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Aerial Crop Spraying — Inherently Dangerous Activity — Non-delegable Duty — Theories of Liability

During 1961, three cases involving liability for damages caused by aerial crop spraying reached the supreme courts of three different states. The theories employed by the courts in arriving at the decisions present an interesting contrast in two areas. These are (1) the liability of a landowner for the conduct of the sprayer, and (2) the theories of liability for the damages caused. The purpose of this note is to point up the distinguishing features of the cases and to compare them to past decisions.

In one case defendant landowner employed the defendant aerial spraying company to rid the former's property of weeds. The herbicide spray spread to the plaintiff's cotton crops causing substantial damage. The trial court found that the spraying operations had been conducted negligently and that the landowner was liable along with the aerial sprayer. The Texas Court of Civil Appeals affirmed. *Held: judgment against landowner reversed.* Under the facts of this case, the aerial sprayer is an independent contractor to whom the risk of harm may be delegated, thereby absolving the landowner from liability for such operations. *Pitchfork Land & Cattle Co. v. King,* 346 S.W.2d 598 (Tex. Sup. Ct. 1961).

The second case involved damage to the seed crops of the plaintiff which were sprayed by the defendant aerial applicator. The plaintiff based his claim on a theory of trespass. The trial court granted an involuntary nonsuit to the defendant landowner because the other defendant was an independent contractor. At the close of evidence the aerial sprayer was given a directed verdict. *Held: reversed and remanded as to both defendants.* The aerial sprayer is strictly liable for damages caused by his spraying without regard to any negligent acts committed by him. The landowner is also liable because aerial spraying is an inherently dangerous activity and he is not permitted to insulate himself from a suit for damages by hiring an independent contractor. *Loe v. Lenhardt,* 362 P.2d 312 (Ore. Sup. Ct. 1961).

In the third case the plaintiff was covered with poisonous chemical insecticides sprayed from an aircraft as he worked on a gin platform contiguous to a cotton field being treated for insect pests. He became seriously ill and later sued the aerial sprayer, the lessee of the land and the owner lessor basing his suit on a negligence theory. *Held: the sprayer and the lessee are liable.* The lessee of the premises, whose crops were being treated, may not delegate the work of dusting or spraying a crop with poisonous insecticides to an independent contractor and thus avoid liability. *Lawler v. Skelton,* 130 So.2d 565 (Miss. Sup. Ct. 1961).

The holdings in the *Loe* and *Lawler* cases are more nearly in accord with the great weight of authority on the issue of a landowner's liability for injuries caused by an aerial sprayer.[1] The common-law rule that an

[1] See, *e.g.*, McKennon v. Jones, 224 S.W.2d 138 (Ark. 1951); Heeb v. Prysock, 245 S.W.2d 577 (Ark. 1952); S. A. Gerrard Co. v. Fricker, 27 P.2d 678 (Ariz. 1933).

employer is not liable for the torts of an independent contractor hired by him has been limited somewhat by the so-called "intrinsically dangerous" exception.[2] If the activity is of such a nature that it involves a high degree of risk to others, the duty not to harm which is owed to these persons is said to be non-delegable.

The courts in almost every jurisdiction in which the point has been considered have held that aerial spraying or dusting is an "intrinsically dangerous" activity. Accordingly they have uniformly decided that an employer cannot escape liability for damage caused by drifting herbicides or insecticides by hiring an independent contractor to do the work.[3] However, most of the cases deciding the issue have involved damage caused to persons, property or animals located within close proximity of the spraying operations.[4] Dean Prosser suggests that the "intrinsically dangerous" exception may not apply in those cases where there is not a high degree of risk in relation to the immediate surroundings.[5] The blasting case cited by him in support of that proposition certainly seems analogous to the spraying operations, particularly in view of the frequent comparisons of the two activities made by the courts.[6] In *Holt v. Texas-N.M. Pipeline Co.*[7] the Fifth Circuit Court of Appeals held that an employer was not liable for the injuries caused to a third party incident to blasting operations carried on by an independent contractor in barren rural areas. The court stated that such work under these conditions was not even intrinsically dangerous.[8]

In the *Pitchfork* case the closest cotton farm to the area being treated was some seven and a half miles distant.[9] On the other hand, in the *Lawler* case the plaintiff informed the lessee defendant that he would be working on the platform at a distance of twenty to thirty feet from the cotton field.[10] Clearly the risk to the plaintiff was great in view of the toxic qualities of the insecticide and the proximity of the platform to the field. The courts do not discuss the point in any of these cases, but it seems particularly applicable to a determination of whether crop spraying is in fact an inherently dangerous activity.[11]

The holding in the *Pitchfork* case is not actually as broad as it might first appear. It does not stand for the proposition that all inherently dangerous activities may be delegated to an independent contractor under Texas law. Many cases have held that the duty incident to these activities is non-delegable.[12] Nor does it state that crop spraying is not inherently dangerous. The decision in this case is undoubtedly the result of plaintiffs' failure to submit and prove their issue on dangerous instrumentali-

[2] Prosser, Torts 359-61 (2d ed. 1955).

[3] See cases *supra* note 1.

[4] For an extensive list of these cases see Comment, 40 Texas L. Rev. 527, n. 47 (1962).

[5] Prosser, Torts 361 (2d ed. 1955).

[6] See, *e.g.*, Loe v. Lenhardt, 362 P.2d 312 (Ore. 1961).

[7] 145 F.2d 862 (5th Cir.), *cert. den.* 325 U.S. 879 (1945).

[8] 145 F.2d at 863.

[9] 346 S.W.2d at 599.

[10] 130 So.2d at 567.

[11] In the *Loe* case the court weighs the proximity factor to determine whether the activity was extra-hazardous for purposes of strict liability, but does not discuss it in relation to the problem of non-delegable duty. 362 P.2d at 317.

[12] See, *e.g.*, Galveston-Houston Electric Ry. Co. v. Reinle, 258 S.W. 803, 805 (Tex. 1924).

ties.[13] Hence, *Pitchfork* is precedent, at most, for the proposition that in Texas crop spraying is not extremely dangerous as a matter of law. Upon this basis the case does not present too radical a departure from other decisions in this area.

The second point of interest raised by these three cases involves the theory of liability upon which the plaintiffs recover. The jury in the Texas trial court made specific findings of negligence which supported the judgment against the aerial sprayer.[14] It seems unlikely that the Texas courts would permit a recovery in the absence of such findings.[15] There are many cases from other jurisdictions which also couch the basis of recovery in negligence terms.

In the *Loe* case, the Oregon Supreme Court concluded that the defendants were liable for an unintentional trespass committed by them through their drifting spray. The court expressly stated that negligence is not necessary for recovery under the facts. It held that aerial spraying was an inherently dangerous activity, that this was a question of law to be determined by the court and that the rules of the Restatement of Torts relating to innocent trespass applied.

The *Lawler* case presents still another aspect of this question. The jury in the trial court found for the defendants in spite of the overwhelming evidence showing negligence which proximately caused plaintiff's injuries. The court stated that "the issue of liability contains two factors, (1) whether plaintiff was sprayed by [the aerial applicator] with a chemical mixture, and (2) whether the spraying was a proximate cause of his acute illness."[16] The court mentioned acts committed by the pilot which could be constitute negligence,[17] but it was concerned primarily with the question of proximate cause. Hence this case seems to fall somewhere between the doctrine followed by the Texas court and that adopted by the Oregon court.

The several comments which have been written on this subject all seem to agree that there are three classes of cases dealing with aerial spraying.[18] The first is exemplified by the Texas case in which the court relies upon specific acts of negligence to find liability; the second is represented by the *Lawler* case from Mississippi where the court seems to decide that merely spraying under the particular circumstances is negligence; the third is that of strict liability. There have been only two cases decided on this basis, and *Loe* is the first to employ the Restatement

[13] Brief for appellant, pp. 33-35, Pitchfork Land and Cattle Co. v. King, 355 S.W.2d 624 (Tex. Civ. App. 1961).

[14] 335 S.W.2d 624 (Tex. Civ. App. 1961). The grounds were failure to confine the herbicide outside the boundary of the cotton crops in question, failure to use a wind gauge to check the velocity and direction of the wind, failure to properly mix the materials, failure to discover within a reasonable time after beginning the spraying that the velocity of the wind would cause the spray to drift and settle on the cotton, and that the wind was blowing over ten miles per hour on the occasion of the spraying. *Id.* at 629.

[15] Texas purports not to recognize a doctrine of strict liability. The leading case on the point is Turner v. Big Lake Oil Co., 97 S.W.2d 221 (Tex. 1936). See also Vrazel v. Bieri, 294 S.W.2d 148 (Tex. Civ. App. 1956) where the court refused to impose liability in the absence of any finding of unreasonable action on the part of the defendant crop duster. The court said that it would not consider the spraying negligence per se because to do so would be to impose strict liability upon the defendant.

[16] 130 So.2d at 569.

[17] *Id* at 567 (turning on the spray directly over the platform).

[18] See Note, 43 Minn. L. Rev. 531 (1959); Crop Dusting: Legal Problems in a New Industry, 6 Stan. L. Rev. 69 (1953); Comment, 40 Texas L. Rev. 527 (1962).

doctrine.[19] At least one writer has suggested that this is the most appropriate theory for recovery particularly in view of the potential harm.[20]

These cases continue to come up through the courts of almost every state in which there is substantial agricultural activity. The benefits from crop dusting or spraying in the form of insect and weed control are undoubted. However these benefits must be weighed against the dangerous characteristics of herbicides and insecticides and against the damage which they can cause if not properly controlled. The theories of liability will probably continue to be divergent in the various jurisdictions, but this is certainly not a characteristic unique to this particular field of tort law.

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Air Carriers — Tortious Conduct — Actual and Exemplary Damages Awarded "Bumped Passenger" — C.A.B. Penalty Agreement

Plaintiff sued defendant airline charging unjust discrimination, violation of Section 404(b) of the Civil Aeronautics Act.[1] Defendant removed plaintiff from a flight on which plaintiff had confirmed reservations. *Held:* Defendant wantonly violated plaintiff's right to accommodations constituting tortious conduct for which plaintiff was awarded actual and exemplary damages. *Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Calif. 1961).*

Almost without exception, the prohibition against discrimination in Section 404(b)[2] of the Act has been applied to cases involving competitive practices[3] among the airlines.[4] However, in *Fitzgerald v. Pan American World Airways,*[5] the court held that the unreasonable discrimination prohibition of Section 404(b) creates a federal civil-right cause of action.[6] The court reasoned that violation of the statute was a federal crime, and thus when the statute is violated, a federal cause of action accrues to the class of individuals protected by the statute.

In this case, plaintiff complied fully with Passenger Rule 12.[7] By doing

[19] The other case is Gotreaux v. Gary, 94 So.2d 293 (La. 1957), noted in 32 Tul. L. Rev. 146. There the court based its decision upon a civil law statute pertaining to harm to adjoining landowners for activity on one's own property.

[20] Note, 43 Minn. L. Rev. 532 (1959).

[1] Civil Aeronautics Act, Title IV, 72 Stat. 760 (1958), 49 U.S.C.A. § 1374(b).

[2] *Ibid.* "No air carrier or foreign air carrier shall make, give or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever, or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[3] Summer Excursion Cases, 11 C.A.B. 218 (1950).

[4] See generally, Gellman, *Regulation of Competition in U. S. Domestic Air Transportation: A Judicial Survey and Analysis,* 25 J. Air L. & Com. 149.

[5] 229 F.2d 499 (2d Cir. 1956). This case concerned an allegation by Negroes that they had been "bumped" because of discrimination by the airline because of their race and color. This case is the only reported decision which deals with discrimination under the Civil Aeronautics Act other than the competition cases.

[6] Cowen v. Winter, 96 Fed. 929 (6th Cir. 1899).

[7] Passenger Rule 12 of the applicable tariff filed under the authority of 49 U.S.C.A. § 1373 sets out that "the carrier will cancel the reservation . . . of any passenger from any point named on his ticket or exchange order unless the passenger advises the carrier of his intention to

so, he acquired a priority right[8] to accommodations over passengers with reservations confirmed subsequent to his. Defendant arbitrarily cancelled plaintiff's tourist seat reservation in order to accommodate a first-class passenger. This discriminatory action violated plaintiff's rights and Section 404(b) of the Act. The court justified its jurisdiction over the matter in the following manner. The Civil Aeronautics Board, although the watchdog of the airlines,[9] had no authority to grant redress or damages for past violations,[10] thus there was no conflict of jurisdiction and in fact only the courts could grant adequate relief.[11] Finding plaintiff's rights abused, the court awarded actual damages to the plaintiff.[12] The court also awarded $5,000 exemplary damages on the theory that the right to grant punitive damages was justified by statutory[13] implication advanced in *Hague v. Committee for Industrial Organization*,[14] and that those damages were justified by defendant's intentional and wanton disregard of plaintiff's rights.[15]

The true significance of this case is found not in the legal reasoning alone; its significance lies in the apparent effect it had in accelerating the airlines' attempts to solve a major problem in this area. The basic cause for an airline overbooking its flights stems from the air carrier's concern over confirmed passengers failing to appear for their scheduled flights. When a passenger fails to cancel his reservation, a flight may depart with empty seats which could have been sold. To alleviate this problem, eleven major airlines[16] submitted a proposal to the CAB which would permit a service charge to be assessed against "no show" passengers.[17] The CAB, aware of the frequent overbooking indulged in by the airlines,[18] tentatively agreed to the proposal and made final approval contingent on a reciprocal penalty being assessed against the airlines for overbooking, whether it be inadvertent[19] or intentional. On March 1, 1962, the CAB approved an agreement incorporating penalties for both "no shows" and overbooking.[20] This agreement went into effect May 1, 1962 on a trial basis for a period of six months.

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use his reservation by communicating with a reservation or ticket office of the carrier at such point at least six hours before his scheduled flight departure time."

[8] 49 U.S.C.A. § 1304. "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

[9] 49 U.S.C.A. § 402.

[10] 49 U.S.C.A. § 1482.

[11] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 365 (1961). The court stated that an "alternative to a Federal cause of action for the aggrieved airline passenger is to remit a plaintiff to his remedy in the State courts, based on a State created cause of action. But this recourse would fall short of effectuating the purposes of the Act."

[12] Plaintiff's only out of pocket damages were found to be $1.54.

[13] 42 U.S.C.A. § 1983.

[14] 101 F.2d 774, 789 (3d Cir. 1939) *modified on other grounds*, 307 U.S. 496 (1939).

[15] Lake Shore M.S. Ry. Co. v. Prentice, 147 U.S. 101 (1893).

[16] These eleven are: American, Braniff, Continental, Delta, Eastern, National, Northeast, Northwest, Trans World, United and Western.

[17] 1A Av. L. Rep. Para. 21,241 (Current C.A.B. Cases, Jan. 8, 1962).

[18] C.A.B. *Overbooking Practices of Trunkline Carriers*, Docket 11683.

[19] Eastern Airline Overbooking Enforcement Proceedings, Docket 8726, (Order Ser. No. E-14962 (Feb. 26, 1960)). (Overbooking through human error or communication lag does not constitute a violation of the Civil Aeronautics Act.)

[20] 1A Av. L. Rep. Para 21,258 (Current C.A.B. Cases, March 1, 1962). The charge to "no shows" is 5 dollars or 50% whichever is greater of the applicable one-way fare of the first remaining validated flight coupon, with a maximum charge of 40 dollars. The penalty for oversales is similar; however, there are certain conditions which may relieve the carrier from making payments for oversales.

The problem of collecting these penalties is manifest. However, it is hoped that the very existence of these potential penalties will reduce the necessity for such collection. It is hoped that if the traveling public is apprised of the "no show" penalty they will be more likely to inform the airlines of intended cancellations. Conversely, the airlines will be less likely to oversell their flights if overbooking produces penalties. Certainly the decision in the *Wills* case will insure the latter.

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