

Less is Not Always More: Admitting Surveillance Excerpts vs. Continuous, Unedited Videos

A Case Commentary on *Rolley v. MacDonell* 2018 ONSC 164

Presented at the Middlesex Law Association's Twelfth Annual Personal Injury Conference
November 29, 2018.

Alex Wolfe, Legate Personal Injury Lawyers

Investigators using a "less is more" approach to obtaining surveillance evidence should recognize that the gaps left between recordings could lead to inadmissibility. In *Rolley v. MacDonnell* [2017] OJ No 6961, the defendant's motion to substantively rely on a series of surveillance video excerpts was dismissed because the excerpts did not fairly and accurately embody the underlying events they purported to depict. In his ruling, the trial judge traced the investigator's incomplete, excerpted depictions of the plaintiff to the discretionary act of pressing the record button. The judge branded the videos as a "series of excerpts pieced together through editing" and commented that video excerpts cannot be said to substantively represent factual events if the trier of fact is forced to infer what transpired in the recordings.

Facts

Mark Rolley suffered a mild traumatic brain injury and associated cognitive deficits when he was struck by Dorothy MacDonnell while crossing the street in January, 2012. His collision-related cognitive deficits included memory problems, confusion, depression, and a lack of social awareness, but existed on top of a complicated medical history including diagnoses of fibromyalgia, sleep-disturbance disorders (causing fatigue and memory problems), hypothyroidism, two battles with cancer, and sarcoidosis – a chronic pain disorder affecting his lower body. He received disability payments from a long-term disability carrier and Canada Pension Plan prior to the collision.

Mr. Rolley claimed that his cognitive impairments reduced his ability to perform the various fatherly and community tasks that he previously completed with pacing. He sued the defendant for future care costs, attendant care, housekeeping and home maintenance, general damages, and *Family Law Act* damages.¹

The defendant contested whether Mr. Rolley suffered a mild traumatic brain injury and argued that he was at least a "crumbling skull" plaintiff whose cognitive and physical limitations were a continuation of his pre-collision medical problems. It was further argued that Mr. Rolley's post-collision physical capabilities exceeded those outlined by his occupational therapy expert.

A jury trial commenced on November 21, 2017 with causation and damages as the primary areas of disagreement. Mr. Rolley's wife was the plaintiff's first witness, who testified about her husband's post-collision cognitive deficits in relation to his pre-injury medical conditions. She clarified that Mr. Rolley still attempted to perform many of the same fatherly and community tasks, but his cognitive deficits now prevented him from performing them to acceptable, pre-collision levels. For instance, Mr. Rolley previously worked on his family's vehicles but now required his work to be double-checked for errors.

¹Mr. Rolley claimed damages in excess of \$5,215,000. *Rolley v MacDonell* [2018] OJ No 5734 at para 8.

Halfway through Mrs. Rolley's testimony, Defence counsel sought leave to substantively rely on three tapes of surveillance evidence taken of Mr. Rolley during the seven months before trial.² *Voir Dire* arguments took place for a day and a half, where the investigator testified as a witness.

The *Jannarella* Gatekeeper Test

The parties agreed that the substantive admission of surveillance videos requires the following elements to be met:

1. Accuracy in truly representing the facts;
2. Fairness and the absence of any intention to mislead; and
3. Verification on oath by a person capable of doing so.³

The parties further agreed that even if this three-part test is met, the probative value of admitting the videos must outweigh its prejudicial effect.⁴

Accuracy and Fairness: Excerpts vs. Continuous Videos

The trial judge acknowledged that the accuracy and fairness elements of the *Jannarella* test are expanded when a party seeks to admit an excerpted or edited video when compared to an unedited, continuous recording. To be admissible, the video excerpt must be

- A. fair and accurate from a technological and imaging standpoint, and
- B. fair, accurate, and representative of the events it purports to depict.

The following passage from *Jannarella* was cited in support:

[T]he 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. [Emphasis added].⁵

² The plaintiffs took no issue with timing of defense counsel's disclosure of the surveillance videos and their corresponding reports. *Rolley v. MacDone/1* 2018 ONSC 164 ("*Rolley*") at para 11.

³ *Jannarella v. Corbett*, 2015 ONCA 110 ("*Jannarella*") at para 94.

⁴ *Rolley* at para 13, citing *Nemchin v. Green* 2017 ONSC 1321 at para 16, which states "[f]or any portion of the surveillance which satisfies the three criteria [from *Jannarella*], the next issue to be determined is whether the probative value of the evidence outweighs the potential prejudice to the plaintiff."

⁵ *Jannarella* at para 94.

Which videos were Excerpts?

The trial judge's first task was separating the video excerpts from the continuous recordings in preparation for analysis under their relevant branch of the *Jannarell/a* test. He found that all but two of the surveillance videos were excerpts and that the majority of videos were "not continuous, unbroken recordings of Mr. Rolley's activities."⁶ He labelled the excerpts as the "first set of videos," and the continuous recordings as the "Drive Through" and "Massey Auto Pro" recordings.

In the "first set of videos," Mr. Rolley is partially recorded doing tasks in his community, such as visiting a scrap yard, changing a tire, conversing with a friend near his van, and mowing the lawn. The investigator did not film any of these activities in their entirety, resulting in time gaps in the video's presentation where Mr. Rolley was left unrecorded; gaps ranging from 4 seconds to 14 minutes.

Plaintiff's Argument: Gaps in Recordings Create Inaccurate and Unfair Depictions

Mr. Rolley argued that the time-gapped excerpts were inaccurate portrayals because the investigator failed to record large portions of the events that the videos purported to depict. He used the timestamps on the video excerpts to compare the gross amount of time engaged in an activity versus the amount of time that the investigator recorded. For example, Mr. Rolley spent 25 minutes visiting a scrapyards but only 3 minutes (or roughly 15 % of the activity) was recorded. Likewise, only 27% of the time that Mr. Rolley spent mowing his lawn and 50% of the time he spent conversing with a friend was recorded.⁷

Defense Argument: Gaps in Recordings are Reasonably Expected

The defendants argued that the investigator was objective while filming Mr. Rolley and that investigators face practical realities in the field that require them to stop recording, such as their need to stay mobile, obtain shots, shift positions, or evade detection. They further argued that the plaintiff's physical abilities are demonstrated by the "overall nature" of the videos⁸ despite the time gaps.

The Excerpts are Inaccurate, Unfair, and Do Not Depict the Underlying Factual Events

The trial judge held that the excerpted videos fail the accuracy and fairness components of the *Jannarella* test and are therefore substantively inadmissible.⁹ He reasoned that a trier of fact viewing these videos is forced to make assumptions about what is occurring both on-camera and in-between excerpts, and if an assumption is required to make sense of the video it cannot be said that the excerpts contain fair and accurate representations of the events they purport to depict.

The judge isolated four excerpts of the plaintiff shopping at an automotive store to illustrate how differing assumptions could lead to multiple understandings of what the video is factually depicting. In the four excerpts, Mr. Rolley is first seen fixing his tire in the outside parking lot,

⁶ *Rolley* at para 23.

⁷ *Rolley* at para 32.

⁸ *Rolley* at paras 14-16.

⁹ *Rolley* at para 34.

then seen entering the store, then seen back in the parking lot with a wheelbarrow full of items, then finally pushing an empty wheelbarrow back into the store.

[29] What is the jury to make of that footage? Mr. Rolley, whose alleged injuries include memory deficits, may not be able to recall what he did on that occasion. Is the jury to assume that he pushed the wheelbarrow full of items from inside the store to the truck? Is the jury to assume that Mr. Rolley had help in pushing the full wheelbarrow from inside the store to the truck?

[30] The problem with the Kenny U-Pull recording is that it forces the jury to make an assumption. If the jury is required to make an assumption, then the recording cannot be said to be fair, accurate, and representative of the events that occurred while Mr. Rolley was at the Kenny U-Pull. [Emphasis added].¹⁰

For these reasons, the video excerpts were deemed to be inadmissible, and judicial analysis turned to whether the defendant's non-excerpted videos were admissible.

Non-Excerpts: The "Drive-Through" and "Massey Auto Pro" Videos

As mentioned above, the trial judge found that two videos of the plaintiff were not excerpts and therefore did not need to be analyzed under part B of the *Iannarella* test. In the Drive-Through video, the plaintiff was filmed ordering, purchasing, and retrieving food from a Tim Horton's drive-through window. In the Massey Auto Pro video, the investigator used his LawMate camera to covertly film Mr. Rolley shopping at an auto parts store.

The trial judge found that these two videos passed the *Iannarella* test, and were fair and accurate portrayals made under oath of Mr. Rolley engaging-in the drive-through process and shopping. The trial judge then analyzed if the probative value of admitting these two videos outweighed their prejudicial effect.

The Probative Value and Prejudicial Effect of Admitting the Non-Excerpt Videos

The trial judge prefaced his probative value vs. prejudicial effect analysis by stating that the excerpted videos cannot be saved by this provision because they failed the *Iannarella* test. He then clarified that the excerpted videos bear little probative value, regardless of his finding.

The defendant argued that the two remaining videos were probative for demonstrating that Mr. Rolley could crouch, reach, and stand for extended periods of time – activities that Mr. Rolley's occupational therapy expert described as "functionally limited" in a filed report.

Mr. Rolley contested their probative value on two fronts. First, he reasoned that the jury had already heard his wife testify about his post-collision physical capabilities and none of her testimony conflicted with these two videos or the prospective evidence of the occupational therapist. Second, he argued that no experts from either party have opined on whether these two particular videos are probative for demonstrating his cognitive or functional limitations.

The trial judge agreed with the plaintiffs and held that none of the videos would be admitted because nothing in them challenged, contradicted, or impugned the testimony of Mrs. Rolley or

¹⁰ *Rolley* at paras 29-30.

Wolfe, A. (2018). *Rolley v. MacDonell: Admitting Surveillance Excerpts vs. Continuous, Unedited Videos*.

the opinions outlined in the occupational therapy report. He concluded that the prejudicial effect of admitting the videos was far outweighed by their minimal, if any, probative value.¹¹

Takeaways and Practice Points

Counsel seeking to substantively admit surveillance evidence at trial should read this decision and reflect on the following issues before their motion is filed:

1. What is the substantive purpose of admitting the surveillance evidence?
2. How does the particular video achieve the substantive purpose?
3. Is the surveillance evidence a continuous video or an excerpt?
4. What is missing from the video? Do time gaps or breaks in recording exist? If so, can the investigator explain why the gaps exist?
5. Will the trier of fact need to make an inference in order to understand what the video is depicting?
6. Did the investigator objectively produce a quality product? Does their filming style leave you puzzled as to what is actually occurring in the video?

Practice points:

1. Plan ahead respecting the amount of time it takes to conduct a *voir dire* motion on surveillance evidence. At the end of his decision, the trial judge noted that a motion of this magnitude often takes 1.5 to 2 days of trial time and is something that parties should address at their pre-trial or case management conference.¹²
2. Instruct your experts to review the videos you want to substantively admit. An expert opinion on an otherwise admissible video will bolster its probative value at trial.
3. Plaintiff counsel – request the unedited video footage (if it exists) and prepare to cross examine the investigator during *voir dire*.
4. Defense counsel – talk to your investigation company and instruct your investigators to keep the camera running. Although this could add extra costs to the editing process, it beats not having any admissible surveillance evidence at all.

¹¹ *Rolley* at 66.

¹² *Rolley* at 70-73.