

# SEEING IS BELIEVING:

## Use of Video for Nurse Life Care Planning



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### Introduction

In our society, video images are a powerful, integral part of daily routines. Nurse life care planners and legal nurse consultants use videos to reinforce their assessments and nurse life care plans to demonstrate financial need for equipment, aids, nurses and supplies by helping the viewer to understand the injury's effect on a family or a client. A Day in the Life Video demonstrates injuries and can lead to increased damages recovered.

### Video in use

According to the Illinois Trial Lawyers Association CLE Program, attorneys throughout the United States have increasingly discovered the value of using video as demonstrative evidence. Video instantly demonstrates in a few frames what otherwise would take several paragraphs of written text or minutes of spoken words. We more readily identify with people in a video even if they are complete strangers. Demonstrative evidence also provides break periods for the juries from verbal testimony.

Furthermore, we are persuaded by what we see more than by what we read or hear. Studies have shown that most human learning is based on sight; people who have seen and heard evidence remember it better. Increased retention is based in part on how much video information can be accurately

communicated. If a picture is worth a thousand words, a video can be worth millions. **Seeing is believing.**

Not surprisingly, attorneys have discovered the value of using video at trial and for out of court mediation to maintain a competitive advantage. However, they must understand and master the effects of visual tools on the viewer's perceptions, thoughts, beliefs, and emotions.

### Purposes of a Professionally Produced Video

Why would plaintiff and defense want to use a professionally produced video?

- A. Demonstrate or refute damages or liability
- B. Desensitize the viewer to the subject or content
- C. Present evidence that otherwise could not be explained or admitted
- D. Length can be tailored to the viewers' interest level
- E. Support a life care plan
  - 1. Captures pain, physical and psychological disability, and rehabilitation over an extended period; brings subjects, equipment and devices into the courtroom
  - 2. Formats include still photographs, Progressive Video, Day in the Life Video, and Settlement Brochures
- F. Deposition
- G. Document an Independent Medical Examination

### Video Formats

A jury trial may involve evidentiary restrictions for aspects of a Progressive Video or Day in the Life Video. Courts allow more latitude where the video is used as demonstrative evidence, such as a visual aid or context to an expert's testimony. If there are no legal restrictions to limit a video as a settlement tool, certain common-sense restrictions apply.

- A. Day in the Life Video** features the plaintiff in a variety of everyday situations that the non-injured person takes for granted: bathing, eating, dressing, ambulating, and interacting with family members and other activities of daily living. If appropriate, video may be taken of the plaintiff undergoing dressing changes, physical and occupational therapy or other treatments. Video helps the plaintiff convey to the judge and jury the struggles of his and his family's post-injury life. It demonstrates their courage and determination as they confront everyday challenges and obstacles. (Fig. 1a, b)



Fig. 1 a, b Medical malpractice case where the client was left brain-damaged. The video was used to show his condition and necessary constant care. Photo by Traci Ference

Sometimes it is advisable to have a short lead-in, depicting the plaintiff in a healthy, pre-injured, active state. It is highly unlikely that a person with the same or similar injury/disability as the plaintiff will be chosen to be a juror. Jurors have a natural inclination to take health and mobility for granted. Additionally, a plaintiff often has a tendency to be stoic and avoid the appearance of self-pity. This has a dramatic effect when the viewer compares the plaintiff's former life to his daily struggles now. After a month-long trial, a jury of six men and six women returned a verdict of \$101 million in the case



Fig. 2. A progressive video shows the care that this child's mother gives him with a G-tube feeding. (\$100M verdict.) Photo by Traci Ference



of this now 5-year-old child. He was born brain-damaged after hospital staff ignored abnormalities on external fetal monitoring strips for 6 hours. He has a normal life expectancy and is completely dependent on others for all aspects of his care. At the time of the trial, he was in a facility where he received excellent care. His mother will now be able to obtain care for him at home. Pictures used by permission of the attorney and mother. (Fig. 2)

**B. Progressive Video** is a series of Day in the Life films taken over an extended period. It is well-suited to demonstrate pain and suffering over the course of treatment and the stages of recovery. Videotaping begins as soon after the injury as feasible and continues at intervals to capture each stage of recovery, such as acute hospitalization and therapy, rehabilitation, in-home care, and outpatient follow up.



Fig. 3. Man who lost both legs in an accident, learning how to walk again. Photo by Traci Ference

It may be several years before a case reaches trial and the plaintiff may have adapted to (amputee with a prosthesis) or recovered from the injury after extensive therapy. A Progressive Video is very effective at conveying the plaintiff's potential for reaching his maximum function. For example, the expense for a more technologically advanced and expensive prosthesis can be justified by a video showing how much more independent the client could be with an upgraded prosthesis, compared with the prosthesis two years prior (Fig. 3).

**C. Living Plaintiff Documentary/Wrongful Death Documentary (Settlement Brochure)** This is a narrated presentation to build the plaintiff/decedent's life story. The Living Plaintiff Documentary compares and contrasts the plaintiff's level of functioning pre- and postinjury and the finished product shows current condition and level of function. Its visual impact is highly effective in settlement negotiations because it personalizes the plaintiff /decedent. These often use co-workers, family and friends interviews, home video, and photographs for maximum effect.

### Cost

Cost varies with the complexity and length. Cost for taping and editing will typically be \$4000 to \$7500. If including evening care and the following day morning care, the cost could be approximately \$6000.00. Four hours of morning care will cost approximately \$4000. Video of a child, recording home care, therapy at school, and outpatient therapy could be approximately \$7500. Every effort is made to work within a client's budgetary constraints.

### Review of Applicable Case Law

A case frequently cited in Federal and State Court is the 1991 Illinois Supreme Court case, *Cisarik v. Palos Community Hospital*, 144 Ill. 2d 339, 579 N.E. 2d 873 (1991), established a two-pronged admissibility test for video:

- i. Proper foundation must be laid by the person having personal knowledge of the filmed object, who can attest that the videotape accurately depicts what it purports to show; and
- ii. The probative value of the videotape must outweigh the danger of unfair prejudice.

Additionally, *Cisarik* set parameters regarding discovery rules:

- Materials generated during preparation of a video, such as schedules or storyboards are not discoverable because such material is attorney work product.
- Outtakes or unused videotape, that is scenes which were taped but not included in the final edited version, are privileged as attorney work product.
- Opposing counsel has no right to be present at the time of videotaping.

### Examples: Illinois Caselaw

The first Illinois case to examine the use of video was *Barenbrugge v. Rich*, 141 Ill. App. 3d 1046, 490 N.E. 1368 (1st Dist. 1986). *Barenbrugge* holds that a videotape of a

Day in the Life of a plaintiff in a medical malpractice action, which was an accurate portrayal of plaintiff's condition and circumstances and whose probative value was not questioned, was properly admitted.

*In Georgacopolous v. University of Chicago Hospitals and Clinics*, 152 Ill. App. 3d 596, 504 N. E. 2d 830 (1st Dist. 1987), the court upheld the admissibility of a Day in the Life video which demonstrated a medical malpractice plaintiff undergoing painful physical therapy sessions. The defendants' objections that the videotape was both prejudicial and cumulative were unavailing. The court reasoned that no objection had been made that the videotape was not an accurate portrayal of the plaintiff's condition and circumstances. Furthermore, the judge described the tape as "tasteful" and the objectionable therapy session amounted to only a few minutes out of a nineteen-minute tape.

In a personal injury action resulting from a motor vehicle accident, testimony from the plaintiff's wife provided the proper foundation for the admission of the Day in the Life film. She testified that she had personal knowledge of the contents of the film, she had attended two physical therapy sessions, and the film accurately depicted how the plaintiff ambulated and how his therapy was administered. The film did not focus on plaintiff's pain and discomfort to the exclusion of anything else. While he did wince and grimace in various parts of the film, the plaintiff also smiled and talked with the therapist. The film focused on the therapy sessions that would be required for the rest of his life, rather than focusing on his pain. *Donnellan v. First Student, Inc.*, 383 Ill. App. 3d 1040, 891 N.E. 2d (1st Dist. 2008).

Google Scholar can help you locate Federal and state case law. This resource also has articles on the subject of Day in the Life videos. Laws regarding video at trial vary from state to state. The nurse life care planner and videographer should consult with the retaining attorney regarding applicable regulations.

### Role of the Nurse Life Care Planner

Nursing Diagnosis Video can educate the jury on foundational bases for the NLCP's nursing diagnoses. A few examples:

- Alteration in physical mobility
- Imbalanced nutrition, weight loss
- Self-care deficit
- Social isolation
- Compromised human dignity
- Incontinence
- Caregiver role strain

Counsel may show parts of the video during NLCP testimony on line items in the plan, justifying the expense of equipment to increase independence and mobility. The video helps reinforce the written plan by showing:

- medical equipment and supplies, size, and storage
- intravenous tubing
- feeding tube
- various pumps
- injuries and scars
- surgical openings and dressings
- prostheses
- customized motor vehicles
- ramps
- architectural modifications
- space restrictions
- bowel and bladder programs
- functional deficits requiring therapies and adaptive technology
- condition and function of DME

**Coordination** The NLCP is ideally involved with the coordination and preparation of the video from the beginning of the case, perhaps recommending the use of video to the attorney, identifying a videographer, and coordinating the video. Prepare the family and patient for what will happen. Preparing the videographer for the expected activity is appropriate, such as saying, "Be sure to show how the mother handles this child in the bathroom." However, the NLCP should never act as a director or stage manager; the video should show actual activity as it occurs naturally.

**Identifying an appropriate provider** Cases commonly benefiting by video are brain injury, paralysis, and limb loss.

Hiring the right person is critically important. The video company must be familiar with the use of legal video with courtroom restrictions. Refrain from using a family member, friend, or videographer who films weddings and parties; experience and credibility with catastrophic cases are critical.

Ask for referrals and screen them. How often has their work been used in litigation? Speak with references to determine if their videos were effective. Review their work samples. Professional legal videos and non-professional legal videos are of vastly different quality and usefulness; nothing but a clear, well-lit, and properly-sequenced video will effectively tell the patient's story.



**Preparation** Before taping begins, the NLCP should pay attention to several important items. These include:

- Basic demographics
- Date of incident
- Date finished product needed
- Notification/Cooperation of plaintiff/family
- Type of case (e.g., car accident, medical malpractice, construction case)
- Type of injury
- Patient location and special equipment (walker, commode, hospital bed, ventilator, etc.)
- Contact administrator to coordinate if client is in a facility
- Facility release form

Each facility's response to a crew videotaping is different. Some will do anything to help the patient as long as releases are signed and the family initiates and is present throughout the filming. If the facility is uncooperative the retaining attorney may need to obtain a court order.

The NLCP may need to locate therapy experts to provide therapy in the video if the facility does not wish their staff to participate. The NLCP may need to demonstrate nursing care as determined. Original or follow-up tapings at the patient's home will document the home assessment and the family's involvement. (Fig. 4)

## CONCLUSION

A well-made video showing morning, afternoon, and evening routine care and other activities of daily life will make the plaintiff's story come alive and support the economic and noneconomic damages sought. Seeing is believing.

*Fig. 4 A 23-year old-quadruplegic in a standing device at home. Photo by Traci Ference*

