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Jury selection in premises-liability cases

ROOTING OUT THE EYE ROLLS

Of all the cases we handle as plaintiffs' personal-injury lawyers, none are met with more eye rolls and a "give me a break" than when the judge tells the potential panel "this is a slip and fall matter…" It is simply the nature of the premises-liability beast that people in the community seem to have the most bias against these cases for more reasons than we have space to list in this article. We discuss how to root out those biases during jury selection, starting with pre-trial motions and briefs and all the way through the voir dire process itself.

Setting yourself up for a successful voir dire

Jury selection really begins before the jurors even enter the courtroom. In every trial, we file briefs and motions in limine regarding the applicable laws and Code sections that govern voir dire. In trials with a judge who has less experience on the civil bench, these briefs can be especially useful to illuminate the rules and ensure the judge understands the law.

California Code of Civil Procedure section 222.5, as recently modified in early 2019, provides many of the rules for what is and is not allowed during jury selection. Specifically, CCP section 222.5 states, in part, that: (1) questioning of prospective jurors may be a "liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court"; (2) the judge may not impose any "specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire"; and (3) "upon the request of a party, the

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trial judge shall allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process." (Code Civ. Proc., § 222.5.) Have this law on hand to remind judges that they cannot arbitrarily limit questioning or the timing of questioning, and that as soon as one party requests a mini-opening, the request must be granted.

Section 222.5 is particularly important because it provides attorneys with a lot of leeway as to the manner and length of questioning during voir dire. Recent case law has further helped plaintiffs' attorneys, finding that it is proper to question potential jurors on dollar amounts as relevant to discovering bias and prejudice under C.C.P. section 222.5(b)(1). In *Fernandez v. Jiminez* (2019) 40 Cal.App.5th 482, the court of appeal found that asking the jurors if they were comfortable awarding "hundreds of millions of dollars" on a wrongful-death matter was not improper preconditioning of the jury. (*Id.*, at pp. 493-494.) Cite *Fernandez* in opposition to the inevitable defense motion in limine to exclude mention of specific dollar amounts during voir dire.

Section 222.5 also makes a mini-opening *mandatory* upon request. In premises cases, the mini-opening can be a great tool to orient the jury to the facts of your case before digging into more specifics during voir dire.

Using the mini-opening to pinpoint the "bad" jurors

Until very recently, the mini-opening was one of the most underappreciated tools we have as plaintiffs' lawyers. Since the mini-opening is the very first thing the jurors will hear about the case, it affords us the opportunity to gain credibility early, while highlighting the strengths and weaknesses of our case to get jurors talking and expose biases from the start. To take advantage of this opportunity, it is crucial to give the mini-opening in a neutral, fact-by-fact, unargumentative tone.

In a recent slip and fall trial we tried (*Perez v. Hibachi Buffet*, BC659957), here was the mini-opening:

• Hibachi Buffet is a large buffet style restaurant in Inglewood, CA.
• They have dishwashers that use busser carts to bus tables and take the dishware back to the kitchen.
• On January 7, 2017 we contend that one of these carts was spilling some sort of clear liquid, likely water, down one of the hallways.
• The water was a long string about 10-12 feet long.
• My client, George Perez, as he was walking back from the restroom towards the dining area slipped with his right foot. His left knee twisted and landed on the ground.
• His kneecap fractured into pieces.
• A week later he had knee surgery that put hardware in his knee cap.
• He was unable to walk without an aide for about 6-7 months.
• He had to have a second knee surgery in 2018 for the fall.
• His treating knee doctor will say that this fall is causing arthritis in the knee that will not get better and lead to problems the rest of his life including a future knee replacement.
• The defense will contend that no one knows how the water got there since there is no video or other evidence and the water was only there a short period of time.
• The doctor they hired also does not believe there is arthritis in the knee.
• We will be asking you to send a verdict back for medical bills, but those are a small part. The big part of this case is what George Perez has had to go through up to this point and the fact that his knee will not be getting better, and only worse. We will be asking for a lifetime of pain and suffering damages in the millions of dollars.
• Our goal is to have a fair fight here. We want a fair fight for both sides.
• Like, if it is a race, we want to make sure we are all starting even.
• So please be brutally honest with us and the defense if you feel like maybe in your mind either of us are not on equal footing, even slightly.

Laying out the mini-opening with mostly uncontested facts and giving equal weight to the contested ones will garner more respect from the jurors from whom you are truly looking for a fair fight, particularly when the defense attorney stands up and starts giving a closing argument during mini-opening. *Never object when they do this; it is a gift*. The bad jurors will hang on every word and be more than ready to speak their mind once it's your turn to start asking the questions during voir dire.

Addressing the "danger points"

When initially preparing your voir dire, one of the best things to do is simply jot down the things that scare you about your case, often referred to as "danger points." These are the topics you must address to find out who is going to sink your case during deliberation.

Once you draft your list, lay out the topics to flow cohesively, so the jury can openly and freely discuss the topics you present. Each case is going to have its own particular danger points, but here is a general list of items that we found really helped identify the bad jurors in a recent slip and fall trial where the client was a large, intimidating-looking man in his 40s.

• Brutal honesty
• Biases
• Personal injury lawsuits (From Brian Panish's Jury Selection Board)
• Too many lawsuits? Jury awards are too high?
• People are too ready to sue?
• Lawsuits are costing us all too much money
• Slip and Falls
• Comparative Fault
• Accountability/Responsibility
• Restaurant/Store responsibilities to keep safe
• Circumstantial evidence
• Intro to Non-Econ Damages
• Economic v. Non-economic damages (go through each)
• Physical Pain
• Mental Suffering
• Loss of Enjoyment of Life
• Disfigurement
• Physical Impairment
• Inconvenience
• Grief

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- Anxiety
- Humiliation
- Emotional Distress
- Jurors as appraisers of the plaintiff's injuries
- Caps on Damages-$$$
- Jury awards too excessive? Much too large? Too large? About right?
- Would that make you want to award as small as possible?
- Before hearing any evidence, and knowing yourself, would you tend towards larger award, an award in the middle, or a smaller award?
- Smaller company – can't afford a big verdict
- Defendant owned and managed by non-English speakers. Cut them a break?
- Big money for pain
- Credibility of witnesses. Can you spot lying?
- Experience with falls
- Who has a high/low pain tolerance?
- Who knows people in pain?
- Knee injuries
- Pain leading to depression
- Appears uninjured or normal
- Plaintiff looks intimidating
- Plaintiff is overweight
- Who are the leaders?
- Defense goes last
- Burden of Proof

Once you have identified the topics, decide how you will frame each issue and present them to the jury. We go through the key topics for the most typical premises cases below. Many of these ideas have been developed from a combination of CAALA's Plaintiff Trial Academy, Gerry Spence's Trial Lawyers College, Keith Mitnik's *Don't Eat the Bruises*, Dan Ambrose's Trojan Horse Method, Nick Rowley's *Trial by Human*, and other great resources, many of which should be available in the CAALA library.

Slip and falls

Since even mentioning "slip and fall" is enough to get biased jurors talking, a good place to start is:

> This is a slip and fall case. Their side has filed a defense of comparative negligence. They aren't supposed to start out with a finding that my client was at fault, they must prove it. The concern is that some people feel, in a trip and fall or slip and fall case, the person who fell should bear part of the fault. Regardless of the rest of the evidence, that would be their starting point in any slip and fall case. Who feels that way to any degree?
>
> Who thinks that someone who falls shares some part of the blame no matter what?

It is also effective to personalize where you can and saying something like:

> If my dad was sitting here with you all I could see him looking at us very suspiciously, maybe even rolling his eyes a bit, when he heard this was a slip and fall case. I just know his antennas would start to raise and not necessarily be trusting of this kind of case right off the bat. Did anyone here have that initial reaction or feel that way even a little?
>
> Would it be fair to say that you cannot turn those feelings off like a light switch and put them aside?
>
> Can anyone think of a situation where the owner of the place where the person fell should be held responsible?

Duties of the defendant business

When discussing the topic of responsibility and accountability, it is important to see how people feel about the store/restaurant/property owner having any responsibility to keep its property safe. Those jurors that will side with the defense will likely say that the business/property owner shouldn't have to ensure the safety of others, or "the store can't be everywhere all the time," or "there needs to be some level of personal responsibility," or "spills happen, what are they supposed to do?" To find these jurors, you may want to ask this series of questions:

> We will be talking a lot about the [type of defendant]'s duty to keep its property safe, I want to find out what you folks think about that. Who feels the [restaurant, etc.] should have a responsibility to keep its floor free of spills?
>
> How should restaurants do this?
>
> What do you think the requirements should be?

This will help transition into the idea of safety rules below.

Importance of safety rules

From *Reptile* to *Rules of the Road*, most plaintiffs' attorneys are intimately familiar with how important it is to frame our cases in terms of safety rule violations. There is no better place to practice this than in a premises trial. Introducing the rule violation concept during voir dire will set the stage for the entire trial.

For example, in a premises case where the issue was the installation of slippery tile, here was an effective way to get the jurors thinking about rules:

> In this case, there will be a lot of discussion of safety standards, both within the defendant's business and within the [defendant's industry] as whole.
>
> Why is it important to follow safety rules?
>
> Does anyone have a problem using the courts to hold businesses or cities responsible if injuries occur when a company did not follow its own standards? What about industry standards for safety?
>
> How would things turn out at your job if you didn't have rules and regulations?
>
> What would happen in a society that didn't hold those accountable?
>
> Can you give me some examples at your work of holding people accountable? Why is it important? Are there certain rules that need to be followed?
>
> What would happen if those rules did not exist? Are there reasons to follow certain rules?
>
> What happens when people don't follow those rules?
>
> What happens when they don't take responsibility for not following the rules? Is that important to you?

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Circumstantial evidence

Often, the only evidence we have to meet our burden of proof is circumstantial evidence. For example, in a recent case we had, there was no video or eyewitness testimony showing when or how the spill got there, but the spill is in the exact shape of a mop dripping water. Addressing circumstantial evidence in voir dire is critical to dismantle the defense argument that "the plaintiff has *zero* direct evidence of how the spill got there or how long it was there for" before the defense even has a chance to say it. To explore this with the panel, you may want to ask questions like:

> Who has heard the term circumstantial evidence? The judge will tell us that we can prove something by direct and indirect evidence. She will give us an example of a jet plane flying across the sky and direct evidence is a witness saying he saw a plane fly in the sky, while indirect evidence is only seeing the jet stream planes often leave in the sky.
>
> The judge will say that we can rely on indirect or circumstantial evidence to prove our case.
>
> Here we have no video to show how the liquid got on the ground. Does anyone have a problem relying on circumstantial evidence for us to prove our case? Will you rely on your common sense? Anyone ever heard the phrase: the simplest explanation is often the correct one? What do you think about that?

Public entity liability

When jurors hear the defendant is their own city/county/state, the first thought that often comes to their minds is "are my tax dollars paying for this?" You must address this head on. Do not be afraid to dig deep into juror bias against suing their own city/county/state during voir dire:

> In this case, the [type of entity, e.g., airport] is a public facility and we are contending that their [dangerous areas, e.g., restrooms] were dangerous because of the [dangerous decision by defendant, e.g., choice of tile].
>
> How many of you feel that public facilities should be held responsible for protecting its guests? How many feel that it is on the guest and that airports should not be held responsible for protecting the public?
>
> How many feel that if someone is injured because an airport had a dangerous condition, the airport should be responsible for the harm? How many feel they should not be held responsible?
>
> The Los Angeles International Airport is owned and managed by the City of Los Angeles, so because this incident happened at LAX we had to file a lawsuit against the city. Now personally, I take a lot of pride in the city where I live, the schools I went to, the teams I root for, and so on. It's the tribal sense of human nature. My concern is that some of you may have trouble awarding money damages against the city no matter what the evidence shows.
>
> Mr. _____, on the spectrum of 1-10, with 1 being little to no problem awarding money against LAX, which is owned by the city, to 10 being the strong feelings against awarding money against LAX which is owned by the city, where do you fall?
>
> Who is concerned that a verdict will have an impact on their tax dollars?
>
> Who may give a discount or cut some off a fair verdict because of these feelings?
>
> Does anyone feel that the city should have to pay full value if they do something wrong?

Working with second chair to get the best panel

Voir dire is a team effort between the first chair, who is eliciting the information from the jurors, and the second chair, who provides support and feedback the first chair might not catch. Once voir dire is underway, the second chair's role becomes vital to ensuring that the best jury panel is chosen. While the first chair questions specific jurors, the second chair should be observing all the other prospective jurors and gauging their reactions to questions. Are the other jurors nodding in agreement? Shaking their heads no? Widening their eyes in response to something? These nonverbal clues are just as important as the words said by jurors in determining bias and prejudice and should be noted on the jury pad or spreadsheet by the second chair, so that on a break, the second chair can discuss with the first chair which jurors could be bad for the case.

During mini opening, also, the second chair should be observing the jurors both in the box and in the audience for their reactions to the facts and any money ask. Sometimes we will also bring other people in from our office to sit in the audience so they can observe any potential jurors that might be otherwise hard to see during the voir dire process. Doing this also allows the first chair the opportunity to try to get more jurors for cause, because the first chair will know which jurors have already had negative reactions to the case and can ask them targeted questions.

By the time the first panel has been questioned and the judge asks if the defense and plaintiff pass for cause, you should already have built your list of reasons why certain jurors should be excused for cause. This includes writing or typing verbatim certain key phrases used by a juror, such as "I can't be fair," "yes, I am biased," "you'd be starting out with a strike against you," "I can't set aside my experiences," "it would be hard for me to be neutral," or "you would be starting behind the defense." When the judge either calls you to sidebar, chambers or holds a conference outside the presence of the jury for cause, you will then be able to repeat exactly what the juror said to refresh the judge's recollection of why this potential juror must be excused. This is especially useful in courtrooms where the judge does not use real-time transcription or otherwise cannot access the transcript from the reporter on the spot. In our last trial, we had multiple jurors excused for cause based on the above

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phrases, or similar ones, that we were able to recite to the judge for her consideration.

It is also important to remember the law on for-cause challenges, which states that once a juror has admitted bias, he or she cannot be successfully rehabilitated by the defense or the judge. (See, e.g., *Quill v. Southern Pac. Co.* (1903) 140 Cal. 268, 271 [discussing that where a juror has once stated bias but then later states he could act impartially, the declarations of impartiality should not be readily trusted].) We always file a trial brief on for-cause challenges so that we have the law on hand in case the judge or defense tries to argue that a juror with stated bias was properly rehabilitated.

Conclusion

Voir dire is a moving target that requires a lot of attention to detail. In premises cases, it might seem like a daunting task to find jurors who are fair and can remain open minded to the facts of your trial and not automatically dismiss the case in their mind. With the tools presented in this article and the right preparation, you will be on track to confidently accepting the jury panel at your next trial.

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