Agrichemical Use and Risk Management: Questions of Employee Liability

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Plant pathologists in public service must operate in an increasingly complex mass of laws and regulations pertaining to the use of pesticides. Pesticide law includes federal, state, and local legislation, rules, and regulations along with extensive inspections, supervision, and litigation. The law pertaining to pesticides affects every aspect from manufacture of a product to disposal of the container. The law further encompasses such related issues as disease diagnosis and pesticide recommendation, drift, water contamination, and residues. Owing to increasingly refined methods for analyzing pesticide residues, public concern is growing about the potential health risks associated with applying some products that are now detected on commodities reaching the marketplace. As these health and environmental concerns escalate, so too will the number of laws and regulations.

Within the past several years, agricultural professionals and others have taken more than just a casual interest in this escalating legal climate. Many public servants are troubled with the thought of lawsuits challenging their professional judgment. Here, personal liability for omission or commission is of prime concern. This paper addresses the public employee liability issue by introducing plant pathologists to the legal concepts of sovereign immunity and negligence. Because each lawsuit turns on its own particular facts, this paper is by no means complete. Nevertheless, it does provide a basic overview of the law that, when coupled with common sense, may limit the professional's exposure to unnecessary and costly lawsuits. Ultimately, avoidance of litigation is just a matter of sound risk management grounded on a knowledge of law and on common sense.

Sovereign Immunity

In the beginning . . . "The King Could Do No Wrong" (1). That is, the sovereign (government) could not be sued for its or its employees' wrongs. When this doctrine was first adopted by U.S. courts, liability was imposed personally on the public employee committing the civil wrong (tort) but not on the employer government. Needless to say, this custom was not well accepted by public employees. Over the years, however, courts have gradually changed the immunity laws and placed limits on the personal liability exposure of public servants. The government has assumed greater responsibility for the wrongs of its employees. These changes in policy have been adopted at the federal level in the Federal Tort Claims Act (FTCA) (2) and by the states through their various sovereign immunity laws. Nevertheless, under certain conditions, public employees can still be liable for their actions. Courts generally consider several factors before determining whether a public employee is protected under either the FTCA or an appropriate state law.

For an employee to be protected, it must first be determined that the job qualified the employee for protection under federal or state law. For whom was the employee working at the time the wrong was committed? Was it federal or state government? The scope of protection is determined according to

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whether a federal or state "hat" was worn when the civil wrong was committed. This in itself may not always be entirely clear.

Second, it must be determined whether the employee was acting within the scope of official duties when the wrong was committed. The FTCA or state law applies only, if at all, if the wrong was committed in the course of the employee's official duties, that is, within the scope of his or her employment. Because this area of the law is still evolving, it is difficult to determine exactly what constitutes the scope of employment. Generally, the wrongful act must occur while the public servant was "on the job" or was performing a duty for which he or she was employed. Several questions can be asked in defining job- and non-job-related acts. We can begin with a detailed examination of the employee's job description. What is in it? Was the employee authorized to act as he or she did? Would other plant pathologists in like positions have acted similarly? What degree of discretion was allowed in carrying out the designated duties? Was there a historical relationship between the employee and the client? Such factors as the historical employee/client relationship and benefits to the state employer may provide an excellent defense to lawsuits alleging negligence for omissions and commissions occurring during evenings, weekends, and emergencies. But a pathologist moonlighting for personal gain would not be protected under either state or federal law. This activity is clearly not within the scope of employment.

The third determination, and perhaps the most difficult, is whether the employee's duties are ministerial or discretionary in nature. This distinction was established because the courts are reluctant to second-guess the exercise of discretion by the administrative branch. A court may come to different conclusions concerning the question of personal liability, depending on the way an action is characterized. Discretionary acts are those that require personal deliberation, decision, and judgment, whereas ministerial acts require only an obedience to orders or the performance of a duty in which the employee is left no choice (3). The Supreme Court, in interpreting the FTCA, delimited discretionary functions thus: "Where there is room for policy judgement and decision, there is discretion. Acts of subordinates in carrying out the operations of government in accordance with official directives cannot be actionable."

Traditionally, personal liability has not been imposed for discretionary acts, because independent judgment is necessary in reaching difficult decisions inherent in the person's job. Personal liability has been imposed for ministerial acts performed in a negligent manner, whether by commission or omission. The line between these two acts is not always clear and is usually determined on a case-by-case basis in light of the particular facts. This distinction is a continual source of uncertainty for practicing attorneys and judges.

Finally, it must be determined if the wrong was committed with a malicious or criminal intent or in bad faith. Both state and federal law and corresponding court decisions limiting personal liability are, for the most part, inapplicable when the public employee acts in bad faith or with a malicious or criminal intent. As an example, a plant pathologist who knowingly recommends a pesticide "inconsistent with its labeling" (4) would be open to a lawsuit without the state's protection. Similarly, if a plant pathologist knows that an individual has used or plans to use a pesticide inconsistent with its label but voices no objection, that "silence" could, in some courts, be construed as tantamount to making an illegal recommendation. Silence alone could be enough to strip away the employee's sovereign immunity protection.

To summarize, assuming that a wrong was committed by an employee in the course of employment and that the wrong was not done in bad faith or with a malicious or criminal intent, the ultimate issue to be decided is whether the act constituting the wrong was ministerial or discretionary in character. A ministerial act giving rise to a civil wrong, even if the employee acted in good faith, will open the employee to personal liability.

Negligence

Common law, or court-made law, is distinguished from statutory law, or legislatively made law. Common law actions are for civil wrongs, or torts, and are initiated by the person (plaintiff) who has suffered some injury to person or property as a result of the acts or omissions of another, the defendant. The common law originates from decades of Anglo-American customs and traditions that have been incorporated into judicial rules for settling disputes. Of special significance to the plant pathologist is the common law action, or "lawsuit," of negligence.

An individual is negligent who neglects to do something that a "reasonable person" would do under like circumstances or does something that a reasonable person would not do. Few legalistic phrases have caused as much confusion and debate as the subjective term "reasonable person." Because the "reasonable person" who reacts correctly to every situation has probably never existed, the jury ultimately decides if the conduct was acceptable in the existing circumstances. Obviously, this "reasonable person" varies with community standards and customs and with the background of the individual. This concept will be addressed along with the elements of negligence.

The basis of liability under negligence is the creation of an unreasonable risk of harm to another. Any act or omission that creates such risk constitutes negligence. Specific elements, however, must first be demonstrated. First, the defendant must have had a duty of care toward the plaintiff. If a reasonable person could have foreseen, for example, that a method of pesticide usage could result in harm to another, then the defendant had a duty to avoid the risk. Second, if a duty of care did exist, the defendant must have breached this duty by acting unreasonably in light of the foreseeable risk. This standard is again an application of the reasonable person, or "put yourself in the other person's shoes" concept. We must ask what the reasonable and prudent plant pathologist would have done under the same or similar circumstances. Here, the plant pathologist is held to the standard of care practiced by the average member in good standing within the profession in the same or similar localities. A plant pathologist who claims to be a specialist in a designated subject area, however, will be held to a higher standard of care. For example, an expert in taxonomy of *Cercospora* will be held to a higher standard of care in identifying *Cercospora* species than will the rank-and-file pathologist. Additionally, any public employee certified as a specialist in a given area will be held to a higher standard of care reflective of that certification.

There is more. In order to recover damages from the defendant, the plaintiff must have suffered some actual injury to person or property that was caused by the defendant's breach. Causation need not be direct. The breach may be the indirect cause of the injury as long as the chain of causation is not so attenuated that foreseeable injury is impossible to establish. This principle for indirect but foreseeable injury is known as "proximate cause." For example, two samples of corn grain submitted for aflatoxin analysis are received in a diagnostic laboratory on the same day. The samples are from lots intended for use as cattle feed. During the "log-in" activity, the samples and their enclosed identification forms are inadvertently switched by the examining diagnostician. As a result, one client receives a false-positive and destroys the grain, the other receives a false-negative and feeds that grain to cattle, and both suffer an economic loss—one of grain, the other of cattle. The plant pathologist's switch of the samples may be viewed as the actual cause of both losses. In addition, had it been "foreseeable" that the farmer

receiving the false-negative would have also fed that grain to his family, then the pathologist could have been liable for the "proximate cause" of their injury or death.

Several additional items should be noted. First, the public employee will not be held to knowledge of risks that are not known or apparent. For example, if a grower relies on the plant pathologist's observations in the field, the pathologist's level of care is based on those field observations. If the reliance is on phone-in "observation," the standard of care should be lowered because the pathologist has not directly viewed the problem. Diagnoses and follow-up pesticide recommendations are frequently made by phone, sight unseen. Sound risk management would require the diagnostician to put the caller on notice that a phone-in problem has inherent limitations as compared with actual field visits.

A poor result of diagnosis should not necessarily be equated with negligence. Professionals will rarely be held liable for a mistake of judgment where the reliability of a procedure or technique is open to reasonable doubt. For example, a pathologist sued for negligence in a misdiagnosis may avoid liability by showing that he or she exercised the ordinary care shown by similar members of the profession. Naturally, care should be taken by the professional to refrain from making promises that are impossible to keep or from claiming knowledge not possessed.

In practice, the law of negligence is not always easily defined. The outcome of a lawsuit in negligence almost always depends on the facts of a particular case, the particular conduct of the wrongdoer, and whether the acts of the wrongdoer were in fact the cause of the injuries suffered by the plaintiff. Even slight factual differences in cases may lead to different conclusions regarding liability. Nevertheless, some generalization is possible. Once a plant pathologist decides on a course of action—diagnosing a disease, recommending a pesticide, or both—the act must be carried out reasonably and responsibly under the existing circumstances and in accordance with acceptable standards of care and common sense. Common sense is a key element in any approach to agrichemical risk management.

Conclusion

As laws and regulations continue to proliferate, so too will the number of lawsuits. Like it or not, plant pathologists and other publicly employed agricultural professionals are becoming more involved in the liability arena. Many lawsuits can, however, be avoided if the practicing professional employs only sound risk management practices grounded on a knowledge of law and on common sense. This is especially true in the diagnostic and agrichemical professions. This paper has used the law as a vehicle to carry a risk management message for public employees. It is an introduction designed to provide a basic description of the legal structure affecting agriculture, so that the plant pathologist can be a better informed professional and thus a more effective participant in agriculture.

REFERENCES

1. Blackstone Commentaries, 246-247 (Jones Ed. 1915).
2. 60 Stat. 843.
3. *Dalehite v U.S.* 346 U.S. 15 at 36 (1953).
4. 7 U.S.C. 136j (2) (G).

(Some knowledge of legal research is required to locate these sources. The information can be obtained from the reference desk of any law library.)