Agent Orange and the Law

In the New Zealand Vietnam veterans' community there has been, and remains, confusion and often misrepresentation about the outcome of several legal cases in the USA, and about the Evatt Royal Commission in Australia. Many veterans believe that some legal cases have indicted Agent Orange and dioxin. The reverse is actually the case. The courts have not found against Agent Orange.

To correct the record this paper addresses several of the important legal cases involving Agent Orange and/or dioxin. It shows that in the courts Agent Orange has not been found to have caused health conditions in Vietnam veterans, other than chloracne.

It covers:

- A relevant 1983 case in Canada (Palmer v Nova Scotia Forest Industries);
- The 1979-84 US Agent Orange mass tort class action involving US, Australian and New Zealand veterans as claimants;
- The 1983-85 Evatt Royal Commission on the use and effects of chemical agents on Australian military forces in South Vietnam;
- The 1984-87 Kemner v Monsanto case much cited by VVANZ;
- The 1998-2004 Stephenson Litigation which effectively brought an end to decades of Agent Orange litigation in the USA;
- The 2007-18 WAI 2500 Waitangi Tribunal Military Veterans Kaupapa Inquiry; and
- The important 1986-89 Nehmer v US Veterans Affairs decision.

Of all the litigation *Nehmer* is the most important. It is also the only one in the above list that directly challenged policy rather than the science. It is a decision, seemingly unnoticed by New Zealand Vietnam veterans and their claim makers that reasserted and reimposed the presumptive standard of proof on veterans' administration in the USA. It has had flow on effect in Australia, and eventually in New Zealand.

The Burden of Proof

"Scientists and lawyers approach arguments very differently. Lawyers are trained to start with a conclusion, discover evidence to support that conclusion, and craft it into a compelling narrative to win the argument."[1]

Thus it has been with several legal cases alleging health effects caused by Agent Orange, or specifically by its contaminant TCDD/Dioxin.

[1] Otto, S., The War on Science: Who's waging it, Why it matters, What we can do about it, Milkweed, 2016, p 11.

Judges and juries are left to discern justice between evidence leading to conclusion or not (science), and conclusion leading to evidence or not (legal argument), and depending on which standard of proof they are required to apply.

For there are different standards of proof and they are often not appreciated by scientists, policy makers or the public. And in the case of war pension or repatriation law often not understood by lawyers representing war veterans.

Beyond reasonable doubt, on the balance of probabilities, presumption, benefit of the doubt and reverse onus of proof.

Litigation from 1979 to the present alleging Veterans and their families' health effects resulting from chemical exposure of the veteran has consistently failed to pass the legal/civil court standard of proof.

In legal cases the "*burden of proof*" is quite clear. In criminal cases the burden of proof is on the prosecution to establish the case "*beyond reasonable doubt*". In civil cases the burden of proof is still with the complainant but the required standard of proof is "*the balance of probabilities*". That is, in cases alleging harm caused by herbicides the plaintiffs must prove their case "*on the balance of probabilities*".

As shown below none of the Agent Orange litigation has accumulated the necessary burden of proof to the standard required in civil law whether in the USA or in Australia. Importantly the cases discussed have also demonstrated the courts' repeated inference that the resolution of the Agent Orange issue was for policy makers rather than judges and juries.

For in repatriation or war veterans' presumptive law (policy), the burden of proof shifts from the veteran to the veterans' administration, under such powerful benevolent concepts as "*benefit of the doubt*", and "*reverse onus of proof*". Presumption has been discussed in the first paper in this series and will be discussed in a lot more detail in a following paper.

The following cases demonstrate the failure to accumulate the necessary burden of proof required in civil law.

Canada 1983 - Palmer v Nova Scotia Forest Industries (Justice Nunn)

Justice Nunn rendered his judgement in the controversial Nova Scotia spraying case, *Palmer v Nova Scotia Forest Industries,* on 15 September 1983. It was not brought by Vietnam veterans but this case could have provided a precedent for Agent Orange litigation in the USA, Australia and New Zealand had it been more widely known.

"The Palmer case presented a novel problem to the court. The plaintiffs desired to prevent a particular chemical compound, 2,4,5-T, with its inevitable contaminant TCDD, from being sprayed. While this article has attempted to show that the plaintiffs were entitled to succeed in some

measure regardless of the health risks associated with 2,4,5-T and TCDD, it is also fair to say that the case in effect put the chemicals on trial. As Mr. Justice Nunn himself concluded:

> *"This matter thus reduces itself now to the single question. Have the plaintiffs offered sufficient proof that there is a serious risk of health and that such serious risk of health will occur if the spraying of the substances here is permitted to take place?"*

"Notice that, for the trial judge, the sine qua non of the case is whether or not a serious health risk exists. In order to make an affirmative finding, "the plaintiffs [must offer] sufficient proof."

"As Nunn J. says elsewhere:

> *"The complete burden of proof, of course, rests upon the plaintiffs throughout for all issues asserted by them."*

"In short, if the plaintiffs say these chemicals are unsafe, let them prove it.

"The problem with this approach is captured, perhaps unwittingly, by the learned trial judge when he states:

> *"As to the wider issues relating to the dioxin issue, it hardly seems necessary to state that **a court of law is no forum for the determination of matters of science**. Those are for science to determine, as facts, following the traditionally accepted methods of scientific inquiry. A substance neither does nor does not create a risk to health by court decree and it would be foolhardy for a court to enter such an enquiry. **If science itself is not certain, a court cannot resolve the conflict and make the thing certain**".* [Emphasis added].

*"This translates into saying that if the plaintiffs must prove the human health dangers of the chemicals, but the scientists themselves have not agreed or settled this issue in scientific terms, then the plaintiffs lose. **Scientific uncertainty results in the benefit of the doubt being given to the chemicals. In a court of law, chemicals are presumptively innocent**. The classical analysis illustrated by the Palmer case values the right to produce and use chemicals over possible adverse human health effects. As Nunn J.'s view demonstrates, **the court is normally only concerned with the probable and not the possible**".*[2] [Emphasis added].

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[2] Wildsmith, B., Of Herbicides and Humankind: Palmers Common Law Lessons, Osgood Hall Law Journal, Volume 24, Number 1 (Spring 1986), Article 6.

This case demonstrated, right at the beginning of Agent Orange claim making and litigation, a central problem for claim makers that has persisted in all of their efforts to prove causation.

It is not enough to produce anecdotal accounts, no matter how many witnesses are produced. It is not enough to produce some scientists who support the claims against Agent Orange. It is not enough to try to discredit all of the science presented by the defendants of the case against Agent Orange, or to discredit some of the science. The plaintiffs or claim makers must themselves prove causation and that, given the uncertainty and contested nature of the science, has always been too high a hurdle.

USA 1979 to 1984 – Agent Orange Mass Tort Action (Judges Platt and Weinstein)

This was the class action that eventually included thousands of Vietnam veteran plaintiffs in the USA, Australia and New Zealand. It was the important early litigation that brought together claim makers in all three countries, and brought into the claim making process several thousand (about 15,000) veterans.

About Mass Tort (or Class Action) Litigation

In the 1970s and 1980s class action litigation became a very popular and very profitable specialty for large numbers of lawyers in the USA. The largest cases involved asbestos exposure. Mass torts of lesser scale included various kinds of drug and prosthesis cases - Bendectin, DES, Dalkon Shield, breast implants, and heart valves. Close behind the asbestos claims came Agent Orange.

"Like the asbestos litigation, the Agent Orange cases involved heterogeneous claimants with widely varying exposure, different manifestations, and uneven latency. The Agent Orange litigation was less difficult than the asbestos cases because it involved far fewer claimants. However, the Agent Orange litigation was even more difficult than the asbestos cases because of the dimension known in science as etiology and in law as proximate cause: whether or not the maladies of the claimants, or some of them, were actually caused by Agent Orange. By 1980 it had become legally indisputable that many asbestos claimants were victims of asbestos. This has not yet become clear for the Agent Orange claimants."[3]

Once a lawyer or firm of lawyers decided to pursue a claim on behalf of a claimant they would advertise right across the USA to attract as many claimants as they could to the case. Other lawyers would jump on the bandwagon and also gather as many claimants as they could. The aim was to bring thousands, sometimes tens of thousands, of claimants into the litigation.

[3] Hazard, G.C. Jr, Reflections on Judge Weinstein's Ethical Dilemmas in Mass Tort Litigation, Yale Law School Faculty Scholarship Series 1-1-1994, p. 571.

Mass tort lawyers were generally not interested in taking a case to trial. What they were interested in was pressuring the defendant companies into settling the claim as quickly as possible without going to trial. Trials took time and money. It was often cheaper for the targeted companies to settle rather than go to the expense and adverse publicity of a trial. The settlement strategy worked in most of the high profile, highly profitable cases.

Mass tort lawyers also employed accountants and financial analysts to determine how much they could expect to get from settlement.

The lawyers were often not concerned with how much they obtained in settlement for each of their claimants. They settled for what they could get, and they took anything from 20% to 40% off the top of any settlement amount gained by their clients. What was more important to them than the amount per client or claimant was to have as many claimants as possible, often in the thousands. Their primary concern was their own profit.

That was so in the Agent Orange mass tort litigation, and it is one of the main reasons why the Agent Orange Narrative was spread far and wide across the USA, and into Australia and New Zealand by lawyers. The motive in many cases was profit.

As noted above and below the Agent Orange case was never going to be won at trial. The chemical companies and Agent Orange were never going to be found guilty on the balance of probabilities, and the only positive outcome would be a negotiated settlement.

It is likely that none of that was explained to the veterans involved as claimants, many of whom harboured expectations of substantial individual compensation that were simply unrealistic.

The Agent Orange Mass Tort Action

The plaintiff's lawyers were aware of *Palmer v Nova Scotia Forest Industries*. A scientist who presented evidence in *Palmer* was an advisor to one of the leading lawyers in the Agent Orange class action. The scientific evidence that would have been presented in the mass tort case, had it proceeded to trial, would have been largely the same as that presented to Justice Nunn, with the same result.

Judge Weinstein took over the case from Judge Platt in October 1983. Judge Weinstein is widely acknowledged as one the leading intellectuals in

the development of mass tort law in the USA, and his handling of the Agent Orange case is seen as a landmark case in American legal history.[4]

"He defined the class to include all American, Australian, and New Zealand veterans who served at any time between 1961 and 1972 and who claimed injuries while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those containing 2,4,5-T or dioxin..."[5]

4000 Australians and 502 New Zealanders including prominent claim makers Colonel John Masters and Victor Johnson joined the case. The case had been brought to the attention of New Zealand veterans after a lawyer acting for Australian veterans[6] approached Vic Johnson who became one of two leading claim makers in New Zealand[7].

Interestingly the Vietnam Veterans Association of Australia (VVAA) did not join the class action as an organisation because of the complexity of the legal case and the political issues involved. VVAA reasoned that the class action would take years to resolve. VVAA always preferred to work directly through the Repatriation system which in law, at least, favoured the veteran.[8] By contrast, as we shall see later, VVANZ tended to prefer to try to influence politicians directly rather than to work through the war pension system.

The mass tort action was a class action against the chemical companies who produced tactical herbicides for use in the Vietnam War. US veterans were limited in any attempt to claim compensation from the government by the *Feres Doctrine*[9], which precludes litigation against the government by soldiers or former soldiers. That left the chemical companies in the firing line.

After he took over the case Judge Weinstein worked towards settlement rather than having it go to a jury trial that might have lasted for years, and in his opinion would have had an inconclusive outcome or a finding against the veteran complainants. He called a judicial conference on 21 October 1983 immediately he took over the case.

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[4] Hackney, J.R. Jr, Judge Jack Weinstein and the Construction of Tort Law in America: An Intellectual History, DePaul Law Review, Volume 64, Issue 2, Winter 2014: Twentieth Annual Clifford Symposium on Tort Law and Social Policy - Symposium: In Honor of Jack Weinstein, Article 12.

[5] Schuck, P., 1986, "Agent Orange on Trial: Mass toxic disasters in the courts", Belknap Press, p 126.

[6] McMillan and Co. of Brisbane.

[7] With John Moller.

[8] McCulloch, J., The Politics of Agent Orange: The Australian Experience, Heinemann, 1984, p 169.

[9] A doctrine that bars claims against the US federal government by members of the armed forces and their families for injuries arising from or in the course of activity incident to military service. The U.S. Supreme Court decided in 1950, in Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed.

In his authoritative book, cited as general authority on the class action by the US Court of Appeals[10], Peter Schuck noted:

"He deftly and unmistakably turned the Agent Orange case around, inside out, and on its head".[11]

"The central problem of proof in a case like Agent Orange would be 'one of showing causality through statistical analysis'".[12]

"The Agent Orange litigation, he suggested, presented not so much a case as a social problem, one 'that is very difficult for the Courts to decide alone. It is a political as well as a Court problem".[13]

Another author noted:

"If Weinstein was not happy with the lack of substance in the veterans' case, he made it clear that he was by no means suggesting that their claims had been without merit; he felt that they should have been treated more compassionately. "Many do deserve better of their country," he said in his approval of the settlement. "Had this court the power to rectify past wrongdoings—actual or perceived—it would do so. But no single litigation can lift all of the plaintiffs' burdens. The Legislative and Executive branches of Government—state and Federal—and the Veterans Administration, as well as our many private and quasi-public medical and social agencies, are far more capable than this court of shaping the larger remedies and emotional compensation people seek." Kenneth Feinberg, who had assisted Weinstein, said, "Unless the Congress provides a comprehensive program, anything the court succeeds in doing will be a Band-Aid."[14]

In his consideration of the class action Judge Weinstein reflected the legal findings of Justice Nunn in the Canadian case. But as noted above he also anticipated by some years, and alluded to, the need for a solution to a social and political Agent Orange problem through policy rather than litigation.

That turning point in the class action was not noticed by some New Zealand claim makers.

"But this case would be 'better settled than tried. If it can be settled, let's. If I can help you, I will'".[15]

[10] Kovnat, R., Book Review, Agent Orange on Trial: Mass Toxic Disasters in the Courts, Natural Resources Journal, Vol 27, 955, 1987.
[11] Schuck, P., 1986, "Agent Orange on Trial: Mass toxic disasters in the courts", Belknap Press, p 112.
[12] Ibid, p 113.
[13] Ibid, p 114.
[14] Severo, R., The Wages of War: When America's Soldiers Came Home: From Valley Forge to Vietnam (Forbidden Bookshelf) (Kindle Locations 7601-7608). Open Road Media. 1989, Kindle Edition 2016.
[15] Schuck, P., 1986, "Agent Orange on Trial: Mass toxic disasters in the courts", Belknap Press, p 115.

Judge Weinstein did indicate that the plaintiffs would probably not succeed if the case went to trial in telling them, "*... in no case have you shown causality for the health effects alleged.*"

He eventually pushed it to settlement rather than trial by jury. Many veterans and their families wrongly interpreted the $180 million settlement paid by the chemical companies as proof of causation and acceptance of liability. It was neither. Others who had hoped for a definitive judgement against the chemical companies, and for legal confirmation that their diseases, disorders, disabilities and defects had been caused by Agent Orange, rejected the settlement and tried to bring their own legal actions against the chemical companies.

This class action also featured early claims by the wives and children of Vietnam veterans:

"In Agent Orange, wives were claiming that their husbands' exposure to the herbicide damaged their sperm, causing the wives to miscarry; children were claiming that genetic damage to their fathers had caused the children's birth defects".[16]

The settlement of the class action left that claim in limbo, and it remains an unresolved social problem; not proven to a scientific, medical or legal standard, and only partially addressed through policy. It is the basis of the WAI 1401 and WAI 1877 claims that form part of the WAI 2500 Waitangi Tribunal Military Veterans Kaupapa Inquiry.

It is part of the social problem that I have called *Mamae: New Zealand's Vietnam Legacy.*[17]

The May 1984 class action settlement did provide limited financial assistance to some of the 644 New Zealand veterans who applied for compensation, dispersed through the New Zealand Agent Orange Trust Board.[18] Colonel John Masters and Vic Johnson both served on that board.

Australia 1983 to 1985 - Vietnam Veterans Royal Commission (Justice Evatt)

The report of the Australian Royal Commission, and more particularly claim makers' portrayal of its findings in Australia and New Zealand, played an important role in shaping public knowledge about Agent

[16] Ibid, pp 131-132.

[17] In a book being researched and written.

[18] See Marriott, A., A Bridge Over: the story of John Masters, veteran fighter, The Masters Family, 2009, pp 153-157.

Orange, and in forming deeply embedded perceptions and opinions in the Vietnam veterans' communities in both countries.

The rebuttal and discrediting of the Evatt Royal Commission's final report was a key plank in claim making strategy in both countries.

The Royal Commission resulted from several years of activity by the leading Australian claim makers, Vietnam Veterans Association of Australia (VVAA), who eventually succeeded in having their claims investigated. They received political patronage from Clyde Holding MP and Clyde Cameron MP, leading members of the Australian Labor Party, and when Labor was elected in 1983 a royal commission was established, headed by Justice Phillip Evatt. The Australian claim makers had finally succeeded in engaging with policy makers.[19]

As shown below the Evatt Royal Commission served two purposes:

(1) Firstly to evaluate the scientific evidence for and against the Vietnam veterans claims at a legal (civil) standard of proof; and
(2) Secondly to investigate policy responses to the claims.

The two distinct aspects were not recognised by most of the claim makers, who focused entirely on the legal standard of proof in the hope that that would bring the remedies they desired. The second finding about the policy response was also ignored for a time by the policy establishment.

After two years of inquiry the Commission brought down its findings in a report released on 31 July 1985 encompassing 9 volumes, 360,000 words of text, 120,000 words in references, in 2,760 pages.[20]

Agent Orange - Not Guilty

Applying a civil standard of proof (on the *balance of probabilities*) it controversially pronounced Agent Orange, "*Not guilty*". This single finding became the focus of claim makers in their efforts to discredit the Commission.

In arriving at that conclusion the Royal Commission considered a mountain of scientific evidence[21]. In the process it enraged a number of the scientists presenting evidence by subjecting them and their research to intense cross examination, and by declaring some of them unreliable. That was especially so of the witnesses produced by the leading claim maker, VVAA.

[19] Geoff Braybrooke MP had tried to achieve something similar in 1983 with a Bill he unsuccessfully introduced into the New Zealand Parliament.
[20] Evatt, Mr Justice Phillip, Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam, Final Report, Australian Government Publishing Service, 1985.
[21] Smith, F.B., Agent Orange: the Australian Aftermath, in O'Keefe, B.G., Medicine at War: Medical Aspects of Australia's involvement in Southeast Asia 1950-1972, Allen & Unwin in association with the Australian War Memorial, Official War History, 1994, pp 285-351.

Several of VVAA's expert witnesses were shown under cross examination to be less than expert. In particular Dr John Pollak, who was a key advisor to VVAA before, during and after the Royal Commission, was shown to have misinterpreted a wide range of research that he presented in support of VVAA. However his self-defeating testimony was not exposed in the Commission's final report, and thus was not made known to the public. That allowed Pollak and other experts who were similarly exposed at the Commission to maintain their public credibility, and to continue to support the AO campaign to discredit the Royal Commission.[22] [23]

VVAA's scientific advisor, John Evans, who VVAA acknowledged as one of the key advisors who helped gain a Royal Commission, was later unmasked as a fraud in relation to his claimed credentials, and the Commission considered recalling him to answer possible contempt charges for comments he made in the media. This was not reported by VVAA or by its New Zealand counterpart VVANZ.

The quality of VVAA's two main scientific advisors was reflected in the quality of the evidence produced to the Commission by VVAA, even though the Government had paid to have VVAA evidence brought forward.

VVAA then found that "*great slabs of the most important parts of the Royal Commission's report*" were lifted verbatim (mistakes and all) and without attribution from the submissions of the Australian subsidiary of the chemical company, Monsanto.

"Second, the Evatt Commission has been accused of plagiarising material from the submission of the Australian subsidiary of the Monsanto Chemical Company which was one of the manufacturers of the Agent Orange used in Vietnam [Gil]. It is undeniable that material from the Monsanto submission was used in the Commission's report. It is equally clear that it was unwise for the Evatt Commission to have done so since any evidence given by the chemical companies would be perceived as tainted by the general public. But the Commission's critics have not demonstrated that the Evatt Commission's conclusions were wrong. The public has been encouraged to draw that conclusion by reasoning that the conclusions must be false since they were supported by Monsanto, and it was in Monsanto's interests to deny the WAA's claim. This form of ***cui bono***[24] *reasoning has pervaded the controversy, creating a presumption in favour of the veterans' claim. Given this fact, the Commission's use of the Monsanto material ensured that the public would perceive its conclusions as inadequate".*[25]

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[22] Ibid, pp 347-349.

[23] The late Professor Smith's war history has been successfully challenged over his treatment of veterans claim makers and their organisation (VVAA) and it is to be rewritten. However his recording of the proceedings of the Evatt Royal Commission remains mostly unchallenged except for some of the emphasis.

[24] "Whom does it profit". Commonly the phrase is used to suggest that the person or people guilty of committing a crime may be found among those who have something to gain, chiefly with an eye toward financial gain.

[25] Hall, W., The Logic of a Controversy: The Case of Agent Orange in Australia, in *Sm. Sci. Med.* Vol. 29, No. 4, 1989, pp 539-540.

VVAA were also unhappy with how the Royal Commission had handled some of the other evidence, causing a storm in the scientific community with world-renowned scientists outraged by the unequivocal '*Not guilty'* findings. Two of the scientists expressed their outrage in a letter to the Governor General.

This became the basis of a concerted campaign by claim makers and their supporters in the media and sciences in Australia, New Zealand and elsewhere to undermine the credibility of the Royal Commission. In the court of public opinion it was a very successful campaign.

Repatriation Administration - Guilty

However, while the Royal Commission reported there was insufficient evidence to find the chemicals guilty of harm at the standard of proof required in a civil court, this was largely irrelevant to the veterans cause, because compensation cases were heard within the Repatriation system based on the lower and powerful standard of presumption, benefit of the doubt, and reverse onus of proof. The required burden of proof in repatriation law was very low and, indeed, reversed.

Far more important than the "*not guilty*" finding, the Royal Commission in the body of its report delivered a scathing indictment of the policy response to the issue. In the hue and cry in response to the "*not guilty*" verdict this indictment was lost.

It found that the Department (DVA) had:

"*... for a number of years, refused to concede that benevolent judicial interpretations of the application of ... [the law] were consistent with parliamentary intention*". And, the report said, the Department was guilty of "*finding a method whereby the Repatriation Commission may restrict benefits which have flowed from a generous – though proper – interpretation of the legislation.*"

The Royal Commission went so far as to accuse the Department of Veterans Affairs of training Determining Officers "*to find ways around Court statements of what the law was*" and of emphasising "*ways in which a claim could be 'knocked-out'*." The Royal Commission scolded the Repatriation Commission saying that if it was unsatisfied with the law it should move to change it, not break it.

It also found that a Repatriation determining authority might well attribute a Vietnam veteran's soft tissue sarcoma or non-Hodgkins lymphoma to his exposure to Agent Orange while on war service in Vietnam based on a presumptive level of proof.

The Royal Commission pointed out that:

"*It is a matter of public record that there has been a clear divergence of opinion and of result between the Repatriation Review Tribunal and the Repatriation Commission as to the proper interpretation and application of the standards of proof prescribed under the legislation."*

The above summation of the repatriation issues raised by the Commission is based on an account by Lieutenant Colonel (Retired) Graham Walker, formerly the honorary research officer for the VVAA, then honorary research officer for the Vietnam Veterans Federation of Australia (VVFA) after the NSW branch of VVAA split from the national organisation and formed VVFA. He was and remains a leading claim maker. They are a balanced view of the Commission's report, in stark contrast to the near-hysteria of some claim makers' responses.

He acknowledges some of the weakness in the claim making:

"The Agent Orange controversy was a chaotic episode. Given the horror of a situation in which veterans saw possible connections between their war service and a range of post-war cancers and birth defects, it was understandable that emotion sometimes overwhelmed rationality. In fact, as war-caused psychological stress sometimes amplified the concerns of veterans, their claims could become exaggerated and even hysterical. The pronouncements of some over-enthusiastic lawyers and fringe medicos did not help either. Additionally, the media fed an intense public interest with sensational and sometimes inaccurate reports. There were also problems with the evidence presented to the Evatt Royal Commission. In some cases, the scientific opinions on which the veterans had relied were cut to pieces. In one case, a witness was even found to have exaggerated his qualifications. The evidence given by some Vietnam veterans was also found to be flawed and unconvincing".[26]

Walker reasoned however that without the blemish of the obvious Monsanto content in the report, the Royal Commission *'not guilty'* findings (at the civil standard of proof) may have been less emphatic leaving more room for doubt.

Expressing a similar reservation as Walker, and adding fuel to the rejection of the whole Evatt report, the Government also questioned the "*not guilty*" verdict:

"Third, the Labor government rejected the Commission's finding that Agent Orange was 'not guilty'. The Minister for Veterans' Affairs, Senator Gietzelt, preferred a conclusion that "the case for a link between Agent Orange and health problems among Vietnam veterans has not

[26] Walker, G., The official history's Agent Orange account: the veterans' perspective, in Ekins, A.; Stewart, E.. War Wounds: Medicine and the trauma of conflict (Kindle Locations 2168-2174). Exisle Publishing, 2009. Kindle Edition. Updated version, 2013 - http://honesthistory.net.au/wp/wp-content/uploads/AO-VETERANS-PERSPECTIVE-2013-UPDATE-with-INSULTS-Annex.pdf

been established"[27]*. Other critics of the Evatt Commission have argued for a similar finding".*[28]

The Evatt Royal Commission, in applying the civil standard of proof to the scientific evidence and expressing it as "*not guilty*", had not met the expectations of the leading claim maker (VVAA), or the Labor Government that had supported VVAA's bid for a royal commission.

However the VVAA's own response to the report, admitted the Evatt Commission's recommendations *". . . that veterans be treated for ill health effects such having been caused by stress achieve the same result as a finding that they were chemically poisoned"*[29], indicating that the same claims based on PTSD would have been more successful than those based on chemical exposure.

That recommendation has since been supported by more recent Australian and other PTSD research.[30]

<u>*New Zealand and the Evatt Commission*</u>

New Zealand interest in the Evatt Royal Commission began as soon as it was established. In 1983 Vic Johnson and John Moller of VVANZ were denied the opportunity to submit evidence, and after the report was released VVANZ condemned it in total. They obviously did not notice or understand the important repatriation law issue addressed by the Commission, or realise that it had been addressed, and focused only on the issue of scientific proof, and the use of Monsanto evidence in the final report.

"*In New Zealand the response was equally scathing* [as the response in Australia]. *After being told for years to wait for the commission to complete its work, the VVANZ criticized the final report as a sham, renewing its claims for an independent inquiry. V. R. Johnson of VVANZ was still fuming about the commission years later. Writing directly to "Her Majesty, Queen Elizabeth II," in 1990, Johnson accused the commission of being "tainted" by "perjury and fraud*."[31]

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[27] Gietzelt A. *Tabling Statement,* The Senate, Canberra, 22 August, 1985.

[28] Hall, W., The Logic of a Controversy: The Case of Agent Orange in Australia, in *Sm. Sci. Med.* Vol. 29, No. 4, 1989, p 540.

[29] Vietnam Veterans' Association of Australia. Response to the Final Report of the Royal Commission on the Use
and Effects of Chemical Agents on Australian Personnel in Vietnam*,* The Senate, Canberra, 1985, p 301.

[30] McLeay, S. et al., Physical comorbidities of post-traumatic stress disorder in Australian Vietnam War veterans, Medical Journal of Australia, 306 (6), April 2017. This landmark 2017 research on PTSD supports the Evatt Commission recommendation that comorbidities similar to those claimed in the Agent Orange narrative are associated with PTSD.

[31] Martini, Edwin A.. Agent Orange: History, Science, and the Politics of Uncertainty (Culture, Politics, and the Cold War) (Kindle Locations 3970-3973). University of Massachusetts Press, 2012. Kindle Edition (citing "VR Johnson to Queen Elizabeth," Poisons-Substances-Agent Orange, Archives NZ, ABQU632 W4452, file 5: 1980–89).

Vic Johnson wrote at length about the Evatt Royal Commission in his 2003 submission to the NZ Parliamentary Health Select Committee. Nearly twenty years after the event the full findings of Evatt still eluded him.[32]

John Moller later stated:

"As early as 1990 our Association had made a comprehensive submission to Parliament on the effects which the Monsanto studies had had on our medical and scientific understanding of Dioxin contamination. Simply put the 1985 Evatt Royal Commission findings in Australia on which the New Zealand Government relied were a fraud aided and abetted by the Australian Government."[33]

Overlooking or being unaware of the statement by Senator Gietzelt expressing the Australian Government's rejection of the "not guilty" finding.

The use of the presence of Monsanto evidence to discredit the findings of the Commission also found expression in an influential claim making memorandum by Cate Jenkins of the US EPA, much quoted by Australian and New Zealand claim makers:

"The Monsanto studies have also been utilized by Australia and New Zealand as a basis for denying their Vietnam veterans compensation for health effects related to Agent Orange exposure. Horribly, the Australian Royal Commission set up to review dioxin health evidence lifted language prepared by Monsanto "as is" and used it for a determination that dioxins caused no cancers or other long term effects in humans."[34]

The memo was cc'd to a range of environmental and Agent Orange claim makers including VVANZ. Once again a claim maker had failed to recognise the different standards of proof, and that the Commission's finding in relation to Agent Orange was based on the civil standard.

In using the Monsanto evidence to discredit the whole of the Commission's report claim makers ignored the crucial finding that the repatriation standard ought to apply even though the scientific and legal standard of proof was not reached. That the resolution of the Agent Orange issue was a matter for policy makers rather than scientists, judges and lawyers, and would be a policy response to a social problem, rather

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[32] Johnson, V.J., Agent Orange Inquiry New Zealand Parliament Select Committee, Submission by Victor Johnson, Vietnam War Veteran, 25 November 2003, paragraph 5.1. http://nzvietnamvets.freeservers.com/Selectsubmit2003.html#topic13

[33] Moller, J., Presentation to the New Zealand Select Committee of Inquiry into Agent Orange Exposure by Vietnam Veterans Association of New Zealand, 25 November 2003. http://www.iwvpa.net/mollerja/presenta.php

[34] Jenkins, C., Regulatory Development Branch, US EPA, Impact of Falsified Monsanto Human Studies on Dioxin Regulations by EPA and Other Agencies -- January 24, 1991 NIOSH Study Reverses Monsanto Study Findings and Exposes Certain Fraudulent Methods, Memo to Office of Criminal Investigations, EPA, 24 January 1991, p 8.

than the translation and incorporation of non-existent scientific certainty into policy.

USA 1984 to 1987 - Kemner v Monsanto (Judge Goldenhersh)

This case ran from February 1984 to October 1987. Monsanto was the defendant in the longest civil jury trial in US history. The case was brought by a group of plaintiffs who claimed to have been poisoned by dioxin in 1979 when a train derailed in Sturgeon, Missouri. Tank cars on the train carried a chemical used to make wood preservatives, and small quantities of the dioxin 2,3,7,8,TCDD.

The jurors agreed with Monsanto that the plaintiffs had suffered no physical harm from exposure to dioxin. But they accepted the plaintiffs' argument that Monsanto had failed to alter its manufacturing process to eliminate dioxin as a by-product, and that it had failed to warn the public about dioxin's harmfulness. Most of the plaintiffs were awarded a token one dollar each for actual economic losses, but they were awarded $16.25 million in punitive damages.

In 1991 the economic loss and damages judgements were all overturned on appeal:

"Based upon the foregoing, we hold that the punitive damage award must be reversed. The jury found that the plaintiffs suffered no noneconomic damage, and, since there are no underlying compensatory damages, no punitive damage award can stand. Nor will the verdict stand on $1.00 verdicts for economic loss. As we have indicated, this is not a case where there was an intentional tort alleged nor a case where damages could not be easily computed. The plaintiffs tried this case for punitive damages, and although they argued for actual damages, we believe that the verdicts of $1.00 per plaintiff for economic loss were entered only to sustain the punitive damages award. The jury found that there was no actual damage, and this verdict was not appealed by plaintiffs. There is, therefore, no underlying tort; thus, the verdict cannot stand". [35]

In New Zealand VVANZ's Victor Johnson described the case.[36]

"There was controversy over the role of Monsanto in the [Evatt Royal] *Commission as well as the Commissioner's treatment of some epidemiological scientists who made submissions. The controversy was re-ignited in 1990 by sworn testimony in the Kemner et al. court case*

[35] 576 N.E.2d 1146 (1991), 217 Ill. App.3d 188 160 Ill.Dec. 192, *Frances E. KEMNER et al., and all other cases consolidated with Cause No. 80-L-970, Plaintiffs-Appellees, v. MONSANTO COMPANY, Defendant-Appellant (Bruce D. Ryder, Appellant, and St. Clair County, Illinois, Appellee).* Appellate Court of Illinois, Fifth District. July 22, 1991. Accessed at: https://www.leagle.com/decision/19911722576ne2d114611573

[36] Johnson, V.J., Agent Orange Inquiry New Zealand Parliament Health Select Committee, Submission of Victor Johnson, Vietnam war veteran, 25 November 2003. http://nzvietnamvets.freeservers.com/Selectsubmit2003.html#topic13

[USA] in which Monsanto was defendant. The case was the longest jury trial in US legal history, started in the St Clair County of Illinios during 1984. An award of $16.25 million punitive damages was made against Monsanto. Dr Frank Dost, Monsanto's Toxicologist in the United States, who testified during the trial, assisted the Australian Royal Commission as a part time consultant.

"The trial related to a chemical spill by Monsanto at Sturgeon, Missouri. The plaintiffs' lawyers tendered evidence, confirmed in cross-examination, showing Monsanto had falsified, manipulated and concealed study results. Evidence also showed the company had been selling dioxin-contaminated chlorophenol products for nearly 30 years. Sworn testimony during the Illinios trial indicates that for over thirty years Monsanto Chemical Company manipulated, falsified and concealed study results that showed 2,3,7,8-TCDD, a contaminant of 2,4,5-T manufacture, is harmful to human health.

"Analysis of Monsanto's data from one study established that the true results should have been:

- *Cancer deaths, 65% higher than expected*
- *Lung cancer deaths, 143% higher than expected*
- *Genitourinary cancer deaths, 108%*
- *Bladder cancer death rate, 809%*
- *Lymphatic cancer death rate, 92%*
- *Death from heart disease, 37%"*

However Monsanto's scientific data introduced as evidence by the plaintiffs in *Kemner,* and later published as the *Kemner File,* had no bearing on the eventual judgement at appeal. New Zealand claim maker John Moller corresponded with the plaintiffs' lawyer:

"Mr Rex Carr, legal counsel for Kemner et. al., wrote to Mr John Moller explaining Monsanto Chemical Company's response in the Appellate Court. Mr Carr, of Carr, Korein, Tillery, Kunin, Montroy, Glass & Bogard, Attorneys at Law, Louis, Illinios, said:

> *'...I was surprised to read in the letters written by the New Zealand Monsanto representative that my charges have already been rejected by the court and are not supported by the scientific evidence. This is another lie which joins the long list of lies to which we have been subjected by Monsanto. No court has ever rejected the charges and Monsanto, itself, was unable to respond to any of the charges in court although Monsanto had a year and a half in which so to do.*
>
> *'The charges which I made in court and which are supported by the documentary evidence and sworn testimony of Dr. Roush have never been rebutted. In point of fact, the Appellate Court case was recently argued before a panel of three judges and I repeated the same charges*

> *of fraud in the course of the argument. Monsanto's attorney made absolutely no effort to defend Monsanto against these charges.*
>
> *'The jury in the original trial did obviously find that my clients had been unable to prove that their health was jeopardised by the dioxin exposure because of the very low levels of dioxin involved in the chemical. However, the $16,250,000 punitive verdict was a direct finding of the jury that Monsanto had committed fraud. It may be that for several technical reasons, the Appellate Court will someday reverse the punitive damage verdict, the effect of that verdict cannot be reversed. In a long and hotly contested trial, a jury of twelve American citizens found that Monsanto had lied and had wilfully failed to remove dioxins from its chemical and that it should be punished for so doing."*[37]

There were four outcomes from the Kemner case:

(1) The jury agreed with Monsanto that the plaintiffs had suffered no harm and most of them were awarded only $1 each for actual economic loss;
(2) The jury agreed that Monsanto had falsified some of its own research.
(3) Having awarded $1 to each plaintiff for economic losses, the jury awarded punitive damages of $16.25m. Both were later reversed on appeal;
(4) The evidence discovered by Rex Carr, the plaintiffs' lawyer, concerning the "fraudulent" nature of Monsanto's research, was to be used by claim makers to discredit Monsanto, especially the Monsanto evidence at the Evatt Royal Commission in Australia, as much of that evidence was incorporated into the Commission's final report.

In Australia and New Zealand that last outcome was the main impact of *Kemner et al v Monsanto*, used by claim makers to discredit the Evatt Commission report.

Monsanto Chemical Company has not rebutted the charges of fraud since February 1990, when they became widely reported by many sources, including New Zealand claim makers. However, this was a legal case, and Monsanto did not have to defend or refute those charges, for the case was not about what had or had not happened in the manufacturing process and whether or not Monsanto had covered up any adverse effects in its workforce caused by dioxin.

The case was entirely about whether or not the residents of Sturgeon, Missouri had been adversely affected by the chemical spill. In the *Kenmer* case the charges levelled against Monsanto were legal red herrings regardless of their veracity.

And although those charges were extensively cited as evidence by New Zealand claim makers, what had or had not happened in the Monsanto factories had absolutely no direct bearing on whether or not Vietnam

[37] Johnson, V., 2003.

veterans had been directly or indirectly exposed to TCDD/dioxin produced by eight different manufacturers with differing levels of dioxin contaminant, in sufficient dosage over sufficient time to result in the adverse conditions claimed to have been suffered by Vietnam veterans and their progeny as a result of exposure.

The translation of claimed or proven health effects in the manufacturing process into claimed health effects in Vietnam veterans could not and cannot be logically sustained without evidence of similar high levels of exposure over the same extended timeframe as in factory exposure.

Whether or not the Monsanto evidence was flawed or fraudulent was immaterial to the decisions in both *Kemner* and *Evatt*. If all or part of the Monsanto evidence was seriously flawed, that was not enough to find dioxin "guilty" in the specific *Kemner* case. In this civil case the burden of proof required that there had to be compelling evidence FOR a guilty verdict to demonstrate guilt *on the balance of probabilities*. The *Kemner* jury and the Evatt Commission both found that there was not.

The need to prove the claim of causation was affirmed by Rex Carr, the lead lawyer for the *Kemner* plaintiffs:

"Our proof requires a doctor to say to a reasonable degree of medical certainty – jesus christ medical certainty – that dioxin caused that cancer. Not only could we not do that we couldn't even prove that our people were sick.

"Our people came back three years later when we argued the case to the jury and they came into the courtroom all looking healthy, all looking vital, not a damn thing wrong with any of them."[38]

He needed sick people, proof of exposure and proof of causation rather than red herrings.

Australian and New Zealand claim makers had gone one step too far in their use of *Kemner et al v Monsanto* to prove their own claims.

All that the *Kemner* evidence might have proven was that Monsanto was wrong in the conduct and interpretation of its own research into the health effects in its own workforce, deliberately or not. *Kemner* did not prove that the claim makers were right about the health effects in Vietnam veterans and their families. That link could not be introduced into the chain of logic. There was a degree of misrepresentation (albeit unintentional) in the attempt to do so.

The missing link in the chain of logic was demonstrated by other litigation, summed up by Judge Weinstein seven years later in the *Stephenson Litigation*.

[38] Carr, R., interviewed by Robert Allen in 1998, cited in Allen, R., The Dioxin War, Pluto, 2004, p 15.

Australia 1989 - Evatt Revisited

A conference was convened in 1989 to revisit the scientific evidence presented to the Evatt Royal Commission. Many of the scientists at the conference had presented evidence to the Commission and had it rejected. The proceedings of the conference were published.[39]

Some of the scientists who disputed the scientific findings were the Swedish scientists Axelson & Hardell,[40] [41] and Pollack,[42] Martin,[43] Humphrey,[44] Bellett, McCullagh, Selinger and Steele.[45]

Several of them had presented evidence to the Royal Commission and had their evidence contradicted by other scientific witnesses. Hardell's evidence had also been rejected by Justice Nunn and Judge Weinstein.

Scientists had criticised the Evatt report from soon after it was released.

"The final report is also an example of bad science and little of the document stands scrutiny from the perspective of existing scientific orthodoxy. In regard to its treatment of science much of the Report is clumsy, misinformed and simply wrong. An analysis of any volume reveals errors in approach and competence. In brief the Commission failed to grasp even basic principles in current scientific procedure."[46]

The Evatt Revisited conference of disaffected scientists did however acknowledge:

(1) That the science of Agent Orange was contested and uncertain;
(2) That Evatt had made generous recommendations for veterans [repatriation]; and
(3) That the matter was one to be resolved by society and that scientists can only advise.

"In the introductory paper, my colleagues and I concluded that on balance the evidence now suggests that pesticide exposure increases the risks of some cancers and birth defects, but that there is uncertainty about this conclusion that, at least in the case of the Vietnam veterans, is unlikely to be resolved by further research". This is consistent with reports since the Evatt Commission by the International Agency for

[39] Steele, E.J., Bellett. A.J.D., McCullagh. P.J. and Selinger, B. (Eds.) (1989) *Evatt Revisited; The Interpretation of Scientific Evidence*. Centre for Human Aspects of Science and Technology, University of Sydney, Sydney (1989);

[40] Axelson , O . & Hardell, L. *Med. J. Aust.* 144, 612, 1986.

[41] Hardell , L. & Axelson , 0 . *Med. J. Aust.* 145, 298, 1987.

[42] Pollak, J.K. *Med. J. Aust.* 144, 612, 1986.

[43] Martin, B. *Aust. Soc.* 5 (11). 25, 1986.

[44] Humphrey, G.F. *Aust. Soc.* 6 (3), 46, 1987.

[45] Bellett, A.J.D., McCullagh, P.J., Selinger, B. & Steele, E.J. in *Evatt Revisited,* 1989.

[46] McCulloch, J., ''Whistling in the Dark: The Royal Commission into Agent Orange" in K. Maddock and B. Wright (eds.), War: Australia in Vietnam, Harper & Rowe. Sydney, 1987.

Research on Cancer and the USAF School of Aerospace Medicine, as well as several research papers", but other authors still defend the commission's unqualified exoneration of Agent Orange, dioxins and other chemicals used in the war.

"In The Politics of Agent Orange,[47] McCulloch argued that epidemiology "cannot resolve the problem of public responsibility for the suffering of the veterans", and speculated prophetically: "Perhaps the specialists will reveal eventually that it is not possible to prove or disprove that the veterans are ill because of chemical exposure which occurred in the RVN [Republic of Vietnam]".

"Which of these studies should be accepted, and what level of proof to apply, is a social choice on which scientists can only advise; there is no statistical algorithm that will convert a controversial and confused situation into a simple objective truth that absolves society from making choices that involve value judgments".[48]

"Its extreme pro-pesticide position and parroting of chemical company views discredited its scientific stance, while its generous recommendations for veterans were able to be ignored by the government due to the fuss over the Agent Orange findings".[49]

So although the scientists disputed the emphatic "not guilty" verdict of the Evatt Commission, they did acknowledge that the science was uncertain and that the resolution would be a matter of policy.

And at least some scientists did not understand the nuances of the *burden of proof* in judicial settings, illustrating once again the gaps between understandings, in this case between judicial understandings and the understandings of some scientists.

USA 1998 to 2004 – Stephenson Litigation (Judge Weinstein)

This case was an amalgamation of two cases brought by the Isaacson's and Stephenson against the chemical companies. It became known as the *Stephenson Litigation*.[50]

Of note is that Gerson Smoger, the lawyer for the Isaacson's, had promised Admiral Elmo Zumwalt, who believed that his son had died of exposure to Agent Orange, and that his grandson was also affected, that he (Smoger) would get Agent Orange back into the courts. Zumwalt had asked Smoger to "*join him in his personal mission to raise the profile of exposed*

[47] McCulloch, J., The Politics of Agent Orange. The Australian Experience, Heinemann, Richmond , Victoria, 1984.

[48] A.J.D.Bellett, Agent Orange Controversy, letter to the editor, Nature Vol. 343, 15 February 1990.

[49] Pesticides, the Vietnam war and the Evatt Royal Commission - Brian Martin, in Evatt Revisited, 1989.

[50] In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION. Joe Isaacson and Phillis Lisa Isaacson, Plaintiffs, v. Dow Chemical Company, et al., Defendants, Daniel Raymond Stephenson, et al., Plaintiffs, v. Dow Chemical Company, et al., Defendants. 304 F.Supp.2d 404 (2004). Judge Weinstein presiding (Finding - 9 February 2004).

veterans"[51]. Smoger initially brought another case to the US Supreme Court, *Ivy v Diamond Shamrock (1993)*, to try to overturn the US class action $180m settlement. It failed. "*He told the admiral he would try again*"[52] and in 1998 he brought a case for Joe Isaacson and another for Daniel Stephenson.

Admiral Zumwalt was a leading claim maker much cited by Australian and New Zealand claim makers in support of their claims.

The two cases, Isaacson and Stephenson, were amalgamated and heard by Judge Weinstein.

The eventual written decision by Judge Weinstein in 2004 outlines in some detail extensive Agent Orange litigation in the USA from the late 1970's to 2004. Part II of the judge's finding lists hundreds of historical cases relating to Agent Orange.

"In earlier waves of such suits 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 [balance of probability] *between exposure to Agent Orange and disease (except for a quickly discoverable and curable form of skin irritation, chloracne). The scientific basis for that conclusion of lack of any substantial proof of causality, either general or specific to individuals, remains much the same. See Institute of Medicine, Veterans and Agent Orange: Update 2002 (2003).*

"Congress has now provided for payment to veterans of compensation for a series of diseases presumptively caused by exposure to Agent Orange. See, e.g., McMillan v. Togus Regional Office, Dep't of Veterans Affairs, 294 F.Supp.2d 305 (E.D.N.Y. 2003) ("Based on statistical associations, [304 F.Supp.2d 408] the Academy's studies have resulted in the creation of presumptions that certain diseases are attributable to Agent Orange for purposes of Veteran's compensation. These `associations' are not equivalent to cause in a legal sense for such purposes as mass tort liabilities. These presumption decisions are made by the Secretary for Veterans Affairs. A showing of cause to any degree of probability is not required. The result is summarized in the privately funded National Veterans Legal Services Program, Self-Help Guide on Agent Orange, Advice for Vietnam Veterans and their Families (2000 plus supplement) (`Self-Help Guide'), financed, in part, by this court from proceeds from an Agent Orange Settlement Fund created by contributions from manufacturers of Agent Orange.").[53]

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[51] Allen, R., The Dioxin War, Pluto, 2004, p 4.

[52] Ibid.

[53] Weinstein, J., Memorandum, Order, Judgement of Dismissal, and Stay in Agent Orange III, 304 F. Supp. 2d 404 (2004) In re "Agent Orange" Product Liability Litigation, Joe Isaacson and Phillis Lisa Isaacson, Plaintiffs, v. Dow Chemical Company, et al., Defendants, Daniel Raymond Stephenson, et al., Plaintiffs, v. Dow Chemical Company, et al., Defendants. Nos. MDL 381, CV 986383(JBW), CV 993056(JBW). United States District Court,

In a new twist in the long running Agent Orange litigation the Stephenson judgement refuted a long-standing allegation by claim makers in the USA, Australia and New Zealand; that because the chemical companies knew of the presence and dangers of dioxin in tactical herbicides, but did not inform the government, the chemical companies themselves were liable for the alleged effects of dioxin on veterans and their families.

The evidence produced in *Stephenson* showed that the government knew anyway, independently of the chemical companies. That new evidence was contained in government documents obtained under discovery.

With that revelation the chemical companies were then able to successfully use the *government contractor defence*[54], because the US Government knew that the 2,4,5-T it was ordering contained dioxin and was toxic, and therefore liability, if any, fell upon the government.

"In the early 1960s, personnel at Edgewood, on orders from the White House, investigated the toxicity and potential dangers of 2,4,5-T and 2,4D, thoroughly reviewing the existing literature and data. The President's Science Advisory Committee (PSAC), an organization within the White House, was briefed by the military on the Vietnam defoliation program and learned of dioxin as a contaminant in Agent Orange. At the time it developed its specifications for Agent Orange, the United States knew that 2,3,7,tetrachlorodibenzopdioxin ("dioxin") was at the time formed as a by-product during the manufacture of TCP, the intermediate used to produce 2,4,5T, and that dioxin was also present in 2,4,5T. It also knew that dioxin was believed to be toxic.

"Knowledge possessed by the government albeit somewhat speculative as to the actual hazard, if any, posed by Agent Orange as it was used in Vietnam was far greater than that possessed by defendants [the chemical companies]. *There was never a period when defendants possessed as much knowledge as the government of the dioxin content of Agent Orange and of its dangers as it was used in Vietnam".*

The Stephenson Litigation seems to have escaped the notice of Australian and New Zealand claim makers, or to have been ignored.

The finding once again states that the resolution of the Agent Orange issue would not be found in litigation requiring a legal and scientific standard of proof, but in policy responses to the issue.

Judge Weinstein later stated (2009):

"The case came back to me, whereupon I dismissed it again on the ground that the manufacturers had the benefit of the government

E.D. New York. February 9, 2004. Accessed at: https://www.courtlistener.com/opinion/2563436/inreagentorangeproductliabilitylit/

[54] See Christensen, R., & Battista, U., American Bar Association Brief, Tort, Trial and Insurance Practice Session, Winter 2009, Vol. 38 No. 2, http://condonlaw.com/wp-content/uploads/2013/09/brief_winter2009.pdf

contractor defense which was equivalent to that of the government's. They were acting under compulsion as agents of the government. That dismissal was affirmed. (The same defense would have applied to the original Agent Orange case [1979 – 1984], *but the defendants were willing to settle because the strength of this defense was not clear at that time.)"*

Judge Weinstein remarked:

"*That pretty much terminated Agent Orange as a litigation matter*".[55]

Lennart Hardell and the Burden of Proof

Swedish scientist Lennart Hardell's work regarding soft tissue cancers has been relied upon by claim makers for decades. His long running defence of his work, against judicial findings of unreliability, demonstrate the gap in understandings about the civil law and presumptive standards of proof.

During *Palmer v Nova Scotia Forest Industries* Hardell's findings were rejected as unreliable by Justice Nunn. His evidence was also found to be unreliable by Judge Weinstein in the class action against the chemical companies (see next). Hardell later presented evidence at the Australian Evatt Royal Commission which also found his testimony unreliable.[56] Hardell then became involved in the campaign to discredit and overturn the Evatt Commission's findings. He has also been involved in long running public disputation with other scientists who question his methodology and conclusions.

The US Environmental Protection Agency[57], in its comprehensive 2000 review of the risks of dioxin does not rely on Hardell, and the International Agency for Research on Cancer[58], the European Commission[59], and the World Health Organisation[60] disregard him as well.

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[55] Weinstein, J., "*Preliminary Reflections on Administration of Complex Litigations*", Cardozo Law Review (25 March 2009);

[56] O'Keefe, B., Soft tissue sarcoma: law, science and logic, an Australian perspective, in Young, A., Reggiani, G., Agent Orange and its associated dioxin: assessment of a controversy, Elsevier, 1988, pp 131 – 169.

[57] U.S. Environmental Protection Agency, Science Advisory Board (SAB), Dioxin Reassessment——An SAB Review of the Office of Research and Development's Reassessment of Dioxin (EPA-SAB-EC-01-006) (Washington, D.C.: EPA, May 2001).

[58] International Agency for Research on Cancer, IARC Monographs on the Evaluation of Carcinogenic Risks to Humans: Polychlorinated DibenzoHoover para-dioxins and Polychlorinated Dibenzofurans 69 (Lyon, France: IARC, 1997). Information about this publication can be found at www.iarc.fr/ by clicking on "IARC Press" and following prompts to a listing of the Monographs and scrolling to Monograph no. 69.

[59] European Commission, Scientific Committee on Food, "Opinion of the Scientific Committee on Food on the Risk Assessment of Dioxins and Dioxin-Like PCBs in Food," Adopted on May 30, 2001. http://europa.eu.int/ comm/food/fs/sc/scf/out90_en.pdf.

[60] Food and Agricultural Organization of the United Nations, World Health Organization, Joint FAO-WHO Expert Committee on Food Additives, 57th Meeting, Rome, June 5–14, 2001. Summary and Conclusions. Annex 4: Contaminants. 3. Polychlorinated Dibenzodioxins, Polychlorinated Dibenzofurans, and Coplanar Polychlorinated Biphenyls. http://www.who.int/ pcs/jecfa/Summary57-corr.pdf. pp. 24–40.

Nevertheless Hardell, having failed to influence judges and leading scientific authorities, continued to be quoted as an authority by Australian claim makers into the 21st century.

However Hardell's research was relied upon, in part, by the National Academy of Sciences (NAS) in its 1994 and subsequent reports (1996 – 2014), although Hardell did not prove that the workers he studied had actually been exposed to dioxin, and his 1986 paper showed that those classified as having been exposed to herbicides did not have elevated levels of dioxin in their bodies. The NAS committee disregarded questions and criticisms of Hardell raised by many reviewers.

But the NAS reports aim to identify "associations" leading to presumptive conditions, at the lower presumptive burden of proof, rather than at the civil court standard, on the balance of probabilities.

Hardell himself did not seem aware of the different standards of proof in a paper[61] he co-authored in 1998, in which the authors cited the NAS 1993 interim report's "associations" as evidence that the Evatt Royal Commission was wrong. Given that the two reports, Evatt and NAS, were based on different standards of proof[62], that comparison was between chalk and cheese, or apples and onions.

It is the same mistake often made by Vietnam veteran claim makers.

New Zealand 2007 to 2018 - Waitangi Tribunal Military Veterans Kaupapa Inquiry WAI 2500 (Judge Wilson Isaac)

Two claims, WAI1401 and WAI1877, are part of the WAI2500 inquiry. Both relate to claimed inter-generational effects resulting from exposure to a toxic environment.

As shown above, litigation relating to the veterans themselves has not been successful and Judge Weinstein, who has presided over most of the Agent Orange litigation in the USA, is of the opinion that Agent Orange as a litigation matter has been terminated. Litigation has not been attempted in Australia and New Zealand, although VVANZ and the newer New Zealand Vietnam Veterans Action Group (VVAG), formed as a result of dissatisfaction with the 2006 Memorandum of Understanding with government, did threaten to litigate in national and international jurisdictions.

Litigation relating to the claimed intergenerational effects in the children and grandchildren has also not been proven to a legal and scientific standard of proof. Which leaves that claim in the bailiwick of the policy maker. However, as shown later, the only condition accepted as having a statistical association with Agent Orange is spina bifida. All other birth

[61] Hardell, L., Erikson, M., Axelson, O., Agent Orange in War Medicine: An Aftermath Myth, in International Journal of Health Services, Vol. 28, No. 4, 1998, pp 715 – 724.
[62] Civil court standard and presumptive standard.

defects are not considered for classification as presumptive conditions. And in 2014 spina bifida was removed from the list of accepted statistical associations, leaving no birth defects covered by the policy.

That would seem to direct the Tribunal towards consideration of the two claims relating to intergenerational effects as a policy making matter absent any legal, scientific or medical evidence to either the civil or presumptive standards of proof.

It might also invite some deliberation about what should be addressed by policy; the frequently flawed claims of the witnesses, or the social problem of the malaise or *Mamae* underlying those claims.

Legal Understandings: Civil Law vs Veterans Law

The above legal cases create civil law precedent such that a legal and scientific standard of proof in a judicial process would result in findings against the causation of health effects by chemicals, including dioxin. And as pointed out throughout those cases the proper jurisdiction to resolve the claims is in the policy arena, rather than the courts.

However there was a far more important legal case, not involving claims against the chemicals or the chemical companies in civil law, and not trying to prove Agent Orange guilty. It was about policy, and enforcing presumption, in veterans' law.

Presdumption Prevails
Nehmer v United States Veterans' Affairs 1986-1989

This legal case and rulings flowing from it provide the legal precedent for the acceptance of presumptive conditions to this day. *Nehmer v US Veterans Administration* started in 1986 as another class action, during the $US180m settlement process following the 1979 – 1984 mass class action.

Veterans claim makers frequently attribute the acceptance of conditions related to Vietnam service to their own claim making, or to the advocacy of their preferred claim makers. However this legal challenge became the main impetus for the acceptance of presumptive conditions in the USA, and in Australia following the US lead. New Zealand moved from a general presumption to specific presumptions based on the US and Australian precedent between 2006 and 2014.

Nehmer challenged policy rather than the science of Agent Orange.

The suit was brought by Vietnam Veterans of America (VVA) and the National Veterans Law Center (NVLC) challenging the standards of proof required by the Department of Veterans Affairs (DVA) regarding Agent Orange (cause and effect). In 1989, the United States District Court for the

Northern District of California (Judge Henderson) ruled VA's regulation was invalid because the causation standard it used was inconsistent with the intent of Congress. The Court invalidated VA's regulation and voided all benefit denials made under it.

Following that decision on 11 May 1989 Secretary Derwinsky reversed DVA policy and accepted the ruling.

"Edward Derwinski, appointed by George H. W. Bush as the first secretary of the newly created Department of Veterans' Affairs, chose not to appeal. He was determined to end the impasse between veterans and his agency. In fact, he agreed with much of the court's decision and believed the new DVA should resolve scientific doubt in favor of the veterans. Derwinski acknowledged that he had been influenced by his long-time friend, Admiral Elmo Zumwalt. He still trusted his scientists' expertise and sincerity, but he believed they'd gotten stuck defending the wrong position; their backs had been against the wall for years and they had refused to budge". [63]

This momentous *Nehmer* ruling that started the move to presumptive conditions related to Agent Orange in the USA was missed entirely by VVANZ and presumably by the International Independent Agent Orange Network (IIAON) of which VVANZ was a member.

"The veterans refused to accept the impossibility of conducting a true Agent Orange study and kept pushing the government to do more. ***Actually, a definitive exposure study shouldn't have been necessary****. The VA's past disability rulings had never required such strict proof. The agency had always relied upon a looser "statistical association" standard, a showing that the evidence connecting a disease and its presumed cause probably wasn't the result of chance. Also, the agency was supposed to give veterans the benefit of the doubt when determining which illnesses were compensable. The VA had followed these guidelines when it established presumptions for cases of diabetes and multiple sclerosis showing up within seven years after service in Vietnam. The Agency assumed neither disease had anything to do with herbicide exposure. A connection between dioxin and diabetes was identified years later. But the VA insisted on a tighter "cause and effect" standard for any health problem potentially related to herbicides. This would require both a strong, consistent level of association and a plausible description of the responsible biological mechanism. Neither seemed attainable after the failure of the government's research, with one exception, chloracne.*

[63] Sills, P., Toxic War: The Story of Agent Orange (p. 217). Vanderbilt University Press. Kindle Edition.

"In 1989, the National Veterans Legal Services Project (NVLSP), representing Vietnam veterans and their survivors, filed a federal class action, Nehmer v. U.S. Veterans Administration, demanding that the VA apply its usual standards to disability claims related to herbicide exposure .... The court sided with the veterans:

> *"The Administrator both imposed an impermissibly demanding test for granting service connection for various diseases and refused to give veterans the benefit of the doubt in meeting that demanding standard. These errors compounded one another, as they increased both the type and the level of proof needed for veterans to prevail during the rule making proceedings. We find that these errors sharply tipped the scales against veteran claimants."*[64]

Nehmer has continued to influence US veterans' policy since the 1989 judgement.

"In May 1991, the Nehmer parties entered into a "Final Stipulation and Order" (Final Stipulation) outlining the actions to be taken in response to the Court's decision. Among other things, the Final Stipulation provided that VA would re-adjudicate the claims where a prior denial was voided by the Court's 1989 order and would initially adjudicate all similar claims filed subsequent to the Court's order, and, if benefits were awarded upon such re-adjudication or adjudication, the effective date of the award would be the later of the date the claim was filed or the date the disability arose.

"Ordinarily, if a claim is granted on the basis of a new regulation, the law states the effective date of the award may not be any earlier than the date on which the regulation went into effect.

"In a February 1999 decision, the Court clarified the scope of its 1989 decision. It voided all VA decisions issued while the invalid regulation was in effect and that denied service connection for a Vietnam veteran's disease later found associated with herbicide exposure under new regulations.

"In December 2000, the Court provided further clarification when it concluded VA must pay the full retroactive benefit to the estates of deceased class members.

"On October 13, 2009, VA announced Secretary Eric Shinseki's decision to establish presumptive service connection for three additional illnesses associated with exposure to herbicides used in Vietnam based on an independent study conducted by the Institute of Medicine:

- *B cell leukemias (such as hairy cell),*

[64] Sills, P., Toxic War: The Story of Agent Orange, Vanderbilt University Press. 2014, Kindle Edition, pp 216-217.

- *Parkinson's disease,*
- *and ischemic heart disease.*

"A proposed rule adding these three conditions to VA's list of presumptive diseases was published in the Federal Register on March 25, 2010 (75 Fed. Reg. 14,391). As of September 20, 2010, approximately 145,000 Vietnam veterans and survivors were previously denied service connection or filed new claims (number may include duplicates that will be removed from final total). All these claims must be adjudicated/re-adjudicated in order to comply with the Final Nehmer Stipulation".[65]

The *Nehmer* decision was so important and influential in reasserting and imposing the presumptive burden of proof that the US Department of Veterans Affairs published a *Nehmer Training Guide* from which much of the above information was obtained.

Influence of Nehmer on Australian and New Zealand Policy

While this case had an important and far reaching impact on US policy, it can also be considered relevant, and to have had an indirect influence in the Australian and New Zealand contexts. It affirmed in 1989 and 1990 a presumptive standard in the USA, rather than a causal standard, as the Evatt Royal Commission had also done in Australia in 1985. The flow on effect from *Nehmer* brought about prescribed presumptive conditions in the USA in 1993, and in Australia in 1994.

This court decision made absolutely clear the difference between causation (science) and presumption (policy), and the legal requirement in the USA for the veterans' administration to apply the presumptive standard. It resulted in a number of specified presumptive conditions from 1993 onwards rather than a general presumptive requirement. Australia followed that lead in 1994.

New Zealand continued to operate on the more general requirement for presumption in the War Pensions Act 1954 rather than incorporating specific presumptive conditions into legislation or regulation. Specific presumptive conditions based on the US model were regulated in 2006, and conditions based on the Australian model were legislated in 2014.

Conclusion: Proof vs Presumption

The difference between *Nehmer* and the previously cited cases illustrate the important difference between scientific and legal proof, and presumption. Presumption is the concept long enshrined in New Zealand's

[65] Source: US Department of Veterans Affairs, Veterans Benefits Administration, Nehmer Training Guide (February 10, 2011, revised).

war pensions' legislation, and generally not known or not understood by Vietnam veterans and their leading claim makers.

Nehmer tells us that we fought the wrong battle against Agent Orange, rather than mobilising to enforce the proper administration of the War Pensions Act 1954 (WPA54). Or if some did try to challenge the administration of WPA54 it got hopelessly mixed up in the unwinnable battle against Agent Orange. And that was probably the result of a lack of clear thinking, a superficial understanding of both science and law, and a lack of knowledge about the difference between scientific and legal proofs, and presumption.

Without that depth of understanding, in the war after the war we went in blind, with the blind leading the blind.