CAN BSE BE TRANSMITTED TO INSURERS' BALANCE SHEETS?

By Tony Cherry and Joanne Dee

If life's uncertainties are the lifeblood of the insurance industry then uncertainty as to the potential impact of BSE/CJD on insurers is an unwelcome exception. At the heart of this uncertainty is science. There is as yet no scientifically proven link between BSE in cattle and CJD in humans although recent experiments in which monkeys contracted the new variant of CJD when their brain tissue was injected with BSE infected material from cows may provide the first direct evidence of a link. Until it is established beyond doubt exactly how BSE can be transmitted to humans, then the range of potential victims cannot be defined with any certainty. Equally, the future incidence of CJD cannot be predicted with accuracy. There have been predictions that at its extreme there could be half a million cases of CJD cases in the UK. As the incubation period for CJD can range from 10 to 50 years, it will be some time before we know whether these predictions will hold true.There is therefore no way of knowing how long the BSE/CJD problem could affect insurers and whether the industry will be exposed to the sort of long-tail liability it has experienced with asbestos claims. If BSE can be genetically transmitted, then the BSE/CJD problem may outlive the 50 year ceiling of the incubation period. But should all this uncertainty be causing insurers to lose sleep? The answer lies in looking at the potential difficulties for the various categories of persons who theoretically could bring BSE/CJD related claims.

Product Liability

A consumer of beef who contracts CJD could sue a meat retailer under Section 14 of the Sales of Goods Act 1979 as amended by the Sale and Supply of Goods Act 1994 (the "SGA") for selling goods of an unsatisfactory quality. He may also be able to sue a meat processor for producing "defective" goods under the Consumer Protection Act 1987 (the "CPA"). This depends on whether the meat processing actually changes the characteristics of the beef as Section 2(4) of the CPA excludes persons supplying agricultural produce to others which has not undergone an "industrial process". There is as yet no relevant case law on the interpretation of "industrial process" in Section 2(4) but it is unlikely that abattoirs or meat packagers would be caught by the CPA.

To prove that the meat supplied was unfit for human consumption and that the goods supplied were of "unsatisfactory quality" under the SGA or "defective" under the CPA, the claimant would have to prove the causal link between eating BSE infected meat and contracting CJD. As yet there is no definitive scientific and minimal epidemiological evidence for the link. Exactly when, if ever, this will be available is itself a matter for debate. It has been suggested that the most likely way of establishing the connection will be the surveillance of new CJD cases. Dr Robert Will of the CJD Surveillance Unit was reported in the Times (9 November 1995) as estimating that another 10 to 15 years of surveillance might be needed to prove the link, if any exists. The theory that there is a "species barrier" and the height of it are the subject of trials on genetically engineered mice.

Given the problem of proof, will it help the CJD claimant that in **Loveday v Renton [1990] 1 Med LR 117**, the court dispensed with exact scientific proof of the causal link between the whooping cough vaccination and brain damage due to the inadequacy of the biological explanations put forward by the claimants? Probably not because the claimants would then need to establish that it was the meat product supplied by the defendant that caused the onset of CJD. Identifying the contaminated meat and its source will be well nigh impossible particularly given the number of retail outlets and restaurants the consumer frequents and the intervention of the potentially long incubation period.

In the unlikely event that a claimant could prove all aspects of causation, then for both the SGA and CPA liability is strict and there is no requirement for the claimant to prove negligence. However in the case of the CPA there is a defence allowing a supplier to argue that the state of scientific knowledge and technical expertise at the time did not enable him to detect that the product supplied was defective. Whether this would cover the case of a supplier of processed meat is questionable as the defence was originally intended to cover only high risk experimental producers.

Will the commercial claimant be better placed to litigate? Farmers, abattoirs, wholesalers, meat processors and retailers will all be seeking to recover uninsured and uncompensated losses. Their insurers might also seek to exercise their subrogation rights against those whom they hold responsible for the insured's losses. The causal link between infected cows' meat and the feed

consumed by the cows would first have to be demonstrated. Again this proof might be difficult. In Ashington Piggeries v Christopher Hill [1971] All ER 1051 the court had to infer the composition of the feed in question seven years after its supply. Proof of continuity of supply from one particular supplier to the claimant might assist.

Assuming the burden of proof can be discharged by the claimant, the central question in any litigation between these parties will be who is responsible for contaminating the feed which infected the cows and meat in question. This may ultimately be the farmer who supplied the scrapie infected sheep to the abattoir, or the abattoir who failed to separate out scrapie infected offal from other meat when supplying the feed manufacturer. Liability can be traced down the contractual chain of supply as long as it can be demonstrated that the party in question knew that the goods he was supplying were to be used for the particular purpose of producing animal feed. This principle was established by the court in **Henry Kendal v William Lillico & Sons Ltd and Others [1968] 3 All ER 444** in imposing liability for contaminated pheasant feed on the supplier of groundnuts used as an ingredient in the feed.

Will a feed supplier be able to rely on a defence equivalent to the CPA defence that such was the state of scientific knowledge at the time that he was not in a position to know that the feed was unfit for cattle consumption? This issue arose in Ashington Piggeries which was decided under the Sale of Goods Act 1893. The plaintiffs, manufacturers of animal foodstuff, brought a debt action against the defendant mink breeder for unpaid supplies of mink food. The mink food had been contaminated by the addition of Norwegian herring meal which itself contained a preservative toxic to mink called DMNA. The defendants brought a counterclaim to recover damages in respect of the mink that died after eating the feed. The House of Lords held the plaintiffs liable to the defendants but also held the plaintiffs could recover an indemnity in damages from the supplier of the herring meal who had been joined as a third party. In his judgment Lord Diplock said:

> *"At the relevant time the possibility of the chemical reaction which produced the toxic substance DMNA in the course of manufacture of the meal was unthought of. In the then state of knowledge, scientific and commercial, no deliberate exercise of human skill or judgment could have*

prevented the meal from having its toxic effect on mink. It was sheer bad luck. The question in each of these appeals is: Who is to bear the loss occasioned by that bad luck?".

The court did not have to consider the question of whether the plaintiffs or third party had been negligent because contractual liability under the SGA 1893 (as under the SGA 1979) was strict. The case of **Ashington Piggeries** demonstrates that if the consumer claimant can prove causation, then the defendant supplier and therefore its product liability insurer may have to pay out.

Employer's Liability

There have now been four confirmed cases of CJD in dairy farmers in the UK since 1993 and each of these farmers had at least one infected cow in his herd. This raises the question of the possibility of contact infection from cows or even inhalant infection from contaminated meat and bone meal feed. It is important to stress that there is no scientific evidence for this as yet. It is only recently that the Dangerous Pathogens Committee has been asked to consider whether measures should be taken to safeguard workers in slaughterhouses and meat rendering plants from any potential risk of contracting CJD from dust or airborne particles that might be carrying the BSE agent. Also, there has been no incidence of CJD since 1990 in abattoir workers, butchers or vets who might be supposed to be at risk.

Despite this the risk remains and Employer's Liability insurers may wish to consider how to deal with any potential claims from employees in supposed high risk areas of employment. Claims would be brought against employers for negligence and/or breach of statutory duty. The employee's first difficulty would be to establish a clear causal link between CJD and the workplace and, as we have seen, there is no scientific evidence to support this at present. Of course, granted the latency period, the scientific proof could feasibly exist by the time claims were made.

Assuming difficulties of causation could be overcome, to establish negligence the employee would then have to show that the employer knew of the risk of becoming infected with CJD at the workplace and that he failed to take reasonable precautions to prevent harm to the employee. Could the employer

argue in his defence that before the Government commenced its regulation of the BSE situation in 1988, the reasonable employer could not have been expected to know of any risk to humans of contracting CJD through eating beef let alone by coming into contact with beef carcasses and that once Government regulations were in place, the employer complied with these. Compliance with statute or statutory codes has in the past been held to meet an employer's duty in negligence but in principle the employer's duty of care and statutory duty are separate so it is not guaranteed that an employer's compliance with Government regulations will be a good defence to a negligence claim. In fact recent experience in Employer's Liability disease cases suggests that the Judges at first instance will not hesitate to apply higher standards than required by contemporary regulations and in particular will look increasingly at the position in Continental Europe.

Even if an employer has complied with Government regulations it might be argued by the employee that he was negligent in failing to keep himself informed of the risks of dealing with BSE infected meat by reading the medical journals, HSE leaflets and other relevant industry literature. While an employer is expected to keep abreast of current knowledge concerning dangers arising within his trade, he cannot be held liable for risks about which no specific warnings have been issued **(Tremain v Pike [1969] 3 All ER 1303.)**

However a HSE leaflet published in July 1994 states:

> *"that while it is unlikely that BSE will affect human health, it is important to take reasonable hygiene precautions in handling carcasses of these animals. The precautions suggested here will also protect you from other diseases known to affect man."*

It suggests appropriate hygiene measures such as wearing protective clothing (including eye protection), covering any cuts and abrasions, washing hands before eating, washing down contaminated areas with detergent.

If the measures suggested in the HSE leaflet or those required as a matter of general hygiene, for example in the Slaughterhouse (Hygiene) Regulations 1977 have not been implemented by employers this may be sufficient to support a case of negligence and/or breach of statutory duty. The point to grasp is that

employees' protection from BSE might depend not on their employer's compliance with specific regulations governing BSE but on compliance with general hygiene regulations addressing all diseases contractible from contact with animal carcasses.

Life and Health Insurance

Fortunately for the families of CJD victims the only conceivable ground on which a life insurer could avoid a claim under a life insurance policy would be non-disclosure by the insured that a member of his family had previously died from CJD or perhaps of some possible occupational exposure, but this seems remote.

The real question for life insurers is rather how the BSE scare will affect future risk assessment/management. Can any comparisons be made with the AIDS crisis? Will insurers require insureds to undergo such presymptomatic tests, if any, as exist? Will all insureds have to undergo tests or will insurers lay themselves open to allegations of discrimination in requiring tests only for those who are considered, but not yet scientifically proven, to be at a higher risk of contracting CJD either through contact with BSE at the workplace or because of the possible genetic transmission of the disease. Similarly will it be reasonable for life insurers to seek to protect themselves with "lifestyle" questionnaires in proposals forms? In the light of all the uncertainty surrounding BSE and CJD, no doubt a measured response will be required as the industry will not want repeated the criticism it received over its reaction to the AIDS crisis.

Health and Permanent Health insurers similarly will simply have to pay out for insureds who contract CJD unless there has been any material non-disclosure as already discussed. The extent of medical costs depends on many factors: the duration and nature of the disease and any recommended treatment either of the condition or for the ease of the dying patient. A House of Commons Research Paper on BSE (No 95/132) dated 20 December 1995 indicates that there is no effective treatment for CJD although hospitalisation and nursing care is obviously recommended. The duration of sporadic CJD is usually a matter of months (70% of cases die within 6 months) so that PHI Insurers may find their period of payment quite short. Inherited CJD could last up to 20 years.

Environmental Insurance

Environmental insurance may also be affected by the BSE crisis. The Independent (10 April 1996) reported that Friends of the Earth have alleged that the water supplies in Norwich are being contaminated by leaching from landfill sites in which 100 headless carcasses of BSE infected cattle have been dumped. The sites are situated half a mile away from a river supplying water to the city.

Recently there has been debate on the most appropriate method of disposing of the remains of the incinerated carcasses of all the dairy cattle over 30 months which are to be slaughtered at the end of their useful lives. There are environmental implications of both landfilling and marine dumping and fears that either method could result in the BSE agent finding its way back into the human food/water chain. The Times (10 June 1996) reported that a consultant neurologist from Guy's Hospital is concerned that cattle remains contaminated with the BSE agent could threaten the health of people living near the rendering plants that dispose of the carcasses. He was worried about reports that a rendering plant in Kent is spreading the treated remains of carcasses on unfenced land particularly since he has been treating three suspected cases of CJD in the surrounding area. The plant is reportedly one of the nine in the country receiving cattle over 30 months for slaughter. The doctor claimed that the BSE prions could survive the rendering process and pollute land and water supplies for years. He recommended that any contaminated land should be quarantined indefinitely. The licensing agencies and the rendering plant itself however have insisted that the rendering and disposal process is safe.

If the causal link between BSE and CJD and the methods of transmission can be scientifically established, then the contamination of land and water supplies with BSE infected material may give rise to an action in nuisance or even negligence. Case law has tended to focus attention on the tort of nuisance and **Rylands v Fletcher**. This is because negligence claims are harder to prosecute as the plaintiff needs to establish a duty of care and failure to exercise the relevant standard of care as opposed to the strict liability principles of Ryland v Fletcher. Similarly plaintiffs steer clear of bringing a claim for breach of statutory duty as this involves demonstrating that the relevant statutory obligation either creates a public right or is for the benefit of a particular class of persons (difficult to argue when most environmental legislation is there to protect society as a whole). The

appeal of a **Rylands v Fletcher** claim is that the claimant need not prove fault on the part of the defendant as liability is strict. However recently the courts have made bringing a claim based on **Rylands v Fletcher** more difficult.

In the case of **Cambridge Water Company v Eastern Counties Leather plc [1994] 2 WLR 53, HL**, a claim for pollution of a supply borehole by chlorinated solvents was brought in negligence, nuisance and **Rylands v Fletcher**. What is interesting about this case is the House of Lords' decision that the rules of foreseeability as they apply to nuisance should apply to **Rylands v Fletcher**. In other words, even if a claimant could establish that he contracted CJD through contact with land or consumption of water contaminated by the defendant's release of BSE infected materials, he would then have to demonstrate that it was reasonably foreseeable that the release of those materials would cause some kind of disease in humans on consumption of the water.

Summary

In the absence of definitive scientific evidence, the difficulty of proving causation should deter consumer and employee claimants, if properly advised. Life and health insurers will have little choice but to honour policies held by CJD victims.

Insurers should take action now to manage the risk of tomorrow's potential CJD claims. Employer's Liability insurers may consider making enquiries as to their insureds' hygiene procedures to satisfy themselves that appropriate standards are being met. Environmental insurers might wish to monitor proposals for the disposal of BSE infected material and consider whether the situation should be covered in proposal forms and policies. Above all, it is essential that insurers follow scientific developments as closely as possible and respond to any newly identified risks.

Overall however, it does not appear, from our current standpoint, that the BSE crisis will have any significant effect on insurers' balance sheets.

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Readers are further referred to the House of Commons Research Papers No 95/132 and 96/62 which were used as sources for this article.