

FROM MY SIDE OF THE BENCH

Voir Dire Checklist (Personal Injury Case)

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LISTEN TO VOIR DIRE EXAMINATIONS ALL THE TIME. I hear great examinations and poor ones. I am often distressed, however, by two things. First, lawyers often omit critical areas of inquiry. They just simply don't ask questions that should be asked in virtually every voir dire. Second, I continue to be amazed by the number of times that a lawyer for one side will ask a question that logically should be asked by his opponent. For example, a plaintiff should spend his time trying to identify potential jurors who might align themselves with the defendant. However, lawyers often ask questions that do nothing more than identify their own favorable jurors. Here's an example—plaintiff asks whether there are any jurors who have previously been injured and sued someone. That's the defendant's question! Any panelists who raise their hands will be struck by the defendant. Now, it's conceivable that a plaintiff may ask that question first in order to ask it in a softer way than the defendant to prevent a cause strike. However, frequently I see the plaintiff ask that question and not ask the corollary question—whether anyone has been sued.

When I was still trying cases at my old firm, shortly before every trial I would sit down and think of the various topics I wanted to touch on during voir dire. It seems I had to re-invent the wheel with every case. I had no checklist. With this in mind, I have sat through the last dozen or so personal injury trials and have created this checklist of voir dire questions. I'm sure this list is by no means exhaustive. Any facts that are unique to your case ought to be discussed and inquired about. Obviously, not all of these questions should be asked in every case. However, when you're sitting at your desk about to start a trial, here's a useful place to start and to focus your attention on what should be asked of whom.

PLAINTIFFS' QUESTIONS

Background

- Know the parties? Know attorneys?
- Know witnesses? Know experts? Doctors?

- Know anyone on the jury panel? Judge? Staff?
- Familiar with the location of incident?

Prior Work Experience

- Work in same business as defendant?
- Work in insurance business or in any business handling claims?
- You or close personal relative work in legal profession?
- You or close personal relative work in medical profession?
- Inquire of jurors who are retired what they did before retirement.
- Inquire of jurors who are homemakers to see if they previously worked outside the home and where.
- Same with unemployed jurors.

Sympathize with Defendant?

- Ever been sued? Ever had a claim filed against you?

Burden of Proof

- Define: the greater weight of the credible evidence; different than criminal
- Anyone hold me to a greater standard? Anyone require me to prove case beyond a reasonable doubt? Anyone unable to comply with judge's instructions to decide this case by a preponderance of the evidence?

Previous Injuries

- Anyone suffered a similar injury as the plaintiff, e.g., had a relatively minor automobile accident and felt ok and then woke up the next morning in pain? [This is a double edge sword question—it will identify jurors favorable to your position and thus might be struck by the defendant, but it will also pre-condition the jury to thinking that your client's experience is not unique. This is a question you

will need to decide whether to ask in any particular case.]

Pain & Suffering

- Define: our legal system works by awarding damages. Define P&S
- Anyone unable to consider awarding P&S damages?
- Does anyone believe that, while they could consider awarding some nominal amount of P&S damages, that you could not consider awarding substantial P&S damages, even if the evidence justified a greater amount?

Punitive Damages

- Same questions as P&S questions

Translator/nationality issues?

- If any witness is required to testify with a translator, inquire whether anyone is unable to consider the testimony of a witness who testifies via a translator.
- Will anyone be unable to give adequate weight to the testimony of a witness because the witness does not speak English?
- If plaintiff not a citizen (assuming plaintiff is here legally)—does anyone harbor ill will to people who are not citizens here? Members of any organizations opposed to immigration reform? Anyone unwilling or unable to award damages to a citizen of a foreign country?

Tort Reform

- Member of any lawsuit abuse organization or given money to such organizations?
- Do you believe that there are too many lawsuits?
- Do you believe that damages awards are too high? Do you believe there should be caps on the amount of damages that are awarded?

Chiropractors

- Who goes to chiropractors? [Another double edge sword--while this will flag jurors who are favorable to the plaintiff, it may also get other jurors thinking that perhaps chiropractors are ok since other jurors treat with them]
- Anyone view chiropractors with suspicion? Just don't like chiropractors?
- Anyone here unable to listen to or consider the testimony or medical records of chiropractors?

Catch All

- Anyone who didn't raise their hand in response to a previous question, but now that you've heard more about the case, have thought more about it, realize that perhaps you should have answered yes to a previous question?
- Anyone thinking, "that lawyer hasn't asked this question yet, but if he did, he'd realize that one side or the other wouldn't want me on this jury?" [Although be aware—this is often a dangerous question in that it will often identify favorable jurors that the opponent will strike]

DEFENDANTS' QUESTIONS

The Defendant

- Familiar with the defendant?
- Ever had a bad experience with the defendant or a similar company?

Prior Work Experience

- Work in same business as plaintiff?
- Belong to a union?

Alligned with Plaintiff?

- Ever sued anyone? Ever made a claim against someone?
- Ever been badly injured in an automobile accident?
- In an industrial accident?
- If the defendant is a company, who tends to sympathize with the individual versus the company? Anyone view large companies with distrust?

Burden of Proof

- Understand that plaintiff has the burden of proof?
- If the plaintiff fails to prove his case by the preponderance of the evidence, will you be able to award zero?
- Anyone believe that just because someone has filed a lawsuit that they must be entitled to recover something?
- I go last. Plaintiff goes first in voir dire or jury selection, goes first in putting on his evidence, and gets to argue first. That's because he has the burden of proof. He must prove his case. Will you be able to wait to decide this case until you have heard both sides? Anyone who will be unable to do so?

Sympathy

- Judge will instruct you not to let bias, prejudice or sympathy play any part in your deliberations. Will you be able to follow?
- If plaintiff badly injured—I agree that plaintiff was badly hurt. Will you be able to put your sympathy

aside and just decide this case based on the evidence that you hear and see?

Contesting Damages

- (If contesting liability)—there are two basic things that plaintiff must prove, liability and damages. We don't think we caused the accident. Plaintiff will try to prove that we did. However, plaintiff also has to prove that she was injured and by how much. I think plaintiff is overstating her damages. Trying to claim too much. I am going to contest both parts—both liability and damages. Is there anyone here who believes that if I argue that plaintiff is overstating her damages—that plaintiff was only damaged \$1,000 by this accident rather than the \$50,000 she is claiming—that I must be conceding that I caused the accident?
- (if not contesting liability) I am not contesting that my client caused the accident. We do believe, however, that the plaintiff is not injured as much as she is claiming. Is anyone going to hold that against me? That is, does anyone think that because I agree that my client caused the accident that you must award plaintiff whatever they ask for?

Tort Reform

- A number of you raised your hands in response to questions about too many lawsuits. Some of you believe that there should be caps on the amount of damages. You are the cap. You get to decide how much, if any, to award. Is there anyone here who cannot do that?

Clean Up

- Explore any of the plaintiff's voir dire questions listed above that plaintiff did not cover that you deem appropriate.

Rehabilitation

- If any juror indicated during plaintiff's voir dire examination that he/she might have a bias or prejudice, spend time rehabilitating that juror, *e.g.*, can you follow the judge's instructions? Can you listen to the evidence and decide this case based on the facts you hear in this courtroom? Can you follow the Court's instructions on the law?