

# How to Present Non-Physical Injuries and Damages: *What Every Plaintiff's Attorney Needs to Know*

By Michele M. Betti, Esq. and Mark Alexander, Verdict Videos

In law school, every lawyer takes a course on Torts. In the portion which discusses the building blocks of the body of negligence law, the bright eyed first year law student reads the "Flour Barrel" case or one of its progeny. In the "Flour Barrel" case, the innocent plaintiff is strolling along the sidewalk on a Wednesday afternoon in front of a bakery, minding their own business, when they are suddenly and without warning hit on the head with an empty wooden flour barrel. The injured plaintiff attempts to seek relief from the bakery who denies responsibility. The bakery employees also state that they have no idea of what happened. The case goes to trial and the smug attorney for the bakery tells the court they must dismiss the case since the plaintiff cannot prove the essential element of causation. It is the plaintiff's word against the defendant. The plaintiff can't identify where the barrel came from, who tossed it and the like. The bakery denies any wrongdoing or fault. The Solomon-like judge suddenly trots out some Latin, and it is game over for the bakery. The Judge says: "Res Ipsa Loquitur," or "the thing speaks for itself." The judge opines that you don't have to be a rocket scientist to put two and two together. The plaintiff was walking past a bakery when they were hit over the head from above by a flour barrel with a brand of flour that is habitually purchased by the bakery. Moreover, as the bakery

employees testified, it is the type of barrel that is tossed to the ground every Wednesday afternoon to be picked up by the trash collector. When the surrounding facts clearly point to one outcome; that has to be the outcome: Res Ipsa Loquitur.

Fast forward to the 21<sup>st</sup> century. While Res Ipsa Loquitur is a comforting notion, it wasn't the "go to" arrow in your quiver at the dawn of modern Tort law, and in our fast paced, complex world, it isn't now either. Then as now, most personal injury cases begin with a single incident and involve some form of physical harm that was inflicted on the victim. The victim's injuries are visible and well documented making their claim generally easy to establish via typical damages formulas. However, for certain cases, the ability to utilize the surrounding circumstances to establish liability and damages, is just as important and relevant today as it was for the plaintiff in the classic Res Ipsa cases. Today, complex cases where the plaintiff doesn't display clear, visible injuries, cases such as those that involve traumatic brain injury or the emotional and mental damages suffered by sexual abuse victims, can often be more difficult to present to the opposing parties in a fashion which provides for maximum impact and maximum compensation. For these and most other types of cases, the modern day plaintiff's lawyer needs a simple, high-tech



*Michele M. Betti, Esq. is a principle at the **Law Offices of Betti and Associates** where 90% of the practice is devoted to litigation. Betti & Associates have been involved in the litigation of over 150 sexual abuse cases and hundreds of complex civil litigation cases, all resolving with positive and successful outcomes for its clients. You can reach Ms. Betti at [mbettilaw@gmail.com](mailto:mbettilaw@gmail.com)*

[www.bettiandassociates.com](http://www.bettiandassociates.com)



*Mr. Mark Alexander is owner of **Verdict Videos**, an award-winning legal video production company focused exclusively on providing professional legal video presentations to consumer attorneys. Verdict Videos' staff has over twenty-five years experience producing broadcast television, documentary and legal video productions. You can reach Mr. Alexander at [mark@verdictvideos.com](mailto:mark@verdictvideos.com)*

[www.verdictvideos.com](http://www.verdictvideos.com)

version of “Res Ipsa Loquitur;” one that is visual and persuasive to maximize demands.

### **Presenting invisible harm**

For the purposes of this article we will explore the challenges of presenting a case of an adult survivor of sexual abuse. Adult survivors of sexual abuse rarely have physical signs of injury. Regardless of the age of the victim at the time of the sexual abuse, it is a traumatic, violating experience that may impact every aspect of the victim’s life. For instance, an adult survivor of child sexual abuse may have difficulty trusting others and suffer from low self-esteem. They may engage in destructive personal relationships or choose an under-achieving career path. They often show signs of posttraumatic stress, eating disorders, anxiety, depression, substance abuse and addiction, insomnia, hyper-aggressiveness and possess suicidal tendencies. Since the symptoms are rooted deep within the victim’s psyche and affect nearly every aspect of the victim’s life, the plaintiff’s expert psychiatrist’s written evaluation may not be enough to demonstrate the deep-seated harm caused by the abuse.

So how does one succeed in presenting a three dimensional case without a visible injury so that it lives and breathes for those reviewing the client’s claim? Unlike physical injuries, there is no way to reconstruct the horrific events of sexual abuse and no physical way to show the emotional scars that have so deeply affected the victim. Enter the best weapon in every attorney’s arsenal: the legal video settlement documentary.

Video documentaries are sophisticated presentations produced specifically for

pre-trial mediation and settlement. The sole purpose of these videos is to present your client’s claim in a clear, concise and visual way so as to convince the opposing parties it is in their best interest to pay maximum compensation now, rather than risk the wrath of a jury trial later.

A well-crafted settlement video can incorporate the key factors of a case, and visually weave them into a cohesive television-style documentary presentation. The effect is profound, as it not only provides a humanizing portrait of the victim; it individualizes the case and forces the opposing parties to evaluate the claim promptly and in earnest.

In addition, the settlement documentary can be an effective tool used to present critical evidence and prove damages, thereby improving the impact of your client’s demand letter or settlement brief, thus increasing the value of the case. Professionally produced legal video documentaries are powerful and persuasive forms of communication that reveal the deeper components of the case and leave an impact on the viewer like no other medium can. A professional settlement video will deliver the case theme and events as if the matter is being presented as a news documentary program such as [Dateline](#) or [20/20](#).

### **Day in the life video v. Settlement documentary**

Day in the life videos are primarily utilized in catastrophic personal injury cases to document, without prejudice, the plaintiff’s daily activities and the impact the injury has had on their lives. Typically, day in the life videos are presented in trial for jurors to witness the plaintiff’s condition in a typical day. The content of these videos are

subjected to the Rules of Evidence. In most cases, day in the life videos are admissible, so long as they are prepared by an experienced legal video production company that understands the common admissibility requirements of the jurisdiction where your client’s case is being tried. The key to this success is an open dialogue wherein the commissioning attorney discusses these requirements with the legal video production team, who uses their expertise to execute a high quality and admissible product.

By contrast, settlement video documentaries are not limited by the Rules of Evidence. This allows for extended latitude whereby all the elements of a negligence case can be presented in a dramatically more powerful and compelling way than a day in the life video. Of course, the degree to which a settlement documentary focuses on liability issues is determined on a case-by-case basis. Overall, a documentary video can succinctly establish for the viewer, in the simplest terms; the who, what, when, where, how and why – all within an average of about 20 minutes.

### **Every case has a story**

What was the victim’s life like before the abuse or incident? Who is liable? What are the damages and why should the opposing parties pay compensation? These and other issues can be addressed with on-camera interviews of expert witnesses, informed family members and deposition testimony of the key players. The interviews may be intertwined with before-and-after photos, demonstrative recreations, police reports and other visual elements. Professional narration is included throughout the video to guide the viewer through the sequence of

events.

This television-style legal video documentary has the ability to unveil a captivating depth about the victim, the effect on victim's family and the circumstances surrounding the case. To achieve that depth, an experienced documentary production team will skillfully create a videotaping atmosphere of safety, openness and patience, which allows the interview subjects to fully explore and share the deep, emotional hidden truths about what has occurred. There is no doubt, presenting the case information in this way makes for a convincing and powerful presentation.

### **Use of experts**

In almost every matter, the expert's testimony is a necessity and is expected by the opposing parties. This is especially true in cases where the issues are difficult to interpret and define. It is therefore beneficial to have key expert witnesses interviewed on-camera for the documentary presentation. We all know these witnesses add credibility to the plaintiff's claim, but a well-made point of fact enhanced with demonstrative evidence may be enough to solidify the ambiguities of certain facts and make the case. For a non-physical injury matter, it is best to have key family members' testimony buttressed with that of the expert witnesses. In this way for instance, a forensic psychologist or a traumatic brain injury (TBI) medical expert can validate what the family has communicated throughout the video about the victim's life changes.

Just as with seeing and listening to key family members tell the story of the victim and the life that once was, viewing the expert witness onscreen

supported with demonstrative evidence makes for a clear, concise and effective presentation of the facts.

### **Caution interviewing the victim**

There is one unwritten rule when preparing for a legal video documentary: never interview the victim on camera for a settlement video. The reason is obvious; so as not to provide opposing counsel information that could be potentially harmful to the case. The basic wisdom is to err on the side of caution, rather than have the victim potentially reveal information which could be considered contradictory to other testimony or evidence produced in the case. The general rule is to keep it simple and avoid controversy.

Notwithstanding general wisdom, sometimes rules are made to be broken. Non-physical injury cases seem to require, if not demand, an interview of the victim. When it comes down to it, the victim's ordeal can only be conveyed by the victim in order to fully understand the nature and extent of the injuries. Does one dare break the one unwritten rule? Certainly not before you and your video production team completes due diligence.

A professional video production team will spend a significant amount of time carefully reviewing case materials and constructing a series of interview questions to pose to the victim. Only after the team conducts an in depth pre-shoot interview with the victim should you carefully weigh your decision to interview the victim on camera. Be aware, all videotapings may be discoverable and contradictory testimony may be used against the

victim. Only after careful sifting and winnowing process can the team proceed with the videotaping of the victim.

While this may not be the approach for most personal injury cases, breaking the rules has its just rewards for non-physical injury cases. On videotape, the questions posed can not only capture the horror of the victim's experience in the victim's own words, but the victim's body language and heart-felt facial and vocal expressions can reveal intense emotions that also add to the victim's credibility and sincerity. This portrayal of the victim is generally the emotional catalyst the case needs to persuade the opposing side to settle.

For mild and traumatic brain injury cases, interviewing the plaintiff may be the only way to demonstrate for the opposing parties the invisible effects of their injury. Communication and cognitive impairments may be detected during the on-camera interviews and may be spliced with expert witness interviews and day in the life footage to highlight expert observations and opinions. Again, interviewing the plaintiff should only be considered on a case-by-case basis. However, it is most important when demonstrating the plaintiff's suffering, that the video documentary remain authentic; staying true and accurate to the facts and circumstances.

### **Gilding the lily and other extremes**

Gross or even subtle exaggerations may cause opposing counsel to view the video presentation with suspicion and not take the demand seriously. Overstating or over dramatizing events can reflect poorly on the entire mediation process and

cast reservations about the validity of the case. Thus, it is important to make sure that your video presentation company is experienced in producing legal videos, as opposed to depositions or mere television productions. Even experienced companies have different styles, so ask for a sample of their work-product to see their general production style. Regardless of the type of case the sample covers, poor production quality – bad lighting, distorted audio, distracting camera angles, poor attention to details, or overly dramatic techniques - will often become readily apparent.

On the other side of the pendulum, presentations that lack compassion or understate the emotional impact of the case may do a disservice to the plaintiff as much as gilding the lily. Broadcast journalists and deposition videographers hawk their wares for producing legal videos, but they often lack the narrative skills and patience of a long-form documentary filmmaker. A newscast-style video presentation may not garner the sympathy or compassion the plaintiff deserves and therefore may not elicit a compulsion to settle the case. Again, this is where doing your homework and reviewing video samples before hiring your legal video production company will serve you and your client well.

A properly constructed settlement video will balance the factual and emotional facets of the case. The documentary will faithfully portray the extent of the damages without heroics, and hold true the emotional expressions of the participants. It will not stage or exaggerate events for the sake of dramatics. Remember, the sole purpose of the settlement documentary is to persuade the opposing parties it is in their best in-

terest to settle the case instead of proceeding to a jury trial. Dabbling in deception may reduce that probability.

### **Damages**

The most important issue to be addressed in the settlement video is damages. The documentary must clearly demonstrate for the claims administrator and opposing counsel how the victim's life has been altered, what the severity of the victim's injuries are, as well as an assessment of current and future needs. While presenting damages, it is imperative to highlight the credibility and sympathy of the victim and their condition. Here again, interviews with key family members will assist in presenting the effects of the injuries with before and after anecdotes. In addition, providing the victim's medical, psychiatric, education and employment records for inclusion into the documentary in conjunction with interviews with the plaintiff's expert psychiatrist is recommended.

### **Bolster the case**

While this article focuses on adult survivors of sexual abuse, it also applies to many other types of cases. A cohesive, logical and persuasive settlement video presentation can educate the opposing party about the merits of a case. It also can demonstrate the credibility, preparedness and commitment of plaintiff's counsel. Settlement videos may be presented as the plaintiff's opening statement, or it may be submitted to the mediator and opposing counsel several weeks in advance so that they may adequately prepare for settlement. No matter how they are used, settlement video documentaries are highly effective tools and are a must for the modern day plaintiff's lawyer. □



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