Neutral Citation Number: [2009] EWHC 685 (QB)

Case No: IHQ/08/X04050

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2009

Before :

THE HON MR JUSTICE TUGENDHAT

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Between :

	D. Pride & Partners (a firm) & ors	**Claimant**
	- and -	
	Institute for Animal Health & ors	**Defendant**

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Mr Richard Lissack QC, Mr Tim Lord QC, Maya Lester (instructed by **Thring Townsend Lee & Pembertons**) for the **Claimant**
Michael Beloff QC , Mr Charles Pugh and Mr Ben Cooper (instructed by **Manches**) for the **First Defendant**
Mr Jonathan Sumption QC, and Mr Tom Adam QC (instructed by **Covington & Burling LLP**) for the **Second Defendant**
Mr Nigel Wilkinson QC and Mr David Barr (instructed by **DEFRA**) for the **Third Defendant**

Hearing dates: 23-24-25 February 2009

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Judgment

Mr Justice Tugendhat :

INTRODUCTION

1.Foot and mouth disease ("FMD") is one of the most contagious diseases affecting livestock. As everybody knows, when an outbreak occurs, the consequences are devastating. Animal movements are one of the key routes for transmission of the disease, so stopping all livestock movements as quickly as possible is critical to the containment of any outbreak of FMD. An outbreak can destroy food supplies and farmer's livelihoods almost overnight because of the wide number of cloven-hoofed animals that are affected, the most commonly affected being cattle, pigs and sheep. FMD is listed among the International

Organisation of Epizootics List A diseases which have particularly serious socio-economic or public health consequences and are of major importance in international trade of animals and animal products. In the event of an outbreak, all or any of the livestock industry in Great Britain with susceptible animals are affected, through the disease itself and through national movement restrictions.

2. In August and September 2007 there was an outbreak of FMD in two phases. It was first identified at a farm near Godalming, Surrey, 4.6 kms South West of the facility at Pirbright. That facility was formerly occupied by the Defendants in the well known case brought by a firm of auctioneers: *Weller v Foot and Mouth Disease Research Institute* [1966] 1 QB 569. In that case Widgery J (as he then was) said at p577C-D:

> "Mr. Eveleigh says that, since the defendants should have foreseen the damage to his clients but nevertheless failed to take proper precaution against the escape of the virus, their liability is established. It may be observed that if this argument is sound, the defendants' liability is likely to extend far beyond the loss suffered by the auctioneers, for in an agricultural community the escape of foot and mouth disease virus is a tragedy which can foreseeably affect almost all businesses in that area. The affected beasts must be slaughtered, as must others to whom the disease may conceivably have spread. Other farmers are prohibited from moving their cattle and may be unable to bring them to market at the most profitable time; transport contractors who make their living by the transport of animals are out of work; dairymen may go short of milk, and sellers of cattle feed suffer loss of business. The magnitude of these consequences must not be allowed to deprive the plaintiffs of their rights, but it emphasises the importance of this case."

3. If any claims for compensation were brought by any of the farmers in either of those categories (those whose beasts were slaughtered, and those prohibited from moving their cattle), then there is no record of that fact in the law report. But both categories of farmers issued proceedings in the present case.

THE CLAIM

4. This claim was brought by 14 livestock farmers against the two operators of the facilities at Pirbright, the First Defendant ("IAH"), Second Defendant ("Merial") and against the Third Defendant named as the Secretary of State for Environment, Food and Rural Affairs ("DEFRA"). The claim is for damages for the losses they allege that they have suffered as a result of the tortious act which they allege the Defendants committed, and which caused the leak of live FMD virus ("FMDV") from the facilities. The claim is founded on the

three torts of negligence, private nuisance, and under the rule in *Rylands v. Fletcher*.

5. The Claim Form was issued on 15 October 2008 and served with Particulars of Claim of the same date. On 12 and 20 November 2008 and 5 December 2008 the Defendants issued Application notices. All three Defendants applied to strike out the claims pursuant to CPR Part 3.4(2)(a), on the grounds that the claims disclosed no good cause of action. IAH and Merial applied in the alternative for summary judgment pursuant to CPR Part 24.2 on the ground that the claimants have no real prospect of establishing any liability of the kind that they are alleged to have sustained. These Applications of the Defendants came before me.

6. Before this hearing the claims of the First to Seventh Claimants were the subject of a settlement made between them, IAH and Merial, with the result that they no longer pursue claims against any of the Defendants. The First to Seventh Claimants are all farmers whose livestock was culled, either because the animals were infected or because they were suspected of being infected. It follows that I am concerned now only with the claims of the Eighth to Fourteenth Claimants (and that D Pride and Partners will have given their name to a case to which they are no longer parties). None of the livestock of the Eighth to Fourteenth Claimants was culled. From this point onwards the words "Claimants" will be used to refer to Eighth to Fourteenth Claimants, except where the context shows otherwise.

THE APPROACH TO BE ADOPTED BY THE COURT

7. The proper approach of the court to these applications can conveniently be taken from the speech of Lord Hoffmann in *Sutradhar v Natural Environment Research Council* [2006] UKHL 33; [2006] 4 All ER 490:

> "[3] Under CPR 24.2 the court has power to give summary judgment against a claimant if it considers that (a) he 'has no real prospect of succeeding on the claim . . . and (b) there is no other compelling reason why the case or issue should be disposed of at a trial'... The new power has been described by Lord Woolf MR (in *Swain v Hillman* [2001] 1 All ER 91 at 92) as salutary:
>
> > 'It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success . . .
>
> [4] Lord Woolf went on to say (at 94, 95):
>
> > 'It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the

> claimant's interests to know as soon as possible that that is the position . . .
>
> Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial.'
>
> [5] These remarks were approved by this House in *Three Rivers DC (No 3) v Bank of England* [2001] UKHL 16, [2001] 2 All ER 513, [2003] 2 AC 1 (see Lord Hope of Craighead (at [91]–[93]); Lord Hutton (at [134])). In addition, as Lord Millett said in the same case (at [192]) the 'most important principle of all is that justice should be done. But this does not mean justice to the plaintiff alone'. It is not just to a defendant to subject him to a lengthy and expensive trial when there is no realistic prospect of success.
>
> [6] I therefore approach this appeal on the basis that the claimant's allegations of primary fact must (unless plainly fanciful, which is not the case here) be accepted as true and allowance must be made for the possibility that further facts may emerge on discovery or at trial. The question is whether, on these assumptions, he has a real prospect of success."

8. Accordingly, I shall first set out the facts as alleged in the Particulars of Claim, together with some background matters of which I have been informed by counsel. At the close of the submissions for the Claimants I was concerned to know whether it is appropriate for me to decide at this stage the issues raised before me, or whether there should be a trial of those issues. I asked Mr Lord (transcript p271-272) if there was anything on the topics upon which he had made submissions to me that might be affected in a manner favourable to the Claimants if there were a trial of the facts, following disclosure in the usual way. At that point he replied that he could see no additional facts that the Claimants need, assuming all the facts pleaded to be proved. But he added that if there were a trial the submissions on the points of law would be conducted in a more thoroughgoing way. Having heard the submissions for the Defendants in reply, Mr Lord had second thoughts. He then considered that at a trial there would be further evidence before the court on the question whether the loss of condition of animals is recognisable in law as physical damage (transcript p413-414). He also submitted that further evidence on the knowledge and culpability of DEFRA would inform the scope of the duty of care. It has not been suggested, that there is any other compelling reason why the issues in this case should be disposed of at a trial, if I find that the Claimants have no real prospect of succeeding on the claim.

9. The written argument for the Claimants covers 129 pages, of which 35 became redundant in the light of concessions made by the Defendants after the settlement made with the First to Seventh Claimants. That leaves 94 pages on the issues raised before me. The citation of authorities is comprehensive. I can see nothing in the suggestion that at a trial the points raised before me would be addressed in a more thoroughgoing way. I shall return to the

other points at a later stage in this judgment.

10. No Defences have yet been served, and no evidence has been filed. Although I must assume for the purposes of these applications that all the pleaded allegations are true, this does not mean that the Defendants accept that they are all true. If the matter goes forward to trial, the Defendants have indicated that there are important matters which will be in dispute. One purpose of the Defendants in reminding me of the factual issues which are in dispute (but which I do not set out in this judgment) is to make the point that if this action proceeds to trial, it will be time consuming and expensive. It is the duty of the court to consider at this stage whether the Claimants are claiming any (or any significant) loss which is recoverable in law, and if it is found that they are not, then it is in the interests of all parties for that to be determined before such time and expense is incurred.

11. The issues that I have to decide are essentially issues of law. I summarise the factual allegations in the Particulars of Claim as if they were established facts. And any further reference to a fact in this judgment is to be understood as an alleged fact, which may or may not be proved, if the matter proceeds to a trial.

12. The Defendants each made submissions through their leading counsel, but each adopted the submissions of the other two, and so the submissions can all be attributed to the Defendants collectively, except where the context shows otherwise.

THE FACTS TO BE ASSUMED

13. All of the Claimants are livestock farmers who farm land in various parts of England and Wales. The Eighth Claimant farms about fifty acres as a tenant in Pirbright, together with land he owns in Kent and elsewhere, and land which he rents in Surrey. The Ninth, Tenth and Eleventh Claimants also farm land in Surrey. The Twelfth and the Thirteenth Claimants farm land in Yorkshire and Wales respectively. The Fourteenth Claimant farms land in Cumbria. None of their livestock was actually infected with FMD, nor was it suspected of being infected. This reflects the success of the measures put in place to prevent the spread of the infection.

14. By way of background, I have been told that compensation was paid to owners of livestock culled, or other items or materials seized, pursuant to the Animal Health Act 1981 s.31 Sch 3 para 3(2). That legislation empowers DEFRA to cause the slaughter of animals either affected, or suspected of being affected, with FMD. Compensation for animals slaughtered is the value of the animal immediately before it became affected, and in every other case it is the value of the animal immediately before it was slaughtered.

15. Compensation is not paid for consequential losses. The Claimants were not eligible for these payments. On 8th October 2007 the government put in place a support package worth £12.5 million for farmers in England affected by movement restrictions put in place to control the disease. The Welsh Assembly Government also introduced a light lamb disposal scheme for which a fixed price was paid for lambs voluntarily sent for slaughter

and disposal.

16. In order to farm their land, all the Claimants rely on being able freely to move their livestock on and off their farms, between their farms, and from their farms to livestock markets, to abattoirs and to places for export. The losses they claim are ones which arose in consequences of their being unable to move their livestock freely for the period during which measures were in force to prevent the spread of the disease.

17. IAH is a publicly funded research company limited by guarantee and with charitable status. IAH undertakes research on animal diseases and provides diagnostic services for the government and for international agencies, from its laboratories at Pirbright and at another facility in Berkshire, with which I am not concerned. IAH states that it "exists to advance science and diagnosis that underpins the health of farm animals and, as a consequence the prosperity of farmers and allied rural businesses".

18. The largest single source of IAH's funding is DEFRA, which enters into diagnostic and research contracts with it. IAH leases its facility at Pirbright, and receives grants, from the Biotechnology and Biological Sciences Research Council ("BBSRC"). This is a non departmental public body which owns the site. IAH subleases part of the site to Merial. The defendant in *Weller* was a predecessor body to BBSRC. Work on the foot and mouth disease virus has been undertaken at the Pirbright site since around 1925.

19. Merial is part of a joint venture between two well known corporations, Merck & Co and Sanofi-Aventis. Merial operates a production plant at Pirbright, where it manufactures vaccines for foot and mouth disease and another disease, Bluetongue.

20. DEFRA licences and inspects laboratories working with specified animal pathogens, including FMDV. It licensed both IAH and Merial to work with that virus.

21. There is an elaborate legal and regulatory framework applicable to foot and mouth disease. One provision prohibits farmers from routinely vaccinating their animals against the disease. This is the Foot and Mouth Disease (Control of Vaccination) (England) Regulations 2006 made following the decision of the Council of the European Communities in 1990 to adopt a uniform slaughter and stamping out policy ahead of the completion of the internal market on 1 January 1993 (Directive 90/423/EEC). Measures to control the disease are laid down in Council Directive 2003\85\EEC of 29 September 2003 ("the Directive"). The Directive has been implemented by the Foot and Mouth Disease (England) Order 2006 SI 2006 No 182 ("the 2006 Order") and by a separate Order in Wales.

22. Once infection is suspected, premises (which include land) are declared to be "suspect premises". DEFRA declares a "temporary control zone" around the suspect premises of such size as is considered fit to prevent the spread of the disease. Animals susceptible to the disease (which include cattle, sheep and swine, and many other more exotic beasts) may not be moved in or out of that zone except in limited circumstances. Additional requirements may also be imposed restricting the movement of animal products, vehicles, and non-susceptible animals. If an infection is confirmed, the premises are declared to be "infected premises". A number of further measures are then put in place. There must be declared a "protection zone" and a "surveillance zone" (at least 3 km and 10km respectively in radius centred on the infected premises). Controls apply to the movement of susceptible animals into or out of these zones. But they also apply to a much wider section

of the community than livestock farmers. There are restrictions on the holding of fairs and markets, on breeding and slaughter, on the transport and sale of fodder, milk and milk products. Similar but less strict controls apply in the surveillance zone. See the 2006 Order Arts 31 and 36. There may also be declared a wider "restricted zone" in which less strict controls are imposed pursuant to the 2006 Order arts.38-9 and Sch 7. Measures applicable in respect of a restricted zone include the requirement of a licence to move susceptible animals, and provisions relating to the transport, slaughter of animals. Restrictions imposed under Sch 7 also directly affect people other than livestock farmers. They may include restrictions of gatherings of animals and people (including restrictions on hunting and stalking), on the shearing and dipping of sheep, and on the management of slaughterhouses.

23. There are also a number of bio-security standards imposed by law. Some of these apply to effluent treatment systems.

24. Licensing is provided for under the Specified Animal Pathogens Order 1998 SI 1998 No 463 ("SAPO"), which prohibits any person from possessing FMDV without a licence. Such licenses stipulate the way in which the pathogen must be handled to ensure safe containment and disposal. Licenses are issued subject to inspections made on behalf of DEFRA. IAH and Merial are the only facilities in the United Kingdom licensed to work with the foot and mouth disease virus ("FMDV").

25. Between 1922 and 1967 there were only two years in which Great Britain was free of FMD. In four years there were severe epidemics: 1922, 1924, 1954 and 1968. In 1960 an outbreak occurred near the Pirbright facility which gave rise to the case of *Weller*.

26. From 2 to 9 August 2007 in the first phase of the outbreak various measures were taken pursuant to the legal regime referred to above. These included the establishment of control zones around premises near Pirbright, the ban of exports, and the slaughter of cattle, sheep, goats and pigs. These measures directly affected parts of the land of some of the Claimants. What affected all the Claimants were declarations on 3 August 2007 of a restricted zone across the whole of Great Britain by DEFRA, and corresponding authorities in Wales and Scotland. This was pursuant to the 2006 Order arts.38-9 and Sch 7.

27. Between 9 August and 7 September restrictions were lifted. But on 11 September 2007 a further infection was suspected at a farm in Surrey. This was the second phase of the outbreak. Infection was confirmed at a total of eight premises (none of them concerning the Claimants), resulting in the imposition of control zones and the slaughter of animals. On 12 September a restricted zone across the whole of Great Britain was declared, and the European Commission imposed a further ban on animal and related exports from Great Britain to the European Union. Restrictions were progressively lifted through October and November. All remaining restrictions on exports to the European Union were lifted on 31 December 2007, and the United Kingdom's international (OIE) FMD free status was restored on 19 February 2008.

28. The farming community in Great Britain observed the immediate prohibition of the movement of all animals. The effect of the movement restrictions on the farming community is pleaded as follows, although this pleading was drafted at a time when there were 14 Claimants, and this part of the pleading does not distinguish between the two categories of Claimant:

- "Farmers were unable to move cattle and sheep freely to fresh grazing within farms, necessitating supplementary feeding and leaving areas of fresh pasture ungrazed for the duration of the restriction;

- Milk production was lost as calved cows were unable to be moved back from outlying fields to the main farm;

- Farmers were unable to move fattened stock to slaughter at the optimum time, particularly within the pig sector and in the protection and surveillance zones leading to the loss of condition, welfare problems and additional feeding costs;

- Light lambs destined for the export market had to be kept on hill farms, resulting in loss of income, welfare concerns and the necessity for additional fodder;

- Pig breeder and rearing units were overstocked, leading to welfare problems and costs;

- There were delays in putting rams to ewes, leading to disruption in established production patterns;

- The traditional sale of animals through livestock markets, from farms where they were bred to other farms for rearing/or fattening was disrupted;

- Farmers were unable to export live animals (beef calves, older sows and cows, breeding stock) and derivative products abroad at all or at the optimum time".

29. The expressions "loss of condition" and "welfare problems" are further explained in the pleadings as follows. "Loss of condition" refers to a reduction in an animal's optimal condition, including a loss of weight (muscle and/or body fat). It also includes a change in condition including a gain in overall weight such that the body condition moves away from the animal's optimal condition and weight, and in particular for the purposes of slaughter. "Welfare problems" are impairments to the health and well being of animals, including the effects of overstocking (e.g. stress, overgrazing of pasture, worm infestation, footrot, and other problems); the effects of birthing animals in outlaying fields being unable to be moved back to a holding where they could be better monitored and assisted including injury or death to themselves and/or injury or death to their progeny and the effect of contractors being unable to attend stock in order to shear or dip sheep leading to worm and parasitic infestation or other matters.

30. Although that is a general description of the claims pleaded at a time when the First to Seventh Claimants were pursuing their claims, not all of the Claimants are pursuing claims under all of those heads. Counsel for Merial did an analysis of the claims still being pursued, and it shows the following, as pleaded in Appendix 1 to the Particulars of Claim.

31. The claim of the Ninth Claimant can be taken as representative of a number of the heads of loss claimed by itself and by others of the Claimants:

> "**EFFECTS ON LIVESTOCK AND FARM OF 2007 OUTBREAK**
>
> Holdings situated within the Protection, Surveillance and Restricted Zones in the first part of the outbreak and within the Surveillance and Restricted Zones in the second part of the outbreak…
>
> As a result of the movement restrictions, cattle could not be sold for breeding or sold for meat as the cattle could not be moved until the restrictions were lifted.
>
> Cattle could not be moved onto the main holding, to be brought in for the winter, from the grazing at the other holdings.
>
> The animals that would ordinarily be sold for breeding have been kept at a cost to the partnership, until the market improved. Some of the animals that would have been sold for breeding have instead been sold for meat at a lower price in order to generate income. Cattle had to calve away from the main holding as they could not be moved back to the main holding and *some of the calves were lost* [emphasis added]
>
> Female cattle could not be moved across the holdings to see the bull at the usual time.
>
> Replacement straw had to be purchased as straw originally intended for the partnership had to be left in the field, as it was in close proximity to an infected premises.
>
> Cattle have had to be fed extra silage to improve their condition as they were left out at grass for too long.
>
> Extra labour had to be employed to look after the cattle out at grass on the holdings and staff also had to assist the DEFRA veterinary teams when they came to inspect the cattle.
>
> An arranged tour and subsequent sale to promote the business due to take place in September 2007 had to be cancelled…
>
> **Losses resulting from disinfecting of livestock farms and equipment (including disposal of contaminated materials)**
>
> £390.59 plus VAT (disinfectant purchased to increase biosecurity on holdings during the outbreak – knapsack sprayers, disinfectant, buckets and brushes and barrier tape).
>
> **Losses resulting from being unable to move livestock on and off the farms such as to market or for export.**
>
> £2,800 (losses on sale prices of four bulls sold for breeding after

the outbreak).

£3,625 (5 heifers sold for meat that would usually have been sold for breeding, at a loss of around £725 per animal)

£1,050 (3 cows sold for meat that would ordinarily have been kept loss of around £350 per animal)

£11,250 (cost to business of keeping 15 bulls that would ordinarily have been sold for breeding, at £25 per bull per week for 30 weeks-bulls eventually sold in March 2008)

£24,750 (cost to business of keeping 30 females that would ordinarily have been sold for breeding, at £15 per female per week for 55 weeks-females not yet sold and costs ongoing)

£1,053 (3 calves lost as heifers carved away from the main holding, at £350 per calf) [emphasis added]

£1,600-2,400 (estimated loss of profit on for females that should have been sold during/after the tour-not yet sold)

£X - as yet unquantified losses arising as a result of delays to breeding programme where females did not see the bull at usual time

£X - as yet unquantified losses on sale of 20 female animals that would have been exported to European buyer or breeding at an agreed price of £2,000 per animal-not yet sold

Extra Labour Costs

£500 (cost of additional staff taken on to assist during outbreak)

£3,202 (2 full-time staff spent 80% of their time dealing with outbreak for two months-usual salary £1000 per month per employee)

Additional Expenses

£43.33 plus VAT (cost of vet visiting farm and completing certificate or the movement of cattle)

£96.90 plus VAT (vet fee and injection cost for eight heifers whose calves had to be aborted)

£432.99 (additional mobile phone costs-£359.58+ £139.41 less typical costs of £33 and £33 respectively)

Management Time

£3,200 (80% of the time spent dealing with outbreak for two months – usual salary £2,000 per month)

Consequential losses caused by the disruption to farming business

£165 (cost of storing frozen embryos and semen that could have been sold during tour that was cancelled - £15 per month for 11 months)

£10,000 (estimated loss of profit on potential future sales of breeding animals lost following cancellation of tour)

£2,750 cost of buying replacement silage – 500 tonnes at £5.50 per ton.

£600 to £800 (loss of profit on 100 bales of straw that would have been sold)

£6,645 (additional cost incurred in buying replacement straw – 590 bales at £8 per bale more than usual cost and 175 bales at £11 per bale more than usual cost)

£440 (estimated cost of buying in a further 220 bales of straw that would have usually been saved from previous year's supply – 220 bales at additional estimated cost of £2 per bale)

Additional financing costs

Up to £1000 (estimated interest charges on additional overdraft)

Estimated total losses at 1 September 2008 (subject to revision) £75,588.81 - £76,588.81"

32. The Eighth Claimant has a total claim estimated at the same date in the sum of £31,587.26. The Eighth Claimant is the only one specifically to claim for the slaughter of an animal (not infected or suspected of being infected) and to claim in terms for "lost condition". These parts of the claim of the Eighth Claimant are pleaded as follows:

"**Losses Resulting from Slaughter of Livestock or Disposal of Livestock Products**

£900 (estimated value of cow which had to be shot on land near Pirbright – the animal did not have FMDV but had to be shot by a DEFRA vet because it was unwell and a local vet willing to treat the cow could not be found)

£207 (cost of burial of cow, invoiced by Animal Health) …

Losses resulting from being unable to move livestock on and off the farms, such as to market or for export

£1,700 (loss on sale price of cattle – valued at £500 a head in August but lost condition and sold for £400 a head after restrictions were lifted - £100 loss on each of 17 cattle sold)…" [emphasis

added]

33. The Eleventh and Twelfth Claimants have claims respectively for totals of £146,011.52 and £368,242. While the words "loss of condition" are not used, it may be that their claims include substantial elements for loss of condition in that the pigs are said to have grown "oversized" or "overweight". For example, part of the Eleventh Claimant's claim includes:

> "**Losses resulting from being unable to move livestock on and off the farms, such as to market or for export**
>
> £72,357 (losses on sale prices of finisher pigs that went to the abattoir oversized – calculated from actual losses, but averaging around £99.26 loss on each of 729 pigs.
>
> £2,374 (losses on sale prices of sows that went to the abattoir oversized – calculated from actual losses, but averaging around £23.98 loss on each of 99 sows)

34. Part of the Twelfth Claimant's claim, under the same heading, includes:

> "£11,717 (prices paid by the abattoirs were lower for pigs that had grown overweight owing to the delay in sending them to the abattoir. On average [the Twelfth Claimant] was paid 16-20p per kilo (deadweight) less for the whole pig than it would have received before the outbreak. Therefore 58,585 kilos at 20p per kilo)".

CAUSATION AND FORESEEABILITY

35. The primary case of the Claimants is that the source of the outbreak in 2007 was IAH, and their alternative case is that it was Merial. They attribute it to a defect in the effluent system at the Pirbright site. It is unnecessary for me to set out more details of this part of the claim. I have to assume that it is correct. There was no issue raised before me on causation. I have to assume that the Claimants are correct when they state that the outbreak was caused by the acts or omissions on the part of IAH and/or Merial and/or DEFRA which the Claimants allege to constitute breaches of a relevant duty of care. Further, for the purposes of the applications before me, there is no dispute that damage claimed by the Claimants was a foreseeable consequence of a failure to take such care.

PLEADING DUTY OF CARE - NEGLIGENCE

36. The duty of care that is alleged is stated as follows as against IAH (para 75) and Merial (para 77):

> "IAH[/Merial] owed the Farmers a duty at common law to take reasonable care in and about IAH[/Merial]'s operation at Pirbright

and its working with FMDV so as not to cause escape of FMDV therefrom and in consequence an outbreak of FMD and the losses sustained as a result by the Farmers as set out below".

37. This and the following parts of the pleading must be read in the light of the fact that the expression "the Farmers" is defined in the Particulars of Claim (para 3) as referring to all 14 claimants. Moreover, although the duty of care pleaded is said to be owed to "the Farmers", the facts relied on in support of that contention include reference to "livestock farms in Great Britain" and "the livestock community of Great Britain" (Particulars of Claim paras 76(3) to (6), and paras 26 and 40 and 43 of this judgment). Thus there is nothing specific to the Claimants which is relied upon as giving rise to a duty of care owed to them, which would not also give rise to a corresponding duty of care to any livestock farmer in Great Britain. I have been informed by counsel for the Defendants that it is understood that the Claimants have been selected as a representative sample of livestock farmers and that their action is being supported by the National Farmers' Union.

38. DEFRA is alleged to be a joint tortfeasor with IAH and/or Merial, but it is also alleged to have owed an independent duty of care. There is no material distinction between the duty of care alleged to be owed by IAH and/or Merial, and that alleged to be owed by DEFRA. The independent duty of care that is alleged is pleaded as follows as against DEFRA:

> "The Secretary of State owed the Farmers a duty of care at common law to take reasonable care in and about the licensing of IAH and/or Merial to work with FMDV at the Pirbright site so as not to cause an escape of FMDV therefrom and in consequence an outbreak of FMD and the losses sustained by the Farmers as a result set out below".

39. In support of the contention that such a duty of care exists, the Claimants rely on a number of matters to which I have already referred, including the fearful characteristics of FMD, the roles of the Defendants, and the regime for imposing measures to prevent the spread of the disease, including restrictions on the movement of livestock and related products. The words "the measures" is used in the Particulars of Claim (eg at Particulars of Claim para 76(5)(c)) without formal definition, but it refers comprehensively to all the "regulatory measures" (Particulars of Claim para 76(5)(b)) which I have summarised above (paras 21 to 22 and 26 to 27 above). The pleading does not relate particular measures either to particular Claimants, or to particular areas of land farmed by particular Claimants. More specifically the Claimants plead as follows:

> "(7) Where livestock and/or livestock farms were infected by foot and mouth disease virus as a result of the outbreak, the farmers concerned suffered *physical damage* to their property [emphasis added].
>
> (8) Even where livestock and/or livestock farms were not actually infected by FMDV, the farmers concerned suffered *physical damage alternatively damage analogous to physical damage or physical interference with property* [emphasis added] since their goods (the livestock) and/or land (the livestock farms) were directly affected by the measures. The measures were imposed to

> deal with the threat of injury to the livestock and the farms in the form of foot and mouth disease. The measures were the very kind of thing likely to happen in the event of a carelessly caused outbreak. The outbreak and the measures constituted injury impairing the value or usefulness of the livestock and the livestock farm. In view of the restrictions upon movement and use, the livestock and livestock farms were materially harmed. Such loss and damage does not fall to be viewed as pure economic loss; further or alternatively it is recoverable in any event".

40. In addition, the Claimants plead that they had no option but to comply with the measures, and so were "in a particularly vulnerable position and dependent on" IAH and/or Merial performing their FMDV operations carefully. IAH and/or Merial were in a position to prevent the escape of FMDV and knew that "the interests of livestock farmers of Great Britain were at stake" if they carelessly caused an outbreak of FMD, and that the farmers would depend on IAH and/or Merial to handle the FMDV carefully. So it is alleged that such reliance was reasonable, and

> "(12) in view of the above facts and matters, there was a special relationship between IAH [and/or Merial] and the livestock farmers in Great Britain and/or IAH [and/or Merial] assumed responsibility to them to perform [their] operations in and about the handling and treatment of FMDV at the Pirbright facility with reasonable skill and care.
>
> (13) Further or alternatively, in all the circumstances including the relationship of proximity between IAH [and/or Merial] and the farmers it is fair, just and reasonable to impose such a duty upon IAH [and/or Merial].

41. There is a corresponding plea against DEFRA in relation to its responsibility as "the regulator responsible for licensing laboratories to work with FMDV and ensuring compliance with licence conditions, and under obligations strictly to control biosecurity in laboratories handling live FMDV pursuant to the Directive". SAPO art 3(2) empowered DEFRA to impose conditions and/or modify, suspend or revoke any licence.

42. It is alleged that, by reason of outbreaks and reports relating to previous years (in particular reports in 2002-2005, and communications between IAH, Merial and DEFRA in 2003-2007) DEFRA "was expressly on notice that (a) live FMDV was being released by Merial into the drains on the site rather than being inactivated at source; (b) Merial and IAH considered that the old effluent drains on the site ought to be renewed; (c) Merial and IAH considered that replacement of the drains would be a very considerable improvement and would provide the necessary level of biosecurity for the transfer of restricted effluent from the Merial site to the IAH fluent treatment plant" and "By necessary inference … knew or should have known that the existing systems and state of the Pirbright premises were not or may not be sufficient to provide the necessary level of biosecurity".

43. The pleading goes on (para 8):

> "(11) [DEFRA]'s state of knowledge of the dangers and risks of foot and mouth disease virus was at least as good as that of IAH and/or Merial.
>
> (12) The farmers were in a particularly vulnerable position and dependent on [DEFRA] carefully to perform his responsibility for licensing the work with foot and mouth disease virus by IAH and/ or Merial … Such reliance by the Farmers … was entirely reasonable.
>
> (13) In view of the above facts and matters, there was a special relationship between DEFRA and the livestock farmers in Great Britain and/or [DEFRA] assumed responsibility to them to take reasonable skill and care in and about the licensing of IAH and/or Merial…
>
> (14) Further or alternatively, in all the circumstances including the relationship of proximity between [DEFRA] and the farmers, it is fair, just and reasonable to impose such a duty upon [DEFRA]".

44. Mr Lissack, and to a lesser extent Mr Lord, both emphasised to me the magnitude and gravity of the breach of duty that the Claimants allege. I do not repeat what they said, because for the purposes of these applications I have to assume that, if there is a relevant duty of care, then the Defendants are in breach of it. Moreover, in civil claims for damages for tort, the degree of culpability of a defendant is of little relevance. There is a single standard for liability, whether it be strict liability, or liability for breach of a duty of care, and where liability depends upon breach of a duty of care, the gravity of the breach is immaterial. All the claimant has to establish in this part of his case is that there has been a breach.

45. Following the allegations which I have summarised, the pleading then goes on to identify the three torts alleged under the headings "Negligence", "Nuisance" and "Rylands v Fletcher".

46. Under the heading Negligence, there are pleaded the breaches of duty the factual basis for which had been set out as summarised above. The breach is identified, in particular in causing or committing, or alternatively failing to prevent, the escape of the virus on the part of IAH or Merial. In relation to DEFRA the plea is breach of the duty in the licensing and regulatory functions. Again I must assume that these allegations are true, but in the light of the arguments addressed to me, I do not need to set out these parts of the pleading in more detail.

PLEADING NUISANCE

47. Under the heading Nuisance there is pleaded first the proprietary interests of the Claimants as owners and/or occupiers of their livestock farms in Great Britain. It is then alleged that the causing or permitting, alternatively failing to prevent, the escape of the virus by IAH and/or Merial constituted unreasonable user by them of the Pirbright site, which by the

time of the escape in 2007 was in a state potentially hazardous to the land of the Farmers. It is said that IAH and/or Merial knew or ought to have known of the danger and that this escape of the virus caused:

> "undue or unreasonable interference with the use or enjoyment by the Farmers of their land by:
>
> (a) causing physical damage to the land or damage which in law is analogous to and should be treated as physical damage to such land. Paragraph … (8) [in para 39 above] is repeated; and/or
>
> (b) unduly interfering with the Farmers in their convenient enjoyment of their land in the form of the measures imposed upon them in relation to their farms which materially impaired the amenity of the property".

48. The loss and damage under this head is said to comprise:

> "(a) [this pleads physical damage to land, and so is applicable only to the First to Eighth Claimants].
>
> (b) Damage analogous to physical damage to such land as a result of the measures imposed upon the Farmer's farms in order to identify whether there had been foot and mouth disease infection, to remove potential infection even where this was not established and/or to prevent the spread of infection.
>
> (c) The loss of amenity value arising from the contamination of the farms whether by way of actual infection, potential or threatened infection and/or the impairment caused by compliance with the restrictions which themselves directly affected and impaired the Farmers' use of their land.
>
> (d) Consequential loss flowing from the matters set out in (a) to (c) above, which includes the losses arising upon the … threatened infection of livestock (the threat being evidenced by the imposition of the measures set out above),… the postponing of their [the livestock's] sale or export, the reduction of their sale price, the extra holding or sale expense and other lost profits or increased costs arising from the Farmers' livestock businesses operated upon or from their livestock farms".

PLEADING *RYLANDS v FLETCHER*

49. Under the heading *Rylands v Fletcher,* there is pleaded in addition that each of IAH and Merial "brought onto the Pirbright site for their own purpose and/or with the other's permission quantities of live FMDV", that this "constitutes a non-natural user of land", and that "FMDV is a dangerous thing likely to cause damage if it escapes". It is said that the damage suffered was all foreseeable, and "is either physical damage to the Farmers' property (livestock and/or livestock farms) and/or damage which in law is analogous to

and should be treated as physical damage and/or is properly consequential on the same and/or is properly recoverable".

50. Under the heading Joint Liability of the Defendants, it is pleaded that DEFRA is jointly liable for the torts of IAH and/or Merial and IAH is jointly liable for the torts of Merial.

51. It is said that IAH had sufficient authority over Merial's operation to be held to have authorised its torts. IAH had control in particular over Merial's system for inactivation for live virus, carriage of live virus from Merial's laboratory around the site and the effluent disposal. These matters are said to constitute a common design or concerted action by IAH and/or Merial and these two Defendants agreed on a common action in relation to the handling and disposing of the virus.

52. DEFRA is also alleged to have had sufficient authority and control to be held to have authorised the torts of the other two Defendants by means of the licensing regime. Accordingly DEFRA is also alleged to be part of a common design or concerted action as to the handling and disposal of the virus. The claimants also rely on DEFRA's demand as the customer for the services undertaken by the other two Defendants and to the matters upon which it is alleged DEFRA was on notice as pleaded.

53. Particular losses are pleaded in relation to each Farmer in the Appendix, extracts from which are set out above.

PHYSICAL DAMAGE OR ECONOMIC LOSS

54. It is convenient to start by considering the nature of the loss and damage claimed, since it is by reference to that that the duty of care alleged by the Claimants is defined (para 36 above). The Defendants submit that the loss and damage claimed in this case (or at least all but "a small rump" of it) can only be classified as pure economic loss, not consequential upon any physical damage, and as such it is not recoverable in negligence, in nuisance, or under *Rylands v Fletcher*. The Defendants submit that, in value terms, almost all the losses claimed can only be classed as pure economic loss (eg losses of sales or lower prices on sales). They accept that there are some minor items of loss which are what they call "a more orthodox kind" of physical damage, for example the Ninth Claimant's claim cited above that "some of the calves were lost" (for which the Ninth Claimant claims £1,053). The Defendants do not accept that the claims for loss of condition are claims for physical damage, although they recognise that that is how they are advanced by the Claimants. £1,700 is claimed for the loss of condition of a cow (para 32 above), and more substantial sums may be claimed under this head for pigs (paras 33 and 34 above).

55. The law provides causes of action by which aggrieved claimants can claim compensation

for loss and damage. But the law distinguishes between, on the one hand, physical damage (and economic loss consequential upon physical damage) and, on the other hand, economic loss which is not consequential upon physical damage, commonly known as pure economic loss. The law of contract provides one, and perhaps the main, cause of action for claims for pure economic loss. The torts commonly referred to as the economic torts (such as conspiracy and interference with contractual relations) require greater culpability than negligence, and they provide other causes of action for claims for pure economic loss. The tort of wrongful interference with goods provides another cause of action by which pure economic loss may be recoverable. None of these causes of action are relied on in this case. As Lord Oliver said in the context of the law of negligence in *Murphy v Brentwood DC* [1991] 1 AC 398, 487:

> "The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and *the fact that its occurrence could be foreseen* [emphasis added]. Thus the categorisation of damage as economic serves at least the useful purpose of indicating that something more is required …"

56. This passage is cited by the editors of Clerk & Lindsell on Torts 19th ed, at para 1-33. The Defendants invite the court to adopt as the law the next sentence but one in that paragraph:

> "Physical damage, in the context of Lord Oliver's dictum, means actual tangible harm to the fabric of the property, or to the land itself, caused by a factor external to the property".

57. That sentence is to be read in its context, which was the damage alleged in the *Murphy* case itself (which concerned a house with defective foundations). That is clear from the next sentence, which refers to safety, when plainly there can be damage to property which does not affect safety:

> "Defects in the property which simply render it less valuable, affect quality, but which do not affect safety, do not constitute physical damage".

58. Nevertheless, I accept that the sentence relied upon by the Defendants may well be helpful. It is not in terms derived from any case, but it is put forward as representing the effect of the case law. In ordinary English, injury and damage are words that suggest causation by a factor external to the property.

59. There is further help on the meaning of damage in the tort of negligence given in *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2007] 3 WLR 876. That case concerned pleural plaques appearing on the claimants' lungs as a result of exposure to asbestos. Lord Hoffmann said:

> "[2] Proof of damage is an essential element in a claim in negligence and in my opinion the symptomless plaques are not

> compensatable damage. Neither do the risk of future illness or anxiety about the possibility of that risk materialising amount to damage for the purpose of creating a cause of action, although the law allows both to be taken into account in computing the loss suffered by someone who has actually suffered some compensatable physical injury and therefore has a cause of action.
>
> [7] ….a claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability."

60. The Claimants chose not to advance any case before me which distinguished between the different heads of damage advanced by each particular Claimant, or between the claims for damages alleged to have been suffered by the individual Claimants. The Claimants' arguments were at a higher level of principle. They did separately advance arguments as to why loss of condition is physical damage (or analogous to it), but these arguments were subsidiary. As it is put in the Claimants' written submissions (para 196)

> "[the Claimants] suffered the requisite (direct) physical damage or damage analogous to physical damage… the fact that [the Defendants] concede that [the Claimants] have sustained certain damage 'of a more orthodox kind' (the 'small rump') merely serves to show that it is impossible to separate out certain types of loss in the context of these claims. All the Farmers have suffered losses born of their being 'on the cattle trail' [for this expression see para 68 below]. Their losses are not purely economic but arise due to a real effect on the Farmers' tangible property".

61. There are a small number of cases in which the effect of an alleged wrong upon livestock and growing vegetable produce has been considered. Each turns on its own facts, and it is difficult to discern a principle.

62. The first is *Weller* itself. On the distinction between physical damage and pure economic loss the Claimants refer to passages in the judgment of Widgery J where he said there was a great volume of authority:

> "[at p577] to the effect that a plaintiff suing in negligence for damages suffered as a result of an act or omission of a defendant cannot recover if the act or omission did not directly injure, or at least *threaten* directly to injure, the plaintiff's person or property but merely caused consequential loss…
>
> [at p583] … only those whose property is injured, or at least directly *threatened* with injury, can recover." [emphasis added]

63. It will be necessary to consider the passage at p 577 below, but at this stage the focus is on the word "threaten", which appears to suggest something less than actual injury will suffice. The passage is not clear. In *SCM* at p 351 Winn LJ observed that the suggestion might be "a gloss, sound or unsound, which [Widgery J] put on" *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265.

64. The passage is at best of little assistance to the Claimants, because neither Widgery J, nor any other judge who has referred to this passage, has upheld a claim for damages for something less than actual injury to property. Nevertheless, I note Mr Sumption's submission, which (together with the doubts of Winn LJ) undermines the submission of the Claimants. Mr Sumption suggests a different interpretation of the word "threaten", that is that it relates back to the sentence higher on the same page (at 577D) where Widgery J said:

> "The affected beasts must be slaughtered, as must others to whom the disease may conceivably have spread".

65. In other words, "threatened" means "suspected", so as to be subject to slaughter. The duty was thus owed not only to those whose cattle were infected and slaughtered, but also to those whose cattle were slaughtered in accordance with an administrative decision before it could be determined whether the threat of infection to them had been realised or not. Mr Sumption submits that Widgery J cannot have been suggesting that a threat insufficient to require slaughter would suffice, because when he came to formulate the duty of care he did not include damage which was not actual damage or injury. He said, at p587B:

> "The duty of care arose only because a lack of care might cause direct injury to the person or property of someone, and the duty was owed only to those whose person or property were foreseeably at risk".

66. In *Muirhead v Industrial Tank Specialities Ltd* [1986] 1 QB 507 the plaintiff reared lobsters in tanks into which seawater was pumped for the purpose of oxygenation. The whole purpose of the pumps was to preserve the health of the lobsters. Due to the negligence of the third defendant, the pumps cut out and the lobsters died from lack of oxygen. Robert Goff LJ held that the killing of the lobsters was physical damage: p532-533.

67. In *F&H Contractors v Commercial Union* (18 May 1993, CA unreported) contractors had spread fertiliser unevenly on a field preparatory to the planting of a crop of potatoes. The result was "striping", some potatoes showing signs of nutrient deficiency, whilst the remainder grew too quickly, resulting in an overall loss of yield. The Court of Appeal upheld the decision of Steyn J that the loss was not "loss of or damage to material property" within the meaning of the public liability policy. All the plants were found to have produced potatoes of uniform quality, but of uneven size. There was no disease. This case does not seem to me to touch on the Claimants' case on loss of condition. An analogy with vegetable crops might be a case where the crops had ripened naturally, but beyond the stage at which they could be marketed. The Claimants are not complaining simply about the uneven size of their animals, and in the *F&H* case the complaint was not that the

potatoes were overripe.

68. In *McMullin v ICI Austalia Operations Pty Ltd* (1997) 72 FCR 1 ICI had developed an insecticide for cotton plants whose active ingredient was CFZ. It was common for cattle to graze on cotton stubble. A number of cattle became contaminated with CFZ in this way, and it was suspected that other cattle, whose owners had bought cotton plants treated with CFZ, might have become contaminated. At p 69 Wilcox J listed the claimants in seven categories. The first four categories were claimants who owned, or had in their possession, cattle which became contaminated, or those who had bought cattle, or meat, after it had become contaminated. A fifth category was claimants whose cattle were not in fact contaminated but were placed in detention because of a belief (erroneous in the event) that they were or may be infected. It is from this case that the Claimants derived the expression the "cattle trail". The cattle trail was the expression used to refer to the link connecting each of the first four categories of claimant (contaminated cattle or meat). The fifth claimants did not recover because that link was missing: p78. So the Claimants are using the expression the cattle trail differently: they use it to include cattle which were not infected or suspected of being infected, but which were detained by reason of the movement restrictions. However, *McMullin* also differs from the present one in that contamination by CFZ was not so serious as an infection by FMD: suspected contamination did not lead to slaughter, and it was held not to be foreseeable that erroneous suspicion by a government authority of contamination would lead to detention. Nevertheless, so far as it goes, the case tends to assist the Defendants, because Wilcox J considered that the loss in relation to the fifth category of claimant (whose uncontaminated cattle were detained) was pure economic loss (p75) and that absent contamination ("the connecting link") no duty of care was owed (p79).

69. In *Landcatch Ltd v International Oil Pollution Compensation Fund* [1998] 2 Lloyd's LR 552 (Outer House, Lord Gill) and [1999] 2 Lloyd's LR 316 (Inner House) the pursuers' business was to rear salmon eggs to smolt (juveniles up to two years of age) in freshwater conditions and then to sell them to others for growing to maturity in seawater conditions mostly around Shetland (p55 col 2). As a result of an oil spill in the sea off Shetland caused by the defenders, the Secretary of State for Scotland exercised his statutory powers to designate the affected area an Exclusion Zone, which meant that the smolt could not be grown on in that zone. The pursuers were unable to sell on their smolt to those with whom they had anticipated making contracts. Some were sold at a lower price than expected, and a significant amount had to be culled (p561 col 2). Lord Gill considered the case law on economic loss which is considered below, and then found that "the pursuers have suffered nothing more than relational economic loss" (p570 col 1). The Inner House agreed: see p328, p335 col 2, p336 col 1. No distinction was drawn between the smolt that were sold for less than expected and those which were culled. This case will be considered again in relation to the relevance of damage being "direct".

70. In *Perre v Apand* [1999] HCA 36; [1999] CLR 180 the Respondent Defendant Apand negligently introduced into South Australia a form of potato disease known as bacterial wilt on to the land of a farmer known as Sparnon (not the Appellant Claimant). The disease did not spread to the Perre's land. The potatoes were grown for export to Western Australia, but Western Australian regulations prohibited the import into Western Australia of potatoes grown within a radius of 20 kms of Sparnon's land. The Perre's land was within that radius. At p193 Gleeson CJ considered the exclusionary rule (and its

distinction between physical and economic loss), but did not need to discuss what exactly happened to the Perre's potatoes, so as to establish whether it was physical damage. Under Australian law the claim succeeded on principles which the Claimants seek to introduce into English law. For present purposes the Defendants note that the loss was categorised as pure economic loss. Callinan J said that what happened to the uninfected potatoes "may not have been actual physical damage", but he compared what happened to them with what happens to land which is said to be subject to planning blight.

71. There are a number of cases where what constitutes physical damage has been considered in the context of a variety of other types of property. The Claimants cited *Lojinska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyds Rep 395. A layer of hydrochloric acid had leaked on to the deck of a ship, and Mance J (as he then was) proceeded on the basis that there was in fact no alteration of the deck caused by the acid, but that the acid had to be cleaned off. That was a strike out case, and Mance J was proceeding on the assumption that alleged facts were true. One such fact was the port authorities required the vessel to be decontaminated of the acid before she could sail.

72. In deciding that the vessel should be regarded as having suffered physical damage, he referred to some criminal cases. He said (p399)

> "the criminal test is one of fact and degree … Relevant considerations are whether there has been 'injury impairing value and usefulness' of the property in question, and the need for work and the expenditure of money to restore the property to its former usable condition is material".

73. The Defendants submit that the Claimants' animals (with the minor exceptions already referred to) are not alleged to have lost limbs or organs, but have simply got older, and either bigger and fatter, or thinner, but in either case less valuable.

74. The Claimants submit that this analysis fails to address the particular features of animal and vegetable produce that distinguish it from many types of inorganic matter. Buyers will commonly be unwilling to take organic produce which is beyond or below a certain stage of natural development. Meat products are commonly required to have a limited range of ratios of fat to lean. As the Defendants note in their written argument, larger carcasses are hard to handle at abattoir and have higher fat content. So too, fruit vegetables and flowers are commonly required by buyers to be at no more than a given stage of their natural processes of ripening or maturing. The environments in which animal and vegetable produce is grown and transported (including ships, trucks and warehouses) are commonly subject to cooling and other controls of air quality to ensure the required condition at the expected time of sale. Failure of the pumps (as in the *Muirhead* case) may result in death (which was there held to be physical damage), but it may also result in accelerated growth which is either impossible or expensive to reverse. Clearly, the breaking of a leg of sheep, the skin of a potato, or the stem of a flower, is physical damage. If the produce is too fat (or thin), or too ripe, as a result, for example, of the failure of a ventilation pump, or delay, caused by breach of duty of care, then a court could conclude that that was as much the result of an external factor (in the sense meant in the passage from Clerk & Lindsell), as would the death of the produce. If a relevant duty of care is breached, and it results in the produce passing the stage of its natural development at which it can be marketed, then I

consider that there is a real prospect of a court accepting that as physical damage. In the present case the prospects of success of such an argument may depend upon more detailed information as to the precise losses and their causes that is not available at this stage of the proceedings.

75. It follows that in my judgment, subject to an important proviso, those Claimants who allege that their pigs went to the abattoir oversized have a real prospect of succeeding in the contention that that is physical damage, and so of recovering the loss of profit truly consequential upon that fact, but not any other economic loss. The proviso, of course, is that they must also have a real prospect of proving the other elements in a cause of action relied on by them.

76. Whether there is any other damage claimed as loss of condition to which the same conclusion would apply need not be decided in this judgment. I was not addressed at that level of detail on the particular heads of damage. What does appear is that loss of condition (as in the case of the overweight pigs and loss of profit truly consequential upon that fact) forms only a limited part of the claims of some of the Claimants, and no part of the claims of others. That seems to me to be the only conclusion on this point that I need reach at this stage.

77. The Claimants referred to a number of cases the facts of which are so far removed from those of the present case that I do not find them helpful. In *Caltex Oil (Australia) Pty v The Dredge Willemstad* (1976) 136 CLR 529 a pipeline was damaged and the owner of the terminal (who was not the owner of the pipeline) incurred expense in transporting refined oil to the terminal while the pipeline was out of use. It was held that he was entitled to recover that expense from the dredger which had damaged the pipeline. In *Candlewood Corpn v Mitsui Ltd* [1986] 1 AC 1, the Privy Council at p24G approved only the reasoning of Jacobs J in *Caltex*. His reasoning was (as cited at p23H) that the duty of care owed to the owner of the pipeline was also owed to

> "a person whose property was in such physical propinquity to the place where the acts of omissions of the dredge … had their physical effect that a physical effect on the property of that person was foreseeable as the result of such acts or omissions".

78. The Claimants rely upon passages from the judgment of Jacobs J not cited by the Privy Council. At p597 Jacobs introduces the concept of "immobilisation of property". He expresses the view that this ought to be a recoverable head of loss, expressing (at p602) his agreement with the dissenting judgment of Edmund Davies LJ in *Spartan Steel*. At p605, shortly after the passage cited by the Privy Council, he states:

> "The damage suffered was the immobilization through the pipeline of the processed crude oil".

79. The reasoning of Jacobs J in *Caltex* seems to me to be no more than the application to facts involving a pipeline, and the product that is carried through it, of the principle applied in *Greystoke* to a ship and its cargo. Jacobs J discusses *Greystoke* at p602 to 602 and derives

from it the propositions:

> "first, that a physical effect, short of physical injury, is a kind of injury the risk of which, if it be foreseeable, there may be a duty of care to avoid; and secondly that there will be such a duty where there is a physical propinquity of the plaintiff's property to the place where the defendant's act or omission has its physical effect".

80. In the present case (as in *Candlewood* (p24G)) that reasoning gives no support to the argument for the Claimants, three of whom are located in Cumbria, Yorkshire and Powys, that is to say, far from Surrey. Surrey was the place where the defendant's act or omission had its physical effect, if and in so far as it is the case that all the damage suffered by some Claimants (and much of the damage suffered by the others) is pure economic loss.

81. In *Jan de Nul (UK) Ltd v AXA Royale Belge SA* [2002] 1 Lloyd's Rep 583 the defendant appellant caused silt to be deposited on land occupied by the third party claimant, and the claim was against the insurers of third party liabilities. In that case the court held that the deposit of silt was a form of physical interference with the third parties' land. Nothing is alleged to have been deposited on the land or livestock of the Claimants. So that case does not assist them. In *Transco Plc v United Utilities Water Plc* [2005] EWHC 2784 [15] the defendant's employee closed off a valve, cutting off the gas supply to the claimant's customers. The claimant incurred costs investigating and restoring the gas supply. Butterfield J held that physical damage included wrongful interference with goods, and that closing the valve was such interference. He held that the tort of wrongful interference with goods was made out (para [24]). In the present case the defendants are not alleged to have touched any property of the Claimants, and what the Claimants do allege bears no relationship to the turning of a valve. Wrongful interference with goods is a separate tort from any of the three pleaded in this case.

82. In *SCM Ltd v WJ Whittall* [1971] 1 QB 337 the defendants' workmen damaged an electric cable belonging to the electricity board, thereby cutting the current to several factories, including that of the plaintiff. The claim was not struck out, on the footing that it was a one for physical damage. But the court discussed the law on pure economic loss. The Claimants rely upon the use of the words "analogous to physical damage" in the following passage:

> "I must not be taken, however, as saying that economic loss is always too remote. There are some exceptional cases when it is the immediate consequence of the negligence and is recoverable accordingly. Such is the case when a banker negligently gives a good reference on which a man extends credit, and loses the money. The plaintiff suffers economic loss only, but it is the immediate - almost, I might say, the intended - consequence of the negligent reference and is recoverable accordingly: see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465. Another is when the defendant by his negligence damages a lorry which is carrying the plaintiff's goods. The goods themselves are not damaged, but the lorry is so badly damaged that the goods have

> to be unloaded and carried forward in some other vehicle. The goods owner suffers economic loss only, namely, the cost of unloading and carriage, but he can recover it from the defendant because it is immediate and not too remote. It is *analogous to physical damage*: because the goods themselves had to be unloaded. Such was the illustration given by Lord Roche in *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)* [1947] A.C. 265. Likewise, when the cargo owners have to pay a general average contribution. It is not too remote and is recoverable.
>
> Seeing these exceptional cases you may well ask: How are we to say when economic loss is too remote or not? Where is the line to be drawn? Lawyers are continually asking that question. But the judges are never defeated by it. We may not be able to draw the line with precision, but we can always say on which side of it any particular case falls."

83. It is clear that in that passage that Lord Denning is explaining why the *Greystoke Castle* is an exceptional case. He cannot be taken to be saying that it lays down a general rule, or that there is some category of damage which is not physical damage, but is to be treated as if it were, for the purposes of the exclusionary rule. No case was cited to me in which the concept of "damage analogous to physical damage" has been applied by an English court in allowing a claim for damages.

84. Subject to the observations on the loss of condition claims in para 74 above, I conclude that all the damage claimed by some of the Claimants, and much of the damage claimed by the others, is pure economic loss. I therefore turn to the question whether the Claimants can recover damages for pure economic loss.

THE EXCLUSIONARY RULE

85. The Defendants submit that there is a rule, sometimes referred to as the exclusionary rule (Clerk & Lindsell on Torts 19th ed para 8-115), that there can be no recovery in any of the three torts in respect of loss resulting from damage which is done to property which is not the property of the claimant, but of a third party with whom the claimant is in contractual relations.

86. The Claimants do not claim to be in contractual relations with any third party who did suffer physical damage (eg no Claimant claims loss suffered as a result of his inability to take, or make, delivery of cattle that he had agreed to buy from or sell to one of the First to Seventh Claimants). The Defendants submit that the Claimants are in an even weaker position than persons in contractual relations with a third party who has suffered physical damage. It follows that the claims for pure economic loss cannot be good in law.

87. The Claimants submit that the Defendants' submission entirely misses their point, because they are not advancing their claim on the footing that they were in contractual relations with a person who has suffered physical damage. The Defendants submit that it is the Claimants who are missing the point. If the arguments from principle that the Claimants advance are sound, then they must be able to explain how those arguments are consistent with the exclusionary rule, but the Defendants submit that that cannot be done.

88. *Weller* is itself an example of the application of the principle relied on by the Defendants. Before applying that principle, at p577 Widgery J said there was a great volume of authority:

> "to the effect that a plaintiff suing in negligence for damages suffered as a result of an act or omission of a defendant cannot recover if the act or omission did not directly injure, or at least threaten directly to injure, the plaintiff's person or property but merely caused consequential loss as, for example, by upsetting the plaintiff's business relations with a third party who was the direct victim of the act or omission. The categories of negligence never close, but when the court is asked to recognise a new category, it must proceed with some caution."

89. The Defendants also rely on a separate, but related, principle, to the effect that where a claimant relies on physical damage, the defendant must directly have injured the plaintiff's property, but that will be considered below.

90. The origin of the line of cases referred to by Widgery J is *Cattle v The Stockton Waterworks* (1875) LR 10 QB 453. In that case the plaintiff was a contractor. The owner of land had made a contract with him by which he was to build a tunnel under a road, along which there was a defective water pipe. The pipe leaked, and when the contractor started to dig, the water that had accumulated under the road flowed out, obstructing the works. This either reduced the contractor's profit or caused him to make a loss. The action was brought under *Rylands v Fletcher*. The case was dismissed on the basis of the contractor not having title to sue. Blackburn J said:

> "In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so, we should establish an authority for saying that, in such a case as that of *Fletcher v. Rylands* … the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley v. Gye* … , Courts of justice should not "allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to

> transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts." In this we quite agree."

91. In other words, Blackburn J contemplated as possible an action by the owner of the land, and by those workmen whose tools or clothes were destroyed. All of these had suffered physical damage. But what is excluded is claims for loss of wages by those whose tools or clothes had not been damaged, or profits on the contract.

92. Since *Weller* there have been further authorities, including the *SCM* case cited above. In *Spartan Steel & Alloys Ltd v Martin* [1973] QB 27 it was held that the claimant was unable to recover the manufacturing profits that were lost due to a power cut caused by the defendants allegedly cutting the supply line owned by a third party electricity supplier. In *Candlewood Navigation Corp v Mitsui Lines* [1986] 1 AC 1 (PC) it was held that a time charterer of a vessel could not sue for the profit it would have made during the period that the vessel was under repair following a collision caused by the defendant's negligence.

93. In *Leigh & Sullivan v Aliakmon Shipping Co* [1986] AC 785 the claimant had agreed to buy a cargo to be shipped on the defendant's vessel. Because of poor stowage, the cargo was damaged. At the time of the damage the claimant was neither the owner nor possessor of the cargo, but under the terms of the purchase contract he had assumed the risk of damage to the cargo. The House of Lords held that as the property was owned by a third party at the time it was damaged, the claimant had no claim. In that case Lord Brandon set out the reasons for the rule:

> "Mr. Clarke [as he then was] said, rightly in my view, that the policy reason for excluding a duty of care in cases like [*Candlewood* otherwise known as] *The Mineral Transporter* and what I earlier called the other non-recovery cases was to avoid the opening of the floodgates so as to expose a person guilty of want of care to unlimited liability to an indefinite number of other persons whose contractual rights have been adversely affected by such want of care. Mr. Clarke went on to argue that recognition by the law of a duty of care owed by shipowners to a c.i.f. or c. and f. buyer, to whom the risk but not yet the property in the goods carried in such shipowners' ship has passed, would not of itself open any floodgates of the kind described. It would, he said, only create a strictly limited exception to the general rule, based on the circumstance that the considerations of policy on which that general rule was founded did not apply to that particular case. I do not accept that argument. If an exception to the general rule were to be made in the field of carriage by sea, it would no doubt have to be extended to the field of carriage by land, and I do not think that it is possible to say that no undue increase in the scope of a person's liability for want of care would follow. In any event, where a general rule, which is simple to understand and easy to apply, has been established by a long line of authority over many years, I do not think that the law should allow special pleading in a

> particular case within the general rule to detract from its application. If such detraction were to be permitted in one particular case, it would lead to attempts to have it permitted in a variety of other particular cases, and the result would be that the certainty, which the application of the general rule presently provides, would be seriously undermined. Yet certainty of the law is of the utmost importance, especially but by no means only, in commercial matters. I therefore think that the general rule, re-affirmed as it has been so recently by the Privy Council in *The Mineral Transporter* [1986] A.C. 1, ought to apply to a case like the present one, and that there is nothing in what Lord Wilberforce said in *Anns*' case [1978] A.C. 728 which would compel a different conclusion."

94. Any extension of the meaning of physical injury or damage (to encompass what hitherto has been regarded as economic loss) for the purposes of the law of negligence would undermine the certainty of the law, the importance of which Lord Brandon stressed in that case. It would also require consideration of the boundaries between the tort of negligence and the other torts referred to in para 55 above.

95. The principle was re-affirmed in *Murphy* at p 485C-E, and other cases, and applied in *Landcatch*, as noted above.

96. The argument that the Claimants in this case are in a weaker position than if they had been in contractual relations with the First to Seventh Claimants is one supported by Lord Gill at p 570 col 1.

97. A related question is whether any physical damage must be direct if it is to support a cause of action. What the word "direct" means in this area of the law may depend on the factual context under consideration in any given case. In *British Celanese v A H Hunt* [1969] 1 WLR 959 Lawton J considered it in the context of *Rylands v Fletcher,* negligence and nuisance where Metal foil had been blown from the defendant's factory premises on to an electricity sub-station, which in turn brought the plaintiff's machines to a halt. At p966 Lawton J said the meaning he would give to the phrase "direct victim" was a person whose "property was injured by the operation of the laws of nature without any human intervention".

98. It is clear from the citations already made that the requirement of directness came in with *Cattle* ("only the proximate and direct consequences of wrongful acts"), and, in negligence, with *Donoghue v Stevenson* [1932] AC 562, 580 ("persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected…"). It is repeated by Widgery J in the passage cited above from *Weller* at p577 (para 88 above).

99. The requirement that the injury be direct was modified, as the Claimants submit. In *SCM* Lord Denning MR set out the law as follows:

> "…Mr. Kidwell said that the contractors here owed a duty of care

> *to the electricity board* which owned the cable, because their cable was liable to be *directly* injured and the contractors ought reasonably to have *foreseen* it. But the contractors, he said, owed no duty *to the factory owners* because their factory was not liable to be *directly* injured, but only *indirectly* (by having the current cut off). He admitted that the injury to them might reasonably be foreseen, but nevertheless said that the contractors were under no duty to avoid it.… I cannot accept Mr. Kidwell's proposition. The distinction between "direct" and "indirect" has been attempted before, but it has proved illusory. It was decisively rejected in a parallel field in *The Wagon Mound* [1961] A.C. 388 and should not be revived here. The cases, too, do not warrant the distinction. A man may owe a duty of care to those whom he foresees may be indirectly injured, as well as to those whom he foresees may be directly affected. A good example is wilful damage done by an escaping borstal boy. Such damage is as indirect as can be, but, being reasonably foreseeable, a duty of care is owed to those in the neighbourhood who may be injured by it: see *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004."

100. But the law has moved on since then. In *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] 1 AC 211, 237, Lord Steyn expressed it as follows:

> "Counsel for the cargo owners argued that the present case involved the infliction of direct physical loss. At first glance the issue of directness may seem a matter of terminology rather than substance. In truth it is a material factor. The law more readily attaches the consequences of actionable negligence to directly inflicted physical loss than to indirectly inflicted physical loss. For example, if the N.K.K. surveyor had carelessly dropped a lighted cigarette into a cargo hold known to contain a combustible cargo, thereby causing an explosion and the loss of the vessel and cargo, the assertion that the classification society was in breach of a duty of care might have been a strong one. That would be a paradigm case of directly inflicted physical loss… The role of the N.K.K. was a subsidiary one. In my view the carelessness of the N.K.K. surveyor did not involve the direct infliction of physical damage in the relevant sense. That by no means concludes the answer to the general question. But it does introduce the right perspective on one aspect of this case."

101. In *Perrett v Collins* [1998] 2 Lloyd's Rep 255, 264, a personal injury case, Hobhouse LJ commented on that passage from the speech of Lord Steyn as follows:

> "He expressly said that the fact that the carelessness of the surveyor did not involve the direct infliction of physical damage did not exclude the existence of a duty of care; indeed he could not have done so without overruling previous authority. As I have attempted to explain, established principle shows that this is not a requirement. The highest that the point can be put is that where the

> conduct would amount to a direct invasion of property or personal rights amounting to or closely analogous to trespass, a special justification is required to negative liability."

102. In none of the cases does the court discuss the issue of directness as it arises in the present case, namely the effect of the government imposed restrictions upon movement, which saved the Claimants' livestock from risk of infection with FMD, but at the price of them suffering the economic and physical consequences of those restrictions, for which they now claim compensation. Although there is no issue before me on foreseeability, or causation, there is an issue of remoteness, or the scope of the duty of care. That issue is as to the significance of the fact that it was the Measures that affected the Claimants animals, and not the FMDV.

103. The case that comes closest to assisting on this point is *Landcatch*, which was cited with approval by Mance and Chadwick LJJ in *The Sea Empress* [2003] 1 Lloyd's Rep 327, 335-336, 339. As noted at para 69 above there was in that case a restriction on movement of fish into the area where the oil spillage had occurred. The order did not include in the designated zone the place where the pursuer was growing the smolt, but it did include the place where the buyer of the smolt would have grown them on.

104. The issue of directness was addressed by Lord McCluskey in the Inner House in passages to which both sides referred me. That claim was advanced under the Merchant Shipping Act 1974, and not at common law. The legislation was construed as permitting recovery for economic loss, so the distinction between physical injury and pure economic loss did not have the importance it would have at common law. The distinction that mattered was that between direct and indirect loss. There was an issue as to whether the loss (which included the smolt culled for lack of sales) was too remote. Lord McCluskey distinguished the fishermen who had regularly fished in the polluted waters. He then said (at p332):

> "For the fisherman I am considering, the pollution of the waters in which he regularly fishes does no physical harm to his person or his property; the oil does not touch him or anything belonging to him; there is no contamination of him or of his vessel or equipment. Nevertheless, it appears to me that the loss of his livelihood is properly described as damage that is caused directly and immediately by contamination resulting from the discharge or escape of oil from the ship. The contamination does not set in train a chain of events that eventually results in his suffering loss or damage. On the contrary, the contamination is both the immediate, direct and, in such a case, the only cause of his loss. The contamination occurs at the very point at which he carries on his economic activity, fishing. But, because he does not own the waters in which he fishes or the fish which swim there, that loss is properly described as pure economic loss; because what he loses is not the fish or the waters but the intangible prospect of making a net profit by selling any fish that he might otherwise have caught in the waters had they not been contaminated. That loss of prospective profit is pure economic loss. In a figurative sense what he has in the waters is a direct economic interest. That interest is

> directly affected by the contamination. By contrast, the trader who regularly supplies him with the diesel and the nets without which he cannot catch any fish has himself no direct interest in the waters in which the fisherman fishes. That trader's economic interest - in making a profit out of the sale of diesel and nets - has its location, at least figuratively speaking, in the place where he supplies the goods that the fisherman buys from him. There is no contamination there. The trader's loss of profit, which begins to occur when his expected sales do not eventuate, is essentially relational loss. It is, of course, pure economic loss; but it is not that which is important; what is important is that it is not a loss that is caused directly by contamination. In the same way, the wholesaler who supplies the diesel in bulk to the trader, or the netmaker who sells the trader nets for onward sale to fishermen may be economically prejudiced by the disruption of his market; but his economic prejudice, or loss, is not caused directly by oil pollution, or contamination. It is directly caused by the trader's decision not to buy what he has to sell. It is also relational loss. In my opinion, therefore, the so-called concession does not lead in itself to the conclusion that all relational loss falls under the head of "damage" in the statute provided it can be shown to have resulted on a "but for" basis from the oil escape and contamination."

105. At p335 Lord McCluskey summarised his reason for rejecting the claim of Landcatch:

> "The whole corpus of cases cited to us from different fields in which the common law or the legislature have conferred rights to compensation, reparation or damages for loss demonstrates, in my view, that the test of remoteness is too well established to be excluded except by express and unambiguous enactment. That test would exclude a claim such as is now advanced by Landcatch on the ground that it was indirect, relational pure economic loss which is too remote from the causal factor which makes the causer liable. I do not consider that Landcatch have succeeded in showing that the words used in the statutes creating liability for this particular compensation have displaced these familiar principles."

106. Mr Beloff in his written argument summarises the position as follows:

> "Just as the culling of the smolt in *Landcatch* was simply the by-product of the interference with the pursuer's ability to sell the smolt, so the alleged 'loss of condition' to the animals in the present case was simply the by-product of the Claimant's inability to deal with them as economic units at the 'optimal time'. The actual loss in both cases is, on proper analysis, 'nothing more than relational economic loss'".

107. The Claimants submit that because they have a proprietary interest in the farms and the livestock, their position is to be assimilated to that of the fishermen who regularly fished in

the polluted waters, and whose loss (albeit economic in that case) was not too remote.

108. It is the restriction on movement that led to the inability of Landcatch to sell its smolt at the price expected, and to cull what it did not sell. In my judgment the loss that the Claimants suffered was as indirect as the loss suffered by Landcatch, and that is so whether the loss be physical injury or economic loss. Their farms were not polluted by FMDV. It would have made no difference in *Landcatch* if the culled smolt had been characterised as physical injury (as the dead lobsters were in *Muirhead*). Whether economic loss, or physical injury, the culled smolt were an indirect loss that was too remote. Causation was no more than of the "but for" kind: but for the pollution or the outbreak of FMD, the loss of the smolt and the losses of the Claimants' cattle and pigs, would not have occurred.

109. If any of the Claimants are to succeed, they must have a real prospect of establishing at trial that the duty of care is owed to them in respect of indirect physical loss. And if all are to succeed they must have a real prospect of establishing at trial that the duty of care is owed to them in respect of indirect pure economic loss. So I turn to consider the scope of the duty of care.

NEGLIGENCE – DUTY OF CARE

110. For the purposes of the applications before me the Defendants accepted that they owed some duty of care to avoid causing damage through the escape of FMD. The question in issue before me was: what are the limits of any such duty? I should mention that the Defendants had advanced in their written arguments another point which they have not abandoned, but did not advance before me, namely that liability at common law was pre-empted by statute (*Marcic v Thames Water Utilities* [2002] 2 AC 42, [33]-[35], [62]-[70]).

111. The starting point can be taken from the speech of Lord Hoffmann in *South Australian Asset Management Corporation v York Montague Ltd* [1997] AC 191, 211A-B, 211G-212D:

> "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action.
>
> A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by *Caparo Industries Plc. v. Dickman* 1990] 2 A.C. 605. The auditors' failure to use reasonable care in auditing the

> company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders who had bought more shares in reliance on the accounts because, although they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares. As Lord Bridge of Harwich said, at p. 627:
>
> > "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."
>
> In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed.
>
> How is the scope of the duty determined? … In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty."

112. The Defendants submit that the scope of the duty in this case is restricted in accordance with the exclusionary rule, discussed above, including the principles that there are excluded from the scope of the duty both pure economic loss and indirect physical injury.The reasons for the existence of the exclusionary rule are set out in numerous case, including *Cattle* (para 90 above), *Candlewood* (para 92 above), *Murphy* (para 55 above).

113. The Claimants plead a duty of care to themselves in terms set out in para 36 above, that is in terms "not to cause … the losses sustained by the Farmers as" pleaded. I have already noted that there is nothing pleaded in support of this duty which would not equally apply so as to give rise to a similar duty to all the livestock farmers of Great Britain.

114. Conscious of the need to show in argument before me the limits of the alleged duty, in their written submission the Claimants argued, under the heading "There is no danger of indeterminate liability":

> "… the Measures provide a complete answer to any allegation by the Defendants as to indeterminacy or floodgates since they provide a ready made guillotine which defines the relevant class: the duty is owed to those who would have to submit to the Measures in the event of a confirmed FMD outbreak".

115. This proposition is derived from *Perre* where Kirby J said at para 299: "It is the regulation which answers the complaint about indeterminate liability". It is to be noted that the Western Australian regulation in that case restricted the importation of potatoes to those which complied with specified conditions. One condition was that the potatoes had to have

been "grown on a property situated at least 20 kilometres from a known outbreak of the disease Bacterial Wilt detected within the last 5 years" (see para 59 of *Perre*). There was a similar condition in relation to processing of the potatoes. The contrast here, where the measures restricting movement apply to the whole of Great Britain, is therefore striking.

116. Of equal concern as a suggested duty owed to livestock farmers in the whole of Great Britain, is a suggested duty owed to all those who would have to submit to the Measures. In the present case they are not limited to livestock farmers. The Defendants submit that the principle for which the Claimants contend could not be confined to livestock farmers, but would affect auctioneers and many others. That is a wider class than the processors and others referred to in the second condition in *Perre* at para 59 of the court's judgments.

117. In the Claimants' written submission "the Measures" are defined as the measures which the Government imposed to prevent the spread of the disease "which included nationwide restrictions upon the movement of susceptible livestock potentially at risk". I take that to be an abbreviated reference to the measures set out in the Particulars of Claim and summarised in this judgment at paras 21 to 22 and 26 to 27 above.

118. Three examples taken from the 2006 Order Sch 7 indicate those to whose business Sch 7 of the Order is directed. Art 1 prohibits the movement of susceptible animals into or out of a restricted zone, and, as it seems to me, will foreseeably have an impact on hauliers as it does as livestock farmers. Livestock farmers are not specifically identified in Sch 7, although they are clearly one of a number of groups potentially affected by it. The same applies to art 2, which controls the movement of carcases, manure, slurry or used litter from slaughterhouses. That foreseeably will affect the business of hauliers and slaughterhouse owners. The impact of art 6 is much wider than livestock farmers. It does not identify livestock farmers in terms, but does identify a number of others (for example auctioneers would be caught by art 6(1):

> "**Control of animal gatherings and gatherings of people in a restricted zone**
> 6.—(1) Subject to sub-paragraph (5), no person shall—
> (a) hold any animal gathering which includes susceptible animals in a restricted zone; or
> (b) hold any gathering of people on premises in a restricted zone in connection with the sale of any susceptible animal kept there at which more than two people (other than the owner or keeper of the animal and his representatives) are present, except under the authority of a licence granted by the Secretary of State.
> (2) Subject to sub-paragraph (5), no person shall hold or take part in the following activities in a restricted zone—
> (a) hunting any drag or other trail; or
> (b) stalking,
> except under the authority of a licence granted by the Secretary of State.
> (3) Subject to sub-paragraphs (4) and (5), no person shall shoot deer except under the authority of a licence granted by the Secretary of State.
> (4) The occupier of any land, members of his household, persons

> employed by him as beaters and any member of a shooting party of not more than three persons authorised by him may shoot deer found on that land…"

119. It follows that I cannot accept the submissions of the Claimants that "the Farmers … should have been a uniquely prominent class in the Defendants' contemplation", or that there is a clear limiting factor "beginning and ending with livestock farmers in possession of susceptible animals", or even that "the Farmers are an identifiable class, membership of which was capable of ascertainment at the time at which the Defendants were performing their work at or in respect of Pirbright". The class foreseeably affected by the declaration of a restricted zone under Sch 7 of the 2006 Order seems to be to encompass potential claimants no less numerous than those to whom Widgery J was referring in the passage cited from *Weller* at para 2 above.

120. As a further, or alternative approach, the Claimants advance submissions to the effect that they fall outside the exclusionary rule on the bases of a number of recognised exceptions. One basis for this was by reference to the *Greystoke* case referred to above. But as Lord Keith confirmed in *Murphy* at p 468E, that case is exceptional. He regarded it as turning on the specialities of maritime law concerned in the relationship of joint adventurers at sea.

121. The Claimants allege a special relationship and an assumption of responsibility by the Defendants (see paras 40 to 43 above). This is a reference to cases such as *Hedley Byrne, Smith v Bush* [1990] 1 AC 831, *Henderson v Merrett* [1995] 2 AC 145, *White v Jones* [1995] 2 AC 207 and *Spring v Guardian Assurance plc* [1995] 2 AC 296. The Defendants submit that these cases are of no assistance at all. They are each an example of "a relationship having all the indicia of contract save consideration": *Customs & Excise v Barclays Bank* [2007] 1 AC 181, 190F para [4]. There is nothing pleaded in the present case which suggests any relationship with any indicia of a contract between the Claimants and the Defendants, or any dealings between the Defendants and the Claimants. The Defendants are said to have been performing "a task", but they were not providing a service to any of the Claimants in the sense required in these cases, where the facts are very far removed from those of the present case. As the Defendants submitted, the touchstone of liability in this line of cases is "things said or done by the defendant or his behalf in dealings with the plaintiff … on exchanges … which cross the line between the defendant and the plaintiff": *Williams v Natural Life* [1998] 1 WLR 830, 835C-G. Nor is there anything pleaded that could be characterised as reliance. The test is not simply reliance in fact. The test is whether the plaintiff could reasonably rely on an assumption of responsibility: p836E to 837B. The relationship here, it is submitted, is no more than one of dependence.

122. Further the Claimants refer to the threefold test in *Caparo Industries v Dickman* [1990] 2 AC 605, *Customs & Excise v Barclays Bank* [2007] 1 AC 181, 189C, where Lord Bingham sets it out as follows at [4]:

> "whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant".

123. Finally, the Claimants referred to the 'incremental test', set out by Lord Bingham in the same case, at paras [4] and [7] as follows:

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'. .. I incline to agree with the view …, that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in *Caparo Industries plc v Dickman*, to find that there has been an assumption of responsibility or that the proximity and policy conditions of the threefold test are satisfied. The converse is also true."

124. So far from satisfying the incremental test, if the Claimants' submissions are correct, then the exclusionary rule cases must have been wrongly decided. Foreseeability is rarely, if ever, in question in those case. For example, in *Cattle* the loss of profit by the contractor, and the laying off by the contractor, which led to the loss of wages of the workmen whose tools are not damaged, must be the very thing that would be foreseen. In *Weller* the loss to the auctioneers (and to almost all business in area affected) was foreseeable, as Widgery J noted in the passage at 577C-D cited in para 2 above. As the 2006 Order Sch 7 shows, the livestock farmers of Great Britain are in no closer proximity to the Defendants than the auctioneers. There is no connecting link, or "cattle trail", in that there is nothing connecting livestock that is infected (or is suspected of being infected) and so liable to be slaughtered with livestock that is not liable to be slaughtered. It is true that the livestock farmers are vulnerable, in the sense that there is nothing they can do to protect themselves (that is the sense used in *Perre*). But that is true of auctioneers and all others carrying on business in an area subject to a declaration made under the 2006 Order.

125. I recognise, of course, the respect that is due to the editors of Clerk & Lindsell who have written (at para 8-117) in relation to *Perre*:

> "The current willingness of the English appellate courts to articulate policy reasoning rather than to rely on bright lines excluding liability, suggests that the incremental approach in *Perre* might be followed".

126. That may be the strongest support there is to the Claimants' arguments. But the point is not arguable, in any event at first instance. As already noted, this case is distinguishable from *Perre*, since the class of potential claimants in the present case, if taken from the terms of the 2006 Order, is very much greater than the class of potential claimants in *Perre*.

127. I accept the submissions of the Defendants. There is no real prospect of the Claimants

succeeding in establishing a duty of care that relates to any of the loss or damage referred to in the pleading cited at paras 36 and 38 above, examples of which are set out at paras 31 to 34 above.

CONCLUSION

128. It follows that in my judgment the Claimants have no real prospect of succeeding in their claim in negligence against any of the Defendants.

129. That conclusion also means that they have no prospect of succeeding in either of the other two claims, since nuisance and *Rylands v Fletcher* are as much subject to the exclusionary rule as is negligence. The rule originated in *Cattle*, which is a *Rylands v Fletcher* case: see para 90 above, which Widgery J repeated in *Weller* at p587G-588F. That was the view of Thesiger J in *SCM v Whittall & Son Ltd* [1970] 1 WLR 1017, 1031E. It is common ground that *Rylands v Fletcher* has now been recognised as a sub-species of nuisance: *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 at para [9].

130. Nevertheless, I shall deal shortly with the claims in nuisance and *Rylands v Fletcher*.

NUISANCE AND *RYLANDS v FLETCHER*

131. The Claimants pleaded case in nuisance and *Rylands v Fletcher* is set out at paras 47 and 49 above. In *Hunter v Canary Wharf* [1997] AC 655, at 695, Lord Lloyd summarised the law as follows:

> "Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land. In cases (1) and (2) it is the owner, or the occupier with the right to exclusive possession, who is entitled to sue… the basis of the cause of action in cases (1) and (2) is damage to the land itself, whether by encroachment or by direct physical injury."

132. The Defendants refer to the following passage from the speech of Lord Goff at p685G-686A:

> "for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land. Such an emanation may take many forms - noise, dirt, fumes, a noxious smell, vibrations, and suchlike. Occasionally activities on the defendant's land are in themselves so offensive to neighbours as to constitute an actionable nuisance, as in *Thompson-Schwab v. Costaki* [1956] 1 W.L.R.335, where the sight of prostitutes and their clients entering and leaving neighbouring premises were held to fall into that category. Such cases must however be relatively

rare."

133. The Defendants submit that there has been no infringement upon any private rights of the Claimants. If there has been any interference with the enjoyment of their land it has not been directly caused by anything emanating from the Defendants' land. So the Claimants can have no claim under either of these heads.

134. Nothing from the Defendants' land encroached on any land of the Claimants. For reasons given in relation to negligence, the Claimants have no real prospect of establishing that any physical injury was done to their land, still less that it was direct physical injury. The Claimants' strongest argument is in relation to the third kind of nuisance, interference with quiet enjoyment.

135. In order to establish that what caused the interference with the enjoyment of their land was the Defendants, the Claimants plead that the interference was in the form of the Measures (para 47 above). And in support of the proposition that liability can be found where the effect on a claimant's land is via a third party, reliance is placed on three cases: *Thompson-Schwab v Costaki* (customers of prostitutes in the neighbouring land), *Lippiatt v South Gloucestershire Council* [1999] 4 All ER 281 (travellers operating from the defendant's premises, which premises constituted a launching pad for the nuisance) and *Lyons v Gulliver* [1914] 1 Ch 631 (crowds queuing to gain access to the defendant's theatre blocked access to the claimant's shop).

136. These examples are remote from the exercise by DEFRA of the statutory powers in question in this case. In my judgment, there is no real prospect of establishing that the measures imposed by DEFRA amount to a nuisance by the Defendants.

DEFRA AS JOINT TORTFEASORS

137. The claims in nuisance and *Rylands v Fletcher* are not made against DEFRA as occupiers of any land (since they were not alleged to be occupiers). The case is advanced against them as joint tortfeasors in respect of all three torts.

138. In the light of the conclusions I have reached, to the effect that the Claimants have no real prospect of succeeding on any of their claims in tort, I do not need to consider whether, if they did have a real prospect of succeeding against Merial and/ or IAH, there would be a real prospect of them succeeding against DEFRA as joint tortfeasors. If I did have to consider that, I would consider that there was force in the Claimants submission that this may not be an issue appropriate for determination at this stage, that is before disclosure, and perhaps also before trial. Accordingly, I reach no conclusions on this part of the case.

SUMMARY

139. For the reasons set out above, I conclude that the Claimants have no real prospect of succeeding on any of their claims, and that the claims must therefore be dismissed under CPR Part 24.