Are attitudes about tort reform fair game for voir dire? In a growing number of jurisdictions, the answer is “Yes.”

MEDICAL MALPRACTICE CASES are extremely difficult and expensive for the plaintiff’s lawyer to prosecute. The reasons are not hard to understand. First, to make out a prima facie case of medical malpractice, an expert witness, usually in the same field of expertise as the defendant physician, must testify to a reasonable degree of medical certainty about the alleged breach in the standard of care and must link that breach to the plaintiff’s alleged harm. Second, and perhaps, more important, is the fact that physicians make sympathetic defendants. People in general have high regard for physicians and for the work they do, and often view patients’ claims of malpractice with skepticism.

This skepticism makes adequate voir dire all the more important to the plaintiff’s lawyer. Voir dire is a crucial process that, if handled properly, ensures the selection of a fairly impartial jury. On the other hand, handling voir dire cavalierly is certain to undermine the case for the plaintiff.

Based on my own experiences as a trial lawyer, and also based on anecdotal evidence gleaned from writings on the subject, many judges used to be reluctant to accord the voir dire process the importance it deserves. Rather than seeing voir dire as perhaps the most crucial step to-
ward bringing about a fair result in the case, some judges viewed it as an impediment to actually getting on with the trial. Thus, they would sometimes respond unfavorably to lawyers’ requests for extended questioning of prospective jurors, remarking “Counselor, let’s get on with the case,” or something similar. But “just getting on with the case” has never been enough—especially for a plaintiff’s lawyer who has invested a substantial amount of money and effort into an inherently difficult case.

The overwhelming majority of trial lawyers were unrelenting in their push to have a substantial amount of time and flexibility in the voir dire process to question prospective jurors and flush out their hidden biases and prejudices. To that end, over a decade ago many appellate courts in different states began to allow lawyers substantial latitude in their questioning of prospective jurors on tort reform issues during voir dire. Recently, Pennsylvania joined that enlightened group of states that recognizes the importance of questioning prospective jurors about tort reform issues. In an opinion handed down on January 31, 2006, the Pennsylvania Superior Court (an intermediate appellate court), for the first time, allowed questioning during voir dire in medical malpractice cases on “tort reform and medical negligence propaganda.” This seminal opinion was handed down in the case of Capoferri v. Children’s Hospital of Philadelphia (“CHOP”), 893 A.2d 133 (Pa. Super. Ct. 2006).

**CAPOFERRI V. CHOP**• This case involved negligent failure to timely diagnose an infant’s testicular torsion with resultant testicular atrophy. On March 6, 1999, Jared Capoferri began experiencing testicular swelling and redness. In response, his parents contacted Jared’s pediatrician, who instructed them to take him to the emergency room of CHOP the next morning to keep an eye on him through the night for vomiting, fever, and nausea. Even though Jared did not develop vomiting, fever, or nausea, his scrotal swelling continued. His parents brought him to the emergency room of CHOP where he was initially examined and then sent for an ultrasound. It’s not clear from the facts of the case whether the ultrasound ruled out a testicular torsion, but defendant Dr. Hutcheson, a fellow in urology, even though unsure of whether Jared was suffering from an apparent testicular torsion, allegedly dissuaded Jared’s parents from an exploratory surgery for testicular torsion, which the parents had allegedly requested for Jared. Instead, Dr. Hutcheson discharged Jared and instructed his parents to return him to the hospital in a week for follow-up evaluation unless he developed a fever or other symptoms, in which event he was to be returned to the hospital immediately. During the intervening one-week waiting period Jared apparently did not develop a fever or the other symptoms mentioned by Dr. Hutcheson, but both the swelling in his scrotum and its redness remained. When Jared was returned to the hospital at the end of the one-week waiting period, another ultrasound was done. Dr. Hutcheson and co-defendant Dr. Carr informed the Capoferris that this second ultrasound showed adequate blood flow to Jared’s testicle. Dr. Hutcheson, allegedly, again dissuaded the Capoferris from exploratory surgery for testicular torsion which they allegedly again requested for Jared. Instead, Jared was discharged and his parents instructed to return him to the hospital in two months for a follow-up evaluation. Two months later Jared was returned to CHOP where another ultrasound showed that he had suffered a left testicular atrophy. As a result of the atrophy, Jared had to undergo a procedure to conserve his remaining testicle.

**The Voir Dire Questions**

The Capoferris filed suit against CHOP, Dr. Hutcheson, and Dr. Carr. During jury selection, plaintiff’s counsel submitted to the court for consideration the following proposed four questions, among others, for the jury venire about “the al-
The trial court refused the proposed voir dire questions on the grounds that first, the court’s own set of standard questions sufficiently addressed any issues of potential jury bias, and second, based on its concern that the “entire panels of jurors [could be]... found unsuitable for service because they have heard about a particular public issue, such as the ‘medical malpractice crisis.’” Over plaintiff’s counsel’s objection, the jury was selected without the proposed questions. The trial ultimately resulted in a defense verdict.

The Reality Of The Debate—And The Perceptions

The major factors, it appears, that convinced the appellate court to find an abuse of discretion and a violation of the constitutional right to a fair and impartial jury were:

• Evidence of a “massive amount of media coverage on [the] issue that relates to the matter that will be heard by the chosen panel” id. at 141; and

• An observation that the defendants did not even dispute the fact of a substantial amount of media coverage on the medical malpractice debate.