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“Trip, Fall and Fly Me To The Moon”

Risk Management is a real time profession. It not only requires empirical knowledge, but practical experience combined with common sense. Often, decisive moments can pass without seizing the opportunity that they present. Time never stands still. The risk professionals who count make the difference whenever and wherever they can.

I. Accurately Recording What Happened Leads To Better Results

Preparing for trial is the best leverage to control a claim. It starts with what happened. Model jury instructions, such as the Ninth Circuit Court of Appeal Model Civil Jury Instructions 1.6, describe the following:

“The evidence you are to consider in deciding what the facts are consists of:

1. The sworn testimony of any witness;
2. The exhibits which are received into evidence; and,
3. Any facts to which the lawyers have agreed.”

When, where and how evidence is recorded matters. With differing statutes of limitation throughout the country, making the record early and accurately is the best way to ensure that a claim can be managed because there is credibility in the information provided. In evaluating witnesses and their testimony, juries are so instructed:

“...In considering the testimony of any witness, you may take into account:

1. The opportunity and ability of the witness to see or hear or know the things testified to;
2. The witness’s memory;

3. The witness's manner while testifying;
4. The witness's interest in the outcome of the case and any bias or prejudice;
5. Whether other evidence contradicted the witness's testimony;
6. The reasonableness of the witness's testimony in light of all the evidence;
7. Any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it. Ninth Circuit Court of Appeal Model Jury Instructions 1.11."

A risk management professional can and does make all the difference. Keeping in mind how, when and ensuring the accuracy of the information elicited after an accident allows the story flow from what happened and not what those may selectively remember.

Not all witnesses will see or remember the same thing. Based on the 1950s film "*Rashomon*," several authors have studied concepts of subjectivity and its effect on perception and recollection. In that film, there were four different recollections of a crime. In her 2004 book, Media Ethics and Social Change, Valerie Alia incorporates information from earlier authors to describe how looking at the same event does not result in the same recollections. Potentially conflicting information will require strong, contemporaneous documentation even in the best of circumstances.

As the power of suggestion may come into play after the passage of time, interests in the welfare of the claimant, similarities in age, demographics or other factors may result in different interpretations of an accident. This confirms the essential role that risk professionals play in ensuring that the preservation of evidence, taking photographs, securing witness statements and retention contemporaneous with the accident.

II. It Happens Every Day

You are the risk manager for an airport. Your cell phone rings. There has been a serious accident. The private transportation company you just subcontracted with to ferry passengers around had an accident. An elderly man with alcohol on his breath is reeling in pain. Paramedics have been called. Facilities wants to move the cart which hit the elderly man, get rid of its broken wheel and make room for the rush of passengers coming in on arriving flights. Departing passengers, some of whom saw the accident, want to get to their gates to leave on their planes. You have no staff available and you are walking toward the scene. It's your call and you have to get all the decisions right, reach them quickly and protect your airport from a 7 figure suit.

III. Application of Principles Arise From Facts

A working knowledge of legal principles is important. These principles give rise to the theories upon which a claim can be made. Typically, these principles find their source in state law. As a result, they may vary in the 50 states. While simply stated, their application arises from the facts.

A. Negligence:

The key principle of negligence is fault. Fault arises in different contexts, but requires that the person who creates the harm, rather than society at large, bear the financial risk and responsibility for injury to another. “Compensation and Commensurability” by Margaret Jane Radin, 43 Duke Law Journal 56 (1993).

The Restatement (Second) of Torts, provides the elements of negligence:

1. The existence of a legal duty to exercise reasonable care toward another;
2. A failure to exercise reasonable care;
3. Causation of physical harm due to the failure to exercise reasonable care; and,
4. Physical harm in the form of actual damages to another.

Duty is typically a question of law for the Courts. Often, the question of duty involves an assessment of foreseeability. In the landmark case of Palsgraf v. Long Island Railroad, 248 N.Y. 339 (1928), New York Court of Appeals Chief Justice Benjamin Cardozo, who later went on to serve on the U.S. Supreme Court, determined that a railroad did not owe a duty to passenger who it assisted onto a train. The passenger, who lost a wrapped parcel containing fireworks, was injured in an explosion that followed and sued for damages. The Court reasoned that the railroad personnel could not know the package contents and no duty arose to plaintiff.

In this accident, the claimant was injured while using the walkways at an airport. A passenger cart was involved. The condition of the walkways, control of passengers using them, operation of the passenger cart in those walkways all present foreseeable risks of harm. The risk of harm is to person and property of those passengers who use the walkways inside the airport. Thus, there is likely a duty of care that runs from the airport to those who use its walkways.

The failure to operate the passenger cart safely, whether due to operator error, maintenance or loss of a wheel due to product concerns is a failure to exercise reasonable care. The claimant who is injured, ostensibly from contact with the cart, has a physical injury which results from the failure to exercise reasonable care. As a bilateral hip

replacement patient, his injury, while severe, follows the general rule that you take the plaintiff as you find them. Thus, in the absence of other evidence or exculpatory information, the airport's conduct may satisfy the requirements of negligence.

B. Contributory or Comparative Negligence:

Traditionally, any fault on the part of the plaintiff constituted contributory negligence. Contributory negligence was often a complete bar to liability under the common law. Butterfield v. Forrester, 103 Eng. Rep. 926 (1809). Over time, apportionment of fault became a more acceptable. Some states adopted a scale of comparative fault barring recovery at 51%. Others adopted pure comparative fault up to 100%. In modern times, the vast majority of jurisdictions have comparative fault. Restatement (Third) of Torts, Section 17. Only three states remain with pure contributory negligence: Alabama, Maryland and North Carolina.

In this case, there are some facts which suggest comparative fault. Alcohol was on his breath. It's not Listerine. The bar may be close by. The plaintiff may have fallen for medical reasons, the condition of his shoes or an ambulatory device. He may have been bumped into by another passenger. Perhaps he was on a cell phone and not paying attention. In short, question the premise of whether the cart really caused the accident or is simply there contemporaneous with the accident caused by other circumstances.

C. Products Liability:

There are multiple tests for a products liability case. For example the most claimant friendly is the consumer expectations test. It is described in Restatement (Second) of Torts, Section 402A as when the product left the seller's hands in an unreasonable dangerous condition in comparison to its reasonably foreseeable use. Put another way, it failed to meet the reasonable expectations of the consumer.

There are alternative theories for a defect in manufacture where the product was not made in accordance with the manufacturer's specifications, risk benefit test for design defect or failure to warn under Restatement (Second) of Torts 402B.

The facts raise a potential products liability issue-a broken wheel on the passenger cart. How, when and why this took place should be considered by the risk professional in the context of their investigation.

D. Worker's Compensation:

Worker's compensation statutes provide for benefits without regard to fault. The system of compensation varies from state to state. Generally, does the accident arise out of and in the course of his employment. In this situation, is the claimant returning to his work activities through his travelling. If he is, potentially he may be able to receive worker's compensation benefits for returning after a personal mission is accomplished. Ray Bell Construction v. King, 281 Ga. 853 (2007). Some indices to look for: wearing

company clothing, travelling with company equipment, use of company cell phone or engaged in business related communication at the time of the accident. Worker's compensation typically gives rise to subrogation exposure.

E. Indemnity:

Agreements often contain risk of loss provisions. Indemnity is a means of transferring the risk of loss from one party to another. These provisions, generally interpreted by state law, may cause the risk transfer without fault. The California Supreme Court started a trend which spread eastward in Crawford v. Weathershield (2008) 44 Cal 4th 541. In that decision, the Court upheld indemnification language which required one entity to fully pay for the defense of another even when it was not at fault itself. For an airport likely to receive a claim for a serious injury, the presence of signed agreements with these terms from vendors such as floor maintenance companies, security companies and a passenger transportation provider can transfer the risk of loss dramatically.

F. Subrogation:

Subrogation is a legal principle which describes the right of another. Typically, a right of subrogation may arise by operation of law, by virtue of a contract such as insurance, or by statute. It is based on the principles of unjust enrichment. For example, the worker's compensation insurer who pays medical and disability benefits by law is also entitled, in most jurisdictions, to pursue recovery from third parties who may have caused the industrial injury to begin with.

It traces its history to the English common law which focused on equitable remedies to ensure that third parties were held accountable for a loss. Mason v. Sainsbury 3 Dougl KB 61 (1782). Overtime, enactments in the legislatures confirmed statutory authority for insurers in a variety of situations where payment was required by law to seek recovery.

In this situation, the claimant is injured. There may be rights of subrogation that can arise by statute, law or contract. This implies, as outlined below, a derivative need to ensure the preservation of evidence.

G. Preservation of Evidence:

Both Federal and most state laws require the preservation of evidence following an accident. Steps in preserving evidence include photo-documentation, video, taking custody of and storage of instrumentalities and things which have a relationship to an accident. One famous suit involved a very, very tragic accident-Apollo 1. After a January 27, 1967 fire which killed astronauts Gus Grissom, Roger B. Chaffee and Edward H. White, Texas attorney Ronald Christ subpoenaed the Apollo 1 capsule and successfully obtained a settlement for certain surviving families. The power of the law to fashion a remedy in the most tragic of events depends on the preservation of evidence.

So, on this fact pattern, you don't throw out the wheel. The passenger cart and wheel are kept in a safe place intact and unaltered until all interested parties have had an opportunity to inspect and document those conditions. Certain items may also have to be retained for Trial. That may be at the expense of others or shared as the case may be.

IV. The Investigation:

A. Emergency Medical Response:

Ensure that emergency medical personnel have access to and an exit from the Scene. Both Federal and state standards will require minimum ingress and egress for emergency responders. This is probably established by design; however, the risk professional should periodically audit the emergency procedures and access annually to ensure compliance.

B. Evidence:

As noted in the consideration of evidence by jurors, the witnesses and exhibits are key to the recordation of what took place. The most persuasive evidence, as outlined in the jury instructions, is closest in time to the accident. For photographs, take them immediately following the accident. For statements, identify the witnesses, get confirmed identities and contact information. Complete as many statements as possible at the scene. Ensure that the passenger cart, wheel, shoes of the claimant or torn clothing (if any) are kept and preserved. Manage the scene to ensure that the recordation is accurate. This may mean routing passengers around the scene.

By and large, accidents which occur due to dangerous conditions should be documented and fixed so as to ensure against repeat accidents. Many states exclude evidence of subsequent remedial measures to prove fault or negligence. Record the information such as witness statements, evidence logs and photo-documentation on forms which say "Attorney-Client Privilege" or a phrase in your jurisdiction which attempts to convey and confirm that privilege attaches to your investigation. The key result is to leave the scene with an early assessment of potential exposure and with the information that you and your airport need.

C. Protocols in Place:

Do not undertake an investigation by happenstance. Have a plan. Start with counsel for the airport. What is the procedure that counsel wants followed to ensure privilege, evidence preservation and risk management? Develop, follow and annually review procedures to ensure accuracy and legal compliance.

D. Prepare to Settle by Preparing for Suit:

With lengthier statutes of limitation, in some jurisdictions up to 6 years, the

ability to have the evidence marshaled can make all the difference between a blind claim without anyone except the claimant and having full documentation to attack unsubstantiated allegations of fact and/or law.

V. Focus on Assessment:

A claim professional needs to approach the situation from the perspective of a multi-disciplinary professional. Keeping in mind all the legal principles outlined above creates a frame of reference for collecting and preserving essential evidence.

A. Contracts:

Who did the airport have contracts with? Certain contracts, including those which are to last more than one year, are required by most states to be in writing. Do you have signed contracts with the potentially responsible parties? Do those contracts require that the airport be made an additional insured? Ensuring that there are viable, signed contracts should not be discovered after an accident, but regularly reviewed and confirmed as part of the daily business of the airport.

B. Additional Insured:

Assuming the airport was required to be an additional insured, was the airport actually endorsed onto the policy? If the policy was renewed, did that continue? The management of additional insured status is a regularly reviewed and confirmed part of the day to day business of the airport. A certificate is never, ever, enough.

C. Notices:

Many policies and contracts have notice provisions. Often, there is an internal clock. The best policy is to tender early and tender often. By indemnity contract, always tender to your vendor. By the additional insured endorsement, always tender to the carrier and the broker. It is better to later say their protection was not needed than for them to say that your delay deprived your airport of the protection it bargained for.

D. Records:

Ensure that the records you keep are backed up. Electronic storage is acceptable often reduces cost. Keeping these records stored safely, marked as privileged where appropriate and identifiable by claimant and date ensures ready retrieval.

E. Details:

Don't leave details to others or chance. Find out where the inspection records are

for the walkway. Follow up on the maintenance of the passenger cart. Is it leased or owned? Who had the duty to maintain it? Is the manufacturer of the cart on notice? Research whether there are design or other documents which explain the condition of the accident scene.

F. Statutes of Limitation:

Learn what the applicable statutes of limitation are. Are there Government Code requirements that need to be followed to perfect a claim. Know when you need to file suit to perfect contractual rights of indemnification or benefits under insurance policies. Quite often, these statutes of limitation can vary with the personal injury claim.

G. Evidence Preservation:

There are two sides to evidence preservation. First, it protects and preserves legal rights by keeping key information and evidence available for use in litigation. Second, it prevents adverse inferences about evidence that can be levied by law for failing to keep evidence reasonably calculated to bear upon a suit or arbitration arising from an accident. In short, evidence preservation is the ounce of prevention on both fronts.

H. Social Media:

While most states will bar you from “friending a claimant on Facebook,” access social media is the key to very revealing information. This public access information can be recorded in a screen shot or other means as internet sites often change. Thus, the claimant’s Facebook, Linked In or other social media presences can lead to substantial information which can either bear directly on the accident itself or other circumstances.

VI. Evaluating and Managing Risk:

A. Fault:

Whose fault is involved is often not apparent from an initial review. After the initial information laden phase is complete, it may be wise to put the file down for a couple of days and return anew to look and see where the events led to this accident. Quite often, a timeline or similar analysis can breakdown the events and point not only to how it occurred, but also on how to prevent it from happening again.

B. Acceptance of Risk of Loss:

It is best to ensure that the risk of loss is accepted-and stays that way. Follow up periodically that the claim is handled appropriately and closed efficiently.

C. Tender Contractual Defense:

If the risk of loss has not been accepted, never tire in asking and following up as

to why. Often, it is the persistence in follow up that pays off. Remember, this is breach of contract and you have legal rights to enforce, sometimes with prevailing party attorney's fees clauses in your favor. Make sure the indemnitee is reminded often.

D. General Liability Tender:

If the liability is not transferred successfully by indemnity or additional insured protection, do not deprive yourself of your own coverage. Quite often, your insurer may be able to pick up where you left off on tendering additional insured protection and indemnification as they have a similar interest to do so.

E. Damages:

Consider who will bear the damages. For someone in their sixties or older, Medicare is likely to be involved in paying for medical expenses and have statutory rights to reimbursement. Further, settlements reached may require a Medicare Set Aside by law. Ensure that liens are considered and potential subrogated interests are resolved before reaching a full and final settlement.

F. Firm, Fair and Final:

Sometimes, despite the best of intentions and protections, the decision to resolve try a case will be yours. Develop a style of negotiation and stick to it. Consistency is paramount so that claimants and their attorneys know this is business. You will not overpay, but will be firm, fair and final. Keeping your word and dealing directly will create a record of doing business successfully and closing files efficiently.

While the objective is to get matters resolved without the necessity of retaining counsel, giving counsel a package of information in a useable form can be of great assistance to them and to the airport.

The file should be organized with the information accessible for management and legal counsel. It should include: (1) Summary; (2) Photographs or Video; (3) Witness Statements; (4) Information on the injured claimant; (5) Social media investigation and updates; (6) Information on prior, similar accidents (if any); (7) Identification of potentially responsible parties, their contracts and related materials; (8) Preliminary recommendation for course of action and additional tasks to be performed to complete the investigation (if any); (9) Recourse available through indemnity, additional insured endorsements, separate insurance and contact information to facilitate same. Finally, all file materials, forms and other evidence should be marked under state law to protect privilege in anticipation of litigation.

VII. When Do You Need Counsel:

Counsel are best utilized under the following circumstances: (A) Where the pre-

suit claim is large, is sensitive to the airport operation and its management; (B) Where there is publicity which may affect the outcome of litigation and require early management; (C) Where there are efforts to formally mediate before suit to ensure that all potential exposures are considered, dealt with and closed; (D) Where litigation is deemed inevitable due to claimant counsel or other circumstances to ensure protection to employees and early management for discovery and investigation.

VIII. Conclusion

While seeing is believing-you have to believe what you see. In the world of risk professionals, the opportunities exist to make a decisive difference in the outcomes for their clients. Following measures like these can have a positive impact on client outcomes and add value for the risk management profession.