Personal Injury

December 2013

# PERSONAL INJURY BULLETIN

**Welcome to the December edition of our Personal Injury Bulletin.**

In this Bulletin, we look at a number of recent and upcoming developments and revisit some key issues which remain of critical importance.

*Plana v First Capital East* illustrates how surveillance footage can be used appropriately to combat exaggerated or fraudulent claims, and *Mitchell v News Group Newspapers* show the intent of the courts in applying the new procedural rules.

We also look at the changes to the Athens Convention coming into force next year and changes to the French Social Security Code which will affect compensation for seafarers in cases of "inexcusable fault". Finally we look at how the Maritime Labour Convention is being implemented, some four months after its coming into force.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to the Bulletin, or your usual contact at HFW.


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## Who is watching? Who is listening? – Use of surveillance in legal proceedings

It is clear that a balance has to be reached between evidencing a claim sufficiently and using surveillance to an extreme, taking into account overarching rules of law and the interests of justice.

In our April 2013 edition of this Bulletin, we explored recent case law, notably *Summers v Fairclough Homes Ltd*[1], concerning exaggerated and fraudulent claims in personal injury, which highlighted the Court's attitude to such claims as well as reviewing the options available to defendants and their insurers (for whom this is of particular concern, especially in today's market conditions) as to how to handle these types of claims.

One of the messages from such case law is that defendants and their insurers should tread carefully when making allegations of fraud or dishonesty and back-up such allegations with appropriate material evidence. Surveillance evidence is frequently a key consideration, and in this article we explore what place surveillance has in evidence-gathering for the purpose of legal proceedings.

One recent case, *Plana v First Capital East Ltd*[2], shows how the careful and appropriate use of surveillance can be used to unmask fraudulent and exaggerated claims. In this case, the claimant claimed to have suffered a traumatic brain injury sustained during a workplace accident. He claimed that the injury meant that he had to be constantly supervised, and that he was unable to drive (having previously been employed as a bus driver) or undertake any work. The defendants admitted liability and significant interim payments were made.

On further investigation, surveillance footage revealed that the claimant had severely exaggerated and/or lied about his injuries and, more importantly, their impact on his life. Surveillance evidence showed the claimant working at a car wash and driving. Despite the claimant's arguments that the footage amounted to merely isolated incidences of activity and that his injuries were gravely serious, the Judge struck out the claim on the basis that the claimant's conduct amounted to an abuse of process.

This case is a good example of how surveillance footage may indeed be of assistance to defendants and their insurers in fighting exaggerated and fraudulent claims. However, surveillance evidence should always be used with care, and recent cases before the Employment Appeal Tribunal (EAT) have considered the legal parameters and attitudes to surveillance, which should be borne in mind.

In *AA Vaughan v London Borough of Lewisham and Others*[3], the claimant sought to adduce in evidence 39 hours of covert recordings in support of her discrimination claim, without any transcripts, and the EAT considered the issue of relevance of material.

As a starting point, the EAT confirmed that this evidence was not inadmissible merely because the method through which the recordings were gathered may be discreditable[4]. The EAT did however note its reservations as to the practice of secret recordings, which it considered *"very distasteful"*.

In essence, the decision turned on the question of relevance. The EAT stated that with every piece of evidence it is necessary to assess its relevance and in what way it relates to the pleaded points. The claimant could not rely on generalities. Therefore, it would appear that so long as defendants wanting to adduce surveillance evidence can show that such evidence is relevant to the matter in hand and/or provide means through which relevance can be assessed, it is more likely to be allowed.

This ties in neatly with the question of proportionality. After all, would all 39 hours of recordings have been referred to in the proceedings? Were they all necessary to prove the claimant's claims? It is clear that a balance has to be reached between evidencing a claim sufficiently and using surveillance to an extreme, taking into account overarching rules of law and the interests of justice.

This was an issue raised in *City and County of Swansea v Mr Gayle*[5], where the employer used covert video surveillance to "spy" on an employee who had been previously seen at a sports centre playing squash when he should have been at work. The Employment Tribunal alleged that the investigation was unreasonable and disproportionate because it was, in essence, too thorough – the employer already had evidence of what Mr Gayle was doing.

1 [2012] UKSC 26

2 15 August 2013, Central London County Court

3 UKEAT/0534/12/SM

4 See also – Dogherty v Chairman and Governors of Amwell View School UKEAT/0243/06

5 UKEAT/0501/12/RN

On appeal, the EAT said that the criticisms of the employer (including those relating to its obligations under the Data Protection Act 1998 and failure to abide by Article 8 of the European Convention on Human Rights) were not relevant to the main issue, namely whether the employee was dismissed fairly. It was held that Mr Gayle's right to privacy had not been impinged because he was in a public place and was defrauding his employer, and as such did not have a reasonable expectation of privacy – and thus the actions taken were proportionate. The EAT went as far as to say that even if there was a breach, it may have been possible for the employer to justify interfering with this right by showing that its aim was to prevent crime.

Obviously each case will be different, but although there may be a *"distaste"* for surveillance evidence, it will generally be admissible if it is:

- Relevant – and presented in a way which will allow the court to consider its applicability to a given situation.
- Proportionate – taking into account both the value (and volume) of the evidence gathered and the rights of the person being investigated.

Parties should always bear in mind the wider implications of using surveillance evidence, but in circumstances where defendants are suspicious of personal injury claims, surveillance methods should not be shied away from where such conduct is promoting legitimate aims – in other words it is necessary to expose injustice.

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## Breaking Jackson's rules: no relief for the wicked

On 27 November 2013, the Court of Appeal handed down its decision in respect of the appeal made by the claimant, Andrew Mitchell MP, in his libel action against News Group Newspapers Ltd (*Mitchell v News Group Newspapers Ltd* [2013] EWHC 2355 (QB)). This case is more commonly known as the "Plebgate" case. This important decision addresses the issue of what happens when a party fails to comply with the new costs budgeting rules implemented earlier this year as part of the Jackson reforms and has been branded by many as one of the most significant rulings of the year.

Under new rule 3.14 of the CPR, *"Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees"*. This case was different in that the proceedings were commenced prior to the implementation of the new Jackson reforms on 1 April 2013 and therefore CPR PD51D of the Defamation Proceedings Costs Management Scheme applied to the proceedings. This was a pilot scheme which was in force until 31 March 2013. Para 4 of the practice direction provided:

*"4.1 During the preparation of costs budgets the parties should discuss the assumptions and the timetable upon which their respective costs budgets are based.*

*4.2 The parties must exchange and lodge with the court their costs budgets in the form of Precedent HA not less than 7 days before the date of the hearing for which the costs budgets are required."*

In brief, the claimant failed to file his costs budget at least 7 days before the CMC, as he was required to, and then filed a budget for £506,425 on the day before the CMC. The First Instance judge imposed the very sanction set out under CPR 3.14 on the claimant, sanctioning his budget for Court fees only, and subsequently turned down his application for relief from sanction. The claimant appealed, and the appeal was fast-tracked so that general guidance could be given on this previously untested, but important, point.

In reaching its decision, the Court of Appeal for the first time was called upon to decide on the correct approach to granting relief from sanctions under new rule 3.9 of the CPR. The question at the heart of the appeal was: *"how strictly should the courts now enforce compliance with the rules, practice directions and court orders"* post Jackson? The traditional approach of the civil courts has been to excuse non-compliance where any prejudice to the 'innocent' party can be remedied (usually by a costs order). Though the introduction of the CPR in 1998 sought to address this issue to some extent, Jackson in his *Review of Civil Litigation Costs* called for a *"tougher and less forgiving"* approach.

Having decided that the judge was entitled to impose the sanction set out in rule 3.14, the Court of Appeal was required to look closely at the wording of the new CPR 3.9. Gone is the long list of factors that the court used to have to take into account when deciding whether to grant relief from sanction and in its place is the following, clear wording: *"On an application for relief from sanction... 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 the rules, practice directions and orders"* (our

emphasis). The need for justice, and for litigation to be conducted efficiently and at proportionate cost, refers to the revised *overriding objective* of the CPR.

As the Master of the Rolls, Lord Dyson, observed earlier this year, *"… the relationship between justice and procedure has changed… The tougher, more robust approach to rule-compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases... Parties can no longer expect indulgence if they fail to comply with their procedural obligations. Those obligations... serve the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the Court enables them to do so."* The Court of Appeal (with a single judgment given by the Master of the Rolls himself) endorsed this view. The claimant's failure to comply with the rules meant that the CMC had to be adjourned to a later date, with the result that the judge had to postpone other cases that were already in her diary.

In reaching its decision, the Court of Appeal gave some helpful guidance as to how the new approach to granting relief from sanction should be applied in practice, in the form of a two-stage test. Firstly, what is the nature of the non-compliance? If it can properly be regarded as trivial, the Court will usually grant relief where an application has been made promptly. Secondly, if the non-compliance cannot be regarded as trivial, is there a good reason for it? The Court gave a number of examples of 'good reasons' e.g. the solicitor or the party to the proceedings has suffered a debilitating illness, or has been involved in an accident, or where there has been a development in the course of litigation which means that the period for compliance becomes unreasonable. What is not acceptable

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is merely overlooking a deadline, whether due to other urgent work, insufficient resources or otherwise.

The Court of Appeal concluded that the defaults by the claimant in this case were not minor or trivial and there was no good excuse for them. The defaults resulted in an abortive CMC and an adjournment which had serious consequences for other litigants. The Court readily acknowledged that, while the result might seem harsh, overturning the judge's decision would result in a major setback to Jackson's attempt to achieve a change in culture. In short, the Court of Appeal made an example of the claimant and his solicitors.

A clear message has been sent out: the post-Jackson judiciary mean business!

### What's next?

There is a good chance that, in the short term, there will be will be an increase in expensive satellite litigation as the new rules (not just those in relation to costs-budgeting) continue to "bed in". However, those who previously flouted the procedural rules should beware as the consequences can be dire.

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## Getting ready for the Athens Convention 2002: the countdown to April 2014

Earlier this year, Belgium became the tenth country to ratify the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (the Athens Convention). The 2002 Protocol has therefore now received the requisite number of ratifications and will enter into force on 23 April 2014. The 2002 Protocol states that the Athens Convention, as amended and added to by the Protocol, will constitute and be called the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002.

### Background

The 2002 Protocol significantly revises and updates the Athens Convention, which established a regime for liability for damage suffered by passengers carried on-board seagoing vessels. The Athens Convention applies to the international carriage of passengers and their luggage where: the ship is flying the flag of, or registered in, a state party to the convention; the contract of carriage has been made in a state party to the convention; or the place of departure or destination (according to the contract of carriage) is in a state party to the convention.

In essence, the Athens Convention renders a carrier liable for damage or loss suffered by a passenger where the incident giving rise to the damage occurred during the carriage and was caused by the fault and/or neglect of the carrier, but also allows carriers

to limit their liability except where the carrier acted with the intention of causing the damage, or recklessly and knowing that the damage that was caused was the likely result of its actions. In respect of liability for the death of, or personal injury to, a passenger, this limit was capped at 46,666 Special Drawing Rights (SDR) per carriage (approx £43,900 or US$71,800 at current rates).

### Key provisions of the 2002 Protocol

The most significant change introduced by the 2002 Protocol is the increase in limits for carrier liability in respect of death of or personal injury to passengers. From 23 April 2014, carriers will face a higher maximum liability of 250,000 SDRs for each passenger injury and death (approx £235,000). The 2002 Protocol applies a strict liability regime for shipping incidents, unless it can be established that the incident was intentionally caused by a third party, or resulted from an act of war, hostilities, civil war, insurrection or force majeure. If the loss exceeds this limit, the carrier may also be further liable up to a limit of 400,000 SDRs per passenger on each occasion (approx £376,000), unless the carrier can prove that the incident which caused the loss occurred without the fault or neglect of the carrier.

The 2002 Protocol also introduces changes to the liability regime for loss or damage to luggage or vehicles. Liability for the loss of or damage to cabin luggage is limited to 2,250 SDRs per passenger, per carriage (approx £2,115); loss of or damage to vehicles (including all luggage carried in or on the vehicle) is limited to 12,700 SDRs per vehicle, per carriage (approx £11,900); and liability of the carrier for the loss of or damage to other luggage is limited to 3,375 SDR per passenger, per carriage (approx £3,175).

Finally, the 2002 Protocol introduces compulsory insurance of 250,000 SDRs per passenger. The ship's registry is required to issue a certificate evidencing the insurance and this is largely being evidenced through the "Blue Card" system.

Prior to Belgium's ratification of the 2002 Protocol, it had previously been ratified by the European Union (which counted as only one signatory) and has been in force in the EU since 31 December 2012 via the EU Passenger Liability Regulation 392/2009 (PLR) . The other ratifying states prior to April 2013 were Albania, Belize, Denmark, Latvia, Netherlands, Palau, Saint Kitts and Nevis, Serbia and Syria. Croatia and Malta have since also ratified the 2002 Protocol, but they are, of course, EU Member States, Croatia having joined the EU earlier this year.

### Impact of entry into force

Given that the substance of the 2002 Protocol is already in operation in the EU, when the 2002 Protocol enters into force on 23 April 2014, two very similar but not completely identical sets of legal systems will be in operation in the EU. It is not entirely clear how these two systems will co-exist and whether the entry into force of the 2002 Protocol will have any impact on the system currently in place in the EU. To date, the PLR has not been considered in any EU judgments and therefore there is little basis for comparison.

The most significant change introduced under the 2002 Protocol is undoubtedly the increase in passenger liability limits. Although some countries had already increased the limits in respect of their own national carriers, such as the UK which had already increased the limit to 300,000 SDRs (approx £282,000), many countries had not and either relied on the limits set out in the 1974 Athens Convention or on other limits set out in their national laws. The increased limits introduced by the 2002 Protocol may have a significant impact in this regard. This is particularly so in the wake of major casualties involving passenger vessels, such as the Costa Concordia disaster, in which 32 people died and 64 people were injured.

The 2002 Protocol is also likely to impact insurers, given the new compulsory cover carriers must have per passenger. Carriers and insurers affected by the 2002 Protocol should therefore turn their minds to 23 April 2014 and start putting in place systems that will enable them to cope with the impending changes. It remains to be seen whether the 2002 Protocol is adopted more widely, as currently of the ten ratifications so far, four are also EU Member States and therefore only six Member States outside the EU will be affected by this. However, the scope of the convention means that a wide number of shipowners will be affected, including any involved in the ever popular European cruise market, wherever the vessel may be registered.

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## Inexcusable fault: equal treatment for all French employees

As a matter of French law, any employee (or his or her next of kin) who suffers a work-related accident or illness is entitled to receive benefits from the benefits agency (ENIM for seafarers and CPAM for non-seafarers). Those benefits include medical care as well as a daily allowance or lump sum annuity in case of a permanent impairment reducing the working capacity of the employee. This system provides "automatic" but limited indemnification as some heads of loss are not normally covered by the benefits agencies such as moral damages, damages for pain and suffering and damages for permanent disfigurement.

In return for employers' high social security contributions, the Social Security Code provides them with a degree of immunity from civil liability actions in case of work-related accidents or illnesses: employees are not entitled to commence an action against their employer for compensation for losses not covered by the benefits agencies unless the employee demonstrates that the accident or illness was caused by the employer's "inexcusable fault" (faute inexcusable).

### Impact of the *Conseil Constitutionel's* ruling of 6 May 2011

Up until the ruling of the Conseil Constitutionnel on 6 May 2011, the employer's immunity was even greater where seafarers were concerned. Seafarers could only bring a claim against their employer where they were able to demonstrate that the accident or illness was caused by the employer's intentional fault. Needless to say, the cases in which a seafarer was able to prove a voluntary act or omission by his employer which caused the loss and damage and with the intent of causing such loss and damage were few and far between.

The *Conseil Constitutionnel* considered however that notwithstanding the terms of the law promulgated by decree on 17 June 1938 in relation to the social security regime for seafarers, this law should be interpreted in such a manner as to permit a seafarer who is the victim of an accident at work or a work-related illness to pursue a claim against his employer before the Social Security Courts for full damages in circumstances where the employer has committed a *"faute inexcusable"*.

As a result of this decision, the government has changed the law. From the beginning of 2014, the Social Security Code will contain new provisions (Article L.412-8) whereby, in the event of an accident at work or a work-related illness, seafarers and shipowners will now be treated in exactly the same way as any ordinary French employee and employer.

### Definition of inexcusable fault for the purposes of the Social Security Code

The *Conseil Constitutionnel's* ruling and the changes to the Social Security Code now mean that the French law concept of inexcusable fault in employment law matters, laid down by the *Cour de Cassation* in its ruling of 28 February 2002, will apply to claims by seafarers and ordinary employees alike.

The test for inexcusable fault is twofold and the burden of proof is on the employee to prove both aspects.

First, the employee must demonstrate that the employer has breached an *"obligation de sécurité de résultat"*. French civil law traditionally distinguishes between *"obligations de résultat" and "obligations de moyens"*. In summary, an *"obligation de moyens"* is where the debtor is bound to take all measures which a reasonable man (*bon père de famille*) would take. An *"obligation de résultat"* on the other hand is not simply to show due diligence, but to achieve the result which has been promised. As a result, a breach of an *"obligation de sécurité"* is usually borne out by the mere fact that an accident or a work-related illness has occurred.

Secondly, the *Cour de Cassation* considers that where the employer has breached its *"obligation de sécurité de résultat"*, an inexcusable fault within the meaning of article L.452-1 of the Social Security Code is committed in circumstances where the employer had or should have had knowledge of the danger to which the employee was exposed, but failed to take the necessary steps to protect the employee. Although the burden of proof is on the employee to demonstrate that the employer knew or should have known of the danger but failed to act, the lack of employee protection or a failure to take steps by the employer is often simply inferred from the mere occurrence of the accident or work-related illness. In practice therefore, it is usually for the employer to demonstrate what steps it took to ensure the safety of its workers.

The employer's knowledge of the danger to which an employee is exposed is determined on the one hand by reference to scientific knowledge at the relevant time when the employee was exposed to the risk of injury and on the other hand by reference to what the employer could have known about the risks in its particular industry sector. This is particularly relevant in relation to asbestos type claims.

Given that the overall trend of the French Courts is to infer the inexcusable nature of the fault from the employer's *"obligation de sécurité de résultat"* rather than by reference

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to the seriousness of the fault itself, the employers of seafarers ought to be concerned about their increased exposure to claims now that article L.412-8 in the Social Security Code will effectively strip them of the immunity from claims which they had until recently enjoyed. Insurers may also want to consider how their policies will respond to the broadening scope of this potential liability. What remains however to be seen is how the lower courts will apply the test laid down by the *Cour de Cassation* in the particular context of claims against the employers of seafarers.

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## MLC update

Nearly four months from the entry into force of the Maritime Labour Convention (MLC), we have already seen the first detentions under the convention, in Canada, Denmark, Russia and Spain, affecting vessels flagged in Cyprus, Liberia, the Marshall Islands, the Netherlands, Panama and Tanzania.

Detentions have occurred for various reasons, including unpaid wages, recruitment fees paid to crewing agents, lack of wage agreements or employment contracts with crew and poor conditions on board as well as the alleged refusal to allow a crew member access to a doctor, all in contravention of the MLC.

While this shows that the MLC is having a positive impact for seafarers' rights, owners are increasingly concerned that maritime unions are using the MLC as a bargaining chip to win wage deals for crews, with the threat of detention adding pressure.

Other countries are also gearing up for the MLC, where it has not yet come into force. Gibraltar recently confirmed it was repatriating crews of stranded vessels even though the MLC is not in force in Gibraltar until 7 August 2014. In addition, the USA, which has not ratified the MLC and has not announced any intention of doing so, is recommending that its internationally-trading vessels seek to comply with the MLC.

IMO Member States continue to sign-up to the MLC, which now has 50 ratifications (with three pending), most recently from Samoa on 21 November 2013. The MLC will come into force in those countries which ratified the MLC after 20 August 2013 twelve months after ratification in each country and the number of ratifications now represents 80% of the world's gross tonnage of ships. Given that the MLC is still being ratified and still not yet in force in many countries, it may take some time for the application of its requirements to bed in, and for the full impact to be felt. However early experience shows that where it is in force it is clear that port states are taking their obligations under the MLC, or "Seafarers' Bill of Rights", seriously, despite the ILO's plea to show leniency for the first 12 months while the MLC starts to take effect.

The ILO is keeping the MLC under revision, and has in fact just published proposals to require additional financial security to be put in place in respect of repatriation at the end of a voyage and for compensation in the event of death or long-term disability. The development of the MLC and its enforcement is definitely something to keep watching.

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## Conferences and Events

### Chamber of Shipping Dinner

London
3 February 2014
Attending: Andrew Chamberlain, Paul Dean, James Gosling, Craig Neame and Jonathan Webb.

### Litigation in West Africa

HFW London
5 February 2014
Presenting: Xavier McDonald and Stanislas Lequette

For more information about either of these events, please contact events@hfw.com

## HFW extends Season's Greetings to all of our readers with our best wishes for 2014.

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