Suveillance in Insurance – a Game of Inches

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Subheading: Privacy, admissibility and maximising surveillance material

1. The first focus of this presentation is that of privacy. The relevant legislation is the *Privacy and Personal Information Act* 1988 (NSW) ("the NSW statute") which applies to NSW public sector agencies and the *Privacy Act* 1988 (Cth) which applies to Commonwealth agencies. For the sake of brevity, only the NSW statute will be considered.

2. Section 4(1) of the NSW statute defines "personal information" to be information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion. Section 4(2) also defines personal information to include such things as an individual's fingerprints, retina prints, body samples or genetic characteristics. Section 8 prohibits a public agency from collecting personal information for other than a lawful purpose that is directly related to that agency's function or activity and is reasonably necessary for that purpose.

3. Section 62(1) prohibits a public sector official from intentionally disclosing personal information otherwise than "in connection with the lawful exercise of his or her official functions" while section 62(2) prohibits a person from inducing a public sector official to disclose such information. Section 62 is a criminal offence punishable by 100 penalty units or imprisonment for 2 years, or both. Section 17 of the *Crimes (Sentencing Procedure) Act* (NSW) 1999 defines a penalty unit to be $110 dollars. The penalty is therefore significant. Section 96 of the Commonwealth statute creates a similar offence.

4. The effect of the NSW statute is therefore to prohibit the disclosure by the employees of NSW agencies of personal information gathered by that agency. This means that surveillance operatives are unable, without breaking the law, to access personal information of subjects to assist in identification or investigation. Such information may include driver's licence details, health records etc. Such records were used prior to the introduction of the NSW statute in the course of investigations to identify subjects. In the absence of such information, operatives are now heavily reliant on instructions from solicitors and documents in the client's possession to identify subjects and obtain valuable surveillance footage.

5. Contrary to popular belief, the NSW statute does not prohibit taking surveillance footage of persons. Any such act may, however, be limited by the property law and tort of trespass. For instance, shopping centres and swimming pools usually have a policy against the use of video cameras and camera equipped mobile telephones within their premises. The occupier may exercise a right of refusal against persons breaching that policy. Further, any rightful occupier whose land a surveillance operative enters into without permission or after permission has been withdrawn may exercise the right of ejectment using reasonable force to remedy the trespass – as to the general principles of trespass see *Plenty v Dillon* (1991) 171 CLR 635 and as to the right to remedy a trespass by use of reasonably necessary force see *McPhail v Persons Unknown* [1973] 2 All ER 393 per Lord Denning MR.

6. The second focus of this presentation is on admissibility of surveillance material. To appreciate this topic, a brief statement of the objective of the laws of evidence is necessary. Evidence has been described as "any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." – *Best on Evidence* 12th ed, p6, approved in *Cheney v Spooner* (1929) 41 CLR 532 at 537; see also J D Heydon, *Cross on Evidence*,

Eighth Australian Edition, Lexis Nexis Butterworths, 2007 at [1001]. What facts must be proved by the Plaintiff to establish the cause of action and what must be proved by the Defendant to establish the defence is defined by the pleadings, which in turn must be drafted to meet the requirements of the substantive law as to the cause of action. Evidence that does not meet the pleadings, and therefore does not go to a fact in issue in the proceedings, is arguably inadmissible for being irrelevant and failing to meet the first test of admissibility as defined by sections 55 and 56 of the *Evidence Act* 1995 (NSW). As an example, surveillance of a person working as a cleaner would be inadmissible if the Plaintiff admitted to employment as a cleaner but was in fact alleging that hand injuries prevented return to pre-injury employment as a concert pianist.

7. Evidence is in turn broken down into four broad categories: testimony, hearsay, documents, and things and facts which a court will accept as evidence of the facts in issue (e.g. physical evidence and judicial notice under part 4.2 of the *Evidence Act*). Surveillance footage and the work of the investigators who expose it fall into the first and third category, being testimony of observations and the surveillance recording which is a thing or real evidence capable of being viewed and tendered as a physical exhibit. The status of surveillance footage as a thing or real evidence contrasts with 19th century views that photographs were mere explanation of oral evidence or were testimonial in nature as a visual representation of the "image or impression made upon the minds of the witnesses by the sight of the person or the object it represents" – see *R v The United Kingdom Electric Telegraph* Co *(Ltd)* (1862) 3 F & F 73; *R v Tolson* (1864) 4 F & F 103 at 104; see also *Cross on Evidence* (supra) at [1280]. That view was likely influenced by the fact that photographic technology was in its infancy and was incapable of rapid or spontaneous application to capture images. Instead, photographic scenes required a deal of time to set up and take effective images of, thereby indeed being an image or impression similar to a painting or sketch.

8. In contrast, current surveillance footage is characterised by its immediacy of exposure and recording. Surveillance material is able to be viewed with a greater degree of reliance as an independent thing in itself to prove a fact in issue and has been since *Niznick et al v Johnson* (1961) 28 DLR (2d) 541. In that Canadian matter, a Plaintiff claimed to have suffered gross injuries in a motor vehicle accident leaving her unable to ambulate without a limp or use of a cane and in constant pain. Investigators used "motion picture" technology to film her walking unaided and working. The film that was shown had been heavily edited to exclude blank or under exposed footage. The Plaintiff objected to the use of the footage due to this editing. The fact an edited version was used as opposed to an unedited version was commented on by the trial judge, Monnin J of the Manitoba Queen's Bench Division, as unfortunate. His Honour commented that it "would have been preferable" if the original, unedited footage had been exhibited "so as to eliminate all possibility of tampering". The footage was, however, held to be admissible, "on a proper foundation being laid", and was viewed by the Court. That proper foundation was achieved by calling the persons who recorded and developed the film and who confirmed via oral testimony the process of editing and that "they had viewed the film and that it truthfully depicted what they had testified to in the Court" – per Monnin J, Manitoba Queen's Bench Division, 28 DLR (2d) at 545.

9. As a consequence of the investigator's testimony and the physical evidence of the "motion picture", the Plaintiff was awarded limited damages but ordered to pay the costs of the Defendant out of those damages. In effect, a net loss. The trial judge described the contradiction between the Plaintiff's presentation at trial before the footage was shown and her presentation in the footage as evidence that her case was a "fabrication" and a "shocking abuse of the process of the Court" - per Monnin J, Manitoba Queen's Bench Division, 28 DLR (2d) at 546.

10. This decision provides the template for the successful use of surveillance footage and details the two step process in the use of such footage. Firstly, the surveillance

operative must testify as to his or her process of exposing the footage. This confirms that the footage is reliable and has not been unduly tampered with. Secondly, the surveillance operative must testify as to the contents of the footage truthfully depicting what he or she has seen. This testimony lays the foundations for then, thirdly, admitting into evidence the physical or real evidence which is the electronic copy of the surveillance footage, whether by way of video tape or DVD recording.

11. Obviously, counsel for a Plaintiff subject to surveillance footage will attack the basis for adducing the footage and try to limit its impact. This may be achieved in the following ways:

    a. Questioning the operative about whether the footage is a complete record of his or her observations of the Plaintiff.

    b. Depending on instructions, put to the operative that the footage failed to include conduct of the Plaintiff consistent with the Plaintiff's case.

    c. Call for production of field notes and other surveillance reports or footage that have not been disclosed but were created by that operative. This may disclose conduct of the Plaintiff consistent with the Plaintiff's case.

12. In terms of maximising the benefit of the surveillance footage, the colloquial maxim "rubbish in, rubbish out" is highly apposite. Competent surveillance operatives are, like others, as good as their instructions. Providing limited instructions will likely yield patchy results. In contrast, good instructions are more likely to yield good results as the operative will be briefed on when the subject is likely to be on the move and to where and what sort of allegations of fact are to be disproven. As such, the following may be beneficial to the operative:

a. A copy or summary of the particulars of injury in a personal injury case.

b. A copy or summary of the Plaintiff's main medical report detailing alleged incapacities.

c. A summary of any medical appointments for and on behalf of the Defendant and their times and addresses.

d. A summary of any known places of employment or activity such as sporting clubs or voluntary associations.

13. It is also vital that the prior to the trial at which the surveillance footage is to be used that the following be attended to and as a minimum:

a. The surveillance footage be viewed by the solicitor and counsel for the party relying on the footage to determine its relevance to the Defence.

b. The investigator's field notes be obtained as well as any report.

c. A conference with the operatives who created the footage should be conducted to confirm their testimony lays the foundations for admissibility of the footage. This may require the interview of multiple persons who worked on a surveillance operation over a period of time.

d. Any other reports and footage not relied on but which has been obtained by the same operative be viewed to determine whether the contents are supportive of the Plaintiff's case. If the report is supportive of the Plaintiff's case, an argument to prevent it being disclosed should be prepared in anticipation of a call for

production (such as reliance on legal professional privilege under section 118 or section 119 of the *Evidence Act*).

14. In terms of the nature of the operative's testimony, as the operative is a lay witness the testimony is usually limited to that of which he or she has personal knowledge, having perceived it by "one of the five senses" – see *Cross on Evidence* (supra) at [1255] and [1335] and *Ogden v People* 25 NE 755 (Ill, 1890). The operative cannot give evidence as to whether the conduct of a subject is inconsistent with the allegations made in the proceedings, such as incapacity for employment. The prohibition on giving such evidence is based on two considerations. Firstly, such evidence is opinion evidence that can only be given by experts based on specialised knowledge (such as medical practitioners) pursuant to section 79 of the *Evidence Act*. Secondly, such evidence is ultimately the "fact in issue" to be determined by the Court. In other words, the operative cannot determine the final issue such as whether a Plaintiff is incapacitated for pre-injury employment. As such, operatives should avoid providing judgmental or opinionated reports which may be heavily laden with adjectives. Apart from the fact their oral testimony would not be permitted to adduce such evidence, if the report is tendered into evidence it may reflect poorly on the witness.

15. In conclusion, to maximise the effectiveness of surveillance footage it should be borne in mind that the testimony of the operative and footage is another form of evidence available to the Defendant in litigation. The proper foundation for its use must be laid for it to be of greatest impact.

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