

Voir dire in a bicycle case

The quest for understanding and common ground is not easy; jurors may harbor strong feelings about bicycles sharing the road with cars

By Artemis H. Malekpour

If you've got bicycle cases in your "wheelhouse," you know they're tough. And they're tough for reasons similar to what makes motorcycle cases tough: bikers of any sort scare the heck out of the driving public. Depending on where your case is being tried, a majority, maybe even the entirety, of your potential jury pool will be made up of drivers. So it becomes a big issue in your case.

We can hypothesize a variety of other reasons why jurors don't like bikes or cyclists: jealousy, resentment, frustration, laziness, contempt for all things fitness, or weirdness about men in tights. But often, what's driving a jury's judgment in a bicycle case is based more out of worry than ill will.

There's a lot of pressure when vehicle and bicycle are required to share the road. Bikes can be difficult to see. Navigating around a bicycle is risky (take a chance, hold your breath, hit the gas and pray nothing emerges around the corner ahead as you move to overtake). Alternatively, it can be stressful to trail a bicycle, as it inevitably spawns a backlog of impatient motorists cursing the lead vehicle for not passing already. And two wheels are not as steady as four, particularly around potholes or a big stick. So there's an obligation on the cautious driver to allow enough space in between to brake or dodge in time, especially when coming upon a group of riders.

Then there are the times when bikes expect to be treated like cars, then do very un-car-like things, like weave in between traffic lanes or go against the light to get ahead of the pack (placing drivers back in the dilemma of risky pass or turtle's pace when the light turns green). And if vehicle and bicycle face-off, it's not really a fair fight.

So there's a lot of angst your client can create, simply by getting on a bike. And it hangs overhead as the jury is asked to decide who's to blame when someone on a bicycle is harmed. As we tend to

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approach bicycle cases with an "us against them" mentality, there's a perception of division and competing interests right off the bat.

No way to begin a jury selection

So the work you need to do in voir dire becomes pretty critical. You must learn all you can about those potential jurors and what they're bringing into the courtroom to effectively exercise your strikes. You must also establish a tone of unity and community, so that the jury you end up with recognizes the common ground on which you stand.

The danger of what the defendant did could have harmed anyone. This time, it just happened to be someone on a bicycle. That's how we want jurors to see your case: ultimately, it's not about a bike, but an opportunity to protect the community, your client included, from the negligence of another.[1]

First things first…we've got to weed out those prospective jurors who will never get there. That's where voir dire comes in.

Where do we begin?

Getting to know you,
Getting to know all about you.
Getting to like you,
Getting to hope you'll like me.[2]

No matter how much time you have in a jury selection, to the extent possible, you want to engage your panel in a conversation that runs all the way through voir dire. To develop that congenial atmosphere, where jurors feel comfortable opening up, you've got to throw them some softballs initially. Best way to do that is to get them to tell you about themselves. And for you to be interested.

That last sentence is key, so it's worth repeating. Be interested in what jurors have to say. Paying attention is important to learning who these individuals are when deciding if you can keep them. But you also want them to see that you're listening, I mean, *really* listening, and that you care. That's the first step in developing that bond of mutual respect and understanding, and getting on the same side.

You want to find out about work. You want to find out about home. And you want to find out what they do to keep busy – outside of work and home responsibilities – and how they choose to spend their free time. By wading into those topics early on, you get to learn how active your jurors are, and what they enjoy. You also get an idea for the value they place on those things in their lives, and "if you could no longer do that, how much of a loss would it be?" This provides much needed insight about each juror, and it also begins to lay down the foundation for your damages case. For anyone who expresses disinterest or indifference in, well, anything, then what's been lost or made more difficult in your client's world probably won't mean very much.

Here's an example of this in action: In a recent mock trial, the plaintiff's attorney learned during voir dire that one of the jurors played horseshoes in his spare time. This was not just an occasional hobby – the juror actually competed in a league. The plaintiff's attorney then asked the juror how much of a loss it would be if the juror could no longer play horseshoes. The juror thought about it, then shrugged his shoulders and said, "Well, I mean, there's not much to it, it's not like you need to run around, all I need is one good hand…but if I couldn't do that, I guess I'd find something else to do instead."

Warning flag raised. Fortunately, a mock trial format provided the benefit of watching that same juror then deliberate on damages. Any guess how that turned out?

As anticipated, our horseshoes friend put no value on what had been taken away from the plaintiff as a result of someone else's negligence. Stuff happens. Get over it.

Seemingly benign small talk – what do you like to do, and what if you could not do it anymore – proved very telling, and it got our juror talking. He schooled the room on horseshoe competitions, and he simultaneously educated us on what type of juror he was going to be. So don't hurry through what seems like casual chatter or tedious formalities. It's in those moments where you could win or lose your case.

Where do we go from here?

So you've spent time on pleasantries (and hopefully learned a great deal). Now that you've got your jurors warmed up and ready to share, let's get into the meat of it.

We're talking about jurors' attitudes, their experiences, concerns and biases. And – oh yeah – bikes.

If they did not already reveal it in phase one of getting to know them, here's where you want to ask: how many of your jurors ride bicycles, and how many take those bicycles out on the road where there's traffic. What about their kids, or other family members?

What have their experiences been on bicycles? What about others they know?

When they're driving around, how often do they encounter bicyclists? When? And where? Now "tell us about that."

As you can see, we're delving into the liability portion of your case and the areas that may trip you up. But before you start asking about specifics, let your jurors go wherever their minds go as they talk about experiences they've had or seen with bicycles.

It's not only *what* they talk about, but *how* they talk about it. Do you sense frustration or a dismissive attitude? Is there some underlying trepidation or hostility in what they're saying? Dig deeper and you'll get a good idea of where they stand on bicycles without even needing to ask. But don't worry, you still will ask.

Once you've got the conversation rolling, depending on your case, the hurdles you have, and how much time you've got, there are a number of directions to go:

What have you seen bicyclists do that's dangerous? How common is it?

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What have you seen vehicles do around bicycles?

Some people feel drivers are too careless around bicycles, that drivers don't pay enough attention. Others feel drivers are okay around bicycles. Which are you a little closer to?

What are the dangers when you've got cars sharing the road with bicycles? What else?

Who carries the greater responsibility in that relationship between car and bike?

How many times have you seen bicycles do something you would not do? How many times do you see kids doing things on bicycles you hope your kid would never do?

What's the angriest you've ever gotten at a bicycle rider (other than your own child)? What about at a driver when there was a bicycle around?

Some people believe that there are some roads that bicycles should not be on. Others believe bicycles have the right to be anywhere. What do you think?

What do you worry about most when your child rides a bicycle? What do you expect your child to do? What do you expect others to do?

Some people think that when bicyclists are around, a driver has to be more careful and alert. Others think no, that's the bicyclist's problem to pay more attention. Which are you a little closer to?

Some people believe we'd all be better off if bicyclists did not share the road, that there is no safe way to put bicycles and cars on the road together, so bicycles should just stay on sidewalks and bike paths. How do you feel?

If there is no safe way to share the road, what should be done?

What are your thoughts?

You want to be open to and accepting of any answer a juror gives you. Does some of it make you cringe when you're thinking about your case or your own proclivity toward bicycles? Don't let your jurors see that. Embrace the "bad" answer, because you want to hear it. And you want to know more. And who else feels that way.

If you spend any time talking with people in general (which – as a trial lawyer – I highly recommend you do), you learn that sometimes there's reluctance in revealing how one personally feels about something. Whether it's a concern for political correctness, need for acceptance or a desire to avoid embarrassment, there are certain topics or situations where we're far more willing to give our true thoughts only when it's disguised as someone else's opinion.

For instance: "I personally feel that candidate is an idiot…but I know others who believe he's the real deal for telling it like it is."

So, when you're asking for jurors' own thoughts about something, and you suspect you might not be getting a straight answer:

How do you think other people feel about that?

Why do you think people don't like bicycles on the road?

Do people you know consider having bicycles sharing the road a good thing for the community or bad?

We want to recognize and acknowledge the risk and annoyances some, maybe even all, of your jurors feel towards bicycles on the roadway during voir dire. Then, once you get into your undermining section of opening,[3] show – where you can – how your client was aware of and protected himself and others on the road from each irritation or concern your jurors identified:

- Wore gear that was easy to see.
- Used the bike lane where possible.
- Traveled the required distance from the road's edge where there was no bike lane.
- Followed the traffic signals.
- Obeyed the same rules of the road as cars are required to do.

You want to show during trial how your client was different from how your jurors negatively perceive bicyclists. How your client was being safe. And how the defendant's behavior could have endangered anyone. So you ask:

What are some safety things bicyclists should do but generally don't?

What are some safety things cars should do when there are bicycles around?

Is a driver's responsibility to be on the lookout different when there's a bicycle around as opposed to other vehicles or people around?

Does a driver's responsibility to pay attention change when it's a bicycle versus car or pedestrian sharing the road?

Again, we're on the same side of safety here. Which jurors are resistant to that?

A word of caution before we move on: don't think that just because you have a cyclist on your panel, that person will be good for you. Often someone who rides a bicycle, particularly when it's beyond simple recreational use, can be your toughest critic. Not only will that juror be considered an "expert" in the deliberation room, but often cyclists get perturbed at what they see others on bicycles doing that they feel gives the sport or activity a bad rep. And then there's, of course, the defensive attribution that looms in any case:

"I would have been able to protect myself from that. This would never have happened to me, because I would have been safe."

No one wants to imagine they could be harmed in the way your client was (or claims to have been). So "I would have done something different" becomes the mantra for that juror who wants to be critical of your client. It's self-preservation on the juror's part. That's why it's important to show all the ways this plaintiff was safe, and how what happened here could have happened to anyone, at any time. And to strike those who will likely – and strongly – remain in judgment.

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What else do we have to talk about?

As in any case you want to explore jurors' thoughts on lawsuits and tort reform. When there's no affirmative defense, teach the jurors preponderance, then find out what trouble they will have, even if just a little, applying that burden.[4] These categories of conversation, if thoroughly developed, are where many of your cause challenges lie. And you want to wrap up with the jurors' rights questions, as my consulting partner and mentor instructs.[5]

But just before you get there, you need to deal with your client's damages and how your jurors feel about the topic. It's important in any case, but especially where there are "invisible" injuries, or insinuations of faking an injury.

When your plaintiff has brain damage as a result of a bike crash, the biggest harm is that all looks okay when it's not okay. A broken arm we can see. Same for a gash on the leg and resulting scar. But when the injury is inside one's head, it's more challenging to show. And people's expectations of what you *should* see with brain trauma can differ from reality. So you want to talk about that. Especially when there are allegations that your client is lying:

> Who here knows anyone who, or who here themselves, has had anything pretty significantly wrong with them that you could not see just by looking at them (for instance, early stages of cancer or back problems)? Was that person lying about what they had?
>
> Who here knows of someone who claimed to have an injury that they did not actually have, or were not as bad as they made the injuries out to be?
>
> Who knows someone who others thought was faking an injury, and turns out that person was telling the truth, there was actually something really wrong? Tell us about that.

Your client may have injuries that are delayed in appearance, or will get worse over time:

> Who here knows someone who was injured in some way, but the injury did not show up or get bad until sometime later?
>
> Some folks think that if you're in a wreck, any injury that you get from that wreck shows up right away. Others think that it could take a while before the injury appears. Which are you a little closer to?
>
> Some folks believe that brain injuries heal or get better over time. Others believe that a brain injury and its effects get worse as you age. How do you feel?

And with any brain injury case, you want to strongly consider whether your client should sit in the courtroom during trial or even testify. If you decide against it, or will limit how much the jury sees of the plaintiff, discuss it with the panel. Maybe it's a treating doctor who has said it's not good for your client to be there, or you're making the call to keep your client away:

> Some people might have a problem with that, others would be okay with it. Which are you a little closer to?

Go through each injury, and find out what jurors know or have experienced. When it comes to compensation, walk through each element and listen to how answers or even a juror's inflection changes when considering what trouble (s)he may have allowing money in the verdict for, say, medical bills compared with the more squishy stuff, like pain and suffering, or loss of enjoyment of life. Establish a baseline response with the easy items first, then work your way up to those harms or losses that are more problematic for jurors.

By the end of voir dire, you want those jurors selected to be comfortable with you and this bicycle case, which really is not about a bicycle at all. It's about keeping the streets of our community safe from those who choose to violate the rules of the road.


Malekpour

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Endnotes:

[1] See Ball, David and Keenan, Don. *Reptile: The 2009 Manual of the Plaintiff's Revolution*. 1st ed. New York, NY: Balloon Press, 2009.
[2] Hammerstein, O. (1951). Getting to Know You [Sung by Deborah Kerr (singing dubbed by Marni Nixon) and Chorus]. On *The King and I* [Movie Soundtrack]. Los Angeles, CA: Capitol Records. (1956)
[3] See Chapter 5, Section 5-4 of Ball, David. *David Ball on Damages 3*. 3rd ed. Louisville, CO: National Institute for Trial Advocacy, 2011.
[4] *Ibid*, see Chapter 3.
[5] *Ibid*, see Chapter 3 and Appendix A.

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