Pennsylvania's Common Law Right to Privacy Inadequately Protects the Rights of Individual Workers' Compensation Claimants from Harassment Caused by Video Surveillance

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The manifest abuses inherent in a technologically advanced society and caused by surveillance are self-evident. However, an individual's interests in privacy must be balanced with the interests of honest and truthful litigation. Insurance companies and civil defendants must have a method to protect themselves from untruthful and fraudulent litigation. Insurance fraud is a distinct problem in today's insurance intensive society, and is especially relevant to workers' compensation proceedings because the Pennsylvania Workers' Compensation Act requires all employers to carry insurance. This comment recounts the Pennsylvania common law right to privacy as well as national developments in common law privacy rights. Also, this article propounds to suggest a balanced standard for video surveillance of workers' compensation claimants, and attempts to weigh the social utility of video surveillance with an individual's interest in privacy, be it in one's own home or on the public streets. Finally, this comment will introduce a balanced standard for future conduction of surveillance and the admissibility of video surveillance evidence.

I. THE TORT OF INVASION OF PRIVACY IN PENNSYLVANIA

Pennsylvania recognizes two marked rights to privacy. One is judicially created, and the other is a by-product of the commonwealth's Constitution. The right to privacy implicated in

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2. 77 PA. CONS. STAT. § 501(West 2002); 18 PA. CONS. STAT. § 106(b)(8) (West 2002). Failure to issue insurance to employees as statutorily required under the Workers' Compensation Act is a misdemeanor of the third degree in Pennsylvania.

3. Article I Section 8 of the Pennsylvania Constitution creates a right to privacy to protect individuals against certain improper acts of government officers. It states: The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize
the context of video surveillance, where one individual citizen or legally recognized entity conducts surveillance on another individual citizen of the Commonwealth, resolves around the judicially created, or common law, right to privacy.4

The concept of a legal action emanating from an invasion of privacy was first expounded by Supreme Court Justices Warren and Brandeis in the Harvard Law Review over a century ago.5 However, the appellate courts of Pennsylvania took more than fifty years after the publication of The Right to Privacy to judicially recognize a common law right to privacy.6 In Hull v. Curtis Publishing Company,7 the Pennsylvania Superior Court became the first appellate court in the state to recognize the existence of the common law right to privacy. The Hull court cited the language of Warren and Brandeis, who so influentially wrote that “the right to privacy is the right to be left alone.”8

In Marks v. Bell Telephone Company of Pennsylvania,9 19 years after recognizing the common law right to privacy, the Pennsylvania courts adopted the Second Restatement of Torts formulation of invasion of privacy.10 Justice Roberts, speaking for the supreme court, stated that “the action for invasion of privacy is actually comprised of four analytically distinct torts: (1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) publicity given to private life, and (4) publicity placing a person in false light.”11

Intrusion upon seclusion, one element of invasion of privacy, is the tort most implicated by video surveillance, and is defined as, “[t]he intentional intrusion, physically or otherwise, upon the solitude or seclusion of another, or that person’s private affairs or

any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.


7. Hull, 125 A.2d at 644.
8. Id. at 646 (quoting Kerby v. Hal Roach Studios, Inc., 127 P.2d 577, 579 (Cal. App. 1942)).
11. Id. (quoting from the Pennsylvania Supreme Court decision Vogel v. W.T. Grant Co., 327 A.2d 133 (Pa. 1974)).
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concerns . . . if the intrusion would be highly offensive to a reasonable person."\(^{12}\)

For an invasion of privacy action, Pennsylvania courts mandate that "an act must cause mental suffering, shame or humiliation to a person of ordinary sensibilities."\(^{13}\) To determine if the intrusion upon seclusion is highly offensive, courts consider the degree of the intrusion, the context of the intrusion, the conduct surrounding the intrusion, the actor's motives and objectives, the setting, and the expectations of those whose privacy is invaded.\(^{14}\)

In Wolfson v. Lewis, the district court, applying Pennsylvania law, was asked to ascertain whether the conduct of two reporters deliberately encroached upon parties in a manner that would be highly offensive to a reasonable person.\(^{15}\) The television reporters invaded upon the seclusion of a health insurer's CEO by "engaging in a course of conduct apparently designed to hound, harass, intimidate and frighten."\(^{16}\) The court held that evidence presented at trial, which illustrated that the reporters used "telescopes, zoom lenses, and ultra sensitive microphones," could reasonably lead a jury to conclude that the reporters had placed the exterior of the family's home under surveillance.\(^{17}\) The reporters' relentless surveillance caused emotional distress to family members.\(^{18}\) Furthermore, the reporters followed the CEO's daughter and son-in-law to work and attempted to follow them into a building, and glaringly followed the family to Florida where they went for the sole purpose of having a secluded vacation.\(^{19}\) The reporters also established a surveillance boat in public waters as close as feasibly possible to the CEO's home for the "purpose of forcing the CEO to reconsider his earlier decision not to appear on camera for an interview regarding allegedly high salaries paid to executives of the insurer."\(^{20}\)

Intrusion upon seclusion has generally been limited to conduct which occurs in private places, where a person has an objective

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16. Id. at 1432.
17. Id. at 1422.
18. Id. at 1432.
19. Id. at 1426.
and subjective expectation of privacy. However, in Wolfson,21 the federal district court held that "conduct amounting to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may rise to the level of an invasion of privacy through an intrusion upon seclusion."22 In its decision applying Pennsylvania law, the court affirmed that the tort of invasion of privacy does not normally apply to events in public places, and quoted from the Restatement Second of Torts, which propounded a specific exception to the general rule that an invasion of privacy cannot exist in a public place.23 The court declared that “[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or the lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.”24

Further, the Pennsylvania courts have refused to create an independent tort of harassment to cover situations, such as persistent surveillance, not covered by the recognized torts related to invasion of privacy. In De Angelo v. Fortney,25 the superior court rejected adopting harassment as a common law tort, stating, “[w]e decline to do so in the instant case, being of the opinion that an action for invasion of privacy will ordinarily be an adequate remedy for highly offensive conduct which unreasonably interferes with another’s right to be left alone.”26 This comment proposes that if Pennsylvania did recognize a tort of harassment, the necessity of expanding the common law tort of invasion of privacy would not be needed in the surveillance context.

II. CIRCUMSCRIBING THE RIGHT TO PRIVACY BY FILING SUIT

The common law right to privacy is not absolute in any context,

23. The exception is depicted in illustration 7 of §652B Restatement Second of Torts: A, a young woman, attends a "Fun House," a public place of amusement where various tricks are played upon visitors. While she is there a concealed jet of compressed air blows her skirts over her head, and reveals her underwear. B takes a photograph of her in that position. B has invaded A's privacy. RESTATEMENT (SECOND) TORTS Illus. 7 §652B (1977).
25. De Angela, 516 A.2d at 594.
26. Id. at 596.
but is especially limited where a plaintiff initiates a suit for injuries.\textsuperscript{27} The Pennsylvania courts have chosen to apply the so-called "public figure" limitation to those who make a claim for personal injuries.\textsuperscript{28} In doing so, the Pennsylvania Supreme Court has ruled that, "by making a claim for personal injuries [one] must expect reasonable inquiry and investigation to be made of [their] claim and to this extent [their] interest in privacy is circumscribed."\textsuperscript{29}

The Pennsylvania legislature impacted individuals' privacy rights by passing a law allowing private investigators to practice within the commonwealth. In 1953, the Pennsylvania legislature passed the Private Detective Act of 1953 authorizing the use of a licensed detective to carry out certain surveillance activities.\textsuperscript{30}

The Pennsylvania Supreme Court's decision in \textit{Forster v. Manchester}\textsuperscript{31} was the first to hold that investigations into the validity of personal injury claims are in the "best interest of society," and the "following of a subject during his or her daily activities and recording on film, movements and whereabouts of a subject" are consistent with the wording of the Private Detective Act and its purpose of exposing fabricated claims.\textsuperscript{32} The Workers' Compensation Act of Pennsylvania sets forth its own set of rules for the admissibility of video surveillance evidence. Although surveillance films alone cannot sustain the evidentiary burden of showing that a workers' compensation claimant's disability has been diminished, the ramifications of gathering the surveillance film itself is the crux of the issue.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{27} Moses, 549 A.2d at 950.
\item \textsuperscript{28} "Although, the so-called 'public figure' limitation upon the right to privacy has generally been applied to such persons as actors, public officials, and other news worthy persons, its rationale also applies to a person who makes a claim for personal injuries." Forster v. Manchester, 189 A.2d 147, 149 (Pa. 1963).
\item \textsuperscript{29} Forster, 189 A.2d at 149.
\item \textsuperscript{30} 22 PA. CONS. STAT. § 12 (West 2002). The pertinent sections of the Private Detective Act implicated in the workers’ compensation claims are sections 12b(2) and 12b(3). Section 12b(2) allows for observation of "[t]he identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character, of any person, group of persons, associations, organization, society, other groups or persons, partnership, or corporation." 22 PA. CONS. STAT. §12(b)(2). Section 12(b)3 relates to the credibility of witnesses. Id.
\item \textsuperscript{31} Forster, 189 A.2d at 147.
\item \textsuperscript{32} Id. at 151.
\item \textsuperscript{33} Westinghouse Elec. Corp. v. WCAB (McClave), 565 A.2d 204 (Pa. Commw. 1989). Surveillance films alone are inadequate to sustain the evidentiary burden of showing that the claimant's disability has been reduced. McClave, 565 A.2d at 204. This effectively limits surveillance films in workers' compensation cases to credibility decisions.
\end{itemize}
In Forster, the Pennsylvania Supreme Court decided that the plaintiff's privacy rights were not violated by a private detective agency engaged in the investigation of her personal injury claim. Isobel Forster, the plaintiff, was involved in an automobile accident with Francis Martin. Following the accident, Martin's insurer, Guardian Mutual Insurance Company, and the adjuster, Hays Adjustment Bureau, decided to hire a private investigator to observe Mrs. Forster.

Surveillance of Mrs. Forster began on September 15, 1960 and lasted from early in the morning until 5:30 p.m. The investigators conducted surveillance of the vicinity where Mrs. Forster resided, and followed her using two separate automobiles, keeping in contact with each other via two-way radios. The investigators logged all of the places where Mrs. Forster went, and on one occasion, while following behind Mrs. Forster at a distance of one block, the investigators suddenly lost sight of her only to realize that their car was directly beside hers. Recognizing one investigator, Mrs. Forster attempted to evade him in traffic. Later that same day, Mrs. Forster again passed the investigators and was frightened by their persistent conduct; in fact, Mrs. Forster became so extremely nervous and upset as a result of the investigators' conduct that she encountered hallucinations and frequent nightmares which necessitated medical treatment. To prevent further surveillance, Mrs. Forster's attorney contacted the chief investigator by letter explaining the anguish that Mrs. Forster was experiencing from the surveillance. However, the request was ignored, and the investigators continued to observe Mrs. Forster on at least four separate occasions, even after notification of the damage the surveillance was causing her. Unsympathetic to Mrs. Forster's plight, the supreme court held that "[t]here was nothing unreasonable in the manner in which appellant was followed nor in the taking of motion pictures. In regard to surveillance, it was conducted by experienced investigators who did not use improper

34. Forster, 189 A.2d at 152.
35. Id. at 148.
36. Id.
37. Id.
38. Id. at 149.
39. Forster, 189 A.2d at 149.
40. Id.
41. Id.
42. Id.
43. Id.
techniques." Additionally, the majority noted that the chief investigator did not possess the necessary intent or "outrageousness" of conduct necessary for the plaintiff to recover for an invasion of privacy.

Conversely, Pinkerton National Detective Agency, Inc. v. Stevens exemplifies the dangers of invading one's right to privacy, which can be caused by abusing surveillance rights. Ruth Stevens, injured in an automobile collision with an individual named Bell, who was insured by United Services Automobile Association, sued the insured and a detective agency for damages resulting from intentional invasion of her privacy rights. Mrs. Stevens suffered physical injury and severe shock to her nervous and emotional systems after the insurance company, through its attorney, employed the Pinkerton National Detective Agency to follow Mrs. Stevens and report on her activities in an effort to determine the extent of her injury. Mrs. Stevens was placed under "constant surveillance": detectives peeped through her hedges; slinked around her house; snooped and eavesdropped on her activities; parked near her house; and followed her at a distance of only a few car lengths, from morning until late at night. The plaintiff, already upset as a result of her accident, experienced a continuous feeling of being spied upon, and, as a result, suffered from extreme mental torment in the belief that she was "losing her mind." The defendant's surveillance continued even after Mrs. Stevens' attorney informed the defendant about the mental anguish the surveillance had been causing. Consequently, the court held that the surveillance was carried out in a way calculated to frighten and torment Mrs. Stevens, and was not designed to obtain information.

44. Forster, 189 A.2d at 150.
45. Id. at 152. As an example, the Restatement of Torts § 46 gives an illustration: As a practical joke, A falsely tells B that he has read in the paper that her son, C, who is a paratrooper in a division known to be then participating in an invasion of enemy territory in wartime, has been reported killed in action. B grieves over the supposed death of C. A is liable for the grief which he causes her. Restatement of Torts §46 illus. 1 (Supp. 1948).
47. The Pinkerton Detective Agency's treachery is not new to the workers of the Commonwealth of Pennsylvania, especially those of Irish descent living in the Anthracite coal region of North Eastern Pennsylvania in the 1870's. See Kevin Kenny, Making Sense of the Molly Maguires (Oxford University Press 1998).
48. Pinkerton, 132 S.E. 2d at 121.
49. Id.
50. Id. at 123.
51. Id.
52. Id. at 165.
for the defense of plaintiff's lawsuit.\textsuperscript{53}

Besides Pennsylvania, courts of other jurisdictions have circumscribed a person's right to privacy, placing limitations on where a violation of individuals right to privacy can take place. For example, in \textit{Figured v. Paralegal Technical Services, Inc.}, a New Jersey case, two investigators were assigned to investigate the extent of a plaintiff's injury.\textsuperscript{54} The investigators repeatedly drove in front of the plaintiff's home, watched her from the roadway, followed her while she drove to the local store, and parked in a parking lot to observe her.\textsuperscript{55} The investigators even went as far as to follow the plaintiff on a 40-mile jaunt down a highway and into a rest area to conduct observation.\textsuperscript{56} The New Jersey Superior Court held that the investigators' conduct was not capable of producing "mental distress . . . so severe that no reasonable man could be expected to endure it."\textsuperscript{57} Furthermore, the court explained that the plaintiff's invasion of privacy claim must fail because the investigators only observed the plaintiff in public, and "whatever the public can see from a public place cannot be private."\textsuperscript{58} Thus, those who are in public view cannot recovery for the invasion of privacy. In essence, the courts are adopting a view that a person has no right to privacy when venturing into the public realm.

\textbf{III. Workers' Compensation Decisions}

Workers' compensation decisions involving surveillance are somewhat different from cases involving the tort of invasion of privacy because they concern the ability to recover workers' compensation benefits, and not damages in tort. Three workers' compensation decisions, two from California and one from Alabama, though they have inapposite results, help express the plight of the injured worker. These cases are \textit{Redner v. Workman's Compensation Appeals Board},\textsuperscript{59} \textit{Unrah v. Truck Insurance Exchange},\textsuperscript{60} and \textit{Johnson v. Corporate Special Services, Inc.}\textsuperscript{61} \textit{Redner} and \textit{Unrah} are examples of inappropriate surveillance and

\begin{itemize}
  \item \textsuperscript{53} \textit{Pinkerton}, 132 S.E.2d at 124.
  \item \textsuperscript{54} 555 A.2d 663 (N.J. Super. 1989).
  \item \textsuperscript{55} \textit{Figured}, 555 A.2d at 664.
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} Id. at 665.
  \item \textsuperscript{58} Id. at 667.
  \item \textsuperscript{59} 485 P.2d 799 (Cal. 1971).
  \item \textsuperscript{60} 498 P.2d 1063 (Cal. 1972).
  \item \textsuperscript{61} 602 So. 2d 386 ( Ala. 1992).
\end{itemize}
investigator conduct, whereas *Johnson* remains an example of “reasonable” surveillance of a workers’ compensation claimant.

In *Redner*, two workers’ compensation claim investigators induced the claimant to become intoxicated and ride a horse, and filmed the scene from a secluded location.62 The Workers’ Compensation Appeals Board, after relying entirely on the tape, issued an opinion that the claimant was not disabled.63 However, the California Supreme Court ruled that the videotape should have been excluded from the claim proceedings because of the improper conduct of the investigators in gathering the evidence.64 The court stated that claim investigations must be conducted within “legal bounds.”65

*Unruh* represents a rather unusual example of the conduct that investigators are willing to engage in to put a workers’ compensation claimant under surveillance. In investigating the back injury of the claimant, one of the investigators befriended the claimant to “misrepresent his capacity and his intentions toward the plaintiff.”66 The investigator, after cultivating a “relationship” with the claimant, took her to Disneyland where one investigator enticed her to perform activities above and beyond her limitations while the other investigator filmed the events.67 “Upon learning of ‘the ruse and deception’ practiced on her by defendants, plaintiff suffered a physical and mental breakdown requiring hospitalization.”68 The case was remanded for trial on the merits of the claim for invasion of privacy.69

In *Johnson*, the Alabama court reached an inapposite decision to the California courts’ holdings in *Unruh* and *Redner*, evidencing that courts treat workers’ compensation claimants’ invasion of privacy claims differently across the nation. The Alabama Supreme Court, in *Johnson*, upheld summary judgment against a workers’ compensation claimant who alleged his privacy was usurped by the conduct of insurance investigators.70 The claimant, Billy Johnson,
was injured after falling at work. His employer was insured for workman's compensation claims by St. Paul Fire & Marine Insurance Company, which hired Corporate Special Services, Inc., to investigate the validity of Johnson's disability claim. The investigator parked outside of the claimant's house to observe him, but did not "attempt to observe him inside of his house." During the surveillance of Johnson, the investigator was approached by the local police, and after explaining the situation to the officers, changed his location to the driveway facing Mr. Johnson's residence. Johnson then noticed the investigator and blocked the investigator in the driveway with his car. After showing Mr. Johnson that he was carrying a firearm, the investigator was allowed to leave the scene. The Alabama Supreme Court declared "that because Johnson's activities in his front yard could have been observed by any passerby, Corporate's intrusion into Johnson's privacy was not 'wrongful' and, therefore, was not actionable." Therefore, Johnson's privacy was not invaded, and summary judgment was properly granted in the case.

IV. RECOGNITION OF A PUBLIC RIGHT TO PRIVACY

The inherent difficulty with litigating a violation of an individual's right to privacy in the workers' compensation context is complicated by the relevant legal standard applied to conduct carried out in full public view. In his article about privacy law, Professor Andrew J. McClurg expounds a tort theory of liability that holds individuals accountable for their actions that invade a person's privacy, even if occurring in a "public" place. Professor McClurg argues for recognition of a right of "public privacy," and correspondingly "liability for intrusions in public places."

In analyzing a possible invasion of privacy, one must first define public space. Courts have continually defined "public space" to

71. Johnson, 602 So. 2d at 386.
72. Id.
73. Id.
74. Id.
75. Id.
76. Johnson, 602 So. 2d at 387.
77. Id. at 388.
78. Id. at 388.
80. Id.
cover "a wide range of locations, from bustling thoroughfares to remote getaways . . . . the term generally, includes any place, whether publicly or privately owned, to which the public has access." The judiciary has expanded the definition to include:

anywhere that is visible from a publicly accessible vantage point, such as parts of the interior of one's home or garden that are visible from the street. [Public space] may even include parts of the interior of one's home that can be seen with the naked eye from a neighboring apartment.

This broad expansion of the definition of public space severely impairs one's privacy rights by eliminating surveillance occurring in public areas from becoming the subject of a tort suit.

Professor McClurg argues against limiting the tort of invasion of privacy based upon the place of occurrence by refuting the very foundations of the common law right to privacy. Warren and Brandeis worried that technological innovations, which were occurring at a rapid rate during their tenure as Supreme Court Justices, would interfere with individual's privacy rights. Similarly, Professor McClurg argues that the fears of Warren and Brandeis are ever multiplying, and are of even more concern today than they were in the late 19th and early 20th centuries:

If Warren [were] annoyed by the newspaper revelation that the Warrens 'gave a handsome wedding breakfast after the ceremony' or the observation that there were 'no bridesmaids' at the wedding, one can imagine he would be apoplectic reading and viewing media coverage concerning the private lives of citizens in modern times.

Additionally, Professor McClurg asserts that "[w]hatever snooping devices concerned Warren and Brandeis, it is safe to say they are to modern surveillance technology what the slide rule is to the personal computer." Certainly Warren and Brandeis would be alarmed by today's sophisticated surveillance devices such as "night

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82. Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981) (ruling that no actionable claim for an invasion of privacy existed where a pharmacist was filmed inside his pharmacy after opening hours from an adjoining driveway).
83. See supra notes 5-6 and accompanying text.
84. McClurg, supra note 79, at 1008.
85. Id. at 1017.
vision optics" and other surveillance devices, which are easily attainable by any member of the public.\textsuperscript{86} These types of surveillance devices further enable the ability to intrude clearly beyond what should be permissible by law.

The courts, by limiting the tort of invasion into seclusion and the right of privacy in public places, have severely curtailed the rights of a workers' compensation claimant to sue for harassing surveillance. By virtually eliminating a claimant's right to privacy in a public place and by not adopting a tort of harassment, Pennsylvania has severely repressed litigation against workers' compensation insurance carriers by removing the last impediments to stop the insurers from conducting harassing surveillance.\textsuperscript{87} However, at least in dicta, Pennsylvania courts have seemingly mentioned that a right to privacy exists, even in public places, which is consistent with Professor McClurg's views.\textsuperscript{88}

Professor McClurg asserts that the "unanimous acceptance" of the rule that no violation of privacy can occur in a place considered to be "public" stems from the writings of Dean Prosser, an authority on tort law.\textsuperscript{89} Two basic premises gave rise to Prosser's view that there cannot be any invasion of privacy if in a public place: (1) assumption of the risk by placing oneself in view of the public; and (2) there is no difference between observing a person in public and taking their photograph.\textsuperscript{90}

The first principle is entirely relevant to videotaping workers' compensation claimants because the claimant has not only assumed a risk by going into public view, but also has circumscribed the right to privacy by filing a claim for a work-related injury.\textsuperscript{91} Professor McClurg discusses the foundation behind Prosser's rationale for rejecting the existence of a right to privacy in a public place to be that individuals naturally risk exposure by venturing out from their "private sanctuaries."\textsuperscript{92} Dean Prosser relied on the decision of \textit{Gill v. Hearst Publishing Co.}\textsuperscript{93} to support this view.\textsuperscript{94} In \textit{Gill}, the California Supreme Court held that

\textsuperscript{86} An example of a website where these surveillance devices can be purchased by members of the general public is http://www.ittuv.com (last visited February 5, 2002).
\textsuperscript{87} See supra notes 3-58 and accompanying text.
\textsuperscript{88} See supra note 24 and accompanying text.
\textsuperscript{89} McClurg, supra note 79, at 1036.
\textsuperscript{90} Id. at 1032 (citing to William L. Prosser, \textit{Privacy}, 48 CAL. L. REV. 383 (1960)).
\textsuperscript{91} Moses, 549 A.2d at 950.
\textsuperscript{92} McClurg, supra note 79, at 1036.
\textsuperscript{93} 253 P.2d 441 (Cal. 1953).
\textsuperscript{94} McClurg, supra note 79, at 1037.
the “mere publication of [a] photograph standing alone does not constitute an actionable invasion of privacy.”

The Gill case arose over a newspaper photographer taking a picture of a couple, sitting and eating ice cream, at a public confectionary. The man was sitting close to the woman with his arm around her in a “romantic pose.” This photo had no news value, and was taken for only entertainment purposes. It is McClurg’s contention that Dean Prosser adopted the Gill assumption of the risk analysis when he stated that “[o]n the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about.” Professor McClurg argues persuasively that the court’s opinion is based in terms of assumption of the risk, which should not have been applied in this context. The court held that the plaintiffs’ privacy was not invaded because they were in “a pose voluntarily assumed in a public market place,” and “had voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near their place of business.” Professor McClurg argues that the assumption of the risk analysis is inapplicable because the plaintiffs in Gill did not have “knowledge of the risk in any meaningful sense;” more importantly, “it surely cannot be said that the Gill plaintiffs voluntarily consented to the risk of the defendant taking their photograph, much less publishing it in a national magazine.” Disagreeing with Prosser, McClurg further asserts:

There is nothing ‘voluntary’ about assuming a public pose except in the most trivial sense. Under the Gill rationale, the only way one may avoid ‘voluntarily’ exposing herself to unwarranted scrutiny would be not to hold a job, go to the grocery store, obtain medical help, take children to school, seek outdoor recreation, etc.

As to Dean Prosser’s second assumption, Professor McClurg

95. Gill, 253 P.2d at 443.
96. Id. at 442.
97. Id. at 444-45.
98. Id. at 444.
99. Id. (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 391 (5th ed. 1984)).
100. McClurg, supra note 77, at 1038.
101. Gill, 253 P.2d at 444.
102. McClurg, supra note 77, at 1040.
103. Id.
refutes the assertion that observing someone in public with the naked eye and taking the individual’s photograph, or more pertinent, a video, is one and the same. McClurg avers that photographic evidence differs from what is seen by the “naked eye” in three significant ways. Furthermore, McClurg offers that the three differences actually intensify the invasion of privacy when a photographic device is used. The three differences are: (1) temporal limitations; (2) permanency of the record; and (3) the possibility of dissemination of the image.

First, photographic evidence intensified because, “the temporal limitations that are otherwise inherent in public intrusions are eliminated” allowing intrusive scrutiny to be extended indefinitely.” Secondly, McClurg asserts that because of the “permanency” of the record, things can be seen in the “photograph” that would not otherwise have been readily observable with the naked eye. Lastly, the ability of photographic evidence to be widely disseminated intensifies the invasion of one’s privacy via photographic or videotaping surveillance. Explaining, McClurg maintains that “[c]onduct which would be appropriate for one environment may be inappropriate and embarrassing in another.” The three intensifiers identified by Professor McClurg in his article clearly illustrate why photographic evidence obtained in a public place is a more severe intrusion into one’s privacy than observation by the naked eye.

V. DECISIONS IMPLICITLY RECOGNIZING A PUBLIC RIGHT TO PRIVACY

Professor McClurg’s article recognizes that various courts have

104. Prosser stated: “Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.” Prosser, supra note 88, at 383.

105. McClurg, supra note 77, at 1043.

106. Id. at 1043-44.

107. Id. at 1041-42.

108. Professor McClurg cited to McNamara v. Freedom Newspaper Inc., 802 S.W. 2d 901 (Tex.App.-Corpus Christi 1991), to explain his second intensifier of permanency. In McNamara, a photograph, taken during a high school soccer game, showed the plaintiff’s genitalia to be exposed at the moment the photograph was taken. McNamara, 802 S.W. 2d at 902. The plaintiff’s action was dismissed because the court held that the plaintiff “voluntarily” exposed himself to public view by participating in the soccer match. Id. at 905.

109. McClurg explains: “For example, although many persons are willing to expose their flesh at the beach or poolside, most would not willingly expose the same image to other audiences or in other contexts.” McClurg, supra note 77, at 1043.
implicitly recognized a public right to privacy.\textsuperscript{110} For example, in \textit{Daily Times Democrat v. Graham}, the Supreme Court of Alabama became the first court to implicitly recognize that a right to privacy exists even in "public."\textsuperscript{111} In \textit{Daily Times Democrat}, a newspaper published a picture showing the plaintiff with her dress blown up as she was leaving a fun house at a county fair.\textsuperscript{112} Siding with the plaintiff, the court held that "[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust."\textsuperscript{113}

Probably the most famous example of a court recognizing an implicit right to privacy in public is \textit{Galella v. Onassis}, a case involving the wife of late President John F. Kennedy.\textsuperscript{114} \textit{Galella} seemingly exemplifies a case-by-case exception to the rule that no right to privacy exists in public. The court granted injunctive relief against a photographer who went far beyond the reasonable bounds of news-gathering.\textsuperscript{115} "[C]onduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi public place" was held to invade one's right to privacy.\textsuperscript{116} The court declared that "legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment. However the inference allowed may be no greater than that necessary to protect the overriding public interest."\textsuperscript{117} This recognition of a public right to privacy has not been extended beyond the specific facts of \textit{Galella}. The case could be analyzed as one involving the desire to protect a beloved member of American society. Regardless, the public right to privacy has not been extended to workers' compensation client's in claim investigations.

\textbf{VI. A BALANCED STANDARD FOR SURVEILLANCE}

The aforementioned case law establishes one overriding concept:

\begin{itemize}
\item \textsuperscript{110} Id. at 1044. Professor McClurg cites and discusses several judicial decisions that indirectly recognize a public right to privacy, including \textit{Daily Times Democrat v. Graham} and \textit{Galella v. Onassis}, discussed infra.
\item \textsuperscript{111} 162 So. 2d, 474 (Ala. 1964).
\item \textsuperscript{112} \textit{Daily Times Democrat}, 162 So. 2d at 475.
\item \textsuperscript{113} Id. at 478.
\item \textsuperscript{114} \textit{Galella v. Onassis}, 487 F.2d 986 (2nd Cir. 1973).
\item \textsuperscript{115} \textit{Galella}, 487 F. 2d at 990.
\item \textsuperscript{116} \textit{Wolfson}, 924 F. Supp. at 1420.
\item \textsuperscript{117} \textit{Galella}, 487 F.2d at 995.
\end{itemize}
there is a definite need to balance the social utility of surveillance with workers' compensation claimant's interest in privacy while in his home or even in the public forum. The boundaries between clearly public and clearly private behaviors are becoming continually blurred in today's high-tech society because increasingly, individuals are choosing to work from their homes or unconventional places of business. For instance, to start an internet company, all one needs is a basic computer set-up and some general knowledge of the internet. Therefore, to prevent further erosion of the concept of privacy, Pennsylvania courts must act to protect an individual's privacy interest, and avoid making artificial distinctions, such as the location of the alleged incidence, in deciding whether a tort has occurred. The current system of common law court decisions sets forth a standard by which the same conduct may or may not be a violation of privacy, depending on the location of the alleged incident. Locality is an immaterial distinction because an individual's freedom from invasion of privacy, wherever it may occur, must be protected; thus, the locality rule should be summarily discarded by the Pennsylvania courts.

Although there is a need to protect honest and fruitful litigation, unlimited surveillance is clearly not the answer. The three intensifiers that Professor McClurg discussed in his article reveal the difference between observing an incident with the "naked eye" and the result of observing the incident via surveillance. Because of the foreseeability of its misuse, surveillance methods need to be limited. Although the investigation of workers' compensation claims does not always involve the commission of a tort, such as the invasion of privacy, the worker's right to privacy is impacted.

A workers' compensation claimant cannot reasonably be said to have voluntarily placed himself in the public spotlight by filing a claim for benefits. The workers' compensation claimant did not voluntarily allow himself to be injured at work. In fact, under current law, the injured claimant, by simply filing a claim in the hopes of becoming "whole" again, "must expect reasonable inquiry and investigation to be made of [his] claim and to this extent [his] interest in privacy is circumscribed." An individual must expect some type of reasonable inquiry, but it is the danger inherent in that inquiry that needs to be circumscribed. Currently, the workers'

118. See supra notes 106-09 and accompanying text.
119. Forster, 189 A.2d at 149.
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compensation claimant almost entirely loses his right to privacy in a public place when he files a claim for benefits. Safeguards are necessary to prevent this injustice.

First, videotape evidence, like that gathered by private investigation agencies and insurance companies in worker's compensation cases, is recorded without temporal limitations. These limitations are necessary for a workers' compensation judge to properly consider and interpret the evidence. Due to the relaxed nature of workers' compensation proceedings, compared to those in state trial court proceedings, a workers' compensation judge is required to use the surveillance video to determine the credibility of the claimant, which either supports or undermines the opinion(s) of testifying physicians. As a result, the judge's decision is based primarily on his own opinions on the validity and importance of the surveillance evidence. Videos presented in this context, or out of context, as one should say, are wholly unreliable because they are not understood in the context of the daily life of the claimant; therefore, the use of such videotapes should be severely limited. Without the proper expert testimony to explain the nature of physical motions and movements and interpret the films, videotapes are relatively of little use and should not be admitted into evidence.

Second, the permanency of videotapes and their ability to be widely disseminated cause inherent difficulties for a claimant trying to recover workers' compensation. Video surveillance technology allows a film of the claimant to be slowed down to observe behaviors or objects that the human eye cannot clearly see upon normal observation. Thus, a permanency in the record is created, by which insurers and private investigators can closely examine the videotapes for any inaccuracies that might exist. Additionally, the permanency of these records creates a further need for expert testimony in conjunction with the use of these videos.

Although workers' compensation videos are not widely disseminated, the ability of these videotapes to fall into the wrong hands is clearly evident. For example, a private investigator is not the only individual viewing such tapes — everyone in his office, the videographer, and the individuals working for the insurance

120. McClurg, supra note 79, at 1041-42. The first “intensifier” discussed by Professor McClurg was temporal limitations, or context. Professor McClurg argued that video evidence is only a “snap shot” view of the situation and is taken out of context, which is necessary for proper interpretation. See supra note 107 and accompanying text.

121. See supra notes 108-09 and accompanying text.
company all may see the videotape. Therefore, the use of these videos must be carefully scrutinized and limited by the courts of Pennsylvania.

Professor McClurg's three intensifiers clearly illustrate that video surveillance evidence must be limited in court proceedings. Because the courts are highly unlikely to adopt a tort theory of public intrusion into privacy, at least they can limit the use of surveillance in the context of litigation, or effect further safeguards that will adequately protect the workers of Pennsylvania. Even in informal hearings, such as workers' compensation proceedings, the use of surveillance videos must be limited in order to protect the privacy interests of the claimant.

One alternative to using surveillance videotape is for an insurer or private investigator to testify before a workers' compensation judge as to the claimant's conduct that was openly observed. However, these investigators are at best qualified private detectives, not medical experts specially trained in the mechanics of the human body and its relation to physical injury; therefore, they could not testify as to the claimant's physical ability to perform certain activities. A complete ban on video evidence and an adoption of a "live" testimony standard would entirely eliminate the three intensifiers recognized by Professor McClurg in his article. As a result, workers' compensation claimants' privacy interests will be protected, as will the defendant insurance companies' interests in fair and truthful litigation.

VII. CONCLUSION

To create a standard for video evidence in workers' compensation is an almost impossible task. Establishing this standard in one articulable and definite test for ascertaining whether, and under what circumstances a violation of a person's right to privacy has taken place, is nearly impossible. The determination of when and what constitutes a violation of the right to privacy is entirely a fact-based inquiry, which changes depending on the morals and political nature of society as a whole. Additionally, in privacy law, more than any other aspect of the law, individuals have vastly differing opinions as to whether a violation of "privacy rights" has occurred. One individual may totally accept the given conduct of a private investigator, while someone else in the same situation could feel entirely violated by the investigators conduct. These varied expectations of people, which are all arguably reasonable, give the reader just a glimpse of some of the
difficulties judges experience in setting a standard to protect privacy interests.

_Brian Patrick Bronson_