

Early Investigation & Preservation of Evidence in Personal Injury Claims

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When adjusters are put on notice of a potential lawsuit, either by an insured or the potential claimant, there are several loss control measures that can be taken at an early stage and in contemplation of litigation (thus arguably preserving the privileged nature of any such efforts where appropriate).

Different cases call for different efforts in early data collection. It will depend on the subject-matter of the loss and the potential exposure of the anticipated claim. And, of course, there is no one size fits all approach.

There are, however, certain efforts that are time sensitive and/or are more compelling if obtained as close in time to the incident as possible, as discussed below.

Video Footage

I will not preach to the choir about the importance of making an early request for CCTV, dash cam or traffic camera footage from the appropriate parties at the earliest possible opportunity, including the insured, the potential claimant and the relevant municipality as appropriate.

Cases with significant exposure, however, may warrant thinking further outside of the box. Consider whether requests should be made for any footage arising from cameras from nearby businesses, bank machines, traffic cameras (even if not a motor vehicle accident) and/or following vehicles, to name but a few.

Specifically, with respect to occupiers' liability claims, we often rely on the insured's system of inspection, maintenance and repair in its defence of an action. Take for example a case where a supermarket is the insured. While we often receive the footage of the incident itself, what is not so often captured is footage showing the insured's system

of maintenance and inspection in operation and being followed by the insured and/or its employees at the material time.

Individuals retain only 10% of the information they read, but they will retain 85% of the information they see. If there is footage showing a system of maintenance in full operation on the date of the incident, this will be all the more compelling than anything else that could be put before the trier of fact.

Witness Statements

Statements obtained as close in time to the incident are intuitively more compelling than those obtained months or even years later, where it may be said that memories have faded and reliability is called into question.

Consider obtaining statements from all involved individuals that are signed, dated and accompanied with updated contact information. Should there be any door knock investigations and/or interviews with prior employers and co-workers? How about the investigating police officer, independent witness, passenger, family member or friend?

Was the press on scene? Think about reaching out not only to preserve any video or photographic evidence that the reporter may have obtained, but also to consider the value of obtaining a statement from the reporter and any of his/her team as witnesses to the aftermath of the incident.

Again, my message is the same. Widen the net where it is appropriate to do so and think of those individuals you would want testifying on behalf of your insured at trial and what facts you would want them to testify to as a defence witness. These facts may not solely relate to the incident itself, but can address other issues, such as training and supervision, for example.

On an aside, we oftentimes forget to pick up the telephone to have a discussion with potential witnesses and simply rely on e-mail communications where salient facts that should be included in the statement can get lost or misstated in translation. Before you proceed with obtaining a statement, and once you have considered what points should be addressed in that statement, I suggest you first pick up the telephone to have a discussion with the necessary individual.

Social Media Searches

Social media can be friend and foe in litigation, and can often significantly undermine the evidence of a litigant. You will want to make early efforts to capture and preserve any such evidence once put on notice of a potential claim, and to make searches not only of the claimant, but known family and friends.

Consider also making any necessary recommendations to your insured regarding privacy settings for social media pages.

Do this periodically to ensure that any available data is captured and preserved on an ongoing basis. Oftentimes, the most crucial information is obtained early on where claimants are not as alive to the potential for such searches and where privacy settings have not been altered.

Conclusion

The above noted is far short of an exhaustive list with respect to early loss control measures and investigations that can and often should be taken when put on notice of a potential claim.

We at Rogers Partners have lists relevant to any type of civil litigation and would be most pleased to assist in helping guide or providing assistance to you with respect to determining the data collection or preservation efforts you should be taking in your particular case. Please reach out to me or any of my colleagues at any time and we would be happy to have a conversation.