

The Last Chapter of Life: Part 2 Voir Dire as the Bridge to Summation

By Ben Rubinowitz and Evan Torgan

Every lawyer who has tried a case for an elderly client has felt the argument coming long before the defense ever says it out loud. He was already eighty-six. He was not in perfect health. He had only a few good years left anyway. The words change from case to case, but the message is always the same—and it is always the same insult: because our client is old, the loss is small, and the verdict should be smaller still.

Most plaintiff's lawyers try to answer that argument where they feel it most—in summation. That is a mistake. By the time you rise to close, the panel has spent days absorbing the defense's portrait of decline. A closing argument, no matter how moving, is a poor place to introduce an idea for the very first time. The age discount is not a rhetorical problem to be solved at the end of the trial. It is a bias to be exposed, confronted, and neutralized from the beginning. That work happens in jury selection. Voir dire is where you lay the foundation; summation is where you make it count. The two are not separate exercises. Voir dire is the bridge to summation, and in the elderly case, that bridge is the difference between a jury that counts birthdays and a jury that measures life.

The Defense Playbook, and Why It Works

Effective defense counsel almost never stands up and argues that an old life is worth less. They are far too smart for that, and they know a jury might recoil from it. Instead, they build the argument by implication. They march the medical records past the jury one diagnosis at a time—

the arthritis, the osteoporosis, the degenerative disc disease, the bad heart, the diabetes, the earlier fall, the memory that was beginning to slip. They put the mortality tables on the screen and invite the jurors to do the math for themselves. Every exhibit insinuates the same suggestion: not much was taken, because not much was left.

It works because it exploits something the jurors bring into the jury room with them. Most people have watched a parent or grandparent grow old, and they carry an unspoken assumption that decline at the end of life is expected, and therefore not anyone's fault. The defense does not have to prove that assumption. It only has to intimate it. That is precisely why you cannot wait for summation to answer it. If the assumption is left undisturbed through jury selection and all the testimony, it becomes a given, and you will spend your closing arguing against a belief the jury has already embraced.

Jury Selection: Surfacing the Bias Before It Goes Underground

The juror who believes an elderly life is worth less will not announce it. The bias is socially unattractive, and jurors know it, so it gets hidden — taken quietly into deliberations where you have no opportunity to answer it. The first job of voir dire is to give a juror permission to say out loud what he actually believes, because a bias you can hear is a bias you can address, and a bias you can address is one you can remove for cause.

The way to draw it out is not to ask whether a juror is biased against the elderly. No one will answer yes to that. The way to draw it out is to normalize the belief before you ask about it, so the juror who holds it does not feel exposed in admitting it:

COUNSEL: Some people feel that once a person reaches eighty, or eighty-five, they have already lived a long and full life—and that a serious injury at that age simply is not as significant as the same injury to someone much younger. Whether or not you feel that way yourself, can you understand why someone might?

JUROR: Sure. I can understand it.

COUNSEL: Is it a view you have some agreement with?

JUROR: Honestly? A little, yes. I mean, you've lived your life by then.

COUNSEL: And you would agree with me, wouldn't you, that a feeling like that does not just switch off the moment you sit down in that jury box: it might be there with you when you will be asked to put a number on her suffering?

JUROR: Yes. I suppose it could.

COUNSEL: I appreciate that. And there is no wrong answer here. Let me make sure I understand you. If you were back in the jury room, and the evidence supported a substantial verdict, that feeling would make it harder for you to award the full amount, knowing our client was eighty-six?

JUROR: I think it might, yes. I would probably have that in the back of my mind.

COUNSEL: And even if the judge instructed you that the law does not permit you to discount a person's pain, dignity, or independence simply because she is elderly, that feeling would not just disappear, would it?

JUROR: No. Probably not. I would try, but it would still be there.

COUNSEL: I respect your honesty more than you know. Given that—given that this is a case about an eighty-six-year-old woman, and given what you've told me you would be carrying into that room — do you think this may not be the right case for you to sit on?

JUROR: No. I don't think it is.

COUNSEL: Thank you for your honesty.

Ask these questions gently and in a non-accusatory manner, always thanking the jurors for their honesty. The goal is not to shame the candid juror. The goal is to make candor safe, so the other people watching learn that this is a room where true feelings and honest answers are always welcome. The juror you excuse for cause is a gift. The one to fear is the one who feels all of that and never says a word.

Commitment Questions: Getting the Rule on the Record

Exposing bias is only one part of jury selection. Another part is affirmative: securing commitments from the jurors you intend to keep, so that in summation you are not asking them to adopt your key principles for the first time. You are reminding them of ones they already assured you they would honor. The most important of these commitments goes to the duty of care itself: that the law demands the same measure of care for the old as for the young.

The commitment to the standard of care for the elderly is best obtained through a concrete image rather than an abstraction: “We would all agree, I think, that a driver approaching a crosswalk owes a duty to stop for the person crossing. Let me ask you this. Does that driver owe any less of a duty to the eighty-six-year-old woman in the crosswalk than to the twenty-two-year-old walking beside her?” Every juror will say no, of course not — and now this principle becomes theirs, not just yours.

There is a second commitment worth securing: the answer to the litany of diagnoses the defense will wave before the jury. We all know that the law does not permit a defendant to escape responsibility simply because the person he injured was already frail. A wrongdoer takes the plaintiff as he finds her. Address that principle from the beginning: “I want you to know that my client already had conditions — arthritis, a heart condition, and others — before this ever happened. Do you agree with our system of civil justice that says a person who injures another is responsible for the harm he causes, even if the victim was more fragile or more vulnerable than a younger and healthier person would have been? Can each of you accept that principle? Can you assure me that you will hold this defendant to it if I prove it?” Once the jury has agreed, the defense’s long list of preexisting conditions falls flat, because the jurors have already recognized

it for what it is: an attempt to punish your client for the very vulnerability the law was written to protect.

Sowing in Voir Dire, Reaping in Summation

The most valuable thing this voir dire does is subtler than a cause challenge. It lets you plant, in the jurors' own words and out of their own experiences, the very themes you will build your summation on: independence, dignity, and the preciousness of time at the end of a life. When those themes reappear in your closing, they will not feel like some lawyer's argument. They will feel like something the jurors already knew.

Ask about their own lives, carefully and respectfully: "Many of us have parents or grandparents who reached their eighties. When you think about what mattered most to them in those years — living in their own home, driving their own car, not having to ask a child for help getting dressed — what would it have meant to them to lose that?" Let them answer in full. The juror who tells the panel what independence meant to her own mother has just delivered a piece of your summation for you, and she has delivered it more persuasively than you ever could, because it is hers. You need only remember the juror's own words and return them to her at the end of the case.

If jury selection has been done well, three things will be true by the time it ends: the jurors most infected by the age discount are gone, excused for cause or removed by peremptory challenge; jurors who remain have committed, in open court and in front of their fellow jurors, that the standard of care protects the elderly as well as the young; and the themes of your summation — independence, dignity, the value of the time that remained — are already alive and well in the jury room, invoked not by you but by them. Everything that follows in summation is simply the final harvest of the seeds you planted.

Summation: Embrace the Age and Reframe the Question

By the time you get up to sum up, the defense has done exactly what it set out to do. The jury has heard about the age, the arthritis, the failing heart, the fading memory, the earlier falls, the life expectancy tables, and the constant reminder that your client was no picture of health. Do not run from it. Embrace it. Concede it — clearly and unapologetically, that your client was growing old and imperfect, because none of that is the question the jury was sworn to answer.

Then reframe it all: “The defense has spent this trial asking you these questions. How old was he? How sick was he already? How much longer would he really have lived? Those are the wrong questions — and in this very courtroom, during this very jury selection, each one of you already agreed they were the wrong questions. The right question, the only question, is this: what did this defendant’s negligence take from him? Not how many years were left on a spreadsheet. What was his life worth, and what is left of it now?” The defense wants them stingily counting the years. Your job is to get them generously evaluating a life.

Measure the Life, Not the Years Left in the Life

Show the jury the questions that actually measure the loss, and put them in simple terms: What everyday pleasures, the ones we never thought twice about before, are gone now? Which relationships have changed forever, and not for the better? What independence was taken that no medicine and no verdict could ever return? Where is the peace of mind that has now been replaced by fear: fear of the next fall, fear of the next hospitalization, fear of the next indignity? Answer those questions, and you can begin to measure what they owe her for what they took. Things that are not found in a mortality table.

Refuse to let the defense define your client through a pile of charts. A medical record is a catalog of diagnoses. It is not a portrait of a life. The record notes the hypertension and the arthritis; it says nothing about the thirty years of Saturday morning breakfasts with the same three friends, her grandchild's little league game she never once missed, the garden she tended, her dog she walked at dawn, the evening walk she took with her husband down the same block for forty years. Show the jury a human being. Remind them, as you promised you would in voir dire, that a person is not the sum of her diagnoses, but the sum of how she lived.

The Injuries Unseen on X-Ray

The worst wounds in these cases never appear on film. Broken bones mend, scars fade, medical bills can be totaled to the penny, but the injuries that truly destroy an elderly person's life are the ones no diagnostic study will ever show. Put them to the jury directly. She lost the nerve to leave her own home by herself. She had to give up the keys to her own car, and with them the freedom to go where she pleased. She lost the simple ability to bathe and dress herself without another person's help. She lost the comfort — and this one hurts the most — of knowing she would not become a burden to the children she raised.

For many elderly plaintiffs, this is the real injury, and the physical pain is not even the worst of it. It is the loss of independence and mobility, and any juror who watched a parent go through it will feel the truth of it. Negligence that takes those small daily choices does not merely reduce what a person can do; it changes who he is. The husband who spent fifty years caring for his wife now needs her to button his shirt. The mother who raised four children now apologizes to her daughter for making her help her into the bath: "Dependence rewrites relationships built over a lifetime, even the ones built on the deepest love — and that humiliation leaves a wound no X-ray will ever show."

Turning the Mortality Tables Against the Defense

The defense will lean hard on the fact that your client had fewer years remaining than a younger person would. Do not argue with it. Concede it and then turn it into a powerful closing: “They have shown you a life expectancy table, and the table says my client had fewer years left. They want you to conclude that fewer years should mean fewer dollars. But think about what that really means. When only a few summers remained with the grandchildren, each of those summers mattered more, not less. When only a few anniversaries remained with the person she loved her whole life, every one of them was priceless. The defendants did not merely shorten her future — they poisoned the only time she had left.” Show the jury the cruelty in the defense argument and ask them not to accept it.

Use a rhetorical question and answer it yourself: “Does a person feel pain any less on a given morning because a table says there may be fewer mornings left? Of course not. Pain is measured by what it feels like to live with this injury, and a person who must live with it for three years can suffer just as much, day after day, as someone who lives with it for thirty.”

In this way, you take the sting out of the life expectancy tables before the court’s charge: “You’ve heard about life expectancy, but do not let anyone tell you that a number in a table sets the value of Jerry’s suffering. Pain does not get cheaper by the year. The fear he feels every time he is helped to the bathroom, the humiliation he feels every time he must ask, the grief he feels every morning he awakens to a life he no longer recognizes — those are not smaller because there are fewer years of them. If anything, when you understand what these final years were supposed to be, you understand exactly why they are worth so much.” Handled this way, the instruction the defense hoped would cap your verdict becomes one more occasion to remind the jury what was actually taken.

Conclusion

When the jurors walk into the jury room, they should carry one idea above all others: this case was never about age. It was about loss. The law does not put safety on sale because someone has grown old, and it should not let the defendants off cheap because their victim has fewer birthdays left to celebrate. Remind the jury that this is not merely your argument. It is the assurance these jurors made to you, and to one another, on the first day of jury selection. The value of what was taken will never be found in a mortality table or buried in a medical chart. It is found in the dignity that was stripped away, the independence that was stolen and never returned, the relationships that were forever changed, and the final chapter of a life that was rewritten by the defendants — without permission and without warning — into something painful and small.

Try the case this way — building in voir dire what you intend to collect on summation — and the jury stops thinking about how old your client is. They ponder instead the profound and unnecessary human loss that one careless defendant inflicted on another human being. That is where the focus belongs, and exactly where a just verdict is found.

Ben Rubinowitz is the managing partner of Gair Gair Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf and can be reached at bbr@gairgair.com.

Evan Torgan is the senior partner of Torgan Cooper & Aaron and can be reached at etorgan@torgancooper.com.

Both are members of the Inner Circle of Advocates.