SURVEILLANCE IN THE SELFIE GENERATION

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Introduction

You love it or loathe it, depending on whether you are a card-carrying member of Canadian Defence Lawyers or Ontario Trial Lawyers' Association. Surveillance evidence is a habitual weapon at the disposal of the defence's ever-expanding arsenal, deployed to test the merits of claims in personal injury and disability disputes. Along with video surveillance employed by both first and third party insurers, cyber spying on Google, Facebook, LinkedIn and other social media outlets is equally commonplace.

In this age of the selfie and increasing global transparency, claimants must be aware that the traditional right to privacy is a thing of the past. After all, we are a generation obsessed with capturing our own image for posterity online. We post photos and videos of the most mundane aspects of our lives which are somehow of keen interest not only to our family and friends but also to perfect strangers. Moreover, nearly every move we make is captured by cameras located just about everywhere we go. GPS chips in our phones and computers can instantaneously track our whereabouts and we leave our digital mark with every swipe of a bank or credit card. For these reasons, plaintiffs these days are ripe for the picking and, indeed, can be their own worst enemies depending on the size of their online footprint. Personal injury and disability claimants today must assume that their judge, jury or arbitrator will be provided with access to everything about them.

In view of the foregoing, surveillance evidence obtained by the defence can often be the fatal blow to a plaintiff. Its impact cannot be underscored. This is partly because we are visual learners. Seventy-five percent of a person's sensory intake occurs through the eyes.[1] Numerous studies show that visual memory retention by far exceeds audio recall. A U.S. study in the 1980s showed that when information is presented in visual format to jurors, their retention

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1. Karen Campbell, "Roll Tape – Admissibility of Videotape Evidence in the Courtroom" (1996), 26 Mem. L. Rev. 1445.

rate was 100% more than other jurors who had only received the information orally.[2]

The impact of surveillance is also explained by its capacity as a "witness". In the *Law of Evidence in Canada*, Justices John Sopinka, Sidney Lederman and Alan Bryant opined that videotape is in many ways a better eyewitness than a human being. Videotape does not "suffer from the potential frailties of human observation, recollection and communication".[3]

In *R. v. Nikolovski*,[4] the Supreme Court of Canada determined that videotape, even by itself without any corroborating evidence, is sufficient to allow the trier of fact to identify the accused as the person guilty of a crime. In his decision, Justice Cory reasoned:

> 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.[5]

That view has since been criticized. After all, surveillance cameras are typically operated by people who may not be "dispassionate" and "unbiased" observers. In *Snead v. American Export-Isbrandtsen Lines*,[6] a Pennsylvania court posited:

> The camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be speeded up or slowed down. The editing and splicing of films may change the chronology of events. An emergency situation may be made to appear commonplace. That which has occurred once, can be described as an example of an event which recurs frequently . . . Thus, that which purports to be a means to reach the truth may be distorted, misleading and false.

If my pre-adolescent children can digitally distort computer images beyond recognition from their original state, it is not difficult to conceive what a professional could do to "artfully splice"[7] surveillance footage.

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2. Windle Turley, "Effective Use of Demonstrative Evidence: Capturing Attention and Clarifying Issues" (Sept. 1987) Trial at 62 (Turley).
3. *The Law of Evidence in Canada*, 4th ed. (Toronto: Butterworths, 2014) at 2.22, p. 45.
4. [1996] 3 S.C.R. 1197, 141 D.L.R. (4th) 647, 111 C.C.C. (3d) 403 at 410-411 (S.C.C.) (*Nikolovski*).
5. *Ibid.*, at 412.
6. 59 F.R.D. 148 (U.S. D.C., E.D. Pennsylvania, 1973) at 150.

On February 17, 2015, the Ontario Court of Appeal weighed in on the use of surveillance in the case of *Iannarella v. Corbett*.[8] Its findings clarified the law in important respects, although may have muddied the waters at the same time. The purpose of this paper is to provide an overview of the law of surveillance in three areas:

1. disclosure and production obligations under the *Rules of Civil Procedure*, including production of surveillance to medical experts and obligations regarding third party surveillance;
2. the use of surveillance at trial; and
3. emerging trends in the case law post-*Iannarella*.

A Brief Overview of Iannarella

At trial, things went disastrously wrong for the plaintiff, Mr. Iannarella. At issue was the liability for a rear-end collision on a snowy night. Mr. Iannarella was rear-ended on Highway 427 by a truck. He suffered a rotator cuff injury and chronic pain, and underwent two surgeries related to the accident. Despite the fact that it was a rear-end collision, the jury found that the defendant driver was not negligent. The Court of Appeal held there were errors in law regarding liability which are beyond the scope of this paper, but suffice it to say that the ruling confirmed the reverse-onus on a defendant to show that he or she was not negligent in a rear-end collision case.

Atypically, Iannarella's lawyers had waived examinations for discovery and had not requested an affidavit of documents before setting the action down for trial. The plaintiffs did not request an affidavit of documents until a trial management conference, which request was refused by the trial judge, relying on rule 48.04. The plaintiffs advanced to trial without particulars of any surveillance.

During Mr. Iannarella's cross-examination at trial, the defendants tendered a video disc of surveillance. The defendants were permitted to make the video an exhibit and cross-examine the plaintiff on it. The investigators had shot about 130 hours of surveillance. The accident took place in February 2008. The surveillance was recorded in November 2009, May 2010, November 2011 and March 2012. The final recordings had been made the night before trial.

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7. As cited in *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184 (C.A., 1992) at paras. 10-11 (*DiMichel*).
8. 2015 ONCA 110, 45 C.C.L.I. (5th) 171, 65 C.P.C. (7th) 139 (Ont. C.A.), add'l reasons 2015 ONCA 238, 71 C.P.C. (7th) 267, 252 A.C.W.S. (3d) 210.

Mr. Iannarella's claims hinged on an injury to his left shoulder and chronic pain. He was depicted doing the following:

- waving his left arm;
- carrying a garbage bag;
- driving and turning the steering wheel with his left hand; and
- reaching with his left arm up to the top shelf in a grocery store to retrieve an item.

The defendants argued that these activities were inconsistent with Mr. Iannarella's evidence regarding his functional limits. His claim for non-pecuniary damages was dismissed for failing to meet the "threshold" under s. 267.5 of the *Insurance Act*. Since the defence had not complied with rule 30.09, the trial judge had nominally admitted the surveillance for impeachment purposes only, but the defence made substantive use of it in its jury address. In addition, the trial judge's jury charge did not include a limiting instruction that the surveillance was to be used for assessing Mr. Iannerella's credibility only.

Justice Lauwers, writing for the Court of Appeal, confirmed that what should have happened in this case and largely did not is as follows:

- The defendants should have provided an affidavit of documents, regardless of whether one was requested.
- The defendants should have disclosed the existence of the surveillance footage, even if it was created after the matter was set down for trial.
- The trial judge should have ordered at the trial management conference that the videos or a summary be produced if the footage had not been disclosed.
- If the affidavit of documents had not been produced, the surveillance should only have been used to impeach the witness, or with leave of the court (requiring the trial judge to consider the impact of the footage on the trial's fairness, and to refer to Rule 53.08).
- Defence counsel should have put to Mr. Iannarella a detailed series of questions on each incident shown in the surveillance.

Not surprisingly, the Court of Appeal substituted a finding of liability and sent the matter back for a new trial on damages.

Justice Lauwers confirmed a number of important principles in *Iannarella:*

1. The obligation to serve an affidavit of documents is mandatory under the *Rules*. Unlike the permissive word "may", respecting the right in the *Rules* to examine for discovery, rule 30.03(1) provides that a party "shall" serve an affidavit of documents. The Court of Appeal hastened to add that, in the right circumstances, a party may be able to waive its entitlement to an affidavit of documents but only by using express language.
2. A party is obliged to provide an updated affidavit of documents listing new surveillance obtained after its first affidavit of documents is served.
3. Full disclosure of surveillance particulars allows the plaintiff to assess its case more fully and determine the merits of accepting a settlement offer from the defendants. Non-disclosure, the court cautioned, fosters a "trial by ambush" and does not give plaintiff's counsel sufficient opportunity to prepare the plaintiff for examination-in-chief.

Disclosure and Production Obligations

On September 15, 2014, a few months prior to the release of *Iannarella*, a notable recent decision particularly relevant to the defendant's obligations with respect to the disclosure of surveillance was released. The decision of the Superior Court (Ontario) in *Cromb v. Bouwmeester*,[9] dealt with the issue of whether a defendant's decision to produce surveillance reports and related DVDs resulted in an implied waiver of litigation privilege respecting later surveillance reports. In that case the court found that the doctrine was applicable and ordered that the defendants produce all of the surveillance reports and related DVDs that were currently in their possession.

In its decision, the court suggests that the defendants, having produced only some of the available surveillance, engaged in a type of "cherry picking" which created "a significant risk of the court not receiving a full and accurate picture of the plaintiff's true level of functioning". The court went on to state that consistency and fairness required that the defendants produce the later DVD and investigation report.

Shortly thereafter, in *Wigmore v. Myler*,[10] the defendant in a personal injury action had provided details at his examination for discovery of surveillance of the plaintiff conducted in 2006. The

9. 2014 ONSC 5318, 244 A.C.W.S. (3d) 284, [2014] O.J. No. 4298 (Ont. S.C.J.).
10. 2014 ONSC 6744, 123 O.R. (3d) 446, [2014] O.J. No. 5532 (Ont. S.C.J.).

defendant later properly served surveillance that was conducted in October 2012. Additional surveillance was carried out in October 2013 and in June, July and September 2014, but details of the surveillance and the videos themselves were not produced to the plaintiff until November 2014 just before the trial. The same court ruled that:

a) the defendant would have to pay the plaintiffs' costs thrown away of an adjournment if the plaintiffs requested one to respond to the surveillance;
b) if the trial proceeded, the defendant could only use the original surveillance it obtained in 2012 for substantive and impeachment purposes; and
c) the plaintiffs were permitted to make use of any surveillance evidence as they deemed appropriate.

Writing for the Court of Appeal in *Iannarella*, Justice Lauwers expounded on the principles of consistency and fairness as outlined in *Cromb and Wigmore* but also provided a primer on the basic tenets of disclosure obligation. He restated well-settled law that as a document, surveillance obtained before examinations for discovery is to be listed in the defendant's affidavit of documents.[11] If privilege is asserted over the video footage, it must be listed in Schedule B. If requested, the defendant is required to provide a summary of the surveillance which had thus far been obtained including the date, time and place of the surveillance, the nature and duration of the activities depicted, as well as the names and addresses of the investigators. If privilege is not waived, the defence can use the surveillance at trial only to impeach the plaintiff's credibility. Failure to disclose a document that is favourable to a party's case will render it inadmissible except with leave of the judge as provided in rule 30.08(1)(a).[12]

Until *Iannerella*, there was no appeal decision regarding a defendant's obligation to provide surveillance particulars after its discovery had taken place. Typically, examinations for discovery would conclude with the plaintiff requesting detailed particulars of future surveillance and defence counsel being purposefully non-committal, averring compliance with her obligations under the *Rules of Civil Procedure*.

Mr. Justice Lauwers in *Iannarella* stated as follows with regard to a party's disclosure obligations:

11. Rules 30.01, 30.02 and 30.03 of *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
12. Rule 30.08.

> In my view, a party is obliged by a combination of rules 30.06 and 30.07(b) to provide an updated affidavit of documents listing the new surveillance. Further, the party must disclose the particulars of this subsequent surveillance upon request under rule 31.09(1)(b). These disclosure obligations are fundamental and extend to surveillance obtained after the original affidavit of documents is served.[13]

Not only is *a defendant required to disclose surveillance after the original affidavit of documents is served* but the Court of Appeal held that disclosure obligations continue upon request for particulars of all the surveillance, including surveillance conducted after the plaintiff sets the action down for trial. The court reasoned that full disclosure of surveillance affords the plaintiff the opportunity to more fully assess its case and determine the merits of any settlement proposal. Non-disclosure, the court cautioned, fosters a "trial by ambush" and does not give plaintiff's counsel sufficient opportunity to prepare the plaintiff for examination-in-chief.

The court further suggested that, where surveillance is obtained after examinations for discovery, "a requirement that parties re-attend at examination for discovery or submit to cross-examination to address a supplementary affidavit of documents is consistent with the underlying objectives of the discovery rules generally and of rule 30.07 in particular".[14]

Whereas the *Iannarella* decision on its face seems to have augmented the plaintiff's right to obtain surveillance particulars, it may have muddied the waters to a certain extent. In holding that a combination of rules 30.06 and 30.07 requires that a party provide an updated affidavit of documents listing newly obtained surveillance and the disclosure of particulars upon request in accordance with rule 30.09(1)(b), query whether an expert report obtained by the plaintiff after examinations for discovery and delivery of a sworn affidavit of documents ought to be disclosed in a supplementary affidavit of documents even if privileged and the plaintiff does not plan to rely on it. Rule 31.06(3) addresses only counsel's obligation at the time of the discovery. I do not believe that the court intended such a consequence.

Additionally, it seems that the new normal requires counsel to repeatedly serve supplementary affidavit of documents every time a relevant privileged document is obtained, as the Court of Appeal's interpretation of rule 30.07 suggests that the affidavit of documents becomes "incomplete" each time a new relevant document is created, whether or not it is privileged.

13. *Iannerella*, *supra*, footnote 8, para. 55.
14. *Iannarella*, *supra*, footnote 8, para. 64.

Disclosure and Production of Surveillance to Medical Experts

Frequently, defence counsel will provide surveillance to a medical expert. In *Dumaliang v. Cheng*,[15] Master Glustein, as he then was, ordered that the entire videotape from which stills had been taken and provided to a medical expert to assist in forming an opinion were to be produced to the plaintiffs so they could prepare for the case to meet at trial. Master Glustein stated:

> In the present case, Dr. Berbreyer, on behalf of the defendants, relies on certain still photographs from the videotape, provided to him by the defendants, to seek to establish that Dumaliang has not suffered catastrophic impairment. The defendants have opened the door on this otherwise privileged evidence and "it is opened for all purposes related to the topic" of the events relied upon by Dr. Berbreyer. The plaintiffs and the court "must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question".[16]

Both plaintiff and defence counsel should be mindful of the obligation to produce surveillance evidence in its entirety to medical experts preparing an opinion if parts of it are to be relied on in forming the opinion.

Assuming that the surveillance that has been produced to a physician is proper, what are the consequences of this production?

In upholding the ruling of Master Short in *Aherne v. Chang*,[17] Justice Perrell, in the Superior Court, stated as follows:

> The rules about the production of defence medicals and the law about waiver of privilege entail or have the consequence that if the defendant discloses surveillance evidence to a health practitioner – which the defendant is not obliged to do – then the defendant has waived the litigation privilege associated with the surveillance evidence.
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> *Put somewhat differently, the defendant's voluntary disclosure of surveillance evidence to a health practitioner for the purposes of a defence medical has the consequence that the surveillance evidence should be immediately disclosed to the plaintiff.*[18]

Justice Perrell emphasized that the heart of the issue was not whether a waiver of litigation privilege occurs, but when. Ultimately,

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15. (2006), 152 A.C.W.S. (3d) 390, 2006 CarswellOnt 6675, [2006] O.J. No. 4314 (Ont. Master).
16. *Ibid.*, at para. 15.
17. 2011 ONSC 3846, 337 D.L.R. (4th) 593, 16 C.P.C. (7th) 143 (Ont. S.C.J.)
18. *Dumaliang*, *supra*, footnote 15, at para. 13 (emphasis added).

his reasoning was aligned with the Court of Appeal's distaste for "trial by ambush", as expressed in *Iannarella*:

> Temporally locating the waiver with the defendant's decision to provide the surveillance material to the health practitioner *is procedurally fairer and more efficient. Very few cases reach trial, and the disclosure of the surveillance evidence simultaneously to the health practitioner and the plaintiff is more likely to lead to a just and true determination of the dispute*. As Justice Carthy noted in *Ceci (Litigation Guardian of) v. Bonk*: "there will be very few litigants who successfully maintain a dishonest stance simply because they have been exposed to the other party's evidence in advance of giving answers."[19]

Finally, in terms of any potential unfairness that may arise from the plaintiff's timely access to surveillance that has been provided to a medical expert (which could be interpreted as simply allowing the plaintiff to know the case he/she must meet) Justice Perrell cautioned that "if the defendant does not wish to waive what is left of the litigation privilege associated with surveillance evidence, then he or she should not send the surveillance material to the health practitioner".[20]

Disclosure and Production of Third Party Surveillance

Frequently there may be concurrent claims for tort, statutory accident benefits and long-term disability benefits arising from the same motor vehicle accident. Any of these defendants could investigate the claimant and obtain potentially damaging surveillance. As a matter of course, tort defence counsel will seek production of a complete copy of any other file that, in some cases, will include surveillance.

If the non-tort claim is no longer the subject of litigation, the plaintiff will be required to produce the file, including any surveillance, to the tort defendant. The Superior Court concluded in *Abu-Yousef v. Foster*[21] that by commencing a tort action, the plaintiff has put his or her own health in issue and due to this surveillance's relevance to material issues, therefore cannot claim a privacy interest. Justice McDermid stated as follows:

> With respect to the surveillance material, by commencing the tort action, which includes a claim for damages for personal injury and loss of present and future income, the plaintiff has put his medical condition, health and ability to work in issue. I believe the surveillance material,

19. *Iannarella*, *supra*, footnote 8, at para. 44 (emphasis added).
20. *Iannarella*, *supra*, footnote 8, at para. 45.
21. 2005 CarswellOnt 10144 (Ont. S.C.J.).

> generated by PemBridge, is relevant to the issue of the plaintiff's health and ability to work, which are material issues in the tort action. Following the reasoning in *Cook v. Ip*, I conclude, therefore, that, similar to the case of medical records, there can be no claim of privacy or confidentiality attaching to the surveillance material in these circumstances. By commencing the tort action, the plaintiff has waived any privacy interest he may have had in this material. Therefore, it should be produced to the defendants. The issue of its use at trial is for the trial judge to decide, whether in the context of cross-examination to test the plaintiff's credibility or as substantive evidence.
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> It might be argued that it is not unfair for the defendants to proceed to trial without discovery of the surveillance material because their insurer can conduct its own surveillance of the plaintiff. However, I find that this is relevant material that exists now and may have a direct bearing on the damages the plaintiff claims. In such circumstances, I find that it would be unfair to the defendants to require them to go to trial without production of the surveillance material.[22]

Despite this decision, the plaintiff could potentially prevent the tort defendant from obtaining surveillance obtained by the first party insurer if, for example, the surveillance was obtained as part of an ongoing legal action with the first party insurer. The Court of Appeal in *Kitchenham v. Axa Insurance Canada*[23] held that defence medical examinations and surveillance conducted by the tort defendant were protected by the deemed undertaking rule. As such, the plaintiff was not able to produce this material to the accident benefits insurer in that case.

In *Kitchenham*, the personal injury plaintiff had commenced actions in tort and accident benefits. The tort defendant had surveillance and IME (Independent Medical Examination) reports regarding the plaintiff. The plaintiff obtained the surveillance and IMEs from the tort defendant in discovery. The tort action settled. Years later, the accident benefits insurer requested the surveillance and IMEs during discovery in that action. The Court of Appeal determined that deemed undertaking under rule 30.1.01 operated to constrain use by recipients, not providers, of evidence and information:

> In my view, the Rule exists to protect the privacy interest of the party compelled by the rules of disclosure to provide that information to another party to the litigation. The Rule provides that protection by prohibiting the party who obtained the information through compelled disclosure from using that information outside of the litigation, except

22. *Ibid.* at paras. 11 and 12.
23. 2008 ONCA 877, 306 D.L.R. (4th) 68, 69 C.C.L.I. (4th) 51 (Ont. C.A.).

> where certain exceptions apply or the court makes an order permitting its use.
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> The plaintiff obtained copies of the videotape and the IME from the tort defendant in the course of the discovery process in the tort action. Consequently, that material falls within the scope of the deemed undertaking found in Rule 30.1. AXA [AB insurer] can obtain a copy of the videotape and the IME by obtaining either the consent of the tort defendant, or an order of the court pursuant to rule 30.1.01(8).
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> . . . . .
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> The copy of the videotape and the IME are relevant in the benefits action. Both potentially speak to the level of the plaintiff's disability. They are in the possession of the plaintiff.
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> . . . . .
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> The disclosed information flows in one direction, from the discovered party to the discovering party. The undertaking flows in the opposite direction, from the party obtaining disclosure to the party giving disclosure. That undertaking does not limit what the discovered party can do in the future with its own information. There is no reason for imposing an undertaking limiting future use of the information on the party who has suffered the burden of producing the information through compelled disclosure. It is equally at odds with the accepted meaning of an undertaking to hold that parties who had no connection with the process in which the undertaking arose should, at some later time in some other litigation, find themselves bound by that promise or undertaking.[24]

Notwithstanding the foregoing, the Court of Appeal ultimately determined that the accident benefits insurer could obtain the surveillance and IME reports by either getting the consent of the tort defendant to permit the plaintiff to disclose the material to the insurer or by obtaining an order under rule 30.1.01(8) "lifting the deemed undertaking" as it applied to the copy of the videotape and the IMEs. It is difficult to fathom a scenario whereby such consent would not be forthcoming.

Although surveillance obtained in one proceeding is usually required to be produced in the companion proceeding, as held in *Abu Yousef*[25] it remains up to the trial judge to determine the use of the surveillance at trial. Moreover, before the surveillance will be admissible, the tort defendant will be required to call the maker of the video as a witness and satisfy the court of the context of the video and its accuracy, and that it has not been altered,[26] leaving faint hope alive for the plaintiff.

24. *Ibid.*, at paras. 10, 11, 15 and 26.
25. *Supra*, footnote 21, at para. 11.

Use of Surveillance at Trial

Even properly disclosed surveillance evidence will often give rise to argument at trial as to its admissibility and/or use. In *Ianarella*, as discussed, the surveillance evidence was not properly disclosed. The Court of Appeal identified the issues with the trial judge's approach to surveillance:

> The objection to the introduction of the surveillance evidence, in the context, gave rise to three distinct issues. The first was whether the trial judge should have given the respondents leave under rule 30.08 to introduce the surveillance despite the lack of disclosure, even if it was only to be used for the purpose of impeachment. The second was whether the respondents had laid sufficient groundwork for the admission of the surveillance for impeachment purposes, as required by the rule in *Browne v. Dunn*. The third was whether the respondents impermissibly used the surveillance evidence for substantive purposes.[27]

Rule 30.09 of the *Rules of Civil Procedure* states:

> Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

In *Iannarella*, defence counsel wanted to use the surveillance evidence only to impeach the plaintiff. However, the Court of Appeal found that since no privilege was claimed because the document had not been disclosed in the first place, the failure to follow rule 30.03 and claim privilege in an affidavit of documents "severed" the link required to make use of Rule 30.09.[28]

On this issue, Justice Lauwers concluded at para. 83 that:

> At the point in this jury trial where the issue of the admissibility of the surveillance arose, the main benefits that the appellants might have obtained through timely disclosure of the surveillance particulars were gone. The appellants did not have the benefit of considering the surveillance in assessing the possibility of pre-trial settlement, and their counsel had little time to prepare an appropriate examination in chief of Mr. Iannarella. The prejudice was baked in and the trial was well under way. In my view the application of the test for leave to introduce the surveillance should have led the trial judge to refuse its admission even for the purpose of impeachment.

26. *Supra*, footnote 21.
27. *Iannarella*, *supra*, footnote 8, at para. 76.
28. *Iannarella*, *supra*, footnote 8, at para. 77.

Next, the court explored the role of the trial judge as gatekeeper of admissible evidence, noting the particular power that surveillance evidence has in front of judges and juries.[29] The trial judge first must be satisfied that the surveillance is a fair and accurate depiction, mostly a technical issue. Second, the defence must lay an adequate factual foundation in accordance with the rule in *Browne v. Dunn*. To do so requires sufficiently precise testimony from the plaintiff about his disabilities, limitations and restrictions.[30]

Finally, Justice Lauwers provided insight into a longstanding issue. Separate from the issue of the disclosure of surveillance evidence, the admissibility of surveillance evidence is governed by its intended use. Given that video surveillance is powerful demonstrative evidence that "shows, not tells", how can plaintiff's counsel be confident that surveillance evidence admitted for impeachment purposes only will not be used substantively?

The short answer is: they can't be. However, there are safeguards in place that increase confidence in the distinction. In *Iannarella*, Justice Lauwers found that the distinction was far too blurry:

> The overarching issue the respondents sought to address through the surveillance evidence was the functionality of Mr. Iannarella's left arm. The indirect route would have been to use the surveillance as evidence to impeach Mr. Iannarella's assertions about his functionality. The direct route would have been to use it as substantive evidence of that functionality. However, that route was not open to the respondents because they did not comply with Rule 30.09.
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> Despite the trial judge's ruling that the surveillance could only be used for impeachment purposes, *three elements combined to effectively dissolve the distinction between impeachment and substantive evidence in the minds of the jury*. The first was the evidence of the videographers, the second was the respondents' jury address, and the third was the jury charge.[31]

The court found that the plaintiff had been trapped into calling the videographers, that defence counsel had made use of the surveillance in their jury address and that the trial judge failed to include a limiting instruction to the jury.[32] Any safeguard that might exist in distinguishing substantive use from use for impeachment was destroyed.

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29. *Iannarella*, *supra*, footnote 8, at para. 92.
30. *Iannarella*, *supra*, footnote 8, at paras. 95-97.
31. *Iannarella*, *supra*, footnote 8, at paras. 101 and 102.
32. *Ibid.*, at paras. 103-113.

Much has been written on the use of surveillance evidence at trial. For example, in *Smith v. Morelly*,[33] the court offered this thoughtful analysis:

> I find that the surveillance has probative value with respect to the nature and extent of the Plaintiff's injuries and his limitations with respect to his day to day life and his employment. I accept the Defendant's submission that the inconsistency for impeachment relates to the reports given to Mr. Lochenko and Dr. McGonagle and what is depicted on the video. The prejudice does not outweigh the probative value as the Plaintiff has had an opportunity to view the video. Any prejudice arising from the fact that the video has been edited from three days down to four hours can be addressed by way of cross examination of the investigator. The surveillance evidence is therefore admissible to impeach the testimony of the Plaintiff pursuant to Rule 30.09.

It should be noted that central to Justice Gilmore's reasoning was that the appropriate factual foundation for *Browne v. Dunn* had been laid and that prejudice was not severe as, first, the plaintiff did have an opportunity to view the surveillance and, second, her decision provided that the plaintiff be permitted to adjourn the trial.

Interestingly, in *Fernandes v. Penncorp*,[34] admissibility of surveillance was not specifically at issue, but the trial judge engaged in a helpful discussion of the utility of the surveillance that the insurer had obtained. In this seminal long-term disability case, Justice Hambly, in the Superior Court, stated:

> Penncorp puts much emphasis on the surveillance evidence as establishing that Avelino could work competitively doing at least light work. It conducted surveillance of Avelino in August 2005; November 2005; February 2006; June 2006; October 2009 and February 2010. It did this for 19 days over 140.5 hours. *From this surveillance it placed on a highlight video disc about 8 hours of which much substantially less was put to Avelino in cross examination, which it submits supports its position that Avelino can work competitively*. Avelino is captured on video working for short periods of time at light work. *He is never observed working at anything like the heavy demands of bricklaying*. He explained that he was in pain while he was doing this work. He was in pain at night. He took extra pain killers. He said "I pay the price" and "I suffer afterwards". He said that he had two or three days of good days followed by four or five days of bad days. He said that his pain was

33. 2011 ONSC 6834, 210 A.C.W.S. (3d) 123, 2011 CarswellOnt 13035 (Ont. S.C.J.) at para. 30.

34. 2013 ONSC 1637, 20 C.C.L.I. (5th) 129, [2013] I.L.R. I-5415 at para. 61 (Ont. S.C.J.), additional reasons 2013 ONSC 2803, 20 C.C.L.I. (5th) 165, [2013] I.L.R. I-5434, varied 2014 ONCA 615, 378 D.L.R. (4th) 42, 38 C.C.L.I. (5th) 171 (Ont. C.A.) (emphasis added).

> always between 4 and 8 on a scale of 1 to 10. I find Avelino to be a credible witness. I find that he answered all the questions honestly and as best he could. I accept his evidence. I adopt what Justice Cavarzan said in *Lalonde* as follows:
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> > 59 The difficulty with video surveillance is that it is incapable of recording the periods of time when Lalonde was out of sight recuperating, and the days when he was unable to leave his residence. As he testified, he has good days, bad days and horrible days. The videotape evidence shows portions of 17 days of a four-year period since May 14, 1997.

In this case, not only did the court find that the surveillance evidence was not persuasive to impeach the plaintiff's credibility, but also indicated that the insurance company should not have, and ultimately awarded $200,000 in punitive damages. Justice Hambly discussed the insurer's reliance on the surveillance:

> Avelino was observed in the surveillance on August 3, 2005 to lift a wheelbarrow and a wooden skid in and out of a truck on a single occasion. He was also observed to shovel some dirt. This does not remotely establish that he was able to do the heavy continuous labour for long hours for 6 to 7 days per week that he was doing in his bricklaying occupation, before he was injured.[35]

The Court of Appeal upheld the punitive damages award.[36] The issue in this case was not the disclosure of surveillance evidence but, rather, the insurer's inappropriate reliance on it. However, the court's willingness to award and uphold significant punitive damages based on the use of surveillance evidence should serve as a caution to defence counsel. Justice Hambly's conclusions suggest surveillance evidence is not always the "smoking gun" it seems.

Emerging Trends Post Iannarella

In *BNL Entertainment Inc. v. Ricketts*,[37] Master Muir offered this understanding of *Iannarella*:

> This approach is also consistent with the principle of full pre-trial disclosure when discovery rights are in issue. This principle promotes the early resolution of disputes and leads to efficiencies at trial. In my view, this interpretation is supported by the clear language of the Court of Appeal in its recent decision in *Iannarella*. The court places great emphasis on the importance of pre-trial production and discovery for

35. *Supra* (original S.C.J. decision) at para. 61 (emphasis added).
36. 2014 ONCA 615, 378 D.L.R. (4th) 42, 38 C.C.L.I. (5th) 171 (Ont. C.A.).
37. 2015 ONSC 1737, 126 O.R. (3d) 154, 252 A.C.W.S. (3d) 35, at para. 15 (Ont. S.C.J.), additional reasons 2015 ONSC 2689, 252 A.C.W.S. (3d) 681, 2015 CarswellOnt 5767.

> reasons of efficiency and basic fairness. See *Iannarella* at paragraphs 26-70. For the purposes of this motion, it is important to note that the Court of Appeal stated quite clearly that a waiver of discovery rights must be express and not simply implied solely from the fact that an action was set down for trial. See *Iannarella* at paragraph 53. I view the decision in *Iannarella* as affirming the significant importance of pre-trial discovery and the view that discovery rights are at least partly substantive and not merely procedural in nature.

The issue to be decided had nothing to do with surveillance. Here, the plaintiffs sought leave to examine the defendant for discovery after the trial record had been filed. Master Muir used the broad principles from *Iannarella* to determine that the plaintiffs were entitled to examine the defendant for discovery.[38]

Of additional significance is the decision of Justice Richetti in *Blatherwick v. Blatherwick*.[39] In this comprehensive family law decision, for a case that spanned over four years and racked up over $2 million in fees, Justice Richetti wrote a separate Schedule C to discuss an admissibility ruling for new financial documentation and a new report based thereon.[40] In arriving at his decision that the evidence was inadmissible, Justice Richetti adopted the reasoning of *Iannarella*, and stated that the case stood for "*the importance of full and complete disclosure, its importance to civil litigation and trial fairness, and the importance of avoiding trial by ambush*".[41] Justice Richetti used his review of the principles as a springboard to arrive at the significant conclusion that "*[t]he relevant rules are the Family Law Rules. However, the purpose and rationale for the disclosure obligation under the Rules of Civil Procedure are the same*".[42]

Since *Iannarella*, at least one judge has drawn a parallel between surveillance evidence and expert reports, the evidentiary cornerstones of a personal injury trial. In *Bishop-Gittens v Lim*,[43] the court considered opinion evidence offered by a treating physician. In his analysis, Justice McKelvey stated:

> In the Court of Appeal decision in *Iannarella v. Corbett*, 2015 ONCA 110, the Court of Appeal quotes with approval the comments of Justice Howden in *Beland v. Hill*, 2012 ONSC 4855, where he notes that discovery rules are to be read in a manner to discourage unfair tactics and

38. *Ibid.*, at para. 24.
39. 2015 ONSC 2606, 8 E.T.R. (4th) 30, 255 A.C.W.S. (3d) 437 (Ont. S.C.J.).
40. *Ibid.,* at para. 10.
41. *Ibid.*, at para. 12 (emphasis added).
42. *Ibid.*, at para. 13 (emphasis added).
43. 2015 ONSC 3393, 254 A.C.W.S. (3d) 596, 2015 CarswellOnt 8304 (Ont. S.C.J.).

> encourage full and timely disclosure in order to encourage early settlement and reduce court costs. *While those comments were made in connection with the issue of disclosing video surveillance, the disclosure of opinions by professional witnesses called to give opinion evidence about care provided to a party are, in my view, at least as important as the disclosure of surveillance evidence and merit similar treatment*. I therefore conclude that the plaintiff in this case should have disclosed the additional opinion which is being sought from Dr. Antoniazzi.[44]

Innovative counsel may well find that a close reading of *Iannarella* together with the expert evidence *Rules* yields some strategic direction moving forward.

As game changing as *Iannarella* may seem on its face, I have yet to see a deluge of supplementary affidavits of documents come across my desk from my defence counsel friends. I continue to be served with affidavits of documents with no particularized Schedule B, and my written requests for updated surveillance particulars go largely ignored.

Moreover, plaintiff lawyers would be wise not to accept at discovery a vague and ambiguous response from defence lawyers to comply with one's obligations under the *Rules* in response to a request for future surveillance particulars. In light of *Iannerella*, it would appear that a lot more of defence counsel is required. If defence counsel will not be pinned down, Rule 31.04(3) allows plaintiff's counsel to refuse to continue with the examination for discovery of the defendant and refuse to allow his or her client to be discovered. Counsel can bring a motion to produce the surveillance particulars and would invariably succeed in light of *Iannarella*.

As an eternal optimist but at the same time also a realist, I remain hopeful that *Iannarella*'s categorical rejection of "trial by ambush" will contribute to levelling the playing field between the parties. However, I am not convinced that all that much has fundamentally changed on the ground, at least not yet. Time will tell but, in the meantime, one should be aware of both the selfie stick and the hidden camera!

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44. *Ibid*., at para. 12.