

LEGISLATION AND REGULATIONS

Court decisions on liability for airborne spray damage vary widely in several states

COURT interpretations of liability arising from damage to another's property by aerial application of pesticides vary widely by states. Cases date back as early as 20 years ago, but perhaps the most significant is a New Mexico case involving damage by 2,4-D to cotton fields, which was appealed in 1953.

In this case, *Pendergrass vs. Lovelace*, the owner of the land who contracted the application was held to be fully responsible for negligent application even though the aviator was hired as an independent contractor. Under ordinary circumstances an employer is not held liable for the negligence of an independent contractor. However, the New Mexico Supreme Court, in considering the appeal, ruled that aerial application of this herbicide was intrinsically and inherently dangerous to adjacent fields where cotton was grown, and the landowner was responsible.

Briefly reviewing the conditions at time of application, a weed and vine infested area adjacent to a cotton field had been sprayed with 2,4-D by airplane. Evidence showed that there was a good stand of cotton growing which gave promise of a good yield. Testimony of witnesses brought out that the pilot flew at low altitude over this cotton field several times while his sprayer was emitting sufficient quantities of 2,4-D to damage the growing cotton. A lower court had previously ruled that this evidence proved that the pilot's negligence was the proximate cause of damage to the cotton crop. An argument was advanced to consider the aviator as an independent contractor, but the New Mexico Supreme Court held that inherently dangerous work is not delegable to the contractor by the landowner to escape liability. The Court cited an Arkansas case, *Chapman Chemical Co. vs. Taylor*, in support of its contention that 2,4-D was a potentially dangerous material under these conditions.

The New Mexico court referred to the "Master and Servant" test to clarify the ruling, which defines exceptions to the independent contractor liability responsibility as those where danger inheres in the performance of the work. Examples given included building a brick wall abutting on a highway; depositing an insecticide, consisting of a poisonous dust or spray on a field. New

Mexico courts concurred that one who owes, and is personally bound to perform, an absolute and positive duty to the public or to an individual cannot escape the responsibility of seeing that duty properly performed by delegating it to an independent contractor. The person hiring the contractor will be liable for injuries resulting from the contractor's negligence in the performance of the duty, whether it is imposed by law or by contract.

Determination of whether or not the aviator was negligent has brought out some interesting points in other cases, too. In an Arkansas case, *Burns vs. Vaughn*, a rice farmer had an aerial applicator spray his field with 2,4-D. Unusual carrying conditions caused drift of the herbicide to a cotton field more than a mile away. The Arkansas Supreme Court ruled that the user of a potentially harmful spray material such as 2,4-D is not necessarily liable—negligence must be shown.

The farmer testified that he knew that the herbicide was dangerous and had instructed the pilot not to release the material if there was any wind. After the pilot had commenced application a breeze arose. The pilot continued to release dust until the rice farmer succeeded in stopping him. The Arkansas Supreme Court found that evidence was

sufficient to make the issue of negligence a matter for the jury's decision. Negligence had been ruled on the grounds that the farmer was aware of similar damage which occurred in the area a few weeks prior to this incident.

In other cases, California, *Lenk vs. Spezie* (1949), and Arkansas, *Chapman Chemical Co. vs. Taylor* (1949), landowners have been found not liable where damage occurred despite proven careful application by the aviator. In the one case in Arkansas the landowner was not liable for damage to adjacent cotton fields because there was no previous experience available to determine the carrying qualities of the materials sprayed. He had sought information from the local rice grower's association and state experiment station, but experimental data could not be found upon which to base operating practices. The pilot had been careful in making turns and cutting off the sprayer when flying near adjacent fields.

The Texas herbicide law covering distribution and application of hormone type herbicides specifies that application of herbicides in accordance with the regulations set down by the State Commissioner of Agriculture is a joint responsibility of the applier and the custom applier. Present law, which became effective September 1953, has not been subjected to a court test. There has been no specific precedent established in Texas courts. Some cases are pending; others have been settled without court action.

I should have suspected this when he got all those seed catalogs

