

# Shrinking violets: are organic farms the sensitive flowers of the rural environment

A consideration of the common law remedies available to organic farmers consequent upon chemical trespass or GMO contamination

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## Introduction

In New Zealand organic farming is a burgeoning sector of the rural economy. Certified organic production units may have their products guaranteed by a range of systems. These systems generally rely upon organic production standards (the standards) and an external review in terms of adherence to the standards. Failure to comply with the rules results both in a loss of integrity and if detected, decertification.

As New Zealand farming systems generally operate in an open environment, one of the more likely threats to integrity arises when a non-organic activity produces externalities which impact negatively on an organic farm. Chemical drift and pollution by genetically modified organisms (GMO) are two of the more serious threats to organic farms. Contamination of an organic farm by agrichemicals results when a chemical application travels off-target. Off-target effects can occur by the chemical travelling through the air, through the ground and soil, and by water.<sup>1</sup> In New Zealand the majority of all documented events occurred via air,<sup>2</sup> although contamination by water has received attention in the Privy Council.<sup>3</sup> Widespread contamination from non-point sources is increasingly being recognised as a source of pollution. Incursion by GMO is a more recent threat. Under current organic certification systems, latitude in terms of background contamination by GMOs is not entertained. Genetically

engineered varieties and seeds are expressly prohibited, and as such, any contamination will result in decertification of product and/or land.

The author has considered the general protection of organic farms in detail elsewhere.<sup>4</sup> The purpose of this article is to specifically consider common law remedies for loss suffered consequent upon an external event which causes damage to the integrity of an organic farm.

### **Common law loss**

The common law has traditionally been the mechanism used by property owners to restrain others from causing harm to property and to recover for loss suffered. The common law takes effect in different ways. It employs the equitable remedy of injunction to stop or prevent harm occurring and makes provision for damages to compensate for loss suffered. The existence of remedies at common law may also act as a deterrent to unlawful actions. The threat of a suit can result in changes in property use, whereby a neighbouring owner takes care to order activities to prevent damage to another. In this way liability may operate as a pricing mechanism resulting in the internalisation of adverse effects.

The value of common law remedies to the organic farmer will be assessed. One of the enquiries will be, whether these traditional remedies that experienced infancy in the Industrial Revolution,<sup>5</sup> are capable of providing meaningful solutions in the face of the changed world of the 21st century.

Common law loss caused to an organic farm by all external threats can be categorised as follows:

- 1) Property damage, such as damage to plants or pesticide residues due to chemical drift, or GMO contamination of land, crop, processed foods and other products.<sup>6</sup>
- 2) Economic loss consequent upon decertification due to contamination.
- 3) General environmental damage, for instance loss of biodiversity.<sup>7</sup>

Recovery for such loss sounds potentially in negligence and nuisance. A review of these remedies indicates that some forms of loss will be more readily recoverable by the organic farmer than others and exposes the vulnerable position currently occupied by the organic farm. In particular, issues related to economic loss, sensitivity, foreseeability and statutory authority present problems that need to be addressed before recovery can be secured.

The use of common law remedies in response to threats from contamination by agrichemicals and GMOs has been the subject of several publications.<sup>8</sup> These works provide a basis for enquiry and exploration of remedies particular to the organic farm. However, the author's widespread search for judicial consideration of the issues as they relate specifically to organic farms indicates that such consideration is sparse. In New Zealand the authorities do not pertain expressly to organic farms,<sup>9</sup> whilst in the United States, the leading case was decided over 25 years ago.<sup>10</sup> The Australian decisions tend to consider organic farms as the issues arise in the planning context, and any decisions located by searching United Kingdom databases tend to discuss issues peripherally.<sup>11</sup> The Canadian determinations emanating from the *Hoffman v Monsanto*<sup>12</sup> litigation provide the most detailed consideration of common law remedies for loss suffered by organic farmers by virtue of GMO contamination, yet the relevance of that litigation is constrained by limiting factors related to proximity and policy reasons linked with government approval. Given the expansion of organic farming and the concomitant rise of technology which threatens the integrity of organic farming, it is timely to give detailed consideration to recovery for loss suffered.

#### **Liability for damage caused by chemical drift**

##### ***Negligence***

The organic farmer stands in the same shoes as any farmer in respect of recovery for property damage caused by chemical drift. Negligence has been the main ground for recovery in such a situation, although there is also potential for claims based on

strict liability and nuisance.<sup>13</sup> To establish negligence a plaintiff must show:<sup>14</sup>

- 1) The defendant owed the plaintiff a duty of care (that is, the risk of the damage was foreseeable);
- 2) The defendant has breached that duty;
- 3) The breach of the duty caused the loss to the plaintiff; and
- 4) The loss suffered was not too remote.

Recovery for damage caused to property by chemical drift has been viewed as difficult because of the need to establish causation. Commonly drift that occurs is invisible, and unless the event is witnessed and documented there may be insufficient proof of cause and effect. However, improved scientific testing procedures have been developed and are more freely available. In establishing a duty of care, a judge will look to the accumulated experience of past courts. Where proof of causation is available, New Zealand courts have not found any difficulty in establishing a duty of care in terms of application of toxic sprays and have recognised the risks attached to such practices.<sup>15</sup> In a novel or borderline case, the courts tend to apply a two stage approach: first by examining the relationship between the parties, in terms of foreseeability and proximity, and then weighing up policy reasons or broader implications for the community in recognising or denying a duty.<sup>16</sup>

### ***The nature of the damage***

In relation to chemical drift, a particular problem exists for the organic farmer. Not all chemical drift will necessarily create physical damage so as to render the produce unable to be consumed or sold. Maximum pesticide residues levels (MRL)<sup>17</sup> exist for food safety reasons and apply to all produce. If pesticide drift occurs on a non-organic farm, yet does not exceed this MRL (the general standard) then arguably the owner of the property has not suffered damage. The position is not the same for an organic farm. Generally the acceptable level for an organic farm will be set at 10 per cent of the MRL.<sup>18</sup> The question arises as to whether or not the property is physically damaged by the presence of a contaminant at levels lower than those tolerated by general society.

From an organic farmer's point of view the property is damaged at any level in excess of the 10 per cent threshold, as the property is rendered unsuitable for organic certification. The first enquiry in this situation is whether physical damage to the property has occurred. The common law establishes that when property is physically changed then it is damaged, but classification is not always straightforward.<sup>19</sup> Where a defendant sprayed with insecticide, crops which were then consumed by cattle so as to create inert chemical residues in the fat of the cattle, the Court found that the plaintiff had suffered economic loss resulting from the damage to the cattle. Due to the presence of the chemical (which did not harm the cattle) any costs from postponement of sale, reduction of price or other associated expenses suffered by the plaintiff could be recovered.<sup>20</sup> Although it is currently unclear how a court will view similar loss suffered by an organic farmer it is possible that where an organic farmer suffers damage to a crop which causes prohibited residues in excess of the relevant organic standard, but less than the general standard, any claim should be for pure economic loss, as opposed to physical damage. This is arguable and will depend on the extent of the damage, and the view taken by the court of the damage. However, proceeding on the basis that decertification may constitute economic loss, recovery for that loss will now be considered.

### ***Economic loss***

Decertification of an organic farm consequent upon a breach of standards may create financial loss due to loss of sales, forward contracts and premium. Rejection of general (non-organic) export crops due to excess chemical residues creates similar losses. Recovery may be sought in addition to loss caused by physical damage, or in substitution for it if physical damage is not proved. Damages for loss of profits may also be sought.

Due to policy considerations, relating generally to constraining indeterminate claims,<sup>21</sup> the courts have been cautious of imposing a duty of care where a person suffers pure economic loss that is not the result of injury to person or tangible property.<sup>22</sup> The law relating to recovery for economic loss is relatively new, and different approaches have been advanced for dealing with

situations where there is no legal precedent.<sup>23</sup> In New Zealand there is currently no formulaic approach, beyond general principle, and financial loss is recoverable as a matter of ordinary principle where policy considerations point to that conclusion.<sup>24</sup> Recovery is potentially available for both consequential and relational loss.

The High Court of Australia considered the impact of decertification<sup>25</sup> in *Perre v Apand Pty Ltd*.<sup>26</sup> Although since the date of this decision the High Court<sup>27</sup> has restated the law in relation to the significance of the concept of proximity in novel cases, many of the salient factors identified in the case continue to impact upon the establishment of a duty of care and the determination of liability.<sup>28</sup> In *Perre v Apand Pty Ltd* the respondent was a major operator in the potato crisping industry in South Australia and provided potato seed to a number of growers throughout Australia. The seed produced a crop suffering from the disease known as bacterial wilt. Affected growers included the Sparnons. The appellants were all potato growers who conducted their business in close proximity to the affected Sparnon property, as a consequence of which their crops were denied certification due to the risk of infection. Absence of certification resulted in inability to access the Western Australian market. None of the appellants' properties suffered physical harm as a result of the presence of the affected crop. The appellants did, however, suffer significant financial loss due to the loss of market.<sup>29</sup>

The High Court of Australia allowed the appellants' claims to succeed. In doing so, they returned to general principle to support the claims. As stated by McHugh J:<sup>30</sup>

In determining whether the defendant owed a duty of care to the plaintiff, the ultimate issue is always whether the defendant in pursuing a course of conduct that caused injury to the plaintiff, or failing to pursue a course of conduct which would have prevented injury to the plaintiff, should have had the interest or interests of the plaintiff in contemplation before he or she pursued or failed to pursue that course of conduct.<sup>31</sup> That issue applies whether the damage suffered is injury to person or tangible property or pure economic loss.<sup>32</sup>

In connection with the existence of a duty of care the Justices considered proximity and vulnerability. The fact that the appellants were near neighbours (either adjoining or in the locale) was relevant and affected the duty of care. Additionally the respondent's knowledge of the neighbouring potato growers' vulnerability to the disease, and inability to control it was relevant.<sup>33</sup> As summarised by Gleeson CJ and Gaudron J:

Furthermore, the combination of circumstances involving the use and ownership or enjoyment of land, the physical propinquity of such land to the Sparnons' land, the known vulnerability of people in the position of the appellants, and the control exercised by the respondent over the relevant activity on the Sparnons' land, is unlikely to apply to an extent sufficient to warrant an apprehension of indeterminate liability.

...

Where a person is in a position to control the exercise or enjoyment by another of a legal right, that position of control and, by corollary, the other's dependence on the person with control are, in my view, special factors or, which is the same thing, give rise to a special relationship of "proximity" or "neighbourhood" such that the law will impose liability upon the person with control if his or her negligent act or omission results in the loss or impairment of that right and is, thereby, productive of economic loss.

...

In my view, where a person knows or ought to know that his or her acts or omissions may cause the loss or impairment of legal rights possessed, enjoyed or exercised by another, whether as an individual or as a member of a class, and that that latter person is in no position to protect his or her own interests, there is a relationship such that the law should impose a duty of care on the former to take reasonable steps to avoid a foreseeable risk of economic loss resulting from the loss or impairment of those rights.

Although the Justices applied different approaches, the various decisions considered the establishment of a duty and then moved

to issues of policy which could act to negate any duty.<sup>34</sup> Kirby J weighed two policy reasons that in the past have emerged to justify a rule excluding a legal duty of care to a plaintiff who has suffered no physical damage to its person or property, but only pure economic loss.<sup>35</sup> The first related to indeterminacy and was eliminated on the grounds of ability to ascertain. The second reason was whether to hold the respondent to a legal duty of care would be to unreasonably interfere with its economic freedom, its autonomy and the competitive operation of the marketplace.<sup>36</sup> In considering this issue Kirby J took into account the fact that the introduction of infected seed to South Australia was illegal, and as such refused to find a good policy reason for excluding the duty. His Honour did not decide whether, absent such statutory prohibitions, illegality otherwise affecting what Apand did in relation to the Perre interests would have been sufficient in any case to put a limit on Apand's economic freedom.<sup>37</sup> The interface with statute and statutory regulations, and the defendant's conduct in relation to them, therefore becomes relevant.

In New Zealand it is well established that statute law will abrogate common law rights where there is inconsistency.<sup>38</sup> Following a similar line, where the law of negligence develops, courts tend to seek consistency with statutes and other legal principles.<sup>39</sup> It could be argued that where statute law does not restrict a defendant's freedom, then the common law should be slow to impose any limitation. Yet this tends to overlook the plaintiff's freedom to operate within the market, and also any particular exposure or vulnerability a plaintiff may have in relation to its relationship with the defendant. It is accepted that in our free enterprise society, competition in the marketplace will only be restricted on a limited basis.<sup>40</sup> However, in essence this line of policy relates to choice, and the freedom of an individual to exercise that choice without unnecessary limitations. As stated by Mc Hugh J:<sup>41</sup>

One of the central tenets of the common law is that a person is legally responsible for his or her choices. It is a corollary of that responsibility that a person is entitled to make those choices for him or her self without unjustifiable interference from others. In other words, the common law regards individuals as autonomous



beings entitled to make, but responsible for, their own choices ... In any organised society, however, individuals cannot have complete autonomy, for the good government of a society is impossible unless the sovereign power in that society has power in various circumstances to coerce the citizen. Nevertheless, the common law has generally sought to interfere with the autonomy of individuals only to the extent necessary for the maintenance of society.

McHugh J refers to unjustifiable interference. When placing this notion in the context of a land use conflict, it takes on a similar aspect to a claim in nuisance for unreasonable interference with the use and enjoyment of land. Where the interference constitutes an intrusion onto another's land, consideration of fundamental property rights may assist in defining further evolution of policy in this context. The right to exclude, and/or gain compensation for use is apposite. Should it be the defendant's freedom to operate in the market or the plaintiff's right to choose how land owned is managed which is paramount? In considering these issues, a final relevant factor is the steps taken by the plaintiff to protect itself from harm. As noted by McHugh J,<sup>42</sup> where it was reasonably open to the plaintiff to take steps to protect itself, then this may remove reason for imposing a duty of care. The protective steps contemplated are generally in the form of contractual warranties, but do not normally include a requirement to obtain insurance to cover the loss.<sup>43</sup> A plaintiff's vulnerability is more likely to arise where it is unable to protect itself by contract.<sup>44</sup>

New Zealand courts have applied the concept of vulnerability in relation to liability in tort. In *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*,<sup>45</sup> the Court of Appeal, in assessing issues of proximity in negligence, accepted that "the extent to which those in the plaintiff's position are vulnerable can also be taken into account". The Court referred to the High Court of Australia in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*<sup>46</sup> which, in following *Perre v Apand*, found that vulnerability is a key factor in determining liability.<sup>47</sup>

#### ***Application to organic farms***

*Perre v Apand Pty Ltd* is useful to organic farmers to the extent that it allows for recovery for economic loss consequent upon

decertification. In terms of application to New Zealand law, decisions of the High Court of Australia are regarded as highly persuasive. The factual circumstances of the case are slightly different in that none of the appellants suffered any form of physical damage. It was simply their presence in the locale that led to decertification. For decertification to occur on an organic farm, in relation to chemical contamination, there will be some residual presence or damage from a chemical. Nevertheless, in either circumstance decertification is the consequence.

The issue of damage requires further consideration. Traditionally tort has provided a remedy where a defendant gains by expropriating a resource that a plaintiff has an exclusive right to use.<sup>48</sup> A question to consider is to what extent does the damage represent an interference with a property right exclusive to the plaintiff? Does the presence of the residue impact upon the plaintiff and confer a benefit upon the defendant in a manner that is unfair in the circumstances? To what extent does a property right support a claim for zero tolerance? Should the degree of expropriation in an instance of decertification found a right to compensation?

In resolving these issues a court will examine the position of the non-organic farmer. It will need to weigh the steps taken to avoid harm, the gravity of the risk, the ease of avoidance and the social value of the activity.<sup>49</sup> In this way locality, topography, proximity, land use, type of vegetation and crop, physical and natural barriers, chemicals and methods of application require consideration in determining the existence of a duty of care. Exclusionary factors also require consideration, but a court will need to balance the economic freedom of the defendant against the right of the plaintiff to exclude others from property owned. Efficient allocation in a well-functioning market economy turns upon the characteristic of exclusivity.<sup>50</sup> By contaminating the property of the organic farm, the non-organic grower stifles the freedom of the organic farmer to choose how to farm and how to create an economic gain. A policy choice to disallow recovery for economic loss in these circumstances also fails to incorporate the principle of polluter pays to a full extent. Evolving policy in a direction away from the concept of polluter pays is arguably out of step with domestic and international developments in environmental law.

In relation to establishing a duty of care considerations of known vulnerability and proximity, are key factors. Any neighbour who has received notice of presence from an organic farmer will be aware of the farm's vulnerability to prohibited inputs. That neighbour will not normally be in a contractual relationship with the organic farmer and as such protection via contract is unavailable. Should knowledge of the vulnerability and awareness of appreciable harm give rise to a duty of care? The Court in *Perre v Apand Pty Ltd* said yes. What is unclear however, is whether a spray operator, guilty of causing residues which offend organic standards, but not the general standard, should for policy reasons be excluded from owing a duty of care. It is feasible that the existence of a statutory scheme that expresses tolerances by way of MRLs,<sup>51</sup> or any other tolerance standard, could affect the way in which a court applies the doctrine of negligence. A court may choose to promote consistency with statute and thus align the common law with statute. However it is unlikely that a court would adopt this course where it would cut across other statutory schemes, such as the Resource Management Act 1991 (RMA), under which more stringent controls on the use of hazardous substances may be imposed. In particular the provisions of a regional plan would require scrutiny to assess the legality of any discharge activity. A regional plan directed at controlling chemical drift by avoidance, tied to a rule requiring the preparation of a spray plan identifying sensitive activities potentially removes the barriers of legality and foreseeability and could establish known vulnerability. The framing of a regional plan thus acquires real importance in terms of recovery by an organic farmer for economic loss at common law.

Recovery by the organic farmer for economic loss is not assured and will depend upon the facts of a given case. There is, however, potential for considerations of known vulnerability and awareness of appreciable harm, to override other policy considerations. The critical issue is establishing known vulnerability and avoidability. Notice of organic status thereby assumes considerable importance. The existence of known vulnerability may also be a ground for defeating exclusion from duty on the grounds of sensitivity.

### Sensitivity

Upon establishment of the category of damage, the second enquiry relates to the sensitivity of the plaintiff. If chemical contamination causes damage in excess of the general threshold, then an organic farmer is in the same position as a non-organic farmer, and is unlikely to be deemed sensitive. Where however a certification system of any kind sets a threshold higher than the general standard there is potential to be deemed sensitive, where recovery is sought for loss in excess of the general standard. If organic farming systems are deemed sensitive, there is a body of law that suggests that recovery in negligence and nuisance should not be permitted, as it is incumbent upon the sensitive activity to protect itself from harm. The question of sensitivity also affects foreseeability, and hence the extent of the duty of care.

*Hamilton v Papakura District Council*,<sup>52</sup> a decision of the Judicial Committee of the Privy Council deals with the issue of sensitivity. This decision represents a significant but not insurmountable obstacle to activities deemed sensitive. The plaintiffs in this case were not organic growers, but grew cherry tomatoes hydroponically at three properties in Papakura. At two of the properties the water for the hydroponic system was drawn from the town supply, operated by Papakura District Council, and sourced from bulk supplier Watercare Services Ltd. The plaintiffs alleged that the water supplied was contaminated with herbicide levels that were toxic to their plants. The plaintiffs based their case in contract (Sale of Goods Act 1908) and tort (negligence, nuisance and *Rylands v Fletcher*).

The difficulty faced by the plaintiffs was that if the water supply did cause the damage to the plants (which the Court accepted as probable), it was because the tomato plants must have been sensitive and vulnerable to herbicides at very low levels in their particular growing conditions. The chemical in question was triclopyr, and it was suggested that the plants were sensitive to the chemical in the range of 1 to 10 ppb.<sup>53</sup> It was acknowledged that triclopyr at 10 ppb was one-tenth of the maximum allowable level under the 1995 drinking water standard and, if detected, would not precipitate any monitoring on health grounds.<sup>54</sup>

The Privy Council upheld the Court of Appeal and dismissed the claim in negligence. The first ground for dismissing the claim was that it was unreasonable to extend the duty of care to all uses, particularly where those uses may have special needs. The Court found:<sup>55</sup>

If the duty is put in terms of all uses, even all uses known to Papakura, the duty would be extraordinarily broad. For a Court to impose such a duty would be to impose a requirement on water suppliers which goes far beyond the duty met in practice by those authorities supplying bulk water, a duty which has long been founded on the drinking water standards, standards drawn from World Health Organisation guidelines and from other international material and established through extensive consultation. It would impose extras costs on general users which relate in no way to their needs for pure, potable water. No evidence was called to support the imposition of such a wide-ranging, costly and burdensome duty.

This finding would suggest that where a defendant in its activities achieved a minimum standard defined by general law, then a duty of care in negligence would not extend to a more restrictive standard. The Privy Council approved the view of Gault J who said:<sup>56</sup>

Those who have particular requirements, and in this case it was a particular requirement over and above water of ordinary standards, must deal with the problem as part of their ordinary operating procedure.

The Court of Appeal concluded that to require a water supplier to ensure that the town water supply had a zero level of triclopyr contamination would be unrealistic in this country with its agricultural based economy.<sup>57</sup>

### ***Distinguishing features***

*Hamilton v Papakura District Council* relates to water supply for a public purpose. Actionable negligence involves an explicit overall weighing of the costs and benefits generated by the defendant's

activities.<sup>58</sup> The policy evident behind the decision is avoidance of the imposition of undue cost upon water suppliers that then flows onto general users. The difficulties faced by a water supplier in avoiding widespread contamination by chemicals of water catchments are no doubt factored into the reasoning. The Court places the burden on the sensitive user to employ measures that protect from this risk.

In relation to a conflict between organic and non-organic farmers it is arguable whether the reasoning in *Hamilton v Papakura District Council* can be extended to apply to point source chemical drift. In the latter situation there is no question of supply to the public, and the issue of indeterminacy does not arise. A non-organic farmer is in a much better position to internalise the adverse effects of chemical drift, than is a water supplier whose catchment area may have a broad reach.

A second point for consideration is the justification for extending policy so as to treat an entire sector as sensitive. The concept of sensitivity may require reshaping in the face of the 21st century. The growth of the organic sector, environmental benefits produced and the concomitant public support may influence such policy. Cognisance of mounting environmental pressures derived from agriculture and of international measures to actively support organic farming so as to reduce that pressure may have bearing. It may also be helpful to reconsider underlying property rights in this instance. If organic farming is deemed a sensitive activity, an organic farmer's right to exclude others from property owned is diminished. It is arguable that diminution of that fundamental right by reason of sensitivity alone, without recognition of known vulnerability and avoidability, is inequitable.

Property rights evolve and change in response to economic, social and environmental pressures.<sup>59</sup> Regarding organic farmers as sensitive gives primacy to the right of non-organic farmers to pollute on grounds of economic and consequent social benefits. It would, however, completely fail to respond to the economic and social needs of the organic farmer or arguably the need of the wider environment. It can be argued that such policy infringes the right to be free from environmental harm, as well as failing to

provide for future generations. Terming organic farmers sensitive may also be out of step with rules in resource management plans made under the RMA. Statutory directions to promote sustainable management and to consider the sensitivity of the receiving environment may create conditions where vulnerable activities require protection. There is much at stake in consequence of treating an organic farm a sensitive activity, and a court well apprised of these issues may be reluctant so to do.

### Foreseeability

The second ground in *Hamilton v Papakura District Council* for dismissing the claim in negligence related to the inability of the plaintiff to show that the loss was foreseeable. Sir Kenneth Keith<sup>60</sup> for the Judicial Committee held:<sup>61</sup>

The extraordinarily broad scope of the proposed duty provides one decisive reason for rejecting the claims in negligence. A second, distinct reason is provided by the requirement of foreseeability. The High Court in the passage quoted and endorsed by the Court of Appeal (see para [31] above) said that in the circumstances it was unable to conclude that it was or should have been reasonably foreseeable to Watercare, still less to Papakura, that water containing herbicides at a fraction of the concentration allowable for human consumption would cause damage to cherry tomatoes grown hydroponically ...

...

As the Board made clear in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] AC 617 at p 643, damage is foreseeable only when there is a real risk of damage, that is one which would occur to the mind of a reasonable person in the position of the defendant and one which he would not brush aside as far-fetched. The mere fact that certain herbicides may kill or damage certain plants at certain concentrations does not itself establish such a risk. ...

The Court found that lack of reasonable foreseeability was firmly supported by the evidence, and the claim in negligence must fail.

***Distinguishing features***

The finding on this point is related directed to the susceptibility of the tomato plant to certain herbicides, a fact of which none of the parties (not even the plaintiffs) had knowledge. The position for organic farmers can be differentiated in that notice of organic status can readily be given to neighbours and contractors. In fact in many situations this will be a requirement.<sup>62</sup> Possession of knowledge would affect foreseeability of harm, particularly if notice given were comprehensive. The giving of notice is also critical on the basis that it may ground liability in negligence if a defendant, with knowledge of the plaintiff's special susceptibility, fails to adopt such reasonable precautions as would have avoided the damage without appreciable prejudice to his or her own interests.<sup>63</sup>

The scope of appreciable prejudice in the context of restrictions on the spraying practices of a farmer is unclear. However, given the techniques available to limit spray contamination of other properties, it is arguable that this could be achieved with minor consequences to the non-organic farmer comparative to the harm caused to the organic farmer. The question to return to is, is there a real risk of damage, and is it reasonable, fair and just to recover the damage suffered? Most reasonable people apprised of the existence of an organic farm on their boundaries would appreciate the risk of causing physical or economic damage to their neighbour by the use of uncontrolled chemical application. The organic sector, in allowing for contamination of up to 10 per cent of MRLs, also recognises the reality of background levels of pollution. What is yet to be decided is whether or not it is reasonable for organic farmers to recover for loss caused above that background level but below the general level.<sup>64</sup>

To disallow recovery on the basis of susceptibility, places, organic farming firmly in the hypersensitive category. Perhaps it is the reality of the modern world that attempting to farm naturally has become unnatural or abnormal. This is a somewhat troubling reflection of the way in which we order this world, and it would also appear to be out of step with international and national policies geared to reducing the externalities of modern agriculture. If the common law fails to provide for organic farms to recover damages for economic loss consequent upon



decertification, where there was no physical damage, it leaves organic farming with the following choices:

- 1) Reliance on the general law, for instance the RMA.
- 2) Risking contamination for which no recovery will be allowed.
- 3) Grouping with like activities and creating spatial barriers.
- 4) Erecting physical barriers.
- 5) Accepting MRLs as standards thus diluting if not eliminating the organic standard.

### **Nuisance**

Nuisance is the customary common law remedy employed to resolve land use conflicts.<sup>65</sup> A plaintiff suffering damage to property or interference with the enjoyment of land, without physical damage, may make a claim in nuisance.<sup>66</sup> An encroachment on to land so as to closely resemble trespass may also constitute a private nuisance.<sup>67</sup> Fleming describes the inherent difficulties in the resolution of land use conflict:<sup>68</sup>

The paramount problem in the law of nuisance is therefore to strike a tolerable balance between conflicting claims of neighbours, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other.

In nuisance, liability may be easier to prove than negligence. Once damage to property or loss of enjoyment of a naturally occurring right is proven, the defendant must then raise a defence, for instance that he or she was using reasonable skill and care in the ordinary or natural use of land. The focus will be upon whether or not the defendant's interference was unreasonable in the circumstances, rather than upon whether or not adequate precautions were taken.<sup>69</sup> Fleming discusses the factors to be considered in striking the balance between the conflicting claims by reference to the standard of reasonableness:

... In striking this balance, a number of factors are given weight in accordance with traditional values relating to private property

rights. Little, if any, attention is paid directly to utilitarian criteria like cost or resource efficiency or to the larger considerations of zoning and welfare, which are thought to belong to the province of legislation and planning.

Due to the range of interests incidental to ownership, nuisance liability offers protection against a wide range of harms. The character and duration of harm will determine the existence of an unreasonable interference. The immediate neighbourhood will form the background against which the standard of reasonableness will be assessed.<sup>70</sup> In *Hawkes Bay Protein Ltd v Davidson*,<sup>71</sup> Gendall J observed:

... The law requires the standard of comfort and convenience of the average man within the character of the neighbourhood to be taken into account. It is well known if someone lives in an industrial town they cannot reasonably expect the same purity of air or freedom from noise as in a pleasant country locality, or exclusively residential district. But this does not mean that someone who lives in a noisy neighbourhood can never complain of additional noise, any more than someone who occupies an industrial neighbourhood cannot complain of additional excessive industrial disturbances or, in the present case, excessive odours. It is a question of degree and assessment of the extent to which the increased volume of noxious smells, judged by the standards prevailing in that area, is so substantial as to detract from the standard of comfort reasonably to be expected of an occupier of neighbouring property.

The conduct of the wrongdoer need not necessarily be unlawful,<sup>72</sup> and compliance with planning permission does not operate as a defence to a claim in nuisance.<sup>73</sup> Such an approach has parallels to the operation of s 17 of the RMA, which may override lawful activities where an adverse effect upon the environment is evident.<sup>74</sup> It is no defence for the defendant to show that the activity carried out confers a benefit on the public that outweighs the harm done to the plaintiff.<sup>75</sup> Fleming notes that some consideration will be given to the fact that the offensive operation is essential and unavoidable in a particular

locality, but warns that the argument should not be pushed too far:<sup>76</sup>

... it should be remembered that we are concerned with reciprocal rights and duties of private individuals, and a defendant cannot simply justify his infliction of great harm upon the plaintiff by urging a greater benefit to the public at large has accrued from his conduct.

Fleming reminds us that “where the public be interested let the public bear the loss”, a result that he says can be accomplished by holding the defendant liable in the first place and letting him charge the cost to the benefiting public or alternatively conferring statutory authorisation on the enterprise coupled with compensation for damage caused. This approach is consistent with a requirement for internalisation of effects.

In nuisance the focus remains trained upon what is reasonable in the circumstances. It is no defence that the plaintiff came to the nuisance.<sup>77</sup> In this way the common law diminishes a first in time first in right argument. Todd identifies the policy reason for taking the position as “[o]therwise one occupier would be able, by establishing his use first, to permanently diminish the value of neighbouring land without providing compensation”.<sup>78</sup> Furthermore, in nuisance it is irrelevant that the plaintiff failed to take steps to avoid or minimise the harm,<sup>79</sup> as the focus of the enquiry rests upon the interference. In *Bank of New Zealand v Greenwood* <sup>80</sup> it was held that liability in nuisance arose even in circumstances where a plaintiff could avoid the effects more cheaply than the defendant could eliminate the nuisance, unless the cost of elimination was so proportionately small, so as to lead the court to a conclusion that no actionable nuisance had occurred.

Foreseeability of harm is a requirement and the plaintiff may fail if the activity they undertake is unduly sensitive.<sup>81</sup> In relation to sensitivity, Gendall J in *Hawkes Bay Protein v Davidson Ltd* held:<sup>82</sup>

... The discomfort must be substantial, not merely with reference to a plaintiff and his/her sensitivities but to a degree that would

be substantial to any person occupying the plaintiff's premises irrespective of age or state of health. It must be that which materially interferes with the ordinary comfort expected of occupation in the relevant area according to the reasonable standards expected amongst those in that area.

Where, however, a defendant acts deliberately or maliciously to cause harm to a plaintiff with known sensitivities, those actions may be judged unreasonable.<sup>83</sup> In terms of a remedy an injunction is available to refrain the wrongdoer from continuing the nuisance. Where there is physical damage, damages will be awarded and the measure of damages will be the cost of restoring the land, or the diminution of the value of the land due to the damage.<sup>84</sup> Damage to crop as a result of a nuisance is recoverable, as are the costs of averting a physical threat.<sup>85</sup> Where however a "transitory nuisance" causes the damage, diminution of land value will not be the appropriate measure, as the value of the land will seldom be reduced. Damages for loss of amenity value are more appropriate in these circumstances and should only be awarded for the period during which the nuisance persisted.<sup>86</sup>

Where there is no physical damage, reliance is placed upon the interference with use and enjoyment of the land. This may be reflected by damages for loss of utility or amenity value, although an injunction is the more usual remedy. Damages for loss of profits stemming from the inability to use land may also be recovered.<sup>87</sup>

### ***Application to organic farming***

At first glance a claim, by an organic farmer, in nuisance for contamination by spray drift looks promising. Where contamination arises in excess of general tolerances, and a link can be made to the wrongdoer, then recovery for loss suffered is likely. Due to the fact that general tolerances are exceeded, the issue of foreseeability is unlikely to arise. The fact that a nuisance-creating farmer is busily engaged in feeding the nation would not operate as a defence in favour of the farmer. Nor would an argument of first in time. It will also be irrelevant that an organic farmer could avoid the effects at a cost lower than that to be paid by the non-organic farmer in eliminating the nuisance.

The situation is less clear, however, where spray contamination creates residues below the general level, but above organic certification thresholds. The ability to claim for interference with the use and enjoyment of land may assist the organic farmer in this situation. It could be argued that the practices of a defendant unduly restrict the ability of the plaintiff to operate an organic farm and thus use and enjoy land in the manner of choice. Damages could be sought for loss of utility as an organic farm. The issue of foreseeability could be overcome in instances where notice of presence of an organic farm had been given. The Court would then have to assess what a reasonable level of interference is.

In relying on the doctrine of nuisance the greatest obstacle is that of abnormal sensitivity. The decision in *Hawkes Bay Protein v Davidson* suggests that the interference or discomfort need be substantial. This could be difficult to prove where spray drift results in residual contamination, which exceeds the organic, but not the general, standard. In assessing the degree of interference a court would assess what is reasonable in the immediate location. The constitution of the neighbourhood, and spray practices employed would be relevant. The ease and extent of the ability to control the discharge will be weighed as well. Known vulnerability may also be relevant. Where a neighbouring operator has knowledge of a plaintiff's organic status and possesses the ability to control spray practices, it is possible that a court could find that operator to have acted unreasonably in discharging spray in a manner that breached organic certification standards. Although such actions could not be termed malicious, they could be viewed as unnecessary. Toleration of sprays by community and changing industry practice could influence a court's decision in terms of reasonableness.

Arguments from property rights may also bolster the organic farmer as discussed previously. Consideration of the statutory framework may be relevant and a court may also want to consider rules in resource management plans created under the RMA, relating to spray drift and land use when considering whether the activity was reasonable. Planning permission will not necessarily operate as a defence to a claim in nuisance. In identifying the

balance to be struck between the parties a court will need to conclude whether or not the right to farm organically should be subordinated to the right of a neighbour to discharge chemicals over the organic farmer's land in such a way as to result in decertification. Evolution of policy rejecting this latter position is arguably more consistent with international and national efforts to control the externalities of modern agriculture.<sup>88</sup>

A requirement to internalise effects causing decertification represents one way in which a tolerable balance could be struck between the parties. This would not mean that chemical farming techniques could not be carried out on a block adjoining an organic farm. It would simply mean that anyone applying those chemicals should do so in a manner that does not have flow on effects for incompatible activities. It may have implications for some techniques, such as aerial crop dusting, but leaves open other avenues. Finding sensible solutions that support all forms of agriculture, without rendering one impossible should be the goal for those administering the common law.

### ***Rylands v Fletcher***

Reliance upon the doctrine of *Rylands v Fletcher* is another avenue for recovery of damage to property. It is now established that this doctrine is a subset of the nuisance action. The Court of Appeal in *Hamilton v Papakura District Council* assessed the similarities between the causes of action:<sup>89</sup>

The similarities between the *Rylands v Fletcher* cause of action and the cause of action in nuisance are clear. *Rylands v Fletcher* deals with an isolated instance of escape while nuisance is concerned with a continuing wrong. The true nuisance should normally have some degree of continuance about it as the plaintiff must show some act of the defendant on his land that disturbs the actual or prospective enjoyment of the plaintiff's rights over land. However, an isolated escape can give rise to an action in nuisance. Examples include a water main bursting (*Irvine & Co Ltd v Dunedin City Corporation* [1939] NZLR 741), a blocked drain causing a flood (*Pemberton v Bright* [1960] 1 WLR 436 (CA)), and a gas explosion

(*Midwood & Co Ltd v Mayor, Aldermen And Citizens of Manchester* [1905] 2 KB 597). This illustrates the close relationship between the law of nuisance and the rule in *Rylands v Fletcher* which originally dealt with instances of the escape of large amounts of water stored on the defendant's land. Lord Macmillan recognised in *Read v J Lyons and Co Ltd* [1947] AC 156 that nuisance is a cogener of the rule in *Rylands v Fletcher*, but the former usually focuses on the acts of the defendant, while the latter always focuses on the event of an escape of some mischievous thing which the defendant brought onto his land.

The Court of Appeal also found that the requirement of foreseeability was a prerequisite to both forms of action.<sup>90</sup> In *Hamilton v Papakura District Council* the requirement for foreseeability was fatal to all three tort causes of action before all three courts.

A differentiating factor of the rule in *Rylands v Fletcher* is the requirement that the activity carried out by the defendant constituted a non-natural use of land. In *Attorney-General v Geothermal Produce NZ Ltd*<sup>91</sup> the majority were not prepared to classify the use of sprays in that case as non-natural, due to their fairly common rural use in New Zealand and the state of English case law. However Somers J, in minority, took a different view and concluded:<sup>92</sup>

... To direct a toxic hormone spray capable of drifting considerable distances across the boundary of one's land up to heights of not less than six feet hardly seems a natural use of land. I find it difficult to see why the Department should not be liable under the rule in *Rylands v Fletcher*.

In the *Hamilton v Papakura District Council* decisions neither the Judicial Committee nor the Court of Appeal refer expressly to the non-natural issue, instead there appears to be implicit recognition that release of toxic sprays into a water supply could constitute either cause of action, in the event that the requirement for foreseeability is fulfilled. It may be that the better view is as expressed by Professor Todd:<sup>93</sup>

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Aerial spraying of weedkillers near sensitive crops on nearby land probably carries sufficient inherent risk of damage from drift to amount to a non-natural use even though it is a reasonably common agricultural practice.

Accordingly there is potential for the organic farmer to recover in nuisance, providing the issues of foreseeability and sensitivity can be dealt with. What is reasonable in the circumstances will come down to a court's decision in terms of the immediate location.

#### **Liability for damage caused by genetically modified organisms**

##### ***Negligence***

##### ***Physical damage***

Whether contamination by GMO can constitute physical damage raises the same issues discussed in relation to chemical drift. If the contamination causes a change in the nature of the crop or product it is possible that physical damage has occurred. Where there is evidence of physical damage, a plaintiff will need to prove that a duty of care was owed. In an instance where a crop is known as likely to spread, foreseeability is unlikely to be an issue. The duty may also include a requirement that the crop be grown in such a way as not to cause harm.<sup>94</sup>

##### ***Statutory permission***

The issue of statutory permission is relevant to both physical damage and economic loss. The existence of a statutory permission may impinge on whether or not a duty exists, as courts may choose an approach that promotes consistency with statute. In relation to GMO any statutory permission would likely be issued under the Hazardous Substances and New Organisms Act 1996 (HSNO). The relationship between HSNO and the common law has yet to be considered by the courts. In an analogous situation permission granted under the RMA does not prevent responsibility in tort.<sup>95</sup> It is arguable that this approach should be extended to cover permissions issues under HSNO.



Permissions given under HSNO have similarities to resource consents granted under the RMA. Initially HSNO was conceived as part of the RMA. The permissions under each regime are the result of a statutory framework where power is delegated to another body to weigh the interests of the environment and the interests of individuals in deciding how a resource is to be used. Both systems adopt similar purpose clauses, and each focus upon whether a particular activity should be permitted and where necessary prescribe controls upon the exercise of the permission. Administrative decisions under both HSNO and the RMA may extinguish private rights without compensation, and courts have therefore supported the need to retain access to tort remedies regardless of the existence of a statutory permission.<sup>96</sup>

When considering the impact of a statutory permission upon the common law, courts will examine the entire scheme of the legislation. Whilst HSNO does not include a savings provision in terms similar to that of s 23 of the RMA,<sup>97</sup> it is clear that policy makers have assumed that the common law will continue to operate in tandem with statute.<sup>98</sup> Section 124G of HSNO enables recovery of damages for loss caused as a result of a breach of the Act,<sup>99</sup> but specifically preserves the right to seek additional recovery by virtue of another cause of action.<sup>100</sup> HSNO is silent in terms of recovery for GMO damage caused in a situation where there is no breach of the Act. If no common law remedy is permitted for such a loss, the result will be that any loss will be socialised, and this loss will fall on those who wish to produce and trade as GMO-free. If, however, the common law provides a remedy in negligence or nuisance irrespective of statutory permission, it will be possible to recover unanticipated losses for which there may be no other remedy.<sup>101</sup>

If statutory permission did not prevent responsibility in tort, it may yet provide an indicator relative to discharge of the burden.<sup>102</sup> A defendant claiming to have "followed all the rules" may receive some sympathy from the courts. This points to the need for authorising agencies to understand coexistence issues, and to have a detailed knowledge of the environment into which the GMO will be released.<sup>103</sup> Failure to comply with the conditions of permission, such as a requirement for buffer zones

or separation, is likely to constitute breach of duty, as well as rendering a defendant liable under the enforcement provisions of a statutory scheme.

### ***Threshold of contamination***

In determining whether harm has been suffered, the courts will have to decide whether a zero tolerance for GMO contamination can sustain an action in negligence. This will depend upon what a court considers reasonable in the circumstances. A pragmatic court may choose to strike the balance at a level higher than the zero tolerance level required for organic farming. On this basis an organic farmer will be left without a remedy.

Compelling organic farms to accept a degree of contamination, even where the contamination is minimal, removes the right to choose how to farm. This loss of choice is a significant one, and to be condoned must be justifiable. Those who support the widespread use of GMO argue that contamination will need to be accepted by the organic sector, and infer that a minimal degree of contamination is appropriate due to the benefits to be provided by GMO.<sup>104</sup> However, before a court adopts this approach to the level of harm, it would need to examine closely by what measures the harm could be avoided, the gravity of the risk, and the social value of the activity. Such an enquiry would also want to consider damage caused to non-organic growers who wish to remain GMO-free, and in doing so may want to consider increasing consumer support for the purchase of GMO-free products.

Regardless of contamination levels, to succeed in negligence it will be necessary to establish that a duty of care was owed and that the loss was foreseeable. Relying on *Perre v Apand Pty Ltd*, factual conditions creating proximity, known vulnerability and ability to avoid may lead to the establishment of a duty. However, where there is potentially no other illegality arising in relation to the defendant's conduct, a court may not be prepared to interfere with the defendant's economic freedom in the marketplace. The right of the defendant to use GMO will again be juxtaposed against the right of the plaintiff to farm organically and exclude unwanted intrusion. This exclusionary factor may mean that an action in nuisance represents a better prospect

for recovery. Other policy issues such, as indeterminacy would also require consideration. Widespread contamination by GMOs could potentially render it impossible for any grower to be GMO-free. Potentially there could be a large class of persons seeking redress in this situation, but not necessarily unascertainable. It is arguable that reasonable determinacy will suffice in terms of ascertainment. Although it should be noted that in relation to the class action taken by organic farmers in *Hoffman v Monsanto*, Smith J distinguished *Perre v Apand Pty Ltd* on the grounds that the defendants would be exposed to “liability in an indeterminate amount for an indeterminate time to an indeterminate class”. The class action also raised issues in relation to proximity and foreseeability.

A final issue is that of sensitivity. A claim in negligence could be defeated on this ground, however with GMO the class of potentially sensitive activities, extends beyond the organic sector to include all producers who wish to remain GE-free. In contrast to the single class of hydroponic tomatoes in *Hamilton v Papakura District Council*, this would appear to rather overreach the category of sensitive. This issue will be reconsidered in respect of a claim in nuisance, which is the subject of the next enquiry.

### **Nuisance**

The issues for consideration are similar to those for spray contamination. One potential difference is whether or not GMOs can have the classification of dangerous applied in a manner similar to the use of toxic sprays.<sup>105</sup> To establish a claim in private nuisance, a plaintiff as owner of land, must prove that the defendant caused physical damage to the land or interfered with the use and enjoyment of the land. Liability is strict, however foreseeability is a prerequisite.<sup>106</sup> The focus will be on the harm suffered by the plaintiff, but the defendant's conduct will be considered in assessing whether the interference was reasonable.<sup>107</sup> The aim of the law will be to strike a balance between the conflicting interests of neighbouring occupiers.<sup>108</sup> The character of the locality can be used to justify the activity only in relation to inference with the use and enjoyment of land, and not in relation to physical damage.

***Foreseeability***

Damage to any GMO-free farmer will be foreseeable where notice of that status is given to the GMO farmer.

***Is the interference unreasonable?***

Contamination by GMO, whether as physical damage or as interference with the use and enjoyment of the land could potentially found an action in nuisance. To be successful the plaintiff would have to prove that the activity was unreasonable in the circumstances.

Where an organic farmer has choice of operating an organic farm eliminated by the presence of a contaminating GMO neighbour, the use and enjoyment of the land as organic is clearly interfered with. In an area where organic growing is predominant, or at least well represented, a court may find that the interference is unreasonable. While this may be beneficial for tightly grouped organic growers, it does not necessarily represent a just principle for decision-making. It in effect operates a principle of first in time first in right. Such a principle may be initially beneficial to established organic farmers. It may, however, eventually work against the strengthening of the organic sector, as farmers struggle to find appropriate soil types and climatic conditions in an "organic/GE-free island".

***Balancing interests and the issue of sensitivity***

The real issue that a court will have to deal with is again how to strike a fair balance between competing interests in a situation where one of those interests fails to internalise adverse effects and the other is unwilling to accept them. A court will have to consider whether or not the organic sector constitutes a sensitive user. To come to this conclusion a careful assessment of tolerance thresholds for organic and non-organic GMO-free producers will have to be undertaken. If all GMO-free producers adopted a similar standard, given the expanding market, it might be difficult to argue that they are all sensitive. If, however, the organic sector adopts a higher standard, a court favouring the preservation of opportunities, could conceivably apply the label of sensitivity and exclude liability on those grounds. From the

organic sector's point of view such a move would destroy the opportunity to be truly GMO-free.

It is arguable that classing organics as sensitive is inappropriate in the circumstances. GMO technology is an outstanding example of scientific innovation. Years of research and incalculable sums of money have been invested in the technology. If science is capable of such innovation, then it should also be able to provide technological answers to avoid contamination. The evidence suggests that such techniques are under development and will become available at some time in the future.<sup>109</sup> However in the haste to get GMO products onto the market there seems to be something of a time lag between production and response. If there is the possibility of applying technology that could prevent contamination of organic farms, and indeed of the wider environment, then those who come after us would surely prefer to see opportunities for an uncontaminated environment preserved. Although HSNO will provide relief where a GMO farmer creates contamination in breach of conditions imposed, in the absence of breach of condition, the common law can potentially fill the gap. Where, in these latter circumstances, the ground of sensitivity (or any other) prevents the operation of the common law, no other remedy will exist and loss will be socialised. This situation threatens the viability of organic, or any other GMO-free, production as currently conceived. A refusal to allow recovery would need to be based on the premise that no one has a right to choose to be GMO-free. Any such decision will provoke the need for growers who wish to be GE free to utilise other measures such as controlled spatial groupings of activities to remain free from contamination. A more flexible approach to land use is one where effects that cause decertification are internalised, and in that way organic and non-organic growers remain compatible and retain choice in terms of location. Application of the common law so as to provide for internalisation of effects will also potentially be consistent with the current approach to internalisation taken by the courts under the RMA.

### ***Rylands v Fletcher***

A separate argument could also be raised relying on the doctrine of *Rylands v Fletcher*. One element, which sets the doctrine apart

from nuisance, is the requirement that the defendant should be making a non-natural use of land in carrying out the offending activity. Whether or not the escape of GMO contaminating seeds or pollen can be considered non-natural will depend upon the court's assessment of the use of genetically modified plants in farming.<sup>110</sup> The fact that the emanation is from a "natural" source does not appear to be an obstacle. The escape of thistle seeds from a thistle infestation has grounded liability in nuisance.<sup>111</sup> Another benefit of the doctrine is that liability applies whether or not activities are authorised by a licence granted by statutory regulators under environmental legislation.<sup>112</sup>

### Conclusion

In New Zealand the common law has yet to be tested in relation to contamination of an organic farm and consequent loss of certification. Though the common law has been held out as providing remedies that support the organic farm in the face of pollution, a careful study reveals that clear protection extends only so far as physical damage to a level compatible with general damage. Even in that position, problems with causation are possible. To receive the full protection of the common law, the organic farmer needs to overcome the hurdles of foreseeability, sensitivity, and statutory permission and make an appeal to "reason" for the purposes of survival. Factual conditions creating known vulnerability and avoidability may potentially constitute sufficient reason to overcome those hurdles and enable recovery. Courts will be required to decide whether organic farms are entitled to protection by the common law or obliged to defend themselves by whatever means remaining. Reliance upon regulatory schemes may offer an alternative option for preservation of integrity.

### Notes

- 1 Agrichemical Trespass Ministerial Advisory Committee *Final report to the Minister of the Environment* (Ministry for the Environment 2002) at 3.
- 2 Ibid. These events are not organic specific.
- 3 *Hamilton v Papakura District Council* [2002] UKPC 9, [2002] 3 NZLR 308.

- 4 See, for example, P Wallace "Using Resource Management Plans to protect organic production" (2005) 61 New Zealand Geographer 124.
- 5 J Brenner "Nuisance Law and the Industrial Revolution (1974)" in R Percival and D Alevizatos (eds) *Law and the Environment : A Multidisciplinary Reader* (Temple University Press, Philadelphia, 1997).
- 6 Law Commission *Liability for Loss Resulting from the Development, Supply or Use of Genetically Modified Organisms* (NZLC SP14, 2002).
- 7 Ibid. Personal injury and spiritual harm are also documented, but beyond the scope of this enquiry.
- 8 See, for instance, Chen Palmer and Partners and Simon Terry Associates Ltd "Who bears the Risk? Genetic Modification and Liability" (Wellington , 2001); Agrichemical Trespass Ministerial Advisory Committee *Final report to the Minister of the Environment* (Ministry for the Environment 2002); Law Commission *Liability for Loss Resulting from the Development, Supply or Use of Genetically Modified Organisms* (NZLC SP14, 2002).
- 9 For instance the Privy Council decision *Hamilton v Papakura District Council*, above n 3.
- 10 *Langan v Valicopters Inc* 567 P 2d 222 (Wash 1977).
- 11 For Australian decisions see *Koll v Cardinia SC* [2001] VCAT 2118; *Giles v Break O'Day Council* [2001] TASRMPAT 117; *Tomlinson v East Gippsland Shire Council* [1998] VCAT 111. For the United Kingdom see *R v Secretary of State for the Environment, Transport and the Regions ex parte Watson* [1999] Env LR 310.
- 12 *Hoffman v Monsanto Canada Inc* 2005 SKQB 225, [2005] 7 WWR 665; *Hoffman v Monsanto Inc* 2007 SKCA 47, [2007] 6 WWR 387, [2007] SJ No 182.
- 13 *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA).
- 14 Law Commission, above n 6 at 10.
- 15 *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA).
- 16 S Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 142.
- 17 See, for example, *BIO-GRO New Zealand Organic Standards* (30 April 2001), Annex 2, Residue levels in Certified Products, Water, Soil and Composts.
- 18 Ibid.
- 19 S Todd (ed) *The Law of Torts in New Zealand* (3rd ed, Brookers, Wellington, 2001) at 170.
- 20 Ibid, at 170 discussing *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1.
- 21 Ibid, at 258-259. Other policy reasons include economic interests being viewed as less worthy of protection, and market efficiency arguments supporting insurance of the risk rather than liability.

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- 22 *Perre v Apand Pty Ltd* [1999] HCA 36, (1999) 198 CLR 180, (1999) 164 ALR 606 at [70] per McHugh J.
- 23 *Ibid*, at [25] per Gaudron J.
- 24 Todd above n 19 at 252.
- 25 The decertification arose in the context of biosecurity regulations aimed at controlling bacterial wilt, as opposed to decertification for organic production. Decertification of the potatoes prevented entry into Western Australia.
- 26 *Perre*, above n 22.
- 27 *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562.
- 28 For discussion see G Coveney "Who Said You Can't Have It All? The perils of ignoring risk allocation in cases of relational economic loss" (2007) 19 Bond Law Review, Iss 1, Art 4, at 8-16.
- 29 *Ibid*, at [235], per Kirby J.
- 30 *Ibid*, at [100].
- 31 *Donoghue v Stevenson* [1932] AC 562 (HL) at 580 per Lord Atkin.
- 32 See *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529.
- 33 In examining the issue of inability to control, a Court may also consider whether a plaintiff should be required to take reasonable steps by way of self-protection: see *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601, (1999) 5 ELRNZ 90 (HC). What is reasonable in any given circumstance becomes a mixed question of science and law.
- 34 A similar approach has been adopted by the Supreme Court of Canada in *Cooper v Hobart* [2001] 3 SCR 537, 206 DLR (4th) 193. For discussion see R Brown "Still Crazy after All These Years: *Anns*, *Cooper v Hobart* and Pure Economic Loss" (2003) 36 UBC L Rev 159.
- 35 *Perre*, above n 22 at [297].
- 36 *Ibid*, at [300].
- 37 *Ibid*, at [301], per Kirby J.
- 38 *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC), at 632.
- 39 *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601, (1999) 5 ELRNZ 90 (HC).
- 40 The RMA reflects this notion by the operation of s 104(3)(a), which expressly excludes consideration of trade competition in resource consent decisions.
- 41 *Perre*, above n 22 at [114].
- 42 *Ibid*, at [118].
- 43 *Ibid*, at [130].
- 44 *Ibid*, at [123].
- 45 [2005] 1 NZLR 324 (CA).



- 46 [2004] HCA 16, (2004) 216 CLR 515.
- 47 See also *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA).
- 48 R Brown "Still Crazy after All These Years: *Anns, Cooper v Hobart* and Pure Economic Loss" (2003) 36 UBC L Rev 159 at para 169.
- 49 S Todd "Liability issues involved, or likely to be involved now or in the future in relation to the use, in New Zealand, of genetically modified organisms and products" Submission to the Royal Commission on Genetic Modification (27 April 2001) <<http://www.gmcommission.govt.nz/>> at 11.
- 50 T Tietenberg *Environmental Economics and Policy* (Addison-Wesley Longman,, Boston, 2001).
- 51 For example MRLs established by the New Zealand Food Safety Authority or EELs (environmental exposure limits) and TELs (tolerable exposure limits) set pursuant to regulations made under HSNO.
- 52 *Hamilton v Papakura District Council* [2002] UKPC 9, [2002] 3 NZLR 308.
- 53 *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA), at [40].
- 54 *Ibid*, at [41].
- 55 *Hamilton* (PC) above n 52, at [36].
- 56 *Ibid*, at [31], in turn quoting the words of the Supreme Court of Canada in *Munshaw Colour Service Ltd v Vancouver (City)* (1962) 33 DLR (2d) 719 at 727.
- 57 Although as a matter of fact, due to the low residue levels, the water in this case may not have "damaged" organic product, the decision creates a strong impetus for organic farmers to have a hard look at their water supply.
- 58 Todd above n 19 at 504.
- 59 K Guerin Property Rights and Environmental Policy: A New Zealand Perspective (New Zealand Treasury Working Paper 03/02, March 2003) <<http://www.treasury.govt.nz>> at 10.
- 60 A New Zealand Court of Appeal Judge, sitting as a member of the Privy Council.
- 61 *Hamilton* (PC), above n 52 at [37] and [39].
- 62 BIO-GRO Standards 4.2.6.b.iv.
- 63 Todd above n 19 at 502.
- 64 This being for damage created between 10.01 and 99.9 per cent of the relevant maximum residue level.
- 65 This enquiry will be directed to the concept of private nuisance, in relation to interference with property owned, in contrast to a public nuisance consisting of interference with a public or common right. For discussion of the distinction see J Fleming *The Law of Torts* (9th ed, Law Book Co, Sydney, 1998) at 459.
- 66 Todd Report above n 49 at 10.
- 67 *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536 (HC) at [15]. However, to

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result in actual trespass a person must cause some other person or thing to directly intrude on the land; it is insufficient for the encroachment to arise as the indirect or consequential result of the defendant's act. For discussion see Todd above n 19 at 457.

- 68 Fleming above n 65 at 467.
- 69 Todd Report above n 49 at 11.
- 70 Todd above n 19 at 504.
- 71 *Hawkes Bay* above n 67 at [18].
- 72 Ibid, at [15].
- 73 Ibid, at [19].
- 74 Where, however, a defendant's acts are specifically authorised by statute, a plaintiff's claim will fail where the defendant can prove that the creation of the nuisance was an inevitable result of carrying out the authorised activity.
- 75 Todd above n 19 at 504.
- 76 Fleming above n 65 at 471.
- 77 *Ports of Auckland* above n 39 at 608.
- 78 Todd above n 19 at 523.
- 79 *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 (HC) at 534-535.
- 80 Ibid.
- 81 Todd Report above n 49 at 11.
- 82 *Hawkes Bay* above n 67 at [17].
- 83 *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468.
- 84 *Hawkes Bay* above n 67 at [13].
- 85 Todd above n 19 at 529 and *Attorney-General v Geothermal Produce NZ* above n 13.
- 86 *Hawkes Bay* above n 67 at paras [32] – [39].
- 87 *Clearlite Holdings Ltd v Auckland City Corporation* [1976] 2 NZLR 729 (SC).
- 88 For a brief discussion of the American position see P Wallace "Does the Law of New Zealand protect Organic Production" (LLM thesis, Waikato University, 2004).
- 89 *Hamilton (CA)* above n 53 at [71].
- 90 Ibid at [73].
- 91 *Attorney-General v Geothermal Produce NZ Ltd* above n 13.
- 92 Ibid, at 363.
- 93 Todd above n 19 at 552.
- 94 R Repp "Biotech Pollution: Assessing Liability for Genetically Modified Crop Production and Genetic Drift" (2000) 36 Idaho L Rev 585 14.
- 95 *Ports of Auckland* above n 39 at 611, 105.
- 96 For discussion see *Ports of Auckland* above n 39 at 610, 105–106.

- 97 Section 23 of the RMA states that compliance with the RMA does not affect the need to comply with other legal requirements including rules of law.
- 98 See comments of Royal Commission on Genetic Modification, *Report of the Royal Commission on Genetic Modification: Report and Recommendations* (2001) at 419.
- 99 This includes for a breach of controls applied by virtue of an approval or by regulation – see s 124G(1)(c).
- 100 Section 124G(3).
- 101 The existence of a statutory permission may also impede the granting of an injunction by way of remedy, so as to effectively override the permission. Damages in lieu may represent a more palatable alternative. For discussion see M Lee and R Burrell "Liability for the Escape of GM Seeds: Pursuing the 'Victim'?" (2002) 65 *The Modern Law Review* 534.
- 102 For discussion see Repp above n 94.
- 103 The consequences of the failure to do so are obvious in *R v Secretary of State for the Environment, Transport and the Regions ex parte Watson* [1999] Env LR 310, where the decision-maker was unaware that organic growers were operating in the locality.
- 104 M Christensen, P Horgan and A Cudwell "Genetic Modification: the Liability Debate" <[http://www.lifesciencesnetwork.com/Repository/020118\\_liability.pdf](http://www.lifesciencesnetwork.com/Repository/020118_liability.pdf)>.
- 105 For discussion see A Jones "What Liability of Growing Genetically Engineered Crops?" (2002) 7 *Drake J Agric L* 621 5.
- 106 Todd Report above n 49 at 10.
- 107 Todd Report above n 49 at 10.
- 108 Ibid.
- 109 For discussion see Department for Environment Food and Rural Affairs, United Kingdom "Guidance on Principles of Best Practice in the Design of Genetically Modified Plants" Advisory Committee on Releases to the Environment: Sub-group on Best Practice in GM Crop Design (2001) <<http://www.defra.gov.uk>> 1.
- 110 For discussion see Lee above n 101.
- 111 Todd Report above n 49 at 13.
- 112 C Rodgers "Coexistence or conflict? A European Perspective on GMOs and the Problem of Liability" 2007, *Bulletin of Science, Technology & Society*, 27, 233 at 242.