

## **Casting Your Villain: Focusing the Case on Corporate Misconduct**

**Michael Cowen**

Human beings think in stories. The jury weaves the facts of a case into a story that will drive its verdict. It is up to you to provide a compelling story. If you do not, then the jury will come up with a story on their own, and you may not like the ending.

A good story needs a hero and a villain. Luke Skywalker and Darth Vader. Westley and Prince Humperdinck. Harry and Voldemort. In a trial, the best heroes are the jurors themselves, because they can create a happy ending by protecting the community from the dastardly defendant. And the best villains are corporate executives who endanger people to make more money.

The hero-juror's weapon to defeat the villain is the verdict. The bigger and badder the villain, the bigger the verdict will need to be to protect the community from the villain. At the same time, if you focus the case on a low-level employee, then the juror-hero doesn't need to do much to prevent such a minor threat. In fact, if you beat up on the low-level employee too badly, the juror-hero may feel like the employee has been punished enough and no verdict is needed to protect the community.

### **Characteristics of a Good Villain**

What makes a good villain? Examples from literature, television, and movies show that great villains often share a certain set of characteristics. A great villain is usually:

1. Powerful
2. Intelligent
3. Immoral
4. Deceptive
5. A character, rather than a collective.

A good trial story will focus on a defendant that meets as many of these characteristics as possible.

#### **A Villain Is Powerful**

The villain must have enough power to be a true threat to the hero. The more powerful the villain, the more heroic an effort is needed. That's why an individual stormtrooper, who may be a "bad guy," doesn't make a good villain. One stormtrooper doesn't make big decisions. One stormtrooper can only cause a limited amount of harm. In contrast, Darth Vader blows up planets, and the Emperor controls an entire galaxy.

In a trucking case, a good villain is a large trucking company, or even a broker that selects cut-rate motor carriers despite their poor safety records. The truck driver, no matter how bad, is

only a minion, not a powerful villain. It doesn't take much of a verdict to have a huge effect on a truck driver's finances, but it takes a lot more to get the attention of a company like C.H. Robinson that grosses over \$13 billion a year. Look for a villain with enough power to be a threat to the jurors and their families.

### **A Villain Is Intelligent**

Intelligence is one of the traits that distinguishes a villain from a minion. A jury is more likely to attribute a bad motive to a defendant's decision when the decisionmaker is smart enough to understand the consequences of the decision. If the plaintiff's lawyer can easily outsmart the villain, then the jury might not view the trial as a fight where they need to jump in and help.

### **A Villain Is Immoral**

Villains don't care about other people; they will inflict enormous harm on others in order to get what they want. This selfishness is the heart of most negligence and gross negligence cases. A person does not exercise reasonable care because the person doesn't care enough about the safety of others. Look for evidence in your case showing that the villain is exposing others to danger because it values something else more than the lives of others. For example, a drunk driver cares more about the high of alcohol than the lives of other motorists. A texting driver cares more about what is in the text than the health of the kids in the station wagon in front of her. An executive may not bother with safety training because he doesn't see a benefit to the bottom line.

### **A Villain Is Deceptive**

Villains don't care about the truth. They pretend to be something they are not in order to get what they want. A good example is Prince Humperdinck in *THE PRINCESS BRIDE*. He pretends to love Buttercup. In reality, he wants to have her killed and blame it on a neighboring country so he can have an excuse to invade it.

Corporate defendants are similarly deceptive. They pretend to care about safety. They tell the jury all the great things they do. But the reality is that they just want to escape the consequences of their unsafe decisions so they can go on making money and doing business as usual. When you expose the defendant's deception, you show that the defendant is a villain, and the jury will want to protect themselves from the defendant-villain through their verdict.

### **A Villain Is an Individual, Not a Collective**

Corporations and government agencies are not ideal villains because no one person is clearly making the evil decisions if the decisions are attributed to an entity. While Captain America battles HYDRA, it is Red Skull, HYDRA's leader, that is the villain. Similarly, in the Star Wars saga, while the Empire is bad, the villains are the Emperor and Darth Vader.

Finding the high-level individuals whose decisions started the chain that ended in your

client's harm is challenging. For years I have heard people preach at seminars, "it's about the trucking company, not the driver." But "the company" doesn't make a good villain. We need to work hard in discovery to identify the people whose choices led to our client's harms.

There can be more than one villain in a case. So even when you find one, keep looking up the ladder to see if there is a bigger, badder villain hiding higher up the corporate ladder.

### **A Villain Will Do Anything to Escape Justice**

A villain doesn't just give up when the hero catches him. Villains go to great lengths to escape justice. They lie. They cheat. They use violence. They threaten harm to others unless they get away. Similarly, a defendant is playing the role of the villain when they try to avoid responsibility. Look for evidence that the defendant is doing bad things in an attempt to escape liability. Such evidence can include giving false testimony, pretending not to remember things, hiding or destroying documents, giving misleading testimony, and hiring experts to lie for them.

These defense tactics sometimes allow you to cast a villain in a trial that otherwise would have none. An example is a stipulated liability case. When a defendant admits to liability, it is hard to show that the defendant is a villain. In fact, some judges won't allow liability evidence in stipulated liability trials. But when the same defendant hires deceptive experts to try mislead the jury into rendering an unjust verdict, the defendant's villainy is revealed. The secret is for the plaintiff's lawyer to reveal the experts' deception so that the jury understands what is happening.

### **Finding the True Villain in Your Case**

Plaintiffs' lawyers need to spend a lot of time and effort to find the true villain in the case. The true villain is the person whose decisions ultimately created the dangerous situation that harmed the plaintiff. While it may seem easier to dump on the low-level employee, like the truck driver or the roughneck whose negligence caused a tragedy, doing so will likely result in an inadequate verdict. Instead, keep asking "who?" and "why?" For example, in a case with a driver high on methamphetamines driving too many hours, don't just blame the driver; also ask, "Who hired this guy?" and "Why was he behind the wheel of an 80,000 vehicle?" If it was a minimally-insured, fly-by-night trucking company, you may need to even look beyond the motor carrier. Ask, "Who hired a trucking company with such a poor safety record?" and "Why did they hire this trucking company instead of a safer one?" You may find that a large motor carrier is taking the profitable loads for itself but then subcontracting the low-margin loads to unsafe, fly-by-night companies. You may find a broker that hires the cheapest carriers to increase its own margins.

### **Show, Don't Tell**

A good writer doesn't just say, "This is the bad guy;" the villain's actions reveal his character. Similarly, we cannot just call the defendant a villain. We need to show through our story, and through the evidence, that the defendant is villainous.

A great example is Prince Hans in Frozen. He pretends to love Anna, and gets her to marry him. But when Elsa accidentally freezes Anna's heart, and only an act of true love can save her, Prince Hans' villainous ruse is exposed:

HANS:           What happened out there?

ANNA:           Elsa struck me with her powers.

HANS:           You said she'd never hurt you.

ANNA:           I was wrong.

*Anna crumbles, weak.*

HANS:           Anna.

*Hans carries her to a couch, sets her down. Anna is shivering even more.*

ANNA:           She froze my heart and only an act of true love can save me.

HANS:           A true love's kiss.

*Hans takes Anna's chin in his hand and gives her a tender smile. He leans in slowly...gently...*

*Then he stops.*

HANS:           Oh, Anna. If only there was someone out there who loved you.

It is Prince Hans' deception—pretending to love Anna so she would marry him, when he was planning on killing her all along so he could be king—that makes the audience hate him so.

Do not simply tell the jury that the defendant is bad. Instead, tell a story that leads the jury to come to that conclusion on their own. Not only do you lack the credibility to make such a judgment for the jury at the onset of the case, but research has shown that jurors will fight much harder for a conclusion that they reached on their own.

### **Root Cause Analysis**

One way to tie the incident that harmed your client to the villain is to do a root cause analysis. A root cause analysis is a method of analysis used to find the root causes of a problem. The root cause is the earliest, most basic, deepest, cause. Root cause analysis is basically asking "why did that happen?" repeatedly until you go up the chain to your ideal villain. For example, in a recent case where our client was rear-ended by a truck, the root-cause analysis went like this:

*Why did Reynaldo get hurt?*

Because Judas Luna rear-ended his truck.

*Why did Judas Luna rear end Reynaldo's truck?*

Because he was following too closely.

*Why was Judas Luna following too closely?*

Because he didn't know about the 2-second rule for following distance.

*Why didn't Judas Luna know about the 2-second rule?*

Because Crawford Electric didn't train him.

*Why didn't Crawford Electric train Judas Luna?*

Because his manager didn't know that he was supposed to train Judas.

*Why didn't the manager know he was supposed to train Judas?*

Because the District Manager didn't tell the manager he had to.

*Why didn't the District Manager tell the manager he was supposed to train Judas?*

The Chief Operations Officer did not require District Managers to ensure that all employees received safety training.

*Why didn't the COO require District Managers to ensure all employees received training?*

Training wasn't important to him. He only looked at profit margins and delivery times.

Eliminating the root cause will solve the problem. For example, if the driver starts using a proper following distance after our crash, he won't rear end anyone else. But that won't help the other drivers at the company. If the driver's manager starts training employees, it will promote safety at that location, but it does nothing for the other company locations. Only by implementing a company-wide policy to ensure that all drivers are trained (that is, addressing the root cause) can the company promote safety across the board.

### **Dig Until You Find Gold, and then Keep Digging**

It takes a lot of work to uncover the facts that will reveal the true villain. Don't expect to

get everything by simply sending out a stock set of written discovery. Not only do you have to use all of the tools provided by the Rules of Civil Procedure, but you usually have to look outside the litigation process. Google is your friend. So are your fellow attorneys who have sued the same defendant, as well as former employees who are more likely to tell the truth.

One of the greatest example of a lawyer who struck gold by digging deep is the *Garcia v. Allsup's* case chronicled in Randi McGinn's book, CHANGING LAWS, SAVING LIVES: HOW TO TAKE ON CORPORATE GIANTS AND WIN. Elizabeth Garcia was raped and stabbed to death after being kidnaped while working the graveyard shift at an Allsup's convenience store. The obvious bad guy was the murderer, but the lawsuit was against the employer. Randi's incredible investigation revealed that the owners of the convenience store were villains as well. Over the years a half dozen other women had been murdered while working alone after midnight at an Allsup's. Repeatedly the owners had promised the victim's families that they would never again leave a woman working alone overnight. But Allsup's broke those promises. The local police chief asked Allsup's to add lighting outside and have two clerks working the night shift. He pointed out that crime plummeted when the Town and Country convenience stores instituted those safety precautions. But Allsup's refused to do so, saying it would cost too much money. Allsup's even sued their workers compensation carrier, claiming that the carrier cost Allsup's money by not recommending safety measures such as better lighting and bulletproof glass enclosures for the clerks. After settling the case for over \$18 million, the Allsup's owners kept the money and did not implement any of the safety measures. Randi developed the story that showed the Allsup's owners were willing to allow their clerks to be exposed to rapists and murderers so that they could make more money.

## **Examples**

### **Trucking Case**

We had a case where an 18-wheeler rear ended a SUV, killing a teenage boy and causing a severe brain injury to his father. We had several potential targets in the case, but had to dig deep to reveal the true villain in the story.

#### **The Truck Driver**

The most obvious target was the truck driver. The driver was texting on his cell phone while driving an 80,000 pound tractor-trailer down Interstate 10. He had been driving more than 14 hours a day, and sleeping less than 5 hours a night, for the past week. He lied in his log books to cover up the fact that he was working more than allowed by the safety regulations. Due to his fatigue and texting, he didn't notice that traffic had stopped on the interstate until it was too late for him to stop.

While the truck driver did a lot of bad things, he was not an ideal villain. He did not have great wealth; he had no power. He was not particularly intelligent. While he tried to be deceptive, he wasn't very good at it and we caught him in his lies without much effort.

## The Trucking Company

The trucking company had a poor safety history. The owner served as the dispatcher, and had three drivers. He did not check their driving record, which resulted in his hiring drivers with prior citations for speeding, prior convictions for log book falsifications, and prior crashes. He did not require any driver training, or audit driver log books. His drivers received a number of citations for equipment violations, log book falsification, violation of the hours-of-service rules, and using a cell phone while driving. He did not discipline or train them, even after receiving a letter from the Federal Motor Carrier Safety Administration stating that the company was having an abnormally large number of violations.

The trucking company owner was a better villain than the driver. He was smarter, and since he had three trucks on the road he presented a little more danger to the community. But the company was still small. Equally important for our clients, the company only had a \$1 million policy and very few assets. Given our clients' losses, we had to keep searching for a better villain.

## The Broker

How did such a small, dangerous motor carrier end up with this load? It turned out that the load was brokered by a huge corporation. Shippers hired the broker to get the load transported, and the broker chose the motor carrier.

The broker had tremendous resources. It had over 13,500 employees and did \$13 billion in business each year. The broker had the ability to check each trucking company's safety record, which the FMCSA posts on the internet. However, the broker chose not to look at the motor carrier safety records, even though in the past five years at least 20 people were killed when unsafe trucking companies hired by the broker caused crashes. Even though the broker had been sued repeatedly, the Vice President for Operations chose to continue the policy of not even looking at safety records, and instead only considering price and on-time deliveries when selecting motor carriers.

The decision-makers at the broker were the true villains of the story. The broker's choice to continue assigning loads to unsafe trucking companies in order to increase the broker's margins was the reason that people kept getting killed. The broker was powerful. Its executives were intelligent. It was deceptive; it came up with disingenuous reasons for why it was not practical to look at a trucking company's safety record. It was immoral; it just wanted to make more money, even if it meant that innocent people would be killed.

If we had stopped with the truck driver, or even the trucking company, our clients would not have been adequately compensated. Worse, the world would be a more dangerous place, because the broker would face no consequences for its dangerous decisions.

## **Oil Field Case**

We had a case in which our client was badly burned in an oilfield explosion. One company's crew was pumping oil into an open frac tank that was only 42 feet from where our client was assisting with electrical work. The company man for the operator approved the simultaneous operations, even though state law required at least 150 feet separation between an open oil tank and any potential ignition source. The result was the explosion.

The company man was aware of the danger, but pushed the subcontractors to continue working. He was an easy target, as he messed up and caused a lot of harm. But a working man with a high school education did not make a good villain. Moreover, he did not seem deceptive, making many admissions in his deposition that established negligence but also made him less villainous.

To find the real villain, we did a root cause analysis. Why did he allow the simultaneous operations? First, he told us that while he had worked in the oilfield for decades, he had never supervised this type of simultaneous operation before. In fact, he was unaware that Texas had a 150-foot separation rule. Why? Because the company did not provide him with any training before sending him to the field with the mission of increasing production.

We kept going up the corporate ladder, starting with his supervisor, and then his supervisor's manager, until we got to the Chief Operations Officer. At each level, we discovered that no one knew about the 150-foot separation rule. In fact, no one at the company had ever looked at the Texas oil field safety regulations. The company devoted tremendous resources to cutting-edge geologic techniques to find oil, and new methods to extract more oil at a well at a faster rate. But the company did not spend any corporate resources to have a safety department or any employee whose job was solely to provide safety. We identified and deposed the decision-makers, who were intelligent, well educated, and had the power to make decisions on behalf of the company. These corporate officers were also deceptive, giving evasive answers until forced to admit the truth when e-mails and other documents made them do so. The oil company executives who endangered workers to increase company revenue made ideal villains.

## **Conclusion**

Trial lawyers are playwrights and story tellers. To achieve justice, we must present a compelling story that will motivate jurors to render a heroic verdict in order to protect society from villainous defendants. By digging deep into your cases to find the true villains you can get fair compensation for your clients and make the world a safer place.