THE IMPACT OF DAY IN THE LIFE VIDEOS IN CATASTROPHIC INJURY CASES

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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I. INTRODUCTION

Some attorneys say that you only need to use visual technology in the courtroom if you want to win. Of course, that rhetorical statement developed because of the very real impact that visual technology has upon jurors. One tool often used by plaintiff's counsel in a catastrophic injury case is the so-called "day in the life" video. Day in the life videos are routinely used in catastrophic injury cases because they bring testimony to life. As one court has put it, "such films are able to inform and promote a better understanding of the extent of injury or circumstances of the condition involved in the litigation, as no other evidence can do." *Roberts v. Sisters of Saint Francis Health Services, Inc.*, 198 Ill. App. 3d 891, 900, 556 N.E.2d 662, 668 (1st Dist. 1990). Defendants should consider several issues when it is known or believed that plaintiff's counsel may seek to present such a video at trial.

II. DAY IN THE LIFE VIDEOS ARE DEMONSTRATIVE EVIDENCE, NOT SUBSTANTIVE EVIDENCE

In *Cisarik v. Palos Community Hospital*, 144 Ill. 2d 339, 579 N.E.2d 873 (1991), the Illinois Supreme Court determined that day in the life videos are demonstrative evidence, as opposed to substantive evidence. The court held that such videos have no probative value in and of themselves, but rather serve as a "visual aid to the jury in comprehending the verbal testimony," similar to a photograph, drawing, model or chart. *Cisarik*, 144 Ill. 2d at 341, 579 N.E.2d at 874.

The courts apply a two-pronged test in determining whether a day in the life video is admissible as demonstrative evidence. First, a proper foundation must be laid by a witness having personal knowledge of the filmed subject and that the video is an accurate portrayal of what it purports to show. Second, the video's probative value must not be substantially outweighed by the danger of unfair prejudice. *Cisarik*, 144 Ill. 2d at 342, 579 N.E.2d at 874.

Recent decisions from the appellate courts have rejected arguments by defense counsel that certain day in the life videos amounted to substantive evidence, instead holding strong to the *Cisarik* decision. See *Velarde v. Illinois Central R.R. Co.*, 354 Ill. App. 3d 523, 820 N.E.2d 37 (1st Dist. 2004); *Donnellan v. First Student, Inc.*, 383 Ill. App. 3d 1040, 891 N.E.2d 463 (1st Dist. 2008).

III. THE DEFENSE IS NOT PERMITTED TO BE PRESENT AT TAPING, AND OUTTAKES OF VIDEO ARE PRIVILEGED WORK PRODUCT

In *Cisarik*, the Supreme Court also determined that preparation of a day in the life video is "the work product of the lawyer who is directing and overseeing its preparation" and "opposing

counsel has no right to intrude into the production of this demonstrative evidence." *Cisarik*, 144 Ill. 2d at 342, 579 N.E.2d at 875. Based upon these findings, the Supreme Court struck down a protective order entered by the trial court that would have allowed the defense to have one lawyer present at the filming, a copy of the finished film as well as all edited-out and unused footage, and the right to depose any authenticating witness. *Cisarik*, 144 Ill. 2d at 343, 579 N.E.2d at 875.

In *Velarde*, the defendant argued that *Cisarik* only stands for the proposition that defense counsel does not have a right to be present at filming, not that the video outtakes are also protected work product. The *Velarde* court rejected this argument, relying on the broad language of *Cisarik*. *Velarde*, 354 Ill. App. 3d at 533, 820 N.E.2d at 49.

IV. DON'T BE SURPRISED BY LATE DISCLOSURE

Plaintiff's counsel may attempt to surprise the defense by disclosing the video on the eve of trial. In both *Velarde* and *Donnellan*, the day in the life video was not disclosed to the defense until the day before trial. Each of these courts essentially determined that such late disclosure was not prejudicial to the defense because it would make little sense for a plaintiff to film such a video months prior to trial, when the intent is to depict the plaintiff's life at the time of trial. *Velarde*, 354 Ill. App. 3d at 532, 820 N.E.2d at 48 (also finding that the trial court had modified the discovery deadline and depositions were still being taken the week before trial); *Donnellan*, 383 Ill. App. 3d at 1052-53, 891 N.E.2d at 475.

The defense may attempt to avoid such a result by obtaining a specific order from the trial court that any day in the life videos must be produced at least sixty days prior to trial.

V. WAS THE VIDEO FILMED LONG BEFORE TRIAL? OBJECT TO ADMISSIBILITY

If a day in the life video was filmed years before trial, yet plaintiff's counsel proposes to show the video to demonstrate the plaintiff's current condition, the defense should object to admissibility. As stated previously, the courts generally recognize that the purpose of a day in the life video is to demonstrate the plaintiff's life at the time of trial. *Velarde*, 354 Ill. App. 3d at 532, 820 N.E.2d at 48; *Donnellan*, 383 Ill. App. 3d at 1052-53, 891 N.E.2d at 475. If the video was filmed many months or years before trial, it likely will not accurately depict the plaintiff's current condition (i.e. the plaintiff's condition may have dramatically improved). If such a situation exists, the defense should move to bar the video because it will effectively mislead and confuse the jury, rather than helping the jury to understand the testimony.

On the other hand, if the plaintiff has dramatically improved, plaintiff's counsel may wish to play an older day in the life video to illustrate the limitations the plaintiff once suffered as a result of the injury. In such a case, the video would be a demonstrative aid supporting the plaintiff's testimony as to how the injury affected his life in the past. However, the defense may still object

to the video as unduly prejudicial, where it unnecessarily focuses upon only one point in time, excluding other parts of the plaintiff's recovery.

VI. BLUNT THE IMPACT AND SCREEN ULTRA-SENSITIVE JURORS – FILE A MOTION TO PRESENT THE DAY IN THE LIFE VIDEO DURING *VOIR DIRE*

In most cases, plaintiff's counsel will be allowed to show day in the life videos during trial as demonstrative evidence. Therefore, the defense should consider how to make the video less effective when it is presented at trial. One way this can be accomplished is to move the court for an order allowing the day in the life video to be played prior to or during *voir dire*. If the motion is allowed, it can have at least two benefits. First, the defense can determine whether the video arouses such strong feelings in any of the jurors that it affects their ability to be fair and impartial, and if so, to move that such jurors be excused for cause. Additionally, if jurors are exposed to the day in the life video during *voir dire*, the impact at trial will be considerably less dramatic because the jurors will be primed, knowing what to expect.

The ultimate hurdle to showing a day in the life video during *voir dire* is convincing the trial judge that it is proper, because the appellate courts have consistently held that the decision to show the video or not show the video is within the broad discretion of the trial court. The appellate courts have only upheld such decisions by the trial court, and none of the appellate courts have found either decision to be an abuse of discretion.

When moving the trial court for an order allowing the day in the life video to be played during *voir dire*, the defense should look to the rationale presented in *Roberts v. Sisters of Saint Francis Health Services, Inc.*, 198 Ill. App. 3d 891, 900-01, 556 N.E.2d 662, 668 (1st Dist. 1990), where the court stated:

> Certainly such films are able to inform and promote a better understanding of the extent of injury or circumstances of the condition involved in the litigation, as no other evidence can do. For this same reason such films also carry a high potential for arousing sympathy, passion and prejudice for the injured plaintiff. Thus, because litigants have a right to examine prospective jurors to enable them to select a jury that is qualified and competent to determine the facts in issue without bias, prejudice, or partiality, it seems only fair that defendants should be allowed to make prospective jurors aware of the condition or injury, which may be graphically exposed to them during the course of trial. This affords them a meaningful opportunity to "probe an important area of potential bias and prejudice" during *voir dire*.

The *Roberts* court went on to say, of course, that the defense could not then use questioning in *voir dire* to indoctrinate jurors or determine how jurors would decide specific issues. However, the court found that was not done, and instead, the defense properly used the day in the life

video "to expose the veniremen to a potential source of bias in the case that would be before them." *Roberts*, 198 Ill. App. 3d at 901, 556 N.E.2d at 669.

On the other hand, defendants should be aware of appellate decisions upholding the trial court's refusal to play a day in the life video during *voir dire*. *See Golden v. Kishwaukee Community Health Services Center, Inc.*, 269 Ill. App. 3d 37, 645 N.E.2d 319 (1st Dist. 1995); *Foley v. Fletcher*, 361 Ill. App. 3d 39, 836 N.E.2d 667 (1st Dist. 2005). Each of those courts recognized that a trial court may allow defense counsel to play a day in the life video during *voir dire*, but is not required to do so. Further, those courts found that the trial court does not abuse its discretion in refusing to play the video during *voir dire* when defense counsel is not prevented from effectively probing the venire members' views on the plaintiff's disabilities for bias or prejudice. *Golden*, 269 Ill. App. 3d at 49, 645 N.E.2d at 328; *Foley*, 361 Ill. App. 3d at 50-51, 836 N.E.2d at 677.

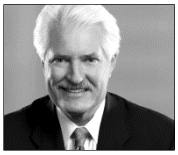
If the defense can overcome the hurdle of convincing the trial judge that the venire should be shown the day in the life video, nothing will more effectively blunt the impact of the video during the plaintiff's case, and nothing will be more helpful in screening potentially biased jurors.

VII. INSIST THE VIDEO BE MUTED – AUDIO MAY PROVIDE THE OPPORTUNITY FOR TESTIMONY NOT SUBJECT TO OBJECTION OR CROSS-EXAMINATION

While no appellate court has apparently ruled on this issue, it appears to be a winning argument for defendants with the trial courts. Whether by agreement of the parties or order of the trial court, in both *Velarde* and *Donnellan*, the audio portion of the video was silenced or muted while being played for the jury. In *Velarde*, the appellate court specifically mentioned this fact in finding that the day in the life video was demonstrative evidence, as opposed to substantive evidence. There, the court pointed out that live witnesses provided narration for the video so that the defense could object to the testimony and cross-examine the witness. *Velarde*, 354 Ill. App. 3d at 529, 820 N.E.2d at 45.

VIII. CONCLUSION

Day in the life videos can very powerfully and dramatically demonstrate how a plaintiff's life has been impacted by catastrophic injury. In order to avoid such an impact, defendants should make every attempt to bar such evidence. If that fails, the defense should consider options to decrease the dramatic effect, such as requesting that the day in the life video be played for the venire and insisting that the video be muted when it is played for the jury.



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Roger is the Chair of our statewide Healthcare Practice Group and has spent his entire legal career with Heyl Royster, beginning in 1978 in the Peoria office. He concentrates his expertise on healthcare law, representing physicians, hospitals, long-term care facilities, and other healthcare organizations in a broad range of issues including licensure, fraud and abuse, corporate compliance, contracting, policies and procedures, staff concerns, and defense of malpractice and other litigation. Roger also chairs our Professional Regulation/Licensure Practice Group and is a leader in the use of technology in our firm and in the legal profession. He recently successfully tried a three week complex medical malpractice case completely paperless. Roger frequently travels across the country for expert witness depositions carrying nothing more than his iPad. In fact, he has used his expertise to develop the first and only fully integrated legal app for the iPad, Second Chair Mobile.

With extensive litigation experience, Roger has personally defended more than 700 medical and hospital cases, taking a significant number to verdict. In recent years, he has developed a special focus on brain-injured infant cases and other catastrophic loss cases. Many of his cases are against leading Chicago and national counsel where damages sought against his target defendants often reach tens of millions of dollars. Although always prepared to try these cases when necessary, Roger is a skilled negotiator and has had great success mediating many of these cases.

Roger has taught master's-level courses in healthcare law and is a frequent national speaker on healthcare issues, medical malpractice, and risk prevention to insurers, medical associations, professional groups, and healthcare institutions. He co-authored the chapter on trials in the Medical Malpractice Handbook recently published by the Illinois Institute of Continuing Legal Education. Roger also co-authored a chapter for *The Law of Medical Practice in Illinois* published by West Publishing. He also authors the Health Law column in the *Illinois Association of Defense Trial Counsel Quarterly*.

Roger is a Past President of the Illinois Association of Healthcare Attorneys which consists of more than 600 healthcare attorneys from throughout the state. He is also a Past President of the Illinois Society of Healthcare Risk Management and the Abraham Lincoln Inn of Court. He has been designated one of the "Leading Lawyers" in Illinois as a result of a survey of Illinois attorneys conducted by the *Chicago Daily Law Bulletin*; another survey, published recently in *Chicago* magazine named Roger an Illinois "Super Lawyer."

Professional Recognition

- Martindale-Hubbell AV Rated
- Selected as a *Leading Lawyer* in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
- Named to the Illinois *Super Lawyers* list (2005-2012). The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.
- Recently mentioned in *Chicago Daily Law Bulletin* and *Chicago* Lawyer magazine for successful resolution of hospital catastrophic injury case.

Professional Associations

- Illinois Association of Healthcare Attorneys (Past President)
- Illinois Society of Healthcare Risk Management (Past President)
- Abraham Lincoln American Inn of Court (Past President)
- Illinois Association of Defense Trial Counsel (*IDC Quarterly* Health Law columnist)
- American Health Lawyers Association
- Defense Research Institute
- American Society of Law, Medicine and Ethics
- American Bar Association
- Illinois State Bar Association
- Peoria County Bar Association

Court Admissions

- State Courts of Illinois
- United States District Court, Central and Northern Districts of Illinois (Trial Bar)
- United States Court of Appeals, Seventh Circuit

Education

- Juris Doctor, Southern Illinois University, 1978
- Bachelor of Arts-Business (Magna Cum Laude), Bradley University, 1975