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**HEADLINE: Trial Advocacy, Dealing With Monetary Damages From Voir Dire To Summation**

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**BODY:**

The ultimate goal for any plaintiff in a personal injury or wrongful death case is the recovery of money. While it is axiomatic that a monetary award is the only remedy that the law provides, a significant amount of the prospective jury pool may find the notion of awarding money as a result of suffering or loss of life repugnant.

The reality is that the effective advocate must meet this issue head on, eliminating those on the jury panel whose biases prevent an award which is commensurate with adequate compensation, and educating the jurors who remain that part of their job includes making an award that is appropriate under the given circumstances. The plaintiff's attorney in a personal injury case faces several fears as he initially looks at the faces of prospective panel members: First, that jurors harbor negative attitudes about such cases, but will be reluctant to admit them during questioning; second, that the juror herself may be secretly considering the perceived effect that a large verdict may have on her personally in terms of her own insurance rates increasing; and, third, that the current events of the terrorist attacks will impact adversely on the client's case. Specifically, how can you effectively persuade jurors that your client's injuries are a life-altering event with the enormous tragedy of Sept. 11 so fresh in their minds? Simply put, will the jury care enough about your case to render justice?

To deal with these issues, you must know at the outset what you want to say in summation, and you must be fluent with the court's charge on damages. You must also anticipate what your adversary likely will say about damages during jury selection and in summation. Although we know that monetary damages is the only permissible remedy, the way you speak about this to the jury could directly affect the result of the case.

#### Voir Dire on Damages

Imagine the scenario where you mention absolutely nothing about damages in voir dire. You know the first thing your adversary will say is, "This case is about one thing: money. That's all the plaintiff wants, money." Your job is to orient the jury to this reality in a way that does not appear greedy or piggish, but, in fact, projects your position as the voice of reason.

Do not merely explore jurors' attitudes without mentioning these concerns, but directly deal with them by speaking about the negative associations people might have about such cases. For example, start off slowly and build on a theme: "Ladies and gentlemen, the only remedy for which the law provides when someone has been injured through the fault of another is monetary compensation. If someone were to say, 'this case is about money,' that would be true. There is no way for us to go back in time and undo the events of the past. My client would like nothing more than to come to court today and have you render a verdict that somehow changes the past, and makes the defendant act reasonably and avoid this horrible accident. Obviously, that can't happen."

After giving this presentation, do not just ask a leading question about whether they agree with that statement. Rather, take advantage of the opportunity to explore their feelings about what you have just said: "Mrs. Jones, how do you feel about that?" Listen carefully to the answer, as you want to find a way to address your jurors' attitudes and beliefs subsequently in your summation. Now, as you continue to question, you can enhance your credibility by reminding jurors of your fairness:

"Let me tell you right now, if we don't prove our case, that the plaintiff was injured through the negligence of the defendant, I'd be the first to tell you, the plaintiff is entitled to nothing. You would agree with that, wouldn't you?"

Having established your fairness, you can now seek a commitment from a juror that she is willing to award

damages: "On the other hand, if we prove to you that the defendant's negligence caused these injuries, then it is our position that the plaintiff is entitled to compensation, no more and no less than is appropriate. What do you think about that?"

The answer to this question can often provide you with insight into the juror's thoughts. For instance, if the juror responds, "If you prove it," then you know that this may be a juror who might start off biased against your case. This presents an opportunity to educate the other jurors while questioning this one further: "Let me ask you, Mr. Smith, are you the kind of juror who believes there are too many lawsuits and too much money being awarded?" "Do you see a case like that McDonald's coffee case, where a woman won a big verdict because her coffee was too hot, and think to yourself, 'There's something wrong with this system?' Here is the thing: I could tell you that every case should be decided on its own facts, and that would sound reasonable. I could also tell you that we were not there for the McDonald's case and we don't know all the facts, or that there are too many lawsuits that are brought for meritless cases. But the fear that I have is this: That you somehow are already leaning against my client's position without having heard any of the evidence. And that no matter what I say, she starts off behind the 8-ball with you as a juror. How do you feel about that?"

You can continue to work with this thought:

"While it's true that we often read about sensational cases, and runaway jury verdicts, the one thing we don't read about is the plaintiff who is awarded an inadequate amount of money."

#### Addressing 'Sympathy' First

Another issue you must anticipate your adversary addressing in voir dire is sympathy. Thus, you must address it first: "If this case were about sympathy, no doubt about it, my client wins. She's been through an awful lot. But you know what, she's had her family, her friends to comfort her and help her get through this. She's not here looking for sympathy. Can we all agree that if your verdict were based on sympathy, that would be wrong?"

Once again, having established your position of fairness, you can now address your concerns with the jurors: "What my client does seek is justice, a fair shake. And while it would be wrong to render a verdict based on sympathy, it would be just as wrong to render a verdict based on cynicism. What I mean by that is I'm fearful of those who don't really care, and that if you would get the case to deliberate at 4:00 on a Friday afternoon, some would just say, 'Let's just reach any decision; let's get out of here; what's the difference?' How do you feel about that?"

Of course, some leading questions followed by open-ended questions are necessary to get your point across regarding fair and reasonable compensation for your client. The prospective jurors must be aware of what the elements of compensation are to begin with, if they are going to determine in voir dire whether they can give an award that is fair and just.

Q: Do you agree with the system of civil justice which stands for the proposition that negligent or careless parties who cause injuries should compensate the people they injure?

Q: Do you agree that if someone is injured through negligence, that they are entitled to be compensated for their medical costs?

Q: Do you agree that if someone is hurt through the fault of another, that the party at fault should compensate her for her inability to work, or her lost earnings?

You now have made your point and educated the jurors on two of the major elements of damages. But just seeking their agreement tells you nothing about their leanings. So now ask them why they agree with the fact that defendants who cause injuries through negligence should pay for the associated costs of medical care. Ask them how they feel about the entitlement to such an award, not just up to the present time, but into the future if you prove the need for medical care and the cost of that medical care. Next, get their assurance that if you prove the costs of medical care, the need for that medical care causally related to the negligence of the defendant, that they

will award for it. Go through the same litany for diminution of earning capacity, and get juror assurances on that issue as well.

### Special Damages

In our society, even the most defense-oriented jurors generally agree that victims are entitled to an award for special damages if those damages are caused by negligent conduct. The more difficult area for both voir dire and the trial is pain and suffering. Begin the questioning something like this: " I am now going to discuss an area which is a lot more difficult to quantify than lost earnings or medical costs, and that is an award for somebody's pain and suffering. Nonetheless, the system of civil justice provides for such an award if it is caused by careless conduct of another. Do you agree with that aspect of our civil justice system that provides that not only are injured people entitled to be compensated for their medical costs, or their inability to return to work, but also for something they have lost in human terms, their pain and their suffering? How do you feel about that? Can I have your assurance that if I prove that aspect of the case you will make an award for that if my client is entitled to it?" Finally, ask about their ability to award substantial damages: "Now picture yourself in the jury room after the case is over, after all the medical testimony, summations and the judge's instructions on the law. And you are convinced that the defendant is negligent and responsible for my client's injuries. Let's say that you are considering the elements of damages: the medical costs, the lost earnings, the pain and the suffering. And that each element, standing alone, does not seem like a lot of money. But when you add up the elements of damages, they come to an amount of money which you consider to be a substantial sum of money. My question is, 'Would you have any hesitation at all in awarding my client a substantial sum of money if you believed he was entitled to it based upon the proof in the case and the law as the judge instructed? Can you assure me of that? "

### The Proof

Many attorneys believe that calling an economist is the key to a substantial award. An economist is important, but his testimony is only as good as the evidence upon which it is based.

In proving special damages, credibility is just as important as when proving pain and suffering. Start with lay witnesses, rather than experts. Your client's employer or coworkers can testify as to the type of worker he was, as well as the physical requirements for the job that they noticed that he could no longer meet after the accident in question. Union representatives can testify similarly, as well as lay the foundation for union contracts revealing fringe benefits and salary growth rates. Treating physicians are generally competent to testify as to your client's inability to return to work. You must, however, lay the proper foundation. Establish that this doctor makes disability determinations every day, instructing patients when, if at all, they can return to work. Many physicians treat particular members of the work force, and based upon that specific experience are competent to opine as to whether their patients can return to work in a full-time basis. Treating physicians are also uniquely qualified to testify as to the future medical care your client will need, and the present-day value of those costs. After you have convinced the jury that the client is compromised medically with respect to his ability to return to work, a vocational expert can rule in or rule out the types of alternative employment the client may be capable of in the future. If the alternative employment pays less, or if it fails to offer the fringe benefits his previous employment offered, that can form the basis of a significant diminution of earning capacity. Finally, the economist can project these future losses based upon the testimony proffered earlier. That way, the only significant aspects of the economist's testimony are inflation rates and growth rates, projecting costs solely based upon the testimony of others

Proving substantial damages take more than adept jury selection technique. It takes actual evidentiary proof with competent witness and convincing evidence.

### The Summation

Now tie in your hard work in jury selection with your final argument. Prompt their memory of the jury-selection process. Discuss how worthwhile the process was because both sides could agree that they had jurors who could be fair and just and do the right thing for all of the parties. Finally, remind them of the assurances they made to you and your client: that they agreed that negligent parties that cause injuries should pay for the injuries they

cause; that they assured you that if you proved negligence that would say that in their verdict; that if you proved the nature and extent of your client's injuries, the need for medical care and the cost of medical care not just now but into the future that they would make an award for that; that if you proved your client's inability to work now and into the future based upon the injuries caused by the defendant's negligence that they would award for that as well; and that they assured you they would award money for pain and suffering for your client's lifetime if you did in fact prove that your client is in pain and will suffer for the rest of his life. Finally, remind them of their individual assurances to you that if you proved each and every element of damages that they would award substantial compensation if your client is so entitled.

#### Conclusion

Simply put, the plaintiff's attorney who relies upon receptive jurors to enthusiastically compensate his injured client may often wind up disappointed. Instead, the smart lawyer must establish his credibility in voir dire, verbalizing his fears and concerns and carefully indoctrinating the jurors to the only allowable civil remedy; money. That theme must be developed throughout the trial, concluding with a summation that incorporates the assurances given by the jurors in voir dire to award damages if the proof supports such a verdict.