



# Liability in the context of biotechnology: Patent related cases in North America

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# Background

- Liability issues not limited to environmental and socio-economic damage
- GMOs often protected by patents
- GMOs can contaminate fields of farmers who have not purchased seeds



## Monsanto vs Schmeiser (Canada)

- Background: GM seeds found on Mr Schmeiser land though he did not purchase them
- Facts establish that seeds likely to have migrated without Mr Schmeiser's knowledge



# Claims

- Action brought by Monsanto for infringement of its patent
- Specific claim: Mr Schmeiser has been ‘using, reproducing and creating genes, cells and canola seeds and plants containing genes and cells claimed in the plaintiff’s patent (...) without the consent of the plaintiffs.’



# Decision

- Mr. Schmeiser ‘knew or can be taken to have known’ that the seeds saved from the 1997 crop were Roundup tolerant
- Infringement found because:
  - That seed was grown and ultimately the crop was harvested and sold.
  - Growth of the seed, reproducing the patented gene and cell, and sale of the harvested crop constitutes taking the essence of the plaintiffs’ invention, using it, without permission.



## Other noteworthy elements

- Use of the invention and infringement: Under *Schmeiser* whether or not the crop was sprayed with Roundup was deemed immaterial
- Land rights: Under *Schmeiser*, the farmer may ‘own the seed or plants on his land even if he did not set about to plant them’.
- Land rights vs intellectual property rights: Under *Schmeiser*, rights attached to the ownership of the land seem to be hierarchically inferior to the rights granted to the patent holder



# Schmeiser decision & biosafety

- A farmer liable to the patent holder is likely to be liable to his/her neighbour for the further contamination of the environment
- In a situation where the farmer is liable, the person given the authorisation to introduce the GMO into the environment seems to escape all responsibility



# Monsanto v McFarling (USA): Background

- Patent on herbicide resistant seeds
- Seeds purchased by farmers covered by patent and a ‘technology agreement’
- Technology agreement includes requirement that seeds can be used for planting one crop only





# Monsanto v McFarling: Decision

- Court accepting validity of restrictions posed by technology agreement
- Exhaustion of rights after first sale not at stake since new seeds grown from previous crop never sold
- Original sale not conferring licence to construct new seeds



# Liability under Monsanto v. McFarling

- Patent liability clearly established  
(irrelevance of Plant Variety Protection Act)
- Patent liability restricts McFarling's right to reproduce the seed but doesn't indicate whether Monsanto or McFarling is liable in case of unwanted reproduction and contamination of other fields

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# Liability and redress in biotechnology and patent liability

- Existing case law shows that issues cannot be considered in isolation
- Patent liability brings up new challenges which need to be addressed in the development of liability and redress regimes
- A system of strict environmental liability seems required to counter-balance existing strict patent liability