(2002) 119 LGERA 440
(2003) 125 LGERA 367 (CA)

[SUPREME COURT OF NEW SOUTH WALES (Court of Criminal Appeal)]

AXER PTY LTD v ENVIRONMENT PROTECTION AUTHORITY

Mahoney JA, Finlay and Badgery-Parker JJ

1, 22 November 1993

Environmental Law — Offence — Pollution of river by aerial chemical spraying — Extensive precautions taken — Isolated error by operator — Mitigating circumstances — No question of principle — Fine $50,000 excessive — Fine $20,000 substantial — Sentencing — Factual issue as to circumstances of offence — Need for sentencing court to make extensive findings of facts proved beyond reasonable doubt — Environmental Offences and Penalties Act 1989 (NSW), s 8B — Clean Waters Act 1970 (NSW), s 16(1).

Offences and Penalties — Environmental law — Offence — Re-hearing on evidence — Pollution of river by aerial chemical spraying — Extensive precautions taken — Isolated error by operator — Mitigating circumstances — No question of principle — Fine $50,000 excessive — Fine $20,000 substantial — Sentencing — Factual issue as to circumstances of offence — Need for sentencing court to make extensive findings of facts proved beyond reasonable doubt — Environmental Offences and Penalties Act 1989 (NSW), s 8B — Clean Waters Act 1970 (NSW), s 16(1).

Appeals — Sentencing — Environmental law — Re-hearing on evidence — Offence — Pollution of river by aerial chemical spraying — Extensive precautions taken — Isolated error by operator — Mitigating circumstances — No question of principle — Fine $50,000 excessive — Fine $20,000 substantial — Factual issue as to circumstances of offence — Need for sentencing court to make extensive findings of facts proved beyond reasonable doubt — Environmental Offences and Penalties Act 1989 (NSW), s 8B — Clean Waters Act 1970 (NSW), s 16(1).

The defendant company was charged with an offence under s 8B of the *Environmental Offences and Penalties Act* 1989 (NSW), based upon s 16(1) of the *Clean Waters Act* 1970 (NSW), for polluting a river.

The defendant company had been engaged in its present business for 13 years prior to the date of sentence and had never been convicted of an offence.

In the Land and Environment Court the company was fined $50,000. The substantial issue in the appeal was whether the fine was too severe.

The appeal was pursuant to s 5AB of the *Criminal Appeal Act* 1912 (NSW).

Held: (1) This was an appeal by way of rehearing on the evidence which was placed before the lower Court.

NSW Sugar Milling Co-operative Ltd v Environment Protection Authority (1992) 75 LGRA 320, applied.

(2) In determining the fine appropriate to an offence of pollution, two things were to be borne in mind: the seriousness with which the community regarded pollution of this kind and the purposes sought to be achieved by the imposition of fines in cases such as the present one.

(3) The legislation did not seek merely to prevent deliberate or negligent

pollution. It envisaged that, at least in many cases, proper precautions must be taken to ensure that pollution did not occur.

(4) Such being the nature of the appeal, the question for the Court was not whether the appellant was able to point to error on the part of the sentencing judge, but rather whether the appeal court, independently of the opinion of the sentencing judge, came to the conclusion that the penalty should be that which was imposed below, or some other penalty.

(5) Where there was an issue about the facts upon which a court was to sentence in respect of any criminal or quasi-criminal offence, the sentencing judge might not act upon any aggravating factors other than such were proved beyond reasonable doubt.

R v O'Neill [1979] 2 NSWLR 582, referred to.

(6) It was the function of the appeal court to form its own view upon the evidence, but in doing so to have regard to the fact that the judge below had the opportunity, which the appeal court did not have, of seeing the witnesses and making assessments of credibility.

(7) The offence was not deliberate.

(8) The criminality involved was to be measured not only by the seriousness of what occurred but by reference to the reasons for its occurrence. The company should be sentenced on the footing that it was an unprecedented error of omission on the part of a competent and experienced pilot which caused the pesticide pollution of the river.

(9) It was an offence of a nature such that the sentencing must embrace powerful considerations of general deterrence. Those who handle dangerous chemicals must be regarded as under a heavy obligation to the rest of the community to do so with the utmost care.

CASES CITED

The following cases are cited in the judgment:

Environment Protection Authority v Capdate Pty Ltd (1993) 78 LGERA 349.
Jones v Dunkel (1959) 101 CLR 298.
NSW Sugar Milling Co-operative Ltd v Environment Protection Authority (1992) 75 LGRA 320.
R v O'Neill [1979] 2 NSWLR 582.
State Pollution Control Commission v Boral Resources (NSW) Pty Ltd (unreported, Hemmings J, 23 May 1991).

APPEAL

The defendant company, having been found guilty pursuant to s 8B of the *Environmental Offences and Penalties Act* 1989 (NSW) and fined $50,000 by the Land and Environment Court, appealed pursuant to s 5AB of the *Criminal Appeal Act* 1912 (NSW). The appeal was by way of rehearing on the evidence which had been placed before the lower Court. The facts of the case are set out in the judgment of Badgery-Parker J.

M G Craig QC, for the appellant.

A R Blondel, for the respondent.

Judgment reserved

22 November 1993

MAHONEY JA. It is accepted that on 22 February 1991 the defendant company Axer Pty Limited polluted the Gwydir River near Moree. It was charged with an offence under s 8B of the *Environmental Offences and*

Penalties Act 1989 (NSW), based upon s 16(1) of the *Clean Waters Act* 1970 (NSW).

In the Land and Environment Court the company was fined $50,000. The substantial issue in this appeal is whether that fine is too severe.

In determining the fine appropriate to an offence of pollution, two things are to be borne in mind: the seriousness with which the community regards pollution of this kind; and the purposes sought to be achieved by the imposition of fines in cases such as these.

The community has adopted a stern policy against pollution. The legislative scheme requires that proper, and strict, precautions be taken by those whose activities may cause proscribed pollution. The quantum of the fines which may be imposed evidences this: for the present offence, a maximum fine of $125,000 was available. The quantum of the fines which the legislation allows to be imposed has no doubt been fixed not merely to indicate the seriousness with which such pollution is regarded but also to deter those engaged in such activities and to procure that they will take the precautions necessary to ensure that it does not occur.

That leads to the second matter. The argument in this appeal has at least suggested that the Court, in assessing the penalty, should take into account the serious effect which fines of this order of severity will have upon the operations of those engaged in the cotton growing industry. I do not doubt that the Court must take into account the impact of a particular fine upon a particular defendant. But that consideration does not stand alone.

The legislation does not seek merely to prevent deliberate or negligent pollution. It envisages that, at least in many cases, proper precautions must be taken to ensure that pollution does not occur. Experience has shown that it is not enough merely to take care: accidents will happen. The legislation envisages that in many cases care must be supplemented by positive precautions; business must be arranged and precautions taken so as to ensure that pollution will not occur.

Precautions may be costly. The cost of precautions to avoid pollution will no doubt become accepted, in due course, as an ordinary cost of operating in an industry where, absent precautions, pollution may occur. The legislature was no doubt conscious of the effect which increased costs may have in a market; what I have said is expressed in general terms and is, of course, subject to the circumstances of each case. But I believe legislation of this kind contemplates that, in general, the cost of preventing pollution will be absorbed into the costing of the relevant industries and in that way will be borne by the community or by that part of it which uses the product which the industry produces. In assessing the quantum of a fine considerations of this kind are to be taken into account. The fine should be such as will make it worthwhile that the cost of precautions be undertaken. As the learned judge indicated, in the present case, in order to prevent pollution of the river, it was necessary, inter alia, that the company delay spraying until the conditions were appropriate for it. No doubt that delay cost money. Ordinarily, the fine to be imposed should be such as to make it worthwhile that costs of this kind be incurred.

I do not mean by this that the legislature saw the legislation as providing, by payment of a fine, a licence to pollute. In the end, the object of the legislation is to prevent pollution and to do this, inter alia, by the deterrent effect of a substantial fine and by, in consequence, persuading the industries concerned to adopt preventive measures. In assessing the fine in an individual case, it is

proper to bear in mind the economic realities upon which such legislation is based.

Had the present pollution occurred merely because of absence of precautions or failure to observe the precautions which had been adopted, I would not have seen a fine of $50,000 as being beyond the range of what could be appropriate. But in this case there are special features. These are detailed in the judgment of Badgery-Parker J which I have had the advantage of reading. I express my agreement with what his Honour has said. Precautionary procedures had been set up and, in general, they had been observed. The record of care exercised by the company in the past had been good. I accept that the inference to be drawn from the less than fully satisfactory evidence in this case is that the precautions were observed except in the two respects to which his Honour has referred. The judge did not, perhaps, have the analysis of the facts which this Court has had presented to it. In these circumstances, I agree with Badgery-Parker J that the fine should be $20,000. I agree with the orders which have been proposed.

FINLAY J. In this matter I have had the benefit of reading in draft the judgment of Badgery-Parker J. I agree with the orders proposed by his Honour and with his reasons for those orders.

BADGERY-PARKER J. The appellant company carries on business at Moree under the business name "Air Care Aviation" and carries out aerial spraying of pastures for local farmers, particularly cotton farmers. On or about 22 February 1991, an aircraft owned by the company and piloted by Mr Lindsay Keenan was engaged in spraying cotton fields on a property known as Beela. The southern boundary of the area being sprayed runs generally along the northern bank of the Gwydir River. Two days after the spraying, fish were found dead in the river and testing of the bodies of some of the fish revealed the presence of two pesticides, Profenofos and Parathion Methyl, broad spectrum organo-phosphate pesticides, both highly toxic to aquatic organisms. The pesticides being sprayed by the applicant's aircraft on 22 February 1991 were of that kind. However, the same testing of the bodies of dead fish revealed the presence of a third pesticide, Endosulphan, which the appellant was not using. On 23 February 1991, another aircraft was engaged in aerial spraying at a nearby property called Sabar and in that operation Endosulphan was used along with Profenofos and Parathion Methyl. The company was charged with an offence under s 8B of the *Environmental Offences and Penalties Act* 1989 (NSW) namely that:

> "On or about 22 February 1991 at Beela via Moree (it) did pollute waters, to wit the Gwydir River, contrary to s 16(1) of the Clean Waters Act 1970."

Before Talbot J in the Land and Environment Court on 16 November 1992, the company entered a plea of guilty to that charge.

The statute prescribes in respect of such an offence committed by a corporation, a maximum penalty of $125,000. On 17 November 1992, Talbot J convicted the company of the offence charged and fined it the sum of $50,000. Having regard to other aspects of the proceedings to which there is no need to refer, his Honour ordered that the applicant pay the amount which is one quarter of the taxed costs of preparation by the prosecution and the whole of the taxed costs of the prosecution in respect of the two days of hearing before him. The company seeks leave to appeal to this Court on the ground that the penalty imposed was too severe.

The appeal to this Court is pursuant to s 5AB of the *Criminal Appeal Act* 1912 (NSW), and has been held to be an appeal by way of re-hearing on the evidence which was placed before the Land and Environment Court: *NSW Sugar Milling Co-operative Ltd v Environment Protection Authority* (1992) 75 LGRA 320 at 322-323. In appropriate circumstances leave may be granted to adduce additional evidence but no application to that effect was made in the present matter. Such being the nature of the appeal, the question for this Court is not whether the appellant is able to point to error on the part of the sentencing judge, but rather, whether this Court independently of the opinion of the sentencing judge comes to the conclusion that the penalty should be that which was imposed below or some other penalty. In theory, such "other penalty" might be less than or greater than the penalty imposed below, but principles applied in other jurisdictions suggest that the penalty should not be increased without giving the appellant an opportunity to be heard on that proposition particularly and, if so advised, to withdraw his appeal. There is no suggestion here that the appropriate penalty might exceed that which was imposed in the Land and Environment Court.

It appears from the evidence that there were two ways in which pollution of the river might have occurred by reason of the spraying operation. First, it was possible that it occurred by reason of an error or omission or negligent act by the pilot. Second, it was possible that it had occurred as an unforeseen consequence of the operation of a windscreen washing device fitted to the aeroplane. Where there is an issue about the facts upon which a court is to sentence in respect of any criminal or quasi-criminal offence, the sentencing judge may not act upon any aggravating factors other than such are proved beyond reasonable doubt — *R v O'Neill* [1979] 2 NSWLR 582. It does not appear that Talbot J made any express finding as to how the occurrence occurred. In my view he was obliged to do so and fell into error in failing so to do. However, as I have already pointed out, the nature of the appeal is such that the jurisdiction and obligation of this Court to re-sentence does not depend upon a finding of error on the part of the judge below. The question for this Court is what, upon the facts found by this Court on the basis of the evidence given below, is the appropriate penalty for the offence charged. It is the function of this Court to form its own view upon the evidence, but in doing so to have regard to the fact that the judge below had the opportunity, which we do not have, of seeing the witnesses and making assessments of credibility; and except so far as any such finding is demonstrated by reference to the transcript to be unwarranted, it is proper that this Court should have regard to the advantage which the judge below enjoyed in that respect and adopt his Honour's views as to the credibility of witnesses so far as those views, if expressed, were based upon his observations of demeanour. Approaching the evidence in that fashion, it is necessary for this Court in order to determine what was the appropriate penalty to reach a conclusion as to what has been proved, beyond reasonable doubt, to be the way in which the pollution of the river occurred.

The material available includes the evidence of two eye witnesses. Mr Bradley Terrence Peacey and Mr Patrick Vanderwerf were fishing on the eastern bank of the river at a point described as being about 500 m downstream of the Boolooroo Weir, that is to say, on the opposite side of the river from the paddocks being sprayed by the appellant but in such a position that on some at least of its flights across the paddock in the course of the spraying operation,

the aircraft passed close to the two men and indeed on at least one occasion directly overhead. The evidence of these witnesses was placed before the Court only by way of affidavit and neither gave oral evidence, so that this Court does not have the benefit of any finding by the trial judge on any question of reliability or credibility.

Mr Vanderwerf observed several passes of the plane from the western or north-western side of the river (Beela) to the eastern or south-eastern side. Initially it passed overhead but to the left of where he was standing but eventually passed directly overhead. On about the third or fourth pass which the plane made over the river, being then about 60 m to Mr Vanderwerf's left-hand side, he observed what he took to be two spray nozzles on the boom under the plane still operating. Those nozzles were towards the centre of the plane and were discharging a fine spray mist and some smoke. Soon after the plane had passed over the river, that mist appeared to travel upstream along the river towards the witness and settle on the river right up to the edge of the river bank immediately in front of him. He did not feel the drizzle settle upon his person but smelt a strong chemical smell which resembled the chemicals sprayed around cotton farms in the district and was not the smell of petrol or fuel. He observed no oily or petrol slick on the surface of the river. On the sixth or seventh pass, the plane passed directly overhead and he saw what appeared to him to be all 10 of the spray nozzles fitted on the boom operating at that time. The witness not having been called, there was no challenge to the honesty of his account and subject to the possibility that he was mistaken in his observation, his evidence suggests that the pilot of the plane had omitted to turn off the spray mechanism at or before the moment when the plane climbed from the low level at which the spraying operation was carried out and ascended to pass over the trees on the river bank.

Mr Peacey says in his affidavit that on about the second or third pass of the plane across the river, some distance downstream to his left, he observed a bluish grey haze together with a very light drizzle settling on the river. He could smell a fairly strong chemical odour but no fuel. He did not observe the spray nozzles in operation. The plane gradually came closer and he packed up his fishing gear and commenced to walk back up the river bank to his vehicle, leaving Mr Vanderwerf behind. His evidence was that at the time when he started to go up the river bank the drizzle was settling on the river about 5 m from where Mr Vanderwerf was standing and that when he was about half way up the bank, he felt something moist settle on his arm. After he reached his vehicle he saw the plane continuing to pass several times across the river. At no time did he observe the spray nozzles to be operating.

The appellant placed before the Court evidence as to the operation of the nozzles which, if accepted, demonstrates that it was not possible for two of the 10 nozzles only to be operating at any particular time. The situation had to be that either all 10 were operating or all 10 were turned off. The pilot did not give evidence but had made a statement which was tendered as part of the evidence for the prosecutor. His statement did not expressly deal with the question of whether or at what point the spray nozzles were turned off at the end of each successive pass over the paddock although he did say that because of the tall trees located at the eastern end of field two it was necessary to cease spraying some distance short of the end of the field to enable the aircraft room to climb out over the trees estimated to be 80 to 100 feet tall. Subsequently, two passes

were made parallel to the trees and that is to say parallel to the river bank to deliver spray to the area which would otherwise have been missed.

There is no doubt that Mr Keenan was an experienced and competent pilot and indeed that it was because he was thus qualified that the appellant company had engaged him. Mr Warburton, the principal of the company, said that Mr Keenan was one of the most experienced aerial spraying pilots operating in the Moree area and in his opinion very conscientious and extremely competent. His experience and competence may make it unlikely that he should have committed the cardinal error of omitting to turn off the spray nozzles as he ascended towards the trees at the end of the spraying pass but it certainly does not preclude the possibility that on this particular occasion an error of that kind occurred. Because he was not called to give evidence, this Court does not have the benefit (as Talbot J did not have the benefit) of making any assessment of his credibility and reliability. Although we were urged by the prosecutor to draw an inference, from the fact that he was not called, that any evidence that he would have given would not have advanced the appellant's case (*Jones v Dunkel* (1959) 101 CLR 298), I would not for my part be prepared to draw that inference from the fact that he was not called. His account of the operation was, from the appellant's point of view, sufficiently before the Court in the form of the statement which he had made and which was tendered as part of the prosecution case. Nevertheless, the fact remains that he did not deal specifically with the allegation made by Messrs Vanderwerf and Peacey. The evidence of Mr Vanderwerf that he saw on one occasion what appeared to be only two of the spray nozzles operating is somewhat suspect having regard to the technical evidence, which I would be disposed to accept, that such a situation could not possibly have occurred. One possibility is, as was submitted on behalf of the appellant, that this apparent error of observation should be regarded as casting doubt on the reliability of his evidence generally and in particular his later claim to have observed all 10 nozzles in operation. The alternative view is that by reason of the distance that the plane was away from him, he had a mistaken impression as to whether any or how many nozzles were in fact operating, but was in a much better position to observe the nozzles as the plane passed directly overhead at a later stage.

The usual practice in crop spraying is that the aeroplane operates into the wind so that the spray mist descends behind the pilot, which has a number of advantages — in particular it protects the pilot and his ground staff (markers or observers) from the risk of injury by exposure to dangerous chemicals, and also avoids the depositing of spray material on the windscreen of the plane which obscures the pilot's visibility. However, the operation of these particular paddocks of Beela were carried out on the day in question (and I would understand from certain answers given by the principal of the company, Mr Warburton, in cross-examination, on every other occasion) in a downwind fashion as a measure to minimise the risk of the chemical being deposited onto the waters of the river.

It is this circumstance that gives rise to the alternative explanation of the entry of the pollutants into the river. A consequence of downwind spraying is that the plane's windscreen becomes obscured by the deposit of spray on the windscreen. Mr Warburton expressed an opinion, based on his own familiarity with the aircraft and its equipment and on discussions with persons unidentified to whom he referred to as experts, that the deposit of spray material on the water of the river probably resulted from the operation of a windscreen washing

device which the plane is equipped. This pumps a jet of water into the slipstream four or five feet in front of the windscreen. This water strikes the windscreen at the equivalent of a speed of 90 to 120 knots and washes the windscreen very effectively and very quickly. Where the material to be washed off the windscreen is the chemical spray being used at the time, then obviously the water discharged from the plane will itself be carrying that chemical after the windscreen has been washed. This explanation derives some support from the evidence of Mr Peacey that as he was leaving the creek bed at a time when the plane was passing overhead, he felt actual droplets of moisture landing on his body. The spray mist itself is so fine that it would not be felt as moisture and when the operation of the aeroplane was demonstrated to SPCC and fishery officials, loaded with clean water not a chemical compound, they were able to stand beneath the plane without feeling spray droplets. Mr Warburton asserted that the most likely explanation for the experience of the eye-witness of moisture actually landing on him, would be that the windscreen was being washed at the time. Mr Warburton was asked whether he knew or appreciated prior to this offence occurring, that the chemical washed off the windscreen could be put into the atmosphere and hence into the river, and he said, "No, you see it was invented to clean the windscreen and we never ever thought any more about it except that it cleaned the windscreen".

It appears to me that if the pollution of the river was the unforeseen (although clearly foreseeable) consequence of the operation of the windscreen washer, rather than a failure by the pilot to turn off the spray nozzles as he passed over the river, the level of criminality involved in the offence is less. For that reason it is clearly necessary to make a finding as to the manner in which the pollution occurred.

The proposition that the spray nozzles were continued in operation on one or more occasions when the plane was passing over the river is supported by the observation made by Mr Vanderwerf. If his evidence be accepted, it is capable of establishing beyond reasonable doubt that on at least one occasion the pilot operated the aircraft over the river with the spray nozzles open. Some doubt may be thought to be cast on Mr Vanderwerf's evidence and the accuracy of his observations by the evidence that it is simply not possible for two only out of 10 nozzles to be operating. It is, however, a distinct possibility that the witness was mistaken in his evidence that two nozzles were operating at one stage but accurate in his observation of all 10 operating at a different time. Photographs were taken of the operation of the plane during the demonstration conducted for the assistance of the investigators and those photographs and the evidence of Mr O'Hern, an environmental control officer employed by the State Pollution Control Commission, who witnessed the demonstration, show a distinctly different appearance when the windscreen washers are operating from the appearance of the plane in spraying mode. When spraying, the spray material emanates from the boom located below the wings. When the windscreen washer operates, water flows over and around the cabin of the plane. When the plane is banked in a turn, there may be fuel emitted from the wing tip vents. Both Mr Vanderwerf and Mr Peacey denied having seen any spray, liquid or other substance coming from the wing tips of the plane or passing over and around the cabin. Mr Peacey, who did not observe the plane as often or over as long a period as Mr Vanderwerf, and he saw no spray, liquid or other substance coming from the plane as it passed over the river on the occasions when he observed it. However, such observations as he did make

appear to be inconsistent with the proposition that the windscreen washers were operating as the plane passed over the river. The observation of Mr Vanderwerf as he described was consistent with the operation of the nozzles on one occasion but on no occasion consistent with the operation of the windscreen washer while the plane was passing over the river. Furthermore, the evidence of Mr Keenan indicates that the windscreen washer was operated "whilst in the turn". On the face of it that seems intended to refer not to the whole of the period between the end of one pass over the field and the commencement of the next but only to the part of that period during which the turning manoeuvre was actually taking place. The evidence of Messrs Vanderwerf and Peacey was that the plane did not bank and turn whilst passing over them or indeed whilst passing over the river, but only after it had travelled some distance beyond the river. On one occasion at least, Mr Peacey observed it to fly about 200 m past the river before turning.

This evidence tends to dispel any doubt which might otherwise arise as to the cause of the pollution. Furthermore, although the evidence is that the appellant company had sprayed this area at least 130 times previously with never a complaint, I can find nothing in the evidence to explain why the operation of the windscreen washer should have caused spray material to be deposited in the river on this occasion only and not on any previous occasion. It is my understanding of the evidence of Mr Warburton that it has always been the practice to spray this particular field downwind (see p 18 of the transcript) and that on every such occasion a necessity would arise at the end of each run for the pilot to clean the windscreen (transcript p 13). If such an outcome was the ordinary result of the use of the windscreen washer and if (which is as I understand the facts) the windscreen would become obscured whenever the plane was operated downwind, one would have expected pollution to occur on at least some earlier occasions as well, but it did not. In the absence of any explanation, the inference is clearly available that the cause of the pollution was something else.

Weighing all of this evidence, I am persuaded beyond reasonable doubt that the cause of the pollution of the river was a failure on the part of the pilot, on at least one traverse of the river, to turn off the spray nozzles. There is, of course, no basis for a suggestion that he did so deliberately; given his experience it is unlikely that he did so through mere oversight; and the probability is that he was distracted from his task in some way, perhaps by some exigency relating to the piloting of the plane. Although there is no evidence from the pilot that any such thing occurred, the Court should proceed to penalty on that basis, as being the most favourable view of the circumstances.

Counsel for the applicant has provided us with a schedule summarising some 50 similar cases in the Land and Environment Court, a proportion of which came in due course to this Court on appeal. There is always a difficulty in attempting to compare the penalty in one case with the penalty in another because of the wide divergence of facts and circumstances; that task is difficult enough when one has the full text of all of the relevant judgments and more difficult where the material is provided in this summary form. For that reason I see no advantage in reviewing the details but content myself with saying that there is only one case where a single conviction for an offence carrying the maximum penalty of $125,000 was visited with a fine as high as $50,000. That was the case of *Environment Protection Authority v Capdate Pty Ltd* (1993) 78 LGERA 349. The short facts were that a watercourse was badly polluted by the

introduction of a solution containing copper, chromium and arsenic which had been deliberately pumped into a stormwater drainage system. The volume of the liquid was approximately 15,000 L. During the investigation of the incident, the defendant was very evasive. The finding that the polluting conduct was deliberate elevated the offence in that case to a major level of gravity. The same schedule details a number of cases where the penalty was imposed against a statutory maximum of $40,000. In some of those cases the penalty imposed was $20,000, that is to say 50 per cent of the maximum and in two cases the penalty was $30,000, representing 75 per cent of the maximum. In one of those cases the penalty was reduced by this Court to $20,000. Each of those cases involved gross negligence on the part of the respective defendants. There was pollution which was potentially very damaging indeed. In the case of *State Pollution Control Commission v Boral Resources (NSW) Pty Ltd* (unreported, Hemmings J, 23 May 1991), where a penalty of $30,000 was imposed against a maximum of $40,000, not only was the offence itself a serious one but the defendant had previous convictions for environmental crimes and for breaches of its licence under the *Clean Waters Act* 1970 (NSW).

The present case is free of any of those aggravating circumstances. The company has been engaged in its present business for 13 years prior to the date of sentence and has never been convicted of an offence. The offence was not deliberate and the evidence was that the company had sprayed the particular paddocks at least 130 times in the past with never a complaint previously. The company and its pilot were aware of the problem associated with spraying at this location, caused by the circumstance that the prevailing wind is from the north-east which requires that application of the chemical be delayed until the wind is in the right quarter. The evidence shows that the company had waited six to eight days, after being engaged to carry out the work, for the occurrence of appropriate weather conditions. The wind was in fact from the south-south-west when the company commenced the spraying operation late on the afternoon of 22 February 1991. That is, the wind was blowing in a direction away from the river. Thus, the operation was carried out, in the words of Talbot J in what should have been, in the company's opinion, the most favourable way to protect the environment and in this case particularly the river.

The offence is serious by reason of the great deal of harm which in all probability resulted from it (the death of a large number of fish), and remains serious even if, as Talbot J concluded, it is not possible to be satisfied beyond reasonable doubt that all of the fish deaths were attributable to the company's activity. It is clear that there was other spraying in the vicinity, some way up river, at the same time and it is at least possible that the fish deaths were equally attributable to the conduct of that other operator. Seriousness lies not only in the actual death of fish but in the potential for harm which the introduction of such powerful poisons into the river system entailed. The criminality involved is to be measured, however, not only by the seriousness of what occurred, but by reference to the reasons for its occurrence, and as to that I am satisfied that the company should be sentenced on the footing that it was an unprecedented error of omission on the part of a competent and experienced pilot which caused the pesticide pollution of the river.

The company had taken considerable precautions to avoid pollution:

1. By flying downwind.

2. By waiting as long as eight days until late in the afternoon of 22 February when for the first time the weather conditions were considered safe.
3. By requiring its pilot to turn off the nozzles before commencing to ascend from the spraying level.
4. By employing a skilled and experienced pilot and using appropriate equipment in good order and condition.

All of those matters indicate to me that the level of culpability is far less than would attract a fine of the magnitude imposed by Talbot J.

There are other matters to be taken into account. Talbot J summarised these matters in the following passage in his judgment:

> "I take into account that subsequently to the 22 February 1991 the company has identified those properties which are at risk to a recurrence of this type of offence or at least the consequences, or, more importantly, the consequences of spraying adjacent to the river or the town. The company has a policy of not undertaking contracts where there is risk to either the river or the town involved. I also accept that the company has engaged in activities which are designed to expand the bank of knowledge in relation to this type of activity and directed towards the limiting of this type of occurrence. I also take into account that all of the representatives of the company starting with Mr Warburton and including the employee pilot, Mr Keenan, co-operated with the investigating officers in relation to this matter and were frank and open in their disclosures of the facts. They even went to the extraordinary extent of demonstrating the operation so that the events could be properly understood by those carrying out the investigation. I accept that the occurrence on 22 February 1991 is unlikely to occur again."

When all is said in favour of the appellant, it remains the case that the offence was a serious one. It is an offence of a kind which generates massive public concern and which has enormous potential for harm. That much is demonstrated by the finding of the dead fish, obviously killed by some sort of pesticide, even if their deaths cannot directly be attributable to this offence. It is an offence of a nature such that the sentencing must embrace powerful considerations of general deterrence. Those who handle dangerous chemicals must be regarded as under a heavy obligation to the rest of the community to do so with the utmost care. This Court should not be seen to send any message other than that.

In my opinion the circumstances of this case call for the imposition of a fine of $20,000. I propose the following orders:

1. Leave to appeal.
2. Appeal allowed.
3. Conviction confirmed.
4. The fine of $50,000 quashed.
5. In lieu thereof the company is fined the sum of $20,000 and allowed three months from this date for payment of that fine.
6. The costs order made by Talbot J is confirmed.

So ordered

Solicitor for the appellant: *Phillips Fox.*

Solicitor for the respondent: NSW State Crown Solicitor.

JOSEPH VENEZIANO