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*Dealing with Gore (*Pictures Not Included)*

- i. Photographs and video depictions of gruesome injuries and injury scenes present a challenge in evaluating and defending claims for both the claims professional and defense counsel.

The ubiquity of cameras, which allow anyone to take and preserve high-quality photos and video, continues to change the evaluation and defense of transportation claims involving bodily injury. Photos and video evidence of all sorts come from a myriad of sources including:

- Dash cams
- Police body cameras
- Business surveillance cameras
- Bystanders and witnesses
- Rapid-response insurance investigators
- City and neighborhood surveillance camera
- Law enforcement cameras
- Doorbell and home monitoring equipment
- Family and friends of a claimant
- Coroner's reports

Savvy plaintiff's attorneys are quick to seek out and preserve photo and video evidence. They often direct their clients to take photographs of healing wounds at regular intervals to document the recovery process if beneficial to their damage claim. In this regard, photos and video of injuries can even blur the line between evidence and advocacy. It is without question that photos and videos of injuries impact how the claimants, counsel, claims handlers, and judges evaluate cases, even if only subjectively.

- ii. The standard of admissibility of photos and video of gruesome images is a low hurdle and the assumption must be that all photos and video will be admitted if even tangentially relevant.

Despite the dramatic increase of photo and video evidence over the past 20 years, there has been little consideration given by courts of the impact of photographs and video of injuries, other than as to the admissibility. With regard to admissibility, the courts overwhelmingly balance admissibility and prejudice in favor of the admission of evidence, generally with the caveat that the court will warn against the emotional impact of such photos in a jury instruction that the jurors are to set aside “passion and prejudice.”

The exclusion of prejudicial evidence under a balancing theory is set forth in Federal Rule Evidence 403, which allow for relevant evidence to be admitted, if a proper foundation can be laid. FRE 403 then allows courts to limit the admissible of relevant evidence when its probative value is substantially outweighed by a danger of unfair prejudice, misleading the jury, wasting time, or needlessly cumulative. State rules of evidence typically follow the federal rules with some notable exceptions. Although the rule seems simple enough, employing a traditional balancing test between probative value and prejudice, one would expect to find three groups of cases – those where there are photos where the probative value is clear and the depictions are admissible; those where the court finds that the photographs are offered primarily to evoke emotional reactions and, thus, ruled inadmissible, and; those where the photos with probative value must be balanced between admissibility and exclusion, with some cases being decided each way. However, the reported cases almost uniformly hold that gruesome photographs are admissible, so long as the most miniscule of probative value is found by the court. Said differently, the photos are almost always admitted into evidence, so we must deal with the consequences even if we see them as unduly prejudicial.

- iii. Gruesome photos of bodily injury unquestionably impact all of the parties to a claim: counsel, claims handlers, judges, and eventually the jury’. The emotional impact is not limited to damages either; gruesome photos impact – both consciously and subconsciously – the determination of liability, causation, and damages.

The importance of emotion to legal persuasion is old news, but sometimes is viewed too narrowly. Emotional impact of photos of bodily injury runs deeper than the verbal heartstring-tugging and pandering by plaintiff’s counsel in closing

arguments. The effects range from the real, but often subtle, influence on counsel and the judges who must make legal and evidentiary rulings through the final appeal.

It is a long-settled principle that we trust our vision over all other senses. We place confidence in what we see. In that sense, as the documentarian, Errol Morris said, “we imagine that photographs provide a magic path to truth.”ⁱ In fact, we gather and extrapolate information from photographs in tenths of a second while, in contrast, we must labor for understanding from the spoken word. Possibly even more importantly, jurors remember and trust images more than the spoken word.ⁱⁱ

A claimant and his or her counsel are generally the first to trumpet to the emotional value of gruesome photographs. In fact, in some jurisdictions, there is a trend for plaintiff’s counsel to include photos in or attach to original complaints. The stated reason for doing so is typically that plaintiff’s counsel seeking to offer factual support for his or her client’s claim. Regardless of the rationale, it is not lost on counsel that a picture of an injury (outside of any evidentiary foundation or requirements) likely impacts the court in a way that begins at the outset to develop a judge’s empathy under the guise of fact-based pleadings.

Gruesome photos that cause an emotional reaction affect how information is processed. A notable and relevant example is that anger is tied to shallow information processing.ⁱⁱⁱ Angry judges and jurors are less likely to consider the probative and evidentiary value of a photo and instead rely, either consciously or subconsciously, on anger or other elicited emotional drivers in reaching conclusion of fact and law.^{iv}

Emotions elicited by gruesome evidence affect how jurors evaluate other evidence in a case. Jurors who are roused to anger with the defendant, for example, often become motivated to seek out the other evidence that validates their emotion and to minimize or dismiss evidence that does not.^v Participants in a mock juror study conducted by Beatrice Capestany and Lasana Harris, Social Neuroscientists at Duke University, were divided into groups and were presented different types of evidence concerning the same fact pattern had markedly different outcomes.^{vi} The participants shown the materials that elicited the strongest disgust doled out significantly more punishment and they also showed a decrease in brain activity associated with logical reasoning and moral judgment.^{vii} When jurors are presented with evidence that is particularly gruesome, they are

likely to experience a visceral emotionally charged feeling that leads them to be inappropriately punitive.

Voluminous research confirms that photographic evidence is significantly more memorable and the information is retained. Indeed, the research tells us that juries remember 85 to 90 percent of what they see as opposed to only 15 percent of what they hear.^{viii} “Though justice may be blind, expert attorneys know that jurors are not.”^{ix}

Not only does the gruesomeness of evidence produce different patterns of brain activity, it also translates into differences in the perception of liability, causation, and punitiveness.^x Compounding the problem gruesome photos present is that there may be no cure for an emotionally charged juror. Emotional bias, once raised in a person, is difficult to ameliorate by a judicial instruction to ignore the emotional content of graphic evidence. In fact, according to studies, the instruction may even compound the issue.

Research has shown that instructions to ignore certain types of information are ineffective at best and may in fact make the information more important and central to a juror due to a rebound effect.^{xi} In a 2014 study social scientists Edwards & Mottarella, determined that the standard judges’ admonition in jury instructions for the jurors to refrain from basing their decisions on emotions and to set aside prejudice fails to achieve that goal.^{xii}

IV. Claims adjusters and counsel must understand, account for, and seek to limit the prejudice that creeps in with gruesome photos at every stage of a claim.

a. Initial Loss Notice

At this earliest time, based upon an initial assessment, it is important to determine what type of photographs may have been taken. Do any of the vehicles have dash cams? Is there a potential for first responders, specifically police to have body cameras active? If it is a fatality accident, was the investigation begun and the scene photographed before the decedent was removed from the scene? If an insured or transportation company dispatches a rapid response team what photos are they requested to take and in what format? Should you or should you not request photos from a coroner if applicable at this stage? Each claim presents its own variables and considerations, but in all instances, timely information is important.

The strategy for limiting prejudicial images at this stage is first to not unnecessarily collect or have photos taken that depict injury or the aftermath of an accident in close-up and gory detail, unless necessary or adjustment reasons. Make sure you understand what images have been collected by the insured company and driver as well as any rapid response personnel.

b. Pre-Suit Handling

At this stage, if the claims handler is in direct contact with a claimant, what information has been requested? If the claimant has retained counsel, has counsel sought to provide photos of the claimant's injuries? Should you consider surveillance? If you believe the claimant or counsel is documenting the healing process or treatment of wounds or surgical scarring make a note to ask for a scanned copy of the photos at a later date. Consider only request copies of photos that are identified by the claimant or counsel at this stage.

Some strategies for limiting the effect of gruesome photos and evidence at this stage is to continue to be mindful of what you request. You need to assess whether the photos and images you have collected are the basis for a claimant's counsel's unreasonably high valuation or demand. Consider the steps you can take to mitigate the effect of the photos. A thorough and professional social media search may be necessary if the claimant has recovered sufficiently to resume activities that can be seen as ordinary. Have IME doctors photograph healing or healed injuries if an IME is warranted.

With respect to reserves other case assessment that must be done at the outset, claims adjusters should consider the impact of the photos. Although they will likely never be the sole reason for an evaluation, it is understood that particularly gruesome photos can cause an uptick in the value range placed on a claim. However, claims adjusters and counsel often overlook the effect gruesome photos will have on a jury's perception of liability and causation. Here again, images that elicit strong emotional responses should at least be considered when assessing a jury's probability for finding liability and causation.

c. Post-Suit Initial Discovery

At this stage a formal request for copies of all photos in the plaintiff's possession should be requested. The format you request them in is important here. Do you want digital copies, hard copies, or scanned images? Is additional

surveillance warranted based on the claims to match up with the claimant's photos? A thorough evaluation of the images must be made to determine which ones you may object to as cumulative, lacking evidentiary value, or prejudicial.

Some strategies at this stage are to begin to only use selective photos with opposing experts and seek to have opposing experts and witnesses identify what is relevant in certain photos to them. This testimony will be useful in arguing for exclusion based on cumulation. With regard to the photos used at depositions and produced in discovery be mindful of the format in which they are produced. When producing photos it may be beneficial to provide regular size hard copies of the images instead of digital copies. This alleviates any concern over alterations in cropping, filtering, and enlargements.

Particular attention should be paid to foundational issues. Although it is simple to lay a proper foundation for the admission of photographs, it will be worthwhile to question if photos provided by opposing counsel have been altered in any material way through the selection of a camera phone filter or cropping. These same arguments can be made with regard to enlargements. Certainly photos that are placed on a court room projector or displayed on a screen will be enlarged for viewing during trial, but ordinary size photos used and exchanged during discovery, as opposed to enlargements, should be placed into evidence.

Motions in limine should be crafted not just with exclusion in mind, but with alternative limitations to the use of photos. Examples are seek a ruling on the use of selected photos only, based on the testimony of experts and witnesses, as to the relevant parts of the photos that have been selected and shown during discovery. If photos show up embedded in pleadings of any sort, a motion to strike the photos from the pleading or document filed in the record.

D. Trial

Once the world of evidence is closed and the photos are known, there are different strategies that can be considered to limit the impact at trial. Part of the strategy will depend on the relative strength of certain appellate issue based on the court's rulings on motions in limine. Assuming the potential appellate issues concerning the photos are not strong – which is likely going to be the case – several strategies can be employed. In longer cases with many experts and witnesses who will be able to address the photos counsel should consider a desensitization strategy. In cases where liability favors the defendant driver, but the injuries are severe, the claims adjuster and counsel should consider a strategy

of showing the jury that the defendant driver suffers emotional stress and trauma because of a plaintiff's negligence in causing an accident where he or she has clear and significant comparative fault.
