Surveillance and Social Media Evidence

By Brian G. Sunohara
Rogers Partners LLP

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1. Introduction

There are many cases which have addressed using surveillance at trial for impeachment. More recently, the courts have taken a closer look at when surveillance can be admitted into evidence for substantive purposes. The trend is towards broader admission of surveillance, with less emphasis on technical issues.

The Court of Appeal's most recent decision on surveillance is *Nemchin v. Green*.[1] In *Nemchin*, the Court of Appeal referred to the Supreme Court of Canada's decision in *R. v. Nikolovski*, wherein it was stated:

> The video camera…is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.[2]

Surveillance is indeed an "unbiased witness". It can be powerful and compelling evidence. That being said, the courts have stressed that it must be used in a fair manner.

2. Use of Surveillance

Surveillance can be used at trial for two purposes: (1) as a substantive part of the defendant's case to demonstrate a plaintiff's functionality, and (2) to impeach a plaintiff.

(a) *Substantive Use*

A contradiction in a plaintiff's evidence is not necessary to use surveillance for substantive purposes.

Arguments by a plaintiff that surveillance evidence does not have any relevance or probative value because the activities shown on the video are consistent with what he or she is able to do on a good day generally do not inoculate the plaintiff from the introduction of surveillance evidence for substantive purposes.[3]

In *Nemchin*, the Court of Appeal endorsed the reasoning of Justice McKelvey in *Taylor v. Durkee*[4], which rests on principles of "broader application".[5] The fact that a plaintiff has

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[1] 2019 ONCA 634 at para. 9 ("*Nemchin*").
[2] [1996] 3 SCR 1197 at para. 21
[3] *Nemchin* at para. 19.
[4] 2017 ONSC 7358
[5] *Nemchin* at para. 21.

given some evidence about his or her abilities does not mean that no other evidence may be introduced on that point.[6]

Surveillance can provide context and can qualify a plaintiff's testimony as to his or her true functionality.[7]

The Court of Appeal indicated that relevant evidence on a critical issue should not be excluded. It is ultimately a question of fact for a jury to weigh all of the relevant evidence on the nature and degree of any impairment.[8]

(b) ***Impeachment***

A defendant must lay an adequate factual foundation before surveillance can be used to impeach a plaintiff's testimony.[9]

A defendant has to elicit from the plaintiff the nature of his or her injury with sufficient precision. It cannot be done in a generalized and superficial manner.[10]

In determining whether a defendant can impeach a plaintiff with surveillance, the Court of Appeal in *Iannarella v. Corbett*[11] agreed with the approach of Justice Bryant in *Lis v. Lombard Insurance Company*.[12]

In particular, in a *voir dire*, a defendant must identify with specificity which inconsistencies or contradictions in the plaintiff's testimony the surveillance would be used to impeach. The trial judge must then analyze each alleged inconsistency and determine whether the surveillance contradicts the witness's testimony.

A trial judge must be satisfied that the surveillance is relevant to the witness's credibility before admitting it into evidence.[13]

When surveillance is used to impeach a witness, a jury should be provided with a limiting instruction. In *Iannarella*, the Court of Appeal provided the following example of a limiting instruction:

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[6] *Ibid.* at para. 19.
[7] *Ibid.* at para. 47.
[8] *Ibid.* at para. 20.
[9] *Landolfi v. Fargione* (2006), 79 OR (3d) 767 (C.A.) at para. 65 ("*Landolfi*").
[10] *Machado v. Berlet et al.*, [1986] OJ No. 1195 (HCJ).
[11] 2015 ONCA 110 ("*Iannarella*")
[12] 2006 CanLII 21595 (ON SC).
[13] *Iannarella* at para. 100.

> You saw a video of surveillance conducted by the defence on the Plaintiff. I made an order that it was admissible and as a result you saw this video. I need to remind you however as to the use that you can make of what you saw on the video. It is not admissible as substantive evidence of the Plaintiff's physical capacities. It has a limited purpose. It is to be used by you, the judges of the facts, to assess the Plaintiff's credibility as to his physical limitations following the accident. To repeat, you cannot use what you saw on the video to determine his physical capacities. You can only use what you saw on the video for the purpose of determining credibility – specifically it is your role as the triers of the facts to determine if there are inconsistencies between what he said during his evidence and what you saw on the video.[14]

Without a limiting instruction, there is a risk of the jury using the surveillance for substantive purposes, that is, for determining the plaintiff's functionality.

3. Pre-Trial Disclosure and Production of Surveillance

(a) *Substantive Use*

If surveillance is going to be used as a substantive part of the defendant's case to demonstrate a plaintiff's functionality, then the defendant must abandon privilege over the surveillance and produce it to the plaintiff at least 90 days prior to trial.[15]

When surveillance is produced, it can also play a dual role of impeaching a plaintiff. As explained in *Nemchin*:

> A short video clip, for example, might show the witness doing a particular movement or activity that she testified she was not able to perform. It is open to the defence to use the excerpt in cross-examination to impeach the witness's credibility, and then also to use that excerpt to show the witness's true functionality for substantive purposes.[16]

Therefore, broader use can be made of surveillance if it is produced to the plaintiff in advance of trial.

In most cases, it would be prudent for a defendant to produce surveillance in its entirety as a matter of practice, as it could then be used for both impeachment (if the occasion warrants) and substantive purposes. As the opportunity for impeachment may or may not arise depending on the testimony of the plaintiff at trial, full production allows, at the

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[14] *Iannarella* at para. 112.
[15] Rule 30.09 of the *Rules of Civil Procedure*.
[16] *Nemchin* at para. 15.

very least, for the tendering of the surveillance as substantive evidence (subject to the trial judge's discretion).

Little purpose is gained by holding surveillance back. The plaintiff is already entitled to particulars of surveillance in any event.

A defendant is not permitted to abandon privilege over only selected rounds of surveillance. In *Cromb et al. v. Bouwmeester et al.*, the defendants produced two rounds of surveillance but refused to produce a third round. Justice Chappel ordered the third round to be produced.[17]

Her Honour indicated that there was an implied waiver of privilege and that, if the third round of surveillance was not produced, it would create a significant risk of the court not receiving a full and accurate picture of the plaintiff's true level of functioning. The defendants were not permitted to engage in "cherry-picking" of favourable evidence.[18]

Justice Chappel also ordered the defendants to produce unedited copies of the videos.[19]

If a plaintiff attends a defence medical examination under section 105 of the *Courts of Justice Act*[20], and if the defendant provides the expert with surveillance, then privilege is waived over the surveillance. The waiver occurs once the surveillance is provided to the expert. Therefore, the defendant is not entitled to wait until after the defence medical examination is completed to produce the surveillance to the plaintiff.[21]

(b) ***Impeachment***

If surveillance is going to be used to impeach a plaintiff, it does not have to be produced to the plaintiff in advance of trial. However, it must be disclosed in Schedule B of the defendant's affidavit of documents.

As indicated by the Court of Appeal in *Iannarella*, the *Rules of Civil Procedure* are designed to require full disclosure of information in order to prevent surprise and trial by ambush.[22]

The Court of Appeal stated that pre-trial disclosure of surveillance in a personal injury action is particularly important since "the impact of video evidence can be powerful."

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[17] 2014 ONSC 5318 at para. 53.
[18] *Ibid*. at paras. 5 and 53.
[19] *Ibid*. at para. 70.
[20] R.S.O. 1990, c. C.43
[21] *Aherne v. Chang*, 2011 ONSC 3846 at paras. 43-49.
[22] *Iannarella* at para. 33

Disclosure provides the parties with the opportunity to carry out a realistic assessment of their positions and therefore facilitates settlement.[23]

On an examination for discovery, a plaintiff may request particulars of surveillance. The particulars that must be disclosed include the date, time and location of the surveillance, as well as the nature and duration of the activities depicted and the names and addresses of the videographers.[24]

If surveillance is obtained after the defendant serves an affidavit of documents, an updated affidavit of documents listing the surveillance must be served, and the defendant must disclose the particulars of this surveillance upon request.[25]

4. **Late Disclosure or Production of Surveillance**

If a defendant fails to disclose or produce surveillance in accordance with the *Rules of Civil Procedure*, leave of the trial judge is required to use the surveillance.

Rule 53.08 of the *Rules of Civil Procedure* states that "…leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial".

In *Nemchin*, the Court of Appeal stated that rule 53.08 is not mandatory in an absolute sense. In the context of an ongoing civil jury trial, an adjournment is often not a viable or reasonable response.[26]

However, the Court of Appeal indicated that, if surveillance is disclosed late, a trial judge is required to assess whether admitting it would be prejudicial.[27] In particular, the Court of Appeal set out the following test:

> …The question is 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. Late production is usually not a good reason for excluding relevant evidence where it is similar to evidence that was disclosed on time, so that neither the plaintiff nor her counsel were unfairly caught by surprise.[28]

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[23] *Ibid.* at para. 44.
[24] *Ibid.* at para. 40.
[25] *Ibid*. at para. 55.
[26] *Nemchin* at para. 49.
[27] *Ibid.* at para. 50
[28] *Ibid*.

Therefore, the main factor to take into account is whether the plaintiff was taken by surprise. For example, if properly disclosed surveillance shows the plaintiff bicycling and late-disclosed surveillance also shows the plaintiff bicycling, there should be no surprise. The late-disclosed surveillance should be admitted.

The question of how late the surveillance was disclosed or produced is important. In *Iannarella*, two factors considered by the Court of Appeal were whether the plaintiffs had the benefit of considering the surveillance in assessing the possibility of pre-trial settlement and whether their counsel had sufficient time to prepare an appropriate examination-in-chief of the main plaintiff.

If surveillance is disclosed or produced shortly prior to the commencement of trial, the trial judge will likely give the plaintiff the option of either proceeding with the trial or adjourning the trial, with the defendant being responsible for costs thrown away.

This is what occurred in *Bishop-Gittens v. Lim*.[29] The defendant obtained surveillance of the plaintiff following examinations for discovery but did not serve an updated affidavit of documents as required by *Iannarella*.

Justice McKelvey gave the plaintiff the option of having the trial adjourned, with costs thrown away. Justice McKelvey otherwise permitted the defendant to use the surveillance for impeachment, but ordered the surveillance video to be produced. His Honour stated:

> …the overall objective in a civil trial is to have a fair adjudication of the dispute on the merits, subject to overall principles of fairness to both parties. The exclusion of the surveillance evidence in this case might well prevent the defendant from being able to try the case on its merits. I also conclude that the potential prejudice to the plaintiffs can be addressed through the imposition of appropriate terms.[30]

In *Wray v. Pereira*, the defendant disclosed the existence of surveillance in a timely manner, but did not produce it until just over a week prior to trial. While the plaintiff was testifying in examination-in-chief, the defendant brought a motion for leave to use the surveillance both for the purposes of impeachment and as substantive evidence.[31]

One of the plaintiff's arguments was that he was disadvantaged because he did not have an opportunity to obtain responding reports from his medical experts taking into account the surveillance. Justice McKelvey stated that this could be remedied by providing an

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[29] 2015 ONSC 3553.
[30] *Ibid.* at para. 16.
[31] 2018 ONSC 4623.

exception to the order excluding witnesses which would facilitate the preparation of responding reports by the plaintiff's experts.[32] In other words, the experts could be permitted to prepare additional reports during the course of the trial.

However, Justice McKelvey was concerned with the late production of the surveillance. He held that the defendant could use the surveillance for impeachment since it was properly disclosed. However, the defendant was not permitted to use the surveillance as substantive evidence.[33]

If a defendant discloses the existence of surveillance at a very late stage, in particular, at trial, there is less likelihood of leave being granted to show the surveillance, even for impeachment, unless it can be demonstrated that the plaintiff was not taken by surprise.

In *Iannarella*, the plaintiff was cross-examined on activities depicted in surveillance videos even though he had no particulars of the surveillance in advance. The Court of Appeal held that the trial judge should have excluded the surveillance, even for impeachment purposes.[34]

5. General Test for Admissibility of Surveillance Evidence

In *Nemchin*, the Court of Appeal agreed with the following statement of Justices Fuerst and Sanderson in *Ontario Courtroom Procedure*:

> A video recording is admissible as soon as it is established that it depicts the scene and has not been altered or changed – any other factors, such as the integrity of the recording or the identity of a speaker, are matters for the trier of fact and go to weight only, not admissibility.[35]

The Court of Appeal stated that, regardless of whether surveillance is introduced for impeachment or for substantive purposes, it must be assessed by the trial judge in a *voir dire* for two purposes:

1. to permit the videographer to be examined in order to ensure that the video presents a fair and accurate depiction; and

2. for the trial judge to ensure that the use of the surveillance will not impair trial fairness.[36]

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[32] *Ibid.* at para. 19.
[33] *Ibid.* at paras. 18-19.
[34] *Iannarella* at para. 83.
[35] 4th ed. (Toronto: LexisNexis Canada, 2016), at p. 1097
[36] *Nemchin* at para. 11.

Ordinarily, the *voir dire* will take place after the witness has been set up in cross-examination.[37]

Even if portions of a surveillance video are objectionable, a blanket exclusion of the entire video is not appropriate. A trial judge is required to look at each piece of video evidence that the defence wants to put to the jury and determine whether it is, in and of itself, admissible, instead of considering the surveillance as a whole.[38]

One wonders if the videographer needs to testify in all cases where surveillance is sought to be introduced. It would not seem necessary if the parties agree that the surveillance is a fair and accurate depiction of the plaintiff's activities.

However, in light of the comments of the Court of Appeal in *Nemchin*, the unavailability of the videographer may pose a hurdle. Nevertheless, that issue was not squarely before the Court of Appeal in *Nemchin* because the videographer testified.

Arguably, any witness should be able to authenticate a surveillance video by testifying that the video represents a fair and accurate depiction of the plaintiff's activities.

This is similar to photographic evidence. The actual photographer does not need to testify if the parties agree that a photograph is a fair and accurate depiction or if a witness can testify in this regard.

In *Landolfi*, the Court of Appeal stated that there is no principled basis for video evidence to attract a different, and more stringent, test for admissibility at trial than that which applies to any other form of evidence.[39]

(a) ***Fair and Accurate Depiction***

The trial judge must be satisfied that the surveillance video is a fair and accurate depiction of a plaintiff's actual activities. This relates to technical details, such as distortion and image speed.[40] For example, a video cannot be sped up to make it look like a plaintiff is walking faster than he or she really is.

In *Landolfi*, the Court of Appeal said that the fact the surveillance videos were grainy and sometimes unclear did not make the videos inadmissible. These types of issues usually go to the weight to be accorded to the video evidence rather than to its admissibility.[41]

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[37] *Ibid.* at para. 36.
[38] *Ibid.* at para. 12.
[39] *Landolfi* at para. 52.
[40] *Iannarella* at para. 94.
[41] *Landolfi* at para. 57.

Video is permitted to be edited. As stated in *Nemchin*, there is no requirement for a video to be continuous or complete before it can be said to accurately depict a witness's activities. The Court of Appeal noted that lengthy surveillance is rarely played for a jury. Doing so would usually be a waste of valuable trial time.[42]

That being said, where only an excerpt of the surveillance is tendered, the trial judge must be satisfied that it is fair, accurate and representative of the events that it purports to depict.[43] For instance, editing might have trimmed the video just before or after the plaintiff's grimace.

There is often agreement among counsel as to which portions of a video provide a fair and accurate depiction. However, if there is a dispute, the trial judge should review the surveillance footage from before and after the excerpted selection.[44]

Often, an investigator who conducts surveillance does not edit the video himself or herself. Another employee at the investigation company does the editing. An investigator does not need to know precisely how a video was edited in order for the video to be admissible. A lack of detailed knowledge of the editing process does not affect whether a particular sequence of images was accurate or not in what it depicted, or the investigator's ability to authenticate it.[45]

(b) ***Trial Fairness***

The court always has discretion to exclude evidence where the probative value is exceeded by its prejudicial effect.

Prejudice in this context does not mean that the evidence will be detrimental to the other party's position. Rather, the prejudice is related to the detrimental effect that the evidence may have on the fairness and the integrity of the proceedings.[46]

In *Ismail v. Fleming*, Justice Leach stated that surveillance has *prima facie* relevance if it relates to an issue in dispute in a trial, such as the condition and abilities or disabilities of the plaintiff, and the degree of impairment suffered by the plaintiff in his or her activities of daily living.[47]

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[42] *Nemchin* at para. 59.
[43] *Iannarella* at para. 94.
[44] *Ibid*.
[45] *Nemchin* at para. 56.
[46] *Taylor v. Durkee*, 2017 ONSC 7358 at para. 9 ("*Taylor*").
[47] 2018 ONSC 6311 at para. 13 ("*Ismail*")

That being said, defendants do not have "carte blanche" to introduce surveillance videos as substantive evidence in whatever manner they choose.[48]

Surveillance can be excluded from evidence if it inclines the jurors to be influenced by emotion and sentiment rather than reason. For example, in *Ismail*, Justice Leach was of the view that surveillance showing the plaintiff and her mother at a cemetery engaging in prayer may be prejudicial.[49]

It may also be unfair and misleading if segments of surveillance are played as though they are one continuous video. In such circumstances, defence counsel may need to intermittently pause the video to note and highlight interruptions and timing concerns.[50]

In *Taylor*, Justice McKelvey rejected the plaintiff's argument that surveillance should be excluded because it captured only a small slice of the plaintiff's activities. His Honour stated that the jury would be aware of this limitation and that he would reference it in his charge.[51]

Moreover, as indicated above, in *Nemchin*, the Court of Appeal adopted Justice McKelvey's reasoning that surveillance does not need to contradict a plaintiff to be used for substantive purposes. The Court of Appeal stated that such evidence is arguably available to provide context and to qualify the plaintiff's testimony as to his or her true functionality.[52]

When surveillance is used for substantive purposes, defence counsel must be mindful of the rule in *Browne v. Dunn*, as a matter of trial fairness.

If there is a major discrepancy between the plaintiff's evidence and surveillance, then the surveillance should be put directly to the plaintiff in cross-examination. If there is only a minor discrepancy, then the surveillance can be put in as substantive evidence without first being put to the plaintiff for impeachment purposes.[53]

When a plaintiff has psychological injuries, a trial judge may consider whether surveillance should have been put to medical experts to interpret how the surveillance should be viewed.[54] The fact that a person is able to engage in physical activities does not necessarily mean that the person does not have depression, anxiety, post-traumatic stress disorder, or another psychological condition.

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[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid*.
[51] *Taylor* at para. 18.
[52]*Nemchin* at para. 47
[53] *Ibid.* at para. 32.
[54] *Ibid.* at para. 48.

As a result, defence counsel may want to send surveillance to their medical experts in matters involving psychological injuries (and also in some cases involving other injuries).

If surveillance was not provided to the defence experts, a trial judge should 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".[55]

6. Social Media Evidence

If a defendant wishes to introduce social media evidence at trial, such as photographs from a plaintiff's Facebook or Instagram accounts, the court is required to consider whether the plaintiff has been taken by surprise.

As a matter of practice, both plaintiffs and defendants should list in Schedule A of an affidavit of documents any relevant social media contents. Rule 30.02(2) of the *Rules of Civil Procedure* provides that "[e]very document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested,…unless privilege is claimed in respect of the document".

Social media documents should be produced in a timely manner. However, when this is not done, the Court of Appeal in *Nemchin* stated that the approach to take with late-produced social media evidence is the same as late-produced surveillance. In particular, the trial judge has to consider whether there are any realistic or meaningful concerns of the plaintiff and his or her counsel being unfairly taken by surprise.[56]

Presumably, a plaintiff would rarely, if ever, be taken by surprise by his or her own social media contents. These documents are the plaintiff's own documents. In the unlikely event the plaintiff is surprised, a possible remedy is to stand the trial down to permit the plaintiff to review the social media documents.

Trial fairness issues apply to social media evidence in a similar manner as surveillance evidence, as described above. A contradiction in a plaintiff's testimony is not necessary to use social media documents for substantive purposes.

However, social media documents can be excluded if they are unduly prejudicial and/or would cause the jurors to be influenced by emotion and sentiment.

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[55] *Ibid.* at para. 48.
[56] *Ibid.* at para. 69.

7. Conclusion

The Court of Appeal's decision in *Nemchin* provides helpful guidance on surveillance evidence.

The Court of Appeal stated that relevant evidence on a critical issue should not be excluded. A jury should be able to hear from a variety of sources apart from the plaintiff and weigh all of the evidence.

As a result of the Court of Appeal's decision, there will likely be less emphasis on technical aspects of surveillance videos.

The fact that surveillance is edited does not affect whether a particular sequence of the video is accurate or the investigator's ability to authenticate it. A video does not have to be continuous or complete.

That being said, surveillance must fairly and accurately depict a plaintiff's activities, and it must not impair trial fairness.

Overall, the Court of Appeal's decision in *Nemchin* will likely result in fewer skirmishes at trial regarding the admissibility of surveillance videos and social media documents.