Ont. C.A. Opines on "Trial By Ambush"
- what disclosure obligations survive setting down for trial
- when and if undisclosed surveillance can be used for impeachment
A Commentary on *Iannarella v. Corbett*

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In a jury trial in *Iannarella v. Corbett*, a personal injury case, the defendant attempted to show surveillance video to the jury despite the fact that it had not been disclosed to plaintiff's counsel before trial. The defence argued that the surveillance video was still admissible for the limited purpose of impeaching the plaintiff's testimony, even if it was not admissible for the substantive purpose of illustrating the plaintiff's lack of a disability. The trial judge agreed with the defence submissions and allowed the video to be shown.

The Court of Appeal (*Iannarella v. Corbett*, 2015 ONCA 110, released Feb. 17, 2015) disagreed and gave an extensive analysis of what the defendant's obligations of disclosure were, what obligations survived the setting down for trial, and under what circumstances undisclosed surveillance could be used for impeachment purposes.

In this case, the defendant had failed to deliver an affidavit of documents and the plaintiff had set the matter down for trial without requiring one to be filed, and in fact, without any oral discovery. (The Court of Appeal surmised that the plaintiff waived oral discovery as this was a rear-end collision and there was little to be gained from discovery.)

The plaintiff moved before the trial judge at the trial management conference a week before trial for an order that the defendants provide an affidavit of documents and particulars of surveillance.

The trial judge dismissed this motion on the grounds that the plaintiff had set the matter down for trial without first obtaining the defendant's affidavit of documents and could therefore no longer insist in documentary disclosure as a result of Rule 48.04 (1), which reads:

> Any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court.

The Court of Appeal pointed out that, while oral discovery under Rule 31.03 is optional ("A party to an action ***may*** examine for discovery any other party adverse in interest…"), the obligation of documentary production under Rule 30.03 is mandatory

("A party to an action ***shall*** serve on every other party an affidavit of documents") and the obligation therefore survives the setting of the matter down for trial.

Further, there is a continuing obligation of documentary disclosure that survives the setting down for trial set out in Rule 30.07.

The Court of Appeal therefore reasoned that the plaintiff was entitled to bring a motion at any time for an affidavit of documents, and the defendant was obliged either to list the surveillance tapes in schedule "A" and produce them, or list them in schedule "B" and claim privilege. The Court put it this way:

> [52] The trial judge's implicit reliance on rule 48.04 as the authority for refusing to make the order requested by the appellants because they had set the action down for trial was misplaced. Unlike rule 31.03(1), which provides that a party "may" conduct an examination for discovery, rule 30.03(1) provides that a party shall serve an affidavit of documents. The obligation to provide an affidavit of documents, which includes listing privileged surveillance in the accompanying Schedule B, is mandatory. This is the way in which a claim to privilege is to be asserted for the purpose of rule 30.09. Further, rule 48.04(1) specifically provides that even after a matter is set down for trial, a party is not relieved from its obligation under rule 30.07 to disclose documents subsequently discovered or that were not previously disclosed in an affidavit of documents, although rule 48.04 (2)(b)(ii) assumes that an affidavit had previously been delivered in compliance with the Rules.

The Court observed:

> [40] … privileged documents must be included in a party's affidavit of documents. Under rule 30.03(2)(b), video surveillance is typically identified in Schedule B to the affidavit of documents as a privileged document. The plaintiff then has the opportunity to seek full particulars of the surveillance from the defence at examination for discovery; the "particulars" of surveillance that must be disclosed on request include the date, time and location of the surveillance, as well as the nature and duration of the activities depicted and the names and addresses of the ...
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> [41] This practice of disclosing particulars is consistent with the Divisional Court's finding in Murray v. Woodstock General Hospital Trust (1988), 66 O.R. (2d) 129 (Div. Ct.), where the court held, at para. 13, that a person examined for discovery must comply with the plain meaning of the words in rule 31.06(1) and answer questions about the contents of the surveillance "even though to do so would require the disclosure of information contained in a privileged document." While the surveillance films themselves remain privileged, the facts disclosed by the films do not. (Machado v. Berlet, (1986) 57 O.R. (2d) 207 (H.C.J.), at para. 6)
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> [44] Pre-trial disclosure of surveillance in a personal injury action is particularly important since "the impact of video evidence can be powerful." (Landolfi, at para. 52) Disclosure also provides the parties with the opportunity to carry out a realistic assessment of their positions and therefore

facilitates settlement. Justice Hambly explained the important role of disclosure in Arsenault-Armstrong:

> The surveillance evidence will assist the plaintiff in evaluating the strength of her case and arriving at her settlement position prior to trial. Even if the defendant will not be able to use the surveillance evidence for impeachment purposes, as a result of its non-disclosure, the defence will gain knowledge of the plaintiff from the surveillance evidence which it will be able to use to its benefit. (Para. 11)

[45] However, the surveillance evidence can only serve to encourage settlement if it is disclosed in the affidavit of documents and the opposing party has the opportunity to seek particulars at examination for discovery. Here, for example, the appellants did not accept a substantial settlement offer; perhaps they would have accepted it, thus avoiding a lengthy and costly trial, had the respondents properly disclosed their surveillance evidence.

[46] ***Given the interests of fairness and the objectives of efficiency and settlement, the court expects the parties to comply fully and rigorously with the disclosure and production obligations under the Rules.*** [Emphasis added]

The Court of Appeal held very forcefully, for the following reasons, that the trial judge had erred in dismissing the pretrial motion and had in effect facilitated a trial by ambush:

> [66] The respondents breached the following rules: rule 30.03(1) by failing to serve an affidavit of documents; rule 30.07(b) by failing to disclose surveillance conducted after the matter was set down for trial in an affidavit of documents; and, inferentially, rule 31.09 obliging the respondents to correct answers given on an undertaking ultimately leading to the provision of surveillance particulars.
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> [67] In fashioning the appropriate response to the appellants' request for the affidavit of documents, given the respondents' clear breaches the trial judge ought to have considered how this case would have developed if the respondents had complied with the Rules.
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> [68] The respondents would have served an affidavit of documents disclosing the existence of any surveillance, as well as a supplementary affidavit of documents listing any surveillance that was subsequently carried out. The inclusion of the surveillance report in Schedule B of the affidavit would likely have prompted the appellants to seek particulars on examination for discovery, instead of waiving this right. With the surveillance particulars in hand, the appellants would have been in a position to properly evaluate the settlement proffered by the respondents. The appellants might well have provided the particulars of the surveillance to experts for consideration in the formulation of their opinions. Had the matter still proceeded to trial, the appellants' counsel would have been in a position to better plan Mr. Iannarella's examination-in-chief in order to address the surveillance evidence. The entirety of this important pre-trial process was effectively foregone.

> [69] The trial judge erred at the trial management conference. He ought to have ordered the respondents to serve an affidavit of documents disclosing the surveillance or at least to disclose such particulars as are ordinarily provided through a discovery undertaking. He should have offered the appellants an adjournment of the trial, and dealt with the issue of costs thrown away, since the appellants were not without fault. This would have permitted the appellants to access at least some of the advantages of disclosure. Even a relatively short adjournment to permit counsel to plan Mr. Iannarella's examination-in-chief in light of the surveillance particulars would have been appropriate, in the event that the appellants did not want a lengthy adjournment. None of this was offered.
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> [70] Instead, the trial judge enabled what amounted to a trial by ambush, which is completely inappropriate under the Rules (see Ceci, at para. 10). In the circumstances, the respondents cannot be absolved of the disclosure obligations set out above. I do not excuse the lapse in good trial practice by appellants' trial counsel (not Mr. Zuber), by failing to pursue the appellants' entitlements at an earlier stage. However, the weight of the disclosure obligations falls on the respondents, and rule 48.04 does not provide them with an escape route.

Having dismissed the plaintiff's pretrial motion, the trial judge then held at trial that the defendant was entitled to show the tapes at trial but only for the limited purpose of impeaching the plaintiff's credibility and not for any substantive purpose.

The trial judge relied on Rule 30.09, which reads:

> 30.09 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

The Court of Appeal disagreed, saying:

> 77] The respondents asserted that they wanted to use the surveillance evidence to impeach Mr. Iannarella's credibility. This is permitted by rule 30.09, which, as noted, allows a privileged document to be used to impeach a witness. "[w]here a party has claimed privilege in respect of a document". But rule 30.03 requires a party's assertion of privilege to be made in the affidavit of documents; this mechanism serves to link the rules, which work together to require adequate disclosure. The link was severed in this case, to the appellants' prejudice.
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> [78] As noted, rule 30.08(1)(a) provides that if an undisclosed document is favourable to the party's case, "the party may not use the document at the trial, except with leave of the trial judge." Rule 31.09(3) applies the same penalty for failure to update an inaccurate or incomplete answer given on discovery. These rules apply even if the undisclosed evidence will be used solely for impeachment. (Beland, at paras. 39-40)

> [79] Although both rules expose the non-compliant party to the risk of evidence being excluded at trial, rule 53.08 mitigates that risk somewhat. Rule 53.08 applies to rule 38.08(1) and rule 31.09(3), and provides 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."

The Court of Appeal held that the plaintiff had suffered irreversible prejudice and the trial judge should not therefore have granted leave:

> [83] 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.

Further, the trial judge erred in failing to conduct a voir dire with respect to the admissibility of the evidence:

> [91] Assuming that the surveillance had been otherwise admissible for impeachment purposes, the trial judge did not hold a voir dire on the fairness, representativeness and admissibility of the surveillance evidence, nor did he view the material before it was played for the jury and used in Mr. Iannarella's cross-examination. He did not require the respondents' trial counsel to lay an adequate factual foundation that the surveillance evidence could be used to contradict. These were errors.

The decision in *Iannarella v. Corbett*, 2015 ONCA 110 also contains rulings on a number of other interesting issues, such as the limitations of a trial judge's discretion with to respect to costs, the reverse onus on a defendant in a rear-end collision, as well as a containing a more detailed discussion of the procedure to be used by a trial judge in dealing with evidence introduced only for impeachment purposes. If you have the time, and have any interest in those issues, you will find it worth your while to read the decision in full.