

Excluding Surveillance Evidence at Trial

Case comment: *Nemchin v. Green*, 2019 ONCA 634 (CanLii)

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In *Nemchin v. Green*¹ the Ontario Court of Appeal considered and clarified the process and principles for excluding social media and surveillance evidence from trial.

In *Nemchin*, the Defence intended to produce video surveillance and Facebook posts to demonstrate the Plaintiff's functional abilities. The trial judge excluded the surveillance and the Facebook posts from evidence.

The Court of Appeal held that the surveillance ought to have been admitted but declined to order a new trial.

Trial and Outcome:

In 2010, the Plaintiff, Tanya Nemchin, was involved in a car crash. She alleged suffering physical complaints and post-traumatic stress disorder as a result. A trial was held in 2017. PTSD was the main issue, with the Defence disputing causation.

The Defence sought to introduce surveillance and Facebook posts to show that Ms. Nemchin's PTSD had not affected her activities to the degree alleged. During trial, Justice Sylvia Corthorn ruled:

1. The Defence was not permitted to show surveillance evidence to the jury; and,
2. The Defence was not permitted to show Facebook posts to the jury.²

The jury awarded \$700,000.00 in damages to Ms. Nemchin.

The Defence appealed, asserting that the trial judge's ruling on the evidence led to an unjust verdict from the jury.

¹ 2019 ONCA 534

² *Ibid* para 3

Issues on Appeal:

The Court of Appeal considered three issues:

- a) Did the trial judge err in excluding all Defence surveillance evidence?
- b) Did the trial judge err in excluding the Facebook evidence?
- c) Considering the trial context, the evidence and the arguments, did the trial judge make errors sufficiently grave to warrant a new trial?³

In determining the issues, the Court of Appeal considered Rules 30.09 and 53.08 of the *Rules of Civil Procedure*, regarding waiving privilege and the admissibility of evidence, and *Iannarella v. Corbett*, the leading authority on surveillance production.

(a) Did the trial judge err in excluding all of the surveillance evidence?

The Defendant conducted three rounds of surveillance, on May 2015, September 2015; and May 2016. The first two rounds of surveillance were produced to the Plaintiff in a timely manner. The May 2016 surveillance was produced late, two weeks before trial.

All surveillance was tendered for substantive purposes. All surveillance was excluded by the trial judge.⁴

The Court of Appeal reviewed the admissibility test from *Iannarella v. Corbett* before considering the trial judge's reasons for excluding surveillance.⁵ *Iannarella* holds that video evidence must be assessed by the trial judge in a *voir dire* for two purposes:

1. With an examination of the videographer, to ensure that the video presents a fair and accurate depiction for the surveillance to be admitted in evidence; and
2. To ensure that the use of surveillance video will not impair trial fairness.

It is the trial judge's task to look at each piece of video the Defence wants to put to the jury and determine if it is admissible. Making that determination requires a discrete and granular

³ *Ibid* para 5

⁴ *Ibid* paras 6-8

⁵ *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523.

assessment. If disclosed properly, the surveillance itself can be used in a dual role, impeaching credibility and showing true functionality.⁶

In *Nemchin*, the trial judge found that the video not the be fair and accurate, and held that trial fairness would be impaired if the surveillance was included in evidence.

Specifically, the trial judge excluded the surveillance for three substantive reasons and one procedural reason, with the Court of Appeal considering all four reasons as failing to hold up under scrutiny.⁷

First, the trial judge held that surveillance is of minimal probative value and was therefore inadmissible. The trial judge held that for the surveillance to have probative value, the footage must be capable of contradicting, challenging, or impugning the witness' testimony.

The Court of Appeal disagreed. The surveillance does not have to contradict the Plaintiff in order to be shown. Surveillance could be shown to provide context and to qualify the Plaintiff's testimony as to her true functionality.⁸

Second, the trial judge held that the jury could not be expected to interpret surveillance meaningfully without expert opinion, and no experts had reviewed the surveillance.

The Court of Appeal acknowledged that not having expert commentary was an appropriate factor to consider in rejecting surveillance. However, the Court held that an effort could have been made to consult with experts, and that excluding the surveillance was incongruent with the Plaintiff having led her own video evidence, also with no expert comment.⁹

Third, the trial judge excluded the last round of surveillance as it was served too late.

Again, the Court of Appeal acknowledged late service as an appropriate factor to consider in rejecting surveillance. However, the Court found the overall analysis for excluding this round of surveillance to be in error, as the trial judge did not consider whether the late disclosure would

⁶ 2019 ONCA 534 paras 12,15

⁷ *Ibid* para 51

⁸ *Ibid* para 47

⁹ *Ibid* para 48

result in prejudice or would cause undue delay in the conduct of the trial, as required by rule 53.08.¹⁰

Fourth, the trial judge also enumerated procedural reasons for refusing to admit the video surveillance, indicating the video footage was not accurately representing the facts. What concerned the trial judge were missing time stamps, unknown editing methods, subjective input from the investigator, and gaps in footage.

The Court of Appeal did not consider these reasons to be persuasive, indicating there is no requirement for a video to be continuous or complete before it can be said to accurately depict a witness's activity. As a basic principle, a video recording is admissible as soon as it is established that it depicts the scene and it has not been altered or changed – any other factors, such as the integrity of the recording or the identity of a speaker, are matters for the trier of fact and go to weight only, not admissibility.¹¹

(b) Did the trial judge err in excluding the Facebook evidence?

At trial, the Defence sought to put Facebook posts to Ms. Nemchin. The posts were produced near the end of the Plaintiff's cross-examination. The trial judge ruled that the Facebook posts could not be used as evidence at that point in time as prejudice would result to the Plaintiff's presentation of her case.

The Court of Appeal considered the trial judge's ruling on this issue to be correct, based on the information as presented during trial. During the appeal, appeal counsel clarified that the Facebook posts had been available to the Plaintiff prior to disclosure by the Defendant, making them available for use as evidence. However, since confusion resulted from Defence counsel's submissions, the Court of Appeal upheld the trial judge's ruling.

Had the source of the Facebook posts been properly identified at trial, the trial judge would have had to consider prejudice and fairness under Rule 53.08.¹²

¹⁰ *Ibid* para 50

¹¹ *Ibid* paras 59-61

¹² *Ibid* paras 68-60

(c) Did the trial judge make errors sufficiently grave to warrant a new trial?

After finding the trial judge had excluded surveillance evidence in error, the Court of Appeal considered ordering a new trial. For a new trial to be ordered, the interests of justice must plainly require that to be done. The appellant must show a substantial wrong or miscarriage of justice has occurred, and the context of the entire record must be considered.

The Court found that even if the excluded surveillance had been admitted, it would not have affected the jury's verdict on damages. In the Court's view, it was significant that physical functionality did not loom large in the trial, as the main issue was post-traumatic stress disorder. This limited the value of the video surveillance. Further, the proposed video had no real contradictions regarding physical or mental functionality as a result of the collision. Lastly, the Court indicated that the jury had a chance to see video of the Plaintiff's function: the video presented of the Plaintiff engaged in yoga. The excluded video did little to add or subtract to the video already played to the jury.¹³

The appeal was dismissed with costs to the Respondent in the amount of \$44,000.

Obiter dicta, timing and scope of motions to exclude surveillance:

In *Nemchin*, the motion to exclude surveillance was brought prior to the cross-examination of the Plaintiff.

The Court of Appeal considered the timing of this motion, and commented that pre-emptive wholesale attacks on surveillance evidence, as undertaken in *Nemchin*, should generally be avoided. In the Court of Appeal's view, a trial judge may refuse the Plaintiff's motion to exclude surveillance and invite it to be renewed at a more appropriate time. Considering each video excerpt proposed for evidence separately is preferable to an early and exhaustive ruling on the admissibility of surveillance.

¹³ *Ibid* paras 75-77

Conclusion:

The Court makes clear that to exclude surveillance, a motion must be properly timed, the video inaccurate, and the impact on the trial unfair. If the surveillance is disclosed late, prejudice must be demonstrated. Procedurally, *Nemchin* guides trial judges to avoid making blanket rulings on the admissibility of surveillance evidence and encourages granular analysis of specific surveillance at appropriate times. Ultimately, *Nemchin* confirms the difficulty in seeking to exclude surveillance, while also clarifying how and when that attempt to exclude can best be made.