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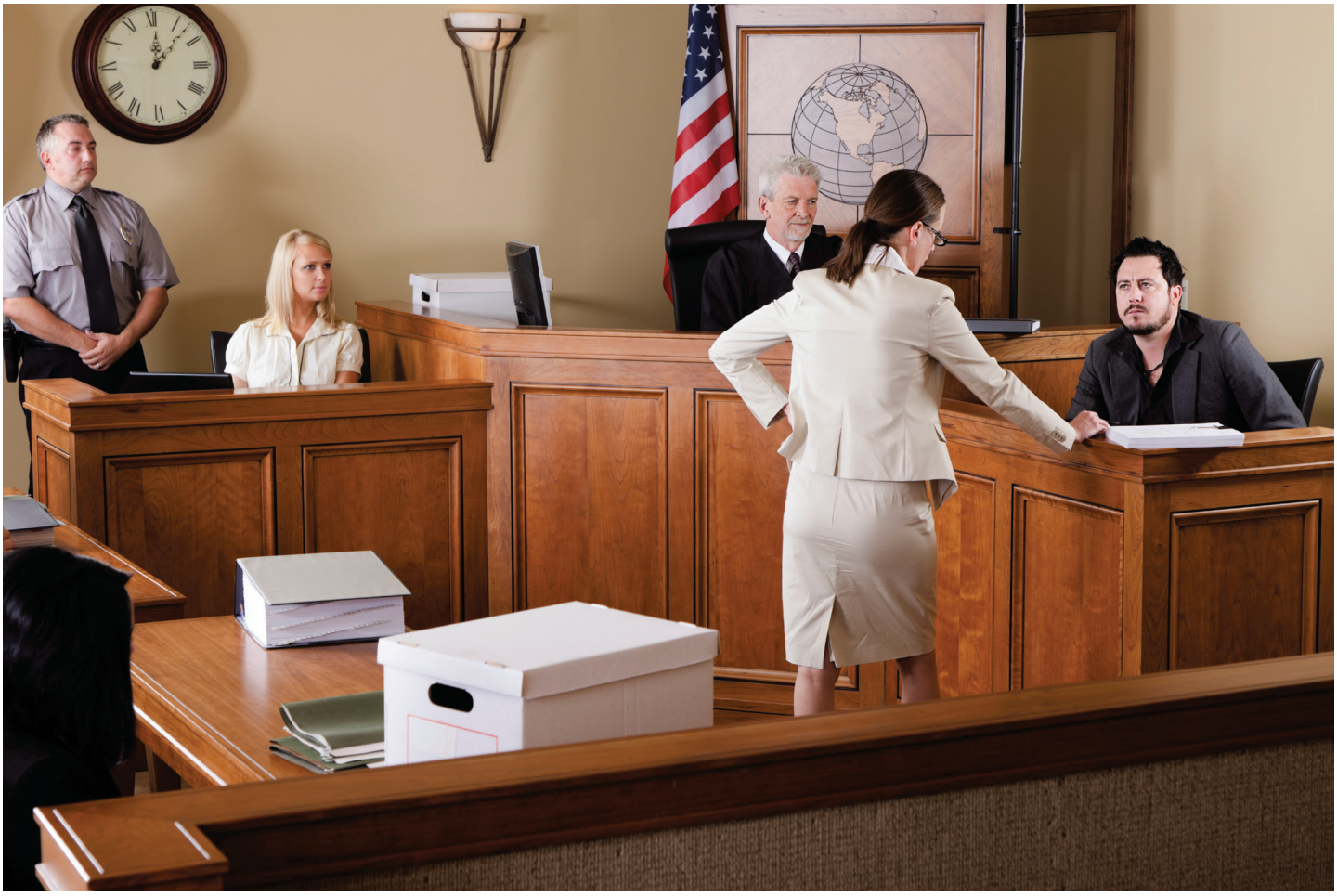

Jones v. Smith: Much to learn from one case

THE JUDGE'S REVIEW OF A LARGE JURY VERDICT THAT OPENED UP AN AUTO POLICY, AND AN ANALYSIS OF WHY OTHER TRIALS END UP IN LOW/DEFENSE VERDICTS

Before I went onto the bench, I practiced law for 20 years handling civil litigation. In addition to my legal work, I served as the game-day statistician for the Los Angeles Raiders from 1982 through 1994. I love football and I was paid to sit in the Press Box, watch the game from the 50-yard line and keep track of every movement of the ball. Life can be tough!

I enjoyed the fast pace of keeping track of all the statistics while the game was unfolding. It gave me the opportunity to combine my love of sports with my love of numbers. At the end of each football game, I called New York and spoke with the Elias Sports Bureau. They received all the game-day NFL statistics from me and the other statisticians around the country, which they inputted into their computers. Those stats were then sent out to the newspapers, television stations, and NFL teams as the official statistics.

When I became judge, I was assigned to a few different assignments and eventually I got my dream assignment, to preside over an Independently Calendared ("IC") courtroom. The IC assignment gave me the responsibility of shepherding each case assigned to me from its filing to its conclusion. Once I settled into my courtroom, I became interested in the percentage of my cases that settled. Many of my cases were quite contentious and I saw the attorneys on a regular basis with requests for ex parte relief, motions, etc. With other cases, I never saw the attorneys.

After one year as an IC judge, I decided to do an evaluation of my caseload. I sat down and reviewed all the cases assigned to me to determine what percentage of those cases had either settled or had been dismissed regardless of the extent of my involvement with the case. Another way to look at this process was to determine what percentage of my cases went to trial.

The process was straightforward. I added up all the cases that either went to judgment or were dismissed. I discovered that 97% to 98% of my cases were

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resolved without trial. The number was much higher than I estimated.

Once I established this stat, I then posed another question: Is there something in common with the cases that went to trial? To answer this question, I looked at the files and specifically my notes from those cases that went to trial; I discovered something in common with each of them.

Unrealistic expectations

Since I had always asked counsel to discuss the possibility of settlement, and I kept careful notes about settlement, I knew what the demands and offers were made on each case before they went to trial. I kept this information as part of an informal program we had at the Santa Monica Courthouse. The judges exchanged information about demands and offers vs. the amount realized at trial to use as a tool when we conducted settlement conferences. We were trying to give credibility to our suggestions of settlement values.

A review of my notes showed that in each case that went to trial, one or more parties had an unrealistic expectation concerning the outcome. For example, in one case I had a pedestrian Plaintiff who crossed a busy street in downtown Los Angeles which was not controlled by a traffic signal, stop sign or crosswalk. In crossing the street, he almost safely traversed the street, when in his last two steps, a car hit the back of his right heel, causing him to sustain a ruptured Achilles tendon.

There were obvious issues of comparative fault, and the insurance company made the plaintiff a fair, reasonable, and substantial offer. He declined the offer and demanded that they pay for his health care for the rest of his life. He was 40 years of age with an estimated life expectancy of 38 years. The insurance company declined the demand, and the case was tried. The jury found in favor of the Defendant car driver and awarded $0 to the Plaintiff. The jury felt that the Plaintiff not only exaggerated his injuries and treatment, they also found the Plaintiff to be 100% responsible for the accident.

Another example of an unrealistic expectation is seen in automobile accidents where the property damage to the plaintiff's vehicle is minimal, the complaints of injury are all soft tissue, and plaintiff's medical and/or chiropractic bills are in a range of $5,000 to $10,000. Several times I had a plaintiff demand a huge amount of money to settle this type of case. With offers less than $20,000 coming from the carrier, many of those cases went to trial. The jury verdicts were always close to the carrier's offer. A photo of the minimal property damage was usually very compelling evidence for a jury.

The case of *Smith v. Jones*

Today, I mediate cases at ADR Services, Inc. I retired from the Los Angeles Superior Court bench in December 2018 and a few weeks later, I began working as a mediator, arbitrator, and special referee.

As I first considered my resources as a mediator, I drew upon my experience on the bench, specifically working with counsel to mediate cases before trial and my firsthand knowledge of presiding over jury trials and jury verdicts.

My thoughts went specifically to a case I handled around 15 years ago entitled *Smith v. Jones*. Willy Smith, 19 years of age, grew up in Los Angeles. He was always quiet, inward, and shy. He grew up attending private schools in the Los Angeles area. His mother was an art teacher, and his father was an architect. Willy was not good at sports and was not the most popular student at school.

He found his calling, however, in the world of art. In high school, Willy only took art classes as his elective choices, and he often stayed after school to work with one of his teachers. She encouraged Willy to find his voice through art and since his work was exceptional, she directed him to enter his work in some of the national art competitions. Willy was an expert with oils, and he won first place in one of the most prestigious competitions sponsored by New York University.

Willy graduated high school and was accepted at Yale University. After completing his freshman year in college, he returned home to spend that summer with his parents.

Willy Smith needed another outlet and his father encouraged him to take up cycling. Together they rode from their Brentwood home to Manhattan Beach each weekend along the bike path from the beach in Santa Monica heading southward. As part of this route, they traveled along San Vicente Boulevard to reach the beach.

One Sunday in the summer, Willy rode out along the familiar route from Brentwood along San Vicente Boulevard to the beach. He was accompanied by his father, and they had lunch at the mid-point of their ride.

On that same Sunday, Mitzi Jones was operating her SUV vehicle on one of the streets in Brentwood which intersects with San Vicente Boulevard. At first, she stopped at the stop sign controlling the intersection but then quickly accelerated toward San Vicente. She did not see Willy on his bike and her SUV struck him broadside. Upon impact, instead of applying the brake, Mrs. Jones accidentally pushed the accelerator, causing the SUV to lurch forward and run over Willy with her front tires.

The injuries were extremely bad. Willy Smith sustained a broken hip, broken right leg, and a ruptured bladder. He was taken by ambulance to the UCLA emergency room, where he was hospitalized for four weeks.

This case had been pending in my court for a couple of years, and two days before it was set for a jury trial, the attorneys appeared in my court for a final status conference. When they entered my chambers, I asked them if I could help settle the case. They both responded affirmatively, and we spent the next two hours exploring settlement.

The plaintiff's counsel was a very experienced personal-injury attorney. He had appeared in front of me before but never in trial. I would describe him as very knowledgeable about his case, assertive, and a little combative when he didn't get his way. I wondered what type

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of impression he would make with a jury if that combative side was displayed in the courtroom.

He came into my chambers to discuss the settlement, presented the case and an outline of the injuries and damages sustained by the plaintiff, then demanded the policy limit.

The defendant's counsel was also a very experienced personal-injury attorney. He had appeared in front of me before but also never in trial. I would describe him as calm, thoughtful with a welcoming smile and his voice was laced with southern charm. His response to the other attorney's combative nature was a mere shrug of the shoulder. I wondered how that southern charm would affect a jury.

The defense attorney declined to accept the plaintiff's demand and offered an amount equal to about 75% of the policy limit. At first, after I heard the demand and offer, it seemed to me that the case would settle. However, it was not to be because both attorneys dug in their heels.

Plaintiff's counsel was raising his voice and demanding that either the insurer pay the limit, or the policy would be opened. Whereas the defense attorney just smiled in a way that told me he wasn't worried. His final words to me and opposing counsel were, "We made you a fair offer." Two days later we started the jury selection process.

Jury selection

I had devised a questionnaire to present to prospective jurors that contained one question: "This trial is scheduled to last 10 days starting today. Would you be able to serve as a trial juror in this case? If not, in the space below, please state why you are unable to serve."

Before using this questionnaire, I showed it to counsel in each of my jury trials and asked for their permission to present it to all prospective jurors. The attorneys always agreed to use the form because it eliminated a time qualification of jurors; it showed them which jurors are willing to serve, and why a juror was declining to serve. In every case in which I used the questionnaire, we usually received a substantial number of "Yes" responses and those jurors were escorted down from the Jury Assembly Room. As to the jurors who checked "No" we had an explanation about why they claimed to be unable to serve. The attorneys could then decide which of those jurors should also be brought down to the courtroom for voir dire.

The trial took nine days and was smooth. Both attorneys knew their way around the courtroom and were very professional. There were some evidentiary disputes, but I believe that both sides were able to put their side of the case before the jury.

Once all the evidence was in, I met with counsel to finalize the jury instructions. It was always my practice to instruct the jury before final argument. This prevented one or both attorneys from telling the jury what instructions I was going to give. Since the jury might draw some conclusion from that, I always instructed first to eliminate that practice by the attorneys.

After the instructions were read, both counsel made their final arguments and plaintiff's counsel had the last say with a short rebuttal. At that point, the jury was transferred into my jury deliberation room just off the courtroom. They deliberated for several hours and then the foreperson summoned the court attendant into the deliberation room: They had reached a verdict.

The verdict

The jury had completed a special verdict form which took them through the elements of negligence, voting "Yes" and "No" on each question on the form. Once the jury re-entered the courtroom and took their seats in the jury box, the verdict was given to me, I read their responses to each of the negligence elements and polled the jury to verify that nine jurors voted on each answer to each question. The vote was unanimous on all the questions. Then, the form asked for the economic and non-economic damages. The jury awarded damages, both economic and non-economic in the total sum of $5,100,000. The policy limit was considerably less. The insurance company paid the entire judgment.

About one week after I read the verdict, I thought about this case and concluded it was yet another example of a case where one of the parties, the defendant through her insurance carrier, had an unrealistic expectation. In addition, I posed a question to myself: What contributed to this high verdict? I began to replay the trial in my head and focused on several factors which I believe contributed to the verdict.

This article discusses those factors and how it impacted the verdict. I hope it will serve to present some practical tips to aid counsel when they try a case to a jury.

The defendant did not testify

Mitzi Jones was present during each stage of the trial. She was around 55 years of age, nicely dressed, and sat calmly and expressionless next to her counsel during the trial. The jury did not learn much about her except for the information provided by the police officer who arrived at the scene. The officer testified: Defendant drove a late model SUV, she drove her car from a side street toward San Vicente Boulevard, she told the officer that she did not see the bicycle, striking him broadside, and then pushed the accelerator instead of the brake, which caused her car to roll over him with her front tires. Counsel for defendant did not call her as a witness.

She could have been called to explain what she did or failed to do; most importantly, she could have apologized for what she did and the injuries she caused to the plaintiff. This would have humanized her and left the jury with a finding that it was an accident. Without hearing from her, the jury probably felt that she did not care.

I also believe that the jury needed to hear from her about her failure to brake the car after she initially struck the plaintiff. If the jury determined her to be

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reckless, it might have influenced the amount of non-economic damages they awarded to the plaintiff. Though the claim against her was not gross negligence, it still might have impacted the jury to feel that she was the type of driver who did not belong on the road, and they might have punished her.

The defendant communicated to the jury by *not* taking the stand

As I indicated in the discussion above, the defendant communicated to the jury by not taking the stand. And she also communicated to the jury during the recesses. After around one hour and fifteen minutes of testimony, it was my custom to take a break for the benefit of counsel, their witnesses, and the court reporter. Also, I believe the jury benefited from a break to stretch their legs, to be able to use the restrooms, and check their phones for messages.

I usually stayed in the courtroom during breaks in case counsel wanted to discuss an issue with me. Near the end of the break, my court attendant would round up the jurors and bring them back into the courtroom.

In my pre-instruction to the jury, I told them that everything that went on in the courtroom was there for them to see and hear; yet, not to discuss until they went into the jury deliberation room.

The defendant usually stayed in the courtroom during breaks and remained in her seat at counsel table. A few times as the jurors were re-entering the courtroom, she was applying lip stick. Her counsel, seated right next to her, never said a word to her. I believe this was another message to the jury that she did not care.

Plaintiff did not overplay his hand

As I previously described Willy Jones, he was quite reserved and he seemed a bit uncomfortable talking about himself, especially when he talked about his extended hospital stay and the extent of his injuries, his pain, and his suffering. I felt that Willy understated his injuries.

This accident caused him severe injuries to his hip, leg, and bladder. His expert told the jury that his right hip had been replaced and that it would last around 15 years. Further, the expert testified that considering his age, he would probably have three or four additional hip replacements.

Willy had spent four weeks at UCLA Hospital. Initially, there was great concern about survival and then concern over whether he would walk again. He testified about the accident and how it impacted his art and his ability to ride a bike again. "Other than my family, these are the two loves of my life."

He spoke to the jury in a direct way about his time in the hospital, his rehabilitation, the prospects for being able to paint again and his love of bike riding. He did not overstate his injuries, he did not come off as pathetic, and he even sounded up-beat at times as he told the jury that he had resumed painting and some limited bike riding.

Willy Jones gave the jury a complete look at how his life had been altered and what he went through to gain stability in his life.

I have presided over several hundred personal-injury jury trials. In some of those cases, the plaintiffs claimed injury from minor accidents including testimony about how the accident ruined their lives. However, when the jury felt that a plaintiff overstated his/her injuries, the jury lost trust in the claim; the proof is in the low verdict.

Willy Jones was one of the best plaintiff witnesses who ever testified in my courtroom.

Dr. Johnson, treating physician for the plaintiff

The plaintiff's expert was his treating doctor. Dr. Johnson was the head of orthopedics at UCLA Hospital and his CV was 50 pages long. He was a tall man with large hands, and counsel for the plaintiff asked me to place him in the well with a large easel full of photos and X-rays. I granted the request and Dr. Johnson took over as though he were lecturing to a group of first-year medical students.

Dr. Johnson testified for several hours as he walked the jury through the surgeries Willy endured and each stage of his hospitalization. The jurors leaned forward in their seats and listened closely to Dr. Johnson. When he opined that Willy would need three to four additional hip replacements, each juror quickly made a note on their notepads. Some of the jurors had tears in their eyes. Dr. Johnson's presentation was clear, and the jury trusted him.

Jurors know about experts and how they are paid by one side to come into court and to give testimony favorable to the side that pays them. I have found that jurors don't always trust the experts and often disregard what they say in favor of what they learn from the lay witnesses. Dr. Johnson was paid to come into court for the time he lost by being away from his duties at the hospital. Though he is an expert, more than that, he was the treating doctor.

Defendant's expert

To counter the opinions and testimony of Dr. Johnson, the defendant's counsel designated an orthopedic surgeon as their expert. The defense doctor had good credentials and he opined that Willy Jones had made a good recovery from his injuries, that he might only need one other hip replacement, that considering his age, he should be able to ride his bicycle again and resume his career as a painter. His testimony was designed to attack a claim for future medicals and future pain and suffering.

The problem with his testimony was that he never saw or examined Willy Jones. He only did a review of the records. In other words, he only reviewed the records from UCLA Hospital and Dr. Johnson; he reached his opinions strictly from those documents. This was a big mistake by the defense.

The only takeaway by the jury was that the defense expert reviewed hundreds of documents, he was paid a large sum of money to review the documents, and then

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he reached conclusions to minimize the claim of damages. Jurors are smart and they know that a doctor needs to see a patient, hear from the patient, examine the patient, and then reach conclusions. The jury disregarded the testimony of the defense expert.

Attorneys: Hold the antacid

When you try a case to a jury, think about those jurors and how they react to what is being said and done in the courtroom. Jurors are instructed that they may not discuss the case either with their fellow jurors or the persons they see outside of the courtroom until the case has been submitted to them at the conclusion of evidence, the reading of jury instructions, and final argument from counsel.

If jurors cannot discuss what they see and hear until they deliberate, then what do they do during the trial? In addition to listening and taking notes, they are like sponges absorbing all that takes place in the courtroom.

My wife served on three juries, and she told me after the first trial was finished, a criminal case involving a charge of driving under the influence, "The prosecuting City Attorney kept eating antacids. He must have been worried and nervous about the case, maybe he thought it was not a good case."

I thought to myself that it was interesting that she made these conclusions from the antacids. It told me that trial attorneys need to be very aware of their surroundings while in the courtroom.

Judge Gerald Rosenberg was sworn in to practice law in 1975 and he maintained his litigation practice until he was appointed by the judges as a Court Commissioner in 1995. He served in that role for both the Beverly Hills and Santa Monica Courthouses until he was elevated to a judgeship in 2000. Judge Rosenberg is well regarded as a learned and considerate jurist. After initial assignments in Criminal Preliminary Hearings and Trials, Civil Trials, Family Law, and Probate, Judge Rosenberg spent the majority of his career presiding over Unlimited Jurisdiction Civil Cases in the Santa Monica courthouse. In addition, he served as Assistant Supervising Judge and later Supervising Judge of the Los Angeles Superior Court West District. In recognition of his judicial achievements, Judge Rosenberg was named the 2017 Trial Judge of the Year by the Los Angeles Chapter of the American Board of Trial Advocates (ABOTA) and the 2011 Outstanding Judicial Officer by Southwestern Law School. In addition, from 1982 through 1994, he served as the statistician for the Los Angeles Raiders. He was responsible for preparing all game day statistics for distribution to the NFL, the Raiders, the visiting team, and the media. And, he had the honor of serving as the Official Scorer of the 1987 and 1993 Super Bowls, and the American Bowl in Barcelona, Spain.