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Pesticide Over-Spray & the Law of Strict Liability

— by Rudy Lachenmeier and Lori DeDobbelaere

When You Spray Do You Automatically Have to Pay?

In our last article, we briefly outlined what you need to consider initially when handling a pesticide over-spray case. In this article, we discuss whether the sprayer can be held strictly liable for applying a pesticide on his property or the property of another. Of course, if the application is made in a negligent manner (e.g. in too high of winds), then it will not really matter if strict liability is available. However, in cases where the sprayer has done everything properly and in a safe manner, the availability of strict liability to the claimant becomes crucial. In order to analyze this issue, we need to first break down the spraying into two types – aerial spraying (i.e. crop dusting) and ground based spraying.

Aerial Spraying

The first case in Oregon to address whether the aerial spraying of a pesticide is an abnormally dangerous activity[1] was *Loe v. Lenhardt*, 227 Or 242 (1961). In that case, defendant had aerially applied a defoliant to his property which drifted onto plaintiffs' property, damaging their seed crops. The court began its analysis by holding that whether an activity is ultra-hazardous is a question for the court and is not for the fact-finder to decide. The court noted that "crop dusting is an activity sufficiently freighted with danger." It held that, although crop dusting is an accepted practice at the appropriate time and place, "spraying chemicals from a plane is capable of inflicting damage on neighboring crops notwithstanding the exercise of the utmost care by the applicator." Accordingly, defendant could be held strictly liable for aerially spraying his crops.

The next case to examine strict liability in the context of an aerial spraying of a pesticide was *Bella v. Aurora Air Inc.*, 279 Or 12 (1977)[2]. In *Bella*, the landowner had hired his co-defendant to aerially spray the herbicide 2,4-D on his wheat crop. The 2,4-D drifted and damaged plaintiff's mint crop. One of the issues was whether the aerial spraying of 2,4-D is a ultra-hazardous activity. The court held that when determining whether an activity is ultra-hazardous, you need to look at the locality and the circumstances where the activity was done. If the threatened harm is "very serious," even a low probability of harm can give rise to strict liability. The court noted that the legislature had regulated the use of the ester formulation of 2,4-D (the type that was used in this case). It therefore concluded, without any real analysis of the factors it enumerated, that the aerial spraying of a 2,4-D ester is ultra-hazardous.

Accordingly, it is very clear that in Oregon, if a person aerially applies a pesticide, he can be held strictly liable for doing so if any damage ensues. Whether that is true for ground spraying is still an open question.

Ground Spraying

Although *Koos v. Roth*, 293 Or 670 (1982) does not deal with aerial spraying, it does involve another common farming practice – field burning – and is also the leading strict liability case in Oregon. The court in *Koos* discussed the rationale behind allowing strict liability and provided some guidance on what may or may not be an abnormally dangerous activity.

The court stated that "when a person engages in . . . a dangerous activity, useful though it may be, he becomes an insurer." The court reasoned that the person who is engaged in the dangerous activity is the person who should bear the risk of loss and not the innocent third-party who has been damaged. The issue is "who shall pay for harm that has been done." The court concluded that "society has other ways to lighten the burdens of costly but unavoidable accidents on a valued industry than to let them fall haphazardly on the industry's neighbors."

In determining whether an activity rises to the level of an "abnormally dangerous" activity, the court stated:

> Whether the danger is so great as to give rise to strict liability depends both on the probability and on the magnitude of the threatened harm. If the consequences of a mishap are potentially lethal or highly destructive of

> health or property, a slight likelihood that they will occur suffices, even if the harm in the actual occurrence is less severe. Conversely, we have held that even when the risk 'only moderately threatens economic activities rather than harm to life, health or property or environment,' the activity may carry strict liability if the consequences are highly probable or, as stated in *Bella*, if the activity can be carried on 'only with a substantially uncontrollable likelihood that the damage will sometimes occur.'

The court rejected the premise that the court should consider the utility and value of the activity to the community. It reasoned that the determination of the utility and value of a particular activity to the community is too subjective. Furthermore, a person is not immune from strict liability simply because the activity is appropriate for the place in which it was conducted. However, "a dangerous activity is not extraordinarily so if nearly everyone routinely does it or expects to have it done for him." The provision of electricity or irrigation water are examples of activities that may be dangerous but are not "abnormally" so because nearly everyone expects that these will be provided for them.

The fact that an activity may be regulated can play a factor in whether an activity is abnormally dangerous but it is not determinative. In addition, the fact that a person obtained a permit or license to perform the activity does not preclude liability. The *Koos* court ultimately determined that field burning is an abnormally dangerous activity.

In *Burkett v. Freedom Arms Inc*, 299 Or 551 (1985), a firearms case, the court examined Restatement (Second) of Torts (1965) section 519 and 520. Section 519 states "one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." Section 520 lists 6 factors to consider when determining whether an activity is abnormally dangerous. Those factors are:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
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> (c) inability to eliminate the risk by the exercise of reasonable care;
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> (d) extent to which the activity is not a matter of common usage;
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> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

The court stated that Oregon has never explicitly adopted these six factors in determining whether an activity is abnormally dangerous. "While some of the factors may be relevant to the inquiry, our focus has been on 'assessing abnormal hazards by their potential for harm of exceptional magnitude or probability despite the utmost care." Accordingly, it appears that the only factors of the six that really have any significance in the final analysis of whether an activity is abnormally dangerous are factors "b" and "c" – likelihood that the harm that results will be great and inability to eliminate the risk by the exercise of reasonable care.

There has only been one case in Oregon which discussed the ground spraying of a pesticide: *Speers & Sons Nursery, Inc. v. Duyck*, 92 Or App 674 *rev. denied* 307 Or 182 (1988). This case came before the court on defendant's Rule 21A(8) motion to dismiss. The only allegation in the complaint that was relevant to this motion was the one that stated that defendant sprayed "a poisonous chemical herbicide which caused damage to plaintiff's trees." The court stated that it needed to first look to the statutes and regulations which may reflect policy and value judgments regarding the activity, in this case ORS chapter 634. This chapter addresses the application of pesticides but does not give any indication whether the legislature viewed tractor applications of herbicides as abnormally dangerous.

The court then looked to the facts surrounding the activity. Because this was a Rule 21 motion to dismiss, the court was limited to looking at the facts as they were alleged in the complaint. The court determined that the allegations in the complaint were not sufficient to permit the necessary analysis and that further factual development was necessary. The court concluded that the facts alleged described an

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activity that *may* be dangerous and therefore defendant's motion to dismiss should have been denied.

What does all this mean? It means that the issue of the application of strict liability to a ground spraying of a pesticide is still an open question and may well be fact specific. Some pesticides can be sprayed safely and some cannot. For instance, the amine formulation of 2,4-D can be applied safely if certain precautions are taken. Certain sprayer nozzles reduce drift to an almost non-existent level and some nozzles make drift much more likely. The issue will be can the risk of damage be eliminated "by the exercise of reasonable care." As the *Speers* case shows us, this issue cannot be decided at the early stage of a case but depending upon the case, may be an issue for summary judgment. However, given the reluctance of many judges to grant summary judgment, whether a particular ground spraying was abnormally dangerous may not be determined until after all the evidence is in and defendant has moved for a directed verdict. ❖

[1]The courts use the terms "ultra-hazardous" and "abnormally dangerous" interchangeably.
[2]One of the author's of this article, Rudy Lachenmeier, represented the landowner in this case.

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Case Study

Jury to Decide Whether Friend of Gunman was Negligent for Harm to Hostages

— *by* Jeffrey D. Eberhard

In Oregon, unless a plaintiff can establish a status, relationship, or a particular standard of conduct that creates a defendant's duty, the issue of a defendant's liability for plaintiff's harm depends on whether the defendant's conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff. The Oregon Court of Appeals recently explored the application of this rule in the context of harm caused by the criminal acts of a third party.

In *Fraker v. Benton County Sherriff's Office, et al,* 214 Or. App. 473, Oregon Court of Appeals (August 22, 2007), shortly after Ken Fraker was indicted for sex abuse, he told a friend (defendant) that he had a gun and wanted to kill his wife and step-daughters (plaintiffs). The defendant convinced Fraker to give her the gun, which she placed in the trunk of her car. Fraker later surrendered to police and was released on home detention. Because Fraker had no local residence, defendant allowed him to reside at her apartment pursuant to a "roommate agreement" defendant entered into with Benton County Community Corrections (BCCC) in which she agreed to remove all drugs, alcohol, and firearms from her home and to report Fraker to BCCC if he left her residence at unauthorized times. While borrowing defendant's car on a BCCC approved visit to his attorney's office, Fraker traveled to plaintiff's residence where he held them hostage for several hours at gunpoint before killing himself. Plaintiffs sued defendant for negligence, claiming that she was liable for the harm Fraker caused them.

Arguing that she had no special relationship with plaintiffs and that Fraker's criminal actions were not the reasonably foreseeable result of her own actions, defendant moved for summary judgment. Plaintiffs responded to defendant's motion by claiming that she did have a special relationship with plaintiffs by virtue of the "roommate agreement" she had entered into with BCCC. In addition, plaintiffs argued that defendant was liable for their harm under a general foreseeability theory because she knew of Fraker's propensity for violence, failed to disclose his threats of killing plaintiffs to authorities, and made her car available to

> Claims Pointer: In order to prove negligence in the absence of some type of "special relationship," a plaintiff must show that a defendant's conduct "unreasonably created a foreseeable risk of harm of the kind that befell the plaintiff." A defendant may be found liable for harm caused by the criminal acts of a third party if it can be shown that the defendant provided more than "mere facilitation" of the third party's criminal acts.

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him knowing that there was a gun in its trunk. The trial court granted defendant's motion.

On appeal of the trial court's summary judgment decision, the Oregon Court of Appeals found the that the roommate agreement defendant entered into with BCCC was not a contract to take charge of Fraker, nor did it create any special relationship between defendant and plaintiffs, let alone one that imposed a special duty on defendant to guard plaintiffs from harm. The Court did, however, find that defendant may be liable to plaintiffs in negligence if it could be shown that Fraker's criminal conduct was a risk that was directly related to defendant's failure to report his threats and allowing him access to a gun. The Court concluded that on these facts, a jury could find both that it was reasonably foreseeable that Fraker would harm plaintiffs and that defendant's conduct was unreasonable in light of that risk. The Court reversed the trial court's summary judgment decision and remanded the case for further proceedings. ❖

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