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A Lesson in the Development of the Law

Judith S. Kaye

Matthew J. Morris

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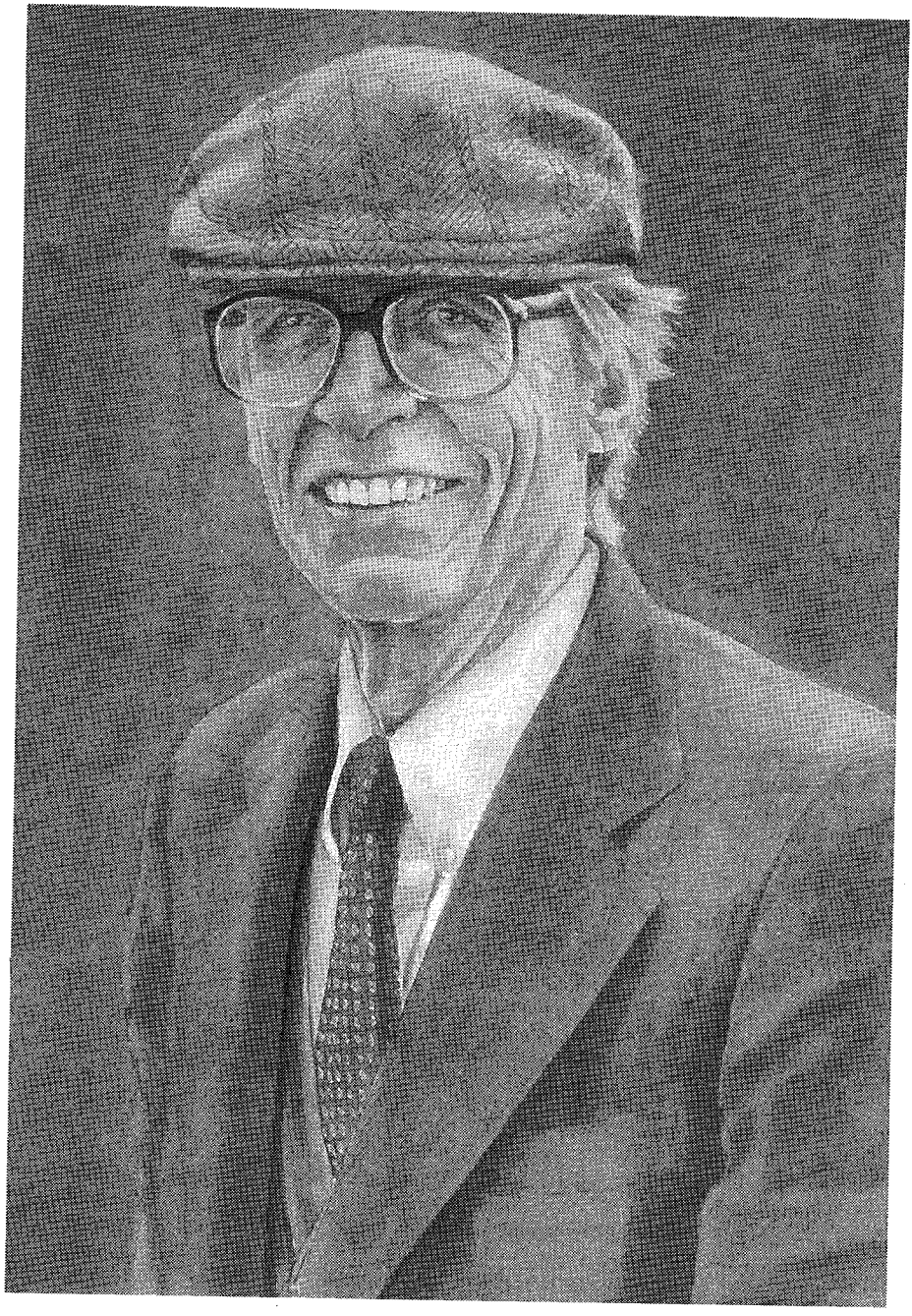

John Rawls
Portrait courtesy of Margaret Fox Rawls

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ESSAYS

A LESSON IN THE DEVELOPMENT OF THE LAW

Judith S. Kaye and Matthew J. Morris[*]

Secret video surveillance tapes of personal injury plaintiffs. For defendants, a potential treasure trove of "gotcha" trial evidence. For plaintiffs, crucial pretrial—preferably pre-*deposition*—discovery. For students of the law, a subject with far broader interest: the development of the law by judges and legislators. Indeed, in this day when the law has become increasingly "statutorified"—with endless books of statutes lining law office walls—this example taken from recent New York law reminds us that, even when the legislature has spoken, there is a very significant role left for common law courts.

Civil pretrial discovery in New York is governed by statute—Civil Practice Law and Rules ("CPLR") article 31, a detailed prescription of when, how and what disclosure is to be made. But until recently, article 31, first adopted in 1962, made no mention of video surveillance tapes. Some defendants therefore simply declined to produce them, claiming that they were work product—that is, material prepared for litigation. That changed dramatically after *DiMichel v. South Buffalo Railway Co.*,[1] decided by the Court of Appeals in 1992.

ROUND ONE IN THE COURTS

The statute's silence on the particular subject left the Court of Appeals with a relatively broad array of alternatives in its first encounter with the issue of discovery of secret surveillance videos. The legal analysis would surely start with CPLR 3101, which generally governs the scope of disclosure, but given the statute's silence on the subject, the more specific application of this statute would, like common law adjudication, require policy choices by the Court.

DiMichel actually consolidated two appeals. In the first,[2] plaintiff Anthony DiMichel, suing the railway that had employed him at the time of his alleged injury, sought disclosure of any surveillance videos

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[*] Judith S. Kaye is Chief Judge of the State of New York. Matthew J. Morris was her law clerk from 2001 to 2003.

1. 604 N.E.2d (N.Y. 1992).
2. DiMichel v. S. Buffalo Ry. Co., 579 N.Y.S.2d 788 (App. Div. 1991).

defendant had made of him. Without admitting that such videos existed, defendants opposed the motion. The trial court denied disclosure, but a divided Appellate Division (Fourth Department) reversed, ordering the railway to produce any surveillance tapes it intended to use at trial.[3] All five justices agreed that the videos were work product, discoverable only on a showing of substantial need and undue hardship in obtaining the equivalent by other means.[4] But the Appellate Division split three-two over whether the required showing of need and hardship had been made—three said it had—and certified the matter for review by the Court of Appeals.

The companion case, *Poole v. Consolidated Rail Corp.*,[5] ran a similar course until the trial court denied defendant's motion for a protective order and directed production of *all* surveillance videos. At trial, however, defendant introduced no surveillance materials into evidence. Rather, it was *plaintiff* who informed the jury that defendant had taken videos, and invited the jurors to find that the videos did not support defendant's case.[6] The jury awarded plaintiff $4,152,000. On defendant's appeal, the Appellate Division held that the trial court should have required disclosure only of those videos defendant intended to use at trial, but concluded that the broader order was harmless error.[7] Two justices dissented, and on that basis defendant appealed as of right.[8]

Writing for the Court of Appeals, Chief Judge Sol Wachtler began with the policy considerations that would inform the decision. On the one hand, surveillance videos can contribute powerfully to the search for truth: "[I]f accurate and authentic, a surveillance film that undercuts a plaintiff's claims of injury may be devastatingly probative."[9] On the other hand, such videos are "extraordinarily manipulable" in the hands of skillful editors, and may present distorted images.[10]

The Court ultimately decided that a rule enabling plaintiffs to study surveillance videos before trial best comported with fairness, honesty and the open disclosure policy embodied in CPLR article 31. But the

3. *DiMichel*, 604 N.E.2d at 65.
4. *See id.* (citing N.Y. C.P.L.R. 3101(d)(2)).
5. 579 N.Y.S.2d 772 (App. Div. 1991).
6. The parties' briefs before the Court of Appeals indicate that defendant had taken a single one-minute video of a man who appeared to be plaintiff operating a snow-blower at plaintiff's house. Plaintiff, who had suffered a fall resulting in a herniated disc and nerve damage, maintained that the person operating the snowblower was actually his brother.
7. *See DiMichel*, 604 N.E.2d at 65 (citing *Poole*, 579 N.Y.S.2d at 772). *DiMichel* and *Poole* were decided on the same day by different panels of the same court. *Id.*
8. *See* N.Y. C.P.L.R. 5601(a) (McKinney 2003).
9. *DiMichel*, 604 N.E.2d at 66.
10. *Id.*

problem was to find the correct analysis within that statute. Those seeking disclosure—including amici—hedged their bets, arguing both that the videos were admissible as party statements under CPLR 3101(e) and as material prepared in anticipation of litigation under CPLR 3101(d)(2). The difference is significant CPLR 3101(e) unconditionally requires disclosure of all party statements, while CPLR 3101(d)(2) requires disclosure only of those materials prepared for litigation for which a party shows substantial need and which are not obtainable by other means without undue hardship.

In advocating that the Court of Appeals classify surveillance videos as party statements, plaintiff DiMichel thus sought an analysis that would logically have entitled him to more extensive disclosure than the Appellate Division had allowed. He thereby offered a way for the Court to find within article 31 an approach most favorable to plaintiffs, an approach that had in fact been adopted by the Appellate Division, First Department.[11] Nevertheless, as one commentator observed, a rule treating a video as a party's own statement could lead to troubling applications.[12] Perhaps recognizing such concerns, DiMichel's brief led with CPLR 3101(d)(2), the subdivision under which the remaining three Appellate Division Departments had analyzed the issue.[13] The Court of Appeals likewise settled on this subdivision as the applicable law.

The choice to regard surveillance videos as material prepared in anticipation of litigation may have been the more attractive choice, but it was still not an exact fit, as videos taken of a party are likely to have a far greater impact on jurors than most other materials prepared by an opposing party. Did plaintiffs have "substantial need" of pretrial disclosure of such videos? Here again, the Appellate Division Departments had divided, with the Third Department holding that plaintiffs could test the authenticity of videos used at trial simply by cross-examining the persons who made them, while the Second and Fourth Departments found substantial need.[14]

The Court of Appeals concluded that plaintiffs did have substantial need of pretrial disclosure of surveillance videos, as the process of testing the authenticity of such evidence is time-consuming, and even if cross-examination revealed that the evidence had been distorted, it

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11. *See* Marte v. Hickok Mfg. Co., 552 N.Y.S.2d 297, 299 (App. Div. 1990).

12. *See* William C. Altreuter, *Use of Surveillance Evidence Poses Risk of Ethical Dilemmas and Possible Juror Backlash*, N.Y. St. B.J., July-Aug. 2002, at 40, 41.

13. *See* Careccia v. Enstrom, 578 N.Y.S.2d 678 (App. Div. 1992); Kane v. Her-Pet Refrigeration, Inc., 587 N.Y.S.2d 339 (App. Div. 1992); DiMichel v. S. Buffalo Ry. Co., 579 N.Y.S.2d 788 (App. Div. 1991).

14. *See Careccia*, 578 N.Y.S.2d at 680; *cf. Kane*, 587 N.Y.S.2d at 344; *DiMichel*, 579 N.Y.S.2d at 788.

would be difficult to undo the initial impact on jurors.[15] Similar considerations prompted the Court to conclude that plaintiffs could not obtain the substantial equivalent of surveillance materials without undue hardship. Noting defendants' contention that plaintiffs really wanted early disclosure of the tapes in order to tailor their testimony to fit the evidence, the Court rejected this argument as a "return to an earlier time, when subterfuge and surprise were common trial strategies" and "persuasive only if we assume that surveillance tapes are always accurate and plaintiffs always dishonest."[16] Weighing these perceptions, the Court held that the danger identified by defendants was a real one, but could be overcome "by providing that surveillance films should be turned over only after a plaintiff has been deposed."[17]

With this framework in place, the Court disposed of the two cases before it. In *DiMichel*, the Court agreed with the Appellate Division that plaintiff was entitled to view any tapes that the defendant intended to use at trial.[18] In *Poole*, the Court reversed and granted a new trial, disagreeing with the Appellate Division's holding that the trial court's error in ordering disclosure of all surveillance materials had been harmless. The Court of Appeals was troubled by plaintiff's aggressive suggestion at trial that defendant's failure to introduce any surveillance materials into evidence signaled that the tapes did not support the defendant's case. In the Court's words, plaintiff's tactics:

> unravel the careful compromise we have crafted today. In holding that the plaintiff here was entitled to obtain those surveillance materials that defendant planned to use at trial, on direct or cross-examination, we have attempted to reconcile defendant's interests in keeping matter prepared in anticipation of litigation private with plaintiff's need to authenticate easily distorted visual evidence. We have been guided by a policy of liberal disclosure, and we seek above all else to ensure that both plaintiff and defendant receive a fair trial.[19]

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15. *DiMichel*, 604 N.E.2d at 68.
16. *Id.*
17. *Id.*
18. *Id.* at 69. DiMichel had asked for more, arguing that surveillance materials were discoverable whether or not defendant intended to use them at trial—which presented a procedural hurdle for the Court. The Court of Appeals cannot grant affirmative relief to non-appealing parties; only defendants were appealing, and therefore the Court could not consider plaintiffs' arguments that they were entitled to broader disclosure than the Appellate Divisions had allowed. This illustrates one of the fundamental constraints on the Court of Appeals: It can grant relief only to a party aggrieved by the disposition of an issue the Court is empowered to review. *See* Hecht v. City of New York, 454 N.E.2d 527, 529-30 (N.Y. 1983); *see also* Reiss v. Fin. Performance Corp., 764 N.E.2d 958, 963 (N.Y. 2001) (declining to grant summary judgment to plaintiff who had not moved for it below, and remitting to lower court to address remedial problems).
19. *Id.* at 198.

Thus stood the law on October 20, 1992: Surveillance videos were work product, plaintiffs were entitled to disclosure of those videos defendants intended to use at trial, and disclosure was to occur only after plaintiffs were deposed.

THE LEGISLATIVE RESPONSE

The legislative response was swift. On July 4, 1993, the Legislature enacted CPLR 3101(i),[20] which provides that:

> 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 memoranda thereof, involving a person referred to in [CPLR 3101(a)]. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use . . . .

As the bill's sponsor noted, the purposes of this amendment were to codify the case law of *DiMichel*, and also make clear that a party must turn over the entire tape or tapes, not just those parts intended for use at trial.[21]

The legislation essentially removes surveillance videos from the class of materials prepared for litigation—where the Court of Appeals had placed them—and thereby removes disclosure of such videos from the framework of CPLR 3101(d)(2). After the enactment of CPLR 3101(i), it would no longer make much sense to prohibit plaintiffs from calling attention to a defendant's failure to submit surveillance materials into evidence at trial.[22] Plaintiffs themselves, after all, are free to submit the materials and to ask defendants whatever questions may be necessary to establish a foundation for this evidence—in effect, as one commentator has observed, to present a "day in the life" video made by their opponents.[23] All the more clearly, therefore, a plaintiff could comment on materials not moved into evidence. Where this possibility exists, the fairness considerations set forth in *DiMichel* obviously must be rethought. But to what extent?

It didn't take long for that question to begin working its way up to the Court of Appeals.

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20. The bill that became CPLR 3101(i) was first introduced in February 1993. *See* Governor's Bill Jacket, L. 1993, ch. 574, at 1.

21. Sponsor's Mem., Governor's Bill Jacket, L. 1993, ch. 574, at 9; *see also* Governor's Bill Jacket at 10, 17, 19.

22. CPLR 3101(i) applies, of course, to many kinds of surveillance materials and to all parties in all kinds of civil litigation, not merely to videos of personal injury plaintiffs as in *DiMichel* and *Tran v. New Rochelle Hospital Medical Center*, 740 N.Y.S.2d 11 (App. Div. 2002). For convenience we have assumed throughout that the facts in these cases are the norm.

23. Altreuter, *supra* note 12, at 42.

RETURN TO THE COURTS

Plaintiff Tai Tran injured his hand at work, was treated at defendant New Rochelle Hospital Medical Center by defendant William D. Mahoney, and returned to work. When he injured his hand again, Tran and his wife sued defendants, alleging that they failed to diagnose and treat his original injury properly. Tran testified at his deposition that he could no longer perform strenuous labor. Defendants learned that Tran had resumed working and sought to reopen his deposition. Tran sought disclosure of the defendant's surveillance videos, culminating in a court order that the videos be disclosed before the deposition. The Appellate Division reversed, reasoning that CPLR 3101(i) did not abrogate the timing rule that had emerged from *DiMichel*: depositions first, then disclosure of any videotapes.[24] Recognizing that this conclusion clashed with that of two other Departments,[25] the First Department certified its decision for review by the Court of Appeals. This time the range of alternatives facing the Court was much narrower.

In a decision authored by Judge Albert M. Rosenblatt, the Court of Appeals reversed, observing that CPLR 3101(i) eliminates any qualified privilege surveillance videos may have enjoyed and subjects all such materials to full disclosure.[26] Acknowledging that CPLR 3101(i) does not facially address the timing of disclosure at all, and specifically does not nullify the *DiMichel* rule that surveillance materials must be disclosed only after depositions, the Court reasoned that this rule "rested heavily on the premise that surveillance tapes were subject to a qualified privilege under [CPLR] 3101(d)(2)" and had hence "lost its statutory moorings."[27]

As the Court added, the Legislature's choice to codify the provision regarding surveillance materials in a subdivision distinct from CPLR 3101(d)(2) made all the more clear its choice to detach this provision from the framework of qualified privilege articulated in *DiMichel*.[28] That the Legislature made this choice advisedly was manifested further by the bill jacket, which includes statements opposing CPLR 3101(i) as enacted because it does not "limit disclosure, as the Court of Appeals held was appropriate, until after [a] plaintiff has been deposed."[29] In light of these indicia of legislative intent, the Court

24. *See Tran*, 740 N.Y.S.2d at 13-14.

25. *See* Rotundi v. Mass. Mut. Life Ins. Co., 702 N.Y.S.2d 150, 153 (App. Div. 2000); DiNardo v. Koronowski, 684 N.Y.S.2d 736, 737-38 (App. Div. 1998). Subsequently, the Second Department also joined the Third and Fourth Departments. *See* Falk v. Inzinna, 749 N.Y.S.2d 259, 263 (App. Div. 2002).

26. Tran v. New Rochelle Hosp. Med. Ctr., 786 N.E.2d 444, 448 (N.Y. 2003).

27. *Id.* at 447-48.

28. *See id.* at 448.

29. *Id.* (citing Mem. of Comm. on Civil Practice Law and Rules, Governor's Bill

concluded that—notwithstanding the continued danger of "tailored testimony"—CPLR 3101(i) "requires full disclosure with no limitation as to timing, unless and until the Legislature declares otherwise."[30]

Thus stood the law on February 20, 2003: Surveillance videos are conventional factual evidence, subject to full disclosure, with no limitation as to timing.

A COMMENT ON THE PROCESS

The video surveillance issue is a recent example of a familiar process of lawmaking today in which courts, either through common law adjudication or statutory interpretation, propound a rule and legislation is enacted that somehow responds to the decisional law.[31] Other examples of New York cases that stimulated legislation include *People v. Rosario*,[32] which held that criminal defendants have the right to examine prior statements by the People's witnesses, a right now codified at section 240.45 of New York's Criminal Procedure Law; *Dole v. Dow Chemical Co.*,[33] which set forth the comparative fault principle now codified at CPLR 1411; and *Steinhardt v. Johns-Manville Corp.*,[34] which held that the limitations period for a personal injury claim based on exposure to asbestos began to run at the time of exposure rather than discovery, prompting the Legislature to enact the more humane discovery rule now set forth in CPLR 214-c.

The video surveillance issue illustrates a further step in the process: Even after enactment of a statute, the courts often are called upon to revisit the issue as it is tested in the crucible of litigation.[35] When this

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Jacket, L. 1993, ch. 574, at 7; Mem. of Glenn Valle, Division of State Police, Governor's Bill Jacket, L. 1993, ch. 574, at 17-18). It is interesting that the State Police felt the need to comment on a bill regulating discovery in civil cases, generally personal injury cases.

30. *Id.*

31. *See generally* Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 Touro L. Rev. 595, 602-03 (1997); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1 (1995).

32. 173 N.E.2d 881, 883-84 (N.Y. 1961).

33. 282 N.E.2d 288, 295 (N.Y. 1972).

34. 430 N.E.2d 1297, 1299 (N.Y. 1981).

35. Another example of this further step is *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 749 N.E.2d 161 (N.Y. 2001), where the issue was whether insurance brokers sued for malpractice may rely on the three-year statute of limitations applicable to professionals sued for malpractice under CPLR 214(6). The Court had applied the six-year limitations period applicable to contract actions, *see* N.Y. C.P.L.R. 213(2) (McKinney 2003), in a line of "contractual malpractice" cases involving non-medical professionals. *See, e.g.*, Sears, Roebuck & Co. v. Enco Assocs., 372 N.E.2d 555 (N.Y. 1977). As the Court explained, the Legislature amended CPLR 214(6) in 1996 to provide that malpractice claims against non-medical professionals, whatever their "underlying theory," should be subject to a three-year limitations period. *See Chase Scientific*, 749 N.E.2d at 165 (citation omitted). It was then only a

happens, if the facts fit the new or revised statute cleanly, there naturally will be little cause to employ the finer instruments of statutory construction. But easy cases are scarce, at least in a court like ours, which chooses most of its docket.

The mission of the Court of Appeals—a second layer of appellate review—is to settle and declare the law. Accordingly, the Court chooses cases in which the parties credibly present an uncertainty in existing law with statewide significance. When, as in *DiMichel*, the Court construes a statute not framed with the disputed issue in mind, the Court has a relatively wide range of options. The Court's proposal of a timing rule in *DiMichel* exemplifies the kind of reasoning, essentially similar to common law decision-making, that may result.

But even in such circumstances, as *DiMichel* also shows, the Court remains limited by the nature of its jurisdiction and by the facts and circumstances before it. Legislatures operate without these limitations, but they simply cannot anticipate all of the problems human beings encounter in the real-life application of statutory language. Often enough, the parties return to the court to determine whether some aspect of earlier law survives under the new scheme. In *Tran*, then, the Court revisited the timing of discovery of surveillance materials, with the legislative policy established, and a more interstitial lawmaking task in view.

When this occurs, advocates reach for canons of statutory construction and similar interpretive tools. Here, the debate turned to a considerable extent on the effect of an omission from the new statute, and hence on the information a bill jacket may or may not provide about the thinking behind the omission. In other cases, parties may engage in doctrinal dispute. One side may say that statutes in derogation of the common law are strictly construed, and the other counters that remedial statutes are construed broadly to effectuate their purpose. The real task is for counsel to tell a credible story of how judges and legislatures have acted in the past and what that action implies for the case at hand. This, in any case, is what appellate judges do when they try to persuade each other how to decide a case.

So, has the last word now been spoken on secret video surveillance tapes of personal injury plaintiffs? Likely not. Even the most visionary courts and legislatures, struggling to formulate sound rules, are no match for twenty-first century technology and eternal human ingenuity, constantly adapting, testing, challenging the rules to meet the needs of a changing world. Indeed a fascinating process.

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matter of time before litigation on the meaning of "professional" in this context reached the Court.