Surveillance evidence in personal injury claims

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Overview

In civil proceedings, surveillance evidence is most commonly used by defendants in personal injury claims. Its aim is to show any difference between the claimant's allegations of impairments consequent on the index accident, and the truth.

The Civil Procedure Rules (CPR) makes no separate provision for surveillance evidence; a recording is considered a document, and CPR 31 applies.

There are three particular features of surveillance evidence that give rise to special considerations:

- surprise—it is of the essence of surveillance evidence that it captures the claimant undertaking activities when they have no expectation of being observed by or on behalf of the defendant. Prior notice must, therefore, be avoided
- secrecy—equally, it is essential that the claimant is not made aware of the fact they are being observed. However, there are limits to the lengths that a defendant should go to obtain such evidence
- timing—its forensic value lies in undermining the claimant's case, and the defendant will therefore want the claimant to pin their factual case to the mast before disclosing the surveillance evidence. However, disclosure must not be so late as to constitute an ambush of the claimant

The unusual nature of surveillance evidence gives rise to particular procedural and tactical issues for both claimant and defendant.

There are further consequences which arise when the successful deployment of surveillance evidence by a defendant results in discontinuance or settlement, including:

- costs issues, including issues around qualified one-way costs shifting (QOCS) and Part 36 offers; and
- the potential for contempt of court proceedings

See Practice Notes:

- Qualified one-way costs shifting (QOCS)
- Qualified one-way costs shifting (QOCS)—case tracker
- Part 36 offers in PI and clinical negligence claims
- Fraud in personal injury claims—remedies and consequences

See also: PI & Clinical Negligence specific funding and costs—overview.

Even after judgment, there is scope to rely on surveillance evidence. For further guidance, see below.

It is also worth noting that there have been instances where a claimant has secretly recorded a medico legal consultation. For further information on the lawfulness of making covert recordings of medical examinations and their admissibility as evidence, see below.

The nature of surveillance evidence

For the purposes of disclosure, a video film or recording is a document within the extended meaning contained in CPR 31.4. It is a document brought into existence for the purposes of the litigation, and is therefore privileged; it is not disclosable in Part 1 of the standard disclosure form.

However, a defendant who proposes to use such a film to attack a claimant's case will waive that privilege, and it will therefore be subject to all the rules as to disclosure and inspection of documents contained in CPR 31.

A defendant may not merely rely on an edited version of surveillance evidence without disclosing the entirety of the evidence gathered. Once privilege is waived in part of the document, the whole document must be disclosed. In practice, this will also extend to surveillance and video logs kept by those responsible for obtaining the evidence.

If disclosure is made in accordance with CPR 31 (whether as standard disclosure under CPR 31.6 or continuing disclosure under CPR 31.11), the claimant is deemed to admit the authenticity of the film unless they serve notice that they wish it to be proved at trial (CPR 32.19). If they do so, the defendant must serve a witness statement by the person who took the film in order to prove its authenticity. If the claimant does not challenge the authenticity of the film, however, it is available to the defendant for the purposes of cross-examining the claimant and/or the claimant's expert medical witnesses at court, unless the court orders otherwise.

Avoiding prior notice of surveillance

There had been concern that the introduction of costs budgeting would leave defendants facing a dilemma: if a costs budget revealed an intention to obtain surveillance evidence, the purpose of that evidence would be thwarted; if it did not, the costs of obtaining that evidence would not be recovered.

The High Court has resolved this dilemma in the defendant’s favour, relying on CPR 3.18 which provides that the court may allow costs not set out in the costs budget if there is good reason to do so. In *Purser v Hibbs* at para [17D], the High Court stated:

> ‘The status of surveillance evidence is anomalous in relation to the costs case management and costs budgeting rules. Those rules do not make any express provision for what we are to do about the costs of surveillance evidence. They are obviously a special case. Most litigation is conducted on a “cards on the table” basis, and the costs budgeting system provides for each side to declare to the other in advance and to declare to the court what it proposes to spend so that the cost budgeting process can take place. Of course, some degree of cunning is required in the administration of surveillance, for entirely legitimate and understandable reasons, particularly given the appalling level of insurance fraud of which the judges become increasingly aware the longer they sit in that field. The court would not, I think, wish to do anything to discourage the judicious use of surveillance evidence or to alert actual or prospective fraudsters to the likelihood of it…I do not consider it sits in the mouth of a fraudulent or deceitful Claimant to object to paying for the reasonable costs of the very work that has exposed their deceit, let alone to object on so technical and undeserving a basis as reliance on cost budgeting.’

In *Yelland v Space Engineering Services Ltd*, Master McCloud held that she was able to vary the defendant’s cost budget so as to include surveillance costs. The costs allowed included, in particular, those incurred before the original costs management order but not covered in the phases which were budgeted. In so doing, she departed from the strict wording of CPR 3.15A(6), which states that the court may vary the budget for costs related to that variation which have been incurred prior to the order for variation but after the costs management order.

Secrecy and the rights of the claimant

It is inevitable that the collection of surveillance evidence will be, or will be perceived to be, intrusive; a claimant in a personal injury matter does not surrender all rights to respect for their home and private and family life. The manner in which such evidence has been collected is relevant to its admissibility. In *Jones v University of Warwick* at para [25], the Court of Appeal stated:

> 'A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Part 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court (CPR Part 1.1(2)(e)). Proactive management of civil proceedings, which is at the heart of the CPR, is not only concerned with an individual piece of litigation which is before the Court, it is also concerned with litigation as a whole. So the fact that in this case the defendant's insurers, as was accepted by Mr Owen, have been responsible for the trespass involved in entering the claimant's house and infringing her privacy contrary to Article 8(1) is a relevant circumstance for the court to weigh in the balance when coming to a decision as to how it should properly exercise its discretion in making orders as to the management of the proceedings.'

This was not a case where the conduct of the defendant's insurers was so outrageous that the defence should be struck out. The case had, therefore, to be tried, and it would be artificial and undesirable for relevant evidence not to be placed before the trial judge. However, the defendant was punished for its improper conduct by an order to pay costs on the indemnity basis.

The European Court of Human Rights (ECHR) held in *Vukota-Bojić* that where surveillance has been carried out secretly, by a public authority, this could constitute a breach of ECHR, Article 8—'right to respect for private life and family life', if the State did not provide adequate safeguards against abuse. States should set out clearly in law the scope and manner in which such surveillance should be undertaken and the data stored and accessed. The two key factors in the case were firstly that Article 8 applied because the defendant was acting on behalf of the State (in many personal injury cases, investigations are almost exclusively carried out by private entities such as insurance companies and therefore Article 8 is not applicable). Secondly, that the surveillance carried out had systematically and intentionally watched the claimant and that they had stored, selected and used the material beyond legitimate and foreseeable purposes. Therefore it amounted to a breach of ECHR, Article 8(1).

When to disclose surveillance evidence

The general principle is that it will usually be in the interests of justice for a defendant to be able to rely on surveillance evidence which undermines the claimant's case, and to cross-examine the claimant and their medical experts on it, so long as this does not amount to trial by ambush.

Generally, a defendant is entitled to wait until a claimant has 'nailed their colours to the mast' as to the extent of their injuries and any consequent disability, before undertaking and then disclosing surveillance evidence. This is normally taken to be either around the time of a witness statement or a schedule of loss. Defendants will have a significant forensic advantage if their surveillance footage is taken at around the time the claimant serves evidence setting out their disabilities.

Once the claimant's case has been sufficiently articulated, however, the obligation actively to obtain surveillance evidence arises; the longer it is left and the nearer the time gets to trial, the more likely it is that the court will regard the delay as culpable.

Once that evidence has been obtained, a decision should be taken whether or not to rely upon it as soon as possible. In *Douglas v O'Neill*, it was said at para [56] that:

> '…a defendant in possession of surveillance evidence should make the decision to rely upon it and disclose it as soon as reasonably possible after receiving sufficient material setting out the Claimant's case, which has been endorsed with a statement of truth so as to enable the surveillance material to be used effectively. If a defendant fails to do so, and the failure to do so has unacceptable case management implications, then that defendant risks being unable to rely upon the material.'

What constitutes an ambush? In *Douglas v O'Neill*, the High Court said at para [46] as follows:

> ‘In my judgment the issue of ambush comes to this—are the circumstances in which the evidence is disclosed such that the Claimant has a fair opportunity to deal with it, or was the time or circumstances of disclosure such that the court should use its case management powers to prevent the defendant from relying upon it?’

This is an objective test, which the High Court stated in *Hayden v Maidstone & Tunbridge Wells NHS Trust* at para [31]:

> ‘…eliminates the need to find some sinister motive in the actions of the party seeking to rely upon the surveillance evidence and focuses on whether the delay in revealing it was “otherwise culpable”.’

The later a defendant leaves its application, the less chance there is it will succeed. In *Grant v Newport City Council*, the defendant obtained footage in February ahead of a trial in July. Rather than disclosing and making its application, it chose to obtain further footage which it had by May. The application was not made until June. Birss J would have refused permission for the defendant to rely upon the evidence had the trial not already been adjourned.

When a party is seeking to rely on surveillance evidence, the fact that it has been disclosed and an expert has looked at it does not mean that a court will be obliged to admit the evidence. It will not be irrelevant as a factor the court takes into account but its weight should not be over-stated.

If an application is made late, the defendant takes the risk that:

- even if the delay does not result in an ambush and the evidence is admitted, culpable delay may result in the defendant being liable for the claimant’s costs thrown away, assessed on the indemnity basis
- if the delay does result in an ambush, the evidence may be excluded. In *O’Leary v Tunnelcraft Ltd*, the High Court acknowledged that exclusion was an unusual step

Issues for the claimant

Effect of adverse surveillance evidence

While adverse surveillance evidence is likely to be damaging to a claimant’s pleaded case, it is not necessarily fatal. The court will dismiss a claimant’s claim altogether only where the footage shows that the claimant has been fundamentally dishonest, as per section 57 of the Criminal Justice and Courts Act 2015. For further guidance, see Practice Notes: What is fundamental dishonesty? and Fundamental dishonesty—case tracker.

Ultimately, it is a matter of fact and degree. Some exaggeration by a claimant may be natural, even understandable, as an attempt to make sure that doctors and lawyers do not underestimate a genuine condition. On the other hand, gross exaggeration and dishonesty will not be tolerated. It is in the public interest both that personal injury claimants pursue honest claims before the courts, and that they do not significantly exaggerate those claims for financial gain.

Where the claimant has in fact suffered a serious injury and has committed a degree of exaggeration, then a court may readily conclude that this does not go to the heart of the claim, but would more appropriately be regarded as incidental, collateral or embroidery. By contrast, in a case where a judge dismisses a claim because the injuries have not been proved at all, then a finding of fundamental dishonesty may easily follow. The position will likely be similar if there is some injury, but it is not of any great significance, and the claimant has exaggerated so as to make it appear very serious.

The central questions may therefore be:

- the stage and circumstances in which the dishonest conduct started
- the extent to which the dishonesty taints the claim, and
- how the value of the underlying valid claim compares with that of the dishonestly exaggerated one

The court can dismiss the entirety of a claim even if it is only fundamentally dishonest in part. See Practice Notes: Personal injury claims and the Criminal Justice and Courts Act and What is fundamental dishonesty?

Scrutiny of surveillance evidence

Surveillance evidence may not be all that it seems. The courts have, on occasion, considered the admissibility of evidence from a witness professing expertise in identifying discrepancies and lacunae in surveillance footage.

Such evidence is generally not expert evidence, as it is not adduced as an expression of expert opinion, but rather as a marshalling of factual material. Permission to rely on such witness evidence is not, therefore, required. However, a report setting out that factual material would (although privileged until disclosed) be available to the court and could be used as the basis for cross-examination of the surveillance officers.

Whether to oppose the defendant's application

The claimant's lawyer will need to carefully consider whether to oppose the defendant's application to rely on the surveillance footage and advise the claimant of the potential risks eg being ordered to pay the defendant's costs of the application.

Where the defendant's application was heard four months before the trial date, and there was sufficient time for witness evidence in response and further joint statements from the experts, Christopher Kennedy KC (sitting as a deputy) praised the claimant's counsel for conceding that the surveillance evidence should be admitted (*Harper v Thomas Cook Airlines Ltd*). He stated that this level of co-operation would be expected save in exceptional cases.

If the claimant consents to the defendant relying on the surveillance evidence or the court permits the evidence, the claimant should consider seeking permission to rely on their own evidence, eg from witnesses including the claimant and anyone else in the footage and potentially an expert counter-surveillance operative. The claimant's representative should ensure that they have received all footage including unedited footage, witness statements and surveillance logs from the individuals who filmed the claimant.

If a claimant's representative believes that surveillance footage may have been taken (or may be taken in the future), they can consider requesting a direction that any such evidence must be disclosed by a certain date. Such direction was given by Master Fontaine in the case of *O'Leary v Tunnelcraft Ltd*. When the defendant later sought to rely upon footage obtained after the relevant date and disclosed (in part) only six weeks before trial, Swift J refused permission.

Surveillance footage may support the claimant's case

Conversely, the claimant's team may decide that the surveillance footage assists their client's case. In *Wilson v Ministry of Justice*, the defendant's footage showed the claimant supporting himself on his car or his building while moving about, and almost losing balance at one point. This was consistent with the claimant's expert evidence, which had identified a need for walking aids but a reluctance on the claimant's part to accept this. Surveillance footage should always be scrutinised carefully not only for matters which may harm the claimant, but also for anything which may be consistent with their case.

The footage may also permit reasonable explanations. The claimant may have been attempting an activity as a 'one-off' to see if they could undertake it; or they may have been performing that activity but to a lesser standard than pre-injury. It will be critical to review the footage in detail with the claimant themselves.

Do not make offers involving potential admissions

One thing that the claimant's lawyers should **not** do is to write to the defendant offering to admit any degree of fundamental dishonesty in return for some compromise from the defendant, for example not publicising the case. This was done in *Morris v Williams* by letter headed 'without prejudice save as to costs'. District Judge Dodsworth held that the offer constituted an admission against the claimant's interest that some fundamental dishonesty had occurred. It was not protected by the without prejudice rule because it fell under the 'unambiguous impropriety' exception. If the letter was excluded, there was more than a risk of the claimant perjuring himself. If it is judged in

the client's best interests to extract themselves from the claim, this should be done without making such offers or even alluding to the possibility of making any admissions.

Advise the claimant client in advance

Given the current climate and the readiness with which surveillance is now used, and admitted into evidence, solicitors for claimants should advise their clients of the possibility that they could be subject to surveillance at the outset of the case. This is a difficult balancing act. Solicitors should not assist others to act improperly and they have a duty to act with honesty under principle 4 of the SRA code of conduct. Equally, clients have a right to be aware of the steps defendants may take to investigate claims.

Perhaps the most important aspect is communication. Claimants should be reminded that if they start to undertake an activity they have previously told their advisers they were unable to undertake, they should inform them so that adjustments to the evidence can be made.

Issues for the defendant

The overriding objective

The latitude given to defendants to conceal the fact and content of surveillance evidence until the circumstances allow it to be most effectively deployed do not excuse them from their obligations under the overriding objective. In *Hannon v Hillingdon Homes Ltd* at paras [13] and [16], it was noted:

> '…it was clearly of particular importance for those managing the case preparation and the pre-trial steps on behalf of both parties to coordinate the various steps being taken and to maintain the timetable that had been crafted in order to give effect to those steps. This was because a balance would need to be struck between, on the one hand, maintaining the timetable and, on the other hand, the obtaining of evidence without the claimant being aware that it was being obtained, but with disclosure of that evidence taking place so that the claimant was not prejudiced. Moreover, the case manager for the time needed to be fully appraised of the situation so as to give effect to the overriding objective…the rules relating to the obtaining and introduction of surveillance evidence are rules which should be applied by the case manager so as so far as possible so as to comply with the overriding objective and with a litigant's rights, particularly his right to a private and family life. The parties are, moreover, required to cooperate with each other in the litigation in order to ensure, as far as is possible, fairness to both parties and to all parties in the litigation.'

See also News Analysis: Pleading fraud and withholding disclosure in a personal injury case (AXA Insurance UK Plc v Kryeziu & others).

The admissibility of edited surveillance evidence

The fact that the video is edited is not fatal to its admission. In *Pendragon Motor Company Ltd v Ridge* at para [13], it was stated:

> '… the Tribunal fell into error in regarding the fact that the video was admittedly a video which had been edited and did not show continuous activity over a period of hours as being a ground for excluding it from consideration altogether. It was agreed that the video evidence sought to be placed before the Tribunal had been edited from a much longer period of video surveillance of Mr Ridge, but it was not disputed before the Tribunal that the edited passages showed a genuine picture of the activities that Mr Ridge was in fact carrying out at the time they were taken…the fact that a video shows edited highlights is quite properly a matter which can be the subject of submission to the Tribunal on the weight to be attached to it. That is a matter on which, obviously, Mr Ridge will be able to give evidence, and submissions can be made on his behalf on the value to be attached to the edited version of the video at the actual hearing itself. But we are not satisfied that that is in itself a ground for refusing to accept it as evidence altogether.'

The claimant will, however, likely seek the full unedited footage prior to trial. If the unedited footage tends to support the claimant's case, then defendant lawyers should consider whether disclosing any surveillance will in fact yield an outcome which would justify the higher costs which will be incurred once the footage is disclosed.

Defendants should take care to preserve the full footage. The court will likely order that the unedited surveillance be disclosed as a condition of reliance on the edited footage. If the unedited footage is lost, then an application should be made at the earliest opportunity to vary the order, with an explanation as to why the position has changed and why the defendant is unable to comply.

After disclosure of surveillance evidence

The disclosure of surveillance evidence may cause a claimant to discontinue or to settle their claim. While not unique to surveillance evidence, the following points should be borne in mind.

Discontinuance

On discontinuance, it remains open for the court to make findings of fundamental dishonesty which disapply the QOCS regime (CPR PD 44, para 12.4(c)). Those findings can be made summarily, including on the basis of surveillance video, but if not, the court may take the view that a trial merely to establish dishonesty is disproportionate.

Settlement

Where proceedings have been settled, the court will not, save in exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings.

After late acceptance of a Part 36 offer following disclosure of surveillance evidence, the court may order that the claimant pay the defendant's costs on the indemnity basis (*Worthington v 03918424 Ltd*, Manchester (District Judge Harrison) June 2015 (not reported by LexisNexis®)).

However, unless the defendant demonstrates by evidence that the claimant's deceit extended back materially into the pre-Part 36 offer period, the court will be slow to disapply the general rule that a defendant should pay the claimant's pre-offer costs. A defendant can protect itself from that consequence by withdrawing any offer, on disclosure of the surveillance evidence.

Strike-out

The issues as to whether a claimant has been fundamentally dishonest will normally be dealt with at trial or assessment, where evidence can be heard and tested in court. It is possible for a defendant in possession of powerful surveillance evidence to apply to strike out the claim on the papers, as was done in *Patel v Arriva Midlands Ltd*. This was, however, an extreme case where the claimant feigned a severe conversion disorder. He was seen by experts lying in bed, mute, almost entirely unresponsive and without movement in his hands, arms or legs. Surveillance operatives later recorded him walking unaided without difficulty, talking, reading and displaying manual dexterity. The court should consider whether there are real grounds for believing that a fuller investigation will add to or alter the evidence relevant to the issues that it must determine. Where there are disputes on the factual conclusions that a court should reach in light of the footage, a judge is unlikely to dismiss the case summarily.

Contempt of court

Contempt of court proceedings can be brought by a defendant against a claimant who has made a false statement in a document, prepared in anticipation of or during proceedings and verified by a statement of truth, without an honest belief in its truth. Such proceedings may only be brought with the permission of the court. Permission will require that such proceedings must be in the public interest; but the courts recognise a strong public interest in allowing claimants to bring honest claims and in punishing claimants who bring dishonest ones.

For further guidance on the consequences of providing a false statement of truth, see Practice Note: Statements of truth.

On 1 October 2020 changes to CPR 81 (applications and proceedings in relation to contempt of court) came into force. It should be remembered that a lot of case law dealing with contempt of court will predate the 1 October 2020 version of CPR 81. For further guidance, see News Analysis: Contempt of court, a dog's dinner: once in a generation changes to contempt litigation—a new breed?

Surveillance after judgment

Surveillance after judgment may disclose that the court was successfully misled as to the severity of the claimant's symptoms and disability. This may give rise to an appeal on *Ladd v Marshall* principles.

Where fresh evidence is adduced on appeal tending to show that the judge at first instance was deliberately misled, the court will only allow the appeal and order a retrial where either the fraud is admitted or the evidence of it is incontrovertible. Where the fresh evidence amounts to an allegation of fraud which is contested, the usual course is to require the issue of fraud to be tried before the established judgment is set aside. However, it is not necessary to commence a fresh action to determine the fraud issue. The trial of the fraud issue can and should be referred to a judge, pursuant to CPR 52.20(2)(b).

Claimant's covert recording of medical examinations

Disputes can sometimes arise between the parties as to what occurred during a medico legal appointment. As a result, particularly in high value cases, some practitioners have advised claimants to record their consultations with experts. This is, in effect, surveillance of medico-legal experts.

In *Mustard v Flower*, the High Court considered the admissibility of the claimant's covert recordings taken during their examinations with the defendant's medical experts. The claimant had been advised by their solicitor to record the examinations on a digital device. The argument was made that the recordings were unlawful under the Data Protection Act 2018 (DPA 2018) or the General Data Protection Regulation (GDPR) and should be excluded and that the manner in which they had been obtained was improper so that the recording should be excluded as evidence. However, the court held that the covert recordings were admissible. The law does not make covert recordings for personal/family use unlawful and it does not prevent such recordings being provided to legal advisers as both the DPA 2018 and the GDPR contain exceptions for personal data processed for exercising or defending legal rights. The judge outlined that the admissibility of such evidence will be determined on a case by case basis and it could not be determined by general guidance to be applied across the board.

In a decision on a subsequent application in the same proceedings, *Mustard v Flower*, the defendants were granted permission to substitute the evidence of one of its experts (whose evidence had been covertly recorded by the claimant). The court considered prejudice to the parties, the balance of prejudice and serving the interests of justice in reaching its decision.

In *MacDonald v Burton*, the court ruled that the defendant should be allowed to carry out its neuropsychological examination of the claimant without being subjected to any kind of recording of that examination. A level playing field could not be achieved because the claimant had not recorded the examination and testing by their own expert. Claimants may therefore be permitted to record defendant medico-legal appointments (with the exception of the neuropsychometric testing element of neuropsychological appointments which requires additional safeguards), provided they record consultations with their own experts of like discipline. They should disclose a copy of that recording with their experts' evidence, as part of their experts' evidence.

In *Bull v Aigbefoh*, the claimant sought to assert litigation privilege over a recording she had made of an examination by an expert instructed by the defendant. The court held that privilege did not attach to such recording.

The High Court in *Mustard* acknowledged that issues in relation to covert records were best worked out through the joint working party between the Association of Personal Injury Lawyers (APIL) and the Forum of Insurance Lawyers (FOIL). In the event, however, the organisations did not reach an agreed protocol. APIL published unilateral guidance in January 2025.