MANUFACTURER, DEALER AND GROWER RESPONSIBILITIES IN HANDLING HIGHLY TOXIC PESTICIDES

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The purpose of this paper is to review, for workers in economic entomology, some of their responsibilities regarding the manufacture, sale and use of highly toxic pesticides.

The cataclysmic expansion of our list of economically available chemicals for use as pesticides has placed economic entomology in a position where, for all practical purposes, the art precedes the science. That is to say, we are finding and using many compounds simply because they have been found to do a job by the trial and error route of investigation. We know little of why a certain compound is a highly efficient insecticide while its chemical isomers, much less its chemical first cousins, are more often than not virtually useless as insecticides. Our inability to predict toxicity from structure leaves us with a void that makes us treat almost all pesticidal compounds as separate entities. The mention of this void is not in criticism of the trade nor the workers doing basic research on the relationships of structures to toxicity but merely to point out that this handicap intensifies our responsibilities to the general public, for where the building blocks are not too firm we must build with extreme caution. Recent popular articles and the investigations by the Delaney Committee all indicate the growing public awareness of the industries obligations.

A discussion such as this seems to outline itself on the basis of the chronology of events from the manufacturers production of a pesticide to its eventual use in the field. Keystone of the statutory law regulating the sale of pesticides is the Federal Insecticide Act of 1947 and its state law counterparts. It goes without saying that distribution of a pesticide on a national scale means conformity with all the divergent state laws and the federal law as well. A few years ago this was one of the difficult problems of the industry, but constructive cooperation by the industry and the various state legislatures is bringing about a degree of uniformity which is a credit to the industry. These laws in general perform two groups of functions, they assure the farmer as to quality and afford protection to the public in general from damage by the use of the product either directly or indirectly. The quality phase of the law involves
inspection, sampling, and chemical analysis by the United States Department of Agriculture and various state governments, thus ensuring against adulterated products. The registration procedure makes quite certain that the product will do the job for which it is intended.

I will not dwell further on the quality aspects of the laws for the needs of performance are obvious, however, it might be well to point out that even the accidental production of an adulterated product might cause serious crop damage, even if it has no phytotoxic effect on the crop itself, by failure to do the intended job. While such damage is often difficult to prove, negligence is present and the manufacturer can be held liable.

Protection to the public is obtained through the following labeling restrictions:

1. The directions for usage, where toxic residues are potential danger, give adequate timing instructions.
2. The instructions for usage with such compounds as parathion contain specific instructions to operators handling the application of the material as to protective equipment and other safety instructions.
3. Warnings are clearly stated to prevent accidental poisoning. Antidotes, when available and deemed necessary, are also a part of the label. Artificial coloration for arsenicals and some fluorides is also necessary.
4. Most recently, precautions to the user with regard to possible damage by drift of the pesticide to other property in the immediate proximity have been required as a part of the precautionary statements. While it is by no means a part of the law, most manufacturers also use a non-warranty clause, the fine print of the label, in an attempt to limit their liability of the product to the chemical analysis. The validity of this clause is of doubtful value.

Violation of the federal insecticide act and most of the state laws is a misdemeanor; however, the liability implications of civil suit can be far more costly to the manufacturer.

The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. However, highly toxic insecticides must, by nature, be considered articles which are inherently dangerous and as such the manufacturer or vendor may be liable for damages without proper warning of a danger which might not be apparent to another.

Assuming that the manufacturer has placed on the market a properly labeled reputable product for sale, it then becomes
the responsibility of his sales organization to see that the product is handled and used according to the manufacturer's recommendations. Sales organizations must be on guard to prevent the over-zealous sales representative from extenuating the precautions or extending product claims, for it must be understood that an agent or employee may do an act or make a statement that not only is not authorized, but is actually prohibited by his employer. Still if it is within the apparent scope of his employment and done in course of principals, business persons dealing with him have the right to depend upon appearance. That is, insofar as the public is concerned, the employees or agents authority may be real or it may be apparent, and the public may rely on either, unless in case of apparent authority the circumstances are such as to put a customer on inquiry.

By accepting benefit of agents act or representations the employer ratifies.

These are general rules and in any particular situation the facts must control. Time does not permit a development of this broad field of law; however, the implications of its application to salesmen, branch managers and possible liability of manufacturers and dealers is obvious.

Of course the employee or agent who does an unauthorized thing is personally liable for loss resulting to person dealing with him, and is also liable to the employer or principal for loss caused by his unauthorized act; however, financial irresponsibility of the employee usually renders this right or indemnity of no practical value.

Dealers' responsibilities parallel those of the manufacturer with respect to sales effort and the same admonitions regarding the extenuation of precautions and broadening of manufacturers claims apply here.

There are two other points regarding the merchandising of highly toxic pesticides with which it is the duty of the dealer to acquaint himself. First, the personnel should be properly cautioned as to the dangers inherent in the product. They should be carefully instructed and protective equipment made available to them so that they can clean up spillage from broken containers which is bound to occur when handling these materials in glass or paper. That this danger to employees handling these materials exists, can be seen by the exclusion of responsibility for damage caused by handling that has crept into most manufacturers non-warranty clauses in the past ten years.
Second, the matter of warehousing these materials should be given more consideration than the average seed, feed and fertilizer dealer gives. There is very real danger of storing highly toxic insecticides with feed or foodstuffs. For, again, breakage of packages occurs all too easily and the dosages of these materials in feeds would not have to be very great to cause trouble.

Storage of weed killers also presents a special problem for contamination of adjacent spray materials or fertilizer packed in paper, from a leaking drum of liquid weed killer, can produce damage to a considerable acreage.

From the dealer the product passes to the grower or the custom applicator. It is this point in the chain of sales that is one of the most problematical phases of the industry. For the industry produces a legion of materials, most of them inherently dangerous, and they must pass in large quantities to as variable a consumer as the American farmer. We are all aware of the newness of many of the tools we work with and it takes time to build up a body of case law; however, there seems to be enough case law arising from spraying and dusting operations to give the farmer some basic principles by which to govern himself when using pesticides.

First, the farmer must choose the right product. This product must do the job without injury to the crop and without possibility of leaving a harmful residue on his produce which would carry through to the consumer. This means that he must be aware of the timing limitations of his pesticide.

Second, he must see to it that his own personnel are familiar with the poisonous nature of the materials they are using, that they are supplied with the proper safety equipment and know how and do use it. It may be well to add here that while farm labor is not included under the Florida Workman’s Compensation Law the employer can elect to come under the provisions of the law with a rate of about $1.92 per $100.00 of payroll.

Third, he must be aware of his rights and obligations with regard to the effect of his spraying operations on his neighbors’ property. There is no doubt that farmers have the right to use the many beneficial dusts and sprays, in fact their necessity to efficient production is a fact rather well established by recent testimony before the Food and Drug Administration hearings on residue tolerance. However, such preventive measures cannot be used with absolute impunity. The owner of an area dusted or sprayed with a pesticide known to be dangerous say
negligently spread the material in such a manner as to endanger stock or other property of persons in the immediate vicinity and become liable to damage therefrom. The plaintiff has the burden of proving that it was the pesticide used that caused the damage; also that the defendants were guilty of negligence on account of the manner in which the material reached adjacent fields; and that such negligence was the proximate cause for the damage. The hiring of independent contractors such as airplane sprayers and dusters would appear to offer a means of avoiding liability. Generally, the employer is not liable for the negligence of an independent contractor; however, this is not true in this case, for again we must take into account the fact that we are dealing with an inherently dangerous substance. The damage due to negligent application should be apparent to the owner and he cannot delegate the work to avoid the liability. It is true that lack of previous experience has been the basis for holding the owners not liable for damage, as in certain cases involving the use of 2-4-D dust on rice. However, as our use of dangerous pesticides expands this should become an ever decreasing basis for defense for damages caused. When it becomes necessary to apply pesticides where there is adjacent stock, notice to or knowledge of impending operations can affect the owners liability. It is best that this be handled by cooperation of grower and adjacent land owners. In regard to trespassing stock on the owner’s land, the plaintiff cannot recover damages unless the poison was distributed wantonly, maliciously, or with deliberate intent to said stock.

In summing up these grower problems, it would be safe to say that almost all of them resolve themselves into reading the entire label carefully and proceeding with all the precautions stipulated, and back this with some honest to goodness common sense.

It is a real tribute to the pesticide industry that they have produced the tremendous dollar and tonnage volume; have marketed this to as mutable a customer as the American farmer; and in so doing have not built up any great body of case law.

In closing; it may be well to point out that the high ethical standards of doing business which is the rule with most companies handling highly toxic pesticides is good business. It is well to understand that neglect of a moral obligation when working with inherently dangerous products may cost you money in a court of common law.