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The Chairman
Victorian Law Reform Commission
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Dear Sir,

Jury Empanelment Review

I refer to the consultation paper issued in October 2013.

Unfortunately, I wasn't aware of the review being undertaken by the Commission until I had cause to go to the internet to research an issue in relation to Jury selection, prompted by reading an article in an American Law Journal.

I have been running personal injury litigation in both the County and Supreme Court for over 30 years. Nowadays I only represent injured Plaintiffs, however, for quite a long period I also acted for the Victorian Compulsory Third Party insurers.

In terms of my field of practice, one thing I have noticed is that Victorian insurers (notably TAC and WorkSafe) always file Jury Notices in common law proceedings.

As a Plaintiff practitioner, I seek trial by Judge alone in over 95% of proceedings that I issue.

I note from the consultation paper that there are only about 600 civil jury trials annually in Victoria. A high proportion of those trials involve the statutory insurers. Hence, but for the determination of these insurers to have every common law claim heard by a jury, there would be very few such proceedings at all.

I understand that the insurers always file Jury Notices because of the view that there is a much greater level of uncertainty about the ultimate outcome of the proceeding when it is to be tried by a jury. I guess the view held by the insurers is that they are financially better placed to deal with this uncertainty of outcome than a single Plaintiff is. Undoubtedly, this is true.

It reflects the reality of the situation in the vast majority of cases, namely, that the insurers



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have the power of financial resources that Plaintiffs usually don't have and this power imbalance is exploited by the exercise of the right to trial by jury.

However, whilst this might be of some interest, it is not the main reason for me writing to you.

My concern relates to the current method of empanelling civil juries.

As you know, the current system provides for 12 individuals to be selected from the jury panel. Their names are selected by drawing cards from a barrel and in the case of a two party trial, each side has 3 peremptory challenges which must be exercised in order to end up with a jury of 6.

Currently, we have no notice at all of the identity of the members of the panel. In fact, during the empanelment process, all we know of the 12 individuals whose cards are drawn from the barrel are their names and occupations. Even the occupation is sometimes so generic as to be virtually meaningless. For example, an occupation of "public servant" clearly doesn't tell us much at all. Similarly, a person's current occupation often provides us with no insight whatsoever into their previous occupation.

An individual's occupation might, for example, be potentially relevant to whether that person ought serve on a jury in a particular case.

For example, if it were known that a woman whose occupation is given as "home duties", was in fact a trained paramedic who had worked in that capacity for 10 years before leaving work to raise a family, one might form a very different view about her suitability or otherwise to serve on a jury in a medical malpractice claim.

One could recite numerous similar examples.

The point I am trying to make is that as lawyers involved in the jury empanelment process, we have little, if any relevant information upon which to work out whose names should be deleted from the list of 12.

Further, there is also an unlimited right to make challenges as to cause. In over 30 years of practice, I have yet to see or hear of a single challenge being made as to cause in a civil jury trial. This is hardly surprising because the present system provides so little information as to make it almost impossible to come up with a sensible ground for such a challenge.

It doesn't really make much sense that there is an unlimited right to challenge as to cause in circumstances where one can't envisage circumstances that could give rise to such a challenge.

In this context, it is perhaps worth considering the approach adopted in the United States.

I attach a copy of the Model Questions that a Trial Judge in a civil action in the State of New Jersey would ask potential jurors as part of the empanelment process.

The questions are asked by the Trial Judge. Presumably, the answers given by potential jurors would either give rise to a challenge as to cause or the Trial Judge could simply exclude a person on the grounds of likely bias or risk of unfairness.

I don't profess to be an expert on the jury system in the United States. I found this document during my internet research which prompted this letter.

The introduction of a similar set of Model Questions in civil trials in Victoria would seem to me to be a sensible step towards remedying the obvious problem that currently exists around challenges as to cause.

In the final analysis, what the parties to litigation involving trial by jury want is a fair decision based upon the facts and merits of the case. Whilst the statutory insurers in Victoria, for tactical reasons, want the uncertainty of a jury trial, I am sure that they too ultimately want an outcome that is concordant with the evidence given.

In a significant number of cases, one is left wondering how a jury reached the conclusion that it did by means of its verdict. This hardly engenders confidence in the system. Further, appeals against jury verdicts are notoriously difficult to win. It is only in extreme cases that the Court of Appeal will interfere with a jury verdict. Successful appeals usually result from errors in the conduct of the trial by either the Trial Judge or Counsel.

It seems to me that a system that enlivens the right to make challenges as to cause would go a long way to improving the current system, if not by achieving more reliable jury verdicts, then at least by giving a greater sense of perceived justice to those involved in the process.

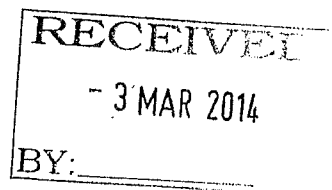
I appreciate that there was a deadline for the lodgement of submissions, but I thought that it was probably better to send this off than to say nothing at all.

I hope that you find this helpful.

Yours faithfully



.....
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MODEL JURY SELECTION QUESTIONS

Standard Jury Voir Dire

Civil

[Revised as Promulgated by Directive #4-07]

1. In order to be qualified under New Jersey law to serve on a jury, a person must have certain qualifying characteristics. A juror must be:
- Age 18 or older
 - A citizen of the United States
 - Able to read and understand the English language.
 - A resident of _____ county (*the summoning county*)

Also, a juror must not:

- Have been convicted of any indictable offense in any state or federal court
- And must not have any physical or mental disability which would prevent the person from properly serving as a juror. Please consider that the Judiciary will provide reasonable accommodations consistent with the Americans with Disabilities Act.

Is there any one of you who does not meet these requirements?

2. a. This trial is expected to last for _____. Is there anything about the length or scheduling of the trial that would interfere with your ability to serve?
- b. Do you have any medical, personal or financial problem that would prevent you from serving on this jury?

c. Do any of you have a special need or require a reasonable accommodation to help you in listening, paying attention, reading printed materials, deliberating, or otherwise participating as a fair juror? The court will provide reasonable accommodations to your special needs but I will only be aware of any such needs if you let me know about them. My only purpose in asking you these circumstances relates to your ability to serve as a juror. If you have any such request, please raise your hand and I will speak to you at sidebar.

[Note: If a juror makes a request, contact the ADA Coordinator to see if the TCA can meet the request right away (e.g., a portable speaker system available immediately) or if the juror's service should be deferred so that the TCA can arrange the accommodation timely (e.g., an ASL interpreter that may require three or four months' reservation in advance).]

3. *Introduce the lawyers and the parties.* Do any of you know either/any of the lawyers? Has either / any of them or anyone in their office ever represented you or brought any action against you? Do you know Mr./Ms _____?

Names of Parties

4. *Read names of potential witnesses.* Do you know any of the potential witnesses?

[Note: List witnesses' names here or attached a separate sheet.]

5. I have already briefly described the case. Do you know anything about this case from any source other than what I've just told you?
6. Are any of you familiar with the area or address of the incident?

7. Have you or any family member or close personal friend ever filed a claim or a lawsuit of any kind?
8. Has anyone ever filed a claim or a lawsuit against you or a member of your family or a close friend?
9. Have you or a family member or close personal friend either currently or in the past been involved as a party ... as either a plaintiff or a defendant... in a lawsuit involving damages for personal injury?
10. A plaintiff is a person or corporation [or other entity] who has initiated a lawsuit.
Do you have a bias for or against a plaintiff simply because he or she has brought a lawsuit?
11. (a) A defendant is a person or corporation [or other entity] against whom a lawsuit has been brought.
Do you have a bias for or against a defendant simply because a lawsuit has been brought against him or her?

[Ask if applicable]
(b) The defendant is a corporation. Under the law, a corporation is entitled to be treated the same as anyone else and is entitled to be treated the same as a private individual. Would any of you have any difficulty in accepting that principle?
12. The court is aware that there has been a great deal of public discussion about something called Tort Reform (laws that restrict the right to sue or limit the amount recovered). Do you have an opinion, one way or the other, on this subject?

13. If the law and evidence warranted, would you be able to render a verdict in favor of the plaintiff or defendant regardless of any sympathy you may have for either party?
14. Based on what I have told you, is there anything about this case or the nature of the claim itself, that would interfere with your ability to be fair and impartial and to apply the law as instructed by the court?
15. Can you accept the law as explained by the court and apply it to the facts regardless of your personal beliefs about what the law is or should be?
16. Have you ever served on a trial jury before today, here in New Jersey or in any state court or federal court?
17. Do you know anyone else in the jury box other than as a result of reporting here today?
18. Would your verdict in this case be influenced in any way by any factors other than the evidence in the courtroom such as friendships or family relationships or the type of work you do?
19. Have you ever been a witness in a civil matter, regardless of whether it went to trial?
20. Have you ever testified in any court proceeding?
21. New Jersey law requires that a plaintiff has to prove fault of a defendant before he or she is entitled to recover money damages from that defendant. Do you have any difficulty accepting that concept?

Biographical Question

The following questions should be asked of each potential juror, one by one, in the jury box:

You have answered a series of questions about civil trials and civil cases. Now we would like to learn a little bit about each of you. Please tell us the type of work you do; whether you have ever done any type of work which is substantially different from what you do now; whether you've served in the military; what is your educational history; who else lives in your household and the type of work they do, if any; whether you have any children living elsewhere and the type of work they do; which television shows you watch; any sources from which you learn the news, i.e. the newspapers you read or radio or TV news stations you listen to; if you have a bumper sticker that does not pertain to a political candidate, what does it say? What you do in your spare time and anything else you feel is important.

[Note: This question is intended to be an open-ended question which will allow and encourage the juror to speak in a narrative fashion, rather than answer the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. If the juror omits a response to one or more sections, the judge should follow up by asking, in effect: "I notice you didn't mention [specify]. Can you please tell us about that?"]

Omnibus Qualification Questions (Two)

1. Is there anything, whether or not covered in the previous questions, which would affect your ability to be a fair and impartial juror or in any way be a problem for you in serving on this jury?

2. Is there anything else that you feel is important for the parties in this case to know about you?

**STANDARD JURY VOIR DIRE
(AUTO, SLIP & FALL, MEDICAL MALPRACTICE)**

Auto

1. How many of you are licensed drivers?
2. Have you or any family member or close personal friend ever been involved in a motor vehicle accident in which an injury resulted?
3. (a) Have you or a family member or close personal friend ever been involved in litigation or filed a claim of any sort?

(b) Has anyone ever filed a claim or lawsuit against you or a family member or close personal friend?
4. Have you or a family member or close personal friend sustained an injury to the _____ or have chronic problems with _____?
5. [Ask if applicable] Have you or a family member or close personal friend utilized the services of a chiropractor?
6. The court is aware that there has been a great deal of public discussion in print and in the media about automobile accident lawsuits and automobile accident claims. Do you have an opinion, one way or the other on this subject?

Slip and Fall

1. Is anyone a tenant?
2. Is anyone a landlord?
3. Is anyone a homeowner?
4. Have you or a family member or close personal friend ever been involved ...as either a plaintiff or a defendant...in a slip and fall accident in which an injury resulted?
5. Have you or a family member or close personal friend ever been involved in litigation or filed a claim of any sort?
6. Have you or a family member or close personal friend sustained an injury to the _____ or have chronic problems with _____?

Medical Malpractice

Note: This information is not to be included on printed copies provided to jurors.

It is expected that the parties will submit a few specific questions seeking juror attitudes towards particular injury claims, such as pecuniary loss for wrongful death or a claim for emotional distress, if applicable, or juror attitudes about other particular types of claims, such as wrongful birth or informed consent issues. In particular, wrongful birth claims might require a questionnaire or separate voir dire to address attitudes about termination of pregnancy.

Before asking the questions below, explain that the trial involves a claim of medical negligence, which people sometimes refer to as medical malpractice and that the terms both mean the same thing.

1. Have you, or family member, or a close personal friend, ever had any experience, either so good or so bad, with a doctor or any other health care provider, that would make it difficult for you to sit as an impartial juror in this matter?
2. If the law and the evidence warranted, could you award damages for the plaintiff even if you felt sympathy for the doctor?
3. Regardless of plaintiff's present condition, if the law and evidence warranted, could you render a verdict in favor of the defendant despite being sympathetic to the plaintiff?
4. Have you, any family member, or close personal friend ever worked for:
 - Attorneys
 - Doctors, Hospitals or Physical Therapists
 - Any type of health care provider
 - Any ambulance / EMT / Rescue

5. Have you, or any members of your family, been employed in processing, investigating or handling any type of medical or personal injury claims?
6. Is there anything that you may have read in the print media or seen on television or heard on the radio about medical negligence cases or caps or limits on jury verdicts or awards that would prevent you from deciding this case fairly and impartially on the facts presented?
7. This case involves a claim against the defendant for injuries suffered by the plaintiff as a result of alleged medical negligence. Do you have any existing opinions or strong feelings one way or another about such cases?
8. Have any of you or members of your immediate family ever suffered any complications from [specify the medical field involved]?
9. Do you have any familiarity with [specify the type of medical condition involved] or any familiarity with the types of treatment available?
10. Are you, or have you ever been, related (by blood or marriage) to anyone affiliated with the health care field?
11. Have you or any relative or close personal friend ever had a dispute with respect to a health care issue of any kind with a doctor, chiropractor, dentist, nurse, hospital employee, technician or other person employed in the health care field?
12. Have you or any relative or close personal friend ever brought a claim against a doctor, chiropractor, dentist, nurse or hospital for an injury allegedly caused by a doctor, dentist, nurse or hospital?

13. Have you or any relative or close personal friend ever considered bringing a medical or dental negligence action but did not do so?

14. Have you or any relative or close personal friend ever been involved with treatment which did not produce the desired outcome?

