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Preventing Trial by Ambush – Court of Appeal Places Tight Lid on Surveillance Evidence

The Court of Appeal addressed the admissibility and permissible use of surreptitiously recorded video surveillance evidence at trial in its recent decision *Iannarella v. Corbett*, 2015 ONCA 110.

Iannarella concerned a motor vehicle accident which had occurred in 2008. The Plaintiff alleged that the Defendant had negligently rear-ended him, seriously damaging his left shoulder.

In advance of trial, the Defendant engaged investigators who shot over 100 hours of video surveillance footage. The existence of the surveillance was never disclosed to the Plaintiff.

At trial, the Defendant sought to admit portions of the surveillance to impeach the Plaintiff's testimony on the extent of his injuries. The trial judge admitted the evidence over the objections of the Plaintiff's counsel, and the action was ultimately dismissed.

On appeal, the Court of Appeal held that the trial judge erred in allowing the surveillance evidence to be adduced and in not placing stricter limits on the purposes for which it was used.

According to the Court of Appeal, parties are obliged not only to disclose the existence of surveillance evidence to the other side, but must continuously update it as surveillance is gathered. If requested, the particulars of the surveillance must also be disclosed, including the date, time and location of the surveillance, the nature and duration of the activities depicted, and the names and addresses of the videographers. If a party fails to make the appropriate disclosure in advance of trial, the evidence generally won't be admissible.

Similarly, a party who intends to introduce the evidence at trial must lay a significant foundation for its admissibility, consistent with the rule in *Browne v. Dunn*. Simply claiming that the evidence broadly impeaches the witness will not suffice.

Even once adduced, trial judges are directed to carefully monitor the use of the evidence to make sure it is used only to impeach the testimony of the witness, rather than to build the substantive case of the party who adduced it. On the facts of *Iannarella*, the Court of Appeal was critical of the trial judge for

allowing defence counsel to refer to the videos as substantive evidence of the functionality of the Plaintiff's arm, rather than limiting it to an attack on his credibility.

While *Iannarella* is consistent with prior case law on the topic, it provides considerable clarification on the scope of disclosure parties are obliged to make, and the consequences for failing to comply with those obligations.

Of equal significance is the policy rationale underlying the decision. According to the Court of Appeal, the imposition of heightened pre-trial disclosure obligations and significant consequences for failing to provide adequate disclosure will promote judicial economy by discouraging "tactics" by defence counsels, and encouraging plaintiff's counsels to undertake realistic case assessments, thereby facilitating settlements.

In sum, *Iannarella* sharply curtails the potential for parties to be caught off guard in Hollywood-esque "gotcha" moments through the use of surreptitiously recorded video surveillance. It remains to be seen whether this will ultimately result in the judicial economy benefits endorsed by the Court of Appeal.

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