LESSONS FROM WOBURN:
THE RULES OF CIVIL PROCEDURE

A "VIDEO" COMPANION TO A CIVIL ACTION

Produced by

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FILMS FOR JUSTICE
SEATTLE UNIVERSITY SCHOOL OF LAW

WITH

THE BERKMAN CENTER FOR INTERNET
AND SOCIETY AT HARVARD LAW SCHOOL

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This videotape is dedicated
to the Woburn families
who persevered for a
cleaner and safer environment
for themselves and those
that share the water, earth, and sky.
"Lessons From Woburn: The Rules of Procedure"
A Film for Justice Production

Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>AA</td>
<td>Anne Anderson</td>
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<td>AL</td>
<td>Al Love</td>
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<td>AM</td>
<td>Professor Arthur Miller</td>
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<td>CN</td>
<td>Charles Nesson</td>
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<td>DR</td>
<td>Donna Robbins</td>
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<td>EL</td>
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<td>JC</td>
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<td>JF</td>
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<td>JH</td>
<td>Jonathan Harr</td>
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<td>JS</td>
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<td>MB</td>
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MK: I think, as a trial lawyer, that you’ve got to understand what the rules are. It is a process which is a process which is a rule-driven and rule-controlled. Whether it is evidentiary rules or procedural rules or substantive law and anybody who holds himself or herself out as a trial lawyer has to understand that because the best judges enforce those rules, and your best adversaries are equally aware of them.

JS: The rules were used as weapons to be hurled at the opponent. The Rules of Civil Procedure were used to punish the plaintiffs bringing this lawsuit and punish the lawyers who dared to bring it on their behalf, and that the Rules of Evidence were used to deny an opportunity for the truth to come out or an opportunity for the facts to be heard so that the jury could _veritas dictu_, speak the truth.

BC: I think the fact is that, when you’re representing the defendant in any litigation, you want to hit them as often and as hard as you can and hope that you weaken them, if you don’t knock them down.
CN: You are up against opponents who will take every opportunity to interpret things wrong, make things go wrong, and we were up against a master.

AM: This videotape, Lessons from Woburn, the Rules of Procedure, explores how procedural rules impact civil litigation. The story of Anderson v. W. R. Grace provides an excellent opportunity to examine the federal rules of civil procedure and the role they play in resolving disputes. We will examine many significant rulings in the Anderson Case. The discussions from questions about whether the civil justice system provides a fair day in court for all litigants.

HC: Justice was absolutely done in this Woburn case, perhaps not the monetary value, but as to enlightening the world, our nation, our people, in what we are doing to our lands, and how we must clean it up not to cause sicknesses and to keep us healthy, yes.

JC: No, I feel that justice was not done in the case; Beatrice should have taken their whacks too as well as Grace.

JH: The system failed in some respects. But it failed not because of the system, but because of people in the system. I think it failed, in part, because of the judge. In part because of the appeals court. By that I don’t mean it failed completely.

AM: The participants speak openly about different philosophies about pretrial procedures, including discovery and motions practice. As you listen to the participants, consider how their approaches to the rules contributed to a fair resolution of the Anderson case – or didn’t they? Did the manner in which the rules were employed accomplish their stated purpose? Remember, federal rules state: “the rules seek the just, speedy, and inexpensive determination of an action in this civil dispute.”

AA: What I learned from the Woburn case is that filing suit is unfortunately very frustrating, very difficult, very time consuming. I didn’t realize what hoops we were going to have to jump through on command, almost constantly. And I didn’t realize that it was going to be as difficult as it was.

JF: I would place the Anderson case as one of the most interesting cases and probably one of the most difficult cases that I’ve had, and certainly one of the most unique cases that I’ve had, because of the issues involved, the personalities involved, the length and complexity of the trial, all of those things combined to make it a unique case.

AM: Are there lessons from the Anderson Case that provide a model that you want to follow?
**Timeline of Events**

- 1964-67  Wells Opened
- 1979    Wells Closed
- 1982    Lawsuit Filed
- 1982-90 Litigation
- 1986    Trial
- 1990    U.S. Supreme Court Cert. Denied
- 1995    "ACA" Book
- 1998-99 Interviews
- 1999    "ACA" Film

**1964-1967  WOBURN WELLS G & H OPENED**


**1998-1999  INTERVIEWS WITH KEY PARTICIPANTS**

The judge, plaintiff and defense attorneys, parties, jurors, witnesses, and the author of the book speak frankly about their experiences, perceptions, and insights, suggesting lessons to be learned about procedural rules and their role in this complex litigation.
Part One: Subject Matter Jurisdiction

THE SECTIONS

1. Removal
2. State or Federal Court?

Timeline of Events:

1982 Petition for Removal

AM: Plaintiffs filed the Anderson Case in the State Superior Court in Middlesex County Massachusetts. Defendant, W. R. Grace, removed the case to the United States District Court in Boston.

Part One: Subject Matter Jurisdiction
SECTION 1
Removal

JS: I wasn’t sensitive enough to the issue or care enough. I didn’t have strong enough feelings about it to take the steps necessary to have tried to keep, stay in state court.

§ 1441. Actions Removable Generally

AM: In this first section, Grace attorney, Bill Cheeseman, declares that removal is a common defense tactic. The Plaintiffs did not oppose the removal. Is there anything the Plaintiffs could have done to defeat removal?

BC: I’ve removed many cases from state court to federal court in my career, and I immediately recognized that this case was eligible for removal on diversity of citizenship grounds because the Plaintiffs were all residents and citizens of Massachusetts, and Grace was a corporation with its headquarters in New York, and it was incorporated under the laws of New York or Connecticut (I’ve forgotten now), and therefore, there was diverse citizenship, and Grace, as a non-resident defendant, was entitled to remove. And in the amount in controversy, it was certainly more than enough to meet the jurisdictional amount requirement.

JS: We sued the Riley Tannery, and when we filed the lawsuit, it turned out that, in fact, Riley had become a division of Beatrice Foods. That was not something we knew, and so we were kinda taken off guard. And we did not fight, you know, to keep it in to state court.

BC: That is a common tactic I think particularly of pharmaceutical or medical
malpractice cases. The Plaintiffs will often sue thinking that the state court system will be best for them, will often sue a pharmaceutical company for the product liability claim and the prescribing physician, who is a local resident, in the same lawsuit so that the pharmaceutical company can't remove the case to federal court. Generally, my practice is if I can remove, I do remove. And I think that is in the general reaction of most defendants that are sued in state court.

JS: I think we certainly could have made an argument to have kept the case in state court, you know, on diversity grounds. I wasn't sensitive enough to issue an, or care enough, I didn't have strong enough feelings about it to take the steps necessary to have tried to keep, stay in state court.

Part One: Subject Matter Jurisdiction
SECTION 2
State or Federal Court?

JF: I think it's very debatable about whether the state court or the federal court was better or worse for the Plaintiff.

AM: In Section Two, the participants share their views about their preference for state or federal court. Are their positions rational? Do you think the removal to federal district court made a difference in the Anderson Case?

CN: Would this case have been better off in state court? It's very hard to say. Probably yes. State courts are much friendlier to Plaintiffs than federal courts. The federal court, as an institution, is a more austere place than the state court system.

JS: I think there is no question we'd have been better off in state court, absolutely. Because, you know, I came to appreciate that federal court just had a series of relationships and dark corridors to it.

JF: I think it is very debatable about whether the state court or the federal court was better or worse for the Plaintiff. I think we have a marvelous state court, and I think a judge of the superior court would very likely have reached the same conclusions as Judge Skinner.

AM: During the Anderson Case it was widely rumored that Judge Skinner knew the defense counsel. Consider the Judge's response. What is the significance of the Plaintiff's concern about Judge Skinner?

AA: Judge Skinner ... I always had the feeling, was of the old boy network. I think he knew the other attorneys. The other attorneys knew him. They had probably gone before him before. Jan Schlichtmann was a small-time operator. He was brash, he was young, he didn't know how to approach a judge on that level.
CN: He felt that it was not his place; he felt that the crowd of people who run it and populate it were not his people.

JS: It is a very political circuit, and it is one that, you know, I feel is very political when it comes to these cases, and is willing to get rid of them or to destroy them or have them die a cut of, a death of a thousand cuts. There might have been at least some chance that at the state court level there would have been some greater chance of a little more independence on the part of the judge, but, you know, that may be just wishful thinking on my part.

MB: Before the Woburn Case began, did you know any of the attorneys involved?

WS: Jan Schlichtmann had been before me in a case involving the Clamshell Alliance and done a very credible job. He’d also, I think, been then seconding Barry Reed in a products liability case. Mike Keating I had known, oh 30 years ago when he was clerking for Judge Pericoe in an estate case that I was on. And I had seen him off and on, I didn’t know, don’t know, I didn’t know him well. Jerry Facher had appeared before me once in a case involving, I think, I think it was Five Fly Baltic Plywood, at which he lost, I knew who he was, he had a pretty good reputation as a trial lawyer by the time he got to the Woburn case, but as far as personal contacts, no. I don’t have any recollection of having seen Cheeseman at all. I mean, this is Boston. Harvard Law School is across the river, there are just lots of Harvard lawyers around and they show up in trials, and I couldn’t care less.
Part Two: Parties

THE SECTIONS

1. The Plaintiffs
2. The Defendants
3. Impleading Unifirst

Timeline of Events:

- 1979 Patrick Toomey diagnosed with leukemia.
- 1981 Jimmy, Robbie, and Patrick die. Meeting held at Trinity Episcopal Church to discuss cancer cluster.
- 1984 W. R. Grace impleads Unifirst Corp.

AM: The Plaintiffs' present poignant stories about their losses, the problems they endured, and the obstacles they encountered. Jan Schlichtmann, their lawyer, asked, "How could a lawyer help them? What claims could they bring? Who might become Plaintiffs? How do the rules of procedure and strategic considerations impact joinder of Plaintiffs?"

AA: And I would get very angry at all those people that were saying that there wasn’t a problem.

JS: Well, what attracted me to the case was the families. I think meeting the families, hearing their story, and just seeing the kind of people they were was inspiring. But I just didn’t understand how I could as a lawyer help them. You know, who are we gonna sue, and what would we sue them about exactly and what would be the connection .... I mean I understood that these were all questions that would be very expensive just to find out what the answers to find out if there was even a possibility of a lawsuit.
DR: It was from ’76 – ‘81, a five-year period. He was four when he was diagnosed, and he was nine when he died.

RR: I need to go in the hospital a lot of times and get IV’s and sometimes I just get regular IV’s and go home right after them, or sometimes I need to sleep overnight with them in my hand. The next day when I get it out at the same time I got it in the other day, my fingers are all stiff, and I can’t move them. I can’t make a fist or anything.

MT: Well, when Patrick was diagnosed in August of ’79, that September there was an article in the paper that said that the G and H wells were closed due to contamination.

DR: To me, it doesn’t take a scientist to figure out that, you know, the amount of illness in Woburn, you know, from drinking that water. You don’t really need to do a massive study to figure it out, it is plain and simple.

AA: We just gradually were connecting some kind of a problem.

DR: There were people that were involved, well, they weren’t involved, but they had come to a meeting that was open for anybody that had a child with leukemia. There were quite a few families that came that did not want to get involved because they didn’t want to make a bad name for the town.

EL: When Anne first felt it was the water and started investigating that, I don’t think anyone believed Anne.

AA: And I would get very angry at all those people that were saying that there wasn’t a problem. And I wished that they could walk in my shoes and his shoes, and they should be breaking down doors to find out if there was a problem instead of dismissing actually a credible argument from me that there was a problem.

DR: The city was more concerned about their real estate values and the bad publicity that we were making towards the community. But, I guess that it made us angry enough that that’s all the more you want to fight.

JS: We filed against John J. Riley Tannery, which we thought was a state company. We also filed against XYZ companies because we thought there might be others out there.
**Part Two: Parties**

**SECTION 2**

*The Defendants*

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<td><strong>AM: The Second Section focuses on the defendants. Procedural rules control the factual and legal basis for joining defendants. In addition, economic, political and social concerns impacted who would be held responsible in the Anderson Case. As you listen to the defendants, think about their strategies and the procedural rules that shape joinder.</strong></td>
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<td><strong>JF: You had 35 plaintiffs. Each one with different injuries. So you had every kind of injury from diarrhea to melanoma. From fear of cancer, psychiatric problems to real cancer. You had deaths. Everybody was in a different position. You had 35 different plaintiffs’ cases.</strong></td>
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<td><strong>MK: They got the wrong target in the case. I mean, I think they picked on Grace because it was a deep pocket, and the parents, and in this respect I would never want to make judgments about them, but they were confronted with, you know, smelly drinking water and discolored water, and they’d keep complaining. And the town would say, add chlorine to it or whatever, and so in my view, it was the stupidity of the city of Woburn not to recognize that they had a serious health issue here unrelated, I believe, to the groundwater movement, other than from that river.</strong></td>
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<td><strong>BC: From all the research we have done that, in fact, there wasn’t any scientific and medical evidence associating these chemicals with leukemia, and there still isn’t to this day.</strong></td>
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<td><strong>AL: One of the companies, of the three companies that were originally sued, came out and said they weren’t at fault. They had a leaky valve and trichloroethylene was leaking into the ground, which could have made it to the aquifer. Well, they paid their fine, and I think it was somebody by the name of Northeast, I’m not sure, some cleaning company, and they left the suit. The only ones that were left then were Beatrice and Grace. Well, that’s when it started to become very hairy over there, and everybody was walking on eggshells. But I kept expecting them to do what the other company had done and come forward and say, because I had known, and they had known, that they had been dumping in the backyard for years on a daily basis I might say. And to a quantity that would be at least a five-gallon pail daily, if not more.</strong></td>
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JS: Grace’s position was that, “we only used a little bit, and all we have is this little receipt that talks about four drums over many many years, and it is just teaspoons and teacups. And it was just little tiny bits.” And what Al Love did, is that, he said “no, no.” First of all he put people with the acts, and also his testimony led to the ... together with what we are finding in the field, led to our uncovering additional pits and dumping in which many, many drums were dumped into a pit where Barbas was finally forced to change his testimony and talk about major episodes of dumping. Well that totally changes the nature of the case from the one that Grace wanted, which was the little bits, you know, with teaspoons to, you know, extensive dumping on a regular basis.

AL: I just felt then I was on the wrong side. I knew I was on the wrong side. It’s something … I’d do it again in a heartbeat.

AM: A question often asked is why the City of Woburn was not a party to Anderson. After listening to the defendants, do you believe the city should have been a party to the lawsuit?

MK: I think one of the targets of the families should have been the city of Woburn because it was obvious that the wells never should have been placed where they were placed. That anything that went into the wells from the Grace or Beatrice or other sites was minuscule compared to what the Aberjona River was pumping into those wells every day.

MT: Well, I think someone brought it up, but they said we’d be suing ourselves because we’re the taxpayers.

DR: The city really believed that we were troublemakers and that we had no reason to be saying that it was the wells that made our kids sick.

AA: People did not appreciate anybody speaking ill of their town.

JS: Certainly we discussed filing a case against the city. But the decision we made was a strategic one. We wanted to focus in on the responsible parties, these companies. And we felt that if we brought the city in … first of all there were tort immunity limitations that would have applied, and it would have brought the city in, and it would have also raised a whole bunch of political issues about the city and the city’s responsibility. And so we made a strategic decision that that would deflect from the case and so we decided that we would just focus it just on the two companies.
Part Two: Parties
SECTION 3

Impleading Unifirst

BC: In retrospect, including Unifirst as a third-party defendant was the biggest mistake in the case.

AM: W. R. Grace impleaded the Unifirst Corporation as a third-party defendant. Do you agree with the attorney’s assessment that impleading Unifirst was an enormous blunder?

JF: I generally am not in favor of dragging in other parties and pointing fingers at other parties because it only complicates the case and brings in another set of lawyers and makes the case more difficult. My view, when you are defending cases, is to defeat the plaintiff not to point fingers at co-defendants. And I suggested that Unifirst was going to be trouble, and in fact, I think it turned out to be trouble.

BC: Impleading Unifirst as a third-party defendant was the biggest mistake in the case, but we didn’t go into it ignorant of the risks. We knew at the time that we decided to implead Unifirst that they were, if anything, a more likely source of contamination than Grace. They’re a big company, at least in the New England region, and they had a, I don’t know, 4 or 5,000 gallon tank of tetrachlorethylene in their building, just three or four doors down the street from the Grace plant. And defending this case was expensive. We frankly would have been happy to have some additional assistance from another defendant, working against the plaintiffs in the case.

JS: I think that it was a tactical decision that he did that happens in war that did not turn out to give the benefits that he wanted and we were able to take advantage of that. You know, it could have turned out differently.

BC: We weighed the pros and the cons and decided to take a chance and as sometimes happens when you take a chance, it came out wrong, they did settle with the plaintiffs very quickly for a million dollars. And that million dollars, I understand, was recycled immediately into prosecuting the case against Grace and Beatrice.
Part Three: Rule 11

THE SECTIONS

1. The First Motion
2. The Last Finding

Timeline of Events:
- 1982 W. R. Grace filed Rule 11 Motion.
- 1985 Yankee Report is delivered to Mr. Riley at Riley J. Tannery.
- 1989 Deposition of Riley with subpoena duces tecum.

AM: As you listen to the participants, consider how their approaches to the rules contributed to a fair resolution of the Anderson Case. Did the manner in which the rules were employed accomplish their stated purpose: the just, speedy, and inexpensive determination of an action in this civil dispute? Are there lessons from the Anderson Case that provide a model that you want to follow?

Part Three: Rule 11
SECTION 1
The First Motion

BC: The most startling aspect of my experience of the Rule 11 motion had to do with the way the Judge contemplated handling the hearing.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions
WS: I was on the advisory committee on the civil rules, and we worked on Rule 11 for a long time, and the draft that we submitted was eventually first adopted by the Rules Committee and then by the Judicial Conference and went through the process and was approved by Congress.
BC: I was aware that Judge Skinner, our Judge in the Woburn case, was a member of the committee of judges that drafted the amendment to Rule 11.

JS: The first day we went in, Judge Skinner made it be known that we want to get rid of the garbage around here, and I like this Rule 11.

BC: Knowing at the time, as I did from all the research we had done, that in fact, there wasn’t any scientific and medical evidence associating these chemicals with leukemia, and there still isn’t to this day, then to see a quotation from a member of the plaintiff’s legal team saying that they knew that was the state of the evidence as well seemed to me that it just called out for the filing of a Rule 11 motion.

WS: His motion was based on a press conference, I think it was a press conference held down in Providence, and a young woman who was associated in some way with Schlichtmann’s office, I don’t know what the connection was, made a comment that it hadn’t been established that this stuff – the TCE – was a cause.

JS: There was a big media attention on the filing of the lawsuit. That was a big surprise to me. And then that led to a motion, you know, against me personally.

BC: So, I moved, I moved basically to strike the complaint, the same effect as moving to dismiss. Jan Schlichtmann sometimes says that he felt it was targeted at him personally on a personal level, it certainly wasn’t. Rule 11 is there in the rules, it is meant to be used in appropriate cases, and I was using it to basically to further the purposes of the Rule.

JF: I didn’t think that in the beginning with a high-profile case brought by our citizens, some of whom were seriously injured, that any judge was going to throw the case out on Rule 11. So, I politely declined to join that.

BC: In some ways the most startling aspect of my experience of the Rule 11 motion had to do with the way the Judge contemplated handling the hearing.

WS: Well, we were in Courtroom Six, I was up on the bench, and the lawyers were all sitting around.

BC: Then he turned to Jan Schlichtmann and said, “Mr. Schlichtmann, take the witness stand. Mr. Cheeseman is going to cross-examine you under oath about what you knew on the day you filed your lawsuit.” Well, I was dumbfounded -- at least as dumbfounded as Jan was. I don’t think anybody thought that there would be a live cross-examination under oath of a lawyer about what they knew on the day they filed the complaint.

JS: I knew then that if I allowed myself to go on that stand and be cross-examined that I will be doing, you know, I would be taking the system and turning it upside down,
and that I would be abdicating my responsibilities as a lawyer.

BC: In the end, Jan suggested that, for the sake of his dignity, the Judge should ask the questions of him rather than me, and he should answer from counsel table as representations of counsel rather than under oath; and the Judge decided to do it that way. So, I had to then stand beside the Judge, the Judge was sitting at the bar, elevated, and I was standing in front of him at a somewhat lower level whispering my questions into his ear because my questions were written down, but I was the only person who could read my handwriting. The Judge would then repeat the questions to Jan—sometimes getting them wrong, so I would have to correct him—and Jan would then answer from counsel table.

WS: And so I had a hearing and Schlichtmann appeared with some lawyers from Washington who apparently had, they were a part of some general group that was interested in toxic torts and so on. And they came and said, “Yes, we’ve gotten opinions from acknowledged experts, and we are ready to go forward.” And I said, “Well, okay, that’s good enough for me.” And so we did. I mean I was inclined to at least give them a chance. So, I denied the motion.

Part Three: Rule 11
SECTION 2
The Last Finding

JH: The judge made a finding that Schlichtmann had violated Rule 11. That was the last finding in the case made by the trial judge, by Judge Skinner.

BC: The case comes full circle at the end. Jan Schlichtmann’s effort to get a new trial against Beatrice loses with a finding that he did violate Rule 11.

JH: I had no idea that the Judge would make it so easy to have such nice circularity to it. I think the Judge certainly had that in mind. The Judge has a very good memory of the first Rule 11 hearing because it was so contentious and because Schlichtmann was such an extraordinary character in that hearing. And I think it was the Judge’s very deliberate decision to punish Schlichtmann by making a Rule 11 finding, something that Schlichtmann objected to so vehemently the first time out.

WS: Then it came to the point of— I’d been asked also, I think, by the Court of Appeals to deal with sanctions, or at least there were motions for sanctions outstanding.

JH: Schlichtmann had a big problem in getting documents from Beatrice. They had all been destroyed according to John J. Riley. So he was missing things. He was looking for evidence that they had used trichloroethylene. There’s no question that they used perchloroethylene, and the case could have been based solely on that. There’s no question that the Beatrice land was grossly contaminated, and the case could have been based solely on that. Hence, the motion of a Rule 11 finding is...
the Judge – against Schlichtmann – is absolutely preposterous.

WS: For umpty-ump months and years, they had been asserting and pushing for the, and spending a lot of time trying to get evidence of the fact that TCE was used by the tannery plant. And I found out, I guess Facher called Schlichtmann to the witness stand, and Schlichtmann said, “I shouldn’t be called because I’m the attorney in the case.” He said, “But I’ll give you my investigative file.”

JF: This is very unique. It had never happened to me before. I doubt that any judge has ever taken the plaintiffs’ own, by taken I mean been given, the plaintiffs’ own investigative file, and had, yes, had he had that file at the beginning maybe he would have granted a Rule 11, but at the end after 78 days of trial and 23 days of inquiry, over 100 trial days, he looked at their file, and when he looked at the file, he said there wasn’t a rumor, a whisper, or an anonymous tip that they had to go on.

WS: Before the trial and up to the very day of trial practically, his investigators were telling him that the plant didn’t use TCE, and oh one of the principal reasons for a Rule 11 was to prevent people from bringing lawsuits and making allegations unsubstantiated by the facts.

United States District Court,
D. Massachusetts.
Anne ANDERSON, et al., Plaintiffs,
v.
BEATRICE FOODS CO., Defendant
Civ. A. No. 82-1672-S.

JH: The judge made a finding that Schlichtmann had violated Rule 11. That was the last finding in the case made by the trial judge, by Judge Skinner. And that finding was sent to the appeals court. The appeals court had maintained … kept control of the case while the judge made findings of fact and reported back to the appeals court.

DR: I think Beatrice won because they had Judge Skinner on their side. But, they probably had ten times more of the pollution than Grace did.

CN: I think by the time that trial was over, Skinner hated Schlichtmann and hated the case. It was a tar baby; he couldn’t get away from it.

JS: Judge Skinner’s Rule 11 finding against me at the end of the trial was so grossly unjust, so perverse an insult, and it stained my reputation, and it was a disservice to all that I had done, and it was just profoundly wrong.
WS: A lot of people think that the defendants were more at fault; I'm inclined to think that in Rule 11 terms the plaintiffs were at fault. In any case, I also knew that while the defendants could pay a fine or something, the plaintiffs probably could not. In fact there had been already items in the paper about Jan Schlichtmann losing his automobile and all that. So, I thought, well I'm just bringing an end to this whole business and say that the sanction for each is that they shall not benefit from the sanction of the other, which the Court of Appeals —

Anne ANDERSON, et al., Plaintiffs,
Appellants,
v.
BEATRICE FOODS CO., Defendant,
Appellee.
No. 88-1070
United States Court of Appeals,
First Circuit.
Heard Feb. 7, 1990
Decided March 26, 1990
Opinion on Denial of Rehearing April 30, 1990.

The Court of Appeals was very nice at this point. They said that I'd, I forget the phrase, but that I had fully understood and adequately complied with, or whatever, their orders. They said that, that kind of a split of a sanction was a little rougher, I mean a rough cut, and it was. I mean, I, it was a hatchet stroke rather than a scalpel stroke. But it … it’ll bring it to an end.
Part Four: Summary Judgment

THE SECTIONS

1. Motion in 1984
2. Motion in 1985

Timeline of Events:
- 1984 W. R. Grace filed the first Summary
  Judgment Motion.
- 1985 W. R. Grace and Beatrice Foods filed
  the second Summary Judgment Motion

AM: In the Anderson Case the defendants filed two summary judgment motions. Only defendant Grace filed the first motion in May of 1984.

Part Four: Summary Judgment
SECTION 1
Motion in 1984

Motion of W. R. Grace & Co. for Summary Judgment
(And Request for Oral Argument Thereon)

WS: Mr. Schlichtmann told me that he was relying on mouse testimony. I think I said to him that wasn't, that didn't appeal to me much.

AM: Defendant Grace argued that there was no scientific evidence that the chemical, TCE, caused or increased plaintiff's risk of contracting leukemia as a result of their exposure. In support of its motion, Grace filed expert witness affidavits. Do you think this is a good evidentiary basis for the motion? What did plaintiffs file in opposing the motion? What burden of proof did the Judge apply?

BC: We had been planning for some time to file a summary judgment motion, basically on medical causation focused on the leukemia cases.

JS: There were, actually, two motions for summary judgment. The first one was a brilliant tactical move that Bill Cheeseman did which was to get these very detailed affidavits.

BC: I felt that it would be a mistake to present a summary judgment motion that that
directly placed in issue the core, the central allegation of the plaintiffs; partly because I knew Judge Skinner really was more inclined to try a case that involved this kind of complexity. And partly because I know that it is too easy for plaintiffs to find some expert somewhere who will say “I think these chemicals did cause the leukemia, and I’m a doctor,” and then there’s the conflict of fact that has to be tried anyway. So I didn’t frame the motion that way. I tried to be a little more clever about it.

JS: And what he did is he had these multi-page affidavits from world renowned experts who said, we researched the world’s literature, and that no literature supports that children get leukemia from being exposed to these chemicals in water, and no self respecting scientist will get on the stand and say so. Very powerful affidavits.

JH: The leukemia issue, of course, was at the center of the case. There was much less in terms of compelling medical evidence that exposure to TCE and perchloroethylene, the other major chemical in the case, could cause leukemia. There was, there were a few studies. There was the Harvard Health Study primarily, which said that there was this correlation between exposure to the well water and the incidence of leukemia. I remain open to the possibility now. I’m not convinced. There is ... the first fallacy is post hoc ergo propter hoc, and it basically means “after the fact, therefore because of this fact.” I think that ... what it says in essence is, if I go to bed at night and wake up with a headache the next morning, therefore my headache was caused by going to bed at night. And you have the same problem in Woburn. You have contaminated wells and a cluster of leukemia. Therefore, the cluster of leukemia was caused by the contaminated wells. It makes sense. We look for explanations of unusual events and that explanation is ... seems like a reasonable one. But the scientific evidence for it, in my mind, still remains unclear.

JS: Anticipating that there was going to be such a motion is we undertook blood studies with the Mass General Immunopathology Laboratory, a very, very famous one which was doing ground breaking work in AIDS research and T-cells. And the results actually showed that they were abnormal and that they were fighting, on a chronic basis carcinogens, which was certainly consistent with our theory. We had animal studies showing that it increased leukemia in rats and mice, because rat studies just came out then.

WS: Mr. Schlichtmann told me that he was relying on mouse testimony. I think I said to him that wasn’t, that didn’t appeal to me much. But still it could have, it could have been worthwhile.

BC: Somewhat to my surprise, the motion was met with an opposition in which one of the plaintiffs’ experts -- we already knew he was in the case - filed an affidavit stating that there were approximately 35, I’ve forgotten the exact number, 37 articles and one personal, private communication showing that these chemicals in fact can and do cause leukemia.
JS: What we did in our affidavits is we approached it from a clinical basis and had a detailed affidavit showing the literature that says that these chemicals can cause, you know cancerous lesions in cells based on cell studies.

BC: Normally when an affidavit like that was filed by an expert, the articles would be attached because the normal lawyer would assume that the judge isn’t going to believe it unless he’s got the paper in front of him and sees the articles. This affidavit didn’t have the articles attached. That was a giveaway right from the start that there was something funny about the affidavit. It took us a little while to collect these because some of them were from very obscure journals. But we weren’t quite ready to file a reply brief and a counter-affidavit when the judge’s decision arrived.

JS: We put all those things together, and it made such a compelling case that Judge Skinner and without a hearing, denied the motion for summary judgment.

WS: It was plain to me that there was a lot of dispute as to material facts. And I think I denied it quite summarily.

BC: Course, one of the many ironies of this case is that, in retrospect, if the summary judgment motion I filed had been granted, it would have saved everybody a lot of time.

Part Four: Summary Judgment
SECTION 2
Motion in 1985

JF: I think summary judgment is always difficult to get.

AM: The second summary judgment motion in February 1985 was a joint motion by both defendants. They sought partial summary judgment for dismissal of some of the plaintiffs’ claims.

JF: I think summary judgment is always difficult to get. I can’t remember my state of mind with respect to summary judgment. It probably was sort of the chicken soup theory: it couldn’t hurt and might do some good. But I suspect I was not terribly optimistic about summary judgment being granted.

AM: Is Facher’s philosophy a good strategy for deciding whether to file this summary judgment motion? How would the United States Supreme Court cases decided since the Anderson Case have affected Judge Skinner’s rulings?

JF: Yeah, I thought summary judgment was a possibility because there was no real evidence that was in dispute that proved that Beatrice was responsible. And I didn’t think there was a disputed fact. And, but there were other, don’t forget that there were many other legal theories.
The judge did pare down the plaintiffs’ case on summary judgment. He did throw out certain counts, as I remember. And our thinking may have been, “Well, maybe one count will survive, but four won’t.” And sometimes summary judgment is very useful to narrow the issues. I doubt that I thought the entire case was going to get thrown out.
Part Five: Discovery

THE SECTIONS

1. The Conduct
2. The Plaintiffs' Depositions
3. Deposition of Al Love
4. After the Love Deposition
5. The Yankee Report

Timeline of Events:
- 1982 Discovery begins.
- 1983 Yankee Report is delivered to Mr. Riley at Riley J. Tannery.
- 1985 Plaintiffs deposed.
- 1985 Al Love Deposed.
- 1985 Al Love talked with Anne Anderson.

AM: The discovery rules seek to level the playing field to insure that each side has a fair day in court. Maintaining appropriate lawyer behavior is as important as following the procedural rules that control discovery. The Anderson Case demonstrates how difficult it is to achieve a truly level playing field.

Part Five: Discovery
SECTION 1
The Conduct

JS: It was war. It was war fought without guns.

AM: Listen to the participants talk about their experiences. What contributed to this incivility? Can current procedural rules protect against these behavioral extremes?

WS: I don't recall quite as much fuss about discovery in other cases as in this case.

JS: It was war fought without guns. It was war where the rules of civil procedure and the code of professional conduct were used as weapons.
JF: I’m a believer in lawyers acting responsibly and collegially together.

JS: We took two hours off for Christmas and two hours off for New Years, you know, during the afternoon, and somewhere in there my grandmother died, and I had to go bury her and spend a few hours to do that. And, you know, to my shame, did not appreciate, you know, because I was so consumed in this war.

BC: I think 13 depositions were taken on the last day in five different cities by a whole bunch of lawyers. One of the depositions lasted until about two that morning.

JF: Just when we thought discovery was almost over, we got a list of 30 more witnesses that were going to be deposed.

BC: But the judge wouldn’t relent on the timing. He wanted the case to go to trial.

WS: By and large, I said, “It’s too bad, you’ll have to send your assistants out to deal with it.”

Part Five: Discovery

SECTION 2

The Plaintiffs’ Depositions

DR: The deposition was one of my most hateful moments, I think, of lawyers.

AM: The plaintiffs do not have fond memories of having their depositions taken. Listen to what they say very carefully. How could the deposition process have been positive for both the plaintiffs and the defendants deposing them or is that just unrealistic?

AA: The first time I met, and the only time, excuse me, I met the defense lawyers were at the time in my depositions. And there is no getting to know anybody; you just answer your questions.

DR: The deposition was one of my most hateful moments, I think, of lawyers. I felt like they were putting me through the third degree and accusing me of doing things, you know, to my kids, you know where they were sick a lot when they were little.

AA: I guess I didn’t really expect what I felt were very, very silly questions. Like does your dog, or do your dogs have fleas?

MT: Did you use peanut butter? Did you use all the different things? What you used in your house. And it seemed silly to us.
Part Five: Discovery  
SECTION 3  
The Deposition of Al Love

BC: I told Al Love, as we told everybody, tell us everything you know about how materials were handled at the plant.

AM: The plaintiffs deposed Al Love because he was the receiving clerk at W. R. Grace, the person responsible for logging in chemical and other deliveries at the Cryovac plant. An ostensibly routine deposition of Al Love became a turning point in plaintiffs' case. The participants lead us through the deposition process.

AL: We were called into Boston by Bill Cheeseman, into his office, somewhere in Boston, I vaguely, I don't remember where. He knew that there was dumping done daily, but he thought it was minimal.

BC: I told Al Love, as we told everybody, tell us everything you know about how materials were handled at the plant. And we interviewed just about everybody who could possibly have known anything about the ration.

AL: We all left under the same agreement that we were going to tell the truth. OK, fine. I didn't have any problem with that. Well, what I didn't realize was that they, in their local talks with Cheeseman and Stoller, the various Grace lawyers, they weren't telling them everything. Well, the morning of my deposition, everything was going quite normal, from what I understood, and I was being asked what were normal questions in regard to receiving and everything that went on in the plant. And then we had a break and 'cause I had very forthcomingly said that we had dumped daily. And that's when that aroused Mr. Cheeseman. He said, "I need time to insert an objection." Which, at that time, I thought, I didn't know, I just thought it was odd. But because he didn't rehearse that part with me at all.

JS: I asked him at my partner's suggestion, did you have any health problems or anything? Were you concerned of anything?

AL: And the next thing I knew, out came the fact that I had a large family. And immediately the man who was reading the newspaper in the deposition started, "I'm not going to sit here and listen to you talk about Al Love's eight children." Well, right away, my hair went up again.

JS: And I remember it was the attorney for Beatrice laughed and said, "Oh what are you going to do? Make him a plaintiff as well?" Kind of a little joke.

AL: I was being contradicted and stopped by my lawyer, Grace. Every time he asked a question that I answered too quickly (correctly), he wanted to object. So, I had to have a -- what do they call them now? -- time-out, or sidebar, whatever? And we went off
and had a little chat, and I, then I hit him with a few questions, which he didn’t, he couldn’t answer correctly. So I said, that’s when the wheels started going off in my head as far as turning “am I on the right side here?”

Part Five: Discovery
SECTION 4
After the Love Deposition

JS: Having the facts and having all these witnesses come forward. Had there not been Al Love, I would not have been able to or cannot imagine how we would have gotten to some people who I actually were able to get to.

AM: Al Love believed he was on the wrong side of the litigation. He became a whistleblower. What effect did his actions have on the Anderson Case? How did Al Love’s deposition impact him and his family?

EL: After his deposition with Jan Schlichtmann, he was very upset the way the deposition went. He felt the truth was not being told.

AA: One evening, it was a summer evening, and there was a knock at the door. I went to the door and I really ... you know, he was familiar, but I didn’t know who he was. And he said, “Hi, Anne, I’m Al Love.” And I said, “Oh, come on in.” He came in, and he didn’t quite know how to start. He said, “You know, I know everything that’s been going on,” he said, “at first I thought that you people were really barking up the wrong tree,” and he said, “but the more I think about it, and the more I see, and the more I’m aware of,” he said, “you know, I think I would like to help.” And so I said, “Well, would you agree to speak with Jan Schlichtmann?” And he said, “Yes.”

EL: Well, Jan Schlichtmann had mentioned, had asked him if he would look at other depositions of other Grace employees, and he said he would. And the next day those depositions were delivered to our home.

BC: We thought immediately of filing a motion to stop this practice, maybe even to disqualify the plaintiffs’ lawyers from all of this. So we did the research, and to our astonishment - to my astonishment - discovered that it was perfectly legitimate under the rules. This isn’t so in every state, but in Massachusetts and in many states, perfectly all right for a lawyer to talk directly with employees of a corporate opponent, even though the corporation is represented by counsel. And that obviously doesn’t extend to high level executives or others who are directly involved in the making of legal decisions.

JS: Had there not been Al Love, I would not have been able to, or cannot imagine how we would have gotten to some people who I actually were able to get to.

BC: One or two of these employees had already had their depositions taken and had
made certain statements about what they knew and what they didn’t know, and now they were taking a different position. The result of it was that I immediately called up Jan Schlichtmann and said, “I think you’re going to want to resume the deposition of this witness, and I won’t object.”

EL: Well, when he went to the other side … he truly was ostracized at work. He ate lunch alone. Office parties – he was never again invited. It was very hard for him, very hard.

BC: We had to be very careful of course, and anyone in this kind of a situation has to be because there are whistle blower provisions in the Superfund statute.

AL: Down the line, I asked Bill Cheeseman, “Should I get my own lawyer? What am I, you’re talking only from Grace’s point of view. My family is totally separate.” He said, “Well, if you think it is necessary,” he said, “I’ll advise you, you should get a lawyer.” I said, “Thank you. Then we have nothing else to talk about.”

Part Five: Discovery
SECTION 5
The Yankee Report

WS: There was something called the Yankee Report, which Riley had commissioned to have done.

AM: This is the story of discovery that simply didn’t level the playing field. Procedural rules applied to requesting discovery and to following through if documents are not produced. What should Schlichtmann have demanded when he did not receive the documents? Whose responsibility is it under the rules? How did the Court deal with the failure to comply with discovery?

WS: There was something called the Yankee Report, which Riley had commissioned to have done. And it had to do with the water flow from the tannery area down the hill, down this swale they called it, which is kind of a little valley. And it had not been produced in discovery.

MK: That became the famous report that Schlichtmann uncovered after the trial and believes that Beatrice or Hale and Dorr or somebody had withheld, that document was asked for during pretrial discovery, not by name but by category, give me all reports involving the Riley Tannery or what have you.

JS: Seven years of misconduct by Beatrice, its attorneys, its consultants, and its representatives. Misconduct involving false representations to the Court, misconduct involving the concealment and suppression of not one document, but many documents.
WS: Schlichtmann made a demand on the EPA for their materials, and there in the materials was this Yankee Report. And Schlichtmann actually said, “Well, why the hell didn’t I see that before?”

MK: Beatrice lawyers asserted an objection to producing the document on the ground that there was a privilege, that it was either attorney-client privilege, therefore was not subject to discovery, or it was what we call attorney work product, which means it was part of an attorney’s work and not subject to discovery. But they asserted that objection in a very general way, and it was not related to that specific document.

JH: There is no dispute about the fact that he should have gotten these documents. Even the Judge acknowledges that he should have gotten them. But the judge found that …

WS: It wouldn’t have changed the result, because there was no evidence of any pollution up at the head of this swale where the factory was. Well, certainly not TCE pollution.

JH: This was not a long and drawn out hearing. And he reported to the Appeals Court … the Appeals Court said, “wait a minute, this is much more serious than that. There is misconduct here, and, you know, maybe this one document wouldn’t have changed the course of the trial, but an able trial lawyer builds on what he has, and maybe there are other things.” The case goes back, they remand it to Judge Skinner for further hearing, and what does Schlichtmann turn up?

JS: The disclosure of not just the one report but hundreds of pages of documents, test results, and studies, and all sorts of things that would have supported my case, which also led to a whole pattern of conduct of where witnesses, employees for the tannery, you know, lied about documents, or the existence of documents, and, I mean, it was all part of a finely weaved web of deceit and lies which totally corrupted the presentation of our case. What this evidence show, what these documents show is that Beatrice won by cheating, and a win by cheating is no win at all.

JF: Generally, these were very baseless accusations; I called them scurrilous in open court against us, because I think the case was fairly tried, fairly won.

WS: Miss Ryan, who was attorney for the Riley interests, filed a motion of some kind … filed an affidavit I guess, saying that she’d only concealed the Yankee … I’d said that she’d lied about the Yankee Report in my report … and she said that, in this affidavit, that the only reason she lied about it was that she’d shown it to one of Facher’s assistants, and he had told her that Beatrice wouldn’t pay the freight if she revealed this.

CN: When a lawyer for Riley, working with the defense team of Facher and company, was actually ready to come forward and say in affidavits, swear under oath about the
skullduggery that was going on with the defense spoliating evidence, Judge Skinner shut her down. Basically said, "I refuse to accept your affidavit; I won’t let you file it. You should have come forward with this information sooner, and because you didn’t come forward sooner and tell the truth, I’m not going to let you do it now."

WS: The trial of cases has got to be a sort of a one-shot deal, and once you’ve had your chance to make your say, to say your piece, that’s the end of it. You don’t come back after the donkey’s tail has been pinned on you and start with another story. And I also felt that the whole case had been going on long enough, and I was not about to start another investigation. I don’t know whether that was right or not, but anyway that was the basis on which I did not proceed.

JF: In retrospect, if everybody knew that such a big fuss was going to be made, that you would say, “oh, turn the document over.”
Part Six: Jury System

THE SECTIONS

1. The Anderson Jury
2. Jury Selection
3. Special Interrogatories
4. Jury Deliberations

Timeline of Events
- 1986 February – Jury Selection

AM: This part explores a philosophical and practical question. What does it mean to preserve the “right to jury trial” in civil cases?

Part Six: Jury System
SECTION 1
The Anderson Jury

JH: So the families got their story, or at least part of their story, before a jury. And I think that’s a remarkable testament to our system of justice.

AM: The attorneys, the Judge, the jurors and the plaintiffs express differing views about having the jury decide the Anderson Case. How important is the right to jury trial in a democratic society? Should the participants have explored other alternatives? What were they?

WS: If the experts are good and the lawyers have done a good job of taking the experts along step by step, I think the jurors are as good at it as most judges.

JF: I like juries. I’m very pleased with juries. I think they do the right thing most of the time. I think they do get it, and if they don’t get it, the lawyers are the persons that ought to be held responsible, because it’s the lawyer’s job.

MK: I think if you had a sophisticated judge hearing this evidence, I would be more comfortable in a case like this with that kind of a fact finder than I was in this case.

JS: I felt that the jury verdict was ridiculous.

JH: The families got their story, or at least part of their story, before a jury. And I
think that’s a remarkable testament to our system of justice.

AA: It would be better if you didn’t have to use the legal system. It would certainly be simpler, but the problem is that you will never have industry admitting culpability to something so gigantic as what was presented to them.

JF: Would it be better to have something like the Industrial Accident Board where every victim of so-called environmental injuries could get compensated? Maybe. Plaintiffs’ lawyers wouldn’t agree with that. They want, and rightfully so, plaintiffs want big money for injuries.

JC: What did I learn from the Woburn jury case? Be careful what you drink, be careful what you throw away. Really. Just to be a little more aware of what the plastics can do and what the dyes can do and that’s about it -- just be a little more aware of your environment.

Part Six: Jury System
SECTION 2
Jury Selection

BC: Depending on the nature of the case, maybe you want women, maybe you don’t; maybe you want older people, maybe you want younger people.

AM: Constitutional cases and procedural rules control jury selection. W. R. Grace attorney, Bill Cheeseman, raises the issue that probable prejudices, traceable to gender and ethnic background, probably have an effect on jury decision making. What criteria would you have used to select the jury in the Anderson Case?

Rule 47(b) Peremptory Challenges:
The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870

BC: From making decisions about striking potential jurors from the juror pool depending on the nature of the case, maybe you want women, maybe you don’t; maybe you want older people, maybe you want younger people. It all depends on your sense of what kinds of thinking that they’ll go through and what kind of decisions they’ll make. You have to be aware of potential prejudices, whether they be ethnic or gender-based or religious or whatever it might be.

JC: Oh, yes, I was very surprised that I was selected for this jury because my father died of leukemia, and I figured that was it, they’re not going to wanna talk to me. But they did. Two seconds flat, and I was very, very surprised.
**Part Six: Jury System**

**SECTION 3**

**Special Interrogatories**

<table>
<thead>
<tr>
<th>CN:</th>
<th>I don’t think the jury understood the special interrogatories. I don’t think I understand the special interrogatories.</th>
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</thead>
<tbody>
<tr>
<td>AM:</td>
<td>In the two sections that follow, the participants discussed the special interrogatories and their impact on the jury.</td>
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<tr>
<td><strong>Rule 49(a) Special Verdicts:</strong></td>
<td>The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.</td>
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<tr>
<td>WS:</td>
<td>I felt that there should be interrogatories because there were so many issues in the case, and it was certain to be appealed, by however it came out; and it would be important to know how the jury found on specific points.</td>
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<tr>
<td>BC:</td>
<td>We proposed a draft, which we felt was simpler than the one that the judge used. The plaintiffs didn’t like our draft. They had one of their own.</td>
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<tr>
<td>JS:</td>
<td>I opposed the questions, and their phrasing, and ... but, you know, we were, we did this over a process of, I think it was like two or three days in his chambers, and, you know, he could care less about what we thought.</td>
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<tr>
<td>BC:</td>
<td>And the Judge was about ready to start the case, had absolutely no patience for the lawyers fighting over the wording of the interrogatories, said, “I’m going to do it myself.” And he sat there, and he wrote the questions out.</td>
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<tr>
<td>WS:</td>
<td>And we finally settled on a form that everybody agreed to. I think I made some comment at the time that they weren’t perfect, but we’d go forward. And so we did.</td>
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<tr>
<td>HC:</td>
<td>We had two sets of questions went for each company that we had to decide. And I think they were the most complicated things that we had set, really, even established through the trial. They were much more complicated than anything we had heard or seen.</td>
</tr>
<tr>
<td>CN:</td>
<td>I don’t think the jury understood the special interrogatories. I don’t think I understand the special interrogatories. I defy anyone to read the special interrogatories and understand them.</td>
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<tr>
<td>WS:</td>
<td>I’ve looked at them again. I don’t see that they were that confusing. They were, they had the defect of having been created by a committee, so to speak.</td>
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<td>JF:</td>
<td>The first question, which is the question which relieved Beatrice, was clearly</td>
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understandable. The first question was, in substance, did Beatrice use and dispose of these chemicals, and the jury said “no.” That was an easy question to answer and easy to understand because all they had to do was consider was there evidence of use, was there evidence of disposal? Not a big complicated, scientific issue. The other questions began to deal with at what point did the groundwater reach the wells, which did involve more complicated issues.

WS: It didn't work. The question concerning the Grace Company, which in my opinion was very clearly at fault.

MK: The answers that we got to those interrogatories would suggest that no one really looked at all the questions as a whole because there was inconsistencies in the answers.

JS: How could we expect jurors, when no expert would or could or did present such an opinion, how could we expect jurors to decide what month and year, like it was a bus station. Oh, trichloroethylene, oh it's coming out, oh, it's September, you know, it was just nonsense.

WS: It was a very important question. Because the wells were closed in, I don’t know, the late 70’s I guess, '79, and if the stuff didn’t get down there before the wells were closed, you don’t have any causal connection. So that was a very important question. And they reported that they couldn’t answer it, and that was a real problem.

Part Six: Jury System
SECTION 4
Jury Deliberations

JF: The time when a verdict comes back, you know, is a very exciting, scary time for all lawyers, plaintiff and defendant.

AM: Special interrogatories were employed to focus jury deliberations. However, whether the interrogatories accomplished their purpose remains a controversial issue. What devices helped the jury? What additional procedures might have been used? Whose responsibility was it to ensure that the jury comprehended the scientific evidence?

JH: They thought ... going into ... as William Vogel told me, they thought going into the jury room, they were going to simply answer yes or no as to liability for these companies.

BC: It was clear from their faces when at the end of the evidence he told them he was going to have some questions for them, that they were shocked.

JC: The questions that the judge asked us to fill out -- no, we didn’t understand them, I didn’t, and I know that there were a lot of other jurors, we looked at them, we read, and I can remember somebody saying, “They kidding?” you know, “What does this
JH: I think they understood the fundamental principles, that W. R. Grace and Beatrice Foods' land was contaminated with these chemicals, that the wells were contaminated, and that there was a case beyond that contamination, that there were kids who had leukemia. That was in the opening arguments of all three parties to the case.

JC: There was a lot that we didn’t understand. Like the chemicals.

HC: The questions that the judge gave us at the end of the trial were very complicated. Having to deal with specific dates and specific four different chemicals that he wanted to know if they got into the groundwater and contaminated Wells G and H.

AA: I think the jury ... I think they had a very difficult job. I think what was presented to them ... I would have had a difficult time comprehending all the scientific aspects of this case. Ground flow and water and contamination and clomes and aquifers and epidemiology and ... it was impossible for them to understand it all.

WS: I did permit them to make notes because it was going to be a long, long trial.

JC: We asked the judge to explain just what “preponderance” was. So he called us all back in, and he explained, “it’s an overabundance like of the, ah, would you call it? the evidence.” It had to be more than just a little evidence, it had to be a preponderance. And that was the word that really stuck in our minds and that we really had to prove the preponderance.

CN: Jan didn’t do as good a job as he could and should have done in the closing argument to the jury. Jan had the opportunity to speak to that jury and say, “Here are the crazy questions that the judge is going to ask you to resolve, here’s the way you should answer them, and here’s the evidence that would support just how you answer this one this way and this one this way. That is, he could have taken them on a guided tour that once they got inside the jury room would have left them feeling solid, if they had wanted to go Jan’s way.

MK: When I gave my closing argument in the case, I don’t think I assumed that they didn’t understand what the interrogatories were. I thought by that time they probably would have understood enough about the evidence so that they could have answered them. But apparently they didn’t based on what the answers were.

JF: The time when a verdict comes back, you know, is a very exciting, scary time for all lawyers, plaintiff and defendant. Even on television, you sort of hang there while the jury reaches a decision. So it was a moment of, you know, great anticipation. It’s like the first parachute jump, you know, you’re always excited.

JC: I voted guilty for Grace, and I thought Beatrice was guilty too, but the word preponderance came in, and you just couldn’t do it, I mean to be fair, there wasn’t that
much evidence.

<table>
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<th>JF: My personal feelings were joy, relief, in some strange way, disappointment that I wasn’t going to be the center of this case anymore, but it was a whole mixture of things. Vindication, pride, all that mixed up in one, and automatically, you know, when the judge said, “Well, we’ll now schedule further events,” I just charged forward, and he said, “No, Mr. Facher, you’re not going to be needed anymore.”</th>
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<td>AA: They were scientific people, and I think that they tried and, you know, they were people with their own feelings and their own inability to understand all that, and I understand that they, you know, would have a problem comprehending everything that was presented to them, so I think that they probably did the best that they could in their own hearts and, you know, I don’t blame them or fault them for however they found or what they thought.</td>
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Time Code: FILMS FOR JUSTICE
(16 Minutes) End of Part Six: Jury System
Part Seven: *Battle of the Experts*

THE SECTIONS

1. Plaintiffs' Expert  
2. Defendant Grace's Expert  
3. Defendant Beatrice's Expert

<table>
<thead>
<tr>
<th>Timeline of 1986 March - Battle of the experts at trial.</th>
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<td>Events: July - Battle of the experts at trial.</td>
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BC: The real subject of Phase One of the trial, the only part that was actually tried, was hydrogeologists on all three sides testifying as to how groundwater flow works, how transport of contaminants works in the groundwater.

Part Seven: Battle of the Experts  
SECTION 1  
The Plaintiffs' Experts

MK: George Pinder wasn't as effective as he might have been because he didn't do his homework.

AM: Dr. George Pinder was a key witness for plaintiffs. Everyone thought he would be impressive in the courtroom. However, by the time he left the witness stand, Pinder's testimony was not so highly regarded. As you listen to the participants discuss Dr. Pinder's testimony, identify what went wrong.

CN: The first part of the trial dealt with the question, as Skinner set it up, of whether the defendants had polluted the wells.

JH: George Pinder was going to testify to groundwater travel of the contaminants, primarily TCE and perchloroethylene. And his testimony was critical for two reasons. One was he had to say that the contaminants that had been dumped on the Grace land and the Beatrice land had traveled underground and gotten to the wells. That in itself was difficult enough. He also had to say, if it was true, presumably, that the contaminants had gotten there within a specific time, so that the Woburn families were exposed to it during that time.

BC: George Pinder, who was the Chairman of the Geology Department at Princeton, and was one of the plaintiffs' chief hydrogeological witnesses and certainly had a stellar reputation. And we were concerned about that. In the end it turned out that he
made a serious mistake in his preparation for testimony.

MK: George Pinder wasn’t as effective as he might have been because he didn’t do his homework. He had not adequately studied the Aberjona River. For some reason, he never read a lot of the reports that had been done about the river.

JF: He was used to lecturing and having his word accepted. And the idea that I would challenge everything he said and the manner in which he said it was foreign to him.

BC: Pinder’s testimony was that the river did not lose water to the wells when they were pumping. And that therefore ... and the importance of that was that there were lots of sources of contamination upriver, the Indusraplex Superfund Site and other industries. And it was part of our case that the contaminants that were found in the wells didn’t come from the Grace site, they came from the river.

JH: There was a pump test conducted by the EPA just before the trial began, and all parties to this case were awaiting that pump test and the results. And the results of the pump test made it abundantly clear to Pinder that the stuff had traveled very rapidly, in fact, under the river. That the river posed no problem whatsoever in the transport of contaminants. It didn’t quite work out so neatly in the trial though.

BC: Jerry Facher timed his cross-examination on that point so that it came right at the end of the day, a standard trial lawyer technique to make sure that the jury has something exciting and helpful to sleep on overnight and hopefully remember.

JH: George did not account for the water that was drawn by the wells out of the river. He’d noticed ... he knew that some water would be drawn out, but he didn’t account ... for some reason, he completely overlooked it when preparing himself for this case, and Jerry Facher did not overlook it.

BC: And on cross-examination, he was shown the downstream stream gauge data, which demonstrated as a simple matter of subtraction, that an enormous volume of water was disappearing from the river when the wells were pumping.

CN: And that allowed Facher to say, “See, when you turn the wells on, it comes out of the river.”

BC: So that was quite a dramatic scene at trial.

JH: The wells, when they begin pumping, draw water out of the river. If the river can satisfy the wells, then they’re not going to be drawing contaminants from the Beatrice Foods’ land.

BC: And the next morning, Mr. Pinder had some sort of explanation that didn’t hold water, if I may say it that way.

WS: He was asked about the rate of travel from the Grace place, and he said, “Well, I
was only asked to work that out day before yesterday.”

CN: George, instead of presenting this in a good solid, logical fashion, decided to become autobiographical about it and he said, “Yes, I was thinking about this problem in the shower, and here’s the answer.” Well, it is the answer, and it is the right answer, but he just didn’t need to say that he thought about it in the shower.

BC: Judge Skinner referred to that ever after as “the epiphany in the shower.”

**Part Seven: Battle of the Experts**

**SECTION 2**

*Defendant Grace’s Expert*

<table>
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<tr>
<th><strong>CN:</strong> Guswa was their best witness, and definitely an excellent witness.</th>
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<tr>
<td><strong>AM:</strong> Dr. Jack Guswa, like Dr. Pinder, was an extraordinarily able witness, but he too ran into difficulties. Consider how the pretrial process might have improved Dr. Guswa’s trial performance. What makes an able courtroom presentation by an expert witness?</td>
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<tr>
<td><strong>CN:</strong> Guswa was their best witness.</td>
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<td><strong>BC:</strong> He was well known in the field because he had come up through the U.S.G.S., the federal geological agency.</td>
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<td><strong>CN:</strong> Definitely an excellent witness. He was well spoken, presented very well. He was like a teacher in court.</td>
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<td><strong>JC:</strong> It was almost a teaching class on the chemicals.</td>
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<td><strong>BC:</strong> We had a little ancient geological history about glaciation in New England and the effects of that on river valleys and soils, and the porosity and permeability of soils and all that stuff. It really did put the jurors to sleep.</td>
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<td><strong>MK:</strong> How we defended the issue of the movement of the chemicals from the Grace site to the wells was we established through expert testimony that, because of the nature of the soil conditions between the Grace facility and the wells, it would have been impossible or unlikely that chemicals of this nature could have moved through the groundwater from that distance.</td>
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| **CN:** If we couldn’t break through that, we were in trouble, because that was the issue as far as Grace was concerned. But it didn’t make any sense to me because, well, first of all, we fully believed that the stuff got there. So, you start from that and see where the hole is in the expert’s testimony. So, basically what I did was go and take the formulas that he had used and understand them a little deeper by going and doing some work on the underlying books. And using his structure was able to show that with the amount of rainfall that flowed, and with the drain being as plugged up as he said it
was, the W. R. Grace property would have been full of water. It would still be sitting there at the level of 10 feet above the ground. And Jan liked that.

BC: On cross-examination, Jan Schlichtmann asked basically a hypothetical question, “Assume there were no fractures in the bedrock, then isn’t it true that there wouldn’t have been enough room in the soil to carry all the water, given your theory about velocity, Mr. Guswa?”

MK: It made certain assumptions that Jack Guswa would not agree to, and finally Judge Skinner said, “You must agree to these assumptions for purposes of the question.”

JH: Grace never successfully rebutted the ten-foot wall of water.

MK: If you get the witness to assume certain things that aren’t true, and then you bring that witness to a conclusion, as long as the witness can maintain that “yes ... I mean, if the moon’s made out of blue cheese, then certain things come from that, but I don’t think the moon’s made out of blue cheese.”

JH: It’s odd the way these things happen, I mean, I think everyone there watching the trial ... certainly Jerry Facher appreciated what Schlichtmann had done, what Nesson had done, but I don’t know that it had that much of an effect on the outcome.

MK: It was not nearly as dramatic in our minds, meaning my mind, Sandy Lynch’s mind, the other Grace people, lawyers there, as Jonathan Harr makes it out to be. I’m sure in Charlie’s mind it’s one of the great courtroom demonstrations of all time.

Part Seven: Battle of the Experts
SECTION 3
Defendant Beatrice’s Expert

CN: Their crazy “faccota” (Yiddish expression: “lousy, ridiculous.”) expert that comes in and tries to say it’s because of methane-eating bugs …

AM: This last section examines so-called junk science in the courtroom. Beatrice’s expert testified that microorganism made their home in the tannery soil and devoured the chemicals that might have been in the ground. Judge Skinner allowed this testimony at the trial, although he was a bit reluctant.

MK: Jerry put up an expert witness who had this kind of wacko theory that the chemicals were eaten by bugs or some ... I mean, where he ever got it, I’ll never know.

CN: Their crazy “faccocta” expert that comes in and tries to say it’s because of methane-eating bugs that he can definitively say that the trichloroethylene was not on the ground prior to a certain date. I mean, with no support. I mean junk science like
you couldn’t believe.

WS: And on cross-examination he was asked if he’d ever seen this, and he said, “Well I heard about it happening out in Arizona.” That was terrible.

AM: The Supreme Court revisited the issue of use of scientific and technical information at trial.

Supreme Court of the United States
William DAUBERT, et ux., etc., et al.,
Petitioners.

v.
MERRELL DOW PHARMACEUTICALS, INC.
No. 92-102
Argued March 30, 1993

Only evidence that is relevant and rests upon a reliable foundation is admissible. What pretrial rules are available to deal with this chemical-eating bug expert testimony?

Time Code: FILMS FOR JUSTICE
(12 Minutes) End of Part Seven: Battle of the Experts
Part Eight: *Motion for Judgment as a Matter of Law or Directed Verdict*

THE SECTIONS

1. Motion for Directed Verdict
2. Post Trial Rulings

Timeline of Events:

- **1983** Yankee Report Is delivered to Mr. Riley at Riley J. Tannery.
- **1986** Feb. - July - Trial.
- **1986** June - Beatrice’s directed verdict motion granted in part.
- **1986** July - Beatrice’s directed verdict motion granted.
- **1986** September - Plaintiffs settle with W. R. Grace. Motion for new trial dismissed.
- **1986** September - Final judgment entered for Beatrice.
- **1989** Judge Skinner’s Findings on Rule 11 and Rule 37.
- **1990** Appeals Court accepts Judge Skinner’s Findings.
- **1991** EPA ordered $69.5 million cleanup of Woburn contaminated sites.

AM: In this part we examine the Federal Rule 50 motions in the *Anderson* Case. *Anderson* uses the old terminology “directed verdict” and “judgment notwithstanding the verdict” or colloquially called the *JNOV*. 
Part Eight: Motion for Judgment as a Matter of Law or Directed Verdict

SECTION 1

Motion for Directed Verdict

BC: In a very complex and lengthy case, a judge always ought to deny, almost always, ought to deny a directed verdict motion.

AM: Both defendants filed motions for directed verdicts after the plaintiffs finished presenting their evidence. Judge Skinner granted partial directed verdicts limiting the evidence the jury could consider. Listen to the participants discuss these motions.

Civil Action No. 82-1672-S:
MEMORANDUM OF W. R. GRACE & CO. IN SUPPORT OF MOTION FOR DIRECTED VERDICT

BC: I don’t now recall who filed directed verdict motions. I’m sure we did. The plaintiffs, I don’t think, could have. But it was all sort of pro forma and preserving appellate rights, because nobody expected the Judge to grant anybody’s motion.

Civil Action No. 82-1672-S:
MEMORANDUM AND ORDER ON MOTIONS FOR DIRECTED VERDICTS, June 9, 1986

JH: Judge Skinner made a ruling, a directed verdict ruling, that eliminated from Schlichtmann’s case all evidence of tannery dumping and waste on the tannery prior to 1968 when the second well opened up. Why Skinner made that ruling is something I, to this day, don’t understand.

WS: The wells were across the river and upstream. And my theory of the case was that for a tort of this sort, you have to have some ... you either know or should have known of the risks to other people.

JS: These directed verdict rulings were things that said, we’re not going to let you present to the jury any disposal activities prior to September of 1969, which was most of our disposal activities, because it wasn’t until then that Riley got a letter from his engineer saying that his pumping well was being influenced by the City wells. That somehow his liability couldn’t start until he got a letter from his engineer. A totally ridiculous legal basis for the ruling, but now he cuts out most of our case that’s going to be presented to the jury, with no indication that this would ever happen.
WS: I said to Schlichtmann that I was very doubtful about admitting this testimony, and Schlichtmann said... I said to him, "Are you going to tie this in." He said, "Yes," but he never did, and so, even if it were true, that there was a spill, there was absolutely nothing to indicate that this -- whatever it was on the land -- contained TCE.

JS: And now six months of presentation of evidence all out the window, and now we’re based on a thread in front of the jury.

JC: I voted guilty for Grace, and I thought Beatrice was guilty too, but the word preponderance came in, and you just couldn’t do it to be fair, there wasn’t that much evidence.

WS: And it was a funny thing, the jurors were very talkative after the trial, and one of them said, “Well, the Judge wouldn’t let us deal with the evidence from the purported geologist who had testified that from an old aerial photograph that there was a spill from the tannery down there.” And I was really quite appalled by that because, first of all it wasn’t terribly believable evidence, and secondly, there was absolutely no tie-in between that evidence and TCE. It shouldn’t even have been allowed in.

BC: I think that, in a very complex and lengthy case, a judge always ought to deny, almost always, ought to deny a directed verdict motion. He’s always going to have the opportunity at the end of the case to revisit that issue.

Part Eight: Motion for Judgment as a Matter of Law or Directed Verdict

SECTION 2
Post Trial Rulings

WS: The plaintiff had not satisfied its burden of proof that any material migrated to the wells.

A.M. The jury verdict found that Beatrice did not dispose of chemicals at the Beatrice site. Beatrice’s attorneys then requested the entry of judgment, dismissing plaintiff’s case against Beatrice. As for W. R. Grace, the jury answered the special interrogatories inconsistently. Grace’s attorneys filed a motion to dismiss and a motion for a new trial.
JH: The judge made several mistakes after the case was over with. He made a post-jury ruling, a finding of fact that contaminants from the 15 acres did not get to the wells, that George Pinder’s evidence was not credible, and that John Drobinski’s evidence about dumping before the wells had closed, dumping before 1979, was not credible. And both of those I think were flat out incredible, to me, incredible rulings to make. I mean clearly this 15-acre piece of property had been littered with stuff before 1979.

JF: They never had any direct evidence connecting Beatrice with the use and disposal of the chemicals in the case. You do not use trichloroethylene to make leather. You just don’t. Just as you don’t use vinegar to make scrambled eggs. I mean it’s just not an ingredient of leather making. And that was the problem. And they didn’t have the disposal.

JH: By the time the case was over in late 1986 or early 1987 the EPA issued its final report. And they cited five parties who were responsible for the contamination of the wells. W. R. Grace and Beatrice Foods were among them. And the EPA, I believe, is just about as impartial as any party to this case could be. No question in the EPA report that Beatrice Foods, the 15 acres owned by Beatrice Foods, was responsible for contaminating the Aberjona aquifer from which the wells drew water.

WS: I said that the plaintiff had not satisfied its burden of proof that any material migrated to the wells. It was later established that it did, by the, at least the EPA found it did. But the evidence that was adduced in the trial, in my opinion, did not, and so I so found.
AM: Consider that the EPA final report established that Beatrice Foods and W. R. Grace were among the parties responsible for the contamination of the municipal wells. Why didn't Judge Skinner grant the directed verdict motions originally?

WS: There was this piece of evidence that put it together, which the jury could find. And there was diverse expert testimony. One expert saying yes, the other expert saying no. There was an issue of fact to be tried by the jury.

JF: In Beatrice’s case, and as the judge pointed out later, he discovered they had no evidence.

MK: And when the jury exonerated Beatrice first ... they treated the case against Beatrice and then the case against Grace, Charlie Nesson put his hands, his head down on his hands, and then they hooked Grace, and Nesson didn’t react one way or the other to the fact that Grace had been held liable. Now at the time, I had no reason ... really understanding why Charlie had done that. Now, and shortly thereafter, I knew. Their plan was to have both of us found liable on the hydrogeology case. They then would have settled with Beatrice, probably for a significant amount of money. And then they would have had the resources to prosecute the case against Grace. When Beatrice was exonerated, Nesson knew at that moment they were dead, because they did not have the resources to pursue the case against us.

AM: Were the final results in Anderson fair?
Conclusion by Donna Robbins

AM: Last we share with you a comment by one of the plaintiffs in the Anderson Case, Donna Robbins. The movie producers of A Civil Action had invited the real players to visit the movie set during the filming. Donna Robbins brought her father with her. It was lunchtime.

DR: As we walked out in the back, Jerry Facher was standing by a trailer hitch eating his lunch and I said to my father, “Oh, I think that is Jerry Facher.” I knew he was there that day, but it was the first time I’d seen him. I was really scared to run into him. So, we were just sort of walking by, and I said to my father that I don’t think that I can just walk by, he’ll probably know who I am.” I just felt funny about it, so I said, “I think I’ll go back and say hi to him.”

DR: So we turned around, and I called him and said, “Mr. Facher?” And he looked up and, you know, like he didn’t recognize me at first, so I could have really gotten away with not going to meet him. And I said that I was Donna Robbins. And he said, “Oh, of course, of course,” and he shook my hand. And then we stood there for 45 minutes talking over lunch. And, you know, he, we talked about everything. I mean just so many things were covered in that short period of time.

DR: And, you know, of course we brought up the case, and he felt that there were no winners and no losers. I said, “Well, I disagree.” I felt the families had won in the long run because the recognition that the case had brought throughout the country, actually in the book too, about environmental awareness. You know, he’s sorta sitting there nodding his head, you know, kind of agreeing with me, in a way. He didn’t disagree with me, let’s put it that way. But we did talk about a lot of things, and in the end, you know, when we parted, he took his glove off and put his hand out to shake hands with me and said how much he appreciated me coming over to say hi to him. So it was kind of meaningful in a way. Like I said, over time things change.
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