

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
DONNA TAYLOR)
) Barry Evans, for the Plaintiff
Plaintiff)
)
– and –)
)
DANIEL DURKEE and GREGORY) Christopher A. Caston and Michelle Farb,
DURKEE) for the Defendants
)
Defendants)
)
)
)
) **HEARD:** November 28, 2017

2017 ONSC 7358 (CanLII)

RULING RE: SURVEILLANCE EVIDENCE

MCKELVEY J.:

Introduction

- [1] This case involves a claim for personal injury by the plaintiff, Donna Taylor, arising out of a motor vehicle accident. The case is being tried before a jury.
- [2] The defence arranged for surveillance video of the plaintiff to be taken in 2013, 2015 and 2017 shortly before the commencement of trial. In the 2013 surveillance, the video shows the plaintiff walking as well as cleaning her car. She is also seen shopping at Costco pushing a shopping cart.
- [3] In the 2015 video the plaintiff is seen walking, shopping and carrying some shopping bags.
- [4] In the 2017 surveillance, the plaintiff is observed playing slot machines and bingo. She is also seen driving a car as well as bending to pick up some change.
- [5] During the course of argument the defence withdrew its request to rely upon the 2017 surveillance.

- [6] The defence is proposing to introduce the surveillance video as substantive evidence. In her evidence, the plaintiff described limitations on her physical abilities which are alleged to result from the motor vehicle accident. She acknowledged, however, that on a good day she was able to do the activities which are seen on the video surveillance. As a result the defence did not have an opportunity to impeach the plaintiff on the video surveillance. It now seeks to admit the evidence as substantive evidence.
- [7] On December 1, 2017, I orally advised counsel of my ruling that the surveillance evidence from 2013 and 2015 could be admitted into evidence and that written reasons would follow. These are those written reasons.

Background

- [8] The case law has established that in order to introduce surveillance evidence, the moving party must satisfy the court of the following:
1. That the surveillance is a fair and accurate depiction of the events seen in the video;
 2. That there is no intention to mislead through the video;
 3. That the video surveillance is relevant; and
 4. That the contents of the video have been properly verified under oath by a person capable of doing so.

See: *Landolfi v. Fargione*, [2006] O.J. No. 1226 and *Iannarella v. Corbett*, 2015 ONCA 110.

- [9] In addition to the above there is always a discretion in the court to exclude evidence where the probative value is exceeded by its prejudicial effect. Further the Rules of Civil Procedure and the case law have established strict requirements for disclosure of surveillance evidence. In the *Iannarella* case, the Court of Appeal carefully reviewed those disclosure obligations.
- [10] In the present case a voir dire was conducted into the admissibility of the video surveillance. During the course of argument on the voir dire the plaintiff agreed that the defence had complied with all of the disclosure requirements to rely on the video surveillance as substantive evidence. No technical objections based on the timeliness of disclosure or compliance with the Rules are relied upon by the plaintiff. This concession was significant in light of the fact that at the voir dire the private investigator who took the 2015 surveillance was not available. Instead the defendant called the investigation manager who testified about the 2015 video surveillance.
- [11] The basis for the plaintiff's objection to the admission of the surveillance evidence is that it is not relevant to any issue at trial. Further if there is any relevance the plaintiff's

position is that the prejudicial effect of the surveillance evidence exceeds its probative value.

Analysis

[12] The plaintiff argued that the surveillance evidence could not have any relevance or probative value given that the activities shown on the video are consistent with what she is able to do on a good day. Therefore it was suggested the video surveillance could not assist the jury in assessing the plaintiff's impairment or disability as a result of the motor vehicle accident. Further it was argued that the prejudicial effect of the evidence exceeded any probative value. In this regard the plaintiff argued that the video surveillance showed only a small fraction of the plaintiff's life. By capturing only a small slice of the plaintiff's activities since the accident it does not show a full picture of the plaintiff's degree of impairment.

[13] The plaintiff relied on a decision of this court in *Nemchin v. Green*, [2017] O.J. No. 1444. In that case the defendant sought to rely on surveillance video of the plaintiff as substantive evidence. The court held that the surveillance evidence was not admissible. The court states at para. 64, "for surveillance evidence to be admissible the probative value of the surveillance video must be such that it is capable of contradicting, challenging or imputing the witness' testimony." In support of that conclusion the court in *Nemchin* relied on para. 99 of the *Iannarella* decision. However, it is apparent in reviewing para. 99 of the *Iannarella* decision that the court's comments address the use of surveillance evidence for purposes of impeachment. Paragraph 99 of *Iannarella* states,

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....

[14] Further, in the *Nemchin* case there appears to be a strong suggestion that there was no physical impairment of the plaintiff's activities of daily living. This is reflected at para. 27 of the decision where the court states,

The plaintiff emphasizes that the primary injury which she alleges she suffered is that of post-traumatic stress disorder – a disorder which the expert witness called on her behalf described to the jury as an "invisible" condition. As a result, footage of the plaintiff as she goes about her various daily and other activities without any manifestation of the symptoms of post-traumatic stress disorder will be prejudicial.

[15] All of this apparently led the trial judge to conclude that the potential prejudice to the plaintiff outweighed the minimal, if any, probative value of the surveillance evidence.

- [16] The facts in the present case appear to be significantly different than the *Nemchin* case. In the present case, the plaintiff in her evidence at trial testified with respect to a number of significant physical impairments which include her right shoulder, neck and lower back. In my view, the fact that the plaintiff has acknowledged that on a good day she is able to perform the activities shown on the video should not lead to its exclusion as substantive evidence.
- [17] Evidence is relevant if as a matter of logic and experience the evidence tends to prove the proposition for which it is advanced (See *R v. Collins*, [2001] O.J. No. 3894 (C.A.)) In this case the surveillance evidence is relevant to the degree of impairment suffered by the plaintiff in her activities of daily living. The fact that the plaintiff has given some evidence about her ability to do these activities on a good day does not mean that no other evidence may be introduced. There is a qualitative difference between the plaintiff's oral evidence on cross-examination and a video which actually shows her doing these activities. A party should not be limited at a trial in introducing relevant evidence going to the level of the plaintiff's impairment which is a critical issue in this case. It is appropriate in this trial for a jury to hear evidence on important issues from a variety of sources. Thus, it is common for a plaintiff in a personal injury action to introduce evidence from a plaintiff describing limitations on her activities as well as hearing evidence from other family and friends about their observations as well as medical evidence based on an assessment by a qualified expert. It is ultimately a question of fact for a jury to weigh all of the relevant evidence and come to a conclusion about the nature and degree of any impairment.
- [18] I do not accept the plaintiff's assertion that there is significant prejudice attached to the surveillance evidence. While our law recognizes the general power of a judge to exclude relevant and material evidence where its probative value is outweighed by the prejudiced caused by its admission, prejudice in this context does not mean that the evidence will be detrimental to the other party's position. Rather, prejudice in this context is related to the detrimental effect that the evidence may have on the fairness and the integrity of the proceedings. See *R. v. Collins*, [2001] O.J. No. 3894 (C.A.) at para 10. In the present case I do not see a basis to believe that the surveillance evidence will negatively impact the fairness and integrity of the trial. The plaintiff relies on the fact that the surveillance evidence captures only a small slice of the plaintiff's activities since the date of the accident. However, the jury will be aware of this limitation and I do intend to reference this in my charge. To exclude the evidence entirely because it represents only a small fraction of the plaintiff's activities since the time of the accident would ultimately result in virtually all surveillance evidence being excluded for substantive purposes. When the jury can be adequately instructed about the limitations inherent in surveillance evidence I do not see any basis to conclude that there is any significant prejudice to the plaintiff from the admission of this evidence.

2017 Surveillance

- [19] I have not dealt specifically with the 2017 evidence as the request for its admission was withdrawn by the defence during argument. However, I did express a number of

significant concerns to counsel about the way that this surveillance was conducted during the course of argument.

- [20] The 2017 surveillance evidence was performed by MY P.I. at the request of Aviva Canada. Only one investigator was assigned to the surveillance. As part of the surveillance the investigator has taken a video while following the plaintiff's vehicle home from a bingo hall. This includes following the plaintiff's vehicle along a 4 series highway. The investigator is using what is clearly a handheld camera for this video. At one point during the surveillance the investigator turns the video camera to her own speedometer which shows her speed at approximately 130 kilometres per hour. The investigator uses the handheld video camera while following the plaintiff's vehicle for a lengthy period of time (approximately 2 ½ minutes).
- [21] I have serious concerns about the investigator's conduct. She has shown a serious disregard to other users of the highway by not only using a handheld electronic device (in apparent violation of s. 78.1 of the *Highway Traffic Act*), but in addition focusing most of her attention on surveillance while driving at a high rate of speed on a busy highway. In my view her conduct in this regard put the safety of other users of the highway including the plaintiff in jeopardy. Distracted driving is a major problem on our roadways today and for a licensed private investigator to engage in this activity is in my view unacceptable.
- [22] Further at both the beginning and end of the surveillance the investigator appears to be taking video surveillance through the windows of the plaintiff's home into the interior of her home. This raises a significant issue with respect to the plaintiff's reasonable expectation of privacy in her home.
- [23] Because the request to introduce this evidence was withdrawn by the defence I do not have to consider whether any of the above concerns affect the admissibility of the 2017 surveillance evidence. However, I feel the need to express my concerns about these actions given that surveillance is commonly conducted in the context of personal injury actions.

Conclusion

- [24] For the above reasons I conclude that the 2013 and 2015 video surveillance of the plaintiff is properly admissible as substantive evidence at this trial.

Justice M. McKelvey

CITATION: Taylor v. Durkee, 2017 ONSC 7358

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DONNA TAYLOR

Plaintiff

– and –

DANIEL DURKEE and GREGORY DURKEE

Defendants

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Released: December 8, 2017