

New York Law Journal

Trying a Wrongful Death Case: Voir Dire as a Bridge to Summation

By: Ben Rubinowitz and Evan Torgan

Damages in a wrongful death case are fraught with complex issues and legal challenges. While it is easy to understand the emotional impact that a death may have on a surviving relative who has lost a loved one, evidence of that raw emotional loss may not be relevant in a wrongful death case. Historically, at common law, the personal injury claim died with the decedent. Today, statutory enactments in New York allow for wrongful death claims. The statutes, however, limit the recovery for wrongful death to pecuniary loss, or what might better be termed as a financial loss. In other words, the grief, pain and suffering experienced by a loved one is simply not a proper item of damages in New York, and jurors are instructed not to award any monetary compensation for such losses (PJI 2:320). Of course, recovery may still be obtained for pain and suffering experienced by the decedent prior to his death, but obtaining a just and proper award from a jury for these damages can also be challenging given that the person who experienced that pain and suffering is dead.

Thus, in any wrongful death case, an effective trial attorney must thoroughly prepare for all stages of the trial in order to obtain an appropriate and handsome jury verdict. Included in

such preparation is a well-planned voir dire that explores the feelings and beliefs of the potential jurors, and a strong summation that relates those feelings and beliefs to the evidence.

THE VOIR DIRE

A proper verdict begins with a proper voir dire and a thorough exploration of juror attitudes about wrongful death claims. To the extent that juror attitudes are not properly explored, a disastrous verdict could be imminent. However, a comprehensive exploration of juror attitudes could pave the way for a successful trial and a just verdict.

Clearly, all wrongful death cases are not created equally. Some tug at the heart strings while others tend to fall flat. Imagine, for example, the contrast between a case in which a 3-year-old child loses a 30-year-old father, and a case in which a 30-year-old man loses his 60-year-old father. In both scenarios, it is easy to determine the loss of earnings by simply calculating the father's yearly lost earnings up to the end of his work life expectancy. Generally, jurors have no problem with such financial calculations. However, it is the intangibles, such as the loss of parental care and guidance, and an award for pain and suffering, that often pose the greatest hurdles in the presentation of proof. These hurdles must be overcome so that the proof translates into an appropriate monetary award. The first step in overcoming these hurdles begins with voir dire.

To properly prepare for voir dire, counsel should create a list of fears and concerns before setting foot in the jury selection room. Needless to say, the most significant fear of the plaintiff's lawyer is often the greatest strength of the defense lawyer, and vice versa. This list

should cover all of the potential attitudes and beliefs that may be held by members of the jury panel. Some of the thoughts that might be going through the mind of a defense-oriented juror are as follows:

- His father is dead. What difference does the money make now?
- It was the father's pain and suffering, not the child's. If he's dead, why should the child recover for his pain?
- Everyone dies. He's not coming back. It's better to just get over it.
- He's an adult who lost a father. It would be different if he was younger.
- I didn't get any compensation when my father died.

The list should also include plaintiff-minded attitudes, such as:

- There is no one more important to me than my father.
- The greatest fear I've ever had is losing my Dad.
- Although people tell me time heals, I just can't get over the death of my father.
- I wish I had the opportunity to speak with him again, to look into his eyes and to see him smile.
- Not a day has gone by when I haven't thought about my Dad.

Although counsel would like to excuse any juror who holds an attitude that is adverse to his position, the reality is that there are only a limited number of peremptory challenges. Thus, the true art of jury selection is to turn the peremptory challenge into a challenge for cause. Furthermore, given the limited number of peremptory challenges, and the occasional unwillingness of the court to strike a juror for cause, the exploration of juror attitudes during voir dire is also critical to summation.

It is the ability of counsel to question the jurors that affords him a modicum of control over whether a juror can be successfully removed for cause. It is this same ability to control the questioning which provides counsel with ammunition for summation. To begin, counsel should fully explore a juror's beliefs by asking open-ended questions, as leading questions can limit an attorney's understanding of a juror's true beliefs. Consider the following setup, and compare the two questions which follow:

"Ladies and gentlemen, a man died. It is our position that his death never should have occurred. It is our claim that he died because of the defendant (company's) negligence and carelessness. His son came to us and asked us to bring a lawsuit to vindicate the death of his father."

Q. Knowing that little bit about the case, can you be fair?

Versus:

Q. Tell us how you feel about a son coming into court to vindicate the death of his father?

Clearly, the first question merely seeks a confirmation from the juror and obtains very limited information. The second question, however, calls for an explanation and is much more likely to shed some light on the potential juror's beliefs. The questioning should continue in an open-ended form:

Q. Tell us about the relationship you have (had) with your father?

Q. What do (did) you like most about your father?

Q. What do (did) you like least about him?

Q. What are (were) your favorite things to do with your Dad?

Q. How did your Dad help you?

Q. What kind of guidance and advice did your Dad give you over the years?

After these basic questions, more difficult questions may be posed:

Q. Some people think that there is never a reason to bring a wrongful death case. They think to themselves, "What's the difference? He's dead". How do you feel about that?

Q. I'll tell you right now that my client is 30 years old. He is no longer a child. Some might say wrongful death compensation should only be for children, not for adults. Others might say that you never stop needing a father, and that you always need his guidance and support. Where do you stand on that? Why?

Q. Some people are of the opinion that, "Everyone dies. Why should this person's family be given a monetary award?" Our position is that he died way before his time. If you believe that it makes no difference when a person dies, we want to know that. Tell us how you feel?

Q. It's (my client's) position that the person (company) who was careless and responsible for the death should be held accountable. Do you think there is anything wrong with adult children getting justice for the loss of their father? Tell us why you feel that way.

This type of open-ended questioning will provide some basic and essential information about juror beliefs. However, it is also important to question the prospective panel about the specific elements of damages in wrongful death cases.

Q: Do you agree with the part of our civil justice system which holds that if someone dies through the negligence of another, the estate of the person who died is entitled to compensation for the pain and suffering experienced prior to death? Why do you agree?

Q. How do you feel about the part of our civil justice system which holds that, when a child loses a parent through the negligence of another, the child is entitled to be compensated for their loss of parental guidance? Why do you feel that way?

Prompting the jurors to speak openly and freely through this type of questioning will provide invaluable insight that can be used at all stages of the trial, not just during the exercise of peremptory challenges. The most important use of the information obtained during voir dire may come at the end of trial, during summation.

SUMMATION

During summation, both sides will take the opportunity to highlight all the favorable responses elicited during voir dire, and to properly address all the unfavorable responses that may be harmful to their client's position. Consider the defense argument:

"Ladies and gentlemen, during jury selection, one of you said it best. No amount of money can bring him back. No damage award can change the course of time. It's time for people to move on with their lives -- to move forward. Money isn't the answer. The harsh reality is that death is inevitable. It will happen to all of us. His (adult) son didn't experience his pain. Yet he comes here seeking money for that. Why is that appropriate? If he was still alive, it would be a different story. Compensation would then be going to the person who rightfully deserves it. It's time to say no. No, you are not entitled to compensation for another's pain."

Plaintiff's counsel must respond to this type of argument with fervor and an appropriate level of righteous indignation:

"Look carefully at what (the defense) is saying. Get over it. Forget the fact that the defendant (company) was negligent. Forget the fact that they were careless. Ignore that! Don't look at the fact that we killed a man. Don't look at the fact that a man suffered terribly before he died. Give us a free pass. He's dead. Forget the fact that his son will never again see his father. Forget

the fact that his son will never again speak with his father. Forget the fact that his son will never again have a simple, loving conversation with his father. Is that justice? Is that right? Of course not. Is that ever appropriate? Of course not!”

After handling defense counsel’s argument, plaintiff’s counsel should continue by reinforcing some of the favorable sentiments expressed by the jurors during voir dire:

“I know that one of you said at the beginning of this trial that no amount of money can bring him back. However, you also recognized the severity of the loss. Is there any doubt after hearing (the son) testify that he would gladly give up any amount of money to bring his Dad back? Of course not! But when someone is careless and negligent, when they break the rules, they must pay for the harm they have caused. A free pass is never appropriate when (a company) like this is so negligent that it has taken a loved one from his family. As members of this jury, you are the voice of the community. You have a powerful and awesome responsibility to bring about justice in this case, and there is a law to guide you in that process. But the law only provides a skeleton. It is you, the jury, who must put the flesh on that skeleton. As the Judge will instruct you, the only measure of damages that we have in our civil justice system is monetary compensation. You know that you can’t turn back the clock and bring this man back. But you can administer justice. You, and only you, can decide the fair value of what this man’s family has lost.

To best explain to the jury the concept of lost guidance and support, an effective trial attorney must emphasize the small things in life. A story can bring the point home:

"How do we measure the loss of guidance and support to an adult child? How can that be evaluated? A little more than 30 years ago, the United States won a gold medal in hockey at the Olympic Games. That team came to be known as the 'Miracle on Ice'. At the end of the game, the meaning of that victory was captured on camera when the winning goalie, Jim Craig, with a flag draped around his shoulder, searched the stadium for one person: his father. When he finally found his father, they embraced as only a father and son can do. That simple and relatable act tells us everything. Why was he looking for his father? Why did that mean so much to him? We all know the answer. Although Jim Craig was an adult, he said to his father in that moment, with that embrace, "You were there for me. You provided the guidance I needed to succeed. You drove me to practice when it was still dark outside, when everyone else was still sleeping. You taught me so much. You made this happen. Without you, this would not have been possible."

"The defense has told you that everyone has to die sometime. That's true. But (my client) lost his father 30 years before he should have died. Ask yourselves, does 30 years matter? Does it matter to be deprived of the love, guidance, knowledge and wisdom of his father for 30 years? Of course it matters. There will be no more advice, no more support, no more counsel, no more celebration. There will be emptiness. To say that it doesn't matter to an adult child is, simply put, wrong. One of you said it best at the beginning of this trial, 'There will never come a time when I no longer need my Dad.'"

The feelings and beliefs of the jurors are one of the most important aspects of any trial. An effective attorney must understand these feelings and beliefs, and work with them throughout the trial. The process begins with voir dire and is not finished until counsel has given his final argument. Many times, the most persuasive words that can be used on summation will not come from trial counsel, but from the jurors themselves.

Ben Rubinowitz is a partner at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz. He is an Adjunct Professor of Law teaching trial practice at Cardozo Law School and The National Institute for Trial Advocacy. GairGair.com; speak2ben@aol.com

Evan Torgan is a member of the firm Torgan & Cooper, P.C. TorganCooper.com; etorgan@torgancooper.com

Timothy Wasiewski, an associate at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, assisted in the preparation of this article; Twasiewski@gairgair.com