

From: The Agent Orange Record

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Around 2.6 million US military served in Vietnam between 1960 and 1973. An additional 514,000 served in waters off the coast of Vietnam in the Blue Water Navy, while close to 300,000 served elsewhere in Southeast Asia (Laos, Cambodia, and Thailand). Shortly after returning home, Vietnam veterans began to suspect that their ill health or the instances of their wives having miscarriages or children born with birth defects may have been related to Agent Orange and the other toxic herbicides they were exposed to in Vietnam. Veterans began to file claims in 1977 to the Department of Veterans Affairs for disability payments or health care for conditions that they believed were associated with exposure Agent Orange, or more specifically dioxin, but their claims were denied unless they could prove that the condition began when they were in the service or within one year of their discharge.

In 1977, Maude De Victor, a case worker at the Veterans Affairs office in Chicago, met the widow of a veteran who had died from lung cancer who believed that his cancer was related to exposure to Agent Orange in Vietnam. De Victor began to ask other veterans about whether they remembered being exposed to Agent Orange and asking the Department of Defense, Dow Chemical and the Department of Veterans Affairs in Washington DC about Agent Orange and what was known about the health impacts. She collected files on about two dozen veterans who had illnesses they attributed to Agent Orange before her boss at the VA asked her to stop her investigation. De Victor took her files to Bill Kurtis, an investigative reporter at the CBS affiliate in Chicago, who interviewed researchers about dioxin and veterans who were sick or who had children born with birth defects. After the story "Agent Orange: Vietnam's Deadly Fog" aired in March 1978, hundreds of veterans began to contact the VA in Chicago.

The documentary raised concerns at the VA, but the key issue was how to respond to the health complaints of the veterans without supporting their case that their illnesses were related to Agent Orange exposure. The VA developed an Agent Orange Policy Group headed by a former researcher at Monsanto and consulted with other industry researchers to determine if there are long-term effects to exposure to Agent Orange. Though the EPA continued to state that scientific research has found dioxin to be a health hazard, the VA held to the conviction that Agent Orange/dioxin had only short term and reversible affects to human health.

Veterans' Lawsuit

The first lawsuit filed by a veteran about damage caused by Agent Orange was filed by twenty-eight-year old Paul Reutershan, who believed that his chloracne and his abdominal cancer were related to exposure to Agent Orange. After his claim to the VA was denied and being unable to sue the VA or the US government, Paul filed a personal injury lawsuit against the Dow Chemical and two other chemical companies that produced Agent Orange in NY State courts. The case received mass media attention, Paul appeared on the Today show in the spring of 1978, stating "I died in Vietnam, but I didn't even know it."

Just before he died in December 1978, Paul founded the Agent Orange Victims International (AOVI) and asked its handful of members to continue the fight after his death. AOVI brought on workman's compensation attorney Victor Yannacone who filed Reutershan's complaint as a class action lawsuit against six of the chemical companies as defendants, Dow, Monsanto, Hercules, Northwest Industries, Diamond Shamrock and North American Phillips. The case grew as lawyers around the country added their clients to the suit received huge media attention. The case managed to survive the numerous legal technicalities and infighting among the lawyers representing the veterans.

"About a million and a half of us are already gone."

– Paul Sutton, former Chairman, Vietnam Veterans of America, Chicago Tribune, 2009.

Finally, the case ended up at Judge Jack Weinstein's court at the Second Circuit Court of Appeals in New York City, who settled one legal question after the other to get the case to trial. Judge Weinstein defined the class as all veterans who served in Vietnam between 1961 and 1972 from the US, Australia and New Zealand who believed that they or their children were harmed by their exposure to Agent Orange. On the eve of the trial scheduled for May 7, 1984, Judge Weinstein worked out a settlement, stressing that while he felt the case was weak, the chemical companies would be unlikely to find a jury who would not side with the veterans and feel for their children born with birth defects. The companies agreed to the settlement, as long as they did not have to admit liability.

At the time, the settlement for \$180 million was the largest in history. It was to be paid out by the companies in proportion to the amount of herbicides they produced and the degree of the dioxin contamination in the respective 2,4,5-T; as a result, Dow got off rather lightly, having the "cleanest" herbicides. The settlement was invested, growing into a fund of approximately \$330 million by the time the distribution and legal technicalities were worked out. The fund mailed out its first checks to veterans in March of 1989. Those who were rated 100% disabled were eligible to receive a settlement of up to \$12,800 paid out over 10 years. For those who had already died of Agent Orange related-illnesses, their survivors were eligible to receive a settlement of \$3400.

The Fund closed in 1997 after it distributed \$197 million in payment to about 52,000 American veterans and their families. The average payment was \$3800. The fund also distributed \$74 million to social service programs that helped 239,000 veterans. Australian veterans received approximately \$7 million of the settlement and New Zealand veterans about \$1 million. Legal fees for the lawyers involved in the case made up almost \$50 million of the total fund.

At the same time the lawsuit was underway, efforts were being made to get Congress to act on Vietnam veterans' concerns.

The Long Wait

Along with efforts in the courts and Congress, veterans have continued to press the VA for attention. The largest integrated medical provider in the country, providing care that is well-regarded and inexpensive, the VA currently faces an overwhelming caseload, including a skyrocketing number of Agent Orange applicants. It has been a perfect storm, what with an aging cohort of exposed veterans now coming down with Agent Orange-related diseases, scientific progress in identifying more and more conditions as Agent Orange-related, and a faltering economy, depriving many of a private insurance alternative. But while its new computer system is expected to reduce the backlog of cases, the absence of a field in the system's records for Vietnam service has already proved a hindrance in resolving the Agent Orange issue, compounding the impact of its long time practice of "waiting for the science."

The battle over health care for Vietnam veterans with Agent Orange-related illnesses will eventually become moot, for two reasons. The army will die, of course. And health care itself seems, in 2010, to be viewed less as a commodity to be rationed and more of an American right.

Vietnamese Lawsuit and A Second Attempt in the Courts by US Veterans

For many years, the Vietnamese pursued diplomatic channels to get the US government to accept responsibility for the health and environmental consequences of toxic herbicides used by the US during the war in Vietnam. However, these negotiations did not get very far. The US continued to insist that more scientific research was needed in order to address this issue, whereas the Vietnamese continued to stress the need for immediate humanitarian assistance for the victims. As a result, many in Vietnam become frustrated that nothing was being done to assist those whose health had been adversely impacted by Agent Orange, even though the US currently provides compensation for US veterans who became ill from their exposure to Agent Orange in Vietnam.

A small group of Vietnamese doctors, scientists and others who have worked over the past several decades with victims of Agent Orange decided that the time had come to pursue the 'American' way to solve this problem, by suing those responsible. They formed the Vietnam Association of Victims of Agent Orange in December 2003, and along with several other individual plaintiffs reached out to American lawyers to file a lawsuit in American courts.

The lawsuit was filed on January 30, 2004 by a team of American lawyers from the National Lawyer's Guild. Since it was not possible to sue the US government, the suit named as defendants Dow, Monsanto, Hercules, Diamond Shamrock and the other chemical companies, including the subsidiaries of the main companies, that produced the defoliants used in Vietnam from 1961-71.

The suit, using the Alien Tort Claims Act, alleged that the companies that produced the toxic herbicides used in the Vietnam war were in “violation of international law and war crimes, and under the common law for products liability negligent and intentional torts, civil conspiracy, public nuisance and unjust enrichment, seeking many damages for personal injuries, wrongful death and birth defects and seeking injunctive relief for environmental contamination and disgorgement of profits.”

At the same time several US veterans who were not part of the 1984 settlement were also suing the chemical companies. Their case had already gone as far as the Supreme Court but was sent back to Judge Weinstein. The veterans' case followed the same hearing schedule as the Vietnamese lawsuit.

The first hearing of the Vietnamese lawsuit was held on March 18, 2004 in the US District Court Eastern District of New York in Brooklyn. The judge on the case was Judge Jack Weinstein, who also sat on the US Veterans' Agent Orange lawsuit that settled out of court for \$180 million in 1985. The hearing was held to resolve the issues around the discovery process for the Vietnamese Agent Orange case and for the other US Veterans Agent Orange cases that were also being considered. Judge Weinstein gave the plaintiff 6 months for the discovery process.

The chemical companies submitted motions to dismiss the case on November 3, 2004. In their Memo of Law on Statute of Limitations the defendants claim that the statute of limitations has not been met. In their Memo of Law on Injunctive Relief the defendants argued that the case should be dismissed on the grounds that the plaintiffs' request that the chemical companies provide resources to remediate the contamination caused by the herbicides is both unfeasible and would infringe on Vietnam's sovereignty. The defendants also argue that having the court oversee remediation of the environment in Vietnam would interfere with the 'fragile relations' between the US and Vietnam and impact US foreign policy in Vietnam.

The defendants also submitted a Memo of Law to Dismiss on grounds of jurisdiction and the failure of the plaintiffs to state a claim that the defendants violated international laws. They also claimed the case would violate the separations of powers of the state, or the 'political question' doctrine and that a finding for the plaintiffs would infringe on the US government's ability to wage war, if the methods of war were later subject to litigation.

The lawyers for the plaintiffs filed their response to the motions to dismiss on January 18, 2005 and then both sides met for oral arguments in front of Judge Weinstein on February 28, 2005.

The US Justice Department was asked to submit an amicus brief about the case in which they argued that the Judiciary was not in a position to rule on the actions of the Executive as it would infringe upon the President's ability to wage war.

On March 10, 2005 Judge Weinstein dismissed the lawsuit filed by the Vietnamese Victims of Agent Orange against the chemical companies that produced the defoliants/herbicides that they knew were tainted with high level of dioxin. In his 233 page decision, Judge Weinstein ruled that the use of these chemicals during the war, although they were toxic, did not in his opinion fit the definition of "chemical warfare" and therefore did not violate international law. The court also ruled that the chemical companies as US government contractors had the same immunity as the US government. However, the court did rule in favor of the plaintiffs on some of the issues including ruling that the statute of limitations was not a factor to dismiss the case and that the Federal Courts did have jurisdiction over this case and that that the court was not infringing on the President's power to wage war.

The lawyers for the plaintiffs filed an appeal of Weinstein's decision to the Second Circuit Court of Appeals. The defendants filed their response to the appeal on February 6, 2006. They also filed a brief concerning the contractors' defense which the chemical companies believe absolved them from legal responsibility from the affects of Agent Orange on both US veterans and Vietnamese. The plaintiffs filed a reply brief to the defendants' response to the appeal on March 22nd and then submitted an amended reply brief on April 17th. Oral Arguments were heard before three judges of the Court of Appeals on June 18, 2007.

On February 22, 2008, the Federal Court of Appeals in Manhattan, NY denied the Vietnamese plaintiffs appeal to reinstate the lawsuit against the chemical companies that produced the herbicides. The judges ruled that the plaintiffs failed to show that the herbicides used during the Vietnam War violated the ban on the use of poisons in warfare. The court also denied the appeals filed by several US veterans who were not part of the original 1984 lawsuit on the basis that the chemical companies were not liable for any health effects of Agent Orange because they were government contractors. The lawyers for the plaintiffs asked the Appeals court en banc (all the judges on the court) to reconsider the dismissal and the expanded panel of judges also agreed with the decision to dismiss.

In October 2008, the lawyers for the Vietnamese plaintiffs filed a writ of certiorari with the US Supreme Court to ask them to hear the case. The lawyers for the US veterans also filed their own writ of certiorari. The Supreme Court held a conference on February 27, 2009 to consider taking on the case and denied both petitions. Chief Justice Roberts and Judge John Paul Stevens both recused themselves from the considering the writ. At the same time, the court also refused the writ of certiorari for the suit filed on behalf of US veterans against the chemical companies. The Court did not publically comment on their decision not to hear either case.