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## ABOUT THE AUTHOR



Constance A. Endelicato is an accomplished trial lawyer with over 30 years of litigation experience in defending professional liability claims and is a member of American Board of Trial Advocates. She was recently honored with inclusion in the 2020 edition of the *Best Lawyers in America* for her work in litigation-healthcare. Ms. Endelicato was one of 30 professionals across the nation to be honored as a recipient of the *Business Insurance* and CLM Women to Watch Award. Additionally, Ms. Endelicato has been named by the *Los Angeles* and *San Francisco* legal newspapers, *The Daily Journal*, as one of the Top 100 Women Lawyers in California. She has been honored by *Los Angeles Business Journal* as one of the Top 50 Most Influential Women Lawyers. She has been recognized by *Los Angeles Magazine* as one of the Top Women Attorneys in Southern California. She also received *Lawyer Magazine's* Legal Award for Elder Abuse Litigation and Women in Law Award for Private Commercial Litigation. In addition to her awards and achievements in the legal field, Ms. Endelicato was recognized by *Los Angeles Business Journal's* 2019 Women's Council & Awards Banquet for her outstanding achievement in her philanthropy efforts.

Ms. Endelicato is the Immediate Past President and sits on the Board of Directors of the Southern California Association of Healthcare Risk Management and is the current Chair of the Education Development Task Force of the American Society of Healthcare Risk Management. She was nominated into membership of the exclusive International Association of Defense Counsel where she is an active member of the Medical Defense and Health Law Committee and has held the position of Vice Chair of the Webinars and is the current Vice Chair of Publications. She was also nominated into membership of Litigation Counsel of America. Ms. Endelicato has also acted as the Medical Defense Committee Vice Chair of Webinars for Claims and Litigation Management Alliance and is the current Co-Chair of the Medical/Healthcare Committee. Ms. Endelicato is a frequent panelist at national healthcare conferences and is a Certified Professional in Healthcare Risk Management. Over the past numerous years, she has received the designation of Super Lawyer in Southern California by *Los Angeles Magazine*, Super Lawyer in Orange County by *Orange Coast Magazine*, and Top Lawyer by *Pasadena Magazine*. She also holds an AV-Preeminent Rating awarded by Martindale-Hubbell.

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# THE SOURCE

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

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SCAHRM Immediate Past President

Intentional tort claims are flooding our media outlets with tales of horrific instances of sexual abuse during medical examinations 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 or her patient, or the alleged unconsented surgical procedure, are now spiraling into complex actions riddled with licensing and accreditation issues involving Medical Board 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 following 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 torfeasor.

Due to the wide exposure afforded by social media, many are well familiar with the abuse suffered by Michigan State University female athletes by physician, Larry Nassar. As is well-known, 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 that including assertions that abuse victims were "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, that it appears as though Duntsch 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 after his civil case had proceeded to trial. This is the first reported case stemming from medical negligence, that resulted in incarceration. His story has been memorialized in a popular Podcast which also investigates whether the medical system failed to protect the patients. It should be noted that the hospital was highly criticized for its failure to screen during the process of affording surgical privileges to Duntsch and for its failure to investigate numerous reports by staff of Duntsch's actions.

Finally, in a more recent horrifying event, a severely disabled woman was discovered to have been raped and impregnated at an Arizona skilled nursing facility. The 29-year-old had been residing in the facility since the age of three. Despite reports that she was "comatose", the young woman, although severely disabled, indeed experiences pain and discomfort and was responsive to her surroundings with facial grimacing or smile and non-verbal sounds. In fact, it was her distressful groans that led the nursing staff to discover that she was in labor with the baby's head already crowning.

Investigation has uncovered evidence suggesting that this young woman has been repeatedly sexually violated and may have suffered a prior miscarriage. Moreover, the infant has suffered at the hands of the perpetrator's acts and the healthcare providers' neglect. As the patient's weight quickly increased and her abdominal distention grew, the providers placed her on a restricted diet due to the mistaken belief that she simply gained weight. Further, none of her consulting physicians detected the pregnancy. The infant was deprived due to the lack of prenatal care and suffered severe hypoxia due to the prolonged labor. In response to the incident, the facility initiated a policy that prohibits males from entering a female patient's room without a female chaperone. Unfortunately, this new policy alone will not prevent this horrific event from happening again.

Of course, these are extreme examples that are widely publicized. Nevertheless, 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 fee rate. In addition to 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 sympathy which also impacts the value of the exposure. The cases are obviously 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 "course 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 will 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 medical board matters 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 again, to prevent the tortfeasor from rendering self-incriminating testimony. 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 is involved, speedy measures 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 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, yet nevertheless, the impact of the conduct can result in an award or verdict in six to seven figures. The victim and circumstance will also play a role in the size of the indemnity. The above scenario can yield an even greater end result if the victim is elderly, dependent, 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 surprisingly 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 also is useful. Once hired, training as to a "no tolerance" policy is a must. Anonymous hotline reporting proves to be helpful as many are hesitant to report suspicions and even actual incidents for fear of repercussions. 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 occurring at the hands of our healthcare providers.

#### Concluding Remarks

With the current trend in the increase in reports of 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, the powerful social media platform, 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. We must get to the root of the problem by identifying these "bad apples" in a much-needed effort to stop the intentional torts from occurring.

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