Jury Selection - Intuition is Key

by Jennifer E. DeThomasis

Introduction

There is often much debate about whether or not to serve jury notices. Some of us are and always will be supporters of the jury system as a matter of principle, while others have serious doubts as to whether the jury system actually works. Regardless of what your beliefs may be, when commencing an action, we must consider whether our case has jury appeal. We must consider whether or not to serve a jury notice.

Some plaintiffs' counsel serve jury notices to further their belief that their case has emotional appeal which will hopefully motivate a jury to address the wrong which has given rise to the claim. Fatalities are good examples of such cases. But, do other civil cases have emotional appeal as well? Take slip and fall cases for example. If a plaintiff trips over a hole in the ground, will the jury hold the defendant responsible for failing to cover the hole; or will the jury think the plaintiff should have been watching where he or she was walking; or will the jury care at all to pay any attention to the concepts of negligence and contributory negligence?

The U.S. movement towards tort reform orchestrated by corporate America and the insurance lobby, aided by the media circus that often follows large damage awards, has had a clear impact on the public's perception of plaintiffs and their cases. The Minnesota Trial Lawyer report *Tort Reform: Perception Versus Reality*[1], observes as follows:

> *"The most notable consequence of the tort-reform media campaign is the changed attitude of judges and jurors. The industry's campaign to portray the legal system as out-of-control and plaintiffs' lawyers as unscrupulous has impacted deliberations in the jury room. One study...concluded that 83% of jurors think that there are "far too many frivolous lawsuits"... Juries also demonstrated a reluctance to find fault in industry practices."*

The Canadian media experience is no different. High damage awards, despite being few and far between, often receive significant press coverage. The "fly in the water bottle" case[2], which was recently reported out of Windsor, is a good example of this. The decision awarding the plaintiff over $300,000 in damages for psychological trauma arising from his seeing flies in his Culligan water bottle, received significant media attention.

The media attention surrounding these types of cases can create a false sense of reality for the public, which may result in jurors imposing greater responsibility on plaintiffs for their own conduct or, put another way, finding against plaintiffs. Unlike criminal cases, the public often has little, if any, vested interest in civil cases. Jurors may feel burdened by having to take time away from their lives to sit in the courtroom, thus making jury trials that much more challenging. This, coupled with the fact that we, unlike our American counterparts, select our juries based on scant information about the individual jurors, makes the behaviour of jurors and the outcome of jury trials all the more unpredictable. At the end of the day, you will have six people who you know very little about, who will decide your client's case.

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Even with the unpredictability, and the challenges counsel face in presenting their cases to juries, the jury system can and does work to our clients' advantage. The first step in making juries work for our clients is taking the time to select a "good" jury, one that "will be fair, is favourably disposed to you, your client and your case, and will ultimately return a favourable verdict."[3] Of course, your opponent will be looking for the same jury. The best counsel can do is to review the information available

regarding the jury panel, do any investigation that makes sense for the particular file, and most importantly, rely on and trust their intuition.

Jury Selection Process

The Jury Panel

Section 108(4) of the *Courts of Justice Act*[4] mandates that civil juries shall consist of six persons selected in accordance with the *Juries Act*.[5] Generally, the Sheriff's office is responsible for putting together a panel of prospective jurors based on provincial voters' lists, the local directory, the telephone book, etc. The panel must consist of Canadian citizens over 18 years of age who are resident in Ontario. Certain occupational groups are not eligible to serve as jurors, such as lawyers, physicians, and law enforcement personnel.[6]

A list of the names on the panel is available in advance of the trial and should be obtained at the earliest opportunity. It is good practice to call the trial coordinators' office a month or so before a trial to determine when the list will be available. This list contains the juror's names, addresses and occupations or employer. You will not be given any further information regarding the prospective jurors.

Upon receiving the list, you will want to obtain as much information as you can about each prospective juror. However, you *cannot* contact any of the prospective jurors prior to the trial, nor can you communicate with them outside of court. You should review the list in detail to eliminate any obvious unwanted prospects, such as insurance adjusters. You will also want your client and witnesses to review the list. You may also want to look at the city directory to determine where the prospective jurors live, which may provide some limited insight into their social and economic background.

Selecting the Jury

Your first opportunity to actually observe the panel is the first day of trial. The prospective jurors will be assembled in the courtroom. When your case is called, the presiding judge will usually make a few introductory remarks to the panel, which may include a brief synopsis of what your case is about based on the pleadings. In my experience, the presiding judge gives counsel an opportunity to introduce themselves to the panel, introduce their clients and list the witnesses to be called. The judge will then raise any particular concerns he or she has about selection of the jurors for the case. The judge may ask whether any of the jurors has any involvement in the case or with a party or witness (e.g. is related to any of the witnesses) and, in the event of such connection, will excuse such prospective jurors from the panel for the particular case.

The presiding judge may also excuse some of the prospective jurors if service on the jury would be a potential hardship for the juror or raise logistical problems at trial.[7] For example, if the prospective juror does not adequately speak and understand English, the juror will be excused. The presiding Judge may deal with the issue of personal hardship before any jurors are called, or may wait for the juror's number to be called and ask that the juror then make a claim of hardship. The prospective juror will then be questioned on his or her claim of hardship or may be asked to sit down and will be questioned only if and when the jury pool runs dry.

Once the presiding judge is ready to begin the selection of the jury, the court clerk will start to draw names out of a box or drum. In my experience, six names are drawn and each of the six jurors takes a seat at the front of the room. The judge will then indicate that counsel should make their wishes known with respect to each juror. Counsel will either say "challenge" or "content" to indicate their preference, or say the number of the juror counsel would like to excuse. Plaintiff's counsel typically makes the first challenge. When dealing with the challenges, I like to have a sheet with six boxes and the jury selection list in front of me to keep track of what jurors are called and excused and to cross-reference the jurors called to the list of occupations and addresses, in order to decide whether to retain or excuse them.

When determining when to exercise your challenges, it is important to observe the jurors as they approach the front of the courtroom. Watch how they respond to you and look for their general demeanor. Take a good look at all of the jurors. Do they have any disabilities? Are they scowling at you? You must trust your intuition and use common sense. One of my favorite trial stories involves a wheelchair-bound juror whose disability went unnoticed by both the plaintiff and defence counsel until after he was selected and the judge raised the issue of accommodating his special needs. We must pay close attention to each prospective juror. Your best source of information is what you can observe on the potential juror's face and his or her body language.

Challenge Rules

Our challenge rules differ significantly from the jury selection procedure that is generally employed in the United States. In Canada, there are two kinds of challenges that may be exercised – peremptory challenges and challenges for cause.

Peremptory Challenges

Under s. 33 of the *Juries Act*, each side may challenge peremptorily any four of the jurors drawn. No

explanation is required. If there is more than one defendant or plaintiff, each plaintiff or defendant does not have four challenges. The challenges are limited to four in total for all plaintiffs and four in total for all defendants.

If counsel uses a peremptory challenge, the juror will be excused from serving on the jury. If counsel is content with the juror, opposing counsel will then have an opportunity to challenge the juror. If neither counsel enters a challenge, that person will be sworn in as a juror. In some jurisdictions each juror is dealt with separately. In others, the jurors are dealt with as a group, for example six at a time. The jurors are not sworn in, and any juror may be challenged, until counsel run out of challenges or are content with the six-member panel.

When exercising challenges, pay close attention to the remaining prospective jurors. You do not want to run out of challenges when you need one the most. It is always advantageous to save your last peremptory challenge until you absolutely must use it.

Challenges for Cause

Challenges for cause are granted whenever a juror meets a disqualification basis, most commonly that the juror cannot be fair or impartial. The number of challenges for cause is unlimited. In reality, challenges for cause are very rarely used in civil cases. The procedure for challenges for cause in civil cases is not governed by any statutory rules. In fact, there exists little guidance with respect to these challenges other than to say that they are similar to that in criminal cases.[8] In the *Oatley McLeish Guide to Personal Injury Practice in Motor Vehicle Cases*, Robert Bell suggests seeking some guidance from the trial judge regarding the use of challenges for cause if dealing with particularly large matters or where background checks have been done or jury consultants hired.[9]

Generally, challenging counsel cannot go on a fishing expedition; counsel must show a realistic potential for partiality. Challenging counsel cannot question all prospective jurors about their general opinions and challenges for cause cannot be based on general grounds such as race or opinions.[10] Counsel must have specific grounds for the challenge – in other words, specific grounds for suspecting partiality. Counsel is required to advise the trial judge of the grounds for the challenge and, if the trial judge is not satisfied that there is some basis for the challenge, the juror will be sworn. Questioning of the prospective juror is only permitted if the trial judge is satisfied that there is a "realistic possibility that the juror is partial".[11]

If the trial judge is satisfied that there is a basis for the challenge, two "triers" will decide the challenge.[12] These triers are the two jurors who were last sworn or if no jurors have been sworn, two persons that the judge appoints for this purpose. Both counsel are entitled to lead evidence and address the triers. The prospective juror may be sworn (as a witness, not a juror) and examined. The triers then decide whether the ground of challenge has been established. If it has, the juror is excused. If not, he is sworn as a juror.

Juror Bias

There are many theories of jury selection in terms of dealing with juror bias. Although none of these theories can replace counsel's own intuition, they can be used to supplement counsel's intuition or assist in making the decision as to who to excuse. Some of the theories are as follows[13]:

Similarity to Parties

This theory involves selecting jurors who have characteristics and backgrounds that are similar to your witnesses and client and dissimilar to the defence's witnesses and client. It presumes that jurors will be more favourable to witnesses with backgrounds similar to their own. Psychological studies have shown that jurors are more likely to believe witnesses that they like or with whom they have something in common.[14] Consider the characteristics of your client and your opponent and the witnesses for both sides. See if any of these help you eliminate any potential jurors who appear to be more similar to the witnesses who will testify for the other side.

It is, however, important to note that this theory has limits, particularly when the plaintiff and defence sides are very similar. It works best when the characteristics of the plaintiff and defence sides differ significantly, such as where a blue-collar plaintiff is up against a multi-national corporation.

Work and Class

This theory presumes that jurors' attitudes and values are a product of their status and class, and that the jurors will act consistent with those attitudes and values. Defence counsel often looks for middle-aged or retired jurors. In contrast, plaintiff's counsel tend to prefer jurors whose backgrounds suggest greater subjectivity and appear more amenable to emotional appeals, such as single or young persons, particularly young females.

Body Language

Observing the prospective juror's body language is particularly important since we know very little about each potential juror. This theory requires an evaluation of the juror's

appearance and behaviour. How is the juror dressed? Does the juror's body language suggest any predispositions? Can one glean the juror's attitude toward counsel. For example, if the juror does not look plaintiff's counsel in the eye, should that juror be deciding your case?

Jury Consultants and Focus Groups

Jury Consultants

American lawyers often use jury consultants to assist in developing juror profiles to aid their decision-making.[15] This process involves creating a list of attributes that one would want in a "perfect juror", as well as attributes to avoid. To do this, one must consider both the facts and circumstances of the case and the characteristics of the client and principal witnesses. Since no single juror will possess all of the desired characteristics, the profiles typically involve some degree of ranking of the characteristics. Jury consultants often prepare extensive "scoring" systems that assign positive and negative point values to each listed characteristic.

Focus Groups

Some counsel employ focus groups to assist in determining how different types of jurors will respond to their case. Counsel can run informal focus groups in the community with an outline of the issues and gauge how different occupations and age groups respond. Counsel can also run a mock trial with members of the community serving as mock jurors, and interview them to determine what did or did not work. This will allow counsel an opportunity to see whether there may be a difference in perspective depending on one's occupation and age.

However, even the best jury profile or focus group will only tell you what a specific individual is more likely to think. It will not tell you what an actual juror in an actual trial setting will do. A profile can be a useful template, but it is not a substitute for counsel's own judgment and intuition. Since we have very little data to rely on in the Canadian context, counsel must depend heavily on their instincts and use their peremptory challenges wisely.

Conclusion

While there are certainly some cases or clients that do not lend themselves to a jury format (and others that are "made" for juries), the reality is that we, as plaintiffs' counsel, do not always get to decide what cases will be tried by a jury. In many instances, the defence will serve a jury notice.

Whether or not we want a jury in a particular case, if we are stuck with one the first step in achieving a just result for our client is preparing ourselves for the jury selection process. This process should not be undertaken lightly or entered into without the proper preparation and contemplation. This is our first opportunity to observe the jury panel and each prospective juror's first opportunity to observe counsel. We must take the time to think about the jury we want for our case and pay close attention to each prospective juror. And in the last analysis, there is no substitute for our intuition. We know our cases and our clients. By paying close attention to each prospective juror, taking note of the various theories regarding jury selection, relying on our instincts and hopefully just a bit of luck, we can effectively select juries who, through our best practices in the presentation of the evidence and in persuasion, will be disposed to render a just result for our clients.

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Notes

[1] Tassoni, Brooke, Daniel O'Fallon & Bruce Finzen, *Tort Reform: Perception Versus Reality,* (Winter 2003) Minnesota Trial Lawyer, online: http://www.rkmc.com/Tort_Reform_Perception_Versus_Reality.htm (last modified: 6 April 2006).

[2] *Mustapha* v. *Culligan of Canada Ltd.*, [2005] O.J. No. 1469 (S.C.J.)

[3] T.A, Mauet, D.G. Casswell & G.P. MacDonald, *Fundamentals of Trial Techniques,* 2d Canadian ed. (New York: Aspen Publishers, 1995).

[4] R.S.O. 1990, c.C.43.

[5] R.S.O. 1990, c.J.3.

[6] *Ibid., s.* 3.

[7] *Supra* note 4, s. 108(7).

[8] *Supra* note 3.

[9] R.G. Oatley & J.A. McLeish, eds., *The Oatley-McLeish Guide to Personal Injury Practice in Motor Vehicle Cases* (Aurora: Canada Law Book Inc., 2002), chapter 51.

[10] *Supra* note 3.

[11] S. Block & C. Tape, eds., *Modern Trial Advocacy: Canada,* 2d ed. (Indiana: National Institute for Trial Advocacy, 2000).

[12] *Supra* note 3.

[13] *Supra* note 3.

[14] *Supra* note 11.

[15] *Ibid.*