Australian jury finds passive smoking causes cancer in landmark legal case

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For the first time anywhere in the world, an employee has successfully sued an employer after contracting cancer as a result of passive smoking. Former bar attendant Marlene Sharp, 62, was awarded $466,000 in damages after a four-person jury in the New South Wales Supreme Court found that the Port Kembla RSL club in Wollongong had been negligent and breached its duty of care.

Sharp had sued the club, claiming that her throat cancer was caused by breathing in smoke while working there between 1984 and 1995. Sharp, who has never smoked herself, used to serve drinks and was constantly exposed to the smoke of others. In May 1995 she noticed a lump on the right side of her neck which was diagnosed as cancerous and had to be removed surgically. Sharp also underwent painful radiotherapy. At the time of the trial, she continued to have difficulty swallowing and, on occasion, breathing as well as to face an increased risk of secondary cancer.

Opposing Sharp in the courts was the law firm Clayton Utz, which used to represent the now disbanded Tobacco Institute, an industry lobby group. An insurance company acting on behalf of the NSW state compensation body Workcover also fought Sharp's lawsuit.

Commenting on the decision, Sharp said: “I'm so very happy. I'm so happy with the jury, but I'm very, very disappointed in the Workcover authority. They could have settled three years ago, 1998. I believe they've spent over a million dollars on this case, and they could have settled back in 1998 for far less than what I've received... But I believe, and I'm very concerned, that they're going to appeal, so they're going to spend a lot more money on it.”

Allegations have been made that the NSW Labor government accepted help from tobacco companies in fighting Sharp's claims. NSW Trades and Labor Council Secretary Michael Costa, a member of the Workcover board admitted that accusations had been made but brushed them aside, saying: “Well, I've had a number of people raise concerns with me whether there was involvement by the law firm Clayton Utz in any of the Workcover proceedings in relation to this passive smoking issue. And what I've asked management is to provide for the next board meeting a detailed analysis of what actually happened in the lead-up to the case.”

Of particular concern are the witnesses called by the defence—Professor Schwartz and Professor Witorsch from Washington DC. They both agreed under cross-examination that they had a long association with the tobacco industry. Peter Semmler, Sharp's barrister, told the court that both of them had been part of a network of scientists set up in the mid-1980s by the tobacco industry in the US to fly around the world testifying that environmental tobacco smoke (ETS) did not cause significant health problems.

Witorsch admitted when questioned that his view that there was only a theoretical possibility that ETS could cause cancer contradicted the opinions of the American Lung Association, the American Thoracic Society, the World Health Organisation's cancer body, the National Research Council of the Academy of Sciences, and the Occupational Health and Safety Association.

The NSW Supreme Court was told that American tobacco companies paid Witorsch up to $US250 an hour and flew him first class around the world to give evidence that passive smoking did not cause lung cancer or serious respiratory diseases. He was also paid thousands of dollars to write letters to medical journals criticising research that linked passive smoking to serious diseases, such as childhood cancer. Asked whether he had ever given evidence contrary to the

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interests of the tobacco industry, he said he suspected he had, but could not recall any examples.

Passive smoking is now an acknowledged health risk and ETS is considered a major source of indoor air pollution. Tobacco smoke contains over 4,000 chemicals, some of which have marked irritant properties that can cause allergic reactions. Sixty of the chemicals in tobacco smoke are either known or suspected carcinogens (cancer causing substances).

Evidence of the health impact of passive smoking has been building up over the past two decades. During the 1980s, a number of comprehensive reviews of the effects of passive smoking were published, including reports by the US National Research Council, the National Health and Medical Research Council of Australia and the UK Independent Scientific Committee on Smoking and Health. This process culminated in a major review by the US Environmental Protection Agency published in 1992 which classified ETS as a class A (known human) carcinogen.

Over the past two years, further research into passive smoking have been published identifying passive smoking as a risk factor in a wide range of health problems and diseases, including low birth weight, cot death, asthma, heart disease, stroke, lung and nasal cancers. The California Environment Protection agency has also identified a link between passive smoking and spontaneous abortions, adverse impact on learning and behavioural development in children, child meningoccoccal infections and cancers and leukemia in children as well as the exacerbation of cystic fibrosis, decreased lung function and cervical cancer.

Sharp is not the first victim of passive smoking to go to court. About nine years ago, Mrs Scholem was awarded damages for aggravated asthma and recovered $85,000 after a four-person jury in Australia found in her favour. There have been a number of other cases internationally but these have been settled out of court and therefore have not established a legal precedent.

The implications of the Sharp case go well beyond the smoke-filled bar of the Port Kembla RSL club. The Cancer Council of Western Australia described the issue as a time bomb for the hospitality industry. “Passive smoking is dangerous and we all, whether government, employers or members of the public, have a responsibility to protect non-smokers from the clearly documented risks,” chief executive officer Mike Daube said. “There is simply no excuse for exposing any employees to the dangers of passive smoking.”

Following the decision, however, NSW Industrial Relations Minister John Della Bosca bluntly ruled out any action by the state government, saying it was up to the hotels to deal with the issue. “The government has been saying to the pubs and to the clubs in NSW that for some time there was a likelihood of a case like this coming through the court system, or eventually working its way into the workers compensation process. The reality is, that it is the responsibility of the pubs and clubs to make determinations as to the way in which they protect their employees. The law is clear and they have that obligation.”

Over the last few years the Australian Hotels' Association (AHA) has been conducting a campaign against any restriction on smoking in hotels, saying that the push by lobby groups for smoke-free pubs is the result of a lynch mob mentality. In documentation provided to anti-smoking campaigner, Professor Simon Chapman, the AHA admitted that the campaign was in large measure funded by tobacco companies. “The tobacco industry has been funding the AHA to run around the country arguing against smoking bans,” Chapman said.

If the decision in favour of Sharp survives legal appeals, it is likely to set a precedent not only in hotels but for employees exposed to passive smoking in other workplaces.

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