

The Use of Surveillance at Trial

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A decision released by the Ontario Court of Appeal provides some helpful guidance on the use of surveillance at trial.

Facts

The case of *Nemchin v. Green*, 2019 ONCA 634, arose out of a motor vehicle accident. At trial, the jury assessed 90% liability on the defendant and 10% liability on the plaintiff. The damages were assessed at approximately \$700,000.

The plaintiff alleged that she suffered from post-traumatic stress disorder (“PTSD”), along with some residual physical issues. There was a dispute at trial on whether the PTSD was caused by the accident or whether it was caused by an earlier sexual assault. There was also a dispute as to the severity of the plaintiff’s PTSD and its impact on her ability to earn a living at the time of trial.

The trial judge would not allow defence counsel to show the jury surveillance evidence and 20 of the plaintiff’s own Facebook posts.

The defendant appealed, arguing that the exclusion of this evidence, which would have presented a more accurate picture of the plaintiff’s true capabilities, was wrong in law and led to a miscarriage of justice requiring a new trial.

Test for Admissibility of Surveillance Evidence

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.

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The first is to permit the videographer to be examined in order to ensure that the video presents a fair and accurate depiction. The second is for the trial judge to ensure that the use of the surveillance will not impair trial fairness.

The Court of Appeal indicated that 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. This usually requires a “discrete and granular assessment”.

In short, the admissibility of surveillance evidence is not an all or nothing exercise.

Impeachment vs. Substantive Use

When a defendant discloses surveillance evidence in accordance with the *Rules of Civil Procedure*, the surveillance can play a dual role. It can be used for both impeachment and substantive purposes.

The Court of Appeal noted that plaintiffs will often argue that the surveillance is not relevant because the activities shown in the video are consistent with what he or she is able to do on a good day.

The Court of Appeal indicated that **such statements generally do not inoculate a plaintiff from the introduction of surveillance evidence for substantive purposes.**

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.

Trial Fairness

Counsel need to be mindful of the rule in *Browne v. Dunn*, which requires a party to cross-examine opposing witnesses on any point he or she later intends to contradict by calling evidence to this effect or suggesting during closing submissions that the witness’s testimony should not be accepted.

Where surveillance may contradict a plaintiff’s evidence, the trial judge must decide whether the claimed contradiction warrants full-on cross-examination as a matter of trial fairness.

If there is a major discrepancy/impeachment, then the evidence should be put directly to the plaintiff in cross-examination. The Court of Appeal stated that a witness should not be called a liar without being given an opportunity to explain the discrepancy.

If there is only a minor discrepancy in the plaintiff's evidence, then the surveillance evidence can be put in as substantive evidence without first putting the discrepancy to the plaintiff.

Timing of Motions to Exclude Surveillance

The Court of Appeal stated that pre-emptive wholesale attacks on surveillance evidence should generally be avoided.

The most appropriate time to bring a motion to exclude surveillance evidence may be during the cross-examination of the plaintiff, just prior to when defence counsel intends to show the surveillance.

The Court of Appeal indicated that, if a motion to exclude surveillance is brought at an inappropriate time, it is open to the trial judge to refuse to hear the motion. The trial judge can invite the plaintiff to renew the motion at a more appropriate time.

General Errors in Trial Judge's Surveillance Ruling

Prior to the plaintiff's cross-examination, plaintiff's counsel launched a full-on challenge to the admissibility of all of the surveillance evidence.

The Court of Appeal held that the trial judge erred in accepting the approach of plaintiff's counsel of dealing with the video evidence as a whole, instead of taking a discrete granular approach to each video excerpt the defence wanted to put into evidence.

The trial judge also erred in concluding that the surveillance could only be shown to the jury if it contradicted the plaintiff.

The Court of Appeal indicated that **the evidence was arguably available to provide context and to qualify the plaintiff's testimony as to her true functionality.**

In addition, the trial judge relied on the fact that the surveillance video was not put to the medical experts for their opinion on how it should be interpreted in light of the plaintiff's PTSD claim.

The Court of Appeal indicated that this is a factor the trial judge could take into account. However, the Court of Appeal held that the trial judge's analysis in this regard was lacking.

In particular, she failed to consider why a video of the plaintiff at a yoga retreat, which was introduced in the plaintiff's examination-in-chief, was in a different category than the surveillance video. Moreover, the trial judge did not consider whether the experts could

have been consulted further to determine whether the video might have elicited further opinions.

One of the videos was disclosed late. The Court of Appeal indicated that a trial judge has discretion to exclude surveillance on this basis.

However, the trial judge did not assess whether admitting the late-disclosed surveillance would be prejudicial.

The Court of Appeal stated that **late production is usually not a good reason for excluding relevant evidence where it is similar to evidence that was disclosed on time**, such that neither the plaintiff nor her counsel would be unfairly caught by surprise.

Specific Issues on Surveillance Videos

The trial judge outlined four specific technical or “process” problems with the surveillance in determining that it should be excluded. The Court of Appeal found none of the trial judge’s reasons in this regard to be persuasive.

First, some of the video was time stamped and some was not. The investigator who took the video explained that this was due to zooming in past the time stamp. The Court of Appeal indicated there was no evidence that the zoomed in video was different from the unedited video from which it was derived. The actual timing of the video, to the extent it was relevant, would have been easy to establish.

Second, the trial judge found that the investigator could not verify under oath that the video was accurate because he did not know precisely how the video had been edited. The Court of Appeal said that this 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.

Third, the investigation company picked out still photos from the video that were included in the body of the surveillance reports. The pictures that were selected most described the plaintiff’s inconsistencies, which concerned the trial judge. The trial judge was also troubled that some of the descriptions in the surveillance reports contained subjective elements.

The Court of Appeal held that the trial judge gave far too much weight to the written surveillance reports. The critical evidence was the video itself, not the reports. The reports could have easily been redacted or excluded if they contained questionable text.

Fourth, the trial judge was troubled by gaps in the surveillance footage. The Court of Appeal stated that 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. The key is to ensure that the excerpts played are fair and accurate.

The Court of Appeal agreed with a leading text which indicates that **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.

Facebook Posts

At trial, there was confusion over which of the plaintiff's Facebook posts had been produced by defence counsel. Based on this confusion, the Court of Appeal held that the trial judge's ruling excluding 20 of the Facebook posts was reasonable.

However, as an aside, the Court of Appeal stated that 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 the Facebook posts at trial.

One wonders if the Court of Appeal's point here is that, since the Facebook posts were the plaintiff's own posts, there would be no surprise.

Refusal to Order New Trial

In considering whether to order a new trial, the Court of Appeal assumed that the surveillance videos were admissible and that the trial judge erred in excluding them.

In a civil action, a new trial should not be ordered unless the interests of justice plainly require it. The appellant must show that a substantial wrong or miscarriage of justice has occurred.

The Court of Appeal held that, 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.

According to the Court of Appeal, the surveillance video did not add much to, or subtract much from, the video of the yoga retreat that was shown in the plaintiff's examination-in-

chief. Further, the surveillance video posed no real contradictions and little grist for cross-examination.

As a result, the appeal was dismissed.

Conclusion

The Court of Appeal's decision provides helpful guidance on surveillance evidence. The main points are as follows:

- If a plaintiff argues that surveillance does not have any relevance or probative value on the basis that the activities shown on the video are consistent with what he or she is able to do on a good day, this generally does not inoculate the plaintiff from the introduction of surveillance evidence for substantive purposes.
- 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. It is ultimately a question of fact for a jury to weigh the evidence and come to a conclusion about the nature and degree of any impairment.
- Even when surveillance is used for substantive purposes, if the surveillance shows a major discrepancy in the plaintiff's evidence, then trial fairness suggests that the evidence should be put directly to the plaintiff in cross-examination. However, if there is only a minor discrepancy, then the surveillance evidence can be put in as substantive evidence without first being put to the plaintiff.
- A trial judge should not deal with surveillance evidence as a whole. Rather, a trial judge should take a "discrete granular approach" to each video excerpt that the defendant wants to put into evidence.
- When a surveillance video is disclosed to the plaintiff late, a trial judge is required to examine whether its admission would be prejudicial. Late production is usually not a good reason for excluding relevant evidence where it is similar to evidence that was disclosed on time, such that the plaintiff and his or her counsel would not be unfairly caught by surprise.
- The fact that surveillance is edited does not affect whether a particular sequence of the video is accurate in what is depicted or the investigator's ability to authenticate it.
- There is no requirement for a video to be continuous or complete before it can be said to accurately depict a witness's activities. Lengthy surveillance is rarely played for a jury and is usually a waste of trial time.

In terms of a defendant's late production or non-production of a plaintiff's own social media content, such as Facebook posts, a trial judge is required to consider whether there are any realistic or meaningful concerns of the plaintiff and his or her counsel being unfairly taken by surprise.

The Court of Appeal's decision will likely result in fewer skirmishes at trial regarding the admissibility of surveillance videos and social media content. Such evidence will likely be more broadly admitted.