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# BRIEF

## National Product Liability Association

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# PRODUCT LIABILITY OF A DIFFERENT KIND

## INSIDE MELBOURNE'S UNDERWORLD WARS

Come hear the keynote address of  
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# ACTIONS AGAINST FAST FOOD COMPANIES UNDER AUSTRALIAN PRODUCT LIABILITY LAW

DAVID MCCREDIE, PARTNER, AND ALEXANDRA SKELLET, ASSOCIATE,  
BAKER & MCKENZIE

Actions against food companies, by people who claim those companies' products have made them obese and unhealthy, are looming as the next mass tort in the United States.

Some actions of this type have already been commenced as the plaintiffs' lawyers who pioneered and sought to profit from tobacco litigation in that country's search for the next wave of fruitful product liability litigation.<sup>1</sup> "Big Tobacco", "Big Guns" and "Big Asbestos" have all had, and continue to have, their day before the courts, with mixed results. Will "Big Food", or "Big Fat" as some commentators have labelled it, be next?

The prospect of consumers successfully suing the manufacturers of the food they choose to eat might sound far-fetched. Opinion on the chances of success of such claims in the United States has generally been divided into two camps – some scoff at the possibility, while others consider that such claims have merit and that Big Food should be held accountable. There is survey evidence that potential jurors in the United States "are about as likely to vote for plaintiffs in obesity law suits as they are to support smokers suing tobacco companies, even before hearing any evidence..."<sup>2</sup>

In this article we analyse some of the recent litigation against fast food companies in the United States, including arguably the highest profile "food liability" claim brought to date – *Pelman v McDonald's Corporation*<sup>3</sup> – and then consider whether mass *Pelman*-type fast food claims are likely to be successful if brought in Australia.

## "FOOD LIABILITY" CLAIMS IN THE UNITED STATES

Proceedings commenced against the fast food giants in the United States in recent years have made news headlines around the world.

In *Barber v McDonald's Corporation et al*<sup>4</sup>, attorney Samuel Hirsch filed a putative class-action complaint against McDonald's, Burger King, Wendy's and Kentucky Fried Chicken on behalf of millions of Americans who claim to have consumed the defendants' products and "have become obese, overweight, developed diabetes, coronary heart diseases, high blood pressure, elevated cholesterol levels, and/or other detrimental and adverse health effects and/or diseases."<sup>5</sup> The specific claims included negligent distribution, failure to warn, deceptive marketing and sales practices and false advertising. Lead plaintiff Caesar Barber claimed that he ate fast food because the restaurants deceived him into believing it was healthy and because he never knew that the food contained saturated fat, salt or sugar.<sup>6</sup> This case is currently dormant.

In *Pelman v McDonald's Corporation*, Hirsch filed a second putative class-action suit, this time on behalf of two overweight teenagers and naming only McDonald's as defendant. The allegations in *Pelman* mirrored those in *Barber* and are discussed in greater detail below.

McDonald's and Burger King were also at the centre of a claim brought on 3 September 2002 by the Council for Education and Research on Toxic (CERT), a public interest group in California, alleging that their cooking of French fries causes the carcinogenic chemical by-product acrylamide.

<sup>1</sup> Heller, E., "Fat Suit" weighs in: Mac headed down tobacco road", *The National Law Journal*, 11 December 2002, [www.banzhaf.net/obesity](http://www.banzhaf.net/obesity), (last viewed on 16 March 2004); Buchholz, T., "Burger, Fries and Lawyers: The Beef behind obesity lawsuits", conducted for the US Chamber of Commerce and the US Chamber Institute for Legal Reform, 2 July 2003.

<sup>2</sup> "Jurors will hold fast food companies liable for obesity – surveys support for plaintiffs same in obesity and tobacco cases", [www.banzhaf.net/obesitylinks](http://www.banzhaf.net/obesitylinks) (last viewed on 22 February 2004).

<sup>3</sup> 02 Civ. 7821 (RWS).

<sup>4</sup> In the Supreme Court of New York, Index #23145 of 2002.

<sup>5</sup> *Caesar Barber v McDonald's Corporation et al*, Verified Complaint, 24 July 2003 at 1.

<sup>6</sup> Campbell, D. and Stypinski, J., "Fast Food Litigation: Will 'Fat Fraud' become the next tobacco?", 3 *IADC Newsletter*, November 2002 at 2.

Under Californian law, any person is entitled to sue in the public interest to enforce Proposition 65, which requires the Governor to publish a list of chemicals that are known to cause cancer. Acrylamide was added to the list of cancer-causing chemicals on 1 January 1990. A company with ten or more employees that sells products in California must comply with Proposition 65 by providing a "clear and reasonable warning before knowingly and intentionally exposing anyone to a listed chemical".<sup>8</sup>

In another case, *Penelope Block et al v McDonald's Corporation*<sup>9</sup>, McDonald's admitted that it deceived consumers into thinking that its French fries were entirely vegetarian when in fact they were cooked with natural beef flavour. McDonald's settled a class action for US\$10 million and apologised to Hindus, vegetarians and others for this "confusion".<sup>10</sup>

Whilst fast food restaurant chains have been the primary focus of the recent litigation activity, there are indications that snack food manufacturers might also be targeted. In May 2003, Kraft Foods was the subject of a lawsuit by a San Francisco lawyer who wanted to block Kraft from selling Oreo cookies to children because the cookies contain trans fats which exist in hydrogenated oil.<sup>11</sup> Although the lawyer soon dropped the suit, claiming that the publicity generated by the case had raised awareness of trans fats, Kraft has in any event announced that it is putting a limit on the portion size of servings and is eliminating all marketing at schools.<sup>12</sup>

## GOVERNMENT REACTION

A recent study in the United States by the Centers for Disease Control and Prevention found that obesity could soon overtake smoking as the leading cause of preventable death in the United States.<sup>13</sup> Alarming statistics such as this, combined with the spate of fast food lawsuits in the United States,

have sparked debate as to who really is to blame for the obesity epidemic that is sweeping the globe. On one side of the argument, advocates in favour of cases such as *Pelman* argue that fast food manufacturers should be held accountable for supplying unhealthy food to the public. On the other side, however, are those who consider that the debate is really about personal responsibility and choice.

On 10 March 2004, the Republican-controlled United States House of Representatives voted 276-139 in favour of the *Personal Responsibility in Food Consumption Act*, informally known as the "Cheeseburger Bill". The future of this bill is uncertain, however, as Democrats in the Senate have said that the fast food industry does not need such protection. If this bill becomes law, it would shield restaurants and food producers from obesity or weight-related claims. The food industry would, however, remain liable for claims based on tainted food or misleading or false advertising about products.<sup>14</sup>

Republicans have said that food manufacturers should not be held liable for injury resulting from a person's consumption of legal, unadulterated food. There is also concern that such lawsuits could bankrupt an industry that employs almost 12 million people in the United States.<sup>15</sup> Democrats and other opponents have argued in reply that the bill is against consumer interests and that the judicial system should be trusted to dismiss frivolous lawsuits.<sup>16</sup>

It is not just in the United States that the fast food-obesity debate is receiving attention from government and the food industry. In the United Kingdom, Prime Minister Blair's government has called for a "fat tax" on hamburgers, chips, soft drinks, butter and whole milk.<sup>17</sup> It is also seeking to ban fast food advertisements being shown on television during children's programs.<sup>18</sup> And in

<sup>7</sup> Heller, E., see above n 1.

<sup>8</sup> "French fries", *City News Service*, September 5, 2002; Cohan, J., "Obesity, public policy, and tort claims against fast-food companies", 12 *Widener Law Journal* 103 at 122-126.

<sup>9</sup> In the Circuit Court of Cook County, Illinois, County Department, Chancery Division, 01 CH 9137.

<sup>10</sup> Heller, E., see above n 1; "McDonald's apologizes: fast-food chain 'regrets confusion' about beef flavoring in French fries", <http://money.cnn.com/2001/05/24/news/mcdonalds/> (last viewed 15 March 2004).

<sup>11</sup> Langley, A., "It's a fat world, after all", *New York Times*, 20 July 2003 at 1.

<sup>12</sup> Shoebriidge, N., "Too Crafty", *Business Review Weekly*, 17 July 2003 at 61.

<sup>13</sup> Centers for Disease Control and Prevention, "Physical inactivity and poor nutrition catching up to tobacco as actual cause of death", <http://www.cdc.gov/od/media/pressrel/fs040309.htm> (last viewed on 13 March 2004); Lee, C., "Fast-food chains get a break today; bill would prohibit lawsuits over obesity", *The Washington Post*, 11 March 2004 at A02.

<sup>14</sup> Munoz, S., "Curb than hunger for obesity suits", *The Wall Street Journal*, 28 January 2004 at D4.

<sup>15</sup> Holland, J., "House votes to ban fast-food lawsuits; Legislators say fat is public's fault", *Chicago Tribune*, 11 March 2004 at 15; Griffith, S., "House passes 'Cheeseburger Bill' shielding restaurants from obesity lawsuits", *Agence France Presse*, 11 March 2004.

<sup>16</sup> Holland, J., "Fat chance to sue food chains in cheeseburger bill", *Sydney Morning Herald*, 6-7 March 2004 at 15.

<sup>17</sup> Charter, D., "Blair spits chips with fat tax plan", *The Australian*, 20 February 2004 at 7.

<sup>18</sup> Wood, M., "Ad bans on fast food too much to stomach", *The Sun-Herald*, 6 June 2004 at 59. Currently the Australian Federal Government is opposed to regulating television advertising in this way: see Stevenson, A., "Why onion rings are like smoke rings", *The Sydney Morning Herald*, 5-6 June 2004 at 32.

France, McDonald's has warned children not to eat in their restaurants more than once a week.<sup>19</sup>

## PELMAN V MCDONALD'S CORPORATION

Of all the "food liability" cases commenced to date, *Pelman* has arguably received the greatest media attention. A review of judgments delivered in the case by US District Court Judge Robert Sweet provides a useful, albeit preliminary, insight into the way plaintiffs' lawyers may seek to frame their actions against fast food companies.

On 22 August 2002, two overweight teenagers commenced proceedings in the State Supreme Court of New York, Bronx County. For jurisdictional reasons, the action was subsequently removed to the United States District Court in the Southern District of New York. The two plaintiffs made the following categories of allegations in seeking to hold McDonald's liable for their obesity and related illnesses:

- (a) that McDonald's failed to adequately disclose the ingredients and/or health effects of ingesting certain of their food products with high levels of cholesterol, fat, salt and sugar, described their food as nutritious, and engaged in marketing to entice consumers to purchase "value meals" without disclosing the detrimental health effects thereof;
- (b) that McDonald's marketing techniques were directed towards inducing children to purchase and consume its food products;
- (c) that McDonald's was negligent in selling food products that are high in cholesterol, fat, salt and sugar when studies show that such foods cause obesity and detrimental health effects;
- (d) that McDonald's failed to warn consumers of its products of the ingredients, quantities and levels of cholesterol, fat, salt and sugar in those products and failed to warn that a diet high in cholesterol, fat, salt and sugar could lead to obesity and other health problems; and
- (e) that McDonald's was negligent in marketing food products that were physically and psychologically addictive.<sup>20</sup>

The causes of action asserted by the plaintiffs were:

- (a) deceptive acts or practices and false advertising in contravention of sections 359 and 350 of the New York *Consumer Protection Act*. Section 349 makes unlawful "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this State". Section 350 prohibits "false advertising in the conduct of any business".<sup>21</sup> The plaintiffs alleged that McDonald's deceptively advertised its food as not unhealthy and failed to provide consumers with nutritional information, and induced minors to eat at McDonald's through deceptive marketing ploys;
- (b) negligently selling inherently dangerous products. The plaintiffs alleged that McDonald's products are inherently dangerous because of the inclusion of high levels of cholesterol, fat, salt and sugar. They further alleged that McDonald's products have been processed to the point where they have become completely different and more dangerous than other products they resemble and that a reasonable consumer would expect, and that McDonald's should be aware that consumers misuse its products by eating in larger quantities or at greater frequencies than is healthy;
- (c) negligently failing to warn of the unhealthy nature of its products; and
- (d) negligently failing to warn consumers that its products are addictive. In this regard it is interesting to note that comparisons have been made between tobacco and fast food litigation, with the obvious difference being that there is, at present, no scientific evidence that fast food is chemically addictive in the same way as plaintiffs have asserted that the nicotine in tobacco is addictive.<sup>22</sup>

McDonald's moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*. This Rule provides for dismissal of complaints but only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief.

<sup>19</sup> "McDonald's France says kids shouldn't eat their food more than once a week", [www.licenseenews.com/news/news101.html](http://www.licenseenews.com/news/news101.html) (last viewed 16 March 2004).

<sup>20</sup> *Pelman v McDonald's Corporation* 02 Civ. 7821 (RWS), Opinion of US District Court Judge Robert Sweet, 22 January 2003 at 11-12.

<sup>21</sup> *Ibid* at 42.

<sup>22</sup> Bucholz, T., see above n 1 at 19; Heller, E., see above n 1 at 3.

## First Opinion

US District Court Judge Robert Sweet delivered an opinion on McDonald's motion for dismissal on 22 January 2003. Given the nature of the motion, the opinion considers whether the Complaint was sufficiently pleaded to allow the case to proceed to trial. It does not provide an in-depth discussion of whether the causes of action, if properly pleaded, could be successful at trial.

Judge Sweet dismissed the Complaint in its entirety. Each of the four causes of action described above was struck out. First, the deceptive conduct and false advertising claim was struck out because:

- (a) the Complaint did not identify a single instance of a deceptive act of commission in violation of sections 349 and 350; and
- (b) to the extent the allegations of deceptive conduct were based on McDonald's failure to provide consumers with "nutritional" information about the content of its food, the allegations failed because they were allegations of deceptive conduct based on omissions, and under New York law, in order to prove that an omission is deceptive, it is necessary to prove that the information in question was solely within the defendant's possession or could not reasonably be obtained by a consumer. The plaintiffs failed to plead that the information as to nutritional content which McDonald's allegedly failed to provide was solely within McDonald's possession or could not reasonably have been obtained by a consumer.

Secondly, in order to succeed on the claim that McDonald's had negligently sold inherently dangerous products, the plaintiffs had to establish that McDonald's had a duty to warn the plaintiffs because the dangers of consuming its food were not within common knowledge. Thus, the plaintiffs had to allege either that the attributes of McDonald's products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public, or that the products are so extraordinarily unhealthy as to be dangerous in their intended use.

Judge Sweet held that the Complaint did not meet this test. While the Complaint did allege that McDonald's food contains high levels of cholesterol, fat, salt and sugar, and that the foods are therefore

unhealthy, it was held that this was already common knowledge about fast food in general. Judge Sweet said:

*"If a person knows or should know that eating copious orders of super sized McDonald's products is unhealthy and may result in weight gain (and its concomitant problems) because of the high levels of cholesterol, fat, salt and sugar, it is not the place of the law to protect them from their own excesses."*<sup>23</sup>

Judge Sweet also referred to principles of free choice and consumer knowledge:

*"As long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer. It is only when that free choice becomes but a chimera – for instance, by masking of information necessary to make the choice, such as the knowledge that eating McDonald's with a certain frequency would irrefragably cause harm, that manufacturers should be held accountable."*<sup>24</sup>

Further, the plaintiffs failed to allege a significant connection between their health problems and obesity and McDonald's. The Judge stated:

*"...in order to allege that McDonald's products were a significant factor in the plaintiffs' obesity and health problems, the Complaint must address ... other variables and, if possible, eliminate them or show that a McDiet is a substantial factor despite these other variables. Similarly, with regard to the plaintiffs' health problems that they claim resulted from their obesity (which they allege resulted from their McDonald's habits), it would be necessary to allege that such diseases were not merely hereditary or caused by environmental or other factors."*<sup>25</sup>

Accordingly these allegations were dismissed because of the plaintiffs' failure to plead that the alleged dangers of McDonald's products were not well-known, and their failure to plead with sufficient specificity that McDonald's products were a proximate cause of their obesity and health problems.

Thirdly, the allegation of negligently failing to warn of the unhealthy nature of McDonald's products was dismissed because the Complaint failed to

<sup>23</sup> *Pelman v McDonald's Corporation*, see above n 19 at 42.

<sup>24</sup> *Ibid* at 41.

<sup>25</sup> *Ibid* at 55.

plead that the products were dangerous in any way other than that which was open and obvious to a reasonable consumer. In addition, the Complaint did not plead with sufficient specificity that the plaintiffs' consumption of McDonald's products was a significant factor in their obesity and related health problems.

Fourthly, the allegation that McDonald's negligently failed to warn consumers that its products are addictive was held to be "insufficient as overly vague" because, for example, it did not specify whether it is the combination of fats and sugars that is allegedly addictive or whether there is some other additive that allegedly adduces addiction. Further, the plaintiffs did not allege that the addictive nature of McDonald's food and the plaintiffs' ingestion of it was a proximate cause of the plaintiffs' health problems. Accordingly these allegations were dismissed.

Although he struck out the Complaint in its entirety, Judge Sweet granted leave to the plaintiffs to file an Amended Complaint.<sup>26</sup>

#### Amended Complaint

On 19 February 2003, the plaintiffs filed an Amended Complaint alleging three causes of action based on sections 349 and 350 of the New York *Consumer Protection Act*:

- (a) that McDonald's misled the plaintiffs, through advertising campaigns and other publicity, that its food products were nutritious, of a beneficial nutritional nature or effect, and/or were easily part of a healthy lifestyle if consumed on a daily basis;
- (b) that McDonald's failed adequately to disclose the fact that certain of its foods were substantially less healthy, as a result of processing and ingredient additives, than represented by McDonald's in its advertising campaigns and other publicity; and
- (c) that McDonald's engaged in unfair and deceptive acts and practices by representing to the New York Attorney General and to New York consumers that it provides nutritional brochures and information at all of its stores when in fact such information was and is not adequately available to its plaintiffs at a significant number of McDonald's outlets.<sup>27</sup>

<sup>26</sup> *Ibid* at 63.

<sup>27</sup> *Pelman v McDonald's Corporation* 02 Civ. 7821 (RWS), Opinion of US District Court Judge Robert Sweet, 3 September 2003 at 7.

The plaintiffs alleged that as a result of these deceptive acts and practices, they have suffered damages including but not limited to an increased likelihood of the development of obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, related cancers, and/or detrimental and adverse health effects and/or diseases.

In their Amended Complaint, the plaintiffs also alleged as a fourth cause of action that McDonald's was negligent because of its failure to warn the plaintiffs of the dangers and adverse health effects of eating processed foods from McDonald's. However, this cause of action was dropped shortly before oral argument. Accordingly the case proceeded solely as an action under the New York *Consumer Protection Act*.

#### Second Opinion

The Amended Complaint fared no better than the original Complaint. On 3 September 2003, Judge Sweet dismissed the Amended Complaint.

First, his Honour found that the plaintiffs had failed to allege that the single advertising campaign on which they stated reliance was objectively deceptive; that is, that a reasonable consumer would have been misled by McDonald's conduct.<sup>28</sup>

Secondly, his Honour found that the plaintiffs failed to plead causation sufficiently. His Honour held that the plaintiffs failed to draw an adequate connection between their consumption of McDonald's food and their alleged injuries. Judge Sweet described this failure as follows:

*"... the plaintiffs should have included sufficient information about themselves to be able to draw a causal connection between the allegedly deceptive practices and the plaintiffs' obesity and related diseases. Information about the frequency with which the plaintiffs ate at McDonald's is helpful, but only begins to address the issue of causation. Other pertinent, but unanswered questions include: What else did the plaintiffs eat? How much did they exercise? Is there a family history of the diseases which are alleged to have been caused by McDonald's products? Without this additional information, McDonald's does not have sufficient information to determine if its foods are the cause of the plaintiffs' obesity, or if instead McDonald's food are only a contributing factor."*<sup>29</sup>

<sup>28</sup> *Ibid* at 30.

<sup>29</sup> *Ibid* at 28-29.

Accordingly, all claims in the plaintiffs' Amended Complaint were dismissed.

The failure of the amended claims in *Pelman* was due to defects in the pleadings. The remainder of this article discusses whether a properly pleaded claim in a case like *Pelman* could succeed under Australian law, and whether there is the potential for a wave of "food liability" claims to be brought in Australia.

We will only be discussing substantive heads of liability, and not procedural issues such as the potential for, and restrictions on, the use of class actions or representative proceedings as a vehicle for bringing actions against food manufacturers. That is a complex area and worthy of separate consideration on its own.

## HEADS OF LIABILITY UNDER AUSTRALIAN PRODUCT LIABILITY LAW

The heads of liability under which product liability claims are usually brought under Australian law are:

- (a) negligence;
- (b) breach of contract (implied warranties – the *Sale of Goods Act* and Part V Division 2 of the *Trade Practices Act 1974 (Cth)* ("TPA));
- (c) Part V Division 2A of the TPA (actions against manufacturers and importers of goods);
- (d) Part V Division 1 of the TPA (misleading and deceptive conduct and false or misleading representations); and
- (e) Part VA of the TPA (liability of manufacturers and importers for defective goods).

Some of the *Fair Trading Acts* of the various States and Territories contain equivalent provisions to the TPA provisions listed above. Our discussion in relation to the TPA provisions is equally applicable to the corresponding *Fair Trading Act* provisions. Thus, for the sake of conciseness, we have not included specific reference to or discussion of the *Fair Trading Act* provisions in this article.

### Negligence

In an action for negligence, the plaintiff must prove that:

- (a) the defendant owed the plaintiff a duty to take reasonable care;

- (b) the defendant breached that duty by failing to take reasonable care;
- (c) the defendant's breach of duty caused injury or damage to the plaintiff; and
- (d) the injury or damage was not too remote a consequence of the breach of duty.

### Duty of care

A defendant owes a duty of care if:

- (a) it is reasonably foreseeable that his or her conduct would cause loss or damage to a class of persons to which the plaintiff belongs; and
- (b) there is sufficient proximity in the relationship between the plaintiff and the defendant.

Establishing the existence of a duty of care is rarely problematic in product liability cases. In Australia, the common law provides that a manufacturer of products owes a duty to take reasonable care to those who may suffer loss or injury through use of the products. This means that a manufacturer ought reasonably have the purchaser or user in contemplation when considering the issues of design, manufacture, presentation and distribution of its products.

### Breach of duty

Once it has been established that the defendant owed the plaintiff a duty of care, the next step is to determine the standard of care required of the defendant and whether that standard has been breached. This is a question of fact in each case.

The standard of care is generally expressed according to an objective standard of the reasonable person of ordinary skill and capacity. Therefore, the duty of care will be breached if the defendant failed to do what a reasonable person would have done or did what a reasonable person would not have done. Considerations bearing on reasonable care include the magnitude of the risk and the degree of 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.<sup>30</sup>

Manufacturers are commonly required to warn about any dangers or risks associated with use of

<sup>30</sup> *The Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 per Mason J at 47-48; see also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 554 per Mason CJ, Deane J, Dawson J, Toohey J and Gaudron J and *Thompson v Johnson & Johnson Pty Ltd* [1991] 2 VR 449 at first instance per Vincent J at 469 and on appeal at 491.

their products. At common law, a manufacturer breaches its duty of care if it fails to warn persons who may be injured by using its product when the product has a dangerous characteristic of which consumers are not aware. Thus, there is a breach of duty where there is a failure to use labels, instructions or other warnings to alert consumers to any dangers inherent in a product which renders the product unsafe.

We consider that in Australia it would be difficult for a plaintiff in a case like *Pelman* to establish that a fast food company breached its duty of care. The magnitude of the risk of harm from consuming fast food products is arguably not high. A person will not suffer the kinds of health-related ailments alleged in *Pelman* if they consume a single fast food product. Nor will they suffer such ailments as a result of consuming 10 fast food meals. It is, arguably, only through prolonged frequent consumption of such foods and, usually, a combination of other factors such as lack of exercise, genetic predisposition and other dietary choices, that such ailments might materialise. Consequently, the degree of care that must be taken by fast food companies is not so great as it would be if there was a greater magnitude of risk.

In our view the argument that fast food companies' duty of care extends to a duty to warn consumers about eating their food is weak. The consuming public has known for a long time that fast or processed food may not be as "healthy" as fresh food. Even those with a relatively unsophisticated understanding of the relationship between diet and health are aware of the risks of eating foods that are high in fat, sugar and cholesterol. As a result, it would be very difficult to argue that fast food has an unknown, inherently dangerous characteristic that gives rise to a duty to warn consumers.

#### Injury

Negligence is not actionable without proof of physical or psychiatric injury and/or economic loss.

For example, the teenage plaintiffs in *Pelman* alleged that as a result of their consumption of McDonald's products they became overweight and developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake and other detrimental and adverse health effects. This would be sufficient to establish injury under Australian law.

There is, however, an interesting divergence between Australian and American tort law on the element of injury, although to our knowledge this divergence has not yet arisen in the context of a claim against a fast food company.

As discussed above, under Australian law a negligence action will not succeed without proof of injury. In Australia there are ethical restrictions preventing legal practitioners from acting on a claim unless they reasonably believe, on the basis of material then available to them, that the claim has reasonable prospects of success. For example, in New South Wales, practitioners are required to file a certificate to this effect when commencing proceedings. This means that a plaintiff's lawyer must reasonably believe at the time proceedings are commenced that his or her client has reasonable prospects of proving injury.

Conversely, in the United States it is possible for a plaintiff to commence an action and then later use the extensive procedures for discovery to obtain evidence in support of the claim, including evidence to prove injury.<sup>31</sup> Furthermore, plaintiffs in the United States can sometimes commence proceedings for negligence *before* their injuries manifest physically. For example, in some states plaintiffs can file asbestos claims if they have been exposed to asbestos, even though they have not suffered from any asbestos-related disease or impairment. Asbestos-related diseases have very long latency periods and most plaintiffs file claims as soon as they learn that they have been exposed to asbestos. Plaintiffs do this concerned that, if they were to wait, they might be prevented from commencing proceedings because a limitation period might have expired, or the relevant defendant might have gone bankrupt.<sup>32</sup>

It remains the case in Australia, however, that *actual* injury (as distinct from the potential to suffer injury) must be proved in order to bring a successful negligence claim. In our view this is one reason why there is less chance of a wave of food liability claims (or indeed product liability claims generally) being brought in Australia than there is in the United States.

<sup>31</sup> Goldring, J., "Tort liability in America – a story of abandoned principles" (1989) 24(4) *Australian Law News* 24 at 26.

<sup>32</sup> In Australia, section 12A of the *Dust Diseases Tribunal Act 1989 (NSW)* provides that limitation periods do not apply to claims for dust-related conditions brought in the Dust Diseases Tribunal.

Causation and remoteness

The final essential element of the tort of negligence in Australia is to establish that the injury or damage was caused or materially contributed to by the breach of the duty of care.

Proving the causal link between fast food and obesity will be one of the greatest hurdles for a plaintiff in a *Pelman*-like action to surmount. As Judge Sweet said in *Pelman*:

“There can be several independent causes for a given event. It may be difficult to show how much of someone’s obesity can be attributed to consumption of fast foods at McDonald’s, and how much it might be from other food sources, such as eating junk food at school or poor meal choices at home.”<sup>33</sup>

In our view it is unlikely that if a *Pelman*-type action were brought in Australia, the plaintiff would be able to prove causation. This is because of the myriad of other dietary and environmental factors which are known to contribute to obesity and which a plaintiff would have to exclude sufficiently in order to show that the defendant’s products were so connected with the plaintiff’s injury that they should be regarded as having caused it.

These factors would include what else the plaintiff ate, how much of the defendant’s products the plaintiff ate compared with other foods, how much he or she exercised and whether he or she had a family history of or genetic predisposition to obesity or any related health problems.

Defences – voluntary assumption of risk

Even if a plaintiff overcame the difficulty in proving causation, he or she would face another significant obstacle in the defence of voluntary assumption of risk. The defence of voluntary assumption of risk will absolve a defendant from all responsibility for breach of duty. In order to establish this defence, the defendant must show that the plaintiff:

- (a) was fully aware of the risk;
- (b) fully comprehended and appreciated the nature and extent of the risk; and
- (c) voluntarily accepted the whole risk.

No doubt, this defence would be adopted by fast food companies in Australia if *Pelman*-type litigation were brought against them. As discussed above, the characteristics of fast food are commonly

<sup>33</sup> Cohan, J., see above n 8 at 128.

understood. In reply, however, consumers might argue that they were not fully aware of the risk of consuming fast food or did not fully comprehend and appreciate the nature and extent of the risk. Such a reply might be based on an argument that the fast food companies did not disclose the ingredients in their food products, or the effects of excessive consumption of products.

Such allegations were considered by Judge Sweet in the proceedings on the Original Complaint. Whilst not alleged in their Original Complaint, the plaintiffs alleged in further submissions that McDonald’s products had been processed to the point where they have become completely different and more dangerous than other products they resemble and that a reasonable consumer would expect.

In light of today’s high levels of awareness of the harmful effects of over-consumption of fat, sugar, cholesterol and so on, it would be difficult in our view to allege successfully that a consumer of fast food did not comprehend the nature and extent of the risk of consuming these products. This will be particularly true going forward as the trend appears to be for fast food companies to disclose an increasing amount of information about the ingredients in their products.<sup>34</sup>

The position might not be so clear, however, in the case of children who are too young to understand the risks of consuming fast foods or if it can be proved that the public is not fully aware of specific risks because the industry has failed to disclose them.<sup>35</sup>

Contract

In addition to the express terms of a contract, certain additional terms and conditions are implied into consumer contracts by legislation.

Sale of goods legislation

The sale of goods legislation in force throughout the states and territories of Australia implies into every contract for sale of goods:

- (a) an implied condition that the goods are reasonably fit for the particular purpose for which the goods are required<sup>36</sup>; and

<sup>34</sup> For example, Red Rooster has said that its chicken nuggets are only 56% “formed” chicken and McDonald’s has said that its chicken nuggets are 65% chicken: Needham, K., “One vital nugget of information: product may not contain chicken”, *Sydney Morning Herald*, 23 March 2004 at 3.

<sup>35</sup> Cohan, J., see above n 8 at 127.

<sup>36</sup> *Sale of Goods Act*: NSW s19(1); Vic s 18(a); Qld s 17(a); SA s 14(1); WA s14(1); Tas s 19(a); ACT s 19(a); NT s 19(a).

(b) an implied condition that the goods shall be of merchantable quality when they are bought by description<sup>37</sup>.

Reasonable fitness for purpose

In general terms the “fitness for purpose” requirement arises in situations where the purchaser makes known to the seller the purpose for which goods are required and relies on the seller’s skill and judgment in selecting goods. This is not typically the context in which fast food is bought and sold. We think it is unlikely a *Pelman*-type plaintiff could bring a successful unfitness for purpose action in Australia.

Merchantable quality

A *Pelman*-type action against a fast food manufacturer based on the implied condition of merchantable quality is equally unlikely to be successful in our view. “Merchantability” is a measure of the quality or saleability of the goods which the seller is required to supply under the contract. Various tests for merchantability have been used by the courts over time, some linking merchantability with the price of the goods, some with their description, some with their condition and some with their intended purpose. In our view, leaving aside isolated instances of departure from manufacturing specifications, fast food would not be held to be of unmerchantable quality regardless of which test is adopted.

Part V Division 2 of the TPA

Part V Division 2 of the TPA implies into all consumer contracts certain non-excludable conditions and warranties. In particular, section 71 implies into all contracts for the sale of goods to a consumer by a corporation in the course of business a warranty that the goods are of merchantable quality and a warranty that they are reasonably fit for the purpose for which they were acquired. If these warranties are breached, the action to be instituted by a consumer is an action for breach of contract, not an action for breach of the TPA.

Unlike the condition of merchantable quality implied into contracts pursuant to the *Sale of Goods* legislation, the concept of merchantable quality is given a specific meaning in the TPA. Section 66 provides that goods are of

“merchantable quality” if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. This warranty is not excludable.<sup>38</sup>

Section 66 poses two questions of fact. Firstly, what is the purpose or purposes for which goods of this kind are commonly bought? Secondly, are the goods fit for that purpose or purposes as is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other circumstances?

To answer the first question, arguably the usual purpose for which fast food is bought is to provide a quick and relatively cheap meal for the consumer. To answer the second question, in our view it is reasonable to expect that fast food is fit for this purpose having regard to the description applied to it (ie “fast food”), the price (relatively cheap) and all the other circumstances (including convenience, taste and so on).

Thus, we consider it unlikely that a plaintiff could argue successfully that fast food is not of merchantable quality for the purposes of the Part V Division 2 of the TPA. The fact that fast food sometimes contains ingredients such as anti-foaming agents, or contains a lot of fat, sugar or other such ingredients, does not change our view.

In addition, for the same reasons set out above in relation to the sale of goods legislation, we do not consider that the implied warranty of fitness for purpose in section 71 of Part V Division 2 of the TPA would create opportunities for consumers to sue fast food restaurants such as McDonald’s.

Part V Division 2A of the TPA

In addition to the warranties that are implied into consumer contracts by virtue of Part V Division 2 of the TPA, manufacturers will be directly liable to consumers pursuant to Part V Division 2A of the TPA, which operates independently of any contract, where (amongst other things):

- (a) goods are unfit for a stated purpose (section 74B);
- (b) goods do not correspond with their description (section 74C);

<sup>37</sup> *Sale of Goods Act*: NSW s 19(2); Vic s 19(b); Qld s 18(b); SA s 14(s); WA s 14(2); Tas s 19(b); ACT s 19(b); NT s 19(b).

<sup>38</sup> Section 68 of the TPA.

- (c) goods are not of merchantable quality (section 74D);
- (d) goods do not comply with samples provided by the manufacturer (section 74E); and
- (e) goods do not comply with express warranties given by the manufacturer (section 74G).

By allowing consumers to bring proceedings directly against manufacturers in these circumstances, Part V Division 2A removes the difficulty that arises from the doctrine of privity of contract. For example, an individual injured by a product would not have a cause of action in contract against the manufacturer if the injured individual did not purchase the product from the manufacturer.

We do not consider that Part V Division 2A provides an avenue for *Pelman*-style plaintiffs to bring proceedings successfully in Australia.

We note, however, that a claim such as that made in *Penelope Block et al v McDonald's Corporation*<sup>39</sup> (which we referred to earlier in this article) could, in our view, be successfully brought in Australia under section 74C (goods which do not correspond with their description). *Penelope Block* was the case in which McDonald's described its French fries as "vegetarian" when in fact they were cooked with natural beef flavouring. Indeed, an action based on these facts would also likely be successful under sections 52 and 53(a) of the TPA (discussed below), under the relevant sale of goods provisions concerned with correspondence with description<sup>40</sup> and under section 70 of the TPA which implies into consumer contracts a condition that goods correspond with their description. This is an isolated, fact-specific case, however, which would not be amenable to mass obesity-based claims.

#### Part V Division 1 of the TPA

Fast food companies might be liable under sections 52 and 53 of the TPA if they engage in misleading or deceptive conduct and product-related injuries arise as a result.

Section 52 provides that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 53(a) more specifically provides that a corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services, falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use. "Quality" has been given a very wide meaning by the Courts and refers to the attributes, properties, special features, nature or character of the product.<sup>41</sup>

Damages may be payable under section 82 of the TPA to individuals who suffer loss or damage as the result of a corporate manufacturer's contravention of these sections. Alternatively, a person may apply to the Court for an injunction pursuant to section 80 of the TPA to restrain a breach or attempted breach of sections 52 and 53(a). Further, the Court has a wide power to make remedial or "other orders" pursuant to section 87 in favour of a party who has suffered loss or damage by the conduct of another in breach of these sections.

A claim of misleading conduct on the part of McDonald's was made in both the original Complaint and the Amended Complaint in *Pelman*. In the original Complaint, the Plaintiffs alleged that McDonald's deceptively advertised its food as not unhealthy, failed to provide consumers with nutritional information and induced minors to eat at McDonald's through deceptive marketing ploys. This claim was struck out because the Complaint did not identify a single instance of deceptive acts in violation of sections 349 and 350 of the *New York Consumer Protection Act*. Similarly, in their Amended Complaint, the plaintiffs alleged that McDonald's misled the plaintiffs "into believing that its food products were nutritious, of a beneficial nature/effect, and/or easily part of a healthy lifestyle if consumed on a daily basis."<sup>42</sup> The claim was dismissed because the plaintiffs failed to allege that the advertising campaign in question was objectively deceptive.

Under the TPA, in order for a plaintiff in a food product liability action to recover damages based on a breach of section 52 or section 53(a), he or she would need to prove:

<sup>39</sup> In the Circuit Court of Cook County, Illinois, County Department, Chancery Division, 01 CH 9137.

<sup>40</sup> *Sale of Goods Act*: NSW s 18; Vic s 18; Qld s 16; SA s 13; WA s 13; Tas s 18; ACT s 18(1) and 18(2); NT s 18.

<sup>41</sup> *Given v C V Holland (Holdings) Pty Ltd* (1977) 29 FLR 212 at 216.

<sup>42</sup> *Pelman v McDonald's Corporation*, see above n 26 at 10.

- (a) that a fast food manufacturer engaged in conduct that was misleading and deceptive or falsely represented that its products were of a particular standard, quality, value, grade, composition or style; and
- (b) that the plaintiff relied on that conduct or representation and suffered loss or damage as a result.

Thus, plaintiffs in Australia will potentially face the same barriers as did the plaintiffs in *Pelman* in that they would have to identify particular conduct (most likely, representations made in product advertising), prove that such conduct was misleading and prove that they relied on that conduct to their detriment. As we discussed earlier in the context of potential negligence claims, it is commonly understood by consumers that fast or processed food may not be as "healthy" as fresh food and may contain relatively high levels of fat, sugar and cholesterol. Accordingly *Pelman*-like plaintiffs may have difficulty in proving reliance in an action for damages for breach of sections 52 and 53(a).

It should be noted, however, that the Australian Competition and Consumer Commission ("ACCC") could also bring proceedings for relief against a manufacturer in breach of these sections without the need for a particular individual to prove reliance and damage. For example, the ACCC could seek an order for an injunction pursuant to section 80 or could seek non-punitive orders pursuant to section 86C, such as an order requiring the manufacturer to publish corrective advertising.

#### Part VA of the Trade Practices Act 1974 (Cth)

Part VA of the TPA was introduced on 8 July 1992 and is based on the 1985 European Community Product Liability Directive. Part VA provides a statutory cause of action against the "manufacturer" of "defective" goods in favour of persons suffering injury, loss or damage caused by the goods.

#### Cause of action

The elements of the cause of action which must be proved are set out in section 75AD of the TPA, which provides:

"If:

- (a) a corporation, in trade or commerce, supplies goods manufactured by it; and
- (b) they have a defect; and
- (c) because of the defect, an individual suffers injuries; then:
- (d) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and
- (e) the individual may recover that amount by action against the corporation; and
- (f) if the individual dies because of the injuries – a law of a State or Territory about liability in respect of the death of individuals applies as if:
  - (i) the action were an action under the law of the State or Territory for damages in respect of the injuries; and
  - (ii) the defect were the corporation's wrongful act, neglect or default."

Section 75AE provides a similar cause of action for persons who suffer loss because another person suffers death or injury because of the defect.

#### Meaning of "manufacturer"

"Manufactured" is defined in both section 74A(1) under Part V Division 2A and section 75AA under Part VA to include grown, extracted, produced, processed and assembled.

Whilst "manufacturer" is not defined in the TPA, sections 74A(3)-(8) deem a corporation to be the manufacturer of goods:

- (a) where the corporation manufactures the goods;
- (b) where the corporation holds itself out to the public as the manufacturer;
- (c) where the goods are "home brand" manufactured under the licence for the corporation;
- (d) where the corporation permits someone to promote the goods as those of the corporation; or
- (e) where the corporation is the importer of the goods.

Thus, the provisions of Part VA apply to the majority of retail products sold in Australia. Section 75AB provides that "manufacturer" is to be given the same meaning as under sections 74A(3) to (8) in Part V Division 2.

On facts such as those in *Pelman*, there would be no difficulty in proving that the food products were "manufactured" within the meaning of section 75AA and in proving who the manufacturer of the food was.

Meaning of "defect"

Section 75AC of the TPA ascribes a particular meaning to the word "defect", namely:

- (1) For the purposes of this Part, goods have a defect if their safety is not such as persons generally are entitled to expect.
- (2) In determining the extent of the safety of goods, regard is to be given to all relevant circumstances including:
  - (a) the manner in which, and the purposes for which, they have been marketed; and
  - (b) their packaging; and
  - (c) the use of any mark in relation to them; and
  - (d) any instructions for, or warnings with respect to, doing, or refraining from doing, anything with or in relation to them; and
  - (e) what might reasonably be expected to be done with or in relation to them; and
  - (f) the time when they were supplied by their manufacturer."
- (3) An inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.
- (4) An inference that goods have a defect is not to be made only because:
  - (a) there was compliance with a Commonwealth mandatory standard for them; and
  - (b) that standard was not the safest possible standard having regard to the latest state of scientific or technical knowledge when they were supplied by their manufacturer."

Accordingly, Part VA is not limited to manufacturing defects but will also apply to products defective in design or with inadequate instructions or warnings.

Causation

Causation is an essential element of a claim under section 75AD. An individual can only bring a claim against a manufacturer of defective goods if, "because of the defect", the individual suffers injury.

The Plaintiffs in *Pelman* failed in their Amended Complaint to prove causation under New York's *Consumer Protection Act* because they failed to draw an adequate connection between their consumption of McDonald's food and their alleged injuries.

Similarly, under Part VA of the TPA, an injured individual must show that the defective product was a cause of their injury. In a fast food product liability action, this would necessitate proof that the plaintiff's consumption of fast food caused their alleged injury, whether that be obesity or other health-related problems.

It is not necessary that the defective product be the only cause of the plaintiff's injury. Section 75AN of the TPA provides that where the loss was caused by both a defect in the goods and an act or omission of the person who suffered injury or loss because of the defective goods, the court will reduce the amount of compensation to such extent as the court thinks fit having regard to that individual's share in causing the loss.

Consequently, other acts or omissions by the plaintiff that might have contributed to the injury, such as lack of exercise and consumption of other foods which are high in fat, sugar, salt or cholesterol, might reduce the amount of compensation payable to the plaintiff under Part VA. Further, courts would be able to take into account the plaintiff's decision to consume large quantities of fast food, knowing of the high content of fat, sugar and so on, in reducing compensation pursuant to section 75AN. In our view this is likely to be a significant obstacle to Part VA claims becoming a lucrative avenue for *Pelman*-style plaintiffs in Australia.

Consumer expectation test

Section 75AC(1) defines goods as having a defect if their safety is not such as persons generally are entitled to expect. This is an objective test based on the expectations of safety of the public at large rather than on the subjective expectations of a particular individual. This is known as the "consumer expectations test".

This test is also used in some states in the United States.<sup>43</sup>

<sup>43</sup> Sebok, A., "The 'Big Fat' class action law suit against fast food companies", [www.writ.findlaw.com/sebok/20020814.html](http://www.writ.findlaw.com/sebok/20020814.html) (last viewed 15 April 2004).

Products do not have to be risk free in order to avoid being found to be defective under Part VA. In fact, it was acknowledged in the Explanatory Memorandum to the *Trade Practices Amendment Bill (No 2)* 1991 (Cth) that there is a class of inherently dangerous products, such as tobacco, guns and knives, of which the community expects a degree of risk.

Section 75AC(2) sets out a series of circumstances to which regard is to be had when determining the extent of the safety of particular goods. The following circumstances on this non-exhaustive list are pertinent when considering whether fast food products can be said to be "defective" under Part VA of the TPA:

- (a) the manner in which, and the purposes for which, the products have been marketed (s 75AC(2)(a));
- (b) any instructions for, or warning with respect to, consumption of the products (s 75AC(2)(d); and
- (c) what might reasonably be expected to be done with or in relation to the products (s 75AC(2)(e).

Manner in which and purposes for which food is marketed

Fast food companies such as McDonald's and KFC operate extensive and far-reaching marketing campaigns. Some advertising campaigns focus on particular food products whilst others promote new in-store competitions or "meal deals". Undoubtedly the campaigns are intended to saturate consumers and to increase consumption of fast food products. However, in our view such advertising saturation could not, without more, support a finding that the foods being promoted are defective by reason of the manner in which they are marketed.

To use an extreme example, if it were represented in an advertising campaign that a consumer's entire daily nutritional needs could be met from eating fast food alone, and if such claims were untrue, this could contribute to a finding that fast food is "defective". It is interesting to note, however, that in *Pelman* McDonald's advertising campaigns which encouraged people to eat at McDonald's "everyday!" were held to be "mere puffery" in the absence of a representation that to do so will result in a specific effect on health.<sup>44</sup>

Another example that might attract section 75AC would be if a campaign advertised fast food products as being sugar or fat free, or containing no preservatives or additives, if this was not in fact the case.

In any event, to our knowledge this is not the way fast food has generally been marketed in Australia to date. Furthermore, fast food is intended to be, and is often marketed as, a fast and convenient alternative to home-cooked food or more expensive restaurant quality food. The community knows and expects it to be potentially less healthy than those other types of food, and to have a higher "processed" rather than "fresh" content. In our view liability under section 75AC is unlikely to arise by reason of the manner in which, and the purposes for which, fast food has been marketed in Australia.

Instructions and warnings

The existence (or lack) of any instructions or warnings will be taken into account in a consideration of whether goods are "defective" within the meaning of section 75AC.

Do instructions or warnings need to accompany the sale of fast food so as to ensure that the food is as safe as the community is entitled to expect? What would the content of any such instructions or warnings be? The question of warnings was an issue in the original Complaint in *Pelman*. This aspect of the claim was dismissed because the plaintiffs failed to allege that McDonald's products were dangerous in any way other than that which was open and obvious to a reasonable consumer.

Similarly, in our view it would be difficult for a consumer in Australia today to claim that fast food products are unsafe because they do not carry a warning that persons who consume the products may become obese or suffer from other conditions. It is common knowledge that fast food is not necessarily healthy, and should not constitute a person's complete diet. The "unhealthy" or "less healthy" nature of fast food has been understood by the community for decades.<sup>45</sup> Hence, the use of the popular phrase "junk food".

In response to the debate surrounding obesity and the fast food industry, McDonald's in Australia has recently announced that it will introduce labelling on each of its products that lists the fat, sugar,

<sup>44</sup> *Pelman v McDonald's Corporation*, see above n 19 at 29.

<sup>45</sup> Campbell, D and Stypinski, J., see above n 6 at 5.

salt, energy and other nutritional measures of that serve of food.<sup>46</sup> We do not consider that this move was necessary in order to avoid a finding that McDonald's goods were defective in breach of Part VA. However, following the introduction of this nutritional labelling, it will be even more difficult for a plaintiff to bring such a claim against McDonald's.

#### Expected use

Another circumstance relevant to a consideration of whether a product is "defective" is what might reasonably be expected to be done with or in relation to the product (section 75AC(2)(e)).

This consideration might be used to fashion an argument that, because fast food can reasonably be expected to be consumed in large quantities and with high frequency, and because such levels of consumption can contribute to health problems and obesity, fast food is defective. Once again, however, bearing in mind the common knowledge that eating (let alone over-eating) foods that are high in fat, sugar and cholesterol carries a health risk, we think the better view is that it is not reasonable to be expected that consumers will consume fast food products to the extent required to cause such conditions. In our view liability should not arise by reason of section 75AC(2)(e), particularly when the Court must have regard to all relevant circumstances in determining the extent of safety of goods, not only their expected use.

#### Later safer goods

Section 75AC(3) states that an inference that goods have a defect is not to be made only because of the fact that, after they were supplied by their manufacturer, safer goods of the same kind were supplied.

The recent release by McDonald's of its SaladsPlus and Quickstart breakfast menus was discussed above. Following section 75AC(3), such a release of arguably "healthier" foods cannot be used to infer that other, previously supplied McDonald's products are defective. So too with McDonald's decision to phase out "super-size" serves of French fries and drinks.<sup>47</sup>

## CONCLUSION

In our view, it is not surprising that a claim such as *Pelman* has not yet been brought by an obese or unhealthy plaintiff in Australia.

The above analysis of the traditional heads of liability for product-related damage shows that plaintiffs will have difficulty in successfully bringing actions in Australia to make fast food manufacturers liable for the plaintiff's obesity and related conditions. They will face particular difficulty in:

- proving a breach of the duty of care by failing to warn, given the wide and longstanding public knowledge of the potential adverse health effects of eating fast food;
- proving reliance in an action brought under the consumer protection provision of the TPA; and
- proving causation, bearing in mind the variety of dietary, environmental and hereditary or other personal factors which can all cause or contribute to obesity and other conditions.

It is theoretically possible that a plaintiff could be found who ate sufficient quantities of fast food but was otherwise free of the known risk factors for obesity, and whose personal circumstances enabled him or her to overcome the obstacles relating to reliance and duty of care referred to above. Such plaintiffs would be rare, however, and accordingly we think the likelihood of a wave of *Pelman*-type claims being successfully brought in Australia is currently low.

This is not to say that manufacturers of fast and other processed foods should ignore the potential for liability. Proactive steps such as those recently announced by McDonald's relating to labelling and content disclosure should help to reduce exposure to claims. Further, manufacturers should always be vigorous in ensuring that their marketing activities are not misleading in any way and that they disclose to consumers any information about the nature of their products which consumers are entitled to receive. Diligence in these and other areas will assist fast and processed food manufacturers and distributors in reducing their exposure to product liability claims.

<sup>46</sup> Dabkowski, S., "McDonald's to list menu contents", *Sydney Morning Herald*, 31 March 2004 at 3.

<sup>47</sup> "Big Mac cut down to size", *The Australian*, 5 March 2004 at 7.

# LEGAL PROFESSIONAL PRIVILEGE: COMMUNICATIONS WITH THIRD PARTIES BEFORE ANTICIPATED LITIGATION

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To manage the risks of product liability, or any other business or organisational risk, a client may seek both legal advice and assistance from non-legal advisors. While communications with the lawyer will be privileged, communications with non-legal advisors and service providers may also contain sensitive information that the client would not want to be disclosed subsequently.

The opportunity to claim legal professional privilege over communications with third parties will often therefore be attractive. For circumstances where there is no actual or anticipated litigation, the opportunity for a client to attract legal professional privilege for communications with third parties has been broadened by the decision of the Full Court of the Federal Court of Australia in *Pratt Holdings Pty Ltd v The Commissioner of Taxation* (2004) 207 ALR 217. In those circumstances, the Full Court held that privilege could attach to communications with third parties where:

- the communication was prepared by or at the direction of the client; and
- the client had (at the time of creating or directing the creation of the communication) the dominant purpose of using it to obtain legal advice.

## THE SCOPE OF PRIVILEGE

Legal professional privilege is recognised as protecting communications (and documents evidencing those communications) from subsequent disclosure in two contexts:

- legal advice, where the communication is created for the dominant purpose of providing or obtaining legal advice; and

- litigation, where the communication is created for the dominant purpose of use in or in relation to current or anticipated legal proceedings.

The extension of privilege to communications with third parties in the context of litigation is well recognised. The administration of justice is served by allowing parties to prepare fully for legal proceedings. Using third parties (including experts) to provide views and collect information assists clients to present the best evidence to the court, and to be sufficiently informed to settle the dispute in appropriate circumstances.

The scope of privilege in the context of legal advice is, however, more contentious. It has been traditionally limited to communications only between client and lawyer. The administration of justice was seen as being facilitated by encouraging full and frank communication between client and lawyer. Without the real prospect<sup>1</sup> of litigation, it had been doubted whether a client needed the encouragement of privilege to communicate with third parties, or whether the administration of justice warranted those communications being withheld. However, the decision in *Pratt* held that communications with third parties can still assist in obtaining effective legal advice, and should therefore be privileged.

## THE FACTS OF PRATT AND THE DECISION AT FIRST INSTANCE

In *Pratt*, the client (Pratt) sought advice in relation to a corporate restructure. The lawyers suggested that Pratt obtain a valuation of assets from an

<sup>1</sup> In a recent product liability case, the Victorian Court of Appeal held (*Mitsubishi Electric Australia Pty Ltd v Victoria WorkCover Authority* (2002) 4 VR 332) that there must be a "real prospect" of proceedings for privilege in a litigation context to be attracted, if legal proceedings are not on foot at the time the communication is created. In that case, a circuit breaker had malfunctioned, and privilege was claimed in relation to a loss assessor's report. The court held that there was a real prospect of proceedings because the incident "was inherently such as to make litigation of some kind or kinds likely", as the client had instructed lawyers and notified its insurer.

independent accounting firm. Pratt obtained such a valuation report, and provided it to the lawyers. The accountants never communicated directly with the lawyers.

The ATO issued notices to both Pratt and a firm of accountants to produce documents under section 263(1) of the *Income Tax Assessment Act 1936* (Cth). Privilege was claimed on behalf of Pratt in relation to the report and related documents.

At first instance, Kenny J held that the accountants' report and related documentation were not privileged. Her Honour held that, in order for privilege to apply to a third party communication where there is no actual or anticipated litigation, the third party must be the agent of the client for the purpose of communicating a request for legal advice from the client to the lawyer or the legal advice from the lawyer to the client. Privilege was not available where the third party was an agent for some other purpose, such as gathering information or providing an expert opinion on a matter relevant to the legal advice.

Her Honour recognised that such an analysis could lead to anomalies or artificialities. A large organisation with internal resources could attract privilege (by preparing in-house a report for submission to a lawyer) in circumstances where a smaller organisation could not (by engaging a third party to prepare such a report). However, after an extensive review of English and Australian authorities, she ruled that it was not the role of privilege to provide the extended protections.

Kenny J's approach was doubted by Allsop J in *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 23 ALR 348. His Honour ruled that privilege could be claimed over communications with investment bankers who were part of a team working on the acquisition of a business. Broadening the concept of agency used by Kenny J, his Honour held that it was sufficient for the agent's role to be to communicate with a lawyer *in connection with* the provision of legal advice. In other words, privilege could extend to advice provided by the third party where the third party was authorised by the client to give this advice to assist in the provision of legal advice by a lawyer.

## FULL COURT DECISION

The Full Court (Finn, Merkel and Stone JJ) held unanimously that privilege could be claimed in respect of communications between Pratt and the accountants, provided Pratt was able to establish that its dominant purpose for creating those communication was use in obtaining legal advice.

The Full Court recognised that a narrow approach to third party communications would undercut the rationale of legal professional privilege, by depriving effective access to legal advice on complex and technical matters. The Full Court held that it was not necessary for the third party to be the client's agent. Finn J said at [41]:

"The important consideration in my view is not the nature of the third party's legal relationship with the party that engaged it, but rather, the nature of the function it performed for that party. If that function was to enable the principal to make the communication necessary to obtain legal advice it required, I can see no reason for withholding the privilege from the documentary communication authored by the third party. That party has been so implicated in the communication made by the client to its legal advisor as to bring its work product within the rationale of legal advice privilege."

In *Pratt*, Kenny J did not make a finding as to what Pratt's dominant purpose was in obtaining the accountants' report. The case was remitted to her Honour accordingly.

## A DIFFERENT POSITION UNDER THE UNIFORM EVIDENCE ACTS?

The decision in *Pratt* dealt with common law principles, which will apply to most disputes in relation to claims of privilege.

However, the uniform Evidence Acts (which apply at trials in federal, New South Wales and Tasmanian jurisdictions) seem to be drafted in narrower terms. Although section 118 provides for privilege over legal advice communications between the lawyer and a client's "agent", and over confidential documents prepared by a client's agent, it apparently does not extend to communications between the client and other third parties.

As a result, the full benefit of *Pratt* may not be available in trials in federal, New South Wales and Tasmanian jurisdictions.

## ESTABLISHING A CLAIM OF PRIVILEGE

On the basis of *Pratt*, a client seeking to obtain legal advice may therefore draw on the assistance of third parties in obtaining that advice, and claim privilege over communications with the third parties, even before there is a real prospect of litigation.

However, there may still be practical difficulties in establishing the claim. The Full Court warned that it may not be straightforward for a client to prove the relevant dominant purpose if there are other purposes for which the third party's communication may be used. The report of an expert in relation to the safe performance of a product, for example, may be used for reviewing or developing the business processes of the client, as well as to assist a lawyer to give advice.

It is important therefore that when appropriate, steps are taken to maximise the prospects of proving that the dominant purpose was to assist in providing or obtaining legal advice. Considerations to bear in mind include the following:

- contemporaneous records should demonstrate that the third party's communication is sought by the client, or by the lawyer upon instruction from the client;
- contemporaneous records (preferably the third party communication or the request) should state how the communication may be used to assist in providing or obtaining legal advice, and emphasise the legal purpose over any ancillary business or administrative purposes; and
- the third party communication should not be adapted or modified before it is provided to the lawyer.

# HOW WOULD YOUR COMPLIANCE SYSTEM RATE AGAINST THE ACCC'S EXPECTATIONS?

ELEANOR SCACCO, SPECIAL COUNSEL, FREEHILLS

## WHY DO COMPANIES NEED COMPLIANCE SYSTEMS?

A compliance system is a means to prevent, identify and respond to applicable laws, regulations, industry codes and organisational standards and to achieve compliance. Effective compliance systems will promote a "culture of compliance" and add value to an organisation by enhancing brand value and reducing unnecessary costs.

There are many reasons for an organisation to develop, maintain and continually improve its compliance system, not the least of which is that resolution legal action taken by the ACCC under the *Trade Practices Act 1974 (TPA)* increasingly involves a reference to compliance programs which satisfy with the requirements of the Australian Compliance Standard (*AS 3806*).

## WHAT ARE THE ESSENTIAL ELEMENTS OF COMPLIANCE SYSTEMS?

AS 3806 provides a good structure for compliance systems, separating the essential features of the system into structural, operational and maintenance elements.

Structural elements include:

- having an organisational policy and commitment to compliance;
- allocation of responsibility and resources; and
- continuous improvement of the system.

Operational elements include:

- identification of issues;
- development of operating procedures including complaints handling systems;
- record keeping and reporting; and
- identification and rectification of problems.

Maintenance elements include:

- education and training;
- visibility and communication;
- monitoring, assessment and review;
- liaison with relevant authorities; and
- accountability.

## HOW HAVE THE COURTS REGARDED COMPLIANCE SYSTEMS?

Given that the ACCC is regularly seeking compliance programs as part of the resolution of enforcement proceedings, the Courts are forming views on what is required for a successful compliance program.

Some judges have expressed a reluctance to impose orders relating to AS 3806 compliance programs on the basis that it "imposes standards which are aspirational in their expression and not readily measured in application." (per French J in *ACCC v REIWA* (1999) ATPR 41-673.) This is one of the reasons why AS 3806 is currently under review. (A draft of the revised AS 3806 is being prepared. It is anticipated that the draft will shortly be available for public comment.)

In the meantime, the preferred formulation of the orders sought by the ACCC includes not only the introduction or revision of a compliance program in accordance with AS 3806, but also a requirement that the compliance program be audited and that the audit reports be provided to the ACCC.

## WHAT DOES THE ACCC BELIEVE IS REQUIRED FOR A COMPLIANCE SYSTEM?

The ACCC has recently published a document entitled *Compliance audit requirements* which sets out its expectations for matters to be addressed in audits of compliance programs. The guidelines can

be found at [www.accc.gov.au/content/index.phtml/itemId/505238](http://www.accc.gov.au/content/index.phtml/itemId/505238)

Although focusing on the matters to be addressed in a compliance audit report, it is possible to use the ACCC document to understand the features that the ACCC expects to form part of a compliance program. Hence, the *Compliance audit requirements document* is a good benchmark against which to measure the features of your company's existing compliance program.

The over-riding expectation is that the audit report will demonstrate the effectiveness of the compliance program and the company's commitment to compliance. Using items mentioned by the ACCC as aspects to be covered in the audit report, the effectiveness of a program might be shown by establishing that:

- the compliance system is effective in terms of preventing, identifying and correcting breaches of the TPA;
- a corporate culture of compliance exists;
- the compliance culture will remain even if the person overseeing compliance is replaced or absent;
- compliance procedures continue to be maintained and improved, where and when necessary; and
- previously identified recommendations have been implemented.

Other aspects of the audit report requirements which shed light on the features that the ACCC believe are required in a compliance program include:

- considering whether individuals' positions may expose the company to compliance risk and, if so, what measures were put in place to ensure these employees are aware of their compliance obligation;
- reviews of compliance documentation including the compliance policy, staff KPIs and compliance training materials and attendance records;
- staff and management interviews and site visits;
- internal and external testing of the compliance system - including examination of the complaints handling system;

- the systems put in place to ensure that compliance is put into the daily practices of the company;
- the company's disciplinary measures for blatant non-compliance; and
- how the compliance manager/officer provides compliance reports to management, committees or the board and the minutes of those meetings.

## WHAT SHOULD YOU CONSIDER DOING?

The ACCC's *Compliance audit requirements* provide an insight into the approach taken by one of Australia's key regulators and a useful checklist of items that companies should seriously consider incorporating into their compliance programs. These are certainly matters that the ACCC will be looking for when determining what action should be taken against a company that might be alleged to have breached the TPA and also what penalties the ACCC might seek.

The existence of a good and strong compliance program is a mitigating factor which is taken into account both by the ACCC and the Courts when determining a penalty for any breach of the TPA. In any event, the introduction and continual improvement of a compliance program should be considered for the benefits that it brings in terms of cost savings, brand enhancement and competitive advantage. The ACCC publication provides a useful benchmark and perhaps some new ideas.

How well would your company score against the compliance features identified by the ACCC?

# DOCUMENT RETENTION POLICIES POST *MCCABE*

PETER HOLLOWAY, PARTNER, FREEHILLS

Many readers will have followed the debate that followed the 2002 decision of Justice Eames of the Victorian Supreme Court to strike out the defence of British American Tobacco Australia Services Limited (*BAT*) to a claim brought against it by Mrs McCabe on the basis of *BAT* having failed to comply with discovery orders.<sup>1</sup> The decision of Justice Eames to strike out *BAT*'s defence was appealed to the Court of Appeal, which allowed the appeal. A subsequent application by the estate of Mrs McCabe for special leave to appeal to the High Court was refused.

Subsequent to the conclusion of this litigation, the Victorian Attorney-General, the Honourable Robert Hulls MP, asked the Victorian Crown Counsel, Professor Sallmann, to examine the current law, procedures and practices of discovery in the conduct of civil litigation in Victoria. The Attorney-General asked Professor Sallmann to focus in particular on the approach that should be adopted if documents that could be relevant evidence in a trial were to be destroyed, whether the destruction occurred before or after the commencement of the actual legal proceeding.

The terms of reference provided to Professor Sallmann contained the following:

"As part of your investigation of these matters, you are requested to give particular attention to the need for fair trials in civil litigation in Victoria, and what the appropriate role for the courts should be in ensuring the fairness of proceedings when relevant documentary evidence has been destroyed"; and

"Having examined these matters you are asked to report your views to the Attorney-General, the Honourable Robert Hulls, MP, including on any proposals or suggestions for change in the present position under Victorian law, and on how any such proposals or suggestions would best be implemented".

Professor Sallmann has now issued a report, entitled "Document Destruction and Civil Litigation in Victoria".<sup>2</sup> The following is intended to provide an overview of the recommendations made by Professor Sallmann.

## POLICY CONSIDERATIONS

In conducting his review, Professor Sallmann identified a number of policy issues which he regarded as having broad application. He identified a key legal and public policy issue as being how the law, the civil justice system and, in particular, the Courts, should deal with the situation where material (documents, broadly defined) relevant to civil proceedings has been destroyed or is otherwise "unavailable" for some reason.<sup>3</sup>

Professor Sallmann observes that it is important for the proper and fair resolution of civil justice proceedings that material relevant to those proceedings be available to the Court.

Professor Sallmann also considered what consequences should follow from the destruction of documents, where the destruction has occurred before the commencement of legal proceedings but at a time when litigation could reasonably be anticipated. He identifies fairness as perhaps the most fundamental of issues, although also makes reference to the general integrity and reputation of the judicial and legal systems.

## RECOMMENDATIONS

Professor Sallmann expresses the view that the current law in relation to destruction of documents is unsatisfactory and needs to be changed.

<sup>1</sup> Details of the claim made by Mrs McCabe and of the decisions of Justice Eames and of the Court of Appeal can be obtained from the decisions: [2002]VSC 73 and [2002] VSCA 197.

<sup>2</sup> A full copy of the report can be viewed on the web page of the Victorian Department of Justice, at <http://www.justice.vic.gov.au/ca2569020010922A/page/listing-home+page+news>.

<sup>3</sup> Report at page 12.

A number of recommendations are made:

#### New civil procedure legislation

Professor Sallmann recommends new legislation to apply to civil litigation conducted in the Supreme, County and Magistrates' Courts in Victoria which would apply when civil proceedings are affected by the unavailability of relevant documents, including in circumstances when documents have been destroyed or removed in advance of legal proceedings being issued.

He recommends that the legislation:

- (a) provide a basis for the appropriate exercise of a broad judicial discretion to "do justice" when relevant documents are unavailable; and
- (b) indicate the criteria that a Court would consider in the exercise of that discretion;

with the emphasis being upon the impact of the unavailability of documents on the particular proceeding rather than the lawfulness or otherwise of the conduct which resulted in the documents being unavailable.

He suggests that this statutory provision would:

- (a) set out the sorts of powers that are currently available as part of the inherent jurisdiction of a superior Court and in Rules of Court for dealing with breaches of discovery obligations;
- (b) add some elements to these existing laws; and
- (c) extend these existing laws to circumstances in which documents are to become unavailable prior to the commencement of legal proceedings.

He suggests that the legislation could provide for consequences including:

- the drawing of adverse inferences;
- presuming facts in dispute to be true;
- reversal of onuses of proof on particular matters; and
- striking out all or parts of a defence or statement of claim.

The circumstances that he considers that a Court might take into account in determining whether any orders should be made would include:

- why the documents were destroyed or otherwise unavailable;

- what the broader context was, especially whether litigation was contemplated at the time or should reasonably have been anticipated; and
- the impact or consequences of the unavailability – not just on the disadvantaged party and the fairness of the proceedings, but, as well, on the administration of justice generally.

#### Criminal responsibility

Professor Sallmann comments that at present in Victoria the common law offence of attempting to pervert the course of justice is theoretically available to deal with some cases of document destruction. However, he notes that whilst this common law offence is available in Victoria, it is likely to be applied only in a limited instances. He prefers a new criminal law provision to be modelled on section 39 of the *Commonwealth Crimes Act* (1914).

Section 39 of the Crime Act provides, relevantly:

"Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, intentionally destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, shall be guilty of an offence".

Professor Sallmann recommends that this provision be adapted to suit Victorian purposes, and to make it clear that instances of "pre-commencement" destruction would be covered.

He also recommends that a criminal law provision be adopted similar to section 5.2(3) of the *Commonwealth Criminal Code Act* (1995), which is to the effect that "a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events".

Professor Sallmann comments that:

"... the fundamental elements of such a new provision for Victoria would be knowledge on the part of the party destroying the document that it is or may be required for litigation, coupled with an intent to prevent it from being available"<sup>4</sup>.

<sup>4</sup> Report at page 22

He also suggests that the criminal law recognise an offence of document destruction by criminal negligence, thus addressing the difficulties often encountered in bringing prosecution against a corporation on the basis of direct liability.

#### Professional conduct of lawyers

Professor Sallmann also recommends that a professional conduct rule be introduced aimed at what lawyers advise clients about retaining documents, and also at the lawyers themselves when they are in possession or control of documents which are relevant to anticipated litigation.

He suggests that the rule be modelled upon section 142A of the New South Wales Legal Profession Regulation.

The recommendation is that there be provision that it would be professional misconduct for a legal practitioner to give advice to a client to the effect that a document should be destroyed in circumstances where the legal practitioner is aware that it is likely that legal proceedings will be commenced in relation to which the document may be required and that following the advice will result in the document being unavailable or unusable for the purposes of those proceedings.

Will these recommendations become law?

The purpose of Professor Sallman's report is expressed to be "...to identify the key public and legal policy issues which arise in this area and to suggest what the appropriate responses might be." Whether Professor Sallman's recommendations will become the law in Victoria remains to be seen.

# CASE NOTE: FORBES V SELLEYS PTY LTD (2004) NSWCA 149

ANNABEL EVANS, SENIOR ASSOCIATE, MINTER ELLISON LAWYERS

One Saturday afternoon in February, Mr Forbes purchased two cans of Selley's Space Invader for the purpose of sealing part of a fireplace. Mr Forbes claimed that he read the warning label before purchasing the product. The label said, amongst other things:

## CAUTION

- Do not incinerate or puncture this can even when empty
- Keep upright in a cool place out of the sun
- Allow plenty of ventilation when applying
- Not suitable as a floatation (sic) device

## WARNING

Intentional misuse by deliberately concentrating and inhaling contents can be harmful or fatal.

## SAFETY DIRECTIONS

- Avoid contact of uncured product with skin and eyes.
- Wear protective gloves and eye protection when applying.

Mr Forbes followed the instructions on the can in that he was careful to ensure that the area in which he was working was well ventilated. He opened the windows and doors and placed two fans in appropriate positions. In addition, the Court noted that there was a breeze passing through the house.

Nevertheless, from time to time, Mr Forbes' face was close to the area where he was directing the sealant product, and there was a strong draft coming down the chimney at the time. After he finished using the product, Mr Forbes washed his hands. The next thing he remembered was waking up in hospital several days later.

Mrs Forbes gave evidence that her husband had developed a headache later in the afternoon and that there was a slight slurring of his speech by

the following (Sunday) afternoon. By Sunday evening, he was apparently speaking with 'rambling incoherent words' and was having difficulty with comprehension. He had a very restless night and, the following morning, dressed himself in a dishevelled manner with his shirt out, trousers undone and without shoes or socks. He would not go to the doctor and so instead was driven to work where he collapsed shortly after arrival. He was taken to hospital and admitted in an unconscious condition.

Mr Forbes remained in a coma for at least two days. The provisional diagnosis was encephalitis (an inflammation of the brain usually viral or bacterial in origin) and it was thought that he might not survive. Mrs Forbes mentioned to the treating doctor, Dr Darveniza, that Mr Forbes had used the Space Invader sealant on Saturday, following which the doctor contacted Selleys and obtained a copy of its Material Safety Data Sheet. This document included a passage with the heading 'Health Hazard Information', underneath which was a sub-heading entitled 'Inhaled' which read as follows:

'Vapour and spray mist is irritant to mucus membranes and respiratory tracts. Inhalation of vapour or spray mist can result in headaches, dizziness, nausea and possible breathing difficulties due to respiratory sensitisation which may be delayed. Inhalation of high concentrations can produce central nervous depression, which can lead to loss of co-ordination, impaired judgment, and if exposure is prolonged, unconsciousness'.

After conducting a number of tests to exclude the known causes of encephalitis, Dr Darveniza diagnosed toxic encephalopathy and concluded that the sealant was the toxic culprit.

Despite the dire prognosis, Mr Forbes made a rapid recovery and was discharged after ten days in hospital. However, he suffered significant physical, psychosocial and cognitive loss. The illness severely

affected his working capacity and allegedly contributed to the breakdown of his marriage.

Mr Forbes sued Selleys in negligence and for breach of the provisions Part VA of the *Trade Practices Act 1974* (Cth). He gave evidence that he would not have bought the product if there had been a warning of the risk of headaches, dizziness or nausea with normal use of the product, let alone a warning about the potential for illness of the type which he suffered.

The trial concentrated mainly on scientific and medical issues. The critical issue was whether Mr Forbes' use of the product on the Saturday caused or materially contributed to the medical condition he was suffering from when he was brought to the hospital the following Monday. After considering all of the medical and scientific evidence the Court, at first instance, was not persuaded that, on the balance of probabilities, exposure to the product had caused or materially contributed to Mr Forbes' encephalopathy.

Mr Forbes appealed, contending that the Judge had erred in his approach to the causation issue and/or in his analysis of the facts. Before the Court of Appeal, Mr Forbes' counsel was critical of the trial judge for not taking a 'robust and pragmatic' attitude to the scientific evidence. Justice Mason mentioned this in his judgment and commented that 'robust and pragmatic decisions are not always made in the plaintiff's favour'.

It was also submitted that Selleys bore an evidentiary onus to rebut a finding that its product was the probable cause of the illness. The Court of Appeal upheld the primary judge's view that, in fact, it was Mr Forbes who bore the ultimate onus of proof of causation, and Their Honours did not find any flaw in the legal methodology adopted by the trial judge in addressing the scientific causation issue. It was open to the trial judge to prefer the evidence of one expert over another. Accordingly, Mr Forbes' appeal was dismissed.

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# ALIEN TORT LITIGATION IN THE UNITED STATES

COMPANIES NEED TO BE AWARE OF THE RISK OF INTERNATIONAL TORT LITIGATION BEING HEARD IN US COURTS

ANNETTE HUGHES, PARTNER AND ALEXANDER DANNE, ARTICLED CLERK, ALLENS ARTHUR ROBINSON

## IN BRIEF

The United States Alien Tort Statute (28 U.S.C. §1350) (the **ATS**) vests US federal courts with jurisdiction for civil actions brought by aliens for torts committed in violation of international law, or a US treaty.<sup>1</sup> The US Supreme Court recently issued its first ruling on the scope of the ATS in *Sosa v Alvaraz-Machain* (**Sosa**)<sup>2</sup> confirming the jurisdiction of the US courts to hear ATS claims.

## BACKGROUND

The ATS was passed by the Continental Congress in 1789 to allow redress for international torts such as piracy, 'violation of safe conducts' and 'infringement of the rights of ambassadors'. It was largely motivated by concerns that not allowing such redress could have serious international consequences.<sup>3</sup> The ATS essentially lay dormant until about 1980, when Paraguayan citizens used it to pursue Paraguayan officials (then present in the US) for earlier acts of torture allegedly committed in Paraguay.<sup>4</sup>

Since that time, case law under the ATS has evolved and, more recently, attempts have been made to pursue claims under the ATS against private corporations (particularly large

multinationals) conducting operations in the third world. There has been a proliferation of claims, many aimed at the resources sector, but also involving multinational corporations in the banking, pharmaceutical and other sectors.<sup>5</sup> Those claims have included allegations of human rights abuses, torture, environmental pollution and slave labour. By way of illustration of the possible anatomy of such a claim, it might be alleged that a company cooperating with a local government's militia to ensure security for operations conspired to commit, or aided and abetted acts committed by that militia. Obviously, the allegations might range across a broad spectrum, depending on the local conditions – politically, socially or otherwise – of the country in which the company's subject operations are based.

Broadly speaking, the ATS has been invoked to provide 'universal jurisdiction' to US federal courts for tort claims said to arise from violation of customary or ratified principles of international law. The boundaries of ATS jurisdiction, and the sorts of international legal principles that qualify as sufficiently well-settled to be enforced under the ATS, have been the subject of protracted litigation in US courts. *Sosa* was the US Supreme Court's first decision addressing this complex area.

## THE SOSA DECISION

The *Sosa* case arose out of an alleged kidnapping in Mexico of Alvarez-Machain (**Alvarez**), a Mexican national, by another Mexican national (**Sosa**), on instructions from the US Drug Enforcement Agency (**DEA**). The purpose of the 'kidnapping' was to enable the DEA to prosecute Alvarez for the earlier

<sup>1</sup> 28 U.S.C. §1350 (*Alien's action for tort: The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*).

<sup>2</sup> 124 S. Ct. 2739 (2004). Souter J, delivered the opinion of the Court, Parts I and III of which were unanimous, Part II of which was joined by Rehnquist, C J, and Stevens, O'Connor, Scalia, Kennedy, and Thomas, JJ, and Part IV of which was joined by Stevens, O'Connor, Kennedy, Ginsburg, and Breyer, JJ. Scalia, J, filed an opinion concurring in part and concurring in the judgment, in which Rehnquist, C J, and Thomas, J, joined. Ginsburg, J, filed an opinion concurring in part and concurring in the judgment, in which Breyer, J, joined. Breyer, J, filed an opinion concurring in part and concurring in the judgment.

<sup>3</sup> The *Sosa* court noted that the 'Continental Congress was hamstrung by its inability to cause infractions of treaties, or of the law of nations to be punished... and had done what it could to signal a commitment to enforce the law of nations'. *Sosa*, at 2756.

<sup>4</sup> See *Filatiga v Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>5</sup> ATS defendants have included, for example, ExxonMobil, Chevron Texaco, Rio Tinto, Unocal, Talisman Energy, Shell, BP, Freeport McMoran, Anglo-American, Newmont, Citigroup, UBS, JP Morgan Chase, Barclay's Bank, Credit Lyonnais, Bank of America, and many multi-national pharmaceutical companies. There are presently at least sixteen ATS claims pending in various stages in US federal courts.

torture and murder of a DEA agent. Alvarez was acquitted but subsequently instituted an ATS claim against the US Government and Sosa, alleging that the act of kidnapping constituted a tort in violation of settled international law prohibiting individuals from effecting 'arbitrary detentions'.<sup>6</sup>

The US Supreme Court (the *court*) reversed. It held that the ATS was a jurisdictional statute which, of itself, did not create any separate causes of action. However, it also found that the ATS was intended to create a 'federal remedy' by providing the courts with jurisdiction to entertain 'some common law claims derived from the law of nations'.<sup>7</sup> Accordingly, the courts have jurisdiction to enforce very well-defined and accepted norms of international law comparable in stature to the eighteenth-century torts that originally provided the impetus for the enactment of the ATS. The court held that the alleged tort of arbitrary detention in Sosa violated 'no norm of customary international law so well defined as to support the creation of a federal remedy'.<sup>8</sup>

In reaching this decision, the court examined in some detail the history of the ATS and the jurisdiction it creates. Consequently, the decision contains at least three key points concerning the limits of the jurisdiction provided under the ATS and provides abundant discussion relevant to possible future trends in ATS litigation and jurisprudence.

## RESTRICTING THE SCOPE OF ATS CLAIMS

The court held that the ATS was intended to create jurisdiction in federal courts to hear claims in only 'a very limited category defined by the law of nations and recognised at common law'.<sup>9</sup> This narrow category includes only claims involving violation of international law norms with 'definite content and acceptance among civilised nations'.<sup>10</sup> The court explained that 'the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably

must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts'<sup>11</sup> It is apparent that various factors are relevant to the exercise of this judgment. These factors include the views of recognised jurists and scholarly commentators (as to 'what the law really is' and not 'what the law should be') and also whether the norm takes the form of a treaty to which the United States is a party. However, the court did not provide clear guidance as to how to recognise which international law norms may be enforced in US courts.

Nevertheless, there is sufficient language in the decision to suggest that certain well-accepted (or *jus cogens*) international norms, such as norms against torture, genocide, crimes against humanity and war crimes, will be enforced the ATS jurisdiction. It is expected that claims based upon those norms will still be pursued and heard in the US federal courts.

## RESTRAINTS ON JURISDICTION – POLITICAL QUESTION AND EXHAUSTION OF LOCAL REMEDIES

The court made clear in dicta that even where there is jurisdiction to hear an ATS claim, there may be compelling reasons for a court to refrain from exercising that jurisdiction. For example, the court said that in an appropriate case, it 'would certainly consider' imposing a requirement that, prior to seeking remedies in US courts under the ATS, a potential litigant must have 'exhausted any remedies available in the domestic legal system [of the place of the alleged tort], and perhaps in other fora such as international claims tribunals'.<sup>12</sup> The court referred to the amicus brief of the European Commission in this regard.<sup>13</sup> While exhaustion of local remedies is a principle widely accepted at international law, it has not always been applied by US courts hearing ATS claims. It remains to be seen whether the Sosa court's comments will change this.

Again in dicta, the court also recognised the clear tension between any exercise of jurisdiction under the ATS and the executive branch of government's ultimate constitutional power in the area of

<sup>6</sup> Alvarez also brought suit under the Federal Tort Claims Act (the *FTCA*), which waives sovereign immunity in suits 'for .. personal injury... caused by the negligent or wrongful act or omission of any [government] employee while acting within the scope of his office or employment,' 28 U.S.C. § 1346 (b)(1). This article will focus on the ATS aspects of the decision, rather than the FTCA issues.

<sup>7</sup> Sosa, at 2764-2765, and FN 19.

<sup>8</sup> Sosa, at 2769.

<sup>9</sup> Sosa, at 2754.

<sup>10</sup> Sosa, at 2764.

<sup>11</sup> Sosa, at 2766 [FN omitted].

<sup>12</sup> Sosa, at 2766, FN 21.

<sup>13</sup> Sosa, at 2766, FN 20. The European Commission cited I. Brownlie, *Principles of Public International Law* 472-481 (6th ed. 2003) in this regard.

foreign policy and international politics.<sup>14</sup> The court strongly supported a deferential approach for courts in relation to executive foreign policy concerns. In this regard, the court made reference to ATS cases pending in the federal district court in New York, in which it is alleged that various corporations aided or abetted South Africa's apartheid regime, and noted that both the US and South African governments have objected to these courts continuing to exercise jurisdiction over these claims (for various reasons, including the cases' interference with the policies of South Africa's Truth and Reconciliation Commission).<sup>15</sup> It will be interesting to observe the extent to which future courts decline to exercise jurisdiction over ATS claims on the basis of the 'political question' and/or 'exhaustion of remedies' doctrines, in light of the *Sosa* court's message (albeit in dicta).

## THE STATUS OF CORPORATE DEFENDANTS

The court did not definitively rule on the amenability of corporations to actions under the ATS although it did urge 'great caution in adapting the law of nations to private rights'.<sup>16</sup> It recognised that there was an issue as to 'whether international law extends the scope of liability for violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual'.<sup>17</sup> An en banc decision is expected shortly from one of the US Circuit Courts of Appeal that should provide further guidance on this issue.<sup>18</sup> In the meantime, it seems that lower courts will continue to permit ATS claims to be prosecuted against corporations.

## MOVING FORWARD IN THE WAKE OF *SOSA*

In some ways, *Sosa* is symbolic of the complexities of alien tort litigation and international law generally. It is by no means a clear decision. While the text of the court's decision may be seen by some as reigning in misplaced use of domestic US courts, others have applauded it as an affirmation of the availability of that forum for 'enforcing' international law, especially against multinational corporations doing business in countries with poor human rights records or similar social problems. There clearly remains a continuing need for corporate awareness of the risk of liability in US courts (with US juries) for alleged international torts anywhere in the world. Even unsuccessful claims can be damaging and expensive, and responsible corporate behaviour in compliance with local law may not prevent litigation.

<sup>14</sup> The court also emphasised the legislature's power to curtail the jurisdiction of the courts and even to 'shut the door to the law of nations entirely'. *Sosa*, at 2765. In this regard it pointed out that Congress has done the opposite, enacting legislation to supplement the courts' international law jurisdiction in relation to torture. *Id.*, citing the *Torture Victim Protection Act*, 106 Stat. 73. It is interesting to note that in 2003, the Belgian legislature, when faced with pressure arising from litigation conducted under the then *Belgian Genocide Act*, which granted Belgian courts jurisdiction over claims by aliens against aliens for genocide, amended the Act to restrict that jurisdiction to claims where there was a connection to Belgium – eg, where the defendant was in Belgium, the crime took place in Belgium, or the victim was Belgian or had lived in Belgium for at least three years. In addition, the amendments explicitly authorised the Belgian government to intervene and transfer the case to a more appropriate venue. Reed Brody, *Belgium Curtails Anti-Atrocity Law under US Pressure*, 2003 ACLU International Civil Liberties Report, at [http://sdshh.com/ICLR/ICLR\\_2003/ICLR2003.html](http://sdshh.com/ICLR/ICLR_2003/ICLR2003.html).

<sup>15</sup> *Sosa*, at 2766, FN 21.

<sup>16</sup> *Sosa*, at 2764.

<sup>17</sup> *Sosa*, at 2766, FN 20 [citations omitted].

<sup>18</sup> The en banc decision of the Ninth Circuit Court of Appeal is expected shortly in the matter of *Doe v Unocal* (*Doe v Unocal*, 963 F. Supp. 880 (C.D. Cal. 1987); summary judgment granted, *Doe v Unocal*, 110 F. Supp. 2d 1294 (C. D. Cal. 2000); rev'd in part, remanded, *Doe v Unocal*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002); vacated, reh'g granted en banc, *Doe v Unocal*, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003)).

# BRIEF

National Product Liability Association

