C.A. No. 115107

NOVA SCOTIA COURT OF APPEAL

Cite as: O'Brien v. Clark, 1995 NSCA 171
Hallett, Bateman and Flinn, JJ.A.

BETWEEN:

NORMA LOUISE O'BRIEN and BARBARA CLARK	)	
	)	R. Malcolm MacLeod
Appellants	)	J. Hunt for the Appellants
- and -	)	
ROBERT E. CLARK, PAULETTE CLARK, an infant by her guardian ad litem, Robert E. Clark	)	J. Brian Church M.E. Wortman for the Respondents
Respondents	)	Appeal Heard: September 20, 1995 Judgment Delivered: November 2, 1995

THE COURT: Appeal allowed and new trial ordered per reasons for judgment of Bateman, J.A.; Hallett and Flinn, JJ.A. concurring.

BATEMAN, J.A.:

The defendants appeal an award of damages to a plaintiff, injured in

a motor vehicle accident.

FACTS:

The respondent, Paulette Clark, suffered a whiplash type injury in a motor vehicle accident on July 22, 1988. At the time of the accident she was employed as a mail clerk with the Registry of Motor Vehicles.

The learned trial judge found that she had sustained injuries to the cervical and lumbar spine which prevented her from ever returning to work. He fixed damages for lost future income at $272,923, general damages at $45,000 and costs on scale 4 at $20,850.

GROUNDS OF APPEAL:

There are several grounds of appeal. Counsel agree, however, that the significant issue is the refusal by the trial judge to admit surveillance video tapes. The grounds of appeal in relation to this point are:

> 1. The Learned Trial Judge erred in failing to admit into evidence or consider videotaped surveillance of the Plaintiff that was inconsistent with the Plaintiff's assertion of total and permanent disability;
>
> 2. The Learned Trial Judge erred in his finding that the non-disclosure of the videotaped surveillance prior to trial was "unfair advocacy" and "trial by ambush" and this coloured the Learned Trial Judge's appreciation of the evidence in general;

SURVEILLANCE VIDEO EVIDENCE:

After the respondent, her husband and two of her treating physicians had completed their testimony counsel for the appellant advised the Court that he intended to introduce surveillance video tapes of the respondent. He proposed to call the investigators who had taken the videos and have them testify with the aid of the tapes. Respondent's counsel did not know of the video tapes until the night before the appellant sought to tender them.

Counsel for the respondent opposed the introduction of the tapes. The learned trial judge heard the evidence of the investigators and viewed the tapes, subject to later ruling on admissibility. After hearing the submissions of counsel, the learned trial judge rendered his decision. He said, in part:

> Mrs. Clark had given her direct evidence and had been cross-examined by defendant's counsel. *No mention whatsoever was made to her of the video tapes. No mention was made of the occasions portrayed in the tapes*. Rule 31.15(2) is clear. The preceding sub-section of the Rule does not apply to a document (including a video tape) "...used solely as a foundation for, or as part of a question in, cross- examination...." *In this trial the time had passed for the defendant to produce a video tape pursuant to this sub-section. The proper time for such a process was while the plaintiff was still on the stand and after setting the proper foundation*. The document or video tape should have been produced upon an undertaking to prove it, and shown to the plaintiff. See Sopinka, Lederman, Bryant, **The Law of Evidence in Canada**, p. 864, for the correct procedure to be followed. See also Sopinka & Lederman **The Law of Evidence in Civil Cases**, p. 513; **Machado v. Berlet** et al (1987), 32 D.L.R. (4th) 634, in which Ewaschuk, J. set forth two possible courses of action in dealing with surprise videos; and **Youssef v. Cross** (1991), 80 D.L.R. (4th) 314, where Granger, J. set forth his view of the procedure to be followed.
>
> *Additionally, the video tape ought to have been referred to in the process of discovery and inspection of documents. The video tape was obtained after the usual exchange of documents pursuant to Civil Procedure Rule 20.01. Compliance with Rule 20.08, however, remained necessary. (emphasis added)*

Certain of the **Civil Procedure Rules** are relevant to this issue:

Rule 1

Definitions

(g) "document" includes a sound recording, photograph, film, plan, chart, graph and a record of any kind;

RULE 20

DISCOVERY AND INSPECTION OF DOCUMENTS

List of documents: exchange

20.01. (1) Unless the court otherwise orders, a party to a proceeding shall, within ten days after the close of the pleadings between an opposing party and himself, or within seven days after the service of the originating notice where there are no pleadings, serve on the opposing party a list in Form 20.01A of the documents that are or have been in his possession, custody or control relating to every matter in question in the proceeding and file with the prothonotary the list without a copy of any document being attached thereto.

(2) A list of documents under paragraph (1) shall enumerate the documents in a convenient order with a short description of each document or, in the case of bundles of documents of the same nature, of each bundle.

(3) A claim that any document is privileged from production shall be made in the list of documents with a sufficient statement of the grounds of the privilege.

(4) Unless the court otherwise orders, a list of documents shall state, with respect to any document on the list that is in the possession, custody or control of the party serving the list and for which privilege from production is not claimed,

(a) that a true copy of the document is attached to the list,

(b) that the party receiving it may, if it is necessary inspect the document by immediately communicating with the party serving the list, and

(c) that the party serving the list will produce the document at the trial or hearing of the proceeding.

Newly discovered documents

20.08 When, at any time after a list of documents has been delivered under Rule 20,

> (a) it comes to the attention of the party delivering it that the list was inaccurate or incomplete;
>
> (b) any document relating to any matter in question in the proceeding comes into the party's possession, custody or control after the time the list was delivered,

the party shall file and serve a supplementary list with reference thereto.

20.09. (1) Where a party fails to make discovery of or produce for inspection any document under an order or Rule 20, he is liable to be punished for contempt, and if a plaintiff, to have the proceeding dismissed, or if a defendant, to have the defence struck out.

(2) Where it appears that there has been a failure on the party of a party or his solicitor or, in the case of the Crown or a body corporate, or an officer thereof, to make a reasonable effort to give full discovery of all documents that relate to any matter in a proceeding the court may impose on the party, solicitor, or officer such terms or penalty as it thinks just.

RULE 31

31.07 Unless an opposite party, at least ten days before the commencement of a trial, has been given an opportunity to inspect any plan, **photograph** or model and to agree to its admission without further proof, the plan, photograph, or model shall not be admissible in evidence without the approval of the court, which may be granted on such terms as are just.

31.15(1) *Unless the court orders, no document shall be admissible in evidence on behalf of a party unless,*

(a) reference to it appears in the pleadings, or in a list of documents filed and served under rule 20.01 by any party;

(b) it has been produced by any party or an officer, director or managing agent of a party that is a body corporate,

> partnership or association, on an examination for discovery;
>
> (c) it has been produced by a witness who is not, in the opinion of the court, under control of the party;
>
> (d) it is a plan, photograph, or model in respect of which the requirement of rule 31.07 has been satisfied.
>
> (2) *Paragraph (1) does not apply to a document that is used solely as a foundation for, or as part of a question in, cross-examination or re-examination.*
> (emphasis added)

Our Supreme Court has considered **Rule 31.15(2)** in a number of cases.

In **Smith v. Avis Transport** (1979), 132 N.S.R. (2d) 291 (S.C.T.D.) the defendant sought to introduce, during the defence case, video surveillance evidence not disclosed before trial. The learned trial judge expressed reservations about the admission of such evidence, and offered to adjourn the trial at the option of the plaintiffs. He said at p. 672:

> It appears that evidence of this kind was anticipated by the defendants, who hired a firm of private detectives, Evidence Research Limited, whose operatives staked out the plaintiff's residence and filmed the plaintiff with a video tape camera. Counsel for the plaintiff objected to the admission of the evidence of the detectives and to the admission of the video tapes on the ground that no notice had been given pursuant to Rule 31.08 of the Civil Procedure Rules. I allowed the video tapes to be shown after first giving counsel for the plaintiff an opportunity to view them in my absence and after assuring them that, at their request, I was prepared to adjourn the trial in order to give them full opportunity to prepare rebuttal evidence. Even with these safeguards I have reservations as to whether the tapes should have been admitted in evidence, especially since counsel for the defendants stated that the tapes were deliberately introduced in this manner to

> achieve surprise. Clearly the matter is discretionary under Rule 31.08 of the Civil Procedures Rules and it is my opinion that the ruling given by me in the circumstances of this case does not in any way erode the discretionary power to reject evidence thus presented in future cases.

In **Faulkner v. Inglis and Barkhouse** (1989), 94 N.S.R. (2d) 411, Davison, J. considered the introduction on cross-examination of a statement of the witness, not included in the List of Documents. He said at p. 413:

> On cross examination he was faced with a statement which he gave to an insurance adjuster wherein he stated, he thought the defendant's vehicle was "stopping" as many do to watch the model aircraft. When the statement was produced, counsel for the plaintiff took exception to the use of the statement because it was not included in the defendant's List of Documents, as required by Civil Procedure Rule 20. I ruled that the statement was a document which comes within the wording of Civil Procedure Rule 31.15(2).
> ...
>
> It is clear that the **Civil Procedure Rules** promote substantial disclosure of one party's case to the other party but the object is not disclosure per se. The object is to ensure the discovery of the truth and to permit justice to be done among the parties. One of the most important weapons available in the search for truth is cross-examination. 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 the truth. In my view, it was the intention of the drafters of the **Rules** to prohibit such a result when they set out the exception in **Civil Procedure Rule** 31.15(2).

In **McDermott v. Atlantic Mutual Life Insurance Co.** (1989), 91 N.S.R. (2d) 408 at p. 411 Glube, C.J. held:

> During cross-examination the defence may refer to a document or documents which have not complied with any of the provisions of Civil Procedure Rule 31.15(1). If there is a surveillance report prepared in the present case, under the provisions of subsection (2), the defence could use that document during cross-examination of the plaintiff without having it comply with subsection (1). One purpose of cross-examination is to test the credibility of the witness. Referring to a surveillance report on cross-examination is appropriate for that purpose.

Here, the learned trial judge determined not to admit the tapes because they were not being used in the manner contemplated by **Rule 31.15(2)** and the tapes had not been included on the List of Documents, as required by **Rule 20.01** and **20.08**.

(a) Non-Disclosure Under Rule 20:

Rule 20 requires that all relevant documents be included in the List of Documents.

Rule 20 is a rule of disclosure, however, not a rule of admissibility. Under **Rule 20.01(3)**, the maker of the list can claim privilege in relation to any document, provided the proper basis for such a claim exists. Privileged documents need not be produced. If issue is taken with the claim of privilege, the parties can resort to a Chambers judge for a ruling. Admissibility, on the other hand, is addressed in **Rule 31**, more particularly, in the context of this case, **Rules 31.15(1)(a)** and **(2)**.

Rule 20 requires the ongoing disclosure of the existence of all relevant documents. **Rule 31.15(2)**, however, clearly contemplates the limited use of a document not disclosed under **Rule 20**. To deny admission of the tapes based on counsel's failure to include them on the List of Documents, would render **Rule**

31.15(2) meaningless. Provided counsel uses the document as set out in **Rule 31.15(2)**, it is admissible to a limited extent. The learned trial judge thus based his decision to refuse counsel the use of the tapes, at least in part, upon an irrelevant consideration.

(b) Failure to Lay a Proper Foundation:

Counsel for the appellants submits that he was entitled to rely upon the wording of **Rule 31.15(2)**. He acknowledges that he, intentionally, did not divulge the existence of the surveillance tapes, to achieve surprise. This was a case where the credibility of the appellant was crucial to her success at trial. Her injuries belied objectively verifiable symptoms. Her physicians, of necessity, relied upon her own reports about her condition.

The appellant submits that he laid a proper foundation on cross-examination and, therefore, that the learned trial judge erred in refusing to admit the evidence. In the alternative, he submits that the trial judge should have permitted him to recall the respondent for cross-examination on the video tapes, or, that the respondent could have testified in rebuttal. Counsel for the appellants proposed both of these options at trial.

The appellant refers to the following excerpts from the cross-examination of the respondent:

> Q. I think you have an OBUS form with you?
> A. That's right.
> Q. When did you start using that?
> A. I've had it for a long time.
> THE COURT: What do you call it -OTIS form?
> MR. MACLEOD: OBUS. O B U S.
> THE COURT: O B U S
> MR. MACLEOD: Do I have that right?
> A. That's right.
> THE COURT: You see them in the drug stores.
> THE COURT: It's a trade name, My Lord.
> THE COURT: I see.
> MR. MACLEOD: You've had that for a long time?

A. That's right.
Q. Like years?
A. That's right.
Q. What do you have it for exactly? I know it's for your back but what does it do?
A. To try and make me a little but more comfortable.
Q. It supports your back does it?
A. Somewhat, yes.
Q. It's a pad or a cushion or whatever that goes between your back and your chair, is that it?
A. That's right.
Q. And the idea is for it to give more support for the back?
A. That's right.
Q. And thereby make you more comfortable.
A. Try to.
Q. Yes, try to. You have used that OBUS form pretty well all the time since you got it?
A. That's right.
Q. And if you've got to come to this court room or whatever you'll bring the form in with you and put it in your seat.
A. That's right.
Q. *What happens when you sit without that support? Is it...what does it do?*
A. *It makes it more uncomfortable.*
Q. I notice you're quite uncomfortable sitting now. You've been shifting around quite a bit during the course of the morning.
A. That's right.
Q. So it would be even worse without your OBUS support.
A. That's right.
Q. And I notice when you came up to the witness box you were limping, Mrs. Clark.
A. That's right.
Q. When did this limp start?
A. I would guess about a year ago.
Q. About a year ago?
A. Uh, huh.
Q. Did this start all of a sudden?
A. I had pain on and off, certain ways that I sat or laid and it would go down in my leg and then about a year ago, one night I was in bed and it got really, really bad and I was on my back for three weeks or so on the flat of my back and I had to go to see Doctor Colwell and Doctor Asker at that time and I think they might have tried different medications again.
Q. What is it that makes you limp, Mrs. Clark? What exactly?
A. Pain comes from my back and down into my leg, right out through the bottom of my foot.

Q. So it's pain from your back down your leg that makes you limp.
A. That's right.
Q. And that started about a year ago?
A. Yes, the limping, yes, but the pain...you know different times would come and go in my leg, but I wasn't limping until about a years ago.
Q. Now the limp started about what, five years after the accident, is that it?
A. That's right.
Q. And would you agree with me that it's likely that the limp really doesn't have much to do with the accident?
A. That's your opinion.
Q. Well, that's what I'm suggesting to you. I'm asking, do you agree with that suggestion?
A. That it's not from the accident? No, I don't agree with you.
Q. You don't agree with that. And is the limp very significant? Do you limp much?
A. That's right.
Q. I'm sorry?
A. I do.
Q. *You do, You don't limp all the time do you?*
A. *Yes, I do.*
Q. (question missed during tape change)
A. Do I really have to? I think you seen me come in.
THE COURT: I noticed it, Mr. MacLeod.
MR. MACLEOD: Okay, that's fine, that's fine. As long as we've got in on record.
THE COURT: Yes, oh, I notice it.
MR. MACLEOD: Okay, great.
Q. Now your work. Just before we...are you able to move your neck alright?
A. Not without pain.
Q. *What if I asked you to say look at the Judge? Would it hurt for you to turn your head and look 90 degrees to where the Judge is sitting?*
A. *I could turn my head, but I have pain.*
Q. *So it would hurt you to do that would it?*
A. *That's right.*
Q. Okay, I won't ask you to do that. *So it would hurt you...just to be sure...to sit there and turn you head 90 degrees to look at somebody. That would hurt your neck.*
A. *That's right*.

(emphasis added)

Counsel for the appellant says that the video tapes depict the respondent walking without a pronounced limp, sitting in bleachers for an

extended time, without any backrest, and turning her head, while in the bleachers, to engage in conversation. Thus, submits the appellant, in cross-examination of the respondent, he directed her to the relevant aspects of the tapes, while not referring to the tapes themselves. This, he says, is sufficient compliance with the **Rule**.

In **Machado v. Berlet** (1986), 57 O.R. (2d) 207 (H.C.) Ewaschuk, J. considered the use of privileged surveillance evidence at trial. He referred to **Rule 30.09** of the **Ontario Rules of Practice** which provides:

> 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.

While not identical to our **Rule 31.15(2**), it is similar. Ewaschuk said at p.209:

> I must decide whether the defendants intend to use the document at trial to "impeach" the testimony of the plaintiff. If so, the defendants come within the first exception permitted by rule 30.09 and get the benefit of both non-inspection prior to trial and use at trial without the opposition knowing the substantive content of the films. Here, the defendant did not disclose the existence of the films until after his discovery.
>
> "Impeach" in the sense it is used in rule 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' 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 defendants' negligence.

However, Mr. Mann, counsel for the plaintiff, contends that rule 30.09 is qualified by the general rules of evidence. I agree. Rule 30.09 is indeed qualified by both the collateral evidence rule and the rule in **Browne v. Dunn** (1893), 6 R. 67 (H.L.). Little need be said at this point about the collateral evidence rule by which the cross-examiner is bound by a witness' answer on a collateral issue. In the present case, the surveillance films deal with material matters which in no way can be characterized as merely collateral.

The rule in **Browne v. Dunn** imposes on an opposing party the duty of giving a witness an opportunity of explaining evidence which the cross-examiner intends to use later to impeach the witness' testimony or credibility. In other words, 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' 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. It is noteworthy that the Supreme Court of Canada has expressly adopted the rule in **Browne v. Dunn** in **Peters v. Perras et a**l. (1909), 42 S.C.R. 244, 13 Alta. L.R. 80, as has at least one other level of Canadian courts (e.g., **United Cigar Stores Ltd. v. Buller et a**l. (1931), 66 O.L.R.593, [1931] 2 D.L.R. 144 (C.A.)).

I am satisfied that defendants' counsel has breached, though not totally, the rule in **Browne v. Dunn**. Mr. Mollison did, indeed, put to the plaintiff the various activities depicted in the surveillance films, but in a very generalized and superficial way. He asked the plaintiff whether he could run, shovel snow, and scrape ice off windshields.

It is my view that the rule of fair advocacy enunciated in **Browne v. Dunn** requires more. For example, if opposing counsel has written materials contradicting the witness, counsel must put the written materials to the witness and must point out the contradiction to the witness' testimony. If the written materials have been authored by the witness, then s. 20 of the **Ontario Evidence Act**, R.S.O. 1980, c.

> 145, also applies. If opposing counsel has an impeaching photograph, the photograph must be put to the witness for comment and possible explanation. In the present case, *I am of the opinion that the films need not have been shown to the witness during his cross-examination (although that procedure would have been feasible in this case given the short length of the films). However, it was at least incumbent on opposing counsel to put to the witness the fact that films had been taken of the plaintiff and to have particularized the films' contents so as to afford the plaintiff an opportunity to explain his conduct as it related to his injuries.*
>
> Counsel for the plaintiff submits that the films cannot now be used to impeach the, plaintiff's testimony if the rule in **Browne v. Dunn** had been breached. Undoubtedly, there is precedent to that effect: **R. v. Jackson and Woods** (1974), 20 C.C.C. (2d) 113 (Ont.H.C.J.). *It seems to me, however, that the more prevalent practice is to permit the impeaching evidence to be tendered (**R. v. Dyck**, [1970] 2 C.C.C. 283, 70 W.W.R. 449, 8 C.R.N.S. 191(B.C.C.A.)), subject to the right of the plaintiff to call reply evidence* to explain the impeaching evidence and subject to the right of adverse comment to the jury by both plaintiff's counsel and the judge during address and charge. I will adopt that practice to this case. I note, however, that opposing counsel gains a further advantage by following this procedure. He gains the advantage of further cross-examination of the impeached witness.
>
> I will also take into consideration the breach of this basic rule of fair advocacy in dealing with costs of this motion. (emphasis added)

In **Browne v. Dunn** Lord Chancellor Herschel said at p.70 :

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention on the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether,

> unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity to make an explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

And Lord Halsbury said at p.76:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

The relevant **Ontario Rules of Practice** are as follows:

AFFIDAVIT OF DOCUMENTS
Party to Serve Affidavit

30.03(1) A party to an action shall, within ten days after the close of pleadings serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.

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(2) The affidavit shall list and describe, in separate schedules, all documents relating to any matter in issue in the action,

(a) that are in the party's possession, control

or power and that the party does not object to producing;
(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and
(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION.

Failure to Disclose or Produce Document

30.08(1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules or an order of the court,

(a) if the document is favourable to his or her case, the party may not use the document at the trial, except with leave of the trial judge; or

(b) if the document is not favourable to his or her case, the court may make such order as is just.

PRIVILEGED DOCUMENT NOT TO BE USED WITHOUT LEAVE

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.

EVIDENCE ADMISSIBLE ONLY WITH LEAVE

53.08 Where evidence is admissible only with leave of the trial judge under,

(a) subrule 30.08(1) (failure to disclose document);
(b) rule 30.09 (failure to abandon claim of privilege);
(c) rule 31.07 (refusal to disclose information on discovery);
(d) subrule 31.09(3) (failure to correct answers on discovery);
or
(e) subrule 53.03(2) (failure to serve expert's report),

> leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

Under the Ontario scheme the existence of all relevant documents, whether privileged or not, must be disclosed. Failure to do so precludes the use of the document at trial, save with leave of the trial judge. Ontario does not have a rule, such as our **Rule 31.15(2)**, which expressly contemplates non-disclosure yet limited use at trial. The Ontario **Rule** most like ours is **30.09**, set out above. Ontario **Rule 30.09** provides for use at trial, as of right, for the limited purpose of "... impeaching the testimony of a witness" but only in relation to documents for which a claim of privilege has been made and not waived. In other words, only if the existence of the document has been disclosed.

Our **Rule 31.15(2)**, on the other hand, does not vest discretion in a trial judge to exclude the tendered evidence, provided it is used within the narrow contemplation of the Rule and is otherwise admissible (i.e., subject to verification; accuracy; fairness of representation; relevance and probative value: **R. v. Creemer and Cormier,** [1968] 1 C.C.C. 14 (N.S.C.A.))

The learned trial judge determined that counsel, not having referred to the tapes on cross-examination, did not use the tapes in the manner contemplated by the **Rule**.

There is some conflicting authority as to whether the rule in **Browne v. Dunn**, has been universally adopted by Canadian courts. (See **R. v. Palmer** (1980), 50 C.C.C. (2d) 194 (S.C.C.); **R. v. Dyck,** [1970] 2 C.C.C. 283 (B.C.C.A.); **Peters v. Perras et a**l (1909), XLII S.C.C. 244; **United Cigar Stores Ltd. v. Buller and Hughes**, [1931] 2 D.L.R. 144 (Ont.S.C.A.D.), **Penney v. Manitoba Public Insurance Corp** (1992), 81 Man. R. (2d) 145 (Man.C.A.))

In **R. v. Palmer**, **supra**, McIntyre, J., writing for the Court endorsed the following words from McFarlane, J.A. in the Court of Appeal:

> The second ground of appeal was that the Trial Judge should have found that the evidence of Douglas Palmer raised at least a reasonable doubt of his guilt. With particular reference to the three occasions to which I have just referred, it was said that Palmer's evidence was not shaken in cross-examination and it is suggested he was not specifically questioned about one or two of them. Reference was made to **Browne v. Dunn** (1894) The Reports 67, and to **R. v. Hart** (1931), 23 Cr. App. R. 202. I respectfully agree with the observation of Lord Morris in the former case at p.70:
>
> > I therefore wish it to be understood that I would not concur in ruling that it was necessary in order to impeach a witness' credit, that you should take him through the story which he has told, giving him notice by questions that you impeach his credit.

It appears, then, that **Browne v. Dunn** does not, in all cases, impose an absolute rule. I am satisfied, however, that in these circumstances fair advocacy and a proper application of **Rule 31.15(2)**, require that the witness be directed to the video tapes, after a proper foundation has been laid. Indeed, the tapes cannot, otherwise, come before the Court.

The procedure outlined in **Machado**, which is similar to that required when cross-examining a witness on a prior inconsistent statement, is the process that should be followed. Specifically, while it is preferable that the relevant portions of the video tapes themselves be shown to the witness, at a minimum, the witness should be advised that the tapes exist, and directed, specifically, to the activities or events depicted which counsel suggests contradict the witness's testimony. Our **Civil Procedure Rules** promote full disclosure before trial. **Rule**

31.15(2) provides a limited exception to that overarching principle. It should be narrowly interpreted.

I agree that counsel for the appellant did not use the video tapes in the manner provided for in **Rule 31.15(2)**. He did not show the witness the tapes, nor refer to the incidents depicted therein with sufficient particularity. Nor, even had he done so, could he, under **Rule 31.15(2)**, tender the videos into evidence through the investigators. In **Murray v. Woodstock General Hospital Trust**, (Nov. 15, 1988, Action No. 8507/83, S.C.O.) Campbell, J. said:

> The material is tendered under Rule 30.09 for the purpose only of impeaching the testimony of the witness. The material tendered does not become in any sense original evidence, even to the extent that it contradicts the plaintiff, as I understand it, subject to further argument. It is used to impeach only and is in just the same position as, for instance, a purportedly previously inconsistent statement under s.10 of the **Canada Evidence Ac**t. That is, it is introduced to the extent it may impeach the testimony of the plaintiff but it does not itself become evidence on behalf of the defence.

I endorse those comments and agree that a document introduced under **Rule 31.15(2)**, can be used only on a limited basis.

The consequences of failing to follow the correct procedure must, however, be decided in the circumstances of each case (**R. v. Palmer**, **supra**).

Civil Procedure Rule 2.01 states that non-compliance with the **Rules**, unless the court otherwise orders, is to be treated as an irregularity. For example, there are many cases in which a plaintiff's counsel, who has inadvertently failed to prove a material fact before closing his case, has been permitted to reopen. (see, for example, **Veinot v. Maritime Life Assurance Co.** (1976), 22 N.S.R. (2d) 84 (N.S.S.C.T.D.); **Coyle v. Fredericks Insurance Ltd. et al** (1984), 64 N.S.R. (2d) 93 (N.S.S.C.T.D.)) Indeed, **Civil Procedure Rule 31.09**

expressly permits a court to do so. In my view, this situation is analogous. Counsel made a procedural error.

While a trial judge has discretion to exclude evidence and to determine the consequences of counsel's error, such discretion must be exercised judicially. In **R. v. Casey** (1988), 80 N.S.R. (2d) 247, at p.248, Macdonald J. A. referred to a statement of Lord Halsbury to explain what is meant by the judicial exercise of a discretionary power:

> In **Sharp v. Wakefield et al.**, [1891] A.C. 173, Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (p. 191):
>
> > An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case (1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

It is undisputed that matters concerning the management of a trial are properly within the purview of the trial court. Orders concerning these issues are not to be lightly overturned on appeal. In making such decisions a trial judge must balance a number of relevant and often competing factors. It is crucial to a just result, however, that the judge direct herself to those factors. In other words, the discretion must be exercised within a rational framework.

In **Ward v. James**, [1965] 1 All E.R. 563 at p.570, Lord Denning commented on an Appeal Court's review of a judge's discretion:

> This brings me to the question: in what circumstances will the Court of Appeal interfere with the discretion of the judge? At one time it was said that it would interfere only if he had gone wrong in principle; but since **Evans v. Bartlam** (19), that idea has been exploded. The true proposition was stated by Lord Wright in **Charles Osenton & Co. v. Johnston** (20). This court can, and will, interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him. A good example is **Charles Osenton & Co. v. Johnston** (21) itself, where Tucker, J., in his discretion ordered trial by an official referee, and the House of Lords reversed the order because he had not given due weight to the fact that the professional reputation of surveyors was at stake. Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him, as in **Hennell v. Ranaboldo** (22). It sometimes happens that the judge has given reasons which enable this court to know the considerations which have weighed with him; but even if he has given no reasons, the court may infer from the way he has decided, that the judge must have gone wrong in one respect or the other, and will thereupon reverse his decision; see **Grimshaw v. Dunbar** (23).

In **Grimshaw v. Dunbar**, [1953] 1 All E.R. 351 (H.L.), at p.353, Jenkins, L.R. said:

> ... did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right considerations? If so, then he decided on wrong principles, his error was a matter of law, and this court can interfere...
>
> ... In my view, although no reasons are given by a judge exercising, or refusing to exercise,

> a discretionary jurisdiction, it may nevertheless, be possible, on looking at the facts, to say that, if the judge has taken all the relevant circumstances into consideration and had excluded from consideration all irrelevant circumstances, he could not possibly have arrived at the conclusion to which he came, because on those facts that conclusion involves a palpable miscarriage of justice....
>
> ... What were the matters to be taken into consideration here? Far be it from me to attempt an exhaustive statement of the considerations which should influence a judge in exercising his discretion under Ord. 37 r.2; but I can, at all events, state a few considerations which are of the first importance...

In my view, before ruling on the matter, and consistent with the spirit of the **Rules**, the learned trial judge, acting judicially, should have considered factors such as: the degree to which the **Rule** had been breached, the reasons for the violation of the rule, the significance of the fact in issue sought to be contradicted by the impeaching evidence, and the prejudice to each party in allowing or disallowing the evidence, including whether the procedure would necessitate an adjournment of the trial. Only by doing so could he reach a just result. There is no indication on the record that he addressed himself to these relevant considerations. In **Machado**, **supra**, the judge permitted counsel for the appellant to recall the witness for cross-examination. The learned trial judge, while referring to that case, and despite the request of counsel, appears not to have considered this option.

An application of the factors that the learned trial judge should have considered leads, inevitably, to the conclusion that counsel for the appellants should have been permitted to correct his error: (i) counsel attempted compliance with the **Rule** by questioning the witness, albeit generally, about the

incidents depicted on the tape; (ii) there is little judicial consideration of this issue in Nova Scotia; (iii) it cannot be said that counsel intentionally flouted the Rules, indeed, his approach was consistent with the procedure reluctantly endorsed by Burchell, J. in **Smith v. Avis**, **supra**,; (iv) the evidence sought to be tendered was not collateral but went to the heart of the issue at trial - the extent of the respondent's disability; (v) any prejudice to the respondent could have been remedied by recalling her for limited cross-examination, or by allowing her to take the stand in rebuttal; (vi) an adjournment would not be necessary as there was, in any event, a lengthy adjournment between the motion to admit the tapes, and the judge rendering his decision on that issue. The plaintiff could have been provided with the tapes to review during that recess, then recalled.

This is not to suggest that counsel are routinely entitled to correct errors in the presentation of a case. On each such occasion the consequences depend upon the circumstances of the case. Trials must proceed expeditiously. All relevant factors must be weighed. Provided this is done, the exercise of discretion by the trial judge will not be disturbed.

Here, however, the learned trial judge addressed himself only to the issue of whether, within **Rule 31.15(2)**, counsel for the appellants could use the tapes in the manner intended. He did not consider counsel's request to rectify the error by recalling the witness. He focused on counsel's failure to include the tapes on the List of Documents, which for the reasons set out above, is irrelevant when a document is tendered under **Rule 31.15(2)**.

In **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143, Chipman, J.A., spoke of the Court's power to interfere with a discretionary order. At p.145:

> At the outset, it is proper to remind ourselves

> that this Court will not interfere with a discretionary order, especially an interlocutory one such as this unless wrong principles of law have been applied or a patent injustice would result ...
>
> ...Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. See **Charles Osenton and Company v. Johnston** (1941), 57 T.L.R. 515; **Finlay v. Minister of Finance of Canada et al**. (1990), 71 D.L.R. (4th) 422; and the decision of this court in **Attorney General of Canada v. Foundation Company of Canada Limited et al**. (S.C.A. No. 02272, as yet unreported). (emphasis added)

In **Kostopoulos v. Jesshope** (1985), 50 O.R. (2d) 54 (C.A.), the test to be applied on an appeal from a discretionary order was set out at p.69 by Robbins, J.A.:

> ... I think it manifest from the authorities that before an appellate court may properly intervene it must be shown that the discretion was exercised arbitrarily or capriciously or was based upon a wrong or inapplicable principle of law. The question to be addressed in this case is whether the trial judge committed an error of such a nature. If not, this Court is not entitled to interfere with his exercise of the discretionary power ...

A judge cannot arbitrarily exclude relevant, probative and otherwise

admissible evidence. In failing to weigh the relevant factors when considering counsel's mistake, I conclude that the learned trial judge committed a reversible error.

In **Tzagarakis v. Stevens** (1968), 2 N.S.R. 1965-69 674 the judge refused to allow questions to a witness on the grounds that the questions were irrelevant. On appeal, the Court found that the proposed questions of the investigating officer were relevant. The Court, in allowing the appeal said at p.682:

> .... it cannot be said that such evidence would have no effect on the jury.
>
> An opponent's witness may be contradicted on all points material to the issue; but he cannot be contradicted upon any point not material to the issue, with a view of showing that his evidence, generally, is not worthy of credit.": Roscoe's Evidence in Civil Actions, 20th ed., p.186.
>
> If admissible evidence has been rejected by the judge and substantial injustice thereby occasioned, the injured party is entitled to a new trial, provided he formally tendered such evidence to the judge at trial, and requested the latter to make a note of the point, or, if that request be refused, to enter and exception upon the record.": Phipson, 10th ed., p.854, para. 2051.
>
> In the case at bar I am unable to say that a substantial injustice was not occasioned to the appellant herein by the rejection of the evidence sought to be adduced, and, therefore am of the opinion that the appellant should succeed.....

The respondent submits that the tapes were of such slight probative value that their exclusion could not have affected the outcome of the trial. The respondent says that no injustice was done, here, because the learned trial

judge viewed the tapes and heard the evidence of the investigators. I cannot agree that the observations of the investigators were an adequate substitute for the tapes. The learned trial judge's purpose in viewing the tapes is unclear. While one might infer that, having reviewed the tapes and determined not to admit them, the learned trial judge concluded that they were lacking in probative value, this is not, unfortunately, addressed in his decision. Having refused to admit the tapes I must assume that he did not consider them in reaching his final decision. As in **Tzagarakis**, **supra**, I cannot say that the tapes would have no effect on the trier of fact.

Accordingly, I would allow the appeal and order a new trial.

The parties shall file written submissions on costs.

J.A.

Concurred in:

Hallett, J.A.

Flinn, J.A.

C.A. No. 115107

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

NORMA LOUISE O'BRIEN and BARBARA CLARK

Appellants

- and -

ROBERT E. CLARK, PAULETTE CLARK and COLIN CLARK, an infant by her guardian ad litem Robert E. Clark

Respondents

REASONS FOR JUDGMENT

BY:

BATEMAN, J.A.