

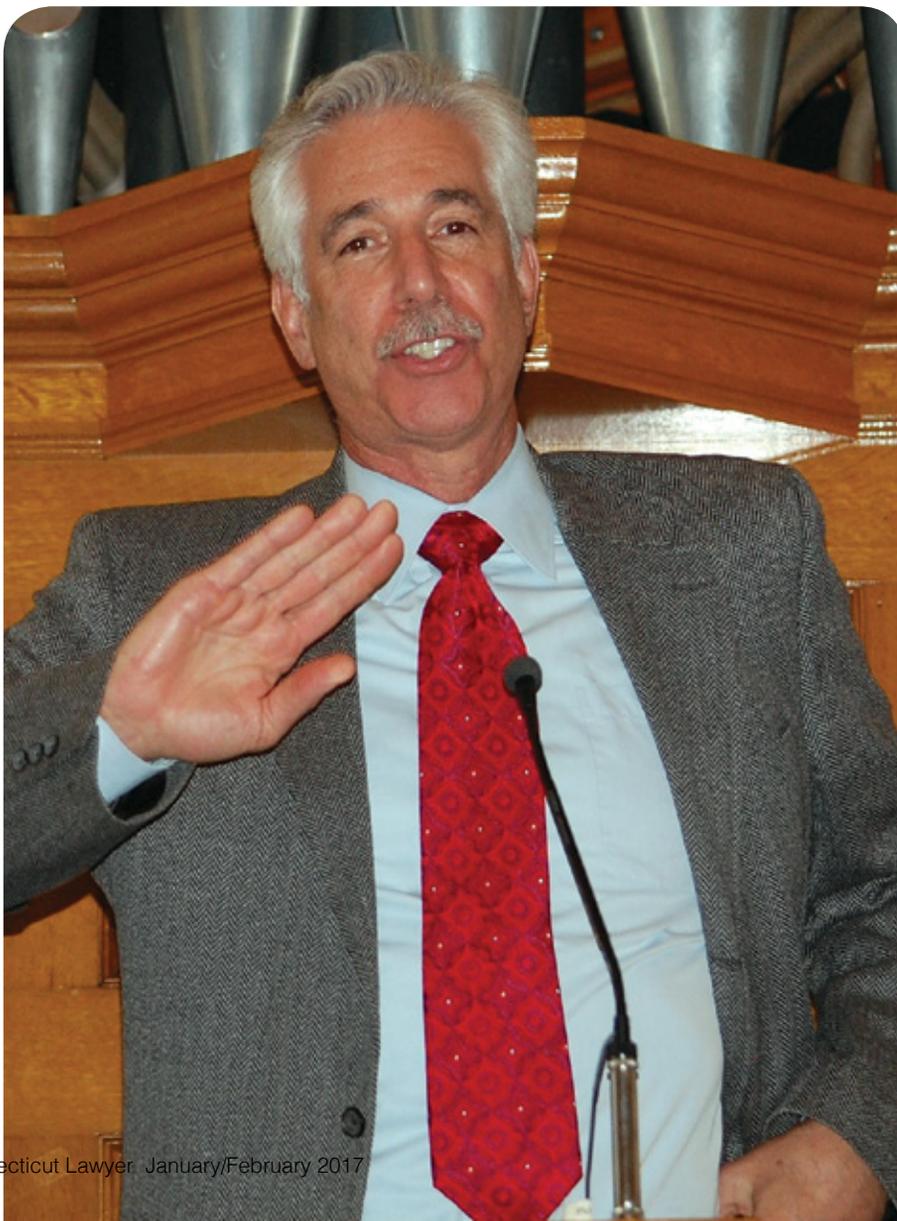
CBA at the American Museum of Tort Law:



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An Interview with Jan Schlichtmann

By Eric Hard



Connecticut Lawyer contributor Eric Hard chatted with Attorney Jan Schlichtmann, portrayed by John Travolta in the movie *A Civil Action*, who represented families of children poisoned by environmental contamination in Woburn, MA. He was a featured speaker at the Spring Awakening, the reopening of the American Museum of Tort Law in Winsted, along with other guest speakers, including consumer advocate Ralph Nader and trial lawyer Mitchell Garabedian (his work was depicted in the movie *Spotlight*). With concerns awakened among civil libertarians and others about the recent presidential election, the lessons offered by each of these advocates may provide some clues as to how to keep constitutional liberties in the public discourse and connect people to popular and well-known lawsuits. This is the second interview in a three-part series.

EH Where did you grow up?

JS Cochichuate, a little suburb west of Boston.

EH Is there any part of your education that you credit for your approach to law?

JS I went to the University of Massachusetts, where I took a business class with John Monseigneur, a lawyer who looked at the law from all different sides, including the poor and defenseless, to measure how the law works. What is law to people who have no power and influence? I was interested in philosophy. I did not expect to become a lawyer. I did end up working for the American Civil Liberties Union, and saw lawyers represented people with no power, giving people respect, vindicating their rights. There was a good, smart judge presiding in that Rhode Island court, so I saw the legal system at its best.

EH It is easy to be cynical.

JS Equal justice under the law can happen, but it takes real courage, constant effort. Working with the ACLU inspired me to go on to law school.

EH What motivated you to take on a case of the magnitude of the Woburn Massachusetts toxic tort child cancer case?

JS Good, bad, ugly—all the reasons people get captured by something. I was young, ambitious, successful,

I really liked personal injury law. I liked contingent fee practice, I liked working for people, mastering science, engineering, investigating the past. One of the Woburn mothers asked a colleague for help—my name came up. She came to me, told the story, I met with the families, but I realized it was not something that I could do. It was way too complex, too big. I tried to get other lawyers involved; they wanted nothing to do with it. I went out to San Francisco for a convention. Ralph Nader came to a group of attorneys and said that there are cases out there that we must take as lawyers, and we need to form an organization to support that project. He asked each of 200 lawyers to contribute \$1,000 each, and the Trial Lawyers for Public Justice was formed. When I returned to Boston, I had a phone call from Rony Roisman, just hired as Executive Director of the Trial Lawyers for Public Justice. He wanted my help with the Woburn contamination case.

EH It clicked in your head.

JS It was almost like the case found me. I was fascinated by the families. The mothers, for instance, would not take no for an answer. The Trial Lawyers for Public Justice gave us the emotional courage to take it on, because we had all these other lawyers with whom to work. Without Ralph Nader and that group, it

would not have happened.

EH You have to be a risk taker, to do this sort of law.

JS Where it hasn't been done before, and you are feeling your way, these are cases that are done on faith. That's why having a support structure is so important. The fact that these families needed representation forced us to do it.

EH What was the difference between bringing a case like that and religion?

JS I flew all over the country to meet with people with special expertise, to see if I could put together this puzzle. The big challenge of this case was that it touched on so many different disciplines. When the judge broke the case into three phases, it was so detrimental to our case, to show that Jimmy Anderson's or Robby Robbins' cancer was caused by chemicals in the water, you had to review dumping history, health histories. By breaking the trial up, the judge forced a multidimensional problem to be seen through a one-dimensional lens. I didn't appreciate how devastating that would be. Because I had dumping histories, first-hand accounts, pictures, historical facts. At the end of all that process, at defense counsel's urging, the judge required the jury to determine the month and the year that each chemical reached the wells, as if it were a

bus or a train station. It was a challenge for the jury.

EH There was also a Rule 11 motion.

JS W.R. Grace's counsel asked the judge to rule on whether I had violated the ethical rule of bringing a case with insufficient evidence. The judge said he was very familiar with Rule 11, it had just been revised, and it was time to take some of the garbage out—looking straight at me. Attorney Cheeseman said he wanted to call as his first witness Jan Schlichtmann. I refused to take the stand, telling the judge that, if I did so, I cease being a lawyer for my client, and I become a witness, concerned about my own protection, and I cannot represent my client, which means I must withdraw, depriving my client of representation. If you use Rule 11 to destroy a lawyer's representation of his client, you are allowing the defense—regardless of the merits—to prevent the case from being tried.

EH Did you come up with that idea at that moment?

JS I knew instinctively that I could not take the stand. I stood my ground. I did have that ACLU experience, which gave me some sensitivity to this issue.

EH Is that an inherent weakness in Rule 11 altogether?

JS Rule 11 demonstrates the fundamental fallacy of the Federal Rules of Civil Procedure. The rules turn in on themselves. Rule 1 says that all the rules should be construed for the just, speedy, and inexpensive determination of every action, and every subsequent rule puts that rule to the lie. At that time as well, discovery was flourishing, leading to a very costly investigative process. We are now seeing the virtue of reining some of that in.

EH What was the biggest obstacle to proving liability in the Woburn case?

JS Not allowing the whole case to be tried. We spent ten months on the first phase. In order to connect the conduct with the illnesses, you had

to show the conduct going into the water, the water going into the wells, the wells going around the city, the exposure, and the health histories. Each one of those levels was tremendously expensive to show. You can't understand this case, and you can't find liability, causation, and damages, unless you hear the whole story. We had far more of a case in science, medicine, and engineering than we were able to get through the courtroom door. A one-dimensional, pale imitation was given to the jury for them to figure out what happened. We were given a truncated, cartoon, one-dimensional keyhole approach.

EH Particularly after you've been boring these people to tears for ten months.

JS And that's what we do in the law. Woburn was merely the law writ large. The scale of Woburn took all of the foibles and fictions that permeate our practice and blew them up to a grand scale, where we could see them. It happens every day in every court house in the country. We have major problems with establishing the truth.

EH There is also a concern with moving things along, managing the docket.

JS That's right. They are not truth-based, not truth-friendly.

EH Has the situation changed at all for toxic tort since that time?

JS Back then, the knowledge was thin, but the law was good. Now, as the science has become richer, the law has become poorer. We've become really good at using these procedural devices to bleed out the right to jury trial, the right to have the story told to a jury. Restrictions on expert witnesses, for example.

EH How do we tell whether a toxic exposure has led to cancer?

JS You will tend to see a particular type of cancer, a particular disease or syndrome becomes evident. As opposed to a noisy expression of cancers. If it's there, you can find it, with the right digging.

EH How has the science improved?

JS You can go on the Internet now and find out in an hour what it took us months to do in the library, go through the journals. Everything was extremely expensive and took a lot of time. The technologies, the engineering expertise, all of our insights into immunology and toxicology, have grown by orders of magnitude. The science, the medicine, the engineering, has developed by leaps and bounds.

EH What was your best day working on the Woburn case?

JS After we came to the settlement with W.R. Grace, talking with the families, the journey gave them some economic tools to dig out of the rubble of their experience. That event, and the day that the Center for Disease Control announced the results of their study, that the families were right that the contamination caused the illness. All the years of stress seemed worth it.

EH So, over time, this experience helped you move from playing the one lone hero to a more collaborative approach?

JS It was a very painful experience. I was bankrupted by it—financially, physically, spiritually. It forced me to look at my life and figure out what is important, who I am. It is a very rich experience that informs my life every day.

EH Early in the book, *A Civil Action*, your Porsche is repossessed, which helps take readers right into the story. There was a writer hanging around with you for years.

JS He showed up around 1984-85, the case finished in 1989, and he then wrote the book, which he finished around 1995. We became great friends. We spent half that time working on the case, and half that time reflecting on what had happened.

EH How many people get to have a good friend who then turns them into an icon?

JS It was very therapeutic, a transfor-

mative experience. I have had a lot of joy talking with others about what I learned. That is probably the greatest treasure I have. I get to talk to young and old. I recently spoke with some 8th graders who had read the book, seen the movie, they had lots of wonderful questions.

EH What are the sources of motivation for today's youth? Are they different than when you were young?

JS Think about it. In 1970, I was 19. Twenty million people came out, and in the next two years, foundational laws were passed in that miracle period—the Clean Air Act, the Clean Water Act, the Environmental Policy Act, the Endangered Species Act. These were all the iconic acts that we have spent the next half century trying to undo.

EH During the Nixon administration, no less.

JS There is an important lesson there, because these achievements arose from cross-party collaboration, enlightened members from both parties understanding the importance of preserving wilderness, and environmental health. Then, it was burning rivers, and dumps and smokestacks. Now, the metaphor has become a burning planet. The scale of what we must now do has changed. Technology and its impacts are now worldwide. We must catch up with it. And we must work together. What kind of community life do we want to have? That is our challenge. And it is the challenge of the young. When I speak to them, at the end of the talk, one or two of them will approach me and say, "I want to be a lawyer too."

EH What are you most proud of?

JS The understanding. We learned a lot about steps we can take that can improve the health of a community, on a very fundamental level. That, and pushing for better laws. It was collaborative and collective effort by many people, including scientists who have used Woburn as a stepping off place for later work in toxicology

and other fields. I recently received a request from people in Flint, MI, asking what can we do? The struggle continues, and the scale has increased. Decaying infrastructure, cost cutting, ignoring risk, harm falling upon children. That is unacceptable. We can't exist as a community in that way.

EH Didn't ancient Rome decline in part from lead in the water pipes?

JS Very much so.

EH What is the role of alternative dispute resolution—ADR—in the area of toxic torts?

JS ADR is everything, because we can't afford these protracted battles, with a system that drags things out and distorts the facts, or prevents the facts from coming out. The only way we can do it is to sit around the table, talk to one another, try to understand the past, and figure out what should be done about it. Everything else is just wasting resources, time, money, in the hopes of somehow taking advantage of an event, but not really learning from it or engaging in a healing process that must take place in a community that wakes up to that kind of nightmare. We have to approach this differently. We cannot approach this as combatants.

EH What do you think are the long term prospects for the practice of law, as a vocation?

JS We have problems of environmental scale that threaten our existence, and the law has got to be there for us. The sad truth is that the law has been going backwards, not forwards. If you want to be a lawyer, there must be passion, you must follow that passion in the law, because that is the only thing that is going to allow you to get through each of the days of being a lawyer, which are quite challenging. You have to keep your soul, and you have to deal with people who are at their worst, sickened by conflict. Chief Justice Berger said that we should be healers of law. An unlikely source, perhaps, but he saw something, and he tried to get other lawyers to see it as well.

We get sick from litigation. We need to heal our clients—even more so if they are a community suffering from an environmental catastrophe.

EH Do you believe that most people, regardless of their side on an issue, would prefer to do good?

JS There is no us against them. There is only us. We're a community locally, we're a community regionally, as a nation, as a planet. We have to look at problem solving in a collective way. One part of the community against another part is disunity. That's going backwards, it's not building. When we disempower ourselves economically, we disempower ourselves philosophically, politically, and spiritually.

EH You and attorney Mitchell Garabedian, the "Spotlight" attorney that uncovered child abuse and corruption within the Catholic church, each tried to do something that had not been done before.

JS Taking on entrenched interests.

EH When you appeared before Judge Skinner, did you feel like an outsider?

JS I felt it to the bone. No question. When you take on power on behalf of people with far less power, it is always that way. To power, you are an outsider, unless you have power. From the point of view of the disenfranchised, it is easy for them to feel that they have no stake in the community. It is the challenge of the lawyer as citizen, when people come for help, to improve our society's understanding of this basic truth. We have to solve our problems by being honest, we must come together to find out what actually happened, to ensure it does not occur again. We need a legal institution that honors that process, rather than one that simply serves power. A legal system that sees the law as something that civilizes power, so that there can be justice. Cure abuse, help power become something better than it was. The alternative is authoritarianism.

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