



# Cigarettes and cheeseburgers

By Jnana Gumbert

## Is fast food litigation the next big thing?

Cardio-vascular disease and lung cancer are two of the leading causes of death in Australia and other developed countries.<sup>1</sup> Both are known to be linked with lifestyle risk factors; namely, obesity and tobacco use respectively. Litigation against tobacco companies commenced very soon after the dangers of tobacco-smoking became a matter of public knowledge. >>

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**N**ow, perhaps inevitably, people who are suffering obesity-related illness are looking to the big fast-food manufacturers for compensation. The big question is the nature and extent of the duty of care owed by fast food manufacturers to consumers of their products, and the extent to which this is offset by the popular concept of 'personal responsibility'. Much can be gleaned from the tobacco litigation that has already transpired.

### TOBACCO LITIGATION

The US has paved the way in litigation relating to chronic diseases. The first major targets for this litigation were the tobacco companies. The first two 'waves' of tobacco litigation in the US, in the 1950s and 1980s, were unsuccessful for plaintiffs.<sup>2</sup> Back then, the public was only just starting to become aware of the dangers of cigarette-smoking, and juries found that tobacco companies were not liable, as they couldn't have foreseen the adverse health implications that would arise from smoking.<sup>3</sup>

In 1964, when the Report to the Surgeon General on Smoking<sup>4</sup> was released, the link between tobacco-smoking and certain chronic diseases was finally widely accepted. Developing public awareness of the dangers of smoking gave rise to an associated sentiment that smokers were the authors of their own misfortune.<sup>5</sup> Cases brought in the following few decades were also unsuccessful.

Recently the pendulum has swung back the other way, largely because leaked documents indicated that the tobacco companies had known about the harmful effects of cigarette-smoking since the at least the 1960s, if not earlier, and had concealed their knowledge of these dangers.<sup>6</sup> In contrast to the former public attitude, smokers could now be viewed as victims of an industry that knowingly dealt in addiction.<sup>7</sup>

The revelations emerging from the leaked documentation have led to cases being brought in negligence, but also on other bases including product liability for defective warnings, fraud and intentional misrepresentations.<sup>8</sup> This latest round of litigation has resulted in some resounding successes for individual plaintiffs and large class actions.

Australia has been relatively slow to follow the US in terms of litigation aimed at industries that contribute to chronic disease. The Cancer Council has attributed this to a number of factors, including the different procedures in Australia (particularly the 'loser pays' principle for court proceedings); the disincentive for lawyers to take on novel and complex litigation due to the inability to charge a percentage fee; and the restricted availability of large punitive damages awards in Australia.<sup>9</sup> Suffice to say, the litigation brought in Australia to date has not enjoyed the same success as some of the US litigation.

In 2002, Rolah McCabe became the first Australian (and

indeed, the first non-American person) to bring a successful claim against a tobacco company,<sup>10</sup> in the now infamous case of *McCabe v British American Tobacco Australia Services Ltd.*<sup>11</sup> Mrs McCabe was a long-term smoker who, at the time of the trial, was 52 and dying of lung cancer. The bases for Mrs McCabe's claim were similar to the grounds for the claims in the third wave of the American tobacco litigation. In particular, she alleged that the tobacco industry knew that cigarettes were dangerous and addictive and that, despite this knowledge, it not only failed to take reasonable steps to reduce the risk to consumers, but actively marketed to children.<sup>12</sup>

Evidence emerged that the defendant had deliberately destroyed relevant documents, and the trial judge found that this was done with the intention of denying Mrs McCabe a fair trial.<sup>13</sup> On this basis, the judge held that the plaintiff had suffered incurable prejudice and that the defence must be struck out. Accordingly, a verdict was entered for the plaintiff and she was awarded damages of just under

\$700,000.<sup>14</sup> On appeal, the Victorian Court of Appeal overturned the trial judge's decision on the basis that many of the documents admitted by the trial judge into evidence were subject to privilege and confidentiality claims.<sup>15</sup> However, further documentation has since been leaked that may defeat British American

McDonalds' decision to publish nutritional information and offer healthier menu options demonstrates the effectiveness of the deterrence principle.

Tobacco Australia's privilege and confidentiality claims, allowing the McCabe case to be re-pleaded and re-started.<sup>16</sup>

There have not yet been any successful class action lawsuits in Australia regarding tobacco-related disease. In 2004, the NSW Supreme Court refused to allow a plaintiff to bring a class action against Phillip Morris Limited.<sup>17</sup> The lawyers involved in the case expressed the view that the decision effectively ruled out the possibility of further class actions against tobacco companies in Australia.<sup>18</sup>

The Australian litigation involving harm suffered by smokers is still in its very early stages, and is yet to find a resonance with the general public. However, other litigation, and threatened litigation, relating to cigarettes and smoking have been quite successful.

In 2005, the Australian Competition and Consumer Commission (ACCC) threatened to take legal action under the *Trade Practices Act 1974* (Cth) against Phillip Morris (Australia) Limited, British American Tobacco Limited and Imperial Tobacco Australia Limited, in relation to those companies' use of misleading terms such as 'light' and 'mild' to describe cigarettes.<sup>19</sup> Research indicated that smokers believed that such terms meant that cigarettes so marked were a 'healthier' choice than regular cigarettes, when in fact the evidence showed that this was not the case.<sup>20</sup> The case was eventually settled before it was even litigated, with the

ACCC agreeing that it would not litigate in exchange for undertakings provided by the tobacco companies that they would cease using the misleading terms and would also fund a \$9 million advertising campaign to inform the public that those terms had been misleading.<sup>21</sup>

Several successful cases have also been brought by plaintiffs who developed chronic illnesses as a result of exposure to second-hand smoke. In 1992, Ms Scholem successfully sued her employer for health conditions that she sustained as a result of being exposed to passive smoking in her work environment.<sup>22</sup> Her case was the first passive smoking case in the world to be successful.<sup>23</sup> In 1996, Marlene Sharp brought a successful action against two of her employers for their failure to take reasonable care to protect her from inhaling second-hand smoke during her employment as a bar attendant at a hotel and RSL club, which resulted in her developing cancer.<sup>24</sup>

**IS THERE A FUTURE FOR FAST FOOD LITIGATION?**

The litigation against fast food companies for the health problems associated with obesity is still in its infancy, and in many ways can probably be compared to the first wave of tobacco litigation in the 1950s. The major difficulty for plaintiffs is the public perception that people should take personal responsibility for their eating habits, and this has made obesity-related litigation politically unpopular.<sup>25</sup> This view is well encapsulated by Congressman Sensenbrenner, chairman of the United States Congress Judiciary Committee, who has been quoted as saying, *'Don't run off and file a lawsuit if you are fat... Look in the mirror, because you're the one to blame.'*<sup>26</sup>

Again, the US is leading the way when it comes to obesity-related law-suits. The first major case was filed by Caesar Barber against McDonalds, Burger King, Wendy's and Kentucky Fried Chicken.<sup>27</sup> Mr Barber, who was 56 at the time and weighed 270 pounds, alleged that he had become obese, and developed obesity-related health problems, as a result of eating the defendant's food. However, the case was viewed very dimly by the public and, as a result, his lawyers decided to put the case on hold and to use a different case.<sup>28</sup>

The new test case, *Pelman v McDonalds*,<sup>29</sup> was brought by children who alleged that they had sustained health problems as a result of becoming obese from eating McDonalds' food. The claim was initially brought on a number of bases which were eventually narrowed to two main points: that McDonalds had failed to warn consumers of the danger posed by its food, and that it had breached the state consumer protection laws by engaging in fraudulent and deceptive conduct.<sup>30</sup> Further revision saw the failure to warn allegation withdrawn, and the court found that the plaintiffs had not successfully proved the remaining allegation of breach of the consumer protection laws.<sup>31</sup>

Even though the case was not successful, McDonalds changed a number of its practices very shortly after the case, including making nutritional information more widely available and adding healthier options to its menu.<sup>32</sup>


The plaintiffs in *Pelman* may have had more success had they maintained the negligence claim based on a failure to

warn. The thrust of this argument is that the foods are so processed and have so many additives that the end result is fundamentally different from what the reasonable person would expect from 'food' and that McDonalds therefore had a duty to warn consumers that the foods were potentially harmful to health.<sup>33</sup> As some commentators have noted:

*'Arguments emphasising the synthetic nature of McDonald's food appeared to have hit the mark in Pelman: the judge analogised McDonald's products to genetically engineered food and suggested that consumers are not well positioned to understand the health impacts of such complex products.'*<sup>34</sup>

This suggests that future litigation regarding obesity would have a greater chance of being successful if claims are brought on the basis of a breach of duty of care for failure to warn. There may also be scope for litigation to be brought for breach of consumer protection laws, even though the *Pelman* plaintiffs were not successful in this regard. The success of these 'breach of statutory obligation' claims would depend on the particular provisions of the consumer protection laws in the jurisdiction where the claims were being brought.

Critics of obesity litigation say that it is 'frivolous' litigation, and that it should never, and will never, succeed. Critics argue that there are considerable differences between tobacco and food, primarily because there are no health benefits from smoking; by contrast, there is no safe way to >>



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abstain from food.<sup>35</sup> The most widely cited problem with obesity litigation is that of causation, as there are often a myriad of different influences and lifestyle factors that can lead to obesity.

Academics have tended to point to causation as 'the most formidable hurdle for fast food plaintiffs'.<sup>36</sup> Some have suggested that, in order to establish causation, plaintiffs will have to satisfy a three-limbed test, namely:<sup>37</sup>

1. They must prove that the defendant's food was a substantial factor in their obesity.
2. They must prove a link between obesity and the specific health condition that is claimed.
3. They must prove that if appropriate warnings had been given, they would have avoided the food that caused their ill-health.

On the other hand, believers in the future of obesity lawsuits draw clear connections between the obesity litigation and tobacco litigation. Some have commented that those who do not believe that obesity litigation has a future have not truly understood the lessons from the tobacco litigation,<sup>38</sup> and have pointed to the fact that it takes the juries, and the public, time to accept new ideas and concepts.<sup>39</sup>

Despite the fact that the obesity litigation has not yet been successful in terms of receiving a favourable verdict from the courts, the commencement of some claims against fast food and snack food companies have yielded positive results without the need to proceed to a hearing. In 2003, a claim was brought against McDonalds and Kraft in relation to the use of trans fatty acids in their foods.<sup>40</sup> As a result of the mere filing of this lawsuit, McDonalds agreed to pay a total of \$8.5 million to the American Heart Association and to fund advertisements to notify consumers about the existence of trans fatty acids in its products, and Kraft agreed to significantly reduce or entirely remove trans fatty acids from its products.<sup>41</sup> Sometimes, 'the mere threat of litigation is enough to induce an industry to change its ways'.<sup>42</sup>

As yet, there have not been obesity-related cases in Australia but, if the US litigation is any indication, it will only be a matter of time before similar cases are brought here.

### LEGISLATIVE CHANGES: THE GOVERNMENT STRIKES BACK

Much recent legislation, both in Australia and internationally, has a strong flavour of 'personal responsibility'. The legislation that has been enacted under the banner of personal responsibility has had the effect of significantly curtailing the rights of injured persons. Chief Justice Spigelman has commented that:

'One of the clearest themes to emerge in recent Australian case law and legislation is the renewed emphasis on individuals taking responsibility for their own actions. There is a distinct retreat in Australian jurisprudence, as in a broad range of social policies, from the hitherto dominant relativism by which misconduct is to be explained and, generally excused, on the basis of difficulties experienced by a person in his or her upbringing or other social interaction.'<sup>43</sup>

In the US, legislation has been enacted in over 20 states limiting the exposure of fast food companies to obesity-related claims.<sup>44</sup> At a federal level, two similar personal responsibility bills were considered by Congress, although they were not passed. These were the so-called 'cheeseburger bills' – the *Personal Responsibility in Food Consumption Act* (2003),<sup>45</sup> and the *Commonsense Consumption Act* (2005).<sup>46</sup>

In Australia, all of the state and territory governments have introduced legislation to alter the common law position in relation to both liability and damages for tort litigation. In NSW, we have the *Civil Liability Act 2002*. The Act has the double effect of both limiting liability for tortious conduct and limiting the damages that can be recovered. The majority of the Act specifically does not apply to tobacco-related claims,<sup>47</sup> but there is nothing to exclude its application for claims relating to other chronic illnesses.

Of great significance are the provisions regarding 'obvious risk' in the *Civil Liability Act 2002* (CLA). It provides that injured persons are presumed to be aware of obvious risks,<sup>48</sup> which are defined as risks that would have been obvious to a reasonable person, including risks that are a matter of common knowledge.<sup>49</sup> Further, there is no duty on potential defendants to warn of obvious risks.<sup>50</sup> These provisions could prove to be fatal to obesity claims, unless plaintiffs can show that the food that is complained of was so substantially different from normal food that a reasonable person could not have been aware of the risk of eating it.

At around the same time that the CLA was being introduced, the *Trade Practices Act 1974* (TPA) was also amended in ways that significantly impact on the ability of potential plaintiffs to claim for chronic illnesses brought about by dangerous products. These amendments do not affect tobacco litigation, as the TPA contains specific exceptions for tobacco-related claims.<sup>51</sup> There are no exceptions, however, for claims regarding other chronic illnesses such as obesity-related illnesses.

Perhaps the most significant of the changes to the TPA was that the right to bring a claim for personal injury or death due to misleading and deceptive conduct was removed.<sup>52</sup> Consumer protection provisions, including misleading and deceptive conduct, have been an important feature of the US tobacco and obesity litigation. Denying plaintiffs the option of claiming for misleading and deceptive conduct will most likely limit the potential for litigation to be successful. Furthermore, the Act was also amended to include restrictions to damages that can be claimed in personal injury matters, along similar lines to the provisions in the CLA.<sup>53</sup>

One of the other major amendments to the TPA was to create a 'long-stop' period of limitation of 12 years from the date of the act or omission that causes an injury, unless extended by the court.<sup>54</sup> The Act also prohibits the court from extending the limitation period for more than three years after the date of discoverability of the cause of action.<sup>55</sup> These changes to the TPA could restrict much potential litigation for chronic illnesses, as often the initial acts or omissions happen many years before the claim is brought, and the restrictions on causes of action and damages would also make some cases less viable.

Given the paucity of litigation in Australia for chronic diseases, and the relatively recent introduction of the CLA and the amendments to the TPA, it is probably too soon to draw any firm conclusions regarding the impact that the legislation will have on litigation.

**CONCLUSION**

The 'cheeseburger bills' and other such restrictive legislation have the potential to quash all litigation for obesity-related illness before it even takes its first steps. Perhaps, in years to come, there will be revelations about the fast food industry that will change the public perception of obesity-related claims in much the same way as public perception to tobacco claims altered dramatically in recent times. If this is the case, then there may be the prospect for claims against fast food companies to succeed. However, the future of fast food litigation is at this stage uncertain. ■

**Notes:** **1** Australian Institute of Health & Welfare (AIHW), *Australia's Health 2004*. **2** S Sugarman, 'Mixed results from recent United States tobacco litigation' (2002) 10 *Tort L Rev* 94, p95. **3** 304 F.2d 70 (5<sup>th</sup> Cir. 1962). **4** US Department of Health, Education and Welfare, *Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964). **5** FE Crawford, 'Fit for its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability', *Ohio State Law Journal*, Vol 63: 1165 (2002), p6. **6** TS Player, 'After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation', 49 *SCL Rev.* 311 (1998), p322. **7** Crawford, above Note 5, p9. **8** Sugarman, above Note 2, p97. **9** Cancer Council, *Tobacco in Australia: Facts and Issues*, 3<sup>rd</sup> Ed, available electronically at <http://www.tobaccoinaustralia.org.au>, p12. **10** See A Keenan, 'Cancer Files Destroyed – Judge Condemns Tobacco Giant in Historic Payout' *The Australian*, 12 April 2002 at 1; J Liberman, and B Loff, 'Australian Court Rules Against Tobacco Company in Lung-Cancer Case' (2002) 359(9317), *The Lancet*, 1586. **11** *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73. **12** L Cameron, 'McCabe v Goliath: The Case Against British American Tobacco Australia Services Ltd' *University of Queensland Law Journal*, 22(1) 2002: 124-8 at p124. **13** *McCabe v BATAS*, above Note 11 at 385. **14** R Ackland, 'Rolah McCabe strikes back from the grave' *Sydney Morning Herald*, 24 April 2009. **15** *British American Tobacco Australia Services Limited v Cowell* (as representing the estate of Rolah Ann McCabe, deceased) [20002] VSCA 197 (6 December 2002). **16** *Ibid*. **17** *Myriam Cauvin v Phillip Morris Limited* (ACN 004 694 428) & Ors [2004] NSWSC 644. **18** M Vincent, 'Class action against tobacco companies thrown out', *The World Today*, Friday 24 September 2004 at 12:46:00. **19** Cancer Council, above Note 9, p14. **20** S Durkin, and D Germain, 'Light' and 'mild' smokers, 2004' *CBRC Research Memorandum for Quit Victoria, Centre for Behavioural Research in Cancer, The Cancer Council Victoria*, 22 February 2005. **21** The undertakings can be accessed online: <http://www.accc.gov.au/content/index.phtml/itemid/683582> (British American Tobacco), <http://www.accc.gov.au/index/phtml/itemid/683563> (Phillip Morris), <http://www.accc.gov.au/phtml/itemid/713957> (Imperial Tobacco). **22** *Scholem v NSW Department of Health*, NSW District Court, Sydney, 27 May 1992. **23** P Cashman, 'The Civil Justice System' *Plaintiff*, June 2001, p6. **24** *Sharp v Stephen Guinery t/as Port Kembla Hotel & Port Kembla RSL Club* [2001] NSWSC 336. **25** LO Gostin, 'Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity', *Journal of the American Medical Association* (2007) Vol 297:1, 87 at p87. **26** C Hulse, 'Vote in House Offers A Shield for Restaurants in Obesity Suits' *New York Times*, 11 March 2004. **27** *Barber v McDonalds Corp*, No. 23145/2002 NY Sup Ct filed 13 July 2002. **28** TH Frank, 'A Taxonomy of Obesity Litigation' *UALR Law Review*, Vol. 28:427, p434. **29** *Pelman v McDonalds Corp*, 237 F.Supp. 2d 512,519 (SDNY 2003). (*Pelman I*). **30** *Ibid* at p3.

**31** *Pelman v McDonalds Corp* 396 F.3d 508 (2d Cir. 2005) (*Pelman III*). **32** *Ibid* at p5. **33** Mello et al, 'The McLawsuit: the Fast-Food Industry and Legal Accountability for Obesity' (2003), 22 *Health Affairs* 2-7, p3. **34** *Ibid* at p3. **35** JP McMEnamin, and AD Tiglio, 'Not the Next Tobacco: Defence to Obesity Claims', *Food and Drug Law Journal*, Vol. 61, No. 3, 2006, 445 at 446. **36** Mello et al, above Note 33, p4. **37** *Ibid*. **38** Crawford, above Note 5, p1. **39** *Ibid*. **40** K Severson, 'SF Lawyer Plans to Drop Oreo Suit', *The San Francisco Chronicle*, 15 May 2003, A3. **41** See S Joseph, 'Plaintiff's Press Release on Settlement of McDonald's Trans Fat Litigation', 11 February 2005 at <http://www.bantransfats.com/mcdonalds.html>, last accessed 4 June 2009. **42** J Alderman, and RA Daynard, 'Applying Lessons from Tobacco Litigation to Obesity Lawsuits', *Am J Prev Med* 2006:30(1) 82, p85. **43** J Spigelman, 'Tort law reform: An overview' (2006), 14 *Tort L Rev* 5, p8. **44** JG Hodge et al, 'Legal theme concerning obesity regulation in the United States: Theory and practice', *Australia and New Zealand Health Policy* (2008) 5:14, p3. **45** See US House Resolution 339, 109th Cong, 2 Sess 2003, and *Commonsense Consumption Act*. This Act was not passed by the Senate: US Senate 1428, 108th Cong 1st Sess 2003. **46** See US House Resolution 554, 109th Cong, 1st Sess 2005. This Act was not passed by the Senate: US Senate 908, 109th Cong, 1st Sess 2005. **47** *Civil Liability Act 2002* (NSW), s3B(c). **48** *Ibid*, s5G. **49** *Ibid*, s5F. **50** *Ibid*, s5H. **51** *Trade Practices Act 1974* (Cth), ss82, 87, 87D, 87E. **52** *Ibid*, s82. **53** *Ibid*, Part VIB. **54** *Ibid*, s87H(1). **55** *Ibid*, s87H(2).

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