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Headline: Jury Selection: Dealing with Damages in Era of Tort Reform

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Without question, the insurance industry and Big Business have done a good job conditioning prospective jurors before they ever step foot in court that tort reform is an important, necessary thing and that many cases are frivolous.

Propaganda

This propaganda has had the effect of making jurors cynical and distrustful of what would otherwise be viewed as solid, legitimate claims deserving of compensation.

The manner in which this public relations campaign has affected public thinking has turned old assumptions about juror attitudes on their ears. While once it seemed that demonstrating a meritorious case and severe personal injuries sustained by an honest plaintiff was sufficient to secure a verdict reflecting fair and reasonable compensation, now a plaintiffs' attorney frequently must overcome a built-in juror cynicism, with jurors starting out disbelieving the plaintiff's claims, or establishing a pre-set cap on damages.

That cynicism and distrust has helped to shape juror attitudes before that juror ever receives his jury summons and meets the trial lawyers. While it is difficult enough to question jurors about their attitudes as they relate to an award of damages, this task has become much more difficult in light of these negative attitudes combined with the severe time limitations now imposed by most courts for jury selection.

Clearly, the astute trial lawyer must deal with the very real concerns that tear at the heart of every civil suit brought seeking monetary compensation for injury or death. These concerns include jury bias regarding the need for tort reform, the belief that verdicts are often outrageously high, that many lawsuits are frivolous, and that sizeable verdicts, even if warranted, are hurting the economy and business, and are driving up the cost of auto, home and health insurance. Indeed, the insurance industry and Big Business have been so successful making their point that, directly or subliminally, jurors might feel that by awarding compensation in a civil suit that they have just increased their own future insurance premiums, medical or household costs.

Examples of this type of thinking are commonplace. Rare is the occasion during voir dire on damages when a juror fails to mention the 'McDonald's coffee case.' The public has latched onto myths about this case and few jurors are aware of the extensive third-degree burns to her labia suffered by the plaintiff and the hundreds of prior complaints McDonald's had received about the high temperature of its coffee.

The propaganda generated in connection with this case leaves people with the impression that the plaintiff was awarded a huge amount of money simply for spilling hot coffee on her lap. Clearly, a

plaintiff's lawyer does not have the time, nor would he be permitted to explain the egregious conduct of McDonald's in that case and the legitimacy of the verdict in light of the true underlying facts.

Meet Issue Head-On

The trial lawyer must, however, identify those prospective jurors whose views are at odds with the interests of his client. One of the best ways to explore juror attitudes on this topic is to meet the concern head-on. Share your fears and concerns with the prospective panel by asking nonleading, open-ended questions designed to force a narrative answer. Once the answer is given, evaluate the response and the manner in which it is given and resist the temptation to interrupt the juror in the middle of the answer.

The most important thing the trial lawyer can do at this point in time is listen to the juror.

Q: One of the concerns I have is that we have all heard something about tort reform, outrageous verdicts, verdicts being too high or verdicts hurting business. How do you feel about this?

A: I believe that there are too many lawsuits and that people just want to take the easy way out and sue someone, instead of taking responsibility for their own lives.

Initially, you can use this as an opportunity to see how many of the other jurors agree with the statement, to get a sense of the panel with whom you are speaking. Some may fear that opening this type of inquiry to the panel runs the risk of enhancing these negative attitudes among jurors.

We believe, however, that putting your head in the sand and pretending these feelings don't exist subjects your case to far greater peril. The reality is that too many jurors harbor such beliefs for you to ignore the topic in hopes that the issue won't be raised or considered during jury deliberations.

Only by dealing with the jurors in a forthright manner can you hope to learn their honest views, overcome bias where possible, and provide a means for peremptory or challenges for cause when the bias cannot be set aside.

Once you have received a negative answer, rather than trying to explain that the jurors have been caught up in a propaganda blitz, and that they have been completely misled, agree with the juror and follow up:

Q: I agree with you that there are too many frivolous lawsuits and unfortunately, too many lawyers willing to take those cases. I sure hope you're not getting this case mixed up with those bad cases. Would you be willing to listen to this case on its own facts without lumping it together with those bad ones?

Another approach is to try and point out what is really going on:

Q: Surely there are cases where there may have been runaway verdicts, or verdicts that just don't reflect reality. But let's face it, these are the sensational cases--the cases that the newspapers pick up and that

are published again and again. But now I have a different question: How many times have you read about someone who was truly deserving of compensation and was hurt very, very badly but didn't receive adequate compensation by the jury?

A: Never.

Q: Do you think it's right that a person should receive inadequate compensation just because at another time and place in another courtroom someone may have brought a frivolous lawsuit?

A: No.

Q: Why not?

Q: The fear that I have is that this case might get decided on issues having nothing to do with the facts but everything to do with what some newscaster or politician said about our legal system. How do you feel about that?

By anticipating jury deliberations at this early point in the trial, the trial lawyer has the opportunity to prevent a verdict based on propaganda or at least limit the inclination of the juror to vote based on a preconceived attitude having nothing to do with the facts:

Q: What would you think if another juror makes a bold, generalized statement that all these cases are frivolous and that, regardless of the facts, he would never award more than a certain predetermined sum of money?

Q: Do you agree that this case should be decided solely on its facts, not on preconceived attitudes or news stories or things that happened in other courts?

Q: Why?

Q: How do the rest of you feel about that?

The 'Sympathy' Issue

Another important aspect of voir dire for a plaintiffs' attorney is dealing with the 'sympathy' issue during your questioning. If your client was seriously injured, or you are bringing a wrongful death case, you can bet your bottom dollar that the defense lawyers will caution the jurors against deciding the case based upon sympathy.

As long as you know that this will be a topic, the plaintiffs' lawyer might as well speak about it himself. By doing so, you can seek a commitment from the jury that the case will be decided solely upon the evidence, and not on any extraneous emotion or belief about the system:

Q: I tell you this right now: my client is not here for sympathy. She wants only 100 percent justice in this case. Would you agree with me that if this case were decided upon the basis of sympathy, as opposed to the evidence you hear in the courtroom, that that would be unfair?

Q: Do you all feel that way?

Q: Do you believe, just as strongly, that it would be just as unfair if the case was decided upon cynicism, as opposed to the facts of the case?

Q: If jurors decided this case based on feelings about the system, or other cases which they've read about, as opposed to the proof in this case, would that be just as wrong?

Such as the defense lawyer's major concern is that a jury will be unduly influenced by sympathy, in today's day and age, the plaintiffs' attorney should be equally concerned that skepticism regarding the system will improperly prevent the jury from deciding the case fairly.

The above-mentioned technique reinforces the point that it would be improper if any outside feeling or emotion affected the deliberations in the case, not just the defense's concern that sympathy will cause a runaway verdict.

Conclusion

Particularly in today's sinking economy, prospective jurors are more prone than ever to be wary of claims of personal injury and suggestions that a large verdict is in order. Although the times are tough, and just getting tougher, there still is reason to believe for the skilled litigator. Dealing with these difficult issues in voir dire may be a necessary first step to ultimate success in the courtroom.