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PESTICIDE USE AND LIABILITY IN NORTH DAKOTA

The danger of pesticide poisoning to man and domestic animals has become a real concern only in recent years. One study in Florida demonstrated that pesticides are definitely the most significant causative agents in accidental death by poisoning of children.¹ The danger of dermal absorption by way of direct application and gross contact, through improper storage and disposal of containers, and by way of occupational and environmental exposure has also been made far more apparent as a result of other studies in this area.²

In addition, the beneficial effects of such a pesticide as 2,4-D, for example, are matched only by its potential for harm. While relatively harmless to narrow-leafed plants, 2,4-D does not discriminate between valuable and harmful broad-leafed plants, and it will kill many important commercial crops if applied to a field for which it was not intended.³ In the dry atmosphere of the West and Southwest, where 2,4-D decomposes very slowly, it has been shown to have killed seedlings in soils as long as six to nine months after its application.⁴

Due to the hazards involved with the use of these chemicals, a relatively new area of liability has arisen in recent years, a liability extending to manufacturers and users of pesticides alike. Liability is grounded upon statutory and common law principles. This note, therefore, treats potential liability for the manufacture and use of pesticides on the federal and state levels, and it also projects possible future theories of liability.

PESTICIDES—DEFINED

As discussed in this note, "pesticides" refers to those chemicals designated "economic poisons" by the Federal and North Dakota Insecticide, Fungicide and Rodenticide Acts. The Federal Act (FIFRA) defines economic poisons as:

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1. Rohrmann, *The Law of Pesticides*, 17 J. PUB. LAW 351, 366 (1968).
 2. *Id.* at 367.
 3. Note, *Crop Dusting*, 6 STAN. L. REV. 69, 70 (1953).
 4. *Id.* at 72.

(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, nematodes, fungi, weeds, and other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the Secretary (of Agriculture) shall declare to be a pest, and

(2) any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant.⁵

The North Dakota Act (NDIFRA) omits the second category from its definition and requires only economic poisons used as insecticides and fungicides to be registered, thereby excluding the entire area of herbicides. The State Laboratories Department, however, requires that herbicides as well as insecticides and fungicides be registered.⁶

In addition, the North Dakota Food, Drug and Cosmetic Act specifically excludes plant regulators from the requirements of that Act:

Nothing in subsection 20 . . . shall be construed to apply to any pesticide chemical, soil or plant nutrient, or other agricultural chemical solely because of its effect in aiding, retarding, or otherwise affecting, directly or indirectly the growth or other natural physiological process of produce of the soil. . . .⁷

Also omitted from regulation by the NDIFRA is the area of nematocides, controllers of nematodes—invertebrate, unsegmented round worms with long, saclike bodies which inhabit the soil, water, plants and plant parts.⁸

Both the Federal and North Dakota Acts include within their definition of "economic poisons" the chemicals designated in their titles. Insecticides are defined as substances intended for preventing, destroying, repelling or mitigating any insects—primarily mosquitoes and houseflies.⁹ Substances performing the same functions against fungi and rodents are designated fungicides¹⁰ and rodenticides.¹¹

Since no distinction will be made in the ensuing discussion, it will be important to remember that the term "pesticide" includes

5. Fed. Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135(a) (1964).

6. Letter from L. A. Koehler, State Laboratories Dept. to Robert E. Beck, March 12, 1970:

While they are not specifically named in the section of registration, herbicides are included in the section on definition. I am sure that it is the intent of this Act to regulate herbicides in the same manner other economic poisons are regulated. Herbicides have been registered with this Department since the law was adopted in 1947.

7. N.D. CENT. CODE § 19-02.1-01 (Supp. 1969).

8. Fed. Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135a (1964).

9. *Id.* at § 135(c).

10. *Id.* at § 135(d).

11. *Id.* at § 135(e).

a broader range of chemicals subject to regulation by the Federal than by the State Act.

MANUFACTURER'S AND SELLER'S LIABILITY

A duty of care binds manufacturers and sellers of pesticides. This duty includes a duty to warn of product-connected dangers, a duty on the part of the manufacturer to subject the compound to reasonable tests, and a duty on the part of the seller to subject the product to reasonable inspection.¹²

The first and second duties are implied in the NDIFRA,¹³ the FIFRA¹⁴ and the law of torts.¹⁵ "The third is a common law duty imposed as a matter of law and practicality."¹⁶

A manufacturer can be held liable for any injury caused by a breach of these duties either as a statutory violation or under common law negligence principles. And even though a manufacturer comply with the specific labeling requirements of the NDIFRA and the FIFRA, such compliance may not be sufficient to free him from liability. A 1965 case illustrates the scope of this duty. Two farm laborers died after spreading parathion dust. The label on the dust container warned:

CAUTION: May Be Fatal If Swallowed, Inhaled or Absorbed Through Skin. Rapidly Absorbed Through Skin. Do not get in eyes or on skin. Wear natural rubber gloves, protective clothing and goggles. In case of contact wash immediately with soap and water. Wear a mask or respirator of a type passed by the U. S. Department of Agriculture for parathion protection. Keep all unprotected persons out of operating areas or vicinity where there may be danger of drift. Vacated areas should not be re-entered until drifting insecticide and volatile residues have dissipated. Do not contaminate feed and food-stuffs. Wash hands, arms and face thoroughly with soap and water before eating or smoking. Wash all contaminated clothing with soap and hot water before re-use.¹⁷

The Court held that the jury could have found that the manufacturer should have known that his product would be used by illiterate laborers and should, therefore, have included a symbol—such as a skull and crossbones—in addition to the label's written warning.¹⁸ This decision is particularly applicable to those areas of North Dakota in which migrant, non-English speaking workers are seasonally employed.

12. Rohrmann, *supra* note 1, at 369.

13. N.D. CENT. CODE § 19-18-03 (1960).

14. Fed. Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135a (1964).

15. See W. PROSSER, THE LAW OF TORTS 649 (3d ed. 1964).

16. Rohrmann, *supra* note 1, at 369-370.

17. Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 403 (5th Cir. 1965).

18. *Id.* at 405.

. . . the area of greatest activity is the possible liability under a breach of warranty theory. There is considerable authority to the effect that manufacturers and sellers of pesticides are bound by the implied warranty of fitness for a particular purpose and the implied warranty of merchantability.¹⁹

Both of these warranties are covered by the Uniform Commercial Code (UCC),²⁰ which is the law in North Dakota.

Even before the passage of the UCC, however, North Dakota cases were holding that where a buyer purchases farm machinery or grain, these materials were covered by implied warranties of fitness.²¹ With the incorporation of the Implied Warranties of Merchantability and Fitness²² into the North Dakota Century Code in 1966 within the UCC, these warranties simply assumed statutory as well as common law authority. Moreover, such a manufacturer or seller may also bind himself by express warranties, the breach of which will give rise to liability for any resulting injury.²³

Traditionally, warranty liability could only be utilized by a prospective plaintiff who could prove that he was injured, that the injury was a result of negligence of the manufacturer, and that he was in privity of contract with the manufacturer. "The area of privity, however, is in a state of great transition. A few jurisdictions have altered this requirement or wholly obliterated it. . . ."²⁴ And, in a suit of this sort, no formal prerequisites may be required if, as a matter of law, the pesticide involved is considered inherently dangerous.²⁵

Another somewhat less significant theory in the case of a person injured by a defective pesticide is that of fraud and deceit.

Here again, if a plaintiff alleges fraud in the sale of pesticide in an effort to recover for some injury he has suffered, he may be forced to prove that he was in privity of contract with the manufacturer or seller. As with the warranty theory, however, the doctrine of privity in relation to fraud is also changing, although the inherent danger of the compound has nothing to do with the decline of this doctrine in these cases.²⁶

19. Rohrmann, *supra* note 1, at 369-370.

20. N.D. CENT. CODE § 41-01-01 (1960).

21. Deere & Webber Co. v. Moch, 71 N.D. 649, 3 N.W.2d 471 (1942); McLane v. F. H. Peavey & Co., 72 N.D. 468, 8 N.W.2d 308 (1943).

22. N.D. CENT. CODE § 41-02-31, -32 (1960).

23. Express warranties are governed by U.C.C. § 2-313 and N.D. CENT. CODE § 41-02-30 (1960).

24. Rohrmann, *supra* note 1, at 370.

25. *Id.* at 370.

26. *Id.* at 371.

USER'S LIABILITY

Pesticide Residues

The civil and criminal sanctions of the North Dakota²⁷ and Federal²⁸ Food, Drug & Cosmetic Acts become operative if a food introduced into intrastate or interstate commerce is adulterated. An agricultural commodity is considered adulterated if it contains any pesticide chemical, unless a regulation limiting the quantity is in effect, and the use or intended use of such substance conforms to the terms prescribed by the regulation.²⁹

The reference here is to the tolerance levels set by the Department of Health, Education and Welfare (HEW). Tolerance levels are the amount of pesticide residue allowed on agricultural commodities since such amount is considered below the amount which causes danger to man or animals.³⁰ Certain pesticides, however, are allowed no tolerance levels—that is, they are considered too dangerous to be allowed a residue or are thought to leave no residue and are therefore registered on a “zero tolerance” basis. One difficulty with the zero-tolerance concept is that the capability of discovering residues on commodities tested is dependent upon the sensitivity of the testing device; since testing devices are constantly being refined, pesticides originally thought to leave no residue, and therefore registered on a zero tolerance basis, have since been found to leave a residue.³¹ The manufacturer's registration has been subsequently revoked and the user's crop become subject to seizure.³²

Agricultural commodities shipped in interstate commerce are subject to the provisions of the Federal Food, Drug & Cosmetic Act and are subject to registration, testing, possible seizure and subsequent penalties prescribed by the Act. “Under the existing legislation, explicit provision is made for interagency action involving the United States Department of Agriculture (USDA) and HEW. . . . In addition to this interagency agreement, the Federal Committee on Pest Control was established in 1964 to coordinate all federal activities in monitoring pesticide residues, guiding research programs and administering public information programs.”³³ Under

27. N.D. CENT. CODE § 19-02.1 (Supp. 1969).

28. 21 U.S.C. § 331 (1964).

29. *Persistent Pesticides*, 6 COLUM. J. L. & SOC. PROB. 122, 132-133 (1970).

30. See *No Residue and Zero Tolerance*, 20 FOOD DRUG COSM. L.J. 608 (1965).

31. *Id.*

32. Ward, *A Dynamic Statute for Pesticides*, U.S. DEPT. OF AGRICULTURE YEARBOOK, 271, 277 (1966):

Since “no-residue” was dependent on the sensitivity of the methods available, it became inevitable that improved chemical analytical methods would create legal problems. This has indeed happened.

The stage had been set . . . for the part FIFRA and its enforcement was to play in the dramatic developments which started on November 9, 1959. That was the day the Secretary of Health, Education, and Welfare announced seizure of cranberries contaminated through misuse of aminotriazole.

the Food, Drug & Cosmetic Act, the Secretary of HEW is delegated the responsibility of enforcement of tolerance standards. If the residue level is above the tolerance established by HEW, its Secretary is authorized to stop the shipment of such commodities through a court injunction³⁴ or to have the commodity seized.³⁵ Any person violating the provisions of the Act is guilty of a misdemeanor and will, upon conviction, be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both.³⁶ But if another violation is committed after a conviction of such person under the Act has become final, he is subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both.³⁷

Under the North Dakota Act, the State Laboratories Department is authorized to test and seize agricultural commodities shipped in intrastate commerce.³⁸ The standards adopted by the Department are essentially those adopted by HEW.³⁹ The penalties differ significantly. The State Act prescribes a fine of not less than \$25 and not more than \$100, or imprisonment in the county jail for not less

This chemical is a herbicide which was first used on nonfood areas to control grassy weeds. It was then found to be effective in removing weeds from cranberry bogs, and an application for its registration for that usage was filed with the Agriculture Department.

Extensive toxicological work was required, and a petition for a tolerance for aminotriazole on cranberries was presented at levels which would permit use during the spring months. After careful consideration of the toxicological facts, the petition was denied and the use on cranberries—in accordance with the spring pattern of application—was not registered.

The company then carried out extensive tests using the material in the fall within 10 days after the berries were picked. This use was shown not to leave any residue on the succeeding crop—and to give good weed control. With the concurrence of FDA this use was then registered.

Unfortunately, some cranberry growers applied the herbicide in the spring and harvested contaminated berries. This type of misuse brought about the "cranberry episode" of 1959.

33. *E.g., Persistent Pesticides, supra* note 29, at 134, 136:

How well does this interagency structure work in practice? In the area of preserving environmental quality, the results have not been encouraging. The problem facing the FDA in trying to establish tolerances which take into consideration the long-term effects of low doses of chemical residues on humans seems to have been ignored and is not answerable from present research. Numerous complaints of inefficiency on the part of the Agriculture Research Service, charged with enforcement of the FIFRA, seem to be warranted. According to the General Accounting Office, the Service has failed to report a single violator for prosecution in 13 years. Frequent complaints are made that the USDA has as its principle obligation protection of agricultural interests, hence conflict of interest exists by merely having pesticide regulation within its jurisdiction. The lack of an ecological focus and a firm policy of ecological management, which was noted in 1964, seems all too apparent today as well. Under the current statutory provisions, fish and wildlife are thought to be protected. However, it is noteworthy that while the USDA and HEW have explicit functions emanating from the FIFRA and the Federal Food, Drug, and Cosmetic Act, respectively, the Interior Department serves only in an advisory capacity under the present interagency agreement.

34. Pure Food and Drug Act, 21 U.S.C. § 334(a).

35. *Id.* at § 332.

36. *Id.* at § 333.

37. *Id.*

38. N.D. CENT. CODE §§ 19-02-01, -03, -05 (Supp. 1969).

39. Letter from L. A. Koehler, State Laboratories Dept. to Robert E. Beck, Oct. 3, 1968: "I wish to advise you that we have not adopted tolerances for pesticide chemicals and food additives at the state level. We acknowledge and accept Federal tolerances in this area."

than ten days nor more than thirty days, or both.⁴⁰ But if another violation is committed after a conviction under the Act has become final, such person will be subject to a fine of not less than \$100 nor more than \$500, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or both.⁴¹

Aerial Spraying

At a minimum, a high duty of care is imposed upon the spray pilot. Due to the great variations in particle size, atmospheric forces, and aerodynamic turbulence, when the spray is applied, the pilot's ability to restrict its application to a given area is limited, and drift to other lands not intended to be sprayed is often the result. Aerial spraying has, therefore, been generally classified as an "ultra-hazardous activity".⁴²

North Dakota Supreme Court decisions indicate that the pilot must at least have been negligent in some aspect of his spraying activity in order for the applicator to incur liability.⁴³ Whether the pilot is spraying his own land or the land of another, however, the owner of the land sprayed will be liable for any injuries incurred as a result of the spraying, since duties arising in connection with such an ultrahazardous activity cannot be delegated to another.⁴⁴ Therefore, the owner of the land as well as the spray pilot may be held liable for damages arising as a result of negligent spraying. In addition, both the owner and the pilot may also be held liable for the non-negligent acts of the pilot under the theory of "strict liability" (discussed below).

"At the state level control over the use of pesticides is accomplished generally by both registration or labeling 'laws' and by means of use and application laws."⁴⁵ Because of the varying needs of different geographic regions, application laws are not uniform throughout the country. They generally include, by regulation or statute, licensing provisions and regulation of the use of pesticides.

North Dakota's licensing statute for spray pilots requires that they obtain a license for each aircraft used in aerial spraying.⁴⁶ Upon payment of a \$15 license fee and compliance with the rules and regulations prescribed by the State Aeronautics Commission, the Commission will issue a license. The statute also provides that any person violating the rules laid down by the Commission shall

40. N.D. CENT. CODE § 19-02.1-04 (Supp. 1969).

41. *Id.*

42. Rohrmann, *supra* note 1, at 375.

43. *Burt v. Lake Region Flying Service*, 54 N.W.2d 339 (N.D. 1952).

44. For the rules governing a principal's liability for the negligence of an independent contractor, see W. PROSSER, *THE LAW OF TORTS* 480 (3d ed. 1964).

45. *Persistent Pesticides*, *supra* note 29, at 139.

46. N.D. CENT. CODE § 2-05-18 (1960).

be punished by a fine not exceeding \$100 or by imprisonment for not more than 30 days or both.⁴⁷

The Aeronautics Commission requires that a private pilot submit evidence of having flown 500 solo hours, of which at least 250 shall have been in the type of aircraft in which his spray equipment is contained. He must have flown a minimum of five hours simulated dual spraying time under the direction of a qualified spray pilot with a commercial Federal Aeronautics Administration license, who has at least 100 logged hours of spraying time.⁴⁸ The Commission's regulations also encompass spraying procedures,⁴⁹ supervisory requirements⁵⁰ and post-spray procedures.⁵¹

In addition to penalties prescribed by the North Dakota Century Code, the regulations of the Aeronautics Commission reserve the right to either revoke existing licenses or refuse to issue them in the first instance where violations of any of its regulations have occurred.⁵² In North Dakota, where negligence must be proven in most instances (exception to be noted), failure to comply with these regulations may be considered negligence *per se*.

Other statutes also apply to claims for damages to persons or property through airplane use. One North Dakota Century Code provision concerning damages due to airplane use explicitly refers to "absolute liability" and defines it: ". . . whether the owner was negligent or not."⁵³ Under this concept, even if the pilot and the landowner have fulfilled all the requirements of the Aeronautics Commission and the Code provisions, as well as complied with the directions for use specified on the label, they may still be held liable for damages—the pilot directly and the landowner indirectly since liability for ultra-hazardous activities cannot be delegated. With the increased recognition of the need for environmental and personal protection, this concept may soon be applied by the North Dakota Supreme Court as well as by the North Dakota District Courts, at least one of which has already applied it.⁵⁴

However, another Code provision⁵⁵ tends to mitigate damages to sprayers and applicators of pesticides. According to the provision, no action may be commenced against the landowner or pilot unless the claimant has filed a verified report of the loss with the Aeronautics

47. *Id.*

48. RULES AND REGULATIONS OF THE NORTH DAKOTA AERONAUTICS COMMISSION Para. II(a)(1), (1970).

49. *Id.* at Para. IV(a) and (b).

50. *Id.* at Para. IV(c) and (d).

51. *Id.* at Para. V(a).

52. *Id.* at Para. XII.

53. N.D. CENT. CODE § 2-03-05 (1960).

54. Special Instructions to the Jury by Hon. Clifford Jansonius in *Lewis Jochim, Albert Meyer, Louis Schumacher v. Agrichemical Aerial Applicators, Inc.*, No. 20324, 20323, and 20325, Dist. Ct. 4th Jud. Dist. (Oct. 30, 1969) (from the files of Rausch & Chapman, Attorneys for Plaintiffs).

55. N.D. CENT. CODE § 28-01-40 (1960).

Commission, together with proof of service upon the sprayer within 60 days of the date the claimant knew of the loss. If the damage is alleged to have been done to growing crops, the report must be filed prior to harvesting of 50% of the crop.

No cases have yet arisen in North Dakota regarding other methods of application. However, since the dangers inherent in aerial spraying are not present to the same degree in other methods of application, it is doubtful that the concept of strict liability would be applicable to them. Cases which are most likely to arise regarding other methods of application will be treated in the following section.

Liability to Employees

Under North Dakota law, any employer is required to have Workmen's Compensation Insurance when employing in a hazardous activity.⁵⁶ Though agricultural employers have been excluded from this requirement,⁵⁷ if a farmer does have the insurance and has contributed to the Workmen's Compensation Fund, he is relieved of all liability by the North Dakota Code: "[The employee] shall have no right of action against such contributing employer . . . for damages for personal injuries, but shall look solely to the fund for compensation."⁵⁸ Workmen's Compensation Insurance covers the employee for injuries due to the employer's negligence, due to accidents, or due to the negligence of the employee himself.⁵⁹

If the employee can prove negligence, the North Dakota Century Code requires that the employer compensate him in the event that the employer does not have Workmen's Compensation Insurance.⁶⁰ This provision has been held to cover gratuitous employees as well as those working for compensation, but there must be evidence that the employer requested the help of the plaintiff.⁶¹

Another Code provision, however, modifies the employer's liability in that the employer is not required to compensate his employees for losses suffered by the latter in consequence of the "ordinary risks" of the business in which he is employed, nor in consequence "of the negligence of another person employed by the same employer in the same general business, unless the employer has neglected to use ordinary care in the selection of the culpable employee."⁶²

This provision simply restates the common law in these areas. Under the common law assumption of risk defense, for example, the

56. N.D. CENT. CODE at § 65-01-05 (1960).

57. N.D. CENT. CODE at § 65-01-02 (Supp. 1969).

58. N.D. CENT. CODE at 65-01-08 (1960).

59. N.D. CENT. CODE at § 65-01-01 (1960).

60. N.D. CENT. CODE at § 34-02-03 (1960).

61. *Olson v. Kem Temple, Ancient Arabic Order of the Mystic Shrine*, 77 N.D. 365, 43 N.W.2d 385 (1950); *Jacobs v. Bever*, 55 N.W.2d 512 (N.D. 1952).

62. N.D. CENT. CODE § 34-02-02 (1960).

employer is not liable to his employees for damages resulting from the ordinary risks of the business in which he is employed.⁶³ The Code provision also restates the common law defense of "fellow servant" as well as the correlative common law duty of providing suitable fellow servants. Yet another common law defense restated by the Code is that of "contributory negligence."⁶⁴ One District Court in North Dakota, however, has held "comparative negligence" to be the rule in this State.⁶⁵ None of these common law or statutory defenses are available to any employer covered by Workmen's Compensation Insurance.⁶⁶

The employer is bound by other common law duties as well. He has the obligation of providing a safe place in which to work, safe equipment with which to work, adequate warning and instruction of any possible dangers connected with the work, which the employer knew or should have known of, and promulgating rules for the conduct of his employees in order to make the work as safe as possible.⁶⁷ A breach of these common law duties with regard to pesticide use is also evidence of negligence.

The Exterminator

Another area involving pesticide liability deals directly with the question of an exterminator's responsibility for personal injury and death. While no such cases have yet arisen in North Dakota, most cases in other jurisdictions hold that the liability of one in this type of business depends upon a showing of negligence,⁶⁸ but several have held, because of the inherent dangers of such operations, the applicator is strictly liable.⁶⁹ However, both the owner of the property and the exterminator may be liable for failure to warn a tenant or other person who has a right to be on the property of the use of such pesticides. "Exterminators are required in some jurisdictions by statute or common law to know the nature and effect of the pesticides they use. A showing of the lack of such knowledge coupled with a resultant injury may be sufficient to constitute negligence and justify recovery for the plaintiff."⁷⁰

POSSIBLE THEORIES OF LIABILITY

Since the area of pesticide use and liability is a relatively unex-

63. W. PROSSER, *THE LAW OF TORTS* 550 (3d ed. 1964).

64. N.D. CENT. CODE § 9-10-06 (1960).

65. *Krise v. Gillund*, No. 11144, Dist. Ct. 5th Jud. Dist. (N.D. July 29, 1969).

This writer agrees strongly with the Hon. Eugene A. Burdick's reading of the phrase "except so far as" of § 9-10-06 of the North Dakota Century Code as lending itself readily to a comparative negligence interpretation, an interpretation which is certainly more equitable.

66. N.D. CENT. CODE § 65-01-01 (1960).

67. W. PROSSER, *THE LAW OF TORTS* 546-49 (3d ed. 1964).

68. Rohrmann, *supra* note 1, at 376.

69. *Id.*

70. *Id.* at 377.

plored field, and because cases are sparse, various incipient liability concepts are certain to gain wider acceptance in prosecutions for pesticide use. One such concept dates back in Anglo-American jurisprudence at least to the year 1200; the second is as new as pesticides; and the third lies somewhere in between.

Nuisance

At times the risk of pesticide use certainly outweighs its utility either to the defendant or the community. Under the concept of nuisance, a complainant so argues and calls for prohibition of pesticide use by court order.⁷¹

The Court would then undertake a balancing process considering such factors as the character and extent of the harm, the social value of the respective uses, the suitability of the uses or conduct in relation to the surroundings, the burden to avoid damage and perhaps the defendant's motive for his conduct.⁷²

One need only refer to Ohio⁷³ and California⁷⁴ in order to see that such decisions have already been made by statute or administrators. Legal Consideration of the Environment

Legal protection of the environment from large-scale pesticide applications has been attempted by court actions of the Environmental Defense Fund. EDF is a nonprofit, public-benefit corporation formed by a group of scientists who contend that courts of equity represent the best hope for action to protect the environment where legislative and administrative procedures have failed.

Headquartered in New York, EDF proposes to effect a change in national policy regarding pesticide use through legal actions brought on broad ecological grounds—asserting the fundamental, constitutional rights of all the people to an environment undiminished in quality.⁷⁵

In 1967, legal action brought by EDF was instrumental in stopping the use of DDT in several Michigan municipalities, and in 1968, 47 more Michigan municipalities were added to the EDF action.⁷⁶

Results of earlier EDF actions, and a similar case involving use of DDT by the Suffolk County Mosquito Control Commission in New York, have encouraged EDF plans for legal action at the highest level in the federal courts to pre-

71. Beck, *Pesticides and the Law*, 37 N.DAK.Q. 49, 63 (Winter 1969).

72. *Id.*

73. OHIO REV. CODE ANN. § 921.06-07 (Baldwin 1964).

74. CALIF. REV. CODE tit. Agriculture §§ 14001, 14031, 14061, 14091 (1965).

75. S. BLOOM AND S. DEGLER, *PESTICIDES AND POLLUTION* 59 (1969).

76. *Id.*

vent continued degradation of environmental quality by certain chlorinated hydrocarbons.⁷⁷

Trespass

In a 1959 landmark decision, the Supreme Court of Oregon held⁷⁸ the Reynolds Metal Company liable in trespass when fluoride compounds in the form of gases and particulates drifted from its plant chimney and settled on the plaintiff's land.⁷⁹ The plaintiff had been awarded \$71,500 for loss of the use of his land and \$20,000 for deterioration to his land. In a decision upholding the lower court's award to the defendant, the Court illustrated the basic impediment to the use of trespass as yet another basis of liability for the use of pesticides and overcame the impediment by reasoning which may become persuasive:⁸⁰

The view recognizing a trespassory invasion where there is no "thing" which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters. . . . It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a direct invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do a man's property if it is released. In fact, the now famous equation $E=mc^2$ has taught us that mass and energy are equivalents and that our concept of "things" must be re-framed.⁸¹

CONCLUSION

Various failings on the federal level in the area of pesticide legislation and enforcement have already been noted.⁸² They are, however, not limited to that level, as this writer learned during the course of his research.

Though some may look optimistically at the fact that the State Laboratories Department in North Dakota has been able to settle all cases of pesticide contamination outside of court, this writer, tending to be more cynical about such things, attributes this to inadequate staffing and enforcement capabilities. After all, the Department is delegated the responsibilities given to a number of federal agencies; yet it operates with a total of 38 employees, in-

77. *Id.* at 60.

78. *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Ore. 1959).

79. *Id.* at 797.

80. Beck, *supra* note 69, at 61-62.

81. *Martin v. Reynolds Metals Co.*, 342 P.2d at 793-794.

82. *See supra* note 29.

cluding a janitor and four stenographers. And it has only one part-time attorney.⁸³ Just what would the Department be able to do if a number of cases were not settled out of court?

Inadequate staffing is not the only drawback to enforcement of pesticide legislation. During a telephone conversation with a member of the State Aeronautics Commission concerning the applications of strict liability to aerial sprayers by North Dakota District Courts, that member remarked that the Commission was trying to fight such application of the concept but was having difficulties. If one considers, in the light of extensive evidence produced in recent years against pesticides, that strict liability would be a boon to the public, the remark by a member of a purportedly public Commission was revelatory of a lack of public sentiment. Conflict of interests?⁸⁴

But enforcement is no better than the legislation behind it, and legislation, or repeal of it, is necessary in North Dakota as well. The statute⁸⁵ limiting sprayers' liability by imposing a sixty-day limit and requiring a verified report to the Aeronautics Commission is rather inconsistent with the need for maximum rather than minimal controls in the pesticide use area. The large dichotomy between penalties imposed on the federal and state levels⁸⁶ as well as the dichotomy between pesticides covered by federal and state acts is further evidence of a need for the re-evaluation of state legislation in this area.

This writer recommends, instead, the swift adoption of a state policy designed to produce and maintain a high level of environmental quality, a policy implemented by legislation providing adequate staffing for agencies delegated the task of maintaining that quality; a policy implemented by removal of conflict of interest from such agencies; a policy implemented by removing limitations to liability of manufacturers and users of pesticides.

This writer also urges the lawyers and courts of this state to utilize existing concepts—such as the strict liability already provided by statute⁸⁷—and to forge new concepts suitable for waging all-out war upon environmental polluters. Other theories cited in this note are intended as suggestions, possibilities, not to be an exhaustive list. As a beginning, the courts ought to apply the theory of strict liability to at least all cases of airplane pesticide spray; they ought also to foresake the privity requirement where injuries have been sustained through manufacturers' negligence; and, in case of

83. State Laboratories Dept. of N.D., Biennial Report [1966-1968] at 3-4.

84. See *supra* note 29.

85. N.D. CENT. CODE § 28-01-40 (1960).

86. See *supra* p. 340.

87. N.D. CENT. CODE § 2-03-05 (1960).

legislative default,⁸⁸ the courts ought to adopt comparative negligence as the most equitable remedy in the case of those injured by pesticide use.⁸⁹

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88. Telephone conversation with the Hon. Eugene A. Burdick, Nov. 10, 1970: If the North Dakota Supreme Court in its decision on the case now before it on appeal (see, *supra* note 63) does not adopt the comparative negligence concept as the rule in this state, legislation will be presented to effect such a rule.

89. *See supra* note 65.