COURT OF APPEAL FOR ONTARIO

CITATION: Iannarella v. Corbett, 2015 ONCA 110
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Laskin, Lauwers and Hourigan JJ.A.

BETWEEN

Andrea Iannarella and Giuseppina Iannarella

Plaintiffs (Appellants)

and

Stephen L. Corbett and St. Lawrence Cement Inc.

Defendants (Respondents)

David A. Zuber and Joseph Villeneuve, for the appellants

Martin P. Forget, for the respondents

Heard: June 26, 2014

On appeal from the judgment of Justice J. Patrick Moore of the Superior Court of Justice, sitting with a jury, dated April 11, 2012, with reasons on the threshold motion reported at 2012 ONSC 2253, and on the costs order, dated November 19, 2012, reported at 2012 ONSC 6536.

Lauwers J.A.:

[1] The appellant Andrea Iannarella was rear-ended by the respondent Stephen Corbett. He and his wife, Giuseppina, sued for damages for his personal injuries. The jury found Mr. Corbett had not been driving negligently and the action was dismissed on liability grounds. Had liability been established, the jury would have awarded general damages of $32,000 and $40,571 as damages for past income loss, but would not have awarded damages for future income loss. The trial judge dismissed Mr. Iannarella's claim for non-pecuniary damages on the basis that the statutory "threshold" for this type of recovery under s. 267.5 of the *Insurance Act*, R.S.O. 1990 c. I.8, was not met. He awarded the respondents costs of about $255,000 for a fifteen-day trial that extended over four weeks.

[2] For the reasons set out below, I would set aside the judgment and substitute a finding of liability against the respondents. In relation to damages, a series of rulings resulted in a trial by ambush, contrary to the letter and the spirit of the *Rules of Civil Procedure*. I would order a new trial on the issues of damages.

A. FACTUAL BACKGROUND

[3] The accident happened on a snowy February evening. It was stop and go traffic on Highway 427. Mr. Iannarella testified that it was starting to get dark, there was some snowfall, and wetness could have made the roads slippery. He

testified that although it was stop and go traffic, he was able to slow and stop his pick-up truck before he was struck from behind.

[4] Mr. Corbett testified that he was driving behind Mr. Iannarella in his concrete mixer (which weighed about 12 tonnes empty) in low gear, and that "[i]t was snowy, dark and the roads were icy." Visibility was "in and out" and there were "little whiteouts" in "bumper to bumper" traffic. He was accelerating and was about to shift into second gear when a snowsquall, which he described as a "whiteout", suddenly reduced his visibility to zero. He testified that at that point he had only two options: to brake or to keep going. After a delay of "one-and-a-half seconds", he "slammed" on his brakes "fairly hard". Despite traveling at an initial speed of at most eight kilometers per hour, his vehicle did not stop before sliding into the rear of Mr. Iannarella's pick-up truck. Mr. Corbett was adamant that there was nothing further he could have done to avoid the collision and repeatedly said that the accident was caused by "mother nature". He told Mr. Iannarella at the scene: "Sorry, but I don't control mother nature."

[5] Mr. Iannarella claimed he suffered a rotator cuff injury to his left shoulder in the accident. He has since had two surgeries to his left rotator cuff. He also claimed to have developed chronic pain, which made him unable to return to any form of employment.

B. THE ISSUES

[6] The appellants assert that the trial judge erred in explaining the liability onus to the jury; in permitting the respondents to use surveillance evidence; in permitting expert reports to be projected on a screen before the jury during Mr. Iannarella's cross-examination; in analyzing the statutory threshold for general damages under the *Insurance Act*; and in his costs award.

C. ANALYSIS

(1) The Liability Onus Issue

[7] The appellants argue that the trial judge erred in instructing the jury on the onus of proof applicable to rear-end motor vehicle collisions. They ask this court to grant them judgment on this issue and to substitute a finding of liability. I consider the law on the onus of proof, the trial judge's treatment of the onus, and the jury charge on liability.

(a) The Law on the Onus of Proof

[8] In charging a jury regarding the onus of proof for rear-end motor vehicle collisions, trial judges often use a variation of the standard liability instruction from O'Brien's Jury Charges (1998), which provides:

> A prudent motorist should drive at such rate of speed with his vehicle under such control that he is able to pull up within the range of his vision. If there is any difficulty in seeing because of weather conditions, then common

> sense dictates that he should travel more slowly. In other words, "if you can't see where you're going don't go". If the road is icy or slippery, then even more care should be taken. In a case where a vehicle is struck without the driver of the rear vehicle having seen it until it was too late to avoid a collision, then you should ask yourselves; (1) Was he keeping a proper lookout? (2) If he was keeping the best lookout possible, was he going too fast for the lookout that could be kept in the circumstances?"
>
> Members of the jury, generally speaking, when one car runs into another from behind, in the absence of any excuse for such a collision, the driver of the rear car must satisfy you that the collision did not occur as a result of his negligence.

[9] This jury instruction places the onus on the defendant to prove that he could not have avoided the accident by the exercise of reasonable care. As the annotation to the standard jury charge observes, a driver must stay a safe distance behind the vehicle ahead, keep a lookout and maintain a reasonable speed, so that he or she has sufficient time to stop if the vehicle ahead suddenly stops. These requirements reflect long-established basic principles: see *Toronto v. Waite*, [1954] O.J. No. 404 (H.C.J.); *Whiddon v. Wickstrom*, [1948] O.J. No. 76 (C.A.); *DeCourcey v. London Street Railway*, [1932] O.R. 226 (C.A.).

[10] In *Beaumont v. Ruddy*, [1932] O.R. 441 (C.A.), at p. 442, this court explained the onus applicable to rear-end motor vehicle collisions: “Generally speaking, when one car runs into another from behind, the fault is in the driving

of the rear car, and the driver of the rear car must satisfy the court that the collision did not occur as a result of his negligence."

[11] This principle was confirmed in *Graham v. Hodgkinson* (1983), 40 O.R. (2d) 697 (C.A.), where the plaintiff was rear-ended by the defendant. This court set aside the jury verdict and substituted a finding of liability where the jury was not properly instructed about the defendant's onus. The court held:

> A defendant thus may be called upon to establish that he could not have avoided the accident by the exercise of reasonable care in certain situations, for example, where he collides with the plaintiff's car on the plaintiff's side of the highway or where, as in this case, he runs into the rear of the plaintiff's car. (Para. 22)

[12] In *Graham*, the court relied on the British Columbia Court of Appeal's analysis in *Hackman v. Vecchio*, (1969), 4 D.L.R. (3d) 444 (B.C. C.A.). At para. 11 of *Hackman*, the court observed that in icy conditions the defendant is "obliged to show that he did not expect ice at that point, and that he had no reason to expect it, for if he ought to have foreseen it, he was bound to drive slowly enough to avoid skidding upon it." The appellants rely especially on the British Columbia Court of Appeal's conclusion, at para. 13, that "[o]n the respondent's own evidence it was impossible for a jury to come reasonably to the conclusion that he was taken by surprise by ice at the point where he skidded, because he speaks of the road throughout being slippery and icy."

[13] This court recently addressed the onus issue in *Martin-Vandenhende v. Myslik*, 2012 ONCA 53. Justice Blair noted, at para. 31, that the common law principle from *Beaumont* does not automatically lead to liability for the driver who is following behind. Instead, "[i]t simply states that *generally speaking* this will be the case, and shifts the onus to the following driver to show otherwise."

(b) The Trial Judge's Treatment of the Onus

[14] In a rear-end motor vehicle collision, such as the one at issue in this case, the onus is on the defendant to prove that he or she could not have avoided the accident through the exercise of reasonable care. This led the appellants' trial counsel to move for a directed verdict on liability, which the trial judge refused. In argument on the motion, the appellants' trial counsel argued that the onus was on the respondents to prove the collision was an inevitable accident. Mr. Forget, counsel for the respondents, correctly pointed out that the expression "inevitable accident" simply denotes a defendant's "lack of negligence". This understanding flows directly from this court's discussion in *Graham*, and the onus of establishing the absence of negligence remains on the defendant.

[15] However, the trial judge took a different tack, stating that the defence applicable in this case was not one of inevitable accident. Instead, he characterized the accident at issue as "nearer an emergent situation than an inevitable accident situation." He went on to explain his position in his ruling:

> In the case of an inevitable accident, clearly the onus is on the defendant to establish on credible evidence the inevitability. In an emergency situation, the onus is on the plaintiff to establish the emergency and to establish that there's no negligence on the part of the defendant leading to the emergency, or until the emergency occurs. Then the law changes and the defendant is burdened not with perfection but with doing the best that a reasonable operator of a motor vehicle could be expected to do in the emergent situation. That's different from inevitable accident, but it still puts a burden onto the defendant to put before the jury sufficient facts to establish that the emergency situation was not of his making and that he could not have avoided it and that's where the argument is going to fall. [Emphasis added.]

The trial judge appears to have misspoken when he used the underlined words.

(c) The Jury Charge on Liability

[16] The jury charge relating to negligence and liability extended over 13 transcript pages. The trial judge told the jury that "the plaintiff has the burden of establishing on a balance of probabilities all of the facts necessary to prove the following issues, that he was injured and that the negligence of the defendant driver was the effective cause of his injuries." He pointed to the burden on the appellants multiple times. He also explained the law concerning an emergency situation in a manner consistent with his ruling on the directed verdict, summarized in the preceding paragraph. The trial judge referred to the section of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, that prohibits following too closely. He then reviewed the evidence of Mr. Iannarella and Mr. Corbett.

[17] The trial judge concluded the jury charge on liability with the following words:

> Remember this caveat, however, as you consider the evidence of Mr. Corbett. The onus of establishing an emergency situation, and in measuring his conduct within it, isn't onus upon the defendant. [Emphasis added.]

These words echo those he used in refusing to direct the liability verdict.

(d) Disposition of the Liability Issue

[18] There was, in my view, no good reason for the trial judge to have departed from the principle expressed in the standard jury charge, which is consistent with the established jurisprudence. To repeat, the standard charge provides:

> Members of the jury, generally speaking, when one car runs into another from behind, in the absence of any excuse for such a collision, the driver of the rear car must satisfy you that the collision did not occur as a result of his negligence.

[19] I would make one minor change to the wording of the standard charge: the phrase "in the absence of any excuse for such a collision" should be deleted. In my view, the driver of the rear vehicle might well have an excuse for the collision that satisfies the jury that the accident did not occur as a result of his or her negligence. Nonetheless, the duty to provide that explanation rests on the

defendant, not the plaintiff. To put it differently, once the plaintiff has proven that a rear-end collision occurred, the evidentiary burden shifts from the plaintiff to the defendant, who must then show that he or she was not negligent. This analysis would apply even where an emergency situation is alleged, as in this case.

[20] The trial judge did not provide an instruction resembling the standard instruction and did not advert to the shift in onus in his jury charge. Instead, he emphasized throughout the charge that the onus was on the appellants. With respect, the trial judge's statement that "[t]he onus of establishing an emergency situation, and in measuring his conduct within it, isn't onus upon the defendant", is simply incorrect.

[21] The respondents point out that trial counsel for the appellants did not object to this element of the charge at trial and submit that the appeal on this issue should be dismissed on this basis. They point to the following comment by Finlayson J.A. in *G.K v. D.K* (1999), 38 C.P.C. (4th) 83 (C.A.), at para. 15: "[I]n civil cases, failure to object … is usually fatal".

[22] I would not give effect to this submission. Trial counsel made his position on the onus plain to the trial judge in the motion for a directed verdict, but the trial judge promptly rejected it. It was unnecessary for counsel to record an additional objection on the same basis. Where there is an error of law on the onus of proof, the failure to object has no relevance.

[23] The respondents also assert that a new trial on this issue "should not be ordered unless the interests of justice plainly require that to be done", in the words of this court in *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.), at para 68. Another way to express this test is in the terms of s. 134(6) of the *Courts of Justice Act*, that the appellant must "show that a substantial wrong or miscarriage of justice has occurred." (*Vokes Estate v. Palmer*, 2012 ONCA 510, at para. 7) The respondents argue that the test is not met since the jury "clearly accepted that Mr. Corbett had no choice but to apply the brakes", and therefore would have found that Mr. Corbett had not acted negligently regardless of the onus.

[24] I would not give effect to this submission. The respondents had ample opportunity at trial to put forward their best foot on the liability issue. In my view, the respondents' explanation falls short of establishing that there was no negligence on Mr. Corbett's part. His evidence fails to prove that he could not have avoided the accident by the exercise of reasonable skill or care. The road and weather conditions at the time called for a higher level of vigilance by all drivers. Mr. Iannarella was able to stop his vehicle without incident, as were other drivers. Mr. Corbett was accelerating when he lost visibility, but rather than immediately braking gently, he hesitated; he then slammed on the brakes. He broke traction and slid into Mr. Iannarella's vehicle. Mr. Corbett was plainly going too fast for the weather and road conditions and could have avoided the collision accident by exercising sufficient care.

[25] The choice is between a new trial on liability and finding the defendants liable. We are justified in finding the defendants liable because, even accepting Mr. Corbett's evidence, he failed to disprove his negligence. Given the circumstances and the law applicable to rear-end motor vehicle collisions, a new trial on liability is unnecessary. I would adopt this court's approach in *Graham,* set aside the jury verdict and substitute a finding of liability against the respondents.

(2) The Surveillance Issues

[26] The accident happened on February 19, 2008. In preparing the defence of this action, the respondents engaged investigators who shot many hours of video surveillance over the following time periods: November 20, 2009; May 4, 2010; November 9, 10, 12, 2011; March 3, 4, 6, 8, 10 and 18, 2012. This final date was the evening before the trial began. According to counsel, the investigators shot about 130 hours of surveillance, all well after the accident.

[27] During Mr. Iannarella's cross-examination, the respondents tendered a video disc of the surveillance that was about 27 minutes long. The trial judge permitted counsel to play the video, cross-examine Mr. Iannarella on its contents, and make the video an exhibit, even though the respondents had not disclosed the existence of surveillance in an affidavit of documents as required by the *Rules* and had not provided particulars of it.

[28] The saliency of the surveillance evidence is that the excerpts that were shown to the jury, and that were filed with this court, show Mr. Iannarella variously waving his left arm, carrying a garbage bag, driving and turning the steering wheel with his left hand, reaching with his left arm to the top shelf in a grocery store to retrieve an item, and driving on a 400 series highway. The respondents claimed at trial that these activities are inconsistent with Mr. Iannarella's self-reported limits on his functionality caused by the collision. As a result, they argued the surveillance showed that his evidence was not credible and could be used to impeach him.

[29] The appellants argue that the trial judge erred:

> (i) in refusing their pre-trial request to order production of the respondents' affidavit of documents, or, at least particulars of the surveillance that the respondents would have been required to provide in answer to the customary discovery question on surveillance;
>
> (ii) in permitting the respondents to use the surveillance evidence despite their failure to disclose its existence in an affidavit of documents, contrary to rule 30.08(1)(a) and in refusing to order the respondents' to provide the appellants with unconditional access to the full surveillance recordings; and

(iii) in failing to instruct the jury on the proper use of the surveillance evidence in their deliberations.

[30] The respondents maintain that the trial judge's rulings were consistent with the law and with the *Rules*.

[31] Mr. Forget asserts that his failure to serve the affidavit of documents was inadvertent, but in his argument at trial and in this court he did not hesitate to capitalize on that failure. He submits that the trial judge properly found that the respondents should be permitted to use the surveillance evidence at trial, despite their failure to disclose the existence of surveillance evidence..

[32] Before considering the legal basis for each of the appellant's complaints, I describe the usual way in which surveillance evidence is handled in civil personal injury actions.

(a) Disclosure and Production Obligations under the *Rules*

[33] The *Rules* are designed to require full disclosure of information in order to "to prevent surprise and trial by ambush." (John W. Morden & Paul M. Perell, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis, 2014), at para. 7.9) Documentary disclosure and production obligations are laid out in rule 30.02, and each party's obligation to swear and serve an affidavit of documents

is imposed by rule 30.03. For the purpose of the *Rules*, a video disc containing surveillance is a document (see rule 30.01(1)(a)).

[34] Rule 30.08 prescribes consequences for failing to comply with disclosure obligations. Rule 30.08(1)(a) provides that: "If the document is favourable to the party's case, the party may not use the document at trial, except with leave of the trial judge."

[35] As noted, the respondents did not serve an affidavit of documents as required by the *Rules* and did not provide particulars of the surveillance, before or after the appellants set the matter down for trial. I acknowledge that trial counsel for the plaintiffs did not request an affidavit, but, unlike under the old *Rules of Practice*, a request is not required.

(i) Disclosure Obligations for Privileged Documents

[36] Rule 30.09 addresses the disclosure and production of privileged documents. It provides:

> 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.

[37] This court explained the tension between the objectives of discovery and litigation privilege in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), at para. 25:

> The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.

[38] In *Ceci v. Bonk* (1992), 7 O.R. (3d) 381, [1992] O.J. No. 380 (C.A.), at para. 9, Carthy J.A. took the position that the exception in rule 30.09, which permits the limited use of a privileged document to impeach credibility despite its non-disclosure, recognizes that parties cannot anticipate everything that an opponent may say at trial and be expected to "relinquish privilege and give notice of documents on the mere chance that they may be used to impeach." The suggestion that rule 30.09 encourages trial by ambush was dispelled, in his view, by the obligations to include any privileged document in the affidavit of documents and to provide particulars of its contents on discovery, and by limiting the use of the document at trial to impeachment purposes.

[39] In *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767 (C.A.), this court explained the distinction, referred to in rule 30.09, between the use of evidence to impeach

a witness's credibility and as substantive proof. Justice Cronk held, at paras. 73-74, that a party can use surveillance as substantive evidence only if privilege was waived and it has been properly disclosed, but is limited to using it for impeachment purposes if the claim of privilege is maintained, as counsel asserts the respondents did in this case. I note, however, that the respondents did not assert the claim for privilege in the affidavit of documents, as demanded by the Rules.

(ii) The Disclosure of Video Surveillance

[40] As noted in *Ceci*, 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 videographers (for example, see *Landolfi*, at para. 22).

[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)

[42] As Howden J. held in *Beland v. Hill*, 2012 ONSC 4855, at para. 50, "the discovery rules are to be read in a manner to discourage tactics and encourage full and timely disclosure in order to encourage early settlement and reduce court costs." See also *Ceci*, at para. 10, and *Arsenault-Armstrong v. Burke*, 2013 ONSC 4353, at para. 11.

[43] Justice Osborne explained that a party's obligation to disclose the contents of surveillance, even if it has no intention of relying on that evidence at trial, "comes from a broad view of the undertaking given on discovery and … the requirement of full disclosure emerging from a libera[l] interpretation of the new Rules of Civil Procedure." (*Niederle v. Frederick Transport Ltd.*, [1985] O.J. No. 1608 (H.C.J.), at para. 17)

[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*.

(b) The Respondents did not meet their Surveillance Disclosure Obligations

[47] The arguments over what the respondents' disclosure and production obligations were, if any, and the consequences of non-disclosure, began at the trial management conference the week before trial and continued during the trial.

[48] The appellants' position evolved in response to the trial judge's rulings. At the trial management conference, the appellants unsuccessfully sought an order requiring the respondents to produce an affidavit of documents and to disclose the particulars of the surveillance. At trial, the judge rejected the appellants' argument that the surveillance evidence should be excluded under rules 30.08 and 30.09.

(i) The Obligation to Serve an Affidavit of Documents is Mandatory

[49] The respondents' position did not change throughout and was largely accepted by the trial judge. Counsel argued that the appellants were not entitled to an affidavit of documents or to surveillance particulars since they had not sought the affidavit and had waived examinations for discovery before the matter was set down for trial. This argument was based on rule 48.04, which provides that once a matter is set down for trial no party may "initiate or continue any motion or form of discovery without leave of the court." Counsel draws particular comfort from the following underlined sentences found at para. 75 of *Landolfi*:

> The question before the trial judge concerned only the application of rule 30.09 and whether Fargione, in the circumstances, could invoke the impeachment exception in that rule. Any prospect of prejudice to Landolfi by Fargione's effort to do so at trial was avoidable through the pre-trial informational discovery provisions of the Rules. On this record, it appears that Landolfi elected not to engage the benefit of these Rules. While this was his right, he could not thereafter seek to resist Fargione's use of the video evidence at trial for impeachment purposes on the ground of inadequate disclosure. [Emphasis added.]

[50] That comfort is misplaced. The issue for the court in *Landolfi* was whether the defendant should be obliged to produce all of the video surveillance for review by the plaintiff. This court ruled that full production was not required when the video was only to be used for impeachment. In making the emphasized comment, Cronk J.A. was hearkening back to her earlier statements at paras. 70-72 of *Landolfi*, where she noted that if the plaintiff was not content with the quality of the particulars already provided by the defence, he should have brought a motion for further and better particulars or for additional oral discovery before trial.

[51] The radical difference between this case and *Landolfi* is that the defendant in *Landolfi* had provided extensive particulars of the surveillance to the plaintiff, including the date, time and place of the videos, as well as the nature and duration of the activities depicted. None of this information was provided to the

appellants in this case, despite repeated requests by the appellants' counsel, and it should have been.

[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*.

[53] I am alert to the Supreme Court of Canada's call for a civil litigation "culture shift" to make the conventional trial process more timely and affordable, and the waiver of a party's strict rights can play an important role in expediting cases. (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 2) I do not suggest that a party cannot waive discovery. Discovery is often waived in rear-end motor

vehicle collisions because the defendant's liability is not disputed; where damages are the real issue, the individual defendant typically has nothing to provide by way of evidence. I also do not suggest that the requirement for an affidavit of documents cannot be waived. There may be simple cases where that makes good economic sense. However, an effective waiver should be express, rather than implied solely from the fact that the matter was set down for trial, as appears to have happened in this case.

(ii) Subsequent Surveillance Must be Disclosed

[54] As noted, it is clear that if surveillance occurs before the affidavit of documents is served, the surveillance report must be listed in the affidavit and requests for particulars must be answered at examination for discovery. In his helpful article titled "Use of Surveillance at Trial" (*Ontario Bar Association Insurance Law Newsletter*, Vol. 18, No. 1 (2007)), Brian M. Bangay observed, at p. 2, that "it appears well settled that a condition precedent to the use of surveillance material at trial is disclosure." However, the respondents dispute the application of these disclosure obligations to surveillance conducted after the affidavit of documents is served, particularly where, as here, no affidavit was served.

[55] In my view, a party is obliged by a combination of rules 30.06 and 30.07(b) to provide an updated affidavit of documents listing the new surveillance. Further,

the party must disclose the particulars of this subsequent surveillance upon request under rule 31.09(1)(b). These disclosure obligations are fundamental and extend to surveillance obtained after the original affidavit of documents is served. In short, rule 30.07 offers the respondents no escape route from the obligation to disclose the existence of surveillance. In my view, rules 30.03 and 30.07 apply even where, as here, the party fails to serve an affidavit of documents, despite the opening words of rule 30.07 that the rule applies "[w]here a party, after serving an affidavit of documents", because the rule assumes that the party has complied with rule 30.03 and has served an affidavit. The court should not reward non-compliance.

[56] Several cases support this result. In *Beland*, Howden J. relied on rule 30.07(b) to find at para. 49, that the conduct of subsequent surveillance rendered the existing affidavit of documents "incomplete and inaccurate". He concluded that "the defendants were required to serve a supplementary affidavit disclosing the additional document, i.e. the surveillance record, in a timely manner before trial."

[57] Similarly, in *Cromb v. Bouwmeester*, 2014 ONSC 5318, Chappel J. ordered the defendant to provide a sworn affidavit of documents – and attend at cross-examination on the affidavit if requested – disclosing the existence of

subsequent surveillance. The defendant in that case had only provided a draft affidavit of documents. See also *Arsenault-Armstrong*.

[58] In *Marchese v. Knowles*, [2009] O.J. No. 1159 (S.C.), Cavarzan J. wrote, at para. 28: "[S]ervice of a supplementary affidavit of documents is required pursuant to subrule 30.07(b). Although the [surveillance] notes themselves need not be produced, the plaintiff is entitled to know particulars from those notes."

[59] I reject the respondents' argument to the contrary, in which they rely on *Jones v. Heidel* (1985), 6 C.P.C. (2d) 318, [1995] O.J. No. 1317 (Ont. H.C.J.), and *MacDonald v. Standard Life Assurance Co.* (2006), 34 C.C.L.I. (4th) 249 (Ont. S.C.). In my view, the analysis in both cases is mistaken, since the judges focused exclusively on rule 30.07(a) and ignored the disjunctive "or" that leads to the obligation to provide an updated affidavit of documents under rule 30.07(b) even for privileged documents.

(iii) The Right to Further Discovery

[60] Rule 48.04(1) provides that a party who has set a matter down for trial "shall not initiate or continue any motion or form of discovery without leave of the court." Rule 48.04(2) sets out some exceptions. One is rule 31.09, which provides that a party must correct an incorrect or incomplete answer given on discovery and can be subject to further examination for discovery on request by

an adverse party. Another exception to rule 48.04 is rule 30.07. It does not expressly provide for further examination for discovery.

[61] However, as the case law demonstrates, and as practitioners well know, there are routes that an aggrieved party can take to obtain disclosure of relevant information when a supplementary affidavit is served, even after a matter is set down for trial. Motions are brought as a last resort against intransigence, and are frequently settled.

[62] It may be appropriate for a court to grant leave for the adverse party to cross-examine on the newly disclosed information. The defendants in *Cromb* served a draft affidavit of documents and assured the plaintiffs a sworn version was forthcoming. No sworn affidavit of documents had been served by the time the matter was listed for trial. Justice Chappel found, at para. 22, that the plaintiffs' motion to order the defendants to serve a sworn affidavit of documents did not "fall squarely within the exceptions to the leave requirement set out in Rule 48.04(2)(b)." She ordered the defendants to serve a sworn affidavit.

[63] Justice Chappel concluded that leave to cross-examine the defendants on the affidavit of documents under rule 30.06 was necessary since this relief did not fall within any of the exceptions listed in rule 48.04(2). She stated that refusing leave would be "manifestly unjust" because the subsequent surveillance constituted a change in circumstances (paras. 33, 38-39).

[64] Quite apart from supportive case law, a requirement that parties re-attend at examination for discovery or submit to cross-examination to address a supplementary affidavit of documents is consistent with the underlying objectives of the discovery rules generally and of rule 30.07 in particular. To conclude otherwise would invite the type of tactics this court condemned in *Ceci*, at para 9:

> [T]he discovery rules must be read in a manner to discourage tactics and encourage full and timely disclosure. Tactical manoeuvres lead to confrontation. Disclosure leads sensible people to assess their position in the litigation and to accommodate.

[65] Had the affidavit of documents been served in this case, and the obligation to update the schedule of privileged documents been met by the respondents, these remedies would have been available to the appellants.

(iv) The Trial Judge Ought to have Granted a Remedy

[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.

[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*.

[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.

[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.

(c) The Use of Surveillance Evidence at Trial

[71] The trial judge's refusal to order disclosure of the surveillance evidence left the appellants scrambling from pillar to post trying to salvage something from the surveillance evidence debacle, unsuccessfully.

[72] Respondents' counsel raised the issue of the admissibility of the video surveillance for impeachment purposes towards the end of Mr. Iannarella's testimony. The appellants' trial counsel, Mr. Villeneuve, objected to the introduction of the surveillance evidence since it had not been disclosed in an

affidavit of documents. He invoked sub-rule 30.08(1)(a), which provides that if an undisclosed document is favourable to a party's case, "the party may not use the document at trial, except with leave of the trial judge."

[73] Mr. Villeneuve asserted that at the trial management conference the trial judge had assured him: "[W]hile I would not be entitled to an affidavit of documents, my friend would not be able to rely upon the documents that would otherwise have been included in Schedule A and B." The trial judge responded that his comment had only been with respect to using the surveillance "as part of the plaintiffs' case," which I interpret to mean using the surveillance as substantive evidence of Mr. Iannarella's functionality.

[74] The trial judge treated the trial objection as a continuation of the argument at the trial management conference to be governed by the same principles. The trial judge asserted that: "Mr. Forget is right. He is not obliged to produce the surveillance when its proposed use at the trial is with relation to a credibility issue." The trial judge concluded, with respect to the appellants' request to examine the entirety of the surveillance footage, that he was "not going to order that anything be produced during the course of the trial."

[75] The surveillance cross-examination occupied about 50 transcript pages in a cross-examination extending over five days and covering about 350 pages.

[76] The objection to the introduction of the surveillance evidence, in the context, gave rise to three distinct issues. The first was whether the trial judge should have given the respondents leave under rule 30.08 to introduce the surveillance despite the lack of disclosure, even if it was only to be used for the purpose of impeachment. The second was whether the respondents had laid sufficient groundwork for the admission of the surveillance for impeachment purposes, as required by the rule in *Browne v. Dunn*. The third was whether the respondents impermissibly used the surveillance evidence for substantive purposes.

(i) The Trial Judge Should not have Granted Leave to the Appellants to Use the Surveillance Evidence

[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.

[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."

[80] In *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, (2000), 51 O.R. (3d) 97 (C.A.), at para. 81, this court held that under rule 53.08: "a trial judge must grant leave unless to do so would cause prejudice that could not be overcome by an adjournment or costs." This mandatory orientation is understandable, since relevant evidence, including surveillance, is ordinarily admissible. (*Landolfi*, at para. 52)

[81] The respondents assert that the ordinary approach should apply, that their assertion of privilege should be given effect even though they failed to serve an affidavit of documents in which the claim of privilege is to be made, and that they

should be permitted to cross-examine Mr. Iannarella to impeach his credibility. I disagree.

[82] While it was open to the trial judge under rule 53.08 to admit the surveillance evidence, despite the lack of disclosure, or to exclude it, upon due consideration of the test under the rule, he ought to have found that the assertion of privilege had not been properly made, to the appellants' prejudice. Further, the trial judge did not advert to rule 53.08 or its accompanying test. Had he done so, it would have been apparent that the appellants had already suffered significant prejudice.

[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.

[84] Several cases support this outcome. As noted above, in *Beland*, Howden J. refused to admit the undisclosed surveillance for impeachment purposes.

[85] In *Capela v. Rush* (2002), 59 O.R. (3d) 299 (S.C.), the undisclosed evidence was presented to the jury before the potential violation of rule 31.09(3) could be addressed. Justice Sutherland explained the approach he would have taken had the plaintiffs had the opportunity to object:

> In the circumstances an adjournment would have been allowed, the jury may have been struck and an opportunity for additional discovery ... may well have been allowed. None of that happened and the result was severely prejudicial to the plaintiffs. (Para. 68)

[86] Justice Sutherland went on to note, at para 69, that "had there been the proper disclosure of the information … it is highly probable that the action would have been settled before trial". Since the evidence at issue had effectively been admitted at the trial, he concluded that there should be cost consequences.

[87] In *Burke v. Gauthier* (1987), 24 C.P.C. (2d) 281 (H.C.J.), the plaintiff stated at examination for discovery that although his neck bothered him, he was still able to engage in recreational and sporting activities. At trial, he unexpectedly testified that his pain had increased to the point that he could no longer participate in any of these activities and had trouble lifting. Justice Campbell noted that rule 31.09(1) required the plaintiff to update his answers to the discovery questions about his pain levels and functional abilities. Because he failed to do so until the middle of trial, Campbell J. excluded the new evidence, explaining at paras. 24-25, that:

> [T]he plaintiff decided to move ahead into the teeth of the rule without trying to do anything to overcome the obvious unfairness and prejudice to the defendants at being met in the middle of the trial for the first time with a new case.

[88] Justice Campbell added, at para. 19, that the obligation to update discovery answers had the goals of creating "some incentive to the plaintiff to disclose a change in the evidence", discouraging "trial by ambush" and promoting "the objects of discovery which include the encouragement of settlement, the narrowing of issues, and the basic rule of fairness that a party should have reasonable knowledge of the case he must meet". As noted above, these goals and objects were defeated in the case at hand by the tactics of the respondents. The trial judge erred by not considering or recognizing how this prejudiced the appellants.

[89] In *Smith v. Morelly*, 2011 ONSC 6834, the defendant sought leave under rule 30.09 to abridge the time for service of surveillance videos taken of the plaintiff so that the surveillance could be admitted at trial as substantive evidence. Alternatively, she sought to use the surveillance to impeach the plaintiff's testimony at trial. Justice Gilmore refused leave to use the surveillance as substantive evidence but permitted it to be used for impeachment. The plaintiffs in *Smith* had the opportunity to view the surveillance videos before they were used for impeachment. This was an important factor in Gilmore J.'s

conclusion, at para. 30, that the prejudicial effect of the surveillance did not outweigh its probative value. Further, Gilmore J. offered the plaintiff an adjournment. Neither of these circumstances occurred in the case at hand.

[90] In this case the trial judge erred by failing to advert to and apply the rule 53.08 test in its entirety. As a result, the conditions for admissibility under the rule were not satisfied and it was an error for the trial judge to have admitted the surveillance.

(ii) The Surveillance Evidence was not Tested for Admissibility for Impeachment Purposes

[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.

[92] Trial judges recognize that surveillance evidence is powerful evidence, as Cronk J.A. acknowledged in *Landolfi.* Mr. Forget submitted to this court in argument that the surveillance evidence was not "that damning", and "not great surveillance". However, in argument to the trial judge, he more candidly asserted

that it was “powerful evidence.” The power of surveillance comes from its nature as “real demonstrative evidence – evidence from which the trier of fact can draw factual conclusions”, as John A. McLeish and Roger G. Oatley note in *The Oatley-McLeish Guide to Demonstrative Advocacy* (Markham: LexisNexis, 2011), at pp. 249-50.

[93] The trial judge’s gatekeeper function respecting surveillance has two dimensions, both of which are to be carried out in the context of a *voir dire*, in the witness’s absence.

[94] First, the trial judge must be satisfied that the video is a fair and accurate depiction. This has to do with technical details, such as distortion and image speed. The relevant information can be led through the evidence of the videographers during the *voir dire*, whom the defence should make available if necessary. Where only an excerpt of the surveillance is tendered, the trial judge must also be satisfied that it is fair, accurate and representative of the events that it purports to depict. See Michelle Fuerst & Mary Anne Sanderson, *Ontario Courtroom Procedure*, 3rd ed. (Markham: LexisNexis, 2012), at pp. 1043-1044. For example, careful editing might have trimmed the video just before or after the witness’s grimace. Often these issues are resolved between counsel, but where, as here, the appellants’ counsel had utterly no information, this task is especially

important and should require the trial judge to review the surveillance footage from before and after the excerpted selection.

[95] Second, the court in *Landolfi* noted, at para. 65, that the defence must lay an adequate factual foundation before surveillance can be admitted to impeach the witness' testimony. This requirement flows from the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.).

[96] In his article on surveillance, Mr. Bangay described the typical set-up for the use of surveillance for impeachment, at p. 8:

> The witness ought to be closely cross-examined on limitations, disabilities and restrictions all with a view to establishing contradictions between the testimony of the witness in the box and the material which the examiner knows is disclosed within the surveillance material. Preferably this "cross-examination on minutae" will be conducted in advance of the *voir dire* thereby enabling the examiner, in the course of the *voir dire* to point out inconsistencies which ought to be put to the witness.

[97] In *Machado,* Ewaschuk J. noted that counsel for the defence must first elicit from the plaintiff the nature of his or her injury with sufficient precision. He found, at para. 13, that defence counsel "breached, though not totally, the rule in *Browne v. Dunn*". Although counsel put the activities depicted in the videos to the plaintiff, he noted that this was done in a "very generalized and superficial way." Justice Ewaschuk held, at para. 14, that it was "at least incumbent ... to put to the

witness the fact that films had been taken of the plaintiff and to have particularized the films' contents so as to afford the plaintiff an opportunity to explain his conduct as it related to his injuries."

[98] In *Lis v. Lombard Insurance Co.* (2006), 39 C.C.L.I. (4th) 108 (S.C.), Bryant J. discussed the procedure for applying rule 30.09 to a specific case. He used the decision of Dawson J. in *Ferenczy v. MCI Medical Clinics* (2004), 70 O.R. (3d) 277 (S.C.), as a relevant example. In *Ferenczy*, the plaintiff testified that she could not hold a cup in her left hand, but the surveillance clearly demonstrated that her claim was false. Justice Dawson permitted the surveillance evidence to be used to impeach the plaintiff in cross-examination.

[99] Accordingly, Bryant J. held, at para. 15 of *Lis*, that to be admissible: "the probative value of the surveillance videotape must be such that it is capable of contradicting, challenging or impugning" the witness' testimony. In a *voir dire*, Bryant J. obliged the defendant to identify with specificity which inconsistencies or contradictions in the plaintiff's testimony the surveillance would be used to impeach. He then analyzed each alleged inconsistency and ultimately concluded that the surveillance video did not contradict the witness's evidence. As a result, he refused to allow the videos to be played for the jury.

[100] Defence counsel made strenuous efforts over many hours to get a categorical statement from Mr. Iannarella about the functionality of his left arm.

He was not clearly successful, which meant that each portion of the video excerpts had to be individually assessed. But counsel did not elicit from Mr. Iannarella the precise testimony as to his functionality that each surveillance extract would contradict, nor did he put an explicit and detailed formulation of a *Browne v. Dunn* challenge to him in respect of each incident depicted in the surveillance. More importantly, the trial judge erred by failing to determine whether the surveillance was relevant to Mr. Iannarella's credibility before admitting it into evidence, through the detailed analysis similar to Bryant J. in *Lis*. Instead, the trial judge permitted defence counsel to simply play the surveillance footage. This was an inadequate foundation for impeachment under rule 30.09 and worked unfairly to the prejudice of the appellants.

(iii) The Surveillance Evidence was Impermissibly Used for Substantive Purposes

[101] The overarching issue the respondents sought to address through the surveillance evidence was the functionality of Mr. Iannarella's left arm. The indirect route would have been to use the surveillance as evidence to impeach Mr. Iannarella's assertions about his functionality. The direct route would have been to use it as substantive evidence of that functionality. However, that route was not open to the respondents because they did not comply with rule 30.09.

[102] Despite the trial judge's ruling that the surveillance could only be used for impeachment purposes, three elements combined to effectively dissolve the distinction between impeachment and substantive evidence in the minds of the jury. The first was the evidence of the videographers, the second was the respondents' jury address, and the third was the jury charge.

The Appellants were Trapped into Calling the Videographers

[103] The appellants' trial counsel expressed concern that there might be other surveillance evidence beyond what was shown to the jury that would assist their case. The trial judge noted that the appellants had the right to have the videographers attend to be cross-examined:

> Mr. Villeneuve: Well, if the video is being shown, our position is the minute it goes on the screen, the entire video needs to be produced to the plaintiff and that witness needs to come for examination.
>
> The Court: No. You're almost right. The minute it goes on the screen, the **videographer will have to attend if you request it** and withstand your cross-examination on – on his involvement in taking the video. If you are feeling bullish, you may even require him to show more video that Mr. Forget proposes to show. That's an opportunity that you would **– that you would have and a risk that may arise from it of seeing even more that you want to or don't want to see, but if you're going to show the video in the circumstances of – of this case, then you're going to have the videographer available**. [Emphasis added.]

[104] The trial judge's approach trapped trial counsel into requiring the videographers to be called as witnesses to testify before the jury, rather than in a *voir dire*, in order to get access to the full surveillance.

[105] The examinations-in-chief of the videographers by respondents were largely perfunctory and technical, as one would expect. Counsel argued, however, that by requiring the videographers to testify, the appellants "opened the door" and he was then able to examine them on their observations of Mr. Iannarella's functionality. This led to the following exchange with one videographer:

> Q: And when you were observing him pushing the cart, did you notice any disability?
>
> A: From my experience, I have – I did notice any pain in his face. He wasn't holding any extremities. He seemed to be moving in fluid motions. (sic)

[106] Counsel asserted in argument that the videographer's live observations constituted proper substantive evidence of Mr. Iannarella's functionality. I disagree; the evidence was substantive and its introduction was not permissible under rule 30.09.

[107] In my view, this evidence was improperly led. It amounted to cross-examination of a witness who was not adverse in interest. See Geoffrey D.E. Adair, *On Trial: Advocacy Skills Law and Practice* (Markham: LexisNexis, 2004),

at pp. 212-213, and Alan W. Mewett & Peter J. Sankoff, *Witnesses*, loose-leaf (Toronto: Carswell, 1991), at pp. 14-30 to 14-31.

The Defence Jury Address made Substantive use of the Surveillance Evidence

[108] Respondents' counsel maintains that he tendered the video surveillance only to impeach Mr. Iannarella's credibility relating to his functionality, not as substantive evidence to demonstrate his actual functionality.

[109] There is no doubt that counsel strongly and repeatedly challenged Mr. Iannarella's credibility, as he was entitled to do. However, in his closing jury address counsel suggested the surveillance could be used as substantive evidence of Mr. Iannarella's functionality:

> We've seen the waving four times in the surveillance. Not only did we see the waving, we see Mr. – not quite clear on this shot – but we see Mr. Iannarella smiling and we've heard from the investigators who have testified as to taking that video not one sign of disability. My friend's going to stand up they're not kinesiologists, they're not doctors, which is true and we're not suggesting they are, not one sign of disability, not a grimace, not a restriction, nothing. And he's waving completely gratuitously, absolutely gratuitously.

[110] This statement explicitly suggested to the jury that the surveillance evidence could be used as proof of the extent of Mr. Iannarella's disability.

Counsel's submissions effectively erased any distinction between the use of the surveillance for impeachment and for substantive purposes.

There was no Limiting Instruction on the Surveillance Evidence in the Jury Charge

[111] In *Landolfi*, at para. 61, Cronk J.A. held that the risk a jury might use surveillance evidence admitted under rule 30.09 as substantive evidence with respect to a plaintiff's disability could be adequately addressed through a limiting instruction in the jury charge. However, in this case the trial judge did not mention the surveillance, nor did he provide a caution about how the jury could use the surveillance evidence.

[112] A typical example of a limiting instruction follows:

> You saw a video of surveillance conducted by the defence on the Plaintiff. I made an order that it was admissible and as a result you saw this video. I need to remind you however as to the use that you can make of what you saw on the video. It is not admissible as substantive evidence of the Plaintiff's physical capacities. It has a limited purpose. It is to be used by you, the judges of the facts, to assess the Plaintiff's credibility as to his physical limitations following the accident. To repeat, you cannot use what you saw on the video to determine his physical capacities. You can only use what you saw on the video for the purpose of determining credibility – specifically it is your role as the triers of the facts to determine if there are inconsistencies between what he said during his evidence and what you saw on the video.

[113] The trial judge's failure to provide a limiting instruction was an error since it increased the risk that the jury would use the surveillance as substantive evidence of Mr. Iannarella's functionality. In cases like this one, where surveillance is used to impeach a witness on a point that is also an issue requiring substantive proof for the purpose of the underlying action, the need for an adequate caution in the jury charge is particularly significant. The absence of a limiting instruction left the jury free to use the surveillance evidence for substantive purposes, contrary to rule 30.09.

(iv) Disposition of the Surveillance Evidence Issues

[114] In my view, the improper use of the surveillance evidence gave rise to a form of trial by ambush. This came about because the trial judge did not require the defence to comply with the *Rules* in relation to the disclosure of the surveillance evidence and the provision of particulars. The trial judge did not exclude the surveillance evidence under rule 30.08, nor did he assess its relevance and require the respondents to comply strictly with the rule in *Browne v. Dunn* before admitting it. He did not provide the jury with any instructions concerning the permissible use of the surveillance despite the defence's problematic jury address, nor did he provide the jury with a limiting instruction.

[115] In my view, the surveillance evidence was effectively admitted into evidence and used by the jury for its substantive content, and not just for its

impeachment value. The trial judge's errors, especially when taken together, were serious and critically impaired the fairness of the trial. The damages verdict cannot stand. I would set it aside and order a new trial on damages.

[116] In *Chrusz*, at para. 25, this court acknowledged that "[t]he modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client." It is time to harness the power of surveillance evidence in the service of the civil litigation culture shift towards early disclosure, accurate case evaluation based on the totality of the evidence, settlement where possible, and fair adjudicative processes based on full information, as *Hryniak v. Mauldin* proposes.

(d) The Use of Experts' Reports in Mr. Iannarella's Cross-Examination

[117] The appellants argue that the trial judge erred in permitting the respondents to project excerpts from medical reports on a screen in front of the jury during Mr. Iannarella's cross-examination. Since there is to be a new trial, there may be no need to rule on this complaint, but the prospect that this form of cross-examination may be taking root requires a response.

(i) Objections to Mr. Iannarella's Cross-Examination

[118] During the course of Mr. Iannarella's cross-examination, Mr. Forget projected an excerpt from a medical report on a screen in front of the jury. The report had been provided by Dr. Soon-Shiong, an orthopedic surgeon, and was contained in Exhibit 1. Mr. Forget was about to ask questions about an excerpt from the report when Mr. Villeneuve objected on the basis that counsel had agreed that the medical brief in Exhibit 1 would not contain any medical reports. Regrettably, Mr. Villeneuve had not checked to make sure that the brief's contents reflected his discussion with Mr. Forget before consenting to the admission of the exhibit. The report was, as he put it, "buried halfway through" the brief. Mr. Forget did not contest Mr. Villeneuve's version of their understanding. He stated that he intended to call Dr. Soon-Shiong as a witness.

[119] In the course of his response to the objection, the trial judge noted that if the report stayed in the brief it would go into the jury room with the jury. The trial judge expressed concern about this, stating:

> [I]t will be, if they choose to read it, read by the jury during the course of their deliberations and it is very clear in law that in jury cases, it's very unusual putting it mildly, it's beyond frowned upon by most judges in jury trials to allow a doctor's report to be filed and the doctor to give evidence.

[120] The trial judge then ruled that if Dr. Soon-Shiong was to be called as a witness, his report should not be in Exhibit 1. He was prepared to permit counsel to read from the factual portions of Dr. Soon-Shiong's report as a lead in to questions, but only "the parts of the interchange between Dr. Soon-Shiong and Mr. Iannarella", and not the doctor's opinion.

[121] After the lunch break, counsel resumed cross-examining Mr. Iannarella and again projected Dr. Soon-Shiong's report. Mr. Villeneuve again objected that it was unfair for counsel to put only selected bits of Dr. Soon-Shiong's evidence to the witness. The trial judge allowed respondents' counsel to continue.

[122] Mr. Villeneuve later objected to the continuation of what he called the "slide show" on the basis that counsel was departing from the factual details in Dr. Soon-Shiong's report and venturing into the doctor's examination and opinion. Counsel responded that the Exhibit containing the report had gone in on consent.

[123] After more skirmishing, respondents' counsel said that he would stop projecting the report. The trial judge concurred, and noted that it would be preferable not to project additional reports so that "whatever is on the written page above and below the proposition that you are focusing on won't be apparent to the jury." He also noted that "[t]he difficulty always is that when doctors attend and give evidence from their reports, almost always, the reports

do not complete the entirety of their evidence". Counsel then proceeded in the conventional way asking questions about Mr. Iannarella's visit to the doctor without projecting the report excerpts.

[124] Respondents' counsel was about to project a report from a physiotherapist when Mr. Villeneuve again objected. The trial judge noted that a physiotherapist is not a doctor and that his direction not to project doctors' reports did not apply to her. The physiotherapist's report was projected before the jury. The trial judge noted that he would later decide whether the physiotherapist's report would remain in Exhibit 1 and go to the jury room for deliberations. (I observe that reports from doctors and physiotherapists fall within s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23. This section addresses the proper procedure for filing medical reports as evidence, and applies to "a member of a College as defined in subsection 1 (1) of the *Regulated Health Professions Act, 1991*", which includes the College of Physiotherapists of Ontario.)

(ii) Analysis

[125] The trial judge did not adequately perform his gatekeeping function in relation to this evidence. I agree with the appellants that the respondents should not have been permitted to use the projected excerpts from the expert reports, for the following reasons.

[126] First, when the appellants raised an objection to the unexpected inclusion of medical reports in the brief, the trial judge did not address the problem immediately and effectively. Although he ruled that Dr. Soon-Shiong's report could not be an exhibit, he allowed the jury to see it on the projection screen. He also failed to rule conclusively on the physiotherapist's report.

[127] It is commonplace in civil actions for counsel to prepare a trial document brief containing documents that are admitted as authentic and admissible. See John Sopinka, *The Trial of an Action*, 2nd ed. (Markham: LexisNexis, 1998) at pp. 41-42. Counsel typically agree on a list of documents and one party attends to the brief's preparation. In this case, Mr. Forget's office assembled the respondents' medical brief, which he tendered at the beginning of the trial and which became Exhibit 1.

[128] It is regrettably not unusual, however, for counsel to differ on the precise basis on which a document in the brief is being tendered or whether it was to have been included, as the implications materialize in the course of the trial. That happened here, where the appellants thought no medical reports were to be included in the brief, but the respondents included the reports. The trial judge should have addressed the problem quickly and completely. Instead, by permitting cross-examination to proceed with the reports projected for the jury's

view, the trial judge exposed the appellants to the potential for the jury to be prejudiced by the disputed reports.

[129] Second, the projected words would have distracted the jury when their attention should have been on the witness. It is to be expected that the projected words from a medical report would carry great weight with the jury, who would naturally see them as likely to be true.

[130] Third, the cross-examination implicitly relied on the hearsay value of the reports before they had been properly admitted. Counsel presented the words as true. This allowed the respondents to attack Mr. Iannarella's credibility in a manner that side-stepped their obligation to comply with the rule in *Browne v. Dunn*. The impression on the jury could not likely be undone either by an effective cross-examination of the practitioner or by a jury instruction, both of which would occur much later in the trial.

[131] Fourth, this approach allowed the respondents to get around the usual requirement that, absent special circumstances, parties must choose between filing a medical report as evidence under s. 52 of the *Evidence Act*, and calling the practitioner as a witness. See *Ferraro v. Lee* (1974), 2 O.R. (2d) 417 (C.A.), at para. 6; *Pool v. Lehoux*, 2007 ONCA 630, at para. 7; *Beck v. Blane*, [1999] O.J. No. 529 (C.A.), at para. 4; Fuerst & Sanderson, at pp. 954-956, 958. The

jury effectively heard from Dr. Soon-Shiong twice, without consideration as to how this could impact the appellants.

[132] There are circumstances when the projection of an image in front of a jury during cross-examination is helpful, for example when the witness is being examined on a pictorial image like a map, a photograph or a diagram. However, reports from medical practitioners who will also be called to testify give rise to unique concerns. The trial judge recognized some of these issues, stating:

> The difficulty always is that when doctors attend and give evidence from their reports, almost always, the reports do not comprise the entirety of their evidence as you know. There are speaking points. Some things that are in the report never make it into evidence so better not to show the members of the jury that which may not become the evidence of those doctors.

[133] Nonetheless, the trial judge permitted a number of reports to be projected before the jury. Regardless of whether or not the reports were ultimately formally admitted as exhibits, the "slide show" had already permitted the jury to view some of their contents. This could not be undone. As this court noted in *Pool v. Lehoux*, at para. 7, there can be no hard and fast rule. However, the respondents' use of medical and other report excerpts in cross-examining Mr. Iannarella in this trial should not have been permitted by the trial judge.

(3) The Threshold Motion

[134] Based on the entirety of the evidence at trial, the trial judge found that Mr. Iannarella had not proven that he had a permanent impairment of a physical or psychological function caused by the accident, and exercised his authority under s. 267.5 of the *Insurance Act* to dismiss the appellants' claim for non-pecuniary damages. The trial was, however, unfair for the reasons set out earlier. It is not possible to discern whether the trial judge's ruling was based solely on admissible evidence. The threshold ruling must be set aside.

[135] The appellants make a number of specific complaints about the trial judge's threshold ruling. Since there is to be a new trial, there is no need for me to rule on those complaints. It will be the task of the trial judge at the second trial to consider the threshold issues under s. 267.5 of the *Insurance Act* based on the evidence that is admitted at that trial if a threshold motion is brought.

(4) The Costs Disposition

[136] The trial judge awarded the respondents partial indemnity costs to the date of their "substantial" offer to settle on March 12, 2012, and substantial indemnity costs thereafter. This was an award to the respondents of about $255,000 for a fifteen-day trial that extended over four weeks. The trial judge rejected evidence that the appellants were impecunious, noting that they had equity in their home.

[137] Since the appeal is to be allowed, the costs disposition is to be set aside. I do, however, wish to make several observations about the trial judge's costs disposition. The action was dismissed, and the defendants would ordinarily be entitled to no more than costs on a partial indemnity basis. But the costs award on a substantial indemnity basis was distinctly punitive to the appellants, who stand to lose their home.

[138] The trial judge stated that he was exercising his discretion under this court's decision in *S.& A. Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243 (C.A.). In that case the court cited rule 49.13, which provides that notwithstanding rule 49.10, in assessing costs a court "may take into account any offer to settle made in writing."

[139] The development of this court's approach to awards of substantial indemnity costs has evolved since *Strasser*, as this court noted in *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66. Outside of rule 49.10, to make such an award as a matter of judicial discretion the court must find that the party has been guilty of egregious misconduct in the proceeding. See *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280, at para. 92 and *McBride Metal Fabricating Corp. v. H. & W. Sales Co.* (2002), 59 O.R. (3d) 97 (C.A), at para. 39. I can see no basis in this case on which the trial judge could have found such misconduct on the appellants' part.

[140] Moreover, the trial judge did not take into account the respondents' breaches of the *Rules*, which should have attracted countervailing weight in the fixing of the trial costs: see *Capela* and *Beland.*

D. DISPOSITION

[141] I would allow the appellants' liability appeal, set aside the judgment and substitute a finding of liability against the respondents. I would order a new trial on the issues of damages. The costs of the trial will be to the appellants in the cause on the second trial.

[142] I would award the costs of this appeal to the appellants. If the parties cannot agree on the quantum they may file written submissions no more than five pages in length within 10 days of the date of this decision.

Released: February 17, 2016 "JL"

"P. Lauwers J.A."

"I agree John Laskin J.A."

"I agree C.W. Hourigan J.A."