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Environmental Law

Case No. 1:

Anne Anderson et. al. v. W.R. Grace et al.

Summary

In 1986, in Woburn, Massachusetts, a young personal injury lawyer, Jan Schlichtman, and his two partners filed a civil lawsuit against the mega-corporations Beatrice Foods Co. and W. R. Grace, alleging that they had negligently and illegally dumped the highly toxic chemicals TCE and PCE on their factory grounds, from where they leached into the soil and, through erosion and gravity, ended up in the Woburn municipal water supply, causing illnesses and death of local residents. Proving his claim, however, would be an expensive, drawn-out endeavor (the discovery phase alone would take four years!) that would eventually result in the case against Beatrice to be dismissed, a financial settlement with W.R. Grace of a paltry $8 Million that merely covered expenses, and Schlichtman declaring bankruptcy. Some of the injured families received less than $300,000 in damages, and the contaminated site was not cleaned up.

Facts

1. **Between 1968 and 1981, eight children die of leukemia in the small town of Woburn, Massachusetts, just north of Boston.** The parents blame their children's death on the foul tasting water that flows from their faucets. Subsequent cluster studies reveal that Woburn's rate of leukemia is four times higher than the national average.

2. **In 1979, state investigators discover that two municipal wells, are contaminated with the** carcinogens trichloroethylene (TCE) and perchloroethylene (PCE).

3. **The EPA identifies three local factories** as the possible polluters of Woburn's drinking water: a dry-cleaning operation owned by **UniFirst**, a tannery owned by **Beatrice Foods, Co.**, and a machine plant, owned by **W.R. Grace.**

4. **In 1982, Schlichtman** –on behalf of eight families-- **files a complaint against UniFirst, Beatrice, and WR Grace in civil court.** UniFirst settles out of court for $1.1 Million, but Schlichtmann refuses an $8 Million settlement offer from Beatrice.

5. **The presiding judge, Walter Skinner, divides the trial into three phases.**
   This crucial, pre-trial decision (to which Schlichtmann objected vehemently) effectively disallowed the victims' testimony during the first phase and resulted in the judge instructing the jury to answer questions they could not possibly understand.

Evidence

The discovery phase lasted four years (from 1982 to 1986), during which Schlichtman spent millions trying to uncover evidence to prove:

1. **That the chemicals TCE and PCE cause childhood leukemia.**
   Schlichtman deposed the victim's parents, medical experts, and toxicologists. During trial, however, he is unable to establish—beyond the shadow of a doubt—that leukemia was indeed the direct result of ingested TCE and PCE.

2. **That the defendants had dumped the toxic chemicals.**
   The defendants admitted to using TCE and PCE, but only in small quantities. They denied dumping the chemicals illegally.

3. **How and where these chemicals flowed, via erosion and through layers of diverse soil density,** to end up in the town's drinking water.

   He hired a geological consulting firm to conduct an extensive (and expensive!) study of the entire area, including the tannery and the machine plant, the contaminated wells, and the nearby river. The result of the geological study revealed evidence of the chemicals leaching into the wells.

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Rules of Law

1. **Beatrice Food Co. and W. R. Grace** committed the **tort of negligence** by **intentionally dumping** toxic chemicals, **causing the local drinking water to become contaminated**, thereby **causing harm** to the residents of Woburn.
2. The tannery's former owner, John Riley, committed **perjury** by testifying under oath that his tannery used only miniscule amounts of TCE and PCE.
3. W.R. Grace was later indicted by a federal grand jury with two counts of **providing false information** to the EPA, and fined $10,000.

Outcome

During trial, Schlichtmann's star witness, a renowned geologist, could not convince the jury how contaminated runoff from the tannery reached the municipal wells. This hurt the plaintiffs' case and at the end of the first phase, the jury found Beatrice not liable and W. R. Grace liable of contaminating the municipal wells.

Because Schlichtmann was deeply in debt (he had spent millions during the pretrial discovery phase) and lacked the financial resources to continue the trial, he settled with W.R. Grace for $8 Million, the same amount he had refused to accept earlier from Beatrice. The victim's families ended up with less than $300,000 each, and the polluted site was not cleaned up. Schlichtmann declared bankruptcy.

Opinion

Environmental Negligence is difficult and expensive to prove

Environmental pollution is a slippery claim to detect and to prove. For example, the pesticide DDT was used for decades in the U.S. before it was finally banned because it was found to be highly toxic. Convincing a jury that one party suffered injury or death from the negligent behavior of another party is almost always difficult to prove. The presence of pollutants in soil and groundwater is almost never obvious, and can, therefore, wreak havoc on unsuspecting citizens who breathe the air and drink the water, long before they are finally identified and long after people suffer from mysterious illnesses and deaths.

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Attorneys' Risks

Attorneys who specialize in tort cases like negligence generally represent their clients on a Contingency basis and must, therefore, spend a lot of their own time and money during the discovery phase, *before* the case ever reaches a jury. Unfortunately, as in the Woburn case, experts are not always great communicators, and their testimony is often beyond the jury's comprehension. Attorneys mitigate the risk of suing polluters by trying to accumulate as many plaintiffs as possible (class action), and by demanding as much as possible in compensatory and punitive damages.

Mistakes made by Jan Schlichtmann and his tiny, boutique Boston law firm:

- He took on a case that was difficult to prove. In fact, the Woburn victims had been previously turned down by another personal injury law firm.
- He went deep into debt during the discovery phase, hiring an army of scientific and medical experts to support his claim. Yet, he never found a "smoking gun."
- He was greedy and refused to settle with Beatrice, whom the jury later found not liable.
- He encountered the bad fortune of a presiding judge (Walter Skinner) whose pretrial decisions were bias and unfair.

But during the course of the trial, Schlichtmann's initial greed turned into compassion for the victims of Woburn. Today, he practices environmental law and lives in Hawaii.

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Case No. 2:

Anderson et al v. Pacific Gas & Electric (PG&E)

Summary

For more than forty years, California's largest utility company, PG&E, had dumped the lethal chemical Hexavalent Chromium (Chrome 6) in their unlined ponds in Hinkley, California. The company's malfeasance was exposed by a young woman, Erin Brockovich, a formerly unemployed, single mother of three who worked in a small Los Angeles law firm, who wanted to know what medical records had to do with a real estate file[1]. Her discoveries led to the largest settlement for a civil class action lawsuit.

Facts

1. The people and animals of the desert town of Hinkley, California, had been getting sick and dying for decades from respiratory illnesses and different kinds of cancer.

2. PG&E, like other utilities, had used hexavalent chromium as an anti-corrosion agent in their cooling towers. The contaminated overflow water was collected in unlined ponds where it seeped into the groundwater unhindered. Water also evaporated, leaving the soil saturated with Chrome 6, with the wind making the poison airborne.

3. In 1987, PG&E formally advises the state of California, that they had found high levels of Hexavalent Chromium (Chrome 6) in a groundwater monitoring well near Hinkley.
   Chrome 6 is a horrifically effective carcinogen that can enter the body by **ingestion** (drinking water, **inhalation** (airborne particles), and even by **absorption** (swimming in polluted swimming pools).

4. PG&E starts buying local real estate properties, in an attempt to get residents off the land they knew was polluted. By the time Erin Brockovich arrived in Hinkley, PG&E owned 70% of the land and had bulldozed the homes on it.

5. Erin Brockovich starts snooping around the public records at the local water board. She finds multiple documents showing the company knew of the pollution and failed to advise local residents.

Evidence

1. Plaintiffs had to prove medical causation.
2. PG&E was aware of the contamination as early as 1965, a whopping 22 years before advising the state and local residents. Chrome 6 levels were 400 times the EPA's current safety standard. Erin

Brockovich found the one witness who produced an internal PG&E memorandum, revealing this "smoking gun."

3. PG&E distributed flyers to local residents claiming "small amounts" had been used. In fact, local water board records showed that Chrome 6 levels reached peak levels of 1000 to 5000 times the safe level for inhalation.
4. Geological surveys revealed that contaminated wastewater reached the Hinkley aquifer through normal rainfall and erosion.

Rules of Law

1. **Failure by PG&E to act in 1965** when it first knew of lethal amounts of Chrome 6.
2. **Failure by PG&E to line its overflow ponds until 1972** to contain the poison and dispose of it properly and in accordance with EPA regulations. For another 6 years, the company sent more polluted wastewater into its unlined ponds.
3. **Attempt to further cover up the pollution** by quietly buying local real estate.
4. Intentional **misstatements to residents**, **omitting the poisonous nature of Chrome 6**. PG&E went as far as telling the people of Hinkley that Chromium was actually "good for the body."
5. PG&E practiced **deception when they lied** to residents claiming it was
    - "okay to swim in a pool where Chrome 6 concentrations were higher than EPA limits
    - fine to swim in the pools because chlorine and other pool chemicals 'kill any contaminants in the pool, including chromium.'
    - The water supply was completely safe and there were no toxic problems with their well water."[2]

Outcome

In 1994, the class action case against PG&E goes to binding arbitration. Initially, the 600 plaintiffs had wanted a trial by jury, but Erin Brockovich convinces them to go the route of binding arbitration: a trial could languish for years, whereas arbitration could provide relief relatively quickly; however, the judge's decision would be binding and could not be appealed.

It was the right decision. The judges decided against the defendant and ordered PG&E to pay $333 Million—a record amount in damages—, required PG&E to clean up the polluted site, and ordered PG&E to stop using Chrome 6.

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Opinion

A Special Responsibility

Companies who have the means and opportunity to pollute our environment have a special responsibility to society: to avoid doing it, to clean up any contamination they cause, and to prevent further pollution of our environment. Our quality of life and –indeed—our survival depends on their following the letter and the spirit of the environmental laws we already have in place. Although the EPA plays a vital role in setting standards and forcing companies to clean up, it can take years, decades, to see results, and the violators often have to pay a laughably small fine. I think our environmental laws should be stricter, should impose stiffer fines and mandatory prison terms for company executives who knowingly pollute our environment.

"Injury" Lawyers: Loved and Hated.

Sadly, most environmental atrocities only reach our national consciousness because someone sues a person or company who perpetrates the pollution. The U.S. has some of the most stringent environmental laws in the world, but it often takes a lawyer to inadvertently become an enforcer of these laws. An "injury" lawyer's role is, therefore, pivotal in exposing some companies' egregious and injurious behavior. Yes, we tend to complain that we have become a litigious society that's ready, willing, and able to sue anyone for the slightest of reasons. We mock personal injury lawyers by calling them "sharks," "ambulance chasers," or worse; yet, we have to take the good with the bad. **If it were not for those brave attorneys who risk everything—like Schlichtman did, and Erin Brockovich, in order to bring a negligent company to justice (and to compel them to clean up a polluted site)—polluters would go on polluting undetected and causing horrible illnesses and deaths in their wake.** Injury lawyers serve the very important purpose of making polluting companies pay—quite literally—for their unconscionable acts.

How the lawyers handled the PG&E case:

The case against PG&E was not necessarily less costly or easier to prove than the Woburn case. There were, however, several major differences in the way the plaintiffs' lawyers handled the investigation and civil proceedings that ultimately affected their clients' demand for justice:

1. Hinkley had Erin Brockovich, a tenacious, intelligent paralegal who became the victims' most passionate advocate.
2. The PG&E proceedings went to binding arbitration; this decision saved the plaintiffs money and time, and resulted in record damages awarded.
3. Erin Brockovich's employer, the Ed Masry law firm, was small like Schlichtmann's in Woburn, but Ed Masry was smart enough to involve a large law firm that could take over the costs (and share in the rewards) of a massive lawsuit like the one in Hinkley.
4. In the Hinkley case, PG&E was ordered to clean up the environment but the Woburn defendants could go on polluting until, finally, the EPA forced them to pay for clean up.

Ethics Theory

All living beings, humans, animals, and plants, are inextricably bound to the environment in which we live. To thrive, we need clean water to drink, air to breathe, and soil to grow our food. These requirements are essential for our survival. It is a company's moral responsibility to practice Moral Minimum, to *make a profit without harming others*. Neither defendant in the Woburn and Hinkley cases did so. Greed directed their unethical and criminal behavior when they polluted the water, air, and soil, causing innocent people to get sick and die.

These defendants also failed to *consider the interest of all stakeholders beyond their shareholders*. Had they reflected on the Stakeholder Interest Theory, they would have recognized a responsibility toward the community in which they operated and were a part of.

Ethical Utilitarianism dictates that companies *should choose the action or follow the rule that provides the greatest good for society*. Neither defendant had the good of society in mind when they lied, deceived, and concealed evidence about pollution they caused. To perpetuate their transgression against Utilitarianism, the defendants in Woburn—though clearly culpable—took no responsible action to clean up the environment mess they had created.

Both Jan Schlichtman and Erin Brockovich are (or became) practitioners of John Rawls' Justice Theory which states that *Fairness is the Essence of Justice and because of Fairness, we must help the disadvantaged*. Schlichtman and Brockovich helped the victims in Woburn and Hinkley fight against mega-corporations by exposing their malfeasance, taking them to court, making them pay damages and clean up the messes they created.

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END NOTES

[1] Carole D. Bos, J.D., Erin Brockovich, (Famous Trials), 1.
[2] Ibid