

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NO. 2007-7037

JONATHAN L. HAAS
Claimant, Appellee

V.

R. JAMES NICHOLSON, Secretary of Veterans Affairs
Defendant - Appellant

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
VETERANS CLAIMS 04-4091, JUDGE WILLIAM A. MOORMAN

AMICUS CURIAE BRIEF ON BEHALF OF IN SUPPORT OF
APPELLEE JONATHAN L. HAAS IN SUPPORT OF AFFIRMANCE OF THE
COURT BELOW

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CERTIFICATE OF INTEREST

NOW COMES BEFORE this Honorable Court, pursuant to Rule 47.6, attorney for amicus curiae,, John B. Wells Esquire, to file the required certificate of interest providing herein:

The represented party in this case is

The real party in interest is Jonathan Haas.

The corporate disclosure statement require by Rule 26.1 does not apply.

The amicus curiae will be represented by the Law Office of John B. Wells, 317 Portsmouth Drive, Slidell, LA 70460.

STATEMENT REGARDING ORAL ARGUMENT

Amicus believes that Oral Argument would be beneficial in that there are many unusual questions before this Court. Many of those issues involve technical provisions of international law, the law of the sea and military equipment and capabilities. The Court may find clarification of these matters helpful in reaching their decision. Accordingly, Amicus requests leave of court to participate in oral argument.

TABLE OF CONTENTS

Certificate of Interesti

Statement Regarding Oral Argument ii

Table of Authoritiesiv

Statement of Issues.....v

Identity of the Amicus and Interest in the Case.....v

Statement of Facts1

Summary of the Argument.....1

Argument.....2

I.THE VETERAN MUST BE PRESUMED TO HAVE CONTRACTED HIS FATAL DISEASE
 A..... THE VETERAN SERVED IN THE REPUBLIC OF VIETNAM 2
B. AGEN

Conclusion8

Certificate of Compliance9

Certificate of Service10

TABLE OF AUTHORITIES

Cases:

<i>C. A. B. v. Island Airlines, Inc.</i> 235 F.Supp. 990 (D.C.Hawaii 1964)	2
<i>United States v. Louisiana</i> 394 U.S. 11 (1969)	2, 3

Statutory Provisions:

33 U.S.C. § 1251	4
38 U.S.C. § 1116	3
42 U.S.C § 9601	4

Other:

1958 Territorial Sea Convention	3
Law of the Seas Convention	2
http://www.bluewaternavy.org/distillation/Water%20treatment.pdf	5
http://www.cia.gov/cia/publications/factbook/fields/2106.html	2

National Research Centre for Environmental Toxicology and the Queensland Health Services, EXAMINATION OF THE POTENTIAL EXPOSURE OF ROYAL AUSTRALIAN NAVY (RAN) PERSONNEL TO POLYCHLORINATED DIBENZODIOXINS AND POLYCHLORINATED DIBENZOFURANS VIA DRINKING WATER, Brisbane Queensland, Australia (2002)

http://www.drawquick.com.au/common/waterdist.pdf	4, 5, 6, 7, 8
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Statement of Principles concerning Malignant Neoplasm of the Lung, NO. 17 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE MILITARY REHABILITATION AND COMPENSATION ACT OF 2004

http://www.dva.gov.au/pensions/SOPs/b004rh_malignant_neoplasm_lung.htm	7
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Statement of Principles concerning Malignant Neoplasm of the Larynx, NO. 1 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE

MILITARY REHABILITATION AND COMPENSATION ACT OF 2004

http://www.dva.gov.au/pensions/SOPs/b013rh_malignant_neoplasm_larynx.htm..7

<http://www.cia.gov/cia/publications/factbook/fields/2106.html>2

<http://www.hnsa.org/doc/destroyer/steamsec10.htm>5

STATEMENT OF THE ISSUES

I Whether the Veteran must Be Presumed to Have Contracted His Fatal Disease as a Result of Agent Orange

IDENTITY OF THE AMICUS AND INTEREST IN THE CASE

Appellant is the surviving widow of who served on active duty from May 1965 through May 1969. On 21 December 1968 was assigned to the *U.S.S. Orleck*, (DD 886), a Destroyer assigned to the Pacific Fleet. He was released from active duty and transferred to the Naval Reserve on 20 May 1969. He was awarded the National Defense Service Medal and the Vietnam Service Medal. The *Orleck* was involved in naval gunfire support in the territorial waters of Vietnam including several harbor areas.

The veteran was diagnosed with tongue cancer in 1986. He had a noted history of tongue and jaw cancer. He later died *inter alia* of lung cancer.

The circumstances surrounding the case are eerily similar. Like Mr. Haas, served close to the Vietnam shore and was awarded the Vietnam Service Medal. Like Haas, he was on board a ship that manufactured potable drinking water from sea water. The distillation process used on both ships was similar. In both cases the ships were in Agent Orange contaminated waters. In

.....'s case he was within the contaminated waters of Vung Tu. Haas' ship was enveloped by a cloud of the dioxin which fell to the sea.

The case is currently pending before the Board of Veterans Appeals after having been remanded by the Court of Appeals for Veterans Claims.

This court's findings will directly affect the case.

Consequently, Amicus asks leave of court to file this brief pursuant to Rule 29 of the Rules of the Court of Appeals for the Federal Circuit.

STATEMENT OF THE FACTS

Appellee Jonathan Haas is a U. S. Navy veteran who was assigned to the *USS Mount Katmai*, a naval warship operating within the territorial waters of the Republic of Vietnam. Haas was awarded the Vietnam Service Medal for service “in Vietnam and contiguous waters.” Haas testified that when operating within 100 feet of shore, his ship was enveloped by a cloud of Agent Orange.

All Navy ships operating at sea for an extended period of time must replenish their potable water supplies by distilling from sea water.

SUMMARY OF THE ARGUMENT

The Secretary has taken a rigid and inflexible approach to the application of Agent Orange benefits in the case of Navy veterans who have been assigned offshore. In the instant case, Mr. Haas’ ship was engulfed by clouds of the toxin. More importantly, the toxin fell to the sea near the intake for the ship’s distillers, which were used to manufacture potable drinking water from sea water.

The enabling statute recognized benefit for those who served in the Republic of Vietnam. By international and domestic law, this includes the territorial waters of the county. Mr. Haas operated within the territorial waters of Vietnam.

Additionally, the Australians have discovered that the seawater distillation

process actually enhanced the effect of the Agent Orange dioxin and deposited the toxin into the potable drinking water of ships operating in contaminated waters. The dioxin would have contaminated the entire distillation process and resulted in the oral ingestion of the Agent Orange toxin.

ARGUMENT

- I. THE VETERAN MUST BE PRESUMED TO HAVE CONTRACTED HIS FATAL DISEASE AS A RESULT OF AGENT ORANGE
- A. THE Veteran SERVED IN THE REPUBLIC OF VIETNAM

The *USS Mount Katmai* was periodically within the territorial waters of Vietnam. Territorial waters were historically defined as

1, the water area comprising both inland waters (rivers, lakes and true bays, etc.) and 2, the waters extending seaward three nautical miles from the coast line, i.e., the line of ordinary low water, (ofttime called the 'territorial sea'). Seaward of that three-mile territorial sea lie the high seas.

C. A. B. v. Island Airlines, Inc. 235 F.Supp. 990, 1007 (D.C.Hawaii 1964). A wider area, the contiguous zone, reaches out to twelve miles from the coast.

United States v. Louisiana 394 U.S. 11, 23 n. 26. (1969). Vietnam claims a 12 mile territorial sea. <http://www.cia.gov/cia/publications/factbook/fields/2106.html> (Last visited 3 April 2006). That is consistent with the limitations of the United

Nations Convention on the law of the Sea Article 3. Since the *USS Mount Katmai* operated as close as 100 feet from shore, it was well within the territorial waters of Vietnam.

The enabling statute, 38 U.S.C. § 1116(a)(1)(A) recognizes a presumption of service connection when the veteran manifests a disease, including lung cancer, when the person was “a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.” The threshold factors are the existence of a prescribed disease and service in Vietnam.

Territorial or internal waters are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory. *United States v. Louisiana, supra*. The territorial waters to include the contiguous zone are also under the control of the sovereign nation, although innocent passage may not be denied. *Id.* Subject to the right of innocent passage, the coastal state, in this case Vietnam, has the same sovereignty over its territorial sea as it has with respect to its land territory. *See*, 1958 Territorial Sea Convention Article 1-2; Law of the Seas Convention, Article 2.

Appellee has alleged that the ship the *USS Katmai* had traveled within 100

feet of the coast of Vietnam. Thus the ship was well within the territorial waters of Vietnam. At all relevant times, the ship was within the sovereignty of Vietnam and therefore its crew “served in the Republic of Vietnam.” Consequently, under both national and international law, Haas served in the Republic of Vietnam.

A. AGENT ORANGE DIOXIN ENTERED THE SHIP’S POTABLE WATER SYSTEM AND WAS ENHANCED BY THE SHIP’S DISTILLING PLANT

In adopting the Comprehensive Environmental Response Compensation and Liability Act, the United States Congress acted to prevent or redress the pollution of the environment. In its definition, the Congress noted that the environment included the waters of the contiguous zone. 42 U.S.C § 9601. In the Clean Water Act Congress recognized that pollutants discharged from shore will contaminate the navigable waters, waters of the contiguous zone, and the oceans. 33 U.S.C. § 1251(a)(6). This happened repeatedly in the offshore waters of Vietnam.

In December 2002, a report by the National Research Centre for Environmental Toxicology in conjunction with the Queensland Health Scientific Services determined that sailors assigned to ships of the Royal Australian Navy were exposed to Agent Orange. National Research Centre for Environmental Toxicology and the Queensland Health Services, EXAMINATION OF THE POTENTIAL

EXPOSURE OF ROYAL AUSTRALIAN NAVY (RAN) PERSONNEL TO POLYCHLORINATED DIBENZODIOXINS AND POLYCHLORINATED DIBENZOFURANS VIA DRINKING WATER, Brisbane Queensland, Australia (2002) (hereinafter RAN Report). The study noted that ships in the near shore marine waters collected waters that were contaminated with the runoff from areas sprayed with Agent Orange. RAN Report at 10. The distilling plants aboard the ship, which converted the salt water into potable drinking water, according to the study, actually enhanced the effect of the Agent Orange. RAN Report at 42. The study found that there was an elevation in cancer in veterans of the Royal Australian Navy which was higher than that of the Australian Army and Royal Australian Air Force. RAN Report at 13. The report further found that oral ingestion can cause multi-site cancer in the human body. RAN Report at 58.

As delineated in the RAN report, the Agent Orange dioxide entered the harbors and territorial waters of Vietnam. More importantly, Haas saw the cloud move offshore and envelop his ship. Thus it can safely said that pollutants used ashore found their way into the waters where the *USS Mount Katmai* was conducting operations.

All Navy ships, manufacture potable drinking water from sea water.

<http://www.bluewaternavy.org/distillation/Water%20treatment.pdf> at 2-3. (last visited June 7, 2007). These ships did not have the capacity to carry potable water throughout the voyage without replenishment via their distillers. The distillers all work on similar principles to produce water for both the boilers and the ship's crew. *See, e.g.* Main Propulsion Plant DD-445 and 692 Classes and Converted Types, Operation Manual <http://www.hnsa.org/doc/destroyer/steamsec10.htm> (last visited April 4, 2006). Water is injected from the sea and is passed through the distilling condenser and air ejector condenser where it acts as a coolant for the condensers. It is then sent through the vapor feed heater into the first effect chamber and into the second effect chamber where it is changed to water vapor. Vapor then is passed through a drain regulator into a flash chamber and passes through baffles and separators into the distilling condenser where it is condensed into water and pumped to the ship's water distribution system. Sea water not vaporized is pumped over the side by the brine pump. *Id.* This is the same type of process discussed in the RAN report. In fact many Royal Australian Navy ships were retired United States Navy ships or ships of the same class as the American Navy.

The Australian study confirmed the enhancing effects of the shipboard

distilling plants. RAN Report at 42. In other words, the effect was even more pronounced than if the veteran had merely ingested Agent Orange by breathing it or by drinking water from a contaminated stream. Consequently, it cannot be argued that Mr. Haas was not exposed to Agent Orange. Indeed he was exposed to an enhanced version.

The Australian government has taken the lead in recognizing that Navy veterans were exposed to Agent Orange. They have recently revised their statement of principles¹ for Agent Orange benefit to include compensation for lung cancer when the claimant has been:

- (i) on land in Vietnam, or
- (ii) at sea in Vietnamese waters, or
- (iii) on board a vessel and consuming potable water supplied on that vessel, when the water supply had been produced by evaporative distillation of estuarine Vietnamese waters.

Statement of Principles concerning Malignant Neoplasm of the Lung, NO. 17 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE MILITARY REHABILITATION AND COMPENSATION ACT OF 2004. *See also, Statement*

¹ The Australian Statement of Principles is a rough equivalent of the American Code of Federal Regulations.

of Principles concerning Malignant Neoplasm of the Larynx, NO. 1 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE MILITARY REHABILITATION AND COMPENSATION ACT OF 2004. While not binding on this court or on the Secretary, in light of the RAN report, the Australian approach is the correct choice. The Australians have embraced the RAN report while the Secretary tries to hide from it. The better view is that the American Department of Veterans Affairs is simply wrong and that hundreds and perhaps thousand of veterans are improperly being denied compensation and treatment.

Notably RAN ships made short 14 day deployment to Vietnamese waters. RAN report at 34. Haas was in Vietnamese or nearby waters for a significantly longer period of time. Consequently his exposure would have been higher than the RAN sailors. Nevertheless, the University of Queensland found that despite the more limited exposure, RAN sailors may have received exposure significantly above the acceptable intake values. RAN report at 36. It is becoming more and more obvious that many Navy veterans of several nations, along with appellant's spouse, were exposed to dangerous levels of Agent Orange. Continued inaction by the Secretary deprives the American veterans of compensation and medical treatment, at a time when our ally Australia is moving to extend service connection

to its Navy veterans.

CONCLUSION

For the reasons discussed herein, Ms. prays that his honorable court affirm the judgment of the court below and direct that judgment be entered in favor of Haas.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2687 words by computer word count, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a monospaced typeface using Wordperfect 8.0.

John B. Wells

CERTIFICATE OF SERVICE

I, John B, Wells, do hereby certify that I have this date mailed by DHL Courier, prepaid, a true and exact copy of this brief to the court and to the Peter D. Keisler, Commercial Litigation Branch, Civil Division, Department of Justice 8th Floor, 1100 L Street NW, Washington DC 20530 and Louis J. George, National Veterans Legal Services Program, 1600 K Street, NW, Suite 500, Washington, D.C. 20006 this 8th day of June 2007.

John B. Wells

*****8
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