By Carolyn Raffensperger





# Toxic Torts, And The Legacy Of War

There are rare events that seem to be holograms of the times, as a fly caught in amber. The Woodstock concert was one of those events. The somber Supreme Court hearing on Agent Orange on February 26 was a hologram of our day: the lingering and malevolent consequences of an unpopular war as we head toward another, the scientific uncertainty surrounding environmental health, the use of the courts by corporations to narrow their social contract, and the increasing role of the Court in big political issues.

At issue before the court in *Dow Chemical, et al. v. Daniel Raymond Stephenson, et al.*, was whether two veterans were adequately represented by the class action on Agent Orange that was settled out of court in 1984. The settlement applied to all future claims, but provided a remedy only for those whose death or disability was discovered prior to 1994, when the fund ran out. 1994 was selected as the end point because the research suggested that any illnesses associated with Agent Orange would develop within 20 years of exposure. The U.S. had ceased using the defoliants in 1971.

In 1984, just hours before the archetypal class action trial was to begin, Judge Weinstein, lawyers for Agent Orange manufacturers, and lawyers for a class of veterans from the United States, Australia, and New Zealand agreed to a settlement in which the manufacturers would pay $180 million to veterans who were exposed to Agent Orange and then died or became ill in the next 20 years.

Agent Orange is shorthand for a suite of chemicals used as defoliants in Vietnam. The name refers to the orange label on drums in which the herbicide was stored. Agent Orange is a 1:1 mixture of the nbutyl esters of 2,4dichlorophenoxyacetic acid (2,4D) and 2,4,5trichlorophenoxyacetic acid (2,4,5T). A byproduct of the manufacturing process of Agent Orange is dioxin. Agent Orange, while only one of 15 herbicides sprayed in Vietnam, is the one most commonly associated with the health problems of Vietnam veterans because it was the most widely used.

Both of the litigant veterans in the new case, Stephenson and Isaacson, ostensibly fell within the class definition of the 1984 litigation: they served in Vietnam between 1961 and 1972, were exposed to Agent Orange in the line of duty, and developed cancers known to be associated with Agent Orange. However, they both learned of their Agent Orange-related illnesses only after the settlement fund had expired. Because the prior litigation purported to settle all future claims, the question was whether res judicata precluded absent class members who were not adequately represented from collaterally attacking the settlement.

There are two salient points about the science and its impact on class action litigation. First, Dow et al. continue to argue that Agent Orange didn't cause these illnesses. Given the lengthy history of research on Agent Orange and its contaminant, dioxin, this is disingenuous and a waste of court time, increasing the costs of litigation. There is a scientific consensus that Agent Orange causes a host of diseases, most notably certain cancers, such as Non-Hodgkin's Lymphoma, Hodgkin's disease, soft tissue sarcoma, and multiple myeloma.

The scientific literature documenting a causal association between Agent Orange and several diseases begins with a clinical report in 1979 in *The Lancet* by a group of Scandinavian physicians and continues on through cohort, case control, and epidemiological studies. The Institute of Medicine, part of the National Academy of Sciences, has also reviewed many of these studies and confirmed the causal association.

The biggest problem linking Agent Orange with cancer in an individual is the long latency period. This observation leads to the second point about science and class actions. Most of the major class action toxic torts like Agent Orange have been litigated over chemicals such as tobacco and asbestos, which cause diseases with very long latencies.

During the Supreme Court oral argument on Agent Orange, Justice Breyer asked the key question, How can we ever bring these class actions to closure? Given the long latency of many chemicals and their manifest diseases, the short answer is that class actions can't have closure unless we change the system. The courts are simply not designed to bring justice in situations where there are millions of injured people, industry resists even post-market testing and thereby leaves damaging products on the market for years, and the injured have to do the science to prove that their illnesses were caused by industry's products.

The answer to closure in these class actions is to reform the system. Long latency periods and scientific uncertainty require fundamentally rethinking research, regulation, and torts. By requiring pre-market testing with performance bonds posted before full scale release, class actions would no longer be the grim tragedies of generations of injured plaintiffs and defendants who never see the end of the judicial tunnel.

As we head into yet another war, it is important to learn the lessons of the past. We have not resolved the Agent Orange fiasco of Vietnam, as this new case demonstrates, and we still do not understand the cause of the Gulf War Syndrome. Perhaps all we have learned is that when General William Tecumseh Sherman said that war is hell, he may have meant that the suffering can continue for an entire lifetime for those exposed to the toxic products of the military-industrial complex.

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