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Theme Development and Jury Selection in Product Liability Litigation

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Know Your Juror

Trial attorneys are confronting a jury pool today that is much more interested in and aware of civil litigation, lawsuits, and jury selection. Litigation is newsworthy. A brief look at any major newspaper, as well as publications oriented toward business, entertainment, sports and science, shows that legal issues and litigation are topics of great interest to American society.

As few as five or ten years ago, the jury selection process remained a mystery for most citizens. At most, 10 to 20 percent of the jury pool had ever participated as a juror in any type of trial. Further, participation in a trial did not mean that jurors necessarily understood challenges for cause, peremptory challenges, or the rules governing voir dire. While the juror selection process still remains somewhat of a mystery, with all of the media publicity surrounding certain trials, there are considerably more people with strong interest and opinions about the process.

However, the typical jury pool consists of an overwhelming number of people who are facing greater demands on their time from work and family. Those time pressures decrease their willingness to serve as jurors. If selected, these impatient jurors share little tolerance for unnecessary delays in a trial. They become irritated if attorneys cannot seem to ask a question correctly, if they are redundant, or if they appear to be disorganized.

As an example of their impatience, in a recent trial in Texas, several jurors stated somewhat jokingly that the day and one half they had spent in jury selection constituted mental distress, and they wanted to know where they could file a claim.

How do these developments affect the trial attorney? The main impact is that jury selection has gotten more complicated. There is more "noise" in the process caused by publicity and the pressures jurors feel to get on with their lives. This “social noise" can make it more difficult for attorneys to form an opinion about jurors’ suitability. Jury selection is often rushed without enough time allowed for a thoughtful voir dire.

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Guidelines for Handling Jury Selection in Product Liability Litigation

Extensive research and observations of hundreds of jury selections suggest the following guidelines:

- Juror questionnaires should be used whenever possible. Juror questionnaires are discussed in greater detail later in this paper. They represent one way for a trial attorney to cut through barriers created by the courtroom setting and allow for the determination of juror attitudes on critical issues.
- Cause challenges must be aggressively pursued.
- In camera or chambers voir dire is extremely helpful for cases involving highly sensitive or personal issues. Jurors are more candid in a more private setting. This procedure can and is often handled while the other jurors have been dismissed for a break.
- Tackle the tough issues in voir dire and in juror questionnaires. Attorneys often avoid asking the most critical jury selection questions because of concerns about appearing insensitive to jurors. Our view is to ask the tough questions and get the best jury.
- Keep a good pace and avoid organizational housekeeping delays. Jurors do not appreciate delays.
- Greater attention needs to be paid to the selection of alternate jurors. In a typical product liability case lasting several weeks, an alternate juror will likely be required to serve as a deliberating juror. Our research has shown that alternate jurors tend to be more biased than regularly seated jurors. This is in large part because not as much attention or time is given to scrutinizing alternate jurors.

Developing Cause Challenges

Judges typically do not like to grant cause challenges. However, an experienced trial attorney knows how to achieve cause challenges and is willing to go the extra distance to obtain such a challenge. The motivation and ability of attorneys to achieve cause challenges vary widely, but these are skills that can be learned.

In achieving cause challenges, there are several steps involved.

1) *Adopt a proper attitude and demeanor.*

Jurors who admit to bias usually will only do it if they are speaking with someone who appears to understand them. Bias is almost never admitted under conditions approximating cross-examination. One key is to talk slowly with the juror and to use pauses to create social pressure. This empathic demeanor is highly effective at getting jurors to confirm their prejudices.

As a corollary to observations about demeanor, it is also true that it is easier to get challenges granted for feelings of sympathy or compassion rather than for feelings of anger or hostility. Judges appear more understanding and less aggressive about rehabilitating a juror who feels sorry for a victim than for a juror who simply dislikes product manufacturers. In cases where sympathy will be an issue, this is often the more fertile area of voir dire for cause challenges.

2) *Establish the grounds for cause.*

This may be done by referring either to the questionnaire responses or to prospective jurors' responses in oral voir dire. For example:

"You said on your questionnaire that you didn't trust product manufacturers. You also said that manufacturers do not care about product safety."

3) *Don't hit prospective jurors over their heads with the notion of being fair.*

Typically, the ones you want off do not like to admit that they can't be fair. Besides, prospective jurors are often offended by the suggestion that they might be anything *but* fair.

4) *Use metaphors.*

Since prospective jurors will seldom say that they can not be fair, the most effective approach an attorney can use is to provide a socially acceptable way to talk about bias. Generally, after the grounds for bias have been established, the strategy is to use some type of metaphor to probe further. Examples include:

- "Given what you said before (or, based on your questionnaire), would the defendant start with a bit of an edge?"
- "Would the plaintiff have a little steeper hill to climb to prove its case?"
- "Would the defendant be starting a little bit behind the plaintiff?"
- "If this trial was a race, would we be starting one step behind?"

- "If you were in my shoes, representing my client, would you want a person with your views sitting as a juror?"
- "Do you tend to side with the underdog? Do you see the plaintiff as the underdog in this case?"

After they have agreed with the metaphor, the attorneys then have to raise the level of commitment and suggest that they might have a more difficult time being fair.

Practical Strategies for Using a Juror Questionnaire

Jury experts agree that potential juror questionnaires to supplement voir dire can greatly improve the jury selection process. The information learned through the questionnaire improves the voir dire process by allowing the attorney to focus on both individuals and specific topics. Benefits of juror questionnaires include:

1) More Candid Responses by Jurors

The courtroom setting is not conducive to open discussion.

2) Minimizing the Risk that One Juror's Extreme Opinions Will Contaminate the Rest of the Panel

If one or more of the potential jurors have had an extremely negative experience with a product or a product related accident, this can cast a negative pall upon the remaining process. Juror questionnaires remove this bias, and help to identify people who may be better questioned at the bench during voir dire.

3) Reducing the Time Needed For Voir Dire

A problem with voir dire is that to really probe the jurors, each person needs to be asked similar questions. Jurors often feel resentful and tire quickly of the repetition. They become more reluctant to speak, and are more likely to give common answers because it is easier. This voir dire is often of limited value as an assessment tool of juror bias. Juror questionnaires help to structure the voir dire process and avoid this problem.

Research has found that many judges are likely at least to consider a juror questionnaire. In a survey of Northern California federal and superior court judges, more than 90% of the judges were willing to consider use of a juror questionnaire, and two thirds have actually used them. Research from Los Angeles has shown that while 66% of Superior Court judges have used questionnaires, almost all would consider their use. In a similar survey of Texas federal and superior court judges, more than half of the judges would

consider using questionnaires. Judges are especially likely to consider use of juror questionnaires in long cases, in complex or multiple part cases, and in cases involving sensitive issues.

When judges resist administering a questionnaire, it is usually because they consider it a waste of time. These objections can be overcome by designing a much shorter questionnaire. Demographic questions asked by the court, such as age, residence, and work history, are redundant when included in a questionnaire and thus can be left out.

Attorneys can also prepare several versions of a questionnaire to be considered by the court. They can develop a set of the most important questions, the core of the questionnaire, and add to it only if the judge does not object to its length. A brief version of a questionnaire should include questions about the relevant attitudes and experiences related to the case. This information typically can be obtained in 20 to 30 questions, which amounts to a four or a five-page questionnaire. However, there are a number of mistakes we see being made in the procedures used to administer questionnaires and the manner in which questionnaires are designed.

b. Questionnaire Design

Juror questionnaires typically include questions on demographics (age, education, employment, etc.); litigation-related issues (jury experience, involvement in a lawsuit, etc.); and knowledge or contact with the parties involved in the litigation. Most often what is not included are questions on relevant attitudes.

Often attitudinal questions are not included in a juror questionnaire for many reasons. Sometimes judges feel attitudinal questions do not constitute a proper area of inquiry. Other times, one side or the other objects to the attitudinal questions. Occasionally, the absence of attitudinal questions is simply a mistake made due to time pressure or inexperience. Attorneys need to argue forcefully for the inclusion of attitudinal questions. Bias can only be detected if jurors are asked about their attitudes on key issues involved in the case.

Sometimes attorneys will object to asking a question about a sensitive issue. Their fear is that it might activate biases against them. For example, questions could be asked such as:

- To what extent do you feel product manufacturers put profit ahead of the safety of the public?
- How important do you think it is that a product manufacturer does everything possible to produce safe products?

An attorney might be afraid that these types of questions would plant a seed in jurors' minds. Our experience indicates, however, that such preconditioning is minimal and is greatly offset by the information gained from the question. If the theme is integral to the case, it is only a matter of time before the jurors hear about it from opposing counsel. Candid questions on the juror questionnaire may help to steal some of their thunder.

Another concern attorneys express about controversial topics in questionnaires is the fear that jurors will know which attorney submitted the question and will then hold it against that party. For example, in cases involving a product that is claimed to cause cancer, attorneys may be hesitant to ask jurors their beliefs about the extent to which they are worried about getting cancer or steps they take to prevent risks to their health.

These concerns about jurors' reactions to the questions do not give enough credit to the jurors. As a rule, jurors are not that naive about the process; they generally understand the need to ask sensitive questions. Furthermore, when the questionnaire is properly administered, it is clear to the jurors that it is a document sanctioned and approved by the court. Few jurors doubt the appropriateness of a question when it has the authority of the court behind it. If it is appropriate, jurors can be told that on certain questions, the follow-up on sensitive topics will be handled in chambers.

b. Question Design - Skewed Questions

The *wording* of a question in a juror questionnaire is extremely important. In fact, there are subtle ways to word a question that can produce a strategic advantage for one side. One such way is to write *skewed questions*. A skewed question is one in which the distribution of responses is uneven. For example, the question, "Do you think *almost all* product manufacturers put their financial interests ahead of concern for public safety," is skewed because most people will answer, "No." Such a response pattern would be a strategic advantage to a defendant. The advantage is gained because the few people who say, "Yes, most product manufacturers put their financial interests ahead of public safety," are identified as likely plaintiff advocates. With the likeliest plaintiff advocates identified, the defense can focus its further inquiry and attention on them and make more intelligent use of its peremptories.

On the other hand, plaintiff's counsel derives little useful information from the above skewed question. Most of the prospective jurors will probably respond, "No, most product manufacturers do not put their financial needs first." Obviously, plaintiff's counsel cannot strike all of these people from the panel; nor does plaintiff's counsel know who among these people it would be best to strike. While the best "strikes" for the defense are clearly identified, its best "keeps" are buried in the large plurality of people who answer, "No."

Thus, attorneys can gain a strategic advantage by using the uneven response pattern of a skewed question to expose their strikes and bury their keeps.

The skewed approach could also be used in the above example by the plaintiff attorney. In writing a plaintiff question, the question would read "Do you think some product manufacturers put their financial interests ahead of public safety?" The distribution of responses to this version of the question would help the plaintiff because a minority of jurors could say no to that question and these jurors would be the plaintiff's strike candidates.

c. *The Questionnaire Procedure*

The procedure we recommend for administering juror questionnaires is:

1. Motion for Adoption
2. Agreement by Both Sides on Content
3. Panel Sworn; Questionnaires Filled Out
4. Panel Sent Home; Copies of Questionnaires Made
5. Oral Voir Dire Begins Next Day

As can be seen from the recommended procedures, after one side moves to adopt a juror questionnaire, both sides have to agree to the content of the questionnaire; that is, they have to agree on what questions will be included. To ease agreement, attorneys will often agree not to object to each other's questions. Notably, those questions commonly objected to in a questionnaire are commonly objected to in court, e.g., a question that asks a juror to suggest their leaning or preference in the case.

One drawback to the use of juror questionnaires is that attorneys need time to review the completed questionnaires. We usually recommend that the questionnaires are administered in the morning, and jurors dismissed until the next day. While copies of the questionnaires are being made for both sides, the attorneys can argue motions to the court.

It is extremely helpful if the court numbers the questionnaires in the order that jurors will be called into the jury box. The clerk randomly assigns the number before copies are made. When this is done, attorneys are saved the time-consuming task of reviewing all of the questionnaires equally. Enabling the attorneys to focus their attention on the questionnaires of those prospective jurors most likely to be called into the box results in a far more reasonable, rational, and higher quality voir dire process.

Two Dilemmas in a Product Liability Case: Sympathy and Anger

Sympathy

In order to prevail on damages and liability there are two common juror reactions to a case that need to be examined: sympathy for the plaintiff and anger toward the defendant. In cases with loss of a family member, crippling injuries, or financial ruin it is natural for jurors to feel sympathy for the injured party. It is the defendant's challenge to acknowledge and remove sympathy associated with a tragedy.

Most often elimination of sympathy begins in voir dire and is repeated in opening statement and closing argument. Post-trial interviews with jurors in successfully defended cases often illustrate the fact that jurors wrestled with the issue of sympathy but were able to set it aside. In a case involving major personal injury:

- "We all felt sympathy for the plaintiff, she lost her husband. Sympathy came up in deliberations, but we discussed how that was not the issue."
- "The defense attorney mentioned about ruling out sympathy, and the judge kept reminding us of our duty."

Anger

There is no doubt that anger toward the defendant fuels damage awards. Whereas for sympathy, it is socially acceptable for a defense attorney to argue that everyone will feel sad and have sympathy for the plaintiff, there is not an easy way to block feelings of anger that might emerge in a trial. We are all familiar with the inflammatory arguments that can be made in response to allegations of corporate misconduct. In terms of mitigating jurors' anger towards a manufacturer, it is important that the jury not only see the bad acts of the company, but also learn about the ways in which the company has taken responsibility for its actions regarding issues such as employee safety, product safety, fair employment practices, and compliance with regulatory agencies.

Anger flows from beliefs about responsibility and blame for a problem. According to the "just world theory," (Lerner, M.J. & Meindl, J. R. "Justice and Altruism." In J.P. Rushton and R. M. Sorrento (eds.) Altruism and Helping Behavior, Hillsdale, N.J.: Erlbaum: 213-32 (1981)) people have difficulty accepting the injustices of life and have a strong need to believe that the world is just. If the world is just, it means that our own outcomes are controllable. In other words, people who do good deeds can expect rewards or profits. Jurors, therefore, will have a tendency to want to even out inequities and seek justice. They wish to assign responsibility for injustice and bring about restitution to injured parties. It is therefore incumbent on the defense to persuade the jury that justice sometimes means that the plaintiff (typically the underdog) goes home without money.

Case Themes

What are case themes and why are they important?

Research in a variety of applied fields has demonstrated the significance of themes for organizing information and making decisions. Every experienced trial attorney understands that jurors need to be able to have some way of organizing all the information they are exposed to during a trial. To persuade a jury, an attorney needs to develop case themes that help organize the diverse case facts and convey the case theory. Case themes can provide a bridge and a way for jurors to understand what they are learning during a trial. For many cases, themes are as important for damages decisions as they are for liability. To affect damages awards, attorneys need to influence jurors on the issues of responsibility, blame, and justice.

Three Approaches to Theme Development

There are techniques that can be used to develop case themes. While these approaches may be used intuitively by attorneys, there is a research tradition that supports and explains why these approaches work.

Attribution Theory/Choice Theme

When a plaintiff engages in a certain behavior, one of the critical ways of looking at that behavior is whether the individual had a choice. When judgments of responsibility and blame are being made, it is important to know whether or not there was any choice involved. Attribution theory looks at the choice factor and supports the notion that when someone chooses to do something, they are then seen as responsible for the consequences of that choice. To the extent that the plaintiff is seen as having a choice in their conduct or to the extent the defendant is seen as having a choice, then jurors will feel they are responsible for the consequences of that choice. Some examples of choices:

- The plaintiff chose <u>not</u> to wear the required safety gear when working with a specific piece of heavy machinery.
- An individual chose to disregard the instructions when using the radial arm saw.
- The manufacturer made a choice to ignore the recommendations of its safety engineer in designing the product.
- A company made the choice of <u>not</u> placing a simple warning on the product against operating without a proper safety guard.

Most attorneys use a version of the choice theme when they introduce the notion of personal responsibility. Jurors reach conclusions about personal responsibility when a

decision is presented using the choice theme. In other words, if someone chooses to do something, he/she is more likely to be seen as personally responsible for what happens. The difference between presenting the theme as a choice or as personal responsibility is that with the choice theme, jurors will conclude on their own that the individual is responsible rather than being told that he/she is responsible by the attorney. It has been our experience that jurors are more accepting of the choice approach rather than the personal responsibility approach, and that the choice approach is more persuasive.

Counterfactual Thinking

Another way of approaching theme development is to use counterfactual thinking. Counterfactual thinking occurs when a person evaluates an event by how easily it could have been undone to create a different outcome, usually a more positive outcome. The ease with which a juror can undo the negative event with a counterfactual affects the amount of blame he/she attributes to a party. In a premises liability case, the question raised is what could either side have done to prevent this problem from occurring. If it is hard for jurors to develop reasonable counterfactuals, "if only" statements, it will be harder for them to attribute responsibility, and thus blame, to the person/company. On the other hand, the more counterfactuals a juror can create to prevent the negative outcome, the stronger their opinions of blame on the party who they feel could have changed the outcome of the event.

The question answered by a counterfactual usually takes the form "if only..." or "what might have been..." An example of a counterfactual would be, "If only there had been a window on the swinging door allowing the employee to look out before opening the door," or "If the door was cordoned off to prevent the public from coming too close to the door, the plaintiff would not have been injured." A counterfactual creates an alternative way of looking at a situation, an alternative reality.

The way to use counterfactuals to look at case themes is to consider what "if only" arguments the plaintiff and defendant could make in a product liability case. It is often the case that the plaintiff will have several "if only" arguments. Examples include:

- If only the cheap plastic wedge had been installed…
- If only the manufacturer had issued a recall in a timely manner…
- If only the product had undergone more testing before release to the public…

The manufacturer defendant, of course, can develop its own themes by employing arguments using the "if only" form. For example, "If only the driver had not parked on an incline without using the required blocks..." and "If only he had curbed the wheels of the truck..."

One way for the defendant manufacturing company to defend against counterfactuals is with an "even if argument". For example, "Even if the wedge had been installed, we could not have prevented this accident, caused by the inebriated driver kicking the gear shift out of position…" Another example is "Even if we had recalled the part, it would not have prevented the truck from rolling."

Counterfactuals and the choice theme are two different ways of thinking about blame and judgements of responsibility. Since they both focus on responsibility, they often deal with the same set of facts. For example, in a securities case:

- Choice Theme: "The plaintiffs assumed the risk involved in investing in limited partnerships when they purchased a share of the venture."
- Counterfactual: "If only the plaintiffs had more carefully read the prospectus and the accountant's report, they would have been aware of the problems faced by the company in the next fiscal year."

The Story Model

The story model assumes that jurors organize the evidence of a case into a coherent explanation or story. This narrative structure is then compared to the verdict categories to determine the best match (Hastie, R. (Ed.), *Inside the Juror*, New York: Cambridge University Press: 3-37 (1993)). Trial attorneys have used the story model for years in crafting case presentations. The point is that jurors actively engage in creating their own story about a case and that may or may not include the attorney's version of the story. The story model, in the hands of most attorneys, is a way of presenting case themes, metaphors and analogies. This short hand version tells what happened and why it happened. Counterfactuals and arguments based on the choice theme can be integrated within the case story.

Some attorneys are gifted storytellers. Creating and fashioning a story for most of us takes time and effort. Questions to raise about the story of the case are: Does it make sense? Does it convey themes? Does it explain what happened and why? Is it compelling?

The Process of Theme Development

Developing case themes and arguments can be assisted by the three approaches described above. However, the creative aspect of case theme development should not be overlooked. Arguments, metaphors, analogies, and imagery to use for argument can come from a variety of sources. Cab rides, taking a shower, and brainstorming sessions

are often the sources of the best ideas. The process of developing ideas is not scientific, but is often critical to develop case winning themes.

On the other hand, testing case themes, to determine how effective they can be, is scientific. Mock trials, and in some cases, community surveys, can be used to evaluated and determine the effectiveness of various approaches to case argument.

Obstacles to Juror Acceptance of Themes

Juror Confusion and Anxiety

At the beginning of a trial, jurors are often anxious about having to serve on a jury because of the effect jury service will have on their personal life, and concern about the job they will have to do. This confusion about their role is enhanced if they feel they do not understand what the case is about. Confused and overly anxious jurors are often lost during a trial and often become so frustrated that they give up trying to understand the case. Since this confusion can interfere with acceptance of case themes, it is important that jurors understand what their role will be. Attorneys need to do what they can to facilitate juror understanding of their role and the decisions they have to make. At a minimum, case issues should be pointed out during voir dire, and the verdict form should be discussed during closing arguments.

Hindsight Bias

Hindsight bias is one of the psychological concepts that affects jurors' decision making when attributing cause and responsibility to an individual for an event. Hindsight bias is an individual's "tendency to see events as expected after they have occurred, even when they were seen as unlikely prior to their happening. This tends to increase feelings of confidence in judgement after the fact, and can lead to continued use of faulty decision strategies." (Heath, L. & Tindale, S. "Heuristics and Biases in Applied Settings." In: L. Heath, R. S. Tindale, J. Edwards, E. Posavac, F. Bryant, E. Henderson-King, Y. Suarez-Balcazar, J. Myers (Eds.), *Applications of Heuristics and Biases to Social Issues*, New York: Plenum Press: 8-10 (1994)).

Most defense attorneys are well aware of "Monday Morning Quarterbacking" and the way it can be used to second-guess a decision by a defendant. A number of studies have been done which show that hindsight bias is very difficult to overcome, even among sophisticated decision makers. If hindsight bias is present in a case, one of the few things that can be done is to educate jurors about hindsight bias: "If something bad happens, we have a tendency to think that we should have known it would have happened." The

hope would be that at least one juror understands that idea and could use it in deliberations.

Failure to Understand the Law

Jurors often spend a considerable amount of time in deliberations trying to understand the laws that apply to a case. Research on jury deliberations has shown that the most common source of jury error is not difficulty understanding the facts, but trouble understanding the legal instructions (Ellsworth, P. "Are Twelve Heads Better Than One? *Law and Contemporary Problems*, 55: 204-224 (1989)). Since defendants often benefit from jurors' use of the law, there are several things defense counsel needs to do to improve juror understanding of the law.

It is important that the verdict form be clearly explained to the jury in closing arguments. It is not uncommon in complex cases for jurors to be confused about which way they should vote on a certain issue if they favor a certain side. That confusion needs to be eliminated.

Another approach to improving juror understanding of the law is for defense counsel to ask the court to pre-instruct the jury on the law prior to hearing any evidence. Pre-instruction of the jury maximizes the effect of the law on the reaction of the jurors to the case arguments.