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'LEGAL'

BATTLE OF THE BULGE



Could we see health warnings on chip packets, or cans of soft drink? **Sharon Givoni*** investigates for *FOOD Magazine*.

THE causes of obesity are complex and it is fair to say that no one factor is to blame. From a food manufacturer's perspective, leaving aside the law and the legal risks, it is simply good practice to ensure open and clear labelling and label foods in a manner that ensures the public understands exactly what they are eating.

This may sometimes mean going above and beyond what the law merely requires. If the food and beverage industry wants to avoid being subjected to further more restrictive regulation, it will need to continue to take pre-emptive and pro-active steps to being part of the solution. This will also help minimise the risk of litigation in the future.

While there have been no successful lawsuits on this issue to date, today's litigious environment makes the threat of litigation very real.

The possibility that "fast food" litigation could be successful cannot be ruled out.

While it would be difficult, if not impossible to hold food companies liable for the immoderate appetites of their customers per se, there are legal grounds on which a successful legal case could be mounted, whether it's on the basis of the misleading and deceptive conduct laws--such as understating fat content or falsely implying a food is

"healthy"-or failing to warn consumers of the risks, particularly if the food manufacturer has not "disclosed all the material facts".

Thirty years ago, no one thought that the tobacco industry would be successfully sued.

Now, warnings on cigarette packs take up half the pack, cigarette commercials are banned and anti-smoking ads such as the Cancer Council Victoria's "Quit" Campaign feature regularly on television sets.

Will we see similar warnings on chip packets or cans of soft drinks?

Why are we getting fatter?

While the reason for the growing rate of obesity might seem simple at first glance - "energy out exceeds energy in", the reasons for the growing rate of obesity are numerous and complex.

Socio-economic status plays a role as healthier foods can be significantly more expensive than pre-packed "junk foods; a substantial increase in labour-saving devices and changes in the workplace have led to more sedentary jobs and a shift away from home meal consumption with working parents looking for "quick food" alternatives all contribute to the problem.

Added to this combination is our luck in the gene pool which determines how fast we metabolise our food.

So does this mean that food manufacturers are "off the hook" in so far as the law is concerned?

Will the war against fat continue to be simply fought out in the media rather than the courts of law?

In today's litigious world it is not outside the realms of possibility that consumers can and will sue food manufacturers.

In fact, in countries outside of Australia they already have.

Taking fat to court

"It used to be that if someone spilled coffee in their lap, they simply called themselves clumsy. Today, too many people are calling themselves an attorney." -

This quote is from Robert Dorigo Jones, president of M-LAW, a non-profit organization working to increase public awareness of how the explosion in litigation is hurting America.

While parallels have been drawn between food and tobacco, the food and beverage industry has been quick to dismiss these comparisons, by pointing out the inherent differences between food and cigarettes and between the smoking and obesity epidemics.

And there are some real differences.

For example, unlike tobacco, we need food to survive. Unlike passive smoking, there is no such thing as "passive eating". There is also no amount of smoking that is good for you, but you can generally eat "fast food" and "junk food" in moderation without adverse health effects.

From a pure legal perspective, it would be very hard to pinpoint the cause of someone's obesity and even harder to prove it was brought about by the consumption of one or two specific foods. However,

it might not be impossible, and, in extreme cases the possibility that "fast food" litigation could be successful, cannot be ruled out.

Potential for a lawsuit

In Australia, there are many legal grounds upon which manufacturers could potentially be sued, the main ones being:

1. negligence (i.e. for breach of duty of care in failing to warn and prevent harm which would have been "reasonably foreseeable");

2. an action for breach of consumer protection laws for false and misleading labelling (under the *Trade Practices Act* and *Fair Trading Acts*);

3. product liability laws - foods can be deemed to be "defective" under the *Trade Practices Act* if



Cartoonist: Estelle Ninnis

In Australia there are many legal grounds upon which manufacturers could potentially be sued.

A HEALTHY APPETITE FOR LITIGATION

In Germany, a diabetic judge sued Coca-Cola and Masterfoods for not putting labels on their products warning consumers of possible health risks.

Judge Hans-Josef Brinkmann claimed to have consumed two bottles of cola a day and was convinced that soft drinks and chocolate bars like "Snickers" were responsible for his onset of diabetes. He claimed that the products were legally defective and sought legal recognition of this from the manufacturers.

The judge, who was diagnosed with type II diabetes, apparently had consumed at least two chocolate bars a day washed down with a litre of coke.

He argued that the chocolate was defective in its: composition, containing excessive quantities of sugar and addictive ingredients; and, secondly, in its design on the basis that the chocolate should have been manufactured in two pieces to avoid excess consumption.

Ultimately, the lawsuit failed. The presiding judge took the view that the general public understands that food such as chocolate is high in fat and sugar. There is only a duty to warn consumers of the dangers they might not be aware of.

they do not meet the level of safety that consumers are entitled to expect. The way a food is packaged or labelled (a good example is lack of allergen warnings) can also make it defective even if the food is perfectly safe.

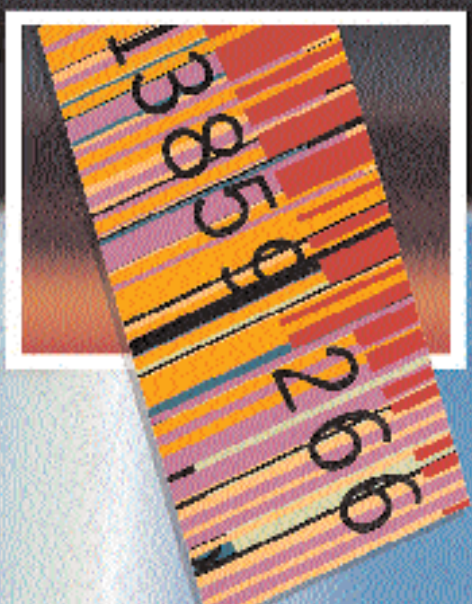
Despite the existence of these laws, the likelihood of manufactures being sued on these grounds is probably low given that Australia has stringent food labelling laws that require manufacturers to routinely provide certain nutritional information about their products on most packaged foods. This includes nutrition information panels, a listing of all the food ingredients in descending order of weight, percentage labelling and the list goes on.

Notably, food regulations do not prohibit or limit the use of refined sugar or saturated fats in the manufacture of foods.

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In defence

In relation to negligence, Australian law recognises a legal defence known as "voluntary assumption of risk".

The defence recognises that in certain situations, a person may voluntarily assume the risks associated with undertaking a particular activity. For example, people who ride on roller coasters often have the opportunity to read a posted warning before riding.

In a food context, the defence would be that people who become obese from consuming too much of a particular food have taken on this risk knowingly and cannot later hold the food manufacturer liable for the size of their appetites.

Contributory negligence is also relevant – for example when someone fails to meet the standard of conduct required for his own safety—such as riding a bicycle without wearing a proper helmet.

Having said all this, each of these defences have their weaknesses, particularly in the case of children who cannot be said to be fully aware of the risks and long-term consequences of eating too much fatty or sugary foods.

Children are also vulnerable to clever marketing – recent Australian studies have shown that most food ads shown during children's television programs are for unhealthy foods. Also, the lure of free toys is often too much for children—and consequently parents—to resist.

The Labor party has recently pledged to



Australian law recognises "voluntary assumption of risk" as a legal defence. – Givoni

take on food giants over childhood obesity, promising to ban all food and drink advertising during children's programs.

At the same time the media and nutritionists have attacked McDonalds and KFC for producing toys such as mini-plastic burgers and nuggets that promote some of their least healthy products.

**Sharon Givoni is a Melbourne-based commercial lawyer. She spoke at the IQPC Kid's Nutrition conference in Sydney in June on legal issues and child obesity.*

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MINIMISE RISK OF LIABILITY

- ensuring clearer food labelling and making nutritional labelling more understandable (for example by showing how many teaspoons of sugar in a can of soft drink and setting out the proportion of the recommended daily intake of a particular nutrient in relation to the particular product, such as "One third of the recommended daily intake of fat");
- ensuring that their advertising doesn't create a misleading impression that a food is healthy if it is high in saturated fats and refined sugars;
- "downsizing" portions of energy dense low-nutrient foods (McDonalds has announced that it will eliminate super-size French fries and soft drinks from its American menus);
- ensuring that the portions in which the foods come in are consistent with their recommended serving sizes on the label, which correspond to calorie counts
- reducing the saturated fat and refined sugar content of foods
- introducing healthier foods in to their food range
- labelling take-away foods with nutritional information;
- promoting healthy eating and supporting health campaigns that aim to educate the public about good eating (a few years ago, McDonalds ran an advertorial in French magazines featuring comments from nutritionists that advised people not to eat too much of their food);
- putting diet tips on labels

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