

# Obesity claims liability

– food for thought

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## Introduction

A conference in Boston, Massachusetts in July 2003 raised global awareness of legal and health issues concerning the obesity explosion. The fact that a group was discussing the crisis and *how to sue* concentrated the minds of a vast and varied audience. Now the insurance market must consider the risk of restaurants and fast-food providers being sued – perhaps successfully.

## Body Mass Index

Obesity is defined as having a weight to height Body Mass Index (BMI) of over thirty. Thus a six foot male topping out at 183 lbs is rated as *normal*; 220lbs as *overweight* and above that as *clinically obese*. The average daily calorie intake in the USA is 3,900 – about twice the typical need. A Californian study showed that the annual cost of obesity in that State was a staggering \$21 billion per annum in medical bills, lost productivity and injuries. In just one sector of California's population, over 60% were obese. Across the USA as a whole, around 30% of the population is obese and the number of obese teenagers has tripled since 1980. In the EU, around 135 million persons are now categorised as obese based on a study by the International Obesity Task Force.

Both UBS Warburg and JP Morgan have published reports warning of significant litigation risks and discussing law and regulatory reforms that will impact companies making or selling fattening food products. However, despite awareness of litigation potential, there has, as yet, been no wildfire of lawsuits either in the USA or in the United Kingdom. That may soon change following 2005 developments in New York. After starting well with some first-round victories, the fast food industry is once again on the defensive.

This Opinion inevitably concentrates more on the American scene because lawyers elsewhere have less muscle or financial incentive to contest difficult ground-breaking litigation. Should the causes of action in the USA prove to be valid, there are many lawyers in the United Kingdom, in parts of Europe and in Australia who would seriously consider running similar test cases in their own jurisdictions. Well-known London lawyers with a reputation in this type of claim have been studying the possibilities. However, the UK law is not as favourable and the costs rules do not encourage running complex litigation at great financial risk.

Since Boston, fast food outlets have made urgent attempts to offer more healthy alternatives to burgers with fries as part of a strategy to avoid being sued. They have also run a successful campaign trashing both what they categorise as the food cops and the *greedy plaintiff attorneys*. Initially, about 80% of the American people regarded obesity as a self-inflicted wound caused by over-indulgence and such attitudes would color jury decisions against plaintiffs. However, as more facts emerge, sentiment is changing, especially when there is better understanding of the apparent exploitation of tots and young children. The self-indulgent are now adversely affecting the prudent in corporate health schemes and the US Government is now going to allow discrimination against obese persons in terms of insurance premiums – a reversal of previous policy.

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## Trans Fat

Trans fat is an unsaturated fatty acid (Trans Fatty Acid or TFA). Manufacturers want the improved shelf-life and the flavour stability that TFA provides. It is found in processed food in particular and often arises from use of partially hydrogenated vegetable oils. These are cheaper than using butter or lard. TFA appears in snack foods, ice cream, pies, chocolates, fried foods, cakes, pastries, salad dressings and margarines – the latter once thought to be more healthy than butter! While not the only villain in health terms (soda drinks like Pepsi and Coca Cola are also under fire), TFA is a prime target for causing obesity and health problems. The American Food & Drug Administration is studying a recommended maximum intake of under just 1 gram of trans fat per day. Five small chicken nuggets weigh in with about 4 grams. A typical Apple Danish contains about 2.7 grams of TFA – ironically enough to fall foul of a new Danish law that imposes fines and even imprisonment for breaching a 2% maximum!

## BanTransFat.com v McDonalds

In February 2005 came an unwelcome headline for McDonalds. The plaintiffs were a special interest group called BanTransFat.com. They alleged that having announced that it was going to reduce the trans fats in its cooking oils, McDonalds had not done so timeously. The company settled for \$8.5 million. The entire food industry is undoubtedly running scared of selling products that contain trans fat. There are moves to limit or ban such fat in some products both in Europe and in the USA following linkage by experts to serious health conditions including obesity.

Previously, in 2001, other plaintiffs won a claim on the basis that McDonalds promoted *vegetarian* fries when in fact the fries were cooked in beef fat. The company paid out \$12.5 million in consequence. Other settled claims against different defendants have involved alleged misdescription of the calorie content of a snack product and a suit over ice-cream alleging that it was misleadingly described as a diet product.

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## Health effects

There seems to be a general consensus that food containing TFA causes atherosclerosis, raises "bad" cholesterol, reduces "good" cholesterol and is linked to type-2 Diabetes leading to coronary heart disease. Obese people also suffer from excessive musculoskeletal disorders so that coupling this with chronic disease risks, they present a problem under Workers Compensation. Another study has linked Alzheimer's Disease with dietary fats and while this may be so, this problem has also been alleged as due to other lifestyle issues like welding or using aluminium saucepans. Proving linkage may be problematical.

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## Life expectation

The explosion in numbers of obese young people means that the long-standing trend of increased longevity may be reversed. One report suggests today's obese teenagers may have their lives shortened by fifteen years. However, confidently predicting the effect is difficult as experts are still divided. Another recent report suggested that obese smokers may lose over thirteen years of life expectation and obese non-smokers about seven years. Other figures from the Centers for Disease Control and Prevention placed obesity second after tobacco on the list of preventable killer factors with an estimated 365,000 American deaths per annum. However, an April 2005 study from the US National Center for Health Statistics surprisingly relegates obesity to seventh position with a mere 26,000 deaths per annum. It points to better medicaments to counter the effects of obesity. There is also a burgeoning market for surgical weight loss, a market which will also lead to medical malpractice claims.

Given the (mainly) accepted serious health risks associated with obesity, it seems curious that this latest report finds that obesity has such little impact on life expectancy. Wherever the pointer falls on obesity-related premature deaths, it is beyond question that the future will create a crisis in shortage of nursing-home accommodation and for the rising cost of Medicaid. Additionally, if the plaintiffs succeed in the litigation explained below, then there will be a rash of new and expensive lawsuits. Life expectation implications when calculating future losses in bodily injury claims are going to be significant.

## Juveniles

Food manufacturers, restaurants and fast food outlets have attacked those advancing legal theories of liability with satirical advertisements and media comments portraying grotesque, greedy and much older obese individuals who do not attract much sympathy. This glib spin to deflect possible blame is unlikely to prevail. Children, obese by the age of seven, cannot be blamed for their diet. Such children will remain obese for life and will suffer increasing health problems in their middle years.

The fast food industry allegedly knew of this danger to health yet has advertised hugely to this age group on TV and has marketed with free toy offers and by providing games facilities for kids' parties. Two year olds recognise the *Golden Arches*. The cost of TV advertising and other marketing was calculated at \$15 billion for 2002 according to the Center for Science in the Public Interest. Parental ignorance or lack of concern about eating a surfeit of what is often called junk food may be a factor. Additionally, many school authorities in the USA, besides offering too much fattening food in canteens, have installed some three million vending machines that are generally filled with items containing TFA, fizzy drinks or other products creating obesity. The vending companies pay rent for the space. The schools need the money. Since the Boston conference, many but not all school authorities, fearing litigation or from genuine concern for health or both, have been removing these outlets or changing the products offered.

Schools are vulnerable to litigation because besides encouraging or enabling excess unhealthy food intake, they have not provided adequate opportunities to burn off the calories by exercise. Since the Pelman decision discussed below, Kraft Foods have volunteered to stop marketing some junk foods to under-elevens.

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## Labelling

Clues as to the TFA content currently come from labelling. Terms such as *shortening*, *hydrogenated vegetable oil* or *partially hydrogenated vegetable oil* are pointers but from 1st January 2006, euphemisms will not be sufficient. Even before this new law, misleading data may already lead to claims under the robust laws on deceptive trade practices.

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## Food quantities

An interesting revelation at Boston was the way that food outlets and manufacturers had gradually increased sizes of products – whether burgers or chocolate bars or drinks. The fast-food giants have competed by offering bigger quantities at very little extra cost overall. Dr Marion Nestle, Paulette Goddard Professor of Nutrition, Food Studies and Public Health at New York University spoke persuasively about this marketing ploy contributing to the obesity explosion. Research had shown that most consumers over the age of five will eat everything in front of them *irrespective of size*. Dr Nestle pointed out that in these outlets, it was not possible to purchase an 8 oz drink - the traditional glass size. The smallest was 12 oz. rising to a gigantic 64 oz. That size even without burger and fries could contain 800 calories, about one-third of a day's needed intake.

## The American legal background

There have been a number of successful lawsuits in the USA related to food / obesity issues but there has yet to be that one clear-cut decision with punitive damages sufficient to kick-start a plaintiff lawyer feeding frenzy, though it may be close. In 2003, Kraft Foods were sued for the trans fat content in their popular Oreo cookies. The litigation settled with the company agreeing to find ways of changing the content. In the battle for the hearts and minds of the public, the attorney who sued Kraft summarised the dispute as: "It's white males who love freedom versus Moms who care about what their kids eat."

That same year, the highest profile test case, *Pelman v McDonalds* was dismissed in New York before the plaintiffs got access to the defendant's documents. The appeal was partially allowed in January 2005 and though McDonalds have described this as a procedural setback, they must now be very concerned. The plaintiffs will get penetrating documentary insight into many different facets of McDonalds' business operations. Whatever is found, McDonalds must face up to the expense of a costly discovery exercise.

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## Litigation parallels

The parallel with the tobacco litigation is apposite. At first the public mood was that cancer from smoking was a self-inflicted wound. Lawsuits were regularly knocked out before discovery of documents. However, once the first case reached discovery, the nastiness of the internal confidential documents changed the landscape. A smoking-gun of epic proportions was revealed. The public became aware of the cynical approach of manufacturers to the health issues and became hostile so that the plaintiffs started winning - not least the States litigating through their Attorneys-General for care costs of victims of smoking related illnesses.

Other experts prefer to compare the legal issues with the liability of vehicle manufacturers if they fail to supply crashworthy vehicles – this being a favoured route to damages following injury in a road traffic accident. In such litigation, a motorist may have driven carelessly causing self-inflicted wounds but if the vehicle did not reasonably protect him, then there can be legal liability against the manufacturer. By analogy, those providing fast food would become liable.

At the Boston conference, various theories of legal liability were debated but favourites were deceptive trade practices laws (described below), products liability, negligence and misrepresentation, especially when linked to marketing and advertising. As expanded below, subrogated claims by States for financial outlays caring for obese people is also looking attractive.

## The Pelman case

Though the plaintiffs lost the first round of litigation, the judge in the Federal Court was pretty scathing about one of McDonalds products:

“Chicken McNuggets, rather than being merely chicken fried in a pan, are a Frankenstein creation of various elements not utilised by the home cook... Chicken McNuggets, while seemingly a healthier option than McDonalds hamburgers because they have “chicken” in their names, actually contained twice the fat per ounce as a hamburger. It is at least a question of fact as to whether a reasonable consumer would know without recourse to the McDonalds web site that Chicken McNuggets contain so many ingredients other than chicken and provide twice the fat of a hamburger.”

The plaintiffs successfully appealed the striking out of the claim and since January 2005 have embarked on the discovery process. They alleged on appeal that various promotional representations by McDonalds created a false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily. The company also allegedly failed adequately to disclose that its use of certain additives and the manner of its food processing rendered certain of its food substantially less healthy than represented. Finally, the company allegedly deceptively represented that it would provide nutritional information when in reality such information was not readily available.

Under the New York General Business Law, clause 349, the claim is framed on the basis that these allegations amounted to *unlawful deceptive acts or practices* in the conduct of a business. No proof of actual reliance upon the deceptive acts need be proved. It is not necessary to prove fraud (usually a heavy burden) to the same degree or manner as under the common law.

The plaintiffs visited McDonalds three to five times per week relying on the company's representations and *inter alia* allegedly developed obesity, diabetes, coronary heart disease, high blood pressure, cancers and elevated cholesterol intake. Coming from what is arguably the second most important court in the USA, this appellate judgment must be chilling for all fast food companies. The plaintiffs will be demanding internal memos, test results and studies relating to content, promotion and marketing. If evidence is uncovered for example of deliberately adding chemicals or substances that are addictive so that food is *more-ish* (as plaintiff lawyers believe) or that they knowingly increased portions, realising that this would cause obesity or health issues, then the industry will have problems.

The statutory offence of breach of **deceptive trade practice laws** is law in many States within the USA. It was the cornerstone of the tobacco case that opened the way for Class Actions in *Miles v Philip Morris*. The defendants were ordered to pay \$10 billion for falsely creating an impression that *light* cigarettes were less harmful than other brands. This legal concept is transferable in principle to the obesity situation except that in February 2005, President Bush signed into law inhibitions preventing some of the worst excesses of Class Action litigation.

## Potential defendants

- a) **Fast food companies**
  - exposed for the reasons given above for product liability, failure to warn, strict liability, breach of warranty, misrepresentation, deceptive trade practices and reckless or negligent marketing. Additionally, they may be vicariously liable for breaches committed by their servants or agents being external marketing and advertising agencies.
- b) **Food Manufacturers**
  - exposed for misleading or inadequate labelling of products, especially when containing trans fats. Breach of warranty may be applicable and allegations related to products liability.
- c) **Marketing Agencies**
  - exposed for orchestrating fast-food campaigns (especially) that were misleading to consumers.
- d) **Advertising Agencies**
  - exposed for orchestrating fast-food campaigns (especially) that were misleading to consumers.
- e) **Quasi marketing agencies**
  - exposed for misleadingly endorsing certain foods as being beneficial to health.
- f) **The Medical Profession**
  - exposed for failing to give adequate advice to parents regarding the dangers of infant and child obesity. One study revealed that the chances of getting appropriate medical advice about obesity was only 50/50.
- g) **School Authorities**
  - exposed for permitting conflicts of interest with the suppliers of some vending machines; for failing to permit sufficient exercise and for provision of unsuitable canteen food.
- h) **Shops and Restaurants**
  - exposed for possible breach of contract; for providing inadequate consumer warnings, guidance or advice on foods or for possible misrepresentations.
- i) **Employers**
  - Exposed:
    - i). For the type of food on offer in canteens
    - ii). For prejudicing fit, non-obese employees by paying loaded group medical premiums due to the number of obese persons. A posse of major corporations claimed that their premiums for employee health coverage were loaded by \$12 billion per annum due to obese staff.
    - iii) For failing to enable opportunities for exercise.
 Besides legal liability risks, the cost of buying coverage for Workers Compensation is increasing due to the number of injuries caused by obesity-related health problems.
- j) **Directors and Officers**
  - If fast-food or food production companies are found liable with huge awards for deceptive trade practices, then shareholders may look to the Directors and Officers for redress.

## State litigation

In a recent development that must have fast-food and other companies very concerned, Attorneys-General are now circling the food industry looking for the entrée to recoup the cost of treating obesity related medical issues – the cost of which arguably exceeds both tobacco and alcohol. Indeed, States can put forward attractive arguments, untainted by any prevailing prejudice against obese claimants. The *community* can make common cause with their Attorneys-General on the basis that the huge State outlays on healthcare ought to be recouped from those companies who knowingly had flooded the marketplace with products in quantities that were unreasonably fattening. Winning back these billions will help ease the State tax burden, an easy way to attract support – and to ensure good results from jurors, especially if schools, vending machines and young children can be wrapped into the legal arguments.

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## Federal & State legislation

About twenty-one States have now passed so-called Cheeseburger Bills (often jokingly linked with the name of former President Clinton who was notorious for his fast-food diets before his heart condition). These prevent restaurants, outlets and others being sued based on obesity arguments. More States may yet follow. In contrast, some States are passing laws enabling special taxes on soft drinks that cause obesity. The aim is to use the tax to educate about fattening foods and to provide grants to schools that remove soft drinks dispensers. This battle between freedom to over-eat and the unfairness to the rest of the community having to pay the medical bills for others' excesses has some long way to run.

In Congress, a draconian *Personal Responsibility in Food Consumption Bill* was re-launched in February 2005 to prevent obesity-related claims in State or Federal courts – and to quash any claims actually under way. This Bill passed the House of Representatives (again) in October 2005 but, just as in 2004, its fate rests in the hands of the Senate. Last time round, it failed there. The new law if passed and then signed by President Bush would curb claims against food manufacturers and restaurants.

Besides legislation, some restaurants and fast-food outlets are protecting themselves by incorporating warnings onto their menus and waivers of liability into their dealings with consumers. The effect of these will be disputed by plaintiff lawyers.

## United Kingdom

There are now eight million clinically obese people in the UK. In ten years, the number of clinically obese adult males has risen nearly 75%. By 2020, 50% of all children will be obese, a permanent blight on their lives. According to a Commons Select Committee, many will predecease their parents. However, until there is a groundswell of American success, the likelihood of lawsuits, let alone the outcome, remains speculative. The disincentives are:

- Though the latest Government figures show a decline in litigation, this has not prevented the media from running lurid stories to the contrary. They have hyped up an image of a greedy lawyer-led American-style litigation explosion since the introduction of *no win, no fee* laws. This inhibits some lawyers who prefer to avoid constant media flak.
- The worst US litigation excesses make the biggest news. British judicial hostility to the American scene, much of it without good cause, acts as a powerful disincentive to lawyers operating on a conditional fee basis. The costly failure of the (*seemingly very promising*) tobacco litigation in the UK remains embossed in the memories of claimant law firms.
- The resounding failure in Britain of the (somewhat difficult) *scalding by coffee litigation* against McDonalds is a further reminder that more than the Atlantic divides the judicial systems.
- The lingering sense of uncertainty regarding interpretation of product liability claims under the Consumer Protection Act 1987.

Consumers buying a Volvo can expect more safety features than a much cheaper model can incorporate. The buyer can see the features offered or absent and cannot expect redress if injured because the economy model did not have the latest safety gizmos. So by analogy, with fattening food, consumers must be made aware of the risks of excessive consumption if suppliers are readily to avoid liability. Informed choice for adults and an end to marketing and advertising to children seems essential.

Legislation like the UK's Food Safety Act 1990 and the statutory instruments made under it are helpful in identifying the standards to be met in labelling, marketing and quality of food products. The laws and regulations, driven hard from Brussels, are changing and will continue to change fast in the next few years. The Food Standards Agency through Local Authorities is responsible for enforcement and prosecution of offenders. Those failures could underpin a civil claim by a consumer who has suffered damage by reliance upon false or misleading data provided by the defendant.

So far there has been no sign of any law that would tax soft drinks or fast food to inhibit sales, though the Government announced in March 2005 that unhealthy food would be phased out of school diets. In the same month, the Food Standards Agency announced the advanced stage of moves towards clear labelling of fat contents to help consumers make an informed choice, part of an EU initiative.

There is currently no law that says a producer must refer to the TFA content. Reference need only be made to hydrogenated fat or oil and the quantity need not be stated. Current UK guidance from the Food Standards Agency is that a maximum of 2% grams of trans fats per day should be consumed, something hard to achieve if many popular foods are consumed. The Agency, which has no plans to be more robust regarding trans fats, has been criticised for being soft on the problem and for grouping it too closely with saturated fats.

## Conclusions

- Insurers of products in this sector must remain alert to pending fast-moving developments, especially Federal legislation.
- Providers of cover for workers compensation are exposed to potentially sharply increasing claims.
- Liability and Excess Casualty Insurers should consider an audit of potential claims from a wide variety of quarters, especially if there is an American element involved.
- Insurers responsible for educational authorities or for the medical profession should be alert to risks of exposure, especially in the USA.
- Life Insurers need to continue to monitor the implications with especial care.
- Health and Disability Insurers will need to monitor trends with especial care.
- School Authorities anywhere should review the wisdom of renting space for vending machines that deliver unhealthy food.
- Companies operating directly or indirectly in the food supply or manufacturing sector should check all aspects of exposure to ensure coverage for claims.

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