Laws Governing Use and Impact of Agricultural Chemicals: Liability for Damage Caused by Agricultural Chemical Drift

Michael T. Olexa

Aerial application of pesticides, while an efficient and effective available manner of applying chemicals to large areas, is also particularly dangerous to surrounding property and crops. This is so for two reasons: (1) chemicals which are beneficial when applied to one crop may be detrimental to non-targeted crops, animals, or human beings, and (2) chemical sprays or dusts, once airborne can drift and land in unintended locations. When present in combination, these factors account for most of the damage and litigation arising from aerial application of pesticides.

Although courts have recognized that agricultural spraying is a beneficial activity, they have also recognized its potential for causing damage. Courts have imposed liability on aerial applicators and landowners under theories of trespass, negligence, and strict liability.

The following precautions have been recommended to avoid damage through the aerial application of dangerous chemicals:

- Follow label instructions. The label is the law.
- Regularly calibrate application equipment to prevent over application or uneven application.
- The applicator must have and properly use all protective clothing and equipment recommended on the label.
- Time of application, the interval between application and harvesting or feeding, and crop reentry specified by the label must be followed.
- Follow recommended application rates.
- Keep thorough records of all aspects of pesticide applications including: copies of product labels, each application, rates of application, exact location of applications, weather at time of application, rates of application, records of equipment calibration maintenance, and any other items that would document conscientious adherence to the law.
Spray only when wind speed is low (the pesticide label should specify maximum wind speed for safe application).6

Pesticides should be applied so as to minimize the possibility of drift, i.e., using buffer zones, checking wind direction, adjusting droplet size, and being certain to cut off spray before reaching the boundaries of the area to be sprayed.

Insecticides must not be used when bees or other pollinating insects are visiting crops being treated.7

Nearby beekeepers should be given appropriate notice of intent to spray and of chemicals to be used so they can protect their bees.8 Check your state requirements regarding notification of bee keepers.

The applicator should make a careful aerial survey of the area to be sprayed immediately prior to application to ensure that no persons, livestock, or wildlife are in or near the area.9

Workers must not be allowed to enter treated fields prior to the re-entry time specified on the label or by state law.10

**STRICLIABILITY**

In four states, Louisiana, Oklahoma, Oregon, and Washington, courts have labeled aerial application of pesticides an "ultra hazardous" or "abnormally dangerous" activity, and have imposed strict liability for damage done without requiring proof of fault.11

In 1961, the Oregon Supreme Court, in *Loe v. Lenhardt*,14 imposed strict liability in an unintentional trespass suit, finding that there was no need to prove fault or negligence where the defendants were engaged in an "extra hazardous" activity. In this case, the defendants were using a mixture of dinitro and diesel oil as an herbicide.15 The spray drifted, having, in the court’s words, a "swift and drastic effect" on the plaintiff's crops.16 The court, noting "the high degree of danger inherent in the spraying of agricultural chemicals from the aircraft",17 determined that strict liability should attach to the activity.18 The court stated the usual justification for the imposition of strict liability rather than a negligence standard: "...the element of fault, if it can be called that, lies in the deliberate choice by the defendant to inflict a high degree of risk upon his neighbor, even though utmost care is observed in doing so."19

The Washington State Supreme Court in 1977 imposed strict liability on crop spraying operations in *Langan v. Valicopters*.20 In this case the plaintiffs were organic farmers. The defendant's helicopter sprayed a neighboring farm with the pesticides Thiodan and Guthion. The plaintiffs sought damages for pesticides which drifted onto their crop of organically grown vegetables, rendering them unsalable as certified organic produce. Plaintiffs proceeded to destroy their crop, and filed a claim for full damages. In upholding a verdict in the plaintiff's favor, the court applied the test for imposition of strict liability suggested by the Restatement (Second) of Torts,21 and concluded that crop spraying was an abnormally dangerous activity, justifying the imposition of strict liability.

In reaching this conclusion, the court stressed that there was no proof to suggest that it is possible to eliminate the risk of drift by the exercise of reasonable care. The court added that while aerial application was prevalent in the area, it was carried out by a relatively small number of people. In justifying its decision to impose strict liability, the court states that "useful but dangerous activities must pay their own way."22

**NEGLIGENCE**

Other states which have considered cases involving damage caused by pesticide drift have applied a negligence standard, both in negligence actions and unintentional trespass actions. A negligence standard requires proof of fault before a
plaintiff can recover losses, damages, etc. Users of agricultural chemicals should note that courts have been willing to assign liability on very slight evidence of negligence.

The courts of at least twelve states have held that the aerial application of pesticides is an "inherently dangerous" activity. This means that a plaintiff seeking damages can recover upon a lesser showing of negligence. If the activity which is causing the harm were a less dangerous activity, then the plaintiff must offer more evidence of negligence in order to recover damages. Often in these jurisdictions the court will seemingly imply negligence from the fact that damage occurs, making this theory of recovery, in essence, close to strict liability.

The Kansas case of Binder v. Perkins\(^{33}\) required a higher standard of care, but also found a specific instance of negligence. In this case, the defendant's application of a 2,4-D/diesel oil mixture to a wheat crop seriously damaged the plaintiff's alfalfa crop. There was no evidence of direct spray drift of the chemical onto the plaintiff's crop, but instead, fumes from the treated field caused the damage.\(^{24,25}\)

The court found that the herbicide was carefully applied when the wind was blowing away from the plaintiff's crop in order to minimize danger to the plaintiff's alfalfa. Nevertheless, the defendant was negligent in applying an overly strong mixture which extended the evaporation time for the 2,4-D. When the wind shifted, the fumes entered the plaintiff's field. The court characterized the handling of 2,4-D as a hazardous activity, and stated that "a particular hazard calls for increased care; and the greater the risk, the more imperative the obligation."\(^{25}\)

There are other cases where negligence has clearly been established. These often involve situations where chemicals were negligently released in excessive winds or over the wrong property, causing damage to crops or livestock. In a few cases, aerial applicators have been held liable for failure to properly clean storage tanks or otherwise properly maintain their equipment where this failure resulted in damage from misapplication. One case imposed liability where the pilot of the plane negligently doused a worker with a pesticide, causing severe illness. Other, more unusual cases, have involved the death of a flagman in the field struck by the landing gear of the airplane, and the imposition of liability for the loss of turkeys frightened to death by a low flying plane.

RESPECTIVE LIABILITY OF APPLICATORS AND LANDOWNERS

Almost all aerial applicators of agricultural chemicals in the United States are independent contractors hired by farmers to treat their fields. This raises the issue of whether farmers should be liable for damages caused by an independent applicator. The general rule is that a person is not liable for the torts of an independent contractor. However, many states have held that because aerial spraying of pesticides involves a heavy risk that damage to others may result, a farmer may not escape liability simply by having the work done by an independent contractor. Thus, in 1976 in Boroughs v. Joiner,\(^{26}\) the Alabama Supreme Court ruled that a farmer who hired an aerial applicator to spray his crops with Endrin was liable for the resulting pollution of a nearby fish pond.

As the court in Boroughs points out, however, a farmer is generally not strictly liable for damage caused by the aerial spraying of his property by an independent contractor. "The test is one of reasonableness. Liability...is imposed on the contractor for failure to exercise due care."\(^{27}\) Thus, while the applicator is liable for his own negligence, the farmer also has a duty to take steps to ensure that third parties are not harmed by the operation. Therefore, to reduce exposure to liability, a farmer should take precautions, such as warning the applicator of nearby crops, farm ponds, or livestock that could be damaged by the chemical being applied, giving notice of intent to spray to all neighbors, supervising the spraying operation to ensure that all application instructions on the label are followed closely, and inspecting the applicator's equipment. Conversely, an applicator who fails to heed the instructions of the farmer who hired the applicator may lose the opportunity to hold the farmer jointly liable.

A different case is presented in those jurisdictions that have held aerial application of agricultural chemicals to be an activity subject to strict liability. Because negligence is not necessary to impose liability, the question arises as to which of two non-negligent actors should pay. In Loe v. Lenhardt, the Oregon Supreme Court placed the burden on the landowner. The court noted that it was the farmer who made the decision to apply pesticides by air, and thus it was the farmer who was responsible for exposing his neighbors to the risk posed by an extra
hazardous activity. This fact rendered the risk, in the court’s words, "non-delegable."28

Because the farmer may be held liable for the torts of the applicator, the farmer should choose the applicator carefully. Farmers should carry liability insurance to cover potential damage or ensure that the applicator has a policy that will indemnify the farmer for damages caused.29

DEFINITIONS, ABBREVIATIONS AND ACRONYMS

Citation Definitions

eq.: and the following
id: the same; used to indicate a reference previously made.
infra: within; used to indicate a reference made in a later part of the paper.
supra: above; used to indicate a reference made in a previous part of the paper.

Definitions

Actual Damages -- The amount awarded to a plaintiff in compensation of the plaintiff’s actual and real loss or injury.

Common Law -- It is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments.

Enjoin -- To require a person, by writ of injunction, to perform, or to abstain or desist from, some act.

Injunctions -- A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

Inherently dangerous -- Danger inhering in an instrumentality or condition itself at all times, so as to require special precautions to prevent injury; not danger arising from mere casual or collateral negligence of others with respect to under particular circumstances.

Nominal Damages -- The trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant’s duty.

Punitive Damages -- Damages that are above and beyond that which would compensate the plaintiff for his loss. They are based on the public policy of punishing a defendant who acted willfully, maliciously, or fraudulently.

Statutory Law -- The body of law created by acts of the legislature in contrast to constitutional and common law.


Abbreviations

C.F.R.: Code of Federal Regulations

Acronym List

BMP - Best Management Practices
CERCLA - Comprehensive Environmental Response, Compensation, and Liability Act
CZMA - Coastal Zone Management Act
DOT - Department of Transportation
EPA - Environmental Protection Agency
ESA - Endangered Species Act
FAA - Federal Aviation Administration
FACT - Food, Agriculture, Conservation, and Trade Act
FDA - Food and Drug Administration
FFDCA - Federal Food, Drug, and Cosmetic Act
FIFRA - Federal Insecticide, Fungicide, and Rodenticide Act
IPM - Integrated Pest Management
MCL - Maximum Contaminant Level
MCLG - Maximum Contaminant Level Goals
NPDES - National Pollution Discharge Elimination System
OSHA - Occupational Safety and Health Act
PPE - Personal Protective Equipment
RCRA - Resource Conservation and Recovery Act
RCWP - Rural Clean Water Program
REI - Restricted-Entry Interval
SARA - Superfund Amendments and Reauthorization Act
TPQ - Threshold Planning Quantity
USDA - United States Department of Agriculture
WPS - Worker Protection Standard
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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. See Holt v. Dep’t of Food and Agriculture, 171 Cal. App. 3d 427, 435-36 (1985) (Failure to make certain that no persons were in the area by conducting an aerial survey constituted negligence when persons working near the field were sprayed, regardless of the fact that such a survey was not a common practice).
11. See Michael T. Olexa, Common Law Standards of Conduct and Theories of Liability, notes 7-8 and accompanying text.
12. 94 So. 2d 293 (La. 1957).
13. Id. at 295.
15. Id. at 315.
16. Id. at 316.
17. Id. at 317.
18. Id. at 318.
19. Id. at 317.
21. See Michael T. Olexa, Common Law Standards of Conduct and Theories of Liability, note 7 and accompanying text.
22. 567 P.2d at 223.
23. 516 P.2d 1012 (Kan. 1977)
24. Id. at 1016.
25. Id.
27. Id. at 343.
28. 362 P.2d at 318.
29. See Harl, supra note 1, at §15.01[3][c].