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Pierson: The Defense Attorney and Basic Defense Tactics; Defense Law Journal, Vol.1

Marcus L. Plant
University of Michigan Law School

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THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS. By *Welcome D. Pierson*. Indianapolis: Bobbs-Merrill. 1956. Pp. xii, 390.

DEFENSE LAW JOURNAL, vol. 1. Indianapolis: Allen Smith Co. 1957. Pp. xi, 431.

It has been the general impression in the United States for some years that the defense attorneys in the country on the whole have been worse than "on the defense"; they have been on the run. It is said that we are living in a plaintiff's age. The basis of tort liability has been expanding, verdicts have been going up, and plaintiffs have been winning on the facts with notable frequency. In part this has been due to the combined efforts of plaintiffs' attorneys organized in the National Association of Claimants' Compensation Attorneys. N.A.C.C.A. has been energetic, aggressive, imaginative, and ably led. Their *Journal* has kept the membership informed of the latest developments in the law and the most modern techniques (or tricks) of trial practice. It would appear that in the years following World War II plaintiffs' lawyers commanded the field. Interested observers (such as professors of Torts) have wondered if this trend would go on forever, if it represented the new order of things, or if the tide would ever reach the turning point.

The volumes noted at the beginning of this review are indications that at long last the defense lawyers of the country are coming to life. Let me refer to Mr. Pierson's book first. This reviewer must admit that he approached it with suspicion and skepticism, as he does all books on the alleged art of trial practice. Too often in the past I have been reminded of a remark Edson Sunderland made to me years ago in a moment of informal conversation. He said, "The trouble with most lectures and books on trial procedure is that they turn out to be nothing more than a collection of anecdotes." Mr. Pierson's book, however, does not fall into this category. To be sure it contains a large number of dubious stories and items of Oklahoma folklore but beneath all this there is real merit.

Mr. Pierson clearly understands that cases are not won by brilliant improvising in the courtroom but by arduous, protracted attention to detail in the preparation of the case. Accordingly the bulk of his book is not devoted to what goes on at the trial but what goes on outside the courtroom.

The chapters on Discovery Proceedings, Discovery Depositions, Propounding Interrogatories, and Demands for Production and Inspection, contain not only a great deal of valuable citation of authority but many ideas and suggestions for a discriminating use of these tools of preparation. His chapter on The Witnesses, and on Settlement Negotiations are filled with practical and useful notions most of which could never be found in law books. They are obviously the fruit of a long and a varied career in which he has been practicing what he is now preaching. The same may be said with respect to his discussion of admissions and the concealed dangers that sometimes lie in making them; practical and some novel aspects of taking testimony by depositions (e.g. the possibility of having a photograph of deponent to display to the jury while the deposition is being offered in evidence); and his appraisal of pre-trial hearings which indicates some of the reasons why this device is not necessarily the solvent of all litigation problems.

This book ought to be studied by every law student who expects to engage in litigation. Some parts of it he will find unduly elementary, almost annoying. It ought not to be necessary, for example, to exhort the attorney to have courage (pp. 13-15), to think (pp. 15-16), or to advise him that "He should change his shirt frequently" (p. 31), or "when addressing the court a cigar should not be cupped in his hand" (p. 33). But if the reader will plow through these and a few other similar homely pointers, he will find much information and many ideas that he could not acquire other than by experience, perhaps bitter experience.

The book ought also to be read by Torts professors. They will not necessarily find it edifying. They may, for instance, be disturbed by the author's bland statement "the law covering the trial of negligence accidents is well defined and established. As one writer has said, 'it is rare for a negligence case either to present a disputed question of law or to lack a disputed question of fact.'" (p. 21) But it teaches a cogent lesson of the law "as she is practiced." One need not be a disciple of the late Jerome Frank to subscribe to the proposition that there are many differences between law in the books and law in action. Mr. Pierson's volume makes the reader very conscious of these differences. Law teachers, especially in the field of Torts, ought never to ignore them.

It would be a great exaggeration to say that this book is the answer to N.A.C.C.A. or to Mr. Belli's *Modern Trials*, but it is a start. Books such as this, and publications such as the new *Defense Law Journal* (of which Mr. Pierson is the editor-in-chief) give some reason for thinking the litigation score in the Torts field may in time become less one-sided. The *Journal* promises to be a stimulating organ. At first glance it appears to be modeled after the *N.A.C.C.A. Journal*—it has, for example, a subdivision "Verdicts for Less Than \$50,000." But on closer inspection it is an improvement on the N.A.C.C.A. format. Much of it is solid material. In Part I "Selected Articles" for example there is an excellent discussion of the doctrine of

forum non conveniens in F.E.L.A. cases. The ideas contained therein, if widely disseminated, may make a real contribution toward halting or at least reducing the scandalous practice of importing such cases into states or cities where the atmosphere is notoriously favorable to claimants. There is an exhaustive compilation of cases in which the defendant was successful, showing the grounds on which the decision rested. There is a valuable section of 40 pages containing a synopsis of a dozen pertinent law review articles. The editor indicates that in preparing this volume he has corresponded with more than 1,100 attorneys and it is obvious that he has spared no effort to collect all valuable current information and developments which might be helpful to lawyers on the defense side of the table. This publication ought to find a place in the library in any law firm that engages in litigation regardless of what side it usually represents.

It is certain that from the defendant's standpoint there is infinitely more promise in works such as the foregoing books than can possibly lie in the appearance of occasional articles in the *Insurance Counsel Journal* or in full-page advertisements in newspapers by insurance companies bewailing the open-handedness of juries and threatening a rise in insurance rates. If the funds wasted on such advertisements were devoted to the type of effort Mr. Pierson has put forth (and perhaps also to more generous fees to defense lawyers) the insurance companies would get a great deal more for their money.

*Marcus L. Plant,
Professor of Law,
University of Michigan*