

The Combustible Jury

by H. W. Moss

Nothing so binds a personal injury jury together more than the desire to be set free never to return.

And none spend other peoples' money so easily or at greater velocity nor more generously than that same personal injury jury.

All the jury wants to do is go home to a previous life that seems serene by comparison to the incredible tragedy that has been portrayed by plaintiff's counsel and the unassuming normalcy of the incident that has been explained by the defense.

The first thing Judge James Bascomb said upon being introduced that first day with the bailiff's, "All rise," was to abjure everyone to sit and that's the last time you will be asked to stand.

"We're a progressive courtroom. We don't stand for anything but justice."

Approximately ninety people waited to endure *voir dire*. Many were culled and few were chosen. They were told this was a bicycle versus automobile personal injury case. The jury was not to consider whether or not insurance was involved.

A show of hands for hardship cases and foreign speakers with limited English. They were released. A name was called, that person took the next available chair and answered questions read from a list on the far wall. Each was asked if they drove a car, rode a bike or took Muni. Any who said they were in the medical profession and capable of reading an MRI or CT scan was let go. One potential juror said he could not be impartial because he was not willing to give \$1 million to a plaintiff.

"Well, I don't believe you, but you're excused," said Judge Bascomb.

Questioning ended when both sides and the judge agreed that person should be kept.

The first person to be empanelled wore a T-shirt with a cartoon panda bear displayed on his chest. Harold did not catch the name, but during the rest of the proceedings thought of him as The Pixar Guy.

Penelope was the fifth accepted. She said she rides a bike exclusively. Everywhere.

Harold stated he was retired and now writes journalism and fiction.

“Does writing pay well?” the Judge asked with a wide smile.

“No one who writes makes any money unless they are named Stephen King.”

Harold became juror number seven.

Walter was a retired attorney somewhat older than Harold. Although it is a truism in the legal profession that lawyers make the worst jurors, he became the eighth.

One potential juror said she rides a bicycle for pleasure, drives to work and takes Muni.

“When do you use Muni?” Whiskey asked.

“When I have to come here.”

Finally, fourteen were empanelled, two of them alternates.

Judge Bascomb explained plaintiff goes first represented by The Whiskey Law Firm, James Whiskey and Brian Mallory present. A young couple shared the table with them.

Defendant’s counsel was Michael F. Greene. Next to him sat a gray haired older man, short with a slender moustache.

In his opening statement, Mister Whiskey addressed the jury saying, “This case is about the sudden opening of a car door, negligence and permanent brain damage.”

He told the jury that plaintiff was damaged by defendant which will affect her in the future, probably as long as she lives, and wants money damages sufficient to compensate her for the rest of her life. This includes past medical and chiropractic costs, lost income from two sources plus damages to bicycle and helmet. She is asking for future working-life income to compensate for earnings she will not have due to the lowered mental acuity she endures.

“As a result of the accident,” he explained, “Grace now has a problem prioritizing, focusing and keeping up with the requirements of her job at the non-profit where she works. She has memory issues due to a head injury she suffered when she hit the pavement. She claims permanent brain damage, daily headaches and regular dizziness now and forever. Diagnostic and Statistical Manuals Four and Five will be introduced.”

“She is not malingering,” Whiskey said in conclusion.

Defense agreed there was an accident, but it is unclear what, exactly, occurred.

“In fact, initially liability was denied,” Greene said, “but we’ve come a long way here.”

Greene said defendant wishes to pay for medical expenses and chiropractic, the bicycle, helmet and torn jeans and a year of recovery. They will even give money as recompense for a perceived slight that has been extrapolated from the incident, but not to the end of plaintiff’s life.

“It was an accident, pure and simple.”

That was the duty the jury would be given to deliberate: Thirty thousand or one and a half million. Testimony began October 8 and lasted until Friday, the 24th.

Before evidence began, Greene asked, “May I speak with you your honor?”

The judge answered so that everyone could hear: “You can talk to me, but it will be an entirely unsatisfactory experience.”

Then judge and counselors retreated to a back room.

Upon return, Judge Bascomb took his seat high above all others in the room, pointed out the plaintiff seated next to Mallory and said, “She looks whole, but that is why we are here: Looks can be deceiving.”

Juror ten, Malcolm, raised his hand. Bascomb acknowledged him.

“Are we allowed to ask questions?”

Yes, but no. The jury was not allowed to raise their hands if they had a question. Instead, Judge Bascomb told jurors to write on a piece of paper which they were to hand to the bailiff at a convenient time, such as at a break in the proceedings.

As he gave out a pen and notebook to each of the fourteen, the bailiff introduced himself as Court Clerk Shasha.

“Be on time, everyone, or last one buys cookies. That’s the tradition.”

Although the defendant and his wife remained throughout the entire trial, the plaintiffs, Grace and her husband, departed after they gave testimony and were never more to be seen. The jury received the case Monday, Oct. 27, and concluded deliberations the next day.

* * *

The first witness called to the stand was the defendant. He testified through an interpreter who sat in the witness box with him. When the judge overheard a minor discussion between them, Bascomb chastised both not to speak English at all, except the translator who would be recorded.

“You have an interpreter. He interprets and you only speak in Greek.” The judge added looking directly at the attorneys, “Motion in Limine, if you will recall.”

Defense attorney Greene elicited from his client through the interpreter that in 1966 Mister P arrived from Greece. He is now 75 and retired. On July 7, 2011, he left a Greek import store at 12:30 p.m., stopped to buy bananas along the way and parked eighteen inches from the curb. He opened his car door on Grace, 32, who was on her way to work at a local non-profit.

Through the interpreter, Mister P explained his door was only opened two-thirds when he heard a sound, closed his eyes because the noise frightened him. When he opened them he saw plaintiff Grace lying in the roadway. By the time he got out to assist, she had already made her way to the sidewalk where she was being consoled by a passerby.

Q. What did you see in your left mirror? If you had an obstruction did you think to turn your head back to clearly see?

A. I didn't see any body.

There were no marks on the door nor damage to the car.

Next witness was the paramedic who interviewed Grace on the scene. He said all vital signs were good, there were no neurological symptoms. He administered the Glasgow Coma Scale tests which are routine after an accident. The lowest score is three

which indicates coma or death; the highest is fifteen which is a fully aware person.

Thirteen is normal.

“She did not meet guidelines for a code,” he said. Upon further questioning, he explained that means there was no siren, no emergency lights and he drove with the flow of traffic to General Hospital.

Before court was adjourned for the day, Bascomb admonished the jury. “I must give you these instructions. You have heard testimony and learned about the case. You will be curious and want to learn more outside this court room. You may want to go on Google to look up the case or do other methods of research. DON’T DO IT! You are not allowed to investigate on your own. Got it? Court is dismissed until 9:00 a.m. Tuesday.”

He brought down the gavel to punctuate this pronouncement.

Court clerks were on strike on the sidewalk out front when Harold approached Tuesday morning. Pickets were carrying signs, circulating under the direction of a man with a loud speaker giving them chanting instructions. The demand was for higher wages which the news that night said are among the highest in the Bay Area starting pay around \$60,000.

Harold and the rest of the jury were to be paid \$15 a day as a juror, about \$3,750 a year when you worked it out. If anyone could possibly sit on a jury that long.

Bascomb entered speaking: “Let the record read twelve jurors two alternates present.”

Plaintiff Grace testified that morning. Under Whiskey’s interrogation the jury learned her full name, date of birth, education, history of teaching English in China where

she learned Mandarin and the fact she was a nanny earning \$50,000 a year until she began working at the non-profit for somewhat less, \$46,000 a year.

At the time of the incident, she was in the right hand number two lane riding to work carrying a canvas bag containing potting soil on the handle bars. She took this five minute ride from home every work day. There is no bike lane or sharrow and would have been inches from parked cars on the right. Her speed was unknown. A door flew open.

She must have been knocked unconscious because she has no memory of what happened until she became aware of lying in Mission Street and somehow got to the sidewalk.

She has no memory of how far open the car door was or of having hit the door. She has no memory of the color of the car, how far to the left of parked cars she was riding, nor where she landed or how she fell. She knows she was confused sitting in the middle of a busy street and wanted to call her husband. She does not remember his arrival. She has no memory of speaking to a cop or being put in the ambulance. She does remember being given an ultra sound at General Hospital, but not arriving at the hospital. Her head hurt where it was bleeding slightly and she had a headache which went away.

She felt good enough to go to work, but within a few hours her headache returned and was as bad as immediately after the accident.

She said she suffers memory loss and repeats herself when in conversations. For example, at a barbeque she told the same story to the same person three times within one hour. She has forgotten simple small things like being given instructions by board members of the non-profit. She cannot concentrate at training events and has become dependent on lists.

“I never used to look at a list to remind me to check my email. Now I have to or I forget to check,” she said.

Greene began his cross examination of Grace by stating, “On July 7, 2011, you drove into a car door.”

She replied, “I don’t remember except passing the trunk of the car.”

Greene said, “You told the police officer you were riding at a constant speed of 15 - 25 miles per hour.”

“I don’t remember.”

Greene said, “On June 26, 2013, your deposition was taken. You testified under oath then and you are under oath today. You testified in that deposition you made contact with a car door. Is that correct?”

“I don’t remember.”

Greene provided the judge and plaintiff with a copy of the deposition of June 26. He directed her to turn to page 27, lines 3 to 5 and began to read out loud.

Q. Do you know what part of the car you made contact with?

A. The door.

Q. How far away were you?

A. The driver had just opened the door.

Q. Lines 13 - 15. When you saw the door open how far open?

A. Flung all the way open.

Q. I’m asking if someone told you you did not hit the door?

Another interjection by Judge Bascomb who said, “I have not been there often. That’s classic ‘Rosencranz and Guildenstern.’” He clapped the gavel. “I’ll not allow that.”

Under further questioning, Grace said she did not remember testifying in the deposition or answering these questions. She did not remember a canvas bag on the handle bars or transporting anything on her shoulder.

“I don’t remember, but it seems logical my purse would be on my shoulder,” she said.

“Do you know your own expert says you did not hit the door?”

Whiskey said, “Objection. Not in evidence.”

Up to then, Bascomb looked like he had gone back to sleep. Elbow planted next to gavel, his head leaned on his right fist with eyes nearly shut. But there came the objection and he sprang to life, raised the gavel and said, “When there’s an objection I have to go to work. Sustained. Because it could go back and forth.” Clap.

Greene said, “July 12, 2011, you went to Clinic by the Bridge. You went primarily complaining of headache and dizziness. They recommended a Computerized Tomography or CAT scan.”

“I don’t remember. I guess so.”

Greene asked, “You learned the results of the CAT scan were normal?”

“I don’t remember. I guess so.”

Two more days of testimony followed including plaintiff’s husband. He testified he arrived on the scene before the paramedics and made the 911 call. He was asked by the operator if his wife was confused.

“She’s confused about whether or not she’s confused.”

He said normal physical relations between them stopped for about a month after the accident, but now had returned to normal. He was dismissed.

Plaintiff called the emergency room physician who saw Grace.

Greene was in the middle of cross questioning the physician.

“She appeared to be well groomed, speech articulate, recalled objects, performed mathematics,” Dr. Roman said adding, “She had a fine short term memory.”

Q. Your conclusion about her condition?

A. All neurological exams were normal. I found intact physical characteristics. I felt she did not have any ongoing problems.

Q. You can tell the difference between malingering and ongoing problems?

Bascomb interrupted Greene before the doctor could answer saying, “That’s like the Marine who gave us the line, ‘Kill them all. Let God sort them out.’”

Greene said, “Let me rephrase the question.”

From the jury box Harold raised his hand and interrupted. “Cromwell. It was the Roundhead Cromwell who said that.”

The judge said, “Well, Rommel or whoever.”

The next day at the mid-morning break Harold stood in front of Bascomb and asked, “I said Cromwell, Oliver Cromwell. Did you hear Irwin Rommel?”

Bascomb said, “I looked it up. It was some abbot named Arnaud Amaury who helped crush the Albigensian Crusade. He told a soldier worried about killing Catholics along with heretics at the sack of Béziers, "Kill them. For the Lord knows those that are His own."

Morning Osterwan was sworn in testifying for the plaintiff. She said she was an expert witness in clinical and neural psychology, a board certified neural psychologist who requested Grace not be present during testimony. She testifies at trials for \$475 per hour.

This prompted Harold to hand in his first note at the next break. It read: Is the witness an MD? Are we going to hear anything about the brain's plasticity?

Harold had read Oliver Sacks and seen Dr. Ramachandra's studies of phantom limb syndrome on PBS. The issue of the brain being able to change and find alternate means of performing functions that had been lost formed the basis for his question.

Osterwan said, "The DSM is the bible of mental health diagnosis." Then she said, "I am not a medical doctor, but I believe she will have significant neurologic impairment for the rest of her life which leads to disability. Every patient takes a different path to recovery."

Greene objected challenging the word "disability" as a disclosure not in Osterwan's deposition.

Bascomb said, "When you disclose you have to follow the deposition. However, neurological disability leads to going forward. Objection over ruled."

Whiskey asked, "Is this sometimes called an 'invisible injury'?"

A. Yes. Memory deficits do not bounce back very well. Certainly, this woman will have deficits for the rest of her life.

Osterwan told the jury two and a half million people a year have brain injury. Eighty-five percent have mild traumatic brain injury and fifteen percent of those may be

mild, but will have longer deficits. And fifteen percent of that group will have permanent brain damage.

Harold tried to do the math. Let's see, 85 percent of 2.5 million, of which 15 percent have longer effects and of that 15 percent will have permanent damage. His brain dribbled back to taking notes.

"We have more sensitive tests now," said Osterwan. "We've found some people are genetically predisposed to brain injury."

She went on to testify that, "Undifferentiated somatoform disorder no longer exists in DSM 5. Functional neurological symptom disorder is the umbrella under which we find many symptoms -- weakness, paralysis, slurred speech, none of which Grace has. It is a common misconception that the patient is in control of their symptoms."

Q. Does the brain have the ability to heal itself?

A. No question there is plasticity and our brain adapts. It can learn, can change, new neurons can develop in the brain. It used to be believed the brain was static.

She then used an analogy: Highway 101 has an injury accident. There is a back-up plan. You can take Highway 280.

"But in the brain there is no backup plan," she declared. "Critical functions take place where there is no backup plan. Memory is the worst for a fortified or backup plan."

Under cross examination, Greene asked Osterwan what Grace remembered about the specifics of the accident.

Q. Did she see the door?

A: She saw the door. Whether or not she hit the door, I don't know.

Q: Did she suffer amnesia?

A: She hit her head.

Q: So she does not remember hitting the door?

A: Whatever didn't happen wouldn't be under the rubric of amnesia.

Harold found this an amusing enigmatic statement and sniggered. Fortunately, this did not draw the attention of the judge

Next witness was Dr. Mark Struldbugg who was called by the defense and stated he is a physician specializing in neurology and psychiatry. He did his residency in psychiatry, has been in private practice in neurology for 25 years.

Dr. Struldbugg was asked his hourly rates. He said he charges \$650 per hour to evaluate someone, \$800 to answer in court and give depositions. He makes \$600,000 per year in the courts and so far has put in a total of 15 to 16 hours in this case.

Under questioning, Dr. Struldbugg said, in his opinion, "If the accident had not happened Grace would still have developed a variety of dependence issues. Now she suffers Conversion Disorder, the most common of which is Somatization Disorder and Anxiety Disorder NOS which means Not Otherwise Specified."

Greene asked, "If the accident had not occurred, given the degenerative pathology of her memory, when would she have developed memory loss?"

With unassailable logic, the witness said, "At the same time the accident did not occur." Then added, "We are talking theory here. No one knows."

Harold carefully printed in block letters, "Please spell and define the following terms: Undifferentiated Somatoform Disorder, Conversion Disorder, Anterograde Amnesia."

Court Clerk Shasha looked astonished as Harold passed his second request in as many days to him on a folded piece of note book paper. “You have another question?” he asked with the profoundest incredulity in his tone.

Plaintiff called Michael Avenue to the stand. He said he does active reconstruction in biomechanics, has an MA and a Ph. D. in bioengineering and charges \$350 per hour.

Greene: Your Honor. Can we have a brief side bar?

Judge: There’s no such thing as a brief side bar.

Again, judge and counselors retreated to the back room.

Upon their return, Avenue continued his testimony. He said it was unclear Grace contacted the door. Given there were no marks on the door, this did not rule out bike contact. She may have taken evasive action and fallen where she hit her head on the ground. Given her rate of speed, between 15 and 20 miles per hour, the automobile driver and the bicyclist had a limited time frame, perhaps a maximum of five seconds before the accident in which to react.

“She probably perceived the hazard one to one and a half seconds out and had half a second to react,” he said. “She would have been in the driver’s rear view or side mirror for five point six seconds.”

Defense rests.

Mister Whiskey addressed the jury in summation. “They called her a liar,” he said indignantly. “But the truth is, Grace is not malingering. She has been robbed of her essence, damaged for the rest of her life and for that she should be compensated.”

* * *

The judge gave instructions to the jury Monday morning. He explained the law they must follow and, again, admonished them not to consider insurance.

“Only a witness’s answers are evidence. You may ask yourself, ‘Does the witness have a stake in the outcome?’ Two people may see the same event, but remember it differently. You are allowed to accept or reject any part of a witness’s testimony and your notes are to help you recollect.”

The jury listened intently.

“This is a civil trial and it is necessary only to prove something is more likely to be true or not true. Some evidence is direct and other evidence is indirect or circumstantial. The law makes no difference between the two. This is a money judgment request and you are not allowed to flip a coin to arrive at a conclusion.”

Finally, before they were escorted out, Bascomb warned them, “You will be given a verdict form that was created by us, the judge and the lawyers. Do not immediately say how you intend to vote. Nine jurors must agree on the answer to each question. You cannot flip a coin or take an average to determine damages.”

In the jury room the alternates were absent. Only the empanelled twelve sat around a long ovoid table. The deputy escorted them in, closed the door behind her.

Although there had been little fraternization among the twelve during the course of evidence presentation, polarized opinions were waiting like mushrooms to burst from the fecund peat bog opposing counsel spent three weeks spreading at their feet.

The first order of business, according to the judge’s instructions, was to elect a foreman.

Walter accepted the unanimous decision.

Walter's first order of business was that everyone write their name on a piece of note paper and prop it up on the table in front of them.

There were suddenly names for hitherto unknown members of the panel. George was The Pixar Guy. The little Spanish lady was Evelyn. There was a Randy and a Charley and Penelope, the bicyclist who had been late to trial every day. She was first to speak: "What do you say to two million? How about we give her three and a half million? I know they didn't ask for that much, but she got doored."

"I can see that." A wise nod from The Pixar Guy. Harold could not think of him as George.

Evelyn voiced concern the defendant might be ruined with a judgment like that.

"Naw. He won't be paying," Walter replied. "Insurance is paying."

Harold was seated next to Penelope. "Did you ever buy us cookies?"

Charley said, "I had no idea they called it that: doored. It's like my grandfather's circumcision."

Sven laughed, a short snort.

Harold said, "Nooooo. I don't think it's anything like your grandfather's circumcision."

The rest of the room sat in anticipatory silence.

"He was eighteen in nineteen-forty-eight, just after the war, when he had to go to general and have his circumcision. In those days it was an outpatient procedure so when it was over he rode his bicycle home on Jefferson Street which had heavy traffic when some guy opened his car door on him. He was doing a fast clip and it tore his stitches out.

He was in the street bleeding and it wouldn't stop so they had to take him back to the hospital to have him sewn up again.”

Harold broke the uncomfortable silence that followed this declamation. “I think not, Charley. Except for the car door opening, our case is nothing like your grandfather's circumcision.”

“Was he wearing a helmet?” Penelope asked.

“Naw, hell no. Nobody wore helmets riding bikes in those days.”

“Did he sue?” asked Randy.

“Nobody had insurance either,” Charley said. “Not required in order to drive a car. No insurance, no law suit.”

“Which is why it is stupid of the judge to say ‘Do not consider insurance,’” Walter explained. “Obviously, there is insurance involved, otherwise we wouldn't be here. Everybody who drives a car in this state has to have insurance.”

“And who's paying for all these expert witnesses?” Harold asked. “I made a list. Osterwan said she gets \$475 an hour to testify and Struldbrugg charges \$650 per hour to evaluate someone, \$800 to answer in court and give depositions and so far has 15 to 16 hours in this case. Do you realize we're up to \$200,000 just for hired guns? This one charges eight fifty. Eight hundred and fifty dollars an hour! And this one at a paltry three fifty must think she's getting low balled. They're cheatin' her.”

No one disputed this and no one seemed concerned with these facts. A concussion discussion began.

“Mild Traumatic Brain Injury is not necessarily mild,” Malcolm said.

“Right. And it can be permanent,” Penelope interjected. “That was brought up by Osterwan. I think it’s permanent in Grace’s case.”

“That’s right. Osterwan testified Grace suffers permanent MTBI, had a concussion and has post concussion syndrome,” Charley said.

“Anybody know what a sharrow is? It’s in my notes,” said Harold.

Penelope explained: “A shared arrow. When there are bike lanes sharing with vehicles.”

Harold waited until it seemed those who wished to voice an opinion had finished. Then he said, “‘She is not malingering.’ That’s three times Whiskey said that. Me thinks he protesteth too much.”

“Does anyone know the difference between the DSM 4 and 5 they’re arguing about?”

When no one volunteered, Ulysses said, “I tried to follow that too.” He flipped pages in his pad until he found what he was looking for, “My notes say there is a disorder that is NOS which stands for Not Otherwise Specified. I think it has to do with they dropped the letter ‘N’ so the latest book says ‘Otherwise Specified.’ At least, that’s my take on it.”

“The latest book dropped the ‘N’ so now it reads Otherwise Specified,” Anderson repeated. Again, there was quiet as everyone took this under consideration. “So they were arguing over one letter of the alphabet?”

“Well, it’s kind of an important letter,” Penelope said. “Stands for ‘not’ right? Not specified, not specific. So the new book says it is specified, specific. Makes sense to me.”

“What’s with refusing to tell us the name of the non-profit?” Malcolm expressed the question most of the jury shared, but had not asked. He must have been holding back waiting for just this moment in deliberations. “The judge said this was a first for him when at the outset of trial both lawyers thought it inflammatory to tell the jury what the non-profit is called.”

Walter said, “There’s the pharmacist Maurice who volunteered at the non-profit five or six hours a week.” Walter was in deduction mode. “So they needed pills prescribed. Was there a nurse too? How about Grace went to something called Christian College. And she visited her friend’s sister who had just given birth to her fifth child. Does this start to add up for you?”

Ulysses appeared not to comprehend where this was leading, but Penelope was right on top of it. “You think it’s an antiabortion clinic? Is that it?”

“That or a pro-choice non-profit. Either way, it might inflame us, set us on fire if we knew that. Another stupid move on the judge’s part.”

At the far end of the table Franklin held up a three ring binder open to a picture of the canvas bag Grace was carrying at the time of the accident.

He turned a page and said, “The non-profit is a pregnancy counseling center. See? It’s in the return address at the bottom of one of the letters written by Grace. I mean, how careless is that? The judge thinks we’d be influenced if we knew what the non-profit does? Yet we can look it up in the information they gave us to deliberate with.”

Harold found this observation particularly amusing, especially since the non-profit had absolutely no influence on his decision making. He said, “She earned \$50,000 a year as a nanny? That seems ridiculous.”

“What’s ridiculous? How low it is?” Penelope asked rhetorically. “I hear the going rate is seventy-five.”

Harold made his voice sound incredulous. “Seventy-five thousand dollars a year for a nanny? That’s bizarre.”

“Anyone else wonder what the so-called experts were talking about with Conversion Disorder? And somata-something disorder?”

“I asked for a definition of terms and never got one,” Harold complained. “What’s undifferentiated somatoform disorder mean? Does anyone know?”

“As in ‘psychosomatic,’” said Walter as if that explained everything.

“It’s all in her head? That’s what I’m telling you,” Harold exclaimed. “She’s faking it. We’re all being hoodwinked! I want the truth.” He inserted a worn joke of his. “That’s what my dentist says: I want the tooth, the whole tooth and nothing but the tooth. I said no, it’s my tooth, I paid for it, it has a gold crown, let me keep it.”

Walter did not laugh, but said, “You’ve used that before I bet.”

Harold said, “Don’t you get it? We are being asked to lower the bar to include more Mild Traumatic Brain Disorder sufferers. The way I get it, right now 85 percent of the total brain injuries are mild. Fifteen percent of those are severe and of those, fifteen percent are damaged permanently. That’s fifteen percent of fifteen percent. Now it’s like they want us to make that a larger percentage. We don’t know how big, but that’s what it sounds like to me.”

“Too much math,” said Penelope.

“How about the canvas bag?” Franklin had returned to the picture of the white bag with two handles laid out flat. It was not a bag that could be carried like a back pack. It

was more a shopping bag, but it had not actually been introduced to the jury. “Let’s ask the guard to tell the judge we want to see the actual bag.”

“If you carry a bag or anything on your handle bars on a bicycle, you are unstable,” Harold observed. “I know cuz I ride a bike recreationally. That’s how bike handle bars are. If she had something in the bag, what did they say it was? Potting soil? If she had anything in the bag and it was dangling from the handle bars, she would have been unsteady riding and could easily lose her equilibrium if she hit something or tried to dodge a car door.”

“The defendant said he closed his eyes when he heard a bang,” said Malcolm. “There is no evidence the bicycle hit the door. What if it was the bag swinging into the door which threw the bike and the rider into the street? That accounts for the bang.”

The request to see the actual bag went out the door to the judge never to be acted upon.

Next morning when deliberations resumed, the jury was sensitive to time constraints.

“If we don’t come up with a judgment before four, they won’t listen to us,” Walter warned. “We’d have to come back tomorrow.”

Franklin said, “So I guess we have to decide. It only takes nine to agree on something.” He went over to the white board and wrote a dollar sign with a zero, drew a straight line downward which ended at the number three million.

“How about this: Who is in favor of giving Grace a large settlement?”

“What’s large?” Harold asked.

“Anything over a million. Show of hands.”

Harold was the only one who did not raise his arm.

“Okay. That puts us here.” Franklin drew a horizontal line one third of the way down the vertical and erased the upper third. “We start at one million.”

“This is crazy!” Harold was indignant. “How can you give this faker a million dollars? You’re all being duped. This is a classic case of ‘My guy can read an MRI better than yours can,’” Harold said in dirge-like chant.

“This is not about an MRI or a CT Scan,” Penelope piped up. “Neither one can show a headache.”

“Or dizziness,” said Anderson.

“So all except Harold agree we should give Grace an award of at least a million dollars. We just have to find the exact amount.”

Harold’s arm shot up. “Do I have a say in this?”

The ever forbearing Walter said, “Of course.”

“This is the national scare *du jour*. Last time I was in a jury room it was for lower back pain purportedly a permanent injury caused by a Muni bus hitting a car at a stop sign. This time it’s post-concussive brain injury which, if the NFL had not been forced to admit its former players are killing themselves and their families and turning into Muhammad Ali pushing a walker, none of us would be here. It’s all subjective. No one can see an unfocused mind or a memory that needs to make lists because of an accident. No one can see headache or dizzy.”

“Point taken. Next person? Sven.”

“Ya. I like to tink she’s fine, but that’s nod whad the expert stink.”

Harold said, “She would have had all those memory problems if the accident never occurred.”

Ignoring this completely, Franklin said, “So except for Harold, we all agree. Start at a million and go up to three. I think we’re Ouija-boarding our way to a conclusion. Who votes for one and a half?”

Harold raised his hand along with eight others. When the vote was counted, an astonished Franklin said, “What? I thought you were against giving her anything why are you voting for one and a half million?”

“I’m trying to stem the flow of this avalanche. Of course I’m voting for the lowest number that’s on the auction block. I don’t want this to go any higher. I’ll do anything to stop raising the ante any further.”

Franklin looked at Harold and said, “I know what you’re saying and there’s a part of me that agrees, but not completely.”

After that, Harold waited until he saw his vote would be the last counted, cast it thinking it might stop the rising tide. His vote may have influenced the jury to stop at two point two five. There were not enough others joining Penelope after that to have any significance and that is where the bidding stopped.

The jury had a number. Now they had to assign fault.

“It’s a hundred percent his fault,” Penelope said “The bicyclist is always right.”

“She bears some responsibility,” Harold responded. “After all, she could see some fool in his car is about to get out. I admit he was negligent, but so was she.”

The eventual calculation was eighty-five to fifteen percent Grace’s fault.

The jury was brought back into court.

Bascomb asked, “Did you elect a foreman?”

Walter said, “We did your honor. It’s me.”

“That’s who we guessed it would be. The smart money was on you. Bailiff will bring your verdict to me.”

Afterwards, the jury was polled to be certain all agreed. When he got to Harold, Bascomb said, “You found both of them substantially at fault?”

“That’s right, your honor.”

“Well, that’s a first. What made her responsible?”

“All bicyclists must drive defensively. What part of her baggage, the canvas bag or the purse, was involved?”

The ordeal was over for everyone. The jury was dismissed, but Bascomb said they were allowed to stay and ask questions of both sides if they desired.

Walter, Franklin, The Pixar Guy and Harold remained. Walter was the most persistent. He turned to Greene and asked, “Why were we not allowed to see the canvas bag?”

“Through pre-trial motions it was determined there was no evidence it played a part in the accident. No expert could say whether it affected the accident.”

“What else was held back from us? The name of the non-profit showed up on the bottom of a sheet of paper you gave us during deliberations. What else?”

“We hired an investigator to follow the plaintiff who saw her at outdoor events and said she showed no signs of debilitation or head problems. That was not allowed. The fact plaintiff had a very traumatic childhood, that was not allowed. Her previous history of psychiatric intervention, that was not allowed.”

On November six a check was cut and mailed to Harold in the amount of \$192.50 for jury service. It included \$2.50 a day for “mileage.”

When he told the story of his month of jury duty at parties, he usually began with, “I couldn’t believe the judge didn’t see me fall asleep. Must of dozed off a dozen times over a couple days. Looks like a seismograph on my note pad where the pen slides off the page as my hand fell away every time I fell asleep.”

When the check arrived, Harold was well into writing this story which he completed before Thanksgiving and was fond of saying to party goers, “I got paid nearly \$200 to write this. I told them I was a writer. Far as I’m concerned, they’re all fair game.”

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November 23, 2014