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## **“JURY SELECTION: YOUR LAST LINE OF DEFENSE”**

**VOIR DIRE** (vwahr deer) *n.* [Law French “to speak the truth”]

“A preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury. Loosely, the term refers to the jury-selection phase of a trial . . . .”

VOIR DIRE, Black's Law Dictionary (10th ed. 2014)

### **I. Case Study – Real \$34,000,000 Brain Injury Trial**

#### **A. FACTS**

This jury trial in Marin County, California arose out of a 3-vehicle collision that occurred in November 2011. Plaintiff, a 69-year-old software programmer, was driving a 1998 Chevrolet Tahoe behind a 2000 Toyota Tundra pickup truck, and Defendant was traveling behind Plaintiff. Defendant was driving a 2003 Ford F250 pickup truck owned by his employer, Construction Company.

Plaintiff stopped his Tahoe two feet behind the Tundra. Defendant observed Plaintiff’s Tahoe slowing in front of him and applied the brakes in an attempt to avoid a collision. However, Defendant was unable to avoid a collision with Plaintiff’s Tahoe. The collision pushed Plaintiff’s Tahoe into the Tundra. At the scene, Plaintiff complained of pain to his head and neck.

Plaintiff and his wife filed a Complaint for personal injury and loss of consortium. Notably, Plaintiffs sought millions of dollars in lost income from a lost mobile phone app contract for TV evangelist Joel Osteen. Plaintiff sought over \$34,000,000 for economic and non-economic damages related to his traumatic brain injuries. Defendants accepted responsibility for the accident, but disputed the cause, extent, and severity of all injuries and damages claimed by both Plaintiffs.

#### **B. PLAINTIFFS’ ALLEGATIONS**

## 1. Personal Injuries

Plaintiff attributed the following injuries to the accident: traumatic brain injury, thoracic outlet syndrome, cervical spine injury, shoulder injuries, traumatic cataracts/double vision, and sexual dysfunction. He also attributed multiple surgical procedures to the accident, including: right cataract surgery, left cataract surgery, right shoulder arthroplasty, and left shoulder arthroscopy. Plaintiff alleged ongoing complaints with all of the injuries he attributed to the accident.

Plaintiff also alleged his traumatic brain injury had a detrimental effect on his software programming business. He contended the TBI caused depression, memory loss, and a change in personality. He also claimed it affected his ability to think, work, and ultimately invent/program software.

Plaintiff complained of a headache at the scene of the accident. Three days following the accident, he presented to the ER complaining of nausea, dizziness, headache, neck, and back pain. He was diagnosed with post-concussion syndrome and a CT scan of his head was taken. The CT scan was normal.

Plaintiff followed up with his primary care physician, Dr. McAllister. Dr. McAllister diagnosed him with a concussion and cervical sprain, and ordered a second CT scan of his head to rule out delayed subdural. Plaintiff then presented to neurologist Dr. Newkirk, at the suggestion of Dr. McAllister. Dr. Newkirk diagnosed Plaintiff with a closed head injury with traumatic brain syndrome (concussion with post-concussion syndrome), cervical and thoracic strain, and thoracic outlet syndrome. Dr. Newkirk noted Plaintiff was “totally disabled from his work at this time, putting massive contracts at grave risk.” Dr. Newkirk prescribed Namenda to treat Plaintiff’s headaches and “cognitive clouding.” He also referred Plaintiff for additional testing, including a MRI, PET scan, and CT scan. Dr. Newkirk also referred Plaintiff to physical therapy for his thoracic outlet syndrome. Dr. Newkirk opined Plaintiff’s traumatic brain injury would require future medical treatment, including continued use of Namenda for the rest of his life, and unspecified “interventional drugs” and “therapies.”

## 2. Lost Wages

Plaintiff was a successful inventor/software developer. He was the founder and CEO of Electronic Media, a small software programming company that was started in 2006. In 2010, Electronic Media contracted with ABC Advertising, a mobile marketing company, to develop software applications to market to ABC clients. One such client was TV evangelist and megachurch Joel Osteen Ministries (“Osteen”). Plaintiff alleged his traumatic brain injury interfered with

his ability to invent and develop software, and prevented him from completing a mobile phone application for Osteen. Plaintiff further alleged the purported Osteen deal, which allegedly included revenue sharing, would have generated millions of dollars in revenue for Electronic Media every year.

Two economic experts testified Plaintiff lost over \$16,000,000 as a result of this accident. Plaintiffs' retained economist opined Plaintiff's loss of income/earning capacity was \$12 million. This figure was derived from a valuation of the Electronic Media common stock based on a post-accident investment in his company. Plaintiffs' retained forensic accountant estimated Plaintiff's lost profits to be \$3.9 million.

## B. DEFENSE ARGUMENTS

Defendants stipulated to liability but disputed causation and all damages. Defendants' experts opined Plaintiff may have had a concussion but did not have a brain injury. Their economist also testified Plaintiff had no economic loss from this accident.

## C. MARIN COUNTY TRIAL

Plaintiffs asked the jury to award over \$34,000,000. Specifically, Plaintiffs requested \$65,000.00 in past medical specials, \$12.9 million in "past lost earning capacity," and \$3.9 million in "present lost earning capacity." With regard to non-economic damages, Plaintiff equated his pain and suffering to his loss of creativity, and suggested his pain and suffering award equal his loss of earning capacity award. Accordingly, Plaintiffs asked the jury to award up to \$16.8 million in pain and suffering. Plaintiffs also asked the jury to award \$1 million in loss of consortium.

Defendants asked the jury to return a total verdict of \$59,000.

## II. Jury Selection

### A. WHO DO YOU WANT ON YOUR JURY?

- Demographic?
  - Gender
  - Age
  - Ethnicity
  - Education
  - Socioeconomic background

- Relationships
- Faith
- Experience with the law?
- Internet Footprint?
- Attitude and Body Language?
- Leadership (Or Lack Thereof)?

B. WHAT QUESTIONS WOULD YOU ASK A POTENTIAL JUROR?

- Substance
- Structure

C. WHO IS PLAINTIFF'S AND DEFENDANT'S IDEAL JUROR?

- Firefighter
- Housewife
- Hairdresser
- College Student
- Engineer
- Retired
- Insurance Broker
- Fast Food Employee
- Teacher
- Retail Store Manager
- Military
- Small Business Owner

D. REAL TRIAL RESULTS

- CEO/Executive
- Secretary
- Babysitter
- Dog walker
- Artist
- Police Officer
- Politician
- Sanitation/Garbage man
- County/City Employee
- Utility Company Employee
- Lawyer

### **III. What Can You Do As A Claims Professional?**

- Ask For Your Attorney's Outline
- Suggest Questions
- Discuss Your Ideal Juror
- Discuss "Bad" Jurors
- Discuss Money