

## OAJ Medical Malpractice Section Article October 2013

### THE “WORLD VIEW” OF YOUR JURY

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It is widely reported that of the medical malpractice cases that go to trial in Ohio, about one in ten results in a verdict for the plaintiff – not good odds. The explanations are plentiful, including:

1. Insurance companies settle the good cases;
2. Tort reform;
3. Bias in favor of doctors and hospitals;
4. Bias against persons who bring lawsuits; and
5. Complexity of the case favors the defendant.

So, how does one reverse this trend?

The answer is to have a new focus on the jury selection process. This will not obviate the need for good case selection and preparation, but it may allow a plaintiff verdict to happen when it would not otherwise, despite all the best efforts of counsel.

In order to be successful in this process, one must understand that the “world view” of potential jurors is not easily changed. The world view of an individual is how the world is looked at to make sense out of the circumstances that are encountered in life. The lens through which jurors view a case will inevitably impact the result. Additionally, world views are not formed in a day and will not be changed in a day or during a week of trial by the most skilled trial lawyer.

We have most recently been treated to a perfect example of this in the Trayvon Martin/George Zimmerman trial. Was this a case of racial profiling or self-defense? In part, it would depend upon whom you asked and what that person’s world view is on these subjects. A black man who has been stopped numerous times for “traffic warnings” may very well have a different perspective than a white suburbanite who has never experienced a similar situation.

So, what does one do in a medical malpractice case to discover the world view of the potential jurors to determine if they really can be fair and impartial? And, after discovering bias, how does one have the potential juror dismissed through a challenge for cause?

In order to uncover the world view of an individual juror regarding how that juror may judge a medical malpractice case, the juror must feel comfortable about sharing an opinion and must believe he or she will not be punished by virtue of the tone or nature of the question posed.

Also, the juror must be individually addressed so the juror is not allowed to hide behind a response of the jury pool as a whole. Questions must be direct enough to focus on specific issues in the case, as well as general feelings on the subject of medical malpractice cases.

Once a bias is revealed, the hard part begins: convincing the judge that the juror should be challenged for cause. The challenge for cause is based upon the client's right to a fair and impartial jury, and when the individual juror is leaning towards one side, this is not allowed.

R.C. 2313.42(J), allows a challenge for "good cause" if a juror discloses that he or she cannot be fair and impartial or will not follow the law as instructed by the court. R.C. 2313.42(J) is a challenge for favor which allows the exercise of discretion by the court. *Hall v. Banc One Mgmt. Corp.*, 114 Ohio St.3d 484, 490 (2007).

In addition, under R.C. 2313.43, any juror may be challenged on suspicion of prejudice against or partiality for either party. The validity of such a challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased. R.C. 2313.43. Challenges for cause under R.C. 2313.43 and R.C. 2313.42(J) are considered challenges for favor and are reviewed on an abuse-of-discretion standard. *Tisdale v. Toledo Surgical Specialists, Inc.*, 6th Dist. No. L-07-1300, 2008-Ohio-6539, at ¶48. The following cases are instrumental in defining "fair and impartial":

When a juror is inconsistent in voir dire responses, which fluctuate from believing she could be fair and impartial to a sense of conflict of interest and being intimidated because a possible witness was her boss, it was an abuse of discretion not to excuse her for cause. The responses fluctuated from, "I believe I can be, you know, fair and impartial" to "I just kind of sense, you know, a conflict of interest here" and "I guess it intimidates me a little bit that, you know, he is my boss and that." *Tisdale*, 2008-Ohio- 6539, at ¶50.

- When a juror volunteered a statement that he might be prejudiced, it was an indication of some doubt in the juror's own mind as to his impartiality.
- The juror did not expressly state that he was not fair and impartial, nor did he say that he would not follow the law, and he ended up being the foreman. The doubt as to the juror's impartiality was not cured by the court addressing the juror as follows:

Court: "You are a most intelligent individual and I want to ask you this: Couldn't you set aside whatever you have observed ... in coming to a fair and impartial verdict?"

Juror: “I think I could arise above it.”

*Moran v. City of Cleveland* (Mar. 27, 1975), 8th Dist. No. 33894,

1975 Ohio App. LEXIS 6223, at \*5-6.

- “An equivocal answer followed by an unequivocal answer does not equal a fair and impartial juror.” *Klem v. Consol. Rail Corp.*, 6th Dist. No. L-02- 1402, 2010-Ohio-3330, at ¶154. “Equivocal means ‘[h]aving a double or several meanings.’” *Id.*, 2010-Ohio-3330, at ¶154, citing *Black’s Law Dictionary* (6th Ed. 1990) 542. .
- The trial court did not abuse its discretion when it did not excuse a juror who stated in response to the question of whether he could put his personal feelings and experiences aside and judge the case fairly and impartially, “I would say I could try, I can’t tell you that I completely can. I can’t say I can’t and I can’t say I can; but I would try.” *Zachariah v. Rockwell International*, 127 Ohio App.3d 298, 301 (1998).

In this ever changing world in which we live, jury selection is of paramount importance in obtaining a just verdict. Asking carefully crafted and penetrating questions to expose the world view of the potential jurors on medical malpractice cases is crucial.

If this part of the case is not devoted the attention it deserves, the rest may all be for naught.