

LAWYER ALERT

Stopping Medical Injustice

How to Win Your Next Malpractice Case with Surveillance Video

A picture is worth a thousand words, right? Then, isn't it even more compelling to show a video of what happened? Seeing is believing. Plaintiff's lawyers know the power of surveillance video for car wrecks and slip and fall cases, but what about medical malpractice cases? It's time to re-think this.

Surveillance video has the power to make or break your next malpractice case. When the jurors see what happened to a patient, they become believers. The jurors can see that the doctor was distracted, paid scant attention to their patient and did not conduct even the most basic physical exam. This is powerful stuff. The course of your next malpractice trial could be changed by surveillance video. Not a believer yet? Let's examine the facts and you can be the judge.

The Magic of Surveillance Video

This medical malpractice/wrongful death case involved the death of acting Supreme Court Justice Michael Melkonian in the emergency department of Albany Medical Center in Albany, NY. Justice Michael Melkonian arrived at the emergency department with the complaint of the sudden onset of severe chest pain.

Following a cursory triage assessment, Justice Melkonian was placed in a private room and he was discovered 23 minutes later alone and unresponsive in cardiac arrest. The essence of the claims in the medical malpractice/wrongful death case was that Justice Melkonian should not have been left alone and unmonitored in a private room, as this deprived him of the opportunity for medical interventions (e.g., medication, defibrillation). The trial hinged on the care and treatment (or lack of treatment) that was provided by the nurses and physician over a period of 33 minutes.

After Justice Melkonian's death, surveillance video was obtained from the hospital. It was discovered that the hospital had 1,100 surveillance cameras on their campus, 22 surveillance cameras in the emergency department, 44 hours of video recording from the emergency department during Justice Melkonian's treatment and multiple views of Justice Melkonian throughout the emergency department. The surveillance cameras run 24/7. The surveillance video showed Justice Melkonian walking in the hallways, sitting and moving around in the waiting room and the 5-minute triage assessment. Using the surveillance video, plaintiff's counsel was able to visually recreate what happened to Justice Melkonian.

During the trial in Supreme Court, Albany County, namely, *Melkonian v. Albany Medical Center*, the surveillance video helped prove key points of the plaintiff's case. Surveillance video was a key factor in the 4 turning points of the trial.

Turning Point #1 Proving a Physical Exam was Not Conducted

Defendants' Claim: Defendants claimed the emergency medicine physician conducted a physical examination of the patient during the triage assessment, including an examination of his lungs and heart.

(continued on page 2)



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The Reality: The surveillance video showed a 5-minute triage assessment from different angles. During the triage assessment, the doctor and nurse failed to conduct even the most basic physical examination. Ouch!

During the trial, the surveillance video of the triage assessment was viewed by the jury and defendants' expert witnesses conceded that a physical examination was not conducted.

Q. You would agree that the ER doctor never laid a hand on Judge Melkonian?

A. Yes.

Q. And during the time before his cardiac arrest there was no aspirin given to Judge Melkonian?

A. Yes.

Q. No nitroglycerin?

A. Yes.

Q. No beta blocker?

A. Yes.

Q. No one listened to his heart?

A. Yes.

Q. And no one listened to his lungs?

A. Yes. [no physical exam was conducted]

During the direct examination, the plaintiff's expert witnesses relied upon the surveillance video to describe to the jury the inaccuracies in the testimony of the emergency medicine physician.

Q. And prior to your testimony you observed a surveillance video of the triage assessment; is that correct?

A. Yes.

Q. What observations, if any, did you make during that video?

A. The main observation was a discrepancy because the physical examination noted sound to the heart and the lungs which could only be attained by placing a stethoscope on the front listening to the heart or the back listening to the lungs. And the video surveillance clearly shows that the doctor never touched the patient with a stethoscope ever.



The Impact of Surveillance Video: The surveillance video contradicted the testimony of the emergency medicine physician that she conducted a physical examination of the patient's chest and back. The surveillance video also contradicted the medical records that revealed a normal chest and respiratory examination.

Turning Point #2 Proving that the Patient was in Acute Distress and Pain

Defendants' Claim: The hospital claimed that the patient was in no acute distress and appeared fine during his triage assessment.

The Reality: The surveillance video showed the patient was clutching his chest while walking in the hallways in the emergency department. While waiting in the registration area, the patient was hunched over, removed his sweater and wiped sweat from his forehead. The patient repeatedly pointed to his chest during the triage assessment.

Plaintiff's expert witnesses viewed the surveillance video before their trial testimony. The jury could appreciate that the plaintiff's experts had seen the surveillance evidence and were speaking authoritatively about what they had seen.

Q. You mentioned that there was a point in the surveillance video where Judge Melkonian was pointing to his chest. What is the significance, if any, of that?

A. It's certainly concerning that he's pointing right at ... one point right to the middle of his chest. He made that gesture there and it's clear that this isn't pain in his stomach or his back. He's putting his hand right on his chest.

Q. At various points in the surveillance video, the photos that we have before you, was there a portion of the

surveillance video in the middle part that showed Judge Melkonian?

A. Yes.

Q. Did you observe that portion of the surveillance video?

A. Yes.

Q. What, observations, if any, did you make, Doctor?

A. What I saw in the video was that he was walking around the ER, he was getting up from his seat, he was walking touching his chest many, many times. At least 10 times I saw him touch his chest. [Clutching the chest is a classic sign of cardiac distress known as the Levine's Sign]

The Impact of Surveillance Video: The surveillance video contradicted the defendants' claim that the patient appeared fine and in no acute distress.

Turning Point #3 Proving that the Patient's Privacy Rights were not Important to the Hospital

Defendants' Claim: The hospital claimed that they put the patient into a private room to protect his privacy rights.

The Reality: The surveillance video showed strangers were walking back and forth through the triage area during the triage assessment. Rather than putting up a curtain to protect the patient's privacy, the hospital staff appeared indifferent to his privacy.

During cross-examination, defendants' expert witnesses conceded that there was little concern for the patient's privacy rights during the triage assessment.

Q. In the surveillance video of the triage assessment, are you aware that the triage was done in an area where there were strangers walking back and forth in front of the triage area?

A. Yes, I did read that.

Q. And were you aware from the surveillance video that when Judge Melkonian was seated in the chair during triage, that his triage assessment

(continued on page 3)

(continued from page 2)

could be viewed by strangers who were walking back and forth in that area?

A. Yes.

Q. And if there was any concern for Judge Melkonian's privacy, would you agree with me that a private curtain could be moved over and placed to block the view of strangers?

A. I would assume that would be possible, yes.

Q. And would it be fair to say, based upon the surveillance video that you have not seen, that there was no concern for Judge Melkonian's privacy during the five-minute triage assessment?

A. I don't know -- I can't speak to the feelings of the providers at the time. I think they prioritize doing that initial assessment and ruling out the level -- you know, basically ESI 1 and 2 as a higher priority.

Q. How can you say whether there was any concern for Judge Melkonian's privacy during triage if you've never seen the surveillance video?

A. Because I'm not telepathic and I'm not in their head. I don't know what they were thinking and the judgment they kind of applied at that time. At some point your worry about confidentiality gets trumped by what is potentially life threatening. [Exactly! Patient privacy is not a concern when the patient has an emergency medical condition.]

The Impact of Surveillance Video: The surveillance video contradicted the defendants' claim that they were concerned for the patient's privacy rights.

Turning Point #4 Proving the Hospital's Expert Witnesses were Not Prepared

Defendants' Claim: Defendants' expert witnesses did not watch the surveillance video before their testimony at trial. During cross-examination, defendants' experts claimed it was unnecessary to view the surveillance video.

The Reality: By failing to view the surveillance video, the hospital's expert witnesses appeared unprepared.



Q. As part of your evaluation in this case, were you aware that there was surveillance video showing Judge Melkonian?

A. I read about them, yes.

Q. And are you aware that the surveillance video showed Judge Melkonian in parts of the emergency room?

A. Yes.

Q. Are you also aware that the surveillance video shows the triage assessment of Judge Melkonian?

A. Yes.

Q. Did you review any of the surveillance video?

A. No. [Say that again?]

Q. In evaluating this case wasn't it important to see the evaluation that was done of Judge Melkonian in triage?

A. No. [Really?]

Q. Wasn't it important for you to see how Judge Melkonian appeared at the time of the triage assessment? [Asking with a touch of sarcasm.]

A. Not based on any information or data I was able to find with all the reviews and all the different sort of vantage points. [Now, we're having fun.]

Q. You would agree with me that a picture is worth a thousand words, wouldn't you?

A. Not always. [Come again?]

Q. I'm sorry, what? [Just for emphasis.]

A. Not always. [Huh? Come again.]

Q. I'm sorry, I didn't hear that. [It should not be legal to have this much fun.]

A. Not always. [Long, silent pause to

let this sink in.]

Q. You did not see any of the surveillance video that shows Judge Melkonian in the waiting area just outside triage, correct?

A. No, I did not.

Q. In fact, you didn't see any of the surveillance video that shows Judge Melkonian walking the hallways of the emergency department on that day, true?

A. That's true.

Q. Is it your testimony before us today that all of that surveillance video is not useful to you in rendering an opinion before us in this courtroom?

A. I don't believe there's anything that would change my opinion.

Q. But you wouldn't be able to know that without first seeing the surveillance video, wouldn't you agree?

A. I can derive it from the number of people that did see it and what they reported back. And I'll accept the things that they noted on that video as being true.

The Impact of Surveillance Video: The surveillance video was a critical piece of evidence that was ignored by the hospital's expert witnesses. This made the defendants' experts appear unprepared.

How to Get the Hospital's Surveillance Video in 4 Simple Steps

There are 4 simple steps to preserving and retrieving the surveillance video from a hospital.

Step #1 Preserving the Surveillance Video

As soon as you are retained, you should IMMEDIATELY send a preservation letter to the hospital via overnight mail, return receipt requested. If you do not act quick, the hospital will claim that the surveillance video was overwritten and lost. Time is of the essence.

Your preservation letter should specify the precise locations in the hospital where the patient was treated as well as the date and time of the surveillance video.

(continued on page 4) 3

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The following items must be preserved for potential litigation:

- Any and all video and/or audio recordings of the emergency department visit of [insert name of patient], including the registration and/or waiting area and triage area for new patients, between 3:30 p.m. and 5:30 p.m. EDT on October 17, 2019;
- Any and all surveillance video/security footage of the hallways and staff work area outside of Triage Room 3 in the intake department of the emergency department of [insert name of patient] and the Staff Work Area outside of Triage Room 3 between 3:30 p.m. and 5:30 p.m. EDT on October 17, 2019;

The above items may be critically important for purposes of litigation and should be **IMMEDIATELY PRESERVED** and should not be discarded or destroyed. If any of the above evidence exists, and you fail to maintain same until the disposition of this claim, it will be assumed that you have intentionally destroyed and/or disposed of evidence.

You are not permitted to decide what evidence our client would like to review for this matter. Accordingly, failing to preserve this evidence will lead to an adverse inference against the hospital in this matter.

You might send a process server to hand-deliver the preservation letter on the risk management department of the hospital. The affidavit of service should identify the recipient by name and physical appearance as well as date and time, so there can be no question that the preservation letter was received.

Step #2 Discovering the Surveillance Video

After filing the lawsuit, serve a discovery demand for a schematic diagram showing the location of every surveillance camera within the interior and exterior of the hospital.

Next, serve a notice to conduct an inspection of the emergency department. Bring a hospital surveillance expert to the site



inspection. At the site inspection, verify the location of the surveillance cameras relative to the schematic diagram. Make sure the hospital's diagram is accurate and they are not hiding any surveillance cameras.

You may need to make a motion to compel the defendants to produce the surveillance video. Once you possess the surveillance video on a flash drive, you can trace the whereabouts of the patient throughout the hospital, including the triage assessment and registration.

Step #3 Discovering the Hospital's Internal Communications about the Surveillance Video

The hospital's risk management will have a video surveillance expert whose job is to preserve the surveillance video. After receiving your preservation letter, the surveillance expert will download the surveillance video to an external hard drive and send it to the risk management department. Most hospitals will also have outside vendors whose job is to maintain the surveillance camera system and ensure that the cameras are operational.

There will be internal email communication between the hospital's surveillance expert and risk management (make sure you demand the internal email communication). The email messages will help you establish that the hospital failed

to timely preserve the surveillance video or ignored your preservation letter. The hospital's internal emails can provide a basis for a motion for negligent spoliation of evidence (surveillance video).

Most hospitals retrieve surveillance video on an almost daily basis. Some surveillance cameras provide 180-degree and 360-degree panoramic views and cameras in the hospital's parking lot and exterior of the hospital can pan, tilt and zoom (known as a PTZ camera). PTZ cameras scan for different views and detect motion. Each camera should be identified by the hospital, e.g., "CCTV C20 Location" on the schematic diagram.

Step #4 Deposing the Hospital's Video Expert about the Surveillance Video

With the surveillance video, you will be ready to conduct meaningful depositions of the nurses and physicians. At the depositions, lock the nurses and doctors into a position about the treatment they rendered and then refute their claims using the surveillance video. This is where the fun begins!

Next, depose the hospital's video surveillance expert. You might ask the expert:

- How many cameras are on the campus? How many cameras are in the emergency department?

(continued on page 5)

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- What camera system do you use?
- Did you check on a laptop to determine whether the video is still available?
- Do you have a cloud-based system for archiving video?
- When did you look at the video?
- Does a request for video get logged?
- How long before the video is overwritten?
- How long is the video stored on the server?
- Is there a chain of custody when you give the external hard drive to risk management?
- Are the surveillance cameras in the emergency department on one server?
- Does the hospital have a policy for preserving surveillance video?
- Do the surveillance cameras record audio?
- What is the software for the surveillance video system?
- When was the last date and time that you had video from the surveillance cameras?

Bring your hospital security expert to the deposition to guide you through the deposition. By the end of the deposition, you might be able to establish that the hospital ignored your preservation letter and critical surveillance video was overwritten. This might give you the evidence you need for a motion for negligent spoliation of evidence.



If a *Picture* is Worth a Thousand Words, How Much More is *Video* Worth?

Surveillance video might be the most powerful evidence in your next malpractice case. You can prove critical elements of your case using the surveillance video. The surveillance video can play a vital role in your direct and cross examination of expert witnesses and your closing

argument. You may very well win or lose your malpractice case based upon the surveillance video.

Are you still not convinced? Let's give the final words to the plaintiff's counsel in the closing argument in **Melkonian v. Albany Medical Center**:

"A picture is worth a thousand words. And didn't we have pictures in this case? We had something far better than pictures. We had a video showing what happened to Judge Melkonian. We had a video showing him sort of hunched over, waiting in the lobby room."

"And then a video that shows the triage completely. And what does it show? That there's total strangers walking back and forth from where he is during triage. Were they concerned about privacy then? A picture is worth a thousand words."

Note of Gratitude: Thank you for our exceptional trial team for making the \$7,600,000 verdict in **Melkonian v. Albany Medical Center** a reality. William E. McCarthy, Esq., Danielle Ascani and Joe Naeem were indispensable to our success. Our summer associate, Joe Naeem, co-authored this article and I am grateful for his work.

FROM JOHN'S CASE BOOK

\$1.2 Million Recovered for Internal Bleeding Death

The preventable death of our client's 55-year-old wife and the mother of his three children resulted in a \$1.2 million recovery when her surgeons failed to timely diagnose and treat internal bleeding during her lumbar surgery in Dutchess County, New York.

A partial blockage of the external iliac vein, the main blood supply to the lower body, was detected by surgeons during her anterior lumbar fusion. Her surgeons could not detect a pulse in her left foot and the skin on her left leg appeared discolored; a symptom of internal bleeding.

As her surgery continued to the second stage of the posterior lumbar fusion, her doctors again observed discoloration of her left leg and an absence of a pulse in her left foot. Her surgeons ended the operation and sent her to recovery. While in recovery, she appeared pale and asked family members, "Am I dying?" Two-hours later, with her blood pressure dropping, she was

returned to surgery, but died from internal bleeding that led to hemorrhagic shock and DIC, a rare condition in which small blood clots develop throughout the bloodstream, blocking small blood vessels.

The death of a wife and mother could have been prevented had her surgeons:

1. Responded in a timely manner to the signs and symptoms of internal bleeding.
2. Ended the operation until the bleeding stopped.
3. Consulted with expert vascular surgeons.

"Failing to timely diagnose and treat internal bleeding during surgery led to our client's wife's death, a tragic death that was totally preventable had her doctors followed best medical practices," said John H. Fisher.

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The **BEST** Decision You Will Ever Make

Have you ever thought about joining a mastermind? Perhaps you've never found the right fit or it was too expensive or not convenient for your schedule.

And there's good reasons to avoid masterminds: some are too expensive, some have the same information shared at every mastermind and some have dishonest, unethical members. Any one of these would be reason enough not to join.

Our mastermind (www.MastermindExperience.com) is unique.

In 2015, we created a special mastermind to address these issues. How so?

UNIQUENESS #1: CONSTANT INFLUX OF NEW MEMBERS

Every mastermind is roughly a 50/50 mix of new and returning members. With new members at every mastermind, there are fresh, new ideas at every mastermind. You meet new members and form new relationships at every mastermind.

UNIQUENESS #2: NO ONGOING FEES

There are no recurring fees. You pay a registration fee one-time and that's it. There are no monthly fees and no continuing obligations. And if you're not completely sold on your experience, we refund your registration fee with no questions asked.

UNIQUENESS #3: VETO POWER OVER NEW MEMBERS

We have special criteria for new members. Our existing members have veto power over the admission of new members. If a new member competes with your law firm or you've had bad dealings with their law firm, you have the right to exclude them from our tribe. It's that simple.

If a new member is not honest, ethical and willing to share everything they know, they are not a good fit. We are careful to exclude those who do not meet our criteria for membership.

What do you get? Relationships with high-achieving lawyers from across the country who will provide you with customized solutions for the biggest challenges facing your law firm. Our workshops are not seminars—they are customized so that you get specific feedback from our tribe that will address the problems

Practice Limited to the Representation of Seriously or Catastrophically Injured Persons



(above) John goofing around by flexing some muscle.

and challenges that you face (we all have them). There is nothing like this.



The Mastermind Experience Comes to Our Nation's Capital on September 9th

Our next mastermind will be held in Washington, DC on Friday, September 9th. We will have a cocktail hour on the roof of the Watergate Hotel on Thursday, September 8th, a special night-time cruise of our nation's monuments on the Potomac River on Thursday evening, September 8th and a very special farewell dinner at Joe's Crab on Friday evening, September 9th. All costs are covered in the registration fee of \$999 for first time members.

Want to join the fun? Have questions? You can call John Fisher on his cell, 518-265-9131. And if you register before August 1st, you will receive a commemorative edition YETI cooler with our compliments.

[Register/Apply Now at www.MastermindExperience.com](http://www.MastermindExperience.com)

Want are you waiting for? You can register/apply at www.MastermindExperience.com.

We hope to see you in September!

www.MastermindExperience.com