

Case Comment – Surveillance

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A recent decision out of the Ontario Superior Court of Justice by Madame Justice Corthorn in Ottawa called *Rolley v. MacDonell* provides cautionary commentary for defendants that choose to rely on surveillance as substantive evidence at trial.

The crux of the decision focuses on the accuracy of the surveillance. In accordance with the Court of Appeal's decision in *Iannarella v. Corbett*, the trial Judge has to be satisfied that the surveillance is fair, accurate and representative of the events that it purports to depict.

This creates a potential issue in respect of **edited** surveillance videos which are often delivered by investigators to the instructing principal. The edited videos tend not to be continuous or unbroken recordings of the subject plaintiff. Justice Corthorn found this practice troublesome because she felt that the edited surveillance videos were based on choices made by the investigator when recording the subject plaintiff. In making these comments, Justice Corthorn rejected the defence argument that an investigator cannot be held to a standard of perfection. Ultimately, Justice Corthorn excluded the surveillance as she did not feel it was fair. In addressing the admissibility test of probative value vs. prejudicial effect, Justice Corthorn noted that none of the medical experts had expressed an opinion on the surveillance evidence.¹

There are now two decisions – albeit by the same Judge in the same jurisdiction – rejecting surveillance evidence for substantive purposes. Practically speaking, the defence should expect these challenges to be made on every case where surveillance evidence is going to be used for substantive purposes.

Surveillance generally captures mundane events, rather than capturing a “gotcha moment” and impeachment is not always an option. Justice Corthorn's comments are a stark reminder of the discretionary power that the trial Judge holds.

One way around this challenge, is to have the defence experts (medical / human factors) review the surveillance to add support to their expert opinion. Another consideration would be to ensure that preferred investigation vendors are aware of these decisions in order to have the investigators properly prepared for challenges at trial.

¹ This decision follows an earlier 2017 decision by Justice Corthorn called *Nemchin v Green* which also happened to involve the same plaintiff counsel. Surveillance evidence was also excluded in that case.