

# THE WIDOW WAVE

a book review of a maritime trial

Book Review  
by Bernard Cotter

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If you have ever appeared in court, for any reason, this book will grab and pull you between its covers. The author, Jay Jacobs, formerly a San Francisco defense attorney, reveals heart and soul, angst and turmoil in describing his defense of a wrongful death lawsuit resulting from the loss of a private fishing boat with captain and four men aboard in the waters outside San Francisco Bay.

The fishing boat, a 34-footer, was owned by Francis Dowd, a Raytheon vice-president. The passengers were Dowd's son, Dowd's brother-in-law, Dowd's friend and Dowd's business associate, Andy Ang. The suit was brought by Ang's widow and five children against the Estate of Francis Dowd. The trial was held in Santa Clara County where Dowd lived.

The boat, the "Aloha," left Sausalito harbor on the morning of March 9, 1984. The boat was never seen or heard of again. Francis Dowd's body was found floating in San Francisco Bay about a month after the tragedy. Jay Jacobs was a young lawyer with ten years' experience selected by Dowd's

insurer, Allstate, to defend the case. The plaintiffs were represented by highly successful lawyers, David Baum and Martin Blake of San Francisco. At stake was a \$1.1 million liability policy and Dowd's estate.

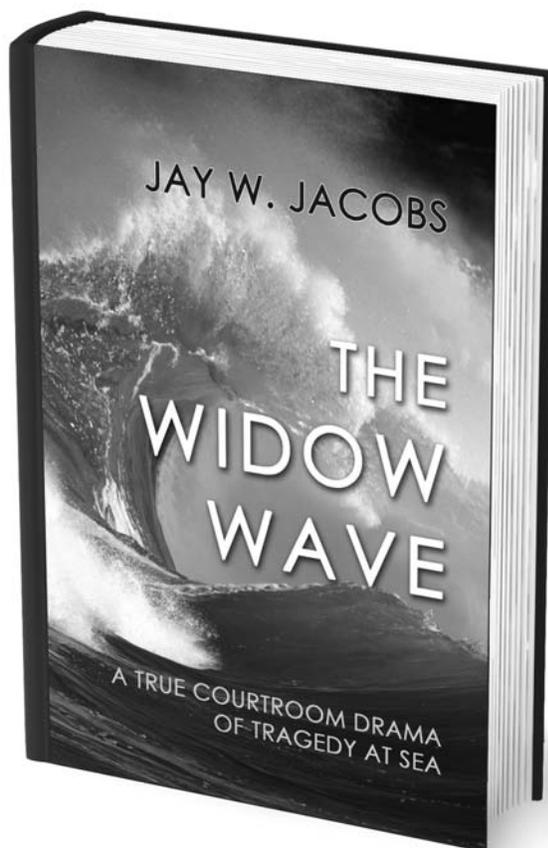
## Cold Air Meets Warm Air

The book begins on an obscure note describing a storm when icy cold air from Siberia met warm moist air from the South Pacific. The writing is poetic:

In this brutally cold environment, there is one unexpected element of beauty: at exceptionally low temperatures a deep breath expelled into the bone dry arctic air freezes instantly, forming miniature ice crystals that make a tinkling sound as they float downwards.

The storm may have produced a wave of unexpected height and power that slammed into the "Aloha" causing her to capsize and sink to the bottom of the Pacific.

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### Keeping an Open Mind

It is well the jurors are told to keep an open mind and not come to any conclusions until the case is finally submitted to them. The trial of *Ang et al. v. Estate of Dowd* ran true to form for three weeks in Judge David Leahy's San Jose courtroom. Lay witnesses and experts appeared and testified. Conflicting facts and opinions clashed. Objections were sustained and broached topics left unexplored. The attorneys espoused their conflicting views of the evidence and implored the jury to come to directly opposite conclusions.

### You Are the Juror

Author Jacobs puts the reader in the jurors' seats in recounting the trial. By defense reckoning, the "Aloha" left Sausalito Harbor at 6:00 am. Plaintiff counsel attempted to establish the "Aloha" lifted anchor at 7:30 am. This was a vital point in the trial.

The "Aloha's" destination was Duxbury Reef just west of Stinson Beach. To get to Duxbury, Captain Dowd would have passed under the Golden Gate Bridge. The opening to San Francisco Bay is actually 2.5 miles west of the bridge. The landmarks are Point Lobos on the San Francisco or south side, Point Bonita on the north or Marin side. After passing under the bridge, Captain Dowd had the choice of continuing straight in the Main Shipping Channel for five or six miles into the open sea before turning right or north to Duxbury or taking a shorter route by turning right at Point Bonita into shallow Bonita Channel and then onto Duxbury. Per the experts, the shallower the passage, the more likely waves are to increase in size when the wind is blowing.

On the morning in question, 15 to 20 fishing boats heading for Duxbury took the Main Shipping Channel. No one on any of the boats saw the "Aloha." The conclusion was Captain Dowd, an experienced boater and fisherman, took Bonita Channel, the shorter route.

As to the storm that was brewing because of the collision of Siberian and South Pacific air, at precisely 8:00 am there was a small craft warning that waves had become dangerous

in Bonita Channel. Attorneys Baum and Blake contended that the "Aloha," having left Sausalito Harbor at 7:30 am and not 6:00 am, as the defense claimed, negligently ventured into Bonita Channel after the 8:00 am warning had aired.

### Trouble for the Defense

A month before the accident, while the "Aloha" was in its berth in Sausalito Harbor, someone snuck aboard and stole the radar equipment, the two-way radio and the ship-to-shore telephone. Replacement equipment had been purchased. However, there was a strong inference that the equipment had not been re-installed. This allowed Baum and Blake to argue Captain Dowd was operating an improperly outfitted boat and, not hearing the small craft warning, negligently blundered into shallow Bonita Channel after 8:00 am, where the "Aloha" was swamped by monster waves and sent to the bottom with all hands aboard.

### The Loss of the "Aloha"

Jacobs, who served in the Merchant Marine as a sailor and an officer for three years before starting Golden Gate University School of Law, again turns poetic in describing the loss of the "Aloha:"

As it is with all living things, there comes a time for a vessel to die. At the moment the first hint of sunlight became visible over the Marin hills, erasing the last hint of stars from the fading night sky, the "Aloha" died.

Striking the bottom in a reverberating shudder, the boat gently rocked on the seabed, preparing a final resting place for herself. The men entombed inside were now in death's repose, their valiant struggle to live concluded. They appeared asleep, resting in silence. In a short time, the sea overhead would revert to gentler swells, leaving no trace of the men or the boat that had intruded into its realm.

### Trial Begins on a Bad Note

The trial began on a bad note for the defense. Baum announced he was waiving the jury. At a previous Trial Setting Conference, Jacobs had waived a jury. He had no

recollection of doing so, but had checked the jury waiver box on the court form bearing his signature. Somehow, he was able to convince Judge Leahy to permit him to have a jury.

### Sunk by a "Coincidence" Wave

Jacobs called in two experts, Captain David Seymour, a boat safety expert, and Rae Strange, a meteorologist, in order to explain to the jury that the "Aloha" went down before the small craft warning was broadcast at 8:00 am. They relied on data from three buoys in the open waters outside the bay which suggested the "Aloha" went down in relatively calm waters when struck by a "coincidence" wave, a wave of unanticipated magnitude formed by two smaller waves, before 8:00 am. The coincidence wave could have reached a height of 20 feet, too much for a 34-foot fishing boat such as the "Aloha" to handle.

### Three Books in One

In reading *The Widow Wave*, the reader will sense he or she is reading three books in one. First, there is the account of the sinking. Second, there is the jumble of the trial. Third and best is Jacobs' recitation of his deepest thoughts while the trial unfolded. Jacobs had profound respect for Baum's ability as a trial lawyer. "After I learned Baum was going to try the case, if a way had presented itself to get out of going to trial, I would have seized it." At one point: "This case was going to be my first or maybe my last big trial." At another: "I saw a man (in the mirror) overwhelmed with fear looking back at me." And then: "I leaned against the table to strengthen my legs which didn't seem to be cooperating." Later: "As the seconds ticked by my heart pounded faster than a sewing machine." Towards the end: "In the three weeks since the trial began, I had been in constant turmoil about not settling." Overall: "I blundered on."

Baum and Blake tried to ignore Jacobs during the trial, not responding to his good morning greetings, only disclosing next day's witnesses when asked. "I had been dismissed without even the courtesy of Baum looking in my

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direction.” At one point, Jacobs heard Baum on the telephone: “It’s all over with now, it’s just a matter of how much.” Jacobs felt “like the wind had been knocked out of me.”

**Fascinating to the End**

In every trial something completely unexpected usually occurs. In this case,

the leading side seemed to change day by day, witness by witness. What happened, including Judge Leahy’s closing comment, will keep you fascinated to the end.

MCLE credits should be given for reading *The Widow Wave*; it’s that good. The book can be ordered through Amazon Books or Barnes & Noble. ☞



**Bernard Cotter**

This review of *The Widow Wave* was written by long-time ADC member Bernie Cotter who, after 50 years of trying cases, now devotes his time to mediating and arbitrating cases at McDowall Cotter, San Mateo – when he is not off fishing.

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