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"A DAY-IN-THE-LIFE" VIDEOS

By

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There are catastrophic cases in which victims cannot speak for themselves to the jury about the hardship, the pain and the suffering, that every day dysfunction entails. Often, these are the most hurt of all the victims that a plaintiff's lawyer might see. Babies with cerebral palsy and retardation, brain damaged adults, and quadriplegics fall into this category of unfortunates who need help in demonstrating what has happened to the quality of their lives. Videotape is the modern tool of choice for the creation of demonstrative evidence of the life-long suffering of these victims.

The purpose of these videos is to demonstrate vividly the hardships that the daily struggle for life imposes on the profoundly injured. It is not intended, nor should it be oriented in any way, obvious or otherwise, toward pandering to the emotions of the jury. Indeed, a deadpan presentation will often have a more profound emotional impact on the trier of fact than any rhetorical appeal.

GETTING IT INTO EVIDENCE

The first consideration is, of course, the necessity of putting the evidence before a jury. If it does not get admitted into evidence, the film will have been an utter waste, except for possible use in settlement negotiations.

In New York, such films have been admitted into evidence on numerous occasions Caprara v. Chrysler Corp. . 71 A.D.2d 515, 423 N.Y.S. 2d 694 (3rd Dept., 1979). Here are some of the criteria under which such films are admitted.

First, "A Day-in-the-Life" film ought to be concise. A concise film will always appeal to a harried Court as it means the trial will move along. Further, it is our experience that the horror of a massive injury has its greatest impact when it is presented briefly to the jury, without lingering. Juries may develop emotional callous to the injuries if the victim is sitting quietly in the courtroom day in and day out. Children, especially, should be presented quickly and then excused before the jury has a chance to observe more than the horror. That advice is not news:

***[Evil] is a monster of so frightful mien,
As to be hated needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace.***

(Essay on Man, line 217, Alexander Pope)

In order to encourage the Court to admit an “A Day-In-the Life” film in its uncut version, it is more effective to make the film in one continuous taping. Once the trigger on the camera is pulled, the entire “A Day-in-the Life” is committed to tape before the camera is stopped. Thus, notwithstanding the brevity of the film, everything should be covered in a single uninterrupted shoot.

By shooting the entire film as a single scene, and by keeping the camera running between rooms, and even between indoors and outdoors, several important things are accomplished. First, there is an overall quality of honesty, because it will be obvious to the Court and the jury that it is impossible to stage or fake any of the movie. Second, because the movie does not have separate scenes that start and stop, it is less susceptible to redaction or editing by the Court, as there are no obvious stopping places to set the margins of redaction.

NO REHEARSALS

The Participating witnesses, (in the case of a baby, we are talking about the parents), should be carefully instructed about their roles. A prior walk-through of the proceedings should be conducted by the attorney (who is the director of this little movie). However, rehearsal of the actual functions should not be done, and the witnesses should be in a position to testify that there was no rehearsal. They should be prepared with general instructions, and should know that they are going to perform certain specific activities, but none of the activities are actually rehearsed before the camera is rolling. This lends an appropriate impression of objectivity to the videotape

The participants are further instructed that they are not to narrate the events. Nonetheless, normal conversation (e.g., “Honey, pass me the soap”) is appropriate; the sound should be on. Narrative may be redacted by the Court, presumably, as hearsay. Communication necessary to the acts being demonstrated should not be redacted; nor should the moans and groans of the victim.

DAILY ACTIVITIES

Daily activities start with waking up. If this is an afternoon film, then we may start with waking up from a nap. Otherwise, and often preferably, start with an early morning wake-up. Dressing the victim comes next. This is done without commentary, but the normal communication with the plaintiff should be recorded. The room is panned. Critical care equipment is filmed. If the child is on a pulse oximeter, for example, the connection is filmed; and the wire connecting the child to the machine is followed to the machine. If the child has a misting machine or the child is on intravenous, it is obviously included. It is effective to follow the machine from its connection at the victim, back to the machine. This authenticates the machinery, and its lifeline necessity.

The plaintiff’s ability to communicate needs is most important and should be filmed. If the victim speaks some words, or cries out, this should be captured on film. Gestures or other non-verbal means of communication should be fully recorded.

It goes without saying that in the case of a victim who is able to converse normally, regardless of his injuries, the entire purpose of an "A Day-in-the-Life" film becomes questionable. Such a person may be fully capable of describing his own life at the same time projecting appropriately the intensity of his feelings.

Once the child is dressed and toileted, and appropriately filmed, transport of the child to a feeding area would ordinarily be the next step. The camera follows the victim to the kitchen. If a wheelchair is used, or the victim is carried, the camera follows. The lawyer who is directing this movie should always be behind the cameraman. The lawyer does not do the filming himself. It is done by a professional who announces where he is, and what he is doing before he starts any actual shooting. The lawyer is not Alfred Hitchcock, and should avoid the temptation to appear on camera, even in a mirror. While there should be no secret that the lawyer was present, his presence should be strongly de-emphasized. There should be no on-camera reminders that the film is being directed by counsel. The attorney does not speak while the camera is on.

FEEDING AND DRINKING ARE NEXT

If feeding is accomplished by gastroscopy, it should be covered in the same fashion that the other vital support machinery is filmed. Start at the bed, and follow the tubing to the machine. No explanation of the nature of the machinery is required or permitted. When the movie is shown to a jury, a parent will usually be on the witness stand. That is the time for the parent to explain the nature of the machinery the jury has seen. The narration may be done live from the witness stand while the movie plays. The entire feeding process is filmed. If special preparation is necessary, (e.g., pureed or cut-up foods) the preparation may be briefly filmed; then the plate is filmed, and the feeding process itself is filmed.

After feeding comes bathing, even if bathing is usually an evening activity. It is appropriate to demonstrate the difficulties of bathing a severely handicapped person. With an adult, this requires an arrangement of machinery, pulleys, slings and the like, to move the victim from a wheelchair or gurney into the bath. Even with a baby, there is special equipment to support the child in the water and prevent injury. Gentle, soothing communication with the victim is normal, and may be captured on the film. If the victim demonstrates pleasure in the bath, that is desirable.

AFTER BATHING, COMES THERAPY

Generally, therapy demonstrates pain and suffering better than anything the jury will ever see. With severely spastic children, for example, the stretching exercises cause physical pain, and the children may cry out even if they are deeply retarded. This is the most effective evidence of the ability of such children to suffer, and is an essential element of their cases, however painful it is to watch. Similarly, adults with severe handicaps will be unable to hide their pain in therapy. It is not appropriate to encourage a plaintiff to verbalize any of his injuries, particularly the pain. If it happens; it happens. In our experience, the trier of fact may be far more impressed by the victim who endures the pain and suffers as quietly as possible. Perhaps this is because suffering is embarrassing to the healthy.

With children, therapy often includes educational or occupational therapy. While this may not necessarily

entail actual physical pain, the intensity of the child's desire to accomplish that which we take for granted often has a significant element of appeal.

Finally, the child or adult victim leaves the house for an airing. If there is a wheelchair or other special carrier involved, it is demonstrated in a short walk. If there is a handicapped school bus picking the child up, the film should be timed to end with the pickup. If the family has a hydraulic van, the last scene might show the child or adult riding up the lift into the van. Do consider making a separate short film at school if it adds to the picture of the loss of quality of life.

PREPARATION CONSIDERATIONS

Generally, in order for the film to work, an adequate walk-through is necessary, and family members who are Participating must be prepared to perform their functions smoothly in the course of a single shot. The attorney-director can usually be confident that the family, who provide the support and care for the victim, know well how to wake him, toilet him, feed him, or bathe him, as these are truly daily activities. They know very well how to get the child into the school bus or the adult to the wheelchair and put the lift into the van. They do it every day without thinking. So the attorney's job is reasonably simple. There is no written script. There is simply a walk through with a list of activities that fit the needs of the plaintiff.

Considerations are not different if the victim is hospitalized. Our experience is that the nursing staff who care for severely injured and handicapped people have no objections to being filmed performing routine care. Hospital administrators need to be informed and reassured for permission to be granted, but our experience has been uniformly positive. Nursing staff need only be told to avoid narrating, although direct communication with the patient ("Good morning, Mr. Jones. How are you feeling today?")—even if Mr. Jones is unable to speak—is appropriate. Waking, dressing, toileting, feeding, bathing, and therapy are the essentials, whether the setting is home or hospital.

IN THE COURTROOM

The courtroom setup should be made by professional video people, not the lawyer. The setup requires that the judge have a monitor on his or her bench, and the jury have a large monitor facing them. With two monitors, the judge need not come down from the bench to observe, and the courtroom has normal decorum, once again encouraging the court to permit the showing of the film. The jury should be told that the camera ran continuously, if possible. Since a parent or caregiver is on the stand while the movie is about to be shown, that should be one of the questions preceding the actual playing of the film.

Finally, the best way to assure that the movie gets into evidence is to serve it on the defense well in advance of the trial. Defendants tend to object more to evidence that is served on the eve of trial. A movie served a year in advance is less likely to create a stir. Defendants should be made aware at the time of service that the film was made in a single continuous shooting. They, too, will have less reason to object knowing that the film is unedited. We do not, however, invite the defendants to the "shooting".

All videotaping these days has provision for date and time, which should be on the screen continuously to

prove that this is a single shoot.

CONCLUSION

If a picture is worth a thousand words, then the moving picture is worth a thousand stills. There is no way words can describe the life of a massively handicapped person. There is now way to convey to a jury the deprivation, and the emptiness of such a life through the mere words of a witness, nor the great burden on the parents. Videotape, however, creates an opportunity to powerfully demonstrate the hardships of such a life.