

SURVEILLANCE: PRODUCTION AND PRIVILEGE

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By Bruce A. Cook

INTRODUCTION

Surveillance is a powerful tool. It gives the trier of fact, whether it be a judge or a jury, a glimpse into the everyday life of a Plaintiff.

It can provide a "snap shot" of the Plaintiff's actual capabilities. It can show, in full colour, the impact that the injuries have had on the capabilities of the Plaintiff to carry on his or her day to day activities.

Surveillance can also weed out fraudulent claims. It can provide evidence to demonstrate when a Plaintiff is malingering or exaggerating.

Truthful Plaintiffs have nothing to fear from surveillance. Surveillance, however, also has the potential to be highly prejudicial. It may show the Plaintiff trying his or her utmost in order to move on with life. It may show them on a "good day". What is really a "snap shot" in time may not reflect the Plaintiff's true abilities over a period of weeks or months.

There are no provisions in the Rules of Civil Procedure that deal exclusively with the subject of surveillance. Because of its nature, surveillance is often the subject of a voir dire, or

other challenge at trial. Because of its nature, surveillance has developed its own subset of caselaw.

THE RULES OF CIVIL PROCEDURE

Documentary Discovery

Generally at the discovery stage surveillance will be a relevant document, which will have been created in contemplation of litigation. Generally speaking any tape, disc, or report needs to be properly identified in Schedule B of an Affidavit of Documents.

Oral or Informational Discovery

Pursuant to Rule 31.06, a defendant in a personal injury action may be obliged to provide details of the surveillance on examination for discovery. This includes:

1. the dates, times, precise locations of the surveillance;
2. particulars of the activities and the observations made; and
3. the names and addresses of persons who conducted the surveillance.

This obligation only applies in the context of an examination for discovery. Prudent Plaintiff

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counsel will ask for an ongoing undertaking to disclose the particulars of surveillance. Likely an undertaking to "comply with the Rules" is not sufficient. There is no rule that requires particulars of surveillance to be disclosed following the examination for discovery. Under Rule 30.07, it is only non-privileged documents that trigger the requirement to provide a supplementary affidavit of documents.

Use at Trial

Rule 30.09 requires that if the surveillance evidence is to be used as substantive evidence as opposed to impeach the testimony of the Plaintiff or any other witness, the surveillance must be produced at least 90 days before the commencement of trial.

However, Rule 53.08 provides that the trial judge may grant leave to introduce evidence and 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.

IMPORTANT CASES

(A) *Landolfi v. Fagione*

In *Landolfi v. Fargione* (*supra*), the Ontario Court of Appeal considered a situation in which the videos had not been produced to Plaintiff's counsel on the basis that they were subject to a litigation privilege. However, well in advance of trial,

defence counsel had furnished written particulars to Plaintiff's counsel of certain contents of the videos, including the date, time and place of the video and nature of specific activities in which Landolfi was engaged at the time of the surveillance. The defence counsel sought to use the videos to impeach Landolfi's credibility and to undermine the factual assumptions made by Landolfi's medical experts in forming their opinions as to the nature and severity of Landolfi's injuries, which included a neck injury.

The Court of Appeal held that in accordance with Rule 30.09, the videos were not admissible as substantive evidence absent leave of the trial judge and could only be used for impeachment purposes. The videos could not be offered as evidence of Landolfi's physical capacities, but that did not preclude the admission of videos to challenge the credibility of Landolfi's evidence as to his physical limitations following the accident. Used for impeachment purposes the videos had the potential to directly undermine the credibility of Landolfi's testimony concerning his physical incapacities.

Importantly, in the *Landolfi* case, there was no suggestion that disclosure of the contents of the defence videos or production of the videos themselves were sought during an examination for discovery or by motion. In fact, the particulars of the video evidence

were provided voluntarily by defence counsel. The Court noted that the obligation to disclose particulars does not arise under rule 30.09 (Documentary disclosure), but rather is triggered through the informational discovery process (rule 31.06(1)).

The Court of Appeal in *Landolfi* warned that any prospect of prejudice to Landolfi by the defendant's effort to use the videos for impeachment purposes at trial was avoidable through the pre-trial information of discovery provisions of the rules [i.e. rule 31]. The Court noted that the Plaintiff elected not to engage the benefit of these rules and while this was his right, he could not thereafter resist the defendant's use of the videos at trial for impeachment purposes on the grounds of inadequate disclosure.

The clear message is that Plaintiff counsel must ask about the particulars of surveillance on examination for discovery and must ask for a continuing undertaking to disclose the particulars of surveillance.

(B) *Lis v. Lombard Insurance Company*

The *Landolfi* decision was considered by Justice. A. W. Bryant in his decision in *Lis v. Lombard Insurance Company* [2006] O.J. No. 2578. In this case, Justice Bryant held that surveillance evidence that had not been produced would be admissible for impeachment

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purposes if it was relevant to the credibility of the witness on a material matter on the subject case and satisfied the probative/prejudice test. The probative value of the surveillance tape must be such that it is capable of contradicting, challenging, or impugning the testimony of the witness with respect to the injuries or their sequelae.

In this case the Court took a detailed look on each issue in the evidence that was said to be impugned by the surveillance tape. The court held that the Plaintiff did not claim that she had lost her range of motion or was functionally impaired as a result of the injuries suffered in the accident. She did not claim that she was unable to work or grocery shop and that videotape did not contradict and was not inconsistent with the Plaintiff's testimony, considering her physical capabilities and the type of activities she was capable of performing. The videotape was, however, relevant to the substantive issue of pain and damages. Because rule 30.09 precluded its use as substantive evidence, there was a danger that the jury might misuse the videotape as substantive evidence on the issue of the degree of the Plaintiff's chronic pain and damages and not limit its use to assessing credibility.

ORAL OR INFORMATIONAL DISCOVERY

The obligation to provide particulars of surveillance does not arise until examinations for discovery. There is no obligation upon the defendant to provide particulars of surveillance in advance of his or her discovery, or in advance of the Plaintiff's examination for discovery, unless the defendant is to be examined first. The order of examination for discovery may become important where there is surveillance evidence obtained in advance of examinations for discovery.

Pursuant to Rule 31.04(3), the party who first serves a Notice of Examination (which must be properly supported by a sworn affidavit of documents) may complete the examination for discovery before being examined by another party, unless the court orders otherwise.

In a case where it is desirable to examine the plaintiff prior to disclosing particulars of surveillance, it is therefore important to serve a sworn affidavit of documents and a notice of examination before being served with a notice of examination by the Plaintiff.

WHEN SURVEILLANCE IS PRIVILEGED

The above commentary assumes that the surveillance report is privileged. This is almost always the case. In order for a surveillance report, videotape or photograph to be privileged it must be created for the dominant purpose of litigation, actual or contemplated. In

some cases surveillance will have been obtained prior to the termination of benefits. Arguably in these cases the surveillance was created to be used as an adjusting tool, or in order that an insurance company defendant can determine the Plaintiff's entitlement to benefits.

In *Xenophotos v. AIG Life Insurance Co.* [2000] O.J. No. 3721, the Defendant insurer obtained surveillance after the denial of benefits, but before the commencement of litigation. The Court held that AIG had put Xenophotos on notice of the limit of entitlement to the disability claim. From that time on, the surveillance was conducted in connection with actual or contemplated litigation. The surveillance tape met the dominant purpose test.

PROCEEDINGS AT F.S.C.O.

Unlike the Rules of Civil Procedure, the Dispute Resolution Practice Code has a specific rule dealing with surveillance (Rule 40).

Caselaw at the Financial Services Commission has limited the insurer's production obligation to situations where it has decided to rely upon any portions or surveillance or investigative evidence at the arbitration. If, however, the insurer wishes to rely upon any part of the surveillance evidence, all of the surveillance evidence in possession of the insurer is producible.

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Of note, the 30 days time requirement is a minimum standard that can be lengthened by the arbitrator if the circumstances warrant.

CONCLUSION

Generally surveillance will be privileged, as normally it is done in contemplation of litigation. As a privileged document, surveillance ought to be listed in schedule B of an affidavit of documents.

On examination for discovery, the party being examined must disclose the dates, times

and precise locations of the surveillance, particulars of the activities and observations made, and the names and addresses of persons who conducted the surveillance. This is an obligation that is only required on informational discovery.

If Plaintiff's counsel asks for an ongoing undertaking to disclose the particulars of surveillance, the defendant will be under a duty to provide those particulars when surveillance is obtained in the future. Of note, obtaining a surveillance report and/or video and or

photographs after a sworn affidavit of documents is completed, does not trigger the obligation for a supplementary affidavit of documents under rule 30.07.

If a defendant wishes to rely upon surveillance as substantive evidence at trial, as opposed to relying upon the evidence to impeach the credibility of the Plaintiff, the privilege must be waived and the documents must be produced for inspection at least 90 days prior to trial, otherwise, leave of the trial judge must be sought.

Firm News

Mario Pietrangeli spoke on the issue of Expert Witnesses at the Ontario Bar Association 2008 Institute of Continuing Legal Education held on February 4, 2008, as part of the program on "Current Issues in Civil Litigation: Keys to Victory".

Bruce Cook spoke about surveillance at the Canadian Defence Lawyers March 31 conference Boot Camp for Law Clerks. The article above is an abridged version of the paper he presented.

Jarvis Scott will provide the defence lawyer perspective in a panel discussion on Catastrophic Injury Claims at the 8th annual Advocacy Conference presented by the Hamilton Law Association on April 23, 2008.

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