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Book Review

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Reviewed by Howard L. Oleck

DEFENSE LAW JOURNAL. Editor-in-Chief: Welcome D. Pierson. Published by The Allen Smith Co., Indianapolis, Indiana. Vol. 1, No. 1 (semi-annual). XI and 431 pages. Jan., 1957.

At last the defense lawyers in personal injury cases have taken a much-needed action. About time, too. Until now, their reaction to the mounting tide of plaintiffs' victories has been chiefly one of baffled bewilderment and angered frustration. Too often they have met the storm of defeats only by shouting "Foul." Or worse yet, their insurer-employers pleaded with the public to hold down verdicts, lest insurance rates become prohibitively high—a plea hardly likely to win cases for the defense. Individual defense attorney articles usually have been bitter rather than persuasive.

Appearance of the first volume of *Defense Law Journal*, long heralded as "the answer to NACCA," was awaited by negligence and compensation practitioners with great interest. Its content suggests that it may indeed become the counter-weight to the powerful *NACCA Law Journal*, in time. It is a good beginning, and promises much.

Welcome D. Pierson of Oklahoma City, the Editor-in-Chief, is a capable representative of the defense lawyers. His active experience in insurance, bar association and public service is described in the preface. His first contributors, too, are representative defense people: Josh Halbert Groce, of San Antonio; Clarence Walter Heyl, of Peoria; Dr. E. Bishop Mumford, of Indianapolis; William J. O'Herin, of Chicago; Forrest Stuart Smith, of Richmond; and Gordon H. Snow, of Los Angeles—all outstanding men—are supported by law review excerpts from articles by such men as William Mitchell, of the Atomic Energy Commission; Elliott C. Fenton; George John Miller; R. Crawford Morris; Judge David W. Peck; John M. Sink; and others.

In reading a *defense* presentation, one is struck by the "interest-advantage" possessed by the plaintiff's side in negligence cases. Besides the natural appeal of a "poor, injured plaintiff" there is an even greater emotional appeal in the plaintiff's negligence claim *per se*. It is interesting to speculate on what *jurors*

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think of plaintiffs' and defense lawyers. Perhaps they think something like this:

What is there about negligence defense practice that casts a pall of polite dullness over the very subject? Is it because defense lawyers are dull fellows—starchy and stuffed-shirtish fellows? No, it isn't. They aren't.

Many defense attorneys, everyone will admit, are lively, imaginative, colorful men, as individuals. Nothing dull or artificial about them. Fine fellows, mostly, of excellent background and high social standing. Gentlemen, usually, in the best sense of that word.

Plaintiffs' lawyers, in the eyes of jurors, on the other hand, mostly seem to be a very different kind of fish. Certainly not ungentlemanly, in most cases, but distinctly *different*. Mostly they seem to be men who came up the hard way, the work-your-way-through-school way. They seem *tougher* than the defense men, in a subtle way; more aggressive. They often make one think of the parlance of the prize ring: "A hungry fighter is a good fighter."

If jurors generalize loosely, they may conclude that some insurance company, railroad and other corporate counsel get their comfortable jobs through social connections as well as on the basis of ability. But a plaintiff's trial lawyer has only one sure road to the top—he must *win*, regularly.

These factors might make a difference. Taken as groups, the NACCA men seem to be tough, hardboiled scrappers of the profession, while the Insurance Counsel Association men seem to be conservative, legalistic, mild mannered men, above all.

When you add to this the natural drama and appeal of an injured plaintiff's champion, it looks like bad odds for the defense counsel, viewing both through the eyes of a juror to whom the wealth of "the interests" may be a proverb.

Compare the number of articles written for free by both kinds of attorneys. The number written by plaintiffs' men vastly overtops the defense men's total. That "figures," too. The plaintiff's men have to work not only to get victories, but also to keep their names well known. It is true, too, that they ardently believe in what they are saying, usually. So do defense men. But the defense man *has* his security and recognition, thinks the juror. And it is a puzzlement to a juror whether he truly believes in the primacy of property over the anguish of need of a *person*. Who does, really?

Whether you agree with these superficial observations or not, you must admit that jurors think along these lines very often. That is the point of these impressions. Many jurors think this way.

What can the defense men do about it? More work such as that begun with the *Defense Law Journal*, for one thing. Less pontifical declamation and more documentation, for another. Even the *Defense Law Journal* as yet does not compare too well with *NACCA Law Journal* in respect to citations. More specific and detailed analysis and logic are needed, all in all. More original, bold, aggressive style and feeling of pioneering advance. And above all—more color, vivacity, vitality, immediacy—more *punch*—all in terms of *people, persons*, not abstract statistics.

NACCA's recent law journals have contained a hint of diffuseness, a glimmering sense of wandering. *Defense Law Journal* would do well to abandon the obvious patterning-after *NACCA L. J.*, and to strike out on new tacks of its own. Its contents are very reminiscent in this respect: Selected Articles; Practical Trial Suggestions; Cases Won by the Defense; Significant Court Decisions; The True Adequate Award; and Review of Current Legal Articles.

All this leaves a sense of general straining for effect, and of inadequacy of new material—in short, still not enough work done. We trust that subsequent volumes will be meatier. And the obvious aim—to convince defense lawyers only, who obviously do not need to be convinced—clearly is a mistake. The aim should be to convince the plaintiffs' lawyers and the courts—who need to be convinced. Arguing only defensively is a tactical error.

Of course it is much easier to criticize than to construct. Granted. But Welcome Pierson is an editor capable of the finest kind of work. With the first volume of *Defense Law Journal* he has begun to build towards a truly powerful negligence defense journal. Only subsequent volumes will tell whether or not he will reach and maintain, in this journal, the kind of quality he can produce. We are sure, judging from this first exploratory effort, that he will soon follow it with solidly potent and persuasive volumes.

In any event, *Defense Law Journal* is the first coherent, organized effort of the negligence defense lawyers to redress the published-argument balance, now so heavily weighted by skillful, industrious and imaginative plaintiffs' attorneys. It is an interesting and promising beginning.

THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS. By Welcome D. Pierson. Published by Bobbs-Merrill Co., Inc., Indianapolis, Indiana. XII and 390 pages. 1956.

Defense of a damage suit is "the hot side of the table." Especially today, when jury verdicts seem to favor claimants in many cases, it takes a first rate lawyer to handle a negligence defense case well, let alone successfully. To aid the harassed defense counsel, Welcome D. Pierson has written a fine exposition of the basic tactics of trial defense work—*The Defense Attorney and Basic Defense Tactics*—apparently the first book devoted exclusively to negligence defense work.

Facing right up to the unpleasant facts of life, he opens with a straight-forward explanation of the popular view of "soul-less corporation defendants." With restraint, he explains the injustice of this view. Then he explains the insurance company advertising of 1950, which sought to influence prospective jurors to hold down verdicts. Here he is not on such firm ground. His warning that vaguely terrible consequences may result from suppression of such propaganda is rather unconvincing. It leaves the impression only that he is trying to be true to his salt, and would have been better omitted.

Thereafter he launches into the real subject matter, beginning with analysis of personal characteristics and demeanor of a good defense lawyer. Preparation, choice of forum, discovery, pre-trial procedures and preparation of witnesses, follow. Then come discussion of settlement negotiations, more about depositions and pre-trial, the problem of revelation of insurance, and the use of mortality tables.

In sixteen chapters he covers in quite adequate detail the basic considerations and tactics of defense on these matters. The annotation is spotty, being very detailed on some points and entirely absent on others. References to publications (i.e., bibliography) at the end, are disappointingly few—until one stops to think how little has been written for the defense, as against the tides of plaintiff's books and articles.

Racy style, interesting anecdotes, and flowing prose do not conceal the real wealth of learning and experience on which the book is based. Pierson knows his business very well indeed, and can expound it pithily and pungently. It is a pleasure to read, as well as profitable.

Many a plaintiff's lawyer will read this book, to enjoy it and learn from it. For defense counsel it is clearly bound to be a standard item—not a desk manual, but a wise and learned friend's sound summary of advice. It is a valuable addition to the library of every lawyer.

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*Reviewed by Marcella Matejka**

HARLAN FISKE STONE: PILLAR OF THE LAW. By Alpheus Thomas Mason. The Viking Press, New York, N. Y. 914 pages. 1956.

Comment: A scholarly biography of high readability, of special interest to members of the legal profession. The author, a professor of Jurisprudence at Princeton, brings to this work the advantages of his previous studies of the Supreme Court of the United States, especially as reflected in his three works on Justice Brandeis. For authentic information on his present subject, he had access to all of Chief Justice Stone's public and private papers, just as the Justice left them. Mr. Mason sought out Stone's companions in college, his associates at the New York bar, and close friends and students at Columbia Law School where Stone was dean for thirteen years. Add to this contacts with Stone's co-workers at the Department of Justice while he was Attorney General of the United States, and with his law clerks and brethren of the bench during his membership in the Supreme Court, and you have a fair idea of what lengths the author has gone to to gather authentic data.

By covering Stone's early life briefly and devoting the greater part of this work to his mature life, with complete emphasis on his profession, the author has really written a history of the Supreme Court as interpreted through the career of Harlan Stone. The inclusion of so many Supreme Court cases and the interpretation of legal problems takes this book completely out of the realm of most laymen.

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