Focus PERSONAL INJURY

Surveillance disclosure tightens

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The Court of Appeal for Ontario recently released an important decision on the admissibility of surveillance evidence at trial in *Iannarella v. Corbett* [2015] O.J. No. 726. The case has particularly significant implications for personal injury actions, in which defence counsel regularly consider retaining private investigators to gather evidence that may undermine a plaintiff's injury claims.

Iannarella was a typical motor vehicle accident: the plaintiff was rear-ended by the defendant on "a snowy February evening" in stop-and-go traffic. The plaintiff brought an action for damages, claiming he had significantly injured his left shoulder.

In advance of trial, defendant's counsel hired investigators who shot over 100 hours of video surveillance footage of the plaintiff.

The defendant did not deliver an affidavit of documents. The plaintiff did not seek production of an affidavit of documents, or examine the defendant. When the existence of the surveillance became known, the defendants claimed litigation privilege over it and in a pre-trial ruling, the trial judge held that it need not be produced.

At a trial before judge and jury, the defendant nevertheless sought to admit portions of the surveillance evidence to impeach the plaintiff's testimony on the extent of his injuries. The plaintiff objected on the grounds that the evidence had not been previously disclosed.

In a mid-trial ruling on admissibility, the trial judge held that the evidence could, despite the earlier non-production, be introduced for the purposes of impeachment of the plaintiff, pursuant to rule 30.09. That rule prohibits a party from introducing documents over which it had claimed privilege through to trial, except to impeach the testimony of a witness or with leave of the trial judge.

Ultimately, the action was dismissed after the evidence was apparently used to some significant effect in the cross-examination of the plaintiff.

On appeal, the Court of Appeal overturned the decision, holding that the trial judge had erred in admitting the surveillance evidence and by not placing stricter limits on its use.

The Court of Appeal took a strict view of the rules, reminding litigants and counsel that they not only have a positive obligation to disclose the existence of surveillance evidence, but that they must also continuously update this disclosure as surveillance is gathered.

If a party fails to make the appropriate disclosure in advance of trial, the evidence generally won't be admissible, since the prejudice to the other side would already be, in Justice Peter Lauwers' words, "baked into" the trial. The prejudice here included the inability of counsel to consider the surveillance in the context of settlement or to prepare and deal with this evidence in the plaintiff's examination in chief.

Iannarella is significant in that it envisions excluding potentially highly relevant evidence from a trial. Preventing "trial by ambush," encouragement of settlement, and the narrowing of issues were all cited as key motivations for what some may see as a relatively harsh result in this case.

It has long been the case that the existence of surveillance was required to be disclosed in advance of trial, even if the party claimed privileged over the actual surveillance itself. But this decision provides important guidance given the not uncommon practice of counsel to not to make the full and continuous disclosure envisioned by the Court of Appeal.

This decision makes it much less likely that defence counsel will be able to completely surprise their opponents with surveillance evidence at trial, even for the sole purpose of impeachment. Nevertheless, plaintiffs' counsel would still do well to consider making any waiver of discovery expressly conditional on disclosure of (or at least particulars of) any surveillance undertaken before trial.

It remains to be seen whether this new mandate to disclose the existence of such evidence in advance of trial will promote the early settlement envisioned by the Court of Appeal, or simply result in a decline in the use of surveillance evidence by defendants.

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