A Civil Action

Felicia Kentridge, chairperson of the Legal Resources Trust of South Africa, London, reviews *A Civil Action** by Jonathan Harr

This is a dull book about enormously interesting subjects. It has been Number 1 on the American bestseller lists for some weeks, and has been found among fiction on British bookseller shelves. It is, however, a true story, not fiction.

IT is a book about the Environment, about Big corporations, about Poor people, about Litigation American style – and Plaintiffs Lawyering, about Expense, about Obsession, about law as a means of making a living. The writer chose to write it because he "was looking for something to write about". An honest, alarming and disarming disclaimer up-front. He also wanted to make a living. In the end Jonathan Harr, a professional writer, took eight years to produce the book. By his own choice Harr watched and noted the proceedings from the vantage of the Plaintiffs lawyers' offices. He did not interview or consult the defendants' lawyers until after settlement of the "Civil Action".

The issue from which all of the above flowed was whether an unusual cluster of leukaemia cases could be traced to a water supply which was contaminated and whether the contamination came from two big corporate industries operating in the area.

The area was 15 acres of undeveloped land near the river Aberjona in Woburn, near Boston, Massachusetts. Two wells were dug in 1964 and 1967 in order to supplement the water being drawn from the river for the tap water to householders in East Woburn. The wells were shut down in the late 1960s and re-opened briefly in 1971.The corporations allegedly responsible for the contamination were W Grace, a huge chemical conglomerate, and a tannery run by J J Riley and owned at the time of trial by Beatrice Foods, another US giant. It was alleged that Grace had deposited toxic waste onto the ground which had seeped into the wells and that the tannery had been guilty of similar practice. Several children in East Woburn had died of leukaemia in the 1960s and 70s, so had some adults and many other family members had unusual but less grave complaints.

In 1982 a decision to proceed with a case for damages was taken by the families of those who had suffered the leukaemia and Jan Schlichtmann had agreed to take on the case. At that stage a 40% fee for the lawyer – a plaintiff's lawyer – whose practice was conducted entirely on a contingency basis was agreed upon. It was a weighty undertaking for the families, eight of them, but not in financial terms. They were not expected nor were they able to make a contribution either to the lawyer's fees nor to the huge expenses involved. It was also an enormous undertaking for the lawyer - the quasi-hero of the book. He and his associates, gambling, took upon themselves the heavy expense of getting evidence together to support the claim. This involved experts in the field of ground water flow, of soil geologists, of epidemiologists and of doctors. The fees for these experts were high indeed and there were many of each. There were also expenses relating to the presentation of evidence in court – such as huge blow-ups of photographs as well as the essential daily transcript and the less essential eight copies made daily for the clients. The style of lawyering, and of the man, led to high expense in a desire to impress. There was lavish expenditure on venues for discussion with the other parties, luxurious appearances at every turn.

The expenses and fees for the defendants' lawyers are given in global terms only: they were risk free and several times higher than those of the lawyer for the plaintiffs.

The preparation for trial and various preliminary hearings took some years. The trial itself took several months.

The families' interest, at the outset, was not financial. Was the lawyer's? They wanted "the truth to come out, to make public the wrong they had suffered". For many of the plaintiffs the case turned sour, for their lawyer it became a nightmare. Starting off the trial with a condominium, a Porsche, and several hand-made suits he ended it sleeping on the floor of his office, a bankrupt. For the years that the case was alive he thought of nothing else, took on no other, could not bring himself to think of other things.

Judge Skinner who heard the case made several preliminary rulings. He divided the trial into two parts: the first dealt with establishing the contamination, the second with the epidemiology of leukaemia. In court for the findings on evidence were six jurors (and six alternates – just in case). At the end of the first part, the case against the second defendant Beatrice Foods, was dismissed. Eventually and before the second part got under way, there was a settlement. About $8 000 000 all in all. Rather less than the wild $125 000 000 once put forward by the plaintiffs' law-

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yer and less too than the more moderate $16 000 000 he had hoped for later in the trial. Each family got something like $475 000. Schlichtmann's firm paid off its debts, Schlichtmann took $30 000. This was after several years' work.

Morals

This is a book full of morals and therefore questions for lawyers. Start with the "truth". How far does that give way to the need for finiteness? At one stage the judge directed the jury to establish a date before which some hydro geological event would not have occurred. Pluck it almost out of the air. A necessary fiction for the resolution of the case perhaps but "the truth"? A document which may well have had a bearing on the question of contamination by Beatrice came to light only after the conclusion of the case: should it have led to a re-opening of a very long trial?

Then contingency fees. In the UK contingency fees relate only to the lawyer's fees. The solicitor is not obliged to fund the case for example by paying expert witnesses' fees or travel expenses. In this case the expenses funded by Schlichtmann and his firm amounted to more than a $1 000 000, an impossible sum if the plaintiffs had had to finance the case themselves. In the UK the poorest can undertake this type of litigation because Legal Aid pays. In the USA anyone can litigate if they can find a lawyer who will take the gamble upon him/herself. In the UK and SA plaintiffs are liable for costs awarded against them in the event of losing the case, another deterrent. In the USA there is no such rule.

The lawyer who gets too involved. The lawyer obsessed. Was this because of the financial investment/gamble that was going on? Or a feeling for justice? There are not many clues to the answer in the book. There are pages devoted to detailed descriptions of Schlichtmann pacing, wearing his "lucky" suit or tie, but the reason for his obsessive behaviour is not explored. He clearly wanted the "truth" recognised; he wanted to win but did he want that so badly because of a passion for justice or for his clients or because he had embarked on that case and put so much into it?

Client control of the case: this vanished and it later led to bitterness over the style in which the trial had been conducted particularly in relation to expenses. It is true that the clients did not pay any of these but the amount which each family obtained from the settlement was noticeably diminished by the expenses which had to be deducted.

Law as a business. Schlichtmann, the lawyer, did not take his fee of 40% of the damages agreed upon initially. He took much less and ended up bankrupt. Other parties, once there was a settlement, who had had a peripheral or initial involvement in the case, appeared like harpies making their demands.

Was legal process the best way to have approached the situation at all? Some years after the trial was over, a government agency made the corporations clean up the aquifer. How far did the publicity attendant on the trial push the political action?

Contingent fees may be a way out of the impasse which faces the huge mass of society which falls outside Legal Aid limits but cannot afford litigation. Its advantages and perils are made clear by example. I have said that this is a dull book. It is written in pedestrian prose. But it is immensely interesting and involving. It is to be recommended for those worrying about legal services, and also for those in any way concerned over environmental damage.

Pre-trial services and awaiting trial prisoners

Continued from page 73

Proposed steps to solve the problem

- The Department of Correctional Services will be approached to furnish the Department of Justice with the following information:
  - Statistics of prisoners awaiting trial for a period of three months and over;
  - statistics of prisoners awaiting trial who, though granted bail, cannot afford to pay the amount determined.
- The information obtained from the Department of Correctional Services will be brought to the attention of Attorneys-General and they will be advised to take the necessary steps to solve the problem.
- The Department of Correctional Services will be asked to advise prisoners awaiting trial who could not afford to pay bail to apply for reduction of the bail amount to an affordable amount or even to be released on their own recognisance.
- The Department of Justice will establish whether certain magistrate's courts are less occupied than others with the aim of temporarily re-deploying court officials to areas with an overload of work to expedite completion of trials.
- Certain divisions and sections at the national and regional head offices will be approached to release some legally qualified officials to offer relief services at areas overburdened with court work.

Conclusion

All indications are that the new Pre-trial Services System is a resounding success. At present these services are provided at the Mitchells Plain and Johannesburg magistrate's courts, while the planning for the introduction of the same structure in Durban and Port Elizabeth are at an advanced stage.