

The Use of Surveillance at Trial

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A decision recently released by the Ontario Court of Appeal will make it less onerous for defendants to rely on surveillance at trial.

Facts

The case of *Nemchin v. Green*, 2019 ONCA 634, arose out of a motor vehicle accident.

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 jury assessed damages at approximately \$700,000. The defendant appealed.

Impeachment vs. Substantive Use

Surveillance can be used for two purposes: (1) impeachment of a plaintiff, and (2) as a substantive part of the defendant’s case.

When surveillance is used for impeachment, it does not need to be produced to the plaintiff in advance of trial. However, the fact that surveillance was obtained must be disclosed to the plaintiff and a summary of it must be provided, if requested.

In order to impeach a plaintiff with surveillance, the trial judge must be satisfied there is a clear contradiction in the plaintiff’s evidence.

When a defendant produces 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.

¹ The authors were counsel for the appellant.

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.**

A contradiction in a plaintiff's evidence is not necessary to use surveillance for substantive purposes. As stated by the Court of Appeal, **surveillance can provide context and can qualify a plaintiff's testimony as to his or her true functionality.**

That being said, 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.

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.

Test for Admissibility of Surveillance Evidence

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* (a mini-hearing within a trial) 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.

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.

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.

Late Disclosure of Surveillance

If a defendant wants to rely on surveillance as a substantive part of the defence case, the surveillance is supposed to be served at least 90 days prior to trial under the *Rules of Civil Procedure*.

However, if surveillance is served late, it does not automatically mean that it is inadmissible. A trial judge is required to assess whether admitting the 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.**

Technical Issues With Surveillance

The Court of Appeal held that the trial judge made a number of errors in refusing to admit the surveillance. She focused too much on the technical aspects of the surveillance.

The Court of Appeal said that a lack of knowledge of the editing process of a surveillance video does not affect whether a particular sequence of images is accurate or not in what it depicts, 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.**

The Court of Appeal noted that playing lengthy surveillance is usually a waste of valuable trial time. The key is to ensure that the excerpts played are fair and accurate.

Facebook Posts

When a defendant finds social media contents of a plaintiff on the Internet and does not produce the documents to the plaintiff prior to trial, the Court of Appeal stated that a **trial judge has to consider whether there are any realistic or meaningful concerns about the plaintiff and his or her counsel being unfairly taken by surprise.**

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.

Refusal to Order New Trial

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.

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.

However, the Court of Appeal surprisingly held that, even if the excluded surveillance evidence had been admitted, it was not so significant that it would have affected the jury's verdict on damages. As a result, the appeal was dismissed.

This is contradictory to other Court of Appeal decisions and also seemingly inconsistent with the Court of Appeal's own comments in this case that it is for the jury to weigh all of the relevant evidence and come to a determination about the nature and degree of an alleged impairment.

Conclusion

The Court of Appeal's decision 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 before it can be said to accurately depict a witness's activities.

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 since a jury should be able to consider all relevant evidence.