THE OATLEY MCLEISH GUIDE TO MOTOR VEHICLE LITIGATION 2014

SURVEILLANCE UPDATE – PRACTICE CONSIDERATIONS

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INTRODUCTION

Despite a fairly well developed body of case law, the personal injury bar remains surprisingly divided on the issue of the disclosure requirements surrounding surveillance evidence.

This paper is designed to provide a practical guideline with respect to the disclosure requirements of surveillance evidence in Ontario. For the purposes of this paper, surveillance will only be discussed within the personal injury context where it is assumed that surveillance will be in the possession of the defendant.

LITIGATION PRIVILEDGE

Rule 30.02(2) requires a party to produce all relevant documents to a lawsuit *unless* privilege is claimed over the document. Surveillance documents attract litigation privilege and therefore do not need to be produced *subject* to certain disclosure requirements (See *Devji v. Longo Brothers Fruit Markets Inc.* (1999), 45 O.R. (3d) 82 (General Division).

DISCLOSURE REQUIREMENTS

Substantive versus Impeachment Evidence

Surveillance of an opposing party is typically used at the trial of a personal injury case for the following purposes;

- As substantive evidence (e.g. to demonstrate the opposite party's functional abilities); or
- As impeachment evidence (e.g. to undermine the opposite party's credibility).

Substantive Evidence

The use of surveillance as substantive evidence is rarely disputed provided that the surveillance documents are produced to the opposite party at least 90 days before the commencement of trial (*Rule 30.09* of the *Ontario Rules of Civil Procedure*) or with leave of the court (*Rule 53.08* of the *Ontario Rules of Civil Procedure*). The decision in *Smith v. Morelly,* 2011 ONSC 6834 discusses and confirms these *Rules*.

Impeachment Evidence

It is the use of surveillance as impeachment evidence which typically gives rise to controversy. This is because the use of surveillance at trial for impeachment purposes is one of the rare occasions where a document can be relied upon at trial without first producing it to the opposing party. This unique exception, however, is heavily regulated by the *Rules of Civil Procedure* and the case law.

The Affidavit of Documents

Any surveillance document over which privilege is claimed and obtained prior to the swearing of the Affidavit of Documents must be included in Schedule B.

Less clear is the issue of surveillance documents obtained after the delivery of a sworn Affidavit of Documents.

Presumably, the overriding requirement of the *Rules* for on-going disclosure would necessitate the delivery of a supplemental Affidavit of Documents with a revised Schedule B disclosing the new surveillance documents.

However, *Rules 30.07* of the *Rules of Civil Procedure* seems to state the opposite. *Rule 30.07* reads as follows:

> **30.07 Where a party, after serving an affidavit of documents,**
>
> **(a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and <u>that is not privileged</u>; or**
>
> **(b) discovers that the affidavit is inaccurate or incomplete,**
>
> **the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.**
>
> **[emphasis added].**

The decision in *McDonald v. Standard Life Assurance Company* (2006), 34 C.C.L.I. (4th) 249 confirms this interpretation of *Rule 30.07* in the context of surveillance. At paragraph 13 of that decision, Mr. Justice Quinn states the following:

> **Initially, I was of the view that, upon receipt of the surveillance report, the failure of the defendant to forthwith serve a supplementary affidavit of**

> **documents containing reference to that report placed the defendant in breach of *Rule 30.07.* However, I now see that *Rules 30.07* does not apply to privileged documents. A surveillance report is privileged.**

This decision was cited with approval in the PEI decision in *Llewellyn v. Carter* (2007) 53 C.C.I.L. (4th) 288.

A different conclusion was reached in *Beland v. Hill*, 2012 ONSC 4855. Within paragraph 49 of that decision, Justice Howden stated the following:

> **As well, at the time the defendant's affidavit of documents was delivered, no surveillance record existed. However, once surveillance had been conducted, the record became a privileged document in the defendant's possession. This is where, in my view, the continuing duty to disclose imposed by the rules kicks in. The existing affidavit of documents had become incomplete and inaccurate…By Rule 30.07(b), the defendants were required to serve a supplementary affidavit disclosing the additional document.**

Justice Howden made no comment on the conflicting decision in *McDonald v. Standard Life Assurance Co*. or indeed, the conflicting wording of *Rule* 30.07(a).

Documentary Disclosure versus Informational Disclosure

In the 1986 decision in *Sacrey v. Berdan*, 10 C.P.C. (2d) 15 (Ont. Div. Ct.), Mr. Justice Borins discussed the difference between documentary disclosure and informational disclosure. In this regard, while privileged documents themselves need not be produced, a summary of the information contained within those documents must be disclosed.

This principle was reiterated in *Devji v. Longo Brothers Fruit Markets Inc.* (1999), 45 O.R. (3d) 82 (General Division). In this case, the defendant provided a summary of the surveillance on the record at Examinations for Discovery but refused to produce the surveillance reports, videos and photographs. The plaintiff successfully obtained an Order from a Master compelling the defendants to produce the documents. The defendants appealed. On appeal, Justice Sachs reviewed the authorities and found that the existing law required the defendant to provide details of the surveillance but that the actual document themselves need not be produced.

Based on the *Devji* decision and the body of cases that came prior, it is now common ground that defence counsel must provide the following information and particulars with respect to surveillance documents over which a claim of privilege has been made:

1. **Dates, times and precise locations.**

2. **Particulars of the activities and observations made;**

3. **The names and addresses of the persons who conducted the surveillance.**

The Level of Disclosure Required

While the information set out in 1 and 3 above is specific and should not give rise to contention, the level of detail required to be produced in 2 is only generally described and would seem to rely heavily on the discretion of defence counsel.

This gives rise then to the question as to what amount of detail must be provided with respect to the "particulars of the activities and observations made".

A review of the case law in this area would indicate that "full" particulars are required. The leading cases have used the following language in this regard:

- "full particulars of the activities and observations made" (*Murray v. Woodstock General Hospital*, (1988), 66 O.R. (2d) 129 (Div. Ct.)

- "full and timely disclosure" (*Ceci v. Bonk,* (1992), 7 O.R. (3d) 381 (C.A.)

- "details of everything the investigator observed the plaintiff to do or not to do on each occasion" (*Sacrey v. Berdan*, (1986) 10 C.P.C. (2d) 15 (Ont. Div. Ct.)

However, one can not help but notice that the word "full" is absent from the requirements set out in *Devji v. Longo Brothers* and the many cases that have followed *Devji v. Longo Brothers*. That being said, it should be noted that in *Devji*, Justice Sachs considered both *Murray v. Woodstock General Hospital* and *Sacrey v. Berdan*. One would think that if Justice Sachs was intending to narrow their scope, it would have been stated explicitly. From a practical point of view counsel should consider the disclosure requirement as set out in the case law to be a requirement of "full" disclosure.

Disclosure Requirements for future Surveillance

If a party intends to rely on future surveillance, it is quite clear that they must provide particulars. The decision in *Beland v. Hill* clearly confirms this principle. In Beland, the court refused to allow surveillance to be used at trial to impeach the witness because it had not been disclosed prior to trial in a timely manner.

A number of cases have also stated that a party must disclose the particulars of future surveillance even if that party does not intend to rely upon the surveillance evidence at trial (See *Marchese v. Knowles*, 2009 CarswellOnt 1501 and *Arsenault-Armstrong v. Burke*, 2013 ONSC 4353).

The specific disclosure requirements as set out in Devji apply to future surveillance as well.

The Disclosure Requirements When Plaintiff's Counsel Does Not Ask For Particulars of Surveillance at Oral Discovery

Much of the case law regarding the disclosure requirements of future surveillance was generated from motions brought in response to a defendant's refusal of a specific request made by plaintiff's counsel at the oral discovery of the defendant. However, a potentially interesting situation arises when a plaintiff's lawyer fails to request particulars of surveillance at all during the discovery of the defendant.

This is because the requirement to produce particulars of surveillance does not arise from the documentary discovery governed by *Rule 30* but rather it arises from the oral discovery governed by *Rule 31*. This was made clear in the Ontario Court of Appeal decision in *Landolfi v. Fiargoni*, (2006), 25 C.P.C. (5th) 9 wherein the Court states:

> **However, the obligation to disclose such particulars did not arise under rules *30.09.* Where, as here, surveillance videos are not sought to be admitted as substantive evidence, this disclosure obligation is triggered, if at all, through the informational discovery process envisioned by rule 31.06(1) of the rules of civil procedure. This rule obliges a person examined for discovery to answer any proper question relating to any matter in issue in the action, including information that is evidence. A disclosure obligation is also imposed by rule 30.03, which compels the delivery prior to the trial of an affidavit of documents by every party to an action and the listing and description in the affidavit of those documents for which the deponent claims privilege.**
>
> **The question before the trial judge concerned only the application of rule 30.09 and whether [the defendant], in the circumstances, could invoke the impeachment exception in that rule. Any prospect of prejudice to [the plaintiff] by [the defendant's] effort to do so at trial was avoidable in the pre-trial informational discovery provisions of the rules. On this record, it appears that [the plaintiff] elected not to engage the benefit of these rules. While this was his right, he could not thereafter seek to resist [the defendant's] use of the video evidence at trial for impeachment purposes on the ground of inadequate disclosure.**

In this case, voluntary pre-trial disclosure was made by the defendant. The real issue was whether or not it was inadequate disclosure. The Court of Appeal concluded that the plaintiff's failure to ask for particulars of surveillance at oral discovery precluded the plaintiff from even making this argument.

The wording of this particular passage of the decision makes it clear that the disclosure requirement is triggered "if at all" at oral discovery in response to the questions of opposing counsel. The language used in *Landolfi* certainly opens up the argument that in the absence of a specific request from plaintiff's counsel for particulars of surveillance, a defendant is not obligated to make such disclosure.

However, the lower courts are much less ambiguous on this issue. The decision in *Beland v. Hill* as well as the decisions in *Moore v. Canada Life* (May 11, 2006, Ont. S.C.J., Court file No. 1355-98) and *Bell v. Brown*, 2012 ONSC 839, all stand for the proposition that a defendant cannot rely on surveillance evidence at trial, even if only for the purposes of impeachment, unless it has been previously disclosed to the plaintiff in a timely manner.

When Do Surveillance Particulars Need to be Disclosed to Opposing Counsel

While the *Rules* and the case law do not set out an exact date by which surveillance particulars must be produced, the defendant runs a real risk that such evidence will not be permitted into evidence if it is disclosed too close to trial. This occurred in the decision in *Moore v. Canada Life*. In this case, plaintiff's counsel did request particulars of surveillance at Examinations for Discovery. Three weeks before trial, defence counsel provided a copy of the surveillance report for the first time. At trial, the plaintiff moved to suppress the surveillance evidence based on Canada Life's failure to provide timely disclosure of surveillance particulars. Canada Life argued that it should still be permitted to use the surveillance evidence for impeachment purposes. For the purpose of the motion, Justice Rivard assumed that the surveillance would show the plaintiff engaging in activities inconsistent with her alleged level of disability. However, he found that Canada Life's failure to make timely disclosure of the particulars deprived the plaintiff of the ability to make the evidence known to his own experts. The defendant would, therefore, have the unfair advantage of being able to discredit the plaintiff's medical experts on the basis that their opinions were based on incorrect or incomplete information. The court had this to say about the late disclosure:

> **The defendants chose to ignore the plaintiff's informational discovery rights under the Rules, thereby depriving the plaintiff of the benefits of the Rules. To permit the defendants to tender this evidence would now make plaintiff's counsel's task a great deal more difficult.**

The court concluded that prejudice to the plaintiff outweighed the value of the surveillance evidence in the assessment of the witnesses' credibility. Consequently, it ordered that the surveillance evidence could not be tendered for any purpose.

A similar situation arose in *Smith v. Morelly*, 2011 ONSC 6834. In that case, a defendant obtained surveillance 17 months before trial. Three weeks before trial, the plaintiff wrote to the defendant requiring production of any surveillance to be relied upon at trial. The defendant responded five days before trial by delivering a videotape containing four hours of surveillance footage. The defendant sought to admit the evidence as substantive evidence despite being well past the 90 day deadline. The court refused to allow the surveillance to be used as substantive evidence, however, the court did permit the defendant to use the evidence to impeach the testimony of the plaintiff but, under the circumstances, granted the plaintiff the option of an adjournment to deal with the new evidence. The plaintiff obtained the adjournment with a hefty costs award against the defendant.

From a practical point of view, although there is no set rule about when particulars should be provided, a week before trial is presumably too late. In *Ceci v. Bonk* the court used the word "timely". Certainly, it would be difficult for a plaintiff to argue that particulars provided 90 days before trial are too late when such a time frame is contemplated by the *Rules* for the use of surveillance documents as substantive evidence.

If surveillance evidence is obtained by the defendant less than 90 days prior to trial, it would be prudent to then produce disclosure particulars forthwith.

WAIVER OF PRIVILEGE

There will be instances where a defendant waives the litigation privilege that it claims over surveillance documents. The defendant may waive its privilege actively or by inference in a variety of circumstances including the following:

1. Provision of surveillance evidence to a defence expert (*Aheme v. Chang,* (2011) O.J. No. 1880 (S.C.J.);

2. Disclosure of surveillance evidence to a co-defendant (*Tremblay v. Daum* (1994) (Ontario General Division);

3. Provision of Surveillance Evidence to a Third Party (*Supercom of California v. Sovereign General Insurance Co.* (1998) (Ontario General Division)).

As well, the court retains its statutory right under *Rule 30.04(6)* to act as the ultimate assessor of privilege.

USE AT TRIAL

Provided that a defendant serves the surveillance video more than 90 days prior to trial, such evidence can be used as substantive evidence in the defendant's case.

The Rule in Brown v. Dunn

Whether using surveillance evidence for substantive or impeachment purposes, defence counsel should always be mindful of the common law rule in *Brown v. Dunn*. *Brown v. Dunn* requires defence counsel to lay a proper evidentiary foundation during the cross examination of the plaintiff before calling any substantive or impeachment evidence. In *Giroux v. LaFrance,* (1993), 19 C.P.C. (3d) 12 (Ont. Gen. Div.)*, Valin J.* applied the *Brown v. Dunn* rule to surveillance documents and found that surveillance cannot be used to ambush the plaintiff but rather, counsel must present the substance of the evidence to the plaintiff and allow the plaintiff the opportunity to deny, explain or call evidence to rebut it.

Relevance and Prejudice

In addition, where evidence is used for impeachment purposes, defence counsel must still establish that the evidence is relevant. In *Landolfi,* the test for admissibility in this regard was described as follows:

> **Where evidence is tendered for impeachment purposes (as in this case) the admission of the evidence requires a showing of relevance to the credibility of a witness on a material matter and a further demonstration that the potential value of the proffered evidence to assist in assessing credibility outweighs the potential prejudicial effect of the evidence.**

SUMMARY

Despite decades of case law, the law surrounding the disclosure of surveillance particulars continues to elicit debate between plaintiff and defence counsel. The area that gives rise to the most controversy is future surveillance or surveillance obtained or produced close to trial.

A plaintiff's lawyer can avoid much of this controversy by requesting particulars of future surveillance at Examinations for Discovery. Once requested, a defendant must produce the following, whether they intend to rely on the surveillance evidence at trial or not:

1. Dates, times and precise locations;
2. Particulars of the activities and observations made;
3. The names and addresses of person who conducted the surveillance.

To rely on surveillance documents at trial for substantive evidence, a party must produce the document to opposing counsel no later than 90 days before trial. The exact time frame for when such information must be disclosed when relied upon for impeachment purposes remains somewhat ambiguous. However, defence counsel who wait too close to trial certainly increase the risk of having such evidence excluded.

Note: In preparing this paper I have relied heavily on the article "Disclosure and Production of Surveillance Evidence Before Trial" by Rikin Morzaria of McLeish Orlando LLP.