PARTIES:	NORTHERN TERRITORY OF AUSTRALIA and OTHERS v MENGEL, Arthur John and OTHERS
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL
FILE NOS:	No. AP 7/92
DELIVERED:	Darwin 12 April 1994
HEARING DATES:	20-23 and 27-30 APRIL 1993, 21, 22 and 24 SEPTEMBER 1993
JUDGMENT OF:	Angel, Thomas and Priestley JJ

CATCHWORDS:

Tort - Miscellaneous torts - Action on the case - "Beaudesert principle" - Three elements: acts of the tortfeasor must be positive, damage to the plaintiff must be an inevitable consequence and the act must be unlawful - Meaning of "inevitable consequence" and "unlawful" - Principle applied -

Garret v Taylor (1621) Cro Jac 567; 79 ER 485, considered.

Keeble v Hickeringill (1707) 90 ER 906, 11 East 574, 103 ER 1127, 11 Mod 74 and 130, 88 ER 898 and 945, considered.

Grainger v Hill (1838) 4 Bing (NC) 212, 132 ER 769, Arn 42, considered.

Beaudesert Shire Council v Smith (1966) 120 CLR 145, followed.

Brisbane Shipwrights Provident Union v Heggie (1906) 3 CLR 686, considered.

Dunlop v Woollahra Municipal Council (1981) 1 NSWLR 76, referred to.

Lonrho Ltd v Shell Petroleum Co Ltd (No 2) (1982) AC 173, referred to.

Kitano v Commonwealth (1974) 129 CLR 157, considered.

Elston v Dore (1982) 149 CLR 480, considered.

Mogul Steamship Co Ltd v McGregor Gow & Co [1892] AC 25, considered.

Tort - Miscellaneous torts - Action on the case - A plaintiff has an action on the case for damage suffered where in face of an express or implied threat by governmental authority of unlawful interference with the plaintiff's property or of unlawful prosecution of the plaintiff, the plaintiff has felt compelled to refrain, and has refrained, to the plaintiff's loss, from dealing with the plaintiff's goods -

James v The Commonwealth (1939) 62 CLR 339, followed.

Tort - Parties in particular relationship - Misfeasance in a public office - Must have malice or knowledge of acting without power - "Knowledge" - Constructive knowledge - Wilful closing of the eyes, a specific intent to avoid knowing something which might be to one's disadvantage - Constructive knowledge not found in this case -

Constitutional principles - Rule of Law - Plaintiffs are entitled to compensation where they suffer direct foreseeable and foreseen loss as a consequence of governmental action which was unauthorised by law -

Bourgoin S.A. v Ministry of Agriculture [1986] Q B 716, referred to.

Crofter Hand Woven Harris Tweed Co v Veitch [1942] AC 435, referred to.

Secretary of State for India v Bank of India (1938) 2 All ER 797, referred to.

Farrington v Thomson Bridgeland [1959] VR 286, referred to.

Little v Commonwealth (1947) 75 CLR 94, considered.

Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105, considered.

Brasyer v Maclean (1875) LR 6 PC 398, considered.

McClintock v The Commonwealth (1947) 75 CLR 1, considered.
Poulton v The Commonwealth (1953) 89 CLR 540, considered.
Poke v Eastburn [1964] Tas SR 98, disapproved.
Tort - Damages - Causation - Question whether the damage would have occurred in the same way and with the same consequences without the actions of the defendant -
March v Stramare (1991) 170 CLR 506, considered
Damages - Measure and remoteness of damages in actions for tort - Heads of damage -
Statutes - Interpretation - Stock Diseases Act NT s27(2) - Meaning of "may" in s27(2) - Gives donee of the power a discretion -
Interpretation of instruments - Government Gazette - Gazettal pursuant to s27(2) of the Stock Diseases Act - "Where herds subject to an eradication programme" following the words "infected, suspect, restricted or provisionally clear" are words of qualification of the four listed categories - Gazette did not give legal authority for movement restrictions as imposed -

REPRESENTATION:

Counsel:

APPELLANT: T Pauling QC S-G and S Gearin
RESPONDENT: G Hiley QC and P Barr

Solicitors:

APPELLANT: Solicitor for the Northern Territory
RESPONDENT: Cridlands

Judgment category classification: A
Court Computer Code:
Judgment ID Number: ang94002
Number of pages: 117

ang94002

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP 7 OF 1992

ON APPEAL from the judgment of Asche CJ in proceeding No 668 of 1989

BETWEEN:

THE NORTHERN TERRITORY OF AUSTRALIA, DAVID TABRETT AND ROBERT BAKER
Appellants

AND:

ARTHUR JOHN MENGEL,
ELEANOR CAROLINE MENGEL,
RODNEY JOHN MENGEL,
SUSY CHRISTINE MENGEL,
WALTER KLEIN and
CAROLYN KLEIN
Respondents

CORAM: ANGEL, THOMAS and PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 12 April 1994)

ANGEL J:

This is an appeal and cross appeal from a decision of Asche CJ who gave judgment in the action for the respondents/plaintiffs against the appellants/defendants in the sum of $305,371.00. His Honour dismissed all the claimed causes of action except that based on *Beaudesert Shire Council v Smith* (1969) 120 CLR 145. The principle of private law formulated and applied in that case (at 156) viz: "... independently of

trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.", has been the subject of learned controversy both academic and judicial. It has been sought on a number of occasions, not without some difficulty, to be explained, and those explanations in turn have been the subject of further learned controversy. There are undoubtedly difficulties about the formulation of principle, not only in what was meant by the terms 'unlawful' and 'intentional' but the import of the principle upon the background of a much wider range of authorities; I have particularly in mind those sentinels of a free trading society, the *Mogul Steamship* case [1892] AC 25 and *Allen v Flood* [1898] AC 1. Opinion has varied as to whether 'unlawful' means forbidden by law or merely unauthorised by law and whether 'intentional' means merely voluntary or intentionally bringing about a result, ie. the loss to the plaintiff. *Beaudesert* was the subject of some discussion by the High Court in *Elston v Dore* (1982) 149 CLR 480 where it was said (at 492) that any reconsideration of *Beaudesert* should desirably be carried out by a High Court comprising all seven Judges.

I have had the very great advantage of reading the reasons for judgment of Priestley J, who has fully set out the facts and the circumstances of this appeal.

I agree with Priestley J, for the reasons that he has given, that this court should not interfere with any of the learned trial Judge's findings of fact.

Contrary to the plaintiffs' submissions, I am of the view that restrictions imposed pursuant to the provisions of s27(2) of the Stock Diseases Act do not necessarily have to be expressed to relate to the disease status of holdings. I do not wish to add to what the learned trial Judge and Priestley J have said on this aspect of the case.

I agree with Priestley J that the August gazette notice had no application to the plaintiffs' herds and that Wilson's classification of the plaintiffs' herds as 'suspect' had no legal effect, and that neither the plaintiffs nor their holdings, nor their herds could be subject to the August gazette notice, the application of which to the plaintiffs' herds was dependent upon the classification made by Wilson on or about 9 September 1988.

For the reasons given by the learned trial Judge and Priestley J, I agree that the defendants had no statutory or statute based power or authority to act and conduct themselves as they did and that the plaintiffs sustained loss as a consequence of the actions and conduct of the defendants.

The plaintiffs asserted various nominate and innominate private torts in claiming their loss. They relied on negligence, conversion, misfeasance in public office, and what was termed unlawful interference with property rights and unlawful interference with economic relations. His Honour the learned trial Judge rejected all such claims. He found the defendants were not motivated to harm the plaintiffs; he found the defendants at all times acted bona fide in the sense they were honestly doing what they considered to be their duty and in the public interest. There is no reason to disturb those findings.

Various analogies were discussed during argument. A tort of besetting was mentioned, as to which see and compare *Lyons v Wilkins* [1899] 1 Ch 255; *Re Van der Lubbe* (1949) 49 SR NSW 309; *Hubbard v Pitt* [1976] QB 142 at 175, *Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760 at 767 per Mason JA and *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383. Nuisance and *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 were also discussed.

I respectfully agree with Priestley J's analysis of *Beaudesert* and what he says as to the substantial basis of that decision and its application to the facts of this case. It may be noticed that Kelly CB in *England v Cowley* (1873) LR 8 Ex 126 at 132 - a case where a plaintiff in possession of his goods as

a guest in a rented house was persuaded not to move them by the landlord who said they were not to be moved until arrears of rent were paid by the tenant - said that in such circumstances "some form of action of trespass on the case" may lie.

I also respectfully agree with Priestley J's careful analysis of *James v The Commonwealth* (1939) 62 CLR 339, a decision of Dixon J, which upon analysis, with great respect, perhaps warrants Professor Castle's observation that the great Judge was at times given to "studied ambiguity to accommodate change within the framework of perceived evolutionary characteristics implicit in time honoured concepts.", see A W B Simpson (Ed) 'Biographical Dictionary of the Common Law', (1984) Butterworths at 153. If I may say so, with respect, it can create difficulties for some who seek to follow. In the circumstances of the present case it is a matter for regret as some of the ideas could be seen to impinge upon individual liberty and the rule of law. The American abstract expressionist Barnett Newman somewhat bluntly once said:

> "One thing is certain: ambiguity as a deliberate act, as a program for either art or life, is an anomaly and an evasion that can lead only to some form of slavery. Clarity alone can lead to freedom.";

Barnett Newman, 'Selected Writings and Interviews', (1992) University of California Press at 123. I mention these matters because the present case concerns freedom.

I am of the view that in the circumstances of this case, the liability of the defendants for the plaintiffs' losses properly rests upon broader considerations than the identification of a personal action on the case. It rests rather, I think, on the place of individual liberty of action within our society under the constitutional principle of the rule of law.

A study of the common law shows that the soundness and usually the acceptability of legal decisions rest upon the integrity of the legal and equitable principles applied rather than the identity of the court making the decision. History is replete with decisions of the highest courts that, upon analysis, have been found wanting. *Anns v Merton L.B.C.* [1978] AC 728 is a recent example of this. This is one reason ultimate courts of appeal now recognise a jurisdiction to overrule themselves. Only time will reveal whether *Beaudesert* shares the same fate as *Anns*. It is to be remembered that the common law is no mere aggregate of past decisions or "wilderness of single instances" but the principles and precepts underlying judicial decisions which take account of - if they do not always articulate - the substantive rights those principles protect. The present case involves the liberty of the subject and one important function of the common law, viz: "to let the ordinary citizen go about his daily life and the conduct of his affairs free from interference by those whose constant preoccupation is

dictating to others how they should lead their lives", per Gleeson CJ, The Law and Change (1989) NSW Law Soc J 51.

This case concerns governmental action, not the actions of private individuals. Had the defendants been private persons, the plaintiffs in all likelihood would have told them to mind their own business - as was the plaintiffs' right, *R v Director of Serious Fraud Office* [1993] AC 1 at 31D - and ignored them and gone about their business. The present plaintiffs do not encounter the difficulties of the plaintiff in *England v Cowley*, supra, see at 128, 129 per Pollock B and at 129 per Bramwell B. Here the plaintiffs suffered direct foreseeable and foreseen loss as a consequence of governmental action which was unauthorised by law. The defendants' words and deeds, intended by the defendants to be acted upon and in fact - reasonably - relied and acted upon by the plaintiffs to the knowledge of the defendants, necessarily brought the plaintiffs' business of breeding and selling cattle to a virtual standstill. The defendants, without lawful authority to do so, intended to bring about and brought about that consequence even though they did not injure the plaintiffs out of spite, cf *Bourgoin S. A. v Ministry of Agriculture* [1986] Q B 716 at 777 G-H, per Oliver LJ; *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435 at 463, 471-472, per Lord Wright. In the circumstances as found by the learned Chief Justice, the plaintiffs never consented to the defendants acting without lawful authority. The plaintiffs acted and refrained from acting to their detriment on the defendants'

requests and directions, and out of a sense of compulsion rather than choice, though I am of the view that liability does not depend on a finding of coercion or compulsion; cf *Secretary of State for India v Bank of India* (1938) 2 All ER 797 at 801, 802 per Lord Wright (PC). In my judgment, losses caused by governmental authorities in such circumstances are recoverable, in the absence - as here - of some specific statutory protection afforded governmental authorities of the kind discussed in *Little v Commonwealth* (1947) 75 CLR 94 and *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105. That this is so, is, I think, a consequence of the constitutional principle of the rule of law rather than any private tort.

I would, with respect, adopt the following statement of T R S Allan, Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism, (1985) 44 Camb L J 111 at 119:

> "The constitutional principle of the rule of law plays the same role in relation to the interpretation of statutes as it does in relation to common law sources of governmental authority. Once again, the burden is on the public authority to justify its exercise of power: the presumption in any case of doubt lies in favour of the citizen and against the authority which seeks to coerce him. The principle of parliamentary sovereignty requires the court to respect and uphold a provision granting wide or discretionary powers to a public official, but the principle of the rule of law is of equal strength. It requires the court first to examine the terms of such a provision with suspicion, jealously construing it in favour of the citizen in the event of ambiguity, and then to satisfy itself that the relevant official action falls within those terms (properly construed) and that its purpose is one contemplated by them. The rule of law, as a juristic principle, thus embodies the liberal and individualistic bias of the common law in favour of the citizen. It transcends the principle of legality by authorising, and demanding, an attitude of independence

> and scepticism on the part of the judges in the face of claims of governmental power."

As I have said, this case concerns governmental action not the actions of private persons. Private persons may do as they like unless confronted with some legal restriction on their freedom. Our law says, "You cannot do this"; it does not say, "You can do that", and so it is that people are free to do whatever they please except that which the law says they cannot do. Governmental authorities, on the other hand, are in a quite different position. They can only act if authorised by law to do so. Such legal authority is almost necessarily to be found either in statute or in the prerogative. The essential principles are stated in Halsbury (4th Ed) Vol 8 para 828:

> "The so called liberties of the subject are really implications drawn from the two principles that the subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law (including the royal prerogative) or statute. Where public authorities are not authorised to interfere with the subject, he has liberties."

In the circumstances of the present case the legality and actionability of the defendants' actions are, I think, coincident and are properly to be seen as lying outside the realm of private torts, cf *Dorset Yacht Co v Home Office* [1970] AC 1004 at 1065 E and 1067 G - 1068 A per Lord Diplock, *Roncarelli v Duplessis* (1959) 16 DLR (2nd) 689 at 729, 730 per Abbott J, 744 per Martland J, Kerwin CJC and Locke J concurring; and compare the illuminating judgment of Smith J in *Farrington v*

Thomson Bridgeland [1959] VR 286, particularly at 293. At 294-296, Smith J discussed the English Court of Appeal decision in *Ward v Blair and Helmsley Rural District Council*, where a barrister/dairy farmer poured milk down the drain after being served with a notice, purportedly pursuant to certain milk regulations, forbidding the sale of his milk for human consumption. As a consequence, his business of selling bottled milk came to a standstill. The defendants were found to have acted from the best motives but without lawful authority. The plaintiff succeeded in claiming lost milk subsidies to which he would have been entitled had he remained in business, but no other heads of damage - including lost profits - for reasons which are irrelevant for present purposes. The milk inspectors themselves did not pour the milk down the drain. If they had done so the plaintiff would have had an action in damages for conversion; cf *Brasyer v Maclean* (1875) LR 6 PC 398 at 406. Had the plaintiff and the inspectors both poured milk down the drain, it would surely be an anomaly if the defendants were liable for the milk poured by the inspectors but not the milk poured by the plaintiff. There is no reason in justice or principle why any distinction should be made between the plaintiff's pourings in such a case and those of the inspectors. In such circumstances I consider it is plain, with respect, that the plaintiff could recover the value of all the lost milk and that such recovery lies irrespective of any question of conversion.

In my judgment, it is for these reasons - rather than any principles of private tort law - that the plaintiffs are entitled to maintain their claim for compensation for their losses in the present action. In this context it is more appropriate to speak of compensation than of damages.

Whilst it is true that in a series of cases - eg *James v The Commonwealth* (1939) 62 CLR 339, *McClintock v The Commonwealth* (1947) 75 CLR 1, *Poulton v The Commonwealth* (1953) 89 CLR 540 - the High Court has held that governmental liability for action taken within the letter of an unconstitutional statute only arises when a private tort known to the common law has been committed, I think, with respect, such cases may be distinguished. In those cases the executive had the de facto approval of parliament; here it did not. Here the defendants were at fault in acting outside the law; in those cases the governmental authorities sought to implement the expressed - albeit unconstitutional - will of parliament. If anyone was at fault in those cases it was the parliament itself and in those circumstances different considerations apply as to whether damnified plaintiffs should be indemnified for their losses.

Nor do I think the present case raises questions concerning remedies in administrative law. Learned judges and commentators have decried the supposed lack of a damages remedy in administrative law, but the circumstances of this case are far removed from a plaintiff seeking damages consequent upon

some invalid exercise of an administrative discretion: cf *Takaro Properties Ltd v Rowling* [1976] 2 NZLR 657 at 672, [1978] 2 NZLR 314 at 338 (CA), [1986] 1 NZLR 22(CA), [1988] AC 473 (PC), *Macksville and District Hospital v Mayze* (1987) 10 NSWLR 708 at 724, 732; *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172D-E.

Mention should also be made of *Poke v Eastburn* [1964] Tas SR 98, where allegations that two stock inspectors had wrongfully and without cause issued an isolation order preventing cattle being moved on or off the plaintiff's property were struck out on the basis that although the order might be void for want of power and no protection for those acting on it, the inspectors owed no duty to the farmer actionable in tort to issue such an order only in good faith. I am respectfully unable to agree with the approach in that case, solely devoted as it was, to finding a private tort.

The learned Solicitor-General in his comprehensive address dwelt at some length (and with some colour) upon the dangers of the spread of brucellosis abortus and the dire necessity for its detection and eradication. He mentioned its danger to human health and its adverse effect upon the Northern Territory economy in general and the health of the Northern Territory cattle industry in particular. He emphasised and re-emphasised the bona fides of the defendants as found by his Honour the learned Chief Justice. He submitted that in all the

circumstances the defendants' actions were justified. Finally he referred to the defendants' concern throughout for the public welfare.

The court can not be impressed by these submissions.

The Stock Diseases Act contains many powers adequate to the task which might have been but were not invoked. The Honourable the Minister might have invoked his powers to quarantine the plaintiffs' properties pursuant to s12. He, it appears, saw fit not to do so, appreciating, perhaps, that he would thereby incur a statutory obligation to compensate the plaintiffs for losses caused thereby. A vista of the defendants being liable to compensate the plaintiffs when acting within the authority of the law but not being so liable when acting outside the law would not only be ironical, it would be wrong. And as Lord Camden CJ said in *Entick v Carrington* (1765) 19 State Trials 1030, sounding a note that rings true to this day: "With respect to the argument of State necessity, ... the common law does not understand that kind of reasoning ...", cited by T R S Allen, supra, at 113.

I would affirm the judgment for the plaintiffs.

The questions concerning quantum of the plaintiffs' claim raised by the cross appeal have been dealt with by Priestley J. I do not wish to add anything to what he has said. I agree

with what he has said concerning consequential loss and causation and quantum and also with what he has said about interest and costs.

I would dismiss the defendants' appeal and allow the plaintiffs' cross appeal for the purposes of entering judgment for the plaintiffs in the sum of $557,611.00. I would order that the plaintiffs have their costs of the appeal. For the reasons given by Priestley J, I agree that there should be no order for costs of the cross appeal.

THOMAS J: I have had the benefit of reading the Reasons for Judgment of Priestley J. I agree with his reasons and with the orders he proposes.

I have also had the benefit of reading in draft form the Judgment of Angel J. I agree with his conclusions and with his reasons.

PRIESTLEY J:

I

The Case in Outline

In 1988 a campaign was being conducted throughout Australia by the Commonwealth, State and Territory Governments to eliminate tuberculosis and brucellosis in cattle and buffalo. In the Northern Territory, government stock inspectors, believing they were justified in doing so, told the owners of two cattle stations that they could not move breeding cattle and that they were under quarantine. For more than two months the owners did what they were told and did not move cattle. This meant they did not sell a large number where and when they had planned. Then the inspectors notified the owners the quarantine was lifted and they took up again the moving and selling of their stock.

The owners believed they suffered loss as a result of the interruption to their business and claimed reimbursement from the government and the inspectors for their losses. Their two main assertions were, first, that they suffered damage by doing what they were told by the inspectors when, unknown to the owners the inspectors had not had the authority to tell them that breeders could not be moved or to put their stations under quarantine, and, second, that the government and its officials had been negligent in connection with telling them that breeders could not be moved and that the stations were under quarantine and that the government negligently had caused loss to the owners. The owners also put their claims in other ways.

The government and the inspectors denied lack of authority, negligence, and the other claims against them.

The owners began court proceedings as plaintiffs against the government and two of the inspectors as defendants.

The case went to trial before Asche CJ, who held that the inspectors had had no authority to do what they had done, that what they had done was unlawful, and that the plaintiffs had suffered loss in consequence. He awarded damages against the defendants which, including interest, amounted to $400,537. He dismissed the negligence and the other allegations.

II

Events Before the Court Proceedings.

General background.

In 1988 the plaintiffs were the owners of two cattle stations in the Northern Territory. These were called Banka Banka and Neutral Junction. The persons principally concerned in the events upon which the plaintiffs based their claim were Mr R. Mengel who lived and worked on Banka Banka, Mr W. Klein who lived and worked on Neutral Junction, Mr D. Tabrett, the Northern Territory's Chief Inspector of Stock, and Mr R Baker, a government Stock Inspector. Messrs Mengel and Klein were two of the plaintiffs. The Government of the Northern Territory was the first defendant, Mr Tabrett was the second defendant and Mr Baker the third defendant.

The defendants were administering the Northern Territory part of the Australia wide campaign against Brucellosis and

Tuberculosis. (The full name was the Brucellosis and Tuberculosis Eradication Campaign, and it had come to be called BTEC.) It was because the defendants suspected some of the plaintiffs' cattle might be infected with brucellosis that they did the things the plaintiffs later complained of.

BTEC.

Introduction. Before Asche CJ considerable material was in evidence describing both BTEC and the nature and varieties of brucellosis. The following summary draws both from those materials and the Chief Justice's digest of them.

The type of brucellosis with which the Northern Territory was concerned was *brucella abortus*. This brucellosis causes cows in calf to abort and affects cattle in other deleterious ways. It can cause symptoms in humans similar to influenza. It is mainly transmitted by contact with fluids or inhalation of emanations from fluids of entire cattle. Countries which import live cattle from Australia require them to be free of brucellosis. Meat products from infected breeding cattle are also regarded as potentially dangerous.

In 1982 the Australian Agricultural Council ("the AAC") set up "a BTEC Planning Group to develop a specific programme including funding requirements, administrative arrangements and target dates". In December 1982 the BTEC Planning Group recommended that the Commonwealth and the States adopt an agreement detailing the financial and administrative arrangements for BTEC. This recommendation was endorsed by the AAC in February 1983 and led to an agreement being made in May

1984 between the Commonwealth and the Northern Territory by which the Commonwealth agreed to provide financial assistance to implement the plans for eradication of tuberculosis and brucellosis in cattle and buffalo.

In the meantime, in March 1983, the Department of Primary Production of the Northern Territory had published a plan for the eradication of brucellosis and tuberculosis in cattle and buffalo in the Northern Territory; this was called "the Calley Plan" and dealt with the Northern Territory situation in terms of the nationwide scheme that was being developed. It seems plain that the Northern Territory Government was endeavouring to do everything necessary on its part to make BTEC workable when finally agreed on.

The Stock Diseases Act (the SDA) in 1983 already contained various provisions giving powers to the government which could be used in conjunction with BTEC in the form then being discussed between the Australian governments and described, in terms of the Northern Territory, in the Calley Plan. Then, on 8 November 1983 Act No 56 of that year was assented to. Its date of commencement was 22 August 1984. This was the Stock Diseases Amendment Act 1983, which inserted s 27 into the SDA. This section gave the Chief Inspector of Stock further powers which could be used in conjunction with the administration of BTEC when it later came into operation. It is the section, and the only section, on which the defendants in this case eventually came to rely as giving them the powers to do what they did in regard to the plaintiffs and their cattle.

Stated very generally, s 27 gave the Chief Inspector, for the purpose of controlling any prescribed disease, complete power to control or prevent the movement, sale or purchase of any stock in the Territory.

Brucellosis was a prescribed disease.

Administrative framework: basis of administrative position. In the agreement of May 1984 between the Commonwealth and the Northern Territory it was provided that the Territory would use the financial assistance provided by the Commonwealth and its own resources to establish and operate a scheme to eradicate brucellosis and tuberculosis in cattle in the Territory. The scheme was to include financial assistance to persons engaged in the cattle industry and was to consist of the forms of assistance described in and be operated in conformity and in accordance with the general principles and the provisions set out in the Schedule (par 2) to the agreement. Paragraph 1.3 of the Schedule referred to the Bovine Brucellosis and Tuberculosis National Eradication Campaign Standard Definitions and Rules prepared in two volumes by the Australian Bureau of Animal Health and said that the criteria, systems, programs, methods, procedures, definitions, standards and rules set out in that document (the SDR) formed the basis of the operation of the scheme and must be complied with by all participants in the scheme.

Paragraph 6 of the agreement provided that both it and the schedule might be amended from time to time by agreement between the Commonwealth and the Territory. The SDR were from time to

time amended. The 1986 version was put in evidence before Asche CJ and accepted by the parties as the one in operation during the time of the happenings this case is concerned with (September-November 1988).

At that time the SDR did not have any direct legislative force or backing. The principal basis on which BTEC was administered in the Northern Territory depended not on statute but upon participation by property owners in the Campaign. Individual property owners participated by means of what were called Approved Programs.* The examples of these in evidence show that although not explicitly drafted in contractual form, they were in the nature of agreements between the Northern Territory Government and individual owners and facilitated the taking of each separate property, by stages, towards the goal of having been tested as brucellosis free. One of the first defendant's documents (Exhibit AAA) described Approved Programs as "the foundation of the Territory's Eradication Campaign" and as being "the basis for all policy decisions" (par D.1., 1.2). A number of inducements were offered to property owners to agree upon an Approved Program. These included tax concessions, holding subsidies on testing cattle, compensation for destocked or reactor cattle, freight subsidies for restocking, eligibility for loans, and application of operational funds to the property (Exhibit AAA, par D.l., 1.5). It seems clear from all the

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* This word was spelt "program" in many official documents and "programme" in others. I have mostly reproduced it as I found it.

material in evidence about events leading up to the commencement of BTEC that the Government would have assumed that every holding owner would be likely to enter into an Approved Program.

Other documents ancillary to the SDR were prepared by the Northern Territory Government. These included a very detailed manual for the guidance of its stock inspectors.

This basis of administering BTEC could be supplemented by certain statutory powers in the SDA, available to government officers, if they chose to use them, to assist the operation of BTEC. For example, s 12 said the Minister, if he considered that on account of the presence or suspected presence of a prescribed disease in a particular place it was desirable to establish a quarantine area to prevent the spread of the disease, might, by notice in the Gazette declare particular land to be a quarantine area. Following sections provided sanctions for the enforcement of quarantines. These and other sections, if brought into operation, gave the Government power to control the movement of stock, in connection with brucellosis and tuberculosis, (and any other prescribed disease).

Another section which could be used to help carry out the administration of BTEC was s 22A. This enabled the Chief Inspector, if satisfied that a place was or was likely to be a source of infection, or stock on a holding were or were likely to be affected by a prescribed disease, by notice published in the Gazette, to declare that place a restricted area. Following sections then gave the Chief Inspector power to give enforceable directions about the treatment of stock in restricted areas.

Further, stock could not be moved in or out of a restricted area, except with the permission of an inspector.

In 1986 the Chief Inspector duly declared a great many properties restricted areas pursuant to s 22A. This armed him with additional powers in regard to possibly diseased stock which would encourage any owners who had not yet agreed to an Approved Program, to do so.

Neutral Junction and Banka Banka were not properties listed as restricted by the Chief Inspector's 1986 declaration.

Section 42 gave an inspector powers of various kinds useful for implementing, inter alia, BTEC. Paragraph (t) of subs (1) of this section gave an inspector power to seize any stock moved contrary to the SDA.

No section directly referred to BTEC.

Administrative position: the legislation and subordinate legislation relied on. As earlier mentioned, the only section which the defendants in the end relied on as a source of power for what they did in regard to the plaintiffs and their cattle was s 27 of the SDA, which said:

> "27. CLASSIFICATION OF HOLDINGS IN RESPECT OF PRESCRIBED DISEASES
>
> (1) The Chief Inspector may, by notice in writing to the owner of a holding, in relation to a prescribed disease, give the holding one of the following classifications:
>
> (a) accredited free;
>
> (b) confirmed free;
>
> (c) tested negative;
>
> (d) monitored negative;

(e) provisionally clear;

(f) restricted;

(g) infected; or

(h) not assessed.

(2) The Chief Inspector may, for the purpose of controlling a prescribed disease, by notice in the *Gazette*, specify the restrictions which shall apply to and in relation to the movement in, or into, or the sale or purchase in, the Territory of stock, or a class of stock, and, for such purpose, the restrictions may be expressed to relate to the disease status of a holding.

(3) Without limiting the generality of subsection (2), the restrictions specified in a notice under that subsection may include -

(a) a total prohibition on the movement; and

(b) a total prohibition on the sale or purchase, of stock or a class of stock.

(4) A person shall not move, sell or purchase stock in contravention of the restrictions specified in a notice under subsection (2).

Penalty: $1,000 or imprisonment for 6 months."

Section 27 was relied on as the source of power for subordinate legislation which the defendants particularly relied on as authorising their actions. This was a notice, dated 15 August 1988 published pursuant to s 27(2), in the Government Gazette of 31 August 1988 ("the August Gazette notice").

The part of the August Gazette notice relevant to brucellosis was as follows:

" Stock Diseases Act

RESTRICTIONS ON MOVEMENT OF CATTLE AND BUFFALO
TUBERCULOSIS AND BRUCELLOSIS

I, DAVID ALAN NEWTON-TABRETT, the Chief Inspector -

(a) in pursuance of section 27(2) of the *Stock Diseases Act* and section 43 of the *Interpretation Act*, revoke the notice restricting the movement of cattle and buffalo dated 16 May 1986 and published in *Gazette* No S28 of 3 June 1986; and

(b) in pursuance of section 27(2) of the *Stock Diseases Act*, for the purpose of controlling the prescribed diseases of tuberculosis and brucellosis, specify, in the Schedule the restrictions which shall apply to and in relation to the movement in and into the Territory of cattle and buffalo.

Dated this fifteenth day of August, 1988.

D.A. NEWTON-TABRETT
Chief Inspector

SCHEDULE

TUBERCULOSIS

...

BRUCELLOSIS

Movement in and Into The Territory

Where cattle or buffalo are from herds with a disease status, in accordance with the national brucellosis and tuberculosis eradication campaign, of -

(a) infected, suspect, restricted or provisionally clear where herds subject to an eradication programme approved for the purposes of that campaign and are -

(i) spayed females or steers - no restrictions and no test required; or

(ii) entire cattle or buffalo - movement permitted for the purpose of immediate

slaughter provided cattle or buffalo moved directly to an abattoir;

(b) tested negative, monitored negative, or confirmed free where herds not previously infected - no test required;

(c) confirmed free where herds previously infected but have undertaken whole herd confirmatory testing not less than 18 months after attaining a confirmed free disease status - no test required; or

(d) confirmed free where herds previously infected but subject to an eradication programme approved for the purpose of that campaign but where herds have not been subjected to whole herd confirmatory testing not less than 18 months after attaining a confirmed free disease status and are -

(i) spayed females or steers - no restrictions and no test required;

(ii) entire males or females which have borne one or more calves - no restrictions if moved directly to an abattoir for immediate slaughter otherwise one clean test within 30 days prior to movement;

(iii) cattle or buffalo, other than referred to in subparagraph (i) or (ii) - movement permitted for purpose of immediate slaughter provided cattle or buffalo moved directly to an abattoir.

Cattle or buffalo (other than for slaughter) are not to be moved from a herd with a disease status of confirmed free, tested negative or monitored negative if the cattle or buffalo have, within 12 months, been introduced to the herd from a herd with a disease status of infected, suspect, restricted or provisionally clear."

Section 27, seems clearly to have been inserted to give the Chief Inspector powers he could use in support of BTEC. The classifications of holdings in sub-s (1), although not identical with herd classifications set out in the SDR, clearly derived from, and were related to, them.

The way Approved Programs worked. The way Approved Programs worked was bound up with the Herd Classification Scheme set out in Part I: A,5 of the SDR. There were ten classifications. (Seven of the herd classifications used the same descriptions as in the holding classifications in pars (b) to (h) of s 27(1) of the SDA.) The classifications were as follows:

> "5.1 NOT ASSESSED (NA)
>
> A herd that has not been tested or for which insufficient information is available is available for it to be classified otherwise.
>
> 5.2 SUSPECT (SU)
>
> A herd in which monitoring information or testing suggests that the herd may be infected, but further evidence is required to classify the herd as infected or otherwise; or in which the field situation suggests that the herd has a high risk of becoming infected. A suspect herd should complete a negative test within 12 months, or otherwise be reclassified as infected.
>
> 5.3 INFECTED (IN)
>
> A herd that is determined to be infected with Brucella abortus.
>
> 5.4 RESTRICTED (RD)
>
> A previously 'Infected' herd that has had one negative herd test without subsequent evidence of infection.
>
> 5.5 PROVISIONALLY CLEAR (PC)
>
> A previously 'Infected' herd that has had two consecutive negative herd tests at an interval not less than six months, and which has not yet completed all the eradication tests necessary to become Confirmed Free or a herd which has undergone the required testing to be classified as Tested Negative, Monitored Negative or

Confirmed Free but is set as Provisionally Clear status due to a risk of infection.

5.6 TESTED NEGATIVE (TN)

A herd not previously classified as "infected" that has had at least one negative eradication herd test without subsequent evidence of infection.

5.7 MONITORED NEGATIVE (MN)

A herd in which the information from the Approved Monitoring System indicates that the herd is free of brucellosis, but a whole herd test has not been carried out.

5.8 CONFIRMED FREE (CF)

A herd considered free of brucellosis. It will be as a minimum a previously 'Provisionally Clear' or 'Tested Negative' herd that has had at least one negative confirmatory herd test at an interval of not less than six months after achieving that status.

5.9 DISBANDED (DB)

A herd for which records were obtained but which no longer exists as a separate entity.

5.10 NIL BREEDERS (NB)

A herd with no eligible animals."

(The Suspect, Disbanded and Nil Breeders classifications did not have any counterpart holding classification in s 27(1). The accredited free holding classification of s 27(1)(a) had no counterpart SDR herd classification. Each of the seven herd classifications used in the August Gazette notice was in Part I: A,5 of the SDR.)

According to evidence adduced by the defendants, the aim of an Approved Program was to improve the classification relevant to a property from a "dirty" one (eg "not assessed" or "infected") to a "clean" one (eg "tested negative", "monitored

negative" or "confirmed free"): see Appeal Books at 1383, 2316 and 2317.

The last sheet of the Approved Programs in evidence shows that a property owner who became a participant in an Approved Program acknowledged that he had thereby made "a commitment ... to the National Brucellosis and Tuberculosis Campaign". This seems to me to have been, effectively, if not very clearly, an agreement by such owner to be bound by BTEC, including the SDR.

Another important aspect of BTEC was that Part I: B,7 of the SDR provided for "Declaration of Areas". This was to be done by a Committee which could declare an area Free, Provisionally Free, or an Eradication Area. Movement in and between these areas was controlled differently according to the type of area.

In September 1988, in regard to brucellosis the northern and middle parts of the Territory had been declared Provisionally Free and the southern had been declared a Free Area. Both Neutral Junction and Banka Banka were in the "Provisionally Free" area. No notice pursuant to s 27(2) had been published restricting movement of cattle from one Provisionally Free area to another.

The facts relevant to the court proceedings (based on Asche CJ's findings).

2 to 12 September 1988. At the beginning of September 1988 the owners of Neutral Junction held a notice in writing from the Chief Inspector classifying Neutral Junction, in relation to brucellosis, as Tested Negative. The owners of Banka Banka held

a similar notice classifying that station as Confirmed Free. This had been so at least since 1985 in Neutral Junction's case, and 1987 in Banka Banka's case.

The plaintiffs' herds on the two properties were not then "subject to an eradication programme approved for the purposes of" BTEC within the meaning of those words in par (a) under the heading "Movement in and Into The Territory" in the August Gazette notice.

The plaintiffs at the time were planning to sell about 4,400 head of cattle during the following weeks. The market was good and they intended to use the sale proceeds to reduce the amount owing to their bank by something in the order of $700,000.

Mr Klein on 2 or 3 September 1988 mustered 95 heifers at Neutral Junction for sale at Alice Springs. Alice Springs was in the southern area which had been declared "Free". It was then thought, and at the trial it was still thought, that to move these heifers to such an area from a "Provisionally Free" area, unless the cattle were being sold direct to abattoirs for slaughter, required a test.

(In the course of the argument in the appeal, questions were asked from the Bench about this, specifically about precisely what was the entitlement of the plaintiffs to move their cattle immediately before the first reactor was found at the beginning of September 1988, and what it was that brought about that position. As a result of these questions the parties eventually produced a map which showed the position and was put

before the court by consent. It was explained that there had been some difficulty in agreeing on what the map should show because it had been discovered in the course of preparing it that what had been believed to be the position concerning movement south of a line running through Alice Springs in September 1988 had not then in fact been the position but that the position as it had then been believed to be only came into existence in 1989. The position as finally elucidated and agreed was that at 1 September 1988 cattle could be moved from Neutral Junction and Banka Banka throughout the Northern Territory and Queensland without restriction. Any testing required would be required, not because of the legal situation in the Northern Territory, but because of the laws of Western Australia, South Australia, New South Wales and Victoria before there could be movement into any of those States. No test was required before movement within the Northern Territory or Queensland. This clarification of the position as it was at the relevant time was not relied on by the parties in the appeal as affecting any of the substantive issues in the appeal.)

Mr Baker went to Neutral Junction on 3 September to do what was thought to be a necessary test. He took blood samples from all the heifers. The samples then went to the Arid Zone Research Institute (AZRI) in Alice Springs. One sample reacted to the preliminary test for brucellosis. This did not mean that the relevant heifer had, or even that it was likely to have, brucellosis, but that there was a possibility it might be

infected, and further testing was necessary to see whether it was or not.

On 6 September Mr Baker told Mr Klein of the result of the preliminary test and told him not to move any breeder cattle from Neutral Junction or Banka Banka except to the abattoir for slaughter. Mr Baker included Banka Banka in this direction because the 95 heifers had been agisted there not long before and then returned to Neutral Junction. During this conversation Mr Baker said "You'll be under quarantine" and that Banka Banka will "be quarantined now too". (In the plaintiffs' case before Asche CJ these statements by Mr Baker were described as "the first movement restriction".)

Mr Baker told Mr G. Wilson, the government Regional Veterinary Officer for the Tennant Creek region, of the result of the test, which was a one in sixteen titre level, and that the reactor was from a movement mob being prepared for sale to go to South Australia (AB 1739).

The test giving this result was known as a CFT test and the Manual provided that when there was a CFT reactor equal to or greater than sixteen the animal was to be considered infected except with RTO approval and the property must be restricted for brucellosis if not already under brucellosis restriction. The Manual had no statutory force. Its provisions applied only to those participating in an Approved Program.

On learning the test result, and to comply with his understanding of what the Manual required, Mr Wilson gave instructions that the entry in the departmental computer which

recorded herd statuses should be changed to record the herds on both Neutral Junction and Banka Banka as being of Suspect status (AB 1750). This was about 9 September. From then on the defendants treated the plaintiffs as if their herds fell within paragraph (a) under the heading "Movement in and Into The Territory" in the August Gazette notice.

The consequences of the change of status to Suspect, if valid, were at least twofold: the plaintiffs' cattle became subject to movement restrictions to which they would not have been if the statuses had not changed, and the values of the properties and herds were at once very adversely affected.

The plaintiffs had meanwhile, immediately after learning the AZRI test result, with the agreement of the government officers, themselves taken blood samples from the suspect animal and forwarded them to the Institute for Medical and Veterinary Science (IMVS) in Adelaide, for separate testing. They did not send cattle for sale as they had planned.

11 to 30 September 1988. On 11 and 13 September approximately 950 Banka Banka heifers and cows were tested. The tests showed 22 reactors. In conversations on 13 September with Mr Mengel, Mr Baker said that Banka Banka was quarantined. (This was later referred to in the plaintiffs' case as "the second movement restriction".) Mr Mengel understood that this restriction did not apply to steers and bullocks or cattle for slaughter (transcript 328 and 404).

The plaintiffs again themselves took samples for separate testing, from the 22 reactors. At some stage before a date which

was probably 29 September, the plaintiffs received advice from IMVS that the sample from the original reactor was negative. Because of this when asked on about 29 September by Mr Baker to have the 22 reactors sent to Alice Springs to be cultured, Mr Mengel refused, until the government officials got their culture results back from the Neutral Junction heifer. In the event this refusal led to a delay of about twenty days in the testing of the reactors. The refusal by Mr Mengel also led to the sending of a fax by Mr Tabrett to Mr Baker on 30 September 1988. It was intended that this fax be shown to the plaintiffs. It was thought of by the departmental officers as a last resort to bring pressure on Mr Mengel to do what they thought he should have done earlier. The fax said:

> "Necessary 13 head suspects ex Banka de-stocked to AZRI to determine status. Compo and transport will be paid. Property quarantine until status determined."

(Only thirteen of the twenty-two reactors were required because they were pregnant, the others not, and pregnant animals were considered more suitable for "culturing", which could only be done after the animal was killed.)

Mr Tabrett did not intend to impose a formal quarantine under the Stock Diseases Act by what he said in the fax. He was "just backing up what - the movement restrictions that [Mr Baker] had placed on the property ..." (AB 3/2024, trial transcript 2260). At the time Mr Tabrett sent the fax, he thought he was acting correctly and within his powers.

Mr Baker either faxed Mr Tabrett's fax to Mr Mengel, or handed it to him, on about 30 September 1988. (The fax and the communication of it by Mr Baker were later described as "the third movement restriction".)

As earlier mentioned, s 12 of the SDA empowered the Minister to declare particular land to be a quarantine area in certain circumstances; however, there was never any suggestion in the present case that the Minister had made a quarantine declaration under s 12 in regard to Neutral Junction or Banka Banka. All the parties, at the time of the three "movement restrictions", understood that the word "quarantine" was not being used in the s 12 sense but in the sense of movement restriction of breeder cattle, (heifers and entire males). At all times the plaintiffs understood they could have sold cattle to abattoirs. Prices for such sales were significantly less than for the sales the plaintiffs had intended to make.

From 30 September to 14 November 1988. Various factors were concerning the plaintiffs from the time the first reactor was discovered. One was that they were being delayed in selling their cattle. Another was the effect of the "suspect" classification on the reputation and value of their properties. A third was what their position would be if, as they at all times believed, it turned out that none of their cattle had brucellosis. Compensation was only payable if the animals were found to have brucellosis. It was common ground at the trial and in the appeal that at the relevant time BTEC made no provision for compensation if movement restrictions applied to a herd

ultimately shown not to have brucellosis, notwithstanding that the restrictions might cause substantial financial loss to the owners of the herd. (At a later time this position changed.)

On 25 October the plaintiffs released the reactors to the Department. Testing thereafter proceeded.

On 14 November 1988 Mr Wilson sent a fax to Mr Mengel advising that the "quarantine" had been lifted.

The plaintiffs subsequently sold cattle, in a way different from that intended before the "movement restrictions". They had been delayed in selling, had missed their best market, had been unable to reduce their debt as planned, and later had to sell cattle they had not planned to sell.

III

The Court Proceedings.

The Case Alleged by the Plaintiffs.

Many heads of claim. On the facts they alleged in the final version of their statement of claim the plaintiffs claimed to be entitled to judgment on a number of different bases, some of which overlapped. It may be that not all of these bases were separate causes of action, and some of them had no accepted name. Those which raised issues still in contest in this appeal, according to paragraph 18 of the summary of the plaintiffs' (respondents) written submissions, were as follows:

(1) The imposition of the movement restrictions was unlawful.

This proposition was based on the view that the powers

contained in s 27(2) of the SDA were not sufficient to support the August Gazette notice.

(2) The provisions of the August Gazette notice did not apply to the case which confronted the government officials when the reactors were discovered on Neutral Junction and Banka Banka.

(3) What the government officers had done constituted the tort of abuse of office.

(4) There had been unlawful interference with economic interests. This was based on paragraphs 46 and 47 of the statement of claim.

(5) There had been unlawful interference with property interests. At the trial, the argument about this claim dealt principally with conversion but I do not understand that in the appeal conversion as a cause of action in itself has been pursued. The claim was based on paragraphs 48 and 49 of the statement of claim.

(6) The case fell within the principle stated by the High Court in *Beaudesert Shire Council v Smith* (1966) 120 CLR 145.

(At the commencement of the hearing of the appeal an application was made to amend paragraphs 46, 47, 48 and 49. This application will be dealt with subsequently.)

Factual issues. Some factual disputes emerged in the course of the evidence relating to the plaintiffs' claims. The most significant of these were (a) what was meant by the defendants' use of the word "quarantine" in the three movement

restrictions and what the plaintiffs understood it to mean, (b) the connection between the "movement restrictions" and the plaintiffs' not selling their cattle when they wanted to, (c) whether the plaintiffs' herds were, in September 1988 subject to an approved eradication programme, and (d) whether the defendants bona fide believed they had authority to do what they did.

The importance of the first of these issues was that if, as the plaintiffs claimed, the defendants were purporting to enforce a quarantine in the statutory sense of s 12 of the SDA, they clearly had no power to do so.

The significance of the second contested issue was that the plaintiffs were claiming that the defendants were responsible for the whole period of delay from 3 September to 14 November 1988, whereas the defendants, while denying liability for any damages at all, said that it was the plaintiffs' own actions which had unnecessarily prolonged the period which ended with the lifting of the "quarantine" on 14 November 1988.

As to the third of the issues, if the herds were not subject to an approved eradication programme, then on one interpretation of the August Gazette notice it did not apply to the plaintiffs' herds.

As to the defendants' bona fides, this was one of the critical matters in the plaintiffs' claim that the defendants were guilty of misfeasance in office.

Asche CJ's Decision.

Factual findings. In earlier setting out the facts I have done so in accordance with Asche CJ's findings.

Except as to the issues I have labelled (a) to (d) there was no significant difference between the parties in regard to most of the facts. The bulk of the argument concerned inferences to be drawn from the facts. On issues (a) and (d), which involved the reliability of witnesses, Asche CJ found in favour of the defendants. I have not attempted to set out the plaintiffs' evidence in respects not adopted by Asche CJ. Before deciding the issues as he did Asche CJ reviewed the evidence in considerable detail and set much of it out in his reasons in a way clearly showing why he reached his findings of fact.

As to "quarantine", he found that the meaning of the word, to the understanding of all the participants in the relevant conversations in which it was used, was movement restriction of breeder cattle. Amongst other reasons was the fact, in his view abundantly supported by the evidence, that the conversation between Mr Baker and Mr Klein on 6 September, and later conversations, all went on the basis that Mr Baker was not asserting there was any restriction of movement to abattoirs. The way in which the word was used, as understood by all concerned, was quite inconsistent with the sense it bore in s 12.

As to the connection between the "movement restrictions" and the plaintiffs' inability to sell cattle, Asche CJ accepted

that between 4 September and 14 November the plaintiffs had been unable to sell cattle because of their compliance with the movement restrictions imposed upon them; they had missed some prime selling time and it had become impractical for them to sell the large number of cattle they had been intending to sell as at 4 September. Further, as a result of the delay the cattle were running short of feed, feed had to be bought in, some cattle had to be agisted and, for cash flow reasons, the plaintiffs had had to sell a number of steers earlier than they had intended. He also held that of the period between 4 September and 14 November the days between 29 September and 19 October made up a period of delay for which the government was not responsible. This delay was caused by the plaintiffs' refusal to hand over the twenty-two reactors.

As to "approved eradication programme", Asche CJ held the evidence did not establish any such programme at the relevant date in regard to either Neutral Junction or Banka Banka. This finding is important to the finding of liability in the plaintiffs' favour. It was accepted as correct in the appeal however, (Transcript of argument, 23 April 1993, p 250) so that it will not be necessary to go into the underlying facts concerning it.

Holdings on matters of law. Asche CJ held against the plaintiffs on all their claims except (2) and (6) in the list given earlier.

As to (1), Asche CJ did not accept the plaintiffs' construction of the relevant provisions.

As to (2), Asche CJ accepted that on their proper construction, the provisions of the August Gazette notice did not "give the power to impose movement restrictions" (reasons, p 109) on the plaintiffs' cattle. In his view the defendants were "acting without legal authority" (reasons p 113) in "changing the status of the herds or the holdings or both" (reasons p 113).

As to (3), Asche CJ considered the case law and came to the conclusion that it was an essential element of the tort that the defendants should at least have constructive knowledge that they had no authority to do what they did. He held that insofar as they had purported to act under authority rather than seeking to persuade they had had a bona fide though mistaken belief in their authority.

As to (4), Asche CJ relied upon a passage in *James v The Commonwealth* (1939) 62 CLR 339 in holding the claim failed because the defendants had done what they did in good faith.

As to (5), Asche CJ concluded that the defendants had not claimed or asserted any right to possession and that the conversion claim must fail.

On the remaining issue, (6), the *Beaudesert* claim, Asche CJ referred to the criticisms of *Beaudesert* made in various quarters, and the limitations that had been said to apply to its principle, but was of opinion that the facts he had

found brought the case within those limitations, and that he was bound to follow what had been laid down by the High Court.

The judgment. Asche CJ held that the defendants were liable to the plaintiffs. He held this on one ground only, which had three basic steps. The first was that on his construction of the August Gazette notice (issue (2)), it did not apply to the plaintiffs' herds; the second was that once the first step was taken, the facts fell within the *Beaudesert* principle; the third, in which he rejected an argument by the defendants that even if the *Beaudesert* principle were otherwise applicable, the plaintiffs had not established any causal link between the actions of the defendants and the plaintiffs' damage, was that the plaintiffs had suffered consequential damage.

After considering very diffuse and complicated evidence about damages he assessed the plaintiffs' losses as $425,125. He reduced this by 20/71 in accordance with his finding that the 71 day period of quarantine and movement restrictions had been twenty days longer that it would have been because of the plaintiffs' own actions. The reduced figure which he allowed as damages was $305,371. He then allowed $95,166 interest on this sum, and judgment was entered accordingly.

(Judgment for the $305,371 is shown in the appeal papers as having been given on 28 August 1992 and for the $95,166 on 29 January 1993. However Asche CJ's reasons for the interest figure show that he was intending it should be added to the judgment sum as at 28 August 1992, so that judgment interest on the total

$400,537 would be running from 28 August 1992 under s 85 of the Supreme Court Act.)

IV

Matters Argued in the Appeal.

Application for amendment of statement of claim. In the statement of claim as it stood at the trial pars 46 and 47 were as follows:

> "46. Further, the Defendants owed to the Plaintiffs a duty of care not to cause them loss or damage by acting unlawfully.
>
> 47. The Defendants breached the said duty by acting unlawfully (as particularized in paragraph 41 herein) as a result of which the Plaintiffs suffered loss and damage (as alleged and particularized in and under paragraphs 34, 35 and 35A herein)."

An index to the statement of claim provided by the plaintiffs to the trial judge referred to these paragraphs as "Unlawful interference with economic interests" (not, as appears at p 166 of Asche CJ's reasons, "unlawful interference with property rights").

Paragraphs 48 and 49 were as follows:

> "48. Further, or in the alternative the act or acts of the Second Defendant, the Third defendant and/or the servants or agents of the First Defendant in purporting to impose the said movement restrictions amounted to unlawful interferences with the Plaintiffs' rights as owners of the cattle whereby the said Defendants converted the said cattle to their own use and wrongfully deprived the Plaintiffs of the same.
>
> PARTICULARS
>
> 48.1 The cattle converted were those available for immediate sale referred to in the particulars given in paragraph 35 hereof.

48.2 The cattle converted were those available for immediate sale referred to in the particulars given in paragraph 35 hereof.

48.3 The cattle were converted as from on or about 3 September 1988 and the number of classes of cattle converted are s referred to in the particulars given in paragraph 35 hereof.

48.4 The cattle were converted as from or about 3 September 1989 and the number of classes of cattle so converted are those referred to in the particulars given in paragraph 35 hereof.

49. The economic loss and damage sustained by the Plaintiffs was contributed to by the act or acts of conversion and unlawful interference of the Second Defendant, the Third defendant and/or the servants and agents of the First defendant referred to in paragraph 48 hereof for which tortious conduct the First defendant is also liable."

The index referred to these paragraphs as "Unlawful interference with property rights".

Paragraphs 46 and 47 were the basis of issue (4) in my earlier list, and pars 48 and 49 the basis of issue (5).

In regard to pars 46 and 47, the application was that they be deleted and the following paragraphs inserted:

"46. Further, by their actions in purporting to impose each of the said movement restrictions, the Defendants intentionally interfered with the Plaintiff's economic interests by unlawful means.

47. By reason of the interference pleaded in paragraph 46, the Plaintiffs suffered loss and damage as alleged and particularized in and under paragraphs 34, 35 and 35A herein."

In regard to pars 48 and 49, the application was that they be amended to read as follows:

"48. Further, or in the alternative the act or acts of the Second Defendant, the Third Defendant and/or the servants or agents of the First Defendant in purporting to impose the said movement restrictions amounted to unlawful interferences with the Plaintiffs' rights as owners of the cattle.

PARTICULARS

'The plaintiffs were restricted from on or about 3 September 1988 from exercising their rights to sell, move or otherwise deal with their cattle as they thought fit.'

49. The economic loss and damage sustained by the Plaintiffs was caused by the act or acts of unlawful interference of the Second Defendant, the Third Defendant and/or the servants and agents of the First Defendant referred to in paragraph 48 hereof for which tortious conduct the First Defendant is also liable."

The reason advanced for amending pars 46 and 47 was that the plaintiffs wished to make it plain that although the word "economic" did not appear in the existing paragraphs, the paragraphs were intended to refer to unlawful interference with economic interests.

In support of the amendment to pars 48 and 49, the plaintiffs submitted that although the trial judge had dealt with their claim under those paragraphs as entirely confined to conversion, they had made it clear at various points in the trial that the paragraphs were relied on for a wider claim, which included but was not limited to conversion. In this connection the plaintiffs referred the court to, inter alia, the commencement of their opening, in which Mr Hiley QC, their senior counsel, had said the action was "for damages suffered as a result of the defendants' unlawful interference with the plaintiffs' property rights", and to their final written

submissions which had a separate section dealing with the wider claim. Reference was also made to what Mr Hiley said in oral submissions after the close of evidence:

> "MR HILEY: I've just about finished reading the document now, but at the bottom of the second page: 'The plaintiffs have suffered substantial financial loss as a result of the unlawful actions of the defendants in preventing them from selling cattle at the prime time of the year.'
>
> I just take you to that, Your Honour, because that was how we started to open the case and it's our submission that, after all this length of time, bearing in mind the evidence, that that still remains to be the position."

The applications to amend were at first opposed by the Solicitor General, Mr Pauling QC, for the defendants, but after some discussion, although I do not think he formally withdrew his opposition, he plainly stated that the conduct of the trial would have been no different had pars 46 to 49 been at the trial in the form now sought and confined himself to saying that if the amendments were allowed then the defendants would be saying that the amended pars 46 and 47 disclosed no cause of action and would also, in the alternative, wish to plead justification in answer to the alleged cause of action; at the same time he said that all the materials necessary to the question of justification were, so far as the defendants were concerned, before the court. (Transcript of argument, 20 April 1993, pp 4-16, especially 15-16.)

The court's response to the applications to amend was to indicate it was disposed to allow the amendments and also to permit the matter of justification to be raised on the pleadings, without making a final decision at that time. The

parties were requested to proceed on the basis the amendments were allowed. (Transcript of argument, 20 April, p 26.)

Subsequently, the defendants handed up the following:

"Further to paragraph 2 of the Defence.

As to paragraphs 46 and 47 of the Amended Amended Substituted statement of claim the Defendants"

(a) deny that they or any of them intended harm to the plaintiffs' economic interests;

(b) deny that they or any of them used unlawful means;

(c) deny that any of the actions of the defendants alleged to have harmed the plaintiffs was without just cause;

(d) deny that any of the actions of the defendants alleged to have harmed the plaintiffs was without just cause;

(e) claim that their actions were justified and for the purpose of the plea:

(i) repeat the matters alleged in paragraph 6 of the defence;

(ii) allege that the defendants were under a duty of care to the public to act in or for the public interest in controlling prescribed diseases in stock and were obliged in obedience to that duty to act as they did."

The hearing of the appeal proceeded on the footing that the amendments, both by plaintiffs and defendants, had been made.

It seems to me appropriate for a formal order to be made permitting the amendments sought. The two basic reasons for this are that it appears that, in a broad way at least, what is sought to be covered by the amendment was sufficiently raised at the trial and, as appears from what I have already said, the

defendants do not assert they will be prejudiced by the amendment. (This approach is consistent also with what the court was told was the attitude of Mr Mildren QC (as he was) who appeared for the defendants at the trial; that is, he made it clear that the defendants wished to contest their liability on the facts of the case without technical reliance upon pleading matter.)

The arguments in the appeal. Written submissions had been filed with the court and exchanged between the parties before the oral argument. These were detailed and helpful. They were then amplified by extensive oral submissions. The result was that the parties dealt with all arguments relating to liability very fully.

The question of damages, however, was left for separate argument. It was, when its time came, also fully argued, both in writing and orally.

By the end of the liability arguments it had become clear that they fell under the following main headings:

(a) Should this court change any of the factual findings of Asche CJ?

(b) The construction of s 27(2).

(c) Was the August Gazette notice applicable to the plaintiff's herds?

(d) Was Asche CJ right in deciding in favour of the plaintiffs upon the basis of *Beaudesert*?

(e) Was Asche CJ right in rejecting all the other bases of the plaintiffs' claim?

(f) Not entirely falling within (e), were the plaintiffs entitled to judgment on the basis of pars 46 and 47 as amended, and/or pars 48 and 49 as amended?

(g) Was any loss suffered by the plaintiffs caused by the defendants?

(h) Policy considerations.

V

Arguments and Conclusions Concerning Liability.

(a) The Facts.

In order to support Asche CJ's judgment on the footing of some of the causes of action he rejected, the plaintiffs sought to persuade this court to change a number of his factual findings.

It does not seem to me to be necessary to set out all the arguments on this aspect of the appeal. Some of the submissions, in particular those about the understanding of the meaning of "quarantine" by the people involved, and the bona fides of the defendants, concerned findings of the kind with which appellate courts do not usually interfere; that is, findings concerning credibility or contested issues of fact where conflicting evidence has been given and resolved by findings made by the judge after assessment of the witnesses giving the relevant evidence. Unless the appellate court is satisfied that a finding of this sort was clearly mistaken (by reason for example of oversight or failure to appreciate some features of the material before the court requiring a different conclusion) it has long

been accepted that judges in an appellate court will not disturb such findings of the trial judge merely to replace them with different conclusions based simply on the record, and without the additional input the trial judge has had by having been at the trial. Despite the earnest arguments of plaintiffs' counsel that such mistakes were made by the trial judge in the present case, having considered those arguments in the light of the trial judge's very extensive and careful reasons and the record, I am unable to agree that there is any solid reason for this court to interfere with such factual findings.

I would not alter any of Asche CJ's factual findings.

(b) Construction of s 27(2).

Before Asche CJ the plaintiffs submitted that s 27(2) of the SDA did not authorise the making of the August Gazette notice. Asche CJ held against the plaintiffs on this argument. In this court both arguments were again fully canvassed.

Section 27 of the SDA is set out at pp 9 and 10 above. Section 27(1) empowers the Chief Inspector to give a holding one of eight classifications. Subsection (2) empowers the Chief Inspector to specify by notice in the Gazette restrictions on movement, sale and purchase of stock; the restrictions are to be for the purpose of controlling a prescribed disease; and, for that purpose "the restrictions may be expressed to relate to the disease status of a holding".

The primary argument of the plaintiffs was that subs (2), read in the context of the section and the Act meant that restrictions imposed pursuant to it had to be expressed to

relate to the disease status of a holding. The second "may" in the subsection, it was contended, was used in the sense of "must", not in its more usual meaning which gives to the donee of a power a discretion.

This argument was very fully developed before Asche CJ and every consideration bearing upon the proper construction of "may" in s 27(2) appears to have been discussed in detail. His Honour did the plaintiffs the courtesy both of recording the argument in his reasons and of explaining by reference to each point relied on by the plaintiffs why he was not persuaded that "may" bore a mandatory meaning in the subsection. I respectfully agree with the substance of his Honour's reasoning concerning construction and with the result at which he arrived. In my opinion the better construction of the subsection is that it empowered the Chief Inspector to specify restrictions within its terms by relating them to the disease status of a holding, but did not oblige him to do so.

(c) Was the August Gazette notice applicable to the plaintiffs' herds?

The principal point argued about the August Gazette notice (set out at 25, 26 and 27 above) turned on the words

> "I ...
>
> (b) ... specify in the Schedule the restrictions which shall apply to and in relation to the movement in and into the Territory of cattle ...
>
> SCHEDULE ...
>
> BRUCELLOSIS

"Movement in and Into the Territory

"Where cattle ... are from herds with a disease status, in accordance with the National Brucellosis and Tuberculosis Eradication Campaign, of -

(a) infected, suspect, restricted or provisionally clear where herds subject to an eradication programme approved for the purposes of that campaign ...

(ii) entire cattle ... movement permitted for the purpose of immediate slaughter provided cattle ... moved directly to an abattoir;"

The plaintiffs' argument was that the words "where herds etc" following the words "infected, suspect, restricted or provisionally clear" were words of qualification of the four listed categories. That is, for the paragraph to apply to a herd it would have to be in one of the four categories and also be subject to an approved eradication programme. The plaintiffs then argued, successfully before Asche CJ (and this point was not contested in the appeal) that their herds were not subject to approved eradication programmes, so that the paragraph, which was the only one relied on by the defendants as supporting the movement restrictions, had not in fact applied to them.

The argument for the defendants was that the words "where herds etc" did not qualify the preceding four classifications but added an additional and separate classification, that is, the meaning of the words when properly understood was "or where herds are subject to an eradication programme etc".

In my opinion the construction urged by the plaintiffs is the preferable one. A primary consideration is that the opening words under the heading "Movement in and Into the Territory" show that the restrictions are imposed by reference to the

disease status of herds. The defendants' construction does not explain why the notice would add an extra category to a list of types of herd explicitly indicated in the introductory words of the list as being comprised of herds categorised by disease status when the extra category had nothing to do with disease status. The defendants' construction of the words "Subject to an eradication programme etc" as words of qualification rather than words establishing an independent category seems to me to be a much more likely reading of them.

The only foothold that I see for the defendants' submission is that the terse way in which the notice was expressed makes it possible to argue it was ambiguous. However, I think most readers would, as I do, react to the difficulty caused by the abbreviated style of the relevant words in par (a) by supplying words to expand those used into "where such herds are subject".

The style is something like that which used to be adopted in writing telegrams and still is when someone is trying to shrink a sentence to abbreviated form. It is a pity perhaps that the draftsman of the notice used such a style, but the meaning seems to me to be relatively clear. Most readers have encountered the telegram style abbreviation at one time or another and the expansion of the abbreviation into the full form meant by the abbreviator is something most readers are used to doing. A modified version of this abbreviating style is used throughout the notice, one repeated example being the "where

herds" formula, which appears in pars (b), (c) and (d) as well as in (a).

The defendants supported their submission with the argument that the consequence of the interpretation adopted by Asche CJ was of such impracticality as to justify adopting what at first sight might seem to be the less obvious meaning for which the defendants contended. The impracticality submission depended on the view that the result of the Chief Justice's interpretation would be to recognise that some part of herds with an infected or suspect disease status, that is herds of potentially infected stock, would not be subject to the movement restrictions specified in the notice.

A combination of two reasons leads me not to accept this submission. The first is the one already mentioned, that the more obvious meaning of the words is that contended for by the plaintiffs. The second is that I am not persuaded that the difficulties which the defendants assert flow from the plaintiffs' construction are as serious as they maintain. For one thing, the SDA contained powers concerning the control of stock which did not depend upon movement restrictions specified in a notice under s 27(2); for another, although I do not think there was any evidence going directly to this point, reading the SDR in light of the voluminous general evidence in the case gives the distinct impression that the government expected that herds with an infected or suspect disease status would be subject to an eradication programme, (see pp 21 and 22 above).

Further, if any were not, they would not be subject to the provisions of the SDR.

A further factor in forming my opinion on this question of construction has been the obvious consideration that the imposition of movement restrictions by a notice made pursuant to s 27(2) can be a very serious matter for the owners of the cattle affected, as this case demonstrates. On the other hand, of course, BTEC was a campaign undertaken as a result of considered joint action by all the duly elected governments in the Australian federal system. Care was plainly taken to try and institute a satisfactory scheme of compensation for those who suffered loss in the campaign for a result which was intended to be for the general good.

As it happened there was no provision for compensating those who lost money because their cattle were subject to movement restrictions because of suspected infection if it turned out that the suspicion was unfounded. This highlights the need to give weight to the interest of individuals in seeing that the scheme works fairly, if possible, in its communitarian objectives.

It thus seems to me to be a reasonable approach to construction of the August Gazette notice, which authorises interference with the arrangements of individuals for community purposes, to make no particular effort to force a construction upon the words of the notice favourable to one interest rather than the other.

Courts often have a difficult task in deciding the meaning of the provisions of legislation and subordinate legislation, and there has been in recent years increasing recognition by judges of the possible ranges of meaning in words to which the courts must give some effect. However, acknowledging these difficulties, it is still right to recognise that there are degrees of obviousness to ordinary readers in the possible meaning of particular sets of words. In the present case my opinion is that the meaning of the words in question contended for by the plaintiffs is relatively more obvious (in the sense that I think most people would read them in the way suggested by the plaintiffs) than that suggested by the defendants.

I therefore agree with Asche CJ's reasoning on this aspect of the case.

An alternative argument was put by the defendants that it was only the Provisionally Clear classification to which the qualifying words applied. I think this argument fails because neither on an ordinary reading approach to the relevant words nor on any purposive basis can I see any reason for regarding the provisionally clear classification as being treated differently from the three preceding ones.

To this point I have been dealing with the reasons why Asche CJ held that the defendants had no authority to do what they did, in purporting to impose movement restrictions and to change the status of properties and/or herds, and in asserting that a quarantine existed in the limited sense in which he found that term was understood by the parties. I both agree with his

reasoning on this point and do not accept various arguments submitted by the plaintiffs as being alternative grounds for supporting Asche CJ's view about lack of authority. But there is one argument which supports Asche CJ's conclusion on this point, which, although only touched on briefly in the way I am going to state it, was nevertheless sufficiently put to warrant its being recorded and dealt with.

Asche CJ found, on the evidence before him, that it had not been proved that either Neutral Junction or Banka Banka had been subject to an approved program which extended to September 1988. There was no evidence that as at that date the plaintiffs had bound themselves contractually to observe and/or be governed by BTEC or the SDR. Hence, as at that date, the only authority the defendants had in regard to the plaintiffs in relation to BTEC was under the SDA and any relevant regulations and/or notices on foot under the authority of the SDA.

I mentioned earlier that at the beginning of September 1988 the owners of Neutral Junction held a notice in writing from the Chief Inspector classifying Neutral Junction, in relation to brucellosis, as Tested Negative. That notice was a certificate under s 27(1) of the SDA which said that pursuant to that subsection the Chief Inspector, inter alia, gave "to the *holding* (my emphasis) known as Neutral Junction the ... classification ... in respect of ... bovine tuberculosis: Tested Negative". The notice continued:

> "Accordingly, as provided under s 27(2), the movement of cattle ... into and out of that holding shall be subject to the restrictions prescribed for holdings having Tested Negative (TN) status in respect to ... brucellosis."

At the time the Chief Inspector gave that certificate, movement restrictions were on foot pursuant to a s 27(2) notice published in the Gazette which imposed movement restrictions by reference to different classifications of disease status which were described as applicable, not to herds as in the August Gazette notice, but to holdings, the term used in s 27(1).

The change in the August Gazette notice which made the disease status referable to herds rather than to holdings, seems to me to have brought about the following result in terms of the facts of the present case. In regard to Neutral Junction, the holding was duly classified under the SDA as Tested Negative. What the defendants relied on (by the time the appeal was argued) as the only basis of their authority for doing what they did in regard to the plaintiffs, was the August Gazette notice founded on s 27(2) of the SDA. This however dealt not with the classification of holdings, but of herds.

This arguably had at least two consequences, a broad and a narrower one.

The broad one was that the introduction of the reference to "herds" meant that the provisions of the notice could only apply to herds whose owners had contracted, by way of an approved programme, to be bound by the SDR. At the relevant time the plaintiffs no longer fell into this category.

The narrower consequence followed from the fact that no statutory or statute-derived basis was pointed to as authorising the classification by Mr Wilson on or about 9 September 1988 of the plaintiffs' *herds* as suspect. The only way such a classification of their herds could have been made by Mr Wilson and be binding on the plaintiffs, in the absence of some statutory or statute-based power for him to make such a classification, would be if the plaintiffs had by contract or in some other way been subject to the non statutory administrative scheme of BTEC. On the materials before Asche CJ and this court there is no basis for any such finding. (This position was accepted by the defendants in the appeal.) Thus, the classification by Mr Wilson of the plaintiffs' herds as suspect had no legal effect relevant to the plaintiffs and neither they, nor their holdings, nor their herds could be subject to those provisions of the August Gazette notice the application of which to the plaintiffs' herds was dependent on that classification.

Because I am not sure the broader of the two consequences was sufficiently argued in this court to make me confident I have grasped its implications fully, I would not base a conclusion on this part of the case upon it. I have no such reservation about the narrower consequence, and consider it to be an additional basis for reaching the same conclusion as Asche CJ on this point.

In my opinion this part of the defendants' appeal does not succeed.

(d) *Beaudesert Shire Council v Smith*.

An action on the case. An important feature of *Beaudesert* is that it is a particular instance of an action on the case.

One view of the history of the action on the case is that it developed as a mutation (and, as it progressed, a profound one) from the medieval writ of trespass: see Lecture VI in Maitland's *The Forms of Action at Common Law* (Cambridge University Press, 1936, pp 65-72, first published in 1909 in Maitland's *Equity*), and in much greater detail, *The Action on the Case* by A.K. Kiralfy (1951). What appears to be a somewhat different view is summarised in *Torts, Commentary and Materials*, W.L. Morison and C. Sappideen 8th ed 1993, at 43-45. All commentators however seem to agree that the action on the case proved to be the prolific begetter of what are today regarded as many different causes of action: breach of contract, nuisance, deceit, conversion, defamation, conspiracy, negligence and other particular instances of liability for which no settled name has developed.

It is also accepted that the action on the case was used by common law judges from at least the fifteenth century as the means for providing a remedy for new fact situations which were thought to require one. In 1481 Fairfax J, and in 1499 Fyneux CJ, were urging the profession to use the flexibility of the action on the case to develop remedies at common law instead of seeking relief in Chancery: see J.H. Baker *Introduction to English Legal History* (3rd ed, 1990) at 48, 52, 384, 385; and,

for repetition of Fairfax J's advice, see *Turner v Sterling* (1692) 2 Ventris 25 at 27; 86 ER 287 at 288.

An early case, still often used, which shows the common law at work in this way, was *Garret v Taylor* (1621) Cro Jac 567; 79 ER 485. A plaintiff pleaded the following:

> "Whereas he was a free mason, ... and was possessed of a lease for divers years to come of a stone-pit ... and digged divers stones there, as well to sell as to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the others from working, &c." (at 567; 485)

The defendant apparently filed no pleading, but later moved to arrest the judgment for £15 entered for the plaintiff, saying that nothing was alleged against him but words, and no act or insult, and that causeless suits on fear provided no cause of action. The court's answer was:

> "for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action : and although it be not shewn how he was possessed for years, by what title, &c yet that being but a conveyance to this action, was held to be well enough. And adjudged for the plaintiff." (at 567; 486)

Keeble v Hickeringill (1705) is another frequently mentioned example. It was a decision of the Kings Bench, and both the argument and Holt CJ's reasons were published in a number of reports of which the most informative appear to be

Holt KB 14-20, 90 ER 906-908; 11 East 574, 103 ER 1127; and 11 Mod 74 and 130, 88 ER 898 and 945.

The plaintiff had equipped a pond on his land with duck-decoys and nets for the purpose of decoying and taking wildfowl. The defendant had fired shots on his own land to frighten the ducks away from the plaintiff's pond.

Holt CJ said (as reported at 88 ER 945) that

> "this action is trespass on the case, to have a recompense for a consequential damage or injury; and is for hindering me from exercising my private right." (underlining in original)

He is elsewhere (103 ER 1128) reported as saying that the action "seems to be new in its instance, but is not new in the reason or principle of it." He acknowledged that there could be damage without a cause of action being thereby created, by for example, a man setting up the same trade as another man in the same town, that being a lawful thing to do; but where what was done was done to disturb the plaintiff and prevent him exercising his trade, then an action lay: see 88 ER 945.

The use of the action on the case to deal with new situations (when the court thought appropriate) still flourished in the nineteenth century. In *Grainger v Hill* (1838) 4 Bing (NC) 212, 132 ER 769; Arn 42, one of the defences raised was that the plaintiff's claim was a novel one, to which Tindal CJ responded that the case fell

> "within the general rule, that where a party has received an injury from the wrong of another, he may have his remedy by an action on the case." (1 Arn 42 at 49)

No name was then given to the particular species of the tort in that case. It has since been classified under the heading abuse of process.

Grainger is a good example of the rather broad way in which judges have been accustomed to describe the general rule underlying the open-ended types of situation where courts will give relief to a plaintiff for damage caused by a defendant. Kiralfy remarked, in the introduction to his book (at 1) "it is substantially true to say that almost all new forms of common law liability are today derivatives of Case".

The ideas behind the action on the case continued to operate after the Judicature Acts did away with the old forms of action. One general statement, which I refer to only because of the way it reflects the continuing effect of those ideas, was the first of the series of propositions stated by Griffith CJ in *Brisbane Shipwrights Provident Union v Heggie* (1906) 3 CLR 686 at 697:

> "The first rule is that any interference with the rights of another, which in fact occasions damage to him, is actionable, unless such interference is authorized, or justified, or excused by law."

Beaudesert is a modern example of the very long common law tradition.

The facts and decision in *Beaudesert*. Mr Smith owned a farm. He pumped water for use on it from a natural water hole in a river. He had a licence under the Water Acts (Q) to do this. The Beaudesert Shire Council took 12,000 yards of gravel for road construction out of the bed of the river. This had the effect of changing the water hole and altering the flow of the river so that Mr Smith could no longer pump water from the water hole. There would be unavoidable expense to him in making arrangements to pump water from another site. He brought action against the Council for his damage.

The Council said that its taking of the gravel was authorised under a permit granted pursuant to the Water Acts. It was held however that neither this permit nor a section of the Main Roads Acts (Q) which was relied upon gave the Council any authority to take the gravel. Further, once it was held the council had neither permit nor authority, it followed that it was in breach of statutory regulations forbidding the taking of gravel except with a permit.

The trial judge gave judgment for Mr Smith in the sum of £5,000.

On appeal, the High Court considered various bases upon which the trial judge's decision might be supported.

The court held a number of matters adversely to Mr Smith. Neither the fact that he was a riparian owner nor a licensee under the Water Acts gave Mr Smith a right to the preservation of the pool or to a flow of water to his pump (at 151). Although in the High Court he sought to rely on negligence as an

alternative basis on which the judgment should be supported the High Court would not consider the argument because it had not been fought at the trial. Nor was Mr Smith entitled to damages because of the breach of the Council's statutory duty not to take gravel without the requisite authority; the regulations of which the Council was in breach were not intended to confer a private remedy (at 152). Mr Smith could not succeed on the ground of public nuisance because removal of gravel from a river did not fall within that category; nor did the facts of the case constitute a private nuisance (at 152).

The court therefore considered the residual category of the action on the case. They said:

> "It appears to us, therefore, that if what the appellant did was actionable at the suit of Smith and his personal representatives for damage suffered thereby, liability must depend upon the broad principle that the Council intentionally did some positive act forbidden by law which inevitably caused damage to Smith by preventing the continuing exercise of his rights as a licensee in the manner in which they had been enjoyed for some thirteen years. Such a cause of action must, we think, be found either in, or by analogy with, an action on the case for trespass." (at 152)

They then referred to Kiralfy's *The Action on the Case* and briefly discussed a number of authorities, mostly authorities referred to by Kiralfy. These were all actions on the case. They included *Garret v Taylor* and *Keeble v Hickeringill*, which I have earlier mentioned. They noted that *Keeble* had been referred to favourably in both the Court of Appeal and the House of Lords in *Mogul Steamship Co v McGregor Gow & Co* (1889) 23 QBD 598 (Court of Appeal) and 1892 AC 25 (House of Lords). They then said:

> "There is, therefore, a solid body of authority which protects one person's lawful activities from the deliberate, unlawful and positive acts of another. It is not, however, possible to adopt a principle wide enough to afford protection in all circumstances of loss to one person flowing from a breach of the law by another, for regard must be had to the limitations which the law has placed upon the right of a person injured by reason of another's breach of a statutory duty to recover damages for his injury. Bearing this in mind, it appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful intentional and positive acts of another is entitled to recover damages from that other. It may be that a wider proposition could be justified, but the proposition we have stated covers this case and leads us to the conclusion that the appellant is liable to the respondents for loss occasioned by its unlawful trespass in removing gravel from the river-bed." (at 155-156; my emphasis, for later reference.)

The High Court's use of the action on the case in *Beaudesert* led to considerable academic discussion and analysis of the case in following years. Much of it has been critical.

Two frequent criticisms have been that the authorities relied on by the High Court did not justify the general principle the court formulated and that the terms in which the principle was formulated were unclear and difficult to understand.

These two criticisms were expressed by Lord Diplock in the Privy Council in an appeal from New South Wales. The case was *Dunlop v Woollahra Municipal Council* (1981) 1 NSWLR 76. One part of the case was dealt with on the footing that the defendant Council had not heard the plaintiff before exercising a power adversely to him. The plaintiff claimed that the exercise of the

power in those circumstances was null and void and then relied, inter alia, on *Beaudesert* as showing that he was entitled to damages. As to this, Lord Diplock first quoted the emphasised part of the passage from the High Court decision at 155-156 earlier set out, then noted that the court had based its general statement of the principle on eight authorities, and continued:

> "Their Lordships understand that they are not alone in finding difficulty in ascertaining what limits are imposed upon the scope of this innominate tort by the requirements that in order to constitute it the acts of the tortfeasor must be 'positive', having as their 'inevitable consequence' harm or loss to the plaintiff and, what is crucial in the instant case, must be 'unlawful'. The eight cases referred to as a solid body of authority for the proposition appear to be so miscellaneous in character that they throw no further light upon the matter. Nor, although *Beaudesert* was decided some fourteen years ago, has it been clarified by judicial exegesis in the Australia courts: or followed in any other common law jurisdiction. It has never been applied in Australia in any subsequent case." (at 82)

Lord Diplock then moved on to what I would think is likely to be a central issue in most invocations of the action on the case to factual situations not having any precedent, that is, whether what the defendant has done is "unlawful" in the necessary sense. In regard to what is, relevantly, unlawful, Lord Diplock said:

> "In *Kitano v The Commonwealth* (1974) 129 CLR 151 Mason J, whose reasons for judgment were later adopted by the Full Court, expressed the view that an act done in breach of a statutory duty in respect of which the statute neither expressly nor by implication provides a civil remedy in damages, is not necessarily 'unlawful' within the meaning of the *Beaudesert* principle although it clearly is unlawful in the ordinary sense of that term. A plaintiff, said

Mason J at p 175, 'must show something over and above what would ground liability for breach of statutory duty if the action were available' - but what that something more was he did not attempt to identify. He held that the plaintiff, Kitano, did not bring himself with the *Beaudesert* principle because inter alia 'he has not succeeded in showing that the act was tortious (and not merely a contravention of the statute)'. In *Grand Central Car Park Pty Ltd v Tivoli Freeholders* [1969] VR 62, at pp 73, 74, McInerney J held that carrying on a trade without a permit in contravention of a statute did not fall within the epithet 'unlawful' in the formulation of the *Beaudesert* principle.

In the instant case Mr Justice Yeldham did not find it necessary to embark upon a general consideration of what kinds of act were intended by the authors of the judgment in *Beaudesert* to be included in the expression 'unlawful'. The only acts relied on were the passing of two invalid resolutions, so what he was concerned with, and what their Lordships are concerned with, was a specific question: whether an act which in law is null and void and so incapable of affecting any legal rights, is, *for that reason only*, included in that expression. The learned judge found no difficulty in answering that question in the negative. He pointed out that in the *Beaudesert* judgment the principle is stated twice, once before the citation of the old authorities relied on (at p 152) and once after (at p 156) and that in the earlier statement the word 'unlawful' is replaced by 'forbidden by law'. He went on to cite a number of English cases in which the distinction between unlawfulness or illegality on the one hand and invalidity on the other is clearly drawn. Of these their Lordships need only mention *Mogul Steamship Co Ltd v McGregor Gow & Co* both in the Court of Appeal (1889) 23 QBD 598 and in the House of Lords [1892] AC 25. The rejection of one of the appellant's arguments in that case turned on this very distinction.

It is true, as Lord Halsbury pointed out in the above-cited case, that prior to 1892 the word 'unlawful' had sometimes been used to describe acts that were void and incapable of giving rise to legal right or obligation; but this extended use of the expression he condemned as inaccurate and so far as their Lordships are aware it has not been used in that extended sense in any subsequent English judgments. Their Lordships have no doubt that in using the expression 'unlawful' in *Beaudesert* the High Court intended it to be understood in what for the past ninety years has been its only accurate

> meaning. Their Lordships accordingly agree with Yeldham J that Dr Dunlop fails on his *Beaudesert* claim." (at 82-83)

Dunlop was decided in February 1981. Lord Diplock had something further to say about *Beaudesert* in June of the same year in a decision of the House of Lords: *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* (1982) AC 173. He again referred to what Mason J had said in *Kitano*, saying that Mason J had made it clear

> "that the adjective 'unlawful' in the definition of acts which give rise to this new action for damages upon the case does not include *every* breach of statutory duty which in fact causes damage to the plaintiff. It remains uncertain whether it was intended to include acts done in contravention of a wider range of statutory obligations or prohibitions than those which under the principles that I have discussed above would give rise to a civil action at common law in England if they are contravened. If the tort described in *Beaudesert* was really intended to extend that range, I would invite your Lordships to declare that it forms no part of the law of England." (at 188)

Other criticisms frequently made of *Beaudesert* are that it seems to be in some conflict with the cause of action for breach of statutory duty and that the absence of a requirement of intention to injure makes it too wide: see for example J.D. Heydon: *Economic Torts*, 2nd ed (1978) at 133,134.

In *Kitano* Mason J made some further observations of general relevance to the present case. In particular, he noted that *Beaudesert* had been discussed by reference to the decisions in the House of Lords of *Rookes v Barnard* [1964] AC 1129 and *J.*

T. Stratford & Son v Lindley [1965] AC 269, and questions had been raised about the possible implications for *Beaudesert* flowing from those cases, in that some of the authorities on which the High Court decision was based were examined also in the House of Lords decisions. The latter decisions dealt in terms with "economic" torts. Mason J said:

> "There is no point in my discussing this development in the law. The *Beaudesert Case* is binding on me and the question is whether the present facts fall within the principle which it enunciated.
>
> Neither the decision nor the principle as it was expressed turns on the existence of an intention on the part of the defendant to cause harm to the plaintiff. It is enough to found liability, provided that the other elements are present, that the act is intentional and its inevitable consequence is to cause loss to the plaintiff." (at 174)

Mason J was making the point here that the requirement developed in England that a necessary ingredient of the economic torts was an intent on the defendant's part to cause harm to the plaintiff could not have a limiting effect on the operation of the principle in *Beaudesert*. The authority of the rule the High Court laid down in *Beaudesert* could not be affected by inconsistent opinions in the House of Lords. This would not of course prevent Australian courts from using the principles developed or explained in the English decisions as persuasive authority in regard to *other* developing torts distinct from that found by the High Court to have been committed in *Beaudesert*.

Mason J also made observations in *Kitano* about "inevitable consequence". I will discuss this topic a little later.

The authority of *Beaudesert*. Mason J accepted in *Kitano* (at 174) that the principle in *Beaudesert* was binding upon him.

This court is in the same position. We are bound to accept the principle stated in *Beaudesert*, and if the facts of the case fall within the principle, to apply it. This was accepted by the defendants in the present case. The situation is not affected by criticism in cases in other courts, including the Privy Council's criticism in *Dunlop*. This last, it is material to note, did not purport to say that *Beaudesert* was wrongly decided, but, rather, indicated limitations as to its effect.

Nor does the reference to *Beaudesert* in *Elston v Dore* (1982) 149 CLR 480 cause any lessening, so far as this court is concerned, of the authority of *Beaudesert*. The plaintiffs in *Elston* failed in their reliance upon *Beaudesert* because they did not establish that the damaging action of the defendant was unlawful. In the leading judgment in that case, Gibbs CJ and Wilson and Brennan JJ after noting the failure of the plaintiffs to show that the defendant's conduct was unlawful, said:

> "It is therefore unnecessary to consider whether *Beaudesert Shire Council v Smith* ... should be followed. When that question does arise for decision, it will be desirable that a court of seven justices should consider it." (at 492)

Even if it were possible (and clearly it is not) to deduce from this statement whether a High Court of seven justices will decide to follow *Beaudesert*, the authority of *Beaudesert* until the High Court considers it, can not be affected. The only practical effect of the observation in *Elston*, in the meantime, is to remind readers of *Beaudesert's* authoritative status.

The applicability of *Beaudesert*. I will approach the question whether the facts of the present case fall within

Beaudesert by reference to the three elements which Lord Diplock said were required to bring its principle into operation. These were that the acts of the tortfeasor must be "positive", that damage to the plaintiff must be the "inevitable consequence" and that the actions must be "unlawful".

Without attempting in the present case to state the outer limits of the requirements, it is in my opinion right to say that whatever they may be, the facts in the present case fall well within them.

In dealing with the "positive" requirement, it is first necessary to make clear the position about movement restrictions under the August Gazette notice. In their statement of claim and at the trial the plaintiffs spoke of the three movement restrictions as if they had been imposed by the stock inspectors. This way of speaking about the matter was consistent with the language used between the parties at the time as reported in the evidence; for example, see the evidence of Mr Tabrett quoted at 20 above, where he spoke of the movement restrictions that Mr Baker had placed on the property. The same language appears to have been adopted by all parties at the trial, and naturally enough by Asche CJ. For example, in his reasons, when saying that for the most part both the plaintiffs and the defendants had done their best to act reasonably in the situation in which they found themselves, he commented:

> "The officers of the department were field officers who clearly understood the potentially serious consequences that might occur by their actions and were most reluctant to impose movement restrictions." (at 33)

He used similar language in various other places in his reasons (as, for example, at pp 109 and 113).

The reality of the situation was, and I think this is clearly implicit throughout the reasons of Asche CJ, that the defendants were in a position to enforce the movement restrictions imposed by the August Gazette notice (if it applied to the plaintiffs' herds), they spoke to the plaintiffs against the background (which I take the plaintiffs to have been aware of, even if only in a very general way) of the availability of sanctions if the plaintiffs did not comply with what the defendants were telling them they must do, and that the plaintiffs did comply with what they were told to do in the belief (very real even if not precise) that if they did not do what they were told they would be in breach of the law and subject to penalty. If the August Gazette notice applied to them, and they disobeyed the movement restrictions they were liable to fine or imprisonment under s 27(2) of the SDA and their stock could be seized under s 42(1)(t).

Thus, as to the "positive" requirement, assuming that in some cases its content may cause problems, I do not think that there is any difficulty in the present case. The actions of the defendants, both the changing of the status of the plaintiffs' holdings and the actions somewhat inaccurately designated as the three movement restrictions were undoubtedly positive actions by the defendants directed to the plaintiffs, which had the effect of what were from the plaintiffs' point of view apparently

lawful commands by government officials disobedience to which could be punished in various ways.

At one stage of the argument the court became concerned about what I have just referred to as the three movement restrictions having been somewhat inaccurately designated as such. The court asked whether the true situation might not be not that the defendants imposed restrictions by any act of theirs, but that the terms of the August Gazette notice if applicable to the plaintiffs' properties or herds, operated, of their own force and independently of any action of the defendants, to restrict movement of the plaintiffs' cattle.

In answer, Mr Pauling said that the case at first instance had been run on the footing that to say to somebody, "you can't move your cattle" was a use of a power by which the defendants were imposing movement restrictions, and that the case had been conducted on the conventional basis that what the defendants were doing was purporting at least to impose restrictions. He therefore did not think it open to the defendants in the appeal to advance any argument based on the view that what, for example, Mr Baker said and did in regard to the first and second movement restrictions could not in any circumstances have had any legal effect, but could only reflect his opinion of what the legal position was. Mr Pauling said that because of the way the trial was conducted the appeal should go on the basis that the defendants were imposing movement restrictions as the plaintiffs contended they had done (see Transcript of argument of 21 April 1993, pp 122-124 and of 30 April 1993, p 538).

In my opinion this was a proper attitude to adopt. It is consistent with the defendants' overall approach to the case both at the trial and in the appeal. This was to contest the plaintiffs' claims vigorously, but fairly, and on the substantial merits of the matter.

That approach, and Mr Pauling's statement of the defendants' position in the appeal, mean that the issues for this court on the *Beaudesert* point are whether the defendants were entitled to act as if their changing the disease status of the herds or properties and imposing the three movement restrictions were valid, and, if not, whether any legal liability attached to their unauthorised actions.

I come now to the second element, "inevitable consequence". There seems to me to be some weight in what the critics of *Beaudesert* have said about this, if the words of the decision are taken completely literally, but I do not think the criticisms in the end detract from the substance of what was decided in *Beaudesert*. It is difficult to see that the phrase "inevitable consequence" means, or could mean, in the context in which it was used, any more than direct consequence, or indeed, any more than that the damage suffered by a plaintiff must be caused by the defendant's action.

As far as I am aware, that is all that plaintiffs have ever been required to prove when bringing actions on the case. In none of the instances of actions on the case referred to by the High Court as the "solid body of authority" supporting the principle stated in *Beaudesert* was proof of the connection

between the defendant's actions and the plaintiff's damage stated in terms of "inevitable consequence" as distinct from "caused by". I will mention this again a little later.

It may be that the phrase "inevitable consequence" was taken up by the court in *Beaudesert* from the reference by plaintiffs' counsel in argument (see at 120 CLR 148) to *Manchester Corporation v Farnworth* (1930) AC 171 and the similar phrase, "inevitable result", used in that case. The phrase was used there however in the following context. What was being considered was a claim that fumes from a power station being run by a public authority pursuant to statute were a public nuisance. It was accepted in the case that it would be a defence for the public authority if it could prove that the creation of the nuisance was the inevitable result of carrying out the directions of the legislature. The onus of this proof was on the defendant. That is, the *defendant* public authority could succeed in defeating the plaintiff's claim of nuisance if it could show that the only way of carrying out its statutory obligation was a way which caused the public nuisance. I doubt whether the High Court intended to carry this idea into the requirements of proof by the *plaintiff* in the kind of action on the case they were formulating in *Beaudesert*.

It was argued for the defendants that the kind of opinion I have expressed above would amount to a reversion to the *Polemis* (1921 3 KB 560) test of the damage for which a defendant is responsible. I doubt whether the High Court had any such idea in mind, nor do I mean to refer to it in what I have said, which

is subject to the recognised requirement of foreseeability. The damage in the present case was, in my opinion, plainly foreseeable.

I do not think this view is inconsistent with what Mason J said about "inevitable consequence" in *Kitano*. There the question was whether the loss by the plaintiff of his yacht was the "inevitable consequence" of the unlawful issue of a certificate of clearance by Commonwealth officials. Mason J thought not, saying:

> "Granted that the issue of the certificate of clearance was an intentional, unlawful (because it contravened s 122) and positive act, nevertheless the plaintiff did not suffer loss as an inevitable consequence of its issue. It may be that the plaintiff's loss (deprivation of possession of the yacht) was a consequence of the issue of the certificate to Matsushita but it was not a consequence which was 'inevitable'. Nor was the issue of the certificate of itself an act which was 'calculated in the ordinary course of events to damage' and which did in fact. In the *Beaudesert Case* it was the plaintiff's intentional act in removing gravel which destroyed the plaintiff's waterhole thereby preventing the exercise of his rights under his licence. Here it cannot be said that the defendant intended that which brought about the plaintiff's loss, namely, his exclusion by his companions from possession of the yacht. Certainly the defendant intended that the certificate should issue, but that act did not deprive the plaintiff of possession." (at 174)

Mason J was here careful to point out not only that the plaintiff's loss was not the inevitable consequence of the defendant's unlawful act, but also (as I read "calculated in the ordinary course" etc) that it was not caused as an ordinary matter of causation.

Whether or not the foregoing views are right, and assuming without deciding that the meaning of the words as an ingredient

in the *Beaudesert* cause of action has some strict literal connotation more onerous for a plaintiff than the one I have indicated, in my opinion the plaintiffs in the present case discharged their onus. On the facts as found, the intended sale of their cattle was delayed. Delay itself was damage to them and was the direct and unavoidable consequence of their compliance with what, at the time, appeared to them to be lawful commands.

This damage was distinct from the consequential damage resulting from the plaintiffs missing an advantageous market. It may be arguable that, looking at the situation as at the dates of the movement restrictions, it was just as possible that the market would move in favour of the plaintiffs as against them during the period of delay. On this basis any loss from the fall in the market could not be said to be an *inevitable* consequence of the defendants' commands.

However, it seems to me the basic point is that the *preceding* loss caused by delay in receiving proceeds of sale *was* inevitable; this gave the plaintiffs a complete cause of action on the case, entitling them to prove the damage that flowed to them, including that consequential upon what turned out to be the fall in the market.

This brings me to the third element, the meaning of "unlawful". Lord Diplock's view was that in using the word in *Beaudesert* the High Court intended it to be understood in what Lord Diplock thought had been its only accurate meaning for the previous ninety years. The meaning he seems to have been indicating, as appears from his references to what was said by

the Court of Appeal and the House of Lords in *Mogul Steamship*, is "contrary to law".

Accepting that view for purposes of the present case, it seems to me that what was done by the defendants falls well within its meaning. Believing that the legal situation was different from what it was, they in effect commanded the plaintiffs to do something in circumstances where the plaintiffs believed they would be liable to penalties if they did not comply. Although no finding to this effect was made in terms by Asche CJ, it is plain from the facts as he found them that the plaintiffs did not do what they did in regard to their cattle voluntarily but because of what to them was pressure from the defendants and because they felt bound to submit to this pressure and that by not doing so they would be in breach of the law and liable to various penalties.

For the defendants it was argued that Asche CJ took too extended a view of the meaning of "unlawful" or "contrary to law". It was pointed out that in *Beaudesert* the defendant was in breach of a statutory regulation that forbade the Council, in the circumstances in which it was placed, to take gravel from the river, so that its actions which did damage to the plaintiff were directly contrary to positive law effected by statutory regulation. In contrast, it was said that the actions of the defendants relied upon by the plaintiffs in the present case were not in breach of any law, but simply lacked legal authority. It was submitted that this was a different and lesser

category of action from that envisaged in *Beaudesert* as fulfilling the description "unlawful".

It may be that the *mere* fact that the defendants' actions were unauthorised would justify the defendants' submission; but the plaintiffs were not relying merely on lack of authority, they were relying on lack of authority in combination with the pressure exerted on the plaintiffs by the defendants, their claims apparently backed by the authority of their official position, to get the plaintiffs to comply with the consequences of the defendants' view of the changed status of their holdings and/or herds and the implied threat of penal consequences if the plaintiffs did not do what the defendants were telling them to do. These things seem to me to have been unlawful in the sense derivable from the "eight cases" Lord Diplock counted (see p 66 above) as being those the High Court described as "a solid body of authority which protects one person's lawful activities from the deliberate, unlawful and positive acts of another" (120 CLR 155).

Notwithstanding Lord Diplock's view to the contrary (see p 66-67 above), a brief look at the authorities will I think be useful in explaining the opinions I have reached in regard not only to the sense in which the High Court was using the word "unlawful" but also the idea of the causal connection between the act of a defendant and the damage of a plaintiff which seems to me necessarily to underlie their observations. It will be useful also in connection with a further submission made by the appellants concerning the *Beaudesert* principle generally.

This submission was that the *Beaudesert* tort was what the appellants called a third party tort. It was submitted that a *Beaudesert* cause of action was only available to a plaintiff who had suffered damage because of a tort committed by the defendant against a third party. It was said that in *Beaudesert* itself the damage suffered by Mr Smith was caused by the council's act of trespass against the Crown, in that the council went on to Crown land, the bed and banks of the Albert River, and wrongfully removed the gravel.

Keeble v Hickeringill (see above at 61) was said to be an example of the same idea. Referring to Holt CJ's example of a plaintiff's trade being disturbed by a defendant's activities, it was submitted that the plaintiff's damage flowed from wrongs done by the defendant to others in order to harm the plaintiff.

It does not seem to me that the High Court in *Beaudesert* had it in mind to limit the application of the principle formulated in that case in that way. I cannot see any sign of such a limitation in the court's discussion, and the principle as formulated seems to me an undoubtedly broader one. Further, at least one of the authorities used by the High Court as the basis of their formulation does not fall into the third party category postulated by the defendants.

The first of the authorities used by the High Court was *The Earl of Shrewsbury's Case* (1610) 9 Co Rep 46b; 77 ER 798 at 806). From Coke's extensive discussion in his report of this case, the High Court took an example repeated in *Bacon's Abridgement*, (1832) 7th ed, vol 1, 109, also cited by the High

Court, to the effect that a plaintiff, entitled to a market toll, had an action on the case, when the market was disturbed, "by which" he lost his toll. In *Shrewsbury* the disturbance was called "causa causans", and the loss "causa causata", the latter additionally being said to be "the point of the action".

Similar ordinary language of causation was used in the next two authorities, *Garrett v Taylor* (see above at 61) and *Tarleton v McGawley* (1793) Peake NP 270; 170 ER 153.

The authorities to this point bear out I think what I have said about the meaning of unlawful and the concept of cause. They also fit in, to this point, with the defendants' submission that the *Beaudesert* tort is a third party tort. However, the High Court's next reference (at 153) was to successful actions by persons injured by the failure on the part of persons responsible for the maintenance of sea walls; a Year Book Case cited by Kiralfy was mentioned which Kiralfy translated (at 11 of his work) as one in which a riparian owner was held civilly liable for failure to repair a sea wall "since by right he ought to do so" (Year Book 18Edw III, pl 6, f 23). The next reference after that was to *Keighley's Case* ((1609) 10 Co Rep 139a; 77 ER 1136), which makes the same point in a clearer way. Both these cases seem to me to be consistent with the views I have been expressing about the meaning of unlawful and the concept of cause, and also seem to me to contradict the defendants' submission concerning the third party tort.

Keighley's Case as well as illustrating the points already mentioned also happens to use the words "inevitable danger" in a

way somewhat similar to the way "inevitable result" was used in *Manchester Corporation v Farnworth* (see above at 75). Under 23 Henry 8, c5, the commissioners of sewers were authorised when (inter alia) a sea wall required repair to raise money for the repair by taxing all property owners who benefited by the sea wall. The case concerned a person who was bound by prescription to repair a sea wall. The effect of the case was that if the repair was needed because of damage caused by inevitable danger, all relevant property owners should be taxed, but if the damage was caused by failure to keep in repair, then the person bound by prescription should alone be taxed. In the latter case, Coke noted that persons damaged by their land becoming unprofitable because of the water coming through the wall had an action on the case against the person bound by prescription. If the defendant could prove the damage was inevitable there was no liability. The unlawful conduct in such a case was the failure by the defendant to keep the sea wall in repair as required by prescription in circumstances where that failure caused damage to the plaintiff. I do not see that in such an action on the case it would always be necessary to show the defendant had committed a tort against a third party.

The next case, *Whaley v Laing* ((1857) 2 H & N 476; 157 ER 196), was one where the defendant's unlawful act was fouling water in a canal, which got from there into the plaintiff's boilers and caused damage to them. The fouling of the water was not unlawful because in breach of any statute, but because the

defendant had no permission from the canal owners to foul it *and* it damaged the plaintiff's boilers.

The last two authorities mentioned by the High Court were *Carrington v Taylor* ((1809) 11 East 571; 103 ER 1126) and *Keeble v Hickeringill* (see above at p 61). The High Court said these were not referred to for the actual decisions, which did not depend on the particular principle they were discussing, but because of certain things said by Holt CJ in *Keeble* which were relied on in *Carrington*. The passage they quoted from Holt CJ's observations is also consistent with the concepts of unlawfulness and cause that, in my opinion, the High Court must have been going on.

The authorities used by the High Court, and *Beaudesert* itself, all seem to me to support the view that in cases where a plaintiff is relying on an action on the case the facts of which do not fall directly within the precedents, it is for the court to exercise judgment whether the actions of the defendant which ex hypothesi do not fall directly into a pattern previously held to be unlawful, in the sense of tortious, should be categorised as unlawful or contrary to law in that sense.

Using the same approach, the facts of the present case seem to me to be sufficiently analogous to those in which conduct has previously been held to be (tortiously) unlawful or contrary to law as to justify the same conclusion.

Explaining my own opinion a little more fully, in light of the preceding discussion it seems to me to be appropriate to class as "contrary to law" the conduct involved in government

officials purporting to change the status of the properties of persons, detrimentally to their commercial interests, without either statutory or contractual warrant for doing so, and directing people to do things, which the people do in obedience to the directions and to their own damage, when the officials have no authority to give the commands, even if they genuinely believe that they do have authority, and where disobedience to the directions exposes the persons, if the directions are authorised, to personal penalty and the seizure of their property.

In my opinion Asche CJ was right in holding that the facts as he found them fell within the substantial basis on which *Beaudesert* was decided, and that as a result the plaintiffs were entitled to judgment.

(e) The other bases of the plaintiffs' claim.

In regard to the other issues upon which the plaintiffs sought to rely in this court in addition to the *Beaudesert* principle as grounding a good cause of action against the defendants, I agree with what Asche CJ had to say about issue (3) in my earlier list (at p 37) and see no need to add to what he said.

Issue (4) was based on pars 46 and 47 of the statement of claim in their original form (set out on p 43 above). Asche CJ dealt with the claim thus framed by saying that in the absence of negligence there was "not a duty of care not to act unlawfully provided that the unlawful act was not knowingly or maliciously done". In support of this he cited a passage from

Dixon J's reasons in *James* (at 672-3). The passage supports the view that it is not a tort for government officials, acting under a mistaken but bona fide view of the law, to procure A to comply with that mistaken view of the law to the damage of B. Asche CJ appears to have taken the passage as also supporting the view that it is not a tort for government officials in the same state of belief to procure compliance by B with the mistaken view of the law by direct orders to B. I do not think the whole of Dixon J's rather elaborate reasons in *James* support this second proposition in this unqualified form.

However, rather than discuss this question in connection with the now superseded pars 46 and 47 with which Asche CJ was dealing, I will do so in considering, in the following section, pars 46, 47, 48 and 49 as amended and argued in this court.

(f) Paragraphs 46, 47, 48 and 49 of the statement of claim as amended.

Two separate causes of action? For the plaintiffs two separate arguments were based on the amended pars 46 to 49. One was directed to unlawful interference with economic interests, the other to unlawful interference with property rights. Although I rather doubt, at least in the circumstances of the present case, whether there is any material difference between the two claims, the parties treated them as if there were, and as if to a claim of unlawful interference with economic interests there was a defence of justification which was not available to a claim of unlawful interference with property rights. Hence the amendment in par 2(e) of the Defence (set out

at 47 above) to the amended pars 46 and 47 of the statement of claim, without any corresponding amendment to the defence to amended pars 48 and 49. On the footing that the assumed distinction is a valid one I will now deal with amended pars 48 and 49, which do not require consideration of the plea of justification.

The argument under pars 48 and 49. Although the argument based on paragraphs 48 and 49 covered much of the same ground as that dealing with the *Beaudesert* principle, I think it can be treated separately and that it may provide a distinct basis for upholding Asche CJ's judgment. This would be that on the facts found by Asche CJ the plaintiffs had an action on the case very similar to that on which *Beaudesert* was based, but not confined to it.

This particular kind of action on the case was mentioned by Dixon J in several parts of his reasons in *James v The Commonwealth* (1939) 62 CLR 339, and I will seek to explain my opinion about it by reference to his discussion.

James v The Commonwealth (1939) 62 CLR 339. In this case Dixon J was the trial judge. I am not aware of there having been any appeal against his judgment.

Mr James claimed damages from the Commonwealth because (putting it very generally) it had caused him damage by enforcing against him the provisions of an Act of Parliament, and Regulations made under it, which turned out to be invalid.

The Act was the Dried Fruits Act 1928-35. The Regulations made under it imposed restrictions upon interstate sale of dried

fruit. Mr James, whose business was in South Australia, at all times claimed to be at liberty to sell, and on various occasions succeeded in selling, dried fruit for delivery into other States without regard to the restrictions.

The Commonwealth, on the assumption that the Act and Regulations were valid, sought to enforce them. It took both direct and indirect steps to do so.

The indirect steps involved notifying the carriers Mr James wished to employ to carry his dried fruit to other States that they would be acting in breach of the Act and Regulations (which imposed penalties for breaches) if the carriers carried the goods. In general the carriers refused to carry the goods.

Among the direct steps were seizures by the Commonwealth, on five occasions, of consignments of dried fruit which Mr James had put in course of Inter-State transportation.

Mr James challenged the validity of the Act and Regulations in proceedings which eventually reached the High Court, where he lost. On appeal to the Privy Council however, the High Court was reversed; the Act and Regulations were invalid; Mr James had been right all along: *James v The Commonwealth* (1936) AC 578; 55 CLR 1.

Mr James then brought the proceedings which came before Dixon J, based on the invalidity of what the Commonwealth had enforced against him.

As described by Dixon J, Mr James's case fell into two parts. The first was a claim for the general loss to his business caused by the administration of the Act and the

Regulations. The second was for conversion of the goods which had been seized.

Some of the matters discussed by Dixon J in dealing with the first part of Mr James's case are relevant to variants of the action on the case argued under the amended paragraphs 46-49 in the statement of claim in the present case. The relevance is qualified because what Dixon J was considering in this part of the case was alleged tortious conduct by the Commonwealth in causing third parties not to carry the plaintiff's goods, in contrast to the conduct in the present case being actions of government officials directly against the plaintiffs.

Dixon J described the cause of action upon which Mr James relied for the first part of the case as one "entitling him to damages for interference in the conduct of his business owing to the manner in which the Regulations were maintained and enforced" (at 360).

A little later he said that

> "to do that, or to threaten, some unlawful act against a carrier in order to induce him to refrain from accepting the plaintiff's goods for carriage and thus to hinder the plaintiff's trade to his loss or damage may give the plaintiff a cause of action." (at 360)

However, having particularised this possible way Mr James might put his case, Dixon J noted that the case at the trial was founded on "[m]ore sweeping propositions ..." (at 360), which he then proceeded to deal with.

The first relied (unsuccessfully) on s 92 of the Constitution as an independent source of liability and is not relevant to the present case.

The second one is, however. For Mr James it was submitted that there was a general principle of law which could be stated in two ways: the first, adopting what Lord Holt said in *Keeble v Hickeringill* (1707) 11 East 574 at 575, 103 ER 1127 at 1128, was, "He that hinders another in his trade or livelihood is liable to an action for so hindering him". The second was expressed by Hawkins J in *Allen v Flood* (1898) AC 1 at 14, as follows:

> "A wilful invader, without lawful cause or justification, of a man's right freely to carry on his calling commits a legal wrong; and that wrong, if followed by 'injury' caused thereby to him whose right is invaded, affords a legal ground of action."

After discussion of the authorities, Dixon J concluded that they did not support such a broad principle. His view of the way the legal position should be stated was:

> "... the mere fact that the Commonwealth in the course of administering the invalid Regulations, without committing or threatening an illegality, procured the shipowners and other carriers to refuse to carry the plaintiff's goods and thereby injured his trade, would not suffice to give him a cause of action. It is necessary that some unlawful or wrongful means should have been used or threatened." (at 366)

Leaving aside the question of what Hawkins J meant by "wilful invader", one clear difference between his view and that of Dixon J seems to be that on Hawkins J's approach a plaintiff would have to show the defendant had done damage to the plaintiff without justification, but on Dixon J's approach would have to prove more, namely unlawful or wrongful means. It further seems that on Dixon J's approach it *would* be a tort for a government, in the course of administering regulations based

on an invalid statute, to do something causing damage to a person by use or threat of unlawful or wrongful means.

Having reached this position, Dixon J examined the further question whether the course taken by the Commonwealth included any unlawful means or threat of unlawful means against the third party carriers. On this, he found as a fact, in favour of the Commonwealth, that, even if it were taken to be the case that a threat of seizure had been impliedly held out, the possibility of seizure did not influence any carrier in refusing to carry Mr James's goods. The paragraph in which he made this finding is an important one for following his views on this possible cause of action:

> "There is no proof that any express threat was made to any carrier that fruit, if delivered to him for transport, whether by sea or land, would be seized in his hands. Such a seizure would involve an unlawful invasion of his possession as bailee. But it may be right to infer that such a threat was impliedly held out. For it may be supposed that it was well enough known that the Commonwealth assumed to possess a power of seizure and shipowners or their servants probably realized, though perhaps in a vague way, that the Commonwealth or the boards would or might take possession of James' fruit if it was dispatched inter-State. I feel sure, however, that the possibility of its being seized had no persuasive effect upon shipowners and carriers and did not influence them in refusing to carry the fruit. What influenced them was fear of prosecution under the regulations, the belief that it was contrary to the law to carry the fruit and the common desire not to come into conflict with a government department" (at 366-367).

Thus at first sight it might seem Dixon J was taking the view that if a carrier had refused to carry Mr James's goods because of an implied threat of seizure of them then the Commonwealth would have caused damage to Mr James by threat of

use of unlawful means and Mr James would have established a tort had been committed against himself, but if the carrier's refusal was because of fear of prosecution then the Commonwealth would not have threatened the use of unlawful means and no tort would have been committed. This would be a puzzling distinction, because it would seem that if seizure under an invalid regulation was unlawful then equally prosecution under the invalid regulation would also be unlawful.

However, I do not think Dixon J was making such a point. In speaking about the seizure aspect, he was dealing with an actual, although implied, threat of seizure. It was the threat to do something unlawful (although the government did not then know it would be unlawful to do it)which made up the unlawfulness Dixon J was speaking of. On the other hand in stating in the paragraph reproduced above (from 366-7) that fear of prosecution etc was what influenced the carriers to refuse to carry the goods, Dixon J seems to have regarded this state of mind as being the result, not of an implied threat, but simply of the carrier's own understanding (misunderstanding as it retrospectively turned out) of the law.

If this interpretation is right, then it would follow that if the Commonwealth had threatened the carriers with prosecution, even by a threat "impliedly held out" then Dixon J would have regarded that as involving the same kind of unlawfulness as the threat of seizure of the goods.

Dixon J next considered and rejected an argument "not during the hearing elaborated or developed by evidence or

argument" that since the ships which had refused to carry Mr James's goods were common carriers, and therefore bound at law to accept the goods for carriage in the absence of some reasonable justification for refusing and as their only justification was an invalid act on which they could not rely, the Commonwealth must be guilty of inducing a breach of duty and be liable on the principle of *Lumley v Gye* (1853) 2 E & B 216, 118 ER 749. For present purposes it is not necessary to discuss this, except to notice that Dixon J thought even if the ships had been common carriers the particular claim must fail. In explaining why this was so, he touched on matters relevant in the present case.

First he referred to the ingredient in the *Lumley v Gye* principle which required a plaintiff to show that the defendant had acted without lawful justification and said that in Mr James's case it raised the question

> "whether the bona fide execution of the law for the time being upheld as valid by the competent judicial power amounts to just cause or excuse notwithstanding that the law is afterwards found to be invalid." (at 371)

He then gave a number of reasons for concluding that the Commonwealth could not be said not to have had just cause or excuse. I think it significant that this statement concerning lawful justification was made explicitly in regard to the *Lumley v Gye* principle. In his consideration of this principle Dixon J made some further observations which need consideration and explanation in regard to the present case.

One was to the effect that the mere enactment by parliament of invalid legislation could not make the Executive Government liable in tort (at 372). The existence of the invalid statute could not be part of the grounds of legal responsibility in tort, but *could* be "regarded as a fact preliminary to and explanatory of the commission by the Executive of a tort" (at 372).

Further, he said it would be an unjustified extension of the *Lumley v Gye* principle to bring within it a mistaken assertion on the part of a government that under the law a third party had a duty to refrain from fulfilling a contractual obligation with a plaintiff (at 372-3). He then reduced his decision on the *Lumley v Gye* aspect of the case to its essentials:

> "The ground upon which I decide this part of the case against the plaintiff is that the Commonwealth incurs no liability for tort merely because A is induced to refuse performance of what turns out to be in fact a civil duty to B by an intimation made to A by the officers of the Commonwealth that, under the law of the Commonwealth, A is not merely absolved from the performance of the duty but is forbidden under penalties to do what would amount to performance and, by doing it, would expose himself to prosecution; provided that the officers act honestly in the purported execution of their duty to maintain and enforce the laws of the Commonwealth and, perhaps reasonably, as, for instance, on the faith of a statute not yet held to be invalid." (at 373)

(This is part of the same passage as that cited by Asche CJ which, as I earlier mentioned he seems to have taken as justifying a broader proposition than that actually stated by Dixon J (see pp 85-86 above).)

A little later Dixon J again made plain the precise basis of his decision on this part of the case:

> "the plaintiff has no cause of action at common law against the Commonwealth for wrongful interference with the plaintiff in the course of his trade by procuring carriers to refuse his dried fruit." (at 373-4)

Dixon J then considered another possible ground of liability under the first part of Mr James's case. He referred to and reproduced a proposition in Salmond's *Law of Torts*, 9th ed (1936) at 633. This passage had remained unchanged since the first edition of the work in 1907. Sir John Salmond had then given the name intimidation to a category of actions on the case. He had subdivided them into "intimidation of other persons to the injury of the plaintiff" and "intimidation of the plaintiff himself". Under the latter heading he had said:

> "Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant with that intention." (at 439)

Dixon J did not reproduce the heading or at any stage in his discussion use the term "intimidation".

Dixon J considered Salmond's proposition in terms of the case before him, and said he thought it might justify the view that if Mr James made out a case of damage suffered because, in face of the seizures and of the threats of seizure, he felt it impossible to continue his interstate trade, that would amount

to compelling him, by means of a threat of an illegal act, to forbear from trading and so to incur a loss (at 374).

Dixon J did not however go on to say that, on those facts, there would be liability, because, in his view, not all the facts could be established; he thought Mr James was not in fact influenced by the fear of seizure and the threat involved in the Commonwealth's administration of the Act and Regulations had not operated to restrain his trading (see at 375.8). The significant points for present purposes are that Dixon J thought Salmond's proposition, in the terms in which he had stated it, a tenable one; that it would be applicable in circumstances where a government by threat of an illegal act caused a trader to feel compelled to stop trading to his loss; and that a threat to enforce an invalid law by seizure was a threat of an illegal act.

Thus far, Dixon J's discussion of the possible application of Salmond's proposition to Mr James's position arose in his consideration of the first part of Mr James's case. He returned to the same idea in deciding the second (conversion) part. Here also he seems to me to make it clear that he accepted that the conduct of the Commonwealth in attempting to enforce the invalid Act and Regulations was illegal, although not, for that reason alone, tortious.

The Commonwealth made two chief contentions in answer to the conversion claim. The first, that the officers who effected the five separate seizures had no authority to do so, was rejected. The second, that the property in the goods had passed

to the buyer before seizure so that even if there had been a conversion it was not of Mr James's goods, also failed, in regard to four of the seizures.

In regard to one of the four, Dixon J considered a view of the facts different from that upon which he actually decided the claim. This possible alternative view of the facts was that, because of a seizure of a parcel of goods on 9 December 1935, Mr James had given up the idea of marketing the fourth parcel shortly afterwards, as he had intended to do. Had this been so, Dixon J said (of the fourth parcel):

> "... it would be necessary to return to the question whether the plaintiff could recover on the ground of the threat of seizure of further consignments implied in the seizure of 9th December 1935." (at 395)

A little later, he restated the question as whether Mr James would have had a cause of action if:

> "... it could be presumed or inferred that [Mr James] forwent any opportunity of shipping fruit [to any buyer] owing to a fear produced by the seizure of 9th December that the goods would only be seized." (at 396)

This seems to be a restatement of the cause of action (an action on the case) that he had discussed when dealing with the first part of Mr James's claim.

He answered the question he had posed by saying that on those facts:

> "... something might be said for awarding him the value [of the particular consignment] as damages flowing from the threat implied in the [earlier] seizure ... notwithstanding that, or, perhaps, because, he could not recover in conversion, assuming the property in the fruit had passed to the buyer." (at 396)

As he did on the first occasion when he raised the question whether Mr James could succeed on such a cause of action, he first raised the state of facts which would make it necessary to answer the question, and then went on to avoid answering it by saying the necessary facts did not all exist. In this instance, in regard to the facts which it would be necessary to presume or infer namely that Mr James gave up the intention of shipping fruit because of the fear of seizure produced by the earlier seizure, he said:

> "But to presume or infer such a thing would, in my opinion, be contrary to evident fact." (at 396)

He therefore did not pursue the question of this particular cause of action further. Although in his final discussion of it he was less positive ("something might be said") in indicating a view that it existed than in his earlier discussion, this later discussion when taken together with the earlier one leads me to think that, at the least, he regarded Salmond's proposition, in the way he had himself reformulated it, as a tenable one.

Dixon J's views are important for the present case for various reasons. First, Salmond's proposition, the starting point for Dixon J's reflections, has since gained support from other sources. The most explicit of these is recorded in the latest successor edition of Salmond's book: Salmond and Heuston, *The Law of Torts* 20th ed, 1992 p 371; where it is noted that Lord Devlin in *Rookes v Barnard* [1964] AC 1129 expressly approved (at 1205) the proposition in the form in which it had been considered by Dixon J. Although this approval was not part

of the ratio decidendi of the case, which dealt with the other of the two branches into which Salmond had subdivided his heading of intimidation, that is, "intimidation of other persons to the injury of the plaintiff", the approval of this branch, which was part of Lord Devlin's reasoning, seems almost inevitably to involve approval of the other one, by way of corollary.

Further, it also seems significant that Salmond's proposition has been repeated in every edition since 1936. The position now is that since it appeared in the first edition in 1907, the proposition has been repeated in nineteen following editions to the present day and read by generations of lawyers, and, so far as I know, there is no authoritative decision raising any doubt about it. Also, in my opinion, it is justified by the course of the common law, and by the centuries of common law experience with actions on the case.

A second reason why Dixon J's views are important for the present case is that his discussion of Salmond's proposition shows that he accepted that a threat to seize goods, on a genuine but mistaken belief that there was statutory authority for doing so, was an illegal act in the sense used in the proposition.

A third important matter for present purposes is that in dealing with Salmond's proposition, and restating it in terms of the facts relating to Mr James, Dixon J was doing so with regard to a category of case more limited than that dealt with by Salmond's proposition. Dixon J's discussion was confined to

unauthorised action by government officials, acting on the belief that they were authorised to do what they were doing. There seems to me to be a difference in the kind of pressure exerted by government officials in such circumstances on the persons to whom they are directing their mistakenly asserted authority, and the kind of intimidation that a private person uses to achieve an object directly against another private person. In a somewhat similar situation involving government officials, Dixon CJ referred to the term "compulsion" as representing the feeling induced in a private person because of which the private person felt obliged to comply with governmental direction based on an apparently lawful statute: *Mason v New South Wales* (1959) 102 CLR 108 at 117. I think this difference between the intimidation directly practised by one private person on another and the feeling of obligation to follow an unwanted course induced in the private person in good faith by a government official is probably the reason why Dixon J in *James*, while using Salmond's proposition as the starting point for his examination of the position in the case of government officials, did not take up Salmond's term, "intimidation".

Although Dixon J was very guarded in indicating his own view about the validity of the possible cause of action in *James* which he derived from the starting point of Salmond's proposition, he must, I think, have been impressed by its potential force; there was otherwise no need for him to deal with it at all. In each part of his reasons where he raised the

matter, he treated it as a possible alternative basis of Mr James's case, notwithstanding that it does not appear to have been argued in that form before him. In each context in which he raised it, the fact that he then held it inapplicable for solely factual reasons seems to be a further indication of his view as to its tenability.

My own opinion is that to regard the cause of action he discussed as a valid and subsisting one at the present day would be fully in harmony with the history of the action on the case and the cases discussed in this general area of the law by the High Court in *Beaudesert*. The way in which Dixon J stated the cause of action involved the plaintiff's having been motivated by fear of seizure of the plaintiff's property impliedly threatened by government officials on the basis of legislation assumed (wrongly) by both plaintiff and the officials to be valid. It seems to me that the cause of action considered by Dixon J was not limited to the precise notion of seizure that he had in mind. The way the cause of action can be formulated, as a general proposition, is that a plaintiff has an action on the case for damage suffered because in face of an express or implied threat by governmental authority of unlawful interference with the plaintiff's property or of unlawful prosecution of the plaintiff, the plaintiff has felt compelled to refrain, and has refrained, to the plaintiff's loss, from dealing with the plaintiff's goods.

If the facts of the present case, as pleaded in amended pars 48 and 49 fall within the cause of action as I have just

stated it, then I think the plaintiffs would be entitled to succeed on this footing, as well as on the basis of *Beaudesert*. The only matter of fact raising any doubt in my mind about whether the facts of the present case fulfil the requirements of the cause of action as I have stated it is whether it can be said that the plaintiffs held back from selling their cattle when they had intended to because of an express or implied threat by the defendants of interfering with their property or prosecuting them.

For the reasons given in discussing the *Beaudesert* action on the case, I think it is an almost irresistible inference, certainly one that I would draw, that in the circumstances of the present case the plaintiffs were presented by the actions of the defendants with an actual threat of interference with their cattle and an implied threat of penalty if they did not comply with the defendants' directions and asserted quarantine.

On these factual questions, the analogy with what happened in *Mason* seems to me to be useful. There the plaintiffs, truck owners, paid permit fees for carrying goods on their truck, which were demanded by the government pursuant to a statute later held invalid. On about twenty to twenty-five per cent of the occasions of payment the plaintiffs had written a protest on their cheque. The plaintiffs sought to show that they had paid the permit fees to avoid the possible seizure of their truck which they, and the government officials, wrongly believed the government officials had power to make if permits were not issued (at 114). Dixon CJ said the evidence supporting this

contention was "slight and feeble", and, "anything but exact or cogent or persuasive" (at 115). However, because of the "general circumstances" which lay behind the actual evidence he thought the plaintiff's contention should be accepted:

> "We are dealing with the assumed possession by the officers of government of what turned out to be a void authority. The moneys were paid over by the plaintiffs to avoid the apprehended consequence of a refusal to submit to the authority. It is enough if there be just and reasonable grounds for apprehending that unless payment be made an unlawful and injurious course will be taken by the defendant in violation of the plaintiff's actual rights. ... and as to the compulsion of a void authority see *Newdigate v Davy* (1693) 1 Ld Raym 742; 91 ER 1397)." (at 117)

In the report of *Newdigate* referred to by Dixon CJ, the word compulsion is not used. It thus appears that this was Dixon CJ's own term for the reason for compliance by a plaintiff with the requirements sanctioned by a void statutory provision.

In the present case the plaintiffs had just and reasonable grounds for apprehending that unless they complied with the movement restrictions and quarantine imposed by the defendants (I state it in this way because of the way the case was conducted at first instance and from which the defendants did not seek to depart on appeal) an unlawful and injurious course (of invalidly applying the sanctions of the SDA for breach of the movement restrictions in the August Gazette notice) would be taken by the defendants in violation of the plaintiffs' rights to sell their cattle unimpeded by the movement restrictions and quarantine.

In my opinion therefore the judgment entered by Asche CJ against the defendants would be justified on the basis of this

latter action on the case as well as the *Beaudesert* action on the case.

However, notwithstanding my opinion that it would be proper to do so, I do not base my conclusion, that the appeal against Asche CJ's decision on liability should be dismissed, on the cause of action I have been discussing. There was some mention in the course of argument in the appeal by the defendants of the fact that the plaintiffs had not pleaded intimidation as one of their causes of action. Nor was it argued. To my mind, for reasons already given, the cause of action I have been discussing is more appropriately regarded as one based on unlawful interference with the plaintiffs' rights as owners of the cattle, as pleaded under the amended pars 48 and 49 than as intimidation in the broader sense used by Salmond. All the ingredients of the cause of action as I have concluded it to be were argued in the appeal. That is why I think it would be proper to base my own view on the claim under pars 48 and 49 as well as on the *Beaudesert* claim. However, it may be that had *James* been examined and argued in the detailed way I have sought to do, then the defendants would have conducted their case and their argument differently. I do not really see that any substantial difference would have been possible, but nevertheless to avoid the chance of unfairness, I base my conclusion on liability on the *Beaudesert* cause of action alone.

In my opinion, Asche CJ was right in finding the defendants liable to the plaintiffs for the damages they suffered as a result of the defendants' actions.

(g) Causal connection between defendants' actions and plaintiffs' damages?

This argument has already been dealt with in an incidental way in earlier parts of these reasons. I here deal with it as a separate matter.

The argument was a comparatively straightforward one. The plaintiffs said that the evidence supported the conclusion that the imposition of movement restrictions caused them not to sell cattle at the time they had intended to sell them and that they had delayed in selling and later sold at lower prices and suffered other damage, because of the movement restrictions.

For the defendants it was submitted that the evidence showed that the discovery of the reactors was the reason for all the damage asserted by the plaintiffs as flowing from the movement restrictions. Adopting the language of Deane J in *March v Stramare* (1991) 170 CLR 506 at 522, the defendants said "the injury" relied on by the plaintiffs "would have occurred in the same way and with the same consequences in any event".

Asche CJ considered the evidence relied on by the the parties for their opposing contentions, and accepted a considerable part of the defendants' submission. In particular he accepted that the presence of a reactor had the result in law that entire animals could not be sold outside the Northern Territory.

However, his conclusion was that although the defendants' arguments showed that the finding of the reactors in themselves would have reduced the ability of the plaintiffs to sell their cattle, that reduction did not have the same consequences as the movement restrictions. He said:

> "Nevertheless the fact remains that without the movement restrictions sales of breeder cattle in the Northern Territory albeit at drastically reduced prices could have been affected. It was the movement restrictions which made this impossible." (Reasons for Judgment 185)

Having examined the same somewhat inconclusive and conflicting evidence that the Chief Justice set out and discussed in his reasons, and having heard the same matter re-argued by the parties in the appeal, I agree with the Chief Justice's view of the matter. He accepted that a number of heads of the plaintiffs' damage should be treated as having been caused by the defendants' actions. I would not interfere with his conclusions in this respect.

(h) Policy considerations.

Questions of policy were not separately dealt with but were continually referred to in the course of argument. The one which needs to be mentioned was a regular theme of the appellants, that the criterion of unlawfulness in the *Beaudesert* action on the case needed to be closely confined (and inferentially, was so unruly that in due course the High Court should overrule *Beaudesert*, although the appellants of course recognised that that was not a matter for this court to become involved in).

The idea was that the *Beaudesert* action on the case, regarded as a cause of action available against defendants generally, exposed all persons and legal entities to the risk of being held liable for damages for an unknowably large range of conduct.

It seems to me there are two answers to the concern thus voiced by the defendants.

The first is that nothing in the history of the common law gives any ground for concern that the availability of the *Beaudesert* causes of action will found a wave of litigation of a kind generally thought to be inappropriate. The history of the action on the case is one of gradual extension of liability as new types of situation are recognised as warranting the granting of relief by courts to persons who have suffered damage in them. The story is one of gradualism, in which the law, speaking very broadly, has kept pace with the times. I see nothing in the High Court's recognition of the *Beaudesert* action on the case which has disturbed or will disturb the pattern of the common law's history.

The second comment I make is that whether or not the opinion that the availability generally of the *Beaudesert* action on the case is desirable should prove to be an acceptable one, I think there is little force in the defendants' concern when the use of such a cause of action against governmental bodies is in question and the unlawfulness alleged is the assertion of a non existent power compliance with which damages the plaintiff. To my mind the availability of such a cause of action against

governmental bodies is an important right for citizens generally.

The difference between private persons and governmental and other public body defendants, so far as the availability against them of the *Beaudesert* action on the case is concerned, is illustrated by the facts of the present case. BTEC was being administered by the defendants pursuant to governmental decision, the government's function and duty being to administer the laws of the Territory for its peace, order and good government. In short, the idea underlying BTEC was that the campaign would be for the benefit generally of persons resident in the Northern Territory. The invalid but bona fide actions of the defendants were done in the course of their employment duties which were necessarily directed to this general public benefit. The damage caused to the private persons in this case by the defendants' actions as public officials must be borne either by the private persons, who themselves did nothing to bring about their loss, or the government whose officials caused the loss in their mistaken efforts to pursue what must be taken to have been a desirable public objective. To me it seems clearly appropriate that in such circumstances public funds should meet the losses, rather than those of private persons not at fault.

This view seems to me to be consistent with the general approach of BTEC itself, which took pains to provide compensation to participants for losses suffered in complying with the campaign. The fact that the particular loss suffered by

the plaintiffs here was not within the compensation scheme does not seem to have been deliberate on the part of the framers of BTEC; there is no sign of deliberation in the BTEC documents, and the lacuna made apparent by this case has since been filled up.

These same considerations apply a fortiori to the tort I have discussed by reference to amended paragraphs 48 and 49 of the statement of claim, because that tort, as I have stated it (at 101 above) is limited to compulsion under void governmental authority.

VI

Damages.

The approach taken by Asche CJ.

Following from his conclusion that the plaintiffs had suffered losses because of the movement restrictions in regard to specified heads of damage, when Asche CJ came to deal with damages he did so by reference to the heads he had earlier listed, dealing with each head separately. The plaintiffs have cross-appealed against the decision on damages, confining their cross-appeal to three of the heads, and to the question of interest allowed by the judge upon the damages figure he arrived at.

The defendants' submission in summary was that the trial judge's assessment should not be interfered with. They pointed to the exceptional difficulty of assessing damages in light of the way a truly vast mass of imperfectly organised evidence was

left at the end of the trial. The difficulties spurred those concerned with the damages problem into language unusually vivid for the subject matter. After recounting some of the problems with which he had been left by the plaintiffs' case for damages, Asche CJ said, "Somehow I must struggle out of this numerical slough of Despond". The defendants in their written submissions said, "The whole question of damages in this case was a nightmare from beginning to end because it depended upon calculations based upon shifting data dressed up as pseudo-science because it had been put through a computer".

At first sight such language is likely to strike a reader as the flourish of lawyers with a liking for a good phrase. However, after reading the lengthy written submissions that were put before us by the parties, listening to their counsel seeking to explain the submissions and the evidence for upwards of two days, and subsequently attempting to digest it all, the language used by the Chief Justice and the defendants strikes me as restrained and sober.

In explaining his overall approach to the damages question, Asche CJ referred to the host of figures and calculations before him. From the plaintiffs' side a computer assisted analysis was relied on. However the expert witness called by the plaintiffs to support and explain the results based on the computer analysis was unable to do so to the judge's satisfaction. Asche CJ found that he simply could not place reliance on the sort of evidence produced. Despite regarding the evidence as unsatisfactory he nevertheless felt

himself bound to try and quantify the damages. That he was right in this was not contested by the defendants in this court. This left the judge with no alternative but to use what he called a "broad axe" approach.

By reference to the different heads of damage, Asche CJ estimated the total loss that followed the quarantine and movement restrictions, as follows:

(a)	Increased interest costs.	$110,286
(b)	Cost of carrying extra stock to June 1989.	$ 6,354
(c)	Loss accruing to the trucking business.	$ 25,000
(d)	Additional testing costs.	$ 21,529
(e)	Agistment costs.	$ 6,269
(f)	Other costs - agistment.	$ 28,120
(g)	Carcase tow away.	$ 635
(h)	Additional wages.	$ 6,000
(i)	Additional accountancy fees.	$ 40,962
(j)	Change in capital base of herd.	$180,000
	Total	$425.125

In the appeal the matters argued by the plaintiffs were put under four heads:

(a) Increased interest costs.

(b) Costs of carrying additional stock.

(c) Change in the capital base of the herd.

(d) Interest.

Having considered the submissions from both sides as well as I can, I fully agree that the Chief Justice's broad axe approach was, as a practical matter, the only one left open to him, notwithstanding the considerable efforts of counsel for the plaintiffs to persuade him otherwise.

I have also come to the conclusion that, subject only to one matter, the approach of Asche CJ to the damages questions was substantially sound and should not be interfered with. Broadly speaking, (subject to the one matter) I agree with his reasoning. The nature of this particular case seems to me to make it profitless for all concerned to recapitulate the facts, theories and submissions set out in Asche CJ's reasons and the careful and thorough arguments of the plaintiffs about them in the appeal. It seems to me appropriate to confine myself to mentioning the main points relied on by the plaintiffs in regard to the matters of damage they criticised and state summarily why I do not agree with the criticism. The detail is available in Asche CJ's reasons.

After dealing with the plaintiffs' four heads, I will come to the one point on which I respectfully disagree with the Chief Justice.

(a) Increased interest costs.

Asche CJ published his reasons concerning liability and damages on 28 August 1992. Judgment was entered as at that date in the sum of $305,371. Liberty to apply was reserved with respect to questions of interest and costs. The present point was argued pursuant to the exercise of that liberty.

For the plaintiffs it was argued that a further amount of damages should be allowed on the item of $110,286 assessed by the Chief Justice for increased interest costs. This was put on the basis that *Hungerford v Walker* (1991) 171 CLR 125 required a further allowance of damages for the additional interest cost.

Asche CJ dealt with this argument by saying he had estimated damages under the particular heading as an overall figure for that item, as his best estimate of the figure "as a concluded item by way of damages" (p 10, Ruling of 29 January 1993).

I do not think it can be said that he was in any error as a matter of law in adopting the approach he did, without reference to *Hungerford v Walker*. The broad axe approach which he was bound to take in the circumstances of the case seems to me to have justified the approach he actually adopted as a reasonable one.

On appeal, it was additionally argued that there was some inconsistency in the figures adopted by his Honour in calculating the figure he arrived at. Again, I cannot see any error in what the Chief Justice did. Clearly, other approaches were open to him, but equally, the view of the facts which he took seems to me to have been fully open to him.

(b) Costs of carrying additional stock.

For the plaintiffs it was submitted that the figure for this item was calculated by reference to figures in a document which at another point in his reasons his Honour had rejected.

However, it appears from his Honour's reasons (at 206-7) that the figure he adopted was the result of a concession by the plaintiffs. In view of the way the evidence was left, and the debate conducted, at trial, I do not see that Asche CJ can be said to have been mistaken in adopting the method of calculation which he did.

(c) Change in capital base of herd.

What his Honour did in regard to this head was to adopt the basic method of calculation suggested by the plaintiffs' expert and then reduce a number of the figures used by that expert in his calculation in light of criticisms urged by the defendants based on the evidence and their expert's opinion evidence. His Honour expressed great difficulty in accepting the plaintiffs' figures, saying in the end:

> "I think the only safe way is to take the lowest - thereby acknowledging the claim but ensuring that it does not go beyond the figures I consider have been proved to my reasonable satisfaction." (reasons, 221)

The plaintiffs' criticisms in this court under this head relate to the method adopted by his Honour and to his acceptance of particular herd numbers for the purposes of calculation.

As the method adopted was that of the plaintiffs' expert witness, subject to the qualifications I have mentioned, I cannot see the plaintiffs have any complaint about it.

As to the number of cattle used in his Honour's calculation, it seems to me relatively clear from his Honour's reasons (at 224) that the figure he used was taken from a report of the plaintiffs' expert which was in evidence. In the

circumstances, I can see no error in his Honour's having used this figure.

(d) Interest.

Under this head the plaintiffs complained that the trial judge had "failed to make a *Hungerford v Walker* award" and, in other respects, had wrongly exercised his discretion.

The interest awarded by his Honour was pursuant to s 84 of the Supreme Court Act. In awarding such interest there was no obligation, in my opinion, to make a *Hungerford v Walker* award.

As to the discretionary matters, I see no error of principle or misunderstanding of fact involved in what his Honour did.

The deduction of 20/71 of the assessed loss.

The matter on which I think Asche CJ's judgment should be varied concerns his finding, noted under the earlier sub-heading "Factual findings", (see p 40 above) that within the whole period of seventy-one days during which the plaintiffs were unable to sell their cattle because of the unauthorised movement restrictions and quarantine, the twenty days between 29 September and 19 October 1988 were not the responsibility of the defendants. He therefore reduced the overall figure of damages which he assessed by the proportion of twenty to seventy-one.

With respect to the Chief Justice I do not think that he should have made this deduction. His conclusion was that the quarantine and restrictions had been imposed unlawfully and without authority. That is, the restrictions and quarantine had no legal effect. Because of the defendants' actions the

plaintiffs felt compelled to comply with the quarantine and restrictions, but, whether or not they realised it at the time, they were fully entitled to withhold the handing over the heifers which were being demanded of them by the defendants. They should therefore not be held responsible for the consequences.

Another way of putting the position is to say that it was the defendants who were acting tortiously throughout the period between the imposition of the quarantine and restrictions and their "lifting". What in law happened when the quarantine and restrictions were "lifted" was not that they were "lifted" (because they never had any legal effect and there was nothing to "lift") but that the tortious conduct came to an end. From beginning to end, the defendants were committing a tort and the plaintiffs were doing nothing wrong.

Conclusion on damages. My opinion is that none of the arguments advanced by the plaintiffs for increasing the figure of $425,125 reached by Asche CJ as the plaintiffs' overall loss should be upheld. In the plaintiffs' favour I agree that that figure should not be reduced as Asche CJ thought it should, and to that extent disagree with Asche CJ. To enable the judgment to be adjusted to accord with my conclusions it would be necessary to set it aside and substitute for it a judgment figure of $425,125 together with interest calculated on the same basis as that used by Asche CJ. By my reckoning (in which I calculated the figure which bears the same proportion to 95,166 as 425,125 to 305,371) the interest figure is $132,486. Judgment should

therefore be entered for $557,611, to take effect as at 28 August 1992. I therefore propose that orders be made accordingly.

VII

Costs.

The plaintiffs have been successful in opposing the defendants' appeal on liability. They should have their costs of the appeal.

On all issues but one in the plaintiffs' cross-appeal on damages they have been unsuccessful. The point on which they succeeded took only a small part of the total hearing time in the appeal. Nevertheless the success of the point results in a not insignificant increase in their judgment sum. In the circumstances it seems appropriate to me that no order should be made for the costs of the cross-appeal.
