

MEDICAL DEFENSE AND HEALTH LAW

AUGUST 2019

IN THIS ISSUE

In this article, Constance Endelicato explores timely issues involving intentional tort claims arising from sexual abuse during medical examinations.

One Bad Apple: Navigating through Sexual Battery and Other Intentional Torts

ABOUT THE AUTHOR



Constance A. Endelicato is an accomplished trial lawyer with over 30 years of litigation experience in defending professional liability claims. She defends physicians, hospitals, and skilled nursing facilities, as well as legal and accounting professionals, among other service providers. She also defends physicians in Medical Board of California licensure matters and hospital and long-term care employers in wrongful termination and discrimination actions. She is experienced in handling class actions, mass tort litigation, appellate and federal matters. She is admitted to practice in the United States District Court, Central, Northern, and Southern Districts of California. She is an active member of the IADC Medical Defense and Health Law Committee and acts as Vice Chair of Newsletters. She can be reached at cendelicato@wshblaw.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:



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Introduction

Intentional tort claims are flooding our news outlets with tales of horrific instances of sexual abuse during medical exams of athletes to a surgeon dubbed as “Dr. Death” whose intentional acts have taken lives and left many permanently injured. The question remains whether these tales impact the state of litigation involving lesser profile and alleged isolated acts of intentional torts.

The current trends demonstrate that what may appear to be a “garden variety” professional negligence case involving alleged unwanted sexual advances by a physician toward his patient, or the alleged unconsented surgical procedure, are now spiraling into complex actions riddled with licensing and accreditation issues involving Medical Boards and criminal investigation, all of which can escalate risk exposure and result in a devastating impact on the insureds’ practice. While there are many instances of credible claims, there are also instances of false claims. This article will address how one “bad” claim can spiral into the professional, as well as personal, detriment of the provider. Early analysis of the credibility of the claim, determination of coverage, damage control strategies, ethical obligations, as well as procedural issues, will be addressed to aid in navigating through this daunting process.

The Impact of High Profile Intentional Torts

Many lawsuits have evolved from high profile tortious acts. These acts fall within many different categories of civil litigation resulting in various theories of liability and causes of action, oftentimes escalating to criminal charges. These cases also have potential for resulting in complex litigation involving numerous parties facing exposure for the bad deeds of a single tortfeasor.

Due to the wide exposure afforded by social media, many are well familiar with the abuse suffered by the Michigan State University female athletes by the physician, Larry Nassar. Nassar is a former university faculty member convicted of sexually molesting female athletes on the U.S. gymnastics team. He was sentenced to 40 to 175 years in prison. The excruciatingly painful accounts of abuse by various young women suffered as a result of the unthinkable acts of their “team physician” they trusted, leaves a permanent imprint in our memory.

As we learned, Nassar did not limit his abuse to the gymnastics team and the number of victims is countless. In the defense of the university, their representative perhaps made a grave error by asserting various defenses including assertions that abuse victims are “probably getting paid to manipulate other students”, or that the victims were “enjoying” the media attention. Not surprisingly, the President of Michigan State University quickly resigned and the interim President was subsequently ousted. Allegations of a cover-up had surfaced,

which suggested an attempt by the University to conceal lawsuits filed against the University trustees.

In the aftermath, Michigan State University vowed to revise its student sexual misconduct policy and procedures to include in-person hearings where students involved in sexual misconduct investigations have the opportunity to make inquiry, interview witnesses, and speak their voice. The Board of Trustees directed the university to re-establish a fund to support counseling and mental health services of the survivors of Larry Nassar. The university made a \$500,000,000 settlement payment to the survivor fund. The university planned to develop a comprehensive program on law enforcement investigations into relationship violence and sexual assault on a trauma-informed and victim-centered basis.

As could be expected, a flood of lawsuits for damages, sounding in the hundreds, were filed. The university initiated its own litigation against its insurance carriers, including its largest carrier, United Educators, for failing to honor their policies. The university also no longer carries direct liability insurance covering sexual misconduct claims and instead, it established its own captive insurance company.

Another high profile story of gross intentional acts, involves a neurosurgeon whose actions were so heinous that he was dubbed "Dr. Death". Christopher Daniel Duntsch, a neurosurgeon practicing in the

state of Texas, infamously committed multiple acts of gross malpractice that were so reckless, it appears as though Dr. Death was operating in a deliberate manner to cause harm to his patients. His patients were either maimed for life or did not survive the surgeries. He is reported to have operated on 38 patients in Dallas alone, leaving 31 paralyzed or seriously injured, and two of them dead. His patients routinely suffered massive blood loss as a result of his tendency to sever the vertebral artery during surgery. He earned the reference, "Madman with a Scalpel" by his colleagues. He made boastful declarations to convince his patients to undergo surgery by claiming that everyone doing spine surgery was incompetent and that he was the only minimally invasive surgeon in the state.

Dr. Duntsch had been indicted on various counts of aggravated assault with a deadly weapon before the extent of his actions were finally unveiled and he was eventually arrested and sentenced to life in prison. His story has been memorialized in a popular Podcast which also investigates whether the medical system failed to protect the patients. Issues of negligent hiring, lack of Quality Assurance, and failure to respond and investigate reports of Duntsch's actions are addressed.

Finally, in a more recent horrifying event, a comatose woman was discovered to have been raped and impregnated at an Arizona long-term care facility. The matter is still under investigation. In the interim, and in response to the incident, the facility initiated

a policy that prohibits males from entering a female patient's room without a female chaperone.

Of course these are extreme examples that are widely publicized but claims of sexual abuse and intentional acts to cause harm exist and as risk managers, claims professionals, and litigators, we are faced with these types of allegations and claims on a frequent basis.

From a litigation standpoint, the intrigue of these types of 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 the 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.

Of course, the fear of publicity and the resulting damage, creates an urgency in resolution of these claims in the face of a PR nightmare. The victims certainly elicit great empathy which also impacts the value of the

exposure. The cases are nearly impossible to defend. In the face of these issues, it is important to determine a plan of action for resolution and correction.

Claims and Litigation Considerations

When faced with litigation involving sexual abuse or other extreme intentional torts, one must consider the facts as a whole to determine the circumstances of the incident. First, it is important to determine whether the perpetrator is an employee or independent contractor. This will play an important role in determining whether there exists any coverage issues. Coverage counsel should be consulted to determine whether a viable reservation of rights exists. In some states, the standard of "curse and scope" may be an effective argument to an insured's liability. However, in other states, this standard is regarded very loosely and often the argument will fail such as in the case of alleged abusive behavior toward an elderly patient. The argument in this scenario is that although the abusive behavior is not the appropriate manner in which to provide care, the tortious conduct indeed occurred while the employee was acting in his capacity as a caregiver. Further, many opponents will bring causes of action for negligent hiring, negligent training and supervision, as well as causes of action for respondeat superior, vicarious liability and agency theory. Thus, such additional defendant may not escape the lengthy and costly litigation process regardless of the employment status of the tortfeasor.

Once coverage has been established, one must investigate whether the activity was consented to by the victim or otherwise initiated by the victim and explore whether there are any facts favorable to the defense. An evaluation of the parties must be considered to determine the credibility of each. It will be important to determine whether the plaintiff will be credible and whether he or she elicit sympathy. One must also consider whether the venue is one that will be favorable or a danger to the defense of the case. Some venues may be more "plaintiff-oriented" and certainly may award runaway verdicts. If there is an arbitration contract, one must consider whether enforcing the agreement will provide a better and less costly result versus a jury trial.

Early mediation is the best remedy in the face of damaging evidence. One must also attempt to curb the discovery process to keep other damaging evidence out of the conversation. Oftentimes, we may find that the perpetrator had a negative background or may have left employment on hostile terms. The selection of a mediator for settlement purposes also will be essential to ensure that the defense has a neutral person who will be strong enough to convince the side with client control issues. Certainly, one who will be neutral and less offended by the deed or one who is not known to be plaintiff-oriented will always be a better match for these types of cases.

In addition to consideration of retaining coverage counsel, many of these cases result

in need for referral to counsel specializing in administrative proceedings such as a medical board hearing in the case of tortfeasor healthcare providers, as well as criminal counsel. Prior to responding to written discovery or giving deposition testimony, engaging criminal counsel can be essential to prevent offering self-incriminating evidence or testimony. Additionally, moving for a stay on proceedings will also be crucial in the event criminal investigation is underway.

Analysis of Liability Exposure

Once you are faced with this damning fact pattern, consideration of legal strategy to resolve the case to avoid discovery and prevent the tortfeasor from rendering self-incriminating testimony is vital. 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. As aforementioned, 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 must be taken 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 of its stores for a

period of time to initiate anti-discrimination, anti-harassment training. The incident was quickly forgotten due to the swift and very public corrective action taken. As noted above, Michigan State University has employed numerous measures in an effort to re-establish its reputation.

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 the case of sexual assault, the victim may be unlawfully touched and humiliated with no physical harm but nevertheless, the impact of the conduct can result in an award or verdict well 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.

Risk Management Considerations

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 consequences, such employee would work to his or her potential. However, this 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

evidence, termination and even criminal consequences.

In attempt to prevent offending activity, careful screening during time of hire is essential. A recitation of references does no good unless one proactively contacts the references. Use of Web services to run background checks is also useful. Once hired, training as to a no tolerance policy is a must.

Orientation, along with ongoing in-service training on the topics of ethics, anti-harassment and anti-discrimination is necessary. Education as to civil and criminal punishment may also lead to a decrease in untoward behavior. If employees are aware that surveillance cameras exist throughout the common areas, it is assumed that negligent or intentional behavior will be curtailed.

Once litigation is in place and the allegations are leaked, Risk Management must engage in tactics to mitigate social media attack. Quick reaction, acknowledgment of responsibility and no tolerance as well as the plan for corrective action, are the essential ways to deflect the negative press attached to shocking ill behavior caught on tape.

With the current trend in sexual assault matters, which is now providing victims with a much deserved voice, litigation will be on the rise. Litigation involving intentional torts 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 for sexual assault and other intentional acts will continue to escalate.

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