

## Jury Selection

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THE MATTER INVOLVED POISONED GROUNDWATER and childhood cancers. The jury consultant had been asked to develop questions indicative of bias toward multinational chemical companies. She had been asked to identify anyone who might be inclined to find blame, to point the finger, to sympathize with and by extension exorbitantly compensate victims of rare nervous system cancers and/or their surviving kin.

She could eliminate sympathetic jurors with the question, *Are you currently unemployed?* She could eliminate the environmentally conscious by asking, *Are you vegetarian/vegan? Do you look for sustainable produce?* The ideal response would be, *It tastes good, so I eat it.*

She recommended eliminating current or recent members of the Sierra Club, World Wildlife Fund, or, heaven forbid, Greenpeace. She recommended eliminating anyone who shopped at farmers' markets or made their own baby food; anyone who refused to vaccinate, or to fluoridate, or to rehydrate with tap water. Anyone who strongly agreed with the statement *chemicals are altering the natural environment* ought to be struck. Anyone who strongly agreed with the statements *genetic modification of crops is altering our metabolisms*, or *hormones in the milk are bringing on early puberty*, ought to be excused post-haste.

Her experience told her that unemployed males in their late twenties and early thirties were most likely to award extravagant sums for pain and suffering. Females of child-bearing age were most likely to be moved by the plight of childhood cancer. Retired people, of both genders, were the least likely to award

large sums, the least likely to disbelieve the motivations of large multinational conglomerates.

The jury consultant's goal was to stack the box with persons hostile to the EPA, disdainful of government clean water mandates, and dubious of the entire notion of groundwater contamination. Persons old enough to recall the halcyon days of DDT; persons who believed in pesticides and herbicides and genetically modified soybeans. Persons who strongly agreed with the statement, *chemical companies provide good jobs to good Americans*. Persons who strongly agreed with the proposition that chemical companies were overregulated by fascist elements within the government and ought to be free to dump untreated sludge wherever they saw fit. Persons who disbelieved that trace amounts of organic chemicals—parts per million, parts per billion—could migrate through porous gneissic rock, and into the groundwater table.

The matter was sensitive, involving as it did children, inoperable brain tumors, and the survival of the white-tailed buck, whose numbers had so dwindled (allegedly from frolicking in contaminated soil, ingesting trace quantities of chemicals inimical to reproduction) that they were on the verge of extinction. The matter was likely to elicit reactions on the spectrum of outrage (*how dare they poison the children! we're all going to develop cancer!*) from all but the most rationally inclined. Those who could put aside feelings occasioned by terms like *child killer!* and concentrate on exposure pathways and *p.* values for those with small body mass ratios.

The jury consultant had been asked by the client to gauge jurors' reactions to the defense attorneys, to assess who among them rated most likeable, most trustworthy, most reliable, able to convince potential jurors that Zyclone was a good company, one that abided by spill containment protocols and did its best to mop up whatever was leaching out by area 55, if anything. To determine who among them would succeed in tempering the jurors' natural sympathies toward children and cancer victims with raw, statistical facts. To determine whether jurors would be more likely to relate to Theo, who appeared unassuming, somewhat awkward; or Gordon, who was bombastic, but irritatingly charming. To ascertain whether Gordon's ability to seduce female jurors, to convince them of the veracity of statements like *the incidence of cancers is statistically insignificant, a blip in the data*, outweighed any potential backlash from male jurors, who might perceive him as a scam artist. To determine whether Theo's awkward

bearing and understated delivery would work in their favor, enable him to make devastating points regarding the lack of sound scientific evidence, statements like, *the link between 1,2 dichloroethylene and nervous system cancers has never been proven*, and *the so-called cancer cluster is a statistical fluke*, while retaining the jurors' sympathies.

To assess whether a jury would better relate to Gordon, an aficionado of fine wine and patron of the New York Philharmonic, or Theo, who wasn't artsy but was similarly an oenophile. To determine whether a jury would be more put off by Gordon's habit of flipping his hair, or Theo's habit of rubbing his bald spot. To assess whether Gordon or Theo could best straddle the line between *cancer is regrettable* and *Zyclone is not responsible for rare neuroblastomas in the nine-to-twelve cohort*; who could best communicate that the plaintiffs were searching for someone to blame—who better than a Swiss chemical giant?—rather than accepting that the tragedies were no one's fault, at least not in the strict legal, proximate cause sense. Who could politely suggest that in their zeal to find justice for the children, the plaintiffs were tarnishing the reputation of a company who employed half the township, built community wellness centers, and singlehandedly revived the prospects of the white-tailed buck, which were now frolicking on the re-sodded basins of the former third-generation wastewater treatment plant.

The jury consultant would pit both Gordon and Theo against an actor assuming the role of Reginald Blackwell, the plaintiffs' lead attorney. Reginald had saturated the media with stories about corroded drums and leaking, highly flammable substances. He gave interviews in which he stared directly into the camera, decrying a world in which children died at the hands of profit-mongering international conglomerates who then tried to spin off their liabilities into off-shore entities. He held candlelight vigils at the location of the former area 55, his arm around the shoulders of the mother of little Grace, praying for rain to cleanse the polluted soil and recharge the aquifer.

The jury consultant had to assess whether Theo or Gordon was best equipped to go toe to toe with Reginald. Whether it was better to go with the more subdued and elderly-statesman-type Theo, who would urge rationality, ignoring Reginald's antics as one would an unruly child; or whether it was better to go with Gordon, who would affect outrage at the insult to the corporate reputation of Zyclone, dismiss Reginald as a showboating charlatan, and vie

with him for the affections of the female jurors, who thought both suave but complained that the simulated Reginald wore too much hair gel. Whether it was better to go with Theo, who would impress upon jurors their sacred duty as the arbiters of the facts, not of hysteria, not of calumnies; or whether it was better to go with Gordon, who would scoff at the notion that Zyclone's chemicals had caused childhood brain cancers, refute the premise that a "cancer cluster" existed, and accuse the plaintiffs' attorney of profiting off grief-stricken parents.

She had cautioned the attorneys to avoid referring to witnesses by their first names, which might seem overly familiar. To refer to them by the more respectful "sir," or "ma'am," and to offer a prefatory *I'm sorry for your loss* before cross-examination. She advised the attorneys to jettison the bespoke suits and Italian leather briefcases, and pick up something off-the-rack at Joseph A. Banks. To be seen carrying paper bag lunches, preferably with a greasy spot or two, defusing their image as effete New York counsel who charged \$1,000 an hour to defend corporate polluters against charges of environmental pillaging.

She advised them, if at all possible, to hire local counsel. To let him sit at the trial table, intersperse the occasional objection, and cross-examine one or two minor, inconsequential witnesses. She recommended Joe Carlucci, a well-known local attorney. Someone who came off as champion of the people, as opposed to an apologist for a corporate overlord indifferent to the environmental ramifications of epoxy resin manufacture. Someone with an unassuming office off route 9. To avoid, at all costs, the appearance of a David and Goliath battle pitting cancer-ridden plaintiffs against a Swiss behemoth paying a New York law firm in excess of \$1 million per month to make the case go away.

The mere presence of Joe would temper any negative feelings provoked by terms like *high-priced New York lawyer* or *corporate sell-out*, regardless of whether he uttered a meaningful word, or just sat mutely while the New York lawyers examined the witnesses, endeavoring to refute the proposition that Zyclone's chemicals were carcinogenic, or in any way harmful in the quantities shown to have infiltrated the groundwater.

Sampling had revealed the populace to have conflicting feelings regarding the case. They resented being a dumping ground for trichloroethylene (why can't they bring it further up the Garden State?), but appreciated Zyclone's vital place in the economy of the township. They empathized with little Grace's mother, yet several expressed the opinion that she was a "moneygrubbing"

woman of "loose morals" who had, by all accounts, smoked throughout pregnancy. They believed that the plaintiffs deserved to be compensated for their suffering, but disliked the media frenzy surrounding the case, and believed that the mother of little Grace was hoping to parlay her frequent appearances on HLN into a career in television.

Opposing counsel's strategy, as best as she could ascertain, was to paint Zyclone as a pernicious chemical manufacturer with no regard whatsoever for natural resources or clean water mandates or spill containment procedures. Zyclone's indifference to the environment dated back to the discharge of untreated effluent into the Rhine. The document production at Basle headquarters showed Zyclone to be an agrochemical colossus with little regard to chemical flash points or the deleterious by-products of its manufacturing.

Any instance of an unpermitted discharged or escaped molecule in the fifty-year history of the plant would be fair game. The minute quantities of heavy metals detected in monitoring well 19; the indictment under the Clean Water Act for discharging untreated effluent into the creek. The fact that none of those chemicals had been linked to the infant plaintiffs' cancers would be a distinction a chemist but no juror would make.

Reginald would seize upon deficiencies in waste treatment technologies and impoundment design; he would make hay of the fact that the contractor Zyclone employed to haul waste up the New Jersey Turnpike had been indicted for illegal disposal of toxic substances. Reginald would introduce evidence of OSHA violations, occupational exposures, and employee chemical burns. He would introduce photographs of oozing 55-gallon drums and lit-up barrels and allow the jurors to draw the expected inferences. The average juror could not be expected to appreciate the distinction between occupational exposures (full strength) and exposures to chemicals in the infinitesimal quantities to be found in the groundwater (parts per million, parts per billion). By the time their expert toxicologist got on the stand to explain concepts like *dose* and *exposure pathway*, it would already be too late.

She remained optimistic that a carefully selected jury, when presented with evidence concerning the incidence of neuroblastomas in the nine-to-twelve cohort, would scrutinize the statistical "proof" with a discerning eye, separating fact from weakly suggestive data, understanding that the standard morbidity ratio, eleven cases in the nine-to-twelve cohort, was hardly of a magnitude

that would qualify as epidemiological "proof" linking TCE to nervous system cancers.

Rational, skeptical jurors would not be swayed by weeping mothers or metastasizing tumors, but would remain faithful to their oath to apply the law to the facts as charged by the judge. They would not speculate as to the larger meaning of the questions on the verdict sheet, *if you do not find that trichloroethylene in the groundwater was a substantial factor in causing the infant plaintiffs' cancers, stop here and do not go on to the next question.* They would sift through internal studies expressing concern regarding the potential carcinogenic effects of long-chain hydrocarbons, understanding that sober corporate self-reflection was not tantamount to *legal admission*. They would not be unduly swayed by photos of oozing phosphorescent sludge or corroded 55-gallon drums. They would resist the impulse to shift costs to the deep pocket, reasoning they had insurance coverage anyway.

The jury consultant recommended striking, for cause, juror no. 1, who shopped exclusively at Whole Foods and advocated labels identifying food as genetically modified.

She recommended striking, for cause, juror no. 26, whose father had died from metastatic liver cancer; juror no. 27, whose mother died from a neurological wasting disease; juror no. 30, who admitted that she could not be impartial in evaluating claims that children had died from malignant brain tumors.

She recommended striking for cause juror no. 32, who had lost a child, albeit in a drowning accident; she recommended striking juror no. 37, whose father had died of a myocardial infarction; juror no. 39, whose niece was born with an enzyme deficiency and unable to digest dairy.

Reginald objected that the defense was trying to eliminate every juror who had suffered an unexpected loss and/or expressed skepticism of the genetically modified food industry. Gordon argued that jurors could not be expected to set aside their emotions and to concentrate on *p*. values. The court exhorted the attorneys to *move it along*.

The consultant disliked juror no. 41, a bottled water aficionado. She disliked juror no. 43, who shunned trans-fats, and 44, who refused to eat anything

refried or deep fried, and juror no. 46, who ate only grass-fed beef roaming around on an artisanal farm in Sussex county.

She disliked juror no. 48, who had solar panels on his roof; 49, who had a bumper sticker declaring *Foie gras is torture*.

She tried to seat juror no. 52, who had eaten in all of the fast-food franchises along route 9 and scoffed at the organic foods movement, calling them *food Nazis*. Opposing counsel succeeded in dismissing the juror, asserting that he could not maintain the requisite objectivity in passing upon the evidence.

Reginald struck every juror who owned a firearm and self-identified as a fish and game enthusiast. He struck juror no. 60, who refused to segregate recyclables and scoffed at the entire notion of Earth Day. He struck juror no. 65, who drove a 10 mpg sports utility vehicle and strongly agreed with the statements *chemical companies are the backbone of America, the EPA has no business over-regulating American industry, and the EPA ought to be dismantled*.

They bickered over juror no. 68, an animal rights activist. Gordon argued that she might have unaccountable sympathies toward the plaintiffs; Reginald rejoined that predilections for defenseless furry animals were not at all comparable to sympathies toward small children. After being upbraided by the court for *deplorable lack of civility*, they consented to dismiss the juror.

The jury consultant recommended using a peremptory challenge to strike juror no. 15. Anyone guided by dubious syllogisms, *chemicals are bad, 1,2 dichloroethylene is a chemical, therefore it's bad*, threatened to undercut days of toxicological testimony designed to educate the jurors regarding concepts like dose + pathway = exposure.

The consultant asked to have struck, for cause, juror no. 77, who exhibited strong negative reactions to the terms *effluent, tar slurries, and sludge*; juror no. 78, who winced as the process of anaerobic digestion of wastes was explained; and juror no. 79, who referred to chemicals of concern in the groundwater as "poisons."

Juror no. 81, an anti-fracking activist, called multinational energy and pharmaceutical companies *profit-mongering scum* who viewed exploitation of natural resources as their God-given right. The juror's allegations led to charges by Zyclone's attorneys that the process had been rigged. Reginald asserted that people were entitled to express their views, however hostile, to the Swiss chemical establishment.

Gordon rejoined that notwithstanding opposing counsel's insistence on tarring Zyclone as a multinational desecrator of natural resources and poisoner of innocent children, his client was entitled to a fair trial. Reginald asserted that it wasn't his fault jurors had negative views toward big oil and pharma and were inherently suspicious of every link in the food chain, meat of unknown provenance, methane-producing cattle, soil-depleting irrigation practices. Gordon wondered what the hell any of that had to do with the alleged ingestion by the infant plaintiffs of ppms of volatile organic chemicals, to which Reginald rejoined that it was all part of the same ball of wax, environmental pillaging, careless disposal practices, employing waste haulers like Tommy Tomillo, who promised to dump 55-gallon drums of 1,2,3 dichloroethylene somewhere off the New Jersey turnpike. The Garden State a seething dumping ground for the chemical industrial complex.

Reginald slammed his fist down, affecting outrage; Gordon derided his showboat tactics and railed against the willful disregard of science. He tugged uncomfortably on the sleeves of his off-the-rack suit, murmuring to the consultant that if he had to eat another Taco Bell burrito or wear another synthetic blend garment he would *scream*.

The court urged the parties to come to an agreement and said they would reconvene the next day after everyone had an opportunity to calm down.

The following day, it was revealed that several prospective jurors disregarded admonitions not to discuss the case amongst themselves or with friends and family members. They were upbraided by the judge for violating their sacred oaths as jurors and the integrity of the process and summarily dismissed.

Juror no. 101 admitted that he had read the *Chronicle*, and juror no. 115 admitted that she had watched the coverage on the local news stations, occasioning rebuke from the court for disregarding its explicit directions, and resulting in their summary dismissal.

Juror no. 122 admitted that he had driven by the Zyclone plant, disregarding the court's admonition not to make any impromptu site visits; he observed white-tailed buck frolicking just beyond the gate, leading him to question the assertion that the land had been despoiled.

Juror no. 135 admitted that he had seen Reginald eating in the Boston Market Chicken on route 9; that he observed Reginald to eat a factory farm rotisserie chicken and to drive a Chevy four by four, not at all the environmentally friendly vehicle he had imagined, but a low mpg emission-spewing one.

Reginald defended himself and the Boston Market franchise, averring that they peddled only humanely raised chicken. He asked the court to sequester the jury, lest they risk more unauthorized site visits and forays to the fast-food corridor along route 9; the court refused to sequester the prospective jurors, stating it would reconsider once the jury had been impaneled and sworn in, an increasingly futile hope given the fractious bickering and the splitting hairs over whether partialness toward kittens was indicative of predisposal toward cancer-ridden children.

The court took the opportunity to remind the prospective jurors that they were not to talk amongst themselves or to follow the news coverage and were to avoid, at all costs, any contact with the attorneys or the litigants, including waiting on the same line in the Boston Market Chicken. The court told the jurors not to make any unauthorized site visits or to undertake any investigation of their own, including googling the company and attempting to uncover its history of waste disposal violations and/or any alleged association with Tommy Tomillo, who was presently under indictment. The court instructed the jurors that emotion was to play no part in their decision-making; they were duty bound to follow the court's instructions as to the law; and to apply the law to the facts in evidence, not the facts as ascertained from informal investigations and unauthorized site visits and surmise regarding the parties' fast food proclivities.

The jury consultant asked to strike several more jurors of whose objectivity she could not be assured. Juror no. 150, who insisted that eleven incidents of neuroblastoma among the nine-to-twelve-year-olds of the township constituted a *cancer cluster*; juror no. 140, who agreed, refusing to accept the notion that the statistical *p* values might say otherwise; and juror no. 163, who maintained that she did not care about standard morbidity ratios or epidemiological probabilities, *children were dead, for God's sake, and oughtn't Zyclone be responsible?*

Reginald countered that no one could be expected to assimilate toxicology overnight; that concepts like statistical significance and dose + exposure pathway were of necessity opaque to the average juror, nothing more than statistical gobbledygook. What did Zyclone expect when it was dumping untreated waste on the ground? That it would magically evaporate? That it would remain inert? That it wouldn't leach into the soil? That it would never reach the aquifer?

Reginald used peremptory strikes to eliminate every smoker from the panel. The jury consultant vociferously objected, complaining that he was unfairly trying to eliminate anyone with an independent streak, anyone who enjoyed carcinogenic substances, anyone who resented the CDC's attempts to regulate their behavior. Research had shown smokers to be among the most ardent defense jurors. Research had shown them to be hostile to safety and environmental regulations, to scoff at advertising and cigarette box labelling rules depicting black lungs and patients with tracheostomies on oxygen 24/7.

Thwarted in her quest to have seated jurors nos. 122 and 124, diehard advocates of fossil fuels and deep water drilling, the consultant asserted that opposing counsel was being obstreperous, obfuscatory, and that his tactics threatened to turn the jury selection process into a never-ending ordeal. Zyclone's attorneys made a motion to limit for-cause challenges to those who had worked at the plant and/or members of their immediate family; those who expressed disdain for the EPA and/or its state counterpart, the Department of Environmental Protection; and those who had worked in the chemical or agro-chemical sector. Plaintiffs' attorneys opposed the motion, asserting that nothing less than the first amendment was at stake; to which Zyclone's attorneys rejoined that their client had a right to a fair trial sometime in this century. The court denied the motion, but urged plaintiffs' attorneys to *get on with it* so that they had a prayer of finishing the trial.

Upon discovering that he had once made a donation to Greenpeace, defense counsel asked the judge to recuse himself, citing a conflict of interest. The judge denied the motion, and cautioned the attorneys that they were getting far afield. At the end of the day, it was impossible to find a juror who had not been exposed to a chemical of concern, who did not have an opinion about the tap water, who had not heard tell of phosphorescent sludge on the banks of the creek. To select a jury wholly composed of people devoid of opinion regarding organic produce, environmental awareness, or childhood nervous system cancers. To find jurors who had not suffered a terrible loss of some kind, who had neutral feelings regarding the statement *sometimes bad things happen to good people, and there is no explanation*. To find jurors who could set aside whatever feelings they had toward multinational chemical conglomerates and rationally

evaluate the evidence showing a statistically insignificant fluke of eleven neuroblastomas among the nine-to-twelve-year old cohort. To find jurors who could watch little Grace's mother testify as to how her daughter had succumbed to a malignant brain tumor, and not want to blame someone, anyone, for the tragedy.

LINDSAY DAIGLE

## Let It Die

(after *Let It Die*, Feist, 2004)

To he who loved my winter-ribboned scalp,  
my red pages, the slow mule  
I rode on city sidewalks,  
I was a liar. I said what blew in  
through the kitchen window  
was a holy thunderstorm asking  
for fresh paint  
to keep framed on the shelf.  
To the man who carved sore throat  
demands into strangers' front doors,  
I was confessor. To he who dark-room-  
recognized a black-haired figure  
behind him, I was concealer.  
I was thin shawl over table lamp.  
To the man who was a fear of whispers,  
I was the cold air  
that showed smoke. To him, the man  
who did not want to speak slowly  
nor to spackle the cracks  
in his own veins, I was both known  
and unknown. I traveled on the outskirts,  
avoided writing it down. Now I am  
reconciler. I am the black-haired figure.