

28 April 1983

Dear Harold and Lil:

The trial ended two days ago, and since nothing else happened to me from the time I last wrote you I've waited until it was over to have something to report.

This was a civil damage suit brought by a young woman, Nancy Lewis, against the A.H. Robins Co. of Richmond, VA, alleging that a Dalkon Shield they had made and which was inserted in her in 1972 had caused her first to become pregnant ~~and then~~ ~~have a spontaneous abortion~~ two years later and then have a spontaneous abortion after she and her boyfriend (they already had a marriage license) decided to be married and have the child. She naturally charged all this happened because they had fraudulently advertised the product and put it on the market ~~prematurely~~ without adequate testing. Her complaint also was brought against Dr. Hugh Davis of Johns-Hopkins Medical School and an engineer named Lerner who invented the device and had marketed about 38,000 copies of it before selling all rights to Robins in June, 1970. The jury had no difficulty finding for Davis and Lerner since they had sold all rights to the product, which Robins subsequently modified by the time Nancy Lewis obtained hers.

As you know, Robins is more than 100 years old and always has been one of the more reputable pharmaceutical manufacturers. We were told they have several hundred drugs on the market for the prescription trade and make such non-prescription items as Robitussin and Chapstick. They also make and market the Sargeant line of flea collars for dogs and cats.

However the Dalkon Shield was their first venture in the field of intra-uterine devices, and their own evidence and internal documents show clearly that the business leadership in the firm succumbed to the opportunity of marketing what they thought was a safe and effective intra-uterine device (and one that was unique in design among such devices) just at the time when the ~~XXX~~ Pill was coming under serious medical attack because of side effects which were beginning to show up. On the same day they bought the Dalkon rights, their own medical director warned of problems to be expected: the shield needed further testing and indeed Dr. Davis' own tests showed in follow-up figures a pregnancy rate ~~100%~~ twice that of the 1.1 % rate he at first reported. They also ignored their own century of experience and that of the ~~industry~~ industry in marketing potentially harmful pharmaceuticals only after exhaustive tests which were standard practice throughout the industry and which Robins had helped to develop.

As this was a civil suit, the jury ~~had~~ could find either way by a 9-3 majority. We were not limited to a unanimous verdict based on evidence ~~beyond~~ beyond reasonable doubt. And a good thing. Although highly expert on both sides, the evidence was about equally mushy on both sides because ~~so~~ much of it was based on statistics and opinion rather than hard facts.

But the testimony was none the less fascinating, because of the expertise involved, and a good deal even was taken in Richmond on videotape which was played in court.

The jury was made up of seven women and five men. Two of the women -- a young girl graduate student and a housewife -- were steadfast along with the five men in a feeling of outrage at the way Robins misrepresented the product in the labeling and advertising and put more than two million of them in women around the world before taking it off the market in 1974. (removing it from the market was because of septic abortion, a problem not involving Nancy Lewis, whose abortion was spontaneous and not septic).

Three other women were ambivalent at times, largely because of their doubt than Nancy actually was pregnant. We debated that question first and spent a whole day at it before voting 9-3 that there was a preponderance of evidence ~~that~~ (mostly from her gynecologist) that she was.

We went over all the evidence fairly throughly, had key testimony read back in three areas, and finally voted unanimously that Robins was guilty as charged after two more days of debate.

The 9-3 vote on Nancy's pregnancy reflected one of the honestly ambivalent women and two die hards -- a little old lady who ~~was~~ appeared never to consider it, and a garrulous Army wife who talked endlessly to avoid considering the possibility. She herself has four children and has had two abortions (spontaneous) but could not admit that Nancy could have been damaged either physically or emotionally. If she had been damaged, this woman argued, it was from her own choice. This was one of the two occasions when I suggested ~~that~~ mildly that Robins was on trial, not Nancy, and that ~~she~~ having worn the shield for two years because of her choice did not exonerate Robins if the shield had contributed to any damage ~~either~~ either from pregnancy or abortion.

~~Where we got hung up was on the question of damages~~ Nevertheless, the evidence against the defendant was so obvious and inescapable that even this woman and the other two joined in a unanimous vote to find for the plaintiff and against Robins. Where we got hung up on the last day was on the question of damages. The complaint was not in evidence, and the only figures we had to go on was a suggestion (very vague) by the plaintiff's counsel's summation that mentioned \$15,000 for compensatory damages, and an equally vague ~~rumor~~ rumble from the defendant's counsel that it would be ridiculous to award \$450,000 in exemplary damages.

We went round the table proposing figures. The two diehard women held out for absolutely nothing in damages of any kind. A retired naval aviator with seven children (four of them girls) called for at least \$150,000 in exemplary damages. There were a couple of other suggestions, including one from me of \$15,000 compensatory and \$45,000 ~~exemplary~~ exemplary damages. There was no disposition on the part of anyone to be excessively punitive towards Robins. We had no evidence that Robins isn't an otherwise reputable company in an industry that ~~that~~ conducts itself very well in most cases and has to put up with an avalanche of lawsuits after such misfortune as the thalidomide episode.

Someone else had suggested \$1,000 and \$2,000, and that's where we finally compromised. I talked to both attorney's afterward. Robins' man knew we had let him off easy and obviously was not happy about the unanimous vote against his client when he demanded that we be polled individually. The plaintiff's attorney understood that we'd had to settle for token damages in order to avoid a hung jury and bring in a unanimous vote for his client. Nancy herself said she was happy -- all she really wanted was a moral victory, she said, and I think she meant it. She had taken the stand early in the trial and testified candidly and reasonably about some very private matters, without histrionics of any kind. Both attorneys also were restrained and low key. The plaintiff's counsel told me that Robins has defended against some 200 of these suits nationwide with varying results, and has 400 more awaiting trial. You can be sure they've got the message -- the whole industry has, already, he said.

I'm still not clear why this suit wasn't settled out of court and ever came to trial. I'm inclined to assume that Robins refused anything reasonable and more or less forced the plaintiff to choose between nothing and a gamble with a jury. In spite of the ridiculous damage award, I think Robins and the industry have been told that ordinary people, in order to trust them, have to be shown they're trustworthy.

I'm already back in the routine for Hospice, and we have a big rummage sale coming up two days hence. The staff has been panting to find out about the trial, of course.

I had a day off when Elizabeth Wrone came through on her way back from China and Japan. She still was a bit dazed by it all but was in fine shape and having the time of her life. She's wearing braces on her teeth but as you say she's on her way to being a lovely woman.

Thanks for the offer of the Django cassette. Why don't you send it to me here where I can copy it on two identical players and then return it to you ?

Guess it's clear I've been away from a typewriter longer than's good for me. Hope you can make this out. I'm happy to hear you're both well and hope your bad weather has slacked off a bit. Still raining here, but not as much.

Best to you both,


jdw