
POISONED PATRIOTISM

When Vietnam veterans charged Agent Orange had poisoned them and deformed their children, the chemical companies balked, the government ordered studies. Victor Yannacone sued

Outside a small gray house on Baker Street in drowsy little Patchogue, New York, hangs a sign that reads: Yannacone & Yannacone. Inside the house is a country lawyer's office—its simple waiting room is as homey as a den: the chairs are old and comfortable, mementos clutter the walls and bookshelves.

The memento that stands out most is a showy green plaque adorned with the scales of justice and glittery letters proclaiming, "To Carol and Victor Yannacone With All Our Thanks, Agent Orange Victims of New York." A metal statue of a whooping crane is a 1969 award from the National Wildlife Federation. "Sue the Bastards"—the motto of the Environmental Defense Fund—is the message on a number of knickknacks; "Still a David Among the Goliaths" is the tribute beneath a slingshot mounted on a wooden plaque.

The collection is disarming; the man is even more so. Victor John Yannacone Jr. is ebullient as he charges into his office only 20 minutes late. The David characterization is apt—at 46 Yannacone is not a boy, but he takes a boyish delight in showing off the trophies of his antiestablishment cases. It is easy to forget that he is the father of environmental law (he claims he even coined the phrase), and that Agent Orange, the chemical defoliant sprayed in Vietnam, is a household name today due largely to his litigation on behalf of the veterans exposed to and damaged by it.

Victor Yannacone could not be called self-effacing. His sweeping gesture takes in his whole office. "Look—no law

BY
MOIRA K. GRIFFIN



Vietnam veterans demonstrating in front of the White House

books. You don't need law books when you make new law," he says. But he admits with mock reluctance that he does have a couple of legal texts and points to the two volumes of *Environmental Rights and Remedies*, by Yannacone and Cohen.

There is an element of the mischievous kid in Yannacone—a delight in maneuvering grown-ups into embarrassing situations. But those who have worked with him, or against him, in court agree that his reputation as a passionate crusader and courageous litigator is well earned. It was this reputation, and Yannacone's ability to deal with the complex properties and long-term effects of dangerous chemicals, that led to his involvement in the Agent Orange suit, the largest product liability case in history.

A few days after 28-year-old Paul Reutershan died of cancer on December 14, 1978, the Islip, New York, law firm of O'Hagen, Reilly and Gorman contacted Yannacone. Reutershan had believed his cancer was caused by exposure to Agent Orange. The O'Hagen firm and the veteran's family wanted Yannacone to assist them with the \$10 million damage suit against Dow Chemical they had filed in U.S. district court the previous

Moira K. Griffin is a New York-based free-lance writer.

September. "They wanted to make sure that Paul had not died for absolutely nothing!" says Yannacone's wife, Carol, remembering how moved she was by the family's concern for other veterans. Within three weeks of being retained by O'Hagen, Yannacone had amended the original suit with a 104-page, class action complaint.

The files on Agent Orange are kept in Yannacone's computer-equipped office, which takes up most of the first floor of the house. The Yannacones at first thought one small room would easily contain their files on the herbicide, but as veteran after veteran from across the country contacted them, each with his unique, but ominously similar, story of disfiguring skin disease, cancer, or a child with multiple birth defects, the files overflowed into two rooms.

The office could be that of a medical researcher. Shelves are crowded with books documenting the results of exposure to dioxin, the highly toxic chemical in Agent Orange believed to be responsible for the veterans' problems. Carol Yannacone takes a personal interest in the lives of the veterans, whom she calls "good, honest people." Formerly a biologist with the medical physics department of Brookhaven National Laboratory, she has been responsible for amassing an enormous quantity of the biological evidence that Agent Orange

exposure can have lethal, long-term effects on humans and their future children.

Until it became too massive, the Yannacones carefully tracked the Agent Orange case as it spread across the United States. A large map of the country hangs in their hall; it is covered with red, blue, and yellow flags and pins that show where cases have been filed, where potential cases exist, and where there are scientists and medical centers capable of diagnosing and treating the effects of Agent Orange exposure.

By December 1981, 314 law firms and more than 10,000 named plaintiffs were associated with the suit, all coordinated by the Yannacones from their computerized office. When he realized there would be thousands of plaintiffs, Yannacone devised a special management system that he believes may serve as a model for future mass tort litigation.

He began by using the press and other outlets to tell interested veterans to contact their family lawyers, who would then contact the Yannacones about the class action suit. Many of the family lawyers, however, were hostile toward Yannacone, he says, because they recognized that some veterans might have big cases, and they did not want to share the spoils with other lawyers. Moreover, some attorneys felt that class action suits reduce all plaintiffs to the lowest common denominator, which might mean that people with serious injuries would not recover as much as they might in separate adjudication, while people with lesser injuries might recover more than they actually deserve.

But Yannacone devised a trial strategy to prevent such inequities. He proposed that the trial be conducted in three stages—the first two to be handled centrally by Yannacone and his associates, the third by the family lawyers. In phase one, Yannacone would try to prove fault on the part of the defendants, showing that the producers of Agent Orange not only knew of some of the dangers of the dioxin-contaminated substance, but failed to warn anyone about them.

Causation would have to be proved in both the second and third phases. "I explained to [the family lawyers] that we were going to have some difficulty proving causality, and that we would have to be our own epidemiologist [someone who traces the origin and spread of a disease]. We also would have to prove causation in two ways: generically and

proximately," Yannacone adds.

Proving generic causation would be the goal of his phase two actions—establishing that exposure to dioxin-contaminated Agent Orange can be dangerous to humans. In the third phase, individual cases would be filed in the veterans' home states by their family lawyers, who would have to prove the proximate, or specific, cause of each veteran's problems and establish individual damages, thus avoiding possible leveling effects of a class action suit.

Yannacone also proposed a financial management system, suggesting that all fees be equally split between the family lawyers and his end of the operation, and that all expenses be individually covered. In Yannacone's opinion, this system would "eliminate mass ambulance chasing, which we think is gauche—you know, the F. Lee Bailey kind of lawyer." Most of the attorneys agreed to the arrangement.

But despite all the careful planning, on December 14, 1981, the veterans' cases received a major blow when the Supreme Court refused to hear Yannacone's appeal of a lower court ruling that refused guaranteed equal access to federal court for all the veterans. The Agent Orange cases essentially are product liability suits, which usually are subject to state, not federal, law. But in 20 states, the statutes of limitations have expired, which means, says Yannacone, "that one-third of the veterans get screwed. They won't be able to go along with the cases that we're presenting to the court [in January]."

The case, *Chapman v. Dow Chemical*, was originally filed in the U.S. District Court for the Eastern District of New York, where the judge, George C. Pratt, ruled that the "substantial federal interests" in the case entitled the veterans to bring their claims in federal court. But that decision was reversed by the U.S. Court of Appeals for the Second Circuit, which ruled that state law, including statutes of limitations, must apply. Yannacone, however, believes that uniform rules of recovery should apply to all plaintiffs, no matter what state they live in, and that the Agent Orange cases should be determined under a uniform rule of federal common law. And while U.S. Supreme Court Justices Sandra Day O'Connor and Harry Blackmun voted to hear the appeal, at least four justices must agree for certiorari to be granted.

Yannacone, however, has not given

up hope for the thousands of Agent Orange victims who live in the "wrong" states. Some states already have relaxed their statutes of limitations, and he hopes others also will do so. In addition, Yannacone believes that the Veterans Administration has been brought into the case, though perhaps indirectly, which may mean that the "Second Court of Appeals decision could be rendered moot." If not, Agent Orange plaintiffs such as veteran Michael Ryan and his daughter, Kerry, who was born without an anus or a urethra, missing an elbow, the opposite wrist, and several fingers, will be denied a forum in which to make their complaint.

Those who have witnessed Victor Yannacone's tenacity in earlier cases are confident he will eventually win a measure—some say it will be consider-

The Agent Orange suit has grown to include 314 firms and more than 10,000 veterans who fear for their own health and for their families' futures

able—of compensation for veterans exposed to Agent Orange.

His first public interest case originated with a very personal cause: he and his father (Yannacone & Yannacone) were arrested for trespass while fishing off Crane Neck Point on Long Island during Christmas week 1959. The complaint was made by Sinclair Hatch (a Wall Street lawyer, Yannacone points out), whose house was at the end of the point.

But before there can be trespass, there must be ownership. And Hatch, like other private landowners in the area, had merely assumed ownership of the waterfront by his property, based on a formal agreement to deny public access to the beaches created by the landowners just before World War II. Fresh out of law school, Yannacone at 23 was in a very litigious frame of mind and not easily daunted. The trespassing arrest was just the goad he needed.

In the basement of the town hall, Yannacone found the original town record books from 1666 to 1712; they had what he was looking for. On behalf

of the Freeholders and Commonalty of the Town of Brookhaven, Yannacone sued the Incorporated Village of Old Field for the benefit, use, and enjoyment of the "private" beaches, as guaranteed under 17th century colonial charters.

It was in this early case that Yannacone's role of David against Goliath emerged. The village was represented by Pelletreau and Pelletreau, the premier law firm in the country at that time, in Yannacone's opinion. And he, after all, was just an inexperienced kid who had recently graduated from what he describes as a "law school not generally considered to be of the first rank." During this case, however, he developed the legal strategy he later perfected in the environmental cases fighting the use of DDT. "It was a strategy of massive retaliation, later known as the Moshe Dayan Theory of Defending Israel—you push me, I push back harder," Yannacone says.

The gambit that finally forced Old Field to settle was what Yannacone calls the Siege of the Lighthouse. "For forty years, an antique lighthouse was parcelled out to the personal friends of Ward Melville, mayor of the Incorporated Village of Old Field," Yannacone charges. Melville's friends lived there, Yannacone claims, although a red, white, and blue sign out front said, "Government Property—No Trespassing."

So Yannacone looked up the lighthouse deed in Washington, D.C., and found that the Lighthouse Service had deeded the property to the village in trust for use as a park, without discrimination based on race, creed, color, or national origin.

"So one Sunday afternoon I took a group of children, five to seven years old, and their parents, to the lighthouse—after notifying the local police and a few other people that there might be a kidnapping that afternoon," says Yannacone. (Kidnapping can include any prevention of a person from leaving the premises; for example, locking a door behind someone could be a technical kidnapping.) When they got to the lighthouse, they flipped the children over the fence and hailed the current resident, suggesting he come unlock the gate.

"He told us in clear and obscene terms what we could do about it," Yannacone says. "Whereupon, we called

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for the police, who appeared with all kinds of newspeople. The cops gave them sixty seconds to open the gate or be arrested for kidnapping, which, they pointed out, was a capital crime. So they came out and opened the gate.

"The resident then said, 'You're trespassing; we're living here by right.' We said, 'Okay, you got a deed?' Of course, he couldn't produce it. We could. But what really got him to settle was the NAACP picnic we had scheduled there for the following week!" Yannacone chuckles. The lighthouse, now open to the public, is known as the Old Field Village Hall.

In 1966, another personal interest—his wife's old swimming hole—started Yannacone's legal battle against the use of DDT, a chemical pesticide that was implicated in the widespread reproductive failure of several types of birds, including the peregrine falcon and the bald eagle.

The Yannacones learned that a large number of fish in the swimming hole, where local children swam, had died

because 5,000 gallons of DDT had been dumped in the water by the Suffolk County Mosquito Control Commission. "We then read that the commission was planning to spray the mosquitoes with DDT and how beneficial and harmless the chemical was," Yannacone says. But if dumping the chemical had such an immediate, disastrous effect on the fish, the Yannacones thought it also would be dangerous when sprayed.

"Carol demanded that I do something about it," says Yannacone. "We wrote the complaint together: 'Carol A. Yannacone, individually and on behalf of all the people of Suffolk County, against H. Lee Dennison, Suffolk County Executive, the Suffolk County Mosquito Control Commission and the County of Suffolk.'"

Having asked that the commission be restrained from further use of the pesticide, Yannacone had to show that the injury to natural resources (other than mosquitoes) was substantial, permanent, and irreparable, and that the plaintiff (Carol Yannacone and the people of Suffolk County and even "those children yet unborn") would "suffer serious, permanent, and irreparable damage" by the continued use of DDT.

"The trial strategy was basic Neanderthal," says Yannacone. "We had no experts. We were going to ask the court to take judicial notice that the skull and crossbones—the traditional warning label—showed that DDT was an inherently dangerous toxic substance. By careful examination of the commissioner, we were going to establish that he was an idiot and we were going to ask the court to rule that idiots not be allowed to spray toxic substances in Suffolk County."

Not long after Yannacone filed his complaint, a letter to the editor appeared in the *Long Island Press* from Charles F. Wurster Jr., a biological chemist at the State University at Stony Brook, complaining about the use of DDT for scientific reasons. "We called him. He was afraid to talk to lawyers but suggested that I attend a meeting in Brookhaven where I'd meet other people like himself. I went, and out of that meeting came what was later known as the Environmental Defense Fund," Yannacone recalls.

Together the scientist and lawyer developed a new trial strategy. They presented the court with all the available literature—seven and a half pounds of

it—on the effects of DDT. They called the material “A Technical Appendix to a Pair of Affidavits,” both of which were quite short. Wurster’s appendix became a legend in environmental litigation; it concluded: “Therefore, to continue the use of DDT . . . can be likened to using atomic weapons to clear the New York streets of criminals.”

The judge, D. Ormande Ritchie, actually read the technical appendix and on August 15, 1966, ordered an injunction—the first of its kind—against the pesticide, and the complaint went to trial.

The case came before Judge Jack Stanislaw, who owned a large farm where DDT was used. “The first day of the trial, the judge called me to the bench and said, ‘I’ve got a busy day. I’m going to let you go until coffee time, and then I’m going to dismiss.’ But we went on to coffee time, then to lunch, then to afternoon coffee, and then we started again in the morning,” Yannacone says now.

Fortunately for Yannacone, Stanislaw’s background included scientific training, and he was interested in and able to understand the significance of the evidence they had collected. In fact, after hearing two hours of testimony by Wurster on his experiments with DDT, the judge exclaimed, “My god, I’m responsible for killing all the crabs in Smithtown Bay!”

Although the case was dismissed in December 1967 on technical grounds, Wurster and Yannacone were satisfied that the point against DDT had been made.

Wurster and the Yannacones continued to work together to protect the environment through litigation. In October 1976 they and seven other supporters incorporated the Environmental Defense Fund (EDF) on the second floor of the yellow house next door to Yannacone’s current office. They planned to borrow some of the strategies of the civil rights movement (Yannacone had worked for the NAACP) and use the courts to further their cause. Wurster headed the Scientists’ Advisory Committee to the EDF; Yannacone was its counsel and litigation arm. They were ready for bigger and better challenges.

The challenges—or opportunities—came quickly, the most significant being the hearing on DDT before the Wisconsin Department of Natural Resources.

Wisconsin was an ideal forum for

presenting the EDF’s scientific evidence against DDT, because its statutes provide for state agency hearings on the applicability of laws they enforce. So the EDF asked the Wisconsin Department of Natural Resources to determine whether DDT was a water pollutant according to the state’s water quality standards.

“Yannacone brought together to aid in the unholy crusade against DDT . . . sportsmen, bird watchers, and those concerned about the effect that a tainted environment has on the quality of human life,” authors Henkin, Merta, and Staples wrote in *The Environment, the Establishment and the Law*. “The petitioners in the Madison case made up an awkward—at times, unwieldy—coalition whose members ranged from the new left to the old right with every gradient between. Although the very affluent found common cause with poverty stricken students, the internecine political and social struggles which developed in the coalition during the hearings made it sometimes difficult to realize that the common foe was DDT. The amazing thing . . . was that the ad hoc group managed to stay together at all during the five-month fray,” the journalists continued.

By all accounts, Yannacone dominated the hearings. Not everyone, even on his own side, was pleased about that. Henkin reported, “Yannacone, despite efforts of some EDF trustees to curb him, remained indubitably the ringmaster, alternating between soothing and aggravating the frayed tempers and temperaments of the coalition as it dug in for the long bitter fight. . . .” Yannacone prepped his own witnesses before they went to the stand, and some of the scientists didn’t like his challenges to their scientific competence. “Tempers flared, voices shrieked, and more than one scientist threatened to pack up his papers and reputation and charge back to the sanctuary of his university or laboratory,” according to Henkin. But the cause always proved more important.

Thomas R. Dunlap, in a *Wisconsin Magazine of History* article, wrote: “The most conspicuous figure in the hearing was Victor Yannacone. . . . He was in the limelight every day, and he enjoyed it. Aggressive and flamboyant, he badgered witnesses, declaimed for the benefit of the court, and made sure that the newspaper reporters got a story each day.”

One of Yannacone's coups was calling opposing counsel Louis McLean to the witness stand. According to Dunlap, Yannacone wanted to establish McLean, a former counsel to the Velsicol Chemical Company, as a "longtime intellectual hatchet man for the industry." Yannacone produced an article McLean had written for *Bioscience*, a magazine of the popular science genre, that claimed critics of pesticides were compulsive types, too concerned with problems of sexual potency. McLean had written, "The anti-pesticide leader can almost always be identified by the numerous variant views he holds about regular foods, chlorination and fluoridation of water, vaccination, public health programs, food additives, medicine, science, and the business community."

The EDF witnesses did much better. Dunlap reported that the hearing examiner felt Lucille F. Stickel, pesticides research coordinator at the Patuxent Wildlife Research Center of the Department of the Interior, was the witness who "nailed down" the connection between DDT and the thin eggshells of the birds of prey.

On May 21, 1969, the Wisconsin hearings were adjourned, the case against DDT firmly established in the mind of the hearing examiners and, perhaps more important, in the public's mind.

Though the hearings clearly opened the way for more EDF lawsuits, Yannacone and the EDF went their separate ways. Personality conflicts played a large part in the breakup, according to both Yannacone and Wurster, who is still with the EDF. Some people objected to Yannacone's harsh and abrasive courtroom behavior, or his prima donna attitudes and arrogance, according to various reports. According to Wurster, "Yannacone is a very dynamic fellow. When he walks in the room, sparks start flying, rational people start doing irrational things. One of them is likely to be on the phone to the governor."

Yannacone's particular strength was in handling scientific witnesses, though some were put off by his rough cross-examinations. Wurster says that he, however, thought Yannacone was "pretty good at it, brilliant sometimes."

According to Wurster, Yannacone was dismissed from the EDF in part because there was "a substantial conflict between his personal and private

practice and EDF's business." He says that the EDF was anxious to get going in other areas and Yannacone was dragging his feet. "The board of EDF felt it could get better legal assistance for less money elsewhere."

Yannacone, not surprisingly, remembers it a little differently. The delays that Wurster views as foot-dragging, Yannacone describes as the result of his concern for maintaining EDF's credibility. "In October 1969, I refused to go on national TV and say DDT causes cancer," Yannacone claims. "Some of the scientists inferred that DDT might be a carcinogen, but I was not positive about some of my colleagues," he explains. "Nobody knew. Why stick our neck out when we already had enough against DDT on other grounds?"

But Wurster responds, "We wanted him to get started . . . he's difficult to work with and was sometimes two hours late for a meeting. . . . EDF would never have started without him, . . . but we wanted someone who would devote substantially all his or her time to EDF."

By all accounts, Yannacone's departure from the EDF was stormy. The organization, according to Yannacone, has "gone the administrative route and has lost the weapon of litigation." He says that while government regulations like the Air Quality Act seem to work, they are "bad from a litigation standpoint. . . . Government bureaucracy sits, exhausted, and little gets done. We must beware the administrative approach because agencies act as judge, jury, and executioner."

Yannacone's battles against DDT and Agent Orange manufacturers grew out of his belief that the "large corporations, especially chemical companies, in the U.S. today, because of their technological knowledge and economic power, are really fiduciaries of the public health, safety, and welfare to the extent that they market and advertise their products." He believes that these companies have a responsibility to promote safe products and a duty to warn consumers about any potentially dangerous effects. "Failure to make such warnings should be actionable by the class at risk," he insists, "not just those who have injuries."

If Yannacone is a David pitting himself against the corporate Goliaths, his slingshot is litigation. "The legal profession is on a thin edge between being considered socially superfluous or an

economic pariah. If lawyers went to court on behalf of society more often than on behalf of the economic interest of individuals, this would not be true," he says.

"In every toxic tort case, there can be found a social cause. Litigation is revolution's alternative; if the door to the court is open, the door to the street can stay closed." 