Lessons Learned from Recent Mass Toxic Tort Litigation and What's Next

Agent Orange Retrospective: The More Things Change, The More They Remain the Same

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When we speak of mass toxic torts, one of the first chapters in the story is the litigation concerning the Vietnam War defoliant Agent Orange. The cases were presided over in the U.S. courts by late federal district judge Jack Weinstein, who is commonly referred to as the Father of Mass Torts. As recounted below, Agent Orange litigation began in 1978 (and in fact continues today, though primarily in non-US venues).

In reviewing the Agent Orange retrospective and considering today's myriad mass torts, we see that the battleground issues are largely the same and perhaps the more things have changed, the more they remain the same. For a few of these aspects, first, note that the original Agent Orange case was somewhat unusual among mass torts in that it was certified as a class action; however, handling the case on a class basis was later questioned when the settlement fund was exhausted before the injuries of certain members of the class had manifested and their claims had ripened.

Second, as is always the case for toxic torts, causation and exposure were key issues. After the original litigation, Agent Orange became the subject of a governmental benefits scheme based on a presumptive disability standard that is provides a lower threshold than legal causation. In some later litigation contexts, this has presented some issues over the effect of "regulatory findings," comparable to issues arising over IARC findings relating to glyphosate. As for the exposure element, modeling exposure and dose for Agent Orange from limited data concerning spray missions and troop locations have been the subject of great effort and controversy over the years. This perhaps compares with the scientific challenges and legal questions over whether and how to quantify exposure and dose based on a consumer's recollection of a product's use.

Lastly, in Agent Orange, the chemical companies established the government contractor defense, i.e., they produced the herbicide based on the government's own specifications. We have seen attempts to apply GCD in, for example, the PFAS litigation, and GCD is frequently a tactic to gain federal jurisdiction based on federal officer removal.

Agent Orange Background

Agent Orange was an herbicide used during the Vietnam War to defoliate vegetation and deprive the enemy of cover and concealment. Agent Orange was a combination of 2,4,5-T and 2,4-D; the issue of its toxicity arose from the presence of a trace amount of the TCDD dioxin congener formed during the production of the 2,4,5-T component. Agent Orang was produced by several chemical companies, with varying concentrations of TCDD, but the average concentration across the entire supply was less than 2 ppm. The claims relating to Agent Orange allege diseases ranging from multiple, different cancers, to diabetes and hypertension, to birth defects; in contrast to more discrete disease sets in other circumstances, like the current glyphosate claims, which focus only on lymphoma.

Veterans began filing Agent Orange lawsuits in the U.S. courts in the late 1970s.[1] The veterans generally alleged the chemical companies were liable for "the veterans' exposure to dioxin-contaminated herbicides in Vietnam result[ing] in a wide variety of systemic diseases including soft tissue sarcoma and porphyria cutanea tarda as well as miscarriages to veterans' wives and birth defects in their children."[2] Almost 600 cases were originally filed in various state and federal district courts. The state court cases were removed to federal court, and all the cases were consolidated under the MDL 381 docket in the Eastern District of New York.[3]

The original U.S. Agent Orange cases were pled as a class action, alleging that the approximately 2.4 million U.S. servicemen present in Vietnam had been exposed. Adding in claims by spouses, widows, children and parents, as well as Australian and New Zealand veterans who were later made part of the class, the size of the class was estimated to comprise between 8 and 10 million members.

The district court ultimately certified the Agent Orange class in 1983, defined as:

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.[4]

In May 1984, a settlement was reached in the class action, with seven defendants agreeing to pay $180 million into a settlement fund that would be established and administered by the court.[5] The companies' payments were "designed to terminate any liability they may have – present or future – for production of Agent Orange."[6] (As discussed below, the resolution of future claims under the 1984 settlement later became an issue.)

Post-settlement, the district court held extensive hearings on the fairness and adequacy of the settlement and the plan for distribution of the settlement fund. The court's distribution plan had two components: an Agent Orange Veteran Payment Program and an Agent Orange Class Assistance Program.[7] The payment program "provided for distribution of cash payments to individual veterans based generally on the severity of the veteran's medical condition or death," with the objective of providing "prompt financial benefits to those most in need."[8] The class

[1] For an overall summary and overview of the U.S. veterans litigation history, see sections I and II of Judge Weinstein's 2004 decision dismissing the later Stephenson/Isaacson wave of veterans' cases based on the government contractor defense, In re Agent Orange Prod. Liab. Litig., 304 F. Supp. 2d 404 (E.D.N.Y 2004), aff'd, 517 F.3d 76 (2d Cir. 2008), cert. denied, 555 U.S. 1218 (2009).
[2] Id. at 415.
[3] Id. at 415-16.
[4] In re Agent Orange, 304 F. Supp. 2d at 416-17.
[5] Id. at 418.
[6] Id. at 408.
[7] Id. at 420-21.
[8] Id. at 420.

assistance program was intended to provide grants and financial support to various veterans' service organizations and agencies to foster their delivery of programming and services to the population of Vietnam veterans and their families.

Finally, in the original class action, the opt-out plaintiffs were dismissed on summary judgment because "none could prove by the probability demanded in tort litigation that his or her ailment was caused by Agent Orange . . . and that all the claims were barred by the military contractor defense."[9]

In the aftermath of the U.S. class action litigation, the U.S. government implemented a veteran's benefit scheme under the Agent Orange Act of 1991. The scheme is based on a presumptive disability standard where veterans are presumed to have been exposed and are entitled to benefits if they suffer from one of the conditions found to be *associated* with exposure to one of the herbicides. Such determinations were made by the Veterans Administration, based on biennial reports on a review of the scientific literature by the National Academy of Medicine, formerly known as the Institute of Medicine. While neither the Agent Orange benefit scheme nor the IOM/NAM reports themselves satisfy evidence of causation, those arguments are commonly made (akin to the use of IARC findings in the glyphosate cases).

The issue of future claims arose a decade later, as a later group of veterans' claims was filed beginning in August 1998, with the plaintiffs, known as the Stephenson/Isaacson group, alleging their diseases were not discovered until after exhaustion of the settlement fund and arguing they were not bound by the class settlement.[10] The district court dismissed the newly filed cases as barred by the 1984 class settlement.[11] On appeal, however, the Second Circuit reversed and reinstated the newly filed lawsuits, reasoning that future claimants like the Stephenson/Isaacson group had not been adequately represented in connection with the settlement, that is, "The Court of Appeals found that there was an apparent conflict between plaintiffs and the class representatives because the litigation addressed all future claimants, but only provided recovery for those whose injuries were discovered prior to 1994," therefore, they "could not be bound by the 1984 class settlement without violating their rights to due process."[12]

On remand, the Stephenson/Isaacson cases were dismissed based on the government contractor defense, with the courts finding the chemical companies established three prongs: (i) the United States had provided the companies with reasonably precise specifications for Agent Orange, (ii) the companies' Agent Orange conformed to the government's specifications, and (iii) the companies had warned the United States about dangers in the use of Agent Orange known to Dow but not the government.

Agent Orange has continued to be a subject of litigation, worldwide advocacy and scientific study. In 2004, an action was brought in the U.S. courts on behalf of a class of Vietnamese asserting that the use of the herbicide violated international law norms as a chemical weapon,

[9] In re Agent Orange, 304 F. Supp. 2d at 419.
[10] Id. at 422-23.
[11] Id. at 423.
[12] Id.

which claims were dismissed,[13] and more recently, a Vietnamese expatriate, French citizen brought a tort suit in the French court, which was dismissed by the Civil Court on a plea of inadmissibility applying sovereign immunity to the chemical companies. The Korean veterans, who comprised the second-largest Allied force, have litigated their claims in the Korean courts after not being part of the original US class action.

Class Action

The Agent Orange case was somewhat unusual from a mass toxic tort standpoint in being certified as a class action, given the differences among members of the class with respect to their individual exposures, diseases, medical histories, etc. The ostensible bases for certifying the class were common issues relating to general causation and the potential applicability of the government contractor defense, but more so, the class action was necessary for Judge Weinstein's apparent goal of reaching a settlement.

As would be determined, however, a class action resolution did not work for the future claims. This is an issue that persists in mass toxic tort litigation, such that a defendant cannot really buy its complete peace when resolving a mass tort.

Causation and Exposure

Due to the class settlement and the later dismissal of claims under the government contractor defense, Agent Orange causation has not been fully tried. In his 2004 GCD decision, Judge Weinstein did observe that throughout the litigations "in the 1970s, 1980s and 1990s, the courts concluded that none of the available evidence would support a finding to a more-probable-than-not standard of causality between exposure to Agent Orange and disease (except for a quickly discoverable and curable form of skin irritation, chloracne)."[14] The link between Agent Orange and disease has been the focus of the literature reviews made by the IOM/NAM, but these findings explicitly are not legal causation. Again, Judge Weinstein differentiated the government's Agent Orange benefits, which are based on presumed exposure to Agent Orange and statistical "associations," which "are not the equivalent to cause in a legal sense for such purposes as mass tort liabilities."[15] (In the Korean Agent Orange litigation, the Korean Supreme Court likewise upheld this distinction and ruled that the IOM reports submitted by the plaintiffs did not satisfy their burden of establishing legal causation.)

The "association vs. causation" battle under the Agent Orange reports and benefits scheme has a current analogy in the dispute regarding reliance on the IARC findings in the glyphosate cases. In March 2015, IARC classified glyphosate as "probably carcinogenetic to humans."[16] But, like the inaptness of the IOM/NAM reports to show causation because they are based on an association standard, the IARC findings are lacking because they do not account for typical

[13] Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 373 F. Supp. 2d 7 (E.D.N.Y. 2005), aff'd, 517 F.3d 104 (2d Cir. 2008), cert. denied, 555 U.S. 1218 (2009).
[14] In re Agent Orange, 304 F. Supp. 2d at 423.
[15] Id. at 407-08.
[16] Kathryn Z. Guyton et al., "Carcinogenicity of Tetrachlorvinphos, Parathion, Malathion, Diazinon, and Glyphosate," 16 Lancet Oncology 490 (May 2015).

levels of human exposure or consumption and thus do not measure risk. While Roundup MDL Judge Vince Chhabria recognized the IARC report, while relevant, is not central to the general causation question and the underlying studies are the necessary evidence to be considered, the imprimatur of the IARC finding, like the Agent Orange findings, present an impediment to be overcome in defending on causation.

The need to quantify exposure has been a renewed focus in some recent toxic tort decisions, for example, in the cosmetic talc cases where the data is essentially the plaintiff's recollection. Not long ago, the New York Court of Appeals, in Nemeth v. Brenntag North Am., Inc., reinforced that exposure and dose needed to be quantified and rejected the plaintiff's attempted simulation of asbestos exposure dues to "flaws" in the test, noting that "[t]he requirement that plaintiff establish, using expert testimony based on *generally accepted methodologies*, sufficient exposure to a toxin to cause the claimed illness."[17] The New Jersey Appellate Division recently reaffirmed such principles that an extrapolation of exposure presumptions to quantify a dose must be carefully scrutinized and meet standards of sound science.[18]

In comparison, despite having certain Agent Orange data from which to start, a relatively known quantity and dioxin concentration, modeling and quantifying Agent Orange exposure has been a difficult exercise (though several factors point to the implausibility of exposure to a harmful amount of TCDD). Modeling of an aerial spray is complicated, including accounting for matters such as spray drift, interception by the forest canopy to which the substance was applied, photodegradation of TCDD while adhering to the vegetation, etc. Moreover, the locational data to compare spray missions and troop presence is imprecise. While the benefits scheme presumse exposure, for a tort case, though difficult, calculating a dose must be done and done via sound science.

Government Contractor Defense

As alluded, one of the cornerstones of the Agent Orange litigation was the applicability of the government contractor defense. The early GCD cases frequently arose from the design of military aircraft; the United States Supreme Court's seminal 1988 decision, Boyle v. United Technologies Corp., involved an alleged design defect in a military helicopter.[19]

While the aircraft cases tend more clearly to call out for GCD, scenarios involving a "commercial" product involved in or related to a military use, or with military origins, might be

[17] Nemeth v. Brenntag North Am., Inc., 38 N.Y.3d 336, 347 (2022) (emphasis added). As a subsequent decision explained, Nemeth did not reject the notion of exposure modeling, but reiterated it must employ appropriate, accepted methodology. See Dyer v. Amchem Prods. Inc., 207 A.D.3d 412 (1st Dep't 2022) ("[E]xposure simulation studies must account for the amount of respirable asbestos fibers released from the toxic product . . . Simply quantifying the magnitude of asbestos fibers released into the environment is insufficient.").

[18] Barden v. Brenntag North Am., Inc., 2023 N.J. Super. Unpub. LEXIS 1624 (N.J. Super. Ct. App. Div., Oct. 3, 2023).

[19] 487 U.S. 500 (1988). As the Supreme Court observed the underpinning of the defense, "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." Id. at 512.

more complicated. In Agent Orange, the Second Circuit acknowledged that GCD would not apply where the government buys a product "off-the-shelf" or "as-is," but concluded that Agent Orange was not an off-the-shelf product.[20]

A similar commercial/military dichotomy has subsequently arisen in the context of, for example, aqueous film-forming foam (PFAS). A key element in such circumstances can be whether there is a "military specification," or "MilSpec," that covers procurement of the item at issue and provides some indicia of the military's involvement in decision-making concerning the product's design. So, federal officer removal based on GCD was granted where the AFFF at issue was accepted in compliance with "military specifications ("MilSpec") promulgated by Naval Sea Systems Command, including specifications that AFFF product formulations include the chemical class that includes PFOA/PFOS," establishing that the defendant "was manufacturing the product under the U.S. military's guidance.[21]

On the other hand, the combat ear plug litigation provides an example of GCD not applying in an instance where the military/commercial line is straddled.[22] There, the court found the government's role in designing the ear plugs for military use to fall below that needed to trigger GCD protection: "The design and development process for the CAEv2 could not be more different from government contractor defense cases in which courts found that a 'continuous back and forth' between the government and the contractor demonstrated meaningful approval of reasonably precise specifications as a matter of law."[23]

[20] See In re Agent Orange Prod. Liab. Litig., 517 F.3d 76, 90-91 (2d Cir. 2008) (rejecting plaintiff's off-the-shelf argument because concentrations mandated by military's Agent Orange specifications were not commercially available and mere fact that component herbicides were commercially available did not render final product off-the-shelf; rather, inquiry is whether government was "agent of decision" regarding product's composition), cert. denied, 555 U.S. 1218 (2009).

[21] In re Aqueous Film-Forming Foams Prods. Liab. Litig., 2019 U.S. Dist. LEXIS 119283 (D.S.C. May 24, 2019).

[22] See In re 3M Combat Arms Earplug Prods. Liab. Litig., 474 F. Supp. 3d 1231 (N.D. Fla. 2020).

[23] Id. at 1255. As the court elaborated:

> Defendants had no contractual relationship with the Army regarding the design of the CAEv2. True, the Army liked the dual-sided, non-linear design of Aearo's earplug and believed it would improve military readiness. Indeed, it is not too much to say that the Army wanted Aearo's earplug, and, at one point, even went so far as to make clear that it would not commit to purchasing the earplug unless it could be stored inside a military carrying case and worn underneath a Kevlar helmet. But, the design already existed—it came into existence without any input from the Army, and Aearo's subsequent actions changing the length of the CAEv2's stem were not compelled by the terms of any government contract. And none of the Army's purchase orders (or the much later IQC) included a design component. Thus, Aearo was never "performing [any] obligation under a procurement contract" with the Army when it came to the CAEv2's design. . . . Consequently, the uniquely federal interests that Boyle sought to protect are not implicated in this litigation. Stated differently, whatever federal interests there may be in a products liability dispute between private parties arising from the CAEv2's design, those interests are not "uniquely" federal within the meaning of Boyle.

Id. at 1249.