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# Managing Jurors in Catastrophic Personal Injury Claims

Voir Dire, Jury Selection and Countering Sympathy

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# **Managing Jurors in Catastrophic Personal Injury Claims**

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## Catastrophic Injury Case

Catastrophic Injuries Often Involve:

- Permanent Disability
- Long-term medical problems
- Reduced Life Expectancy
- Significant Lost Quality of Life
- Impact on multiple family members, care givers

## Sympathetic Reactions

Catastrophic Injuries, by their nature, can trigger sympathetic reactions from jurors. This reaction can create the following problems:

- Jurors ignoring causation/liability issues
- Jurors giving disproportionate awards for non-economic damages for pain and suffering
- Jurors ignoring evidence on causation/permanency/co-morbid conditions
- Jurors blaming and wanting to punish the defendant

## How Jurors Approach Catastrophic Personal Injury Claims

- There is no “one way” jurors approach injury claims
- Jurors have vastly varying life experiences, education, biases, prejudices, attitudes, and beliefs
- Jurors also have different reactions to learning about, and seeing catastrophic injuries

## Jurors Are Human and Therefore, Emotional

- If there are dramatic photographs or significant visible injuries, sympathy is a natural, human reaction
- Your job is not to negate the jurors reaction – it is to manage it
- Your goal is to have a fair trial of the issues based on the evidence, not emotions

## Managing Sympathy

- You need to meet the sympathy issue head on, and acknowledge it for what it is
- If the evidence is dramatic, acknowledge this, and share with jurors your concern that it may bias them as a natural sympathetic reaction
- You are not scolding jurors for being human. You are letting them know that the trial is a search for truth, and that they must set aside their emotions and decide the case solely on evidence.

## Considering Juror Management Concerns at All Stages of the Litigation

- Discovery
- Motions In Limine
- Voir Dire
- Opening Statement
- Direct Examination
- Cross Examination
- Closing Arguments
- Instructions

## Discovery

- You should diligently work to uncover as soon as possible all inflammatory evidence
- You need to discover photos, video, and other evidence that potentially could cause juror sympathy
- Think about how you will deal with the sympathy the inflammatory evidence causes

## Discovery (Continued)

- What evidence can you present to off-set, minimize, or reduce the prejudicial effect?
- How will this evidence fit into your overall strategy, and your theme of the case?
- What can you do to help get fair and impartial verdict for your client?

## Discovery(Continued)

- Consider damages, especially what Plaintiff may recover based on the allegations in the case
- Think how the other side will prove up non-economic damages, and strategies you can use to counteract or mitigate that evidence
- Determine if there are any categories of damages alleged that can be eliminated by motion or pleading practice

## Discovery (Continued)

- You must thoroughly investigate plaintiff's pre-accident and post accident life and medical history
- In deposing Plaintiff, it is critical to question about all areas of alleged damages, including and sometimes especially pain and suffering
- It is sometimes useful to depose people who know Plaintiff to develop inconsistencies or favorable evidence
- Handling "show" or "day in the life" depositions/videos by Plaintiff's counsel

## Motions In Limine

- Try to preclude plaintiff from introducing evidence that is unduly prejudicial
- Try to preclude plaintiff from introducing duplicative evidence such as multiple pictures of the same injury, or overly graphic day-in-life videos
- Try to preclude plaintiff from introducing evidence that makes your client look bad, but is not probative of any issues in the case

## Motions In Limine (continued)

- Day In the Life Evidence

May sometimes be excluded on grounds of prejudice

Federal Rules of Evidence 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..."

## Motions in Limine (continued)

- Day In the Life Evidence

*Bolstridge v. Central Maine Power Co.*, 621 F.Supp. 1202, 1204 (1985)

Excluding video of Plaintiff, the Court held that day in the life videos should be admitted as demonstrative evidence only when video conveys observation of witness more fully than could be conveyed in court

## Motions In Limine (continued)

*Bolstridge* Court identified several problems with these videos (*Id.* At 1203-1204):

- 1.) Are edited tapes fair representation of fact?
- 2.) video unduly prejudicial because of manner presented?
- 3.) Are they self-serving?
- 4.) Dominates evidence vs. conventional evidence
- 5.) Distracts jury from other issues that must be considered

## Voir Dire

- Develop your theme:
  - 1.) Plaintiff unable to experience pain and suffering
  - 2.) Plaintiff overreaching
  - 3.) Plaintiff can be rehabilitated or can retrain for a different job
  - 4.) injuries not caused by Defendant
  - 5.) Plaintiff is exaggerating his/her injuries/damages
  - 6.) Future damages are speculative

## Voir Dire (continued)

- Consider the larger concepts that will be important in your case that jurors can relate to: fairness, right and wrong, justice
- Remember that Voir Dire is really a *deselection process*, not the other way around

## Voir Dire (Continued)

- Figure out what type of jurors you think would be advocates for the opposing party
- Every case is different, and has its unique facts and issues
- What works in one case may not work in the current case

## Voir Dire (Continued)

- Conventional Wisdom – Good Jurors for Defense<sup>1</sup>:
  - 1.) Jurors connected to insurance industry
  - 2.) Managers of small businesses
  - 3.) Human resources personnel
  - 4.) Fiscally conservative
  - 5.) People who dislike “frivolous lawsuits”
  - 6.) People in favor of Tort Reform

## Voir Dire (Continued)

- Conventional Wisdom – Bad jurors for defense<sup>2</sup>:
  - 1.) Overly emotional or overly sympathetic
  - 2.) Union employees or people who emphasize communal responsibility
  - 3.) Postal workers
  - 4.) People who are already angry with your specific client

## Voir Dire (Continued)

- In catastrophic injury cases, it may backfire to attack a sympathetic Plaintiff
- The plaintiff's attorney will likely be investing a large amount of time and effort to make the plaintiff appeal to the jury
- Plaintiff sustained a serious injury, which makes the plaintiff sympathetic

## Voir Dire (Continued)

- Whether your client is a person, a small business, a corporation, you must take steps to humanize your client
- You must have a well-chosen individual to be the corporate representative at the trial
- Consider how humanizing your client might fit into your overall theme

## Voir Dire (Continued)

- Know the local rules of court. Will your voir dire be limited? Will the Court ask questions? Are you required to submit a joint case summary?
- If possible and permitted, try to talk to every venire person
- Every voir dire is different, every panel will be different. You will have to make impromptu changes to your voir dire

## Voir Dire (Continued)

- Use open-ended questions and listen carefully to verbal responses of prospective jurors, asking follow-up questions when appropriate
- It is critical to identify those people on the panel that you are going to try to rehabilitate, and those you need to develop responses from to justify striking for cause
- Watch for non-verbal cues

## Voir Dire (Continued)

- You will likely want to spend significant time in voir dire discussing sympathy
- You want to try to minimize the affect of sympathy as much as possible by calling attention to the natural tendency to sympathize
- You will want to confirm with the panel that they will commit to deciding the case on the evidence, not emotions, and remind the jurors of their agreement in your closing argument

## Voir Dire (Continued)

- Some Voir Dire mistakes to avoid<sup>3</sup>:
  - 1.) Staying tied to your voir dire question list
  - 2.) Not listening to answers to the the other side's questions
  - 3.) Arguing with a potential juror about their position
  - 4.) Never promise more than you can deliver
  - 5.) Repeating questions already asked
  - 6.) Failing to refer to a panel member by name

## Opening Statement

- Relate to your theme
- Be a story teller
- Tell your side of the story, and what you expect evidence to show
- You must be consistent and logical in appropriately discussing damages

## Opening Statement (Continued)

- Make sure jury understands what the liability and damage issues are, including what jury will be asked to decide
- Be sure to request that jury to keep an open mind until they have heard all evidence in the case
- Give jury preview of evidence defendant will be presenting on liability and mitigation of damages

## Opening Statement (continued)

- Do not exaggerate your case
- Speak in plain English, not legal language
- Make sure jurors understand any vocabulary they will hear in case
- If your case has weaknesses, try to anticipate and diffuse

## Direct Examination

- In Catastrophic cases, Plaintiff will have expert witnesses. Normally defense should also, at least in areas you are contesting.
- You should utilize expert witness testimony to support your theme or story of plaintiff's injuries and damages, even if your are contesting liability

## Direct Examination (continued)

- There is a line of thought that if you talk about damages, you are implicitly conceding liability. You have to make up your own mind on this, but conventional wisdom suggests that you can explain why both elements are being addressed to the jury
- Leaving Plaintiff's damage number unaddressed without an anchor or floor (defense number) can lead to high verdicts if you lose on liability
- Bolster your expert's education, experience and background along with the foundation of his opinions to help the jury better understand your theory of injuries and damages.

## Direct Examination (continued)

- You need experts who can clearly and concisely convey their opinions and conclusions in a way that is readily understandable to jurors
- Experts should address plaintiff's pain and suffering damages. For example, if plaintiff is paralyzed, you may be able to argue plaintiff is incapable of experiencing pain below a certain level

## Cross Examination

- You will want to discredit Plaintiff's expert to the extent possible, i.e. expert income, contradictory research/publications
- Determine your direct examination strategy of the catastrophically injured plaintiff when questioning about impeachment or other areas that challenge the plaintiff's credibility
- Your cross examination should include activities, such as activities of daily living (shower, dressing) that plaintiff can still do, as well as participation in hobbies

## Closing Argument

- Need to re-emphasize theme
- Last chance to address jurors regarding injuries and damages, especially being able to remind jurors of the evidence contradicting the plaintiff's claims
- You need to accurately and concisely summarize your evidence on injuries and damages
- Failure to discuss damages, even if you believe you have a strong liability defense, is usually a critical mistake

## Closing Argument (continued)

- Evaluate before arguments how your jury might respond to having only a damage number from the plaintiff
- If you have properly educated the jury throughout the trial, the jury will understand that you are not conceding liability when you address damages
- Studies suggest that “anchoring” and giving a lower alternative damage number produces lower awards<sup>4</sup>

## Closing Argument (continued)

- When suggesting an alternative damage number, present it in the context of what is fair and reasonable and take the jury through the damage instruction
- Consider displaying the verdict form completed as you are suggesting. If the jurisdiction itemizes the damages, and you are admitting liability and causation, complete the damages numbers
- You should contrast your numbers and provide a rationale for them, with reference to the evidence

## Closing Argument (continued)

- In some catastrophic cases, the amount of damages requested by the plaintiff can be millions. Think of creative ways to illustrate just how many dollars \$1 million really is
- Consider creative ways to show the value of money. Some counsel talk about what you can buy for \$1, \$10, \$100, \$1,000, etc. as way of demonstrating just how much plaintiff is asking for.

## Closing Argument (continued)

- Classic improper arguments by Plaintiff attorneys to look for and object to:

1.) **Per Diem Argument:** In most jurisdictions, it is improper for plaintiff to argue that the jury should award plaintiff an amount per day, and then multiply this by plaintiff's life expectancy

2.) **Golden Rule:** Again, it is almost universally improper for the plaintiff's attorney to ask the jury to put themselves in the shoes of the injured plaintiff, and award an amount that they think would compensate them to deal with the pain and suffering experienced by plaintiff

In some jurisdictions, either or both of these arguments may warrant a mistrial, though defense counsel needs to timely object and ask for this relief.

## Instructions

- While some instructions are provided in their entirety, many instructions require at least some modification
- Be sure to carefully consider wording, as the instructions are what the jurors will be referring to when the case is handed to them.
- Counsel should pay careful attention that the proper instructions are being utilized, and have the proper instructions available at the instruction conference if the court sustains your objection to plaintiff's instruction.

## Endnotes

<sup>1</sup> “How to Pick a Talk to a Jury: Defense Perspective”

[www.americanbar.org/gp\\_solo/2014/september-october/how\\_pick\\_and\\_talk\\_a\\_jury\\_defense\\_perspective.html](http://www.americanbar.org/gp_solo/2014/september-october/how_pick_and_talk_a_jury_defense_perspective.html)

<sup>2</sup>Id.

<sup>3</sup> “Voir Dire in Personal Injury Cases – A Defendant’s Real World Perspective” David Prichard, 31 The Advocate (Texas), Summer 2005.

<sup>4</sup> See, Wissler Kuehn, and Saks, “Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities” 6 Psychol. Pub. Pol’y & L. 712, 723 (Sept. 2000)

**Thank You**

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