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Smile You are on Candid Camera! Cellphones, Drones, and Granny Cams, a Tortfeasor's Worst Nightmare.

Recent Litigation Involving Video Evidence

The use of cell phones, drones, and hidden surveillance cameras have led to an influx of litigation. With the tortfeasor being caught on tape, there is not much luck of defending the negligent, or often intentional, activity. Whether it be the Uber passenger caught assaulting the innocent driver, the recreational drone inadvertently catching a glimpse of an employee sleeping in the parking lot rather than tending to his or her duties, or the granny cams installed in skilled nursing facilities capturing shocking instances of physical abuse to our elderly and dependents. The reality of the availability of these cameras creates a damaging case which is next to impossible to defend. Technology is advancing and is readily affordable and the use of social media outlets such as YouTube and Facebook, create a PR nightmare for our insureds and clients.

It is imperative to focus on risk management strategies for awareness and prevention, as well as to conduct an analysis of claims exposure so that one can develop a plan for mitigating damages when faced with this damning evidence. One thought is that if staff are readily advised of the presence of cameras, such employee would work to his or her potential. However, this surprisingly is not always the case. Thus, supporting the premise that those who have the propensity to act recklessly or intentionally, will do so, with or without the risk of the incriminating photographic or video graphic evidence.

Due to the wide exposure afforded by social media, many are well familiar with the Uber driver assaults caught on the driver's web cam, the United Airlines incident where the dragging of a passenger down the narrow aisle of the airplane is caught on a cell phone video, or the "Dancing Doctor" who deliberately videotaped herself and her staff laughing and dancing in the OR during the performance of surgical procedures. Such

doctor had her medical license suspended once the videos went viral. Multiple lawsuits were filed by the patients once they witnessed the videos. Surveillance cameras in facilities capture unsuspecting employees committing acts of negligence. In one case, a nurse slipped out of a psych ward for a lengthy period despite her duty to monitor her patients only to return and find one such patient to have committed suicide in her absence. Interestingly, as such cameras can catch unsafe or inappropriate activity, they also can be a detriment in litigation. As an example, if the footage of a surveillance camera is stored for a period versus being recorded over day after day, the lack of video footage in the face of litigation, would strongly suggest to the opposing side that the footage exists and is damaging. Hence, if the cameras installed do not preserve the evidence, the facility may be better off removing the cameras.

Claims and Litigation Considerations

Not surprisingly, the most frequent subjects of litigation involving abuse or neglect caught on tape sound in Elder and Dependent Adult Abuse and Neglect cases. Elders are typically defined as individuals who are 65 or older, while dependent adults are defined as individuals between 18 and 64 who have physical or mental limitations that restrict their ability to carry out normal activities or to protect their rights. This can include a person who is admitted as an inpatient to a 24-hour health facility.

The intrigue of Elder and Dependent Adult Abuse and Neglect claims primarily stems from the enhanced damages available to plaintiffs and their attorneys including penalties, punitive damages, and attorneys' fees. As an added incentive, there typically is no cap on non-economic damages, even in those states that have such caps in actions against healthcare providers, leaving an unlimited amount of non-economic damages to add to the verdict or settlement. Plaintiffs' lawyers are motivated by the collection of attorneys' fees and can readily rack up an average of \$800,000 to \$1,000,000, in fees prior to trial, with little evidence required to establish fee rate. Beside the economic advantage of collecting inflated fees and funding of the suit in this regard, naturally, opposing counsel are also eager to establish necessary elements to warrant penalties and punitive damages.

Arizona's "elder abuse" laws include an even greater avenue of damages. In 2013, an Arizona Court of Appeal, ruled that elder abuse litigation was not limited to skilled nursing facilities and assisted living but also includes acute care hospitals. Further, the state's elder abuse laws allow the prevailing party to claim recovery of all out-of-pocket costs, including expert witnesses and cost of investigation. The potential exposure creates a barrier to defending these actions and most will forcibly end in settlement.

With the advent of the "granny" cam, video evidence of either blatant abuse or neglect and lack of attention is being caught on tape. More and more states are enacting legislation to allow either hidden or known cameras in patient rooms. These videos are being used more frequently in litigation and whether they are disclosed at the outset of litigation to encourage early resolution or used as impeachment, the case is most arguably, indefensible with such graphic surveillance.

It follows that granny cams are garnishing much debate between the nursing home industry and patient advocates. The nursing home industry opposes such surveillance as it creates privacy and HIPAA concerns, deflates employee morale, and results in increased overhead costs. Advocates in favor of the cameras argue that such cameras are a means of discouraging abuse and neglect and, will improve quality of care.

Certain states such as Texas, Washington, and Illinois, require granny cams to be installed by the facility if requested by the resident's family. It is a resident's choice, not a choice of the facility and the resident is responsible for the cost and signage of the surveillance must be posted rather than a covert usage. Other states, such as Pennsylvania, allow a resident to install a hidden camera without the facility's knowledge. New Jersey adopted a recent program known as the "Safe Care Cam" which enables family members who suspect abuse or neglect of their resident family member, to have access to micro-surveillance cameras that can be readily installed to detect abuse. The camera and its memory card are loaned to the resident for a period of thirty days and extended upon request.

Analysis of Liability Exposure

Once you are faced with this damning evidence, consideration of legal strategy to resolve the case to avoid discovery and to prevent the tortfeasor from rendering self-incriminating testimony. A strong PR team is necessary in the case of a YouTube viral video. However, once the offending actions are exploited on social media, an individual perpetrator will have a difficult time gaining employment in a same or similar field. It can also result in criminal charges and potential licensure suspension, among other detrimental consequences.

If a company or health facility are involved, speedy measures to ensure that the tortfeasor has been removed from the employment and that training of all other employees is instituted. Branding guru, Starbucks, expeditiously terminated an employee who was caught arguably discriminating against innocent patrons. Starbucks shut down all its stores for a period to initiate anti-discrimination anti-harassment training. The incident was quickly forgotten due to the swift and very public corrective action taken.

Risk Management Considerations

In further attempts to mitigate damages, one must focus on the resulting damage. Physical harm versus emotional harm, however, can be just as costly in the face of litigation. In one cell phone video, the victim is being ridiculed and humiliated with no physical harm but a resulting settlement in six figures. The victim and circumstance will also play a role. The above scenario can yield seven figure settlements if the victim is elderly, ill, or otherwise falls into a special class of protected individual pursuant to the ADA.

A picture is worth a thousand words and in litigation it can translate to thousands, if not millions of dollars. With the ever-changing laws and the increasing damages potential for plaintiffs and their attorneys, we can expect the number of claims supported by video graphic evidence to continue to escalate.