Supreme Court sides with insurers on surveillance

LARS GERSPACHER looks at the issue of whether surveillance reports on claimants are an infringement of their personal rights

SURVEILLANCE reports can be quite handy in legal proceedings for various reasons.

Imagine an assured who asserts claims against an insurer of an accident insurance policy, contends he or she was involved in an accident and is, as a result, no longer able to work. If the insurer denies cover, a lawsuit may become inevitable and medical reports may not answer all questions conclusively. A good means of proving the assertions of the claimant were untrue is instructing a private investigator to prepare and submit a surveillance report on the daily life of the assured to the courts.

How convincing would it be if the defendant insurer could show the claimant is still enjoying sporting activities and breaking his or her personal records on a regular basis?

Not all jurisdictions, however, allow this type of evidence.

In the last couple of years, the Supreme Court of Switzerland – the country's court of ultimate resort – has had the chance to render a number of authoritative decisions in this regard.

All the earlier cases, however, related to social insurance matters. In these cases, the court held surveillance reports may be used by social insurance carriers, provided a number of requirements are met.

First, while performing his or her observations, the private investigator must not commit any offences and he or she is only entitled to observe the target subject in public places. Hence, only events that occurred in public places can be reported and could be noticed by any other person as well (eg, whether or not the individual is able to walk, use stairs, carry items or do sports).

Although these requirements seem fairly narrow, the Supreme Court tends to define the term "public" quite widely. In a case in 2008, the court for instance held a privately rented tennis court would still be a public area. Video surveillance made by the private investigator and showing the allegedly injured party performing astonishing lobs and returns was deemed legitimate.

Whether or not such evidence is also permitted in private insurance matters has not been dealt with by the Supreme Court very often as yet. One reason for this is that, until December 31, 2010, civil procedure has been in the competence of the cantons. What type of evidence is admissible lies in the hands of the cantonal legislators and cantonal courts. If cantonal law is in dispute, the Supreme Court of Switzerland, as a federal court, is only entitled to intervene in decisions of lower instances in limited cases.

Despite these procedural limits, last year the Supreme Court had a chance to consider under what circumstances surveillance reports would be permitted in private law matters.

The underlying facts were, very briefly, as follows: X suffered bodily injuries in a car accident involving two cars. He sued the drivers of the two cars and the two owners' liability insurers. He asserted claims for damages because, as he contended, he was no longer able to take care of his household on his own.

Once this lawsuit was initiated, one of the liability insurers instructed a private investigator and obtained a surveillance report on X's daily life. The report showed X was, despite the accident, still able to carry heavy items, do the shopping, vacuum and wash and polish his car. The cantonal courts accepted the surveillance report and dismissed X's action.

X further initiated a lawsuit against the liability insurer and claimed for damages on the basis that, by being observed by a private investigator, his personal rights were infringed.

Personal rights are dealt with by the Civil Code, which is a federal matter and, hence, fall within the competence of the Supreme Court of Switzerland. Article 28 of the Swiss Civil Code provides if someone's personal rights are unlawfully infringed, he or she can take legal action against the wrongdoer.

Such infringement is deemed unlawful if it is not justified by agreement of the injured person, by an overriding private or public interest or by statutory provision.

Each individual's personal rights include the rights to their own picture.

A surveillance report that contains a number of pictures showing the target subject (as in the present case) is an infringement of such personal rights, if the person has not agreed to it.

The Supreme Court held the private investigator took a series of pictures of X during a couple of days. X was the target subject and he did not agree to this. As a result, there was an infringement of his personal rights.

When establishing whether there was an overriding interest of the insurer or the public and hence the infringement was justified, the court considered the following:

- While the injured party's interest is that his or her privacy is protected, the interest of the liability insurer is not to pay indemnities wrongly; and
- This is also in the interest of the public and, in particular, of the community of insureds behind the insurer, which does not want to pay higher premiums when indemnifications are paid to people who are not entitled to them.

In addition to the above requirements, in social insurance matters (ie, that the investigator may not commit any offences while undertaking his observations and he or she may only observe the target subject in a public place) the Supreme Court considered a number of further requirements as being essential:

- Before the insurer instructs a private investigator, there must be indications the information given by the claimant is not true. In this case, this requirement was met because X made a number of statements to the court and the medical surveyors which were apparently inconsistent; and
- The extent of surveillance needs to be reasonable. In this case, the private investigator did his surveillance only in public places over the course of a couple of days and only routine activities were observed. The amount in dispute was, on the other hand, around £1.3m ($2.1m).

The court balanced the conflicting interests and decided the interests of the insurer and the public outweighed the interest of X not being observed in public. Surveillance was rendered justified and lawful and the report could be used as evidence in the civil proceedings.

The judgment brought, to some extent, clarification for the insurance world. What, however, if the surveillance had not been done lawfully? Does this mean such kinds of evidence are generally not admitted?

The new Federal Civil Procedure Rules of Switzerland, which entered into force on January 1, contain, in article 152, s2, a new provision: "Illicitly acquired means of evidence are admitted only where there is an overriding interest in discovering the truth."

As the new Federal Civil Procedure Rules are only one month old, it remains to be seen if they would give further possibilities for defendant insurers to produce even unlawfully acquired surveillance reports as evidence.

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LEGAL BRIEF

BARLOW LYDE & GILBERT

ECJ decision on ETS could have serious impact

IN DECEMBER 2009, the Air Transport Association of America (ATA) and three of its members – American Airlines, Continental Airlines and United Airlines – filed an application for a judicial review of the UK regulations that implement the European Union's (EU) Emissions Trading Scheme (ETS).

In May last year, the National Airlines Council of Canada, the International Air Transport Association and a transatlantic coalition of environmental organisations were granted permission to intervene in the judicial review application, which the English High Court referred to the European Court of Justice (ECJ) for a preliminary ruling.

The parties have recently filed their written submissions ahead of an oral hearing at the ECJ, expected during the course of this year.

The ETS was extended to the aviation industry pursuant to Directive 2008/101/EC, which should now have been implemented into the national legislation of all EU member states.

From January 1, 2012 all civil aviation flights operating within, arriving into and departing from European Community airports will be included within the ETS. The parties to the legal challenge have requested the matter be expedited for determination by the ECJ before the implementation date.

The European Commission is determined to cut emissions at ever-increasing rates and consequently regards the extension of ETS to aviation as essential. However, the extension of the scheme has already proved highly contentious and sparked criticism from airlines and industry groups around the world.

The airlines argue the scheme merely imposes a global tax on fuel use and will have a substantial impact on profit margins at a time when the industry is experiencing unprecedented financial hardship. Although many airlines generally accept the need to reduce and regulate carbon emissions, some would rather look at alternative options, such as improved technologies and more efficient air traffic management.

Others, while not averse to a cap-and-trade scheme as one measure to combat emissions, have deeply held reservations about the mandatory imposition of the EU scheme and, in particular, its application to carriage outside EU territory.

The above concerns prompted the legal challenge that is now before the ECJ. The ATA and the supporting parties argue the extension of the ETS to aviation is unlawful for a number of reasons, including the following:

1) It violates the fundamental principle of international law that each state has complete and exclusive sovereignty over the airspace above its territory;
2) It violates a number of provisions contained in the Chicago Convention, including those that prohibit charges on airlines for flying into the airports of signatory countries; and
3) It violates the terms of a large number of bilateral air services agreements, including the Open Skies Agreement (1997) between the EU and the US.

The UK's secretary of state for climate change opposes the arguments advanced by the airlines but, in recognising the significance of the issues at stake, did not object to the matter being referred to the ECJ for determination.

The decision reached by the ECJ will clearly be of considerable importance to all the airlines affected by the scheme, from both a financial and administrative perspective.

If the EU ETS survives the legal challenge then, following the planned implementation of the scheme from January 1, 2012, operators that fail to comply with the scheme will face heavy sanctions.

Airline insurers will wish to follow developments closely in view of the overall financial and potential operational impact on the insured airlines and the prospect the extension of the ETS will stifle growth in the industry.

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