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TORTS—STRICT LIABILITY—LANDOWNER IS LIABLE FOR DAMAGE DONE
TO PROPERTY OF OTHERS BY CROP SPRAYING.

Young v. Darter (Okla. 1961).

Defendant had his pasture, which was adjacent to a cotton field owned by the plaintiff, sprayed with 2-4d poison, a herbicide, in order to kill weeds growing therein. Plaintiff alleged that some of the chemical used by the defendant in this operation drifted, spreading across his cotton crop and causing serious damage to it. The trial court entered judgment on a jury verdict against defendant, from which he appealed. The Supreme Court of Oklahoma, with one justice dissenting, affirmed, *holding* that a landowner using a herbicide on his land does so at his own peril and is liable for damages caused to adjacent crops, regardless of lack of negligence¹ or precautions taken. *Young v. Darter*, 363 P.2d 829 (Okla. 1961).

Strict liability of land owners or liability without fault is frequently said to have begun with the famous decision of *Rylands v. Fletcher*.² In that case the defendant mill owners built a reservoir on their estate, and the water collected therein broke through into an abandoned mine shaft, found its way into plaintiff's mine, and did extensive damage. The court, holding defendants liable, stated that a person who gathers something on his land which, if it escapes is likely to do damage, is liable for the damage which results if it does in fact escape, regardless of whether or not he was negligent. On appeal, the House of Lords restricted the lower court's decision by limiting its application to "non-natural" uses of land.³ The English courts following this decision had some difficulty in determining just what constituted a "non-natural" use of land, words such as "extraordinary",⁴ "exceptional",⁵ and "abnormal",⁶ being used in an attempt to describe that use of land to which strict liability would attach. In appraising an activity to see if it came within the *Rylands v. Fletcher* principle, these courts considered both the activity itself and the manner in which it was carried on in light of the surrounding circumstances.⁷ Thus, water kept in large hydraulic power mains⁸ was considered a non-natural use while water kept in a cistern⁹ was considered a natural use to which strict

1. Although the court held defendant liable without a showing of negligence, the opinion indicates that there was negligence on the part of defendant. *Young v. Darter*, 363 P.2d 829, 831 (Okla. 1961).

2. L.R. 3 H.L. 330 (1868). However, even before this case, strict liability was imposed on owners of straying animals for property damage done by them. *Cox v. Burbidge*, 13 C.B.N.S. 431, 143 Eng. Rep. 171 (1863). Also strict liability was applied in cases of damage done by fire. *Tubervil v. Stomp*, 1 Salk 13, 91 Eng. Rep. 13 (1691).

3. *Rylands v. Fletcher*, L.R. 3 H.L. 330, 338 (1868).

4. *National Tel. Co. v. Baker*, (1893) 2 Ch. 186; *West v. Bristol Tramways*, (1908) 2 K.B. 14.

5. *Rainhams Chemical Works v. Belvedere Fish Guano Co.* (1921) 2 A.C. 465.

6. *Barker v. Herbert* (1911) 2 K.B. 633.

7. PROSSER, TORTS 859 (2d ed. 1955).

8. *Charing Cross Elec. Supply Co. v. Hydraulic Power Co.* (1914) 3 K.B. 772.

9. *Blake v. Land and House Property Corp.*, 3 Tasm. L.R. 667 (1887).

liability would not attach. In the United States, two states, Massachusetts¹⁰ and Minnesota¹¹, almost immediately adopted the doctrine, but shortly thereafter it was vigorously rejected by three other states.¹² The doctrine was also condemned by legal writers as an unjustifiable extension of liability to unavoidable accidents.¹³ Hence, from its reception into American jurisprudence in 1868¹⁴ until the present day, the doctrine of liability without fault has been the subject of much controversy¹⁵ and confusion. This is evidenced by the fact that only twenty one states have adopted it while nine states have flatly rejected it.¹⁶

That the rule is confusing in application becomes obvious when one reviews the cases applying the rule and attempts to define its contours and limitations.¹⁷ These cases make evident the fact that the development of the *Rylands v. Fletcher* concept in America has been a highly unsystematic one, with the courts determining on a case to case basis to what conduct by a landowner they will attach strict liability. In determining whether such liability will be imposed in a given case, consideration must be given to the benefit which the particular activity affords to society,

10. *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56 (1868). (percolation of filthy water).

11. *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184 (1871). (water from underground water tunnel broke through into plaintiff's property).

12. *Brown v. Collins*, 53 N.H. 442, 16 Am. Rep. 372 (1873); *Losee v. Buchanan*, 51 N.Y. 476, 10 Am. Rep. 623 (1873); *Marshall v. Welwood*, 9 Vroom 339, 20 Am. Rep. 394 (N.J. 1876).

13. Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916); Smith, *Tort and Absolute Liability*, 30 HARV. L. REV. 241, 319, 408 (1917).

14. See note 11, *supra*.

15. 2 HARPER AND JAMES, TORTS § 14.2 (1956).

16. Those states rejecting it: *Rodgers v. Bond Bros.*, 279 Ky. 239, 130 S.W.2d 22 (1939); *Reynolds v. W. H. Hinman Co.*, 145 Me. 343, 75 A.2d 802 (1950); *Brown v. Collins*, 53 N.H. 442, 16 Am. Rep. 372 (1873); *De Gray v. Murray*, 69 N.J.L. 458, 55 Atl. 237 (1903); *Cosulich v. Std. Oil Co.*, 122 N.Y. 118, 25 N.E. 259 (1890); *Sinclair Prairie Oil Co. v. Stell*, 190 Okla. 344, 124 P.2d 255 (1942); *Summit Hotel Co. v. National Broadcasting Co.*, 363 Pa. 182, 8 A.2d 302 (1939); *Rose v. Socony Vacuum Co.*, 54 R.I. 411, 173 Atl. 627 (1934); *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221 (1936).

Those states accepting it: *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949); *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948); *Sylverter v. Jones*, 19 Colo. 128, 34 P. 760 (1893); *Central Ind. Coal Co. v. Goodman*, 111 Ind. App. 480, 39 N.E.2d 484 (1942); *Healey v. Citizens Gas and Elec. Co.*, 199 Iowa 82, 201 N.W. 118 (1924); *State Highway Comm. v. Empire Oil and Refining Co.*, 141 Kan. 161, 40 P.2d 355 (1935); *Toy v. Atlantic, Gulf & Pac. Co.*, 176 Md. 197, 4 A.2d 757 (1939); *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224 (1878); *Bridgeman-Russell Co. v. City of Duluth*, 158 Minn. 509, 197 N.W. 971 (1924); *Central Exploration Co. v. Gray*, 219 Miss. 757, 70 So. 2d 33 (1954); *French v. Center Creek Powder Mfg. Co.*, 173 Mo. App. 220, 158 S.W. 723 (1913); *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N.E. 528 (1899); *Brown v. Gessler*, 191 Or. 503, 230 P.2d 541 (1951); *Frost v. Berkeley Phosphate Co.*, 42 S.C. 402, 20 S.E. 280 (1894); *State v. Fleming*, 37 Tenn. App. 460, 264 S.W.2d 589 (1953); *Britton v. Harrison Const. Co.*, 87 F. Supp. 405 (S.D. W. Va. 1948); *Whitman Hotel Corp. v. Elliott & Watrous Eng. Co.*, 137 Conn. 562, 79 A.2d 591 (1951); *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S.E. 207 (1919); *Fitzsimons & Connell Co. v. Braun*, 199 Ill. 390, 65 N.E. 249 (1902); *Midwest Oil Co. v. City of Aberdun*, 69 S.D. 343, 10 N.W.2d 701 (1943); *Foster v. Preston Mill Co.*, 44 Wash. 2d 440, 268 P.2d 645 (1954).

17. For a collection of the cases, see 2 HARPER AND JAMES, TORTS, Ch. 14.

the commonness of the activity,¹⁸ what, if any, restrictive effect such an imposition will have on the activity, and finally, the degree of danger to others involved in such an activity.¹⁹ The *Restatement of Torts*²⁰ attempts to set up a uniform rule of application in defining what activity will or will not be saddled with strict liability. Application under the *Restatement* is limited to those activities of an "ultra-hazardous" nature, that is, activity involving a risk of serious harm which cannot be avoided even by the exercise of utmost care.²¹ A further condition imposed is that the activity must not be one of "common usage".²² Although some courts adhere to the rule of the *Restatement*,²³ it has not commanded general acceptance and there is still no uniformity in application of the doctrine of strict liability, with the result that each case is generally decided on its own facts.

In the present case, it would seem that the court is imposing strict liability in a field in which heretofore recovery has been conditioned upon a showing of fault.²⁴ A leading case almost identical with the present one was decided²⁵ in which plaintiff's cotton crop was damaged by a herbicide used on defendant's land. The Arkansas court denied recovery because plaintiff failed to show that defendant had any previous experience in the use of agricultural chemicals which would indicate that he was negligent in his present use of them. Aside from the present decision, the recent case of *Loe v. Lenhard*²⁶ appears to be the only other instance involving the spraying of herbicides in which strict liability was imposed. The Oregon court in that case partially followed the *Restatement*²⁷ in holding defendant strictly liable without a showing of fault; it held that crop spraying was an "ultra-hazardous" activity, but significantly failed to apply the further condition set out in the *Restatement* that the activity not be

18. Although not involving land, a prime example of this is seen in the case of damages resulting from automobile accidents; it is obvious that automobiles are dangerous instrumentalities, yet liability has always been conditioned upon a showing of fault.

19. For a fine discussion of the social, economic, and danger elements involved in such cases see *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944), (Traynor, J. concurring). Although this case does not involve activities on land, still the same considerations are present in land situations.

20. RESTATEMENT, TORTS § 519 (1938): "Except as stated in §§ 521-24, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."

21. *Id.* § 520.

22. *Ibid.*

23. *Beck v. Bel Air Properties*, 134 Cal. App. 2d 834, 286 P.2d 503 (1955); *Luthringer v. Moore*, 181 P.2d 89 (Dist. Ct. App. Cal. 1947); *Prentiss v. National Airlines*, 112 F. Supp. 306 (N.J. 1953). However, none of these cases involve crop spraying.

24. *Lenk v. Spezia*, 95 Cal. App. 2d 346, 213 P.2d 47 (1949); *Miles v. Arena & Co.*, 23 Cal. App. 2d 680, 73 P.2d 1260 (1937).

25. *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949).

26. 362 P.2d 312 (Ore. 1961).

27. See note 21, *supra*.

one of common usage.²⁸ On the contrary, the court specifically stated that common usage of the activity was not the issue.²⁹

In light of the fact that, in all prior cases, recovery was limited to a showing of fault, the question arises as to whether the extension of strict liability in either the above case or in the instant case was justifiable. This problem can best be considered by balancing the effect of such an extension against the need for a stricter standard. One might argue that an imposition of strict liability will discourage the spraying of crops with a resulting reduced production or a production of lower quality. This argument, however, would seem to be refuted by the fact that, in other instances where strict liability has been imposed, its imposition did not in anyway materially restrict the activity involved.³⁰ On the other hand, such imposition will encourage greater caution and safety in the carrying on of the activity.³¹ As to the need for application of the doctrine in this area, the element deserving prime consideration is that of the danger involved.³² The high degree of danger involved in the use of herbicides is evidenced by the fact that statutes have been enacted in several states³³ regulating such use. In fact, as noted by the court in the present opinion, Oklahoma has enacted similar statutes, not only requiring a licensing of those engaged in the business of using herbicides but also requiring that a bond be posted guarantying that the licensee will answer in damages for any injury to person, plants, or animals resulting from the use.³⁴ Therefore, the extension of liability in this case would seem justifiable because the activity is recognized to be dangerous, the imposition of liability without fault seemingly will not materially restrict the activity and would probably increase caution in the use of herbicides.

Robert J. Jackson

28. See note 22, *supra*.

29. 362 P.2d 312, 317 (Ore. 1961).

30. An excellent example of this is in the area of aviation. There strict liability was immediately imposed, but it is obvious from the mass use of aircraft today that the imposition of strict liability did not restrict its use. A case applying strict liability to aircraft was *Rochester Gas and Elec. Co. v. Dunlap*, 148 Misc. 849, 266 N.Y. Supp. 469 (1933).

31. It is probable that the imposition of strict liability would result in increased insurance coverage. Further, the premiums on such insurance would be adjusted to the safety record of the insured and this alone would have a tendency to encourage greater safety and caution.

32. In other areas where strict liability has been imposed, one of the factors considered was the plaintiff's difficulty of proof where evidence had been destroyed or was difficult to acquire. See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). However, that problem is not present in the area under discussion since, in the prior cases, no particular difficulty was evidenced in obtaining the needed evidence to establish fault. See 12 A.L.R.2d 436.

33. *Ariz. Rev. Stat. Ann.* §§ 3-371 to 3-386; *Conn. Gen. Stat. Ann.* § 15-99; *Minn. Stat. Ann.* §§ 20.31 to 20.35; *Miss. Code Ann.* 1942, Re-compiled 1956, §§ 5000-21 to 5000-33; *Nev. Rev. Stat.* §§ 555.260 to 555.460; An analysis of these statutes is found in *Loe v. Lenhardt*, 362 P.2d 312, 317 (Ore. 1961).

34. *Okla. Stat. Ann.* (1959 Cum. Supp.), Tit 2, §§ 3-82 to 3-85; These statutes are only applicable to a commercial sprayer and since defendant is not in the business of spraying they are not applicable to him, but they do indicate the danger involved in the use of herbicides.