One Hell of a Book

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Jonathan Harr, *A Civil Action* (New York: Random House) 1995, 500 pages, $25.00

A Civil Action is a first-rate book. Jerry Gette, who is as good a lawyer as this is a book, read it in two straight evenings. He would not leave me alone until I read it. He prevailed in the end, as he almost always does. I read it in a few more sittings than he did, but I found myself wanting to get back to it, whenever I was doing anything else. Both of us were enlightened and delighted.

A Civil Action gives the best picture I have ever seen of the inside of a large, complex lawsuit. The book brings lawyering alive. It vividly portrays the emotional rollercoaster that litigation can be for the lawyers, not to mention clients who are individuals. (Large corporations are not given to intense emotion, although their managers sometimes are.) For the most part, the story makes the assorted moves of the litigation game comprehensible and portrays the drama of an unfolding legal dispute extremely well.

In essence, *A Civil Action* tells the story of the toxic tort litigation growing out of the (alleged) leukemia cluster (allegedly) discovered in Woburn, Massachusetts, in the middle 1980s. The plaintiffs' general theory was that trichlorothylene (TCE), then an ingredient in industrial solvents, had somehow gotten into the public water supply from one or both of two sources: a factory belonging to W.R. Grace & Company and a factory belonging to Riley Tannery, an independent business which later became a division of Beatrice Foods. Local parents whose children had been killed by leukemia were searching for causes, and it seemed to them that more people in close proximity to each other and to certain wells were dying of leukemia than randomness could tolerate. Many expert witnesses agreed.

Eventually, the grieving, angry parents went to a firm of plaintiff's

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lawyers. One of the lawyers there, Jan Schlichtmann, ended up with the case. He eventually left that firm and took the case with him, and it became one of the anchor-cases of his new law firm. Schlichtmann was then a semi-successful plaintiff's lawyer, who had successfully pursued a number of malpractice cases, and he wanted to hit the big-time. William Cheeseman represented W.R. Grace & Company, while Beatrice Foods was represented by Jerome Facher. Informed observers agree that Facher is one of—if not *the*—best trial lawyers in Boston. For the most part, *A Civil Action* revolves around the activities of these three men, plus those of Charles Nesson. Nesson is a Harvard law professor specializing in evidence and he assisted Schlichtmann in the formulation and presentation of the plaintiff's case. (Of course, scores of other people worked on the matter over the multiyear history. Some of the plaintiffs' other lawyers marginally figure in the book, but almost none of the other defense lawyers play any interesting role. There were probably 20, or so, such people.)

Essentially, the Woburn case was a negligence case.[1] At a very high level of abstraction, all negligence cases involve the same type of issues: Did a bad thing happen? Was that event the responsibility of the defendant? Has the plaintiff suffered an injury? Did the bad thing for which the defendant was responsible cause the plaintiff's injury? Was that causal link foreseeable? Law schools teach this sort of analysis to freshman law students every day, and we teach them that the elements of a given tort are always the same, no matter how much the facts vary. One of the things this book concretely, although unconsciously, drives home is that this conceptual approach to tort law is true only at a very high level of abstraction.

In reality, if not in the rhetoric of pseudo-Socratic law school dialogue, a mass toxic tort case and a roadway collision differ from one another as night the day. In the latter, the first question—in theory—is whether there was a wreck. Ninety-nine times out of a hundred, that question is not really an issue. In a toxic tort case, however, whether bad stuff got dumped into the ground is an extremely important question both in theory and in practice.

In an automobile case, a wreck is a unitary event which happens at a particular time on a particular day. In a toxic tort case, the "event" which constitutes the nucleus of the action is really much more like a process. It is necessary to look at a period of years—and sometimes even decades—to determine whether the untoward "event," which is an absolutely necessary condition for the lawsuit, actually happened. This event-process distinction creates enormous differences in proving the case.

In the collision case, moreover, evidence of the wreck is often fresh and direct. People are in it. Other people see it. The police often investigate it immediately. If they do not, insurance adjusters and accident reconstructionists do. Witnesses frequently give statements within days—and even hours—of the wreck. Interested parties frequently retrieve and save the physical objects (e.g., the vehicles) involved. In toxic tort cases, in contrast, the evidence of the injurious event is often indirect and old. The following question is typical: "Did you see Jones dump junk into the pit 22 years ago?" To which the following answer is typical: "Not really. It always happened at 2:00 A.M. But Smith, a fellow employee, told me it was Jones, and he supervised both of us. Too bad about Smith being shot dead by his irate wife."

And there is more. If a collision occurs, everyone believes that a bad thing happened. It is not so clear that if stuff is dumped onto the ground or into a pit that a bad thing has happened. Another stage of proof is needed. The plaintiff must make a prima facie case that the stuff dumped is bad stuff. (Of course, in theory, this proof relates to causation, but in reality the discharge must be shown to be prima facie toxic in order to grab the attention of the judge and jury.)

These features are only the beginning of the differences between a run-of-the-mill negligence case and a toxic tort case. Once it is established that a bad thing has happened, in both types of case, it is then necessary to determine whether the defendant is responsible for the untoward event. In the collision case, one asks whether the defendant was driving too fast, whether he ran a red light, whether he was drunk, whether he was being unnecessarily diverted by the salacious activities of his front-seat passenger, and so forth. One may also ask how much the driver's principal knew about his history and behavior. In the toxic tort case, the questions seem to be the same: Did the defendant cause the untoward event? And so on. But because the "bad event" is process-like, because a number of employees of the defendant have usually been involved in causing that "event," and because the production of the event(s) in question may not be susceptible to simple eyewitness testimony, the strategy of proof is entirely different. Moreover, lots of those involved in producing the bad event(s) run for cover. Often they fear for their jobs. Evidentiary problems, consequently, proliferate quickly. *A Civil Action* is very good on this point.

One of the other important differences between toxic tort cases and garden-variety negligence cases revolves around causation. If Jones is a pedestrian and is struck by a car, the chances are there is not much argument about whether the car caused his manifest and immediate

injuries. Of course, automobile collisions involve their own causation difficulties. Do the plaintiff's headaches five years later result from being struck by the car? Does the plaintiff really suffer from a whiplash injury? Are the plaintiff's lost wages two years after the accident really attributable to the accident, or is the plaintiff malingering? These questions are nothing, however, compared to trying to figure out whether some chemical (or some witches' brew of chemicals) causes a type of cancer, or whether some nasty substance discharged into the ground at point A could possibly end up at point B quite some distance away.

In the Woburn case, the defendants could not possibly be responsible for causing leukemia unless their discharges moved from their facilities to certain public wells. Much of the evidence in the case concerned whether such migration was even possible. Interestingly, these scientific questions were not the same for both the defendants: There was a river between the Riley Tannery and the public wells, which was not between those wells and the W.R. Grace facility. This difference was probably crucial to the outcome.

One of the most interesting parts of the book concerns the opposing experts. The plaintiffs employed George Pinder, a hydrologist at Princeton University, while W.R. Grace employed John Guswa, who I am told is also a leading figure. The book entertainingly portrays both experts having been subjected to crushing cross-examinations. Professor Pinder is portrayed as a victim of his own erratic arrogance. The cross-examination of Guswa—engineered by Nesson—turned upon a step-by-step elaboration of Darcy's Law, a basic law of hydrogeology. One can get some idea of how good *A Civil Action* is by reading that section alone: It makes the exposition and forensic application of that dull scientific formula a page-turning thriller.

The trial of the Woburn case was never completed. It was to be tried in a segmented way. The jury was to be asked a series of factual questions as the trial went on. The jury resolved the first issue presented in favor of Beatrice but against W.R. Grace. This did not mean that Grace was going to have to pay, although it did mean that Beatrice would not have to pay. There was lots more trial to go, so far as W.R. Grace was concerned. Moreover, the district judge concluded that the jury had not understood the evidence, so he ordered a mistrial as to W.R. Grace. It was back to square one. The plaintiffs and W.R. Grace settled, at that point in time, for $8 million. Cheeseman, counsel for Grace, has told me that this was approximately what his client thought it would take to try the rest of the case, taking into account a possible retrial.

As with the trial of many lawsuits, this case was not over even when it was over. Not only was there an appeal, but during the appellate process, the plaintiffs discovered that there was evidence they had not received. That evidence began with a hydrogeological report from 1983 concerning the Beatrice site. In the plaintiffs' view, they had asked for this type of material numerous times, and it had been concealed from them. In the defendants' view, there had been no discovery misconduct. Initially, the district judge agreed with Beatrice. The First Circuit, however, determined that there was "clear and convincing evidence, overwhelming evidence" that counsel for Beatrice had misbehaved. On this basis, the appellate court required the district court to make an aggressive inquiry into misconduct.

Eventually, the district judge heard testimony from 26 witnesses and received 236 exhibits into evidence. As *A Civil Action* points out, "[t]he misconduct hearings lasted longer than most major trials." In the end, the manager of the Beatrice facility, who had formerly owned the tannery, was made to appear a liar in one particularly dramatic exchange. It turned out Beatrice and its predecessor had hundreds, if not thousands, of documents pertinent to the chemicals which were being used at the tannery during the 1960s and 1970s which had never been produced in discovery. Naturally enough, counsel for the plaintiffs insisted that he had asked for them, while the lawyer for Beatrice who had them insisted that they were never requested.

The district court eventually held that the manager of the Riley Tannery was guilty of perjury and that one of the lawyers for Beatrice was guilty of "deliberate misconduct" in failing to give the plaintiffs' counsel the engineering report. At the same time, the district judge completely exonerated Facher, chief trial counsel for Beatrice. The lawyer who was found guilty of misconduct hired a lawyer and attempted to reverse that finding. She took the position that Facher was fully aware of the engineering report in question. If the court had accepted this allegation, it would have had to shift the burden of responsibility from the lawyer it targeted to Facher—a darling of the bar and an adjunct professor of law at Harvard. The district judge refused to receive materials on this motion. He felt that it was untimely, and he was probably correct. The lawyer who took the heat for concealing evidence was not sanctioned by the court, however, and her fellow lawyers have now elected her to an august position in the local bar.

The court's final resolution of the post-trial controversies was very unsatisfactory. The judge found that both sides had violated Rule 11 of the Federal Rules of Civil Procedure. The plaintiffs had violated it by

filing a lawsuit against Beatrice Foods for which there was no basis, and Beatrice violated it by failing to produce documents it was required to produce. The court called it a wash. The First Circuit refused to find that the district judge had abused his discretion in this double finding.

Throughout, this book discusses the impact of heavy-duty litigation on the personal lives of the participants. One of the stories is particularly dramatic. As the story of the Woburn case ends, Jan Schlichtmann, the plaintiff's lawyer, is a ruined man. He has lost most of his relationships. He has been forced to file bankruptcy. His Woburn clients are considering taking action against him for his lavish expenses. He is held in low esteem by the Boston Bar.

From a business standpoint, Schlichtmann made a number of mistakes, of course. He failed to control expenses. He spent far in excess of his resource base. He failed to obtain a mix of contingency fee and hourly work. And the Woburn case was his only large contingency fee case. Any one of these sins is utter madness, and Schlichtmann committed all three at once.

The stories of the other lawyers involved are less dramatic, but they are archetypal. If my students had the time, I would assign the book to my "Professional Responsibility" class if for no other reason than to expose them to the "feel" of a litigating life.

I asked one of the lawyers involved in this case, Cheeseman, whether the book gave a fair picture of the trial. His answer was "no and yes." He was concerned that a number of things were omitted. The book does not make it clear that the jury was permitted to pose questions at the end of the examination of every witness. That probably should have been mentioned. Nor does the book make it clear that the plaintiffs especially relied extensively on colorful graphics and various other models and mechanical devices to try to demonstrate its theory. Since the book is such a marvelous portrayal of a litigation, it would have been nice to have had some of those described, drawn, or even included photographically. Cheeseman also believes that John Guswa performed better than he was portrayed, but, then, Guswa was Cheeseman's witness.

Because *A Civil Action* provides a relatively comprehensive view of a large, complex case, it raises a number of questions which it could not begin to solve. Some of these are ethical questions. One of the focuses of the book, for example, is on the taking of depositions and their use for impeachment in trial. Taking depositions and presenting witnesses for depositions is probably the staple of the professional litigator from his second or third year as an associate to his fourth year as a partner. Presenting witnesses for depositions is, perhaps, half of

that activity. One of the most important parts of presenting the witness for deposition is preparing her or him. Frequently, lawyers try to teach witnesses to be good deponents. One school of thought on this subject is that deponents should resist giving up any information, except that which is expressly demanded. Young lawyers are taught to teach witnesses to listen to the question and answer only the question put to them. Witnesses are taught never to volunteer anything, if at all possible.[3]

My experience, in general, is that this instruction is pointless. People are going to be who they are without stringent behavior modification, so, within an hour or so, deponents are generally answering questions as they would have, had they not received attorney instruction. Sometimes, intelligent, tough, determined witnesses can follow their lawyer's teaching consistently, over a prolonged period of time, but this is rare. Most participants in litigation probably realize this, and perhaps that is the real reason the early part of a deposition often concerns trivial matters. As a result of the ineffectiveness of lawyers' work with witnesses, there is now a new litigation-support profession. There are people with various kinds of training (speech, rhetoric, psychology, sociology, drama, and sometimes even law) who are spending several days at a time preparing witnesses for depositions. The rule "Never volunteer!" is almost always part of their instructional agenda, and by subjecting the prospective witness to repeated participatory exercises with video feedback, more disciplined witnesses can be produced. Obviously, such activities are extremely expensive.

I have also wondered about the forensic wisdom of this gambit. If one has an intelligent, discerning, loyal witness, perhaps one should have the witness utter favorable truths for the record at every opportunity. If nothing else, it will make the deposition virtually unreadable at trial and unusable for summary judgment purposes. I wonder if the lawyer's instruction "Never volunteer!" is not hubris on the lawyer's part. Isn't the lawyer really saying, "This is my case. I run it. Get in line and stay in line." In our post-Freudian world, hubris is usually a cover for fear. So, of what is the legal profession afraid?[4]

I also wonder about the ethics of "Never volunteer!" High-dollar litigation is becoming more scripted all the time. It is not clear to me that the careful crafting of answers and the preparation of witnesses for days on end facilitates the search for truth. I am also troubled about whether the rule "Never volunteer!" is really consistent with the oath every witness takes to tell not only the truth but the *whole truth*. It seems to me that under many circumstances telling the whole truth

might require at least a smidgen of volunteering. If a witness has sworn to tell the whole truth, should the witness deliberately permit examining counsel to labor under a misapprehension? Hard-nosed, perhaps cynical conceptions of the adversary process say, *Yes.* It seems to me the oath says, *No.*

Anyway, *A Civil Action* entertains, instructs, and stimulates. Strong virtues these. The book would also make an excellent present for anyone contemplating going to law school. It is simply written and fully explained. Anyone over 16 should be able to understand it. This is one hell of a book.

Notes

1. One of the theories was strict liability, but from the point of view of advocacy and jury appeal the plaintiffs' presentation was fault-based. Further, the real goal in the case—according to *A Civil Action*—was punitive damages, and such a recovery required a finding of gross negligence.

2. For a history of community organizing in response to the leukemia cluster at Woburn, see P. Brown and E.J. Mikkelsen, *No Safe Place* (1990). See also P. DePerna, *Cluster Mystery* (1985). For a different perspective, see K.R. Foster, D.E. Bernstein, and P.W. Huber, *Phantom Risk: Scientific Inference and the Law*, Chapters 7 and 10 (1993).

3. S.B. Shapiro, *How To Survive a Deposition*, 103 (1994). See J.W. McElhaney, "Nine Ways To Use Depositions," 19 *Litigation* 45 (1993).

4. Also, one wonders how discoverable prolonged deposition preparation sessions are. Very, I should think.