

Legal Education & A Civil Action in Canada: (In)visibility of the Courtroom in Film

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As John T. Noonan stated in his 1976 book *Persons and Masks of the Law*, “the paradigm of law is trial before a court.” It did not matter that the chief business of American lawyers lay elsewhere – that lawyers (at least elite lawyers) had for the most part moved out of the courtroom into the boardroom. “The image of the courtroom as the center of the legal process has remained.”¹

Why is that? One cannot help but think that the hegemony of the courtroom paradigm must be related to its massive representation in film and literature. Speaking of film specifically, a flip through the book *Reel Justice* illustrates the point well.² There is courtroom drama on every page, not to mention what a flip through television stations would reveal. Why is the courtroom drama so well-represented in popular culture? Why is it so visible? A large part of the explanation must be the intrinsic ability of the courtroom to contain and carry a well-told, dramatic story.

Stories are not normally the terrain that lawyers who are not trial lawyers feel the most comfortable on – it is not their stock in trade. Viewed from the neutral, dispassionate, evenly balanced perspective that the law is meant to inhabit, stories tend to be emotional, subjective, idiosyncratic, objects to distrust. So, for instance, many evidentiary rules in a jury trial seek to limit, mitigate or mute the distorting effect that an emotional plea would have. Even outside the courtroom, in the law schools, we normally

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¹ John T. Noonan Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, Wythe as Makers of the Masks* (New York: Farrar, Straus & Giroux, 1976), 4.

² Paul Bergman & Michael Asimow, *Reel Justice: The Courtroom Goes to the Movies* (Kansas City, Missouri: Andrews & McMeel, 1996).

think that the ideal classroom legal analysis will try to reduce as much of the dramatic fact as it can – contain it so that the analysis boils down to succinctly stated facts, a narrowly defined legal issue, with parties, who are fully and adequately represented by designations like A, B (and maybe a C). This is what we teach students when they learn to do case briefs. The point is to be brief and not get too distracted by interesting fact and “irrelevant” issues.

This stripped down version of things while clearing the way for the doctrinal point often leaves out some of the most interesting information on the case, making it difficult to understand why the case was decided the way that it was and, more importantly for those not directly involved in the dispute, why the rule or principle was framed the way that it was.³ The movement away from fact accounts for a great deal of the apathy people often feel with respect to law and their legal studies, namely, that it is difficult to summon up a great deal of enthusiasm for these stripped down situations. Generations after generation of law students find themselves working with cases gutted of their human stories.⁴

It is somewhat ironic then that when the case method of legal education was being heavily advocated in the “great methods” debates in the late nineteenth century in the United States (there the question was whether the case method would replace the

³ See e.g. the additional information provided on the famous Cardozo decision in *Jacob and Youngs v. Kent* in Richard Danzig, *The Capability Problem in Contract Law: Further Readings on Well-Known Cases* (Mineola, New York: Foundation Press, 1978), 108-128. See also Noonan, *Persons and Masks of the Law*, 111-51, for an illuminating discussion of *Palsgraf v. Long Island Railway Company*, Cardozo’s opinion, and its connection to the American Law Institute’s Restatement on Torts.

⁴ There is a trend to restore human stories to cases studied in law school represented most notably by the *Law Stories* series, including a civil procedure installment: *Civil Procedure Stories*, Kevin M. Clermont ed. (Foundation Press, 2004). For an overview and sampling of various examples in the literature, see Angela Fernandez, “Enriched Case Method: Legal Archaeology as an Antidote to the Case Method’s Air of Unreality,” paper presented at Toronto Legal History Group, Faculty of Law, University of Toronto, March 1, 2006 and to be presented at Law and Society Association, Baltimore, Maryland, July 6-9, 2006.

traditional treatise method), it was frequently said that it was a good idea to use cases to teach the law, because cases were like stories with vivid facts. These vivid facts were supposed to make it easier to remember the legal principles. One great promoter of the Harvard case method, Oliver Wendell Holmes Jr., put it this way: “Does not a man remember a concrete instance more vividly than a general principle? ... [I]s it not better known when you have studied [the concrete instance] than when you merely see it [the principle] lying dead before you on the printed page?”⁵ Louis Brandeis spoke about the way that the case method allowed points to become “impressed upon the mind as they never could be by mere reading [in a treatise] or by lecture [on a passage from a treatise]” because “they occur as an integral part of the drama of life, -- of an actual lawsuit.”⁶

Some would say that while the case method does make learning of the law more vivid or lively in the moment of study, it is not in fact at all clear that it is well suited to remembering legal principles. Perhaps more devastatingly from the perspective of this point about vivid fact and drama is the way in which traditional case method treatment is actually extremely effective at removing the personality of those involved in the cases. Who were the litigants? Who were the lawyers? Who was the judge?⁷ Without these personalities and some sense of why they shaped the legal rules the way they did, it is difficult for the rules to not, as Holmes put it, lie “dead before you on the printed page.” As law teachers, we are constantly looking for ways in which to counter this, to make the

⁵ “Holmes’s Oration” in Reprint of the Harvard Celebration Speeches, 3 *Law Quarterly Review* (1887): 121-22. See also Louis D. Brandeis, “The Harvard Law School,” *The Green Bag* 1 (1889): 22; William A. Keener, “The Inductive Method in Legal Education,” *American Law Review* 28 (1894): 720.

⁶ Brandeis, “The Harvard Law School,” 21.

⁷ “The cases are not concrete enough. The characters in them, turning into *A* or *B*, *P* or *D*, lose personal identity.” Noonan, *Persons and Masks of the Law*, xi.

rules come to life. That rationale probably best describes why we use the novel and film *A Civil Action* in our first-year course “Legal Process” at the University of Toronto.⁸

This is a mandatory first-year course that introduces students to some of the basic rules of civil procedure and provides an introduction to the legal profession. *A Civil Action*, especially in its novel form, is not primarily a story about a trial – the chapter “The Trial” does not begin until page 291.⁹ The fact that the courtroom is invisible for the bulk of the novel, makes for a (fairly unusual) dramatic depiction of pre-trial procedural events, perfect for a course that also focuses on events leading up to trial. The movie understandably makes more dramatic use of a visible courtroom – the opening scene, for instance, shows the lawyer-protagonist bringing his severely injured client into the courtroom as a demonstration of this lawyer’s ability to cynically manipulate jury sympathy.¹⁰

Pre-trial lawyer skills are probably most vividly captured in the description of one of the lawyers, William Cheeseman (whose name is pronounced in various ways to good comic effect in the film), who represents one of the defendants in the case, W.R. Grace & Co. Cheeseman is described by Jonathan Harr in the novel as a lawyer who “specialized in pretrial maneuvering,” someone who usually “represented one large company that was suing another, or was being sued by the government, in disputes that were complicated but dry and bloodless and almost invariably settled out court.” He had a reputation for

⁸ Thanks to Lorne Sossin and Kenneth Jull with whom I co-taught Legal Process in the fall term of 2005. Many of the materials I rely on here come from this collaborative teaching process and our students’ response to this exercise.

⁹ Jonathan Harr, *A Civil Action* (New York: Vintage Books, 1995).

¹⁰ *A Civil Action*, dir. Steven Zaillian, 112 min., Disney, Touchstone Pictures, 1998.

“finding clever ways to kill lawsuits in their infancy, with motions of demurrer or summary judgment.”¹¹

Cheeseman’s attempts in this case included a letter telling the plaintiffs to withdraw their suit,¹² a request for removal from Massachusetts state court to federal court (believed to be more corporation-friendly), a motion for summary judgment, and a Rule 11 motion¹³ combined with an allegation of barratry (“the groundless stirring up of lawsuits”).¹⁴ This last, a dubious allegation that the plaintiff’s lawyer engaged in improper conduct in soliciting clients for the case, proved too much for the judge’s patience, and as Harr tells it, had the inadvertent effect of reflecting badly on the defendant, resulting in a denial of the Rule 11 and summary judgment motions.¹⁵ Indeed, Harr reports that the plaintiff’s lawyer would later say that if it were not for those early procedural tactics, particularly the Rule 11 motion, he would probably have followed the

¹¹ Harr, *A Civil Action*, 95.

¹² “If you do not withdraw this action ... please be informed that we will take appropriate steps to seek a prompt dismissal of the action, and we will seek an award of attorneys’ fees and expenses against you and your associates.” Ibid., 99.

¹³ Rule 11 is a way to request sanctions against a lawyer who when filing a civil suit violates the representation that “the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” See Rule 11(b)(3) in *Federal Civil Judicial Procedure and Rules*, rev’d ed. (Thomson, West, 2005), 91.

See Harr, *A Civil Action*, 99-101, 104-105. Those familiar with the story know that Rule 11 resurfaces at the end of saga in an extremely dramatic way. Harr has said that he thought of calling the book “Rule 11”: “It had the virtue of symmetry – Rule 11 marked one of the first and last rules invoked in the litigation, functioning almost like bookends to the case. It is also the only Rule of Civil Procedure that articulates a fundamental ethical imperative in the practice of law – that pleadings filed by lawyers must be made in good faith. In my mind, Rule 11 carried a faint echo of *Catch 22*, a book I admire greatly. But I didn’t have the courage – or the hubris – to use that title.” Jonathan Harr, Introduction to *A Documentary Companion to A Civil Action*, Lewis A. Grossman & Robert G. Vaughn eds. (New York: Foundation Press, 2002), xiii.

¹⁴ Harr, *A Civil Action*, 104. Barratry is elsewhere defined as “[t]he offence of frequently exciting and stirring up quarrels and suits, either at law or otherwise.” *Blacks Law Dictionary* 6th ed. (St. Paul, Minn.: West, 1990) s.v. “Barratry.”

¹⁵ See Harr, *A Civil Action*, 99-119.

advice of friends and let the case slip away,¹⁶ thereby avoiding what the appeals court later called (with not a little exasperation) “[t]his long safari of a case.”¹⁷

The story in *A Civil Action*, one of true events, is about the town of Woburn, Massachusetts, where in the 1980’s local factories accused of having poisoned in previous decades the town drinking water, which the plaintiffs allege caused a number of the town’s children to die from leukemia. The perspective is sympathetic to the plaintiffs, less so to their lawyer, Jan Schlichtmann (played in the movie by John Travolta) who is not part of the upper crust Boston legal community but who throws his heart and soul (along with his car, deed to his house, and all his partners’ houses) into the case. The road is a long and unsatisfactory one for the plaintiffs, with one defendant (Beatrice Foods Co.) being found not liable at trial. The other defendant settles for a relatively small amount of money given all the resources that have been poured into the case (W.R. Grace & Co.). The judge who is managing the action appears to be biased against the plaintiffs. The clients are ultimately unhappy with the outcome. The lawyer/protagonist goes bankrupt and loses everything. The final scene of the movie has the bankruptcy judge (played by Kathy Bates) say to the character played by John Travolta: “The purpose of these questions is not to embarrass or humiliate you but rather to verify the information you’ve declared as your assets because what you’re asking your creditors to believe with this petition is, well, it’s hard to believe that after seventeen years of practicing law all you have to show for it is fourteen dollars in a checking account and a portable radio?” Schlichtmann: “That’s correct.” Judge: “Where did it all go?”

¹⁶ *Ibid.*, 141.

¹⁷ *Anderson v. Beatrice Foods Co.*, 900 F.2d 388 (1st Cir.) (1990), reproduced in *A Documentary Companion*, 490-96, 495. Also quoted in Harr, *A Civil Action*, 488. See generally “An Outline of the Procedural History of *Anderson v. Cryovac*” in *A Documentary Companion to A Civil Action*, xxix-xliii.

Response: “The money?” Judge: “The money, the property, the personal belongings, the things one acquires in one’s life Mr. Schlichtmann. [Pause] The things by which one measures one’s life.”

Not the stuff of a happy Hollywood hit. One scholar who has commented on the movie has gone so far as to suggest that the brutally realistic portrait it paints – a self-interested anti-hero lawyer, with little discernible sympathy for his clients, little concern for the careers of his partners, on a paranoid and career-ending campaign to prove he was right – violates too many traditional movie-going narrative expectations to be a successful film, commercially and critically.¹⁸ Certainly the view that a court of law has nothing to do with the truth is not a particularly heartening message.¹⁹ On this view the movie’s “failure to convincingly transform its protagonist’s moral character, and its refusal to conform to the laws of audience expectation and narrative truth doom it to both cinematic and socio-legal marginality.”²⁰

However, box office figures will not capture the enthusiasm of civil procedure teachers, desperate for a “case study” to introduce into the classroom.²¹ These teachers have used materials related to the case, augmented by novel and film, especially in the United States, where some teachers have set themselves the task of teaching all of their civil procedure course using these case study materials (a task made imaginable by virtue

¹⁸ See Steven Penney, “Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film,” 30 *Queen’s Law Journal* (2004): 234-49.

¹⁹ Both film and novel have the lawyer for Beatrice, Jerome Facher, say “[t]he truth is at the bottom of a bottomless pit.” See Harr, *A Civil Action*, 340. However, the scene in the movie in which the words are uttered does not appear in the book. Versions of the phrase have been used in writing on the case. See e.g. Robert F. Blomquist, “Bottomless Pit: Toxic Trials, The American Legal Profession, and Popular Perceptions of the Law,” 81 *Cornell Law Review* (1996): 953-988.

²⁰ Penney, “Mass Torts, Mass Culture,” 249. The film grossed \$56,709,981 in the United States. See <http://www.the-numbers.com/movies/index1998.html> for 1998 U.S. box-office numbers.

²¹ There are many websites listing resources related to the case. See e.g. the posting by University of Washington School of Law prepared by Mary Whisner and posted at <http://lib.law.washington.edu/ref/civilaction.htm>.

of the fact that the litigation went on for so long and eventually raised so many issues, motions and appeals).²² This would obviously be inappropriate in an introductory course in which Ontario rules were the primary object of study. However, the novel and film can still be used to good complementary or supplementary effect. Take discovery. There is a terrific scene from *A Civil Action*, both novel and film, in which the lawyers for the plaintiffs are examining an uncooperative witness, who decides in a rather dramatic fashion to pour a glass of water on the protagonist's expensive boardroom table – it is a gesture of contempt – although ostensibly an answer to the question “How did you use the chemical?” the answer implied being “We Poured it on.” Here is the scene from the novel:

[The plaintiff's lawyer, Schlichtmann] asked Riley [the witness] again to describe just how he had used a mixture of silicone and tetrachloroethylene to waterproof leather for the U.S. Army. “In what contraption was it used?” Schlichtmann asked.

Riley looked down at the glass of water in front of him. He had a massive, bejeweled face and a darkly florid complexion with blue eyes that looked small, almost porcine. He picked up the water glass, holding it between thick sausage-like fingers, and then, looking directly at Schlichtmann, he emptied his glass onto the bird's-eye-maple conference table.

Schlichtmann stared at the pool of water on his \$12,000 table, at the water dripping onto his carpet. “Let the record show that the witness has emptied a glass of water on the conference table.”

“Just a few drops,” said Neil Jacobs [one of the lawyers for Beatrice], attempting to minimize the act in the pages of the record.

“What do you intend to indicate by pouring the water on my conference table, Mr. Riley?” asked Schlichtmann.

“That is how the silicone was put on the leather,” replied Riley.

“Poured right on like you poured this glass of water on my table?”

“A pump was pumping it,” replied Riley.

“Some of the mixture would spill off the leather, like it spilled on my table wouldn't it?”

“No.”²³

²² Thanks to Judith Resnik of the Yale Law School for sharing the approach she takes in her civil procedure course and specifically for her direction to the Grossman & Vaughn *Documentary Companion*.

²³ Harr, *A Civil Action*, 183-84.

This is a memorable scene, which the filmmakers do well the first time round. They then use it again to good effect in a later “Eureka” moment for Schlichtmann – he is in a diner, a glass of water is spilled in one of the restaurant booths, and the action of the server cleaning up the water causes Schlichtmann to flashback to the belligerent incident with Riley. It is then that Schlichtmann realizes that he made a mistake focusing on who was doing the dumping of the chemicals when what he should have been looking for was someone who helped clean them up.²⁴

The Eureka moment is probably complete fiction – there is no corresponding scene in the book (which itself is partly a work of the imagination).²⁵ However, the description of Riley’s examination on discovery in the novel and its representation in the film, along with the other discovery scenes, are helpful. They show in a vivid and memorable way some important things about how such an examination works, the nuts and bolts of it. One can teach this, and we do, with written rules on “Procedure on Oral Examinations.”²⁶ However, the student knows by “seeing” details like the fact that the parties are in an office rather than a courtroom, the lawyers from both sides are there, and there is a stenographer but no judge.

The old point about vivid fact that used to be made in relationship to the case method gains traction on this kind of terrain where one gets both the visual representation and the “thick description” (to use the term the anthropologist Clifford Geertz made

²⁴ The movie contains another reference to the incident in the courtroom scene in which Schlichtmann cross-examines Riley. Schlichtmann pours a glass of water, holds it up and asks Riley “Would you care for a glass of water?” When Riley declines, Zaillian has Travolta tip the raised glass to one side, so that the water looks close to pouring out, while Schlichtmann asks “Are you sure?” This questioning ultimately does not go well for the plaintiffs. Compare this scene with Harr’s description of Riley as a broken man, after the post-trial proceedings reveal that he perjured himself during the trial. See *ibid.*, 482-83.

²⁵ It is true, however, that it is the later focus on clean up that brings Riley’s perjury to light. See *ibid.*, 471-83.

²⁶ See generally, Rule 34, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

famous) in the written account, replete with detail relating to the personalities involved (e.g. the lawyers, who have become characters by this time), along with their surroundings (e.g. the \$12,000 bird's-eye-maple conference table). The fact that such representations and descriptions will not entirely track truth (in a way that a video camera there at the time of the events would) seems less important from an introductory perspective than that they convey some idea of what the thing is like in a memorable way.

What one is looking for in an introduction is something that will capture the imagination, and then after an initial stimulus, at a second level, at least from a Canadian perspective on *A Civil Action*, provide enough information to stimulate reflection on differences between procedural systems and whether there are different policies behind different procedural rules. So, for instance, with respect to “improper conduct” under the Ontario rules, students can safely use something like the following scene from the novel to imagine what an out-of-control situation might look like. Here Schlichtmann has agreed to “preliminary” depositions of his medical witnesses for a limited purpose and when he feels that the defendants’ questioning did not confine itself to the agreed parameters, began to disrupt the proceedings, exclaiming things like “‘I’m here under false pretences’ ... ‘I’ve been abused!’ A dozen times he threatened to walk out.”²⁷ The defendants make a complaint to the judge. Harr wrote:

The motion accused him [Schlichtmann] of ‘undue interference with the orderly taking of depositions, unwarranted disruptions, rude and threatening statements’ ... Attached to the motion were forty pages taken from the deposition transcripts, with his utterances, oaths and all, boldly underlined. Schlichtmann felt a stab of

²⁷ Harr, *A Civil Action*, 221.

panic. Glancing at this material was like awakening the morning after to the faint, hazy memory of a terrible indiscretion.²⁸

The warning “[t]he record will reflect everything we’ve said” brings new life to what would otherwise be a flat and lifeless provision relating to how examinations would be recorded.²⁹ The Ontario rules say that “[a]n examination may be adjourned ... where, (a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections” – what Schlichtmann is accused here of doing – or “(b) the examination is being conducted in bad faith, or in an unreasonable manner” – what Schlichtmann counter-claims in the conference before the judge.³⁰

What about rules that are different? Discovery in the United States “is typically not limited to the parties – any person may be examined for discovery (deposed).”³¹ Indeed, the choice to arm every American lawyer with a subpoena power to uncover misdeeds that adversely affect the public by way of private litigation means that discovery has traditionally operated as a powerful regulatory device.³² “In Canada the

²⁸ Ibid., 223.

²⁹ Ibid., 222; Rule 34.16, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended (“Every examination shall be recorded in its entirety in question and answer form in a manner that permits the preparation of a typewritten transcript of the examination, unless the court orders or the parties agree otherwise”).

³⁰ See Rule 34.14(1), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

³¹ Janet Walker et al., *The Civil Litigation Process: Cases and Materials*, 6th ed. (Toronto: Emond Montgomery Publications, 2005), 746.

³² “[D]iscovery is the American alternative to the administrative state. We have by means of Rules 26-37, and by their analogues in state law, privatized a great deal of our law enforcement, especially in such fields as antitrust and trade regulation, consumer protection, securities regulation, civil rights, and intellectual property. Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.” Paul D. Carrington, “Renovating Discovery,” 40 *Alabama Law Review* (1997): 54.

traditional position has been to restrict the availability of discovery to the parties” – although nation wide reform has changed the traditional position to some extent, and so, for instance, in Ontario, a court can grant leave for examination of a non-party.³³ This legislative choice to think restrictively rather than extensively, at least with respect to non-party witnesses and experts, might well seem like a wise one when one considers the following description of discovery:

Everything about discovery was contentious. Each side filed motions asking Judge Skinner to compel the other side to produce documents, witnesses, and answers to interrogatories. And then each side filed countermotions asking for protection against the other’s demands. These motions, hand delivered by messengers who crossed each other’s paths, arrived daily, sometimes hourly, at each firm. They seemed to fall like leaves from a tree and settle in a thick pile on Judge Skinner’s desk.³⁴

The graphic descriptions of guerilla tactics – slowing things down to render continued dispute prohibitively expensive or each side trying to drown the other in paper – provide realistic counterbalance to the traditional “no surprise” rationale of discovery. In other words, discovery might lessen the prejudicial effect of surprise at trial and it might also encourage more informed pre-trial settlement; however, it also has the potential to turn into a tool of delay and abuse.³⁵

³³ Janet Walker et al., *The Civil Litigation Process*, 746. See also Rule 31.10, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

³⁴ Harr, *A Civil Action*, 216.

³⁵ The Canadian Bar Association, *Report of the Canadian Bar Association, Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) recommended that “every jurisdiction (a) amend its rules of procedure to limit the scope and number of oral examinations for discovery and the time available or discovery” (Recommendation 16), quoted in Janet Walker et al, *The Civil Litigation Process*, 754. See generally Lynn M. Lopuchi & Walter O. Weyrauch, “A Theory of Legal Strategy,” 49 *Duke Law Journal* (2000): 1405-86, on the underestimated effect of strategic lawyering on legal outcomes, including delay.

Consider also the functioning of discovery under the American Federal Rules. The last chapter of *A Civil Action*, “Blindman’s Bluff,” describes the serendipitous unearthing by the plaintiffs of a geological report, which was not turned over by the defendants in the discovery process – a real-life Eureka moment not depicted in the film.³⁶ There are a series of decisions dealing with whether or not the existence of this report (and another related report) would have made a difference to the decision at trial and how to deal with the issue of what misconduct might have been involved in withholding the report, commissioned by Riley over which his lawyer asserted a litigation privilege.³⁷

Under the Ontario rules, which require that each party’s affidavit of documents disclose all documents related to a matter at issue that are or were in their “possession, control or power,” it is clear that the report should have been listed, even if a privilege was claimed.³⁸ This is because the Ontario rules require separate listing of documents that the party does not object to producing and those that it does object to producing on

³⁶ “At the EPA regional office the next day, Gordon [Schlichtmann’s associate] went through files he’d gone through many times before. He knew them so well that all he had to do was look at them and judge their size and heft to tell if they contained anything new. They were voluminous, and it took Gordon most of the morning to work his way through them. In the end, he found nothing new. On his way out, he stopped for a moment at the office of the project director of the east Woburn cleanup. He thanked her for her help, and then he noticed on the shelf behind her a document, perhaps half an inch thick, with a light blue cover, a document he had not seen before ... Schlichtmann was at his desk when Gordon came in and dropped the document in front of him. ‘Shouldn’t we have gotten this thing during discovery?’ Gordon asked. It was a report, sixty pages in length, by a firm named Yankee Environmental Engineering. The first page bore the title ‘Hydrogeologic Investigation of the John J. Riley Tanning Company.’ The study, which Riley himself had commissioned, had been completed in 1983, three years before the start of trial. Schlichtmann was astounded. He had never seen this report before, and yet he had asked repeatedly, in interrogatories, in depositions, and by subpoena – on eleven separate occasions, he counted – for all such documents ... The report stated that groundwater from under the tannery flowed to the east, toward the city wells, through very porous soil, exactly as Schlichtmann’s expert, Pinder, had predicted.” Harr, *A Civil Action*, 459-60.

³⁷ See materials located in *A Documentary Companion to A Civil Action*, 415-96, more specifically designated below.

³⁸ See Rule 30.02(1), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended (“Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document”).

the grounds of privilege, including those that may only briefly have been in their “possession, control or power.”³⁹ The American system, by contrast, has traditionally worked primarily in response to specific requests for documents where parties are entitled to ask for and get all relevant information from any person unless it is privileged.⁴⁰

The Ontario system is a voluntary or “self-executing” system in a way that would have been unrecognizable under the Federal Rules at the time of these events.⁴¹ As the judge in the Woburn case put it, “[n]o litigant has an obligation to produce or volunteer anything that is not demanded.”⁴² However, documents over which one asserts a litigation privilege may be obtained by the other party in the form of a “statement.”⁴³ Relying on common local discovery practice in Boston, the lawyer in this case, waited for the request for such documents and objected to their production when the request was made.⁴⁴ The Ontario system does not allow parties to take this passive attitude with

³⁹ Rule 30.03, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended (The affidavit of documents “disclosing to the full extent of the party’s knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party’s possession, control or power” shall “list and describe, in separate schedules” all documents “(a) that are in the party’s possession, control or power and that the party does not object to producing; (b) that are or were in the party’s possession, control or power and for which the party claims privilege, and the grounds for the claim; and (c) that were formerly in the party’s possession, control or power, but are no longer in the party’s possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location”).

⁴⁰ Rule 26(b)(1) (“Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party”), *Federal Civil Judicial Procedure and Rules*, 146.

⁴¹ In 1993, amendments were made that introduced initial “core” disclosure without request. See Rule 26 (a)(1) & *Federal Civil Judicial Procedure and Rules*, 159, for a summary.

⁴² Harr, *A Civil Action*, 482.

⁴³ See Rule 26(b)(3), *Federal Civil Judicial Procedure and Rules*, 146.

⁴⁴ See “Affidavit of Attorney Mary K. Ryan,” reproduced in *A Documentary Companion to A Civil Action*, 463-68, 466 at ¶18 (on local practice) and “Memorandum in Support of Motion of Mary K. Ryan for Reconsideration of Finding of Deliberate Misconduct and in Opposition to Recommendation of Sanctions,” reproduced in *A Documentary Companion to A Civil Action*, 458-62, 459 (on objection made). The judge ruled that Rule 26(b)(3) “does not permit concealment of the exempted documents, which must be identified sufficiently to permit judicial resolution of the issue if it is contested by the party seeking discovery.” See *Anderson v. Beatrice Foods Co.*, 127 F.R.D. 1 (D. Mass.) (1989), reproduced in *A Documentary Companion to A Civil Action*, 451-56, 456.

respect to allegedly privileged documents. Interestingly, since 1993, the American Federal Rules have made it crystal clear that they do not either.⁴⁵

While the Ontario rules do not impose the obligation to *produce* such documents, they do impose the obligation to *disclose* their existence, since without the disclosure how could the privilege be challenged? The geological reports were documents (arguably) protected by a work product privilege. Yet one must ask how the plaintiffs' lawyers could have challenged the status of the reports as privileged when they did not even know of their existence. Listing systems do create a potential "Catch-22" situation in the sense that the description cannot destroy the privilege but it must contain enough information to allow the party to challenge its assertion. However, the most minimal description communicates the baseline knowledge of the existence of relevant material about which further inquiry could be made, and this does not depend on an initial inquiry into the matter, which may be objected to, as was the case here.⁴⁶

In the end, a failure to respond fully to demands for specific kinds of documents amounts to the same kind of abuse of the discovery process as the failure to disclose the existence of a document in the affidavit of documents or to later file a supplementary affidavit of documents. The Ontario rule gives a judge much discretion in deciding how to deal with such abuse.⁴⁷ One imagines that he or she would be free to respond, as the judge did here, by accepting the explanation by Beatrice lawyers that the omission of the

⁴⁵ Rule 26(b)(5), *Federal Civil Judicial Procedure and Rules*, 147 & 162-63 on the 1993 amendment. The wording of 26(b)(3) does seem compatible with the older passive attitude.

⁴⁶ Rule 26(b)(5) requires that "[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." See *Federal Civil Judicial Procedure and Rules*, 147.

⁴⁷ See Rule 30.08, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

Yankee Report from the documents turned over on discovery was a lapse of judgment brought on in a pre-trial preparation that involved thousands of documents and not enough time to deal properly with them all.⁴⁸

The case obviously provides a good real life scenario to deal with important and difficult ethical issues relating to discovery conduct and what constitutes misconduct.

What of the pessimism in the novel and film? Is this too much for first year law students?⁴⁹

It is probably worth noting that the novel is worse than the movie in this respect. Spoken against shots of trucks moving forklifts full of boxes of documents into a huge warehouse space, the movie has John Travolta say the following in a letter to the Environmental Protection Agency:

The Woburn case has become what it was when it first came to me, an orphan. I am forwarding it on to you in all its unwieldiness even as I know you may not

⁴⁸ See “Memorandum and Order on Plaintiff’s Motion for a New Trial,” reproduced in *A Documentary Companion to A Civil Action*, 417-25, 424 (“Failure to disclose these reports in January, 1986 was in my view a lapse of judgment, but in the midst of the discovery frenzy that was initiated by the plaintiffs in that period, these reports may have seemed minor”). See also “Statement of Jerome P. Facher in Response to Court Order of December 22, 1988” in *A Documentary Companion to A Civil Action*, 440-46 (describing the period in which the report appeared as one of “discovery chaos and disorder . . . Even those who survived that period can not adequately describe the chaos, disorder and crushing burden of the discovery and the frenzy of other last minute events that were taking place in January 1986. . . there was a ceaseless barrage of paper that threatened to engulf us all”).

The District Court held that the “lapse in judgment” was misconduct, suggesting that the question of whether there was knowing and deliberate concealment warranted further inquiry on remand. Beatrice “played possum” when they did not amend answers to answers to interrogatories that asked for documents like the report over which they had “control” in the required sense. See *Anderson v. Cryovac, Inc.* 862 F.2d 910 (1st Cir.) (1988), reproduced in *A Documentary Companion to A Civil Action*, 426-38, 431-35. On remand, the trial judge found that while Riley’s concealment of the reports was deliberate and he and his lawyer’s behavior amounted to “deliberate misconduct,” Beatrice lawyers did not deliberately conceal evidence. However, since “the activities of Ms. Ryan, Mr. Riley and the defendant’s lawyers were so functionally synergistic . . . the conduct of Ms. Ryan and Mr. Riley should be attributed to the defendant.” See *Anderson v. Beatrice Foods Co.*, 127 F.R.D. 1 (D. Mass.) (1989), reproduced in *A Documentary Companion to A Civil Action*, 451-56.

⁴⁹ For a more optimistic take on the novel by a law professor who teaches American civil procedure at the University of Pennsylvania Law School, see Stephen B. Burbank, “The Good, the Bad, and the Ugly,” 79:6 *Judicature* (May-June 1996): 318-22.

care to adopt it any more than I did at first. If you do decide to take it on, I hope you'll be able to succeed where I failed. If you calculate success and failure as I always have in dollars and cents divided neatly into human suffering, the arithmetic says I failed completely. What it doesn't say is if I could somehow go back knowing what I know now, knowing where I'd end up if I got involved with these people, knowing all the numbers, all the odds, all the angles, I'd do it again. In the novel, when the protagonist is asked whether he regretted taking on the case: "Do I regret it? ... Does a paraplegic regret the moment he stepped off the curb and the bus ran him down? This case has ruined my life."⁵⁰

The film does try to leave the impression that some justice prevailed – flashing print across the screen to the effect that the defendants paid their share (though we are not told how much that was) of a 69.4 million dollar EPA mandated clean up project, "the largest, most expensive project of its kind in New England history." However, it would probably be fair to say that *A Civil Action* is not a film that "overcomes audience scepticism toward lawyers and reclaims the progressive potential of the civil justice system."⁵¹

Famous films that overcome such skepticism and tell a progressive story abound. *Twelve Angry Men* (1957) helps one believe in the working of the jury system – a heroic figure played by Henry Fonda will be there to make sure wrongful convictions based on racist assumptions do not happen. *To Kill a Mockingbird* (1962) shows us power of the

⁵⁰ Harr, *A Civil Action*, 455.

⁵¹ Penney, "Mass Torts, Mass Culture," 257 (comparing *A Civil Action* to *Erin Brockovitch*, a film that comes out more favorably in the comparison since it is described as able to do this). *Erin Brockovitch*, dir. Steven Soderbergh, 130 min., Universal Studios, 2000.

technique of cross-examination to bring out the truth.⁵² In *A Civil Action*, on the other hand, when we finally do get to the trial, we see a jury alternately bored and overwhelmed by technical geological evidence related to ground water flow, being asked to answer questions that look unanswerable, never hearing a single plaintiff's story. We also see a painful cross examination of an expert witness for the plaintiffs, whose theory of how the chemicals might have got into the town's water wells, while thoroughly discredited in the court room generally lines up with what the EPA would later report.⁵³

However, *A Civil Action*'s pessimism ought not rule it out for our purposes, since we are interested in both sides of the story – seeing “real truth” and “legal truth” diverge, as well as converge.⁵⁴ This illustration of divergence might not make for the most hopeful model of a lawyer/hero.⁵⁵ As Brenda Cossman asked, “Is an anti-hero like Jan Schlichtmann the best that we can now hope for?”⁵⁶ Schlichtmann is certainly not likely to inspire generations of would-be lawyers in the way that Gregory Peck did as Atticus Finch in *To Kill a Mockingbird*. However, films that relentlessly portray the triumph of justice and truth against all odds are not telling the truth about the way that the world is and the way that the civil justice system operates.

As Michael Asimow put it in his keynote address, these fictional representations, while endlessly entertaining, create quite a lot of “cognitive dissonance” relating to lawyers and how they are viewed by the public (and indeed maybe how many lawyers

⁵² *Twelve Angry Men*, dir. Sidney Lumet, 95 min., UA, Orion-Nova, 1957; *To Kill a Mockingbird*, dir. Robert Mulligan, 129 min., 1962. See *Reel Justice*, 265-69, 139-42, for a discussion of both of these films.

⁵³ See Harr, *A Civil Action*, 325-40.

⁵⁴ See generally Mirjan Damaska, “Truth in Adjudication,” 49 *Hastings Law Journal* (1998): 289-308.

⁵⁵ For a criticism of the film for failing to provide “a good role model for what a lawyer should be,” see Jenny R. Hoffman, “A Civil Action – A Law Student's View,” available at the University of San Francisco School of Law website “Picturing Justice: An On-line Journal of Law and Popular Culture,” http://www.usfca.edu/pj/articles/Civil_Action-Asimow.htm

⁵⁶ Brenda Cossman, University of Toronto, Faculty of Law, “The Lawyer as Anti-Hero,” talk given at this colloquium.

see themselves). They do this by building up one kind of expectation – that the truth will always emerge, even if, for instance, that means a defence lawyer will not do his or her job and “sell out” his or her client. This is well represented in clips from the films Asimow discussed, the *Devil’s Advocate* (1997) and *And Justice For All* (1979).⁵⁷ The problem is that this expectation is in fact completely incompatible with what the legal system in Canada and the United States actually requires – an at least minimally robust defence even for a client whose lawyer believes him or her to be guilty.⁵⁸ *A Civil Action* stands out for the way in which unlike other more commercially successful films, it does not trade in rosy myth.⁵⁹ What it gains vis-à-vis minimal disjuncture between fact and fiction it might well lose in terms of creating a loveable hero. However, the more realistic it is the better from the perspective of law teachers.⁶⁰

John Noonan issued a ringing indictment when he wrote that the rules and interests tracked in our casebooks are like “so many severed heads, detached from the persons who carried them. Such a way of study permits masks to be taken for persons.”⁶¹ He used these vivid metaphors of “severed heads” and “masks” to communicate the point that “abstract indifference” could be successfully met, head-on, as it were, by the reinsertion of persons and their stories into the life of the law. Those involved with

⁵⁷ *Devil’s Advocate*, dir. Taylor Hackford, 144 min., Warner Brothers, 1997; *And Justice For All*, dir. Norman Jewison, 119 min., Sony Pictures, 1979.

⁵⁸ Michael Asimow, UCLA School of Law, Los Angeles, “Keynote Address – When the Lawyer Knows the Client is Guilty: Legal Ethics and Popular Culture.”

⁵⁹ Another film about people using the legal system to cope with the deaths of children, which has a lawyer who shares traits with Jan Schlichtmann is *The Sweet Hereafter*, adapted from a novel by Russell Banks. *The Sweet Hereafter*, dir. Atom Egoyan, 112 min., Finline Features, 1997.

⁶⁰ See Michael Asimow, “In Toxic Tort Litigation, Truth Lies at the Bottom of a Bottomless Pit,” available at the University of San Francisco School of Law website “Picturing Justice: An On-line Journal of Law and Popular Culture,” http://www.usfca.edu/pj/articles/Civil_Action-Asimow.htm, who writes that the film “dramatizes the human side of the litigation, while presenting the realities of complex tort litigation more successfully than any other film” ... “*A Civil Action* stands alone as the most realistic film about a complex civil trial ever made.”

⁶¹ Noonan, *Persons and Masks of the Law*, 7.

popular film, television, and literature have long understood the importance this. Can law schools and law teachers take a page from their book? As Noonan put it, “[t]he masks of the law are magical ways by which persons are removed from the legal process. By rational criticism, by historical reconstruction, the persons may be restored.”⁶²

Consider the line made for the Beatrice lawyer, Jerome Facher (delivered in the film by the actor Robert Duvall) who, after hearing one particularly moving plaintiff’s story, turns to his partner and says “these people can never testify.” The decision to “bifurcate” the trial meant that the jury was asked first to find whether the plaintiffs had proven that the defendants were responsible for dumping chemicals that reached the wells (the geological evidence) and then, only if the answer to that was “yes,” to move to the second phase of the trial in which the issue of whether those chemicals caused the illnesses complained of would be tried (the medical evidence). Grace was found liable at the first trial and Beatrice not (no whistleblower was found to testify against Beatrice and one was found for Grace). Beatrice did not continue to the second phase and the plaintiffs settled with Grace before phase two of the trial. This outcome renders the words the film attributes to Facher ominous in retrospect: “You think you’re going to put those families on the stand. Your mothers and your fathers are going to tell their stories and the jury is going to pull out their handkerchiefs and dab their eyes. Do you really think I would let that happen?”⁶³

Is it a triumph of legality that the jury was shielded from “the heart” or “the humanity” of the case? This is the way that Facher has represented things in his public

⁶² Ibid., 25.

⁶³ The lines from the book are slightly less inflammatory: “‘You think you’re going to put those families on the witness stand and break everybody’s heart. You think the jury’s going to pull out their handkerchiefs and dab their eyes.’ Facher shook his head resolutely. ‘It will never happen. Those families will never see the light of day’”). Harr, *A Civil Action*, 231.

commentary on the case and in particular on point about the bifurcated trial.⁶⁴ In a Canadian context, where jury trials in civil cases are rare, especially in cases that contain complicated evidence, as a toxic tort case inevitably would, we are not committed to the principle that the judgment about what would be right in a case like this should be made by a jury.⁶⁵ Similarly, limits on damage awards, including punitive damages, mean that we do not share in a culture of using the private litigation system to punish corporate wrongdoing, at least not with the same high stakes.⁶⁶ We do not think then that stories told to a captive audience of jurors likely to be sympathetic but not well equipped to understand is a very effective way of engaging in corrective or distributive justice.

Hence, there is a very real sense then in which the terrain on which the battle is waged in *A Civil Action* is of a different planet. It might then seem especially counter-intuitive to turn to these particular recreations of real-life events in order to replicate real life in a classroom. Certainly, even in a U.S. context, one would expect to find many things to quibble with in novel and film with respect to how truthfully or accurately they track real life – while entertaining and laudable forms of art, they do capture what actually happened in the case in the way that is fair to all sides, or represent what a more balanced view of this or that legal point might look like.⁶⁷ This turn to fiction is

⁶⁴ See Jerome P. Facher, “Considering *A Civil Action*: The View from the Bottomless Pit: Truth, Myth, and Irony in *A Civil Action*,” 23 *Seattle University Law Review* (1999): 243-81. See also, Jerome P. Facher, Introduction to *A Documentary Companion to A Civil Action*, xviii-xx. For a live view of Facher’s impassioned defence of the outcome of the case, see “The Berkman Center at Harvard Law School & Films for Justice at Seattle University School of Law, “The Lessons from Woburn Project,” video of January 30, 1999 conference sessions available at <http://cyber.law.harvard.edu/acivilaction/>.

⁶⁵ See Gary D. Watson, “Class Actions: The Canadian Experience,” 11 *Duke Journal of Comparative & International Law* (2001): 269-87.

⁶⁶ See Penney, “Mass Torts, Mass Culture,” 220-23 (for an outline of the Canadian law on punitive damages and the use of juries in civil trials in Canada).

⁶⁷ So, for instance, W.R. Grace has a website where they attempt to tell their side of the story. <http://www.civil-action.com/>. See Facher, “The View from the Bottomless Pit,” who argues against the perspective in the novel and lays out a long list of different interpretations of legal events in the case.

complicated in the Canadian case by the fact that the “real life” we are relying on the fiction to recreate is not actually our real life.

However, despite these two levels of distance, the animation that novel and film provide is helpful, especially for students who are at the beginning of their studies and whose impressions of role and law have probably been shaped in large part by what they have seen in television and the movies – more likely to have been of the more triumphant and rosy sort. However, more important than dispelling Hollywood-inculcated myths about the inherently transformative potential of the civil litigation system, is the more basic point that most students have come to the studies expecting to see something of both legal rules and their impact on human actors. In their first year, and particularly in their first semester, they are in various degrees of a state of shock at finding everyone reduced to an A, B, or C. Use of a fictional work like *A Civil Action* in civil procedure classrooms can help rectify this to some extent by restoring persons to the legal process and by sending the message that this is what it is supposed to be about.

While our own legal system would not have required that these plaintiffs’ stories necessarily be heard in the way that the plaintiffs’ lawyers desired (by a jury authorized to award large amounts of money to send a message to the corporate boardrooms of the nation⁶⁸) the use of stories and humanity in classroom case study is not confined to those

⁶⁸ Words attributed to the law professor on the plaintiff’s team, Charles Nesson, an important figure in the book (“Billion Dollar Charlie”), who is not represented in the movie. “The Woburn families ... feel that they’re suing on behalf of a broader constituency. They want this case to set an example ... They want to send a message, to ring the alarm, if you will, in the corporate boardrooms across the United States.” The judge later responds “Lawsuits are between parties, Professor. One side seeks compensation and the other side defends against it. If the boardrooms of America happen to notice what’s going on here, that’s an incidental consequence of the process. It’s not the purpose of it.” Harr, *A Civil Action*, 251. Nesson is a co-founder of the Berkman Center for Internet and Society at Harvard Law School and so an internet search results in many hits, many of which relate to the Woburn case. See in particular a website created by students in Nesson’s 1999 evidence class on the effects of a bifurcated trial, available at <http://cyber.law.harvard.edu/evidence99/woburn/>.

focusing on sympathetic plaintiffs. It extends to sympathetic learning about all of the actors in the legal system – the lawyers, the judges, along with the clients. A fuller view of the story behind a case is important and at the very least some sense that there is often more to the story than can be or usually is captured in the law report or the casebook, as well as a sense that there is always more than one side to any story. It was Clifford Geertz who said “whatever it is that the law is after it is not the whole story.”⁶⁹

However, for those in the legal system to play their roles as alert and ethical practitioners, they must be alive in some sense to the rest of the story that is there to be told and heard.

Probably my favorite scene in the movie *A Civil Action* is a depiction of a condensed version of the negotiation Schlichtmann has with W.R. Grace executive, Al Eustis (played in the movie by Sidney Pollack).⁷⁰ The plaintiffs are in a desperate financial situation and they know they will have to settle for much less certainly than they had originally hoped for and would in fact have been able to settle earlier for.

Schlichtmann has to endure an unbearably long lunch with Eustis at the Harvard Club in New York City, which begins with a reprimand in response to Schlichtmann’s attempt to discuss the case that “it is an unspoken rule that business is not discussed here” and continues with forced small talk about sailing (a topic about which Schlichtmann knows nothing and cares even less). Finally he and Eustis return to Eustis’s office and there is this odd struggle over whether or not Schlichtmann like Eustis will put his feet on up a coffee table between the two men, “this spindley French antique thing.” Schlichtmann is clearly uncomfortable and does not want to do it – as he puts it reporting the event back

⁶⁹ See “Local Knowledge: Fact and Law in Comparative Perspective,” in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 173. Many thanks to Michael R. Marrus for his direction to this quote.

⁷⁰ For Harr’s description, see *A Civil Action*, 426-30.

blow by blow to his partners, “It was weird. There was all this talk about my putting my feet on this table.” It is something that for whatever reason is important to Eustis. It is awkward and painful. You know Schlichtmann will lose this small, pointless negotiation. You know this is a microcosm of the whole event and seems to have as much sense and nonsense as everything else related to the trial. You wonder if this was what it was all about – power and prestige locked in with ambition and obstinacy. That is much of the story. It was one in which the rules of civil procedure played no small part.