



Day-in-the-Life: Video as Evidence

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Subjects who are permanently or catastrophically injured need to have the harm they have suffered told effectively and convincingly. How a story is presented to a jury or mediator is critical for damages assessment and awards. In most cases, mere words to describe the loss do not compare to watching a person try to adapt to a new life full of physical limitations and challenges. If seeing is believing and a picture is worth a thousand words, a day-in-the-video is worth its weight in gold.

When it comes to all personal injury matters, the subject's lawyer must first prove opposing parties liable and present the client's damages. Liability

is sometimes more obvious, but attempting to communicate and assess the value of the subject's injuries is not. This is especially true if jurors have had no exposure to a catastrophically-injured person. Trying to explain a quadriplegic's day is nearly impossible. Demonstrations of injuries in court are permissible, and so are demonstrations of activity of daily living: day-in-the-life videos.

Day-in-the-life-videos are typically presented to demonstrate injuries (permanent and/ or catastrophic), and their effect on the subject's daily living activities. Carefully videotaped footage of these activities, (e.g., rising, feeding, bathing, toileting, and physical, speech,

and occupational therapy) can vividly demonstrate dependency, limitations, and frustrations better than words. Whether the subject is managing life independently, has a caretaker, or lives in a care facility, a day-in-the-life-video can effectively communicate what the struggle with completely ordinary daily tasks is like with a permanent personal injury.

BETTER THAN WORDS

Video circumvents the impracticality of having jurors witness the subject's injuries and challenges firsthand, especially if the subject is homebound or cannot not perform certain tasks for demonstration, e.g., bathing or

toileting. It is a powerful tool for personal injury cases, and the courts wholeheartedly agree.

In *Grimes v. Employers Mutual Liability Insurance Company of Wisconsin (1977)* the court found the day-in-the-life video submitted by the subject exemplified “better than words” the effect the injury had on the subject’s life in terms of pain and suffering and loss of enjoyment of life.

Similarly, in *Arnold v. Burlington Northern Railroad (1988)* the court noted that although the video offered to illustrate and supplement the subject as cumulative testimony, “the day-in-the-life film communicated to the jury effectively, and perhaps better than words could do, what subject’s life...was like.” [emphasis added].

Also, in *Bannister v. Town of Noble (1987)*, the court surmised that “a jury will better remember, and thus give greater weight to evidence presented in a film as opposed to more conventionally elicited testimony.”

TRIAL ADMISSIBILITY GUIDELINES

Courts have established that day-in-the-life videos must conform to the same rules as other forms of demonstrative evidence. Their admissibility is subject to broad, although not absolute, judicial discretion. The submitting party must provide appropriate legal foundation for its admission into evidence, showing that the videotape is an accurate portrayal of the events depicted, (*Cisarik v. Palos Community Hospital, 1991*). Someone who has personal knowledge of the videotape’s contents and must be available for in-court cross-examination to lay foundation: typically the subject, a caregiver, nurse practitioner, or the person most knowledgeable from the video production company.

Most courts will admit videos provided



that (1) their probative value outweighs any prejudice to the defendant (*Arnold v. Burlington Northern Railroad, 1988*) and (2) there are no demonstrated improprieties in the video’s content or production techniques (*Ocasio v. Amtrak, 1997*).

In order to be representational, day-in-the-life-videos must have a foundation of accuracy and fairness (*Foster v. Crawford Shipping Company, 1974*). For instance, the scenes depicted in the video may be unpleasant, but its prejudicial impact cannot substantially outweigh the video’s probative value. If the video does not present probative value it may not be admitted into evidence.

Counsel must also show that the daily activities were typical for the subject, so that the video would not be unduly prejudicial (*Cisarik v. Palos Community Hospital, 1991*) Nor should the day-in-the-life-video contain inter alia, artistic highlighting that emphasizes some scenes more than others, obvious exaggerations, self-serving behavior by the subject/subject(s), scenes that serve mainly to create sympathy, or those that contain other unduly inflammatory material.

DOCUMENTING SUBJECT’S DAILY ACTIVITIES

Because a day-in-the life video must follow the Rules of Evidence, it must be filmed and edited in a precise way. It is best to commission an experienced

legal video production company that understands the common admissibility requirements and has a track record of having work admitted at trial.

If the subject is in a nursing or rehabilitation facility, the attorney must receive permission to film there. The videographer must be very careful not to film other patients at the facility. Should someone be inadvertently videotaped, that person’s face must be blurred during the postproduction editing process. This also applies to nudity during changing, toileting, or shower; those must be blurred as well out of respect for the subject and members of the jury.

The videographer should approach the taping as an unbiased third-party solely to document the subject’s typical day. It is helpful for the videographer to know what sequence of events to expect, but should never direct or dictate the subject’s actions or ask the subject to do anything out of the ordinary.

The most critical time of the day is usually when the patient receives morning care. The videographer should arrive before the typical rising time and begin recording before any care begins. During filming colloquy should be kept to an absolute minimum, with the videographer recording the ambient sound.

Most day-in-the-life videos can be videotaped in four hours. However, if a subject is in a rehabilitation facility,



physical, occupational and other therapies may be scheduled throughout the day. The video should be edited to a reasonable timeframe. A good goal is about 12 minutes in order to keep jurors' attention.

Editing can be vexing, because it must strike a delicate balance of what should and should not be in the final cut. For instance, a jury does not need the entire process of digital rectal stimulation for a bowel movement when thirty to sixty seconds will make the point.

The video will be played while the person best suited to authenticate it is on the stand. That person, usually someone who was present during the filming, may be asked to narrate the actions seen on screen (Cisarik, 1991).

FOR PERMANENT INJURY CASES

One misconception is that day-in-the-life videos are for catastrophic injury only. Though the average juror has not been exposed to the daily activities associated with quadriplegia or a quadrilateral amputation, nearly any permanent injury can be documented and presented for a lasting impression. This is all about assessing how the subject has been harmed so the jury can award the proper damages. If seeing is believing, and a picture is worth a

thousand words, then a day-in-the-life video is worth its weight in gold.

Although there is no absolute measure for how a day-in-the-life video affects the bottom line, I personally have been involved in cases where the jury has awarded significant sums after watching the day-in-the-life video.

- A case involving a 13-year-old boy who was paralyzed from the chest down after being shot by Los Angeles Police Department was awarded \$24 million. (Rubin, 2016)
- A teenage subject was rendered paraplegic after being involved in a car accident with a defective seat belt was awarded \$12.5 million (Hirsch J, 2014)
- A medical malpractice matter involving a 27-year old who went into septic shock at a hospital and had all 4 limbs amputated as a result, was awarded \$13.3 million during arbitration after the video was played (conaldoylelaw.com, 2015)

Although these cases may not be typical, they demonstrate the effectiveness of presenting video as evidence of harm caused.

SUMMARY

Day-in-the-life videos can be effective, and should be admissible at trial as

demonstrative evidence as long as they do not contain inter alia, artistic highlighting, obvious exaggerations, self-serving behavior, scenes which serve little purpose other than to create sympathy, or other unduly inflammatory material.

To view a day-in-the-life exemplar video, visit: <https://vimeo.com/124573273>.

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