

Surveillance in Personal Injury Claims

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Abstract

The authors review the use of surveillance evidence in personal injury proceedings and provide advice to the wary practitioner.

Introduction

Prior to the Civil Procedure Rules¹ (CPR), it was frequently the case that insurers would undertake surveillance of a plaintiff, but withhold the evidence until the day of trial. The first notification the plaintiff would have of the film would be television and video players being brought into court with inquiry agents following behind. Fortunately, since the introduction of the CPR, the days of ambush have, in theory, gone and now defendants are required to put a claimant on notice when intending to rely on surveillance evidence. However, despite the cards on the table approach under the CPR, defendants remain reluctant to disclose DVD evidence until the last minute, the consequences of which can be damaging for both claimant and defendant. Therefore, to ensure clients' interests are protected practitioners need to be alive to the CPR and case law relating to reliance upon such evidence.

*Rall v Hume*²

Relevant case law begins with the 2001 case of *Rall v Hume* in which Potter L.J. gave the leading judgment. The proceedings arose out of a road traffic accident in 1996, when the young claimant mother sustained neck and back injuries. She also developed psychiatric injuries for which she received treatment. She was just 31 years old at the time. Following the accident she moved with her husband to Australia, but as she required continuing support, she later returned to the United Kingdom. The claim was pitched at less than £100,000. This included a future loss element as the claimant alleged continuing symptoms.

¹ 1998

² *Rall v Hume* [2001] EWCA Civ 146.

By May 2, 2000 the defendant solicitors were in possession of video evidence of the claimant shopping and carrying her baby, taken on February 8 and 15, 2000. The evidence was disclosed on June 21, 2000. The defendant took possession of further surveillance on September 11, taken on August 21 and 24, 2000. This was disclosed on October 10, 2000.

The court observed that directions relating to the use of the surveillance evidence should have been sought at a hearing on October 9, although both parties appeared to be oblivious to this event and thus the action, temporarily, was stuck out. Following reinstatement, a Case Management Conference was listed for December 13, 2000 and a disposal hearing was fixed for January 22, 2001. That disposal hearing had a time estimate of four hours. Due to the time estimate for the hearing, and the break for the Christmas period, the Judge found that there would be insufficient time for the claimant and her experts to comment on the defendants' surveillance film, and as such excluded the evidence. He also said that even if the surveillance evidence had been allowed, he would have excluded the film of the claimant in her own home, and at a nursery, on the basis it represented an invasion of privacy.

The case then proceeded to the Court of Appeal. Potter L.J. observed the film was a document within CPR 31.4 and should be disclosed under CPR 31.11 (continuing duty of disclosure).

It was further noted that under CPR 31, a claimant will be deemed to admit the authenticity of the document (film) unless notice is served that the claimant wishes the film to be proved at trial. The defendant will then be required to serve a witness statement to prove authenticity.

It was observed that the showing of a film requires facilities to be made available in the court room, as well as time to view the evidence, for which allowance would not have been made in the original time estimate.

"It is the interests of proper case management and the avoidance of wasted court time that the matter be ventilated with the judge managing the case at the first opportunity... Such a duty lies upon the defendant under CPR 1.3 which requires the parties to help the court to further the overriding objective under CPR 1.1 (2), in furtherance of which, under CPR 1.4, the courts duty of active case management includes giving directions to ensure that the trial proceeds quickly and efficiently."

Potter L.J. said (when considering the use of surveillance evidence) the starting point is that where such evidence undermines the claimant's case and would substantially reduce the award, then:

"it will usually be in the overall interests of justice to allow the defendant to rely on the film, so long as it does not amount to ambush."

He found that there was no ambush in this case in that there had been no deliberate delay on the part of the defendant and the evidence had been disclosed timeously.

However, the court was critical of the defendant in that permission to rely on the evidence had not been made earlier. It was mindful that "Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it." (CPR PD23). However, the error by the defendant in not making the application in this case was not sufficient to shut out the film.

The Court of Appeal also thought that three weeks (between the appeal and trial) was long enough for the claimant and her experts to view the films. Potter L.J. also observed that under CPR 32.2 and CPR 32.1 (3) the judge could limit the cross examination.

(The defendant abandoned any attempt to rely on that part of the film in her home or at a nursery.)

*Jones v University of Warwick*³

The proceedings arose out of an accident at work, when the claimant sustained an injury to her hand for which the defendant contended she had recovered relatively quickly.

The claim for special damages was put at £135,000. In response to the claim, the defendant obtained video evidence on November 19, 1999 and January 18, 2000. The inquiry agent posed as a market researcher. This evidence was disclosed to the claimant on the June 11, 2001. The defendant then carried out further surveillance on the January 21 and March 30, 2001.

The film obtained included observations of the claimant in her home, obtained by way of deception. The defendant did not dispute the agent was guilty of trespass.

The defendant's experts had seen the film by the time of the application and thus the defendant argued that if the film was excluded then new experts would need to be instructed.

At the hearing on October 19, 2001, the District Judge was persuaded not to allow use of the film on the basis that the court should not give approval to the methods deployed by the

³ [2003] EWCA Civ 151

defendant's agent.

However, in his reserved judgment of May 16, 2002 Judge Harris came to opposite view.

In the Court of Appeal there was consensus that the court had discretion to allow such evidence, both parties being conscious of CPR 32.1, namely:

1. "the court may control evidence by giving direction as to...
 - (c) The way in which evidence is to be placed before the court.
2. The may court may use its power under this rule to exclude evidence that would otherwise be inadmissible."

When it came to exercising that discretion, the claimant argued art.6⁴ (Right to a Fair Trial) and art.8⁵ (Right to Respect for Private and Family Life), highlighting the evidence was obtained as a result of trespass and infringement of the claimant's privacy. However, the court was not persuaded that art.8 had a role to play as there was no interference by a public authority, the claimant arguing that the art.8 was relevant as it was the court, a public authority, exercising the discretion.

The Lord Chief Justice recognised it was not possible to resolve the competing arguments in a totally satisfactory manner and held:

"If the conduct of the insurers in this case goes uncensored there would be a significant risk that practices of this type would be encouraged. This would be highly undesirable, particularly as there will be cases in which a Claimant's privacy will be infringed and the evidence obtained will confirm that the Claimant has not exaggerated the claim in any way."

It is a balancing exercise, one of which is to consider the court's resources CPR 1.1(2)(e) ("allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases").

Proactive case management not just concerned with the case before the court but litigation as a whole.

The Court of Appeal held that it must try to give effect to two competing interests. The court

⁴ Human Rights Act 1998

⁵ Human Rights Act 19998

used the familiar phrase, "the decision will depend on all the circumstances". In this particular matter the court stated, "This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out". It would be artificial and undesirable not to have the evidence before the court. To exclude it would require new experts to be instructed and relevant evidence (the film) would have to be concealed from them. Therefore, the Court of Appeal upheld the decision of Judge Harris.

Criticism had been directed against the claimant for not passing the surveillance evidence to the medical experts. However, the Court of Appeal rejected that criticism. "It was sensible to defer doing so until it was known whether the evidence could be used."

Although the defendant was permitted to rely on the surveillance evidence the Court of Appeal made it clear "that the conduct of the insurers was improper and not justified". The insurers' objectives did not justify either the commission of trespass or the contravention of the claimant's privacy which took place.

*O'Leary v Tunnelcraft Ltd*⁶

The use of surveillance evidence was again considered in the case of *O'Leary v Tunnelcraft Ltd*⁷ The judgment in this case was based on an application made by the first defendant for permission to rely upon surveillance evidence, including film footage and photographs taken of the claimant.

The claim related to an accident on September 4, 2003 when the claimant, who was 22 years old (28 at the time of application) was injured as a result of a crushing accident during the course of his employment. Liability was not in dispute being agreed at 90/10 in the claimant's favour.

The claimant's injuries included a severe crushing injury to his pelvis with fractures of the pubic rami and a left-sided extension into the hip joint. There was a complete occlusion of the urethra which was separated from the bladder and prostate. The claimant underwent a series of complex surgical procedures and was in hospital for several months.

The claimant's case was that he was left with permanent frequency and urgency of micturition with associated incontinence and risk of bladder infections. His erectile function was impaired and it was believed to be unlikely that he would be able to father children naturally.

In his Schedule of Loss, served during June 2009, the claimant also claimed a number of

⁶ [2009] EWHC 3438 QB

⁷ [2009] EWHC 3438 QB

psychiatric effects including a major depressive disorder and obsessive compulsive disorder. He was said to be lonely, emotionally detached, and lacking in energy and stamina. It was claimed that he had very limited earning capacity and was described as virtually unemployable. The Schedule placed the value of his claim at over £2 million.

The defendant's case was that the claim was worth much less and that the claimant's function and abilities were substantially greater than that described in his claim.

Proceedings were commenced in August 2006. On May 3, 2007, there was a directions hearing before Master Fontaine, during which it was ordered that any application by the defendants to rely on evidence of enquiry agents or video evidence should be made not later than July 1, 2008.

Subsequent directions were provided on October 13, 2008 when it was ordered that the defendant should provide to the claimant all quantum related disclosure that had been served, in a non-redacted form.

The application was made 31 days before the start of the trial window, at a stage where witness evidence had been exchanged and the experts had prepared joint statements.

During the application hearing it became clear that the defendant had, since the beginning of 2009, been instructing enquiry agents in the Republic of Ireland to keep the claimant, who resided in the Republic of Ireland, under surveillance.

Late in March 2009, the enquiry agent sent the defendant's solicitor video evidence and photographs that had been taken by them in January and March 2009. This included a very short video of the claimant "running, jogging or walking fast". The defendant's solicitor reviewed the evidence and decided not to make use of it.

The claimant submitted that upon review of the June 2009 schedule, which also included a large claim for loss of earnings and loss of earnings capacity, the defendant's solicitors decided to instruct a different firm of enquiry agents, this time based in the United Kingdom but carrying out surveillance on the claimant in the Republic of Ireland.

The second firm of agents conducted surveillance between August 17 and 22, 2009. However, on August 22, it became apparent that the operatives were watching the wrong man. They then correctly identified the claimant on August 22, 2009 and began to film him. Oral reports were provided to the defendant's solicitor including the details of mistaken identity. Neither the film nor the logs were sent to the defendant's solicitors at this stage and no request was made

for them.

The surveillance continued during September and October 2009. A joint settlement meeting had been arranged for 4.30pm on October 27, 2009. At 12.30pm on that same day the defendant's solicitors contacted the claimant's solicitors and informed them that they had on the previous day received DVD footage, together with logs and statements, from their enquiry agents. Later that afternoon the statements taken from August, September and October 2009 were delivered to the claimant's solicitors. The August logs made reference to activities that were carried out by the person who the operatives had wrongly identified on August 17 and 22. The defendant's solicitor was aware of this fact but it was not made apparent to the claimant's solicitors until the following day. Based on this point, during the application hearing, Counsel for the claimant alleged that the defendant's conduct amount to trial by ambush.

Following the joint settlement meeting both parties made Pt 36 offers; however, the parties were not able to reach a compromise.

From October 28 to the application hearing on November 11, 2009, there was further exchange of correspondence between the parties in which it was stated there was further surveillance evidence still to be disclosed. The footage which the claimant's advisors had in their possession was said to be of poor quality. It was dark and out of sync; the editing was poor and the claimant's solicitors had not received the un-redacted copies despite previous requests being made.

The defendant's case was that the surveillance footage was significantly inconsistent with the claimant's reported physical and psychiatric symptoms in that he had greater functional ability and, therefore, residual earnings capacity. The defendant argued that the admission of the evidence would not amount to any substantial prejudice towards the claimant; whereas, there would be enormous prejudice to the defendant were the evidence not to be admitted, due to the significant potential value of the claim. The Defendant submitted that the court should be flexible and if their conduct were to be criticised, then the remedy to the claimant should lie in costs rather than denying the defendant the opportunity to rely upon the evidence.

In her judgment, Swift J. found that an ambush situation had in fact taken place. She found that there was no reason why the August footage could not have been disclosed at an earlier stage. There was no explanation as to why the August footage, the high point of the defendant's evidence, as she found, had only come into the defendants' solicitors hands on October 26, 2009.

Swift J. stated it was not satisfactory that surveillance evidence should be in the hands of enquiry agents, to the knowledge of the defendant's solicitors, without being reviewed. The court also expressed concern that shortly before the joint settlement meeting the claimant's solicitors were served with evidence that was inaccurate and misleading and was known to the defendant's solicitors to be such.

Another point of concern was that of the quality of the surveillance evidence provided. The material relating to the first period, January and March 2009, was confusing as to dates and not supported by witness evidence. That relating to the second period, August, September and October 2009, was not in chronological order and contained entries in the logs not visible in the films; and, that relating to the third period was of poor quality, difficult to make out and difficult to reconcile with the surveillance logs.

Swift J. took the claimant's point that once all of the evidence had been obtained it would then be necessary to obtain statements commenting on the same from the claimant and his lay witnesses, following which the comments would need to be considered by the experts to enable them to prepare supplementary reports and joint statements. This additional work would lead to distraction from the ordinary preparations for trial and considerations of Pt 36 offers and potential settlement. This would also have a substantial bearing on the length of trial.

If the defendants' application were to be approved, an additional four doctors and several surveillance operatives would need to be added to the current 20 potential witnesses. A further complicating matter was the uncertainty in relation to the doctors' availability to attend trial within the current trial window.

Based on the above, Swift J. accepted the claimant's submission that if the defendants' application was allowed, it would not be practicable for the trial to proceed. She also accepted that it would place unfair pressure on the claimant's solicitors and would not be manageable. The Court of Appeal also found that any adjournment of the trial would prejudice the claimant as psychiatric evidence suggested that the proceedings themselves were not assisting the claimant's recovery and any further delay would cause additional distress to him

Swift J. balanced this with the prejudice to the defendants if they were not able to rely upon material which would possibly be of assistance to them. However, the court found that the responsibility for the current difficulties lay firmly with the defendants. Further, she was not satisfied that penalising them in costs would meet the practical difficulties faced by the claimant and the court. Swift J. based her judgment on the principles made by Potter L.J. in *Rall* and Lord Woolf in *Jones*.

She held that it was open to the defendants to seek and obtain surveillance evidence earlier than they had done. It was also open to them to make a decision as to whether to rely on that evidence and, having made that decision, to disclose it. She found that the defendant preferred to delay in the hope that more useful surveillance would take place and that they would then be permitted to rely upon all evidence obtained.. Swift J. did not make the same findings in respect of the January and March period accepting that the defendants had not intended to rely upon these films.

In view of the above the application made by the defendants was refused.

*Vimmerslev v Edwards*⁸

In the case of *Vimmerslev v Edwards*, the court took a very different approach to that set out in the previous case law considered. The case involved an application by the defendant on the first day of trial to adduce additional evidence in the form of various DVD's which purported to show the claimant in various day to day activities.

The background to the application was that the claimant was involved in a car accident on September 25, 2006. The defendant's admitted liability, proceedings were issued and the case was being managed to a five day trial, with the application to be heard on the morning of the first day, April 26, 2010.

The defendant sought to rely on evidence to undermine the claimant's case as to the nature and extent of her injuries and their effect on her daily life and made an allegation of dishonest exaggeration on the part of the claimant.

The initial Schedule of Special Damages contained no figures on future loss of earnings. The loss of earnings claim was fully particularised in an Amended Schedule served in November 2009, when it became clear that the claimant sought approximately £1.8 million.

The defendant submitted that the sum of this head of loss led to a reassessment of their stance and subsequently, surveillance evidence was commissioned. The claimant was then videoed during January, February and March 2010. (Also relevant, is that during August 2009, at a joint meeting, various orthopaedic consultants were substantially in agreement with all of the matters, including their assessment of the claimant's ability to work full time).

The January, February and March DVD's were disclosed to the claimant on the March 26,

⁸ Unreported, April 26, 2010

2010. Summary logs were provided for the January and February discs but not for the March footage, the last of which had been shot on the March 24, 2010. At this stage, the parties only had 18 working days to trial. In the days following the service of the DVD evidence, the defendant also served updated medical reports from their experts including one which had been prepared in February 2010, prior to the March footage being obtained.

The DVD's were provided in their edited forms without statements from the operatives. Statements were subsequently served on April 6, 2010. These statements referred to logs which were signed and dated by the individual operatives, although were not provided and which the claimant was without on the first day of trial and the time of the application. During the application the claimant criticised the defendant for their delay in disclosing the material; and, in making the application.

Counsel for both parties referred H.H. McKenna Judge to the case of *O'Leary v Tunnelcraft Ltd*. However, in his judgment, H.H. McKenna Judge found this application was very different to that before Swift J. He noted that in that case there was a five month delay and here, the claimant received the footage two days after the final segment was shot. As a result, H.H. McKenna Judge found that this was not an attempt to ambush the claimant.

H.H. McKenna Judge also noted the claimant's second submission that if the application was allowed then the trial could not proceed as listed because the claimant's orthopaedic consultant was not in a position to prepare a report or give evidence.

Weighing all relevant matters, H.H. McKenna Judge concluded that it was in the interests of justice that the defendant be able to rely on the DVD evidence. He stated that it would be most unsatisfactory to try a case of significant value where evidence that could affect the award, had been excluded. The defendant would be significantly prejudiced. He found that the same could not be said for the claimant if the trial were to be vacated as the claimant could be compensated in costs.

He then went on to find, agreeing with the claimant's second submission, that the matter had to be adjourned. He noted that both the defendant and the defendant's experts had some time to view the evidence and it would not now be fair to the claimant to meet new evidence overnight.

As aforementioned, even this agreement with the second submission illustrated a very different stance to that taken in the previous case law considered above.

Conclusions

If a defendant wishes to ensure that the surveillance can be used at trial, then it is imperative that once the evidence is obtained by inquiry agents, the defendant takes possession and makes an early decision as to whether to rely upon the film. Failure to do so may result in the evidence being excluded. Conversely, early disclosure coupled with an application to rely upon the evidence, will improve the defendant's prospects of using the film at trial. If a claimant, suspects that they being filmed, they should endeavour to smoke the defendant out, to secure possession of the film, thus enabling them, and their experts, sufficient time to evaluate the evidence. That will allow time, before trial, to respond to the film, obtain evidence to counter the same and to seek further views from their experts. When the defendant discloses the film, the claimant should make it clear that they object to its use, thus forcing the defendant to apply for directions. Further, the defendant should be challenged to ensure that all unedited film evidence has been obtained and surveillance logs secured and statements, so that the claimant and their experts can take account of all evidence.

The way in which a party prepares for, or responds to, disclosure of surveillance evidence will influence whether the film is shown at trial. Failure to prepare may not only result in a party being disappointed, but adverse costs orders. In *O'Leary*, the defendant was unable to rely on the film and suffered costs consequences. In *Rall*, the court stated that the costs of the appeal would have been avoided if the defendant had not delayed raising the issue before the court and consequently, the defendant was ordered to pay the costs of the appeal. In *Jones*, again, the defendant was ordered to pay the costs of the hearing before the District Judge and Court of Appeal. Further, the Court of Appeal went on to say that a court should take into account the defendant's conduct when dealing with costs. A trial judge may decide not to allow the inquiry

agent's costs and/or the defendant may be ordered to pay the claimant's costs on an indemnity basis if it transpires that the surveillance evidence is not as persuasive as argued by the defendant.

If you would like to talk to us about the issues raised by this note, please contact:

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