CONSIDERING *A CIVIL ACTION*

The View from the Bottomless Pit: Truth, Myth, and Irony in *A Civil Action*

*Jerome P. Facher**

I. INTRODUCTION

A. *Prelude to* A Civil Action—*Court Proceedings in* Anderson

For almost nine years, *Anderson v. Cryovac, Inc.* occupied some or all of my attention as counsel for Beatrice Foods Company. *Anderson* was a personal injury tort case brought by thirty-three plaintiffs against two "deep pocket" defendants, W.R. Grace & Company (Grace) and Beatrice Foods Company (Beatrice). It was said to be the first "toxic tort" suit for personal injury and deaths allegedly caused by consuming water from contaminated town wells. *Anderson* was filed in the Massachusetts Superior Court in May 1982 and was removed to federal district court in June 1982, where it was assigned to Judge Walter Jay Skinner. Reading the complaint in 1982 and the material that accompanied it gave me a glimpse of the tangle of scientific, technical, industrial, medical, and legal issues that the case presented, but in no way foreshadowed the magnitude and complexity of the litigation which ensued. No one could have foreseen that there would be a book, *A Civil Action*, about the litigation, a movie of the same title, numerous television documentaries about the case, a textbook about the court materials, and widespread academic interest in

* Jerome P. Facher is a senior partner and former Chairman of the Litigation Department of the Boston law firm of Hale and Dorr LLP. Mr. Facher taught Trial Practice at Harvard Law School for twenty-nine years and is a Fellow of the American College of Trial Lawyers. He represented Beatrice Foods in the *Anderson* case and has written and lectured extensively on the case, on civil procedure and trial advocacy, and on the book, *A Civil Action*.

using *A Civil Action* and the *Anderson* case as a tool for teaching civil procedure, or as the basis for a new law school course.

The *Anderson* complaint alleged certain chemicals disposed of or deposited on each of the properties owned by Grace and Beatrice had contaminated the groundwater, which thereafter traveled to the Woburn town wells (which had closed in May 1979), causing deaths and various injuries to the plaintiffs who had consumed the well water.[1] The Beatrice property consisted of two separate parcels Beatrice had purchased in 1979 and owned until 1983. Both parcels were west of the town wells and separated from them by the Aberjona River.[2] One parcel consisted of fifteen acres of heavily contaminated vacant land that was a superfund site ("the fifteen acres"). The other was a nearby parcel to the southwest of the fifteen acres on which the buildings and facilities of the John J. Riley tannery were located ("tannery property"). The fifteen acres, and not the tannery property, was the focus of the plaintiffs' complaint and the trial. However, the complaint did *not* allege that Beatrice had used or disposed of TCE (as was alleged against Grace), but only that chemicals "deposited" on the fifteen acres (by unidentified companies) had contaminated the groundwater and been drawn to the wells when they were pumping.[3]

After an enormous amount of pretrial discovery, trial began in March 1986. The case was to be tried in three phases. The first phase would determine whether each defendant had used and disposed of the chemicals and whether contaminated groundwater from each defendant's property had traveled to the wells before they closed in 1979. If the jury determined that these two essential prerequisites were present, the next phases of the case would try the issues of injury, medical causation, and damages.

---

1. The case involved five or more specific chemicals. For purposes of this Article (as it was in the case), the principal chemical is trichloroethylene (TCE).

2. The Grace property was northeast of the wells and on the same side of the Aberjona River as the town wells.

3. Plaintiff's Second Amended Complaint for Injury, Wrongful Death and Injunction (filed Mar. 7, 1983), Anderson v. Cryovac, Inc., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION 62, 72 (1999). Many of the court papers in *Anderson* have now been collected in this new and valuable textbook authored by Professors Lewis Grossman and Robert Vaughn of American University's Washington School of Law. [Please note: The actions that form the basis of *A Civil Action* were brought by the plaintiffs against multiple defendants. These actions were consolidated in federal district court and brought under a single docket number (Civ. A. No. 82-1672-S). Although it is *Bluebook* practice to provide only the first of multiple case names in a consolidated action, the editors have provided the names of the specific parties involved in the litigation matters referred to by Mr. Facher, to aid our readers in their research. - Eds.]

The first phase of the trial took seventy-eight days and ended in July 1986. The jury deliberated for eight and a half days and returned its special verdict (in the form of its answer to Special Interrogatory No. 1), which exonerated Beatrice of liability.[4] Judgment was eventually entered for Beatrice and was appealed to the Court of Appeals for the First Circuit. During the pendency of this appeal and before it had been argued, a report concerning the tannery property, which had not been produced in discovery, was fortuitously discovered by plaintiffs on file at the U.S. Environmental Protection Agency.[5] Based on the nonproduction of the Yankee Report, plaintiffs moved to vacate the judgment, first claiming newly discovered evidence under Fed. R. Civ. P. 60(b)(2)[6] and later changing theories to claim fraud, misrepresentation, or other misconduct under Fed. R. Civ. P. 60(b)(3).[7]

After extensive briefing from both sides and three days of oral arguments, Judge Skinner denied the motion to vacate, finding, under Rule 60(b)(2), that the Yankee Report would not have affected the outcome of the case and, under Rule 60(b)(3), that its nonproduction did not prevent plaintiffs from fully and fairly presenting their case.[8] In fact, in some aspects, Judge Skinner found the report more favorable to Beatrice than to the plaintiffs.[9]

The plaintiffs appealed the denial of the motion to vacate to the United States Court of Appeals for the First Circuit,[10] where it was consolidated and argued with the first appeal from the judgment for Beatrice following the trial.[11] The court of appeals denied and dismissed the first appeal. This disposed of the case that had claimed that the contamination of the wells had come from the fifteen acres. As to the second appeal, the court reversed Judge Skinner's denial of the motion to vacate. The court retained jurisdiction and remanded the case to Judge Skinner for a special evidentiary inquiry to determine

---

4. *See infra* Part IV.

5. The report became colloquially known as the "Yankee Report." It had been prepared for the John J. Riley tannery by the Yankee Environmental Engineering and Research Services, Inc. (sometimes called YEARS) and concerned groundwater and other matters at the tannery property.

6. Motion for Vacation of Judgment Entered for Beatrice Based on Newly Discovered Evidence (dated October 8, 1987), Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982).

7. Supplemental Memorandum in Support of Opposition at 3-4 (dated Nov. 2, 1987), Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982).

8. See Memorandum and Order on Plaintiffs' Motion for a New Trial (dated Jan. 22, 1988), *reprinted in* Anderson v. Beatrice Foods Co., 127 F.R.D. 1, 7-11 (D. Mass. 1989) (Appendix).

9. *Id.* at 7.

10. *See* Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988).

11. *Id.*

whether the nonproduction of the Yankee Report had substantially interfered with a possible plaintiffs' case based on the theory that the contamination of the wells had come from the tannery property as opposed to the fifteen acres.[12]

Pursuant to the mandate of the court of appeals, Judge Skinner held a twenty-three day evidentiary inquiry over a ten month period in 1989 and fully investigated the circumstances surrounding the nonproduction of the Yankee Report and other matters. Judge Skinner issued findings and decisions in July and December 1989. In his Final Report, Judge Skinner concluded that there had been no substantial interference with any "tannery case" and that no "tannery case" had ever existed. Judge Skinner recommended that there be no new trial, and that plaintiffs' counsel be sanctioned for violating Rule 11 and 28 U.S.C. § 1927 by bringing and continuing to prosecute a claim against the tannery knowing that there had been no evidence of any use or disposal of TCE by the tannery.[13] In 1990 the First Circuit accepted Judge Skinner's Final Report and recommendations, upheld the denial of the motion to vacate, and affirmed the judgment for Beatrice.[14]

B. The Book, the Movie, and Beyond

In 1995, the best selling book, *A Civil Action*, by Jonathan Harr was published, followed about a year later by the paperback edition. In 1998, the movie, *A Civil Action*, was released. The book was written from the author's vantage point inside the plaintiffs' camp, where he was privy to the plans, secrets, conversations, and confidences of plaintiffs and their counsel.[15] The book was not intended, nor was it written, as a neutral or impartial portrayal of the merits of the litigation, the litigants, or their counsel. Sympathetic to the plaintiffs, the book's account of the *Anderson* case is told almost entirely from the plaintiffs' viewpoint with the plaintiffs' counsel as the main character (if not the flawed "hero"), whose words, thoughts, actions, reactions, and imaginings are central to the narrative and to the book's implicit advocacy of the plaintiffs' viewpoint and the impression that the civil justice system operated to thwart their claims.

---

12. Anderson v. Cryovac, Inc., 862 F.2d at 932-33 (1st Cir. 1988). The district court later referred to this claim or theory as the "tannery case" to distinguish it from the "fifteen acres case," which had already been tried and finally disposed of by the court of appeals. *See* Anderson v. Beatrice Foods Co., 129 F.R.D. 394, 397, 402 (D. Mass. 1989).

13. *See infra* Part III.G.

14. Anderson v. Beatrice Foods Co., 900 F.2d 388 (1st Cir. 1990).

15. JONATHAN HARR, A CIVIL ACTION 493 (1995). All citations to *A Civil Action* are from the hardcover edition published by Random House in September 1995. References to the movie are to the version released in 1998 and available on video in July 1999.

Although the movie has not achieved any enduring fame, the book itself has become recommended or required reading at more than fifty law schools and, in some schools, is the basis of a specialized course in civil procedure. However, this carries with it the twin dangers of using the book for a purpose for which it was not intended and of encumbering an outstanding work of nonfiction with an academic mission it has not sought and cannot achieve. Taken alone, *A Civil Action*, although excellent reading, offers no independent legal scholarship, nor can its subject, the *Anderson* case, serve as a learning model for civil litigation. Moreover, *A Civil Action* provides no valuable insights into how complex cases are tried, how federal judges manage such cases, or how the civil justice system works, nor does it reflect an understanding of the significance of the important procedural events that shaped the *Anderson* case. This lack of understanding and litigation insight, and the author's close association with the plaintiffs' case (including the sympathetic reaction from the public), may well explain some of the book's important omissions which, if corrected, would have made *A Civil Action* and the overall impression it creates somewhat less one-sided, and somewhat more accurate.

This Article offers the observations, analysis, and commentary of Beatrice's chief trial counsel about some of the important issues and rulings in *Anderson*, the accuracy of the events reported in *A Civil Action*, and the misimpressions created by the book's undoubted tilt in the plaintiffs' direction. Wherever possible, this Article's effort to balance the scales relies on court records, trial and hearing transcripts, and on other actual trial materials in *Anderson* to present the relevant facts and events in the context in which they arose.

With these facts and the materials in the record, the student, professor, or practitioner can, in a lawyerly way, reach his or her own conclusions about the important issues of the case, the viewpoint of the book, and the operation of the civil justice system. Contrary to the erroneous impression of justice gone astray created by the book and movie, a complete and balanced view of the *Anderson* case reveals a properly working civil justice system that afforded the plaintiffs, at both the trial and appellate levels, with a full and fair opportunity for a trial before a jury and full and fair appellate review of the jury's verdict in Beatrice's favor.

II. THE ROLE OF THE TRIAL JUDGE

A. *The Basic Misimpression*

One of the egregious misimpressions fostered by both the book, *A Civil Action*, and the movie of the same title, is that Judge Skinner, an experienced and highly respected federal judge, was somehow unfair to the plaintiffs and biased in favor of the defendants in his conduct of the case. In fact, the record shows that he was neither and, that on the key issues affecting the survival of the plaintiffs' case, the plaintiffs repeatedly received the benefit of favorable rulings.

The movie's brief but unfair portrayal of Judge Skinner can be excused as stemming from Hollywood's need to entertain and its disinterest in fidelity to the record. However, the book's misjudgments have other roots in addition to its affinity with the plaintiffs' case. The author was not a legal writer, nor did he have experience with the judicial system or how judges manage and try complex civil litigation. More importantly, he had been unable to discuss the case with Judge Skinner because of the judge's proper observance of the code of judicial conduct. Had an interview been possible about the judge's handling of the litigation, the author would have better appreciated that difficult role and better understood and respected the judge's actions and decisions.

Although the movie may not be long remembered, the book will have greater longevity, especially in law schools, where it may be required reading or the basis for new courses. It would indeed be a true injustice if the book's portrayal of Judge Skinner, however unintentional, was not challenged as inaccurate and uninformed. It would be equally unjust if the facts about Judge Skinner's handling of the case and its key issues were not set down so that students, professors, and practitioners who read the book are given a more complete and balanced basis for reaching any conclusions about his judicial performance.

B. *The Rulings on Dispositive Motions*

Although neither the book nor the movie represent fair or competent evaluations of Judge Skinner's performance in *Anderson*, reliable guides exist that good lawyers and good students may recognize and apply. First, the pretrial record and the trial transcript are the best evidence of the overall fairness and competence with which Judge Skinner presided over the case. Although, as in any case, some of the trial judge's individual rulings can be debated, the record in *Anderson*,

when viewed as a whole and in the context of the adversary system, shows that the plaintiffs were treated fairly, that the trial was conducted competently, and that Judge Skinner's rulings were even-handed and often generous to the plaintiffs.

Even if the entire record is not reviewed, the same conclusion can be demonstrated by reviewing Judge Skinner's rulings on key procedural and evidentiary challenges in *Anderson*, especially those which sought to prevent the plaintiffs' case from reaching the jury. These rulings reflected not only Judge Skinner's understanding of the issues and his knowledge of the plaintiffs' case, but his inclination to permit the case to be considered by the jury.

The fundamental goal of every plaintiff's case is to reach the jury, overcoming along the way all motions potentially fatal to the case. In *Anderson*, that goal was particularly difficult because of the legal, scientific, and factual obstacles the plaintiffs faced. Nonetheless, on every attempt by the defendants to prevent the plaintiffs' case from being decided by the jury, Judge Skinner's decisions were in the plaintiffs' favor and preserved the plaintiffs' goal of reaching the jury. Specifically, a Rule 11 motion was denied,[16] a summary judgment motion was denied in substantial part,[17] and a directed verdict was substantially denied.[18] None of these motions presented easy issues, nor were they routine decisions made on routinely filed motions.

C. Other Crucial Rulings on Evidence and Procedure

Two other rulings, without which the plaintiffs' case against Beatrice could not have reached the jury, were also decided in the plaintiffs' favor. The first involved a highly suspect opinion attempting to establish the time period when TCE, found on the fifteen acres in 1985, had first been introduced at that site. Because of the substantial time required for the groundwater to have reached the wells before they closed in May 1979 and for sufficient consumption of the well water to have allegedly caused the various injuries and deaths, plaintiffs had to show that this time period was in the mid-1960s to early 1970s. The necessary time period was supplied by plaintiffs' expert, who, relying on little more than his observations of the fifteen acres in 1985, transformed (and in effect backdated) those observations into an opinion as to the period of time that certain activities had

16. Anderson v. Cryovac, Inc., 96 F.R.D. 431 (D. Mass. 1983). *See infra* Part III. A.

17. Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986).

18. *See* Memorandum and Order on Defendants' Motions for Directed Verdict (dated June 9, 1986), Anderson v. W.R. Grace & Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 612.

taken place, namely the mid-1960s and early 1970s, which supposedly resulted in TCE contamination in that period.[19]

This speculative and unscientific opinion—admitted over strong objection and a motion to strike—was provided by an engineer who had few, if any, relevant qualifications to perform the task of "back-dating" TCE contamination of groundwater. He followed no established scientific principles and, as Judge Skinner said, did little more than "eyeball" the property. Although Judge Skinner was plagued with doubt at his "hairbreadth decision," in which he had no particular confidence,[20] and characterized his ruling as a "very close one," he nevertheless exercised his discretion in the plaintiffs' favor and admitted the "expert" opinion despite the fact that it could not correctly be called "scientific".[21] This decision prevented the entry of a directed verdict against the plaintiffs, much to the jubilation of plaintiffs' counsel.[22]

The other key ruling Judge Skinner made in the plaintiffs' favor dealt with the issue of foreseeability, an essential element of the plaintiffs' negligence claim. In order to reach the jury, plaintiffs had to prove that the tannery's alleged disposal of TCE in the mid-1960s created a foreseeable risk of harm to the plaintiffs.[23] To prove this critical element, the plaintiffs had to show that the tannery knew or should have known, twenty years before the trial, that the groundwater under the fifteen acres would travel *easterly* toward the town wells that provided water to the plaintiffs. Obviously, no duty existed prior to

---

19. Trial Transcript Vol. 8 at 116-17, Anderson v. W.R. Grace & Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982) [hereinafter Transcript].

20. Transcript, Vol. 74 at 67.

21. HARR, *supra* note 15, at 302. See Memorandum and Order on Defendant Beatrice Foods Co.'s Motion for Immediate Entry of Final Judgment Under Rule 54(b) (dated Sept. 17, 1986), Anderson v. W.R. Grace & Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *posted at* <http://www.law.fsu.edu/library/faculty/gore/index.html>. In this posttrial order entering judgment for Beatrice on the jury's Special Verdict, Judge Skinner stated that he had admitted the opinion "very reluctantly because [he] could see no foundation for the opinion." He added that, even if the jury had found against Beatrice, he would have been obliged to grant a judgment notwithstanding the verdict. In fact, the opinion was nonscientific, speculative, and basically unreliable. Today it would be clearly excluded by Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Callahan, 526 U.S. 137 (1999), and a verdict would be directed for Beatrice.

22. The success of the argument that resulted in the admission of the expert opinion (and later the denial of the directed verdict motion) prompted plaintiffs' counsel to congratulate his co-counsel, Professor Charles Nesson of Harvard Law School, on getting the opinion in evidence, "crowing gleefully" to him, "You were touching the old bastard's (Judge Skinner's) brain." HARR, *supra* note 15, at 302. By contrast, however, *A Civil Action* mentions nothing about Judge Skinner's Memorandum and Order, described in note 21, *supra*, stating that he had erred in allowing the expert opinion in evidence and had been misled by one aspect of the expert's testimony about conditions on the fifteen acres.

23. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 341-43 (1928).

1964, when the wells were not in existence. Even after that point in time, it was highly doubtful that anyone knew or could have known the usual direction in which groundwater flowed under the fifteen acres, (which in fact was north to south, not west to east), much less its direction as affected by the pumping of the town wells.

In another close question, Judge Skinner admitted a 1968 letter from a well driller to John J. Riley that referred to the fact that the static water table level at one of the tannery's production wells (PW1) had been affected by another of the tannery's wells (PW2) and the installation of town wells in the same general area. Later, in framing special interrogatories to the jury, Judge Skinner thought that it was "arguable" that this letter could be treated as some notice after 1968 of a foreseeable duty to consumers of well water.[24] I strongly disagreed with Judge Skinner's expansive interpretation of this letter, which basically did not deal with groundwater flow or direction and was written for an entirely different purpose. Without such interpretation and the admission of the letter, there would have been no evidence of foreseeability and the verdict would have been directed in Beatrice's favor on the issue of negligence.

D. The Ruling Denying Beatrice a Continuance

In addition to these important rulings in the plaintiffs' favor, Judge Skinner denied the one motion I most desperately wanted to be granted—and the plaintiffs most desperately wanted to be denied—a motion for a continuance of the trial date to provide more time to prepare for the complex trial ahead. This critical plea for a trial continuance was supported by my long, detailed, personal affidavit—something I had not done before nor have I since—which described the enormous complexity of the case, the unbelievable quantity of technical, scientific, medical, and legal documents, the vast numbers of witnesses and experts, the constant, continuous, backbreaking seven-day-a-week labors for all counsel, and the stark reality that no counsel was, or could have been, prepared to try the case as it then stood.[25] As my affidavit made clear, if ever a trial lawyer needed the exercise of

---

24. Transcript Vol. 75 at 36.

25. *See* Affidavit of Jerome P. Facher In Support of Continuance of Trial Date on the Ground of Fairness (dated Jan. 27, 1986), Anderson v. Cryovac Inc., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 501. The affidavit was submitted in support of the Joint Motion of the Defendants for Continuance of Trial Date (dated Jan. 27, 1986). In addition, Beatrice made a separate motion for continuance with the self-explanatory title, "Beatrice Foods Co.'s Motion for Continuance of the Trial Date Because of Thirty-Seven Newly Identified Surprise Witnesses and New Evidence Given by Partially Deposed (and Now Unavailable) Last Minute Hostile Witnesses" (filed Jan. 27, 1986).

judicial discretion in his favor, it was in connection with this motion for continuance.

In a chapter entitled "Facher's Plea," *A Civil Action* describes the efforts I made to obtain the continuance, the explanation for its necessity, the opposition by plaintiffs, their insistence on keeping the trial date, and my importunings before Judge Skinner.[26] Nevertheless, Judge Skinner (whom *A Civil Action* implies was guilty of favoritism toward me) ignored "Facher's Plea," took heed of the plaintiffs' counsel's opposition and the brave bluff that plaintiffs were ready for trial, and denied my request for a continuance.[27] As *A Civil Action* reports it (and the author was undoubtedly present), Judge Skinner's decision resulted in glee and gloating in the plaintiffs' camp,[28] even though, as later events showed, they were in fact unready for trial themselves, but desperate to maintain the trial date because of their financial circumstances.[29]

E. Lessons to Be Taught by A Civil Action*: Part One*

In the areas that mattered most to the plaintiffs, and at every important stage where the plaintiffs' case could have been dismissed, Judge Skinner's fair, impartial, and even generous rulings kept the plaintiffs "in the ballgame," kept the plaintiffs' case in court, kept the trial date on track, and ultimately permitted a highly sympathetic plaintiffs' case to be presented to the jury, which is where the plaintiffs wanted it decided. *A Civil Action* neither appreciates this important point, which would be instantly apparent to trial lawyers and trial judges, nor makes any comment or observation that illustrates or even

---

26. HARR, *supra* note 15, at 269-72.

27. *A Civil Action* also incorrectly states that my "plea" for a continuance was made for the purpose of putting financial pressure on the plaintiffs' counsel in the hopes that a long postponement would leave plaintiffs' counsel in too much debt to proceed. *Id.* at 286. Nothing could have been further from the facts. *See infra* note 29. The author acknowledged this error at the time *A Civil Action* was published, knowing that I made the motion and affidavit solely because of my need for a continuance in the interest of adequate preparation.

28. *Id.* at 273.

29. At this time, I was completely unaware that the plaintiffs were in serious financial straits and might have been adversely affected by the continuance. In fact, both defendants had been wholly deluded by the illusion, carefully created and nurtured by the plaintiffs' attorneys, that the plaintiffs were well financed and able to match the defendants motion for motion, expert for expert, test for test, and tactic for tactic. Indeed, they did so throughout the pretrial and trial period. Not until *A Civil Action* was published was I aware that (according to the book) the plaintiffs' attorneys had been preparing and trying the case on borrowed money and had been led to the brink of financial disaster by unrestrained expenditures. *Id.* at 209-10, 320-22, 347-50, 417-18. *See also infra* note 87.

recognizes the significance of Judge Skinner's key rulings favorable to the plaintiffs that allowed the case to reach the jury.[30]

Once given the case, the jury was free to decide in the plaintiffs' favor, aided by the evidence and arguments marshalled by plaintiffs' counsel. The jury deliberated for eight and one-half days, and returned a Special Verdict for Beatrice based on the law and the evidence. Although *A Civil Action* has the right to suggest disagreement with that verdict and with the court of appeals' ultimate affirmance of the judgment for Beatrice, there is no basis to suggest any judicial unfairness or partisanship at the trial, nor did the plaintiffs ever make any such claim on appeal.[31]

Moreover, the unstated but clearly implied charge of judicial partisanship is contradicted by the record of Judge Skinner's published and unpublished decisions and rulings in *Anderson*, his outstanding judicial record, his unchallenged reputation for competence and integrity, and the court of appeals' recognition of his "incisiveness and vigor" in carrying out the "thankless task" that had been assigned to him, all of which demonstrate his fair and able handling of the case.[32] As the court of appeals stated in its final opinion affirming the judgment for Beatrice, his findings were "sound, well-substantiated and free from observable legal error."[33]

---

30. On the other hand, in addition to its overall unfavorable portrayal of the judge, *A Civil Action* is not reluctant to criticize and editorialize about specific rulings by the judge thought to be unfavorable to plaintiffs. *See, e.g.*, HARR, *supra* note 15, at 369 (the judge's special interrogatories "had the quality of a text that had been translated from English into Japanese and back again . . . the answers were essentially unknowable"); *id.* at 477 ("Judge Skinner could have challenged EPA policy . . . but he chose not to."); *id.* at 367 (proper exclusion of so-called (by plaintiff's counsel) "killer document" and other irrelevant evidence). Nor is *A Civil Action* reluctant to make its own inaccurate pronouncements about the law. *See, e.g., id.* at 192 ("legally it did not matter who had contaminated the land"). *A Civil Action* also engages in criticism or condemnation of the judge by the device of using the harsh words and thoughts of plaintiffs' counsel, *see infra* at 265-66, a technique also applied to Beatrice's counsel or Beatrice's case. See *infra* note 78.

31. In matters of evidence, Judge Skinner, on most occasions, showed patience, courtesy, and fortitude in handling the plaintiffs' attempts to frame proper questions, lay proper foundations, and introduce exhibits into evidence, and in permitting re-arguments. As Judge Skinner noted during the trial, many of the frequent objections to plaintiffs' counsel's questions stemmed from the fact that plaintiffs had insisted that they were ready for trial when in fact they were not. HARR, *supra* note 15, at 301.

32. *See infra* at 260, 266-67.

33. Anderson v. Beatrice Foods Co., 900 F.2d 388, 391-92 (1st Cir. 1990).

III. THE RULE 11 DECISIONS AT THE BEGINNING AND END OF THE CASE

A. The First Rule 11 Hearing

One of the most compelling ironies of the *Anderson* case was that it began and ended with Judge Skinner's rulings and opinions on Rule 11, the federal rule permitting dismissal of cases not brought in good faith or brought without adequate investigation. When the case against Grace and Beatrice began, Grace filed a Rule 11 motion seeking to have the case dismissed as having been brought against Grace without a good faith belief that there was good ground to support the pleading.[34] Grace believed that a Rule 11 motion was appropriate because, among other things, (1) the reports on which the complaint was based revealed numerous industries surrounding the town wells without specifying the actual source of the contamination; and (2) there was no valid medical evidence that the chemicals involved caused childhood leukemia. In addition, Grace referred to a statement from a consultant employed by the plaintiffs that there was no link between the chemicals in issue and leukemia.[35]

Beatrice did not join in Grace's Rule 11 motion because I believed that it was not likely to be successful. I concluded that the allegations of the complaint and the assurances of plaintiffs' counsel would be viewed in a light most favorable to the injured plaintiffs (who had received widespread and sympathetic publicity in a "high profile" case) and that the judge would not, at such an early stage, dismiss the plaintiffs' case under the Rule 11 standard.

The issue, however, was not free from doubt. As the record shows, Judge Skinner treated the motion seriously and was prepared to hold an evidentiary hearing in which plaintiffs' counsel was to testify as to his compliance with Rule 11.[36] In the end, after brief argument and an abbreviated nonevidentiary hearing in which the plaintiffs' counsel refused to testify, Judge Skinner deemed the plaintiffs' allega-

---

34. This was the standard for compliance with Rule 11 under the Federal Rules as they existed in 1982. Rule 11 was amended in 1983 to require, among other things, that attorneys conduct a reasonable inquiry into the facts and the law before signing pleadings. *See* Advisory Committee Notes, FED. R. CIV. P. 11, 1983 Amendment.

35. *See* Motion by Defendant W.R. Grace & Co. d/b/a Cryovac Division to Strike the Complaint and Amended Complaint and Dismiss the Action Under Rule 11 (dated Nov. 8, 1982), Anderson v. Cryovac Inc., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 115.

36. *See* Court's Order of Dec. 15, 1982, referred to in Plaintiffs' Motion for Reconsideration of the Form of Demonstration of Compliance with Rule 11 (dated Dec. 23, 1982), Anderson v. Cryovac Inc., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 122.

tions sufficient to meet the requirements of Rule 11 and denied Grace's motion.[37] The first Rule 11 decision had no further significance for the case and was of no further interest until the *A Civil Action* book appeared in 1995 and the movie in 1998.[38]

B. The Special Evidentiary Hearing Inquiry and the Final Rule 11 Finding

Judge Skinner's second Rule 11 decision came in December 1989, more than seven years after the case was filed (and more than six years after Grace's Rule 11 motion had been denied). That decision was part of Judge Skinner's Final Report and recommendations following a special evidentiary inquiry ordered by the First Circuit concerning whether the nonproduction of the Yankee Report substantially interfered with a so-called "tannery case" which, to that point, plaintiffs had not pursued.[39] In that Final Report, Judge Skinner found that plaintiffs' counsel had violated both Rule 11 and 28 U.S.C. § 1927[40] by bringing and continuing a lawsuit against Beatrice, knowing before suit, and at least by the end of discovery, that there were no facts to justify any claim that the Riley tannery had used and disposed of TCE and, thus, that there was no "tannery case." The legal and factual significance of this important finding is ignored by *A Civil Action*, which is one of the book's serious omissions.

The court of appeals opinion ordering the special evidentiary inquiry arose out of plaintiffs' appeal of Judge Skinner's denial of the Motion to Vacate Judgment under Rule 60(b)(3). In its opinion, the court of appeals announced a never-before articulated interpretation of

---

37. Anderson v. Cryovac, Inc., 96 F.R.D. 431 (D. Mass. 1983).

38. The book describes the first Rule 11 hearing fairly accurately, *see* HARR, *supra* note 15, at 110-19, but the Rule 11 scene in the movie is wholly fictional except as to result. Judge Skinner did not refer to Rule 11 as being so "arcane and obsolete" that he had to look it up. Nor did he refer to the Rule 11 motion as a "no-brainer" and hear no argument. In fact, Judge Skinner, like all federal judges, was fully familiar with the rule. At the hearing, he indicated that he had taken an interest in the rule, suggesting that its lack of use had probably clogged the federal courts. HARR, *supra* note 15, at 110-18.

39. Because of privilege and work product objections, the report had not been produced as part of the tannery's document production, nor at a January 1986 deposition of the tannery's record keeper. The plaintiffs had been offered an opportunity to compel production, but the plaintiffs' counsel, in his zeal to maintain the trial date, told Judge Skinner that the problem with respect to documents demanded at the tannery record keeper deposition had been resolved. *See* Hearing, January 14, 1986, Anderson v. Cryovac Inc., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982). Despite this fact, neither the objections to the production of the report nor any previous practice or understanding of the parties as to production of tannery documents was considered by Judge Skinner to be sufficient to have justified nonproduction of the report. Anderson v. Beatrice Foods Co., 127 F.R.D. 1, 5-6, 7-11 (D. Mass. 1989).

40. 28 U.S.C. § 1927 (1994) provides that any person who so "multiplies the proceedings in any case unreasonably and vexatiously" may be required to pay the additional costs generated.

the term "misconduct" as used in Rule 60(b)(3), and a somewhat more elaborate standard for vacating a judgment under that subsection of the rule.[41] Guided by this new interpretation and standard, the special evidentiary inquiry was to determine whether there had been "*deliberate* misconduct," as the court of appeals had newly defined it. If so, the court would determine whether the "deliberate misconduct" had "*substantially* interfered" with the development of a possible "tannery case" based on the theory that there had been disposal of TCE on the tannery property that had contaminated the groundwater and reached the town wells[42] (as opposed to the plaintiff's earlier theory, now foreclosed by the trial and the dismissal of the first appeal, that the contamination had come from the fifteen acres).[43]

The special evidentiary inquiry consumed twenty-three trial days over the period from January 1989 to October 1989, and was in two parts. The first part (January-July 1989), on the issue of "deliberate misconduct" (as specially defined by the court of appeals), took seventeen days and involved twenty-two witnesses and 236 exhibits. The

---

41. As stated in the opinion, the court of appeals put its own "gloss" on the term "misconduct" as used in Rule 60(b)(3) and on the standard for vacating a judgment, including new presumptions and burdens of proof if "deliberate misconduct," a term of art, were found. The court stated that "misconduct" must be "deliberate" and that any nonproduction that was not accidental would be considered as deliberate. Misconduct that was deliberate then triggered a presumption of "substantial interference" in favor of the moving party, which the opposing party had the burden to overcome by clear and convincing evidence. *See* Anderson v. Cryovac Inc., 862 F.2d 910, 924-27 (1st Cir. 1988). As articulated by the court of appeals, the concept of deliberate misconduct would include instances in which a lawyer had made a good faith judgment about nonproduction which thereafter was ruled to be in error. Judge Skinner later referred to the court of appeals' definition of deliberate misconduct as a "term of art" or a specialized term that had been "artificially sanitized" by the court of appeals, and did not connote any bad faith but only the difference between purposeful and accidental conduct. *See* Hearing, Nov. 14, 1989, at 49, Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982).

42. *Anderson*, 862 F.2d at 924-27, 930-32. In addition to the complex "gloss" the court of appeals put on Rule 60(b)(3), the order to hold an *evidentiary* hearing was one of the most surprising results reached by the court. Evidentiary hearings on motions for new trial were and are rare, especially where, as in *Anderson*, there had already been three days on which oral argument had been heard on the Motion to Vacate and a detailed written opinion by the trial judge. *See* Memorandum and Order on Plaintiff's Motion for a New Trial (dated Jan. 22, 1988), Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 417.

43. The report had been commissioned by John J. Riley in 1983, without advising his counsel. Anderson v. Beatrice Foods Co., 127 F.R.D. 1, 5 (1989). The report itself stated that its purpose was to determine the direction of groundwater flow on the tannery property when Riley's own well was pumping and also to determine whether groundwater contamination, if present on the property, was contributing to the contamination of Riley's production wells. *See* Yankee Environmental Engineering and Research Services, Inc., Hydrogeologic Investigation of the John J. Riley Tanning Company, Inc. at 1.1, *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 763. Neither the work commissioned by Riley nor the report itself had anything to do with use or disposal of TCE.

hearing produced almost 3,000 pages of transcript, as Judge Skinner heard substantial evidence about the initiation, preparation, nature, and purpose of the Yankee Report and the circumstances surrounding its nonproduction, including the chaotic and crushing last minute discovery burdens, the deposition of the Riley tannery record keeper, the objections to producing the report, plaintiffs' failure to move to compel, the understanding of the parties as to the tannery's responsibility for producing tannery documents (such as the Report), and the testimony of Beatrice's counsel about their contacts with the Report.

Judge Skinner also heard extensive evidence about conditions on the fifteen acres, Riley's removal of soil, surface objects, and other materials from parts of the fifteen acres, and the nature and chemical composition of such materials. As he had at the trial, Judge Skinner again permitted witnesses to testify to their observations about objects and materials on the fifteen acres, such as scrap iron, truck bodies, and certain reddish-brown "peatlike" material. In addition, although the special evidentiary inquiry was supposed to be limited in scope, Judge Skinner allowed the plaintiffs to raise the issue that Beatrice and others had engaged in various alleged conspiratorial activities, including the sale of the tannery, subversion of test well results, and removal of materials from the fifteen acres.

At the second part of the inquiry in October 1989, the plaintiffs had the benefit of the presumption that the failure to produce the Yankee Report constituted "substantial interference" with the plaintiffs' case, and Beatrice had the burden to rebut this presumption by clear and convincing evidence. Judge Skinner took seven more days of evidence about the significance of the report, the chemical nature of certain materials taken from the fifteen acres, and the plaintiffs' attempt to reopen the closed fifteen acres case, including new expert opinion on groundwater flow which contradicted plaintiffs' trial expert, Dr. George F. Pinder.[44]

Judge Skinner even admitted and considered the nature and alleged significance of some foreign material that plaintiffs' counsel had secretly removed from the fifteen acres. In a last minute unsuccessful attempt to connect TCE with the tannery, plaintiffs' counsel

---

44. The plaintiffs' new expert contradicted Dr. Pinder's opinion at trial that town Wells G and H did not draw water from the Aberjona River. The new expert opined that at least 50% of the well water was drawn from the river. *A Civil Action* makes no observation, nor provides any comment (even from plaintiffs' counsel) about this surprising turn of events. The decision not to call Dr. Pinder to testify about the alleged importance of the Yankee Report was argued by Beatrice's counsel as creating an inference that the lack of the report had not substantially interfered with any alleged "tannery case." *See* Hearing, October 27, 1989, at 11-12, Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982).

removed material from the fifteen acres without the tannery's knowledge, thereafter retaining it until it could be used as "evidence" supposedly favorable to plaintiffs, along with the proffered testimony of additional experts who had analyzed it.[45]

C. *The Court's Conclusions About the Yankee Report and the Removal Activities*

In the course of both parts of the special evidentiary inquiry, Judge Skinner had reviewed all of the evidence about the nonproduction of the Yankee Report and the "removal" activities by Riley and all of the strident accusations of alleged conspiracies and other charges of misconduct against Beatrice's counsel. In addition, he had heard evidence on the alleged significance of the report, including the plaintiffs' attempts to reopen the fifteen acres case. After the conclusion of the first part of the inquiry, Judge Skinner issued his findings on "deliberate misconduct" in July 1989[46] and, after hearings in October on the issue of "substantial interference," he issued his Final Report in December 1989, which contained his findings and recommendations.[47]

As to Riley's "removal" activities, Judge Skinner found that they had no consequences as far as the case was concerned and were legitimately connected to the drilling of test wells and other investigative procedures.[48] The evidence also showed that the removal had taken place in the daytime (not secretly at night as the movie *A Civil Action* depicts them) and in the presence or vicinity of the EPA official in charge of the property.[49] In addition, Judge Skinner found that the material allegedly removed from the fifteen acres was not even tannery waste, but another substance that had not come from the tannery. Although the removal activities suggested some "deviousness on Riley's part" or his "secretive disposition,"[50] they provided no evidence of conspiracy nor of use of TCE by the tannery.[51] Nor was

45. See Anderson v. Beatrice Foods Co., 129 F.R.D. 394, 400 (D. Mass. 1989); Hearing Oct. 24, 1989, at 4-5, Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982).

46. Anderson v. Beatrice Foods Co., 127 F.R.D. 1 (D. Mass. 1989).

47. Anderson v. Beatrice Foods Co., 129 F.R.D. 394 (D. Mass. 1989).

48. *Anderson*, 127 F.R.D. at 4.

49. The court noted the use of "a diesel front end loader and a dump truck in broad daylight, with representatives of the EPA present on the property." *Id.* at 3.

50. *Id.* at 4.

51. Riley's "removal activities" were not only outside the scope of the inquiry ordered by the court of appeals, but were of dubious relevance coming, as they did, two to four years after the wells were closed in 1979 and having no relation to alleged TCE contamination which, according to the plaintiffs' own expert opinion, was supposed to have resulted from "activities" twenty years earlier. *See supra* at 249. In addition, the removal of materials from the surface of the fifteen acres in 1983 provided no proof that the tannery had disposed of TCE in the mid-

there any evidence that the tannery had disposed of tannery waste on the fifteen acres or engaged in any alleged conspiracy to conceal it.

Furthermore, as to the material obtained illicitly by plaintiffs' counsel, it was not found to be tannery waste, nor did it constitute any reliable or persuasive evidence that the tannery ever used or disposed of TCE.[52] Finally, no evidence was found at the tannery site of the existence of vinyl chloride, a breakdown product of TCE, thereby demonstrating that TCE had not been introduced into the tannery property.

Thus, the charges and accusations about the alleged significance of Riley's so-called removal activities, the alleged "tannery waste" found on the fifteen acres, and the numerous alleged conspiracies in which Beatrice had supposedly engaged were all found to have no merit whatsoever. In fact, the trial judge found that much of the testimony given at the first part of the special evidentiary inquiry about these matters was not credible.[53]

Concerning the Yankee Report, Judge Skinner found that it might have been helpful to the plaintiffs if they had any case against the tannery, but that, based on plaintiffs' counsel's own pretrial investigations and discovery, there was never any tannery case to begin with. These and other facts supported the finding that plaintiffs' counsel had violated Rule 11 in continuing to prosecute a nonexistent tannery case.[54]

D. Lessons to Be Taught by A Civil Action*: Part Two*

A Civil Action's partisan viewpoint is especially evident in its discussion and reportage about the special evidentiary inquiry held by Judge Skinner.[55] The significance of many of the important facts and conclusions about the special evidentiary inquiry are not explained, commented on, or even described in *A Civil Action*. Although much is made of plaintiffs' counsel's efforts to find witnesses and evidence for the inquiry,[56] no commentary emerges emphasizing the fact that the plaintiffs charges about Riley's "removal" activities and the reckless accusations of conspiracy were totally rejected even with the heavy

---

1960s as the plaintiffs' alleged expert had opined. Furthermore, any chemical contamination found in the soil on or near the surface of the fifteen acres would have demonstrated recent contamination, which conclusion would have been favorable to the defendants, not the plaintiffs.

52. *Anderson*, 129 F.R.D. at 400-01.

53. *See* Anderson v. Beatrice Foods Co. 129 F.R.D. 394 (D. Mass. 1989); Anderson v. Beatrice Foods Co., 127 F.R.D. 1, 3-4 (D. Mass. 1989).

54. *See infra* Part III.G.

55. *See* HARR, *supra* note 15, at 469-89.

56. *Id.*

burden of proof that had been imposed on Beatrice. Also ignored is the significance of the startling conclusion that no "tannery case" ever existed, and the plaintiffs' counsel's precomplaint knowledge of that fact.[57] In addition, *A Civil Action* makes no mention of Judge Skinner's tolerance in admitting irrelevant evidence that was outside the scope of the special evidentiary inquiry and would have been excluded in any other circumstances.[58]

Nor is there mention of the significance of the events concerning Judge Skinner's appointment of a *neutral* expert to conduct tests to determine the presence of TCE on the tannery property. Had TCE been found, this would have provided powerful evidence in the plaintiffs' favor. Nevertheless, the plaintiffs' counsel staunchly opposed and objected to this procedure and, eventually, the order for a neutral expert was withdrawn because of the expense and the amount of time the tests would have taken. Significantly, *A Civil Action* fails to note the serious contradiction between the plaintiffs' constant assertions that they had been denied an opportunity to test the tannery property for TCE and their objections to the appointment of a neutral expert to do the very tests they claimed should have been carried out.

Finally, Judge Skinner's Final Report and related events are so compressed and consolidated in *A Civil Action* that little emerges other than the viewpoint that the plaintiffs were somehow thwarted by the judge or the system.[59] Thus, despite the detailed and exhaustive series of evidentiary hearings, two written opinions by Judge Skinner, the nonexistence of any "tannery case," and the definitive rejection of the plaintiffs' baseless accusations of conspiracies, *A Civil Action* still leaves the impression that the plaintiffs were unfairly treated, an impression that itself is unsupported and unfair, and reflects a lack of regard and understanding for the workings of the civil justice system.[60]

---

57. *See infra* at 263.

58. *A Civil Action* also suggests, through the forceful remarks of plaintiffs' counsel, that the judge deliberately intended to injure the plaintiffs case. HARR, *supra* note 15, at 356, 452.

59. This rush to judgment never pauses to criticize any improprieties by plaintiffs' counsel during the special evidentiary inquiry, such as use of an invalid witness subpoena, *see id.* at 479, or improperly obtaining "evidence" from the fifteen acres. *See supra* at 257. Nor do the earlier chapters of *A Civil Action* make any direct criticisms about other similar conduct. *See, e.g., id.* at 98 (improper pretrial publicity); *id.* at 220-21 (improper deposition conduct). Furthermore, *A Civil Action* omits entirely any report, description, or comment concerning the unauthorized and improper revision of an amicus curiae brief to launch a personal attack on Beatrice's counsel, an action that drew a public apology from the group acting as amicus, and the withdrawal of the brief from the court of appeals. *See* 16 MASS. LAW. WKLY. 1197, at 23 (April 4, 1988); BOSTON GLOBE, March 25, 1988, at 74; BOSTON HERALD, March 28, 1988, at 2; WOBURN TIMES-CHRONICLE, March 20, 1988, 2A at 1.

60. *See infra* Part VI.

Overall, *A Civil Action* wholly fails to recognize or credit Judge Skinner's competence and fairness in conducting the special evidentiary inquiry, his careful consideration of the evidence, his well-supported findings of fact, and his carefully written and detailed Final Report, which was affirmed by the court of appeals. Moreover, Judge Skinner's conduct of the special evidentiary inquiry reflects the competence, restraint, and thoroughness with which he handled the entire case. His findings and decisions at the special evidentiary inquiry not only revealed that the plaintiffs had no evidence that the tannery used or disposed of TCE, but served to reaffirm the correctness of the jury's Special Verdict rendered three and one-half years earlier to exactly the same effect.

E. The Refusal of Plaintiffs' Counsel to Testify at the Inquiry

The special evidentiary inquiry ordered by the First Circuit envisaged that the district court would receive evidence from the defendants' counsel about their contacts with the Yankee Report and that there would be evidence from the plaintiffs on how and why the nonproduction of the report had substantially interfered with an alleged "tannery case." Consistent with this expectation, my partner and I each took the stand during the first part of the special evidentiary inquiry (dealing with nonproduction) and testified fully under oath about our contacts with the report. In addition, I had previously filed a lengthy and detailed response to the court's order for a statement of position concerning the nondisclosure of the report and any knowledge of materials removed from the fifteen acres.[61] After my testimony at the inquiry was completed, plaintiffs' counsel never attempted any cross-examination about the report, the sworn statement previously filed, the so-called removal activities by Riley, the various "conspiracies" alleged by plaintiffs' counsel, nor any other issue concerning the fifteen acres or the tannery.

Not only did plaintiffs' counsel fail to challenge any part of my testimony, but when the special evidentiary inquiry reached the crucial issue of "substantial interference," namely, how or why the nonproduction of the Yankee Report had substantially interfered with plaintiffs' alleged "tannery case," plaintiffs' counsel refused to take the stand to testify on this issue or to substantiate the accusations of misconduct that had been made against Beatrice's counsel.[62] Claiming

---

61. Statement of Jerome P. Facher in Response to Court Order of December 22, 1988 (dated January 26, 1989), Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 440.

62. Throughout the entire Special Inquiry, the plaintiffs made 31 motions, most of them

lawyer-client privilege as the basis for his refusal, no such testimony was ever given by plaintiffs' counsel.[63]

F. Lessons to Be Taught by A Civil Action*: Part Three*

The failure to challenge or rebut the testimony of Beatrice's counsel at the special evidentiary inquiry and the failure of plaintiff to testify might well have justified an inference as to the invalidity of the claims and accusations that the plaintiffs' counsel had made. Based on such an inference and the limited credible evidence from plaintiffs, Judge Skinner could have reached the conclusion that plaintiffs had failed to sustain their ultimate burden, which was to prove that the nonproduction of the Report had "substantially interfered" with an alleged "tannery case." Nonetheless, *A Civil Action* never explains or even comments on plaintiffs' counsel's failure to cross-examine or to testify, although it finds space to suggest an adverse impression about the expected and necessary testimony from Beatrice's trial counsel by employing the trivial observation of one of plaintiffs' attorneys that the procedure was somehow "surreal" or otherwise inappropriate.[64]

Finally, regardless of the inference, if any, to be drawn from the plaintiffs' counsel's refusal to testify and his failure to cross examine Beatrice's trial counsel, the fact remained that Judge Skinner had received no sworn evidence from plaintiffs' counsel—a highly important witness with supposed first-hand knowledge—to support the

---

filled with rhetorical excess and indignation, alleging all manner of conspiracies and seeking extreme sanctions, including three motions seeking general default, five motions seeking inquiries or investigations, two motions to disqualify Beatrice's counsel, and a variety of others for sanctions, for Fed. R. Civ. P. 60(b) relief, for estoppel, for directed findings and for a restraining order. The opportunity to prove these allegations and to provide evidence instead of rhetoric and testimony instead of accusations was afforded to plaintiffs' counsel (if not expected by the court of appeals and the district court) at the twenty-three day Special Inquiry, but such testimony was never forthcoming even though the trial judge had suggested, but not required, that it should be given as part of plaintiffs' counsel's burden. *See* Hearing Oct. 27, 1989, at 6-9, Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982).

63. Any such privilege had likely been waived because the plaintiffs had put in issue the alleged interference with their case and could not assert privilege to foreclose inquiry about that issue. *See* Connell v. Bernstein-Macaulay, Inc., 407 F. Supp. 420, 422-23 (S.D.N.Y. 1976) (holding privileged communications waived where plaintiff injected issue about his claimed reasons for not filing suit). In any event, there is no doubt that any lawyer-client privilege had clearly been waived by the plaintiffs' permitting and encouraging the author of *A Civil Action* to sit in on and to share their plans, strategy, and confidences. *See* HARR, *supra* note 15, at 493. Nevertheless, *A Civil Action* takes no note of this unusual decision which might have had serious legal and tactical consequences.

64. *See* HARR, *supra* note 15, at 483. In addition to its general partisan viewpoint, *A Civil Action* contains numerous cameo observations, characterizations or editorializations which are unfavorable to Beatrice or favorable to plaintiffs. *See, e.g., id.* at 345, 357, 362. *See also infra* at 265-66.

accusations, so fearlessly stated in unsworn papers, that the plaintiffs' alleged tannery case had been substantially impaired by Beatrice's "conspiracies" or other alleged improper conduct. On this point, the silence of *A Civil Action* clearly testifies to its steadfast leanings in the plaintiffs' direction.

G. The Court's Conclusion That Rule 11 Had Been Violated

Consistent with his mandate from the court of appeals to conduct an aggressive investigation, Judge Skinner, rebuffed by plaintiffs' counsel's refusal to testify, looked to other basic sources of information to determine whether the lack of the Yankee Report had substantially interfered with the plaintiffs' alleged "tannery case." Lacking direct testimony from plaintiffs' counsel, Judge Skinner ordered him to submit his investigative file to be examined *in camera*, not to be shown to Beatrice's counsel.

The result of the court's examination of the plaintiffs' investigative files was electrifying and, to this day, unprecedented in its revelations and results. The court found that the plaintiffs' own investigators had been unable to provide evidence or witnesses to support the claim—at the heart of the plaintiff's so-called "tannery case"—that the tannery had used and disposed of TCE. Even more startling was the revelation that the plaintiffs' investigators, who had interviewed dozens of people, including chemical suppliers, tannery employees, ex-employees, residents and former residents living near the tannery, and others, had provided plaintiffs' counsel affirmative direct evidence that TCE had *not* been used by the tannery.[65] All of the many employees and former employees of the tannery interviewed by plaintiffs' investigators stated that they knew of no use of TCE at the tannery.[66] In fact, in April of 1985, one supplier of industrial chemicals had told the plaintiffs' investigator that the complaint chemicals "do not belong in the leather industry."[67]

From this critical evidence and his detailed knowledge of the case, Judge Skinner made important factual findings. He concluded that plaintiffs' counsel had pressed his claim of tannery disposal of complaint chemicals

> *[n]otwithstanding the fact that his own investigative file contained no support whatsoever for the claim of disposal of the complaint*

65. In addition, in pretrial discovery, plaintiffs had deposed more than a dozen witnesses on tannery operations and use of chemicals including employees, ex-employees, waste haulers, and suppliers of chemicals. No evidence was found that the tannery used TCE.

66. Anderson v. Beatrice Foods Co., 129 F.R.D. 394, 399 (D. Mass. 1989).

67. *Id.*

chemicals at the tannery site, or by the tannery on the 15 acres, and significant positive evidence to the contrary.[68]

In addition, Judge Skinner stated that:

at the time of the commencement of the trial, throughout the trial and at the time that plaintiffs' motion for a new trial was filed, plaintiffs' counsel knew that there was no available competent evidence tending to establish the disposal of complaint chemicals by the defendant itself, either at the tannery site or on the 15 acres.[69]

As to any possible new trial based on any "tannery case," Judge Skinner found that:

The chance that a viable "tannery case" could be developed in any further proceedings is virtually nonexistent, even if the plaintiffs were entitled to try. In my opinion, a new trial on the issue of the pollution of wells G and H resulting from disposal of the complaint chemicals at the tannery site would be pointless, wasteful and unwarranted.[70]

In light of these and other similar findings, Judge Skinner also concluded that there had been a misrepresentation to the court about the basis of a "tannery case."

Plaintiffs implicitly and explicitly represented at trial and through these extensive post-trial proceedings that there was a basis in fact for the assertion that the defendant disposed of the complaint chemicals at the tannery site or on the 15 acres. At least by the close of his investigation and discovery, however, plaintiffs' counsel knew that there was no such basis in fact. Continued prosecution of the claim at that point was a violation both of Fed. R. Civ. P. 11 and 28 U.S.C. sec. 1927.[71]

Finally, these dramatic findings about the plaintiffs' lack of any evidence to support a "tannery case" were succinctly highlighted in Judge Skinner's last ironic footnote to his Final Report:

More latitude should be allowed at the beginning of a case for a claim based on information and belief, *but so far as appears plaintiffs did not have even the benefit of rumor, whisper, or even an anonymous tip. The entire exercise was apparently purely for forensic advantage.*[72]

---

68. *Id.* (emphasis added).
69. *Id.* (emphasis added).
70. *Id.* (emphasis added).
71. *Id.* (emphasis added).
72. *Id.* (emphasis added).

Having presided over years of discovery, a full seventy-eight day trial, three days of oral argument on the new trial motion, and a twenty-three day special evidentiary inquiry, Judge Skinner had amassed a detailed knowledge of the case and had overwhelming support for his finding that the plaintiffs had violated Rule 11 and 28 U.S.C. § 1927 by bringing or continuing to prosecute any so-called "tannery case" against Beatrice when there was no evidence to support it.[73] Although unusual in its timing because it came at the end of the case, Judge Skinner's Rule 11 finding was rooted in the facts, especially those contained in the plaintiffs' own investigative files which revealed that there never had been any "tannery case." To bring or to continue to prosecute that nonexistent case was indeed a Rule 11 violation, as Judge Skinner found.[74]

H. Lessons to Be Taught by A Civil Action*: Part Four*

Although *A Civil Action* devotes much attention to the first Rule 11 hearing, which ended favorably for the plaintiffs,[75] it offers no similar treatment of the final Rule 11 decision, which was highly unfavorable to the plaintiffs. Nor does *A Civil Action* offer any direct or indirect observations on the importance of Judge Skinner's careful, detailed findings about the plaintiffs' lack of a tannery case or counsel's conduct in prosecuting that nonexistent case.[76] Instead, *A Civil Action* chooses to demean and trivialize the significance of Judge Skinner's final Rule 11 decision by the unstated but clear suggestion that it was the product of an irrational judge determined to end the case and thwart the plaintiff.[77]

---

73. The Rule 11 denial at the beginning of the case took place under the 1982 version of the rule, which required only a good faith belief by counsel that there was good ground to support the pleading. At the time of the final Rule 11 decision in 1989, the rule had been further amended to add the requirement, among other things, that counsel make a reasonable inquiry of the facts and law before filing the complaint. In 1993, Rule 11 was again amended, this time to reduce the excessive litigation caused by the 1983 amendments. In the 1993 version of the rule, a party seeking a Rule 11 sanction was required to bring a claimed Rule 11 violation to the attention of the offending party, who then had a 21 day period, or "safe harbor," in which to withdraw the material claimed to violate the Rule. *See* FED. R. CIV. P. 11.

74. Judge Skinner imposed no additional sanction against the plaintiffs, but off-set the plaintiffs' Rule 11 violation against the defendants' nonproduction of the report, noting that "the honors for sanctionable conduct are about evenly divided." *Anderson*, 129 F.R.D. at 403. The court of appeals adopted Judge Skinner's recommendations, which included denial of the plaintiffs' numerous accusatory motions, and affirmed the judgment for Beatrice. Anderson v. Beatrice Foods Co., 900 F.2d. 388, 396 (1st Cir. 1990).

75. HARR, *supra* note 15, at 107-19.

76. The movie *A Civil Action* fictionalizes the first Rule 11 hearing and then totally ignores the special evidentiary inquiry, the final Rule 11 decision, and the trial judge's conclusion that the plaintiffs never had any case against the tannery.

77. *See, e.g.*, HARR, *supra* note 15, at 487.

This impression is created, as are other similar impressions adverse to the judge and to the defendants, by viewing the event or incident through the eyes, mind, thoughts, and words of plaintiffs' counsel, and by using his quoted statements to suggest, however implicitly or subliminally, the validity of those impressions.[78] With respect to Judge Skinner's finding of a Rule 11 violation, *A Civil Action* makes no comment of its own but chooses only to report plaintiffs' counsel's disrespectful remarks: "The man is demented . . . . The man is a f. . . . . monster. I know the joy of a madman. He says *I* should be sanctioned."[79]

A Civil Action provides no balancing quotation or observation to temper or challenge the tone and tenor of these rash remarks or the impression that Judge Skinner has acted unfairly and irrationally. Equally significant, *A Civil Action* provides no facts to refute Judge Skinner's findings, which are the foundation of his Final Report to the court of appeals.

Having had plaintiffs' counsel adversely pronounce judgment on Judge Skinner's decision, *A Civil Action* makes no further mention of it and, in a rush to conclusion, completes its unbalanced portrait of the postinquiry proceedings, pausing only to note briefly that the court of appeals upheld all of Judge Skinner's findings, adopted his recommendations, and commended him for his efforts carried out in a "thankless task."[80] Even the basic fact that the court of appeals affirmed the judgment that had been entered for Beatrice almost three years earlier after the jury's Special Verdict is omitted.

It is regrettable that *A Civil Action* does not reflect an adequate understanding of the judge's role in *Anderson* or his significant finding that a Rule 11 violation had occurred because no case against the tannery had ever existed. It is even more regrettable that *A Civil Action*

---

78. This is a technique found elsewhere in *A Civil Action*. For example, on whether Beatrice's counsel had an *ex parte* contact with the judge, the book quotes plaintiffs' counsel's obsessive imaginings to this effect without including any fact, comment or quote to the contrary, *id.* at 224, and with the knowledge that no such contact ever took place. On the nonproduction of the Yankee Report, the book again uses plaintiffs' counsel's thoughts to improperly suggest impropriety. *See id.* at 315, 345, 460. Other thoughts of plaintiffs' counsel accomplish the same effect as to other subject matters. *See id.* at 315, 345; *see also supra* note 58. In addition, *A Civil Action* has no hesitation in suggesting (incorrectly) an alleged familiarity and affinity between Facher and the judge which, in fact, had not existed. *See* Memorandum on Motions of John J. Riley et al. and Attorney Mary Ryan for Reconsideration and Motion of Attorney Ryan to Participate in Hearings on Sanctions, at 3 n.1 (Dec. 4, 1989), Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 472.

79. HARR, *supra* note 15, at 487.

80. *Id.* at 488. The book devotes only ten pages of its five hundred pages to the entire 23-day inquiry (held over a ten month period), Judge Skinner's interim and final reports, and the court of appeals' affirmance of the judgment for Beatrice. *Id.* at 477-87.

fosters the overall unfair impression that the plaintiffs had been thwarted by the judge and the civil justice system, especially where there was much evidence to the contrary, including (1) a jury decision which found that Beatrice was not liable to the plaintiffs, (2) a Final Report which, after an exhaustive special inquiry, found that no tannery case existed, and (3) a court of appeals decision that confirmed Judge Skinner's findings and affirmed the judgment for Beatrice.

In these circumstances, *A Civil Action* might well have paid some heed to the thought that its unshaken partisan view of the case, although likely to be popular, was not one which the *Anderson* record and fair minded students and lawyers would support. Furthermore, for the student or lawyer who pursues the truth, Judge Skinner's findings, popular or not, were supported by the evidence and were not to be lightly dismissed, glibly overlooked, or silently rejected.

IV. EFFECTIVE AND FAIR CASE MANAGEMENT: THE DECISION TO TRY DISPOSITIVE ISSUES FIRST

A. The Need to Adopt a Trial Plan to Fit the Case

As of the early 1980s, the *Anderson* case was one of the most complex pieces of civil litigation ever to face a federal judge, and it presented an enormous case management challenge. The case had thirty-three plaintiffs (including the executors of five deceased children), who charged that two corporate defendants each: (1) had used and disposed of specific chemicals on their properties, which (2) had reached the ground water and (3) had traveled in the groundwater to certain town wells (4) in quantities sufficiently substantial to contaminate the wells, which (5) had distributed the contaminated water to the plaintiffs, (6) who consumed or were exposed to sufficient quantities (7) to cause serious physical and mental injuries of almost every type and description.

In addition to the legal issues presented by the various amended complaints, the case involved complex and diverse issues, including hydrology, hydrogeology, geology, soil chemistry, water distribution, leather making, waste disposal, engineering, computer modeling, statistics, environmental history, industry practices, well drilling, groundwater flow, industrial injuries, cardiology, immunology, hematology, epidemiology, psychology, neurology, oncology, psychiatry, pathology, and more.

Although I had tried numerous complex cases before *Anderson*, none had involved such a large number of parties, witnesses and experts, such a broad diversity of scientific, technical, medical, and

legal issues, and such an immense mass of discovery and trial preparation materials. These complex issues created unbelievably enormous discovery burdens, including endless depositions and document requests which were a nightmare for all counsel and a never ending source of court papers, motions, objections, and court appearances.

As the time of trial approached, there were hundreds of deposition transcripts, with an even greater number of exhibits. There were dozens of expert reports, hundreds of medical reports and tests, and tens of thousands of pages of scientific, medical and technical articles, reports, records, and studies, as well as a vast array of other materials. Inundated by these materials, I estimated they would have made a paper mountain as high as a three-story building, and that such an enormously complex case might consume a year or more in trial.

Judge Skinner was not only aware of the overwhelming complexity of the *Anderson* case, but also that it was high profile litigation that had generated much pretrial public sympathy. He perceived that there was a real danger that justice could not be served if the outpouring of sympathy and emotion that surrounded the case were permitted to prevent its orderly presentation or to obscure or replace the scientific facts which were a necessary prerequisite to liability.

No judge faced with this gigantic case, its mountain of evidentiary and documentary materials, and the danger of having emotion, not evidence, decide the issues, could fail to take proper steps to organize, simplify, and make fair and manageable an otherwise unmanageable trial. No judge could allow this case to run amok, nor tolerate the hopeless confusion in which a jury would find itself if presented with a mammoth unstructured mass of complex medical, scientific, and technical evidence together with lay testimony, all in an atmosphere rife with sympathy for the plaintiffs.

Although dividing a case into liability and damages is a common judicial technique for efficient case management, such bifurcation alone would not have sufficed in *Anderson* because any separate trial on liability would still have involved the liability claims of thirty-three plaintiffs and would still have raised all of the complex scientific, medical, and technical issues. Moreover, the facts of each plaintiff's claim differed as to injury, causation, and personal circumstances, such as age, health, exposure to water, and other matters.

Faced with a challenging problem of trial management, Judge Skinner requested and received from the parties their proposals for a trial plan to manage and try the case. These proposals were thoroughly explored and argued. The plaintiff argued for a so-called

"model trial" or "test case" that would try one plaintiff's case, Anne Anderson's, to completion on liability and damages with the findings and results in that case to be applied in some way to every other plaintiff's case to the extent possible.[81]

The plaintiffs' plan seemed likely to be unworkable because the plaintiffs had brought thirty-three separate claims with different injuries, damages, and proof requirements for each claim. Given the different legal, factual, and medical circumstances of each plaintiff, substantial time and effort could be wasted in one "test case" without providing a clear result that could be applied and enforced as to every other plaintiff and each defendant. Even if the plan resolved some issues common to all plaintiffs, a huge amount of time would have been taken up with the issues of injury, causation, and damages involving a single plaintiff, with thirty-two more individual cases remaining for trial.

Accordingly, it seemed to me that a better plan would involve a separate trial to decide, as a first step, those dispositive issues *common to every plaintiff's case* before considering the morass of scientific, technical, medical, and causation evidence and the complicated issues of damages. Under this approach, the suggested trial of dispositive issues would involve whether the defendants used and disposed of TCE and whether it was foreseeable that TCE could reach and eventually contaminate the wells before they closed in May 1979.[82] If the defendants had not used or disposed of TCE, if it was not foreseeable that any such disposal could cause harm to the plaintiffs, or if the groundwater had not reached the wells before they closed in May 1979, no claim of *any* plaintiff could be sustained and there would be no need to continue the trial on the lengthy and difficult issues of causation and damages. However, if there was foreseeability and if the defendants had disposed of TCE into the groundwater that had reached the wells before May 1979, the case would then proceed to the issues involving injuries and medical causation, and thereafter to the issues involving damages.

After argument, Judge Skinner decided to divide the trial into three phases.[83] The first phase, which he dubbed the "waterworks"

---

81. *See* Plaintiffs Trial Plan: A Modified Test Case (dated Jan. 15, 1986), Anderson v. Cryovac, Inc., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 535.

82. *See* Beatrice's Memorandum Concerning Trial of Dispositive Issues (dated Jan. 15, 1986), Anderson v. Cryovac, Inc., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *reprinted in* GROSSMAN & VAUGHN, *supra* note 3, at 531.

83. Unlike the scene in the movie, Judge Skinner's adoption of a trial plan similar to that put forth by Beatrice did not come instantaneously in a short chambers conference, but after the submission of written trial plans, and the court's careful consideration of them, aided by the

phase, took almost four and one-half months to try. Thus, my earlier estimate of one year or more for the entire trial was not as unrealistic as the plaintiffs' had contended. At the end of the first phase, Judge Skinner put four special interrogatories to the jury. The first special interrogatory in effect asked whether Beatrice had used and disposed of TCE after August 1968, and whether the TCE had traveled via the groundwater from the Beatrice property to the wells before they closed in May 1979. The jury answered "no" to Special Interrogatory No. 1, thereby finding Beatrice not liable,[84] and ending the case as to Beatrice.

At the time, I fully understood the plaintiffs' disagreement with Judge Skinner's procedural decision to try the case in three phases. My own experience informed me that any plaintiff's counsel would likely have been displeased. But I did not concur, then or now, with the melodramatic charge that the judge had "cut the heart" or had taken "the humanity" out of the case.[85] This convenient rhetoric not only disregards Judge Skinner's responsibility to manage fairly a complex and high-profile case, and to avoid emotion and sympathy as a basis for its resolution, but also ignores the fact that the jury was aware, from the first day of trial and even earlier, of the human issues and the "humanity" involved in the case. First, the jury was aware, from the pretrial publicity about the deaths and injuries to the families, that these were heart-rending human tragedies. Furthermore, this knowledge was reinforced by the plaintiffs' counsel's powerful and unrestricted opening statement about the deaths and injuries, which dramatically emphasized the human issues with a power that doubtlessly stayed with the jury.

With the best-selling success of *A Civil Action* (and, to a much lesser extent, the movie of the same title), there has been a renewed public and academic interest in the *Anderson* case and Judge Skinner's trifurcation order. Although never challenged or appealed at the time, the order has been retroactively claimed by plaintiffs and others as the inequity that destroyed the "humanity" of the plaintiffs' case. Contrary to these recent shrill arguments, Judge Skinner's decision to try dispositive issues first was not a death knell, nor even a decision eliminating the human issues of the case, and was not necessarily so considered at the time the decision was made.

---

arguments of counsel.

84. *See infra* Part IV.C.

85. These or similar comments on the effect of Judge Skinner's decision have been advanced by those who opposed or disagreed with that decision.

I have little doubt that the plaintiffs' counsel would probably have preferred to put the plaintiffs on the stand as the first series of witnesses. Although these witnesses had no information or expertise on the scientific or medical issues that controlled the case, their testimony about their injuries or their loss of loved ones would have had an undoubted emotional impact on the jury. However, this would not necessarily have been the unequivocal advantage that the plaintiffs anticipated. Once the plaintiffs completed their testimony, there would not have been much more "humanity" in the case, and only the long and technical "waterworks" phase would have remained to consume endless days of trial on scientific issues on which the defendants could present strong evidence and mount effective cross-examination.

On the other hand, although the trifurcation order meant that the plaintiffs would not be the first witnesses, their testimony was not being denied or excluded, but only deferred until the stage of the trial after the jury had decided the basic scientific facts that were prerequisite foundations to every plaintiff's claim. I observed that plaintiffs' counsel, despite arguing to the contrary, could see some advantage in this alternative sequence of testimony because they were highly confident that their impressive array of experts would be successful in the "waterworks" phase. Once this major battle of the scientific experts had been won, the plaintiffs would then have been able to present the "humanity" of their case in a very persuasive and nonrebuttable form in the second and third phases.[86]

In those phases, the sympathetic plaintiffs would fully testify, and the two defendants would have been left in the unenviable and untenable position of cross-examining grieving parents and sick and injured men, women, and children who had consumed contaminated water from the town wells (which, according to the first phase decision, had been contaminated by groundwater from the defendants' properties). In this way, the plaintiffs would be telling their sympathetic stories to a sympathetic jury that had already decided the scientific issues in the plaintiffs' favor. This indeed would have given the plaintiffs a powerful tactical advantage.[87] Thus, even though the plaintiffs fought to have their trial plan adopted, they were disap-

86. In the movie (but not the book), plaintiffs' counsel is seen advising Anne Anderson that his order of witnesses would be to offer the scientific evidence first, followed by the medical evidence and her testimony. Given the movie's lack of accuracy and excess of fiction, this conversation may never have occurred.

87. Had the plaintiffs continued or retried the case against Grace, they would have been able to utilize this advantage. That they did not do so cannot be attributed to the trifurcation order, but to their financial problems, which are dramatically detailed in both the book and the movie. *See, e.g.*, HARR, *supra* note 15, at 322, 347-50, 418, 434-36.

pointed, but not in despair, when Judge Skinner ruled that the dispositive issues involving the use and disposal of the chemicals and groundwater movement to the wells would be tried first, with injuries, medical causation, and damages to follow.

B. Lessons to Be Taught by A Civil Action*: Part Five*

Judge Skinner's trifurcation order was an intelligent and sound technique to manage an enormously complex case and to ensure that the case was decided on the facts, rather than on sympathy or exasperated confusion. Not only did it save time and judicial resources, but it presented the case in an orderly way dealing with first things first. Had the case begun with months of testimony about sickness, injury, and death (which were issues of medical causation and damages), it would have been nearly impossible for the jury to have considered, fairly and dispassionately, the basic scientific prerequisites which, as a matter of fairness, logic and necessity, had to precede any finding of causation or any assessment of damages.

In fact, the outcome of the first phase of the trial was the best evidence of the wisdom and judgment of Judge Skinner's trifurcation order. As a result of its answers to Special Interrogatory No. 1, the jury exonerated Beatrice, and Beatrice was dismissed from the case. Thus, the trial judge's order worked as Federal Rule of Civil Procedure 42(a) intended,[88] by reducing the length and complexity of the case, by having the case decided on the facts, not emotion, and by allowing a defendant who was not liable to be dismissed from further participation in a long and complex case in which it never belonged in the first place.[89]

C. The Significance of Special Interrogatory No. 1

Under Rule 49(a), Judge Skinner was permitted to submit special verdicts (or special interrogatories, as they were styled in *Anderson*) to the jury seeking written findings on specific issues of fact. Judge Skinner's use of special verdicts on the issues in the first phase of the case was not only logical, but imperative in order to permit the jury to deliberate in a fair and orderly way and to understand what the jury had decided.

With the full participation of all counsel, Judge Skinner ultimately formulated four special interrogatories, which have since

88. Rule 42(a) gives the court power, "in furtherance of convenience or to avoid prejudice or . . . when conducive to expedition and economy," to order a separate trial of any separate claim, "or of any separate issue." FED. R. CIV. P. 42(a).

89. *See supra* Part III.G.

become targets for discussion and controversy, the blanket charge against all four special interrogatories being that they were too complex and confusing for the jury to understand. However, this was not true of Special Interrogatory No. 1, which asked if the plaintiffs "had established by a preponderance of the evidence that [TCE] was disposed on Beatrice land after August 27, 1968, [the date of the well driller's letter], and had substantially contributed to the contamination of the wells before May 22, 1979 [the date the wells closed]." The plaintiffs did not object to Special Interrogatory No. 1 and, in fact, had suggested its compound nature.[90] The jury had been instructed and understood well that the case had been divided into phases and that if their answer to Special Interrogatory No. 1 in the first phase was "no," the case against Beatrice would end. In fact, there had been instructions to this effect at the beginning as well as at the end of the case.

Whatever might have been the complexities of the last three special interrogatories, the first special interrogatory, which was basic to the entire case, was not difficult to understand and could be answered "yes" or "no" by the jury on the evidence before it. As to Beatrice, the jury's answer was "no" and the case against Beatrice properly ended there. Moreover, any possible challenge to the nature and form of Special Interrogatory No. 1 was resolved by the court of appeals, which affirmed the jury's verdict and denied and dismissed the first appeal.[91]

V. THE ABSENCE OF SETTLEMENT OR MEDIATION

A. The Missed Opportunities

I am often asked why the *Anderson* case did not settle or why it was not subject to some form of Alternative Dispute Resolution (ADR), such as mediation. As to ADR, the answer is simple: these procedures were not then as well known or widely used as they are today. In fact, the words "mediation" or "ADR" were never uttered by any of the parties, nor were these approaches ever suggested. Furthermore, in all likelihood, the plaintiffs would not have been amenable to them under the unusual circumstances of this unusual case.

As to settlement (speaking from Beatrice's perspective), I was never able to obtain any specific figure or demand from the plaintiffs

---

90. *See* Memorandum and Order on Defendant Beatrice Food Co.'s Motion for Immediate Entry of Final Judgment Under Rule 54(b) (dated Sept. 17, 1986), Anderson v. W.R. Grace & Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982), *posted at* <http://www.law.fsu.edu/library/faculty/gore/index.html>.

91. Anderson v. Cryovac, Inc., 862 F.2d 910, 922, 933 (1st Cir. 1988).

in the four and one-half year period that preceded the sumptuous breakfast spread at the Four Seasons Hotel in Boston held early in 1986, very close to the then scheduled trial date. At an earlier point in the case, I had tried to begin settlement talks with plaintiffs' counsel and had actually suggested an amount close to one million dollars.[92] The plaintiffs did not consider my suggestion acceptable, nor did they respond with a counteroffer. Rather, plaintiffs' responded by counsel insisting that there be a "process," which was never defined, and that discussions had to be with the "decision-makers," which I assumed meant the actual corporate executives, even though I was their representative, whose recommendation was likely to be accepted. Because simply making an offer was not apparently considered part of a "process," and I was apparently not considered a "decision-maker," settlement was not broached by me (or to me) again.

As the trial date approached, Judge Skinner told the plaintiffs to provide the defendants with a realistic settlement figure. In response, the plaintiffs prepared the elaborate and highly choreographed proceedings at the Four Seasons. Because it was close to the trial date, it was time to talk realistically. Instead, the plaintiffs' counsel delivered a lengthy speech about the defendants' conduct and responsibilities, and the plaintiffs' financial advisor then presented explanations and figures concerning the millions of dollars required to provide annual payments to each family for thirty years, the millions to establish research foundations, and the millions to be paid immediately in a lump sum.[93]

The plaintiffs' proposal at the Four Seasons breakfast was so far from an understandable and realistic settlement figure, so contrary to what the judge had ordered, and so foreign to my idea of settling the case, that there was no point whatever in discussing it, and I left. After that, I had nothing to do with settlement, but returned to the imminent business of preparing a difficult and complex case. The settlement meeting at the Four Seasons is accurately described in the book, *A Civil Action*,[94] and is more or less accurately portrayed in the movie. However, I do not know and did not observe whether the

92. HARR, *supra* note 15, at 230.

93. *Id.* at 278, 274-76. Presumably, the overall purpose of both presentations was intended to be some sort of structured settlement proposal. In recent seminar discussions about the case in 1999, one of the attorneys for the plaintiffs indicated that the purpose of the breakfast was supposed to have been to suggest a $175 million demand, which was to be considered as an invitation to provide a counteroffer. I received no such impression at the time. In fact, *A Civil Action* reports that at least one of plaintiffs' counsel was concerned that making a settlement presentation with such grandiose demands would cause the defendants to walk out, which is exactly what happened. HARR, *supra* note 15, at 274, 276.

94. *Id.* at 277-80.

partners of plaintiffs' counsel exhibited the disdain and astonishment at his conduct that the movie indicates.[95]

The plaintiffs had a final opportunity for settlement literally on the eve of trial. On the Friday before the Monday in March 1986 when the trial was to start, Beatrice's Assistant General Counsel (who was clearly a "decision-maker") and my partner, Neil Jacobs, met with plaintiffs' counsel. At that time, it was suggested to plaintiffs' counsel that if something in the vicinity of one million dollars for each of the eight families was acceptable to plaintiffs, Mr. Jacobs would recommend it.[96]

To a seasoned trial lawyer with extensive knowledge and experience in the language of settlement, Mr. Jacobs' suggestion should have been a signal that, if the plaintiffs indicated that they would accept such a sum, it was likely that Beatrice would have followed its counsel's recommendation. The seasoned trial lawyer would also have known that the occasion was not intended as the start of a bargaining session. The trial was to begin the following Monday morning and, after almost five years of litigation, it was time for the plaintiffs' counsel to fish or cut bait on settlement.

Even at the eleventh hour meeting with Mr. Jacobs and Beatrice's Assistant General Counsel, plaintiffs' counsel was not ready to indicate an acceptance in principle or to state a willingness to recommend Mr. Jacobs' suggestion to the clients as a framework for settlement. Nor was he ready, then and there, to say what final figure the clients would accept, although there had been many years to consider the matter. That night, the plaintiffs' counsel called back and said that their "bottom line" to settle the case against Beatrice was $18 million,[97] which Mr. Jacobs indicated was totally unacceptable (a fact that *A Civil Action* does not report). Never before had this figure or anything remotely close to it, been mentioned. Now, literally on the eve of trial, the figure appeared to be nothing more than an attempt at old fashioned bargaining, with a "bottom line" that plaintiffs' counsel knew would be too much and too late, as indeed it was.

---

95. The later movie scene, in which I appear to be offering plaintiffs' counsel $20 million in a courthouse corridor while awaiting the verdict, is pure fiction and never happened. HARR, *supra* note 15, at 231.

96. I was not at that meeting, and I understand that it is slightly misdescribed in *A Civil Action*. However, the suggestion of one million dollars per family was floated as a possible basis for *immediate* settlement, not as an invitation for bargaining. It was far too late for that.

97. *Id.* at 290.

B. *Lessons to Be Taught by* A Civil Action: *Part Six*

According to *A Civil Action*, the settlement suggestion made by Mr. Jacobs was not discussed by plaintiffs' counsel with his clients (some of whom may possibly have favored it).[98] *A Civil Action* makes no comment on this failure to transmit information to the clients, but appears to justify it because plaintiffs' counsel had not received a legally binding offer.[99] That conclusion was technically correct as a matter of contract law. However, such a suggestion by Mr. Jacobs would usually be understood by attorneys representing plaintiffs as a reliable guidepost on a trail, which, if quickly followed, would lead to settlement. Nevertheless, *A Civil Action* does not recognize this practical reality, nor make any critical or other comment on the alleged failure to discuss the matter with the clients, whether there had been a legal offer or not.

On the other hand, *A Civil Action* appears critical of Mr. Jacobs for not calling plaintiffs' counsel back to reject the eighteen million dollar "bottom line" proposal or discuss settlement further.[100] The implication appears to be that settlement was somehow impeded or might otherwise have occurred. No such additional call or response by Mr. Jacobs was necessary. Not only did Mr. Jacobs indicate during the call from plaintiffs' counsel that the plaintiffs' "bottom line" was unacceptable, but the timing and context of the figure suggested by Mr. Jacobs at the meeting should have made it obvious that a "bottom line" counteroffer, which more than doubled Mr. Jacobs' suggestion, would be rejected. Indeed, it was even more obvious from the silence that followed the plaintiffs' counsel's call.[101]

A Civil Action makes no point about the plaintiffs' counsel's failure to recognize that the time for bargaining had long since past and that if there were to be a large last-minute settlement from Beatrice (which apparently the plaintiffs desperately needed to continue the case against Grace), it would have to be at or near Mr. Jacobs' suggested amount. Nor, for that matter, does *A Civil Action* indicate (or wonder) where the authority for the plaintiffs' eighteen million dollar counteroffer came from. In any event, there was no more time for

---

98. *Id.*

99. *Id.*

100. *Id.*

101. In the movie scene where, at a later date, the plaintiffs' law firm is discussing Grace's eight million dollar settlement offer, plaintiffs' counsel is strongly chastised by his financial advisor for being willing to accept only an amount that counsel knew Grace would not offer. Whether this movie scene is accurate or not, similar conversations appear to have taken place, according to the book. *See id.* at 416-18.

bargaining, the trial was about to begin, and the risk remained that the plaintiffs would receive nothing.[102]

The issue was moot, however, because of the unrealistic attempt to double the suggested settlement figure that came far too late and was far too much.[103] Whether or not there was an obligation to transmit Mr. Jacobs' suggestion to the plaintiffs, an opportunity was lost. No settlement with Beatrice was ever achieved; the trial went forward, and Beatrice was found not liable.

VI. THE RESPECT DUE THE CIVIL JUSTICE SYSTEM

A. *The Myth That the System Did Not Work*

Following the publication of *A Civil Action*, I often heard the broadside charge that the system "did not work," or that "justice" was not done. Even today, there are those who continue to make that charge. But reviewing the court materials and analyzing the facts and important procedural issues in the *Anderson* case clearly shows otherwise and plainly refutes such uninformed rhetoric.

From the initial pleadings to the posttrial motions and beyond, the court materials in *Anderson* (many of which are reproduced in the new book, *A Documentary Companion to* A Civil Action) reveal the true picture of the system at work. As I have already noted, the plaintiffs prevailed against every dispositive motion seeking to have the case thrown out of court. These were not routine motions routinely denied but, on the contrary, presented difficult issues and serious dangers for the plaintiffs' case. In addition, the plaintiffs were provided with seventy-eight days in court, followed by eight and a half days of jury deliberation, which distinguished between the liability of two corpo-

102. After the publication of *A Civil Action*, and in recent seminars or panel discussions, I have been informed that the huge sums being borrowed from Bank of Boston and spent by the plaintiffs on the case were part of an elaborate strategy to show the defendants that the plaintiffs were well supplied with money and could aggressively challenge and impress the two large law firms that opposed them. The strategy envisaged was that once one of the defendants was convinced of that fact, it would settle, and the plaintiffs would use the settlement amount to continue the case against the remaining defendant. Only part of the strategy worked—the part that convinced the defendants that the plaintiffs were extremely well financed and willing to spend enormous amounts of money on the case. Not achieving the other part, however, was clearly a missed opportunity for the plaintiffs. Similarly, *A Civil Action* misses the opportunity to comment on or criticize the plaintiffs' settlement strategies, although it notes, in favorable terms, some of plaintiffs' counsel's successful actions. *See, e.g.*, *id.* at 357, 344; *supra* notes 30, 44, 59.

103. I did not personally participate in these last minute settlement negotiations and might not have agreed with the suggestion made by Mr. Jacobs and Beatrice's Assistant General Counsel. Nevertheless, even when liability is highly unlikely, there are always valid business reasons why a client may choose to avoid litigation and settle an otherwise long and expensive (but winnable) case.

rate defendants, finding one defendant, Beatrice, not liable, while permitting the case against another defendant, Grace, to proceed to phase two. Later, a new trial for Grace was ordered and the case settled for eight million dollars without further court proceedings.[104]

The lengthy jury trial in *Anderson* was preceded by four years of pretrial proceedings with intensive judicial oversight. There were also extensive posttrial proceedings, including a twenty-three day special evidentiary inquiry about the Yankee Report, Riley's removal activities, and plaintiff's accusations of conspiratorial activities.[105] Finally, there were two appeals to the First Circuit, where Judge Skinner's findings were accepted, his well supported recommendations adopted, and the judgment for Beatrice ultimately affirmed.

Those who demean juries and those who cynically complain about the civil justice system should reflect on the broad panoply of procedural opportunities, advantages, and safeguards in *Anderson* when they charge that "justice" was not done or that the plaintiffs were thwarted by the system. I suggest that those who make these charges should study the trial record and the *Anderson* court materials closely, and should recognize that justice, if it is to have any meaning at all, must be a two-way street that provides justice not only for plaintiffs, but for defendants as well. If the book, *A Civil Action*, has left the impression that justice was not done, this itself is an injustice, and one which this Article has attempted to correct.

I offer a similar reaction to those who claim that the *Anderson* trial did not search for "the truth," or did not reveal "the truth." In contrast to this useless emotional rhetoric, or the partisan view of *A Civil Action*, the student or lawyer who reviews the record (or who studies the materials in such volumes as *A Documentary Companion to* A Civil Action) should consider whether a trial is, in fact, a vehicle for

---

104. HARR, *supra* note 15, at 448, 451.

105. After the special evidentiary inquiry was complete, Judge Skinner received further affidavits from Riley's counsel about the nonproduction of the Yankee Report and Beatrice's counsel's role, particularly as to when the Report was first seen by Beatrice's counsel. These affidavits became the basis for at least four more accusatory motions by plaintiffs' counsel, again seeking serious sanctions and other dire consequences such as disqualification and default. At hearings on these motions, the affidavits from Riley's counsel, as well as counter-affidavits, were considered by Judge Skinner, who was to review them "line-by-line." *See* Hearing, Nov. 15, 1989, at 51, Anderson v. Beatrice Foods Co., Civ. A. No. 82-1672-S (D. Mass. filed June 3, 1982). In his Final Report, he recommended denial of all plaintiffs' motions, making the significant statement that "even with all the recent revelations," there was still no credible evidence that the tannery had disposed of TCE. Anderson v. Beatrice Foods, Co., 129 F.R.D. 394, 402 (D. Mass. 1989). Thus, the later affidavits from Riley's counsel never affected the basic issue of the special evidentiary inquiry, whether the nonproduction of the Report substantially interfered with the plaintiffs' (nonexistent) tannery case, or the basic issue of the trial, whether the tannery had ever used or disposed of TCE. *See supra* Part III.G.

revealing some kind of single uncontrovertible "truth" or, as many lawyers, judges, and writers believe, a fair and efficient means of resolving disputes by finding facts and applying the law.

To those who still insist that the *Anderson* trial did not reveal "the truth," the challenge remains: how and where is their "truth" to be found? Whose "truth" will be revealed? Whose "truth" must be accepted? Is it the plaintiff's truth? The defendant's truth? The lawyer's truth? The witness's truth? The judge's truth? The public's truth? The media's truth? The government's truth? Whatever the responses to these abstract puzzles, a trial confronts lawyers, litigants and the civil justice system, not with an ongoing philosophical debate, but with a present real life controversy that must be immediately and efficiently resolved on the facts, the evidence, and the law. In light of that reality, a fair trial in a fair adversarial system, even with all its imperfections, not only resolves the existing controversy but, I believe, is still the best system yet devised for finding that elusive and undefined concept called "truth." Despite the unjustified but still lingering doubts implied in *A Civil Action*, those students and lawyers who understand and respect the importance of process, procedure, and fact finding in the civil justice system will come to appreciate that truth is a product, not a victim of that system.

B. The Rhetoric That "Legal Technicalities" Interfere with "Justice"

For as long as I have practiced, I have heard the charge that lawyers use objections, motions, process, procedure, and other so-called "technicalities" to harass or disrupt their opponents' cases and to defeat "truth" and "justice." More often than not, it is a disappointed litigant or an uninformed member of the press or public who makes the charge. To the extent that *A Civil Action* seems to imply or endorse similar observations, I wholly disagree with any such point of view. What *A Civil Action* does not appreciate, but good students and good lawyers come to realize (and volumes like *A Documentary Companion to* A Civil Action help to teach), is that the rules of evidence, the rules of procedure, and a respect for process are not "technicalities" to be ignored or abused, but wise restraints that the civil justice system uses to exclude improper evidence or unfair procedures, and thereby to ensure fairness and prevent injustice.

When the rules of evidence and procedure and their application to court materials in real life trials are examined, the inquiring student may well discover, as the record in *Anderson* will indicate, the improper question that prompted the objection, the reasoned argument that supported the actions of the court or counsel, and the

reasonable policy behind the challenged procedure. So it was in *Anderson*. No one associated with the *Anderson* case would deny that it was long, complex, technical, and replete with procedural issues. But it was not decided by any unfair "technicalities" and, whatever the implications of *A Civil Action* to the contrary, I believe that those who examine the case closely, using a lawyer's knowledge, skills, instincts, and analysis will reach the same conclusion.

C. The Reality That Liability Must Be Based on Fault

I am always surprised by those who can comfortably rush to the conclusion that a "deep pocket" defendant, once accused of wrongdoing, must or should somehow be liable for a plaintiff's serious personal injuries. These conclusions abound in the public's view of the *Anderson* case and, to some extent, have been encouraged by *A Civil Action*. Those who reach these conclusions—whether motivated by sympathy, compassion, outrage, or lack of understanding—ignore or do not care about the requirements of the civil justice system and the necessity to prove that the defendant's conduct caused the plaintiff's injuries.

In *Anderson*, the plaintiffs brought their claim to the civil justice system for resolution by a jury on the facts and the law. Their lawyers knew that, in that system, liability is based on fault, that fault is established by evidence, and that no loss can be shifted from an injured party to a defendant without first showing that the defendant's conduct caused that loss. It remains one of the basic principles of our civil justice system that no party should pay for losses it did not cause, no matter how serious or heartbreaking the injury. In *Anderson*, that basic principle was reaffirmed by the very system the plaintiffs chose to decide their dispute.[106]

VII. SOME CONCLUDING THOUGHTS

The goal of "thinking like a lawyer," though often demeaned as a cliché, remains a high purpose and a difficult achievement for students, law professors, and practicing lawyers. *A Civil Action* does not

106. However, for many readers of *A Civil Action*, this principle appears to be irrelevant. Instead they substitute their own allegedly higher moral code of conduct or sense of outrage to pronounce the defendants liable. As an illustration of this point, the question is often asked of me, "Beatrice owned contaminated property, why were they not liable to the plaintiffs?" The answer is that in the tort system, the plaintiff must also prove negligence and causation before the plaintiffs' loss shifts to the defendant. By contrast, the EPA, in administrative proceedings, has the power to impose clean-up costs on defendants, based on ownership of the property and without the necessity of proving negligence. *See* 42 U.S.C. § 9601 (1994). This is not the standard for a civil suit seeking substantial tort damages for personal injuries.

aspire to or intend any such purpose, nor does the *Anderson* case stand for or provide any universal truth or moral principle to guide a student, professor, or practitioner. At base, *Anderson* was indeed just a civil action, not unlike (except in subject matter and notoriety) thousands of other important or complex civil cases tried all over the United States. Nonetheless, *A Civil Action*, when used with court materials in the *Anderson* case and the materials and commentary in volumes such as *A Documentary Companion to* A Civil Action, can make a valuable contribution to legal education by helping the student to appreciate the ambiguity and complexity of civil litigation; the significance of procedure and process; the need to question assumptions, challenge rhetoric, and avoid snap judgments; and, above all, the crucial importance of facts in the search for truth. With these lessons learned, the student can begin, with some confidence, the long and challenging journey toward the goals of thinking like a lawyer and understanding and appreciating the nature of justice in the civil justice system.