COURT BREAKSTONE, WHITE & GLUCK PC

Lawyers must work to improve *voir dire* system in Massachusetts

BY MARC BREAKSTONE AND DAVID WHITE

Voir dire during jury selection has been used in the United States for over 200 years and can be traced to the 1760 Massachusetts Jury Selection Law. Therefore it is truly ironic that Massachusetts, the birthplace of the jury system, retains one of the most archaic approaches to jury selection.

According to *The State of the States Survey of Jury Improvement Efforts: A Compendium Report* by scholars at the National Center for State Courts and the State Justice Institute, Massachusetts is one of only 10 states in the union in which *voir dire* is conducted predominately or exclusively by judges.[1] In 18 states, judges and attorneys share equally in conducting jury selection. In 23 states, *voir dire* is conducted predominately or exclusively by attorneys.

The effects of an outmoded jury selection system are many, and none are beneficial to our system of justice. Biased jurors are less likely to be identified and end up being routinely seated to the prejudice of parties. Attorneys are forced to stereotype individuals in an effort to exercise preemptory challenges effectively, in abrogation of the rights of individuals to sit as jurors. The only argument that can be made for the current system is that it is a little quicker. But for parties who have waited years (and spent thousands of dollars on their cases), a brief time savings in *voir dire* is hardly a bargain.


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Unfortunately, judges in Massachusetts have been extremely slow to change old habits, and they have been reluctant to utilize questions which go beyond the few ineffective questions to the venire required by statute. According to the Massachusetts Bar Association *Judicial Preference Guide,* of the 42 Superior Court judges who filed responses, six answered that they always allow counsel to question prospective jurors at sidebar, two frequently allowed counsel to participate, 15 never allowed counsel to participate, and 19 rarely allowed counsel to participate. The unfortunate reality is that a practice which excludes counsel from *voir dire* examination leaves trial counsel with little information regarding prospective jurors.

COURT-DRIVEN *VOIR DIRE* DOES NOT ELICIT ADEQUATE RESPONSES

The purpose of the *voir dire* examination is to determine whether a prospective juror will render a fair and impartial verdict on the evidence presented and apply the facts to the law as instructed by the judge. Generally, trial counsel are more familiar with the facts and nuances of a case and, thus, are better suited to formulate questions on those issues than judges. Empirical research has shown that juror responses to attorney questions are generally more candid than to questions from the judge because jurors are less intimidated and less likely to respond with perceived socially desirable answers. [2]

Furthermore, research has demonstrated that citizens are not likely to respond candidly to typical questions from the court, such as "Can you be fair?" or "Can you follow my instructions?" It is highly unlikely that such closed-ended and self-evident questions will produce meaningful answers.[3] Simply stated, a perfunctory examination by a judge does not "reveal preconceptions of unconscious bias." [4]

As one court has noted, "It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hands and declare themselves biased." [5]

STRIKING A BALANCE

The appropriate role for the court during jury selection should be as an impartial referee to ensure that neither party unfairly indoctrinates or pre-educates prospective jurors to a particular theory or defense and to ensure the empanelment of the most impartial jury possible. Lawyers should be permitted to ask jurors open questions properly crafted to expose bias which might affect fair deliberation of the case.

The American Bar Association has issued a set of 19 principles which ➤ 7

1) Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole L. Waters, Ph.D., http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/juries&CISOPTR=112 (April 2007).
2) Susan E. Jones, *Judge Versus Attorney-Conducted Voir Dire*, "Law & Human Behav.," Vol. 11, 131 (1987).
3) V. Hans & A. Jehle, *Avoid Bald Men and People with Green Socks? Other ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi-Kent L. Rev., 1179 (2003).
4) *Dingle v. State*, 759 A.2d 819, 829-29 (MD 2000); *see also Darvin v. Norse*, 664 F.2d 1109, 1115 (9th Cir. 1981); *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984).
5) *Village of Plainfield v. Nowicki* (3rd Dist., 2006) 367 Il. App. 3rd 522, 854 N.E. 2nd 791, 794).

PERSONAL INJURY: SPOTLIGHT SHEFF LAW OFFICES PC

Building a winning tort case

BY CHRISTINA P. O'NEILL

The phrase "litigious society" is almost always used in a negative connotation. But litigation that seeks compensation for a life-changing injury, the effects of which can be lifelong, makes all the difference to the plaintiffs involved. We recently interviewed attorney Douglas K. Sheff, the senior partner at Sheff Law Offices PC. He is vice president of the Massachusetts Bar Association (MBA), past president of the Massachusetts Academy of Trial Attorneys (MATA), and a national workplace injury expert.

Contrary to their portrayal in popular entertainment, personal injury cases are extremely difficult to conduct, Sheff says.

WORKPLACE INJURY

Specifically addressing workplace injury tort cases, he notes that personal injury law does not allow suits against employers. Instead, it casts a wide net covering anyone who is hurt due to the actions or inactions of others. A successful workplace injury tort case needs three elements: Liability, damages and coverage. Bringing it to trial also requires proof of fault on the part of potential defendants.

In Massachusetts, some of the most serious workplace injury cases tend to spring out of construction mishaps and product defects. While employers who make workers' compensation available to their employees cannot be sued under personal injury or wrongful death law, a worker hurt on the job by an entity other than the employer or a co-worker may bring such a lawsuit. Workers' compensation claims are limited to medical expenses, replacement of wages, and to a limited extent, compensation for scarring, disfigurement and losses of bodily functions attributable to the workplace injury. This leaves the potential for a seriously injured worker to never receive adequate compensation for his/her loss, including pain and suffering and loss of enjoyment of life, Sheff says.

Construction cases are common workplace injuries. Several subcontractors may work together at the same time, so there are often many potential defendants from which to choose, namely, the general contractor and its many subcontractors. Massachusetts has strict rules governing general contractors. For example, a "primary" or general contractor shall not be relieved of overall responsibility to create a safe place to work under Massachusetts law. Subcontractors must also ensure that the workplace is safe. If a subcontractor is liable, the general contractor is not necessarily also liable, Sheff notes.

DOUGLAS K. SHEFF

To address the complexity of targeting multiple potential defendants, early and extensive discovery, including several sets of interrogatories, requests for production of documents, request for admissions, and any necessary motions to compel is necessary. These should be followed up by a series of depositions in order to determine the appropriate parties and responsibilities. Concerted effort in this matter can target several potential defendants.

PRODUCT LIABILITY

In product liability cases, an attorney is often pitted against a large corporate defendant and must establish sufficient knowledge of the defendant's processes to make a solid case. Most successful product liability cases are not manufacturing errors, involving a limited amount of faulty items, but design defect cases, involving all items in the category.

The key is to find "reasonable feasible alternatives," Sheff says. The plaintiff should search all sources for design, including sources suggested by experts, and the defendant's own patent portfolio, which might contain an unused patent for a product that was safer but more expensive to build. Then, there's the competition. "If I had Westinghouse [as a client in a hypothetical elevator malfunction case], I'd go to Otis. They've been studying the competition for years," he says. Sheff has actually scrapped around in junkyards to find evidence that would support a finding on faulty design.

The plaintiff's attorney must evaluate the cost of the safety measure relative to the overall product cost. For example, a $5 guard on a $1,000 machine is feasible, but a $1,000 interlock system on a $2,000 item may not be. Including a warning on the machine, which costs pennies, is always feasible.

The goal of a plaintiff's attorney is to find a defect or defects that render a product "unreasonably dangerous," the standard in any product liability case. Ultimately a jury will have to find that the product is indeed unreasonably dangerous in order for the plaintiff to prevail at trial.

Sometimes a product manufacturer is bankrupt or otherwise "judgment-proof." In that case, the plaintiff is not necessarily precluded from pursuing a case. Sometimes sellers and distributors can be found liable for putting an unreasonably dangerous product into the stream of commerce. The test is whether the plaintiff used the subject product in a "reasonably foreseeable manner."

Product liability cases often involve workplace machinery. In Massachusetts, which has many old mill towns, this machinery is often outdated. In the event of a serious injury involving a piece of machinery decades old, a defendant might raise the "state of the art" defense. If the subject machinery was safe at the time of manufacture, it may be difficult or impossible for the plaintiff to prevail.

Careful research must be conducted in order to determine precisely when the technology was developed relative to the product. For example, Sheff cites a case he describes as "significant" from the 1980s in which he prevailed, involving the electrocution of a worker on a machine manufactured in the 1940s. He says he was able to establish that an interlock system, which would have disconnected the electricity at the time of the accident, was actually available in the 1930s.

TBI: PROVING FUTURE DAMAGES TODAY

One workplace injury often overlooked by lawyers and doctors alike is traumatic brain injury (TBI). Sheff, a national expert in this field, says that one out of every 500 people in America suffer TBI every year, with 60 percent of cases involving auto accidents. But only 15 percent of TBI injuries are detectable through MRI or CAT scans. "These are tough cases," he says.

Newer tests such as FMRI, PET, Tesla MRI, which offers higher-resolution images than its predecessors, and Quantitative Electroencephalograph (QEEG), can identify what is known as "diffuse axonal injury," in which fragile nerve cells have snapped due to twisting and shearing of the brain in sudden-impact injuries.

"These new, yet reliable technologies should be welcomed in our courtrooms in order to provide a truthful demonstration of a plaintiff's brain injury," Sheff says.

LOSS OF EARNING CAPACITY

One of the most important aspects of proving damages in a tort case is to account for any degeneration which will occur in the future. "Just picture a horizontal line. Above that line your plaintiff can work, below it, she can't. Imagine your plaintiff is just above the line but degenerating," Sheff says. "In a couple of years she will slip below the line and lose the ability to work at all. We must get her compensation for a lifetime of lost earnings and disability.

"The plaintiff attorney's job is to artfully establish a likelihood that degeneration will occur, and demonstrate the effect of same on the plaintiff over the course of her lifetime," he observes.

"A properly litigated PI case can take thousands of hours, hundreds of thousands of dollars, jury focus groups, and up to a dozen experts to do correctly. But for those plaintiff attorneys who constantly see PI plaintiffs getting far less than they need or deserve, the stakes are worth it to get it right," Sheff says. ■

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VOIR DIRE

Continued from page 3

define fundamental aspirations for the management of the jury system. Principle 11 states, "Courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury." It provides judges and counsel with model procedures which would promote the intelligent and lawful exercise of for-cause and preemptory strikes of unfit prospective jurors. It respects constitutional requirements as well as the privacy interests of prospective jurors, and proposes a model system in which:

1) Jurors are initially questioned by the court to determine minimal legal qualifications to serve in the case.

2) Each party has the opportunity under the supervision of the court and subject to reasonable time limits to question jurors directly.

3) The Court has the responsibility to prevent abuse of the juror selection examination process and facilitate intelligent exercise of preemptory challenges.

THE ROLE OF COUNSEL

The process of bringing Massachusetts into the modern era of *voir dire* continues to be a slow one. *Voir dire* will never change unless counsel consistently press for improved methods of jury selection.

Counsel should request expanded *voir dire* in every case. The matter should be brought to the court's attention by motion at the earliest appropriate instance, which is usually the pre-trial conference. Counsel should be prepared with proposed *voir dire* questions for approval by the court. The questions should be open-ended, not leading, so the prospective jurors will candidly share their views and reveal any potential bias. The questioning can be done quickly at side bar under the supervision of the judge. The trial judge should recognize that the process will add only a small amount of time to the length of the trial, and will also ensure the fairest possible jury for all sides in the case.

FOR MORE INFORMATION

For additional resources, please visit www.massbar.org/voir_dire. There you will find sample motions and sample questions which you can adapt to your case. ■

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