Productions for and at Discovery

BY ANNA SZCZURKO, SISKINDS LLP*

This article outlines productions for and at discovery, and is designed to be used as a tool for junior associates in navigating the discovery process. The following production topics will be canvassed: social media account productions; prior productions in accident benefits and in a tort action; and statements reviewed to refresh memory before an examination for discovery.

Introductory Principles

The *Rules*[1] are designed to require full disclosure of information to prevent surprise and 'trial by ambush'. As such, a party must produce every document that is relevant to the issues pled in a proceeding. The definition of 'document' is broad, including *"a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form"*.[2]

A party must *disclose* every document that is relevant to any matter in issue in an action, regardless of any privilege claimed.[3] The *production for inspection* is limited to those documents not protected by claims of privilege.[4] The obligation to swear and serve an affidavit of documents is imposed by Rule 30.03. Generally, litigants bear the initial disclosure obligation of producing documents that are relevant prior to an examination for discovery.[5]

Further production of documents can be ordered when there is evidence that a litigant has not disclosed or has omitted items that are relevant and not covered by privilege.[6] The party requesting the production order must present evidence that a document relevant to a matter at issue has not been disclosed. The first section of this article will briefly examine the underlying principles with respect to productions. The remaining sections will provide a brief overview of how frequent personal injury-based production issues have been considered by the courts.

A. Relevant Documents

A party needs to produce for inspection relevant documents. As previously

stated, the definition of 'document' is broad, including "a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form".[7] The 2010 rule amendments tightened the test from "semblance of relevance" to "relevant to a matter in issue":[8]

> *"Evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Relevance involves two questions. What is the proposition to which the evidence is supposed to be relevant? What is the probative value?*
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> *The change in the rules narrowed the availability of document production from the semblance of relevance standard requiring production of any document relating to any matter in issue in the action to any document relevant to any matter in issue in the action. Our broad and liberal approach to disclosure and discovery of relevant information sustains".*

Documents that are relevant, therefore, have a tendency to make a fact more or less likely than if the document had not been produced. This fact also needs to be related to the issues in the proceeding. The onus is now on the defendant to satisfy the Court that the requested information is actually relevant to the matters at issue.

In personal injury cases, there needs to be a limit to the inquiries that can be made into the plaintiff's past medical or employment history. "Relevant to a matter in issue" is frequently interpreted as impacting upon the plaintiff's ability to function in vocational or avocational tasks three to five years prior to the injury.

B. Proportionality

Where there is evidence of an omission or non-disclosure, the court, in deciding whether or not a document is producible, will consider the principle of proportionality and whether the evidence warrants the cost of disclosure.[9] The factors set out in the *Rules* include the following:[10]

> *"29.2.03*
> *(1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,*
> *(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;*
> *(b) the expense associated with answering the question or producing the document would be unjustified;*
> *(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;*
> *(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and,*
> *(e) the information or the document is readily available to the party requesting it from another source.*
>
> *(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person".*

The disclosure of the evidence may be outweighed by factors such as privacy, access to justice and fairness, and efficient use of scarce resources in the administration of justice.[11] The consideration of privacy interests is strong, especially in ordering the production of social media accounts as discussed below.

C. The Deemed Undertaking Rule and Prior Productions

In *Goodman v. Rossi*,[12] the court established the common law implied undertaking rule, now incorporated in the *Rules* as the deemed undertaking rule. The deemed undertaking rule impacts how documents produced in a proceeding may be used in subsequent proceedings. The deemed undertaking rule requires that *"all parties and their counsel deem to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which evidence was obtained".*[13]

A "proceeding" is defined under the *Rules of Civil Procedure* as an action or an application.[14] The rationale behind

Rule 30.1.01 is that the undertaking prevents the disclosure of evidence to third parties in a later proceeding.[15] This makes questions with respect to settlement details, prior litigation or requests for productions from prior matters improper. These matters would also raise privilege that cannot be waived by one party.[16]

There are exceptions to the deemed undertaking rule. If the party requesting the production obtains the consent of the person that has disclosed the material at issue, then the rule will not apply.[17] If the material produced has been filed with the court or has been referred to at a hearing, then the rule will not apply.[18] Productions from one proceeding may be used in another proceeding for the purposes of impeaching the testimony of a witness.[19] If there is a subsequent action between the same parties and same subject matter, and the evidence was produced during an examination for discovery, then production may be allowed.[20] The Court may also exercise its discretion if the Court is satisfied that the interest of justice outweighs any prejudice to the party who disclosed the evidence.[21]

D. Affidavit of Documents and Right of First Discovery

It is preferable to examine the defendant first, particularly if credibility issues are anticipated. This permits counsel to obtain particulars with respect to any surveillance prior to the plaintiff's examination starting.

The right of first discovery goes to the party who first serves a Notice of Examination[22] or a list of questions to be answered,[23] under Rule 35.01, after the affidavit of documents is served. This requires a discovery plan to be agreed to, within 60 days of pleadings closing.[24] The agreement under the discovery plan may supersede the service of the Affidavit of Documents and Notice of Examinations.[25]

There is an ongoing obligation to update the Affidavit of Documents. Surveillance and other investigative material is relevant and ought to be included in Schedule B. The plaintiff is then entitled to particulars, including the date, time and location of the surveillance, as well as the nature and duration of activities depicted and the names and addresses of the photographers or videographers. This is required regardless of whether the party intends to rely upon the surveillance.[26]

Social Media Account Production

The general rules of documentary discovery apply to the social media account of a litigant. The material sought must be relevant, not covered by privilege and the request proportionate in accordance with the *Rules*. The defendant bears the onus to establish evidence of non-disclosure or an omission. The court has the discretion to refuse to order the production of a social media account document, including balancing the privacy interests attached.[27]

The current approach to the production of Facebook documents, for example, can be summarized in the recent decision of *Merpaw v. Hyde*:[28]

> *"The burden rests with the Defendant to establish evidence of omission of relevant documents rather than mere speculation. As noted earlier, the Defendant does not have access to this information and is at a disadvantage. The fact of a Facebook account with public and private walls does not entitle a party to gain access to all material placed on the site.*
>
> *If there are pictures or communications in the Plaintiff's public forum relevant to the action it is reasonable to infer there is relevant information contained in the private forum …That raises the enquiry to more than mere fishing. If relevance is established, the process shifts to proportionality and privacy factors".*

In relation to private portions of an individual's Facebook page, the court has held that the existence of relevant pictures or communications in the public portion of the Facebook account can give rise to the inference that the private elements of the account also contain relevant information.[29] In the absence of such an inference or other evidence as to the relevance of the private portions of the Facebook page, production will not be ordered. The analysis of whether to include a litigant's private Facebook page concluded at the relevancy stage when assessing whether the private page would adduce additional evidence:[30]

> *"In the case at bar, the public page information is consistent with her testimony and representation to the examining doctors. There is no reason to expect the private page to contain documents that would tend to give more than the content of the public page to enable the Defendant to procure admissions to dispense with formal proof or destroy the Plaintiff's case, know the case it is to meet, eliminate or narrow issues or avoid surprise at trial".*

The courts in Ontario have held that where publically available material does not indicate that the private elements of the Facebook account will be relevant, then production is not required.[31] If the private section of a Facebook account is accessible by many people, however, the Court has suggested that there is not a reasonable expectation of privacy of the information that is communicated on the account. In *Frangione v. Vandogen,* privacy interests were insufficient to override the defendant's interest in disclosure because the plaintiff's 'private' section of the Facebook account was accessible to 200 'friends' and therefore, no significant privacy interest existed.[32]

If relevance of a Facebook document is found, there is still merit to the position that private messages sent through Facebook messenger, for example, should not be produced given the clear privacy interest that a litigant has in his or her private messages. These are private interactions that are not viewable by all Facebook friends, and a degree of expectation of privacy attaches to these messages. As the court opined in *Stewart v. Kempster:*

> *"Before the dawn of the internet age, people often communicated by writing personal letters to each other. It could be said that such letters served to keep friends and family connected, and provided a medium in which people would share information with each other about what matters to them. They might even discuss the state of their health, if they happened to have suffered a traumatic event such as a motor vehicle accident in the recent past. However, it is unimaginable that a defendant would have demanded that a plaintiff disclose copies of all personal letters written since the accident, in the hope that there might be some information contained therein relevant to the plaintiff's claim for non-pecuniary damages. The shocking intrusiveness of such a request is obvious. The defendants' demand for disclosure of the entire contents of the plaintiff's Facebook account is the digital equivalent of doing so".*[33]

Productions from one proceeding may be used in another proceeding for the purposes of impeaching the testimony of a witness.[19]

The introduction of social media website pages and their production in court proceedings is still developing, but what is clear is that whether a litigant has a reasonable expectation of privacy in the material is a factor that is strongly considered by the Court in whether to exercise its discretion and order the production of social media documents.

Prior Productions

A. Productions From an Accident Benefits File

In personal injury matters, lawyers are frequently requested to provide productions from prior or ongoing accident benefits file. Material may include surveillance or insurer assessments collected through the statutory accident benefits process. This material has been determined **not** to be within the deemed undertaking rule.[34] The deemed undertaking rule only applies to "proceedings", meaning an action or application before the Court of Appeal or the Superior Court of Justice.[35]

If the material is relevant to the matter in issue, it must be produced. In *Abu-Yousef v. Foster*, the Court required that accident benefits surveillance material must be provided in the tort action:[36]

> *"With respect to the surveillance material, by commencing the tort action, which includes a claim for damages for personal injury and loss of present and future income, the plaintiff has put his medical condition, health and ability to work in issue. I believe the surveillance material, generated by PemBridge, is relevant to the issue of the plaintiff's health and ability to work, which are material issues in the tort action. Following the reasoning in Cook v. Ip, I conclude, therefore, that, similar to the case of medical records, there can be no claim of privacy or confidentiality attaching to the surveillance material in these circumstances. By commencing the tort action, the plaintiff has waived any privacy interest he may have had in this material. Therefore, it should be produced to the defendants. The issue of its use at trial is for the trial judge to decide, whether in the context of cross-examination to test the plaintiff's credibility or as substantive evidence.*
>
> *It might be argued that it is not unfair for the defendants to proceed to trial without discovery of the surveillance*

material because their insurer can conduct its own surveillance of the plaintiff. However, I find that this is relevant material that exists now and may have a direct bearing on the damages the plaintiff claims. In such circumstances, I find that it would be unfair to the defendants to require them to go to trial without production of the surveillance material".

The material was determined to be relevant as the plaintiff is putting his or her medical condition and ability to work at issue. The surveillance material is directly relevant to these issues with any privacy concerns waived by the commencement of the tort action.

In *Tanner v. Clark*,[37] the tort defendant requested production of insurer examinations drafted through the accident benefits process. Analysis considered the interrelationship between the tort and accident benefits actions. The court then considered the deemed undertaking rule and its application in this particular context, and concluded that it did not apply to accident benefit matters:

"The rule is quite specifically worded. Rule 30.1.01(3) provides that 'all parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.' The rule provides for its application to limited circumstances. In this respect, rule 30.1.01(2) restricts the application of the rule to evidence or information obtained within the discovery processes referred to in rule 30.1.01(1). The rule does not apply to evidence or information otherwise obtained. The wording in subparagraph 3 makes it clear that the rule does not provide for a deemed undertaking with respect to evidence or information obtained in any process other than a proceeding governed by the rules.

Technical though it may be, the AB proceeding is not a 'proceeding'. A 'proceeding' is defined in rule 1.03 as an action or application commenced under the Rules of Civil Procedure. As a result, the rule does not include an arbitration proceeding commenced before the Financial Services Commission of Ontario.

On this basis, the motions judges were correct in deciding that the deemed undertaking rule has no application in these circumstances".[38]

The accident benefits file, including insurance examinations and surveillance, is not caught by the deemed undertaking rule. An arbitration before FSCO, or the LAT, is not within the definition of proceeding under the *Rules*.

B. Productions From Prior Tort Action

The deemed undertaking rule does assist with respect to productions from prior tort actions. Materials obtained through the discovery process of a prior tort action are generally not producible in a subsequent proceeding.

In *Kitchenham v. AXA Insurance (Canada),* the court considered whether surveillance and medical assessments obtained from a previous tort action, in the possession of the plaintiff, are producible in subsequent proceedings. The motion judge initially held that the deemed undertaking rule applied but only precluded use (not disclosure), ordering production and limiting use to potential impeachment purposes. The Divisional Court agreed that the surveillance and medical assessments were caught by the deemed undertaking in Rule 30.1, but held they could only be produced in the discovery process pursuant to a judge's order under Rule 30.1.01(3).

The Ontario Court of Appeal agreed with the Divisional Court in the result but differed in the analysis.[39] The plaintiff had obtained the videotape and IME through the discovery process. She was bound not to use the materials in another proceeding. No distinction should be drawn between using a document and producing that document. Rule 30.1 applied to both, which could not be disclosed by the plaintiff without a judge's order under Rule 30.1.01(8). Under subrule (8), the interests of the party who was compelled to disclose the information are the only interests that can justify maintaining the undertaking. The protection of the discovered party's privacy interest flows from the imposition of the deemed undertaking rule:[40]

> *"The plaintiff clearly obtained a copy of the videotape during discovery. The fact that she is the subject of that videotape is irrelevant. The plaintiff is bound by the deemed undertaking not to use the videotape except as permitted by the rule. The tort defendant, and not the plaintiff, is the beneficiary of that deemed undertaking. The deemed undertaking protects any privacy interest the tort defendant may have in the use of a copy of the videotape outside of the tort action.*
>
> *Similarly, the plaintiff obtained the IME during discovery in that it was produced to her by the tort defendant pursuant to Rule 33. As with the copy of the videotape, the plaintiff is bound by the deemed undertaking not to use the IME in another proceeding and the tort defendant is the beneficiary of that undertaking".*

The plaintiff's obligation to provide medical information is unaffected by the fact that this information has already been produced in the previous tort action. This information was not "obtained" by the plaintiff in the course of discovery. If that information is relevant and not protected by privilege, it must be produced.[41]

Refreshing Memory Prior to Discovery

A party may provide a witness statement to his or her insurance adjuster or lawyer for the purposes of litigation. The witness statement provided would usually be protected by lawyer-client privilege or litigation privilege. While relevant, it would thus be covered by privilege and not be producible. There is, however, case law suggesting that privilege is waived when a party refers to a witness statement to refresh his or her memory prior to their discovery.

In *Copeland (Litigation Guardian of) v. Fry,* the court held that a witness statement provided to the insurance adjuster, reviewed to refresh the memory of the witness prior to discovery, amounted to a waiver of privilege. The court ordered that the witness statement be produced.[42] In *Ontario (Attorney General) v. C.E.C. Edwards Construction,* the plaintiff kept a diary and took notes on his injury, referenced at the discovery to refresh his memory.[43] The defendant sought production of these notes on the basis that privilege was waived by the use of the notes to refresh memory. It was argued that the notes were never intended to be confidential, but were made for the express use at trial.[44]

Materials obtained through the discovery process of a prior tort action are generally not producible in a subsequent proceeding.

The court considered the following factors to determine whether production of the witness statement is appropriate:

a) There was no solicitor-client communications;[45]
b) The production was for trial purposes;[46] and
c) Privilege was not attached to the document in question.[47]

If lawyer-client privilege attaches to the document and the privilege has not been expressly and deliberately waived, reference to a statement in order to refresh memory prior to an examination will not waive privilege and the document will not be produced.

Conclusion

Deciding which documents are relevant and are required to be produced for and at discovery can be technical at times. Remembering the principles of relevancy, proportionality, privilege, and the deemed undertaking rule, can guide you through the more 'tricky' production requests that are made at discoveries, and what is actually required to be produced.

***Anna Szczurko** is a member of OTLA and practices with Siskinds LLP in London, Ontario*

NOTES

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[1] *Ontario Rules of Civil Procedure,* RRO 1990, Reg 194 [the *Rules*]

[2] Rule 30.01(1)(a).

[3] Rule 30.02(1).

[4] Rule 30.02(2).

[5] *Merpaw v. Hyde* 2015 ONSC 1053 at para. 14.

[6] *Merpaw v. Hyde* 2015 ONSC 1053 at para. 15.

[7] *Rule 30.01(1)(a).*

[8] *Merpaw v. Hyde* 2015 ONSC 1053 at para. 18-19.

[9] *Merpaw v. Hyde* 2015 ONSC 1053 at para. 15-16.

[10] Rule 29.2.03(1).

[11] *Merpaw v. Hyde* 2015 ONSC 1053 at para. 16; see also *Dundee Securities Ltd. v. V. erma,* 2015 ONSC 8068.

[12] *Goodman v. Rossi* 1995 37 C.P.C. (3d) 181 (ONCA).

[13] Rule 30.1.01(3).

[14] Rule 1.03

[15] *Kitchenham v. AXA Insurance (Canada)* 2008 ONCA 877 at para. 46.

[16] *Schleyer v. Bugnet* 2013 ONSC 3215.

[17] Rule 30.1.01(4).

[18] Rule 30.1.01(5).

[19] Rule 30.1.01(6).

[20] Rule 30.1.01(7).

[21] Rule 30.1.01(8).

[22] Rule 34.04.

[23] Rule 35.01.

[24] Rule 29.1.03(2).

[25] *Sultana v. Veley* 2012 ONSC 395

[26] *Iannarella v. Corbett* 2015 ONCA 110.

[27] *Merpaw v. Hyde* 2015 ONSC 1053 at para. 20, 23; *Young v. Comey* 2013 ONSC 7552 at para. 17.

[28] *Merpaw v. Hyde* 2015 ONSC 1053 at para. 22-23.

[29] See also *Merpaw v. Hyde* 2015 ONSC 1053 at para. 23; *Leduc v. Roman* 2009 CanLII 6838 (ONSC); *Stewart v. Kempster* 2012 ONSC 7236 at para. 16.

[30] *Merpaw v. Hyde* 2015 ONSC 1053 at para. 24.

[31] *Stewart v. Kempster* 2012 ONSC 7236 at para 32.

[32] *Frangione v. Vandongen* 2010 ONSC 2823 at para. 38-41.

[33] *Stewart v. Kempster* 2012 ONSC 7236 at para 29.

[34] *Abu-Yousef v. Foster* 2005 CarswellOnt 10144 at para. 11-12; See also *Phul v. Georgian Bay Transport Inc.,* 2016 CarswellOnt 14589.

[35] Rule 1.02(1); 1.03(1) "proceeding".

[36] *Abu-Yousef v. Foster* 2005 CarswellOnt 10144 (ONSC) at para. 11-12.

[37] *Tanner v. Clark* 2002, CarswellOnt 2126 at para. 25.

[38] *Tanner v. Clark* 2002 CarswellOnt 2126 at para. 34-36.

[39] *Kitchenham v. AXA Insurance (Canada)* 2008 ONCA 877.

[40] *Kitchenham v. AXA Insurance (Canada)* 2008 ONCA 877 at para. 47-48.

[41] *Kitchenham v. AXA Insurance (Canada)* 2008 ONCA 877 at para. 50.

[42] *Copeland (Litigation Guardian of) v. Fry,* [2002] O.J. No. 1356.

[43] *Ontario (Attorney General) v. C.E.C. Edwards Construction* 1987 CarswellOnt 520 at para. 2.

[44] *Ontario (Attorney General) v. C.E.C. Edwards Construction* 1987 CarswellOnt 520 at para. 27-29.

[45] *ING Insurance Co. of Canada and Insurance Corp. of British Columbia, Re.,* at para. 21.

[46] *Knox v. Applebaum Holdings Ltd.* 2012 ONSC 4181 at para. 14.

[47] *Hosh (Litigation Guardian of) v. Black* [2003] O.J. No. 2374 at para. 26.