Clifford highlights his five most notable cases — so far

Photo by Lisa Predko.

By Roy Strom

Bob Clifford, *Chicago Lawyer*'s 2012 Person of the Year, shared a list of the five most memorable cases of his career.

January 2009: Liaison counsel for numerous 9/11 property damage litigation cases

When Clifford deposed Michael Touhey, the ticket agent who let one of the terrorists who took down the World Trade Center on 9/11 through airport security, Touhey told Clifford "he thought he was looking into the eyes of the devil."

That testimony helped Clifford, the liaison counsel in the case, secure a $1.2 billion subrogation settlement for a group of insurance companies. The money recouped part of the $4.6 billion they made in insurance payments for the destroyed World Trade Center.

But Clifford said the man's testimony almost never happened. When he first deposed the ticket agent, just a few months prior, he said next to nothing — and for good reason.

Congress required all 9/11-related cases to go to trial in Manhattan, which meant Clifford's subpoena power only extended 100 miles from the court. The man who gave the testimony about the hijacker's eyes lived about 300 miles away from Manhattan in Portland, Maine.

"I left that deposition telling Tim Tomasik (a Clifford Law Offices partner) that we've got to change that law," Clifford said.

First step: He asked Stephan Landsman, the Robert A. Clifford Chair on Tort Law and Social Policy at DePaul University College of Law, to write a white paper "on what was wrong with the 9/11 legislation."

"And then I took it to a congressman by the name of (Rahm) Emanuel, and a senator by the name of (Barack) Obama, and we drafted a tweak in the law that was ultimately passed and signed by President Bush that gave that judge national subpoena power in that case," Clifford said.

With national subpoena power now behind Clifford's deposition, the ticket agent opened up and helped Clifford make his argument:

That 9/11 "not only was predictable, but it was foreseeable and preventable."

"The theory of the case was the airlines knew that the overall terrorist threat to civil aviation was increasing, but, at the same time, the effectiveness of checkpoint screening was decreasing," Clifford said.

February/March 1999: Rachel Barton v. Chicago and North Western Transportation Co., et al.

When Rachel Barton lost her left leg after her violin case caught in the doors of a Metra train, local media covered the ensuing 1999 court case in moment-by-moment fashion.

The *Chicago Tribune*, for instance, wrote an article titled "Barton Put On Defensive By Metra's Witnesses," which detailed her testimony and cross-examination in 1,200 words.

But Clifford said his work on the case tried to point out a fact that made the accident seem less newsworthy: He found about 80 similar cases of commuters caught in Metra's doors — "near misses," as Metra called them — during discovery.

"For the first few weeks of that trial, we put that into evidence, through the actual (near) victims," Clifford said, noting the judge allowed 17 such testimonies.

"And we kept a chart. And by the time you got to Rachel, she was just another one of them. And you just knew it was going to happen eventually. And it was her bad day."

This scene-setting, which Clifford called "the context of decision-making" for jurors, changed the course of the trial, he said, citing jurors' opinions in post-trial interviews.

"If you just heard about her fact pattern without knowing more, you might be highly critical of her," he said. "But once you heard about the dozens and dozens of what (Metra) called near misses, or similar incidents with not as devastating a consequence, you got to a point where you would say, 'Hey wait a minute. They're not operating this thing the right way.' "

The evidence of 17 other "near misses" helped obtain a $29.6 million verdict for Barton which, after appeals, turned into a $35 million payment for a client Clifford said he stays in touch with today.

"If you don't know how (juries) think, how do you make them listen?" he said. "Before you start telling the jury what happened, you teach them how it was supposed to happen."

June 2002: Dr. James York v. Rush Presbyterian St. Luke's Medical Center et al.

When Dr. James York experienced a paralyzed right leg in 1998 after a misplaced spinal anesthetic, his civil lawsuit against Rush Presbyterian St. Luke's Medical Center seemed like a long shot, Clifford said.

The anesthesiologist who punctured York's spinal cord did not work for the hospital. And, at the time, Illinois case law held that medical-malpractice plaintiffs could not sue a hospital where a doctor merely performed a surgery, but was not employed.

"Judges would easily throw those cases out," Clifford said.

But Clifford said that law struck him as hypocritical.

"One of my favorite sayings is 'if it isn't the law, it ought to be,' " he said.

The *York* case made an obscure doctrine known as "apparent agency" a dominant factor in Illinois medical malpractice cases, Clifford said. In effect, the doctrine allows plaintiffs to sue hospitals who contract physicians to perform surgeries on their operating tables.

"I remember arguing that motion where the hospital tried to get out on the basis that they weren't accountable for the conduct of the independent contractor," he said. "And it always galled me that these hospitals would tout their services as top-of-the-line, and then when something went wrong they'd say, 'Oh, not my fault.' "

Clifford won that motion in front of Cook County Circuit Judge James P. Flannery. An appeals court agreed with Flannery's decision, as did the Illinois Supreme Court.

The original $12.5 million verdict for York got upheld. His wife, Elizabeth, won $1 million for loss of consortium.

Most notable about the *York* case, Clifford said, is it became the most frequently cited case in Illinois history on the issue of apparent agency.

"I don't think it's anything other than fair," he said.

August 1990: Oakley Lowe, minor v. Estate of Adam Riechert, Dec'd, et al.

In addition to winning the first, eight-figure verdict in his career, Clifford said the 1990 case where he represented an 11-year-old sole survivor of a car crash stands out for another reason.

The case, which resulted in a $14.2 million verdict on behalf of Oakley Lowe, helped Clifford develop a template for how he organizes his work on big cases to this day.

"One of the habits I developed during that case was I always kept a pad of paper and a pen with me, and every time I had a thought about a motion, I made sure to include it in my to-do list and we followed up on it the next day."

Today, Clifford sends e-mails to himself to remember any spur-of-the-moment ideas for a case. Or, when things get closer to closing argument, he jots down notes such as "C: emotion." The "C" stands for "closing argument" and the word serves as a reminder for his next one.

"And when I'm going to prepare for a closing argument, I'll go through all the 'Cs,' " he said.

The verdict for Lowe, who survived a car crash on his way to a Boy Scout trip, set a record for Clifford's young career, but it came in well below what he asked for: $48 million.

"Nobody was asking for $48 million 22 years ago," Clifford said. "(But) there was no question we were going to win."

June 2012: John W. Jentz, Robert Schmidt and Justice Becker v. ConAgra Foods Inc. and West Side Salvage Inc.

Clifford's most recent jury verdict in June — where he represented burn victims from a ConAgra Foods grain elevator explosion — also stands out as the largest verdict in his career.

Two of the clients his law firm represented, John W. Jentz and Robert Schmidt, won $112 million out of a $180 million verdict.

The $41.5 million in compensatory damages and $34.3 million in punitive damages awarded to Jentz, who suffered burns over 70 percent of his body, represents the largest amount for a burn victim in the history of the *Illinois Jury Verdict Reporter*.

While Clifford said he couldn't talk in specifics about his work on the case — it remains in a post-trial phase — he said it does not represent a stepping-off point for his career.

"At the moment, I still think my biggest case is ahead of me," he said.

"I'm not done. And I think I'm very lucky that that's so."

Many of the lawyers he called friends — the late Phil Corboy and the late Jerold Solovy — "had some of the most productive times of their careers in their 70s," Clifford said.

"I want to mimic their model." ■

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