

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANNE ANDERSON, et al.,
Plaintiffs,

v.

W. R. GRACE, et al.,
Defendants

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DOCKETED

CIVIL ACTION
NO. 82-1672-S

MEMORANDUM AND ORDER ON
MOTIONS FOR DIRECTED VERDICTS

June 9, 1986

SKINNER, D.J.

The defendants' motions for directed verdicts are ALLOWED in part as follows:

1. Benzine is excluded from consideration by the jury as there has been no evidence concerning benzine.
2. Chloroform is excluded from consideration by the jury; plaintiffs concede that there is no evidence that chloroform contributed to the injuries allegedly suffered by the plaintiffs.
3. 1,1,1 Trichloroethane is excluded from consideration in the case against W. R. Grace & Co. because plaintiffs' expert testified that he was not persuaded that the Grace site was the source of this contaminant.

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4. Defendants' activities or omissions prior to the time Well G became operative in 1964 may not be considered as a basis for liability on any of the grounds asserted by the plaintiffs. Liability is based on the breach of a duty to "those whom the defendants might reasonably have foreseen to be potential victims of the negligence". Carrier v. Riddell, Inc., 721 F.2d 867 (1st Cir. 1983), citing the famous Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 341-43 (1928). The class of persons to whom the defendants owed a duty not to pollute drinking water did not exist until the well was built to draw water from the Aberjona aquifer for this purpose. Until a class of persons was created by the act of the City of Woburn, there was no identifiable class to whom the defendants owed a duty and consequently no liability for breach thereof. There is no evidence in the case that it was reasonably foreseeable that the City would sink wells for drinking water in the Aberjona valley.
5. As to the negligence claim against Beatrice Foods, the jury may only consider conduct or omission of the Riley Tannery personnel which occurred after the receipt of the letter from Mr. Maher, the well driller, in 1968, in which Maher said that the water table on the Riley

property had dropped in part because of the opening of the City wells. The evidence shows absolutely no basis for imputing notice to anyone at the tannery that ground water from the Riley property would migrate easterly and northeasterly across the Aberjona River to the municipal wells. The land is flat with a gradient of 1:1000 toward the river, and it was generally considered that the flow of water through the valley was southerly following the river. It is at least arguable that the Maher letter provides some basis for inferring notice.

6. Evidence of actual knowledge acquired prior to the dates stated in paragraphs 4 and 5 above may be considered by the jury in determining whether the defendants negligently acted or failed to act after the critical dates.
7. The jury will not be permitted to consider failure to warn as demonstrating negligence because the evidence does not support a finding that either defendant was in any such special relationship with the plaintiffs as to impose upon it a duty to warn. Carrier v. Riddell, Inc., supra at 869.
8. The claim against Beatrice Foods based upon the Massachusetts doctrine of strict liability for hazardous

activity or for the storage of noxious materials may not be considered by the jury because this doctrine appears to be based on purposeful activity. There is no evidence that the Riley people purposefully placed any of the complaint chemicals on the 15-acre parcel which is allegedly the source of contaminating ground water. Assuming an inference is warranted that some of these chemicals escaped from the tannery's drain or its sludge pile, the evidence is that this was accidental, and arguably negligent. Since all the evidence on this point relates to a period prior to 1968, even if established, negligence would not be actionable in this case for the reason stated in paragraph 5 above.

The defendants' motions are otherwise DENIED. W. R. Grace & Co.'s placing of the complaint chemical on its land was purposeful, so that imposition of strict liability is at least an open question. The failure of the plant manager to monitor the disposal of waste material or to investigate environmental issues through the resources of the corporate headquarters is evidence of negligence. Bernier v. Boston Edison, 403 N.E.2d 391 (Mass. 1980).

The jury could find Beatrice liable to the plaintiffs if it was satisfied on this evidence that (a) Riley or Beatrice personnel knew, or after 1958 should have known, that waste was being placed on his land which could cause injury to persons using the water supply, (b) that after Riley or Beatrice personnel learned or should have learned that such waste had been dumped on the land, additional such waste was placed on the land which in fact substantially contributed to the contamination of Wells F and G, and (c) that Riley or Beatrice personnel could have prevented the dumping of such additional waste and failed to do so. Cf. Gray v. Boston Gas & Light Co., 114 Mass. 149, 153 (1873), which I read as standing for the proposition that a landowner, after learning that trespassers have created a condition on the land which is dangerous to others, has a duty to correct the condition. In this case, the condition was not subject to correction, but it would seem to be consistent with this case to impose a liability for negligently permitting exacerbation of the danger if such exacerbation substantially contributed to the resulting harm.

With respect to foreseeability, I have relied on the Restatement of Torts 2d, § 435, which has been cited with approval by Massachusetts courts. Bernier v. Boston Edison, supra at 398; Barnes v. Geiger, 446 N.E.2d 78, 80 (Mass. App. 1983). This section states the following rules:

(1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.

(2) The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears highly extraordinary that it should have brought about the harm.

Applying these rules, it appears to be "highly extraordinary" that the City should have placed wells for drinking water in this industrial landscape, "highly extraordinary" that ground water should flow counter to the flow of an adjacent river and past such river to a well upstream on the far side but not "highly extraordinary" that ground water should have followed the slope of the valley downstream from the Grace site although such flow may have been both unforeseen and not reasonably foreseeable. Alas, as the court said in Barnes v. Geiger, supra, "...[W]hat is reasonably foreseeable depends in fair measure on the range of vision of particular judges".

The independent claim for damages based on the maintenance of a nuisance raises a difficult question under Massachusetts law. Despite statements to the contrary, e.g., Ted's Master Service v. Farina Bros. Co., Inc., 343 Mass. 307 (1961), there may be liability for use of land which is neither negligent nor