# A Picture's Worth a Thousand Words: Investigating the Claimant

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When someone is injured and an insurance claim results, the challenge for the insurer is to separate genuine claims from those that are exaggerated, or even fake. The first question to be answered is whether there is any liability for the claim. The second involves an assessment of a fair quantum for the injuries and impairments. Both questions are answered by evaluating the evidence, but only the second question will be the focus of this article.

We all understand the basics – evidence is something that tends to prove the truth of a fact. Objective evidence rarely presents a problem. If an X-ray shows a broken bone, there is no argument that the person has suffered a fracture. Areas that cause the greatest difficulty are ones for which there is no objective metric. These are things for which the only evidence comes directly from the claimant. Pain is the most obvious example that springs to mind.

It is an established fact that some accident victims will go on to develop chronic pain - pain that persists after the expected healing time has passed. Unfortunately, there is still no objective method of determining when a person is experiencing pain, and no method of quantifying the degree of pain being experienced. Current medical research focuses on methods of imaging the brain and identifying pain responses. However, we still seem to be a long way from a reliable, readily available measuring tool. Another symptom which relies on self-report is tinnitus. This is the sensation of hearing a ringing or buzzing when there is no external source, and can range from mild to totally debilitating. Unfortunately tinnitus cannot be detected by any of the normally available tests, and has been reported to occur after trauma. (On a side note, in the U.S. in 2006, the V.A. paid $539 million to veterans with tinnitus.)

Even if the initial injury and its severity are capable of objective measurement, the subsequent degree of impairment is often also largely subjective. X-rays may show the broken bone has healed, but the claimant may report continuing pain, reduced range of movement, and a general inability to function as before.

Cognitive impairments are measured by sophisticated psychometric tests which are purported to be very reliable. However, there are critics of almost every test in current use. Plus there is enough knowledge in the public domain, despite attempts to keep the test questions confidential, that a determined individual could manipulate the results.

So for now we rely on what the claimant says. The fundamental question then becomes – is the claimant telling the truth. Once again – we have no direct way of determining this – no fool-proof lie detector is available to us. We therefore have to come at this indirectly. If we can obtain evidence that suggests the claimant is not telling the truth in some area, then we can draw the inference that they may not be telling the truth about their symptoms or impairments. Sometimes we will collect evidence that directly contradicts that of the claimant.

The classical tool in the defence arsenal is the surveillance video. Good surveillance contains clear, focused images of the claimant taken for continuous periods over blocks of consecutive days. If the footage shows the claimant engaged in questionable activity on any given day, there should be several days of surveillance after the event. For example, if the claimant is found playing golf on one day, it is important to demonstrate that this was not followed by three days of bed rest. Written reports of the surveillance should be confined to facts, and not opinions. A report which provides the observers own opinions of the lack of signs of pain, or the ease of walking will provide fertile ground for cross-examination at a trial.

Assuming that useful surveillance has been obtained, there is then the question of how best to use it. Assuming that the file is now at the stage where counsel have been retained on both sides, the defence must decide whether to give a copy of the video to the claimant's lawyer, or to claim privilege and save it for impeachment purposes at trial. (Impeachment refers to challenging something the claimant has said in direct testimony.) There are pros and cons to both approaches.

Firstly, no matter which route is chosen, the existence of the video must be disclosed, and a fair amount of detail about the contents must be revealed. These include the dates and times of the surveillance, and a statement of what activities are depicted. If defence counsel plans to show the video at the trial as substantive evidence, then the actual video must be given to the claimant's lawyer at least 90 days before the trial. If it will only be used for impeachment, no copy need be given.

Understanding the difference between substantive evidence and impeachment evidence is no trivial task, and one that confuses juries. An example may make it clear. Suppose the defence has video of the claimant playing golf. If the defence plans to use it substantively, they must give the video to the claimant's counsel more than 90 days before trial, and can then show the video no matter what the claimant says, or does not say about playing golf. However, suppose the defence continues to claim privilege over the video, and wants to use it only to impeach the claimant. If the claimant testifies in direct evidence about playing golf, then there can be no purpose to showing the video – it will not contradict the earlier evidence and the defence will not be permitted to show it.

It may then seem that the best practice is always to use the video as substantive evidence and hand over a copy within the time limits. There is a lot to be said for this approach. If the video demonstrates unequivocally that claimant is clearly less impaired than claimed, the case should settle before trial. However, it is the grey areas that cause all the problems. The video may show the claimant out and about in public, seemingly unimpaired, perhaps carrying something. A carefully prepared direct examination of the claimant at trial may elicit the testimony that this was the public face, not revealing the inner pain, or that this was taken in unusual circumstances, or was followed by days of pain etc. Many defence counsel are reluctant to give the claimant's counsel 90 days to prepare this rebuttal.

An interesting case to read about the admissibility of surveillance at trial is the 2006 Ontario Court of Appeal decision in *Landolfi v. Fargioni*[1]. The defendant had appealed the trial decision on three grounds, one of which was the judge's refusal to admit surveillance of the plaintiff. In his trial testimony, Mr. Landolfi said he had almost constant neck pain and restricted neck mobility. At a *voir*

*dire*, the judge was shown video of Mr. Landolfi working out in an exercise room, and being very active outside his home. He disallowed the video, finding it was grainy and hard to see Mr. Landolfi's facial expressions. He was also concerned because the videos were not continuous or complete. The Court of Appeal disagreed and set out the test for admissibility of a videotape. In addition to the usual requirements that all evidence must be reliable and necessary, videotapes must be accurate, a fair representation of the facts, and capable of being verified by a person under oath. Addressing the possibility that the jury would use the video as substantive evidence, not just for impeachment, the Court said this was always a risk, but required a proper limiting instruction to the jury. A new trial was ordered.

Shortly after the *Landolfi* decision was released, the issue was considered in *Lis v. Lombard Insurance Co*[2]. There Justice Bryant refused to admit surveillance taken over 7 days of the plaintiff loading groceries and picking up cases of water. The judge held that the plaintiff had never said she could not do these things, only that she suffered from constant pain. He held that the jury would be likely to misuse the tape as substantive evidence.

By contrast, Madam Justice Walters reached the opposite conclusion in *Howe v. Garcia*[3]. The plaintiff claimed daily pain in her neck and back with associated headaches. Applying the *Landolfi* test, video of the plaintiff shopping, driving and gardening was found to be inconsistent with this evidence and thus was admitted for impeachment

Anyone commissioning surveillance needs to be very careful how it is obtained. The case of *Cowles v. Balac*[4] is a sobering example. This is the famous African Lion Safari case. David Balac and Jennifer-Ann Cowles were mauled by Bengal tigers when driving through the African Lion Safari park. Somehow the windows came down, allowing the tigers access to the occupants of the car with devastating results. An investigator was sent to Hanrahan's Tavern, where Ms. Cowles was continuing to work as an exotic dancer, and he engaged her in conversation. The trial judge excluded the investigator's evidence on the grounds that defence counsel had violated the Rules of Professional Conduct that prevent a lawyer from contacting a party who is represented by counsel. The investigator was acting on behalf the lawyer, which is considered direct contact.

The trial decision was appealed on several grounds, one of which was the exclusion of the investigator's report. The appeal was denied on all grounds. All three judges of the Court of Appeal panel agreed that the trial judge erred in excluding the report. However, the majority held that the investigator's evidence would have made no difference to the outcome. Despite the ruling in this case, it still appears to be prudent practice to instruct investigators not to make direct contact with plaintiffs.

Courts permit surveillance videos on the basis that they are taken when the claimant is out in public, and has no expectation of privacy. What expectation of privacy exists for a claimant who posts images on Facebook or other websites? It seems obvious that if the pages are accessible to the general public, then the claimant has put them in the public domain and has no expectation of privacy. It is analogous to handing out copies on the street. However, if access to images is only achieved by making direct contact with the claimant, then that would seem not to be permissible, just as the defence cannot

approach the claimant directly in person. Facebook for example, requires you to ask to be "a friend" in order to view private pages.

However, in posting images at all, even if supposedly only to "friends", has the claimant relinquished the right to privacy? The fine print to which you agree when you become a user of Facebook gives Facebook the right to publicly display and distribute the content for any purpose. It will be interesting to see how courts will interpret this agreement for the purpose of access to "private" pages.

In the meantime, all adjusters and defence counsel should routinely search claimants' names on all the commonly used personal websites as soon as the file lands on their desks, and if images are found which contradict the claimant's story, should download all such material and store it in a safe (electronic) spot.

Some recent cases show the trend that is emerging.

On December 17, 2000, an 18 year old woman, Fotini Kourtesis, was rear-ended and alleged that she went on to develop chronic pain. During the five week jury trial, Fotini gave evidence that her social life was non-existent as a result of the accident. This was backed up by evidence from her brother John. Unfortunately for Fotini, she had posted pictures on Facebook that painted an entirely different picture, showing a vigorous and active social life right up to the time of trial. These pictures came to light during the trial and defence counsel sought their admission in a *voir dire*. The judge allowed them to be admitted into evidence, but gave Fotini the opportunity to be recalled to address them. The judge took note of the fact that Fotini had control over the photographs, and she placed them on the website to present herself to those who had access. Ruling that the plaintiff's claim for general damages did not cross the threshold, the judge also noted that when recalled, Fotini gave an animated and detailed account of the times and places of the events depicted, in contrast to other evidence of memory and concentration problems. Fotini was awarded only $25,000 for future financial loss, all other claims, including FLA, were dismissed.

The *Kourtesis* case[5] was promptly followed by a pre-trial motion in the case of *Murphy v. Perger*[6]. Defendant's counsel was aware that the plaintiff had a publicly accessible site called "The Jill Murphy Fan Club", but also knew there was a private site created by Jill's sister, but controlled by Jill. The defendant sought access to this site.

The plaintiff resisted, saying this was a fishing expedition, the photographs were taken by friends, thus the plaintiff could not control the content, the defendant was not prejudiced because she had access to the public site, and finally the request was unfair, being made four weeks before trial.

The defendant relied on the decision of Justice Browne in *Kourtesis*[5] (above) who held that the photographs were analogous to surveillance, over which the plaintiff would have no control, the photographs were highly relevant, and although they had minimal probative value, they related to a material issue, namely the assessment of general damages.

The judge ruled in favour of the defence, finding that any invasion of privacy was minimal, and was outweighed by the defendant's need to have the photographs in order to assess the case. The judge commented that the plaintiff clearly considered some photographs to be relevant, having served photographs of herself taken before the accident. The plaintiff was ordered to provide the defence with copies of the web pages. This case settled three days before the trial. While one can never know for

certain the impact of these very revealing pages on the settlement discussions, it is a fairly safe bet they did not help the plaintiff.

Facebook also seems to have played a role in a third decision in which a plaintiff failed to cross the threshold. In *Goodridge (Litigation Guardian of) v. King,* Stacey Goodridge claimed to be embarrassed by scars on her face and shoulder sustained in a car accident[7]. However, the judge noted she had posted pictures of herself on Facebook, and that she had acted as a bridesmaid, wearing an off-the-shoulder gown.

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1 *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767

2 *Lis v. Lombard Insurance Co.,* [2006[ O.J. No. 2578 (S.C.J.)

3 *Howe v. Garcia* (2008) CarswellOnt 5671 (S.C.J.)

4 *Cowles v. Balac*, [2006] O.J. No. 4177 (C.A.)

5 *Kourtesis v. Joris*, [2007] O.J. No. 2677 (S.C.J.)

6 *Murphy v. Perger*, (2007) Carswell Ont 9439 (S.C.J)

7 *Goodridge (Litigation Guardian of) v. King,* (2007) Carswell Ont 7637 (S.C.J.)