SPECIAL COMMUNICATION

Scottish court dismisses a historic smoker's suit

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The decision in a Scottish smoker's case, *McTear v. Imperial Tobacco Limited*, that there was no scientific proof of causation between the plaintiff's smoking and his death from lung cancer, accepted all of the traditional arguments that the tobacco industry has made throughout the history of tobacco litigation, including that epidemiology is not an adequate branch of science to draw a conclusion of causation, that the tobacco industry has no knowledge that its products are dangerous to consumers, and that, despite this lack of knowledge, the plaintiff had sufficient information to make an informed decision about the dangers of smoking. This case relied on outmoded methods of reasoning and placed too great a faith in the tobacco industry's timeworn argument that ''everybody knew, nobody knows''. Further, the judge found it prejudicial that the plaintiff's expert witnesses were not paid for their services because she was indigent, believing that the lack of payment placed in doubt their credibility and claiming that the paid tobacco expert witnesses had more motive to testify independently because they had been paid, a perverse and novel line of reasoning. The *McTear* case contrasts unfavourably with the recent decision in *United States v. Philip Morris*, a United States decision that found the tobacco industry defendants to be racketeers, based both on the weight of a huge amount of internal tobacco industry documents showing that the tobacco industry knew their products were addictive and were made that way purposely to increase sales, and on the testimony of expert witnesses who, like those who testified in *McTear*, have made the advancement of the public health their life's work and are not ''hired guns''. The *McTear* case's reasoning seems outdated and reminiscent of early litigation in the United States. Hopefully, it will not take courts outside of the United States 40 more years to acknowledge the current scientific knowledge about smoking and health.

On 31 May 2005, a Scottish judge issued a ruling in *McTear v. Imperial Tobacco Limited*,[1] an individual's smoking case, finding that the defendant tobacco company had no liability for the death of the plaintiff, a two-pack-per-day smoker, from lung cancer. This decision contrasts with the 17 August 2006 ruling of an American judge in *United States v. Philip Morris, Inc., et al.*,[2] the ''DOJ case'', that the major American cigarette manufacturers and their parent companies violated US racketeering laws by fraudulently marketing their products. (Imperial Tobacco Limited had, at the time of this case, not sold cigarettes in the United States, and hence was not a defendant in the DOJ case.) The two judicial opinions are roughly contemporaneous; each case was adjudicated solely by a judge, and each opinion comprises many hundreds of pages and was very carefully analysed and reasoned. Yet, the decisions are completely at odds with each other. The Scottish decision found no fraudulent motives on the part of the tobacco company defendant, and placed the responsibility for smoking-related illness squarely on the plaintiff. In contrast, the US decision compiled thousands of findings of facts that impugned the tobacco industry's motives and actions, and concluded that it intentionally endangered the health and lives of its customers.

Coming more than a decade after American tobacco CEOs discredited themselves by swearing under oath before the United States Congress that they did not believe nicotine was addictive, the *McTear* decision seems almost quaint in its willingness to take at face value the tobacco industry's well-worn denials and semantic arguments. The judge, Lord Nimmo Smith, accepted the tobacco industry's usual defence that both blames the smoker for not realising that cigarettes cause disease, while at the same time claiming that no scientist alive has yet proven causation, a strategy that can be summed up as ''everybody knew, nobody knows''.[3] In contrast, US Judge Gladys Kessler, in the DOJ case, cut through the tobacco industry's rhetoric and obfuscations, holding it accountable for failing to warn its customers about the dangers which were well known to its scientists, as a result of heavily funded and secretly guarded internal scientific research, as well as for actively misleading the public.

This article summarises the *McTear* decision, critiques the inadequacies of its reasoning and conclusions, especially in comparison with the DOJ decision, and discusses possible explanations and implications.

FACTS OF THE CASE

The plaintiff in this case was the widow of Alfred McTear, who died from lung cancer at the age of 48 years after smoking approximately 60 cigarettes per day for most of his adult life.[4] His favoured cigarette brand, John Player, was manufactured by the defendant, Imperial Tobacco Limited (ITL), a UK cigarette company. Margaret McTear alleged that ITL had failed to put warnings on its cigarette packets in the 1960s when her husband started smoking, so that by the time warning labels appeared on the packets in 1971, he had already been smoking for 7 years and was addicted. She further alleged that Mr McTear's lung cancer was a result of his having smoked ITL's cigarettes.

Mrs McTear was hampered in her legal efforts in many respects. First, she applied for and was denied legal aid (financial assistance for indigent plaintiffs) seven times,[5] a fact which, the judge acknowledged, made presenting an adequate case difficult (see 2005 ScotCS Outer House 69[1] at [1.27]). Owing to a lack of funds, she was forced to present expert witnesses who were willing to donate their time, a decision that would have unexpectedly negative consequences for her case.[6] She also could not afford to introduce the documentary evidence, which proved so effective in persuading the judge in the DOJ case, that the tobacco industry knew of the dangers of its products and failed to warn its customers.[6] Under Scottish law, those documents that have been made available on the internet and through document depositories in both the US and the UK may not be introduced into evidence unless the plaintiff brings in a witness to authenticate each document.[7] In addition to the financial disadvantages, she also had to overcome the fact that her husband had a checkered past of unemployment, malingering, alcoholism and numerous brushes with the law that included several prison sentences (see 2005 ScotCS Outer

House 69[1] at [4.1]–[4.169]). Nevertheless, Mrs McTear's solicitor brought forth her case because, of all the smoking cases he had been asked to try, hers was the only one that was both ripe for adjudication and had a plaintiff willing to be the first ''test case''.[7]

VERDICT

Lord Nimmo Smith's decision in favour of ITL accepted all of the tobacco defendant's traditional defences. He concluded:

> ….I am satisfied that advertising had nothing to do with [Mr. McTear's] reasons for starting to smoke. (see 2005 ScotCS Outer House 69[1] at [9.3]) … I am prepared to accept that Mr. McTear found it difficult to wean himself off his habit once he had started smoking and in that sense could be described as addicted. I do not accept that he was for this reason unable to stop smoking.[]. (see 2005 ScotCS Outer House 69[1]1) at [9.3]) … I am satisfied that at all material times, and in particular 1964, the general public in the United Kingdom, including smokers and potential smokers, were well aware of the health risks associated with smoking, and in particular of the view that smoking could cause lung cancer. (at [9.4]) … There is no direct evidence that ITL, as a company, have ever accepted that there was a causal connection between smoking and disease … . (at [9.6]) In any event, the Pursuer [plaintiff] has failed to prove individual causation. Epidemiology cannot be used to establish causation in any individual case, and the use of statistics applicable to the general population to determine the likelihood of causation in an individual is fallacious. (at [9.10]) … The individual is well enough served if he is given such information as a normally intelligent person would include in his assessment of how he wishes to conduct his life, thus putting him in the position of making an informed choice. (at [9.11])

The judge gave virtually no weight or credibility to any of the witnesses or evidence that the plaintiff presented. Of Mr McTear, he said ''I would regard him as a profoundly dishonest man who readily lied in order to obtain advantage for himself.'' (see 2005 ScotCS Outer House 69[1] at [4.222]). He regarded Mrs McTear as a ''poor witness'' who was willing to testify to anything that would help her husband's cause (see 2005 ScotCS Outer House 69[1] at [4.225]). Further, the judge seemed convinced that the tobacco control advocacy group Action on Smoking and Health (ASH) not only coerced and used Mrs McTear's evidence and the McTear case to achieve its own policy objectives (see 2005 ScotCS Outer House 69[1] at [4.207], [4.222]), but also supplied expert witnesses to testify, free of charge, in order to push its own interests in a biased fashion (see 2005 ScotCS Outer House 69[1] at [5.18], [5.101]). In a bizarre twist of logic, Lord Nimmo Smith contrasted more favourably ITL's expert witnesses who were remunerated handsomely, and deemed this factor particularly dispositive in showing that they had less bias than the plaintiff's unpaid experts who had dedicated their lives and professional careers to their research and endeavours (see 2005 ScotCS Outer House 69[1] at [5.18]). He seemed to believe that payment for service was proof of independence and, referring to the tobacco defendant's witnesses, suggested that ''It may well be that [the tobacco industry's] ample funding leads to sound research.''(see 2005 ScotCS Outer House 69[1] at [5.18]).

Apart from mistrusting the plaintiff's witnesses because they donated their services, Lord Nimmo Smith completely rejected their argument that epidemiology could be used to show that smoking caused Mr McTear's lung cancer. He stated:

> Given that there are possible causes of lung cancer other than cigarette smoking, and given that lung cancer can occur in a non-smoker, it is not possible to determine in any individual case whether but for an individual's cigarette smoking he probably would not have contracted lung cancer. (see 2005 ScotCS Outer House 69[1] at [9.10]).

The judge opined that epidemiology is the only branch of scientific inquiry that had found such causation, and that the plaintiff's experts in this area had many weaknesses in their testimony, including a bizarre observation about the eminent physician and renowned epidemiologist Sir Richard Doll. The judge disapproved of Doll's demeanour, in part because he failed to accept the judge's invitation to sit during his testimony (see 2005 ScotCS Outer House 69[1] at [6.149]) and criticised Doll's substantive testimony for relying on ''*ad hominem* arguments of a kind which is surely unacceptable in rational academic debate'' (see 2005 ScotCS Outer House 69[1] at 6.164]).

As shocking as the judge's scepticism about the science of epidemiology was his willingness to take ITL's arguments completely at face value. For example, he accepted with no reservation the testimony of defence witness Gareth Davis, ITL's Chief Executive Officer, about his company's internal research findings about the dangers of its product. Davis claimed that by 1970 his company had ceased doing any research at all on ''the search for compounds in cigarette smoke with potential biological activity by breaking the smoke down into its constituent parts'' (see 2005 ScotCS Outer House 69[1] at [2.47]), and stated that when he became ITL's CEO in 1996, the company did not know whether smoking killed consumers (see 2005 ScotCS Outer House 69[1] at [2.32], [2.44]). He further claimed that he ''did not have information that would allow him to understand what was meant by the phrase 'highly addictive'' (see 2005 ScotCS Outer House 69[1] at [2.52]). Lord Nimmo Smith even chided the plaintiff's counsel for his cross-examination of Mr Davis, which, in the judge's opinion, ''appeared to me to go beyond the immediate purposes of the proof'' (see 2005 ScotCS Outer House 69[1] at [2.75]). This contrasts with the judge's decision to allow Mrs McTear to be cross-examined for several days about her husband's unsavoury and irrelevant employment history and brushes with the law, which he spent dozens of pages of the written decision recounting in excruciating detail (see 2005 ScotCS Outer House 69[1] at [4.1]–[4.169]).

Lord Nimmo Smith also accepted Davis's word about ITL's supposed dearth of any internal documents that would aid the court in discovering the truth in this case. With regard to Davis's claims that his company had no useful documentation of its scientific findings that could assist the court in determining whether the company knew its products were deadly, the judge concluded that ''[t]he position about documentation appears to me to be entirely neutral, and I draw no inferences adverse to ITL from the fact that documentation has not been produced to vouch their position over the years. The only conclusion I draw is that such documents, if they ever existed, are no longer extant. I accept senior counsel for the defenders' submissions about this matter'' (see 2005 ScotCS Outer House 69[1] at 2.76]). He gave full weight and credit to ITL's assertion that it derived its information from the same published sources as were available to the public.

> There was nothing to which they were privy which was not publicly available and which might therefore place them under a duty to provide information which the public did not otherwise have. ITL had no better or greater knowledge than

> the average consumer, and they gained it at precisely the same time as the average consumer did, and in the same way.[1 at [7.416]]

He also accepted without question ITL's claim that ''[t]here was no evidence that the tobacco industry sought to contradict the public health message that smoking causes cancer'' (see 2005 ScotCS Outer House 69[1] at [7.146]), and echoed in his conclusions of law the defendant's argument that, if an individual had heard both the warnings about the dangers of smoking and the tobacco industry's response, ''[t]he fact that such an individual might have been made aware of the position of the tobacco industry still left him with the relevant information to enquire further if he wished or, if not, to make a choice about future action'' (see 2005 ScotCS Outer House 69[1] at [7.147]).

CONTRAST BETWEEN THE DOJ OPINION AND *MCTEAR*

Although the DOJ case did not involve issues of causation, there is no question that Judge Gladys Kessler found that cigarettes do cause a variety of deadly diseases. In her opinion, in which she held that the tobacco defendants were racketeers, she stated: ''In short, Defendants have marketed and sold their lethal products with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.'' (see 449 F.Supp.2d1 at p 19). Her conclusions were diametrically opposed to those of Lord Nimmo Smith, finding that the tobacco defendants' products were manufactured to be addictive, had deadly health effects on those who consumed them, and were marketed in a way to counter fears about health consequences, while focusing solely on the profit motive rather than concern that their product does not harm smoking consumers. Judge Kessler several hundred pages making findings of fact that included evidence that the tobacco company defendants knew that their products caused disease (see 449 F.Supp.2d1 at pp 146–208), knew how addictive nicotine made their products (see 449 F.Supp.2d1 at pp 218–307), and made efforts to manipulate the amount of nicotine in their products to addict their customers maximally (see 449 F.Supp.2d1 at pp 308–83).

Judge Kessler also took an opposite view on the propriety of professional public health advocates testifying against tobacco companies in litigation. She stated:

> Much of the Defendants' criticisms of Government witnesses focused on the fact that these witnesses had been long-time, devoted members of ''the public health community.'' To suggest that they were presenting inaccurate, untruthful, or unreliable testimony because they had spent their professional lives trying to improve the public health of this country is patently absurd. It is equivalent to arguing that all the Defendants' witnesses were biased, inaccurate, untruthful, and unreliable because the great majority of them had earned enormous amounts of money working and/or consulting for Defendants and other large corporations, and therefore were so devoted to the cause of corporate America that nothing they testified to, even though presented under oath in a court of law, should be believed. Such simplistic attacks on the credibility of the sophisticated and knowledgeable witnesses who testified in this case are foolish. [2 at p 30]

One expert witness whose scholarship was categorically rejected by Lord Nimmo Smith was eminent pharmacologist Jack Henningfield of Johns Hopkins University. Henningfield's work in pharmacology and behavioural processes has found that cigarettes are addictive. In the DOJ opinion, Judge Kessler relied heavily on his testimony as a fact/liability witness (and mentioned it 122 times favourably),[2] while in *McTear*, Lord Nimmo Smith says that Henningfield's work ''lacked a sound scientific basis'' (see 2005 ScotCS Outer House 69[1] at [6.206]).

The final point of contrast between the two decisions is that Judge Kessler was presented with and gave credence to millions of pages of internal tobacco industry documents that she found to be utterly convincing evidence that the tobacco industry not only knew that its products were harmful and addictive but also strove to make them more addictive and marketed them aggressively at the cost of its customers' health. In *McTear*, Lord Nimmo Smith was not presented with any internal industry documents by the plaintiffs because of financial constraints and the different procedures required by Scottish law, but, nevertheless, he took no great pains to require that ITL turn over any information it might have retained for itself, and was perfectly willing to accept its assertion that no such documentation existed.[2]

CONCLUSION

Although the precedent set in *McTear* bodes ill for at least the immediate future of smoking and health litigation in the UK, some of the factors that caused an adverse verdict in *McTear* may be overcome by advocates in other cases and in other countries who have the means to better educate the judges hearing smoking and health cases. Mrs McTear's counsel, Cameron Fyfe, expressed concerns about the lack of financial resources available to file future cases, and worried that any plaintiff who does not have enormous personal financial resources cannot afford to mount a sufficient case ''unless they win the lottery''.[5] With plaintiffs lacking the financial wherewithal to introduce the internal industry documents that proved so effective in convincing the judge in the US case, the documents will remain an unrecognised body of information with no power to hold the tobacco industry accountable for its own words and actions in the UK. Perhaps, in other countries, the means to bring suit and authenticate documents may not be as difficult and will follow the model established in the US.[6]

Another barrier to smoking victims' access to future judicial redress is the rule in the UK and some other countries that the loser pays the winner's legal costs. In the aftermath of *McTear*, ITL made it quite clear that it would feel fully justified in pursuing its costs against Mrs McTear, whose sole asset was a small house and a retiree's pension, in order to frighten future litigants from attempting to bring similar litigation, stating ''We would hope the judge's decision would act as a deterrent to any other speculative claims against us.''[5]

McTear most likely will have no effect on US litigation, where judges have generally allowed industry documents as evidence, and where the willingness of experts to testify for little or no compensation is not treated as evidence of bias.[8] In fact, the highest court for the State of Florida recently ruled in a class action suit, *Engle v. Liggett Group, Inc., et al.*,[9] that there was a proper finding of general causation against the defendants' products based on epidemiology and industry documents containing research results. Furthermore, American courts regularly permit experts to use epidemiological evidence as a basis for their conclusion that a particular plaintiff's lung cancer was caused by his or her smoking. Unfortunately, the *McTear* case is not unique in its obtuseness. For instance, in Japan, a court recently ruled against the plaintiffs in a class action suit claiming damages for lung cancer caused by smoking, finding that there was no causal relationship between smoking and lung cancer,[10] and in Korea, a court ruled that

none of the 32 plaintiffs' cancers were proven to be directly caused by smoking.[11] The *McTear* decision may have set a dangerous precedent for tobacco litigation outside of the US, or perhaps it just reflects the reality that many courts outside the United States are stuck in an outmoded manner of thinking.

The *McTear* decision has challenged the credibility of the entire field of epidemiology as it pertains to smoking and health: hopefully, this is merely the result of a paucity of experience adjudicating smoking and health cases that resemble the US experience in the 1950s and 1960s. During the first wave of smoking and health cases brought in the United States, judges and juries often accepted propositions that now seem equally outlandish. For instance, in *Green v. American Tobacco Co.*,[12] the jury found that, although they believed that smoking the defendant's cigarettes caused the plaintiff's lung cancer, the defendant could not have known that its cigarettes caused cancer. On appeal, the court found that death by lung cancer was an aberration because it did not affect a great many smokers and thus causation could not be proved. Similarly, in *Lartigue v. R.J. Reynolds Tobacco Co.*,[13] the appeals court refused to overturn a finding in favour of the defendant, stating that ''Today, the manufacturer is not an insurer against the unknowable.''[13] Hopefully, it will not take courts outside of the United States 40 more years to acknowledge the current scientific knowledge about smoking and health.

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REFERENCES

1 2005 ScotCS Outer House 69.
2 449 F. Supp.2d 1 (D.D.C. Aug 17 2006).
3 **Givelber D**, Strickler L. Junking good science: undoing Daubert v Merrill Dow through cross-examination and argument. *Am J Public Health* 2006;**96**:33–7.
4 **Burning Issue**. *Law Gazette* 23 June 2005. http://www.lawgazette.co.uk/features/view=feature.law?FEATUREID=242932 (accessed 16 July 2007).
5 **Robertson J**. Tobacco giant breathes easy as widow's case fails, *The Scotsman*. http://thescotsman.scotsman.com/index.cfm?id=598262005&format=print (accessed 4 Apr 2007).
6 **Davis S**. Smokescreen: despite the government's anti-smoking bluster, the big tobacco companies live a charmed live in Britain, especially in the courts. You can't sue them and win. *New Statesman*, 27 June, 2005.
7 Interview with Solicitor Cameron Fyfe, 15 November 2006.
8 **Danne A**. McTear v Imperial Tobacco: understanding the role and limitations of expert epidemiological evidence in scientific litigation. 2006;13 JLM 471..
9 **--- So**. 2d ----, 2006 WL 3742610 (Fla.).
10 Japan top court rejects appeal by former smokers, Reuters Yahoo! *Asia News*, 26 January 2007. http://asia.news.yahoo.com/060126/3/2equ2.html (accessed 4 Apr 2007).
11 **Rahn K**. Smokers lose in tobacco suit, court cites lack of link between smoking, lung cancer. *The Korea Times*. http://www.google.com/hws/dell-inc-rel/afe?hl=en&channel=us&s=http://server.iweather.co.kr/hankooki/engbn.html.
12 304 F.2d 70 (5th Cir. 1962), question certified on rehearing, 154 So.2d 169 (Fla) reversed and remanded, 325 F.2d 673 (5th Cir. 1963), reversed after remand, 391 F.2d 97 (5th Cir. 1968), reversed on rehearing en banc, 409 F.2d 1166 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970).
13 317 F.2d (5th Cir. 1963), cert. denied, 375 US. 865 (1963).