CITATION: Rumney v. Nelson, 2021 ONSC 5632
COURT FILE NO.: CV-18-0006-00TI(Orangeville)
DATE: 2021 08 19

ONTARIO

-

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JESSICA RUMNEY	)	Robert H. Littlejohn, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
BRYCE CAREY NELSON and SUPER PAVING & CONSTRUCTION LTD.	))))))))	William J. Jesseau, for the Defendants

Defendants

HEARD: May 21, 2021

REASONS FOR JUDGMENT

Fowler Byrne J.

I. Relief Sought

[1] The Plaintiff, Jessica Rumney ("Rumney") seeks the following:

a) An order excluding certain surveillance evidence obtained by the Defendants;

b) An order striking the Jury Notice; and

c) An order that the jurors be advised of the statutory deductible and that an instruction to the jury be given in this regard.

[2] The Defendants oppose all the relief sought.

II. Background

[3] This action arises from a motor vehicle accident that took place on September 13, 2012, when Rumney's vehicle was struck from behind by a vehicle owned by the Defendant, Super Paving & Construction Ltd. ("Super Paving"), and driven by the Defendant, Bryce Carey Nelson ("Nelson").

[4] This matter is scheduled to be tried before a judge and jury on October 4, 2021 and is expected to last 4 weeks. The Plaintiff also sought leave to bring this motion following the matter being set down for trial. The Defendants do not oppose leave being granted.

III. Issues

[5] The Court has been asked to determine the following issues:

a) Should certain surveillance be excluded as evidence in the trial of this matter because of the manner in which it was obtained?

b) Should the Jury Notice be struck? and,

c) Should the jury be advised of the statutory deductible and an instruction given in that regard?

IV. Analysis

A. Surveillance

[6] Rumney seeks an order that the Defendants not be permitted to rely on or reference ten (10) specific video surveillance clips taken of her during the summer of 2018.

[7] Rumney maintains that the surveillance was taken illegally in two ways. First, she argues that the private investigator trespassed on private property when the surveillance was taken. Second, Rumney argues that the private investigator unlawfully invaded her privacy. In both ways, the unlawful nature of the acquisition of the surveillance is an abuse of process and would bring the administration of justice into disrepute by offending society's general sense of decency.

[8] The Defendants concede that the footage at issue was taken from the parking lot of the Good Shepherd Catholic School, the parking lot of the Jamiat-Ul-Ansar Islamic Centre ("Islamic Centre"), or from the parking lot of the Vespra Hills Golf Club.

[9] The following surveillance footage is at issue:

a) From June 1, 2018, commencing at approximately 6:34 a.m.: video footage 0:07 to 2:23 which Rumney alleges was taken from the parking lot of the Good Shepherd Catholic School, which is private property ("Clip 1");

b) From June 1, 2018, commencing at approximately 7:11 a.m.: video footage 2:35 to 2:49 which Rumney alleges was taken from the Islamic Centre, which is private property ("Clip 2");

c) From June 2, 2018 commencing at approximately 10:06 a.m.: video footage 4:10 to 4:22, which Rumney alleges was taken from the Islamic Centre, which is private property ("Clip 3");

d) From August 17, 2018, commencing at approximately 9:49 a.m.: video footage 0:07 to 2:23, which was the day before her wedding, and which Rumney alleges was taken from private property ("Clip 4");

e) From August 17, 2018, commencing at approximately 1:47 p.m.: video footage 4:55 to 28:11, which Rumney alleges was taken from private school property ("Clip 5");

f) From August 17, 2018, commencing at approximately 3:30 p.m.: video footage 28:12 to 34:46, which Rumney alleges was taken from the property of the Vespra Hills Golf Club, which is a private golf club ("Clip 6");

g) From August 17, 2018, commencing at approximately 3:18 p.m.: video footage 34:47 to 38:06, which Rumney alleges was taken from private school property ("Clip 7");

h) From August 18, 2018, commencing at approximately 3:55 p.m.: video footage 54:19 to 1:40:45, which Rumney states was taken on or around the day of her wedding ceremony and

her picture taking, and she alleges, was taken from property of the Vespra Hills Golf Club, which is a private golf club ("Clip 8");

i) From August 18, 2018, commencing at approximately 6:21 a.m.: video footage 1:40:50 to 1:41:05, which Rumney alleges was taken from private school property ("Clip 9"); and

j) From August 18, 2018, commencing at approximately 10:04 a.m.: video footage 1:41:06 to 2:25:30, which Rumney alleges was taken from property of the Vespra Hills Golf Club, which is a private golf club ("Clip 10"); truthful.

[10] The admissibility of surveillance evidence is governed by the *Rules of Civil Procedure* ("*Rules*") and the common law.

[11] With respect to the *Rules*, all surveillance must be listed under Schedule A or B of a party's Affidavit of Documents. If listed under Schedule A, then privilege is waived, and the surveillance can be used as evidence at trial. If listed in Schedule B, privilege is claimed, and it can only be used for impeachment purposes. When privilege is claimed, the Plaintiff can seek full particulars of that evidence: *Rules* 30.03, 30.09, 31.09, *Landolfi v. Fargione*, (2006) 2006 CanLII 9692 (ON CA), 79 O.R. (3d) 767 (Ont. C.A.) at paras. 73-75, *Arsenault-Armstrong v. Burke et al,* 2013 ONSC 4353, 116 O.R. (3d) 508 at paras. 4 and 11.

[12] The test for admissibility of surveillance evidence is set out in *Landolfi* at para. 48. First, the established test for the admissibility of evidence at trial rests on relevancy. Once relevance is established, the evidence is *prima facie* admissible subject to a discretion to exclude where probative value is outweighed by its prejudicial effect. As noted in *Landolfi* at para. 52, there is no principled basis for which video evidence attracts a different and more stringent test for admissibility than any other form of evidence.

[13] The probative value of surveillance evidence is clear when the surveillance depicts the Plaintiff engaging in activities which may have an impact on the issues before the Court.

[14] Prejudice in this context is related to the detrimental effect that the evidence may have on the fairness and the integrity of the trial proceedings, and not the effect that the evidence may have on the Plaintiff's case. For example, the evidence may not be worth receiving if its reliability is clearly outweighed by its potential to mislead or confuse the trier of fact. The evidence could also be excluded where its admission would involve an inordinate amount of time that is not commensurate with its value: *R. v. Collins*, 2001 CanLII 24124 (Ont. C.A.), at para 19; *R. v. Mohan*, 1994 CanLII 80 (SCC), 1994 SCC 80, [1994] 2 S.C.R. 9 at para. 22.

[15] The Court has alluded to prejudice that may arise due to the manner in which the evidence is obtained. In the case of *Ismail v. Flemming*, 2018 ONSC 6311 at para. 13, the Court found that surveillance of a subject at a cemetery with her Mother, in which the subject displayed obvious sadness and was engaged in prayer, may have potential prejudicial impact. Defence counsel decided not to rely on it, so no specific ruling was required.

[16] In the case of *Taylor v. Durkee*, 2017 ONSC 7358 at para. 21, the Court raised concerns about the private investigator exceeding speed limits on a public highway in order to obtain surveillance evidence. McKelvey J. also believed that the investigator's footage of the subject in her home, through a window, raised a significant issue with respect to her reasonable expectation of privacy in her home. Again, in this case, the Defendant withdrew their request to rely on this evidence, so a ruling was not necessary.

[17] As indicated, the Plaintiff relies on the unlawfulness of the surveillance, as a violation of the *Trespass to Property Act*, R.S.O. 1990, c.T.21 ("*TPA*"), and an invasion of the Plaintiff's privacy. It is argued that to accept evidence gathered in this manner would bring the system of justice into disrepute.

[18] A violation of the *TPA* is not a criminal offence. Violations of this act are prosecuted pursuant to the *Provincial Offences Act*, R.S.O 1990, c.P.33. An offence under the *TPA* is set out in s.2, which notes that a trespass occurs when a person enters onto a premises where entry is prohibited, or engages in a

prohibited activity on the property, without express permission of the occupier. It is also an offence to not leave when directed to do so by the occupier.

[19] In this case, there is no evidence that the school, place of worship, or golf course ever sought to have the private investigators charged under the *TPA*. The private investigator was never asked to leave. It is also clear that none of the properties were used for agricultural purposes or were enclosed, as contemplated by s.3(1) of the *TPA*.

[20] Notice under the *TPA* can be accomplished by means of a posted sign: s.5(1). I have reviewed the signs that were posted or believed to be posted around the time the private investigator conducted his surveillance. It is not entirely clear what signage was posted in 2018 when the subject surveillance was taken. Even if there was clear signage in 2018 that unauthorized persons were not permitted, I do not interpret parking in a school parking lot during non-school hours or parking at a place of worship when the facility was not in use, to be the type of unlawful conduct that would result in bringing the administration of justice into disrepute.

[21] With respect to the golf course, all golf courses, even private ones, anticipate visitors coming onto their property. People can attend to inquire about membership, purchase something in the pro shop or enquire about having their wedding at the facility. The "no trespassing" signs are clearly in reference to the greens and fairways. Accordingly, I would not consider parking in the parking lot of a golf course to be the type of unlawful conduct that would bring the administration of justice into disrepute.

[22] However, I do find that the surveillance of the Plaintiff's wedding day should be excluded. I do not find this because it was an invasion of her privacy, but because the potential prejudice of this footage would outweigh its probative value. The appearance of the Plaintiff on one important day, where her activities and the efforts exerted by her are clearly out of the ordinary, may unfairly prejudice the Plaintiff in that it could unfairly divert or misled the jury's attention. The investigators knew that this was an important day and knew the Plaintiff's activities would be beyond her normal day to day activities. It can only be assumed that the defence sought to take advantage of that situation.

B. Jury Notice

[23] There is a possibility that civil juries will not be permitted in the fall of 2021 due to the ongoing pandemic. Rumney seeks an order striking the Jury Notice in this matter. In particular, she seeks a conditional order striking the Jury Notice such that if the Court is not permitting civil jury trials in Orangeville when the matter is scheduled to commence, namely October 4, 2021, that the matter will proceed nonetheless, without a jury. If juries are being picked at that time, then the matter will proceed with a jury.

[24] The Court's authority to strike a Jury Notice is founded on s.108(3) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, on Rule 47.02 and in the Court's exercise of its inherent jurisdiction to control its own process: *Cowles v. Balac,* 2006 CanLII 34916 (ON CA), 83 O.R. (3d) 660 (Ont. C.A.) at para. 38, leave to appeal refused, [2006] S.C.C.A. No. 496.

[25] The substantive right to a civil jury trial is qualified because this right is subject to the power of the Court to order that the action proceed without a jury: *Louis v. Poitras*, 2021 ONCA 49, 456 D.L.R. (4th) 164 at para. 17. In *Cowles,* the Court of Appeal explained at paras. 38 and 39 that,

> It makes sense that neither party should have an unfettered right to determine the mode of trial. Rather, the court, which plays the role of impartial arbiter, should, when a disagreement arises, have the power to determine whether justice to the parties will be better served by trying a case with or without a jury.

[26] When deciding whether justice will be served by striking the Jury Notice, the court should consider (i) the resources available to the Court to outfit its courtrooms to allow for the conduct of jury trials with social distancing; (ii) the local impact of the pandemic, to assess the likely timing for the resumption of jury trials; (iii) the prejudice to the parties that would be caused by delay in adjudication, (iv) the age of the case, and (v) the history of adjournments: *Johnson v. Brielmayer*, 2021 ONSC 1245 at para. 32.

[27] Finally, this Court has broad jurisdiction under Rule 1.04 to fashion an order that responds to the specific circumstances of this matter and provides flexibility. This means that a Jury Notice does not have to be definitively struck, nor not.

[28] The motor vehicle accident at issue took place on September 13, 2012, almost nine years ago. Pleadings were closed by the fall of 2014 at which time the Jury Notice was served. Examinations for discovery of the Plaintiff took place in January 2015. On July 5, 2016, this matter was transferred from Toronto to Orangeville. A trial record was not filed with the court until January 29, 2018 and a pre-trial took place on March 11, 2019. In August 2019, the parties requested a fixed trial date. This request was granted in September 2019. The first available fixed trial date was two years later. The parties accepted this date and this trial is now fixed to commence on October 4, 2021, for 4 weeks. A second pre-trial did occur on October 1, 2020 where some trial management orders were made, including that two motions should proceed in advance of trial. These are the motions before me today.

[29] Although this action has been ongoing for seven years, October 4, 2021 is the first scheduled date for a trial. There have been no other adjournments.

[30] If juries are not available in October 2021, this matter may not be rescheduled in a timely manner. As stated in *Louis* at para. 22, "delay in obtaining a date for a civil jury trial can, by itself, constitute prejudice." In addition, when juries resume, priority will have to go to criminal jury cases in which *Jordan* deadlines are a factor or to more pressing family law matters: *Sauve v. Steel* 2021 ONSC 1557 at para. 26; *Roszczka v. Tiwari*, 2021 ONSC 2372 at para. 13.

[31] The last Notice to the Profession that addressed the resumption of juries in the province was released on May 12, 2021. This Notice indicated that jury selection and jury trials may resume in July, August or September, subject to the public health situation and the direction from the Regional Senior Justice. Criminal jury trials have recommenced in Brampton in July 2021, utilizing the Pearson Convention Centre for jury selection and a large courtroom at the courthouse to allow for social distancing.

[32] In Orangeville, there is one courtroom sufficiently large enough to allow for a jury to socially distance. This courtroom is also installed with plexiglass. In addition, Orangeville juries can utilize the Pearson Convention Centre for jury selection.

[33] While the matter has not been adjourned before, I am concerned about the evitable delay if a new fixed trial date needs to be secured. It took two years to get this fixed date. If it is adjourned due to the lack of a jury, it may be another two years before a new fixed date can be secured. Accordingly, this matter should proceed as scheduled. If a jury is not possible, the matter should proceed without a jury.

[34] Accordingly, the Jury Notice will be struck conditionally, so that if a jury cannot be chosen for the trial on October 4, 2021, the matter will proceed without a jury. If a jury is available, the Jury Notice will be automatically reinstated.

C. Statutory Deductible

[35] Rumney seeks an order that the judge at trial provide an instruction to the jury regarding the statutory deductible as set out in s.267.5(7) of the *Insurance Act,* R.S.O. 1990, c. I.8. In particular, the Plaintiff would like the jury to be advised of how the statutory deductible operates and that the jury should not consider the statutory deductible when determining the appropriate award for non-pecuniary damages. She argues that this information is readily available to anyone with a simple internet search and that proper clarification would be appropriate from the Court.

[36] In a motor vehicle personal injury action, it is the role of the jury to determine the amount of general damages that should be awarded to the Plaintiff to compensate them for their non-financial losses. The *Insurance Act* sets out the steps to be taken to determine the Plaintiff's entitlement to general damages.

[37] Section 267.5(7) of the *Insurance Act* states:

> 1. The court shall first determine the amount of damages for non-pecuniary loss for which the protected defendant would be liable without regard to this Part.
>
> 2. The determination under paragraph 1 shall be made in the same manner as a determination of the amount of damages for non-pecuniary loss in an action to which this section does not apply and, in particular, without regard to,
>
> i. the statutory accident benefits provided for under subsection 268 (1),

ii. the provisions of this section that protect protected defendants from liability for damages for pecuniary loss, and

iii. the provisions of paragraph 3.

[38] The "provisions of paragraph 3" allude to the statutory deductible that will reduce the amount determined under paragraph 1, and the circumstances in which it is not reduced, such as when the award exceeds an amount set out in the regulations.

[39] Rumney argues that the *Insurance Act* only requires that the assessment of general damages by the trier or fact be *without regard* to the statutory deduction, and not "without knowledge of". She argues that there is no reason why the jury should not be made aware of how their assessment of general damages is then used to determine the exact amount awarded to her. She argues that a juror may already have this knowledge or that it is readily available with a simple internet search.

[40] Both parties rely on the principles of statutory interpretation that require a modern or purposive approach. It also requires legislation to be read in its entire context, and in its grammatical and ordinary sense. Statutory interpretation should not lead to a result that is absurd, extremely unreasonable or inequitable, is illogical or incoherent, or if incompatible with other provisions or the object of the legislative enactment: *Rizzo & Rizzo Shoes Ltd., Re* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at paras. 21 and 27. Any words in legislation must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the action, and the intention of Parliament: *Bell ExpressVu Ltd. Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26.

[41] There has been much judicial consideration of this issue within the context of statutory accident benefits.

[42] As stated in *Girao v. Cunningham,* 2020 ONCA 260 at para. 90, a jury has no role in determining whether the award granted by the jury for loss of income or future health care costs should or should not be reduced in light of what accident benefits the Plaintiff has already received.

[43] In those circumstances though, when a jury may need to know what accident benefits a Plaintiff has received, the Court of Appeal for Ontario in *Girao* has stated that the general rules of evidence apply. Generally, the evidence must be relevant. Then, if relevant, it must be determined whether the probative value of the evidence outweighs it prejudicial value. The Court also set out various principles to assist a trial judge in determining in which context, and to what extent, evidence relating to accident benefits should be disclosed to the jury.

[44] The existence of a statutory deductible is not necessarily the same. It is not evidence, but rather a regulation. Every case is subject to the same regulation. No evidence at trial has any impact on the application of this statute.

[45] The role of the jury is to decide liability, apportion liability if applicable, and assess damages without regard to the statutory deductible or other amounts that may be deducted. The jury is not asked to determine how much the plaintiff is to receive. That is the role of the judge. The judge takes the assessment of damages and apportionment of liability and applies the law to them to determine the actual amount to be awarded to the Plaintiff.

[46] As was pointed out in *Girao,* the primary goal of Ontario's hybrid motor vehicle accident compensation system is to adequately compensate injured persons. While the focus of the decision in *Girao* was more to prevent double recovery (by an award of tort damages and accident benefits) the following comment at para. 131 is of assistance on the issue of the statutory deductible:

> ...As noted, the practice in civil jury trials is to include an instruction to the jury to make their award of damages on a gross basis with no deduction for any collateral benefits. The reconciliation of the receipt of benefits and tort damages is not expected to be controversial in most instances. The task is left to the trial judge in order to take it out of contention before the jury. *Perhaps that statutory allocation of responsibility to the judge reflects a recognition that the jury might otherwise be tempted to do some informal discounting of the damages award to take account of the statutory accident benefits the plaintiff has already received* (emphasis mine).

[47] The converse may also be true. If the jury was aware of the amount of the statutory deductible, or the amount of damages after which no statutory deductible is applied, the jury may be tempted to do some informal *grossing up* of the damages to take that into consideration.

[48] Accordingly, bearing in mind the structure of the motor vehicle compensation system, and the plain and contextual wording of s.267.5(7) of the *Insurance Act*, it would not be appropriate to include a jury instruction that explains the statutory deduction and what happens after they determine a proper quantum of damages. If their job is to determine that quantum without regard to later deductions, there is no need to instruct them on those deductions which are applied after their job is complete.

V. Conclusion

[49] For the foregoing reasons, I make the following orders:

a) On consent, leave is granted to the Plaintiff to bring this motion;

b) The Defendant may not rely on or refer to Clip 8, Clip 9 or Clip 10, as defined in paragraph 9 herein, at the trial of this action;

c) The Jury Notice filed by the Defendants shall be conditionally struck so that this trial will proceed as a non-jury trial, unless, when this case is called to trial, there is an ability to pick a civil jury and conduct a civil jury for this matter (whether in the Orangeville courthouse or in a separate facility utilized for Orangeville trials and jury selection). If a civil jury is available, the Jury Notice is automatically reinstated without the need for a further motion;

d) If a judge alone trial cannot be held for any reason on the fixed trial date, and jury trials are being conducted when the matter is recalled, then the defendant's Jury Notice is automatically reinstated, without the need for a further motion;

e) The Plaintiff's motion to include a jury instruction regarding the statutory deductible is dismissed; and

f) The parties are encouraged to resolve the issue of costs themselves. If they are unable to do so, the Plaintiff shall serve and file her written submissions, restricted to two pages, single sided and double-spaced, exclusive of costs outline and offers to settle, no later than 4:30 p.m. on September 3, 2021; the Defendants shall serve and file their responding submissions, with the same restrictions, no later than 4:30 p.m. on September 17, 2021; any reply submissions by the Plaintiff, with the same size restrictions, shall be served and filed no later than 4:30 p.m. on September 24, 2021.

Fowler Byrne J.

Released: August 19, 2021

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