

“VOIR DIRE IN TBI CASES”

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VOIR DIRE IN TBI CASES

The voir dire of prospective jurors in a traumatic brain injury case is an opportunity to discuss with prospective jurors their attitudes and biases about what it means to have a brain that is not functioning normally. It is beyond the scope of this paper to conduct an exhaustive review of voir dire in general. The focus in this paper will be on how to voir dire a prospective jury about the themes and issues common to the majority of cases involving traumatic brain injury.

Importance of Open Communication

One advantage of representing the plaintiff is the right to initiate the voir dire process. However, my experience has been that the start of voir dire is a time of anxiety. Perhaps the reason for the anxiety and awkwardness that I have experienced initiating voir dire can be explained in the following commentary reflecting on the mind-set of a prospective juror at the start of the voir dire process.

The average person arrives at the courtroom on the morning of the first day of trial in less than an open-minded state. He or she has been summoned from home, work or play, has had to make arrangements to cover for his or her absence, and is looking forward to forced participation in a process not understood and not trusted. Parking is expensive and sparse, directions to the courtroom are, at best, misleading, and the potential juror has just been forced to listen to a monotonic court employee utter convoluted intonations about a system of justice, which has no relevance to real life.

Potential jurors are then herded into a wooden corral, the prospect of release from which is unpromising. They are faced with a God-like figure wearing a black robe and a bevy of lawyers about whom they have misgivings at best and dislike for at worst. They know not when or if they will be allowed to go to the bathroom. They do know they are about to be asked personal and perhaps embarrassing questions. They have been told by their neighbors and even their personal lawyers what to say to extricate themselves from jury duty.

GETTING STARTED

Given the defensive mind-set of most prospective jurors at the beginning of voir dire it is important to give them “permission” to open-up and state their true feelings and give frank answers to the questions you are about to ask of them. My review of social science research and personal experience garnered from years of convening focus groups and selecting juries has led me to believe that the individual attitudes and biases of prospective jurors stemming from their prior experiences is the most important factor in how they will view the evidence to be presented in the traumatic brain injury trial. Thus, it is important to attempt to create an atmosphere in voir dire in which prospective jurors will “open-up” and talk about how they feel about key issues and themes in your case. I have used the following statement to give potential jurors “permission” to make statements in voir dire they may believe I would not necessarily want to hear.

“Good morning ladies and gentlemen. As His/Her Honor has told you I represent John Jones. This is a chance for me to ask you questions and a chance for you to ask me questions. Both sides in this lawsuit are trying to get an even start, a jury with no biases one way or the other.

Even judges have to occasionally excuse themselves from handling certain cases because of some conflict they have which would make it inappropriate for them to sit in judgment in the case. The same may be true for you as potential jurors in this case. Some of you may not be the best jurors for this case because of a feeling or belief that you have about this kind of a case.

First, I am going to ask each of you a few questions about yourselves. I have reviewed the questionnaire all of you prepared so I know a little about each one of you. After talking with each of you I am going to ask all of you about things that might have a bearing on whether you would be a good juror to sit on this case, a juror that will start out neutral with no bias for one side or the other.

QUESTIONS ADDRESSED TO EACH JUROR INDIVIDUALLY

After laying this groundwork that it is okay for potential jurors to acknowledge that they

would not be the best juror to sit on this type of a case, I then move on to questions that I ask of each individual juror. In examining each individual juror, it is important to have a diagram in front of you with the names of the jurors so that you can address each individual juror by name.

The length of this phase of the voir dire depends in part on the depth of the information contained in the juror questionnaires that you should have prior to the beginning of voir dire. However, in my experience voir dire is often limited to forty-five (45) minutes to an hour per side and thus, this portion of the voir dire will often be limited to getting to know a little bit about each juror and establishing some individual rapport. Also it should provide counsel with a feel about how they connect with each individual juror. The following is a sampling of questions that I often ask in this phase of voir dire.

What is your employment?

What does your spouse do?

Do you have any children?

Are they in school?

If the children are adults: What do your children do?

Any prior jury service? If so, civil or criminal case?

What was the case about?

What was the judgment of the jury?

Were you the foreman?

Have you ever been a plaintiff (one who brings the claim) or a defendant (one who defends against a claim)?

Do you have any health problems that would make it difficult for you to serve on a jury in a trial that might last a week?

This trial might last a week or longer: is there any reason that the length of this trial would be such a hardship on you that you may not be able to pay full attention to the evidence and do your job as a juror?

What do you like to do in your spare time, assuming you have any spare time?

For those prospective jurors who have attended college: what did you study in school?

QUESTIONS TO ADDRESS TO THE GROUP

Because of time constraints that I generally face in conducting voir dire, after ten (10) to fifteen (15) minutes of questioning prospective jurors (in Indiana where my practice is primarily based we have six (6) person juries), I then address questions to the group. I preface these questions by explaining to prospective jurors that I am going to ask questions to the group as a whole and ask them to raise their hands if they have a response to the question. In order to “break the ice” in this phase of the questioning I try to start with a question that I am reasonably sure everyone will have a reaction to. This question for the past ten (10) years or more has dealt with the pre-conceived notion that almost all potential jurors have that we live in a very litigious society and that there are too many lawsuits. When I ask this question I raise my own hand to indicate to the jury that I agree with them that there are too many lawsuits. Then, however, I begin to distinguish the particular lawsuit I am trying from “those other frivolous lawsuits that clog the courts”. The questions that I ask in this phase of voir dire include the following.

And now ladies and gentlemen I am going to ask questions addressed to the entire group and would ask that you please raise your hand if you have a response to any of these questions. I will then discuss the responses with each of you who has raised his or her hand.

TOO MANY LAWSUITS

Is there anyone sitting here in the jury box that feels like I do that there are too many lawsuits? (As I ask this question I raise my hand. From my experience, every prospective juror or almost every prospective juror will raise their hand along with you as you finish this question.)

Typically, because the question concerning “too many lawsuits” will receive a unanimous response, I do not spend time asking the following questions of each individual juror. Rather, I

will ask each question of a different juror and try to talk with as many jurors as I can through this series of questions.

Do you feel that too many lawsuits clog the courts?

Believe that there are frivolous claims that should never come to court?

Award of cases involving an automobile collisions where there is no damage to either vehicle and the person is claiming a serious injury?

I then try to change the tone of the discussion and differentiate my case from “those cases” with the following type of question.

Despite the frivolous lawsuits that get so much attention, do you think that there are lawsuits that are legitimate and should be decided by a neutral body like this jury (ask a potential juror how they feel about that question, who appears to have doubts about the question, does not seem to understand the question, or who has not spoken much during the voir dire.)

After establishing that the lawsuit that I am bringing on behalf of my client is not frivolous, but rather a legitimate claim that requires a neutral jury such as the one present in the courtroom today to decide, I then move to themes and issues specific to traumatic brain injury cases.

I. YOUR TBI CLIENT MAKES A GOOD FIRST IMPRESSION/APPEARANCE

Unless your client has suffered the type of brain injury that results in permanent paralysis and/or an obvious speech impairment, many persons who have suffered a brain injury will

recover to the point where they can make a good first impression or appearance and “appear normal as anyone else”. Oftentimes I have represented a person with a brain injury that was not readily apparent, but only became apparent during conversation with the injured person. As we all know, first impressions are important and if your client appears outwardly normal this should be addressed in voir dire. I have used the following line of questions to *educate and remind* potential jurors that people can have problems with the normal functioning of their brain and yet outwardly appear “normal”.

Do you know anyone that has any problem with the normal functioning of their brain? Or have you had contact with anyone that has a learning disability or is or was in a special education class, anyone who has Alzheimer’s Disease, senility, or suffered a serious concussion or brain injury?

I then follow-up with the following series of questions to those who have raised their hand.

Who do you know that has a problem with the normal functioning of their brain?

What problem do they have?

What kind of contact do you have with the person?

Do they look different from other people their age?

Do they have good days and bad days (in order to encourage this discussion I might indicate to the jury that I had an aunt who had Alzheimer’s and on some days she would remember me, and on other days she had no idea who I was)?

Does their condition effect how they feel about themselves?

Is it embarrassing for them to have this condition?

Do they have anxiety with meeting new people or going places?

Do they have anxiety at being seen in public?

Do they have to take medication?

Are they depressed?

Are they still able to do certain things (for example, talk on the phone, drive an automobile, etc.)?

Do they forget or have trouble doing things they had done their entire lives?

Do they have problems with their short term memory such that they forget directions, names, places they have been, or what they did earlier in the day?

2. ANY PRIOR EXPERIENCE WITH TRAUMATIC BRAIN INJURY AND/OR THE TREATMENT OF TRAUMATIC BRAIN INJURY

The trial of a brain injury case usually involves testimony from a number of healthcare providers who specialize in the treatment of brain injury. It oftentimes will involve a brain injury that at one point or another has been labeled “mild” either in the emergency room, or subsequently by a treating healthcare provider such as a neurologist or a neurosurgeon. If I am involved in a case that involves the so called MTBI (mild traumatic brain injury) I usually ask the following question.

Have any of you or someone close to you had the type of brain injury commonly referred to as a concussion?

I follow up this question with the following series of questions to those who have responded in the affirmative.

Were you/they unconscious or “out on your feet” (like a boxer who loses a fight on a TKO or technical knock out)?

What did it feel like?

Did you (or they) make a full recovery?

What did the people who came to your assistance do for you?

Would you think it would be dangerous for you/they to suffer another concussion?

What is the effect or possible consequences of a football player or boxer having their “bell rung” too many times?

Did any doctor ever use the words “post concussion syndrome” to describe the injury?

Do you think a concussion has to be life-threatening to be serious?

Did you know that doctors and other professionals who work in the field of brain injury call a concussion “mild” if it is not life-threatening?

Did you know that a concussion can have long-term effects on a person’s ability to think and on the normal functioning of a person’s brain?

Do you know about the types of doctors or other professionals that treat this type of injury? (neurologist, neuropsychologist, doctors of rehabilitation medicine, psychologist)

Do you know about the test that are used to diagnose a concussion?

(C-scans, MRI's, written tests and examinations)

Did you know that a concussion is not always something that a doctor can see on an x-ray, C-scan or MRI?

Did you know that neuropsychologists are professionals that often help neurologist and other doctors diagnose a concussion?

Did you know that a concussion is a type of injury to the brain?

Has anyone on the panel ever heard of the CDC or the Center for Disease Control?

Do any of you know that the CDC publishes information for doctors and the public about concussions and brain injury?

Are any of you familiar with the American Academy of Neurology (AAN)?

The latter questions about the Center for Disease Control and the American Academy of Neurology are asked if I have a neurologist or other doctor who will discuss the CDC brochure on concussion and the long-term adverse effects that a concussion can have on an individual. The CDC brochure can be viewed on line at www.cdc.org/ncipc/tbi and is entitled "Facts About Concussion and Brain Injury". Likewise, the American Academy of Neurology has a slide presentation about concussions and there potential severity which can be viewed online at www.aan.com. This slide presentation is entitled "Management of Concussion in Sports".

The above series of questions can be modified depending on your case and how your client's injury will be described by the witnesses. For example, brain injuries are often called "head injuries". In a case where that terminology is going to be used the above series can include the following questions.

Have any of you or someone close to you suffered a brain injury or closed head injury?

Did you (they) make a full recovery?

Have you ever heard the phrase "closed head injury" used to describe a brain injury?

Did you know that doctors and other professionals who work in the field of brain injury call a brain injury "mild" if it is not life threatening?

Did you know that a brain injury can have long-term effects on a person's

ability to think and on the normal functioning of a person's brain?

Do you know about the types of doctors or other professionals who treat this type of injury? (neurologist, neurosurgeons, neuropsychologist, doctors of physical medicine and rehabilitation)

Do you know the particular doctors in this case that will testify and explain to you John's injuries to his brain:

Dr. Lance Trexler, Neuropsychologist ,

Dr. James Fesenmeier, Neurologist,

Dr. Darryl Kaelin, Doctor of Physical Medicine and Rehabilitation

Do you know about the types of tests that are used to diagnose a brain injury? (written tests and examinations, CT scans, MRI's, etc.)

Did you know that neuropsychologist are professionals who often help neurologist and other doctors diagnose a brain injury and determine how the injury effects a person's ability to use their brain?

3. ABSENCE OF THE PLAINTIFF FROM THE COURTROOM DURING THE TRIAL

One decision that you have to make in representing a person with a brain injury is whether or not you want them to sit with you at counsel table during the trial. My preference has always been not to have them in the trial for many reasons, including the emotional pain and embarrassment they will incur in listening to the witnesses describe how they have changed from the person they were before the injury-producing event.

The absence of the plaintiff should be discussed in voir dire and typically can be handled without a lengthy discussion.

John Jones will be absent from the courtroom during much of this trial and as you have probably noticed, he is not present in the courtroom at this time. (Prior to the start of voir dire, after my client is introduced to the prospective jurors I have my client leave the courtroom with a significant other or family member and wait outside the courtroom.) Because of the nature of John's injuries which you will learn about in this trial you will come to understand that it is not a good idea for him to be in the courtroom when witnesses are describing how he has changed since he was injured at the construction site on October 14, 1996. I want you to know John will be present just outside the courtroom throughout this trial with his mother or other family member. John's wife, Lisa, will be present for the entire trial sitting with me at counsel table and representing John and herself.

In my experience, this statement is usually received at face value by the prospective jurors and does not require any additional discussion. However, while I am making this statement I scan the faces of the prospective jurors and if someone seems puzzled or does not understand what I am saying, I will ask questions of that prospective juror and give a fuller explanation of my client's absence from the courtroom if necessary.

4. ISSUE OF MEDICATIONS

Many persons who have suffered brain injury have to take medications on an on-going basis. As we all know, these medications can contribute to the difficulties faced by a person with a brain injury. I have found that it is generally accepted in our society that having to take a lot of medications on an on-going basis is a harm in and of itself. The following questions are the type I ask to both *educate and remind* prospective jurors about the potential adverse consequences of having to take medication on an on-going basis.

Do you or anyone close to you have to take medications on an on-going basis because of a medical condition?

What type of medications?

How do you/they feel about having to take medications on an on-going basis?

Do you/they experience any side effects caused by the medications? (Make them tired, feel funny, allergic reactions, constipation, upset stomach, etc.)

Have you/they found that the medications prescribed can lose their effectiveness over time and that the medications have to be changed to new medications?

5. YOUR CLIENT HAS SUFFERED SUBSTANTIAL DAMAGES

Most brain injury cases involve a claim for substantial damages on behalf of the plaintiff. I spend a significant amount of time at the end of my voir dire examination discussing the issue of damages. By this point in the examination the jurors will hopefully understand that my client has suffered a substantial injury that has dramatically and permanently changed their life. Thus, most of the prospective jurors at this point will be more receptive to a discussion of substantial damages than they would have been at the beginning of the voir dire examination. However, it has been my experience particularly in the last ten (10) years or so (likely because of the publicity generated by the insurance industry and tort reformers) that many prospective jurors will have an attitude or bias against awarding large damages regardless of the facts in the case at issue. I have had occasion in the past three (3) brain injury cases that I have tried to strike a number of potential jurors for cause who acknowledged that they did not believe in providing any damages for mental and physical pain and suffering and that they would hold to that view regardless of what evidence was established in the case.

The following is a series of questions which I have used to initiate a discussion about damages.

In judging John and Lisa's claim do you all realize that it will be your job as jurors to decide what will be fair and full compensation for the damages that I prove have been suffered by John and Lisa as a result of the brain injury that

John received on October 14, 1996?

How do you feel about that Mrs. Jones? (Then discuss with Mrs. Jones and other prospective jurors how they feel about that. Often I use this time to direct questions to people that have not spoken very much during my voir dire exam, or potential jurors that I have concerns about).

Do you feel that a person who has been injured through the carelessness of another should absorb their own losses and not bring a lawsuit, even though our system of justice was established for this?

Do any of you feel that a person should not get compensated for injuries they could have made in the future but are no longer able to because of the effects of an injury?

I then begin a discussion about damages that can result in a verdict in excess of a million dollars. The following question is one that I use to learn how the potential jurors feel about awarding a verdict in excess of a million dollars.

Is there anyone on this panel that has an upper limit on the amount of money they would award in the case? For example, I have a neighbor who has told me he could not imagine awarding anyone over a million dollars as compensation for their injuries regardless of what happened to them. Is there anyone who feels like my neighbor does?

Mrs. Jones, if I prove to you that John and Lisa have suffered damages of three million dollars, could you award that amount or do you feel like my neighbor that no one should get an award over a million dollars?

CONCLUDING THOUGHTS

The above discussion is intended as an overview in how to deal with common issues in the voir dire of a brain injury case. It is very helpful to conduct a focus group prior to trial to learn more about how prospective jurors will view the particular themes and issues involved in your case. A well conducted focus group will often provide you with information about the key

issues and potential weaknesses in your case which you will want to explore in your voir dire examination.

I hope that this paper has been of some help to you and will assist you in your representation of persons who have had the misfortune of suffering a brain injury.

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