

# Proving the Invisible Injury: *Making an Impact With Video Settlement Documentaries in Traumatic Brain Injury Cases*

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The medical profession now has more tools than ever available to diagnose and treat traumatic brain injury (TBI). In addition to X-rays for obvious skull fractures, doctors have the CT scan, the MRI and functional MRI (fMRI) to provide incredible three-dimensional views of acute and chronic brain injury. They also have diffusion tensor imaging (DTI) studies that enable them to show evidence of injury at a microscopic level (axonal fiber tracts and connections) and even positron emission tomography (PET scans) to prove injury by illustrating brain function i.e. altered brain metabolic patterns. Despite these advances in medical technology to visualize and treat TBI, it is often an invisible injury to the outside world.

Sometimes a brain injury does not appear in a CT scan or MRI. And the real life effect on the victim can never be captured by any of these sophisticated techniques. For this we need another tool. No tool demonstrates a chronic TBI better and more convincingly than a documentary video of the victim in their environment. Traumatic brain injuries can last a lifetime, condemning a victim to chronic problems. Brain injuries do not heal like other injuries. Once the brain dies (encephalomalacia) it does not grow back. Of course, depending on the patient, the brain has a certain degree of plasticity that allows some functions to be taken on by other undamaged parts of the brain, but even when that happens, patients are often not who they used to be nor can they do what they used to do.

The challenge for the victim's attorney is proving the brain injury. Traumatic brain injuries are categorized as mild, moderate or severe. The general rule is that the more severe the injury, the easier

it is to prove. But that is not always the case. Head injuries with apparent physical injuries like skull fracture and signs of physical trauma to the soft tissue are often the easiest to prove. If you can supplement this with diagnostic studies like X-rays, CT scans and MRIs, that is also helpful. The more advanced studies can show brain bleeds, encephalomalacia and the changes in the brain due to brain death. You may need PET scans or DTI to help you prove that there was a physical injury, if the other studies are not helpful. For the cognitive effects of a physical injury, neuropsychological testing is essential but even then the results may be inconclusive, inconsistent or inadequate to prove the true effect of the brain injury.

The video documentary allows you (and the jury) to see the true effects of a TBI in terms of how a victim performs in their environment. In a nutshell, it demonstrates how the victim is different from what they used to be and how these differences affect their life and relationships with their family, friends and colleagues. Your brain makes you who you are and when your brain is injured, you may become an entirely different person and that loss can be effectively proven with a video documentary. The loss of ability to remember, to concentrate, to process thoughts and language, to be independent and to interact with others affect the very core of your being. As one parent of a severe traumatic injury victim recently said, "My son went to camp one day and he never came home." The loss can be profound and to effectively represent your client you need to prove that loss.

Day-in-the-life films have been around for many years but the current state of the art is well beyond that. We now have



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Rob and Keiko Feldman are the co-founders of Juris Productions, Inc. The company, based in Pasadena, specializes in video documentaries for plaintiff's attorneys.  
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television news professionals at companies like Juris Productions who bring their skills to help you prove these invisible injuries and their effects. Is it any wonder that *60 Minutes* has been one of the most popular television shows for as many years as it has? It is popular because its producers have a formula that works. It communicates interesting stories in 15-20 minute bites by using good interviewers and lots of visuals. The public is used to digesting this form of communication and claims representatives, defense lawyers and jurors are all members of the public who are just as receptive to a good story.

These documentaries are usually prepared for settlement purposes. Since most cases are resolved by mediation these days, they are prepared in anticipation of mediation and are protected by the mediation privilege (Evid. Code § 1119). It is wise to label them as follows: Confidential: Protected by Evidence Code, Section 1119. However even if there is no mediation scheduled, you can often get your opponent to stipulate that any video you present to him will be protected by the privilege. In some cases you may not have that concern.

Despite the fact that video documentaries are usually prepared for settlement purposes, that does not mean that you cannot use portions of them at trial to supplement a plaintiff's testimony or that of an expert witness. Some of the video that is shot may serve as a day-in-the-life-video.

If you are going to prepare one of these videos for mediation, it is essential that you serve them with your mediation brief as long before the mediation hearing as possible so the video can be seen by the right people. The right people include the claims representatives and the defense lawyers. To increase the chances that a video will be viewed you have to send it in no later than 30 days before the mediation. You also need to send at least two copies of your brief with the video disk included to each defense lawyer.

Before giving you a real life example of how one of these videos is produced, we need to answer some obvious questions for you. Cost is always an issue. A video documentary can be produced in the \$15,000-\$20,000 range. This is certainly not insignificant, but you will find that it is worth it in a brain injury case. The

increased value it adds to your case will more than make up for its cost.

There is always the issue of length of the video. Some lawyers feel that the longer the video the better. Some lawyers want to include a lengthy discussion of liability along with the portion illustrating damages. We have found that if liability is going to be included it should be short because the purpose of the video is to enhance damages by explaining the "personal" injuries and their effect. If you get bogged down in liability it can turn off or polarize the viewer in a litigation setting. We have found that the shorter the video, the more likely it will be viewed and the more effective it will be. This is particularly true with today's Internet society where people's attention span is short. The successful news documentary programs are built on the 15-20 minute segment for a reason and that is the best length for one of these videos.

There is also the issue of how involved the lawyer will be in the process. The lawyer is essential in providing raw material for the project like family photographs, videos, academic records like report cards and California's Standardized Testing and Reporting (STAR), diplomas and awards. Video depositions are also important to have, particularly for damage witnesses if any expert depositions have been taken. Some lawyers like to be present for all interviews of witnesses and experts for the video, and they like to be intimately involved in editing and even want to be the narrator for the video. We have found that this is not necessary as long as you are using a real professional. Always remember that the work is all protected by the mediation privilege and there may be adverse effects from having the lawyer as the narrator. The reason is that it may appear more as an adversarial piece than an objective television news presentation which seems to have more credibility with an audience. This is what sets this type of presentation apart from a lawyer-created and narrated video. Furthermore, editing is a very time consuming process that requires expertise and experience and a lawyer's time is better spent doing other things. Of course, the lawyer has to approve the completed job and has input into editing.

Once again the advantage of a video documentary is that it can pull together so

many aspects of a brain injury. It can show the contrast in a victim before and after the injury through interviews, home videos and the creative use of photographs. Key demonstrative evidence can be embedded like 911 calls, anatomical diagrams, anatomical animations of the actual injuries using CT scans to illustrate the level and severity of the injury, cards and letters and portions of the victim's videotaped deposition. The expert interviews not only can help explain the injury but also outline the plaintiff's current and future needs.

To demonstrate how a settlement documentary works in practice in an 'invisible' brain injury case, consider the case of Kenny (not his real name). Kenny was struck in the head with a metal golf club driver. He was only 12 years old at the time. The golf club crushed Kenny's skull and inflicted a severe traumatic brain injury. He was nearly killed. The challenge in presenting Kenny's case was that he appeared to have made a miraculous recovery. A plate was inserted into Kenny's skull to replace the fractured bone. He regained consciousness, re-learned to walk and even speak. In fact, his recovery looked so convincing that a stranger could hold a conversation with Kenny and not ever know he suffered a brain injury. What began as a very visible traumatic brain injury had become an invisible one.

In creating a video settlement documentary about Kenny, it was crucial to show the contrast between Kenny's life before and after the accident. Only then could someone truly understand what he had lost. This was accomplished in several ways. First, the video included interviews with friends, mentors and Kenny's parents. They talked about his amazing potential before the accident and his plans to attend college. The video concluded with a 15-second interaction between Kenny and his father on home video taken about a year before his accident. In the home video, Kenny was articulate, engaging and effervescent. It created a stark contrast with Kenny's own interview in the documentary in which he searched for words and seemed unfocused and stoic.

The documentary featured a collection of evidence embedded into the presentation that helped to paint the damages picture. Kenny's performance in schools suffered because of the injury. In the documentary, the striking difference was evi-

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dent when his state testing bar graphs were set side by side. Through interviews with the expert neuropsychologist, the viewer learned that Kenny's mental capacity had been severely limited, as documented in neurological testing. Also embedded in the presentation were photographs of the huge golf club that crushed his skull, animation of his injuries and MRI scans showing the damage to Kenny's brain. Photos from Kenny's recovery process helped to roll back the clock and demonstrated that while Kenny's recovery seemed miraculous, it was an exhausting, excruciating journey.

In the video, Kenny read an essay he wrote in fourth grade to help demonstrate the challenges he faced. The essay is about which colleges he would like to attend – mostly Ivy League schools. But in the video, Kenny struggled just to read the words. The message was not subtle: There was no way Kenny will ever be able to attend college, let alone such prestigious universities. Helping to fill in that picture, Kenny's psychiatrist and rehabilitation doctor expressed concern for his social and academic future in their interviews. Kenny's current and future needs were demonstrated in the documentary with video of Kenny visibly struggling with basic homework assignments and having trouble reading an age-appropriate book. In her interview, his mother expressed her concern for Kenny ever getting through school or landing a job. She doubted he would be able to live independently. "I hope that we're around long enough to take care of him," she concludes. The obvious solution, according to the experts' interviews, is that Kenny will need care for the rest of his life.

Multiple copies of Kenny's video were submitted to the defense lawyers, the insurance adjusters and the mediator about 45 days before the mediation. It had a tremendous effect because not everyone knew Kenny and his problems before the mediation started. These were things that were not learned in his deposition nor were they obvious at the mediation because he looked perfectly normal and could greet and shake hands with everyone with a smile on his face. A reasonable person who had not seen the video could have concluded that this was a boy who had sustained a bad injury but had made a terrific recovery without any serious con-

tinuing problems. The video told the more accurate story.

As advocates for our brain-injured clients we must use every effective tool available to prove damages. Just as CT scans and MRIs have become the standard means for proving brain injury, the video documentary has become another essential tool in our arsenal. It may be the only tool to effectively prove the invisible brain injury. ■