CASE NOTE: *POU V BRITISH AMERICAN TOBACCO (NZ) LTD* – A COMPREHENSIVE WIN FOR THE NEW ZEALAND TOBACCO INDUSTRY

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I. INTRODUCTION

In 2002 New Zealander Janice Pou died from lung cancer at the age of 52. She had been a heavy smoker since the age of 17. She claimed that the two tobacco companies that sold her the cigarettes she smoked had negligently caused her lung cancer, and sought approximately $300,000 damages in compensation. Her children continued the proceedings after she died. In May 2006, in the judgment *Pou v British American Tobacco (NZ) Ltd*,[1] the New Zealand High Court found the defendants not liable.

The *Pou* case is the first time that a New Zealander has claimed damages for harm caused by smoking. Tobacco litigation is not new in the United States where there is a 50 year history of tobacco litigation with some substantial successes for smokers.[2] Cases filed outside of the United States have been less prolific and largely unsuccessful.

The plaintiff in *Pou* failed at virtually every hurdle. The case, in effect, forecloses the possibility of any New Zealand smoker ever successfully claiming damages from the tobacco industry for harm caused by smoking. The reason that the case failed was largely due to the following three factual findings made by the Court:

- The dangers of smoking were common knowledge in 1968.[3]
- The plaintiff's personality and the fact she was an adolescent in an environment where smoking was the norm meant that she would have started smoking even if the defendant's had warned her of the dangers.[4]
- The plaintiff knew about the dangers of smoking by 1974[5] at the latest, and did not make reasonable attempts to give up.[6]

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1 Unreported, High Court, Auckland CIV 2002-404-1729, 3 May 2006, Lang J.

2 Two recent judgments in the United States have been particularly favourable to smokers. In *Engle v Liggett Group Inc* [2006] NOSC3-1856, 6 July 2006, the Florida Supreme Court, while ruling that a $145 billion punitive damages award was excessive, upheld findings that cigarette manufacturers were negligent, that they concealed information and made misrepresentations regarding the health effects and addictive nature of tobacco and that their products are the cause of 16 major diseases. In September 2006 the District Court in Brooklyn, New York rejected a motion to dismiss a NZ$302 billion class action alleging that tobacco companies deceived consumers into believing 'light' cigarettes were safer than others.

3 Above n 1 at paras 196 and 199.

4 Ibid para 316.

5 Ibid para 331.

6 Ibid para 389.

This note explains how these factual findings are relevant to the various legal tests that needed to be satisfied. It comments on various aspects of the judgment including the finding of common knowledge, the Court's analysis of the plaintiff's intervening conduct and the application of an individualist philosophy of the law. Finally, it examines whether there are any potential categories of injured smokers who, in light of the *Pou* decision, could succeed in a claim against the tobacco industry. It is concluded that there would be few or no smokers who would have a chance of success.

II. Facts

Janice Pou fits into a small subset of smokers who had a chance of succeeding in a claim against the tobacco industry. She started smoking in 1968 before the tobacco industry put warnings on cigarette packets. Within a year of starting to smoke she had become addicted to smoking, and smoked approximately 30 cigarettes a day until she died of lung cancer in 2002. The evidence suggested that Mrs Pou had an extremely high degree of addiction to tobacco. Apart from the first year, when she smoked cigarettes manufactured by WD & HO Wills (NZ) Ltd ('Wills'), she smoked only cigarettes manufactured by Rothmans. Mrs Pou also had the dubious advantage of having a low enough income to qualify for legal aid.

Other categories of smokers may not have had such a strong case as Mrs Pou. For example, smokers who started smoking after 1974, when the first warnings appeared on cigarette packets, would have been unable to say that the tobacco companies failed to warn of the dangers. Smokers who started smoking before 1960 would have found it difficult to prove that the tobacco companies knew at that stage that cigarettes were addictive and caused lung cancer. Smokers who could not show a strong addiction to tobacco may have had difficulties proving causation because their own voluntary action of continuing to smoke could be seen as breaking the causation chain. They may also have had difficulty overcoming the defence of voluntary assumption of risk. Smokers who smoked many different brands of cigarette would have faced the additional problem of being unable to identify which tobacco company's cigarettes caused their illness. In addition, smokers that suffered illnesses other than lung cancer may have had trouble establishing causation. Finally, smokers who had a higher income then Mrs Pou may not have qualified for legal aid and might have been dissuaded from pursuing a claim in light of the likely high legal fees and the risk of costs being awarded against them.

III. The Claim

In summary, the plaintiffs claimed that the defendants knew by 1968 that cigarettes were addictive and caused lung cancer. They therefore had a duty of care either to cease manufacturing cigarettes or to warn of these risks. Since they continued to manufacture cigarettes and failed to give any warnings they breached their duty of care. The plaintiffs argued that this breach caused Mrs Pou to commence smoking and become addicted. The addiction led to her continuing smoking and as a consequence she contracted lung cancer. The plaintiffs sought damages of $310,966.

The Court held that there was not and never had been a duty on tobacco companies to cease manufacturing cigarettes.[7] The Court also made several other findings that are worth setting out in brief. It found that the claim was not barred by the Limitation Act 1950. It quickly dismissed the

7 Ibid paras 20 to 29.

claim against Wills as it could not be established that Wills cigarettes caused Mrs Pou's lung cancer. The defences of contributory negligence and voluntary assumption of risk are not discussed in any great detail in the judgment because the Court did not need to consider these due to its finding that the defendants were not liable in negligence. The bulk of the judgment therefore deals with two issues. First, whether the defendants had a duty to warn of the risks of smoking and secondly whether a failure to warn caused Mrs Pou's lung cancer. Each of these is discussed below.

IV. Duty to Warn

The principles in *Donoghue v Stevenson*[8] have been developed over the years to include a duty on manufacturers to take reasonable steps to warn potential consumers about any dangers associated with their product.[9] Thus, the Court in *Pou* found that, given the level of knowledge about the risks of smoking that the tobacco companies must have had in 1968, there was a prima facie duty to warn consumers that cigarettes were a danger to smokers' health.[10]

A. Common Knowledge

The problem for the plaintiffs stemmed from the allegation by the defendants that the dangers of smoking were common knowledge in 1968 and that this knowledge negated liability. The Court agreed that if in 1968 the health dangers of tobacco were common knowledge to reasonable persons who were potential consumers of cigarettes then there could be no liability for failing to warn.[11]

The defendants employed a historian for over 2000 hours to produce a report about the public's level of knowledge of the health hazards of smoking from 1900 to 2000. The description of the contents of this report absorb over a quarter of the *Pou* judgment.[12] It was largely this report that convinced the Court that the health risks of smoking were common knowledge in 1968 and that this negated any duty to warn. The Court concluded that this common knowledge was a result of the information about tobacco dangers that was imparted to the community by various means including radio, school programmes, magazines and newspaper reports.[13] This information would have spread further via informal discussions on the topic amongst friends, family and colleagues.[14]

The plaintiffs argued that the messages received by the community about the dangers of tobacco were diluted by the tobacco industry's vigorous advertising of smoking as a glamourous and sporty activity and by its continued denials of the dangers. The result was a mixed message that left the community confused about the risks of smoking. The Court dismissed this argument in one paragraph by arguing that New Zealanders should have been able to weigh up compet-

8 [1932] AC 562 (HL).

9 See, for example, *Watson v Buckley* [1940] 1 All ER 174 (risk of serious reaction from using hair dye); *Hollis v Dow Corning* (1995) 129 DLR (4th) 609 (risk of breast implants rupturing) and *Carroll v Fearon & Others* [1998] PIQR 146 (risk of tyres exploding).

10 The Court had no doubt that the defendants were aware of the risks by 1962 when the Royal College of Physicians released its report 'Smoking and Health' that concluded that cigarette smoking causes lung cancer.

11 Above n 1 at paras 50 to 62.

12 Ibid paras 65 to 199 deal largely with the contents of the historical report.

13 Ibid paras 163 to 185.

14 Ibid paras 186 to 190.

ing arguments and messages and would not have been surprised to hear the tobacco industry's statements.[15]

The concept of common knowledge needs to be analysed in light of its significance to the duty to warn. Common knowledge is relevant because it means that people can be assumed to have made an informed choice on the facts and do not therefore need to be warned. The duty to warn should not be negated merely because people are making a choice on the basis of a realization that there is a debate about a topic. The Court acknowledged that members of the public in 1968 would have had to make decisions about smoking on the basis of competing and sometimes contradictory information.[16] Awareness that there is a debate about the possible dangers of smoking should not constitute knowledge of those dangers for the purposes of negating a duty to warn.

Given the fact that much tobacco advertising in 1968 was directed at the youth market, it might also have been appropriate to assess the common knowledge of teenagers at this time. Such an assessment is necessary in order to ascertain whether there was a duty on manufacturers to warn teenagers of the dangers of smoking. Teenagers in 1968 were presented with specific youth-targeted advertisements that showed smoking as 'cool', fun and healthy. They are also likely to have heard statements by the tobacco industry denying a link between smoking and cancer. In addition, given teenagers lack of maturity, they may not have been as capable as the adult population of weighing up the competing messages about the dangers of tobacco. Despite the media reports about the health dangers of tobacco it is questionable whether teenagers in 1968 could be said to have had sufficient common knowledge of the risks to negate a duty to warn. They may have needed a forceful warning on the cigarette packet in order to have made a fully informed decision. It is of some interest that the government today requires detailed warnings on cigarette packets, despite an almost universal knowledge of the dangers of smoking.

One particular difficulty for the plaintiffs was the view that the Court took of statements made by bodies other than the defendants, such as the Tobacco Institute of New Zealand. The Court, when assessing Mrs Pou's knowledge, made the comment that the defendants could not be held responsible for these statements.[17] This approach is somewhat confusing in that the plaintiffs were not claiming that the defendants were directly liable for any statements not made by them. These statements should, however, have been highly relevant to the issue of individual and common knowledge.[18] Whether or not the community, or Mrs Pou herself, are likely to have known about the dangers of cigarettes can be deduced, in part, by assessing the quality of information about those dangers that they received. Whether that information came from the defendants or from some other source should not have mattered.

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15 Ibid para 202. It is not until later in the judgment at paras 337 to 345, on the different issue of whether Mrs Pou knew of the risks after 1974, that the Court consider the effect of the tobacco industry advertisements in some more detail. In that respect the Court concluded that advertising, sponsorship and repeated denials of a causal connection between smoking and cancer, would not have negated warnings that were on the cigarette packets.

16 Ibid para 202.

17 Ibid para 344.

18 As has already been explained above, common knowledge is relevant because of its potential to negate a duty to warn. The knowledge possessed by Mrs Pou is relevant to issues of causation and voluntary assumption of risk which are discussed below in Part V.

B. Policy

The Court also addressed the issue of whether, as a matter of policy, it would be reasonable retrospectively to impose a common law duty to warn on cigarette manufacturers in 1968. It concluded that it would be unreasonable because the government of the day had not seriously considered placing warnings on cigarette packets until the early 1970s.[19] The Court speculated that the reasons for this reluctance are likely to have included a concern about jeopardizing the livelihood of those employed in the tobacco industry, ambivalence about the effectiveness of warnings on packets, the social acceptability of smoking and an unwillingness to threaten the income received from taxes on tobacco.[20]

Understandably, the Court preferred to take a cautious approach when deciding whether to impose a duty in respect of behaviour that occurred a long time ago. However, the fact that the legislature at that time failed to impose a duty is insufficient reason for refusing to impose a common law duty. The objective of tort law is to make a morally blameworthy wrongdoer pay for the damage caused to the injured party. It should not matter that Parliament has not itself given the injured party protection under a statute. In fact, much of the common law consists of rights afforded to victims in situations where these rights are not provided by statute. As the Court in *Pou* pointed out, the main policy argument in favour of imposing a duty to warn on cigarette manufacturers is the desirability that consumers be placed in a position where they are able to make an informed choice.[21]

V. CAUSATION

A. Did the defendant's conduct cause her to start smoking? - The 'but for' test

The Court goes on to argue that even if it is wrong about common knowledge and there was a duty to warn, the defendants would not be liable because the failure to warn did not cause Mrs Pou's lung cancer.[22] The Court concluded that even if there had been warnings on the cigarette packets in 1968 Mrs Pou would have started smoking anyway. In other words the claim fails for not satisfying the 'but for' test of causation. The Court based its conclusion on several factual findings:

- Mrs Pou was intelligent and strong willed and in 1968 had very low self esteem;
- She saw smoking as a way of resolving her problems with self esteem;
- Smoking in 1968 was the norm;
- She was an adolescent at the time and research shows adolescents as a category of people most likely to take up smoking;
- When Mrs Pou was later warned about the dangers of smoking she continued to smoke.

The plaintiffs relied on the direct evidence from Mrs Pou to establish that the 'but for' test was fulfilled. In her affidavit filed in support of her claim she stated: 'Had I known in 1967 that smoking cigarettes was going to be so addictive and would cause me lung cancer and drastically shorten my life, I simply would not have started smoking.'[23]

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19 Above n 1 at para 251.

20 Ibid paras 241 to 250.

21 Ibid para 221.

22 Ibid paras 253 to 317.

23 Ibid para 265.

The small, but fatal, flaw in this piece of evidence was the use of the word 'would' instead of 'could'. The choice of the word 'would' may simply have been the result of the fact that she did indeed have lung cancer. However, the Court took the view that Mrs Pou was saying that she would not have started smoking only if she knew that she would get lung cancer rather than if she had merely been warned that she might get lung cancer.[24]

The Court was only prepared to give Mrs Pou's direct evidence limited weight and relied instead on an examination of the circumstances that existed in 1968 and Mrs Pou's personality.[25] Essentially, the Court did not believe Mrs Pou. Arriving at the conclusion that Mrs Pou would have started smoking even of there has been warnings necessarily involved a degree of subjectivity and speculation. No-one can say for sure what Mrs Pou would have done in 1968 if the tobacco company had warned her that the product was highly addictive and could cause her to die of lung cancer. The Court points out that when the tobacco companies did begin to produce warnings Mrs Pou did not give up smoking.[26] But of course by this stage she was highly addicted and giving up was no easy feat. The comparison between her actions at that point and her initial decision to begin smoking is perhaps a little unfair.

B. Did the plaintiff's intervening conduct break the causation chain?

The Court went on to argue that even if it was wrong on the 'but for' ground, the defendants could not be said to have caused the injury because Mrs Pou's failure to give up smoking once she found out about the dangers was an intervening act that broke the chain of causation.[27]

The Court concluded that Mrs Pou's act of continuing to smoke was deliberate and voluntary. This was despite the fact that the evidence suggested Mrs Pou's addiction was so severe that there was an extremely low chance of Mrs Pou being able to give up.[28] The Court decided that her actions were deliberate and voluntary because she failed to take immediate reasonable steps to stop smoking once she became aware of the risks.[29] Namely, she did not have a plan or strategy for giving up and she did not enlist the support or advice of her doctor, pharmacist, friends or family. Mrs Pou only ever gave up smoking for a few hours at each attempt. The Court, therefore, concluded that the defendant's misconduct could no longer be treated as the cause of Mrs Pou's injury. It did not take into account the possibility that Mrs Pou's addiction and failure to quit were, at least in part, caused by the defendant's misconduct; that is, creating a dangerous, addictive product and failing to warn about the dangers and the likelihood of addiction.

One useful question to ask when assessing causation in a case where a defendant's misconduct is potentially linked to intervening conduct is to ask whether the original wrongdoing (in this case the failure to warn) posed a likely risk of the intervening conduct (either third party or plaintiff's own conduct) occurring.[30] If it did pose such a risk there is no break in the chain of causation.

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24 Ibid para 266.

25 Ibid para 271.

26 Ibid paras 291 to 300.

27 Ibid paras 389 and 400.

28 Ibid para 362.

29 Ibid paras 373 and 400.

30 This was the approach taken in, for example, *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).

Thus, there are a number of cases where the plaintiff's own conduct brought about the harm but the defendant's conduct is still regarded as the cause.[31]

It is arguable that the defendant's failure to warn in *Pou* posed a risk that the plaintiff would become addicted to smoking so that by the time she found out about the dangers she would continue to smoke and ultimately suffer an injury. In fact, the purpose of the defendant's business and probably also the purpose of its failure to warn, was to get people to start smoking and keep smoking. According to this risk analysis the chain of causation was not broken by the plaintiff's act of continuing to smoke.

The Court did not, however, analyse the issue of the plaintiff's intervening conduct in terms of risk. Instead, it held that the chain of causation would be broken if it could be said that the plaintiff's intervening conduct was voluntary and fully informed.[32] Addiction was only treated as relevant in so far as it affected voluntariness.

An alternative approach would have been to have accepted that the plaintiff's loss was within the scope of risk created by the defendant's misconduct and then to have treated the failure of the plaintiff to take reasonable steps to quit smoking as contributory negligence under the Contributory Negligence Act 1947. Section 3 of this Act provides that a claim for damage that is partly the result of the plaintiff's own fault and partly the fault of another person should not be defeated by reason of the plaintiff's fault. Instead the Court should reduce the damages recoverable to such an extent as it thinks just and equitable having regard to the plaintiff's share in the responsibility for the injury. In *Pou* the Court could have attempted to apportion responsibility for Mrs Pou's injury between Mrs Pou and the tobacco company.

IV. Individualist Theory of the Law

The Court briefly touched on the concept of the law reflecting individualist values as an alternative basis for analyzing Mrs Pou's conduct. It concluded that a theory based on individual values should be applied to the area of product liability since '[t]here is no reason why individuals who have the ability to control their own actions should not also be responsible for them'.[33] Two points can be made here. First, it is not entirely clear that a person suffering from a degree of addiction as severe as Mrs Pou's addiction could sensibly be said to have had the ability to control her own actions. Secondly, the field of product liability law is probably more accurately characterized as an area of law founded not on individualist values but on the idea that the law should hold powerful people accountable for harming vulnerable people.

VII. Likelihood of Smoker's Claim Succeeding After *Pou* Decision

This Part of the article considers whether there are any categories of smoker who might be able to succeed in a claim against a tobacco company after the *Pou* judgment. The following factors would make a smoker's claim stronger than Mrs Pou's claim:

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31 See, for example, *Caterson v Commissioner for Railways* (1973) 128 CLR 99 (HCA) plaintiff saying goodbye to passenger in train jumps off train when it started quickly without warning and injures himself; *Russell v McCabe* [1962] NZLR 392 (CA) a volunteer firefighter injuring himself while attempting to put out a fire that had spread from defendant's land.

32 Above n 1 at paras 370, 373, 389, and 400.

33 Ibid para 392.

- Plaintiff started smoking in 1962 when the Court in *Pou* accepted that the tobacco industry would have known about the dangers of tobacco but there would have been no common knowledge.
- Strong evidence that plaintiff would not have started smoking if was warned of dangers.
- Plaintiff started smoking as an adult and not as an adolescent. Court in *Pou* considered fact that Mrs Pou started smoking as an adolescent made it more likely that she would have started smoking even if she had been warned of dangers.
- Plaintiff smoked only one brand of New Zealand cigarette for entire life.
- Addiction as severe or more severe that Mrs Pou's addiction.
- Reasonable attempts made to give up smoking when became aware of dangers when warnings written on packets (1974). For example, used professional help, nicotine patches and enlisted support of friends and family.
- Developed lung cancer not more than three years before filing claim so that claim not barred by the Limitation Act 1950.
- Plaintiff managed to quit smoking no more than 15 years before contracting lung cancer. Otherwise there would be difficulties proving causation.[34]

Nevertheless, a smoker who satisfies all the above criteria may still find the timing requirements set up by the Court in *Pou* almost impossible to satisfy. Suppose this smoker files his claim in 2006, three years after he first developed lung cancer in 2003. In order that there be a causative link between the cancer and his smoking he would have needed to have given up smoking not more than 15 years earlier. This takes the time back to 1988. This is 14 years after the first warnings were placed on cigarette packets in 1974. The Court in *Pou* required smokers at this time to take immediate reasonable steps to quit smoking. Thus, in order for our mythical smoker's claim to succeed he would have to have taken reasonable steps to quit 14 years prior to actually giving up. The Court in *Pou* does not consider the position of a smoker who takes reasonable steps to stop smoking but fails to give up smoking. It is not clear how long the smoker is required to continue to take the reasonable steps. Perhaps it would be assumed that if the smoker does not initially manage to quit smoking the steps were not reasonable because the smoker cannot have been determined enough or motivated enough to quit. Perhaps if our mythical smoker never manages to quit smoking his case would, ironically, be stronger because it can be argued that reasonable steps were taken but that he was one of the few unfortunate people unable to give up. In any case, even with the most favourable set of facts the chances of a tobacco company being found liable are at best minimal. The individualist philosophy of the law espoused in *Pou* and the level of resources that the tobacco industry are able to spend to defend a claim are both powerful impediments to any New Zealand smoker successfully claiming against a tobacco company.

VIII. Conclusion

The Court in *Pou* took a cautious approach to determining liability. It covered all possible arguments even though its initial finding that any duty to warn was negated by common knowledge was a sufficient basis for denying the claim. Its overall approach was based on the notion of individual responsibility rather than the concept of consumer protection. Little consideration was given to the effect that tobacco advertisements and the tobacco industry's denials of the dangers

34 Evidence presented in *Pou* suggested that a smoker who gives up smoking will have the same chance of contracting lung cancer after 15 years of abstinence as a person who has never smoked. See para 332.

of smoking had on the degree of knowledge that the community had about the risks of smoking in 1968.

In terms of causation the plaintiff failed in two respects. First, the Court found that Mrs Pou would have started smoking anyway even if she had been warned of the dangers. This is despite Mrs Pou's direct evidence that seems to suggest the contrary. Secondly, the Court held that the fact that Mrs Pou continued to smoke and did not take reasonable attempts to quit once she was aware of the risks constituted a deliberate choice that broke the chain of causation. It did not consider that the reason Mrs Pou continued to smoke was, at least in part, because she was addicted and that this addiction was arguably a risk posed by the defendant's misconduct. It may have been more appropriate to view the failure of the plaintiff to take reasonable steps to quit smoking as contributory negligence under the Contributory Negligence Act 1947. Responsibility for Mrs Pou's injury could then have been apportioned between the parties.

The Court in *Pou* found against the plaintiff on almost every aspect of the case. In the future, New Zealand smokers have very little chance of claiming any compensation from the tobacco industry for harm suffered by smoking.