Has "Trial by Unsurpise" Gone too Far? The Case for Delayed Disclosure of Surveillance Videos

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I. INTRODUCTION

The ability to videotape has been in existence for over fifty years, and videotape has performed key evidentiary functions in a number of Ontario legal actions since the 1970s. In the United States, videotape has been used to record and present discoveries, to show jurors shots of crime scenes, to depict the injuries of plaintiffs in "Day in the Life" videos, and to expose exaggerating or dishonest plaintiffs through surveillance videos.[1]

Videotape has a powerful ability to influence audiences, jurors and even judges. Seventy-five percent of a person's sensory intake occurs through the eyes.[2] A U.S. study in the 1980s showed that when information is presented in visual formats to jurors, their retention rate was 100% more than other jurors who had only received the information orally.[3] In the same study, jurors who received information both orally and verbally retained 650% more than those who received only oral information.[4]

In personal injury actions, videotaped surveillance is often one of a defendant's only options if the defendant seeks to deny the extent of the injuries allegedly sustained by the plaintiff. While videotape has been used by both plaintiffs and defendants for a number of different reasons in Ontario and in other

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1 Karen Campbell, "Roll Tape—Admissibility of Videotape Evidence in the Courtroom" (1996) 26 Mem. L. Rev. 1445 at 1451-1452 [*Campbell*].

2 *Campbell, Supra* note 1 at 1448.

3 Windle Turley, "Effective Use of Demonstrative Evidence: Capturing Attention and Clarifying Issues" (Sept. 1987) Trial at 62.

4 *Ibid.* at 62.

jurisdictions, this paper shall focus on defendants' use of videotaped surveillance in personal injury actions, since this is where the issue most commonly arises in Ontario courtrooms. The issue is controversial for many reasons including privacy rights. This paper will focus on legal and strategic analysis viewed though the eyes of the defendant.

In *The Law of Evidence in Canada*, authors J. Sopinka, S. Lederman, and A. Bryant noted that videotape is in many ways a better eyewitness than a human being, since videotape does not "suffer from potential frailties of human observation, recollection and communication".[5] In *R v. Nikolovski*,[6] the Supreme Court of Canada held that videotape, even by itself without any corroborating evidence, is sufficient to allow the trier of fact to positively identify the accused as the person guilty of the crime. In his decision, Cory J. held:

> The video camera is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.[7]

The U.S. jurisprudence, which has encountered videotape to a greater extent than its Canadian counter part, has commented on some of the more negative aspects of videotape. In *Snead v. American Export-Isbrandtsen Lines*, one U.S. court observed:

> [t]he camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be speeded up or slowed down. The editing and splicing of films may change the chronology of events. An emergency situation may be made to appear commonplace. That which has occurred once, can be described as an example of an event which recurs frequently... Thus, that which purports to be a means to reach the truth may be distorted, misleading and false.[8]

With its crucial advantages, and potential for abuse, it is paramount that videotape be subjected to critical scrutiny and due process in the administration of justice. Where videotaped surveillance forms a critical piece of evidence in a personal injury trial, the principles of fairness and justice demand that it be admitted to the process. And yet for the reasons aforesaid by the U.S. courts, the other party must be given ample time to comment on issues of unfairness raised in the videotape. It is through this kind of rigour in the pre-trial and cross-

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5 John Sopinka, Sidney Lederman & Allan Bryant, *The Law of Evidence In Canada*, 2nd Ed. (Toronto: Butterworths, 1999) [*Sopinka*].

6 [1996] 111 C.C.C. (3d) 403 at 410-411 [*Nikolovski*].

7 *Ibid.* at 412.

8 59 F.R.D. 148 at 150.

examination process that courts have separated truth from untruth for hundreds of years.

With respect to disclosure of the contents of videotaped surveillance, the timing and extent of the disclosure is of critical importance. If a defendant possesses videotaped surveillance that indicates the untruth of a dishonest plaintiff's claims of injury, it is crucial that the plaintiff go through informational discovery without knowing that the defendant has evidence to the contrary. The plaintiff does not need to know the evidence of the defendant in order to be able to truthfully answer questions about the extent of her injuries. Giving the plaintiff the contradictory evidence in advance of informational discovery gives the plaintiff the opportunity to fit the dishonesty she is perpetrating on the defendant. Conversely, if a dishonest defendant has filmed the plaintiff in a selective and distorted manner, and is allowed to spring the videotape on the plaintiff in the middle of trial without any advance disclosure of the contents, this does not give the plaintiff an appropriate amount of time to address issues of unfairness. Therefore, it is of the utmost importance that the courts strike a balance between, on the one hand, the need to preserve the integrity of the informational discovery by denying opportunities to tailor evidence, and, on the other, the need to disclose the contents of potentially unfair surveillance videos before the trial to allow both parties to adequately prepare their submissions in respect of the video.

The principal argument of this paper is that the Ontario Court of Appeal decision in *Ceci v. Bonk*[9] failed to strike this balance. The decision has substantially disadvantaged defendants with respect to the timing and extent of their disclosure of the contents of surveillance videos, in a jurisprudential approach that has been rejected by courts. In a perfunctory and incomplete analysis, and in the absence of express statutory wording, the Court of Appeal rendered almost nugatory a litigation privilege which has been in existence for almost two hundred years. It has demanded that the contents of surveillance videos—all facts and evidence contained therein—be fully turned over to the opposite party before the opposite party undertakes informational discovery. This paper shall submit that the extreme interpretation of the "new" *Rules of Civil Procedure* adopted in 1985 will allow plaintiffs to tailor their evidence before informational discovery, since plaintiffs will know the full extent of the defendant's evidence well in advance of trial. It will also be contended that this interpretation will not lead to earlier settlement of cases and the end of trial by surprise, but will in fact merely change the rules of engagement, as defendants try to regain lost advantage. What the decision has done is create incentives for defendants to perform their disclosure obligations in less than good faith, and encourage defendants to delay their research and evidence-gathering until after the other

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9 (1992), 6 C.P.C. (3d) 304 [*Ceci*].

side has been discovered.[10] Lastly, this paper will briefly explore any potential holes in the jurisprudence that present opportunities for the Ontario courts to develop the common law in a manner which mitigates the damages of this poor decision by the Court of Appeal.

II. LITIGATION PRIVILEGE AND SURVEILLANCE VIDEOS

A party seeking to use surveillance videos in an action—usually a defendant hoping to cast doubt upon the credibility of a plaintiff's claims of injury—has a strategic interest in delaying disclosure of the contents of the videos for as long as possible.[11] In a personal injury action, for example, the longer that a defendant can delay disclosure of the contents of surveillance videos, the more opportunity there is for the plaintiff to make statements during discovery that appear to contradict the evidence contained in the surveillance videos. Thus, when such circumstances arise, the defendant produces the video and impeaches the testimony of the plaintiff, or forces him to an earlier and more agreeable settlement of his claim.

Historically, parties have protected this strategic advantage by invoking litigation privilege, and Canadian courts have recognized that surveillance materials are covered by this privilege with only a few controversial exceptions.[12] Until the early 1990s, parties could rely upon litigation privilege to delay—if not altogether foreclose—the disclosure of most of the contents of the surveillance videos to the other side, until it was advantageous to make a strategic strike by dis-

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[10] (1990), 74 O.R. (2d) 637 at 643 (Div. Ct.) [*Ottawa-Carlton*]

[11] Of course, the party would also have a strategic interest in refusing to disclose even the existence of the surveillance videos, but this option has been foreclosed by the *Rules of Civil Procedure* for reasons that shall be entertained at a later point in this paper.

[12] Brian Vail and Peter Gibson, "A Review of Recent and Important Legal Developments" (1998) 16 Can. J. Ins. L. 19 at 1. Such cases include *Peters v. Toews* (1993), 13 C.P.C. (3d) 177 (Man. Q.B.), which was over-ruled by the Court of Appeal in *Chmara v. Nguyen* (1992), 78 Man. R. (2d) 169 (Man. C.A.), and *Parker v. London Life Insurance Co.*, [1993] I.L.R. I-2911 (B.C.S.C.), and *Iannucci v. Heighton*, [1994] B.C.J. No. 1721 (B.C.S.C. Master). Although this issue is beyond the scope of this paper, Vail's dismissal of these cases at 3-4 is worth noting: "With respect, these decisions are contrary to the weight of authority and are unlikely to be followed. They ignore the established legal principle that even though an insurer's non-legal personnel make the decision as to whether or not to pay a claim, materials they collect to put before counsel to obtain legal advice to assist in making that decision are privileged solicitor-client communications, even without the possibility of litigation being involved". This issue is not salient for our purposes because the Ontario Court of Appeal has recognized that surveillance videos are covered by litigation privilege in both of the most recent cases in which privilege and surveillance videos were at issue: in *Ceci, Supra* note 9 and *General Accident Assurance Co. v. Chrusz* [1999] O.J. No. 3291. For our purposes, what is at issue is the scope of the litigation privilege itself, which has been severely curtailed under the Court of Appeal's interpretation of Rule 31.06.

closing dramatic contradictory evidence against sworn testimony. This was the heyday of "trial by ambush" methodology, but the policy direction of rules committees from across the continent began to shift in the mid-1980s. The newer direction favoured wider and more comprehensive disclosure obligations during discovery, in the hopes of facilitating access to more information earlier, in a more transparent environment, to encourage earlier settlement, or at the very least, to narrow the outstanding issues before trial.

In Ontario, changes to the *Rules of Civil Procedure* became effective in 1985, and these narrowed the scope of protection offered by litigation privilege. While the new rules enacted in Ontario very closely mirrored the statutory changes implemented in other jurisdictions throughout North America—some rule additions were identical in the case of Manitoba and Ontario for example—the courts have interpreted the rules very unevenly from jurisdiction to jurisdiction. The Manitoba and Ontario Courts of Appeal have treated identical rules in dramatically different fashion, with the result being that Ontario defendants are substantially disadvantaged as compared to their counterparts in Manitoba. However, before we can embark upon an explanation of these procedural changes, and the reasoning behind the very different bodies of case law that have emerged subsequent to the reforms, it is necessary to have a brief refresher on the principles that gave rise to privilege and the countervailing principles which have kept privilege in check.

A. The Origins of Privilege

The genesis of privilege came out of the recognition by the courts that there was a social and judicial interest in maintaining the confidentiality of solicitor-client communications, notwithstanding that the interest of justice requires access to all relevant and material evidence. It was believed that protecting the secrecy of solicitor-client communication would promote the integrity of the relationship and encourage parties before the courts to fully and aggressively pursue their legal interests. The justification of this principle was articulated by Lord Brougham in *Greenborough v. Gaskell*:

> The foundation of this rule is not difficult to discover... It is out of regard to the interests of justice, which cannot be upholden, and the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting the rights and obligations which form the subject of all judicial proceedings.[13]

The concept expanded over time based upon the principle that there was, external to the legal process, a societal interest in maintaining the sanctity and confidentiality of certain other relationships.[14] Statutory enactments were made

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[13] (1833), 1 My. & K. 98, 39 E.R. 618 (L.C.).

[14] *Sopinka, Supra* note 5 at 713.

to protect the confidentiality of spousal communications, and in some jurisdictions, other special relationships such as clergy-parishioner were protected by statute. The Province of Quebec enacted a statutory privilege to protect the confidentiality of doctor-patient communications in civil cases.[15]

The early expansion of privilege in the 1800s, and the litigation therein, reflected the courts' attempts to grapple with two conflicting principles: the need to adjudicate legal matters upon their merits and the need to promote the sanctity of valued relationships. This conflict was enunciated by the Honourable John Sopinka in the *Law of Evidence*:

> In any discussion about privileges, one must keep in mind the constant conflict between two countervailing policies. On the one hand, there is the policy which promotes the administration of justice requiring that all relevant probative evidence relating to the issues be before the court so that it can properly decide the issues on the merits. On the other hand, there may be a social interest in preserving and encouraging particular relationships that exist in the community at large, the viability of which are based upon confidential communications.[16]

Solicitor-client privilege continued to develop into the late 1800s, and expanded to include not only communications between the solicitor and the client themselves but also communications between the solicitor or client and third parties. However, the communication had to be made for the "solicitor's information for the purpose of pending or contemplated litigation".[17] The motivation for this privilege was steeped in the legal process rather than in acknowledgement of outside societal interests, and "litigation privilege" was thus aptly named with this conceptual distinction in mind. Having its moorings in the adversarial nature of the litigation process itself, this new privilege came to encompass not just the communication made during or in contemplation of litigation, but also the research, expert examination, and surveillance videos, made in preparation for litigation. This new privilege allowed solicitors and clients to prepare strategy and engage in tactics for litigation without fear that every bit of research, investigative result, or expert examination could be used against them by the other side. The import of this privilege was expounded in *Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co.*:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other

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[15] *Ibid.* at 713–714.

[16] *Ibid.* at 713.

[17] *Ibid.* at 745. *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644, at 649–650 (C.A.); *Southward Water Co. v. Quick* (1878) 3 Q.B.D. 315, at 321–323 (C.A.); *Re Strachan*, [1895] 1 Ch. 439, at 444-445 (C.A.).

> preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel..[18]

Litigation privilege is available for communications and materials made during or in contemplation of litigation, as long as they are made for the "dominant purpose" of litigation. In Ontario, there had been case law which had allowed the more easily attainable standard of "substantial purpose" to qualify for litigation privilege,[19] but the Ontario Court of Appeal clarified this inconsistency in *General Accident Assurance Co. v. Chrusz*,[20] and adopted the "dominant purpose" test.

Litigation privilege also appears to cover a broader array of items than traditional solicitor-client privilege, as elucidated by Jessel M.R. in the 1881 decision in *Wheeler v. Le Marchant*:

> The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence.[21]

While this appears very broad at first blush, the privilege is not absolute, as noted by Philp J.A of the Manitoba Court of Appeal in *Chmara v. Nguyen*:

> [Litigation privilege] will protect statements, reports, documents, and other information obtained by a lawyer for the dominant purpose of use in litigation from production before trial; and it may protect that information from disclosure on discovery; but it may not prevent that evidence from being tendered at trial.[22]

For the purposes of our later discussion on disclosure obligations related to surveillance videos in the State of New York, it is salient that there was no American equivalent of the Anglo-Canadian litigation privilege until the 1947 U.S. Supreme Court decision in *Hickman v. Taylor*.[23] In the decision, Murphy J.

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[18] *Supra* note 10.

[19] The "substantial purpose" test had its Ontario origins in the Court of Appeal decision in *Blackstone v. Mutual Life Insurance Co. of New York* (1944), O.R. 328 at 333 (C.A.) and was used in several lower court decisions in the 1980s and lastly in *Werner v. Warner Auto-Marine Inc.* (1990), 73 O.R. (2d) 59 (H.C.J.).

[20] [1999] O.J. No. 3291 at para. 31 (C.A.) [*Chrusz* C.A.].

[21] (1881), 17 Ch. D. 675 at 681 [*Wheeler*].

[22] [1993] M.J. No. 274 (C.A.) [*Chmara*].

[23] (1947), 67 S.Ct. 385, 329 U.S. 495 [*Hickman*].

outlined the scope of the "work-product" doctrine, and opined[24] that it protected "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible [things] —aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer'".[25] The Justice went on to outline, in forceful terms, what would happen if this privilege were not recognized:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in giving of legal advice and in the preparation of cases at trial. The effect on the legal profession would be demoralizing. And the interests of the clients and cause of justice would be poorly served..[26]

American "work-product" doctrine was a qualified privilege, however, because the party against whom the privilege was invoked would be able to overcome the privilege by a factual demonstration of "substantial need"[27] and "undue hardship".[28] A successful discharge of this burden in relation to privileged material would mean that the material was nonetheless discoverable.

In Ontario, the courts have consistently held that surveillance videos are "documents"[29] which fall under litigation privilege.[30] As with all "documents" falling under litigation privilege, surveillance videos were not available for full discovery by the other side, but could only be used at trial for the purpose of

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24 U.S. judges issue "opinions" not judgments.

25 *Hickman, Supra* note 23 at 510–11.

26 *Ibid.* at 510–511.

27 *Sopinka, Supra* note 5 at 747.

28 *DiMichel v. South Buffalo Railway Company* (1992), 80 N.Y. (2d) 184 (C.A.).

29 *Ontario, Court of Queen's Bench Rules*, r. 30.01(1)(a) [*Rules*]. The *Rules* will be discussed in greater detail in the next section.

30 *Spatafora v. Wiebe*, [1973] 1 O.R. 93 (H.C.J.) [*Spatafora*]; *Nolan v. Grant* (1986), 54 O.R. (2d) 702 (H.C.J.) [*Nolan*]; *Machado v. Berlet* (1986), 15 C.P.C. (2d) 207 (Ont. S.C.) [*Machado*];*Sacrey et al v. Burden* (1986) 10 C.P.C. (2d) 15 (Ont. Dist. Ct.) [*Sacrey*]; *Weisz v. Gist*, [1986] O.J. No. 2079 (Ont. Dist. Ct.) [*Weisz*]; *Murray v. Woodstock General Hospital Trust* (1988) 66 O.R. (2d) 129 (H.C.J.) [*Murray*]; *Ceci, Supra* note 5 (C.A.) [*Ceci*]; *Youssef v. Cross* (1991), 80 D.L.R. (4th) 314 (Ont. Gen. Div.) [*Youssef*]; *General Accident Assurance v. Chrusz*, [1997] O.J. No. 4655 (Gen. Div.) [*Chrusz Gen.*]; *Chrusz C.A., Supra* note 20; *Devji v. Longo Brothers Fruit Markets* (1999), 45 O.R. (3d) 82 (Ont. Gen. Div.) [*Devji*]; *Graham v. Feijo*, [2001] O.J. No. 3175 (Sup. Ct.) [*Graham*]; *Walker v. Woodstock*, [2001] O.J. No. 157 (Sup. Ct.) [*Walker*]; *Nikeas (Litigation Guardian of) v. Dominion of Canada General Insurance*, [2002] O.J. No. 5057 (Sup. Ct.) [*Nikeas*]; *Evans v. Jenkins*, [2003] O.J. No. 5796 (Sup. Ct.) [*Evans*]. The case of *Calogero v. Tersigni*, [1985] 49 O.R. (2d) 508 (H.C.J.) dealt with the separate issue of the enforceability of undertakings.[*Calogero*]

impeaching the testimony of a witness or with leave of the trial judge.[31] Under Ontario Rule 30.09, privileged surveillance videos could not be used as substantive evidence by a party to assert or deny one of the claims being made at trial,[32] but the distinction was not always easy to make.

Even after the "new rules" were implemented in Ontario in 1985, the courts continued to hold that surveillance videos made in contemplation of litigation were protected by privilege. What did change after the reforms—dramatically in the case of Ontario—was the scope of the protection offered by the privilege.

III. 1985 Changes to the Ontario Rules of Civil Procedure

A. Application of the Rules and Case Law Before 1985

Under the former *Rules* in Ontario, facts contained in privileged documents were required to be disclosed, but a party was never required to disclose evidence.[33] The documents themselves did not have to be disclosed or produced. In the case of videotaped surveillance, the pre-1985 case law was clear that the existence of videotaped surveillance had to be disclosed in the Affidavit of Documents and at discovery if a query about their existence was made.[34] The date and times of the observations had to be disclosed, and the conclusions drawn from those observations, but details of the observations and names of observers did not have to be disclosed, since these were evidence of facts to be proven at trial.[35] Obviously, the party relying upon the surveillance video would have an advantage in trying to shield as much detail as possible in the Affidavit of Documents and in discovery. The subtlety of the distinction between facts and evidence presented just such an opportunity, and was a source of much litigation prior to the changes to the *Rules*, as was noted by then-District Chief Justice of York District Borins in *Sacrey*.

By way of example, if a defendant in a personal injury action had conducted surveillance videotaping of a plaintiff in contemplation of litigation, the defendant would be required to assert, in her Affidavit of Documents, the fact that she had conducted taping and possessed the videotape. She would also be obligated to disclose the material facts obtained in the surveillance, for example, that the plaintiff walked to the plaza on October 3rd 1982 without the aid of a walker and without a neck brace and without any other assistance. In such a

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31 *Supra* note 29.

32 *Youssef, Supra* note 30.

33 *Sacrey, Supra* note 30.

34 *Ibid.*

35 *Ibid.*

situation, a dishonest plaintiff claiming to have been bed-ridden from September to December 1982 would be made very nervous by the above assertion. He might not know whether the claim was simply made up or whether the defendant had in fact made this observation. He would know from the Affidavit of Documents that there was a surveillance video, and that videotaping allegedly took place on the day in question; but he would not know for certain precisely what was contained in the video, nor would he have access to it unless the defendant used it for impeachment purposes at trial. Of course, all of these calculations assume that the defendant performed disclosure in good faith—in *Sacrey* the litigation was sparked when counsel for the defendant answered there may have been in response to questions about whether there had been surveillance videotaping. The plaintiff could not be confident about what was on the video until he had seen it. His strategic objective would be to obtain more particulars about the "facts" in order to shed greater light on the strength of the evidence, while the defendant would want to place as many details under the sanctuary of "evidence" as possible.

Before 1985, then, there were two basic *Rules of Civil Procedure* with which parties seeking to assert privilege for surveillance videos had to concern themselves with. The first was 30.01(1)(a):

> 30.01(1) In rules 30.02 to 30.11,
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> (a) "document" includes sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and data and information recorded or stored by means of any advice; and

Clearly, surveillance videos qualify under this rule. The second rule applied in relation to the aforementioned litigation privilege:

> 30.09 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 not later than ten days after the action is set down for 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.

In relation to surveillance videos—which, again, occur most frequently in the context of defendants challenging the credibility of a plaintiff's claims to injury—Rule 30.09 meant that the surveillance video itself could not be shown in the courtroom without leave except to impeach the testimony of a witness. Before 1985, this meant that the plaintiff would go through discovery—and parts of the trial process—without having seen the video and without knowing its substantive content or the names of the people involved.

The only grounds upon which a master or a judge could order production of the video for inspection were if the video was intended to be used as substantive evidence of a claim in issue at trial. In a personal injury context, this distinction is a fine one—particularly in the context of a jury trial. Again, under the *Rule*, the video could remain privileged and not be shown at trial until the plaintiff

had committed himself to statements which contradicted the videotape. In such a case, the defendant could then use the tape to impeach the witness by contradicting the veracity of his testimony.[36] That said, the video could not be shown to demonstrate that the plaintiff was in fact capable of doing what was shown in the video. That would be substantive evidence. Given that this distinction allowed the defendant to use privilege to demonstrate—in dramatic fashion on film—the plaintiff doing something he said he could not do as the key issue at trial—it is not surprising that many defendants were not fazed by the limited legal effect of merely "impeaching" the witness's testimony. Indeed, the following statement by Justice Ewaschuk in paragraph 9 of *Machado*[37] indicates that defendants were giving up very little in return for not using surveillance videos as substantive evidence:

> "Impeach" in the sense it is used in r. 30.09 means to call into question the veracity of evidence given by a witness by calling *evidence* to contradict, challenge or impugn the witness's prior testimony. In this case, the defendant obviously intends to use the films to impeach the plaintiff's testimony that he is physically incapacitated by reason of the defendant's negligence (my italics).[38]

There was a common law check against defendants who attempted to skirt their pre-1985 disclosure obligations. The 1893 House of Lords decision in *Browne v. Dunn*,[39] imported into Canada by the Supreme Court in *Peters v. Perras*[40] and also by the Ontario Court of Appeal in *United Cigar Stores v. Buller*,[41] imposed a duty upon the party seeking to impeach a witness's testimony or credibility to give the witness an opportunity to explain the evidence which the cross-examiner intended to use later to impeach. This duty was explained in *Machado*:

> ... a cross-examiner must expressly put to the witness the substance of evidence which is to be later tendered in an attempt to contradict the witness. Thus, a witness's testimony cannot later be impeached by contradictory evidence unless the contradictory evidence has been previously put to the witness in an express and particularized manner.[42]

In *Machado*, the defence had not even disclosed the existence of the films until after discovery. In the eyes of the court, the defence had also breached the

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[36] After this point, the plaintiff would be given an opportunity to explain the content of the video from his perspective.

[37] *Machado, Supra* note 30.

[38] *Ibid.*

[39] (1893), 6 R. 67 (H.L.) [*Browne*].

[40] (1909), 42 S.C.R. 244 [*Peters*].

[41] [1931] 66 O.L.R. 593 (C.A.) [*United Cigar Stores*].

[42] *Machado, Supra* note 30 at para. 12.

rule in *Browne*: they had questioned the plaintiff about the activities depicted in the surveillance film, "but only in a very generalized and superficial way. He (the defendant's lawyer) asked the plaintiff whether he could run, shovel snow, and scrape ice off windshields."[43] Notwithstanding the breach of the *Browne* "fairness" rule, the court allowed the defendant to show the surveillance videotape in court, subject to the right of the plaintiff to call reply evidence to explain the impeaching evidence and subject to the right to "adverse comment" to the jury by plaintiff's council and the judge. This breach was also "take[n] into consideration" in calculating costs on the motion involved.[44]

B. Key Rule Changes in 1985 With Respect to Surveillance Videotapes

Although the new *Rules* significantly expanded the scope of examination for discovery, this paper will cover only those which apply to privileged surveillance videos. The new Rule 31.06 expressly provided that during discovery no question could be objected to on the grounds that the information sought was evidence. In Ontario, the courts found that evidence must be obtained even from privileged documents—since the section required disclosure of "any matter in issue in the action":

> 31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,
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> (a) the information sought is evidence; [45]

Secondly, Rule 31.06(2) allowed for parties to obtain the names and addresses of persons "who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action", unless the court ordered otherwise.

IV. EFFECT OF THE RULE CHANGES UPON THE CASE LAW

A. The Starting Point of the Ontario Disconnect: The "Facts" Not "Evidence" Distinction Before 1985

The key to understanding the Ontario interpretation of these changes—an approach at odds with that taken in Manitoba, Prince Edward Island, Nova Sco-

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[43] *Ibid.* at para. 13.

[44] *Ibid.* at paras. 14–15.

[45] *Supra* note 29, r. 31.06

tia, and British Columbia is to examine the pre-1985 jurisprudence respecting the treatment of privileged documents during discovery.

The 1973 decision of Mr. Justice Holland in *Spatafora*[46] was the first to deal with discovery obligations in respect of privileged surveillance videos. In *Spatafora*, a plaintiff was seeking $180,000 in special and general damages for injuries sustained in a motor vehicle accident caused by the defendant. The defendant conceded that he had no personal knowledge of the extent of the injuries, but challenged the extent of the injuries in the Statement of Defence. It became clear during the discovery process that the defendant was conducting surveillance of the plaintiff and that he would probably be relying upon this surveillance at trial. The plaintiff maintained that it was entitled to the "facts" and not "evidence" in support of the defendant's position, and that preventing surprise at trial was the purpose of discovery. The defendant countered that any surveillance it had of the plaintiff's activities should not come as a surprise at trial since the video simply documented the plaintiff's own activities. Holland J. agreed with the plaintiff and held: "It is trite law that in an examination for discovery you are entitled to the facts upon which the opposing party relies, although not the evidence to support such facts". He ruled that the photographs and movies themselves did not have to be produced because they were privileged, but that the dates and the "conclusions arrived at as a result of the observations" had to be disclosed. Holland J. ruled that the "evidence in detail" and the names of the observers were to be excluded from disclosure.[47]

In *Spatafora*, Holland J. relied upon two Ontario decisions about scope of discovery and the obligations of the parties. The first was the 1966 decision of *Rubinoff v. Newton*.[48]

In *Rubinoff*, the court held that facts contained in privileged material had to be disclosed but not the evidence. Haines J. held that the moment at which a party relied upon information for the purpose of founding an action or defence, that party had to disclose the facts upon which that action or defence was relying, although not the evidence in support of the facts. The court acknowledged the difficulty in demarking the difference, but gave an example:

> In motor vehicle accident cases vast amounts of information are obtained by solicitors and insurance adjusters in the course of their investigation. From this information specific acts of negligence may be pleaded or the opposite party may conclude the plaintiff was not seriously injured or had recovered. The opposite party is entitled to know the facts upon which the acts of negligence or recovery are alleged but not the evidence to support it.[49]

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[46] *Spatafora, Supra* note 30.

[47] *Ibid.*

[48] (1967), 1 O.R. 402-405 [*Rubinoff*].

[49] *Rubinoff, Supra* note 48 at para. 4.

The second case relied upon in *Spatafora* was *Ohl et al. v. Cannito*.[50] In *Ohl*, Osler J. also relied upon *Rubinoff* and held that the defendant would be required to undertake to disclose facts—but not the evidence obtained in the future about the nature of the injuries sustained by the plaintiff.

By the time of the 1985 rule changes, the Ontario position in relation to the discovery of privileged surveillance materials was clear: the materials themselves were privileged and did not have to be produced; the names of the observers did not have to be disclosed; the fact that surveillance had been conducted and the existence of the materials themselves would have to be disclosed in the Affidavit of Documents; and the dates, and "facts" relied upon in support of the party's position had to be disclosed, but not the "evidence".

Outside the Province of Ontario, *Rubinoff* has only been followed once, by the Alberta Queen's Bench in 1986.[51] A year later, the same court expressly rejected *Rubinoff* in *Can-Air Services Ltd v. British Aviation Co.*:[52]

> ... I prefer the view that a question in the form: "on what facts do you rely to support such an allegation?" is improper. I have read the Ontario decision Rubinoff v. Newton, [1967] 1 O.R. 402 but do not agree with it. I prefer the view that a witness be asked specific questions which require a specific answer, rather than a question which requires a witness to exhaustively review all the possibilities in his mind and leave him in the position where if he has inadvertently missed one fact out of a large number of facts in support of a certain allegation, his credibility might be challenged if he subsequently remembers that additional fact and wants to give evidence of it.[53]

This paper does not purport any expertise on the "facts" versus "evidence" case law outside Ontario prior to the rule changes in the mid-1980s, but reasoning such as the above certainly indicates that the use of the word "evidence" in Rule 31.06(1)(a) would mean different things in different provinces.

B. The Ontario Case Law from 1985 to 1992

In the years immediately after the 1985 changes, two different interpretations of the scope of Rule 31.06(1) emerged. The first held that Rule 31.06(1) expanded the scope of discovery obligations to include more information than was previously available, but did not require that a "whole running account" of the contents of privileged documents be given because that would mean an emasculation of Rule 30.09. The second body of case law held that the old "fact" versus "evidence" distinction had been done away with by the use of the word "evidence" in Rule 31.06(1), and that now both had to be disclosed if they related

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[50] [1972] 2 O.R. 763-765 [*Ohl*].

[51] *Clif Den Holdings Ltd v. Automated Concrete Ltd.*, [1986] A.J. No. 43 [*Clif Den Holdings*].

[52] [1987] A.J. No. 1393 [*Can-Air Services*].

[53] *Ibid.* at para. 6.

to "any matter in issue in the action or to any matter made discoverable by subrules (2) to (4)".[54]

Calogero v. Tersigni[55] was rendered by the Ontario High Court of Justice 30 days after the new rule had been implemented. The case did not directly concern the issue of litigation privilege for surveillance materials already in existence. The plaintiff had brought a motion to compel the defendant to honour an undertaking the defendant had made to disclose any future observations made of the plaintiff. The discovery of the defendant had already taken place. In the middle of discovery of the plaintiff, the plaintiff amended the damages sought on the Statement of Claim from $50,000 to $800,000. During discovery, counsel for the plaintiff asked counsel for the defendant if any subsequent surveillance had taken place, and the defendant's counsel responded that surveillance had taken place but that no information would be forthcoming until discovery of the plaintiff was completed. The plaintiff then brought the motion to compel.

The court upheld the position of the defendant. Griffiths J. ruled that if the defendant were required to submit the results of the surveillance during the discovery of the plaintiff, this would prejudice the defendant and would allow the plaintiff to tailor his answers. The court noted: "There is no valid reason why the plaintiff should have the information concerning his activities as observed on the surveillance, before his examination for discovery. *Such information is obviously not necessary to enable the plaintiff to truthfully answer any questions posed.*" [Emphasis added]

Nolan v. Grant[56] was the first decision on privileged surveillance videos to recognize the issue of the new Rule 31.06(1). In a personal injury action, the defendant disclosed the fact that he had conducted surveillance of the plaintiff, and admitted the dates, the amount of time of the videotaping, and facts concerning the behaviour of the plaintiff. Specifically, it was disclosed that: the plaintiff was moving her neck and body, without apparent restriction, although she was not jogging or carrying anything in particular. The defendant had undertaken to provide similar information related to any future surveillance, but had "refused to give the whole running account of everything that was on

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[54] Subrule (2) allows for the discovery of the names and addresses of persons "who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action"—and this would certainly include the names and addresses of persons conducting surveillance videotaping. In Ontario, these names and addresses were privileged information prior to the introduction of this rule. Subrule (3) requires that expert reports be discovered unless the party conducting the report did so solely for the purpose of litigation and undertakes not to call the witness at trial. Subrule (4) allows for the discovery of insurance policies.

[55] *Calogero, Supra* note 30.

[56] *Nolan, Supra* note 30.

film".[57] The court held that any additional information was privileged and not required to be disclosed. Steele J. held that both Rule 30.09 and 31.06(1) must both be given meaning, and that "disclosure of every detail in the film would be to obtain indirectly what cannot be obtained directly".[58] The court found that to order the defendant to disclose any more of the privileged contents would be to emasculate the effect of Rule 30.09. The court held that Rule 31.06(1) required disclosure from persons of specific knowledge—not persons of general knowledge—and held that the defendant was not required to get information from persons from whom the plaintiff could equally get information from.[59]

In my view, one thing that was most striking about the decision was its sturdy defence of the litigation privilege Rule 30.09 in relation to the new incursion from Rule 31.06(1):

> It [Rule 31.06] was never intended to require of all the inquiries made by a party in preparation for trial to be disclosed. To interpret it in such a way would be to encourage one party not to inquire or to undertake any preparation for trial knowing that he could rely on the other party to do all the work.[60]

This statement echoed the fear raised in *Ottawa-Carlton* earlier in this paper:

> ...if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel. [61]

While I do not doubt that this will be part of the broad effect of the later Ontario Court of Appeal decision in *Ceci v. Bonk* to drain the substance of litigation privilege, I think that the findings of the U.S. Supreme Court in *Hickman* —the 1947 decision which created "work-product" privilege in the United States—have particular bearing upon the practices of those conducting surveillance of plaintiffs:

> Were such materials open to opposing counsel on mere demand... inefficiency, unfairness and sharp practices would inevitably develop in giving of legal advice and in the preparation of cases at trial.[62]

In an environment where the contents of privileged documents must be disclosed, the strategic advantage of delaying the videotaping of surveillance videos until well after discovery, and to the eve of trial, will be overwhelming—since it would be technically in compliance with the rules. The defendant would

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[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

[60] *Nolan, Supra* note 30 at final paragraph.

[61] *Ottawa-Carlton, Supra* note 10.

[62] *Hickman, Supra* note 23.

merely be obligated to continue to pass on any new information relevant to matters at issue in trial. Of course, this would regenerate the "surprise at trial" which it was the purpose of Rule 31.06 to prevent. Again, the words of the court earlier quoted in *Ottawa-Carlton* are of particular assistance in this regard:

> The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information.[63]

Notwithstanding this, District Chief Justice Borins, as he was in June 1986, decided in *Sacrey v. Berdan*[64] that Steele J. had erred in *Nolan* and found that the new Rules had eliminated the old distinction between facts and evidence, and that both facts and evidence were now discoverable. This is where *Rubinoff* hit home in the Ontario case law, and it was this branch of the case law that inspired the eventual Ontario Court of Appeal decision in *Ceci v. Bonk.*

In his decision, District Chief Justice Borins held that since the extent of a plaintiff's injuries were an issue at trial, and since the defendant's surveillance videos contained information in respect of this issue, the contents of the videos were now fully discoverable. Borins D.C.J. found that this would avoid trial by surprise and would assist plaintiff's counsel in adjusting expectations of the cost of the plaintiff's injuries and might help promote earlier settlement of the case.

In rendering his finding, Borins D.C.J. was of the view that Steele J. had misunderstood the difference between informational discovery under rule 31 and documentary discovery under rule 30:

> He [Steele J.] held that as the film was privileged, "to order the disclosure of every detail in the film would be to obtain indirectly what cannot be obtained directly." With deference, as indicated earlier, this is to confuse documentary discovery as provided by R. 30 with informational discovery as provided by R. 31.[65]

Borins cited Osbourne J's decision in *Niederle v. Frederick Transport*[66] in support of his finding that the issue of actual production of the film was a separate issue from disclosure of the film. With respect, however, it is clear that this issue – the separateness of physical production from content disclosure – was not beyond the grasp of Steele J. in his decision:

> The film itself cannot be ordered to be produced, nor is it asked that it be. This being so, to order the disclosure of every detail in the film would be to obtain indirectly what cannot be obtained directly. Rule 31.06 and rule 30.09 must both be given meaning. They deal with different matters and they must be balanced against each other. In the present case, [the defendant] has given all the information with respect to the surveil-

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63 *Ottawa-Carlton, Supra* note 10.

64 *Sacrey, Supra* note 30.

65 *Sacrey, Supra* note 30 at para. 18.

66 (1985), 50 C.P.C. 135 (Ont. H.C.) [*Niederle*]. Note: I have not canvassed this case because it did not determine the question of litigation privilege.

> lance that is required by rule 31.06. To order more would defeat the privilege contemplated by rule 30.09.[67]

In other words, Steele J. clearly understood the simple distinction between Rules 30 and 31, but was also able to understand that comprehensive disclosure of the contents of a privileged video would defeat the purpose of shielding the video under privilege. He understood that the intent of Rule 30 was obviously more than merely to allow a party to keep physical possession of a document (without having to copy it or allow it to be inspected before trial).

In *Weisz v. Gist*,[68] Salhany D.C.J. attempted to broker a compromise between the heightened discovery obligations of the new rule and the timing of the obligation to disclose the contents of privileged material. He imported the rule from *Calogero* and held that the defendant would be required to make complete disclosure of the contents of the surveillance video, but only after the plaintiff had finished examination for discovery. This decision avoided the renewal of hair-splitting over how much evidence or information was enough to give meaning to both rules—or whether the balancing act between rules applied as per *Nolan*—or whether there should be a wholesale gutting of one rule in favour of superficial compliance with the physical specifications of documentary privilege as per *Sacrey*.

Weisz allowed disclosure of the "whole running account", but only after the plaintiff had had to make statements without the benefit of knowing what the defendant had observed on tape. As pointed out in *Calogero*, "such information is obviously not necessary to enable the plaintiff to truthfully answer any questions posed."[69] The plaintiff would receive the disclosure before trial, and this would allow him to address any deficiencies or unfairness in the surveillance video. The plaintiff could always request leave to re-attend on discovery to address such issues if necessary, but the defendant would maintain the advantage of having had discovery statements made in the absence of information about what the plaintiff really knew. In the context of a case involving a witness statement, Justice Davison reasoned in *Faulkner v. Inglish and Barkhouse*:[70] "Previous statements and evidence under oath are often used to test credibility, and if a statement was produced and submitted to the other side prior to the trial, the effect of it would be to render impotent the cross-examination and impair the search for truth."[71] This view was echoed in *Blake v. Gill*:

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[67] *Nolan*, *Supra* note 30 at para. 4.

[68] *Weisz*, *Supra* note 30.

[69] *Calogera*, *Supra* note 30.

[70] (1989), 94 N.S.R. (2d) 411 (N.S.S.C.) [*Faulkner*].

[71] *Faulkner*, *Supra* note 70.

> ...ambush does at least have one virtue: the potential to expose lies (and the willingness to lie) by the use of evidence put to a witness for the frst time on cross-examination" such that "it sometimes may be, and in this case was, reasonable for counsel to withhold disclosure of a document in order to make better use of it for cross-examination pu rposes." [72]

Again, *Weisz* would have brokered a compro mise between the comprehensive disclosure obligations of *Sacrey*, and the need to give meaning to privilege as per *Nolan*, while addressing the fear of tailoring raised in *Calogero*. Under the *Weisz* model, a defendant could emerge with contradictory testimony in the face of a dishonest plaintiff, but an honest plaintiff could have enough time before trial to get ready to counter the deficiencies and unfairness raised in videotape taken out of context.

In *Murray v. Woodstock General Hospital Trust*,[73] the High Court of Justice rejected this compromise and accepted the reasoning of *Sacrey* which required disclosure of all privileged facts and evidence in light of Rule 31.06(1). The court rejected the position that *Sacrey* meant that litigation privilege was now "meaningless":

> The argument would have more force if all privileged documents contained only information relating to matters in issue in the action. If a document which contained information about a question directed *solely to the witness* were not privileged, the privilege left by rule 31.06(1) with respect to such information might be impaired and that is a reason for preserving some limited privilege for documents. (Emphasis added)[74]

Of course, the *Murray* position only holds where the credibility of the witness is not a matter at issue in the action. Thus, according to the logic in *Murray*, where any plaintiff makes any fraudulent claims against a defendant, there is simply no litigation privilege in respect of the defendant. This is because the matter at issue in the action is the credibility of the fraudulent claim—where the two are one in the same there is no litigation privilege. I submit that it is precisely in such situations that preparation for litigation needs to be protected. Otherwise, early disclosure of the contents of surveillance videos will merely allow fraudulent claimants more time to tailor and massage their evidence to fit the fraud they are perpetrating. Of course, as observed in *Ottawa-Carlton*, a defendant's only other strategy is to wait until well after disclosure until the eve of trial—and to go to further lengths to get unanticipated footage of the plaintiff—in order to be able to present a credible defence.

The Ontario Court of Appeal decision in *Ceci v. Bonk* put an end to the debate on two fronts. First, it embraced the formula adopted by Borins D.C.J. in

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[72] [1996] B.C.J. No. 2017 (B.C.S.C.) as reproduced in Brian Vail and Peter Gibson, "The law of privilege as applied to the claim adjustment process" (1998) 16 Can. J. Ins. L. 19 at 18.

[73] *Murray, Supra* note 30.

[74] *Murray, Supra* note 30 at para. 6.

Sacrey with respect to the extent of the discoverability of "facts" and "evidence". More comprehensively, it rejected the delayed disclosure compromise forwarded by the *Calogero-Weisz* line and adopted the test developed in *Parro v. Mullock*,[75] *Bradbury v. Traise*,[76] and *Gumieniak v. Tobin*.[77] *Parro* held that one could not delay or interfere with the disclosure of material during discovery unless there was a "real likelihood" that the plaintiff would tailor his evidence – "mere apprehension" was not enough.[78] Borins D.C.J. had applied the *Parro* test in *Bradbury*, and, a year later, Gibson D.C.J., who replaced Borins D.C.J in the judicial district of York, used the test in *Gumieniak*.

In *Ceci*, Carthy J.A. found that *Parro* established a "very strict standard for interrupting the normal discovery process".[79] In the second last paragraph of the judgment, Carthy J.A. justified the new Ontario standard of full disclosure of privileged documents unless there is a "real likelihood of tailoring" on the following grounds:

> In my view, the 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. In cases such as this, there will be very few litigants who successfully maintain a dishonest stance simply because they have been exposed to the other party's evidence in advance of giving answers. It is more likely that the process of discovery will make it difficult for a litigant to conceal untruth and that a plaintiff will back away voluntarily from claims that are exposed as invalid, limiting further expense in the litigation.[80]

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75 (1982), 35 O.R. (2d) 168 [*Parro*].

76 [1986] O.J. No. 2625 [*Bradbury*].

77 [1987] O.J. No. 2320 [*Gumieniak*].

78 As part of a stinging criticism of the decision, the Manitoba Court of Appeal in *Chmara*, *Supra* note 22, observed that the Ontario decision in *Ceci* mistakenly characterized the decision in *Parro* as: "...an order postponing the obligation to disclose particulars of surveillance reports should only be made if the evidence shows a real likelihood that the plaintiff will tailor evidence if disclosure is made." The Manitoba Court of Appeal correctly pointed out: "Parro, a decision pre-dating the 1984 amendments to the Ontario Rules of Civil Procedure, was concerned, not with surveillance reports, but rather with the production of a statement made by the plaintiff to an insurance adjuster 'presumably representing the defendant' shortly after an accident for which the defendant raised no claim of privilege". Both subsequent decisions used by the Ontario Court of Appeal in *Ceci*, however, which were *Bradbury* and *Gumieniak*, were rendered after the implementation of the new *Rules* and involved privileged surveillance videos.

79 It is important to point out the "normal discovery process" is that the party who serves first is the party who conducts examination for discovery first.

80 *Ceci*, *Supra* note 9.

C. Why the Ontario Court of Appeal Got it Wrong

i. Review of Aforesaid Deficiencies

Before confronting the hostility with which *Ceci v. Bonk* was received by courts outside of the province, it is important to summarize the deficiencies raised above. Quite simply, parties do not need to know all of the facts and evidence contained in surveillance videos in order to answer questions truthfully. Injuries and pain and suffering are not lessened by footage from surveillance tapes. The compromise principle of *Calogero* would have allowed plaintiffs to receive full disclosure of privileged surveillance tapes prior to trial, and this would have allowed them the option of re-attending on discovery or simply preparing in advance of trial to address issues of unfairness that may have been raised by the surveillance tapes. The advantage to defendants would have been to be able to elicit discovery testimony from the plaintiff without the plaintiff knowing what the defendant really knew about the nature of the injuries. The uncertainty about what the defendant could prove would have provided a check against fraudulent claims. That check has been removed by the Court of Appeal.

Trial by ambush has not been defeated; it has simply been forced under ground. Parties are not required to stop obtaining evidence or documents simply because the other side has already been discovered. Indeed, the courts have found that undertakings to continue to turn over related documents and evidence are enforceable. *Ceci* just ensures that such undertakings will not be made voluntarily, and increases the temptation to comply with such obligations in less than good faith. The justice system is still adversarial and defendants who have been disadvantaged will simply have to go to greater lengths to gain advantage and cover up their preparations in order to put their case in the strongest light. It is a hallmark of our justice system that cross examination is one of the best ways to distinguish the truth and expose dishonesty. *Ceci v. Bonk* means that the rules of engagement have changed; and, as such, it encourages defence council to utilize the sharp practices referred to by the U.S. Supreme Court.

ii. Serious Fact-Finding Inappropriate before Trial

By adopting the 'real likelihood of tailoring' test, the Court of Appeal has also created other problems. For one, on what basis will a determination of "real likelihood of tailoring" emerge? Secondly, is it appropriate for courts to be making such findings of fact before a trial has even occurred? Certainly, it will reduce the number of motions that Masters can hear, because "real likelihood of tailoring" is properly a question of fact – not law – and it is not appropriate for asters to make determinations of fact prior to trial. In my view, such a determination is a genuine issue for trial and should not be made during discovery.

iii. Nullification of Historical Privilege without Express Language to Do So

A year before the decision in *Ceci v. Bonk*, courts in Manitoba and Nova Scotia had already rejected the direction of the *Sacrey* body of case law in Ontario. In *Penney v. Manitoba Public Insurance Corp*,[81] the court acknowledged that nearly all of the Province's new rules were "an exact copy" of Ontario's and that "there was no question that these new rules have greatly broadened the before trial discovery process". The court held that surveillance videos were privileged and then wrestled with the conflict between Rules 30.09 and 31.06(1) (which are also identically numbered to the Ontario rules):

> I am not bound by the varying and conflicting opinions emanating from Ontario, and I choose to follow what appears to me to be the most logical and sensible approach and not to emasculate or ignore Rule 30.09. To say that one should wipe out, with one stroke of a pen, hundreds of years of the common law (and statutory) Rules and privileges without the express, and I repeat express intention found in the Rules, is not sound in my view.[82]

The later Manitoba Court of Appeal decision in *Chmara* agreed:

> One starts with the general proposition that the abrogation or alteration of a long-standing rule of privilege should be done in clear and unambiguous language. See: Sopinka, Lederman, Bryant, The Law of Evidence in Canada (Butterworths, 1992) at p. 672...[83] Whether or not such a substantive change to a long-standing rule of privilege would come within the power granted to the rules committee is an issue that has not been addressed on this appeal.[84]

The court in *Penney* concluded that the trite rule of statutory interpretation, requiring that the specific rule (30.09) take precedence over the general rule (31.06(1)), applied. The decision also used language virtually identical to that used by Steele J. in *Nolan*: "To allow such discovery would be to let a litigant obtain through the back door, what cannot be obtained through the front door..."[85] As in *Nolan*, it would not be correct to infer from this statement that the judge had "confused" documentary and informational discovery.

Finally, the court found that allowing discovery of evidence in privileged material would lead to "absurdities in discovery" such as reflected in the kinds of information requested by the plaintiff of the defendant in the case. For example, the plaintiff had attempted to compel the defendant to answer questions about whether the defendant knew of any of the following: any other injuries that might also be affecting the plaintiff, whether the plaintiff had engaged in mechanical work since the date of the accident, and whether the plaintiff had

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81 [1991] M.J. No. 172 (Q.B.) [*Penney*].

82 *Ibid.* at para. 13.

83 *Chmara, Supra* note 22 at para. 40.

84 *Ibid.* at the second last paragraph.

85 *Nolan, Supra* note 30.

engaged in other types of work since the accident. As Steele J. pointed out in *Nolan*, these are questions that the plaintiff ought to be able to answer himself. The court in *Penney* found that these types of "pure fishing activities" were another compelling reason to disallow full disclosure of privileged documents. [86]

In *Chmara*, the Manitoba Court of Appeal found that the fact that Rule 31.06(3) specifically provided for discovery of a privileged document—an expert's opinion—suggested that the Rules Committee had felt that 31.06(1) was inadequate on its own to trigger informational discovery of all privileged evidence and documents. Expert opinions solicited in contemplation of litigation are privileged, and so Rule 31.06(3) clearly applies to privileged documents. The court made a similar argument about Rule 34.10, but that rule relates only to the physical production of documents – from which privileged documents are obviously excluded—and even *Sacrey* and *Ceci* have not disturbed this express rule. What is at issue is the substance of 30.09 given the broader informational disclosure requirements of the new rules.

Still, the argument raised by *Chmara* with respect to the discoverability of expert opinions is a strong one—because why would the Rules Committee single out expert opinions if 31.06(1) mandated the discovery of all privileged evidence? A possible counter argument is that 31.06(3) also gives special protection to expert opinions that it does not give to "evidence" under 31.06(1)—it allows for non-disclosure of the information, names and addresses of the expert if the findings, opinions, and conclusions are prepared solely for the purpose of litigation and the party undertakes not to call the witness at trial. Was the expert opinions Rule 31.06(3) singled out to mandate increased disclosure obligations or special protection from disclosure or both—and what does this indicate about the discoverability of other privileged evidence? A further complication is that, while surveillance videos are "documents" under 30.01, so is "information recorded" such as an expert's report. Who is to say that the Rules Committee intended 31.06(1) to apply to surveillance videos? Rule 31.06(3) could equally apply. Who is to say that the camera person was not an injury expert conducting research? Granted, it would take an extremely disgruntled and creative Ontario justice to hold that surveillance videos were "expert opinions" and not discoverable under 31.06(1)—and it would be an open question as to whether the party relying on the video would be allowed to use the video at trial if the party undertook not to "call the expert as a witness".[87] Still, this ambiguity in the

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[86] *Penney, Supra* note 81.

[87] My strong suspicion is that it would not be allowed. However, if the defendant had disclosed the existence of the "expert opinion" in her Affidavit of Documents, and had undertaken not to "call the expert as a witness" at trial – but had passed on the video to the plaintiff's counsel just after discovery but before trial, it might be arguable. In any event, post-*Ceci*, this is probably the least of the "sharp practices" that can be expected in the future.

rules raises doubt that the Rules Committee intended to emasculate a two-hundred year old privilege to the extent found by the Ontario courts.

At the very least, *Chmara* gives credence to the view that *Ceci v. Bonk* did away with litigation privilege based upon a rather perfunctory and incomplete analysis of the inter-relationship between the rules:

> What is absent in the Ontario decisions is a convincing analysis of the disclosure, production and discovery rules leading irresistibly to the conclusion that there is a conflict between Rules 30.09 and 31.06(1) which can only be resolved by the determination that a long-recognized rule of privilege has been abrogated. In my view, that conclusion cannot survive such an analysis.[88]

In *McDermott v. Atlantic Mutual Life Assurance Co.*,[89] the Nova Scotia Supreme Court also rejected the Ontario view. It found that the disclosure of the factual content of a privileged surveillance video would be the same as requiring the whole of a privileged document to be divulged. It held that this was neither the purpose nor the intent of the *Rules*.

The British Columbia Supreme Court also rejected the weight of the authority in Ontario in *Daruwalla v. Shigeoka*,[90] and held that the defendant only had to disclose the fact of surveillance, including the type of surveillance, but not the facts disclosed by a descriptive process of what was filmed and observed. "In my view, the surveillance information, including the films, is not necessary to enable the plaintiff to answer truthfully questions put at his discovery. In this perspective, it seems to me the purpose of disclosure is more so than any other factor to enable him to adapt or tailor his evidence."[91]

The Prince Edward Island Supreme Court also refused to follow the *Ceci* approach, but noted that the New Brunswick Queen's Bench had gone even further than Ontario: it had found that surveillance documents were not even subject to privilege.[92] Notwithstanding this, the P.E.I. Supreme Court held in *Breau v. Naddy*[93] that surveillance documents were privileged and had to be given more protection than afforded by *Ceci* or the privilege would be rendered "illusory". In a balanced ruling, the court raised the concern that no disclosure until trial would raise some unfairness in having the plaintiff be confronted at trial with uninspected video surveillance, and decided upon the compromise brokered by the New York Court of Appeal in *DiMichel v. South Buffalo Railway*

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88 *Chmara, Supra* note 22 at para. 32.

89 [1989] N.S.J. No. 226 (S.C.) [*McDermott*].

90 [1992] B.C.J. No. 1209 (S.C.) [*Daruwalla*].

91 *Ibid* at second last paragraph.

92 The New Brunswick decision was: *Cormier et al v. LeBlanc* (1993) 135 N.B.R. (2d) 75 (Q.B.) [*Cormier*].

93 [1995] P.E.I.J. No. 108 (S.C.) [*Breau*].

Company.[94] The court allowed post-discovery production (going further than *Calogero* and *Weisz*, which allowed for post-discovery disclosure only) of the surveillance tapes "based on necessity". This concept of necessity appears to have been borrowed from the American doctrine of "substantial need or undue hardship" which qualifies U.S. "work-product" privilege and was applied in *DiMichel*.[95]

Before proceeding to a brief account of the decision of the New York Court of Appeal, it must be noted that *Ceci* has not been followed by any court outside of the Province of Ontario and has only been followed once[96] in Ontario itself in *General Accident Assurance v. Chrusz*.[97]

As stated above, the New York Court of Appeal in *DiMichel* allowed the plaintiff in a personal injury action to obtain post-discovery production of surveillance videotapes based on the "substantial need and undue hardship"[98] that would otherwise result if an uninspected video were sprung during the course of the trial.[99] It observed that:

> ...film and video tape are extremely manipulable media. Artful splicing and deceptive lighting are but two ways that an image can be skewed and perception altered... Thus, while an accurate surveillance film may indeed prove to be a bombshell, the possibility of inaccuracy, given the nature of the medium, is very real.[100] [S]killful editing or crafty camera work [can] give a false impression of the plaintiff's condition.[101]

In his opinion, Chief Justice Wachtler noted that changes to the rules of civil procedure had occurred requiring enhanced disclosure obligations in order to prevent the "subterfuge and surprise" formerly commonplace. [102] The New York Court of Appeal found, however, that the risk of tailoring evidence was real, and this is why it arrived at the aforementioned result.

Less than a year after *DiMichel*, the New York Legislature passed N.Y.C.P.L.R. section 3101(i), which reads:

> In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or

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94 *DiMichel, Supra* note 28.

95 *Ibid.*

96 According to <www.Quicklaw.ca> as of Monday April 4th, 2005.

97 *Chrusz, Supra* note 30.

98 *DiMichel, Supra* note 28.

99 New York has similar rules preventing the use of privileged materials except for impeaching the credibility of witnesses)

100 *DiMichel, Supra* note 28 at para. 10–11.

101 *Ibid.* at para. 1.

102 The new U.S. *Federal Rules of Civil Procedure* were enacted in 1993, but several local jurisdictions had passed their own versions of reforms earlier.

> memoranda thereof, involving a [party]. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use.[103]

In *Tai Tran et al v. New Rochelle Hospital Medical Centre et al*,[104] the New York Court of Appeal conceded that the express provision from the Legislature eliminated any privilege formerly attaching to surveillance videos. It also found that the court could no longer impose restrictions which would delay disclosure of such documents until after discovery. In the opinion, Rosenblatt J. acknowledged:

> We recognize, as have all of the Appellate Divisions, that requiring full disclosure of surveillance tapes before a plaintiff is deposed reintroduces the prospect of tailored testimony. Defendants complain of this danger, and indeed one commentator has characterized section 3101(i) as a "one-sidedly pro-plaintiff statute" that "seems to be an unabashed promotion of total disclosure of all surveillance materials..."... While we articulated our solution to the tailored-testimony problem in *DiMichel*, we are not now free to impose a timing requirement...[105]

This paper takes issue with the policy error of the New York Legislature for the reasons aforesaid, but observes that the fifty-year "work-product" qualified privilege was abrogated—with respect to surveillance videos in particular—only after express language was used to do so. I further observe that the New York Court of Appeal made no secret of its position on the issue but was bound by the will of the Legislature.

V. MITIGATING THE DAMAGES OF A BAD DECISION: IS THERE A WAY OUT?

As stated above, *Ceci v. Bonk* has removed a crucial external check against a plaintiff's ability to make fraudulent claims—a dishonest plaintiff can now receive a "whole running account"[106] of all of the defendant's privileged material and rest assured that he will not be confronted with the surprise of a video exposing his fraud. This is not to suggest that many plaintiffs are in fact dishonest, but it is not the role of the justice system to give the participants a free pass. Rather, the tradition of our justice system is to subject all parties to the harshest scrutiny that the other side can bring to bear, so that truth can be distinguished from fiction in an adversarial model. On its face, *Ceci v. Bonk* has neutered and denuded some of the fundamental tools of this adversarial model. These include: the ability to prepare for trial without conveying strategic information in

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[103] *DiMichel, Supra* note 28

[104] (2003) 99 N.Y. (2d) 383 (C.A.) [*Tai Tran*].

[105] *Ibid.* at 389.

[106] *Ceci, Supra* note 9.

advance, and the ability to subject the other side to fresh evidence, unrehearsed, in rigorous cross-examination. It may be costly and time-consuming, but it is the system we have used for hundreds of years to get at the truth between disputants.

In the absence of clear and express language, *Ceci v. Bonk* has reduced a centuries-old privilege—a principal feature of our adversarial system—with vague assurances that its removal will not compromise the good faith of legal parties. It seems as though trust and benevolence have replaced reason and scrutiny in the search for truth between conflicting positions. As pointed out in decision after decision, a party does not need full disclosure of the contents of surveillance videos to be able to answer questions truthfully. A plaintiff claiming hundreds of thousands of dollars in compensation for personal injuries does not need to ask the defendant what she knows about the nature of his injuries. Is it any wonder that the hardest-hitting criticism of *Ceci v. Bonk* came from *Chmara v. Nguyen*, wherein the Manitoba Court of Appeal adjudicated on a matter in which a plaintiff was claiming over $700,000 in personal injuries allegedly sustained during an automobile accident in which the plaintiff's vehicle had incurred only $132.47 in damages?

It is inevitable that sharp practices will develop as defendants attempt to restore balance to the process. There is no prohibition in the rules against continuing to seek evidence after the other party has been discovered. Defendants may go to increasing lengths to avoid having service performed upon them first, and will go that extra mile to get last minute surveillance footage on the eve of trial with vague undertakings to pass on all relevant facts and information in a timely way. As suggested above, look for increasingly clever arguments about expert injury specialists conducting expert surveillance. There is nothing in the rules to suggest that Rule 31.06(1) has to apply to surveillance videos instead of the expert opinion Rule 31.06(3). What if a surveillance video were shot by an expert injury specialist working for a defendant who undertook not to "call the expert as a witness to trial"? Such a defendant could mention the existence of the "expert opinion" in the Affidavit of Documents, but relying upon Rule 31.06(3), would not have to disclose the expert's information, name or address to the plaintiff. The defendant, claiming privilege until during trial, could then spring the video to impeach the witness at trial. To the best of my knowledge it has not been done before, but on the facts, it is arguable. Again, the rules of engagement have changed, but trial by ambush has simply gone underground.

One small positive note from *Ceci v. Bonk* is that it has not closed the door on delayed disclosure completely; but it has raised the bar to the 'very strict standard' of 'real likelihood of tailoring'. This writer has only been able to discover one such case in which this standard has been exceeded. The case was *General Accident Assurance v. Chrusz*,[107] and although it advanced from the

[107] *Chrusz, Supra* note 30.

General Division to the Divisional Court and then to the Court of Appeal, the Court of Appeal decision did not deal with the "real likelihood of tailoring" and so it appears that this aspect of the General Division ruling may have survived.

Chrusz deals with an insurance company that had begun paying out benefits to a motel company which had sustained serious property damage caused by fire. One of the employees of the business observed a number of suspicious activities being committed by one of the business principals and other employees that appeared to indicate that the fire may have been deliberately set. There were also other allegations of fraud. The employee had made a taped statement on video on behalf of the insurer in which the employee (a non-party in the action) detailed the substance of his observations. The insurer then launched the action against the motel owner and several employees based upon detailed fraud allegations substantially supported by the employee's statement.[108]

The court held that, in the case of the motel owner, disclosure of the videotaped statement would be delayed until after discovery of the motel owner. The employees, meanwhile, would be substantially prejudiced by delayed disclosure of the statement, so they were granted immediate access to disclosure of the statement. The judge's reason for delaying disclosure in the case of the motel owner was that the motel owner was intimately aware of the allegations because of the amount of detail in the Statement of Claim. Though it was unclear in the Statement of Claim whether the allegations were directed at the motel owner alone, or in concert with the other defendant employees, the judge found that the defendant's personal knowledge of the allegations, and of the legal action more generally, gave him sufficient information to be aware of the type of allegations that would be coming from the employee statement. At paragraphs 10 and 11 of the judgment, Kurisko J. noted that the substance of the videotaped statement and the allegations in the Statement of Claim were such that the "real likelihood of tailoring" test was met:

> It is apparent that the Pilotte [non-party employee] Statement constitutes the basis for the detailed allegations of fraud set out in the Statement of Claim against Chrusz [motel owner] personally. Having read the Pilotte Transcript, I conclude the evidence therein concerning these allegations of fraud satisfies the stringent standard stated in *Ceci*.[109]

This decision is a breath of fresh air for the Ontario courts. They should seize upon it to build a more responsible common law test to fill in the void left by *Ceci v. Bonk*. The *General Accident Assurance* case allows the party relying upon the surveillance video to allege fraud or misrepresentation in the Statement of Claim, to forward to the court a surveillance tape with substantial evidence against the other party, and in so doing raise a 'real likelihood of tailor-

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[108] Plaintiffs have valid reasons for relying upon videotape as well.

[109] *Chrusz*, *Supra* note 30.

ing' in order to delay disclosure.[110] This would allow for a mitigation of the damages caused by *Ceci v. Bonk*, but it would not eliminate them altogether. It would still place upon the party relying on the surveillance video the burden of having to force pre-trial courts to make serious findings of fact before a trial is even under way. This is not good for the administration of justice. It would still mean a substantial emasculation of litigation privilege and all of the attendant consequences for sharp practices in the preparation for trial. But where the "real likelihood of tailoring" test is satisfied, it would force parties to go through discovery without knowing whether the truth will emerge to surprise them later.[111] Since disclosure of the videotape would be made after discovery, parties would still have the chance to prepare for any unfairness raised in the disclosure.

This paper submits that the case law is still uncluttered enough to allow the common law test to be adjusted thus: that wherever a judge or master receives videotaped surveillance that appears to indicate that the plaintiff has exaggerated his claim or has been dishonest, there is *prima facie* evidence of a real likelihood of tailoring, and therefore disclosure of privileged documents must be delayed until following discovery. Although this would not undo all of the damage caused by *Ceci v. Bonk*, it would be a great start.

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[110] *General Assurance*, *Supra* note 12.

[111] The fact-finding in *Chrusz* was more than reasonable. Please see *Chrusz*, *Supra* note 30.