Organic versus GMO farming: Contamination, what contamination?

> "… the late November/early December 2010 airborne incursion of GM canola swathes into Eagle Rest (described by the Marshes in their pleadings and submissions in tendentious fashion as a 'contamination')" Justice Kenneth Martin (2014, p.15).

A landmark case against the planting of GMO crops in Australia has delivered a big win for GMO farmers and produced no protection for organic farmers. The case pitted farmer against farmer. An organic farmer, Steve Walsh, initiated the legal action against his GMO growing neighbour, Michael Baxter in the Supreme Court of Western Australia (Martin, 2014).

The Marsh and Baxter farms (477 hectares and 900 ha. respectively) are adjacent to each other and located in Kojonup, 260 km south east of the capital city of Perth in the wheat belt of Western Australia (WA) - and coincidentally nearby Broomhill was one of the earliest sites in the development of the organic movement in Australia (from 1930) (Paull, 2013a). Just before Baxter's first crop of Monsanto's genetically modified (GM) Roundup Ready (RR) canola (a variety of rape) was harvested, the standing crop was sprayed with herbicide (glyphosate), and rather than being direct harvested, the crop was swathed, i.e. the stalks were mown off at their base, dropped *in situ* and windrowed, and left in the field (exposed to the elements) for collection in two or three weeks. GMO swathes, seeds and plant material were subsequently found dispersed over much of Marsh's farm. As a consequence 70% of Marsh's farm lost its organic certification (from 29 December 2010 until it was restored in October 2013) (Martin, 2014).

Marsh sued Baxter for economic loss (agreed between the parties as $85,000), on the basis of common law negligence or private nuisance, and sought a permanent injunction, initially to stop Baxter in future planting GM canola in paddocks adjacent to Marsh's organic fields and finally lessened to stopping Baxter harvesting GM canola by swathing in adjacent paddocks. The case ran over three weeks, and was then dismissed in its entirety; so no nuisance, no negligence, no injunction, and no damages (Martin, 2014).

The cornerstone of the case was that Marsh's organic farm had been "contaminated" with GMO plant material. There was no dispute that GM canola plant material was blown onto 70% of Marsh's farm, no dispute that it came from Baxter's farm, and not even any dispute that Baxter's chosen harvesting method of swathing created the precondition for the wind to blow the GMO material into Marsh's farm. But the case foundered on the characterisation of the "incursion" as "contamination" which characterisation was never accepted by the Judge who commented, early in his 150 page judgement: "the late November/early December 2010 airborne incursion of GM canola swathes into Eagle Rest (described by the Marshes in their pleadings and submissions in tendentious fashion as a 'contamination')" (Martin, 2014, p.15). The failure to cross this necessary rubicon was fatal to the case.

It became legal to grow GM canola in WA in January 2010 and Baxter immediately took

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up the option to plant a crop. Subsequently: “Mr Marsh then describes the asserted 'contamination' of a number of the Eagle Rest paddocks in late November/early December 2010, by a discovered presence of some 245 cut GM canola swathes which he found scattered across some Eagle Rest paddocks (Martin, 2014, p.81).

Marsh notified his organic certifier the National Association for Sustainable Agriculture Australia (NASAA) and its certification arm NASAA Certified Organic (NCO): “Mr Marsh's first communication to Ms Goldfinch told her there was 'substantial contamination' from 'neighbours swathed GM Canola crop ... up to 800 metres inside the boundary'. His second fax revised this to 'an area up to 1.2km from GM boundary into our property by 1.6km wide ... approximately 160 Ha', including 'hundreds of swathed GM plants and thousands of seeds spread across our land'” (Martin, 2014, p.25).

Following on from those faxes from Marsh: “According to documentation produced in December 2010 by the senior executive certification decision-maker for NCO (Ms Stephanie Goldfinch), NASAA standard 3.2.9 was invoked to support first the initial suspension, then the decertification of Eagle Rest paddocks 7 - 13. Those paddocks were assessed by NCO as being 'contaminated' by GMOs, raising the underlying question as to what actually had constituted the 'contamination,' for the purposes of the National Standard and the NASAA standards” (Martin, 2014, p.48).

The decertification of most of the Marsh farm followed: “NCO's suspension (on 10 December 2010) of paddocks 7 - 10, 12 and 13 of Eagle Rest, was followed (on 29 December 2010) by the decertification of those same paddocks plus paddock 11 (in all, approximately 70% of the area of Eagle Rest). This contractual sanction was imposed by NCO, on the basis of Eagle Rest's then asserted 'contamination by [Genetically Modified Organisms]'. Unhelpfully, there is no definition of 'contamination' or of 'genetic contamination' found in the NASAA standards or, for that matter, in the National Standards” (Martin, 2014, pp.47-48), whereas contamination is “defined in IFOAM standards as: Contact of organic product or land with a substance prohibited for organic production or handling” (p.58).

The Judge declared that: “Much of the difficulty for Ms Goldfinch (and for that matter for Mr Marsh) seemed to stem from the fact that the term 'contamination' is not defined in the National Standards or in the NASAA standards. Hence, a hypothetical example put to Ms Goldfinch of a GM canola swathe transiently landing on a sheep's back as effectively a source of contamination of the sheep produced interesting evidence” (Martin, 2014, p. 118). It is tempting to speculate that if there was an ‘incursion’ of sand into the judge’s favourite breakfast spread might he perhaps determine that his vegemite, or whatever, was indeed contaminated - without reference to a dictionary, a definition or a standard?

However, as the Judge declared: “courts resolve litigation exclusively on the basis of the state of the evidence led before the court ... In this trial, the Marshes did not prove or even seek to prove that a swathed canola plant with attached seed pods and with viable canola seed in the seed pods is in any way toxic, harmful or otherwise dangerous to humans, animals or to land. No evidence was led to that end. The trial evidence was overwhelmingly the other way ... it was not contended in this trial that any adverse physical consequences had ever been suffered by humans, animals or by the land (ie, at Eagle Rest) by reason of the airborne incursion on the wind of approximately 245 GM

canola swathes, which I have found were blown into some Eagle Rest paddocks from Sevenoaks, in late November or early December 2010" (Martin, 2014, pp.130-131).

The story of Marsh v. Baxter is part of a greater narrative of what Northbourne (1940, p. 81) characterised as the contest of "organic versus chemical farming". In his manifesto of organic agriculture, Northbourne had warned that "It is a task for generations … And those engaged will be fighting a rearguard action for many decades, perhaps for centuries" (1940, p.115). There is at least one solid precedent (Murphy v. Butler, 1960) where an expensive legal case was mounted by organic/biodynamic farmers (Marjorie Spock and Mary Richards, of Long Island, New York), lost in the courts of law, but subsequently won in the court of public opinion (Paull, 2013b). In that case, the expert witness testimony and the data generated by Spock and Richards were reformulated by Rachel Carson to produce *Silent Spring* (1962). The present case leaves less scope for such an approach since as the judge observed: "I will also record that there was also a high measure of agreement at the trial between the six expert witnesses called in aggregate for both sides" (Martin, 2014, p.14).

Marsh v. Baxter offers no assurance for the possibility of coexistence of GMO and organic farming in Western Australia, it offers no protection for organic farmers, it places no constraints on GMO farmers. For the organic sector the case sets an unfortunate precedent. It provides a case study prescription of how to contaminate an organic farm with GMO material with impunity (at least in this case): plant GMOs on the boundary of an organic farm, upwind of the organic fields, instead of direct harvesting the seeds, swathe the plants and let them drop, and await the next prevailing wind to disperse them.

Marsh v. Baxter has been the most expensive legal case mounted in Australia by the organics sector. Unfortunately the results, to date, are not just unproductive, they are counterproductive. An appeal against the decision is possible. Marsh has regained his organic certification.

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