IMPOSITION OF STRICT LIABILITY FOR CROP DUSTING DAMAGE

Loe v. Lenhardt

72 Or. 1011, 362 P.2d 312 (1961)

Defendant hired an independent contractor to spray his crops by airplane. Plaintiff, an adjoining landowner, alleged that the spray damaged his land and crops. In an action for trespass, the trial court granted a judgment of involuntary nonsuit for defendant and directed a verdict in favor of the independent contractor. The Supreme Court of Oregon reversed for a new trial on the basis of strict liability. The court held that a landowner who undertakes an extra-hazardous activity, knowing of the high probability of harm involved, should be liable for the resulting damage if the activity miscarries. The element of fault in the landowner's conduct is the intentional subjection of his neighbor to a high degree of risk.[1]

Courts generally find liability for damage resulting from crop dusting[2] on the basis of negligence.[3] The crop dusting cases holding negligence have adopted two distinct theories.[4] One theory followed holds the defendant landowner liable only if he fails to exercise due care in applying the spray.[5] The other theory holds him liable if the plaintiff merely establishes the fact that it was the defendant's act which caused the damage.[6] Under the first theory, the failure to cut off the spray when making a circle over a neighbor's pasture,[7] spreading poison close enough to a neighbor's fence so his cattle could reach it,[8] or not making proper allowance for weather conditions[9] were held to be negligent acts. The second theory removes, for all practical purposes, the element of fault as a basis for defendant's liability, thus tending to apply the doctrine of strict liability under the guise of negligence.[10] It is generally held that an employer is not liable for the torts of an independent

---

[1] Loe v. Lenhardt, 72 Or. 1011, 362 P.2d 312 (1961). The court apparently intended "fault" to mean moral or social rather than legal fault in this instance.

[2] The term "crop dusting" in this note is used to describe the application of spray or powder by airplane.

[3] Link v. Spezia, 95 Cal. App.2d 296, 213 P.2d 47 (1949); 12 A.L.R.2d 436 (1950).

[4] Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868), the leading case returning to the doctrine of strict liability since negligence has become an important element of tort law, has not been followed in the crop dusting cases.

[5] Pitchfork Land & Cattle Co. v. King, 335 S.W.2d 624 (Tex. Civ. App. 1960), *modified*, 346 S.W.2d 598 (Tex. Civ. App. 1961).

[6] Adams v. Henning, 117 Cal. App. 2d 376, 255 P.2d 456 (1953).

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

[8] Underhill v. Motes, 158 Kan. 173, 146 P.2d 374 (1944).

[9] Faire v. Burke, 363 Mo. 562, 252 S.W.2d 289 (1952); Jones v. Morgan, 96 So.2d 109 (La. App. 1957); Miles v. A. Arena and Co., 23 Cal. App. 2d 680, 73 P.2d 1260 (1937).

[10] Adams v. Henning, *supra* note 6, at 378, 255 P.2d at 457; Heeb v. Prysock, 219 Ark. 899, 245 S.W.2d 577 (1952); S. A. Gerrard Inc. v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933); Aerial Sprayers Inc. v. Yerger, 306 S.W.2d 433 (Tex. Civ. App. 1957).

contractor.[11] However, once the plaintiff establishes negligence by an independent contractor, the majority of courts have made an exception to the general rule and held the landowner liable.[12]

The only other reported case holding the landowner strictly liable for crop dusting damage is *Gotreaux v. Gary*.[13] In that case, the herbicide sprayed by defendant drifted onto the fields of plaintiff and destroyed his crops. In holding for plaintiff, the court said:

> Although the use of the spraying operation was lawful it was carried out in such a manner as to reasonably inconvenience plaintiff and deprive him of the liberty of enjoying his farm.[14]

The court based its decision on the civil law theory that one cannot use his property to the injury of any legal right of another. This theory is similar to the early common law concept of strict liability.[15] The court in the principal case differentiated its reasoning from that of the *Gotreaux* decision and held crop dusting to be an extra-hazardous activity.[16] Liability is imposed only when the risk of harm is greater than the utility of the sprayer's conduct[17] and when the harm complained of is within the class of harm threatened by the conduct.[18] Crop dusting is a beneficial and often an essential practice in

---

[11] Mechem, Agency § 1870 (2d ed. 1914).

[12] Heeb v. Prysock, *supra* note 10, at 901, 245 S.W.2d at 579; McKennon v. Jones, 219 Ark. 671, 244 S.W.2d 138 (1951); S. A. Gerrard Co. v. Fricker, *supra* note 10, at 507, 27 P.2d at 680; Pendergrass v. Lovelace, 57 N.M. 661, 262 P.2d 231 (1953). *Contra*, Pitchfork Land & Cattle Co. v. King, 346 S.W.2d 598 (Tex. Civ. App. 1961), the only reported case not holding the landowner liable for negligence when the spraying was done by an independent contractor.

[13] Gotreaux v. Gary, 232 La. 373, 94 So. 2d 293 (1957).

[14] *Supra* note 13, at 378, 94 So. 2d at 294.

[15] 2 Harper and James, The Law of Torts 785 (1956): "Liability at common law for injury to person or damage to real or personal property is for the most part today based upon some moral or social fault . . . there are good grounds to believe that the very early concept of justice in common law was otherwise; that the law required anyone who caused harm to his neighbor to make good the loss irrespective of any fault or intent to harm on the part of the actor."

[16] Chapman Chem. Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949). It is the function of the court to decide if an activity is extra-hazardous.

[17] Gronn *et ux.* v. Rogers Constr. Inc., 221 Ore. 226, 233, 350 P.2d 1086, 1089 (1960); Prosser, Selected Topics on the Law of Torts 185 (1953). A hypothetical case will illustrate this point. *A* hires an aerial applicator to spray his rice field with 2,4-D, a chemical that is commonly known to have a fatal effect on cotton. *B* is an adjoining landowner growing cotton. Because of the propensity of a spray to drift, it is highly probable that *B*'s cotton crop will be damaged even if the applicator uses utmost care in spraying.

[18] Loe v. Lenhardt, *supra* note 1. Suppose that *A* is contemplating spraying his rice field with 2,4-D. This chemical will not have harmful effect on any crops within a four mile radius of *A*'s land. *B* lives five miles from *A* and 2,4-D will have a deadly effect on *B*'s cotton crop. Assume that when *A* decides to spray he cannot reasonably anticipate that the chemical will drift beyond a one mile radius of his land. If *A* then sprays and *B*'s cotton crop is damaged, *B* cannot recover on the theory of strict liability.

agricultural production and is not always an extra-hazardous activity.[19] At certain times and under the proper conditions, aerial spraying is a safe agricultural practice. There is danger involved, however. Some chemicals used in this activity are harmless to certain plants and animals, but are fatal to others.[20] The problem of drift, which often cannot be eliminated with the use of utmost care, further increases the risk of harm in crop dusting.[21] When these elements of danger are present it is apparent that the risk of harm can be greater than the utility of the sprayer's conduct.

The court reached a desirable result in the principal case by applying the doctrine of strict liability rather than following existing precedent. The spraying landowner should bear the loss when crop dusting is held to be an extra-hazardous activity, even if he used utmost care. The spraying landowner may be free from fault under negligence law, but the question of fault is not at issue. The question to be decided is which of the two legally innocent parties should bear the loss. The injured neighbor is wholly innocent. No act or omission to act by him has caused the damage. Therefore, it is reasonable that the party who voluntarily caused the harm shall bear the loss. The fact that the spraying landowner can minimize his loss by purchasing insurance should not be overlooked. Thus his innocent neighbor can be protected and the sprayer's loss can be spread among the other landowners engaged in the same activity.[22] The principal case coincides with Prosser's view that "the hazardous enterprise, even though it be socially valuable, must pay its way, and make good the damage inflicted."[23]

---

19 See note, 43 Minn. L. Rev. 531 (1959).

20 As an example, 2,4-D, a chemical commonly used by aerial applicators, does not harm narrow-leafed plants such as corn and wheat, but has a deadly effect on broad-leafed plants such as cabbage and tomatoes. See Burns v. Vaughn, 216 Ark. 128, 224 S.W.2d 365 (1949).

21 *Ibid.* Even though the applicator uses due care, the spray or dust may drift a great distance, many miles in some cases, from the area sprayed.

22 *Supra* note 18.

23 Prosser, Torts 332 (2d ed. 1955).