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JUDICIAL AND REGULATORY DECISIONS

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LIABILITY FOR CROP-DUSTING

SINCE the advent of modern pest-control methods there have been only nine reported decisions dealing with the question of liability for damages resulting from serial crop-dusting, yet significantly, six of this number have been decided within the last two years, displaying the growing importance of airborne pest-control operations.¹ All of the earlier decisions held the "flying farmer" liable for damages, yet half of the recent cases have absolved him of all liability. This development may be attributed either to the specific facts of each case, or may be a part of the general trend of the courts to lessen the degree of care required of owners and operators of airplanes with regard to injury to persons or property on the ground.

The typical case² envisages the farmer employing an aviator experienced in "dusting" crops by air, to spray his fields with a poisonous substance designed to obviate the pending destruction of his crops from harmful pests. In this operation damage occurs to crops,³ or animals,⁴ on adjacent property. The injured party then seeks judicial aid in gaining reparations for the resulting damage. The basis of recovery is invariably negligence on the part of either the operator of the aircraft of the farmer who promoted the dusting.⁵ The types of negligence generally alleged are: failure to cut-off the dusting equipment when passing over adjacent property,⁶ operating

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¹ Agricultural flying, including crop-dusting, was a major topic of discussion at the recent Second Annual National Agricultural Aviation Conference at Fort Worth, Texas. Civil Aeronautics Administrator D. W. Rentzel in his address to the conference said agricultural flying is a most promising field, and that he believed it is "just getting started." Rentzel cited CAA figures showing that 1,724 operators are using 4,906 planes in crop-dusting, spraying, seeding, fertilizing, and defoliating, 227 companies are making equipment used in such operations and 19 schools are giving courses in agricultural flying. *American Aviation Daily*, March 10, 1950, p. 59. The CAA also reported in June 1950 that there had already been 1200 applications for waivers necessary for low-flying spraying operations. In 1949 the total number of applications for the year was 265.

² The facts of the simple case exemplified here, are almost universally common wherever crop-dusting damage occurs. In all of the reported decisions discussed in this note, the typical facts are present. If other facts altering the situation have occurred, they will be indicated.

³ *Damage to Crops: Chapman Chemical Co. v. Taylor*,... Ark...., 222 S.W. (2d) 820 (1949); *Burns v. Vaughan*,... Ark...., 224 S.W. (2d) 365 (1949); *Kennedy v. Clayton*,... Ark...., 227 S.W. (2d) 934 (1950).

⁴ *Damage to Bees: Gerard v. Fricker*, 42 Ariz. 503, 27 P. (2d) 678 (1933); *Miles v. Arena Co. et al*, 23 Cal. App. (2d) 680, 73 P. (2d) 1260 (1937); *Lundberg et al v. Bolon*, 67 Ariz. 259, 194 P. (2d) 454 (1948); *Jeanes v. Holtz et al*,... Cal. App...., 211 P. (2d) 925, (1949); *Lenk v. Spezia et al*,... Cal. App...., 213 P. (2d) 47 (1949); *Damage to Livestock: Hammond Ranch Corp. and Homer Ricks v. Dodson and Williams*, 199 Ark. 846, 136 P. (2d) 484 (1940).

⁵ The exception to this statement occurred in *Chapman Chemical Co. v. Taylor*,... Ark...., 222 S.W. (2d) 820 (1949) (the manufacturer of the chemical dust was held liable for negligence in not running tests with reference to the volatility of the dust).

⁶ *Hammond Ranch Corp. v. Dodson and Williams*, 199 Ark. 846, 136 S.W. (2d) 484 (1940).

the dusting equipment during high winds,⁷ failure to give notice of the dusting operation to adjoining landowners,⁸ and finally, a lack of care in not investigating the highly volatile nature of the poison used in the "dusting" operation.⁹

Gerard v. Fricker,¹⁰ the first decision posing the question of crop-dusting liability, involved the typical fact situation previously set forth. Both the airplane owner and the farmer employing the pilot were held liable for damages to the adjoining landowner caused by the drifting of the poisonous dust. The major issue on appeal was the defendant's assertion that the dusting company employed was an independent contractor, and that therefore the defendant's farmer was not liable for any damages suffered by the plaintiff. This assignment of error was denied with the court announcing that crop-dusting by aircraft was *per se* "inherently dangerous," and therefore the defendant could not delegate the work to an independent contractor and thus avoid liability.¹¹ The language of the court in speaking of the "inherently dangerous" nature of the work, said, "This is especially true where the agency or means employed to do the work, if not confined and carefully guarded, is liable to invade adjacent property, or the property of others, and destroy or damage it."¹² This language is slightly ambiguous for the "agency or means employed to do the work" may mean either the mode of transportation utilized, or the poison dropped from the airplane.¹³ The court probably meant the latter for the cases cited by the court as authority for this proposition deal with the use of poisons for fumigation and pest-control purposes, administered on the ground.¹⁴ If the court was referring to the aircraft itself as "inherently dangerous," the proposition is wholly unsupported.

Miles v. Arena Co.,¹⁵ the next decision, and the first of a series of California decisions, held the promoter-farmer of the dusting operation liable

⁷ *Miles v. Arena Co.*, 23 Cal. App. (2d) 680, 73 P. (2d) 1260, (1937).

⁸ *Lundberg v. Bolon*, 67 Ariz. 259, 194 P. (2d) 454 (1948); *Jeanes v. Holtz*, ... Cal. App. ..., 211 P. (2d) 925 (1949).

⁹ *Chapman Chemical Co. v. Taylor*, ... Ark. ..., 222 S.W. (2d) 820 (1949); *Burns v. Vaughan*, ... Ark. ..., 224 S.W. (2d) 365 (1949); *Kennedy v. Clayton*, ... Ark. ..., 227 S.W. (2d) 934 (1950).

¹⁰ 42 Ariz. 503, 27 P. (2d) 678 (1933).

¹¹ The general rule is that an employer of an independent contractor is not liable for the torts of the contractor or the contractor's servants. Restatement, Torts §409 (1934); 57 C.J.S. §584 and cases there cited. Where though, the work is inherently or intrinsically dangerous, liability for harm caused cannot be evaded by employing an independent contractor, for in such cases the employer is responsible for the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous nature of the work. Restatement, Torts §427 (1934); 57 C.J.S. §590. "Inherently dangerous" means not only that the work itself or the instrumentalities used are such as can be safely performed only by the exercise of special skill and care, but also that the work, if unskillfully and carelessly done, involves a grave risk of serious property damage, bodily harm or even death. Comment, RESTATEMENT, TORTS §427 (1934). See further 23 A.L.R. 1084.

¹² 42 Ariz. 503, 507 (1933).

¹³ Many states had early considered the airplane to be a modern novelty of transportation, dangerous in operation. Section 5 of the UNIFORM STATE LAW FOR AERONAUTICS imposed absolute liability for damages by aircraft to persons or property on land or water, unless the injured party was at fault. See, RHYNE, AVIATION ACCIDENT LAW 65 *et seq.* (1947). Fourteen of the twenty-three states which have adopted this section on surface injuries have retained the feature of absolute liability. These states are listed at 235 CCH AVIATION LAW SERVICE p. 11002, §11000 *et seq.* (1943).

¹⁴ *Medley v. Trenton Investment Co.*, 205 Wis. 30, 236 N.W. 713 (1931); *St. Louis & S.F.R. Co. v. Madden*, 77 Kan. 80, 93 Pac. 586 (1908).

¹⁵ 23 Cal. App. (2d) 680, 73 P. (2d) 1260 (1937).

for damages caused the plaintiff's nearby apiary, due to the drifting of poisonous dust on a windy day. Although the case was decided four years after the *Fricker* Case, *supra*, neither counsel cited it in the briefs, and the court thought that this was a case of first impression in this country. They reasoned that the fact situation presented, drifting of poisonous dust to adjacent property, was similar to drifting smoke, dust, noxious gases or similar substances originating on the defendant's property, and that the defendant should be responsible in damages for the resulting nuisance. The court did not speak of crop-dusting as "inherently dangerous," nor did the issue of shifting the liability to the independent contractor arise. In fact, the court said, "It must be conceded that, in itself, dusting vegetables to kill pests that prey upon them is a necessary and lawful operation which the owner of the vegetables may perform, either himself or through his servants, or may have performed by an independent contractor. However, he should not do the dusting, or have it done, under conditions which would indicate to a reasonably prudent person that damage to his neighbor would result.¹⁶ From these words, it may be deduced that the California court was not holding the farmer or the "duster" to the high degree of care that the Arizona court felt necessary in the *Fricker* Case, *supra*, and that in the future the courts should allow the common law defenses to be raised.

The third of the three early decisions, *Hammond Ranch Corp. and Homer Ricks v. Dodson and Williams*,¹⁷ presented facts very similar to those of the *Fricker* Case, *supra*, with the court here ruling that crop-dusting was "inherently dangerous" and thereby denying the defendant's attempt to shift the liability to the "independent contractor-duster."¹⁸ No cognizance was taken of the nuisance theory of the *Arena* Case, *supra*. Thus, prior to 1948 both the Arizona and the Arkansas courts held crop-dusting to be "inherently dangerous," resulting in absolute liability, whereas the California court in the *Arena* Case, *supra*, held the defendant to a degree of care no higher than that of a reasonably prudent man.

In three of the next six cases, decided within the last two years, the defendant has avoided liability. In *Lenk v. Spezia et al.*,¹⁹ notice of the dusting operation had been given to the plaintiff, but he failed to take

¹⁶ 23 Cal. App. (2d) 680, 683, 73 P. (2d) 1260, 1262 (1937).

¹⁷ 199 Ark. 846, 136 S.W. (2d) 484 (1940).

¹⁸ Shifting of liability to the independent contractor-duster was again attempted in the most recent of these decisions, *Kennedy v. Clayton*,... Ark...., 227 S.W. (2d) 934 (1950), but the Arkansas court adhered to the rule of *Gerard v. Fricker*, the landmark case, in holding that the promoter's responsibility may not be delegated to an independent contractor thereby evading liability, as the task undertaken was of an "inherently dangerous" nature.

In *Britton v. Industrial Commission of Wisconsin*, 248 Wis. 549, 22 N.W. (2d) 525 (1946), the employer of the aviator was held liable for compensation in the death of the employee during a crop-dusting operation. On appeal, it was contended that the canning company which had engaged the crop-duster for the farmer-employer was liable for such compensation. Held, the decedent had not performed services directly for the canning company as the farmers owning the fields had the final determination as to whether the land would be "dusted" or not. The test adopted by the court was that if the canning company had been bound under contract with the farmers to dust the peas at its own expense and had equipment which it operated for that purpose, they, the canning company, would have been liable for the compensation.

¹⁹ ... Cal. App...., 213 P. (2d) 47 (1949). This court lingered at great length over the problems relating to the duty owed trespassing honeybees. The court proceeded on the assumption that bees are domestic animals and resolved that wanton and malicious conduct and intent to injure and destroy was needed for recovery when trespassing bees are injured. But see, 2 Bl. Comm. 391 (Gavit Ed.) (1941), where bees are considered *ferae naturae* capable of only qualified property ownership.

precautions to protect his apiaries, whereas on previous occasions he had screened the beehives, thereby protecting his honeybees. The burden of proof on the plaintiff was very difficult as others in the area had also sprayed their fields about this time, and the understandable difficulty of proving which poisonous dust had caused the death of the hives was insurmountable. The defense of contributory negligence was allowed by the California court, and the defendant prevailed.

In *Jeanes v. Holtz et al.*,²⁰ another California decision, the plaintiff alleged that no forewarning notice had been given of the dusting operation as required by statute,²¹ and that his bees had been damaged thereby. The court answered this contention by stating baldly that notice would not have stopped the bees from wandering, and their resultant contact with the poison. This district of the California Court of Appeals it seems, did not have the advantage in point of time, of the *Spezia* decision, *supra*, decided the next month by another appellate district, where the notified farmer's failure to screen his beehives resulted in denial of recovery.²² Here the plaintiff did not have that precautionary warning, and yet was denied recovery, for he had failed to assert that the resulting damage was occasioned by the bees contacting the poison on his own property. The court adopted some dictum of an Arizona decision, *Lundberg et al v. Bolon*,²³ which indicated that where the bees come in contact with the dust as trespassers, recovery must be denied. A question might be raised as to a bee's capacity to be considered a trespasser. The defense of trespassing of bees might be countered by a theory of license, for the plaintiff should not be heard to call them trespassers, after he has previously accepted the benefits of their cross-pollination. This question may soon have to be answered by the courts, for damage to apiaries seems to be the most prevalent harm occasioned by dusting operations in the majority of the reported decisions.²⁴

In the third case in which the farmer escaped liability, *Chapman Chemical Co. v. Taylor*,²⁵ the action was originally brought against a rice growing company for damages caused plaintiff's cotton crop. The defendant rice company filed a cross-complaint, in the nature of an interpleader, against the manufacturer of the chemical dust, 2,4-D,²⁶ alleging either joint liability, or complete liability on the part of the manufacturer. The basis of the cross-complaint was similar to Cardozo's reasoning in the case of *MacPherson v. Buick Motor Car Co.*,²⁷ in that the chemical company failed to perform tests on the floating power of the dust prior to its being offered for sale. The defendant rice company was absolved of all liability, but the chemical company was held accountable for the damage done by the use of such an "inherently dangerous" article on the principle that "where the thing, when put to the use for which it was intended, by reason of defects which were known, or by the exercise of reasonable care could have been known by the manufacturer, and the injury results from such use, the manufacturer is

²⁰ ... Cal. App...., 211 P. (2d) 925 (1949).

²¹ Rules and Regulations of the Director of Agriculture, §1(c), issued pursuant to CALIFORNIA AGRICULTURAL CODE §150 (Deerings, 1944); repealed by CALIF. STAT. 1949, c. 1043, §1. For present pest-control regulations in California, see the CALIFORNIA AGRICULTURAL CODE §§160.1-160.9 (Deerings, 1949).

²² See further *Lundberg v. Bolon*, 67 Ariz. 259, 194 P. (2d) 454 (1948) (question of liability turned exclusively on the issue of notice).

²³ *Ibid.*

²⁴ See note 4, *supra*.

²⁵ ... Ark...., 222 S.W. (2d) 820 (1949).

²⁶ The chemical name of 2,4-D is dichlorophenoxyacetic acid.

²⁷ 217 N.Y. 382, 111 N.E. 1050 (1916).

liable."²⁸ A showing was made by the rice company that it had sought counsel as to the intended use of the dust prior to purchase, and that a high degree of care in applying the dust had been exercised by their pilot. This decision seems to fall within the scope of the "inherently dangerous" rule adopted by this same Arkansas Court in the *Hammond Ranch Case*, *supra*, thereby obviating the necessity of proving a defect in the dust other than its highly poisonous nature. Quite possibly this same result would have been reached under the California "reasonably prudent man" test, for the damage incurred here would have been foreseeable if the highly volatile nature of the dust had been discovered in pre-marketing tests. Five months after the *Chapman Chemical Case*, *Burns v. Vaughan*²⁹ was decided by the same court. The identical issues were raised with regard to the extreme volatility of the 2,4-D dust, and both the farmer and the chemical manufacturer were held liable for the resulting damage. The manufacturer did not appeal the adverse judgment, and on appeal by the farmer the Arkansas court affirmed for the plaintiff. The court placed the onus upon the defendant-farmer, for he had constructive notice of the possible harm as previous dusting damage had recently occurred in the locality. Besides this failure to act upon such notice, the pilot of the aircraft continued to spray the defendant's fields during a high wind, although his instructions were not to do so. The court advanced the proposition that the defendant farmer could have avoided the damage by seeking advice with regard to proper application of the spray from the federal agricultural agent in his county, appointed specifically for that purpose.³⁰ It was this type of information that was not available to the farmer in the *Chapman Chemical Case*, thereby allowing him to shift the liability to the manufacturer of the chemical dust.

In the *Chapman Chemical Case*, and *Burns v. Vaughan*, the Arkansas Supreme Court warned that the promoter of a "dusting" operation should gain adequate knowledge of the methods of "dusting" to be employed, commensurate with the destructive propensities of the 2,4-D spray utilized. In spite of this warning, the most recent crop-dusting case, *Kennedy v. Clayton*,³¹ found the defendant again lacking this vital information, to his detriment. Even though safety precautions were employed by the defendant, the court felt that ordinary care was insufficient, and that the defendant should have exercised a degree of care commensurate with "known" danger. Although the defendant-farmer was held liable in this case, the last-mentioned test of liability by the Arkansas court seems to be a far-cry from the absolute liability normally rendered under the "inherently dangerous" test, and seems to be a more lenient stand approaching the "rea-

²⁸ *Ibid.*

Evidence presented in the *Chapman Case*, displayed to the amazement of the manufacturer of 2,4-D, that the spray vaporized in the air, and spread for miles. This showing certainly substantiated the court's warning of great danger that might occur if tests are not made when the sprays are placed on the market.

²⁹ . . . Ark. . . ., 224 S.W. (2d) 365 (1949).

³⁰ 38 Stat. 373 (1914), 7 U.S.C. §342 (1939). "Cooperative agricultural work shall consist of the giving of instruction and practical demonstrations in agriculture . . . to persons . . . in the several communities, and imparting to such persons information on said subjects through field demonstrations, publications, and otherwise . . ." Section 341 of the same title, provides for agricultural aid and instruction at any federally endowed agricultural college cooperating with the agricultural extension program.

³¹ . . . Ark. . . ., 227 S.W. (2d) 934 (1950). All three crop-dusting cases involving 2,4-D, the volatile "dust," have been decided by the Arkansas Supreme Court. It seems to be the most satisfactory chemical available for spraying rice fields, but is certain death for broad-leaved plants, thereby requiring great care in its usage.

sonably prudent man" test first adopted by the California courts. Such a test allows flexibility in determining what damage is foreseeable by the reasonable man under the peculiar circumstances of the activity, and alleviates the harsh penalty experienced by defendants where the "inherently dangerous" test is applied with almost certain liability.

It is hoped that from these relatively few cases some semblance of workable solutions may be found. It is relatively difficult to prescribe definite requirements, but the following are suggested to the promoter of crop-dusting ventures as guides in avoiding damage to adjacent property and resulting liability.

(1) Obtain complete information concerning the poisonous nature of the dust, its volatile propensities, and the proper methods of spreading by aircraft. Such information should be readily available from either the manufacturer of the chemical, his local representative, or from the local county agricultural agent.³² If the dust does not seem suitable for the airborne operation, substitute a more easily controlled chemical.

(2) Hire only experienced, capable and reliable pilots, for the stigma of the "inherently dangerous" rule does not allow the shifting of liability to the pilot under the independent contractor rule.³³

(3) Publish notice of the intended "dusting" in the local newspaper, and wherever possible, contact adjacent landowners personally, informing them of times, dates, and suggested precautions they may take.³⁴ The cases indicate that notice, if given, may shift the burden of loss for the resulting damage to the adjacent landowner, if he failed to observe precautionary measures.³⁵

(4) Be explicit in the instructions given the pilot. Inform him that care must be taken in cutting-off the spray a safe distance before adjacent property is crossed in making turns for the return run.³⁶ The time of the cut-off should vary with the volatility of the dust, otherwise even slight wind will carry the poison for hundreds of yards resulting possibly in damage and liability. This last factor should be one of those discussed with the manufacturer of the dust, and the county agricultural agent.

(5) In conjunction with the pilot, and the United States Weather Service, obtain sufficient weather data, wind velocity and direction in particular, to enable pilot to choose the proper weather in which to operate. The pilot must be informed that all "dusting" is to cease when the wind reaches

³² See note 30, *supra*.

³³ CALIFORNIA AGRICULTURAL CODE §§160.2, 160.6 (Deerings, 1949) provide for the registration, licensing, and examination of all pest-control operators using aircraft. Such control, if properly enforced would aid immeasurably in cutting down damage resulting from negligence of the operator.

³⁴ *Lundberg v. Bolon*, 67 Ariz. 259, 194 P. (2d) 454 (1948) (liability turned specifically on question of notice); *Burns v. Vaughan*,... Ark...., 224 S.W. (2d) 365 (1949) (recent dusting operations by others considered constructive notice to defendant); *Contra: Jeanes v. Holtz*,... Cal. App...., 211 P. (2d) 925 (1949) (failure of statutory notice held not proximate cause of damage, but see note 35, *infra*).

³⁵ *Lenk v. Spezia*,... Cal. App...., 213 P. (2d) 47 (1949) (failure to take precautionary measures after notice was given, held, contributory negligence, resulting in denial of liability).

³⁶ *Hammond Ranch Corp. v. Dodson and Williams*, 199 Ark. 846, 136 S.W. (2d) 484 (1940) (employer held liable when pilot did not cut off poison when circling over plaintiff's pastures, causing injury to livestock).

a velocity making any operations precarious.³⁷ Test runs should be made with an observer on the ground viewing the possibilities of danger. Flag signals might possibly be employed to inform the pilot of the success or imminent failure of the spreading operation.

Although many of these suggestions seem elementary, a recurrence of these factors has appeared in the reported decisions as forerunners of liability, thereby necessitating notice of them in all "dusting" operations in order to satisfy the courts' standard of a high degree of care. The position first assumed by the California court, and the present implication of a similar tendency on the part of the Arkansas court not to apply the "inherently dangerous" rule to all crop-dusting operations is an encouraging sign. It indicates that aerial crop-dusting, along with other phases of aviation, has come of age, and no longer is a mode of transportation that is to be penalized for its swiftness and flexibility. Despite this enlightened view of the use of aircraft, the aforementioned precautions should be observed, for the courts still recognize dangers inherent in the poisons used in aerial crop-dusting.

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³⁷ *Miles v. Arena Co.*, 23 Cal. App. (2d) 680, 73 P. (2d) 1260 (1938) (dusting operations took place on windy day resulting in damage to an apiary; held, the defendant should have exercised extreme care so as not to injure the property of others. Operating in strong winds resulted in harm foreseeable by the defendant).

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