

GEARING UP FOR LITIGATION AGAINST ALCOHOL MANUFACTURERS

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“Thinking Drinking – From Problems to Solutions” Conference, Melbourne
26 February 2007*

Writing in the BMJ in 2000, Professor Richard Daynard wrote;

Tobacco litigation has transformed the prospects for tobacco control, first in the United States and more recently worldwide. It has forced tobacco companies to sit at the bargaining table with tobacco control advocates, has produced settlements under which the industry is committed to paying about \$10bn each year to reimburse American states for healthcare expenditure caused by tobacco, and it has generally put the industry on the political defensive. For example, the millions of pages of internal documents from the tobacco industry that are now open for public inspection in Minneapolis, Minnesota, and in Guildford, England, as a result of the Minnesota state litigation continue to fuel exposés of industry misconduct, and only a fraction of the material has yet been analysed.

Gideon Haigh, after publishing his remarkable text on the history of Australia's own James Hardie asbestos scandal, had this to say at the end of an exhaustive examination of eighty years of pitched battle between corporate gangster and the community it preyed upon;

“The group that has done the most to bring about compensation for victims of asbestos-related disease in Australia is neither government nor union. I began my research holding no particular brief for plaintiff lawyers and I can understand complaints about the complication and cost they bring to the system. But without the tenacity of Melbourne’s Slater and Gordon and Sydney’s Turner Freeman, asbestos would have levied its human toll with impunity.”

In truth, with respect to a myriad of products ranging from exploding motor cars to asbestos cement, from contaminated blood products to tobacco; litigation in the United States and in Australia, has been one of the major societal forces in the promotion of product safety and consumer protection.

A couple of years ago, Kraft and McDonalds announced that they were changing the way they were going to do business. Consumers were going to be better informed, products were going to be healthier, portions smaller. A great result for

individual consumers, and to society generally. And what was one of the acknowledged drivers of these welcome changes? It was the perceived threat of lawsuits.

For similar reasons, we don't have asbestos in our workplaces any more, drugs are put through rigorous testing and review before humans (at least humans outside Africa,) can consume them, churches are facing up to issues of sexual abuse of children which have remained hidden for years, Australian mining companies in third world nations are suddenly giving some thought to the environments in which they work, and our children play in playgrounds where they fall on woodchips or rubber rather than tar and cement.

But there is little or no track record of success for litigation in moderating the behaviour of manufacturers and purveyors of alcohol. No one can point to landmark decisions which have changed the operating or marketing practices of manufacturers overnight.

It is timely to ask...why is it so?

The question invokes the much broader issue of the varying roles that the private right of legal action has and may play in influencing outcomes in any public health scenario.

Why, for example, have plaintiff lawyers managed to close down the asbestos industry?.....but not the heroin trade?

And in the biggest battle ground of public health; the battle with big tobacco; to what extent do Professor Daynard's observations about the role of litigation, account for the reductions which have been made in smoking rates in Australia and overseas?

The key answer to this question is that no one mechanism for regulatory influence of the biggest threats to public health is a panacea for achieving optimal or desired outcomes.

For all of the achievements of lawyers aligned with the anti-smoking movement around the world over the past twenty years; it would be fallacious and foolish to deny the critical role that has been played by progressive governments in imposing regulation; advertising restriction; point of sale restriction; age limits; and pack design.

Equally important has been the partnership role of educators; both public and in the home.

Likewise, the role of public health advocates.

Given the wealth and resources of the tobacco industry, little could have been achieved without the presence of a sound and on-going compendium of scientific and medical evidence, demonstrating the nature and extent of the dangers of smoking, and standing up to the funded junk science propagated by the industry and its highly paid lackeys.

Considerable achievements have been made in Australia and many parts of the world in the last decade in reducing the incidence of smoking and it is, I think, clear that it has been the synergy of these various modes of education, advocacy, regulation and enforcement which has significantly influenced this outcome.

It is no accident that the biggest increase in smoking incidence in the 21st century is in countries which lack these synergistic regulatory controls. No advertising restrictions. No public health advocacy or education. No effective private rights of action

In countries like Australia, litigation has played its role; and its role has included many factors; exposure through the discovery process of many of the iniquities of the industry; huge unprecedented financial accountability; and equally important though seldom dwelt upon....the general deterrent effect upon industry of the knowledge that it may be held accountable in Courts in suits brought by affected citizens.....a threat that cannot be closed down by buying off or lobbying off government.

In the USA, the list of victories against the tobacco companies by State governments (who recovered hundreds of billions from tobacco companies in compensation for monies spent by states in treating patients with tobacco-caused illnesses), individual smokers and, more recently, even the Federal Government (alleging conspiracy and racketeering), continues to grow. One study, "Epidemiology of the third wave of tobacco litigation in the United States, 1994–2005," examines the litigation trend over the past dozen years or so and finds an impressive 41% success rate against cigarette companies and their allied interests in the U.S. trial courts.

What lessons and potential does this history of tobacco litigation offer for the regulation of another drug of addiction, alcohol ?

The Trauma Foundation at the San Francisco General Hospital, after the States had successfully extracted a multi-billion dollar health-care costs settlement from Big Tobacco, were optimistic;

The states' tobacco lawsuits provide us with important lessons for alcohol. The greatest benefit of the tobacco litigation was not any of the legal awards and settlements, but public health gains made possible by court supervised discovery of industry documents. That documentation showed

that the industry aggressively promoted tobacco to children while hiding the facts about addiction and disease. As a result, public perceptions of the industry turned sour, giving lawmakers the necessary public support to promote tobacco control legislation including increased tobacco taxes and indoor smoking bans.

The similarities between tobacco and alcohol promotion are clear. Both products are aggressively marketed to children. Both cause disease and death. In addition to long-term disease, alcohol use can also result in immediate damage, unintentional injuries, drink-driving collisions, domestic violence and crime, thus creating huge criminal justice as well as health costs.

Against this optimism, however, there has been the singular lack of success in lawsuits against alcohol manufacturers alleging product liability and failure to warn. No claim has been successful on this basis. Some examples are;

Bruner v Anheuser-Busch (Fla. 2001) ; Beer drinkers with alcohol-related injuries claimed fraudulent concealment and failure to warn. The claim was dismissed on basis that dangers from over-consumption of alcohol were well known, and therefore the product was not unreasonably dangerous, and because the cause of plaintiffs' harm was their voluntary consumption of beer not the manufacturing or sale of beer per se.

In Joseph E Seagram & Sons Inc v McGuire (Tex 1991); the Claim was dismissed on the basis that the danger of developing addiction from frequent drinking was well known.

Malek v Miller Brewing (Tex 1988); Grant of summary judgment to brewer holding that brewer had no duty to warn underage drunk driver of the dangers of intoxication, the product as marketed was not unreasonably dangerous, the dangers of intoxication and overindulgence of alcohol were well known, and labelling the product "Lite" was not misleading or deceptive.

Robinson v Anheuser-Busch (Ala, 2000); the father of a teenage boy claimed the defendant had failed to warn of known dangers, on the basis that watching Anheuser-Busch's television commercials featuring talking frogs and lizards caused his son to drink Budweiser beer underage. The court dismissed the claim, finding "Anheuser-Busch's advertising did not vitiate plaintiff's son's common knowledge about dangers of alcohol.

Morris v Adolph Coors Co (Tex 1987); The court concluded that the defendant brewers could not be held liable for the injuries sustained by a group of teenagers as a result of an accident involving a teenage drunk driver. The court held that "beer in its regular form, is not a product defectively designed or

marketed” and thus defendants had no liability for allegedly failing to warn teenagers of the hazards of drinking and driving.

More recently, this lack of success led to alternate liability theories being pursued in the USA, including on the basis of consumer fraud. For example, a Washington DC class-action claim issued in 2003 against several alcohol producers claimed that in an effort to create brand loyalty in the young, the defendants have for over two decades deliberately targeted their television and magazine advertising campaigns at consumers under the legal drinking age.

Echoing successful tobacco claims, it accused alcoholic-beverage producers of purposefully marketing products to underage youth to increase companies' profits and lying about their actions. The suit claimed that the companies violated D.C.'s consumer protection law. It sought to recover the profits gained by these companies from their "long-running, sophisticated and deceptive scheme...to market alcoholic beverages to children and other underage consumers." The lawsuit claimed that each company violates industry-enforced marketing codes and uses website design, magazine and radio ads, television spots, video games and special promotions as the main outlets for targeting underage youth and children.

Similar suits were filed in 2003 in Denver; North Carolina in 2004; Wisconsin; in Michigan and Los Angeles; seeking \$4 billion, and an end to marketing and advertising practices that target underage youth.

In the case of *Goodwin*, the parents of a young adult killed by an underage drunk driver filed a lawsuit against Anheuser-Busch and Miller Brewing under California's unfair competition and public nuisance laws.

The plaintiffs accused those companies of intentionally targeting underage youth with their product advertising, sought orders to stop the companies advertising to children and claimed damages, including the profits gained through the illegal sales to underage people. In particular, the plaintiffs highlighted the promotion of “alcopops”...as a means of attracting underage youth by blurring the line between soda pop and alcoholic beverages.

In *Alston*, a group of parents had asked the Court to force the alcohol manufacturers to return profits obtained from the illegal sale of alcohol to underage drinkers. The plaintiffs “alleged that advertising is responsible for the illegal, underage purchase and consumption of alcoholic beverages, and sought recovery of "family assets" spent by underage drinkers purchasing alcohol.”

One by one, each of these suits has been dismissed.

In dismissing the suits, the Courts identified some consistent problems with the claims filed.

One major one was the failure of several of the suits to identify an injury to the plaintiffs themselves upon which the suit could be founded. Economic injury to parents by children misusing family funds was insufficient as the court ruled that money given to children by parents, then belonged to the children to use as they wished.

The Courts also tended to reject claims that the defendants' advertising caused injury by interfering with their "general right to make decisions concerning the care, custody and control of their children". The courts took the view that nothing done by the companies in advertising had prevented parents from monitoring their children's media exposure, from communicating with them to counter the images and influences derived from media and marketing or to exercise greater control over what their children spent their money on.

The unjust enrichment claims were dismissed because the plaintiffs could not establish that the Defendants retained a benefit conferred by the Plaintiffs. The beverage manufacturers did not engage in illegal underage transactions because the alcohol was obtained from retail stores or bars from complicit adults not from manufacturers.

In some of the cases, the courts held that negligence claims failed because there was no legal duty owed by alcohol beverage manufacturers to parents of illegal underage drinkers. The defendants - unlike retailers or parents - had no relationship of proximity or control so as to be able to prevent the illegal act and resulting injury.

None of the courts considered the advertising false or misleading under unfair trade or consumer protection statutes merely because it was attractive to underage people as well as people over 21.

Most of the courts were reluctant to impose restrictions on advertising simply because the advertising appealed to adults and children. The issues involved in teenage drinking were too complex for what they observed to be simplistic or blunt responses.

Typical of the sentiments expressed in the dismissal of the claims came in the *Alston* action. In that case, the judge rejected the argument that teenagers are "induced" by alcohol advertisements to purchase alcohol. "To assert that minors, because of their age, cannot understand that alcohol does not, in fact, make everyone more attractive, transport them to a tropical paradise, or other similar scenarios that are common themes in alcohol ads is ridiculous at best."

The judge emphasized that "there is no presumption that minors are incompetent to watch advertising, handle the messages included therein, or that they are

incompetent to understand that underage drinking is illegal.” She added that “the illegality of underage drinking are well known to the public, including minors.”

The judge also affirmed that advertisers are under no duty “to disclose either inherent dangers of consuming alcoholic beverages, or that alcohol would not make fantasies come to life. Nor [do they] have a duty to disclose that underage drinking is illegal”. Dismissing the attractive advertising to underage persons claim, the judge said that the whole purpose of advertising is to be “attractive” and to present products and services in an attractive light. When that’s done without statements that are objectively false and misleading, advertisers have done nothing illegal or against the law. Attractive advertising is not false advertising. Judge Battani dismissed the claim and rejected plaintiffs' request to file an amended complaint, observing that “the complaint is nothing more than a diatribe against the advertising practices of the alcohol industry as a whole.”

I must confess to a growing sense of unease as I read through these dismissals. Although it must be confessed that some of the claims seemed to have some fairly fundamental problems, some of the claims were not so substantially dissimilar to allegations brought against tobacco companies, which as we have seen, have been relatively successful. I noted as I read, some familiar names among the lawyers representing the alcohol manufacturers – you may all have heard of the lawyers Shook Hardy and Bacon – for years the lawyers of choice of tobacco companies – probably the most evil law firm in the history of the world.... (quite a statement really).....who have spent years refining the arguments (and the ridicule) (and the commentators to express the public ridicule) against the sorts of allegations made in these actions.

I also noted that the claims were brought without the benefit of the vast libraries of internal company documents that marked the success of litigation against tobacco companies, and I wondered what might be in the archives of the major alcohol producers (or what had been destroyed over the years on advice from attorneys who were advising the tobacco industry). Only further, perhaps more refined or targeted litigation, can uncover the answers to such questions, and the documents which might turn speculation about alcohol manufacturer motives into justified condemnation of youth targeting and marketing and youth addiction.

And I wondered whether maybe the alcohol claims were being judged on an altogether different standard to tobacco or asbestos claims. Was the starting point for a claim against a tobacco or asbestos company whose conduct has been so manifestly despicable, one of presumptive guilt, where alcohol manufacturers are still afforded the benefit of the doubt?

The real breakthrough for redressing the tobacco companies and making them accountable came when the US states took on the tobacco companies seeking to recover the costs of treating tobacco-caused illness. It was from this litigation that the vast archives of tobacco documents were uncovered and made publicly

available. And it was from this litigation that the real issue of tobacco abuse was brought front and centre – the cost to the community of the massive promotion of, and addiction to, such dangerous products as tobacco and nicotine.

The same is undoubtedly true of alcohol. And it may be that the real path to accountability of alcohol manufacturers lies in the hands of the US State governments to replicate their litigation claiming the health costs of treating alcohol-caused disease and trauma in the community.

The prospects for such litigation in Australia must be considered remote. The state governments rejected a plan put forward about 6 years ago by some attorneys-general to pursue tobacco health-care cost recovery litigation. It must be said that the rejection took place under the most heavy pressure from a Federal Government which in the last ten years has been much more concerned to close down the rights of injured Australians than the companies who make the products which kill and maim so many of us. In such circumstances it would seem impossible to convince Australian governments of the prospects of success for alcohol health and trauma cost recovery litigation, however sympathetic individual ministers may be to such a course.

Claims for damages for personal injuries caused by misleading and deceptive conduct by corporations pursuant to the *Trade Practices Act 1974*, (except for tobacco-caused injuries) have been abolished by the Commonwealth Government in a massive over-reaction to the so-called 'insurance crisis'.

Moreover, recent litigation seeking to make a supplier of alcohol, responsible for its conduct has been unsuccessful in Australia.

The high water mark for the promotion of the doctrine of "personal responsibility to the exclusion of corporate responsibility" which marked, and I would argue, distorted, tort litigation in Australia in the first half decade of the 21st century - was in *South Tweed Heads Rugby Club v Cole*.

On the evening of 26 June 1994, Ms Cole was seriously injured when struck by a motor vehicle driven by Mrs Lawrence. Ms Cole had been drinking at the Club premises and had consumed a large quantity of alcohol throughout the day. She had arrived at the Club at around 9.30am and attended a "champagne" breakfast at which free Spumante was available. When the free supply ceased Mrs Cole and a friend purchased and consumed further bottles of Spumante. Ms Cole was refused service at the bar in the afternoon because of her intoxicated state. Ms Cole stayed at the Club and its surrounds for the day and was ejected between 5.30 and 6pm for being intoxicated. The Club had offered to call a taxi for Ms Cole as well as offering her the use of the Club bus and driver. One of the men Ms Cole was with had told the Club manager that he would look after her. At some time after this Ms Cole left the Club.

Mrs Lawrence's vehicle hit Ms Cole at around 6.20pm. Ms Cole suffered serious injuries from the accident and has continuing disabilities.

The trial judge held that Mrs Lawrence had been negligent in that she had failed to keep a proper lookout while driving. Her liability for the injuries suffered by Ms Cole was assessed at 30%. The Club was also held liable for continuing to serve Ms Cole when she was intoxicated. The Club's liability was also assessed at 30%. His Honour held that Ms Cole had contributed to her injuries by failing to take reasonable care for her own safety and assessed that she had contributed 40% to her injuries.

The New South Wales Court of Appeal found that the club did not owe any duty of care to Ms Cole and in any event had breached no owed to Ms Cole. The Court identified several factors that it said pointed decisively against the recognition of a duty of care owed by publicans not to serve customers whom they know will become or have become intoxicated in order to prevent the customers causing injury to themselves. One was that if the duty existed it might call for constant surveillance and investigation by publicans of the condition of customers. That process of surveillance and investigation might require publicans to direct occasional oral inquiries to customers. Inquiries of this kind would ordinarily be regarded as impertinent and invasive of privacy. Quite apart from the inflammatory effect of these activities on publican-customer relations and on good order in the hotel or club, the impact of these activities on the efficient operation of the businesses of publicans would "contravene their freedom of action in a gross manner".

The other significant matter identified was that if a customer reached a state of intoxication requiring that no further alcohol be served and the customer decided to depart, recognition of the duty of care in question might oblige publicans to restrain customers from departing until some guarantee of their safety after departure existed. The Court asked how were customers to be lawfully restrained? If customers are restrained by a threat of force, prima facie the torts of false imprisonment and of assault will have been committed. If actual force is used to restrain customers, prima facie the tort of battery will have been committed as well as the tort of false imprisonment. Further, the use of actual force can be a criminal offence. It is a defence to these torts to prove lawful justification - reasonable and probable cause. However, the constitutional significance of the torts in question in protecting the liberties of citizens means that "lawful justifications" should not lightly be found independently of legislative sanction.

The *Registered Clubs Act* 1976 (NSW) make it lawful for the secretary or an employee of a registered club to use whatever reasonable force is necessary to "turn out" of a club intoxicated persons. But the legislation says nothing about using reasonable force to keep intoxicated persons in pending the appearance of some guarantee for their safety after departure. In short, the Court reasoned, if

the tort of negligence were extended as far as the plaintiff submitted, it would "subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms."

Moreover, the Court felt that the Appellant Club's offer of safe transport did discharge any duty that the Appellant Club might have had to take reasonable steps for Ms Cole's safety, were such duty to have been found, contrary to the conclusion it had reached. ...a finding which personally, I cannot and do not take issue with.

This finding against a duty was subject to one important caveat reserved by the Court which may well prove important for future litigation against alcohol manufacturers and vendors in this country;

..."There may, however, be circumstances which bring about a different result. For example, it may be that where a person is so intoxicated as to be completely incapable of any rational judgment or of looking after himself or herself, and the intoxication results from alcohol knowingly supplied by an innkeeper to that person for consumption on the premises, the scope of the duty of care of the innkeeper will be extended to require reasonable steps to be taken for the protection of the intoxicated person."

The Court of Appeal also recognised a second possible qualification on the absence of a duty.

It is that the situation may be different where injury is caused, not to the intoxicated patron but to a third party injured as a result of that patron's intoxication, though their Honours observed that other contributing factors must then be taken into account.

Ipp JA said *"It is generally accepted that the duty to take reasonable care to avoid a foreseeable risk of injury to invitees, owed by the occupier or person in control of a hotel, restaurant, bar or similar establishment, extends to injuries to patrons caused by tortious or criminal acts of other patrons:*

In Oxlade v Gosbridge, President Mason said: "It is exceptional for the law to impose a duty to exercise care in controlling a third party to prevent the third party doing damage to another). But a duty to exercise reasonable care to protect patrons has been imposed upon the manager of a hotel as regards intoxicated or dangerous customers. Whatever the outer limits of such, it encompasses the protection of a patron while he or she is on or departing from the licensed premises."

Key findings which illustrate the perspective of the Court of Appeal in finding that no duty of care was owed (or breached) in the circumstances were these;

"It was said in this case that impaired judgment of the intoxicated patron precluded a voluntary choice. But that is to ignore the fact that ordinarily a person, not a minor or mentally enfeebled, knows that if he or she drinks, their judgment will be impaired, and is in control of the decision to get himself or herself drunk unless coerced or tricked into drinking excessively;".

The court recognises, "what in ordinary life would normally be regarded as the reasonable limits for attributing blame or responsibility for harm".

The Courts in Canada have, however, found a duty of care of the type rejected by the NSWCA in *Cole*.

In *Jordan House Limited v Menow*, Laskin J observed that the hotel that had sold alcohol to the plaintiff, was aware of his intoxicated condition. He noted (at 111) that "there was a probable risk of personal injury to [the plaintiff] if he was turned out of the hotel to proceed on foot on a much travelled highway passing in front of the hotel." The Justice considered that in these circumstances there was a duty upon the hotel to take care that the plaintiff was not exposed to injury because of his intoxication. Laskin J held:

"The hotel came under a duty to [the plaintiff] to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself".

And he stated:

"A call to the police or a call to his employer immediately come to mind as easily available preventive measures; or a taxi cab could be summoned to take him home, or arrangements made to this end with another patron able and willing to do so".

Two other Canadian Superior Court decisions have found the existence of a similar duty.

In 2000, Malcolm Gladwell first published his fascinating book, 'The Tipping Point,' which has influenced a great deal of public health thinking ever since. Its simple theory goes like this....

Three characteristics, contagiousness, the fact that little causes can have big effects, and that change happens not gradually but at one dramatic moment....are what shape change in society...habits..... fashion trends....public health threats and phenomena.

In a sense, the greatest potential for litigation in alcohol manufacturer behavioural control is in its potential to act as a central component in change....to be a tipping point.

Just as the sight of Bernie Banton and his oxygen mask staring down Meredith Hellicar outside the James Hardie court case was.

Just as the image of three indigenous people from the dense central highlands of PNG marching into the Victorian Supreme Court to lodge proceedings to force BHP to clean up Ok Tedi was.

Just as the sight of a frail and dying Rolah McCabe outside the Supreme Court after she had exposed the shameful conduct of BAT was.

We may yet see litigation play that role in alcohol abuse.

So I hope my message to you today is not too regarded as too guarded. And lest it be seen as such by those of you who may tonight be secretly reporting to the alcohol industry on the state of the litigation threat, let me revert to type and give you some direct messages.

We at Slater and Gordon, are looking at you and looking for you.

We are looking at the schoolies rock concert promoters who get truckloads of west coast pop cooler into their festival grounds; and we are looking at the manufacturers who supply them, knowing the 'alcopop' is to be pumped out into their young audience like big tobacco did back in the sixties.

We are looking at the privateers who ship barrels of beer into aboriginal communities on pension day and parcel it out until the pension money is gone.

We are looking at the big pubs and clubs who get the footy team boys in for a big pay TV fight; and award the best 'skullers' of the night.

In a lifetime of taking on the big end of town, sometimes ending up the rooster....sometimes the feather duster.....nothing makes us prouder than bringing bastards like you to account.

Such scenarios may well provide for the imposition of liability to the purveyor of alcohol in the circumstances. There is nothing in the existing common law of Australia, even as it has been emasculated by the tort reform movement of the last five years, which would prevent it.

Such a scenario may well provide a tipping point for the imputability of alcohol manufacturers or vendors.

Until then, litigation differentially takes its place behind other social policy regulators; government regulation, education, and medical and public health lobbying....in the fight against the excesses of the alcohol industry.

In the immortal words of my childhood hero Jim Croce...."Thank you for your time....you've been so much more than kind..."