

Evidentiary Disasters

Evidentiary Disasters of *Titanic* Proportions





Glove Evidence

- Left glove found at Brown's condo and right glove at Simpson's residence are brown Aris Isotoner Light gloves, size XL.
- Nicole Brown bought pair of brown Aris Isotoner Light XL gloves in 1990 at Bloomingdale's.
- Only 200-240 total pair of brown Aris Isotoner Light XL gloves sold in 1990.
- Simpson wore brown Aris Isotoner Light XL gloves from 1990 to June 1994.

OJ Trial Transcript

(The following proceedings were held at the bench.)
MR. COCHRAN: Your Honor, I wasn't clear what counsel was trying to do.
THE COURT: All right.
MR. DARDEN: Your Honor, these are Aris Isotoner Gloves, similar make, exact same size as the ones now in front of the witness.
THE COURT: Yes.
MR. DARDEN: I would like to lay the foundation to show they are the exact same size, similar make and model so that perhaps we can have Mr. Simpson try them on at some point to determine whether or not the gloves found at the scene and at his home will fit him.
MR. COCHRAN: We object to this, your Honor. First of all, we've had no time to deal with this. At some point, if Mr. Simpson testifies and we want to have him try the gloves on in evidence, that is one thing. There's no foundation with regard to this. So that's why I asked to approach the bench. I don't think it's appropriate at this time with this witness under these circumstances. This is redirect and it's improper.

OJ Trial Transcript #2

MR. COCHRAN: Are you going to allow them to have the Defendant try these gloves on?

THE COURT: I think it would be more appropriate for him to try the other gloves on.

MR. COCHRAN: That was exactly my point. So --

THE COURT: I mean the real gloves that were found.

MS. CLARK: The only problem is, he has to wear latex gloves underneath because they're a bio hazard and they're going to alter the fit.

THE COURT: We'll take that up when we get there.

MR. COCHRAN: I object to them having him try these gloves on.

Briar Patch Objection

THE COURT: We're over at the sidebar.

MR. COCHRAN: With regard to this, I think that this is an inappropriate time for it. I think it's inappropriate at this point.

My client has no objection basically, but the problem is, he doesn't want to do it with the T.V. cameras trained on him, all that sort of thing. I think that -- I'm not sure how I want to phrase this objection. First of all, I don't want him to have to do it without having latex gloves on, and I think the evidence is good that I would like to ask more questions of this witness. This witness says he thinks anything from a medium to extra large is going to fit him. That will be helpful to us.

Court's Ruling

THE COURT: All right. The asking of a Defendant to don a piece of clothing or somehow to utilize some other piece of evidence is pretty clear. I don't know that I can restrict the camera.

MR. COCHRAN: Judge, I think you're asked to rethink things every day, Judge.

THE COURT: I know.

MR. COCHRAN: I just think -- I'm just saying to you from a standpoint of -- sense of, you know, what's right. Maybe we can ask Mr. Bariccroft for a wide shot, not a tight shot.

MR. DARDEN: Why? I mean why now? It was okay before.

THE COURT: I don't --

MR. COCHRAN: Because we request it.

MR. DARDEN: This is a Court of law, not live at the improv.

THE COURT: All right. I'm not going to concern myself with the camera at this point.

Cochran No Longer Objects

MR. DARDEN: Okay. Your Honor, at this time, the people would ask that Mr. Simpson step forward and try on the glove recovered at Bundy as well as the glove recovered at Rockingham.

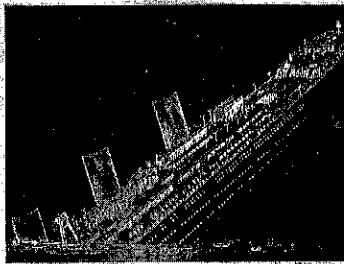
THE COURT: All right. Do you want to do that?

MR. COCHRAN: No objection, your Honor.

MR. DARDEN: Okay. Your Honor, at this time, the people would ask that Mr. Simpson step forward and try on the glove recovered at Bundy as well as the glove recovered at Rockingham.

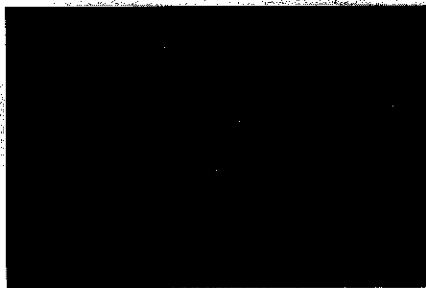
THE COURT: All right. Do you want to do that?

MR. COCHRAN: No objection, your Honor.



TITANIC SINKS

OJ Tries on the Glove



Transcript of OJ Trying on Gloves

MR. DARDEN: Your Honor, apparently Mr. Simpson seems to be having a problem putting the glove on his hand.

MR. COCHRAN: Your Honor, I object to counsel's statements.

THE COURT: Sustained.

Darden's Narrative Continues

MR. DARDEN: Mr. Simpson is indicating that his fingers aren't all the way into the gloves, your Honor.

THE COURT: All right. Thank you, counsel.

MR. DARDEN: Mr. Simpson told the jury that the gloves are too small.

THE COURT: All right.

How could Prosecutor Recover?

Group Discussion

O.J. Finds Killer

LOS ANGELES (AP) — A Los Angeles police officer who found the body of a woman in a Los Angeles apartment building last week, said he had been told by a woman who had been the victim's neighbor that she had been killed by a man who had been living in the apartment building.



O.J. Simpson (right) and his L.A. County Sheriff's office with the body of the victim, Mrs. Nicole Brown Simpson.

At last, justice is served. The man who was charged with the murder of a woman who was found dead in a Los Angeles apartment building last week, said he had been told by a woman who had been the victim's neighbor that she had been killed by a man who had been living in the apartment building.

O.J. Simpson (right) and his L.A. County Sheriff's office with the body of the victim, Mrs. Nicole Brown Simpson. Simpson was charged with the murder of the woman who was found dead in a Los Angeles apartment building last week.

Evidentiary Disasters of SS Minnow Proportions

LIGHTNING ROUND QUESTIONS

Lightning Round | Prob 1

- CERCLA contribution action
 - Plaintiff must show machine shop disposed of waste at a Superfund dump site in the '70s
 - Machine shop is identified in invoices of garbage hauler who regularly used the site
 - Garbage hauler is defunct, no custodial witness alive

Lightning Round | Prob 1

- CERCLA contribution action
 - Plaintiff must show machine shop disposed of waste at a Superfund dump site in the '70s
 - Machine shop is identified in invoices of garbage hauler who regularly used the site
 - Garbage hauler is defunct, no custodial witness alive
- Are they admissible?

Lightning Round | Prob 1

- CERCLA contribution action
 - Plaintiff must show machine shop disposed of waste at a Superfund dump site in the '70s
 - Machine shop is identified in invoices of garbage hauler who regularly used the site
 - Garbage hauler is defunct, no custodial witness alive
- Are they admissible?
- Perhaps as "ancient documents"
 - "In existence 20 years or more whose authenticity is established"

Lightning Round | Prob 1, cont'd

- To establish authenticity, must show document :
 - "is in a condition that creates no suspicion concerning its authenticity"
 - "was in a place where it, if authentic, would likely be"
 - "has been in existence 20 years or more"

Lightning Round | Prob 1, cont'd

- To establish authenticity, must show document :
 - "is in a condition that creates no suspicion concerning its authenticity"
 - "was in a place where it, if authentic, would likely be"
 - "has been in existence 20 years or more"
- Invoices:
 - dated 1978
 - have been in files of lawyer probating estate of owner of hauler, since 1996

Lightning Round | Prob 1, cont'd

- To establish authenticity, must show document :
 - "is in a condition that creates no suspicion concerning its authenticity"
 - "was in a place where it, if authentic, would likely be"
 - "has been in existence 20 years or more"
- Invoices:
 - dated 1978
 - have been in files of lawyer probating estate of owner of hauler, since 1996
- Admissible?

Lightning Round | Prob 1,
cont'd

- Yes, perhaps
- *Horak v. Building Services Industrial Sales Co.*, 2012 WI App 154, 341 Wis. 2d 403
- "business invoices in possession of a business's attorney are in a place where, if authentic, they are likely to be"

Lightning Round | Prob 2

- Probate dispute:
 - Should estate be distributed according to terms of 2010 Will or 2007 Will?
 - 2007 Will was authorized under power of appointment in a 2002 Marital Property Agreement, but not 2010 Will, due to an alleged drafting omission
 - 2007 Will unambiguously splits daughter's share with granddaughters; 2010 Will is ambiguous
 - Granddaughters offer testimony of lawyer who drafted 2010 Will as to decedent's intent to split daughter's share
 - Admissible?

Lightning Round | Prob 2,
cont'd

- *Czaplewski v. Shepherd*, 2012 WI App 116, 344 Wis. 2d 440
- Testimony of lawyer admissible under hearsay exception for "statement of the declarant's then existing state of mind . . . such as intent, plan, motive, design . . ."
- "This exception . . . can be used to prove that the declarant later acted in conformity with a certain mental state"

Lightning Round | Prob 3

- Pharmaceutical product liability trial
- Defendant's drug is alleged to cause cancer
- Parties stipulate not to elicit testimony of cancers associated with a "knock-off" manufactured in China
- At trial, plaintiff's expert, unsolicited, refers briefly to "similar cancer problems with another drug in the family tree"
- Defendant objects – but waits an hour until the jury is excused
- Too late?

Lightning Round | Prob 3, cont'd

- No
- *State v. English-Lancaster*, 2002 WI App 74, 252 Wis. 2d 388
- Court recognizes that defendant is put "in a classic 'Catch 22' position. By not objecting, [defendant] is held to waiver. By objecting, [defendant] draws the jury's attention to the very prejudicial . . . evidence that the trial court had already ruled inadmissible"
- "The facts of this case do not demonstrate that [defendant] tactically laid in the weeds and then raised the issue later only when it was to his advantage"

Evidentiary Take-A-Ways



Fairchild Inns of Court: February 11, 2014

Titanic Evidentiary Disasters: Takeaways

- Whenever possible, be in control:
 - Don't ask an important question on cross-examination that you don't know the answer to.
 - Don't ask an adverse witness to do or answer something that you can't control.
- Plan from the inception of the case:
 - As you gather evidence, start thinking, from the beginning, about how you might lay foundation for that evidence and what exceptions it may fill.
 - Consider any special requirements for that evidence far in advance of trial (i.e. how to get it authenticated, etc.).
 - File pretrial motions and motions in limine to allow your evidence in and to streamline the issues.
 - Try to anticipate objections and plan for them.
- Be careful with the evidence you're seeking out:
 - Is the evidence essential to your case?
 - If you were your opponent, how would you use that evidence against the other side?
 - Be careful when considering character evidence and whether it's capable of opening the door to character attacks!
- When in doubt, turn to the rules:
 - There are numerous exceptions to hearsay, among other things, that we don't commonly use.
 - Think about how you might get your evidence in another way; even though you may be convinced that your evidence fits in one category, the court may not agree with you- try to have a back up or another way to get it in.

NARRATOR: A young, naïve prosecutor, Grant, has run into an evidentiary disaster of titanic proportions. In his desperate search for answers, Grant turns to the wily veteran, Jake.

Grant: Jake, I desperately need your help.

Jacob: *(Scribbling on a piece of paper)* Can't help right now. I am attempting to figure out how large my County backdrop will be.

Grant: Aren't you a State employee?

Jacob: *(thinks about that).* Well it appears that I do have the time to help you.

Grant: I have an evidentiary disaster of Titanic proportions.

Jacob: That sounds a little melodramatic.

Grant: It is not. Next week I go to trial on a seven year old homicide. The defendant shot the victim during a pharmaceutical sale gone bad. He posted bail and then fled to Fiji. We did not get him back into custody until just recently. Just recently I was preparing the case and I realized that an essential witness is no longer available. Now I am worried that since the witness is part of my chain of custody on a key piece of evidence that I may not be able to get it before the jury.

Jacob: Slow down my young friend. Let's take this one step at a time. First, what witness is no longer available?

Grant: The Medical Examiner that performed the autopsy.

Jacob: Could be a problem. Where is he or she? Are you sure that they are unavailable.

Grant: Pretty sure. He died five years ago.

Jacob: That is unavailable. What was the ME's determination of cause of death.

Grant: Homicide as a result of multiple gunshot wounds to the face, chest, legs, arms, neck, legs, and groin.

Jacob: How many is multiple?

Grant: 39 total gunshot wounds

Jacob: That does appear to be a bit excessive. Was anyone else present for the autopsy?

Grant: Hold on, let me check (*rustles through papers*) Two people, one being the ME's investigator William Molitor, the other a detective. Molitor is currently on a round the world cruise and unavailable. The Detective is retired in Florida but willing to come back.

Jacob: The Detective monitored the autopsy? That's good, gives you a way to get the ME photos into evidence. Can you have the current ME take a look at the deceased ME's report, notes, and photos and render an opinion.

Grant: I did and the ME says it something they do. That is the reason I am here. The defense attorney is raising a confrontation issue. He says that since the original ME is dead, he can't cross-examine the opinion as to the cause of death.

Jacob: Have your ME look at the notes and photos and see if he can base his own independent opinion based on that.

Grant: The defense is saying he can't base his opinion on testimonial hearsay under some Matador case.

Jacob: Olay. I think you mean Bullcoming, which is my favorite Supreme Court case name. You can probably get around that if you make sure not to move in the underlying report.

Grant: But the current ME disagrees with some of the determinations of the deceased ME. He says that he just can not see in the photos the stippling required to support the original opinion that the wounds were close contact.

Jacob: That won't be a problem, shows your expert is coming to his own conclusions. Any other problems?

Grant: The ME recovered five bullets in the body that matched to the firearm we recovered from the defendant.

Jacob: I thought you said that you could get the detective there.

Grant: I can

Jacob: So he can testify and get them into evidence. Stop being so dramatic and get back to work.

Question #1: Can the substitute ME testify as to the cause of death if that opinion is based upon the work of the deceased ME?

Question #2: Does the answer change if the testimony is about testing that can be retested, i.e. DNA, fingerprint, etc?

Question #3: Does the lack of ME prevent the bullets from coming into evidence?

Question #4: Do you really even need the ME in order to prove cause of death?

①

Lawrence James of Court Feb. 12, 2014

MEMBER	PRESENT	EXCUSED ABSENCE	UNEXCUSED ABSENCE	SUBSTITUTE
Hon. Lynn S. Adelman				
Atty. David Asbach	<i>DWA</i>			
Atty. Michael Ashton				
Atty. Tony Scott Baish				<i>T. Scott Baish</i>
Taylor Barnes	<i>TB</i>			
Atty. Melinda A. Bialzik	<i>MB</i>			
Atty. Remzy D. Bitar	<i>RB</i>			
Atty. Melissa Blair	<i>MSB</i>			
Atty. Rachel M. Blise				
Atty. Charles S. Blumenfield	<i>CSB</i>			
Atty. Sean Bosack				
Atty. James. Boyle	<i>JB</i>			
Hon. William W. Brash, III	<i>W. Brash</i>			
Atty. Laura A. Brenner				
Atty. Thomas M. Burnett	<i>TMB</i>			
Atty. John Arthur Busch	<i>JAB</i>			
Hon. Louis B. Butler, Jr.				
Atty. Nathaniel Cade, Jr.	<i>NC</i>			
Hon. William E. Callahan, Jr.	<i>WEC</i>			
Atty. Mark Cameli	<i>MC</i>			
Atty. Scott J. Campbell	<i>SCC</i>			
Atty. Nicholas D. Castronovo	<i>NC</i>			
Atty. Kelly L. Centofanti	<i>KLC</i>			
Hon. Charles Clevert, Jr.				

MEMBER	PRESENT	EXCUSED ABSENCE	UNEXCUSED ABSENCE	SUBSTITUTE
Atty. Rebecca M. Coffee				
Atty. Michael Cohen	MSC			
Hon. Pedro A. Colon	PC			
Atty. Jacques C. Condon	JCC			
Hon. Jeffrey Conen	JC			
Atty. Daniel Conley	DC			
Hon. Charles H. Constantine				
Atty. Joshua B. Cronin				
Hon. Patricia Curley				
Hon. Rebecca F. Dallet				
Atty. Donald Daugherty, Jr.	DD			
Atty. William Duffin	WD			
Atty. Laurence J. Dupuis	LD			
Vanessa Eisenmann				
Atty. Matthew R. Falk	MRF			
Atty. Jessica Farley				
Atty. Heather K. Gatewood				Claire E. Hatley
Atty. Robert L. Gegios	RLG			
Atty. Kate Gehl	KG			
Atty. Derek H. Goodman	DHG			
Hon. Patricia J. Gorence				
Hon. Lindsey Grady				
Hon. Michael Goulee	MG			
Atty. Laurence C. Hammond, Jr.				
Atty. Scott W. Hansen				

MEMBER	PRESENT	EXCUSED ABSENCE	UNEXCUSED ABSENCE	SUBSTITUTE
Atty. William Harbeck	WTH			
Atty. Thomas Hruz	THH			
Atty. Grant Huebner	GH			
Atty. James L. Huston	JLH			
Atty. Michelle Jacobs	MJ			
Hon. Nancy Joseph				
Dean Joseph D. Kearney				
Hon. Joan Kessler				
Margo S. Kirchner				Sandra Gegias
Atty. Matthew D. Krueger	MDK			
Hon. Mary Kuhnmuench	MKM			
Atty. Lisa M. Lawless	LM			
Atty. Jeremy Levinson	JL			
Atty. Susan E. Lovern	SEL			
Atty. Kevin J. Lyons				
Atty. Jacob Manian	JM			
Atty. Jonathan H. Margolies	JHM			
Hon. Margaret McGarity				els
Atty. James T. McKeown				
Nancy Morris				Ruiza Barnes
Atty. William J. Mulligan	WJM			
Atty. Elizabeth a. Odian	EO			
Atty. Aaron Olejniczak	AO			
Atty. Matthew W. O'Neill				

④

MEMBER	PRESENT	EXCUSED ABSENCE	UNEXCUSED ABSENCE	SUBSTITUTE
Atty. Richard T. Orton	X			
Atty. Wendy A. Patrickus	X			
Atty. David G. Peterson				
Atty. Mark A. Peterson	✓			
Atty. Nelson W. Phillips, III				
Hon. William Pocan				
Atty. Benjamin W. Proctor	X			
Atty. Janet Protasiewicz	Ø			
Atty. Thomas H. Reed	X			
Atty. John A. Rothstein				
Hon. Richard Sankovitz	✓			
Atty. James L. Santelle				
Atty. Jane C. Schlicht				
Prof. Ryan Scoville				
Atty. Nancy J. Sennett				
Atty. William L. Shenkenberg				
Atty. Sheryl A. St. Ores	✓			
Hon. J.P. Stadtmueller	✓			
Atty. William R. Steinmetz	✓			
Atty. Karen Louise Tidwall				
Hon. Paul Van Grunsven				
Atty. Eric J. Van Schyde				
Atty. Christopher R. Walker				
Atty. Joseph Wall	X			

