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Liability for Pesticide Application

by

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LIABILITY FOR PESTICIDE APPLICATION

I. INTRODUCTION

Large-scale farming in the United States has created a need for adequate and effective weed, insect, and pest control,¹ which in turn has led to the rapid growth of the crop dusting industry. The agricultural productivity currently enjoyed by the United States would be impossible were it not for the chemical treatment of crops with weed, insect, and pest-killing chemicals.² The development which contributed most to the expansion of the crop dusting industry was the creation of a chemical weed-killer 2,4-dichlorophenoxyacetic acid, commonly known as 2, 4-D.³ This chemical is relatively harmless to narrow-leaved plants such as wheat, corn, and rice, but is extremely lethal to broad-leaved plants.⁴ While application of 2,4-D to fields of wheat, corn, and rice will effectively kill the weeds which endanger these plants, such application may also damage nearby valuable broad-leaved plants.⁵

Recognizing the right of farmers to use pesticides upon their land,⁶ one must concurrently recognize liability if in the course of a spraying operation, some of the chemical drifts and causes injury to adjoining property. While increasing agricultural productivity, there have been numerous instances where the application of pesticides has endangered human life,⁷

¹ D. FREAR, *PESTICIDE HANDBOOK—ENTOMA* 27 (20th ed. 1968).

² Stakman, *Pest, Pathogen, and Weed Control For Increased Food Production*, in *PROSPECTS OF THE WORLD FOOD SUPPLY* 72 (1966). The term pesticide will be used for the remainder of this article to mean any chemical used to kill insects, weeds, or pests.

³ Note, *Crop Dusting: Legal Problems in a New Industry*, 6 *STAN. L. REV.* 69, 70 (1953) [hereinafter cited as *Crop Dusting*].

⁴ D. FREAR, *CHEMISTRY OF INSECTICIDES, FUNGICIDES, AND HERBICIDES* 316 (2d ed. 1948).

⁵ *Crop Dusting* at 71 & n.21 (1953). The author points out that 2,4-D has been found to be harmful to cotton, grapes, tomatoes, beets, onions, peas, sweet clover, spinach, cucumbers, strawberries, cabbage, squash, fiber flax, orchard trees, alfalfa, pumpkin, cane berries, cauliflower, mint, vetch, ornamental shrubs, and flowers.

⁶ *Faire v. Burke*, 363 Mo. 562, 252 S.W.2d 289 (1952).

⁷ See, e.g., *Lawler v. Skelton*, 241 Miss. 274, 130 So. 2d 565 (1961).

crops,⁸ bees,⁹ and livestock.¹⁰ The majority of the litigation in this area has involved a landowner spraying a chemical beneficial to his crops but which harms an adjoining landowner's crops or livestock.¹¹

Washington has no reported crop dusting cases but it is felt that this particular problem will inevitably become a source of litigation in this state due to the tremendous increase in the application of pesticides.¹² The thrust of this article will analyze this problem and attempt to delineate the probable legal liabilities of both the landowner-employer and the commercial applicator who is hired to apply the chemical.

II. STATUTORY LIABILITY

The Washington Pesticide Application Act¹³ was enacted, "in the exercise of the police power of the state" for the purpose of protecting the public health and welfare.¹⁴ Under the Act, the Washington State Director of the Department of Agriculture (Director) administers and enforces rules governing the use and application of pesticides.¹⁵

The Act requires the licensing of all commercial pesticide application companies.¹⁶ Exemptions from the licensing requirement exist for forest landowners, their employees, and for any farm owner who applies pesticides to his own land or the land of another farmer on an occasional basis.¹⁷ Prior to the issuance of a license, each applicant is required to pass a written examination designed to test the applicant's knowledge of the proper application techniques and his knowledge of the

⁸ See, e.g., *Kennedy v. Clayton*, 216 Ark. 851, 227 S.W.2d 934 (1950); *Chapman Chem. Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949); *Gotreaux v. Gary*, 232 La. 373, 94 So. 2d 293 (1957); *Young v. Darter*, 363 P.2d 829 (Okla. 1961); *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961).

⁹ See, e.g., *Lundberg v. Bolon*, 67 Ariz. 259, 194 P.2d 454 (1948); *S.A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933); *Brown v. Sioux City*, 242 Iowa 1196, 49 N.W.2d 853 (1951).

¹⁰ See, e.g., *Sanders v. Beckwith*, 79 Ariz. 67, 283 P.2d 235 (1955); *Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W.2d 484 (1940).

¹¹ See cases cited, *supra* notes 7-10.

¹² D. FREAR, *PESTICIDE HANDBOOK—ENTOMA* 27 (19th ed. 1967). The author states that from 1962-65 the production of herbicides alone increased from 52 million pounds to 113 million pounds. In 1965 the sale of primary weed control chemicals rose 29% over 1964 sales. *Id.*

¹³ WASH. REV. CODE ch. 17.21 (1961) (originally enacted ch. 249, [1961] Wash. Sess. Laws 2113).

¹⁴ WASH. REV. CODE § 17.21.010 (1967).

¹⁵ *Id.* § 17.21.030.

¹⁶ *Id.* § 17.21.070.

¹⁷ *Id.* § 17.21.200.

nature and effects of the pesticides he may apply.¹⁸ After issuance the licensee is required to keep records including: the names of all individuals for whom pesticides are applied; the location where applied; the date applied; the type of pesticide applied; and, the direction and velocity of the wind at the time the pesticide was applied.¹⁹ This license may be suspended or revoked for various reasons including: failure to maintain the required records; use of faulty equipment; careless or negligent operation;²⁰ or failure to post a \$25,000 surety bond or liability insurance policy.²¹

In addition there are criminal penalties for violation of the Act. Generally, the penalty is a misdemeanor for the first offense and a gross misdemeanor for subsequent offenses.²² The Act does not, however, in any way terminate or modify any civil liability already in existence when it was enacted.²³

III. CIVIL LIABILITY

A. *Theories of Liability*

1. *Negligence*

The traditional view with regard to crop dusting has been that while landowners are entitled to enjoy the beneficial uses of pesticides in an effort to eliminate weeds and pests, they must take measures to safeguard the rights of others who may be injured through misapplication of pesticides.²⁴ Due care must be exercised in the application of such chemicals to insure that the wind does not spread the chemicals onto the crops of others.²⁵ Liability for injury to an adjoining landowner's property as a result of a crop-spraying operation generally has been predicated upon the tort concept of negligence.²⁶ Examples of what the courts have considered as negligent acts include: failing to shut off the spray while flying over adjoining landowner's

¹⁸ *Id.* § 17.21.090 (1971).

¹⁹ *Id.* § 17.21.100.

²⁰ *Id.* § 17.21.150.

²¹ *Id.* § 17.21.170 (1967).

²² *Id.* § 17.21.310.

²³ *Id.* § 17.21.900 (1961).

²⁴ *Faire v. Burke*, 363 Mo. 562, ____, 252 S.W.2d 289, 290 (1952).

²⁵ *Id.* at ____, 252 S.W.2d at 290.

²⁶ *See, e.g., Lundberg v. Bolon*, 67 Ariz. 259, 194 P.2d 454 (1948); *Burns v. Vaughn*, 216 Ark. 128, 224 S.W.2d 365 (1949); *Faire v. Burke*, 363 Mo. 562, 252 S.W.2d 289 (1952).

property;²⁷ spraying on a windy day when the applicator had previous knowledge of the drifting propensities of the chemical being used;²⁸ and, failure to give notice to adjoining landowners that a spraying operation was going to be conducted.²⁹

2. *Strict Liability*

While the majority view has been that liability with respect to pesticide application will not be imposed absent a showing of fault, three jurisdictions have adopted strict liability in tort in this area.³⁰ In *Loe v. Lenhardt*,³¹ plaintiff sought to impose liability on the basis of an unintentional trespass. The Supreme Court of Oregon stated that crop spraying is an extrahazardous activity³² and imposed liability without any showing of fault on the defendant's part. In *Young v. Darter*,³³ the Supreme Court of Oklahoma imposed strict liability stating that "one must so use his own rights so as not to infringe upon the rights of another."³⁴ Similarly, in *Gotreaux v. Gary*,³⁵ plaintiff's pea and cotton crops were damaged by spraying. He sued, claiming the spray constituted a private nuisance. The Supreme Court of Louisiana rejected this theory but held the defendant liable under a strict liability theory,³⁶ comparing damage from crop dusting to an injury sustained as a result of dynamite blasting operations.³⁷

B. *Analogous Washington Cases*

It is felt that a meaningful prediction of the potential liabilities of the parties involved in crop dusting operations in Washington can be made by examining the supreme court's treatment of similar activities.

²⁷ See *Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W.2d 484 (1940).

²⁸ See *Burns v. Vaughn*, 216 Ark. 128, 224 S.W.2d 365 (1949).

²⁹ See *Brown v. Sioux City*, 242 Iowa 1196, 49 N.W.2d 853 (1951).

³⁰ *Gotreaux v. Gary*, 232 La. 373, 94 So. 2d 293 (1957); *Young v. Darter*, 363 P.2d 829 (Okla. 1961); *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961).

³¹ 227 Ore. 242, 362 P.2d 312 (1961).

³² *Id.* at ____, 362 P.2d at 318.

³³ 363 P.2d 829 (Okla. 1961).

³⁴ *Id.* at 832.

³⁵ 232 La. 373, 94 So. 2d 293 (1957).

³⁶ *Id.* at ____, 94 So. 2d at 294.

³⁷ *Id.*

1. *Blasting Operations*

In *Foster v. Preston Mill Co.*,³⁸ the court found blasting operations to be an ultrahazardous activity holding that the doctrine of absolute liability applies to damages caused as a result of casting rocks or debris onto adjoining property.³⁹ The doctrine of strict liability has also been applied where the invasion of plaintiff's property was intangible, *i.e.*, damage caused by concussion, vibration, or jarring from the blasting operation.⁴⁰

2. *Smoke, Soot and Cinders*

A line of cases has been decided by the court in which harm occurred to a neighboring landowner's property occasioned by the invasion of soot, smoke, cinders or sawdust.⁴¹ In *Bartel v. Ridgefield Lumber Co.*,⁴² the landmark case in this area, smoke, cinders and sawdust were cast upon plaintiff's land by defendant's sawmill. These deposits resulted in the destruction of plaintiff's fruits and vegetables. The court imposed strict liability upon the mill owner notwithstanding the fact that his mill was operated without negligence. The court stated that the rule to be applied is that one may use his property as he wishes, so long as he does not damage someone else's property as a result of his use.⁴³

3. *Noxious Fumes and Gases*

Another line of cases decided by the Washington Supreme Court, closely analogous to the crop dusting situation, involves the escape of harmful fumes and gases from one person's land resulting in harm to the property of an adjoining or neighboring landowner.⁴⁴ *Sterret v. Northport Mining &*

³⁸ 44 Wn. 2d 440, 268 P.2d 645 (1954).

³⁹ *Id.* at 443, 268 P.2d at 647. See also *Schade Brewing Co. v. Chicago, M. & P.S. Ry.*, 79 Wash. 651, 140 P. 897 (1914).

⁴⁰ *Patrick v. Smith*, 75 Wash. 407, 134 P. 1076 (1913).

⁴¹ See *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash. 526, 285 P. 446 (1930); *Mattson v. Defiance Lumber Co.*, 154 Wash. 503, 282 P. 848 (1929); *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 229 P. 306 (1924); *Woodard v. West Side Mill Co.*, 43 Wash. 308, 86 P. 579 (1906). See also *Smith v. St. Paul, M. & M. Ry.*, 39 Wash. 355, 81 P. 840 (1905).

⁴² 131 Wash. 183, 229 P. 306 (1924).

⁴³ *Id.* at 189, 229 P. at 308.

⁴⁴ See *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 154 P. 450 (1916); *Lavner v. Independent Light & Water Co.*, 74 Wash. 373, 133 P. 592 (1913); *Johnson v. Northport Smelting & Refining Co.*, 50 Wash. 567, 97 P. 746 (1908); *Sterrett v.*

Smelting Co.,⁴⁵ was an action to recover damages for the destruction of fruit trees and vegetation such as alfalfa and grass by reason of poisonous fumes escaping from defendant's smelter. The complaint contained no allegation that the fumes escaped through careless management or negligence on defendant's part. The court affirmed a judgment for plaintiff, stating that the damage was a necessary result arising from the character of the ore smelted and the manner of operating the smelter, and that, while it was lawful to operate a smelter, injuries caused by such operation must be compensated.⁴⁶

In *Hardin v. Olympic Portland Cement Co.*,⁴⁷ defendant's cement manufacturing plant emitted noxious fumes and gases which were carried by the wind onto plaintiff's property damaging his crops, shrubs, trees, fruits, and grasses. Plaintiff proceeded on the theory that defendant's business was a nuisance per se⁴⁸ for which strict liability should be imposed. The court agreed and imposed liability with no showing of fault.

C. Crop Dusting—Negligence or Strict Liability

When the Supreme Court of Washington is confronted with a case of injury sustained by a neighboring landowner as a result of a crop dusting operation, it will be the duty of the court to decide, as a matter of law, whether strict liability or traditional negligence principles should be applied. Such a decision will require a balancing of conflicting social interests.⁴⁹

In fashioning a rule of liability for crop dusting operations the court should take cognizance of the following factors: (1) the effect that the rule of liability will have upon appeasing the vengeful spirit of the injured victim;⁵⁰ (2) the social value of

Northport Mining & Smelting Co., 30 Wash. 164, 70 P. 266 (1902). See also *Riblet v. Spokane-Portland Cement Co.*, 41 Wn. 2d 249, 248 P.2d 380 (1952).

⁴⁵ 30 Wash. 164, 70 P. 266 (1902).

⁴⁶ *Id.* at 176, 70 P. at 270.

⁴⁷ 89 Wash. 320, 154 P. 450 (1916).

⁴⁸ *Id.* at 324-25, 154 P. at 451. Prosser states that strict liability for nuisance may be imposed when conduct is abnormal and out of place in relation to its surroundings. W. PROSSER, *LAW OF TORTS* 574 (4th ed. 1971). According to Prosser this form of strict liability is imposed in all American jurisdictions in the name of absolute nuisance. *Id.* at 512.

⁴⁹ Carpenter, *The Doctrine of Green v. General Petroleum Corporation*, 5 S. CAL. L. REV. 263, 271 (1932) [hereinafter cited as *General Petroleum*].

⁵⁰ Keeton, *Is There a Place for Negligence in Modern Tort Law*, 53 VA. L. REV. 886, 888 (1967) [hereinafter cited as *Modern Tort Law*].

having the activity carried on in the community as against prohibiting it;⁵¹ (3) the extent to which fair and just allocation of accident costs will be facilitated by the rule;⁵² and, (4) the effect the resultant rule will have upon deterring risky practices.⁵³

As to the first factor Professor Keeton speculated that "merely recognizing a right to compensation does far more to appease the offended than basing that right on negligence rather than some other theory."⁵⁴ In fact "in some situations persons injured through the risky but prudent activities of another have a deep sense of grievance that negligence law aggravates rather than appeases."⁵⁵

Crop dusting is an industry which benefits the general public in the form of increased agricultural productivity and hence lower prices for foodstuffs. It has significant social value and should not be prohibited, despite the fact that there is a risk of serious injury if the chemicals are misapplied. Application of strict liability as opposed to negligence principles may tend to impede rather than stimulate growth of the crop dusting industry.

With respect to cost allocation of personal injuries, the landowner-employer can, and the applicator usually must, obtain liability insurance.⁵⁶ The cost of such insurance can be allocated to the general public in the form of higher prices for agricultural products. Such a result seems just because the public actually reaps the benefits of increased agricultural productivity in the form of lower prices.

In the area of deterrence it seems that imposing strict liability upon the applicator and landowner-employer would provide greater incentive to utilize safe methods of application than would negligence principles. However, damage resultant from negligence can result in prohibitive insurance premiums and possible revocation or suspension⁵⁷ of the applicator's license, in addition to the requirement to pay damages for the

⁵¹ *General Petroleum* at 271.

⁵² *Id.*

⁵³ *Modern Tort Law* at 888.

⁵⁴ *Id.* at 889.

⁵⁵ *Id.*

⁵⁶ WASH. REV. CODE § 17.21.160 (1967).

⁵⁷ *Id.* § 17.21.150.

harm inflicted.

Balancing all of the factors, it would seem that the application of strict liability will appease an injured victim, facilitate fair cost allocation for injury, and deter risky practices more effectively than would the application of normal negligence principles. On the other hand, imposition of strict liability would probably hinder rather than promote widespread use of crop dusting. While this latter result is an undesirable one, it seems only fair that one who undertakes an activity beneficial to him should not be allowed to reap the benefits without bearing the cost of losses he may inflict upon another.

Strict liability previously has been applied to the conduct of ultrahazardous activities⁵⁸—those involving a risk of serious harm incapable of elimination despite utmost care,⁵⁹ and not a matter of common usage.⁶⁰ An activity is a matter of common usage, not constituting an ultrahazardous activity, “if it is customarily carried on by the great mass of mankind or by many people in the community.”⁶¹ Whether crop dusting is a matter of common usage would depend on whether it was carried on by many people in the community, since it is certainly not engaged in by the great mass of mankind. It can be contended that crop dusting is common to the agricultural community where the activity generally takes place. This is not to say however, that crop dusting is a matter of common usage in the agricultural community. It cannot fit this category unless it is engaged in by many people within a community on a frequent basis. As crop dusting operations are carried out at sporadic intervals it does not appear that the activity could be considered a matter of common usage even in a solely agricultural community.

Therefore in terms of the ultrahazardous activity test;⁶² in

⁵⁸ RESTATEMENT OF TORTS § 519 (1934).

⁵⁹ The risk of harm from crop dusting cannot be eliminated by even the most careful crop duster because of the tendency of the chemicals used to drift due to wind, convection currents, and aerodynamic turbulence. See *Crop Dusting*, *supra* note 3, at 72-75. The author lists and discusses three uncertain and uncontrollable facts relating to drift: (1) the size of the dust or spray particles; (2) air disturbances created by the spraying plane; and, (3) natural atmospheric forces. *Id.* Evidence of the drifting power of chemical sprays and dusts is shown by the fact that a three-micron droplet of pesticide will drift eight miles when dropped from a height of ten feet. *Id.* at 73.

⁶⁰ RESTATEMENT OF TORTS § 520 (1934).

⁶¹ *Id.*

⁶² *Id.*

view of the social benefits to be derived thereby;⁶³ and, in light of the fact that the court has so held in similar cases;⁶⁴ it would seem that the court will promulgate a rule of strict liability for harm resulting from crop dusting operations.

D. *Vicarious Liability of Landowner*

It is a general rule of law that an employer is not liable for injury resulting from the conduct of an independent contractor.⁶⁵ There are, however, certain exceptions to this rule. One of the exceptions is the rule that continues to hold the employer liable for the negligence of an independent contractor if the act engaged in by the independent contractor is inherently dangerous,⁶⁶ or extrahazardous.⁶⁷ As many courts have labeled crop dusting inherently dangerous,⁶⁸ it can be argued that this exception is applicable to crop dusting. The imposition of vicarious liability on the landowner can be supported by the rationale that the landowner derives the benefit from the spraying and he should not be able to avoid liability for damage by delegating the work to an independent contractor.⁶⁹

If the Supreme Court of Washington fashions a rule of strict liability for application in crop dusting cases, then both the sprayer and the landowner-employer can be held liable irrespective of negligence on the part of either. If instead the court elects to apply traditional principles of negligence to crop dusting, then the landowner-employer may be held liable only if the sprayer has been negligent during the conduct of the spraying operation, and in addition, the court determines crop dusting to be an inherently dangerous activity.

⁶³ See footnotes and accompanying text, *supra* notes 50-53.

⁶⁴ See footnotes and accompanying text, *supra* notes 38-48.

⁶⁵ See *Northern Pac. Ry. v. Tillotson*, 84 Wash. 678, 681-82, 147 P. 423, 424 (1915); W. PROSSER, *LAW OF TORTS* 468 (4th ed. 1971).

⁶⁶ See, e.g., *S.A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933); *McKennon v. Jones*, 219 Ark. 671, 244 S.W.2d 138 (1951). The Washington Supreme Court has defined an inherently dangerous activity as one which will necessarily or probably result in injury unless preventative measures are adopted with regard to the activity. *Freebury v. Chicago, M. & P.S. Ry.*, 77 Wash. 464, 467, 137 P. 1044, 1045 (1914).

⁶⁷ See *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961).

⁶⁸ See, e.g., *S.A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933); *McKennon v. Jones*, 219 Ark. 671, 244 S.W.2d 138 (1951); *Pendergrass v. Lovelace*, 57 N.M. 661, 262 P.2d 231 (1953); *Leonard v. Abbott*, 357 S.W.2d 778 (Tex. Civ. App. 1962). See also *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961) where the Oregon Supreme Court stated that the nondelegability rule should be applied with even greater force if the activity is extrahazardous.

⁶⁹ See, e.g., *Lawler v. Skelton*, 241 Miss. 274, 130 So. 2d 565 (1961).

IV. CONCLUSION

Crop dusting is an activity involving a serious risk of harm if the chemicals used in the treatment of crops are misapplied. Washington has recognized the danger inherent in the application of pesticides and has enacted legislation aimed at regulating this activity.⁷⁰ The statutory regulations presently in effect fall short of effectively dealing with the problems arising from pesticide application as they provide no guidance for determining the civil liability of one who causes injury to another through such application.

The Washington courts will have the responsibility of determining whether to impose strict liability upon crop dusting or to utilize traditional negligence principles. Arguments for strict liability include the view that one who undertakes an activity beneficial to him should not be allowed to reap the benefits without bearing the cost of losses he may have inflicted upon another. On the other hand, it can be contended that imposition of strict liability will impede the growth of crop dusting industries and thereby slow down increased agricultural productivity.

The jurisdictions which have imposed strict liability upon crop dusting operations represent the better view, for there is no justifiable reason, in crop dusting cases, for requiring one injured through no fault of his own to bear the loss unless he can prove negligence on the part of the one injuring him. The Supreme Court of Washington has already established a pattern of imposing strict liability in situations analogous to crop dusting. Therefore, it is urged that the court extend this doctrine to crop dusting activity when such a case is presented.

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⁷⁰ WASH. REV. CODE §§ 17.21.010-.931 (1961).