Jury Selection in the Era of Tort Reform [1]

By Lois Heaney

The Public Climate

As litigants and their lawyers begin a trial in 1995 they do so against a backdrop of a national campaign of "tort reform" aimed at persuading the public (from whence the jurors come) that personal injury litigation has produced a national crisis which threatens the economy and the services that jurors rely upon.[2] Personal injury litigation, with the aid of environmental regulations, is the bogey man responsible for America's economic problems, plant closures, lost jobs and lost competitiveness. It is seen as a big part of the problem and almost no part of the solution.

The campaign would have the public believe that no one--other than greedy plaintiffs and their lawyers--is advanced when toxic polluters or the manufacturers of defective products are held to answer and found to be at fault. It would seem that no social or public good is served when litigation works to get unnecessarily toxic materials or defective products out of the marketplace, workplace, home or community. Beyond the supposed harm to the economy that personal injury litigation stands accused of, it has also purportedly contributed to making this a nation of whiners, fat and lazy people, unwilling to work for a living, and always in search of the deep pocket.

The tort reform movement is very cynical, inspiring harsh judgments about those who would turn to the courts for justice, emphasizing that the fault seems to lie most with those who have been injured. The central "moral" underpinning of much of the tort reform rhetoric is "personal responsibility." In the abstract personal responsibility sounds good to most people-- individuals taking responsibility for what they do and what happens to them. Theoretically, personal responsibility should cause dead-beat dads to pay their child support, hit and run drivers to stop and wait for the police to come, and corporations to own up to their misdeeds. However, in the context of personal injury litigation it amounts to something very different, usually a quest to find fault with the plaintiff, placing the blame or a significant portion thereof on the injured party for what has transpired, emphasizing the plaintiff's shortcomings. It shifts the burden of proof away from a preponderance standard and comparative negligence back in the old direction of the contributory negligence exclusion. It offers an odd comfort to jurors, that they are somehow "better" than the plaintiff because they are "more careful" and they are safe because it was the plaintiff's failure, miscalculation or misuse of the product which caused the injury.

Understanding how this public relations campaign has affected public thinking and juror attitudes is an imperative for trial lawyers. Old assumptions that an injured plaintiff can rely upon jurors' "natural sympathy," empathy for the underdog, or skepticism toward large corporate defendants, are no longer viable in preparing for such trials or making decisions about voir dire and jury selection. Some evidence that this tort reform campaign is having an impact includes reports of a drop in 1994 in medical malpractice awards. Jury Verdict Research[3] reports that the median award fell $43,000 in 1994 from those achieved between 1988 and 1993, and noted that the average medical malpractice award fell $523,000, suggesting that the high-end awards have come down.

Another arena in which evidence that the tort reform movement is having an impact is in voir

dire. When asked, a huge number of prospective jurors say they think jury awards are often too high and that improper cases are being brought to trial. They also have begun to cite as an example the now famous McDonald's coffee case. The public has latched onto myths propounded about this case and few people seem aware of the extensive burns suffered by the plaintiff, or the hundreds of prior complaints McDonald's received about the high temperature of its coffee. Rather they recall that a plaintiff was awarded a great deal of money for "spilling hot coffee on herself." The task in voir dire is not to fight with prospective jurors and convince them that they are wrong about the McDonald's case or about the need for reform in the tort system. Instead, counsel should identify the relative depth of their attitudes and the influences upon them. As an advocate, counsel must identify those prospective jurors whose views and opinions are most antithetical to the interests of your client. Even within this group, because you must be selective in your exercise of peremptory challenges, you must then analyze which prospective jurors are likely to have the most influence over others.

Case Analysis and Jury Selection Strategy

Effective trial strategy from the voir dire to the concluding jury instruction in any case is tied to case analysis which includes clearly articulated case themes and a realistic evaluation of the strengths and weaknesses of the plaintiff and defense cases. In many cases such an analysis may be advanced and illuminated by pre-trial research which includes focus groups or trial simulations. Such research provides counsel with an opportunity to test case themes in advance of trial and identify the stumbling blocks jurors may encounter in evaluating liability, causation and damages. This research may also illuminate for counsel and consultants the attitudes and experiences most likely to influence jurors' reactions to the case and provide useful insights into the specific issues for jury selection in the case at hand.

Case analysis which builds toward a theory for jury selection includes thinking through the following kinds of questions:

- What are the themes and issues that are going to stand out?

- What will jurors respond to and react to in my case and in my opponent's case?

- What will cause jurors to blame the plaintiff?

- What are the moral and ethical issues involved?

- What is the human story/human drama contained here?

- What are the motives?

Preparing for Voir Dire

Like everything else involved in a trial, effective voir dire and jury selection require attention and advance preparation. Decide in advance what you want to know about prospective jurors, what information will help you make informed, intelligent decisions about how to exercise peremptory challenges or support challenges for cause. Identify and protect the information which would help the other side eliminate those jurors whose attitudes and experiences your pre-trial research tells you may be helpful to your client.

Start preparing for voir dire early. As you might with your opening statement or closing

argument, start a file or notebook section where you jot down ideas as they occur to you throughout your trial preparation. Jot down points you think will trouble jurors, things about the case which may get in someone's way of returning a verdict in your client's interest. These ideas can later be turned into questions for use in jury questionnaires and oral voir dire. Consider the sorts of biases, cultural and racial stereotypes and presumptions prospective jurors will bring to court and how these will interact with the identities of the parties, case issues and facts.

Jury Questionnaires and Voir Dire Questions

Well-formulated juror questionnaires can provide counsel with a substantial amount of information about prospective jurors which would otherwise be unavailable, especially in jurisdictions where the scope of attorney-conducted voir dire is limited or judge-conducted questioning is the mainstay. Even where there is attorney voir dire, well-formulated questionnaires can provide counsel with an overview of the entire venire, not just the 12 people in the box. They are an efficient means of collecting consistent background and attitude information and provide attorneys with the opportunity to ask intelligent follow-up questions in oral voir dire. To effectively use voir dire questionnaires, counsel should give careful thought to their preparation. Prospective jurors should have sufficient time in which to complete them, enabling them to provide meaningful answers. Counsel should provide for the duplication of the questionnaires for the court and all counsel. The material obtained should be reviewed and analyzed thoroughly. Jurors are rightfully annoyed when they have gone to the trouble of completing the questionnaire and the attorneys appear to have paid little, if any, attention to their responses.

Well-formulated questionnaires can provide:

- Answers which are more candid and less subject to the pressures of social conformance or social desirability so evident in the courtroom[4];

- A time-saving means of obtaining background and demographic information, without taking up the limited amount of time the judge may have allowed for attorney questioning;

- A baseline of attitudinal information about the jurors with which to compare and contrast their oral responses in voir dire;

- Information to attorneys about all the prospective jurors in the panel prior to the exercise of peremptory challenges. In this respect, the use of questionnaires is akin to the struck system for jury selection, in which a sufficient number of jurors are questioned and passed for cause before peremptory challenges are exercised, allowing counsel to evaluate individual jurors relative to the entire panel.

- Privacy for the jurors. Filling out the questionnaire is often less fraught with anxiety than answering questions out loud in front of an audience (except for those with literacy problems).

The fundamental purpose of voir dire is to obtain information about prospective jurors which will form the basis of challenges for cause or provide for the intelligent use of peremptory challenges. When voir dire lacks this kind of depth attorneys are left to rely upon stereotypes and gross generalizations in their exercise of peremptory challenges, forcing attorneys to exercise challenges on the very basis the United States Supreme Court has held impermissible.

(Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 499 U.S. 400 (1991); Edmonson v. Leesville, 500 U.S. 614 (1991); J.E.B. v. Alabama, 511 U.S., 114 S.Ct. 1419 (1994).[5])

Lawyers like archaeologists must excavate. Since bias most often deceives its holder, jurors' proclamations of fairness should be suspect.[6] In the courtroom where the premium is on the appearance of fairness, most prospective jurors want to appear fair, and many will deceive even themselves into believing that they can be fair. In order to identify the biases jurors hold which are detrimental to the client's interests, lawyers must first understand what the particular case issues are which inspire, or perhaps conspire with, bias.

In crafting questions about attitude and experience, it is critical to word them in such a way that they serve to differentiate between people--having everyone agree with anything counsel states does not help to identify bias or differences between prospective jurors. More effective questions generally are open-end, calling for narrative responses rather than yes/no answers. In the alternative questions may be scaled, offering a range of responses which reveal an array of attitudes.

In almost any personal injury case, assessing how jurors feel about the legal system and lawsuits is an important feature of juror evaluation. Those who are bitter about lawsuits in general and who distrust the civil justice system are often hostile to plaintiffs.

Some examples of questions which help differentiate between jurors and which can be written for inclusion in a questionnaire or modified for oral voir dire are:

Lawsuits

- Have you ever considered bringing a lawsuit or claim, or felt like you had a good reason to sue, but decided not to? Yes/No (If yes, please explain:)

- If you thought you were injured because of the fault of someone else, would you consider bringing a lawsuit? Yes/No (If no, please explain:)

- How do you feel about individuals who bring lawsuits for personal injuries?

- Are there any kinds of lawsuits which you think are unfair or unjust and should not be brought to court? (If yes, please you give us examples of the kind of lawsuits you disagree with.)

- How satisfied or dissatisfied are you with the legal system in the way it treats someone who has brought a lawsuit?

- How satisfied or dissatisfied are you with the legal system in the way it treats someone who has been sued?

- Do you agree or disagree with the statement: "Juries can be trusted to make fair awards in personal injury cases"?

Products/Industry

- Do you think the problem of [toxic substances] [defective products] has been exaggerated? (Yes/No, Why?)

- Overall, would you say the government places too many regulations, just enough regulations, or not enough regulations on business and industry?

- Overall, do you agree or disagree: most environmental problems caused by industry are minor and not worth worrying about? (Why is that?)

- Overall, do you agree or disagree: big companies would not knowingly pollute the environment?
(Agree/Disagree)

- Overall, do you agree or disagree: big companies would never knowingly sell products which cause injury if those products could have been made more safely?
(Agree/Disagree)

Personal Experience

- What do you consider to be your most important or significant informal learning experience (something outside of school or work)?

- What is one of the hardest lessons you have had to learn in life?

Conducting Voir Dire

Voir dire is an interview, a conversation with each juror. This is more easily accomplished when you are familiar and comfortable with the questions you intend to ask. Try your questions out on a colleague, support staff, friend or spouse in advance of trial. This will enhance your familiarity with the questions and provide valuable information about whether your questions are really getting at the information you are after.

Set the atmosphere in voir dire. Remind jurors that there are no "right" or "wrong" answers, just candid and complete responses. Encourage jurors to talk to you by using a mixture of open-end and close-end questions. Develop questions which reveal a spectrum of attitudes to help you distinguish people, and prepare alternative wordings for those questions to get around objections and alleviate repetition. Consider in advance the sorts of answers a question may elicit and have appropriate follow-up questions ready. Stay focused on jurors as you talk with them, let them know you are interested in what they have to say. Even when you may not like what someone is saying, give that juror permission to have his/her say as it may form the basis of your motion for cause.

Juror evaluation

Develop criteria in advance upon which you will evaluate prospective jurors. Assess jurors as individuals and as members of a small group, the jury. Evaluate jurors in comparison with each other and consider the special qualities each may bring to the jury as a whole. Consider attitudes relevant to the case issues, technical knowledge, analytic ability, empathy, flexibility, thoroughness in reasoning, leadership, and negotiation skills.

There are many tasks in jury selection--conducting the oral questioning, listening, taking notes, keeping track of which juror said what, evaluating jurors, noticing how jurors interact with each other, noticing how jurors in the jury box and in the courtroom respond to you and your

opponent, pursuit of cause challenges and the intelligent exercise of peremptory challenges. Given the large number of tasks it is often helpful to have an assistant with you in jury selection--a jury consultant or co-counsel, legal assistant, law student--to help you with these tasks and to provide a framework which encourages a systematic and thorough evaluation of prospective jurors.

Above all, approach the task of jury selection thoughtfully. Real life attitudes and experiences influence how jurors will view the case facts, arguments and the law. The voir dire process is the trial lawyer's only opportunity to find something out about those attitudes and experiences which jurors bring with them to court. Use that opportunity wisely.

References:

1. Portions of this article appear in Krauss & Bonora, eds., Jurywork®: Systematic Techniques, New York: Clark Boardman Callaghan (2d ed. 1983, updated annually).

2. For example, a full page "informational" ad in Time magazine (March 16, 1995) by Mobil Corporation contained the following:

Civil justice: Balance the scales
"Americans have become a litigious lot. And no wonder. For some, the civil justice--or the tort--system has become a grand jackpot, providing windfalls to plaintiffs and their lawyers."

"The result is a system out of balance, tilted to favor plaintiffs and reward their lawyers. The losses to society in the form of higher product and insurance costs, less innovation, fewer jobs and reduced availability of services are enormous."

"...Tort reform is a front-door effort to bring down the cost of doing business, making American companies globally competitive and freeing citizens from the excessive costs of our current civil justice system."

3. Reported in New York Times, January 27, 1995.

4. See Rosenberg, When Dissonance Fails: On Eliminating Evaluation Apprehension from Attitude Measurement, 1 Journal of Personality and Social Psychology 28 (1965); Collins and Hoyt, Personal Responsibility for Consequences: An Integration of the Forced Compliance Literature, 8 Journal of Experimental Social Psychology 558 (1972); Festinger, A Theory of Social Comparison Processes, 7 Human Relations 117 (1954); Schacter, The Psychology of Affiliation (1959).

In addition, social scientists have written on the efficacy of judge-conducted voir dire. See, Note, Judges' Non-verbal Behavior in Jury Trials: A Threat to Judicial Impartiality, 61 Va. L. Rev. 1266 (1975); Suggs and Sales, Juror Self-Disclosure in the Voir Dire; A Social Science Analysis, 56 Indiana L.J. 245 (1981). Greater candor in response to questions posed by lawyers is also attributed to lawyers asking more specific questions as a result of greater knowledge of the case and to jurors' perceptions of lawyers as being biased on behalf of their clients. For the latter reason, lawyers' participation in the questioning implies a right to the participation of "biased" parties; therefore, "biased" answers become more socially acceptable than where the questions are posed by the judge. See also, Padawer-Singer, et al., Voir Dire by Two Lawyers: An Essential Safeguard, 57 Judicature 386 (1974) and Jones, Judge-Versus Attorney-Conducted Voir Dire, 11 Law and Hum. Behav. 131 (1987). See generally, Krauss & Bonora, eds. Jurywork®: Systematic Techniques, New York: Clark Boardman Callaghan (2d ed., 1983, updated annually).

5. See, Krauss & Bonora, eds., Jurywork®: Systematic Techniques, New York: Clark Boardman Callaghan (2d ed. 1983, updated annually) Chapter 5.

6. See People v. Williams, 29 Cal.3rd 392 at 402 (1981). "In fact, some authorities suggest that the accuracy of a person's estimation of his fair mindedness is likely to be inversely proportioned to the depth of his actual prejudices and predispositions".