

INSURANCE LAW BULLETIN

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NEMCHIN v GREEN:

Surveillance and Social Media Research – Clarifying Rules Regarding Admissibility

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I. OVERVIEW

In *Nemchin v. Green*, 2019 ONCA 634, the Ontario Court of Appeal was tasked with considering the admissibility of late surveillance and Facebook photographs taken of the plaintiff. The trial judge made two rulings that the defendants took issue with: the defence was not permitted to show the jury surveillance evidence in order to establish that the plaintiff's PTSD was not as debilitating as the jury was led to believe; and, the defence was not permitted to show 20 of the plaintiff's Facebook posts sought to be admitted for the same purpose. Justice Lauwers, writing for a unanimous bench, dismissed the defendant's appeal. However, despite dismissing the appeal, the Court found that the trial judge erred in many of her determinations. This decision was the Ontario Court of Appeal's first opportunity to consider and provide further clarity to its ruling in *Iannarella v. Corbett*, 2015 ONCA 110.

II. ISSUES

1. Did the trial judge err in excluding the surveillance evidence?
2. Did the trial judge err in excluding the Facebook evidence?
3. All circumstances considered, did the trial judge make errors sufficiently grave to warrant a new trial?

III. ANALYSIS

1. Did the trial judge err in excluding surveillance evidence?

The defence conducted three rounds of surveillance: May 2015, September 2015, and May 2016. Disclosure was completed in a timely manner for all surveillance minus the May 2016 round, which was not disclosed until two weeks before trial. This required the

Court of Appeal to answer two questions. First, was the surveillance admissible on ordinary principles? Second, what was the effect of the delay in disclosure with respect to admissibility of the May 2016 surveillance? The appellant argued that it wished to tender the surveillance evidence for the jury's consideration as part of its "fact-finding process with respect to the extent of the plaintiff's alleged limitations and functioning, and in assigning a monetary value to the plaintiff's alleged pain and suffering, loss of enjoyment of life and loss of income."

The test for admissibility

Justice Lauwers held that the test for admissibility of surveillance evidence is the same whether the evidence is to be used for impeachment purposes or for substantive purposes, and the approach to the assessment of the evidence in the *voir dire* must be the same. As per *Iannarella*, the video evidence must be assessed for two purposes: first, to permit the videographer to be examined in order to ensure that the video presents a fair and accurate depiction for the surveillance to be admitted in evidence; and second, to ensure that the use of surveillance video will not impair trial fairness.

Distinction between surveillance used to impeach and surveillance used as substantive evidence of functionality

When surveillance is disclosed in accordance with the *Rules*, it can play both the role of an impeachment tool and of substantive evidence of a witness's functionality. At trial, the defence used the surveillance only for substantive purposes and thus the trial judge's decision was restricted to that use.

The Court noted similarities between the case at bar and the decisions in *Taylor v. Durkee* and *Ismail v. Fleming*. In *Taylor*, plaintiff's counsel objected to the admission of surveillance because it showed what the plaintiff was capable of "on a good day." *Taylor* provides that this "on a good day" explanation does not generally shield the plaintiff from admission of surveillance for substantive purposes. In *Ismail*, Justice Leach noted that his ruling was "intended to provide general confirmation that the defendants will be permitted to tender, (if only through their own witnesses), a measure of surveillance video evidence relating to the plaintiff on various occasions." However, Justice Leach also noted that the defendants were not given *carte blanche* to introduce all surveillance video as substantive evidence, in whichever manner they chose.

Trial fairness and spectrums

While the first purpose of the *voir dire* noted above is self-explanatory, the second requires elaboration. The second purpose of the *voir dire* is to ensure the use of surveillance evidence will not create an unfair trial. This purpose includes the rule in *Browne v. Dunn*, which states that if counsel intends to present evidence contradictory to a witness's testimony as part of his or her argument, counsel must put that version of events to the witness during cross-examination. This allows the witness an opportunity to explain any inconsistency before counsel draws attention to said inconsistency in argument.

Justice Lauwers stated that "the trial judge must decide whether the claimed contradiction warrants full-on cross-examination as a matter of trial fairness." Justice Lauwers provided the idea of a spectrum to illustrate his point. Significant contradictions must be put to the witness in cross-examination prior to using the surveillance to effectively call the witness untruthful, whereas minor discrepancies can be put forth as

substantive evidence without first providing the witness an opportunity to explain the minor contradiction. In essence, significant contradictions trigger the rule in *Browne v. Dunn*, whereas minor contradictions may not.

Timing of motions to exclude surveillance evidence

Justice Lauwers stated that it is preferable for the motion to be brought as it was in *Ismail* (prior to any evidence being adduced). However, “pre-emptive wholesale” attacks on surveillance evidence should be avoided.

Substantive reasoning

The trial judge provided three substantive reasons for refusing to admit the defendant’s surveillance evidence:

- a. The surveillance video was minimally probative and as such was unable to contradict, challenge, or impugn the witness’ testimony.
- b. In light of the plaintiff’s PTSD, the surveillance video could not be interpreted meaningfully by the jury without expert opinion evidence.
- c. The May 2016 surveillance was inadmissible because it was served late.

The Court of Appeal found that the trial judge erred with respect to each substantive reason:

- a. The evidence was arguably available to provide context and to qualify the plaintiff’s testimony as to her true functionality, along the lines of the evidence in *Taylor*. It was not strictly necessary that the evidence be able to contradict, challenge, or impugn the plaintiff’s testimony.
- b. This factor could be taken into consideration by the trial judge to determine admissibility of the surveillance video. However, the trial judge’s analysis was lacking in that it failed to consider whether the experts could have been consulted further to determine whether the video might have elicited further opinions and led to the need for testimony.
- c. The trial judge did not assess the late-disclosed surveillance to determine whether its admission would be prejudicial in accordance with 53.08 of the *Rules*. Late production is usually not deemed sufficient reason for excluding relevant evidence where it is similar to evidence that was disclosed on time. The trial judge erred in failing to assess whether admittance would be permissible considering fairness and surprise.

Procedural Reasoning

The trial judge provided four procedural reasons for refusing to admit the defendant’s surveillance evidence:

- a. Some video was time stamped while some was not. This was explained as the effect of zooming in past the time stamp.
- b. The trial judge found that because the investigator did not know precisely how the video had been edited, he was unable to provide verification on oath that the video was accurate, even though he filmed it.

- c. Some “stills” had descriptions of subjective elements from the investigator. The trial judge found it inappropriate for the investigator to include his personal observations of the plaintiff in the report.
- d. There were gaps in the footage, which in the trial judge’s opinion resulted in inaccurate depictions of the plaintiff’s activities. The trial judge found the incomplete footage did not accurately reflect the plaintiff’s activities.

The Court of Appeal found that the trial judge erred with respect to all four of the procedural reasons:

- a. There was no evidence that the zoomed-in video was different from the unedited video from which it was derived. The actual timing, to the extent it was relevant, would have been easy to establish.
- b. The ability of the investigator to know precisely how the video had been edited or provide verification on oath that the video was accurate did not affect whether a particular sequence of images was accurate in what it depicted.
- c. The trial judge gave too much weight to the written surveillance reports. The critical evidence was the video itself, not the reports, which could have easily been excluded or redacted if the reports contained questionable text.
- d. There is no requirement that a video be continuous or complete before it can be said to accurately depict a witness’s activities. The key is to ensure that the excerpts that are played are fair and accurate.

Justice Lauwers stated that “the trial judge’s task was to look at each piece of video evidence and determine whether it was, in and of itself, admissible. She did not take this sort of granular approach to the video evidence, but dealt with it as a whole. This led her into error.”

2. Did the trial judge err in excluding the Facebook posts?

The defence sought to introduce 20 Facebook posts to form the basis of a critical cross-examination that would have challenged the plaintiff’s functionality. Defence counsel informed the trial judge that the Facebook posts were obtained through an access agreement between counsel. The agreement provided that the plaintiff’s Facebook would be reactivated but that any posts or pictures taken by the defence would be provided to the plaintiff “posthaste.” The defence failed to provide pictures taken through inadvertence. The trial judge refused to admit the pictures due to the prejudice faced by the plaintiff if they were to be admitted, based on the fact that the picture agreement was not upheld.

As it turned out, the Facebook photos were taken prior to the subject agreement being set in place. However, this was only discovered post-trial ahead of the appeal hearing. As such, on the facts as they were before her, the trial judge did not err in refusing admittance of the Facebook photos. Justice Lauwers also stated at paragraph 69 that “the approach that Leach, J. took in relation to the late-produced surveillance in *Ismail* would otherwise have application. The trial judge was required to consider whether there were any realistic or meaningful concerns about the plaintiff and her counsel being unfairly taken by surprise by the admission of such evidence at trial.”

3. Is a new trial warranted?

Despite identifying several errors in the trial judge's ruling, the Court of Appeal refused to order a new trial. Justice Lauwers stated that the "plaintiff's functionality did not loom large in the trial" and that the critical live issue at the trial was causation. Even if the excluded surveillance evidence were to have been admitted, it was not so significant that the evidence would have affected the jury's verdict on damages. Thus, the appeal was dismissed.

IV. PRACTICAL IMPLICATIONS

This decision, in conjunction with the Court of Appeal's earlier ruling in *Iannarella*, supports the proposition that disclosure of surveillance in accordance with the *Rules* is an important factor for the use of surveillance at trial for substantive purposes. In addition, this decision provides a guideline for counsel to assess what a first instance judge will consider with respect to issues regarding admissibility of surveillance disclosed outside of the time frame prescribed by the *Rules*. Finally, this decision suggests that arguments regarding admissibility of surveillance and social media research will revolve around fairness, prejudice, and where the specific evidence falls along the "spectrum" discussed above.