



## Anything But Child's Play

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Identify and de-select potential jurors who can't overcome emotional and intellectual obstacles in these most difficult of cases to try.

# Voir Dire in Cases with Child Plaintiffs



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Trial starts tomorrow. You are ready, but because you can never be too ready, you will continue to work. This is a serious case. The plaintiff is an injured child and you are representing a corporate defendant. As you

put the finishing touches on your opening statement again, you glance at the clock. Only so many minutes—spend them on opening or going over strategy and lines of questions for voir dire? As you balance these potential tasks, consider that you cannot change the facts of your case, but you can help determine the people who hear it: the deciders—the jurors. Thus, voir dire, especially in cases involving child plaintiffs, can become the most critical part of your trial and should not be overlooked.

With rare exception, an injured child is the most sympathetic plaintiff imaginable, particularly when the adverse party is a large corporation. For most potential jurors, that child represents a multitude of tragic considerations: once limitless possibilities shattered, a ruined childhood, an adult life that will be plagued by hardship. This is your plaintiff, however, not your case. Rather than ignore or downplay the sympathy factor, defense counsel should prepare to acknowledge—if not embrace—sympathy during voir dire. This serves many purposes. This will “humanize” the lawyer involved, and by association, the defendant corporation. But far more importantly, you have to create maximum sadness to root out those potential jurors who will respond overwhelmingly to it so that you can “de-select” them.

Attorneys commonly underestimate the importance of voir dire. Some even relegate it to the second chair. The judge is the judge. The facts are what they are. But, the deciders are wild cards, and you must approach this phase of your trial for what it is—the make it or break it tipping point moment in a case with a highly sympathetic plaintiff. Your goals should be multifaceted: find out who the potential jurors are and engage in jury *de*-selection, acknowledge the plaintiff’s tragedy, introduce the defendant in the most honest and realistic terms, and present defense arguments in the most palatable forms possible.

### What Is Voir Dire?

Voir dire is perhaps the most overlooked and least understood aspect of trial, and with good reason. It is given nary a mention in most law school curriculums. In fact, voir dire is mentioned in only one subpart out of the 86 Federal Rules of Civil Procedure. See FED. R. CIV. P. 47(a). To fully appreciate its particularly important role in child cases, it is first essential to understand the basics of the elusive concept of voir dire.

The purpose of voir dire is to empanel an impartial jury. *Davis v. State*, 461 So. 2d 67, 69–70 (Fla. 1984). Specifically, conducting voir dire serves a dual purpose: (1) to determine whether anyone on the venire can be challenged for cause and (2) to enable counsel to strategically exercise peremptory challenges. *State v. Anderson*, 513 S.E.2d 296, 308 (N.C. 1999). However, due to the wide variety of voir dire procedures across jurisdictions nationwide, the similarities end here. Thus, it is vital for the defense to understand and use local customs to its advantage.

For the most part, the voir dire process is subject to the discretion of the trial judge, who controls both the manner and scope of the examination of prospective jurors. See, e.g., *State v. Cornwell*, 715 N.E.2d 1144 (Ohio 1999); *Bryant v. State*, 803 S.W.2d 546 (Ark. 1991). The overall judicially recognized goal of voir dire is to discern members of the venire that may be biased—either latently or overtly—against your client. In most jurisdictions, if a prospective juror is inherently biased because of a fundamental characteristic, for instance due to a relationship with a party, an interest in the action, or a formed opinion about the case, you can target him or her with one of your generally unlimited challenges for cause. See, e.g., FLA. R. CIV. P. 1.43(c)(1). These members of the venire are relatively easy to weed out, as they will commonly volunteer the information necessary to buttress a challenge for cause. The more difficult

situation, and the focus of this article, is the decision-making process fundamental to using a *limited* number of peremptory challenges to strike potential jurors who, from your client’s perspective, may be better suited to spending the next few weeks elsewhere. Maximizing these opportunities requires a cleverly conceived strategy devised well before trial.

The fact that voir dire is commonly referred to as “jury selection” reflects a misunderstanding of the entire process. While one cannot underestimate the value of questioning, vetting, and getting to know your venire, it is imperative that you determine who you absolutely must strike, not who you must keep. In effect, voir dire should be properly termed a “jury *de*-selection” process, which requires finesse and precise execution. And when your time is limited, deselection must take priority over all other areas described below.

### Getting to Know You: Discovering Your Potential Jurors’ Personality Traits

Obviously, cases with child plaintiffs present unique challenges not present anywhere else. Therefore, defense counsel must be ever mindful of maximizing the opportunity in voir dire to ascertain exactly who the people are that will ultimately decide the outcome of the trial. This requires a mix of intuitiveness and ingenuity.

The main purpose of voir dire is to get rid of those potential jurors who would vote against your client, in the order of the intensity with which they harbor this sentiment. You want to find out which potential jurors are not going to be favorable to your cause, and you do that by isolating people with emotional and intellectual obstacles that prevent them from siding with your client. In any case, the ideal defense jurors are people who are happy and satisfied with their lot in life, reasonably accepting of their economic stature and of the opportunities for their children, and relatively content with their currently available employment opportunities. The plaintiff generally wants jurors who are the exact opposite: people with big chips on their shoulders. Plaintiff jurors feel disappointed with their own lives in general, taken advantage of or that life has dealt them bad cards, resentful of other people’s opportunities, or angry with the govern-

ment or the “establishment.” These are the potential jurors that, as the defense, you want to deselect.

In child plaintiff cases, parental responsibility is often contrasted with responsibility for a product or policy, so figuring out which individuals on the venire are individualistic and which are paternalistic will help you decide which potential jurors you

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need to deselect. Specifically, the defense wants to home in on potential jurors with paternalistic tendencies for elimination. A paternalistic juror believes that everyone’s lot in life should be equal, or that corporations ought to be benevolent, or that governments or big business ought to take care of us. They believe that no one should ever be injured without compensation. More importantly, they will likely downplay the importance of individual responsibility and are rarely compelled to face the consequences of their own actions or force others to face the consequences of theirs. Paternalistic jurors wish to teach the world a lesson and will invariably side with “the little guy.” These are jurors who are not going to initially favor a defendant’s position, and they rarely come around.

On the other hand, individualistic jurors feel part of mainstream society. They do not feel as though life has passed them by. They work hard, are regularly employed, and can be responsible for the employment of others. They appreciate the role that personal responsibility plays in injury causation and are more likely to see beyond the causal connections usually served up by plaintiffs’ lawyers and more willing to examine concepts of comparative fault than paternalists.

However, merely classifying members of the venire as either individualists or pater-

nalists is not enough. The defense should also try to determine whether potential jurors are leaders or followers. Leaders are opinionated, likely have strong personalities and able to sway others on a jury panel. Counsel should likewise endeavor to note those people who have large personalities but may not inspire enough respect, for various reasons, to induce others to follow them.

Followers are the opposite of leaders in various ways. They can have an opinion but lack the strength of character to stick with that opinion in the face of confrontation. Sometimes followers cannot make up their own minds or are easily swayed into following the direction of large, forceful personalities, for better or for worse.

With these classifications alone, deciding who you are going to deselect in any case is easier. Followers are rarely worth a strike from the defense. People who will not talk, or whose views will not encourage respect, are unworthy of a strike. Regardless of whether that follower is an individualist or paternalist, a follower will have little clout in the deliberation room. A follower is not going to influence anyone’s decision, but a follower could be molded into a defense juror throughout the trial by the defense team.

As for leaders, the defense wants to strike paternalistic leaders who clearly have the strength and conviction to sway followers. Other leaders who may emerge through voir dire as people who favor the plaintiff should also be deselected. If you are, as we often are, faced with choosing the lesser of evils, you may also consider preserving strikes by retaining leaders who will not invite enough respect to sway others or whose biases will diminish the extent to which a panel will take them seriously. Ultimately you want to identify dangerous people who will worry you and sway others if they remain on the jury. Find them, strike them and then try your case. And remember, while this sounds akin to science, it is more akin to art, and the brushstrokes and details matter very much.

Now that you know what categories of people you are looking for, how do you go about pinpointing those whom you should deselect? The key is getting the venire to open up to a complete stranger, in the middle of a very stressful situation, and

divulge extremely personal details. It is not an easy task, but it is the only way to find out the details of a venire’s background, experiences, and personalities that will enable you to accurately classify its members. To accomplish this monumental task, a good defense attorney will ask open-ended questions, make it comfortable for the venire members to admit bias and to candidly share those biases, and be both self-revealing and honest.

### Techniques for Paving Your Pathway to Success

How do you elicit the information necessary to make your decision to exercise one of your valuable peremptory strikes? The answer is simple: be authentic and professional and remember when you used to talk to people who weren’t lawyers. Specifically, you should ask open-ended questions and attempt to create a safe, comfortable environment that encourages the prospective jurors to be as candid as possible.

The courtroom is a foreign and nerve-racking place for most people. Prospective jurors are missing work and leaving their families to answer the oft-loathsome call of jury duty. Defense counsel thus must understand the mindset of the average venire and seek to demystify the jury service process through voir dire. After introducing yourself and your clients, attempt to build rapport with the panel by asking simple questions. Inherently, people want to answer questions, and they want to answer them correctly. By presenting straightforward, uncomplicated questions, prospective jurors will get accustomed to being responsive, and their fears and discomfort will be somewhat allayed.

### Ask Open-ended Questions

After building a baseline rapport, you should move quickly to open-ended, non-leading questions. Once again, this will encourage the venire to talk. When asked a question that requires more than a yes or no, people feel the need to share more information. Once they start speaking, let them talk. Listen to what they and watch their eyes and body language. If possible, watch the other potential jurors to see how they react to what a venire member says. Are they willing to take that person seriously as a potential leader?

Most people like to talk about themselves. They want to share information about their children or their job. This can be a potential gold mine. Accordingly, you want to take that information and dig as deeply as you can. Find out what they like most about their job and what they like least. Find out if he or she is happy in his or her position or looking for something new. Remember, individualistic people are generally happy with their lot in life and that includes being happy with their jobs. A paternalistic person is looking for someone to blame for their unhappiness in life, so listen for comments about bad supervisors, hours, or other job-related complaints.

Make a list of categories of questions that you will always ask during voir dire. That list should include questions about education, marital status, children and their ages and occupations, and prior service on a jury. Remember, the more information they share, the easier they will be to categorize. Design your follow-up questions to help pinpoint individualistic or paternalistic tendencies, as well as leadership qualities or the lack thereof.

### **Jurors Should Feel Comfortable Being Candid**

Naturally, people make judgments and have feelings about things every day. Feelings come to people without being summoned; they just happen. Everyone has them, and they unavoidably influence people's choices. It is precisely these feelings and judgments that must be elicited in voir dire, as they are necessary in determining whether prospective jurors can manage their preconceptions if they are ultimately selected for the panel.

You must acknowledge and be gracious to prospective jurors who are vocal about their own feelings or biases, especially when they are unfavorable to your position. Highest praise must be given to the person who will look you in the eye and tell you he or she does not like your client's position. This is what you need to hear and these are the people you need to ferret out. Positive reinforcement—no matter how painful and antithetical to your nature—is called for. Potential jurors should be congratulated for their candor. Make it clear that their willingness to expose bias and deal with it in front of complete strangers is a

very positive and mature step. Delivering an affirmation will encourage others on the panel to be equally forthcoming.

In the end, you are only looking for those individuals who have unreasonable biases. Some attorneys imagine unreasonably biased individuals are easy to spot, but they can hide just as easily, particularly if you don't dig with the right tools. Also, highlighting even a reasonable feeling or bias, a bias that does not rise to the level of a strike for cause, is important in another respect. If that person talks candidly about his or her opinions or biases, it puts the venire on notice, and if that person is ultimately retained, the other jurors will remember his or her biases and opinions when the group deliberates. Any position that juror takes will be tempered by his or her exposed biases and opinions, and the other jurors will be free to give that juror's positions the weight they deserve in light of these biases and opinions.

### **Be Revealing, Authentic and Honest with Jurors**

Like most people, prospective jurors find it difficult to open up to a complete stranger. As mentioned earlier, you must build rapport by establishing comfort and earning trust. Being self-revealing with the venire will help its members feel comfortable enough with you to be able to share the highly personal information that you need.

Prospective jurors relate to people who talk to them like people. You could ask, "Have you had a negative experience with X-Brand's products?" The question is very lawyerly and certain to get responses, but it's not your best approach. You could also say, "Does anybody here think X-Brand makes lousy widgets?" People will appreciate the latter question, and the people who think X-Brand's widgets are lousy will raise their hands and look forward to telling you why. They will also look at you as a person who appreciates a real-world perspective. The honest question thus elicits an honest response, and the venire will realize you are a straight talker, too. The most important impression you give in front of the venire is that you are being yourself. They are going to get to know you throughout the course of the trial anyway, so it is best to be honest and forthright out of the gate.

The jury deselection process is arguably the most important phase of the trial because when you are done, you will have all of your decision-makers in place. Some groups will never find against you, and some will never find for you. But if you make smart choices in your voir dire questioning, you can highlight those people who are going to make or break you and deselect accordingly.

### **Specific Keys to Success in Child Plaintiff Cases**

While the foregoing principles should permeate almost any defense voir dire, defending cases with child plaintiffs raises unique challenges that must be strategized. Because we know that if you want to predict juror behavior in any case, what is most crucial are prospective jurors' specific preconceptions related to the ultimate issues—something even more important than their general predispositions discussed above. As a preliminary matter you must obtain a fulsome understanding of the prospective jurors' daily and historical interactions with children generally, children the age of the plaintiff, and children with your product. Once you have fleshed out these generalities, talk with the venire about many unique topics that child plaintiff cases bring to bear, including the following: parental responsibility and alternative cause, technological feasibility, sympathy, fairness, and your client's positive work.

### **Tackle the Parental Responsibility Issue**

When a child is injured, jurors invariably want to blame someone or something. Children are innocent, so someone must be at fault. Obviously, you do not want your client to be the target of these sentiments. Therefore, in voir dire, while it is essential to acknowledge the tragedy in a plaintiff's situation, the defense must explore the venire's willingness to accept the assignment of responsibility to other parties, such as parents or relatives, who may be fairly said to have caused or contributed to the child's injuries. The defense must tread carefully here, but tread you must.

Many jurisdictions allow juries to consider the fault of non-parties to the action, which allows a jury to allocate responsibility to negligent parents or caregivers. See, e.g., *Lash v. Cutts*, 943 F.2d 147, 149–

50 (1st Cir. 1991) (applying Maine law) (holding that mother's failure to supervise child on a tricycle is negligence imputed to the child); ARIZ. REV. STAT. §12-2506(B) (2008) (allowing jury to consider fault of non-parties); *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986) (same). Also, virtually every jurisdiction recognizes misuse or alteration as a defense in

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product liability actions. See Restatement (Second) of Torts §402A cmt. g (1965) (“[t]he seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed.”). Specifically, courts have found that failure to follow instructions or heed warnings constitutes unforeseeable misuse that relieves a manufacturer of liability for ensuing injuries. See, e.g., *Higgins v. E.I. Du Pont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988); *Kay v. Cessna Aircraft Co.*, 548 F.2d 1370, 1373 (9th Cir. 1977). Thus, proof that a parent or caregiver interfered with the product's ability to do its job could potentially foreclose liability altogether. You must attempt to introduce these considerations in voir dire.

Some people are able to grasp and give proper consideration to this type of argument. Other people, due to their personal experiences or biases cannot ever “blame” a parent. Maybe it's because they themselves are parents. Maybe it is because they had a parent who came up short. Maybe they feel guilty over some injury they have inflicted and want to set that right. It doesn't matter why they are not going to hear your evidence, it only matters that they are not. These people have got to be identified and jettisoned.

There are many questions defense counsel can ask to probe the parental responsibility issue. For example, who do the

panel members feel are ultimately responsible for the safety of children in relation to “x” product? Is the answer the parent or the manufacturer? Do they read instruction and owner's manuals before allowing their children to use a product? If the panel member is not a parent, does he or she think parenting is important, easy or relevant? Why? Do venire members feel that children should be expected to read these manuals and instruction booklets? An added bonus of asking these questions is that in addition to finding those you need to strike, you will also educate the venire on these alternative cause themes and get them ready to receive your evidence that someone other than your client caused this injury.

#### **Educate the Jury about Technological Feasibility**

In many cases when a child has been hurt the plaintiff will have the burden, if not legally, then practically, of showing how the injury could have been prevented. Vague testimony about alternative feasible designs can and should be taken on and dispelled in voir dire. If the lawsuit involves an alleged alternative design that is pure fancy, ask the venire about it. See if you can get your venire members to tell the plaintiffs how silly their case is so that they avoid trying it. One example of this fanciful alternative design is favored in child automotive restraint cases: an integrated child restraint system. When parents do not properly restrain a child with a child seat, plaintiffs' counsel will often present an alternative design theory that had the vehicle only been equipped with a built-in child seat the parents would have used it and used it properly. During voir dire, you can ask whether the venire has ever heard of a car with an integrated child restraint system. Have panel members ever seen a car with a built-in? Have they ever put their child in one? Do their own cars have one? Do their spouses' cars have one? Do their neighbors' cars have one? Do they consider their own cars defective? If you find someone who has one, you *needed* to know this and you *needed* to talk to him or her. More likely, however, you will have conducted on-site survey research that destroys a plaintiff's alternative feasible design theory.

#### **Address the Sympathy Factor**

As mentioned earlier, sympathy directed toward children is hard to overcome. Venire members overtly displaying sympathy during voir dire rarely undergo a miraculous metamorphosis to impartiality over the course of trial. It is your job to root these folks out and get them off the jury.

As much as it may run counter to your intuition, insofar as the judge will allow it, try to expose the panel to the worst horrors of the case. Tread carefully, and use your instinct. Be professional but unapologetic. This is the case. When the time is right, do not hesitate to show hospital photos, autopsy photos, and day-in-the-life videos. Show the “life before” videos that depict the happy family, now destroyed. Describe verbally and show pictorially the human loss better than your opponent will. This will give you the opportunity to gauge the reactions of specific jurors to what they will inevitably encounter during the trial. Ask the venire members if they can handle it. Ask them if they can be fair. Ask them if it puts them in mind of anything in their lives. Ask them if they can hear your evidence through their tears. Ask the judge to strike them for cause.

Another task accomplished by this artful, businesslike, hard, but necessary questioning is that the people who eventually become your jury begin the process of desensitization to tragedy during voir dire. This is a necessary evil on the path to setting their sympathy aside and reaching a verdict based on the evidence, which the law demands.

#### **Your Client as an Individual, Equal in the Lawsuit**

Finally, you have to decide whether there are potential jurors who have bias or prejudice against your defendant or corporations generally who will never be able to see an innocent child on one side of the room and an innocent corporation on the other and just hear the evidence. This necessarily includes evaluation of both the negative and positive issues at play in the case regarding your client. Tell the venire members what they will hear that disfavors your client and ask them if they can still be fair. Don't pull punches. If they are going to hear it later, tell them now. Also, use these questions to point out your client's good works

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and ask about high-profile charity or safety programs spearheaded by your defendant. Counsel can also ask prospective jurors about positive aspects of your client's products, such as their popularity, durability or versatility. Thus, in the course of assessing the venire, you can also inculcate positive ideas about the challenged product.

### Conclusion

Attorneys are thinkers by nature. We like to wrangle over esoteric principles and are accustomed to debating intractable issues. You must resist your urge to do this during voir dire. Go back to first principles, the ones that predate your law degree, and maybe even predate your time in middle

school. All you need to know about a potential juror you learned very early. Will they listen? Will they sleep? Will they lead or follow? Will they bully or be bullied? Do they take responsibility or cast blame? Do they believe in the fundamental and preeminent duty and responsibility of parenthood? Do they understand technology takes time to develop? Do they understand the trade-offs associated with technological conveniences and advances? Will they reject fixes for problems that create more ills than they address? Will they hear your case through the glaze of sympathy that the plaintiffs will paint on your case?

A child plaintiff presents challenges not found in any other type of case. The

stakes will be high, and sympathy will be unavoidable. In these high-risk, if not "bet the company" cases, it is all the more crucial to carefully and strategically deselect those potential jurors who will never give your evidence a fair shake. The power of voir dire cannot be underestimated. The defense must embrace this unique opportunity to learn the predispositions in belief and of personality of venire members, build credibility, introduce the defendant, and introduce defense themes. Through its appropriate and strategic use, the seeds planted during voir dire will grow into a panel that gives your client the full and fair opportunity to have the case decided on the evidence—not on emotion. 