K Garforth et al. Journal of Environmental Law (2006) Vol.18(3) p 459 – 477
Hoffman v Monsanto Canada Inc. (Larry Hoffman, L.B. Hoffman Farms Inc. and Dale Beaudoin v Monsanto Canada Inc. and Bayer Cropscience Inc.)
Saskatchewan Court of Queen's Bench 2005 SKQB 225 (CanLII); [2005] 7 W.W.R. 665; (2005), 264 Sask. R. 1

This initial hearing considered whether or not loss of 'organic' status and resulting clean-up costs as a result of GM seed infiltration was sufficient grounds for a civil claim. The judge found that there was no basis for a claim in negligence, trespass or *Rylands v Fletcher*. However, nuisance and state environmental protection law could be sufficiently meritorious to warrant a subsequent hearing.

A group of "organic" farmers seek damages against two GM seed producers. The report explains the claim and the judgement, which was concerned with whether or not the claimants could pursue a class action. One of the rules for permitting a class action is that the case would not self-evidently fail. While not a ringing endorsement of the merits of the case the confirmation of a class action could indicate at least the pass ability of the argument presented.

The claim was based on several themes:

- The widespread use of GM Canola in Canada, mishandling of seed and spread of GM canola transgenes has now made it impossible for organic farmers in Canada to claim the complete absence of GM crops from their fields and produce (whether or not this crop is canola).

- The cleanup of organic farms [and presumably produce] would be expensive and should be paid for by the two defendants, Monsanto and Bayer.

- The system of identity tracing, which was designed to help ensure that GM and non-GM criops remained separate has been terminated. Purchasers now have no assurance as to the fidelity of their purchase. The claim is that European purchasers have exited the market for Canadian Canola because of this.

Negligence is claimed: specifically the breach of duty to warn, the duty to prevent cross-pollination, the duty to prevent gene spread. The loss was defined as the loss of a rotation crop, the loss of a market and clean-up costs.

The judge in this preliminary decision found that the spread of GM canola was foreseeable but was less certain that the damage done was foreseeable (at the time certification did not specify restrictions on GM).

The judge found that there was no proximal relationship between the claimants and the defendants.

There was also the question of public policy; the crops had been approved for unrestricted use by the government.

The claim seemed to be a claim based on economic loss, no damage, of a kind usually recognised in civil law, having been done.

The rule in *Rylands v Fletcher* was invoked: strict liability applies if (i) the defendant has made a non-natural use of its land; (ii) the defendant brought onto his land something which was likely to do mischief if it escaped; (iii) the substance in question escaped; and (iv) damage was caused to the plaintiff's property or person as a result of the escape'.

The judge found that the sale of GM canola could not be regarded as an escape, but did not comment on whether or not GM canola was a dangerous substance or represented an unnatural use.

Nuisance: there is authority for the proposition that no action can be brought by a plaintiff who is unduly reactive to the defendant's conduct because he is carrying on a business or operation that is particularly sensitive to the kind of intervention. On the other hand, weeds can be the basis for a claim in nuisance. But did either of the defendants have control over the land where the GM crops were sown? The court decided they did not need to own or control the land where the seed was used, they had begun the process, initiated the nuisance. However there could be a successful defence related to proximity; which the judge considered to be remote but was something for the trial judge to decide.

Trespass: 'the plaintiffs must establish an unauthorised entry upon another's land of a physical object or physical contact with land, and the defendants' act or interference must be voluntary and intentional or negligent'. The action in trespass could not be sustained; owning the patent for the genes was not equivalent to owning the seed at all stages of use.

Several Canadian Regulations were worded such that the merits of a claim would need to be assessed by another court. The claimants could not rely on negligence, *Rylands v Fletcher* or Trespass but there were sufficient grounds in nuisance and state regulation for it to be decided later.

Comment
The question of the rights and duties implied by a GM patent is more complex than stated above. The *Schmeiser* case found that the farmer had no right to keep seed from his crop as this would infringe the patent held by the seed producer. In return for this extended ownership, the seed producer should perhaps be required to exercise more responsibility?

Some estimates suggest that if 10% of UK crops were to become GM then it would be almost impossible for organic farmers to retain their certificated 'GM free' status.

In our view, the claims lack evidence of physical harm and, whilst weeds can be a legitimate cause of loss in nuisance the claimant here would seem to be 'particularly sensitive' (i.e. other people would not regard this GM plant as a weed).

Whatever the decision in any hearing of the above case it will have a strong influence on public policy and GM liabilities.