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Covert Surveillance and Social Media: From Big Brother to Love Island

Rob Hunter

Rather like reality television, covert surveillance feels as though it has been around for a long time.

Although several of the leading cases were decided in the early noughties, some old issues have received recent airtime.

This paper will review the current legal landscape and tactical issues before asking: how much has changed?

What's New?

Various claims databases have been available to insurers for decades. Other counter-fraud membership forums are more recent innovations.

Over the last decade, a more active form of investigation known as claimant profiling has become ubiquitous. In essence, claimant profiling is screening by desktop: it is a means of deciding whether to undertake further enquiries without, at that stage, leaving the office.

If further investigations are commissioned then there are a large number of companies now offering covert surveillance services. A basic surveillance package can be obtained for as little as £2,000, or less.

Social Media (#becarefulwhatyoutweet)

Documents are defined in CPR 31.4 as “*anything in which information of any description is recorded*”. As such, electronic documents of all types including web pages, application data, instant messages, emails and photographs are all documents that fall within the ambit of a reasonable search.

References to material gathered from social media have begun to make an appearance in reported cases.

[Saunderson & Others v Sonae Industria \(UK\) Ltd](#) [2015] EWHC 2264 (QB) contains perhaps the first reported example of cross-examination based on an excruciating Twitter exchange involving one of the lead claimants.

More examples can be anticipated. As HHJ Seymour wryly observed in [Cirencester Friendly Society v Parkin](#) [2015] EWHC 1750(QB), “*like so many people nowadays, in particular those who seem minded to seek to perpetrate frauds, [the Defendant] seemed incapable of keeping off the Internet and sharing the true nature of his activities through social media*”.

Typical Cases

The type of case most strongly associated with surveillance and enhanced social media snooping is the medically controversial claim and/or the ‘walking wounded’ claimant. Examples include claims arising from back injury and chronic pain.

Although these are classical examples, the falling cost of enquiries is such that surveillance of one kind or another can be anticipated in a growing proportion of claims.

Admissibility

Arguments to the effect that the deployment of covert surveillance evidence or material from social media involves a breach of a claimant’s human rights have not been successful in English Courts. Instead, issues of admissibility have tended to arise because the evidence is provided late in the litigation.

In the recent case of [Vukota-Bojic v Switzerland](#) (Application 61838/10), the ECHR concluded that the collection and storage of surveillance footage for further use in the insurance dispute *did* amount to an interference with the applicant’s Article 8 right to private life. Further, the actions of the insurer (rendered a public authority by Swiss law) could not be justified by reference to legitimate aims under Article 8.2 of the Convention. Consequently, relatively modest awards were made in damages and costs.

On the other hand, the applicant failed to establish a breach of Article 6 because the proceedings as a whole had been conducted

fairly. As such, the judgment in [Vukota-Bojic](#) does not support the argument that surveillance evidence ought to be routinely excluded.

The leading case in English law remains [Jones v University of Warwick](#) [2003] 1 WLR 954 where an enquiry agent obtained access to the Claimant’s home by posing as a market researcher. The Court of Appeal concluded that the conduct was not so outrageous that the defence should be struck out. It was admitted but with a substantial costs penalty applied to the defendant.

Ambush

The starting point is that relevant evidence will usually be admitted so long as it does not amount to trial by ambush ([Rall v Hume](#) [2001] EWCA Civ 146). This begs the obvious question: What is an ambush?

The sole reported example of a case where late disclosure of evidence was held to be an ambush was [O’Leary v Tunnelcraft Limited](#) [2009] EWHC 3438 where there was there was piecemeal provision of footage coupled with the appearance of cynical manipulation of the litigation. At the date the application was determined, it was “*not practicable for trial to proceed*”. The new footage would be a “*distraction from ordinary preparations from trial and [continued negotiation]*” and was excluded.

The case of [Douglas \(by his Litigation Friend\) v O’Neill](#) [2011] EWHC 601 (QB) is a more helpful case for defendants. HHJ Collender QC noted that surveillance had “*long been a legitimate weapon*” for defendants and expressed the view that the defendant was entitled hold onto the footage in secret until the Claimant produced a statement with a declaration of truth.

In [Douglas](#), an ‘ambush’ was defined as (a) circumstances in which the evidence is disclosed such that the Claimant does not

have a fair opportunity to deal with, or (b), where the Defendant has failed to act in a manner consistent with effective and fair case management.

Recent Cases

In the majority of cases where surveillance material becomes available, deadlines in respect of the service of evidence will have been and gone. In such circumstances, the burden is on the Defendant to bring the matter before the Court for the exercise of case management powers (see [Watson v Ministry of Defence](#) [2016] EWHC 3163 (QB)).

[Hayden v Maidstone Tunbridge Wells NHS Trust](#) [2016] EWHC 1121 (QB) is a recent example of a hard fought application for admission of surveillance evidence. Mr Justice Foskett supplemented the test in [Rall](#) with the suggestion that the question was not simply one of ambush but also whether the Defendant had addressed the issue of surveillance in a timely way (see paragraph 44). The price of admission in [Hayden](#) was high: the Defendant was to pay the costs thrown away by vacation of trial as well as all of the costs of the Claimant's experts dealing with the evidence, all on the indemnity basis.

Foskett J also provided useful guidance in relation to the 'fait accompli' problem, namely the proposition that if a party's experts have seen a video, it will not be possible to exclude its contents from their minds and so, *ipso facto*, the evidence is admitted. In his view, the Claimant was not to be 'bounced' into showing his or her experts the footage when it was potentially inadmissible. Conversely, the fact that the Defendant had shown the DVD to his experts, whilst not ideal, was not fatal to their application; nor would it force the Court's hand. Experts should be capable of and Judges were familiar with putting inadmissible evidence out of their minds.

With regard to case management in future, Mr Justice Foskett suggested a more liberal use of an order that required a defendant to disclose surveillance by a certain point, a direction that had been made by Master Fontaine in [O'Leary](#).

In [Hicks v Personal Representatives of Jonel Rostas \(Deceased\) & MIB](#) [2017] EWHC 1344 (QB), notwithstanding delays in disclosing unedited footage and further surveillance footage until 2 months before a trial window, it was in the interest of justice to allow the Defendant to rely on footage.

The trial window, scheduled for just 5 weeks after the application, was vacated in order to do justice in the case, and avoid potential overcompensation. The penalty for late disclosure was that only the claimant could rely on the later footage, and there was a costs order in the Claimant's favour.

Counter-Surveillance

What lessons are to be learned?

1. *Claimant's lawyers should warn their clients about the use of social media.*

It is improper to advise clients to "clean up" their social media. On the other hand, it is appropriate to advise that: activity on social media may be visible; it is likely to be of interest to defendants; and it is potentially disclosable.

2. *The exercise of judicial discretion will usually favour admission.*

Surveillance evidence is generally regarded as "a legitimate weapon" for defendants (see, e.g., [Douglas](#)). At the risk of over-simplification, social media is often broadcast to the world or a large group of friends. As such, it is not likely to be protected from disclosure by a right to privacy. Both forms of evidence are potentially attractive because they may show the claimant behaving as he or she would without the filter of litigation.

3. Ambushes are rare

Late service, on its own, is generally not enough to persuade a Court to refuse to admit surveillance. The key issues are whether the claimant will have a fair opportunity to deal with the evidence and whether the defendant has addressed the issue of surveillance in a timely way (see [Hayden](#)).

4. A strategic approach to case management is needed

It is suggested that claimant's representatives should, as a matter of routine, ask themselves whether an order in the terms encouraged by Foskett J should be sought. If there is disclosure in contravention of such an order, a defendant would need to surmount the well-known three-stage test in [Denton v TH White Ltd](#) [2014] EWCA Civ 906.

5. Surveillance evidence is costly.

Even in a claim where evidence is provided in a timely fashion, the claimant's representatives will be permitted to view the unedited footage and prepare witness evidence in response before it is put to the experts. It is likely budgets will need to be adjusted. Further, in several of the claims considered above, the sole penalty for late introduction of the admission was in costs.

Has anything really changed?

As [Davina McCall](#) observed so sagely: "Love Island is what Big Brother used to be." So, too, with covert surveillance and social media where recent cases have involved many of the same old issues looked at through a similar, albeit more seasoned, lens.

In litigation as in reality television, the more things change, the more they stay the same.

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