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Dear Mr Swinbourn

Submission: Inquiry into mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material (‘Inquiry’)

Thank you for your letter dated 21 December 2017 and the opportunity to make a submission to this Inquiry. We write to provide that submission.

1. TERMS OF REFERENCE AND SCOPE OF SUBMISSION

We note that the Terms of Reference – or the term of reference – is to:

Inquire into and report on mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material, including approaches taken in Western Australia and by other jurisdictions and any other relevant matter.

The scope of our submission is limited to matters within our expertise. We consider judicial mechanisms for compensation. In particular, we consider whether the law of torts can provide a mechanism for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified (‘GM’) material.

2. SUMMARY

In the absence of legislative change, farmers who have suffered economic loss caused by contamination by GM material will not be able to obtain compensation by bringing civil litigation. The law of torts is unlikely to provide affected farmers with a remedy.

If the Parliament of Western Australia desired to provide a means for affected farmers to obtain compensation in the courts, it could consider introducing: (1) a statutory concept of ‘genetic damage’ into the Civil Liability Act 2002 (WA); or (2) a statutory tort, tailored to provide compensation for affected farmers. Alternatively, it might consider the establishment of some kind of no-fault compensation scheme, analogous to that funded by car registrations in order to compensate victims of motor vehicle accidents. These are matters which deserve further
detailed consideration by legal researchers; ideally, they would be the subject of an inquiry by the Law Reform Commission of Western Australia.

Whether it is desirable for GM-affected farmers to obtain compensation is a matter of debate. That debate ought to be informed by economic and scientific analyses which are beyond the scope of our expertise. Those analyses might consider whether other changes could provide a better response to this issue. For example, the prospect of GM ‘contamination’ might be addressed with adequate buffer zones between crops; or by changing farming practices (eg, in relation to swathing); or by placing further restrictions on GM farming. Once again, those responses ought to be grounded in an empirical approach which is beyond our expertise.

3. ANALYSIS

In the sections that follow, we explain why farmers who have suffered economic loss caused by contamination by GM material will not be able to obtain compensation by bringing civil litigation. We consider: (1) compensation through civil litigation; (2) compensation for ‘economic loss’; (3) common law bases for compensation for economic loss caused by GM material; and (4) problems for future claimants in Australian courts.

3.1. Compensation through civil litigation

A farmer who suffers economic loss as the result of contamination by GM material may be able to sue the person responsible to recover compensation. That responsible person could be the farmer responsible for the GM contamination; a company through which the responsible farmer conducts his or her business; or, arguably, the company which provides the licence to farm GM crops to those responsible farmers.

As there is unlikely to be any contract between the parties or their respective business entities, the causes of action most relevant are those arising in tort. We consider the relevant principles of the law of torts below.

These principles are applied by Australian courts, including the Supreme Court of Western Australia, in the context of adversarial litigation. To gain the benefit of this body of law, an individual must commence litigation against the person who ‘wronged’ them. They must comply with the court’s procedure and pay various fees. In practice, only persons of means who can afford to instruct a lawyer will gain the benefit of the principles of law we consider

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1 Questions to consider include the following: What are the ecological risks of the proliferation of GM farming? How do the economic benefits of the increased yields provided by GM farming compare to the negative economic impact caused to other industries, such as the organic farming industry? With GM cotton and GM canola already in the environment, what is the best way forward?

2 As noted by Ludlow: ‘Neither the national regulatory scheme created by the Gene Technology Act 2000 (Cth) … nor the State moratorium legislation gives immunity to those who comply with the legislation but nevertheless cause harm to others’: Karinne Ludlow, ‘Genetically Modified Organisms and Private Nuisance Liability’ (2005) 113 Tort Law Review 92, 94.

3 Eg, Monsanto Australia Ltd.

4 The selection of the appropriate defendant is an important strategic question for an affected farmer. The companies which promulgate GM farming – like Monsanto Australia Ltd – are attractive targets for their ‘deep pockets’. However, it may be difficult to recover from these companies under existing principles.

5 See Rules of the Supreme Court 1971 (WA).

6 For example, for a natural person seeking to litigate in the Supreme Court of Western Australia, it costs $1,226 to commence the litigation; see Supreme Court of Western Australia, General Division Fees (2018) <http://www.supremecourt.wa.gov.au/G/general_division_fees.aspx?uid=1953-2760-2885-1682>.
below;\textsuperscript{7} this is a well-known and substantive barrier to access to justice in Australia.\textsuperscript{8} Although some farmers will have the means to litigate, many will not. The only Australian case which considered a claim in tort in respect of losses caused by GM farming – \textit{Marsh v Baxter} – was brought at significant financial risk to the plaintiffs. That risk did not pay off. After the High Court rejected their appeal in 2016, the plaintiffs were required to pay the defendant’s significant costs of around $800,000: this was about ten times the sum the plaintiffs claimed in damages.\textsuperscript{9}

\textbf{3.2. Compensation for ‘economic loss’}

In a sense, all loss is economic.\textsuperscript{10} If a person suffers an injury, or damage to their property, or loss of wages, or a downturn in their business, the event has an economic value. But the law takes different approaches to different kinds of losses. Some losses are compensable; they provide the basis for a court order that person B must pay person A money. Other losses are not compensable. Where the loss does not involve any physical harm, recovery is more difficult. The problem for farmers affected by GM ‘contamination’ is that their situation falls into a difficult category for two reasons. Firstly, there is an argument that GM ‘contamination’ does not constitute damage at all. Secondly, even when GM contamination has resulted in damage, the damage may not be ‘physical’. This is explored further below.

The Terms of Reference for this inquiry refer to ‘contamination’ by GM material. But what does ‘contamination’ mean? In the \textit{Marsh v Baxter} litigation (considered further below), Kenneth Martin J considered a great deal of expert evidence concerning the impact of the movement of GM material from a GM farming operation (Baxter) into the property of the GM farmer’s organic-farming neighbours (the Marshes). His Honour concluded that there was no ‘physical damage’ to persons, animals, land, or chattels.\textsuperscript{11} It was notable that none of the Marshes’ crops or sheep could acquire any genetic traits from Baxter’s GM canola; perhaps if the Marshes were farming organic canola, the case would have been decided differently.\textsuperscript{12}

Further, it is not clear that a change in genetic traits could constitute ‘damage’ for the purpose of a claim in tort. The concept of damage generally requires there to be ‘detriment’ to the plaintiff.\textsuperscript{13} Arguably, a change in genetic traits is not detrimental, and may even result in benefit: for example, cross-fertilisation between traditional and GM canola could deliver Roundup-resistance to the traditional canola crop with a weed problem. Monsanto Canada Inc appealed to this idea in a successful patent infringement case brought against a Saskatchewan

\footnotesize{\textsuperscript{7} Note that it is unlikely that Legal Aid WA would provide assistance to farmers affected by GM materials. It is likely that farmers’ claims would be considered ‘commercial disputes’; see Legal Aid WA, \textit{Civil Litigation Assistance Scheme – Info Sheet} (2018) <https://www.legalaid.wa.gov.au/LegalAidServices/specialist/Documents/CLAS_Info.pdf>.}


\footnotesize{\textsuperscript{9} See \textit{Marsh v Baxter} [2016] HCATrans 22 (12 February 2016); \textit{Marsh v Baxter [No 2]} [2016] WASCA 51 (22 March 2016).}

\footnotesize{\textsuperscript{10} See R S Chambers, ‘Economic Loss’ in PD Finn, \textit{Essays on Torts} (Lawbook, 1989).}

\footnotesize{\textsuperscript{11} \textit{Marsh v Baxter} (2014) 46 WAR 377, 475 [711].}

\footnotesize{\textsuperscript{12} Although, as we understand it, because canola is not a competitive plant, it would be difficult to farm organically; see \textit{Marsh v Baxter} (2014) 46 WAR 377, 399 [147].}

\footnotesize{\textsuperscript{13} That is because the concept of damage generally requires there to be ‘detriment’: see, eg, \textit{Tabet v Gett} (2010) 240 CLR 537, 564 [66] (Hayne & Bell JJ) (referring to the concept of ‘damage’ for the purpose of a negligence action).}
farmer. On the other hand, a change in physical structure coupled with a reduction in value can be properly conceptualised as ‘damage’, albeit not necessarily ‘physical damage’.

Where no physical damage has occurred as a result of GM contamination, any resulting economic loss suffered by farmers is described as ‘pure economic loss’. For example, in Marsh v Baxter, the compensation claimed corresponded to the loss in value of produce after a farming operation lost its certification as ‘organic’. This was loss of an economic nature which was not consequential upon physical damage – it was pure economic loss.

‘Pure economic loss’ is known as a difficult area of the law. Traditionally, in the absence of a contractual relationship, common law systems of law do not allow a person to recover damages (ie, monetary compensation) for pure economic loss. Indeed, the infliction of pure economic loss is seen as a necessary and even desirable part of our economic system: ‘[c]ompetition involves traders being entitled to damage their rivals’ interest by promoting their own…’ Generally, the common law does not require a businessperson to put a competitor’s interests ahead of their own.

This ‘exclusionary rule’, which denies compensation for pure economic loss, is not absolute. In certain kinds of cases, damages are recoverable for economic loss which is not consequential upon injury to the plaintiff’s person or property. Principles of the law of torts may provide the basis for compensation for pure economic loss in the absence of a contract between the parties.

3.3. Common law bases for compensation for economic loss caused by GM material

The law of torts is about wrongs. It is part of private law; as opposed to criminal wrongs, it is invoked in civil litigation. The body of law can be understood with reference to its purposes. One purpose of the law of torts is to ‘adjust […] losses and afford compensation for injuries sustained by one person as a result of the conduct of another’. Tort duties are “‘primarily fixed by law”, in contrast to contractual obligations which can arise only from voluntary agreement”.

There are many different species of tort. The torts most relevant to the position of farmers affected by GM contamination are negligence and nuisance.

3.3.1. Negligence

The tort of negligence is the ‘main legal vehicle’ for remedying personal injury and financial harm suffered as result of the fault of another. However, negligence is not an intentional tort,

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16 The term is usually invoked in relation to the law of negligence.
17 Ultramares Corp v Touche 255 NY 170 (1931) (Cardozo CJ).
19 Sutherland Shire Council v Heyman (1985) 157 CLR 424.
20 See Caltex Oil (Australia) Pty Ltd v The Dredge ‘Willemstad’ (1976)136 CLR 529.
22 Ibid 4.
in the sense that it is not a requirement that the defendant intended to cause harm to the plaintiff. Rather, the ‘fault’ element of negligence consists of the defendant’s failure to exercise reasonable care. To claim damages for negligence, a plaintiff must demonstrate the following in relation to a defendant: (1) the existence of a duty of care, (2) breach of that duty, and (3) causation of damage. Compensation will not be available if the damage is ‘too remote’, or if the defendant can make out a defence. This area of law was the subject of detailed consideration in the early 2000s, which produced the ‘Ipp Report’. The Civil Liability Act 2002 (WA), which resulted from recommendations made in the Ipp Report, modified the common law of negligence.

3.3.2. Nuisance

Nuisance guards against an unreasonable interference with the use and enjoyment of another person’s land.24 It is primarily concerned ‘with the reciprocal rights and duties of private individuals, usually neighbours, where there is a conflict over competing uses of land.’25 Farmers affected by GM farming are most likely to consider an action in private nuisance.26

As with negligence, a nuisance action can compensate for property damage and personal injury, as well as economic loss,27 and it is not necessary to show that the defendant intended to cause harm. Unlike negligence, the central concern of a nuisance action is not with whether the defendant failed to take reasonable care, but with balancing the respective rights of the parties.28 To claim damages for nuisance, a plaintiff must demonstrate title to sue: exclusive possession of the land as tenant or owner.29

3.3.3. Consideration in Marsh v Baxter

In Marsh v Baxter, organic farmers affected by GM contamination sued their GM-farming neighbour in negligence and nuisance. They claimed $85,000 in damages for the loss arising from the decertification of their organic farming business,30 and an injunction restraining their neighbour from swathing GM canola.31 The negligence claim was characterised as one for pure economic loss.

In 2014, the Marshes lost at first instance in the Supreme Court of Western Australia.32 They appealed to the Court of Appeal of the Supreme Court of Western Australia. In 2015, Justices of Appeal Newnes and Murray dismissed the appeal by majority, while President McLure dissented.33 The Marshes then pursued a further appeal; they sought special leave of the High

24 Hargrave v Goldman (1963) 110 CLR 40, 49 (Windeyer J); see Kit Barker, Peter Cane, Mark Lunney and Francis Trindade, The Law of Torts in Australia (Oxford University Press, 5th ed, 2011) 185. NB, there are two torts of nuisance: private nuisance and public nuisance. Public nuisance involves an interference with a public or common right. The tort of nuisance considered in our submission is known as private nuisance.
26 On this point see Ludlow, above n 2, 93 (FN 3).
27 Marsh v Baxter (2015) 49 WAR 1, 43 [244] (McLure P).
28 However, the question of whether or not the defendant’s use of land was reasonable is a relevant consideration in striking the balance between the respective rights of the parties.
29 Oldham v Lawson (No 1) [1976] VR 654.
30 Ibid [39], [296].
31 Ibid [749].
Court of Australia. In 2016, special leave was denied. Thus, although the Court of Appeal decision was a 2-1 majority rather than a unanimous decision, it will stand as a significant impediment to future plaintiffs seeking compensation for economic loss caused by GM contamination. We flesh out that impediment in the following section.

3.4. Problems for future claimants in Australian courts

This section summarises the problems facing farmers affected by GM contamination wishing to pursue an action for negligence or nuisance in Australian courts. A more detailed analysis of the reasoning behind these conclusions is set out in the Appendix to these submissions.

3.4.1. Problems for a negligence claim

Farmers claiming damages for negligence in respect of economic loss caused by GM contamination will face several barriers. In total, they mean that these farmers (identified below as ‘plaintiff’) would have very low prospects of success under existing law.

First, the plaintiff must prove actual ‘damage’. As discussed above, even where there has been a transfer of genetic material from a GM plant to the plaintiff’s property, it is unclear whether that change would constitute damage. However, where GM contamination results in some financial loss, that loss is properly characterised as ‘damage’ for the purpose of an action in negligence. In the absence of physical damage, a plaintiff must frame a negligence claim as one for pure economic loss.

Second, where the loss is pure economic loss, the plaintiff must overcome the exclusionary rule which prevents recovery of that loss in negligence. It is unlikely that a plaintiff would be able to do this, which means that the court would not impose a duty of care. Courts will be reluctant to interfere with the autonomy of GM farmers to pursue their business interests. Further, the fact that organic farmers (the farmers most likely to suffer economic loss from GM farming contamination) are ‘certified organic’ pursuant to private contractual relationships, and are able to protect themselves against the occurrence or consequences of GM contamination, means that courts would not consider them sufficiently vulnerable to justify the imposition of a duty of care.

Third, even if the plaintiff could establish the existence of a duty of care, it is unlikely that the plaintiff could establish a breach of that duty. The plaintiff must establish that the risk of harm was one of which the defendant knew or ought to have known, and that the risk was not insignificant. The court then considers whether a reasonable person in the defendant’s position would have taken precautions against that risk of harm. Following the Court of Appeal in Marsh v Baxter, and consistently within the principle of autonomy, a GM farmer’s failure to

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35 Tabet v Gett (2010) 240 CLR 537, 564 [66] (Hayne & Bell JJ). This is discussed in more detail above (3.2 Compensation for economic loss).
36 See Mark Lunney and Robert Burrell, ‘A farmer’s choice? Legal liability of farmers growing crops’ (Research Paper prepared for the Department of Agriculture, Fisheries and Forests by the Australian, Centre for Intellectual Property in Agriculture, 2006) 3 [2.8] suggesting that a change in physical structure coupled with a reduction in value is properly conceptualised as ‘damage’.
37 In Marsh v Baxter, the mere presence of GM material on the Marshes’ land—including the germination of GM plants—did not amount to physical damage.
40 Civil Liability Act 2002 (WA) s 5B(1).
take precautions to guard against the movement of GM material will not necessarily be considered unreasonable.

3.4.2. Problems for a nuisance claim

It has been suggested that nuisance may be a more viable cause of action for farmers affected by GM contamination. To establish the tort of nuisance, a plaintiff must demonstrate that the relevant interference with their use and enjoyment of land was ‘substantial and unreasonable’. Determining whether an interference is ‘unreasonable’ involves striking a balance between ‘the right of the occupier to do what he likes with his own land and the right of his neighbour not to be interfered with’.42

Although physical damage is not necessary for nuisance, the fact that GM contamination would not necessarily result in physical damage makes a nuisance claim difficult for affected farmers. Generally, farmers who have suffered physical harm would be more likely to succeed in establishing that the interference causing the harm was unreasonable.44

A decision as to whether an interference is unreasonable is to be judged objectively, taking into account a number of factors, which were identified by McLure P in Southern Properties:

the nature and extent of the harm or interference, the social or public interest value in the defendant’s activity; the hypersensitivity (if any) of the user or use of the claimant’s land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference...46

The mere growing of GM crops in Western Australia will almost certainly not be considered an unreasonable interference for the purpose of an action in nuisance, provided it is done under licence from an approved GM supplier.47

Considerations of sensitivity are likely to present significant hurdles for organic farmers affected by GM contamination. As noted by the majority of the Court of Appeal, ‘[a]n interference which “alone causes harm to something of an abnormal sensitiveness does not of itself constitute a nuisance”’.48 Following Marsh v Baxter, organic farmers in particular are amenable to characterisation as abnormally sensitive: their loss of organic status will be

42 Sedleigh-Denfield v O’Callaghan [1940] 3 All ER 349, 364 (Lord Wright).
44 This is because it will be presumed that material damage constitutes a substantial and unreasonable interference unless the defendant can show that their use of land was reasonable: see Ludlow, above n 2, 102.
46 Southern Properties (2012) 42 WAR 287, 310 [118] (McLure P). McLure P appears to suggest that these factors should be taken into account in determining whether any interference is unreasonable for the purpose of a nuisance action. However, this is not entirely correct; it is well-established (as noted above) that different considerations will apply where the interference results in physical damage, so that in the latter case, considerations of locality and public interest will not apply: St Helen’s; Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145, 150, 151 (Veale J).
47 Statutory authorisation is a defence to an action in negligence so where statute has authorised the act that is said to constitute the nuisance there can be no liability for the act in the absence of negligence: Southern Properties (2012) 42 WAR 287, 311 [121] (McLure P).
pursuant to a contract with a certifying body. Those bodies may have very little tolerance for the presence of any GM material in an organic farming operation. 49

4. CONCLUSION

A farmer who suffers economic loss as a result of contamination by GM material will not be assisted by common law principles. If an affected farmer brings a claim in tort in an Australian court, it is unlikely that the farmer would obtain compensation.

Further research is required in respect of alternative mechanisms for compensation. We recommend that the Law Reform Commission of Western Australia considers statutory reforms, including amendments to the Civil Liability Act 2002 (WA), which could provide affected farmers with compensation.

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February 2018


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APPENDIX

Submission to the Inquiry into mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material

Anna Bunn and Michael Douglas

This Appendix provides more detailed reasons to support the Analysis in Section 3.4 (Problems for future claimants in Australian courts) of our submissions.

1. PROBLEMS FOR A NEGLIGENCE CLAIM

A plaintiff wishing to sue in negligence for GM contamination will face several hurdles. First, plaintiffs must prove actual loss which, where established, is most likely to be treated as pure economic loss. Second, a plaintiff who has suffered pure economic loss must overcome the exclusionary rule which precludes a duty of care unless the case is exceptional. Finally, even if a plaintiff can establish the existence of a duty of care, it is unlikely that they will be able to establish a breach of that duty. These problems are discussed below.

1.1. Damage

A negligence action does not accrue until a person has suffered relevant damage. Damage means that the plaintiff has suffered some detriment.1 As discussed in our submissions (section 3.2 Compensation for economic loss), GM ‘contamination’ will not necessarily constitute damage. Further, the mere prospect of damage is not sufficient.2 Where GM contamination has only created a risk of future detriment (for example, the risk that GM seeds may germinate on a farmer’s property and cross-fertilise with other crops, thereby causing loss), an action in negligence will not be open to that farmer. On the other hand, there may be actual damage where a farmer has incurred some expenditure or sustained a loss as a result of GM contamination. Whether that damage is recoverable is considered below (under ‘Duty of Care’).

Assuming a farmer has suffered actual loss, it is necessary to determine whether the loss involves physical harm. If GM contamination does not cause physical damage, any losses associated with the contamination will be treated as pure economic loss. For example, in Marsh v Baxter, the loss of premium prices that could have been charged if the produce were certified organic constituted pure economic loss.3

1.2. Duty of care

Establishing a duty of care will be difficult in cases where GM material has not caused any physical damage: the general rule (known as the ‘exclusionary rule’) is that there is no duty to avoid causing pure economic loss to others.4

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2 Kenny & Good Pty Ltd v MGICA (1999) 199 CLR 413, 424 [14] (Gaudron J), citing Wardley Australia Ltd v Western Australia (1992) 175 CLR 514.
There are exceptions to the exclusionary rule. A plaintiff may still be able to establish a duty of care if the case is treated as ‘exceptional’. To be considered exceptional, the facts must show one or more special or ‘salient’ features that support the imposition of a duty (and the absence of features that militate against one). In addition, plaintiffs must establish that the kind of harm that occurred was a consequence of which the defendant had actual knowledge, or was a reasonably foreseeable consequence of the defendant’s act or omission.

In each case, the question of what the defendant knew or ought to have known is a question of fact. In *Marsh v Baxter*, the hurdle of ‘foreseeability’ was one which the plaintiffs were unable to overcome. However, given that the *Marsh v Baxter* litigation has been widely reported in both mainstream media and specialist agricultural media, it may be more likely that a court would find that GM farmers are on notice (ie, it is reasonably foreseeable) that organic farmers can suffer financial loss due to the mere presence of GM material on their land.

In any event, foreseeability of harm in itself is not sufficient to establish a duty of care (at least in cases involving pure economic loss). Thus, in *Marsh v Baxter*, the majority concluded that ‘physical propinquity [of the respective farms] coupled with reasonable foreseeability of the risk of loss, would still, in themselves, be insufficient in the circumstances to generate a duty of care for the benefit of the appellants’. That case failed to present salient features supporting the finding of a duty. Courts will consider various features of the case, the weight attributed to each relevant feature being dependent on the nature of the case. Two salient features of claims in tort for pure economic loss regarding GM ‘contamination’ are likely to present hurdles for a non-GM farmer: ‘autonomy’ and ‘vulnerability’.

### 1.2.1. Autonomy

The exclusionary rule seeks to prevent the imposition of unreasonable burdens upon business and private activity. Specifically, there is an assumption that individuals should be free to ‘pursue their own legitimate social and business interests without the need to be concerned with other people’s interests.’ This is also known as the principle of ‘autonomy’.

Although the principle of autonomy is not absolute, ‘the common law has generally sought to interfere with the autonomy of individuals only to the extent necessary for the maintenance of society.’ Therefore, ‘[a]s long as a person is legitimately protecting or pursuing his or her social or business interests, the common law will not require that person to be concerned with

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6 The question being whether a reasonable person in the defendant’s position would have foreseen the kind of harm that occurred.
7 Essentially, this was due to the majority’s finding that a reasonable person in the defendant’s position could not have been expected to foresee that the mere presence of GM material on the plaintiffs’ land could result in the loss of the plaintiff’s organic certification. This finding was due, in part, to debate over the proper construction of the contract between the plaintiffs and the organic certifying body, NASAA, as well as the wording of the notice that had been provided to the defendants by the plaintiffs prior to the planting of GM crops: *Marsh v Baxter* (2015) 49 WAR 1, 106–8 [659]–[673] (Newnes & Murphy JJA).
10 Ibid 51 [310]–[311] (McLure P).
11 Ibid, references omitted.
the effect of his or her conduct on the economic interest of other persons. And that is so even when that person knows that his or her actions will cause loss to a specific individual’. The question, then, is what constitutes the legitimate protection or pursuit of a business or social interest?

In *Marsh v Baxter*, the plaintiff’s alleged that the GM farmer’s method of harvesting (swathing) caused GM material to blow onto their land and ‘contaminate’ it. However, the majority in the Court of Appeal found that the method of harvesting was chosen in legitimate protection or pursuit of the GM farmer’s interests; a factor relevant to the finding that the GM farmer owed no duty of care. In reaching this conclusion, the majority took into account that swathing was not illegal, nor in breach of Monsanto licence conditions, nor did it give rise to a cause of action in nuisance.

Following this reasoning, if the act or omission causing contamination by GM material is neither unlawful, nor contrary to licence conditions, nor a breach of a contractual or other duty under which the defendant operates, it is very possible that the principle of autonomy will ‘trump’ the plaintiff’s interests. In that case, the defendant will not owe a duty of care to the plaintiff. Conversely, if the defendant is acting unlawfully, in breach of licence conditions or of a contractual or other duty, the autonomy principle may not stand in the way of a finding of duty – although this is not a given.

In Western Australia, the supply of GM cotton and canola will not be unlawful, provided it is in accordance with the licenses issued under the Gene Technology Act 2000 (Cth) and any exemption order issued pursuant to *Genetically Modified Crop Free Areas Act 2003* (WA). The lawful supply of GM cotton and canola will therefore be considered to be in legitimate pursuit of the supplier’s business interests.

Outside of experimental plantings of GM crops, growers of GM canola or cotton in Western Australia must enter into an agreement with approved GM suppliers. A GM grower who complies with the terms of their licence agreement can be considered to be acting in legitimate pursuit of their business interests for the purpose of the autonomy principle. However, it is by no means certain that growers acting contrary to the terms of a licence agreement will be considered to be acting illegitimately.

Moreover, GM growers are not always subject to particularly stringent licence conditions, meaning it could be relatively easy for them to demonstrate they are acting legitimately. For example, in the case of Roundup Ready® (RR) canola, the crop grown by the defendant in

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15 Ibid [115].
16 *Marsh v Baxter* (2015) 49 WAR 1, 11 [30] (McLure P). At trial the plaintiffs had pleaded that it was also unreasonable for the defendant to have grown GM canola in such close proximity to their farm: *Marsh v Baxter* (2015) 49 WAR 1, 11 [30] (McLure P).
17 Ibid 113 [694]–[695] (Newnes & Murphy JJA).
18 Ibid [695].
19 Ibid 128-30 [775]-[789] (Newnes & Murphy JJA).
20 Even if an act or omission is unlawful it may not automatically be considered ‘illegitimate’: *Perre* (1999) 198 CLR 180, 224–5 [116] (McHugh J).
21 That is, those who hold a licence from the Gene Technology Regulator authorising ‘Dealings Involving International Release (DIR)’ into the environment.
22 In *Perre* (1999) 198 CLR 180, 224–5 [116], McHugh J observed that even an unlawful act or omission might not be considered ‘illegitimate’ and that ‘[p]erhaps no more than be said in the abstract than that the line of legitimacy will be passed only when the conduct is such that the community cannot tolerate it.’ Accordingly, an act or omission that contravenes a licence condition might also not be considered illegitimate.
Marsh v Baxter, the relevant supplier is Monsanto Australia Limited (Monsanto). Monsanto, in turn, enters into licence agreements with farmers wishing to grow GM canola in Western Australia. Growers of RR canola in Western Australia must comply with the terms of the Monsanto licence and the Crop Management Plan (CMP) that is incorporated into that licence. The objective of the current CMP is to ‘detail strategies that can be implemented on-farm to manage risks to the integrity of grain supply-chains and the sustainability of agricultural production.’ The CMP sets out several recommendations designed to manage risks such as cross-pollination and the occurrence of GM canola ‘volunteers’. However, the CMP makes it clear that it is the responsibility of the person growing crops to satisfy a particular market (eg, the organic market) to implement practices that satisfy marketing or certification standards.

In fact, the CMP requires little more of growers of RR canola in Western Australia than that they communicate their cropping intentions vis-à-vis GM canola to their neighbours, and that they monitor and manage the appearance of volunteer RR canola in systems and areas over which they have control.

In summary, overcoming the autonomy principle for the purpose of establishing a duty of care will be a challenge for farmers who suffer pure economic loss as a consequence of GM ‘contamination’. Even if a farmer overcomes this obstacle (which may be possible where a GM grower is acting unlawfully or contrary to contractual or other duties under which they operate), that farmer will still have to establish that they were vulnerable to the consequences of the acts or omissions of the person responsible for GM ‘contamination’.

1.2.2. Vulnerability

In situations involving pure economic loss, vulnerability of the plaintiff to harm from the defendant’s conduct is ‘ordinarily a prerequisite to imposing a duty of care’. In this context, ‘vulnerability’ means that the plaintiff was unable to protect themselves from the harm caused by the defendant’s conduct. In considering whether a person is vulnerable, courts will generally ignore the possibility that they could have taken out insurance to protect themselves against the harm. The plaintiff’s ability to self-protect must be considered at the time of the act or omission in question, or before the damage occurs (any steps that a plaintiff could have taken subsequently to mitigate that damage being relevant at the stage of calculating how much compensation is due to the plaintiff).

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23 And other States where this is permitted
25 Ibid.
26 Ibid 3, stating that: ‘As stewards of technology, growers are expected to consider these factors and talk with their neighbours about their cropping intentions’. It is not clear whether this would include communication of harvesting methods.
27 Ibid 4 (emphasis added).
29 Ibid.
31 In Marsh v Baxter, McLure P expressed the view that the ‘self-protection principle in connection with the existence of a duty of care must be satisfied before the accrual of the cause of action; that is, before damage is suffered’: Marsh v Baxter (2015) 49 WAR 1, 51 [312]. However, there is also an argument that the assessment of vulnerability should occur at or immediately before the time of the act/omission: Anna Bunn and Michael Douglas, ‘Breaking New Ground? Nuisance, Negligence and Pure Economic Loss in Marsh v Baxter’ (2014) 22 Torts Law Journal 160, 168.
Farmers affected by GM material might not be considered vulnerable if available evidence demonstrates that means were available to them to prevent or manage an incursion of GM material. However, as occurred in Marsh v Baxter, a finding of no vulnerability might even be made in the absence of evidence that effective preventative measures were available to affected farmers, or that it would be reasonable to expect farmers to have availed themselves of those measures.  

1.2.3. Summary of position on establishing a duty of care for pure economic loss

Given the hurdles presented by the principle of autonomy and the requirements of vulnerability, a farmer suffering pure economic loss as a result of GM contamination will likely find it difficult to establish a duty of care. Farmers whose financial loss is consequent upon contamination causing physical harm may have an easier job establishing a duty of care. However, they too may find it difficult to establish that the duty of care owed to them was breached. This is discussed in the next section.

1.3. Breach of duty

To establish a breach of duty, the plaintiff firstly needs to establish that the risk of harm was one of which the defendant knew or ought to have known, and that the risk was not insignificant. Once established, the inquiry moves on to consider whether a reasonable person in the defendant’s position would have taken precautions against that risk of harm. The second limb poses problems for non-GM farmer plaintiffs.

Essentially, the second limb asks whether the defendant acted reasonably. If the person in control of GM material did act reasonably, then an action in negligence will necessarily fail: negligence is a fault based tort. While there is always some risk of GM contamination, where this occurs despite all reasonable efforts, there can be no breach of duty. The mere growing of GM canola in accordance with laws and licence conditions will not constitute an unreasonable act or omission.

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32 In Marsh v Baxter, the majority in the Court of Appeal suggested that the appellant organic farmers could have undertaken preventative measures ‘such as the planting of trees or the erection of physical barriers’ and that, as they had failed to do so, they might not be considered vulnerable: Marsh v Baxter (2015) 49 WAR 1, 110-11 [684] (Newnes & Murphy JJA). However, no evidence was led as to what preventative measures were actually open to the appellants in the circumstances; how effective they would have been; nor how difficult or costly it would have been to implement those measures. In fact, evidence from the appellants’ expert witness noted that: ‘I am not aware of any peer-review studies on the use or effectiveness of physical barriers in fields to prevent the movement of GM material via seed and no barrier (as with no individual containment method) may be sufficient to absolutely prevent the movement of GM canola from [the respondent’s farm] to [the appellants’ farm]’: Marsh v Baxter (2015) 49 WAR 1, 97 [615] (Newnes & Murphy JJA, citing the report of Professor Van Acker). The majority in the Court of Appeal also suggested that the organic farmers may have been able to visually inspect their land for any GM plant material, and remove such material, during times when the risk of incursion was high (eg, when there is a risk of windy conditions during the period when cut GM canola swathes are left stacked in paddocks). However, not clear that the removal of the GM material was possible, nor that it would have been reasonable in the circumstances to have expected the organic farmers to have removed all such material. An unchallenged finding of fact made by the trial judge was that ‘[t]wo hundred and forty five GM canola swaths were blown onto Eagle Rest from Sevenoaks. Canola seeds from broken seed pods from those swaths were spilt over soil on [the organic farm]’: Marsh v Baxter (2015) 49 WAR 1, 12 [33] (McLure P).

33 Civil Liability Act 2002 (WA) s 5B(1).

34 In relation to GM canola, for example, the Monsanto CMP notes that ‘[p]ollen movement between crops will always occur. Although the risk is very low, the development of canola plants tolerant to more than one herbicide could occur through cross-pollination between crop varieties’. See Monsanto CMP, above n 24, 3.
In considering whether the person in control of GM material that has contaminated another’s farm acted reasonably, courts must consider how a reasonable person in the defendant’s position would have acted.\textsuperscript{35} Several factors must be taken into account in making this assessment.\textsuperscript{36} Where the harm in question has arisen due to GM contamination, a court must consider, among other things, whether precautions were available to the defendant that could have prevented or reduced the risk of contamination occurring and, if so, whether it would have been reasonable to expect the defendant to have taken those precautions.\textsuperscript{37}

A defendant who has not implemented strategies known to be effective in preventing GM contamination may be found to have acted unreasonably and, therefore, in breach of duty. Where particular strategies are set out in grower agreements or associated stewardship or crop management plans, it is more likely that a failure to implement them will be considered unreasonable. The Monsanto CMP, for example, refers to several strategies that can be implemented to reduce the likelihood of GM canola contaminating other non-GM canola or other close species.\textsuperscript{38}

However, there is no obligation on the part of GM farmers to take precautions unless a reasonable person in the defendant’s position would have done so. In \textit{Marsh v Baxter}, it was the GM-farmer’s method of harvesting by swathing that was argued to have been unreasonable and in breach of duty. The majority in the Court of Appeal took the view that it would be unreasonable to expect the GM farmer to forego the benefits of harvesting by this particular method, even if that method presented a foreseeable risk of harm to the appellant.\textsuperscript{39}

\textbf{1.4. Summary of problems for a negligence claim}

In summary, a negligence action is only open to a farmer who has sustained actual loss or damage, rather than the prospect of loss or damage. Where a farmer has suffered pure economic loss due to contamination by GM material, that farmer will find it difficult to establish a duty of care. Even if financial loss is a consequence of physical damage, liability in negligence will only be imposed on a person in respect of an act or omission which is, objectively, unreasonable. A failure to take those precautions available to prevent or mitigate GM contamination will not necessarily be considered unreasonable.

Although the likelihood of a successful negligence claim will ultimately depend on the particular facts at hand, the cost and uncertainty of litigation is a barrier to many farmers. Given that defendants in actions for GM contamination may be funded by stakeholders with a commercial interest in the litigation, such as Monsanto,\textsuperscript{40} these barriers may present an obstacle that affected farmers cannot overcome.\textsuperscript{41}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{35} \textit{Civil Liability Act 2002 (WA) s 5B(1)}.
\item \textsuperscript{36} Ibid \textit{s 5B(2)}.
\item \textsuperscript{37} This factor is known as the ‘burden of precautions’ and is one of several factors that are set out in \textit{Civil Liability Act 2002 (WA) s 5B(2)}.
\item \textsuperscript{38} Monsanto CMP, above n 24, 3.
\item \textsuperscript{39} \textit{Marsh v Baxter} (2015) 49 WAR 1, 120–22 [735]–[745] (Newnes & Murphy JJA). In fact, the Monsanto CMP for RR canola specifically lists swathing as one of the methods that GM canola farmers can use to reduce the population of weeds that may be resistant to glyphosate: Monsanto CMP, above n 24, 6.
\item \textsuperscript{40} \textit{Marsh v Baxter (No 2)} [2016] WASCA 51, [22]: noting that Monsanto had entered into a deed of indemnity with the GM farmer agreeing to indemnify him in full in respect of legal costs and any liability he may have to pay the organic farmers’ legal costs related to the trial (but not the appeal) incurred after a certain date.
\item \textsuperscript{41} Refer further to Part 3.1 of our submissions.
\end{itemize}
\end{footnotesize}
2. PROBLEMS FOR A NUISANCE CLAIM

An action in nuisance may be open to farmers who suffer physical harm or pure financial harm due to contamination by GM material.42 However, for those who cannot establish physical harm, establishing that the interference was unreasonable will present a greater challenge.

2.1. Unreasonable interference

Physical damage is not necessary for nuisance,43 as recoverable damage can be purely financial.44 Regardless of the type of damage, nuisance is established only where the interference causing that damage is ‘unreasonable’. A decision as to whether an interference is unreasonable is judged objectively,45 taking into account a number of factors, which were identified by McLure P in Southern Properties:

- the nature and extent of the harm or interference, the social or public interest value in the defendant’s activity; the hypersensitivity (if any) of the user or use of the claimant’s land; the nature of established uses in the locality (eg residential, industrial, rural); whether all reasonable precautions were taken to minimise any interference...46

In Marsh v Baxter, the alleged interference was the method chosen by the respondent for harvesting his crops. In other cases, farmers may seek to show that the relevant interference related to other aspects of the management of GM material. Usually, as in Marsh v Baxter, nuisance actions involve an emanation from the defendant’s land.47 While this is not necessary to sustain a nuisance action, the absence of an emanation may put the case on the ‘outer boundaries’ of the tort.48

The growing of GM crops in Western Australia will not be considered an unreasonable interference for the purpose of an action in nuisance, provided it is done under licence from an approved GM supplier.49 In terms of harm caused by other types of interference, it will be necessary for a plaintiff to show that the interference was unreasonable, taking into account the various factors referred to in Southern Properties. Considerations of sensitivity and locality are likely to present hurdles for organic farmers and possibly GM-free farmers affected by GM contamination.

42 Marsh v Baxter (2015) 49 WAR 1, 43 [244] (McLure P).
46 Southern Properties (2012) 42 WAR 287, 310 [118] (McLure P). McLure P appears to suggest that these factors should be taken into account in determining whether any interference is unreasonable for the purpose of a nuisance action. However, this is not entirely correct as it is well-established (as noted above) that different considerations will apply where the interference results in physical damage, so that in the latter case, considerations of locality and public interest will not apply: St Helen’s; Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145, 150 and 151 (Veale J).
48 Shogunn Investments Pty Ltd v Public Transport Authority of Western Australia [2016] WASC 62 (12 February, 2016) [75]–[76] (Martin J).
49 Statutory authorisation is a defence to an action in negligence so where statute has authorised the act that is said to constitute the nuisance there can be no liability for the act in the absence of negligence: Southern Properties (2012) 42 WAR 287, 311 [121] (McLure P).
2.1.1. Sensitivity and locality

A plaintiff is unlikely to succeed in establishing that the interference with their use and enjoyment of land is unreasonable if they are ‘hypersensitive’. A hypersensitive plaintiff is one who is affected in a way that an ordinary person would not have been. As noted by the majority of the Court of Appeal in *Marsh v Baxter*, ‘[a]n interference which “alone causes harm to something of an abnormal sensitiveness does not of itself constitute a nuisance”’. 50 This was stated in a different way by Cotton LJ in *Robinson v Kilvert*, who held that:

it would … be wrong to say that doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life… 51

Organic farmers, in particular, may struggle to overcome the hurdle presented by their sensitivity because GM farming impacts organic farming operations in a unique way. As observed by McLure P in *Marsh v Baxter*, whilst non-GM farmers are sensitive to the presence of GM material in their products, organic farmers are sensitive to the presence of GM material in both their products and their systems. 52 As such, organic farmers might be considered ‘hypersensitive’ to the ‘adventitious presence’ of GM material on their land in a way which other farmers are not. The majority in *Marsh v Baxter* were of the view that the organic farmers in that case were abnormally sensitive and could ‘not “unilaterally enlarge their own rights” and impose limitations on the operations of their neighbours to an extent greater than would otherwise be the case’. 53

Sensitivity must be assessed with reference to the ordinary usages of people living *in a particular society* 54 and is thus closely related to the nature of established uses in the locality in which the interference occurs. 55 Applying this approach, the Court in *Marsh v Baxter* assessed the reasonableness of the competing land uses with reference to the ‘Kojonup farming district in 2010’. 56 Following that, the majority in the Court of Appeal determined that: ‘[o]rganic farming was … at best, an isolated practice in the Kojunup area. Broadacre farming operations, it is to be inferred of a conventional nature, were the norm and on the evidence, the only other organic farm was 25km to the south. Canola was widely grown and there was at least one other farmer growing GM canola, some 3km away’. 57

51 *Robinson v Kilvert* (1888) 41 ChD 88, 94 (Cotton LJ), cited in Lee and Burrell, above n 47, 531.
53 *Marsh v Baxter* (2015) 49 WAR 1, 129–30 [785], [786] (Newnes & Murphy JJA). The majority’s application of the sensitivity factors is not one with which we necessarily agree.
55 An activity that would cause a nuisance in a residential area may not do so in an industrial area: *Sturges v Bridgman* (1879) 11 Ch D 582 (CA); Harold Luntz, David Hambly, Kylie Burns, Joachim Dietrich and Neil Foster, *Torts – Cases and Commentary* (LexisNexis Butterworths, 7th ed, 2013) 742. Ludlow observes that ‘[p]rima facie people would expect some contamination from neighbours’ properties in agricultural areas’ and that, therefore, ‘[p]rovided the neighbours carry on their agriculture in a reasonable and proper manner there should be no nuisance’: Karinne Ludlow, ‘Genetically Modified Organisms and Private Nuisance Liability’ (2005) 13 Tort Law Review 92, 109.
Therefore, in an environment where organic and certified-GM-free farming is the exception rather than the norm, those kinds of operations may be categorised as hypersensitive.\(^{58}\) As such, the more widespread GM crops become, the more difficult it may be for farmers to establish that the contamination event was unreasonable and, therefore, constituted a nuisance.\(^{59}\)

2.2. **Summary of problems for a nuisance claim**

Aside from the particular challenges presented by the concepts of sensitivity and locality, the outcome of a nuisance action is difficult to predict, particularly where there has been no physical damage. This is because the concept of ‘unreasonable interference’ with the use and enjoyment of property is relative,\(^{60}\) and establishing whether interference is unreasonable ‘wholly depends on an individual court’s application of these quite indeterminate common law notions’.\(^{61}\) The inherent unpredictability of a nuisance action may affect its utility for farmers affected by GM contamination.

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\(^{58}\) If, however, an area were renowned as organic, sensitivity would be assessed differently: Ludlow, above n 55, 110. It should also be noted that, in *Marsh v Baxter*, McLure P believed the characteristic of the particular district was of reduced significance when considering the fact that the appellants had conducted organic farming operations for many years prior to the lifting of the prohibition on the cultivation of GM canola: Ibid 48 [287].

\(^{59}\) On this point see also Ludlow, above n 55, 109.

\(^{60}\) Lee and Burrell, above n 47, 531.

\(^{61}\) Ibid.