The Woburn, Massachusetts Toxics Case & A CIVIL ACTION

The Woburn case offers an opportunity to consider larger questions about the systemic role of tort civil actions against the backdrop of state and federal statutes and regulatory agencies. What observations can be drawn from the following partial chronology of the parallel processes in the Woburn case’s public and private law?

**A WOBURN TOXICS TIMELINE:**

**1979** Government agencies (the federal EPA, the state environmental agency, and the local health board) take the first legal actions after testing groundwater around the well field: they close the wells, fence the site, and identify potentially responsible parties (PRPs).

**1980** EPA began the Superfund process: Preliminary Assessment: site investigation and analysis of the need and method for remediation, under §§106 and 107 of CERCLA (a cleanup process that averages 12 years).

**1980-81** Robbie Robbins, Jimmie Anderson, and Jarrod Aufiero died.

**1981** The future plaintiffs ask CDC to study the seeming leukemia cluster, and the Federal CDC affirms that leukemia cluster is extraordinary.

**1982** EPA placesWells G & H on the National Priorities List (NPL).

Lawsuit filed; discovery and other extensive trial preparations begin; Schlichtmann and plaintiffs give presentation at Harvard School of Public Health that launches field study. Grace admits using TCE and begins to undertake voluntary groundwater investigatory work.

**1983** EPA Remedial Investigation and Feasibility Study (RIFS) complete.

EPA issues an Administrative Order to Grace to look for buried drums, excavate them, and install groundwater monitoring wells.

**1983-85** Plaintiffs’ intensive investigation into medical causation of leukemias.

**1984** CERCLA implementation process continues; Beatrice and Riley tell EPA they never used subject chemicals; Grace completes testing, inventory, and some drum removal as required by the 1983 Administrative Order.

Harvard School of Public Health Study published showing local health anomalies.

**1985** EPA and USGS conduct a 30-day aquifer test. Plaintiffs’ onsite testing accompanied by government investigators.

**1986** Anderson et al. v. Grace & Beatrice: Trial on exposure phase begins in February, verdict at end of July: ambiguous verdict against Grace; plaintiffs cannot prove Beatrice tannery’s contamination on terms required by court.

September: Grace settles for $8 million.

**1987** Plaintiffs discover Yankee Report in EPA files in September, showing contamination at the tannery site itself in test results.

**1987-90** Plaintiffs appeal Beatrice verdict, and attempt to get a new trial to prove Beatrice’s contamination based on Beatrice’s withholding of reports during discovery. First Circuit tells Judge Skinner to review; he does, and denies a retrial based on a Rule 11 theory, cert. denied.

**1988** EPA begins criminal action against Grace based on its responses to a 1982 information request; Grace agrees to a settlement for ca. $10,000 on a plea equivalent to nolo contendere.

**1989** February: EPA proposes Remedial Design with on-site incineration. Major local opposition during comment period.

September: EPAfinalizessecond version of Remedial Design for site remediation, with off-site incineration and some removal of materials to RCRA-approved landfills.

September 14: EPA final Record of Decision (ROD).

**1991** EPA Remedial Action begins with pump tests and pilot study of pump-and-treat system.

Remediation will take “several years,” and will only take place on the property of the individual PRPs. No cleanup is scheduled for the contaminated well sites. EPA negotiates a consent decree with Beatrice, UniFirst, New England Plastics, Grace, and others for cleanup. Estimated cost of $69.5 million, with each party paying their own share. EPA will oversee and charge PRPs for administrative costs.

**1992** Pump-and-treat remediation system in full operation; to remain so for indefinite future. Remediation under the modified plan is based on substantial removal of soils to RCRA-certified landfills.

**1997** State Dept. of Public Health releases study concluding that the contaminated wellwater was the cause of increased likelihood of childhood leukemia in the plaintiffs’ Woburn neighborhood.[[1]](#footnote-1)

**2000** Anticipated date of final remediation of the selected contaminated parcels [except well sites]; groundwater not to be safe until 2020 at the earliest. The total amount of contaminated soil estimated by EPA for removal and incineration was seriously underestimated; the final total has not yet been determined.

There is still major contamination of the land in Woburn. EPA has required the cleanup of only some of the contaminated parcels — Grace/Cryovac, New England Plastics (near Grace), UniFirst, Olympia Nominee Trust (land near Unifirst), and Wildwood Conservation (the tannery’s low-lying 15-acre parcel). There are three additional sites being cleaned up under a state statute (Whitney Barrel, Aberjona Auto Parts, and Murphy’s Waste Oil, all small entities along Salem Street at the bottom of the site map). Massachusetts would only sign on to the settlement if these latter sites were included. EPA had not gone after these sites because they were small and their contamination was predominantly oil, which is not covered under CERCLA. There is no cleanup being done on Well Sites G&H themselves, because EPA is waiting to see whether the cleanup of the “contribution sites” will eventually result in a decontamination of the well sites. Note also that the tannery itself is not one of the sites being cleaned up, much of its soil reportedly having been removed informally during the course of the litigation.

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The Woburn case has become one of the most famous in modern American annals. Its compelling human interest aspects led to the publication of Jonathan Harr’s best-selling book A Civil Action (1995) and the subsequent movie of the same title. An earlier version of the story was P. Brown and E. Mikkelson, No Safe Place (1990). The case’s notoriety coupled with a very interesting procedural history has led to its continuing use as a case study for procedure students. See L. Grossman and R. Vaughan, A Civil Action: A Civil Procedure Supplement (1999). The following items draw on material beyond this coursebook. Students may wish to consult the materials mentioned above while working through these items.

**Discovery issues.** The judge in the Woburn case repeatedly refused to allow plaintiffs to test for contamination on the site of the tannery itself and in its sludge disposal area (see map of the Woburn site), restricting testing to the wetland parcel downhill from the tannery. It is not clear why this ruling was made. Initially Beatrice’s attorneys appeared to resist tannery investigation on the ground that the tannery had been reconveyed back to John Riley and was no longer owned by them. Later the rationale appears to have been that plaintiffs had based their case primarily on the wetland parcel, which they knew to be contaminated, not the tannery for which they had little information. One valid purpose of discovery, however, is to allow plaintiffs to investigate sources of contamination that they have good faith reason to believe are sources, such as the sludge disposal site behind the tannery, in order to build a case. In the meantime, Beatrice took advantage of the exclusion to excavate and clean up the tannery site, including the disposal areas.[[2]](#footnote-2) Later the judge appears to have relented: He would let plaintiffs enter the tannery site if they would use an expert of his choosing. The plaintiffs rejected that belated compromise.

In other toxic tort cases, discovery has been complex and inventive, including the use of physical experimentation on defendants’ land, the tracing of smokestack emissions via isotopes or dye markers in groundwater as in the *Wilsonville* case, and the like. For environmental plaintiffs, the trick often has been to find probative evidence that can be obtained without great cost.

**Novel civil procedure: “polyfurcation.”** The major issues of the Woburn toxics case in *Anderson* never went to trial because the judge in February 1986 split the case into four sequential phases. Under Fed. R. Civ. P. 42(b), a judge may phase a trial in the interests of efficiency, so basic questions, such as liability, are raised and litigated first in a separate trial; then consequential issues, such as remedies, are litigated as necessary. The Woburn judge, however, split the liability issue itself three ways. He set Phase 1 to determine whether defendants’ contaminants ever reached the public wells, Phase 2 on causation of leukemia, Phase 3 on causation of other injuries to other family members, and Phase 4 on damages. Only the first phase ever went to trial, limited to the question of liability for groundwater flow. Plaintiffs’ attorneys generally oppose such multiple phasing because it “cuts the heart out” of the continuity of the story they are trying to present to the jury. The Woburn jury nevertheless came in with a verdict against defendant Grace in Phase 1, and Grace quickly settled for $8 million in damages. Does that outcome reinforce the rationale for phasing or support the plaintiffs’ fear of dilution? See Bedecarré, Polyfurcation of Liability Issues in Environmental Tort Cases, 17 B.C. Envtl. Aff. L. Rev. 123 (1989).

**Special jury questions.** The Woburn plaintiffs’ case encountered another tactical disadvantage when the judge required the jury in the Phase 1 trial, instead of bringing in a simple verdict on whether the defendants’ contamination reached the wells, to specify the particular time at which each of four chemicals reached the wells. The questions were so complex that even the jury verdict against Grace was internally inconsistent, and jury members confessed their extreme confusion about the highly technical subquestions they were required to answer. See Pacelle, Contaminated Verdict, Am. Law. (Dec. 1986), at 75; cf. Brodin, Accuracy, Efficiency, and Accountability in the Litigation Process: The Case for the Fact Verdict, 59 U. Cin. L. Rev. 15 (1990). (Confronted with the inconsistencies in the Woburn jury’s answers, the judge overturned the verdict and ordered a new trial. Grace’s decision, after weighing its options, to settle for $8 million came the same day despite the overturned verdict.)

**The “highly extraordinary” defense and its evidentiary consequences.** A critical legal ruling, not noted in the Woburn case’s popular chronicles, was an application of Restatement (Second) of Torts §435(2)’s “highly extraordinary” excuse. Section 435(2) allows a judge to excuse liability where “looking back from the harm to the actor’s negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.” This grant of discretion to the trial judge was designed to nullify liability where the chains of causation are extremely improbable in statistical terms, as in the classic case of Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928). Under Restatement §435, foreseeability is not the issue; rather it is a response to very unlikely Palsgrafian combinations of coincidence in a chain of causation. In the Woburn case, however, the judge used §435(2) to excuse the Beatrice tannery on foreseeability grounds from any liability prior to the time when it was told by an engineer that the groundwater under its property flowed laterally 800 feet, under the Aberjona stream, to the public wells. The judge said it was extraordinary to him that groundwater can flow laterally under a stream. How does this square with Professor Davis’s analysis cited in a footnote by the court in Branch v. Western Petroleum, in Chapter 3, that implies that long-distance groundwater pollution flow in fact is not extraordinary? Scientifically, it is axiomatic under the laws of physics that pollutants would be drawn, along with the groundwater, under the creek and to the wells from a broad radius including the tannery’s lowland parcel. The evidentiary effects of this ruling were dramatic. Although extensive evidence proved that contaminants came to the wells from Beatrice’s property in the same way as from Grace, a point echoed in government assessments of cleanup liability against both, the judge told the jury that it had to ignore prior passage of contaminants from Beatrice’s land. Beatrice could be held liable only for flows after the engineer’s notice. The jury decided that with the evidence thus restricted, it could not make the required specialized timing findings for chemical exposure in Beatrice’s narrowed window of liability, and the case against Beatrice

**Woburn’s other evidentiary rulings.** The judge in *Anderson* made several other evidentiary rulings that were perplexing. At one point, he substituted his own observations for the testimony of chemists who had found tannery compounds in waste piles on the wetlands parcel: “I compared samples of this material with samples of tannery sludge both at the trial and during the recent hearings and found them totally different in color, consistency and odor.” 127 F.R.D. 1 (1989). At the end of the trial, he made another surprising finding in light of the established fact of groundwater flows to the wells: “In response to plaintiffs’ post-verdict objection to the ambiguous form of the interrogatories, I made a finding of fact under FRCP 49(a): plaintiffs had not proven by a preponderance of the evidence that the complaint chemicals migrated to wells G and H.” 129 F.R.D. 394 (1989). (This perhaps meant to say “within the time horizon I had set for liability under Restatement §435(2).”)

**Fed. R. Civ. P. 11 in the Woburn toxics case.** Fed. R. Civ. P. 11, generally designed to *police attorneys’ ethical practice, waxes and wanes over the years. In toxic tort cases,* including the Woburn case, Rule 11 motions often are made by defendants to challenge plaintiffs for proceeding without traditional proof of causation, when plaintiffs propose to prove their case based on statistical or circumstantial logic or on theories on the frontiers of science. In the *Anderson* case’s first Rule 11 hearing, Judge Skinner ruled that plaintiffs had enough of a case on causation to proceed in good faith.

A second Rule 11 hearing, not noted in the movie, was more remarkable, putting the entire civil action into wry context. Shortly after losing the case against Beatrice, Schlictmann discovered by accident that although during discovery he had requested all data on tannery site contamination and had been told there was none, in fact two such reports existed. Known to the tannery attorneys, groundwater studies done in 1983 and 1985 showed the presence of several of the contaminants on the tannery site proper. Plaintiffs eagerly requested a retrial, arguing that these reports would have triggered greater scrutiny of the tannery, perhaps convincing the judge to allow them to test the tannery site and its disposal lagoons. The judge’s refusal to reopen the case was reversed and remanded by the First Circuit. Anderson v. Beatrice Foods Co., 862 F.2d 910 (1st Cir. 1988). On remand, the judge did make a finding of “deliberate misconduct” against Mr. Riley and his attorney (although refusing to allow Riley’s counsel to introduce evidence implicating Beatrice’s attorney in the coverup[[3]](#footnote-3)). But plaintiffs’ expectations of a retrial against Beatrice (in which they hoped to overturn the key ruling under Restatement §435(2) that had constricted the timeframe of the tannery’s liability) were dashed by the judge’s ruling sua sponte that plaintiffs, too, had committed an offsetting Rule 11 violation, so no new trial would be ordered. After reviewing plaintiffs’ investigative manual, the judge said he thought that plaintiffs had not had enough evidence at the start of the trial to proceed with the claim that the tannery itself had dumped contaminants. Offsetting Rule 11 sanctions meant that defendants won and plaintiffs lost.

The honors for sanctionable conduct are about evenly divided.... At least by the close of his investigation and discovery,...plaintiffs’ counsel knew that there was no...basis in fact for the assertion that the defendant disposed of the complaint chemicals at the tannery site or on the 15 acres. 129 F.R.D. at 403.

Schlictmann was apoplectic. “I know the joy of a madman! He says *we* should be sanctioned?!” The reason that plaintiffs at trial had only circumstantial evidence of contamination on the tannery site (which all now knew in retrospect to be true) was the judge’s original ruling preventing them from direct testing on the site, and the malfeasance of defense attorneys hiding the contamination data. The judge discounted the circumstantial evidence of tannery-like wastes down in the lower parcel as insufficient to go to a jury. A jury, Schlichtmann believed, easily could have found direct tannery liability based on wastes in the ditch leading down from the tannery and from tannery wastes laced with solvents in the wetland. The judge had put plaintiffs into a Catch-22, said Schlichtmann. The First Circuit declined to get back into this thicket, and a petition for certiorari to the Supreme Court was denied, 498 U.S. 890 (1990).

At the end of the Woburn tort case, one should ask whether the *Anderson* civil action shows the continued relevance and efficacy of tort law in toxic contamination situations or the opposite. The plaintiffs recovered $8 million from the W. R. Grace Company (which subsequent geological evidence indicates contributed little or no solvents to the wells) and zero from Beatrice (from whose property most of the pollution originated). The trial cost plaintiffs more than $2 million and defendants more than twice that amount. The actual determinations of fact in the litigation process were partial and some of them almost certainly were inaccurate. The government, as noted later in this chapter, had much more effective remedies available and levied penalties of almost $70 million against the defendants. If there were no toxic tort actions available in the legal system in this case, or in general, would society be better off or worse?

Does the account of the Woburn case give some indication of the enormous burdens imposed on plaintiffs trying to use the common law to redress their injuries in complex circumstances? As with all litigation, students must be reminded that a case does not develop and prove itself at trial. Each step of the litigation involves guesses and gambles, rationing of time and resources, choices made, and viable options foregone. The actions of judges, not to mention attorneys and juries, are not necessarily predictable. Facts and procedural rulings can be slippery. Because of the burdens and complexities of the process, opportunities for appeal may offer no effective redress for mistakes. What ultimately emerges is a potpourri of happenstance that may or may not accord with one’s sense of justice. Alternatively, as you study the remainder of this chapter, evaluate the possibility that Woburn is an early evolutionary decision along a path that now offers far more coherent remedial protection to the victims of toxic exposures.

# PROOF OF COMPLEX CAUSATION

In almost every toxic tort case, proof of causation of harm is a difficult litigation hurdle for plaintiffs. The precise mechanism by which toxic exposure results in disease is not well known and is not observable in the same way that a broken bone can be understood and seen to have been caused by an automobile accident. Even where scientific studies are viewed as authoritative because of the large populations studied, and even where previous litigation has been successful in obtaining remedies, proof of causation remains an issue of fact in each case that is likely to be difficult for the plaintiffs. For example, in litigation involving mesothelioma, asbestosis, or other asbestos-related maladies, plaintiffs must still show that their disease was caused by exposure to defendant’s asbestos products and not by some other toxic exposure or predisposition to disease.

In the Woburn toxics case, which is more typical, the obstacle of proving causation was immense. The plaintiffs had no prior evidence proving that the subject chemicals caused cancer. Defendants steadfastly denied any such dumping. The victims, like most Americans, were exposed to literally hundreds of possible carcinogens in daily life. The Aberjona creek itself carried the four toxics, though in lesser concentrations than the wellwater.[[4]](#footnote-4) Leukemia has long been linked to radioactivity exposures, and Woburn had several radium watch-dial factories in the old days. (It took serious investigation to exclude the possibility that victims had been exposed to these long-defunct companies’ wastes.) When plaintiffs filed (eight days before the three-year statute of limitations was set to expire) the best evidence they had was the EPA field memo from the time the wells were closed, saying that from agency groundwater samples, Grace, Beatrice, and Unifirst were PRPs (potentially responsible parties under CERCLA, or Superfund).[[5]](#footnote-5) The Centers for Disease Control added their statistical conclusion that the leukemias were caused by abnormal exposure, and the Harvard public health students added evidence that some correlation existed between wellwater and illness, but neither of these data came close to establishing causation by the defendants’ chemicals. Even the plaintiffs’ tipoff from Al Love, a Grace employee who lived near the Andersons, revealing the solvent-dumping practices at the Grace plant, did little to tie the defendants specifically to the plaintiffs’ illnesses. Plaintiffs’ attorney Schlichtmann nevertheless was confident he could do so at trial.

**RELATIONSHIPS BETWEEN TOXIC TORT AND PUBLIC LAW:   
CONTRASTING PRIVATE AND PUBLIC LAW**

The common law’s private remedies do not stand alone. Public law — governmental regulatory action — plays an even larger role in environmental law. Like many environmental issues, the mass toxic tort problem is simply too large for adequate control by after-the-fact damage suits and the rare injunction based on prospective nuisance.

The public law statute most readily applicable to the Woburn case was the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, popularly known as Superfund), passed in 1980; a second major statute of potential applicability is RCRA, the Resource Conservation and Recovery Act. These are examined in Chapters 16 and 17 respectively. Both laws work to achieve cleanups of contaminated parcels. Neither grants private remedies for bodily injury or compensation for property damage, although CERCLA creates a private cause of action to obtain reimbursement for cleanup costs. On the governmental enforcement side, both laws allow the federal government to issue administrative orders requiring responsible parties to undertake cleanup, and CERCLA requires responsible parties in appropriate cases to pay damages to government for natural resource damages. RCRA also has elaborate requirements that seek to prevent releases of hazardous wastes into the environment in the first place, but events had moved far past that at Woburn by the time RCRA was enacted in 1976.

In the *Anderson* wellwater contamination case, as in many toxic tort controversies, both private law and public law ultimately played extensive roles. Private law and public law tend to be two different and uncoordinated worlds, both absorbing huge amounts of time and resources, and imposing major legal constraints on the industrial marketplace. Given the complex economic, political, and technical context, it is not surprising that systemic questions are constantly being raised whether the two legal régimes are redundant and ought to be rationalized, most often by proposals for limiting or eliminating toxic tort litigation.

**COMMENTARY & QUESTIONS**

1. **Did public law contribute to the Woburn private law civil action and vice versa?** Looking at this chronology, one can ask, “To what degree, if any, did the parallel processes facilitate one another?” Were they at all coordinated, or were they moving on two quite separate tracks?

It is clear that EPA’s initial studies helped to target plaintiffs’ efforts and that the CDC’s study confirmed the likelihood of wrongful causation of the leukemias. Governmental findings of cleanup liability might have helped prove some of the elements of tort liability, especially Beatrice’s contamination of the wells, and improved the plaintiffs’ momentum, but they were not finalized until five years after trial.[[6]](#footnote-6) The state epidemiology study might have helped prove causation, but it was not completed until ten years after trial. During the tort litigation, as is so often the case, government staffers were hesitant to provide active aid to plaintiffs, who only by chance found the 1983 Yankee Report in EPA files.

Did the private litigation aid the government’s efforts? Without the plaintiffs, the government agencies probably never would have discovered Al Love, whose testimony about Grace’s dumping produced criminal fines for perjury against the company. On several occasions, government field investigators lacked sufficient funds to do ongoing field studies and requested permission to come along when plaintiffs hired backhoes to dig for evidence of contamination. Without the dramatic tort case, is it likely the land and water would still ultimately reach the same level of remediation by EPA? Some government staffers said that the media climate around the case made it easier to negotiate with the corporations and pushed the file with greater internal momentum within the agency. Others denied this. Plaintiffs’ evidence tending to show active contamination by the tannery was of no special assistance to the government because in the Woburn defendants’ context, the toxic cleanup statutes made mere ownership of contaminated land a basis for strict liability.

2. **Comparative advantages of public law.** For the people of Woburn, the public law’s cleanup mechanisms for contaminated land and groundwater presented some substantial advantages over private law. Emergency protective actions can be ordered instantaneously, as were those ordering the well closings. Sophisticated land remediation techniques are applied under expert agency supervision at no expense to the neighborhood, paid for by the responsible corporations. Proof in a public law case can be far easier than in tort law. Unlike private plaintiffs, administrative agencies engaged in environmental protection are not required to prove causation by a preponderance of the evidence. Plaintiffs recovered zero from Beatrice’s contamination of wellwater, while EPA got a large part of $69.5 million.[[7]](#footnote-7) The agencies’ presumed expertise and authority to protect public health entitle their decisions to great deference from reviewing courts. Courts can overturn agency decisions only where they have been found to be “arbitrary and capricious” or the equivalent. See Chapter 6. When scientific uncertainty and potential danger are both great, reviewing courts show even greater deference and accept administrative records that they would reject under other circumstances.

This process of imposing public law liability, needless to say, is totally different from the process of proving legal liability in a tort case like the Woburn setting. As studied later, in Chapters 16 and 17, government hazardous waste remedies have no need to prove specific causation of harm, the scientifically subjective task that overturns most tort plaintiffs. Agencies merely have to show that a responsible party owned the site, or transported, dumped, or arranged for the disposal of toxics at the site. The burden of proof in this context is effectively on the PRP, not the prosecuting agency. It may take an average of 12 years to clean contaminated sites, but government eventually gets the job done.

**3. Comparative advantages of private law.** But private law offers major utilities as well. Public law remedies depend on official decisionmaking, which in some settings can be held back by politics or inertia. At common law, however, if a plaintiff pays the filing fee and has competent proof on point, a court has to hear the case, and if the facts are there, a remedy is likely to issue. Public law produces no compensation for injured citizens. Common law damages are a driving force behind many private law actions against toxic industrial cost externalizations. The self-interest of affected citizens, as in *Boomer*, or in citizen suits authorized by statutes such as the CWA often are a better motivator to bring important issues into the law. Courts in tort actions, moreover, as noted in this and the preceding chapter, also have a variety of equitable remedies to tailor outcomes to public and private needs, a flexibility in available remedies that few agencies know to exercise. (Tort remedies, however, especially punitive damages, may have no necessary proportionality in the burdens they impose. Public remedies, which are developed in standardized administrative procedures, may have greater uniformity and circumspection.) Tort remedies, evolved over centuries and familiar to judges, can sometimes be mobilized more readily and applied more flexibly, without attenuated technical procedures, than can public regulatory law.

Note in the Woburn toxics case a further societal utility of private law: In public law, there is little or no legal obligation of official agencies to investigate and remedy public health threats. The vigilance and perseverance of official agencies in investigating and defending against public toxic exposures depends on a variety of logistical and political conditions. A charged-up media climate is often necessary to attract official response to a diffuse health threat such as a possible leukemia cluster. Private law tort actions can bring health considerations into the central focus of the legal forum and serve to mobilize governmental attention. Public and private law thus operate in two different realms, serving quite different functions.

Do the two realms conflict with one another? On the ground they seem at most to supplement one another. To marketplace industries, however, the two forms of liability understandably seem like duplicative overkill — you can comply with CERCLA and still get sued by the neighbors for an even more stringent common law cleanup order[[8]](#footnote-8) — which leads to calls for “tort reform” relief.

4. **The “tort reform” efficiency debate.** Does the Woburn toxics case throw any light on arguments that complex cases involving scientific subtleties and public risk should be handled in the future by government agencies under public laws rather than by private litigation in courts? Over the years there have been recurring calls (from many academics as well as defense attorneys) for tort reform, based not only on perceptions of the growing size of tort recoveries (the radio talk shows’ favorite example probably is the plaintiff who initially was awarded $2 million for burns from spilled coffee) but also on perceptions of the common law’s limitations in coping with the problems of mass tort and toxics cases. The plaintiffs’ bar responds that the average recovery in tort cases has not increased disproportionately, and that the insurance industry, in decrying the need to raise premiums, focuses on tort payments to the exclusion of its own internal investment policies. That debate is likely to be noisy and continuing.

In recent years, environmental tort cases have regularly provided some of the nation’s largest damage recoveries.[[9]](#footnote-9) As to mass toxic torts, a substantial body of scholarship argues that toxic exposure cases are too massive and complex to be left to the common law. The nature of epidemiology, the size of exposed plaintiff classes, the emotional and economic repercussions of litigation, and the problems of latency all combine to recommend statutory and administrative overrides of the tort law. See Trauberman, Statutory Reform of “Toxic Torts,” 7 Harv. Envtl. L. Rev. 177, 188-202 (1983). Some scholars thus recommend statutory or administrative mechanisms that would permit compensation to be awarded on the basis of exposure and significant risk of disease, without the necessity of proving the existence of present injury. The size and arcane bureaucratic complexity of proposed public law remedies for mass torts, however, and their alleged vulnerability to political pressure from industry defendants combine to raise substantial doubts about any such preemption of common law. What is the verdict on tort reform to be drawn from Woburn’s Civil Action? Tort law is a known commodity that carries its own internal incentives to prosecution of claims. Public law management cannot easily replicate the tort law’s claims-processing mechanisms. For the time being, the legal situation is likely to continue with common law as an active and tangible element in most toxic exposure cases, with supplementary overlays from the public law system. Or is it vice versa?

**More Background Facts on A Civil Action**– a variety of potentially relevant notes on the Case, the Book, and the Movie[[10]](#footnote-10)

**History of Woburn.** Woburn has historically been a heavily industrialized area. In 1853, Woburn Chemical Works was built in North Woburn. Throughout the 1850s, Woburn led the nation is the manufacture of shoes and boots, and by 1899 was the leading producer of pesticides using the arsenic process.

**The EPA role**. EPA has been involved at the Grace site since before the plaintiffs began their lawsuit. In 1982 Grace admitted to using TCE and began doing voluntary groundwater investigatory work. Then, in 1983, EPA issued an Administrative Order to Grace to look for buried drums, excavate them, and install groundwater monitoring wells. By 1984, Grace had completed the testing, inventory, and some of the drum removal as required by the 1983 Administrative Order. In the end, EPA settled for cleanup costs of $69.4 million with each company paying their own share. Ultimately the cost of the government ordered clean-up remedy undertaken by the defendants and other corporations will total far more than the $69.4 million.

EPA refused to testify during the course of the trial, according to EPA attorney Gretchen Muench, not because it didn’t have relevant material, but because of an administrative policy against testifying in ongoing civil litigation.

**The “Aberjona River.”** The Aberjona is not a surging river as depicted in the motion picture, *A Civil Action.* The movie scenes of the Woburn site were actually shot on the upper Charles River. Woburn’s Aberjona is more like a meandering creek, only about eight feet wide, rarely as much as two feet deep, wending slowly through Woburn. The reason why this difference between actual and portrayed scale is significant for legal analysis is that it relates to the trial judge’s ruling on “extraordinary” causation (coursebook at 289-90). The fact that ground water readily traverses below watercourses is easier to understand when the true size of the river is recognized. The watercourse in fact does not strike an observer’s eye as a major physical barrier between the Riley property and Wells G & H. as it appeared in the movie.

The judge’s ruling was briefly noted in the movie that the liability of the Beatrice Tannery, both parcels of which now appear to have been contaminated for years before and during the ‘60’s, could only be based on proved dumping *after* August 27, 1968. Where did this date come from? The movie and the book do not indicate, but it came from a complex ruling under the Restatement of Torts §435(2), noted in the casebook at page 289. The judge took a provision intended to codify *Palsgraf* — where, if in hindsight it appeared to be *statistically extraordinary* that causation happened, then a judge can forgive defendants’ actions — and the judge said it was highly extraordinary to him that solvents could flow in the groundwater from west to east under the Aberjona River to the wells. In hydrological terms, however, this flow of solvents in groundwater was not only *not* extraordinary statistically, but in fact geophysically inevitable, given the laws of science and the presence of wells. Nevertheless, because the court thus narrowed the liability window, the case against Beatrice was made substantially more difficult than the case against Grace. The jury members said the special interrogatories based on this ruling caused them a great deal of confusion and indecision. Understandably, neither the movie nor the book explore this strategic legal ruling, although the John Travolta character protests, “where do these dates come from?!”

**Special jury questions in the Woburn toxics case.** The judge’s evidentiary ruling that Woburn defendant Beatrice Foods could be held liable only for toxins that flowed into the public well after the engineer’s notice they received in 1968 required an impossible degree of chronological certainty from the jury, and the case against Beatrice eventually collapsed. An examination of the complexity and precision that the special jury questions entailed illustrates the difficulty of arriving at an affirmative answer. Here is that special interrogatory to the jury as to defendant Beatrice Foods, as contained in the Lewis Grossman and Robert Vaughn book, A Documentary Companion to A Civil Action, 635 [see also defendant Grace interrogatories at pages 652-653]:

1. Have the plaintiffs established by a preponderance of the evidence that any of the following chemicals were disposed of at the Beatrice site after August 27, 1968 and substantially contributed to the contamination of Wells G and H by these chemicals prior to May 22, 1979?

a.) Trichloroethylene Yes\_\_\_\_\_ No\_\_ *X*\_\_

b.) Tetrachloroethylene Yes\_\_\_\_\_ No\_\_ *X*\_\_

c.) 1,2 Transdichloroethylene Yes\_\_\_\_\_ No\_\_ *X*\_\_

d.) 1,1,1 Trichoroethane Yes\_\_\_\_\_ No\_\_ *X*\_\_

**The relevant geographic sites**. The W.R. Grace plant is located a half mile from the public wells G&H, as the map of the site indicates. The Beatrice lowland parcel, about 15 acres, is only 800’ from the wells on the other side of the Aberjona Stream. The small Unifirst company, as noted in the text, is located 4/10 of a mile to the north of the wells. The Beatrice Tannery lies south and uphill of the lowland parcel (now “Wildwood Conservation land,” a home for indigent wildlife according to the testimony in the movie). For purposes of understanding the law suit, it is probably useful to distinguish *three* relevant sites: Grace’s Cryovac, and Beatrice-Riley’s two parcels, the lowland parcel and the Tannery parcel itself.

**The initial identification of potential defendants.** The nearness of the W.R. Grace Cryovac Plant and Beatrice Foods Tannery to the Woburn wells, as the movie portrayed it, was discovered by Jan Schlichtmann, the plaintiff’s attorney as he was stopped by a policeman on a bridge over the rushing river. In fact, the Environmental Protection Agency had identified these two companies, and three smaller firms, in 1979 as possible sources of the wellwater contamination that EPA had been studying for a year before Schlichtmann came into the case.

**Plaintiffs were barred from testing on the tannery site.** One of the most significant mistakes in the movie, which is virtually overlooked in the book as well, is that when Schlichtmann went onto Beatrice-Riley property with a warrant, he was emphatically NOT allowed by the judge to go onto the Tannery plant property itself, but was allowed only to test in the 15-acre lowland parcel lying some 1000’ from the Tannery itself. In the movie, the Travolta character says “I have a court order which gives me the right to inspect every inch of the Tannery as well,” but this was inexplicably never allowed by the judge. The judge appears to have accepted the argument from the Tannery’s counsel that since the Tannery has been subsequently re-sold by Beatrice Foods back to Mr. Riley and his employees, the court would no longer allow inspection at that site. Subsequently it appeared that the contaminants did exist on that site, according to the two reports that had not been revealed during discovery.

**Distinguishing defendants.** In the movie, William Cheeseman is portrayed somewhat as a fool, and W.R. Grace is considered substantially parallel to the Beatrice Tannery. In fact, there are substantial distinctions between the role of the two companies’ different lands in the case. According to the EPA’s Gretchen Muensch, the Beatrice lowlands parcel was the most highly contaminated site in the area, and the Grace site much less so. The Grace management and attorneys appear to have been surprised to find that their employees had been dumping materials in back of the Grace plant, and when they learned this were quite forthcoming with both the EPA and with the public announcements of the dumping practices that they had been able to discover. The Beatrice and Riley Tannery parties took a very different approach to disclosure of information, which is to some degree reflected in the movie and at greater length in the book.

**Punitives?** The plaintiffs’ case was described as seeking punitive damages as well as compensatory damages. In Massachusetts there are very few grounds on which punitive damages can be awarded under state law. Accordingly there is an Erie question about whether a federal court in Massachusetts can consider a punitive damages claim.

**Rule 11 hearing 1.** There were two Rule 11 hearings — one at the beginning of the case filed by Mr. Cheeseman, and one more interesting ruling at the end of the case, touched upon briefly in the book but totally excluded from the movie, where the Tannery’s defense attorneys were found to have concealed requested information during the discovery portion of the trial. On a complex uncertain balance the judge failed to order a re-trial. The first Rule 11 motion on the merits was unlikely to be successful, because although Schlichtmann had very little direct evidence that he himself had been able to accumulate, the EPA’s study identifying probable sources of pollution were probably enough to survive a Rule 11 motion, at that time at least, in any court in the country.

**Interviewing without counsel.** When Al Love crossed the street and began to talk to Anne Anderson about the dumping behind Grace, it was probably unethical for Schlichtmann to speak with him off the record without Grace’s counsel present. Love was still an employee of Grace and therefore should have been represented by Grace’s counsel at any formal or informal discussions about what he did or did not know.

**Grace’s forthrightness.** When Al Love began to talk about the dumping, Grace apparently did not attempt to silence him, as implied in the movie. Attorney Cheeseman, and Attorney Mark Stoler, corporate counsel for Grace, were embarrassed, and apparently responded with complete disclosure of whatever their employees subsequently told the EPA and the public.

**The civil procedure bifurcation tactic.** A critical question in the movie is how Jerome Facher will be able to keep the grief-stricken and emotionally powerful parents of the leukemic children off the stand. The character, after deposition, says that the parents’ story must be kept from the jury at all costs. Later, the Duvall character says to Schlichtmann, “do you really think I’m going to let that happen?” (that is, letting the parents take the stand). And Schlichtmann replied, “I don’t see how you can prevent it.” The ultimate answer, briefly described in the movie, was “Bifurcation.” Under F.R.C.P. 42B, as noted in the case book at page 288, a judge may split a trial into separate trials in the interest of efficiency. According to the leading article on the case, however, it appears that the judge, who picked up on this suggestion most emphatically, did something quite unusual in splitting the case multiply *within the liability case itself.* The first trial was bifurcated to be just on whether the solvents reached the wells, and the second on whether the solvents moved from the wells to the plaintiffs’ homes, again, without allowing any of the victims to take the stand. Only the third trial would have reached the question of the medical causation of the plaintiffs’ harms. Obviously, as the movie makes clear, the finances of a plaintiff’s case are sufficiently complex that splitting a liability trial into three successive trials increases the opportunity cost such that substantial numbers of plaintiffs never can undertake such a chain of proof.

**Settlement Offers — The “$20 million settlement offer**.” In the movie there is a scene in the courtroom corridor pre-verdict where Attorney Jerry Facher proffers Schlichtmann a $20 bill, and asks whether the plaintiffs would accept that bill as a settlement if there were six zeros after the 20, i.e. $20 million. If true, this interchange would raise serious ethical implications in Schlichtmann’s not having transmitted the offer to his clients, an unethical practice implied in the opening scene of the movie. Attorneys Facher and Schlichtmann both, however, have affirmed to us that this interchange was complete fiction. Facher says he would never leave a twenty dollar bill near Schlichtmann, is proud that he has never paid anyone $1 million to settle a case, and never would. Nevertheless, earlier in the case, during a pre-trial conference, Facher says he twice hinted that he might be willing to settle for a little less than $1 million. A third potential settlement opportunity was during the preparation for trial, as the trial got closer, some of the Beatrice principals urged Facher to consider settlement discussions, and that “$1 million a family might do it” (there were 8 families in the lawsuit). Schlichtmann may have talked with Beatrice attorney Neil Jacobs, an associate of Facher’s, saying that the plaintiffs might take $16 million, but the discussion never went anywhere.

The truth behind the corridor movie scene is important because many law school classes may build an ethical discussion on Schlichtmann’s depicted failure to take the $20 million dollar settlement offer to the plaintiff families. In addition to demurrers from Facher and Schlichtmann, co-counsel Kevin Conway has told us that the firm always took real settlement offer to the families, who were the decisionmakers, eight families, totaling thirty-five people. Conway said that their firm preferred settlement offers to be written down so that agreements could be enforced. The concern was to protect the families from invalid offers that would be withdrawn when the families began to seriously consider them. Facher referred to these types of offers as “lawyer’s code.” Thus, there may indeed be an argument that not all implied, tentative settlement offers were transmitted to the plaintiffs.

**The Four Seasons Hotel settlement conference.** As to the settlement conference scene at the grand Four Seasons Hotel where Schlichtmann fell flat proposing a $400 million settlement, Grace attorney MichaelKeating has said that the Four Seasons meeting was forced by the judge, who didn’t want this case to go to trial and urged the parties to have a settlement conference. The defendants thought that it would probably be at one of the large firm’s conference rooms, and were quite surprised to find that plaintiffs had scheduled it for the Four Seasons. The settlement scene has been called quite accurate, except as to the amount. Mr. Keating remembered that he had added the account up to the approximately $400 million that Schlichtmann was demanding. He said that the Grace attorneys were ready to talk at around $20 million, which was where Schlichtmann began, but the figure rapidly went out of sight, and they left the conference about as quickly as the movie depicts.

The movie depicts the Schlichtmann’s partners as having been flabbergasted by the hug settlement numbers being proposed by plaintiffs’ lead counsel. Plaintiffs’ co-counsel Kevin Conway contradicts, saying that the amount was a carefully structured settlement, adding up to $175 million over a period of thirty years, that had been tried out successfully on several mock juries. Conway said that the plaintiffs’ attorneys were willing to advise their clients to settle for far less than that $175 million structured settlement, but that Schlichtmann wanted to open the discussion with the defendants thinking in big money terms to loosen them up. Conway had warned Schlichtmann that if this were the way the conference opened, the defendants would just walk out. In the event, Conway was right. All the defendants walked out. Conway said, however, that given the plaintiffs’ readiness to deal, the parties were really much closer than the defendants realized at the time. JerryFacher says that he was not in the same Zen trance as Duvall appeared to be at the Four Seasons negotiation. He did keep the pen as shown in the movie, although it subsequently turned out not to work very well.

**An** **arsenic issue**. As EPA was finalizing its cleanup plan in 1989, high levels of arsenic and chromium were discovered in the Aberjona River. EPA did not expect this discovery, and owing to the late timing chose to break this problem off into a second phase study while it finalized the major solvent remediation plan. (There had been much resistance to EPA’s initial cleanup plan from both industry and citizens, so having just overcome opposition to the original plan, EPA wanted to get the solvent plan underway.) EPA did not find substantial arsenic and chromium contaminants except in the river sediments. Research has shown that the concentrations of arsenic contamination increase as you go north from Wells G & H, with the highest concentrations *north* of Route 128, thus suggesting that the arsenic contamination is not coming from any of the sites currently being remediated.

The arsenic is apparently percolating up into the surface waters from the groundwater. Arsenic’s full effects are not completely understood, but recent evidence shows that arsenic is carcinogenic at very low levels. Sediment cores from this area show that there are two historical peaks of arsenic concentration: 1916 and the 1960s. The 1916 peak corresponded to the height of pesticide manufacturing. Arsenic levels again peaked in the 1960s as a result of construction in the watershed. Scientists believed that the disturbance of surface areas mobilized the arsenic in the sediments, thus resulting in increased levels. These levels have decreased since the peak in the 1960s, but have not returned to zero. The arsenic contamination is important to the story of Woburn because it has long existed in the Aberjona river. Since 60% of the water in Wells G & H comes from the river, and arsenic is believed to be carcinogenic, this is another possible cause of the leukemia in Woburn.

**Citizen resistance to cleanup plans**. The City of Woburn and its citizens have been attempting to stall the cleanup of the contaminated sites. This stalling has not occurred because the people like living next to contaminated land, but rather because they fear that once the land is cleaned up, Wells G & H will start pumping again and they will be forced to drink that water. For example, the City refused to allow Unifirst to use city water for its pump-and-treat remediation system. This fear, however, may not be unfounded, since Massachusetts still lists the aquifer where Wells G & H sit as a drinking water source that it will use again in the future. This means that the CERCLA cleanup is theoretically geared toward bring the water quality of the aquifer back to safe drinking water levels — a Cadillac cleanup, despite the locality’s nationally-known contamination and heavily industrialized history. Would a reclassification of this area be both a more practicable and politically realistic alternative?

**The 1985 pump test**. In 1985, Chuck Myette performed a thirty-day pump test for USGS and EPA. In setting up this test, his team identified fifteen or twenty possible sources of contamination, but none of them satisfied all of his team’s criteria. The closest source was the tannery, across the Aberjona River. Unifirst was upgradient, but the chemical profile was not an exact match. Grace was a half-mile away in a low permeability glacial till, which was not a part of the sand and gravel aquifer.

EPA’s goal in conducting this pump test was to limit the area looked at for liability. At the time of the test, EPA believed three companies would be involved in the remediation and had already ordered limited remedial investigations on the property and sent site inspectors. These three properties were: Beatrice, Unifirst, and Grace. The test also identified two other possible contributing sources, New England Plastics and Olympia.

**Grace versus Beatrice as contamination sources**. In the case, as reflected in the movie, Grace was hit with an $8 million settlement payout, and Beatrice walked away paying plaintiffs nothing. The consensus among scientists, however, seems to be that Beatrice’s properties are likely to have been the primary source of local contamination that reached the wells. The tannery’s lowland 15-acre parcel was one of the most heavily-contaminated sites in Massachusetts. The tannery itself had long had disposal lagoons out back, and had contamination showing up in its own on-site wells. Out of approximately fifteen sources of contamination for Wells G & H, Grace is likely to have been an extremely minor source of contamination, or not a contributor at all. The computer simulations tracing whether Grace’s discharges could have migrated through the bedrock and consolidated substrates to reach the wells are based on models in which the worst case discharge conditions would have had to exist every day for twenty-four hours a day. This worst case scenario, with major contamination migration toward the wells from Grace’s direction, would occur only when Wells G & H pumped full force at the same time, but in reality this only occurred 23% of the time. According to this worst case computer scenario model, after 20 years of continuous pumping in worst case conditions, DCE (the fastest moving of the Grace contaminants) would probably still be thirty feet away from the wells, unless there were rock fractures in the substrate undiscovered to date.

On the other hand, even if contaminants migrated from the Grace property to Wells G & H, they could not have been the sole cause of contamination; the contamination at the Grace site was not high enough to cause the contamination that existed in the wells. Therefore, even in this situation there would have to be a second far larger source of contamination, and given the hundred-fold greater contamination on the Beatrice property, that is likely to be where the bulk of contamination came from.

The reason that Grace, the minor player, got hit with liability, while the major actors Beatrice and Riley did not, may be, as the Robert Duvall character says, because plaintiffs could find no one from the tannery who would confess in time for the trial, while at Grace they found Al Love. Another scarifying possibility is the casual report by one juror[[11]](#footnote-11) that the jury was deadlocked with a critical bloc opposed finding both liable, so they ‘picked Grace because we knew water runs downhill and so probably Grace was more liable.’

**Causation**. A Massachusetts Department of Public Health study in 1997 concluded that leukemia was more likely in children whose mothers consumed water from Wells G & H during pregnancy. Mothers were most likely to consume water from Wells G & H during periods of worst case pumping conditions. Worst-case pumping conditions occurred when both Wells G & H pumped at the same time, which was usually sometime in August as these wells only pumped when there was a shortage of water from the other sources. Of the seven children who developed leukemia, six had final trimesters that fell within periods of worst-case pumping conditions, thus suggesting that there is a correlation between the water and the leukemia. EPA attorneys report, as to the question of leukemia causation from the wellwater, statistics now show that childhood leukemia in the Woburn area dropped dramatically after the closure of Wells G and H, and that the Beatrice site was by far the most contaminated site in the area. The problem, however, is that no one has been able to determine whether VOCs, arsenic, chromium, or lead most probably caused the leukemia. Therefore, even if the trial were held today, Schlichtmann would still have great difficulty in proving what in the water, discharged by whom, probably caused the leukemia.

Although the Woburn Health Study done by the Harvard School of Public Health reported many occurrences of serious illnesses other than leukemia, cancer was as usual the dramatic bellwether chosen to carry the plaintiffs’ attack. In cases of complex causation (see pages following 255) it may sometimes be possible to prove causation of the less-dramatic illnesses more readily than proving the cause of cancers. Not here, however, where many potential causes may have led to the various non-cancer illnesses. If the case could not be won based on the dramatic incidence of cancer, it probably would not be successful as to other claimed harms.

Defendant’s attorney Keating, however, has argued that it was a good thing that the jury did not get the question of causation of cancer, because this is a highly scientific issue, which should probably be referred to a scientific court. The jury, facing the emotional injury done to the plaintiffs, would not discern the nuances of causation. They would find causation merely because the solvents were there in the drinking water.

**The Unifirst site.** While doing remediation work at the Unifirst site, the engineers made an interesting discovery. Behind the Unifirst building they uncovered an area of stained soil. Further research showed that the former owners had used this area as a disposal site. Photographs, taken during the 1960s show the stained area as well. The chemical composition of the stain is not currently known, but this suggests that more contamination might have come from the Unifirst site than previously believed.

**Justice, and the jury?** As to the question of jury justice, Facher says that he believes that the function of the trial is to find facts and reach a conclusion in a fair way, and that is a function well fulfilled by the jury, which of course had decided in favor of his client. Mr. Keating, whose defendant lost, says no one in the jury had special education and they should have had some special training in order to understand how to resolve a case of this complexity. Mr. Conway says that simple people using common sense were far more preferable than a panel of geologists or medical specialists in resolving real life cases like this. Conway also notes that according to later interviews, the jury was deadlocked 4-2 against both defendants. The judge sent them back and after only a short time, in order to reach a decision, the jury found for the plaintiffs on the Grace case and against on the Tannery case, but that the latter appeared to be a pressured retraction to cut a deal on a compromise verdict.

**Individual characterizations.** In our judgment, the movie gave quite realistic portrayals of Attorneys Facher, Schlichtmann, Conway, and Crowley, while the book was far more accurate in reflecting Attorney Cheeseman’s professional abilities and ethical integrity. As Bill Cheeseman says, however, “the moviemakers had a hero-figure, and a villain-figure or two, so I guess they needed a clown, ... and so that was me.”

As to Judge Skinner, the defense attorneys have consistently argued that his portrayal in the movie was most unfair, that Judge Skinner was known for his decorum, courtesy, and thoroughness, leaning over backwards to help Schlichtmann and the plaintiffs. Any judge of a long trial sometimes loses his temper. The judge, however, was hampered by the fact that he could not talk to Jonathan Harr, the book’s author, nor to the screenwriters of the movie, so that the movie inclines against him. The judge, according to the defendants, made a number of rulings in favor of the plaintiffs that he did not have to. The first Rule 11 motion — overruled, summary judgment — overruled, motion for directed verdict — overruled, the emotional distress physical cell nexus objection (coursebook at page 240) — overruled, objections against expert testimony which the defense attorneys thought was inadmissible — overruled. Mr. Conway counters that the judge hurt the plaintiffs’ case extremely badly, allowing the defense to depose experts endlessly which ran up the costs, as the movie showed. More than $600,000 was paid by plaintiffs for geologists’ testimony, more than $900,000 for medical experts. Much of this was to pay fees through endless depositions, whereas the plaintiffs had done their depositions of experts within only two days time, approximately 15 minutes a piece. The plaintiffs had wanted to have the lawsuit focused on only one family as a flagship plaintiff, thereafter simplifying the trial by collateral estoppel. The judge would not allow it, forcing the full dress trial, only later to bifurcate it. The second Rule 11 motion was inexplicable according to Conway and eliminated an important, justiciable case that should have been allowed to proceed on the merits. The judge’s rulings, if not his physical appearance, seem to us as observers to have been well captured by the movie; Prof. Marilyn Berger, however, who is one of few who has interviewed the judge at length since the trial, strongly empathizes with the judge and supports his handling of the case.

Most importantly, however, the movie does not show how indefatigably hardworking and involved the families from Woburn were in the building and carrying-on of the case. *Anderson et al*. was one of those cases where attorneys and clients form a team for neighborhood fact-finding, media coverage, money-raising, and maintenance of morale, and to the extent that the movie does not reflect that it shortchanges a significant community reality.

**Costs.** The plaintiffs attorneys poured approximately $2.4 million into the preparation of the case, of which $587 thousand alone was for drilling test wells and testing groundwater. Schlichtmann’s flair for spending money in preparing the case was certainly exuberant, as the book and movie show, but the major portion of the expenses in hindsight were not frivolities. Perhaps one concludes that the plaintiffs needed to find an attorney like Schlichtmann, who was willing to fly high with a very shaky case, risking his own money, house, and car (and ultimately losing them) to present the citizens’ case. As a comparison, attorneys for defendants Grace and Beatrice spent approximately $7 million each, a total of almost $15 million, to prepare and present the corporations’ defense.

**Denouement.** In the dramatic denouement of the story, the plaintiffs’ attorneys bring the financial settlement back to the plaintiffs’ families, about $350,000 per family after expenses, and Mr. Aufiero asks, “and they’ll also clean the place up, right?” and the answer given is no. The plaintiffs in fact appear to have cared more about apologies and restoration than about cash damages, but the EPA was at that time in the process of cleaning up the site so that the dramatic scene’s premise was incorrect.

At the end of the movie, the Schlichtmann character played by Travolta is seen passing the appeal and boxes of exhibits on to someone, with the implication that it might be the EPA. This was not the case. As noted in the casebook, at pages 290-291, his case actually went up to the First Circuit twice, and on *cert* petition to the Supreme Court of the United States, on the question of the Tannery defendant’s failure to disclose test reports showing the Tannery with solvents on the property justified a re-trial.

The EPA settlement negotiations were complex; the CERCLA settlement agreement was at least an inch thick. The lead EPA attorney was distressed that the first day of conferences were spent trying to determine whose name would be first on the EPA petition in the case, which would mean that party would be the leading name in the style of the case. Everyone tried to avoid it. So finally, she announced that the leading name would be the last person to sign off on the agreement, which triggered a rush to sign on and the deal was closed.

**Simulation: Consider doing a FRCP 16 Pre-Trial Conference on the Woburn toxics case.**

Several of our classes will try an experiment this year, capping the Woburn toxic contamination case study with an in-class simulation based on the Rule 16 Pre-Trial Conference format, based on the materials in Chapter Four and A Civil Action, the best-selling book by Jonathan Harr and the movie with John Travolta, available in video. The pre-trial conference can be held after completion of Chapter Four discussions in class, or as a relatively cold-turkey exercise after a single class session, setting up the simulation to be done thereafter on the fly. Giving pages 841-849 as a skimming assignment (on how EPA implements CERCLA), provides a useful public law element to be included in the pre-trial conference.

In such Rule 16 simulations, which one of the authors has used extensively in complex Property Law classroom simulations, the teacher dons the role of a federal magistrate judge preparing the case in a pre-trial conference (an initial conference, not necessarily the only pre-trial conference that would be held in such a complex toxic tort case) prior to trial in federal court. The purpose is to show students how the full factual sprawl of a case gets laid on the table, and legal arguments are sounded on the facts from every involved party perspective. It is an opportunity for students to see in practice what we tell them from day one of their legal educations, that they must think like lawyers, anticipating all relevant arguments and counter-arguments. (In fact, when we as attorneys are presented with complex factual and legal problems, don’t we do exactly that, scoping it out analytically by running an imaginary Rule 16 conference in our heads?) The tone in an initial pre-trial conference can be quite informal, with questions left open at every turn as you march the parties through their theories and proof of the prima facie case and defenses thereto. You can say, “Judge So-and-So has low tolerance for trivialities — what factual stipulations can you make here to avoid wasting the court’s time, and what issues and parties can you settle out of this so as not to try the Judge’s patience?” If, for instance, a critical piece of information would be necessary for one party’s argument but has not yet been developed in discovery [i.e. the student attorney doesn’t know the answer], the magistrate teacher can say, “Alright, you’d need that to proceed on that matter at trial, so be sure you have it in admissible shape when we hold our next pre-trial conference, or drop it,” and move on.

An alternative model is to split the pre-trial conference into multiple smaller sections, with each student given a role, which better encourages every student to prepare and participate actively. The downside is that the professor cannot play the role of presiding magistrate in several sections simultaneously. One solution is to have the professor take on simulations sequentially, a less taxing approach is to have several students selected and briefed to perform the role of magistrate in sections doing the simulation concurrently with the teacher.

On the following pages is the assignment for an experimental Woburn toxics Rule 16 simulation. Following the assignment is a brief set of teaching suggestions.

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| **Pre-Trial Conference under F.R.C.P. 16 — Woburn Toxics Controversy** |

*Students will represent the following parties/interests   
(according to first letter of surname):*

A-B Juvenile leukemia victims and their families

C-D Persons with non-leukemic illnesses (assume a substantially equivalent complaint filed, and a motion for joinder under consideration)

E-G Town of Woburn

H-J US EPA (here on a hypothetical motion by plaintiffs seeking to join EPA as a necessary party)

K-M W.R. Grace Corp., owner of Grace/Cryovac

N-P Beatrice Foods, owner for ten year interim in the 1970s-80s of the Riley Tannery and the adjacent 15-acre wetland parcel

Q-R John J. Riley, past and present owner of Riley Tannery, though Beatrice is probably liable for all Riley’s actions under purchase & resale indemnity agreements

S Unifirst Corp., a uniform dry-cleaning company which uses large amounts of the solvents found in the wellwater

T-V Salem Street Minor Commercial Businesses (Aberjona Auto Parts, Whitney Barrel Co., Murphy Waste Oil Co.) none of which has yet been proved to have dumped solvents

W-Z Anyone else who could possibly be a party to the action (e.g. Massachusetts Dept. of Envtl Protection, sportsmen, environmental citizens organizations, etc. — choose a party, and come prepared to define your role)

|  |
| --- |
| Please prepare for a pre-trial conference on the facts of this case which you know from Jonathan Harr’s A Civil Action and Chapter Four’s text materials. Members of the class will sit in designated seating blocs according to client represented, and proceed through a concise pre-trial conference under the direction of the magistrate judge preparing litigation for the federal district court judge who has been assigned this case for trial. |

•**FEDERAL RULES OF CIVIL PROCEDURE**

**RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT**

**(a) Pretrial Conferences; Objectives.** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) **expediting the disposition of the action**;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) **improving the quality of the trial through more thorough preparation**; and

(5) **facilitating the settlement of the case**.

**(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

**(c) Subjects for Consideration at Pretrial Conferences.** At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

(1) **the formulation and simplification of the issues, including the elimination of frivolous claims or defenses**;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 27 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters to a magistrate judge or master;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;

(10) the form and substance of the pretrial order;

(11) the disposition of pending motions;

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

**At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions** regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representatives be present or reasonably available by telephone in order to consider possible settlement of the dispute.

**(d) Final Pretrial Conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

**(e) Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

**(f) Sanctions.** If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the judge’s own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney’s fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

**Some Websites on the Woburn toxics case/A Civil Action.** Here is a list of useful websites that approach the Woburn toxics case and A Civil Action from a variety of viewpoints:

www.lessons.cali.org/web/civ20

**www.civilactive.com** — Environmental Media Service’s take on the case, book, and movie

**www.civilaction.org** — the Chemical Manufacturers Assoc.’s take on the case, book, and movie

**www.acivilaction.org**— the Harvard Berkman Center Website, with extensive multi-format materials and interviews on the case, book, and movie

**www. civilaction.com** — The Moviemakers’ Website

**www.civil-action.com** — W.R. Grace’s Website

**www.library.brandeis.edu/NSF/civil\_action/index.html** — the Brandeis University Library has compiled and posted a valuable collection of Woburn toxics study materials

**www.geology.ohio-state.edu/courtroom/defendants.html** — Ohio State University’s Geology Department Website on the book and movie

**www.bomis.com/cgi-bin/ring.cgi?page=5&ring=acivilaction&t=2648**, —Bill Cheeseman’s website (he represented Grace) gives a good sense of the man — go to “About the Author”— and also has links to skeptics

**www2.shore.net/~dkennedy/woburn\_trial.html** — Reporter Dan Kennedy’s topic-by-topic summary of the Woburn case

**www.usfca.edu/pj/articles/Civil\_Action-Asimow.htm** — A law professor’s critique of the movie

**www.usfca.edu/pj/articles/Civil\_Action-Hoffman.htm** — A law student’s critique of the movie

**www.abcnews.go.com/sections/us/DailyNews/tomsriver990203.html** — An update on the subsequent litigation and negotiation career of plaintiffs’ attorney Jan Schlichtmann.

**Woburn toxics civil action: Web simulation and video companion available.** In addition to the websites noted, a web simulation is entitled Woburn: A Game of Discovery and was created by Owen Fiss and Charles Berger as an interactive litigation simulation that involves the Federal Rules of Civil Procedure in the context of the Woburn lawsuit. The simulation can be accessed at http://lessons.cali.org/web/civ20. Or contact John Mayer for more information at jmayer@cali.org.

Marilyn Berger and Henry Wigglesworth have produced a video companion to A Civil Action, entitled Lessons from Woburn: The Untold Stories. This video includes a unique interview with US District Court Judge Skinner, presenting a very sympathetic view of his role in the Woburn toxics case, unlike Jonathan Harr’s book A Civil Action. Also interviewed are plaintiffs Anne Anderson and Donna Robbins, Jonathan Harr, attorneys for the defendant William Cheeseman and Michael Keating, attorneys for the plaintiffs Charles Nesson and Jan Schlichtmann, and others. The video runs half an hour and includes footage of the original courtroom, archival newspapers, photographs, and the City of Woburn. To obtain a copy of the video, contact Steve Errick, Publisher, Foundation Press via fax (212) 760-8705 or email, steve.errick@westgroup.com.

1. 1. Mass. Dept. Pub. Health, Bur. of Envtl Health assessment, Woburn Childhood Leukemia Follow-up Study (July 1997). [↑](#footnote-ref-1)
2. 10. The closest plaintiffs came to testing on the tannery site, according to plaintiffs’ attorney, was the day Schlichtmann played Ivanhoe: When a phone call from a neighbor told him the tannery land was being bulldozed, he raced off to a hardware store, bought a long piece of half-inch conduit pipe, and drove to the site holding the pipe out the window of his girlfriend’s Dodge like a knight charging with a lance. Thrusting the pipe through the security fence into a pile of excavated sludge, he was able to retrieve a plug of material from the site before a guard came rushing to intercept him. Although the sample proved to contain traces of the solvents, he was not able to introduce it at trial. This scene, inexplicably, didn’t make it into book or movie. [↑](#footnote-ref-2)
3. 11. “[Riley’s attorney] came forward...with an affidavit asserting communications with defendant’s attorneys never before revealed, said to be supported by no less than forty-one documents contradicting defendant’s attorneys in several respects. No rule of due process that I know of permits an attorney...to withhold information until such time as it is to her advantage to reveal it.... Such a rule would put a premium on strategic concealment.” 129 F.R.D. 394, 409. Plaintiffs, of course, were exasperated that this evidence of defendants’ concealment would thus remain concealed, weakening plaintiffs’ case for a retrial. [↑](#footnote-ref-3)
4. 22. If concentrations are greater in groundwater than in an adjoining surface stream, that means the stream cannot be the source of contamination. Materials imported into groundwater do not become more concentrated in groundwater solution; if anything, they diffuse. That basic logic never got incorporated in trial findings. [↑](#footnote-ref-4)
5. 23. The 1979 EPA memo was paradoxically the trigger that started the statute of limitations running. [↑](#footnote-ref-5)
6. 39. Tort plaintiffs often seek to go to trial after the government has successfully prosecuted the same defendants for the same acts, riding the coattails of governmental findings of administrative liability or criminal penalties. A conviction or administrative penalty substantially aids private claims, but given uncoordinated statutes of limitations, the timing is often difficult. [↑](#footnote-ref-6)
7. 40. Under the settlement, the companies agreed to pay $58.4 million to clean up polluted soil and groundwater, $5.8 million to fund EPA oversight of the cleanup, $2.7 million to the government for its previous work at the site, and $2.6 million for further studies and cleanup costs. EPA assessed Beatrice for the majority of these costs, based on EPA’s determination that Beatrice had been responsible for the majority of the contamination. [↑](#footnote-ref-7)
8. 41. That in fact was exactly the situation in the *Escamilla* restoration damages case discussed in Chapter 3. [↑](#footnote-ref-8)
9. 42. The *Exxon-Valdez* civil damage verdicts, totaling more than $5 billion in suits brought by harmed users of the Gulf of Alaska, takes a prize, but asbestos recoveries often have major price tags as well. Coyne and McCoubrey v. Celotex, (settled), Wall St. J., 9 Feb. 1990, at B1 ($76 million for each of two workers exposed to asbestos). [↑](#footnote-ref-9)
10. 2. Some of these notes derive from the first-named author’s work on the case, some from personal interviews with parties and attorneys an both sides, some from a discussion panel at the Appleseed Foundation, Boston, January 14, 1999. [↑](#footnote-ref-10)
11. 3. The statement, ignoring all the scientific evidence, is viewable on the video of the 1998 Woburn symposium, on the Berkman Center website — **www.acivilaction.org.** [↑](#footnote-ref-11)