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## **Tripped Up! Demolishing the Plaintiff's Case – Accident Video as a Lethal Weapon**

### **Introduction**

Jurors today expect that videos exist of most accidents. In this era of heightened juror expectations, the defense bar needs to show juries not only that the incident was captured on video, but that it is actually *favorable* to the defense. But how do we communicate that to juries? We will explain how an engineer conducts a frame by frame analysis with time stamps showing the sequence of events. We can establish many things with this, such as the Plaintiff's inattention to their surroundings, how many times she had walked over the area before the accident, whether she looked down at the floor, and whether store employees and other customers passed through the area without any problems. The video could also contain post-accident evidence that is useful to the defense, such as proof that one small paper towel was used to wipe up the offending substance or the plaintiff's ability to walk from the scene of the accident without any problems.

We have used this technique multiple times, successfully, at trial and mediation. For example, in one instance we were able to prove that in the 7 minutes between a small amount of water ending up on the floor and the plaintiff's accident, 21 people had walked over the area without any issues. We were also able to establish that no employees had walked in that area in the few minutes when the substance was on the floor.

We will review how our expert prepares a video and photographic montage for all of the salient points that are favorable to the defense of the case. Those items can then be used by defense counsel in their witness examinations and closing arguments. The jury can consider them during their deliberations as trial exhibits.

This presentation is geared toward senior level litigation, claims and risk professionals, as well as experienced trial attorneys.

**I. When video is available**

Thinking back to a decade ago, it was uncommon for a case to include video evidence. Today, with the increasing use of security cameras by both businesses and homeowners, as well as with the proliferation of smart phones with video capabilities, it is increasingly unusual for a case not to include any video evidence. As an initial consideration, the video recording being presented for admissibility must be relevant. For example, Florida Statute §90.401 defines relevant evidence as “evidence tending to prove or disprove a material fact.”

**A. What video is to be requested by the Claims Adjuster**

**1. Amount of time**

Let us assume that an incident occurs at 1:00 PM. Of course, video at the time of the accident is important. But how much time should be preserved both before and after the incident occurred? What is your insured’s policy for preservation of evidence? A policy of preserving as much video as possible both before and after the accident is advisable, naturally considering the cost and hours required to preserve such evidence.

**2. What areas of the location of the loss are to be covered**

On many occasions, clients use “dummy domes” that act as a deterrent for theft but do not actually contain an operational camera. It is important that you obtain a map or layout of the insured premises in order to understand every area that is covered, or not covered, by the video system.

**3. Whether other areas and times are necessary**

Your insured may have a policy whereby they clean or sweep the entire store every hour. It will be important to preserve any video evidence that your insured had inspected the area within a reasonable time prior to the accident. Of course, there may be some documentary evidence of this, but jurors prefer video evidence to a sweep logs or other similar document.

You may also want to preserve all video from the moment the plaintiff enters the store, perhaps to show their ability, or lack of ability, to traverse the location prior to the accident. Often times, you may be able to preserve evidence from after the accident showing the plaintiff walk without any problems or issues from the insured premises.

#### **4. What to do when video is unavailable**

Unfortunately, not every inch of the insured's premises is covered by video, so there may be times when the accident itself is not captured. A well-prepared asset protection representative or property manager may need to testify as to the operation of the video system and what areas of the location are not covered by the video surveillance system. Also, sometimes cameras may just be broken or facing in a direction away from the accident. Jurors need to be told that the main purpose of the video surveillance system is theft discovery and theft deterrence, not to capture slip and fall accidents.

#### **B. Preservation of video**

##### **1. Establish chain of custody**

As soon as the claims representative obtains a copy of the video, it is imperative that you start a chain of custody log, indicating from whom you received the video, the date it was received, and the manner in which it was received. This log should be provided to your defense counsel along with the video. Savvy plaintiffs' attorneys will object to a video being offered into evidence if there is not a valid chain of custody that is presented with the video evidence.

##### **2. Multiple copies should be made**

This panel has seen multiple instances where a video is lost after it is preserved. A claims office may move, the video may be lost in the mail, or a system of cataloging and maintaining videos may not exist in a certain office. It is always best to preserve the video in different formats. For example, our offices typically have a disk as well as a digital version of a video so that it can be used in different ways.

### **3. Defense counsel's recommendations**

When in doubt, call your defense counsel for recommendation on what should be preserved in a particular instance. Working with defense counsel, it is always preferable that the insured has a policy in place for preservation of video evidence that is followed in every instance.

## **II. Multiple case studies**

### **A. Gaps in time between substance on floor and plaintiff's fall**

Whether you are faced with a 36-second gap between an item falling on the floor and the plaintiff slipping on that item, or a two hour gap in time between when the floor was last inspected and the accident, your video can help to establish whether your insured had actual or constructive notice of the item on the floor. In most jurisdictions, in order to be successful, the plaintiff must show that the defendant had actual or constructive notice of the substance or item on the floor. In certain retail settings, the mode of operation approach shifts the burden to the defendant to prove that they understand the risks of their self-service mode of operation and take reasonable steps to maintain a reasonably safe environment for all people lawfully on their premises.

### **B. Mechanism of falls**

Oftentimes a plaintiff claims a particular injury, but the video shows that that particular body part was not involved whatsoever in the accident. Certainly, given the traumatic nature of some slip and fall accidents, a plaintiff's memory is not always best in terms of what body parts struck the floor. We have experienced numerous cases where the plaintiff was surprised to see that her elbow never struck the shelf as she was falling, or her head never struck the floor. This video evidence is often useful for medical experts when assessing causation and degrees of injuries that are being claimed.

**C. Videos involving incidents other than falls**

Beyond slip and fall accidents, they are times when there is a physical confrontation between two people, or more, and plaintiffs have tried to establish that the property owner should have been on notice that a fight was going to take place. Videos can be used to dispel that notion and prove that your insured had no prior notice of such an incident.

**III. Engineer's participation in video review and interpretation**

**A. Video and photographic montage that dismantles plaintiff's case**

A video engineer is often useful to prepare a video and photographic montage for all the salient points in a favorable to the defense of the case. Those items can be used by defense counsel in their witness examinations and closing arguments. The jury can consider them during their deliberations as trial exhibits.