Neutral Citation Number: [2016] EWHC 1121 (QB)

Case No: TLQ/15/1122

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2016

Before:

MR JUSTICE FOSKETT

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Between:

Lorna Catherine Hayden	**Claimant**
- and -	
Maidstone & Tunbridge Wells NHS Trust	**Defendant**

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- -

Colin Mendoza (instructed by **Dawson Hart Solicitors**) for the **Claimant**
Giles Mooney (instructed by **BLM Solicitors**) for the **Defendant**

Hearing dates: 8 April and 29 April 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Foskett:

The application

1. The Defendant's application dated 30 March 2016 concerning surveillance evidence first came before me on 8 April. In the circumstances I will refer to below, I adjourned it to the first open date after 14 days to enable the Claimant's advisers to take stock of the situation and to make a considered decision about what position they wished to take in relation to the application. Although Mr Colin Mendoza, who represents the Claimant, had prepared a detailed Skeleton Argument inviting me to refuse the Defendant's application, there were factors mentioned at the hearing that suggested some further consideration of the position would be beneficial. One consideration was that this kind of application can sometimes backfire on the party applying for it and can represent a bonus for the Claimant. However, issues like that need mature assessment before reaching such a conclusion. I gave certain directions in the meantime (including granting the Claimant permission to disclose the material to one of her expert witnesses), but felt obliged to vacate the trial date (see paragraph 3 below). The application came back before me on 29 April.

2. It is of passing interest to note that on 8 April His Honour Judge Yelton, who happened to be sitting as a Deputy High Court Judge in the QBD in the Royal Courts of Justice, had to address similar issues: *Watson v Ministry of Defence* (https://www.lawtel.com/UK/Searches/4550/AC9601916). It does seem clear that issues relating to surveillance evidence in personal injuries claims continue to arise from time to time.

3. The Defendant's application was (and remains) for permission to rely upon some surveillance evidence commissioned by the Defendant in circumstances to which I will refer below. The Claimant's position, having considered the position after the hearing on 8 April, is to resist the application.

4. The application related to a trial on the issue of quantum that had been fixed to begin at the Royal Courts of Justice during the week commencing 11 April 2016 for 5 days. Given that the application related to a trial in the list for which I am responsible as Judge in Charge of the QB Civil List, the matter was drawn to my attention. The Defendant's solicitors had indicated in the part of the Application Notice that specifies the level of judge required for the hearing that the "trial judge" was the appropriate judge. In other words, they were contemplating that this application should be dealt with at the outset of the trial, something that was also said expressly in the Application Notice. Not surprisingly, the Claimant's advisers took a different view and wanted the matter dealt with before the commencement of the trial. I agreed with that view on the papers that I saw and had the matter listed before me on the date I have indicated. As it happened, it was only on the last working day before the commencement of the trial window that the application could be accommodated.

5. I shall say as little as I can about the background to the case and the evidence because, whatever view I take of the Defendant's application, there will be a trial in due course if the case is not settled and I do not wish to, or to be thought to, comment on the merits of the evidence. That will be a matter for the trial judge. However, in order to put this decision in its proper context, some recitation of the background is necessary and some reference to the evidence cannot be avoided.

The background

6. The Claimant sustained an injury at work on 23 March 2007, just over 9 years ago. She has a degree in Cardiac Physiology and was employed at the material time as a cardiac physiologist at the Kent and Sussex Hospital in Tunbridge Wells. She said that she felt a sharp pain and a popping sensation in her neck during the course of a lifting procedure involving a patient and in due course an MRI scan showed a significant right-sided cervical radiculopathy. Subsequently she underwent surgery in relation to this.

7. Liability for her injury was admitted in April 2009.

8. All I need to say for present purposes is that there is a dispute about the extent of her continuing symptoms: whilst this is not a case where she is claiming significant disability *per se*, she is claiming that she continues to suffer symptoms which interfere significantly with her normal daily life and that they are likely to continue to impede her ability to get back to work, in particular. Given the loss of earnings claim, the alleged financial value of the claim is substantial and runs, as presently pleaded, to not far short of £1.5 million. The Defendant suggests that the symptoms are not as significant as she says they are and that her ability to work is not materially affected.

9. The Particulars of Claim were issued in May 2010 and, in due course, by an order of 24 November 2014, Master Kay QC set the trial window for the period between 1 February 2016 and 1 May 2016. As I have said, the trial was subsequently fixed within that period. The Master gave full case management directions, some parts of which were subsequently varied by agreement, but the appearance to all intents and purposes was that the case was being prepared by both sides in the usual way for trial at the scheduled time. There are some issues concerning compliance with that order, but they are secondary to the principal issue I have to consider. I would simply observe that the solicitors acting for the Defendant, through the National Health Service Litigation Authority ('the NHSLA'), until December 2014 were different solicitors from those who currently act for the Defendant.

10. The Defendant's essential case as outlined above (see paragraph 8) is supported by one of its expert witnesses, Dr Rajesh Munglani, Consultant in Pain Medicine. He expressed the view in a letter to the Defendant's solicitors dated 15 May 2015 (albeit only recently disclosed) that he did not consider that the Claimant's physical impairment was as great as she made out and that the existence of the court case was a "significant negative influence in terms of the presentation of the Claimant particularly in front of examiners." Following an examination on 10 February 2015 he had said in a report dated 8 March 2015 that he was "concerned that the Claimant … may be actually much better than she makes out." In a response dated 22 May 2015 to a Part 35 request he expressed the view that one possibility was that she was "grossly exaggerating for the purposes of financial gain."

11. It is a fairly obvious comment, but if that was the view of an expert upon whom the Defendant was placing considerable reliance, it raised at least the real possibility of this being an appropriate case for obtaining surveillance evidence at that stage. It should also be observed that even at that stage a substantial loss of earnings claim for the future was being advanced: the Schedule of Loss claimed not far short of

£700,000 and a loss of pension of £150,000. However, as will appear, nothing was done about surveillance evidence until the events to which I will now refer.

12. It appears from what I have been told in a recent witness statement from Mr Mark Flavell, the partner in the firm of solicitors now representing the Defendant and who has conduct of this matter, that the possibility of obtaining surveillance evidence was discussed at a conference with Counsel on 15 January this year and was an avenue that would be pursued if no settlement was achieved at the planned joint settlement meeting on 29 January. I must assume that this was the first time anyone on the Defendant's side thought about surveillance evidence – or at least was the first occasion upon which it was advanced actively. No settlement was achieved at the joint settlement meeting and, whilst authority from the NHSLA for obtaining surveillance evidence had been sought on 19 January, authority was only received on 17 February, some 4 weeks later (see paragraph 51 below). Instructions were given immediately by the Defendant's solicitors to the surveillance company and surveillance was carried out on 18, 22, 23, 24 February and 10 March.

13. There were, it is to be observed, over 14 days between the last surveillance operation in February and the final one in March, the explanation for which, I was told by Mr Mooney, was that it was not thought that the evidence obtained on the earlier occasions was sufficiently compelling for reliance to be placed upon it. Given that no expert appraisal of that evidence was obtained at the time, it is to be inferred that that assessment was made by the Defendant's legal team. I am assuming that further authority from the NHSLA was required for the further surveillance because no other explanation for the delay of 14 days has been given. Since the clock was ticking towards trial, it should have been obvious that delaying further surveillance would imperil the trial date which was just over 4 weeks away.

14. On 11 March the Defendant's solicitors completed and signed a Listing Questionnaire which indicated that they believed that "additional directions are necessary before the trial takes place", but no application was made on that date for any directions relating to the surveillance evidence. This has been the subject of criticism on behalf of the Claimant, but it is to be observed that as at that date the Defendant's solicitors had either not seen the video evidence from the previous day or certainly had no authority from their client to disclose it.

15. On 18 March authority was received from the NHSLA to rely upon and disclose the surveillance evidence when it was received providing that it was "favourable to the Defendant" and on 24 March edited surveillance evidence was received by the Defendant's solicitors which included the surveillance conducted on 10 March. 24 March was Maundy Thursday, the last working day before the Easter weekend and 9 working days before the commencement of the trial window.

16. On that day the Defendant's solicitors viewed the edited surveillance evidence and then sent it to Dr Munglani and Mr Michael Cass, the Consultant Spinal & Orthopaedic Surgeon advising them, for comment and also to the Claimant's solicitors. They sent the evidence to the Claimant's solicitors by registered post and, according to a witness statement from Mrs Jacqueline Hardaway, the solicitor acting for the Claimant, it was received mid-morning on 29 March, the first working day after the Easter weekend. I would observe that there had been no e-mail communication from the Defendant's solicitors to the Claimant's solicitors telling

them, simply as a matter of courtesy, that they should anticipate receiving this material immediately after the weekend.

17. The letter enclosing the surveillance footage was very brief and simply indicated that it was the intention of the Defendant to apply to the court for permission to rely upon it. It provided no explanation or apology for the last minute arrival of this material. The Claimant's solicitors acknowledged it by letter dated 30 March, requested "the usual logs and unused material" and confirmation that the footage would not be made available to any of the experts until the court had given permission to rely upon it. It was on that day that the Defendant's Application Notice that comes before me was issued. The brief letter in response from the Defendant's solicitors was to the effect that they would "request that the application be heard on the morning of 11 April 2016 prior to [the Claimant] giving evidence."

18. It was not until an e-mailed letter of 5 April, 4 working days before the commencement of the trial window, that the Defendant's solicitors indicated that the video footage had been seen by Dr Munglani because in that letter they enclosed a third supplementary report from him dated 31 March dealing in detail with the surveillance evidence. Mr Flavell has said in a witness statement that he had simply asked Dr Munglani for "informal written observations", but he provided those views in the form of a third supplemental report. That report is very detailed, runs to some 13 pages and, incidentally, reveals that, in his view, the sightings on 22, 23 and 24 February, as well as the sighting on 10 March, provided evidence supportive of his previously expressed opinion.

19. The Defendant's solicitors also revealed that Mr Cass had been invited for his comments and that they would be disclosed "once received if so advised". They suggested that the Claimant's experts should be shown the surveillance evidence so that "if the Defendant is given permission to rely on the evidence the experts for both parties will be fully appraised of it and able to give oral evidence as to its content." It was suggested that if the Claimant's solicitors required sight of the original unedited footage of the surveillance, they (the Defendant's solicitors) could make enquiries "to have this made available to you at" the offices of the surveillance operatives. Those offices are, I understand, some 60 miles or so from the Claimant's solicitors' offices. On any view, the suggestion was hardly a helpful suggestion.

20. On 5 April the Claimant's solicitors issued an application seeking an order that the Defendant's Application Notice dated 30 March should be listed before me prior to the first day of the trial. As I have indicated, that request was accommodated.

21. By the time of the hearing before me, the Claimant's legal team had copies of the edited surveillance evidence, but not of the unedited footage. In accordance with their perception of what was correct practice they had not invited the attention of any of the experts instructed on behalf of the Claimant to view and comment upon the footage. That was indeed a proper course to take: there was no reason in the circumstances why they should have been "bounced" into simply beginning the process of engaging the Claimant's experts with this new material at that time.

22. Against that background, it is hardly surprising that the Claimant's legal team were not in a position when they appeared before me on 8 April to say precisely and unequivocally what position they wish to adopt. Undoubtedly, they regarded

themselves as the victim of an ambush and, in principle, wished to object to the reliance by the Defendant upon the surveillance evidence. On the other hand, one of the experts on the Defendant's side had already seen and commented upon the surveillance evidence and this was inevitably, it was thought, going to affect the way he gave his evidence if he was to be permitted to continue to give evidence. Furthermore, although, as I understand it, the legal team had not felt that there was anything in the footage they had seen that undermined the Claimant's case, they had not had an opportunity (or, at least for the reasons already given, taken the opportunity) of obtaining the views of their own Consultant in Pain Medicine, Dr Jon Valentine.

23. That being the state of affairs, it seemed to me that the only sensible course was to give the Claimant's team an opportunity to consider the position more fully and, accordingly, I ordered that the trial date should be vacated and the matter should return to me for further consideration when they had decided on the position they should take.

24. In the meantime, the Claimant herself has had an opportunity to view the surveillance footage and comment upon it and so too has Dr Valentine. They both comment on Dr Munglani's third supplementary report and express the view, amongst other things, that it overstates in significant respects what is shown on the footage. As I have made clear, it is not for me to assess either Dr Munglani's opinion or that of Dr Valentine and the Claimant, but it would, I think, be right to record that the response to the new evidence from the Claimant's side is, certainly at face value, a strong one.

25. The current position is that none of the other experts on either side have seen the footage and indeed Mr Cass has not seen it either: as stated above, he was sent it, but was subsequently told not to watch it pending the outcome the present application.

26. Before I come to the competing arguments, I should summarise briefly what I perceive to be the established law and practice in this regard.

The law and practice

27. It is well-established that a surveillance video is a "document" for the purposes of the CPR: see *Sally Rall v Ross Hume* [2001] EWCA Civ 146 at [16] and *Douglas v O'Neill* [2011] EWHC 601 (QB) at [32]. Equally, such a document, obtained for the purposes of litigation, "is plainly privileged material [and as] such it is not discloseable in Part 1 of the standard disclosure form": *Douglas v O'Neill*, [40].

28. The starting point for relevance purposes is as set out by Potter LJ (with whom Sedley LJ agreed) in *Sally Rall v Ross Hume*:

> "19. In principle, as it seems to me, the starting point on any application of this kind must be that, where video evidence is available which, according to the defendant, undermines the case of the Claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendant should be permitted to cross-examine the plaintiff and her medical advisors upon it, so long as this does not

> amount to trial by ambush. This was not an 'ambush' case: there had been no deliberate delay in disclosure by the defendant so as to achieve surprise, nor was the delay otherwise culpable …. Nor is this the comparatively rare kind of case in which the film has to be independently adduced because what it shows goes beyond what can be established by cross-examination, and where different directions may be needed."

29. In *Douglas v O'Neill* [2011] EWHC 601 (QB), HHJ Collender QC analysed the legal position on the basis of the then existing authorities at [32]-[54] and I see no reason to differ from that analysis in any respect. There is one additional dimension to this subject that has arisen subsequently to which I will refer later (see paragraph 44 below).

30. In relation to what constitutes an "ambush" for these purposes, Judge Collender QC said this:

> "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?"

31. I respectfully think that this description of what amounts to an "ambush" in this context is helpful and is consistent with the way Potter LJ characterised an "ambush" in *Rall v Hume* and the circumstances in which the material might be ruled inadmissible by the court under its case management powers. It 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". One problem in the present case is that I sense that the Claimant's advisers have felt it necessary to make and sustain the suggestion that there was some deliberate policy on the part of the Defendant's team to withhold this evidence until the last minute with a view to wrong-footing the Claimant. Historically, that was a tactic adopted, as I can recall from my days in practice. Indeed, as Judge Collender QC observed in *Douglas v O'Neill* [44], "in past days" parties had a carte blanche to deal with such evidence without any control by the court. The existence of that practice was confirmed in a helpful article entitled 'Surveillance in personal injury claims' in the Journal of Personal Injury Law 2010, p. 246, by Anna Davies and Malcolm Underhill. (I should say that I have read that article as well as an article in the same journal by Richard Edwards entitled 'Admissibility of surveillance evidence: a review of the current law and suggestions for reform' - (2012, p. 118).)

32. For reasons I have already given (see paragraph 22 above) and to which I will return below, I can quite understand why the Claimant's advisers saw what occurred as an ambush in the conventional sense and, objectively speaking, what occurred did indeed ambush the trial date and the Claimant's preparations for it. I will return to that below, but before doing so I will refer briefly to one reported decision where an "ambush" was held to have occurred in the conventional sense.

33. In *O'Leary v Tunnelcraft Ltd* [2009] EWHC 3438 (QB) Swift J found the circumstances to constitute an ambush and declined to permit the defendant to rely upon the surveillance evidence. She heard the application on 10 November 2009, 31 days from the first time when the six-day trial could start, 24 days of that period being working days. In that case on 3 May 2007 there was a directions hearing when Master Fontaine ordered, amongst other things, that any application by the defendants to rely on the evidence of private enquiry agents or video evidence at trial should be made no later than 1 July 2008. No surveillance evidence was disclosed prior to that date or thereafter because, it was said, that no such evidence had been obtained at that stage. In June 2009 the Claimant's schedule of loss was served which included a large claim for loss of earnings and loss of earning capacity. In consequence the defendant's solicitor instructed surveillance operatives. In short, they observed the wrong person on one or possibly two occasions, but on 22 August 2009 they filmed him in a sequence which showed the Claimant warming up for a football match in which he did not actually play (or not while the surveillance operatives were present) but for which he was a substitute. That was disclosed, together with other video evidence, the day before a joint settlement meeting in somewhat misleading circumstances that are set out in considerable detail in Swift J's judgment. Her conclusion is of relevance. She said she was driven to the conclusion that this was an "ambush". There was no reason, she said, why the relevant footage should not have been disclosed earlier. There was no doubt, she said, that the defendants' solicitor was aware of the existence of that footage which represented the "high point" of the defendant's surveillance evidence even though he had not received it until shortly before the joint settlement meeting. Her conclusion was expressed thus:

> "At best, this amounts to a serious error on the part of the solicitor concerned. At worst, it amounts to a deliberate attempt to withhold the evidence in order to ambush the Claimant at a later stage …."

34. Although, as I have said, the conclusion in that case was that there was an "ambush", it was not an unequivocal finding of a deliberate ploy to wrong-foot the claimant in that case at the last minute. The problem with making any such finding is that it might be said that to do so fairly could in some circumstances require a mini-pre-trial hearing in which the defendant's solicitor is required to give evidence about what was done and when. In that context, of course, the problem of privilege could arise. The court's jurisdiction is quite robust enough to deal with such a situation if called upon to do so, but this has all the hallmarks of undesirable, costly and time-wasting preliminary satellite litigation. That is why, for my part, the focus should be an objective one based upon the real effect of the late application to rely upon this kind of evidence on the preparations for the trial and, most importantly, on the trial date itself, particularly if fixed. The time estimate for the trial may change which can affect other cases in the list.

35. In *Douglas v O'Neill* Judge Collender QC recorded a concession made by the defendant in that case as follows:

> "The Defendant accepts 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."

36. It appears to be well-recognised that a defendant is entitled to wait until a claimant has pinned his sail to the mast of a particular level of disability or collection of symptoms (through a witness statement and/or schedule of loss, accompanied by a statement of truth) before the defendant needs to undertake the relevant surveillance. Indeed it was the delay of the claimant in *Douglas v O'Neill* in serving witness evidence in support of his case (in breach of six court orders) that delayed the obtaining of the surveillance evidence and was a weighty factor in the exercise by Judge Collender QC of the discretion vested in him: [19-20] and [72-76]. Incidentally, in that case there was no order such as the order made by Master Fontaine in the case of *O'Leary v Tunnelcraft Ltd*. The defendant was not thus in breach of any court order.

37. In *Douglas v O'Neill* Judge Collender QC decided that, whilst the timetable might be tight, the trial date was not definitely threatened by the late disclosure of the evidence.

38. One factor that Judge Collender QC mentioned in the course of considering the exercise of his discretion, to which Mr Mooney referred, is revealed in these two paragraphs:

> "71. The DVD evidence exists. Although, the point should not be determinative of the question, I asked myself and asked counsel in the course of this application, how this trial would be conducted if the DVD evidence was not admitted. Would the Defendant be precluded from cross-examining as to the detail of what is in the DVD in the course of the trial? Are the experts who have seen the DVD to be precluded from making references to the evidence? How could they do that without perhaps being unfaithful to their oaths or affirmations?
>
> 72. At the heart of my consideration when exercising my discretion, must be a determination as to whether or not the Defendant by his advisers has been guilty of delay in producing this DVD film; delay caused by apathy, or worse, through an attempt to take an unfair advantage of the Claimant such that in popular parlance he can be said to have been "ambushed"."

39. Mr Mooney suggests that, applying this approach, it would be wholly unjust to preclude the Defendant from relying upon this evidence purely because it was obtained close to the trial and he asserts that there has been no apathy nor any attempt to take unfair advantage by the Defendant's solicitor.

40. I will return to this submission in due course, but I would make the following observation about what Judge Collender QC said in [71]. I agree that it would be difficult for an expert who has seen the surveillance evidence to put it out of his or her mind and to make no reference to it, but I do not think that that can be a reason for a

court to feel obliged to admit the evidence. Experts are familiar with the need not to refer to the content of any "without prejudice" discussions with their counterparts and the same applies, albeit doubtless with less familiarity, to lay parties who have to be advised by their lawyers not to make reference when giving their evidence to what was said during "without prejudice" negotiations. When, inadvertently, some forbidden material "slips out" during the course of giving evidence, all judges are familiar with the need simply to put such material out of their mind. Where some obviously deliberate attempt is made to refer to such material, it will weigh heavily in the evaluation of the witness who makes such an attempt.

41. It follows that, for my part, I do not see this consideration as a determinative consideration when conducting any balancing exercise that is necessary when deciding on an application of this nature.

42. Mr Mooney also submitted, when the matter came before me on the second occasion, that, in the events which have happened, to use his expression, "the genie is out of the bottle" in this case and, accordingly, the court should regard that as a weighty factor. The factor is not irrelevant, but its weight should not be over-stated: to do otherwise would simply enable a party wishing to rely upon surveillance evidence to produce it at the last minute and assert that now it is on the playing field between the parties it is something that must remain in play. That cannot be right.

Some general observations

43. Before I come to deal with the application made in this case, there are one or two general observations I would wish to make. It is certainly not for me, in one isolated case, to make pronouncements about how best to deal with this issue generally: if there is a problem with the application of the present rules, or the rules are considered inadequate, it must be a matter for the Civil Procedure Rule Committee to consider, doubtless having received observations from the perspective of both sides of the personal injury litigation divide. I do not, of course, know how widespread the problem may be, but it is odd that two applications raising the same kind of issue were considered on the same day in the RCJ.

44. It has, however, occurred to me, pending any such consideration if it is thought necessary, that more liberal use might be made of the kind of order made by Master Fontaine in *Leary v Tunnelcraft Ltd* such that the court would be given even greater control than it currently possesses over preventing the unjustifiably late deployment of surveillance footage. An order with a "date by which" provision will, if disobeyed, bring into focus the relief from sanctions jurisdiction and any application to deploy the evidence will fall to be assessed by reference to the approach in *Denton*. The making of such an order would also focus the minds of the defendant's representatives on the need to address the issue in a timely way so that, whether justifiably or not, they are not accused of simply trying to ambush the claimant.

45. Whilst preparing this judgment, I have discussed the matter with Master Fontaine, now the Senior Master. She tells me that the issue of making such an order is usually raised on behalf of a claimant and, in her experience, the making of such an order is often resisted by the defendant. Whether it is or is not made is determined in the circumstances of each case.

46. As it seems to me, whilst it may be sensible for a claimant's advisers, who perceive that there may be a risk of this kind of evidence being relied upon, particularly if there are expressed reservations by the medical experts about the claimant's presentation, to raise the issue with the court, it may be appropriate for the court itself at the case management stage to raise the question. To do so will enable a record to be made of the position of both parties (possibly to be incorporated into a preamble to the overall order), so that a court facing a late application for reliance upon such evidence will have available that recorded position to assess the application being made. Where no order is made, the reason for making no order can be recorded. Where an order specifying that any application by the defendant to rely on surveillance evidence should be made by a certain date, the reason for making that order can also be recorded.

47. A very significant factor in deciding whether to accede to a late application, in my judgment, is the time when a defendant ought reasonably to commission such evidence. Once the claimant's case, both in relation to the disabilities relied upon and their consequences, is clearly articulated and the defendant is possessed of an opinion from an expert upon whom it relies that the claim is "suspect", it seems to me that the obligation actively to obtain surveillance evidence arises if it is considered a proportionate approach to adopt in the particular case. 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.

The application in this case

48. As I have already indicated, I can quite understand why the Claimant's advisers believed that a deliberate ambush was what the Defendant's advisers had set out to achieve. The sending of an edited video (with no reference to the unedited material) by registered post over the Easter weekend with no courtesy e-mail of warning of its impending arrival was exactly the kind of initial approach that would engender suspicion on the part of the recipient. Then to be told that the application for permission to rely on it would be made on the first day of the trial, just before the Claimant would give evidence, is exactly the way this kind of issue was dealt with in the past (see paragraph 31 above) when ambush was precisely the objective. To add to that the suggestion that, on effectively the eve of the trial, the Claimant's solicitor, who will have considerable responsibilities for the arrangements for the trial, should travel to the offices of the surveillance company some 60 miles away to view the unedited footage, was reflective of an obstructive attitude. It may not have been intended to be obstructive, but that is undoubtedly how it would have appeared. Some proper professional co-operation at a time like this is essential.

49. When the Application Notice dated 30 March was issued, nothing was said within it about the chronology prior to the first sequence of surveillance in February. Mr Flavell's witness statement dated the day before the first hearing before me gave no detail about when the instructions for the obtaining of the surveillance evidence had been sought or given and contained the following paragraph:

> "I have made it clear to the claimant's solicitors that the defendant's application for permission to rely upon the surveillance evidence would be heard on the morning of the trial and that the surveillance evidence should be circulated to

> the claimant's experts so that, if permission is granted, the claimant's experts in this case will be fully appraised of its content and will be able to comment upon it. In this way the five-day trial commencing on 11 April 2016 would not be prejudiced. It is unclear whether the surveillance evidence has been circulated to the claimant's experts."

50. If I may say so, Mr Flavell was making some very large assumptions about the court's attitude to his client's application that may have proved unjustified.

51. At all events, it was not until his witness statement dated 28 April 2016 (thus signed the day before the second hearing before me) that the sequence of events to which I have referred previously was made clear. In that statement he was answering the suggestion that he had acted improperly and/or in bad faith. I accept, on the basis of what he has said in that witness statement, that he did neither. It would seem that from 15 January 2016 onwards he was constrained by the timetable dictated by the NHSLA's protocols concerning surveillance evidence. He says that there was "a slight delay in the NHSLA providing its authority to proceed with the surveillance because of its strict OSINT[1] and surveillance protocols". I am afraid that, when a trial is fixed for 12 weeks hence (one part of which total period is the Easter weekend), a delay of 4 weeks in giving instructions for the initial surveillance (which cannot be described as "slight") and then, if I understand the sequence correctly, another 2 weeks before the surveillance on 10 March could be carried out, is simply not acceptable. Still to be looking for supportive surveillance evidence 4 weeks before the trial when the need to look for it was first highlighted 10 months previously is also wholly unacceptable. There can be no doubt that there was every reason on the Defendant's side to commission such evidence at least from May 2015 (see paragraph 11 above). Mr Mooney was unable to say why no such step was taken at that time and even if it had been delayed for a few months, there was absolutely no reason to leave it until two months before the trial. Since the suggestion for obtaining such evidence was only made on 15 January, then it was probably not unreasonable to see whether the joint settlement meeting two weeks later yielded a settlement. However, that emphatically does not mean that the evidence should not have been commissioned at a much earlier stage. If it was helpful to the defendant's position, it could be deployed in any settlement negotiations, including the settlement meeting.

52. It is really the delay in obtaining this kind of evidence before it was first suggested on 15 January 2016 that is unexplained and, in my view, unreasonable in this case, coupled with no real urgency being shown in pursuing it thereafter. As I have said, I acquit Mr Flavell of personal bad faith and impropriety, but the whole delay in obtaining this evidence, such that it was made available for the first time (in partial form) nine working days before the trial, was culpable within the way that term was used in *Rall v Hume* and applied in subsequent cases.

53. On that basis, the Defendant would have had an uphill struggle to persuade the court that it should be permitted to rely on the surveillance evidence at a trial commencing in the week beginning 11 April. Indeed, had the full picture that I now have been available to me on 8 April, I am inclined to think that I would have dismissed the Defendant's application.

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[1] I assume this is Open Source Intelligence

54. Because, understandably, the Claimant's advisers were presented with a dilemma at that hearing, some further time for measured consideration was entirely in order. Unfortunately, to achieve that, the trial date had to be vacated. I have indicated above (see paragraph 24) what has happened in the meantime. That does mean that it will be a little while before the trial can be re-listed.

55. This brings me back to Mr Mooney's genie in the bottle argument to which I referred in paragraph 42 above. He submits that, in light of those events, it would be in the interests of justice to permit the reception of the surveillance evidence. He accepts that there may be costs consequences from the Defendant's point of view, but contends that it would be unjust in the new circumstances to prevent the evidence from being deployed.

56. For reasons to which I have already made some reference (see paragraph 42, this argument is deeply unattractive. The opportunity to present it arises solely because the culpable delay on the Defendant's part quite reasonably led the Claimant's team to want a little time to digest and consider the implications, but to do so required the vacation of the trial date. To accede to the argument might well be seen as a reward for poor litigation behaviour. Indeed I have considered with some care whether I should entertain the argument at all. Mr Mendoza, somewhat engagingly, asked me to put the genie back in the bottle. I have been very tempted to do so. Had I been persuaded that not to do so would have caused the Claimant irreparable injustice and prejudice, I would unhesitatingly have done so. However, with considerable misgivings, I have decided that the overall interests of justice require that the evidence is considered as part of all the evidence in the case and, subject to the conditions to which I will refer shortly, I will grant permission for it to be received at trial. As I have explained at the outset, the evaluation of all the evidence will be for the trial judge, but I do have to make it clear that I have been influenced in the decision to which I have referred by the fact that the Claimant and one of her principal medical experts have been able to answer (as I have said, at least at face value) the new material and Dr Munglani's analysis of it in a strong fashion. The playing field has, in my view, remained level. The views of the other experts (including the other experts for the Defendant) who have not yet seen the material remain to be seen, of course.

57. The precise terms of the order giving effect to this conclusion will have to be determined. I will deal with one or two issues of principle first. The trial had to be vacated because of the Defendant's late application. Mr Mooney accepted that this was so, but argued that the costs thrown away by the adjournment should be reserved to the trial judge. I see absolutely no reason why that issue should be left over to the trial. This, in my view, is the clearest possible case in which the order should be that the Defendant should bear the costs thrown away by the vacation of the trial date on the indemnity basis. This was, objectively speaking, unreasonable litigation behaviour. I will assess those costs summarily and they will be paid to the Claimant's solicitors within 14 days of the sealing of the order. The Defendant will also pay the costs of the two hearings before me, again on the same basis. I will deal with the summary assessment below.

58. Mr Mooney also submitted that any further costs incurred in instructing the Claimants other experts to consider the surveillance footage, to express their views about it and to discuss it with their counterparts with a view to further joint statements, should also be dealt with by the trial judge. His argument was that, if the surveillance footage had

been obtained when it should have been, these matters could have been dealt with at the time the experts considered the case originally and that the trial judge would be in a better position to assess how much extra cost has been incurred by dealing with these issues now rather than then.

59. I do not accept this approach. The whole delay and the additional costs to be occasioned have been caused by the late obtaining and late deployment of this material. In my view, the Defendant must be responsible for the additional costs of instructing the Claimant's experts to consider this new material, for those experts to consider it, report upon it and discuss it with their counterparts with a view to new joint statements. To my mind, this is merely an extension of the issue of the costs of the trial thrown away and again should be paid on an indemnity basis. Since this is a future liability, I am not in a position summarily to assess these costs at this stage although it appears that Dr Valentine has submitted an invoice for the work he has done in considering the footage and Dr Munglani's report. I propose, however, to leave that over for consideration along with the costs incurred in relation to the other experts. It is right to say that the Defendant has failed to comply with CPR Part 35.4(1) and (2) in relation to the costs of putting in Dr Munglani's third supplemental report or for any of its other experts who will be invited to consider the surveillance footage. I regard the order for the payment of the Claimants' experts' additional costs caused by considering the surveillance footage on the indemnity basis a suitable sanction for this breach of the CPR. It follows that the order will be that these additional costs are to be assessed by the trial judge on a summary basis at the conclusion of the trial and will be paid by the Defendant in any event. The trial judge will, of course, be in a position to consider the costs of the trial itself.

60. In view of the adjournment of the trial, some of the other issues that have been raised fall away in practical terms. There was an argument about the literature upon which Mr Cass was seeking to rely and about a further report from Mr Patterson, the Claimant's orthopaedic expert. I do not propose to address these disputes: the material on both sides can be deployed at the trial.

61. Mr Mendoza has submitted that if what the Defendant is alleging against the Claimant is some fraudulent attempt to obtain increased damages on a false basis, this should be pleaded or otherwise made clear. Mr Mooney accepts that if that is the Defendant's case, it would need to be spelt out clearly. However, he has said that, at least until the Defendant's psychiatric expert has considered the surveillance footage, he is not in a position to say whether that will necessarily be the Defendant's case. A provision in the order concerning this must be made.

62. So far as the trial itself is concerned, it should be delayed no longer than is reasonably necessary. Given that the Defendant has been responsible for the vacation of the trial date, I am not prepared for the new date to be prolonged because of difficulties concerning the Defendant's experts. If arrangements for the trial before the end of 2016 cannot be agreed within 28 days of the sealing of the order giving effect to this decision, I shall reserve to myself the listing of the case.

Summary assessment of the costs thrown away by the vacation of the trial date and of the hearings on 8 and 29 April

63. In relation to the hearing on 8 April, the Claimant's solicitors have submitted Statements of Costs relating to responding to the Defendant's application of 30 March and for making the Claimant's own application to bring the hearing of that application forward to a date before the start of the trial. The first is in the sum of £11,892.36 and the second is in the sum of £3640.31. There may be a marginal overlap between the two and I will reduce the overall sum payable to £15,000 inclusive of VAT.

64. In relation to the adjourned hearing on 29 April, the Statement of Costs submitted is in the sum of £21,855.12. I do not detect anything inherently unreasonable in that statement, but, painting with a broad brush, I will reduce that to £20,000 inclusive of VAT.

65. So far as the cancellation charges of the experts are concerned, Mr Patterson has charged £1800, Dr Cooling has charged £2400 and Mrs Nicola Hill, the Claimant's care expert, £667.20. These appear to be consistent with their normal charging policies and there is nothing inherently unreasonable about them. Accordingly, I will allow those charges.

66. Dr Valentine's cancellation charge appears to be £11,700. Even allowing for the fact that I am dealing with this on an indemnity basis, I shall need some further explanation for such a large figure. I will defer ruling on that until greater detail has been provided. I would propose dealing with this on the basis of written submissions.

Conclusion

67. I will be grateful if Mr Mendoza could draft an order giving effect to this decision and submit it to Mr Mooney for his agreement.