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## SEEING IS BELIEVING

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The assessment of damages in personal injury claims is often challenging when dealing with injuries that cannot be measured objectively. Cases involving plaintiffs who allegedly suffer from chronic pain, fibromyalgia, or other conditions involving the incorrigible experience of pain, present obvious problem with respect to quantifying damages. Medical professionals must rely on the subjective reports of plaintiffs in assessing their condition. Often, these cases result in a scenario where the opinions of medical experts are pitted one against the other, resulting in uncertainty and risk for the parties. Although the Supreme Court of Canada has concluded that “chronic pain patients are suffering and in distress, and that the disability they experience is real”<sup>19</sup>, there nonetheless exist unscrupulous claimants that feign or exaggerate chronic pain symptoms in an effort to cash in on claims against insurance companies. In this way, chronic pain has become a catchbasin for personal injury claims that cannot be couched in more objective injuries. Because self-reports factor heavily into medical assessments for chronic pain, it can be very challenging to distinguish between plaintiffs that legitimately suffer from chronic pain and those who do not. The plaintiff's credibility becomes a central issue in the litigation, and counsel often look to medical experts for guidance. While it is possible to build a defence based on expert medical opinion, it helps to have additional evidence to tip the balance in favour of a successful defence. Surveillance, when properly gathered, can be an effective tool to impugn a plaintiff's credibility and challenge the validity of her claim.

Surveillance is a powerful tool in cases involving plaintiffs with chronic pain, because it can lend objectivity to a case rife with subjective reporting. Continuous surveillance evidence over a period of several days can greatly assist defence counsel to either build its case, or justify early settlement. Video footage that shows a plaintiff engaged in physical activity that belies her alleged physical limitations, can have a significant impact on the integrity of the plaintiff's claim. Conversely, surveillance that fails to depict the plaintiff for a sufficiently continuous time period, or that only shows the plaintiff engaged in physical activities that are not strenuous, will not harm the defendant's case. Overall, the relative cost of surveillance evidence as compared to its benefit, often makes it a cost-effective tool in personal injury litigation.

There are, however, important rules that defence counsel must abide by when gathering surveillance. These disclosure requirements are discussed below, and they suggest that surveillance should be gathered and disclosed early in the litigation process in order to encourage early resolution of the matter, if at all possible.

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<sup>19</sup>*Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504 at para 1.

## **Disclosure at Minimum Whether or Not There Is Reliance on the Surveillance**

At minimum, surveillance evidence must be disclosed in defence counsel's Affidavit of Documents, regardless of whether the defendant intends to rely on the surveillance at trial. There is some discretion with respect to what must be produced to opposing counsel, and the following outlines the rules regarding the production of surveillance, depending on how defence counsel intends to use it.

If counsel intends to rely on the surveillance evidence at trial and opposing counsel requests production of the surveillance, then defence counsel must provide the following particulars about the records:

1. dates, times and precise locations of the surveillance;
2. particulars of the activities and observations made; as well as,
3. the names and addresses of the persons who conducted the surveillance.<sup>20</sup>

This is consistent with Rule 31.06(2) of the Ontario *Rules of Civil Procedure* which requires that “the names and addresses of persons who might reasonably be expected to have knowledge of the transactions or occurrences in issue in the action” be disclosed on examination for discovery.

The Ontario Superior Court has held that the addresses of the investigators who conducted the surveillance must also be disclosed. However, the court draws the line when it comes to requests for resumes of investigators, or the volume of work that investigators perform for their clients on other matters, and has refused to require production of these documents.<sup>21</sup> Ontario courts have also held that although an investigator's notes need not be disclosed, the plaintiff is entitled to particulars of those notes. However, where a defendant refuses to undertake to produce “the particulars of any future surveillance, including the dates and times of the surveillance and a description of any videos or photographs”, the defendant cannot be compelled to do so.<sup>22</sup> Additionally, both parties in a dispute have an ongoing obligation under Rule 31.09(1)(b) to provide an updated affidavit of documents. As such, if surveillance evidence is acquired after discoveries then the Affidavit of Documents must be updated, otherwise a defendant can be penalized in costs.<sup>23</sup>

## **Disclosure Requirements for Substantive and Impeachment Evidence**

The objective of gathering surveillance evidence in personal injury cases is so that it can be used either as substantive evidence or for impeachment purposes. If the surveillance is good, and it reveals that the plaintiff has physical abilities that contradict the limitations they have alleged in their statement of claim or have confirmed during examinations for discovery, this evidence can

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<sup>20</sup>*Devji v Longo Brothers Fruit Market*, [1999] OJ No 1542, 45 OR (3d) 82 (Gen. Div).

<sup>21</sup>*Marchese v Knowles*, [2009] OJ No 1159, 176 ACWS (3d) 71 at para 21 [*Knowles*].

<sup>22</sup>*Bell v Brown*, 2012 ONSC 839, [2012] OJ No 6501.

<sup>23</sup>*Beland v Hill*, 2012 ONSC 4855, [2012] OJ No 3997.

be used to impugn the validity of the plaintiff's claim. In some cases, even if the court accepts that a plaintiff honestly suffers from chronic pain, surveillance can persuade the court to find that the degree of plaintiff's disability is not as significant as reported.<sup>24</sup> Depending on how good the evidence is, defence counsel may choose to use it either to impeach the plaintiff's credibility, or to challenge the validity of the plaintiff's claim. The disclosure requirements of evidence used for substantive purposes differ from those used for impeachment purposes.

Rule 30.09 of the *Rules of Civil Procedure* requires that if surveillance is to be used as substantive evidence at trial, then counsel must give the opposite party notice of its intention to use the evidence, and the evidence itself must be produced to the opposite party at least 90 days before the commencement of trial.<sup>25</sup> If counsel fails to do so, the Court will limit the use of that evidence to impeachment purposes only, except where a trial judge grants leave to use the evidence for substantive purposes.

The Ontario Court of Appeal in *Landolfi v Fargione* provided guidance with respect to Rule 30.09 and the use of surveillance evidence for substantive versus impeachment purposes:

*...[R]ule 30.09 precluded offering the videos as evidence of Landolfi's physical capacities, but did not foreclose the admission of the videos to challenge the credibility of Landolfi's evidence as to his physical limitations following the accident. Used for impeachment purposes, the videos had the potential to directly undermine the credibility of Landolfi's testimony concerning his physical incapacities and the further potential to undermine the reliability of the opinions formed by Landolfi's medical experts to the extent that those opinions relied on Landolfi's description of his physical incapacities.*<sup>26</sup>

Surveillance that is to be used as impeachment evidence does not have to be produced, (except for particulars if requested), but it does have to be disclosed in Schedule B of a party's Affidavit of Documents. However, before surveillance can be used to impeach a plaintiff's credibility, counsel must comply with the requirements of *Brown v Dunn*, which requires that a witness be given the opportunity to explain or deny the evidence.<sup>27</sup> In addition, the court must be satisfied that the surveillance meets the test for admissibility. In *Landolfi*, the test for admissibility of surveillance as impeachment evidence was found to be one 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 prejudicial effect of the evidence."<sup>28</sup> In this way, the content of the plaintiff's testimony dictates the relevance of the surveillance, as the objective of the surveillance is to contradict the plaintiff's testimony. In *Lis v Lombard*, the Court held that the proffered impeachment evidence did not contradict the oral testimony of the

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<sup>24</sup>*Hollows v Wood*, 2013 BCSC 1991.

<sup>25</sup> Rule 30.09 of the Ontario Rules of Civil Procedure or with leave of the Court (see Rule 53.08 of the Ontario Rules of Civil Procedure)

<sup>26</sup>(2006), 79 OR (3d) 767, [2006] OJ No 1226.

<sup>27</sup>(1893) 6 R 67, HL.

<sup>28</sup>*Supra* note 8 at para 49.

Plaintiff and refused to admit the surveillance evidence. This highlights not only the limitation on the use of surveillance for impeachment, but also highlights the importance of a detailed examination for discovery.<sup>29</sup>

Following *Landolfi*, discovery rules “are to be read in a manner to discourage tactics and encourage full and timely disclosure in order to encourage settlement and reduce court costs.”<sup>30</sup> As *Landolfi* emphasizes, disclosure has practical benefits that can lead parties to properly assess their positions and to adjust their expectations, ultimately limiting the cost of unnecessary litigation.

### **Concluding Remarks**

Surveillance can prove essential to exposing unfounded or exaggerated personal injury claims. Given the limitations that may be imposed on the use of surveillance evidence, defendants must be cognizant of the rules related to surveillance in order to ensure that steps are taken early in the litigation process to protect its efficacy. If obtained early in the litigation process, surveillance can benefit both defendants and plaintiffs, as it has the potential to reveal exaggerated claims, but also to concretize plaintiffs' allegations. Whatever the case, surveillance evidence that reveals the extent of a plaintiff's limitations lends certainty to the litigation process and encourages the parties to take a reasonable approach to settlement.

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<sup>29</sup> [2006] OJ No 2578, 2006 CanLII 21595 (ON SC).

<sup>30</sup> *Knowles*, *supra* note 3 at para 50.