Toxic Torts


Reviewed by W. Kip Viscusi

Perhaps the most difficult problem facing courts and government agencies that regulate risk is how to remedy long-term health hazards. For the most part, government policy has stressed preventive control of these hazards through direct government regulation. In some prominent instances, however, where the hazards did not become apparent until after the fact, thousands of exposed individuals have sought compensation for their injuries through the tort system. Suits involving asbestos victims and victims of Agent Orange are chief among these tort cases.

Agent Orange on Trial, by Professor Peter Schuck of the Yale Law School, provides a dramatic and insightful account of the Agent Orange case. This superb volume gives a blow-by-blow account of the Agent Orange litigation and also draws general conclusions about how society should approach mass toxic disasters.

Originally hailed as a model herbicide and used extensively in Vietnam, Agent Orange allegedly contributed to a wide range of severe illnesses among veterans and birth defects among their children. By almost any standard, the tort action Agent Orange generated was a major undertaking. The case combined 600 separate actions on behalf of more than 15,000 named individuals. There were 7 (originally 24) corporate defendants, plus the involvement of the United States government (though not as a defendant). The case ended in 1985 with the largest tort settlement in history up to that point—$180 million plus interest to compensate the victims and their families.

Schuck examines the implications of three distinctive aspects of the Agent Orange case. First, this was a "mass" tort claim. The thousands of claimants involved, in Schuck's view, led to a geometric increase in the transaction costs involved in settling the case. The class action approach was thus much more efficient than separate individual suits would have been.

Second, the harm was generated by a toxic substance. Long-term toxic hazards, as opposed to more immediate accident risks, create intractable problems of proof. For example, it was difficult to identify which illnesses could be caused by Agent Orange, and which particular victims of those illnesses were affected by their exposure to the chemical.

Third, this was a tort case, which involved a particular set of evidentiary standards and burdens of proof. Plaintiffs in a tort case must show that the chemical exposure caused the illness; making this link is difficult when the chain of causation is probabilistic and not deterministic.

In setting the context for his analysis, Schuck reviews the scientific properties of Agent Orange. The principal source of the hazard is an unavoidable contaminant, TCDD, which has been called the "most toxic molecule ever synthesized by man."

Schuck also reviews evolving developments in the legal system as they pertain to the Agent Orange case, which makes the volume a self-contained treatise even for those lacking extensive legal backgrounds. For example, he recounts the evolution of the strict liability doctrine and the concept of design defect as they pertain to the Agent Orange case. These changes in the legal landscape greatly enhanced the likelihood that plaintiffs would prevail in such cases.

The bulk of the book concerns specific aspects of the litigation, with Schuck playing the dual role of recount of events and critic of legal strategies and judicial decisions. Schuck's description of the litigation process is both compelling and insightful throughout. He writes eloquently about the veterans' illnesses and their
efforts to obtain compensation. The focus of his analysis is more on the plaintiffs and the judges than on the defendants. This emphasis no doubt stems, at least in part, from the fact that he was given less access to the deliberations of the corporations involved.

The Agent Orange litigation was initiated by Victor J. Yannacone, a Long Island lawyer. Eventually the group headed by Yannacone developed into a consortium with 8,300 clients and 1,300 associated counsel agreements. Schuck focuses on the group-decision problems involved in coordinating such a massive litigation effort. There was, as one would expect, a substantial struggle for control. At stake were shares of the contingency fee to be awarded by the court. Schuck’s work brings to life the common observation that class action lawsuits involve substantial problems of coordination. Rather than simply noting these problems, he explores the roles and interactions of the personalities involved to give the reader a tangible sense of the obstacles to coordination.

The principal missing party to this litigation was the United States government, which, as Schuck observes, sent the soldiers to Vietnam, contracted for the production of Agent Orange, directed the application of Agent Orange in Vietnam, and had responsibility for the troops while they were in Vietnam. Schuck reviews the reasons for excluding the government, particularly the 1980 U.S. Supreme Court decision in Feres v. United States, which sustained the federal government’s immunity from liability “where injuries arise out of or are in the course of activity incident to [military] service.”

Because of the many special problems involved in the Agent Orange case, Judge Weinstein assumed the role of a policy maker rather than merely a judge, making a series of decisions that were vital to the way the case was ultimately settled. An example is his assertion that there was a “national consensus” on three areas of law involved (product liability, government-contract defense, and punitive damages) even though there were many important differences in state laws.

Of perhaps greater interest to the lawyers than the $180 million settlement was their share of the award. In a typical product liability case, the contingent fee provides plaintiffs’ lawyers roughly a one-third cut. In a rather dramatic departure from this distribution rule, Judge Weinstein awarded only 5 percent of the total settlement to the lawyers. His decision to both limit the tort award and reduce the share of the award going to the lawyers reflected an apparent desire to discourage groundless mass toxic-tort litigation. Schuck concludes: “Like so many of Weinstein’s other decisions in the Agent Orange
case, his distribution plan represented a sound (or at least defensible) exercise of policy discretion masquerading as the rule of law.”

The concluding three chapters of the book represent Schuck’s attempt to grapple with the broader policy implications of the Agent Orange case. In particular, how should society handle such toxic-tort problems in the future? Schuck makes a compelling argument that mass toxic-tort cases are not simply large versions of standard tort cases. Rather, they involve factors such as indeterminate causation, spatial dispersion, temporal dispersion, and enormous transactions costs that are not present in, for example, an auto accident case involving only property damage. Schuck concludes that the tort liability system is not well suited to handle mass toxic-tort cases. To the extent the legal system can cope with these problems, it will do so by taking a quite non-traditional role, as did Judge Weinstein. Schuck sees a role for insurance systems and social insurance in providing incentives for risk reduction. He also sees an important role for government regulation.

Since the government did not appear as a defendant in the Agent Orange litigation, Schuck does not examine in detail the government’s various decisions with regard to Agent Orange. Yet, to evaluate the potential for regulation, it is essential to consider the role of the Army and its ability to self-regulate. Schuck could well have written a second book analyzing the Army’s decision to use Agent Orange in light of its knowledge of the herbicide’s toxicity as well as its benefits. Although Schuck’s advocacy of increased reliance on regulation is a sensible approach for other mass toxic risks, it seems less well suited to the risks posed by Agent Orange. Widespread spraying of such herbicides within the context of military conflict is not an area covered by existing regulations, nor is it one the Environmental Protection Agency is in a position to address. Thus, while it is appropriate for the U.S. government to play a minor role in a book concerned primarily with the Agent Orange litigation, it would necessarily be more central in a discussion of the broader policy questions involved.

The Agent Orange case does not provide a blueprint for how future risks of this type should be addressed. Agent Orange on Trial highlights the many deficiencies of tort remedies and begins the search for a sensible solution. The fact that Schuck does not provide precise guidelines for how such risks might best be addressed in the future is not so much a shortcoming of the book as it is a reflection of the current state of our knowledge in the area. Discussion of mass toxic hazards will dominate the policy agenda for years to come. This insightful and superbly written book will be essential reading for anyone who wishes to participate in this debate.

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**Insurance Insights**


**Reviewed by Howard Kunreuther**

Insurance markets are in a state of crisis. Various kinds of insurance coverage—such as gradual pollution insurance—are drying up while rates on others—such as medical malpractice—are skyrocketing. There is no one culprit in these developments. Recent changes in tort law have contributed to some unusually large settlements in court; poor underwriting practices by insurers have necessitated rate increases; and government policy in the environmental area has imposed special liability provisions that make losses to individual manufacturing concerns difficult to estimate. There will be no simple solutions to the insurance crisis.

Kenneth Abraham’s new book, Distributing Risk, helps shed light on some important aspects of the insurance crisis. Abraham explores ways in which insurance can induce individual responsibility by consumers and businesses and thereby improve social welfare. The contribution of this book lies in linking economic analysis with legal processes to evaluate the potential of insurance as a meaningful policy tool.

Abraham’s principal message makes considerable sense: Let the free market operate as best it can, but when it falters rely on other approaches such as regulation, legislation, and judge-made laws. The appropriate program depends on the circumstances. Abraham argues that lawyers, judges, and scholars concerned with insurance need to pay more attention to

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