should be made about the use of statements recorded on BWVs at the scene. First, the 2003 Act provides for a witness to refresh their memory from such a document under s. 139.⁵² Secondly, for the sake of completeness it should be noted that if a defendant makes a statement on the BWV recording that is wholly or partly adverse to their interest⁵³ that constitutes a confession and falls to be admitted under the regime established in section 76 of PACE. There is nothing legally significant in the fact that the statement is video-recorded - as a matter of course it is likely to

⁴⁸ S. 120(4)(5).

⁴⁹ S. 120(4)(6).

⁵⁰ *Gibbons* [2008] EWCA Crim 1574.

⁵¹ *Osborne* [2010] EWCA Crim 1981; *Hengari-Ajufo* [2016] EWCA Crim 1913.

⁵² The leading case is *Sugden v DPP* [2018] EWHC 544 (Admin).

⁵³ Section 82 of PACE and *Hasan* [2005] UKHL 22.

preclude any argument about words being put into the defendant's mouth or suggestions that they were being coerced at the time.⁵⁴ It may be of other value in validating the appropriateness of the police conduct surrounding the arrest and interview with the suspect by, for example, confirming the suspect's lucidity and suitability to be interviewed,⁵⁵ or their intoxicated state.⁵⁶

Similarly, care will be needed to ensure compliance at trial with the rules regulating the manner in which the recording is played, potentially replayed and how transcripts of comments etc are used.⁵⁷

(ii) Routine Recording of Witness Statements

As noted above, there is an important distinction to be drawn between recording people making assertions incidentally during the filming of some event - and intentional recording of a formal witness statement using a body-worn camera. The recording in these circumstances is analogous to a traditional documentary witness statement.

The use of BWV for this purpose appears to us to be preferable to the traditional practice of producing written witness statements. The statements that witnesses provide to the police serve a number of purposes. They might influence the direction in which an investigation proceeds, and as a consequence, determine what evidence is sought and secured, and what evidence happens to be overlooked. They provide the basis of the prosecution's theory of what happened, and a foundation for the development and presentation of a coherent case against an accused. Yet despite their fundamental importance, we know little about the manner in which these statements are produced.⁵⁸

Unlike police interviews with suspects, there is little regulation of the process through which narrative evidence is obtained from witnesses. The account set out in a witness statement is unlikely to represent a witness's 'free-recall' about the matters with which it is concerned. It will usually be necessary for the police officer responsible

⁵⁴ The legal test in s. 76 is that the confession was not obtained by oppression and not by things said or done likely to lead any confession in such circumstances to be unreliable. See *Blackstone's Criminal Practice* (2021) F18. The same would be true of mixed statements by the defendant - "I hit him but he attacked me first", see CJA s 118 and *Blackstone's* (ibid).

⁵⁵ *Cooper* [2018] EWCA Crim 2456.

⁵⁶ *Wenham, Siksnys* [2018] EWCA Crim 1926.

⁵⁷ See *Blackstone's Criminal Practice* (2021) D14.35 and *Popescu* [2010] EWCA Crim 1230 - reiterated in *Sardar* [2012] EWCA Crim 134.

⁵⁸ The problem is one that has been recognised in the past: see D. Wolchover and A. Heaton-Armstrong, 'Recording Witness Statements', [1992] *Crim. L.R.* 160.

for obtaining that account, to maintain some control over the process. Without a degree of prompting and interjection on the part of the interviewing officer the account provided by the witness might be partial, rambling, and/or disjointed. To serve as a useful record of events, it will usually be necessary for the officer to guide the witness's recollection, and impose some form of order on the process through which a statement is created.

The way in which an interview between police officer and witness is managed by the former will have significant epistemic consequences. Interview techniques have been developed which, if used, are likely to maximise the amount of accurate information obtained from a witness.⁵⁹ But it is equally possible that a poorly conducted interview will produce inaccurate, misleading, or only partial information about relevant events. What we have in mind when we refer to a 'poorly conducted' interview will be one in which the interviewer attempts to maintain strict control by asking predominantly closed and leading questions;⁶⁰ or provides information about the suspect, or the details of accounts provided by other witnesses; or the existence of other forms of incriminating evidence. The way in which a witness is interviewed can contaminate and corrupt a witness's memory of events. We know that the words used by an interviewer when questioning a witness can affect the witness's recollection of events.

There is also a risk that information disclosed by the interviewer will affect the account of matters provided by the witness. The risk of memory contamination will increase as the period between perception and an attempt at recall increases. Memory for the details of things we observe deteriorates rapidly. At some point the extent of the deterioration might be such that the gaps have to be filled to enable a coherent account to be given. The witness might simply use information acquired from the interviewer, and the implicit suggestion in some of the questions, to fill those gaps. This is unlikely to be something of which the witness is cognisant, and acquisition may be wrongly

⁵⁹ See generally, R. Milne and R. Bull, *Investigative Interviewing: Psychology and Practice* (1999: Wiley).

⁶⁰ See J. Wheatcroft, D. Caruso and J. Krumney-Quinn, 'Rethinking Leading: The Directive, Non-Directive Divide', [2015] *Crim. L.R.* 340. The authors are concerned with the adverse effects of directive leading questions asked in cross-examination on the fact-finding process, but the concerns and the psychological research to which they refer are equally relevant to the effect of leading questions asked in the process of recording a witness statement. See also Ng and Skinnis... [this issue]

attributed to perception of the original event rather than the subsequent investigative interview.⁶¹

Using information acquired from others is not the only way in which problematic deficiencies in memory might be overcome. To provide a sufficiently detailed narrative it might be necessary for a witness to draw on their beliefs about the way in which events tend to occur - to resort to stereotypes. Any information that an interviewer discloses, or which is implied by those disclosures, will form part of the framework in which this kind of cognitive processing occurs. Even if it is not directly incorporated into the account, such information might lead the witness to draw inferences as to what *must* have occurred, the assumed facts then finding their way into the witness's account. It is possible, therefore, for a witness's account to be unintentionally influenced in quite subtle ways. Indeed, guidance on video recorded witness interviews published by the Association of Chief Police Officers, implies such influence might be inevitable:

“It is accepted that the demands of operational policing are such that interviewers will usually know more about the offence than is, perhaps, ideal. In these circumstances, interviewers should try *as far as possible* to avoid contaminating the interview process with such knowledge.”⁶² (emphasis added)

But an interviewer might also use suggestive questions and disclose information with the intention of procuring from a witness an account that supports a certain investigative hypothesis as to what happened and who was responsible.⁶³

⁶¹ On this phenomenon, referred to by psychologists as a 'source monitoring error', see M. Johnson, S. Hashtroudi and D. Lindsay, 'Source Monitoring', (1993) 114 *Psychological Bulletin* 3; M. Zaragoza, S. Lane, M. Akil, and K. Chambers, 'Confusing Real and Suggested Memories: Source Monitoring and Eyewitness Suggestibility', in N. Stein, P. Ornstein, B. Tversky and C. Brainerd (eds.), *Memory for Everyday and Emotional Events* (1997: Lawrence Erlbaum Associates).

⁶² National Investigative Interviewing Strategic Steering Group, *Advice on the Structure of Visually Recorded Witness Interviews* (2nd edition: 2013: ACPO), available at <http://library.college.police.uk/docs/APPREF/ACPO-Witness-Interview-Structure-2013.pdf>.

⁶³ On the inevitability of psychological bias in police investigations see D. Simon, *In Doubt: The Psychology of the Criminal Justice Process* (2012: Harvard University Press), Ch.2. See also, T. Moore, B. Cutler and D. Shulman, 'Shaping Eyewitness Testimony with Coercive Interview Practices', (2014: The Champion, National Association of Defense Lawyers), who suggest that the kind of coercive interview tactics used on a suspect might also be used on a witness where it is believed that he or she is being unhelpful or obstructive. It is perhaps telling that the Ministry of Justice's guidance admonishes those who video-record interviews with "significant witnesses" to "be aware that the defence might ask the court for permission to play some or all of the recording in support of their case"; *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures*, (2011: Ministry of Justice), [1.28].

Despite significant cause for concern, there is currently no requirement for interviews with witnesses to be routinely recorded.⁶⁴ In most cases the only record of an interview will be the witness's written statement. But this will reveal little, if anything, of the process through which it was produced.⁶⁵ It will be very difficult at trial to establish whether anything was said by the interviewing officer, or the questions that were asked, could have influenced the account of events set out in the witness's statement, or have contaminated the witness's memory. In the absence of an audio or video-recording of the interview, reliance will be placed on the ability of those who were present to accurately recall what was said.⁶⁶ But memories for those events will deteriorate in the period leading up to the trial, and as it does so, they too will be vulnerable to contamination and distortion in the way that a witness's recollection of the events about which they are being interviewed will. The effectiveness of cross-examination as a means of establishing whether the interview was conducted in a manner that distorted the witness's recollection, is undermined by the very problems it is intended to reveal. But a question that might be asked is that if we take the witness, rather than the statement, to be the primary source of evidence, and insist on the witness testifying at trial,⁶⁷ why should this be thought a significant problem?

The reason is that where a witness testifies, the content of the witness statement is likely to find its way into the evidence presented to the tribunal of fact. This can occur in more and less obvious ways. Section 139 of the Criminal Justice Act 2003 permits a witness, while giving oral testimony, to "refresh their memory" from a document that they have made or verified. This is provided that they confirm the document records their recollection of the relevant matters when it was created, and their recollection of the matter was likely to have been "significantly better" at the time that the document

⁶⁴ Code C 11.22. The provisions of this Code and Codes E and F which govern the conduct and recording of interviews do not apply to interviews with, or taking statements from, witnesses.

⁶⁵ Wolchover and Heaton-Armstrong suggest that there is "a certain coyness on the part of most officers, when asked how they "took" a statement, in admitting that the narrative was obtained by questioning": D. Wolchover and A. Heaton-Armstrong, 'Recording Witness Statements', above n.60. Also, A. Heaton-Armstrong, D. Wolchover, and A. Maxwell-Scott, 'Obtaining, Recording and Admissibility of Out-Of-Court Witness Statements', in A. Heaton-Armstrong, E. Shepherd, G. Gudjonsson, and D. Wolchover (eds.), *Witness Testimony: Psychological, Investigative, and Evidential Perspectives* (2006: OUP).

⁶⁶ See further, A. Roberts, 'The Frailties of Human Memory and the Accused's Rights to Accurate Procedures' [2019] *Crim. L.R.* 912.

⁶⁷ Of course if the witness is unavailable to testify, and the conditions set out in s.116 Criminal Justice Act 2003 are met, the party that would otherwise have called the witness will be able to rely on the statement.

was created than it is when they testify.⁶⁸ If we take “better” to mean more complete, it is difficult to envisage circumstances in which a witness’s recollection when providing a statement shortly after the relevant events, or at least significantly closer to them in time than the point at which they testify some weeks or months later, would not be better. As Ian Dennis points out, in such cases, “the court is, in effect, permitting the witness to give [what is taken to be] reliable hearsay, on the basis that the witness is prepared to vouch for the accuracy of the contemporaneous record.”⁶⁹

It should be acknowledged, however, that the use of witness statements at trial extends beyond the circumstances set out in section 139. The common law permits a witness to ‘refresh’ their memory from a statement prior to testifying and it is rare for any witness who has provided a statement to the police not to be provided with an opportunity to read it shortly before testifying. As we pointed out earlier, we know that memory for the details of what is perceived tends to deteriorate rapidly,⁷⁰ and that consequently, when witnesses are required to testify, their memories of events will be incomplete and lacking detail.⁷¹ Any suggestion that the statement acts as an aide-memoire in such circumstances, allowing the original memory of specific detail to be ‘revived’ is a legal fiction. A more plausible view is that significant parts of the witness’s testimony will amount to no more than the adoption and reiteration of information recorded in the statement consulted immediately prior to testifying.

In the course of its inquiry into various aspects of the criminal justice system, the Royal Commission on Criminal Justice considered a proposal that the process of taking witness statements that were likely to be contentious at trial should be audio- or video-recorded. The recording, it was suggested, would remove any argument that a witness had made the statement under pressure or inducement.⁷² However, for a number of reasons, the Commission considered the idea to be unworkable:

⁶⁸ Section 139(1) Criminal Justice Act 2003.

⁶⁹ I. Dennis, *The Law of Evidence*, (Sweet & Maxwell 2017), p.583.

⁷⁰ D. Schacter, ‘The Seven Sins of Memory: Insights from Psychology and Cognitive Neuro-Science’, (1999) 54 *American Psychologist* 182.

⁷¹ There is a substantial body of research on this issue, see for example, M. Goldsmith, A. Koriati and A. Pansky, ‘Strategic Regulation of Grain Size in Memory Reporting over Time’, (2005) 52 *Journal of Memory and Language* 505; E. Ebbensen and G. Reinick, ‘Retention Interval and Eyewitness Memory for Events and Personal Identifying Attributes’, (1998) 83 *Journal of Applied Psychology* 745; D. Read and D. Connolly, ‘The Effects of Delay on Long-Term Memory for Witnessed Events’, in M. Toglia, D. Read, D. Ross and R. Lindsay (eds), *The Handbook of Psychology*, vol. 1, *Memory for Events* (2007: Lawrence Erlbaum Associates).

⁷² *Report of the Royal Commission on Criminal Justice*, Cmnd 2262, (1993: London, HMSO), p.11, [14].

“We see the attraction in the proposal but doubt whether it is workable on a wide scale. It would be impracticable and costly to record electronically all interviews with witnesses. Nor is it easy to see how the police could predict which interviews would be likely to prove contentious later and so call for electronic recording. Nor would we wish any recommendation of ours to result in more people being taken to the police station for interviews which could as readily be conducted elsewhere.”⁷³

If every operational police officer is issued with a body worn camera - a possibility that it seems will soon be realised - there will be little if any substance to an objection to routine recording of interviews with witnesses on grounds of impracticability, cost, or inconvenience to the witness.

Shortly before publication of the Royal Commission on Criminal Justice report, Wolchover and Heaton-Armstrong had argued not only that witness interviews should be video-recorded, but (for reasons we have elaborated above) that playing the recording at the trial would be preferable to allowing a witness to consult their written statement while testifying for the purposes of ‘refreshing’ their memory.

No new legislation would be required to facilitate this in trials for indictable only and some triable either way offences conducted in England and Wales. Although it has not been brought into force, the effect of section 137 Criminal Justice Act 2003 would be to disable operation of the hearsay rule and permit a judge in such cases to direct that a witness’s video recorded account of events be admitted as their evidence in chief.⁷⁴ As things stand, in circumstances other than those considered in the previous part (hearsay exceptions), if BWV has been used to record a witness interview, the recording will not be admissible as proof of assertions made by the witness. Rather, it will be used in the production of a written witness statement, and this will enjoy primacy over the recording as a record of the witness’s pre-trial account of events.⁷⁵

We realise that some of what we have already said about the nature of interviews with witnesses might provide the grounds of an argument against witness interview

⁷³ Ibid, [15].

⁷⁴ The rationale for allowing such evidence is that the witness’s recollection of events is likely to have been significantly better when the recording was made than it will be when he testifies; s. 137(3)(b)(i)..

⁷⁵ See *Body Worn Video* (2014: National College of Policing), p.31; *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures*, (2011: Ministry of Justice, 2.135-136.

recordings made using BWVs being played as a witness's evidence-in-chief. We observed earlier that accounts that are initially provided by witnesses might be partial, rambling and disjointed, and that some prompting might be required on the part of the interviewer to obtain a complete account. In view of this, it might be thought that current practice in which the recording is used as the basis of a written statement that presents a clear, concise, and chronological account of the matters perceived by the witness, is preferable, and that the interview be disclosed as unused material. Such a position would be consistent with the current guidance on interviewing "significant witnesses".⁷⁶ This directs that where an interview has been recorded, a written statement should be "derived" from the recording of the interview. The use of the term "derive" is telling. The process will be one in which the video-recorded account is transformed into one related to, but distinct from, that given in the recording. We have already pointed out that a written witness statement will reveal little if anything about the nature of the witness interview in which it is created. The same observation can be made in respect of the process of deriving an account set out in such a statement from that provided in a recording. It will disclose nothing about the nature of this transformative process and the input of these involved in it.

It would, of course, be preferable to have a recording of the witness interview than to have none. But the possibility that witness interviews might be considered in some way 'imperfect' does not seem to us to provide the foundation of a compelling argument against playing a video recorded interview as a witness's evidence-in-chief. As the current version of the ACPO (now NPCC) *Guidance on Visually Recorded Witness Interviews* suggests, adequate planning and suitable structuring of interviews will improve the evidential value of recordings. From an epistemological standpoint, if the written statement does no more than re-arrange information provided in a recording, it seems superfluous. To the extent that rearrangement is necessary, it is something that could be carried out at trial, in a process that can be contested by the defence, and observed by the fact-finder. Empirical research on the transcription of records of interviews with suspects and their presentation in evidence, conducted by Kate Haworth, has demonstrated how during this process interview data can - and has been - distorted and misinterpreted, and subsequently received in evidence undetected and

⁷⁶ Achieving Best Evidence, *ibid.*, 2.135.

unchallenged.⁷⁷ There is no reason to think that such distortions and misrepresentations would not afflict the process of deriving a witness statement from the recording of an interview, the statement then forming the basis of the witness's evidence at trial.

Although we call for the implementation of s. 137, we recognise that it should be accompanied by a dedicated code of conduct regulating the manner in which such interviews would be conducted. That code could stipulate some conditions which must always be followed (subject to exceptional circumstances). One such matter would, we suggest, be the need for recordings to be continuous. This is already recommended by NPCC Guidance. That requirement should guard against the risk that witness's accounts have been negotiated/choreographed by officers off camera.⁷⁸ In the absence of continuous recording, what is filmed is likely to represent a wholly convincing but partial account of an event. We suggest that there is a non-trivial risk that fact-finders will uncritically accept what is depicted in a recording as the whole truth of a matter. In addition to the absence of important (contextual) information, there is a risk that information presented to fact-finders in a recording that would not otherwise be available to them will distort fact-finding in ways that we consider undesirable.

III. Contextual Information

We have suggested that certain contextual information might be epistemically beneficial. A recording of a witness interview might reveal that the person conducting the interview has said or done things capable of distorting the account provided by the witness, or conversely, that they conducted the interview in a manner that created no such risk. The same goes for a recording of the period leading up to the interview, and any interaction between witnesses and police officers that might have occurred. However, it is possible that some forms of contextual information that is revealed when a BWV recording is viewed will have undesirable effects on the fact-finding process.

⁷⁷ K. Haworth, 'Tapes, Transcripts and Trials: The Routine Contamination of Police Interview Evidence', (2018) 22 *International Journal of Evidence and Proof* 428.

⁷⁸ See M. McConville, 'Video-Taping Interrogations: Police Behaviour On and Off Camera' [1992] *Crim. L.R.* 532. See also, M.A. Birck, 'Do You See What I See? Problems with Juror Bias in Viewing Body-Camera Video Evidence', (2018) 24 *Michigan Journal of Race and Law* 153, 169, who points out that while BWV cannot capture every detail of events, fact-finders might assume them to have done so.

The limitations of human perception and recollection, and of language, are such that a video recording will convey far more information than we can expect to be provided in a testimonial account of the matters depicted in the images. But the omission of information from a testimonial account will be deliberate. No record will be made of facts that are of no relevance to the matters that are being investigated. Where the police have visited a witness's home to take a written witness statement, for example, we would not expect the statement to contain information about the general condition of the premises, what was hanging on the walls, what witnesses were wearing, and so on. A statement taken in a hospital will not provide details of the nature of the treatment that the complainant is receiving, bloodstains on the victim's clothing, the machines that are being used to monitor the witness's condition, the concern for the witness's well-being that attending medical staff might exhibit or express, the conduct of those accompanying the witness. In neither of these examples will the usual written statement include a description of the emotional state of the witness or complainant from the perspective of a third person. But all of this information might be captured in a BWV recording, and if the recording is played at a subsequent trial, will be revealed to the fact-finder.

There seem to us to be two broad issues that warrant close attention here. The first is the effect of fact-finders' emotional responses to some forms of information conveyed in a BWV recording but not - or at least not to the same extent - by written statements and testimony. States of fear, shock or distress, are likely to be portrayed in a BWV recording in ways that are not possible in a written statement or testimony, and to engender emotional responses in fact-finders that are stronger than those invoked by testimony or written statements. We will deal with the issue of emotion in the next section. In this section we want to draw attention to a second issue that might easily be overlooked in decisions concerning the admissibility of BWV evidence. The law of evidence imposes constraints on the admissibility of evidence on which parties might seek to rely to bolster the credibility of favourable witnesses and undermine that of those whose testimony is unhelpful. The circumstances in which the bad character of a non-defendant witness is admissible is governed by s 100 of the Criminal Justice Act 2003. Aside from cases in which admissibility is agreed by the parties or the evidence constitutes important explanatory evidence, only where it is of substantial probative

value will it be admitted.⁷⁹ As the courts have made clear in interpreting that provision, it should not be used for “kite flying and innuendo”.⁸⁰ The approach has been to admit less character based evidence against non-defendants than prior to the 2003 Act. The courts have also continued to prohibit the calling of evidence of general reputation to boost the credibility of a non-defendant witness, unless the accused makes a specific challenge to a rebuttable character trait.⁸¹

Although there is increasing judicial recognition - at least in civil proceedings - that demeanour is not a reliable indication of the truthfulness of a witness, insofar as it is still thought important to assessment of credibility, a witness statement recorded using BWV will provide fact-finders with an opportunity to observe the witness. But as we have already indicated, and others have observed, it is possible that a BWV recording will provide juries with information about the witness to which they would not have access were their evidence to be received as testimony. As David Bakardjiev points out:

“[A] great deal of information can be conveyed through video, even without listening to the audio. Jurors can infer religion when they see a cross hanging on a wall, financial wealth when they see expensive cars, and sexual lifestyles when they see same-sex partners.”⁸²

Information captured by BWV that makes it possible to draw inferences about a complainant's or witness's character - their attitudes, commitments, proclivities, preferences, and so on - are, in turn, likely to influence assessments of credibility. Bakardjiev suggests that where BWVs are being used, police officers be trained “to relocate their interactions with citizens to a neutral setting.”⁸³

Ideally, where a BWV is used to record a statement made by a witness or complainant, the recording should reveal nothing from which the inferences just referred to could be drawn. However, it is likely that attempts will be made to rely on recordings that, for various reasons, do reveal such information. Allowing such

⁷⁹ See s. 100(1)(b). the leading cases are *Braithwaite* [2010] EWCA Crim 1082; *Hussain* [2015] EWCA Crim 383; *Simpson* [2021] EWCA Crim 302.

⁸⁰ See *Miller* [2010] EWCA Crim 1153 per Pitchford LJ

⁸¹ See e.g. *Mader* [2018] EWCA Crim 2454; *Amado-Taylor* [2001] EWCA Crim 1898.

⁸² D. K. Bakardjiev, 'Officer Body-Worn Cameras: Capturing Objective Evidence with Quality Technology and Focused Policies', (2015) 56 *Jurimetrics: The Journal of Law, Science & Technology*, 79, 90.

⁸³ *Ibid.*

evidence to be presented to the jury might undermine the constraints established by s.100 Criminal Justice Act and the prohibition on oath helping. This issue will assume special significance in a case in which the accounts provided by a witness (or complainant) and the defendant are the only evidence, and the outcome depends on who the jury believes.

The most obvious way of addressing this problem would be to allow only the audio of the recording to be played. But this is not without problems. There is little empirical research on the effects that exposure to the kind of information we are concerned with here will tend to have on assessment of credibility.⁸⁴ In some circumstances, the risk that what can be seen in the background of a recording will influence the jury's assessment of the credibility of the witness, will be an obvious one. An example might be where the witness's accommodation was littered with empty beer bottles and was unclean or in contrast where a particular uniform was visible in the background (that of a medical professional or emergency services). But in others it will be less so. Footage may contain subtle social cues that affect a jury's assessment of the witness in complex and unpredictable ways.⁸⁵ Jury warnings might not only be ineffective, but undesirable.⁸⁶ Once the jury has been warned about an issue, jurors' attention will be drawn to it even if previously it had been something they had disregarded. Some empirical research suggests that directing a jury to ignore some of what can be seen in a recording might have the paradoxical effect of ensuring of it that it remains prominent in a jury's thinking.⁸⁷ That is a wider problem across the law, but there is no reason to perpetuate it in this new context.

⁸⁴ For one of the few examples that can be found, see, C. Smith, J. P. Davis and A. Roberts, 'Probative or Prejudicial: Biasing Effects of Background Information in Police Body-Worn Video Evidence on Mock Juror Decisions in Victim-Depressed Domestic Abuse Cases', (2019) PsyArXiv, August 19. doi:10.31234/osf.io/72xwh.

⁸⁵ See Birck, above n.81, 164 who suggests that while video-recordings are often perceived by courts to be an objective, truthful and unbiased form of evidence, the meaning of what is seen when footage is viewed is subjectively determined, and that interpretative process relies on the viewers own experiences and beliefs. Also, K.A. Jones, W.E. Crozier and D. Strange, 'Believing is Seeing: Biased Viewing of Body-Worn Camera Footage', (2017) *Journal of Applied Research in Memory and Cognition* 460; K.A. Jones, W.E. Crozier and D. Strange, 'Objectivity is a Myth for You but Not for Me or Police: A Bias Blind Spot for Viewing and Remembering Criminal Events', (2018) 24 *Psychology Public Policy, and Law* 259.

⁸⁶ On the general ineffectiveness of warnings, see N. Steblay et al., 'The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis', (2006) 30 *Law and Human Behavior* 469.

⁸⁷ See D. M. Wegner, D. J. Schneider, S. R. Carter and T. L. White, 'Paradoxical Effects of Thought Suppression', (1987) 53 *Journal of Personality and Social Psychology* 5; K. Edwards and T. S. Bryan,

IV. The Significance of Emotion

We want to finish by making a general point that cuts across the various issues that we have considered in previous parts of the article. It seems to us that if there is to be greater reliance on BWV recordings in criminal trials, there is a need for further reflection on the effects that emotion might have on the fact-finding process, and how those effects might be addressed.

There seems to be ambivalence in the role that emotion ought to play in this context. Spottswood observes that “to the extent [that the] rules of evidence discuss emotions at all, they characterize them as an improper influence on jury-decision-making” - the antithesis of reason - but that “there are times when emotions are treated as a valuable part of the trial process”.⁸⁸ The strategies advocates adopt at trial - the theories and arguments that are presented, decisions about what evidence should be adduced - will be shaped to a significant extent by consideration of the way in which fact-finders are likely to respond emotionally to them. It has been suggested that lawyers tend to view the trial as an “emotional battleground”⁸⁹ in which the parties attempt to manipulate the emotions of the jury in ways they believe will deliver desired outcomes. Efforts to engender in fact-finders feelings of sympathy, empathy, anger, or disgust, are considered not only to be a legitimate aim of advocacy, but an attribute of the effective practice of it.⁹⁰

Research conducted in New Zealand and Australia by Westera and Powell found considerable support among prosecutors for the use of BWVs to record complainants' statements in domestic violence cases.⁹¹ Among the views expressed was that jurors would find an account “more compelling” if presented by a complainant in a visibly “heightened” emotional state rather than in written statement. Prosecutors also believed that visible injuries would increase both the ‘value’ of the evidence and

‘Judgmental Biases Produced by Instructions to Disregard: The (Paradoxical) Case of Emotional Information 23 Personality and Social Psychology Bulletin 849.

⁸⁸ M. Spottswood, ‘Emotional Fact-Finding’, (2014) 63 Kansas Law Review 41, 41.

⁸⁹ Ibid, 42.

⁹⁰ See for example, N. Messing, *The Art of Advocacy* (2013: Wolters Kluwer), at p.3: “Effective [legal] storytelling involves two or three critical goals: creating empathy toward your client or generating enmity toward the defendant (or both)...”; R. McPeake (ed.), *Advocacy* (15th edn: 2010: OUP), at p.119: K. Evans, *Advocacy in Court* (1995: Blackstone Press), at p.26.

⁹¹ N. Westera and M. Powell, ‘Prosecutors’ Perceptions of How to Improve the Quality of Evidence in Domestic Violence Cases’, (2017) 27 Policing and Society 157.

the credibility of the complainant's account, one suggesting, "Get it on video. Get it while they're angry. Zoom in on that black eye. Get a video of her while she's lying in the hospital bed."⁹² But as Spottswood points out, juries "find themselves positioned awkwardly ... caught between advocates who strive to engage their feelings and judges who demand that they perform heroic feats of emotional control."⁹³ The current version of the *Crown Court Compendium*, for example, suggests that at the outset of a criminal trial, the jury be directed that "... cases like this sometimes give rise to [emotions/sympathies]. You must not let such feelings influence you when you are considering your verdict."⁹⁴

BWV recordings mark a significant departure from the traditional ways of presenting information to juries – for the most part, in-court testimony and documentary evidence. What has emerged from research undertaken to date, is that changes in the medium through which it is presented, can affect fact-finders' emotional responses. Douglas and colleagues, for example, discovered that showing mock jurors still photographs of a post-mortem examination induced feelings of anxiety, shock and anguish, and these feelings were stronger when presented in the form of colour images when compared with those aroused by black and white images.⁹⁵ It is also now well established that emotion has a significant effect on the way in which evidence is evaluated. It seems that anger leads fact-finders to rely to a greater extent on heuristics - cognitive shortcuts. They tend to seek and place greater weight on evidence that is congruent with their feelings of anger, to overlook and place less weight on evidence that might engender different emotional responses, to be more certain about evaluative conclusions, and are more punitive in their attitude towards the defendant. However, belying the law's view of emotion as something that is entirely inimical to reliable fact-finding, there is evidence that feelings of sadness lead to more careful and systematic processing of information.⁹⁶ It has also been suggested that empathy might improve

⁹² Ibid, at 163.

⁹³ Ibid, at 42.

⁹⁴ *Crown Court Compendium*, Part 1, Jury and Trial Management and Summing Up, (December 2020), 4-3.

⁹⁵ K. Douglas, D. Lyon, and J. Ogloff, 'The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial', (1997) 21 *Law and Human Behavior* 485. See also, S. Kassin and D. Garfield, 'Blood and Guts: General and Trial-Specific Effects of Video-taped Crime Scenes on Mock Jurors', (1991) 21 *Journal of Applied Psychology* 1459.

⁹⁶ C. Carver and E. Harmon-Jones, 'Anger id an Approach-related Affect: Evidence and Implications', (2009) 135 *Psychological Bulletin* 183; C. Semmler and N. Brewer, 'Effects of Mood and Emotion on Juror Processing and Judgments', (2002) 20 *Behavioral Sciences and the Law* 423.

fact-finding by encouraging fact-finders to adopt differing perspectives.⁹⁷ It might be that the effect of emotion on fact-finding has an extensive and profound effect on the fact-finding process.

Perhaps the most influential theory of jury decision-making is Pennington and Hastie's Story Model.⁹⁸ According to this theory, jurors use a narrative story as a means of organising and evaluating information that is presented to them during a trial. The evidence is understood through its incorporation into one or more plausible stories capable of explaining what happened. The story that will determine the jury's verdict, will be that which best satisfies the principles of coverage and coherence. The idea of coverage concerns the extent to which the story accounts for the evidence that is presented during the trial. The principle of coherence, Pennington and Hastie explain, requires the story to be consistent with jurors' knowledge or assumptions about the way in which things tend to occur in the world, and to be free of internal inconsistencies. In subsequent work, Reid Hastie went on to consider how the story model might account for what is known about the effects of emotion on juror decision-making.⁹⁹

He suggested that effects of emotion would be manifested in various ways. The decision-making process begins with jurors identifying a story that seems to explain the evidence presented in the case. This process might involve either retrieval from memory of either a ready-made story - a 'script' or schema that might be based on a television programme or something the juror has read - or the construction of a story *de novo* from pieces of knowledge that the juror possesses. Hastie suggests that emotion might have a biasing effect on both processes.¹⁰⁰ If a script or schema provides the basis of the story, the juror's emotional state is likely to influence the process of selection. The story retrieved from memory might be one that in the past had provoked the emotions that the juror is experiencing in the trial. Where the story is constructed *de novo*, the retrieval from memory of its component parts is also likely to be biased by the emotions affecting the juror when engaging in this process. He suggests that an angry juror is likely to retrieve from memory information that is negative and is likely to

⁹⁷ N. Feigenson, 'Emotional Influences on Judgments of Legal Blame: How They Happen, Whether They Should, and What to Do About It', in B. Bornstein and R. Wiener (eds.), *Emotion and the Law* (2010: Springer), p.67.

⁹⁸ N. Pennington and R. Hastie, 'A Cognitive Theory of Juror Decision-making: The Story Model', (1991) 13 *Cardozo Law Review* 519.

⁹⁹ R. Hastie, 'Emotions in Juror's Decisions', (2001) 66 *Brooklyn Law Review* 991.

¹⁰⁰ *Ibid.*, 1007-8

exaggerate the seriousness of wrongdoing or harm suffered by the victim.¹⁰¹ Moving beyond selection or construction of a broad schema or framework, emotion is also likely to affect the process of filling in the detail of a story. Inferential reasoning depends on generalisations. In criminal trials, these generalisations will, for the most part, will be grounded in jurors' own experience or their 'common sense'. Emotions such as fear, anger, sympathy will influence the experiences that are drawn upon, and judgments that are made, in identifying generalisations that are considered to be relevant, and ultimately on the conclusions that will be drawn.

Susan Bandes and Jessica Salerno have suggested that there needs to be a shift in the law's current approach to the issue of emotion in fact-finding.¹⁰² They argue an approach that "overlooks affective influences is likely to be particularly poorly equipped to evaluate the probative value or prejudicial effects of modern forms of evidence."¹⁰³ Consideration needs to be given to the way in which the evidence conveys information, the emotion it is likely to invoke in the fact-finder, and the effect that this is likely to have on evaluation of the evidence.¹⁰⁴ It should be apparent from the preceding discussion that BWVs might be used to make records in a wide range of circumstances. Bandes and Salerno observe of photographic evidence, that compared to documentary and testimonial evidence, it both conveys information differently, and conveys different information.¹⁰⁵ The same observation can be made of video-recorded evidence by comparison with photographic evidence. It seems that while words and images are both capable of provoking emotional responses in fact-finders, images are likely to do so more quickly,¹⁰⁶ and that audio-visual materials - film clips - have particularly powerful and prolonged effects.¹⁰⁷

¹⁰¹ Ibid., 1008

¹⁰² S. Bandes and J. Salerno, 'Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements', (2014) 46 Arizona State Law Journal 1003.

¹⁰³ Ibid, p.1009.

¹⁰⁴ Ibid, p.1008.

¹⁰⁵ Ibid, p.1021.

¹⁰⁶ N. Feigenson and C. Speisel, *Law on Display: The Digital Transformation of Legal Persuasion and Judgment* (2009: NYU Press), pp.7-8.

¹⁰⁷ Because of this, it is commonly used in laboratory studies to manipulate emotion; see generally, L. Fernandez-Aguilar, B. Navarro-Bravo, J. Ricarte, L. Ros, and J. M. Latorre, 'How Effective are Films in Inducing Positive and Negative Emotional States? A Meta-analysis', (2019) PLoS ONE 14(11) e0225040; N. Nunez, V. Estrada-Reynolds, K. Schweitzer, and B. Myers, 'The Impact of Emotions on Juror Judgments and Decision-making', in B. Bornstein and M. Miller (eds), *Advances in Psychology and Law*, (2016: Springer), p.64; V. Fishfader, G. Howells, R. Katz and P. Terisi, 'Evidential and Extralegal Factors in Juror Decisions', (1996) 20 Law and Human Behavior 565.

Several decades of scientific study has provided us with a valuable body of empirical knowledge of relevance to fact-finding in criminal proceedings, but the influence of emotion on that process remains under-researched. As BWV recordings become a more common form of evidence in criminal trials, we need to know more about their emotional effect on fact-finders. It should be apparent from the discussion in preceding parts of this paper that, while it is presented through the same medium, the nature of the information conveyed by BWV recordings, might be quite diverse. It seems to us that there is a need for research that reveals something of the emotional responses experienced by those who view BWV recordings of the kind of incidents in which they are typically deployed. Such as, scenes of domestic violence or other disturbing circumstances and recordings of initial accounts given by distressed, distraught and/or fearful witnesses and complainants. Such knowledge will facilitate a more sophisticated approach to determining whether this kind of evidence is likely to have such an adverse effect on the fact-finding process, that it ought to be either excluded, or edited before presentation to a jury.

What we already know about the part that emotion plays in reasoning casts doubt on the effectiveness of the direction typically given to juries, that emotions are to be set aside when reaching a view about the matters in dispute. This will be true not only of some BWV recordings, but of any form of emotive evidence. Bandes and Salerno point out that emotion is something that we necessarily rely on to “screen, organize and prioritize” information to which we are exposed.¹⁰⁸ The emotions we feel will often act as heuristics; intuitive guides to what we should do or think. Spottswood, drawing on an influential idea - the dual processing theory - suggests that in a criminal trial, the intuitive thinking associated with jurors’ emotional responses to evidence interacts with the deliberative reasoning processes in which juries are required to engage.¹⁰⁹ Intuitive judgements will have been made during the course of evidence. They will have shaped jurors’ initial understanding of the evidence, and their views about what is significant and what is not. This is the starting point for the deliberation in which they engage at the conclusion of the trial. Deliberation might mitigate the risk

¹⁰⁸ Bandes and Salerno, above n.103, p.1011.

¹⁰⁹ Above n.89; also M. Spottswood, ‘The Hidden Structure of Fact-Finding’, (2013) *Case Western Reserve Law Review*, 171.

of conclusions based on flawed intuitive reasoning,¹¹⁰ but as Spottswood - among others - points out:

“[T]rying to separate the products of emotion from those of reason will generally be futile, because emotions are an inherent component of rational fact-finding, rather than something that competes with or undermines it.”¹¹¹

It has been suggested by Feigenson that jurors are unlikely to be aware of the extent to which their emotions might affect the way they evaluate evidence and the reasoning in which they engage.¹¹²

If we accept the proposition that emotion, and the intuitive thinking associated with it, is an inherent aspect of legal fact-finding, an approach that simply admonishes juries who have viewed emotive BWV recordings to set emotion aside, is inadequate. There seems to be agreement among commentators that a direction intended to address the problems to which emotional responses might give rise, needs to:

- (i) explain to juries how emotion might affect their reasoning, and that they are unlikely to be aware of this happening; and
- (ii) point out that once we are aware that it is possible for emotion to affect reasoning in this way, we can adopt an approach to the evidence that consciously seeks to counteract it.

For example, by adopting different perspectives and revisiting evidence that initially might not have seemed important.¹¹³ Until we have reliable empirical knowledge concerning the kind of BWV recordings that give rise to emotional responses that have an adverse effect on reasoning, it seems to us that judges' own intuitive emotional responses to such evidence ought to guide the issuing of such a warning.¹¹⁴

There might, of course, be some forms of BWV evidence, the emotional impact of which is likely to be such that it cannot be mitigated by a direction of this

¹¹⁰ M. J. Saks and B. A. Spellman, *The Psychological Foundations of Evidence Law*, (2016: OUP), p.67.

¹¹¹ Spottswood, above n.89.

¹¹² Feigenson, above n.98, at p.84-5.

¹¹³ Ibid. p.87.

¹¹⁴ This is part of a larger question for the criminal justice system as the value of directions are more accurately tested by empirical studies with jurors. See for example the recent study by Prof Thomas on sexual myths; C. Thomas, 'The 21st Century Jury: Contempt, Bias, and the Impact of Jury Service', [2020] *Crim. L.R.* 987; cf J Chalmers, F Leverick and V Munro, "" [2021] *Crim LR* issue 8.

nature. In those cases, consideration ought to be given to a ruling that evidence be adduced in a different form - witness testimony or written statement. In some cases, the risk might be so great that it ought to be excluded all together.¹¹⁵ Which of these alternatives - jury directions, evidence presented through a different medium, and exclusion - might be warranted in any given circumstances, ought to be based on a sound understanding of the emotional effect of various forms of BWV recordings on fact-finders, and the way in which this affects the fact-finding process. In this respect, the current lack of relevant empirical research is problematic. It is clear that more work by many agencies will be needed, including those responsible for drawing up jury directions in the *Crown Court Compendium*.

V Conclusion

There is no doubt as to the value that body worn video recorded evidence might serve in the criminal trial. We consider that a strong case can be made for more widespread use, subject to necessary safeguards, to take witness accounts instead of the current process of producing written statements. Section 137 of the Criminal Justice Act 2003 should be brought into force to facilitate this. The courts and criminal justice professionals need to be alert to the dangers of the emotional impact such recordings might have and of the need for clear jury directions to guard against potential unfair prejudice.

¹¹⁵ The effectiveness of attempts to address the biasing effect of emotion through instructions depends on fact-finders being motivated to employ reason to counteract its effects. If the nature of the evidence makes it unlikely that they will be so motivated, the only means of ensuring fairness might be exclusion.