Great cases I have lost

And the lessons learned

By Walter "Skip" Walker

Lesson Number One

In 1985, I tried the Alpine Meadows Avalanche case in Placer County for four and a half months. It took over two weeks to pick a jury in August, and in December the chosen 12 deliberated for two and a half weeks before coming in on the Friday afternoon before Christmas with tears streaming down the faces of three of the jurors. It is well known that jurors don't cry for defendants. Not in our business.

The case received national attention, was written up in Time magazine and the verdict was on the front page of the San Francisco Chronicle. I was 35 years old and thought there was nothing unusual about any of this.

Lesson Number Two

I had lost a couple of cases before the Alpine Meadows trial, but they were aberrations, I was sure. One of them was a common carrier aviation case in Nevada. A tourist flight to the Grand Canyon had crashed on landing with many injuries but no fatalities. All the passengers had settled except one French couple who had not engendered much sympathy from defense counsel.

The Las Vegas jury was allowed to deliberate into the night and came back at 10:30 p.m. with a defense verdict. It was the judge who cried out, "What?" It was the judge who then laid into the jurors, asking if they thought a trial was like a Perry Mason show, where somebody broke down on the stand and confessed.

"No," explained the foreman, "it was just that we couldn't figure out if the plane crashed because water got in the fuel, as plaintiffs said, or because of wind shear, as defendant said; and so, since we couldn't figure out which it was, we voted for the defense."

Lesson Number Three? Not yet.

Of interest (and of salvation to me) is that both cases settled after the verdict but before appeal. In the latter case, it was obvious the judge was going to grant a new trial, but the French couple let it be known they were not coming back to Las Vegas under any circumstances. So we had to take what we could get. In the avalanche case, there was a very significant matter that came to light after trial that defendants were not keen to have debated, and so that settled on much better terms.

Truly Lesson Number Three

Many years later, a jury came in with a defense verdict in a case in which twin girls wearing dark clothes on a dark morning were crossing a San Jose street in a marked crosswalk in front of their high school when defendant came roaring along in her Mercedes. Defendant claimed she never saw them, which of course is no excuse. One twin saw her, however, and jumped out of the way, leaving the second twin to get hit and suffer rather severe injuries. The defense paid almost a million dollars to the girl who got hit, but would pay nothing to the girl who jumped out of the way.

The jury's verdict was not that there were no damages, but that there was no liability. Once again, the judge nearly came unglued and let it be known from the bench that he was going to grant a new trial, which he eventually did.

On appeal, the Sixth District said the judge was wrong. He should not have granted a new trial; he should have granted a directed verdict for plaintiffs. That case, too, settled, but by then both the plaintiff and her sister had moved on in life and the emotional distress case did not have the value it formerly had.

A note about lessons and rules

I have been trying cases for over 40 years now, have tried 55 to jury verdict and about 100 in various forums, including court trials, administrative hearings, and jury trials that settled during the proceedings. With each trial I learn something more, and it should come as no surprise that I find I learn the best lessons from the losses I have experienced. They include:

- Don't represent a drunk victim or a drugged victim;
- Don't represent a speeding driver;
- Don't represent a plaintiff with a lousy disposition;
- Don't represent a plaintiff who says stupid things;
- Don't represent a liar;
- Don't represent a victim who was in possession of a gun;
- Don't represent a victim who has neither friends nor eyewitnesses who can or will testify as to what he/she was doing;
- Don't try a case with engineers on the jury;
- Don't try a case in Fresno.

But wait...I have also tried and won cases in which I had to deal with each of those situations. So are there no rules, no lessons to be learned after all?

No, the lessons from each of my losses did not impose a formula on my practice – but they did enable me to recognize pitfalls, work around difficulties, and not make the same mistake twice. On the other hand, the best lesson about lessons is that there are always more to learn.

Lesson Number Four

I lost a trial in Napa when I was a very young lawyer, years before the Alpine Meadows trial. I had started my courtroom career on a winning streak, which had caused me to be under several misimpressions, not the least of which was that I was an exceptionally talented advocate. My client in the Napa case was a young man who had geared his life to going to medical school until he got his hand mangled in a Toro lawnmower while working a summer job at his church. He had received workers' compensation and the workers' comp carrier insisted on intervening to get its money back. (*Lesson!*)

My mistake was in picking the jury. I did not excuse a senior citizen who had gotten his own hand mangled when he was a youth. I figured that he would identify with my client and together we would be able to tell the other jurors of the travails one has to experience with a crippled hand. Wrong. He had gone through life just fine, had learned to adjust, had never gotten workers' comp himself, and so joined in heartily when others brought up the fact that my client had already been "compensated."

Lesson Number Five

With such hard-earned wisdom about jury selection, I proceeded into Fresno 30 years later, representing the family of a driver who had rolled his SUV on a country road, crawled out and positioned himself on the side of the road, waving his arms frantically to warn oncoming traffic of the overturned vehicle ahead. A slightly speeding truckdriver had hit his brakes, wrenched his steering wheel to the right, and slid right into the waving man, killing him on the spot.

We questioned prospective jurors for the better part of two days, getting each and every one to commit not to prejudge the case "just because" the victim had been drinking. We did a good enough job to earn a half-million dollar offer after the jury was selected. But half a million wasn't good enough for us, much to our regret when the jury came in with a defense verdict. The jury foreman, a retired CHP Captain ("*But the defendant was speeding!*") when asked what had caused such a miscarriage of justice, explained, "Well, your guy had been drinking."

Lesson Number Six

Then there was the case involving a shopper inspecting goods in a kiosk set up by a hardware store in its parking lot just three feet from a cement parking bumper. Shopper steps back to look at the goods in the kiosk, trips over the bumper and snaps his leg in a compound fracture. The store wants the shopper to look up at its wares, not keep his eyes on the ground. Hence the store is responsible for its unsafe premises. Of course, you protect against the unlikely. While arguing that it is all the store's fault, you nonetheless insist on the instruction about the possibility of there being more than one cause of an accident, insist that the judge read to the jurors CACI, No. 431: "A person's negligence may combine with another factor to cause harm."

So what do you do when you find out that the jury only got to the first

question on the Verdict Form: Was the defendant negligent? Not much more than tell your next jury to be sure to read beyond the first question. Not much more than emphasize next time the possibility of multiple causes even when you yourself are convinced there was only one.

Lesson Number Seven

Or how about the speeding driver who was misled by an improperly placed sign on Highway 101? Her car rolled over as she belatedly tried to take an exit and she was killed. Multiple causes, it seemed to me. But we tried the case in San Jose and had no choice but to leave a couple of engineers on the jury. (There are, after all, only so many peremptories allowed, but there are an endless number of engineers in Santa Clara County). I don't think engineers like the concept of multiple causes. What they do like is putting square pegs in square holes and that is not always possible when trying to explain why a decedent did what she did.

Defendants had a square-hole engineer as its expert, and with my years of scars and hard-earned wisdom, I took him on. Admirably, I was told. In the words of my referring attorney, I "absolutely destroyed him." I "left blood on the floor," he assured me. But that was before lunch. Quit while you are ahead my present self would say to my then self. But no, I was going to continue pummeling the poor fellow, racking up even more points to list for the jury in closing argument. Except there was that lunch break, and defense counsel was at least as experienced and skillful as I. When the expert returned to the stand he was a totally different person, not answering my questions and instead, with the judge's permission, giving long, non-responsive speeches that turned the blood on the floor from his to mine. I sat down before I was exsanguinated.

The jury, no doubt, thought that was a wise decision. They came in with a defense verdict. ("Well, if she hadn't been speeding," a juror-engineer told me, "the sign wouldn't have made any difference.")

Conclusion

Let's review – and remember, these are just lessons from my career, yours may be quite different. In reverse order:

Lesson No. 7: Beware hubris every bit as much as you beware engineers.

Lesson No. 6: Don't take jury instructions for granted.

Lesson No. 5: Don't think that just because a juror has made a commitment to you that you have a contractual right to that juror's vote.

Lesson No. 4: Don't superimpose your ideals on prospective jurors.

Lesson No. 3: Don't despair, sometimes cases will right themselves...but not always as right as you would like.

Lesson No. 2: Jurors don't always think the way lawyers expect them to think.

Lesson No. 1: Enjoy the ride. It might not happen again.

"I've got a million of 'em," as Jimmy Durante used to say. And you're welcome to each and every one.


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