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Trespass - Basis of Liability - Damage Caused by Aerial Crop Spraying

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TRESPASS—BASIS OF LIABILITY—DAMAGE CAUSED BY AERIAL CROP SPRAYING.—Plaintiff brought an action of trespass against a neighboring landowner for crop damage resulting from the aerial application of chemicals over adjacent land. The trial court rendered judgment adverse to plaintiff. On appeal the Supreme Court of Oregon, in a case of first impression, *held,* one justice dissenting, that liability will be imposed in a case of unintentional intrusion, only when damage arises out of negligence or some extra hazardous activity and aerial spraying of defoliant is such a hazardous activity. *Loe v. Lenhardt,* 362 P.2d 312 (Ore. 1961).

At common law, every unauthorized entry upon the soil of another was a trespass, regardless of any fault on the part of the one who entered. The tendency has been to repudiate this doctrine of liability without fault,[2] subject of course, to the "extra hazardous activity" exception.[3] It is the duty of the court to decide as a matter of law whether a given activity, in a specific factual setting, is or is not extra hazardous.[4] The *Restatement* has denominated as "ultrahazardous" any activity which involves a risk of harm that cannot be eliminated despite the utmost care, and a matter not of common usage.[5] Although a number of courts have applied the test to various activities, its judically defined limits have yet to be completely disclosed. The keeping of explosives,[6] use of exterminating gas,[7] oil well drilling,[8] operation of aircraft,[9] and blasting[10] have been held to be ultrahazardous, thereby imposing liability without fault.[11]

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1. PROSSER, TORTS 54 (2d ed. 1955).
2. Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956); Smith v. Pate, 246 N.C. 63, 97 S.E.2d 457 (1957).
3. RESTATEMENT, TORTS § 166 (1934) "Except where the actor is engaged in an extrahazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry caused harm to the possessor or to the thing or third person in whose security the possessor has a legally protected interest."
4. Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1, 5 (1948).
5. § 520 (1934).
6. Exner v. Sherman Power Const. Co., 54 F.2d 510 (2d Cir. 1931).
7. Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948).
8. Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928).
9. Parcell v. United States, 104 F. Supp. 110 (S.D. W. Va. 1951).
10. Bedell v. Goulter, 199 Ore. 344, 261 P.2d 842 (1953).
11. Other underlying social and economic reasons for imposing absolute liability has been to shift the loss to one whose acts have been the proximate cause of a foreseeable risk; of preventing an actor who has increased the value of his property by a hazardous activity from being unjustly enriched at the expense of others; and to subject an economically valuable activity to a degree of responsibility. See generally Comments, **Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine,** 37 Calif. L. Rev. 269 (1949); Freedman, **Nuisance Ultrahazardous Activities, and the Atomic Reactor,** 30 Temp. L.Q. 77 (1957);

An examination of the cases concerning damage caused by aerial crop spraying show almost unanimous recovery,[12] generally upon the theory of negligence.[13] In many cases the spraying operations have been conducted under adverse conditions or without reasonable care, such as applying chemicals despite blowing winds[14] or failing to turn off the spray while circling over the plaintiff's land.[15] Some courts have upheld a finding of negligence solely on the basis of damage caused by the spraying operation, without any mention of careless conduct.[16] These cases which hold spraying, without more, to be negligent produce the same result as strict liability, but the method of arriving at the result is different. Under the negligence theory, the risk of doing the act even in the most careful manner is found to outweigh the utility, therefore the actor is at fault. Under strict liability, the court finds that the utility outweighs the risk, but the one benefitting from such activity must pay his way.[17] The instant case is the first common-law jurisdiction to have applied the concept of strict liability for damage caused by crop spraying. A Louisiana case held applicable the doctrine of strict liability, but this case is distinguishable because based on civil law principles.[18]

No cases in point have arisen in North Dakota.[19] It is probable that the issue may arise since crop spraying is an important activity in an agricultural state. To this end the proposed legislation would be desirable. (1) Enact a statute making ap-

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Seavey, **Nuisance: Contributory Negligence and other Mysteries,** 65 Harv. L. Rev. 984 (1952).

12. **Supra** notes 9, 10, 11 and 12.

13. Burns v. Vaughn, 216 Ark. 128, 224 S.W.2d 365 (1949) ". . . one who uses a dust of this kind 2,4-D is not liable to his neighbors in every case; negligence must be shown." Park v. Atwood Crop Dusters, 118 Cal. App. 2d 422, 257 P.2d 653 (1953) "The dusting was done under conditions which would indicate to a reasonable and prudent person that damage to plaintiff's crop would result." Lawler v. Skelton, 130 So. 2d 565 (Miss. 1961). The appellant has sought recovery upon the theory of absolute liability in certain cases, but the court has rejected each. See Harris v. United States, 205 F.2d 765 (10th Cir. 1953); Smith v. Okerson, 8 N.J. Super. 560, 73 A.2d 857 (1950) (ground application).

14. Faire v. Burke, 363 Mo. 562, 252 S.W.2d 289 (1952); Pitchfork Land & Cattle Co. v. King, 335 S.W.2d 624 (Tex. Civ. App. 1960).

15. Hammond Ranch Corp. v. Dodson, 199 Ark. 846, 136 S.W.2d 484 (1940).

16. Adams v. Henning, 177 Cal. App. 2d 376, 255 P.2d 456 (1953); Kentucky Aerospray, Inc. v. Mays, 251 S.W.2d 460 (Ky. 1952); Schultz v. Harless, 271 S.W.2d 696 (Tex. Civ. App. 1954).

17. See **Crop Dusting: Legal Problems in a New Industry,** 6 Stan. L. Rev. 69, 79 (1953).

18. Article 677 of the Louisiana Civil Code is patterned after the French Civil Code which provides that "a person is responsible. . . for the damage which is caused. . . by things which are in his custody." Since the article does not contain the word "fault" it has been held to impose liability regardless of fault.

19. **Cf.** Burt v. Lake Region Flying Service, 78 N.D. 928, 54 N.W.2d 339 (1952). The applicator was liable to the employing landowner for crop damage caused by the negligent mixing or application of spray.

plicators absolutely liable for all crop damage. (2) Require by statute all applicators to carry adequate liability insurance, or, in the alternative, to post a bond assuring financial responsibility adequate to cover crop spraying damage.[20] In applying the extra hazardous concept to crop spraying, where such a concept has not been expressly imposed before, *Loe v. Lenhardt* may well become a landmark case.

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20. See Note, **Liability for Chemical Damage From Aerial Crop Dusting,** 43 Minn. L. Rev. 531 (1959).