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Case note: Marsh v Baxter

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On 28 May 2014, the Supreme Court of Western Australia handed down its decision in *Marsh v Baxter*,[1] an economic loss claim relating to conflicting land uses between rural neighbours at Kojonup. The claim was for wholly financial injury asserted by one neighbour (Marsh), who farmed (non-canola crops) organically, against the other farmer (Baxter), who lawfully worked his land and harvested genetically modified (GM) vegetable seed crop (GM canola). The Marsh claim was for damages and a permanent injunction against Baxter's future swathing of GM canola on his farm.

A key issue raised by the decision is whether it prohibits the likelihood of a successful economic loss claim arising from incursion of a GM crop onto non-GM land and/or crops.

Background

Marsh obtained organic certification in 2006 from the National Association of Sustainable Agriculture (Australia) Ltd (NASAA).[2] To the western side of the Marsh land was a road reserve and to the west of that was the Baxter land. Baxter had never sought to grow organic produce and planted and harvested conventional canola for about 10 years prior to the growing of GM canola.

In or about November 2008, Marsh discovered 12 conventional canola plants on his land, which he pulled out. This led to a meeting between Marsh and Baxter, during which Baxter was informed that if Marsh's crop was contaminated by GM canola (once it was legal to grow GM crops), the organic certification of Marsh's farm could be imperilled.

Subsequent to the growing of GM canola becoming lawful in Western Australia[3] and Baxter planting his GM canola crop, Marsh erected "certified organic farm" signs along the boundaries of his farm and delivered to Baxter a "Notice of intention to take legal action" (Notice), which stated (relevantly) that the use of GM organisms could cause "catastrophic commercial losses" to farms not cultivating GM crops, particularly those accredited, and that a person would be responsible for losses "caused by the escape of a dangerous thing from land even where there [had] been no fault or negligence".[4]

In November 2010, Baxter harvested the GM canola on his land. Baxter harvested the GM crop by using the swathing methodology, which led to the cut GM canola being pushed together into standing windrows in the paddock and standing exposed to the elements for two to three weeks to allow the pods to ripen.[5]

By 1 December 2010, Marsh had notified the Department of Farming and Agriculture Western Australia (DFAWA) and NASAA of the presence of GM canola swathes on his land. Throughout December 2010, during inspections by both DFAWA and NASAA representatives, Marsh left the GM canola swathes where they were found on his land. Subsequently, the portions of the land on which the GM canola were found were suspended from organic certification and finally, on 29 December 2010, decertified.

Decision

The court found in favour of Baxter.[6]

Negligence

It was alleged that swathes were blown onto the Marsh farm and it was reasonably foreseeable that if Baxter did not take the requisite care to ensure against that eventuality, Marsh would be at risk of losing organic certification and suffer loss and damage, including economic loss.[7] Relevant environment findings were as follows:

- Expert evidence had failed to establish that "GM canola per se is in any way physically dangerous or injurious to persons, animals or to property … [so as to] equate … canola to some dangerous phenomenon akin to a lethal or toxic substance",[8] such that escape of it had the potential to carry calamitous consequences for neighbours.[9]
- The duty to take reasonable care to ensure that GM canola was not blown or carried from the Baxter farm to the Marsh farm so as to ensure that Marsh did not suffer loss, including economic loss, arising therefrom was "novel" and could not be accepted as "generally arising out of a relationship between two neighbouring farms".[10] There was no accepted duty of reasonable care for the circumstances presented in the case.

- There was no cross-pollination of GM canola with Marsh's crops, nor had the individual swathes pollinated the Marsh land. Therefore, no damage had been sustained.
- The economic loss claimed arose by reason of the decertification by NASAA and was therefore a consequence of the workings of a private contractual relationship between Marsh and NASAA.[11]
- The duty contended for by Marsh against Baxter was for Baxter to ensure that GM canola was not introduced onto the Marsh farm so as to result in decertification of Marsh's crops as organic. However, the duty was set too high, given that broadacre crop-farming taking place was necessarily the subject of exposure to uncontrollable seasonal weather conditions. The phrase "reasonable care" was unjustified, "especially so where this is not a case about the failure to control some physically dangerous phenomenon".[12]
- A reference in the Marsh claim to GM canola being "blown or carried" illustrated the problem for Marsh, as it demonstrated the fact that Baxter was unable to control a climatic event.[13]
- The most legitimate grievance was the allegation that Baxter could have grown GM canola further away from the Marsh farm, could have harvested rather than swathed, or could have grown conventional canola. His Honour concluded: "As formulated, this all rather smacks again of an absolute duty being imposed against [Baxter] (ie, not to grow) rather than a lesser duty of taking reasonable care."[14]

Private nuisance

It was alleged that there was interference by Baxter with Marsh's use and enjoyment of the farm.[15] His Honour concluded as follows:

- As the growing of the GM canola was an entirely lawful activity, as was the choice of swathing, the use of the word "unlawful" by Marsh in the wider sense was "potentially presumptive". The more "helpful" terminology would be a "substantial and unreasonable interference with the beneficial use of the [plaintiff's] land".[16]
- There needed to be demonstrated "more than the mere harm done to the neighbour's property to make the party responsible" in order to find in favour of Marsh. "Deliberate act or negligence is not an essential ingredient, but some degree of personal responsibility is required …".[17]
- A balance is to be maintained between the right of the occupier to do what they like with their own and the right of a neighbour not to be interfered with,[18] and the interference must be "unreasonable".[19]
- If Marsh was seriously concerned about the introduction of GM canola onto his land, he would have acted to remove the swathes immediately as a matter of priority, "rather than the swathes just being left to blow around in the paddocks … for a period of about five months" (referring to the eight GM canola swathes located on the Marsh farm in a subsequent season).[20]
- Baxter was as entitled as Marsh to make a living from farming and "make appropriate and reasonable commercial decisions in his own commercial interests as regards the lawful uses of his land".[21]

Summary

The court noted the following:[22]

- Marsh did not prove or attempt to prove that a swathed GM canola pod with viable GM canola seeds in the pod was in any way toxic or otherwise harmful or dangerous to humans, animals or the land.
- It was not contended that there had been any adverse physical consequences suffered by humans, animals or the land by the incursion of the GM canola swathes.
- The only injury/loss claimed was in respect to loss of profits arising from decertification by NASAA.
- The evidence at trial was that none of Marsh's crops or sheep could acquire any genetic traits of GM canola, given that transfer could only occur via pollen to a compatible species.
- Only eight of the 245 swathes were ever detected in a subsequent growing season and they were easily removed from Marsh's land.[23]
- The risk of incursion would have been significantly reduced, if not eliminated, had Baxter direct headed instead of swathing.[24] The relevant question was whether swathing constituted an unreasonable interference with the land on which Marsh conducted organic farming, which was answered in the negative, given the findings of the court that:
  - — there was no physical damage to persons, animals or chattels;
  - — there were legitimate agricultural reasons for swathing;
  - — swathing itself was not a novel or aberrant method of harvesting;
  - — Baxter did not make unilateral or uninformed decisions to swathe;

— airborne GM canola incursion was not reasonably anticipated or expected by Baxter;
— there was a certain measure of first-time novelty in the swathe incursion events of 2010;
— when Marsh delivered his Notice to Baxter, the GM canola crop was up and out of the ground, at the flowering stage, and therefore there was never any prospect of Baxter not growing GM canola and there was nothing in the Notice demanding or requesting harvesting not be conducted by swathing within a stipulated distance of the Marsh boundary; and
— Marsh's own expert evidence was unable to stipulate separation distances as between segregated canola crops, and fluctuations in precise dimensions for appropriate buffers illustrated the difficulty in practice in being able to identify appropriate and reliable buffer zones.[25]

- The 2008 discussion between Marsh and Baxter did not deliver a proper basis upon which to assert a duty of care or a breach of the type alleged, and "[i]t is not possible to artificially manufacture a duty of care, where it would not otherwise arise".[26]
- The loss arising from the decertification arose from an erroneous decision by NASAA to decertify the relevant portions of the Marsh farm, not by reason of the incursion of GM canola.

Future claims

In coming to his decision, Kenneth Martin J distinguished the facts in the case before him from other circumstances where it may be possible for such a claim to succeed.

Specifically, his Honour stated:

> The overall experience from that first time GM canola cropping season would now obviously bear upon … the community's overall body of experience and knowledge, so as to be potentially relevant to any future assessment of a GM canola cropping exposure in the Kojonup district.[27]

Further:

> Had the underlying facts been different, by an incursion of a physically dangerous substance … thereby causing physical damage, the nuisance evaluation would, of course, be quite different…[28]

In respect to the duty of care alleged by Marsh, his Honour's consideration of the content of the Notice[29] implies that a different decision may have been reached had the Notice been differently constructed — for example, by requesting an appropriate buffer zone or alternative harvesting other than swathing, and setting out the consequences arising from a failure to concede to the request.

Further, and unrelated to the Notice, his Honour stated that had he:

> …found some lesser level of duty of care … to take reasonable measures to inhibit the movement by wind of GM canola from a boundary paddock … I still would not have found that more truncated duty to have been breached…[30]

It is open to suggest that this implies that a "lesser level of duty" may be found in the circumstances of a different case for determination.

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Footnotes

1. *Marsh v Baxter* [2014] WASC 187; BC201404120.
2. The Australian Quarantine and Inspection Service accredits private organisations, such as NASAA, to audit and certify organic operators. The organisations have their own set of standards which must be complied with, in addition to the Australian Standard for Organic and Biodynamic Produce (AS6000 — 2009) (often referred to as the National Standard).Full certification usually takes three years or more: see Department of Agriculture and Food (Western Australia) "Going organic — what you need to know", available at www.agric.wa.gov.au. "Pre-certification", or "pre-conversion", involves a 12-month period to put a workable conversion plan in place. The property may then be certified as "in-conversion" prior to qualifying as "organic". Adherence at the last two stages entitles a producer to market and label their product as such. See above, n 1, at [189]–[288] and [504]–[538] for details on the NASAA contract and standards regime.
3. Pursuant to the state Minister of Agriculture's order dated 25 January 2010. Genetically modified organisms (GMOs) are regulated nationally by the Gene Technology Regulator (the Regulator), pursuant to the Gene Technology Act 2000 (Cth) (the Act). The Act is supported by the Gene Technology Regulations 2001 (Cth), the inter-governmental Gene Technology Agreement 2001 and corresponding state and territory legislation (in Western Australia, the Western Australian Gene Technology Act 2006 (WA)). All states and territories recognise the Regulator's authority to approve the release of GMOs under the national regime, but retain the capacity to refuse the release of GMOs on the grounds of trade and market impacts (see s 21(1)(aa) of the Gene Technology Act 2000 (Cth) and the Gene Technology (Recognition of Designated Areas) Principle 2003).Since 2004, there has been a moratorium on the cultivation of all commercial GM crops in Western Australia by virtue of the Genetically Modified Crops Free Areas Act 2003

(WA) and the Minister of Agriculture's Genetically Modified Crop Free Areas Order 2004 (see Western Australia *Government Gazette* No 49, 22 March 2004). However, the Minister for Agriculture and Food may grant exemption orders to allow commercial cultivation of specified GM crops in specified areas of the state. Since 2010, the Western Australian government has allowed GM canola to be grown on the commercial scale, provided the appropriate licence is obtained and adhered to under the national regime. See also above, n 1, at [150]–[162].

4. Above, n 1, at [98]–[100].
5. GM canola is alternatively referred to as Roundup Ready canola, or RR canola.
6. Above, n 1, at [704] and following.
7. Amended Statement of Claim, 4 February 2014 (ASOC), at paras 21, 25, 31, 35–7.
8. Above, n 1, at [326].
9. *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; 120 ALR 42; 68 ALJR 331; BC9404607; *Weller & Co v Foot & Mouth Disease Research Institute* [1966] 1 QB 569; [1965] 3 All ER 560.
10. Above, n 1, at [328]–[330].
11. Above, n 1, at [331]–[332].
12. Above, n 1, at [333]–[334].
13. Above, n 1, at [335]. Not considered, in the context of this decision, is the closely related issue of spray drift in Western Australia. Licensed spray operators must comply with the Aerial Spraying Control Act 1966 (WA). In contrast, landholders who cause spray drift are not subject to mandatory regulation. The Health (Pesticides) Regulations 1956 (WA) and the Poisons Act 1964 (WA) regulate the use of sprays in relation to human health, but that would not assist in the case of spray drift onto organic premises. The Environmental Protection Act 1986 (WA) makes it an offence to cause or allow "pollution" and "environmental harm" of a material or serious nature to occur. Such provisions are broadly defined and could, in some circumstances, apply to spray drift.
14. Above, n 1, at [341]–[343].
15. Above, n 7, at paras 41–6.
16. Above, n 1, at [353]–[354].
17. Above, n 1, at [355], quoting *Elston v Dore* (1982) 149 CLR 480 at 487; 43 ALR 577; 57 ALJR 83; BC8200126 per Gibbs CJ, Wilson and Brennan JJ, which cited with approval the House of Lords decision in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; [1940] 3 All ER 349.
18. Above, n 1, at [357]–[365].
19. *Southern Properties (WA) Pty Ltd v Executive Director, Dept of Conservation and Land Management* (2012) 42 WAR 287; 189 LGERA 359; [2012] WASCA 79; BC201201927.
20. Above, n 1, at [384]–[439].
21. Above, n 1, at [490].
22. Above, n 1, at [658]–[753].
23. Above, n 1, at [669], [687]–[693].
24. Canola can be direct headed, or swathed for uniform maturity and later threshed. Swathing involves cutting the crop and placing it in rows directly on the cut stubble. This hastens the drying rate of the crop, ensures even ripening, and reduces the possibility of seed losses from wind and hail. Usually five to 10 days after swathing, it is ready for harvesting. Direct heading involves cutting the crop after drying the canola in the ground.
25. Above, n 1, at [704]–[728].
26. Above, n 1, at [683].
27. Above, n 1, at [680].
28. Above, n 1, at [729].
29. Above, n 1, at [720].
30. Above, n 1, at [742].

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