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**Feature Story**

## 'Invisible Injury' Lawyers Share Voir Dire Strategies

*By Michael M. Bowden*

Ask any trial lawyer and they'll agree that picking a jury can be the most important part of trial.

In this issue, Lawyers Weekly USA continues its series on jury selection, this time with a focus on "invisible injury" litigation.

Such lawsuits - which involve injuries that are difficult to support with objective medical evidence - have gained strength in recent years. All of these conditions are alleged to cause physical rather than emotional injuries, which distinguishes them from purely emotional problems such as post-traumatic stress disorder.

Although such cases were once considered an easy defense win, the tide has been turning in plaintiffs' favor. (See "Handling The Invisible Injury," Lawyers Weekly USA, Aug. 7, 2000; Search words for LWUSA archives: Fasi and Bowden.)

Among the most common invisible injuries are closed-head brain trauma, fibromyalgia, Chronic Fatigue Syndrome (CFS), Temporomandibular Joint Dysfunction (TMJ) injury, Thoracic Outlet Syndrome, and Reflex Sympathetic Dystrophy (RSD).

Post-traumatic stress syndrome is a slightly different animal, and some lawyers prefer not to mix the two concepts.

"That's a psychic stress injury; it's different than a physical-but-undetected injury," explained Chris Searcy, a plaintiffs' lawyer in Palm Beach, Fla.

However, other lawyers point out that there is a considerable overlap, in that

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PTS can be either a symptom or a result of an otherwise unseen ailment. These attorneys felt the same voir dire rules apply for post-traumatic stress syndrome as for other invisible injuries.

An area of more recent concern for lawyers who try invisible injury cases is the influence of the Sept. 11 terrorist attacks on the way jurors think.

"I think 9/11 has drastically changed the way people look at lawsuits," said Howard Spiva, a plaintiffs' attorney in Savannah, Ga. "In the context of voir dire, the biggest lesson I've learned is: Don't mention it! Jurors have told us in focus groups and interviews that the first lawyer who brings up 9/11 loses. They're suspicious that the lawyer is 'using' that tragedy as part of their legal strategy in a deliberate play on their sympathies."

The better approach, Spiva says, is to let the jurors bring up the attacks themselves if they want to, by using open-ended questions like, "Has anything happened to you within the last year or so that has caused you to feel different about victims of trauma?"

Plaintiffs' lawyer Clay Davis, also of Savannah, Ga., added that his personal experience and discussions with other PI lawyers have convinced him that 9/11's general effect is that small and borderline invisible injury cases are now most likely to be lost.

"Juries seem to be *more* sympathetic to catastrophically injured people, and *less* sympathetic to invisible cases - like fibromyalgia or even certain closed-head traumas, where they can't see and deal with the injury," Davis said.

"Most people now have a perspective on tragic death that they did not have before Sept. 11," said Houston plaintiffs' attorney Howard Nations. "I think any of us would look with more skepticism upon cases involving injuries that are not nearly as significant as those suffered in the attack. The bar has absolutely been raised on frivolous lawsuits."

As a result, Nations added, it's essential to distinguish the invisible injury from the frivolous injury during voir dire.

"If you don't, your case becomes a very easy shot for the defendant," he said.

If you succeed in convincing the jury that your claim is serious, however, your cases can still yield verdicts as big or bigger than ever.

"Everyone in America now knows what post-traumatic stress syndrome is," Spiva said.

But some lawyers, like Denver defense attorney Matthew Biscan, hesitate to put too much weight on any single event, however traumatic.

"The breadth of human experience goes into all jury decisions, and nobody in



the country doesn't know about Sept. 11," he said. "I have no doubt that the losses and heroism that surrounded that event weigh heavily on peoples' minds when they consider the complaints of anyone who claims to have suffered an injury. But I've not seen any decisions in which I could identify it as the pivotal deciding factor."

As in the first article in this series (See "Employment Lawyers Share Voir Dire Strategies," Lawyers Weekly USA, March 18, 2002; Search words for LWUSA archives: Sylvia AND Barrister.

This week, Lawyers Weekly USA talks to lawyers on both sides of invisible injury cases about their favorite voir dire questions.

### **Howard Spiva**

Plaintiffs' Attorney, Savannah, Ga.

*Can you think of anything you can't see, but you still know exists?*

Somebody will say the wind, someone else might say a headache; someone inevitably mentions God. I let *them* come up with ideas, and then we talk about them a little. You have to develop a rapport with the potential jurors; too many lawyers just stand there and read off a list of questions, barely even looking at the people they're asking. I try to look at each juror as an individual, in the eye; and I try to get them talking so I can get to know them better.

This approach is especially vital in an invisible injury case - because if the jurors don't think of both my client and I as human beings like them, then we have no chance of winning the case. My solution is to come right out and share that dilemma. I tell them: "Look, I have a problem. This injury is invisible, but I need to show you that it exists."

That humanizes me.

When I start talking to jurors about invisible injury cases, I like to bring up the Hubble Telescope. Since it went into orbit, we've discovered countless galaxies that we never even knew existed. So I ask: Did those galaxies exist before we could see them? Of course they did. Then, to bring it a little closer to home, I could say: Twenty-five years ago, we didn't have MRI tests to detect herniated discs. Does that mean people didn't have herniated discs 25 years ago? Sure they did, but we couldn't see it without surgery. The idea I'm conveying is, it's not my client's injury that's the problem; it's that technology has not yet figured out how to detect it.

With an older or less sophisticated jury, you can also do that by talking about things like: "Have you ever dropped a watch, and it appeared undamaged, but it never kept good time again?" With a younger or more sophisticated jury, talk about the difference between hardware problems - your monitor falls and the screen cracks - and software problems, where all the parts of the

computer seem fine, but just the same nothing is running quite right.

Once I've got the jurors tossing ideas around, I can begin to talk about my case: "Well, let me ask you this. Suppose that someone had an injury to their brain that we can only detect by its results?" By this time, someone's likely to say, "Well, I had a cousin who was in a wreck in high school, and after that his grades slipped and he stopped playing tuba in the high school marching band, and now he's bagging groceries for a living." I let *them* tell those stories. And I note them down and give them back to the jury in opening and closing. Likewise, if a similar example comes up during trial - say, during an expert's testimony, I'll turn and make eye contact with that juror, and they'll immediately make the connection.

## **Joseph Fasi II**

Defense Attorney, Milwaukee

*Do any of you know someone who's been diagnosed as having a somatic injury? Do you understand what a somatic injury is?*

Ideally, I like a juror with some experience in medical issues, who'd be able to read the records, and understand what's in them - and more importantly in an invisible injury case, what's *not* in them. That doesn't necessarily take an RN - it could be a parent who's once had a child fall down and had to get an x-ray.

In many of these cases, you'll find that the plaintiff has had prior injuries, but they want to state that they were just fine until this injury occurred. So what happens is they get another incident of a bump on the head, or they slip on a piece of ice, and suddenly their entire life has been demolished, all because of this one injury. And nobody can find any objective sign of it other than the lawsuit.

So I'm looking for skeptics, people who'll look at a claim of, say, fibromyalgia, and say, "What are they trying to pull on us?" Somebody who will understand when our experts talk about *psychogenic* or *somatic* injuries - which is code for, "It's all in their head."

In my experience, a lot of jurors are incredibly skeptical of invisible injuries. I'm on the Board of Directors of the DRI [Defense Research Institute], so I have the opportunity to speak to attorneys from all over the country. Here in Wisconsin, and anyplace in the country with a lot of rural areas, you get a lot of farmers who get bumps and bruises all the time, who actually lose fingers and things like that. And they just shrug it off and go right back to work. At worst, they'll say, "I spent a few days in bed and it got better."

Those are the kinds of jurors I want. They're going to look at someone who says they're permanently disabled because they got tapped with a bumper at three miles per hour - and I've got exactly such a case pending right now - they're going to look at that plaintiff and say, "Get a life and get real." They're going to understand that this plaintiff is simply seeking compensation - or

preferably a lifetime annuity - at the expense of someone who had the misfortune of having a minor accident with them.

I can't say it directly, or I risk losing them. By asking the jurors to explain their experiences and their understanding of somatic injuries, I get this issue on the table for discussion. Because my experience is, a judge will cut off a lawyer during voir dire, but the same judge will not cut off a juror who's talking.

All I need is one juror who'll communicate all of that for me. And to tell the truth, I don't really care if that juror remains on the panel. I just want the rest of the jurors to begin to get the picture. I want to plant that seed of doubt.

### **Chris Searcy**

Plaintiffs' Attorney, Palm Beach, Fla.

*How many of you, as you're sitting here, are in pain?*

When I'm a ways into questioning a panel of potential jurors, I like to toss this one out. If nobody responds, I move right on, but usually one or two will raise their hand.

So I'll say, "All right, Mr. Jones and Mrs. Smith, I'm going to want to ask you a few questions about that. But first, I'd like to ask the rest of you something. We've all been sitting here at close quarters for a while, some of you right next to Mr. Jones and Mrs. Smith. How many of you could tell they were in pain?" Nobody ever raises their hand.

Then I say, "All right now, Mr. Jones, tell me about your pain." He'll say something like, "Well, I've got this bad back, and it always hurts me, but sometimes worse than others. These hard benches are aggravating it a little." Then of course, you want to ask whether they'll be able to tolerate the pain and sit on the jury. Tell him about the periodic breaks, that the judge will allow him to stand up and walk around if he needs to. Then I ask Mrs. Smith the same questions. She might say, "I've got this bad headache problem. I've got one right now; sometimes they get a lot worse."

Then I say to the panel of potential jurors, "Okay, we've now heard Mr. Jones and Mrs. Smith tell us about their complaints and problems, and now I'd like to ask all of you a question. You've been sitting here for 30 minutes, and you haven't been able to observe anything about these people that would lead you to believe they're in pain. And yet you've now heard them describe the pain they're in. How many of you disbelieve them? Let me see your hands. How many of you, because you can't see it, think it's not there? Let me see your hands."

Well, of course, if somebody raises their hand, that's a juror you want to get rid of! But usually they won't. What's happened here is, you've given some firsthand examples that the jurors can probably relate to something in their

own experience. Which puts everybody at one with the concept that someone can be in significant pain without showing it to the outside world.

The general principle that underlies this example is that, in voir dire, the driving force should not be to find good jurors, but to try and identify the bad apples and get rid of them. Because one bad apple can definitely spoil the whole barrel when it comes to a jury trial.

### **Matthew Biscan**

Defense Attorney, Denver

*Has anybody here had a headache? Do you ever get confused about things? Do you lose your keys?*

A lot of times, some of the symptoms you'll get in a closed-head injury case will be headaches, confusion, memory problems. So you try to bring out with the jurors the fact that the kinds of things that get complained about in these invisible-injury cases are the kinds of things most people have to deal with every day to one degree or another.

The juror who responds, "Well, that kind of thing never happens to me," is someone you don't want. That person is unbelievable, and probably more inclined to think that a plaintiff claiming a subjective injury is actually hurt.

In general, you're looking for the jurors' willingness or unwillingness to believe their own eyes. You want to see an ability to understand when the believability of a claim is in question. But still, you have to be very careful with these issues of what jurors "believe." Because belief is an interesting thing: It can change depending upon a person's goals.

You're going to get much more information by asking people what they do and what they've experienced rather than what they believe about a medical condition they've probably never encountered. The objective is to get people talking about themselves, in such a way that you can draw conclusions about their lack of bias, and their ability to question a diagnosis, the accuracy of a plaintiff's account.

For example, in a brain damage case, I might ask someone if they've ever had to care for an older relative who had Alzheimer's or dementia or had become senile; what they did, what the experience was like. Those folks are going to realize that things sometimes happen to the brain without trauma, without any objective evidence of injury. That tells me, this person might be inclined to believe the plaintiff's claim that low-impact whiplash resulted in undetectable brain damage.

Similarly, in a fibromyalgia case, I might ask whether they've suffered a workplace injury, whether they've gotten sore because of repetitive motion. If they say yes - and many people do - I ask them, "So what did you do?" Some

will say, "Oh, I went right to the doctor!" That's someone I'd like to avoid. But others will say, "I took an aspirin and kept working." That's the juror I want. That's my call.

But it's very difficult to articulate a question that would universally apply. To my way of thinking, a voir dire is a very fact-specific exercise. I try to use it to educate the jury about the case. In a serious *visible* injury case, I can always hold up the plaintiff's medical evidence - say, an x-ray of crushed bones - and say, "Does this bother anyone?" But in invisible injury cases, I'm looking more for juror attitudes about perseverance, recovery; the notion that bad things happen to everyone, but life goes on.

## **Howard Nations**

Plaintiffs' Attorney, Houston

*Does anyone here recall the story of Robinson Crusoe, and how he figured out that he was not alone on the island?*

I voir dire invisible injury cases using specific metaphors that I've developed both through focus groups and through trial-and-error in the courtroom. The message is: The injury is there; often these invisible injuries - like mild brain injury - can be physically seen upon autopsy. The problem is that we have not yet developed the technology to detect it in the living patient using MRI, CT scans, etc.

The Robinson Crusoe story is a classic example of circumstantial evidence, and most potential jurors know how he found a human footprint in the sand. It wasn't his, so he knew there was another human on the island. Similarly, I'll tell the jury, when the neuropsychologist in this case considers a patient's injuries, he looks at symptoms such as lost organizational skills, short-term memory loss ... and I go through the litany. And when he looks at the totality of that circumstantial evidence, its meaning is just as clear as that footprint in the sand. That's how I set it up.

The other thing you can do in invisible injury cases is to pull what I call a "thematic reversal" - I try to take away the defense's theme and use it against them before they ever get on their feet. Because that theme is always basically the same: I tell the jury, "The defense is going to argue that if you can't see it, it's not there.

"But let me ask you this: Are there important things in your life that you can't see, but you're pretty sure they're there? Oh, I don't know, let's start with oxygen. Or a headache. You can't see it, but when you have one, do you know it's there?" Get them talking about it: someone will say God; some romantic will always say love.

So then you cap that off with, "Well, when you hear the defendant say if you can't see it it's not there, just think back to love and oxygen." If you do it right, with the right jurors, it kind of takes the wind out of [the defense's] sails at the

outset of your invisible injury case.

## **Kenneth Kolpan**

Plaintiffs' Attorney, Boston

*Do you believe a person can have a serious injury, even though you can't see it?*

It may appear somewhat basic, but that's precisely the kind of question you need in a jurisdiction where you don't get direct attorney voir dire, as is the case here in Massachusetts, and in many other courts across the country.

In that sort of situation, we have to be economical. We submit our questions to the judge, and the *judge* does the voir dire. So it's important to get that basic question to the potential jurors without beating around the bush. The court will entertain additional questions as the voir dire proceeds, but you don't get broad range to propose a large number of questions. And when you offer judges fewer, they're more willing to give you some leeway when you want to ask additional questions.

For instance, if someone answers my question, "No, I don't believe there's such a thing as invisible injuries," I might request a sidebar with the judge and ask for further questions. I'd want to explore whether the juror doesn't believe it simply because they've never heard a doctor say such a thing. So if I follow up by asking, "Would you believe it if a doctor told you it was possible?" they might very well say, "Sure." They just don't believe it coming from a lawyer.

In general, in an invisible injury case, you need to watch out for engineers, accountants - people trained to think in terms of facts, figures, and hard-and-fast rules. Still, if it turns out you've got a bunch of "numbers types" to choose from, all is not lost. Because that will tell you how you've got to present your case. You have to hit the jury heavy with science. You need your experts to say, "Look, this is no different than any other type of injury. It's just that the technology is not yet sophisticated enough to pick it up - like a microscopic muscle tear. We can't see it but we can see the symptoms of it."

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