

PIGS,
a Trial Lawyer's Story

By Mark Munger

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*For my father Harry,
a true believer;
And for my mother Barbara,
who taught me to love
books.*

AKNOWLEDGEMENTS

As a trial lawyer it was my distinct privilege to represent clients throughout the Upper Midwest in state and federal courts. Many of these folks came to me for help in the most difficult and trying of times. There were occasions, at the end of a matter, when I beamed with pride at the result achieved. There were also occasions when the outcome of a case sorely tested my resolve.

Of the memories I carry with me from my days as a trial lawyer, the most compelling are those that recall my legal work for family farmers. This book is dedicated to the men, women, and children of the Midwest who raise our cereal grains, produce our milk, beef, pork, and poultry, and who try to scratch out a living from the reluctant soil.

My deepest thanks to musicians Sarah Harmer and Brenda Weiler, and poet Li-Young Lee, for allowing their words to appear in this work. Please support these talented young folks by buying their art.

Finally, this book is dedicated to the memory of Senator Paul Wellstone. American farmers had no greater friend than the diminutive senator from Minnesota.

Mark Munger
Duluth, Minnesota
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Stories from the Lake Superior Basin
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CHAPTER 1

“Ladies and gentlemen of the jury, have you reached a verdict?”

Judge Davidson's genteel voice carried easily across the sparsely decorated confines of the courtroom. The judge's words were projected from high above the gallery in the matter-of-fact style common to those who've grown up in the country. The jurist's inflection carried a hint of authority leaving no question as to who was in charge.

Though the voice was not loud or obviously demonstrative, the judge's confident delivery filled the stark, near silent void between his honor and the others in the room. As Judge Davidson asked the question, a question he had asked countless juries at the conclusion of countless other trials, his eyes squinted behind the bronze frames of his bifocals. Davidson clearly displayed the weariness of someone who'd stayed too long in a profession that devours men and women of lesser stamina.

Davidson's pale face displayed ridges of crinkled skin above faint traces of hair that were once his eyebrows. A suggestion of wisdom was conveyed by the fragile grace of his silhouette.

In the back row of the jury box, a well-dressed woman in a sharply pressed blue business suit rose to speak. Her manner conveyed an impression of means: here was a person of maturity, a person over fifty, trim of body and quick of mind, one of the county's elite, one who wore the exclusivity of her heritage on her sleeve.

“We have, your honor.”

The woman's voice was shrill, high pitched, and just a touch annoying. Her words carried with them a tone of obvious self-righteousness that was hard to ignore. The words “we have” were spoken with certainty. She left no room for the listener to attach the slimmest doubt or apprehension to the phrase.

As Judge Davidson watched the foreperson deliver her appointed line, he smiled. The jurist's reaction conveyed an understanding of the trial's likely result long before the verdict was revealed. He knew the lady's heart, her mind, her soul. They both came from privilege. They both spoke the same language. Their speech bore the same patterns, the same inflections. They were not like the others; not like the farmer, the tavern owner, the two ordinary housewives, or the two blue-collar workers comprising the remainder of the seven-person jury. He knew that. She knew that. Soon, the rest of the courtroom would know it.

Davidson nodded towards the Bailiff. Earl Bethard, age sixty-two, a retired Becker County Sheriff's Deputy, filled that role. Bethard had retired from active law enforcement after successive knee injuries forced him first to a desk job and then, ultimately, out of the profession. The deputy's maladies reduced him to the role of a

pensioner. Bethard had supplemented his meager disability retirement payments for over twenty years by working in the courthouse as a bailiff. The ex-cop tried hard to bring professionalism and a sense of duty to the position.

The bailiff hobbled across the frayed carpeting covering the stone floor. His predetermined path took him past the bench, directly underneath the watchful gaze of Judge Davidson. Bethard cast a languid smile towards Louise DeSmedt, the court reporter. Louise sat to the left of the judge on a platform between the level of the floor and the exalted elevation of Judge Davidson. The deputy continued on past Maggie O'Brien, the courtroom clerk, who occupied a seat to the right of the bench. Again, the elevation of Ms. O'Brien's station was lower than that of the judge, though somewhat higher than that of the court reporter.

This seating arrangement was repeated throughout most of the courtrooms in the State of Minnesota. By and large, the men occupied the judge's chairs, the seats of power, while the women, the people who controlled the day-to-day operation of the criminal and civil courts, occupied seats of lesser prominence. There were female trial judges located in the larger population centers such as the Twin Cities, Moorhead, St. Cloud, Rochester, and Duluth. But the female lawyers lucky enough to be elected or appointed to judicial posts outside these metropolitan areas generally found themselves mired in the quicksand of family court, imprisoned in the flotsam of broken marriages and child custody disputes.

Though the 1990's brought slow, inexorable change to the bench, it was rare for trial lawyers in Outstate Minnesota to advocate major criminal or complex civil litigation in front of female trial judges, even though, for a time, women held the majority of the seats on the Minnesota Supreme Court. Despite this model of gender-based equality on the state's highest court, from Roseau to Pipestone; from Wadena to Grand Marais; the scene in most county courthouses was identical: the male sat high above his subordinate female employees, occupying the throne of power. Becker County was an exception to this observation. In addition to Judge Davidson, the other jurist holding court in the Detroit Lakes Courthouse was female.

Mrs. Austin, the foreperson, handed the special verdict form to Earl Bethard. The woman adjusted her pleated skirt so that it hung evenly before resuming her seat. Once situated, once assured that everything was in its place, Mrs. Austin did not look up. Her eyes remained fixed upon her hands, hands folded deliberately across her lap. From the determination in her gaze it was clear that she did not want to endure eye contact with the lawyers.

Bethard labored with a noticeable limp and clutched the verdict form in his right hand as he passed before the bench. The

retired deputy offered the document to the judge. Davidson nimbly snatched the verdict form out of the old man's hand as Bethard continued on by, the bailiff's progress undeterred by the transfer. The jurist watched the ex-cop return to a seat against the far wall. A slight grin stole across the judge's face as Bethard resumed working on a crossword puzzle.

Behind the cheap Formica tops of the counsel tables, they waited. At one station, the one directly in front of the jury, three defendant medical doctors nervously witnessed the action. Two lawyers represented each defendant; one appointed by the doctor's malpractice insurance carrier; the other retained by the doctor personally to prevent a verdict in excess of his malpractice insurance limits.

At the other table, the plaintiff, Ms. Pelletier, and her lawyer also waited. Unlike the armada of legal and medical talent across the aisle, the individuals at the plaintiff's table seemed vulnerable and somewhat misplaced amongst the dignity and expensive suits of their opponents.

Daniel Aitkins was relatively young but he'd tried many cases before this one. Criminal cases. Automobile accident cases. Land disputes. An odd assortment of product liability lawsuits. This wasn't his first significant case. It wasn't the first time he'd represented a malpractice victim against the medical establishment in town.

Somehow, sitting in the unnaturally silent courtroom, appreciating Judge Davidson's review of the verdict, watching the jurist check each answer to make sure the responses were consistent, the power of the moment made Aitkins uneasy. He felt his heart pound beneath the cotton fabric of his inexpensive white dress shirt complete with button-down collar and red necktie held neatly in place by a tie clasp. The clasp depicted a gold arrow and had been given to Aitkins by his grandfather, the first of three generations of his family to practice law.

"The search for the truth," Grandpa Willard Aitkins had said, "is a trial lawyer's ordeal. Your path must be straight and true, like the aim of a hunter's arrow."

Willard Aitkins had died a month after Danny's graduation from law school, having lived just long enough to see the family legacy assured.

It was March. A blizzard raged outside. Aitkins perspired heavily under the weight of his navy blue wool two-piece suit. The courtroom's atmosphere seemed to thicken, seemed to close around Daniel as an old mechanical clock located high on the wall above the judge's bench counted off the seconds. Davidson's courtroom was large and generous. The ceiling rose twenty feet above the attorneys.

It was not the size of the room making Daniel feel claustrophobic: it was his anxiety.

The attorney's attention was distracted by rapidly swirling snowflakes assaulting the precarious glass of the building's single pane windows. Moist clots of precipitation adhered to the glazed surface and formed intricate patterns against the muted daylight entering the room.

The lawyer's mind wandered back to another occasion, another battle. The LeMaster case. Daniel's first medical malpractice trial. Waiting for Judge Davidson, Aitkins' mind retreated to the LeMaster matter, an occasion in court when everything had gone his way. The young lawyer had been able to turn the night nursing staff of Moorhead Memorial Hospital against the on-call resident. He had convinced the stubborn defense lawyers in the LeMaster matter that they'd heard enough.

That was another case, another time. Once the testimony of Nurse Olson had been completed, the insurers for the hospital and Dr. Stevens settled the claim. Based upon the contingency fee agreement Mrs. LeMaster had signed with Aitkins' office, the firm kept one third of the settlement. It was Daniel Aitkins' first major fee. It was the case that made him a partner.

Movement by Judge Davidson brought the lawyer back to the present, back to the matter at issue. Maggie retrieved the verdict form from the jurist. Unfolding the document, the clerk rose from her chair and cleared her throat. Aitkins felt his client's hand seek his fingers beneath the table. Daniel grasped Ms. Pelletier's moist palm and waited for the inevitable.

Tina Pelletier had been a free-spirited thirteen-year-old girl when the pain struck her down. At first, the tremors of agony came only after meals. It wasn't what Tina ate; it was the fact that she ate. The instant she forced food down, the pain would begin.

Betty Pelletier, Aitkins' client, was a single mother. Though Betty quit school at fifteen when she found out she was pregnant with Tina, though she suffered through a brief, violent marriage to the child's father, though the beginning of her life with her daughter had been tough, Ms. Pelletier managed to find work as a waitress at the local Ojibwe gambling casino run by White Earth, her home reservation. The meager wages and tips she earned provided them with food, shelter, and a few amenities. She could not afford private health insurance.

For routine check-ups and exams, Tina went to the local tribal clinic near Round Lake. Patients at the clinic paid for their medical care on a sliding scale based upon what they could afford. A

doctor with the Indian Health Service, a family practitioner, Dr. Lisa Envold, saw Tina for the stomach aches. X-rays, upper and lower GI studies, and blood chemistries were done. Dr. Envold opined that an obstruction of the small bowel, caused by adhesions left from post-natal surgery to repair an abdominal fissure, were the cause of Tina's pain.

The child was born with a gap in the skin covering her stomach. The fissure had been surgically corrected at birth. Dr. Lisa wasn't certain, but as an educated guess, felt that the surgery left significant scar tissue, which caused the small bowel to hang up on the adhesions. It was the doctor's theory that each time the bowel got stuck on the scars, the organ would twist, cutting off the blood supply, causing pain. She recommended that Tina see a specialist, a gastroenterologist. Dr. Envold said Tina wasn't in any immediate danger. There wasn't an urgent need for the suggested consultation. Betty Pelletier had thanked Dr. Envold and taken her daughter home.

It was only a matter of days before Tina's symptoms returned. This time, the pain did not abate. It robbed the girl of her cheer, her whimsy. She was unable to concentrate in school. Her grades plummeted. She became quiet, reclusive, and spent two days curled up in a fetal position on the couch, clutching her belly in agony. Betty Pelletier knew that her daughter was gravely ill. She had no choice but to call Dr. Envold.

Three days later, after much red-tape and delay, Tina was seen at Detroit Lakes Specialized Medicine, Ltd., a practice group of three internal medicine specialists housed in a single story brick clinic adjoining Detroit Lakes Lutheran Hospital. Dr. Rudolph Bongaard, Jr. saw Tina. He was a general surgeon, Detroit Lakes being too small to support a gastroenterologist on a full-time basis. Bongaard was also the proud owner of a championship quarter horse mare, Mary's Sheba of Becker. The day the doctor saw the Pelletier girl he was due to be at a horse show by 5:00pm. Tina was scheduled to see the doctor at 4:30pm. The girl arrived early.

"So, Tina, your mom tells me that you have a tummy ache. Let me have a look, will you?"

The young Indian girl, dressed only in a hospital smock, reclined on the examining table. She turned her head to avert her eyes, concentrating upon her mother's face as the doctor roughly manipulated her abdominal wall. Betty Pelletier noted a wave of pain descend over her daughter. There was no outcry from the child. And when the surgeon attempted to examine Tina's lower abdomen, the girl's cheeks turned rubicund. The doctor's gesture, though strictly professional, clearly embarrassed her.

Privately, Bongaard hated to see another patient from the reservation on referral from Indian Health. The agency paid too little

and took too long to pay the pittance authorized. Every test, every x-ray or procedure not done in the outmoded IHS clinic had to be pre-approved. The whole system turned him off. Try as he might, he could not disguise a similar disdain for Indian patients themselves.

Though Ms. Pelletier and her daughter seemed nice enough, Bongaard regarded Native people in general as ill kept, poorly nourished, and alcoholic. It was difficult for him to examine the child in a vacuum when he believed this, when in his heart he was convinced that this was her heritage.

His physical exam of the girl took only a few minutes. Its rapidity and the doctor's curt manner led Ms. Pelletier to believe that her daughter's condition was not serious. It was a perception that the physician reinforced with words.

"Ms. Pelletier, could I see you outside the exam room? Tracey, you can get dressed and wait for your mother in the lobby."

His use of another's name made Tina cringe. Her reaction was internalized but obvious to her mother. Betty Pelletier knew how hard her daughter struggled in school, in her life, to be someone, to be Tina Pelletier. The white skinned doctor had taken the child's self, her pride away in one moment of insensitivity. Betty and the surgeon exited the room to discuss the child's condition in private. After dressing, Tina passed them in the hallway. The little girl's cold stare, her black eyes fierce and hateful, locked on the physician as she passed him. If the doctor noted Tina's expression, he ignored it.

"I'm puzzled why Dr. Envold sent your daughter here. I don't find anything wrong on exam. Her pain is not reproducible. There's no fever, no obvious sign of infection or distress. Her tests are within normal limits. May I ask, how is her mental health?"

"Mental health? Why, it's been fine. She's a little high strung but a wonderful kid. Hard working, loving. Good grades in school. Lots of friends. Why do you ask?" Betty Pelletier replied.

"Frankly, we see similar problems in a lot of young women entering puberty. Often times they get upset, uptight about the changes they're going through. This unrest can manifest itself physically, not uncommonly as stomach pain," the doctor opined.

Bongaard handed the woman a packet of medicine wrapped in silver foil.

"Here."

Betty Pelletier recognized the pills to be Valium.

"Have her take two of these if the pain returns. If the pills don't help, have her see Dr. Envold again."

"But what about Dr. Envold's view that the pain is related to her fissure surgery?"

"Ms. Plaintiff, that couldn't be. The symptoms would be reproducible. Don't worry yourself about this, ma'am. She'll be fine once she passes through this rough spot."

Her surname misspoken, the Indian woman was shown the door. Two days later, after the abdominal discomfort became severe, after a gastroenterologist and psychiatrist concurred with Dr. Bongaard's diagnosis of emotionally induced angst, Tina withered in distress in the Mental Health Unit of Detroit Lakes Lutheran, her small bowel completely obstructed. She remained there, trying not to complain, trying to listen to her mother's admonitions that she should "knock it off" and "be a good girl", until the tissue strangled itself. Once that occurred, there was no saving the child. She lapsed into a septic coma and died.

When George Simonson, a local probate attorney and a member of the White Earth Tribal Council approached Dan Aitkins and asked Aitkins to take the Pelletier case, the white man hesitated. It was one thing to sue an inexperienced resident physician as in the LeMaster case. It was quite another to bring a wrongful death case against a small town's most prominent doctor claiming that the physician neglected his professional duty towards a helpless Indian child. But when the details of Tina Pelletier's death became obvious to Daniel after a cursory review of the girl's medical records, Aitkins agreed to take on the case.

Danny Aitkins knew that it wasn't enough that Dr. Envold held a professional opinion that Tina Pelletier's death was caused by an obvious small bowel obstruction. To prove a case against the defendants, Aitkins had to show that the obstruction caused Tina's death and that it was the negligence of the physicians that killed her. Negligence without causation would not suffice. He had to prove both.

To do so, the attorney assembled a team of board certified specialists to review the conduct of the defendant physicians. Aitkins hired a pathologist to link any negligence found by the other experts to the cause of death. On paper, in the form of written reports, each of the experts appeared confident and strong in their views; strong enough to sway a jury of seven hometown jurors that Tina Pelletier's death was not an act of God but an act of malpractice caused by the collective failure of three reputable doctors to adhere to the standards of care.

Then there was Dr. Envold. The Native American community, the community from which she derived her personal satisfaction as a healer, began a subtle campaign of pressuring her to stand behind her opinions. Reluctantly, at the risk of being ostracized by her own profession, the doctor agreed to testify on behalf of the plaintiff. But when the time to point to the truth came, when she sought to defend her opinions before the jury, Dr. Envold collapsed under the collective onslaught of the defense lawyers.

Her views as to the cause of Tina's death became mere guesses; the unsubstantiated theories of a family practitioner; mere speculations when compared to the learned positions of the three defendant doctors and the platoon of distinguished expert witnesses called at trial by the insurers; expert witnesses who had written text books and prestigious journal articles regarding the causes of and appropriate treatments for bowel obstruction.

At the conclusion of the cross exam of Dr. Envold, her words became so confused, so illogical, that Aitkins did not interpose a single inquiry on re-direct.

The questioning of plaintiff's hired experts, those out-of-town, out-of-state professional witnesses that Aitkins relied upon, fared little better. Despite hours and hours of meetings and discussions with each of them to hone their positions, so that their collective story formed a seamless, brilliant edge of knowledge, Aitkins had not been prepared for, and did not anticipate, his adversaries' theory of the case.

Dr. Emil Scholts, the Becker County Medical Examiner, the man who completed Tina Pelletier's autopsy, was not the subject of a discovery deposition prior to the trial. Aitkins did not question the man because Scholts' opinions were succinct and clear. The ME's conclusions as to the cause of death were set forth in great detail in his autopsy report. The bottom line, the end result of his examination of the dead child's body, was that her death was occasioned by "an obstruction of the small bowel with septic consequences resulting in coma and death."

When the defense called Scholts to the witness stand pursuant to subpoena, Danny Aitkins felt he was ready for anything the man would say. Except for what the man did say.

"Dr. Scholts, thank you for your review of the protocol you observed in conducting the autopsy in this tragic case."

Attorney F.W. Barnes, lead counsel for the defense and personal friend of Dr. Bongaard, spent nearly an hour going over the precise details of the dissection of the corpse of Tina Pelletier. In stoic Germanic fashion, Scholts described each intrusion he made into the little girl's cold body with negligible emotion. Aitkins took sporadic notes, confident that Barnes was wasting valuable time on a boring preliminary inquiry.

"Dr. Scholts, is it customary for you to dictate your findings as you perform an examination? In other words, is a tape made which is later transcribed into the official autopsy report?"

The question caught Aitkins off guard. His eyes left the idle doodling he'd been engaged in during the introductory questions of the Medical Examiner. He focused his gaze on the face of F.W. Barnes as the veteran attorney stood up and stepped out from

behind the counsel table. A meager grin formed across the old advocate's face. Aitkins recognized the gesture as the same disingenuous, less-than-honorable "I've got your balls in my hand" snigger the younger man had encountered in the past.

F.W. Barnes, tall, distinguished, every inch an aristocrat, his sixty-something-year-old head covered with wave upon wave of glorious silver hair, made sure Aitkins saw the grin. Barnes' gesture was for no one else in the courtroom, on the planet.

Aitkins had first encountered that smile as a young lawyer fresh out of law school. He was representing a woman who claimed injury to her shoulder in a slip and fall accident. At trial, Aitkins' client provided an oral medical history devoid of any reference to prior shoulder injuries. When Barnes inquired, the experienced barrister approached the woman with a stack of medical records. In full view of the jury, Barnes used an overhead projector to display innumerable medical records referencing previous shoulder injuries incurred by the woman, many of which had involved litigation and the recovery of damages for pain and suffering.

Confronted with his client's dishonesty, Aitkins sought to withdraw from the case. The judge had refused his request. The case went down in flames. Daniel remembered his adversary's smile from that first bitter encounter.

Scholts' response to Barnes' question brought Aitkins back to the present.

"That's standard procedure."

"In this instance, we've looked at Exhibit 19, the death certificate, and Exhibit 20, which is your report. You've indicated that you completed both of these documents and signed them?"

"I signed them. The report and the certificate were typed by my secretary, Joan."

"Do you find any significance in the fact that you did not personally prepare the documents?"

"Yes."

"How so?"

"I've listened to the tape, the actual tape made while I was performing the autopsy. There's a difference between what was dictated into the tape and what appears on the report as transcribed by my secretary. A material difference."

Sensing that he was about to be surprised, Aitkins scrambled to his feet.

"Objection, your honor. Failure to disclose. May we approach the bench?"

"You may."