THE SUPREME COURT OF

WESTERN AUSTRALIA

CIV 1561 of 2012

STEPHEN WILLIAM MARSH

and

SUSAN GENEVIEVE MARSH

and

MICHAEL OWEN BAXTER

KENNETH MARTIN J

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 28 FEBRUARY 2014, AT 10.33 AM

Continued from 27/02/14

MR R.M. NIALL SC, with him MS L.M. NICHOLS and MS C.M. PIERCE, appeared for the plaintiff.

MS P.E. CAHILL SC, with her MS F. VERNON, appeared for the defendant.

THE ASSOCIATE: In the Supreme Court of Western Australia, civil matter 1561 of 2012. Marsh and Baxter.

KENNETH MARTIN J: Mr Niall.

NIALL, MR: If your Honour pleases. Yesterday, I was dealing with the facts, and I got to the point where the decision as between Baxter and Robinson to plant Roundup-Ready canola was taken. That discussion in early February, and I refer to our written submissions in the balance of that matter. Your Honour will recall that subsequently to that, in April 2010, Mr Baxter tells Marsh at the working bee that he's going to plant in Two Dams and the Range.

Now, our learned friends would have that as a happy example of coexistence, which was only disturbed by the pernicious interference with NASAA. But in our submission, it's relevant that the notice was taken after the decision had been made, and was concrete. It was not in the context of discussing management options, but rather, advising of a fait accompli.

KENNETH MARTIN J: That nevertheless led Mr Marsh to move his oat crops further to the north east.

NIALL, MR: Which was what - and an opportunity to at least move a crop some further distance. But - - -

KENNETH MARTIN J: Where they were unaffected.

NIALL, MR: No. Not on the evidence.

KENNETH MARTIN J: By swaths.

NIALL, MR: Well, the swaths - there were a number of swaths found in the paddock, but not within the wheat crop. And it was really a matter of Marsh's, in a sense, resignation, rather than accommodation, as to the position that he was faced. Now, of course, there was no discussion - there was no movement of the oats crop, of course.

KENNETH MARTIN J: The oats were further, as north east, in one to six.

NIALL, MR: Already going to be - and we were all going to be - - -

KENNETH MARTIN J: And they were fine, as I understand it. The wheat crop was in the middle.

NIALL, MR: And there had been – yes. There had been no discussion or consideration, for example, to plant in a different paddock, or to discuss harvest techniques, such as not swathing. Now, the decision to swath, so that the things are growing, was made in late October. Now, that followed a further incident of notice from Mr Marsh. Your Honour will recall the notice of intention to take legal action. The warning that Mr Marsh gave. And in our submission, it was entirely prudent of him to give that notice. That's at tender bundle 250. I won't take your Honour to it.

KENNETH MARTIN J: The horse has really bolted, though, in terms of growing the crop at that point.

NIALL, MR: Yes. Yes, your Honour.

KENNETH MARTIN J: The crops in the ground mature. It's there.

NIALL, MR: There's a significant decision to – as to harvest technique to be made.

KENNETH MARTIN J: Yes. And swathing, I think, is mentioned once in that notice.

NIALL, MR: Yes.

KENNETH MARTIN J: But the two critical facts that Marsh remains concerned about, canola coming onto his property, and the loss of decertification, the loss of certification, were again brought home as impacts. And for the reasons we set out in our written submissions, Mr Baxter did not draw that to the attention of Mr Robertson. He said that he showed it to him, but Mr Robinson was clear that he had never seen the document before, and we would invite you to accept Mr Robinson's evidence on that count.

But importantly, your Honour, Mr Baxter says that his reason for giving it to Robinson was to make him aware of the facts. Now, that is stark evidence of the factual basis on which Mr Baxter was proceeding.

KENNETH MARTIN J: So the fact is you've got a neighbour who is threatening legal action.

NIALL, MR: The threat – no. That there is a concern that a likely impact will be presence of canola and loss of certification.

KENNETH MARTIN J: Which doesn't really take things beyond, really, the November 2008 conversation much.

NIALL, MR: Well, it puts them in a current and immediate context where a decision is about to be made, and it's not brought to bear in the swathing decision. Critically. The knowledge remains – Mr Baxter's knowledge remains current, but it is not brought to bear in his decision to swath or not to swath. Now, what then happened was that Mr Baxter made a deliberate decision to leave his crop lying on the ground, untethered, for a number of weeks. That's the – it's swathing.

KENNETH MARTIN J: That is – – –

NIALL, MR: But that's the consequence.

KENNETH MARTIN J: That's exactly the consequence of swathing.

NIALL, MR: That – which is to leave his crop exposed in a way, to the elements, and for the purpose of exposing to the elements, in circumstances of his knowledge. Now, what happened was that there was the significant incursion onto Eagle Rest. Now, the evidence of the – and extent of the incursion, comes principally from the evidence of Mr Marsh, and the inspection reports of Purves and Coleman. Purves recorded that there – when she inspected that there was a strong southerly wind blowing, there had been extensive inundation of canola swaths.

Sheep were observed eating the swaths, and pods were observed empty. So there is undoubtedly substantial evidence of significant and extensive exposure to canola swaths and significantly canola seeds. The significance of that is clear, in our submission. The seed was incorporated into the pasture where it fell. Swaths were found in rye. Swaths were found in paddock 11 near the wheat crop and seeds were lying present in a not uniformly-distributed fashion, as one would expect from the mechanical cause of the distribution, across a number of paddocks.

We set out in paragraph 126, your Honour, of our written submissions, a number of important matters which we invite your Honour to find; that they were carried by the

wind; that the pod contained – that each swathe contained a number of pods each of which contained somewhere between 20 and 80 canola seeds. The seeds were viable, that is that they were capable of germination. They were scattered over a number of paddocks. They continued to be blown on the farm – that was something that Ms Purves records, something that Mr Marsh observed. And we know at April that there were more than 240, or thereabouts, swaths on the land and it's clear, in our submission, on the evidence that there would have been more than that in December.

KENNETH MARTIN J: Swaths.

NIALL, MR: Yes. Because the evidence was that sheep were eating swaths and they would have catered for an unknown number of swaths. So the swaths present the vector of thousands of unevenly distributed viable canola seed within a pasture of paddocks, currently used as pasture, and intended to be used in the coming years as crop. Now, your Honour may recall Dr Preston's evidence, that the fact that the sees deposited in pasture would have protected the seeds to some extent.

Now, your Honour cannot find on the evidence the number of seeds which were distributed across the paddock – paddocks but there was a very, very large number. Dr Preston, your Honour may recall, indicated it would be possible to devise an experiment, to use his word, to calculate the number of seeds but that would require, if there was to be any accuracy, very, very many samples of soil – he gave a figure of 150 plus samples in order to get some sort of reasonably accurate estimate of the seed bank load.

Now, at that point, your Honour, it's important when one looks – because we are looking at a window between the start of December and the end of December at this point. None of the seeds that were found, of course, were likely to have germinated or any significant number within that period. And if they had germinated, they would be very small and not readily observable in a paddock.

Having inundated with this amount of seeds incorporated into the sward of the pasture, as described by Professor Powles, management – and this proposition doesn't matter whether it's management in the conventional setting or an organic setting – management relies on treating the plant once it has germinated. Not feasible, the evidence suggests, for there to be any means of eradicating the seed.

So there is a problem, an insipient problem of timing and germination. And it was, on the evidence, difficult, if not impossible, to predict the seed load, the likely germination rate; difficult, if not impossible, to remove the seed before germination; and it appears that the available time span for germination, assuming no accretions to the seed bank, was up to three years. So obviously if the plant germinates and is left to grow to maturity and deposit seed, there will be an accretion to the seed bank.

But, on assuming the management regime which is adopted prevents that happening, that you're not increasing the seed load, there remained on Eagle Rest a substantial seed load capable of germination. That was the factual scenario confronting NASAA when it was advised in December, 1st and 2nd, and through its period until the decision was made by Ms Goldfinch to decertify on 29 December.

KENNETH MARTIN J: She suspends on the 10th.

NIALL, MR: She suspends on the 10th. And there's confirmation of – of the genetic composition of the material.

KENNETH MARTIN J: So she has a Purves inspection on 4 December, suspends on the 10th, 21st there's a second inspection by Coleman.

NIALL, MR: Yes.

KENNETH MARTIN J: Then the 29th – – –

NIALL, MR: There's the decision.

KENNETH MARTIN J: – – – is the actual decertification decision of 70 per cent of the land.

NIALL, MR: Correct. And – – –

KENNETH MARTIN J: As I read all that information – and I've looked at it, because it seems to be critical to the case – the only review sheet that she actually prepares is post the first inspection, in terms of identifying her thought processes and reasoning, and what she relies upon. She said I think, in evidence, that she was waiting for the confirmation of the DNA testing on the sample; the sample went astray; that's why Coleman went back, took another sample, and then I think it's confirmed that there's genetically modified material in the swathe.

NIALL, MR: And Ms Goldfinch read the Coleman report.

KENNETH MARTIN J: Yes.

NIALL, MR: And so that was part of the material on which she acted.

KENNETH MARTIN J: So just in terms of looking for the rationale of what records her thinking in terms of that decision, it's really in the review sheet that she prepared after the Purves report pre suspension.

NIALL, MR: And her evidence.

KENNETH MARTIN J: And her evidence, after the event, yes.

NIALL, MR: And, of course, your Honour, for reasons I will come to in a minute, it's not critical – although the evidence supports our case – it's not critical for your Honour to know what the reasons were, because the relevant question is – and this was opened by my learned friends – is whether NASAA was entitled, on the material before it, to decertify. Because it would only be if they were not entitled that the relevant problem that our learned friends identify, and which we will grapple with and deal with, arises.

KENNETH MARTIN J: Well, looking at the NASAA – or, more correctly, NASAA and NCO contract – – –

NIALL, MR: Yes.

KENNETH MARTIN J: – – – with Mr and Mrs Marsh of 2007, which I think is at volume 1 page 40. There's nothing in there that I can see in regard to decertification. It deals elaborately with suspension, and it deals explicitly with termination of the licence relationship.

NIALL, MR: That's so, your Honour.

KENNETH MARTIN J: But says nothing that I can see in it about decertification. If you're getting to the decertification scenario, that can only come from the standards.

NIALL, MR: The obligation within the contract is compliance with the standards – – –

KENNETH MARTIN J: Yes.

NIALL, MR: – – – and the standards provide authority. And the standards are contractual in the sense that – and – – –

KENNETH MARTIN J: Absolutely. They're incorporated as part of the contract.

NIALL, MR: Yes. And when one looks at it, and in particular 3.2.9 – I will develop this very shortly – one sees a specific power in 3.2.9. It's both a source of power and describes the conditions for its exercise. The question, if I could just return one step back in the analysis, for NASAA was – sorry, the question we respectfully submit for your Honour is, did the inundation of those thousands of seeds, in the facts that existed, over a number of paddocks, permit, that is, provide a factual basis for, NASAA to make a decision under 3.2.9.

If your Honour is satisfied, firstly, that that's the correct question, and secondly, the facts would have or did support the exercise of contractual power, then there is no question that NASAA were entitled to do what they did. And that's why, ultimately, it's not a question of your Honour construing the contract divorced of the facts. It's a question of your Honour determining whether the facts were capable of supporting the decision that was made. Now, the defendant submits that NASAA proceeded on a misconception – and if I can turn now to the construction point.

KENNETH MARTIN J: Yes, indeed.

NIALL, MR: NASAA – our learned friends proceed on the basis that there can't be contamination because contamination only occurs in 3.2, where there's a genetic transfer into the end product, or somewhat begrudgingly, there's an intermingling into the end product. And the rationale for that construction, your Honour, before I come to the text in terms, is simply put by our learned friends. A construction is contamination is genetic. The reason, the premise, the fundamental contractual premise upon which that contraction is advanced, your Honour, is because this is a labelling regime, and it – as a label which describes the physical condition of a product.

That is the fundamental premise which underpins the construction of the defendant, that is, you're looking at this from, and back from the product of NASAA authorises a licence to apply to a product. If that product is not genetically infected, either through a transmission of a gene, or through intermingling, there is no difficulty in describing that product as organic, and therefore contamination should be read in that way. Now, there's two problems: firstly, your Honour, the premise is wrong. This is not a labelling regime which describes the physical condition of a product. It describes a product that is

being produced from a particular system of agricultural practice.

Otherwise, it would not matter if a farmer did not rotate his crops. It would not matter if a sheep was given a steady diet of genetically-modified canola. It would not matter if the organic farmer used a herbicide, such as – on the hypothesis – glyphosate, which is said to be not residual, and is said to have a short life. It would not matter. If the premise of the labelling exercise was to produce a good of a particular physical composition, it would not matter, and there would be no reason for the standards to proscribe spraying glyphosate as a knockdown herbicide, because you could spray knockdown as a herbicide. It kills the weeds. It clears the way. It's non-residual.

You plant your organic wheat; you grow your organic wheat through to completion. It will pass all tests on this hypothesis and our learned friends will say, well, that is – that would serve or advance the purpose of the scheme. Now that, in our respectful submission, demonstrates the falsity of the premise because it ignores the centrality of the system. The second aspect, your Honour, is one which is more textual. Can your Honour turn to the NASAA standards?

KENNETH MARTIN J: Now, our learned friends start their submissions by reference to the national standards, but it's the NASAA standards which authorised or did not authorise NASAA to do what it did. And your Honour has been taken to a number of it but if your Honour goes to page 1305, your Honour will see the purpose is a totally management – total quality management system developed for organic production dealing with certification, inspection and approval, advertising and labelling.

Now, when your Honour comes to look at the text of the standards, there are four things that your Honour needs to bear in mind, in our respectful submission. The first – and this comes from orthodox contractual interpretation principles. The first thing is your Honour will need to look at the language; the second is the circumstances it is designed to address; the third is the objects the contract is designed to secure. And we put a fourth matter, your Honour, which is because of the peculiar – when I say peculiar, I mean, individual nature of the contract.

The contract is between Mr and Mrs Marsha and NASAA but it incorporates the standards. The standards, your Honour – and the authority that the contract confers is the authority to affix the label of NASAA. That label is a legal precondition for export, so it has a legal dimension to it, but it speaks to the world that the product has been produced in accordance with a standard which is published and publicly available. So the standards also speak to third parties, the consumers.

So, your Honour, when one looks at the objects it's intended to secure, a significant object is the protection of the interests of the consumer and third parties so that they understand the whole of the system. We give an analogy, your Honour, in our submissions which is not entirely apt which is the principles that attend the construction of articles and memorandum of association of a company.

And the upshot is that contractual principles of construction apply but there is less room to look at the individual circumstances only known to the two people who – you know, the individual shareholder in the company because the articles have a public dimension and here the standards have a public dimension. So what Ms Denham thought is even more immaterial than in a normal contractual construction exercise, what she thought or any of the NASAA people thought – – –

KENNETH MARTIN J: Mr May, for instance.

NIALL, MR: Yes.

KENNETH MARTIN J: Who thought GMO contamination was genetically transferred.

NIALL, MR: What he thought, if that – certainly it includes that. If he thought it was exhaustive, it would not assist your Honour one centimetre along the way to determining the construction.

KENNETH MARTIN J: Quite so.

NIALL, MR: Similarly, our learned friend says, "Well, your Honour heard that the NASAA witnesses believed it to be consistent with the NASAA standards – with the national standards." Conformity, particularly in a context where the text only provides, that is, the legal framework only provides that the national standards are a minimum standard.

KENNETH MARTIN J: Yes. The NASAA standards are perfectly capable of grafting - - -

NIALL, MR: Additional.

KENNETH MARTIN J: **- - -** requirements above and beyond the national standard. Your only concern would be some sort of inconsistency with the basic principles.

NIALL, MR: That's so, your Honour. And the basic principle repeated is that genetically modified organisms have no place in organic production perhaps because they are an oxymoron, that is that they are contra-definitional or simply because, for whatever reason, it's mandated that genetically modified organisms have no part to play as a principle.

KENNETH MARTIN J: Well, it's either definitional, ideological or financial.

NIALL, MR: But it's there.

KENNETH MARTIN J: But it's there.

NIALL, MR: And when one looks then at the text - and your Honour, so much emphasis of our learned friend's submission was on reading contamination narrowly.

KENNETH MARTIN J: It would be helpful if contamination was actually defined somewhere. I mean, everything else is defined but contamination is - - -

NIALL, MR: Contamination means no more - - -

KENNETH MARTIN J: **- - -** murky.

NIALL, MR: Contamination means no more than the presence of something which is prohibited or not to be included. Now, here, there's a prohibition on genetically modified organisms within the system. Now, your Honour ought not give a narrow definition to contamination. That's crystal clear, as a matter of construction. Why, we would ask rhetorically, would the parties to the contract, and the third party's consumer, expect a narrow construction to a contract which sets, as a guiding principle, that there is to be no place for genetically modified organisms in the production cycle?

Now, in order to give some context to the concept of contamination, particularly in 3.2.9, if your Honour goes

to 3.2, your Honour will see this. That the standards expressly contemplate the GMOs might be used or introduced into a farming system in a variety of ways. That's paragraph 3.2.1. So there's no doubt that GMOs can be incorporated. That is, they could be used or it could be introduced through seed, feed, propagation material, farm inputs, vaccines, crop protection materials.

So there's a variety of ways where they could be used or introduced. If your Honour then goes to 3.2.2, there's a relevant prescription in relation to input materials at risk of containing GMOs. In paragraph 3.2.4, there's a relevant prescription in relation to the use of ingredients, additives or processing aids derived from GMOs. And in 3.2.5, there's the prohibition on exposure to GMOs. So when one looks at that - the way that standards deal with GMOs, they can be brought into the system at a variety of levels, and are prohibited from doing so.

And your Honour ought readily find, as a matter of construction, that in many of those ways, they would not find reflection or necessarily find reflection in the finished product. Feed would be an example. Now, my learned friend made much of the fact that the sheep are eating GMO, but they're not somehow become contaminated by genetically modified organisms. Well, on the evidence, it does not appear there is any basis to say that eating genetically modified grain would produce a trait of genetically modified meat. But it's prohibited. So - - -

KENNETH MARTIN J: Sorry. What's prohibited? Feeding?

NIALL, MR: Feeding. Using or introducing GMO in feed. Now, that is strong evidence, strong contextual pointers, that the means by which it could be incorporated are diverse and unlimited, and may not necessary find their reflection in the end product. So when your Honour comes over to look at 3.2.6, there's a reference to inputs, processing aids, and ingredients, should be traced back one step. In 3.2.7, there's the assessment of risks from contaminations including contamination risks, buffer zones, maintaining samples, testing of crops.

Testing of crops is only one of the means by which you assess the risks. 3.2.8 is a specific example where the planting or sowing of the GM product - it's a product based prescription. Now, one doesn't read this ejusdem generis, your Honour. One reads this as a whole, designed to achieve a particular objective. I will - - -

KENNETH MARTIN J: 3.2.8, I think, is planting – well, you can't plant for five years on a paddock that has had a GM crop on it.

NIALL, MR: That's right. It might have absolutely no – – –

KENNETH MARTIN J: It might affect Mr Baxter if he wanted to go organic. He has got a five year – – –

NIALL, MR: It would.

KENNETH MARTIN J: – – – buffer.

NIALL, MR: But there may be no evidence that at four years, for example, there's going to be contamination of an end product. That's not what the standards are concerned about. And if your Honour goes to 3.2.10, it's instructive, we submit, that if your Honour looks at that provision, it says:

> Any certified production area within 10 kilometres of a site used to grow genetically engineered crops is perceived to be at risk of contamination.

Stopping there, your Honour. That which is contaminated is a certified production area. A risk of contamination of an area. Not a risk of contamination of product. Now, moving back up to 3.2.9, the risks of contamination, that is, an unacceptable risk of contamination from GMOs identifies that it must be contamination and identifies the contaminant. But it doesn't identify that which is contaminated.

Now, my learned friends say it can only be contamination of product because that's the only concern of the standards. Then why, we ask rhetorically, would there be any concern to be – for a risk of contamination of a production area. As a matter of text, the standards plainly contemplate contamination of an area. Contamination of land. And there is no words of limitation in 3.2.9. What 3.2.9 requires, your Honour, is that NASAA form a particular view. Considers – that's the first that's required.

So it's reposed in NASAA. A decision making task based on a consideration. An unacceptable risk. So that deals with an assessment of the likelihood of contamination of whether – – –

KENNETH MARTIN J: But that's a notch up from 3.2.10, because the 10 kilometre area is a perception that you've got to notify about as to a risk of contamination.

NIALL, MR: Precisely, your Honour. And then that's - - -

KENNETH MARTIN J: 3.2.9 takes the same phrase and applies that word unacceptable risk

NIALL, MR: So one - - -

KENNETH MARTIN J: So there's two different concepts there. One is a risk within 10 Ks, and the other is an unacceptable risk.

NIALL, MR: Well, with respect, it's the same concept at two different - - -

KENNETH MARTIN J: Grafted upon.

NIALL, MR: - - - grades. So there's a notification for a risk.

KENNETH MARTIN J: Yes. But that doesn't necessarily mean an unacceptable risk.

NIALL, MR: It doesn't.

KENNETH MARTIN J: Yes.

NIALL, MR: And 3.2.9. So if there was a production area to be at risk of contamination, and NASAA informs the existent – sorry, the operator informs NASAA of the existence of the known sites within that radius, NASAA could then make a decision about whether that risk was unacceptable for the purposes of 3.2.9.

KENNETH MARTIN J: Well, by reference to 3.2.10, as soon as Mr Baxter planted his GM canola crop, there was an obligation on Mr Marsh to notify, because that was within 10 Ks. And according to these standards, there's a perception that Mr Marsh's certified operation from that point is at risk, or was perceived to be at risk, of contamination.

NIALL, MR: Yes. And that NASAA made no decision, prior to the incursion, that the mere presence of the crop was unacceptable. And indeed, it's currently – land is currently certified. But returning to 3.2.9, your Honour, there is simply no warrant from the language used. So one has an unacceptable risk. So that's a risk of

contamination. There's no warrant to say, well, only contamination of a specific type. It's capable of covering both sorts of contamination.

Contamination of land, contamination of system, contamination of product. It's capable of covering all of those things. And what NASAA must do is make an assessment as to whether it considers that that risk is unacceptable or not. And there will be various factors that it would be entitled to operate on. But there is no limit, as a matter of text, to say that contamination can't be contamination of land. And indeed, it would be completely inconsistent with the structure of 3.2.10, and completely inconsistent with the modes by which GMOs might be incorporated into a system.

Now, that being so, your Honour, on the material before NASAA, it was entirely open. We would say likely, but for present purposes, entirely open for it to conclude that by reason of the contamination, by reason of the level of incursion, by reason of the fact that it was spread over a number of paddocks, that they were – it was viable seed. That it landed on pasture which would be used both as pasture for feeding stock and in the future for cropping, that there was an unacceptable risk of contamination of the system with GMOs.

Now, the risks that were faced would include the risk of germination, and that was a real risk. So there was existing contamination by the presence of the seed. There was a risk that it would germinate. There was a risk that it would be incorporated into the pasture. There was a risk that it would be eaten by the sheep after it germinated, obviously. There was a risk that the sheep would eat both germinated plants and seed, and then pass that seed through its system and into other parts of the farm or other paddocks.

There was a risk that germination would occur within a crop. Swaths were found in the rye crop. Swaths were found near the wheat crop. It was patently open, in our respectful submission, for NASAA to have concluded that there was a risk that they would grow – volunteers would grow within the crop.

KENNETH MARTIN J: Well, I don't know about that.

NIALL, MR: Well, there's – – –

KENNETH MARTIN J: The crops are almost ripe and ready for harvest in December. You're not going to have any rain probably until - - -

NIALL, MR: Sorry, your Honour.

KENNETH MARTIN J: - - - February or March. It's the next crop.

NIALL, MR: Next crop I'm talking about. Yes.

KENNETH MARTIN J: You might have a volunteer.

NIALL, MR: Yes. I beg your Honour's pardon. The land is being used on a rotational structure.

KENNETH MARTIN J: Yes.

NIALL, MR: And in the next crop. So NASAA was not dealing with a static circumstance of inert plant material. It was dealing with a dynamic agricultural system with the prospect of germination, and for those reasons, incorporation into the pasture. Eaten by the sheep, pasture of the sheep included in the crop.

KENNETH MARTIN J: Let's say NASAA is there in that situation with everything you've said. And a panoply of potential remedies at its disposal to cater for that situation. Taking the presenting circumstances, you've got the rye and the spelt crop in the paddock next to the road, which seems to be - the road paddocks seem to be the ones most heavily affected by the incursion. Then you've got a wheat crop further east, which has got minimal swaths by way of potential incursion. And then you've got the totally unaffected oat paddocks to the north east. In terms of - and the rest is pasture. Just with sheep grazing on it.

In terms of how one would address that situation, where the risk of contamination, by reference to GMO is through the seeds, wouldn't one address, first of all, the products like the rye crop or the spelt crop in terms of whether there was any seeds discernable in that?

NIALL, MR: The - - -

KENNETH MARTIN J: And likewise, the wheat crop. And likewise, any subsequent crops?

NIALL, MR: The primary issue at stake for NASAA, or at least on which it could take a reasonable view, was that

the land had been inundated with very large numbers of seeds. And the risk that that posed was entirely capable of being addressed by decertifying the land on which it was present until it had been eradicated, or dealt with, or managed. Now - - -

KENNETH MARTIN J: Well, I suppose the proposition is is that a sledge hammer to crack a nut? Until you actually know that those seeds are going to germinate or not. And I suppose, with the benefit of hindsight, we know that there were nine volunteers in 2011 in total.

NIALL, MR: There's - the issue of the pasture had to be seen, or was capable of being seen by NASAA, as part of a rotation system of paddocks and, therefore - knowing that the seed is not going to eradicated, and the farmer says, "Well, I will - my plan is to rotate crops into that paddock. The cultivation is likely to promote germination. It's likely to promote the volunteers growing." Now, all of that was a very, very substantial incursion. It was not a swath on a sheep's back, your Honour. It was, from NASAA's perspective, a substantial incursion that was systemic. Now, it can be tested perhaps this way, if Mr Marsh did nothing.

KENNETH MARTIN J: Well, Mr Marsh is totally blameless and faultless - - -

NIALL, MR: Yes.

KENNETH MARTIN J: - - - in terms of what has happened. He is - - -

NIALL, MR: No, sorry, if he did - - -

KENNETH MARTIN J: He ticked every box - - -

NIALL, MR: Yes.

KENNETH MARTIN J: - - - in terms of his requirements.

NIALL, MR: If he did nothing after the incursion, and NASAA just said, "Well, don't do anything about it. It's not a big problem. Well, let's just wait and see." Now, plainly, there would be, without management regimes, probably potentially very many volunteers. The management regimes that were adopted were mitigation of the contamination, and NASAA said, "You will stand out of certification during the management regime." It was not obliged, as a matter of contract, to say, "We will keep you

certified, allow you to sell certified crops, allow you to rotate the paddocks, allow you to graze the sheep."

KENNETH MARTIN J: The tenor of the communication from Ms Goldfinch on 29 December decertifying ends, I think, on the basis of, "Terribly sorry about this. You've done everything that we expected of you. It's not your fault, but we don't have any option." Now, that, surely, has to be questioned - - -

NIALL, MR: Well - - -

KENNETH MARTIN J: - - - when you look at what's here.

NIALL, MR: Well, one can't use hindsight as to what actually happened to determine the reasonableness of NASAA's assessment. NASAA was dealing with - and 3.2.9 is designed to deal with - prospective risk. And NASAA was dealing with a situation where it was unknown how many would germinate. It was unknown how many seeds were distributed. And NASAA formed a view that that risk of contamination, and continuing contamination over the lifecycle of the seed, was unacceptable. 3.2.9 applied.

Now, when one talks about sledgehammers and, with respect, this is a rigorous standard, which is designed to protect the consumer, for example, your Honour, if a farmer uses a quarantine paddock from a sheep who's drenched, you can put the sheep in that paddock, but you can't grow any crop in the paddock for a year.

KENNETH MARTIN J: Well, that's exactly the position with the Spelt and rye, I think, isn't it? Paddock 12?

NIALL, MR: One of them. But the point, your Honour, is that taking a paddock out of certification is not Draconian, in the sense that there should be an overarching desire to protect the commercial interests of the operator.

KENNETH MARTIN J: Well, in that situation there has been a deliberate choice to use the artificial chemical product - - -

NIALL, MR: But - - -

KENNETH MARTIN J: - - - contrary to the standard, which takes you into a different scenario to adventitious presence, doesn't it?

NIALL, MR: But – we would not – for the purposes of testing the seriousness of the consequence, the use of deliberate or negligent introduction is not punitive, your Honour. It's not about punishing. It's about protecting the integrity of the system. And, in our submission, it's just not open for our friends to say that, given the facts that were in existence, given a fair and reasonable construction of 3.2.9, that NASAA was precluded from concluding there was an unacceptable risk as at 29 December. And the casting of it in peremptory terms, your Honour, that is organic certification shall be withdrawn on the unacceptable risk, realises or emphasises the importance of the protective nature of the provision.

KENNETH MARTIN J: But how do you rationalise 3.2.9 with 3.2.11, which is precisely Mr Marsh's case?

NIALL, MR: Well, your Honour, 3.2.9 is precisely Mr Marsh's case. Now one – – –

KENNETH MARTIN J: All right. Let's say they are both Mr Marsh's case.

NIALL, MR: They may both be, your Honour. But the position, of course, is that one doesn't read the contractual terms as if 3.2.9 and 3.2.11 are positing alternative. And, secondly, there is a very strong reason for submitting that there is no ejusdem generis principle to be applied to these, your Honour. Your Honour is reading the document as a whole, including 3.2 as a whole, and it's demonstrative of a protective purpose. And, secondly, your Honour, there is a good reason for concluding that protection of the land is, in many ways, more important or as equally important as protection of the product. Though particular product can be decertified, it can come off.

KENNETH MARTIN J: Well, that's 3.2.11.

NIALL, MR: But that doesn't address the underlying contamination of the system.

KENNETH MARTIN J: Which is 3.2.11. So you might find – – –

NIALL, MR: No, 3 point – – –

KENNETH MARTIN J: – – – in a totally innocent scenario, like Mr Marsh's, that the product under 3.2.11 will be decertified because it's contaminated and, in terms of the

operation, which is the last word of 3.2.11, that's in the lap of the gods. But it's not a necessary outcome.

NIALL, MR: But, your Honour, they are dealing with a circumstance in which there is contamination of product and it gives a (indistinct). 3.2.9 deals with an unacceptable risk of contamination.

KENNETH MARTIN J: 3.2.9 deals with everybody – the deliberate, the negligent, it's an all-embracing scenario for anybody who has corrupted the purity of the organic system.

NIALL, MR: It's indifferent – – –

KENNETH MARTIN J: Exactly.

NIALL, MR: – – – to the source of the contamination.

KENNETH MARTIN J: Quite so.

NIALL, MR: And deliberately so, in our submission. Particularly in a clause which, in other parts, identifies where the source of the contamination is a material constraint. It is not a material constraint on 3.2.9. You don't – the question is not that 3.2.9 is a general power and 3.2.11 is a specific power and therefore you carve out from the general the only circumstance in which accidental or circumstances beyond the control of the operator may be dealt with. There's no reason, in our submission, to read 3.2.9 having the carve out simply because there is a power that deals with one specific manifestation of contamination.

And it certainly would not cover, for example, contamination of land. It's just not designed to deal with that. It's not designed to deal with contamination of the system. But that doesn't mean that one should exclude that subject matter from the protective power of 3.2.9. One is not dealing with a mortgage contra proferentem; one is dealing with a standard of – – –

KENNETH MARTIN J: Well, you are dealing with a person's rights which one has to be extremely sensitive about.

NIALL, MR: It's a licence – – –

KENNETH MARTIN J: Yes, absolutely.

NIALL, MR: – – – to obtain to use but there is no reason – this structure doesn't – it gives primacy to the

protection of the system, not the individual profit of an operator.

KENNETH MARTIN J: Quite so.

NIALL, MR: And when one looks at 3.2.9, if one looked at it and said, "Well, that's a general power" and then there's a circumstance in 3.2.11 from circumstances beyond the control of the operator.

KENNETH MARTIN J: It's – the situation that is exercising my mind is what's written on 29 December to Mr Marsh at the end of the letter which is, "My hands are tied." It's volume 2 – 338.

NIALL, MR: Yes, your Honour. So there is some expression of sympathy or empathy for the situations of the Marsh, but that empathy or sympathy can't control the construction of 3.2.9, certainly not. But nor does it suggest – – –

KENNETH MARTIN J: That's just the adaptation. It's not – the interpretation is totally objective.

NIALL, MR: Yes, your Honour. And then – – –

KENNETH MARTIN J: Then they have to be applied, though.

NIALL, MR: And your Honour will see, sorry, if your Honour goes back to 337 – I beg your Honour's pardon.

KENNETH MARTIN J: Yes.

NIALL, MR: Your Honour will see in the bundle there's an amendment of the certificate identifying the land. Under that, it says:

> All crops on the decertified paddock – paddocks are decertified. And the decertified areas will remain as such until we verify the GM material has been entirely removed. For this land to resume organic status, paddocks must be eradicated of GM material and verified by inspection during the cropping season.

So the position rightly taken by NASAA was that there was an unacceptable risk and that had to be managed to the point where the genetically modified canola was removed from the system. And what happened thereafter, your Honour, was that there were steps – there were management steps – that saw probably an unknown number of plants germinate and eaten by the sheep. Some germinated to the point of being visible enough to be collected – I think

there's about eight or nine. Some seed remained – an unknown amount of seed remained and would have remained viable. So we – – –

KENNETH MARTIN J: Well, there's – all the swaths were collected and put into two drums – – –

NIALL, MR: That's so.

KENNETH MARTIN J: – – – after they had been GPS plotted sometime in April 2011.

NIALL, MR: April, yes. So through the period, NASAA were operating on a legitimate basis of seeking the management to the point of eradiction. Now, of course Mr Marsh was not permitted to knowingly use canola volunteers as part of his paddock, so having been fixed with the knowledge – – –

KENNETH MARTIN J: Well, he had to use totally organic feed for his sheep.

NIALL, MR: Yes. So he put – – –

KENNETH MARTIN J: So even ordinary canola, the conventional canola swaths that had blown in would still traverse that infringement.

NIALL, MR: He couldn't comply, given the inundation, with the mandate that he not use genetically modified plants as part of his pasture. He was – – –

KENNETH MARTIN J: He has got to – he has got to use organic feed to be an organic producer of – – –

NIALL, MR: But the pasture that he intended to use included within the swath genetically modified seeds.

KENNETH MARTIN J: Well, swaths that had landed there and presumably some seed had spilled out onto the ground from some seed pods that had split open. But the sheep are not going to eat the soil.

NIALL, MR: No. Well – – –

KENNETH MARTIN J: Unless they pull out the root of a plant that has a bit of soil on the root and ingested that way.

NIALL, MR: Now, the question, your Honour, is whether NASAA was entitled, as a matter of contract, to form the

view that it did in 29 December. If it was, then the consequence was that decertification followed from the presence of the canola, and I will return to its significance when I get to causation. Now, we do submit in writing that once the swath included canola, GM canola, Mr Baxter was precluded from using the pasture – Mr Marsh was precluded from using the pasture thereafter, in 3.2.1.

So looking forward, once he knew that there was contamination of seed which was likely to be viable, and germinate, as part of the pasture, he was not entitled to use the pasture which contained genetically modified organisms as part of the feed. And that would have, thereafter, contravened 3.2.1.

KENNETH MARTIN J: He could have picked them up.

NIALL, MR: Well – – –

KENNETH MARTIN J: Before they germinated and became volunteers.

NIALL, MR: Well, he couldn't have picked up the seed.

KENNETH MARTIN J: No, the swaths.

NIALL, MR: He did pick up the swaths in April.

KENNETH MARTIN J: In April.

NIALL, MR: But he – he could not have picked up all the seeds that had been dispersed – – –

KENNETH MARTIN J: True.

NIALL, MR: – – – prior to that point in time.

KENNETH MARTIN J: But they were only a problem if they germinated.

NIALL, MR: Yes, and – but the position – if they germinated, which was more probable than not, it was a likely position, once they germinated they formed part of a swath, and he was precluded from using it, because the paddock contained genetically modified organisms. It contained genetically modified plants. He wasn't free to say, "I've now got all these genetically modified plants, but – and I'm free to feed my sheep on them." That constituted – – –

KENNETH MARTIN J: He has got his pasture. There's a few swaths lying around that he could have picked up. Now, out of those swaths, seeds have hit the ground, presumably, out of the seed pods that are fractured, but they haven't germinated. Now, on that basis, you say, "Well, you can't put sheep on that pasture because - - -" - it's not going to be a DNA transfer, but the sheep might eat the seed and ingest it and move the seed somewhere else on the pasture.

NIALL, MR: Moving forward, post germination. So at - if one starts the time clock in December there's an unknown amount of seed, thousands of seeds, in a pasture which, as Dr Preston says, protects the seed. There's likely to be germination at some point with - with moisture, be that in a summer rain or in the usual course - because they're planted, of course, your Honour, just - without irrigation, and come May, the usual time for seed, there will be the expected rains, and the crops - in this case, the canola seeds will grow within the pasture. Dr Rudelsheim said that one spill, fell likely into the soil, Dr Preston said they're protected by the pasture, so once the rain comes there will be germination.

KENNETH MARTIN J: Yes.

NIALL, MR: Once that happens, as Dr - Professor Powles said, the seed is incorporated, as germinated plants, into the swath of the pasture, a fact known to Mr Marsh.

KENNETH MARTIN J: Which turned out to be nine plants, which were pulled out.

NIALL, MR: They're the ones that reached maturity, your Honour. But he's grazing his crop. So part of an unknown number of germinated canola plants will have been eaten by the sheep post germination, and not been identifiable. That's what Professor Powles says in his report. Professor Powles, if your Honour goes to his first report (indistinct).

KENNETH MARTIN J: Thank you. I've got it. Now, in his report on page 3, right in the middle of the first large paragraph starting "In some situations", Professor Powles, right in the middle of that paragraph, says:

> If a field was devoted to pasture in the year following a canola crop, then some volunteer canola seedling emergence occurs and is present as a component of the pasture swath. Livestock would graze the pasture and consume the canola foliage, along with foliage of other species present in the pasture.

He has emphasised that this applies to both non-GM (indistinct) canola.

KENNETH MARTIN J: Yes.

NIALL, MR: So the point we make, your Honour, is that the sheep were grazing, and therefore would eat, not just the swaths, but almost inevitably would eat canola post germination at early stages of maturity, prior to it being capable of being observed and removed. Now, that was a fact that existed not on 29 December 2010, but in the 2011 year. Now, that is an important fact when one comes to look at 3.2.1, when there's a positive prohibition on the use as feed or any other way. So Mr Marsh was, to a significant sense, handicapped in his ability to produce certified product. NASAA perceived that to be an unacceptable risk and acted under 3.2.9.

KENNETH MARTIN J: Were his sheep at the time were problematic anyway, weren't they, for other reasons?

NIALL, MR: They weren't - they weren't certified.

KENNETH MARTIN J: Yes. So - - -

NIALL, MR: But - but one looks at - of the cycle and of the incorporation of the pasture. Now, the sheep were not - were decertified, your Honour. But the obligation, in relation to decertified sheep, is to include them as if - to manage them in an organic way, which he couldn't do. That was his obligation. So you don't - you don't run - for example, it doesn't then authorise you, on the decertified sheep, to feed them genetically modified material, even though they're decertified, or non-organic material, because of the obligation to keep the system as organic.

Now, your Honour, on that construction, and on those facts, there is no doubt that NASAA were authorised to do what they did. And we make some submissions in relation to 3.2.1 in our - in writing, which I won't repeat. Now, what thereafter followed, your Honour, was a movement towards returning the farm to a proper organic foundation. There was management and observation in 2011, where, as it happened, some volunteers emerged. There was no germination to observable levels in 2012, and in May 2012, Ms Denham, cognisant on the science on three years, starts to work towards seeing the restoration of the property within two clear growing seasons. And that happened in 2013.

Now, that process of reintegration, which we set out in our written submissions, entirely accorded with the steps that NASAA could take to recertify, having triggered, we submit lawfully, 3.2.9. Your Honour, that's what I wanted to say about the facts and the decision of NASAA to decertify. Now, I wanted to come and address your Honour on the causes of action, and the elements of them, and much of what I've said will be directly relevant to those, and I won't repeat. Can I start, your Honour, with our submissions on the claim in negligence.

There is a critical issue in the case as to whether Mr Baxter owed a duty of care in the circumstances that obtained. Now, because it's economic loss, reasonable foreseeability of the risk of harm is not sufficient. But the knowledge of the risk of harm, or the foreseeability of the risk of harm, is critical to the starting point. The question – and I seek to address on now on the principles applicable to the reasonably foreseeability of the risk of harm.

KENNETH MARTIN J: So just to be absolutely precise, what's the harm we're talking about?

NIALL, MR: The harm is economic loss, consequent upon the loss of certification, and the inability to – the economic loss was manifest by the inability to attract and sell his produce as certified organic. Now, the duty that we plead is a duty to take reasonable care to ensure that canola was not blown or carried from Seven Oaks onto Eagle Rest with the resulting loss of certification and economic loss. Now, the first issue that arises is the question of whether the risk of harm was reasonably foreseeable.

Now, the relevant principles, your Honour, on reasonable and foreseeability, have three aspects. The first is it's prospective. Secondly, it is foreseeability of the risk of harm, namely the type of harm. Not the particular harm that was suffered, and not the mechanism or the process by which that harm was suffered. And it's enough if the loss that's foreseeable is of the same general character for the consequences are of the same kind. It doesn't involve any precise or particular foreseeability of the character of the loss.

It doesn't foresee the actual events, or the chain of events, that led to the loss. And it doesn't foresee the mechanical or process that was adopted. Authority for that proposition, your Honour, can be found in Chapman v Hearse, which I can hand up a copy to your Honour.

KENNETH MARTIN J: Thank you.

NIALL, MR: Which involved a motor vehicle accident, and the particular circumstances about the presence of the plaintiff. And that – it's reported in 103 Commonwealth Law Reports at 112. And the relevant passage starts at 119, where the argument about, or the construction of the duty, or the – sorry, the risk of harm, by reference to the particular circumstances that happened to Dr Cherry. Your Honour will see this at the top of 120.

And it was all about whether it was foreseeable that Dr Cherry should be – the plaintiff should be there at the time. The circumstances in which he was there, and the like. And your Honour will see, right about point 4 on the page, that this argument – that's the argument I've just briefly summarised, assumes, as the test of the existence of duty of care, with respect to Cherry, the reasonable foreseeability, the precise sequence of events, which led to his death. And it was rejected, and rightly rejected.

It is, we think, sufficient in the circumstances of this case to ask whether a consequence of the same general character as that which followed was reasonably foreseeable as one not unlikely to follow a collision between two vehicles. And then a little bit lower, there's a reference to the quote from Haynes v Harwood. It's not necessary to show that this particular accident, and this particular damage, was probable. It's sufficient if the accident is of a class that might be anticipated.

Now, the two aspects of the risk of harm were the presence of swaths on Eagle Rest and the loss of certification. It's not necessary there be foresight as to who would make the decision to decertify, which standards applied and how they might be applied, or the process by which that decision or result or consequence might result, or the precise number of canola swaths that are present. And your Honour will see that that principle is breached by the defendant at paragraph 44 of his submissions, if your Honour could go to that paragraph.

KENNETH MARTIN J: Sorry. Paragraph 44, was it?

NIALL, MR: 44, your Honour.

KENNETH MARTIN J: 44. Yes.

NIALL, MR: Where they seek to – the defendant seeks to negative the perception of risk of harm, and at 44, it said:

> A reasonable person would not foresee the accidental presence of any amount, however small, could result in decertification. In fact, a reasonable person with greater knowledge, who had read the NASAA and Australian Standards, would not foresee that result.

Now, what that invites, at this stage o the analysis, is four (indistinct) to the particular provisions, the particular circumstances, and how the operate it. And the hypothesis, the accidental presence of any amount, is not what either the risk of harm was directed to, or in fact, what happened.

The defendant seeks to read the risk of harm in a way, at this point of the analysis, which offends the correct principle in Chapman v Hearse, and seeks to descend in the type, the particular character or manifestational process. So that's the first problem with the defendant's proposition. The second, your Honour, turns on the concept of reasonable foresight. Reasonableness is a qualifier of foresight because – and is necessary because foresight is extended beyond the subjective belief or assessment of the defendant and extends to an objective person.

So it's a construct. So because it's a foresight of a person in the circumstances and with the knowledge of the defendant but not the knowledge, it's necessary for there to be a reasonable constraint on it. So it's reasonable foreseeability. That's the work that reasonable does. In this case, your Honour, it's not a case of reasonable foresight, it's a case of knowledge of the risk of harm because Mr Baxter knew both the two propositions. His knowledge was that there was a risk that canola would be blown on the farm and there was a risk of a loss of decertification. He didn't need to know any more in order to have a knowledge of the risk of harm.

Now, knowledge is an important but not a necessary element – actual knowledge – but it's the knowledge that the plaintiff had which was important, the defendant had, not whether it was reasonably held or he should have held it. There's no reasonable qualification on his knowledge, your Honour; it's a question of what he believed to be true and what he acted upon. And to apply that here, your Honour, Mr Baxter knew that he was told the potential impact was loss of certification by Mr Marsh who was certified. That's the first point of his knowledge.

And the second point, that he had no reason to doubt it. He proceeded on the basis. He was informed as to the

risk and therefore could take what actions a reasonable person could take or not take. But he was in a position to make the decision armed with the knowledge. Now, his knowledge was reasonable and correct, as it happened, but it's not negative for this purposes of establishing the first element of the duty of care that it might later be shown to be wrong.

So, in our submission, there was actual knowledge of the risk of harm in the relevant sense but, in any event, there was a reasonable foreseeability of the risk of harm having regard to the generally available information including the DAFWA publications I took your Honour to; generally accepted understanding of the movement of seed and swaths and information concerning organic standards. Now knowledge, your Honour, is a critical aspect of the duty of care. If your Honour goes to Perre v Apand, which I can hand to your Honour, and both the parties have addressed this case in some detail in the written submissions.

KENNETH MARTIN J: Thank you.

NIALL, MR: If your Honour goes to a passage in the judgment of Hayne J at paragraph 342, page 304, Hayne J recalls the majority in Caltex Oil, which is the dredge case, that:

> Pure economic loss was recoverable if the defendant had knowledge or the means of knowledge that a particular person, not merely as a member of an unascertained class would be likely to suffer economic loss as a consequence of the defendant's negligence.

No, that demonstrates knowledge of a particular person would be likely to suffer economic loss, is critical to the attribution of a duty of care. And here, that knowledge that a particular person, namely Mr Marsh, would be likely to suffer economic loss as a consequence of the defendant's conduct, was a matter that was critically known to Mr Baxter. The state of knowledge of those facts suffice to establish the duty.

Now - and Caltex is, as his Honour says, authority for that proposition. And we submit that the knowledge of Mr Baxter was sufficient to establish the duty of care that he had. Your Honour knows that in addition to reasonable foreseeability and knowledge, the High Court in Perre looked at other aspects of the relationship in order to determine whether a duty of care should be imposed. And the critical task there is not a shopping list of items

but, rather, a means of analysis to describe the nature of the relationship between the plaintiff and the defendant and whether that relationship is sufficient to attach a duty to take reasonable care in the particular circumstances.

Now, in our submissions at paragraph 227, your Honour, we identify the features of the relationship between plaintiff and defendant that warranted the recognition of the existence of a duty of care arising out of the facts of Perre v Apand. And we emphasise and identify – and I will develop each of these, your Honour – but the first point was the close physical propinquity of the land. The second – – –

KENNETH MARTIN J: Well, you can tick that box.

NIALL, MR: The second is actual foresight of the likelihood of harm. The third is control over the activity. The fourth is that the plaintiff's business was vulnerably exposed to the defendant's conduct. It's not necessary for all of them to demonstrate the existence of the duty of care. They are relevant to ascertaining the nature of the relationship. Can I deal first, your Honour, with physical propinquity because it's not just the physical co-location of the two farms.

There is three aspects of the physical propinquity which makes it stronger than Perre v Apand; they are firstly the geographic closeness; secondly, they are the mode of transmission is physical, that is the wind moving the swaths and conveying the seed – so there was a physical aspect to the harm – and the third is that it directly impacted on the enjoyment of the property by the Marshes. So you look at physical propinquity at three aspects, not just geographic but also the mode of harm and the particular impact was an impact on the enjoyment of property which was adjoining. So each of those three things are relevant.

Now, in Perre – and we have set out some quotes in our written submissions from a number of – four of the members of the court – starting at paragraph 245 dealing with what Gummow J said to Chief Justice, Callinan J and Kirby J. And if your Honour goes to those quotes in our submission, if it's convenient to do so, your Honour, your Honour will see that Gummow J in the middle of that paragraph, notes as significant that there was the closeness of the land, but that the business activities of those parties, that is, the plaintiff's, depended on varying degrees upon the

occupation and utilisation of land, and the turning of products to economic account.

So his Honour is identifying that there was a physical aspect to the interference, or the harm that was sustained by the plaintiffs. The Chief Justice, in the next passage, quoted – noted the direct relationship between the two land, and Callinan J, in the bit that we've underlined, your Honour, the passage, refers to the fact that the circumstances were very much akin to a physical attribute of property.

That is, the circumstances in which they used it, and the inability to use it in a way that they wanted. Now, that physical propinquity in those manifestations is very important to establishing the duty of care. In Perre, your Honour, the physical relationship was important, but it was of a different type, because your Honour will recall that the seed was – contaminated seed went into the Sparnen's farm. And the – – –

KENNETH MARTIN J: Close enough.

NIALL, MR: Yes. The geographical connection, your Honour, was the 20 kilometre regulatory limit. That was a regulatory construct. Presumably, it had some underpinning. But the case didn't turn on any physical movement, or physical contamination of the plaintiff's land. It was simply in an area where the regulation determined would be the subject of the quarantine. Now, that regulatory construct meant that there was some physical propinquity constrained by that barrier.

Here, your Honour, the physical relationship means that there was a very significant limitation operating in relation to the duty, namely, it was a duty that related to the physical movement of seed to an adjoining property in circumstances of notice. So bearing in mind that part of this exercise is to look at control mechanisms and limitations on the extent of the duty, the fact that this was a physical transmission of property onto an adjoining property is itself a very powerful means of limitation.

And again, in our submission, physical propinquity in the way that I've just submitted would be sufficient to establish the duty to take reasonable care toward the neighbour. So we've got actual knowledge. We've got the physical connection, and the interference with land. The next question is vulnerability, your Honour. And in our submission, vulnerability means simply the inability to protect oneself from the want of reasonable care. Now

here, Marsh could do nothing to protect himself from the want of reasonable care.

In oral submissions, it was said that he could have contracted with someone else, or entered into a different contract. That could be no answer to the vulnerability point, your Honour. It's like saying - - -

KENNETH MARTIN J: Well, the vulnerability is - arises out of the contract as opposed to Perre, where the vulnerability arises out of the exposure to the potato blight if it gets into your land.

NIALL, MR: No. The vulnerability doesn't arise out of the contract, the vulnerability arises out of the fact that he has physically located, and has no means, of protecting against the want of reasonable care. The want of reasonable care led to the incursion.

KENNETH MARTIN J: It's the loss of the right. It's the loss of the certification which comes out of the contract, which contains a body of rules and conditions which have been voluntarily accepted, and it's out of the loss of those contractual rights that the loss -the economic loss from the products ultimately, not being able to be sold as certified, arises.

NIALL, MR: Consequential economic loss will often involve a contractual element to it.

KENNETH MARTIN J: I suppose, coming back to vulnerability as a concept, the argument is, well, you made yourself vulnerable by entering into this contract. You didn't have to enter the contract. That's a self-inflicted vulnerability, as opposed to sitting there on your property watching the potato blight wipe out your potato crop.

NIALL, MR: Yes. Well, it's no different - - -

KENNETH MARTIN J: Or watching the pipeline rupture in Botany Bay.

NIALL, MR: It's like - - -

KENNETH MARTIN J: After it has been hit by the dredger.

NIALL, MR: But it's like saying the Perres were vulnerable because they chose potatoes when they could have grown pumpkins. Their decision to grow potatoes was voluntary, in the context of a blight.

KENNETH MARTIN J: So you would say that they're committed to a regime, come what may.

NIALL, MR: And the regime is not some idiosyncratic regime. It is a legal requirement, your Honour, in order to conduct export of organic product, to be certified by an accredited agency, and in this case, he has done that. He was certified with NASAA in 2004. It's a precondition for the exploitation of his land in the manner in which he chooses to exploit it, and the market he chooses to exploit. Perre's chose to sell into Western Australia to attract a premium market.

They could have chosen to sell to any other market. Our client consensually enters into a contract, but he's required to do it, under the regulatory regime. It's an accepted and well-established business that he had been operating, and in our submission, it's not reasonable to say that he could simply enter into a different contract. In terms of the suggestion that he could have entered into AUS-QUAL, it wasn't put to Mr Baxter. There's no evidence that AUS-QUAL certifies crops in Western Australia.

And there's simply no evidence as to whether that would achieve the objective that he wanted. He - part of his evidence is that he sells to Mr Morton, his oats, also NASAA certified. And so the NASAA certification is essential to the operation of his business. And it's not a sign of lack of vulnerability in the context of a physical movement of someone else's property onto his, that he could have entered into a different contract, even assuming that such a contract was available and sufficiently attractive to him, or would have avoided the loss that he suffered.

In terms of a buffer, or some voluntary reduction of his own certified land, in our submission, that's not a means of avoiding or dealing with the risk of harm. That's assuming the consequences of the risk of harm. That's really saying, well, I will decertify myself, or a portion of my property, in order to avoid the risk that I will be decertified as a result of your lack of reasonable care. Now, that, in our submission, is conceptually wrong, and factually, the evidence shows, as we set out in the written submissions, that the Marshes used the whole farm necessarily for the crop rotations, which they maintain under their organic program.

So in our submission, Mr - the Marshes were vulnerable, and could not protect themselves from a lack of reasonable care on the part of the Baxters. Now, can I say something short about autonomy, and interference with a

lawful activity. Our friends placed great emphasis on the fact that planting and swathing of genetically modified canola is lawful and safe. But as a general statement, that says nothing about whether there should be a duty to take care in a given set of circumstances.

The proposition that swathing may generally be recommended or used in canola production says nothing about the freedom or circumstances in which Mr Baxter chose to plant and swath his genetically modified canola. Now, in terms of his own activities, that is, Mr Baxter, of course, swathing was not his preferred method of harvesting. He had never swathed before 2010. In the very same year, in the adjoining paddocks of Range and - - -

KENNETH MARTIN J: Two Dams?

NIALL, MR: No. Range and Mailbox.

KENNETH MARTIN J: And Mailbox.

NIALL, MR: Mailbox was identified as a target for Roundup Ready Canola, presumably on the basis that it had a significant rye grass resistant problem. He direct hits that in the very same year.

KENNETH MARTIN J: Well, he swaths - or more correctly, he gets a contract swather, Mr Meredith, to carry out the swathing operation on Two Dams and Range, which is the first time he has grown Roundup Ready Canola. But, you're quite right in regard to the Mailbox paddock, where conventional canola is grown he uses his header to direct head.

NIALL, MR: That's so, your Honour. And in 2011 on Baxter's block he grows Roundup Ready Canola and he's free to swath it, and he directs harvest it, because, on his evidence, is that that's the way he did things.

KENNETH MARTIN J: But just coming to swathing, there is some evidence from the experts that that's the optimal method, in terms of yield, in terms of harvesting a crop, and it has got the advantage of a uniform ripening scenario in windrows. And, also, there's some allied weed protection associated with using that.

NIALL, MR: Now, on the two advantages of - of seed shattering and even ripening, Mr Baxter's evidence was that he had been growing canola for many years and they weren't problems for him. He said they were not significant

problems. And certainly not problems to abandon direct heading. And on weed control, your Honour, it was entirely unsatisfactory basis to establish any evidence of weed burden, let alone late germinating weed burden. And in the very next paddock, without the benefit glyphosate application, he direct heads.

Now – so in terms of his own – exercise of his own autonomy, or freedoms, he's not swath at all, other than for the first time in 2010. Now, that's the factual scenario. But, as Gummow J says in Perre at 160 – if your Honour turns to that – his Honour is there dealing with the fact the importation of the seed into South Australia had been forbidden by the Fruit and Plant Protection Act, and delegated legislation – that's over to 239.

> The presence of this regulatory regime, whether or not breach of it actually occurred, is a matter relevant to the existence and scope of duty of care imposed upon Apand. However, whilst relevant, the presence of such a regime cannot be determinative of these common law questions. Legislative values may influence, but not necessarily dictate, the content of common law values which are in play. If this were not so, then there would be no recovery for negligently inflicted economic loss, unless there was a breach of statute which justified placing the stigma of unacceptable business conduct onto the felon's alleged tortious conduct. One might find it surprising that the events which gave rise to Caltex Oil did not involve some infraction of statute.

There is no principle, in our respectful submission, that a duty will only be imposed, or should only be imposed, where there's some existing breach or duty of care. It's not necessary to show that the conduct is unlawful, and it's not necessary to show that another duty of care to some other party, for a different form of harm, attends.

Now, if, of course, some other legal burden had to be imposed, pre-existing burden, before a duty would be imposed, there are – there is the fact that in our submission the conduct also constituted a private nuisance. So if your Honour determined that claim first, it would be a duty arising in the case of unlawful – of conduct which the law prohibits. And, secondly – and we developed this in our written submissions – the freedom or autonomy of both plant and grow – and swath genetically modified canola was heavily circumscribed, circumscribed by the licence agreement and the stewardship agreement.

KENNETH MARTIN J: They just go to growing, I think, don't they?

NIALL, MR: Well, they go – well, they – no, they extend to obligations in relation to treatment of volunteers – – –

KENNETH MARTIN J: Yes.

NIALL, MR: – – – and care of volunteers.

KENNETH MARTIN J: But they don't proscribe swathing.

NIALL, MR: Not in terms, no, your Honour. And in terms of what's legitimate would be informed by information in the community, including the DAFWA publications. So in our submission, when one looks at all of those matters, particularly knowledge and the physical nature of the circumstances, a duty to take reasonable care to avoid the type of harm is imposed on Mr Baxter. Can I then – – –

KENNETH MARTIN J: Would you accept that it's a normal duty?

NIALL, MR: No, your Honour. It's akin to the – Caltex, the dredge, to take reasonable care to avoid economic harm – – –

KENNETH MARTIN J: I think the way you frame it in paragraph 31 is a duty to ensure.

NIALL, MR: It's – it's a – – –

KENNETH MARTIN J: Reasonable care to ensure.

NIALL, MR: Yes. It's no different than a reasonable care to avoid, a reasonable care to ensure – any number of words could be used, but the – – –

KENNETH MARTIN J: Reasonable care to minimise?

NIALL, MR: Any – any – in different formulations, the obligation is no more than one that the law imposes to take reasonable care. And here, we say, that the reasonable care would be the taking of precautions, namely, planting further away or not swathing. Now, the duty to ensure – sorry, the duty to take reasonable care – – –

KENNETH MARTIN J: See, that's very close to the duty in Burnie Port Authority vis-à-vis fire, where you can get such a – such a duty because of the inherently physically

dangerous characteristics of the activity, that it's almost a duty to guarantee that something doesn't happen.

NIALL, MR: Not – not at all, your Honour. The duty is no more than the duty to take reasonable care. And it may be, like in any case, that reasonable care may not prevent a particular consequence. Or it may be that when one comes to look at breach, what reasonable care requires might be large, or it might be relatively small. Each of them depends on the circumstances. But we don't plead, and it's no part of our case, that there is some guarantee to prevent GM canola being blown or carried from Seven Oaks. We assert a duty to take reasonable care, and we identify how that duty was breached. And we do no more than that, your Honour. Now – – –

KENNETH MARTIN J: So we're not in novel territory as regards duty?

NIALL, MR: We would submit not, your Honour. And the science has a different aspect to it but the nature of a duty to prevent – reasonable care to prevent economic loss in circumstances of knowledge in close physical propinquity where the harm is in the nature of physical – interference with a use or enjoyment of property, it's quite a traditional and certainly not novel duty of care.

Now, in terms of, your Honour, breach your Honour needs to apply section 5B. And yesterday, the course of the submissions by my learned friend, your Honour raised the question of the meaning of "not insignificant". And I will come to that in a moment. The three elements of breach which 5B identifies, firstly, is that it's necessary that the risk of harm is to be foreseeable in the sense that the person knew or ought to have known and we have made submissions about how that fits in.

KENNETH MARTIN J: So, yes indeed.

NIALL, MR: The next requirement is that the risk was not insignificant. And, your Honour, I think understandably, with respect, referred to the difficulties that double negatives can wreak. If your Honour could be handed a copy of Gunnison v Henwood, which is a decision of the Supreme Court of Victoria dealing with the cognate provisions of the Wrongs Act.

KENNETH MARTIN J: Thank you.

NIALL, MR: And if your Honour goes to page 117 of the judgment – this is a case. The facts are not material for the purpose of my submission, your Honour. But Dixon J, commencing at paragraph 355 at page 117 deals with the concept of breach of duty. And his Honour sets out the passage from Sir Anthony Mason in Wyong which your Honour will recall addresses what it is that a reasonable man would do in response to the risk. And I won't read those passages which will be familiar to your Honour. And over on page 358 – paragraph 358, his Honour sets out the Victorian provisions which are the same as paragraph 5B in relevantly terms. And his Honour notes that the sections are evidently directed to sections of breach – does your Honour see that?

KENNETH MARTIN J: I do.

NIALL, MR: So we are dealing here with a statutory application of the breach provisions which Sir Anthony Mason was addressing in Wyong v Shirt and the reference in his Honour's judgment to the judgment of Garling J in the Supreme Court of New South Wales in Bennick and that informs his Honour's analysis. And if your Honour goes over to 361, his Honour says:

> The first step is the plaintiff must identify risk of harm against which he or she alleges a defendant would be negligent for failing to take precautions. The particular risk of harm may be sufficiently described as a class of injury as distinct from a particular injury actually suffered.

And that's the common law approach. So I have addressed your Honour on that. The next step is to address the three elements in section 48(1) and your Honour will see on the first dot point the reference to foreseeability. And I have addressed your Honour on that and invite your Honour to read it. And then his Honour notes on the second dot point, at paragraph 362:

> The second element which is cumulative on the first is whether the alleged risk of harm was not insignificant. This must be judged from a perspective of reasonable person.

And then there's a reference to Gleeson CJs judgment in de Burro:

> A risk is real and foreseeable if it's not far-fetched or fanciful, even as the (indistinct) likely to occur. The precise and particular character of the injury or

> the precise sequence of events leading to the injury need not be foreseeable. It is sufficient if the kind or type of injury was foreseeable, even if the extent of injury was greater than expected.

Now, as his Honour notes in relation to 48(3), insignificant risks are not limited to risks which are far-fetched or fanciful. It would seem that the bar has been raised. So his Honour is identifying that the position is not insignificant and dealing with the definition of not significant - - -

KENNETH MARTIN J: The extract from the (indistinct) report at 715.

NIALL, MR: Precisely, your Honour. And the deliberate use of the double negative. Now, the - - -

KENNETH MARTIN J: That answers my question.

NIALL, MR: We deal with this at 276 of our submissions, your Honour, but your Honour will see over at page 122 in terms of the assessment of risk from Garling Js judgment:

> The assessment of the risk of harm is one made in prospect and not retrospect. The phrase is of a higher order than the common law test and this is intended to limit liability being imposed too easily. The phrase "not insignificant" is intended to refer to the probability of the occurrence of the risk. In the realm ... Or the probability of an occurrence is both a quantitative measurement which may, but does not necessarily, reflect the statistical (indistinct) assessment. And where the risk is not insignificant must be judged from the defendant's perspective, it must be judged on a broader base than the mere reduction as to mathematical formula.

And the proposition for which we contend is that the concept of not insignificant doesn't mean significant. And, secondly, it's only higher, but only slightly higher, than the common law test of far-fetched or fanciful.

KENNETH MARTIN J: Not far-fetched or fanciful.

NIALL, MR: Yes. So that's where - and in the present case the risk of harm, having identified it in the way that we have done in our submissions, was not insignificant in that sense. The risk that canola would blow and there would be a loss of certification. So in our submission, (a)and (b) are satisfied. We develop this a bit more in

our written submissions. Can I turn to deal with the question of (c), which is the precautions of the reasonable person. Now, in our submission, the precaution a reasonable person would have taken would have been not to plant genetically modified canola in those two paddocks, Range and Two Dams, given their physical relationship to the Marsh property.

And, secondly, a reasonable person armed with all of the information would have direct-headed - that is, they would have taken the precaution of not swathing with the attendant risks. In determining why that is so, your Honour needs to look at subsection (2) and the first is the probability that the harm would occur if care were not taken. Now, certainly in relation to swathing, your Honour, there was a real and substantial risk that swaths, having concentrated the canola seeds and material, and having exposed them, that they would be blown by the wind.

KENNETH MARTIN J: How do you know that? Because, in fact, swathing had never happened before, so this was a first-time scenario.

NIALL, MR: Well, we know that - - -

KENNETH MARTIN J: We don't really know much about the elements that prevailed at the time, on 30 November 2010, other than the fact that there were strong winds from the south.

NIALL, MR: Well, we know more than that, in our respectful submission, because if your Honour goes to 282 of our written submissions.

KENNETH MARTIN J: 282. Yes.

NIALL, MR: And, of course, your Honour, it's an objective test looking forward, and 282 we refer to some evidence that - as to the probability of the harm that:

> The production of volunteers after the movement of seed was obvious, that volunteers could be found in adjacent paddocks. Swathing provides an opportunity for seed to be moved by wind.

And, as Mr Robinson volunteered in his evidence, it's not so much seeds blowing, it's the pods that blow, and the swaths. He refers to pods but it would be the swaths. So the form in which the plant is left in the paddock is important. Mr Robinson agreed with the Farmanco advice,

which is to the effect that the possibility of strong winds moving swath onto a neighbour's paddock.

So this is a known and expected phenomenon. Professor Van Acker identified the – from a perspective prospective look – approach, planting – swathing your canola there was a known and real phenomenon of swaths being moved to adjacent paddocks.

KENNETH MARTIN J: But nobody puts any empirical linear determination to how far. And I think even one of the professors says very little research has been done in terms of that sort of analysis.

NIALL, MR: But, certainly – again, it's the probability of the type of harm, so canola coming onto Eagle Rest. And Professor Van Acker identified that at swathing there is a known opportunity for canola swaths to be moved by the wind. And Dr Rudelsheim identifies wind as a significant movement – effector for the movement of seed. So all of those things are known phenomenon in an agricultural context.

The evidence is that it's necessary to look into areas in adjacent paddocks for swathing volunteers. That was something that Farmanco advised. It was consistent with the advice that Monsanto advised. So one is dealing with, in terms of the probability of risk, in an agricultural setting, broadacre agricultural setting, a known and real phenomenon. And so that there was, looking prospectively, a probability that the seed would – would – the swaths would move from Seven Oaks to Eagle Rest. And we submit that there was also a probability that decertification would follow from the presence of genetically modified canola onto Eagle Rest.

KENNETH MARTIN J: Only on the basis of what Mr Marsh had said to Mr Baxter, which Mr Baxter presumably took at face value.

NIALL, MR: Yes. And also the evidence of the farm note.

KENNETH MARTIN J: Mainly the signs, too.

NIALL, MR: The signs, and the farm note, which deals with – the DAFWA farm note which deals with genetically modified crops and organic farming.

KENNETH MARTIN J: The farm note is not in for the truth of its content, though, just for the fact that it's said.

NIALL, MR: But it's – it's evidence of an understanding of the – of the Department of Agriculture officials which would provide a basis upon which your Honour could conclude, objectively, that the phenomena is known and would influence the probability of it occurring in a particular event.

KENNETH MARTIN J: Well, certainly the phenomena of the wind moving material in windrows for people who cut hay, and things like that, is really not going to surprise anybody too much.

NIALL, MR: To adjacent paddocks?

KENNETH MARTIN J: Yes, absolutely.

NIALL, MR: So that was the probability on the – on the position facing Range, for example, that was a real and substantial probability if the swaths were left for a fortnight or three weeks in a windrow. In terms of the likely seriousness of the harm, in our submission, it's plain, looking forward, that the loss of certification was a serious matter. It was a subject that Mr Marsh had raised with Mr Baxter. It was something that Mr Baxter was alive to, and he appreciated that it was a serious matter.

KENNETH MARTIN J: And he also got the notice of intention to take legal – – –

NIALL, MR: That's so, your Honour, which reinforced – – –

KENNETH MARTIN J: – – – proceedings pre swathing.

NIALL, MR: That's right – which reinforced the seriousness of the position from – of harm to the Marshes in prospect. In terms of the next aspect of the precautions of the burden of taking precautions, again, it's looked at prospectively, at the time taken to plant, in the first case, and swath in the second. In relation to swathing, in our submission, there was no significant burden in not swathing Range or Two Dams. It had been, and remains, on the evidence, Mr Baxter's – but was at the time Mr Baxter's preferred mode of harvest. It had advantages to him.

He could use his own equipment. He could determine when to harvest. He has not seen or been exposed to significant problems of seed shatter or uneven ripeness. He was familiar with it. And it was a very small burden, if a burden at all, for him to direct harvest the crop,

evidenced by his decision to do exactly the same thing, even on his evidence, a very similar paddock next door, which had been slated for Roundup Ready Canola. It would have been planted in Roundup Ready Canola had it not been for him running out of seed.

KENNETH MARTIN J: But he actually pays someone to swath.

NIALL, MR: That's so.

KENNETH MARTIN J: So he incurs the cost of that outlay, which probably – wouldn't probably – well, he wouldn't if he did it himself with his header.

NIALL, MR: So he's – in a sense, that was a burden of not taking the precaution. He assumed the cost. And, looking prospectively, the burden of taking reasonable care in not swathing the adjacent paddocks was insignificant, on the evidence, prospectively, of an objective person in the position of the defendant. So the burden of not swathing is not to be answered by reference to generalised preferences in different contexts for swathing.

Now, in terms of identifying the burden of not – of taking the precaution by not swathing, comfort seems to be sought to be taken from the defendant by the fact that the burden was identified and referred to by the agronomist, Robinson. Now, in our submission, it's important, when looking at what a reasonable person would do in terms of the position of Mr Robinson, that Mr Robinson – Mr Baxter didn't seek specific advice from Mr Robinson on the risk of harm.

He didn't seek advice on dealing with the risk. Mr Robinson wasn't retained or instructed to address the risk. And in our submission, Mr Baxter didn't advise him, or inform him, of critical matters that were within Baxter's knowledge. So to the extent that the defendant relies in looking at the burden of not swathing on the advice of Mr Robinson, in our submission, that needs to be put into the context of what Mr Robinson was not told. And it also needs to bear in mind, in our submission, the evidence of Robinson's knowledge of weed contamination was minimal.

He only had knowledge at 2010 for the '08/'09 tenures from what he was told by Mr Baxter. And there's questions that we raise in our submissions about what he in fact was told. He gave some evidence, your Honour will recall, in his amended statement in paragraph – the paragraph dealing with 2005 and 2006, in the back paddock and silo paddock.

In cross-examination, it was clear that he had no knowledge, no memory, I should say, of what was planted or done in those two paddocks, and could not recall, and there was no documentation to record, any particular problem with weed resistance in '05 and '06.

So the evidence that it was necessary to deal with a particular weed burden is completely unsatisfactory, so that the burden of not swathing Range and Two Dams, and direct heading in terms of weed control, is completely unsatisfactory, and doesn't provide any firm basis that – and in fact, in submission – – –

KENNETH MARTIN J: What do you suggest is the finding that I should make about that?

NIALL, MR: Yes, your Honour. Your Honour should find that there was weed need to swath. So there was no – the – – –

KENNETH MARTIN J: If I have to find a motive for swathing, are you suggesting that I should find a sinister motive or something that like?

NIALL, MR: No. The motive for planting, in the first place, wasn't to deal with a particular or known herbicide resistance problem. It was because Mr Baxter had used and regarded glyphosate as effective. In terms of swathing, it's exactly the same position. It was not because there was a particular or identified weed problem of late germinating rye grass, but rather, there was a generalised unthinking decision to swath without any consideration of the particular circumstances.

Now, Robinson's evidence was that had he been aware of the risk of harm to Marsh, he would have told him to be careful in planting on the boundary, and of the risk of swathing. And your Honour should conclude that that means that Robinson was of the view that it would not be a reasonable approach to swathing on those two paddocks. He certainly can't – free from the knowledge of what Baxter told him, he certainly would have said – sorry. If he had the knowledge that Baxter had, he certainly would have said, "Be careful on the risk of swathing".

And that's at transcript 941. So the upshot of that evidence, your Honour, is that your Honour ought not be satisfied that planting in different paddocks, or not swathing, was a burden which would have led a reasonable person to swath or plant. In terms of social utility, your Honour, which is the last of the things that your Honour

needs to examine in terms of breach, the decision to plant and swath genetically modified canola did not have a relevant social utility dimension. Both neighbours were engaged in primary production, and both were farming within the area.

Now, in our submission, in terms of social utility, the utility was purely private for Baxter's decision to plant swath. And he wanted, in our respectful submission, for the perceived benefits, but without any responsibility for the burdens of the movement of his product onto his neighbour's property. And therefore he can't, in our respectful submission, call in a particular social utility in the activity which created the risk. Your Honour, can I then - that's what I wanted to say about breach.

Can I now deal with causation, and deal firstly with the question of factual causation. And this is subject, of course, to section 5C. And the first question, your Honour, is the statutory manifestation of the but for test. And in our submission, both planting and swathing were necessary conditions for the occurrences of the harm. Now, swathing is a plain necessary condition in terms of the movement of swaths, because direct heading would not produced, obviously, the movement of swaths onto the neighbouring property.

But the existing of planting - sorry. The planting was also a necessary condition for the occurrence of the harm, and would satisfy factual causation. If your Honour - if I could take your Honour briefly to Strong v Woolworths.

KENNETH MARTIN J: The lady slipping on the spill in the supermarket?

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: Yes.

NIALL, MR: And - - -

KENNETH MARTIN J: Yes. Thank you.

NIALL, MR: If your Honour goes to page 190 of the report, where there will be a judgement of the Chief Justice, Gummow, Crennan and Bell JJ. Their Honours set out the statutory provision. In paragraph 18, they note that the determination of factual causation under 5D(1)(a), the statutory statement of the but for test of causation, the plaintiff would not have suffered the particular harm but

for the defendant's negligence. Over on paragraph 20, their Honours say:

> Under the Statute, factual causation requires proof of the defendant negligence with a necessary condition of the occurrence of the particular harm. And necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set. And if follows, a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation. In such a case, the defendant's conduct may be described as contributing the occurrence of the harm.

Now, in our submission, as a matter of factual causation, the decision to plant was a necessary condition for the occurrence of harm.

In terms of swathing, there doesn't seem to be much apart in the parties, your Honour. If your Honour goes to paragraph – of the defendant's submissions – and goes to paragraph 135 – – –

KENNETH MARTIN J: Yes.

NIALL, MR: – – – the defendant concedes that if a finding is made, it's more probable than not that the swath canola originated from Seven Oaks – a case of factual causation may arise by reason of the swathing being a necessary component leading to the present of swaths on Eagle Rest. That finding alone is not sufficient to support legally causative.

So the question of swathing and its factual cause is not significantly apart, only on the question of the probability of the origin of the swaths. And, in our submission, your Honour can be comfortably satisfied on the evidence that the swaths originated from Seven Oaks, and we set 311 – 311 in our submissions, the factual basis for that submission.

KENNETH MARTIN J: Well, I understand the swathing position, and I understand the fact that the defendant formally puts in issue whether the source of the swathed incursion material was from Seven Oaks or not. But, in terms of the state of the evidence, in terms of what's before me, there appears to be very few candidates in terms of source – – –

NIALL, MR: That's so, your Honour.

KENNETH MARTIN J: - - - other than Seven Oaks, and in particular, the Range paddock, if we're talking about southerly winds. But just in terms of the but-for test, and the growing, if the cross-examination of Mr Baxter, at 831 - sorry, 830 - 829 to 830 proceeds on the basis of it's pretty much close to a certainty that if you direct harvest the chance of any canola blowing onto Eagle Rest would be substantially reduced, doesn't that take growing out of the equation? Because - because growing doesn't give you a swath necessarily. To get a swath, swathing - well, put it the other way, direct harvesting and swathing are incompatible.

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: And you need the swaths to actually take off in the wind and land on Eagle Rest in order for the harm to follow. And if it's practically certain that that's not going to happen if you direct harvest, then growing becomes simply an antecedent fact, which is not factually causative, in applying the but-for test.

NIALL, MR: But is it - - -

KENNETH MARTIN J: In fact, it fails the but-for test.

NIALL, MR: Well, it is a necessary - it's a necessary condition.

KENNETH MARTIN J: Well, it's like saying your parents are a necessary precondition to you being a tortfeasor but, you know, it's - it's just historic.

NIALL, MR: In - if your Honour goes back to Strong at paragraph - - -

KENNETH MARTIN J: Is there anything there that helps?

NIALL, MR: At 27 - in the last sentence in paragraph 27:

> In some cases if the relative contribution of two or more factors cannot be determined, it may be that each factor was part of a set of conditions necessary to the occurrence of that harm.

KENNETH MARTIN J: Absolutely.

NIALL, MR: And then over on the next page the danger of the - and this is really the commonsense restriction on the

but-for test, in a sense, that over on the next page there's a caution about the causal (indistinct) to determination. But, in our submission, planting does satisfy the but-for test. It may be that there are different considerations on the scope of liability for the two - - -

KENNETH MARTIN J: But for the planting, would that swath have landed on my land, and decertified me?

NIALL, MR: No. That's what I wanted to say about factual causation, your Honour. In terms of legal causation and the operation of the normative exercise that's required in 5(c) paragraph (b), I want to take your Honour to a couple of authorities on that - it might be a convenient time?

KENNETH MARTIN J: Yes. Yes. By all means. How are we going? 2.15 to resume?

NIALL, MR: Yes, your Honour.

KENNETH MARTIN J: So we will adjourn to 2.15 pm to resume.

(LUNCHEON ADJOURNMENT)

KENNETH MARTIN J: Please be seated. Mr Niall.

NIALL, MR: Thank you, your Honour. I'm just concluding the negligence submissions, and I'm just going to address your Honour, if I may, on legal scope of liability causation. If I could invite your Honour to take up section 5C.

KENNETH MARTIN J: Yes.

NIALL, MR: And your Honour will see the 1A deals with the factual causation in 1B, whether it's appropriate for the scope of the liability to extend. Now, it's said against us that there are really two reasons why the - it's not appropriate for the liability to extend. One is that NASAA's decision was not authorised, or secondly, NASAA's decision wasn't reasonable. It seems to be the way the defendant seeks to invoke, in his favour, 5C(1)(b). Can I make some short submissions about how the section operations, firstly, by reference to Wallace v Camm, and then by reference to Midland. Can I hand up copies of those two cases to your Honour.

KENNETH MARTIN J: Yes. Thank you.

NIALL, MR: Now, dealing first with Wallace v Camm. I'm not sure if your Honour is familiar with Wallace v Camm.

KENNETH MARTIN J: Yes.

NIALL, MR: Yes.

KENNETH MARTIN J: I've had a churn through.

NIALL, MR: Yes. If your Honour goes to paragraph 21 and 22. The facts are quite idiosyncratic.

KENNETH MARTIN J: Medical negligence.

NIALL, MR: Yes. But the risk that – wasn't warned, didn't materialise, and the like. But if your Honour goes to 21 and 22, your Honour will see that 5(1)(b) poses a normative question, that is, ought liability be imposed. And 22, their Honours say, that 5D guides, but does not displace common law methodology. The common law method is that a policy choice, once made, is maintained unless confronted and overruled. Now, that's important because Midland, of course, is a common law case.

And if your Honour then goes over to paragraph 26, your Honour will see their Honours have just dealt with circumstances in a medical negligence case. But their Honours go on to say within the limiting principle of the common law, the scope of liability for the consequences of negligence is often coextensive with the content of the duty. And that is because, as their Honours go on to explain, the policy of the law in imposing the duty on the negligent party will ordinarily be furthered by holding the negligent party liable for all harm that occurs in fact that would not have occurred, but for breach of that duty, and if a harm was of a kind the risk of which it was the duty of the negligent to use reasonable care and skill to avoid.

So there's an – in terms of a normative exercise, one starts with the proposition that the law seeks to identify liability with the existence of the duty, the breach of the duty, and the damage. And it will normally be furthered, that policy, by holding the defendant liable where the duty is established. Their Honours go on to say the scope of liability doesn't always work that way, and they explain one – or give one reason for that at the top of the next page, or midway through, where the difference is that in part – because the elements of duty and causation of damage in the role of negligence serve different functions.

The former imposing a forward looking rule of conduct, the latter imposing a backward looking attribution of responsibility for breach with the result that policy, considering each, may be different. Now, that's really where we've been this morning. Spending a lot of time looking at the forward looking aspect, which is about foreseeability, the imposition of the duty, and what a reasonable person might do. And we're now looking back to see whether there should be an attribution, that having happened.

Within that context, the principles that need to be examined on how the court should deal with the intervention of a third party. Now, here, of course, we have Mr Baxter's conduct, we have the physical presence of the swath, and then we have the interposition of a third party, namely, NASAA, which is a necessary precondition for the loss. And in terms of scope and viability, your Honour will have to examine how the interposition of that decision making process, if I can use that, should be relevant to causation. And that's where Midland, in our respectful submission, is highly instructive.

If your Honour – Midland – your Honour, will know the facts in Midland, and I'm embarrassed to say that I've got Administrative Law Reports judgment, which I have marked up. But if your Honour goes, in the judgment of the joint judgment, to page – this is Dean, Dawson, Toohey and Gaudron JJ, to page 6, beginning with the purposes of the law of negligence. And your Honour will see the plurality observed, that the question of whether the requisite causal connection exists between a particular breach of duty is essentially one of fact.

And that remains so in a case such as the present, where the question of the existence of the requisite causal connection is complicated by the intervention of some act or decision of the plaintiff or third party, which constitutes a more immediate cause of the loss or damage. In such a case, the but for test, while retaining an important role as a negative criteria – which will commonly (indistinct) always exclude causation, is inadequate as a comprehensive positive test

But their Honours go on to say that the ultimate question must, however, always be whether, notwithstanding intervention of the subsequent decision, the defendant's wrongful act or omission is as between the plaintiff and the defendant, and as a matter of common sense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in many cases – some

cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken chains of causation which would otherwise have existed.

An example of such a case is whether the negligent act or omission was itself a direct or indirect contributing cause of the intervening act. So here, as a matter of common sense and experience, it was the wrong to which we attribute to Mr Baxter that was the very basis of NASAA's decision. Therefore. There's no break in the chain of causation. As a matter of common sense and experience, it's properly seen, including with the normative content, to have caused the relevant loss or damage.

Over on page, about, 10, your Honour, about the middle of that paragraph, where it begins, towards the right hand side of (indistinct):

> The necessary causation between a defendant's negligence and the termination of a plaintiff's employment, in the sense that a termination is the product of an accident that caused loss, can exist notwithstanding the fact that the immediate trigger was the plaintiff's own decision to retire prematurely. If, for example, it appears that the plaintiff's decision to retire prematurely would not have been made were it not for the fact that the effective accident caused injuries, is that continuation of employment would subject him to constant pain and serious risk, it may well be that common sense dictates the conclusion that the plaintiff's decision to retire prematurely was a natural step in the chain of causation, which suffices to designate, for the purposes of the law, negligence, for termination of employment as a product of those injuries.

So their Honours then, over on page 11, immediately before the bottom of the last commencing paragraph, about five lines up, your Honour recalls the facts that the professor retired prematurely as a result of the car accident, so his case was. And their Honours say, about .6 of the page.

In these circumstances, the relevant question was not whether the plaintiff should have continued in his university post, or whether his decision to retire was not reasonable, but whether, in the context of what was reasonable between the plaintiff and defendant in determining the defendant's liability and damages, the premature termination of the plaintiff's employment was the product of the plaintiff's loss of earning capacity,

notwithstanding it was brought about by his own decision to accept.

Now, what their Honours is there saying is you don't examine whether Mr Midland, Professor Midland's decision to retire was reasonable in the circumstances. One asked whether in all of the circumstances, it's reasonable, as between the plaintiff and the defendant, that liability should attach to the defendant.

KENNETH MARTIN J: I think that's an application of the common sense test of causation, as they expressed it.

NIALL, MR: Yes.

KENNETH MARTIN J: So called.

NIALL, MR: And they qualified – because McHugh J, on which our learned friends rely, placed heavy emphasis on the reasonableness of the decision to retire. And their Honours, in the majority, give very qualified analysis of that proposition in the paragraph on page 12 for getting their remains for consideration. And their Honours say the course – there was a question about how the court should determine the claim, and whether it should be remitted. And their Honours say the course – there was a question about how the courts should determine the claim and whether it should be remitted but their Honours say the preferable course is that adopted by McHugh J. This court to determine whether the premature termination was the produce of the plaintiff's relevant loss of earning capacity.

We agree with McHugh J that the question of whether the premature termination was the product of the plaintiff's diminution of earning capacity should be answered in the affirmative. Subject of one qualification, we also agree with his Honour's reasons. The qualification is that any question of reasonableness should be framed in terms of what is reasonable as between the plaintiff and the defendant in the context of assessing damages for negligence, rather than a question of whether the plaintiff acted reasonably or unreasonably in resigning his post.

Now, the plurality expressly accommodate that principle in circumstances where there's a decision of a third party and here the correct proposition, we invite your Honour to derive from Midland is looking at the decision of NASAA as to whether it's reasonable as between the plaintiff and defendant to attribute liability to the

defendant. Now, at this point, your Honour, we submit that it was plainly open to NASAA to do so.

And we also submit that it was reasonable, certainly within the reasonable ambit of a contractual power. And given all of the facts, including knowledge, standard breach, it does conform to the policy of the law to hold the defendant responsible for the loss, notwithstanding the interposition of NASAA. They are the submissions we seek to make on negligence, your Honour. Can I then address your Honour on nuisance and provides your Honour a copy of the judgment of the Court of Appeal in Southern Properties.

KENNETH MARTIN J: I think - - -

NIALL, MR: Do you have that?

KENNETH MARTIN J: - - - Ms Nichols was good enough to hand it up so I do actually have it and I have actually marked it, so - - -

NIALL, MR: Well, your Honour, I won't need to read it but in the judgment of the President, in particular at page - paragraph 118 through to 119, her Honour notes the circumstances - and I won't read it to your Honour - but in 119, her Honour notes there's a weighing of the respective rights of the parties and the use of their land to make a value judgment as to whether the interference is unreasonable. And her Honour goes on to say:

> The duty not to expose one neighbour's to nuisance is not normally necessarily discharged by the exercise of reasonable care. Liability and nuisance is strict once a prima facie case has been established to prove its defence.

So they are the - - -

KENNETH MARTIN J: That's a much easier road home for you.

NIALL, MR: It is, your Honour. And that's the - they are the organising principles and applying those organising principles - and I know that I have spent a long time with your Honour going through the facts and the negligence case but those facts very much inform the matrix of the calculus in nuisance. Now, firstly, the Marsh use and enjoyment of land was long established, complied with legal obligations to obtain certification, used an accredited certifier and he did absolutely nothing wrong. He is entirely an innocent victim, we say in an actionable sense but in a more general sense, a victim of circumstance. The

interference was the presence of the canola seed and organic material on his land. It was a - - -

KENNETH MARTIN J: That might just be the factual distinction between Southern Properties because that was a case of damage, smoke damage to the grapes at Margaret River.

NIALL, MR: Yes.

KENNETH MARTIN J: And I think somewhere in here, McClure J says that she assumed it to be a case of - yes, paragraph 89:

> Conducted on the basis that the appellant suffered property damage, not pure economic loss; I proceed on that assumption.

But you would presumably say makes no difference.

NIALL, MR: Makes no difference because the President identifies, of course, the organising principle in paragraph 118:

> It covers physical damage to property and non-physical damage.

So that is a distinction without a difference. If anything, your Honour, the presence of someone else's physical property on yours is different to a smoke taint in some respects because there was no right for Mr Baxter to simply dump his canola material over the fence. Now, nuisance acknowledges perhaps some give and take in - by reference to the neighbourhood principle and the water cases are a good example where, like Gardiner, which we refer to in our submission, where the subservient tenement has to accept the natural flow of water.

So there's a recipient obligation to receive. It's completely altered if the dominant tenement dams or alters the natural course of the water flow. And then, leading up to a concentration of water, you get the nuisance. Now, here there is no corresponding obligation on the part of the Marsh's to accept the product in the same sense as water but in any event there was a concentration of the swaths and the lying of the land.

Now, the unreasonable interference, your Honour, and that's the critical question, does not inquire as to whether the conduct of Mr Baxter was unreasonable. It's a question of whether the inference was unreasonable. Now,

one can look at Mr Baxter's conduct but that's not the subject matter of the tort. Now here, and we identify in our submissions, some of the factors which we would urge upon your Honour.

KENNETH MARTIN J: So fault of the defendant might be relevant but it's not necessary.

NIALL, MR: That's so.

KENNETH MARTIN J: According to her Honour.

NIALL, MR: And - - -

KENNETH MARTIN J: It's just an orthodox application of the tort.

NIALL, MR: Exactly. And the same in relation to precautions. The taking of reasonable precautions might not provide a defence to nuisance but it might be relevant to the question of whether it's an unreasonable interference. Now, here, in our respectful submission, there were - no precautions were taken which were in any way meaningful in light of the knowledge of Mr Baxter. There was the road and there is the five metre but in terms of swathing and the decision to swath and the movement of swaths, there were no precautions made. There's no - - -

KENNETH MARTIN J: There's no precedent for swathing in terms of historic, previous swathing because it hadn't happened before, on the evidence.

NIALL, MR: That's so but there is - there's knowledge on the part of Mr Baxter. He says he didn't have much experience of swathing. He had an opportunity to seek advice and didn't seek advice on the issue that is now joined and for him, in terms of the swathing decision, the fact that there was no precedent is not a virtue for Mr Baxter, it demonstrates a lack of need, a lack of significance, a lack of - that it's necessary within the operation of his farming enterprise.

In that context, his claim that he was dealing with some late germinating rye grass really lacked a coherent justification and I have gone through the facts in that respect. Your Honour, the defendant puts much on the fact that canola growing and swathing is part of normal agricultural practice but it has to be borne steadily in mind, in our submission, that this was a new technology. It had never been introduced into Western Australia before

on a commercial basis; it was introduced with significant public information from the department, significant information from Monsanto, and significant and unusual restrictions.

So it can't be said that Mr Baxter was simply completing the ordinary incident of his agricultural practice. There were significant differences in which we've (indistinct) both in the factual summary, and in our written submissions. So that said, your Honour, on an application of just ordinary principles, the decision to swath the two paddocks plainly gave rise to a nuisance, which was an unreasonable interference with the Marsh's land. Your Honour, can I then turn to relief.

KENNETH MARTIN J: Yes.

NIALL, MR: And your Honour has dealt with – and heard submissions on the question of damages. And we have, with respect, both reviewed the evidence and the interaction between your Honour's – my learned friend's submissions on the injunction. Now, in our submission, the evidence shows that were Mr Baxter to swath on paddocks that are adjacent to the road that separates them, your Honour can be comfortably satisfied that there's a risk that he will, and he has certainly not indicated that he won't, swath those paddocks at some point of his rotation.

And when that happens, there is an imminent risk that there will be an unreasonable interference, and a nuisance on the Marsh property, which would justify, at this point, an injunction in joining the defendant from swathing on the paddocks that are adjacent to the road of South Glenorchy Road. Now, that's narrower than three weeks ago, when it was, when I opened in the afternoon. And – – –

KENNETH MARTIN J: Well, it's narrower – let me just get the dimensions of narrowing.

NIALL, MR: It doesn't deal with planting.

KENNETH MARTIN J: It doesn't deal with growing or planting.

NIALL, MR: Growing. It reflects the current position in relation to what we say the evidence demonstrates that swathing is an imminent – swathing of genetically modified canola on the border of paddocks that border the road. They're identifiable clearly by Range, Mailbox, Silo, Road and Two Dams, presents an imminent threat that there will

be a continuation or a reprise of the nuisance that occurred as a result.

KENNETH MARTIN J: Well, I mean, just looking at the basis for that inference, I know, necessarily, from published judgment, that there was an undertaking in 2013 not to swath. That applied to 2013, and no more. Hence, it's expired. Hence, in the absence of any undertaking about swathing, I should assume that if GM canola is grown, that no undertakings are offered.

NIALL, MR: That's so.

KENNETH MARTIN J: Ergo there's a potential threat in the future of swathing.

NIALL, MR: That's so, your Honour. And your Honour knows the vectors of seed movement as a result of swathing. Your Honour knows that, in our respectful submission, that swathing increases the risk to the point where there is an imminent threat in the circumstances where swathing on those paddocks were to occur. And in our submission, the defendant - the plaintiff should not have to wait until the nuisance eventuates to recover damages given the nature of the nuisance.

The imminent threat, and what we say your Honour can be comfortably satisfied, is the probability that it would result in a reprise of the nuisance.

KENNETH MARTIN J: The narrowing that you refer to, of the framing of the permanent perpetual injunction, as originally framed, was limited to the linear dimension of a kilometre, I think, from the boundary.

NIALL, MR: It was, your Honour.

KENNETH MARTIN J: But no longer, as I understand you've just said.

NIALL, MR: No. That's right. We - - -

KENNETH MARTIN J: So that's not really a narrowing. It's an expansion.

NIALL, MR: Well, not an expansion, your Honour. It identifies the paddocks by reference to their contiguous nature of the road.

KENNETH MARTIN J: Well, by reference to exhibit 6, it's Range, Mailbox, Silo and Road, but possibly - well, how do

you treat Two Dams, which is above paddock 13? I suppose a possible exposure on a wind - - -

NIALL, MR: It does, your Honour.

KENNETH MARTIN J: - - - from the north.

NIALL, MR: Yes, your Honour. And that, in our submission, provides a reasonable basis upon which the threatened nuisance can be both identified and enjoined. Your Honour, unless there are any other questions from your Honour, they're the submissions, in addition to our written submissions, for the plaintiff.

KENNETH MARTIN J: Thank you, Mr Niall.

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: The only other thing was the response to the chronology, that's all. I wanted to actually make that an exhibit at some point.

NIALL, MR: I understand this is - and I can stand to be corrected - that this is agreed. So I hand up two copies to your Honour.

KENNETH MARTIN J: Just have a little look at that. All right. Thank you.

NIALL, MR: And also, your Honour, a final form of the index to the trial bundle, as agreed.

KENNETH MARTIN J: Excellent. Thank you very much.

VERNON, MS: Your Honour, if I - - -

KENNETH MARTIN J: Yes, Ms Vernon?

VERNON, MS: Sorry, if I might say something about the trial bundle - not now - I'm sorry to have interrupted my friend, but I would like to say something about the index.

KENNETH MARTIN J: You want to say something about the trial bundle?

VERNON, MS: The index to the trial bundle.

KENNETH MARTIN J: All right. We will come back to that in a moment, if you just don't mind. The chronology of

events, as consolidated, I will make exhibit 40, if the parties are happy with that?

NIALL, MR: If your Honour pleases.

KENNETH MARTIN J: 41, I'm corrected.

NIALL, MR: Thank you, your Honour.

EXHIBIT 41 Plaintiffs
Chronology of events

KENNETH MARTIN J: All right. That's helpful, thank you. And, no, there's nothing further, thank you, Mr Niall.

NIALL, MR: Your Honour asked, and we are still attending to, the return of Mr Ayachit's signed amended statement, and that, I understand, is in hand, but it's not - I'm not in a position to give that to your Honour now.

KENNETH MARTIN J: All right. No, that's fine. Thank you very much. Yes, Ms Vernon?

VERNON, MS: I'm sorry, your Honour. It's a small point. The index that has been handed to your Honour of the trial bundle does not note the documents that were tendered on a limited basis.

KENNETH MARTIN J: I see. It doesn't make that - - -

VERNON, MS: It doesn't make it plain in the index.

KENNETH MARTIN J: Discrimination in terms of their status.

VERNON, MS: So I just wanted to - - -

KENNETH MARTIN J: Do you want to let me have a list of what they are?

VERNON, MS: Well, it's a very short list, and it's - the reference is at page 724 of the transcript, but they're documents numbered 27 to 31, and 40 to 45.

KENNETH MARTIN J: All right. I've noted that. Thank you, Ms Vernon.

VERNON, MS: Thank you, your Honour.

KENNETH MARTIN J: I will make the revised index to the trial bundle, as I've dated, with the qualification noted

by Ms Vernon as regards documents 27 to 31 and 40 to 45, as the finalised version of exhibit 3. All right. Nothing further? All right. Well, that concludes the submissions and the trial. What I propose to do, given the magnitude of the material before me, and the complexity of the issues, is to reserve my decision, to be published at a future time.

I want to conclude on the basis of thanking counsel and their instructing solicitors for the very considerable assistance that I've received throughout the course of the case, both in writing and orally. And it's now my responsibility to do justice to that very fine assistance which I have received. So I will reserve my decision. And the court will adjourn.

AT 2.46 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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