

Obesity claims liability

– food for thought

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Introduction

Aspen Re originally issued its Obesity Claims Liability review in November 2005. There have been substantial developments during the intervening period.

The purpose of the pivotal Boston Conference on Obesity in 2003 was to warn food manufacturers and other potential defendants such as school authorities that without urgent changes in food products and the ending of the marketing of junk food to children, plaintiff lawyers would en masse begin to sue for damages. Some four years on, it is evident that the Conference warnings were heeded as schools, advertisers, governments and the food industry have enacted a number of reforms and changes of policy to help protect children and, by implication, stave off the threatened lawsuits. Although there have been some successful legal actions, the flood of lawsuits has not (yet) occurred. A key focus has been the reduction or elimination of trans-fats from food products to avoid litigation. Better food labelling has been applied and in New York City, trans-fats will be banned from July 2008.

Another possible reason for the relative calm is that the critical test case in New York of Pelman v McDonald's has yet to go to trial. As a result, the world is not yet privy to the mass of company documents that McDonald's will be required to disclose as part of the proceedings. Should a smoking-gun emerge from these files, then the floodgates will surely open – and other fast-food companies may be drawn into the fray.

Many US states have also passed legislation seeking to safeguard sellers, restaurants, manufacturers and distributors from obesity-related lawsuits, though the new laws would almost certainly not protect companies against false or misleading trade practices. Other significant factors are changes of ingredients; more cautious marketing strategies (especially to children) and the ending of selling through vending-machines at schools, either voluntarily or through policy reform by school authorities

Introduction (continued)

Governor Schwarzenegger in California has signed nutrition standards into law for food and drink sold on school premises. In the UK, Ofcom announced proposals to curb advertising of fattening or unsuitable products to children during peak hours, though the School Food Trust (a new body) is demanding more stringent curbs and legislation to protect children is still a possibility. In September 2006, the UK government's new policy on better school meals became effective, together with the ban on vending machines dispensing crisps, chocolate or fizzy drinks.

Summary of pending legal action

Pelman v McDonald's – The company is facing claims by juveniles about the ingredients in its products and allegations of deceptive trade practices.

McDonald's has ended the 'super-sizing' of portions, one of the core complaints at the Boston Conference. Even so, many US restaurants still offer unlimited fast-food and sweet drinks. In 2006, several lawsuits were launched against McDonald's over allegations of gluten in the fries. Some claimants link gluten to behavioural and digestive problems for autistic children, though McDonald's has denied liability. Other cases involve claimants with celiac problems.

Lawsuits have been filed against Burger King, McDonalds, Chili's, Chick-Fil-A, Applebee's, Outback Steakhouses and TGI Fridays alleging that their grilled chicken is carcinogenic and as unsafe as high-fat fried chicken.

In December 2005, the US Institute of Medicine reported (Food Marketing to Children and Youth: Threat or Opportunity) that the current pattern of food and beverage marketing to children was a threat to health. TV advertising is also contributing to the unhealthy diets.

Although it is nearly 12 months since the announcement of possible proceedings against Viacom and Kellogg, there has been no evidence of any actual lawsuits being filed. One would expect a fanfare of publicity if any cases were filed. Equally, even if the claims had been settled out of court on confidential terms, this would still be in the public domain.

As predicted in the 2005 Aspen Opinion, the basis for the claims would be that the companies' advertising was targeting children. A class action that was due to be launched in Massachusetts was set to contend that Kellogg advertised fattening food to children who watched the Nickelodeon TV channel owned by Viacom. Massachusetts was chosen by parents and pressure groups for its plaintiff and consumer-friendly laws.

Obesity Claims Liability

A conference in Boston, Massachusetts in July 2003 raised global awareness about the health and potential legal issues arising from the explosion in the levels of obesity. Discussions about the crisis that included how to sue concentrated the minds of a diverse audience. The insurance industry needs to address the pressing risk of restaurants and fast-food providers being sued and the resulting potential for significant damages.

Body Mass Index

Obesity is defined as having a weight to height Body Mass Index (BMI) of over 30 (weight in kilos divided by square of height in metres). Thus a six foot male weighing 183 lbs is rated as normal; 220 lbs as overweight and above that as clinically obese. The average daily calorie intake in the USA is 3,900 - about twice the typical requirement. A Californian study showed that the annual cost of obesity in that state was a staggering US\$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 according to a study by the International Obesity Task Force.

Both UBS Warburg and JP Morgan have published reports warning of significant litigation risks and discussing the legal and regulatory reforms that could affect companies making or selling fattening food products. However, despite awareness of the potential for litigation and damages, the anticipated flood of lawsuits has so far failed to materialise. That may change following developments in New York in 2005, where after some first-round victories, the fast-food industry is once again on the defensive.

This Opinion focuses most closely on the American situation as lawyers elsewhere have less muscle or financial incentive to contest difficult ground-breaking cases. Should the test cases in the US prove valid, there are many lawyers in the UK and other parts of Europe as well as Australia, who would seriously consider filing similar lawsuits in their own jurisdictions. Well-known London lawyers with a reputation in this type of claim have been studying the possibilities. However, UK law is not as favourable and the costs rules do not encourage running complex litigation at great financial risk.

Initially, around 80% of American people regarded obesity as a self-inflicted wound caused by over-indulgence and it was felt that such attitudes could colour jury decisions against plaintiffs. It is significant that the US Government may permit discrimination against obese persons in terms of insurance premiums – a reversal of previous policy. However, as more facts have begun to emerge, sentiment has been changing, especially when there is better understanding of the apparent exploitation of impressionable young children.

The fast-food industry has taken action. Since the Boston conference, fast-food outlets have made urgent attempts to offer more healthy alternatives to burgers and fries as part of a strategy to avoid litigation. They have also run a successful campaign aimed at tarnishing what they categorise as 'food cops' and 'greedy plaintiff attorneys'.

Trans-fat

Trans-fat is an unsaturated fatty acid (Trans Fatty Acid or TFA). TFA is cheaper than using butter or lard. It can also provide flavour stability and improved shelf-life. It is most commonly found in processed food and often arises from use of partially hydrogenated vegetable oils. This includes snack foods, ice cream, pies, chocolates, fried foods, cakes, pastries, salad dressings and margarines - the latter once thought to be healthier 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. There are moves to limit or ban such fat in some products both in Europe and in the US, following linkage by experts to serious health conditions including obesity. The American Food & Drug Administration is studying a recommended maximum intake of less than 1 gram of TFA 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 this would fall foul of a new Danish law that imposes fines and even imprisonment for breaching a 2% maximum!

BanTransFat.com v McDonalds

February 2005 saw an unwelcome headline for McDonald's. The plaintiffs were a special interest group called BanTransFat.com. They alleged that McDonald's had failed to live up to its promise of reducing the TFA in its cooking oils. The company settled for US\$8.5 million.

In 2001, other plaintiffs had won a claim against McDonald's promotion of what it described as 'vegetarian' fries when in fact they were cooked in beef fat. The company paid out US\$12.5 million as a result. Other settled claims against different defendants have involved alleged misdescription of the calorie content of a snack product and a suit over ice-cream that alleged that it was misleadingly being described as a diet product.

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 when coupled with a heightened risk of chronic disease, they pose particular issues for providers of Workers Compensation. Another study has linked Alzheimer Disease with dietary fats and while this may be so, this problem has also been linked to other lifestyle issues like welding or using aluminium saucepans. Proving linkage may be problematic.

Life expectation

The growing incidence of childhood obesity may reverse the longstanding increase in longevity. One report suggests today's obese teenagers may have their lives shortened by as much as 15 years. However, confidently predicting the effect is difficult as experts are still divided. Another recent report suggested that obese smokers may lose over 13 years of life expectancy and obese non-smokers about seven years. Other figures from the Center for Disease Control and Prevention placed obesity second after tobacco on the list of preventable killers, accounting for 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 improved treatment to counter the effects of obesity. There is also a burgeoning market for surgical weight loss, though this could also lead to more 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 latest round of test claims succeeds, then there will be a rash of new and expensive lawsuits.

Young people

Food manufacturers, restaurants and fast-food outlets have attacked claimants with satirical advertisements and media comments portraying grotesque, greedy and older obese individuals who may 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 was allegedly aware of the danger to child health, yet advertised extensively to this age group on TV; offered free toys as incentives and by provided games facilities for kids' parties. Two year olds recognise the 'Golden Arches'. The cost of such TV advertising and other marketing was US\$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 US have offered overly fattening food in their canteens, along with installing some three million vending machines that are generally filled with items containing TFA, sweet drinks or other products that could give rise to 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 through exercise. Since the Pelman decision discussed below, Kraft Foods have volunteered to stop marketing some junk foods to under-11s.

Labelling

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

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 how this marketing ploy may have contributed 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 some fast-food outlets, it was not possible to purchase an 8 oz drink - the traditional glass size. The smallest was 12oz rising to a gigantic 64oz. That size even without burger and fries could contain 800 calories, about one-third of recommended daily intake.

The American legal background

There have been a number of successful lawsuits in the US related to food/obesity issues. However, there has yet to be one clear-cut decision with punitive damages sufficient to kick-start a legal feeding frenzy, though it may be close. In 2003, Kraft Foods were sued for the TFA content in their popular Oreo cookies. The ruling forced the company 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 McDonald's* was dismissed in New York before the plaintiffs could gain access to the defendant's documents. An appeal was partially allowed in January 2005 and though McDonald's have described this as a procedural setback, they must now be concerned. The plaintiffs will gain penetrating documentary insights into many different facets of McDonald's business operations. Whatever is found, McDonald's must face up to the expense of a costly examination of its records.

Litigation parallels

The parallel with tobacco litigation is apposite. At first the public mood was that cancer from smoking was a self-inflicted wound. Lawsuits were regularly kicked out before full examination of the 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 so hostile that the plaintiffs began to be successful – not least the states suing for the 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 offer reasonably protection, then there can be a legal liability against the manufacturer. By analogy, those providing fast-food would become liable.

At the Boston conference, various aspects of potential legal liability were debated. The most prominent were deceptive trade practices laws (described below), product liability, negligence and misrepresentation, especially when linked to marketing and advertising. As expanded below, subrogated claims by states for the cost of caring for obese people may also prove viable.

The Pelman Case

Although the plaintiffs lost the first round of litigation, the judge in the Federal Court was scathing about one of McDonald's 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 McDonald's 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 McDonald's 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 McDonald's 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 to fully disclose that its use of certain additives and the manner of its food processing made some of its food substantially less healthy than represented. Finally, the company allegedly deceptively asserted that it provided 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 shown. Neither is it necessary to prove fraud (usually a heavy burden) to the same degree or manner as under the common law.

The Pelman Case (continued)

The plaintiffs visited McDonald's 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 US, 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 become moro-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 remedy of breach of deceptive trade practice laws is law in many States within the US. 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 US\$10 billion for falsely creating an impression that 'light' cigarettes were less harmful than other brands. This legal concept would have been transferable in principle to the obesity situation had President Bush not signed into law certain curbs on class actions.

Potential defendants

- a) **Fast food companies**
 - susceptible to claims relating to 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 ie external marketing and advertising agencies.
- b) **Food manufacturers**
 - susceptible to claims relating to misleading or inadequate labelling of products, especially when containing TFA. Breach of warranty may also be applicable.
- c) **Marketing agencies**
 - susceptible to claims of orchestrating fast-food campaigns that were misleading to consumers.
- d) **Advertising agencies**
 - susceptible to claims of orchestrating fast-food campaigns that were misleading to consumers.
- e) **Quasi marketing agencies**
 - susceptible to claims of misleadingly endorsing certain foods as being beneficial to health.
- f) **The medical profession**
 - susceptible to claims of 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 were only 50/50.

Potential defendants (continued)

g) School authorities

- susceptible to claims of 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

- susceptible to claims of possible breach of contract; for providing inadequate consumer warnings, guidance or advice on foods or for possible misrepresentations.

i) Employers

Susceptible to claims relating to:

- i). The type of food on offer in canteens
- ii). Acting against the interest of 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 US\$12 billion per annum due to obese staff.
- iii) Failing to provide opportunities for exercise.

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 cover for redress.

State litigation

In another development that is likely to be of concern for fast-food and other companies, states are now looking at how to open up legal routes 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 compelling arguments, untainted by any prevailing prejudice against obese claimants. These moves could enjoy wide community support, not least as winning back these billions could help ease the state tax burden - and possibly ensure good results from jurors, especially if schools, vending machines and young children can be wrapped into the legal arguments.

Federal & State legislation

Around 20 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 diet before his heart condition). These prevent restaurants, outlets and others being sued for their alleged contribution to obesity. More states may yet follow. In contrast, some states are passing laws enabling special taxes on sweet drinks that cause obesity. The aim is to use the tax to educate people about fattening foods and to provide grants to schools that remove sweet 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' has some long way to run.

Federal & State legislation (continued)

In Congress, the Personal Responsibility in Food Consumption Bill was re-launched in February 2005 to protect against obesity-related claims in state or federal courts. This Bill passed the House of Representatives (again) in October 2005 but, just as in 2004, it failed to win Senate approval.

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 damages, the likelihood of lawsuits, let alone the outcome, remains speculative. The disincentives are:

- Though the latest UK 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 acts as a powerful disincentive to lawyers operating on a conditional fee basis. The costly failure of the tobacco litigation in the UK remains embossed in the memories of claimant law firms.
- The resounding failure in Britain of the (somewhat difficult) scolding by coffee litigation against McDonald's 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 whether the features have been provided and therefore 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 to avoid liability. Informed choice for adults and an end to marketing and advertising to children seems essential.

United Kingdom (continued)

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 mainly from Brussels, are likely to evolve rapidly over the next few years. The Food Standards Agency and its partners in local authorities are 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 sweet drinks or fast-food to inhibit sales, though the UK 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 TFA per day should be consumed, something hard to achieve if many popular foods are consumed. The Agency 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 US.
- 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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