

Getting the jury you want: Voir dire in dangerous condition of public roadway cases

By Mary Alexander

I. Introduction

There are special issues in dangerous condition of public property roadway cases. Addressing the issues early in voir dire will help to reveal jurors who would be adverse to your case and, if you are lucky, begin to condition jurors to your theory of the case. Whether the defendant is a city, county, state, or other entity, there are biases that jurors bring to the courtroom. Keep in mind during voir dire what you must prove pursuant to CACI 1100.

Gerry Spence sets the stage for voir dire like this:

This is a very special part of the trial. It's the only time, until this case is finished, where we can just talk to each other, where I can ask you questions about how you feel about certain things, and where you can ask me questions about what I mean. One of the things we're here to talk about is the prejudices we have. I have them, my opponent has them, and so do you. All it means is that we prejudice things. There's nothing wrong with that. We prejudice people based on the cars they drive or the clothes they wear. Our kids prejudice things when they don't want to try a new food. It's OK to have prejudices. We all have them. But the problem, the biggest crime that could be committed in this courtroom today, would be for somebody who really had an opinion about something — and we all have opinions — to not be willing to say it.

Spence goes on to say that he is nervous about voir dire because he is afraid of offending someone, but that he must do this job for his client.

Let's look at some of the attitudes that jurors express or silently think.

II. "Will My Taxes Go Up?"

One of the biggest issues for jurors is one that would affect their own wallet: If the government entity is liable, their taxes will go up to pay for the damages.

Ask the jurors directly if they have that opinion and then point out that their job is not to speculate, but to decide on the

evidence. It does not matter if the damages will be paid or by whom.

Start with the Rules of the Road:

Q: "In this case there will be a lot of discussion about safety standards for roadways. Why is it important for any business or public entity to follow the safety rules?"

Q: "Does anyone have a problem using the courts to hold businesses or cities or the state responsible if injuries occur when they did not follow their own safety standards?"

Q: "What about industry standards as a whole? How would things turn out at your job if you didn't have rules and regulations?"

Q: "What would happen in a society that didn't hold those accountable?"

Q: "What happens when people don't follow those rules?"

Q: "What happens when people don't take responsibility for not following the rules?"

Q: "Is that important to you?"

Jurors worry that a big verdict will be placed on the shoulders of the people, passed on by a government that doesn't have the money or won't want to pay it out of their coffers.

Q: "How many of you feel that if someone is injured because a city had a dangerous condition on a roadway, the city should be responsible for the injury?"

Q: "How many of you feel the city should not be held responsible?"

Q: "How many of you feel that public entities should be held responsible for



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protecting the public from a dangerous condition?”

Q: “Who is concerned that a verdict will have an impact on their tax dollars?”

Q: “Who here might give a discount or cut some off a fair verdict because of these feelings?”

Q: “Do you have any personal or financial reasons why you could not serve as a juror at this time?”

Q: “Do believe that the current economic climate could affect how you would award damages if it were proven that a damage award is warranted?”

III. “The Public Entity Wasn’t Even There!”

Picture a big rig truck making a left turn from a left turn lane on a state highway where there are no traffic controls or warning signs. It was certainly the truck driver’s fault, but the dangerous roadway contributed. Some jurors feel that since the state was not there at the time then it should not be held responsible.

Questions suggesting who had more time to analyze the danger, or warn of it and prevent the incident, can help identify those who will not be able to hold the state responsible.

Q: “Would you be able to hold the state responsible if they had years to observe and analyze the condition of the roadway while the driver had only a second?”

Q: “If the evidence supports it, would you have a problem finding fault with the state?”

IV. “With The Current Economic Situation, The Public Entity Shouldn’t Be Held Responsible.”

A defense available to the public entity is that they did not have enough money to make the repairs to the roadway.

If they make this claim, then the plaintiff is entitled to present financial information to rebut the allegation. You can ask the jury in voir dire, that if there are such available sums of money, would they be able to consider the fault of the entity.

Q: “Do you hold the belief that in the current economic situation the City should not be liable for any alleged problems of public property?”

Q: “Some people believe lawsuits against public entities are a good way to hold them accountable for their actions. Others believe lawsuits do little good and only drive-up costs for us all. How do you feel?”

V. “Be True (Loyal) to Your School”

Jurors can have a bias in favor of the public entity because, for example, they were born and raised in the city, or simply love the city, their county, and their neighborhood.

A feeling of allegiance and protection of the public entity can outweigh the evidence.

Maybe a family member or friend has worked for the public entity or been a volunteer. This creates a sense of loyalty and bias that is hard to overcome.

Q: “Have you, a family member (including spouse/partner), or close friend ever worked for or had any special connection or experience with the city?”

If yes, ask: “Please explain, and do you have any loyalties that would make you prefer to be a juror on a case where the city has not been sued?”

CACI 1100 Dangerous Condition on Public Property — Essential Actual Elements (Gov. Code 835)

1. That defendant owned [or controlled] the property;
2. That the property was in a dangerous condition at the time of the incident;
3. That the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;
4. [That negligent or wrongful conduct of defendant’s employee acting within the scope of his or her

employment created the dangerous condition]

[or]

[That defendant had notice of the dangerous condition for a long enough time to have protected against it;]

5. That plaintiff was harmed; and
6. That the dangerous condition was a substantial factor in causing plaintiff’s harm.

You may also want to ask about other areas that they, a family member or close friend ever worked in, been trained in, studied, or had experience in:

- Traffic and Public Safety Public Service
- City, County or State Administration Maintenance/Repair
- Field Engineering, including Civil Engineering Construction
- Road Design
- City, County or State Codes or Inspections Law Enforcement or Law

VI. “There can only be one cause of an accident.”

Some jurors have difficulty with the concept of comparative fault, with more than one cause of the incident. They think that the cause can only be the defendant without contribution by the roadway.

In *Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, the court said, “[A] public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff’s injury is a third party’s negligent or illegal act (such as a motorist’s negligent driving), if some physical characteristic of the property exposes its

users to increased danger from third party negligence or criminality. Public entity liability lies under Section 835 when some feature of the property increased or intensified the danger to uses from third party conduct.”

The defendant public entity had years to see, study, and analyze the defect in the road. The defendant driver and the plaintiff only had seconds. That puts responsibility on the public entity to fix or warn of the danger.

Q: “Some people believe there can be more than one cause of an accident. Others believe no more than one thing can be a cause. How do you feel?”

Q: “How do you feel about holding a public entity liable for damages to a person caused by a dangerous condition of a roadway?”

Use the language of the jury instructions like “substantial factor” in causing injury.

Q: “Do any of you have any strong feelings or beliefs about the law that says that a substantial factor in causing harm is a factor that a reasonable person would consider as having contributed to the harm?”

Q: “What are your feelings or beliefs about the law of multiple causes which

provides that a person’s negligence may combine with another factor to cause harm?”

Q: “How do you feel about assigning percentages of liability against the government entity and a motorist who struck the pedestrian in the crosswalk?”

Q: “If you found that the negligence of the public entity was a substantial factor in causing plaintiff’s harm, would you have any difficulty holding the entity responsible for the harm if there were other causes of the harm?”

Q: “Do you have any feelings or thoughts about holding a public entity responsible for damages when some other person was also a substantial factor in causing plaintiff’s harm?”

VII. “A driver (plaintiff) has to be alert and careful.”

A juror may be familiar with the roadway and may even feel that it is dangerous, but believes it is up to the driver to be alert and careful. Everybody thinks they are a good driver, and a juror may think that they would have avoided the accident.

There is the feeling that the driver should have been more attentive because the road is dangerous. Others may believe that generally roads are safe. If the driver is careful and drives defensively, accidents do not happen.

Jurors sometimes say that they know the road is dangerous and the driver should have known to be more attentive.

Q: “Are you familiar with state Highway 12?”

If yes, ask: “Do you have any feelings about whether Highway 12 is dangerous or not?”

Q: “Have you seen or heard of any accidents on Highway 12?”

If yes, ask: “Any accidents at this location?”

VIII. Conclusion

Identifying jurors with the greatest bias in favor of a public entity can help you challenge a juror for cause or to use a preemptive strike. There can be deep seated feelings in favor of the public entity and concerns the lawsuit will affect their wallet. Asking the right questions can about beliefs about dangerous conditions of public roadways can help you win your case. ■