

VIDEO SURVEILLANCE EVIDENCE

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TOPICS

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PURPOSE AND POPULARITY

1. Perhaps surprisingly, covert surveillance by video recording continues to prove a very effective tool in meeting the fabricated or, much more commonly, significantly exaggerated claim for damages for personal injury.

2. Notwithstanding spectacular success in some cases, destroying what would otherwise have been a very substantial claim, the much more common result in "successful" surveillance is the identification of a material and substantial discrepancy between the presentation of a claimant to experts instructed in the case (normally medical but also care and employment experts) and the claimant's conduct when observed going about his or her daily life. Often the discrepancy is of a nature and extent which leads to an inevitable inference that the claimant has (at least in part) consciously sought to mislead experts and the Court. On this scenario, the claimant does not have to be shown doing cartwheels for the surveillance video to be devastating to his claim.

3. In this context video surveillance continues to be deployed widely although generally in my experience judiciously, that is to say in the appropriate case, i.e. one of substance in which there is already some reason to have the claimant's assertions tested by some means. I certainly know of no "blanket" approach whereby all claims above a certain value are deemed to be claims requiring covert surveillance of the claimant to be undertaken.

4. The development of better tools for surveillance (principally ever smaller cameras) and the influx of (in the main!) more experienced and able operatives into the market have also been factors influencing the continued deployment of covert surveillance evidence long after its use has become widely known.

THE REQUIREMENT TO DISCLOSE VIDEO SURVEILLANCE EVIDENCE

5. It is worth keeping in mind the development of the law on the use of covert surveillance evidence and particularly issues of admissibility and disclosure.

6. In *McGuinness v. Kellogg* [1988] 1 WLR 913 it was held that notwithstanding the provisions of RSC O.38 r.5 (current counterpart CPR Rule 33.6) requiring disclosure in the absence of "special reasons" of any "plan, photograph or model" at least 10 days before trial, the Judge hearing the interlocutory application had been correct to rule that the defendant was entitled not to disclose the "cine film" it had obtained of the claimant said to have been greatly exaggerating the effect of his injuries and the extent of his continuing disability. Although the "cards on the table" approach was conceded to apply (916H) by the defendant it was successfully argued that this could be modified on occasions where there was an issue as to *bona fides*. In essence the Court of Appeal accepted that where the *bona fides* of a claimant was disputed this could amount to "special reasons" not to disclose the content of an enquiry agent's film although its existence would have to be made clear. This decision now of course represents nothing more than a nostalgic glimpse of the Lost World of Non-Disclosure.

7. In *Khan v. Armaguard Limited* [1994] 1 WLR 1204 the Court of Appeal declined to follow *McGuinness* saying effectively that the landscape had changed considerably with the changes in the rules to require exchange of witness statements in QB cases (1st October 1989), and automatic discovery in personal injury cases (16th November 1992) and the "very considerable" development of the "cards on the table" approach in the Queen's Bench Division contemporaneous with those rule changes. The Court held that "it should be very rare indeed in a personal injury case for an Order for non-disclosure of a video film to be made" (per Rose LJ at 1211E). The ground for this result (in which Sir Thomas Bingham MR as he then was expressly concurred) had been set by *Digby v. Essex County Council* [1994] PIQR P53, an earlier decision of the Court of Appeal in which Sir Thomas Bingham MR had emphasised that non-disclosure of material such as a video recording required "exceptional circumstances" and that the starting point was that the Courts favoured disclosure with only "a clear and unequivocal challenge to the *bona fides* of the plaintiff" being sufficient to engage a discretion regarding disclosure. In *Digby*

Simon Brown LJ as he then was gave a powerful concurring judgment emphasising the clear potential for settlement arising from early disclosure of evidence undermining a claimant's case. The benefits of early resolution or shortened trials arising from early disclosure of surveillance evidence were expressly persuasive for the Court of Appeal in *Khan*.

8. One footnote from *Khan* was that (correctly anticipating the Court's likely approach) Leading Counsel for the defendant had submitted that it was only in cases where there was clear film evidence to support malingering and lack of *bona fides* that disclosure should not take place. The response of the Court of Appeal was that those were just the cases where the possibility of the claimant trimming his evidence after sight of the film was most remote. The Court has not completely neglected the need to limit opportunity for claimants to trim their evidence: see *Utley* below.

9. That *Khan* represented an irrevocable shift in the Court's approach as to disclosure of surveillance evidence was made clear by *Libby-Mills v. Commissioner of Police for the Metropolis [1995] PIQR P324* in which the defendant wished to withhold until trial a video recording of a former police officer who had retired on medical grounds and was pursuing a claim for damages for the injury said to have caused that. The Claimant was said to be someone who "has for years been manipulating the system", in respect of whom there was "extremely strong and persuasive video which is powerful evidence of the falsity of his case" and who was capable of trimming his evidence with skill: "a plausible raconteur". The Court of Appeal nonetheless held that such a video had to be disclosed.

10. As ever, Hoffmann LJ (as he then was) eloquently summarised the position in his own short judgment in *Libby-Mills*:

"Attacking the credit of a witness by dramatic confrontation in the witness box is so much part of the English forensic tradition, so hallowed in history and fiction, that lawyers are naturally reluctant to be deprived of the chance to ambush the opposing party with some devastating piece of cross-examination. But times have changed..."

THE TIMING OF DISCLOSURE OF VIDEO SURVEILLANCE EVIDENCE

11. In *Rall v. Hume* [2001] EWCA Civ 146 [2001] 3 All ER 248 the Court of Appeal took the matter a step further. It held that a video film of a claimant is a document within the extended meaning contained in CPR Rule 31.4 and is thus subject to the provisions of CPR Part 31 as to disclosure and inspection of documents, including the continuing obligation for disclosure under Rule 32.11. From that was stated to arise the obligation to raise with the Court (in the interests of proper case management) the intention to cross-examine a claimant on the content of any video recording "at the first practicable opportunity once a decision has been made by a defendant to rely on video evidence obtained.". Thus whilst the defendant is entitled to consider its position once video surveillance evidence has been obtained (with the help of assistance from the medical expert if required), once a decision has been made that the evidence obtained is to be relied upon then the disclosure duty and the duty to make the Court aware of the video recording (if necessary for case management purposes) arises.

12. This decision followed the decision in *Ford v. GKR Construction Limited* [2000] 1 WLR 1397 given 6 months after the commencement of the CPR where the Defendant had decided to undertake video surveillance during a 7 week adjournment when the trial was part heard. The video evidence was certainly effective in reducing the damages awarded (and the Claimant did not challenge the award) but the Claimant recovered all of her costs from the Defendant notwithstanding that she had failed to beat a payment into court made almost 6 months prior to the commencement of trial. The Court of Appeal was very critical of the timing of the obtaining of the surveillance evidence. As Judge LJ put it "it would be flattering to describe this decision as a last-minute idea". Whilst stating that he himself might have reached a different conclusion (no order as to costs after payment in) Judge LJ did not find himself persuaded that the trial judge had erred in principle in the exercise of his discretion. There was express reference to "the importance, rightly and increasingly, to be attached to civil litigation being conducted openly between the parties". Unsurprisingly Lord Woolf MR (as he then was) gave a judgment concurring specifically with the latter point.

13. Two further points need to be made regarding this decision. Judge LJ did not rule out the possibility that it might be appropriate only to commence surveillance after commencement of trial (1401B) and secondly he placed importance upon the fact that the trial judge had expressly not found the Claimant to be dishonest in her exaggeration of symptoms (1401D).

14. One benefit to a defendant of the decision in *Rall v. Hume* that the video recording is a document subject to the provisions of CPR Rule 31 is that under Rule 32.19(1) the claimant is deemed to admit the authenticity of the film unless he serves a notice requiring it to be proved at trial: *ibid* para 16.

15. The timing of the disclosure of video surveillance evidence is clearly a potentially difficult question. All those advising defendants are bound to be mindful of the Court's approach in *Rall v. Hume* and of their overriding duty to the Court. Furthermore as *Ford v GKR* demonstrates there is potential prejudice in costs arising from a late attempt at surveillance and consequent late disclosure.

16. However that does not necessarily mean that a video has to be disclosed the moment it is received. The phrase "once a decision has been made by a defendant to rely on video evidence" is worth repeating.

17. For a practical example of the proper application of the approach see *Uttley v. Uttley* [2002] PIQR P12. In that case Hallatt J (as she then was) was concerned with the question of costs where a claimant had in January 2001 accepted a payment into Court made in November 1999. He had accepted that payment into Court after disclosure on 20th December 2000 of video evidence obtained by the defendant's solicitor on 18th July 2000. The claimant complained that the costs consequences of late acceptance of payment into Court should not follow where the defendant had withheld disclosure of the video. Hallatt J rejected that argument upon the basis that the defendant was entitled to wait to see how the claimant's case was put before making its decision to rely upon the video evidence and it was the claimant's, not the defendant's, fault that the claimant's Revised Schedule which he had been ordered in April 2000 to be served by 31st July 2000 was not in fact served until 15th December 2000.

18. Hallatt J did not seek to derogate from the principle in *Rall v. Hume* and noted the criticism of the Court of the timing of the defendant's obtaining of surveillance evidence in *Ford v. GKR*. She was keen to emphasise that she was dealing solely with the circumstances of the case with which she was concerned but held that in that case the defendant's solicitors had been entitled not to disclose the video recording because the defendant's insurers "not surprisingly wished to assess the evidence in their possession with the claimant's up-to-date account before disclosing it". She went on to hold that notwithstanding the availability of medical evidence setting out the claimant's account of the effect of the accident upon him the insurers and solicitors were entitled to press for an updated statement and Schedule from the claimant himself.

19. Thus whilst no one could sanction a general policy of withholding disclosure of video evidence "until the best moment", one could contend that defendants are entitled to see exactly how the claimant's case is to be pursued to trial before making their decision as to whether to deploy their video evidence. Arguably this is nothing more than a manifestation of the question of whether the video recording is a "document upon which he relies" for the purposes of CPR Rule 31.6.

HUMAN RIGHTS ISSUES

20. Where video surveillance of a Claimant contains footage arguably intrusive to the claimant's private and family life there is an obvious tension between Articles 6 and 8 of the ECHR, relating respectively to the right to a fair trial and the right to respect for private and family life.

21. One point not ruled upon in *Rall* (it was conceded by Counsel for the purposes of the appeal) was the question of whether the defendant could rely upon footage showing the claimant within her own home and within the nursery which the claimant visited with her child. I return to that issue below but first consider a case involving a weightier Human Rights argument.

22. The tension between Articles 6 and 8 was addressed in *Jones v. Warwick University* [2003] 1 WLR 954 [2003] EWCA Civ 151, where an enquiry agent posing as a market researcher twice obtained entry to the home of a claimant making a substantial claim and by way of "market research interview" obtained by use of a hidden camera video evidence which materially undermined that case. It was frankly conceded before the Court that the enquiry agent was guilty of trespass and thus the evidence had been obtained unlawfully but it was submitted that the evidence was nonetheless admissible since to exclude it would give rise to a real danger of an unjust result.

23. Lord Woolf CJ giving the judgment of the Court held that whilst it was not possible to reconcile perfectly the conflicting public interests that arose, on the one hand that the truth should be revealed and on the other hand that the Court should not acquiesce still less encourage the use of unlawful means to obtain evidence, the conduct of the insurers was not so outrageous as to require the Defence to be struck out. The Court of Appeal held that once that position was reached then the requirement for a fair trial required that there be the ability for the defendant to cross-examine the claimant on the video evidence. Reference was made to the overriding objective and it was held that a Judge properly exercising his discretion under the CPR to admit

such evidence with a view to maintaining the fairness of trial would not place the Court in breach of Article 8 since under Article 8(2) a public authority (here the Court) is entitled to interfere with the right to respect for private and family life if such would be "in accordance with the law" and "necessary ... for the protection of the rights and freedoms of others".

24. The Court in *Jones* strongly deprecated the insurers' conduct in instructing the enquiry agent to gather evidence as she did and marked its disapproval by ordering that the defendant should pay the costs of the proceedings to resolve the issue (including its successful opposition to the claimant's appeal).

25. In Scotland the Outer House case of *Martin v. McGuinness [2003] Scots CS 96* considered a somewhat similar but less intrusive approach. An enquiry agent posed as a former army colleague of the [Claimant] and engaged his wife in conversation on her doorstep. This was not filmed. There was also video evidence taken from a public area but showing the Claimant on his own property. At an interlocutory hearing not only did the Claimant seek to have the resulting evidence ruled inadmissible, he intimated a claim for damages for breach of Article 8 and at common law arising from the doorstep conversation only. The latter claim was always doomed as no damages could be recovered (the Defendant was not a public body) and because as in England there is no remedy for breach of privacy *per se*. Lord Bonomy held that the doorstep conversation and surveillance were *capable* of amounting to impingement of the Claimant's Article 8 right as expressed in Article 8(1) but that such a conclusion could not be considered in isolation from the provisions of Article 8(2). He referred to Article 6 and the Defendant's right to protect his position. He also referred to the wider public interest in the avoidance of exaggerated claims. He held that striking the balance between the interests of the parties the evidence ought to be admitted. *Jones* (decided 2 months earlier) was not cited at this stage.

26. As it happens the case of *Martin* came back before Lord Bonyon for him to deal with the costs consequences of the Claimant's late acceptance of a tender (payment in). This time *Jones* was cited and the Claimant by relying on *Jones* sought to avoid the normal order. He failed in that regard, the Judge distinguishing what was done in *Jones* and holding that in this case there had not been "improper and unjustified conduct". Two points call for comment: firstly Lord Bonyon expressly warned against anyone drawing the conclusion "anything goes" for investigation of such claims and secondly there was an obiter comment that Lord Bonyon might have refused to admit the evidence admitted in *Jones*.

27. *Jones* should thus by no means be seen as a charter for insurers to use whatever means are necessary to gather covert evidence upon a claimant confident in the knowledge that "if what we get is good enough we will get it in". The Court has a discretion under CPR Rule 32.1(2) to exclude admissible evidence. The Court in *Jones* made it clear that in circumstances where the law is cynically flouted one of the weapons in the Court's armoury is the striking out of the Defence.

28. What of the video taken from outside the Claimant's property showing him within and engaged in family activity? Clearly the Article 6 and Article 8 dichotomy will arise. For my own part I would venture that its resolution will depend upon a balancing exercise between the cogency and importance of the evidence and the degree of intrusion that the video represents. The Court would probably have little difficulty in admitting a video recording of a Claimant building his own extension but is likely to be extremely reluctant to admit evidence showing intimacy with his wife.

DECISIONS IN THE EMPLOYMENT LAW CONTEXT

29. In *XXX v. YYY* [2004] IRLR 137 [2004] EWCA Civ. 231, the juxtaposition of and potential conflict between Article 6 rights and Article 8 rights in the context of an Employment Tribunal claim was considered by the Court of Appeal. A nanny brought a claim against former employers for unfair dismissal. Her claim was that she was dismissed because she rebuffed unwelcome advances from the child's father. The parents of the child submitted (jointly!) that there had been a consensual sexual relationship between the father and the nanny whose termination had precipitated her voluntary resignation. The nanny wished to adduce in evidence a video recording covertly made by her within the home and showing her with the father. As it happened it showed the child in the background. In the end the Court of Appeal held that the EAT had been wrong to overturn as irrational the Employment Tribunal's conclusion (having seen the video) that it was irrelevant to the matters put in issue. The matter ended there. However along the way the Court of Appeal implicitly approved the EAT's original decision (the case had been to the EAT twice before reaching the Court of Appeal) that the Employment Tribunal had to consider potential interference with the child's Article 8 rights before ruling on whether the video was admissible.

30. Therefore the Court of Appeal did not get as far in this case as weighing the balance between Articles 6 and 8. It is right to say that the EAT had concluded that “a more obvious infringement of [the child's] rights to protect his private life is hard to envisage” but that was based upon what it showed the nanny and the father doing where “public description or publication of the images even within the litigation process would be severely embarrassing for him if it were on record in public at a time when he became older and was able to understand what had happened in his presence”.

31. Therefore the important aspects of *XXX v YYY* are as follows: (a) The video was ruled inadmissible on the grounds of relevance and anything said about Article 8 rights by the Court of Appeal is therefore obiter. (b) Whilst the EAT felt that the showing or description of the video recording would constitute the most clear breach of the child's Article 8 rights, that was because of what the video showed others doing and not the mere fact that he was shown.

32. Therefore it is my view that there is no "blanket ban" on the use of video surveillance which happens to show children of the Claimant. Certainly *XXX v YYY* is not authority for such a proposition. Thus whereas one can understand the caution in *Rall* it was arguably unnecessary.

33. In the Scottish case of *McGowan v. Scottish Water [2005] IRLR 167* the EAT upheld the Employment Tribunal's decision to admit evidence obtained by video surveillance of the Applicant's home from across the road for long periods (as it happened the home was a tied house but nothing rested on that). This had been held to be reasonably undertaken in order to confirm (as it was accepted it did) that the applicant had been falsely claiming payments for call outs to his place of work nearby and in circumstances (as found) where there was no practicable alternative to undertake an important investigation into misuse of public funds. The EAT was less sanguine about the ET conclusion that Article 8 was not engaged at all saying "at least at first sight, covert surveillance of a person's home, unbeknown to him or her, which tracks all people coming and going from it, quite apart from persisting with it over a period of bereavement, raises at least a strong presumption that the right to have one's private life respected is being invaded and if the issue stopped there we might have considered that the Article was engaged." However the EAT was bolstered in its conclusion by the approach in *Martin v. McGuinness* (see above).

34. Note in the case of a public authority constituting an “emanation of the state” there is a direct duty to comply with the ECHR (as occurred in *McGowan*). The local or health authority which undertakes intrusive surveillance is arguably in breach of its own Article 8 obligations before the material is even considered by the Court. In any event such a body is bound by the Regulation of Investigatory Powers Act 2000 and subject to the requirements thereof (written authorisation of limited duration for necessary and proportionate surveillance by designated person). Such should not affect “normal surveillance” where a claimant is filmed in public, at least not in circumstances where he would expect privacy: see *Peck (2003) 36 EHRR 41* (survivor of attempted suicide establishing his Article 8 right breached by retention and publication of CCTV film of attempt).

NO NECESSITY TO PLEAD “FRAUD”

35. The point is still taken from time to time on behalf of a claimant who at trial has provided unsatisfactory explanations of ostensibly devastating video surveillance evidence that the Court should not hear the submissions of the defendant based upon gross exaggeration or fabrication of injury and disability since such allegations are tantamount to allegations of fraud and the latter has not been pleaded.

36. Putting to one side the fact that allegations of this nature (successful or not) are now and have for many years been commonplace (so far as I am aware none of the cases cited above specifically included allegations of fraud) this is not a requirement of the Court. It is now clear that there is no need to plead “fraud” in cases of this nature. This is established in the low velocity impact case of *Kearsley v. Klarfeld [2005] EWCA Civ 1510*. Having said that, there is a clear invocation from the Court that an allegation as fundamental as contending that the claimed disability is being consciously exaggerated would have to be made clear.

37. Thus if a defendant is alleging conscious exaggeration or fabrication of injury or disability then the claimant must be put on proper notice of that. [In practical terms in a claim of significant potential value that is generally done in the Counter-Schedule rather than by way of specific amendment of an earlier "non-admission" Defence].

WIDER CONSEQUENCES FOR A FRAUDULENT OR EXAGGERATING CLAIMANT

38. The two most common consequences which tend to follow a finding of exaggeration or fabrication by a personal injury Claimant are firstly that the Judge does not give such a Claimant the benefit of any doubt in aspects of his damages claim and secondly costs consequences not only in any failure to beat a Part 36 payment or offer but also even if that offer is beaten: see CPR Rule 44.3(5)(d).

39. The reader will be familiar with the exercise by the court of its wide discretion on costs where claims have been held to be exaggerated: *Painting v. University of Oxford* [2005] EWCA Civ 161 [2005] PIQR Q5 is a familiar example as are *Bajwa v. British Airways* [1999] PIQR Q152 and *Molloy v. Shell (UK) Ltd* [2001] EWCA Civ 1272 [2002] PIQR P7. However those cases must be seen in context and it has recently been affirmed by the Court of Appeal that a claimant is not to be deprived of his costs merely because he has not recovered as much as he hoped (provided of course his award exceeds any Part 36 offer): *Hall v. Stone* [2007] EWCA Civ 1534.

40. However where a claimant is found to have attempted to mislead the court the consequences may be more dramatic than merely reduction in his award. Much may depend on the extent of the attempted fraud and the view of the particular judge. In *Bashir & ors. v. Ahmed* (unreported save for Lawtel 29.1.08) Judge McKenna struck out the claims of all four claimants (including two which were apparently genuine) where all four were party to a fraudulent attempt to mislead the court about their involvement in an accident.

41. In *Churchill Car Insurance v. Kelly* [2006] EWHC 18 Gibbs J., hearing an appeal from the decision of a Recorder, admitted fresh evidence obtained since the trial and held that a fraudulent claimant who had perjured himself and forged a purported letter of dismissal from his employment due to sickness absence was still entitled to recover those modest damages (car repair costs) which were not in dispute. He distinguished *Axa General Insurance v. Gottlieb* [2005] EWCA Civ 112 (entirety of only partly fraudulent insurance claim struck out) as confined to insurance cases and did not feel he could follow the dictum of Laws LJ in *Molloy v. Shell* (“I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the Court should once it knows the facts entertain the case at all save to make the dishonest Claimant pay the Defendants’ costs”). However Gibbs J did order the Claimant to pay costs both of the appeal and the trial on an indemnity basis and ordered the referral of the papers to the CPS. Thus the Claimant may not have felt the litigation was a complete success!

BOUNDARIES FOR BOTH SIDES

42. It will be clear from *Jones* that there are boundaries as to what the Court will accept. Identifying where the boundaries are is more difficult.

43. Practitioners are to be reminded that it is one thing to advise that illegally obtained evidence can be relied upon (if the Court permits it) but it is entirely another to sanction the obtaining of such evidence. There will be circumstances where the instructing solicitor must be advised by Defendant’s counsel that the insurers be told that they have acted illegally and that such acts should not be repeated.

44. On the other side of the coin there is the question of whether it is right to advise claimants that they might be the subject of covert surveillance. My understanding is that some solicitors do so and have done so for many years as a matter of course. I may be persuaded otherwise but I can see no reason to give this advice other than to ensure that the claimant acts at all times consistently with his claimed disability when otherwise he might not. If that is the reason for giving that advice, then in my view it is tantamount to conspiracy to pervert the course of justice.

PRACTICAL POINTS

45. These are aimed at those acting for Defendants who might wish to cross-examine a Claimant upon video surveillance evidence at a trial. They are in addition to the obvious points arising from what is set out above regarding the duty of disclosure and the prohibition on the sanctioning of unlawful means of surveillance:

- (a) No commentary from the surveillance operatives is required. Any commentary should be taken off the copy disclosed and relied upon. If the surveillance operatives can give important and relevant evidence of activity undertaken by the Claimant actually seen but not shown on video then *perhaps* a witness statement to that effect might be prepared and disclosed, but the Court will be unwilling to enter into a thorny dispute and I advise caution;
- (b) Decide which pieces of surveillance are likely to be most important and make careful notes of timings and duration etc. One aspect of the decision in *Rall* was to emphasise the desirability of the use only of selected footage from video surveillance. A video surveillance log (disclosed to opponent in advance) containing dates and times and describing in neutral terms the activity shown is a very useful tool for the Judge's cross reference and for ease of exposition at trial

- (c) Get into the courtroom before the trial starts and familiarise yourself with the controls for the video or DVD player (it is likely to be you holding the remote control on fast forward whilst the impatient judge taps his pen!). A good time also to check the player in Court will actually play the DVD!

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PIBA - Lecture on Surveillance Evidence (gat)