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## **MASKING A RISK: COULD WEARING A FACE COVERING PLAY A ROLE IN SLIP, TRIP AND FALL CLAIMS?**

### **I. The Science Behind Walking (20 minutes)**

#### **1. Typical Human Gait**

Walking is a task that generally require a low level of mental and physical work load. Human walking, or gait, entails the bipedal, biphasic cyclic movement of the lower limbs to cause forward propulsion of the center of mass of the human body. Gait is broadly divided into two phases: swing and stance, with those phases delineated by heel contact and toe-off. The gait cycle typically commences at heel contact, which begins the stance phase of the leading limb, and, more specifically, the double stance phase where both feet are on the ground. As the gait cycle progresses, the opposite foot lifts off of the ground at toe-off and swings forward. Toe-off of the trailing limb begins the single support phase of the leading foot. After toe-off, the trailing limb swings forward and becomes the leading limb as the cycle repeats.

#### **B. Visual Input**

Human gait needs to be monitored constantly to ensure a smooth transition between different steps. For most, visual information is acquired and used in a feed-forward mode to plan and initiate changes in the gait patterns to maintain a synchrony of actions for the process to effectively happen smoothly. While scanning the environment, visual input provides environmental information at a distance and information about self-motion through the environment. Research has shown that, while walking, individuals who are reasonably scanning the environment have a central field of view approximately six-to-14 feet ahead. When head movement is minimized, the horizontal field of view is approximately 60 degrees, with rotation of the head increasing it to 110 degrees. Eye movements can increase the horizontal field of view an additional 15 degrees. When approaching and overcoming an obstacle, a person's gaze is intermittently focused on the obstacle and beyond the obstacle, utilizing both the central field of vision and peripheral vision.

#### **C. Lower Visual Field Occlusion**

Negotiating obstacles like elevation changes or steps requires an individual to observe, perceive, and react to the environment. Classically, visual information is taken in by the subject, which is

then used to determine how to modify one's gait and initiate any changes she sees as necessary when approaching an obstacle. This information is used to determine the appropriate limb movement and foot placement. Primarily, the swing-phase trajectory of the limb, after toe-off, is modified to avoid obstacles on the ground, select alternate foot placement, or adjust for changes in elevations. Thus, environmental information has to be seen and sampled at least one step before the changes in the normal swing- limb trajectory are initiated in order to successfully implement an adaptive strategy to negotiate an obstacle. Negotiating an obstacle is more demanding on the motor-control system than avoiding it. Research has shown that although safe negotiation of the physical environment during gait utilizes the entire visual field, the information provided from the lower visual field (LVF) is most predominately used for last-minute updating during the approach of the obstacle. Heel clearance and pre-landing Cinematic (i.e. movement) parameters are determined using LVF information acquired in the penultimate step during the approach to an obstacle or step, with information related to foot placement before the obstacle or step being the most salient. Scientific research has shown that LVF occlusion during the gait cycle can have a significant impact on foot placement, foot clearance, and other Cinematic measures.

Impediments in the LVF obstruct visual-position awareness of the lower limbs relative to the obstacle. Research regarding obstacle crossing has found that direct visual information regarding the lower limb and the limb's position in the environment is important for the control of the swing-limb trajectory, as visual obstruction of the lower limb results in placing the foot farther away from the obstacle, biases the swing limb upwards, and decreases precision control of the swing limb. These adaptations are conservative and protective measures to prevent the foot from coming into contact with the obstacle. Visual cues within the environment that help identify the location of the obstacle were found to be more relevant for controlling lead- and trail-foot placement as compared to visual information regarding the location of the lower limbs. The LVF is typically used in an online manner to control and update final foot placement, and without such control, uncertainty regarding foot placement causes toe clearance to be increased. Altered or obstructed vision in the LVF generally increases toe clearance in the lead and trailing legs, increases stepping time, and increases vertical forces during a step-down task. Changes during step up suggest a more conservative adaptation, while increased forces during step down suggest a reduced level of control.

#### **D. Masks and Missteps**

It is all too often that, during a slip, trip, or fall, a causative factor is that the individual often claims not to have seen the condition or to have misstepped due to improper placement of her foot. Fundamentally, from a human factors' perspective, a person's ability to safely navigate her environment requires an adequate degree of cognitive attentiveness and entails an integration of sensory cues that include a visual element to develop a mental construct of the environment and evaluate any potential hazards, which includes identifying changes in the pedestrian walkway, including obstacles and changes in elevations (e.g. steps). Typically, the visual sensory input is the primary sensory input of this process. Obstructions to the lower visual field have been shown to decrease task performance and visual distortion of ground-level objects is associated with increased fall rates. Thus, as the science has shown, vision is a key element to one safely walking through their environment. Due to the COVID-19 pandemic and its related health guidelines, many people are performing tasks wearing a face covering. Depending upon

the style of face covering and how it is being worn, it is certainly foreseeable that the face covering could obscure a part of the lower visual field. While it has yet to be determined how this will affect claims, including those involving slips, trips, and falls, it is known that the lower visual field is a key component used by individuals to safely walk in a given environment, and it is also known that many people will be wearing facial coverings. Therefore, to properly evaluate a future slip, trip, and fall claim, it will be important to document whether the claimant was wearing a face covering and, if so, what type.

## **II. And then the Claim is filed (20 minutes)**

### **A. How Carriers are seeing and treating mask slip, trip or fall claims**

Carriers are currently seeing these claims in business that often already had history of claims like this like grocery stores and convince stores. We treat these like any other trip/slip and fall claims.

### **B. Claim handling in countries with developed history of wearing masks**

Countries like Japan and South Korea have a more developed history of people wearing masks in public . Will talk about techniques and guidance from people in those countries.

### **C. Gathering information once a claim is filed**

A large part of the claim process is making sure to gather information so we can not only advise liability, but to be able to provide pertinent details about the incident for the expert.

This includes asking the right questions to the claimant. Some useful questions are: Did you slip or trip? Did you fall forward, backward or to the side? How fast were you walking? What type of shoes were you wearing? Which foot slipped or tripped? Were you carrying anything at the time? Where were you looking? Were you doing anything that was distracting? How did you fall-specific locations of body parts? What parts of the body made impact with the ground?

When dealing with a company and an employee falls some questions for those scenarios are: Do you have a safety policy that covers slips and falls? Are employees trained regarding recognizing and minimizing hazards? Do you have an inspection policy? Have there been prior similar incidents? When was the area constructed? What are the cleaning processes for the subject area? Are there maintenance records or logs? Were there any existing controls in place for the subject area?

By gathering all of these details during the initial conversation with the claimant, you're building a base of facts for the forensic experts and counsel.

## **III. Legalese and Expertise (20 minutes)**

### **A. How Attorneys are seeing and treating mask slip, trip or fall cases**

Claims in this area can come under a number of different guises, mainly based on negligence and premises liability. The crucial aspect is to determine the claimant's relationship to your insured. Knowing who is bringing the claim and how they are tied to our client will help us develop crucial defenses that need to be plead right out of the gate. With all of the claims, it is important to know exactly what requirements regarding the use of a mask were imposed, whether by local/state/federal government, or the requirements of the insured directly, and how those requirements were communicated to the claimant.

Often, the claimant will be an employee hurt on the job, or a vendor or other type of visitor who has license to visit your property. License in this case refers to the legal relationship as someone

who has full rights on the property. In the case of an employee, the issue of availability and use of Worker's Compensation insurance is a key factor to be established, if you are not the carrier providing the same. Then knowing what the roles and responsibilities of the employee claimant entailed, and what duty(ies) they were or were not carrying out at the time of the incident will be much of the focus of the liability portion of the case.

In the case of a visitor, then the relationship between the claimant and the insured will be the initial essential determination. Depending on your jurisdiction and this determination, what responsibilities did your insured have to the claimant at the time of the incident. Further, as with employees, but even more important, we need to determine what the roles and responsibilities of the claimant entailed and how they relate to their business on the property.

## **B. Defending the Claims**

### **1. Depositions and Trials**

With regard to depositions, it will be clear to establish early on the claimant's views and bias towards mask-wearing. Do they support wearing masks and support their use whenever possible, despite any local requirements; or do they think that mask wearing should be optional, and oppose any mandates for their use. Determining exactly what kind of mask they were wearing, the composition, size, and exactly how it was worn will also be examined, do determine if there is any actual interference with sight vision, and ability to traverse and work in their respective roles. Whether or not they wear eyeglasses, safety goggles, or any other type of eyewear will also be important, and makes the question of how they wore the mask in relation to that eyewear a significant line of questioning.

### **2. Introduction of Expert Testimony**

With cases like this, that may be considered novel or new, sometimes the experts can have a hard time with the science involved when the outcomes lead to low probability outcomes. In these cases, either the causation is hard to determine or an agreeable protocol can be hard to define. These can lead to circumstances where the experts have to be more open-minded and work to determine what conclusions are the most plausible.

The biggest problem as you reach this stage could be the qualifications of the testing, and many times the experts themselves, for trial. That is when the pre-trial expert challenges become a very significant, and costly, part of the litigation budget. Most states have adopted one of two methods for determining the reliability of experts and expert testimony, the Daubert and Frye standards. While most of you may be familiar with one or both, the distinctions, and method of analysis are crucial to understanding how the use of "inexact" science can affect your case.

These two major governing standards can be found in the two seminal cases from which they are named; a D.C. Circuit Court case, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and a U.S. Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The federal court system exclusively follows Daubert, while state courts are divided between the two. However, even within each system, each state has taken on its own interpretation of the two standards, making the admissibility of expert testimony more variable between jurisdictions. It is crucial to

have a working understanding of these standards, their specific jurisdictional variations, and any recent, applicable case law when considering experts and their use at trial.

### **C. Issues with Potential Bias and Impressions for jury members**

The issue of wearing a mask can be political and polarizing to jury members. Given the demographics of your jurisdictions, you could have very different opinions on whether it is proper and should be mandated. This could lead to conflicts between jury members themselves, as well as the jury member's view of your insured's policies and procedures. While your counsel will work to try to weed out these issues in Voir Dire, it is likely you will still have conflicts with the remaining jury. For these reasons it is best to try to steer away from arguments signaling policy debates and positions, and use your expert to focus on the science and theories directly involved in the incident.

Will jurors wear masks during jury selection?

Will judges ask jurors to take their masks off during jury selection? Some judges have asked prospective jurors to take off their masks only when answering questions. How will lawyers assess masked jurors' reactions to questions and comments during trial. We can assume that some judges may not order jurors to take off their masks at any time during trial.

How do lawyers assess jurors when selecting a jury or for that matter their reactions to testimony and arguments during trial. There are some lawyers who would argue that jury selection is the most important part of any trial and when lawyers evaluate juror body language and facial expressions.

Masks will interfere with establishing connections between the Judge, the jury, the parties, the lawyers and the witnesses.

Lawyers attempt to cultivate jurors and Judges from the very first moments of trial. How will lawyers' connect with jurors on a visceral level when lawyers and jurors are wearing masks? It may be difficult for lawyers to portray their clients as sympathetic, likeable and truthful if jurors can't see their client's face.

### **D. Credibility & Confrontation of Witnesses**

How will lawyers judge the credibility of witnesses if they are wearing masks?

Lawyers are continuously evaluating the credibility of witnesses. When a lawyer cannot see the face of the witness they are questioning or their adversary is questioning the lawyer's ability to assess credibility will be severely impacted. Jurors will be deprived of the opportunity to evaluate body language and facial expressions.

Confrontation of witnesses will be severely weakened by wearing masks.

Lawyers want the jury to see and appreciate the impact of a tough cross examination on an adverse witness. How will this be accomplished when the witness's reactions are covered by a mask?