

Item ID Number 02049

Author

Corporate Author

Report/Article Title Typescript: Agent Orange Hearing, August 24, 1984

Journal/Book Title

Year 0000

Month/Day

Color

Number of Images 8

Description Notes Summary of the Agent Orange Settlement Fairness hearings in San Francisco in Friday, 24 August 1984. Typescript accompanied by a slip saying, "With the Compliments of the Embassy of Australia, (J. Grinberg), Second Secretary" 6 September 1984.



WASHINGTON, D. C.

6 September 1984

With the Compliments

of the

Embassy of Australia

(J. GRINBERG)
Second Secretary

AGENT ORANGE HEARING

Six Australians appeared before U.S. Judge Jack Weinstein at the Agent Orange Settlement Fairness Hearings in San Francisco on Friday, 24 August, 1984.

2. Appearing were Mr. William T. McMillan, Barrister of Brisbane; Mr. Ross Lonney, Barrister of Perth; Mrs Stephen Ramsay (June), member of the Vietnam Veterans' Family Association, Perth; Mr. Monty Hollow, Solicitor and Secretary of the TPI Association of Victoria; Mr. Barrie O'Keefe, QC, Sydney; and Mr. Michael Bigg, Solicitor of Brisbane.

3. The Australians commenced their submissions to the Judge at 8pm and concluded at 11pm and were given a very fair hearing. The judge allowed each of the witnesses to put forward all the material they wished and said that he was prepared to sit all night rather than make them rush their submissions.

4. Mr. McMillan told Judge Weinstein he had been involved in the Agent Orange Class Action case since 1980. He gave the background on how Australian troops served at Da Nang which he said had been heavily sprayed with defoliant and he referred to the evidence of numerous members of the Australian forces saying they had gone through defoliation areas. McMillan explained the operation of law in Australia and the background of the Repatriation Act. He gave details of Australians serving in World War I, World War II, Malaya, Korea, Borneo (during Confrontation) and then Vietnam. His evidence covered background on the RSL lobbying for extra benefits and appeal provisions of the Repatriation Act. Mr McMillan went on to outline what he termed the "Nancy Law" case. He also mentioned the case of "Widow Simpson" and its implications.

5. McMillan told the judge that Australian veterans were still battling for recognition and were upset and annoyed at not being able to get anywhere in the chemical actions. He said the Repatriation Board took a negative view which was not consistent with veterans' rights. While there were amendments in the wind, these would have to await the result of the Evatt Royal Commission. Mr. McMillan gave the court details of Australia's various medical schemes and coverage which veterans could receive under pension arrangements. Included was an outline of the new medicare scheme and options veterans had under that scheme. He explained the operation of the Vietnam Veterans' Counselling Service. Mr. McMillan referred to the Pearson Commission which he said had identified that 86% of claims were settled before going to court and that 90% of those going to court were settled before trial.

6. McMillan compared the Agent Orange case with the Thalidomide Hearings of the 1960s, saying that the time frames affecting offspring were similar. Other similarities included children being born deformed. He said in both cases scientific evidence could not be brought forward to prove the cause, but the companies involved still settled. Mr. McMillan said the Agent Orange case was similar and that the settlement formula of 40% in the Thalidomide case might be appropriate as a bench mark. He explained Dr. William McBride's work in Australia which led to the Thalidomide hearings and this prompted a discussion with the Judge on whether the Australian settlement money might appropriately be distributed by a similar foundation to the one that Mr. McBride had set up in the Thalidomide case (Foundation 41) and whether Dr. McBride might be able to assist in this instance.

7. McMillan touched on what Australian veterans thought of the settlement, saying that the NT Veterans' Association was the only group that had formerly met to discuss the settlement. It had indicated total opposition to settlement. He said there were generally three points which concerned the veterans:

1. Nobody was able to estimate the amount of money that should be distributed to Australian veterans;
2. The settlement was a sell out; and
3. Veterans did not want money, but instead wanted a court hearing of the charges against the chemical companies, so the matter was not hushed up.

8. McMillan said that other reactions were that in agreeing to a settlement without bringing the companies before the jury was "letting them off too cheaply".

9. Judge Weinstein suggested the figure available for Australian veterans would be in the vicinity of \$US3,600,000 (although later in the Hearing he made it clear that this figure was not a final one. This only could be worked out when a definite formula was accepted, and all submissions made. The figure was based on a percentage rate of 2 per cent.)

10. During this portion of McMillan's evidence, Judge Weinstein spoke about his conviction that the Australians would have to come up with a method for distribution and repeatedly said that he saw his court passing over a cheque for the final figure to an individual or an organisation in Australia who would then administer its distribution to veterans. Judge Weinstein said it would be very difficult to assess whether Australia and New Zealand troops, because of their location at Da Nang, had

carried a heavier burden in contact with Agent Orange. At this stage he did not think his court could do anything about organising the distribution of the Australian settlement figure to Australian veterans. "It would appear preferable," he said, "to take a lump sum and give it to your court system for distribution. If this is not acceptable, the other way would be to give it to a respected group or individual who could administer the distribution of the settlement funds. That seems to be a substantial issue here." McMillan asked the Judge whether the court would accept handing over the settlement funds to an individual such as McBride. To this the Judge replied that the system he would prefer was the drawing of one single cheque for a settlement sum for the Australians and sending it to one person or group to enable them to devise distribution methods. He said it was not appropriate for his court to decide which veterans in Australia should receive money and it would be helpful if all the Australians present at the hearing addressed their thoughts to that special problem of a fair method of allocating funds to veterans. He said he would like to ensure that whatever distribution method was agreed upon, it did not involve lawyers because their fees would diminish the amount available to the veterans. Judge Weinstein said that the question of Attorney's fees for those attending this court hearing was a separate problem and legal representatives were being asked to make their own submissions separately on this matter. On the question of timing, Judge Weinstein said that assuming settlement was approved, he would expect the money to be paid to someone in Australia by the next northern Spring. Consideration would be given to including interest monies between now and then.

11. Mr. Ross Lonney said he had been involved in the Agent Orange action since 1979. Lonney said he was now Council for various veterans based in Perth, Western Australia with a sprinkling of clients elsewhere in Australia. The background of his involvement dated to a meeting in Western Australia of veterans. He had since taken instructions from 400 families. The cases were so similar that each involved only about a 10-minute interview to determine justifiable claims. Lonney said that most veterans and their families did not want money, but wanted recognition. Most had found there had been a major blockade of their claims and their reaction to settlement was that it was inadequate. Lonney explained how the Vietnam Veterans' Family Association of Western Australia had been formed and how it later affiliated with the Vietnam Veterans' Association of Australia. As well as his normal Vietnam veteran clients, Lonney said he had a "one day brief" from 2000 claimants. Lonney said while he accepted Judge Weinstein's

settlement proposals, his clients, who did not understand the legal difficulties, had a different attitude. They saw the case only in terms of whether there was enough money. They wanted to get the chemical companies before the Court and to have evidence produced to show "what the chemicals did". Lonney said of his 400 Western Australia clients, 90 had instructed him to accept settlement, ten were opposed to it and 300 had made no comment. Lonney said there had been no comment from Australia's national service organisations, other than that they were prepared to disseminate information on the settlement to the 4,500 veterans in Western Australia. Lonney said he would expect about 2000 claims by veterans from Western Australia. He had been told on Thursday night that there were presently 17 000 claims before the Department of Veterans Affairs in Australia. At the conclusion of Lonney's evidence Judge Weinstein said he did not know enough about the Australian law or its systems to be able to interpret the claims, or evaluate them, for Australian veterans. In the case of Americans, the Judge said he was in a position to make his decision with speed and certainty. It was for this reason, he said, that he would prefer a single cheque be drawn up and held for whatever plan is proposed for dispersal of the Australian share of the settlement. He said he would prefer not to hear from any Australian Vietnam veterans as he did not know enough about the Australian or New Zealand involvement to make a sound judgement. "I am unable," he said, "to integrate bits and pieces and therefore I would prefer that you (the Australian legal representatives at the San Francisco hearing) should have the burden of coming forward with a plan on dispersal."

12. Mrs. Stephen Ramsay told Judge Weinstein that she had decided 21 days ago to fly to San Francisco for the hearings. She gave background to the establishment of the Vietnam Veterans' Family Association which she said had achieved its aim to get the Vietnam veterans to talk about their problems. From the beginning when they were reluctant to speak out, there was now a Royal Commission in Australia and the Class Action in the United States and the veterans were "speaking out for themselves". She gave evidence on how her dental technician husband had been affected by the Vietnam experience which was not just post war stress, but was linked to the effects of Agent Orange. Problems such as these had tremendous consequences on the families of all Vietnam veterans. What the veterans wanted was recognition. Mrs. Ramsay said that no money could compensate for the loss of loved ones or marriage break-ups. She was here to ask for justice and now that she had been able to give evidence to the Court, she would be able to go home with a warm heart. At the conclusion of her evidence, Judge Weinstein said the court was very appreciative of Mrs. Ramsay's efforts and the burden she had undertaken in

coming to San Francisco. "We have shared the burden of war," Judge Weinstein said, "and now we must share the burden of peace." The Judge said that Mrs. Ramsay's work had obviously lightened the burden of many Vietnam veterans.

13. Mr. Monty Hollow gave evidence before Judge Weinstein that he had become involved in the Agent Orange case in 1979. Mr. Hollow said he was pleased to be able to give evidence before the court, but it should be remembered that he was just a suburban solicitor and not a trial court orator. He said that Judge Weinstein had a formidable record and was noted for his ability to deal with complex cases. This brought a response from the Judge who joked about the conclusions of the Agent Orange case and his future recognition in connection with complex cases. Mr. Hollow said the Australians sought justice and recognition. He gave details of individual cases and his evidence at times was emotional (at one stage he charged that the United States and Australia had come very close to committing war crimes in Vietnam, said that corporate America still had much to answer for, described the Agent Orange case as the most significant Hearing in the Western world since the Nuremberg Trials and claimed that the Dow Company was being let off the hook). Mr. Hollow said the Vietnam veterans had the same major problem he had and that was no funds and this was the reason many of the Australian veterans had not appeared before the court. They had been told not to get involved because costs would probably go against them. Mr. Hollow disagreed with Judge Weinstein on what he said was the "partitioning off" of the Australian claims (he was referring to the Judge's comments on distribution of the Australian share of the settlement). Hollow said this would bring about a dispute of the credibility of the American Court system and told the Judge that "Pontios Pilate could wash his hands, but the Judge could not". Mr. Hollow said that the Australian people believed that justice would be meted out at the American trial and that a lot of faith was being placed by Australians on the American judicial system. It was believed that this was the only place where justice would be done in the Agent Orange matter and that justice would be carried out no matter how big the company. Mr. Hollow said the Dow Company was worth at least \$US5 000 million and had unlimited funds to fight the Agent Orange case. He said it was being quoted that the lawyers for the company were laughing that they got their settlement for ten cents in the dollar. He questioned the adequacy of the settlement in view of the enormous profitability and resources of the defendant. He pointed out that from the time of the end of the Vietnam conflict a single investment of \$US40 million would have earned the company enough interest to fund the \$US181 settlement. He

noted that the Dow Company had spent somewhere in the vicinity of \$US55 million in its defense which showed the inadequacy of the settlement figure. The company, he said, would claim this \$US70 million and the \$US181 million settlement as tax losses. The real question was the company's capacity to pay, Mr. Hollow said. Mr. Hollow compared examples of handicaps affecting the families of Vietnam veterans and those people affected by motor vehicle and industrial accidents. The latter would receive substantial damages for the sorts of injuries comparable with the veterans' families. There had been much said about how much individual veterans could expect to receive ranging from as low as \$US211 per individual to \$US1,500 in some cases with the high being an estimated \$US40,000. Mr. Hollow referred to a letter he had received from the Prime Minister of Australia, referring to the Vietnam veterans' problems with Agent Orange in which the Prime Minister said that one of the main problems was the lack of specific evidence on the effects of exposure. He said the Prime Minister's letter referred to the possibility that the veterans' few needs would not be met by the repatriation system. Discussing how the settlement distribution could be handled Mr. Hollow referred to the Prime Minister's economic/ industrial consensus agreement. He explained how conflicting sides in Australia had been directed through consensus to a course of action and said that it was still possible for discussions with chemical companies involved in the Agent Orange case to see whether this sort of solution could be used to help the Vietnam veterans of the future. At the conclusion of the last of Mr. Hollow's evidence, Judge Weinstein said he thought Mr. Hollow had been most eloquent and when the Melbourne solicitor suggested he was taking up too much of the court's time, the Judge said: "you could speak all night if you like, I'll be happy to hear you." Mr. Hollow said he would not speak all night, but would like to refer to a specific case, that of Barry Kelly who served in Vietnam from October 1964 and saw spray falling on himself and colleagues which was Agent Orange. During his description of physical defects in the subsequent Kelly children and a claim that Kelly's wife suffered cancer of the cervix as a result, Judge Weinstein clashed with Mr. Hollow after asking what evidence existed that Agent Orange at any time had caused cancer of the cervix. The Judge said that it was essential to the case that if you cannot establish a cause of a deformity or physical problem, that there was no case. "That is why we are looking at a settlement...there is just no evidence of Agent Orange causing cancer of the cervix," he said. Judge Weinstein said he would not credit Mr. Hollow's claim that the chemical company had unlimited funds to fight its case. He said everyone was fully aware of what evidence existed and the settlement agreement was being proposed even though the plaintiff's case was not as adequate as that of the defense.

The Judge pointed out that there was no evidence to indicate any variation of scientific proof available in Australia to that available in America. The Australian evidence did not show any clearer, causality, than did the American evidence." If there is no causation evidence then any figure above zero paid to the Vietnam veterans is quite unacceptable to the defendant." Judge Weinstein said. He added that had the Agent Orange case gone before a court in England or Australia, there was no doubt that under those legal systems, it would have resulted in dismissal with a ruling of substantial costs against the plaintiff. He understood the position Mr. Hollow was arguing, but did not accept the implied criticism of the amount of the settlement.

14. Mr. Barry O'Keefe, QC, said that since July 1983 he had been involved in the Agent Orange Royal Commission. He gave Judge Weinstein background on the Royal Commission and told the Judge that the Commission would be visiting the United States to hold Hearings in late September. O'Keefe undertook to convey an invitation from the Judge to the Royal Commissioner to meet with him in New York. Mr. O'Keefe on the request of Judge Weinstein undertook to make available to the Judge a copy of the final Royal Commission report when it was published. He corrected earlier evidence given at the San Francisco Hearing that the Australian Royal Commission had laughed at evidence provided in a study quoted in the court hearing. He said that the Royal Commission had given the study serious consideration. Mr. O'Keefe said he would like to confirm that there was no data in Australia on causality that conflicted with or was any stronger than any evidence of causality presented at the United States Hearings.

15. Mr. Michael Bigg said he only wished to make a submission on one point and that was the difficulty that had occurred in notifying veterans in Australia of the Agent Orange settlement, the Fairness Court Hearings and the need to lodge claims. Bigg said he wished to make the Court aware that there was considerable delay in getting notices out in Australia to inform veterans. At the conclusion of Mr. Bigg's evidence, Mr. Hollow asked to be reheard and said that he had one additional point he would like to make. This was that there was much criticism in Australia of the Royal Commission and its inaccessibility to people wishing to place evidence before it. Mr. Hollow said as both a solicitor from Victoria and a secretary from the TPI Association he had been refused leave to appear before the Royal Commission and this was something he wanted Judge Weinstein to know.

16. The above summary is paraphrased and should be used for information only.