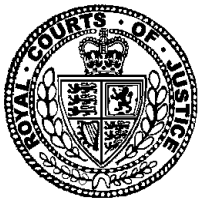

Neutral Citation Number: [2012] EWHC 4146 (QB)

Case No: HQ 12 X 00390

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2012

Before:

MR. JUSTICE STADLEN

- -

Between:

MARLENE SAMSON	**Applicant**
- and -	
MOHAMMED ALI	**Respondent**

- -
- -

MR. ANDREW RITCHIE QC and **M. GRANT** (instructed by **Irwin Mitchell**) for the **Applicant**
MR. BERNARD LIVESEY QC (instructed by **Greenwoods**) for the **Respondent**

- -

Approved Judgment

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MR. JUSTICE STADLEN:

1. There is before the court an application by the claimant in this action for permission to rely on the evidence of a Mr. Simm in the form of a witness statement dated 23rd August 2012, alternatively permission to rely on his evidence in an expert capacity. This is a claim for damages resulting from a car accident in which the claimant was the driver of a car which was stationery in traffic when it is alleged that the defendant drove into her car from behind and one of the injuries alleged to have resulted from this was a contusion of the right knee as it struck the dashboard. The accident was on 4th December 2006. It is alleged that the condition of the knee deteriorated to the point that the claimant had to give up her employment in 2008 and the claim is advanced on the basis that the claimant is permanently in pain for which she requires continual analgesia, and is disabled. She says that she cannot walk for more that twenty metres without stopping and that her whole of life is substantially impaired. The trial is due to start on 4th February with an estimate of four days. There are medical experts on both sides on the issue of the knee.

2. The defendant insurers instructed a number of surveillance operatives to film the claimant and video footage in the form of DVDs, carried out by a number of operatives on allegedly 14 different dates between April 2010 and February 2012, were disclosed by the defendant to the claimant in support of the contention that will be advanced at trial, that in fact the claimant is shown walking for more than twenty metres at a time inconsistently with the evidence which she has committed to.

3. On 7th March 2012 at a case management conference Master Cook made an order for permission to the defendant to crossexamine the claimant on the content of the video surveillance evidence disclosed on 1st March in relation to surveillance of the claimant on specified dates. The claimant has obtained a witness statement or a report from Mr. Jeffrey Simm dated 26th September 2012 which runs to some 32 pages and it is this evidence that the claimant wishes to be permitted to admit at trial for use at trial. Mr. Simm describes himself in the report as a video evidence consultant from 2007 to the present, a freelance covert surveillance operative from 1999 to the present, an APIL expert from 2011 to the present, and a guest speaker at conferences of the PIBA and the APIL.

4. He says that he has operated in freelance covert surveillance for 13 years carrying out in excess of 50 surveillance operations annually. They have predominantly been insurance claims matters. His duties have included organising surveillance personnel, carrying out surveillance operations, editing gathered film and compiling reports. Since 2007 he has concurrently acted as a video surveillance evidence consultant being called to give evidence on the way video evidence has been gathered and presented. Through his experience in both areas he is able to advise where he believes evidence has been compiled in a manner benefiting one particular party. He was called to give evidence in what he describes as the landmark ruling *Noble v. Owens* that was heard at the Royal Courts of Justice and has given lectures on the subject of video evidence to many leading UK associations. He has written articles on the subject of surveillance evidence for leading law and trade journals and produced copyright protected training for advisory manuals.

5. He says that he has reviewed unedited video footage supplied out of chronological order making analysis difficult and time consuming. He says that he has completed a detailed analysis of the evidence, including appendices, and he reaches certain conclusions. They include that having reviewed the logs and film it is his opinion that not all the film has been disclosed. He says it is normal industry practice to insert a direct line of sight covert trigger, if possible, in order to obtain both opening and closing footage and all relevant movement at the given home address. Such a position was clearly available during the periods of surveillance carried out on the claimant but throughout the surveillance, for reasons unknown, opportunities to obtain footage of her as she left or arrived back at her own address have either not been taken or the film has not been disclosed.

6. Throughout the film there are 26 occasions, it is said, where her movements have been logged where it would, in Mr. Simm's opinion, have been possible to obtain film, but for reasons unknown no film has been taken or disclosed. Furthermore, there are ten occasions where the surveillance log indicates that film was taken but none has been presented for those periods. Throughout the periods of surveillance the claimant was known to have boarded or alighted from a motor car without being filmed on 25 occasions. On a large majority of them the operative knew the type and whereabouts of the car being used by her and on many occasions demonstrated that a clear line of sight of the car was available. No reason has been given as to why so many opportunities to film her as she boarded or alighted from the cars were not taken.

7. On twenty occasions she is known to have entered public transport places where no film has been taken or disclosed. It is known that the operatives had access to close quarters recording equipment. No reason is given as to why no filmed entry was made on so many occasions.

8. During the surveillance period the film cuts suddenly without explanation and with her in full and open view 74 times. An occasional break in filming is expected if there is third party awareness, a battery or recording media change but that would normally be reported in the log. No reason is given as to why filming was stopped on so many occasions. With modern digital recording devices the user is simply able to rewind and record over any previously taken but unwanted footage. The manipulation of the time indicator is also routinely deployed. During the surveillance period the log stated that the claimant was not seen. However, there is clear evidence on the unedited film that in fact she was active on the day. No reason is given as to why the extended period of filming has not been included in the footage logged in the surveillance report.

9. By choosing when and when not to enter an open and public accessible environment or when to stop filming when she was in full and open view, the operatives have made use of selective filming methods meaning that anyone making use of the films to assess or form an opinion does so based entirely on what the surveillance team have chosen to be shown. For clarification purposes he suggests that a request be made to have sight of all the original recording media used throughout the surveillance. I am told by Mr. Livesey for the defendant that no such additional material exists, there being some five edited and five unedited DVDs that were disclosed.

10. Then it is alleged that there were some nine occasions on which the surveillance operative was able to locate the car being used by the Claimant and the conclusion drawn is that the only explanation is that the operatives must have planted a magnetic device on the car which it is said constitutes a breach of the claimant's article 8 rights and is indicative of bad practice suggestive of people who are unscrupulous and who would be prepared to prepare a footage which is designed to be misleading and which is, in effect in summary form, the consequence of the effect of the previous opinions of Mr. Simm to which I have referred.

11. He adds that in his opinion a particular section of the film taken on 24th September 2010 has been deliberately presented at a higher than real time frame rate that gives the viewer the impression that the claimant is moving in a free and fluent manner.

12. He says that the privately instructed covert surveillance industry is currently unregulated. The Association of British Investigators has a code of conduct and is promoted on The Law Society website but there is no specific regulation or requirement for anyone wishing to start up as a private investigator.

13. Objection is taken by the defendant to the admission of this evidence. First it says that Mr. Simm is not qualified as an expert. It is submitted that being a covert surveillance operator is not a recognised expertise. He does not profess to have any technical or other qualifications. He does not claim to have expertise acquired by learning, training, examination or membership of a recognised institution governed by appropriate professional standards.

14. Second, it is said that his criticisms can be advanced by any competent lawyer after examining the relevant documents and these are not points in respect of which a judge will require explanation and help.

15. Third, it is said that it will create a further collateral list of issues, collateral to the main issue which is whether the claimant truly does suffer from disabilities which she now claims.

16. Fourth, it is said that it is not suggested that the person videod was other than the claimant. The defendant's expert doctors say that she has exaggerated and there is no reason to suppose that that conclusion will be invalidated by any of the criticism advanced.

17. Fifthly, it is said that Mr. Simm is biased because he has an interest in a business called "Don't Be Watched" which has a website which I was shown which, it is said, displays an attitude that is not objective but displays bias.

18. When I asked Mr. Livesey what prejudice would be suffered by the defendant if this evidence was admitted he said that it would raise collateral issues, it would lead to the surveillance operative being crossexamined by the claimant's counsel as to what the video footage in fact shows, that it will lead to conflicting views as to what that evidence shows which in turn will make it less likely that there would be compromise and it may give the claimant false optimism, thereby making compromise less likely. So far as that is concerned in my judgment that is not a legitimate ground of prejudice, nor, in my judgment, is it, with respect, a rational one.

19. It is part of Mr. Livesey's case that any criticisms that the claimant wishes to make of the footage are criticisms that can be made by counsel and, if necessary, by crossexamining the operatives. If that is right, and it plainly is, then any optimism that the claimant may derive from that process will depend upon the validity or the strength of that process and the weakness of the operative's footage. It does not seem to me that it is a legitimate ground of complaint if evidence is adduced which the claimant may consider is likely to improve her case.

20. So far as whether this is expert evidence or not, reliance was placed by Mr. Livesey on the dicta of EvansLombe J in the case of *Barings plc v Coopers & Lybrand* [2001] PNLR 22, paragraphs 44 to 47 and a test where he says that:

> "... the test whether expert evidence in any particular case is to be received is a two stage test, the first stage being whether the evidence is admissible as 'expert evidence' for the purposes of section 3 of the 1972 Act, and the second stage whether the Court should admit it as being relevant to any decision which the Court has to arrive at, that is, helpful to the Court for that purpose."

He added that:

> "... expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues. Evidence meeting this test can still be excluded by the Court if the Court takes the view that calling it will not be helpful to the Court in resolving any issue in the case justly. Such evidence will not be helpful where the issue to be decided is one of law or is otherwise one on which the Court is able to come to a fully informed decision without hearing such evidence."

In that case he held in his view it is:

> "... very significant that this is an area of commerce which is highly regulated, practitioners in which are required to be licensed by the regulator and in respect of which the regulator has prescribed standards of required competence."

21. It is the experience of this court that in commercial cases it not infrequently happens that accountants give evidence as experts, albeit that as a matter of very strict analysis it could be said that they are not technically expert witnesses in the sense that they are not expressing opinions and the value of their evidence lies not in any expert opinion

that they express but rather in the saving of costs and time by marshalling material in a way that is helpful to the court and helpful to the parties.

22. This is an area in which a number of points have been made by Mr. Simm on the video evidence. Some of those points, for example whether there are gaps in the evidence, are no doubt points which, through a painstaking analysis by counsel or by solicitors, could be arrived at by lawyers. As to those, it seems to me that it having been done by somebody who is experienced in that area can only save time. There are other aspects of it on which Mr. Simm has expressed an opinion which it would be difficult for the court to form a view on without some assistance. It may be that it could. It may be that it could not. I have in mind in particular the suggestion that there is one aspect where the footage has been speeded up.

23. Be that as it may there is a considerable part of the report where in effect what is being said as I understand it is that in the opinion of Mr. Simm what appears to have happened is that the operatives have taken video evidence in a deliberately selective way so as, it is be inferred, to confine themselves to shots that are supportive of the defendant's case that the claimant is able to walk more freely with her knee than she claims and to omit evidence which might have shown the reverse or might have qualified that.

24. Those are, of course, matters which operatives could be crossexamined on by counsel at trial but that does not mean that the crossexamination may not be more effectively conducted by reference to evidence such as that provided by Mr. Simm. Nor does it mean that in assessing the evidence of the operatives as to validity of the video footage or in simply assessing the weight to be attached to the video footage itself, the court might not be assisted by the evidence provided by Mr. Simm himself. If it is denied by the operatives that these criticisms are valued criticisms. In forming a view as to the validity of those denials, it may or may not be that the court would be assisted by the view it takes as to the views expressed by Mr. Simm.

25. Criticism is made by Mr. Livesey of three of the occasions in which it is said by Mr. Simm that it is to be inferred that the operatives must have placed a tracking device on the car. That is by reference to the comparison between the assertions made by Mr. Simm on those three occasions and extracts from the log of the operatives which state that in fact on those occasions the claimant was followed. That, he says, suggests that Mr. Simm was wrong. Maybe he puts it higher than that and suggests that Mr. Simm is being deliberately misleading. There are six occasions on which Mr. Livesey is not able to make that point.

26. The validity of those criticisms of Mr. Simm may or may not be good. I see the force of the point made in relation to the three identified examples by Mr. Livesey but that, as it seems to me, is a point that goes to the strength or otherwise of the evidence but not to its admissibility as a whole.

27. This is an area which, it is submitted by Mr. Ritchie for the claimant, is rife with what are described as cowboy operatives. It may be that this is not a regulated area but if one compares the ability of a judge to draw inferences from a large amount of footage, both edited and unedited, on the one hand and someone who has spent many

years in that area on the other, it seems to me that it may well be, and indeed is probably likely, that at the very least a great deal of time may be saved on those issues with the assistance of somebody like Mr. Simm and beyond that it may well be that there are particular contentious aspects between the parties as to whether this was deliberately onesided footage or not in which the evidence of somebody who has been involved in this area for so long may assist the court.

28. Whatever criticisms Mr. Livesey makes of Mr. Simm will be open to him to make at trial but that does not of itself in my judgment mean that there is no possibility that that material may not assist the court.

29. I do not have any doubt at all that this is material which the claimant ought to be entitled to deploy. It is a frequent practice that in a claim such as this insurers will engage private investigators to privately film the claimant with a view to trying to show that the claimant is deliberately lying or exaggerating the extent of her injuries, in particular, from the point of view of mobility. Where the insurer seeks to rely on video footage and the claimant wishes to challenge that video footage on the basis that it has been selectively filmed, is misleading or has left out bits that are helpful to the claimant, it seems to me that that is a central issue in the case and it does not lie in the mouth of the insurer to says that this is a collateral issue or likely to spawn collateral issues.

30. The suggestion that it may lessen the prospects of a successful compromise is really to put the cart before the horse. It may only lessen the prospects of successful compromise if the claimant, because of that evidence, takes the view that the damaging effect of the video evidence is less than the insurers will argue at trial. It either is or is not on the merits and that is not a matter which can be described as collateral any more than it could be said that it was a collateral issue simply because the claimant's counsel crossexamined the video operative in order to show those very points that are sought to be made in this case by Mr. Simm.

31. I can see the full force of Mr. Livesey's criticism that this is not a case, for example, like that of an accountant where the accountant is part of a regulated profession, but it does not for that reason in my judgment follow that a person such as Mr. Simm does not have more expertise in assessing video footage, assessing whether it has or has not been deliberately filmed in order to create a onesided impression than anyone else at the court and any criticisms that may be made about Mr. Simm, whether because he is not regulated or he is not a member of an established body, can be made at trial.

32. One particular point made by Mr. Livesey is that the case in which Mr. Simm boasts that he was a participant was one in which, as he showed me, the challenge to video evidence was rejected. That is a point that can be put to Mr. Simm in crossexamination no doubt but, if anything, it seems to suggest that his evidence was admitted in that trial, whether as expert or factual evidence it is not clear from the judgment that I was shown.

33. As I have indicated there are areas, and I have given an example of accountants marshalling a great deal of financial material, where the precise borderline between factual and experts evidence may be blurred but in my judgment, whether this is

regarded as strictly expert evidence or evidence of fact, in so far as the facts adduced by Mr. Simm are, for example, as to the number of gaps, the length of gaps and so on, does not really seem to me to be decisive of this application. If I ask myself the question, if I were trying this case, would I find Mr. Simm's evidence helpful, the answer is, yes, I would. It may, of course, be wholly bad evidence and subject to criticism. When I say it would be helpful I do not mean that I express any view as to whether it is correct or not, I simply mean in terms of assisting my understanding as to the video evidence.

34. As to the alleged bias point, in my judgment that is a good reason for excluding this evidence. The extract relied on in the website of "Don't Be Watched", says:

> "Have you received covert video evidence that completely undermines the very foundations of one of your cases? Don't just accept it. Here at dontbewatched.com we are able to spot cheats, human rights breaches, trespassing issues and clever editing tricks in what may at first appear to be conclusive evidence. Our report of findings is delivered in compliance with Part 35 of the Civil Procedure Rules and often results in the film being withdrawn by the other side. The Don't Be Watched team work directly with UK solicitors and barristers providing invaluable no nonsense advice to claimants about the realities of being investigated and put under surveillance regarding their injuries."

35. In my judgment that is effectively in shorthand saying that Don't Be Watched act for claimants in insurance cases where insurers have instructed surveillance operatives. It does not seem to me to follow from that that they are biased any more than expert witnesses who conventionally frequently or even exclusively act for either claimants or defendants in litigation. If there is criticism to be made, that can be deployed at the trial. I have no doubt that this evidence should be admitted and I allow the application.

36. I should add that Mr. Livesey also suggested that this might cause delay because, if admitted, the defendant would, as he put it, seek to instruct their own expert. That, of course, is a submission inconsistent with the principal ground on which the application was resisted, namely that there are no such experts. Be that as it may it does not seem to me that that is a material prejudice such as to reject the application. We are now on November 21st, the trial is 4th February, the defendants are insurers, there should be no difficulty in obtaining evidence in rebuttal in time for the trial. If there is such difficulty, an application can be made in due course for consequential directions. As to it complicating the trial, in my judgment this would not complicate the trial. Central to the trial is going to be this very issue as to whether the claimant is fabricating or exaggerating her injuries or not. To that central issue the surveillance evidence goes and, in my judgment, so does Mr. Simm's evidence.