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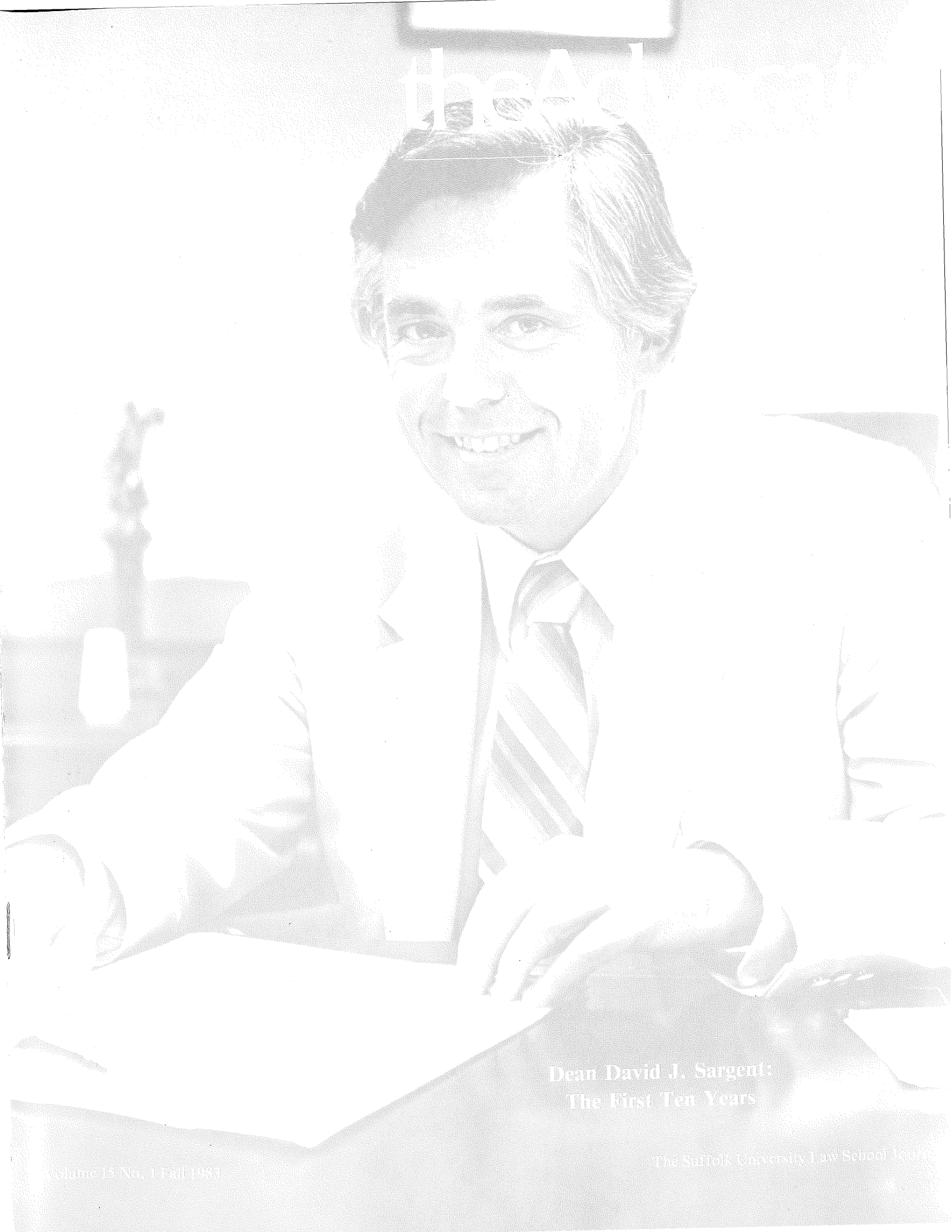
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Dean David J. Sargent:
The First Ten Years

theAdvocate

The Suffolk University Law School Journal

Volume 15 No. 1 Fall 1983

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The ADVOCATE is a publication of Suffolk University Law School. Our current circulation is 11,000 throughout the United States. The ADVOCATE is published three times a year: orientation, fall and spring issues. The orientation issue is distributed to law students only.

The objectives of the ADVOCATE are to publicize the activities and outstanding achievements of the Law School and to present articles by students, faculty and guest writers on timely subjects pertaining to the law.

All articles and editorials reflect the personal views of the authors and are not necessarily the views of the administration or faculty of Suffolk University Law School.

Guest editorials by students and faculty are welcomed by The ADVOCATE, which recognizes its obligation to publish opposing points of view. Persons desiring to submit manuscripts, to be put on the mailing list or to communicate with the staff please address all letters to The ADVOCATE, Box 122, Suffolk University Law School, 41 Temple Street, Boston, MA 02114.
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Dean David J. Sargent: The First Ten Years, The Faculty's Perspective.



Introduction

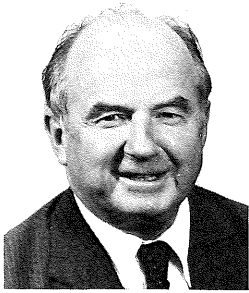
The Advocate salutes David J. Sargent on the occasion of the tenth anniversary of his appointment as Dean of Suffolk University Law School. This publication has a very special relationship to Dave Sargent. In 1968, while he was a member of the faculty, he founded *The Advocate* and served as its first advisor. Dave's vision helped him understand that Suffolk had the potential to become a dynamic center of legal education, and that a journal of opinion edited entirely by students would add a significant contribution to this development. In a sense, the founding of *The Advocate* foreshadowed the kind of Dean Dave would become. Just as *The Advocate* has attempted to be a focus for discussion of current issues and ideas, the deanship of David Sargent has witnessed the development of Suffolk into a vital, idea-oriented center of legal learning.

David's modesty would no doubt cause him to down-play his own role in the development of Suffolk over the last ten years. But anyone who has worked with him over the past decade knows that the school would simply not be what it is without him in the Dean's chair.

The Advocate invited a number of experienced faculty members to comment on Dave's service as Dean. With their combined experience as legal educators, these professors are in a position to comment on Dave's deanship from an unusual perspective. The editors only asked that these comments be personal, and they reflect the faculty member's own experience of what it means to have served at Suffolk while Dave was the Dean.

Dean Sargent, we thank you for the past decade. We are proud and happy to have you as a leader, confidant, inspiration and friend. We hope we will enjoy the pleasure of your company for many more years.

Professor Charles P. Kindregan
Faculty Advisor, *The Advocate*



Any evaluation of the Sargent years at Suffolk University Law School is inevitably conditioned by the perspective of the evaluation. My perspective is unique. During the past ten years of David J. Sargent's tenure as Dean, I have been privileged to serve alongside him as Associate Dean. Accordingly, while my views are undoubtedly colored by my association with him in a position of administrative leadership, I believe that they are not without some value as an insider's view of the exciting developments of the past decade and Dean Sargent's role in bringing them to fruition.

The past ten years have been challenging years for Suffolk University Law School. They have been years marked by outstanding growth, and development not only in terms of physical facilities, but in terms of intellectual stature and educational achievement. During this time, Suffolk University Law School has truly come into its own as a recognized institution of legal education of the highest quality. Its growing reputation for legal excellence has increasingly spread far and wide throughout the country.

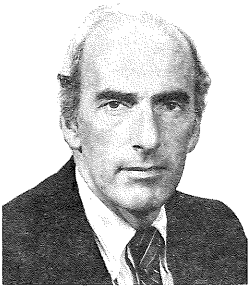
While justifiably proud of his role in Suffolk University Law School's success, Dean Sargent would be the first to acknowledge that no one person is responsible for the prominence which Suffolk has achieved during this period. Yet, while it is undoubtedly true that Suffolk's success is attributable to the combined efforts of every segment of the Suffolk University Law School — the students, the faculty, and the administration, I am sure that without David Sargent's vision, commitment and energy Suffolk University Law School would not have reached the measure of success it now enjoys.

David Sargent has always known what must be done to bring Suffolk University Law School to a position of leadership in the field of legal education. In his own quiet and unassuming way, he has persisted in undertaking those measures which, regardless of their lack of popularity at the time, were deemed to be absolutely necessary to improve the quality of legal education at Suffolk. While some did not always agree with his every decision, no one has ever had cause to doubt that he was operating at all times to make progress on the road to institutional greatness.

The role of educational leadership in the law school community is never easy and undemanding. There are always those, both in and out of the law school community, who are prepared to criticize and belittle. I have witnessed at first hand the inevitable frustrations and disappointments which Dean Sargent has borne over the years as his hopes and expectations have not been fully reached, or as some of his goals and objectives have taken longer than originally anticipated to be realized. Yet, in spite of momentary setbacks and unexpected difficulties, David continued to forge ahead. His enthusiasm for Suffolk University Law School and its future has never waned. He remains today, as he was on the very first day of his assumption of leadership ten years ago, a true believer in an ever-improving future for Suffolk.

As Associate Dean of the Suffolk University Law School, I am proud to have been a part of the Sargent years. I am proud to have worked with Dean Sargent and to have shared his vision of greatness for our Law School. Never one to rest on his laurels or to bask in the glory of past accomplishments, the Dean continues to provide fresh leadership and new inspiration in dealing with today's educational problems. I consider it a continuing honor and privilege to work with him to achieve that long-overdue educational preeminence which is Suffolk University Law School's rightful claim and Dean Sargent's rich legacy.

Malcolm M. Donahue
Associate Dean



It is a privilege for me to have the opportunity to express my thoughts concerning the tenure of David Sargent as Dean of the Law School. I have known Dean Sargent for over twenty years and worked closely with him in the administration of the Law School over the last eight years. His accomplishments on behalf of the Law School are evidenced by the ever increasing level of excellence and reputation of Suffolk in the legal and academic community. More importantly, he has put his personal stamp on this institution. Having had the opportunity to observe Dean Sargent in all sorts of situations, I would be hard-pressed to find one word which would encompass all of his personal attributes. However, to me his overriding quality has been his civility toward all. Speaking as one with a deserved reputation for impatience, his ability to be civilized and sensitive to the personalities of all with whom he works is impressive. This includes not only the senior administrators with whom he has close contact and years of experience, but also the more junior persons in the administration and faculty of the University and Law School with whom he comes in contact from time to time. The Dean's high degree of professionalism also pervades all of his professional activities. Not only does he carry this high standard but also his personality and presence demand it from all with whom he relates and the institution as a whole. From my vantage point as a faculty member and administrator for over twenty years, having had the opportunity to observe all persons connected with this University, I have no doubt that he is the overriding dominant personality at Suffolk University Law School and the credit for all of its advances are rightly placed upon his shoulders.

Speaking from a personal perspective, I can attest to innumerable kindnesses that David Sargent has shown to me over many years. Not only are words inadequate to describe this relationship, I am afraid my own activities in this regard pale by comparison.

Associate Dean Herbert Lemelman





When asked to write a few words by *The Advocate* by way of recollection and reflection on my thirty years of knowing Dean Sargent on the event of his tenth anniversary in that office, I thought it would be an easy task and readily accepted. But thirty years is a long time, even in retrospect, and reviewing the turgid history of this period with enough material for an epic makes selection difficult when the occasion allows so little of the much that might be said. At length, it appeared that I might best serve present purposes by sharing some bits and pieces of the Dean's early encounters with the Law School that are probably not well known.

I first met David Jasper Sargent (Jasper is a surname from his genealogical tree) through a mutual friend we have both retained to the present day while the three of us were students at this law school. He was (and still is) a little younger than our mutual friend and myself, which is unfortunately (for us) all too obvious, and he had the temerity to be married already, although I could better understand why once I met Shirley, his lovely and gracious wife. He was also a year ahead of us, receiving his LL.B. (the J.D. was yet to arrive on the scene) from Suffolk with the Class of 1954. To accomplish this latter feat, he had to cheat a little by convincing the then administration that two years of preparation at the University of New Hampshire was all he needed for law school, whereas the rest of us even in those days had to have an undergraduate degree from somewhere. Of course, he then proceeded to prove his point, as has been his habit, by graduating first in his class and doing so well on the New Hampshire Bar examination as to prompt an extraordinary letter of commendation from the New Hampshire bar examiners to the Dean of the Law School.

After law school, there wasn't much doing in Newport in the scenic New Hampshire hills, the site of the family homestead where his Dad was a realtor, so he retained his home in nearby Medford, where he still resides at least when not "up-country" (which is as often as possible through all seasons of the year, where he maintains a rustic, if not too humble, retreat on the shores of Lake Sunapee close to Sargent's—no relation—Landing, where visitors are endemic but not necessarily academic, welcomed and well-fed and libated) and having been licensed to practice in the Commonwealth by virtue of his also passing the Massachusetts Bar examination immediately upon graduation, he commenced his quest for fame and fortune here in Boston. He very shortly found more than enough to do in the office of an established labor law expert, before whom he had sat as a law student, Leon Kowal, Esquire, who promptly elevated him to partnership status in the firm of Kowal and Sargent. He was not long away from the Law School, however, as a need suddenly developed for a Trusts instructor in the Evening Division for 1955-1956 and Dave consented to take it on as an interim, stop-gap accommodation in spite of the fact the subject had little in common with the law he was practicing. The one year, part-time commitment spread into 1956-1957, the same academic year I joined the full-time faculty. When September of 1957 rolled around, the infection to teach that had such a benign onset in September of 1955 had blossomed into a chronic condition. The school was expanding under the new administration of Dean Frederick A. McDermott and he and the then Chairman of the Board of Trustees, Judge Frank J. Donahue, decided that the best candidate for the sixth (yes, friends, that was all there were and the Dean was included in the count) full-time faculty position was David J. Sargent, whose resistance to the idea had now turned to an enthusiastic acceptance from which he has yet to recover. Hard to believe though it may be, the then almost wholly required curriculum in both Divisions was taught, with few exceptions, by a full-time faculty of six in addition to handling all the administrative tasks of the school with but one administrative staff member, the Registrar. This required individual teaching loads of ten to twelve hours a week and three to four different courses a semester with one or more repeats in both Divisions being fairly standard. Relief was a semester without a 9:00 A.M. class following an 8:00 P.M. class the previous night. Of course, the school was much smaller then, about one-fifth of its present enrollment, and that helped when it came to grading (the 400-600 Blue Books in June were yet to come), but it did not help with the class preparations. Talk about being hounded by deadlines! A newcomer on this faculty had to read fast, digest quickly, talk slowly and hope some bright student did not embarrass you by asking a penetrating question you obviously ought to be able to answer but did not yet know enough to handle adequately. To voluntarily undertake this intellectual and physical regime had to be a form of masochism! I say this not to denigrate the school. It had its growing pains like any institution that has survived and Suffolk, because of its peculiar circumstances, perhaps had a more protracted adolescence, but to give you some idea of a part of the background of Dean Sargent that may be unknown to you, a part of the iceberg you don't ordinarily see. Dave was blessed with considerable intelligence, but he was never content to rest on it. He worked hard at the tasks he undertook, served a very demanding apprenticeship and stands on a very solid foundation of accomplishment.

Let me close by touching on two points. One is my great pride in having Dave Sargent as a personal friend, which is a treasure I share with many others in and outside of the Suffolk family and antedates his deanship. He is a very perceptive and caring human being, a raconteur of distinction and as eloquent and moving a spontaneous orator as the contemporary scene has to offer and I am happy to add my voice to the chorus of well-deserved tribute to him.

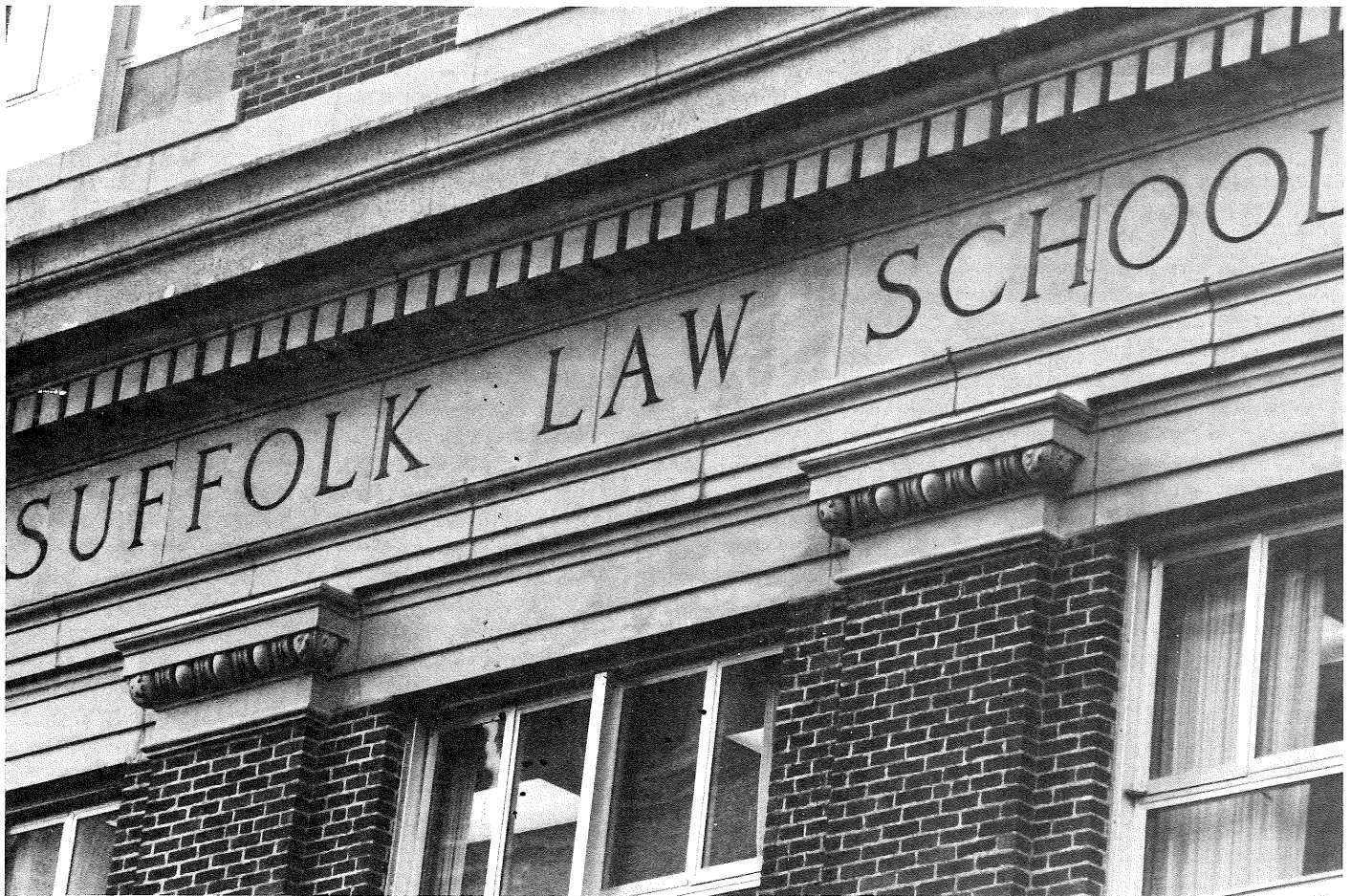
The other is my great satisfaction with what Dean David J. Sargent has done, with many helping hands certainly, for the Law School in the last ten years and on this note, I would like to quote from my own remarks at the last Annual Faculty Dinner just before the start of the school year in presenting a gift to him on behalf of the faculty to commemorate the close of his decanal decade.

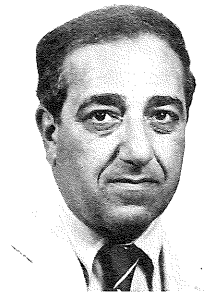
I do not think there is a single member of this faculty that feels the least bit uncomfortable with you at the helm. There is the sense that whatever the problem, you are up to handling it appropriately and in commendable fashion.

I do not think there is a single member of this faculty that feels he or she could do a better overall job as Dean than you have done and are doing.

And that says it all.

Professor John J. Nolan





When I joined the adjunct faculty in September 1961, Suffolk Law School was a very different institution. I was asked to teach one section of Legal Methods to first year evening students at the mortifying hour of 8:00 p.m. on Friday nights. The course was a more informal, less structured Legal Practice Skills as we know it today. It was, by and large, a successful course for students and a valuable experience for the various young instructors who offered the course. Because of the nature of the course and the small size of the class, it was not the intimidating experience I expected. That would come the following year.

My initial appointment to the full-time faculty was for the academic year 1962-1963. I was the seventh, and junior, member of the faculty. The Dean was Fred McDermott. He was a great scholar, a quiet, effective leader and a kind person. He had come to the Suffolk Deanship from a professorship at Boston College Law School with a charge from the University Board of Trustees to strengthen the Law School. He was avuncular in his approach to students and faculty, hovering around us, quietly asking questions about the course materials and examinations and gently making helpful suggestions to younger faculty members.

The entering classes during those years were 35 or so. The admissions policy was generous. It consisted of allowing almost anyone with an undergraduate degree, a completed application (most of the time, anyway!) and *some* money to enroll, even up to and including the first day or evening of classes in September (and also in January, for entering classes came in twice a year). The last rule of having a deposit of some kind was broken frequently; a great deal of faith was placed in a student's promise to pay.

The attrition rate was outrageously high. The law library, as such, did not exist. There was a section in the corner of the University library to accommodate the few law books that were available. The rest of the library was for the College and the Business School. The Law School did not have exclusive use of facilities. Undergraduate, business and law school classes were meshed into a schedule utilizing the same auditorium and classrooms. Two or three faculty members shared the same cramped office.

There was no orientation for entering students. They simply went to their first classes opening day. There was what I have frequently referred to as the "pre-orientation session." This was held two or three hours before classes were scheduled to begin. The Dean, with his inspection team, checked the corridors and classrooms to determine their readiness for opening day. The team became very adept at putting chairs into neat rows. It consisted of John Fenton, David Sargent and myself. This was my first acquaintance with David, some 22 years ago.

The first substantive courses I offered were Criminal Law and Domestic Relations (now exalted as Family Law). I had a modicum of teaching experience in the Army and was on a summer session faculty at Phillips Academy, but nothing prepared me for the terror of lecturing to, or using the Socratic method with, professional, graduate students. One method I used to improve my teaching skills was eavesdropping; the objects of my stealth were John Fenton and David Sargent. I chose John because I knew him well and had witnessed frequently his public speaking. David was chosen because of his reputation as a classroom teacher. In addition, he had had, at the age of 29, about six years of teaching experience. They were superb in the classroom, and I learned more from them than I should, perhaps, admit.

This period was the beginning of a 22 year faculty association and friendship with David Sargent.

My reminiscences of my early days on the faculty are not mere storytelling, but are intended to give the reader a sense of the Law School in the early 1960's and to provide an understanding of, and more importantly an appreciation for, the progress of the Law School during David's tenure as Dean.

David has been affiliated with Suffolk since 1956 as a teacher and an administrator. He has excelled as a classroom teacher and an administrator. His first-class mind and oratory skills are known to the generations of students, to bar associations, to legislative committees and to civic and charitable organizations. But his most significant contribution to Suffolk has been in the field of administration. His appointment as Dean in 1973 followed a period of University Trustee indecision and a caretaker administration. What his administration has effected is a major overhaul of all aspects of Law School life.

The Law School has progressed from mixed-university use of facilities to exclusive, spacious and attractive quarters; from a small and good faculty to a large and strong group of teacher-scholars; from a predominantly three-state student body to one representative of 40 states and 200 colleges and universities; from an impossible employment environment to representation in law clerkships and major law firms throughout the country; and from American Bar Association approval to membership in the Association of American Law Schools, symbolizing recognition, prestige and inclusion in the mainstream of American legal education. To cite this progress is not to denigrate the contributions of trustees, other administrators, faculty, staff, students and alumni. But the galvanizing force behind this effort has been the unique leadership of David Sargent. Others may have witnessed anger or pettiness or meanness or deviousness - I never have. Even under the most trying circumstances, I have seen only integrity, decency and good will. I have always been baffled by his ability to coalesce the many constituents of the Law School, press forward and achieve outstanding results without alienating or antagonizing anyone in the process. Machiavelli was obviously discoursing on another kind of leader.

Each year in his tenure has brought improvement in the Law School. And each year has also brought, for myself and others, a greater respect for David Sargent as an administrator, as a faculty colleague and as a fellow human being.



The first I ever heard of Suffolk University was at a convention of the Association of American Law Schools in 1952, when then Acting Dean John F.X. O'Brien introduced himself to me to discuss some remarks that I had made during a meeting about the teaching of Civil Procedure. Two years later, after I had just completed a year of graduate studies at the Harvard Law School, Dean O'Brien hired me to teach Taxation for the year on a part-time basis. After that year, I left Boston to join the faculty of Albany Law School, where I was never able to teach Taxation, a field I then thought of as my field of special interest.

The next occasion that I had to speak with anyone from Suffolk was at another Association of American Law School convention, in December of 1958. A new Dean, Frederick A. McDermott, had gone to the convention to do what had never before been done by anyone at Suffolk. He had gone to recruit full-time faculty in the national marketplace, and he had brought with him David J. Sargent, a young member of his still tiny faculty, to help him screen possible candidates. At a time when a small number of people had to cover the entire curriculum, efficient employment of faculty talents was essential. My strong interest in both Taxation and Commercial Law must have made me an attractive candidate. I never did know how much the young Professor Sargent had to do with my getting an offer, but I did join the full-time faculty in 1959, and I have now spent the major part of my working life here.

Since coming here in the fall of 1959, I have written a eulogy for one Dean under whom I have served, presided over the retirement dinner for a second, and spoken (along with others) at the retirement dinner for a third. Now I have been asked to write a tribute to David J. Sargent while he is still in office, and while he still has the power to appoint me to committees and to recognize me when I want to deliver one of my diatribes at a faculty meeting! It is certainly easier to write a eulogy or an encomium for those who have died or stepped aside than for one who is alive and well and seems still to be moving upwards, no matter how illustrious the heights he has already reached. This tribute will say more about my own feelings toward the person whom I first met in December of 1958 and who has been my colleague for a quarter of a century than about his achievements.

The task of a law school Dean has become a task of such burdensome responsibilities that it is unusual to find someone who lasts as long as ten years. To find someone who has performed well at this task for ten years and who shows no signs of weakening is rare. David J. Sargent is one of the rare ones. He is both liked and respected by his faculty. He presides over faculty meetings which can become harrowing and acrimonious, and he does so with such skill, patience, and aplomb that when the meetings are over the faculty members continue to talk to him and to each other. To someone who has not experienced a faculty meeting, this might seem unremarkable. To me, who have experienced many, it seems miraculous.

My most vivid recollection is not of the Professor or the Dean, but of the person who stepped into my office in 1972, when I was still engaged in the practice of setting fire to one end of a cigarette and sucking the smoke into my lungs through the other end. He said, matter of factly, "I don't mind when people smoke." Then, after a perfectly timed pause and a slight change in inflection, "But not when it's people I like." This simple statement did more to shape my behavior than all of the statistics of horror to which I had been subjected. I have used the same line on others since then, but I doubt that it has ever had the same impact as when spoken spontaneously by our Dean. It was far from the most important thing he ever said, but it encapsulates his mastery of the art of advocacy and persuasion.

For a tribute to be a reward, it must express more than mere words of praise. Charles Evans Hughes, a former Chief Justice of the United States, created a touchstone for determining the extent of a lawyer's reward when others pay tribute with these words:

"The highest reward that can come to a lawyer is the esteem of his professional brethren. That esteem is won in unique conditions and proceeds from an impartial judgment of professional rivals. It cannot be purchased. It cannot be artificially created. It cannot be gained by artifice or contrivance to attract public attention. It is not measured by pecuniary gains. . . . It is an esteem commanded solely by integrity of character and by brains and skill in the honorable performance of professional duty."

This touchstone well describes my feelings about David Sargent. As Lawyer, Professor, and Dean, he has won the esteem of his professional brethren by the integrity of his character and by the use of his brains and skill. I am honored to have been asked to contribute my thoughts about him.

Professor Alfred I. Maleson



I first met David Sargent when I was enrolled as a first-year evening law school student in his Torts class in the Fall of 1957. Even in those early days when he was just embarking upon his career in legal education, his mastery of the subject matter, his clarity of expression and explanation, and his complete domination of the classroom were impressive. Never one to suffer fools, incompetents, or laggards gladly, Professor Sargent insisted that his students come to class fully prepared to discuss the cases intelligently or else have the common decency not to waste time by opening their mouths. Unlucky was the student who thought he could muddle through on the wings of glittering generalities and unexamined premises. Through the brilliant incisiveness and superb logic of his own mind, Professor Sargent would readily lead the hapless dullard down the inevitable path to his own humiliating self-destruction.

Suffolk University Law School was a relatively small law school in those days. My evening law school class started out with approximately fifty members. By graduation, the size of the class, voluntarily or involuntarily, had dwindled to less than half the original number. Professor Sargent was one of a mere handful of full-time law professors; most of the teaching was done at that time by part-time practitioners. We considered ourselves fortunate indeed as we progressed through law school to be students of Professor Sargent once again in our courses in Wills and in Trusts.

When I first joined the Suffolk University Law School faculty in 1971, the full-time faculty had increased to almost twenty members, the student body had expanded enormously to the point where there were approximately 2300 students in the combined day and evening divisions, and the growing pains of such rapid expansion and development were just beginning to be appreciated. In due course in 1973, Dave Sargent became Dean and immediately began the long and difficult process of addressing the law school's problems and taking these steps that would ultimately bring about full accreditation.

Those of us who have been here at Suffolk during the past decade have been privileged to witness at first hand the success of David Sargent's leadership. During the Sargent years, Suffolk University Law School has moved into the mainstream of American legal education. Today Suffolk University Law School is a significantly different institution from what it was in my days as a student from 1957-1961, and from what it was when Dave Sargent took over as Dean in 1973. Vast changes have come about in the expansion of the physical plant and facilities, in increasing the size of the full-time faculty, and in upgrading the quality of education. In no small measure, Dave Sargent has been the prime mover behind all of these developments.

To be the Dean of a law school at any time is a challenging experience. To be Dean of Suffolk University Law School during the past decade of dynamic institutional progress has tested the mettle of the man as few other experiences could have done. For a Dean occupies a precarious and unenviable position at best. The academic leader to all segments of the law school community, he is, like the British Prime Minister, *primus inter pares*, first among equals, to his faculty colleagues. To be called upon to preside over a deliberative meeting of the Suffolk University Law School faculty, as strong-willed, passionately committed, and highly articulate a collection of rugged and irreverent iconoclasts as were ever assembled under one roof, on any issue of importance in the field of legal education is no task for the faint-hearted or the thin-skinned. Confronted with any educational problem, my colleagues and I at first glance are likely to have as many well-reasoned solutions as there are members present and are just as likely to be prepared to speak eloquently upon them at great length.

Over the years, I have often thought that Dave Sargent's conduct of controversial faculty meetings has epitomized the outstanding leadership qualities which he possesses at their very best. Patient, understanding, and sensitive, he has always manifested scrupulous fairness to each of his faculty colleagues. While not always agreeing with the views expressed, and even on occasion finding them disturbing and distasteful, Dave's respect for each of his faculty colleagues, his inherent toleration of widely diverse views, his belief in the integrity of the process of faculty governance, and his innate graciousness and courtesy, even in times of great pressure, invariably saved the day and made it possible in due course to achieve an effective working consensus on the most troublesome of issues. His skills at educational consensus building are unparalleled and account in no small measure for his outstanding achievements.

In the final analysis, Dave has always recognized that the true measure of a great legal educational leader is the extent to which, by enjoying the respect and confidence of his colleagues, he can persuade and inspire them to work faithfully to implement his vision of what needs to be accomplished. In this regard, Dave has succeeded magnificently, and Suffolk University Law School has been the beneficiary of his tireless efforts.

On this memorable occasion of the Tenth Anniversary of his assumption of the reins of leadership, I am most pleased to extend to Dave my personal best wishes and heartiest congratulations for a job well done. It is my earnest hope that Suffolk University Law School may continue to enjoy the benefits of his guidance and leadership as Dean for many more years to come.

Professor Alexander J. Cella



It is a great honor to be given this opportunity to address the many accomplishments of David J. Sargent since his appointment as Dean in 1973.

To many, a decade is but a period which gently blends into the shadows of oblivion, but to David J. Sargent the past ten years has been a time devoted to planning, dedicated pursuit and the fulfillment of many goals, foremost of which has been the recognition which Suffolk University Law School has attained as an outstanding institution in both the legal and academic communities.

The Law School has grown from a relatively provincial institution to one whose enrollment is now composed of students from over thirty-five states representing approximately two hundred and fifty colleges and universities.

The quality of the education at the Law School has been enriched as a result of the continuing effort on his part to bring to the faculty many young scholars, distinguished professors and members of the judiciary. The faculty has nearly doubled in size. The curriculum has been expanded to enable students to concentrate in specialized areas. The *Law Review*, The *Transnational*, the Clinical Programs and the Moot Court Programs are beneficiaries of his encouragement and support.

Since he has become Dean, the school has become technologically sophisticated. Practically every department in the Law School now has access to computers including the law review, the library, the administrative offices and law placement.

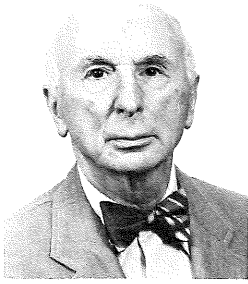
Through his efforts the law libraries' capacity has doubled in size and is rapidly approaching the two-hundred thousand mark. The Stephen P. Mugar Law Library and the E. Albert Pallot Law Library are considered as two of the finest law libraries in the area.

All of his accomplishments, of which the above-mentioned are but a few, are not only an important part of the history of the Law School but a part of the lives of those who shared in these experiences and achievements, whether it be as students, administrators, or faculty.

As these experiences have touched many, so has the presence of the Dean. His dedication, his concern, his understanding, and his compassionate manner have left an indelible mark on those who have known him as Dean, faculty member and friend.

His stature belies his humility. He is the first to remind others that the success of the Law School has been a team effort. As with every team, its achievements are but an image of its coach.

Professor Catherine T. Judge



In the tradition of the Navy, the ideal ship is a “taut and happy ship”; and the measure of a ship’s commanding officer is the degree to which the ship approximates the ideal. Although Suffolk University is not the Navy, Suffolk Law School is a taut and happy ship. Dean Sargent is one big reason.

A newcomer to the Suffolk Law School faculty feels the quality immediately. No loose ropes and no waste of limited resources. (Well, hardly any.) An unswerving concentration on doing the job, at steadily rising levels of performance. Such a pattern of conduct could become grim, despite its virtues or to a degree even because of them. At Suffolk Law School, it never does, because the sharp focus is sheathed in mutual support, warm friendliness, and a genial sense of community. The propitious blend of tautness and happiness is a measure of Suffolk Law School’s dean, and a projection of his personality.

Dean Sargent hasn’t done it alone, of course. The faculty and the student body are vital components of the solution. But David Sargent has been and remains the primary catalyst. This is singularly appropriate for one who, as student, teacher, and dean, has been a part of Suffolk University Law School for 32 years, almost half its historic existence.

During these thirty-two years, especially during the last twenty-five years, and at an accelerating pace during the ten years of David Sargent’s deanship, Suffolk University Law School has evolved from a local to a regional institution and has set its course toward becoming a national law school. Throughout its history it has been, and it remains today, an urban law school, part of an urban university. It is urban not merely in the sense that it is located in the center of a large city but in a deeper sense. It has grown in response to the needs and aspirations of an urban population. It is in tune with the profound and subtle changes which have occurred in our legal system in its application to contemporary life in large urban centers. As such an urban law school, it has a special opportunity and mission along with its general mission of contributing to the national enterprise of legal education. Both by instinct and through study and reflection, Dean Sargent has perceived the special opportunity and the need to grasp it while persevering in general high performance and the course already charted toward national status. In the years ahead under Dean Sargent’s continuing stewardship, we can anticipate that the special and the general effort will reinforce one another and blend into a constantly renewed record of accomplishment.

Professor Milton Katz



Past, Present and Future: An Interview with Dean Sargent

For the occasion of David J. Sargent's tenth anniversary as Dean of Suffolk University Law School, Christopher R. Hopkins, editor-in-chief of *The Advocate* and Martin D. Hernandez, associate editor, interviewed Dean Sargent. The focus of the interview was to gauge the law school's efforts to provide a quality legal education to its students over the past 10 years and efforts to achieve national recognition as one of the finer law schools in the country.

THE ADVOCATE: Gleason Archer founded Suffolk Law School in 1906 with the idea of providing legal training to those people excluded from the more elite institutions. Do you see Suffolk today as living up to its historical role as a provider of opportunity to the disadvantaged and if so, how?

DEAN SARGENT: The answer to your question is that yes, I do believe we are living up to our heritage. I think it's important for us to remember what Gleason Archer was really trying to do. He was trying to provide a quality legal education not to academically poor students, but to people who were discriminated against by most of the "establishment" institutions: recent immigrants, Jews, Blacks and Mediterraneans. Most of those people were recent immigrants to the United States. Irish Catholics were not admitted routinely to most law schools in this country at the turn of the century. So I think what he was trying to do was to make sure that there was no disadvantage of opportunity based on one's ethnic background, social background or religious background. I don't think he ever intended the school should be a haven for intellectually disadvantaged people. So I think we are doing exactly what our historical mission was. We are doing it by making sure that people of modest circumstances do not have exorbitantly high tuition: our's is substantially lower than other institutions in the area. We shall provide and always will provide an opportunity for people who must of necessity study law in the evening which I think again is very much in keeping with our heritage

and we provide a very substantial sum of money to people who cannot afford the tuition in the form of a grant and aid program. In my ten years as Dean, it totals in the millions of dollars. It's not a loan program, it's a flat grant and aid program. So I think in those ways, yes we are living up to our traditions.

THE ADVOCATE: When you became Dean of the law school in 1973, enrollment was approximately 2100. Do you believe that such a large enrollment was a major stumbling block in attaining high educational standards at Suffolk?

"... I do believe we are living up to our heritage."

DEAN SARGENT: I think that the people that were produced then in many instances were outstanding people, but it was not a desirable way of studying law. I think the numbers were actually somewhat higher than that; I believe they were slightly over 2200 students when I came in. It produced a tremendous crowding condition. The library you have to remember was about one third its present size as far as seating capacity. We were still sharing this building with part of the undergraduate school. The faculty was small. It was a very undesirable situation. I do not think people ended up being poorer lawyers, but it was not the academic climate that I think we have today.

THE ADVOCATE: Are you satisfied with the size of today's present enrollment of approximately 1600?

DEAN SARGENT: I think that's a rather desirable goal. This semester we are actually somewhat under 1600. But that's about as far as I think we ought to go. I think that roughly 900 students in the day division and 700 in the evening division presents the opportunity for a great blend of people from all over the country and still provide a large number of opportunities for people in the New England area. The building I think is suitable, the library is also suitable for that number of students. Faculty is about the right size for that number. So

I think we've had that as our target figure for ten years and we have just resolved it last year. I think that's a very good goal. We are in the unusual position of having reduced our student body by 500 to 600 students in the last ten years. We are probably the only school in America that has done that. Most of them, including all of our sister institutions in the Greater Boston area have greatly increased their enrollment.

THE ADVOCATE: The reduction in the student body has been matched by a corresponding increase in the number of the faculty which has caused a reduction in the student-faculty ratio from nearly 150 to 1 to 30 to 1. Do you feel the law is best taught in smaller groups than the typical lecture size class?

DEAN SARGENT: The answer to your question is that no I really don't, at least in the core curriculum classes. At this school and at most, including the most prestigious schools, the basic courses are still taught in groups that are comparable to our size classes. I think that the reason for the desirability of having a small student-faculty ratio is number one, there ought to be opportunities for all students to have a number of classes, usually of a specialty nature, in relatively small, seminar-type meetings. Secondly, the small student-faculty ratio with the lower student-faculty ratio provides a greater opportunity for faculty members to participate in a meaningful way in scholarly research and writing and I think that's the weightier concern of a small student-faculty ratio as opposed to having torts and contracts sections of forty as opposed to eighty or ninety.

"I think that roughly 900 students in the day division and 700 in the evening division presents the opportunity for a great blend of people from all over the country."

THE ADVOCATE: Suffolk has seen a continuous debate between the advocates of opportunity and those of excellence. Charges have been made that opportunity equals mediocrity and excellence equals elitism. Can the two be effectively combined?

DEAN SARGENT: I think so. I think that we have had the good fortune in recent years in particular, and perhaps always in the history of this school of attracting many extremely gifted people and we have simultaneously provided through tuition grants and in other ways an opportunity for people to acquire an education who could not otherwise do so. If opportunity means giving a chance to study to a person who is economically disadvantaged, such as minority students, then I favor giving such an opportunity. But as to the people who have had every advantage and who simply have not demonstrated the intellectual ability, then I would say that I am not interested in providing that kind of an opportunity when there are literally thousands of men and women who have demonstrated the ability. So I don't think that is elitism, I think that is simply a recognition of the fact that some people have demonstrated an ability to succeed in law school and others have not. But as far as economic opportunity is concerned, anyone who is going to be disadvantaged in that way, I think we ought to give them the opportunity. And people who have not had a fair shot at demonstrating their intellectual ability because of the disadvantage of minority status or even if they are not minority members, if they are people such as the Appalachian type of whites: I think these people have not had the opportunity to demonstrate their intellectual ability. But short of these, I think opportunity ought to be given to those that earned it.

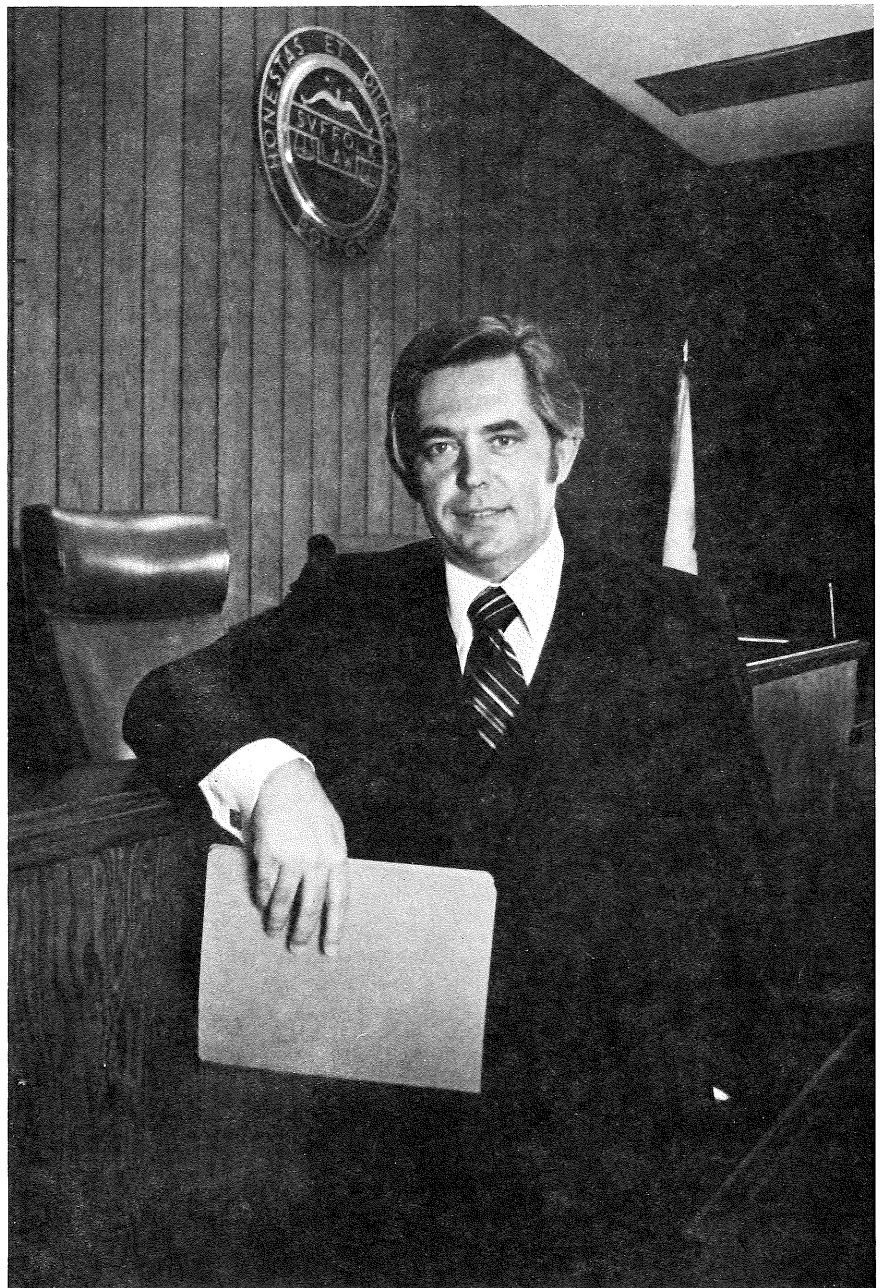
THE ADVOCATE: Some critics have stated that Suffolk has undergone a process of "Harvardization" in its pursuit of excellence, of emulation of the traditional path of the casebook and the Socratic method with the result of creating lawyers who are aggressive, amoral, and devoted to the adversarial ethic. How do you respond?

DEAN SARGENT: I think that what we've done is to ensure that this law school is in the mainstream of legal education. As far as the case method is concerned, the case method is not used either here or at any other institution exclusively; in fact, we may use it less here

than we should. I believe that our students are as concerned about social problems and ethics and the obligation of the Bar to take a meaningful role in society in general. I'm not sure what the "Harvardization" really means; certainly it might have some plusses associated with it, but to the extent that it is meant to convey an indifference, elitism, and aloofness to social responsibility, I certainly do not accept that as even remotely demonstrated fact.

THE ADVOCATE: The last ten years have seen the creation and development of several clinical programs such as Prosecutors, Defenders, and SULAB. What is their role in creating the Suffolk Lawyer?

DEAN SARGENT: I think that clinical opportunities are an extremely valuable opportunity for all law students. In my day in law school, clinical opportunities here and at every law school were completely unknown. It is certainly desirable. It is an opportunity to acquire some first hand experience of the practice of law at the time that you are also getting the theories relative to that subject. The problem with clinical education is that it is terribly expensive because to a very large extent, we talk about a 30 to 1 ratio of students to faculty and you are all aware of the fact that in many classes (and in my judgment rightly so), you may have 80 people. In clinical education, you can't work with those



kinds of numbers. The cost to the law school per student in a clinical education opportunity is several fold greater than the cost to the law school of that same student in a regular, substantive law course. So I think that it is an extremely valuable part of the legal experience. The time may come when the demand for clinical education causes a tremendous problem with regard to its cost. But so far, although the cost is very significant, it has not prevented us from giving an opportunity to almost everyone who seeks it.

“I think that clinical opportunities are an extremely valuable opportunity for all law students.”

THE ADVOCATE: How do you view Northeastern with its stress on such programs?

DEAN SARGEANT: I think that the Northeastern program, from everything that I am aware of, is a very good program. Although it is extremely effective for Northeastern, I do not believe that it necessarily has great application to all law schools in general and to Suffolk in particular. The Northeastern program, in my judgment, works as effectively as it does because you are dealing with a relatively small number of students. Northeastern is a very small law school. As a result, they have been able to attract some very meaningful job opportunities for their relatively small number of students. If we were faced with that same problem of finding meaningful job opportunities for all of the students enrolled in all of the Boston law schools, I think that we would be totally overwhelmed. So I think that it is a very good program for Northeastern but I have great reservations as to whether or not its of general application to other schools, particularly to other large law schools.

THE ADVOCATE: Suffolk has been criticized at times for being too geared to having its students pass the bar, i.e. having nearly 2/3rds of one's courses be required, and not geared enough to intellectual introspection. Do you feel this criticism is fair?

DEAN SARGEANT: I think the reason for the faculty's insistence upon a relatively large core curriculum has nothing to do with gearing people for passing the Bar examination although I can't say that is something that we should never consider. The faculty has reviewed on several occasions proposals to change the structure and to allow more electives and fewer required courses. Each time, it has overwhelmingly been voted down. I think the reason for that is, is not for Bar purposes, but rather because the vast majority of members of the faculty have come to the conclusion that people are not really worthy of carrying the title lawyer unless they've been exposed to certain basic, core courses. For example, I think the vast majority of people in this school at least would come to the conclusion that any person who is a graduate of the law school should have a required course in evidence. Evidence is not a required course in some schools, but I think it is more a question of the philosophy of what a lawyer ought to do rather than gearing it to Bar exams. I think as far as the opportunities for intellectually broadening experiences are concerned, that although we have a large core curriculum, we also have a tremendous number of elective offerings and sufficient opportunities for people to take a great number of those courses. I might also point out that although we were at one time substantially out of step with a great number of schools with regard to the amount of courses that were required, that the pendulum has swung. More and more courses are now being required at sister institutions than was previously the case. There is greater pressure from bar associations and from some of the courts and many of the critics of the lawyering process to increase, rather than decrease the number of required courses.

THE ADVOCATE: The past decade has seen the development of the placement office as well. Dean Deliso has stressed the need for graduates to go outside the Massachusetts-New England area for their jobs. Do you support such a move away from regionalism to a more national market?

DEAN SARGEANT: I support the movement to the school being more national, period, not just for market purposes. We strive to take more students from widely geographical areas than was once the case. But it is important in specific reference to your question to make all

students aware of the fact that Massachusetts happens to be a heavily saturated job market and that people should not be too parochial in setting their horizons as to where they are willing to consider taking job opportunities. I think that is something that all of us ought to do. It was once true that you were born in a place and went to school nearby and came back and lived in the same place for the rest of your life. That has changed dramatically and I think we will continue to change. People cannot expect to set very narrow geographic boundaries and receive all of the satisfaction career-wise that they would really like.

THE ADVOCATE: The number of minority students has increased somewhat over the last 10 years. Will we see increased recruitment of minority students? Do you get much input from minority students as to their special needs at Suffolk?

“The Faculty has reviewed on several occasions proposals to change the structure and to allow more electives . . . Each time, it has overwhelmingly been voted down.”

DEAN SARGEANT: The number of minority students has increased, but I would certainly say that I am disappointed that it hasn't increased substantially more than it has. We have recruited vigorously in an attempt to attract more minority students to apply here. We've held CLEO programs here two years in a row. The University has now hired a Director for Minority Affairs. We recruit whenever possible where there are large concentrations of minority college people. If we are really going to fulfill our mission, it is to make sure that we attract to the school, and make sure that people are aware that we desire to attract to this school, people from all walks of life. Everyone will be welcomed. We haven't succeeded as well in that respect as I would like, and I'm not comforted greatly by the fact that our minority pool is more or less consistent with that of most other schools in the area, but I'm hopeful that that will improve greatly in the time to come.

THE ADVOCATE: One problem we should discuss is the space problem Suffolk confronts. Are there any plans for the law school or the university to expand its facilities?

DEAN SARGENT: When I first started teaching at this law school, the entire law school and library were housed in the one same building, the Archer building. It also housed the School of Management, and the College of Liberal Arts and Science and their library. When I became dean of the law school, although we had our separate library in this building, we had no separate classrooms; they were used interchangeably by the undergraduate students and the law students. We had a very small faculty. In the interim, we succeeded in moving the undergraduate school from the building. We've more than doubled our faculty. We've tripled the size of the library. We've built modern, bright, amphitheater-style classrooms. There is more to be done. I'm not suggesting that we've eliminated our space problem. But you must understand that the Board of Trustees has done a tremendous job in responding to our space problems as those problems existed. If we had 90 miles to go originally, then I would say that we were within 10 miles of the goal at this point. But in direct answer to your question, yes, there are plans presently being discussed for enlargement of the facilities to provide for some more seminar rooms, for some more law faculty rooms. As you know, we are at saturation point so far as that is concerned. Hopefully we will also be able to have larger faculty offices which would be more conducive to being in for longer periods of time without developing claustrophobia.

THE ADVOCATE: Although we do have an acknowledged space problem at Suffolk, last year we dedicated a new law library to match the old one. Your tenure as Dean has seen a rapid increase in the number of volumes of the library. How do you view the library's progress?

DEAN SARGENT: I think the library has made dramatic progress. I have said on many occasions and the view is not limited to me that Suffolk's Law Library is the best law library in the City of Boston. I think that is evidenced by the fact that a tremendous number of members of the practicing bar use this library on a regular basis and the majority of them are not members of our alumni. So

I think in all respects, quantitatively and qualitatively, and staff wise as well, that we've made probably as dramatic an improvement in the law library as we have in any other single segment of life in this institution.

THE ADVOCATE: Suffolk started off as an evening school and the evening division has remained an integral part of the school. What are your views and plans for the evening division?

DEAN SARGENT: To keep it an integral part of the school. I have occasionally been asked by concerned members of the alumni whether or not in an attempt to further elitism, perhaps we would consider closing the evening law school. My answer has been and always will be that it is a very basic foundation of this law school and the evening law school will never be closed. It is important that people, who cannot study law in the day division because of economic circumstances, have an opportunity in any large metropolitan area to acquire a quality legal education in an evening school.

... Suffolk's law library is the best law library in the city of Boston.

THE ADVOCATE: Last year we saw the reintroduction of student evaluations of courses and faculty after a long hiatus. Do you feel these perform a useful function?

DEAN SARGENT: I don't think the hiatus was a long one to the best of my knowledge; it was a two year hiatus which is long from perspectives and since you weren't here prior to that, I guess it seems long to you. But I have mixed feelings about faculty evaluations. I wasn't terribly pleased with the format of last year's evaluations. There were parts of it I thought were enlightening. But there is always some hesitancy on the part of viewers of those results to take them at face value. There is some room for the perception at least that some members of the faculty who may be strong members of the faculty but who are also vigorous in their grading policies received less enthusiastic responses from the evaluations because of their grading policies. It is a difficult thing to have people be terribly objective. I am not attributing any bad

motive to any person who might have filled out this.

THE ADVOCATE: There has also been some agitation for a greater student role on various committees headed by the faculty, particularly the tenure and curriculum committees. How do you view those efforts?

DEAN SARGENT: There is presently student representation, and I believe fairly active representation, on the faculty curriculum committee and I think that is a very worthy place for having student involvement and student participation. As far as the tenure process is concerned, I think that student perspective on proposed faculty members for tenure appointments is relevant and I think every member of the faculty has their own assessment of how this person is received by the student body. But, I do not believe that the question of students voting on tenure applications is valid. But, so far as gleaning in whatever way, perhaps from evaluations, perhaps from talking to great numbers of students, and certainly I'm in a position where I hear at least the complaints from students concerning individual members of the faculty and frequently (I am happy

to say also) the rave notices, I think that every member of the faculty is aware that student views are important and each in his own way gains an insight as to what the student's perspective is. But I do not believe that students should be involved in the final determination of the granting or denial of tenure. I would not consent to students sitting as observers at committee meetings. That is a highly confidential proceeding. Non-tenured members of the faculty who are not candidates for tenure do not have access. It is something that I believe of necessity, must be kept somewhat secret in order to make sure that there is no inhibition of people's honest assessment of the situation.

THE ADVOCATE: Derek Bok, the president of Harvard, has recently charged that the legal system is not fulfilling its role in society adequately; that it is too costly, complex and geared to the wealthy. He feels that we are wasting good minds that could be better used elsewhere. How do you regard Mr. Bok's criticisms and how is Suffolk striving to avoid these pitfalls?

DEAN SARGENT: I would certainly agree that it is desirable to make law students and people in general as responsive as possible to their social obligations. I'm not sure that the picture that President Bok painted is as bleak as he portrays it. If it is true with regard to Harvard students, then so be it; I really don't think it is. But, I am convinced that it is not true with regard to Suffolk students. I was somewhat surprised by President Bok's comments because the school that he was so critical of, at least to the extent that he was directing his comments to Harvard, is the same school of which he was dean 2 or 3 years before. I don't think that it got substantially less involved in these activities in the 2 or 3 years that he was dean. It didn't seem to be a terrible problem for him when he was dean and I realize that he may have the advantage of stepping back and viewing it from a different perspective. Certainly, there is always room for great improvement, but I do not believe the problem to be of as great a magnitude as his comments would indicate.

"I think that the major accomplishment is that the school is now rather widely perceived as being in the mainstream of legal education."

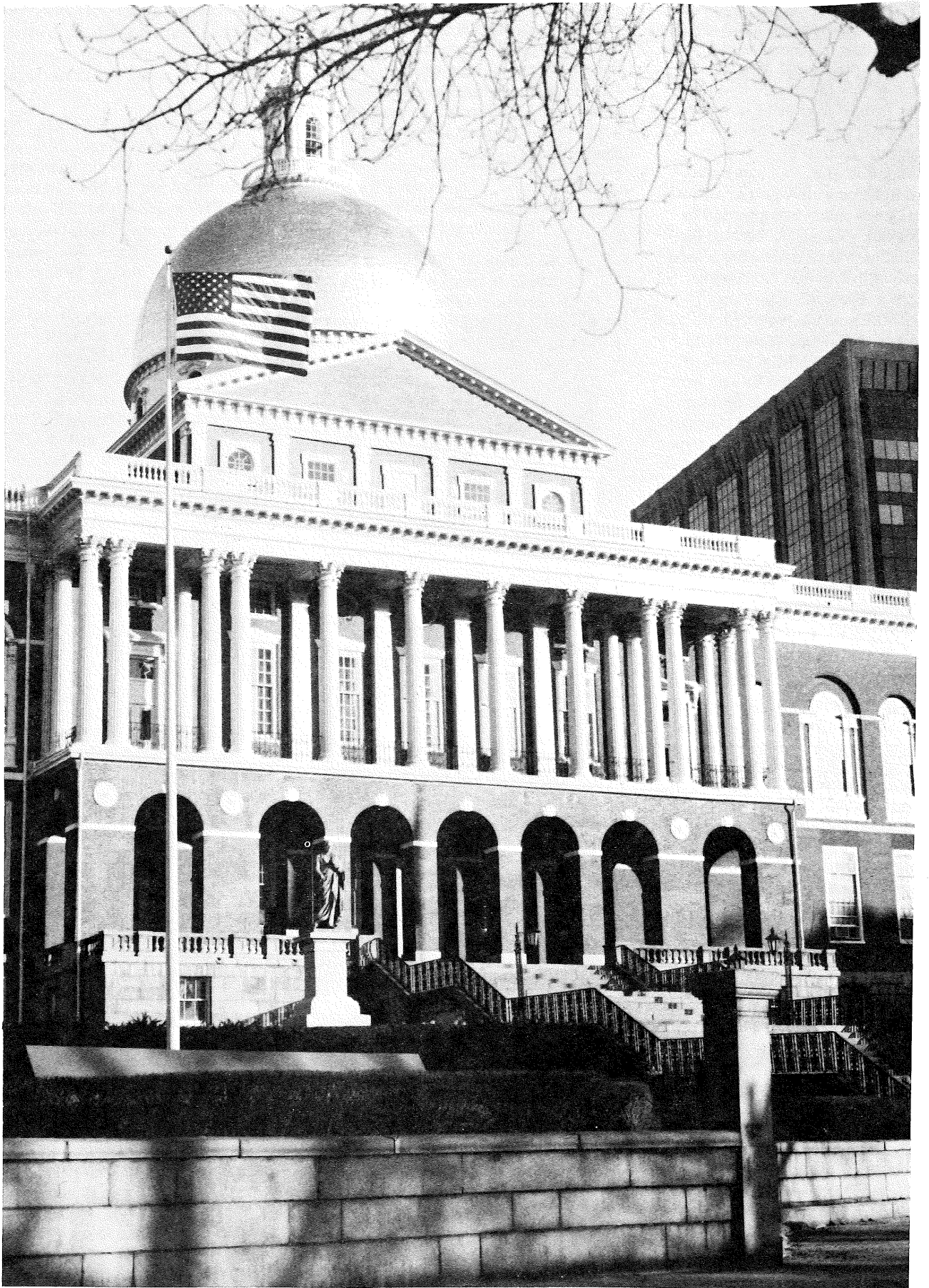
THE ADVOCATE: You have been Dean for 10 years now and your association with the school is close to thirty years. What do you feel are your major contributions to Suffolk and what can we look for in the future?

DEAN SARGENT: Its very difficult for one to assess their own good and so I'll leave that to others to judge. As far as the future, I guess I'll do the same thing. I really don't know about the future. That is a very tough question; both ends of it. It would be immodest and perhaps not even realistic to try to cite things that I have done because the truth of the matter is, no one person accomplishes anything in an institution. If I could even think of something that I've done, the truth of the matter is that I may have had some involvement in it, but so many other people had so many major roles that it would be presumptuous to say that that was my major accomplishment.

THE ADVOCATE: Perhaps if we rephrase the question to accomplishments of the school in the last 10 years.

DEAN SARGENT: I think that the major accomplishment is that the school is now rather widely perceived as being in the mainstream of legal education. But I'm not sure that the law school wasn't always in the mainstream of legal education, but the perception at least has changed dramatically.





Suing for Safety*

by Thomas F. Lambert, Jr.

Thomas F. Lambert received an A.B. and an LL.B. from the University of California. He also received an LL.M. from Yale University. He served as a Professor of Law at Boston University, N.Y.U., and John B. Stetson College of Law where he became the youngest dean of any law school in the U.S. As a Rhodes Scholar, he attained his Bachelors and Masters degrees in Jurisprudence at Oxford University. For many years, he served as the Editor-in-Chief of the Assn. of Trial Lawyers of America.

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It has been well and truly said, "If you would plant for a year, plant grain; for a decade, plant trees; but if you would plant for eternity, educate a man." For nearly four generations, ATLA has been teaching its men and women, and they have been demonstrating to one another, that you can sue for safety. Indeed, one of the most practical measures for cutting down accidents and injuries in the field of product failure is a successful lawsuit against the supplier of the flawed product. Here, as well as elsewhere in Tort Law, immunity breeds irresponsibility while liability induces the taking of preventive vigilance. The best way to make a merchant responsible is to make him accountable for harms caused by his defective products. The responsible merchant is the answerable merchant.

Harm is the tort signature. The primary aim of Tort Law, of the civil liability system, is compensation for harm. Tort law also has a secondary, auxiliary and supportive function—the accident prevention function or prophylactic purpose of tort law—sometimes called the deterrent or admonitory function. Accident prevention, of course, is even better

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than accident compensation, an insight leading to ATLA's long-standing credo: "A Fence at the Top of the Cliff Is Better Than an Ambulance in the Valley Below."

As trial lawyers say, however, "If you would fortify, specify." The proposition that you can sue for safety is readily demonstrable because it is laced and leavened with specificities. They swarm as easily to mind as leaves to the trees.

Accident Prevention Through Successful Suits in the Products Liability Field

(1) *Case of the Charcoal Briquets Causing Death from Carbon Monoxide.* Liability was imposed on the manufacturer of charcoal briquets for the carbon monoxide death and injury of young men who used the briquets indoors to heat an unvented mountain cabin. The 10-pound bags read, "Quick to Give Off Heat" and "Ideal for Cooking in or Out of Doors." The manufacturer was guilty of failure to warn of a lethal latent danger. Any misuse of the product was foreseeable because it was virtually invited.¹ Next time you stop in at the local supermarket or hardware store, glance at the label on the bags of charcoal briquets. In large capital letters you will

"Accident prevention, of course, is even better than accident compensation . . ."

find the following: "WARNING. DO NOT USE FOR INDOOR HEATING OR COOKING UNLESS VENTILATION IS PROVIDED FOR EXHAUSTING FUMES TO OUTSIDE. TOXIC FUMES MAY ACCUMULATE AND CAUSE DEATH." Liability here inspired and exacted a harder, more emphatic warning, once again reducing the level of excessive preventable danger.

(2) *Case of the Exploding Cans of Drano.* When granular Drano is combined with water, its caustic soda interacts with aluminum, another ingredient in its formula, and produces intensive heat, converting any water into steam at a rapid rate. If the mixture is confined, the pressure builds up until an explosion results. The manufacturer's use of a screw-on top in the teeth of such well known hazard was a design for tragedy. The expectable came to pass (as is the fashion with expectability). In *Moore v. Jewel Tea Co.*,² a 48-year-old housewife suffered total blindness from the explosion of a Drano can with a screw-on top, eventuating in a \$900,000 compensatory and \$10,000 punitive award to the wife and a \$20,000 award to her husband for loss of conjugal fellowship.

A high school chemistry student could see that what was needed was a "flip top" or "snap cap" designed to come off at a pressure of, say, 15-20 pounds per square inch. After a series of adverse judgments, the manufacturer substituted the safer flip top. Of course, even the Drano flip top will be marked for failure if not accompanied by adequate testing and quality control.³ *Capers* involved a suit for irreversible blindness suffered by 10-year-old Joe Capers when the redesigned flip top of a can of Drano failed to snap off when the can fell into the bathtub and the caustic contents spurted 8½ feet high impacting Joe in the face and eyes with resulting total blindness. The shortcomings in testing the can with the reformulated design cost the company an award of \$805,000. As a great Torts scholar has said, "Defective products should be scrapped in the factory, not dodged in the home."

Drayton v. Jiffee Chemical Corp.,⁴ is a grim and striking companion case to the Drano decisions mentioned above, and it underscores the same engineering verities of those cases: the place to design out dangers is on the drawing boards or when prescribing the chemical formula. A one-year-old black girl suf-

ferred horrendous facial injuries, "saponification" or fusion of her facial features, when an uncapped container of Liquid-Plumr was inadvertently tipped over. At the time of the accident, this excessively and unnecessarily caustic drain cleaner was composed of 26 percent sodium hydroxide, i.e., lye. No antidote existed because, as the manufacturer knew, Liquid-Plumr would dissolve human tissue in a fraction of a second.

"To open the courtroom door is often to open a school door for predatory producers."

To a child (or any human being) a chemical bath of this drain cleaner could be as disfiguring as falling into a pool of piranha fish. Liquid-Plumr, mind you, was a household product, which means that its expectable environment of use must contemplate the "patter of little feet," as the children's hour in the American home encompasses 24 hours of the day.

At the time of marketing this highly caustic drain cleaner, having made no tests as to its effect on human tissue, within the existing state of the art, the defendant could have reformulated the design to use 5 percent potassium hydroxide which would have been less expensive, just as effective and much safer. After some 59 other Liquid-Plumr injuries were reported to defendant, it finally reformulated its design to produce a safer product. In *Drayton* the defendant was allowed to argue in defense and mitigation that its management was new, that it had learned from its prior claims and litigation experience and that it had purged the enterprise of its prior egregious misconduct.

To open the courtroom door is often to open a school door for predatory producers.



(3) *Case of the Tip-Over Steam Vaporizer*. A tip-over steam vaporizer, true to that ominous description, was upset by a little girl who tripped over the unit's electric outlet cord on the way to the bathroom in the middle of the night. The sudden spillage of scalding water in the vaporizer's glass jar severely burned the 3-year-old child. The worst injuries in the world are burn injuries. The cause of the catastrophe could have been eliminated by adopting any one of several accessible, safe, practical, available, desirable and feasible design alternatives, such as a screw-on or child-guard top. The truth is that the manufacturer, Hanksraft, had experienced a dozen prior similar disasters. In the instant case, the little girl recovered a \$150,000 judgment against the heedless manufacturer, impeaching the vaporizer's design because of lack of a screw-on or child-guard top.⁵ When the manufacturer, with icy indifference to the serious risks to infant users of its household product, refused to take its liability carrier's advice to recall and redesign its loose-lidded vaporizer, persisting in its stubborn refusal when over 100 claims had

been filed against it, the carrier finally balked and refused to continue coverage unless the company would recall and redesign. Then and only then did Hanksraft stir itself to redeem and correct the faulty design of its product, thereafter proudly proclaiming (and I quote), "Cover-lock top protects against sudden spillage if accidentally tipped." Once again Tort Law had to play professor and policeman and teach another manufacturer that safety does not cost: It pays. Under what might be called the Cost-Cost formula, the manufacturer will add safety features when it comes to understand that the cost of accidents is greater than the cost of their prevention. The Tip-Over Steam Vaporizer case is the most graphic example known to use

"... the manufacturer will add safety features when it comes to understand that the cost of accidents is greater than the cost of their prevention."

showing that corporate management can be recalled to its social responsibilities by threat of stringent liability, enhanced by deserved civil punishment via punitive damages, and that belief in such a proposition is more than an ivory tower illusion.⁶

A good companion case to the Tip-Over-Steam-Vaporizer case, serving the same Tort Touchstone of Deterrence, is the supremely instructive Case of the Remington Mohawk 600 Rifle. While a 14-year-old boy was seeking to unload one of these rifles, pushing the safety to the "off" position as required for the purpose, the rifle discharged with the bullet entering the boy's father's back, leaving him paralyzed and near death for a long time. The agony of his guilt, his feeling that he was to blame for his father's devastating injuries, pressed down on the boy's brow like a crown of thorns and almost unhinged his sanity. Assiduous investigation by the family's lawyer unearthed expert evidence of unsafe design and construction and lax quality control of the safety selector and trigger assemblies of the Mohawk 600.

The result of the exertions of the plaintiff's lawyer, deeply and redoubtably involved in challenging the safety history of the rifle model, was a capitulation by Remington and an agreement to settle the father's claim (he was a seasoned and successful defense trial lawyer) for \$6.8 million. Remington also wrote the son a letter, muting some of his anguish by stating that the weapon was the whole problem and that he was in no way responsible for his father's injuries. Then, facing the threat of cancelled coverage from its carriers for skyrocketing premiums in the projection of other multimillion dollar awards, Remington commendably served the public interest by announcing the recall campaign in which we see another electrifying example of Tort Law litigating another hazardous product feature from the market.

Remington's nationwide recall program affected 200,000 firearms; notices in newspapers and magazines similar to this one that appeared in the January 1979 issue of *Field and Stream* cut back on the harvest of hurt and heartbreak:

"IMPORTANT MESSAGE TO OWNERS OF REMINGTON MODEL 600 and 660 RIFLES, MOHAWK 600 RIFLES, AND XP-100 PISTOLS. Under certain unusual circumstances, the safety selector and trigger of these firearms could be manipulated in a way that could result in accidental discharge. The installation of a new trigger assembly will remedy this situation. Remington is therefore recalling all Model 600 rifles except those with a serial number starting with an 'A' . . . Remington recommends that prior to any further usage of guns included in the recall, they be inspected and modified if necessary. [Directions are then given for obtaining name and address of nearest Remington Recommended Gunsmith who would perform the inspection and modification service free of charge.]"

Tort Law forced Remington to look down the barrel and see what it was up against. Once again Tort Law was the death knell to excessive preventable danger.

For a wonderfully absorbing account of The Mohawk 600, see Stuart M. Speiser's justly praised *Lawsuit* (Horizon Press, New York, 1980) 348-55.

(4) *Case of MER/29, the Anti-Cholesterol Drug Which Turned out to Cause Cataracts.* Many trial lawyers will recall the prescription drug MER/29 marketed for its benign and benevolent effect in lowering blood cholesterol levels and treating hardening of the arteries but which turned out to have an unpleasant and unbargained-for effect on users, the risk of causing cataracts. As Peter DeVries recently observed, "There is nothing like a calamity to help us fight our troubles." Blatant fraud and suppression of evidence from animal experiments were proved on the manufacturer's part in the marketing of this dangerous drug. Who did more—the federal government or private trial lawyers—in getting this dangerous drug off the market and compensating the numerous victims left in its wake? The question carries its own answer. The United States drug industry has annual sales of 16 billion dollars per year, while the Food and Drug Administration has an annual budget of 65 million dollars to

oversee all drug manufacture, production and safety.⁷ How can the foothills keep the Alps under surveillance? Worse, as shown by the MER/29 experience, enforcement of the law in that situation, far from being vigorous and vigilant, was lame, limp and lackluster. It was only private suits advanced by trial lawyers that furnished the real muscle of enforcement and sanction, compensation for victims, deterrence of wrongdoing, and discouragement of corporate attitudes toward the public recalling that attributed to Commodore Vanderbilt.⁸

As to the indispensable role and mission of the trial lawyer in Suing for Safety, it should not be overlooked that the current Administration has moved to sharply restrict the regulation of product safety by the Consumer Product Safety Commission. The 1982 Budget for the commission was reduced by 30 percent in the first round of Reagan Administration budget cuts and is marked for further cuts in the future.⁹

" . . . we have crime in the suites as well as crime in the streets. Corporate culpability calls for corporate accountability . . . "

As the Thalidomide, MER/29, Dalkon Shield, Asbestos, DES, Slip-into-Reverse Transmissions and Fuel Tank scandals have been starkly revealed, we have crime in the suites as well as crime in the streets. Corporate culpability calls for corporate accountability, and our society has developed no better instrument to encourage socially responsible corporate behavior than the vehicle of adverse judgments beefed up by punitive damages. In the MER/29 situation, for example, the criminal fines levied on the corporate producer and its executives were slap-on-the-wrist trivial when contrasted with the deterrent impact of punitive damage awards in current uncrashworthiness cases where flagrant corporate indifference to public safety was established.¹⁰

Our leading scholar in the field of punitive damages, writing with verve and virtuosity on the subject, concluded in 1976 that punitive damages awards should be permitted in appropriate products liability cases.¹¹ Writing in 1982 with the same unbeatable authority, Professor David G. Owen traces the ferment and developments of doctrine in the ensuing years and then delivers a conclusion informed by exhaustive research, seasoned reflection, and an obvious morality of mind, "I remain convinced of the need to retain this tool of legal control over corporate abuses. . . ."¹²

(5) *Case of the Infant Who Died from Drinking Toxic Furniture Polish Where Manufacturer Failed to Warn Mother to Keep Toxic Product out of Reach of Children.* This is the celebrated case of *Spruill v. Boyle-Midway, Inc.*,¹³ in which a 14-month-old child reached over from his crib and pulled a doily off a bureau, causing a bottle of Old English Red Oil Furniture Polish, manufactured by the defendant, to fall into the toddler's crib. During the few minutes his mother was out of the room, the baby got the cap off the bottle and drank a little bit of the polish. He was dead within two days of resulting chemical pneumonia. The bottle had a separate warning about combustibility in letters 1/8 inch high, but only in the midst of other text entitled "Directions" in letters 1/32 inch high did it say "contains refined petroleum distillates. May be harmful if swallowed, especially by children." The mother testified that she saw the warning about combustibility but did not read the directions because she knew how to use furniture polish. In a negligence action against the maker, the jury found that both defendant and the baby's mother were negligent and awarded wrongful death damages to the child's father and siblings but not to the mother.¹⁴ The Fourth Circuit in keeping with the grain of modern authority held that it was irrelevant that the child's ingestion of the toxic polish was an unintended use of the product. The jury could properly find that in the absence of an adequate warning to the mother

that she could read and heed—to keep the polish out of the reach of children—such misuse of the product was a foreseeable one. The defect was to be tested not only by intended uses but by foreseeable misuses.

The jury could find that the manufacturer's placement of the warning was designed more to conceal than reveal, especially in view of the greater prominence given the fire warning (1/8 of an inch compared to the Lilliputian print, 1/32 of an inch, as to the contents containing "refined petroleum distillates"). The poison warning could be found to fall short of what was required to convey to the average person the dangerous nature of this household product. The label suggested that harm from drinking the polish was not certain but merely possible, while experts on both sides agreed that a single teaspoon would be lethal to children.

"No error is a mistake unless you refuse to correct it."

The warning in short could properly be found to be inadequate—too soft, mispositioned and not sufficiently eye-arresting. Defendant admitted in answer to interrogatories that it knew of 32 prior cases of poisoning from ingestion of its "Old English Red Polish."

Did the imposition of liability in this seminal *Spruill* case *supra* stimulate, goad or spur the manufacturer to take safety measures against the foreseeable risk of ingestion by innocent children? A trip to the local hardware store a couple of days ago reveals that Old English Red Oil Polish now sports the following on its label: "DANGER. HARMFUL OR FATAL IF SWALLOWED. COMBUSTIBLE. KEEP OUT OF REACH OF CHILDREN. SAFETY CAP."

An error is not a mistake unless you refuse to correct it.

(6) *Case Holding Manufacturer of PAM (Intended to Keep Food from Sticking to Cooking Surfaces) Liable for Death of Teen-Ager from Inhalation of PAM's Concentrated Vapors.* *Harless v. Boyle-Midway Div. of Amer. Home Products*,¹⁵ involved an increasing number of teenagers who were dying of a "glue-sniffing syndrome," inhaling the concentrated vapors of PAM, a household product intended to keep food from sticking to cooking surfaces. Originally, the manufacturer used only a soft warning on the can's label: "Avoid direct inhalation of concentrated vapors. Keep out of the reach of children." However, to the knowledge of defendant, the children continued sniffing and dying. Then the manufacturer, as an increasing number of lawsuits were pressed upon it for the preventable deaths of such children, changed the warning on its labels, shifting to a harder warning: "CAUTION: Use only as directed, intentional misuse by deliberately concentrating and inhaling the contents can be fatal." This was, or course, a much harder and more emphatic warning. The Fifth Circuit held that it was reversible error to exclude plaintiff's evidence (in an action for the wrongful death of a PAM-sniffing 14-year-old) that no deaths had occurred from PAM sniffing *after* the defendant had hardened its warning by warning against the danger of death, the ultimate trauma.

On remand the jury brought in a verdict for the boy's estate in the amount of \$585,000 with an additional finding by the jury that the lad's administrator was entitled to an award of punitive damages. Prior to the punitive damages suit, the case was settled for a total of \$1.25 million. It was uncontested that prior to the lad's death the manufacturer knew of 45 inhalation deaths from foreseeable misuse of its product, and upon remand admitted to an additional 68 from the same expectable cause.

If you will examine the label on the can of PAM on your shelf, as the writer has just done, you will find: "WARNING: USE ONLY AS DIRECTED. INTENTIONAL MISUSE BY DELIBER-

ATELY CONCENTRATING AND INHALING THE CONTENTS CAN BE HARMFUL OR FATAL." Once again the pressures of liability stimulated a producer to avoid excessive preventable dangers in its product's use by strengthening its warning label, thereby enhancing consumer protection.

(7) *Case of the Poisonous Insecticide Holding That Warnings Must Contain Appropriate Symbols, Such as Skull and Crossbones, Where Manufacturer Knows That Product May Be Used by Illiterate Workers (Spanish-Speaking Imported Puerto Rican Laborers) Who Could Not Understand English.* This is the salutary holding in the celebrated case of *Hubbard-Hall Chem. Co. v. Silverman*.¹⁶ The First Circuit upheld judgments entered on jury verdicts for the wrongful death of two illiterate migrant farm workers who were imported by a Massachusetts tobacco farmer and killed by contact with a highly toxic insecticide manufactured and distributed by defendant. Even though the comprehensive and detailed danger warnings on the sacks fully complied with label requirements of the Department of Agriculture, the jury could properly find that because of the lack of a skull or crossbones or other comparable symbols the warning was inadequate. Use of the admittedly dangerous product by persons who were of limited education and reading ability was within the range of apprehension of the manufacturer. While evidence of compliance with governmental regulations was admissible, it was not decisive. Governmental standards are "minimums," a floor not a ceiling, and so far as adequate precautions are concerned, federal regulations do not oust the possibly higher common-law standards of the Commonwealth of Massachusetts.

The steady, unflagging pressures of litigation against the inertia, complacency and moral obtuseness of manufacturers have not only resulted in enhanced safety in the field of conscious design choices (substituting child-guard screw-on tops on tip-over steam vaporizers or over-the-axle fuel tanks for those mispositioned more vulnerably in front of the axle or adding rear-view mirrors to blind

behemoth earth-moving machines whose design obstructs the vision of a reversing operator, etc.) but also in inducing product suppliers to reduce marketing defects in the products they sell by strengthening the adequacy of the instructions and warnings that accompany their products set afloat in the stream of commerce.



The net affect of such benign and beneficial litigation has been to improve the adequacy and efficacy of the educational information given to consumers by producers via improvements in the conspicuousness of warnings given; making them more prominent, eye-arresting, comprehensive, complete and emphatic; placing the warnings in more effective locations; avoiding ambiguous warnings; extending warnings to the safe disposition of the product; and avoiding any dilution of the warnings given. In short, the bottom line, as indicated in the cited representative sampling of cases, is that successful lawsuits operate as safety incentives to "inspire" product suppliers to furnish instructions and warnings that are in ratio to the risk and in proportion to the perils attending foreseeable uses of the marketed products.¹⁷

"We see the conspicuous usefulness of the lawsuit as the weapon for ferreting out marketing defects . . ."

Here, too, we see the conspicuous usefulness of the lawsuit as the weapon for ferreting out marketing defects, whether ingenious or ingenuous, in selling dangerously defective products.

(8) *Case of Marketing Carbon Tetrachloride Using Warnings Found to Be Inadequate Because Inconspicuous.* Suppose a defendant sells carbon tetrachloride and places on all four sides of the can, in large letters, the words "Safety Kleen," and then uses small letters (Lilliputian print) to warn of the serious risk of using the cleaning fluid in an unventilated place (or places the fine print warning only on the bottom of the can). It requires no tongue of prophecy to predict that this warning will be found inadequate because too inconspicuous. It was so held in *Maize v. Atlantic Refining Co.*¹⁸ Not only was the warning inadequate because not conspicuous enough, but the representation of safety ("Safety Kleen") operated to dilute, weaken, and counteract the warning. Moreover, in *Tampa Drug Co. v. Wait*,¹⁹ the court upheld a judgment for the wrongful death of a 38-year-old husband who died from carbon tetrachloride poisoning after using a jug of the product to clean to the floors of his home. While the label warned that the vapor from the liquid was harmful and that prolonged breathing of it or repeated contact with the skin should be avoided and that the product should only be used in well ventilated areas, the court with laser-beam accuracy ruled that the warning nonetheless could be found inadequate because of its failure to warn with qualitative sufficiency as to deadly effects or fatal potentialities which might follow from exposure to its fumes.

Decisions such as *Maize* and *Wait supra* were the prologue and predicate for the action taken by the FDA in 1970, under the Federal Hazardous Substances Act, to ban and outlaw carbon tetrachloride.²⁰

Torts archivists know that successful private lawsuits to recover for harm from products simply too dangerous to be sold at all, regardless of the completeness or urgency of the warning given, frequently lead to a recall and reformulation of the product's design or to a decision to ban the product from the market.²¹ Life and limb are too important to trade off against unmarketed inventory.

(9) *Case of the 8-Year-Old Boy Who Choked to Death from Strangling on a Quarter-Inch Rubber Rivet, Part of a Riviton Toy Kit Given Him for Christmas.* This case will indeed rivet the attention (in the sense of attract, fasten and hold) of concerned citizens who wish to understand how the threat of liability operates as a spur to safety on the part of product producers. The present example involves a toymaker whose work is indeed "child's play."

Parker Brothers, a General Mills subsidiary headquartered some 18 miles north of Boston, had big plans for Riviton. This was a toy kit consisting of plastic parts, rubber rivets and a riveting tool with which overjoyed children could put together anything from a windmill to an airplane. In the first year on the market in 1977, the Riviton set seemed on its way to becoming one of those classic toys that parents will buy everlastingly. However, one of the 450,000 Riviton sets bought in 1977 ended up under the Christmas tree of an 8-year-old boy in Menomonee Falls, Wis. He played with it daily for three weeks. Then he put one of the quarter-inch long rubber rivets into his mouth and choked to death. Ten months later, with Riviton sales well on their way to an expected \$8.5 million for the year, a second child strangled on a rivet.

What should the company do? Just shrug off the two fatal child strangulations, ascribe the deaths to freakish mischance, try to shift the blame to parental failure to supervise and police their children at play, or assign responsibility to the child's abnormal misuse or abuse of their product? Could not the company cap its disavowal of responsibility by a bromidic disclaimer that, "After all, peanuts are the greatest cause of strangulation among children and nobody advocates the banning of the peanut."?

However, as manufacturers, Parker Brothers well knew that they would be held liable to an expert's skill and knowledge in the particular business of toymaking and were bound to keep reasonably abreast of scientific knowledge, discoveries and hazards associated with toys in their expectable environment of use by unsupervised children in the home. The toymaker knew that the Riviton set must be so designed and accompanied by proper instructions and warnings that its parts would be reasonably safe for purposes for which it was intended but also for other uses which, in the hands of the inexperienced, impulsive and artless children, were reasonably foreseeable.²² When you manufacture for children, you produce for the improvident, the impetuous, the irresponsible. As a seasoned judge put it: "The concept of a prudent child, God forbid, is a grotesque combination." Much must be expected from children not to be anticipated when you are dealing with adults, especially the propensity of children to put dangerous or toxic or air-stopping objects into their mouths. The motto of childhood seems to be: "When in doubt, eat it." Knowledge of such childish propensity is imputed to all manufacturers who produce products, especially toys, which are intended for the use of or exposure to children. Cases abound to document this axiom.²³

Recently, Wham-O Manufacturing Co. of San Gabriel, Calif., voluntarily recalled its Water Wiggle, a garden hose attachment that drowned a child when it jammed in its throat. Still more recently, Mattel, Inc. of Hawthorne, Calif., initiated a recall of missiles fired by its Battlestar Gallactica toys when a 4-year-old boy inhaled one and died. The manufacturer of a "Play Family" set of toy figurines would have been well advised to pull from the market and redesign the small carved and molded figures in the toy set, intended for children of the teething age. A 14-month-old child swallowed one of the toy figures 1 3/4" high and 7/8" in diameter, and before it could be extricated from his throat at a hospital's emergency room, the child was reduced to vegetable status as a result of irreversible brain damage from the toy's windpipe blockage of air supply to the brain. The manufacturer's dereliction of design

and lack of product testing were to cost it a \$3.1 million jury verdict for the child and his parents.²⁴

Against the marketing milieu and the legal setting sketched above, what should be the proper response of Parker Brothers, manufacturers of the Riviton toy set, when its executives learned of the second child's death from strangulation on the quarter-inch rubber rivet in the toy kit? Should they have tried to tough it out or luck it out in the well known lottery called "do nothing and wait and see"? The company was sensitive not only to the constraints of the law (liability follows the marketing of defective products), but also to the imperatives of moral duty and social responsibility, and the commercial value of an untarnished public image. Parker Brothers decided to halt sales and recall the toy. As the company president succinctly stated, "Were we supposed to sit back and wait for death No. 3?"

Business, the Frenchman observed, is a combination of war and sport. Tort Law pressures business to realize how profitless it may prove to war against children or to trifle and jest with their safety. The commendable conduct of Parker Brothers in this case is one of the most striking tributes we know to the deterrent value and efficacy of Tort Law and the example would make a splendid case study for the nation's business schools.

(10) *Case of the Recycling Washing Machine That Pulled out a Boy's Arm.* In *Garcia v. Haisett*,²⁵ the plaintiff, an 11-year-old boy, sued the owner of a coin-operated laundromat for injuries inflicted while he was using one of the washing machines in the launderette. He waited several minutes after the machine had stopped its spin cycle before opening the door to unload his clothing. As he was inserting his hand into the machine a second time to remove a second handful of clothes, the machine suddenly recycled and started spinning, entangling his arm in the clothing, causing him serious resulting injuries. The evidence was clear that a common \$2 micro switch—feasible, desirable, long available—would have prevented the accident by automatically shutting off the electricity in the machine when the door

was opened. The reviewing court held the launderette owner strictly liable for defective design because the machine lacked a necessary safety device, an available micro switch. Shortly thereafter the defendant obtained 12 of these micro switches and installed them himself on the machines. Once again, the threat of tort liability serves to deter—the prophylactic purpose of Tort Law at work. The deterrent function of Tort Law is not just an idea in the air; it has landing gear, has come down to earth and gone to work.

Summary

The foregoing 10 cases and categories are merely random and representative examples, not intended to be complete or exhaustive, of the deterrent aim and effect of Tort Law in the field of product failure or disappointment.

It needs to be emphasized that the preventive aim of Tort Law is pervasive and runs like a red thread throughout the entire corpus of Torts. For example, the private Tort litigation system has served, continues to serve, as an effective and useful therapeutic and prophylactic tool in achieving better health care for our people by discouraging and thereby reducing the incidence of medical mistakes, mishaps and “misadventures.” An error does not become a mistake unless you refuse to correct it. For example, successful medical malpractice suits have induced hospitals and doctors to introduce such safety procedures as sponge counts, electrical grounding of anesthesia machines, the padding of shoulder bars on operating tables, and the avoidance of colorless sterilizing solutions in spinal anesthesia agents. Remember, the fraudulent butchery practiced on defenseless patients by the notorious Dr. John Nork was not unearthed, pilloried or ended by the vigilant action of hospital administrators, peer review groups, or medical societies but by successful, energetically pressed malpractice actions prosecuted by trial lawyers in behalf of the victimized patients.

So we come full circle and end as we began: Accident Prevention Is Better Than Accident Compensation: “A Fence at the Top of the Cliff Is Better Than an Ambulance in the Valley Below.” A successful lawsuit and the pressures of stringent liability are one of the most effective means for cutting down on excessive preventable dangers in our risk-beleaguered society.

My hero in the foregoing chronicle of good lawyering has been the hardworking trial lawyer with his care, commitment and concern for public safety, the civil religion of us all.

He more than any other professional has proved that we can indeed Sue for Safety. My tribute to him is in words Raymond Chandler used to salute his hero: “Down these mean streets a man must go who is not himself mean, who is neither tarnished nor afraid.”

Notes

1. *Alfieri v. Cabot Corp.*, 235 N.Y.S.2d 753 (App. Div. 1962), *aff'd*, 245 N.Y.S.2d 600, 195 N.E.2d 310 (N.Y. Ct. App. 1963). *Accord: Hill v. Husky Briquetting, Inc.*, 220 N.W.2d 137 (Mich. App. 1974); *Johnson v. Husky Indus., Inc.*, 536 F.2d 645 (6th Cir. 1976).
2. *Moore v. Jewel Tea Co.*, 253 N.E.2d 636 (Ill. App. 1969); *aff'd*, 263 N.E.2d 103 (Ill. 1970).
3. See, e.g., *Capers et al. v. Drackett Products Co.*, Calif. First App. Dist., Div. II, 1 Civ. No. 33591, Aug. 25, 1975 (unpublished opinion, extensively abstracted in 36 ATLA L.J. 13-17 (1976)).
4. *Drayton v. Jiffee Chemical Corp.*, 395 F.Supp. 1081 (N.D. Ohio 1975), *aff'd as modified*, 591 F.2d 352 (6th Cir. 1978).
5. *McCormack v. Hanksraft*, 278 Minn. 322, 154 N.W.2d 488 (1967).
6. See Hamper, *Products Safety vs. Reality: Know the Difference!*, 43 MACHINE DESIGN 26 (July 8, 1971); Schwartz, “Foreward,” *Understanding Products Liability*, 67 CALIF. L. REV. 435, 450-51 (1979); *Los Angeles Times*, Oct. 22, 1978, §V, at 2, col. 2. *McCormack v. Hanksraft* is a refreshing example of an insurance company working to minimize accidents by pressuring its insured to adopt safer design features. It also shows that when an insurance carrier wants to, it can serve as a construction gang rather than as a wrecking crew.
7. Johnson, *Products Liability “Reform”: a Hazard to Consumers*, 56 NO. CAR. L. REV. 679, 688 (May 1978).
8. See, e.g., *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. (2d) 689, 60 CAL. RPTR. 398 (1967) (award of punitive damages as remitted by trial court from \$500,000 to \$250,000 upheld in MER/29 case); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968); Rheingold, *Development of Litigation Groups*, 6 AM. JOUR. OF TRIAL ADVOCACY 1-15 (Summer 1982); Dobbs, REMEDIES 221 (1973) (distinguished authority states that trial lawyers acting as Private Attorneys General did more effective policing, deterrent and reparation work than governmental officials and entities in the MER/29 disaster).

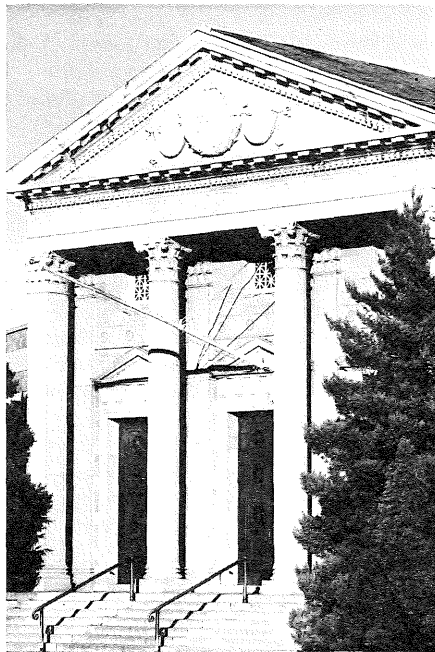
9. 9 PROD. SAFETY & LIAB. REP. 740-41 (1981).

10. E.g., *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) (Fifth Circuit reinstates a \$5 million punitive award for catastrophic injuries to driver of a subcompact Honda in a crashworthiness case); *Grimshaw v. Ford Motor Co.*, 174 CAL. RPTR. 348 (Cal.App. 1981) (\$3.5 million punitive damage award as remitted from a \$125 million exemplary award to teen-age passenger for devastating burn injuries caused by uncrashworthy design of Ford Pinto gas tank assembly which ruptured in low-velocity rear-ender where jury found that Ford knew that lack of fuel tank integrity could be remedied through inexpensive safety “fixes” but chose instead to sell the car in its vulnerable condition to save on costs).
11. See Professor David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, at 1371 (1976).
12. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, at 59 (Winter 1982).
13. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962).
14. 30 NACCA L.J. 109-16 (1964).
15. *Harless v. Boyle-Midway Div. of Amer. Home Products*, ___ F.Supp. ___ (N.D. Fla., Feb. 22, 1980), 23 ATLA L. REP. 151-56 (May 1980), *on remand* from 594 F.2d 1051 (5th Cir. 1979).

16. *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965).

17. See, e.g., a representative warnings sampler: *Haberley v. Reardon Company*, 319 S.W.2d 859 (Mo. 1958), 23 NACCA L.J. 29-39 (May 1959) (where a boy, helping his father whitewash bricks in driveway, lost sight in one eye from inadvertent contact with paint brush held by his father and dripping with defendant's Bondex, a cement-base paint, the jury could properly find that defendant's warning label that the paint contained “calcium oxide (hydrated) 44%” was inadequate because not readily understandable by the mass of consumers; the jury could properly find that the warning should have stated “Lime”; defendant volunteered during the trial that, after the accident, the warning on Bondex was improved by adding the words, “Care should be taken to avoid contact with eyes.”); *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965), *supra* (comprehensive and detailed warnings as to dangers of poisonous insecticide may be found inadequate where not accompanied by skull and crossbones, other international symbols, or translated into Spanish where foreseeable users were of Hispanic origin and illiterate in English); *Ziglar v. E.I. Dupont de Nemours & Co.*, 280 S.E.2d 510 (N.C. App. 1981), 25 ATLA L. REP. 83 (March 1982) (even though insecticide's label used the words “dangerous-poison” and was accompanied by red skull and crossbones placed on a container of clear

liquid crop poison, similar in appearance to water, the warning was inadequate as a matter of law; the manufacturer should have used an opaque container and colored the poison so that it would not be mistaken for water by thirsty field hands working in the sun); *Fiorentino v. A.E. Staley Mfg. Co.*, 416 N.E.2d 998 (Mass. App. 1981) (where plaintiff carpenters were burned in a flash fire while using a contact adhesive to install formica in a kitchen when the adhesive vapors, heavier than air, migrated along the kitchen floor and became ignited by a closed oven pilot light located eight feet from the adhesive and concealed from view, the warning label could properly be found inadequate to warn even a professional user despite statements on the label: "Caution: Flammable Mixture. Do Not Use Near Fire or Flame" and "Keep Away From Heat, Sparks, and Open Flame," since the warning fell short of alerting to the danger of using this flammable contact adhesive near a closed and concealed pilot light); *Johnson v. Husky Industries, Inc.*, 536 F.2d 645 (6th Cir. 1976) (where three prior claims were made from inhaling carbon monoxide fumes from charcoal briquets burned indoors, as "caution" to use the fuel only in ventilated areas was inadequate as if failed to warn of fatal potentialities, such serious risk requiring use of code word warning of "danger"); *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851 (8th Cir. 1975), 36 ATLA L.J. 8-10 (1976), cert. denied, 423 U.S. 865 (1975) (tire manufacturer's catalogue warning that a mismatched truck tire rim assembly might cause tire to explode was inadequate in the



absence of a warning stamped or impressed on rim pieces warning of serious danger from use of mismatched pieces); *Gordon v. Niagra Machine & Tool Works*, 574 F.2d 1182 (5th Cir. 1978) (where the plaintiff operator of punch press lost four amputated fingers when a punch press recycled, court cogently held that instructions and warnings in a service manual, usually filed up on the thirteenth floor in the personnel department, was no substitute for a clear warning attached to the press by a decal); *Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571 (5th Cir. 1979) (jury could properly find that warning as to dangerous nature of fuel switch on motorcycle was inadequate where only warning given was in ordinary type on p.13 of the owner's manual and motorcycle was accidentally tipped over in basement of the plaintiff's home and gas leaking from motorcycle's tank was ignited by nearby pilot light, where fuel switch had not been turned to "off" position to prevent gas escape); *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex. 1978) (warning to doctors in Physician's Desk Reference on the use or overuse of drug Kantrax, resulting in patient's hearing loss, was inadequate because of failure to convey explicit danger from repeated irrigation of a surgical wound when a one-time-only post-surgical irrigation was considered safe); *Brownlee v. Louisville Varnish Co.*, 641 F.2d 397 (5th Cir. 1981), 24 ATLA L. REP. 339-43 (Oct. 1981) (where a 5-year-old boy was seriously burned when an aerosol paint can exploded as he lit a fire in a trash drum, the court convincingly held that to be adequate a warning concerning dangers from a product's use must also encompass warnings of dangers from the spent products inevitable discarding, here a cautioning against disposing of the container without first making sure it was empty); *Stevens v. Parke Davis & Co.*, 507 P.2d 653 (Cal. 1973), 35 ATLA L.J. 126-31 (1974) (where warnings given on package insert used in marketing defendant's Chloromycetin might well have been found adequate to warn prescribing doctor of risk of serious side effect of aplastic anemia, the jury was nevertheless entitled to find a marketing defect where drug company manipulated its detailmen to overpromote the drug in personal sessions with doctors thereby diluting, watering down and undercutting the warnings given on the package inserts or warning labels attached to the drug when the pharmacist filled the prescription). There are at least 10 other chloromycetin decisions squinting in the same direction as to the overall inadequacy of the warning used as diluted by the manufacturer's overpromotion. E.g., *Love v. Wolf*, 38 Cal. Rptr. 183 (Cal. App. 1964), 5 NACCA NEWS L. 50 (April 1962); *Salmon v. Parke, Davis & Co.*, 520 F.2d 1359 (4th Cir. 1975), 18 ATLA NEWS L. 425 (Nov. 1975). In this clutch of cases, the courts held that a jury might find that defendant's overpromotion of a dangerous

drug subjected it to liability to the injured patient, although the promotional activities were directed to the medical profession, one of whose members overprescribed the drug to plaintiff.

18. *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945).

19. *Tampa Drug Co. v. Wait*, 103 So.2d 603 (Fla. 1958), 22 NACCA L.J. 98-103 (1958).

20. 35 Fed. Reg. 4001 (3 March 1970).

21. E.g., *Ruggers v. Minnesota Mining & Mfg. Co.*, 380 N.E.2d 445 (Ill. App. 1978), 22 ATLA L. REP. 125-26 (April 1979) (where industrial adhesive with low flash point burned the plaintiff; although the warning was found to be adequate, the danger was found to be excessive, notwithstanding, and the product defective because it was unreasonably dangerous).

22. 2 Harper & James, Law of Torts (1956) § 28.4 nn.1-7; Supplement, Vol. 2, Harper & James, Law of Torts (Little, Brown & Co. 1968) 33-34.

23. *Victory Sparkler Co. v. Latimer*, 53 F.2d 3 (8th Cir. 1931) (foreseeable that children would put a toxic firework, called "spit devils," into their mouths and eat them resulting in the death of the ingesting child); *Acosta v. Irdank Realty Corp.*, 238 N.Y.S.2d 713 (Sup. Ct. 1963) (foreseeable to slumlord that a child would eat paint and plaster falling from cracked walls in tenement and incur irreversible brain damage from lead-base paint); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962) *supra*, (child dies from drinking furniture polish) (32 prior instances admittedly known by manufacturer); *Killeen v. Harmon v. Grain Products, Inc.*, 413 N.E.2d 767 (Mass. App. 1980) (retailer liable for selling candy-flavored toothpicks to children who are too young to handle them and where their unsafe use is foreseeable as by children sucking on them absent-mindedly while engaged in the rough and tumble of play, 10-year-old girl's lip punctured by candy-flavored toothpick when she fell from jungle-gym and landed face down); cf. Senate Report No. 1158 (86th Cong., 2d Session): "[W]e have been informed by the Public Health Service, that as the result of the recent national health survey the Service estimates that 600,000 children under the age of 15 will swallow a poisonous or potentially poisonous substance each year."; *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (1977) (where young boy lost an eye when hit by pellet from his young friend's slingshot, the jury could properly find that marketing slingshots in such a way as to permit direct sales to youngsters made the manufacturer and all distributors in the marketing chain liable for harm to the child).

24. *Cunningham v. Quaker Oats Co.*, U.S. District Court, W.D.N.Y., Civil Action No. 1973-343, June 18, 1981, 24 ATLA L. REP. 249-52 (Aug. 1981).

25. *Garcia v. Hallett*, 82 Cal. Rptr. 420 (Cal. App. 1970).

Defective or Hazardous Medical Devices

by Gary L. Boland, B.A., J.D.

Since earning his Juris Doctor at the University of Oklahoma in 1967, Gary L. Boland has been a very active member of the legal community. From 1969 to 1984, Mr. Boland has published or given nearly 50 papers on the topic of Law and Medicine. In addition to this prodigious effort, he is presently a special lecturer on Law and Medicine at the Schools of Medicine and Nursing at LSU. Mr. Boland also is an Adjunct Assistant Professor of Legal Medicine at the LSU School of Veterinary Medicine. During the 1982 and 1983 Summer terms, Mr. Boland was a Visiting Professor of Law at Suffolk University. In 1983, Mr. Boland was elected to the prestigious American Law Institute.

Advances in the biomedical engineering field over the last twenty years have led to physicians being given options in a variety of products as part of their use in medical treatment. According to FDA records, approximately 2,000 companies produce more than 12,000 different types of devices with sales totaling more than five billion dollars per year. In nearly all of the cases where a device is utilized, the patient is generally not given information concerning the device. The device may be defective if there is an inherent weakness in the product which prevents it from being used in the way it was designed and for the purpose so indicated. It may be hazardous if the device causes harm whether it is user caused or not. In either case, if an injury is caused, some party involved with the product may be cast for damages under the various theories of negligence, warranty, or strict liability involving products.

Before proceeding to discuss the various theories upon which a cause of action can be based, the different parties involved in a transaction, the difficulties in proving the existence of a defect, and the peculiar problems posed by the statute of limitations in these cases, it might be helpful to distinguish the various types of medical devices; and then, to discuss some of the various

sources of information or standards available to the trial attorney needed to prove the standards of care for their intended uses.

Implantable medical devices or implants, as used in this article, are manufactured devices which are intentionally implanted inside the human body for extended periods of time, with some notation of permanence. The manufactured nature of these devices distinguishes them from blood and human tissue transplants.

“ . . . the patient is generally not given information concerning the device.”

The devices discussed in this article are distinguishable on two functional levels. Internal devices are designed to operate and remain within the body, and medical instruments are intended to operate from outside the body. The cases involving medical instruments usually fall into three categories. First, there are cases involving pure negligence by the operating team for failure to remove a device after its function and the operation is completed. Typical cases involve lap pads, sponges, or clamps left inside the patient. Second, there are cases involving devices which unintentionally remain in the body because of a defect in the manufacture or negligence in administration. Typical cases involve defective hypodermic needles, catheters or surgical blades which break off in the body. The second group of cases usually involve many similar causation questions to those involved in proving a defect in the internal device case. The defense most often asserted by the manufacturer is, of course, that the device was not defective at the time of the sale, but only became defective when administered improperly. The last case of instruments include devices which may involve no intended direct contact with the patient whatsoever. These cases range from machines which jar loose

and fall upon a patient to machines which administer improper quantities of radiation. Additionally, internal devices are distinguishable because of their permanent or semi-permanent nature. A heart valve or pacemaker is intended to remain in the body for an extended period of time and to function autonomously within the body. Instruments are intended to operate upon the body and have an immediate effect.

The characteristic of permanence is also a factor which distinguishes implantable devices. Early medical device cases were analogous to drug cases. The courts found similarities in the lasting nature, internal operation and direct effects of both devices and drugs. The application of the doctrine of products liability to defective drugs is becoming more prevalent and may provide useful analogous reasoning for cases involving defective implants.

One of the basic problems of the application of products liability to any medical related field is how to separate the service professional aspects of the practice of medicine from the sale or products aspects of the case. Implants are similar to medical instruments, but their function is to replace a nonworking part of the body to bring about desired results. In most cases, the continued operation of the device is the desired result. Implants are similar to drugs but operate within or on the body without any change in their own nature. For these reasons, implants appear to be the most likely candidate, under the proper factual circumstances, for the imposition of products liability law.

When the manufacturer of a medical device discovers a design defect or an inherent weakness in his product, the attorney may discover the defect with not too much difficulty. However, when the manufacturer does not withdraw the product from commerce, or the federal government does not cause the product to be withdrawn and warnings issued, what sources of information are available to the attorney to discover how the product was intended to be used? Many

of these sources of information may be obtained from the federal government without too much difficulty. Frequently, the information is not expensive to obtain.

When the manufacturer patents his product, in the product patent application he lists what the invention is supposed to do and how the product is made. Therefore, the patent application and the specifications of the patent would be a starting place for the attorney to commence his study.

The most productive information, other than within the manufacturer's research and development files, may be found within the files of the Federal Food and Drug Administration's Bureau of Medical Devices. Before May 28, 1976, Congress had not thought it necessary to provide guidelines involving medical devices. Indeed, the major concern of the F.D.A. was primarily to implement its proscriptions against defaults and the misleading labeling of products with respect to such devices. To be fair, until a few years ago, devices were relatively simple and only minimal federal monitoring was necessary to determine the efficacy and safety of most such products in the field.

The Medical Device Amendments to the Federal Food, Drug and Cosmetic Act (21 U.S. C. § 321 et. seq. 1938) which was signed into law May 28, 1976 represented the first attempt on the part of Congress to establish a comprehensive regulatory system over the medical device field. An understanding of the F.D.A. regulatory system and amendments will enable the attorney to narrow his search for the necessary standards.

The 1976 Amendments established a three-part classification system which categorizes medical devices on the basis of their safety and effectiveness. The first category, "Class I, General Controls," includes, under Section 360(a)(1)(A), all devices for which specific performance standards or premarket approval is not required to assure their safety and effectiveness, and for which the general provisions of the Amendments and the Act are suitable safeguards. The second classification, "Class II, Performance Standards," encompasses under Section 360c(a)(1)(B), devices for which general controls are not sufficient, but for which performance standards can be enunciated that adequately assure that the goals of safety and effectiveness will be met. "Class III, Premarket Approval," covers, under

Section 360c(a)(1)(C), devices which require premarket approval because they are intended for use in life-supporting or life-sustaining situations, or because they present an unreasonable risk of illness or injury.

All "old" devices, those which were on the market when the Amendments were enacted on May 28, 1976, and all newly marketed versions of old devices, have been, or are being, placed in one of these three classifications by advisory panels formed under the sponsorship of the Food and Drug Administration. New devices, and old devices used for life-sustaining and life-supporting purposes, are, under Section 360c(f)(1), automatically placed in Class III and remain there unless the manufacturer or importer, pursuant to Section 360c(f)(2), successfully petitions for a change in the classification.

"A device is to be placed in Class I if its safety and effectiveness can be assured by general controls . . ."

The classification panels consist of experts in the fields of clinical and administrative medicine, engineering, biological and physical science, and related fields. The Amendments specify in great detail the necessary qualifications and procedures for appointment of panel members, and the manner of handling, and the content of their recommendations. The Food and Drug Administration pursuant to Section 360c(d)(1), reviews all panel recommendations and publishes notices of the classification of devices in the Federal Register. Any interested party may participate directly in the classification process under Section 360c(c)(1) by making a presentation at the meetings of the appropriate expert panel, as well as by filing comments on the proposed notice of classification. Almost all of those devices which existed prior to May 28, 1976 had been classified by the advisory panels. About forty percent of the devices had been classified as subject only to general controls, while fifty-five percent require standards and only five percent require premarket approval.

"A Class II device is one for which the FDA and its advisors deem the general controls to be insufficient to assure that the device will be safe and effective."

A more thorough breakdown of the classification system reveals a comprehensive regulatory scheme. A device is to be placed in Class I if its safety and effectiveness can be assured by the "general controls" that have been used to regulate devices since 1938. Such general controls include post-market enforcement of rules concerning adulteration and misbranding, good manufacturing practices, inspection, registration of device manufacturers, notification and repair, replacement or refund, and records and reports on devices. No testing is required of Class I devices before they are placed on the market.

A Class II device is one for which the FDA and its advisors deem the general controls to be insufficient to assure that the device will be safe and effective. If it is thought that information is available which will permit the promulgation of an adequate performance standard, the product will be placed in Class II. Until the performance standard is actually formulated, the device is subject to the general controls applicable to Class I devices. A performance standard is essentially a measurement designed to provide reasonable assurance of the safety and effectiveness of a device. Section 360d provides that a performance standard should include, where necessary, provisions for the construction, components, ingredients and properties of the device and its compatibility with power systems and connections to such systems; the testing of the device on a sample or an individual basis; the measurement of the performance characteristics of the device; and, where appropriate, a requirement for the use and a prescription for the form and content of labeling for the proper installation, maintenance, operation, and use of the device.

Performance standards are established by regulations in a similar manner to the original allocation of products into the classification system. The FDA invites the submission of existing standards

which have already been developed by public entities or private standard-setting organizations, or offers by these groups to develop standards. When the Agency accepts a standard in this manner, it then initiates a notice and comment rule making proceedings during which it may refer proposed standards to expert advisory committees for recommendations. The final performance standard is codified in a final regulation covering all Class II devices for which it was developed.

“The most stringent controls are applied to Class III devices.”

The most stringent controls are applied to Class III devices. An old device is to be placed in Class III if it is represented for use in supporting or sustaining human life, if it is of substantial importance in preventing the impairment of human health, or if it presents a potentially unreasonable risk of illness or injury. However, if the safety and effectiveness of such a device can be assured through the use of the general controls or a performance standard, it may be reclassified under Section 360c(e) as a “Class I” or “Class II” device. The classification of an old device into the Class III category does not subject it immediately to all premarket controls. Section 351f(2)(B) allows a thirty month period to the manufacturers of old devices to allow them sufficient time to gather the data needed to support an application for premarket approval. The devices may remain on the market during this grace period.

New devices for which Class III controls are required, on the other hand, are automatically put into that class and require premarket approval. Under Section 360e(c)(1), an application for premarket approval must contain full reports of all information on investigations known or which should reasonably be known to the applicant to determine the safety and effectiveness of the device; a statement of the components, ingredients and properties, and of the principle of the operation of the device; a description of manufacturing methods, facilities, and controls; information

showing compliance with a performance standard which would be applicable if the device were a Class II device; samples of the device, if practical; and, specimens of proposed labeling.

Under the Amendments there are provisions for testing for premarket approvals, for premarket clearances, for judicial review under Section 360g(a) for enforcement provisions under Section 352(2)(1) and (2), 331q(1)(A) and (B), Section 333 which provides for fines and imprisonment, Section 374 giving the FDA the right to inspect factories where devices are manufactured, processed, packed, and held.

Another significant remedy is the repair, replacement, or refund provisions of the Amendments, which is found in Section 360h(B). Four determinations must be made by the FDA in order for it to demand that a party submit a plan for repair, replacement, or refund. It must find the following: (1) that the device presents an unreasonable risk of substantial harm to human users; (2) there are reasonable grounds to believe the device was not properly designed and manufactured; (3) that in order for notification of health professionals and persons subject to the risk the continued benefit would not be adequate to alleviate the hazard, and (4) that there are reasonable grounds to believe the unreasonable risk was caused by the manufacturer, importer, distributor, or retailer. If these requisite findings are made, the FDA may order the appropriate party to repair the device to eliminate the unreasonable risk, replace the device with one that complies with the Act, or refund the purchase price of the device. If such findings have been ordered, of course, the attorney pursuing this case may directly benefit from the government’s findings. As a final remedy, the Agency, under Section 360h(c), may include, in an order for repair, replacement, or refund, a requirement that the manufacturer, importer, distributor, or retailer reimburse other parties similarly situated for expenses incurred in carrying out the remedy plan. These reimbursement orders do not affect the private rights which one party may have against another.

Medical devices that are electronic products are also subject to the additional regulatory controls of the Radiation Control for Health and Safety Act of 1968 (41 U.S.C §263b et seq. 1968).

The Radiation Control Act gives the FDA the authority to establish performance standards for electronic products.

In 1978 and 1979, the Food and Drug Administration promulgated regulations to realize the purposes of the 1976 Amendments. These regulations fall into three broad categories and provide additional sources of product information. They are: detention, labeling, and registration and notification.

Under the regulations concerning detention, the FDA is empowered to detain medical devices intended for human use which are believed to be misbranded or adulterated. The period of such detention is generally limited to twenty (20) days or until a hearing is granted. (21 C.F.R. §800.55).

Under the Amendments involving labeling, the regulations require that the labeling and exemptions for medical devices include the name and place of business of the manufacturer, packer, or distributor, and adequate directions for intended use must be in the language a lay person can understand. Such labeling



information must be displayed prominently. The regulations also provide that the following classes of medical devices are exempt from the labeling requirements. They are: certain devices available only by prescription, devices having commonly known directions for use, in vitro diagnostic products, and devices used only in the processing, repacking, or manufacturing of drugs or other medical devices. These requirements are contained in 21 C.F.R. §801.1, 801.5, 801.15, 801.109, 801.116, 801.119, and 801.122. Additionally, custom devices may be exempted entirely from FDA performance standards and premarket approval under Section 520j(b) if it is made on the order of a physician intended either for a particular patient or for the physician's own use in his practice, and generally not available to other physicians. Of course, this exemption would not affect the implied warranties or other remedies which the patient might have against the parties.

The manufacturer, preparer, propagandizer, compounder, assembler, or processor of medical devices intended for human use must register those devices with the FDA and submit a listing containing certain information for those devices currently in commercial distribution. (21 C.F.R. §807.20). This information includes identification of the product and establishment, certification of compliance with the relevant regulations, the FDA number, and other general information (21 C.F.R. §807.25). In addition, in certain cases the establishment must submit a notification of intent to market prior to commercial distribution (21 C.F.R. §807.81).

The Office of Enforcement of the Bureau of Medical Devices will, when notified of possible problems involving devices or equipment, visit the site, examine the device, and make a report. If it is a hospital respirator, for instance, they will examine records to determine whether or not the hospital has met the standards as prescribed by the manufacturer for servicing the unit, and under the Freedom of Information Act, the astute attorney may be able to obtain copies of that investigation and the development of the cause of action. When defending such an action an investigation such as this may help to prove that your client was not at fault or negligent.

When the FDA files have been thoroughly examined and their usefulness determined, additional information setting out accepted standards may be acquired by reviewing the hospital or clinic's regulatory procedures as set out by their own organization. Such manuals are required by the Joint Commission on Accreditation of Hospitals in their 1979 edition of the *Accreditation Manual for Hospitals*; and most hospitals are accredited by the JCAH. Many modern hospitals have, as a part of their risk management programs, incorporated and adopted safety standards and regulations, and hired equipment engineers as a part of their operating procedure to reduce liability premiums. These safety standards may be discovered and utilized to prove the necessary missing elements of a cause of action.

“Of course, one could name everyone in the chain of custody of the device . . . but the resulting cause of action could be an expensive one to pursue.”

Another source of information to be utilized in determining applicable standards of care would be the National Fire Protection Association standards. The National Fire Protection Association specifically indicates particular laboratories used to test equipment and indicates standards for such equipment as: respiratory therapy equipment, laboratory electrical equipment, and anesthetic areas and equipment. Of course, all lawyers would have already done their own medical research by this time and would have hired the necessary experts to give them the “correct” opinion for their case.

The question of how and whom to sue is extremely relevant to the attorney in evaluating the cause of action involving a defective medical device. Of course, one could name everyone in the chain of custody of the device on the grounds that everyone connected with the product is guilty of some action or the device would not have caused an injury. Such actions by some plaintiffs are not un-

common, but the resulting cause of action could be an expensive one to pursue. Some of the obvious potential defendants would be the physician involved, the hospital or clinic where the procedure was performed, the retailers or suppliers of the product, any independent contractors involved, the manufacturer of the product, and the federal government for allowing the product to enter the stream of commerce.

Each of the potential defendants will require an individualized analysis of the necessary elements of proof by the plaintiff before the trial commences. In this article the writer will discuss some of the problem areas involving liability of the physician and the hospital in Massachusetts since they are considered health care providers and must conform to the general laws in force. Those laws, G.L. c.231, Sec. 60B-D, require different treatment in the handling of the law suit for physicians and hospitals before the suit can finally be commenced for a trial posture.

The physician or hospital is by statute a “provider of health care” and must proceed before a tribunal whereby it is to be determined if the evidence presented would be sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case was merely an unfortunate medical result. The tribunal make-up is composed of a superior court judge, an attorney, and a member of the medical community. The plaintiff presents his offer of proof which must be assumed that if it were substantiated, would raise a legitimate question of liability appropriate for judicial inquiry.

The statute defines the procedure and the type of evidence allowed. The testimony of the witnesses at the tribunal level, as well as the decision or opinion of, the tribunal is admissible.¹ If the tribunal finds for the defendant, then the plaintiff must post a bond, and if he does not post the bond within thirty days of the tribunal's finding the action shall be dismissed. The statute provides also that the ad damnum clause in the law suit be prohibited from the pleadings.

The statute of limitations for malpractice, error or mistake against “providers of health care” is three years. If there is a claim by a minor under the age of six

years, he shall have until he is nine years old, but any claim by a minor must be commenced within three years after the appointment of an administrator.² After the tribunal's requirements have been complied with and the bond has been posted the case may proceed to trial as any other suit.

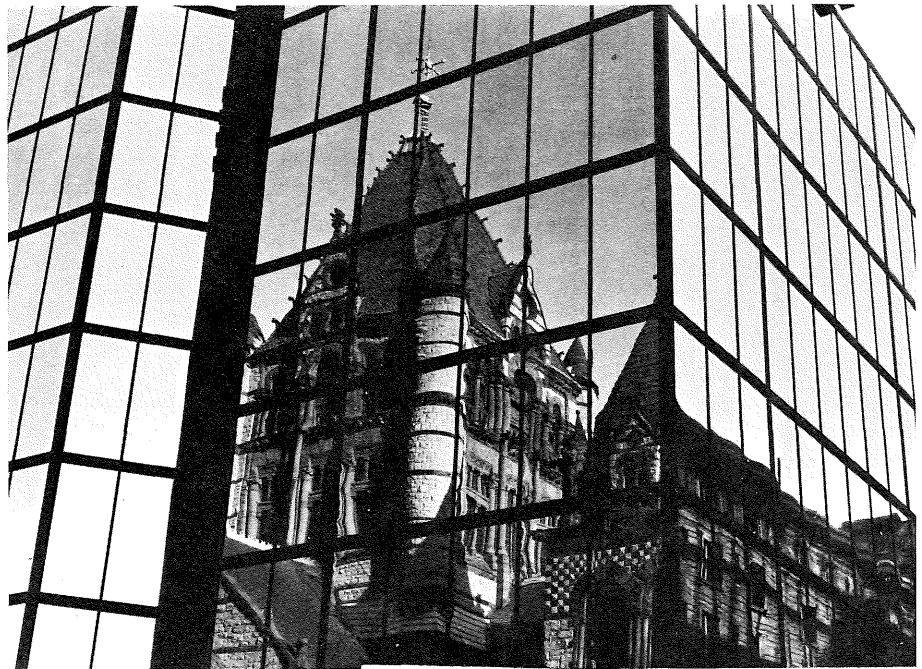
In the cause of action against the physician involving medical devices several approaches are necessary. The primary consideration involving a medical device might be in considering whether or not the physician deviated from the standard of care and skill of the average member of the profession practicing within that specialty. One should also consider the advances of the profession in this type of procedure, and, as in the case of the general practitioner, it is permissible to consider the medical resources available to him.³ If the physician is a specialist, the attorney should aver that the specialist physician deviated from the standard of care of the specialty in inserting or implanting the device. This then raises the issue of the medical and surgical experience of the specialist in the performance of this service, and more important, how the procedure should have been performed.

In the negligent selection of the medical device, the provider of health care or physician is liable, not for some defect in the device, but for the doctor's failure to select the proper device for the task at hand. Indeed, the patient does rely on the provider or health care's expertise in the evaluation of solving his medical problems. It is argued that there are several reasons for holding the physician responsible for the wrong instrument used at the wrong time or incorrectly used or the wrong implant for the procedure. They are: doctors sometimes through the hospitals are the purchasers of medical devices; patients are not in the position to evaluate or select among the different devices available, and the physician is in a superior position by having at his disposal the data necessary to make an informed decision and give an informed consent (discussed separately under "informed consent"); implants are brought into the stream of commerce, involving extensive advertising in medical journals directed at doctors involving sophisticated sales forces from the manufacturers; physicians are often the only parties aware of warranties of the products and are able to evaluate the

warranties; and physicians should not be able to claim that the injury was an unpredictable medical contingency when the cause of injury occurs from a directly identifiable technical malfunction discussed by the manufacturer directed to the physician; when the physician misuses the product or does not properly inspect it, different problems arise. It may be the device does not present a danger if used properly, or it may involve a defective device that the physician uses in the face of a known danger.

Public policy arguments recognize the special need for life-saving devices and the inability of the physician and the hospital to have sufficient knowledge of means to adequately test such equipment for latent defects, especially in pre-packaged sterile devices where inspection might contaminate the device. However, the physician, nevertheless, must still be suspect of even the slightest defect in an implant, and liability should be imposed where there is proof of misuse of the device or continued use of the defect in the face of known or reasonably discoverable defects.⁴

Another method of attack available to the plaintiff would be to allege that the informed consent was not adequate. Under the general uniform consent law, consent to medical treatment means a consent in writing to any medical or surgical procedure or course of procedures which is to be performed. The nature and purpose of the procedure or procedures should be discussed in general terms with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, and of disfiguring scars associated with such procedure or procedures. There should be an acknowledgment that such a disclosure of information has been made and that all questions asked about the procedure or procedures have been answered in a satisfactory manner. The person signing should have legal capacity to sign a contract. Such consent shall be presumed to be valid and effective, in the absence of proof that execution of the consent was induced by misrepresentation of material facts.



The Supreme Judicial Court on August 13, 1982, in *Harnish v. Children's Hospital Medical Center*, 439 N.E. 2d 240, held that: The physician's failure to divulge in a reasonable manner to a competent adult patient sufficient information to enable patient to make an informed judgment whether to give or withhold consent to a medical or surgical procedure constitutes professional misconduct and is malpractice. The Court also asserted, that the physician owes to his patient the duty to disclose in a reasonable manner all significant medical information that the physician possesses or reasonably should possess that is material to an intelligent decision by the patient whether to undergo a proposed procedure, and the information a physician reasonably should possess is that information possessed by the average qualified physician or, in the case of a specialty, by the average qualified physician practicing that specialty. The determination whether medical information a physician possesses is material to an intelligent decision by the patient whether to undergo a proposed procedure is one that lay persons are qualified to make without the aid of an expert.

In other jurisdictions where this identical language has been adopted, it is accepted that, since the manufacturer issues the warnings to the provider of health care, it is part of the treatment and the risks inherent in a device or drug should be conveyed to the patient. If the warning is given, then the patient is deemed to have assumed the risk of the known danger or condition.⁵

Another theory advocated by writers in the torts law field is the continuous tort theory. The continuous tort theory has its origins in the law of confidential doctor-patient relationships where the injury is measured not from the first injury or alleged act, but from the last injury on the grounds that the professional relationship is a continuing duty. Therefore, when the physician gains knowledge from the medical literature including the manufacturer's warnings, notwithstanding the state of the art at the time, he is the one who knows what particular type of device was utilized or drug prescribed. Therefore, if a recall is made by the manufacturer, it is contended that when he knew of the defect or

should have known of the defect, he was under a duty to recall any patient in which he placed the device, or for whom he prescribed drugs.⁶

Res ipsa loquitur generally is raised in the pleadings and is determined by the judge before the case is given to the jury, but it is a rule of evidence which the attorney must preserve against the physician and the hospital,⁷ as well as, the other parties.

The liability of the hospital other than following the Joint Commission's regulations are involved with proper selection of the medical equipment, installation and operation of the equipment, maintenance checks, and keeping the staff educated on these changes.

Although the manufacturer has a responsibility to supply effective equipment, properly designed, assembled, tested, packaged and labelled, neither he nor his salespersons may use misleading advertising or conceal known patient hazards, but on the other hand, the hospital then has a duty to ensure that the equipment it buys operates according to the required standard of care. This implies that the hospital has a responsibility to ensure and, if necessary, to test to see that the equipment it buys is effective, safe and can be used properly by its staff.

“... the hospital has a responsibility to ensure ... that, the equipment it buys is effective, safe and can be used properly by its staff.”

The hospital has a further duty to comply with the Food, Drug and Cosmetic Act Section 504 with regard to the installation and operating instructions, which are written, printed or graphic material accompanying the device, as a labelling requirement of the Act. Instructions inadequate for safety and effectiveness can thus constitute misbranding, and if the hospital does not set up the equipment as per the instructions it will have violated a standard set out to protect the public, and they be found to be negligent per se. Additionally, the

hospital has a duty to make sure that the staff is trained in the equipment's use under normal and emergency conditions.

The hospital may be held responsible for equipment defects causing injury, including patent defects and those latent defects which can be checked or should have been maintained. The courts have generally held that the hospital cannot be responsible for latent defects which cannot be checked, since it is not reasonable for the user of the equipment to test for these defects before use; it is reasonable, however, to expect the user to make periodic examinations, with appropriate thoroughness and frequency. If the staff knows of a prior malfunction and fails to take action, the hospital is deemed to know and is responsible.⁸

“... it is reasonable, however, to expect the user to make periodic examinations, with appropriate thoroughness and frequency.”

Other theories associated with hospital liability involving medical equipment would be the hospital's failure to employ routinely used devices, keep abreast of advances, keep equipment standards up-to-date, advise the staff when the proper equipment is unavailable, and advise where the proper equipment is available.

Defenses available to the physician or hospital and those which are most frequently advanced are: no warning to user because of inadequate informed consent from the manufacturer to the physician or hospital; the product was not defective; it was not put to its normal use by the patient when the injury occurred; it was not unreasonably dangerous in the particular use to which it was put when the damage occurred; the harm was not a result of the defect; the user assumed the risk, was contributorily negligent or comparatively negligent; public announcements from the manufacturer and the federal government as were issued in the toxic shock cases associated with tampons, and the Tylenol controversy puts the public on notice not to use the product; and when the statute of limitations has estopped the plaintiff from stating a cause of action or pursuing his claim.

Since malpractice cases against doctors make them very uncooperative in future personal injury cases, you must win every malpractice undertaken! Before suing the physician, it would be prudent to consider the following items or questions. Ask yourself if the injury could have been avoided if the product had been designed or manufactured differently. Is the product as safe as scientific knowledge could make it? This approach was applied in *Direling v. General Electric Co.*, 511 F.2d 768 (5th Cir., 1975), and the court charged the jury to the effect that the device should not be considered defective if it was as safe as scientific knowledge could make it. Most courts do not agree. Does the device comply with F.D.A. regulations requiring pre-market testing and classification, warnings, etc.? If not, then negligence per se, or at least deviation from the standard of care as set forth by the government. Have you read all of manufacturer's claims through his patent application to the patent office, all correspondence to the F.D.A., all advertisements, all information and brochures given to and by the detail men or salesmen involving the product? Was the medical research done by an expert in the field or undertaken by you in a medical school library to determine the most current thinking regarding your product? If you are still convinced you have a case, then your work has just begun!

Notes

1. See, *Gugino v. Harvard Community Health Plan*, 403 N.E.2d 1166 (Mass., 1980) and *Beeler v. Downey*, 442 N.E.2d 19 (Mass. 1983) and *Kapp v. Ballantine*, 402 N.E.2d 463 (Mass., 1980) for a discussion of the tribunal's review, and see also, *Feinstein v. Massachusetts General Hospital*, 643 F.2d 880 (1st Cir., 1981) and *Austin v. Boston University Hospital*, 363 N.E.2d 515 (Mass., 1977) for actions brought in Federal Court.

2. See, G.L. c.231, Sec. 60D for minors and c.260 Sec. 4. See also, *Franklin v. Albert*, 411 N.E.2d 458 (Mass. 1980) where the Supreme Court held that cause of action for medical malpractice does not "accrue" under statute of limitations until patient learns, or reasonably should have learned that he has been harmed as a result of physician's conduct. See also, *Teller v. Shepens*, 411 N.E. 464 (Mass. 1980) which affirmed *Franklin* and *Dinsky v. Tower of Framingham*, 438 N.E.2d (Mass. 1982) where *Franklin* is cited with approval.

3. See, *McCarthy v. Boston City Hospital*, 266 N.E.2d 292 (Mass. 1971), *Rogers v. Okin*, 478 F.Supp. 1345 (1979), and *Delicato v. Bourless*, 404 N.E.2d 671 (Mass. App. 1980).

4. See, *Zeller v. American Safety Razor Corp.*, 443 N.E.2d 1349 (Mass. App. 1983).

5. See, *Buckner v. Allergan Pharmaceuticals Inc.*, 400 So.2d 820 (Fla. App., 1981) where the court held that the physician had a duty to warn the patient of the adverse warnings given in the package insert to the medical community.

6. See, *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982), for a discussion of the enterprise theory and analogous reasons for the continuous tort theory.

7. See, *Haas v. United States of America*, 492 F.2d Supp. 755 (1980).

8. See, *Barber v. St. Francis Cabrini Hospital, Inc.*, 345 So.2d 1307 (La. App. 3 Cir. 1977) where the employee taped the switch on the x-ray machine, because it was not working.





Aviation Products Litigation

by Patricia D. Stewart

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As in any products liability action, the essence of an aviation products case is a defective product. What distinguishes aircraft cases from those involving defective blenders or snow blowers, are (a) a variety of procedural problems attendant upon virtually every crash, (b) the numerous sources and kinds of information to be obtained and reviewed in attempting to identify the product defect, and (c) the pervasive governmental regulation of virtually all aspects of aviation. While an attorney need not necessarily be a pilot or aeronautical engineer to successfully handle an aviation products claim, it is essential that he or she understand some of aviation's idiosyncracies.

Initially problems arise from the very nature of the crash itself. More often than not, your best witnesses, the crew and passengers, are dead, or if they have survived, traumatic amnesia blocks their recollection of any facts preceding the crash. The aviation attorney, therefore, bears the heavy burden of reconstructing the pre-crash sequence in the virtual absence of first-hand information. Moreover, the force of a crash often destroys or severely damages the aircraft and causative components. What wreckage remains may be located hundreds or thousands of miles from your office, scattered over several acres of inaccessible terrain. Because case preparation

requires thorough, independent examination of aircraft parts, it is vitally important to put the aircraft owner and custodian of the wreckage on notice to preserve all wreckage until the termination of any anticipated litigation. Customarily a certified letter sent return receipt requested asking that the wreckage not be disposed of suffices, but as a practical matter, there is little you can do to enforce this request, short of a court ordered preservation.

“The aviation attorney bears the heavy burden of reconstructing the pre-crash sequence . . .”

Preliminary evaluation of an aviation products case requires an analysis of the activity of an uncommon number of potential defendants. The aircraft manufacturer, seller and lessor are obvious targets, but keep in mind that the mere fact an aircraft came apart in flight does not necessarily mean it was defective. Any airframe can be overstressed by improper pilot technique with disastrous results. The manufacturers, sellers and maintainers of any of the hundreds of an airplane's component parts are also potential defendants.

Furthermore, the defective product may not be the airplane at all, but one of the support products consumed by the aircraft such as fuel, oil or de-icing fluid. The conduct of these manufacturers and suppliers must be scrutinized in the search for a defect.

In the initial analysis of the role played by the manufacturer of any aircraft or aircraft component, it should be borne in mind that, before its manufacture, every aircraft or component must be shown to comply with extensive regulatory requirements established by the Federal Aviation Administration. This process, known as aircraft “certifica-

tion” has recently exposed the United States Government to liability in aircraft product liability actions where certification was improper.¹

Unlike more commonplace product accidents, an aircraft accident breeds an abundance of information. The mere happening of a crash sets in motion the immediate participation of the National Transportation Safety Board and/or the Federal Aviation Administration who are charged with determining the “probable cause” of such accidents.² These governmental agencies acting jointly or independently, depending upon the type of crash and/or aircraft involved, assemble an investigative team which may include representatives of the manufacturers of the aircraft and/or aircraft products involved.³

Within hours of any given crash, this team is dispatched to the crash site where it examines wreckage, interviews witnesses, and assembles data relating to such things as weather, maintenance, and crew history. Through the investigator in charge the team records their factual findings, which become available in three separate reports. The first, generally available within five or ten days of the crash is the Preliminary Accident Report. This is often no more than a one or two paragraph document stating the location of the crash, the identification of the aircraft and its occupants, and the most basic description of the crash itself, i.e., “collision with high terrain following take off. . .”.

On the other hand, all of the pertinent factual material developed during the investigation will ordinarily be available within six to ten months of the crash in the form of an Aircraft Accident Report (“AAR”). This report is usually quite extensive, and although helpful, forms only the launch pad from which initial discovery will proceed. The AAR, or parts of it, may be admissible in evidence, depending upon the jurisdiction of your case.

What is clearly and universally inadmissible, however, is the third and last report issued by the NTSB, known as the "Probable Cause". Typically a one or two sentence report, it sets forth the opinion of the Board as to the cause of the crash, i.e., "pilot failed to see and avoid unlighted tower...". Because the Board renders its finding solely for the purpose of furthering aviation safety, both Congress and the courts have prevented its use in civil litigation.⁴

The Federal Aviation Act of 1958 [the "Act"]⁵, the single most important source of law in aviation, created the Federal Aviation Administration ["FAA"]⁶ as overseer of aviation safety in the United States and spawned the voluminous body of rules known as Federal Air Regulations (FAR's)⁷. The FAR's regulate every aspect of aviation including the design, manufacture, operation, and maintenance of aircraft.⁸ The Act and the regulations promulgated under it establish a standard of care for aircraft manufacturers and sellers⁹ and define the parameters within which all other persons associated with aviation must perform.

Of the sources of product data unique to aviation, there is perhaps none richer than the documentation generated by the aircraft type certification process. As a prerequisite to manufacturing any aircraft, the manufacturer must obtain the government's endorsement that the aircraft's design is safe and complies with the minimum safety requirements of the FAR's.¹⁰ When satisfied that the design fulfills this criteria, the FAA issues a type certificate authorizing the manufacturer to begin production. The type certification process generates copious documentation on the design, testing, and manufacturing history of an aircraft. Painstaking examination of these materials may disclose a manufacturer's non-compliance with regulations, and thus a product defect, even though a type certificate ultimately issued, or may suggest a basis for holding the government liable for negligent certification of the aircraft's design.¹¹

Numerous other sources of data peculiar to aviation may yield valuable clues in the search for a defect. Every aircraft sold includes an operator's or pilot's manual describing the aircraft,

the procedures for its use, and its operating characteristics. Maintenance and illustrated parts catalogues intended for use by aircraft repairers, abound with details on all of the hundreds of aircraft components. Both categories of manuals can be purchased directly from the manufacturer or obtained through discovery.

Virtually every aircraft manufacturer maintains a system for tracking problems which develop in its aircraft post-sale. A nationwide network of service representatives routinely relays service difficulty information back to the manufacturer. In-house customer service and warranty claims departments receive and diligently record reports of malfunctions and product dissatisfaction. If a problem recurs frequently, or if not recurring, is of sufficient gravity, the manufacturer circulates a "service bulletin" advising owners about it. The service bulletin may also include instructions on how to avoid or remedy the difficulty. When a malfunction poses a serious threat to the aircraft user, the bulletin will usually warn against further use of the aircraft until corrective action has been taken.

If it appears that "an unsafe condition exists in an aircraft" and that the "condition is likely to exist or develop in other aircraft of the same type design", the FAA will issue an airworthiness directive ("AD") to alert aircraft users to the hazard and to prescribe inspections, conditions and limitations under which the aircraft may continue to be operated.¹² Unlike service bulletins, airworthiness directives have the force of law. No aircraft to which an AD applies may be flown legally until the action mandated by the AD has been performed.

Audio tapes of aviation operations can be rewarding sources of pre-crash data and are of two types: (1) air to ground communications between a pilot and FAA air traffic controllers and (2) cockpit voice recordings of commercial airline flights. Air-ground tapes cover from five minutes before the first radio contact with the tower until five minutes after the last communication, unless otherwise requested by the NTSB. In general, the FAA retains air-ground tapes for fifteen days unless there is an accident in which case they are retained indefinitely. A transcript of the record-



ings is included in the NTSB accident package and is available for use by litigants.

Cockpit voice recorders ("CVR's") pertain to commercial aircraft only. They operate in a continuous thirty minute loop from before starting the engine to completion of the flight. A microphone in the cockpit records voices and background noises in the cockpit area. The recorder, familiarly known as the "black box" is located in the tail section of the aircraft where it is least prone to destruction in the event of a crash. Customarily, after an accident and recovery of the CVR, the NTSB prepares a transcript and includes it as part of its accident materials.

The thorough preparation of an aviation products case produces an overabundance of information and creates the problem of selectivity - barely ten percent of the material you assemble will be usable. But, do not be put-off by the seeming thanklessness of the task. Persistent wading through the ocean of printed matter will yield substantial dividends - you will find the defect and once found, your only limits are those of imagination.

Notes

1. 14 Code of Federal Regulations Part 21, 49 U.S. Code Section 1423. Until recently the FAA escaped liability for negligent certification based on the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. Section 2680(a). However, in 1982, the Ninth Circuit in an enlightened decision upheld the trial court in *United Scottish Insurance v. U.S.A.*, 692 F.2d 1209 which found the United States liable for negligently certifying the installation of a gas fuel heater in an aircraft which later caused an in-flight fire and crash. The United States Supreme Court granted *certiorari*, No. 82-1350, on May 16, 1983 filed February 10, 1983.

2. Federal Aviation Act of 1958, Sec. 701, 49 U.S. Code Section 1441.

3. Victims of the crash and their representatives are prohibited from participating in the investigation. 49 Code of Federal Regulations Part 831.5(a).

4. *Universal Airlines v. Eastern Airlines*, 188 F.2d 993, 1,000 (D.D.C. 1951); Sec. 701(e) Federal Aviation Act of 1958 (49 U.S. Code Section 1441).

5. Federal Aviation Act of 1958, 49 U.S. Code §1301 et seq.

6. Federal Aviation Act of 1958, Sec. 301.

7. Federal Aviation Act of 1958, Sec. 601.

8. Title 14 Code of Federal Regulations.

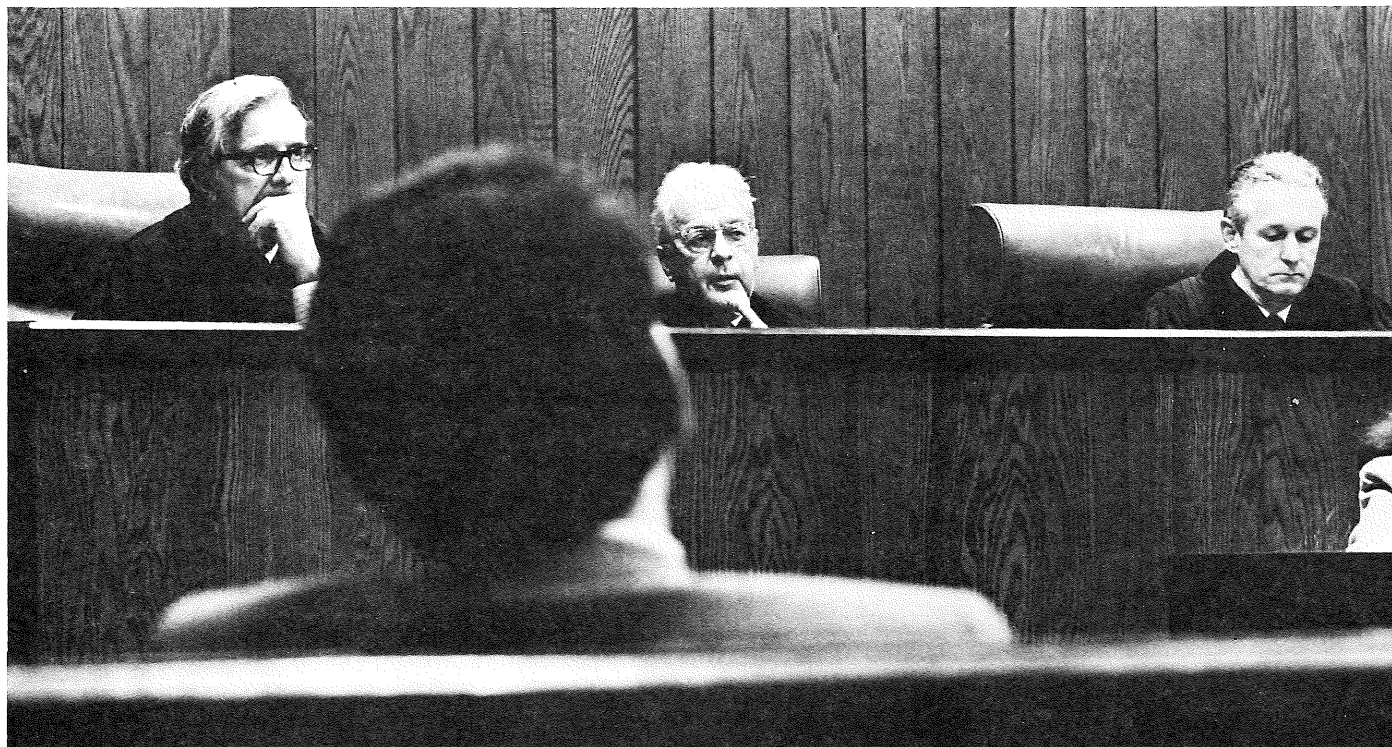
9. Federal Aviation Act of 1958, Sec. 610. Statutory violations may be evidence of negligence or negligence *per se*. The sheer breadth of the regulations, however, creates a special problem for the plaintiff's lawyer as juries are inclined to believe heavy regulation results in a safe product. The regulations, however, are a *minimum* standard. Federal Aviation Act of 1958, Sec. 601. While a regulation is admissible in civil litigation as evidence of a proper standard of care, circumstances may require a greater degree of care than mere regulatory compliance. *do Canto v. Ametek, Inc.*, 328 N.E.2d 873, 367 Mass. 776 (1975).

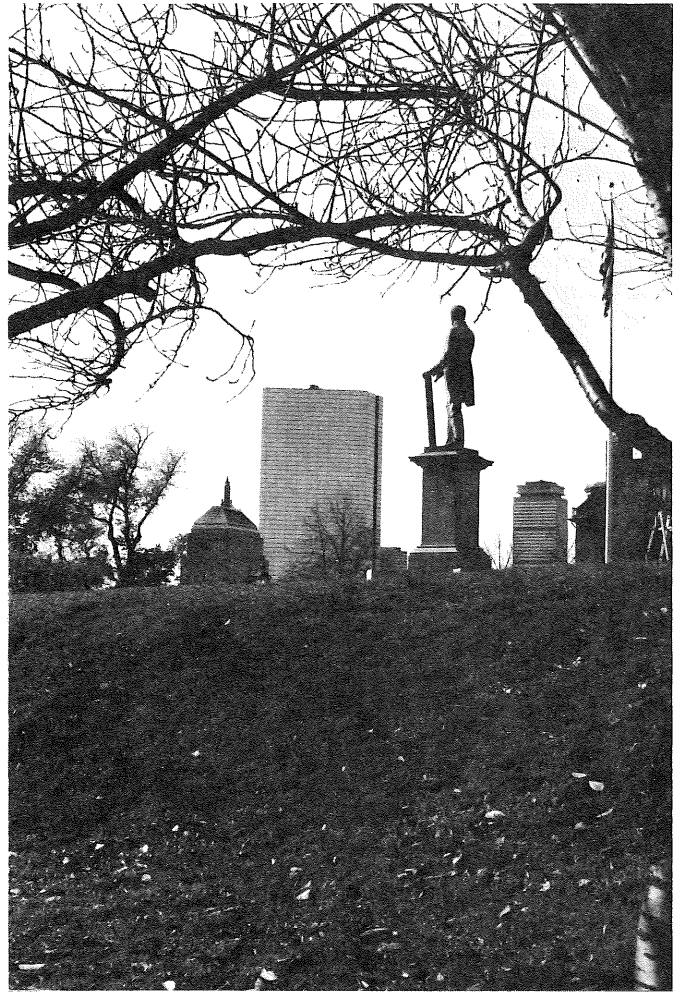
10. 14 Code of Federal Regulations Part 21.21, 49 U.S. Code §1423.

11. See text to note 1 *supra*.

12. 49 Code of Federal Regulations Part 39.1.

13. 49 Code of Federal Regulations Part 39.3.





Applying Indemnity Principles to Construction Accidents

by John F. Klipfel, Esq.

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Of increasing frequency in personal injury litigation is the so-called third party suit by an employee of an independent contractor injured on the premises owned or controlled by the defendant. Many of these cases involve very serious injuries with large worker's compensation liens and great potential exposure. As the following section will discuss, reasons these cases are difficult to defend not the least of which is the fact that the law may prohibit suing the plaintiff's equally negligent employer unless there exists an express indemnification agreement. See *Whittle v. Pagani Brothers Construction Co., Inc.*, 1981 Mass. Adv. Sh. 1462, *Liberty Mutual Ins. Co. v. Westerlind*, 374 Mass. 524 (1978).

The Plaintiff's Case

"Proof of negligence in the work place, in theory, is no different than any other kind of negligence." Connolly, *Mass. Academy of Trial Attorneys News*, Sept./Oct. 1980 at 1. (See this article for an excellent discussion of the plaintiff's case). In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant left undischarged. *Densky v. Town of Framingham*, 1982 Mass. Adv. Sh. 801 citing *Sweeney v. Old Colony & Newport R.R.*, 10 Allen 372 (1865). The plaintiff must prove (1) a duty owed to the plaintiff by the defendant; (2) the existence of an act or omission in violation of that duty; (3) injury or damage; and (4) a causal relationship between the breach of the duty and the harm suffered. Nolan, *Mass. Practice Series*, Tort Law, Vol. 37, Sec. 171 (1979).

The defendant who owns or controls the premises owes the same duty of care to the employee of an independent contractor as it owes to its own employees and all other lawful visitors on the premises. *Afienko v. Harvard Club of Boston*, 365 Mass. 320, 327-328 (1974). No longer may the owner or controller of the premises rely on the hidden defect rule which placed the burden of proof on the plaintiff to establish that the injury sustained was the result of a hidden defect which the defendant knew or should have known existed. *Poirer v. Town of Plymouth*, 374 Mass. 206, 207 (1978). The owner or controller of the premises must now take those steps necessary to prevent injury that are reasonable and appropriate under all the circumstances. *Id.* at 288.

" 'Proof of negligence in the work place, in theory, is no different than any other kind of negligence.' "

The plaintiff, in establishing the defendant's breach of the standard of care owed him, may rely on a number of factors which are evidence of negligence: Expert testimony (*Carey v. General Motors Corp.*, 377 Mass. 71 (1979)); Violation of law or regulations having the effect of law (*Afienko v. Harvard Club of Boston, supra*); Violation of accepted industry standards and failure to use preferred methods of operation (*Stewart v. Roy Bros. Inc.*, 358 Mass. 446 (1970)); Violation of standards established by contract (*Kushner v. Dravo Corp.*, 339 Mass. 273 (1959)); Violation of an employer's written safety instructions (*McNeil v. New York N.H. & H. R.R.*, 282 Mass. 575 (1933)); Violation of an employer's oral safety instructions (*Scott v. Thompson*, 5 Mass. App. 372 (1977)).

The above list is not meant to be exhaustive but is offered here to demon-

strate the variety of methods available to the plaintiff to establish negligence in addition to the plaintiff's own direct testimony. It should be readily apparent that recent developments in Massachusetts law have been extremely favorable to the plaintiff. The plaintiff can mount a very powerful and persuasive case if the above factors are coupled with the argument that he or she had no real choice as to the condition of the work place premises "As where a worker must either work on a dangerous machine or leave his job." *Uloth v. City Tank Corp.*, 376 Mass. 874, 880 (1978).

The Defense Dilemma

When defending the owner or controller of the premises where an injury has occurred, the defense lawyer often finds that he or she is hindered by a bewildered corporate client whose management does not understand how or why they are being sued. The client's management has hired an independent subcontractor who agreed to supply its own labor, materials and supervision as well as proof of adequate worker's compensation and general liability coverages. Management assumed that the independent subcontractor would supply proper and safe tools and materials along with properly trained workers coordinated by properly qualified and sufficiently experienced supervisors. Typically, the client's management also, wrongly but not unreasonably, assumed that they would be immune from suit under the insurance they required the independent subcontractor to purchase. After all, that was the purpose in requiring such policies. It soon becomes painfully apparent that the best method to protect the client from sustaining a substantial financial loss is an express indemnity agreement between the client and the subcontractor who employed the injured employee or other party contracting for part or all of the work.

This article will discuss the three categories of indemnity: (1) indemnity by express agreement; (2) the theory of

indemnity by implied agreement; and (3) indemnity by operation of common law. As the first part of the article will demonstrate, a properly drawn construction contract which contains an express indemnity agreement can shift the entire risk of substantial financial loss to another party contracting for part or all of the work including, but not limited to, the plaintiff's employer. The second part of the article will examine the applicability of the theories of implied contractual indemnity and common law indemnity to third party actions as well as examining the similarities of the reasoning applied by various courts when discussing these theories. The article also analyzes a line of cases which provide for rights of common law indemnity even where there has been a negligence finding against the party seeking indemnity. The conclusion provides some thoughts on public policy considerations as well as views on the use of indemnity counts to effectuate settlements in third party litigation.

Express Indemnity Agreements

Where there exists concurrent negligence on the part of the owner or controller of the premises, the express indemnity agreement is the only method of shifting the entire loss to another party. For the reasons stated previously, if it exists, an express indemnity agreement may be the only viable method of shifting the entire loss to coincide with the defendant client's misconception of its standard of care regarding the employees of independent contractors.

A contract agreeing to indemnify a party against the consequences of its own concurrent negligence is not against public policy. Prosser, *Law of Torts* (4th Ed.), Sec. 51 (1971). *Shea v. Bay State Gas Co.* (*Shea*), 1981 Mass. Adv. Sh. 765. Such express contractual indemnity provisions are to be fairly and reasonably construed in order to ascertain the intention of the parties and to effectuate their purposes, *Whittle v. Pagani Brothers Construction Co., Inc.* (*Whittle*), 1981 Mass. Adv. Sh. 1462, 1464, *Monadnock Display Fireworks, Inc. v. Town of Andover*, 388 Mass. 153 (1983),

although some of the older cases lay down a rule of strict construction for claims of indemnity covering the negligence of the indemnitee. *Whittle* at 1464. The older cases on the subject must be read in light of the *Shea* and *Whittle* decisions which gave broad meaning to express indemnity language.

“A contract agreeing to indemnify a party against the consequences of its own concurrent negligence is not against public policy.”

In *Shea* the plaintiffs sought damages from the defendants, Bay State Gas Company (Bay State) and the contractor J. Andreassi & Son, Inc. (Andreassi), for injuries incurred when a gas pipe ruptured causing an accumulation of natural gas and a subsequent explosion in the basement of the building occupied by the plaintiffs. The plaintiffs alleged that Bay State negligently maintained and serviced the gas pipe, and that Andreassi was negligent in excavating, backfilling and inspecting a sewer system in that area causing the rupture. Andreassi filed a third party complaint against Camp, Dresser & McKee, Inc. (CDM) seeking contribution on the grounds that CDM negligently supervised, tested and inspected the sewer construction. CDM moved for summary judgment on the third party complaint claiming a clause on an insurance certificate required Andreassi to indemnify CDM against CDM's concurrent negligence. For purposes of its summary judgment motion, CDM proceeded on the assumption that they were equally at fault with the primary defendants.

Prior to the explosion, CDM had contracted with the Town of Canton where-by CDM was to provide services as consulting engineers for the construction of a sewer system. Those services included basic engineering and inspection services as well as the preparation of construction plans, specifications and contract

documents prepared or provided by CDM for construction of the sewer system. Approximately four months after Andreassi completed work the explosion occurred. At the bottom of the certificate of insurance a paragraph entitled “Contractual Liability” read in relevant part as follows:

“The contractor (Andreassi) shall at all times indemnify and save harmless the OWNER, CAMP, DRESSER & McKEE INC. . . . on account of any and all claims, damages, losses . . . arising out of injuries . . . caused in whole or in part by the acts, omissions, or neglect of the contractor . . .” *Shea* at 768.

In holding that the proper construction of the “Contractual Liability” clause shifted to Andreassi as the general contractor responsibility for CDM's concurrent negligence, the court adopted the position that it is not necessary for the indemnity agreement to expressly make reference to losses due to the indemnitee's own negligence if that intent otherwise sufficiently appears from the language and the circumstances. *Shea* at 769. The *Shea* court did warn, however, that:

“Contract interpretation is largely an individualized process, with the conclusion in a particular case turning on the particular language used against a background of other indicia of the parties intention.” *Shea* at 770 citing *United States v. Seckinger*, 397 U.S. 203, 213, n. 17 (1970).

In construing such contracts of indemnity the courts will closely examine the situation of the parties when they executed it as well as the objects sought to be accomplished. *Shea* at 770. In determining that the fair and reasonable construction of this indemnity provision provided CDM with indemnification against its own concurrent negligence, the court found that holding otherwise would mean the clause had no content or purpose, that it would have been mere surplusage, and would otherwise rob the clause of its vitality and a sensible practical construction. *Shea* at 770.

In *Whittle*, a case decided subsequent to *Shea*, the court upheld an indemnity agreement which was not set out in the subcontract but rather incorporated by reference the indemnity clause in the general contract. *Whittle* involved an employee of a subcontractor on a contract for alterations of a Scituate school who fell off a ladder and was injured. Both he and his wife brought a third party action against the contractor alleging the fall and injuries were caused by the contractor's negligence. The contractor impleaded the subcontractor and two insurance companies alleging the subcontractor had expressly contracted to indemnify the contractor and that the insurers, by a certificate of insurance, agreed to assume the subcontractor's obligations.

The contractor, Pagani Brothers Construction Co., Inc. (Pagani) entered into a contract with the Town of Scituate to repair and remodel a school. The contract made use of the same "General Condition" published by the American Institute of Architects (AIA) recommended by the court in *Shea* at 771, n. 9. In addition the general contract required the contractor to maintain liability insurance protecting it from bodily injury claims which might arise out of operations under the contract including "contractual liability insurance as applicable to the contractor's obligations." *Whittle* at 1464. Certificates of insurance were required to be filed with the owner before any work began.

The subcontractor, Scott Prescott Corp. (Scott), executed a subcontract with Pagani for the heating and ventilating work. The subcontract incorporated by reference the general contract between Pagani and the Town of Scituate containing the following:

"The subcontractor agrees . . . to assume to the contractor all the obligations and responsibilities that the contractor by those documents assumes to the Town of Scituate hereinafter called the 'Awarding Authority' except to the extent the provisions therein are by their terms or by law applicable only to the contractor."
Whittle at 1464.

Pursuant to the general conditions of the contract, the subcontractor submitted to the contractor a "certificate of insur-

ance" providing "specific contractual liability coverage" with respect to the heating and ventilating for the Scituate school contract.

The court held that there was no question that the indemnity provision in the contract between the town and the contractor is broad enough to cover the concurrent negligence of the indemnitor and the indemnitee. *Whittle* at 1465. The court further held that the natural reading of the subcontract language is to impose the same obligations on the subcontractor to indemnify the contractor against claims arising out of the performance of the subcontract as the main contract imposes on the contractor to indemnify the town against claims arising out of the performance of the main contract. *Whittle* at 1465.



As *Shea* and *Whittle* evince, an express indemnity agreement will be given broad construction in this Commonwealth, and as such, affords the best protection for construction work accidents. *Whittle* further extended the broad interpretation of *Shea* to indemnity provisions in other contracts in the awarding procedure document chain. Express indemnity provisions, however, should explicitly reference personal injuries as the subject of indemnity as those which refer only to property damage will not be extended that far. *New Bedford Gas & Edison Light Co. v. Maritime*, 380 Mass. 734 (1980). Most importantly, the warning in *Shea*, that contract interpretation is largely an individualized process turning on the background indicia of the parties' intention, should be heeded. The indemnity provision should set forth exactly what rights

and responsibilities are to be the subject of indemnity and which party shall bear the burden of indemnity. The *Shea* court recommended the AIA "General Provisions" phrasing set out in *Shea* at 771, n. 9. After the *Shea* court's endorsement of this AIA language, no properly drawn construction contract would be completed without it.

Common Law and Implied Indemnity

Where no express indemnity provision exists the defense lawyer must then consider the applicability of common law indemnity which was first recognized in the case of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). The court held that when one contractor engages another it is impliedly warranted that the job will be done in a workman like manner and impliedly agrees to indemnify the other for damages resulting from such breach even where there was concurrent negligence on the part of the hiring contractor.

The Supreme Judicial Court on two occasions expressly left unanswered the question of whether or not the theory of implied contractual indemnity is a valid cause of action in this Commonwealth. *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 77 (1976), citing *Stewart v. Roy Bros. Inc.*, 358 Mass. 446, 458 (1970). However, the Massachusetts court did state that it will not recognize any theory of indemnity where there is concurrent negligence attributable to the party seeking to be indemnified.

"Indemnity is permitted only when one does not join in the negligent act but is exposed to derivative or vicarious liability for the wrongful act of another. In such cases the court has held that plaintiffs in the indemnity actions had no participation in the negligence of the defendants. 'Their subsequent negligence was rather constructive than actual.'" *Stewart v. Roy Bros. Inc.*, 358 Mass. at 459 citing *Lowell v. Boston & Lowell R.R.*, 40 Pick. 24, 34 (1839).

The Supreme Judicial Court did recognize an implied contractual indemnity agreement in the context of a commercial lease which contained an agreement to make repairs to the leased premises. *Great Atlantic & Pacific Tea Co., Inc. v. Yanofsky (Yanofsky)*, 1980 Mass. Adv. Sh. 897.

In *Yanofsky* the A&P sought indemnification from Yanofsky for a payment it had made to a customer who suffered personal injuries when she slipped and fell on a puddle of water allegedly caused by a leak in the roof of the store building leased to A&P by Yanofsky. The lease in effect at the time of the customer's personal injury contained provisions under which the lessor agreed both to make "all outside repairs" and was given a right of access "at reasonable hours" for repair and inspection. The A&P manager noticed a leak in the roof of the building over one of the produce aisles. The manager promptly notified the lessor in writing; he subsequently attempted to communicate with the roofing contractor who had added the new roof several years before. For approximately one week at various times prior to the customer's fall, the manager and staff mopped up the resulting water on the floor, placed shopping carts around the area where the water was dripping and put out pails to catch the water. No repairs had been performed on the roof up to the time the customer slipped on the water and fell. A&P was sued by the customer, negotiated a settlement and made a demand on Yanofsky for indemnification of that sum prior to obtaining a release, reserving all rights and causes of action against other parties to A&P.

In finding an implied agreement to indemnify the lessee against losses arising from the failure to repair, the court cited a series of landlord tenant cases imposing a duty to repair leased premises on the lessor after receipt of notice of an unsafe condition not caused by the tenant.

"We believe that, apart from G.L. c. 186, §19, when a lessor agrees by an express provision in a lease to make repairs to the leased premises, or to those portions of the building in which the leased premises are located and over which he retains control, such express agreement to make repairs should be construed as an agreement to indemnify the lessee against any loss or damage sustained by him as a result of the lessor's negligent or otherwise wrongful failure to make required repairs or of his negligent making of such repairs." *Yanofsky* at 902.

"... the Supreme Judicial Court will find indemnification by implied agreement where a party contracts to perform services and then ... fails to do the work properly."

In finding indemnification by implied agreement in *Yanofsky*, the court adopted its position consistent with the reasoning of the *Restatement (Second) of Torts*, Sec. 357, as well as the *Restatement (Second) of Property, Landlord & Tenant*, Sec. 17.4 & 17.5. It now seems clear that the Supreme Judicial Court will find indemnification by implied agreement where a party contracts to perform services and then wrongfully or negligently fails to do the work properly. The court, however, did not give an indication as to what, if any, different circumstances would give rise to indemnification by implied agreement in the future. What the court did make clear is that:

"An implied contract of indemnity such as involved here will not be considered as indemnifying a lessee against his own negligence. Only express language can create such indemnity." *Yanofsky* at 905 citing *Laskowsky v. Manning*, 325 Mass. 393, 398-399 (1950).

The court's position here is correct in requiring the party seeking indemnity to be negligence free, but its reasoning seems to be identical to that of indemnification by operation of law. If you contract with a party for the performance of certain tasks which they fail to perform after proper notice then you are not negligent. Your derivative and vicarious liability, if any, has arisen by operation of law and you should be reimbursed by the negligent party. Similarly, in industry, if you hire a welding contractor to make, inter alia, relocations and alterations in diesel fuel lines in your plant yard then who are you to tell that contractor's welders how to perform their highly specialized function? *cf. DeMartin v. New York, New Haven & Hartford Railroad*, 336 Mass. 261 (1957). In contracting for the welding

services and retaining the right of control only as to where and when the work is to be performed on your premises you have a duty to use reasonable care under all the circumstances to prevent injury and to:

"Warn of the danger incident to his work which he did not know or appreciate and could not reasonably have discovered... but which dangers... you knew or should have known." *Id.* at 266.

If one of their welders fails to properly drain the fuel oil from the lines, fails to properly ventilate the lines or fails to use an arc weld rather than an acetylene torch weld and he is subsequently severely burned as a result of an explosive fire due to residual fuel remaining in the pipe, who are you to tell that welder or his supervisor how to perform their specific expert jobs?

The point here is that whether we are dealing with implied contractual indemnity or rights of indemnity by operation of common law the arguments are identical. Vicarious liability is based upon the defendant's relationship to the tortfeasor rather than upon any wrong committed. Although *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, *supra*, recognized indemnity by implied agreement even where there was concurrent negligence on the part of the party seeking indemnity, Massachusetts courts have not gone that far, requiring the indemnitee to be free from negligence. *Yanofsky* at 904.

In Massachusetts the theory of implied contractual indemnity is identical to indemnity by operation of common law. If the defendant owner or controller of the premises has fulfilled its duty of care owed to the plaintiff, then there is no negligence and therefore the theory of implied contractual indemnity is an unnecessary duplication of the traditional common law rights of indemnity by operation of law. Moreover, if there is no basis for the plaintiff's recovery under a derivative, vicarious or other constructive liability theory then the owner or controller of the premises is entitled to defendant's finding.

In third party actions problems arise in attempting to utilize any theory of indemnity, other than express agreement, where there are allegations by the plaintiff that there was in fact negligence on the part of the owner or controller of

the premises. For example, in *DeMartin, supra*, the whole picture would change, presuming the plaintiff could sustain the burden of proof as to causation, if there was an allegation that one of the railroad's employees negligently allowed fuel into the lines without warning the plaintiff after the welder had properly drained the pipe. Similarly, the A&P in *Yanofsky* would not have been successful on the ground of implied indemnity



had there been an allegation that a stock boy's cart had been left in the aisle so that the customer was required to walk in the area of the water accumulation from the roof leakage thereby causing her fall. On such a fact pattern there would be negligence on the part of A&P and implied contractual indemnity would not have been found by the court if the trier of fact found A&P's negligence to be a proximate cause of the plaintiff's injury. *Yanofsky* at 906. Only express language can create indemnity for one's own negligence. *Id.* at 904. Or is there another way?

Common Law Indemnity - With Fault

In Massachusetts there is an apparently still valid exception to the rule that the party seeking common law indemnity must be negligence free. The exception involves a decision which stretched the definition of "vicarious" and "constructive" liability. The exception has its origins in an older case decided in a less insurance conscious and less safety con-

scious time. *Hollywood Barbeque Co. v. Morse* (*Morse*), 314 Mass. 368 (1943).

In *Morse* the defendant entered into an agreement with the plaintiff landowner to purchase and remove the plaintiff's meat scraps. While the agreement was in force, a servant of the defendant, acting within the scope of his employment, undertook to remove the meat scraps from the plaintiff's premises through a bulkhead which opened onto the abutting sidewalk. When the defendant's employee, without any warning, suddenly raised and opened the bulkhead doors they struck and injured a

pedestrian. The pedestrian sued Hollywood Barbeque and recovered based on Hollywood Barbeque's negligent failure to properly guard the bulkhead door located on the sidewalk. *Morse* at 369. The defendant *Morse* contended that Hollywood Barbeque was found to be itself negligent in the pedestrian's action and therefore was not entitled to indemnity.

The court disagreed, holding that where the defendant employees undertook the removal of the scraps they consequently owed the plaintiff the duty to perform the work in a proper manner, including the duty to warn pedestrians prior to opening the bulkhead doors. *Morse* at 369. The court held the rule that one of two parties who, acting together, commit a wrongful act cannot have indemnity from the other does not apply when one does the act and the other does not join therein, but is exposed to liability and suffers damages solely from the negligence of the other party. *Morse* at 369 citing *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 154 (1873). The court granted Hollywood Barbeque indemnity since it did not join in the wrongful act of the defendant. *Morse* at 370.

The reasoning in *Morse* was applied by the federal courts when interpreting Massachusetts law in *Garbincius v. Boston Edison Co.* (*Garbincius*), 621 F.2d 1171 (1st Cir. 1980). A wrongful death action was brought as a result of the plaintiff's intestate driving his automobile into an excavation dug by the independent contractor, Charles Contracting Co., pursuant to a contract with Boston Edison. A jury returned a verdict finding both defendants negligent, however, the court awarded Boston Edison indemnity on its cross-claim against Charles Contracting holding that Boston Edison was only vicariously liable. The contract required Charles Contracting to do the work but placed the duty of supervision and overall safety responsibility on Boston Edison. The court further held that "There was no evidence that Edison agreed to undertake any of Charles' responsibilities relative to the excavation or that Charles expected or relied on it to do so." *Garbincius* at 1176.

The First Circuit held that even though Boston Edison had a duty to the public to make sure that Charles Contracting kept the premises safe, and did not fulfill this duty, that breach did not

make Boston Edison personally liable. *Garbincius* at 1176. The *Garbincius* court's reasoning seems throughout to ignore the jury's finding that Boston Edison was in fact negligent. In spite of a negligence finding, based on *Morse's* reasoning, it appears that there is a defense where the owner or controller of the premises is not guilty of active negligence: an approach seemingly rejected by Massachusetts courts. *Ford v. Flaherty Yankee Dodge, Inc.*, 364 Mass. 382 (1973).

In relying upon *Garbincius* there are some possible caveats to be considered. It must be remembered that Boston Edison is a public utility and its costs are passed on directly to the public. Furthermore, Boston Edison is probably one of a small class of entities which could have obtained a permit from a municipality to excavate a public way. Boston Edison bound itself to the governmental agency which issued the permit to keep the area clean and passable; otherwise, the permit would probably not have issued, with the result of a decline in service to a vast number of the public. Boston Edison then hired Charles Contracting to do the specific excavation work and with that went the duties flowing therefrom, including responsibility for the flow of traffic. The proximate cause of the accident was Charles Contracting's failure to properly place the barriers.

The facts in *Garbincius* are analogous to the situations giving rise to the theory of implied contractual indemnity. Boston Edison hired Charles Contracting to per-

form a specialized function and its breach of its standard of care regarding the barriers placed the entire loss on it. Public policy considerations aside, *Garbincius* and its predecessor *Morse* provide an effective theory of defense when representing a general contractor or other party retaining only a general right of control over the job site premises.

Public Policy Considerations

The owner or controller of the premises has the right to assume that the independent contractor hired for a specialized job will perform the work using properly trained supervision and labor. Further, the owner or controller of the premises has the right to assume that the employees of the independent contractor will use their common sense and report dangerous work conditions to the defendant client's management for correction before work proceeds. A properly drawn express indemnity agreement converts this assumption into an enforceable right as a matter of law, shifting to another the entire loss which occurs as a result of the concurrent negligence of the defendant.

Express indemnity agreements have the advantage of placing the overall safety responsibility on the party best suited to insure compliance. Express indemnity agreements have the disadvantage of allowing an equally negligent party to escape financial responsibility. This factor may encourage a less safety conscious attitude on that party's part. The subcon-

tractor is in a better position to oversee his smaller specialized part of a large project, whereas the general contractor may have a difficult task in supervising the various specialized subcontractor's functions on a large project.

Also, a degree of certainty is introduced when employing express indemnity agreements with respect to insurance premiums and coverages. Insurance premiums could be adjusted according to the benefits and burdens of the contract with lower premiums for parties who benefit from the agreements.

Practical Applications

From a practical point of view, indemnity counts in a complaint can be used by both plaintiffs and defendants to add parties to the litigation. This is helpful to plaintiffs and defendants in that it increases the number of potential contributors for purposes of effectuating a settlement. To a defense attorney, multiple defendants can decrease a potential one hundred percent loss to something much less. This is especially true because questions of indemnity and fault are issues to be decided by the trier of fact and are not properly raised by summary judgment. *Hamilton v. New Bedford Gas & Edison Light Co.*, Massachusetts Lawyer's Weekly, January 24, 1983 (Bristol Superior Ct.) at 25. Additionally, plaintiffs will also find indemnity counts useful in establishing which party or parties retained control of the area where the injury occurred.



Book Reviews

Stephen M. Acerra, Jr.

The Partners

by James B. Stewart

The Partners is a compendium of eight major legal cases of recent years which introduces readers to the plush offices and personalities within some of America's richest and most secretive institutions—the elite “blue chip” corporate law firms. The author, currently the executive editor of *American Lawyer*, is a graduate of Harvard Law School and a former associate with Cravath, Swaine and Moore of New York City. Stewart writes about the subject matter in a reverential style (not surprising in light of his background) noting in the introduction that he believes he is describing the activities of lawyers who stand at the pinnacle of their profession, representing roughly 3,000 out of the 500,000 lawyers practicing in the United States today—all graduates of the nation's finest law schools who survey the rest of the profession with a touch of arrogance and disdain.

The book is the product of more than two years of investigative reporting by Stewart and makes very interesting reading. The author's background and sources within major law firms provide an insight into these cases which is usually missing in other publications. Most importantly, perhaps, for the practitioner with a busy schedule, is the book's format. Each story is only about fifty pages long, which provides the opportunity to read the chapters in a fragmentary fashion when time permits.

In one of Stewart's most fascinating tales the author reveals the behind-the-scenes maneuvering of lawyers for the twelve largest banks in the United States, led by John Hoffman of New York's Shearman & Sterling—representing Citibank, which ultimately resulted in the release of the fifty-two American hostages held in Iran.

These twelve banks had outstanding loans to the government of Iran totalling nearly ten billion dollars, and the Shah had enormous amounts of money deposited in his financial citadel, the Chase Manhattan Bank, and several other major American banks. Lawyers for these banks were in a panic when President Carter ordered a freeze on all Iranian assets held by American banks, realizing that a default on Iran's loans would create chaos in the U.S. financial community.

When President Carter's military rescue mission failed, as a result of the well publicized events which took place in the Iranian desert, all direct negotiations between the United States and Iranian governments came to an abrupt halt.

From this point onward the fate of the American hostages and the financial stability of the largest banks in the United States rested in the hands of Shearman & Sterling's Mr. Hoffman. His negotiations through German lawyers representing the Iranians were conducted in such secrecy that he always travelled alone, using fictitious names to make hotel reservations, and rarely using the telephone to discuss his progress. Within the government only President Carter, Secretary of State Cyrus Vance (later replaced by Edmund Muskie), Treasury Secretary William Miller and five other senior administration officials were aware of Hoffman's negotiations.

An intricate plan was finally worked out for the mechanical transfer of billions of dollars of assets by a single telex payment order, which would electronically transfer the funds between the United States, England, Europe, Algeria and Iran in a matter of hours.

During the fleeting period when those assets “moved” in the United States, they could be subject to an attachment order issued by any U.S. district court. This attachment problem had been anticipated, and feared, at the highest

levels of government, and when it became apparent that Hoffman's negotiations were entering their final stage that threat was made more specific. At a meeting of lawyers for the twelve banks, Timothy Atkeson with Steptoe and Johnson—representing Bank of America, began talking vaguely about the fact that his firm also represented some major industrial clients with outstanding contract claims against Iran. Such clients were precisely the kind who would, under normal circumstances, be interested in an attachment. Hoffman notified Secretary of State Muskie and a word was passed to Atkeson and the other lawyers that both Air Force I and Air Force II were standing by, ready to fly a squad of Justice Department lawyers anywhere in the country if Steptoe or any other firm tried to interfere. Justice Department lawyers were already on location, armed with the necessary papers to fight such an action in Washington, New York and Boston, the most likely sites for an attachment attempt. In the unlikely event that an attempt by Steptoe actually succeeded, the government had alerted the United States Supreme Court and the justices were standing by, prepared to grant review of such an order in less than four hours.

At 10:30 P.M. on Inauguration eve the transfer plan was set into motion and chaos reigned throughout the night because the Iranians had not accurately recorded or transmitted the required telex message. As Treasury Secretary Miller stood at his side, an attorney for Davis, Polk & Wardwell yelled into the telephone that London was to ignore all errors of less than one million dollars. And when a mechanical hitch prevented Chemical Bank from making its transfer, Miller threatened to deduct its share of the frozen assets out of its Federal Reserve deposits.

These problems were finally straightened out, and at 6:44 A.M. on January

20, 1981, the money completed its global circulation. There had been no attachment attempts that night as the assets flowed through the New York Federal Reserve Bank and six hours later the plane carrying the fifty-two American hostages took off from the Teheran airport. Billions of dollars had successfully been shifted in the accounts of the twelve American banks whose lawyers had, in a sense, just bought the hostages' release—without a single news account of their activities informing the American people of what had actually transpired.

Stewart's account of the successful diplomatic and legal negotiations which took place in the Iranian hostage situation is filled with drama but does not address the personal sacrifices that many lawyers in these blue chip firms often find themselves making.

In his discussion of the antitrust action that the Justice Department brought against IBM in 1969, which was defended by Stewart's own Cravath, Swaine & Moore, the author reveals the price that had to be paid by associates who were assigned to this massive litigation effort.

Although they received annual "bonuses" of up to \$10,000, luxury cars and summer mansions on the Connecticut Coast, these young lawyers were assigned to a nondescript IBM office building in White Plains, New York, where eighteen-hour days became normal in a world far removed from the influences of the rest of the Cravath firm at 1 Chase Manhattan Plaza.

Competition between these associates for partnerships became fierce, and shortly after one associate gained fame for billing twenty-four hours in one day another managed to bill twenty-seven hours in a day by working on a flight between New York and California and taking advantage of the three hour time difference between coasts.

For the case, IBM had more than three million documents recorded in full text in one of the world's largest computer systems. An additional seventeen million documents were in an addressee code for ready identification and location, and the trial record ended up totalling over 114,000 pages.

The demands of such a massive litigation took its toll on both sides. Many Cravath associates were divorced as a

result of pressures from the case, while others joked that their children had forgotten their names. At the end of the government's case, which cost in excess of fifty million dollars, Raymond Carlson, the Justice Department's lead counsel, quit. Exhausted and evidently demoralized, he left the Justice Department to pursue a career as a tennis pro.

For most, however, there was something about working at Cravath that seemed to make any sacrifice bearable. When a new Cravath associate questioned whether she was experienced enough to oversee the work of a senior partner from another large firm which had been enlisted to aid in the litigation she was told by a Cravath partner to "(r)emember that you, as a Cravath associate, are the equal, if not the superior, of partners in any other firm." Later, four associates and two partners assigned to the IBM team spent a substantial amount of time researching issues and looking for a legal mechanism to stop the State of Rhode Island from building a public path across some land owned by another Cravath partner to provide access to an adjacent river. Although it turned out that the partner knew about the state's right-of-way on the land when he purchased the property, and that the purchase price had evidently been deeply discounted in anticipation of the construction, the partner in charge of stopping the foot path blustered to his associates that "(t)hey can't get away with this against Cravath!"

Cravath eventually extracted a dismissal of the IBM antitrust action, announced by the Justice Department on the same day it announced a favorable settlement of a similar action against AT&T. In recognition of the efforts they expended in the monumental ten year litigation, all Cravath partners involved with the case were offered the opportunity to take well deserved extended vacations. Not one partner did so.

Other cases which Stewart writes about are Pillsbury, Madison's involvement with the SEC in bringing a genetic research company public for the first time; Kirkland & Ellis' prosecution of a uranium price fixing case for Westinghouse, which ended with the firm being disqualified from the litigation on conflict of interest grounds after billing millions of dollars in fees to Westing-

house; Debevoise, Plimpton's role in the salvation of Chrysler corporation; Milbank, Tweed's responsibilities to the Rockefeller family and their vast fortune after Nelson's death; Sullivan & Cromwell's involvement in Kennecott's industrial merger battles; and Donovan, Leisure's representation of Kodak against Berkey's private antitrust action.

Within each of these chapters are vivid descriptions of the personalities that bring these institutions to life, complete with narrative, plot, conflict and suspense. It is excellent light reading that succeeds in painting a lifelike portrait of these powerful and secretive institutions.

Martin D. Hernandez

Mr. Dooley And Mr. Dunne-The Literary Life Of A Chicago Catholic

by Edward J. Bander

This is Edward J. Bander's second book on Finley Peter Dunne's "Mr. Dooley". Mr. Bander's first book, *Mr. Dooley On The Choice Of Law*, is a collection of the Dooley essays. *Mr. Dooley And Mr. Dunne-The Literary Life Of A Chicago Catholic* is essentially a collection of quotations from the Dooley essays.

Finley Peter Dunne (1867-1936) was one of the great political humorists of his time. Through his alter ego, the bartender Martin Dooley, Mr. Dunne was able to effectively make his point on a wide range of topics; from foreign affairs to politics and the law. Mr. Dooley was proficient in dispensing beer, whiskey and his opinions on diverse topics. As an example, Mr. Dooley had this to say on the "personality of a judge":

"If I had me job to pick out, I'd be a judge. I've looked over all th' others an' that's th' on'y wan that suits. I hate wurruk".

The dialect-humor employed by Mr. Dunne in his Dooley essays may have had a disarming effect on its targets; among them, John D. Rockefeller, Teddy Roosevelt and the U.S. Supreme Court! Mr. Dunne himself felt that by using the comical Dooley character to express his irreverent opinions, the targets of such opinions would be less

inclined to sue. But, as Mr. Bander points out, Dooley was too well-loved to be sued or berated. In an era of graft and corruption in the public and private sectors, Dooley's irreverent opinions were refreshing to read.

Mr. Bander's latest book on Dooley provides the reader with interesting information on Finley Peter Dunne's life and political humor. At the end of each of the five chapters is a generous sampler of "Dooleyisms" on topics arranged from A to Z. For a person not familiar with the political humor of Finley Peter Dunne, this book is an excellent primer. The comprehensive appendix (155 pages) will prove helpful for anyone wishing to research the literary and historical background of the Dooley quotes and comments.

John J. Masiz

Breaking Up Bell

by David S. Evans

AT&T is a giant among American Corporations. "In terms of assets, AT&T was the largest corporation in this country in 1980 - as large as the next three corporations combined." Even after the breakup of AT&T, when the local telephone exchanges will become independent, "Bell will still remain one of the four largest corporations in the country." The Department of Justice's antitrust action, which caused the breakup of the giant, was predicated on a new economic theory. This theory, called "pricing without regard to cost," expounded a new measure of predatory pricing. However, David S. Evans, in *Breaking Up Bell*, showed that it was AT&T's theoretically erroneous defense which resulted in the success of the government's antitrust action.

The Government's Charge

The Justice Department claimed that AT&T's practice of pricing without regard to cost amounted to predatory pricing. Generally, economists consider predatory pricing to be short-term pricing below that firm's marginal cost func-

tion. Pricing of this nature forces competition out of the market. The predatory firm hopes that once the competition is gone, it can recover the losses from predatory behavior with long-term monopoly profits. However, the Justice Department's charge fell outside of the generally accepted definition of predatory pricing.

The government did not charge that AT&T's prices were below their marginal cost function. Instead, the government charged AT&T with "predatory intent." As David Evans points out, the Department of Justice only charged that "AT&T had set prices with the sole intent of excluding competition and without regard to whether their prices covered cost." The government further asserted that even if prices were above marginal cost, pricing without regard to cost represented predatory intent. The government's expert witness (Bruce Owen) concluded that AT&T's action constituted "illegal intent" and on this AT&T should be penalized.

Theoretically, the government's charge was erroneous. AT&T probably had little knowledge of its marginal cost functions. Knowledge in this area is generated by "trial and error pricing." However, AT&T is a regulated monopoly with the government regulating its price ceiling. In addition, regulatory board approval is required for any price change that AT&T makes. Being in this position, Bell could not have changed its prices with the frequency necessary to generate marginal cost function knowledge. Therefore, "AT&T's tariffs which were not supported by cost studies may show regulatory requirement failure but they do not show that AT&T ignored costs in setting price or intentionally set prices below costs." Thus, the government's predatory conclusions were erroneously extrapolated from a misinterpretation of the market information gathering capabilities existing in a regulated monopoly.

The Defense

AT&T presented three economic theories which they hoped would justify their actions. The first defensive theory was called cream skimming. Cream skimming occurs when a regulated monopoly is required to serve two markets: a

profitable one and an unprofitable one. Revenue generated from the profitable market is used to partially subsidize the unprofitable market. The cream skimming argument manifests that if competition was allowed, competitive firms would enter only the profitable markets and absorb the profits (skim the cream). If this happened, no excess funds would be available to subsidize service to the unprofitable markets. Therefore, social utility would decrease if competition entered the industry. Thus, AT&T was alleging that its pricing "represents a good faith effort to compete fairly and thereby mitigate the cream skimming effects of new interests."

The second defensive theory was called integration. AT&T, with this argument, alleged that "market systems in which the ownership over the means of production is dispersed among numerous enterprises, can coordinate the provision of complex and interactive goods and services." Thus, if one company can control every aspect of the industry (production, distribution, etc.), the industry would be more efficient. Competition, by taking away integration, would yield duplication of effort and incompatible products. Inefficiency would drastically increase.

AT&T's third defensive theory centered around a natural monopoly theory. Natural monopoly theory says that a very efficient firm might, by the nature of its efficiency, competitively become a monopoly in the industry. This theory follows from AT&T's statement that "in lowering rates in response to competition, AT&T was merely exploiting its inherent scale economies." Therefore, AT&T's pricing policy reflects its efficiency and cannot be considered predatory pricing.

Basically, each of these defensive theories is theoretically erroneous. Cream skimming was irrelevant since AT&T did not show that competitive entry "would not have developed new markets" and not just absorbed the profits from established markets. Integration theory fails since AT&T's corporate structure itself uses a decentralized model rather than relying on centralized planning as the integration theory dictates. The natural monopoly defense also was inadequate since AT&T only argued that they possessed "engi-

neering scale economies." AT&T failed to show that bureaucratic inefficiencies did not outweigh the engineering efficiencies. In sum, AT&T economic defense was as theoretically flawed as the government's antitrust action.

The Bottom Line

David S. Evans, in *Breaking Up Bell*, portrayed U.S. v. AT&T to be a case riddled with erroneous and inconsistent economic applications. Basically, AT&T lost this case because "the evidence presented by AT&T fell far short of meeting AT&T's burden of proof." Perhaps, if AT&T had attempted to show the burden of obtaining marginal cost data, the outcome would have been different. But, by attempting to justify its pricing policy with economic theory, AT&T gave the impression that they were a predatory firm. Thus, the inappropriate AT&T defense, not the government's new antitrust theory, resulted in Bell's breakup.

Notes

Alumni Notes

Deborah A. Bagg (J.D. 1981) recently received an LL.M. from the Columbia University School of Law. Ms. Bagg completed her clerkship with William S. Sessions, Chief Judge of the United States District Court for the Western District of Texas at the end of August 1983. She is presently clerking for Judge Thomas Gibbs Gee of the United States Court of Appeals for the Fifth Circuit.

John A. Beal (J.D. 1977) received a certificate of advanced graduate study in Dental Public Health from Boston University's School of Graduate Dentistry. Mr. Beal is an assistant clinical professor at both Boston University and Forsyth Dental facilities where he teaches Bio-medical Law and Ethics to pre and post doctoral dental students. He practices law with the Lawrence, Mass. law firm of Manzi and Manzi.

Jerri M. Blaney (J.D. 1980) was recently named partner in the firm of Rossow, Mayer, Thomas and Blaney in North Palm Beach, Florida.

Gary L. Boland (LL.M. law Suffolk University 1970) was elected to the American Law Institute in 1983. Mr. Boland is presently Director of the Center of Continuing Professional Development, special lecturer on law and medicine at the LSU Medical School, special lecturer on law and medicine for the LSU School of Nursing and Assistant Professor of Legal Medicine at the LSU School of Veterinary Medicine.

Joan Davenport (J.D. 1980) has been elected partner in the firm of Tighe, Curhan and Piliero of Boston and Washington, D.C.

Mary Ann Gilleece, a graduate of Suffolk University Law School, has been appointed Deputy Undersecretary of Defense for Acquisition Management.

Carl D. Goodman (J.D. 1976) was recently made a partner in the firm of Kamens, Harris, Donovan, Goldman and Goodman.

Brien E. Heffernan, a graduate of Suffolk Law School, has become associated with the Woburn, Mass. firm of Bigelow and Saltzberg. Mr. Heffernan has recently completed his term as a law clerk to the Superior Court of Massachusetts.

Faith Lane (J.D. 1983), Editor in Chief of Volume 14 of *The Advocate*, is now serving as a law clerk in the Massachusetts Appeals Court.

Patricia (Perry) Stewart (J.D. 1976) has been elected partner in the firm of Healy, Farrell and Lear of Norwood Airport and Washington, D.C. She is a litigator specializing in aircraft products liability cases.

Theodore A. Schwartz (J.D. 1969) of Philadelphia, has been elected Chairman of the State Civil Judicial Procedure Committee of the Philadelphia Bar Association and has also been elected to the Board of Governors of the Pennsylvania Trial Lawyers Association.

Carol A. Siemon (J.D. 1981) is completing a law clerkship in the Ingham County Circuit Court in Lansing, Michigan. She has also prepared a handbook on the *Legal Rights of Battered Women in Michigan* and serves as a member of the Board of Directors of the Women Lawyers Association of Michigan.

Obituaries

The Honorable **Henry Chmielinski** passed away in May, 1983. Judge Chmielinski was a retired member of the Superior Court. He presided over Superior Courts in Plymouth, Norfolk and Suffolk counties for nearly 20 years. Judge Chmielinski was chairman of the Massachusetts Judges Conference in 1977 and served as the first president of the Massachusetts Judges Association in 1968.

Frank R. Cote (J.D. 1970) passed away in January, 1984. Mr. Cote was a member of the Boston, Massachusetts and American bar associations.

Joseph W. Kane (J.D. 1970) passed away in December, 1983. Mr. Kane served as general counsel to both the Massachusetts Department of Labor and Industries and the Massachusetts Division of Insurance. He was also counsel to the Boston Housing Authority. Mr. Kane was a member of the Suffolk University Alumni Assn. and an alumni council representative. He formerly served as president of Suffolk Law School's Alumni Board of Directors and of the University's Alumni Council.

Recent Faculty Publications

Prof. Milton Katz is the co-author of a new book titled *Strengthening Conventional Deterrence in Europe: Proposals for the 1980's*. This book was published in the U.S., U.K. and the Federal Republic of Germany in May, 1983 by St. Martin's Press.

Prof. Eric Blumenson is the author of "Limits of State Prosecutorial Discovery Examined," published in the *Harvard Civil Rights/Civil Liberties Law Review*, Vol. 18, Page 123 (1983).

Prof. Valerie Epps published "The Question of International Title: The Falklands/Malvinas Dispute," Condyne/Oceana tape 1983. Prof. Epps also published a review of a book by C. Van den Wijngaert at 77 *Amer. J. Int'l. Law* (1983).

Prof. Charles Kindregan published an article, "The Nature of Lawyer Discipline," in *The Reporter on the Legal Profession*, Vol. 4, Page 77 (1983).

Prof. Thomas F. Lambert, Jr. published the article "Law in The Future: Tort Law" in *Trial*, Vol. 19, No. 8, Page 62 (Aug. 1983).

Prof. Joseph D. Cronin has published two case comments at 68 *Mass. L. Rev.* 98 (1983) and 68 *Mass. L. Rev.* 95 (1983). Prof. Cronin also published an article on "Search Incident to Arrest in Massachusetts" at 11 *Lawyer's Weekly* 1252 (July 4, 1983).

Prof. Gerard J. Clark has published an article titled "Fear and Loathing in New Orleans: the Sorry Fate of the Kutak Commission's Rules," *Suffolk Univ. Law Review*, Vol. XVII, No. 1, Page 79 (1983). He also published an article titled "Zealous Advocacy on Trial" in *The Boston Globe* (6/13/83).

Prof. Marc Perlin has published "Is 'Last and Usual' Service of Process Unconstitutional?" in 11 *Mass. Lawyer's Weekly* 1208 (1983). Prof. Perlin has also published the B.R.C. Notes for Domestic Relations (National, 1984; N.Y. & Mass. 1983-84).

Prof. Thomas Finn is the co-author of the report of the *Task Force on the Death of a Four-Year-Old Child*, R.I. Pub. Doc. 83-106 (1983).

National Moot Court Team

On February 6-9, 1984, the National Moot Court Team, representing Suffolk University Law School competed in the Final Round of the National Moot Court Competition in New York City. I am pleased to report that the team, comprised of Susan Berry, Betsy Gould and Henry Sullivan advanced to the "final four" of the competition before being defeated by the team representing Syracuse University. I have also learned that our brief was ranked third in the nation.

On February 6, the team argued against and defeated Southern Methodist University Law School. That victory set a wonderful tone for the lovely reception held by the Law School at the Harvard Club that evening.

On February 7, the team emerged victorious from an argument against the University of Florida Law School, the

defending national champions. As a result of the team's perfect record during these two preliminary rounds, advancement to the first of the single elimination rounds, the so-called round of sixteen, was guaranteed.

In that round, held on the afternoon of February 8, the team prevailed over Arizona State University and advanced to the quarter final round, held that evening. In that argument, the team defeated the University of Washington, thereby advancing to the semi-finals.

The team's semi-final argument was Syracuse University, our opponents in the final round of the regional competition. Each team was arguing a position opposite that argued in the Regional finals. Unfortunately, history was repeated and the team was again defeated (narrowly) by Syracuse.

Professor Marc Greenbaum

Advocate Editorial Staff



(Left to right: Jason Zorfias, business editor, Joseph Giblin, executive editor, Christopher R. Hopkins, editor-in-chief, Professor Charles P. Kindregan, faculty advisor, Orlando Ruiz-Roque, associate editor, missing: Martin Hernandez, associate editor)

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