

CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

To: Torts Section A & E
From: Professor Sebok
Re: First class meetings and readings
Date: August 15, 2025

The first class will meet on Thursday, August 21 in Room 206 at 10 AM.

Class on Friday, August 22 is cancelled.

For the first class please read pp. 3 – 46 and pp. 1197 – 1242 in the casebook. This assignment is much longer than what you will be asked to prepare for a typical class. Concentrate on pp. 6 – 16.

The casebook is:

Goldberg, Kendrick, Sebok & Zipursky, *Tort Law: Responsibilities and Redress* (Fifth Edition) (2021)

Please refer to Canvas for information related to this class.

APPENDIX



MATERIALS CONCERNING WALTER v. WAL-MART STORES, INC.

- I. **Plaintiff's Complaint**
- II. **Defendant's Answer**
- III. **Requests for Documents and Interrogatories**
- IV. **Notice of Deposition of Antoinette Walter**
- V. **Jury Verdict Form**
- VI. **Consent Agreement: *In re: Henry Lovin, III***
- VII. **Supplemental Notes and Questions**

Sections I-VI of this appendix reproduce documents referenced in the discussion of *Walter v. Wal-Mart* in Chapter 1. Section VII provides further information about the litigation and discusses additional procedural, substantive, and tactical issues it posed. The authors gratefully acknowledge the assistance of Steven Silin, Esq. and Mark Franco, Esq. in assembling these materials.

I. PLAINTIFF'S COMPLAINT

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

ANTOINETTE WALTER,

Plaintiff,

vs.

WAL-MART STORES, INC., #1797,
an Arkansas Corporation with a place of
business located in Rockland, Maine,

Defendant,

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**COMPLAINT AND DEMAND
FOR JURY TRIAL**

1. At all times pertinent hereto the Plaintiff was a resident of Rockland, County of Knox and State of Maine.
2. That at all times relevant hereto the Defendant was an Arkansas corporation doing business in Rockland, County of Knox and State of Maine and did operate a pharmacy at that location.
3. That on or about May 7, 1997, Plaintiff's physician, Dr. Stephen Ross, wrote Plaintiff a prescription for Chlorambucil (2 mg.).
4. That on or about that date the Defendant by or through one of its employees or agents, did undertake to fill that prescription and did fill that prescription in a negligent, careless and reckless manner, specifically included but not limited to substituting a different drug, Melthalan, for the drug prescribed by Dr. Ross.
5. That as a result of the Defendant's actions as aforesaid the Plaintiff did suffer severe, painful and permanent, physical and emotional injuries, including an extended hospitalization because of the adverse reaction that the inappropriately filled medication caused.
6. Because of the Defendant's actions as aforesaid the Plaintiff did incur and will continue to incur great expenses in an effort to heal the said injuries.

7. The Plaintiff does hereby make a demand for trial by jury.

WHEREFORE, Plaintiff demands judgment against this Defendant in an amount which will fairly and reasonably compensate her together with interest and costs.

DATED at Lewiston, Maine this 12th day of May, 1998.

Steven D. Silin, Esquire -- Bar Roll #2686
Attorney for Plaintiff

II. DEFENDANT'S ANSWER

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: CV-98-035

ANTOINETTE WALTER)
)
 Plaintiff)
)
 vs.)
)
 WAL-MART STORES, INC.)
)
 Defendant)

ANSWER TO PLAINTIFF'S
COMPLAINT AND DEMAND
FOR JURY TRIAL

NOW COMES Defendant Wal-Mart Stores, Inc. (hereinafter referred to as "Wal-Mart") and answers Plaintiff's Complaint and Demand for Jury Trial as follows:


1. Defendant Wal-Mart admits the allegations contained in Paragraph 1 of Plaintiff's Complaint.
2. Defendant Wal-Mart admits the allegations contained in Paragraph 2 of Plaintiff's Complaint.
3. Defendant Wal-Mart has insufficient information with which to form a belief as to the truth of the allegations contained in Paragraph 3 of Plaintiff's Complaint and, therefore, denies same.
4. Defendant Wal-Mart denies the allegations contained in Paragraph 4 of Plaintiff's Complaint.
5. Defendant Wal-Mart denies the allegations contained in Paragraph 5 of Plaintiff's Complaint.
6. Defendant Wal-Mart denies the allegations contained in Paragraph 6 of Plaintiff's Complaint.
7. Defendant Wal-Mart admits the allegations contained in Paragraph 7 of Plaintiff's Complaint.

WHEREFORE, Defendant Wal-Mart respectfully requests that Plaintiff's Complaint be dismissed and for its costs and for such other relief the Court deems just and appropriate.

AFFIRMATIVE DEFENSES

1. The Plaintiff's Complaint fails to state a claim upon which relief may be granted.
2. The negligence of the Plaintiff was equal to or greater than the alleged negligence of the Defendant.
3. The Plaintiff's claim is barred by the doctrine of mitigation of damages.

Dated at Portland, Maine, this 28th day of May, 1998.



Mark V. Franco, Esq.
Attorney for Defendant Wal-Mart Stores, Inc.

THOMPSON & BOWIE
Three Canal Plaza
P. O. Box 4630
Portland, ME 04112
(207) 774-2500

III. REQUESTS FOR DOCUMENTS AND INTERROGATORIES

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: CV-98-035

ANTOINETTE WALTER)
)
 Plaintiff)
)
 vs.)
)
 WAL-MART STORES, INC.)
)
 Defendant)

REQUEST FOR PRODUCTION
OF DOCUMENTS PROPOUNDED
TO PLAINTIFF

NOW COMES Defendant, Wal-Mart Stores, Inc., and requests, pursuant to Rule 34 of the Maine Rules of Civil Procedure, that Plaintiff, Antoinette Walter, produce for inspection and copying by the Defendant at the offices of Thompson & Bowie, Three Canal Plaza, Portland, Maine, within thirty (30) days, the following documents:

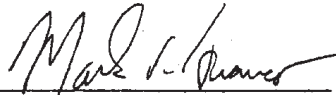
1. A certified, legible copy of any memoranda, notes, correspondence, reports including pharmacology reports, or other documents of any kind, of any hospital, laboratory, clinic or other medical or health facility, by or at which the Plaintiff has been examined, treated, or tested within the last ten years;
2. Legible copies of any and all reports, correspondence, memoranda, notes including office notes or other documents of any kind whatsoever reflecting the examination, testing, or treatment provided by any physician, technician, physical therapist, or other practitioner of the healing arts, or psychologist, psychiatrist, marriage and/or sex counselor, or other treating individual, relative to the Plaintiff within ten years prior to this request;
3. Legible copies of any report, list, memoranda, graph, correspondence or other documents of any kind, reflecting in any way test or treatment or examination performed on or with the Plaintiff, within the ten years prior to the date of this request;
4. Each and every statement, bill, check or other document of any kind reflecting any medical expenses on the part of the Plaintiff, related to the occurrence of which the Plaintiff s complained in this action;

5. Each and every document of any kind which relates in any way to the damages which are not of a medical nature which the Plaintiff claims to have suffered or incurred in relation to the subject matter of this action;

6. Any and all notes, memoranda, correspondence, reports, or other documents of any kind, reflecting treatment, examination, testing, or consultation for each and every psychologist, psychiatrist, psychotherapist, or similar health professional, relating to injuries allegedly sustained by the Plaintiff relative to the occurrence which forms the subject matter of this suit;

7. Each and every document in the nature of a report or otherwise reflecting any of the Plaintiff's expert's opinions concerning the subject matter of this action,

Dated at Portland, Maine, this 26th day of June, 1998.



Mark V. Franco, Esq.
Attorney for Defendant Wal-Mart Stores, Inc.
Bar Roll No: 2967

THOMPSON & BOWIE
Three Canal Plaza
P. O. Box 4630
Portland, ME 04112
(207) 774-2500

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: CV-98-035

ANTOINETTE WALTER)
)
 Plaintiff)
)
 vs.)
)
 WAL-MART STORES, INC.)
)
 Defendant)

INTERROGATORIES
PROPOUNDED BY DEFENDANT
TO PLAINTIFF

NOW COMES the Defendant, Wal-Mart Stores, Inc., in the above-entitled action and requests the Plaintiff, Antoinette Walter, answer under oath the Interrogatories below within thirty (30) days of service in accordance with Rule 33 of the Maine Rules of Civil Procedure. The Plaintiff is further requested to provide supplemental information to Defendant as it becomes available so that the answers may remain true and accurate until this matter is finally adjudicated.

DEFINITIONS

A. "Person" shall include the plural, as well as the singular, and shall include, in addition to natural persons, any firm, corporation, association, partnership or other form of entity.

B. To "identify" a person shall mean to state with respect thereto:

- a. His full name;
- b. His present of last known business and/or home address;
- c. His employer and employment position, both now and during that time period which is the subject of the particular inquiry.

C. "Document" shall include but not be limited to any written, recorded, filmed or graphic material, whether produced or reproduced or on paper, cards, tapes, film, electric facsimile, computer storing device or any other media, including but not limited to papers, books, letters, photographs, objects, tangible things, correspondence, telegrams, cables, telex messages, memoranda, notes, notations, records, work papers, transcripts, minutes, reports and recordings of telephone or other conversations, or of

interviews or of conferences, or of other meetings, affidavits, statements, charts, graphs, specifications, drawings, blueprints, summaries, opinions, proposals, reports, studies, analyses, audits, evaluations, contracts, agreements, journals, statistical records, ledgers, books of account, bookkeeping entries, financial statements, tax returns, vouchers, checks, check stubs, invoices, receipts, desk calendars, appointment books, diaries, lists, tabulations, summaries, sound recordings, computer printouts, data processing reports and output, microfilms, all records kept by electronic photographic or mechanical means, and things similar to any of the foregoing however denominated.

- D. To "identify" a document shall mean to state with respect thereto:
- a. The type of document;
 - b. Its date, and if it bears no date its approximate date;
 - c. The name of the person who prepared it and/or sent or delivered it;
 - d. The name of each person to whom it was addressed and/or delivered;
 - e. Its nature and substance, with sufficient particulars to enable it to be identified;
 - f. Its physical location, and the name and address of its present custodian;
 - g. The person or persons in possession or control of the original writing, including their full names and current addresses.
- E. To "identify" an oral communication shall mean to state with respect thereto:
- a. The date and place where the communication occurred;
 - b. The name and current address of each person who participated in the communication, and the name and current address of each person who was present at the time it was made;
 - c. By whom each such person was employed, and whom each person represented or purported to represent in making the communication;
 - d. A complete and accurate statement of what each person said;
 - e. A complete identification of each document regarding or relating to the communication.

F. The term "the incident" as used in these Interrogatories shall mean the incident which occurred on or about the date, which allegedly caused the damage, as set forth in your Complaint.

G. When referring to non-natural persons, to "identify" means to state the full name, form (e.g., corporation, partnership, Professional Association, etc.), state the origin and principal place of business.

H. When referring to objects or things (other than documents), to identify means to describe the object or thing by stating its approximate size (dimensions) and weight, color, function, purpose, the materials of which it is (or was) composed, and any and all serial numbers or other identifying numbers, letters, or marks. When the request to identify objects or things refers to a group or class, the identifying marks, letters or numbers of a series, so long as all items in the series are substantially identical.

INTERROGATORIES

1. Please identify yourself by stating your full name, present address, present employment position, if any, date of birth, the full name and present address of your spouse, if you are married, your height and weight as of the time of the incident referred to in the Complaint, color of hair, color of eyes, Social Security number, and the names, ages and addresses of your children, if any.

2. Please state each of the addresses at which you have lived during the past ten (10) years, together with the inclusive dates for each such residence address.

3. Please state the full names, current addresses, employment positions and employers of each and every person who, to your knowledge or to that of your agents, attorneys or employees have knowledge of any of the facts concerning the incident referred to in the Complaint. Identify all documents which relate to each of these persons and the incident.

4. State the full name, current address and employment position of each person who investigated on your behalf the matters which are the subject of this suit. Identify each and every document which relates in any way to this Interrogatory answer.

5. Set forth in full the substance of any admission by a party or by an alleged agent of a party, and include within your answer the name of the person making each such admission, the date and time of the admission, and the name and address of all

persons present at the time of the admission. Identify each and every document which relates in any way to each such admission.

6. Please itemize in complete and exhaustive detail each and every element of damage which you claim or contend is associated with the incident. Identify all documents presently in your possession, or of which you, your agents, servants, employees or attorneys are aware, which in any way substantiates these damages.

7. Do you claim or contend that you incurred any other damages as a result of the incident? If so, please itemize in complete and exhaustive detail each and every element of damage, other than that referred to in the previous Interrogatory, which you claim or contend resulted from the incident. Identify all documents presently in your possession, or of which you, your agents, servants, employees or attorneys are aware, which in any way substantiates these damages.

8. If you, or anyone on your behalf, has obtained any statements concerning the accident which is the subject matter of this lawsuit, describe separately each such statement by setting forth the name and address of the person who gave it, the name, address and employment position of the person who took it, the date it was taken, whether it was written or recorded, whether it was reduced to writing, whether it was signed and the present location of all notes, recordings, transcripts or other writings of any kind pertaining to each statement.

9. If you have made an insurance claim or have been reimbursed by any insurer for any of the losses or damages claimed in this suit, state with respect to each such claim or reimbursement the name and address of the insurer, the policy number under which the claim or reimbursement was made, the nature of insurance coverage provided, the amount claimed, and the amount of each reimbursement made. Identify all documents which relate in any way to the claim or reimbursement.

10. Please identify and itemize by source, date and amount all expenses, including medical expenses, which you claim in this lawsuit as having resulted from the incident.

11. Please identify each and every physician, technician, physical therapist, hospital, laboratory, clinic or other medical person or facility by whom or at which you have been examined, tested or treated during the ten (10) year period immediately preceding the date of the incident. Include within your answer the inclusive dates during which each such exam, test or treatment occurred, together with the name, type and/or description of each such examination, test or treatment and the reason therefore.

12. Please identify each and every physician, technician, physical therapist, hospital, laboratory, clinic or other medical person or facility by whom or at which you have been examined, tested or treated from the date of the incident up to and including the present date; and include within your answer the dates of each exam, test or treatment, and the name, type and/or description of each such examination, test or treatment, and the reason therefore.

13. If you have had physical complaints of any kind since the incident, set forth in complete and exhaustive detail the nature of each such complaint, including the dates and times of each complaint; and describe the frequency, intensity and duration of each complaint.

14. Please describe in detail each and every diagnosis you have received from each and every doctor you have consulted to date concerning injuries you may have suffered as a result of the incident.

15. If you were at any time confined as a result of injuries sustained in this accident, please describe in detail:

- a. The period of time you were confined in any hospital;
- b. The period of time you were confined to bed; and,
- c. The period of time you were confined to your home.

16. Please describe in complete and exhaustive detail your symptoms at the present time, including the sites and intensities of any pain.

17. Please describe in complete and exhaustive detail any and all injuries, painful symptoms, and/or congenital defects you had suffered before the incident, and further indicate how recently before the incident you had been treated for such difficulties, by date.

18. Please describe in detail each and every occupational activity which you were able to perform before the incident that you were unable to perform to any extent as a consequence of the incident.

19. Please describe in detail each and every activity, other than activities referred to in the preceding Interrogatory, which you were able to perform before the incident which you claim you cannot perform now as a result of the incident.

20. Do you claim or contend that you are entitled to damages for pain and suffering?

21. If so, please list in precise detail each and every occurrence, symptom or other factor which in any way supports this claim or contention.

22. State how the occurrence which is the subject of this suit took place setting forth, in detail, the events in the order in which they occurred.

23. Identify each expert witness you will call by stating his name, address, employment position and a summary of his qualifications as an expert; state the subject matter of which he is expected to testify, the substance of all facts and opinions to which he is expected to testify, and a summary of the grounds for each opinion he will give.

Dated at Portland, Maine, this 26th day of June, 1998.



Mark Y. Franco, Esq.
Attorney for Defendant Wal-Mart Stores, Inc.
Bar Roll No: 2967

THOMPSON & BOWIE
Three Canal Plaza
P. O. Box 4630
Portland, ME 04112
(207) 774-2500

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: 98-035

ANTOINETTE WALTER,

Plaintiff

WAL-MART STORES, INC. #1797

Defendant

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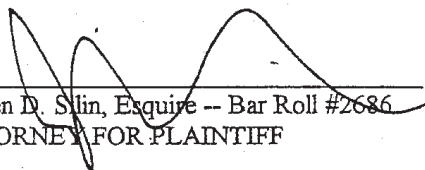
**PLAINTIFF'S REQUEST FOR
PRODUCTION OF DOCUMENTS
PROPOUNDED TO DEFENDANT**

In accordance with the provisions of Rule 34, M.R.Civ.P., the Plaintiff requests the Defendant, to produce for inspection and copying in the offices of Plaintiff's Attorney, 129 Lisbon Street, Lewiston, Maine on or before August 14, 1998 the following:

1. All documents relating in any way to the filling of the prescription for the Plaintiff on or about May 7, 1997, that is the prescription which underlies this complaint, specifically included but not limited to all prescription slips, invoices, incident reports, subsequent directives pertaining to any policies with respect to filling of prescriptions or substituting of prescriptions, or any other documents of any kind relating in any way to the filling of the prescription which is the basis of the complaint in this case.
2. Any and all guidelines, manuals, policies or regulations or any other related documents which relate generally to the filling of prescriptions or substituting of prescriptions used, referred to, made available to, or relied upon by pharmacy employees of the Defendant with respect to the filling or substituting of prescriptions as of May 7, 1997 or at any point subsequent.
3. Any and all documents supporting, or anything relied upon by any employee of the Defendant with respect to, the appropriateness of substituting Chlorambucil (Leukeran) with Melphalan (Alkeran).

4. All literature within the Defendant's possession, custody or control pertaining to Chlorambucil (Leukeran) and Melphalan (Alkeran), derived from medical texts or other medical literature, manuals, guidelines, manufacturer's literature or from any other source, specifically including but not limited to information on dosage and administration, clinical pharmacology, indications and usage, precautions, adverse reactions, contraindications, warnings, substitution with other drugs, or possible anticipated adverse reactions.

DATED: July 14, 1998



Steven D. Slin, Esquire -- Bar Roll #2686
ATTORNEY FOR PLAINTIFF

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. 98-035

ANTOINETTE WALTER,

Plaintiff,

vs.

WAL-MART STORES, INC., #1797,

Defendant,

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**PLAINTIFF'S INTERROGATORIES
PROPOUNDED TO DEFENDANT**

Plaintiff, by and through counsel, requests that the Plaintiff answer, under oath, the following Interrogatories and Request for Production of Documents within thirty days of service upon them in accordance with Rules 33 and 34 of the Maine Rules of Civil Procedure. The Defendant is further requested to provide supplemental information to Plaintiff as it becomes available to them so that the answers may remain true and accurate until this matter is finally adjudicated.

1. Please state the name, address, age, social security number, telephone number, height, weight, name and address of present employer and present occupation or position of each and every person answering these Interrogatories.

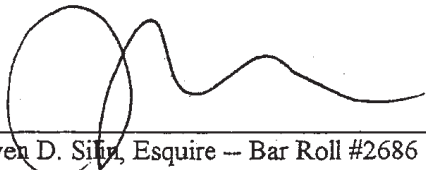
2. Have any statements been taken from you or anyone else, by you or anyone acting on your behalf relating to the occurrence which is the subject matter of this lawsuit? If so, for each statement, please state the following:
 - a. The name of the person who gave the statement;
 - b. The substance of said statement;
 - c. The date upon which said statement was taken;
 - d. The name of the person who took the statement;
 - e. Whether or not the statement was reduced to writing;
 - f. The present location of the statement and the name and address of the person who is now in possession of it; and
 - g. If you will do so without a formal Notice to Produce, please attach a copy of all statements described in your answer to this Interrogatory if they are in your or your attorney's possession.

3. Please describe in detail the substance of any admission by a party or agent of a party with respect to the facts which give rise to this action, including within your answer the names and addresses of the person or persons making each admission, the substance of each admission, date and time of each admission and the names and addresses of any person present at the time of each admission.
4. State the full name and last known address of each and every person known to you, your agents, servants, employees or attorneys who has or may have information with regard to the subject matter of this lawsuit and summarize what you understand this information to be.
5. Please state the full name and complete address of each and every person you intend to call upon on your behalf as an expert witness in this matter, and, as to each such person, please state:
 - a. In what field this witness is an expert, and a resume of his/her education and experience and qualifications in such field;
 - b. The date, place and form of each occasion when he/ she has been offered as an expert witness and, with respect to each such occasion, the subject matter upon which he/she was called to testify, whether he/she did in fact qualify as an expert, and a detailed description of the technical area, if any, in which he/she is qualified as an expert;
 - c. The name of each organization with which he/she is affiliated and with respect to his/her testimony, the full name and complete address of each person, firm or corporation with whom he/she has consulted concerning his/her testimony;
 - d. The date of publication, publisher, or any text, textbook, article or other published material which was authored by said expert;
 - e. The subject matter in which the expert is expected to testify;
 - f. The substance of all facts and opinions to which the expert is expected to testify and a summary of the grounds for each such opinion; and
 - g. A description of any reports, memoranda, correspondence, notes or writings of any kind in any way related to his/her anticipated testimony and the date, author, addressee and substance of each.
6. Please state the name and current address of each and every person who you intend to call as a witness and who will testify to the facts.
7. The name of the pharmacist and/or pharmacy technician or assistant involved in the filling or execution of the prescription for Plaintiff Antoinette Walter at the Rockland Wal-Mart Store on or about May 7, 1997 for Chlorambucil -- as prescribed by Dr. Stephen Ross, and the following information:

III. Requests for Documents and Interrogatories

- a. Current address;
 - b. Current employment status;
 - c. Position as of May 7, 1997 and as of this date;
 - d. License status as of May 7, 1997 and as of this date;
 3. Educational training and employment background prior to May 7, 1997.
8. With respect to any pharmacist or pharmacy technicians, not included in the previous interrogatory answer, that were on duty at the Rockland Wal-Mart Store on May 7, 1997 please provide the following information:
- a. Name;
 - b. Current address;
 - c. Current employment status;
 - d. Employment position as of May 7, 1997;
 - e. License status as of May 7, 1997 and as of this date;
 - f. Educational training and employment background prior to May 7, 1997.
9. The name and current employment position of any and all Wal-Mart personnel or any other individuals who investigated or made inquiry into the specific prescription practices which underlies the Complaint in this case, including but not limited to any state or other governmental regulatory or oversight board or personnel. With respect to any such individuals please provide their address and position.

DATED: July 14, 1998



Steven D. Silver, Esquire -- Bar Roll #2686
ATTORNEY FOR PLAINTIFF

IV. NOTICE OF DEPOSITION OF ANTOINETTE WALTER

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: CV-98-035

ANTOINETTE WALTER)
)
Plaintiff)
)
vs.)
)
WAL-MART STORES, INC.)
)
Defendant)

NOTICE TO TAKE ORAL
DEPOSITION OF PLAINTIFF
ANTOINETTE WALTER

**NOTICE TO TAKE ORAL DEPOSITION OF PLAINTIFF
ANTOINETTE WALTER**

TO: Steven D. Silin, Esq.
Berman & Simmons, P.A.
129 Lisbon Street, P.O. Box 961
Lewiston, ME 04243-0961

Please take notice that on Thursday, November 19, 1998 at the offices of Edward B. Miller, 32 School Street, Rockland, Maine, Defendant Hoyt's Cinemas Corporation in the above action will take the deposition of Plaintiff Antoinette beginning at 1:30 p.m. on said day, upon oral examination, pursuant to the Maine Rules of Civil Procedure, before Bickford & Melton, a Notary Public, or before some other officer authorized by law to administer oaths. The deposition will continue from day to day until completed.

Ms. Walter is requested to bring with her copies of all medical and hospital reports concerning the examination, treatment, diagnosis and prognosis of the injuries allegedly sustained in this accident, and proof of any alleged loss of earnings and loss of earning capacity, which may not have been previously supplied.

Ms. Walter is requested to produce at her deposition, copies of all notes, memoranda, letters, contracts, photographs and any other documents of any kind which have not previously been supplied.

Dated at Portland, Maine, this 26th day of October, 1998.

A handwritten signature in cursive script, reading "Mark Y. Franco", written over a horizontal line.

Mark Y. Franco, Esq.

Attorney for Defendant Hoyt's Cinemas Corp.

Bar No. 2967

THOMPSON & BOWIE

Three Canal Plaza

P. O. Box 4630

Portland, ME 04112

(207) 774-2500

V. JURY VERDICT FORM

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. 98-035

ANTOINETTE WALTER,

Plaintiff,

vs.

WAL-MART STORES, INC., #1797,

Defendant,

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JURY VERDICT FORM

1. What are Antoinette Walter's total damages?

\$ 550,000.00

Number of Jurors concurring in verdict

8

Number of Jurors not concurring in verdict

0

DATED: 2-23-99

Robert de Bradstreet
FOREPERSON

**VI. CONSENT AGREEMENT:
*IN RE: HENRY LOVIN, III***

STATE OF MAINE
BOARD OF PHARMACY

<u>In re:</u>)	CONSENT
Henry Lovin, III, R.Ph.)	AGREEMENT
Complaint No. PHR-148)	

PARTIES

This document is a Consent Agreement regarding disciplinary action against Henry Lovin, III's license to practice pharmacy in the State of Maine. The parties to this Consent Agreement are: Henry Lovin, III, R.Ph. ("Mr. Lovin"), the State of Maine Board of Pharmacy ("the Board") and the Maine Department of the Attorney General ("the Attorney General"). This Consent Agreement is entered into pursuant to 32 M.R.S.A. § 13741(2) and 10 M.R.S.A. § 8003(5).

FACTS

1. Mr. Lovin is a licensee of the Board.
2. On or about February 13, 1998, the Board received a complaint from State Pharmacy Inspector Tonya Dickey, a copy of which is annexed hereto and made a part hereof as Exhibit A and which the Board docketed as Complaint No. PHR-148.
3. On June 9, 1998, the Board voted to offer Mr. Lovin this Consent Agreement, in order to resolve Complaint No. PHR-148.

COVENANTS

4. Mr. Lovin admits violations alleged in Complaint No. PHR-148.
5. As discipline for conduct admitted in ¶ 4 above, Mr. Lovin shall, no later

- 2 -

than thirty (30) days after the date of the last signature hereto, pay the Board a monetary penalty of Five Hundred Dollars (\$500.00), which payment is to be made to "Treasurer, State of Maine" and remitted to Kelly B. Webster, Complaints & Investigations Clerk, Maine Department of Professional and Financial Regulation, 35 State House Station, Augusta, Maine 04333. Further, effective April 1, 1999, Mr. Lovin's license shall be SUSPENDED for fourteen (14) consecutive days.

6. In his regular application for license renewal, Mr. Lovin shall submit to the Board proof of fifteen (15) extra hours of continuing professional education on a topic relevant to Complaint No. PHR-148.

7. This Consent Agreement is not appealable and is effective until modified or rescinded by the parties hereto.

8. The Board and the Department of the Attorney General may communicate and cooperate regarding any matter related to this Consent Agreement.


9. This Consent Agreement is a public record within the meaning of 1 M.R.S.A. § 402 and will be available for inspection and copying by the public pursuant to 1 M.R.S.A. § 408.

10. Nothing in this Consent Agreement shall be construed to affect any right or interest of any person not a party hereto.

11. Mr. Lovin acknowledges by his signature hereto that he has read this Consent Agreement, that he has had an opportunity to consult with an attorney before executing this Consent Agreement, that he executed this Consent Agreement

of his own free will and that he agrees to abide by all terms and conditions set forth herein.

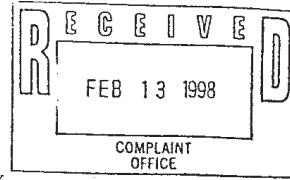
DATED: 3/6/99  RPh
HENRY LOVIN, III, R.Ph.

DATED: 3/9/99  RPh.
President
Maine Board of Pharmacy

DATED: 3/9/99 
JAMES M. BOWIE
Assistant Attorney General



STATE OF MAINE
DEPARTMENT OF PROFESSIONAL
AND FINANCIAL REGULATION
OFFICE OF LICENSING AND REGISTRATION
BOARD OF COMMISSIONERS OF THE PROFESSION OF PHARMACY
35 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0035



ANGUS S. KING, JR.
GOVERNOR

S. CATHERINE LONGLEY
COMMISSIONER
ANNE L. HEAD
DIRECTOR

February 5, 1998

To: Kelly Webster

Please file a complaint against the following license: Henry Lovin III RPh
25 Wadsworth St.
Thomaston, ME 04861
License No. 2960



The statutes and regulation being cited for violation are:

Title 32: Section 13784 (1) Patient Information Regulation
Section 13794 Labeling of Prescriptions
Board Rules, Chapter 16 (1)(B) Patient Counseling Requirements

The above violations are being cited for the error in dispensing caused by Henry Lovin III RPh on a prescription for Antoinette Walter dated 5/7/97.

Sincerely,

Tonya Dickey RPh
Pharmacy Inspector

PHONE: (207)624-8603 (Voice)

INSPECTOR VOICE MAIL: (207)624-8604



PRINTED ON RECYCLED PAPER
(207) 624-8563 (TDD)

FAX: (207)624-8637

VII. SUPPLEMENTAL NOTES AND QUESTIONS

Section II of Chapter 1 discussed some of the basic procedural and substantive issues associated with Antoinette Walter's negligence action against Wal-Mart. The notes that follow provide additional information about the suit and pose additional questions raised by it.

1. *What Went Wrong?* Recall that the trial judge, Judge Marsano, entered judgment as a matter of law for the plaintiff, ruling that a reasonable jury would have to find that Wal-Mart breached the duty of reasonable care it owed to Walter so as to cause her injury. The evidence presented at trial pertaining to Wal-Mart's breach of duty—i.e., its carelessness—was minimal: it consisted entirely of brief testimony from Henry Lovin, the pharmacist employed by Wal-Mart. That testimony came under direct examination from Mr. Silin, the plaintiff's attorney:

MR. SILIN: . . . As I understand it, what you did when you saw [Walter's] prescription receipt, in your mind you thought Alkeran is the brand . . . name for Chlorambucil. Is that what you did?

MR. LOVIN: Yes, unfortunately. . . .

MR. SILIN: You went ahead and filled the prescription with the Alkeran drug instead of the Chlorambucil or the Leukeran drug prescribed by Dr. Ross?

MR. LOVIN: Yes.

MR. SILIN: You would agree with me, would you not, that that was a serious error?

MR. LOVIN: Definitely.

MR. SILIN: That was not the kind of substitution [that] . . . you intentionally or purposely or knowingly [would] make if you were even remotely trying to satisfy the proper standard of care for a pharmacist?

MR. LOVIN: No. . . .

MR. SILIN: This wasn't a purposeful substitution you made because you thought it would be appropriate for the prescription that was written?

MR. LOVIN: No.

MR. SILIN: This simply was an error that you made, a mistake, a serious mistake that resulted in the wrong drug being given to Antoinette Walter?

MR. LOVIN: Yes.

MR. SILIN: As I understand it, at the time this prescription was filled there were various protocols in place at Wal-Mart, and I assume at every other pharmacy on the face of this planet, certainly in this part of the country to help prevent this very thing from ever occurring . . . [and] in the

literature [from Wal-Mart] it talks about a four-point step process to double check, triple check that under no circumstances is a wrong drug prescribed for a patient; is that correct?

MR. LOVIN: Right. . . .

MR. SILIN: [To follow this protocol,] . . . what you need to do is to check the stock bottle against the doctor's prescription to make sure . . . [they match]?

MR. LOVIN: True.

MR. SILIN: So would you agree with me that would have been the second error that you did in this case. The first being mixing up the brand names. . . . Then the second mistake was failing to check the stock bottle against the written prescription provided by the doctor?

MR. LOVIN: Yes.

MR. SILIN: That's something that is incumbent upon you as a pharmacist practicing safe pharmacy, complying with the standard of pharmacy care to check the stock bottle against the prescription?

MR. LOVIN: That's correct.

MR. SILIN: If you had, you would have, don't you agree, discovered the mistake that you had made?

MR. LOVIN: Yes. . . .

MR. SILIN: An additional check in your process . . . is for you to . . . counsel the patient, showing her the drug that is prescribed, discussing what it's used for and discussing that in the context of the doctor's specific prescription?

MR. LOVIN: Yes.

MR. SILIN: Would you agree with me that . . . if you had done that, that yet once again your error would have been detected?

MR. LOVIN: It very definitely could have been. . . .

MR. SILIN: There were three chances to find out about [the mistake] and correct it. All three of those checkpoints were missed by you; would you agree with that?

MR. LOVIN: Yes.

On cross-examination conducted by the defense attorney, Mr. Franco, the jury learned that Henry Lovin's father had been a pharmacist, and that Lovin, age 51 at the time of trial, had worked in, and eventually taken over, his father's store before moving to Maine and joining Wal-Mart. Lovin further testified that he had wanted to be a pharmacist since he was a teenager. He professed horror at what had happened to Ms. Walter: "Obviously I [have] been in this career all my life. I went into it to help people, not to cause anybody harm."

The trial transcript does not shed any more light on the explanation for Lovin's error. For example, no evidence was introduced concerning Lovin's general practices as a pharmacist, his record for safety prior to this incident, or the performance evaluations that he had received from his superiors at Wal-Mart. One may perhaps infer from the absence of such evidence that Lovin's mistake was a one-off lapse that came about through an unfortunate sequence of errors. Assuming that this was the case, does it affect your assessment of Lovin's conduct? Is it plausible to argue that a jury was at least permitted to conclude that, although Lovin made a mistake, it was *not* a careless mistake?

2. A Reasonable Mistake? In fact, attorney Franco made exactly this argument in opposition to plaintiff's motion for judgment as a matter of law (obviously without success):

MR. FRANCO: With respect to the plaintiff's . . . motion [for judgment as a matter of law], the defendant objects. [It would] be unusual for a trial court to take the issue of negligence away from the jury in a case such as this. . . .

The uncontroverted facts of the case are Mr. Lovin dispensed the wrong medication to Ms. Walter. The law is clear that the fact that somebody makes a mistake in the exercise of their duties, whatever it may be, it doesn't have to be just a pharmacist, it could be in the exercise of driving an automobile, it could be in the exercise of maintaining . . . premises. . . .

There are human factors involved in the law that have to be recognized. Mistakes are made everyday. That doesn't mean that a mistake translates into negligence as a matter of law. If that were the case . . . we might as well just rid the system of the law of negligence. A mistake equals negligence basically means strict liability.

We are not here to talk about strict liability. Whether or not this was an acceptable mistake, whether or not this is a mistake that falls within what a jury would consider to be . . . a reasonable mistake under the circumstances, is up for them to decide, not for this Court to decide as a matter of law. . . .

Franco's observation that mistakes are made every day is surely correct. But how does it support his contention that the jury was entitled to conclude that Lovin acted with reasonable care for Ms. Walter's well-being? What does he have in mind when he says that the jury could have found that Lovin made an "acceptable" or "reasonable" mistake?* What does the trial and appellate courts' rejection of this argument tell you about negligence law's conception of what it means to be act with reasonable care?

3. How Do We Know How Pharmacists and Pharmacies Should Conduct Themselves? As indicated in Section II of Chapter 1, attorney Franco also argued that Judge Marsano should grant judgment as a matter of law in favor of Wal-Mart. Among other things, Franco argued that the plaintiff had failed to produce an expert to establish

* For a decision endorsing the idea that the commission of a mistake does not necessarily entail a finding of carelessness, see *Myers v. Beem*, 712 P.2d 1092 (Colo. 1985). There, the defendant attorney admitted that he "screwed up" in representing his client, yet the state Supreme Court held that the client was not entitled to a directed verdict on a subsequent claim against the attorney for legal malpractice because a reasonable jury could find that the lawyer's mistake was not a careless mistake. To note the ruling in *Myers* is not to suggest that the Maine Supreme Court erred in reaching the opposite conclusion in *Walter*. As indicated in Chapter 1, even superficially similar precedents are often distinguishable. Certainly *Walter* does not suggest that *all* instances of error constitute instances of carelessness. Rather it holds only that the evidence pertaining to Lovin's errors conclusively established that he was careless.

a standard or benchmark against which to assess the reasonableness of Lovin's conduct. Here is part of that argument, which was made to the judge without the jury present:

MR. FRANCO: Your Honor, at this point the defendant would also move for [judgment as a matter of law]. This is what is called a professional tort or an allegation of professional tort. A professional tort . . . requires testimony of an expert witness as to the appropriate standard of care attributable to the defendant.

The [Maine Supreme] Court has made it clear in every case in which they have spoken on this subject that expert testimony is necessary as a matter of law to prove malpractice. What we are talking about is malpractice. We can dance around various terms all we want. But we are talking about [a] professional dispensing a medication. . . .

In the case of a . . . medical professional or a quasi-medical professional, it's the burden of the plaintiff to prove negligence, that is the failure of reasonable care. Reasonable care is that degree of care which a reasonably careful pharmacist would use under similar or like circumstances.

In order to prove the elements . . . of negligence, the plaintiff is required at the outset to establish what the standard of practice is applicable to pharmacists and the pharmacy profession. The record contains no evidence of the standard applicable to Mr. Lovin in this case. The only evidence in this case that was discussed in the context of the standard of practice is the standard of practice that is exercised by Wal-Mart. That is their own practice—their own prescription drug check . . . the four-point check.

There has been an acknowledgement on the part of Mr. Lovin that he made a mistake. There is no question about that. There has never been a question that a mistake was made in the four-point check, in adhering or failing to adhere to the Wal-Mart standard of practice. That Wal-Mart standard of practice doesn't necessarily mean that that's the standard of practice in the pharmacy industry. In fact, there has been no evidence of that. . . .

. . . Mr. Lovin . . . was not here as an expert witness.

Does Franco have a point in noting the absence of any evidence indicating whether other national or local pharmacies follow a protocol like Wal-Mart's? Suppose most of them don't have such a protocol. Would this fact affect your judgment about Wal-Mart's responsibility for Walter's injury?

Obviously, the Maine Supreme Court agreed with Judge Marsano that Franco's objections were off-base, and that the plaintiff was not required to produce an expert to testify whether other pharmacies have in place protocols such as Wal-Mart's, or whether other pharmacists routinely follow those protocols. Its ground for doing so was that certain instances of professional malpractice are so straightforward as to be identifiable by judges and juries without the help of expert testimony as to how prudent members of the profession ordinarily conduct themselves. (It is perhaps also worth noting that, as stated in the Consent Agreement reached between Lovin and the

Maine Board of Pharmacy, Lovin's conduct violated Maine regulations as to the proper methods for dispensing prescription medication. The role of regulations in setting standards of care for tort law is discussed in Chapter 6.)

4. *Respondeat Superior Revisited.* As explained briefly in Section II of Chapter 1, the doctrine of *respondeat superior* holds even employers with reasonable hiring and supervision policies and procedures responsible for injuries to customers and others caused by an employee's careless performance of his job. Is it fair to say that Franco's arguments in favor of judgment as a matter of law for Wal-Mart, and against entry of judgment for Walter, are really arguments against the application of that well-established doctrine? Do they collapse the issue of whether Lovin behaved reasonably in this instance with the issue of whether Wal-Mart had adopted reasonable policies for the dispensation of prescription medications?

5. *Accepting Responsibility?* As indicated in footnote 1 of the Maine Supreme Court's opinion, attorney Franco opened by telling the jury that "Wal-Mart has never denied responsibility for this incident," and that the major issue it would need to decide is how much compensation was owed to Walter. How could he take that position and then proceed to argue that Wal-Mart was entitled to judgment as a matter of law on the issue of breach, and to contest the entry of judgment as a matter of law for Walter? In a concurring opinion, omitted from the excerpt of *Walter v. Wal-Mart* in Chapter 1, three Justices of the Maine Supreme Court indicated displeasure with the defense's approach:

WATHEN, C.J. (concurring) (joined by Rudman and Dana, JJ.).

[¶40] I concur in the result, but I reach that result on different grounds. . . . In my judgment, defense counsel in this case admitted liability in his opening statement when he told the jury that Wal-Mart had never denied liability and that the only issue concerned the amount of fair and just compensation. Having made that statement, he then sought to try the issue of liability behind the jurors' backs. To countenance such a strategy would be to ignore the requirement of the Maine Bar Rules that trial counsel employ "such means only as are consistent with truth, and shall not seek to mislead the . . . jury . . . by any artifice or false statement of fact or law." M. Bar R. 3.7(e)(1)(i). . . .

6. *Trial Tactics: Stipulating and Blaming.* Judge Marsano ruled that a reasonable jury not only *could* conclude that Lovin breached the legal standard of reasonable care, but that it *would have to* reach that conclusion. Yet attorney Silin could hardly have been certain at the outset that the judge would issue such a ruling, or that the Supreme Court would uphold any such ruling. Nonetheless, prior to trial, Silin never retained the services of an expert who could testify that Lovin failed to act as would an average qualified pharmacist. Indeed, Silin never even deposed Lovin. What might explain these tactical decisions? Was Silin being cavalier? Was he attempting to minimize the costs of preparing for trial? Or was he justifiably confident that, even if he could not obtain a directed verdict, he could convince a jury that Lovin's error was negligence?

The answer seems to reside in the fact that Silin had obtained through discovery a copy of a letter that Lovin had written in response to an inquiry from the Maine Board

of Pharmacy.* In that letter, Lovin apparently expressly acknowledged his mistakes and expressed great remorse over them. In light of this “smoking gun,” and conversations between himself and Franco, Silin expected until just before trial that Wal-Mart would *stipulate to liability*, i.e., formally concede at the outset of trial that Lovin had acted unreasonably so as to cause injury to Walter. Even if no stipulation was reached, however, he believed that the letter provided more than enough information to establish that Lovin had acted unreasonably so as to breach a duty owed to Walter.

Consider the following portion of the trial transcript, which reflects a conversation that was held outside of the jury’s hearing at the commencement of the trial. Ask yourself whether the issue of stipulating to Lovin’s negligence was something the two lawyers had adequately discussed with one another before the trial.

MR. SILIN: I’ve . . . thought until probably . . . last week . . . that we were going to stipulate to liability. I still don’t know how liability is an issue. They want it both ways, to admit to liability but to still have the jury somehow give them an out. I now realize because they are not stipulating to anything that I have to [sic]. I didn’t intend until I thought about [it] last week . . . to call Mr. Lovin to establish the elements of negligence in this case. I have no reason to think he’s not going to admit everything in there. I have the [letter] to keep him honest. . . .

MR. FRANCO: Your Honor, at this point I’m not prepared to stipulate to liability simply because it’s my understanding from speaking to Steve [Silin] that if I had done that, he would fight me tooth and nail over Mr. Lovin testifying at all. I think it’s an important part of my case for Mr. Lovin to testify.

THE COURT: I understand that quite often logic yield[s] to tactics; that’s where we are at.

Franco’s stated reason for refusing to stipulate to liability—to guarantee that Lovin would be able to testify at trial—was in one respect well-taken. Rules of evidence bar the introduction of superfluous or irrelevant testimony. Thus, if the only issues left after stipulation as to liability were the issues of the extent of Walter’s damages and whether she failed to mitigate them, the judge might well have ruled that Lovin could not testify because Lovin had nothing to say about those issues. Still, why do you suppose that Franco was so anxious to ensure that Lovin would testify at trial? (Here it may be helpful to recall from Note 1 the nature of the testimony from Lovin elicited by Franco.)

Is there any other explanation for the failure of Silin and Franco to stipulate to liability? Keep in mind that lawyers are ultimately answerable to their clients, and that decisions about litigation strategy, although usually made by trial counsel in consultation with their clients, are sometimes insisted upon by the client, particularly when the client is a sophisticated business with in-house lawyers of its own. Thus, it is quite possible that Wal-Mart instructed Franco not to stipulate to liability. In hindsight,

* The Board’s inquiry ultimately led to the Consent Agreement reproduced in Part VI of this appendix.

would Franco and/or Wal-Mart have been well-advised to stipulate that Wal-Mart was liable to Walter for at least some damages? Suppose the jury had never heard Lovin testify to his mistakes, and suppose Silin was not able to harp on Wal-Mart's refusal to "accept responsibility" in his opening and closing statements. Would the jury have returned a damage award of the same magnitude?

7. Settlement. Stipulation is a method by which the parties can agree to set aside uncontested issues so as to limit the issues submitted to the jury at trial. Settlement agreements, by contrast, provide a method for resolving all the issues in a case, including damages, and for doing so prior to trial, if possible.

Today, most tort suits are resolved by settlements reached at some point after the filing of the complaint and prior to trial. Such agreements offer various advantages to the parties, including, most importantly, the promise of a prompt disposition of the dispute, and the avoidance of often substantial litigation expenses. The latter is of particular value to defendants, but also provides incentives to settle for plaintiffs. A plaintiff's attorney operating under a contingent fee agreement will often stand to recover a fixed percentage of the plaintiff's recovery, regardless of whether it is received as a settlement payment or a jury award. Still, as the litigation progresses, the plaintiff's lawyer will be required to invest additional hours of work in the litigation. Thus, unless there is reason to believe that the jury will render an award substantially larger than a figure at which the defendant might settle, the plaintiff's attorney's rate of compensation (per hour devoted to the case) will decrease over time.

The typical tort settlement agreement consists of a document, signed by both parties, in which the defendant disavows responsibility or liability for the plaintiff's injury, but nonetheless agrees to pay a certain amount to the plaintiff in order to avoid the trouble and expense of fully litigating the dispute. Often such agreements include confidentiality provisions that forbid either side from disclosing the nature of the lawsuit or the terms of the settlement. This practice is controversial, with critics arguing that such provisions withhold from the public important information about dangers facing the general populace. (For example, imagine that a driver is injured when his car rolls over as he swerves to avoid an obstacle. Now suppose that he sues the car's manufacturer, claiming that it was negligent in producing a car that was prone to roll over under normal driving conditions. If that suit is resolved by a confidential settlement, it cannot serve as a warning to thousands of other drivers who might be at risk of injury through roll-overs.) Some courts have promulgated so-called "sunshine" rules that mandate that settlement agreements be publicly available.

Given that tort suits often result in settlement, it is worth pondering why no settlement was reached in *Walter*. Indeed, the failure of the lawyers to come to terms prior to trial is in some respects quite surprising. The issues in the case were not complex by the standards of ordinary tort litigation. Thus, while attorney Silin could not be certain that a jury would find for his client, nor could he predict exactly what they would award her, he had plenty of reason for optimism. Likewise, the defendant's lawyer, Franco, certainly had grounds to worry that the jury would find for Walter and that they would award her a substantial sum. So why couldn't they resolve the matter with a negotiated settlement? Silin's first offer of settlement sought an amount in the

neighborhood of \$250,000. However, Franco apparently was authorized to offer only about \$100,000. Despite further conversations during the course of litigation, the two attorneys could not get any closer to settlement. Does the following excerpt offer insight into the settlement dynamics of the case?

Wal-Mart Shifting Litigation Strategy
The Retailer Settles Cases, Prompting Lawyers To Ask, "What's Happening?"

Catherine Aman & Gary Young
The National Law Journal
September 30, 2002

In late July, Wal-Mart Stores Inc. settled a suit brought by Robert McClung, whose wife was abducted from the parking lot at a Memphis, Tenn., store in 1990 and murdered.

For any other company, resolving a horrific case like this would be routine, but Wal-Mart has a long history of refusing to negotiate with plaintiffs. Indeed, for more than a decade the retailing colossus fought tooth-and-nail against McClung and his lawyer, Bruce Kramer of Borod & Kramer in Memphis. When Wal-Mart first proposed mediation this past May, Kramer said he was "more than skeptical." . . .

The shift in litigation strategy is just one of several significant changes in the company's law department during the past year. . . .

With 4,300 stores worldwide and 100 million shoppers a week, Wal-Mart has more exposure than a Playboy centerfold. According to spokesman William Wertz, the company is sued roughly 5,000 times a year, and, typically, has about 10,000 pending cases. Until recently, Wal-Mart routinely reacted to these challenges by playing judicial hardball.

"They absolutely would not consider settling anything," said Mary Jo O'Neill, acting regional attorney for the Equal Employment Opportunity Commission in Phoenix. Her agency has brought dozens of employment suits against the company in the past decade. "It was part of the corporate culture." Several factors probably forced Wal-Mart to rethink its legal strategy. Among these are a string of embarrassing and expensive court losses in the late 1990s; widespread negative publicity for its hard-nosed litigation style; a threatened \$18 million sanction for discovery abuse in 1999; and the 2000 appointment of a new chief executive officer, H. Lee Scott, who appears to back the changes in the law department.

"Wal-Mart has probably recognized that, based on the litigation strategy they chose in the past, they've created a horrible reputation for themselves among judges and lawyers," said Gilbert Adams III, an associate in the Beaumont, Texas, practice of his father, Gilbert T. Adams. The younger Adams, who has brought several suits against the company, added, "That horrible reputation is causing them difficulty litigating cases." . . .

Wal-Mart has also dropped a long-standing policy of retaining only those outside counsel who would work for a flat, per-case fee. Wertz said that the change was prompted by a desire to hire the most qualified attorneys, many of whom insist on hourly compensation. But the change may also reflect a reconsideration of the

company's hardball tactics. Critics have long charged that flat-fee arrangements added to Wal-Mart's intransigence, since the company did not have to pay the price for stalling, rejecting settlement offers and insisting on trial. Wertz would not comment on whether Wal-Mart was now settling more cases than in the past. . . .

8. *Summing Up.* What is your impression of tort law in light of the foregoing account of *Walter v. Wal-Mart*? What were the procedural and substantive aspects of the tort system able or unable to accomplish in this instance? Perhaps it will be helpful to break these questions down into other, slightly more manageable questions.

First, and most obviously, one can ask about the desirability of the result: a verdict of \$550,000 for the plaintiff, upheld by the trial judge and the Maine Supreme Court. Attorney Silin argued to the jury that Ms. Walter—already 80 at the time—incurred about \$70,000 in medical expenses.* Thus, so far as the jury was concerned, the vast bulk of the award—\$480,000—compensated her for the distress, suffering, and lost quality of life associated with illness she was caused to suffer by Wal-Mart's carelessness. Does this figure seem appropriate, excessive, or inadequate? As measured against what criteria or scales? What does this sum represent or accomplish?

Second, one might ask what was accomplished in terms of process. Clearly, both sides were given the ability to discover and present a lot of information to the jury, even though, as it turned out, the jury was permitted to decide only a small portion of the case. Thus, the trial judge and the jury heard from Lovin himself about how the error was caused. They also heard from Walter and a friend of hers about what she did and didn't do after the error occurred, and how it adversely affected her life. And they heard from two doctors—Walter's doctor and an expert hired by Wal-Mart—about the medical effects of the error. In this respect, the procedures of tort law seemed to permit a relatively complete investigation into what went wrong as a predicate to the judge's and the jury's assignation of responsibility. Could similarly complete information have been obtained by other means? Is there any potential downside to a system that is geared to permit litigants to explore in great depth all the different facets of a dispute?

* Fixing the amount of Walter's medical expenses at \$70,000 turns out to involve something more than simple arithmetic. Silin based that figure on the total amount billed by medical providers for the services rendered to Walter during and after her hospitalization. As explained in Chapter 1, Section III.A.3, Walter herself did not actually pay the full amount of these bills: at least 80 percent of the charges were probably covered by Medicare—federally-funded health insurance for senior citizens. However, the jury was not told of this fact because of the *collateral source rule*, a doctrine that specifies that jurors are not allowed to consider other sources of compensation to a tort victim in determining damages. The collateral source rule thus dictated that the jury was to be presented with a figure representing Walter's "expenses" even though she didn't pay most of them. Even so, there remained a question as to what that figure should be. This is because the amount of reimbursement paid by the government to providers of medical services to Medicare patients is *not* determined by the amount the providers charge, but rather by schedules set by the government that are invariably lower than those charges. Indeed, in this case, the government's schedules dictated payment to Walter's providers of about \$34,000—roughly half the amount nominally charged by Walter's healthcare providers. Franco argued to the trial judge that the jury should thus have been instructed that Walter's medical "expenses" were \$34,000 (what was actually paid) not \$70,000 (what the providers billed). Obviously, the judge was unpersuaded.

Another aspect of tort law revealed by *Walter* is that tort suits tend to place the alleged victim and injurer in a starkly adversarial posture, one that can easily block potentially sensible resolutions of disputes even if the key actors—the attorneys and the trial judge—are proceeding in good faith. Moreover, it may at times induce some of these actors to behave in a manner that might strike you as less than ideal. These observations in turn suggest that the proper functioning of tort law cannot help but depend in part on the exercise of good judgment by the professionals who make up the tort bar and bench.