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MAGAZINE

The New KING OF TORTS

Thomas Malone learned from losing; now he rarely does

by JERRY GRILLO

photography by LARRY MARCUS

When Tommy Malone was a 16-year-old pool hustler and rodeo cowboy in Albany, Ga., with dreams of becoming an auctioneer, or possibly a blacksmith, he used to plunk down \$50 in pool-hall winnings in the church collection plate every Sunday to cover his action for the following week.

“I really believed the Lord would reward me if I gave Him something,” Malone says. “And generally He did.”

His father, Rosser Malone, an attorney who eventually became a state court judge, didn’t encourage his son’s extracurricular activities.

“He wanted me to be a football player,” remembers Malone, now 67, who gave football a brief try back then. “My father wanted to sit around the Gordon Hotel coffee table with his friends in Albany and brag about my touchdowns. But I liked getting paid to ride horses, even if I was risking my life for two bucks a ride. Nobody at that coffee table wanted to hear about me riding bucking horses.”

As for career choice? “My mother got through to me,” Malone says. “She told me there weren’t many women who were going to be interested in a blacksmith/auctioneer compared to, say, a lawyer.”

The gambling remained, though. Malone even ran a regular poker game at the University of Georgia School of Law. “I like the thrill of gambling,” Malone says. “And the truth is I probably enjoyed the game more when I had to borrow money and my palms were sweating.”

That hasn’t changed, either. Malone’s mentor and occasional co-counsel, the late and legendary Melvin Belli, the “King of Torts,” used to say that lawyers who advance money and work on a contingency basis are some of the biggest gamblers in the world. That was Belli then, and that’s Malone now. He spends hundreds of thousands of dollars up front on research and expert witnesses and only collects if he wins.

But he wins more than 90 percent of the time.

“In this arena,” Malone says, “we’ve got way better than house odds.”

IT’S LATE SEPTEMBER 2009 and Malone has just won the hardest-fought case of his life. A few happy reminders of the victory, gold balloons, hover in the Atlanta office of Malone Law. They float in front of the bookcase and above the cutaway model of a human head, and printed on each balloon is the dollar amount of Malone’s latest verdict: \$49,123,375.87. It’s his largest yet.

That award, minus \$12 million in pretrial settlements, is for Malone’s client, Drew Bianchi, a pre-med student who suffered a traumatic brain injury in a wreck on a California highway. It’s one of the highest verdicts in Santa Clara County history.

It’s also the capstone of Malone’s 43-year career. He’s won some

landmark verdicts, including \$45 million in 1995 against an HMO for a child in Georgia who suffered the loss of his legs and arms, and a slew of seven- and eight-figure awards for victims and their survivors, most of them in Georgia, but the Bianchi case tops them all.

Sitting in a leather lounge chair in his office, Malone looks satisfied. Smiling at the balloons, and the colossal number hovering here and there, he recalls a case from 1969 that brought him to tears and almost to his knees.

Malone returned to Albany after graduating from law school in 1966—he’d passed the bar a year earlier, but never earned an undergrad degree and figured he owed his parents at least one sheepskin.

“Back in Albany, I did some criminal defense work, handled divorces, did a little real estate, but I didn’t enjoy being confined to the records room with the dusty books. So I made a deal with my father’s former associate,” says Malone, who worked at his father’s firm. “I told him, ‘If you check all the titles, I’ll do all the courtroom work.’ He readily agreed. That’s how I got tricked into handling my first medical negligence case: *Bitterman v. Johnson*.”

Although young, Malone had already earned a reputation by representing a businessman, an atheist, who wanted to keep his store open on Sundays.

“The local preachers would get together with the DA and line up against the merchants who were open on Sundays. Three different times I had the Sunday ‘blue laws’ declared unconstitutional until they just quit passing them,” Malone says.

Those same preachers now loomed large in *Bitterman v. Johnson*. Malone’s client, Carol Bitterman, was a 15-year-old Jewish high school student who, despite her acknowledged allergy to sulfur, was given a sulfur drug, azulfidine, by Dr. Tom Johnson, a popular physician who sang in the Methodist church choir.

Carol developed huge blisters that burst, leaving her with virtually no skin, no hair, no fingernails, toenails or eyelashes. According to Malone, nurses said she looked like a peeled tomato. She also developed paralysis in the lower part of her body. If anybody had a case, it was her.

Except people didn’t sue doctors in rural Georgia. Not back then.

During the six-day trial, Malone saw preachers from the Baptist, Methodist and Presbyterian churches, as well as most of the town’s physicians, patting the doctor on the shoulder, nodding to the members of their congregation on the jury.

“We lost,” Malone says. “I cried myself to sleep and almost quit practicing law. That was my career-defining case.”

After the trial, a juror flagged a despondent Malone down in the street.

“He told me, ‘Tommy, it’s good to know there’s a lawyer as capable



"There was a great lesson in losing that case," Malone says. "I learned that prejudice has an awful lot to do with the outcome of jury trials, and you have to maximize the prejudice that exists for you, and minimize the prejudice that exists against you."

as you are that will take on the Albany establishment.' I was stunned. I said, 'But you were on the jury and you lost!' And he said, 'Yeah, but if you'd been anywhere but Albany, you would've won.' I can still feel those words. *Feel* them.

"Until that moment, I'd always believed truth and justice and fairness were what really mattered in a courtroom," Malone adds. "There was a great lesson in losing that case. I learned that prejudice has an awful lot to do with the outcome of jury trials, and you have to maximize the prejudice that exists for you, and minimize the prejudice that exists against you."

So Malone figured he'd use prejudice in Bitterman's favor. Through a mutual acquaintance, Malone met Melvin Belli, and together they filed suit against Pharmacia Laboratories, the New Jersey-based company that made azulfidine, claiming the company did not adequately warn of potential hazards in using the drug.

"I figured, we've got a paralyzed local girl. We've got a world-famous lawyer from San Francisco, the great Melvin Belli, coming to Albany, Georgia. We've got a New Jersey drug company—not a

local doctor—on the other side. We'll fight the 'War of Northern Aggression' all over again," Malone says.

It worked. Pharmacia Laboratories settled for, Malone believes, several hundred thousand dollars. "That was back when \$20,000 was a good verdict," Malone says. "It would be \$65 million today."

He's devoted his career to personal injury cases, particularly medical malpractice, ever since. Early on, that meant learning how to live with losing. He lost, time and again, and remembers each case: a woman who received 25 electric shock treatments in less than six days; a man who suffered severe burns due to a botched plaster of Paris cast. Malone has files and files of this stuff. It's the foundation of his success.

"During that second Bitterman trial, Mel Belli told me that I was the best lawyer he'd ever been in the courtroom with, on either side," Malone says. "Of course, I realize today that he probably said that to everybody. But I believed it and it gave me the confidence to take on case after case."

ADAM MALONE WAS a young schoolboy when he saw the pictures. His father was representing a woman who was trying to recover from breast cancer. Following her mastectomy, she enlisted the services of an Atlanta physician who said he could reconstruct her breasts after others said it was impossible because radiation therapy had obliterated blood supply to the area.

The surgery failed and the results were hideous.

Adam, who was supposed to be in bed, came bounding into the kitchen as Tommy and a colleague were discussing the case, with pictures of the woman lying on the table.

"I saw those pictures and fainted," says

Adam, now his father's partner at Malone Law. "You don't forget something like that. It made an impression on my life. That's when I realized that even if Dad couldn't help this poor woman, he was bringing an understanding to society, and making a tremendous difference in the lives of victims who sought justice and needed an advocate."

In 1979 Malone tried the case Adam became unwittingly privy to, *Jurczyk v. Musarra*, in the United States District Court in Atlanta. That victory demonstrated for Malone a clear difference when medical negligence cases were tried in a large city. In rural areas, where there weren't as many health care providers, and where jurors often depended on the defendant for medical care, juries didn't typically sympathize with the plaintiff.

By the early 1980s, Malone moved his entire operation to Atlanta, where he's forged a reputation as one of the best trial lawyers in the country and a master of *voir dire*.

Through the years, he maintained a close friendship with Belli, who dubbed Malone "The Prince of Torts," and Malone emulated his mentor, who died in 1996, right down to the red silk lining in his suits. "I



At 13, with dreams of being a rodeo cowboy.

was little Mel,” says Malone.

San Francisco attorney Randy Scarlett was a clerk in Belli’s office when he first met Malone; they’ve been friends ever since.

“Over the years I tried many cases with Mel Belli, and two strong cases with Tommy Malone,” says Scarlett, Malone’s co-counsel in the Bianchi case and in a \$22.8 million 2007 verdict for a woman who suffered severe brain injury when hit by a tour bus making an illegal left turn in San Francisco.

“These are two very remarkable men. But in retrospect, Tommy by far is the master. He relates well with a jury, he relates to everyday people.”

Atlanta attorney Bernard Taylor of Alston & Bird, who has opposed Malone on a number of occasions, concurs. “He’s very good at simplifying complicated facts and communicating them to a jury in a way that they get it the first time they hear it,” Taylor says.

Scarlett adds that Malone, “cuts through the nonsense and brings it back to common sense.” And he offers an example from the Bianchi case, in which two trucks collided, and one struck the car Bianchi was riding in, causing serious brain damage.

The defense used an expert witness, a doctor from the Life Expectancy Project, in an effort to prove that Bianchi wouldn’t live long enough to require the compensation his legal team was seeking. Malone asked the doctor—who had never treated a patient in his life—a few pointed questions. “Have you ever seen Drew?” he asked. “Do you know what treatment and care he’s getting? Aren’t



Belli (left) said Malone (right) was the best lawyer he’d ever been in a courtroom with.

you here just to tell us what your boss’s literature states?” The jury was swayed.

“Instead of the 25 years of care the defense argued, the jury adopted the 45 years Drew’s treating physicians suggested,” Scarlett says. “Tommy had cut straight through to the issue.”

LIKE ALMOST EVERY trial attorney, Malone bristles at what he sees as draconian tort reform measures in the U.S. In 2005, Georgia passed a law that caps non-economic (pain-and-suffering) damages at \$350,000.

“Tort reformists want to prevent jurors, the citizens of this country, from deciding what is fair,” Malone says. “I represented two children in my career whose penises were amputated during botched circumcisions. Well, they don’t have great economic loss. How can you prove someone lost a lot of money because of that?

But these children never will reach their full physical potential.”

Both of those cases were ultimately settled, for a lot more than \$350,000.

“Sure, everyone would like immunity,” Malone says. “The other side spends millions of dollars on lobbyists, and the best lawyers their money can buy, trying to confuse people about the value of the civil justice system.”

In September, Adam Malone and his co-counsel Michael Terry—representing the victim of a botched face-lift—put the constitutionality of Georgia’s tort law to the test, arguing to the Georgia Supreme Court that the cap, by limiting a jury’s decision, violates the right to a jury trial.

A Fulton County jury had already defied the law by awarding the woman more than \$1.2 million, and a Fulton County judge later ruled the state law unconstitutional. The defendant appealed the decision to the Georgia Supreme Court.

“We have not really paid attention to the cap, because we believe it’s unconstitutional,” Tommy Malone says. “We’ve settled cases well beyond the cap because I think the other side knows it’s unconstitutional also.”

Malone always has given time to teaching other lawyers, as a speaker or a mentor. But nothing pleases him more than seeing the progress his son has made as an influential plaintiff’s attorney.

Last year Adam won \$24.5 million in compensatory damages—in Albany, Ga.—for the unnecessary and preventable amputation of a 14-year-old’s right leg.

“This one was especially sweet for me,” Tommy Malone says. “Because it was Albany, and because it was my son.” ◀