IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M.286/85

LOW PRIORITY

1084

BETWEEN ISAAC JOHN JEFFERSON

Appellant

AND MINISTRY OF AGRICULTURE AND FISHERIES

Respondent

Hearing: 9 July 1986

Counsel: P.F. Gorringe for Appellant
D.J. McDonald for Respondent

Judgment: 12 August 1986

JUDGMENT OF BARKER J

This is an appeal against the conviction of the appellant in the District Court at Tauranga on 12 September 1985. The appellant pleaded not guilty to a charge under Regulation 10 of the Pesticides Regulations 1983 ("the Regulations"). The information alleged that, on 15 October 1984, the appellant applied a herbicide in such a reckless manner that damage resulted to property other than the property to which he had applied the herbicide. After a defended hearing extending over 2 days, the learned District Court Judge convicted the appellant.

Because the District Court Judge regarded this as a test case, he did not impose a fine; he simply ordered the appellant to pay solicitors' costs and witnesses' expenses amounting in total to $600. There is no appeal against sentence.

The appellant is an experienced agricultural contractor in the Tauranga area. The prosecution alleged that, on 15 October 1984, he was spraying a herbicide on kiwifruit vines on a property near Tauranga, of which a Mr Thomas was the lessee. The herbicide was of a type encompassed by the Regulations which create an offence by every person "who applies or causes to be applied any herbicide in such a reckless manner that damage results to any property other than the property on which he applied or intended to apply the herbicide".

The prosecution alleged that spray generated by the appellant's operations was borne by the wind from the property where the appellant was working onto 2 adjoining kiwifruit orchards and that the spray there damaged some vines. At the hearing of the appeal, it was not challenged that the appellant was applying herbicide on Mr Thomas' property at Cambridge Road and that damage was caused to the adjoining properties as was demonstrated by deformity of certain plants. The appellant attacked the findings of the District Court Judge that (a) the damage to the plants on the two adjoining properties was caused by herbicide applied by the appellant; (b) the application of herbicide was performed by the appellant in such a reckless manner that damage to the neighouring properties resulted.

The evidence on causation came from a Mr Gosney, an inspector employed by the Ministry, and from a Mr Sotaris, an expert attached to the Ministry's Head Office with botanical qualifications. Both witnesses conducted a visual examination of plant specimens taken from the two properties concerned (called in evidence the 'Smith property' and the 'Holland property'). Both witnesses stated that, upon this visual examination, their experience led them to conclude that the damage done to the plants was caused by a herbicide of the relevant kind. As a check to this opinion, Mr Sotaris spoke of a

scientific test he had devised. The test was not properly formulated; the witness was unwilling in cross-examination to give details of it.

The learned District Court Judge, who saw and heard the witnesses, accepted the evidence of Mr Gosney and Mr Sotaris. He held that both had had previous knowledge of the effect of hormone damage on kiwifruit plans and that what each observed was consistent with damage caused by a prohibited pesticide. The District Court Judge accepted the validity of counsel's criticism of Mr Sotaris' test; however, he regarded evidence of the test merely as secondary evidence and not as primary evidence; he was therefore prepared to accept the opinion of these two witnesses based on their experience and observations.

I cannot say that the District Court Judge was wrong to have accepted this evidence; he was perfectly entitled to accept the evidence of these two witnesses who were qualified to assess horticultural damage by observation. There is no merit in this head of appeal.

I agree with the learned District Court Judge that, if the prosecution had sought to place sole reliance on Mr Sotaris' as yet undeveloped test, then there should have been more evidence of its methodology and efficacy. However, like the District Court Judge, I consider that this test was a secondary matter and that there was acceptable evidence available from the visual observations of these two officials.

The next head of appeal arises out of the finding of the learned District Court Judge that the spray which damaged the plants on the two properties emanated from the defendant's operations. There is no suggestion that any other operator was using herbicide in the relevant area at the relevant time. Although the appellant stated that the spray could have come from elsewhere, he was unable to

nominate either another operator or any area where another operator may have been working. The two properties affected were immediately adjacent to the property where the appellant was working.

The learned District Court Judge considered it too much of a coincidence that the appellant was working in the adjoining property using a spray which would cause the type of damage to the plants; he accepted evidence that the wind was blowing in the appropriate direction and that the wind increased in velocity whilst the appellant was working.

Counsel for the appellant scrutinised the evidence given by various prosecution witnesses as to the wind direction. They said variously that the wind was 'west to south-west', 'westerly close enough, until 8 a.m., backing slowly to south-westerly until 9 a.m.' The appellant said the wind was west to north-west. The appellant, at around 8 a.m., had lit a fire to check on the direction of the wind; he claimed that the wind was not then blowing to the neighbouring properties.

Counsel criticised the learned District Court Judge's inference that the spray came from the appellant's operation. Counsel submitted that a conviction depending on inference cannot be justified unless the inference is the only rational explanation open on the facts. This criticism does not accord with the judgment of the Court of Appeal in R v Puttick (1985), 1 CRNZ 644. There, the Court of Appeal stressed that there is no distinction in law or logic between facts established by direct evidence and those established by inference. It was held to be an unjustifiable restriction of the normal and proper use of inference for a Judge to direct a jury that only irresistable inferences that tend to confirm guilt are permissible. A jury (and a District Court Judge sitting alone) are both entitled to draw logical inferences from

proved facts and are not bound to accept inferences of one sort or to reject another. An inference is a mental process which may be used by a tribunal of fact in carrying out the primary task of assessing the evidence and deciding whether or not the evidence establishes guilt beyond reasonable doubt. Proof of guilt where a charge has several elements, involves proof of each element to the same standard, but does not require proof beyond reasonable doubt of every fact which may be relevant to the proof of every essential element.

In my view, counsel was putting at too high a level the duty of the District Court Judge when considering inferences. I consider that the District Court Judge was entitled to draw the inference that the damage to the adjoining properties was caused by the appellant's activities. He was entitled to accept the evidence as to wind direction given by prosecution witnesses; he was entitled to take into account the lack of evidence of any other potential source of damage. He was entitled to consider the juxtaposition of the relevant properties. In my view, this factual finding cannot be challenged.

The principal head of this appeal concerns the application of the concept of recklessness in the circumstances of the appellant's actions. The District Court Judge based his correct interpretation of the word 'reckless' in the relevant regulation on the following dictum of Lord Diplock in R v Caldwell, (1981) 1 All ER 961, 967:

> "In my opinion a person ... is reckless as to whether or not any property would be destroyed or damaged if (1) he does an act which in fact creates an obvious risk that the property will be destroyed or damage and (2) when he does the act he either has not given any thought to the possibility of there being any risk or has recognised that there was some risk involved and has nonetheless has gone on to do it."

The District Court Judge accepted the evidence of the appellant that, whenever there was any spraying near other orchard blocks, there was always an element of risk; the appellant, however, believed that he had taken reasonable precautions in the circumstances. The District Court Judge accepted that the appellant was a sprayer of considerable experience and that his equipment was of a good standard and well maintained. However, the District Court Judge held that the appellant was caught by the above formulation because he recognised the risk but continued spraying nonetheless.

The District Court Judge held that, when the appellant first started spraying, there were satisfactory conditions but that, by the time he had commenced to spray a second paddock, these conditions had deteriorated to such an extent that he himself had registered concern by lighting a fire to test the wind. He rejected the appellant's evidence that the wind was blowing from a direction which would not have drifted the spray; he accepted other evidence that the wind was from the south-west and of sufficient velocity to cause the spray to drift.

In view of these findings, the District Court Judge held that the appellant was aware of the risk of possible drift and of the danger that resulted but was prepared to 'chance his arm'. He considered this view confirmed by a subsequent action of the appellant in moving to a rear paddock.

Mr Gorringe submitted that the District Court Judge was in error in not applying properly the subjective element of Lord Diplock's test and that the District Court Judge was in error in holding that the risk was not obvious to the appellant; counsel submitted that the regulation refers to 'in such reckless manner that damage results' and that the word 'manner' adds to a qualification that the application of spray must be reckless in the way in which the

application is done or happens. I cannot see the point of this latter submission. The words 'in a reckless manner' are merely another way of saying 'recklessly'.

It is clear from the authorities such as Caldwell's case and R v Storey, (1931) NZLR 417, that the term 'reckless' in the criminal context involves the notion of culpable carelessness as to a risk of an adverse result. There must be an appreciation of the risk involved and the carrying out of the action nevertheless.

The appellant concluded that there was an acceptable risk to allow spraying to continue. The real question is whether, allowing that the appellant was incorrect in his assessment, he subjectively knew the risk and decided to carry on regardless.

Counsel referred me to an article entitled "Recklessness Redefined" by Professor Glanville Williams in 40 Cambridge Law Journal 252 and also to a number of unreported decisions of various Judges of this Court. Professor Glanville Williams' article calls the House of Lords decisions in Caldwell and in R v Lawrence, (1981) 1 All ER 974 as a "slap-happy repudiation of the concept of recklessness that has been carefully developed in the past few years, going back to the notion that recklessness includes inadvertent negligence". The learned author referred to the decisions as "working a profoundly regrettable change in the criminal law".

The burden of the learned article is to show that recklessness should not be equated with negligence and that it is necessary still to have a mental element in any offence involving recklessness. The learned author concludes at pp.279-291 that, on charges of recklessness, other than reckless driving, the person who adverts to the question of risk and decides there is none is free from liability. The learned author considers that Lord Diplock

in Caldwell's case did not intend to include this category of person in his new formulation of recklessness.

A further helpful passage from Caldwell's case comes just before the passage cited from Lord Diplock's speech at p.966. It reads:

> "Nevertheless, to decide whether someone has been 'reckless' whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as 'reckless' in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as 'reckless' in its ordinary sense if, having considered the risk, he decided to ignore it. (In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave.) So to this extent, even if one ascribes to 'reckless' only the restricted meaning, adopted by the Court of Appeal in Stephenson and Briggs, of foreseeing that a particular kind of harm might happen and yet going on to take the risk of it, it involves a test that would be described in part as 'objective' in current legal jargon. Questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective."

Viewed in the light of that dictum, the decision of the learned District Court Judge, given after seeing and hearing the witnesses, was open to him. The circumstances of the weather drew the attention of the appellant to the possibility of spray drift. The District Court Judge held that the risk of damage to other properties was more than so slight that the ordinary prudent individual, on due

consideration of the risk, should ignore it. It cannot be said that there was no basis in the evidence for this view of the facts.

With respect to the distinguished author of the article referred to, Lord Diplock's formulation of the concept of recklessness must command the respect of this Court in the absence of a contrary indication from our Court of Appeal. Certainly the formulation has been accepted or referred to by Judges of this Court; e.g:

(a) Bisson J in Thompson v Innes (M.512/84, Hamilton Registry, 25 November 1984 - directors carrying on the business of a company in a reckless manner);

(b) Hardie Boys J in McBreen v Ministry of Transport (M.102/82, Dunedin Registry, 27 September 1982 - reckless driving);

(c) Hardie Boys J in Mutual Rental Cars Ltd v Forster (M.241/82, Dunedin Registry, 15 December 1983 - operating a vehicle 'recklessly' contrary to an agreement for car hire).

It may well be that the Laurence and Caldwell decisions have narrowed the gap between negligence and recklessness. However, I do not consider that I should refuse to follow them for that reason.

Accordingly, the appeal must be dismissed. I record my appreciation of Mr Gorringe's careful argument.

R.D. Barker J.

SOLICITORS:
Maltby, Hare & Willoughby, Tauranga, for Appellant.
Crown Solicitor, Rotorua, for Respondent.