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Current Legal Rules Benefit Spray Applicators When It Comes to Pesticide Drift

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Homeowners, landowners, pesticide applicators, and farmers are concerned about pesticide drift. It may injure a homeowner's garden or flowers or ruin a neighboring farmer's crop. While no Maryland court has considered the issue of liability from pesticide drift, courts in other states have. These decisions provide some guidance on how a Maryland court might handle the issue. Depending on the facts of the drift case, pesticide applicators and farmers could owe damages for nuisance or trespass, or for uses inconsistent with the pesticide label.

Previous decisions show that it is not easy for neighboring landowners to win pesticide drift cases. Applicators should remember to utilize best practices when applying pesticides to limit drift issues.

Pesticide Applicators Must Follow State Regulations

The Maryland Department of Agriculture (MDA) under the ***Pesticide***

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Applicator's Law regulates pesticides use. The law requires that a business or individual must be trained, certified, and registered with MDA before they can commercially apply pesticides.

General use pesticides are those that you can purchase at a retail outlet (such as the local hardware or garden supply store) and use without a license (§ 5-201). You must be certified by MDA, however to apply ***restricted use pesticides***—those that only a certified applicator can apply—or when selling pest control services, for example services to control termites at your house. The pesticide's label will clearly state if the substance is for restricted or general use.

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MDA certifies two types of applicators:

1. Private – a person who can only apply restricted use pesticides to produce an agricultural crop on his/her own or rented farmland.

2. Commercial – individuals who can apply general or restricted use pesticides as employees of a licensed pest control business or public agency (§5-201).

Remember the law requires you to only use certified commercial applicators or registered employees of licensed pest control firms when paying someone to apply pesticides to your owned or rented property.

Both types of applicators must attend certification training programs either through MDA or one approved by MDA. Check MDA's website at http://go.umd.edu/PestCert to learn the dates and times of certification programs.

Commercial applicators and registered employees of licensed pest control firms are authorized to handle restricted and general use pesticides. For example, Victoria pays Steve to apply pesticides to her pastures. Steve must be a certified commercial applicator in order to apply pesticides for Victoria.

What if Steve is just a private applicator and Victoria pays him in a portion of beef to spray the pasture? This would violate the law because Steve is not applying pesticides to his own owned or rented farmland and is being paid (a portion of beef counts as payment). Remember the law requires you to only use certified commercial applicators or registered employees of licensed pest control firms when paying someone to apply pesticides to your owned or rented property.

Traditional Legal Doctrines Could Apply to Pesticide Drift Cases

1. Negligence

Negligence is simply failure to exercise a ***duty of care*** under the circumstances. Duty of care means that an individual failed to act as a reasonable and prudent person would have in the same situation. Courts have found that negligence has four elements that need to be proven:

1. Party owed a duty of care to act reasonable under the circumstances to the injured party;

2. Party breached that duty of care;

3. Breach was the proximate cause of the injury; and

4. Actual damages occurred.

Negligence has been used in pesticide drift cases when the question is whether the applicator/sprayer breach was the proximate cause of the injury. Proximate cause is a cause that is legally sufficient to find liability (Black's Law Dictionary, 2004). Proximate cause is not always an easy concept to grasp, even for attorneys. Courts often utilize a "but for" test to determine proximate cause. Looking back at our example, if Victoria hadn't sprayed

weed killer on an extremely windy day, Charlie's pasture would not have been damaged. This is an example of proximate cause, and shows negligence because a reasonable and prudent person would spray pesticides only on a calm day to minimize drift.

In all the cases involving negligence and pesticide drift, courts acknowledge that pesticides may drift regardless of the conditions and some drift is almost always expected. Pesticide drift only reaches the point of negligence when the sprayer/applicator has breached the duty of care or the breach was the proximate cause of the injury.

In *Mangrum v. Pigue*, a neighboring farmer claimed that negligent application of *Roundup Ultra* killed his corn. The Arkansas Supreme Court found no evidence to show that the commercial applicator was negligent in the application of *Roundup Ultra*. The applicator (who was the only witness) stated the application was done according to the rules, no witnesses saw a plume of chemical drift hit the neighbor's corn, the chemical was commonly used, and the application took place with minimal winds. *Mangrum* is a good example of a court not finding the applicator breached the duty of care owed to a neighboring landowner.

In Farm Services, Inc. v. Gonzales, the Texas Court of Appeals found that the sudden and unexpected discharge of a chemical by a crop duster did not normally occur in the absence of negligence.

On the opposite end of the spectrum is *Boyd v. Thompson-Hayward Chemical Co.* In *Boyd*, an aerial operator was hired to spray 2, 4-D on a field, and the spray drifted and injured a neighboring landowner's cotton crop. It was shown that the aerial operator knew that 2, 4-D could injure cotton and that there was cotton in the area. Witnesses saw the operator continuing to spray as he flew over property lines to turn around. Finally, the operator knew that it was windy because wind had forced him to quit spraying each of the three days before the incident.

Each of these cases required a showing of proximate cause. In *Mangrum*, there were no witnesses to see the drift and records showed minimal winds that day. With *Boyd*, there were witnesses to the drift, records to indicate it was windy, and the sprayer used a chemical which could potentially injure neighboring crops. There is no guarantee, however, a Maryland court would consider these same factors in a negligence case involving pesticide drift.

2. Res Ipsa Loquitor

Another state looking at pesticide drift as negligence applied the doctrine of *res ipsa loquitor* (Latin for "the thing speaks for itself). *Res ipsa loquitor* cases are based on the idea that some events do not ordinarily happen without negligence. In the original case for *res ipsa loquitor*, a man walking by a warehouse was injured when a flour barrel fell out the window. At trial, the injured man argued that the fact he was injured was enough to demonstrate negligence and the court agreed.

In *Farm Services, Inc.* v. *Gonzales*, the Texas Court of Appeals found that the sudden and unexpected discharge of a chemical by a crop duster did not normally occur in the absence of negligence. In applying *res ipsa loquitor*, the court noted the evidence suggested a strong probability that the crop duster negligently failed to keep up equipment. A few years later, the Texas Court of Appeals in another opinion involving drift, refused to apply the doctrine because there was

no sudden and unexpected discharge of a pesticide and no indication the drift had been caused by negligence (*Parker, 2007*).

3. Strict Liability

One final theory of negligence utilized by a court in drift cases is strict liability which does not require a person to show negligence but involves the breach of a duty to make something safe. This is typically the theory used in product liability cases and in cases involving dangerous animals. For example, Mike Tyson owned a tiger. No matter how strong Mike's tiger cage was, if that tiger got out and caused damage, Mike would have been strictly liable regardless of proving negligence because a tiger is a dangerous animal.

In *Young v. Darter*, the Oklahoma Supreme Court held that a landowner using a weed killer (in this case 2, 4-D) did so at his/her own peril and would be liable for the damage, regardless of negligence being shown. In *Young*, the 2, 4-D drift injured the neighbor's cotton crop. Cotton is one crop susceptible to damage from 2, 4-D, which is one reason the court applied strict liability. As of June 2016, this is the only finding of strict liability due to pesticide drift.

4. Trespass

You probably are aware that a person can commit trespass, but what about particulate matter like pesticides? Trespass is when a person enters and remains on your land without your consent. In *Johnson v. Paynesville Farmers Union Co-op Oil Co.*, the Minnesota Supreme Court found that invasion by particulate matter, like a pesticide, did not amount to a trespass. The Minnesota court pointed out that some states have found invasion by particulate matter to be a trespass. A quick review of previous Maryland court decisions, however, shows no similar judgments.

Drift Liability Can Occur When Directions for Pesticide Use Are Not Followed

Pesticides must be used for purposes consistent with the label. In the Louisiana case *Johnson v. Odom*, Johnson was a commercial applicator who lost his license following run-ins with the Louisiana Agriculture Department. Johnson continued to operate as a commercial operator after his license was revoked. A state agriculture official took photos from a public road of Johnson applying chemicals. Johnson sprayed the state official during the application. The state agriculture department found this use was inconsistent with the approved label and imposed the maximum fine against Johnson. The Louisiana Court of Appeals agreed with this determination and affirmed the agriculture department's decision.

According to USDA, Maryland had 858 acres of grapes in 2014. Grapes, like cotton, can be severely damaged by drifting 2, 4-D. The Young decision means applicators need to be aware when applying a pesticide near a vineyard/ winery and utilize best management practices.

Pay attention to the labels and make sure the pesticide applications are consistent with the warnings and instructions. Otherwise, court could potentially find you liable for drift.

What About Organics?

Organic agriculture has increased in the United States and in Maryland since federal regulations were published for the National Organic Program in 2000. According to the 2012 Census of Agriculture, organic sales grew 226% between 2002 and 2012 in Maryland and by 118% since 2007. With increases in organic production, there can be conflicts between conventional and organic production, especially when pesticide drift occurs.

Johnson v. Paynesville Farmers Union Co-op Oil Co. is one of the few cases dealing with pesticide drift on organic crops. The organic farmer in this case argued that farmland was taken out of production because of pesticide drift. The organic farmer and the organic certifier stated that the federal standards require land be taken out of production for 3 years if a synthetic chemical was applied to organic farmland.

The Minnesota Supreme Court disagreed with this interpretation of the federal organic standards. In the Minnesota court's opinion, land did not have to be taken out of organic production unless pesticide residues exceeded the 5-percent tolerance level in the federal standards. Because there was no evidence that the pesticide residues exceeded the 5-percent tolerance level, the sprayer was not the proximate cause of the organic farmer's damages and there was no negligence.

Pesticide drift and organics is a developing area of the law and we likely will see more court opinions in this area. The Maryland Department of Agriculture provides a *Sensitive Crop Locator* to help pesticide applicators know where crops sensitive to pesticide spraying are located. Producers should consider listing their organic fields on the locator to aid applicators and neighbors in knowing what is around them before spraying. Information on the locator can be found at http://mda.maryland.gov/plants-pests/Pages/pesticide_regulation.aspx. ■

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Authored by:

Paul Goeringer
Extension Legal Specialist
lgoering@umd.edu
@aglawPaul

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University of Maryland
College of Agriculture
and Natural Resources

Department of Agricultural
and Resource Economics
Symons Hall, Room 2119
College Park, MD 20742
(301) 405-1293
www.umaglaw.org
Twitter: @MDAgLaw

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