

DAILY REPORT

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VERDICTS HALL OF FAME LIFETIME ACHIEVEMENT AWARD

Tommy Malone Earns Opponents' Healthy Respect

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Special to the Daily Report

SUCCESSFUL TRIAL LAWYERS are usually natural raconteurs who love to tell their war stories, but the tales behind Tommy Malone's victories will clear a dinner table.

Quadriplegia, a baby with amputated limbs, massive strokes and deaths on highways and in the hospital are his subjects. Juries often believe him, and defendant companies and insurers fear going to trial against him. So they settle.

"His willingness to lose and love of the courtroom is what makes him a great lawyer," said Jud Graves, a retired partner from Alston & Bird who has won and lost cases against Malone.

"That scares defendant insurance companies."

Though Graves said he looked forward to trying cases against Malone because "he calls you to your best game," his clients didn't always have the same enthusiasm for a showdown.

"I've paid Tommy a lot of money in settlements," said Graves, who uses Malone's fearlessness as a model to students he teaches at Emory University School of Law.

Health care defense specialist Paul Weathington of Weathington Smith, another frequent courtroom foe, remembers being sent as a young attorney to argue a motion to compel against Malone. The prospect was unnerving, he recalled.

He's "the John Wayne of litigation," Weathington said. "You get this imposing presence with a great case, and it can be intimidating."

"He casts a long shadow in the courtroom," Weathington said.

Noting Malone's long shadow and big wins, the Daily Report is recognizing him this year with a Verdicts Hall of Fame Lifetime Achievement Award.

SON OF A JUDGE

Malone said all of his personal anecdotes have already been published, but some are worth repeating.

One story is that, growing up in Albany as the son of a prosecutor who became a judge, Malone wanted to be a rodeo cowboy, auctioneer, blacksmith or farrier. Farriers are like podiatrists for horses, caring for their hooves and putting shoes on them. His mother told him to be a doctor or lawyer, if he wanted to attract a better class of woman.

Malone did ride in rodeos while he was young, even though his father, Rosser Malone, preferred that Tommy play football so the lawyer could brag over coffee to his friends, the story goes.

Malone worked at his father's office in the summer during high school. He sat in on a number of trials before he reached the Walter F. George School of Law at Mercer University. He took the bar exam in 1965 before earning his law degree in 1966.

There were no model medical negligence or catastrophic injury litigators to counsel Malone in when he began practicing law in Albany. He also had little money and no reputation to back him when he started.



Tommy Malone is this year's Daily Report Verdicts Hall of Fame Lifetime Achievement Award winner. Opponents say his legal skill "scares defendant insurance companies."

His early years in law practice were lean. To make payroll one time, he sold the family car, rather than seek a loan from the bank. He already had a \$25,000 loan to pay back. If he asked for more money, he feared the bank would call that note.

He took any case he could get, including loan closings and criminal defense work. He sat in the courtroom during arraignments to get clients. By 1976, he estimates he had tried more than 200 cases.

"I'd strike a jury while another jury was deliberating," he said. The volume and nature of

those cases in his early years means his losses will always outnumber his wins, he said. However, his catastrophic injury verdicts survived appeals, he said.

His decision to represent clients with unpopular cases and causes of action kept him from so-called polite society, he said. This was still during an era where the southwest Georgia community was having a hard time adjusting to black people voting and sitting on juries, he said.

“If I wanted to be in the local country club, I would have been the only white person denied,” Malone said. “I was persona non grata.”

He lost his first medical negligence case in Albany. A local high school girl was paralyzed after taking sulfa medication given by a local doctor. The best evidence was her medical chart, clearly stating she was allergic to that class of drugs. Clear negligence, Malone thought.

Albany in the early 1970s, as described by Malone, still was provincial. No one wanted the girl’s case, and no lawyer liked suing a local doctor.

Malone filed suit on behalf of the girl, Carol Bitterman, went to trial and lost. Losing a case with a cause of negligence so obvious gave Malone pause to briefly doubt his chosen path.

“If you can’t win a case like that, maybe you shouldn’t be practicing law,” he said after that defeat.

Around the time of the Bitterman loss, Malone met San Francisco lawyer Melvin Belli, one of the first big-time lawyers called the “King of Torts.” The lawyers were a match. Together they filed a federal suit on behalf of Bitterman against the New Jersey manufacturer of the drug that paralyzed her.

No one in Georgia had a problem finding a New Jersey drug maker liable, Malone said. The Associated Press said in a 1973 news brief that Bitterman sought \$3 million and settled for a reported \$650,000.

Malone has followed Belli’s path, collecting hundreds of millions of dollars in verdicts and settlements.

TRANSLATING FOR THE JURY

Medical malpractice cases are scientifically and technically complex, and Malone has spent many thousands of hours learning medicine, medical procedures and anatomy. Malone estimated the Bitterman case required 1,000 hours alone for studying. He kept a medical dictionary by his side as he learned the language of physicians. He has devoted hundreds of hours recently to understanding endovascular devices used in the brain.

Malone translates medical language to TV-script simplicity for jurors. His manner is compelling enough that observers can follow the facts, the storyline and remember what they heard years after court is adjourned.

There was the 1999 medical malpractice trial in Fulton County State Court in the case of a 38-year-old stroke victim. The defendants

included a neurologist, but the word neurologist was seldom used. Instead, the defendant was “the head doctor.”

Malone, employing his southwest Georgia drawl, strolled back and forth before the jury box as if it were his living room.

His client had gone to an emergency room on Memorial Day weekend, slurring his words, drooling and noticeably losing function on one side. He was in the early stages of a massive stroke in a large artery in the brain.

Everything that could go wrong, it seemed, did go wrong. The “head doctor,” covering seven hospitals over the holiday weekend, misdiagnosed him with an immune system disorder that causes stroke-like symptoms.

A CT scan showed the stroke’s progression. But it sat on the desk of someone who would not be back to work for several days. In the meantime, the stroke nearly finished the man off as he lay in a hospital bed.

The formerly fit weightlifter was left paralyzed and bedbound.

Had the doctor properly diagnosed what Malone presented as the obvious, his client likely would have received Heparin, a commonly used drug to stop blood clots and minimize the damage of a stroke.

The more urbane-sounding Graves represented the defense.

The result: a \$26 million verdict.

Reminded of the case, Graves said, “Wow. *Jones vs. Bashuk*. I think I spent several months in an asylum after that verdict.”

Weathington said that, in any of Malone’s cases involving botched kidney transplants, he doubted Malone ever called the urologic transplant surgeons anything but “the kidney doctor.”

“He knows how to talk the language people understand.”

Weathington does not recall the amount or the year except to say “that was many millions ago for Tommy.”

At 73, Malone’s largest verdict to date is a \$49.1 million verdict out of Santa Clara County Superior Court in 2009 in California for a pre-med student. He was crushed in a wreck between two commercial trucks on a California highway.

One truck driver fell asleep and drifted across the double line. The other was talking on a cell-phone. The victim, Drew Bianchi, will need 24-hour care from a nurse for the rest of his life.

Malone took a horrifying case in 1995 on behalf of an infant and his family in Fayetteville. The baby had a high fever and was in the throes of near-death “agonal moaning.” He went into cardiac arrest while waiting for an insurer’s phone advice nurse to approve a hospital visit.

That he survived was a miracle. But his arms and legs were gangrenous due to delay in treatment. Cardiac arrest stopped circulation beyond the major organs. The limbs were

amputated. The jury found against the insurer, Kaiser Foundation Health Plan of Georgia, and awarded the baby boy and his parents \$45 million.

A change in state policy followed the verdict, Malone said. Insurers cannot deny coverage to policyholders if they do not get prior permission from a phone advice nurse to get emergency help. “Anyone can declare an emergency,” Malone said.

The case also pointed to a subject passionate to Malone—voir dire. Careful jury selection cannot win a case, but it can lose one, he said. Weeding out subtle bias is key. “It’s the most important segment of a trial,” he said.

That philosophy held true in the Kaiser case. Three focus groups Malone held blamed the parents for waiting so long to get help despite the insurer’s rules. Trial lawyers call that defensive attribution.

Keeping his focus groups in mind, he asked the jury pool if they would ever fault a parent for following the advice of a healthcare provider. They answered no, he said. That question likely redirected any defensive attribution, he said.

Malone’s most valuable associate besides his son Adam, who joined the practice 10 years ago, is his wife, Debbie.

She is “the “in-house focus group,” he said.

“If she thinks I need to talk about it, I talk about it,” he said.

Today, Malone suffers a luxury problem of turning away clients. His firm handles about six cases a year. The largest pretrial investment so far is \$1 million, he said.

When he’s not in trial, publishing papers or presenting at seminars, Malone is likely to be at his home in North Palm Beach or his compound in Snapper Point in The Abaco Islands. He is a saltwater fisherman, doing it for fun and in competition. He enjoys entertaining and fishing with friends on his 70-foot boat.

As for philanthropy, Malone served as a board trustee for the Shepherd Center, which specializes in the treatment and rehabilitation of spinal cord injury patients. He has donated significant amounts of money to the center in the past 20 years.

The only downside to his success has been the hours spent away from home. He was not the family man “some expected I should be,” he said. “Law practiced well is the most jealous mistress there can be.”

He does not claim full credit for his accomplishments.

“I know there is a guiding hand my life,” Malone said. “I’m not smart enough to do this by myself.” ☞