

FABLES IN LAW, CHAPTER 6

LEGAL LESSONS FROM FIELD, FOREST, AND GLEN

D. Brock Hornby

We are pleased to present the third installment of the second trilogy of Aesopian legal fables by Judge Hornby. We hope to make it a trilogy of trilogies.

- The Editors

THE MYSTERY OF HARMLESS ERRORS IN THE FOREST GLEN

The Three Vultures were excruciatingly aware of the costs and emotional and administrative burdens they created when they reversed a case that Owl had decided and sent it back for a do-over. They also recognized that perfection was not achievable in proceedings in the Forest Glen. Consequently, when they discovered an error in the Glen proceedings, they said so, but then proceeded to determine whether the error had caused serious prejudice to the fairness of the proceeding and the outcome, or whether, on the other hand, it was harmless. This approach worked well, for Owl and the advocates learned what was proper and what was not proper in their roles, but not every verdict had to be overturned. As the years passed, however, the Three Vultures discovered that it was often easier for them

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D. Brock Hornby

not to decide whether there was error at all, but merely to say that even if it was error, it was harmless. As a result, although individual decisions were upheld, Owl and the advocates were left with heightened uncertainty over what the applicable rules were.

Moral: For guidance of the trial judiciary and the bar it is best for an appellate tribunal first to determine whether error occurred before announcing that what occurred, error or not, was harmless.



THE UNKNOWN UNPREDICTABILITY OF THE VISITING CONDOR

A tone point, Owl's caseload became so heavy that her docket fell seriously into arrears and she had to seek assistance from away. As a result, Condor, a well-regarded but tough arbiter from a distant jurisdiction, was brought in to preside at trials. Strikingly, the Forest Glen advocates resolved an unusually high percentage of their disputes by agreement just on the eve of trial before Condor, unlike their experience before Owl, where far more cases refused to settle.

Moral: Because advocates value predictability in their professional pursuits, they prefer a known arbiter, whatever her weaknesses, to an unknown arbiter, no matter how brilliant, and therefore do what they can to avoid the unknown arbiter.

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Fables in Law, Chapter 6



THE FOX'S CLEVER CLOSING

Snake had two separate personal injury lawsuits to try before Owl and a jury of the Forest Glen creatures. Woodchuck represented Skunk as the defendant in one of the lawsuits, and Fox represented Hedgehog as the defendant in the other. All three advocates did a fine job of presenting the evidence in the two cases. It was apparent to all the Forest Glen observers that the cases were difficult and that closing arguments would be important in persuading the respective juries.

At the end of his first case, Snake presented his closing argument to the jury in conventional fashion, explaining first that the facts and the law on liability favored his injured client Hare and that the jury therefore should find the defendant Skunk liable. Next, Snake proceeded to highlight the evidence of Hare's damages and urged the jury to give Hare a generous verdict against Skunk.

When Woodchuck stood up to give his closing argument for Skunk, he followed the same format, explaining first why the jury should find that Skunk was not liable to Hare under the facts and the law. Woodchuck hoped that he had made a persuasive case for no liability, but he knew that he could not take the risk of failing to address damages in case the jury disagreed. His transition was clumsy. He said to the jury, "For the reasons I have just given you, you really don't need to reach the question of damages. But I have to address damages in case you disagree with me; that is my duty to my client Skunk." Woodchuck then proceeded to explain why, on the evidence presented, any damage award to Hare should be much smaller than Snake had requested. During deliberations, the jurors could not avoid feeling that Woodchuck did not really expect to persuade them on liability. Moreover, the issue of the appropriate damage calculations was fresh on their minds. They ended up awarding damages to Hare.

AUTUMN 2015 97

D. Brock Hornby

Snake used the same format for his closing argument in the second trial. But Fox had watched the first trial and its outcome, and she determined to use a different strategy than Woodchuck for her closing. When Snake ended his closing argument by telling the jury the generous damages he requested for his client Snail, Fox stood up to close for Hedgehog and launched straight into the weaknesses of Snake's damages calculations. After doing her best to demolish Snake's damages number, Fox said to the jury, "But you never need to reach these pesky calculation issues because there is no basis for finding my client Hedgehog liable to Snail in the first place." Fox then proceeded to argue why the facts and the law favored Hedgehog on liability. It seemed logical to the jurors that Fox had argued lower damages in immediate response to Snake's ending words on that topic, before she turned to liability. It did not occur to them in deliberations that Fox had any doubt about the merits of her defense, and Fox's last words to them were her challenges to liability. As it turned out, they rendered a defense verdict.

Moral: Advocates who argue "but if" to a jury tend to weaken the power of their preceding argument. Plaintiffs' advocates seldom confront that risk. But for defendants' advocates in civil case closing arguments, it is often better to consider attacking damages first and liability last.



THE PROBLEM OF THE FAMOUS BUT POSSIBLY PARTIAL OWL

A fter some high-profile cases that Owl had handled, one of the Magpies asked to interview her, and Owl agreed. The resulting story in the Forest Glen Gazette talked about Owl's courage in making her decisions,

Fables in Law, Chapter 6

and Owl's views about various topics such as sentencing severity and processes, police behavior, and internet privacy issues. Owl rather enjoyed the attention and her new prominence in the media. But the advocates and Forest Glen denizens appearing before Owl began to question her impartiality and became concerned that she might have pre-ordained opinions in their cases.

Moral: Citizens and advocates (although not journalists) generally expect their arbiters to maintain a low profile and limit their expressed opinions to the cases they are required to decide.



AUTUMN 2015 99