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Item ID Number	05412 ☐ **Not Scanned**
Author	
Corporate Author	United States District Court, Eastern District of New Yor
Report/Article Title	United States District Court, Eastern District of New York In re: "Agent Orange" Product Liability Litigation, Before Honorable George C. Pratt, U. S. C. J, MDL No. 381
Journal/Book Title	
Year	1983
Month/Day	May 12
Color	☐
Number of Images	0
Description Notes	Judge Pratt's decision. Also included is a letter from Stanley Pierce to Alvin L. Young regarding the decision. See item 5414 for pretrial order no. 51.

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May 19, 1983

Lt. Col. Alvin Young, Ph.D.
Agent Orange Projects Office,
Symbol: 10A7B
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Dear Al:

Enclosed please find a copy of Judge Pratt's decision of May 12, 1983, as per your request. At present, we plan to move for reargument, and when we do so, I will send our memorandum in support, albeit due to a protective order in respect to this case, it will probably be a redacted reversion.

Once again, thanks for the information you provided, and please do not forget me when ACS accepts your article on the A/O registry. By all means, call me when you are in New York on June 1 - 3. I would love the opportunity to return the hospitality that you have shown me in the past.

With my warmest person regards, I am

Very truly yours,

Stanley Pierce, J.D., Ph.D. (Biology)

SP/rr
enc

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- X

In re:

"AGENT ORANGE" MDL No. 381

Product Liability Litigation

- X

United States Courthouse
Uniondale, Long Island
New York

May 12, 1983
2:25 o'clock P.M.

B E F O R E :

HONORABLE GEORGE C. PRATT, U.S.C.J.

HARRY RAPAPORT
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oOo

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A F T E R N O O N S E S S I O N

THE COURT: I apologize for keeping you waiting. I was trying to do a few last minute adjustments on the grammar of what I'm about to place on the record.

I have reviewed the motions and I am prepared to announce a formal decision. The reason I am doing it orally rather than by a written decision is primarily for purposes of saving time. I expect for historical purposes, that I will have published a condensed version of what I am about to put on the record. But if I were to be driven at this point to polish the matters up to the point ofa formal written decision presently suitable for publication I am afraid that I wouldn't have it ready for you or be able to have it ready for you until at the earliest early next week.

So the decision that I make with respect to the seven motions for summary judgment that were heard here last Wednesday, a week ago Wednesday, is the following:

In this action referred to me by the Multi District Litigation Panel under MDL docket number 381, thousands of veterans and their relatives seeking

to recover damages from nine chemical companies, Dow, Hercules, Monsanto, Diamond Shamrock, Hoffman-Taff, Thompson Chemical, Thompson Hayward, Riverdale and UniRoyal, for injuries suffered as a result of an exposure to a herbicide called Agent Orange used by military in Vietnam.

As the action has been contoured the claims of the plaintiffs have focused on Dioxin as a contaminant in the Agent Orange supplied to the Government under contract with the separate chemical companies.

By pretrial order number 26 dated September 26, 1980, I recognize the possibility of a Government contract defense to the plaintiffs' claims. The contours of that defense were developed in more detail in pretrial order number 33, dated February 24, 1982. Because the issues presented by the Government contract defense seemed to be separate and distinct from the general theories of liability then being advanced by plaintiffs I ordered a separate trial of the defense begin on June 27th of this year.

After about eleven months of extensive discovery I permitted any defendant who so elected to move for summary judgment with respect to the Government contract defense issues. The basis of such summary

judgment would, of course, be that there were no triable issues of fact with respect to the defense and that the moving defendant was therefore entitled as a matter of law to have all claims against it dismissed.

All defendants but Monsanto and Diamond Shamrock moved for summary judgment.

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THE COURT: (Continuing) I have reviewed all of the papers submitted both in support of and in opposition to the motion, including counse's extensive memoranda. I listened closely to the oral arguments presented to me last Wednesday, May 4, 1983, and I am not prepared to place my decision on the record.

The central issue in the government contract defense focuses on its third element, whether the government knew as much as or more than the contracting defendant about the hazards to people and accompanied use of Agent Orange.

In the context of plaintiffs' claims as they have developed here, the knowledge in question is knowledge about dioxin. Thus, to focus on this element, it is necessary to compare what knowledge the government had about dioxin and about its contamination of Agent Orange with what knowledge each of the moving defendants had about these matters.

First I will discuss the knowledge of the government.

Even when all doubts are resolved in favor of the plaintiffs as required by SEC v. The Research Automation Corp., 585 F. 2d 31, the record demonstrates

that the government and the military had a considerable amount of knowledge about 2,4,5-T, about dioxin and about the health hazards associated with both. The following general chronology, while not all inclusive, gives some indication of both the extent and the continually increasing level of government knowledge in this area:

As to the 1940s, during World War II the military discovered the herbicidal properties of 2,4,5-T and conducted extensive testing of various possible herbicides. This research was done under the supervision of the Crops Division of the Army Chemical Corps at Camp Dietrick, Maryland.

In 1949 Dr. Donald Birmingham of the Public Health Service visited Nitro, West Virginia, where there had been an explosion of the Monsanto 2,4,5-T plant. The report of Dr. Birmingham's colleague, Dr. Schwartz, indicated a connection between chloracne and the chemicals produced in the plant.

As to the 1950s, during that period there is uncontradicted evidence in the record that a number of people knew that dioxin was toxic, although they may not have connected it with 2,4,5-T. Several factors contributed to this awareness.

In the early 1950s C.H. Boehringer Sohn Company of Germany had serious problems of chloracne among workers engaged in the production of trichlorophenol, a precursor chemical used in the manufacture of 2,4,5-T. For convenience I will refer to this precursor chemical as TCT. By 1959 the Boehringer Sohn Company was forced to halt production at two plants. Dr. H.K. Schulz, a skin specialist, investigated the problem and in 1957, together with Professor Kimmig, reported his findings in an article entitled Chlorinated Aeromatic Cyclic Ethers as the cause of chloracne. In this article the author stated they were able to isolate dioxin which they believed to be the contaminant in TCP that was causing the health problems.

While it is not established that anyone in the government read the Kimmig and Schulz article at the time it was published the article was available as part of the scientific literature and it was referred to in the report written by Frederick Hoffman on his trip to Europe in 1959.

Dr. Hoffman, who was searching for potential chemical warfare agents, reported that he had received what he called startling information regarding the toxicity of the compound dioxin.

In his report he described the deaths of several workers in a plant manufacturing wood preservatives which contained trace amounts of dioxin. In addition he reported that the compound could cause severe, indeed fatal liver damage.

At least ten copies of the Hoffman report were sent to Edgewood Arsenal, the government body responsible for investigating toxicity and analyzing chemical agents. Thus the Hoffman report on dioxin, coupled with the Kimmig and Schulz article connecting dioxin to TCP, raises a strong possibility that personnel Edgewood were aware even before 1960 of the connection between dioxin and TCP, as well as the use of TCP to make 2,4,5-T.

(Continued on following page)

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In addition, deposition testimony of Edgewood personnel confirms that people at Edgewood knew about the toxicity of Dioxin. Dr. Jandorf testified that people at Edgewood were familiar with this fact since the late 1950's. Dr. Horton testified that he knew Dioxin was toxic in 1959 as did Dr. Simmons.

Mr. Sultan testified that he had read the Hoffman report.

Further evidence of knowledge by Government personnel is found in the article written by Dr. Birmingham of the Public Health Service in 1959 stating that in the manufacture of 2,4,5-T intermediate hydrocarbons of the chlorine group had caused chloracne in more than 200 chemical workers at a manufacturing plant, presumably Monsanto's.

Dr. Marcus Key of the Public Health Service testified that he had learned of the association between hydrocarbons and chloracne and other diseases that the Harvard School of Public Health in 1953.

In the early 1960's Dr. McNamara performed a study at Edgewood Arsenal of the toxicity of Agent Purple, which was another defoliant containing 2,4,5-T that was used by the military.

This testing was conducted at the request of General Delmore, Commanding General, U. S. Army Chemical Corps,

Research and Development Committee.

While the testing indicated there was some toxicity the results were not conclusive.

At a meeting held at Edgewood Arsenal in 1963 to discuss and evaluate the toxicity of 2,4,5-T the overall thrust of those reporting was that both 2,4,5-T and 2,4-D was safe for humans.

Other events occurring in 1963 give additional indication of Government knowledge. The Institute for Defense Analysis wrote a report for the Advanced Research Project Agency, an agency within the Department of Defense.

This report stated that herbicides were safe when used commercially but that there could be increased hazards in military use because greater concentration would be applied by less experienced personnel under the pressures that are inherent in battle field use.

The report noted the connection between chloracne and skin and respiratory irritations and their associations with herbicides.

Dr. Key of the Public Health Service testified at his deposition that in 1963 he placed a sample of 2,4,5-T herbicide on his forearm to see if it would induce chloracne. He did this three times a

week for three weeks and did develop chloracne on his forearm.

Dr. Key also testified that he had read Kimmig and Schulz and learned of Dioxin from that article. When questioned concerning a June 1964 article by Dr. Jacob Bleiberg, which discussed chloracne and pertheoria in workers engaged in 2,4,5-T production Key stated that he had reviewed the article at the time it was written and that it was only a more complete version of what they already knew.

Going to the mid or late 1960's, the level of Government knowledge appears to have increased much more rapidly during this period. Defendants point in numerous instances of Government knowledge which are not disputed by plaintiffs.

Dr. Stokinger, the Chief Toxicologist of the Division of Occupational Health testified that he knew Dioxin was an impurity in 2,4,5-T sometime around 1965.

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THE COURT: (Continuing) Colonel Shade, who is Chief of Chemical Operations Branch of the Military Service Assistance Command, Vietman, and later on the staff of the Chemical Branch of the Assistant Chief of Staff for Development, testified that he learned of the connection between Dioxin and 2,4,5-T sometime between mid-1966 and December of 1968.

In July of 1966 the director of the National Academy of Sciences, wrote to the Chief of the Bureau of Medicine and Surgery for the Navy, advising him of a connection between 2,4,5-T and porphyria and chloracne.

In August of 1966, the National Academy of Sciences, in response to a request for information, wrote to the Army Surgeon General telling him that 2,4,5-T was toxic and chloracne was associated with it.

Recent deposition testimony indicates that people closely associated with the White House were aware of hazards involved in the use of defoliants. Dr. Gordon MacDonald, a member of President Johnson's Science Advisory Committee, testified that the issues of herbicides and dioxin in herbicides were informally discussed by a subgroup of PSAC sometime between April and June of 1965. Dioxin as an impurity in 2,4,5-T was also discussed. He said there was discussion of the

potential toxicity of dioxin, and while it was considered that the evidence was fragmentary and inconclusive, the subject of dioxin contamination deserved continuing attention. Dr. MacDonald testified that human health effects were discussed, and that he attended a meeting where the effectiveness of herbicides and the presence of dioxin in 2,4,5-T were discussed. Secretary of Defense MacNamara, attended this meeting.

Dr. Donald Hornig, President Johnson's science advisor, testified at his deposition that by 1066, the President's Science Advisory Council was discussing impurities in 2,4,5-T. He stated that this discussion occurred sometime between 1964 and 1966. He said that when he learned of the impurity, he felt that "one ought to be concerned" about what the magnitudes of the toxicological effects of the exposures might be. He testified that he understood it was a health hazard to human beings. However, it should be noted that he also testified that he did not relay the information to President Johnson.

An additional element of knowledge is found in a 1967 Rand report commissioned by the Advanced Research Project Agency of the Department of Defense, which describes "actual experience" of health hazards associated with the use of defoliants in Vietnam.

Finally, there is the study commissioned by the National Cancer Institute, called the Bionetics Report. This study evaluated the carcinogenic, teratogenic and mutagenic effects of various chemicals. The study was commissioned in 1063 and the report is dated August 1968. The study did result in a finding of some teratogenic effects connected with the use of 2,4,5-T. While it is not clear that defendants are correct that portions of the study were available to the government earlier than August 1968, it is clear that by 1968 and 1969, the results of the study were available to the government.

This picture of knowledge shown to be in government hands is based almost entirely on uncontradicted and uncontested evidence. It reveals that the government and the military possessed rather extensive knowledge tending to show that its use of Agent Orange in Vietnam created significant, although undetermined risks of harm to our military personnel. Against this picture we must examine what what was known by the different defendants, keeping in mind that by and large most of the government's knowledge was classified and not shared with the defendants.

I will discuss each of the defendants separately.

First, as to Dow: Dow supplied Agent Orange to the military, pursuant to seven contracts. Deliveries were made from September of 1965 to December of 1968.

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THE COURT: (Continuing) It also supplied the government with Agent Purple, pursuant to three contracts which were probably dated November 1961, December 1962, and May 1963, although the contracts themselves are not available. The government established the specifications for the delivered product, and Dow performed to those specifications.

Dow began manufacturing 2,4,5-T in 1948. Dow admits that it knew prior to this that chloracne was an industrial health hazard present in the production of certain chlorinated hydrocarbons, and it developed the "rabbit ear" test, which was non-specific, but was able to determine if a chloracnegen was present. Dow used this test until 1964.

Undoubtedly, Dow also knew about the explosion at the Monsanto plant in Nitro, West Virginia, in 1949, and the resulting cases of chloracne. Plaintiffs argue persuasively that Dow must have known about it, and Dow does not deny such knowledge.

Moving into the 1950's:

After C.H. Boehringer had the chloracne problems in its plant referred to above, it wrote to Dow for help. In 1955, Dow replied by sending a data sheet describing the hazards due to toxicity and the precautions Dow was taking to prevent them. In 1957, C.H. Boehringer sent

Dow information it had learned on how to prepare TCP in a manner to avoid "chloracne exciters".

The Kimmig and Schultz article discussed above was produced by Dow from its files during discovery. There is no indication in the record of when Dow obtained the article, other than the fact that it was referenced in a memo written by a Dow official in 1964.

Plaintiffs argue that Dow knew about the explosion at the Diamond Alkali plant in 1956, and Dow does not deny this.

Moving into the 1960's:

In February of 1664, at Dow's plant in Midland, Michigan, more than 40 workers developed chloracne. These workers had been engaged in the manufacture of TCP. Dow shut down the plant, and its investigation found that there was a high concentration of chloracnegen in the waste stream from the plant. Dow determined that this chloracnegen was dioxin.

This incident was reported to the Michigan Department of Health.

Dow developed a method of using gas chromotogrpahy to detect dioxin in TCP and in 2,4,5-T at concentration levels as low as one part per million. This is followed by the usual designation (ppm). Dow researchers

determined that there was no chloracnegenic response if the dioxin level was at or below one ppm. Dow thereupon instituted precedures to ensure that no TCP or 2,4,5-T left the plant with a dioxin level above one ppm. Dow's exhibits 42 through 45 indicate that Dow's dioxin levels in its 2,4,5-T were less than one ppm, but these exhibits do not appear to cover all of the 2,4,5-T and Agent Orange Dow produced. However, plaintiffs do not, as I recall, challenge Dow's contention that its 2,4,5-T was contaminated by one ppm of dioxin or less. Since Agent Orange was a 50-50 mixture of 2,4,5-T with 2,4-D, and since plaintiffs have abandoned their earlier claims against 2,4-D, this in effect establishes for purposes of this motion a contamination level for Dow's Agent Orange at .5 ppm or less.

In March 1965, Dow called a meeting attended by Hercules, Diamind Shamrock, and Hooker to discuss the health hazards involved in the production of TCP and 2,4,5-T. No one from the government was invited to the meeting, but Dow had not yet contracted to produce Agent Orange. It is not disputed that Dow knew that the dioxin problem arose during the manufacturing process and that any dioxin produced at that stage could carry forward into the delivered product. At the meeting,

Dow explained that precaustions were necessary to prevent health hazards, and stated that it had examined herbicides sold by some other companys and found some to contain "surprising high levels" of dioxin.

It should be noted that in a memo to the file after the March 1965 meeting, Chandler of Diamond indicated that Dow thought that repeated exposure to one ppm could be dangerous.

In June of 1965, V.K. Rowe of the Dow biochemical research laboratory wrote to Ross Mulholland of Dow Chemical of Canada. He described the chloracne problems Dow had experienced and stated thatDow did not want any of its customers to develop acne. The letter also indicated a fear of government intervention into and control of the entire herbicide industry, and that Dow wanted to get the problem under control without governmental regulation. Mulholland was cautioned not to transmit this information to anyone else.

There are four items which Dow claims show that it transmitted information concerning health hazards to the government:

The first was a February 29, 1967 letter from A.P. Beutel, vice president of Dow, to General Hebbeler concerning the government's plan for producing Agent

Orange. Beutel mentions "certain health problems" inherent in the manufacturing process.

The second was an April 20, 1967 letter of Beutel to H.G. Fredricks, concerning the proposed government production of Agnet Orange. Beutel mentions a "serious potentioal health hazard" to workers, and states that even with detection methods, care is necessary in the handling of the product.

The third occurred in August, 1967, when Beutel and two other Dow representatives told two officals from the office of the Secretary of Defense that caution should be exercised in producing 2,4,5-T.

The fourth was on September 27, 1967, when Beutel wrote to the government indicating that Dow would not bit on the government project because of the chloracne problem, among other factors.

In March, 1970, Dow briefed representatives of the military on the presence of dioxin as an impurity in PCP and 2,4,5-T. By this time, there appears to have been widespread concern in various sectors of the government concerning the hazards of defoliation program.

In June 1970, after temporary suspension of Agent Orange use, Dow wrote to Secretary of Defense Melvin Laird recommending "strongly" that the government set

appropriate specifications and controls to insure that no 2,4,5-T be used if it contained more than one ppm dioxin, and Dow specifically urged that standard for any 2,4,5-T used as a component of Agent Orange, if it was to be used as a defoliant in Vietnam.

If there is a real difference of the level of knowledge between Dow and the government, it focuses upon Dow's discovery in 1964 that dioxin was the chloracnegen in TCP, its development of a test to determine dioxin levels, and its development of techniques obtained partially through purchase from C.H. Boehringer to reduce the dioxin levels during the manufacturing process. One question of fact is whether this knowledge, if disclosed to the government, would have made a difference in the government's decision making process about the use of Agent Orange.

Related questions of fact are the actual dioxin levels in Dow's product and the actual hazards involved in the use of the products at different levels of dioxin.

A lot of this boils down to whether or not one ppm is or was safe. Arguably, if Dow was selling a clean "safe" product to the government, then it told the governement everything it needed to know. Of course, if the product was clean and safe, Dow would win on the

causation issue, too, because a clean and safe herbicide, by definition, would not cause the injuries plaintiffs claim to have suffered from Agent Orange.

(continued on following page.)

Next, Thompson-Heyward, T-H supplied the government with Agent Orange pursuant to contracts dated June 28, 1967, March 1, 1968, and May 20, 1968.

T-H had manufactured 2,4,5-T for commercial sale as a herbicide prior to 1967. It did not make TCP but rather purchased it from other chemical companies.

T-H's first knowledge of any problems associated with 2,4,5-T occurred in 1964. In December of that year, Dr. Groth of the Public Health Service wrote to T-H requesting samples of 2,4,5-T. The letter stated that 2,4,5-T was associated with chloracne and that it was suspected that dioxin was the culprit. Groth stated that he was attempting to develop a method to isolate the contaminant. T-H claims that this was the first time it learned of such problems.

In December 1964, DeAtley, a vice president of T-H, wrote to Dr. Dosser, the laboratory director at Dow, telling him of Grother's letter. Dosser replied in a telephone call that there might be some methods of production which led to a toxic compound. In January 1965, DeAtley concluded that T-H should conduct some tests of its own.

At this time T-H was not yet a government supplier of Agent Orange.

On February 19, 1965, DeAtley and Fuhlhage of T-H visited Dow's Midland plant. The minutes of the meeting indicate that DeAtley and Fuhlhage learned that cases of chloracne had recently been more severe, and that Dow had its workers changing clothing and showing at mid-shift.

T-H admits that it had cases of chloracne among its workers, but claims that it did not know the cause until December 1964 at the earliest. T-H's point is that by June 1967 when it first became a government contractor, the government certainly knew as much as it did.

In June 1967, when T-H negotiated its first contract, it did tell the government that there was a chloracne problem in the manufacturing process and that this was factored into the price.

The level of dioxin in T-H's Agent Orange is not clear. According to plaintiffs, T-H has not turned over its books recording levels of dioxin, except for 1970 and 1971. Samples tested at Gulfport indicate a level that went as high as 4.1 ppm which raises a question of fact as to its harmful potential.

Plaintiffs emphasize the fact that T-H knew that gas chromotography could determine dioxin level, but never told the military about it even after it began to supply Agent Orange to the government. Nor did it tell the government that its chloracne manufacturing problem was probably caused by dioxin, or that the contaminant very likely carried over into the delivered Agent Orange.

(Continued on following page)

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Uniroyal, Inc. sold Agent Orange to the government pursuant to three contracts between October 6, 1966 and March 1, 1968. It appears to be undisputed that the product it sold was not manufactured by Uniroyal, Inc., but rather, was supplied to Uniroyal, Inc. by a Canadian subsidiary now named Uniroyal, Ltd. Inc. denies having had any knowledge of the toxicity of 2,4,5-T or that there were any health hazards connected with Agent Orange. Uniroyal has not presented evidence of the actual level of dioxin contamination of its product.

The sole "definitive evidence" of Uniroyal, Inc.'s knowledge of chloracne problems is found in a memo from Uniroyal, Ltd. to Uniroyal, Inc. dated June 11, 1962, which states that five employees at the Clover Bar plant had symptoms of chloracne. A reply affidavit of Arthur Gorman, technical liaison to the Uniroyal, Ltd. plant at the time, states that the Clover Bar facility did not produce either TCP or 2,4,5-T in 1962. The inference is that this memo has nothing to do with this case.

There are at least two issues of fact with respect to Uniroyal, Inc. which preclude summary judgment in its favor. The first concerns the memo

of T. H. Evans of Uniroyal, Ltd. dated August 10, 1965. That memo was found in the files of Walter Harris of Uniro-al, Inc. who stated that he did not receive it until 1968. Evans stated in his affidavit that he did not send it to Uniroyal, Inc., and Arthur Gorman of Uniroyal, Ltd. also stated that copies of the Evans memo were not sent to Uniroyal until 1968. Just when Uniroyal, Inc. received it, however, presents a triable issue of fact.

The memo is important because it contains Evans' description of his visit to Dow's Midland plant in 1965 and discussions of chloracne problems and dioxin. If the jury were to find that Uniroyal, Inc. knew a lot more than it claimed it knew when it entered into its first contract with the government in 1966.

The second issue of fact is whether Uniroyal, Inc. is chargeable with the knowledge of its subsidiary, Uniroyal, Ltd.,because of the corporate relationship. Assuming without deciding the validity of Uniroyal, Inc.'s argument that there is a presumption of separateness, I do not fault Uniroyal, Inc. for its irritation at plaintiffs' eleventh hour argument here.

I do not think, however, that plaintiffs' or Uniroyal's cross-claiming co-defendants should be permitted to introduce evidence, if they can, that the two corporations were really the same entity. If the parties intend to pursue that line I expect that they will be doing so in good faith and not just wasting the court's time or attempting to confuse the issues.

Riverdale states that it manufactured Agent Orange pursuant to a contract, that the government set the specifications, that it performed to specifications, and that it knew of no health hazard connected with Agent Orange.

Riverdale's motion for summary judgment is unopposed, except by its co-defendants who argue merely that it is too early to grant summary judgment for Riverdale. However, as Riverdale points out in its reply memorandum, opposition to a summary judgment motion "must set forth specific facts showing that there is a genuine issue for trial." FRCP 56(d). The party opposing summary judgment must offer "some competent evidence that could be presented at trial showing that there is a genuine issue as to a material fact."

No such evidence has been presented, and there are no other circumstances as to why summary judgment can't be fairly granted now.

Hoffman-Taff is in the same situation as Riverdale, and for the same reasons is entitled to summary judgment in its favor.

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Originally, Thompson declined to bid for Agent Orange contracts. Acting under appropriate statutory authority, however, the government required Thompson to supply Agent Orange pursuant to two contracts dated April 19, 1967 and May 24, 1968. It supplied 333, 685 gallons between September 1967 and January 1969. As reflected in test results, the dioxin content of its product ranged from .10 to .3 ppm.

There is no evidence that Thompson knew of any toxicity problems associated with the use of any of its products up to the time that the government required it to produce Agent Orange. Thompson himself testified that he had never heard of dioxin until recently.

Soon after it began to manufacture Agent Orange, Thompson experienced an incident that caused a few of its employees to develop what was believed to be chloracne. The principal evidence of Thompson's knowledge of this health hazard is found in an internal memo of Dow Chemical Company dated February 1967. A Mr. Buckley, now deceased, of Thompson, requested information from Dow to assist him in dealing with a "severe chloracne problem" with some of their employees. The second memo, written by

V.K. Rowe, indicates that he did not give Buckley a very detailed description of what caused the problem because, in his words, "It was quickly apparent that Mr. Buckley had little understanding of the toxicological aspects of his problem. Had he asked for methods, etc., I would have agreed to send them to him."

There is no claim that Thompson disclosed this production accident to the government; however, the government already knew of similar and more serious problems that had occurred at Monsanto and Diamond, and, possibly, the government knew of Dow's 1964 chloracne problem.

At most, this incident establishes Thompson's knowledge of possible health hazards related to the manufacture of Agent Orange. It establishes no knowledge in Thompson of hazards to users. Plaintiffs would have me infer such knowledge, perhaps even infer that the problem was discussed in the telephone conversation between Buckley and Rowe. The evidence presented, however, does not support the inference but instead invites mere speculation, particularly when we consider that the deceased Mr. Buckley would be unavailable to testify.

On the other side of the knowledge comparison, it is clear that by 1967, when Thompson first contracted to manufacture AGent Orange, the government had a significant amount of knowledge about dioxin, its contamination of 2,4,5-T, and its association with chloracne and some other health problems. Without question, the government's level of knowledge greatly exceeded that of Thompson in 1967.

Plaintiff also argues that Thompson had knowledge of and the disretion to use alternative methods of manufacturing Agent Orange. Thompson points out that there is no evidence to support that assertion. Even assuming it to be true, however, there is no evidence that Thompson knew of any risk to users that would call for the use of an alternative manufacturing method, and Thompson itself denies knowledge of any such risk.

Under these circumstances, I conclude that Thompson has established that there is no issue of material fact remaining for trial on the government contract defense, and that Thompson is therefore entitled to summary judgment.

Hercules supplied compounds containing 2,4,5-T pursuant to 15 contracts dating from May 8, 1964

through May 20, 1968.

There is no evidence in the record that Hercules knew anything concerning chloracne or other health problems related to the production of 2,4,5-T during the 1940s or 1950s. Dr. Frawley, Hercules' general manager of Health, Environment and Safety, who has been with Hercules since 1956, testified at his deposition that he did not learn of Monsanto's 1949 chloracne problems until February 1965. With respect to Diamond Alkali's explosion in 1956, Frawley testified that he knew of the explosion but not of the toxicity associated with it.

Hercules began producing phenoxy herbicides in 1961. In 1964, it began to manufacture AGent Orange under contracts with the U.S. Government.

Frawley of Hercules wrote to V.K. Rowe of Dow on July 3, 1963 concerning a request by Dr. Leary of the United STates Department of Agriculture that the chemical companies do some testing of phenoxy herbicides. Plaintiff contends that this letter is evidence of Hercules' knowledge of the problems associated with 2,4,5-T. However, as Frawley points out in his answering affidavit, the few problems of alleged health hazards mentioned in the

letter relate to 2,4-D, not to 2,4,5-T.

Frawley states that the firstknowledge he had of industrial health problems associated with the production of 2,4,5-T occurred in February 1965, when he was told by Dow of their chloracne problem. In March 1965, Frawley attended the Dow meeting (discussed above), where he received Dow's analyses of Hercules' product. They showed a very low level of dioxin.

Later in 1965, Hercules improved its process of production so as to eliminate even the low dioxin level, and hercules began to test its own product for dioxin contamination.

From January 1966 through May 1970 Hercules' product contained no measurable dioxin except in September 1966 when it measured .1 ppm.

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The results of U.S.D.A. tests in 1970 also howed no measurable dioxin. Nor do plaintiffs seriously contend that Hercules' product was contaminated by any significant amounts of dioxin.

With the exception of the inconclusive incidents involving two children who ate sprayed fruit and the workers who worked in a sprayed area, plaintiffs present no concrete evidence of Hercules' knowledge of any problems prior to March 1965.

Frawley states in his affidavit that to his knowledge Hercules never had a case of chloracne among its workers from 1961 until 1970 when it ceased production. Further, he states that Hercules learned of possible teratogenicity only in 1969 when the government released the Bionetics report.

Under the heading discussion.

In pretrial order No.33 dated February 24, 1982, I defined the government contract defense as follows:

> A defendant in this case will be entitled to judgment dismissing all claims against it based on that defendant's having supplied "Agent Orange" to the government pursuant to a contract, if the defendant proves:
>
> 1. That the government established the

specifications for "Agent Orange";

2. That the "Agent Orange" manufactured by the defendant met the government's specifications in all material respects; and

3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange".

Each defendant has established the first two elements of the defense. Consequently, pursuant to Federal Rules of Civil Procedure 56(d), I have determined that there is no substantial controvery with respect to any defendant over those two facts which shall be deemed established for purposes of the trial of this action. But these are the only two facts I am determining for future purposes. All other discussion of facts and evidence in this decision relates only to these summary judgment motions.

Plaintiffs argued with considerable force that because defendants did not share with the government all their knowledge about AGent Orange, the resulting irnorance on the government's part affected not only what was put into or omitted from the specifications but also the standards applied to determine whether a particular defendants' product conformed to the

specifications. I view this more as a means of talking about the central problem of knowledge, then as a proper description of the elements of the government contract defense. For purposes of that defense and its analysis, the various problems arising out of differing level of knowledge between the government and the defendants are encompassed in the third element.

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With respect to that third element -- whether the government knew as much or more than the defendant about the hazards to people that accompanied use of Agent Orange -- four of the defendants, Riverdale, Hoffman-Taff, Thompson, and Hercules, have established that there is no triable issue and each of them is entitled to judgment dismissing all complaints, and all cross-claims against them on the ground that the government contract defense shields them from liability.

As to all four of these defendants there is no triable issue over knowledge. As to each, on the record before the Court the government clearly knew as much as or more than the defendant about any hazards to people that accompanied use of that defendant's product.

Riverdale and Hoffman-Taff both deny any knowledge of hazards, and no other party has controverted their denials. Thompson was essentially an unwilling producer of Agent Orange who knew virtually nothing about its hazards.

Clearly, in 1967 when it first began to supply the herbicide, the government's knowledge of the hazards of Agent Orange exceeded that of Thompson.

Hercules' dismissal rests on the same ground, but follows for different reasons. Unlike Riverdale, Hoffman-Taff and Thompson, Hercules was aware of possible Dioxin contamination of 2,4,5-T.

But since the Agent Orange produced by Hercules was free of the contamination, there was no Dioxin-related hazards accompanying its product about which Hercules could have had knowledge.

Summary judgment is denied with respect to Dow, Thompson-Hayward and Uniroyal, Inc. on the ground that on the papers before the Court triable issues of fact are presented on the question of relative knowledge. Following our earlier schedule, this would have meant that the trial of the government contract defense would proceed for these defendants together with Monsanto and Diamond on June 27th.

However, for a combination of reasons I have concluded that a separate trial of what remains of the government contract defense with respect to the remaining defendants is no longer appropriate.

It might prejudice the plaintiffs by over-emphasizing the importance of this narrowly drawn defense as it has evolved in its present context: it might prejudice the defendants

by requiring presention of the issue on hypothetical questions of causation that ultimately would have to be developed on a full record; and it would prejudice both sides due to the additional time, effort and expense that would be required.

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THE COURT: As this case has developed we all have learned a lot. In 1080 when I entered an order anticipating phased trials, the idea of a separate trial of the fact issues raised by the government contract defense seemed appealing. It had the advantages of focusing on what appeared to be a discrete segement of the evidence with a possible early termination of the lawsuit, and a saving to all parties of considerable unnecessary expense. The chief disadvantage of the separate trial appeared to be a relatively insignificant one of having to assume hyposhetically certain facts about liability. On balance, the goals of obtaining a just, speedy, and inexpensive determination seemed to be well served by working toward a separate trial of the government contract defense. The premise underlying that conclusion was that the elements of the defense would be uniquely suited to consideration of adjudication, separately and apart from the issues of liability, general causation, and dagages. In addition, it seemed to me at the time that as a practical matter discovery on those discrete issues would be rather narrow compared to the discovery that some of the other fact issued presented by this action might require.

What has actually happened, however, is that, as

we all have learned more about the development and use of Agent Orange in Vietnam, the issues in the action have become clearer. Plaintiffs undoubtedly will strongly emphasize a negligent failure to warn as a bias for liability. But when the "knowledge" factor of the government contract defense is placed alongside a liability theory of a neglighet faulure to wark, the issued, unfortunately, no longer remain discrete or separate. On the contrary, they tend to merge, and so much so that the legal test for liability under a failure to warn negligence theory would fully encompass all the knowledge issues of the government contract defense except for the final test of whether the knowledge "would have" as opposed to "might have: affected the military's handling of Agent Orange purchases and use.

Separate application of the government contract defense has been possible as to the four defendants in whose favor I will be granting summary judgment. As to the remaining defendants, however, the central point of the dispute seems to have shifted. Plaintiffs' claim is that dioxin is extremely toxic, that it was produced as a by-product in the manufacture of TCP which was a precursor chemical for 2,4,5-T which in turn was conbined with 2,4-D to make Agent Orange. Any dioxin

produced in the manufacturer of TCP carried forward into 2,4,5-T and therefore into the Agent Orange.

Whether or not the presence of a dioxin contaminant in Agent Orange gives rise to liability is complicated by a variety of curcumstances, including the relative ignorance of birtually everyone about dioxin when our involvement in Vietnam commenced, the increasing level of everyone's knowledge about dioxin at varying rates until Agent Orange was no longer used in Vietman, the changing level of technology which enabled the scientist to detect and measure smaller and smaller concentrations of dioxin ober the erlevant time period, and the dynamic, constantly cnanging attitudes of the military and political authorities about the use in Vietnam of herbicides.

The problem is illuminated by comparing the situation of Hercules with that of Dow. Hercules attended the 1965 meeting called by Dow to consider the problem of dioxin contamination in 2,4,5-T. Beginning January 1966, the 2,4,5-T produced by Hercules was, with one exception, free of any detectable dioxin. This meant that if dioxin was present, it was there in concentrations of less than one tenth of one part per million. In one month out of the ensuing 39 months of production,

Hercules' 2,4,5-T did show dioxin contamination, but at minimum measurable level: .1 ppm. Under all these circumstances Hercules had no knowledge of harm from dioxin contamination caused by its product, because its product was free of such contamination. The one month when a trace was found becomes de minimis when compared with the dioxin contained in the other companies' products. Since Hercules had no knowledge of its product creating hazards to peopel, its knowledge could not have exceeded that of the government, and it therefore has established the third element of the government contract defense, thereby entitling Hercules to summary judgment in its favor.

Dow took a different approach to its production than Hercules. Instead of producing a dioxin-free product, it adopted a self-imposed contamination standard of one ppm for its 2,4,5-T. At the March 1965 meeting, Dow urged the others in attendance to adopt that single standard and to use it as the industry standard for 2,4,5-T. From the evidence in the present record Dow believed that standard to be within a reasonable margin of safety so that hazards to people would be eliminated. The test results in the record show that neither Diamond nor Monsanto followed Dow's recommendation. Dow itself

lived up to its self imposed standard, however, with the result that the Agent Orange it produced contained .5 ppm. It may eventually appear that the 1 ppm standard was safe. If so, then Dow could succeed in its government contract defense, just as Hercules has now done by showing the safety of its product. It could also succeed against any liability claim based on an allegedly defective product. We do not know whether Dow's self imposed 1 ppm standard was a safe level for dioxin contamination of the 2,4,5-T. Indeed, we do not know whether contamination even at the level of 140 ppm, the highest level for any product given at any time in the papers now before the court, would produce Agent Orange that was hazardous to people. This, the 1 ppm standard raised an issue of fact that precluded summary judgment in its favor.

It may also eventually appear that if Dow had revealed its concerns about dioxin to the government in 1965 the military would have adopted that standard regardless of what our present knowledge twlls us about the safety of that standard. In that event, Dow would succedd against a claim of negligent failure to warn, but not on its government contract defense. Rather, it would suceed on the causation issue, because Dow's

failure to disclose its concerns about dioxin would not have affected the military's judgment in using the product.

If we were to proceed at this time with a separate trial of the government contract defense as to those defendants who remain in the case, we would on that trial have to determine whether dioxin contamination of Agent Orange was harmful, if so, in what concentration did it become harmful, and finally, if the defendant's product was unsafe and if the defendant had told the military in 1965 of Dow's fears about the effect of dioxin contamination, might the military have stopped using Agent Orange, changed its specifications to provide a maximum level of contamination, changed its method of using Agent Orange in the field or imposed safety precautions in connection with its use in the field.

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THE COURT: (Continuing) A trial to answer these questions would necessarily involve most of the evidence needed for trial of the issues relating to liability and general causation. Under these circumstances I conclude that justice would be served by combining what remains of the government contract defense issues with a trial on liability and general causation which will be scheduled after completion of the remaining discovery necessary for those issues.

In the general context of case management for the future, I will continue the action under the supervision of the Special Master, Sol Schreiber, who has thus far provided extraordinary, even heroic, assistance in bringing the case this far. His authority will continue as before, with the objective being a trial at the earliest reasonable date covering the issues of liability, general causation, and the government contract defense. I will request the Special Master to recommend an appropriate timetable for the remaining discovery, any further motions, preparation of a pretrial order, and for the trial. I will also request from him, as quickly as possible, a formal recommendation with respect to the nature and form of class

certification. Despite the determined resistance by some of the dismissed defendants, I will nevertheless in the interest of justice defer entry of summary judgment on the present motions until after the class has been certified. As a kindness to my colleagues in the Second Circuit, I suggest to defendants that as soon as possible you tell them of whatever parts of your mandamus petitions you wish to withdraw on grounds of mootness.

A question has been raised as to the pending status and circumstances with respect to intervention by the additional plaintiffs, which I discussed with you at an earlier date. When the problem was brought up, plaintiffs offered to have all their known potential plaintiffs intervene in the option, and they offered to do this, as I understood it, for the purpose of blending possibly even destroying any claims of prejudice by the defendants that might have arisen from a deferral of class certification until after the trial on the government contractor defense. We are all aware of many of the problems that relate to the problem of class certification in an action of this type. I took at face value plaintiffs' representation of their willingness to

intervene. I granted permission to do so. There have been so misunderstandings with respect to the form and place of intervention, and in light of that I have extended the time of the plaintiffs to do so for an additional two weeks. In light of some questions that have been asked, I should state -- although it seems to evident to me -- that I have no power to require anyone to intervene in the action. Nevertheless, it would greatly facilitate the future course of the action, if the intervention plan was carried through by the plaintiffs as they represented they would do so weeks so.

I have a couple of additional points:

I am going to ask the Special Master to reconsider with counsel whether the need for secrecy about the papers in this case still remains. I'd like him to consider whether some of the restrictions on public disclosure of the affidavits, documents and depositions cannot be lifted. From what I have seen on television and from what I have read in the newspapers, it appears that some counsel and some parties in this case don't take seriously either their ethical obligations or the orders of this Court with respect to disclosure of information. I have more important things to do,

I think, than to police such problems. I do understand that due to a careless designation on the filing of some papers in the action, some information which was intended to be under seal ended up in the hands of a newspaper reporter. However, other documents as to which there have been no slip-ups in filing or designation for sealing, have also been quoted directly in newspaper articles. This simply confirms my own view that in the circumstances of this case, as with many others, it is futile to attempt to keep information confidential.

Although keeping discovery materials subject to the protective order previously granted in this case has already served several worthwhile purposes, I am not certain that those purposes are furthered by continuing the sealing with respect to the motion papers on these summary judgment motions. I request the Special Master to review the matter again with counsel and make an appropriate recommendation to me.

Finally, a word as to why I requested the Special Master to stop the depositions that were scheduled for this week. When I learned that there were several depositions scheduled to take place in various parts of the country, I became concerned over

the unecessary expense that those depositions would cause for some of the parties, and the extra expense and incovenience that the accelerated deposition schedule would impose on other parties. I was also accutely aware of the tension and anxiety that the rapidly approaching trial date was generating in all concerned. As a result, once I reached the conclusion that a separate trial of the government contract defense for the remaining defendants would not further the interests of justice, I felt it appropriate to put a hold on the depositions until you could hear the full details of this decision. There will be ample time for the remaining defendants to reschedule the cancelled depositions and to readjust their schedules to conform to the new trial date.

Mr. Schreiber, the Special Master, has asked me to tell you that he will meet with counsel here, next Monday at 2:00 o'clock, in order to discuss further steps in this case.

I thank you very much.

(Whereupon, the proceedings were concluded)

C E R T I F I C A T I O N

I, HARRY RAPAPORT, a Court Reporter for the Eastern District of New York, hereby certify the foregoing transcript as being true and accurate.

HARRY RAPAPORT