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"Bad Oysters – A Government Responsibility?"

A big question for our judicial system is where to draw the line defining government liability for failure to act.

Each year in Australia many people suffer injury that government is in a position to prevent. By building better roads, imposing tougher safety standards, or carrying out tougher regulation and inspection, government could reduce many of the hazards of contemporary living.

But the ideal world comes at a price. Not only would the budgetary outlay be infinite, the spectre of ever-increasing government control and regulation would be invidious to many.

Yet those considerations alone cannot absolve government of all responsibility for removing obvious hazards and preventing known dangers.

Where is the line to be drawn? Or, more to the point in an age of litigation, when should government be liable to compensate a person who has suffered injury arising from a government failure to act?

The search for an acceptable legal standard to define government liability for failure to act has occupied the attention of the High Court in at least seven cases in the last five years. The latest, decided in December, was *Graham Barclay Oysters Pty Ltd v Ryan*, otherwise known as the Wallis Lake Oyster case.

Early in 1997, over 400 people contracted Hepatitis A after consuming contaminated oysters from Wallis Lake in NSW. The virus resulted from recent heavy rain in the Lake catchment area that caused faecal pollution in the Lake.

The danger to oysters was well understood, and preventative action including a four-day suspension of sales was taken by the oyster grower (Graham Barclay).

However, the incubation period for the virus can last from 15-50 days and widespread illness was the consequence.

A class action was started in the Federal Court by 185 people. At trial, Wilcox J held that three parties were jointly liable to compensate those who were injured:

the oyster grower (for not warning consumers or suspending sales for a longer period);

the State Government (for not being diligent in health inspections and not closing the Lake to fishing);
and the local council (for not taking action within its sphere to reduce the risk of viral contamination).

The Full Federal Court on appeal (by a 2:1 majority) upheld the findings against the grower and the State, but reversed the finding against the council. On appeal, the High Court held 7:0 that neither the State nor the council was liable, and held 4:3 in favour of the grower also.

A major consideration in all three instances was the unprecedented, exceptional nature of the health hazard that had occurred. This was the first viral outbreak of its kind in NSW.

The ever-present risk in consuming oysters was also noted – colourfully by Chief Justice Gleeson, wryly quoting Jonathon Swift: "He was a bold man that first eat an oyster".

There was general consensus, too, that neither the State Government nor the council played a role that warranted imposing upon them an actionable duty to remove foreseeable health risks of this kind.

Both had statutory powers that could be used to prevent faecal contamination, to close the Lakes, or to coerce other parties to take preventative measures.

Yet, equally, preventing oyster contamination was not the only issue confronting government. Environmental pollution could come from many sources and affect diverse people and activities.

Nor was government in direct managerial control of the oyster industry and had opted instead for a system of industry-funded self-regulation or co-regulation. In all, government could not be expected to safeguard the health of the public generally.

While the result of the case will provide relief to government, less comfort is to be had in delineating the legal principles on the scope of government liability.

Some justices were quick to distinguish and defend other recent decisions in which (by majority) liability had been imposed on government for failure to act.

The cases included *Pyrenees* (1998), holding that a local council was liable for damage arising from fire that spread from a known defect in a chimney in a private house; *Crimmins* (1999), holding that a stevedoring authority was liable for not protecting private stevedore workers from asbestosis; and *Brodie* (2001), holding that a highway authority can be liable for accidents due to inadequate road maintenance.

What principle distinguishes one situation from another? The difficulty of constructing a simple test, or drawing a clear line, was noted by some judges.

Justice Kirby, who lamented that his own earlier attempt to devise a test had not persuaded any of his brethren, resolved to impose a duty of care “when in all the circumstances it is reasonable to do so”.

Justice Callinan thought government should be under a duty to act if it would be “irrational” to abstain.

Other justices, while emphasising the need for a “multi-faceted inquiry”, emphasised two factors that would ordinarily increase governmental exposure to liability. They were the existence of a specific risk of harm to particular individuals; and government “control” of a hazardous activity, physically or managerially.

Beyond that general guidance, it can perhaps be said that the Wallis Lake Oyster case illustrates the trend away from imposing liability too readily or with hindsight bias.

The mere fact that government has statutory powers that enable it to play a more active or interventionist role is not itself a reason for imposing an actionable duty to do so.

The policy choices made by government, about where to spend money and how much to spend, and whether to opt for industry self-regulation, are also important limiting factors.

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