



Fall 1987

Agent Orange on Trial Mass Toxic Disasters in the Courts

Ruth L. Kovnat

University of New Mexico - Main Campus

Recommended Citation

Ruth L. Kovnat, *Agent Orange on Trial Mass Toxic Disasters in the Courts*, 27 NAT. RES. J. 955 (1987).
Available at: <https://digitalrepository.unm.edu/nrj/vol27/iss4/24>

This Book Review is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

AGENT ORANGE ON TRIAL MASS TOXIC DISASTERS IN THE COURTS

PETER H. SCHUCK, ed.

Cambridge, Massachusetts and London, England:
The Belknap Press of Harvard University Press, 1986.

The Agent Orange litigation was at once a symbol and a lawsuit. As a symbol, it dramatized the national and individual pain suffered as a result of the Vietnam War. As a lawsuit, it challenged the limits of our civil justice system. In *Agent Orange on Trial*, Peter Schuck has masterfully woven the disparate elements of the case into a rich tapestry in which he displays the complex human forces which ultimately shaped the litigation: the veterans' idealism, their need to tell their story, their compassion-driven desire for compensation from chemical companies coupled with the patriotism which restrained them from suing the government they had served in war. He unveils both the vision and the greed of the adroit and egotistic, often over-worked, lawyers. He vividly describes Judge Jack Weinstein's brilliance, energy, and charm while recognizing the dangers of judicial omnipotence. At the same time as Schuck paints lively portraits of the people associated with the case, he gives a detailed account of the stresses imposed on the adjudicative process by the mass toxic tort action—an action which characteristically involves large numbers of claims with indeterminate plaintiffs and defendants and which may also entail probabilistic proof of causation at the frontiers of scientific knowledge. By combining the human account with a powerful portrayal of a justice system in crisis, Professor Schuck has produced a triumphant piece of work.

The book is divided into three parts. The first explains the social, technological and legal developments which spawned the Agent Orange litigation. The second and longest section describes the course of the case itself, starting with the first injured veteran's phone call to a lawyer made after reading a newspaper story linking health problems to exposure to Agent Orange in Vietnam. Schuck aptly depicts the early skirmishes: the positioning of the lawyers; the rulings of Judge Pratt, the first judge to hear the case; the maneuvers of the "clean" defendant, Dow Chemical Company, to distance itself from its "dirty" co-defendant, Monsanto, including sufficient detail about difficulties of class action notice, and problems of discovery and proof to satisfy the most curious lawyer. He proceeds to describe the spectacular alteration of the case effected by its assignment to Judge Weinstein, a dazzling, activist judge who from the outset steered a course guided by his vision that this case, in particular, was one that cried out for settlement, not adjudication. In the final chapters of the book, Schuck explicitly argues that the decentralized, individu-

alistic tort model is too expensive and uncertain to adjust losses stemming from the release of toxins into the environment. He suggests that rational risk management requires, instead, enhanced public and private enforcement of regulatory standards supported by improved risk information. He proposes that compensation for injuries should be managed primarily through a first-party insurance scheme. He ends by urging probing, thorough-going public debate focusing on improving the institutional responses to mass toxic exposures.

Among all of the powerful players in the Agent Orange litigation, Judge Weinstein emerges as the single most potent actor. Undoubtedly, this can be explained by Schuck's clear admiration for the judge, admiration which however does not prevent Schuck from criticizing Weinstein's rulings and tactics when he is dubious about them. However, neither admiration nor the common-sense observation that a smart, active, managerial judge always dominates litigation is an adequate explanation for Weinstein's centrality in this book. Plainly, Schuck wishes to make a more important point. By showing Weinstein to be all-powerful in shaping the outcome of this mass tort litigation, Schuck demonstrates that a judge may fuse in himself, legislative, administrative and judicial powers, subject to no checks and balances. His vivid depiction of Weinstein's role demands that the public seriously address the proper role of the federal judiciary. His argument is so eloquent that it eclipses the often sterile debate on that subject that has been such a prominent feature of the 1987 bicentennial celebration and of the Senate Judiciary Committee hearings on President Reagan's nominations to the United States Supreme Court.

This review would be incomplete if it failed to notice that Professor Schuck's book has already received a greater accolade than any reviewer could offer. It has been cited as general authority by the United States Court of Appeals, reviewing the \$180 million settlement fashioned by the district court. *In Re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2d. Cir. 1987), at 152, 154, and 155, that the Court of Appeals for the Second Circuit relied on Schuck for its history of the proceedings of the litigation testifies to the force of his book. The book's importance transcends its undoubted value to courts and lawyers. Professor Schuck has written a book for the public, thereby exposing important institutional questions to a broad audience. He has therefore made an enormous contribution to the discourse which he has himself stimulated. One can only hope that the questions raised by Schuck are taken seriously enough both by the general public and the legal profession to result in institutional changes capable of responding to wide-spread exposures to toxic substances.

Ruth Kovnat
University of New Mexico