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The Right to Liberal and Probing Examination of Jurors for Bias Against Large Verdicts

A Commentary by Scott L. Frost and Paul C. Cook of Frost Law Firm PC

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In the April 2023 issue of HarrisMartin’s *COLUMNS-Asbestos*, authors Hugo and Ghanaat submitted, under an article entitled “*The Big Problem With Mini-Openings*,” that parties should not be allowed to mention a dollar number when conducting *voir dire* of potential jurors. The authors call this “anchoring,” an alternative phrase for “preconditioning” of the jury during *voir dire*. The law, however, is directly to the contrary. Plaintiffs in California courts have been granted the right, on request, to mention particular dollar amounts in *voir dire* for the purpose of identifying biased jurors and impaneling a fair and impartial jury. The *Wennerholm* case, cited in the April 2023 article, is one example of Plaintiffs’ counsel having been granted such a request. (*Wennerholm v. DAP Products Inc.*, JCCP 4674, Los Angeles Superior Court, Case No. 19STCV15874 [1/31/23].) *Editor’s Note: the authors of this article are counsel for the plaintiffs in the Wennerholm case.*

Notably absent from the article is any mention of California Code of Civil Procedure section 222.5 which provides that California courts “shall” grant any party requesting an opening statement at the *voir dire* stage the right to do so. CCP § 222.5(d). That is, the right is mandatory, not discretionary. And, the mandatory right extends to all the circumstances of a particular case, of which damages are one. CCP § 222.5(b)(1) [providing “...the trial judge **shall** permit

liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court.”]. (Emphasis added.)

The authors suggest the authority of *Fernandez v. Jimenez* (2019) 40 Cal.App.5th 582 be disregarded or distinguished on procedural grounds. In fact,

“Due process requires that the parties be allowed to obtain a fair and impartial jury to hear the evidence in their case.”

Fernandez holds it is not improper preconditioning to question prospective jurors on specific dollar amounts, holding *voir dire* questioning that expressly referenced the dollar amount of \$200 million in damages “was not improper preconditioning. Jurors may be informed of the damages a plaintiff seeks.” (Id. at 493 – 94.)

The legislative history of Section 222.5 unambiguously shows the intent to grant litigants the right to a “liberal and probing” examination of jurors for bias, as a right that essential to the selection of a fair and impartial jury. Section 222.5 was added to the Code of Civil Procedure by Assembly Bill 1065, introduced on February 3, 1989. It was passed without dissent or opposition. It gives counsel for each party the “right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause.” (Code Civ. Proc., § 222.5(b)(1).) It further provides “the trial judge **shall** permit **liberal and probing examination** calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court.” (*Id.*, emphasis added.)

Due process requires that the parties be allowed to obtain a fair and impartial jury to hear the evidence in their case. For a plaintiff seeking compensation for their injuries, this means identifying and excluding from the jury those who cannot award the full amount of damages to which plaintiff is entitled.

California law is clear that Plaintiff is entitled to be awarded whatever sum in damages he proves. (*See e.g. Roby v. McKesson Corp.* [2009] 47 Cal.4th 686, 702 [(W)here separate items of compensable damage are shown by distinct and

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independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories.]). That said, some prospective jurors hold personal beliefs against large verdicts. Such jurors will refuse to follow the law. They will not award Plaintiff the damages he requests even if he proves that he is entitled to that sum.

The right of counsel to ask questions in *voir dire* about potential juror bias against awarding large sums of damages is supported by the widely recognized and respected treatises, California Supreme Court authority, and well-reasoned case law from other jurisdictions:

- Wegner, et al., Cal. Prac. Guide Civ. Trials & Ev. (The Rutter Group: 2021) at § 5:312, cited with approval by *Fernandez v. Jimenez, supra*, 40 Cal.App.4th 482;
- *Beagle v. Vasold* (1966) 65 Cal.2d 166, 170;
- *Murphy v. Lindahl* (1960) 24 Ill.App.2d 461, 470 [“[S]ome prospective jurors may have had fixed opinions, which indicate bias or prejudice against large verdicts, and which might not readily yield to proper evidence.”];
- *Bunda v. Hardwick* (1966) 376 Mich. 640, 663 [“A fair trial is predicated upon an impartial jury, and to deny plaintiff the right to make inquiries of this nature might subject him to a jury prejudiced against awarding him what lawfully may be due him.”].)

The only way to ensure that Plaintiff has a fair jury and due process - without jurors who possess concealed beliefs precluding them from following the law – is to allow Plaintiff’s counsel to inquire into whether prospective jurors could award a certain sum of damages if the evidence does prove that sum. The court may concurrently remind the jury that such an inquiry is not evidence and that, if selected, jurors are in no way bound by counsel’s *voir dire*.

Any juror that cannot follow the law and award Plaintiff the damages he proves must be struck for cause. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 443 [79 Cal.Rptr.2d 408, 966 P.2d 442] [“State law required the court to excuse [prospective juror], for she acknowledged that she was “unable to act with the ‘entire impartiality’ required of jurors.”

There was no constitutional impediment to the exercise of state law, for her ability to perform her duties was at least substantially impaired—in fact her views prevented her from following the law.”] (internal citation omitted); *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 [71 Cal.Rptr.3d 415] [“One of the purposes of *voir dire* is to expose the possible biases of potential jurors, who can be excused for cause if bias is demonstrated...”].)

Plaintiffs’ counsel must be vigilant and insistent that their right to examine prospective jurors for bias not be transgressed, and their right to a liberal and probing examination for bias against large verdicts includes the right to reference specific dollar amounts as may be supported by the evidence.



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