



Twelve concepts crucial to successful voir dire

The jury is the canvas upon which your case will be painted. Take special care in painting the minor impact, soft-tissue case

BY CHRISTOPHER B. DOLAN

Many people say that your case is won or lost during opening argument. I believe it is won or lost to a great degree during voir dire. This is especially true in a low-speed, soft-tissue case. The jury is the canvas upon which your case will be painted, displayed and judged. Choose your canvas carefully, or your creation, your case, will fail. Use voir dire not only to determine who is unsuitable to sit in judgment of your client, but to exact a commitment to resist the skepticism and prejudices that the defendants will use to win their case.

Your introduction is critical. Don't stand behind a podium; walk out in the open and greet the jurors. Introduce yourself and state that you are honored to represent your client. Introduce your client and have the client stand up and greet the jury. Thank the jury for appearing in response to the court's summons. Advise them that this is your opportunity to determine who is best suited to serve in this trial. I explain that it is my job to determine if they hold some prejudice, resentment, or preconception that might interfere with their ability to be fair to my client. I remind them that they have taken an oath and that it is critical that

they be completely candid in their responses, whether popular or not. I inform them that it takes time, justice can be slow, but this part of the trial helps to protect the integrity of our system. Explain that the parties will turn this dispute over to them to reach a decision and that they must decide it on the facts presented in this room rather than upon personal beliefs or preconceptions. I begin to explore their prejudices while interweaving the theme of my case with the ever-present reminder that the burden of proof is ever so slight.

With regard to style, I prefer the Phil Donahue approach. People are used to a



talk show format. Ask pointed questions. When you discover someone who can poison the panel, don't run from them unless they are about to torpedo the whole case by stating that they know your client and do not believe anything they say; or that they are a claims investigator; or a radical orthopedist who believes that no one gets hurt in these types of collisions. Running from an unfavorable opinion creates a serious hazard and makes the jury think you are hiding something. If you confront it respectfully, as a recognized and valued opinion, you will learn more about your jury and be in a better position to eliminate or reduce bias. Thank jurors for expressing their unfavorable views and recognize that they feel them strongly and deeply. Praising their honesty will encourage others to come forward. Ask whether anyone else feels that way. Use the first aberrant juror to "out" the next. Ask these potential jurors if, given the strength of their feelings, knowing nothing more of the facts, they would require your client to meet a higher burden than that provided by the law. Ask whether, if they were your client, they would want twelve jurors like them sitting in judgment on this case. Other jurors, who do not hold such strong opinions, may distance themselves from their own tendencies when they see the ugliness of these opinions. Use your challenges later to rid the panel of aberrant jurors, especially those for which the other jurors have shown dislike. In cleaning out the prejudice you reward and bestow your trust on those who have demonstrated objectivity.

Numerous dangerous prejudices have been cultivated by the insurance industry in order to defeat juror empathy and to encourage the rejection of a plaintiff's claim for damages. This article will focus on only a few. I will identify and discuss subject areas, or "concepts," critical to address, confront, and/or diffuse during voir dire.

Concept No. 1 – Who is responsible for their juror service?

The first issue to be addressed is the identity of the person responsible for taking

them away from their lives and bringing them to the thankless task of jury service. Advise them that the parties have been unable to resolve their disputes and, for good reason, your client felt it necessary to bring the matter to the court for resolution. It is helpful to remind jurors that this is the method provided by our society for the peaceful resolution of conflicts. Ask whether anyone thinks that people should avoid bringing a lawsuit if they believe that they have been injured as the result of a collision. You might introduce the subject by stating:

"My client is the plaintiff. She is the party who has filed this action that resulted in the court summoning you here today. The defendant is denying responsibility for some or all of the plaintiff's claims. One would hope that if you had a problem that you were unable to resolve, jurors would appear willingly to serve on your day in court as well."

Ask if anyone feels so much resentment about being required to appear for the length of the trial, that they might be unfair to either party, or might allow it to interfere with their ability to listen attentively or reach an impartial judgment.

Find out whether they have ever been parties to litigation. Beware of business people who have been sued numerous times and resent anyone bringing an action. Ask any former plaintiffs about the type of case in which they were involved and whether they were satisfied with the outcome. This will help the jurors with the concept of the "other" identified, see Concept No. 2. Ask whether their experience would cause them to favor one side or the other, or would affect their ability to listen to, weigh, and decide the facts in this case. Get a commitment from them to separate their experience from your case. It is important that they divorce themselves from the prior experience in front of the panel.

Identify individuals with prior juror service and ask them if that experience was favorable or unfavorable. Determine whether it was a criminal or civil case,

and if they resent that they may have to serve again. Determine if they reached an outcome and whether that juror was the foreperson. (Jurors tend to give more weight to the opinions of experienced jurors and the fact that they were foreperson reveals them as an opinion leader or consensus builder so you need to carefully monitor their prejudices.)

Concept No. 2 – The "other" identified

Perhaps one of the most dangerous challenges facing a trial lawyer is the common juror belief that your client's loss has not actually happened because the juror has never had such an experience. This emotional disconnect discourages juror empathy and allows jurors to punish plaintiffs for making claims that are "outrageous." It permits jurors to render an opinion devoid of any personal risk involved in receiving a similar rejection in their own lives, because this will never happen to them or someone they know. Some people seek to deny your client's injury as a way of reducing their own sense of vulnerability.

It is essential to demonstrate that collisions affect members of the jury, their friends and family. Put the face of their mothers, brothers and friends on the plaintiff. Even if that juror is challenged for cause, you will have educated the rest of the jury.

Delve into the details of any collisions and/or litigation in which the juror, a friend or family member has been involved. By demonstrating the sheer number of people who have been involved in, and/or injured in, automobile collisions, you have gone a long way to removing the "otherness" of your client's experience. Be careful to weed out any jurors who may resent your client for doing something that they find distasteful – filing suit. On the other hand, many jurors who themselves have not sued, or know someone who has not sued, regret the decision not to sue as they, or their relation, still experience pain. This approach



also demonstrates an interest in the jurors and furthering your relationship with them.

Sometimes a juror has settled an accident claim with an insurance company. While you may not ask about insurance, you may ask about the settlement. If the case settled, ask whether they were satisfied with the result. If so, this juror can be dangerous to your case. If they were able to resolve their case and felt good about the experience, they may think that reasonable people settle and greedy people go to trial. They also have a preconceived notion of the value of a case based upon their own experience.

Explore the jury's collective experience with injury as well. Go back to the people who indicated they knew individuals who had suffered injuries in collisions. Determine the type of injuries. Some people have had loved ones die in collisions; if so, express your sympathy. Ask whether friends or family members still have pain or limitation from the collision. If so, ask how many years it has been, in order to show the jury that real people suffer for a long time from these injuries. Make sure that jurors with related experiences commit to evaluating the case based only on the facts you present in trial.

After canvassing the jury for collisions and collision-related injuries, explore any neck or back injuries from other causes. Ask if they have ever heard the term "soft-tissue injury." Define it and take ownership of the term. State that a soft-tissue injury is where muscles, ligaments, and parts of the body other than the bones have suffered injuries such as tears, ruptures, strains and lacerations. Determine who has suffered a soft-tissue injury in the back. Let those who have had injuries that have persisted convince the others that these injuries are real. Use your jurors as teachers so that you don't have to impose your theory on them.

Concept No. 3 - Individual responsibility

Many jurors will adopt the view that people need to accept responsibility for

their own actions and their own lives. The defense will suggest that your client should do so. Own this defense theory before they speak. Ask whether anyone feels that your client should just "suck it up" or "tough it out," live with the pain and not seek to hold someone else responsible for it. Ask how they might react if someone wronged them, or a loved one, and refused to make them whole. The concept of individual responsibility has become twisted to the point that injured persons are seen as sniveling victims out to seek monetary gain through opportunistic behavior. Exploring the concept with the jury can diffuse the defense's ability to convince them of the strength of the argument.

In the end, ask for a commitment that they will not, based on the concept of personal responsibility, hold your client or the defendant to a higher standard, or treat them with skepticism, either for denying responsibility for the collision, or for deciding to go to court to hold the other person accountable.

Concept No. 4 - People who look good aren't injured

The fourth concept is the belief that people who can walk and talk are not seriously injured. I usually begin by recounting my mother's refrain that "you can't judge a person's insides by their outsides." I ask the jurors whether they have a preconceived notion that injured people look or act a particular way. I do this to get the issue out there, get them to consider it, and again, get their commitment to be led by the evidence, not by prejudice.

Concept No. 5 - Stereotype of rear-end-collision plaintiffs and their attorneys

The insurance industry has waged a campaign through the media to convince the public that your client is a faker, you are a money-grubbing liar, and this is a scam. Deal with it straight up and you will gain credibility; shy away from it and you may get slapped with the stereotype. I like to state the obvious:

"We have all seen negative stereotypes projected in the media about certain types of people. Certain ethnic groups are classified as lazy, opportunistic, and/or criminal. Certain professionals, such as the politician, the cab driver, the plumber with his backside exposed, the greedy stock broker, the get-rich dot-commer are held in disdain. These stereotypes and prejudices are not facts or evidence and have no place in a courtroom. Attorneys are stereotyped as well. We are the butt of jokes - joke books written about attorneys. Many people have preconceived notions about lawyers. We get called 'ambulance chasers,' 'crooks,' 'liars,' 'swindlers,' 'instigators of controversy.' While there will always be individuals that will live up to those stereotypes, on the whole, we work hard and are accomplished people. I can state my opponent is none of these things and neither am I."

Follow this up with questions concerning their notions about attorneys who represent plaintiffs, and whether they have had any personal experiences with attorneys which might influence their decision-making ability. Ask whether they are aware of any prejudices against individuals seeking compensation for losses in court and how they feel about that.

Concept No. 6 - The burden of proof

This is your chance to reinforce your relatively light burden. By this time you have determined who has had prior jury service and whether it was in a criminal or civil case. It is a critical time to distinguish the burden of beyond a reasonable doubt from your preponderance of the evidence standard. Call out, by name, the jurors who have sat on criminal trials. Describe the difference between the proof standards. Demonstrate the difference by moving your hands up and down to show how slight your burden is compared with the "beyond a reasonable doubt" standard. Using an example such as O.J. Simpson, who was found not guilty in the criminal prosecution because



of the heavy burden of proof, but liable in the civil trial by a preponderance of the evidence, can be effective.

I like to get individual commitments from jurors who have served in criminal trials, promising that they will not use the higher standard in this case.

Concept No. 7 - No one paid me for my pain

Jurors are sometimes reluctant to compensate someone for an injury of a type for which they themselves may never have received compensation. Those who have been injured, or know people who have been injured, and who have not been compensated, may be unwilling to compensate your client. This is especially true for jurors with back injuries that were not caused in a compensable event. Those jurors with personal or familial experiences involving old football injuries, industrial accidents, disease, chemotherapy, burns as children, diabetic amputation, or the like, may deny recovery out of jealousy or resentment. In conducting your examination, gauge whether they will see your case through the filter of their own tragedy. I suggest asking about all injuries that they have sustained, as well as those sustained by loved ones. Find out whether they or their loved ones continue to experience pain, and if so, whether jury service would detract from any care they may need to render. Ask whether the fact that this individual had no redress against another party would influence their ability to be fair to your client.

Concept No. 8 - The relative value of injury

People have difficulty determining the value of injury. Many have had no experience in determining the value of pain and suffering. Some have experience from prior dealings with their own collisions. Some have had worker's compensation claims. Some have read about large verdicts that offend them. Find out who is dead set against awards for pain and suffering and/or who may have an

artificial ceiling on an award unless you prove an intentional act or malice. It is important that you raise the issue because many people don't even know they have this prejudice unless you expose it.

Ask whether, if you prove that the defendant's negligence caused the collision, and your client is entitled to compensation for property damage, wage loss and medical expenses, any jurors believe that they could not, and would not, award damages for pain and suffering. Find out whether anyone believes that it is wrong to compensate people for pain caused by the negligence of another; or whether there is a maximum, or floor, that they would or would not award for those injuries.

Ask whether those who have suffered pain would judge your client's injuries against their own, or those of a loved one, and think that your client should feel grateful that they were not worse. Remind them that this case is about your client's injuries, and the facts and evidence demonstrating this injury, pain, and suffering. The jury must be reminded that its role is to weigh these facts and determine what that injury means to your client and her life and ultimately, if they find the defendant responsible, to compensate your client for the injury and pain your client has suffered.

Some jurors may have had an on-the-job injury and made a worker's compensation claim. Workers compensation does not compensate claimants for pain and suffering. It is important to discuss this difference with jurors who have had a worker's compensation claim and determine whether their experience would color their ability to listen to these facts and follow the law in this case, despite not having been compensated for that type of damage themselves.

Concept No. 9 - Tort reform

Many potential jurors believe that there are too many frivolous lawsuits. They do not know what that means, but they think that an epidemic of "those complaints" has occurred. Likewise, many

believe that verdicts are out of hand and driving up insurance rates. You have to address this right up front. Your willingness to do so will demonstrate that your case is not one of those frivolous cases.

I usually start by asking the jurors if anyone thinks that there are too many lawsuits being filed, and if so, why. Separate those with personal experience from those who have just heard it in the news or through those nice letters that their insurance companies send them. For those with personal involvement that has been business-related, ask if they were motor vehicle cases or business lawsuits. Ask if they are aware that the majority of litigation involves businesses suing businesses and that injury complaints have been on the decline. Ask whether they know anyone who has filed a frivolous lawsuit, and whether they believe your client's lawsuit is frivolous. Ask whether, if the case were frivolous, they think the court would have let it get this far in the legal system. Ask if they believe that this type of case should not be brought to court. Ask if they were involved in any of the recent insurance-sponsored initiatives to limit citizen's rights to bring lawsuits. Ask whether they have given time or financial support to any organization designed to limit the number or type of lawsuits that can be brought. Ask if they think that people should not have the right to file lawsuits. Ask if they believe that some other system is preferable to ours. Ask whether their beliefs will affect their ability to be fair and impartial to your client.

Concept No. 10 - The juror as an expert

The tenth concept involves a juror's personal knowledge in the areas that are at the heart of the defendant's case, physics and bio-mechanics. Your opponents' theme is that your client could not have been injured by the forces involved in this collision. Their second theme is that if they were, they should have healed within two to six weeks and that any additional treatment is pure fluff for the purpose of milking the system. You



need to see if there are people in that box who will either be translators for the physics and bio-mechanical gobbledygook that the defendant's expert will spout and/or people who have experience in the health care field who will validate the defense medical expert's opinion that no injury of a significant nature could have occurred. I find that orthopedists should be excused. Physical therapists are fine. Chiropractors are great either for educating the jury before the defense gets rid of them, or for service. Massage therapists are wonderful, as are acupuncturists. Physics geeks and cops who think that they are accident reconstructionists have to go. Likewise, any private investigators and/or insurance adjusters or claims handlers have to be eliminated.

Ask whether they or their loved ones have any experience or specialized knowledge in the fields of accident reconstruction or investigation, bio-mechanics, medicine or insurance adjusting. For people with some applicable background, you need to get a commitment that they will not become additional experts. Ask whether they would be able to set aside any such knowledge or experience in deciding this case, and whether they would be able to refrain from doing experiments or advising the jury of information not presented during the trial.

Concept No. 11 - No crash, no gash, no cash

The defense has a name for this type of case. No crash, no cash. That is their motto; it is their theme. Do not underestimate its impact. Grab the theme and debunk it right from the start and get the jury to commit to a more sophisticated approach.

Ask whether anyone thinks that there must be some level of speed involved in a collision before a person can be injured, and whether a person belted in a car that is hit from behind needs to be hit at any particular speed before they can suffer an

injury. Ask whether anyone would require that a car be heavily damaged before they would award compensation for physical injury, wage loss, medical expenses or pain and suffering. Ask whether anyone thinks that unless there is a broken bone, or an injury that shows up on an X-ray, a person is not injured. Ask whether anyone believes that all injuries heal in the same manner between different people, or that there is a set recovery schedule. Explore their beliefs about rear-end collision injuries being temporary or minor.

Concept No. 12 - Blatant prejudice

Many of our clients are members of minority groups. We need to do the obvious and monitor our jury for prejudices born out of their background and stereotypes that exist in our society. Again, do it right up front. If your client is African American or Haitian or some other dark-skinned race such as Indian, ask the jury if there is anyone there who will have their opinion influenced by the color of your client's skin or any beliefs that they may have about your client's race. If your client has an accent or is from another country, ask the jury if they will give the benefit of the doubt to a defendant because they may be more like them. If the defendant is a big corporation ask them if they own stock in that corporation or know anyone who works there. Ask them if they have any opinions about people suing corporations or whether that corporation is a good or bad corporation.

Ask whether anyone on the jury does not drive a car. Some people ride only bikes, can't afford a car, or hate cars and drivers. Do you want a Critical Mass (a group that lobbies for bicycle rider safety) organizer on your jury if they hate all auto owners?

Find out if a religious belief would interfere with any juror's ability to sit in judgment in your case. Jehovah's Witness members often refuse to judge another.

Christian Scientists do not believe in medical intervention. Some fundamental religions believe that what happened is God's will and no one should try to alter that in any way. It is critical to show respect for the juror's beliefs when asking these questions.

Determine if there is some prejudice towards your client's choice of medical treatment. Some people think chiropractic care is voodoo. Others reject all forms of psychotherapy. Still others love acupuncture. Get those who believe in the treatment received by your client to talk about its benefits, to legitimize it for those to whom it is foreign. Watch out for those who reject the types of treatment that were chosen by your client.

Conclusion

This is but a sample of what needs to be considered in conducting voir dire. It is an uncertain process; follow your gut and get to know your jury. Make sure to consult your client; they must feel a part of this process; it is their jury after all. In the end, if you are thorough, the jury will gather from your concern for fairness that this case is an important one. If nothing else, you will hopefully leave with a commitment that they will guard against their prejudices.



Dolan

Christopher Dolan is the founder of San Francisco's Dolan Law Firm. Mr. Dolan, who is bilingual in English and Spanish, only represents individuals who have been injured, denied their rights, harassed, or wrongfully terminated.

He was selected from among all of California's lawyers as the Consumer Attorney of the Year for 2007. Mr. Dolan served as the 2010 President of the Consumer Attorneys of California, a board member of the San Francisco Trial Lawyers Association, and is a member of The Million Dollar Advocates Forum.