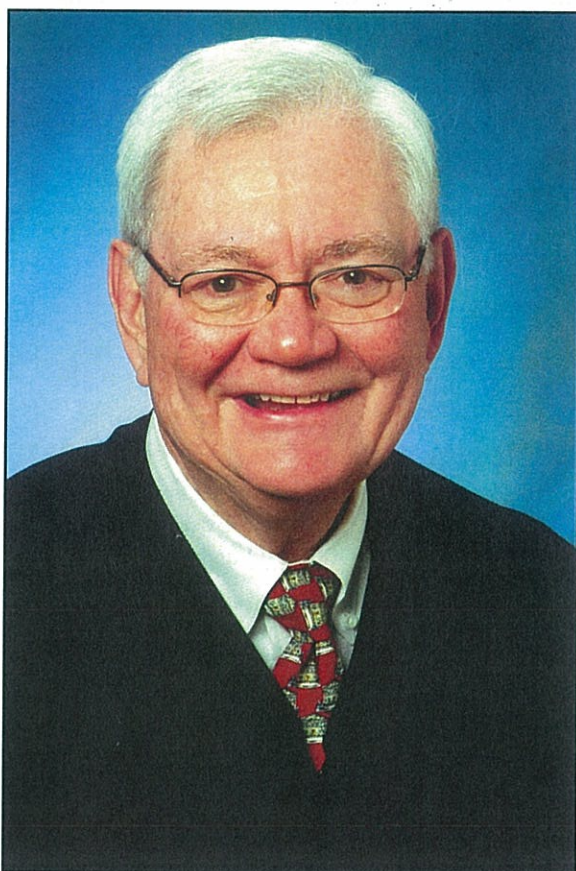


TRIAL JOURNAL

of the Illinois Trial Lawyers Association



Retired Illinois Supreme Court Chief Justice

Thomas R. Fitzgerald

a distinguished member of Illinois' judiciary since 1976

Volume 13, Number 1 • Winter 2011



Kenneth J. Allen

Trial Techniques in Trucking Cases

by Kenneth J. Allen & Bryan L. Bradley



Bryan L. Bradley

Themes and Other Considerations

A trial is a slice of life, a struggle between good and evil, truth and deception, right and wrong. Sometimes that slice more readily favors the defense right out of the box, as in medical negligence cases.¹ But in heavy truck crash cases, credible research has long demonstrated that juries side most often with the plaintiff.²

This is so for a number of reasons. First, the Federal Motor Carrier Safety Regulations (FMCSRs), specifically adopted by Illinois law,³ impose clear safety duties on the owners and operators of commercial motor vehicles.⁴ The FMCSRs require vigilance by the company to assure its drivers are not only qualified and rested,⁵ but the tractor-trailers they operate are safe.⁶ The motor carrier also bears the burden of assuring that its driver complies with the FMCSRs.⁷ The driver and motor carrier each have the duty to limit the driver's hours of service,⁸ the obligation to inspect the equipment,⁹ place unsafe equipment out of service,¹⁰ and operate the vehicle with extreme caution in hazardous weather and various other safety duties.¹¹

The onerous and specific safety responsibilities imposed by the FMCSRs, coupled with the devastating harm a semi-truck crash can inflict, make the case for holding commercial motor carriers and their drivers to the highest standard of care – or at least to a standard well above that of the average passenger car driver. This point becomes even more evident considering that the specific safety duties imposed by the

FMCSRs on motor carriers and their drivers are in addition to the general obligation to use due care and follow the “rules of the road”— rules well-known by the typical juror. So juxtaposing the higher level of skill and training required of professional truck drivers with that possessed by the average motorist is important, particularly when the actions of the motorist contribute to the truck crash, as often occurs. Remind the jurors that professional truck drivers are “on the job” behind the wheel, as opposed to motorists who are not at work when they drive.

Secondly, many jurors possess some knowledge, direct or indirect, about the epidemic of unsafe heavy trucks and careless commercial truck drivers on our highways. These jurors are therefore likely then to apply that life experience to your accident facts, viewing the evidence through a filter which best suits the plaintiff's case. Assuming the evidence demonstrates at least a slight probability that safety regulations were transgressed, jurors are willing to find plaintiff has satisfied her burden of proof, whereas those same jurors would likely return a defense verdict with similar evidence in a crash case involving only passenger cars.

Third, heavy trucks are intrinsically dangerous instrumentalities. A loaded tractor-trailer with out-of-adjustment brakes is akin to an 80,000 pound freight train barreling off its tracks and straight down the highway. Juries understandably want to assure that safety laws regulating these frightening instrumentalities are strictly followed. After

all, most jurors drive and are forced to share the highway with those same dangerous trucks and drivers. Jurors are therefore typically willing to reinforce the safety rules with a substantial verdict.

For plaintiffs' counsel then, the secret is to go with the flow. Themes relating to safety will resonate loudly with the jury. Defense counsel, however, face a bumpier road. The tried and true defense theme of personal responsibility is likely to backfire, particularly if there is an evident failure by the motor carrier or its driver to fulfill the safety responsibilities the FMCSRs impose. On the other hand, if the facts do support the defense position, and the jury is supplied with clear evidence supporting those facts, then juries will rule for the defendant trucker or motor carrier every time – particularly if the defense counsel succeeds in discrediting plaintiff or her attorneys.

Jury Selection in a Trucking Case

No facet of trial possesses greater importance than voir dire. But the moniker “jury selection” is grossly misleading; the process is really one of “de-selection.”¹² Your job as counsel is never to *select* a jury but “de-select,” ridding the panel of those biased or prejudiced against your client.¹³

The fundamental goal of voir dire is to help identify these biases and attitudes regarding your case and client. Of course, this goes hand in hand with the intelligent exercise of peremptory chal-

Continued on page 10



Continued from page 8

lenges. As our appellate court has succinctly stated:

The purposes of voir dire are to (1) enable the trial court to select jurors who are free from bias or prejudice, and (2) ensure that attorneys have an informed and intelligent basis on which to exercise their peremptory challenges. *People v. Gregg*, 315 Ill. App. 3d 59, 247 Ill. Dec. 820, 732 N.E.2d 1152 (2000).

* * *

A trial court's limitation on voir dire will constitute reversible error if it precludes a party from ascertaining whether the minds of the jurors are free from bias or prejudice which would constitute a basis of challenge for cause or which would enable him to exercise his right of peremptory challenge intelligently. *People v. Strain*, 194 Ill. 2d 467,

467-77, 252 Ill. Dec. 65, 742

N.E.2d 315, 320 (2000).

Village of Plainfield v. Nowicki, 367 Ill. App. 3d 522, 854 N.E.2d 791 (2006).¹⁴

The fundamental goal is to gather sufficient information so that one may intelligently exercise peremptory challenges and exclude those jurors likely to construe the evidence or inferences against your client, regardless of the proof. Both sides of the “v” share this same goal, as experienced trial lawyers well-know. A secondary, but equally important, goal for plaintiff’s counsel is inoculation of the panel from disqualification due to bias against semi-trucks or truckers. It is therefore critically important for plaintiff’s counsel to address the issue of bias, first. Make sure you let the jurors know that both sides want a fair and impartial jury; they must promise not to judge the defendants by their prior, out-of-court experience regarding trucks or truckers. Otherwise, many of the jurors will “strike

themselves” by conceding some sort of “bias” without defense counsel using any preemptory strikes. Addressing bias first will allow you to help potential jurors understand the difference between past experience and actual bias. Concomitantly, this will assure that defense counsel uses his or her preemptory strikes without getting a free pass, so that ultimately your jury is well-balanced.

Most experienced lawyers agree that neither the defense nor the plaintiff is likely to gather enough information to intelligently exercise their peremptory challenges when the court conducts voir dire. In fact, in a trucking case, lawyer participation in voir dire is critical — especially for defense counsel. This is so because the defense, from the outset, may well face a venire adverse to their client before the trial commences.¹⁵ Social science has long established that potential jurors typically respond to the judge’s questions in a less-than-candid way.¹⁶ That voir dire conducted by coun-

The foundation for success

The advertisement features a central graphic of a computer monitor displaying an "ER Note" with a patient's photo and medical details. To the left, a large grey arrow points from various evidence types towards the monitor. The evidence types are represented by images and labels: fetal monitor strips (a graph), video depositions (a man in a uniform), scene photos (a truck accident), medical records (stacks of papers), e-discovery (a woman in a uniform), settlement demands (a document with a "FOUR CAR PILEUP" sign), and medical illustrations (anatomical diagrams). The company name "groundwork" is written in a stylized font, with "TRIAL CONSULTING" in a smaller font below it. Contact information is provided at the bottom right.

groundwork
TRIAL CONSULTING
info@groundworktc.com
www.groundworktc.com
901 W. Jackson, Ste 301
Chicago, IL 60607
312-970-9781

sel rather than the court is the best means of ensuring juror impartiality has long been established and it is supported by sound psychological research.¹⁷

The reasons are best summed-up as follows:

(1) The judge is an imposing authority figure possessed of a higher social-ranking than anyone in the room whom most potential jurors will wish to please; the dominate concern of potential jurors is often “how do I not offend the judge?” Venirepersons therefore tend to respond to the judge’s inquiry with less candor than if the questions are posed by counsel, to whom potential jurors believe they owe, and will typically show, much less deference.¹⁸

(2) The lawyers for each side necessarily possess a more thorough working knowledge of the case details than the judge. The trial judge simply cannot be expected to know all the evidence to be presented in

every case, or at least certainly not as well as the trial lawyers who have spent countless hours working on the case over the course of years. Counsel are therefore better positioned to understand what questions should be posed and more inclined than the judge to follow-up on incomplete or ambiguous initial responses with the type of probing questions required to explore and expose prejudices.¹⁹

(3) The non-verbal communication of a prospective juror (such as displays of tension, evasion or hostility) is much more revealing when questions are posed by advocates and not by the neutral judge. This data, which by its very nature is not part of the record, is nevertheless essential for intelligent exercise of peremptory challenges. But when the judge conducts voir dire, the litigants are largely deprived of this critical data.²⁰

Venirepersons are often unaware of their own prejudices and preconceptions and disinclined to acknowledge them when asked general questions on voir dire such as whether there is any reason they cannot be fair and impartial, as the U.S. Supreme Court and Seventh Circuit Court of Appeals have conceded.²¹ Potential jurors may also conceal prejudices out of a desire to avoid embarrassment, or to conform to expected responses, or even for more sinister reasons.²²

In order to intelligently exercise one’s peremptory challenges in a trucking case, particularly if you are representing the defendant, you must have the opportunity to participate in voir dire. Your primary goal will be to encourage and facilitate a frank discussion by the venire of the issues in your case, so that you can learn from their answers whether they are likely to be hostile or adverse to your position.²³

Continued on page 12



EXPERIENCE THE RIGHT PARTNERSHIP™

ACCESS. EXPERTISE. SERVICE. Together, these powerful advantages form the cornerstone of the Northern Trust experience. When you work with Northern Trust, you and your clients have access to a community of knowledge, innovation and fresh perspectives, delivered with the personal attention of our tenured professionals.

Built from a fiduciary heritage of putting our clients’ best interests first, we complement your expertise with a complete array of banking, investment management and trust and estate services – as well as specialized solutions in areas such as philanthropy, family business and real estate – so you can address virtually any complex issue faced by your clients.

To learn more about how we can work together to help your clients achieve their financial goals, call Tom Kloster at 312-444-5533 or visit our dedicated website for professional advisors at northerntrust.com/wealthadvisor.



Northern Trust

Private Banking | Asset Management | Financial Planning | Trust & Estate Services | Family Office Services | Business Banking

