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PUBLICATION

Particulars of Post-Discovery Surveillance Must be Disclosed

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The Ontario Court of Appeal issued an important decision on February 17, 2015, regarding the disclosure of surveillance. As a result of the ruling in *Iannarella v. Corbett*, the particulars of all surveillance undertaken before trial must be disclosed to the plaintiff.

Pre-Discovery Surveillance

The law regarding disclosure of surveillance obtained prior to discoveries is well-settled. Surveillance must be listed in the defendant's affidavit documents. At discoveries, the defendant is required, upon request by the plaintiff, to provide a summary of the surveillance which has been obtained up to that point. The summary is to include 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.

The defendant is not required to produce the surveillance video, unless the defendant wishes to use it as substantial evidence at trial (i.e., to prove that the plaintiff can perform the specific activities depicted on the surveillance). If privilege is not waived over the surveillance, the defendant can only use the surveillance at trial to impeach the plaintiff's credibility (i.e., to show an inconsistency in the plaintiff's evidence).

Post-Discovery Surveillance

Controversy usually arises with respect to surveillance conducted after discoveries are completed. From the defendant's perspective, there may be strategic reasons for not wanting to disclose the particulars of the post-discovery surveillance. For example, the defendant may wish to use the surveillance at trial to impeach the plaintiff's credibility, particularly if the plaintiff is seen performing activities which are inconsistent with his or her discovery evidence. The surveillance may also be unhelpful to the defendant and the defendant does not wish to disclose the details to the plaintiff.

Until fairly recently, there was little judicial authority regarding the defendant's obligation to provide surveillance particulars after its discovery was completed. The authority weighed in favour of disclosure. However, there was no appellate case law on the issue. Examinations for discovery usually proceeded with plaintiff's counsel requesting detailed particulars of future surveillance, with defence counsel responding that the defendant will comply with the *Rules of Civil Procedure* without any commitment to produce the particulars.

The Ontario Court of Appeal in *Iannarella v. Corbett* has ruled in favour of the disclosure of the particulars of all surveillance obtained by a defendant. The decision dealt with a rear-end collision. The defendant obtained surveillance of the plaintiff on various dates which depicted the plaintiff performing activities that he maintained he was unable to carry out. The surveillance was not produced to the plaintiff, nor were any particulars provided.

The defendant was not examined for discovery and did not produce an affidavit of documents. At a trial management meeting, the plaintiff asked the trial judge to order the defendant to produce an affidavit of documents as well as the particulars of any surveillance. Rule 48.04 provides that a party who has set an action down for trial may not continue any form of discovery. The trial judge held that plaintiff was precluded by Rule 48.04 from bringing the motion. At trial, the defendant was permitted to use the surveillance for the purported purpose of impeaching the plaintiff's credibility.

The Court of Appeal noted that production of an affidavit of documents was mandatory under the *Rules of Civil Procedure* and held that the trial judge ought to have ordered the defendant to produce an affidavit of documents. The Court also held there is an ongoing obligation on a party to update its affidavit of documents. The Court noted that, had the defendant complied with its obligations in this regard, the surveillance would have been listed in its affidavit of documents.

The Court went on to state that the plaintiff, after receiving the updated affidavit of documents, would have been entitled to request particulars of all the surveillance, including surveillance conducted after the plaintiff set the action down for trial. The Court reasoned that 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.

In addition to the surveillance disclosure issue, the Court of Appeal also addressed the onus of proof in rear-end collisions (with a reverse onus found on the defendant to prove he/she was not negligent) as well as the proper use of surveillance evidence at trial. The Court of Appeal found that the defendant had improperly tendered the video surveillance and oral evidence from the investigator as substantive evidence of the plaintiff's abilities. A new trial was ordered.

Summary and Conclusion

As a result of the *Iannarella* decision, defendants will be required to provide particulars of post-discovery surveillance to the plaintiff, irrespective of whether the defendant intends to rely on it.

As was always the case, however, if the defendant intends to use the surveillance for substantive purposes, the survelliance must be produced to the plaintiff at least 90 days before trial.

The effect of the *Iannarella* decision is to take away the surprise use of surveillance evidence to impeach the plaintiff's credibility. As a result of this decision, defendants will be required to provide particulars of the surveillance in advance of trial.

While the decision minimizes the tactical use at trial of some surveillance, good surveillance is good surveillance. If the plaintiff is observed carrying out activities which contradict his or her discovery evidence or other information, the surveillance should still be effective.

The mandatory disclosure obligation set out in the decision, however, is something that claims examiners and defence counsel will need to keep in mind when considering whether to conduct post-discovery surveillance. Overall, however, the decision is unlikely to be a game-changer.