

# How insurance firms try to scare claimants



**JEFF ENNIS**

*Community Editorial Board*

Peek-a-boo is a game we usually play with babies. However, insurance investigators who perform videotape surveillance on insurance claimants following an accident have never outgrown this game. The only difference is this adult form of peek-a-boo is not fun for all participants.

The general public believes the insurance industry uses videotape surveillance to help catch people committing insurance fraud.

If this is true, then the use of videotape surveillance in personal injury cases makes sense. After all, the general public absorbs the cost of insurance fraud.

But videotape surveillance is not always used this way. It is performed routinely on anyone who makes an insurance claim that involves personal injury. It is no longer a tool to investigate insurance fraud. It is now a tool of intimidation.

Surveillance is now used to make the injured party believe the insurance company will be able to convince a court he is lying about his injuries and his inability to do things such as work. The insurance company's hope is the claimant will back off of any lawsuit and will settle the matter in favour of the insurer.

I have seen film after film showing injured people walking, driving or carrying things. Investigators write statements like: "Mr. X was observed getting out of his car, moving in a smooth and fluid fashion."

The intimation is that Mr. X cannot possibly be experiencing any pain

because he moved so well. The only way Mr. X can prove he is feeling unwell is to show he has pain by limping or moaning. He might stop driving and doing any activities. In fact, Mr. X might choose to stay in his home in order to escape the intrusion of surveillance.

The result is that Mr. X's life becomes more restricted and his ability to manage his pain is severely compromised.

In fact, the use of surveillance as a tool of intimidation tends to undo much of the work done by chronic pain management programs. The negative effect of surveillance is likely to continue to plague people like Mr. X long after their cases are closed.

Fortunately, the courts recognize that surveillance in personal injury cases has limited value. There are multiple scientific problems with it.

For example, no one has tested the likelihood that two people viewing the same surveillance tape will come to the same conclusions.

In a study called *Who Can Catch a Liar?*, researchers found judges, federal polygraphers, robbery investigators, psychiatrists and regular folks were unable to catch liars.

The only people who could catch them were U.S. Secret Service Agents. Since Secret Service Agents are not usually hired to analyze videotapes in personal injury cases in Canada, the usefulness of these tapes to detect fraud is questionable at best.

Mr. Justice J. Burchell of the Nova Scotia Supreme Court said in his deci-

sion in *Smith v. Avis Transport of Canada Ltd.* and *Harvie*: "My general reaction is that evidence of this kind (surveillance) must be received with definitive reservations. It must be remembered that the tape was taken by persons who were paid to gather evidence tending to discredit the plaintiff. ...

"It should also be remembered that evidence of this kind is subject to a high degree of manipulation. The most obvious possibility is that a tape may be edited by the person who operates the camera."

Given that videotape surveillance can cause harm, it is important that its use as intimidation be reviewed by the courts. The courts should control its use just as they control wiretaps.

The insurance company should have to demonstrate that fraud is likely taking place before permission to use videotape surveillance is granted.

Until the courts reign in the investigative powers of insurance companies, it is up to injured individuals, their families, legal counsel and health care providers to encourage good coping and function regardless of surveillance and to trust in the ability of the courts to act justly.

After all, surveillance is not a game of peek-a-boo. It is a serious game that requires proper rules.

*Dr. Jeff Ennis of Dundas is an assistant professor of psychiatry with a subspecialty practice in the management of chronic pain.*