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A Caveat: The stories contained herein are true. Or mostly true. Or, at least, somewhat true. Some are apocryphal. Many of the names have been changed. The facts have often been "improved." A wise man once said, "Much of the misunderstanding abroad in the world can be attributed to literal thinking." Southern Bell Tel. & Tel. Co. v. South Carolina Tax Comm'n, 377 S.E.2d 358, 360 (S.C. Ct. App. 1989) (Sanders, C.J.). The reader who is a stickler for literal truth may miss whatever modest lessons can be found in

THE WORST JURY ARGUMENT I EVER MADE

ALEX SANDERS*

In the preceding articles, prominent lawyers and judges advise the reader how to achieve huge courtroom victories. The desperate hope is that lesser-experienced lawyers will learn from the good examples of the experts. At the College of Charleston, where I am now safely ensconced, English literature is taught by good example. History, on the other hand, is taught by bad example. Santayana is routinely quoted: "Those who cannot remember the lessons of history are condemned to repeat them." (I have always thought that anyone who has heard that quote is condemned to repeat it.) Consistent with Santayana's admonition, I present an opportunity to learn from a bad example.

I have told the story many times before. I heard that the incomparable trial lawyer, Racehorse Haynes, tells a similar story. I do not apologize for telling the story yet another time. What's wrong with telling the same story over and over? Suppose the principle of not repeating stories were applied to music. Where would we be then?

The story begins in the summer of 1961. Kennedy's presidency had just begun. General Eisenhower had retired. The 50s, when my classmates and I began law school, were over—over on the calendar and over in the hearts and minds of young Americans. The war in Vietnam had not started in earnest, and the hippies, with their pleas for peace, were just cranking up in San Francisco.

I was sitting peacefully in the Law School lounge on the USC campus, in the building named for James L. Petigru, the great Southern Unionist. Seated beside me was my friend and classmate, Johnny Jenrette, later to become the wildly-popular Congressman from the Sixth District and easily the most charming rogue I ever knew.

Everybody loved Johnny. I loved Johnny, and I still do. Despite those unfortunate circumstances which later led to his expulsion from Congress and his incarceration in a federal prison, he remains my friend, and he is, in my opinion, an all-around grand fellow. Some people at the College have viciously

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attacked me recently for visiting my friends while they are in prison. They say I am setting a bad example for our students.

I don't see it that way. I remind the pious ones that St. Matthew's Gospel (Chapter 25, Verse 36) requires us to visit people in prison. I don't personally know that many people in prison, and I have to take advantage of the opportunity to visit those I do know. I tell my critics something else: I have been so busy lately that I have decided to let God judge other people. I just don't have the time. But, I digress. Back to the story:

Johnny had just been elected law school student body president for the first semester of our senior year, about to begin, and I had been elected president for the second semester. He turned to me and made a preposterous suggestion. "Why don't we go to the American Bar Association Convention next month in St. Louis?" he asked, rhetorically. I gave him a rhetorical answer. "Two reasons, Johnny," I said. "We're not members of the American Bar Association, and we can't join because we're not lawyers. One other little thing: we don't have five bucks between us." "Watch this," said Johnny, and he got up and walked straight away into the Dean's office, with me trailing timidly behind him.

A new dean had just come to the Law School, not from academia but from the private practice of law. He was the legendary South Carolina lawyer, Robert McCormick Figg, and he had just finished representing the defendants in the most momentous case in history, *Brown v. Board of Education.* Johnny and I caught him at a vulnerable moment. His guard was down. He didn't know much about the Law School, and he was naturally morose from having lost the biggest case in all of American jurisprudence.

Johnny got right to the point. "Dean, I know you just arrived," he said. "And we hate to bother you, but Alex and I are the new Student Body Presidents, and we were just wondering whether you had a chance to make the arrangements for us to attend the ABA Convention in St. Louis?"

"Gentlemen," Dean Figg replied, visibly embarrassed. "I just haven't had a chance to get around to that yet. I'll get on it right away." "Well, Dean," Johnny said solemnly, "you had better hurry. You know, the Convention begins in a couple of weeks."

A few days later, Dean Figg called us back into his office. "Boys, I can't seem to find out anything from the University about that trip to St. Louis. I apologize for my incompetence. I have, however, arranged for y'all to borrow a school car, and I'm just going to give you a couple of hundred dollars out of my pocket for your expenses. Will that be okay?"

"That should cover everything," said Johnny. "Everything but the gas, that is." I kicked him under the table. Dean Figg solemnly reached into his wallet and handed over his Esso credit card. The next week we took off for St. Louis, with George Gregory and Bobby Mallard going along for the ride and acting as drivers for President Jenrette and President Sanders. We never made it to the ABA Convention, and Dean Figg didn't see his credit card again for ten years. I understand it showed up in 1971 at South of the Border.

We had every intention of attending the Convention. We really did. It's just that we were diverted by an attractive nuisance. Our undoing was none other than the great Melvin Belli, the self-appointed "King of Torts." At the previous year's ABA Convention, Belli had been responsible for a part of the program, but because he was so controversial, they wouldn't let him have anything to do with torts. Instead, they gave him the assignment of arranging a presentation on tax law.

Belli took revenge. He introduced the speaker as a distinguished professor, vastly experienced in the tax field. The "professor" proceeded to make a most erudite presentation, which was enormously well received by the tax lawyers in attendance. It was not until the next day that screaming headlines revealed that Melvin Belli had duped the ABA. The speaker was, in fact, no professor at all. He was Belli's client, a notorious gangster, who was at the time under indictment for tax fraud.

The ABA reacted by revoking Belli's membership. There was a lot of misunderstanding about that. The press assumed that he could no longer practice law. As he explained to *Time* magazine, that was, by no means, the case. "Getting kicked out of the American Bar Association," he said, "is tantamount to being kicked out of the Book-of-the-Month Club." A year later, he took the hostilities to a higher level, and that's where Melvin Belli collided, head on, with me and Johnny Jenrette. My life would never be the same.

Before the ABA could secure it, Belli somehow tied up the use of the largest auditorium in St. Louis. The Bar Association was relegated to being crammed into a much lesser hall across the street from the building, on which hung a banner at least a hundred feet long and twenty feet wide, proudly proclaiming in progress therein "The Belli Seminar." We went in, and except for one night when we went to see Stan Musial play, we never came out. We immediately fell under the spell of Melvin Belli, the "King of Torts."

Belli was imposing on every level. His stage presence was electrifying. He wore an electric blue, silk sport coat with pearl buttons that matched the color of his hair, a gold Rolex watch, and cowboy boots. (Remember, that was at a time when all lawyers, even California lawyers, dressed like Henry Hyde.) He stood on the stage alone and talked without stopping for three full days. His theme was compelling. "Justice is an absolute," he said. "Justice can't be qualified. Justice can't be quantified. Justice can't be compromised. Ninety-nine percent of justice is injustice." He proceeded to show us something we had never seen, never even imagined. He showed us how to make the classic per diem blackboard argument on pain and suffering.

Pain is a concept not many people can grasp in the abstract. Zoe has scant appreciation of pain. (I'm speaking of my wife Zoe, not my daughter Zoe, the famous trial lawyer.) Zoe and I resolve every year that our time at Pawleys Island will not be interrupted for any reason. It never happens. Last year's interruption was especially unpleasant. We had to pay a visit to the only dentist at Pawleys Island. Zoe approached him with unmitigated resolve. "I want a tooth pulled, and I don't want novocaine, and I don't want any other anesthetic,

because I'm in a big hurry," she said. "Just extract the tooth as quickly as possible, and we'll be on our way." Needless to say, the dentist was impressed. "You are certainly a courageous woman," he said. "Which tooth is it?" he asked. Zoe said, "Show him your tooth, Alex." But, I digress.

"Pain, pain, pain," said Melvin Belli, his voice rising with emotion. "Pain is the very most awful, awful thing that can ever be inflicted on a person. Pain is worse than death itself. Witness how many in pain cry out for death. Death is often a welcome relief from pain. God, Himself, could not think of a worse punishment than pain. He did not promise us eternal death as punishment for our sins. He promised us eternal pain, and pain is what Bobby Johnson has suffered at the filthy hands of the wicked defendant." He always said "the defendant" as if he were talking about somebody charged with a major crime, but he never said "the plaintiff." He always referred to the plaintiff by name. "Pain is what Bobby Johnson has suffered."

"Pain, that most awful scourge," he continued, "has a dollar value, and that value is determined where all dollar values are determined in our glorious free enterprise system. The dollar value of pain is established in the marketplace. In deciding justice in this case, we need to look no further than the dollar value the law of supply and demand has established for pain." He proceeded to explain.

"Look at the anesthesiologist's bill," he said. "$175 for what? The absence of pain for the time of a surgical procedure, lasting less than an hour. Who would ever say, 'That's too much.' Who would say, 'I can't afford $175, go ahead and operate. I'll take the hour's worth of pain and keep the $175.' Nobody, that's who. Nobody would dispute that $175 is too much for the absence of one hour's pain."

"Now let's consider how many hours of pain Bobby Johnson has suffered, and will suffer pain, in the 10.2 years he has remaining on this earth, hours that will never be happy because of pain, hours that will be racked with pain until God mercifully relieves him by a welcomed death. Let's consider the value of that pain. It's just a matter of a little arithmetic."

Belli then turned to the blackboard, and he did the arithmetic. From the hours within the 10.2 years, he generously subtracted 8 hours a day for sleep. He multiplied the remaining hours times $175, which he reduced to $100 and discounted further for present value, and he came up with a grand total of $5,611,416.11. I'll never forget that number. Five million, six hundred eleven thousand, four hundred sixteen dollars, and eleven cents. He wrote it all on the blackboard, and he turned to the audience, as if the audience were the jury, and a great hush fell upon that cavernous auditorium, and Melvin Belli said: "Justice is an absolute. Justice can't be qualified. Justice can't be quantified. Justice can't be compromised. Ninety-nine percent of justice is injustice." And, then he delivered the punch line. "Give me five million, six hundred eleven thousand, four hundred sixteen dollars, and eleven cents ***or give me nothing.***"

Nothing! He actually dared the jury to give him nothing.

"And don't forget about the eleven cents," he added, almost as an

afterthought. "That's a part of justice too."

His analysis was irrefutable, but it was the sheer audacity of his argument that inspired me. I returned home determined to bring about my own version of tort reform, 1960s style. I set about to single-handedly raise insurance premiums in South Carolina. The first chance I got was two years later in Winnsboro, South Carolina, 12 miles from my hometown of Ridgeway in Fairfield County.

In Fairfield County, the record for a jury verdict at the time had come in a case where liability was not disputed, and a father of five had burned to death trapped in the cab of his pulpwood truck, while his wife and children looked on helplessly. The lawyer for the plaintiff was one of the great trial lawyers of the day, Senator John Martin. He had boldly turned down an offer to settle for $1,500. The jury returned the verdict of $4,000, a Fairfield County record.

I faced the jury in 1962, in the courthouse designed by Robert Mills, the great architect who designed the Washington Monument. I was armed to the teeth with the tactics of Melvin Belli. I had my own blackboard. Before their very eyes, I became the great Melvin Belli, the "King of Torts."

(When I tell the story at a seminar, I always change clothes at this point. I put on an electric blue silk sport coat, with pearl buttons, cowboy boots, and an imitation gold Rolex.)

My case was a rear-end collision, with a run-of-the-mill sprained neck, a car repair bill of $25, and a chiropractor's bill of $93. At the time, I was specializing in rear-end collisions. In fact, I called myself the "King of Rear-End Collisions."

"Pain, pain, pain," I said, my voice rising with emotion. "Pain is the very most awful, awful thing that can ever be inflicted on a person. Pain is worse than death itself. Witness how many in pain cry out for death. Death is often a welcome relief from pain. God, Himself, could not think of a worse punishment than pain. He did not promise us eternal death as punishment for our sins. He promised us pain, and pain is what Alfonso Brown has suffered at the filthy hands of the wicked defendant."

I went to the blackboard. I didn't have an anesthesiologist's bill. I used the charges of the Ridgeway dentist, with whom the jury was quite familiar. The dentist in Ridgeway, when I was a boy, supplied the power to his drill by a foot pedal, like the pedal on an old-fashioned sewing machine. The drill spun fast or slowly depending upon his energy or attention span at the moment.

The dentist's office was on the second floor over the hardware store. The screams of his patients often could be heard up and down Main Street. He had recently taken on a modern convenience for his patients: novocaine—for which he charged a mere $3 for an injection lasting about 30 minutes, the time it typically took him to drill a tooth. He thereby established the value of pain in Fairfield County at $6 an hour. I had my per diem value, and I did the arithmetic on the blackboard. I came up with $5,611.11. I wrote it on the blackboard, and I turned to that Fairfield County jury, and I said: "Justice is an absolute. Justice can't be qualified. Justice can't be quantified. Justice can't be

compromised. Ninety-nine percent of justice is injustice. Give me five thousand, six hundred eleven dollars, and eleven cents. Or give me. Or give me. Or give me . . . ." I couldn't seem to get it out. I couldn't say "nothing." I started over. "Give me five thousand, six hundred eleven dollars, and eleven cents. Or give me. Or give me. Or give me. . . ." I just couldn't make myself say "nothing." As in a cartoon, a lightbulb was illuminated over my head, and a small voice was speaking to me, and the voice said, "You've got twenty-six dollars in costs tied up in this case."

And, I said, "Or, give me four thousand dollars. That will do. Or whatever you think. I don't want to set any records. But, don't forget about the eleven cents. That's a part of justice too." The jury looked at me like I had lost my mind. I slunk back to my seat, deeply embarrassed. That awful moment of humiliation was when I first began to think about becoming a judge. It was the worst jury argument I ever made. Why? Three reasons:

First and foremost, the argument was Melvin Belli's, not mine. The argument was not personal to me. I just couldn't bring it off and still be myself. Second, by the time I got to the end of the argument, my enthusiasm for Melvin Belli had bottomed out. The argument seemed phoney, even to me. Finally, although blackboards and other demonstrative devices certainly have their places in the courtroom, generally speaking, props are the enemies of wit. Nowhere is that more apparent than in the current overuse of computers, video presenters, and laser pointers. All of these can be minimally helpful, if properly used, but none of them have the power of words. Instead, they tend to lessen the power of words. Consider the best jury arguments I have ever heard or heard about.

The first is the case of the plaintiff, who suffered the horrendous injury of having both his hands severed at the wrists. His lawyer told the jury quite simply, in words everyone could understand, but words of indescribable power, "I had lunch with my client today. He eats like a dog." An argument like that, short, simple, and precisely to the point, is infinitely superior to either the antics of Melvin Belli or the complex animation of the computer. "I had lunch with my client today. He eats like a dog."

Three other powerful arguments have come to my attention. One was in the case of the *State v. William Hayward.* "Big Bill" Hayward, the radical labor leader of the 1920s, was the subject of the malicious rumor that he was an agent of international communism. He was charged with murder in the bombing death of the union-busting Governor of Idaho. Clarence Darrow was Bill Hayward's lawyer. The prejudice against his client was overwhelming. Clarence Darrow faced the jury in closing argument, and he said:

"Out on our broad prairies where men toil with their hands, out on the wide oceans where men are tossed and buffeted on the waves, through our mills and factories, and down deep under the earth, the poor, the weak and the suffering of the world are stretching out their helpless hands to this jury in mute appeal for the life of Bill Hayward."

"Not guilty," said the jury.

A footnote: Whether "Big Bill" Hayward was actually guilty of the murder was debated for years thereafter and never fully resolved, but the matter of his politics was eventually laid to rest. While his conviction on other charges was on appeal, he vanished and later reappeared as a political exile in the Soviet Union. When he died, Russian officials interred his remains in a place of conspicuous honor on the grounds of the Kremlin.

Another great jury argument was the argument I heard Ed Mullins make in his very first case. Ed is a great trial lawyer. He was President of the Defense Research Institute. But, this was well before he reached prominence. His firm had reluctantly allowed him to make the argument on the relatively trivial aspect of a case where the plaintiff's husband sought compensation for loss of consortium with his injured wife.

"Loss of consortium? He wants money for loss of consortium?" Ed shouted, swollen with indignation. "I'm 23 years old," he said. "And I've never even had any consortium." I can't remember the jury's verdict, but I can't imagine a more personal argument.

Finally, there is the argument I heard last summer, in the case of *State v. Wanda Barfield*. The defendant was indicted for murder in Horry County, South Carolina, and tried in Conway.

Wanda Barfield, slight of build and mother of three, stood over her much larger husband fast asleep in the bed they shared. Their child slept peacefully beside him. To Wanda, however, the scene was far from peaceful. Herman Melville said: Evil is unspectacular and always human, and eats at our own table and shares our bed. Wanda's mind was trembling. Her emotions were in turmoil. Her testimony was poignant. Her husband had violently abused her for years, she said. She had called 911 for help at least six times, she said. Her calls were well documented. No help had come. Her nose had been smashed against her face. That very afternoon her husband had raped and sodomized her, she said. "I will definitely kill you," she said he had declared. "And only I know when."

Wanda Barfield shot her husband through the heart as he lay sleeping. Then she shot herself. He died. She survived. It was 3 a.m. in the early hours after Christmas Day, 1996. Wanda said she had begged her husband not to beat her during Christmas. He had agreed, and he had kept his promise. Just before going to bed, however, he had made an ominous observation, she said. "Christmas is over," he had said.

The solicitor charged Wanda Barfield with murder, straight up, and the grand jury indicted her for murder. She pleaded not guilty and went to trial, invoking the defense of self-defense. The prosecutor asked the jury a hard question: "Why did she need to defend herself? He was asleep." Wanda's lawyer, a young woman barely 30 years old and trying her very first murder case, told the jury an old joke.

Question: Where does a 600 pound gorilla sleep?

Answer: Anywhere he wants to.

She asked the jury another question: "Suppose he was asleep in your bed.

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What would you do?" What an argument!

The judge asked the jury the last question: "How do you find the defendant, guilty or not guilty?" "Guilty of murder," said the foreman.

Wanda Barfield is now serving a life sentence. Her children, two boys and a girl, live with her husband's parents. Her young lawyer remains passionately committed to the cause of justice, although she does not believe justice was served in Wanda's case. She thinks the failure was hers. Her name is Zoe. She learned to make jury arguments from her father. He learned to make those arguments 38 years ago from the great Melvin Belli, the "King of Torts."