

# DEFENDANT

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# Investigation of the Premises Liability Claim and the Potential Problem of Spoliation Sanctions



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A premises liability claim can arise from many different factual scenarios: trip and fall, assault, robbery, motor-vehicle accident, and failure to maintain security to name a few. Each fact pattern requires its own specialized investigation that will lead to the collection of valuable evidence. This article will provide an overview of what you should generally expect from a premises liability investigation

By the time a defendant receives a claim letter from plaintiff's counsel, you are already late. Proper, accurate assessment of incidents, followed by internal reports and aggressive investigation, is the best way to protect your client's interests. As the cost of static surveillance continues to drop and the hardware becomes smaller and smaller, it is easier to accept as a first step. Once video surveillance is established, there are two paths: monitoring and storage. A person or company can be hired to monitor the video looking for incidents or it can be cataloged and stored against future claims.

While video surveillance may be the best defense to a premises liability claim, the failure to preserve such evidence can often turn into a sword for the benefit of the plaintiff. The issue of spoliation of evidence will be addressed later in this article.

Once an investigation is commenced, the first piece of evidence that we look for is video. Next, the location of loss is examined, photographed, and measured. Pertinent measurements are checked against local building codes. Lighting conditions are noted and checked at the time of loss. Certified weather reports are obtained. Contracts with any third-party entities are requested. Work orders (internal and external) are requested for any notice defense or subrogation. Police reports, if applicable, are obtained. Surrounding properties and owners are canvassed for pertinent information and additional surveillance.

The claimant's physical/medical history is examined. The driving record is obtained for possible previous accidents and to try to find activities that may lead to injuries (motorcycles, jet skis, etc.) DMV records may also reveal solid leads for future surveillance of the claimant. In addition, DMV records may contain adverse information on the claimant for use as impeachment evidence down the road. The DMV search can be augmented with a criminal background check, as well as a complete prior claim check.

Increasingly, information found in a claimant's on-line presence contradicts their Notice of Claim and Bill of Particulars. Often, claimants are coached to scrub or privatize their accounts. A solid effort by a trained Social Profiling team can pull information from the claimant's ancillary contacts that belie the nature and extent of the claimed injuries.

We have found that results on defending premises liability cases are substantially improved when investigation is conducted shortly after an incident occurs. One potential pitfall for defendants in today's world, however, involves video surveillance. Many retail establishments and commercial properties have active video surveillance systems recording activity in public spaces 24-hours a day, 7-days a week. Even some residential homes have video surveillance through devices such as Nest and other home surveillance systems. The pitfall, as mentioned above, is what happens when the video surveillance is not preserved, as most systems automatically overwrite themselves after a short period of time.

The radiographic or X ray images of teeth with a history of dental disease differ from images of teeth after traumatic injury. X rays of teeth having dental

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disease show decay (known in dentistry as “caries”), loss of supporting bone from periodontal disease, or generalized bone loss from infection. Decay or bone loss is seen as dark gray or black areas where the normal dense structure has been lost. Normal healthy tooth structure or bone is white or light gray. X rays of post traumatic tooth injury show dark vertical or horizontal lines through the crown or root of the tooth. If teeth are avulsed, empty sockets would be seen. In a setting of preexisting disease, examination of the plaintiff’s dental records, including X rays, should reveal notes regarding previous treatment or recommendation of treatment for severe decay, periodontal disease, bone infections related to pulpal disease, osteomyelitis, or osteo necrosis of the jaw. If the plaintiff has been seen by a periodontist, expect potential reasons for the visits to include treatment of periodontal disease or other oral inflammation which is not traumatic in origin. The plaintiff may also see a periodontist or other dentist for dental implants, discussed below, which may or may not relate to a traumatic event. A plaintiff’s visit to an endodontist may reflect oral or facial pain, plausibly traumatic or non-traumatic in origin. One procedure by an endodontist is root canal, which removes tooth nerve and pulp that is irritated, inflamed or infected from trauma or disease.

### Standard for the Imposition of Spoliation Sanctions

According to the Court of Appeals, “[a] party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense.”<sup>1</sup>

### Obligation to Preserve the Evidence

When does one have an “obligation to preserve” evidence? Courts often look to whether litigation was pending or whether a party had notice of a specific claim at the time evidence was destroyed. Absent pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices.<sup>2</sup>

Once a claimant or an attorney for a claimant places

a defendant on notice to preserve video evidence, then that video must be preserved. If, however, the letter requesting preservation was sent after the video had already been deleted or overwritten, then spoliation sanctions should not be imposed upon the defendant. Although this can be used as a general guideline, cases have imposed spoliation sanctions on defendants where letters to preserve were not sent pre-suit and the video was overwritten.

In *SM v Plainedge Union Free School Dist.*<sup>3</sup>, the Second Department affirmed the imposition of a negative inference charge on the defendant. In that case, the claim against the defendant was based on negligent supervision of an infant during school recess. Given the nature of the accident, an incident report was completed by the school nurse, notice was given to the school’s insurance company, and a report was made directly to the central office. In addition immediately following the accident, the school principal reviewed surveillance footage to determine the cause of the accident.

The defendant only preserved 24 seconds of surveillance footage from the day of the accident. During the litigation, the plaintiffs demanded “the entire footage of the recess period leading up to the time of the accident. In response, the defendant stated that it had saved only that portion of the video which depicted the actual accident and claimed that because it had no prior notice of the need to preserve any additional footage. In keeping with the defendant’s usual custom and practice, the remaining footage was automatically erased 30 days after the accident.

The Second Department, in affirming the Supreme Court’s order of a negative inference charge, held that the plaintiffs demonstrated that the defendant had an obligation to preserve surveillance footage of the moments leading up to the infant plaintiff’s accident at the time of its destruction, but negligently failed to do so. The court continued and held that the defendant was clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation.

Sometimes, the nature of the plaintiff’s injury, coupled with the defendant’s immediate investigation into the cause of the accident, should alert the defendant to the possibility of litigation and the

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- <sup>49</sup> See *Wilmot v. State*, 32 NY2d at 168; *Mayer Co. v. State*, 18 NY2d at 554.
- <sup>50</sup> *Dombrowski v. Moore*, 299 AD2d 949, 951, 752 NYS2d 183 (4th Dept 2002).
- <sup>51</sup> See *McLaurin v. Ryder Truck Rental*, 123 AD2d 671, 673, 507 NYS2d 41 (2d Dept 1986); *Miah v. Private One of New York LLC*, 23 Misc3d 1133(A), 2009 WL 1492725 at \*6 (Sup Ct, Kings Cty 2009).
- <sup>52</sup> See *Bell v. Shopwell, Inc.*, 119 AD2d 715, 716, 501 NYS2d 129 (2d Dept 1986); *Thompson v. Port Authority*, 284 AD2d 232, 233, 728 NYS2d 15 (1st Dept 2001); *Miah*, 2009 WL 1492725 at \*6.
- <sup>53</sup> *Dombrowski v. Moore*, 299 AD2d 949 at 951; *Fafard v. Ajamian*, 60 AD2d 853, 400 NYS2d 856 (2d Dept 1978).
- <sup>54</sup> Citing *Lyons v. Erie Ry. Co.*, 57 NY 489 (1874), and *Goldman v. State*, 28 AD2d 782, 280 NYS2d 879 (3d Dept 1967).
- <sup>55</sup> *Garber v. Lynn*, 79 A.D.3d 401, 406, 913 N.Y.S.2d 175 (1st Dept 2010) (in dissent).
- <sup>56</sup> *Garber v. Lynn*, 79 A.D.3d at 404.
- <sup>57</sup> Citing *Cornell v. TV. Development Corp.*, 17 NY2d 69, 268 NYS2d 29 (1966).
- <sup>58</sup> See *Wooten v. State*, 302 AD2d 70, 74, 753 NYS2d 266 (4th Dept 2002); *Cody v. State*, 59 Misc3d 302, 68 NYS3d 815 (Ct Clms 2017).
- <sup>59</sup> *Kabalan v. Hoghooghi*, 77 AD3d 1350, 1353, 908 NYS2d 299 (4th Dept 2010).

Any views and opinions expressed in this article are solely those of the authors. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

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need to preserve video. And, courts have held, as in SM, that preserving only the video of the accident itself may not satisfy the preservation requirement. Where the events leading up to the accident will

be an essential element of the litigation, then the defendant must preserve more than the happening of the accident itself.

These gray areas will continue to be sources of litigation, so it is better to err on the side of preserving more video than less.,

### Culpable State of Mind

In 2012, the Appellate Division, First Department held that “a culpable state of mind for purposes of a spoliation sanction includes ordinary negligence.”<sup>4</sup> Courts since 2012 have continued to restate this standard.

### Destroyed Evidence Must Be Relevant to a Party’s Claim or Defense

Where evidence was intentionally or willfully destroyed, its relevance is presumed.<sup>5</sup> Where evidence was negligently destroyed, however, the party seeking sanctions must establish that the destroyed evidence was relevant to the party's claim or defense.<sup>6</sup> Thus, where the absence of the video does not deprive the plaintiff of the ability to prove her case, spoliation sanctions will not be warranted.<sup>7</sup>

The most effective way to defend a premises liability case is to promptly investigate the claim and to preserve all relevant evidence in anticipation of litigation. With the evidence preserved, potential sanctions for spoliation of evidence will be avoided.

<sup>1</sup> *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015) (internal quotations omitted)

<sup>2</sup> *Dziadaszek v Legacy Stratford, LLC*, 177 A.D.3d 1276 (4th Dept 2019); *Sanders v 210 N. 12th St., LLC*, 171 A.D.3d 966 (2d Dept 2019)

<sup>3</sup> 162 A.D.3d 814 (2d Dept 2018)

<sup>4</sup> *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 A.D.3d 33 (1st Dept 2012)

<sup>5</sup> *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015)

<sup>6</sup> *Hirschberg v Winthrop-Univ. Hosp.*, 175 A.D.3d 556 (2d Dept 2019)

<sup>7</sup> *Sarris v Fairway Group Plainview, LLC*, 169 A.D.3d 734 (2d Dept 2019)