

## Telehealth Risk Scenario : The Betrayal of Elizabeth<sup>i</sup>

Case Study: *Telehealth can create challenges around “informed consent.”*

*Question:*

*What might happen in the event a telemedicine or similar home health visit violates a patient's privacy. What consequences await when a young girl's tele visit goes viral?*

By: Dan Reynolds | October 12, 2020

### **PART ONE: CRACKS IN THE FOUNDATION**

Elizabeth Cunningham seemingly had it all. The daughter of two well-established professionals — her father was a personal injury attorney, her mother, also an attorney, had her own estate planning practice — she grew up in a house in Maryland horse country with lots of love and the financial security that can iron out at least some of life’s problems.



Tall, good-looking and talented, Elizabeth was moving through her junior year at the University of Pennsylvania in seemingly good order; check that, very good order, by all appearances.

Her pre-med grades were outstanding. Despite the heavy load of her course work, she'd even managed to place in the Penn Relays in the mile, in the spring of her sophomore season, in May of 2019.

But the winter of 2019/2020 brought challenges, challenges that festered below the surface, known only to her and a couple of close friends.

First came betrayal at the hands of her boyfriend, Tom, right around Thanksgiving. She saw a message pop up on his phone from Rebecca, a young woman she thought was their friend. As it turned out, Rebecca and Tom had been intimate together, and both seemed game to do it again.

Reeling, her holiday mood shattered and her relationship with Tom fractured, Elizabeth was beset by deep feelings of anxiety. As the winter gray became more dense and forbidding, the anxiety grew.

Fed up, she broke up with Tom just after Christmas. What looked like a promising start to 2020 now didn't feel as joyous.

Right around the end of the year, she plucked a copy of her father's New York Times from the table in his study. A budding physician, her eyes were drawn to a piece about an outbreak of a highly contagious virus in Wuhan, China.

"Sounds dreadful," she said to herself.

Within three months, anxiety gnawed at Elizabeth daily as she sat cloistered in her family's house in Bel Air, Maryland.

It didn't help matters that her brother, Billy, a high school senior and a constant thorn in her side, was cloistered with her.

She felt like she was suffocating.

One night in early May, feeling shutdown and unable to bring herself to tell her parents about her true condition, Elizabeth reached out to her family physician for help.

Dr. Johnson had been Elizabeth's doctor for a number of years and, being from a small town, Elizabeth had grown up and gone to school with Dr. Johnson's son Evan. In fact, back in high school, Evan had asked Elizabeth out once. Not interested, Elizabeth had declined Evan's advances and did not give this a second thought.

Dr. Johnson's practice had recently been acquired by a Virginia-based hospital system, Medwell, so when Elizabeth called the office, she was first patched through to Medwell's receptionist/scheduling service. Within 30 minutes, an online Telehealth consult had been arranged for her to speak directly with Dr. Johnson.

Due to the pandemic, Dr. Johnson called from the office in her home. The doctor was kind. She was practiced.

"So, can you tell me what's going on?" she said.

Elizabeth took a deep breath. She tried to fight what was happening. But she could not. Tears started streaming down her face.

"It's just... It's just..." she managed to stammer.

The doctor waited patiently. "It's okay," she said. "Just take your time."

Elizabeth took a deep breath. "It's like I can't manage my own mind anymore. It's nonstop. It won't turn off..."

More tears streamed down her face.

Patiently, with compassion, the doctor walked Elizabeth through what she might be experiencing. The doctor recommended a follow-up with Medwell's psychology department.

"Okay," Elizabeth said, some semblance of relief passing through her.

Unbeknownst to Dr. Johnson, her office door had not been completely closed. During the telehealth call, Evan stopped by his mother's office to ask her a question. Before knocking he overheard Elizabeth talking and decided to listen in.

## **PART TWO: BETRAYAL**

As Elizabeth was finding the courage to open up to Dr. Johnson about her psychological condition, Evan was recording her with his smartphone through a crack in the doorway.



Spurred by who knows what — his attraction to her, his irritation at being rejected, the idleness of the COVID quarantine — it really didn't matter. Evan posted his recording of Elizabeth to his Instagram feed.

**#CantManageMyMind, #CrazyGirl, #HelpMeDoctorImBeautiful** is just some of what followed. Elizabeth and Evan were both well-liked and very well connected on social media. The posts, shares, and reactions that followed Evan's digital betrayal numbered in the hundreds. Each one of them a knife into the already troubled soul of Elizabeth Cunningham.

By noon of the following day, her well-connected father unleashed the dogs of war.

Rand Davis, the risk manager for the Medwell Health System, a 15-hospital health care company based in Alexandria, Virginia was just finishing lunch when he got a call from the company's general counsel, Emily Vittorio.

"Yes?" Rand said. He and Emily were accustomed to being quick and blunt with each other. They didn't have time for much else.

“I just picked up a notice of intent to sue from a personal injury attorney in Bel Air, Maryland. It seems his daughter was in a teleconference with one of our docs. She was experiencing anxiety, the daughter that is. The doctor’s son recorded the call and posted it to social media.”

“Great. Thanks, kid,” Rand said.

“His attorneys want to initiate a discovery dialogue on Monday,” Emily said.

It was Thursday. Rand’s dreams of slipping onto his fishing boat over the weekend evaporated, just like that. He closed his eyes and tilted his face up to the heavens.

Wasn’t it enough that he and the other members of the C-suite fought tooth and nail to keep thousands of people safe and treat them during the COVID-crisis?

He’d watched the explosion in the use of telemedicine with a mixture of awe and alarm. On the one hand, they were saving lives. On the other hand, they were opening themselves to exposures under the Health Insurance Portability and Accountability Act. He just knew it.

He and his colleagues tried to do the right thing. But what they were doing, overwhelmed as they were, was simply not enough.

### **PART THREE: FALLING DOMINOES**

Within the space of two weeks, the torture suffered by Elizabeth Cunningham grew into a class action against Medwell.

In addition to the violation of her privacy, the investigation by Mr. Cunningham’s attorneys revealed the following:

Medwell’s telemedicine component, as needed and well-intended as it was, lacked a viable informed consent protocol.

The consultation with Elizabeth, and as it turned out, hundreds of additional patients in Maryland, Pennsylvania and West Virginia, violated telemedicine regulations in all three states.

Numerous practitioners in the system took part in teleconferences with patients in states in which they were not credentialed to provide that service.

Even if Evan hadn’t cracked open Dr. Johnson’s door and surreptitiously recorded her conversation with Elizabeth, the Medwell telehealth system was found to be insecure — yet another violation of HIPAA.

The amount sought in the class action was \$100 million. In an era of social inflation, with jury awards that were once unthinkable becoming commonplace, Medwell was standing squarely in the crosshairs of a liability jury decision that was going to devour entire towers of its insurance program.

Adding another layer of certain pain to the equation was that the case would be heard in Baltimore, a jurisdiction where plaintiffs' attorneys tended to dance out of courtrooms with millions in their pockets.

That fall, Rand sat with his broker on a call with a specialty insurer, talking about renewals of the group's general liability, cyber and professional liability programs.

"Yeah, we were kind of hoping to keep the increases on all three at less than 25%," the broker said breezily.

There was a long silence from the underwriters at the other end of the phone.

"To be honest, we're borderline about being able to offer you any cover at all," one of the lead underwriters said.

Rand just sat silently and waited for another shoe to drop.

"Well, what can you do?" the broker said, with hope draining from his voice.

The conversation that followed would propel Rand and his broker on the difficult, next to impossible path of trying to find coverage, with general liability underwriters in full retreat, professional liability underwriters looking for double digit increases and cyber underwriters asking very pointed questions about the health system's risk management.

Elizabeth, a strong young woman with a good support network, would eventually recover from the damage done to her.

Medwell's relationships with the insurance markets looked like it almost never would.

## Lessons Learned - Partner's Content

*Risk & Insurance® partnered with Allied World to produce this scenario. Below are Allied World's recommendations on how to prevent the losses presented in the scenario.*

**The use of telehealth has exponentially accelerated with the advent of COVID-19. Few health care providers were prepared for this shift.** Health care organizations should confirm that Telehealth coverage is included in their Medical Professional, General Liability and Cyber policies, and to what extent. Concerns around Telehealth focus on HIPAA compliance and the internal policies in place to meet the federal and state standards and best practices for privacy and quality care. As states open businesses and the crisis abates, will pre-COVID-19 telehealth policies and regulations once again be enforced?

### **Risk Management Considerations:**

The same ethical and standard of care issues around caring for patients face-to-face in an office apply in telehealth settings:

- maintain a strong patient-physician relationship;
- protect patient privacy; and
- seek the best possible outcome.

Telehealth can create challenges around “informed consent.” It is critical to inform patients of the potential benefits and risks of telehealth (including privacy and security), ensure the use of HIPAA compliant platforms and make sure there is a good level of understanding of the scope of telehealth. Providers must be aware of the regulatory and licensure requirements in the state where the patient is located, as well as those of the state in which they are licensed.

A professional and private environment should be maintained for patient privacy and confidentiality. Best practices must be in place and followed. Medical professionals who engage in telehealth should be fully trained in operating the technology. Patients must also be instructed in its use and provided instructions on what to do if there are technical difficulties.

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This hypothetical, yet realistic stories, showcase emerging risks that can result in significant losses if not properly addressed.

Disclaimer: The events depicted in this scenario are fictitious. Any similarity to any corporation or person, living or dead, is merely coincidental.

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<sup>1</sup> Risk & Insurance Magazine, Dan Reynolds, October 5 , 2020. “Telehealth Risk Scenario: The Betrayal of Elizabeth”. <https://riskandinsurance.com/the-betrayal-of-elizabeth/>