



Interview with Mike Danko

Civil juries rarely hang. A prominent plaintiff's attorney explains his strategy after experiencing a hung jury

By **BOBBY THOMPSON**

In 1994, Caltrans commissioned a study by California State University on marking crosswalks across streets with multiple lanes of traffic. The study found that marking crosswalks at such intersections invited disaster and made the intersections more dangerous than they would have been without them. Marking the crosswalk, without other mitigation efforts, creates a false sense of security for pedestrians who enter the crosswalks. In 2005, the Federal Highway Administration conducted a similar study and also concluded crosswalks should not be marked at intersections with multiple lanes of traffic. A handful of years later, the State was sued by a teenager who suffered catastrophic brain injuries after being struck by a car while crossing El Camino Real in a Caltrans crosswalk located in Millbrae. A San Mateo jury found the State liable because the crosswalk was dangerous.

Last December, *Chandler v. State of California*, a wrongful death case involving another Caltrans crosswalk on El Camino Real in Atherton, was tried in San Mateo County. The jury hung. When the case was



Danko

burden of proof is lower, and dissenting jurors are less likely to hold out because the “only” thing at stake is money. In fact, researchers believe only between 0.8 percent and 1.5 percent of civil trials result in a hung jury. See *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, Northwestern University Law Review, Vol. 100, No.1, at p. 28. That makes the *Chandler* retrial an unusual one worthy of a closer look.

I wanted to understand why the results in the two trials were different and see if there were any practice take-aways. I asked Mike Danko, plaintiffs' lead trial lawyer, about the verdict.

retried this July, the result was a unanimous \$9.5 million verdict for plaintiffs.

Civil juries hardly ever hang. Legal scholars say that is because, in contrast to criminal trials, the verdicts need not be unanimous, the

intersection a bit over the 35-mph speed limit hit and killed him. The driver said he had a clear view of the road, but never saw Chandler until after the impact. We sued Caltrans, arguing that the intersection was busy enough that Caltrans should have left the crosswalk unmarked.

As it turns out, marked crosswalks at uncontrolled intersections can give pedestrians a false sense of security – the pedestrian believes that drivers will yield when, in fact, the driver's view of the pedestrian may be blocked by other traffic and so the driver may have no reason to even slow down. So it can be safer to cross at an unmarked crosswalk than at one that is marked. Counterintuitive, but true.

Caltrans wasn't having any of it. Its best settlement offer was a 998 for \$10,000. It blamed the 62-year-old Chandler for riding his bicycle into the crossing traffic without looking, and blamed the elderly driver for speeding and not paying attention.

Did you have a sense the first jury might hang?

It was a surprise. I've seen jurors running out of jury rooms crying. I've heard them through the door yelling at each other. One of my juries deliberated for 6 days. But never have I had a jury say that they couldn't reach a verdict.

Most cases settle after the jury hangs. Why didn't yours?

I knew fault on the case was a close call to begin with, so the fact that the jury hung was a surprise. But that didn't make me think differently about case value. You might have expected Caltrans to reassess its position after the jury hung, but it didn't. It made it clear that it wasn't going to budge from its previous offer. So that made the decision to press ahead and try the case again pretty easy.

The case: Cyclist hit in dangerous crosswalk

Chris Chandler was crossing El Camino Real, a main drag running from San Francisco to San Jose. Chandler was on his bike in the crosswalk. An elderly driver traveling through the





What were the two verdicts?

The first jury hung on the first question – whether the intersection constituted a dangerous condition of public property. The jurors said that when they started deliberations, they were 8 to 5 in favor of plaintiffs and that when they ended they were 8 to 5 in favor of the State.

The second jury was unanimous in plaintiffs’ favor. It found the State 90 percent at fault, the driver 10 percent at fault, and Chandler blameless. That was nice for the family, since the Atherton police had found Chandler entirely at fault. In fact, they had investigated Chandler’s death as a possible suicide.

The retrial was before the same judge, who made the same evidentiary rulings, and charged the jury with the same instructions. So then, what made the difference?

I’ve talked about this with Claire Choo, who tried the case with me. I’m not sure we can say it came down to any one thing we did differently.

Did you change your strategy for the retrial?

We thought our presentation to the first jury was a good one and decided not to change things just for the sake of shaking things up. So the changes we made in our trial strategy were subtle. For example, we decided we needed to discredit only one Caltrans employee, and that was the decision maker. In the second trial, we let the other employees off the hook. We didn’t ask them any question that would lead to impeachment or make the witnesses look bad. The examinations were relatively pleasant, non-confrontational, and quick. Light and breezy with no distractions. One of the State’s witnesses told me afterwards how much easier my questions were for her as compared to the first trial and how relieved she was. So that was one difference. The surprise was that, even so, the second jury found the lower level employees

Four views of the dangerous crosswalk



COURTESY PHOTOS: MIKE DANKO

to be cold, bureaucratic, and part of the problem.

Another difference was that the second time through we did a better job of turning the State’s defenses against it. For example, the State’s key witness testified that there was nothing unusual or special about the crosswalk at issue; it was essentially the same as all the others at uncontrolled intersections on El Camino Real. We ran with that. Either *all* the crosswalks up and down the Peninsula from San Francisco to San Jose are dangerous, or *none* of them are. The case was no longer about one seldom-used crosswalk in Atherton. That upped the ante for the second jury.

And we presented evidence that Caltrans had a “short-term” memory problem as just three years earlier another San Mateo jury handed down a large verdict against Caltrans for a very similar marked crosswalk in Millbrae. We also showed the jury that in 1994, Caltrans commissioned a study, which found that laying down crosswalk markings across so

many lanes invited disaster and made intersections more dangerous than they would have been without them. A 2005 Federal Highway Administration study reached the same conclusion. I think that evidence went a long way with the second jury.

Did you take a second look at all the discovery and experts before the re-trial?

We did. We spent a lot of time working with our witnesses and experts prior to the second trial, which helped their presentation to the jury. In the first trial, one of our experts came off poorly to the jury. I remember running into Mary Alexander, who worked with this expert in trial before. With her input and a lot of work, we spent a fair amount of time beating up our own experts. As a result, our experts came across much better in the second trial. We were also successful in hamstringing Caltrans’ experts, who attempted to offer irrelevant information to create confusion and offer new opinions



and theories that were not disclosed at their depositions. Our judge kept that stuff out, and kept the jury focused on the question of whether the crosswalk was dangerous, as opposed to whether or not Caltrans followed its own manual.

Were all the judge's rulings the same?

Caltrans asked the judge to reconsider virtually every decision he made in the first trial. Ultimately, the judge made the same rulings the second time around. But we handled the rulings differently. For example, in the first trial, Caltrans wanted to get before the jury evidence that the crosswalk markings complied with all Caltrans' standards and manuals. That was true enough, but we kept that evidence out as being irrelevant to the issue of whether the markings constituted a dangerous condition. That strategy may have backfired. One of the jurors from the first trial seemed to fault us for not proving that crosswalk markings violated any of Caltrans' standards.

So in the retrial, we let Caltrans get a little further into their "compliance" evidence before either objecting or moving to strike based on relevance. In each instance, the judge either sustained the objection or struck the testimony. Caltrans' lawyers tried again and again to get the evidence in front of the jury, thinking that in the end, even if the evidence wasn't admitted, the jury would get the point that the markings complied with Caltrans' handbooks. Instead, what the jury heard repeatedly was that whether the crosswalk complied with Caltrans' standards and handbooks was irrelevant to the key issue of whether it was dangerous. The jury heard that not from plaintiffs' lawyer, but from the judge.

Could the different results be explained just by the fact that you had a different jury?

Sure. For the second trial, we felt we needed to do a better job of identifying

and removing defense jurors. So I left out of my mini-opening any talk of the evidence showing that marking crosswalks makes them more dangerous, why that might be, or how Caltrans knew that marking crosswalks at busy uncontrolled intersections was a bad idea. Without that background, our case sounded improbable, even to me.

Once we started voir dire, the defense jurors just couldn't help themselves. One practically leapt out of her seat, explaining how the case was frivolous, that we were just going after deep pockets, and that we were wasting everyone's time. It was not difficult to find other jurors who wholeheartedly agreed with that juror. Had we disclosed some of the evidence that made the case a closer one than it otherwise appeared, the defense jurors might likely have held their tongues. But as it was, of the first 18 prospective jurors in the box, 12 were excused for cause. Those who were left were at least receptive to hearing the evidence. So, no question, the second jury was more open-minded than the first, and that could have made the difference.

Did you do anything differently in your closing argument?

You know, I'm not very good at being cognizant of my behavior in the moment. Claire said I became pretty vocal during my rebuttal, but I have no memory of being particularly loud. Caltrans' closing was long and contained so much information that I wanted to rebut. We had a bit of time before I had to give my rebuttal, so Claire and I came up with a "top ten" list of points we needed to rebut. We then whittled that list down to 3 or 4 main points.

For example, Caltrans argued it did nothing wrong since it painted the crosswalk per the MUTCD. I tried to refocus the jury on the central question of whether the crosswalk was dangerous, not whether the lines were painted per the MUTCD. Because if it was dangerous, then the law required Caltrans to fix or remove the crosswalk. It's not an excuse

that Caltrans decided it didn't have to fix or remove the crosswalk because it felt it complied with the MUTCD. I told the jury that Caltrans doesn't get to write their excuse. I also pointed out how Caltrans cherry-picked its compliance with the MUTCD on the crosswalk markings, while ignoring other parts of the MUTCD relating to whether there should be a crosswalk in the first place.

I finished up by explaining to the jury what Caltrans' position meant, which was that Caltrans knows these crosswalks up and down El Camino are dangerous, but it won't fix them until after someone is killed. I asked the jury to tell Caltrans its position was unacceptable.

What's next for the case?

We had hoped a verdict would lead to the State correcting the dangerous crosswalks up and down the Peninsula. But the State has made it clear it has no respect for the jury's decision. We expect the State to appeal rather than take the verdict to heart. The State's already filed a motion for a new trial, which focuses on the jury instructions and verdict form. Fortunately, the verdict has garnered the support of many of the residents who live along El Camino. They're now demanding change and that, in turn, has caught the attention of some of our lawmakers. It may end up that the verdict generates legislation requiring Caltrans to do its job and fix the crosswalks. We just hope we can make it happen before someone else is killed or injured.

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