'A BURGER WITH THE WORKS PLEASE, HOLD THE PRIONS!'
Could Statutory Importation Authorities be Liable in Torts if vCJD Occurred in Australia?

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This article explores the potential for public authority liability should an outbreak of variant Creutzfeldt-Jacob Disease occur in Australia. Discussion will focus on authorities which are empowered to watch over the importation of consumable beef products that could seriously threaten public health. This analysis is hypothetical. While no cases have yet been recorded in Australia, the spectre of mass contamination lends considerable imperative to appropriate governmental response.

Introduction

What if a disease that is 'seemingly indestructible, almost indescribable, hardly understandable and probably infecting millions of people'[1] made its way to the lucky country? What if all it took to transmit this disease was the ingesting of a piece of contaminated meat the size of a peppercorn?[2] What if the gatekeeping public authority failed to take sufficient precautionary measures to trace potentially infected products that had infiltrated primary industries or to warn consumers against eating or using suspect contaminated products?

Although variant Creutzfeldt-Jacob Disease (vCJD) has been scientifically linked to the consumption of Bovine Spongiform Encephalopathy (BSE) contaminated beef (also known as 'mad cow disease'), there is a lack of scientific consensus that it actually 'causes' vCJD. Yet it may well be that those who fall victim to vCJD will seek compensation in negligence based on this suggested link, despite the absence of a clearly defined causative link. If one accepts that there exists a serious potential for harm, the spectre of mass contamination gives scientific development (in finding a cure) and governmental response (in minimising the serious risk to public health) considerable imperative.

To date, relevant authorities have assured the Australian public that BSE has not infiltrated the Australian beef industry. This is important because European BSE is believed to transmit to humans in the form of the new vCJD.

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1 Thornton (2001).

2 A British report has established that as little as 1 gram of infected material when fed to cattle is known to cause BSE in 70 per cent of those animals fed the infected material. See Bryant and Monk (2001).

But before considering whether the importation authority would be legally responsible should vCJD emerge in the 'lucky country', an attempt at clarifying the nature of the disease (to the extent that is possible in light of limited scientific understanding of this illness) is useful.

This paper is in two parts. The first sets the scene by providing general information about 'mad cow disease'. Any future claim in negligence against an importation public authority for the contraction of vCJD will probably represent a novel claim. Although there is a food contamination case debating public authority liability currently before the High Court, the food in question (oysters) was 'home grown' and not capable of introducing a new disease to Australia.[3]

Consequently, the second part of the paper discusses three main issues. First, the High Court's current position with regards public authority liability permeates most of the discussion. The focus then turns to the issues that a plaintiff would need to address to succeed in an action for negligence against public authorities empowered to protect consumers from the risk of harmful imported foods. Various policy considerations that may impact on the success of such a claim conclude the discussion .

'Mad Cow Disease'

What are TSEs?

Scrapie,[4] European BSE[5] and vCJD comprise a family of diseases that have been the subject of media attention in Australia. All are forms of Transmissible Spongiform Encephalopathy (TSE).[6] Their pathology is characterised by sponge-like cavitation of the brain — hence the name 'spongiform'. The presence of TSEs has caused escalating concern amongst the scientific community because, in some cases, they are capable of crossing species and infecting humans.[7] Perhaps what is most troubling about prions is that, unlike

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3 *Graham Barclay Oysters Pty Ltd & Anor v Ryan & Ors* s 258/2001 (13 March 2002).

4 A natural progressive brain disease of sheep that frequently causes itching so intense that the animals scrape off their wool seeking relief. Other symptoms include tremors, blindness, loss of ability to stand and death.

5 BSE, or 'mad cow disease', is the bovine equivalent of Scrapie in sheep and was first recognised in 1986. At first it was thought the disease arose from the Scrapie agent in sheep crossing the species, but the current view is that the disease arose in the 1970s from an unknown source in a ruminant animal. See Klim (2000).

6 Kuru, known as 'the shaking disease', is another TSE that occurs in humans. It is a progressive fatal brain disease first reported in 1957 and is confined to the Eastern Highlands of Papua New Guinea (PNG). It is acquired through the ritual funerary cannabilisation that is practised in certain PNG communities. Understanding the causes of both Kuru in humans and Scrapie in sheep provided models for studying other prion infections when they emerged in Western countries. See CJD Surveillance Unit (2001).

7 Professor Alpers, prion specialist with the federal government's Special Expert Committee on Transmissable Spongiform Encephalopathies (SECTSE), formed

other infectious agents, they lack genetic materials — thereby making them incredibly difficult to destroy.[8]

Although CJD is not a new disease, it is rare and fatal.[9] It is typically a neurodegenerative disease of unknown aetiology appearing in people aged 50 years and over.[10] Variant CJD differs in that it affects younger people (a number of whom have been teenagers), symptoms last longer and patients experience earlier psychiatric symptoms.[11] The disease is typified by rapidly progressing dementia, ataxia and other neurological symptoms.[12]

There is no known cure for these diseases.[13] The difficulty of providing meaningful treatment is exacerbated by the TSEs' ability to change — not unlike the mutating qualities of AIDS viruses. Also like AIDS, it may take in excess of 16 years for symptoms to manifest.[14] While it has been established that TSEs are zoonotic (animal diseases that can be transmitted to humans), exactly how these diseases are transmitted remains puzzling.

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under the auspices of the National Health and Medical Research Council (NHMRC), is cited in Thornton (2001), p 25. TSEs are also known as prion diseases based on the suspected causative agent of these and related diseases. It is thought TSEs transmit by infectious protein (prion) rather than by microorganisms; however, no theory is as yet conclusive. For a discussion of the various theories, see Phillips (2001), Volume 1; see also CJD Surveillance Unit (2001).

8 Prions have been found to be resistant to heat and cold, formaldehyde and ultra-violet light: Thornton (2001), p 25.

9 The first case of CJD, a 23-year-old woman named Bertha, was reported in 1920 by Hans Gerhard Creutzfeldt, one of neurologist Alois Alzheimer's assistants at the University of Breslau. The woman had displayed signs of mental illness, but her dazed expression, silly giggling, twitching eyes, tick-like jerks, tremors and unsteady walk alerted Creutzfeldt to the fact that she was suffering from physical damage to her brain. She died a few months later. An autopsy of Bertha's brain revealed that millions of brain cells had been killed and cleaned away, causing extensive damage without inflammation. Viewed under a microscope, the brain tissue was full of holes like a sponge. Alfons Jakob later reported four of his patients who displayed the same extensive brain damage as described by Creutzfeldt in a paper published in 1921. See Rhodes (1998), pp 47–50; also CJD Surveillance Unit (2001).

10 CJD Surveillance Unit (2001).

11 Will et al (1996). Symptoms for vCJD appear earlier and last up to 14 months, compared with four months for CJD. See Surveillance for Creutzfeldt-Jakob Disease — United States, Centres for Disease Control and Prevention (1996), p 45; 'New Variant CJD (nvCJD)' (date unknown); Will and Zeidler (1996); Schonberger (1998).

12 CJD Surveillance Unit (2001).

13 The first clinical trials of a drug to treat vCJD, quinacrine, have begun in the United Kingdom; however, there is pessimism amongst some of the experts. See 'First vCJD clinical trial to begin' (2001).

14 See the Queniborough Report.

Transmission of TSEs: What is Known?

CJD

There are three currently accepted modes of CJD transmission. It can be transmitted iatrogenically (through medical procedures), appear sporadically or can be associated with genetic mutations that may be inherited.[15] There is as yet no epidemiological or clinical evidence that CJD can be transmitted through blood transfusions or vertically in families, except in the familial cases of CJD.[16]

BSE

Epidemiological studies have confirmed that the rapid spread of BSE was most likely due to the presence of contaminated meat and bone meal (MBM) in cattle feed.[17] This necessitated eradication of infected material from the food chain at the source of production. MBM consists of the waste products of otherwise healthy animals' slaughter.[18] These materials are rendered and processed into a MBM (sometimes pressed into pellets) and fed back to cattle, sheep and pigs — in essence, turning them into cannibals.[19]

Many believe that transmission by the oral route (ie eating contaminated products) has been the cause of the major BSE outbreak in cattle and the minor one (70 cases) in cats.[20] Isolated cases have manifested in several zoo animals, and BSE has been experimentally induced orally in other animals.[21] To date, the BSE agent has been found in brain, spinal cord and retina (eye) tissue of naturally infected cattle.[22]

VCJD

Variant CJD was first documented in 1996 when 10 Britons under the age of 45 years began to display symptoms.[23] Shortly thereafter, the potential link

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15 Iatrogenically — for instance, treatment with human pituitary-derived hormones, corneal transplantations and neurosurgical procedures. See Hurley (1996); Pearl (1996). For a discussion of the first case of a woman dying from CJD in 1971 as a result of a corneal transplant, see Rhodes (1998), pp 133–34. Sporadically — CJD occurs at one case per million a year in Australia in the absence of any known risk factors or causes. See Australian Quarantine Inspection Service (AQIS) (1996). Inherited — This is referred to as familial CJD: see Australian Quarantine Policies (1996).

16 AQIS, Department of Primary Industries and Energy (1996).

17 See the Phillips Report (2001); Klim (2000).

18 For example, tails, feet, horns, skin waste, fat, gut, blood, bone and offal as well as diseased tissue such as wounds, infected lymph nodes, tumors and other diseased parts, and may include diseased, sick, wounded, maimed, dying and dead animals.

19 See Rhodes (1998), p 174.

20 Institute of Food Science & Technology (1996), Part 3/3 of the Position Statement.

21 Institute of Food Science & Technology (1996).

22 Wells et al (1998).

23 Statement by Spongiform Encephalopathy Advisory Committee, www.cjd.ed.ac.uk/seac.htm, accessed 2 March 2001.

between CJD and BSE was reported to the House of Commons.[24] Some four months later, the European Commission and the UK government confirmed that laboratory transmission of BSE to sheep was achieved by inoculation and by the oral route.[25] The association between the consumption of BSE-infected beef and people who developed vCJD was acknowledged and has continued to gain support.[26]

Significantly, no reliable test is as yet available to detect whether a person or product is carrying the vCJD prion.[27] Despite attempts at developing new tests that will permit earlier diagnosis, definitive identification of vCJD in humans rests on histopathological examination of brain tissue.[28]

Is BSE Coming to Australia?

As Australian politicians, beef graziers and meat and livestock figureheads applaud Australia's BSE-free status,[29] others warn against complacency.[30] Various governments have reacted differently to perceived dangers of TSEs, and some have been heavily criticised.[31] As the body of evidence grows to

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24 Agriculture and Resource Management Council of Australia and New Zealand (27 September 1996) 'Ruminant Feeds and Rendering: Annex A Regulation Impact Assessment Statement' Resolution No 1K, p 2, www.affa.gov.au/docs/operat...canz/resolutions.

25 See Institute of Food Science & Technology (1996).

26 See Wells et al (1998); also MacKenzie (2001).

27 Email correspondence, 2 July 2001 with P Chan, Centre for Infectious Disease Prevention and Control, University of Toronto Surveillance Unit, Canada.

28 See Will (1996). However, by removing a small piece of tonsil tissue and analysing it for the prion protein, researchers may be able to provide a definite diagnosis of vCJD at an earlier stage. See 'New Variant CJD (nvCJD)' (date unknown).

29 See Brook and Stock (2001); Wahlquist (2001); Stock quotes Smallwood (2001).

30 See Thornton (2001); the Queniborough Report (2001); Cooke (2002).

31 For instance, the United States reacted by banning importation of cattle from BSE-infected countries since 1989 and restrictions were extended in 1991 and 1997 to include most ruminant products for human consumption, whereas Canada has live ruminant ban and a ban on meat products from the United States and other countries such as Germany, France, Spain, the United States, Argentina and Finland. Japan restricts import of MBM, tallow, fats and greases and pet food from all EU member states, and recently importation of Australian beef. Other countries, including Brazil, Poland, Czech Republic, Estonia, Jordan, Russia, Egypt Philippines and Thailand have also suspended imports of beef products from a number of European countries. In addition, the 1990 BSE epidemic triggered the reinstitution of the surveillance of Creutzfeldt-Jakob disease in the UK and in other countries. The aim of the CJD Surveillance Units is to identify any changes in CJD that might indicate an association with BSE and report these to the appropriate Spongiform Encephalopathy Advisory Committees (SCAC). The British Government received strong criticism since the release of the Phillips Report. Early scientific community warnings of the possible spread of vCJD through the consumption of BSE-infected beef were ignored presumably because of uncertainty surrounding the matter. It took almost a decade before a voluntary ban against the inclusion of Specified Bovine Offal (SBO) in the manufacture of

reveal strong links between vCJD infection and certain practices relating to the feeding, slaughter and butchering of beef in Britain, there is a commensurate growth of potential for liability in Australia and elsewhere.

Potential Public Authority Liability for Importing BSE-contaminated Foods

The Public Authority Defendant

For many years, consumer protection legislation at both state and federal levels has imposed something approaching strict liability for failure of merchantability or fitness for purpose on vendors, manufacturers and so forth.[32] The main focus of the present discussion is, however, on negligence as a cause of action against public statutory bodies for the importation of contaminated foodstuff that presents a serious risk to public health. Although some of the issues that could arise in pursuing such claims could be extrapolated from food poisoning cases,[33] a distinction is drawn because public authorities are really in a somewhat different position than an immediate supplier or the ultimate manufacturer *vis-à-vis* the consumer.

The issue of Crown and public authority liability in tort raises 'vexed' issues[34] — in particular, the question of whether they should be treated differently to private litigants.[35] It is now well accepted that the general principles of negligence apply to public authorities.[36] It would be a giant step — but not a far-fetched or fanciful leap — for an Australian court to find a public authority liable in negligence to consumers who developed vCJD after eating imported BSE-infected products.

Because it enjoys exclusive power to regulate what foods are permitted to enter Australia, the most likely defendant would be the federal government and its instrumentalities. The federal government, through the Department of Agriculture, Fisheries and Forestry Australia (AFFA) and the agency, AQIS (Australian Quarantine Inspection Service), regulates the food industry pursuant to the *Imported Food Control Act* 1992 (Cth) and associated Orders and Regulations.

MBM fed to ruminants was imposed in the UK in 1989. The voluntary ban was subsequently made law in 1990 by the *Bovine Spongiform Encephalopathy (No 2) Amendment Order*. The Phillips inquiry found that the government's responses to the BSE outbreak 'were not always timely nor adequately implemented and enforced' resulting in 'unacceptable delay'. See Phillips Report (2001).

32 Manufacturers have also been made accountable at common law for their defective products since *Donoghue v Stevenson* [1932] AC 562.

33 See R Colbey, 'Suing for CJD' (1996) 7 *APLR* 25.

34 See *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431.

35 See Redwood (1999) (1993).

36 See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423; *Pyrenees* (1998) 192 CLR 330; *Romeo's Case* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1; *Brodie v Singleton Shire Council* (2001) 75 ALJ R992.

Pursuant to the *Food Inspection Scheme*, AQIS acts as the legislative 'gatekeeper' of all food imported into Australia.[37] Its function is to inspect and analyse food that may pose a risk to humans. This would include imported beef or beef products. AQIS must take reasonable steps to minimise the risk of importing materials that may prove a danger to public health by identifying 'failing food' and advising how the food is to be dealt with.[38]

It is difficult to predict with certainty how the action would be framed, but guidance can be sought from precedent, as the ensuing discussion illustrates.[39]

The Hypothetical Negligence Action for Importing Failing Foods

In determining liability of public authorities in tort, the courts have applied various tests. Criteria to be determined include whether the authority has properly exercised its statutory power; whether the authority has the statutory power to protect a specific class including the plaintiff from a risk of harm; whether there is a 'relationship of dependency in existence' between the plaintiff and the regulatory authority (this includes situations where the exercise of power involves a high-risk activity); and the 'justiciability' of the situation.[40]

The potential culpability of relevant public authorities over an outbreak of vCJD could derive from two separate heads of negligence. The first would be based on a duty of care to ensure only safe foods enter the country. Arguably, if BSE-contaminated products are permitted to enter the country, this could constitute a breach of duty of care. The second could be based on the statutory body's duty to warn the public of a serious risk of harm from eating imported beef based on its inability to ensure the particular food is safe. Sporadic assertions made by various government officials in relation to the safety of eating imported beef and beef products have been made against the background of an increasing number of BSE-infected cattle being detected globally. If such statements proved tenuous, anyone adversely affected might argue a breach of duty to warn in negligence.

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37 See *Imported Food Control Act* 1992 (Cth) s16.

38 *Imported Food Control Act* 1992 (Cth) s14 (advice is to be given to the owner of food, and if in the Customs control, to the person in possession of the food).

39 There has also been successful Human Growth Hormone and CJD litigation in the UK. A group of children in the UK suffering from dwarfism had been injected with HGH capable of infecting them with CJD during clinical trials. They succeeded in their claims for psychiatric injury against the Department of Health. Morland J found that on the balance of probabilities, cases of CJD amongst recipients of HGH whose treatment began after July 1997 had been caused by the breach of duty of care owed to them by the Department. See *The Creutzfeldt-Jakob Disease litigation; Group B Plaintiffs v Medical Research Council and ors* [2000] Lloyd's Rep Med 161, 41 BMLR 157.

40 See Kneebone (1998), pp x, 393–96; also *Graham Barclay Oysters* (2000) 109 LGERA 1 per Lee J at 12-13 where his Honour proposes a six question test.

However, prior to determining whether a breach of duty has occurred in a given situation, it is necessary to establish whether the relevant statutory authority owed a duty of care to a specific identifiable person or persons. The issues of causation, indeterminate class and Crown immunity present formidable barriers to a successful hypothetical claim, and this particular example of public statutory authority liability has yet to be tested in Australian courts. However, these issues may not necessarily prove fatal to an action.

The Duty of Care

The first of the three elements of negligence — a duty of care owed to consumers by the relevant food inspection authority — is without clear precedent. Proximity appears to have been displaced by the High Court as the 'comprehensive test' to establish the existence of a duty of care. This has permitted the development of a number of new approaches that have created a backdrop of uncertainty.[41] Without a precise test or single formula for determining whether a duty of care exists in a given situation, in novel cases a cautious approach would require the law to develop incrementally and by analogy with decided cases.[42]

For the purposes of this discussion, the case *Ryan v Great Lakes Council*[43] is a useful starting point in establishing a duty of care in public statutory bodies. The case involved a public outbreak of Hepatitis A resulting from the consumption of contaminated oysters. Liability was extended to encompass the public authority regulators (the Great Lakes Council and the State of New South Wales) which failed to exercise their statutory powers in respect of the lake. The case raised novel issues in Australian case law in relation to public authority liability for failure to exercise statutory powers. At first instance, Wilcox J highlighted some concerns about industry self-regulation and governmental risk management. However, His Honour's judgment fell short of providing clear guidelines to government on the exercise of its powers in terms of public health.

Wilcox J found the local council, the New South Wales state government and the growers each one-third liable for damages.[44] On appeal, a majority of the Full Court (Lee and Keifel JJ, Lindgren J dissenting) affirmed the trial judge's findings against the State and the growers (the Barclay companies), yet they based their decisions on different reasoning. A different majority (Lindgren and Kiefel JJ) did not accept that the council owed the affected consumers a duty of care. In effect, Lindgren J found none of the parties liable.

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41 *Hill v Van Erp* (1997) 188 CLR 159; *Perre v Apand* (1999) 198 CLR 180; *Agar v Hyde* (2000) 201 CLR 552 and *Modbury Triangle Shopping Centre v Anzil* (2000) 176 ALR 411.

42 For instance, see McHugh J's judgment in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 217–19.

43 *Ryan v Great Lakes Council* (1999) 102 LGERA 123.

44 *Ryan v Great Lakes Council* (1999) 102 LGERA 123, per Wilcox J at 230–31 [392].

In determining whether a public statutory body has come under a duty of care, the courts have suggested a number of criteria to be considered, namely:[45]

- the nature of the statutory powers and functions capable of being exercised;
- the connection such powers have with the risk of harm in question and foreseeability of risk of harm to the person or class of persons exposed to it;
- the extent to which those powers reasonably permit it to address the risk;
- whether the legislature intended that that action be undertaken when the risk was present; and
- generally whether the imposition of a duty of care is inconsistent with the statute in question.

Both Lee and Keifel JJ, in supporting the trial judge's findings against the state,[46] found the authority liable for breaching its duty to ensure it exercised its statutorily created powers to minimise the risk of harm. It breached that duty of care by reason of its failure to manage the waters of the lake.[47] In addition, the court found that it should have controlled the harvesting of oysters where it knew that the risk of oyster contamination had increased. In particular, the majority agreed that the state failed to close the lake fishery when those conditions occurred in 1996, and keep the fishery closed until circumstances permitted the harvesting of safe oysters for sale to the public to resume.[48]

Legislative Intent

When considering the state's liability, Lee J made a number of observations concerning the legislature's intention. Correlations may be drawn in support of the finding of a duty of care in the BSE/vCJD context. However, a wholesale comparison between the two pieces of legislation is not intended. All that is being alluded to is what appears to be the prevailing judicial attitude to common law public authority liability in food contamination cases. Lee J's reasoning, with my analogies to the vCJD question, is as follows:

> 1 The powers delegated by the legislature ... to State departments, were directed *to protection of public health with the expectation that the powers would be exercised whenever circumstances demonstrated a need for that to be done* [my emphasis added].[49]

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45 *Graham Barclay Oysters* [2000] 109 LGERA 1, per Keifel J at 139–40 [576] [578]; *Perre's case* (1999) 198 CLR 180, per McHugh J; *Crimmins' case* (1999) 167 ALR 1.

46 *Graham Barclay Oysters* [2000] 109 LGERA 1, per Lee J at 25 [62], per Keifel J at 155 [599]

47 Specifically, the state should have taken steps to have sanitary surveys of oyster-growing waters undertaken and sources of pollution, or potential pollution, identified and rectified. See *Graham Barclay Oysters* [2000] 109 LGERA 1, per Keifel J at 156–57 [603].

48 *Graham Barclay Oysters* [2000] 109 LGERA 1 at para 62.

49 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 17 [18].

> Because of their inherent nature, such powers are to be exercised in priority to the performance of other obligations.

The powers delegated to AQIS are directed to similar protection of public health with analogous expectations.[50]

> 2 In providing appropriate powers to local authorities and Crown officers to maintain and protect public health, the legislature did not intend that the prospect of costs being incurred would make the exercise of the powers wholly discretionary.[51]

By implication, the same could be argued of the legislative intent in relation to the *Imported Food Control Act* and inspection of foods.

> 3 The risk to health represented by the introduction of the contaminant in water used for the production of oysters was exposure of a section of the public, namely, the consumer of those oysters, to the risk of contraction of disease ...[52]

The preferred theory concerning the cause of BSE in cattle is the introduction of bovine offals into the MBM that was re-fed to cattle in the United Kingdom. This contaminated meat was then made available for sale to a section of the public, namely consumers of beef, thus exposing them to the risk of contracting vCJD.

> 4 If such a risk materialised in the outbreak of a disease, substantial cost would be incurred by the community in providing medical treatment to persons who contracted the disease and in rectifying the cause of the outbreak. *Declining to exercise the relevant powers was not a choice to be made to provide a cost-saving option* [my emphasis added].[53]

A fortiori, this argument would have even greater impact in the BSE context. This is because those who develop vCJD will suffer massive progressive neuro-degeneration that requires full-time care until death, and indications suggest the outbreak will be more widespread than first thought.[54] These factors suggest huge financial and emotional drain on victims and their families and on the health care system. Further, an outbreak would seriously impact on Australia's 'Clean Green' beef industry.

> 5 The statutory powers provided by the legislature *reflected public will that they be exercised* [my emphasis added].[55]

By parity of reasoning, because of the extensive powers delegated to AQIS, arguably the public will is similarly expressed.

> 6 The imposition of a duty of care on a relevant public authority would be unlikely to inhibit the authority carrying out other duties and would do no more than reflect the intent of the legislature that

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50 *Imported Food Control Act 1992* (Cth), s 14.

51 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 17 [18].

52 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 17 [18].

53 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 17 [18].

54 See ABC News (2002); N Furgeson, Imperial College London, as quoted in 'Mad cow disease may have spread to sheep' (2002), p 4.

55 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 17 [20].

> steps necessary for the protection of public health be undertaken by authorities empowered to act for that purpose.[56]

The Council's Liability

Lindgren J found neither the council nor the state liable.[57] His Honour considered that, despite the powers and functions of the council pursuant to state legislation, it did not owe a duty to take reasonable steps to minimise faecal contamination of the lake. His Honour determined the notion of 'minimisation' too broad to found a duty of care. Because contamination came from a number of non-specific sources, to impose on the council a duty to conduct the appropriate testing would have required a burden of an indeterminate nature.[58] In light of the specific statutory powers, Lindgren J found it would have been too financially onerous to hold the council responsible for eliminating the risk.[59]

As for the state's liability, Lindgren J relied on the state's submissions concerning its determined policy of non-intervention and of leaving the oyster industry to self-regulation. The state's statutory framework at the time placed the financial and administrative responsibility for 'on the ground' control of oyster production in the state's estuaries on the local growers. According to Lindgren J, the state did not have a duty to take steps that were reasonably open to minimise faecal contamination of the lake. His Honour based his decision on similar reasons as those relied upon for his conclusion in respect of the council.[60]

For Keifel J, the council's inaction, in light of its statutory powers, did not materially increase the risk of harm, and therefore she also found it was not liable.[61] These issues are currently the subjects of discussion in an appeal to the High Court.[62]

'Mere Power' does Not Necessarily Create a Duty

In *Romeo v Conservation Commission* (NT), Gaudron J pointed out that the mere existence of powers in an authority does not of itself 'create' a duty of care.[63] However, Her Honour subsequently stated in *Crimmins v Stevedoring Industry Finance Committee*:[64]

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56 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 17 [21].

57 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 107–8 [364, 368] re the issue of causation and the Council; 126 [455] re the state.

58 *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 109 LGERA 1 at 103–4 [358] where Lindgren J lists his reasons for his decision based on Kirby J's 'fair, just and reasonable' element of the *Caparo* three-stage test.

59 *Graham Barclay Oysters* (2000) 109 LGERA 1 at 106–7, 110 [361, 373, 377].

60 *Graham Barclay Oysters* (2000) 109 LGERA 1 at 106–7, 126 [455].

61 *Graham Barclay Oysters* (2000) 109 LGERA 1 at 106–7, 155 [595–97].

62 *Graham Barclay Oysters Pty Ltd & Anor v Ryan & Ors* s258/2001 (13 March 2002).

63 *Romeo's case* (1998) 192 CLR 431 at 457–58.

64 *Crimmins' case* (1999) 200 CLR 1 at 18 [25].

> It is not in issue that a statutory body, such as the Authority, may come under a common law duty of care both in relation to the exercise and the failure to exercise its powers and functions ... What is in question is not a statutory duty of the kind enforceable by public law remedy. Rather, it is a duty called into existence by the common law by reason that the relationship between the statutory body and some member or members of the public is such as to give rise to a duty to take some positive step or steps to avoid a foreseeable risk of harm to the person or persons concerned.

A critical consideration in determining whether a duty of care arises is the defendant's ability to control whatever caused the ensuing harm. This is reflected in a variety of contemporary decision.[65] In considering the liability of a public road authority, the joint judgment in *Brodie v Singleton Shire Council*[66] considered that the degree of 'control' exercised by the authority was fundamentally relevant in determining whether a duty existed. Their Honours said:[67]

> it has become more clearly understood that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance.

Their Honours found that highway authorities 'have physical control over the object or structure which is the source of the risk of harm'.[68] This placed the authorities in a category apart from other recipients of statutory powers. Kirby J, who relied on the *Caparo* test in determining whether a duty of care existed,[69] found it necessary to answer these questions by reference to the

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65 *Perre's case* (1999) 198 CLR 180; *Agar v Hyde* (2000) 201 CLR 552 and *Modbury Triangle Shopping Centre v Anzil* (2000) 176 ALR 411.

66 *Brodie's case* (2001) 75 ALJR 992. The majority judgment consisted of the joint decision of Gaudron, McHugh and Gummow JJ, and the separate reasoning of Kirby J. Chief Justice Gleeson, Hayne and Callinan JJ were in dissent.

67 *Brodie's case* (2001) 75 ALJR 992 at 1013 [102]. Their Honours cite as their authority for this principle *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551–52.

68 The source of the risk was a bridge that collapsed through inadequate maintenance: *Brodie's case* (2001) 75 ALJR 992 at 1013 [103].

69 The tripartite test asks whether the damage to the applicant was reasonably foreseeable; whether the relationship between the applicant and the respondent was sufficiently proximate; and whether it is just and reasonable to impose a duty of care in the circumstances of the case. See *Caparo Industries Plc v Dickman* [1990] 2 AC 605 per Lord Bridges of Harwick at 617–18. Also *Brodie* (2001) 75 ALJR 992, per Kirby J at 1040 [242]. The test has since been rejected as

authority's statutory charter. His Honour found a person's private right of action against a public authority compatible with that arising pursuant to relevant legislation.[70]

A simplistic view of *Brodie* is that the case stands as authority for the proposition that, where a public authority's statutorily vested powers amount to such a significant and special measure of control over the safety of the person or property of citizens, a duty of care is imposed upon that authority.[71] In this sense, although the statutory authority is under no general common law duty to exercise its statutory powers, it is obligated to exercise its powers to avert known danger or alert citizens who are potentially at risk of harm.

The situation is arguably more complex when it comes to establishing the actual control that importation authorities have with regard to meat that has been declared 'BSE free' by another country. Even if another country declares its meat safe, the importing authority can still prohibit importation in certain circumstances — for instance, if meat earmarked for importation does not abide by certain agreed importation protocols such as the inter-government certification process.[72] However, if such protocols are adhered to, it becomes very difficult for a country like Australia to reject the importation of meat unless it has sufficient scientifically based evidence to support its decision.[73]

These restrictions are based on Australia's international obligations derived principally from the World Trade Organisation (WTO) Agreements to which it is a signatory.[74] It is important to bear in mind that AQIS's power to reject the importation of products has been, and continues to be, affected by market influences. The exercise of its powers must be consistent with Australia's international obligations.

Salient Features

Where a risk of harm is considered reasonably foreseeable, but the case does not involve an established duty of care, the courts may consider the 'salient features' of the case when determining whether a duty of care exists. An example of a salient feature is the plaintiff's vulnerability in incurring loss as a result of the defendant's conduct.[75] The defendant's actual knowledge of the risk and its magnitude are then scrutinised.[76]

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representative of the law in Australia in *Sullivan v Moody* [2001] 75 ALJR 1570 at 1578 [49].

70 *Sullivan v Moody* [2001] 75 ALJR 1570 at 1578 [49].

71 *Brodie's case* (2001) 75 ALJ 992 at 1013.

72 The process must be consistent with Australian/New Zealand Standard AS/NZS 3931:1998.

73 See Commonwealth Department of Primary Industries and Energy (1998).

74 For instance, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). See Commonwealth Department of Primary Industries and Energy (1998), p 9.

75 *Perre's case* (1999) 198 CLR 180, per McHugh J at 220 [104]; Gleeson CJ at 194 [10]; Gummow J at 259 [216]; McHugh at 236 [149]; Gaudron J at 202 [41].

76 ibid.

In *Perre v Apand*, a pure economic loss case, the High Court referred to 'vulnerability' as a significant factor where the plaintiffs are 'powerless to protect their own interest'[77] against 'the effects of the defendant's negligence'.[78] Gleeson CJ suggested that, where a reasonable defendant can identify a person or class of persons who may rely on advice or information, this will be relevant in establishing a duty of care.[79] His Honour further pointed out that 'vulnerability can arise from circumstances other than reliance'.[80]

Australian consumers of imported foodstuffs are exceedingly vulnerable. Their inability to determine what foods may be contaminated makes them powerless to protect themselves against the potential dangers of contaminants such as BSE-infected products. Also, consumers are neither in a position to determine whether consumable foods contain ingredients imported from BSE risk areas[81] nor appropriately appraised of the level of risk associated with eating or using these foods.

Indeterminate Liability

The mere fact that harm may be foreseeable is insufficient to sustain the finding of a duty of care. There is no duty owed to the public at large.[82] The circumstances must be such that the court is prepared to impose a duty on potential tortfeasors to avoid causing foreseeable harm to a particular person or persons. This is, to an extent, to avoid potential indeterminacy of liability.[83] In the present context, the range of people that might foreseeably suffer some kind of harm as a consequence of careless importation and dissemination of BSE-contaminated foods is extensive. The question is whether those people who develop vCJD from eating imported BSE-contaminated products would constitute an indeterminate number of plaintiffs or an unascertainable class of vulnerable people.

There is evidence that the size of the class and the lack of geographical boundaries do not necessarily impede recovery. In this context, 'indeterminate liability' refers to a class of plaintiffs that is more than 'extensive' or 'large'. Although *Perre's case* did not concern public authority liability, the judgments contain useful observations on the issue of indeterminate liability. McHugh J, for instance, found that the size or number of claims is not decisive in determining whether potential liability is so indeterminate that no duty of care is owed.[84] His Honour said:[85]

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77 *Perre's case* (1999) 198 CLR 180, per Gaudron J at 202 [41].

78 *Perre's case* (1999) 198 CLR 180, per McHugh J at 220 [104].

79 *Perre's case* (1999) 198 CLR 180, per Gleeson CJ at 194 [10].

80 *Perre's case* (1999) 198 CLR 180, per Gleeson CJ at 194 [11].

81 Consumable products are inadequately labelled to permit consumers to readily identify the source of all the ingredients that make up that product.

82 *Yuen v Attorney-General of Hong Kong* [1988] 1 AC 175, particularly at 194–95.

83 See *Ultramares Corporation v Touche* 174 BE 441 (1931) at 444, per Cardozo J.

84 *Perre's case* (1999) 198 CLR 180 at 221 [107].

> Liability is indeterminate only when it cannot be realistically calculated. If both the likely number of claims and the nature of them can be reasonably calculated, it cannot be said that imposing a duty on the defendant will render that person liable 'in an indeterminate amount for an indeterminate time to an indeterminate class' ... Indeterminacy depends upon what the defendant knew or ought to have known of the number of claimants and the nature of their likely claims, not the number or size of those claims ... The principle of indeterminacy is designed to protect the defendant against indeterminate liability, not numerous plaintiffs.

Haynes J, with whom Callinan J agreed, was of the view that what is meant by 'indeterminate' in the present context is that the persons who may be affected cannot readily be identified.[86] In the context of *Perre,* the court found that the class of person who could be affected by the respondents' negligence was indeed ascertainable and capable of ready determination. Legislation that restricted the sale of the plaintiff's contaminated crops by a geographical limit, thereby resulting in economic loss, was viewed as an adequate limiting factor. This was sufficient to permit the defendants to determine what growers and processors would be affected by their negligence. The defendants were deemed to have had knowledge of this class of persons.

Arguably, there is no geographical limit or limit to the size of the class of potential litigants who may contract vCJD. It is possible — though unlikely — that the geographical limit would be extended to all residents of a country. Perhaps other limiting factors, such as the powerlessness of consumers to protect themselves from the serious risk of harm, would need to be established in the BSE/vCJD situation to overcome this barrier. This may prove the necessary 'factor or factors of special significance' required to render a defendant public authority such as AQIS, liable in negligence.

Noteworthy are McHugh's J comments in *Crimmins.* His Honour determined that, in public authority liability cases, '[w]here powers are given for the removal of risks to person or property, it will usually be difficult to exclude a duty on the ground that there is no specific class. The nature of the power will define the class'.[87] In *Brodie*, the majority of the court found the class of potential litigants included all road users. Pivotal to this issue in the present context will be whether the High Court will disturb the findings in *Ryan's* case where the statutory authority was held liable to the oyster-consuming public. In the words of Lee J:[88]

> The risk to health represented by the introduction of human faecal polluting in waters used for the production of oysters was exposure of a

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85 *Perre's case* (1999) 198 CLR 180 at 221, 233 [108], [139].

86 *Perre's case* (1999) 198 CLR 180 at 303 [336], per Haynes J and 326 [409], per Callinan J.

87 *Crimmins' case* (1999) 200 CLR 1 at 40 [99].

88 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 17 [18].

> section of the public, namely, the consumers of those oysters, to the risk of contamination of the disease ...

Also, the duty propounded was not limited to the exercise of powers in respect of a particular place. In the case of the council, the duty extended to all places from which faecal matter might eventuate to pollute the lake, and in the case of the state, in respect of the oyster industry based on all oyster leases in the lake and in the state.[89] Based on this rationale, in the case of vCJD, meat eaters could similarly constitute members of the beef-consuming public, and the duty would extend to all imported BSE-infected products.

When applying principles to a new situation (like the potential BSE/vCJD eventuality), the cases have established the importance of determining the nature and degree of power exercised by the relevant authority. It is now established that, where a public statutory body has power to inspect (at least in the case of a highway authority), it has an obligation 'to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist'.[90]

In the context of food regulation, AQIS has a comparable obligation. The statutory body exercises a high degree of control over imported products that may represent a risk to public health. In discharging its duties, AQIS has wide statutory powers. For instance, its officers can enter and search premises, inspect, examine, take extracts, or take samples of any imported substance or thing.[91] Depending on its findings, it can order the treatment, seizure, destruction or re-exportation of 'failing food'.[92]

Such wide power over the importation of food arguably amounts to what the High Court envisaged as a significant measure of control over a person or property of citizens. The statutory body can be said to have physical control over the food that is the source of the risk or harm thus casting upon it a duty of care owed to those that fall within an identifiable class of potential plaintiffs.

Breach of Duty

When determining whether a duty of care has been breached, matters of policy and competing demands on the resources of the authority may require consideration.[93] That an authority owes a common law duty of care because it is invested with a function or power does not mean that the total or partial failure to exercise that function or power constitutes a breach of duty.[94] Breach

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89 *Graham Barclay Oysters* [2000] 109 LGERA 1 at 20–21 [33-37]; 23–24 [52] and at 156–57 [603].

90 *Brodie's case* (2001) 75 ALJ 992 at 1024.

91 *Imported Food Control Act* 1992 (Cth), s 21.

92 *Imported Food Control Act* 1992 (Cth), s 20.

93 *Imported Food Control Act* 1992 (Cth), s 20.

94 *Pyrenees case* (1998) 192 CLR 330, per McHugh at 371 [109].

will depend upon 'all the circumstances of the case including the terms of the function or power and the competing demands on the authority's resources'.[95]

The Standard of Care

To determine whether the standard of care has been breached in the present circumstances, it would be necessary to consider the common practice and body of scientific knowledge at the relevant time. In *E v Australian Red Cross Society*, a contaminated blood case, the issue of breach of duty of care was in dispute. [96] Wilcox J found that the failure to introduce surrogate testing for HIV-contaminated blood in time to have prevented an infection from a blood transfusion was not negligent.[97] When considering what a reasonable person would do by way of response to the risk, His Honour referred to what was said by Mason J in *Wyong Shire Council v Shirt*:[98]

> The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

After balancing the relevant matters including the scientific knowledge of the time, Wilcox J, in *E's case*, concluded that a breach of duty had not been established. At the relevant time, the only test available was a surrogate test that did not have a scientifically demonstrated connection with the HIV condition.[99] Also, there had been no known transfusion-related AIDS case in Australia.[100] These factors weighed heavily against finding liability. Based on policy, His Honour found the concern for contamination did not outweigh the difficulties that would ensue from a reduction of the blood supply — most importantly, the possible loss of life.[101]

Similarly, to determine whether Australian authorities responded reasonably to the BSE outbreak, it is helpful to consider and balance the criteria that forms the basis of the test enunciated by Mason J in *Wyong*.[102]

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95 *Pyrenees case* (1998) 192 CLR 330, per McHugh at 371 [109].

96 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 359.

97 *E v Australian Red Cross Society* (1991) 27 FCR 310.

98 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 356; *Wyong's case* (1980) 146 CLR 40 at 47-48.

99 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 378.

100 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 375.

101 *E v Australian Red Cross Society* (1991) 27 FCR 310 at 381.

102 *Wyong's case* (1980) 146 CLR 40 at 47–48.

Australia's Key Responses to a Serious Foreseeable Risk

In response to the BSE outbreak, Australia banned the importation of live cows, embryos and sperm from the United Kingdom in 1988. A tracing program and voluntary buy-back scheme were established for the 131 or so animals imported from the United Kingdom and Ireland between 1980 and 1988. The majority of animals were returned and destroyed. Relevant authorities have reassured us that the remaining animals have been tagged and are being kept under surveillance.[103]

However, other possible sources of contamination may not have been so decisively dealt with. For instance, in 1992, Australian agricultural records indicate cattle from BSE-suspect herds were imported via Argentina for breeding purposes.[104] The Phillips report also exposed the abhorrent decision of the then British Ministry of Agriculture, Fisheries and Food (MAFF) to export BSE-suspect meat and MBM, at the peak of the outbreak, to various developing countries at 'bargain prices'.[105] In effect, this means that suspect products may have made their way past unsuspecting authorities in the guise of a manufactured product made from infected beef and imported into Australia.

Australian statutory authorities have taken no action to prohibit the importation of numerous suspect products including dairy products, other than a temporary ban in 2001. The ban was in response to the Foot and Mouth disease (FMD) outbreak in Britain and Europe and not to the threat posed by BSE.[106] Cosmetics are of particular concern for some, because many products contain ingredients made from certain cattle tissues that make them more likely to contain the prion agents.[107] Controversy also surrounds the use of

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103 See Klim (2000).

104 See Thornton (2001).

105 See the Philips Report (2001); Thornton (2001). Also, in late 2000, France's Farmers Union Leader Mr J Bose, described all agriculture ministers since 1988 as 'accomplices to the importation of banned animal feed'. leading to a demand by the French public for an investigation into the alleged failure of past governments to guard against BSE infection. Mr Bove's organisation allegedly unearthed customs documents showing 14000 tonnes of potentially dangerous British animal feed had been illegally imported between 1993 and 1996. See Bremner (2000), p 8.

106 For example, fats and tallow (used in food such as margarine and cosmetics), gelatine (used in food and pharmaceuticals), collagen (used in cosmetics and cosmetic surgery), rennet (used in cheese) or other dairy products were not banned because of the amount of processing involved in making them. See Brook and Stock (2001). This occurred despite the lack of understanding of how BSE is transmitted and a 1996 report released by the UK MAFF indicating a possible low-level maternal transmission of BSE in milk from an infected cow to her calf. See MAFF report (1 August 1996), cited in Agriculture and Resource Management Council of Australia and New Zealand (1996).

107 Brain, spinal tissue, spleen, pancreas, thymus and placenta are used in the production of cosmetics. Although not ingested, products such as anti-ageing creams and makeup could be absorbed through the mucous membranes of the eyes and mouth. See Australian Consumers' Association (2001).

products, such as bovine-sourced insulin, that contain material derived from non BSE-free countries.[108]

The relevant statutory bodies could argue that they responded like reasonably prudent authorities in light of what was known of the risk at the time. The UK government did not officially and publicly advise of the possible link between BSE and a new variant form of CJD until 1996.[109] In response to the announcement, a special task force and BSE/CJD Scientific Advisory Group were formed to provide scientific advice on health and food safety issues.[110] Six months later, legislative effect was given to an initially voluntary industry-wide ban on the feeding of ruminant origin MBM to ruminants, and feeding ruminant tissue to ruminants in accord with the World Health Organisation recommendations.[111] It was at this time that recommendations were made to review rendering practices. The Animal Health Committee then developed a national systematic passive surveillance system to examine cattle brains for BSE.[112]

Restrictions were also placed on blood donations in 2000 as a precautionary action.[113] A temporary ban on blood donations from people who lived in the United Kingdom for six months or more during the height of the BSE outbreak was announced in July of that year, despite a lack of evidence of transmission of vCJD through blood. Although the bans placed on blood donations differ in some jurisdictions, they share the common intention of protecting the blood supply from theoretical risk of vCJD.[114]

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108 See Australian Consumers' Association (2001).

109 When Secretary of State for Health, Stephen Dorrell, spoke in the House of Commons informing the British public that BSE had probably spread to humans through eating beef, it caused worldwide panic. British schools banned beef from their cafeterias, the European Union (EU) blocked imports of beef and beef products from Britain, and McDonald's switched to Dutch beef. However, London newspapers soon revealed that more than 100 000 veal calves exported to France from Britain in 1995 had never been slaughtered. Instead, they had been illegally absorbed in herds in France, Italy, Spain and Holland, reared to maturity and sold as beef. By 1996 Switzerland reported the largest number of BSE-infected cattle second to Britain. To rekindle consumer faith, the Swiss government announced it would destroy cattle born before MBM was outlawed in 1990. It also announced the remains would be processed into MBM and fed to pigs earmarked for export. See Rhodes (1998), p 216.

110 Agriculture and Resource Management Council (1996).

111 Agriculture and Resource Management Council (1996).

112 Agriculture and Resource Management Council (1996).

113 Department of Health and Ageing (2002).

114 In Canada, for instance, Quebec's ban, based on one month's residence in the United Kingdom between 1980 and the present, is reason for permanent deferral, whereas in the rest of Canada, six months' residence in France is reason for deferral. In August 1999, the US FDS issued guidelines that asked blood centres to also exclude potential donors who spent six or more cumulative months in the United Kingdom between 1980 and 1996. A recommendation was made in late June 2001 to extend the ban in the United States against individuals who: had spent a total of five years or more in any European country (except the United

At the end of 2000, the National Health and Medical Research Council (NHMRC) Expert Committee on Transmissible Spongiform Encephalopathies (ECTSE) was formed to study the full range of TSEs, including BSE in cattle, Scrapie in sheep and CJD and vCJD in humans, and to look at their implications for public health. It is to advise the government on how best to deal with these emerging issues based on 'sound evidence and best practice'.[115] Other initiatives have focused on evaluating rapid post-mortem tests developed in Europe for the detection of the BSE agent and on the development and evaluation of tests for detecting non-compliance with the ruminant feed ban.[116]

Magnitude of Risk and Gravity of Harm

Although little is known of the disease, what *is* known is that the effects of vCJD are devastating to its victims and their families, causing certain death to all who are diagnosed. As yet, there is no cure.

However, predictions based on the 1998 rates of infection suggest that by 2015, human deaths from vCJD will reach about 200 000.[117] As of October 2002, there have been 117 definite and probable deaths from vCJD in the United Kingdom.[118] There are a further 11 probable cases still alive. A further six cases in France,[119] one in Hong Kong and one in Italy[120] have been credited to the disease since its official identification in 1996. While tragic on a personal scale, this rather modest number of cases seems unlikely to warrant further panic. Other far less optimistic predictions, however, propose that earlier figures could prove grossly underestimated.[121]

Kingdom) since 1980; had spent three months or more, cumulatively in the United Kingdom from 1980 to 1996; had spent more than six months on a European Department of Defence base from 1980 to 1996 (or through 1990 was on bases North of the Alps); or received a blood transfusion in the United Kingdom from 1980 to the present. See US Department of Health and Human Services (2001); also correspondence by email with P Chan, Center for Infectious Disease Prevention and Control, University of Toronto Surveillance Unit, 2 and 17 July 2001.

115 The ECTSE is chaired by a former Dean of Medicine, and includes experts in food safety, communicable diseases, quarantine, agricultural and veterinary science epidemiology, blood and consumer interests. See Agriculture and Resource Management Council (1996).

116 See Klim (2000).

117 See Rhodes (1998), p 222.

118 See 'The UK Creutzfeldt-Jakob Disease Surveillance Unit' at www.cjd.ed.ac.uk/ visited 21.10.02.

119 Institut de Veille Sanitaire, 'Nombre de cas de maladie de Creutzfeldt-Jakob, http://www.invs.sante.fr/recherche/index2asp?txtQuery=creutzfeldt-jakob accessed 21 October 2002.

120 NMAA Meat Features (2001).

121 Furgeson (2002), p 4.

Fiscal considerations

One way of reducing the risk of vCJD contamination in Australia would be to cease importation of all foreign beef and beef products. This drastic response would have to be weighed against other considerations, such as the nation's direct financial interests in the beef industry and indirect financial, social and political interests. Arguably, in terms of global trade agreements, the financial cost to Australia if it were to stop importing beef and beef products would be highly influential. This was demonstrated when attempts at implementing a blanket ban on European meat and animal products, including confectionery and infant formula, failed in early 2001. The bans were reportedly relaxed after only one day following the EU's threat to take Australia to the World Trade Organisation with claims that the bans were excessive and in breach of free trade agreements.[122] The federal government and the AQIS defended their decision to lift the bans, stating that there was no connection with EU concerns.[123]

The discovery of three BSE-infected dairy cows in Japan in late 2001 is further demonstrative of the financial impact TSEs can have on the Australian economy. As a consequence of the incident, the demand for Australian beef dropped significantly, even though Australian animals were not involved.[124] Australia is still suffering from the 'fallout' as more than 1300 meat workers became unemployed when a North Queensland meatworks failed to reopen after the Christmas holiday closure.[125] Obviously, if Australia's BSE-free status were impugned, the consequences would be far greater.

In *Brodie*, the joint judgment found that financial considerations and budgetary imperatives may fall for consideration when determining what should have been done to discharge a duty of care.[126] Their Honours went on to consider the impact of 'political choice' involving the shift in 'resource allocations'.[127] Kirby J, in examining the way any statutory authority chooses to deploy its resources in performance of its functions, found that it 'necessarily involves examining the choices made by that authority'.[128] He raised a number of questions that lie behind the distinction drawn between operational and policy matters.

For instance, how are the courts to decide whether the choice made by one authority was reasonable? What is meant by reasonable and what kind of authority is to be taken as the benchmark? How relevant is knowing what political pressures an elected body faced when it prepared its budget and whether it matters if the authority receives the money it spends from funds

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122 Ellicott et al (2001).

123 Robinson et al (2001).

124 'Meatwork Takes a Cautious Line' (2002); 'Mad Cow Fear' (2001).

125 'Mad Cow Fear' (2001).

126 *Brodie's case* (2001) 75 ALJR 992 at 1013[104].

127 *Brodie's case* (2001) 75 ALJR 992 at 1014 [106].

128 *Brodie's case* (2001) 75 ALJR 992 at 1054 [312].

provided by the federal government under state grants legislation?[129] This analysis led to a finding of liability in the public road authority.

Discharging the Duty of Care

The risk to humans who eat BSE-infected beef has been recognised by the relevant authorities since the 1990s, yet appropriate tests to identify the prion agent in all beef products remain evasive. To discharge its duty of care in these hypothetical circumstances, the public authority would have to show that it acted diligently in its attempts to address the serious risks associated with the importation of beef and beef products. It would have to demonstrate that it exercised its powers in line with the standards of the reasonable authority and the knowledge reasonably available at the time to avert the particular risk.

By establishing BSE Committees and taskforces to observe and monitor TSEs, developing and updating guidelines and tests to identify infected products and the presence of the prion agent in beef and beef products, and prohibiting the importation and use of certain products through bans, the government could argue that it has taken reasonable steps in exercising its powers. It is difficult to predict whether these steps would be sufficient to discharge its duty of care.

Duty of Care to Warn

In light of recent High Court decisions, AQIS would be less likely to succeed in proving it adequately discharged its duty to warn. The High Court has demonstrated a willingness to find a duty to warn exists where public authorities have knowledge of the presence of foreseeable known risks of harm.[130] There is arguably sufficient scientific evidence to establish that the risk of contracting vCJD from eating imported BSE-infected beef is neither far-fetched nor fanciful. The relevant statutory bodies have been well apprised of this grave risk since, if not prior to, the United Kingdom's official announcement in 1996. Yet, according to Ian Lindenmayer, Australia and New Zealand Food Administration's (ANZFA) managing director, Australia did not stop importing fresh beef from Europe until at least 1999.[131] Although as yet there have been no reported cases of vCJD in Australia, the risk must be considered a serious potential hazard in light of the government's importation policy and the global spread of the disease.

AQIS has similarly had incontestable knowledge of a lack of an appropriate test to determine the presence of prions in beef and beef products. Assuming the risk proves real, warnings ought to have been issued to advise the consuming public that foods sold in Australia contain imported beef products and, more importantly, that such foods may not be safe. The potential risk of contracting vCJD from the consumption of beef in Australia has had minimal public exposure. In addition, suggestive assertions that beef is safe

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129 *Brodie's case* (2001) 75 ALJR 992 at 1054 [312].

130 *Nagle's case* (1993) 177 CLR 423; cf. *Romeo's case* (1998) 192 CLR 431.

131 Commonwealth Department of Health and Aged Care (2001a).

have repeatedly been made by government officials to engender a feeling of safety in the public.

In January 2001, the federal government announced (somewhat cryptically), in statements made by Australia's Chief Medical Officer, its decision to suspend the import of foods containing beef from certain European countries. The statements appear to have been designed to reassure the beef-consuming public. The risk to the health of Australians from the consumption of these products was described as 'extremely small', but it was suggested that 'we need to keep one step ahead of the BSE/vCJD situation'.[132]

The authority's choice of a 'softer' option of self-regulation for dealing with the BSE risk is also likely to have quelled public concern. A voluntary rather than legal ban of specified European beef products was implemented. Supermarkets were advised to voluntarily withdraw from sale foods made from European beef products[133] and discard them. Despite assurances that 'no retailer should be too badly affected', the amount of such foods on the Australian market was estimated at around 1000 tonnes per annum.[134]

Likewise, consumers were also asked to discard such products. Compensation was not made available. This demonstrated governmental complacency and a lack of urgency with regard to the BSE/vCJD crisis, echoed the highly criticised 'mixed messages' given by British authorities in the early 1990s.[135]

According to Gaudron, McHugh and Gummow JJ in *Brodie*, an authority can leave itself open to a finding of misfeasance if it has taken any positive action to remove a known danger or risk 'even where that risk has been increased solely by omission to act'.[136] A false sense of security or safety has been created in relation to the consumption of beef. The government's reaction to the crisis may well have created and/or maintained a 'trap' by producing an appearance of safety.

The Issue of Causation

In the present hypothetical discussion, the lengthy incubation period of vCJD (16–20 years), coupled with the many sources of possible contamination, would require a broad approach to the issue of causation. For instance, if a meat eater eats beef several times a week at several different locations, one of

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132 Commonwealth Department of Health and Aged Care (2001a), per Professor Smallwood.

133 Examples of such food products range from corned beef, frankfurts and cooked meat in brine to meat flavourings and stock cubes, soups and filled pasta.

134 Commonwealth Department of Health and Aged Care (2001b).

135 In November 1989, a voluntary ban was imposed in the United Kingdom against the inclusion of Specified Bovine Offal (SBO) in the manufacture of MBM fed to ruminants. Critics suggest that the lack of adequate compensation incentive offered by the British government to farmers for the destruction of BSE-infected cattle and supplies of contaminated MBM led to under-reporting of sick animals and the continued use of the banned feed. See Rhodes (1998), p 179.

136 *Brodie's case* (2001) 75 ALJR 992 at 1010 [88].

the forensic difficulties would be to establish a case against a particular source in order to identify a supplier so as to work up the chain of supply to establish where the beef originated — that is, whether it was imported beef. It may be impossible to identify the immediate supplier of the defective product if beef has been consumed by the plaintiff over a period of time — say a few weeks, months or even years. Overseas travel by the plaintiff to the United Kingdom or other European countries where beef may have been consumed either in a foreign country or on aircraft flights for instance, would also require consideration. Such uncertainty creates difficulty in establishing a causal link between the public authority's alleged negligent act or omission and the loss, injury or damage suffered by a plaintiff.

The commonsense approach that involves value judgments and considerations of policy rather than the traditional 'but for' test would prove more useful in these hypothetical circumstances. As Lord Reid said in *Stapley v Gupsum Mines Ltd*:[137]

> The question ['What caused an accident from the point of view of legal liability'] must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults that must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident.

The commonsense approach appears to have gained increasing acceptance in Australia.[138] Therefore, if a plaintiff could establish that he or she had consumed imported beef some time after 1996 by pointing to a source, even if it is one of numerous sources, the court could then question whether on the balance of probabilities the defendant public authority's acts or omissions (by permitting potentially BSE-infected beef into the country for distribution and failing to warn of the risk) caused or 'materially contributed' to the plaintiff's contraction of the disease.[139] As McHugh J explained in *Henville v Walker*, provided that the defendant's breach 'materially contributed to the loss or damage suffered, it will be regarded as a cause of the loss or damage'.[140] This will be the case despite the existence of other factors that may have played a more significant role in achieving the loss or damage.[141]

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137 *Stapley v Gupsum Mines Ltd* [1953] AC 663 at 681.

138 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506; *Chappel v Hart* (1998) 156 ALR 517.

139 *Bonnignton Castings Ltd v Wardlan* (1956) AC 613 at 621 per Lord Reid.

140 *Henville v Walker* [2001] HCA 52 at [106].

141 *Henville v Walker* [2001] HCA 52 at [106].

Although the issue of causation in a similar negligence action has yet to be tested, the consumption of BSE-contaminated beef has, in at least one location, been linked to the contraction of vCJD. A report in 2001 identified how the disease was spread in the North Leicestershire village of Queniborough, where Britain's worst-known cluster of vCJD deaths occurred.[142] A 'higher than normal risk' that the cattle had been exposed to BSE was identified and a biologically plausible explanation was advanced suggesting that brain matter from BSE-infected beef had contaminated meat ultimately consumed by the victims.[143] This established a crucial link between the victims and the probable source of contamination.[144] The report further demonstrates that traditional epidemiological methods can be used to trace exposures that took place two decades ago.

Crown Immunity

If the causation hurdle could be overcome, the issue of Crown immunity would then need to be addressed. It is established that, in the absence of a specific statutory exemption,[145] the Crown will be subject to the ordinary principles of negligence.[146] However, with regard to the importation of food, the *Imported Food Control Act* does provide specific statutory immunity to the Commonwealth and its officers for acts or things done or omitted to be done negligently, provided they were done in good faith, in the exercise of any power or authority pursuant to the Act.[147] Similar immunity clauses exist in other relevant legislation.[148]

In its recent pronouncements, however, the High Court has demonstrated a leaning away from Commonwealth liability immunity. This appears particularly evident in light of the current push toward corporatisation and privatisation of public authorities. As public authorities increasingly adopt the structures of private corporations, they become progressively more liable because the presumption of immunity dissolves. Despite the traditional presumption that statutes cannot bind the Crown, Gaudron, McHugh and Gummow JJ in *Brodie* were of the view that statutory provisions that permit 'public authorities to engage in what otherwise would be tortious or otherwise

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142 The disease was found to have been spread through traditional craft butchering methods. See the Queniborough Report (2001); also Walker (2001).

143 The local beef stock had been fed the now-banned MBM supplements.

144 The report found that three butcher shops in the township where the victims had purchased their meat were the probable source of contamination. The victims were aged 19 to 35 and all died of vCJD within a two and a half year period. See the Queniborough Report (2001).

145 *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290.

146 In *Brodie's case* (2001) 75 ALJR 992 at 1011 the majority relied on reasoning in authorities such as *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* (1981) 150 CLR 225.

147 See *Imported Food Control Act 1992* (Cth), s 38(1).

148 *Australia and New Zealand Food Authority Act 1991* (Cth), s 68.

legally wrongful conduct' are to be 'disfavoured', and are 'strictly' and 'jealously' construed.[149] The majority agreed with the recent observations of Lord Cooke of Thorndon:[150]

> Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly .. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ...

According to Kirby J, where the court identifies defects that lead to 'confusion, uncertainty or injustice' in an established principle, it is appropriate for judges to re-express the common law. Referring specifically to the law of negligence, Kirby J said, 'sometimes the re-expression may erase outmoded rules or immunities' in favour of 'a policy more in tune with contemporary social values'.[151]

However, it is important to note that *Brodie*'s case represented a historical anomaly in common law with regard to highway authorities, and has little relevance, if any, in statutory immunity situations. Within the context of the present discussion, the legislature has acted by instituting bans on the importation of BSE-infected products in an attempt to contain the spread of the disease. However, in failing to adequately warn the public of the dangers associated with eating or using imported beef and beef products, such omission can be considered negligent as it may constitute a potentially devastating public health risk. It would be anomalous to allowing the federal government immunity in circumstances where it was the only body that could have acted to halt the entry of such products or at least raise adequate awareness or alert of the possible dangers of consuming imported beef.

Further discussion on the issue of Crown immunity is beyond the scope of this discussion. It has been raised merely to bring attention to its potential effect as a barrier that would need to be overcome before a claim in negligence against the importation authorities could succeed. Suffice it to say that, in a case such as the vCJD situation, much will depend on the facts of the case and other circumstances deemed to be relevant by Australian courts.

Conclusion

The emergence of vCJD has been described as 'the Chernobyl of the twenty-first century'.[152] The disease represents a new paradigm of infection capable of potentially vast health and economic consequences. Britain and other jurisdictions continue to bear the heavy toll exacted by their lack of vigilance

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149 *Brodie's case* (2001) 75 ALJR 992 at 1012; *Coco v The Queen* (1994) 179 CLR 427; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

150 (2001) 75 ALJR 992 at 1012.

151 *Brodie's case* (2001) 75 ALJR 992 at 1034.

152 Kunast (2001), p 8.

in responding to the 'mad cow' crisis. Apart from the cost in terms of human life, vCJD has proved a substantial financial burden on the public health care system and a challenge for those charged with the task of developing measures aimed at preventing any further spread of TSEs.[153]

Even in those jurisdictions that have extensive measures in place, incidents of BSE-infected meat being illegally introduced into the food chain persist.[154] Before Australia can truly allow itself to feel confident about its BSE-free status, important questions remain. Were all potentially infected products turned away at Australia's doorstep by AQIS? Was the general public sufficiently warned of the continuing risks posed to health by products imported from infected countries? Are ongoing vigilance measures adequate?

Apart from monitoring the situation in the United Kingdom and Europe in order to exclude 'unsafe' imported foods, the ANZFA has recently developed a certification regime that will require all beef and beef products sold in Australia to be derived from and officially certified as BSE-free cattle.[155] The current exemptions attached to dairy and other products will continue based on 'scientific opinion that BSE cannot be transmitted through these products'.[156]

Some authors express doubt as to whether all suspect imported MBM was prevented from entering the food chain in Australia.[157] In 2000, the then federal Minister for Financial Services and Regulation, Joe Hockey, said that 'consumers have the right to expect what they buy is safe'. He added that, in order to achieve 'consumer sovereignty', people must be permitted to make decisions about their own welfare based on 'choice, information, protection and redress'.[158] While the minister's concept of 'consumer sovereignty' seems desirable, the operative question is: 'To what extent is government prepared to

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153 For instance, on 26 October 2000, Alan Milburn, the UK Health Secretary, announced £1 million would be lodged with the CJD Surveillance Unit to provide care and compensation packages to assist vCJD victims and their families. All affected families are promised a case worker and assistance to avoid the experience of Mr Churchill, father of the first vCJD victim, who said his son was unable to even get a wheelchair or appropriate place to die. In reiterating his personal apologies to the affected families, Mr Milburn is quoted as saying: 'I would regard it as pretty perverse if government in this country was able to make compensation available to farmers for the loss of their cattle, and not to make compensation available to families for the loss of their loved ones.' See '1M Care package for vCJD victims' (date unknown) *BBC News* http://news.bbc.co.uk, accessed 2 August 2001. Also, on the cost associated with the establishment of TSE monitoring and advisory committees; and the cost of new surgical tools, see Dyer (2001); Walker (2001b).

154 Editor (2002).

155 The regime is linked to an amendment to the Australian New Zealand Food Standard Code. See ANZFA (2001) 'Certifying the BSE-free status' www.anzfa.gov.au/mediareleasespub.

156 ANZFA (2001).

157 See Thornton (2001).

158 See Department of the Treasury (2000), Foreword.

alter our present product safety regime to achieve this end?'[159] Arguably the fear of tort liability should drive greater safe-keeping.

While this paper tends to pose perhaps as many questions as it answers, it does so in the interests of raising awareness. The object of this discussion has been to stimulate dialogue on the legal consequences that may follow possibly the worst global contaminated food and public health conundrum. With the present uncertainty surrounding public liability claims, it remains to be seen whether the High Court will put the brakes on the imperial march of negligence or command it even further.

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