The Civil Justice System an

Marlene Sharp worked as a bar attendant at the Port Kembla Hotel. She later worked at the local RSL club. Although not a smoker, in the course of her employment for over two decades she was subjected to the cigarette smoke of others. She is now 62.

New South Wales pubs and clubs, like those in other States, are notorious for the levels of cigarette smoke. They are amongst the last bastions of smoke filled environments in which workers and members of the public are exposed to the risk of serious personal injury.

Hotel and club owners have failed to take action for fear of losing business. Profit is regarded as a higher priority than the health and welfare of employees and members of the public. Unions whose members are exposed to harm have also failed to take effective action. Jobs have often been regarded as a higher priority than the health of those employed. Successive governments have failed to take action. Vigorous lobbying efforts by industry associations and the tobacco industry have thwarted proposed bans or restrictions.

Fortunately, Marlene Sharp did not fail to take action. While getting ready for work at the RSL club one morning in May 1995 she noticed a small lump on her neck. Further investigation revealed that it was a malignant tumour in the

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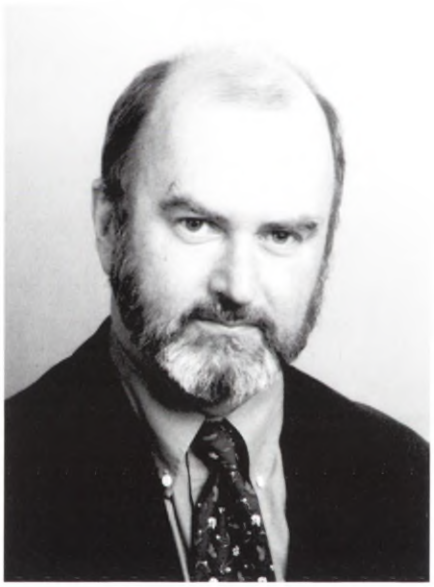

second stage. The primary cancer was located in August 1995 in her throat. She underwent major surgery at the end of August 1995 to save her life. Mrs Sharp has not worked since that operation. She continues to have difficulty swallowing and has an increased risk of contracting secondary cancer. Her injuries are a result of the failure of her employers, her union and successive State governments to take action to prevent such injuries. Her last resort was the civil justice system.

She commenced proceedings in the New South Wales Supreme Court on 5 September 1996. She subsequently entered into a settlement agreement with the hotel. The remaining defendant, the Port Kembla RSL club, through its insurers and the WorkCover Authority of New South Wales resolved to fight her claim. Marlene Sharp was prepared to settle her claim against both defendants in May 1998 for $210,000. The WorkCover Authority refused to settle. Prior to the trial it was proposed that settlement should be considered at a settlement conference. The RSL club refused to attend.

Rather than paying a modest amount of money to settle her claim, the insurers and the WorkCover Authority resolved to spend substantial funds to defeat her in court. A small army of lawyers was deployed. Senior counsel was sent to the United States. Expensive witnesses from the United States, with a long and lucrative association with the tobacco industry, were engaged by the defendant. Two of them, Professor Schwartz and Professor Witorsch from Washington DC, admitted in evidence that in the past they had been paid large amounts of money by the tobacco industry to give evidence about environmental tobacco smoke. They agreed that they had been flown around the United States and around the world with expenses paid by the tobacco industry to give evidence to various regulatory bodies about passive smoking and its effects on human health.

Professor Schwartz, one of the defence experts, agreed that in the past he had become part of a global strategy by the tobacco companies on environmental tobacco smoke to set up teams of scientists in various countries to review scientific literature and carry out work on environmental tobacco smoke to keep controversy about it alive.

Professor Witorsch, another defence expert, admitted during cross examination that he could not name one respected scientific medical organisation which did not receive funding from the tobacco industry which agreed with his position on environmental tobacco smoke and its effects on human health.

PETER CASHMAN
APLA NATIONAL PRESIDENT

Prevention of Injury

The defendant's lawyers made it clear that settlement was out of the question. It was no doubt hoped that Marlene Sharp would either give up or be unable to afford the cost of taking the matter through to trial. In defending the case, the defendant appeared to have had the assistance of lawyers acting for the tobacco industry.

Marlene Sharp's fate was determined by four members of the New South Wales public. A jury was empanelled and the trial commenced on 12 March this year. The trial lasted two months.

Marlene Sharp was fortunate to have been represented by several APLA members, including her solicitor Miki Milicevic and former APLA National President, Peter Semmler QC. They were prepared to conduct her case on the basis that they would only be paid if she succeeded in recovering damages.

There had never been a successful case, anywhere in the world, brought by someone who suffered cancer as a result of passive smoking. Although the first successfully litigated passive smoking case was in Australia (*Scholem v New South Wales Department of Health*), the plaintiff in that case did not have cancer. The first second-hand smoke trial in the United States was determined only last month. In that case a Miami jury refused to award damages to a former TWA flight attendant for injuries alleged to have been caused by passive smoking.

Undeterred, Marlene Sharp and her legal team continued their legal battle in the New South Wales Supreme Court. At 12.50pm on 2 May 2001 the jury returned its verdict. The defendant was found liable and ordered to pay Marlene Sharp $466,000 in damages. This was more then twice the amount she had offered to accept more than three years ago before the trial. After deduction of the amount she had received pursuant to the earlier settlement, she still received more in damages from the second defendant than she had previously offered to accept from both defendants. The defendant was ordered to pay her costs.

"The prospect of further litigation is driving the reform initiative."

The case is important for a number of reasons. First, it is the first successful passive smoking cancer case in the world. It has been on the front page of newspapers all over the world. More importantly, the landmark decision is likely to lead to a ban on smoking in hotels and clubs. The union has now been galvanised into further action. The employers' industry association has called on all 14,000 registered clubs in New South Wales to act immediately in order to avoid tougher laws and bans. The prospect of further litigation is driving the reform initiative. The New South Wales Government Health Minister, Craig Knowles, has stated that bans are "inevitable".

Concurrently with these developments the New South Wales WorkCover Authority is aiding and abetting proposals to take away the rights of workers who are injured in the course of employment. Political concern has arisen out of an alleged $2 billion deficit. Greedy plaintiffs' lawyers and fraudulent plaintiffs are being blamed for the escalation in compensation costs and payouts.

The reality is that all too often, defendants and their insurers refuse to settle meritorious claims like those of Marlene Sharp. All too often, legions of lawyers are deployed to defend claims and the plaintiffs' lawyers are blamed for the legal costs incurred. In the present case it is understood that the insurer and the defendant's lawyers recommended settlement but this was opposed by the WorkCover Authority. More worrying is the proposition that Marlene Sharp's case was vigorously defended, not just to defeat her claim, but to deter or prevent other similar claims in the future. While statutory authorities such as the WorkCover Authority of New South Wales have mounted expensive publicity campaigns focussing on accident and injury prevention, one can only speculate as to what the WorkCover Authority is now doing to accelerate the ban on smoking in hotels and clubs in New South Wales.

But for the persistence of a single plaintiff, with the assistance of plaintiff lawyers, and without the common sense of the four jury members, employees and members of the public would no doubt have continued to be exposed to the risk of serious injury well into the future. In this, as in many other areas, the rhetoric of prevention will only become a reality as a result of the civil justice system. PL