

Voir Dire in a Railroad Case

By: Ben B. Saunders

Association of Trial Lawyers of America

Voir Dire in a railroad case is essential not only for the same reasons you have in every personal injury case, but also because there is no workmen's compensation on the railroad and the jury must understand this is a FELA claimant's only chance to recover for an on-the-job injury.

Suppose you have a client who has been legitimately injured on the railroad.

You are in Federal Court.

Your job is to pick a fair and impartial jury and deselect those with political, philosophical, and religious prejudices.

You have a strict Federal Judge who realizes to control their courtroom they must be the head and master of it and you.

To let you voir dire relinquishes control.

The cure-all question used by the jurist, after questions are asked to each juror, is: "Despite what you have volunteered, will you agree to be fair?" A "yes" to this question is the elixir that cures all and allows this juror to sit.

The question thus becomes, how do you get a fair jury in order to get a fair trial with such dynamics?

Today the press has so molded the American public, but for a small number of hot bed liberal forums, that conservatism is the philosophical standard and the belief emanating from it is: "Stuff happens!" If you are unlucky, accept your fate.

What must be pondered by the judiciary is whether this is indeed in keeping with the oath taken by each member of the court when they swore to uphold the United States Constitution and administer a fair trial.

Are fair calls to both sides during the course of trial sufficient to guarantee a fair trial if a fair jury was not empaneled?

Until the Federal Judiciary accepts the premise that both plaintiff and defense lawyers must voir dire the jury, fair trials will *not* be the rule of the day in conservative court houses any more that they are in ultra-liberal pockets of this country where every juror believes a multi-million dollar verdict is warranted for a hangnail.

The question we must each ask ourselves: if we are truly going to have relative justice in this country is, "What is the human thing to do?"

Did you ever wonder if justice in our Court System is *real* or only *relative*?

A high profile example of this question is the O.J. Simpson trial. Was justice done in the criminal case, or was justice done in the civil case considering the opposing results?

It is suggested the solution to this dilemma is moderation. Meeting in the middle is the key to a fair and impartial trial with a just result. Any deviation to either extreme renders injustice.

Let me explain how this relates to voir dire examination.

One extreme in Federal Court occurs when a Judge who is appointed for life, falls victim to their own idiosyncrasies in an effort to control their courtroom and render speedy justice. In order to move cases and the docket, the Judge denies both sides the right to probe prospective jurors as to their real attitudes, thereby saving a lot of time. Often, in such courts, the Judge's

control of the lawyers and the courtroom becomes so obsessive that both sides, plaintiff and defense, are forbidden to select (or deselect) a jury other than to strike from a list.

Is justice rendered when a panel composed of 50% insurance agents are seated to try the case of an injured railroader, and the Court allows them to stay because they say they can be fair even though they are philosophically oriented against claimants? This is wrong. This is not a fair and impartial jury. To leave an insurance agent on the jury to try the case of an injured plaintiff is not going to render a fair result even though the individual juror may be a reasonable person because they cannot help but vote their philosophy if they are going to be true to themselves.

By the same token, to put a professional claimant in the jury box is just as unfair to the defense.

How then are these people weeded out?

Only by allowing lawyer voir dire.

So only in courts where attorney voir dire is permitted does either side stand a chance of getting an impartial jury with the hope of obtaining relative justice.

Only by giving each side time and allowing permissible questions to be asked of the panel can attorneys become satisfied a juror is not holding a grudge or an opinion that would keep them from voting fairly at the conclusion of the evidence.

To illustrate, many believe if a person is injured on the job, they receive workmen's compensation. Thus, if the injured person is in Court, they are trying to get something more. This is a topic which must be explored in voir dire.

The question, from the plaintiff's standpoint, is whether anyone has a problem with an individual seeking money for injuries because they were hurt on-the-job where their sole

remedy is to collect in Court because it is a FELA case and no workmen's compensation covers them.

This is also true in Jones Act cases or third party tort actions where claimants can recover the full measure of damages.

Additionally, jurors must be questioned as to whether they have a problem awarding the full measure of damages if the law permits it. The full measure of damages should be explained carefully to the jury so each juror can ascertain the elements included. Each element should be explained so the jury understands. Each juror, if possible, should be questioned as to his or her own personal beliefs on each and every element encompassed.

The same goes for religion. This should be crucial from both the plaintiff and defense sides. Years ago we tried a FELA case in Birmingham where a gentleman of a certain religious persuasion believed God did not want people to have money. In another case, a good friend, who is a defense lawyer in Jacksonville, had a friend who believed you must give away everything because the world is ending, so as a practical matter, "What difference does it make?"

Now do you see why a controlling Judge who totally disallows voir dire can wreak devastation to the plaintiff or the defendant by not allowing either side to explore juror beliefs?

The defense lawyer could sit down and look at 6 suits on the jury and be very pleased; never dreaming one of them was so far right, he has actually left and a liberal. Do you get my drift?