Don't blame the jury for its incoherent verdict in the W.R. Grace toxic tort trial.
The judge's jury questions were so confusing that jurors never had a chance.

By Mitchell Pacelle

For four months juror Jean Coulsey listened to testimony in a suit brought by the families of eight leukemia victims from Woburn, Massachusetts. At issue was whether industrial dumping at W.R. Grace & Co. and Beatrice Companies, Inc. factories had poisoned the town drinking water. For the 62-year-old retired nurse and one-time forklift operator, the case seemed to illustrate one of her long-held beliefs: "Businesses can get away with murder."

In her modest retirement condominium in Norton, Massachusetts, her parakeet mostly fluttering about its cage, Coulsey discusses what she anticipated when the jury retired for deliberations. "We thought we were going to go up, and sshhew!" she exclaims with a karate chop at the air. "Find them guilty, and we'd come right down. But the paper," she says, shaking a list of four special interrogatories that the jurors were instructed to answer, "just cut us right down."

Fellow juror Harriett Clarke, 46, clashed with Coulsey over whether the two companies were responsible for contaminating the drinking water. But the total frustration over the trial's outcome. Seated at her kitchen table, Clarke, who has spent the day sloshing through cold bogs harvesting cranberries, echoes Coulsey's complaint. "I don't believe to this day that I did the right thing," she says, head in hands. "But this was all I had," she laments, pointing to the jury's list of questions.

Last July, after nine-and-a-half days of deliberations, the six-person jury found Grace, although not Beatrice, liable for negligent dumping that polluted the wells. But because not one of the jurors understood all of the questions penned by federal district judge Walter Skinner, their answers to separate questions contradicted one another. As a result, Skinner threw out the verdict against Grace in September and ordered a new trial. Days later, the company settled with the plaintiffs for about $8 million—a fraction of the structured settlement the plaintiffs were demanding before trial, a settlement that defense lawyers calculated would cost Beatrice and Grace $400 million if paid out all at once.

W.R. Grace's head defense lawyer, Michael Keating of Boston's 110-lawyer Foley, Hoag & Eklund, believes that the case, which involved weeks of testimony by hydrogeologists, was just too complicated for a
When Schlichtmann failed to explain to the jurors how important their answers to key questions would be, he opened the door—however inadvertently—for them to gut the plaintiffs' case.
The defense strikes a blow
Just before the case went trial, Facher and Keating struck what Schlichtmann calls "the most crippling blow we had." Responding to defense motions, Judge Skinner ruled that the whole case would not be tried at once. Skinner broke the case into four phases: The first would determine whether Grace or Beatrice was responsible for the pollution; the second would resolve whether the chemicals had caused the leukemia; the third would address other health claims; and the fourth would handle punitive damages. If the plaintiffs failed to prove phase one, the trial would end.

Harvard's Nesson, speaking for the plaintiffs, called the ruling a "wipe-out for us." What the plaintiffs had hoped to do, Nesson explains, was present the case as the Woburn family's story. The Woburn family had experienced: leukemia, strokes, the family suffers. Nephews are ill. Water is sick, and clean water is impossible to attain. The baby is dead. Conditioners study the water, looking for the cause of the leukemia. They find the cancer. It is traced to the Grace site. The defense puts up a defense, but the plaintiffs have nothing to show.

The divided trial into four parts means the jury will have to go to the grass in the water if the defendant didn't contaminate the water. Last February, the lawyers spent a week selecting a six-member, six-alternate jury for all four phases. The six jurors were two cranberry harvesters, one insurance counsel, one lawyer, and a farmer.

Four reasons for a jury's confusion
Following are the judge's four interrogatories that bewildered the jurors and ultimately undermined their deliberations. As a result of confusion over questions two and four, the jury's answers contradicted one another.

1. Have the plaintiffs established, by a preponderance of the evidence that any of the following chemicals were disposed of at the Grace site after October 1, 1964, and substantially contributed to the contamination of Wells G and H by these chemicals prior to May 22, 1979?

   A. TRICHLOROETHYLENE?
   Yes  No

   B. TETRACHLOROETHYLENE?
   Yes  No

   C. 1,2 TRANSDICHLOROETHYLENE?
   Yes  No

   [If you have answered "No" to all these chemicals, you need not proceed further.]

2. Have you answered "Yes" in question 1 as to any chemical(s), what, according to the preponderance of the evidence, was the earliest time that such chemical(s) disposed of on the Grace site after October 1, 1964, in the presence and contribution to the contamination of Wells G and H prior to May 22, 1979 by these chemicals disposed of on theGrace site after October 1, 1964, was caused by negligence of Grace, that is, the failure of Grace to fulfill any duty of due care to the plaintiffs— with respect to:

   A. TRICHLOROETHYLENE?
   Yes  No

   B. TETRACHLOROETHYLENE?
   Yes  No

   C. 1,2 TRANSDICHLOROETHYLENE?
   Yes  No

   [Only answer with respect to a chemical as to which you answered "Yes" to question 1.]

3. If you have answered "Yes" in question 1 as to any chemical(s), what, according to the preponderance of the evidence, was the earliest time at which the contamination contribution referred to in question 3 was caused by the negligent conduct of Definition of the defendant(s)— with respect to:

   A. TRICHLOROETHYLENE?
   Yes  No

   B. TETRACHLOROETHYLENE?
   Yes  No

   C. 1,2 TRANSDICHLOROETHYLENE?
   Yes  No

   [If, on the evidence before you, you are unable to determine by a preponderance of the evidence the appropriate date, write "ND" for Not Determined.]

4. If you have answered "Yes" to any part of question 3, what, according to the preponderance of the evidence, was the earliest time at which the negligent conduct referred to in question 3 was caused by the negligent conduct of the defendant(s)— with respect to:

   A. TRICHLOROETHYLENE?
   Yes  No

   B. TETRACHLOROETHYLENE?
   Yes  No

   C. 1,2 TRANSDICHLOROETHYLENE?
   Yes  No

   [If, on the evidence before you, you are unable to determine by a preponderance of the evidence the appropriate date, write "ND" for Not Determined.]
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Defence lawyer Michael Keating says the unclear wording in the jury questions may have been the result of “too many cooks in the kitchen.”

A LESSON IN HYDROGEOLOGY?

On the simplest level, there was eyewitness testimony on what went on inside and outside the plants. Against Beatrice, Schlichtmann called to the stand, among others, a man who described playing on the waste-laden Riley land as a boy. He called one polluted ditch “Death Valley.” Against Grace, Schlichtmann summoned several employees who told of regular and large scale dumping of paint sludge and solvents, including TCE. One employee testified that a supervisor threatened “to get” the person who had notified the EPA about dumping.

But it was the expert hydrogeological testimony that consumed the lion’s share of time. One plaintiffs’ witness, geologist John Drobinski, testified that he found evidence at the Beatrice site that the chemical solvents had been dumped. EPA pumping tests, he continued, proved that the town wells drew water off the Beatrice property, even though a small river flowed between the property and the wells.

Facher hammered the expert on cross-examination. In addition to mocking Drobinski by uncorking bottle after bottle of common household products that contain TCE—which Drobinski declined to sniff—Facher forced the geologist to admit that he had lied about what year an Australian university awarded him his master’s degree.

Another expert witness for the plaintiffs had dream credentials. George Pinder had a doctorate in hydrology and was teaching at Princeton, where he was researching the movement of contaminants in underground water. The upshot of Pinder’s testimony: The contaminants came from the two companies’ properties, not from the small river near the wells.

Once again, Facher cut down Schlichtmann’s point man, blazing holes in Pinder’s testimony by showing that the expert had not studied the EPA data on how the wells drew water from the river.

Facher and Grace’s Keating spent a month with their own experts. Beatrice held that any pollutants from its site couldn’t possibly pass underground to the river to the wells. Grace attributed contaminants to the town wells, arguing that it would take roughly 25 years—not three years, as Pinder suggested—for pollutants to reach the wells from the Grace plant.

When Keating rested his case at the end of June, it seemed that victory would go to the side whose experts seemed most credible. But interviews with jurors reveal that—whatever score the lawyers may have gained at the bench—many jurors had judged it all but impossible to believe one expert over another.

THE FINAL BLOW TO THE PLAINTIFFS?

When he delivered his charge to the jury on July 15, Judge Skinner explained several critical decisions he had made in response to earlier Beatrice and Grace motions. Skinner told the jurors that for the arguments in Schlichtmann’s complaint—Beatrice would not be held strictly liable. In his ruling on the question, the judge found that there was no evidence that Beatrice knowingly dumped the harmful chemicals. So even though the dumping itself was clearly an “ultrahazardous” activity, Beatrice lacked the necessary intent to hold strictly liable, the judge said. Skinner reserved ruling on whether Grace was strictly liable until after phase one of the trial.

These rulings made it necessary for the judge to later ask the jury whether either company had been negligent. In asking for strict liability, Schlichtmann had argued that the companies should be held liable even if negligence was not proved.

In perhaps the most important decision of the entire trial, Skinner instructed the jury. “There can be no reasonable foreseeable risk of harm by reason of the contamination of drinking water unless there exists a group of people likely to drink the water involved.” Grace, he said, had no reason to suspect anyone would be harmed until one of the drinking-water wells was finished in October 1964. Beatrice, he continued, would have had no reason to believe that its activity would affect the wells until August 1965, when the company received a letter from a well digger informing it that pumping water from the town wells had lowered the water table under Beatrice’s land.

Schlichtmann had bitterly opposed the ruling. “According to the judge,” Schlichtmann grouses, “Grace could have stopped dumping by October 1964—the day before the wells opened—and from 1960 to 1964 could have dumped cyanide, pesticides, run an open toxic dump... and then stopped all that activity the day before the wells opened... and is not responsible for the contamination.”

While Schlichtmann had asked the judge to direct jurors to decide one simple fact issue—whether the two companies were guilty of polluting the wells—the judge sent them off with two nearly identical sets of four questions. He was dealing with Grace, the other with Beatrice (see sidebar). His ruling on the dates restricted the evidence to the last year. Skinner told the jurors not to move beyond question one unless they found evidence against Grace between 1964 and 1965 and against Beatrice between 1965 and 1979.

THE DELIBERATIONS

Although the judge had explained the interrogatories in his charge, when jurors retired to the jury room on Tuesday, July 15, they were, according to retired nurse Coulsey, “in utter shock” over how specific the questions were: “We were all under the impression it was either guilty or innocent.” Says retired nurse Coulsey: “We got up to the jury room, we looked at the paper and said, ‘Now what are we going to do?’”

“All we were told,” said, “We must be missing something, or Mr. Schlichtmann never would have let it happen.”

Not quite sure how to start, Vogel suggested a straw poll for each defendant on question one, which asked jurors whether “a preponderance of the evidence” established that dumping at the company sites “substantially contributed” to the well contamination in the prescribed time period.

College graduate and painting contractor Fox recalls that it broke down as follows: Everyone but Harriett Clarke and Fox held that Grace contributed to the pollution, and everyone but Clarke thought Beatrice was responsible, with Fox undecided.

This initial vote set the stage for eight days of frequently heated debate between Fox and Clarke (see sidebar). Their initial discussion reveals just how critical it was for Beatrice’s defense that Judge Skinner ruled that the company’s liability began in 1966. Clarke reminded her fellow jurors that plaintiffs’ expert Drobinski had dated most of the plaintiffs’ dumping from the late 1950s to the mid-1960s. “We had hardly any evidence of dumping in the mid-1960s,” says Vogel.

Unfortunately, Drobinski recalled hearing only two witnesses testify that they saw dumping after 1966, and no one knew just what was being shipped.

Foreman Vogel says that Clarke convinced him that Beatrice couldn’t be held liable. Although retired nurse Coulsey would later concede there was no preponderance of evidence against Beatrice, she continued to insist on blaming against the company.

On the third day, temporarily stalling on Beatrice, the jury turned to Grace. On the fourth day, only one question one, the jurors sorted through evidence of Grace dumping and...
Discovery was monumental. Facher conceded that if all the documents collected were stacked vertically, they "would exceed... the equivalent of a three-story building."
It's like you're waiting for a big bang, and you get a pop," says one Woburn politician of the trial. "Both sides think they won, and neither side thinks they lost."

As they did on question two, the jurors had a hard time coming up with a specific date. At first, they were stuck with a "not determined". But then Fox came up with a date. He explained to the others that in September 1973, the factory closed a storm drain into which workers were dumping TCE. Fox suggested that the negligent dumping had started before the drain was closed, but he couldn't say how much before September 1973. The earliest date he could be certain of was the evening of September 1973. The answer to question three was "not determined." As they almost did.

But because the jurors misunderstood the question, Keating gained an opportunity to erase the jury's entire verdict, including its finding of negligence against Grace. Within a month, Keating had filed a motion to dismiss the new trial, and a motion for entry of final judgment. All of the motions seized on the inconsistency between questions two and four.

On Wednesday, September 17, the judge ordered a new trial because of the inconsistencies in the verdict. He told the jurors that the court would make the ruling public until the following Monday, when he could explain in the jurors when they came back to start phase two of the trial. Serious talks between the two sides began immediately. The rulings had been obtained in a settlement. According to one informed source, Grace would have gotten a "a substantial amount of money," but he admits that the plaintiffs lawyers did not fulfill their goal of winning a verdict that would cost $400 million. That Saturday night, Grace settled with the eight families, plus seven other families who had filed or planned to file suit. Grace admitted to fault, but the judge declared a directed verdict for Grace. Grace certainly didn't sound repentant. Keating, speaking on behalf of Grace, told reporters after the announcement, "The settlement agreement is an admission of no guilt. A condition of settlement was not to discuss its terms."

According to Harvard's Nesson: "It would have gotten the attention of corporate directors across the country. Grace certainly didn't sound repentant. Keating, speaking on behalf of Grace, told reporters after the announcement, "The settlement agreement is an admission of no guilt. A condition of settlement was not to discuss its terms."

After the trial, Schlichtmann had proposed a structured settlement that defense lawyers calculated would cost $400 million. That Saturday night, Grace settled with the eight families, plus seven other families who had filed or planned to file suit. Grace admitted to fault, but the judge declared a directed verdict for Grace. Grace certainly didn't sound repentant. Keating, speaking on behalf of Grace, told reporters after the announcement, "The settlement agreement is an admission of no guilt. A condition of settlement was not to discuss its terms."

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