



NINESTJOHNSTREET
LARGE LOSS PERSONAL INJURY

GDPR & PERSONAL INJURY LITIGATION

BRIAN MCCLUGGAGE



Scope of Presentation

BM1

Q1:
SURVEILLANCE

Q2:
MEDICAL
RECORDS

Q3:
SOCIAL
MEDIA

Slide 2

BM1

Brian McCluggage, 02/11/2020

SURVEILLANCE (1)

- Preamble to the GDPR: “Protection of natural persons in relation to the processing of personal data is a fundamental right”
- “The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society....”
- Article 8, Right to Privacy, Convention of Human Rights
- IMAGES ARE PERSONAL DATA, when we know identity of the data subject on film
- Biometric/health data? for surveillance footage: *physical, physiological or behavioural characteristics* of the data subject are key

SURVEILLANCE (2)

OTHER SOURCES

- **Protection of Freedoms Act 2012** – ICO encourages following
- **Surveillance Camera Code**, June 2013 (ICO)
- **European Data Protection Board**

SURVEILLANCE (3)

- ❑ Established principles: Rall v. Hume (2001) – *usually admit unless ambush*
- ❑ Douglas v. O'Neill (2011), Hayden (2016); Stewart v. Kelly (2016)
- ❑ Cf Hicks v. Rostas (2017); O'Leary v. Tunnelcraft (2009)
- ❑ Denton guidelines and **CPR 3.9** given little prominence in surveillance

SURVEILLANCE (4)

Section 57 DPA 2018: obligations of a controller include technical and organisational measures to ensure that the processing of personal data complies with the requirements of this part

Includes measures so that only personal data necessary for each specific part of the processing is used: s57(3)

- Amount?

- Extent ?

- Period?

- Accessibility?



SURVEILLANCE (5)

- ☐ Every day for weeks on end?
- ☐ Static surveillance?
- ☐ Following data subject into private establishments like a café?
- ☐ Listening into conversations in a café or restaurant?

3rd Data Protection principle: adequate, relevant and limited to what is necessary in relation to the purposes for which processed?

SURVEILLANCE (6)

- ❑ Can GDPR compliance be made a condition to permission for surveillance being given?
- ❑ Or put another way, can lack of it be a reason for excluding evidence under CPR 32.1?
 - ❑ (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
- ❑ So perhaps could develop principles of admissibility to more than simply the question of “ambush”?
- ❑ Or feature within the “circumstances of the case” for exercise of a Denton discretion

SURVEILLANCE (7)

- ❑ Jones v. University of Warwick (2003) – illegal but admitted into evidence
- ❑ Costs is hardly an adequate sanction cf *section 57 CJCA 2015*
- ❑ Filming through windows and into private garden, including children?
- ❑ Tracking device on car
- ❑ Complaints to ICO (s165) or to the Court (s167) under the *DPA 2018*?

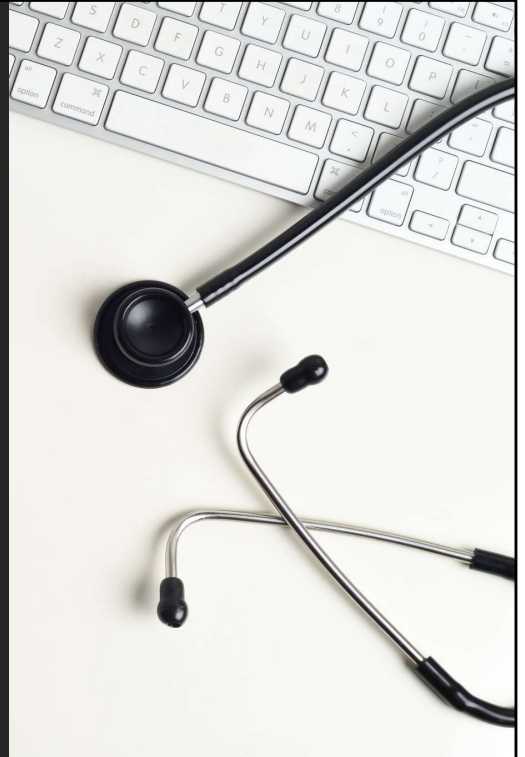


MEDICAL RECORDS (1)

Wholesale disclosure of records?

Why?

- ☐ Pre-existing history for current complaint
- ☐ Incorrect history to experts (section 57)
- ☐ Unrelated conditions relevant to causation of loss
- ☐ Insight into causation of present complaints



MEDICAL RECORDS (2)

But prejudicial or of little value?

- ☐ Drug habit
- ☐ Unfortunate past
- ☐ Prison
- ☐ Sexual dysfunction
- ☐ Abuse

MEDICAL RECORDS (3)

☐ Dunn v. British Coal (1993)

☐ Hipwood v. Gloucester Health Authority (1995)

☐ Bennett v. Compass Group (2002)

Realistic to give discretion/judgement to a medical expert?

MEDICAL RECORDS (5)

Article 9 of GDPR – Processing of personal data revealing race, religious beliefs, biometric data, “data concerning health” and similar

- Explicit consent *for one or more specified purposes*
- Processing relates to personal data made manifestly public by the data subject
- Processing necessary for the exercise or defence of legal claims...
[NO BALANCE BUT ‘NECESSARY’]
- Processing necessary for reasons of substantial public interest on the basis of law which shall be proportionate to the aim pursued... [BALANCING EXERCISE]

MEDICAL RECORDS (6)



Data principle of "data minimisation"



Cf CPR Part 31 standard disclosure test



So, is GDPR a legitimate consideration when court is exercising its discretion?



"Big money" case?

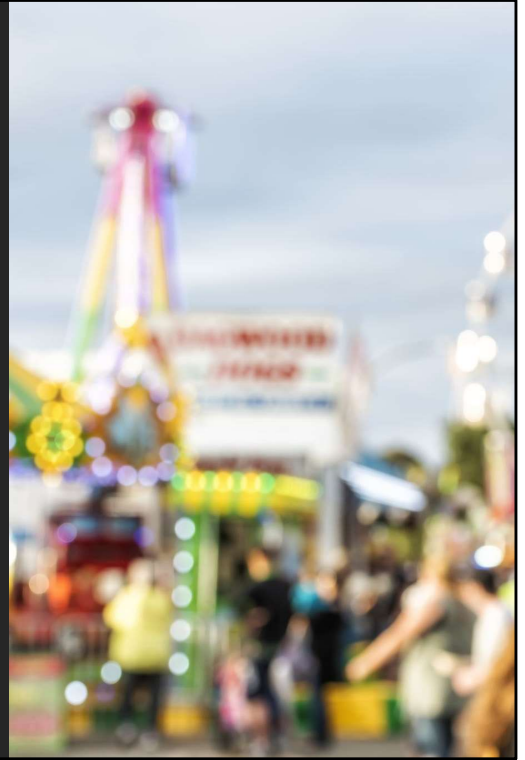


Back to review by an expert, or somebody independent?



SOCIAL MEDIA (1)

- ❑ Fair game if in the open?
- ❑ Real world use of social media in litigation:
 - ❑ Facebook Holiday and sporting photographs
 - ❑ Ebay activity – what are they selling and why?
 - ❑ Facebook – business cf Tuson v. Murphy (2008)
 - ❑ Twitter – references to drug use



SOCIAL MEDIA (2)

☐ Legitimate interest?

- ☐ What is it? *Business interest; prevent fraud; investigate crime*
- ☐ Processing necessary to that end?
- ☐ Subject's rights and freedoms override the insurer's interests?
- ☐ Legitimate interests Assessment? Will help - *just needs to be brief*

SOCIAL MEDIA (3)

❑ PROBLEM SCENARIOS:

- ❑ Thousands of pages of Facebook material being sent to counsel, doctors etc?
- ❑ Not just the claimant, but media of family members, friends, workmates?
- ❑ Private Facebook settings, but friend has screenshotted the wall and 'leaked' to the other side
- ❑ False or misleading identity used to 'befriend' e.g. "Vaping Ideas" Instagram account

SOCIAL MEDIA (4)

Factors in the balance?

- ☐ Deception?
- ☐ Whether GDPR policy/assessment?
- ☐ Probative force of the material?
 - ☐ Relevant to an issue?
 - ☐ *Prima facie* wrongdoing?
- ☐ Value of case?
- ☐ Embarrassing or humiliating?
- ☐ Interfere with family life e.g. financial issues, adultery, upsetting to children

"ANY QUESTIONS?"



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