

# Insurance Case Note

29 July 2009

## Credit and video evidence

### *Sabanovic ats Atco Controls Pty Ltd 2009 (VSCA 143)*

by Graeme Armstead, Partner

Insurers are often unsure if it is worthwhile placing plaintiffs under surveillance. While good video may alter the outcome of a case, more often than not investigators spend hours and hours observing a plaintiff's residence without seeing anything of interest. To make matters worse, some judges seem to delight in the attacking video evidence. However, the Court of Appeal in this decision has highlighted how video evidence can be important.

### Background Facts

The appellant was a 37 year old woman when she arrived in Australia and commenced working as an assembler for the respondent in 1995. Her work involved rapid repetitive duties using both hands. She assembled up to 800 small transformers each day and half that number if she was working on larger transformers. Her duties were not rotated.

She claims that in early 2001 she began experiencing pain, numbness and pins and needles in her wrist and hands mainly on her right side and particularly at night. She also complained of discomfort in her shoulders and neck. She continued working until 11 September 2001 when she felt severe pain in her hands, wrists and arms. She consulted her general practitioner on that day and he noted the presence of a swollen wrist. She underwent nerve conduction tests and was diagnosed as suffering from bilateral carpal tunnel syndrome. She was referred to an

orthopaedic surgeon who operated upon her right wrist. The appellant claimed that surgery did not improve her condition. As a result she declined surgery to the left wrist.

The appellant claimed that her condition never improved and that as at the date of the hearing of her serious injury application she remained totally incapacitated. She complained of symptoms that seriously restricted her ability to undertake the activities of daily living, engage in house keeping and even drive her car for anything other than short distances. In an affidavit she claimed that she suffered from constant but variable levels of pain in her arms, shoulders and neck.

Prior to the hearing of her serious injury application the appellant had been placed under surveillance by the respondent on numerous occasions from September 2006 until September 2007. On virtually every occasion she was placed under surveillance she was observed using her arms normally and generally moving without any evidence of restriction or pain.

During the years prior to the hearing of her serious injury application, the appellant saw numerous doctors during the course of her treatment and for medico legal purposes. These doctors prepared medical reports. As is usual a range of opinions were expressed. Some doctors strongly supported the appellant whereas others expressed reservations as to the severity of her complaints and the extent to which there was an organic basis for her symptoms. As is usual the

more sympathetic reports were based heavily upon an acceptance of the worker's subjective complaints of pain and incapacity.

### The Trial

The primary Judge referred to the marked conflict between the opinions expressed by the more sympathetic doctors and the appellant's presentation when placed under surveillance. He described the video footage as "uncompromisingly contradictory" of the plaintiff's evidence. He said that the plaintiff had "hoodwinked a number of doctors". He concluded that the appellant lacked credibility and dismissed her application.

### The Appeal

The Court of Appeal again discussed the manner in which appeals needed to proceed pursuant to section 134AD of the *Accident Compensation Act 1985*. In essence it noted that it was for the Court of Appeal to decide the issue of serious injury itself. As a result it noted that any appeal ground based upon the inadequacy of the trial Judge's reasons, could only ever be of secondary importance.

Given the fact that there was some evidence the appellant's condition was coloured by a co-existing psychological condition, the court had to first determine whether or not that psychological condition made it impossible to ascertain whether or not the organic injury could be regarded as being serious in the relevant sense. In the circumstances of this case it was able to sever or disregard the co-existing psychological condition. Had it not been able to do so, the appellant's case would have failed.

The Court of Appeal noted how difficult it was to assess the irreconcilable, conflicting evidence of medical experts in the absence of cross examination. Nevertheless, in the present case it was prepared to accept the preponderance of opinion that the appellant actually suffered from bilateral carpal tunnel syndrome. This led the Court of Appeal to discuss whether or not the diagnosis of an injury inevitably led to the conclusion that a worker had a serious injury. In relation to carpal tunnel syndrome it said:

*"if the consequence of carpal tunnel syndrome were invariably the symptoms, effects and disabilities described by the appellant, the assessment of serious injury in this case would be independent of her account and presentation. The appellant's credit and reliability would be irrelevant.*

*In our opinion, however, the evidence did not establish that carpal tunnel syndrome invariably entails*

*the symptomatology and degree of pain to which the appellant testified and which she recounted and demonstrated to doctors."*

Obviously in making these comments the court is referring to the fact that the consequences of some injuries are invariably so serious that the simple diagnosis of the injury will be enough for a worker to demonstrate that they have a serious injury.

However, on the other hand, there may be many types of injuries that may or may not be a serious injury depending upon the way in which they effect the individual claimant.

In this particular case the Court of Appeal thought that the video evidence was inconsistent with the appellant's evidence as to the extent of her incapacity. It was concluded that her credit was significantly impaired by the video footage, the evident exaggeration of symptoms to some doctors and her evasive responses when placed under cross examination. It was noted that the damage to her credit extended to and weakened her evidence on the severity of her symptoms and the disabling effect of her injuries. Furthermore, it detracted from the medical opinions which relied, in part upon her account of her condition. It was concluded that the appellant failed to discharge the onus of establishing that the consequences of her organic injury were serious to the requisite degree. As a result the appeal was dismissed.

## Comments

The facts of the case were hardly unusual. The appellant initially suffered an injury for which she received treatment. Over the subsequent years she denied any improvement. The various medical witnesses opinions were heavily based upon the account the appellant provided to them. Some doctors strongly supported her case whereas others clearly thought she was exaggerating. Surveillance showed that she was capable of engaging in activities that were not particularly stressful. However, her presentation when videoed was inconsistent with the complaints she made to the doctors and her evidence.

There have been many similar cases in the past where courts have gone to great lengths to downgrade the significance of similar video evidence. However, in this case the appellant encountered a trial judge who was not prepared to do so and the Court of Appeal reached a similar conclusion.

The case demonstrates how video surveillance may still be important if a plaintiff is observed undertaking activities in a manner inconsistent with the complaints they have made about their injuries.

---

## Contact us

|                          |              |  |
|--------------------------|--------------|--|
| Graeme Armstead, Partner | 03 8602 9249 | <a href="mailto:garmstead@hunthunt.com.au">garmstead@hunthunt.com.au</a> |
| Nieva Connell, Partner   | 03 8602 9239 | <a href="mailto:nconnell@hunthunt.com.au">nconnell@hunthunt.com.au</a>   |
| Peter Ewin, Partner      | 03 8602 9226 | <a href="mailto:pewin@hunthunt.com.au">pewin@hunthunt.com.au</a>         |
| Barry Josephs, Partner   | 03 8602 9247 | <a href="mailto:bjosephs@hunthunt.com.au">bjosephs@hunthunt.com.au</a>   |

Disclaimer: The information contained in this case note is not advice and should not be relied upon as legal advice. Hunt & Hunt recommends that if you have a matter that is legal, or has legal implications, you consult with your legal adviser. If you no longer wish to receive this e-alert or any other publication from Hunt & Hunt, please email us at [unsubscribe@hunthunt.com.au](mailto:unsubscribe@hunthunt.com.au).