

THE LAW AND THE USE OF HERBICIDES

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Summary. Compensation for damage caused by herbicides may be obtained by a number of different alternatives. These include negligence, nuisance, trespass and the rule of *Rylands v. Fletcher* all of which would normally be pleaded in the alternative.

INTRODUCTION

Herbicides are most commonly applied by either ground based booms or aerial application.

Unfortunately, these methods result in the herbicide moving to the target in the form of discrete droplets, which have the potential to drift considerable distances before causing damage to susceptible crops. Also many herbicides are volatile, the vapour having the ability to drift hundreds of kilometers under the right conditions before causing damage. With the large number of vineyards being established in Victoria combined with already established multicropping practices, it is surprising that few cases are reported in the Law Reports. The Department of Conservation, Forests and Lands which is the largest user of phenoxy herbicides in the State has a number of alleged damage incidents brought to its attention. However, in all cases these have been settled out of court.

In Victoria the Crown Solicitor has stated that the Crown's servants undertaking the spraying operation in the vicinity of susceptible crops owes a duty of care to ensure that the spray does not come in contact with the crop, particularly where it is likely to cause damage to that crop. If, through failure to take reasonable care required in the circumstances, the crop is damaged by the spray, the Crown would be liable vicariously under section 23(1)(b) of the Crown Proceedings Act 1958 to pay compensation for the damage and loss sustained through the torts (in this case negligence) of its servants. Therefore, in appropriate instances, an offer of settlement has been made, based on a reasonable sum, for the damage incurred by the claimant.

CAUSE OF ACTION

Actions brought in overseas cases come under the Law of Torts. This area of law deals with compensation for damage caused by the defendant. Everybody has a right to expect that his person and his property shall be inviolable by other citizens. A tort is the violation of such a right, which entitles the injured party to bring a civil action for damages to compensate for the injury he has suffered (Fleming, 1965).

Cause of action open to those who have suffered damage from the misapplication of herbicides are: negligence, trespass to land, nuisance, and

strict liability based on *Rylands v. Fletcher*.

Negligence. Negligence is conduct falling below the standard established for the protection of others against unreasonable risk of harm. This standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do in the circumstances. However, it must be established that:

- 1) the existence of a duty of care was owed to the plaintiff by the defendant;
- 2) there was a breach of this duty, and
- 3) the damage was not too remote.

Jenson (1968) reported that in America, by 1966, 52 cases involving actions brought by neighbouring property owners against applicators and/or landowners for damage allegedly caused by the application of pesticides had been reported in 18 jurisdictions. Of these, fifteen approached the problem in terms of negligence. Twenty-four of the cases involved damages due to herbicides, 2,4-D being responsible in 20 out of the 24 cases. In the cases where the causation was established the plaintiff recovered on 15 occasions.

An interesting Canadian case is *Bridge Brothers Ltd. v. Forest Protection Ltd.* (1976). As a result of the defendant's aerial spraying operation with insecticide in the vicinity of the plaintiff's fields the number of pollinating bees was reduced, adversely affecting the pollination of blueberry flowers. The plaintiff succeeded in negligence, and nuisance, but not trespass or *Rylands v. Fletcher*. It was held that the defendant ought to have known that the insecticide would be toxic to bees. Thus the defendant, in spraying close to the plaintiff's fields failed to use reasonable care to prevent the insecticide from falling upon or drifting on to such fields. Such failure amounted in law to negligence. It is not hard to see how this case could be extended to damage caused by herbicides.

Some of the inadequacies associated with negligence are that the plaintiff may establish causation and damage but be unable to establish a lack of reasonable care. Firstly, it is generally accepted that herbicides may drift despite attempts to exercise all reasonable care. Secondly, the effects of the herbicide may not be immediately obvious. This delay makes it difficult for the plaintiff to establish the action of the defendant which caused the damage. The plaintiff also needs to establish the source of the herbicide. This may be difficult because of the large distances herbicides may drift, and the number of spraying operations that may be carried out at any one time.

Trespass to land. Trespass serves the function of an ordinary tort remedy for material damage sustained by an occupier as the direct result of another's activity involving an entry, whether personal or by means of animals or inanimate objects.

A number of American cases relating to pesticide damage from aerial spraying have succeeded on a theory of trespass.

In *Schronk v. Gillam* (1964) the defendant's aircraft deposited a poison on the plaintiff's crops and pasture while in flight in air super-adjacent to the plaintiff's land. The court held that the flight conducted by the defendant was not carried out in a reasonable manner and unreasonably

interfered with the plaintiff's enjoyment of the surface of his property. The court concluded that the entry of the fuselage was accompanied by active and continuous spraying of the poisonous substance which constituted as much a part of the flight as if the defendant's aircraft had been dragging a great scythe across the land below it. The court held that actionable trespass was thereby established.

If in the case of herbicide drift the injury results in killing the crop or at least reducing its yield then the injury is direct and probably actionable as a trespass. However, in the case of long term residual herbicides, such as picloram or atrazine, drift on to the plaintiff's fields may affect subsequent crops. Such damage may be viewed as consequential rather than direct and, therefore, fail on the grounds of trespass.

Private nuisance. Private nuisance is a complementary action to trespass and deals with interferences to an occupier's interest in the beneficial use of his land. This includes not only the occupier's claim to the actual use of the soil, but also the comfort and enjoyment derived from occupancy of his land. The disturbance of this comfort may be due to the escape of deleterious things from another person's land. In order to merit legal intervention, the annoyance or discomfort must be substantial and unreasonable.

In *Newman v. Conair Aviation Ltd.*, (1972), during an aerial spraying operation the plaintiffs were enveloped in a spray mist when it drifted on to their land. This together with the noise of the low flying aircraft caused the plaintiffs fright and nausea. The court held that a person covered in spray would not know whether it is poisonous or not and his reaction would be one of fright and nausea. Quoting from *Crump v. Lambert* (1866), L.R. 3 Eq. 409, the Judge said that in nuisance there is a necessity to prove damage, but the burden of proving damage is a relatively easy one in that, where there is an interference by noise or smell with the amenities of living, no permanent loss or injury to health need be proved. The defendants were found liable and an injunction awarded.

It is not difficult to see that in cases concerned with the misapplication of herbicides that an action of nuisance pleaded in the alternative has a good chance of success. For example, some herbicides will result in the land being made unsuitable for cropping, at least in the short term. In addition, following the recent controversy with 2,4,5-T the community has developed a fear that this herbicide may affect their health. Finally, many herbicides and, in particular, 2,4-D amine, have a smell which is quite distinctive and may be considered offensive. In such circumstances, private nuisance may be established.

Rylands v. Fletcher. The doctrine of strict liability for the escape of dangerous substances dates back to 1868 when in the case of *Rylands v. Fletcher* 1868 it was stated that a "person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape". This definition was later qualified and now only applies to damage due to non-natural use of the land. Further, it has been held that there must be an escape of the dangerous substance from the land under the control of the defendant to a place outside his occupation.

The earliest application of *Rylands v. Fletcher* to herbicide damage is in *Mihalchuk v. Ratke et al.*; *Kwasnuik v. Ratke et al.* (1966). Whilst it was held that the usual method of application for 2,4-D was with a boom sprayer towed behind a tractor, in this case the herbicide was applied by an aircraft. It was established that this increased the danger to adjoining crops and was considered an unusual operation which was not a natural use of the land. Therefore, the principles of *Rylands v. Fletcher* applied and the defendants were liable.

Since this case the aerial application of herbicides has become very widespread, and it was argued in *Cruise v. Niessen* (1977) that it could no longer be regarded as a non-natural operation. However, the court held that it did not make any difference whether the herbicide was applied by ground or air. It was not the method of application, but the action of allowing a dangerous substance, in this case a herbicide, to escape from the boundaries of his property which makes the defendant responsible for any damage under the principle of absolute liability of *Rylands v. Fletcher*.

Recently there has been considerable publicity about *Rylands v. Fletcher* in England. This has led to an escalation in the number of claims for herbicide damage. Martin (1981) reported that in the Vale of Evesham an area where cereals are grown alongside horticultural crops there is \$250,000 in compensation claims awaiting litigation.

CONCLUSION

To date, action against the Department of Conservation, Forests and Lands have been on negligence. It will be interesting to see if there is a swing towards other forms of litigation similar to overseas experience, and if there is an increase in the number of cases arising from increased public awareness of the perceived dangers of herbicides.

LITERATURE CITED

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