

**LIGHTS, CAMERA, ACTION – USING
VIDEOTAPES AT TRIAL IN ILLINOIS**

By Jeffrey J. Kroll

I. Introduction

If a picture truly is worth a thousand words, then videotapes are worth an infinite number. Videotaping has rapidly become a societal addiction. The price of equipment is now affordable to the general population, and few homes are without a VCR.

The use of video in the courtroom has dramatically increased as well. Trial attorneys are recognizing the value society has placed on television and the videotapes,¹ and videotapes have become effective weapons in a trial attorney's arsenal. Experience dictates that a picture, diagram or chart can amplify or clarify a point at trial. The potential benefits of videotape far exceed those of the photograph, diagram or chart. A videotape brings the image to life and help juries to clearly understand the issues. This article educates attorneys on the case law governing videotapes and some of the practical uses of videotapes at trial.

II. General Law Regarding Use of Videotape

It is well established in Illinois that films and videotapes, when properly authenticated and relevant, are admissible as demonstrative evidence.² In general, videotapes are admissible on the same basis as photographs.³ Thus, before a videotape and can be admitted, it must pass a two-prong test. First, a proper foundation must be laid by someone having personal knowledge of the filmed object and who can attest that the videotape accurately depicts what it purports to show. Second, its probative value must not be substantially outweighed by the danger it poses of unfair prejudice.⁴

Of course, the videotape must be relevant to the case. If a videotape is shown not to be unduly prejudicial, it is admissible if it tends to prove some material fact.⁵ The court makes the relevancy determination based on logic and experience.⁶ The videotape need only be relevant to some issue in the proceedings and need not establish any fact conclusively. If the video is relevant and a proper foundation has been laid, it is abuse of discretion for the trial court to deny its admission.⁷

III. Specific Uses of Videotape

A plaintiff's lawyer may use a video for a variety of purposes, including encouraging settlement negotiations. Progression videos, day-in-the-life videos, videotaped evidence depositions, videotaped surgical procedures, wrongful death documentaries, and reconstruction videotapes – all described below – are commonly used during the course of a trial. For their part, defense counsel often use surveillance videotapes, also discussed below.

A. Progression Videotapes

Progression videotapes trace the plaintiff and his or her injuries over an extended period. Typically, taping begins shortly after the injury-producing event and continues at various intervals up until the trial. The progression videotape is an effective way to document a client's pain and suffering over time. It demonstrates the plaintiff's needs and limitations during various phases of recovery.

The effectiveness of the documentary will depend largely on the amount of footage. The more video, the greater the opportunity to demonstrate your client's injuries. Once the hours of videotape are accumulated, it is the plaintiff's attorney's task to pare down the footage to something manageable. Less is more. Keep the finished videotape short and precise. Do not bore the jury with footage that fails to prove a disputed issue.

B. Day-in-the-Life Videotapes

Perhaps the most well known and effective use of videotape in the courtroom is the day-in-the-life video, which depicts the struggles a severely injured individual must endure on a daily basis following an injury-producing event. Unlike a progression video, a day-in-the-life video generally focuses on *daily* life as opposed to years of "progress."

Recent Illinois decisions have addressed the use of day-in-the-life videos at trial. For example, in *Georgacopoulos v. University of Chicago Hospitals & Clinics*,⁸ the first district appellate court upheld a trial court's ruling that a day-in-the-life film was admissible. The plaintiff offered a day-in-the-life videotape of painful physical therapy sessions into evidence, and the defendants objected and claimed that the videotape was both cumulative and prejudicial. In rejecting the defendants' position, the appellate court stated:

[Defendants] argue that this videotape inflamed the jury especially because it showed a painful physical therapy session. "Day in the life" videotapes, similar to the tape admitted in the present case, have been admitted if their probative value is not outweighed by their inflammatory effect. No assertion is made here that the evidence was not an accurate portrayal of [her] condition and circumstances;

its probative value is not seriously questioned. The insistence that such evidence is merely cumulative is not persuasive.⁹

Similarly, in *Barenbrugge v. Rich*,¹⁰ the appellate court held that a day-in-the-life video showing the plaintiff's daily activities during her terminal bout with cancer was admissible despite the defendant's arguments that the video was prejudicial. In reaching its decision, the appellate court noted:

No assertion is made here that the evidence was not an accurate portrayal of plaintiff's condition and circumstances; its probative value is not seriously questioned. The insistence that such evidence is merely cumulative is not persuasive. Videotapes similar to the tape admitted in the present case have been found admissible in other states... Therefore, the introduction of this evidence was not error.¹¹

The *Barrenbrugge* case was one of the first Illinois decisions to address the use of a day-in-the-life videotape.

In 1991, the Illinois Supreme Court announced that defense lawyers have no right to be present when a day-in-the-life videotape is made or to have a copy of all outtakes not included in the finished video.¹² In *Cisarik*, the supreme court held that the creation of such a video was part of an attorney's work product.¹³ In reaching its conclusion, the court noted that "opposing counsel has no right to intrude into the production of this demonstrative evidence. The test of this evidence will occur when and if it is offered into evidence."¹⁴

One of the appellate court cases did limit the powerful effects of day-in-the-life videos. In *Roberts v. Sisters of St. Francis Health Services*,¹⁵ the first district appellate court held that a defendant could show a plaintiff's day-in-the-life video to prospective jurors during voir dire so that the defense attorney could inquire whether the jurors felt that what they saw prevented them from giving the defendant a fair trial. The *Roberts* decision, however, does *not* mandate that a trial judge allow the defendant to show a plaintiff's day-in-the-life video to prospective jurors during voir dire. Indeed, in *Golden v. Kishwaukee Community Health Services Center, Inc.*,¹⁶ decided four years after the *Roberts* case, the first district appellate court explicitly noted that the decision to allow a day-in-the-life video during jury selection is discretionary.¹⁷

While there is not much Illinois case law on day-in-the-life videotapes, other authorities have discussed their admissibility.¹⁸ While day-in-the-life videotapes are widely accepted, the issue that remains is to what extent. In one federal court case, the jury was allowed to see a strip of dead skin removed from the plaintiff's arm as he emitted groans and screams.¹⁹ One Oregon court permitted the plaintiff to testify between three videotaped segments as to what the tape had shown.²⁰ Illinois decisions

have not yet addressed these issues. Objection to narration on the basis of hearsay will likely be granted. If, however, the narrator is available to testify and adopts the narration, the hearsay objection will probably be overruled.²¹

C. Videotaped Evidence Depositions

Because of their convenience, videotaped evidence depositions have grown popular. They are often used to get the testimony of witnesses who are unavailable because they are on vacation or located far from the court. In personal injury cases, videotaped evidence depositions are often used for treating physicians, who usually cannot sacrifice a full day to testify in court and who typically charge for their time from door-to-door. Needless to say, this can be very expensive, and everyone benefits from a videotaped evidence deposition prior to trial. In a catastrophic injury case with numerous treating physicians and opinion witnesses, videotaped depositions can invigorate the jury and increase their attention to the important facts of your case.

In Illinois, all the rules governing the practice, procedures, and use of depositions apply to videotaped depositions.²² At the beginning of the videotaped deposition, the operator must state on camera (1) his or her name and address; (2) the date, time, and place of the deposition; (3) the caption of the case; (4) the name of the witness; (5) the party on whose behalf the deposition is being taken; and (6) the party at whose instance the deposition is being videotaped.²³

In addition, the officers before whom the deposition is being recorded must identify themselves and swear in the witness on camera.²⁴ After the deposition has concluded, the tape must be securely sealed by the operator in an envelope bearing the title and number of the action and marked before promptly filing or sending by certified mail to the clerk of the court for filing.²⁵ The party at whose instance the videotaped deposition is taken must pay the operator's charges and any filing fees.²⁶

Finally, the videotaped deposition may be presented at trial in lieu of reading from the stenographic transcription of the deposition.²⁷ It is important to note, however, that the decision to permit the use of videotaped, as opposed to transcribed, deposition is within the trial court's discretion.²⁸ It is helpful, for appellate review, to include a transcript of the video.²⁹

There are some pitfalls to be aware of when using videotaped evidence depositions at trial. Do not put the witness in front of an open window or allow background pictures to be in plain view. This can distract jurors. Keep some of the courtroom lights on while replaying the video. Also, even attorneys not on camera have microphones, so do not whisper comments – they will be picked up on the tape. When examining a treating doctor, avoid boring the jury by laboriously going over every office visit. The attention span of a juror lasts for approximately one hour. Use demonstrative evidence to stimulate, not exhaust, jurors' attention.

D. Videotapes of Surgery and Hospitalization

A videotape of a complicated surgery performed on a plaintiff can help convince a jury of the seriousness of an injury that might not be understood by medical testimony alone. In *Barry v. Owens-Corning Fiberglas Corp.*,³⁰ the first district appellate court held that it was not error to allow the jury to see a videotape of a thorascopy procedure performed on the plaintiff. There, a thoracic surgeon performed a diagnostic procedure to determine the cause of the plaintiff's shortness of breath. The physician testified at trial and used the videotape as a demonstrative tool to explain the procedure and the observations that led him to conclude that the plaintiff was suffering from mesothelioma.

The defendant objected and argued that the videotape was irrelevant, immaterial, and cumulative. The trial court admitted the videotape and the appellate court affirmed and flatly rejected defendant's argument, noting as follows:

The videotape becomes, by its nature, cumulative to the testimony, but cumulative in a good way. The goal is to help the jury understand something.... Fictional medical dramas on television regularly provide viewers with the sight of scalpels being inserted in various parts of the human anatomy. So does educational programming. No widespread public shock is discernible.... It was not error to allow the jury to see it.³¹

Taking the same position as the *Barry* and *Glassman* decisions is the fourth district appellate court decision of *People v Crayton*.³² In *Crayton*, slides showing the condition of the victim's body taken in the hospital immediately after the injury were admissible because they helped explain the pathologist's testimony concerning tissue damage.³³ Similarly, a California court held admissible a film showing the plaintiff in a hospital with a tube down the nose, temporary tracheotomy, and uncontrollable flailing arms.³⁴

Depending on the injury, a prudent attorney will request videotapes, slides, films or other visual evidence of the surgery or the resulting injury. If you represent a plaintiff scheduled to undergo surgery, such as an arthroscopy, contact the surgeons so that they can preserve the videotape.³⁵

E. Wrongful Death Documentary

Wrongful death documentaries are typically used in settlement negotiations rather than trial. These documentaries are commonly referred to as settlement brochures. Typically, the plaintiff's attorneys (or their representatives) will interview co-workers, friends, and family members about the decedent's life. The brochure usually includes photographs and videotapes showing the decedent in his or her healthy, pre-injured states.

It is important to interview influential people in the decedent's life. When narration is added, the decedent's story unfolds. Clearly, much of this is included solely

to encourage settlement. It differs from the progressive format in that it tells a story about who the decedent was, how he or she was viewed (as a co-worker, friend, child, sibling, spouse, parent, etc.) and what the future probably held.

It is well-established Illinois law that videotapes in a wrongful death action are admissible.³⁶ In *Drews v Goebel Freight Lines*, the supreme court affirmed a trial court's decision to allow the jury to see two videotapes of the decedent teaching his son to swim and play golf. The defendant contended that the videotapes were cumulative and prejudicial, but the court held that the tapes were relevant to show the decedent's state of health, his relationship with his children, and the services and instruction he provided to his family.³⁷ In *Exchange National Bank*, the first district appellate court held that a videotape of the decedent being interviewed about a job program was admissible to show her state of well-being prior to her death.³⁸

F. Reconstruction Videos

It is well-settled that reconstruction videotapes are admissible when the essential elements of the reconstruction are shown to be substantially similar to those at the time of the injury-producing event.³⁹ Further, the decision whether to admit evidence that reconstructs the scene of an accident rests with the trial judge.⁴⁰

The seminal case in this area is *French v City of Springfield*.⁴¹ In *French*, the supreme court held the trial court improperly admitted a motion picture offered by the plaintiff that was taken four years after the collision, at a different time of day, with different objects on the road, and from the deceased driver's position behind the wheel.⁴² In *Silverman v. General Motors*,⁴³ the court allowed a videotape of a brake test experiment that used the same model car equipped in substantially the same manner under the same conditions as during the incident.⁴⁴

G. Surveillance Videos

The surveillance videotape is becoming common in personal injury actions to impeach or contradict the testimony of an injured party. The plaintiff's attorney should request complete, unedited copies of all surveillance filming during the course of discovery.⁴⁵ Courts usually give the defendant an opportunity to depose the plaintiff before providing copies of the videotape.⁴⁶ This allows the defendant to use the tapes at trial for impeachment purposes should the injured plaintiff exaggerate his or her injuries.⁴⁷

One of the first reported cases involving surveillance film in Illinois is the appellate court decision in *McGoorty v Benhart*.⁴⁸ There, the appellate court reversed the trial court in refusing to allow an in-court presentation of motion pictures while demonstrating the plaintiff's physical capabilities regarding his capacity to work. In *Carney v Smith*,⁴⁹ the first district appellate court permitted the use of surveillance tapes over the plaintiff's objection. The plaintiff contended that the tapes were prejudicial

because they left the jury with the impression that the plaintiff was caught in a lie. The court rejected this argument.

IV. Conclusion

Technological developments have altered our lives dramatically over the past couple of decades by giving us conveniences we cannot imagine living without today. Attorneys have embraced many of these technological advances with open arms and made them necessities in our daily practice of law.

The videotape is yet another technological tool we can use as lawyers. Lawyers who learn to use videotape technology smoothly and seamlessly will appear skillful and well prepared to the jury. While it cannot win the case for a lawyer, it can help keep the attention of jurors and gain their respect.

¹ Witke, Higgins and Babcock, *A Video Tape is Worth a Thousand Words: The Use of Demonstrative Evidence in the Defense of an Automobile Products Liability Case*, 50 Ins Couns J 94, 97 (1983) (“[People] start the day... watching ‘Good Morning America’ and wind up at night with the [10:00] news... [television] has more credibility than just the eight-by-ten black and white photograph.”); Begam and Begam, *A Day in the Life of a Quadriplegic*, 14 Trial 3 at 26 (March 1978) (“The average juror possesses a highly-developed cinematic sensibility... which derives from years, usually decades, of movie-going and television-watching.”)

² *Carney v Smith*, 240 Ill App 3d 650, 608 NE2d 379 (1st D 1992).

³ *Cisarik v Palos Community Hosp.*, 144 Ill 2d 339, 342, 579 NE2d 873, 874 (1991).

⁴ *Id.*, 579 NE2d at 874.

⁵ *Palumbo v Kuiken*, 201 Ill App 3d 785, 559 NE2d 206, 210 (1st D 1990) (rejection of videotape of knee surgery upheld when it was cumulative to testimony of operating doctor).

⁶ *Belshaw v Hillsboro Hotel, Inc.*, 229 Ill App 3d 480, 593 NE2d 170 (5th D 1992).

⁷ *Missouri Portland Cement Co. v United Cement Workers’ Union*, 145 Ill App 3d 1023, 496 NE2d 489 (5th D 1986).

⁸ 152 Ill App 3d 596, 504 NE2d 830 (1st D 1987).

⁹ *Id.*, 504 NE2d at 832.

¹⁰ 141 Ill App 3d 1046, 490 NE2d 1368 (1st D 1986).

¹¹ *Id.*, 490 NE2d at 1375.

¹² *Cisarik*, 579 NE2d at 875.

¹³ *Id.*, 579 NE2d at 874.

¹⁴ *Id.*, 579 NE2d at 875. See also *Burke v 12 Rothschild’s Liquor Mart, Inc.*, 209 Ill App 3d 192, 658 NE2d 80 (1st D 1991) *aff’d* 148 Ill 2d 429 (1992) (opposing counsel has no right to see the outtakes of a day-in-the-life video).

¹⁵ 198 Ill App 3d 891, 556 NE2 662 (1st D 1990).

¹⁶ 269 Ill App 3d 37, 645 NE2d 319 (1st D 1994).

¹⁷ *Id.*, 645 NE2d at 328.

¹⁸ See, e.g., Passante, *The Use of Clinical and “Day-in-the-Life” Presentations in Personal Injury Litigation*, 20 Wake Forest L Rev 12 (1989). Graham and Lapp, *Day-in-the-Life Videos: Evolving Arguments on their Making and Use at Trial*, *Tort & Insurance Law Journal* at 574, vol 27, no 3, (Spring 1992). Preiser and Hoffman, *Day-in-the-Life Films-Coming of Age in the Courtroom*, 17 Trial 8, at 26, 27 (Aug. 1981).

¹⁹ *Thomas v C.G. Tate Construction*, 465 F Supp 566, 568 (D SC 1979).

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- ²⁰ *Arnold v Burlington Northern Railroad*, 748 P2d 174 (Or Ct App 1988). But see *Harley v Byers Transportation*, 414 SW2d 777 (Mo Supreme Ct 1967) (the court noted that the films “would have constituted... testimony from Plaintiff which was not subject to cross-examination”).
- ²¹ See *Ciuzio v United States*, 465 US 1034 (1984); *United States v McKneely*, 69 F3d 1067, 1074 (10th Cir 1995).
- ²² Ill S Ct Rule 206(g).
- ²³ Id.
- ²⁴ Id.
- ²⁵ Id.
- ²⁶ Id.
- ²⁷ Id.
- ²⁸ *People v Johnson*, 118 Ill 2d 501, 517 NE2d 1070 (1987); *Healy v Bearco Management, Inc.*, 216 Ill App 3d 947, 576 NE2d 1195 (2d D 1991).
- ²⁹ *Howe v Varsity Corporation*, 36 F3d 746, 749 (8th Cir 1994), aff’d, 116 S Ct 1065 (1996); *United States v Betancur*, 24 F3d 73, 75 (10th Cir 1994).
- ³⁰ 282 Ill App 3d 199, 668 NE2d 8 (1st D 1996).
- ³¹ Id., 668 NE2d at 11. See also, *Glassman v St. Joseph Hospital*, 259 Ill App 3d 730, 631 NE2d 1186 (1st D 1994) (expert doctor allowed to narrate a videotape of other surgeons performing a similar procedure to the one at issue).
- ³² *People v Crayton*, 175 Ill App 3d 932, 530 NE2d 651 (4th D 1988).
- ³³ Id., 530 NE2 at 663.
- ³⁴ *Lehmuth v Long Beach Unified School Dist.*, 348 P2d 887, 894 (Cal Supreme Ct 1960).
- ³⁵ *Paula Solimini v R.C. Topsoil, et al*, 94 L 1382 (Lake County, Illinois) (trial judge allowed a videotape of an arthroscopic knee surgery to be viewed at trial).
- ³⁶ *Drews v Gobel Freight Lines*, 144 Ill 2d 84, 578 NE2d 970 (1991); *Exchange Nat’l Bank v Air Illinois*, 167 Ill App 3d 1081, 522 NE2d 146 (1st D 1988).
- ³⁷ *Drews*, 578 NE2d at 977.
- ³⁸ *Exchange Nat’l Bank*, 522 NE2d at 150.
- ³⁹ See, e.g., *Wiedemann v Indust. Erectors*, 137 Ill App 3d 47, 483 NE2d 990 (1st D 1985); *Hubbard v McDonough Power Equip., Inc.*, 83 Ill App 3d 272, 404 NE2d 311 (5th D 1980).
- ⁴⁰ *Wiedemann*, 483 NE2d at 996.
- ⁴¹ 65 Ill 2d 74, 347 NE2 438 (1976).
- ⁴² Id., 357 NE2d at 442. See *Rios v Navistar Int’l Transport, Corp.*, 200 Ill App 3d 526, 558 NE2d 252 (1st D 1990) (trial court did not abuse its discretion in admitting videotape of experiment even though it took place nine years after plaintiff’s injury producing event because the experiment duplicated essential conditions existing at the time of the accident).
- ⁴³ 99 Ill App 3d 593, 425 NE2d 1099 (1st D 1981).
- ⁴⁴ Id., 425 NE2d at 1105-06. See also, *Nachtsheim v Beech Aircraft Corp.*, 847 F2d 1261 (7th Cir 1988) (manufacturer’s videotape demonstrating manner in which ice accumulates and is removed by deicing equipment was properly admitted for demonstrative purposes).
- ⁴⁵ Ill S Ct Rules 214 and 237.
- ⁴⁶ See, e.g., *Daniels v National Railroad Passenger Corp.*, 110 FRD 160 (D NY 1986); *Boyle v CSX Transportation, Inc.*, 142 FRD 435 (SD WV 1992).
- ⁴⁷ *Daniels*, 110 FRD at 161.
- ⁴⁸ 305 Ill App 458, 27 NE2d 298 (2d D 1940).
- ⁴⁹ 240 Ill App 3d 650, 608 NE2d 379 (1st D 1992).