

Australia ponders law after passive smoking trial

Earlier this year a New South Wales supreme court ruled that environmental tobacco smoke "materially contributed to" or "caused" a 62-year-old barmaid's throat cancer. The court awarded her US\$238 000. Although this was an important victory for Marlene Sharp (see *Lancet* 2001; 357: 1510), whose cancer is now in remission, the implications of her case have been felt across Australia.

Australia already has tough regulations on smoking in restaurants and cafes. And from September smoking will be banned in the dining areas of pubs and clubs across New South Wales. However after Sharp's case, pub and club owners fear that a national smoking ban will soon follow. Antismoking groups have capitalised on the national debate provoked by Sharp's case and are calling for a blanket ban. The union representing 30 000 bar and club staff have also called for a complete ban.

Restaurant and pub managers have argued that a ban would be bad for business, but clearly Sharp's success could make business even worse. Simon Chapman, Professor of Public Health at the University of Sydney, said that even if the government does not legislate, the insurance industry will drive up premiums to the extent that this will function like de facto legislation. It will be cheaper for employers to have staff working in a smoke-free environment rather than risk being sued.

Marlene Sharp, a non-smoker, was a barmaid at the Port Kembla Returned Services League Club for about 11 years. She and others testified that the club had a smoky atmosphere. But nine witnesses for the club said there was no lingering smoke and that an exhaust fan got rid of smoke.

Christopher O'Brien, a consultant head and neck surgeon at the Royal Prince Alfred Hospital in New South Wales who removed Sharp's squamous cell carcinoma of the larynx, believed smoke had probably contributed to the development of the tumour. Stephen Vaughan, a board member of the Peter MacCallum Cancer Institute in Victoria and a haematologist oncologist, testified that environmental tobacco smoke had probably contributed to the onset of the tumour.

Bernard Stewart, head of the Cancer Control Program of the South Eastern Area Health Service in New South Wales and an advisor for

WHO's International Association for Research into Cancer, referred to two studies in his testimony, which support an association between squamous cell head and neck cancer and environmental smoke (*Cancer Epidemiol Biomarkers Prev* 2000; 9: 1043-9; *Am J Clin Oncol* 1997; 20: 146-50). Both studies were scrutinised during the trial—no other studies were available to the court because the relation of Sharp's cancer with passive smoking is not well researched.

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Jeffrey Wigand

The two main defence witnesses were Sorrel Schwartz and Philip Witorsch from Georgetown University Medical Center, Washington, DC, USA. Under cross examination by Sharp's lawyer, Peter Semmler, both men acknowledged that they received substantial payment from the tobacco industry for giving evidence at government hearings in many countries, maintaining a literature database, and writing letters to medical journals.

When Semmler asked Witorsch: "Can you name a major respected scientific medical organisation which does not receive funding from the tobacco industry that agrees with your position on environmental tobacco smoke and its effects on health?" Witorsch answered, "No, I can't".

However the defence put forward several theories for Sharp's cancer. These included that she lived in an industrial city and there were pollutants from a local copper smelter; and that her father died of bowel cancer. They also argued that it was not possible to conclude on a sound epidemiological basis that this cancer was caused by exposure to environmental tobacco smoke. However, the judge told the jury that it did not need to be persuaded that the scientific evidence was of "gold standard" but simply that they were satisfied on the balance of probabilities.

Experts believe that Sharp's case is a significant step forward for litigants

and a step back for the tobacco industry. After the trial Semmler said that the jury's decision could be afforded considerable scientific and legal weight. Although he noted that in the first passive smoking case in the USA, a former flight attendant, Marie Fontana, unsuccessfully sued the tobacco industry for severe respiratory illness caused by smoking by airline passengers. Her case is the first of 3200 cases filed by flight attendants.

Simon Chapman said that the general implications of the case were profound and were of great significance for the hospitality sector. For example the New South Wales Registered Clubs Association has written to its 1400 members asking them to adopt a passive smoking policy. It hopes that self regulation might head off government legislation.

Jeffrey Wigand, a former employee of the Brown & Williamson Tobacco and the highest-ranking executive to expose the industry's tactics said "I think what you are seeing is the gradual unravelling of the decades of generating controversy with science rather than the search for the truth. It is the archaeology of the industry's documents and obfuscation that has become a millstone, and a definitive moment for juries throughout the world.

"The once 'jury-proof' industry is now being held accountable for the deceit and loss of life", said Wigand, who blew the whistle on his former employers on CBS's *60 Minutes* and was recently portrayed in *The Insider*. "It is apparent that when the plaintiff is still alive and can describe the factors that made them ill juries are quick to recognise the fraud, whether it is the smoker by addiction from being manipulated or duped as a child or the innocent smoker by environment tobacco smoke . . . either way tobacco smoke is a killer."

Rob Moodie, Director of the Victorian Health Promotion Foundation, an agency whose funds have replaced tobacco sponsorship in the sports and arts, said the case has resulted in a fundamental change in the balance of power and responsibility with respect to passive smoking. The government, community, and the hospitality industry used to ask "why should we have smoke-free workplaces?" Everyone is now asking "can we afford to put employees at risk any longer?"

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