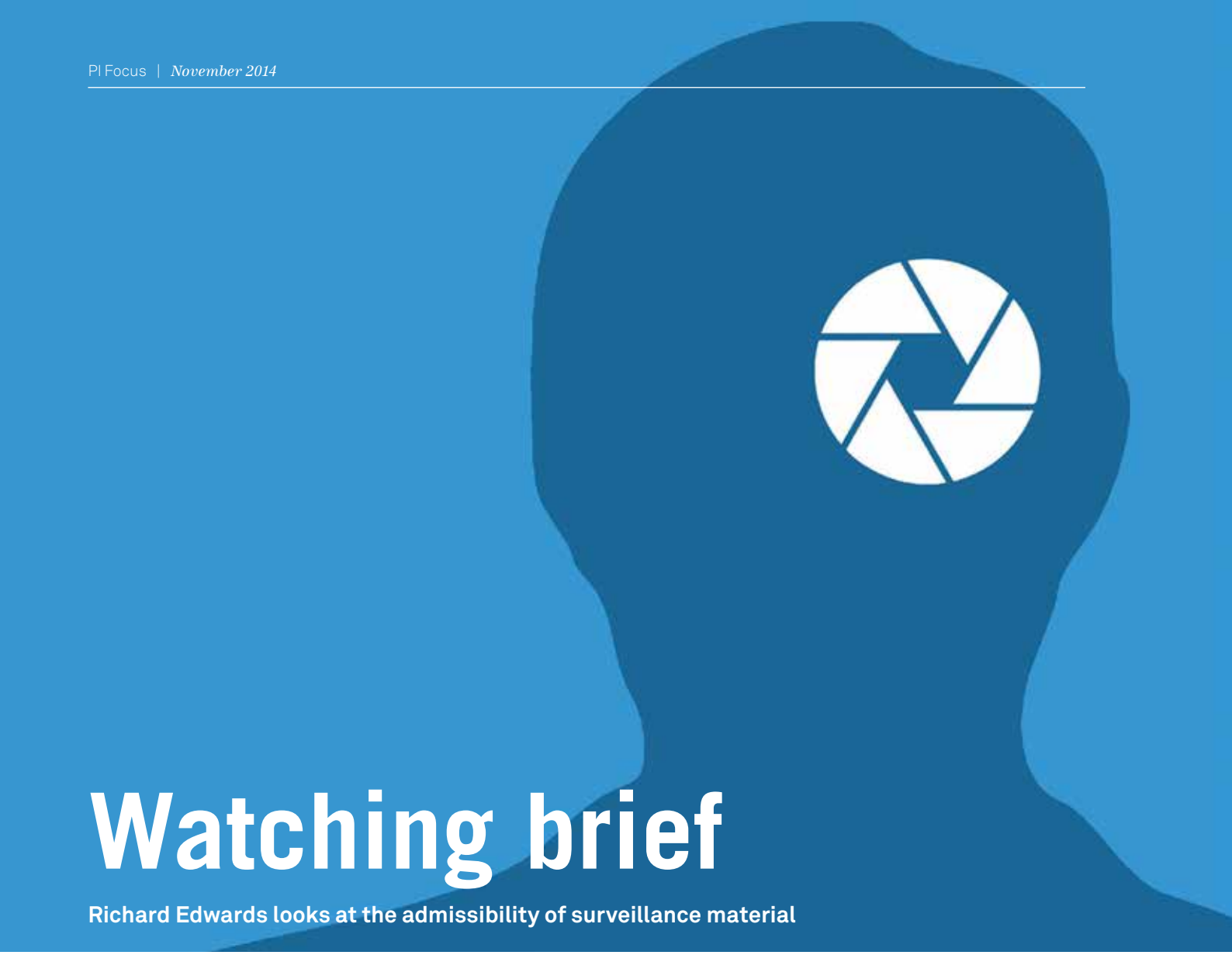

Watching brief

Richard Edwards looks at the admissibility of surveillance material

For those dealing with serious injury litigation, this will be a familiar scenario. One day, perched atop of the day's post, sits a harmless looking jiffy bag. As the parcel is lifted, a puzzled expression gives way to a wince when the unmistakable sound of DVDs rattling in their cases is detected. A client has been snooped on. Often the footage will have little impact, beyond increasing costs - and invoking in the client a justifiable sense of indignation. But occasionally, the jiffy bag becomes the delivery system for a weapon of mass destruction, capable of obliterating the most carefully constructed schedule of loss, and inducing medical experts to abandon positions. This article will hopefully help avoid - or at least mitigate - the effects of such a catastrophe.

Recently, incentives to engage enquiry agents have grown from simply providing the means to restrain the value of a claim, to potentially supporting a strike out application, following the Supreme Court's decision in *Fairclough Homes Limited v Summers* [2012] UKSC 26. It can also lead to loss of the qualified one-way costs shifting shield under CPR 44.16, as shown in *Gosling v Screwfix Direct Ltd* Lawtel 28/7/14.

Clause 49 of the Criminal Justice and Courts Bill, as currently drafted, obliges a court to dismiss a claim which is found to be fundamentally dishonest, even if the court is satisfied that the claimant is entitled to damages, unless this will cause the claimant substantial injustice. The government hopes this will encourage insurers to challenge more claims.

These new developments, combined with the changing landscape on relief from sanction under CPR 3.9, provide the backdrop for this examination of the admissibility of surveillance material.

Pre-Jackson decisions

In *Rall v Hume* [2001] EWCA Civ 146, the Court of Appeal held that, as a video recording counted as a document under CPR 31, it was subject to the rules relating to standard and continuing disclosure. So if a claimant did not serve notice requiring the video to be proved at trial, they would be deemed to admit its authenticity. But once a defendant decided to rely on the video evidence, the issue had to be raised before the court at the first practicable opportunity; it 'should not amount to trial by ambush'.

In *Huckbody v Jones* 11/04/2011 (unreported), HHJ Holman held that CPR 3.9 was engaged when confronted with a late application to rely on surveillance evidence. Permission to rely on the evidence was refused, even though it was alleged the footage showed the claimant going about normal day-to-day activities without apparent difficulty, in a low velocity impact claim in which more than £500,000 was sought in damages.

Furthermore, as the defendant's solicitors had disseminated the footage among their experts, they were refused permission to call their evidence orally. This was later varied on appeal to the extent that the experts could be called, albeit that surveillance evidence they

had seen would not be before the court. Prominent in HHJ Holman's mind was the fact that he found there had been an invasion of privacy; that the footage was disclosed after an unexplained delay three months before trial and without any effort by the defendant to make an application until required to by the court; that if the footage was admitted, the trial would be jeopardised; and the need to identify an appropriate sanction to ensure behaviour consistent with the CPR.

More recently in *Dass v Dass* [2013] EWHC 2520 (QB), Haddon-Cave J upheld a case management decision of Master McCloud to refuse the defendants permission to rely on any expert medical evidence, in another claim valued at more than £500,000. The defendants served medical evidence over two years late, in part to carry out surveillance and provide the footage to the experts. While the court held CPR 3.9 was applicable (in pre-Jackson form), the issue on appeal was whether or not Master McCloud's decision was within the generous ambit of discretion allowed at a CMC. Haddon-Cave J held that the decision was justified, despite the fact that a trial date had still not been fixed, as there had been a wanton failure to comply with a court order for tactical reasons, which contributed to court time being wasted. It was further held that Master McCloud had given proper regard to the overriding interests of justice, including the need to respect and obey court orders. Haddon-Cave J said the same decision would be reached after 1 April 2013. While not a case concerning an application to rely on surveillance evidence, *Dass* is another example of the courts being prepared to take a tough line where expert evidence is disclosed late for reasons linked to covert surveillance.

Post-Jackson

A significant feature of the Jackson reforms was the amendment to CPR 3.9, intended to usher in a culture of compliance. In place of the list of nine factors to be considered was substituted a new streamlined rule providing:

'(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.'

In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 the CA ruled that although regard should be had to 'all the circumstances of the case', the factors (a) and (b) should be the paramount considerations; and it introduced a test whereby if a breach was not 'trivial', the party in default would have to convince the court that relief should be granted. Had matters rested there, insurers would have found their prospects of success on a late application to rely on surveillance evidence to be poorer than they are now. But a well documented backlash followed *Mitchell*, and the antidote arrived in the conjoined appeals of *Denton v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others* and *Utilise TDS Ltd v Davies and others* [2014] EWCA Civ 906. This has seen the introduction of a new, three-stage test on applications for relief from sanctions, requiring courts to: 1) Identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order; 2) Consider why the default occurred; and 3) Evaluate all the circumstances of the case, so that the court can deal justly with the application including factors (a) and (b).

When considering the first stage, Lord Dyson MR and Vos LJ, in a joint judgment, said that in many instances the most useful measure of the significance of a breach will be whether or not it has imperilled a future hearing, or otherwise disrupted the conduct of the litigation concerned, or litigation generally. If the breach is considered neither serious nor significant, it is unlikely the court will need to devote much time to the other stages.

On the second stage, the court declined to produce an encyclopaedia of good and bad reasons, although it did note that some examples were given in *Mitchell*. For the purposes of this article, a good reason would include the late emergence of evidence tending to suggest exaggeration. The need to ensure that a fraud is not perpetuated - because of the implications that would carry for the proper administration of justice and public confidence in the civil justice system - will always weigh heavily on the court. A bad reason might include tactical delay.

On stage three, Dyson and Vos asserted that factors (a) and (b) were of particular – but not paramount - importance, and should be given particular weight when all the circumstances of the case were considered. Jackson LJ dissented on this point, stating that factors (a) and (b) simply required specific consideration, and the weight to be attached to them was a matter for the court having regard to all the circumstances. As such, they were to have a seat at the table, not the top seats at the table. This distinction could count in some instances.

It was also emphasised that, at stage three, it was appropriate to take into account the promptness of the application, other past or current breaches, and that the courts were no longer to give pre-eminence to the need to decide the litigation on its merits. At times, the needs of justice in the wider sense, including the need to ensure that court orders and rules are observed and to manage the pressures on court resources, will mean that the ability of a party to put its case must be circumscribed. The more serious or significant a breach, the less likely it would be that relief was granted, unless there was good reason for it.

The *Denton* case in particular gives clues as to how a surveillance application might now be approached. Here the claimant alleged breach of contract in the design and construction of a milking parlour. The parties exchanged witness evidence by 8 June, and expert reports by 27 July 2012, in accordance with directions. The claimant's expert opined that the parlour did not provide enough space for the cows. The case was then listed for a ten-day trial starting on 13 January 2014. In late November and early December 2013, the claimant served six witness statements containing evidence about the allegedly unsatisfactory spacing in the parlour. The spacing had been modified in August 2013, bringing improvements in milk yield, and this was offered by the claimant as the reason behind its delay. At PTR on 23 December 2013,

HHJ Denyer QC granted permission to rely on the statements, and adjourned the trial to give the defendant the chance to call evidence in response. On appeal, that was reversed. It was held that the breach was significant, as it had caused the trial date to be vacated. The claimant was also criticised for not calling the evidence sooner on the basis that they knew, since the expert's report in 2012, that there was an issue about spacings in the parlour. In addition, the concern of HHJ Denyer QC - that refusing the claimant permission to rely on the statements would mean conducting the trial on an artificial basis - was not considered correct. This was because the claimant had brought the problem on themselves, and to indulge them would have caused major disruption, wasted court resources and generated extra costs.

So this case raises some of the same issues that will also feature in a typical application to rely on surveillance evidence. Defendants will no doubt argue that when the evidence is needed to defeat a claim believed to be wholly or partly fraudulent, then different considerations should apply. The hard line taken in *Denton* is nevertheless notable, as is the lack of prominence given to concerns about the trial proceeding on an artificial basis.

What strategy points can be gleamed from all of the above?

Pre-application considerations

In any serious injury case, consider the following to manage the risks presented by potential arguments of exaggeration and covert surveillance:

1. Carefully scrutinise all medical records before instructing experts. Look out for unexplained symptoms, unusually prolonged recoveries, and references to ongoing litigation;
2. If possible do not instruct quantum experts until your client has reached the end stage of recovery;
3. Ensure witness evidence is consistent with medical records and any discrepancies are explained;
4. Consider warning your client in general terms of the risk that they may be monitored in public or on social media and conduct maybe misinterpreted;
5. Require defendants to give disclosure lists, even when liability is not in issue. This may subsequently help if, applying *Rall*, you can show that the defendant has failed to give proper disclosure in breach of Part 31 (some doubt about this was expressed in *Douglas v O'Neill* [2011] EWHC 601 (QB));
6. While mindful of the risks, if appropriate consider seeking an order at CMC that any application to rely on evidence of a private enquiry agent or video evidence should be made by a particular date. There is reference to such an order in *O'Leary v Tunnelcraft* [2009] EWHC 3438 (QB);
7. Comply with court orders. In *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506, the court took into account the fact that both parties had breached an order for filing witness statements when granting a claimant's relief application. This also counts at *Denton* stage three;
8. When preparing statements, avoid absolute terms, unless appropriate. Consider with your client whether 'I usually' or 'I tend to' would be more accurate than 'I never'.
9. Consider how this impacts on your costs budget. You may choose to provide an assumption that surveillance will not feature or stay silent. If so, you will need to apply to revise the budget if the issue arises. Alternatively, you may incorporate an appropriate contingency - certainly the best option if allegations of exaggeration have already been made.

Post-service of application

Before the court rules on admissibility:

a) If statements are not served from the operatives, file a notice to prove under CPR 32.19 within seven days and request all surveillance logs and statements;

b) Consider why your opponent arranged surveillance, and if they can show they have acted promptly in commencing, concluding and serving the surveillance evidence, and then making the application. If not, what reason is given for any delay?

c) Will granting permission cause the adjournment of any hearing, including the trial, or impact other litigation? If so, could the footage reasonably have been disclosed earlier to avoid this impact?

d) Is the evidence significant, and will the defendant's ability to defend the case really be impaired?

e) Consider issues of fairness, including: i) Are there any privacy or human rights implications in the methods used? In *Jones v University of Warwick* [2003] EWCA Civ 151 the presence of these factors incurred judicial opprobrium; ii) Will your client have a fair opportunity to respond if the evidence is admitted, or is this an ambush? iii) Will punishing your opponent in costs be a sufficient deterrent? iv) Has your opponent sought to tie the court's hands by disseminating the material among experts? If so, ask the court to rule that evidence inadmissible. If not, ask your opponent not to do so, and the evidence should not be sent to your client's experts until the court rules on admissibility.

f) Has your opponent or client breached any other rules or orders?

g) Pursuant to *Denton*, parties should not unreasonably or opportunistically oppose an application for relief, and those who do may face heavy cost penalties. Whether or not this will stand in a surveillance evidence situation will depend on all the circumstances. It certainly could bite in a finely balanced case, but is unlikely to do so if there has been unexplained and / or tactical delay.

Post-hearing considerations

If the evidence goes in, then it may be worth using a video surveillance expert to advise if the footage has been selectively edited or tampered with. Ask your opponent to produce all the operatives' invoices, so that the full extent of the surveillance operation can be known. Also consider obtaining rebuttal statements from your client and any others who can fill in gaps in the footage, for example by explaining how your client presented away from the camera.

Richard Edwards is a solicitor-advocate with Potter Rees Dolan Serious Injury Solicitors, Manchester