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# How to Stay Out of Court…And Why You Should

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Well, let's be honest. You can't; at least you can't be sure. Though not as certain, perhaps, as death and taxes, litigation or the fear of it is a fact of life for all design professionals.Construction is a complex enterprise in which it is impossible to control all the variables however much of the project lies under your influence. When something goes wrong and the blame game is in full swing, there is often someone willing to point the finger at the designer, and, of course, there is always a lawyer willing to serve as a hired gun.

Recently in this space I have suggested that arbitration frequently provides less than it promises in efficiency of dispute resolution. Iıll now fill in the picture with some remarks on the alternative to arbitration, the jury trial system. Though I prefer it to arbitration in large disputes, I think it has developed some unhappy features with serious implications for designers. To illustrate, I must relate the tale of a recent trial.

**A Horror Story**

A utility authority brought suit in the local county court contending that an engineer had failed in his contractual duties in recommending a certain design for a treatment plant. Actually, the design in question came from one of the pre-eminent plant experts and designers in the world, whom the engineer had engaged to second-guess the engineerıs preliminary review and recommendation. The plant indisputably met every permit requirement, but the authority was disappointed in the plantıs performance of one incidental function that was not essential to the operation but was intended to assist the main process and save on energy consumption. The contract between the parties contained no express guarantee of any particular performance level in this respect, but some sample design calculations indicated an assumed performance level higher than was being achieved in actual operation. The original designer as well as another equally eminent expert looked into the complaints and concluded that the authority could operate the plant better to optimize performance in this area if it wanted to, but there was little point in doing so since the function was purely incidental.

Representing the engineer and armed with these formidable opinions, we proceeded to trial. Arrayed against us were the technical opinions of a high school-educated plant operator and a Ph.D. engineer who had never designed a plant in the geographical region and climate of the plant at issue, and who had an interest in the redesign work if the authority won (and thus an arguable bias).

We charged into battle with confidence. Our soldiers performed competently and suffered no obvious setbacks, but we returned from the field not merely bloodied but decimated. Seven good citizens deliberated over the course of a short afternoon and □ in time to get home for supper□ awarded the plaintiff every thin dime requested.

Even assuming that sample design calculations could become a guarantee of a certain performance level (a frightening thought in itself), the legal question clearly presented was whether our client was so wrong in its judgment regarding the design choice that it fell short of what a reasonable

professional would have done. The plaintiff should have had to show that the plant design really was defective (not just less than optimum). On that point we had them clearly and overwhelmingly outgunned. Even if the expert technical disputation went over the juryıs head, the straight road to decision lay in balancing the credentials and reasoning of the experts on each side, and here we had the nuclear arsenal. Yet our missiles fizzled in their silos.

**Postmortem: An Hypothesis**

How can this have come to pass? This question always haunts the days and lonely nights of the defeated general. No obvious candidate for blame emerged from the witnessesı or lawyersı performances. Our clients were not loathsome creatures but a respectable engineering firm and its highly esteemed outside consultant. The presiding judge was eminently fair and even-handed.

I have concluded that the result is best explained by the fact that the jury did not view the question quite as I have stated it two paragraphs back, the way a lawyer would state it. Despite the judgeıs instructions, those conscientious citizens did not worry overmuch about whether the plant design was technically sound or not. Their formulation of the issue was crucially different: they asked themselves only if the plaintiff was legitimately injured. That is, was the authority genuinely disappointed in the performance of the plant it had paid a large amount of money for? Note I do not say reasonably disappointed, for that would necessitate an inquiry into whether the authority had a legal right to expect the level of performance it found lacking, an inquiry the jury almost surely did not make.

The jurors essentially wanted to know only if the authority was being truthful about having been ³damaged.² This required evaluation only of the credibility and conviction, but not the competence, of the plant operator and the authorityıs expert, and both appeared to be men of integrity. I believe this juryıs verdict was plausible only if I am right about their formulation of the question.

Maybe this is all sour grapes, but I have reflected on this hypothesis regarding other sorts of cases and I think it may hold up. In most personal injury cases, whether arising from accidents or allegedly defective products, I believe juries usually ask not whether the defendantıs conduct was blameworthy but rather whether the plaintiff has a genuine injury, and if the answer is yes then a way will be found to award some recovery. Likewise, in contract cases, the legal niceties of contractual obligations will yield to the basic question of whether one party suffered significantly in the transaction. The only exception I can think of is medical malpractice, where the fact of injury alone does not automatically favor a verdict against the defendant. This exception may be explained by the peculiar reverence we reserve for our doctors, perhaps because we are loath to acknowledge that they are either incompetent or neglectful. I think my hypothesis explains many verdicts and, particularly, how jurors can be both conscientious in their duty and reach results contrary to the law and the weight of the facts.

This phenomenon has grave implications for design defendants, which Iıll discuss next time, along with some suggestions for reducing your chances of ending up in that wood-paneled torture chamber.

Next time: The implications and how to guard against this fate.

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