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# DAY-IN-THE-LIFE FILMS: THE CELLULOID WITNESS COMES TO THE AID OF THE PLAINTIFF\*

## I. INTRODUCTION

Traditionally, motion pictures have been used by attorneys defending personal injury actions to expose malingering plaintiffs.<sup>1</sup> Recently, however, plaintiffs' attorneys have begun to use "day-in-the-life" films to net large recoveries for personal injury clients.<sup>2</sup> These films are documentaries, usually fifteen to fifty minutes long, which demonstrate for the jury the extent of the plaintiff's injuries, disabilities, and therapy. The introduction of a day-in-the-life film in evidence, however, is not a simple matter but requires an extensive foundation and careful production and presentation of the film. This Note examines the admissibility requirements for day-in-the-life films, objections to their admissibility, and the procedural implications of their use. It suggests guidelines for making and presenting an acceptable film.

## II. REQUIREMENTS FOR ADMISSIBILITY

For well over a century, still photographs have been admissible in evidence despite objections that they misrepresent the subject portrayed.<sup>3</sup> Because motion pictures are nothing more

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\* See Paradis, *The Celluloid Witness*, 37 U. COLO. L. REV. 235 (1965).

1. See generally Sweet, *The Motion Picture as a Fraud Detector*, 21 A.B.A.J. 653 (1935).

2. *E.g.*, *Munns v. Vaughn*, 20 ATLA L. Rep. 128 (Alaska Dist. Ct. 1977)(6.5 million dollar judgment); *Savage v. Van Marle*, 15 ATLA News L. 219 (Cal. Super. Ct. June 1972)(1.6 million dollar award for brain damage in *jury waived* trial); *Cyester v. Gregoris*, 15 ATLA News L. 217 (Cal. Super. Ct. June 1972)(1 million dollar settlement for brain damage after film shown to defense attorneys prior to trial); *Bush v. General Elec. Co.*, 13 ATLA News L. 474-5 (Nev. Dist. Ct. Dec. 1970), *aff'd*, 498 P.2d 366 (Nev. 1972)(3.5 million dollar judgment for brain damage and resulting paralysis).

3. See, *e.g.*, *State v. Fox*, 25 N.J.L. 566 (1856). South Carolina has followed the traditional rule in this area. See, *e.g.*, *Holmes v. Black River Elec. Coop., Inc.*, 274 S.C. 256, 262 S.E.2d 875 (1980); *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979); *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977); *Joyner v. St. Matthews Builders*, 263 S.C. 136, 208 S.E.2d 48 (1974); *Rhodes v. Spartanburg County*, 262 S.C. 644, 207 S.E.2d 85 (1974); *Still v. Hampton & Branchville R.R.*, 258 S.C. 416, 189 S.E.2d 15 (1972); *Ledford*

than a series of still photographs imprinted sequentially on film to add motion, many courts have admitted films on the same basis as still photographs.<sup>4</sup> In both cases, two requirements for admissibility exist: the subject portrayed must be relevant to an issue in the case, and the photograph or film must be an accurate reproduction of persons and subjects about which oral testimony is presented.<sup>5</sup>

The Federal Rules of Evidence define relevant evidence as that which tends "to make the existence of any fact that is of consequence to the determination of the action more or less probable."<sup>6</sup> Thus, a day-in-the-life film must be probative of some issue in the case, such as the extent of the plaintiff's injuries, pain and suffering, inability to enjoy life, range of activities, and therapy.<sup>7</sup>

Because a motion picture is merely a mechanical reproduction of a witness' testimony rather than direct evidence, it must be properly authenticated by the offering party.<sup>8</sup> In the past, courts have required a more extensive foundation for films than for photographs because film was believed to be more easily al-

v. R.G. Foster & Co., 252 S.C. 546, 167 S.E.2d 575 (1969).

4. See *Powell v. Industrial Comm'n*, 4 Ariz. App. 172, 418 P.2d 602 (1966), *vacated on other grounds*, 102 Ariz. 11, 423 P.2d 348 (1967); *People v. Hayes*, 21 Cal. App. 2d 320, 71 P.2d 321 (1937); *McGoorty v. Benhart*, 305 Ill. App. 458, 27 N.E.2d 289 (1940); *Morriss v. E.I. DuPont de Nemours & Co.*, 346 Mo. 126, 139 S.W.2d 984 (1940); *Streit v. Kestel*, 108 Ohio App. 241, 161 N.E.2d 409 (1959); *Lampley v. Waygood*, 57 Tenn. App. 610, 422 S.W.2d 708 (1967); *Richardson v. Missouri-K.-T. Ry.*, 205 S.W.2d 819 (Tex. Civ. App. 1947); *Hare*, *Demonstrative Evidence*, 27 ALA. LAW. 193, 196-98 (1966).

5. See *Kortz v. Guardian Life Ins. Co.*, 144 F.2d 676, 679 (10th Cir. 1944); *Thomas v. C.G. Tate Constr. Co.*, 465 F. Supp. 566, 569-71 (D.S.C. 1979); *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 609 (D. Alaska 1977); *Miles Laboratories, Inc. v. Frolich*, 195 F. Supp. 256, 263 (S.D. Cal. 1961); *Streit v. Kestel*, 108 Ohio App. 241, 245-46, 161 N.E.2d 409, 413 (1959); *Hayward v. Ginn*, 306 P.2d 320, 324 (Okla. 1957); *John B. Kelley Co. v. Workmen's Comp. App. Bd.*, 8 Pa. Commw. Ct. 589, 592, 303 A.2d 255, 257 (1973).

6. FED. R. EVID. 401. See generally 1 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 401 (1980).

7. Furthermore, because determination of the relevance of offered evidence is within the trial court's sound discretion, decisions that films are relevant evidence are seldom disturbed on appeal. 3 C. SCOTT, *PHOTOGRAPHIC EVIDENCE* § 1296 (2d ed. 1969). If the film contains any irrelevant material, however, the entire film may be excluded; the trial court is not obligated to edit out irrelevant sequences. See *Morriss v. E.I. DuPont de Nemours & Co.*, 346 Mo. 126, 132, 139 S.W.2d 984, 988 (1940).

8. *Sanchez v. Denver & R.G.W. R.R.*, 538 F.2d 304 (10th Cir. 1976); *UAW v. Russell*, 264 Ala. 456, 88 So.2d 175 (1956); *Balian v. General Motors*, 121 N.J. Super. 118, 296 A.2d 317 (1972).

tered and distorted.<sup>9</sup> The photographer was required to testify to his skill and experience; the type, mechanics, quality, and quantity of the photographic equipment and film used; and the conditions under which the film was made. Explanation of the process of developing and printing the film; any distortions of height, distance, illumination, or spatial relationships caused by that process; and any editing and splicing was also required. Finally, the photographer had to testify to the speed of the filming, the mechanics and speed of projection, the distance of the projector from the screen, and to the accuracy of the film's portrayal.<sup>10</sup>

Modern courts are satisfied by testimony that proves the reliability and accuracy of the finished film.<sup>11</sup> Although the traditional criteria illustrate the broadest possible foundation that could be required, brief direct examination of the authenticating witness on only those technical points of the photographic process familiar to most laymen appears to provide a sufficient foundation.<sup>12</sup> The authenticating witness should identify the persons, objects, and places pictured; testify that the film is a true and accurate representation of the events he observed while filming; and explain briefly the circumstances of taking, developing, and projecting the film.<sup>13</sup> The identity of the authenticating witness is unimportant so long as he or she was present when the film was taken and observed the people and events por-

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9. McElroy & McWelthy, *Motion Pictures, A Potent Factor in Trial Work*, MED. TRIAL TECH. Q., Sept. 1955, at 109, 110.

10. McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E.2d 289 (1940)(motion picture of malingering plaintiff was admitted only after an elaborate foundation was laid). For a list of the elements of proof, see 18 AM. JUR. PROOF OF FACTS, 153, 157-58 (1960).

11. *E.g.*, *Grimes*, 73 F.R.D. at 609 (sufficient verification provided by photographer's testifying that he was a professional, that he used a camera in good condition, that the material filmed was not rehearsed, that no special effects were used, that the film was not edited, and that it accurately portrayed what he had personally observed); *Long v. General Elec. Co.*, 213 Ga. 809, 102 S.E.2d 9 (1958)(motion picture held admissible on basis of foundation testimony by witness-photographer that it portrayed what he saw); *Balian*, 121 N.J. Super. at 125, 296 A.2d at 320-21 (1972)(authenticating witness must testify to the circumstances surrounding the taking of the film, the manner and circumstances of its development, and evidence about its projection and its accuracy).

12. A sample direct examination for use in establishing a film's authenticity is provided in *Paradis*, *The Celluloid Witness*, 37 U. COLO. L. REV. 239 (1965).

13. *See Grimes*, 73 F.R.D. at 609; *Kortz*, 144 F.2d at 679; *Balian*, 121 N.J. Super. at 125, 296 A.2d at 320-21; *Hayward*, 306 P.2d at 324.

trayed.<sup>14</sup> Nevertheless, the practitioner should bear in mind that the credibility and weight given to any film is based in part on the credibility and expertise of the authenticating witness.<sup>15</sup> For this reason, a professional photographer who can withstand technical attacks on cross-examination and who can elicit the trust of the jury is most effective.<sup>16</sup> As a practical matter, if a photographer's assistant is to testify in the photographer's absence, the assistant should have observed the making of the film.

### III. OBJECTIONS TO DAY-IN-THE-LIFE FILMS

#### A. Hearsay

Hearsay evidence may be defined as in-court testimony to an out-of-court statement offered to prove the truth of the matter asserted.<sup>17</sup> In certain situations, a hearsay objection to the showing of a day-in-the-life film may be well founded. For example, a staged demonstration on film is assertive conduct and as such is inadmissible unless it qualifies as an exception to the hearsay rule.<sup>18</sup> A few courts have held that a film of the plaintiff demonstrating his injury by doing normal, unstaged activities is equivalent to a witness' testimony about assertive conduct to prove the extent of the plaintiff's injuries and is therefore inadmissible as hearsay.<sup>19</sup> The majority view on unstaged activities, however, is to the contrary.<sup>20</sup>

14. See *Kortz*, 144 F.2d at 676.

15. A motion picture may distort its subject matter in many ways. Light can be filtered to create a gloomy or bright environment. Lighting gels can be used to highlight certain colors, like the redness of the skin. Sound can be taped on two separate tracks, picking up soft gasping or labored breathing even on a long camera shot. The product may also enhance certain specific noises, such as the tearing sound a bandage makes on skin, the bumping of a prosthesis, or the clicking of a brace. Prieser & Hoffman, "Day In The Life" Films—Coming of Age in the Courtroom, TRIAL, Aug. 1981, at 30.

16. McElroy & McWelthy, *supra* note 9, at 110.

17. C. McCORMICK, McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 246 (2d ed. 1972).

18. FED. R. EVID. 801(a). See *Grimes*, 73 F.R.D. at 607 (film showing the plaintiff performing tasks to demonstrate his disability was assertive conduct); *Foster*, 496 F.2d at 791 (dicta suggesting such a film was testimony of assertive conduct).

19. See, e.g., *Haley v. Byers Transp. Co.*, 414 S.W.2d 777 (Mo. 1967) (film of a paralyzed plaintiff getting from his bed into a wheelchair and a walker was properly excluded as testimony by plaintiff that was not subject to cross-examination when film would have a prejudicial effect that outweighed its probative value).

20. Bloch, *The Direction and Presentation of a "Day in the Life" Film*, 53 Wis. B. BULL., Sept. 1980, at 20. See *Balian*, 121 N.J. Super. at 125, 296 A.2d at 324 (cross-

Several answers to a common-law hearsay objection exist. The offering party can meet the objection by arguing that films of unstaged conduct are not hearsay because they are records of nonassertive conduct.<sup>21</sup> He can also argue that because the film is free of the usual infirmities of hearsay<sup>22</sup>—the narrating witness and the individual subjects of the film are in court, under oath, and available for cross-examination, it should be admitted in evidence.<sup>23</sup> The rationale supporting this position is that the narrating witness merely uses the film to illustrate his observations, much as a physician might use an anatomical chart or an engineer might use diagrams and scale drawings to facilitate the presentation of testimony.<sup>24</sup> The film might also be admitted under one of the common-law exceptions to the hearsay rule. If, for example, the film shows the plaintiff consulting a physician or therapist, the plaintiff's attorney can use the "declaration of bodily condition" exception.<sup>25</sup> The rationale for admitting these

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examination does not ordinarily provide a sufficient avenue to rebut a motion picture of a reconstructed or posed demonstration; offering party must give the adverse party notice that film portrays staged event and chance to monitor making of film).

21. See C. McCORMICK, *supra* note 17, at 599-600 ("The position that hearsay includes neither non-assertive conduct nor assertive statements not offered to prove what is asserted finds solid adherence in recent and current statutes and rules dealing with the subject."). *Id.* See also UNIF. R. EVID. 62(1); CAL. EVID. CODE §§ 225, 1200 (West 1966); KAN. CIV. PRO. CODE ANN. § 60-459(a) (Vernon 1965); N.J.R. EVID. 62(1) (1969).

22. Hearsay evidence is inadmissible because the party against whom the statement is offered is unable to confront or cross-examine the original speaker and the original speaker is not under oath. C. McCORMICK, *supra* note 17, § 245.

23. *Grimes*, 73 F.R.D. at 610-11; *Reggio v. Louisiana Gas Serv. Co.*, 333 So. 2d 395, 397 (La. Ct. App. 1976); *Richardson v. Missouri-K.-T. Ry.*, 250 S.W.2d 819, 823 (Tex. Civ. App. 1947) (both therapist and plaintiff were available for cross-examination; court held that main test for determining whether motion picture constitutes hearsay is whether it is subject to cross-examination through witness who verifies and uses it). See also UNIF. R. EVID. 62(1), 63.

24. *UAW v Russell*, 264 Ala. 456, 88 So. 2d 175, *aff'd*, 356 U.S. 634 (1958). The film, however, must illustrate and correspond exactly to the witness' testimony.

25. See C. McCORMICK, *supra* note 17, at 690, which states that statements of a presently existing bodily condition made by a patient to a doctor consulted for treatment are almost universally admitted as evidence of the facts stated, and even courts greatly limiting the admissibility of declaration of bodily conditions generally will admit statements made under these circumstances. . . . [T]heir reliability is assured by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician.

Most courts, however, will not admit statements of present bodily condition made to a physician consulted solely for trial preparation or testimony. In *Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967), the South Carolina Supreme

statements is that the need for accurate diagnosis and treatment and the opportunity to cross-examine the physician afford appropriate hearsay safeguards.<sup>26</sup> This rationale not only supports the introduction of films illustrating the physician's testimony but also supports the patient's out-of-court statements.

In the federal courts, the hearsay exception embodied in Federal Rule of Evidence 803(24) may be available.<sup>27</sup> Under this rule, the trial court has the discretion to admit hearsay evidence of a material fact if the evidence is sufficiently probative and trustworthy and the purpose of the evidentiary rules is best served by its admission.<sup>28</sup> Although this rule is intended to be used "very rarely and only in exceptional circumstances,"<sup>29</sup> at least one court has found it applicable to day-in-the-life films. In *Grimes v. Employer's Mutual Liability Insurance Co.*,<sup>30</sup> the District Court of Alaska determined that these films can be highly probative of the nature and extent of the plaintiff's injuries and disabilities and that they contain the necessary "circumstantial guarantees of trustworthiness" when the verifying witness and individual subjects are available for cross-examination by the opposing party.<sup>31</sup> Moreover, because rule 803(24) requires that sufficient advance notice be given to provide the opposing party with a fair opportunity to meet the evidence,<sup>32</sup> the defendant cannot honestly claim unfair surprise.<sup>33</sup>

### B. Editing

Although editing ideally should be avoided, presentation of an unedited film is normally impractical. Removal of unneeded

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Court adopted the view that a physician consulted as a prospective witness may testify to the plaintiff's statements of present condition and past symptoms; however, the testimony is not admissible as proof of the facts stated but only as information relied upon by the physician to support his opinion. See also FED. R. EVID. 803(4).

26. C. McCORMICK, *supra* note 17, at 690-92.

27. See generally J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 803(24)[01].

28. Advisory Committee Notes, FED. R. EVID. 803(24).

29. *Id.*

30. 73 F.R.D. 607 (D. Alaska 1977).

31. *Id.* at 611.

32. FED. R. EVID. 803(24).

33. "Use of this exception is justified . . . where the normal hearsay problems do not exist or can be remedied. [Where film is used] [t]here are no problems with perception, memory, or meaning, and any sincerity problems can be solved by having the verifying witness or plaintiff-actor subject to cross-examination." *Grimes*, 73 F.R.D. at 611.

footage is a prerequisite of a smooth, effective film because the beneficial impact on a jury of an unedited film may be lost if the film is cumbersome. Furthermore, some scenes may embarrass both plaintiff and jury, and much "dead" film may be produced while the camera is being moved, while the plaintiff is awaiting therapy, or when individual subjects "freeze" before the camera. Finally, unedited film may contain relevant but prejudicial material—for example, scenes of the plaintiff moaning because of painful therapy—that must be removed to avoid an objection.<sup>34</sup> These are legitimate reasons for editing to which the courts should give deference.

The majority of courts subscribe to the rule that editing goes to the evidentiary weight given a film but does not affect its admissibility.<sup>35</sup> A minority of jurisdictions have excluded edited film on grounds that editing destroys the sequence and chronology of the film and confuses the jury.<sup>36</sup> An unusual limitation on editing was imposed by the court in *Grimes*,<sup>37</sup> which determined that part of the required authenticating foundation was a guarantee that the film had not previously been edited by the plaintiff.<sup>38</sup> The court said that it should be permitted to preview the unedited film so that it might identify and require the removal of any prejudicial or cumulative sequences.<sup>39</sup> Thus, the court completely forbade nonjudicial, pretrial editing,<sup>40</sup> a rigid approach that appears to be unwarranted. On direct examination

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34. *Thomas*, 465 F. Supp. at 566. See notes 54-69 and accompanying text *infra*. Because the court is under no duty to edit out the objectionable segments of film, the film will be excluded if not properly edited. *Morris v. E.I. DuPont de Nemours & Co.*, 346 Mo. 126, 139 S.W.2d 984 (1940); *C. Scott*, *supra* note 7, at 159.

35. *Appelby v. State*, 221 Ind. 544, 49 N.E.2d 533 (1943).

36. See, e.g., *Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 100 (10th Cir. 1958) (matter of the editing of film goes to weight of evidence and not to admissibility); *Pritchard v. Downie*, 326 F.2d 323, 326 (8th Cir. 1964) (citing *Millers'*). See also *UAW v. Russell*, 264 Ala. 456, 470, 88 So.2d 175, 186 (1956); *Thomas v. C.G. Tate Constr. Co.*, 465 F. Supp. 566 (D.S.C. 1979) (implied that edited film would be admissible). But see *Grimes*, 73 F.R.D. at 607 (editing of film allowed *only* by court order). Because photographs introduced into evidence need not be presented in the same order in which they were taken, the same should hold true for film.

37. *Grimes*, 73 F.R.D. at 609.

38. *Id.* at 609.

39. *Id.* at 610 n.1.

40. *Scott*, in his treatise on photographic evidence states that the "removal of irrelevant sequences is all the editing that should be permitted." 3 *C. Scott*, *supra* note 7, at 160.

of a client or a friendly witness, an attorney in effect "edits" the witness' testimony by asking questions that present evidence in the most favorable light and in the desired order. Opposing counsel has the task on cross-examination of discrediting that testimony by bringing out facts and circumstances the first attorney purposely avoided. The device of cross-examination is used to assure presentation of the entire truth. Because film is, in actuality, the narrating witness' testimony, cross-examination of the narrating witness should serve the same purpose in this context.

A less restrictive safeguard than that imposed in *Grimes* is available. The offering party can simply make available for judicial preview both the edited and unedited versions of a film.<sup>41</sup> Recommendations for correcting any objectionable features of the film can then be made during the preview. Afterward, the veracity of the film should no longer be an issue—opportunities for cross-examining the plaintiff and the authenticating witness and for previewing the entire unedited film assure trustworthiness. Furthermore, a judicial preview guarantees the film's admission at trial and virtually eliminates subsequent reversal on appeal.<sup>42</sup> Thus, at the proper time, the offering party should move to have the film previewed by the adverse party and the court.<sup>43</sup>

41. *Accord*, Prieser & Hoffman, *supra* note 15, at 29.

42. The trial court, however, is granted wide discretion in determining the admissibility of film. If certain precautions are taken at the trial level (*e.g.*, notice to adverse party and judicial preview), an appellate court will seldom overturn the trial court's decision to admit a film. *See, e.g.*, *Luther v. Maple*, 250 F.2d 916, 921 (8th Cir. 1958) (no abuse of discretion by trial court despite appellate court's opinion that film's admission was unwise); *Kortz v. Guardian Life Ins. Co.*, 144 F.2d 676, 679 (10th Cir. 1944) (question of sufficiency of photographic evidence is largely within discretion of trial court); *Butler v. Chrestman*, 264 So. 2d 812, 816 (Miss. 1972) (the trial court is afforded wide latitude in exercising discretion to admit or exclude films).

43. *Bloch*, *supra* note 20, at 22. *See, e.g.*, *Reggio v. Louisiana Gas Serv. Co.*, 333 So. 2d 395, 402 (La. 1976) (film edited at judicial preview). The film should be previewed by the court regardless of whether it has been edited by the offering party.

[A]ny unused film . . . must, of course, be kept and catalogued for review by opposing counsel and the court. To insure against a fatal evidentiary flaw, it is wise to plan the entire film in advance so that any objectionable material is kept to a minimum. [If there is too much editing], it could be forcefully argued that the production is not accurately representing a routine day.

Prieser & Hoffman, *supra* note 15, at 30.

### C. *Lack of Continuity of Action in the Film*

Day-in-the-life films may portray the continuous activities of the plaintiff during a single time period or may consist of a series of shorter segments of the plaintiff's activities filmed on the same reel at different times. Although an offer of proof that a film shows continuity of action generally is not essential to admissibility,<sup>44</sup> a lack of continuity may adversely affect the evidentiary weight accorded the film. Furthermore, overly selective filming may destroy the film's probative value and render the film inadmissible.<sup>45</sup> The photographer should thus be prepared to explain why discontinuous filming took place and what types of activities were not filmed.

### D. *Cumulative Effect*

At least one court has excluded a film when its subject matter had already been extensively described by oral testimony, even though the film provided a more graphic representation.<sup>46</sup> The majority position, however, holds that a film depicting a plaintiff undergoing clinical tests or performing daily functions to which appropriate witnesses have thoroughly testified is not cumulative because films more effectively testify to the plaintiff's pain, suffering, and loss of enjoyment of life.<sup>47</sup> The majority of courts find day-in-the-life films cumulative only when they follow other photographic evidence dealing with the same subject matter.<sup>48</sup> Although an objection in this context might be countered with the argument that the addition of motion makes the evidence different in kind from still photographs,<sup>49</sup> a practi-

44. C. SCOTT, *supra* note 7, at 157; *McGoorty v. Benhart*, 305 Ill. App. 458, 467, 27 N.E.2d 289, 294 (1940).

45. *Grimes*, 73 F.R.D. at 610; J. WEINSTEIN & M. BERGER, *supra* note 6, at 1001(2)[03].

46. *Johnson*, 604 F.2d at 958. The cumulative evidence objection in *Johnson* was a make-weight measure to support the court's decision to exclude a film that distorted the evidence. The modern view is that films are cumulative only of other photographic evidence. 73 F.R.D. at 609. *But see* *Balian v. General Motors Corp.*, 121 N.J. Super. 118, 128, 296 A.2d 317, 324 (1972)(court noted that film is by nature cumulative).

47. *Grimes*, 73 F.R.D. at 610. *See also* *Prieser & Hoffman*, *supra* note 15, at 28: "[t]he film is the most efficient and authentic evidence plaintiff can offer."

48. C. SCOTT, *supra* note 7, § 1022.

49. *See* *Richardson v. Missouri-K.-T. Ry.*, 205 S.W.2d 819 (Tex. Civ. App. 1947)(court admitted film of certain machinery even though forty-seven still photographs of same machinery had already been introduced).

tioner should exercise caution when introducing any still photographic evidence before presenting a film.

### *E. Prejudice*

Courts traditionally view the use of motion pictures as demonstrative evidence with a jaundiced eye because improperly made films may be inflammatory and prejudicial. A film's vivid impression on a jury is almost impossible either to limit, if the film has been properly admitted, or to expunge, if its admission has been improper.<sup>50</sup>

Some subjects are so prejudicial that films portraying them are excluded almost as a matter of course. Footage of a plaintiff grimacing or accompanied by a soundtrack of a plaintiff moaning while undergoing therapy for injuries allegedly caused by the defendant ordinarily falls into this category. Expositions such as these might easily inflame a jury and diminish the likelihood of an impartial judgment.<sup>51</sup> In *Thomas v. C.G. Tate Construction Co.*,<sup>52</sup> an otherwise acceptable film was excluded because it showed the plaintiff undergoing painful physical therapy for burns that covered his arms and upper torso. The soundtrack carried his moans and close-ups revealed his face contorted by what appeared to be great pain. In excluding the entire film, the court noted that not only the plaintiff, but also his doctor, wife, and therapist would be able to testify about the painfulness of

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50. The novelty of using video tape in the courtroom in and of itself may make the [presentation] stand out in the minds of the jury. Unquestionably it will dominate the evidentiary scene. This court is greatly concerned that its dominating effect will distract the jury from its proper consideration of other issues they will be called on to decide. . . . No amount of testimony from the attending physician, nurses, etc., could possibly offset the dramatic effect of the [tape] in question.

*Tate*, 465 F. Supp. at 571.

51. See, e.g., *Grimes*, 73 F.R.D. 607. The offered film showed the plaintiff performing daily functions and clinical tests, which showed how limited he was in seeking entertainment and how physically debilitating his injury was. The film was held to be more probative than prejudicial because it illustrated better than words the plaintiff's pain, suffering, and loss of enjoyment. "While the scenes are unpleasant, so is the plaintiff's injury." *Id.* at 610. Weinstein suggests that when a film's admissibility is in doubt, it should be admitted with the proper instruction. 1 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 403[01]. See *Reggio v. Louisiana Gas Serv. Co.*, 333 So.2d 395 (La. App. 1976); *Swaggard v. Haney*, 363 So.2d 251 (Miss. 1978); *Holmes v. Black River Elec. Coop., Inc.*, 274 S.C. 252, 262 S.E.2d 875 (1980).

52. 465 F. Supp. 566 (D.S.C. 1979).

the therapy.<sup>53</sup> The approach of the court in *Thomas* is typical.<sup>54</sup>

Unless family members are an integral part of the plaintiff's therapy, scenes of the plaintiff with his family may be prejudicial and irrelevant and should ordinarily be excluded.<sup>55</sup> Theatrical scenes verging on melodrama should similarly be avoided. An understated scene depicting a plaintiff resolutely attempting to adapt to his new life will have sufficient impact on a jury and yet avoid the likelihood of successful objection. Sensational content alone, however, does not render a film inadmissible as long as it presents relevant evidence on the nature and extent of the plaintiff's injuries accurately and without exaggeration.<sup>56</sup> Similarly, evidence that is ghastly or gruesome should be admissible as long as it has not been introduced for its shock effect alone.<sup>57</sup>

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53. *Id.* at 571.

54. See, e.g., *Butler v. Chrestman*, 264 So. 2d 812 (Miss. 1972) ("day in the life" film of a paraplegic was excluded as cumulative because one of the final scenes showed her crying from pain and frustration).

55. *Grimes*, 73 F.R.D. at 610.

56. *People v. Cheary*, 48 Cal. 2d 301, 309 P.2d 431 (1957); *Commonwealth v. Makarewicz*, 333 Mass. 575, 132 N.E.2d 294 (1956). See generally C. SCOTT, *supra* note 7, at § 1296. In *Holmes v. Black River Elec. Coop., Inc.*, 274 S.C. 252, 262 S.E.2d 875 (1980), the trial court admitted into evidence pictures of the plaintiff's injuries, which defendant described as "hideous, grotesque, and grossly unfair." Defendant argued that the photographs should have been excluded because they may have aroused the jury's sympathy for the plaintiff. The South Carolina Supreme Court held that the pictures were admissible if they accurately depicted plaintiff's injuries at the time the photographs were taken and that they were not introduced for the sole purpose of inflaming the minds of the jury. *Holmes*, 274 S.C. at 258, 262 S.E.2d at 878. The court considered the pictures demonstrative evidence that aided the jury in its evaluation of the injuries and the pain suffered and added that they were "admissible as a matter of discretion by the trial judge, if not as a matter of right." *Id.* at 258, 262 S.E.2d at 878 (emphasis added). Since an analogy can be drawn between photographs and films, South Carolina courts may take a very liberal view of the admissibility of motion picture evidence.

57. 465 F. Supp. at 569. See, e.g., *Anderson v. Sears Roebuck & Co.*, 377 F. Supp. 136 (E.D. La. 1974) (photographs of plaintiff's severely burned body admitted as relevant to nature and extent of injuries, even though pictures presented horrifying spectacle).

By analogy, unembellished films of gruesome injuries should be admitted under even a conservative reading of FED. R. EVID. 403, if a film is accurate and presents evidence material to the offering party's cause of action. See *Lehmuth v. Long Beach Unified School Dist.*, 53 Cal. 2d 544, 348 P.2d 887, 2 Cal. Rptr. 279 (1960) (film of hospitalized plaintiff in bed with life support tubes in arms and throat, thrashing about in the midst of a coma, was admissible). See also *Faught v. Washain*, 329 S.W.2d 588 (Mo. 1959).

## IV. PROCEDURAL CONSIDERATIONS

## A. Adequate Notice

Although introduction of a day-in-the-life film at trial without previous warning may give the offering party a tactical advantage, advance notice to both the court and the adverse party precludes the possibility of exclusion for unfair surprise.<sup>58</sup> Of course, if the offering party is asked through discovery to produce the report of the expert whose testimony the film illustrates, then the film's existence must be disclosed.<sup>59</sup> Otherwise, adequate notice may be provided by use of the judicial preview process discussed earlier.<sup>60</sup> During the preview, the plaintiff's attorney should make available all footage shot in making the film and should secure stipulations, approval of pretrial editing, and an advance ruling on the film's admissibility.

## B. Bifurcation

Although a day-in-the-life film is normally relevant only on the issue of the plaintiff's damages, it may be sufficiently forceful to influence a jury's decision on the question of the defendant's liability. Consequently, the defendant may find it desirable to seek a bifurcated proceeding, that is, separation of the determination of liability from the determination of damages.<sup>61</sup>

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58. *Foster*, 496 F.2d at 790. Although the film was excluded for other reasons, the court noted with disapproval that it had been made without notice to the defendant.

59. See *Sanchez v. Denver & R.G.W. R.R.*, 538 F.2d 304 (10th Cir. 1976), cert. denied, 429 U.S. 1042 (1977)(adverse party should have been able to discover the film); *Balian*, 121 N.J. Super. 118, 296 A.2d 317 (1972)(verdict for the defendant reversed because existence of film not disclosed when plaintiff requested production of reports of defendant's narrating experts).

60. See, e.g., *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981)(trial judge should preview film outside jury's presence); *Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 100 (10th Cir. 1958)(preview is correct procedure). See also *Prieser & Hoffman*, *supra* note 15, at 30. Scott suggests that the preview should be conducted under the same conditions that prevail when the jury sees the film. The offering party should therefore attempt to use the same projector, screen, and room as contemplated for trial. C. Scott, *supra* note 7, at § 1296.

61. Vogel, *The Issues of Liability and of Damages in Tort Cases Should Be Separated for the Purpose of Trial*, A.B.A. Section of Insurance, Negligence, & Compensation Law Proceedings 265, 269 (1960); "the separation of the trial [into consideration of liability and then damages] will tend to reduce prejudice against defendants and should eliminate or greatly reduce the effect of sympathy and compassion in personal litigation." See also *Beeck v. Aquaslide-n-Dive Corp.*, 562 F.2d 537, 542 (8th Cir. 1977)(appellate court noted that, due to the severe and extensive injuries plaintiff had suffered, evidence of

A bifurcated trial may be less time consuming than a unified one; if no liability is found, the need to present evidence on the damage issue is eliminated.<sup>62</sup> Bifurcation also improves the trial by forcing the jury to decide the case according to the substantive legal guidelines laid down by the judge.<sup>63</sup>

Although the defendant is not absolutely entitled to a severance of the issues,<sup>64</sup> bifurcation is usually granted upon request. The decision rests within the sound discretion of the trial court<sup>65</sup> and absent a showing of prejudice, will seldom be reversed on appeal.<sup>66</sup> Courts generally permit a severance of the issues upon a showing that the issues are distinct and separable;<sup>67</sup> the plaintiff's offer of proof of damages is disproportionately greater than his offer of proof on liability;<sup>68</sup> or the offer of proof of damages may overly prejudice the jury in favor of the plaintiff.

Federal Rule of Civil Procedure 42(b) authorizes federal

damages, if introduced with evidence of liability, might be prejudicial to defendant. Thus, the trial court's bifurcation of the trial had been proper); *Bowie v. Sorrell*, 113 F. Supp. 373 (4th Cir. 1953) ("Rule 42(b) has often been applied in actions for damages for personal injuries . . . to avoid prejudice [to the defendant]"); *Grissom v. Union Pac. R.R.*, 14 F.R.D. 263 (D. Colo. 1953).

62. Zeisel & Calahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963). The authors' study revealed that bifurcated trials take twenty percent less trial time than cases that simultaneously submit evidence of liability and damages to the jury. *Id.* at 1619. *But see* Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961). One commentator has observed:

The great end for which courts are created is not efficiency. It is justice. We cannot sacrifice the latter to attain the former. Perhaps the result is more just when defendants win 79 percent of the cases. Perhaps juries are moved by sympathy when they hear of the injuries to the plaintiff. But if so substantial a change is to be made in the nature of jury trial and if the Seventh Amendment permits such a change, it should be made deliberately on the merits by Congress. It should not be made by the courts under the guise of an attack on calendar congestion.

Wright, *Procedural Reform: Its Limitations and Its Future*, 52 A.B.A.J. 742 (1966).

63. J. WEINSTEIN & M. BERGER, *supra* note 6, at 852.

64. *Sudderth v. National Lead Co.*, 272 F.2d 259, 261 (5th Cir. 1959).

65. *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 25 (6th Cir. 1965); *Ammesmak v. Interlake S.S. Co.*, 342 F.2d 627, 631 (7th Cir. 1965); *Bowie v. Sorrell*, 209 F.2d 49, 51 (4th Cir. 1953); *Grissom v. Union Pac. R.R.*, 14 F.R.D. 263, 264 (D. Colo. 1953).

66. *C.W. Regan, Inc. v. Parsons, Brickenhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969).

67. *Kushner v. Hindon Constr., Inc.*, 81 F.R.D. 93 (D.C. Pa. 1979); Note, *Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis*, 46 MINN. L. REV. 1059, 1073-74 (1962).

68. J. WEINSTEIN & M. BERGER, *supra* note 6, at 853.

trial judges to grant bifurcation.<sup>69</sup> The Advisory Committee Notes to rule 42 indicate that bifurcation is "encouraged where experience has demonstrated its worth" but add that separation "is not to be routinely ordered."<sup>70</sup> Several courts have interpreted this language as requiring limited use of bifurcation,<sup>71</sup> and the Third Circuit Court of Appeals has ruled that negligence cases bifurcated routinely rather than on a case-by-case basis will be reversed without a showing of prejudice.<sup>72</sup> Finally, some trial courts deny bifurcation when the issues of liability and damages are interwoven and interdependent.<sup>73</sup>

Because a day-in-the-life film is almost always presented only during the damages phase of a bifurcated trial, it has no influence on the jury on the question of liability. Indeed, if a jury finds for the defendant on the issue of liability, the film is not used at all.<sup>74</sup> In some instances, however, bifurcation may

69. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2390 (1971). FED. R. CIV. P. 42(b) provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any separate issue . . . always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution . . . ."

70. Advisory Committee Notes, FED. R. CIV. P. 42.

71. See, e.g., *Moss v. Associated Transp., Inc.*, 344 F.2d 23, 26 (6th Cir. 1965); *Eichinger v. Firemen's Fund Ins. Co.*, 20 F.R.D. 204, 207-08 (D. Neb. 1957).

72. *Lis v. Robert Packer Hosp.*, 579 F.2d 819 (3d Cir. 1978). Pursuant to a district procedural rule, the district court that decided *Lis* bifurcated negligence actions as a matter of practice. The appellate court did not reverse but noted that

[t]his court has heretofore cast its lot with the views expressed by the Advisory Committee that bifurcation "be encouraged where experience has demonstrated its worth," but that "separation of issues for trial is not to be routinely ordered." We adhere to that position. Thus a routine order of bifurcation in all negligence cases is a practice at odds with the requirement that discretion be exercised and seems to run counter to the intention of the rule drafters. . . . We disapprove of a general practice of bifurcating all negligence cases. . . . A general policy of a district judge bifurcating all negligence cases offends the philosophy that a decision must be made by a trial judge only as a result of an informed exercise of discretion on the merits of each case.

*Id.* at 824.

73. See, e.g., *Franchi Constr. Co. v. Combined Ins. Co.*, 580 F.2d 1, 8 (1st Cir. 1978); *C.W. Regan, Inc. v. Parsons, Brinckenhoff, Quade & Douglas*, 411 F.2d 1379, 1388 (4th Cir. 1969) (separate trials held improper because jury had to make quantitative judgment on amount of damage that resulted from plaintiff's own conduct and amount of damage caused by others); *United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 306 (9th Cir. 1961).

74. Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 29 (1965). This study found that defendants win forty-two percent of cases tried routinely but win seventy-nine percent of the cases in which the liability issue is tried before the damages issue. *Id.* at 49.

work to the advantage of a plaintiff's attorney. Because liability has already been established, the chance of unfair prejudice is greatly reduced and the odds of the film's being admitted are improved.<sup>75</sup>

## V. PRACTICAL CONSIDERATIONS

Although tactics useful in presenting a day-in-the-life film vary from case to case, certain guidelines are applicable generally. First, a film may be the plaintiff's most eloquent witness and will have the greatest impact if presented at the end of his case. The content of the film lingers in the minds of the jurors and undercuts the effect of the defendant's evidence. Second, although more than one presentation is not legally prohibited, a film should not be shown more than once. During the first showing, jurors ordinarily experience sufficient discomfort to become sympathetic; a second showing may irritate jurors or toughen their sensibilities. Third, court time consumed by mechanical preparations for the film's projection must be kept to a minimum. Readied and reliable equipment and a competent projectionist are essential to showing a film without delay. Finally, a film should be made by a professional photographer to ensure quality and predictability.

## VI. CONCLUSION

Day-in-the-life films can be instrumental in securing for plaintiffs, especially permanently injured plaintiffs, more adequate recoveries in personal injury actions. This tool may have a greater impact on a jury in twenty to fifty minutes than will many hours of testimony. Films must be carefully prepared, introduced, and presented in anticipation of possible objections to their admissibility. Because the use of a day-in-the-life film to prove a plaintiff's damages can influence the jury's decision on the defendant's liability, proceedings in which these films will be offered in evidence should be bifurcated to avoid the prejudice

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75. Although purists and defense attorneys welcome the coming of bifurcated trials, questions remain. Should the jury be deprived of its traditional ability to "temper" the law? Are juries sophisticated enough to find liability if they see no damages?

that predictably results from the use of this evidentiary technique.

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