HOW FAR CAN ONE GO IN USING DEMONSTRATIVE EVIDENCE TO ASSIST THE JURY IN UNDERSTANDING YOUR THEORY OF THE CASE?

In Eric T. Trainor v. Westchester County Health Care Corp. d/b/a/ Westchester Medical Center, Francis Baccay, M.D. and Sodexho, Index No. 3379/08, our office recently confronted the problem of how to overcome a jury's inherent, "common sense" prejudice that quadriplegics are essentially confined to a bed and that "a [C-6] quad is a quad is quad." Our client suffered stage four bed sores while recuperating at Westchester Medical Center ("WMC") from a serious auto accident.[1] In the subsequent medical malpractice suit against WMC, the thrust of our theory of damages was not that the bedsores had caused him conscious pain and suffering, a very limited damage claim, but that the bedsores had caused him to miss a critical window of opportunity to develop upper body strength—resulting in a permanent loss of the potential for increased functioning. [2]

[1] His injuries suffered as a result of the automobile accident, including his quadriplegia, were not before the jury, and that personal injury case had been settled long before the client came to our office.

[2] "C-6 patients have musculature that permits most shoulder motion, elbow bending, but not straightening, and active wrist extension which permits tenodesis, opposition of thumb to index finger, and finger flexion. . . . C-6 patients can perform upper body dressing without assistance and may also perform lower body dressing without assistance. They can catheterize themselves and perform their bowel program with assistive devices. They can perform some transfers independently with a transfer board, turn independently with the use of side rails, and relieve pressure by leaning forward, alternating sides, or possibly by push-ups. . . . They can propel a manual wheelchair short distances on level terrain, operate

The videotape we wanted to show was that of a C-6 quad who was not the plaintiff. [3] The purpose of the proffered film was to illustrate what "could have been", rather than what was a day in our client's life. The videotape at issue showed a different C-6 quad, moving in and out of a wheel chair, via a portable board, into a specially equipped motor vehicle; actually driving the vehicle and then returning to the chair—all unassisted.

We obviously could not make a day-in-the-life film of our plaintiff, a C-6 quad, performing those activities because he had permanently lost an opportunity to be able to successfully execute those activities, as a proximate cause of defendant's negligence.

We submitted a detailed pre-trial motion in limine seeking permission for plaintiff's rehabilitation expert, a medical doctor, to use the prepared videotape as demonstrative evidence during her trial testimony. The videotape was previously

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power wheelchairs, and may drive with a van and special equipment. They can cook, perform light housework, and live independently with limited attendant care." http://www.spinal-injury.net/quadriplegia.htm (This on-line recitation of the functional abilities of a C-6 quad is consistent with our expert's testimony at trial).

[3] We first discovered the existence of a similar, self-made film through a "random" internet search and contacted the maker of the film who, like our plaintiff, was also a C-6 quadriplegic. Our office considered the admission of a high-quality, prepared videotape of a different C-6 quadriplegic performing upper body activities as demonstrative evidence, central to the jury's understanding of the case and to its pain and suffering verdict of 2.25 million dollars. (During an extended deliberation, the parties entered into a high-low agreement which resulted in a plaintiff's verdict of $800,000.).

exchanged and was being offered to assist the jury in understanding the expert's testimony and in grasping plaintiff's theory of damages.

The motion argued that the film was instructional, non-inflammatory, and was properly offered to educate jurors regarding the capacity and potential functioning of C-6 quads, such as the plaintiff, in the "real world."

We successfully argued that the proposed use of the tape as demonstrative evidence fell within similar uses approved of under New York law.

UNDER NEW YORK LAW, A TRIAL COURT HAS BROAD DISCRETION IN ADMITTING DEMONSTRABLE EVIDENCE, ESPECIALLY WHERE THE EVIDENCE IS USED TO ILLUSTRATE OR ENHANCE AN EXPERT'S OPINION TESTIMONY.

Whether or not a videotape may be viewed by a jury depends upon the facts of the case and the purpose for which it is being offered. [4] Moreover, " the determination as to its appropriateness lies in the sound discretion of the trial court." [5] Under New York law, a videotape used by an expert for instructional purposes is permissible so long as the videotape does not mislead the jury. [6]

Where a proposed video might assist a jury in understanding a

[4] See Kane v. Triborough Bridge & Tunnel Authority, 8 A.D.3d 239 (2d Dep't 2004)(animation reconstruction video not proper to prove how accident happened but only to illustrate expert's opinion).
[5] Rojas v. City of New York, 208 A.D.2d 416 (4th Dep't 1994); City of New York v. Prophete, 144 Misc.2d 391 (N.Y. Civ.Ct. 1989)(noting the court's "wide discretion" in admitting videotaped evidence).
[6] Glusaskas v. Hutchinson, 148 A.D. 2d 203 (1st Dep't 1989).

plaintiff's damage claim, New York courts have freely admitted them despite their alleged potential for "prejudice" and despite the fact that they are prepared solely for the purposes of trial. For example, so-called "a day in the life" films of severely injured plaintiffs are readily admitted even where there is "ample uncontradicted medical testimony concerning the nature and extent of plaintiff's injuries. . . " [7]

The Court of Appeals has stressed that the purpose of demonstrative evidence, like all evidence, is "'to inform the trial tribunal of the material facts, which are relevant as bearing upon the issue, in order that the truth may be elicited and that a just determination of the controversy may be reached. It is not objectionable, in these cases, that the evidence may go beyond the oral narrative and may be addressed to the senses; provided that it be kept within reasonable limits by the exercise of a fair judicial discretion.'" [8]

We argued that the videotape of a "higher functioning" C-6 quad was certainly relevant in light of plaintiff's allegations that he had permanently lost a level of functioning that a C-6 quad could have attained but for defendants'

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[7] Caprara v. Chrysler Corp., 71 A.D.2d 515, 522-23 (3d Dep't 1979), aff'd, 52 N.Y.2d 114 (1981)(the probative value of a 10-minute "day-in-the-life" film showing the impact of a personal injury on plaintiff outweighed any prejudice where the film illustrated "a portion of the typical daily routine of plaintiff being tended to at his parents' home … in an informative and noninflammatory manner."

[8] Harvey v. Mazal American Partners, 79 N.Y.2d 218 (1992)(citation omitted).

negligence. Plaintiff's theory of the case was that defendant's negligence resulted in severe malnutrition and decubitus ulcers shortly after his motor vehicle accident. Defendants' negligence in turn resulted in plaintiff missing a critical time period during which he could have developed sufficient upper body strength to engage in independent activities such as those depicted in the videotape.

We stressed that the feasibility of such opinion testimony was so contrary to societal, "common sense" prejudices regarding the functional limitations of C-6 quadriplegics, that without the instructional aid the jury was virtually certain to reject the expert's testimony out of hand as sentimental, Pollyannaish, or otherwise crafted solely for the purpose of litigation.

We noted that that the proposed videotape was not real evidence but demonstrative evidence that properly illustrated plaintiff's expert's testimony. The sum and substance of plaintiff's expert's testimony, as well as the proposed use of the tape and copy of the tape itself , were all previously disclosed and provided via CPLR § 3101 responses.

A key element of our argument was that the tape's probative value far outweighed any claim of unfair prejudice. Moreover, any potential prejudice could be easily eliminated by an intra-trial instruction that the videotape is not of the plaintiff, and that it is being admitted for the limited purpose of illustrating the

expert's opinion regarding the importance of upper body development in a C-6 quad in order to achieve independence and develop skills that demand the use of the upper body.

It was highly unlikely that the jury could be misled by viewing a video in conjunction with expert testimony regarding the feasibility of C-6-quads achieving independent levels of functioning. Moreover, since there was no claim made that the plaintiff's expert was guaranteeing that the plaintiff would have the identical functioning of the C-6 quad in the video, an interim instruction as well as cross-examination was sufficient to combat defendant's objection that the patient in the video was not the plaintiff.

PRACATICE TIP: Don't be afraid to use a case that, at first blush, appears to favor your opponent—especially where the case concerns the admission [or exclusion] of relevant evidence. Analyze the case carefully. Don't overlook researching how the underlying issues have been subsequently addressed in other jurisdictions. The reasoning of foreign courts will often provide you with the key to a convincing argument, whether or not you cite the case.

Along this same vein, don't shy away from using a criminal case to support your argument where the criminal case addresses the same or analogous evidentiary issues. Courts of all jurisdictions have long used criminal cases in

support of evidentiary decisions they reach in civil cases, [9]and vice-versa.

In objecting to the use of the videotape in Trainor, defendants relied heavily upon Glusaskas, supra as categorically preventing the use of a film of "another patient", not the plaintiff. Glusasksas, however, carefully observed, that while it would be appropriate and permissible for an expert witness to use an "instructional film" that demonstrates how a particular medical procedure is commonly carried out, a self-serving film "prepared by a defendant specifically for introduction at a trial in order to disprove his negligence in an entirely separate surgery. . . is surely inappropriate ." [10]

So although the prepared videotape in Glusaskas was excluded, other jurisdictions have specifically cited to Glusaskas and applied its reasoning in admitting videotape evidence—even where the tape at issue depicted a different

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[9] Matter of Brandon's Estate, 55 N.Y.2d 206, 210-11 (1988)("A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different occasion … "; and discussing further and applying the familiar so-called Molineux [criminal law] exceptions in the civil context). See also, American Bank Note Corp. et al. v. Daniele, 81 A.D.3d 500, 500 (1st Dep't 2011) (using criminal case in support of holding that the trial court had properly exercised its discretion in permitting a defendant in a civil action to testify via a video conference link.).

[10] Glusaskas , 148 A.D. 2d at 209. See also Rivera v. Anilesh, 32 A.D.3d 202, 204 (1st Dep't 2006) (noting the videotape disapproved of in Glusaskas bordered on impermissible character evidence); Acevedo v. New York City Health & Hosps. Corp., 251 A.D.2d 21 (1998) *lv. denied* 92 N.Y.2d 808 (1998)(citing Glusaskas).

surgeon or patient. For example, in Glassman v. St. Joseph's Hosp.,[11] the reviewing court, citing Glusaskas , upheld the admission of videotape evidence in a malpractice action where the purpose was to assist the jury in understanding expert testimony.

The defendant doctor in Glassman had been permitted to show a videotape of other surgeons performing a very similar coronary bypass surgery as that performed on the plaintiff. Id. In approving the admission of the videotape, the reviewing court stressed that it had been made clear to the jury that the plaintiff was not the patient in the tape and that the defendant was not the surgeon. Id. Moreover, the jury was specifically instructed that the tape was "just a demonstrative aid for better understanding the [expert's] testimony." Id.

In permitting the tape to be shown as a demonstrative aid to assist the jury in understanding the expert's testimony, the reviewing court first noted that "unlike Glusaskas, the videotape [at issue] was relevant to defendant's theory. . . . " Id. Moreover, the court further stressed that the proffered videotape was properly shown to the jury because it was an "instructional film used to show how a procedure is carried out, a use expressly distinguished in Glusaskas . . . ." Id. [12]

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[11] 259 Ill. App. 3d 730 (1994).

[12] See also Mesina v. Lewis, 1992 WL 24778 (Ohio App. 12 Dist. 1992)("[V]ideotape was presented to assist jury's understanding of the technical aspects of surgical procedure and is analogous to the use of a skeleton, diagram, or

In virtually every jurisdiction the balancing test is the same:[13]

videotapes that might assist the jury in understanding a relevant issue may be shown if "their probative value is not outweighed by their inflammatory effect." [14]

In Mercatante v. Hyster Co, [15] the Second Department, citing Glusaskas, rejected defendant's proposed use of a videotape at a products liability trial for three reasons. First, the court noted the limited need for and utility of the videotape as an "instructional tool." Second, the videotape had no evidentiary value with respect to the plaintiffs' principal claim of a design defect. Third, in contrast to the virtually nonexistent probative value of the tape, there was a

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other demonstrative visual aid.").

[13] Demonstrative evidence has no probative value in itself. It serves, rather, as a visual aid to the jury in comprehending the verbal testimony of a witness. Cisarik v. Palos Community Hospital, 144 Ill.2d 339, 341, 162 Ill.Dec. 59, 579 N.E.2d 873 (1991). Before a film can become evidence at trial: (1) a foundation must be laid, by someone having personal knowledge of the filmed subject, that the film is an accurate portrayal of what it purports to show; and (2) the film's probative value cannot be substantially outweighed by the danger of unfair prejudice. Id.

The admission of comparable videos in other jurisdictions supplied additional support for plaintiff's position that the video should be admitted in order to enhance and illustrate the expert's opinion testimony. In Peterrie Transp. Services, Inc. v. Thurmond, 79 Ark.App. 375 (2002), for example, the expert testified that the proposed videotape would be useful in explaining the body's reaction in a rear-end collision. The reviewing court acknowledged that not all rear-end collisions are identical. Nonetheless, it was proper for the expert to use a videotape to illustrate the expert's opinion that some amount of head jerking is involved in any rear-end collision if the person was not expecting to be struck.

[14] Glassman, 259 Ill.App.3d at 730.

[15] 159 A.D.2d 492 (2d Dep't 1990).

significant prejudicial effect: the tape had been prepared by the defendant exclusively for use at trial to defend liability and portrayed circumstances "vastly different from those which existed at the time of the accident. . . . "

In Trainor, our motion in limine spelled out in detail those factors that were found missing in Mercacante.

The need for and utility of the demonstration video as an instructional tool.

First, we argued that there was a need for the videotape as an instructional tool to assist the expert in graphically illustrating not only the importance of developing upper body strength, but also in demonstrating how a C-6 quad actually uses that physical strength and upper-body development in carrying out the practical, life-affirming activities depicted in the videotape.

We stressed that plaintiff's expert would testify further that C-6 quads who have had the opportunity to develop their upper bodies during the critical time period can achieve levels of functioning and independence that include the ability to move in and out of a wheel chair and drive a car—without assistance!

We argued that using the short film in conjunction with the doctor's testimony would lend clarity and interest to her opinions. Not only is one picture worth a thousand words, seeing is believing. As a practical matter, it would be both unnecessarily time consuming and beyond the skill-level to require the doctor

to draw stick figures or use more sophisticated graphic representations in order to illustrate her testimony.[16]

Ironically the film did not remotely seek to induce sympathy, but was clearly instructional: offered solely to assist the expert's efforts to educate jurors regarding the capacity and potential functioning of C-6 quads in the "real world." The fact that the "evidence may go beyond the [expert's] oral narrative and may be addressed to the senses" was not grounds for its exclusion.[17]

The videotape was offered to assist the jury in understanding plaintiff's damage claim of a permanent, "lost opportunity" to increase his function and was therefore highly relevant.

It was undisputed that at the time of defendants' negligence plaintiff was already a C-6 quad. The issue was whether defendants' negligence was a proximate cause in further limiting plaintiff's functioning and quality of life. Plaintiff's expert's opinion was that it did.

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[16] Reviewing courts in other jurisdictions have likewise noted that instructional or illustrative videotapes that accompany a medical expert's testimony at trial are "nothing more than a doctor getting up on the stand and drawing a picture to illustrate his testimony." Roy v. St. Lukes Medical Center, 305 Wis.2d 658, 741 N.W.2d 256 (Wis. App. 2007)(rejecting defendant's argument that the animations at issue "were improperly admitted into evidence under the guise of being demonstrative aids when, instead, the animations depicted ultimate facts at issue in the case.)" See also Anderson v. State, 66 Wis.2d 233, 248, 223 N.W.2d 879 (1974)(explaining that "[d]emonstrative evidence , whether a model, a chart, a photograph, a view . . . is [properly] used simply to lend clarity and interest to oral testimony.").

[17] Harvey v. Mazal American Partners, supra.

In response to defendant's objections that the film was of a different "unknown" patient, we argued that the rehabilitation doctor was prepared to testify that the patient depicted in the instructional video was known to her, as a former patient, as a C-6 quad.

In addition, we were prepared to have the videographer testify regarding the time, place, and manner in which the film was made, and that no special lenses or camera effects were used in recording the film. Under New York law, videotape evidence is admissible once a proper foundation has been laid if the tape is a true, authentic, and accurate representation of the event taped without distortions or deletions.[18]

We stressed that the authentication process including the voir dire could be accomplished in whole, or in part, outside the presence of the jury if required.

The critical probative value versus prejudicial effect analysis and the use of an analogous criminal case to convince the court that the use of the film was proper.

At the outset, we noted that plaintiff's expert testimony clearly met the standard regarding making out a prima facie case, and that the only issue was permitting plaintiff's expert to use the tape in conjunction with her testimony.

As a substantive matter, we stressed that plaintiff's evidence may be deemed

[18] See People v. Curcio, 169 Misc.2d 276, 279, 645 N .Y.S.2d 750, 752 (Sup.Ct. St. Lawrence Cty.1996).

legally sufficient on the issue of causation even if the proffered expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury. [19]

We knew that New York courts have allowed less probative and more prejudicial videotapes intended to illustrate and enhance the feasibility of an expert's opinion testimony to be actually admitted into evidence. Further, because the legal standards regarding admissibility of videotapes are the same in civil and criminal cases, the precedents are interchangeable. If anything, courts are more restrictive in the admission of demonstrative evidence in the prosecution of a criminal case because of constitutional concerns for a defendant's liberty and due process rights.

Accordingly, People v. Bierenbaum, [20] was especially instructive and helpful in Trainor in illustrating to the trial court the permissible limits of using a videotape as demonstrative evidence.

Bierenbaum was a high-profile homicide case in which the victim's body

[19] See Flaherty v. Fromberg, 46 A.D.3d 743, 745 (2d Dep't 2007)(citations omitted).
[20] 301 A.D.2d 119 (1st Dep't 2002), leave denied, 99 N.Y.2d 626 (2003), cert. den. 540 U.S. 821, 124 S.Ct. 134, 157 L.Ed.2d 40 (2003).

was never found. The appellate decision ruled, in strong dictum, that the trial court had not abused its discretion in admitting a staged videotape which depicted an expert's opinion as to the feasibility of the defendant's single–handedly loading a victim's body onto a small airplane, flying it over the ocean and tossing a body into the water. The demonstrative videotape, illustrating the expert's testimony, was made and the activities carried out by a police pilot, not the defendant.[21]

The subsequent habeas petition was based in part upon the ineffective assistance of counsel because defendant's counsel had not unambiguously asserted and/or properly preserved defendant's purported objections to the videotape. Upon review, both the federal district court as well as the Second Circuit rejected defendant's claims and emphatically embraced the appellate division's reasoning that the videotape had been properly admitted. Moreover, both courts flatly rejected defendant's objection that the videotape was impermissibly speculative.

[21] The First Department noted that the defendant's purported evidentiary objection was ambiguous at best and had not been properly preserved, and further declined to formally address the merits of the objection under its "interests of justice" jurisdiction. However, the Appellate Division nonetheless stressed that even if the issue had been squarely presented, it would have rejected defendant's contention that the videotape was impermissibly speculative. Bierenbaum, 301 A.D.2d at 51-153. (In so ruling, the appellate division stressed the film's relevancy to the prosecution's theory of the case: that it "was possible for defendant, …[acting] alone, to pilot the Cessna 172 over the Atlantic Ocean as much as 85 miles east of the shoreline, maintain sufficient control of this relatively easy-to-operate plane so as to singlehandedly throw these human remains [of a 110-pound body] from the air into the ocean, and then land back at the same airport, all in less than two hours of flight time.").

In so doing, both courts observed that the tape had properly illustrated the expert's opinion that the prosecution's theory of the case was feasible. [22]

Similarly, in the case at bar, the proposed videotape was not impermissibly speculative. Rather, it was offered to illustrate plaintiff's expert opinion that but for defendants' negligence, it would have been both physically possible and feasible, as a practical matter, for the plaintiff, even though a C-6 quad, to have achieved a much higher functioning as demonstrated on the videotape.

We argued strenuously that defendant's objection to the videotape on the grounds that it was an improper "demonstration" was off-point, and, in any event, could not withstand analysis. Such evidence may be admitted when it "tends to enlighten rather than to mislead the jury." [23] Moreover, the purported variations in circumstances (demonstration performed by a different C-6 quad, although both males, not far apart in age), even if relevant, would affect the weight given to the

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[22] Bierenbaum v. Graham, Not Reported in F. Supp., 2008 WL 515035 (S.D.N.Y. 2008)(denying Bierenbaum's habeas petition and motion for reconsideration noting, among other things, at *27 , that New York trial courts have discretion to admit demonstrative evidence that might aid the jury, and citing with approval the Appellate Division dictum "that the videotapes were properly placed before the jury" and therefore the attorney was not ineffective in failing to object to their introduction.). In Bierenbaum v. Graham, 607 F.3d 36, 57 (2d Cir. 2010) cert. den. __S.Ct. __, 2011 WL 202781 (U.S.), the Second Circuit recently affirmed the denial of habeas corpus emphasizing that it agreed with Appellate Division's dictum and the district court's opinion that "the videotapes were neither speculative nor lacking in foundation, [and] counsel was not ineffective for failing to object to their admission on that basis.").

[23] Goldner v. Kemper Ins. Co, 152 A.D.2d 936, 937 (4th Dep't 1989).

demonstration, but would not provide a basis for its exclusion. [24]

In any event, testimony concerning the demonstration was subject to cross-examination and subsequent expert rebuttal testimony, whereby the defendants could criticize the demonstration and attempt to minimize its significance.

In sum, the probative value of this prepared instructional video, which demonstrated the potential functioning of C-6 quads, was significant, while the prejudicial effect was virtually nil.

Defendant's objection that the film improperly depicted a day in the life of "another patient" rang hollow. It was obviously impossible for the plaintiff to have been the actor in the video because the core of plaintiff's damage claim was that defendants' malpractice had rendered him incapable of ever achieving the functioning depicted.

Finally, fine-tuning our argument, we stressed that the videotape was not being offered as "real evidence", and no request was made to have the exhibit admitted into evidence. Rather, we argued that it simply be marked as a demonstrative exhibit and be included as part of the trial court record, but not sent to the deliberation room with the jury. Further, we conceded that the audio portion of the tape was not relevant and that there was no reason for the jury to hear the

[24] See, e.g., Krute v. Mosca, 234 A.D.2d 622, 623 (3rd Dep't 1996); see also Goldner v. Kemper Ins. Co., 152 A.D.2d at 937.

motivational patter that accompanied the film.[25]

In any event, demonstrative evidence is admissible in the judge's discretion, and even if the proposed tape was considered a classic “demonstration tape” as defendant also argued, any variations between the demonstration and the original event may affect the weight of the evidence, but do not require exclusion.[26]

Finally, we once more emphasized that because the previously disclosed videotape was merely a graphic illustration of the doctor’s previously disclosed opinions, there could be no unfair prejudice.

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[25] The actor-patient wanted to use the film to drum up business for his automotive repair shop, and it was shot with this goal in mind.

[26] People v. Diaz, 163 Misc.2d 390, 396 (Sup.Ct. Bronx Cty.1994); Parkinson v. Kelly, Not Reported in F.Supp.2d, 2006 WL 721645 (N.D.N.Y.2006); cf. also People v. Laufer, 275 A.D.2d 655 (1st Dep't 2000)(crash test videotape was properly received as evidence where “substantial similarity between the conditions under which the experiments were conducted and the conditions at the time of the event in question” was established).

CONCLUSION

Where the proposed use of a videotape can be said to assist the jury in understanding an expert's testimony and in grasping plaintiff's theory of damages, it falls within the parameters of established precedent and should be admitted as demonstrative evidence.