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# THE NATIONAL LAW JOURNAL

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VOL. 3—NO. 5

PRICE \$1.50

*The Weekly Newspaper for the Profession*

MONDAY, OCTOBER 13, 1980

*Attorneys Air Tactics at Closed Strategy Session*

## Agent Orange: A Red Alert



VICTOR YANNAcone:  
Wants a 'lawyer in every county  
where there's a courthouse.'

By JOSEPH R. Tybor  
National Law Journal Staff Reporter

CHICAGO — Kerry Ryan was born with two vaginas, two uteri, four ovaries, no urethra and no anus. She was missing one elbow and the opposite wrist. She had spinal problems, muscular problems, missing fingers, a severe heart defect and a brainstem stroke that put her in a coma for two years and made her unable to walk.

Her attorneys claim she is part of the human fallout from the U.S. government's use of Agent Orange as a defoliant in Vietnam where her father, Michael, now a policeman, served as a soldier near DaNang.

The lawyers are now concerned, however, that because of possible adverse interpretations of her state's

laws, she may never recover a cent even if they can prove her defects were caused by the defoliant. At the same time, a soldier in another state with a more expansive interpretation of its statute-of-limitation might be able to recover monetary damages even if he had nothing more than a skin rash.

These and other possible glaring inequities in the unusually complex litigation arising out of the use of Agent Orange were discussed in a closed session of plaintiffs' attorneys attended by The National Law Journal in Chicago last weekend.

The session provided a rare behind-the-scene glimpse of the attorneys' Continued on page 32

## Foreign Victims Find U.S. Forums

*Human Rights Violations  
Getting Sympathetic Ear  
In American Courts*

By ALICE KLEMENT  
National Law Journal Staff Reporter

PROMINENT SOUTH American lawyer Horacio Galeano Penone stepped onto a political land mine in 1976 when he brought charges in Paraguay against a former police official for allegedly torturing and killing the

# Defiant Suits Erupt Across U.S.

Continued from page 1

fears of legal malpractice claims if they don't cover every possible base, their personal concern about the plight of the victims, and their detailed discussions of possible trial and appellate strategy.

More than 60 attorneys representing about 4,000 named plaintiffs attended the combination pep-talk and nuts-and-bolts working seminar on what many believe is shaping up as the largest tort litigation ever handled by the U.S. court system.

Ultimately, it could result in payments of billions of dollars in damages and scores of thousands of plaintiffs ranging from Vietnam veterans to children of their children.

Today, Kerry Ryan still suffers the horrors of her genetic mutation but otherwise is a bright, happy 9-year-old child of normal intelligence who attends a school for the handicapped. Her most frequent complaint is that "all of the rest of the kids are retarded."

Her attorneys, meanwhile, are a long way from even attempting to prove that her father's tour of duty in Vietnam resulted in her injuries. Instead, they are still charting their way through a legal minefield on such issues as whether uniform rules of recovery will be applied to all plaintiffs regardless of residence and whether not-yet-conceived children of veterans could receive damages in the future.

Both issues are pending before the 2d U.S. Circuit Court of Appeals. Defense attorneys say rulings affecting possible future generations of Vietnam veterans could mean recovery for millions of persons instead of the thousands already involved.

"These are novel and complicated legal questions which have been broached for the first time in our society, questions which our society should be forced to confront," said Leonard Rivkin, of Garden City, N.Y., whose firm serves as national trial counsel for Dow Chemical Co., one of 10 co-defendant chemical manufacturers.

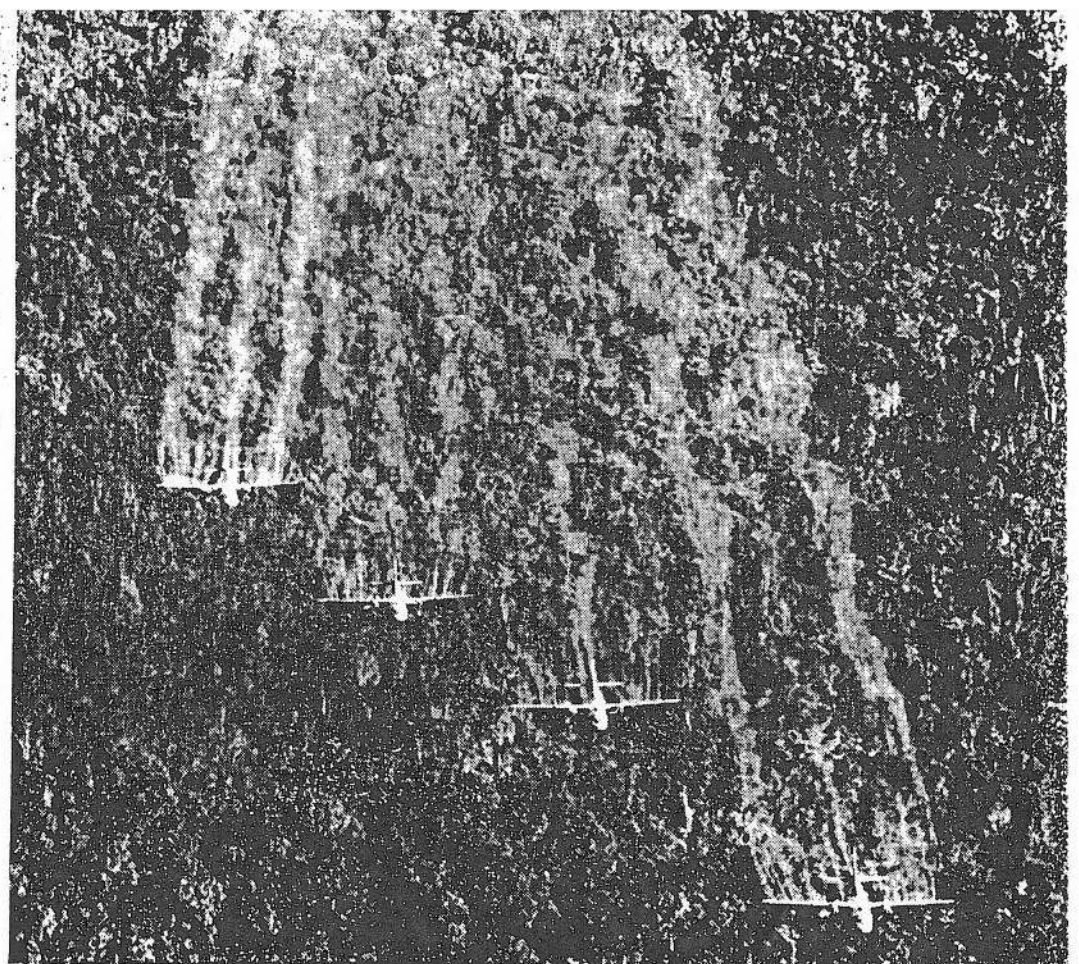
The government has not been named by the plaintiffs, but motions by the defendants are pending before Judge George C. Pratt of the U.S. District Court on Long Island to include the government as a third-party defendant. The plaintiffs said they did not name the federal government largely because it discontinued use of the material when it learned of possible dangers.

## Classified Study

The first complaint was filed in January 1979, by Victor John Yannacone Jr., of Long Island, the co-founder of the Environmental Defense Fund who is generally credited with the legal moves that banned the use of DDT in the United States.

His first complaint, which numbered 162 pages, was based on data Mr. Yannacone said he lifted from a classified Air Force study hundreds of pages long.

Currently, there are nearly 5,000 named plaintiffs in the federal multidistrict litigation consolidated before Judge Pratt. Four thousand of these are clients of about 150 lawyers in 39 states who have agreed to give Mr. Yannacone one-half of any fees recoverable for his leadership of a New York consortium of 12 attorneys



FOUR C-123 AIRCRAFT spraying a suspected Viet Cong jungle position with Agent Orange in South Vietnam in 1965.

who are spearheading the multidistrict effort.

Formal discovery, except of those plaintiffs who are allegedly dying from the effects of Agent Orange, has yet to begin, but already both sides must determine how to deal with an estimated 2.5 million pages of documents already released by the Defense Department.

Both sides are using computers and other sophisticated equipment to help keep the mass of pleadings, plaintiffs, experts and scientific and legal research manageable and within a moment's recall.

The Yannacone group says it has about 4,000 named plaintiffs on whose behalf suits have been filed and con-

in Mr. Yannacone's group were warned of possible legal malpractice claims and were urged to file in state courts suits similar to those now pending before Judge Pratt.

Some of the most spirited debate during the meeting centered on fears of legal malpractice stemming from the running of the various states' statutes of limitation.

Some of the lawyers said the plaintiffs' unprecedented arguments pending in the multidistrict litigation phase of the suit may boomerang if the arguments fail and then attorneys find that filing periods for state actions have lapsed.

"We may be in for some very bloody noses, butts and everything

*'We may be in for some very bloody noses,' said one plaintiffs' attorney concerned about possible legal malpractice claims by clients.*

solidated and at least another 3,000 cases about to be filed.

They estimate they could ultimately have between 20,000 and 40,000 named plaintiffs before they are through.

Benton Musslewhite, of Houston, Tex., who has so far refused to come under Mr. Yannacone's umbrella, says he has 850 cases on behalf of named plaintiffs that also have been consolidated in Long Island and several hundred more pending.

"We're not willing to entrust the destiny of our clients to anyone," he said in explaining his refusal to join the Yannacone group. "That's not a criticism of Mr. Yannacone, it's just the way we want to operate."

## More Pleadings Seen

The glut of pleadings and documents could shortly increase.

At the secret meeting attended by The National Law Journal, attorneys

else," said Leonard Schroeter, of Seattle, Wash., who frequently played Devil's advocate with members of the New York consortium at the meeting.

At the heart of the legal dilemma is the confusing application of contradictory state laws in litigation brought in federal courts.

If New York law applies to the litigation, for instance, a tort action must be filed within two years of the occurrence of the injury. Under Illinois law, for example, a tort action may be filed within two years of the "discovery" of the injury. In some states, the filing period is two years within discovery of the cause of the injury.

Usually in mass tort cases brought in U.S. District Court, the federal court applies the applicable state law in determining the appropriate statute of limitations.

That is why if this is done in the

Agent Orange case, for instance, Kerry Ryan, a resident of New York, may not be able to recover, while a resident of another state suffering lesser injuries might.

## Common Law Right

The plaintiffs argue that federal common law must be applied to ensure that all of the veterans, wherever they live, who may have been injured and suffered damage as a result of their exposure to Agent Orange can recover.

They say that if the only basis for federal jurisdiction in the case is diversity of citizenship between the plaintiff and the defendants, those veterans would be denied recovery who "have taken up residence in a state whose law of products liability may not have evolved to the point of permitting recovery for the kind of toxic tort committed by these corporate defendants."

"Only recognition by this court that the substance of this litigation raises uniquely 'federal questions' requiring federal common law will ensure a uniformity of result for all veterans who served . . . in Vietnam."

In an opinion which defendants say "involves a dramatic expansion of federal jurisdiction [and] . . . was literally unprecedented," Judge Pratt agreed.

"State law has not considered the complex question of a war contractor's liability to soldiers injured by toxic chemicals subject to federal regulation while engaged in combat and serving abroad," Judge Pratt wrote in his opinion issued last November.

"If as defendants insist, application of federal common law to mass tort claims is unprecedented, the reason may be that no claim has heretofore implicated such significant federal interests involving so many persons in an area so little regulated by state law," he wrote. In *Re 'Agent Orange' Product Liability Litigation*, MDL No. 381.

In the same order, Judge Pratt also refused to grant a defendant motion to

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# 3-Stage Trial Sought

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remove from any possible class certification plaintiffs who may face effects later from the fallout of Agent Orange exposure or to strike plaintiffs' request that a "trust fund" be established by the defendant companies — should they be found liable — to handle claims arising from future generations.

The 2d Circuit heard oral arguments on these issues in April, but have yet to come down with a decision, even though, some attorneys note, it prides itself at rendering opinions within two to three months of argument.

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"There is no question that Judge Pratt's decision surprised us," said Mr. Rivk: counsel for Dow. "I'm only guessing here, but I think the 2d Circuit is having trouble with it, they're wrestling with it."

Either side indicated it will probably appeal an unfavorable result to the U.S. Supreme Court.

Two other key issues are pending before Judge Pratt that could shape the future of the litigation and how long it will take before resolution.

In what defendants say is another unprecedented move, Mr. Yannacone is seeking class action status for 15 groups of potential plaintiffs, including not only veterans, wives, widows, parents, children or stillborn children born of the Vietnam vets but also "veterans' children at risk of genetic damage."

It is this potential class which Judge Pratt refused to dismiss and is on appeal to the 2d Circuit. It could open the way for second-generation claims of vets' children, should they be found to be afflicted with genetic

In their appellate brief, defendants argued that determining whether such a class can be certified "will have a profound effect on whether the Court will have before it claims on behalf of a group . . . numbering from several hundred to possibly several thousand, or those of a group in excess of 2.4 million (vets who served in Vietnam during the Agent Orange program), the vast percentage of whom have suffered no injury and are simply 'at risk'."

The class-action request is also one of the issues that is keeping Mr. Musslewhite from joining Mr. Yannacone's group.

"We feel most of our clients will come out better on separate adjudications," said Mr. Musslewhite. "Class actions serve as sort of a common denominator. Those who are hurt the worst may not recover what they truly deserve, while those with lesser injuries may recover more."

## 'Serial' Trials

To guard against just such an occurrence, Mr. Yannacone's group has proposed to Judge Pratt a novel method of trying the complicated suit which Mr. Yannacone believes could serve as a model for future mass tort litigation such as they predicted in the current controversy over the toxic dangers of women using tampons.

He told fellow attorneys at the Chicago session that the trial should be conducted in three parts, or "serials."

The first phase would attempt to determine whether the defendants were "at fault" and would involve, plaintiffs argue, discovery of only 12 or 13 of the defendants' own experts. It would delve into the companies' histories of manufacturing Agent Orange and what they knew or didn't know about the so-called dangers of dioxin — the allegedly deadly poisonous substance that contaminates the Agent Orange during the manufacturing process.

The plaintiffs also place heavy emphasis on the defendants' alleged failure to warn of the possible dangers of the use of the defoliant and, thus, investigation into their alleged failure to warn would be a significant part of the discovery in this first phase.

If the defendants are found "at fault," the trial would go to its second "serial," or genetic causation phase.

"This would be, in effect, the 'science trial,'" Irving Like, of Rellly & Like in Babylon, N.Y., who serves as chairman of Yannacone's Research Committee, told the lawyers at the Chicago meeting. It would attempt to show that Agent Orange contaminated with dioxin is generally dangerous to humans and that the Agent Orange supplied by the "war contractors" to the U.S. government was so dangerously contaminated.

For the third phase, the trial would return to the individual plaintiff's own home district where specific causation as to the individual veteran's status would be established along with proof of individual damages.

The defendants vigorously oppose such a "serial" trial, saying the issues cannot be separated in such a manner.

Albert J. Florella, of Mineola, N.Y., a member of Mr. Yannacone's trial committee, told the closed meeting's participants that such a proposal for trial was made to counter the defendants' massive resources and cut their opportunity for delay during discovery.

## 5,000-Week Trial

Based on the length of discovery that already has occurred voraciously by both sides, Mr. Florella told the group the pretrial process could take 5,000 weeks.

"That's 100 years," he said. "You and I would never see the end of this."

He said defendants have proposed interrogatories to each of the veteran plaintiffs that number 3,000 questions.

"This is the lawsuit of a millenium," he said.

Much of the plaintiff's legal analysis is done by Edward F. Hayes, of New York's Malerba, Abruzzo, Clancy, Hayes, Downs & Frankel.

Mr. Like, whose firm concentrates in commercial litigation, and Aaron D. Twerski, a professor at Hofstra College of Law, also contribute to the group.

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Other key regional liaisons include Stephen J. Schlegel, of Chicago's Schlegel & Tracelet Ltd., who coordinated the weekend conference and who, with Chicago's Sullivan & Associates, has about 200 Agent Orange cases filed; Jack E. London, of Mills, Hodin & London in Miami; Dorothy Thompson, of Greenwald & Greenwald in Los Angeles; Mr. Schroeter of Seattle; and Jules B. Olsman of Southfield, Mich.

In an attempt to find a way for the corporate defendants to pay what could amount to unprecedented

Agent Orange cases will not be Pyrrhic," he said.

He also said the trust concept "neutralized the business press," which, he said, in the past has helped thwart other environmentally effective litigation.

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Mr. Yannacone, who has a keen eye for use of the media, although officially excluding reporters from the session, also told the group during formal conferences and informal conversations how they can be used to the litigation's advantage.

"We have nothing to hide," he said. "Each filing triggers more interest, more calls for legislative action, more findings from the scientific com-

**WHAT AGENT ORANGE DOES:** Top photo is an unsprayed mangrove forest in South Vietnam. At bottom, a mangrove forest that had been sprayed with Agent Orange five years before photograph was taken. Tiny dark specks are surviving trees.

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Plaintiffs contend their injuries from exposure range from cancer and birth defects to skin rashes, dizziness and discomfort, and that the worst possible effects may be latent for an unknown period.

"Only time will tell whether some vital cell within their [plaintiffs'] body has become a ticking toxic time bomb which will explode into a cancer or contribute defective genes to a child who will come into the world burdened with the kind of catastrophic polygenetic developmental defects that have afflicted plaintiff Kerry Ryan," says the plaintiffs' brief before



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Continued from preceding page

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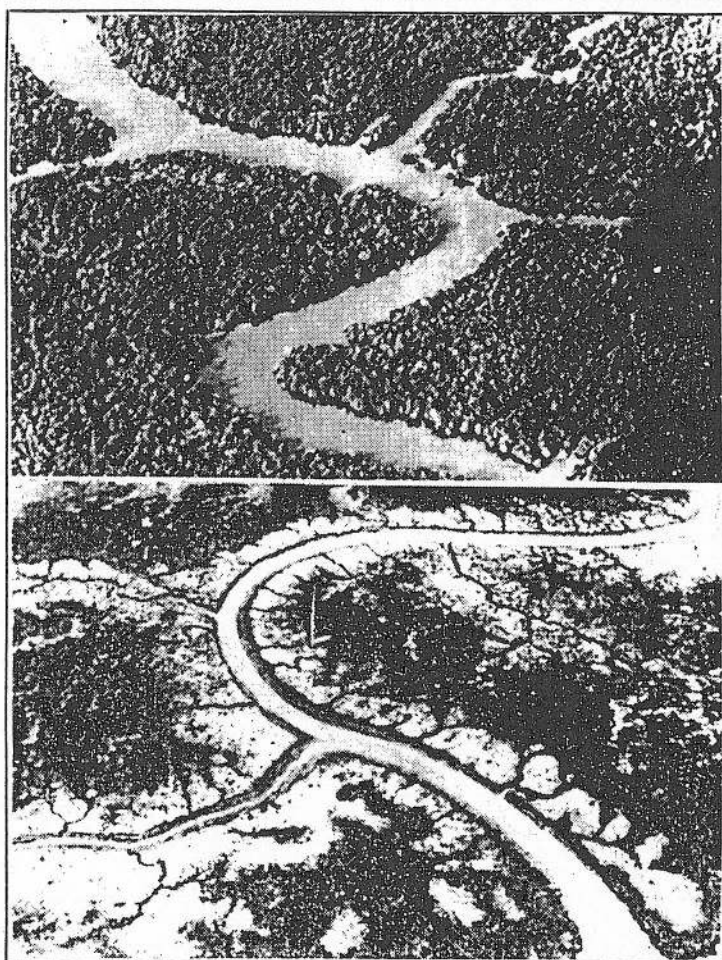
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