

# MASSACHUSETTS Lawyers Weekly

---

## Surveillance video takes center stage in premises liability

*PI attorneys, businesses alert to spoliation issues*

By: Pat Murphy July 23, 2021

For premises liability attorneys, the proliferation of surveillance cameras in the commercial setting has meant a corresponding focus on the duty to preserve video evidence that businesses ignore at their own peril.

Boston defense lawyer Kevin M. Hensley represents a large retailer that he says has cameras “everywhere” on its properties. According to Hensley, a key for businesses is to have in place — and abide by — a written policy establishing standard guidelines for the retention of video that may be relevant to a premises liability claim.



**“They say a picture is worth a thousand words. A video is worth 10,000 words. In many cases, if it captures the entire accident, that’s the only evidence that matters.”**



When there’s no “rhyme or reason” to what’s saved, Hensley says, it opens the door to a plaintiff having greater success in arguing that a store is trying to hide evidence.

“It obviously increases the potential for a spoliation claim if in one case you preserve 15 minutes of video and for the next one you preserve two hours,” he says.

---

Springfield personal injury attorney Lee Dawn Daniel sees an element of cat-and-mouse to litigation over spoliation of video evidence.

We use cookies on our website to give you the most relevant experience by remembering your preferences and repeat visits. By clicking “Accept”, you consent to the use of ALL the cookies.

[Cookie settings](#)

### Technological advances

Advances in video surveillance technology over the last 10 years has had a significant impact on business and property owners in the context of personal injury claims, according to Boston defense attorney Brendan J. Gaughan.

“The [new] systems are relatively cheap, so much so that a lot of premises owners install video surveillance cameras so that every foot of their space is being monitored 24/7,” he says. “We’re seeing a lot more evidence of video surveillance in the courtroom, and by the same token more spoliation issues arising from that.”

In order to get a handle on the issue of spoliation, Hensley says one first needs to understand the limitations of the technology employed by a particular client. While digital recording will be the norm for most clients, Hensley says he knows of a few businesses that still rely on outdated videotape systems.

But even digital recording systems have limitations that prevent the preservation of routinely captured video indefinitely.

“It’s not that somebody goes in and deletes something; it’s that there is only so much memory, so after a set amount of time the system will overwrite what was there before,” he says.

Hensley says he’s seen digital systems that overwrite video in as short a timeframe as seven days, with other systems overwriting up to every two months. That means, for example, when a slip and fall occurs on the property, the company has a set amount of time to preserve the relevant video in anticipation of potential litigation.

But in a recent case, Daniel says she met with skepticism a defendant’s claim that relevant surveillance video had been automatically overwritten.

“It didn’t make sense to me because it wasn’t that long ago,” Daniel says. “I would presume there would be digital copies kept indefinitely.”

Daniel points out that with the arrival of an ambulance to tend to an injured customer or a patron’s report of a fall at a service desk, a business typically will have immediate notice of a potential claim. That makes her question when businesses assert they haven’t kept records relevant to a potential claim of liability.

### Duty to preserve

Gaughan says while it is clear that a premises owner has a duty to preserve evidence relevant to an underlying claim, it is less clear when that duty arises. Courts across the country have identified a wide range of legal standards in order to make that determination, he says.

“In Massachusetts, the standard is pretty straightforward: The duty to preserve evidence arises whenever the threat of a lawsuit becomes sufficiently apparent such that a reasonable person in the spoliator’s position at the time of the spoliation would know the importance or potential importance of the evidence to the case,” Gaughan says.

Plaintiffs can waive claims of spoliation by their own lack of action, he says.

“I know judges in Massachusetts that have refused to give a spoliation instruction or find spoliation at all where the moving party has unreasonably delayed or failed to make a request to preserve the evidence in a timely manner,” Gaughan says.

In order to ensure that a store preserves video evidence, Daniel says she immediately sends a letter of representation on behalf of her client along with a “spoliation letter” outlining the store’s legal obligation to retain relevant surveillance video as well as other pertinent records.

According to Hensley, the duty to preserve surveillance video evidence is triggered only when the business becomes aware of an accident.

We use cookies on our website to give you the most relevant experience by remembering your preferences and repeat visits. By clicking “Accept”, you consent to the use of ALL the cookies.

[Cookie settings](#) ACCEPT

Hensley says a “good rule of thumb” is a written policy providing for preservation of video from one hour before to one hour after an accident. While he says he’s not aware of Massachusetts case law on the issue, precedent from other states supports the reasonableness of the two-hour window.

For slip and fall cases, Boston personal injury attorney Peter J. Ainsworth says he wants, at a minimum, video for the entire day of the accident from every camera that the business has.

“Even if it’s not precisely focused on the area where the accident occurred, you just never know what is going to be important as to who was where when,” Ainsworth says.

If it comes to light that his client has fallen in an area of the store where other falls have occurred, he wants videos of those incidents as well.

With regard to how long to keep a recording, Hensley says clients should preserve the evidence past the statute of limitations — three years after the accident — plus six months to account for claims that have been filed but not yet served within the statute of limitations.

#### Persuasive evidence

While surveillance video that captures an accident can be helpful, a number of variables can diminish its impact. According to Daniel, it is rare for footage to capture clearly all relevant aspects of an accident such as a slip and fall.

Hensley says that while camera placement and resolution are often key factors in how powerful a video may be as evidence, there are cases in which the camera is directly above the accident and shows exactly what happened, making the case for either the plaintiff or the defendant.

“They say a picture is worth a thousand words. A video is worth 10,000 words,” Hensley says. “In many cases, if it captures the entire accident, that’s the only evidence that matters.”

But Daniel says the surveillance video she’s seen tends only to corroborate a client’s testimony rather than tell the whole story.

“I’ve never seen that perfect video where I go, ‘Wow! I can see the [slippery substance] sitting on the floor for that period of time and then see my client with her foot in it,’” she says. “You just see bits and pieces.”

Meanwhile, surveillance video frequently proves to be “extraordinarily helpful” to the property owner, Hensley says, noting there can be a benefit even if it shows the owner was at fault.

“Most property owners want to know that, too, so they can settle the case without wasting a lot of money on litigation,” he says.

#### Powerful remedies

Under Massachusetts law, a party must show either a negligent or intentional destruction of evidence in order to establish a claim for spoliation. The remedies for spoliation depend on the degree of the defendant’s misconduct, Hensley notes.

“The standard that Massachusetts courts demand in proving spoliation really requires knowing action or failure to act before judges are willing to punish a party for failing to preserve evidence,” Gaughan says.

According to Daniel, courts also take a common-sense approach when determining a remedy, taking into account all the available evidence.

“The court is going to look at whether the [lost or destroyed recording] was likely to have proved or corroborated what somebody said,” Daniel says. “The sanctions can range from not allowing someone to present a defense or an

We use cookies on our website to give you the most relevant experience by remembering your preferences and repeat visits. By clicking “Accept”, you consent to the use of ALL the cookies.

[Cookie settings](#)

liability.

The most typical remedy for spoliation in Massachusetts is a jury instruction allowing jurors to draw an adverse inference from the unavailability of the video, he adds.

“In other words, you can assume there was something helpful to the other side on that video and that’s why the defendant destroyed it,” Hensley says. “That’s a pretty powerful instruction. It’s not as bad as a default, but it’s still a pretty drastic remedy, so spoliation is to be avoided at all costs.”

Issue: JULY 26 2021 ISSUE

YOU MIGHT ALSO LIKE

Court-appointed conservator granted immunity

⌚ August 2, 2021

Denial of pot shop application upheld by SJC

⌚ July 30, 2021



Expectation of privacy claimed in social media posts

⌚ July 29, 2021

Copyright © 2021 Massachusetts Lawyers Weekly  
40 Court Street, 5th Floor,  
Boston, MA 02108  
(617) 451-7300

/\* code for sifitag \*/

We use cookies on our website to give you the most relevant experience by remembering your preferences and repeat visits. By clicking "Accept", you consent to the use of ALL the cookies.

[Cookie settings](#)