

# Tales from the Tracks

Jim Beckwith MIPI



## The Professional Investigator

Autumn 2008

The Institute of Professional Investigators

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Dear Members,

The Institute held its Annual General Meeting at The New Cavendish Club London on the 10 October 2008. By now you should have received the minutes of the meeting via email.

After the meeting the attendees were enthralled by a talk given by Retired Detective Superintendent Tony Hutchinson formerly of Cleveland Police, who headed a recently concluded investigation which made National Headlines and could have been entitled "How to Canoe Unsuccessfully". It was the detail behind the case of John Darwin who faked his own death in an attempt to defraud the Insurance company. Interesting facts came out from what the Retired Detective Superintendent described as an investigation that did not involve any brilliant detective work, merely the normal procedure of following the evidence trail. The trail was followed back many years to discover that the subsequent false identity adopted by the now convicted criminal had been taken from the gravestone of a baby who had died around the time of the miscreant's birth.

Meticulously planned over a long period of time it also came to light that such an in depth study had been made of the medical signs of amnesia that the "evidence" that our canoeist displayed to the specialist medic who examined him following his "return" included every one of the 21 symptoms known to the medical profession whilst most true victims suffered from a mere handful of these!

A very interesting speaker was Stuart Room of Field Fisher Waterhouse. Stuart is the man to contact if you are having legal problems of your own as he specialises in defending Investigators, and with a remarkable degree of success. Stuart spoke on "Unlawful Investigation and the Route to Criminality"

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The Regulation of Investigatory Powers Act, along with the Data Protection Act have placed restrictions on the manner in which Investigators may conduct investigations. Fall foul of the law and the Investigator may well end up in the Dock, and even in prison. The penalties on conviction are swinging. Human Rights legislation is a similar minefield.

However, for the genuine investigator conducting a genuine investigation there are special provisions made to allow investigations to go ahead. For example Section 55 of the DPA does free certain circumstances up for investigation which would perhaps otherwise be unlawful, for example for the investigation of crime, and for the protection of the public, or in the public interest, or where the obtainer of information has reasonable grounds to believe that the Data Controller would give permission for the use of the information used. Also, where a Court Order has been obtained, or where other legislation would make such use lawful.

In all cases “Due diligence” must be taken, and the definition of that will or may be pertinent in different ways to different investigators and different investigations, and could include your position and experience in the profession. Even your own attitude in the overall conduct of the investigation may be a key to a decision on “due diligence” in any specific case.

There are genuine ways to work within the Acts mentioned above and I am just drawing your attention to some of them, but how each may or may not fit will depend on the circumstance of each Investigation. This is not a definitive guide. Be on your guard and check for yourself as appropriate.

Later at the following Board Meeting our current Principal, Nicola Amsel, was voted another year in office. Board Member Jim Beckwith, Head of Revenue Protection for First Great Western Railway was pleased to outline the arrest of a young man for defrauding National Rail of some £150,000 in fare revenue, by stealing a Ticket Machine and issuing ALL LINE ROVERS to all and sundry...he shall take porridge for breakfast for the next 12 months. A new record has also been set for the most ticketless travellers found hiding together in the same train lavatory and all successfully prosecuted – seven. In all it was a most entertaining event in the IPI calendar.

Roger Bunting FIPI  
Board Member

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Dear Nicola,

I am shocked and disgusted at the lack of support by IPI members for their AGM. The original venue was superb and was an opportunity for an excellent public relations exercise. This is a missed opportunity having read the SIA's licensing regulations due in 2009 which go beyond the requirements of the profession and will be very expensive and restrictive. I have fought for many years for legislation and submitted evidence and reports along with others and despite what they say it is obvious that pertinent recommendations have been ignored. Investigators need organisations like the IPI and ABI as a voice to protect their interests or face a fight for survival.

As the founder of IPI I am saddened at the lack of support you are being given and ask you not to lose heart but to continue the good work as when the regulations begin to bite you can bet your bottom dollar they will come screaming back and realise the value of their professional body.

I wish you a very successful AGM and thank you and your board for the excellent work you do despite some disappointments. Please keep up the good work along with your true fellow professionals.

John G Grant, Companion and Fellow of IPI



David Palmer FIPI F.Inst.L.Ex

## DAVID PALMER RECEIVES JAMES COLE AWARD

At the recent AGM of the Institute, David Palmer FIPI received the James D Cole Award for Excellence in Investigations.

David Palmer is the Institute's Education and Training Chair, and served as Principal from 2001-2003. He was editor of the journal for five and half years.

He has overseen the creation of the IPI's Distance Learning Course and is now engaged, with Jim Beckwith, in amending it to ensure compliance with the expected licensing competency requirements of the SIA, in preparation for licensing in 2011. The course is already believed to accurately represent the needs of the learners, but there may be fine tuning required. He is a Life Members.

David is a serving police officer, engaged with the Gwent Constabulary Financial Crime Unit as a fraud investigator. He also provides personal development training to his colleagues, and in his spare time is learning to formally qualify as a trainer, in keeping with the SIA's requirements for the provision of sector qualification training. He is qualified Legal Executive and holder of a Post-graduate Certificate in Fraud Management.

## HONORARY FELLOWSHIP AWARD

The Speaker at the AGM Retired Detective Superintendent Tony Hutchinson formerly of the Cleveland Police received an Honorary Fellowship of the Institute. He talked on the recently concluded case of canoeist John Darwin who, in collaboration with his wife Anne, faked his own death.

## Private eyes on books

An article in the Daily Mail says that Private detectives are being paid by Norfolk County Council to track down overdue library books.

A spokesman for the council said that it had spent more than £80,000 in the past three years on debt recovery.

This included the use of private investigators to reclaim unpaid school transport fees, locate the owners of abandoned vehicles and trace missing library books, DVDs and CDs.

## European data directive 'not fit for purpose'

According to Robert Jaques, writing on vnunet.com, European data protection law is increasingly seen as out of date, bureaucratic and excessively prescriptive.

The Information Commissioner's Office has expressed fears that the current European Directive on Data Protection is "no longer fit for purpose". The UK's privacy watchdog called for an international debate on data protection laws in Europe.

To stimulate this debate the ICO has commissioned Rand Europe to carry out an assessment of the strengths and

weaknesses of European data protection law and to identify areas for reform. The watchdog believes that European data protection law needs to be modernised to meet the technological and social challenges of the 21st century.

The research will consider how consumer rights can be enhanced in a rapidly evolving information society. It will provide EU bodies, national governments and the data protection community with proposals for improving regulatory approaches to protecting privacy and personal information.

"We want to generate new thinking," said Information Commissioner Richard Thomas at the Privacy Laws and Business conference in Cambridge. "European data protection law is increasingly seen as out of date, bureaucratic and excessively prescriptive.

"It is showing its age and failing to meet new challenges to privacy, such as the transfer of personal details across international borders and the huge growth in personal information online."

Thomas added that the research will help identify ways to make the law more straightforward and more effective in practice, but less burdensome for organisations.

"We are pleased that the European Commission has recently announced a study of its own and we expect our research to

complement and strengthen the overall impetus for reform," he said. "I also very much hope that the UK government will demonstrate leadership by engaging constructively in these reviews, and supporting better regulation and practical approaches to international data protection."

## Investigators mull T.Italia, Pirelli probe-sources

According to Reuters, Italian magistrates are looking to see whether Telecom Italia and Pirelli can be held accountable for the actions of their employees who spied on several Italian public figures.

The companies could each be fined up to one million euros, newspaper La Repubblica said.

The decision to investigate the two companies comes after more than two years of investigation into alleged spying by Telecom Italia employees and the provision of personal information to private investigators by company employees.

Magistrates will examine whether the companies broke Italian law requiring employers to prevent their employees from acting illegally, the sources said, confirming press reports.

Pirelli held an indirect controlling stake in Telecom Italia until last October. Italian daily Corriere della Sera reported that prosecutors interviewed Pirelli Chairman Marco Tronchetti

Provera and Telecom Italia's former top executive Carlo Buora, as witnesses not as suspects, at the end of June.

The sources said Tronchetti Provera and Buora are not being investigated. The investigation has so far has led to the arrest of several people including the former head of security at Telecom Italia Luciano Tavaroli in September 2006.

One of the people under investigation has mentioned Italian Economy Minister Giulio Tremonti, businessmen Diego Della Valle and Carlo De Benedetti and the former head of TIM Brasil Carla Cico as some of many public figures spied on.

## How reliable is DNA in identifying suspects?

A piece in the he Los Angeles

Times by Jason Felch and Maura Dolan suggests that DNA evidence is not as concrete as is often assumed. A discovery by US State crime lab analyst Kathryn Troyer has lead to questions about whether the odds of people sharing genetic profiles are sometimes higher than portrayed. Calling the finding meaningless, the FBI has sought to block such inquiry.

Troyer was running tests on Arizona's DNA database when she stumbled across two felons with remarkably similar genetic profiles. The men matched at nine of the 13 locations

on chromosomes, or loci, commonly used to distinguish people.

The FBI estimated the odds of unrelated people sharing those genetic markers to be as remote as 1 in 113 billion. But the mug shots of the two felons suggested that they were not related: One was black, the other white.

In the years after her 2001 discovery, Troyer found dozens of similar matches, each seeming to defy impossible odds.

As word spread, these findings by a little-known lab worker raised questions about the accuracy of the FBI's DNA statistics and ignited a legal fight over whether the nation's genetic databases ought to be opened to wider scrutiny.

The FBI laboratory, which administers the national DNA database system, tried to stop distribution of Troyer's results and began an aggressive behind-the-scenes campaign to block similar searches elsewhere, even those ordered by courts, a Times investigation found.

At stake is the credibility of the compelling odds often cited in DNA cases, which can suggest an all but certain link between a suspect and a crime scene. When DNA from such clues as blood or skin cells matches a suspect's genetic profile, it can seal his fate with a jury, even in the absence of other evidence. As questions arise about the reliability of ballistic, bite-mark and

## New Members

The Institute would like to welcome the following new members:

Natak Ghatalia:	MEMBER
Michael Hepper:	MEMBER
Abid Khan:	AFFILIATE
Jerry Ohlson:	MEMBER
James Salter:	MEMBER



even fingerprint analysis, genetic evidence has emerged as the forensic gold standard, often portrayed in courtrooms as unassailable.

But DNA “matches” are not always what they appear to be. Although a person’s genetic makeup is unique, his genetic profile (just a tiny sliver of the full genome) may not be. Siblings often share genetic markers at several locations, and even unrelated people can share some by coincidence.

No one knows precisely how rare DNA profiles are. The odds presented in court are the FBI’s best estimates.

## **Ministry of Justice loses 45,000 records**

According to Nick Heath writing on Silicon.com, the details of 45,000 people, including criminal records and banking and court information have been lost or compromised in the past year by the Ministry of Justice (MoJ).

The MoJ has lost laptops, portable storage devices and papers containing information on recruits, offenders, court appellants and suppliers, the department’s annual resource accounts have revealed.

The MoJ didn’t notify more than 30,000 of the 45,016 affected by the data breaches, first when MoJ supplier records were compromised in June 2007 and then when the names, addresses, birth dates and alleged offences relating to 3,648 people were lost in November 2007.

The largest loss in January 2008 saw an “inadequately protected” laptop containing the names, dates of birth, addresses, offences, and - in a fifth of cases - national insurance numbers, of 14,000 fine defaulters go missing from a “secured” government office.

The biggest breach saw about 27,000 people affected in June 2007, when a disgruntled contractor working for the MoJ gave a journalist names, addresses and bank details from a list of MoJ suppliers kept on “inadequately protected” electronic storage devices.

Two further “inadequately protected” laptops and some “inadequately protected” electronic storage devices were mislaid in 2007, leading to the loss of the names, dates of birth and national insurance numbers of 145 court appellants; names and offences committed by 138 criminals and names and assessments of 13 applicants for a judicial post.

The MoJ refused to explain exactly what “inadequately protected” meant or whether the laptops were unencrypted.

Further losses of documents between October and November 2007 saw mislaid names, offences, risk information, future job training or employment information of 48 offenders and names, dates of birth, addresses and some credit histories of 24 “customers”.

The MoJ insists that it carried out a risk

assessment in each of the cases to see who should be notified and said the data held by the disgruntled contractor was recovered and destroyed.

A spokeswoman for the MoJ said: “Whilst any loss of data is regrettable all MoJ incidents have been reported [to the Information Commissioner] and the necessary action taken.”

This year the ministry is planning to implement a dedicated information assurance programme to oversee and ensure that electronic information and documents are “managed, stored and disposed of in a manner that inspires high levels of parliamentary and public trust and confidence”.

The MoJ spokeswoman added: “No major breaches have occurred. A dedicated information assurance programme has been established for the coming year to address information risks.”

## **Breach of Data Protection Act rules sees accountant prosecuted and fined**

Kevin Reed writing in Accountancy Age says a Whitechapel-based accountant has been prosecuted and fined for breaching the Data Protection Act.

Aziz Arian of Arian & Co Accountants must pay over £900 in fines and costs for failing to notify the Information Commissioners’ Office that the firm processed individuals’ personal information. It is the third prosecution of an accountancy firm this

year.

‘Notifying as a data controller under the Data Protection Act is an important obligation for all organisations which process personal information,’ said Mick Gorrill, assistant commissioner at the ICO.

Accountancy Age revealed in 2005 that the ICO was targeting a potential 10,000 accounting firms that had not registered with the Information Commissioner’s Office.

## Officials ‘back ban on data sale’

An article appearing on the BBC website says that critics fear the sale of electoral data deters people from registering to vote. There is massive support among election officials in England for a ban on the sale of voters’ personal data to direct mail companies, a survey has found.

The Local Government Association poll of more than 200 administrators found 98% supported an end to the practice. Voters can opt out of the roll sold to firms, but the Information Commissioner has recommended an outright ban.

The Direct Marketing Association said the lists were used mainly to verify details rather than to gather names.

The LGA said that far from being a significant earner, councils made on average just £2,000 a year from sales. Richard Thomas, Information Commissioner, said, ‘We feel that selling the

edited register is an unsatisfactory way for local authorities to treat personal information’.

Since 2002, anyone registering to vote in England has been able to tick a box to stop their name appearing on an edited version of the electoral register which can be bought by direct mail companies. To date, about 40% of people have chosen to opt out.

Last month, in a government-ordered review, Information Commissioner Richard Thomas said providing electoral rolls to marketing firms sent out a “poor message” about the treatment of personal data.

“We feel that selling the edited register is an unsatisfactory way for local authorities to treat personal information,” Mr Thomas said.

Then, an LGA spokesman told the BBC it was “no skin off our noses” to end the practice altogether. Now, the LGA’s survey has found overwhelming support for that opinion across the country. Many officials said they believed data sales deterred some people from registering to vote.

The Direct Marketing Association said the majority of its members used the edited roll only to confirm the accuracy of the personal details they held. And it said that banning sales could lead to more, not less unwanted mail.

# Railway Investigations

Jim Beckwith is a member of IPI, and also on the Board of Governors. For the day job, Jim is Head of Revenue Protection for the largest Train Operator in the UK, First Great Western (FGW), and also heads a private Prosecutions Unit for FGW

Whilst Jim's team prosecutes around 3,600 people per year for common fare evasion in the Magistrates Courts, a couple of recent cases have been more out of the ordinary.

One case involved an offender who seriously assaulted two First Great Western staff at Plymouth, on 27 April 2007. Mr. H. was the Train Manager, or Guard, on the Night Sleeper service from Penzance to Paddington on that date, and when the train arrived at Plymouth some two hours into the journey, he very sensibly checked the tickets of passengers who boarded there while the train was still in the station.

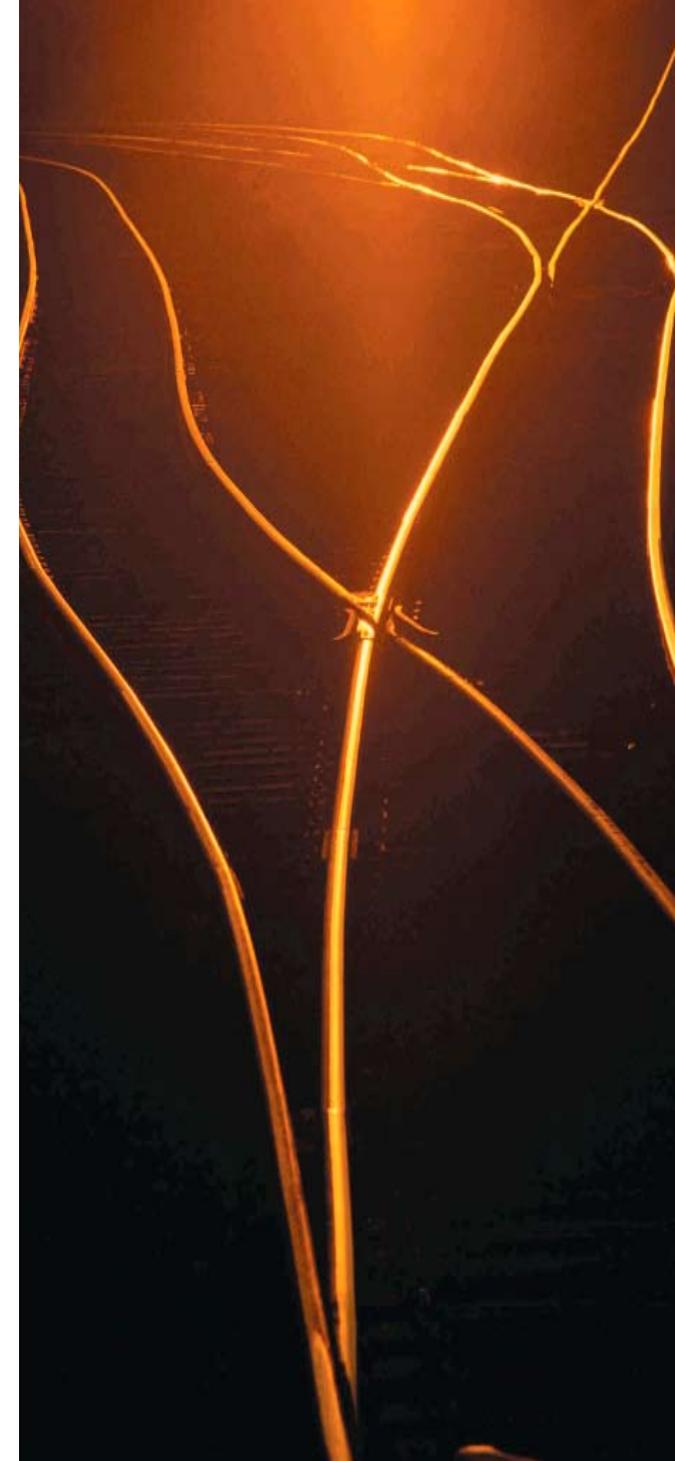
He approached a mid-30's male in one of the seating carriages, and asked for his ticket. The man ignored him. He asked again, and the man became abusive. Mr. H. withdrew, in line with his training, to seek assistance, as the train was still at the station where back-up was available. The man then pursued him through the carriage, and hit him over the head with an acoustic guitar he was carrying, causing a severe laceration to the back of his head, and then persisted in attacking

him further with kicks and blows to the head. A struggle ensued, in which the offender, a much larger man, and Mr. H. ended up in a mutual headlock. Another passenger meanwhile had run from the train and onto the platform, and shouted for help, saying that the Guard was being attacked. Another FGW employee, Mrs. N., ran to the train, and remonstrated with the offender to let go of her colleague.

**Upon being 'unable to trace the offender', the CPS eventually discontinued the case, and no charges were ever brought. The victims of the assaults were naturally aggrieved**

She received in response a vicious punch to the face, leaving her concussed and disoriented. The effects of this injury lasted a number of weeks. Another passenger on the train, a rather well-built male student, then intervened and dragged the offender off from attacking the Guard, and ejected him onto the platform. The offender then ran off before police could arrive.

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Around 36 hours later, the offender returned to the train station, and was recognised by staff, who called the police. After a struggle, the offender was arrested, and made a significant statement, to the effect 'If this is about the other night, I'll give him another battering'. After being held in custody overnight in Plymouth, he was then bailed to return to the police station to face charges at a later date.

The offender then disappeared, and failed to return to be charged. Despite being arrested subsequently on more than one occasion for other minor offences, he was again bailed as the fact that he was wanted on warrant was 'missed'.

Upon being 'unable to trace the offender', the CPS eventually discontinued the case, and no charges were ever brought. The victims of the assaults, Mr. H. and Mrs. N., were naturally aggrieved at this turn of events, as were their employers, and their Trade Union.

In addition, the British Transport Police, who had taken all possible steps to prosecute the offender for the assault, were very keen to ensure that the offender should face justice. To this end, the case file was passed to the FGW Prosecutions Unit to see what could be done.

On 12 June 2008, some 15 months after the assault, Jim Beckwith attended Plymouth

Magistrates Courts to apply for a summons, charging the offender with Assault ABH against Mrs. N., and the Malicious Wounding of Mr. H. After talking the Magistrates at length through the events of April 27 the previous year, and why this had become a private prosecution rather than a CPS one, the Magistrates eventually agreed to issue a Summons for the offender to appear at Plymouth Magistrates on 25 July.

Because the offender had, according to the CPS, 'disappeared', Jim engaged a Private Investigator to trace and serve the Summons upon him. After a brief period of observations and surveillance, the offender was found...at the same address in Widness he had been bailed to in the first place! (Many thanks to IPI member Ted Potter of D-Tect, for a job well done!)

The offender duly appeared in Plymouth Magistrates on 25 July, and was represented by the duty solicitor. He declined to enter a plea at this hearing, and asked for time to review the evidence. He was therefore given conditional bail to return on 21 August, for committal proceedings to Crown Court, following representations from FGW to the effect that the matter was too serious to be dealt with summarily in the Magistrates Court.

On the evening of 20 August, while travelling to Plymouth for the committal hearing, the offender

allegedly stole an item of luggage from another passenger, and was subsequently arrested for this and held in custody overnight in Plymouth.

The following day, he pleaded guilty to two offences of Assault Occasioning Actual Bodily Harm (privately brought, somewhat to the surprise of the CPS barrister who was there to prosecute for the Crown over the luggage theft of the previous day!) as well as the luggage theft.

The case was adjourned for sentencing at the Crown Court, and the defendant was remanded in custody, having made no application for bail. Sentencing is scheduled for early in October, 2008

The message we send to such people is, 'the CPS may discontinue proceedings, but if anyone hurts one of our colleagues, We Don't.'

**UPDATE: 5 November**  
**The offender, named as Robert Halkett, has been jailed for four years. Sentencing Robert Halkett, Judge Paul Darlow said it was only down to the train company pursuing a private prosecution the "proper charges were laid and the proper sentence passed".**

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The second case is of Carl Antony Haywood. The FGW press release copied below sums up the case perfectly, though the story was also reported with photos on Danny Murphy and me in the York Press (Friday 3rd October), The Yorkshire Post (Saturday 4th October), and as a page 7 story (no photos) in the Daily Mirror (Saturday 4th October)...

### **Train fraudster gets 12 months**

Carl Haywood, 19, was given a 12-month custodial sentence this week for issuing over £150, 000 of tickets using a stolen mobile ticket machine, as well as other train fraud offences across Northern England and the South West.

On 31 August 2007, the youth was arrested after being found in possession of an Avantix Mobile ticket machine on a train near Newquay that had been reported stolen from an Exeter-based Train Guard the previous day.

Over 190 tickets were found in his possession, including one ticket from a second machine that had printed out £25,000 of tickets for the ten minutes it had gone 'missing' the previous month. Haywood is well known as a general nuisance to Revenue Protection staff across most of the UK Train Operating Companies, and conducted a huge fraud spree using fake or stolen tickets of various types.

In total, FGW lost around £47,000 in revenue from lost tickets. A nationwide investigation was initiated and led by Jim Beckwith, First Great Western's Head of Revenue Protection, and Det. Con. Danny Murphy from British Transport Police CID, Bristol. This investigation turned up a number of other offences and multiple lines of enquiry, and culminated in the arrest of Haywood at Bath Spa railway station in April 2008.

After being remanded in custody for a few months and then released on 'compassionate' grounds, Haywood finally appeared in York Crown Court on 2 October, where he pleaded guilty to 14 of the 18 charges on the indictment, and was sentenced to 12 months Youth Custody. Even his defense Barrister appeared dumbfounded by the scale of Haywood's offending. In a somewhat fruitless effort to mitigate in his favour, Helen Hendry said of her client: "His whole life became the railways as he got to know staff on routes as he travelled. He found ways the system could be defrauded and exploited it to gain free travel. He was on a complete orgy of offending."

In his summing up, the Judge told Haywood: "Ticket fraud is rife on the railways, but you have committed railway ticket fraud beyond a level I would previously have ever thought possible." Judge Peter Hunt then sentenced him to 12 months' Youth Custody, adding, "had you been any older, the sentence would have been 18 months."

After the machines were stolen last year, Jim Beckwith and his colleague Mark Paulin, Retail Systems Manager at FGW, ensured that the security of mobile ticket machines was upgraded, and each ticket machine now requires a pre-defined (and unique-to-individual) login name, plus a matching unique PIN number before it will operate, rendering machines useless if stolen. Following FGW's lead, this has now been adopted nationally.

Jim Beckwith MIPI  
Head of Revenue Protection  
First Great Western  
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# Member Profile: Jerry Ohlson

Jerry Ohlson has recently joined the IPI. His career as a professional investigator started as a Detective Officer with the City of London Fraud Squad, where he served for 20 years, rising in rank to become Head of Fraud from 1994 to 1997.

He led investigations into three major bank collapses (Johnson Matthey, BCCI and Barings), and has experience of investigating most other types of corporate and investment fraud. He was seconded to the Serious Fraud Office as Senior Police Liaison Officer for 3 years and had responsibility for managing the contingent of police operational teams investigating serious, complicated and sensitive fraud cases. A significant part of this work included international investigation, requiring facilitation of working relations with foreign law enforcement and judicial authorities.

Jerry left the Police to join the Financial Services Authority as a Senior Forensic Investigator with responsibility for the conduct of a wide range of criminal and regulatory investigations within the FSA's Enforcement Division. This work involved

close liaison with Police Fraud Squads, SFO and other enforcement agencies.

He left the FSA in 2007 to start his own company, Spirit Advisory Services Ltd, working with consultants who have built up wide experience of fraud investigation from law enforcement and regulatory careers. The company specialises in providing a comprehensive range of expert fraud investigation and consultancy services to its clients.

# £50,000 monthly expenses bill for McCann's private eyes

Daniel Boffey writing in the Daily Mail reports that the private investigators hired to find Madeleine McCann were embroiled in fresh controversy after it was revealed they claimed nearly £50,000 in expenses for one month's work. US-based firm Oakley International was taken on by the Find Madeleine Fund earlier this year on a £500,000 six-month contract to monitor a telephone hotline, carry out detective work and review CCTV footage from around the world of possible sightings of the missing girl.

The company was selected by double-glazing tycoon Brian Kennedy, who has pledged to support the McCanns financially until the mystery of the disappearance of their daughter is solved. Madeleine has not been seen since May last year, when she disappeared from the family's apartment in the Portuguese holiday resort of Praia da Luz shortly before her fourth birthday.

However, Mr Kennedy became concerned by Oakley's \$74,155 expenses claim in the first month of the contract, and the lack of receipts. It has been reported that the company's contract was terminated at the end of August after Mr Kennedy had become concerned at its lack of results.

Clarence Mitchell, spokesman for the Find Madeleine Fund, confirmed that Oakley International was not now working on the case.

He said: 'The contract with Oakley was just one among many that have been entered into during the search for Madeleine. While Oakley did some valuable work, particularly in the early stages, its contract, like many others, has now come to a close. The search for Madeleine is continuing, however, using other resources and the performance of other contractors is constantly reviewed and monitored. Kate and Gerry and the backers will leave no stone unturned in the search for Madeleine.'

Former police officers are now being interviewed by Mr Kennedy to take over responsibility for the investigation into Madeleine's disappearance. Mr Kennedy, 47, estimated to be worth about £250million, made his money in double-glazing and home-improvement ventures with companies including Everest windows.

He became involved with the McCanns after being moved by their plight during the period they were made formal suspects – *arguidos* – in Madeleine's disappearance. Portuguese prosecutors dropped the couple's *arguido* status in July. Oakley

International said: 'We carried out our instructions from the Fund professionally and responsibly in accordance with our agreement.'

# SURVEILLANCE EVIDENCE

## **Kirk v Walton (2008)**

A recent court case may provide a marketing opportunity for investigators involved in personal injury investigations.

The claimant in this case was a driver who was involved in a rear-end shunt, and she sued the driver of the other car for £800,000 for injuries. As is so often the case, she exaggerated her injuries and surveillance showed this to be the case. The claim was settled out of court for a much more reasonable sum, and for a large percentage of the costs to be paid by the deceptive claimant.

What happened next was certainly unusual. The defendants, having settled the claim in the above terms, sought permission to bring private proceedings for contempt of court on the basis that the claimant made, or caused to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. (Civil Procedure Rules 32.14)

To quote my source: "The effect of this provision was considered in *Malgar Ltd v RE Leach (Engineering) Ltd (1999)*. In *Malgar* it was stated that whilst proceedings for contempt of court are public law proceedings, private individuals may be able to bring them with the permission of the court.

They are in some respects like criminal proceedings but they are civil proceedings to which the overriding objective set out in CPR 1 is applicable. This decision was applied in *Sony Computer Entertainment and others v Ball and others (2004)*. In that case it was held that the discretion to permit applications of this nature should be exercised with great caution."

**From a PI/PI perspective, this means that surveillance can be used as a tool to put pressure on 'dodgy' claimants to settle much earlier**

The decision of the court was that, due to the quality of evidence and the subsequent existence of a prima facie case against the claimant, and the level of the damages originally claimed, contempt of court proceedings were justified. The fact that a settlement had been arrived at did not change that.

The Defendant was given permission to bring proceedings for contempt of court.

It should be noted that while permission has been granted, the outcome of the proceedings is yet to become clear.

From a PI/PI perspective, this means that surveillance can be used as a tool to put pressure on 'dodgy' claimants to settle much earlier, if the evidence shows that they are lying - because the potential for contempt proceedings can, and probably would, result in imprisonment.

(Source: Davies Lavery Solicitors)



# Legislation Committee Report

## Ruth Hoffmann MIPI

### **Private Investigators in Australia to Aid Child Support Agency**

Human Services Minister Joe Ludwig has announced that private investigators are to assist Australia's Child Support Agency to investigate parents who fail to make child support payments. They are to be used to keep under surveillance parents who have made incomplete or false information and provide evidence for court action against the recalcitrant parents.

### **Concerns that changes to Canadian Law may affect the work of Professional Investigators**

This matter may seem to have little relevance for Professional Investigators outside Canada, but something enacted in one jurisdiction can spread its influence, either by similar enactments in other jurisdictions or its affect on cross-border inquiries. This matter impinges on on-line photographs.

The Director of Public Education and Communications in Canada said in an address that privacy concerns may be extending to the requirement that all photographs of third parties in covert surveillance be pixilated or disguised even though the video was obtained in a public place. A Counsel acting for Canadian Private Investigators has requested a meeting with the Canadian

Privacy Commissioner to ascertain whether this matter is in fact being considered.

### **Supporters of the proposals say police are too stretched to deal with fraud even with a new organised crime unit, and partnership with private investigators could help**

#### **Changes to the law in New Zealand could give powers to Private Investigators**

Proposed Changes to the Police Act in New Zealand could give the power to arrest and prosecute criminals to Private Investigators.

Under proposed changes to the Police Act, the Commissioner could from time to time appoint people with the 'powers and duties of sworn officers' or could place an officer with another employer such as a firm of private investigators. Both these measures would be on a temporary basis. Supporters of the proposals say that the police are too stretched to deal with fraud even with a new organised crime unit, and partnership with private investigators could help to deal with white-collar crime. But the measures are not without critics who fear giving more powers to

'untrained and unaccountable civilians'. Critics include the Police Association. The new agency to be launched in 2008 to combat serious and financial crime would amalgamate the Serious Fraud Office with the police.

#### **OECD publication**

The Organisation for Economic Co-operation and Development has published the 'OECD Glossary on Corruption' which is a 95 page glossary of international standards in criminal law. It is available from The Stationery Office under reference 978-92-64-02740-4, price £17.00.

#### **UN Office on Drugs and Crime**

The UN Office on Drugs and Crime has published 'Competent National Authorities under the International Drug Control Treaties', ISSN 02516799 (2007 ed.). This is available from The Stationery Office under reference 978-92-1-048122-9, price £22.00.

It has also published the Legislative Guide to the Universal Legal Regime Against Terrorism. This is available from The Stationery Office under UN publication sales no. E.08.V.9 – 978-92-1-133780-9, price £9.50.

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## Scotland

The Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulation 2007. One sheet. Correction slip to ISBN 97801 10725789 dated May 2008. Available from The Stationery Office free of charge.

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2008. Coming into force 01.07.2008. Available from The Stationery Office under reference 978-0-11-081686-9. Price 5.50.

### **Scottish statutory instruments 2008**

The Court of Session etc. Fees Amendment Order 2008. In accordance with article 1. Effect: S.1. 1997/688 amended. Available from The Stationery Office under reference 978-0-11-082030-9. Price 5.50.

The Court of Session etc. Fees Amendment Order 2008. In accordance with article 1. Effect: S.1. 1997/687 amended. Available from The Stationery Office under reference 978-0-11-082032-3. Price 4.00.

The Stationery Office website is [www.tsoshop.co.uk](http://www.tsoshop.co.uk)

# Polygraphs tested mettle of U.S. federal agents in biker gang case

A report circulated by Associated Press details how in California, weeks of drinking and carousing to win acceptance in a notorious motorcycle gang came down to a nerve-racking moment for three undercover federal agents: taking a polygraph examination in a room full of armed men.

Failing the test would have threatened what has become a three-year probe into the Mongols Motorcycle Club - not to mention the agents' own safety. Federal prosecutors say all three Bureau of Alcohol, Tobacco, Firearms and Explosives agents were prepared for the challenge and passed the tests. These were critical moments in the investigation that culminated last week in multi-state raids and at least 64 arrests on charges including murder, drug trafficking and torture.

The Mongols had been infiltrated before, so gang leaders went to extraordinary lengths to test their "prospects," including running background checks and having a private investigator administer the polygraph tests.

The Mongols increased pressure by standing directly behind the agents while they were hooked up to the polygraph, Assistant U.S. Attorney

Christopher Brunwin said. "Is it scarier to see the threat that is facing you, or ... taking a lie detector test while someone is standing behind you with a weapon?" the prosecutor said. "They could be getting ready to shoot."

Each agent had been given all they needed to assume a new life - an apartment away from their family, a new Social Security number and a cover story. They had also been trained to pass the lie detector.

"It's a remarkable undertaking that the agents whose lives were at risk displayed this level of courage," Brunwin said.

In all, four ATF agents were accepted into the Mongols "brotherhood," though one agent was not required to take a polygraph test. Officials didn't say why.

John Torres, the ATF agent in charge in Los Angeles, declined to discuss how the three beat the polygraph, but said undercover agents generally compile cover stories that echo their own lives so they can tell them more believably.

"Our guys are highly trained and they were pretty much hand selected to do this mission and for their ability to think fast under pressure and beat the box," Torres said, referring to the polygraph machine.

Though the ATF is able to train its agents to pass a polygraph test, the agency still uses lie detectors as part of its screening of potential new hires. ATF spokesman Mike Hoffman said the polygraph is just one of a slew of tests of a candidate's background.

The Mongols' background checks and lie-detector tests were not only to prevent a repeat of the 1998 infiltration that led to at least 29 arrests, but to assess aspiring members' willingness to commit crimes for the gang, prosecutors said.

Mongols circulated photographs of the undercover agents among the criminal underworld to see if anyone recognized them, Brunwin said. On one occasion, a Mongol grew suspicious after coming across an old photograph of one agent posing with ATF colleagues.

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“They were telling him, this sure looks like you,” Brunwin said. “It seemed like he’d been caught.”

The agent convinced them it wasn’t him. Torres said the agents in the Mongols investigation never committed a crime during the investigation and were subject to random drug tests.

The 84-count racketeering indictment against the primarily Latino gang lists allegations including murder, attempted murder, racially motivated attacks on black people, torture, and gun and drug offences. At least 44 defendants have appeared in court, all of them pleading not guilty. It wasn’t immediately known if they had been assigned defence attorneys.

The gang is based in Southern California, but federal and local agents arrested members in six states from the West Coast to the Midwest.

# Institute Law Update

## David Palmer FIPI

### Intestacy Rule Changes

With effect from February 1, 2009, the rules in cases of intestacy will change to allow surviving spouses or civil partners of someone NOT leaving a will double the current amount, as follows:

- up from £125,000 to £250,000 if there are children also surviving the deceased;
- and up from £200,000 to £400,000 if there are no children in the partnership.

### DPP

The new Director of Public Prosecutions, Keir Starmer QC, is a human rights lawyer with a criminal background – usually the two seem incompatible! Or is it just me ...?

### Old name, new job

Elizabeth France, former Information Commissioner and now Chief Executive of Ombudsman Services Ltd (which operates in the telecoms, energy, chartered surveying and estate agency sectors) has now been appointed as Chairwoman of the Office for Legal Complaints, subject to Parliamentary approval. The OLC deals with all complaints against lawyers and legal executives, which means those who work for those parties may also be investigated by that department.

Now, given the fact she has two jobs, and has had high powered jobs before, don't I wish I had been told by MY careers adviser to get a job in the Civil Service and start job hopping...

### Service

Readers will recall the legal update in these pages an issue or so ago, and I am advised that the procedures detailed in that article have now come into force (as of October the first). If you or your legal sector clients have not made yourselves aware of the new rules, best look them up.

### Main amendments

- if a solicitor has been named by a potential recipient of service, or a solicitor has stated that they will accept service, then process MUST be served at the solicitor's address UNLESS a practice direction states personal service is necessary.
- If no solicitor has been named but a recipient has provided an address for service in the jurisdiction, that address may be used. Otherwise, Rule 6.9 applies (last known address, in effect).
- A claimant MUST make every effort to ascertain the current address of someone who has disappeared, if they believe that recipient

to have done a bunk. If that fails, an application can be made for alternative service. Para 9 of Practice Direction 6A provides details of evidence that should be produced about the disappearance, before an application is acceptable. Only after all that has been gone through, may service on the last known address be accepted as 'service'. But Rule 6.15(2) allows for the court, when considering the quality of the evidence described ante, can decree that (because of the efforts) the effort has been sufficient for service.

- There are changes to service 'date', which make things a little easier for the courts and claimants, but arguably little change for practical service. (Readers may think differently if/when they read the new rules.)

### Data Protection

In *Common Service Agency v Scottish Information Commissioner* (2008), it was decided that even if a data controller encrypted and disguised the identity of someone in respect of whom personal data was held, its disclosure was still (potentially) unlawful. This was because even if the recipient of the data could not really identify the individual to

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whom the data referred because of that encryption or disguise, the fact that the data controller could do so meant that the Data Principles still applied. That is, even though the data is 'in disguise', the rules still apply.

### **Fraudulent Misrepresentation/Contract**

Two cases, here. In one case, *Peart Stevenson Associates Ltd v Holland (2008)*, the clause in a franchise agreement where the franchisee signs to say that he did not rely on any representations made by the franchisor when signing up, was considered invalid. Which is fair, because one could argue that the representations are pretty much the sole basis upon which someone signs up, even after some due diligence on their part.

On a similar vein, in *Mylcrist Builders Ltd v Buck (2008)*, a clause in a contract stating that any disputes would be dealt with through arbitration under the Arbitration Act 1950 or any amendment thereof, was also declared invalid because it prevented a user of services from using the courts in any dispute. (This applies mainly to consumers, under the Unfair Terms in Consumer Contract Regulations 1999.)

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