THE TIME HAS COME TO RECONSIDER LIABILITY IN AERIAL APPLICATION CASES

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ABSTRACT

After World War II, the use of airplanes for aerial spraying of pesticides on crops increased. The increased use resulted in more lawsuits. While analyzing these cases, courts have struggled with which standard of care to apply to these operations, and whether the farmers who retain an aerial applicator's services should be vicariously liable for negligent aerial application. On one end of the spectrum, courts apply the traditional, reasonable person, negligence standard of care to the aerial applicators, and hold that the farmers are not liable for the actions of the aerial applicators because they are independent contractors. On the other end of the spectrum, some courts hold that aerial applicators are strictly liable for injuries that result from their operations, and that farmers are vicariously liable because the aerial applicators are engaging in an inherently dangerous activity. Similarly, the application of chemicals by aircraft has vexed state legislatures and Congress resulting in a patchwork of regulations. This Article will examine various courts' application of different standards of care in aerial pesticide application and liability imposed on independent contractors. Additionally, this Article will provide an analysis on state statutes relating to aerial application. Finally, this Article will provide a proposal for all states to treat aerial application like general aviation.

I. INTRODUCTION

Humans have been using pesticides in one form or another since the ancient civilizations of China, Egypt, and Greece.[1] In the early twentieth century, companies began producing synthetic, organic pesticides and herbicides.[2] World War II accelerated the production and use of these products "by creating conditions where tropical warfare and the accompanying insect-related diseases such as typhus, encephalitis, dengue, and malaria devastated troops on both sides."[3] Originally, these products were applied solely on the ground, but this soon changed.

On August 3, 1921, John Macready became the first aerial applicator by taking to the sky in Dayton, Ohio to demonstrate "crop dusting by plane."[4] Since that first flight, many men and women have utilized this trade in an effort to

1. Alexandra B. Klass, *Bees, Trees, Preemption, and Nuisance: A New Path to Resolving Pesticide Land Use Disputes*, 32 ECOLOGY L.Q. 763, 768 (2005).

2. *Id.*

3. *Id.*

4. *Almanac: The First Crop Dusting Flight*, CBS NEWS (Aug. 3, 2014), https://perma.cc/2593-VP3H.

increase crop yields. More recently, agriculture has seen the arrival of unmanned aerial applicators.[5]

Lawsuits related to the use of pesticides on crops started in the early twentieth century.[6] After World War II, these claims increased due to "new pesticides developed during the war, and the increased use of airplanes for aerial spraying of pesticides on crops."[7] While analyzing these cases, courts have struggled with which standard of care to attribute to these operations, and whether the farmers who retain an aerial applicator's services should be vicariously liable for negligent aerial application.

On one end of the spectrum, courts apply the traditional, reasonable person, negligence standard of care to the aerial applicators, and hold that the farmers are not liable for the actions of the aerial applicators because they are independent contractors. On the other end of the spectrum, some courts hold that aerial applicators are strictly liable for injuries that result from their operations, and that farmers are vicariously liable because the aerial applicators are engaging in an inherently dangerous activity.

Similarly, the application of chemicals by aircraft has vexed state legislatures and Congress. As one commentator noted, "[t]he absence of national standards for pesticide drift has resulted in a crazy-quilt pattern of state regulation."[8] Thus, states are all over the board when it comes to how they regulate aerial application.

Part II of this Article provides a historical overview of strict liability, including its impact on the early aviation industry and the evolving disputes over whether aerial application is an inherently dangerous activity. Part III explores the imposition of vicarious liability on farmers for injuries caused by aerial application. Part IV examines the ad hoc body of state and federal rules governing aerial application, including relevant legislation, regulation, and case law. Finally, Part V offers a proposal for changing the standard of care applicable to aerial application to ordinary negligence, and that farmers who hire aerial applicators should not be held liable for injuries caused by aerial applicators absent some showing of independent negligence on the part of the farmer.

5. *Id*.

6. Klass, *supra* note 1, at 792.

7. *Id*.

8. Theodore A. Feitshans, *An Analysis of State Pesticide Drift Laws*, 20 SAN JOAQUIN AGRIC. L. REV. 269, 269 (2011).

II. THE BACKGROUND OF STRICT LIABILITY

A. Emergence of Strict Liability

Under English common law, the English courts developed strict liability to impose liability upon "practitioners of inherently dangerous activities."[9] The English courts developed this doctrine in the nineteenth century in the case of *Rylands v. Fletcher*.[10] In order to further understand this doctrine, one should examine the facts and reasoning of this case. In *Rylands*, a mill owner had a reservoir constructed on his land, which unbeknownst to him, had coal mining shafts underneath it.[11] As a result of the reservoir's construction, the coal mines flooded,[12] and the owner of the mines sued the mill owner.[13] Justice Blackburn of the Exchequer Chamber wrote:

> [T]he true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.[14]

Based upon this case, courts began applying this doctrine to "the keeping of wild animals, keeping of fire, and blasting, but also extended it to any activity deemed by the courts as unusual and abnormal in the community."[15]

The doctrine arrived in the United States with mixed results. Some states, such as New York, initially rejected the doctrine.[16] Whereas other states, such as Massachusetts, readily adopted the doctrine.[17] The social changes and industrialization of the early twentieth century help explain why American courts began to adopt strict liability.[18] For example, a plaintiff in a late nineteenth century case sued a defendant because her house was damaged while the defendant was

9. Jeffrey M. Jakubiak, Note, *Maintaining Air Safety at Less Cost: A Plan for Replacing FAA Safety Regulations with Strict Liability*, 6 CORNELL J.L. & PUB. POL'Y 421, 427 (1997).

10. Rylands v. Fletcher [1868] UKHL1 (17 July 1868).

11. *See id.*; Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 260 (1987) (summarizing *Rylands v. Fletcher*).

12. *Id.*

13. *Id.*

14. Rylands v. Fletcher [1868] UKHL1 (17 July 1868).

15. Jakubiak, *supra* note 9, at 427.

16. *See* Losee v. Buchanan, 51 N.Y. 476, 491 (1873).

17. *See* Ball v. Nye, 99 Mass. 582, 584 (1868).

18. *See e.g.,* Harry H. Ognall, *Some Facets of Strict Tortious Liability in the United States and Their Implications*, 33 NOTRE DAME L. REV. 239, 240 (1958).

blasting rock on property next to her house.[19] The Supreme Court of California applied a strict liability standard and held:

> The defendant seems, by his contention, to claim that he had a right to blast rocks with gunpowder on his own lot, in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken.[20]

By contrast, the Texas Supreme Court in 1936 did not apply a strict liability standard to a defendant who damaged property when salt water escaped from ponds the defendant used to operate an oil well.[21] The court rejected *Rylands v. Fletcher*, and emphasized, "we have departed from common law, and only award damages when predicated upon [n]egligence."[22]

Courts continued to struggle with the application of this doctrine into the late twentieth century. The Supreme Court of Appeals of West Virginia had to determine if a defendant was subject to strict liability when its coke oven battery, used to produce a fuel source known as coke, exploded causing injuries to the plaintiff.[23] The court recognized that West Virginia adopted the concept of strict liability espoused in *Rylands* in 1911,[24] and acknowledged that since 1911, it has gradually modified the ruling in *Rylands*.[25] Instead of adhering strictly to *Rylands*, the court decided to adopt strict liability as it is "articulated in the *Restatement (Second) of Torts* (1976)."[26] Thus, it applied strict liability to the facility owner.[27]

B. The Application of Strict Liability in Early Aviation

As airplanes became more commonplace in the early twentieth century, courts turned to strict liability to deal with the legal questions that arose from operating the new crafts.[28] In one case from New York, a plaintiff sued a pilot because the pilot's aircraft hit one of the plaintiff's towers used to support electric

19. *See* Colton v. Onderdonk, 10 P. 395, 396 (Cal. 1886).
20. *Id.* at 397.
21. Turner v. Big Lake Oil Co., 96 S.W.2d 221, 224 (Tex. 1936).
22. *Id.*
23. Peneschi v. Nat'l Steel Corp., 295 S.E.2d 1, 3-5 (W. Va. 1982).
24. *Id.* at 6 (W. Va. 1982) (citing Weaver Mercantile Co. v. Thurmond, 70 S.E. 126 (W. Va. 1911)).
25. *Id.* at 7-8.
26. *Id.* at 10.
27. *Id.*
28. *See* Rochester Gas & Elec. Corp. v. Dunlop, 266 N.Y.S. 469 (N.Y. Cty. Ct. 1933).

lines.[29] The court determined that the pilot's actions were subject to strict liability and wrote:

> To hold that the defendant here is absolve from liability, because he was himself free from negligence, is to hazard all the chimneys in the land, as well as livestock on the farms, and even the people in their homes. The other alternative seems by far the more reasonable, namely: Such chance as there may be that a properly equipped and well-handled aeroplane may still crash upon and injure private property shall be borne by him who takes the machine aloft.[30]

Another court, when faced with a case where a student pilot flew an aircraft into a house, discussed the doctrine of strict liability in the context of airplane accidents.[31] The court noted:

> The courts and the law formerly looked upon aviation with the viewpoint still expressed in the American Law Institute, Restatement, Torts, Vol. 3, § 520, holding that aviation is an ultra-hazardous activity, similar to the operation of automobiles in the early days of the horseless carriage, and requiring those who take part in it to observe the highest decree of care. The Uniform Aeronautic Act, adopted in time by twenty-three states, imposed absolute liability on the owner, as well as the operator or lessee, of every aircraft for any damage to person or property caused by its operation provided there was no contributory negligence on the part of him who was thus harmed. With the passage of time, however, this view came to be modified, and the trend of decisions established it to be the general rule that, properly handled by a competent pilot exercising reasonable care, an airplane is not an inherently dangerous instrument, so that in the absence of statute the ordinary rules of negligence control, and the owner (or operator) of an airship is only liable for injury inflicted upon another when such damage is caused by a defect in the plane or its negligent operation.[32]

The court, after weighing the policy factors and reviewing the case law from other states, decided that the defendants should not be subject to strict liability, and the plaintiff had to prove the defendants were negligent to recover.[33]

By the 1960's, courts had begun to understand that simply flying an airplane was no longer an ultra-hazardous activity that should subject pilots to strict

29. *Id*. at 473.
30. *Id*.
31. Boyd v. White, 276 P.2d 92, 93 (Cal. Dist. Ct. App. 1954).
32. *Id*. at 98.
33. *Id*. at 101.

liability.[34] One New York court's commentary summarizes the evolution of aviation around this time:

> In the early days of aviation, perhaps, it could have been said that planes crashed frequently and mysteriously through no fault of pilot or maintenance personnel. But great technical progress in the last few years has brought the art of flying to the state where aircraft do not generally meet disaster in the absence of some negligence.[35]

C. Dispute Over the Standard of Care in Aerial Application Cases

1. Courts That Apply Negligence

One of the first states to address the applicable standard of care in aerial applicator cases was California.[36] In *Miles v. A. Arena & Co.*, the defendants allegedly damaged plaintiff's beehives when they were applying calcium arsenate to melons on an adjoining tract of land.[37] The court applied a negligence standard and affirmed the verdict against the defendants, holding they should not have done the dusting because the conditions "would indicate to a reasonably prudent person that damage to his neighbor would result."[38] In particular, the court determined that defendants should have known the dust would drift because of the prevailing winds at the time.[39]

In 1984, a California court had the opportunity to revisit whether to apply a negligence standard of care in these types of cases.[40] Although the court listed the six factors from section 520 of the Restatement (Second) of Torts, it did not decide the issue because it could not do so on procedural grounds.[41]

Another state that appears to use the negligence standard is Arizona.[42] In *Lundberg v. Bolon*, the defendants sprayed insecticide on cotton that was adjacent to land containing bee colonies.[43] The chemicals drifted to the bee colonies and killed the bees.[44] The court affirmed the verdict against the defendants because it

34. Wood v. United Air Lines, Inc., 223 N.Y.S.2d 692, 697 (N.Y. Sup. Ct. 1961).
35. *Id.* at 698 (internal citations and quotations omitted).
36. Miles v. A. Arena & Co., 73 P.2d 1260, 1261 (Cal. Ct. App. 1937).
37. *Id.* at 1261-62.
38. *Id.* at 1262.
39. *Id.* at 1263.
40. *See* SKF Farms v. Super. Ct., 200 Cal. Rptr. 497, 498-99 (Cal. Dist. Ct. App. 1984).
41. *See id.* at 499.
42. *See* Lundberg v. Bolon, 194 P.2d 454, 458 (Ariz.1948).
43. *See id.* at 454-55.
44. *See id.* at 455.

held "[w]hether the poison was properly scattered and whether adequate diligence was exercised in keeping it out of the reach of appellees' stock were questions of fact for the determination of the jury."[45]

The dissent, however, pointed out that the majority affirmed the trial court despite the fact that the plaintiff had not established "any causal connection between this conduct and the death of the bees."[46] As will be further explained below, courts often state that they are applying one standard of care when they are actually applying a different standard of care.

Kansas has taken an interesting approach to determining the standard of care to use in aerial application cases. In *Binder v. Perkins*, the defendant's aerial spraying business accidentally damaged plaintiffs' alfalfa field when it attempted to spray herbicide on a neighboring wheat field.[47] The evidence showed that the herbicide used by the defendant damages broad-leafed plants like alfalfa.[48] Because the Kansas legislature adopted a statute requiring aerial applicators to obtain insurance to protect against damages caused by their negligence, the court rejected a strict liability standard for aerial applicators.[49] Nevertheless, the court determined that the herbicide used by the defendant was a dangerous instrumentality that mandated a higher degree of care than ordinary negligence.[50]

Based upon the prevailing wind and the fact that the herbicide could drift for a period of two days, the court determined the defendant violated the higher standard of care.[51] The Kansas Supreme Court reaffirmed this standard of care in additional crop dusting cases in 1985.[52]

The Alabama Supreme Court also addressed a unique case involving the aerial application of chemicals. Leo Joiner, a farmer, hired J.F. Carter to apply pesticides to his crop.[53] The target crops were located near the plaintiffs' pond, which the plaintiffs stocked with game fish and used for recreational fishing.[54] On July 27, 1973, the fish in the pond began dying, and eventually, all of the fish in the pond died.[55] The plaintiffs restocked the pond, and these fish also died.[56] The

45. *Id.* at 459.
46. *Id.* at 460 (LaPrade, J., dissenting).
47. Binder v. Perkins, 516 P.2d 1012, 1014 (Kan. 1973).
48. *Id.*
49. *Id.* at 1016.
50. *Id.*
51. *Id.*
52. *See* Ernest v. Faler, 697 P.2d 870, 872 (Kan. 1985).
53. Boroughs v. Joiner, 337 So. 2d 340, 341 (Ala. 1976).
54. *Id.*
55. *Id.*
56. *Id.*

plaintiffs hired someone to test their pond, and they learned that the pond contained significant amounts of the pesticide Endrin.[57] The plaintiffs also learned that Mr. Carter had sprayed Mr. Joiner's crops with pesticides around the time that their fish began dying, and that some of this pesticide drifted from his land to their pond.[58]

The plaintiffs argued that Alabama should adopt strict liability for the pilot's actions because applying chemicals by airplane was an ultrahazardous activity.[59] The Alabama Supreme Court rejected this view and held, "…we do not adopt the view, as some courts have done, that such activity is ultrahazardous thereby rendering one strictly liable, notwithstanding [the] exercise of the utmost care."[60]

The Colorado Supreme Court affirmed the use of the doctrine of res ipsa loquitur in an aerial application lawsuit where an airplane applied herbicide to alfalfa and barley.[61] The court determined damage of this sort does not normally occur to crops without negligence, and said negligence was a breach of the Defendant's duty owed to the Plaintiff by positing, "[t]he indicated negligence is within the scope of the defendant's duty to the plaintiff . . . [and] plaintiffs are free from any contributory negligence or other responsibilities."[62] As a result, the court determined it was proper to infer that defendant's negligence caused the harm suffered, affirming the trial court's judgment.[63]

The Wisconsin Supreme Court conducted a thorough analysis of whether to apply strict liability to the aerial application of chemicals and decided against it.[64] In *Bennet v. Larsen Co.*, the defendants leased land to grow corn, which was located near the plaintiffs' bee colonies.[65] In determining whether strict liability should have been the standard of care for the defendant's actions, the Wisconsin Supreme Court looked to § 520 of the Restatement (Second) of Torts, which sets forth the following factors for determining whether an abnormal activity warrants strict liability:

57. *Id.*

58. *Id.*

59. *Id.* at 343.

60. *Id.* (internal citations omitted); *see* Ligocky v. Wilcox, 620 P.2d 1300, 1301 (N.M. Ct. App. 1980); Mustion v. Ealy, 266 N.W.2d 730, 734 (Neb. 1978) (applying negligence standard of care in lawsuit involving cattle).

61. Bloxsom v. San Luis Valley Crop Care, Inc., 596 P.2d 1189, 1191–92 (Colo. 1979).

62. *Id.* at 1191 (analyzing the four elements of res ipsa loquitur as set forth in Branco E. Co. v. Leffler, 482 P.2d 364 (Colo. 1971)).

63. *Id.*

64. *See* Bennett v. Larsen Co., 348 N.W.2d 540, 553 (Wis. 1984).

65. *Id.* at 544.

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.[66]

The court also noted, "…[t]he essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care."[67]

The court acknowledged that the application of the chemicals posed some dangers to bees, but also determined the risk could be reduced by reasonable care, such as monitoring weather conditions and following label directions.[68] Additionally, the court noted that "pesticide application to control severe pest infestations is a common activity which is necessary to ensure healthy crop growth."[69] The court found strict liability should not be applied because it determined "the application of pesticides is a necessary and beneficial activity to ensure the production of adequate and healthy food and that its value . . . outweighs the potential for harm."[70]

2. Courts That Apply Strict Liability

Louisiana became one of the first jurisdictions to apply strict liability to an aerial application case. In *Gotreaux v. Gary*, the plaintiff sued a flying service for accidentally applying herbicide on cotton and peas instead of the target rice fields.[71] The plaintiff asserted that defendant's actions should constitute a private nuisance.[72] The court, however, determined strict liability should apply instead of private nuisance.[73] The court emphasized that rice is an important crop in Louisiana, but the plaintiff should not be deprived of his right to use his land to grow cotton and

66. *Id*. at 553 (quoting RESTATEMENT (SECOND) OF TORTS § 520 (1977)).
67. *Id*. (quoting RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (AM. LAW INST. K 1977)).
68. *Id*.
69. *Id*.
70. *Id*.
71. Gotreaux v. Gary, 94 So. 2d 293, 293 (La. 1957).
72. *Id*.
73. *Id*. at 294.

peas.[74] The court concluded the verdict against defendants was proper because the defendants did not prove there was another aerial application operation in the area and the plaintiff had proven damages.[75]

This trend of applying strict liability to aerial application cases continued in the Oklahoma case of *Young v. Darter*.[76] In that case, the defendant arranged for an airplane to spray herbicide across his pasture, which drifted onto the plaintiff's cotton crop.[77] The plaintiff alleged that the defendant was negligent, and the jury returned a verdict in favor of the plaintiff.[78]

The court discussed the history of strict liability and the rule from *Rylands v. Fletcher*.[79] The court adopted strict liability and explained:

> The use, by the defendant, of a poison on his land, which, if it escaped, would cause damage to plaintiff, was done at defendant's peril. He is responsible for its drifting and thereby trespassing on plaintiff's land where it damaged the cotton. Any precautions defendant's agent may have taken to prevent the injuries to plaintiff's cotton, in view of the results, do not serve the extinguish his liability. The question in general is not whether defendant acted with due care and caution, but whether his acts occasioned the damage.[80]

In 1961, Oregon addressed this issue in *Loe v. Lenhardt*.[81] In *Loe*, the Plaintiff sued defendants for crop damage caused by an accidental trespass of aerial application of chemicals.[82] Most notably, the court recognized the inconsistent history regarding the standard of care used in aerial application cases:

> In some cases, it is difficult to detect what theory the court was following. Only in Louisiana, where the court was applying civil-law principles, have we found a direct holding for the plaintiff without a pleading or proof of negligence. We have found no case in which an intentional trespass was a material issue. We have likewise found no case which discussed the theory of unintentional trespass under the rule found in Restatement, 1 Torts 390, § 165, although a number of the case [sic] imposing liability after a finding of negligence might well have fallen within the Restatement formula: 'One who recklessly or negligently, or as a result of an extra hazardous activity, enters

74. *Id.*
75. *Id.* at 294-95.
76. *See* Young v. Darter, 363 P.2d 829, 833–34 (Okla. 1961).
77. *Id.* at 831.
78. *See id.* at 833.
79. *See id.* at 832-39.
80. *Id.* at 833-34.
81. Loe v. Lenhardt, 362 P.2d 312, 314 (Or. 1961).
82. *Id.*

> land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor thereof or to a thing or a third person in whose security the possessor has a legally protected interest.'[83]

The court stated further, "[i]f an activity is extra hazardous, the resulting harm produces liability in those states which follow the Restatement of Torts, whether the invasion of the legally protected interest is a trespass, Restatement § 165, private nuisance, § 822, or any other compensable injury caused by 'ultrahazardous' activity, § 519."[84] To determine if an activity is ultrahazardous, the court applied a balancing test where it considered when the activity is conducted, how it is conducted, and whether the harm is within "the class of harm threatened by the conduct."[85] Although the court admitted that aerial application is an accepted practice at an appropriate time and place, it does not justify applying a negligence standard of care because "the activity was one capable of inflicting damage upon neighboring crops notwithstanding the exercise of the utmost care by the applicator."[86] The court also applied liability to the defendant landowner for hiring the aerial applicator—an independent contractor—because an inherently dangerous activity cannot be delegated.[87]

The Oregon Supreme Court addressed the issue related to vicarious liability of a farmer for hiring an aerial applicator; this will be further explained in Section III.[88] The court held:

> [W]here a farmer hired a contractor to spray chemicals from an airplane, the activity was one capable of inflicting damage upon neighboring crops notwithstanding the exercise of the utmost care by the applicator. Under the circumstances, the damage which resulted was within the scope of the risk that droplets of spray cast into the air could, and probably would, drift onto the adjoining field. In such a case, it is the voluntary taking of the risk, Restatement, 1 Torts 390, § 165 . . . which imposes liability.[89]

83. *Id*. at 314-315 (collecting cases that purport to apply strict liability but in fact employ a negligence analysis) (internal citations omitted).

84. *Id*. at 316.

85. *Id*. at 314.

86. *Id*. at 316-18.

87. *Id*. at 318.

88. *Id*.

89. *Id*.

Thus, the Oregon Supreme Court found the farmer was liable for the crop duster's actions because the application of chemicals by airplane was non-delegable in light of the inherently dangerous nature of this activity.[90]

The Washington Supreme Court also adopted strict liability for the application of chemicals by airplane in *Langan v. Valicopters, Inc*.[91] In that case, the plaintiff owned an organic farm, which adjoined Thalheimer Farms.[92] Thalheimer Farms retained defendant Valicopters, Inc. to spray pesticide on their land.[93] One of the plaintiffs testified that the Valicopters' helicopter applied chemicals to their organic farm, and the plaintiffs provided laboratory test results showing that the chemicals were present on their crops.[94]

The court acknowledged that most courts addressing whether to apply a strict liability standard of care or a negligence standard of care to aerial applicators typically apply a negligence standard of care.[95] The court, however, pointed out, "[o]pinions which have ostensibly relied upon the principles of negligence have been criticized by legal writers because the reasoning is not clear or more nearly resembles strict liability."[96]

The court then analyzed whether aerial application should require a strict liability standard of care by using the Restatement Second of Torts sections 519 and 520.[97] Thus, it considered: if aerial application involves a high risk of harm, whether the harm will be great, if reasonable care can eliminate the risk, whether aerial application is a matter of normal usage, whether aerial application is commonly used, whether it is inappropriate for the area, and its value to the area.[98]

The court emphasized that all the factors are important and must be analyzed.[99] The court quickly determined that crop dusting involved a high degree of risk and the activity was likely to result in harm, because the defendant's neighbors were organic farmers.[100] Additionally, the court found the risk of harm could not be eliminated with due care because of the "uncontrollability of dust or spray drift."[101]

90. *Id*.
91. Langan v. Valicopters, Inc., 567 P.2d 218, 223 (Wash. 1977).
92. *Id*. at 219.
93. *Id*.
94. *Id*. at 219-20.
95. *Id*. at 220.
96. *Id*.
97. *Id*. at 221.
98. *Id*.
99. *Id*. (quoting RESTATEMENT (SECOND) OF TORTS § 520 (AM. LAW INST. 1977)).
100. *Id*. at 222.
101. *Id*.

The court next analyzed whether crop dusting was a matter of common usage by examining the amount of crop dusting in this particular geographic area.[102] Despite acknowledging crop dusting was prevalent in the area, it emphasized few people carry on crop dusting.[103] As a result, the court determined that crop dusting was not a matter of common usage.[104] The court, in cursory manner, determined crop dusting was not appropriate in that location, given its immediate proximity to an organic farm.[105]

The court noted the value of the activity to the community factor had received criticism from a commentator.[106] While analyzing, the court decided to balance this factor by asking "who should bear the loss caused by the pesticides."[107] As a result, the court adopted a strict liability standard of care.[108]

3. Strict Liability Based Upon Statute

At least one state has applied a strict liability standard of care to the application of chemicals by aircraft because of statute. In *Green v. Zimmerman*, the Supreme Court of South Carolina analyzed what standard of care to apply in a lawsuit where a crop duster accidentally sprayed chemicals into the plaintiff's fishpond.[109] South Carolina, like many other states, has a statute making a pilot absolutely liable for objects dropped from the aircraft.[110] The court determined the "unambiguous" statutory language mandated applying a strict liability standard of care to crop-dusting, which the court construed as chemicals "dropping" from an airplane.[111]

4. Standard of Care Based Upon Chemical Applied

Arkansas took a different approach to the application of strict liability to the aerial application of chemicals.[112] In *Mangrum v. Pigue*, the plaintiff alleged that the defendant negligently sprayed an ultrahazardous chemical, Roundup Ultra, on

102. *Id.* at 223.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *See* Green v. Zimmerman, 238 S.E.2d 323, 324 (S.C. 1977).
110. *Id.* (quoting S.C. CODE ANN. § 55-3-60 (1976)).
111. *Id.* at 324-25.
112. *See* Mangrum v. Pigue, 198 S.W.3d 496 (Ark. 2004).

his neighbor's property, thus allowing it to drift onto his property.[113] The court recognized that it had previously applied a strict liability standard of care in an opinion where the pilot was applying 2-4-D, which the court considered an ultrahazardous activity.[114] The court, however, determined that strict liability should not be applied and held:

> [T]he spraying of the widely used herbicide, Roundup Ultra, was not an ultrahazardous activity. There is simply an insufficient factual basis in this case to warrant such a drastic action on the part of this court. Roundup Ultra is a chemical that is commonly used in the farming community and is available for sale to the general public. . . . [T]he chemical can be controlled by the use of ordinary care as to the environmental factors which are present when it is applied. Since this court is not dealing with an ultrahazardous activity in and of itself, the aerial spraying of Roundup Ultra, strict liability does not apply and the trial court is affirmed.[115]

The Supreme Court of Arkansas affirmed the trial court's directed verdict because the plaintiff was unable to establish that the defendants were negligent.[116]

The Arkansas Court of Appeals further clarified this position in *Wilson v. Greg Williams Farm, Inc*.[117] In that case, the appellate court emphasized, "the more recent pesticide cases focus on the nature of the substance being applied rather than the manner of application."[118] The Court of Appeals agreed with the trial court's determination that the specific chemical was not ultrahazardous and affirmed the trial court's directed verdict because there was no proof the defendants were negligent.[119]

113. *Id*. at 498.

114. *Id*. at 500 (discussing Chapman Chemical Co. v. Taylor, 222 S.W.2d 820 (Ark. 1949)).

115. *Id*.

116. *Id*.

117. *See generally* Wilson v. Greg Williams Farm, Inc., 436 S.W.3d 485 (Ark. Ct. App. 2014).

118. *Id*. at 489.

119. *Id*. at 489-90.

III. LIABILITY FOR ACTIONS OF INDEPENDENT CONTRACTORS

A. Historical "Non-delegable Duty" Rule

In the 1850's, courts in the United States began to recognize that vicarious liability does not typically attach to one who hires an independent contractor.[120] One commentator, while discussing an exception to this general rule, the non-delegable duty rule, wrote:

> Certain situations, it is said, impose upon the person undertaking them a duty which cannot be discharged by entrusting its performance to an independent contractor, however competent he may be and however great the care which has been exercised in his selection. If the contractor fails to take the requisite amount of care, [the person or entity who retains the contractor] incurs liability for any resulting damage.[121]

The concept of non-delegable duty with regard to an independent contractor often walks hand in hand with cases involving strict liability.[122] This can be explained, in part, by the fact the courts often look to the magnitude of risk, a concept adopted from English courts, when determining whether strict liability should be imposed or whether a task is non-delegable.[123] It has also been noted that many courts determine that the duty related to a task is non-delegable when the activity impacts a property interest.[124]

B. Development of the "Non-delegable Duty" Rule in Aerial Application Cases

In the infancy of aerial application, courts held farmers liable for the actions of independent contractors who applied herbicides and pesticides to the farmers' crops by airplane.[125] In *Hammond Ranch Corp. v. Dodson*, the Hammond Ranch Corporation and Homer Ricks retained Silver Fleet Dusting Company to apply poison to their cotton crop.[126] In the process, Silver Fleet allegedly applied the poison to the plaintiffs' pasture, killing some of their livestock.[127]

120. J. A. Jolowicz, *Liability for Independent Contractors in the English Common Law—A Suggestion*, 9 STAN. L. REV. 690, 690-91 (1957) (citing Blake v. Ferris, 5 N.Y. 48 (1851)).
121. *Id.* at 691.
122. *Id.* at 695.
123. *Id.* at 696.
124. *Id.* at 698.
125. *See, e.g.*, Hammond Ranch Corp. v. Dodson, 136 S.W.2d 484, 486-87 (Ark. 1940).
126. *Id.* at 484.
127. *Id.*

The defendants argued they could not be held liable for the actions of Silver Fleet because Silver Fleet was an independent contractor.[128] The Arkansas Supreme Court disagreed, and emphasized the trial court's ruling:

> As a general rule the employer is not liable for the negligence of an independent contractor. There are, however, certain exceptions to this general rule. One of such exceptions is that the law will not allow one who has a piece of work to be done that is necessarily or inherently dangerous to escape liability to persons or property negligently injured in its performance by another to whom he has contracted such work. This is especially true where the agency or means employed to do the work, if not confined and carefully guarded, is liable to invade adjacent property, or the property of others, and destroy or damage it. . . . because of the very great likelihood of the poisonous dust or spray spreading to adjoining or nearby premises and damaging or destroying valuable property thereon, [the defendant] could not delegate this work to an independent contractor and thus avoid liability.[129]

Based upon this logic, the Arkansas Supreme Court determined the farmers could not delegate their duty to the crop-dusting company.[130]

Mississippi also held the farmer liable in *Lawler v. Skelton*.[131] In that case, the plaintiff was working on a neighboring property when he was sprayed with chemicals by a crop duster.[132] Even though the court acknowledged farmers have the right to use dusts and sprays to protect their crops, it decided, "[t]he owner of the premises may not delegate the work of dusting or spraying a crop with poisonous insecticides to an independent contractor and thus avoid liability."[133]

Alabama addressed this issue in *Boroughs v. Joiner* and crafted a unique solution.[134] The Alabama Supreme Court analyzed several other jurisdictions and determined crop dusting was inherently dangerous and, therefore, a landowner could not delegate this duty to an independent contractor.[135] Although the court

128. *Id*. at 486.

129. *Id*. at 487 (quoting S.A. Gerrard Co. v. Fricker, 27 P.2d 678, 680 (Ariz. 1933)).

130. *Id*.; *see also* McCorkle Farms, Inc. v. Thompson, 84 S.W.3d 884, 891 (Ark. Ct. App. 2002) (holding landowner cannot delegate responsibility to independent contractor to apply chemicals to his property).

131. Lawler v. Skelton, 130 So. 2d 565, 569 (Miss. 1961).

132. *Id*. at 567.

133. *Id*. at 569.

134. *See generally* Boroughs v. Joiner, 337 So. 2d 340 (Ala. 1976).

135. *See Boroughs*, 337 So. 2d at 342 (citing Heeb v. Prysock, 245 S.W.2d 577 (Ark. 1952); McKennon v. Jones, 244 S.W.2d 138 (Ark. 1951); Miles v. Arena & Co., 73 P.2d 1260, 1260 (Cal. Ct. App. 1937); Gerrard Co. v. Fricker, 27 P.2d 678 (Ariz. 1933)).

decided a landowner could not delegate his duty to an independent contractor when the aerial application of chemicals is involved, it also held:

> The test of liability on the part of the landowner is one of reasonableness. Liability is not absolute but is imposed on the landowner for his failure to exercise due care in a situation in which the work being performed is sufficiently dangerous that the landowner himself has a duty to third persons who may sustain injury or damage from the work unless proper precautions are taken in the performance thereof.[136]

Even though a landowner cannot delegate his or her duty, they can take reasonable precautions to avoid liability for a crop duster's actions.

In *Pride of San Juan, Inc. v. Pratt*, Loren Pratt had a field containing broccoli.[137] Next to the field, Pride of San Juan, Inc. had a mixed vegetable crop.[138] Pratt hired Sunland Chemical, Inc., an independent contractor, "to inspect Pratt's broccoli crop and to recommend pesticides."[139] Sunland recommended pesticides that "were not registered with the federal government for use on San Juan's vegetable crops."[140] Sunland then arranged for Tri-Rotor AG Services, Inc. to apply the suggested pesticide by aerial application.[141] San Juan sued Pratt and alleged Pratt was vicariously liable for "Tri-Rotor's negligence in applying the pesticides."[142] Pratt denied it was liable for Tri-Rotor's negligence "because, due to technological advances in the aerial application of pesticides, crop dusting was no long an inherently dangerous activity."[143]

While discussing vicarious liability under Arizona law, the Arizona Court of Appeals wrote:

> [A]n employer is not ordinarily liable for the negligent acts of its independent contractors. The reason for this rule is that because an employer lacks control over an independent contractor's work, the independent contractor is the "proper party to be charged with the responsibility of preventing the risk, administering it, and distributing it."[144]

136. *Boroughs*, 337 So. 2d at 343.
137. Pride of San Juan, Inc. v. Pratt, 212 P.3d 29, 30 (Ariz. Ct. App. 2009).
138. *Id*.
139. *Id*.
140. *Id*.
141. *Id*.
142. *Id*.
143. *Id*. at 30-31.
144. *Id*. at 31 (citing Ft. Lowell-NSS Ltd. P'ship v. Kelly, 800 P.2d 962, 966 (Ariz. 1990)).

The court noted an exception existed when the independent contractor engaged in an inherently dangerous activity.[145] Prior Arizona cases found crop dusting was an inherently dangerous activity and non-delegable "because of the very great likelihood of the poisonous dust or spray spreading to adjoining or nearby premises and damaging or destroying valuable property."[146]

Despite the defendant providing expert testimony that crop dusting is safe due to advances in technology, the Arizona Court of Appeals determined that crop dusting was still inherently dangerous.[147] The court's rationale relied upon expert testimony that the risk of spraying an adjacent crop "*cannot be eliminated* by the exercising of reasonable care."[148] More specifically, the court emphasized, "[f]lying in any one direction does not prevent sudden gusts or shifts in wind direction, and such changes in wind conditions create a risk of drift which cannot be eliminated through the exercise of reasonable care."[149] Thus, the Court reaffirmed the application of the non-delegable duty exception to aerial application.[150]

Georgia reached the same conclusion following similar logic.[151] In *Yancey v. Watkins*, Watkins farm sued Stacey Bloodsworth, Tony Yancey, and Milton Ussery for accidentally applying chemicals by airplane to its cotton crop.[152] Ussery decided to retain Bloodsworth "to apply the chemicals to his crop from a crop-dusting airplane."[153] On appeal, Ussery argued that the trial court should have granted his motion for summary judgment because Bloodsworth was an independent contractor.[154] The Georgia Court of Appeals agreed that Bloodsworth was an independent contractor.[155] Relying on a statute and prior precedent, the Court of Appeals concluded that Ussery could not delegate his duty to an independent

145. *Id*.

146. *Id*. at 32.

147. *Id*. at 33.

148. *Id*. at 334 (emphasis original).

149. *Id*. (footnote omitted);*see generally* Emelwon, Inc. v. United States, 391 F.2d 9 (5th Cir. 1968); Boroughs v. Joiner, 337 So. 2d 340 (Ala. 1976); McCorkle Farms, Inc. v. Thompson, 84 S.W.3d 884 (Ark. Ct. App. 2002); Miles v. A. Arena Co., 73 P.2d 1260 (Cal. Dist. Ct. App. 1937); Russell v. Windsor Props., Inc., 366 So. 2d 219 (La. Ct. App. 1978); Lawler v. Skelton, 130 So. 2d 565 (Miss. 1961); Pendergrass v. Lovelace, 262 P.2d 231 (N.M. 1953).

150. *Pratt*, 212 P.3d at 34.

151. Yancey v. Watkins, 708 S.E.2d 539, 544 (Ga. Ct. App. 2011).

152. *Id*. at 541.

153. *Id*.

154. *Id*. at 542.

155. *Id*. at 543.

contractor because it found spraying pesticides or herbicides from airplanes is an inherently dangerous activity.[156] Specifically, the court noted:

> [T]he aerial application of chemicals requires [a pilot] to fly approximately six to eight feet above the crop—at times only two to three feet above obstacles in the field such as irrigation equipment. And considering the likelihood of encountering nearby power lines, trees, or other obstacles, the hazards inherent in crop dusting are readily apparent.[157]

IV. STATE STATUTES RELATED TO AERIAL APPLICATION

The various state statutes that regulate aerial application can be organized into four categories: those that mandate how the aerial applicator goes about his or her job, those that require licensing of aerial applicators, those that restrict where and how chemicals can be applied, and those that mandate financial responsibility on the part of the aerial applicators.

A. Statutes That Mandate How Aerial Applicators Perform Their Operations

Some statutes mandate how an aerial applicator must perform his or her job. For example, the state of Alabama requires aerial applicators to verify the parameter of the target area and determine the safety hazards next to the target area.[158] Furthermore, the applicator must thoroughly clean the spraying equipment after each use, unless he or she will be applying the same chemical during the next use or if it is in accordance with the manufacturers' directions.[159] Unless it is unsafe, the pilot should release the chemical within fifteen feet above the crop and forty feet above the crop for all granules or pellets.[160] Furthermore, an aerial applicator cannot operate when the wind is more than 10 miles-per-hour or exceed the label's directions.[161]

156. *Id*. at 543-542; *see* S.A. Gerrard Co. v. Fricker, 27 P.2d 678, 680 (Ariz. 1933); Miles v. A. Arena Co., 73 P.2d 1260, 1263 (Cal. Dist. Ct. App. 1937); Burke v. Thomas, 313 P.2d 1082, 1088 (Okla. 1957); *see generally* Pannella v. Reilly, 23 N.E.2d 87 (Mass. 1939); Faire v. Burke, 252 S.W.2d 289 (Mo. 1952); Alexander v. Seaboard Air Line R.R. Co., 71 S.E.2d 299 (S.C. 1952).

157. *Yancey*, 708 S.E.2d at 544; *see also* RESTATEMENT (SECOND) OF TORTS § 427 (AM. LAW INST. 1965).

158. ALA. ADMIN. CODE r. 80-1-14.07(3) (2013).

159. *Id*. at 80-1-14.07(4).

160. *Id*. at 80-1-14.07(5)-(6).

161. *Id*. at 80-1-14.07(7).

California requires operators of pest control businesses to register with the Department of Agriculture.[162] Additionally, California statutes provide that it is unlawful for pesticide applicators to misrepresent the chemical's effect, operate carelessly or negligently, fail to comply with the division of agriculture's directives, or not keep the records required by the division.[163]

Florida prohibits aerial applicators from making "a pesticide recommendation or application not in accordance with the label, except as provided in this section, or not in accordance with recommendations of the United States Environmental Protection Agency (EPA) or not in accordance with the specifications of a special local need registration."[164]

B. Statutes Related to Experience and Licensing

Throughout the United States, several states have passed statutes and regulations mandating the experience an aerial applicator needs before he or she can apply substances for agricultural purposes from an aircraft. For example, Oregon requires that a person "may not spray or otherwise apply a pesticide by aircraft unless the person is an individual that holds a valid aerial pesticide applicator certificate issued by the Oregon Department of Agriculture."[165] To obtain an aerial pesticide certificate, the applicator, among other things, must acquire fifty hours of experience applying pesticides by aircraft or fifty flight training hours related to aerial application.[166] Additionally, the applicator must undergo a national examination every five years regarding "testing the knowledge of the individual regarding proper spraying and other application of pesticides by aircraft."[167]

Likewise, North Carolina requires that an applicant for an aerial applicator license have 125 hours and one year's flying experience as a pilot in the field of aerial pesticide application.[168] A pilot lacking 125 hours and one year's experience as a pilot in the field of aerial pesticide application shall be licensed as an apprentice and the application "shall be conducted under the direct supervision of a licensed pesticide pilot."[169]

162. CAL. FOOD & AGRIC. CODE § 11732 (West 2018).
163. CAL. FOOD & AGRIC. CODE § 11791 (West 2018).
164. FLA. STAT. § 487.031(13)(b) (2004).
165. OR. ADMIN. R. 603-057-0108(1) (2017).
166. *Id.* at 603-057-0108(8)(e)(A), (B).
167. *Id.* at 603-057-0108(8)(f), (9).
168. N.C. GEN. STAT. § 143-453(a) (2015).
169. *Id.*

C. Statutes That Regulate Where and How Chemicals Can Be Used

The Alabama legislature has also prohibited aerial applicators from depositing pesticides within 400 feet of occupied churches, hospitals, schools, or nursing homes.[170] Additionally, no aerial applicator may apply pesticides to any dedicated road or on a vehicle using the road.[171] An aerial applicator may not apply a pesticide in such a way to endanger aquatic life unless the aquatic life harmed was the target.[172] To apply pesticides inside a business or residential property, the applicator must obtain written consent from an inhabitant of this property that is at least 18 years old.[173]

Likewise, Arizona restricts the use of certain pesticides on a field next to an area containing 25 residences, or within various distances of certain health care institutions, child care facilities, and school.[174] The distance varies based on the chemical applied.[175] Arizona also requires aerial applicators to notify responsible individuals at schools, child group homes, or child care facilities when paraquat or other highly toxic pesticides are being applied within one fourth of a mile of those facilities.[176] The Arizona legislature emphasized that this statute does not allow an aerial applicator to apply pesticides "in such a way as to cause drift within the grounds of a residence, school, health care institution, child care group home, or day care center, but compliance with this section and the requirements of the pesticide label establishes a presumption of compliance with this subsection."[177]

D. Statutes Related to Financial Responsibility

In South Carolina, an aerial applicator must furnish proof of **"**a surety bond or a liability insurance policy or certification protecting persons who may suffer legal damages as a result of the application of pesticides by the commercial applicator or his agents or employees.**"**[178] However, the statute emphasizes that compliance with pesticide application regulations does not relieve an aerial applicator from liability.[179]

170. ALA. ADMIN. CODE r. 80-1-14.07(8)(a) (2013).
171. *Id*. at 80-1-14.07(8)(b).
172. *Id*. at 80-1-14.07(8)(c).
173. *Id*. at 80-1-14.07(8)(d).
174. ARIZ. REV. STAT. ANN. § 3-365(A)–(C) (2004).
175. *Id*.
176. *Id*. at § 3-365(D)
177. *Id*. at § 3-365(E.
178. S.C. CODE ANN. § 46-13-100 (2017).
179. *Id*. at § 46-13-100(3).

In Tennessee, applicants for an argonaut license must hold an FAA argonaut license, prove their proficiency to the commissioner of agriculture, obtain a $100,000 liability insurance policy, hold a certification in the category of pesticide they will use, and pass an examination.[180] Minnesota also requires an applicator to pass a closed-book exam and obtain a performance bond or policy of insurance.[181]

As these rules exemplify, states have substantially regulated the experience that aerial applicators must have before working, the manner in which they conduct their operations, and how much insurance they must carry.

E. Federal Statutes Impacting Aerial Application

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) "regulates pesticide registration, pesticide disposal, trade secrets, pesticide application through certification, removal of pesticides from the market, and the role of state and local governments in regulating pesticide use within their jurisdictions."[182] Under FIFRA, the EPA will approve the manufacture of a pesticide if it finds the following:

> (1) its composition warrants the proposed claim; (2) the labeling and other required materials comply with FIFRA; (3) it will perform its intended function without unreasonable adverse effects on the environment; and (4) when used in accordance with widespread or commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.[183]

The EPA has become deeply involved in every aspect of pesticide labeling and requires that labels be written in such a way that the average person using the chemical, or supervising the use of the chemical, can understand it, and that the label be sufficient enough to protect the public from fraud, adverse environmental effects, and personal injury.[184] For example, the label can "prohibit use when the wind speed exceeds specified limits to minimize drift."[185]

Additionally, "EPA regulations require that 'no pesticide is applied so as to contact, either directly or through drift, any worker or other person, other than an appropriately trained and equipped handler.'"[186]

180. TENN. CODE ANN. § 43-8-304(a)–(e) (2015).
181. MINN. STAT. § 18B.33(4)(a) (2017).
182. Klass, *supra* note 1, at 772.
183. *Id*. at 773.
184. *Id*. at 776-77.
185. *Id*. at 777 (citing 40 C.F.R. § 156.10(i)(2) (2005)).
186. Feitshans, *supra* note 8, at 272 (quoting 40 C.F.R. § 170.210(a) (1997)).

V. WHY ALL STATES SHOULD TREAT AERIAL APPLICATION LIKE GENERAL AVIATION

Society has significantly advanced from the days when driving automobiles and flying airplanes produced excessive risk, even with due care. Fortunately, technology for these activities improved, as did the skills of those engaged in them. Courts have long abandoned strict liability as the standard of care for those driving and flying. Additionally, absent independent negligence on the part of someone who hires an independent contractor to perform these activities, that hirer is not liable for any negligence on the part of a pilot or driver under contemporary principles.

It is time for all courts to extend the same protections to those who hire others to apply herbicides and pesticides by aircraft. This activity should no longer be labeled as an ultrahazardous or inherently dangerous activity for three reasons: (1) the technology related to aerial application has advanced significantly; (2) both states and the federal government have made this activity safer through expansive regulation; and (3) courts have not properly applied Section 520 of the Restatement (Second) of Torts in aerial application cases.

Since the 1950's, the engines in most crop-dusting airplanes have been engineered to be more powerful, the chemicals designed to be less dangerous, and the aircraft used in aerial application more technologically advanced, featuring global positioning systems to help them spray chemicals more accurately.[187] Modern aerial applicators also have access to real-time weather and wind conditions on networked, mobile devices. Thus, the profession is much safer than when the Louisiana Supreme Court first applied strict liability to aerial application in 1957.[188]

Moreover, both state legislatures and the federal government have significantly regulated the application of chemicals by aircraft for agricultural purposes. They regulate who may apply the chemicals, how much training they must have, what chemicals they may apply, and where and when they may apply them. The government and its agencies even mandate that aerial applicators have insurance and dictate the amount of coverage the aerial applicators must maintain. These regulations, collectively, have increased the safety for aerial application operations and have reduced the risk of harm to the public.

187. Maddy Lauria, *Crop-Dusting Goes High Tech*, CAPE GAZETTE (Dec. 14, 2017), https://perma.cc/C96N-PY7E.

188. *See contra* Gotreax v. Gary, 94 So. 2d 293, 293-94 (La. 1957).

If an aerial applicator complies with all of these regulations and the chemicals somehow drift to a non-target area, a court should apply the standard of care used in negligence cases. Given the numerous safety regulations, the court should not automatically hold a farmer liable for an aerial applicator's negligence, absent some independent negligence on the part of the farmer. If courts continue to reflexively impose strict liability rather than negligence, principles in these cases, the extensive rules, regulations, and the legislative intent behind them becomes superfluous.

Additionally, courts that have used strict liability in aerial application cases, such as the Washington Supreme Court in *Langan v. Valicopters, Inc.*, have misunderstood the analysis of Section 520 of the Restatement (Second) of Torts.[189] The *Langan* court's conclusion—that aerial application of chemicals involved a high degree of risk and was likely to result in harm because the defendant's neighbors were organic farmers[190]—rests on faulty logic.

Instead of determining if aerial application involved a high degree of risk and would likely result in harm using an objective standard, the court used a subjective standard by examining the victim's particularly susceptible organic farming operation. Thus, the court gave more weight to the victim's use of their land instead of the defendant's traditional farming methods. [191]

Because the aerial application occurred near an organic farm, the court found the first factor in Section 520 of the Restatement of Torts satisfied. [192] However, this analysis fails to account for the fact that the organic farmers might have purchased property for their farm next to a traditional farm that is already in operation. If so, then they voluntarily subjected themselves to the alleged nuisance. It is inequitable to impose undue limitations on a farmer's land simply because his or her neighbor chooses to use their land in a particular manner.

The *Langam* court's finding that the risk of harm could not be eliminated with due care because of the "uncontrollability of dust or spray drift"[193] simply does not align with today's technology. As discussed above, because of modern technology, the risk of harm can most likely be eliminated through proper precautions.

The *Langam* court also determined that aerial application was not a matter of common usage by examining the amount of aerial application in that particular geographic area.[194] The court determined that aerial application was prevalent in the

189. *See* Langan v. Valicopters, Inc., 567 P.2d 218, 221-23 (Wash. 1977).
190. *Id.* at 222.
191. *Id.* at 223.
192. *Id.* at 222.
193. *Id.*
194. *Id.* at 223.

area but somehow also decided that the activity was not carried on by a large number of people.[195] The court also determined that crop dusting was not appropriate for that location because it was being conducted next to an organic farm.[196] This is also incorrect; the court should have determined that aerial application was appropriate for the area because it was in an agricultural area, and it was a matter of common usage because it was conducted regularly in that area.[197]

The court noted the value of the activity to the community factor had received criticism from commentators and gave this factor little weight.[198] Thus, the court did not objectively apply Section 520 of the Restatement of Torts. If applied objectively, the test would show that negligence is the standard of care that should usually be applied to aerial application cases.

The same reasons for no longer using strict liability also apply to no longer finding that aerial application is a non-delegable duty. The training and safety measures required by state and federal statutes mean that those who hire aerial applicators should be able to trust that they have adequate training and use sufficient safety measures. Thus, aerial application should no longer be considered an inherently dangerous activity requiring the application of vicarious liability.

VI. CONCLUSION

Courts have struggled to determine what standard of care to apply to aerial application cases and whether to hold those who hire aerial applicators liable for the negligence of those they hire. With advancements in technology and an increase in regulations, it is time for all courts to abandon the strict liability standard. It is also time for courts to abandon the non-delegable duty rule for aerial applicators and those who hire them. Both of these changes will strike a proper balance between the rights of aerial applicators and the rights of plaintiff landowners.

195. *Id.*
196. *Id.*
197. *See id.*
198. *Id.*