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Owning Hazard, A Tragedy

Barbara Young Welke*

In Memory of Frances Young Welke

(March 21, 1992–April 30, 2010)

My daughter Frances championed the idea of my writing a play, enthusiastically listened as I spun out ideas for scenes, and reinforced my flagging commitment when I began to question the whole enterprise. But more important than any of these was simply her being. She brought so much joy and meaning into our lives and taught me so much about laughter, love, purpose, perseverance, and justice. She is with me and teaches me still.

This is for you, Frances.

FOREWORD

The “Law As . . . : Theory and Method in Legal History” conference at the University of California, Irvine School of Law in April 2010, offered an extraordinary opportunity to reflect on and think experimentally about law, legal history, and historical meaning. The invitation to be part of the conference came as I struggled—as part of a larger research project on the history of product liability from the nineteenth century to the present—to explain the historical significance of an episode that served as Americans’ introduction to what came to be referred to as “flammable fabrics.” The reader will learn more about this episode in the play that follows. I might simply say here that I found myself drawn

* Professor of History and Professor of Law at the University of Minnesota. This play is part of her ongoing research on the history of products liability. In addition to her daughter Frances to whom the play is dedicated, the author wishes to acknowledge the important feedback and support of Christopher Tomlins and the participants at the “Law As . . . : Theory and Method in Legal History” conference at the University of California, Irvine School of Law (April 16–17, 2010) where an early version of this play was presented, especially Morton Horwitz, who generously commented on the play at the UCI Conference; the cast, director, producer, and audience in the staged reading of the prologue and opening scene of the play at the 2010 Midwest Law and Society Retreat, Institute for Legal Studies, University of Wisconsin Law School (October 8–9, 2010), especially Nancy Buenger who, as producer, brilliantly redid the original slides for the prologue and act 1, scene 1 and handled every detail of the production; Barbara Corrodo Pope for her insights on dramatization; and Margot Canaday, Tracey Deutsch, and Linda Kerber for their helpful comments on the script. She also wishes to thank Robert Gilmer, Polly Myers, and Chantel Rodriguez for research assistance. And, finally, she wishes to thank the editorial staff, and especially Erica Maloney, of the *UC Irvine Law Review* for their generosity and skill in bringing this very nontraditional piece of scholarship to print.

in by this human drama and perplexed at how this episode could have gone on for so long before generating a public hue and cry and then as quickly seemingly disappear from the historical record. My first inclination in thinking about flammable fabrics, and products liability more generally, was in terms of a shift in the ownership of hazard from the individuals who suffered injury, to the enterprises involved in manufacturing and retailing of consumer products through their payment of damages and product changes, to the state in passing consumer safety legislation. History challenged this reading.

Embracing the invitation that the UCI Conference offered to think experimentally, and having come to see the history we are enmeshed in as tragic, I decided to write a tragedy. Tragedy might seem an odd choice for something as quotidian, as prosaic, as seemingly devoid of heroism and heroic gestures as injury and death from defective products. But, I wonder if this is the result of our own limited view of tragedy. In an essay titled “Tragedy and the Common Man,” published in 1949, the playwright Arthur Miller notes, “The common man is as apt a subject for tragedy in its highest sense as kings were.”¹ At the close of the essay, he challenges the pervasive misconception that tragedy is allied with pessimism. Action and striving define tragedy, he argues, not passivity. “For, if it is true to say that in essence the tragic hero is intent upon claiming his whole due as a personality, and if this struggle must be total and without reservation, then it automatically demonstrates the indestructible will of man to achieve his humanity.”² “It is time, I think,” he urges in closing, “that we who are without kings took up this bright thread of our history and followed it to the only place it can possibly lead in our time—the heart and spirit of the average man.”³ This play takes up the challenge of “tragedy and the common man” qua person as its central task. At the close of the play, when the readers/viewers have the substance of the question more fully before them and can evaluate it for themselves, the play itself turns directly to the question of tragedy.

If the form is tragic, the mode is epic.⁴ The play spans a period of seventy years, from 1940 to 2010. The scenes take place in courtrooms, corporate offices, legislative hearing rooms, and family homes. The play had its debut at the UCI Conference. A staged reading of the prologue and opening scene at the Midwest Law and Society Retreat in Madison, Wisconsin, in October 2010, encouraged me to enter more fully into the dramatic potential that theater offers and, in a sense, requires. You will see as you read that images and text projected on a large screen

1. ARTHUR MILLER, *Tragedy and the Common Man*, in THE THEATER ESSAYS OF ARTHUR MILLER 3 (Robert A. Martin & Steven R. Centola eds., Da Capo Press 1996) (1949).

2. *Id.* at 6–8.

3. *Id.* at 7.

4. See BERTOLT BRECHT, *The Epic Theatre and Its Difficulties*, in BRECHT ON THEATRE: THE DEVELOPMENT OF AN AESTHETIC 22–24 (John Willett ed. & trans., Hill and Wang 1964); see also BRECHT, *The Modern Theatre is the Epic Theatre*, in BRECHT ON THEATRE: THE DEVELOPMENT OF AN AESTHETIC, *supra* at 33–42.

at the rear of the stage—for example, “*Slide: Christmas tree in the city*” or “*Slide: Atlanta Daily World—December, 28 1947—Playing Cowboy Fatal*”—are central in a number of the scenes. I invite you to engage your imagination to visualize these effects as part of the scene before you and, as you do so, to think about the interpretive possibilities and challenges of combining the visual and the performative in legal history. The epic mode is intended to take apart evidence that in the scholarly endeavor becomes reduced to a seamless narrative, to restore to the reader/viewer a role in the interpretive process.⁵ My hope is to provoke questions not simply about “what happened” but about the larger issues that the example here of flammable fabrics raises about owning hazard in everyday things in modern life.

* * *

5. All of the text in the play is drawn directly from historical sources. In keeping with the genre of a play, though, I have not used quotation marks or ellipses noting omitted words, phrases, and sentences or the joining of statements from different parts of a historical source. Neither have I used footnotes, except to provide a single citation, generally at the beginning of each scene, to the sources from which the scene is drawn. I have retained throughout the spelling, capitalization, grammar, and punctuation from the original sources. This means that the reader should be prepared for a range of spellings of corporate names, incorrect punctuation, nonstandard treatments of things like the representation of numbers, grammatical errors, and conflicting uses of the terms “flammable” and “inflammable.” Current usage of “flammable” to mean easily lighted and highly combustible and “inflammable” to mean the reverse, that is, not highly combustible, came out of this moment and the confusion that “inflammable,” which, in fact, meant highly combustible, produced. Hopefully, the intended meaning is clear in each case from the speaker and the context. The purpose of retaining the form of the original sources in these respects is to help the reader remain aware throughout that the play is drawn directly from original sources and to not lose sight of the differences in the nature of the sources. At the end of the play, I provide “A Note on Sources” to explain how I have used the original sources and the limited kinds of license I have taken for purposes of dramatization. Immediately prior to publication, I rechecked the final text of the entire play against the original sources to ensure that all lines in the play reflect those sources.

OWNING HAZARD: A TRAGEDY

(Narrator enters stage left and speaks to the audience. Tone is reflective. Exits stage at end of statement.)

NARRATOR: Although if anyone had studied the question it was common enough prior to the 1940s to read in the newspaper about someone—most often a woman or a child—who was seriously injured or burned to death when her or his clothing caught fire, “flammable fabrics” first became a public issue in the United States with the cowboy suit tragedy in the 1940s and early 1950s. Between 1942 and 1953, an untold number of children across the United States were severely burned when the Gene Autry cowboy suits they were wearing caught fire turning them into “human torches.” A number of children died; others were left with grotesque scars and crippled for life. Between 1945 and 1953, at least one hundred families brought lawsuits against those involved in the manufacture and sale of the cowboy suits and their component parts. When the court reached a verdict against the defendants in the first case to be filed—a case captioned *McCormack v. M.A. Henry Co., Inc.*—the defendants scrambled to settle other cases as quietly as possible and worked to limit publicity relating to the accidents and settlements to forestall the filing of more lawsuits. In 1953, in large measure because of the cowboy suit tragedy, Congress passed the Flammable Fabrics Act, followed in 1967 by a substantial broadening of the Act, and, in 1972, by a second set of amendments applying specifically to children’s sleepwear. The combination of private lawsuits and legislation did not bring an end though to the production and sale of flammable fabrics. This is a tragedy told in two acts.

PROLOGUE

(Stage empty.)

(Slide: Du Pont advertising slogan “Better Things For Better Living . . . Through Chemistry” with text of advertisement for DUPONT RAYON and DUPONT RAYON trademark projected on screen at rear of stage. Liling female voice reads text of ad.)

Do they stretch?

Will they iron?

Will they wash?

Will they clean?

Will they shrink?

Will they fray?

Will they pull?

*Will they fade?*⁶

(Slide: Fall leaves in Du Pont frame)

(Child, young boy, five years old, dressed in Gene Autry cowboy suit, rides tricycle in a serpentine across the stage—he's playing.)

(As the boy on the tricycle exits the stage, quieter, deeper male voice also from offstage)

Will they burn?

(The screen on rear wall goes off.)

ACT I

Scene One

There are two stuffed chairs arranged on the outer edges of the stage—one stage left and the other stage right—along with a small kitchen table and chair stage right. At the center of the stage is a judge's bench and witness stand. At the back of the stage is a large screen.

Seated in each stuffed chair is a man reading a newspaper and beside each is a reading lamp. Seated at the kitchen table is a woman in a housedress with a cup of coffee also reading a newspaper. Both the furnishings and the clothing of the actors reflect the 1940s. One man might be a war industry worker, the other an executive; the woman might be a housewife/mother or a war industry worker.

The stage is dark at the beginning of the scene. The scene opens with a series of news stories read by the men seated in the armchairs and the woman seated at the kitchen table. Their voices are unemotional contrasting with the content of the stories they are relating. The light is brought up on each man/woman as (s)he reads a news story. When the news story ends, the light on him/her goes off and (s)he returns to silently reading the newspaper. The stories are read in chronological order with the newspaper masthead, date, and headline for each article shown on the screen at the back of the stage as the man/woman begins to read. Each headline remains up as new ones are added, so that the screen becomes increasingly blackened by headlines. At various points in the scene other images are projected on the screen. Each slide remains projected until replaced by the next slide.

The only actors on stage who acknowledge that there are other actors are those engaged in the courtroom scene. The courtroom actors remain frozen and in the dark until their part of the scene begins and again freeze as news stories are read in the midst of testimony.

6. Du Pont Advertisement, What's What in Rayon (Wilmington, Del.) (1940) (on file with the Hagley Museum & Library, Wilmington, Del., Du Pont Collection, Accession 1305, Series 2, Part 2, Vol. 611).

(Slide: Passaic (N.J.) Herald-News—November 2, 1943—Playing With Fire Costs Boy His Life)

MAN 1: Two young Eastside brothers were turned into human torches yesterday afternoon when their clothing caught fire while they were playing with matches in their backyard. The matches set fire to tall, dry grass and the boys were trapped in the flames. Stanley Krzeczkowski, who would have been six years of age in January, son of Mr. and Mrs. Casimir Krzeczkowski, Sr., died at 8:10 last night in Beth Israel Hospital. His seven-year-old brother, Casimir, Jr. is in the same hospital in a critical condition.

Both boys were dressed in flimsy cowboy suits made of material that was quickly consumed by the flames.

The boys' mother was in a store across the street when a youth ran in and told her that her two boys were on fire.⁷

(Slide: Philadelphia Inquirer—August 27, 1944—Clothing Ablaze, Boy Badly Hurt)

MAN 2: Despite his rescue by a patrolman, a nine-year-old boy was burned severely yesterday after his clothing caught fire from a blaze in a lot at 18th and Bristol streets. The boy, Joseph Moore, is in Temple University Hospital with severe burns of the entire body. His rescuer, Patrolman Barr, was driving when he noticed a group of boys around a bonfire in a vacant lot. As he drove past the spot, the Moore boy ran from the lot with his clothes ablaze. The policeman stopped and, grabbing a blanket from the car, wrapped it around the stricken youngster and beat out the flames with his hands. He then rushed the boy to the hospital.⁸

(Slide: Alexandria (Va.) Gazette—October 25, 1944—Engleside Child Dies Of Burns)

WOMAN 1: Elwood Leary, Jr., five-year-old son of Mr. and Mrs. Elwood Leary of Engleside, died last night at the Alexandria Hospital of burns received yesterday at his home. According to Fairfax County police, the child was playing around a trash fire in the yard of the Leary residence, when his clothes became aflame, the child being burned practically the entire length of his body. The child's father was seriously burned about both hands in beating out the flames enveloping his son. The accident was investigated by Sergt. James E. Dodson and Officer Thomas E. Denty of the Fairfax County police.⁹

7. *Engleside Child Dies of Burns*, HERALD-NEWS (Passaic, N.J.), Nov. 2, 1943, at 1.

8. *Clothing Ablaze, Boy Badly Hurt*, PHILA. INQUIRER, Aug. 27, 1944, § B, at 3.

9. *Engleside Child Dies of Burns*, ALEXANDRIA GAZETTE (Va.), Oct. 25, 1944, at 1.

(Lights come up on courtroom scene center stage. Screen at back of stage with headlines remains illuminated.)

(Slide: Christmas tree in the city)

MR. PALEY (*counsel for the McCormack family, plaintiffs*): Mr. McCormack, in January of 1945 did you live at the same address as you have given here, 126 East 98th Street in New York City?¹⁰

MR. MCCORMACK (*father of victim-plaintiff Tommy McCormack*)(*This is not a man who is used to being in court. Listening to him suggests it is hard for him to be here; his voice is tense and tightly controlled.*): Yes, sir.

MR. PALEY: In the same apartment?

MR. MCCORMACK: Yes, sir.

MR. PALEY: At Christmas time in 1944 what did your family consist of by way of wife and children?

MR. MCCORMACK: Four boys.

MR. PALEY: And your wife?

MR. MCCORMACK: Yes, sir.

MR. PALEY: They were Tommy?

MR. MCCORMACK: Yes, sir.

MR. PALEY: Jimmie?

MR. MCCORMACK: Yes, sir.

MR. PALEY: Jackie and Pat. At that time they were aged seven, ten, thirteen, and sixteen respectively?

10. All trial testimony in scene 1 is drawn from the record in *McCormack v. M.A. Henry Co., Inc.*, 88 N.Y.S.2d 890 (App. Div. 1949) (on file at the New York State Library).

MR. MCCORMACK: That is right.

MR. PALEY: And where were you employed at the time?

(Slide: Apartment Building New York City Upper West Side just off Central Park)

MR. MCCORMACK: 15 West 81st Street as a doorman.

MR. PALEY: How long had you been in that position?

MR. MCCORMACK: At that time I would say about eleven years.

MR. PALEY: Do you know Milton A. Henry, one of the defendants in this action?

MR. MCCORMACK: Yes, I do.

MR. PALEY: Did you at any time prior to Christmas of 1944 have a conversation with Mr. Henry which concerned itself with a gift that he expected to give or was to give at Christmas time?

MR. MCCORMACK: Yes, I did. He asked me if I -- you want me to tell what the conversation was about?

MR. PALEY: Yes.

MR. MCCORMACK: He asked me how many children I had, and how old they were. I told him. He told me, "Come Christmas, he would have something for the two younger boys"; he was in that business, toys.

MR. PALEY: Now, some day shortly before Christmas Eve of 1944 did you have a further conversation with Mr. Henry?

MR. MCCORMACK: Yes.

MR. PALEY: Did you go up to Mr. Henry's apartment?

MR. MCCORMACK: Yes, I did.

MR. PALEY: How did you happen to go?

MR. MCCORMACK: At his invitation.

MR. PALEY: And when you got there, what happened?

MR. MCCORMACK: Mr. Henry gave me two cowboy suits, he took them out and showed them to me. He asked me the ages of the boys, and (*The witness is overcome with emotion.*)

JUDGE: We will have a short recess.

MR. MCCORMACK: It is all right. I will be all right.

JUDGE: No, we will have a short recess.

(Slide: Florence (S.C.) Morning News—January 7, 1945—Frank Johnson, 6 Seriously Burned)

MAN 2: Frank Johnson, six-year-old son of Mr. and Mrs. C. L. Johnson, was reported in a serious condition at The McLeod Infirmary last night of burns he received while at play during the afternoon. The young boy received burns on a good part of his body. His mother gave the following account of how his clothes caught fire: Wearing a cowboy suit he was playing in the yard and went next door where a lady was burning trash. His suit caught fire and he became excited and ran into the house. It was when he ran back out of the house that a blanket was wrapped around him, smothering the flames. By this time all of his clothes from his waist down were burned off. Frank is a member of the first grade at the Margaret Harlee school, being in Mrs. Zeigler's class.¹¹

MR. PALEY: Was anything further said at that time?

MR. MCCORMACK: Mr. Henry shook hands with me and wished me a Merry Christmas.

MR. PALEY: Now, on January 6, 1945, were you working?

MR. MCCORMACK: Yes, sir.

MR. PALEY: And what time do you leave your position?

11. *Frank Johnson, 6, Seriously Burned*, FLORENCE MORNING NEWS (S.C.), Jan. 7, 1945, at 1.

MR. MCCORMACK: Oh, about 4:15.

MR. PALEY: What did you do then?

MR. MCCORMACK: I came home.

(Slide: Living room, McCormack four-room railroad-style apartment)

MR. PALEY: You got home about a quarter to five, five o'clock?

MR. MCCORMACK: Around that time, yes.

MR. PALEY: Was your wife home at the time?

MR. MCCORMACK: Yes, she was.

MR. PALEY: Your wife went out that night about six-thirty, is that correct?

MR. MCCORMACK: About six-thirty, yes.

MR. PALEY: And for what purpose did she go out?

MR. MCCORMACK: She went to work.

MR. PALEY: She works evenings?

MR. MCCORMACK: That is right, to about nine, eight-thirty, about two hours.

MR. PALEY: So that you come home and you stay at home with the children?

MR. MCCORMACK: That is right.

MR. PALEY: And that same condition obtained on this Saturday night, January 6th; is that right?

MR. MCCORMACK: That is right.

MR. PALEY: At that time who was in the house when your wife left?

MR. MCCORMACK: Myself, Jackie, my second boy; and Jimmie, my third one; and Tommy.

MR. PALEY: Now, about how long before this accident had you seen Tommy?

MR. MCCORMACK: Oh, I seen him, I could see him -- I could see from where I was sitting, I could see the rooms, and he was playing through the rooms, the kitchen.

MR. PALEY: Where were you sitting?

MR. MCCORMACK: In the living room.

MR. PALEY: How old was Tommy at that time?

MR. MCCORMACK: He was seven. He would be eight the following February.

MR. PALEY: The next month?

MR. MCCORMACK: That's right.

MR. PALEY: Had he been going to school?

MR. MCCORMACK: Yes, a parochial school, St. Francis de Sales.

MR. PALEY: Do you pay for that?

MR. MCCORMACK: No.

MR. PALEY: It is maintained by the Parish?

MR. MCCORMACK: By the Parish, that's right.

MR. PALEY: And he was in his third year?

MR. MCCORMACK: That's right.

MR. PALEY: Now, how was Tommy dressed at the time of the accident?

MR. MCCORMACK: He had the pants on, the chaps of the cowboy suit on him. It was the first time he worn them, had just taken them out of the box that night, an undershirt and bedroom slippers. I don't know; I am not quite sure of the slippers.

MR. PALEY: The cowboy suit you had gotten from Mr. Henry, do you recall if it had any name on it?

MR. MCCORMACK: Yes. Gene Autry.

MR. PALEY: Do you know at the time of the accident where the other two children, Jackie and Jimmie who were in the house were?

MR. MCCORMACK: Yes. Jimmie was having a bath and Jackie had his bath already and he was laying in his pajamas on the bed, reading.

MR. PALEY: Now, where were you?

MR. MCCORMACK: I was sitting on my chair in the front room.

MR. PALEY: What is the general purposes for which the kitchen is used at your home?

(Slide: Kitchen, McCormack four-room railroad style apartment)

MR. MCCORMACK: Well, it is used for general living purposes, because it is the warmest room and it is the largest room.

MR. PALEY: Now, what happened as you recall it, at about seven-thirty o'clock in the evening on January 6, 1945?

MR. MCCORMACK: I heard Tommy scream and I rushed out of the room, and Jackie was rushing out ahead of me and he grabbed the bedspread. Tommy was on fire. You could see the blaze reaching out through the rooms. I grabbed Tommy, and I threw him in the bath tub.

MR. PALEY: Now, you recall when you grabbed Tommy *(Mr. McCormack cuts him off mid-sentence.)*

MR. MCCORMACK: He was just all flame.

MR. PALEY: Now, let me understand. Jimmie had been taking a bath in the bath tub?

MR. MCCORMACK: Yes.

MR. PALEY: And the bath tub was full of water?

MR. MCCORMACK: Yes, half full.

MR. PALEY: And you took the child across the kitchen and placed him in the tub?

MR. MCCORMACK: That is right.

MR. PALEY: Where was Jimmie?

MR. MCCORMACK: He was standing naked on the floor there in the kitchen.

MR. PALEY: Now, after you placed the child in the tub, what did you do then?

MR. MCCORMACK: Well, I rushed downstairs, I had my jacket on, see; I was sitting in the front room. I had my jacket on. I rushed downstairs to my two neighbors downstairs. Mrs. Langan. I told her to get a cab; Tommy was badly injured and I had to go to the hospital.

MR. PALEY: What was left, if anything, of the clothing that Tommy was wearing?

MR. MCCORMACK: Well, he was lying in the tub, there was just a few remnants that were stuck to him, you know – just ashes.

MR. PALEY: What about the top shirt?

MR. MCCORMACK: The top shirt was not burned.

MR. PALEY: Now, you took Tommy to the hospital? Mt. Sinai Hospital?

MR. MCCORMACK: Yes.

MR. PALEY: Now your hands were burned right and you were kept at the hospital for several days, is that right?

MR. MCCORMACK: Yes.

MR. PALEY: Now, when was the first time you saw Tommy after you got out of the hospital?

MR. MCCORMACK: Oh, well, I seen Tommy. There was a stairway up to the ward, and I used to go up, walk up those stairs, and I could get a look at him through the glass, he was in that little room by the supervisor's desk, a glass enclosed room, and I could get a look at him through the glass.

MR. PALEY: Now, about a week after you got out you were permitted to visit?

MR. MCCORMACK: Yes, I was.

MR. PALEY: When you visited him what did you see?

MR. MCCORMACK: *(The witness is overcome with emotion.)*

JUDGE: All right, we will have a short recess.

(Slide: Pottsville (Pa.) Republican—February 26, 1945—Son Of Atty. Elwyn Jones Is Seriously Burned)

MAN 1: Jackie Jones, the seven-year-old son of Atty and Mrs. Elwyn Jones, is in a serious condition at Good Samaritan Hospital, the result of having the lower part of his body and legs badly burned when his cowboy suit of flimsy material caught fire Sunday afternoon while he was playing in the yard of his home. He was given two blood transfusions Monday morning. The accident occurred when Jackie is said to have struck a match. His father is Solicitor for the City of Pottsville.¹²

(Slide: Wilkes-Barre (Pa.) Record—March 31, 1945—Son Of Meyers Coach Is Seriously Burned At Play)

WOMAN 1: Richard, the six year-old son of Edward Johnson, Meyers High School coach now at sea with the Navy, was seriously burned yesterday afternoon when his cowboy suit became ignited from a grass fire he and several companions started in an empty lot. The youngster was in serious condition last night in Wilkes-Barre General Hospital, where he is being treated for first and second

12. *Son of Atty. Elwyn Jones is Seriously Burned*, POTTSVILLE REPUBLICAN (Pa.), Feb. 26, 1945, at 4.

degree burns to his legs and lower body. “Ricky” and his companions started the fire on Old River Road, just around the corner from the Johnson residence. Residents of the section said the boys were having a “high time” and, though warned, continued to spread the fire with papers they gathered from the streets. In some manner “Ricky’s” cowboy suit became ignited and he ran to his home where his mother tore the clothing from the boy’s body. Police investigated the accident, but it had not been determined how Ricky’s cowboy suit had been set ablaze, though the theory was advanced he may have walked through the flames.¹³

MR. PALEY: Now, Mr. McCormack, getting back again to the hospital, I am going to try as much as I can to take the testimony away from you, so that we won’t—

MR. MCCANN (*counsel for E.F. Timme & Son and Woonsocket Falls Mill, defendants*)(*Rising from a seat in the audience to interpose his objection, he remains standing until the judge rules, then sits back down.*): If the Court please, may I interpose an objection?

MR. PALEY: Unfortunately, the question of pain and suffering is a vital element in the case, I must, as displeasing as it may be to me and the rest of the court, adduce this evidence, because this constitutes, in the last analysis, my case.

JUDGE: The objection is overruled.

MR. PALEY: Now, when you saw the boy, was he in bed?

MR. MCCORMACK: No. They were giving him a bath when I heard him—rather seen him the first time.

MR. PALEY: Then he was brought back into the room? And how did he look?

MR. MCCORMACK: He was all bandaged, the lower part of his body, and one of his hands, and a piece on his — a spot on his chin.

MR. PALEY: Now, during the various times that you were there, Mr. McCormack, he was fed intravenously, is that correct?

MR. MCCORMACK: Yes. Almost any nourishment he had.

13. *Son of Meyers Coach is Seriously Burned at Play*, WILKES-BARRE RECORD (Pa.), Mar. 31, 1945, at 11.

MR. PALEY: When did you visit him?

MR. MCCORMACK: Well, we visited him constantly, his mother went in the morning and at night. We stayed there until—we could sit with him all the time.

MR. PALEY: Mr. McCormack, did you see Milton Henry after you came back to work?

MR. MCCORMACK: I did.

MR. PALEY: Mr. McCormack, Mr. Henry didn't approach you to speak to you?

MR. MCCORMACK: No, sir.

MR. PALEY: Did you have any conversation with Mr. Henry after you came back to work?

MR. MCCORMACK: No, sir.

MR. HAYES (*counsel for M.A. Henry Co., Inc., manufacturer of the cowboy suit, defendant*)(*Coming from a seat in the audience, beginning question as he approaches the stage.*): So if I understand you correctly then, you yourself never personally told Mr. Henry about this occurrence, is that right?

MR. MCCORMACK: I told his wife.

MR. HAYES: You told Mr. Henry's wife, is that right?

MR. MCCORMACK: She asked me about it. When it broke in the newspapers about the first week in April.

MR. HAYES: You never went up yourself and told her what had happened.

MR. MCCORMACK: No. She come down and made her apologies and said she was sorry.

MR. HAYES: May we have that stricken out?

JUDGE: Strike it out.

(Mr. McCormack leaves the stand and exits stage. Mr. Hayes takes his seat again in the audience. Mr. Paley remains on stage next to the witness stand.)

(Slide: Washington Post—April 9, 1945—Cowboy Suits Catching Fire Take Big Toll)

MAN 1: Three children have died and eight have been seriously burned since early last summer in the Washington area by having cowboy suits catch fire, a check of local hospitals revealed last night. Four children are still recovering at Children's Hospital and another at Suburban Hospital as a result of the burns. In every instance the parents reported that their children were turned into human torches by the highly inflammable suits with a woolly substance resembling fur. The dead children two of them living in nearby Virginia, and another in Maryland—¹⁴
(Reading of news story cut off by Mr. Paley (lawyer) introducing next witness.)

(Slide: laboratory)

MR. PALEY: We call Marvin Kramer as a witness on behalf of the plaintiffs.

(Marvin Kramer takes the stand.)

MR. PALEY: Mr. Kramer, by whom are you employed?

MR. KRAMER: The New York Testing Laboratories in this city. They analyze and test all types of material.

MR. PALEY: And in what capacity?

MR. KRAMER: Chief chemist.

MR. PALEY: Now, Mr. Kramer, did you obtain a piece of the material from a Gene Autry cowboy suit of the sort Tommy McCormack was wearing and have it tested?

MR. KRAMER: I did.

MR. PALEY: Will you tell the Court and jury what tests you made, and the results you arrived at?

14. *Cowboy Suits Catching Fire Take Big Toll*, WASH. POST, Apr. 9, 1945, at 1B.

MR. KRAMER: I tested the materials first, as to the type of fabric that they were composed of, the thread composition, and then also determined the flammability of those materials. The material of chief interest is the fluffy imitation chaps, composed of viscose rayon in a very fine, fluffy form. They were found to be extremely flammable. I took a strip of that material, approximately 1 by 7 inches, and suspended it in a draft-free corner, and I tried to determine the time it took for a flame to start from the bottom and ignite the top; and the material burned so rapidly I was unable to work a stop watch quickly enough to get any record of that time.

MR. PALEY: Now, assume that the bottom of this chap, for the sake of argument, would be touched with a match or some flame. How soon, in your opinion, would it take for the entire suit to be a mass of flame?

MR. KRAMER: The flames will have reached the top of the suit in less than a second.

MR. PALEY: What makes this particular material more flammable, if it does, than the ordinary viscose rayon dress, or something of that kind?

MR. KRAMER: This material is so finely divided. I might – I will put this more simply. Take the case of a log, a large fireplace log, and wood splinters. It is very hard to ignite the log, but if you take that log and with a knife cut off a few splinters, these splinters will ignite very readily. It is the fineness that makes it so inflammable.

MR. PALEY: Is animal fur flammable?

MR. KRAMER: No. It can be made to burn, but it tends to put itself out.

MR. PALEY: If this rayon attached to the cowboy suit caught a bit of flame, would it, in your opinion, be possible to slap it out?

MR. KRAMER: No. It couldn't be caught in time.

(Mr. Kramer leaves the stand and exits the stage.)

(Slide: Philadelphia Inquirer—April 12, 1945—Cowboy Suit Is Blamed In Death Of Boy)

WOMAN 1: Gene Autry cowboy playsuits, now facing a Congressional investigation because of purported dangerous inflammable qualities, were blamed yesterday for the death of one child and serious fire injuries to two others in the Philadelphia area. The flaming death of a five-year-old Conshohocken boy, followed closely by three identical tragedies in Washington, brought Congressional scrutiny for the colorful costumes which are manufactured by a New York concern with another plant in Passaic, N.J. Yesterday an inventory of stocks in Philadelphia stores disclosed that the once popular suit has been withdrawn from sales counters.¹⁵

MR. PALEY: We call Dr. Ernest E. Arnheim. (*Dr. Arnheim takes the stand.*) Please state your name and position.

(*Slide: hospital room*)

DR. ARNHEIM: Dr. Ernest E. Arnheim, in charge of children's surgery at Mt. Sinai Hospital in January 1945.

MR. PALEY: Now, Doctor, I think that Thomas McCormack, who was in Mt. Sinai Hospital between January 6, 1945, and May 12, 1945, was under your direct charge; is that correct, sir?

DR. ARNHEIM: Yes.

MR. PALEY: Doctor, I give you the hospital report for the purpose of refreshing your recollection and I ask if you will explain to the Court and the jury the nature of the child's ailment at the time of his entry, the diagnosis, progress and treatment.

DR. ARNHEIM: Well, at the time of his entry to the hospital, he had third degree burns. Now, these burns were not only of great depth as far as the tissues were concerned, but they involved the greater part of the entire body. That is, they involved the feet, the lower extremities – I meant the legs, and the thighs and a good part of the abdomen. Also there were burns, similar burns to the hands. There was a severe degree of shock which goes with any severe burn. Most severe burns of this type, as we know, are fatal. That is, they result in death very quickly. This boy lived for some time.

15. *Cowboy Suit is Blamed in Death of Boy. Linked to Fires Injurious to 2*, PHILA. INQUIRER, Apr. 12, 1945, at 1.

MR. PALEY: Then I ask you the continuing progress and treatment of the burn.

DR. ARNHEIM: Well, the progress is a very long story, because it continued from his admission on January 6th until the time he died on May 12th, which is a period of approximately five months, during which period he required blood transfusions and plasma to keep him going and also it was about the time that penicillin was first coming into any use, and we used at that time what was considered to be very large doses of penicillin. He had blood poisoning from the burns and so we were unable really to do anything in the way of skin grafting. We felt that this boy could not stand that procedure or any procedure which would involve giving him an anesthesia because we felt that he would die during the procedure. When he finally died, the autopsy examination revealed why it was completely hopeless, because all of his veins in his thighs and his legs and his abdomen were filled with blood clot, which was also filled with these organisms – the germs which produced the blood poisoning.

MR. PALEY: Now, I have been informed from time to time, at least in the early stages, the boy was off the critical list. How would you account for that, Doctor?

DR. ARNHEIM: Well, the hospital doesn't like to keep children continuously on a critical list, because every time a patient is on the critical list, it means that he can be seen day and night by his family, and it isn't a good thing because the parents naturally will stay around as much as possible, and with a boy who is suffering so much, they would themselves feel so badly that it would have a very bad effect on them. So as much as possible, we tried to eliminate, you might say, having the parents around too often when there is a condition of that kind, because it only makes the parents feel badly, and we would rather not have them see what is going on in order to spare their own feelings.

MR. PALEY: Doctor, the hospital also reports that at one time or another maggots infested the wounds. What is a maggot?

DR. ARNHEIM: Well, maggots are, you might say, young flies. You never see really a fly around a hospital, but if one or two flies get there – well, that produces more, and they thrive on dead tissue of this kind. I mean they live on dead tissue, and they consume it as a person consumed food.

MR. PALEY: Now, there also was, as I understand it, a special bed put in this room with some sort of opening in the bottom. What was the purpose of that?

DR. ARNHEIM: That is to make it easier when he has to move his bowels and urinate, it makes it easier to keep it clean, because any motion was extremely painful.

MR. PALEY: There is an expression in the report to the effect that he became increasingly cachetic. What does that mean?

DR. ARNHEIM: It simply means that he was losing a good deal of weight, because the burns destroy a good part of the tissue of the body, and that tissue can only be replaced by food. The food that is essential in this type of treatment was supplied by means of plasma. You could not keep supplying him with enough food, because his food was being destroyed by the burns all the time.

MR. PALEY: He finally died on May 12th, Doctor?

DR. ARNHEIM: Yes. *(The doctor leaves the witness stand and exits the stage.)*

(Slide: Winston County (Miss.) Journal—November 9, 1945—William Augustus Strong III)

MAN 2: An appalling tragedy occurred in Louisville last Saturday afternoon when William Augustus Strong III, better known as Billy, was fatally burned. The accident took place about 5 p.m. when Billy, who was wearing his cowboy suit, caught fire from burning leaves on the lawn of the family home while playing with his little sister, Mary Ann, and neighboring children. He was immediately rushed to the Louisville Hospital where everything possible was done to save him, but at 1:30 Sunday morning, November 4, 1945, he expired from the shock of the burns. Funeral services were conducted at 10 o'clock Monday morning at the First Methodist Church. The Journal joins the many friends in extending sympathy to the bereaved loved ones.¹⁶

(Slide (series of overlaid images): soldier lying on the ground in battle, head facing away, feet closest to the camera; scientist in lab at work pouring liquid into a beaker; chemist's graphical representation of nylon's molecular structure; billowing parachute)

MR. PALEY: We call Mr. Henry, President of the M. A. Henry Co., Inc., the manufacturer of the Gene Autry cowboy suit. *(Mr. Henry takes the witness stand.)* Mr. Henry, can you tell me when the material on the chaps in Exhibit 5 was first used by you?

16. *William Augustus Strong III*, WINSTON COUNTY J. (Miss.), Nov. 9, 1945, at 7.

MR. HENRY: In 1942.

MR. PALEY: Prior to that time what material was used for the chaps?

MR. HENRY: Animal fur from China; a Chinese goat fur.

MR. PALEY: Why did you change material?

MR. HENRY: We foresaw the market to secure these furs was going to be stopped because of the war.

MR. PALEY: From whom did you purchase the material, the fluffy material for the chaps?

MR. HENRY: E. F. Timme & Son.

MR. PALEY: Now, when you looked at samples in choosing a new fabric did you know what the material was?

MR. HENRY: No, sir.

MR. PALEY (*Tone incredulous.*): And do you purchase material without knowing what the material is?

MR. HENRY: Yes, sir. I showed Mr. Bullwinkel, a salesman for E. F. Timme & Son, the outfits that we were making. I said I wanted something that would be a good substitute for fur for the cowboy suits.

MR. PALEY: From what time to what time; that is, from sometime in 1942 to what time did you continue to use this same material bought from Timme?

MR. HENRY: From 1942 to the very early months of 1945. (*Mr. Henry leaves the stand and exits the stage.*)

(*Slide: Terre Haute (Ind.) Tribune—April 19, 1946—**Father, Son Suffer Burns In Trash Fire***)

WOMAN 1: Roy Cizek, three years old, son of Mr. and Mrs. Fred Cizek, is in Union Hospital with severe burns on his hips and legs. According to reports, the boy and other youngsters were playing “cowboy and Indian” around a trash fire Thursday evening when young Cizek’s clothes caught fire. The father of the boy ran to his son’s assistance and in an attempt to extinguish the flames on the child’s clothing suffered severe burns on his hands. Both father and son were taken to the hospital.¹⁷

(The next witness, Mr. Robertshaw, takes the stand.)

MR. PALEY: Please state your name and position.

MR. ROBERTSHAW *(The witness is middle-aged, appears sure of himself, comfortable with his testimony):* My name is Arthur Robertshaw, Jr. I am employed by the Woonsocket Falls Mill and E. F. Timme & Son. I act as manager and am vice-president and secretary of Woonsocket Falls Mill and serve in an advisory capacity to Mr. Roschen, general partner of E. F. Timme & Son.

MR. PALEY: What does the business of Woonsocket Falls Mill consist of?

MR. ROBERTSHAW: The manufacture of pile fabrics.

MR. PALEY: And where did you purchase the rayon thread used in the manufacture of these pile fabrics?

MR. ROBERTSHAW: From the duPont company.

MR. PALEY: Mr. Robertshaw, you stated before that you decided to use the duPont rayon thread in the manufacture of materials that you made certain tests at your laboratory; is that right?

MR. ROBERTSHAW: No, I didn’t say the laboratory. We made trial runs in the plant.

MR. PALEY: And the purpose of the trial runs was to see how the material would turn out, is that correct?

MR. ROBERTSHAW: That is right.

17. *Father, Son Suffer Burns in Trash Fire*, TERRE HAUTE TRIB. (Ind.), Apr. 19, 1946, at 17.

MR. PALEY: Was there any test made at any time as to the inflammability of it? At any time?

MR. ROBERTSHAW: Yes, I think so. The point is that we know this will burn, and we have conducted research at various times to see if a permanent finish could be put on there that would resist flame for the purpose of getting a patent on it.

MR. PALEY: And what did the tests reveal, Mr. Robertshaw?

MR. ROBERTSHAW: They revealed that the fabric burns.

MR. PALEY: And did you subsequently use various substances on the material to see if you could retard the inflammability?

MR. ROBERTSHAW: Yes; we tried that.

MR. PALEY: And what were the results of those tests as to the flame proofing?

MR. ROBERTSHAW: Unsatisfactory.

MR. PALEY: In what sense? Did they retard the flame at all?

MR. ROBERTSHAW: Yes, but they spoiled the fabric.

MR. PALEY: In your tests as to inflammability, is it not a fact that you observed that when the nap was raised or fluffed, that they were then more inflammable than when they were flat; is that true?

MR. ROBERTSHAW: That is true.

MR. PALEY: With reference to these tests that you speak of, which showed that this cloth is inflammable, were the results of those tests submitted to Timme & Son?

MR. ROBERTSHAW: Yes.

MR. PALEY: Now, with that knowledge, did you ever label your cloth, or send instructions out with the shipments of your cloth to anybody, to put them on notice, first, of your own knowledge, that it was inflammable?

MR. ROBERTSHAW: I think not. (*The actors in the courtroom scene remain frozen in place as final headlines are read.*)

(*Slide: Moscow Idahonian—May 13, 1946—**Moscow Boy Badly Burned***)¹⁸

MAN 1: Moscow Idaho boy badly burned.

(*Slide: Passaic (N.J.) Herald-News—June 25, 1946—**Death Lurks In Boys' Play Suits, Old-Style Gene Autry Suits, Made In Passaic Plant, Called "Dangerously Flammable" – Six Victims Here***)¹⁹

WOMAN 1: Death lurks in Boys' Play Suits.

(*Slide: Passaic (N.J.) Herald-News—October 10, 1946—**Another Passaic Boy Burned When Cowboy Suit Ignites***)²⁰

MAN 2: Another Passaic Boy Burned When Cowboy Suit Ignites.

(*Slide: Salt Lake Telegram—July 28, 1947—**Cowboy Suit Blaze Burns Child, 6, Rescuing Mother***)²¹

MAN 1: Cowboy Suit Blaze Burns Child, 6, Rescuing Mother.

(*Slide: Atlanta Daily World—December 28, 1947—**Playing Cowboy Fatal***)²²

WOMAN 1: Playing cowboy fatal.

(*As Woman 1 finishes saying the headline and the Tannoy Speaker begins broadcasting the verdict in McCormack, the headlines that have increasingly blackened the screen disappear. They are replaced by the New York Times masthead and the headline of the story reporting the verdict in McCormack. This headline, in contrast to the earlier headlines, covers the entire screen. The text appears on top of an image—a photograph of a young boy dressed in his Gene Autry cowboy suit, standing with his arms at his side, smiling broadly—repeated in three rows filling the screen like a pattern on wallpaper. The entire image has the same border that has appeared*

18. *Moscow Boy Badly Burned*, MOSCOW IDAHONIAN, May 13, 1946, at 2.

19. Stanley E. Gusty, *Death Lurks in Boys' Play Suits*, HERALD-NEWS (Passaic, N.J.), June 25, 1946, at 1.

20. *Another Passaic Boy Burned When Cowboy Suit Ignites*, HERALD-NEWS (Passaic, N.J.), Oct. 10, 1946, at 1.

21. *Cowboy Suit Blaze Burns Child, 6, Rescuing Mother*, SALT LAKE TELEGRAM, July 28, 1947.

22. *Playing Cowboy Fatal*, ATLANTA DAILY WORLD, Dec. 28, 1947, at 6.

on all the other slides—a ribbon with the words “Rayon by Du Pont” repeating on it around the frame.)

(Slide: New York Times—January 22, 1948—Cowboy Suit Death Gets \$64,500 Verdict)²³

TANNOY SPEAKER (*broadcast from offstage*)²⁴(*Man 1 and Woman 1 sit up straight, look out at the audience, and listen intently.*): New York, New York. January 22, 1948. Cowboy Suit Death Gets \$64,500 Verdict. A cowboy suit that caught fire and caused the death of an 8-year-old boy provoked a damage suit that resulted yesterday in a \$64,500 verdict for the youngster’s father. The costume was presented by Milton A. Henry, president of the M. A. Henry Company, to James McCormack, doorman at 15 West Eighty-first Street, as a Christmas gift for the latter’s son, Thomas, who died on May 12, 1945.

(Slide: As the New York Times story reporting the verdict in McCormack is broadcast, news stories with the appearance of having been torn or cut out of other newspapers are pasted on the screen one at a time at different angles obscuring the New York Times headline and the repeating image of the child in his cowboy suit. The scraps of newspaper include the headline of each story and the first line of the story so that the audience knows they are reporting from New York or are Associated Press stories of the McCormack verdict—\$64,500 Awarded In “Cowboy Suit” Death From Fire; \$64,500 Award In Boy’s Fire Death; Award \$64,500 In Boy’s Death; 64,500 Awarded Father For Son’s Fire Death; Flaming Chaps Bring Verdict.²⁵ After the last headline is pasted onto the screen, the screen goes black.)

MAN 2 (*He is the only one who did not look up from his newspaper when the McCormack verdict broadcast suggesting that, even as awareness of the hazard presented by the Gene Autry cowboy suit was spread to many communities through the McCormack verdict, in many communities residents remained unaware of the hazard.*): April 4, 1948. Scott Timberlake, 5 years old, suffered severe burns late yesterday when fur on the legs of his cowboy chaps caught fire as he rode his tricycle through embers of a leaf fire on

23. *Cowboy Suit Death Gets \$64,500 Verdict*, N.Y. TIMES (Late City edition), Jan. 22, 1948, at 29.

24. Tannoy is the trademark name of a kind of loudspeaker and public address system manufactured by an English company beginning in the mid-1920s and trademarked in the United States in 1943. During WWII, Tannoy (a syllabic abbreviation of tantalum alloy) became a household name as a result of supplying public address systems to the armed forces. I use it here to symbolically suggest the importance of the verdict in the *McCormack* case in spreading popular awareness of the hazard posed by the Gene Autry cowboy suit.

25. *\$64,500 Awarded in “Cowboy Suit” Death From Fire*, ATLANTA CONST., Jan. 22, 1948, at 19; *\$64,500 Award in Boy’s Fire Death*, DES MOINES REG., Jan. 22, 1948, at 1; *Award \$64,500 In Boy’s Death*, DETROIT FREE PRESS, Jan. 22, 1948, at 3; *64,500 Awarded Father for Son’s Fire Death*, SPOKANE-REVIEW, Jan. 22, 1948, at 3; *Flaming Chaps Bring Verdict*, L.A. TIMES, Jan. 22, 1948, at 4.

the street near his family's home in Kansas City. (*The stage curtain goes down as Man 2 continues to read.*) The boy's screams attracted the attention of two neighbor men who rolled him on the ground to extinguish flames on the blazing suit.²⁶

Scene Two

*It is May 1948, a few months after the verdict in the McCormack case was announced. The Honorable John C. Knox, U.S. District Court Judge, Southern District of New York, has consolidated twenty cowboy-suit cases pending before him for a settlement hearing. Counsel for the defendants Du Pont (the manufacturer of the fiber), Woonsocket Falls Mill (the mill that wove the fiber into fabric), E.F. Timme and Son (the mill's agent to the trade), M.A. Henry Co. (the manufacturer of the Gene Autry Official Ranch Outfit), Gene Autry (the cowboy star who had licensed his name for use on the cowboy suit), insurers for Timme and Son, Woonsocket, and the Henry Co., and two retailers (Hecht & Co. and H.L. Green, Inc.) are present. So too are lawyers for the children and their families. In other words, the courtroom is crowded with men arguing over who will pay and how much for each child's injuries or death. The only ones not present are the children and their families.*²⁷

The screen at the back of the stage has the names of the twenty plaintiffs. As each case is being considered, the name lights up. As each case is resolved, the allocation of the damage award is noted on the screen and the total is recorded next to the child's name. On the screen appear the following names: Bates, Lockhart, Cumberledge, Bradley, Warnick, King, Jones, Stultz, Tetla, Gates, Burke, State of Maryland, Berry, McMaster, DiTripani, Wilks, Klinck, Baer, Detrick, Adams.

Although, at points, the courtroom—stage—is crowded with lawyers, during large parts of the scene the stage is empty as conversations (transmitted so the audience can hear them) take place among the lawyers and the judge offstage “in chambers.”

The scene opens on a courtroom crowded with lawyers.

26. *Boy Burned in Bonfire, Screams of Scott Timberlake, 5, Summon Aid, Neighbors Extinguish Flames in Victim's Cowboy Suit After He Rides Through Embers on Tricycle*, KANSAS CITY STAR, Apr. 4, 1948, at 3A.

27. Stenographer's Minutes, *Johnson v. M.A. Henry Co., Inc.*, Civ. No. 35-454 (S.D.N.Y. 1948) (on file with Nat'l Archives & Records Admin., N.Y.C. NY). The following cases were consolidated with *Johnson* for the purposes of this hearing: Civ. No. 43-669 (Bates); Civ. No. 42-201 (Lockhart); Civ. No. 38-280 (Cumberledge); Civ. No. 38-282 (Bradley); Civ. No. 38-281 (Warnick); Civ. No. 40-35 (King); Civ. No. 40-357 (Jones); Civ. No. 40-36 (Stultz); Civ. No. 43-633 (Tetla); Civ. No. 43-569 (Gates); Civ. No. 44-588 (Burke); Civ. No. 44-428 (State of Maryland); Civ. No. 43-660 (Berry); Civ. No. 40-710 (McMaster); Civ. No. 35-386 (DiTripani); Civ. No. 36-249 (Wilks); Civ. No. 40-402 (Klinck); Civ. No. 40-30 (Baer); Civ. No. 39-558 (Detrick); Civ. No. 34-759 (Adams). I have drawn this scene from the first two days of the proceedings: May 17, 1948, and May 18, 1948.

MR. BUTLER (*plaintiffs' counsel for Warnick, Bradley, King, Stultz, Jones, Burke, State of Maryland, Tetla, Wilks, DiTrapini, Cumberledge*): In these cases would it be possible to have a stipulation on the record as to the amount of money that each defendant is to pay?

MR. HAYES (*defendant's counsel for Henry Co.*): No, here is the reason for it. We have, as your Honor knows, a certain amount of money available. So that you see these plaintiffs in all these cases may have a certain interest.

MR. MARTIN (*defendant's counsel for retailer Hecht*): The Wilks case is settled.

THE COURT (*Judge Knox*): Put it on the record.

MR. BUTLER: The amount of the Wilks settlement is \$3,600.²⁸ He sued individually and as administrator, and to be allocated \$600 to him individually and \$3,000 to him as administrator. Our retainer was \$1,200; that is one-third. The contributions would be M. A. Henry Co., Inc., \$1,000, the Hecht Company \$1,000, and E. F. Timme & Son \$1,600 – E. F. Timme & Son and Woonsocket Falls Mill \$1,600. They pay that together.

MR. MARTIN: That brings the Cumberledge case next.

MR. BUTLER: We will pass over it for a moment and take the Gates case. The amount of the settlement was \$15,000 and we recommend that \$3,000 be paid to Mrs. Gates and \$12,000 for the boy. The fee is one-third of that. The contributions would be: M. A. Henry & Co., Inc., \$1,000; Gene Autry, \$500; Hecht & Company \$4,500; E. F. Timme & Son and Woonsocket Falls Mill \$9,000.

THE COURT: Is that satisfactory to all the defendants? (*The lawyers nod signaling their agreement.*)

MR. BUTLER: Can we take the Tetla case. This is settled. The amount of the settlement is \$8,500. The allocation by checks is as follows: To the order of Walter Tetla and O'Connell and Butler by the first group -- M. A. Henry Co., Inc., Gene Autry and Peerless Manufacturing Company -- \$2,000; by E. F. Timme & Son and Woonsocket Falls Mill \$2,000; and to the order of the guardian of the infant, who will be Walter Tetla, by M. A. Henry Co., Inc., Gene Autry and Peerless

28. Willie B. Wilks Jr. was one of those who died from his injuries. He lived for several months after he was injured, never leaving the hospital. It is important to note that those who died received a fraction of the settlement amount agreed to in cases of children who lived.

Manufacturing Co., \$2,250, and E. F. Timme & Son and Woonsocket Falls Mill, \$2,250.

THE COURT: Are there any other cases that are settled?

MR. BUTLER: The amount of the settlement in the Cumberledge case is \$11,000, allocated as follows: \$8,300 to the infant and \$2,700 to the father. The attorney's fee is one-third or \$3,666.66. The contributions will be: by Hecht & Company, \$3,333.33; by M. A. Henry Co., Inc. \$1,000. I want to ask a question, is Peerless in the Cumberledge case?

MR. HAYES: Peerless is.

MR. BUTLER: Then add to M. A. Henry Co., Inc., the Peerless Manufacturing Company, \$1,000. E. F. Timme & Son and Woonsocket Falls Mill \$6,166.67, Gene Autry \$500. A total of \$11,000.

THE COURT: How about the Bradley case?

MR. BUTLER: May I tell you about the Autry situation. I am going to settle seven cases with Autry for a certain amount. I have allocated Autry to pay \$2,500 in the Bradley case. The reason I make that statement is that I want Mr. William Martin²⁹ right over there to know, representing Autry, he is not setting any precedent by that allocation on my part. He is buying releases in a certain number of cases for a certain amount of money, and that is true.

THE COURT: Shall we mark the Bradley case settled, then?

MR. MARTIN: No, it is not that easy. \$500 from Henry, \$2,500 from Autry, that leaves \$2,500 against the \$60,000 demanded. Now Woonsocket Falls Mills \$25,000 and we offered \$15,000 against them. We will go one for their two. I have tried to go up to \$19,000, but cannot pay any more than one to their two. If they want to pay 38 I will pay 19, but as it stands now against the 30 all I can say is 15.

MR. BUTLER: That reduces the amount of settlement to the point where I have no authority. The judge in Washington said he would approve \$60,000 but would not approve anything less.

29. There are two Mr. Martins in this scene: Mr. John C. Martin, counsel for the retailer Hecht & Company and one of the actors in the scene as dramatized, and Mr. William Martin, counsel for Gene Autry, referred to here by Mr. Butler, but who is otherwise not part of the scene as dramatized.

MR. MARTIN: I cannot do any more than that.

THE COURT: Any more of these cases to be settled this morning?

MR. CATALANO (*plaintiffs' counsel for Adams, McMaster, Berry, and Lockhart*): Now the next case is the Berry case. It is being settled for \$25,000 and the contributions in that are, \$10,000 from Henry and \$15,000 from Timme and Woonsocket. The third case is the McMaster case which is being settled for \$30,000. That is \$18,000 from Woonsocket Falls Mill and E. F. Timme & Son, and \$12,000 from M. A. Henry Co., Inc. We have one other case, your Honor, the Adam case, and we have had some discussions about it but have not as yet reached a definite figure.

THE COURT: Is there anybody else has a case to be settled?

MR. FRIEDMAN (*plaintiff's counsel for Baer*): We have one, the Baer case, settled for \$10,500. The contributions are: \$5,000 from M. A. Henry Co., Inc., \$5,000 from E. F. Timme & Son and Woonsocket Falls Mill together, and \$500 from Autry.

THE COURT: Any others? I will take a recess for a little while and you gentlemen see if you can settle some more of these.

(Lights dim on the stage. The judge looks down at the papers before him. The lawyers walk to the sides of the stage and huddle quietly among themselves in small clusters. Then the lights are brought back up. The judge is once again engaged and presiding and the lawyers are back center stage speaking to him.)

MR. BUTLER: If we could discuss them with you I am sure that in at least one or two of these cases there would be a settlement.

THE COURT: Which ones?

MR. BUTLER: One of them is the Bradley case. As to the Stultz case, they have been discussing it and I have been waiting for an answer.

THE COURT: You are only \$1,000 apart?

MR. BUTLER: That seems to be it.

THE COURT: Is there anybody else near a settlement? What about Johnson against Henry? How about Adams against Henry? How about the Bradley case, is that to be tried? Do you think it would serve any purpose to have some more talk about these cases this afternoon? Can you get together?

MR. MCCANN (*defendants' counsel for E.F. Timme & Son and Woonsocket Falls Mill*): I would say looking at these you may be able to settle five or six more.

MR. BUTLER: Perhaps if we can go into chambers first it would be better.

(The lawyers follow the judge "out" of the courtroom. The audience then hears the discussion that follows "in chambers" from offstage.)

MR. BUTLER: The amount of the settlement – and I might say at the beginning that I have to get the O. K. of Mrs. Bradley to the reduction of this settlement to \$58,000, because the figure was \$60,000 of which \$10,000 was for her and \$50,000 for the boy, and on the basis of \$58,000 the payments are to be made as follows: by Timme and Woonsocket, \$34,000; by Hecht, \$21,000; by Henry and Peerless, \$500; and by Autry, \$2,500; total \$58,000.

(The audience then hears muted voices as the lawyers reach agreement with the court on settlement of the Bradley case, but the discussion is "off the record" signified here by the audience being able to hear voices but unable to distinguish what's being said.)

MR. MCCANN: On the Warnick and the State of Maryland cases. Mr. Hayes said he would talk to his home office and let me know just what they would pay in each of those cases.

MR. HAYES (*defendant's counsel for M.A. Henry Co.*): That is a different policy period, Judge, and that is why there is a question on that.

(The judge and lawyers return to "the courtroom"—the stage.)

THE COURT: Gentlemen, the case of Bradley against Autry has been settled. There is hope possibly that one or two other cases may be settled. The parties have tomorrow morning at their disposal. The remaining cases are adjourned until two o'clock tomorrow afternoon. *(Lights fade on stage. As they do, a child in a Gene Autry cowboy suit rides a tricycle across the stage. He is playing. Although he is crossing the courtroom, the actors do not see him. The child looks at them curiously, but proceeds on his way. Only the audience is sure they have seen the child. The lights then come back up to signify resumption of trial the next day.)*

THE COURT: All right, gentlemen, is there anything new overnight?

MR. BUTLER: I haven't heard from them but I think there are about four cases that I suggested we will take up. I think we can settle some of them. Possibly if we take them up one at a time that would be the simplest way.

THE COURT: What is that, the Warnick case?

MR. BUTLER: I would rather hold that until the last. The first is the Stultz case. The representatives of H. L. Green are here, too. Perhaps if we can go into chambers first it would be better.

THE COURT: All right. *(The lawyers follow the judge offstage, leaving the stage again empty. The audience hears discussion "in chambers" from offstage.)*

MR. BUTLER: H. L. Green is the retailer. There isn't any money in Henry's policy. There is a small amount of money available from Gene Autry. So it comes down to the question of H. L. Green and Timme and Woonsocket again.

THE COURT: Was this boy pretty badly burned?

MR. BUTLER: Yes. He had to have another grafting operation in the back of both legs. He was burned from below the groin down to about, oh, six inches from the bottom of his foot. He does have to go back for a skin graft operation on the back of his leg which didn't take and they have broken a couple of times.

MR. MCCANN: Mr. Butler, I think up at the Bench yesterday morning you discussed an amount, didn't you, on the case?

MR. BUTLER: \$15,000 was the amount. I had come down from eighteen to fifteen.

THE COURT: That sounds like a reasonable amount of money. What did the special damages amount to?

MR. GALLOWAY *(of counsel for plaintiffs Warnick, Bradley, King, Stultz, Jones, Burke, State of Maryland, Tetla, Wilks, DiTrapani, Cumberledge; Mr. Butler is counsel)*: \$1,250, Judge, and I think there is an additional medical there. He was 18 weeks consecutively in the hospital. He was in a wheelchair for a year.

THE COURT: How old a boy was he?

MR. GALLOWAY: The boy was six and a half at the time of the accident.

THE COURT: That seems like a very reasonable figure.

MR. ROGERSON (*defendants' insurance adjuster Travelers Insurance covering Timme & Son and Woonsocket*): I am perfectly willing to pay a very good share of that, but I don't feel that I should assume responsibility for 90 per cent of it.

MR. BUTLER: To be very practical on it, I understand the limit that you said H. L. Green would go would be \$3,000 if the settlement was \$15,000, and you said you would go nine, and there is about five hundred of Autry money available, and there we are at twelve-five, and that I cannot take in conscience. I think you both should come up.

THE COURT: What does H. L. Green say?

MR. KEANE (*defendant's counsel for retailer H.L. Green*): That is their top figure and we are through. We won't offer any more.

MR. ROGERSON: Is that your top figure, Mr. Keane. Tell me your top figure and I will tell you what we will do.

MR. KEANE: The top figure is 3500.

MR. ROGERSON: I will add a little something. I will pay ninety-five if they pay forty-five. Will you go to forty-five?

MR. KEANE: No, I wouldn't.

(The child in a Gene Autry cowboy suit rides onto the empty stage on his tricycle. He stops for a moment, gets off his tricycle and explores the courtroom including the judge's bench and then looks out at the audience, as if to puzzle "what are you doing here" but says nothing, gets back on his tricycle and pedals across the stage. All the while the dickering over settlement amounts continues in chambers.)

THE COURT: I don't know what the facts may be as to H. L. Green & Company but I should think you are getting off very lightly. It is going to cost the Green Company a thousand dollars to try it.

MR. BUTLER: You can try all the cases if you want, but I can assure you of this: We bring this kid into the court we show the burns, and if we get a verdict it is not going to be \$15,000. And I will say the same thing to you as I said to Hecht: I will demonstrate that it was negligence on your part that you even sold the suit. Assuming I prove that, then you are not going to have any claim over there and you will be liable and I will collect from you only. It is only because I want to save the money from the others and not because I have anything against you or H. L. Green, but the proper way for us to handle it is to take the money that isn't in any other case.

THE COURT: Well, I don't think anybody ought to go to trial for a thousand dollars. Will you split it?

MR. MCCANN (*defendants' counsel for E.F. Timme & Son and Woonsocket Falls Mill*): You see, the trouble in our splitting that, Judge, is that you work your pattern out and you've got us paying ten thousand and you got them paying four thousand and, you see, our money isn't going to hold out for these other cases.

MR. BUTLER: Judge, I can settle this, unless these fellows are absolutely unreasonable. I will make them a proposition. He wants to save \$500 for another case. Let him save \$250. It's just as good as \$500. I can get another two hundred and fifty out of Autry. You give me two hundred and fifty, and you give me two hundred and fifty. If any of you say no, you ought to be ashamed of yourselves.

(As the judge and lawyers return to the courtroom—the stage—as child pedals off the other side.)

MR. MCCANN: The Stultz case is settled.

MR. BUTLER: The amount of the settlement in the Stultz case is \$15,000. The contributions are to be as follows: By Henry and Peerless \$750; Autry, \$750; Green, \$3,750; and Travelers, \$9,750.

THE COURT: What is the next case that has some hope of settlement in it?

MR. BUTLER: The Burke case.

THE COURT: Do you want to step inside on that?

(The lawyers follow the judge offstage for another discussion "in chambers." Their conversation is again piped to the audience from offstage. The courtroom—the stage—sits empty.)

THE COURT: What are the facts in this case?

MR. BUTLER: There is no retailer in this case. The suit was bought directly from Henry. This is a different insurance coverage. It was in 1946 that the accident happened. The boy was 115 days in the hospital. I think he had the same type of injuries but much more severe than the one we have just settled. We originally asked twenty-seven thousand, five hundred, and we have cut that down to twenty-five.

MR. MCCANN: Henry is the man who purchased the material from us and manufactured the suits and sold them to the stores, who in turn sold them to the people. In these other cases we have been discussing we all know that Henry's policy has been practically exhausted. We have a different situation here now. We have another company with another policy. I think any increase should really come from Henry in this case in the interests of fairness.

MR. WATKINS (*defendants' insurance adjuster for Standard Insurance covering Henry and Peerless*): We come into this picture, as far as coverage is concerned, immediately after the Employers Mutual, and substantially we are in the same position as they are. This is not an endless chain as far as the money is concerned. We have a number of suits in this policy period and there is just so much money. I feel that we know about how much we want to spend per case, including this one. There have been some other settlements in this period and there are other cases and we are not anxious to go ahead and deplete it among one or two particular cases.

MR. BUTLER: It is just another one of those unreasonable situations, Judge. I have no way of getting contributions from any other source because Autry is not available in this. He is not even a party to the action, although we named him, but he comes into New York only once a year in October, and we haven't been able to serve him.

MR. WATKINS: Judge, I settled a case for \$10,000 and it was a worse case than this is.

THE COURT: Is this a photo of the boy?

MR. BUTLER: Yes.

THE COURT (*holding and looking at photo of a burned boy*): A kid that is scarred up something like that, and he is going to get married some day and the effect of those scars on his wife is something to take into account, and his own humiliation from it.

(*Lights go down on stage and voices fade as discussion in chambers obviously continues.*)

Scene Three

It is late 1948. The defendants in the McCormack case—the M.A. Henry Company, manufacturer of the cowboy suit, E.F. Timme & Son, the agent for the mill, and Woonsocket Falls Mill, the mill that wove the fiber into the fluffy, fur-like fabric, have appealed the verdict against them. The defendants/appellants' and plaintiff/respondent's lawyers appear before the New York State Court, Appellate Division, First Department, New York City to present their arguments to the court.³⁰ Each lawyer stands at a podium facing and speaking to the audience.

MICHAEL A. HAYES: Michael A. Hayes, Counsel for M. A. Henry Co., Inc. No one will claim that the “Gene Autry” cowboy suit manufactured by Henry Co. was “inherently” dangerous in the sense in which that term has heretofore been used or that, when used in its normal or intended manner, it possessed the potentialities of danger of a defective automobile wheel or a defectively manufactured coffee urn. On the contrary, it made no representations that this cowboy suit was anything other than what it actually was, that is, a novelty costume or play suit designed to be worn by children while engaged in the popular pastime of “playing cowboy.” (*As he speaks, boy dressed in Gene Autry cowboy suit rides his tricycle onto the stage. He stops, watches, and listens. His presence is not intended to be humorous, but rather is to keep children at play in the mind of the audience.*) It was never intended to be brought into intimate contact with fire and this should have been as obvious to the plaintiff as it was to Henry Co. Many toys and practically all articles of wearing apparel are inflammable and will readily ignite if brought into intimate contact with fire. While some will ignite more readily and burn more completely than others, the difference is merely one of degree. It is doubtful whether it was any more inflammable than most of the other fluffy or flimsy fabrics which have long been extensively used in the manufacture of other types of children’s play suits and masquerade costumes – certainly no more so than the fluffy cotton material

30. There were oral arguments before the appellate division, but no record of those arguments was retained. As is often the case, the same lawyer did not necessarily both write the brief and give the oral argument. For M.A. Henry Co., brief by Michael A. Hayes and argument by William F. McNulty; for McCormack, brief and argument by Elliot B. Paley; for Timme & Son and Woonsocket Falls Mill, brief by Galli & Locker (Frederick J. Locker) and Patrick J. McCann and argument by Patrick E. Gibbons. Because I have staged excerpts from the briefs filed with the appellate court, I have the counsel who wrote the briefs presenting the argument.

commonly used on Santa Claus costumes. In fact it is doubtful whether it was any more inflammable than the flimsy netting generally used for communion and confirmation veils and many of the party dresses manufactured for little girls. (*Losing interest, the boy on the tricycle serpentines through the lawyers and off the stage.*) Surely, the plaintiff will not claim that, because these articles are highly inflammable, they should be placed in the same category as poisons and explosives or even in the category of products which, while they may not be “inherently” dangerous, are nevertheless sources of “probable” danger if negligently manufactured or improperly marketed. It will be observed that the very fabric involved in this action has long been extensively used as the outer covering for the teddy bears and the various other fluffy types of stuffed animals which are manufactured especially for children. If the use of this fabric on cowboy suits was a source of “probable” danger to the wearer, it can with equal propriety be argued that the same is true of many other inflammable materials which have long been widely used not only in the manufacture of children’s toys but in the manufacture of many articles of wearing apparel designed for children. Although all of these materials have been extensively used for many years, accidents caused by their being ignited have been so infrequent as to be practically negligible. It seems trite to say that cowboy suits and other toys made of inflammable materials are not in the usual course of events brought into contact with fire. Practically all wearing apparel is inflammable, yet no one would seriously claim that the manufacturer of a brushed wool or angora sweater or the manufacturer of a communion or confirmation veil is negligent in not warning prospective purchasers that these products are extremely inflammable. The plain truth of the matter is that children are not supposed to play with matches or fire.³¹

ELLIOT B. PALEY: Elliot B. Paley, Counsel for James McCormack individually and as administrator for Thomas McCormack. Fire and flame are a necessary, common, and usual part of our present civilization. We presume, and experience has taught us, that clothing is manufactured in such a way as to cause a minimum of danger from fire. Where clothing is manufactured for children, even more care is required. The “Gene Autry” cowboy suit was a masquerade costume intended to be used by children at play in simulation of the activities of cowboys. Children in their usual activities are subject to the danger of fire. Especially is this so where, as in the case at bar, the nature of a costume subjects it to the danger of fire more than is usual. In simulating the activities of a cowboy, a child foreseeably may play around a campfire -- as “Gene Autry” does in his moving pictures -- or about a bonfire in city streets. It is good husbandry in the country districts to burn grass at certain seasons of the year and in all districts to burn leaves in the Autumn. A

31. Brief for Defendant-Appellant M.A. Henry Co., Inc. at 47–49, record in *McCormack v. M.A. Henry Co., Inc.*, 88 N.Y.S.2d 890 (App. Div. 1949) (on file at the New York State Library).

child can come in contact with fire on the ground, or burning leaves, or cinders, or burning rubbish or other burning particles blown about by a wind. A child too, may light a match to look for something and the match may break and splutter or sparkle, or a child in his curious way may play with matches. These dangers are always present. They are recognizable dangers. Parents stay at home with young children so that they can be available if the child gets himself into a child's difficulties; so that they can minimize the danger and harm. Where, however, the material of a child's clothing is made in such a manner that once it catches aflame, it will render the child beyond the possibility of any aid then the precautions taken by parents can be of no avail and the dangers cannot be anticipated. Where clothing such as the "Gene Autry" cowboy suit once takes fire, it matters little whether the parent is in the house or out of the house. No aid can be of consequence. The best illustration of that situation is the case now under consideration. Aid in the form of a parent and a grown boy was available. Aid was given instantly. A hospital was right around the corner and despite all of this, the chaps to the cowboy suit were completely consumed and the boy's life snuffed out after 126 days of horrifying living. For the Appellants to claim that this was not a foreseeable danger is to stretch the imagination to its limit. We do not think it amiss to state that of our own knowledge well over fifty cases have occurred where children have been burned either seriously or fatally while wearing the "Gene Autry" cowboy suit. It is our considered opinion, and we are sure that the Court in its knowledge of normal probabilities will agree, that a fabric such as this is inherently dangerous to life and limb.³²

FREDERICK J. LOCKER: Frederick J. Locker on behalf of Timme & Son and Woonsocket Falls Mill. This fabric was made from viscose rayon threads, a commercial product which has been in common use for over forty years. It was not treated in any way by either Woonsocket Falls Mill or by Timme so as to change its nature. The plaintiff's expert testified that rayon, like cotton, has a cellulose base, and, like cotton, is inflammable. Fuzzy, high pile rayon, just as fuzzy high pile cotton, is more inflammable than the flat variety. The fuzziness is, of course, obvious to any one who looks at the material. That it is a quality which renders the material more inflammable is a matter of common knowledge; but it is not explosive, nor will it spontaneously ignite. There is no need to notify anybody of ordinary common sense that fuzzy rayon or fuzzy cotton will burn rapidly if a match is applied to it. There was nothing hidden or latent about the qualities of the material. They were not selling Mr. Henry an article which was defective, nor an article which in its normal operation was an instrument of destruction. They were selling an article which had been in common and safe use for many years,

32. Brief for Plaintiff-Respondent James McCormack individually and as administrator for Thomas McCormack at 19–23, record in McCormack, *supra* note 31.

whose qualities were apparent to anybody who looked at it.³³

Scene Four

Legal Department, Corporate Offices of E.I. du Pont de Nemours and Company, Wilmington, Delaware. Corporate secretary (white female) takes dictation from lawyer (white male dressed in a suit) in the Legal Department. The reports from the legal department to the executive committee relating to the Gene Autry cowboy suit litigation span a seven-year period from February 16, 1948, to February 11, 1955.³⁴ On the left side of the stage is a figure (dressed in black to suggest that s(he) is not really present) with a large calendar from the period showing the month of the report. Her role is to help the audience see time passing. She has to flip through multiple pages to get to the correct month/year for each report. On the right side of the stage is another figure, also dressed in black to suggest to the audience that this calculation is happening in the heads of those on stage and in the heads of the audience, with a large whiteboard with a graph recording the number of suits pending in which Du Pont is named as a defendant and the potential liability climbing and then going down to zero. In separate boxes, the figure notes the total number of cases naming Du Pont as a defendant, the total potential liability, the number of cases settled or otherwise disposed of with no contribution by Du Pont, and the tally of cases pending. In this way, there is both a graph rising and falling and a numerical representation of the potential liability. The only one speaking through the entire scene is the lawyer dictating his semiannual report to the Executive Committee.

As the lawyer reads, the audience sees again the boy on the tricycle dressed in his Gene Autry cowboy suit. Initially, the child casts only a small shadow across the stage. As the number of cases and the potential liability climb, the shadow looms larger completely casting the lawyer and the stage in shadow. As the number of cases and the potential liability decrease, the shadow gets smaller and smaller, until by the end of the scene, there is only the child on the tricycle casting no shadow at all. Projected on screen at the back of the stage is an interior view of corporate law offices circa late 1940s/early 1950s overlaying a Chandlersque image of the Du Pont corporate structure.³⁵

There is a shift in the lawyer's emotion over the course of the scene. He is, throughout, professional, corporate, an in-house lawyer reporting on work done by Du Pont's hired counsel, the prestigious New York firm Cravath, Swaine & Moore. At the beginning of the scene, his tone and expression is matter-of-fact; these lawsuits were something to be reported, but not a cause of major concern. As the number of pending cases mounts, an edge enters his voice, but as the scene continues there is growing confidence in his tone as he is able to report that although many

33. Brief on Behalf of Appellants-Respondents E.F. Timme & Son and Woonsocket Falls Mill at 24–26, record in *McCormack*, *supra* note 31.

34. This scene is developed from and relies on the annual and semiannual reports of the Legal Department to the Executive Committee of Du Pont relating to the cowboy suit litigation. Reports to the Executive Committee (on file with the Hagley Museum & Library, Wilmington, Del., Du Pont Collection, Accession 1729, Series 7, Box 37, Folders 1943–1947, 1948–1949, 1950–1953, 1953–1954, 1955–1957).

35. See ALFRED D. CHANDLER, JR. & STEPHEN SALSURBY, *PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION* 342 chart 5 (Harper & Row 1971).

lawsuits remain, the number of new cases is declining and all suits are being settled with no contribution by Du Pont. And by the end, he takes clear satisfaction in having closed the books quite successfully on the whole matter.

LAWYER: Semi-Annual Report, February 16, 1948, To: Executive Committee, From: Legal Department. *McCarthy v. E. I. du Pont de Nemours and Company et al. Bates v. E. I. du Pont de Nemours and Company et al.* These actions pending in the New York Supreme Court, Kings County, and the second pending in the United States District Court for the Southern District of New York, are personal injury actions instituted against Gene Autry and other defendants, claiming \$250,000 each for burns sustained by infant plaintiffs when their "Official Gene Autry Cowboy Suits" caught fire causing the injuries complained of. The chaps of said cowboy suits were made of du Pont rayon piling. Extension of time within which to file answer has been entered in order that we may properly investigate the facts and background of the alleged injuries.

Semi-Annual Report, July 28, 1948, To: Executive Committee, From: Legal Department. The Company has been named as a party defendant in a total of 37 cases brought in New York alleging burns sustained by infants while wearing "Official Gene Autry Cowboy Suits." The other defendants have settled 18 of these actions without any contribution by this Company.

Semi-Annual Report, February 11, 1949, To: Executive Committee, From: Legal Department. The following cowboy suits were filed against the Company since our last report: In addition to 19 unsettled cases, the Company has been named as a party defendant in 14 new cases alleging burns sustained by infants while wearing "Official Gene Autry Cowboy Suits." Four of the new cases have been settled without any contribution by this Company and one has been discontinued with prejudice, which leaves 28 cases pending. Total liability claimed in the pending cases is \$4,817,621.

Semi-Annual Report, August 12, 1949, To: Executive Committee, From: Legal Department. The Company has been named as a party defendant in six new cases in New York alleging burns sustained by infants while wearing "Official Gene Autry Cowboy Suits" having chaps of rayon piling. Six cases pending from our last report have been settled – in one case the Court granted our Motion for Dismissal and directed a verdict in our favor, and settlement of the other five required no contribution by this Company. This leaves 28 cases now pending for claims totaling \$5,100,570.

Semi-Annual Report, February 10, 1950, To: Executive Committee, From: Legal Department. The Company has been named a party defendant in 6 new cases in New York alleging burns sustained by infants while wearing "Official Gene Autry Cowboy Suits" having chaps of rayon piling. Six cases pending since our last report have been settled with no contribution by the Company, one has been discontinued, and one dismissed on our motion for a directed verdict. This

leaves 25 cases presently pending for claims totaling \$5,583,070. ³⁶ (*Figure in black keeping tally of cases looks in puzzlement at lawyer. Her tally shows twenty-six pending cases. She shrugs her shoulders, wipes out the number twenty-six with her arm and writes the number twenty-five on the board showing pending cases.*)

Semi-Annual Report, August 11, 1950, To: Executive Committee, From: Legal Department. In conformity with instructions issued by your Committee on March 22, 1950, the report is confined to items considered to be of major importance. The Company has been named a party defendant in five new cases in New York alleging burns sustained by infants while wearing “Official Gene Autry Cowboy Suits” having chaps of rayon piling. Six cases pending from the last report have been settled with no contribution by du Pont, leaving 24 cases presently pending for claims totaling \$4,463,070.

Semi-Annual Report, February 16, 1951, To: Executive Committee, From: Legal Department. The Company was named a party defendant in five new cases in New York alleging burns sustained by infants while wearing “Official Gene Autry Cowboy Suits” with chaps of rayon piling. Thirteen cases pending from 1949 were settled with no contribution by du Pont, leaving 17 cases presently pending for claims totaling \$3,140,000. (*Figure in black again looks with puzzlement at lawyer. Her tally shows sixteen pending cases, but the difference seems to recover the earlier case that had dropped out, so she once again looks out at audience, shrugs her shoulders, wipes out the number sixteen denoting pending cases with her arm, and writes in the number seventeen.*)

Semi-Annual Report, August 10, 1951, To: Executive Committee, From: Legal Department. The Company was named a party defendant in one new case alleging burns sustained by infants while wearing “Official Gene Autry Cowboy Suits” having chaps of rayon piling. Three cases pending from the last report have been settled, making a total of 53 cases disposed of to date with no contribution by du Pont, and leaving fifteen cases presently pending for claims totaling \$2,690,000. (*Figure in black looks at lawyer, then back at her tally. Begins to count on her fingers. Then simply gives in, erasing the number fifty-nine and replacing it with fifty-three.*)

Annual Report, February 12, 1952, To: Executive Committee, From: Legal Department. The Company was named a party defendant in one new case in New York alleging burns sustained by an infant while wearing “Official Gene Autry Cowboy Suits” with chaps of rayon piling. Ten cases pending from 1950 were settled, making a total of sixty such cases disposed of to date with no contribution by du Pont, leaving eight cases presently pending for claims totaling \$1,305,000. (*Again the figure in black looks at audience in puzzlement. Her tally shows six cases pending and sixty-three cases settled or otherwise disposed of with no contribution by Du Pont. But once*

36. As the reader will see, many elements of the Legal Department’s reports do not “add up.” I deal with this in the scene by noting the discrepancies through the figure in black who is keeping a tally of outstanding potential liability, number of cases pending in which Du Pont is named as a defendant, and number of cases resolved. This enables the audience to see where the numbers do not fully match up.

again, shrugging, she wipes out the six with her arm and writes in its place the number eight for pending suits and wipes out the sixty-three and writes in sixty cases settled or otherwise disposed of with no contribution by Du Pont.)

Semi-Annual Report, August 6, 1952, To: Executive Committee, From: Legal Department. No new suits have been instituted against the Company for alleged burns while wearing "Official Gene Autry Cowboy Suits." One case pending from the last report has been settled, making a total of sixty-one cases disposed of to date with no contribution by du Pont, leaving seven cases presently pending for claims totaling \$1,195,000.

Annual Report, February 13, 1953, To: Executive Committee, From: Legal Department. No new cases have been instituted against the Company for alleged burns while wearing "Official Gene Autry Cowboy Suits." Three cases pending from 1951 were settled, making a total of 63 cases disposed of to date with no contribution by du Pont, leaving five cases presently pending for claims totaling \$992,500. *(The figure in black puts her hands on her hips and looks hard at the lawyer, then at the audience. Her tally, based on his reports, shows sixty-four cases settled or otherwise disposed of and four cases pending. But once again, she follows his report to the Executive Committee. She wipes out the number sixty-four and replaces it with sixty-three and wipes out the number four and, following his report to the Executive Committee, writes in a five.)*

Semi-Annual Report, August 6, 1953, To: Executive Committee, From: Legal Department. One new suit was instituted against the Company for alleged burns while wearing "Official Gene Autry Cowboy Suits." One case pending from the last report has been settled, making a total of 64 cases disposed of to date with no contribution by du Pont, leaving five cases presently pending for claims totaling \$697,500.

Annual Report, February 11, 1954, To: Executive Committee, From: Legal Department. The Company was named one of the defendants in a new case alleging burns while wearing "Official Gene Autry Cowboy Suits." Three cases pending from the last report have been settled, making a total of 66 cases disposed of to date with no contribution by du Pont, leaving 3 cases pending for claims totaling \$440,000. *(The figure in black totally disgusted and skeptical at this point, simply writes a "6" over the "7" in the number of cases pending so that it reads sixty-six cases settled or otherwise disposed of with no contribution by Du Pont.)*

Annual Report, February 11, 1955, To: Executive Committee, From: Legal Department. Three cases pending from the last report alleging burns while wearing "Official Gene Autry Cowboy Suits" were settled. This is the last of these cases and makes a total of sixty-nine cases disposed of with no contribution by du Pont.³⁷

37. By my calculation, based on the reports from the Legal Department to the Executive Committee, Du Pont was named as a defendant in seventy-seven cases and settled or otherwise resolved eighty cases with no contribution. The numbers, as this suggests, do not quite match up. The

ACT II

Scene One

The scene opens in May 1956 at the offices of the Riegel Textile Corporation, moving between its corporate offices in New York and manufacturing and research facilities in Ware Shoals, South Carolina, and ends in October 1956 at the offices of the National Cotton Council of America (New York, New York). The stage is divided into four unconnected corporate offices. In each a man (all the corporate actors throughout the play are white males) sits at a desk otherwise busy with reading and writing. The men speak to each other in the scene only through their correspondence; their offices are, in fact, in different locations. Their tone throughout is businesslike. They are speaking candidly to each other. They do not expect or anticipate that their words will ever be part of a legal proceeding against the company or the cotton industry. As the scene progresses, newspaper and magazine advertisements from the mid-1950s for cotton flannelette pajamas are projected on the screen at the back of the stage.³⁸

(First office.)

C.H. EDMONSTON *(Busy reading a letter when scene opens; speaking into a Dictaphone begins to dictate response.):* May 1, 1956, To Mr. G. H. Norton, Claims Supervisor, Pennsylvania Manufacturers' Association Casualty Insurance Co., Wilkes-Barre, PA. Dear Mr. Norton: I have been out of town for the last 10 days and your letter of April 20 has just come to my attention. New paragraph. You advised that you are the liability insurance carrier for the Katz Underwear Company of Honesdale, Pennsylvania and that you have eight claims pending, which are all for damages sustained by persons wearing garments made by the Katz Underwear Company. You further state that the fabric in the garments was manufactured by several firms, of which Riegel Textile is one. You suggest that we notify our liability carrier and request that they contact you to go over the cases. New paragraph. Before notifying our liability carrier of these potential claims, we wish to determine, if possible, whether or not any of the garments in question were made from Riegel fabrics. Very truly yours, Riegel Textile Corporation, C. H. Edmonston, Insurance Manager. There needs to be a cc on this one to Reid and Gardner. *(Returns to writing/reading tasks as his desk.)*

(Second office—more elaborate and larger.)

main point though remains: Du Pont paid nothing in the Gene Autry cowboy suit lawsuits.

38. The correspondence in this scene is taken from documents produced at trial in *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), and incorporated into the record on appeal. *See* Cases and Briefs Minnesota Supreme Court, *Gryc*, 297 N.W.2d 727 (Nos. 49334, 49525) (on file with the Minnesota State Law Library). Although the documents include author/recipient names, they do not all identify what position the author or recipient held. Their identities were clarified at trial, and I have relied on the Transcript of Proceedings to identify them. *See* Transcript of Proceedings, *Gryc*, 297 N.W.2d 727 (1980) (Nos. 49334, 49525).

G.T. GARDNER (*Senior Riegel executive—Vice-President. He is dressed in a suit; dictating letter to secretary.*): May 2, 1956, Inter-Departmental Correspondence, To Mr. Linton Reynolds – Ware Shoals, SC, From G. T. Gardner, Re: Flammability – Liability. I thought you would be interested in the attached letter. To me this indicates we are always sitting on somewhat of a powder keg as regards our Flannelette being so inflammable. (*He returns to silently working at his desk.*)

(Third office.)

L.C. REYNOLDS (*Manager of laboratory, Research and Development Department, Riegel Textile Corporation wearing a white lab coat; speaking into a Dictaphone.*): May 11, 1956, Mr. G. T. Gardner – New York, FLAMMABILITY. This is in regards to your letter of May 2 concerning the above subject. New paragraph. As you well know, there is not available at present any finish that will impart to cotton fabrics durable non-flammability that is practical for application to our suedes and flannelettes. Of course, there are materials which do a very nice job in bringing about flame resistance of cottons, but cost is a large item for both materials and method of application. New paragraph. It is my personal feeling that we should certainly keep up with what is happening in this field for both cotton and rayon, but with so much work being done by other sources which are better equipped than we, it appears that keeping up with them would be our best course. LCR

(Fourth office.)

GEORGE S. BUCK JR. (*Dressed in a suit; dictating letter to secretary.*): October 23, 1956, To Mr. W. R. Bell, President, Association of Cotton Textile Merchants of New York, New York. Dear Ray: About three weeks ago a six year old girl in Washington was fatally burned when she backed into an electric heater. She was wearing a flannel nightgown. About a week ago a four year old boy in Washington died of burns received when his flannel shirt ignited while he was playing around a bonfire. New paragraph. Within the last year the nephew of one of the secretaries of the ACMI's³⁹ Charlotte office died after his flannel pajamas became accidentally ignited. New paragraph. These are just three different incidents that have come to my attention. The point of all this is that there are some flannels which will not meet the requirements of the Flammable Fabrics Act. The testing method upon which that Act is based was modified during the past few years so that all of the flannels and flannelettes which we would consider to have no unusual hazard would pass. As you know, the provisions of the California law and several of the proposed state acts are much more restrictive on flannels and flannelettes, and might require that almost all such fabrics be eliminated or flameproofed. New

39. American Cotton Manufacturers Institute.

paragraph. I am not sure that all of our flannel manufacturers still realize the seriousness of the situation. Some, I believe, feel that the testing method should be changed if it does not pass all types of flannels. I think you can see the danger in that. If all flannels were to be exempted, a great public outcry would eventually result as a result of incidents such as those I cited above. New paragraph. This letter has no particular purpose, except to draw your attention to these facts. Very truly yours, George S. Buck, Jr., Technical Director, National Cotton Council of America

Scene Two

The cowboy suit tragedy had produced outrage and calls for federal legislation. Retailers—who found themselves targets of lawsuits for flammable fabric injuries and deaths—supported the legislation; the Textile Trade, on the other hand, worked hard to limit the legislation’s scope. The Flammable Fabrics Act, passed in 1953, had banned only the most hazardous inflammable fabrics from interstate commerce. Pressure built, spurred by doctors who treated child burn victims and retailers who faced lawsuits from consumers, to expand the coverage of the Act and establish new standards of what makes a fabric dangerously inflammable. The scene opens on hearings on May 4, 1967, in progress before the U.S. Senate Consumer Subcommittee of the Committee on Commerce on two bills to amend the Flammable Fabrics Act. An image of a committee hearing room is projected on the back screen with the cover page of the 1967 senate hearings on the Flammable Fabrics Act Amendments. As the scene progresses, the middle portion of the image of the hearing room fades into background and in its place other images—advertisements, family life, major news events—are projected. Each image continues to project until replaced by the next image.⁴⁰

(Slide: U.S. Senate hearing room with cover page of 1967 senate hearings on Flammable Fabrics Act Amendments)

(The witness enters stage right, takes a seat at a desk with a microphone facing the audience, and begins reading statement.)

MR. HACKES: Mr. Chairman, my name is Peter Hackes.

(Slide: Family photo circa Christmas 1965)

40. This scene is constructed from testimony in the *To Amend the Flammable Fabrics Act; To Increase the Protection Afforded Consumers against Injurious Flammable Fabrics: Hearings on S. 1003 and H.R. 5780 Before the Consumer Subcomm. of the S. Comm. on Commerce, 90th Cong. 57–60 (1967)* [hereinafter *Hearings*] (statements of Peter Hackes, News Correspondent, NBC News, and Abraham B. Bergman, Director of Outpatient Services, Children’s Orthopedic Hospital and Medical Center).

I am employed by the National Broadcasting Co. as a Washington news correspondent. I do not purport to be an expert on fabrics. I am not an expert on fires, medical treatment, or on legislation. But I feel I have become an expert on one family's experience with a burning fabric. And I have come here this morning to appeal to you to press for enactment of the proposed amendments to the Flammable Fabrics Act, which I feel may help prevent the incident which occurred on May 15, 1966. On that date, almost exactly 1 year ago, my daughter Carole became the victim of a flaming piece of cotton. She was 11 years old at the time, a slightly better-than-average student at the National Cathedral School here in Washington, who enjoyed being a pre-teenager.

(Slide: Gemini 9 space launch, huge flames at the base of rocket. Muted in the background of his testimony is the countdown of the launch.)

On the morning of May 15, 1966, I was out of town on assignment to cover a Gemini space flight, Gemini 9. My wife and three children were at home. It was to have been a quiet Sunday because my wife, as it happened, had her right arm in a cast, the result of a fall at home. Carole still hasn't told us what her reason was, but she struck a match, which dropped onto her cotton blouse, which ignited immediately. At first it smoldered, and when she beat at it, it appeared to go out. Momentarily, however, there came a lick of flame—which again looked to be out each time she beat it. But within seconds it had flared up. Carole panicked and ran. My wife, arm in a cast, running after her. The running only served to fan the flames, which produced a sort of shock reaction and shrieks of pain. Finally my wife caught up with the child and managed to wrap her up in a towel. But even the big towel didn't seem to smother the flames, which were doused only when my wife stood the screaming child in a tub and turned on a cold shower. I was spared the original horror of the accident because, as I have said, I was away from home at the time, but I flew back immediately upon receiving an emergency telephone call. The events of May 15, 1966, are seared into the minds of the rest of my family—and especially into Carole's, like the details of a nightmare. A hospital examination showed the flaming blouse had produced second- and third-degree burns over about 15 percent of Carole's body, from a point just above the navel to high on the front of the neck just under the chin. Actually she was lucky at that—there were no burns on her face and her hair did not catch fire.

(Slide: News stories from the weeks and months after the Gemini launch relating to the space program, the civil rights movement, etc.)

Carole spent the next 9 weeks in two hospitals here in Washington. Her stay at Children's Hospital was often accompanied by severe pain because of certain procedures involved in her burn treatment. During that period her door had to be closed at all times. But her screams of pain had little trouble filtering into the hallway during times of burn treatment. She was in isolation against infection. She could be visited only by me and my wife, and then only when we wore hospital gowns and masks. Carole had to have special private nurses 24 hours a day, and later on had the services of a physical therapist. Carole was transferred to George Washington University Hospital at the end of 3 weeks at Children's Hospital, and spent the next 6 weeks there in the care of a plastic surgeon. Through his care—which included the use, among other medications, of an experimental drug still under development—Carole was able to leave the hospital the last week of July 1966. During his treatment the surgeon performed skin graft (sic) covering a large part of Carole's chest. There followed a period of weeks of recovery at home. Carole then returned to school last fall with a little more than half her plastic surgery out of the way. Her neck was—and is—a series of long, tendon-like welts.

(Slide: Magazine and newspaper advertisements of teen girl clothing styles)

Most of the time it looks like raw meat—an angry red color. The surgeon says he plans more plastic surgery to correct this, during the coming summer months. He is hopeful he can rid Carole of much of the disfigurement she carries with her, but as you know, there are no guarantees in this area. Quite naturally Carole is sensitive and embarrassed by her appearance. She wears high-neck clothing whenever possible. Much of her deep scarring, however, is impossible to cover up because of its location. In the course of the last school year Carole's ability to deal with life's problems has been impaired—in some part, we have been told, because of the burn experience. We are advised that boarding at school might help and for a time Carole was a boarding student. Most recently she has begun psychiatric treatment which we have been told will probably continue for some time to come. I must hasten to add that unpleasant as our problems have been, they are almost miniscule compared to the almost unbelievable fabric-burn cases I saw in the hospital and have since become familiar with. The courage with which these victims and their families face this type of tragedy is most remarkable. I am speaking of cases in which children—most of them very young—have been so badly burned that no amount of plastic surgery or time can really restore them. I am speaking of cases in which the mental anguish that so often accompanies a burn will remain a constant companion for many, many years, and possibly for life. Many other parents could tell you tales of suffering from fabric burns far more upsetting than my story. As I said at the outset, I am not an expert in these matters.

(Slide: Newswire headlines of stories of children burned in flammable fabric incidents)

Until Carole's unfortunate accident the only clothing burn incidents I had run across were those that appeared occasionally on the news wire. I had no idea how easily some clothing can ignite, nor how serious can be the consequences. As an average consumer with no background in this area,

(Slide: News headlines following passage of the Flammable Fabrics Act of 1953)

I assumed that under the law I was protected against any harmful item, be it an explosive toy, a poisoned food, or a hazardous electrical fixture. Having had only a vague knowledge of the fact that there was such a thing as a Flammable Fabrics Act, I took the remains of Carole's burned blouse to have it tested.

(Slide: Language from the 1953 Flammable Fabrics Act regarding the standard for determining whether a fabric violated the terms of the Act along with an image of the testing device)

I was told that the cotton fabric from which it was made lies within the burning-time standards. Nothing, in other words, could be done under the existing law to prevent another Carole from having to undergo the same torture from a burn caused by the same or a similar fabric. This, basically, is my reason for endorsing the legislation before you. The National Safety Council says 1,500 persons die each year in this country from clothing burns or ignitions. And 100,000 others are scarred⁴¹ by clothing burns. The Safety Council says there are other figures—namely, those of the National Fire Protection Association—which are even higher. These are conservative figures. A more likely figure would be upward of 3,000 deaths. Mostly the victims of clothing fires are young children and elderly persons. Quite often they are female, wearing such flammable fabrics as light, filmy nylon. If some of these deaths and injuries, or even one for that matter, can be avoided by passing this bill, it will be justified.

(Slide: Headlines and quotes from trade journals insisting on consumer freedom and that the public is not interested in paying more for treated fabrics)

I am aware of the industry argument that the public is not concerned, that there have been few complaints about the flammability of fabrics, particularly clothing. The simple fact is that consumers like me think we are buying safe products. I am also aware of the industry argument that the public will not buy a flameproofed item, that it doesn't have the proper feel or the correct color, or

41. The text reads "seared." The context suggests to me that "scarred" is what was really said.

doesn't somehow live up to the demands of the buying public. To them I would offer an invitation to visit with my daughter Carole, or with the thousands of other youngsters badly burned by clothing. They would need no other convincing. I am aware also of the industry argument that today's technology has not advanced to the point where every fabric can be made flame retardant. As I understand it, one of the provisions of this legislation would attack just that problem by setting up a mechanism to study and develop improved fabric technology. Hopefully these hearings will provide the impetus to impel fabric and clothing manufacturers—who in my judgment have a moral obligation if not a legal one—to do whatever is necessary, with or without Government prodding, to produce a safer clothing fabric. I also hope that these hearings produce two other effects: that they will lead to stricter burn standards for fabrics, and that they will focus national attention on this problem. At this point only the doctors, nurses, insurance companies, damage-claim lawyers—and grief-stricken families—are vividly aware that the problem exists.

(Slide: Return to family photo shown at the beginning of scene)

But it took only a flaming instant for my own family to acquire that awareness. In my view we can't wait for more Caroles to be burned before some action is taken.⁴²

(Peter Hackes exits stage left, passing as he does the next witness at the hearing. The witness takes the seat Hackes has just left at a hearing table with a microphone and, facing the audience, begins reading his prepared statement.)

(Slide: Headlines for Shriners \$10 million gift to establish three burn centers with photos of Shriners Hospital for Crippled Children, Galveston Burns Institute in Galveston, Texas)⁴³

DR. BERGMAN: Mr. Chairman, my name is Dr. Abraham B. Bergman, Director of Outpatient Services, Children's Orthopedic Hospital and Medical Center, Seattle, Washington. The treatment of burns remains completely unsatisfactory despite advances in other fields of medicine. We haven't materially improved the survival rate in over 30 years, nor have we done much to alter morbidity. The best plastic surgery still leaves terrible scars. Our modern treatment of shock has merely meant that patients die 3 weeks after their burn rather than 3 days. Therefore, if we want to do anything about the problem of burns, prevention is the only

42. *Hearings*, *supra* note 40, at 57–60.

43. Megan Seaholm, *Shriners Hospital for Crippled Children, Galveston Burns Institute*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/sbs14> (last visited May 15, 2011).

answer. In view of the continuing toll of severe burn injuries, especially among young children, our current methods of prevention

(Slide: Safety slogans regarding fire prevention, safety matches, etc., from the early 1960s)

—namely, half-hearted safety slogans—must be considered a failure. Our efforts must be directed toward the source of the injury. The great majority of serious burns in children occur through ignition of their clothing. Passage of the Federal Flammable Fabrics Act Amendments of 1967 (S. 1003) will be a positive step toward solving the little publicized and appalling toll of clothing burns in the United States.

(Slide: 1960s era living room with children playing dressed in pajamas, followed by other images of happy children and families)

Mr. Chairman, 3 weeks ago in Richland, Washington, a little 2 1/2-year-old girl, Suzy, was playing in the living room with her older sister. The sister rushed into her parents' bedroom, crying, "Suzy's on fire!" Indeed she was. When her mother reached Suzy, she was a human torch. It was the all-too-familiar story. She was wearing a flannel nightgown, and there was a space heater in the room. She sustained full-thickness burns (3rd degree) over 85 percent of her body.

(Slide: Remains of burned pajamas or nightgown)

The only areas spared were her lower legs and feet. I have pictures of Suzy here with me, but have elected not to show them to you—there is no point. I didn't even have the heart to take my medical students into the room last week, because she looked so horrible. It was apparent from the moment we saw Suzy that she must inevitably die—the question was only how long it would take.

(Slide: Family photos and photos of children playing)

In cases such as this I earnestly pray that the end comes sooner, rather than later. There fell to me the job of talking to the parents every day, attempting to comfort them and prepare them for the outcome. In fact, Suzy is still alive in Seattle today, but the outcome is still inevitable. Understandably, the child's father, a patrolman in a small town, and his wife had a difficult time accepting this. What finally seemed to help was their eventual realization that were a miracle to ensue, her life after surviving such a severe burn would be worse than death. In all honesty I must say that I do not consider it a triumph when the life of a severely burned child is saved. A lifetime of operations, pain, disfigurement, scarring, and

rejection by society and self lie ahead. Death may be more merciful. This is the nightgown material, Mr. Chairman, that Suzy wore. This is a companion piece. She had two nightgowns. And here is another one of another little girl in the hospital, Margo. Here is the arm burned off of a nightgown. Margo sustained only a rather small burn, 12 percent, but this 12 percent is the whole arm and the side of her face. Of course, children should be careful, and parents should be watchful to keep them from dangerous situations. However, children will always be curious, for this is how they learn. I believe accidents will always be with us, and it doesn't do much good to be morally indignant about how they occur, particularly when they involve children. Our most effective and realistic path would seem to be toward mitigating the serious effects of accidents. Surely we must increase our efforts in safety education, but not use calls for safety education, which cost little and hurt no one, as a rapier to fend off action which will be more effective in achieving the end result.

(Slide: Headlines from news stories in the New York Times and Consumers Reports regarding hazards of flammable fabrics)

The target population for burn injuries are not the people who read the magazine section of the New York Times, or Consumers Reports, and are not likely to be susceptible to educational efforts as we know them.

(Slide: Advertisements for space heaters and inexpensive clothing)

They will continue to buy the cheapest clothes, and to heat their homes with space heaters and open fireplaces. What is needed to prevent serious burn injuries is clothing which does not readily support combustion. The less combustible the fabric that goes into children's clothing, and the more widely such clothing is distributed, the greater will be the reduction in mortality and morbidity from burn injuries. The only practical method of assuring that children's clothing is relatively flame resistant is through Federal legislation allowing minimum standards to be set for fabric flammability.⁴⁴

44. *Hearings, supra* note 40, at 77–79.

Scene Three

*The stage is empty except for a judge's bench at the rear center. A single male figure dressed in a dark suit walks on to the stage from stage right and, standing almost mid-stage, begins to speak. It is May 1980. St. Paul, Minnesota.*⁴⁵

The stage, which is almost empty at the start of the scene, becomes increasingly chaotic as lawyers, parties, and witnesses for each side take the stage. All the actors but four want to persuade the audience to see the case their way. The four are the judge, who speaks for the court and assumes that his is the final, authoritative voice; Lee Ann Gryc, the injured child now teenager who does not speak; and the taunting girls who are not aware of being visible to the court or the audience.

PLAINTIFFS' LAWYER (*Speaking to the audience.*): Remember the cotton flannelette made by Riegel from the first scene in act two from the mid-1950s? We're back to that. The Minnesota Supreme Court will be in session in a moment, announcing its' decision in a case captioned *Gryc v. Dayton-Hudson Corporation*. The case title is a little misleading. The case began as a lawsuit against all the defendants involved in the manufacture and sale, over a decade ago, of the cotton flannelette pajamas worn by a four-year-old Minnesota girl named Lee Ann Gryc. The defendants included the Dayton-Hudson Corporation, Style Undies Inc., Associated Merchandising Corporation and a subsidiary Aimcee Wholesale Corporation, and, of course, Riegel Textile Corporation. All of the defendants except Riegel settled before trial. Collectively, they paid the plaintiffs, Lee Ann and her mother Jacquelyn Gryc, \$135,000 in settlement. Riegel, the company that manufactured the cotton flannelette used to make the pajamas, went to trial and lost big -- \$750,000 in compensatory damages and an award of \$1,000,000 in punitive damages. So, when you hear the abbreviated case name *Gryc v. Dayton-Hudson Corp.*, you really need to think: *Gryc v. Riegel Textile Corporation*.

(The Court Bailiff walks onto stage.)

45. This scene is constructed from three sources relating to *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980). For the parties and various witnesses on their behalf, the transcript of testimony and exhibits introduced at trial. Transcript of Testimony, *Gryc*, 297 N.W.2d 727 (Nos. 49334, 49525) (on file with the Second Judicial District, Ramsey County, St. Paul, Minn. File No. 407340, Microfilm Reel Nos. 2999, 3000). For the plaintiffs' and defendant's lawyers, see the briefs on appeal. Cases and Briefs, *Gryc*, 297 N.W.2d 727 (49334, 49525), (on file with the Minn. State Law Library). For the judge, the Minnesota Supreme Court's opinion. *Gryc*, 297 N.W.2d 727. I am appreciative of Alex Klass for first bringing the Minnesota Supreme Court's decision in *Gryc* to my attention.

BAILIFF: All stand for the Honorable Justice Todd. (*Hopefully, the audience understands that they should stand. They are in this too.*)*(The justice enters the stage and takes his seat at the bench.)* The Minnesota Supreme Court is now in session. The Court renders its opinion in *Gryc v. Dayton-Hudson Corp., et al.* (*Bailiff exits.*)

JUSTICE TODD: On December 8, 1969, Lee Ann Gryc, then 4 years of age, was clothed in pajamas made from a cotton material manufactured by defendant Riegel Textile Corporation. The material was commercially known as “flannelette.” It was not treated but did meet the minimum federal standards of product flammability. Lee Ann was burned when—*(He is interrupted by a woman walking on to the stage from stage right stopping at the center front of the stage and speaking to the audience. She is dressed as though it is winter 1969. The judge allows himself to be interrupted without acknowledging the interruption or that anyone else is on the stage.)*

MRS. JACQUELYN GRYC: It was about 9:30 in the morning. I had fed Tammy and sent her off to school and I was doing my regular chores around the house. My husband was upstairs in the bedroom. Lee Ann was in the living room watching TV. She was wearing her pajamas. I was cooking. I don’t remember everything, but I believe I was using three burners. I know I had coffee cooking on the front-left burner and I had set the timer for the coffee. I went downstairs to either take a load of wash out or hang a load up or something.

(A man walks onto the stage from stage right. He stands next to, but with his body turned away from, the woman. He too is dressed as though it is winter 1969. They seem related, but estranged.)

MR. GERRY GRYC: I was in the upstairs bedroom; I was getting up, getting ready for work.

(In the next lines describing the scene, Jacquelyn and Gerry Gryc speak at the same time so that the audience has to strain to hear their independent memories of the moment. But Gerry Gryc’s memories extend after Jacquelyn Gryc has fallen silent.)

MRS. JACQUELYN GRYC: I heard Lee Ann scream. The timer was ringing and then Lee Ann started screaming and the timer wasn’t ringing after that. I ran up the back stairs. I saw her. She was on fire. I just saw her all on fire. I grabbed a towel and wrapped it around her.

MR. GERRY GRYC: I heard the timer buzzing, buzzing maybe a couple of minutes, then screaming. I couldn't realize exactly what was happening, I heard my wife screaming and Lee Ann screaming and I ran downstairs. By the time I got there, Jacquelyn was already to Lee Ann.

I made a statement to the effect that what happened was, my daughter called downstairs about the timer and my wife told her to turn it off. I also made a statement that my daughter just turned the timer off, reason being, the day after, when I was talking to my wife in asking and talking about what had happened, she was still crying and shaking and saying that she had told Lee to turn the timer off and feeling guilty for the whole thing, and "what have I done to my daughter," and all this. But then, later on, well, she said that she didn't tell her, that she hadn't told her to turn it off. My conclusion was that Lee Ann yelled to her mother that the timer was buzzing and my wife told her to turn it off and Lee pulled a chair over to the stove so that she could reach the timer above the stove and turn it off. That's my conclusion. It can be true, it can be false. I really don't know. *(Jacquelyn and Gerry Gryc look hard at each other for a moment and then away. Jacquelyn Gryc stares out at the audience, but says nothing.) (A stage crew member dressed in black drags two chairs onto the stage for the Grycs to sit in, looking at the couple sympathetically. Jacquelyn Gryc accepts the chair gratefully and sits down facing the audience, exhausted, distraught, her head in her hands. Gerry Gryc takes the chair from the stage person without really acknowledging the courtesy, and faces it partly toward the audience but away from Jacquelyn. He then stands behind the chair for a few minutes as Justice Todd continues and then walks off the stage. The chair sits empty for the remainder of the scene.)*

JUSTICE TODD *(As though never interrupted.)*: Lee Ann reached across the electric stove in her home to shut off a timer. Her pajama top was engulfed in flames. It was estimated that the pajama top burned for 8 to 12 seconds before it was extinguished. As a result of the incident, she suffered severe second- and third-degree burns and resultant scars on 20 percent of her body in the regions of her arms, chest, breasts, stomach, back, neck, and chin. Lee Ann has additional scars on her thighs as a result of skin grafting procedures during her hospitalization. Lee Ann's scars are permanent, her appearance cannot be improved through plastic surgery. The pajamas worn by Lee Ann were two-piece, loose-fitting, and the pajama top flared out at the waist. The flannelette used in the pajamas was manufactured by Riegel and distributed to defendant Style Undies, Inc., on or before August 31, 1967. Associated Merchandising Corporation (AMC) selected the fabric and design of the pajamas. After Style Undies manufactured the pajamas, AMC distributed them to its member store, defendant Dayton-Hudson Corporation. Jacquelyn Gryc bought the pajamas at a Dayton-Hudson store in the summer or fall of 1969.

The flannelette used in Lee Ann's pajamas was woven material made from yarns spun from natural cotton fiber. The fabric was brushed on one side which created a nap.

(As the judge speaks, a man dressed in a suit and tie in the manner from the late 1960s enters the stage from stage left. The audience will recognize him from act 2, scene 1 relating to the fire hazard of cotton flannelette.)

COTTON INDUSTRY SPOKESMAN *(Speaking to the audience.)*: You want to know why cotton flannelette was the dominant fabric used in children's winter sleepwear at the time? You know, I used to work for the Cotton Council, so you have to forgive this, because it is useful, all absorbent, it is launderable, it is durable, it can be dyed in various colors, it is comfortable, and it's usually been reasonably economical.

JUSTICE TODD *(Ignoring the interruption.)*: At trial, plaintiffs contended and presented evidence which tended to prove that the fabric used in the Gryc pajamas was defective.

(The actor who opened the scene interrupts. He too speaks to the audience, but also to the spokesman for the cotton industry. As he speaks, the audience should realize that he was one of the lawyers for the plaintiffs—Jacqueline and Lee Ann Gryc.)

PLAINTIFFS' LAWYER: The plaintiff suffered severe burns, horrible disfigurement, and deep psychological trauma which is still evident today in a tragically needless accident all on account of Riegel's deliberate disregard of the deaths and injuries it full well knew were resulting to children like Lee Ann who were wearing its untreated cotton flannelette. Riegel stubbornly refused to inquire seriously into flame retarding its fabric with available processes *(he speaks with emphasis)* – until it was too late. It refused even to warn parents like Mrs. Gryc of the hazard so that they might decide how best to protect their children. It is no wonder that it took the jury nearly a month to unravel Riegel's finely woven story: Riegel—with help from the rest of the industry—had been spinning it for many years.

COTTON INDUSTRY SPOKESMAN: Cotton can be made fire resistant. It has been made fire resistant for a hundred years with a nondurable type of thing that washes out, but it is very, very difficult to make some fabrics fire resistant in certain ways without sacrificing these good properties that you like in cotton, and people simply are not going to buy products they don't like if they have any choice at all.

(The plaintiffs' lawyer resists.)

PLAINTIFFS' LAWYER: We are talking here, Mr. Buck, about the state of the art from roughly speaking, '66, '67, '68, '69.

COTTON INDUSTRY SPOKESMAN: Now, during that period, so far as cotton is concerned, we had treatments that we could use on heavy goods, like tents. But during that period there was not one single fire resistant treatment that could be used successfully on any cotton construction of 4 ounces or 4 ½ ounces and less per square yard in weight, including cotton flannelette. There was not one successful one available, and, of course, I knew that personally, because at that time we were conducting a multimillion-dollar research program. We were evaluating everything we could find in the market. We had a continuing interest in doing what we could on this problem.

PLAINTIFFS' LAWYER *(Speaking to the audience. He does not want them to be taken in by the earnestness of the claim that the industry had done everything it could.):* This was the same story the industry told the Congress in urging the defeat of the 1967 Amendments to the Flammable Fabrics Act. It was the same story that Riegel was telling to juries in the 1960s—with remarkable success. The story that Riegel has been telling these many years, the falsity of which was finally exposed at the trial in this case, was that the technology simply did not exist at this time to durably flame retard cotton flannelette—at least not without raising its cost excessively and not without making the fabric stiff as a board.

(As the plaintiffs' lawyer speaks, another man, with the appearance of also being a lawyer, enters from stage left.)

DEFENDANT'S LAWYER: We have here a natural product which has been merely processed by a textile mill into cloth. The fact that cotton burns is one of those facts of nature which is known to everyone. That is one of the reasons why every mother instructs her children to stay away from a burning stove.

JUSTICE TODD *(Ignoring the intervening conversation and the activity on the increasingly crowded stage, he continues on with his opinion as though he has not been interrupted.):* The bulk of the testimony at trial concerned the state of the art with respect to flame-retardant processes at the time the fabric used in the Gyc pajamas was manufactured. It was not seriously disputed at trial that there were products available from the early 1950s through 1967, when the sleepwear in question was manufactured, which were capable of being applied to lightweight cotton flannelette which would flame retard the fabric and which were durable, that is, would remain on the fabric through 50 washings. It was shown at trial that the

safety of cotton flannelette could be significantly increased by applying this type of product to the fabric. The serious dispute between the experts concerned the availability of flame-retardant processes during the relevant time period which would not destroy the desirable characteristics of cotton flannelette. (*Again he is interrupted, without evidencing this in his demeanor.*)

COTTON INDUSTRY SPOKESMAN: It was between 1966-1968 that we got the first finish that appeared to be reasonably acceptable and it turned out that it wasn't all that good. It caused a substantial strength loss and required beefing up the yarns in the flannelette which meant it wasn't quite as supple and soft feeling. And it turned out during the marketing of this, that given a choice, consumers would rather have the product that felt better, that felt like the flannelette they had been getting. There were odor problems, the knees popping out of garments, the seams slipping at the cutters, so that the thing comes apart.

(*As he speaks another man has entered from stage right and stands next to the plaintiffs' lawyer. But as he begins to speak a man joins the contingent on the left of the stage and prepares to jump in when he has a chance in support of Riegel and the cotton industry.*)

PLAINTIFFS' EXPERT: As early as 1962, there were flame-retardant processes which could be applied to the fabric without adversely affecting its qualities enough to make it unsaleable. In England, flannelette-like sleepwear was required by law to be flame retarded since the 1950s.

DEFENDANT'S EXPERT (*He speaks to the others on stage, but also to the audience.*): At the beginning of the period there was no way in order to produce a fire retardant cotton flannelette durable for fifty launderings which had any chance at all of being purchased in a free-choice situation—that is, by a customer in a store or in a catalog. There were systems of making fabrics fire retardant, but they all spoiled the fabric.

The first commercial trial was with Sears and Roebuck for the Christmas catalog in 1968. That was the first commercial trial. We ran into trouble. We've all heard of Murphy's Law, I guess. Well, anything that can go wrong will go wrong. The first thing happened is that we found that, when we got more yardage running, it did not consistently pass the fire retardancy test. The net result of it was that we missed a lot of shipment dates. We miss our shipments, the garment manufacturer miss theirs. The second thing was we had a lot of trouble due to stiffness, variable stiffness and tensile strength. The next thing is these garments are put up in polyethylene bags so they stay clean. Now, the trouble is that polyethelene bags don't breathe and any smell that is on the fabric is made much more apparent, and when these bags were opened, a large proportion of the garments had a horrible odor of compound formaldehyde and dead fish. The net

result of this was that at the end of '69 our position really was that we found we had great difficulty in producing this material consistently, and Sears found they couldn't sell it. Sears' report says that women said they did not need fire retardant fabrics, they said, they reported, that they looked after their children, they didn't need fire retardant fabrics. This is one of those odd, unforeseen things, nobody wanted to buy it. Now, this may have been compounded by the unattractive appearance and hand—the feel—of the garment, by the smell, and, after all, there is also a somewhat nebulous feeling among mothers that cotton is one of these good clean fabrics and this fire retardant stuff looking and smelled of chemicals, and we suspect that there was some inherent resistance to putting their kids in this chemical stuff when they could use this pure cotton that they have been using for so many years.

PLAINTIFFS' EXPERT (*Speaking to the defendant's experts and lawyer, the judge, and the audience.*): We admit that there were no mills producing flame retarded flannelette for public consumption in any volume in 1967. But the flame retardant chemicals and the process for applying them could have been made commercially available as early as 1962 to 1966 if only the textile mills had so desired. And in the absence of doing so, the mills were under an obligation to warn the public of the flammable characteristics of cotton flannelette.

COTTON INDUSTRY SPOKESMAN: There was no label warranted on this product. In the first place, there was no reason for Riegel to put a warning on, because Riegel was making a non-defective product, and second, a manufacturer who is making a non-defective normally flammable fabric cannot, of himself, put on a label unless everybody else is going to do that, because it applies a certain stigma to his product. They can't control that in that way and stay in business.

PLAINTIFFS' LAWYER: The point is, long before the manufacture and sale of the untreated cotton flannelette in Lee Ann's pajamas, Riegel had the knowledge and the means to take the following steps—any one of which would have reduced the hazard substantially, and all of which were both technologically and economically feasible: It could have treated the flannelette with a flame retardant chemical process; it could have ceased the sale of untreated cotton flannelette for use in children's pajamas; it could have warned parents of the hazard; and it could have instructed parents on a simple, temporary flame retardant process that could be applied at home. Riegel's refusal to take any one of these steps, despite its knowledge of the extreme danger, shows a shocking disregard for human life and safety.

JUSTICE TODD (*Resuming his opinion.*): This case presents the question, not heretofore considered by this court, of whether punitive damages may be appropriately awarded in the context of a strict liability action. There is ample authority from many jurisdictions approving this remedy in strict liability cases. We recognize today that punitive damages, in an appropriate case, may properly be awarded in a strict liability action. The Flammable Fabrics Act of 1953 in effect at the time this cause of action arose applied to fabrics sold in interstate commerce for wearing apparel. This statute sets forth a test to determine whether a fabric is dangerous when used in clothing. The fabric in the Gryc pajamas passed the CS 191-53 test. Therefore, under the Flammable Fabrics Act, the Riegel flannelette was properly saleable in interstate commerce.

DEFENDANT'S LAWYER (*Looking alternately at the judge and the audience.*): But that decides the question. Since Congress has determined that cotton flannelette which meets the federal safety standards is not defective, Riegel cannot be held liable for compensatory damages, much less punitive damages, as a matter of law.

JUSTICE TODD (*Ignoring the interruption.*): On reviewing the record, we have determined that the trial court's findings are supported by the evidence and that its conclusions are correct. There was substantial evidence at trial which established that the CS 191-53 test was not a valid indicator of the flammable characteristics of fabrics and did not take into account the uses to which a fabric would be put in determining its safety. It was shown that newspaper passed the test with a 48-percent margin of safety.

Several courts have addressed the issue of whether compliance with the test in the 1953 Flammable Fabrics Act precludes liability for compensatory damages as a matter of law and have concluded that it does not. These courts reasoned that since it was shown that the test was invalid, compliance with that test did not preclude a finding that a product was unreasonably dangerous. For the same reason, we conclude that while compliance with this test may be relevant to the issue of punitive damages, it does not preclude such an award as a matter of law.

In instructing the jury on the issue of punitive damages, the court listed several factors which the jury was to take into account in determining whether Riegel had acted in willful or reckless disregard of plaintiffs rights. We have reviewed the entire record and have concluded that there was sufficient, in fact substantial, evidence for the jury to find that Riegel acted in willful, wanton, and/or malicious disregard of the rights of others in marketing its flannelette.

PLAINTIFFS' LAWYER: At the hearings on the 1967 Amendments to the Flammable Fabrics Act of 1953 there was evidence that thousands of people were dying or being seriously injured from clothing fires involving highly flammable fabrics each year.

DEFENDANT'S LAWYER: If the trial judge had allowed us to introduce evidence after the date of this accident – 1969 – we could have shown that those numbers were grossly inflated.

PLAINTIFFS' LAWYER: Would that really have benefited Riegel? After all, the deadline the trial court imposed meant that we were only able to get before the jury a fraction of the cases pending against Riegel for injuries involving its cotton flannelette.

JUSTICE TODD (*Ignoring this exchange; continues with his opinion.*): As previously indicated, plaintiffs introduced a large amount of evidence showing that flame retardant products could have been applied to cotton flannelette well before Riegel manufactured the flannelette used in Lee Ann's pajamas. Of course, there was contrary evidence presented on this point by Riegel's witnesses, but plaintiffs' experts provided credible evidence. However, even if such evidence had not been sufficient, there was sufficient evidence from which the jury could conclude that Riegel was strictly liable for its failure to warn. Under Minnesota law, a manufacturer has a duty to warn users of its products of all dangers associated with those products of which it has actual or constructive knowledge. Failure to provide such warnings will render the product unreasonably dangerous and will subject the manufacturer to liability for damages under strict liability in tort. The high flammability of Riegel's cotton flannelette is itself evidence of its duty in this regard. Furthermore, there was substantial evidence that Riegel was uniquely aware of these flammable characteristics. Riegel did not seriously argue at trial that it was unable to provide a warning to the consumer, nor could it because plaintiffs introduced evidence that Riegel was able to send advertising information concerning the positive attributes of its product through the chain of commerce. Riegel mainly argued at trial and argues here on appeal that it was not feasible to warn consumers because such a warning would "stigmatize" its product, thereby seemingly admitting that it was protecting the marketing of a product consumers might deem unreasonably hazardous. Riegel's knowledge of the hazard involved and its reason for not taking feasible measures to reduce this hazard was demonstrated at trial.

DEFENDANT'S LAWYER: Mr. Gardner at Riegel obviously used the term "powder keg" back in '56 as a hyperbole to prompt action from his subordinate in the research laboratory. That an executive perceived a risk and directed his subordinates to research methods to alleviate that risk falls far short of warranting punishment for the company when those research efforts failed. And if the defective nature of any product can be proven by the simple fact that its manufacturer has been sued seven times in fifteen years, it is doubtful that any manufacturer in business during this decade is not presently mass-producing

defective merchandise.

JUSTICE TODD (*Returns to reading his opinion.*): Riegel introduced a great amount of evidence showing its communications with several chemical companies concerning the availability of flame retardant products and the application of these products to its cotton flannelette. Riegel apparently introduced these items in an effort to show its good faith in attempting to find and apply a viable flame retardant to its cotton flannelette. However, one of Riegel's own letters evidences the reason for its failure in this area. In April 1968, a letter from an official of Riegel explained that satisfactory runs were made with flame-retarded flannelette using various chemicals, but that Riegel was not going to use these products until federal law so required because of the cost factor.

PLAINTIFFS' LAWYER: Riegel's deliberate indifference to the flammability hazard is intensified when one realizes that during the "surveillance" period, in the 1950s through the mid-1960s, Riegel spent so little for the development of non-flammable fabrics that it did not even keep records as to the amounts being spent. When Riegel finally incurred enough expense to warrant record keeping, the amounts they actually spent were so small as to be virtually meaningless: \$27,000.00 in 1967, \$33,000.00 in 1968, and \$44,000.00 in 1969, while the entire research and development spending of the company in these years amounted to \$1,831,731.

DEFENDANT'S LAWYER (*Ignoring this point, his focus is on the judge and the question of punitive damages.*): In any case, there were adequate deterrents against similar future conduct negating the need for punitive damages. The compensatory damage award, lost sales and the impact on Riegel's reputation were deterrent enough. Besides, competition from low-priced imports led Riegel to stop manufacturing cotton flannelette a decade ago, eight years before the trial of this case. Punitive damages can have no deterrent where the defendant is no longer even in the business of manufacturing flannelette. And, finally, I should add, the textile industry is a regulated industry in the United States. During the 1970s, the Federal Trade Commission and the Consumer Product Safety Commission have greatly expanded the regulations under the Flammable Fabrics Act. In such a regulated industry, a manufacturer should not have to also be concerned with what a given jury of six may consider to be quasi criminal activity.

JUSTICE TODD: This argument ignores the fact that Riegel was shown to have acted in reckless disregard of the public for purely economic reasons. A punitive damage award serves to deter Riegel from acting in a similar manner with respect to other products it manufactures in the future.

DEFENDANT'S LAWYER: Those points aside, the verdict was excessive.

MRS. JACQUELYN GRYC (*She does not speak, but looks hard at the lawyer as though to say, "You say the award is excessive? Consider this: my daughter suffered second- and third-degree burns over twenty percent of her body, endured months of hospitalization, skin-grafts, unimaginable pain, and scars she will live with for the rest of her life. The scarred tissue is not like normal skin—it's less elastic and a different color; it doesn't have hair follicles or sweat glands or sensory apparatus. My daughter—who has lived with this for eleven years and is now going through puberty—will have to live her life with a deformed right breast that has no nipple, that will never be the same size as her other breast. She faces the risk of cancer and other benign and malignant growths because of the severity of the burns, to say nothing of the psychological impact of these burns or the fact that she feels responsible for the breakup of our family."*)

JUSTICE TODD: We find the award is not so excessive as to be deemed unreasonable in light of the evidence presented. The testimony indicated that this permanent disfigurement may adversely affect Lee Ann's psychological makeup, and her employment and matrimonial opportunities. The evidence also showed that Lee Ann is presently a constricted girl who has a low self-image and is unable to deal with the emotional problems caused by her burns. Lee Ann's nicknames at school (*He stops short when a girl, in her early teens, comes onto the stage. She keeps her back to the audience. She is followed by two other girls who are whispering to each other and looking at the first girl.*)

TAUNTING GIRL 1: Kentucky Fried Chicken.

TAUNTING GIRL 2: Burnt toast. (*The girl whose back is toward the audience visibly shrinks and moves to cover herself in response to the name-calling. The taunts continue as the taunting girls follow the first girl across and off the stage. Jacquelyn Gryc flinches at the name-calling.*)

JUSTICE TODD (*The judge has obviously heard the slurs, but does not repeat them.*): We are not unmindful that a large portion of the jury award is attributable to pain and suffering damages. However, when this award is viewed in the context of the severe disfigurement which Lee Ann will have to live with for the rest of her life, this award cannot be found to be excessive as a matter of law. The judgment is, therefore, affirmed.

Scene Four

(Slide: Blair Corporation Catalog advertisement for Chenille Robes)

The scene opens on a household kitchen in 2009 with a woman in her mid-sixties on stage. She stands facing the audience at an island with an electric stovetop. There is a teakettle on the stove and she has a cup in her hand. There is a television on the counter opposite the island so that it faces the audience and beside it a radio. The television is on. Also on the counter is a photograph of an older woman who bears some resemblance to the woman on stage.

As the scene opens, a “U.S. postal worker” walks through the audience and “delivers” the mail to the audience: an envelope with the return address, “The Blair Corporation, Warren, Pennsylvania,” and a stamped notice, “Important: Recall Information.”⁴⁶ The woman on stage receives the letter last along with her other mail (bills, magazines, catalogs, coupons, and junk mail). She collects the mail and sorts through it, turning, at last to the recall notice from the Blair Corporation. She opens the letter and begins to read to herself. Some members of the audience, seeing her open and read her letter, will open the one they have received; others will not, and some may not have received a letter at all. That is as it should be—recalls are imperfect devices for reaching consumers.⁴⁷

(Slide: News from CPSC, U.S. Consumer Product Safety Commission, For Immediate Release—April 24, 2009—**WOMEN’S CHENILLE ROBES RECALLED BY BLAIR DUE TO BURN HAZARD** (shown as though seen on a computer screen))⁴⁸

The postal worker circulates through the audience again, distributing a second letter to members of the audience.⁴⁹ And again the woman on stage receives the letter along with her other mail and opens it and begins to read, once again to herself. She continues to look at the letters during the news report. The audience hears the news report; she does not.

46. See *infra* App. A.

47. This scene is constructed from recall notices posted on the Blair Corporation website. See BLAIR, www.blair.com/recall (last visited June 29, 2011), and from newspaper articles, news broadcasts, internet postings, and CPSC announcements relating to the Blair recall of chenille garments sold between 2000 and 2009. The Blair recall is ongoing. In August 2010, Blair announced on its recall site that it had “received 455 reports of incidents where the robes allegedly caught on fire after being exposed to open flames. Ten deaths and 62 injuries have been reported.” See Blair Corp., *Update! Blair Urges Discontinued Use and Prompt Return of All Women’s Chenille Apparel Due to Burn Hazard; 10 Deaths, 62 Injuries Reported*, IMPORTANT RECALL NOTICE (Aug. 10, 2010), http://images.orchardbrands.com/blair/assets/images/landing/07-16-10_Fifth_Robe_Customer_Letter.pdf; see also Blair Corp., *Update! Blair Urges Discontinued Use and Prompt Return of All Women’s Chenille Apparel Due to Burn Hazard; 10 Deaths, 62 Injuries Reported*, IMPORTANT RECALL NOTICE (Aug. 12, 2010), http://images.orchardbrands.com/blair/assets/images/landing/07-16-10_Second_Letter_Expanded_Recall.pdf.

48. *Women’s Chenille Robes Recalled by Blair Due to Burn Hazard*, NEWS FROM CPSC: U.S. CONSUMER PRODUCT SAFETY COMMISSION (Apr. 24, 2009), <http://www.cpsc.gov/cpscpub/prerel/prhtml09/09200.html>.

49. See *infra* App. B.

(Slide: Los Angeles Times—June 12, 2009—Six Deaths Spur Reissue Of Blair Robe Recall)

(From offstage news report.): The *Los Angeles Times* reported today that the deaths of six people prompted federal safety officials and clothing retailer Blair to reissue a recall Thursday of 162,000 full-length chenille robes because the garments don't meet federal flammability requirements and can catch fire if they are exposed to an open flame. Blair of Warren, Pa., and the Consumer Product Safety Commission recalled the women's chenille robes in April because of the fire hazard. Since then, the company heard from families of six people who died after their Blair robes caught fire, commission spokesman Scott Wolfson said. News of the deaths caused Blair and the commission to again alert consumers about the recall of the company's chenille robes, Wolfson said. Consumers are urged to immediately stop wearing the robes and return them to Blair for a \$50 gift card, he said. Of the six deaths reported to Blair as related to the burning robes, five of the victims were women who were cooking at the time and the sixth was a man wearing his spouse's robe. Three of the victims were in their 80s, and the deaths all took place before April. The original April recall was issued voluntarily by the commission and Blair after the company received three reports of the robes catching fire, including one incident that left a victim with second-degree burns. The one-piece robe has seven buttons, a shaped stand-up collar and two side-seam pockets. Blair's catalogs, website and stores in Warren, PA, Grove City, PA, and Wilmington, Del., sold the robes from January 2003 to March 2009.⁵⁰

(Slide: Hartford Courant—October 29, 2009—Family Sues Over Fatal Robe Fire; Garment Recall 4 Years After Death Prompts Legal Action; \$30 Million Sought)

(News report broadcast from offstage.): The *Hartford Courant* reported today that Sharon Davis, the daughter of Atwilda Brown filed a wrongful death lawsuit in U. S. District Court in Hartford this week seeking \$30 million dollars in damages, blaming the Blair Corporation for selling robes made of flammable material from Pakistan without doing the proper testing and designing a garment that turned into a fire trap when ignited. Atwilda Brown died trying to pour herself a cup of hot chocolate. As the 80-year-old woman reached across the electric stove to grab a teapot full of hot water in her East Windsor kitchen on a Saturday night in February 2005, the sleeve of her chenille robe brushed against the burner and caught fire. She ran to her bedroom furiously trying to put out the flames engulfing her robe as her disabled husband looked on. But by the time she threw the robe to the floor it was too late. More than 35 percent of her arms and back

50. Nathan Olivarez-Giles, *Deaths Spur Reissue of Blair Robe Recall*, L.A. TIMES, June 12, 2009, at B2.

were burned and she died a few weeks after being transferred to the Bridgeport Burn Center. Brown is one of at least nine people across the country to die of burns suffered when their robes, sold by the Blair Corporation of Warren, Pennsylvania, caught fire, according to federal officials. Meanwhile, the U. S. Consumer Products Safety Commission, which already has recalled Blair's chenille full-length robes like the one Brown was wearing, expanded the recall late last week to include any chenille tops and jackets made by the same Pakistani manufacturer and sold by Blair. In all, more than 300,000 garments have now been recalled. The fire puzzled the family from the beginning. It wasn't until four years later that they got a clue to what happened – courtesy of the Blair Corp. The company sent a recall letter, dated in April of this year, to Atwilda Brown, warning her that the robe she bought in January 2005 was highly flammable. (*Second news report begins at this point so that both are going for a moment.*) There have been two other Blair recalls of chenille products since that one in April. Following the latest recall announcement, Blair CEO Shelley Nandkeolyar issued a statement: "We strongly encourage anyone still in possession of a recalled robe to call our consumer hot line at (877) 392-7095 and return it immediately. In addition to our outreach to get these robes out of the hands of consumers, we are redoubling our efforts to ensure the products we sell are safe."

WOMAN 1: We were celebrating my 60th birthday. My mother stayed home that night to care for her husband. For years I carried around this guilt because we didn't have the party closer to where my mother lived. We never could figure out what happened. It was an electric stove and my mother was a vibrant woman who could take care of herself. I was so angry to learn what had really happened and to discover that it really shouldn't have happened. You trust when you buy a piece of clothing from someplace that it is safe. My mother ordered the wrong item from Blair's and she died because of it.⁵¹

(*Slide: KFMB-TV 8 (San Diego, Cal.)—October 23, 2009—**Recalled Bathrobe Blamed For Death Of Oceanside Couple***)

(*Second news report broadcast from off-stage. Overlaps with first one.*): The family of an Oceanside woman who died after her bathrobe caught fire has filed a multi-million dollar lawsuit against the manufacturer. In this News 8 Consumer Report, what you need to know about a nationwide recall targeting clothing made from all-cotton chenille.

Framed pictures bring back fond memories for the daughters of Evelyn and Murray Rogoff. (*Two middle-aged women come onto stage holding framed picture of their*

51. Dave Altimari, *Family Sues Over Fatal Robe Fire; Garment Recall 4 Years After Death Prompts Legal Action; \$30 Million Sought*, HARTFORD COURANT, Oct. 29, 2009, at B1.

parents.) In February 2009, the Oceanside couple died after the sleeve of Evelyn's bathrobe caught fire on a hot stove. When her husband tried to help, his clothes caught fire too. Evelyn died in the hospital as a direct result of her severe burns. Her husband died a short time later. Their daughters filed a lawsuit Friday against the maker of the bathrobe, Pennsylvania-based Blair Corporation. For the family, the lawsuit is not about the money, it's about preventing another tragedy.⁵²

(As the news report concludes, the narrator returns to the stage and watches the conclusion of the scene.)

WOMAN 2 *(One of the two women who has come on stage during the broadcast.):* We can't get our parents back, but if we can save somebody else's parents or grandparents, then they should know.

WOMAN 1: No amount of money can ever bring back the loved ones that people have lost but it is the only recourse we have. Our absolute goal is awareness. We don't know how many people may not be aware that these clothes are dangerous and that there is a real problem here.⁵³

As Woman 1 finishes this sentence, an elderly woman dressed in a cotton chenille robe enters and walks slowly across the stage. She is holding a mug of hot tea. She is old, but not frail. As she crosses the stage, she is overtaken by a young girl dressed in pajamas of cotton flannelette hugging a stuffed animal who runs happily across the stage as though she is headed somewhere, and then overtaken as well by a pre-school aged boy, dressed in his Gene Autry cowboy suit, riding his tricycle. Both children are busy; they are playing. They both look up at the giant screen as they cross the stage and at the elderly woman as they pass her, but otherwise do not suggest by their actions that they are aware of entering a different time and place or even that they are on a stage. Both children overtake the elderly woman so that she is the last of the three to exit the stage. The women standing at the kitchen island stare out at the audience unseeing the passing tableau.

As the elderly woman exits the stage, "Credits" begin to scroll on the large screen at the rear of the stage. The image on which "Credits" is superimposed is a mosaic of advertisements for consumer products and clothing from the late 1940s, with smiling consumers—women, men, and children—and corporate trademarks prominent. There are children's toys and playsuits, refrigerators, automobiles, nylons, electrical appliances, stylish clothing and sleepwear, and suburban housing developments. As the "Credits" scroll, the images of products and advertisements change to reflect the passage of time from the late 1940s, through the 1950s,

52. *Recalled Bathrobe Blamed For Death of Oceanside Couple* (KFMB-TV, CBS 8—San Diego, Cal. television broadcast Oct. 23, 2009), available at <http://www.cbs8.com/story/11375725/recalled-bathrobe-blamed-for-death-of-oceanside-couple>.

53. Altimari, *supra* note 51.

1960s, 1970s, and so on. The goal here is to capture the centrality of consumer products and consumption to postwar American life. Following the heading "Credits," come what amounts to a legal timeline, coupled with dates, as in: "1947: Hearings on H.R. 505, H.R. 601, and H.R. 1111 Bills to Prohibit the Transportation of certain Inflammable Textile Fabrics"; 1948: *McCormack v. M.A. Henry Co., et al*"; "1953: Flammable Fabrics Act" and so on.

As the credits scroll, one-by-one actors from earlier scenes return to the stage, repeating a portion of their earlier lines. In contrast to the linear presentation of law in the credits, there is no order to where the actors stand on the stage. Moreover, as each actor comes onto the stage, they acknowledge others from "their scene" but register surprise in their expressions to see others not part of "their scene" already there, as well as surprise to see others joining them after. Woman 1 and Woman 2 from the final scene watch and listen intently as they take in that there is a history to their situation.

MAN 1 (*act 1, scene 1*)(*with his newspaper*): Two young Eastside brothers were turned into human torches yesterday afternoon when their clothing caught fire while they were playing with matches in their backyard.

MR. MCCORMACK (*act 1, scene 1*): Mr. Henry shook hands with me and wished me a Merry Christmas.

DR. ERNEST ARNHEIM (*act 1, scene 1*)(*He sees Mr. McCormack as he enters the stage and acknowledges him.*): Well, the progress is a very long story, because it continued from his admission on January 6th until the time he died on May 12th, which is a period of approximately five months. When he finally died, the autopsy examination revealed why it was completely hopeless, because all of his veins in his thighs and his legs and his abdomen were filled with blood clot.

MR. ROBERTSHAW (*act 1, scene 1*): The point is that we know this will burn, and we have conducted research at various times to see if a permanent finish could be put on there that would resist flame for the purpose of getting a patent on it.

MAN 2 (*act 1, scene 1*): An appalling tragedy occurred in Louisville last Saturday afternoon when William Augustus Strong III, better known as Billy, was fatally burned. The accident took place about 5 p.m. when Billy, who was wearing his cowboy suit, caught fire from burning leaves on the lawn of the family home while playing with his little sister, Mary Ann, and neighboring children.

THE COURT (Judge Knox)(*act 1, scene 2*)(*holding and looking at photo of burned boy*): A kid that is scarred up something like that, and he is going to get married some day and the effect of those scars on his wife is something to take into account, and his own humiliation from it.

FREDERICK J. LOCKER (*act 1, scene 3*)(*lawyer for defendants Timme & Son and Woonsocket Falls Mill in McCormack*): The fuzziness is, of course, obvious to any one who looks at the material. That it is a quality which renders the material more inflammable is a matter of common knowledge.

LAWYER (*act 1, scene 4*)(*In-house counsel for Du Pont*): This is the last of these cases and makes a total of sixty-nine cases disposed of with no contribution by du Pont.

G.T. GARDNER (*act 2, scene 1*)(*Riegel executive*): To me this indicates we are always sitting on somewhat of a powder keg as regards our Flannelette being so inflammable.

PETER HACKES (*act 2, scene 2*): As an average consumer, I assumed that under the law I was protected against any harmful item.

MRS. JACQUELYN GRYC (*act 2, scene 3*): I heard Lee Ann scream.

JUSTICE TODD (*act 2, scene 3*): The testimony indicated that this permanent disfigurement may adversely affect Lee Ann's psychological makeup, and her employment and matrimonial opportunities. The evidence also showed that Lee Ann is presently a constricted girl who has a low self-image and is unable to deal with the emotional problems caused by her burns. A punitive damage award serves to deter Riegel from acting in a similar manner with respect to other products it manufactures in the future.

WOMAN 1 (*act 2, scene 4*): For years I've carried around this guilt because we didn't have the party closer to where my mother lived. We never could figure out what happened.

WOMAN 2 (*act 2, scene 4*): We can't get our parents back, but if we can save somebody else's parents or grandparents, then they should know. (*As Woman 2 speaks, narrator moves to the center of the stage.*)

NARRATOR (*Tone reflective.*): There is a deep and powerful urge to narrate stories such as these in terms of safety purchased through loss. It's a fundamentally human urge. It's part of what makes for tragedy. What was it Arthur Miller said? Tragedy is characterized by action and striving. That it "demonstrates the indestructible will of man to achieve his humanity"?⁵⁴

The children injured in the cowboy suit tragedy—may I use that term, even as I try to explain why I see this as tragic? Most of the children, or in the case of those who died, their families, received monetary damages. But did those settlements—did the damages paid to Lee Ann Gryc and other children like her, the settlements that are all but certain to follow in the lawsuits pending against the Blair Corporation—can we say that they shifted the ownership of the hazard? Wherever liability lay, the individuals and their families, it seems, "owned" the hazard and never ceased owning it. It had been cruelly inscribed on their bodies and their lives. And this too seems tragic. (*Pause.*)

Maybe the sense of tragedy stems as well from an unstated condition to a promise. The end of World War II marked a transformative moment. People had suffered for so long, through decades of Depression and war, and here was this promise: a promise of abundance and security shared by all underwritten by a private mass consumption marketplace. Would we even want to go back? Is that fact buried deep in our resistance to acknowledging the regularly debilitating, too often fatal condition of that promise borne by individuals, families, and communities? Because accident to ordinary people from commonplace goods arising in the normal course of everyday life, unexpected, transformative, was and remains a defining feature of our global mass consumption economy. So that, even had the hazard of flammable fabrics been eliminated, there was always, and, I think importantly, would always be other products that brought harm, new cycles of outrage, lawsuits, and legislation.

(*Pause. Conversational tone.*) My mother was just here for a visit. We keep our thermostat set low and she brought me a warm fleecy robe she had ordered. She has one like it and I had admired hers the last time I visited Kansas City. Anyway, after she'd left, as I went to try it on, I noticed the tags on the inside of the collar. Of course, the most prominent tag is the corporate tag in the center. To the right of that is another that describes the robe as made out of "100% Polyester" and says, "Made in China." The lettering on these tags is black. But to the left of the corporate tag is a small tag with red lettering in all caps. In letters about one-quarter inch high it reads: "KEEP AWAY FROM FIRE."

Should I wear it? Should I make myself a cup of tea with it on? Should I send it back? I checked the catalog online. It doesn't mention anything about fire hazard. It has a description: "Treat yourself to full-body fleece!" and so on and includes several short reviews from thrilled customers who have always been cold

54. MILLER, *supra* note 1, at 7.

in the winter, but with this robe have finally found a way to stay warm. My husband said I should send the robe back to my mom and have her return it. He said I should send a letter to the company telling them that I don't think they should make robes that I can't even comfortably cook breakfast in. I haven't done any of those things though. And maybe it is perfectly safe. It's laying on a chair in my bedroom. Some day, when I just can't get warm, I imagine I'll put it on.

END

A NOTE ON SOURCES

All of the text in the play is drawn directly from historical sources. At the beginning of each scene I have noted in a footnote the primary “legal” texts from which the scene is drawn and have also included citations where I draw on other primary sources for the scene. For example, act 1, scene 1 is drawn from trial testimony in *McCormack v. M.A. Henry Co., Inc.*, and from newspaper reports of incidents involving Gene Autry cowboy suits. With a limited number of exceptions, only one of which is substantive, all of the lines in the play are quotes from the cited sources. The one substantive line in the play of my own addition is the question “Will they burn?” at the end of the prologue. This question was not part of the advertisement for Du Pont Rayon that it follows. It is important in the play to convey this question to the audience; it is equally important that the audience recognize that, as of 1940, it was a question Du Pont neither concerned itself with nor suggested through its advertising that its customers should consider as an important quality in a fabric. Elsewhere in the play I have occasionally added nonsubstantive lines for the purpose of clarifying time and place, facilitating the movement of actors within a scene, or clarifying action. For example, the trial transcript in *McCormack* does not include the lawyers “calling” witnesses to the stand. In the transcript, the testimony of one witness simply follows that of another. I have added lines in act 1, scene 1, such as Mr. Paley saying, “We call Marvin Kramer as a witness on behalf of the plaintiffs,” to reflect what undoubtedly took place in the actual trial and to alert the audience as to who is taking the witness stand. Or, for example, at the close of the scene dramatizing the consolidated settlement hearing of twenty cowboy suit cases—act 1, scene 2—the judge asks, “Is this a photo of the boy?” He did not ask this question in the actual hearing; rather, it is obvious from the exchange he has with the lawyers that he is holding and looking at a photo of the Bradley boy. I have noted in the stage notes that he is looking at a photo of the boy, but this part of the scene takes place offstage in chambers. The only way for the audience to know that he is looking at a photo of the boy was to add this to the exchange.

Trial testimony is characterized by specific, direct questions and responses limited to the specific question asked. I have retained the exact questions and answers. There are places though, to keep the scenes drawing on testimony from being overly long, where I have combined questions and then combined the related answers to speed up the flow or combined answers from different parts of a witness’s testimony. This is true in act 1, scene 1, focusing on the trial in *McCormack*, and in act 1, scene 2 focusing on the consolidated settlement hearing in twenty cowboy suit cases pending in federal district court. In act 2, scene 3, focusing on the Minnesota Supreme Court’s opinion and the underlying evidence in *Gryc v. Dayton-Hudson Corporation*, I have eliminated the questions altogether, presenting what was, in fact, testimony at trial as short narratives. I say more about this scene later in this note.

Perhaps the most important point to bear in mind is that, apart from the newspaper articles, many of the sources I have drawn on here run into the hundreds and even thousands of pages. I have read the sources in their entirety. In selecting excerpts from those sources I have, by definition, changed the source as a whole. For example, the trial transcript in *Gryc* is over two thousand pages with briefs on appeal of several hundred pages. Act 2, scene 3, the primary focus of which is the Minnesota Supreme Court's opinion, provides only glimpses into the contentious record on which the opinion is based. In *McCormack*, the trial transcript is over twelve hundred pages; there are another one hundred and seventy pages in briefs. The testimony relating to Tommy McCormack's injuries takes up a miniscule part of the record: a mere twelve pages. None of the defendant's lawyers even chose to cross-examine the doctor who treated him. The bulk of the testimony in the trial focuses on establishing the nature of the various defendants' connections to the cowboy suit, and what the various defendants knew (or should have known) about the fiber/fabric and when they knew it. In the play, the relationship between Mr. McCormack and Mr. Henry, the Christmas gift, the night of the incident, and the months in the hospital are given space out of proportion to their attention in the trial record. What is true in both these scenes is true for the play as a whole: my goal is not to re-present these sources in their original form, but to engage the audience's attention on the larger question of owning hazard in everyday things in modern life. Equally important are the "scenes" that are not in the play. This is a play and, as such, had to have a limited number of scenes. There might have been many more: scenes involving so-called torch sweaters in the early 1950s, any number of incidents involving the Federal Trade Commission, the work of the Consumer Product Safety Commission established in 1967, the 1972 Amendments to the Flammable Fabrics Act involving children's sleepwear, and so on. In other words, the play does not claim to narrate every important moment in the history of flammable fabrics.

This is a play and, as such, I have engaged throughout in acts of dramatic license which are calculated, or so I hope, to provoke broader, deeper thinking, not simply about flammable fabrics, but, more generally, about owning hazard in everyday things in modern life, as well as about history and law. These take four basic forms: first, the incorporation of visual sources to situate the audience in time and space and to raise questions about history itself; second, the dramatization of written records; third, the use of devices intended to break down the divide between stage and audience—to engage the audience in the inquiry at the center of the play; and fourth, stage notes relating to the demeanor, body language, et cetera, of the actors.

So, first, I use sources to establish the broader historical context of the play and to raise questions about history itself. The play takes place over a seventy-year period in which there were dramatic changes in American life. Throughout I have incorporated visual sources to assist the audience in contextualizing the events in

the play. In some instances, these “are” the places/things they appear to be. For example, in act 1, scene 1 the photographs of the McCormack apartment are drawn from the trial transcript. The photograph of the building where Mr. Henry lived and Mr. McCormack worked is the actual building, although the photograph was taken by me in 2006. The advertisements for cotton flannelette in act 2, scene 1 are advertisements from the 1950s. At other points, the images, advertisements, etc. are intended to be suggestive. For example, the collage in the slide in act 1, scene 1 showing a soldier in World War II, a scientist in a lab, an outline of a parachute, etc. is intended to be suggestive—to remind the reader that the cowboy suit tragedy was unfolding in the midst of a nation, indeed a world, at war, as scientists, like those at Du Pont, not only chemically engineered viscose rayon fibers that could be woven into high-pile fabrics, but also created new fibers, like nylon for parachutes, that were essential to the war effort. The image of the interior of a corporate office in act 1, scene 4 (Du Pont) is intended to take the audience into the postwar corporate world.

But in many instances, I have incorporated images as sources to serve a function that goes beyond establishing historical context. For example, in act 2, scene 2 (hearing on the 1967 Amendments to the Flammable Fabrics Act) the image of the Gemini launch is an actual image of the event that Peter Hackes was away from home reporting on when his daughter was severely burned. The goal in having this image in the background as Peter Hackes testifies is not the simplistic one of showing where he was at the time, but rather is to capture the discordant realities of public, dramatic, national event alongside contemporaneous private tragedy—to capture what is always the case, that is, that the events we recognize as “historic” always run parallel to events which, although of far greater magnitude to those who experience them, are not recognized as “historic.” The trauma and injuries that Carole Hackes experienced on May 15, 1966, are part of U.S. history only insofar as she was one among thousands suffering burns from clothing in the 1960s, at a moment when flammable fabrics had become a matter of national concern. Through her father’s testimony, she became evidence in support of a demand for greater safeguards imposed by the state. There is, in this case too, the dramatic disjuncture of the celebration and national pride bound up in the fireball of an explosion propelling a craft into spatial orbit and fire robbing a child of childhood and a family of security and trust.

At other points, the visual images have a somewhat different purpose. The family portraits in act 2, scene 2 are actual portraits, but their use is intended to trigger for the reader a moment of knowing that is otherwise difficult to convey. This was family life before tragedy. When we think about the impact of the kinds of tragedies described here it is vital to think about what is lost. What happens to the family album when a child dies or is left hideously scarred by burns? Does the family stop taking photos? The purpose of the dramatic effect of having a child wearing a Gene Autry cowboy suit on a tricycle, or a child in cotton flannelette

pajamas, or an elderly woman in a cotton chenille bathrobe cross the stage at various points in the play is similar. One of the striking features of legal documents relating to flammable fabrics is how rarely the immediate victims themselves appear. The proceedings are obviously about them, and yet they are not present. In some cases, the reason is obvious: they died as a result of their injuries. Equally clear is that one of the reasons defendants settled cases was to avoid having a jury see the grotesquely burned child or other burn victim. Even when they are present, however indirectly, as in the example of Judge Knox holding the photograph of the child in the settlement hearing, they are always already victims. Part of what is lost is that we never see them before the incident that transformed or ended their lives. I think it is important to bring that “before” image to the audience. Restoring the “before” is one of the reasons that I deliberately do not show a burn victim at any point in the play.

Second, throughout the play I dramatize written primary source materials. Several scenes capture already dramatized events: in act 1, scene 1, the January 1948 trial in *McCormack*; in act 1, scene 2, the May 1948 consolidated settlement hearing of cowboy suit lawsuits pending before Judge Knox in New York Federal District Court; in act 2, scene 2, the 1967 senate hearings on the proposed Amendments to the Flammable Fabrics Act of 1953. But in many parts of the play, I was working with source materials that were textual rather than oral, including, for example, newspaper stories, the briefs filed by the parties in *McCormack* on appeal, the reports by the legal counsel to the executive committee of Du Pont, the letters and intercorporate memoranda of Riegel Corporation from the 1950s, the Minnesota Supreme Court’s decision in *Gryc v. Dayton-Hudson Corporation*, and the product recalls sent by the Blair Corporation. I have dramatized these sources in a variety of ways to achieve a variety of goals. For example, in the opening act of the play, the verdict in *McCormack* is broadcast over a Tannoy speaker. The text for the broadcast comes from the *New York Times* story reporting the verdict. Although it is very possible that there was a radio story about the verdict, my purpose in using a broadcast, coupled with headlines from newspapers across the country reporting the verdict, is to capture the fact that many families whose children had been burned while wearing Gene Autry cowboy suits only learned of the role the cowboy suit played in their family tragedy through the wide reporting of the Associated Press story on the verdict in the *McCormack* lawsuit. I have used orality here to convey a moment when something became more widely, although as the scene’s ending also suggests, not universally, known.

In dramatizing corporate correspondence and written reports, my hope in focusing on the actual writing of the documents is to highlight the persons plural within the corporate “person,” and to juxtapose the nature and subject of corporate concern with the individual experience of flammable fabrics captured in other scenes. So, for example, in act 1, scene 4 (Du Pont) and act 2, scene 1

(Riegel), I have the corporate employee/executive drafting the document in the first scene by giving dictation to a secretary and in the second by either speaking into a Dictaphone or, again, dictating his letter. In both scenes, the letter would be typed by a secretary whose initials would appear at the bottom of the report or letter following the initials of the author (e.g., “LCR:jrm”). Dictaphones and dictation were common parts of corporate life. In fact, in the *McCormack* trial both the Henry Company and E.F. Timme & Son called secretaries to testify that they had typed and mailed letters bearing their initials. Although both act 1, scene 4 and act 2, scene 1 involve private corporate documents, there are important differences in the sources involved here. The documents involving Riegel were produced in the litigation brought by Jacqueline Gryc individually and as guardian of her daughter Lee Ann. In contrast, the Du Pont documents were private corporate documents that were not part of the court record in the cowboy suit litigation. They are part of the Du Pont Collection held at the Hagley Library. The difference is worth noting because litigation necessarily exposes documents relating only to the specific legal issue before the court and in so doing takes documents in some senses out of context, but conversely may produce private corporate and legal documents to which otherwise the researcher would not have access.

In contrast to the private nature of corporate documents, courtroom proceedings and judicial opinions are public even where the documents—legal briefs on appeal and opinions—are written rather than oral. I have marked this difference in the nature of the sources in the way I have structured these scenes, which takes us to the third point regarding dramatization: breaking down the divide between stage and audience. Whereas in the scenes involving corporate documents the audience looks into but remains separate from the corporate world, in the scenes involving courts (and also act 2, scene 2 involving the 1967 senate hearings on Amendments to the Flammable Fabrics Act of 1953), I purposefully efface the line between audience and actors. This is particularly the case in act 1, scene 3 in which the audience *is* the court on appeal to which the lawyers in the *McCormack* lawsuit make their arguments, and in act 2, scene 3 in which the audience *is* the courtroom to which Justice Todd of the Minnesota Supreme Court reads the court’s opinion in *Gryc v. Dayton-Hudson Corporation*. In the *McCormack* appeal (act 1, scene 3), the audience as court hears the competing arguments and is left to decide how the case should be decided.

In act 2, scene 3, focused on the Minnesota Supreme Court’s decision in *Gryc*, my goal is somewhat different. An appellate decision is an elaborate artifice of subjective experience, legal storytelling, hired expertise, legal argument, and law. The goal in this scene is to deconstruct the opinion almost as though I have cut through the surface level to expose the layers beneath: the contradictions in testimony, the opposing arguments, and so on. The judge reads portions of his opinion to the audience as though in open court, but as he does, his reading is

interrupted by expert and lay testimony and the arguments of counsel from the case. I have reproduced evidence presented at trial and from the parties' legal briefs, as debate among the actors and with the judge and audience. The audience sees the court (judge) erasing discrepancies in testimony, choosing positions, making law. In terms of the construction of the scene, one distinction from the opening scene of the play relating to *McCormack* is important to note. In act 1, scene 1 the audience is in the courtroom for the trial of *McCormack*. They are intended to experience the scene as though hearing the testimony as the trial unfolds. In act 2, scene 3 (*Grye*) the position of the audience is different: they are again in the courtroom, but this time it is to hear the state supreme court's decision in the appeal of the case. The outcome of the trial is already decided. The audience gains glimpses of the contradictions and tensions in the evidence submitted at trial, but largely hears that evidence through the court's opinion as it has already been reduced in service of a particular conclusion by the appellate court. In both scenes, as throughout the play, all the text is drawn directly from the original sources.

The Blair Corporation product recall, dramatized in act 2, scene 4, is, like the other scenes, a matter of factual record. Here too, I dissolve the boundary between stage and audience by the members of the audience receiving the same recall notices as the sole actress on stage. In the other scenes where I breach the divide between stage and audience, the audience is brought into the action of the play intellectually as judge or as courtroom audience. Here the audience becomes consumer; the ownership of hazard becomes more personal, more immediate. In the final lines of the play, as the narrator considers what to do with the robe her mother brought her—a robe my mother in fact gave me—the narrator herself becomes implicated as consumer drawing the audience in to ask if she should wear the robe.

A fourth form of dramatic license in the play is the use of stage notes conveying the appropriate demeanor, voice, tone, body language, etc., of the actors. These are limited both in the interest of being true to the record and with the goals of epic theatre in mind. Some stage notes in the play were part of the official record. In the *McCormack* trial, Tommy McCormack's father was "overcome with emotion" at several points in his testimony. Those moments are noted in the trial record and I have retained them here. I have added other stage notes that I believe accurately capture a character's likely demeanor, tone, etc., based on my reading of the documents in their entirety. In other respects, though, what most characterizes the play is a deliberate flattening of emotion. So, for example, the voices of the newspaper readers in act 1, scene 1 are unemotional, contrasting with the content of the stories they are relating. One of the goals of epic theatre is to engage the audience at the level of reason rather than by acting on the audience's emotions. My hope is to let the evidence speak for itself. It certainly is powerful enough to do so.

There are many other dramatic touches in the play. For example, consider the screen recording plaintiffs' names and settlement amounts in act 1, scene 2 in the settlement hearing of the twenty cowboy suit cases pending in federal district court before Judge Knox, or the figures dressed in black in the Du Pont legal counsel's office in act 1, scene 4. Both of these examples are intended to reduce possible confusion on the audience's part. The visual recording of settlements in the courtroom scene helps the audience keep in mind in the jumble of discussion that there are twenty separate lawsuits before the court. Similarly, the calendar and chart of pending and settled cases helps the audience follow the narrative arc of the scene. They also have deliberately dramatic purposes: projecting along another dimension the crass commodification of injury and death in the settlement hearing, and, in the case of Du Pont, the satisfaction of resolving all the cowboy suit lawsuits in which the company was named as a defendant without paying a dime. The figure dressed in black in the Du Pont scene serves the added purpose of helping me address contradictions in the material record. The reports on pending and settled cowboy suit lawsuits naming Du Pont as a defendant from the legal department to the executive committee of Du Pont do not "add up." I have no way of knowing where the mistake lies. I have taken the sources then exactly as they are and introduced a device—the figure in black keeping the tally of cases—to reflect the discrepancy. Another example of dramatization is in act 2, scene 3 where I have dramatized the cruel nicknames that Lee Ann Gryc faced at school and that appear in the trial record through the testimony of both Lee Ann and the medical psychiatric experts who treated her and testified at trial.

I hope this note on sources explains the staging of "Owning Hazard, A Tragedy" and possibly provokes questions on its own about history, law, and the visualization and dramatization of both.

APPENDIX A

BLAIR

220 HICKORY STREET • WARREN, PENNSYLVANIA 16366-0001

IMPORTANT SAFETY NOTICE

April 21, 2009

Dear Valued Customer,

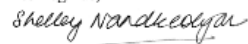
In cooperation with the U.S. Consumer Product Safety Commission, Blair is voluntarily recalling about 162,000 Full Length 100 percent cotton Chenille Robes with the following item numbers: 3093111, 3093112, 3093113, 3093114, 3093115 and 3093116. Our records show that you purchased one or more of these robes from either Blair's catalog, website or retail store.

Blair recently became aware of a potential fire hazard involving this product because it fails to comply with Federal flammability standards. Blair has received three reports of incidents where the robe caught fire after being exposed to open flames. One injury was reported in connection with these incidents.

If you have one or more Blair Full Length Chenille Robes, please discontinue use immediately. Use the enclosed post card to obtain a free shipping label to return your robe(s) to us. On the postcard, you can also indicate your choice of receiving a full refund of the purchase price of your robe(s) or a \$50 gift card for Blair merchandise. If you do not select either option on the return postcard, Blair will refund the purchase price. If you have questions about this recall, please contact our Customer Service Department toll free at (877) 392-7095 between 9 a.m. and 9 p.m. ET Monday through Saturday for answers. You can also visit our website at www.blair.com/recall or contact us by email at blairproductrecall@blair.com for further information.

We regret any inconvenience this may cause and appreciate your assistance in making the safety of our customers our highest priority.

Best regards,



Shelley Nandkeolyar
President and Chief Executive Officer



APPENDIX B

May 7, 2009

IMPORTANT SAFETY NOTICE**Subject: Blair Recall of Women's Chenille Robes Due to Burn Hazard**

If you have chosen not to participate in Blair's recall of our Full-Length Chenille Bath Robe or if you haven't yet returned your robe to us, we urge you rethink your decision to keep it. While we are pleased that you value your robe, we urge you in the strongest possible terms to discontinue using the robe immediately and return it to us, even if your robe appears to be safe. Some robes fail to meet federal flammability requirements and present a risk of serious burns to consumers if they are exposed to an open flame.

Please reconsider your decision and call the Blair Recall Hotline toll free at (877) 392-7095 between 9 a.m. and 9 p.m. EDT Monday through Saturday. One of our Customer Services representatives will see that you get a prepaid shipping label to return your robe to us and see that you get your choice of either a full refund of your purchase price or a \$50 gift card.

Your safety is our highest priority in this matter. We hope it is yours as well.