Neutral Citation Number: [2009] EWHC 3438 (QB)

Case No: HQ06X02439

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2009

Before:

MRS. JUSTICE SWIFT

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Between:

KEVIN O'LEARY	**Claimant**
- and -	
TUNNELCRAFT LIMITED & OTHERS	**Defendants**

- -
- -

MR. ROBERT WEIR (instructed by **Messrs. Finers Stephens Innocent**) for the **Claimant**
MR. WILLIAM AUDLAND (instructed by **Messrs. Plexus Law**) for the **Defendants**

- -

Approved Judgment

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MRS. JUSTICE SWIFT :

1. This is an application by the first defendants for permission to rely on surveillance film footage and photographs taken of the claimant and for appropriate consequential case management directions to be given so that the case can proceed to trial, that trial being listed to start either on Friday, 11th or Monday, 14th December 2009, with a six-day time estimate.

2. The substantive claim relates to an accident which occurred on 4th September 2003. The claimant, who was then 22 years old (he is now 28), was injured when he became crushed between concrete segments which were being lifted by crane in the course of a tunnel project forming part of the construction of one of the Channel Tunnel rail links. Liability is not in dispute, it having been agreed that the claimant should receive 90% of the damages as agreed or assessed by the court. The claim proceeds against the first defendants (whom I shall refer to as "the defendants") only.

3. As a result of the accident, the claimant suffered a severe crushing injury to his pelvis, with fractures of the pubic rami and a left-sided extension into the hip joint. There was complete occlusion of the urethra which was separated from the bladder and prostate.

4. The claimant underwent a series of complex surgical procedures and was in hospital for several months. He underwent two failed operations to reconstruct the urethra. Until he underwent a third successful reconstruction in July 2005, he had to undergo catheterisation which caused pain and problems with blockages. He has been left, so it is claimed, with permanent frequency and urgency of micturition with associated incontinence. He remains at risk of bladder infections and other complications. His erectile function has been impaired and it is believed that he will not be able to father children naturally.

5. The claimant's Schedule of Loss also describes a number of psychiatric effects of the accident, including a major depressive disorder and an obsessive compulsive disorder. He is said to be lonely, emotionally detached and lacking in energy and stamina. It is said in the Schedule of Loss that he has a very limited earning capacity and indeed he describes himself as "virtually unemployable".

6. Expert evidence has been obtained on both sides from orthopaedic surgeons, psychiatrists and urologists and from joint experts in fertility and care matters. The parties also have employment experts and a number of other potential witnesses whom I shall refer to in more detail in due course.

7. The claimant's most recent Schedule of Loss values the case at over £2 million on a full liability basis. That figure includes a claim for past loss of earnings of over £220,000 and for future loss of earnings in excess of £1.3 million.

8. The defendants' case is that the claimant's claim is worth very much less than the amount identified in the Schedule of Loss and that his function and abilities are greater than those described by him in his witness evidence, in the Schedule of Loss and to the various medical witnesses.

9. The proceedings were commenced in August 2006. On 3rd 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 1st July 2008.

10. Extensions of time for compliance with some of the directions given in the Master's order were requested and obtained on 21st November 2007 but no extension of time was sought for the direction I have mentioned. Subsequent directions were given on 13th October 2008. Master Fontaine ordered at that stage that the defendants should provide to the claimant all the quantum - related disclosure that they had currently served but in a non-redacted form within two weeks. I have not seen that evidence and do not know what redacted material was being referred to.

11. Exchange of witness evidence took place. The claimant's solicitors sent the claimant's witness evidence under cover of a letter of l4th July 2008 in which they stressed that the statements were being sent in reliance upon the defendants' solicitors immediately and contemporaneously exchanging the defendants' witness statements of fact including any private enquiry agent reports and video evidence upon which the defendants intended to rely at trial. That was referring back, in effect, to the order which had been made by Master Fontaine.

12. In due course the expert evidence was disclosed and Joint Statements were prepared after discussions between the various experts. Some of those Joint Statements date back to 2008. The most recent is that of the urologists which was prepared in June 2009. The Schedule of Loss to which I have already referred was filed and served by the claimant in June 2009.

13. I come to the circumstances which give rise to this application. It is now clear that the defendants have since at least the beginning of 2009 been instructing enquiry agents to keep the claimant under surveillance. No surveillance evidence was disclosed prior to 1st July 2008 or thereafter. The defendants say that that was because no such evidence had been obtained at that stage.

14. It appears that the defendants' solicitor, Mr. Justin Collins, first instructed a firm of enquiry agents or investigators in the Republic of Ireland. The reason for that was that the claimant lives near Cork, in the Republic of Ireland.

15. At some time - probably in late March 2009 - the enquiry agents sent to Mr. Collins video evidence and photographs which had been taken by them in January and March 2009. Mr Collins reviewed that material. His evidence, set out in a witness statement, is that he decided not to make use of it. It included a very short video sequence taken on 13th March which showed the claimant doing what has variously been described as "running", "jogging" or "walking fast". Mr. Collins' evidence is that, having decided not to use that evidence, he took no action in relation to it. He did not at that stage request witness statements from the operatives who had been observing the claimant.

16. In the middle of June 2009, the claimant's Schedule was served. It included a large claim for loss of earnings and loss of earning capacity. I am told that, at that stage, the defendants' solicitor decided to instruct a different firm of enquiry agents, this time based in the UK but carrying out their surveillance in the Republic of Ireland.

Quite when that decision was taken and the instructions given I am not told but it was plainly before 17th August 2009 when it is apparent that surveillance began.

17. The surveillance took place over a period from 17th to 22nd August 2009. It was recorded in surveillance logs kept by the operatives responsible for watching the claimant. Parts at least of what they saw was recorded on video film. However, on 22nd August 2009, the investigators realised for the first time that they had been watching the wrong man. Thereafter they correctly identified the claimant (or so it appears) and on 22nd August 2009 they filmed him in a sequence to which I will refer in due course.

18. It appears that the UK enquiry agents did not immediately send the resultant film to the defendants' solicitor. I am told today (although I have no evidence to this effect) that the enquiry agents delivered oral reports to Mr Collins of their surveillance during August 2009. In those reports they described what they had seen between 17th and 21st August 2009. It was, so I am told, Mr. Collins who suggested that the person that they had been watching might not be the claimant.

19. As a consequence, the enquiry agents reappraised the situation (in what way I do not know), realised that Mr Collins was correct and were then able to identify and observe the correct person. These events (i.e. the mistaken identity and the subsequent identification and observation of the right person) were known to Mr. Collins at or about the time they occurred.

20. At that stage, Mr. Collins, so I am told, did not request a copy of the surveillance logs or the relevant film. He merely instructed the enquiry agents to continue with their surveillance. This they did. They observed the claimant (or attempted to do so) at various dates during September 2009. It appears that they saw little, if anything, of him during that period, except on 29th September when they obtained a very brief piece of footage of him. It may be, so I am told by Mr. Audland (counsel representing the defendants today), that again that was a case of mistaken identity and it was not the claimant, but that is not clear.

21. Thereafter matters move into October. Further surveillance took place on (I think I am right in saying) 17th October and on one or two dates after that and then again from 23rd October onwards for a period. I will refer to that later footage in due course.

22. A joint settlement meeting starting at 4.30 p.m. had been fixed for the evening of Tuesday, 27th October, that being the only day that the claimant's leading counsel, who is currently engaged in a 25-day trial, was available. It was the first settlement meeting that had taken place during these proceedings.

23. At 12.30p.m. on 27th October, the defendants' solicitors contacted the claimant's solicitors and informed them that they had the previous day received from their enquiry agents a DVD containing footage of surveillance evidence, together with witness statements from four operatives and their surveillance logs.

24. Those witness statements were served on the claimant's solicitors later that afternoon. They were dated 24th August, 25th September, 18th October and 19th October 2009. They related to the footage which had been taken in August and early October, (i.e. on

17th, 18th and possibly 19th October). The witness statements carried statements of truth and referred to the surveillance logs. Those logs appeared to show that, in August 2009, the claimant had been observed working, driving, attending the gym and involved with heavy lifting. Those activities, in fact, were not undertaken by the claimant but occurred during the period that the operatives were watching the wrong person. That fact was known to the operatives by the time they made their witness statements and also, as I have indicated, was known to Mr. Collins. The statements referred to unedited versions of the video evidence which were available. The DVD provided had been edited, as is frequently the case with evidence of this nature.

25. The witness statements - and, rather later, the DVD - were disclosed a short time before the joint settlement meeting was due to start. The errors in the witness evidence were not pointed out to the claimant's solicitors. The letter enclosing the evidence indicated that the defendants' solicitors were prepared to agree to a postponement of the joint settlement meeting. That was not feasible because of the commitments of the claimant's leading counsel and the consequent difficulties of fixing an alternative date. Plainly, the fact that they had received a quantity of witness evidence with accompanying DVD must have placed the claimant's advisers in some difficulty when approaching the joint settlement meeting. That meeting was not attended by the claimant who was available on the telephone at his home in Ireland.

26. The defendants' solicitors' letter of 27th October referred to a further DVD not yet received by them which resulted from surveillance of the claimant conducted on Friday, 23rd, Saturday, 24th and Sunday, 25th October. They indicated to the claimant's solicitors that that DVD would be disclosed to the claimant's solicitors later that week or the following week.

27. In a letter written in response (also on 27th October), the claimant's solicitors requested confirmation before the joint settlement meeting that the defendants had no other surveillance evidence. If they had, the claimant’s solicitors requested that they should disclose the evidence immediately. Having received no response, they repeated that request by letter on 28th October. They also requested an unedited version of the DVD evidence previously disclosed.

28. By a letter dated 28th October, the defendants' solicitors revealed that there was previous surveillance evidence consisting of the photographs which had been taken in January and March 2009 and the piece of video footage taken on 13th March 2009. In the same letter, the defendants' solicitors informed the claimant's solicitors that, contrary to the witness evidence they had disclosed the day before, the man referred to in the surveillance logs of 17th, 18th, 19th, 20th and 21st August was not the claimant, but a man who had been wrongly identified as him. The letter requested reasons for the request for all unedited footage.

29. On 28th October, the defendant made a Part 36 payment. I am told that the claimant has also made a Part 36 offer at some stage since the joint settlement meeting.

30. On 29th October, the claimant's solicitors wrote again to the defendants' solicitors posing a number of questions essentially directed at discovering why it was that, as the defendants' solicitor had stated, he had not received copies of the August DVD evidence before 26th October 2009. That question was not addressed in the

defendants' subsequent letters. Nor was it addressed in the defendants' evidence, in support of this application.

31. The claimant's solicitors expressed concern that the defendants had only then disclosed surveillance evidence which had been in their possession (or certainly in the possession of the enquiry agents instructed by them) for several months. They again requested an assurance that they had been informed of the entirety of the surveillance evidence. They complained about the quality of the DVD evidence and again requested an unedited version of all the footage. They complained also about the misleading contents of the witness evidence served on 27th October 2009.

32. Complaints about the quality of the evidence related at that stage primarily to the 50 photographs with which they had been provided dating from January and March 2009. These were not correctly sorted or dated. In addition, there was no witness evidence from the person(s) who had carried out the surveillance in January and March 2009.

33. On 30th October, the claimant's solicitors wrote again pointing out the problems with the photographs and seeking properly dated copies, together with appropriate witness evidence.

34. By 3rd November, the second DVD mentioned in the defendants' solicitors' letter of 27th October had still not arrived. The claimant's solicitors wrote requesting it, together again with the unedited DVD evidence and repeated their request for properly labelled photographs. The DVD and witness statements were delivered that afternoon. The surveillance logs suggested that the claimant had been observed - not only during the period between 23rd and 26th October as previously stated - but also on 27th October, i.e. the day of the joint settlement meeting. The logs also suggested that the claimant had been observed on various dates in September 2009, although only DVD footage taken on 29th September was disclosed.

35. The claimant's solicitors complained about the quality of this new DVD and again requested unedited copies of the DVD evidence. In the light of the fact that they had not previously been aware of any surveillance in September 2009, they again requested confirmation that all such material had by now been disclosed.

36. On 3rd November, the defendants' solicitors served this application notice on the claimant's solicitors, together with a witness statement which had been made by Mr. Collins on 30th October.

37. The position at that stage - and the position as it is today - appears to be as follows. The claimant's solicitors still have concerns that they have not received full disclosure. They have not received any assurance, either in correspondence or in evidence, which in terms states that the defendants have no further surveillance evidence to disclose. This is despite the fact that they have been requesting such an assurance for some time now. Their letter of 3rd November was written a week ago.

38. Secondly, the claimant’s solicitors complain about the quality of the latest DVD (i.e. that relating primarily to October 2009) which they say is impossible to review because of its dark quality. The defendants’ counsel has told me that the quality of the DVD merely reflects the circumstances in which it was taken and cannot be

improved upon. So far as I am aware, that matter was not addressed in correspondence prior to today.

39. The third matter of concern is that one of the DVDs (that relating, I think I am correct in saying, to the earlier part of October) appears to the claimant's solicitors to be "out of sync", in that the times shown on the footage go forwards and backwards rather than continuing in a chronological fashion. Mr. Audland, who has seen the DVD in question, acknowledges that there has been some poor editing and compilation of that DVD, as a result of which it starts at a time after the later sequences. He suggests that it is not particularly confusing. The claimant's solicitors have requested - but have not yet received - a version of that DVD which runs in proper chronological order.

40. I was told by Mr. Robert Weir who appears for the claimants that the logs attached to the witness statements refer to activities (e.g. the claimant walking across a muddy field) which cannot be seen in the DVD footage. He said that it is impossible to reconcile the description in the logs with the film.

41. The next matter is that the unedited evidence has not yet been made available. The defendants' solicitors have recently indicated that it will now be made available in the early part of next week. It is said that all the unedited material shows scenes in which the claimant does not appear and, therefore, it will be of little positive assistance. Nevertheless, it is now acknowledged that, in fairness, the claimant's solicitors should be able to see the evidence in its unedited form. It is not known of what duration the relevant footage will be.

42. In addition, there is, as yet, no witness evidence available in relation to the January and March photographs and video footage. I am told that the defendants' solicitors are attempting to obtain that evidence.

43. The claimant himself has still not seen all the DVD evidence. This is primarily because of difficulties in the postal system as between the UK and the Republic of Ireland. I was told that the last DVD was sent to him on 5th November and this morning, 10th November, it had still not yet been received.

44. I note at this point that we are now 31 days from the first time when the trial could start, 24 days of that period being working days.

45. The evidence before me consists of a statement from Mr. Justin Collins, a partner in the defendants' solicitors, together with a statement from Mr Daniel Marks of the claimant's solicitors. The statement of Mr. Collins states when he received the relevant surveillance footage and when it was disclosed. He describes the footage, but, as I have indicated, his statement contains no explanation of why the footage of August 2009 was not disclosed to him earlier, nor does it contain any reference to or explanation as to how inaccurate witness evidence came to be disclosed to the claimant's solicitors. It does not mention the September surveillance or footage at all. As I have already indicated, there is no evidence before me in relation to these matters.

46. The defendants' case is that the surveillance footage is significantly inconsistent with the claimant's reported physical and psychiatric symptoms and that it shows that he

retains a significantly greater functional - and therefore residual earning - capacity than he suggests.

47. The claimant's position is that the footage, insofar as his advisers have been able to review it, is not fundamentally inconsistent with his reported physical or psychiatric symptoms and that, it would make very little, if any, difference to a judge's assessment of his disability and earning capacity.

48. I come now to the arguments mounted by the parties during today's hearing. Mr. Audland does not accept that the surveillance evidence relating to the first period (i.e. January to March 2009) and the second period (i.e. August 2009 and from 17th to 19th October 2009) should have been disclosed earlier. Mr. Collins had indicated in his evidence that he did not intend to rely on the material resulting from the first period. In those circumstances, there was no obligation on him to disclose it. In the event, it has been disclosed but only because of a specific request from the claimants' solicitors that they should be permitted to see all surveillance evidence in the defendants' possession. Mr Audland states that the defendants did not intend to rely on the evidence after it was first received and do not now intend to rely on it.

49. As to the material relating to the second period, Mr Audland says that this was taken after service of the claimant's Schedule of Loss on 19th June 2009. At that stage, it was appreciated for the first time that the claimant would be alleging at trial a very significant loss of earning capacity. Because of the sums claimed and the disability alleged in the Schedule of Loss, it was decided once again to instruct the enquiry agents to observe the claimant. Oral reports were received from time to time and Mr. Collins was kept informed of progress that was being made. He did not see the video evidence relating to 28th August. Had he done so, he would not have decided to use that evidence at that stage. Rather, he would have, as he did, instructed the enquiry agents to continue their surveillance activities. Mr. Audland said that one of the reasons that Mr. Collins would not have decided to use the August evidence, and therefore to disclose it, was because that would have alerted the claimant to the fact that he was being watched.

50. Mr. Audland said that it had first been intended that the joint settlement meeting would take place in November. Attempts to organise it proved difficult and it was only on 4th October that it was finally fixed for 27th October. He said that a combination of that fact and the coincidence that further, helpful (from the defendants' viewpoint) DVD footage was taken between 17th and 19th October led to the admittedly undesirable situation whereby the relevant evidence was disclosed only on the day of the joint settlement meeting.

51. Mr. Audland acknowledged that the error in disclosing witness evidence, which was misleading as to the claimant's activities in August, was highly unfortunate in the circumstances, although he told me that he had indicated at the joint settlement meeting, in response to a question from the claimant's leading counsel, that the defendants was not alleging that the claimant was working on ATM machines (an activity shown in the video footage) in August 2009.

52. Mr. Audland submitted that this was not "trial by ambush". It was a sequence of events which had occurred through misfortune, not as a result of any misconduct or design on the part of the defendants.

53. Mr. Audland addressed the risk that the granting of permission to use the surveillance evidence might lead to an adjournment of the trial. He pointed out that the footage, as presently disclosed, lasts for less than two hours in all. It was that footage which the experts would be required to view, not the unedited footage. He acknowledged that the experts, having viewed the surveillance evidence, would have to prepare short supplemental reports and have joint discussions with a joint note of such discussions being prepared as necessary. Nevertheless, he submitted that all that could comfortably be done before the trial.

54. He submitted that to permit what would be a tight timetable and which may include the necessity for urologists and orthopaedic surgeons, as well as surveillance operatives to give evidence at the trial, would be proportionate in all the circumstances.

55. Mr. Audland stressed to me the overriding objective for the necessity to deal with cases justly. He pointed out that the claim has a very significant potential value. He urged me to take all relevant factors into account. He submitted that admission of the surveillance evidence would result in no substantial prejudice to the claimant, whereas there would be enormous prejudice to the defendants at trial if they were denied the opportunity to rely on this evidence. The evidence, he said, would go to the vast majority of the heads of damages claim and, in particular, to the damages claimed for loss of earnings. He suggested that artificiality would be introduced into the trial if he were not permitted to put sequences of the video footage to the claimant in cross-examination. Mr Audland submitted also that there be far better prospects for settlement of the claim if both sides could put in all of the evidence on which it sought to rely. He submitted that the court should be flexible and if, which he contended was not the case, the defendants' conduct was to be criticised, the remedy should lie in costs rather than in denying the defendants the opportunity to rely on this evidence.

56. For the claimant Mr. Weir pointed out that the defendants had known since the inception of the case that the claimant was seeking substantial damages for loss of earnings on a permanent loss basis. He said that there had been no real change in the nature of the claim as a result of the service of the Schedule of Loss in June 2009. It was not, he pointed out, the claimant's case that his condition had in any way worsened over the time which had elapsed since the claim began.

57. Mr. Weir stressed the importance of the Order made by Master Fontaine in May 2007. He submitted that the court had made clear that, if it was intended to rely on surveillance evidence, the claimant should be made aware of it well in advance of any possible trial. He submitted that there had been ample opportunity over the period of the claim for the defendants, if they so wished, to mount surveillance on the claimant and to disclose the resultant evidence in due time. Instead, the defendants had breached the Master's Order made in 2007 and, even after the service of the Schedule of Loss, had not moved promptly to obtain and disclose their surveillance evidence.

58. Mr. Weir enumerated the various problems with the surveillance evidence which I have already described. He pointed out that some relevant evidence remained undisclosed. He emphasised the problems which had been encountered in getting evidence to the claimant so that he was able to give his views on it.

59. Mr. Weir submitted that it was artificial for the defendants to say that, having obtained surveillance evidence, it was open to a party's advisers effectively to "sit on it" without making a positive decision to rely on it. If it were open to a party to do that, then it would be possible for that party to delay (as the defendants had done) until very late in the proceedings before making its decision and deciding to disclose the evidence.

60. Mr. Weir commented that it appeared that the defendants' solicitors were now placing considerable emphasis on the DVD evidence from August 2009. He suggested that it was not credible that, had they been in possession of that evidence shortly after it was taken, they would not have taken the decision to rely on it. At that time, it was, effectively, all they had. He made a similar submission in relation to the evidence of 13th March 2009, which, according to the defendants, showed the claimant running, albeit for only a very short period.

61. In short, what Mr. Weir was suggesting was that there had been a deliberate policy adopted by the defendants' solicitors in this case to "wrong foot" the claimant by disclosing potentially important surveillance evidence at a very late stage and, in particular, in very close proximity to a joint settlement meeting and the making of a Part 36 offer.

62. Mr. Weir sketched out what would be necessary in the way of directions were I to permit this evidence to be deployed at trial. He indicated that he would be asking the court to make an Unless Order requiring all surveillance evidence, witness evidence, and relevant documentation to be provided by the defendants within a short period. He would be asking that the DVD relating to the second period should be placed in proper chronological order and that there should be a statement from Mr. Collins confirming the fact that all surveillance evidence had now been disclosed, and producing a supplemental list of documents.

63. He suggested that the claimant would then have to have the opportunity to provide a witness statement dealing with the footage and the circumstances in which it was taken. Corroborative witness statements from those who knew him may also have to be obtained. In order to effect all that within a reasonable period, the claimant's solicitor would have to fly to the Republic of Ireland to take proofs from him and the other witnesses. That process may well take as much as two weeks.

64. The experts would, Mr. Weir suggested, have to see the claimant's further witness statement in order to have a full picture of what had occurred before providing supplemental reports. Those experts would then have to discuss with their opposite numbers the changes, if any, to their opinions caused by viewing the footage. A note would have to be made of their joint discussions. There may then have to be a Revised Schedule and Counter-Schedule before trial took place. This, Mr. Weir said, would be difficult to accomplish within the time available.

65. Further difficulty was, he said, caused by the position of the claimant's experts. This is referred to in paragraph 79 of Mr. Marks' witness statement. He stated that he had been informed by the office of the claimant's psychiatric consultant, Professor Weller, that he does not have any spare capacity to undertake any work on this case between now and the trial due to work, court and holiday commitments. The claimant's expert urologist is said to be in the same position and will be abroad in the period before the

trial. Mr. Marks had also been informed by the claimant's employment consultant that he is engaged fully on other matters and will be abroad in South Africa and Israel in the period up to the trial and will not have sufficient time to undertake further work in this matter. He has not yet been able to speak to Jan Harrison, the care expert, or the claimant's orthopaedic consultant, Mr. Worlock, who, it is believed, is away at present.

66. Mr. Weir also referred to the impact which the admission of the evidence might have on the length of the trial. He said that it was not known whether the orthopaedic and urological experts (whom it had not been intended should attend trial) would be available. Mr. Audland has subsequently told me that the defendants' orthopaedic surgeon is available for some days towards the end of the trial. The position of the defendants' urologist is not known.

67. Mr. Weir pointed out that it is anticipated that there will be about 20 witnesses over the six-day period of the trial. The claimant's witnesses include the claimant himself, members of his family, persons concerned with his rehabilitation, a psychiatric consultant, an accommodation expert, an employment expert and a tunnel mining expert, together with a joint care expert. There will possibly be a joint fertility expert. For the defendants, I was told, there will be two officers from the tunnel mining industry, a tunnel mining expert, an employment expert and a psychiatrist. Mr. Weir submitted the witness evidence was likely to occupy the court for a substantial period of time and the potential addition of four more medical witnesses, together with surveillance investigators, may well cause the trial to overrun its allocated period.

68. Mr. Weir submitted to me that, if I were disposed to accede to the defendants' application, the only practicable course would be to vacate the trial. He submitted that it would quite simply be impossible to deal with all relevant matters within the time available and, moreover, that it would be unfair to the claimant to attempt to do so. The issues connected with the surveillance evidence would have the inevitable effect of distracting the claimant's advisers and the claimant himself from other preparations for the trial and from considerations relevant to the settling of the claim.

69. In response, Mr. Audland submitted that, whilst the defendants had been aware in general terms of the claimant's case on disability and employability prior to the receipt of the Schedule of Loss, it became clear after service of that document that he was saying that he was very significantly handicapped urologically, physically and psychiatrically and that his loss was very substantial indeed.

70. He referred to the problems which had been highlighted by Mr. Weir. He argued that it would be possible to deal with all matters of preparation before trial and, in all probability, to deal with the additional evidence within the compass of the trial given appropriate case management. He indicated that his primary position was that, even with the addition of the surveillance evidence, the case could be prepared for trial within the appropriate time. If, however, I were to reach a contrary view, he submitted that justice would require an adjournment so that the defendants was not debarred from relying on the evidence it had obtained.

71. Both counsel referred me to the leading cases in this area. In **Rall v Hume** [2001] 3 All ER 248, video films had been disclosed to the claimant's solicitors in June and October 2000 and the claimant and her advisers had had the opportunity to view them.

The defendants then made a late application to rely on the video evidence. That application was refused by the district judge three weeks before the trial which was due to take place in January 2001.

72. The defendants appealed to the judge who affirmed the district judge's decision on the basis that the application had been made too late and would affect the trial length and trial preparation. There was an appeal to the Court of Appeal. In giving judgment, Potter LJ reviewed the rules relating to the disclosure of video evidence. He emphasised that a defendant who proposed to use such a film to attack a claimant's case was subject to all the rules as to disclosure and inspection of documents contained in CPR 31. He pointed out that there are practical constraints which require the giving of notice, particularly the availability of video equipment and the extension of trial time. He emphasised the fact that it was necessary for the judge who was case managing the case to be aware of the intention to use surveillance evidence in order that proper arrangements could be made and proper time estimates given so that the trial could proceed quickly and efficiently. At paragraph 19, Potter LJ said this:

> "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 defendants, 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 defendants should be permitted to cross-examine the claimant 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 defendants so as to achieve surprise, nor was the delay otherwise culpable ..."

73. In the case of **Jones v University of Warwick** [2003] 1 WLR 954, the issue related to surveillance evidence consisting of a video which had been taken inside a claimant's home by an enquiry agent posing as a market researcher and using a hidden camera. The evidence obtained in that way was highly damaging to the claimant's case. That case involved the balancing of the unlawful means used to obtain the evidence with the prejudice which would be caused to the defendants, if it were denied the opportunity to use the resulting evidence.

74. The difficulties posed by such a balancing exercise were discussed in the judgment of Woolf LCJ (as he then was) in the judgment of the Court of Appeal. At paragraph 25 he said:

> "Potter LJ, in the case of **Rall**, added that this does not apply if the conduct of the defendants amounts 'to trial by ambush'. The discretion on the court is not, however, confined to cases where the defendants have failed to make proper disclosure. A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Pt 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share

> of the resources of the court: CPR r 1.1(2)(e). Proactive management of civil proceedings, which is at the heart of the Civil Procedure Rules, is not only concerned with an individual piece of litigation which is before the court, it is also concerned with litigation as a whole."

75. In that case, the Court of Appeal eventually upheld the judge who had permitted the defendants to rely on the evidence, despite the way in which it had been obtained.

76. I should also refer to a passage in the judgment which was relied on by the defendants. It is at paragraph 13 and quotes the judge from whom the appeal lay:

> "The overriding objective of those rules (the CPR) is to enable the court to deal with cases justly. This includes, inter alia, ensuring that the parties are on an equal footing, that the case is dealt with in ways which are proportionate to the amount of money involved and that the case is dealt with 'fairly': CPR r 1.1. The claimant knows very well what she can do with her hand, the defendants does not. It is not, therefore, on an equal footing in this respect."

77. I come now to my conclusions, applying the principles set out in the cases to which I have referred, together with the overriding objective and also the discretion set out in CPR 32.1.

78. First of all, I am driven to the conclusion that this was an "ambush". There was no reason, in my judgment, why the footage which had been taken in August 2009, should not have been disclosed earlier. There is no doubt that the defendants' solicitor was aware of the existence of that footage. Judging by the prominence given to it in the defendants' counsel's Skeleton Argument for these proceedings, it represents what might be described as the "high point" of the defendants' surveillance evidence. It apparently shows 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.

79. It is difficult - indeed impossible - to see why, had the defendants' solicitor obtained that evidence promptly, he would not have chosen to rely upon it. Nor is it possible to see why he did not at least request sight of the evidence so that he could make a judgment for himself as to whether or not it should be relied upon. Instead, the evidence apparently did not come into the defendants' solicitors' hands until 26th October, the day before the joint settlement meeting.

80. 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. All the remainder of the footage taken in October was taken after the joint settlement meeting had been arranged.

81. It is concerning that I have been given no explanation in evidence as to the sequence of events during this period and as to precisely why the August footage and the witness evidence came into the possession of the defendants' solicitors only on 26th October. Nor has there been any explanation for the fact that witness statements in

respect of the August footage (part of which related to another person entirely) were prepared in August and September 2009, despite the fact that I am told that no decision has been taken at that time as to whether or not it was to be relied upon.

82. Even if this were not a deliberate ambush, it is not satisfactory that surveillance material should be in the hands of enquiry agents to the knowledge of the solicitors yet should not be reviewed with a view to deciding what, if anything, should be done with that material.

83. I am extremely concerned that, very shortly before the joint settlement meeting, the claimant's solicitors should have been served with witness evidence which was inaccurate and misleading and which was known to be such both by the surveillance operatives at the time their witness statements were sworn and by Mr. Collins who was responsible for disclosing it. The surveillance logs attached to that witness evidence described the claimant doing activities which would have been wholly inconsistent with his case. The claimant's advisers were not informed of the error before the joint settlement meeting. At best, this constituted a serious lack of care on the part of the defendants' solicitors and/or the enquiry agents whom they employed.

84. It is striking that nowhere in the correspondence which took place during the period between 26th October and 3rd November is there any apology or expression of regret either for the late disclosure of the surveillance evidence or for the mistake, although it was acknowledged in a letter of 28th October. The tone of the defendants' solicitors' correspondence throughout this period can only be described as bullying in nature.

85. The third matter of concern is the generally confused and unsatisfactory nature of the surveillance evidence which has been provided. I have already referred to this in some detail. We have a situation where the material relating to the first period is confusing as to dates and unsupported by witness evidence which might provide an explanation. The evidence relating to second period is not, it is conceded, in chronological order and, I am told, also contains items described in the log which are not visible on the films themselves. That relating to the third period is of poor quality, difficult to make out and, once again, difficult to reconcile with the surveillance logs.

86. These matters may, of course, not be fatal if there were many months to go before the trial. However, the problems still exist two weeks after the first disclosure was made and a period of only 31 days before the trial. No doubt steps can be taken to resolve the various difficulties - at least to some extent - but how long that will take is difficult to say. The defendants' solicitors have not been particularly co-operative thus far and I am not encouraged to believe that the problems will be resolved with any great rapidity, although I recognise, of course, that it would be open to me to make appropriate orders in an attempt to ensure that this happened.

87. A problem which compounds the situation is that of the poor postal service between Ireland and the UK which affects both communications between the defendants' solicitors and their enquiry agents (who, although they are based in England, need to obtain material from the Republic of Ireland) and between the claimant's solicitors and their client. Mr. Audland emphasised to me that it might be difficult for his clients to comply with an Unless Order made in respect of disclosure of material

because the material was not in their power but that of their agents. That observation does not encourage me to believe that the problems will be resolved speedily.

88. Once all the material of the best quality available has been obtained, it will be necessary to obtain statements from the claimant and his witnesses. In addition, the experts (i.e. care, employment, psychiatrist, urologist and orthopaedic experts) will need to see and comment on the footage. Mr. Weir has submitted that it is necessary for the experts to see the claimant's comments on the footage at the same time. Mr. Audland said that that is not necessary. In my judgment, it would only be right for the expert witnesses to see all the additional material together. Quite apart from anything else, this would mean that they would only have to deal with the papers on one occasion rather than on two separate occasions. Addendum reports would then have to be obtained, any discussions would have to take place and any necessary amendments to joint reports: all this within the 31 days left before trial.

89. It seems to me that to fit all this work into the time available before trial would be extremely difficult, even without the problems which have been described by Mr. Marks. They would, in my view, render the exercise completely impossible. Even if the exercise were capable of being done, it would be a distraction from the ordinary preparations from trial and from considerations of the Part 36 offers and possible settlement of the case.

90. The next matter is the length of trial. It is inevitable -- and indeed I do not think that this is in dispute -- that the granting of the defendants' application would add to the length of the trial. This is significant because at the time of the trial window, there are only six (or, at the most, seven) days before the end of term. Plainly problems will arise if the case continues beyond that time. There are already as many as 20 witnesses (albeit some of them relatively brief or perhaps not even necessary) who are expected to attend trial to give evidence. The addition of a further four doctors and several surveillance investigators would add a substantial total length to the trial At present, it is not known whether all the four doctors would be available for trial since their availability has not yet been ascertained.

91. I accept Mr. Weir's submission that, if the defendants' application were to succeed, it would not be practicable for the trial to proceed. It would place unfair pressure on the claimant's advisers and would not, in my judgment, be manageable. An adjournment of the case would have serious implications for the claimant. It is already more than six years since his accident and, according to the defendants' psychiatric evidence, the proceedings themselves are not assisting his recovery. No doubt the adjournment of the case would cause further distress to him. Thus, an adjournment would cause him prejudice, as would the continuation of the trial for which he or his advisers would be unable properly and fully to prepare.

92. Balanced against that must be the prejudice to the defendants if they are unable to rely on material which would possibly be of assistance to them in what is undoubtedly a large claim. However, the responsibility for the current difficulties lies fairly and squarely on the defendants. I have considered whether the proper course would be to penalise them in costs but I am not satisfied that that would meet the practical difficulties faced by the claimant and by the court in preparing for and dealing with this trial at the relevant time.

93. In making my decision, I start from the principle enunciated by Potter LJ in **Rall** to which I have already referred. The problem in this case has been caused by the defendants' delay in obtaining and disclosing its evidence, whether or not that delay amounted to ambush -- and I have found that it did.

94. I take account of the words of Woolf LCJ in **Jones** to which I have already referred. If the defendants' application is granted, the trial date will inevitably have to be vacated. That is not just a matter as between the claimant and the defendants. I must consider also the court's resources generally and CPR Part 1 in particular.

95. To be set against that, I must consider the prejudice to the defendants and the fairness of the trial. Whilst the surveillance evidence may not be as damaging as it appears to have been in the case of **Jones**, nevertheless the defendants plainly believe that it may be of value to them in cross-examining the claimant. It is not part of my function to judge that matter now or to weigh up the differing submissions made by each party and I have not myself seen the evidence. In usual circumstances, however, I accept all that evidence should be before the court in making their decision and I bear in mind also the observations which I have quoted by Woolf LCJ in **Jones** relating to equality of footing of the parties.

96. Here it was open to the defendants to seek and obtain surveillance evidence earlier than they did. It was also open to them to make a decision whether to rely on that evidence of August and, having made that decision, to disclose it. That they chose not to do, preferring, as I have found, to delay in the hope that more useful surveillance would take place and that they would then be permitted to rely upon all the evidence which had been obtained in August and at the later time.

97. I do not make the same finding in relation to January and March period, accepting for these purposes that a clear decision had been taken, in the light of the small amount of DVD evidence available, not to rely on that particular evidence.

98. For these reasons, and in the unusual circumstances of this case, it is, in my view, appropriate to refuse the defendants' application, and that I do.