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Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom

*Andrei Sirabionian**

I. INTRODUCTION

Litigation against tobacco companies, about smoking-related diseases, is novel outside of the United States. While in the past two decades U.S. courts have handed down costly verdicts against tobacco companies, European courts have not been as willing to rule against the tobacco industry.¹ European courts have been much more reluctant to award damages to individuals with smoking related diseases or their families.² As a result, courts outside the United States have not handed down major decisions against tobacco companies.

This comment will examine the few “successful” tobacco litigation cases that have been brought outside of the United States (focusing on the United Kingdom) and compare them to recent litigation in U.S. courts in an effort to analyze why U.S. litigants fared better than their British counterparts. This comment compares the legal structures in the United States and the United Kingdom, analyzing the different legal theories that plaintiffs in Europe have tried and why they ultimately failed. Questions addressed include: a) does the failure of these claims reflect inherent differences in the United Kingdom’s legal system that make winning

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¹ Richard A. Daynard, *Tobacco Litigation: A Mid Course Review*, Tobacco Products Liability Project: Tobacco Control Resource Center, Northeastern University School of Law 383-86 (2001), available at http://www.hsph.harvard.edu/cancer/research/tobacco/tobacco%20notes%20archive/tobacco_notes_12_383_2001.pdf (last visited Jan. 9, 2005).

² *Id.*

tobacco litigation more difficult for U.K. plaintiffs than U.S. plaintiffs, and b) are the legal theories advanced in European cases very different from those in the United States. If not, what other reasons could explain the failure of tobacco claims in the United Kingdom?

This article concludes that the British tobacco cases are not flawed from a legal perspective. Instead, the inherent difference between the legal systems of the United States and the United Kingdom is the reason for the ultimate failure of tobacco cases in the United Kingdom. Furthermore, this article offers a roadmap of the direction tobacco litigation is headed in the United Kingdom and provides sound reasoning as to why U.K. tobacco plaintiffs will eventually enjoy the same success as their U.S. counterparts.

II. THE HISTORY OF DOMESTIC TOBACCO LITIGATION

In order to better understand how far tobacco litigants have come with their recent success, it is important to examine the history of tobacco litigation in the United States. Also, because British litigants and attorneys look to U.S. cases for guidance in bringing claims against tobacco manufacturers,³ the history of tobacco litigation in the U.S. is crucial.

The idea of holding tobacco companies liable for health problems caused by their products began in the early 1950's.⁴ Legal experts believed that any successful lawsuit against a tobacco company would open the floodgates to litigation that would eventually overwhelm tobacco companies.⁵ This belief could not have been further from the truth as the tobacco industry compiled over 300 legal victories in the years following the first tobacco case, *Pritchard v. Liggett & Myers Tobacco Co.*, in 1954.⁶ Of these cases, none were settled, and in the few that made it to trial none of the plaintiffs ever successfully received damages.⁷ Most cases were brought under theories of fraud, negligence and breach of warranty.⁸ Cigarette companies were successful in avoiding liability of any kind by arguing that smoking-related illnesses were unforeseeable results of

³ See, e.g., Robert Verkaik, *Marlboro Man Makes a Stand - A British Smoker's Case Against American Tobacco*, THE INDEPENDENT, Sept. 5, 2000, available at <http://lists.essential.org/pipermail/intl-tobacco/2000q3/000269.html>.

⁴ Jana Schrink Strain, *Medicaid v. The Tobacco Industry: A Reasonable Legislative Solution to a State's Financial Woes?*, 30 IND. L. REV. 851, 857 (1997).

⁵ *Id.* (citing Mark Curriden, *The Heat is on: Facing High-Powered Plaintiff's Lawyers and Damaging Revelations, the Once Invincible Tobacco Industry may no Longer be Able to Snuff out its Opponents*, 80 A.B.A. J. 58).

⁶ *Id.*

⁷ Daynard, *supra* note 1, at 383.

⁸ Heather Cooper, *Tobacco Litigation: A Comparative Analysis of the United States and European Community Approaches to Combating the Hazards Associated with Tobacco Products*, 16 BROOK. J. INT'L. L. 275, 281 (1990).

smoking cigarettes.⁹ Further, tobacco companies argued that plaintiffs assumed the risks of smoking. They also capitalized on the fact that they could afford the best lawyers to defend against generally under-funded plaintiffs.¹⁰ As a result, the tobacco industry defended against forty years of claims without being forced to pay anything in compensation.¹¹ Through 1994, tobacco companies spent over \$600 million in legal fees.¹²

Arguably the first real blow to tobacco companies came in 1964 when the Surgeon General issued a report entitled “Smoking and Health: Report of the Advisory Committee to the Surgeon General” (Report).¹³ The Report linked smoking with several deadly diseases, including lung cancer, emphysema, and bronchitis.¹⁴ The Report also included language stating that smoking was a “health hazard of sufficient importance” and thus required Congressional action.¹⁵

In 1965, Congress, prompted by the Report, enacted the Federal Cigarette Labeling and Advertising Act (the Act).¹⁶ The Act states:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

- (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
- (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.¹⁷

The Act, which went into effect on January 1, 1966, required cigarette companies to include the warning “Caution: Cigarette Smoking May Be

⁹ *Id.*

¹⁰ See Strain, *supra* note 4, at 859.

¹¹ *Id.*

¹² *Id.* at 858.

¹³ U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 31 (1964).

¹⁴ *Id.*

¹⁵ *Id.* at 33.

¹⁶ Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1341 (1994)).

¹⁷ *Id.*

Hazardous to Your Health” on every package of cigarettes.¹⁸ This language, which was amended a number of times, attempted to strike a balance between warning the public of the adverse effects of smoking and protecting commerce from the imposition of non-uniform cigarette labeling.¹⁹ Although the Act may appear detrimental to cigarette manufacturers at first glance, it subsequently turned out to be quite helpful to them. After 1965, the tobacco companies could use the Act as a defense against claims that plaintiffs were unaware of the harmful effects of cigarette smoking.²⁰

Congress amended the Act in 1970 to provide for a stronger warning label on cigarettes stating: “Warning: The Surgeon General Has Determined That Smoking Is Dangerous to Your Health.”²¹ At the same time, Congress gave authority to various administrative agencies, including the Secretary of Health and Human Services and the Federal Trade Commission, to monitor and report on various issues such as the health consequences of smoking and advertising policies.²²

Finally, Congress passed the Comprehensive Smoking Education Act of 1984 which established an agency (the Interagency Committee on Smoking and Health) responsible for tracing the effects of smoking and making recommendations to Congress.²³ This Act also implemented a system of rotating warnings to address the hazards of smoking.²⁴

Another weapon in the fight against tobacco companies was tort theory. The Restatement (Second) of Torts, published in 1965, provides for strict liability, “making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of

¹⁸ Elizabeth C. Price, *Torts – Federal Preemption of State Common Law – Federal Cigarette Labeling and Advertising Act*, 60 TENN. L. REV. 243, 246 (1992).

¹⁹ Sven Krogius, *Dewey v. R.J. Reynolds Tobacco Co.: A Welcome Exercise of Restraint in Applying Preemption Doctrine to State Tort Claims*, 57 BROOK. L. REV. 209, 216 (1991).

²⁰ Brian H. Barr, *Engle v. R.J. Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 FLA. ST. U. L. REV. 787, 798 (2001).

²¹ Federal Cigarette Labeling and Advertising Act of 1969, Pub. L. No. 91-222, 84 Stat. 88 (codified as amended at 15 U.S.C. § 1333 (1988)).

²² Price, *supra* note 18, at 216-17.

²³ *Id.* at 217.

²⁴ *Id.*; Comprehensive Smoking Education Act § 4, Pub. L. No. 98-474, 98 Stat. 2200, 2201-02 (1984) (codified as amended at 15 U.S.C. § 1333 (1988)). These new warnings, which are to be rotated quarterly, are: SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy; SURGEON GENERAL’S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health; SURGEON GENERAL’S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight; SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide. *Id.*

the product.”²⁵ Section 402(a) of Restatement (Second) of Torts (1965) states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) The seller is engaged in the business of selling such a product, and
 - (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) The seller has exercised all possible care in the preparation and sale of his product, and
 - (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.²⁶

Even after the Restatement was published in 1965, cigarette companies could avoid strict liability under § 402(a)(1) because cigarettes were by no means a “defective” product.²⁷ A comment to the Restatement even says “[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful.”²⁸ Some experts viewed this statement as giving *per se* immunity to the tobacco industry.²⁹ Courts, in turn, responded by throwing out many claims against cigarette companies—making the Restatement § 402 a much less useful tool for tobacco plaintiffs than many originally thought.³⁰

A. Background: The Master Settlement Agreement, the FDA Flexes Some Muscle

Despite all of the steps taken by the government, until recently, it was still nearly impossible for plaintiffs to win their cases against tobacco companies. The Labeling Act of 1964 contained a clause that worked to preempt most of the claims being asserted against tobacco companies.³¹ As

²⁵ RESTATEMENT (SECOND) OF TORTS § 402(a) cmt. a (1965).

²⁶ RESTATEMENT (SECOND) OF TORTS § 402(a) (1965).

²⁷ Thomas C. Galligan, Jr., *A Primer on Cigarette Litigation Under the Restatement (Third) of Torts: Products Liability*, 27 SW. U. L. REV. 487, 494-95 (1998).

²⁸ RESTATEMENT (SECOND) OF TORTS § 402(a) cmt. i (1965).

²⁹ Bryce A. Jensen, *From Tobacco to Healthcare and Beyond: A Critique of Lawsuits Targeting Unpopular Industries*, 83 CORNELL L. REV. 1334, 1340 (2001).

³⁰ *Id.*

³¹ Strain, *supra* note 4, at 858; Paul G. Crist & John M. Majoras, *The “New” Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551, 552 (1987) (citing 15 U.S.C. §§ 1331-33).

a result, the number of claims brought after the passage of the Act fell until the late 1970's and early 1980's when theories of strict liability against tobacco manufacturers became popular (following the publishing of the Restatement (Second) of Torts in 1965).³² The Supreme Court also weighed in on the issue in *Cipollene v. Liggett Group, Inc.* and held that the Act did not preempt states from awarding damages based on express warranty, intentional fraud and misrepresentation, or conspiracy.³³

The government's war against tobacco seemed to reach an all time high in 1994 when then Food and Drug Administration (FDA) Commissioner, Dr. David A. Kessler, announced that an investigation was underway to determine whether tobacco products were "drugs" within the FDA's jurisdiction.³⁴ Kessler's announcement, coupled with televised testimony by top tobacco executives telling Congress that they did not believe cigarettes were addictive and the release of highly incriminating industry documents stating that tobacco companies had long been aware of the detrimental effects of smoking³⁵ appeared to have tobacco companies finally backed into a corner.

Nevertheless, the Supreme Court in a 5-4 decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, held that the Food, Drug and Cosmetic Act (FDCA), which gives the Food and Drug Administration, through the Secretary of Health and Human Services, the authority to regulate, among other items, "drugs" and "devices," does not grant the FDA the authority to regulate tobacco products.³⁶

³² Strain, *supra* note 4, at 858.

³³ *Cippollone v. Liggett Group Inc.*, 505 U.S. 504 (1992).

³⁴ Daynard, *supra* note 1, at 383.

³⁵ *Id.*

³⁶ *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The Supreme Court held that any product regulated by the FDA must be "effective for its intended use." The potential for death or bodily injury of any product regulated by the FDA must be outweighed by its therapeutic effects. In its rulemaking procedures, the FDA focused on the fact that tobacco products are unhealthy and can even cause death. Thus, if the FDA were allowed to regulate the product, it would be required to take tobacco products off the market. Congress, however, has explicitly foreclosed such a possibility through its legislation which focused on the regulation of tobacco advertising and required tobacco manufacturers to place warning labels on cigarette packets. Thus, it was clearly Congress's intent not to have the FDA regulate tobacco (and subsequently allow for the possibility of having it taken off the market by the FDA). The Court's reasoning, while focusing on congressional intent, alluded to the fact that tobacco manufacturing is a big business providing jobs for large numbers of Americans. *Id.* For a further discussion of this case see generally Margaret Gilhooey, *Tobacco Unregulated: Why the FDA Failed, and What to Do Now*, 111 YALE L.J. 1179 (2002); Rodney A. Morris, *SSSMOKINNN': The Supreme Court Burns the FDA's Authority to Regulate Tobacco in FDA v. Brown & Williamson Tobacco Corp.*, 34 CREIGHTON L. REV. 1111 (2002); Joseph G. White, *Prestidigitation and the Chevron Doctrine: Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, 120 S.Ct. 1291 (2000), 24 HAMLINE L. REV. 285 (2001).

The watershed point in tobacco litigation came in August of 1996, when an individual tobacco plaintiff won \$750,000 in a judgment in Tampa, Florida.³⁷ Panic hit tobacco companies and the shockwaves reached Wall Street; the next morning tobacco stocks dropped by over ten billion dollars as investors realized that this one verdict could actually bring about dozens more like it.³⁸ Tobacco companies soon shifted strategy and settled with three states (Mississippi, Florida and Texas) in the following year.³⁹

Perhaps the biggest development in recent years regarding tobacco litigation came in 1998, when forty-six states signed a Master Settlement Agreement (MSA) with the tobacco industry.⁴⁰ As part of the MSA, cigarette companies agreed to stop targeting youth, stop using cartoons (e.g. "Joe Camel") to advertise their product, and refrain from sponsoring events such as concerts, athletic events, or any other event where a significant part of the intended audience is "youth."⁴¹ Further, tobacco manufacturers promised to remove ads promoting cigarettes near schools and other areas frequented by youth (e.g. malls, arcades, arenas or stadiums).⁴² Pursuant to the MSA, participating tobacco companies agreed to pay \$206 billion to forty-six states over the next twenty-six years.⁴³ Four states (Florida, Minnesota, Mississippi and Texas) settled separately with the tobacco companies.⁴⁴ Money from the settlements was to be used for, among other things, health and smoking prevention programs and research..⁴⁵

B. The Precursors to *Engle* and the Rise in Popularity of the Class Action Lawsuit

A main factor contributing to plaintiffs' recent success against the tobacco industry has been the onset of class action litigation.⁴⁶ Difficulties involved with proving causation between smoking and cancer, along with increasing knowledge about the risk associated with smoking, have always caused problems for plaintiffs.⁴⁷ However, perhaps the greatest problem in

³⁷ Daynard, *supra* note 1, at 383.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Master Settlement Agreement at 10, available at http://www.tobacco.neu.edu/Extra/multistate_settlement.htm (last visited Jan. 27, 2004).

⁴² *Id.* at 53.

⁴³ Ohio Attorney General Betty D. Montgomery, Allocating Ohio Tobacco Settlement Funds, Testimony before the U.S. Commerce, Science, and Transp. Comm. at 1 (Oct. 5, 2000), available at <http://commerce.senate.gov/hearings/1005mon.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See generally Barr, *supra* note 20.

⁴⁷ Strain, *supra* note 4, at 859.

the fight against big tobacco has been that individual claimants lacked the "fire-power" to take on cigarette companies on their own.⁴⁸ An attempt was made to bring together a large number of plaintiffs and put forth a suit as a "class" in the case of *Castano v. American Tobacco Co.*⁴⁹ The class action involved a large number of plaintiffs' attorneys from top law firms, with each firm contributing funds for the expenses of the suit (in return for hefty fees in the case of a victory, of course).⁵⁰ However, the *Castano* case fell apart because variations in the tort laws of every state involved in the suit made it impractical and extremely difficult to try all the actions as one claim.⁵¹

The move towards class-action litigation which led to the *Castano* case is sometimes referred to as the "third wave" of tobacco litigation.⁵² Commentators have argued this "third wave" was brought about by certain industry documents that emerged in the 1990's, most notably some of which were "leaked" by a former Brown & Williamson Tobacco Co.

⁴⁸ *Id.*

⁴⁹ *Castano v. American Tobacco Co.*, 160 F.R.D 544, 1995 U.S. Dist. LEXIS 2005 (E.D. La. Feb. 17, 1995), *rev'd* 84 F.3d 734 (5th Cir. 1996).

⁵⁰ Strain, *supra* note 4, at 859.

⁵¹ *Id.*

⁵² Susan E. Kearns, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1342 (1999). The "first wave" of litigation described above lasted from 1954 until 1965, i.e. beginning with the very first studies from the scientific community regarding the dangers of cancer until 1965 with the adoption and publication of the Restatement (Second) of Torts. During the "first wave" of tobacco litigation cigarette companies were very successful in arguing that they did not "foresee" injury to smokers. Thus, the chain of causation was extremely attenuated. Further, cigarette companies used their enormous financial resources to crush any claim by a plaintiff refusing to settle. Nevertheless, the "first wave" set the blueprint for future claims against cigarette companies.

The "second wave" of tobacco litigation was symbolized by attempts to strengthen the causation link between smoking and health problems. This wave included attempts by the government to regulate tobacco by mandating that warnings be placed on cigarette packs. The "second wave" was also characterized by the rise of mass tort litigation similar to that in asbestos claims, where plaintiffs' attorneys were getting closer to favorable awards by pooling resources together. Even with pooled resources, however, it was still difficult to go up against the impressive war chests of tobacco companies who made hundreds of millions of dollars in profits annually. Further, with government warnings and all kinds of studies and health reports becoming more available, tobacco companies were in a good position to argue that plaintiffs had assumed the risk of smoking themselves and knew all along (based on cigarette warnings which now existed on every pack of cigarettes) that smoking does indeed cause health problems. Nevertheless, after years of public knowledge that cigarettes caused grave health problems, tobacco companies still did not pay out any compensation because there was no internal "smoking gun" from tobacco companies stating that tobacco executives knew of the risks associated with cigarettes and did their best to addict their customers, thus making it impossible for them to quit should they want to. This "smoking gun" would present itself in the "third wave" of tobacco litigation (discussed *infra*). For a full discussion of the "three waves" of tobacco litigation, see generally Barr, *supra* note 20.

employee, known as the “Cigarette Papers.” These documents clearly showed that cigarette company executives knew—and struggled with—the knowledge that cigarettes can cause cancer and other diseases for several decades.⁵³ The fact that tobacco executives had this knowledge, yet concealed it from the public and even intentionally increased levels of nicotine in their cigarettes to addict smokers is of great strategic importance. It is argued that this information gave rise to increasing numbers of class action claims against cigarette manufacturers.⁵⁴

The Cigarette Papers were sent anonymously to a University of California professor.⁵⁵ The documents detailed years of mass-conspiracies by cigarette companies to secure their market positions at the expense of their very own customers and society in general.⁵⁶ Thus, the Cigarette Papers helped shift the balance from a “David v. Goliath”⁵⁷ relationship to a more level playing field by providing something of a smoking gun against cigarette manufacturers.⁵⁸ Success followed the unearthing of these documents with twenty-two plaintiffs settling their suits with cigarette giant Liggett & Myers Corporation (Liggett).⁵⁹ However, more importantly, Liggett admitted publicly that cigarettes cause dozens of potentially fatal diseases and that tobacco companies purposefully target children.⁶⁰ The Liggett settlement also spawned the discovery of 250,000 pages of documents implicating the tobacco industry in conspiracy cover-ups for decades, and which have been used in later litigation.⁶¹

The first jury award came in the landmark case of *Brown & Williamson Tobacco Corp. v. Carter* where a jury for the first time awarded \$750,000 in damages to the plaintiffs using incriminating information that came from the infamous Cigarette Papers.⁶² Unfortunately, the damage award was overturned by the Florida District Court of Appeal on statute of limitations grounds.⁶³ The Florida Supreme Court later overturned the appellate holding.⁶⁴

⁵³ Kearns, *supra* note 52, at 1341; Strain, *supra* note 4, at 859.

⁵⁴ Kearns, *supra* note 52, at 1342.

⁵⁵ Barr, *supra* note 20, at 798.

⁵⁶ *Id.*

⁵⁷ Howard M. Erichson, *Toxic Torts: Issues of Mass Litigation, Case Management and Ethics Articles*, 28 WM. & MARY ENVTL. L. & POL. REV. 123, 124 (2001).

⁵⁸ Barr, *supra* note 20, at 797.

⁵⁹ *Id.* at 797-798.

⁶⁰ *Id.* at 798.

⁶¹ *Id.*

⁶² *Id.*; *Carter v. Brown & Williamson Tobacco Corp.*, No. 95-934-CA CV-B (Fla. Duval Cir. Ct. Dec. 5, 1996); Strain, *supra* note 4, at 860.

⁶³ *Brown & Williamson Tobacco Corp. v. Carter*, 723 So. 2d 833 (Fla. 1st Dist. Ct. App. 1998). See also Barr, *supra* note 20, at 798 n.80.

⁶⁴ *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932 (Fla. 2000).

The Cigarette Papers and increasing public skepticism of tobacco companies helped refute the long standing “assumption of risk” defense used by cigarette companies for decades in the “first and second waves”⁶⁵ of tobacco litigation; smoking was no longer considered voluntary, but a result of Big Tobacco’s attempts to addict smokers.⁶⁶ The new theory advanced by plaintiffs was referred to as the “addiction as injury” claim.⁶⁷ Thousands of new litigants came to the forefront armed with this new theory.⁶⁸

C. The Class Action Lawsuit and Tobacco Litigation

Although class action lawsuits would seem to be the most logical and efficient way to adjudicate tobacco claims, because of the ability of class actions to bring together litigants with otherwise limited resources, both state and federal courts have been extremely reluctant to certify classes for mass tort claims regarding tobacco litigation.⁶⁹ The main reason behind the reluctance of courts to allow classes of millions to bring suit stems from the fact that individualized injuries would make grouping plaintiffs as a class impractical and almost impossible.⁷⁰

Class actions are governed on the federal level by Federal Rule of Civil Procedure 23 (Rule 23).⁷¹ The four main requirements for a class action lawsuit are: 1) numerosity; 2) commonality; 3) typicality; and 4) adequacy of representation.⁷² The problem with class actions in general, and tobacco class actions in particular, is that the requirements of Rule 23

⁶⁵ See generally, Barr, *supra* note 20.

⁶⁶ Kearns, *supra* note 52, at 1342.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Melodie C. Hahn, *Smokers Chances of a Fair Fight Against the Tobacco Companies Go Up in Smoke: A Study of Phillip Morris v. Angeletti and Its Effect on the Viability of Class Action Lawsuits in Maryland Tobacco Litigation*, 31 U. BALT. L. REV. 103, 103 (2001).

⁷⁰ *Id.*

⁷¹ FED. R. CIV. P. 23 (2004).

⁷² FED. R. CIV. P. 23(a) states:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a) (2004).

are not met because of the “typicality” requirement.⁷³ Tobacco companies often argue that the causation link between cigarettes and cancer or the extent of the individual plaintiffs’ addiction varies within a class and thus, it cannot be said that any one injury is “typical” to the entire class.⁷⁴

Class actions have the potential to eliminate two of the greatest problems facing individual plaintiffs in the fight against big tobacco; namely the aforementioned lack of resources and the lack of strategic coordination.⁷⁵ Class action lawsuits allow plaintiffs to combine both resources and strategies, thereby plaintiffs are better equipped to face powerful tobacco companies in court.⁷⁶ Thus, using the example of *Castano*, instead of smokers suing independently, that case was filed on behalf of over one hundred million Americans who were addicted to cigarettes.⁷⁷

Another problem for plaintiffs in huge class action lawsuits (as was the case in *Castano*) is the court’s unwillingness to overlook the role that juries play in damage awards.⁷⁸ The Fifth Circuit Court decertified the class of plaintiffs in *Castano*, and held that “the collective wisdom of individual juries is necessary before [this court] commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury.”⁷⁹ Facing decertification in federal court, plaintiffs often turn to state courts to plead their claims.⁸⁰

Another problem which arises with the class action lawsuit is that it may be speculative.⁸¹ As demonstrated in *Castano*, “addiction as injury” over a class of a million people diminishes, rather than strengthens, an individual claimant’s ability to bring a more personal and probably more successful case against a cigarette manufacturer.⁸²

Thus, although originally thought to be a more natural forum for tobacco litigation because of multi-jurisdictional issues, federal courts were considered to be a poor forum for plaintiffs after *Castano*.⁸³ Some commentators believe this is unfortunate and argue that federal courts should remain a suitable alternative to state courts as forums for massive

⁷³ Kearns, *supra* note 52, at 1360.

⁷⁴ *Id.*

⁷⁵ Erichson, *supra* note 57, at 131.

⁷⁶ Barr, *supra* note 20, at 799.

⁷⁷ *Id.* See also *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)

⁷⁸ Barr, *supra* note 20, at 799; *Castano*, 84 F.3d at 746

⁷⁹ *Id.* at 804 (quoting *Castano*, 84 F.3d 734 at 751-52).

⁸⁰ Erichson, *supra* note 57, at 138.

⁸¹ Kearns, *supra* note 52, at 1346-47.

⁸² *Id.* at 1347.

⁸³ Erichson, *supra* note 58, at 137-38.

class action lawsuits.⁸⁴ Federal courts could play a valuable part in protecting against substantive due process violations in state courts.⁸⁵

D. Engle v. R.J. Reynolds – Victory at Last?

Engle v. R.J. Reynolds Tobacco Co. is the biggest victory by plaintiffs yet in the war against tobacco.⁸⁶ In *Engle*, 500,000 Florida residents were awarded \$144.8 billion in punitive damages—the largest award in U. S. history against tobacco companies.⁸⁷ The plaintiffs' primary claim was that the cigarette company manipulated the amount of tobacco in their cigarettes and concealed the addictive nature of their product.⁸⁸ The class sought \$200 billion in damages for the cigarette companies' concealment of the addictive nature of nicotine.⁸⁹ Surprisingly, the district court judge certified the class, and this decision was immediately appealed by the tobacco industry.⁹⁰ *Engle* seemed to be the high point for plaintiffs in their fight against cigarette manufacturers.

Nonetheless, there were controversial aspects about the *Engle* case. First, the jury was told to assess punitive damages in one lump sum, rather than the usual practice of assessing damages individually.⁹¹ Only then would compensatory damages be assessed for individual plaintiffs.⁹²

In the end, the \$145 billion award was overturned by Florida's Third District Court of Appeal, ordering the class of plaintiffs decertified and holding that they must sue tobacco companies individually if they wish to continue with their claim.⁹³ When the claim was initially brought, the class

⁸⁴ Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL. REV. 93, 120-21 (2001).

⁸⁵ *Id.* at 94-95. However, recent Supreme Court decisions have nonetheless made federal courts very unattractive for settling tobacco-style massive class-action disputes. *See id.* at 95-98 (citing *Anchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999)).

⁸⁶ *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA-22, 2000 WL 33534572 at *13 (Fla. Cir. Ct. Nov. 6, 2000); Barr, *supra* note 20, at 788.

⁸⁷ Barr, *supra* note 20, at 788; *Engle*, 2000 WL 33534572 at *13.

⁸⁸ Barr, *supra* note 20 at 806; *Engle*, 2000 WL 33534572 at *13.

⁸⁹ Barr, *supra* note 20 at 806; *Engle*, 2000 WL 33534572 at *20.

⁹⁰ *Id.* The case was appealed by the tobacco companies and eventually District Court of Appeal of Florida, Third District decertified the class. *See Liggett Group Inc. v. Engle*, 853 So. 2d 434, 442 (Fla. Dist. Ct. App. 2003).

⁹¹ Barr, *supra* note 20 at 806.

⁹² *Id.*

⁹³ Eric Tischler, *Tobacco Class Action Goes Up in Smoke: Individual and Government Cases Proceed*, 39 TRIAL 12, 12 (Aug. 2003); *Engle v. Liggett Group, Inc.*, 853 So. 2d 434 (Fla. Dist. Ct. App. May 21, 2003).

was reduced from American smokers to Florida smokers.⁹⁴ Despite this reduction, the court the class was too big, and that the many diverse injuries and different situations made individual suits much more practical, especially in terms of applying proper state law.⁹⁵ Also, because punitive damages were assessed as a lump sum prior to the assessment of compensatory damages to each plaintiff within the class, the District Court struck down the punitive damage award as “premature.”⁹⁶ Thus, it remains to be seen what direction *Engle* will take; regardless, *Engle* is likely to become a landmark case. It shows that plaintiffs have come a long way in their war against tobacco, and that juries have become extremely sympathetic—a factor which did not exist twenty years ago.

III. THE HISTORY OF TOBACCO LITIGATION IN THE UNITED KINGDOM

The battle against big tobacco has experienced minor success, at best, outside of the United States. Following the American model, suits against cigarette companies have been filed in England, Scotland, Ireland, Finland, France, Japan, Guatemala, Sri Lanka, Thailand, and Norway.⁹⁷ This comment will focus on tobacco litigation in the United Kingdom, and contrast it to cases brought in the United States. The United Kingdom provides a good point of comparison because tobacco litigation is relatively young and the legal system is sufficiently different (e.g. class actions are seldom brought). Such a comparison allows for a thorough inquiry into why plaintiffs in nations other than the United States have not been successful in their cases against big tobacco.

European Community nations have generally followed a path similar to that of the United States in tobacco litigation.⁹⁸ The Council of the European Economic Community (EEC) adopted the Tobacco Labeling Directive on November 13, 1989.⁹⁹ The Tobacco Labeling Directive sets forward a list of warnings the individual governments may choose to implement into their national legislation.¹⁰⁰

⁹⁴ *Liggett*, 853 So. 2d. 434; Tischler, *supra* note 93.

⁹⁵ *Liggett*, 853 So. 2d. at 443-43; Tischler, *supra* note 93, at 12-13.

⁹⁶ *Liggett* 853 So. 2d 434; Tischler, *supra* note 93, at 13-14.

⁹⁷ RICHARD A. DAYNARD, CLIVE BATES & NEIL FRANCEY, *Tobacco Litigation Worldwide*, 320 BMJ 111, 112-13 (Jan. 8, 2000), available at <http://bmj.bmjournals.com/cgi/reprint/320/7227/111.pdf>.

⁹⁸ Cooper, *supra* note 8, at 300.

⁹⁹ *Id.* at 275-76; Council Directive of 13 November 1989 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Labeling of Tobacco Products (Tobacco Labeling Directive), 1989 O.J. (L 359) 1 [hereinafter Tobacco Labeling Directive].

¹⁰⁰ Cooper, *supra* note 8, at 276; Tobacco Labeling Directive, *supra* note 99.

Just recently, the European Union was fairly close to implementing an outright ban on tobacco advertising.¹⁰¹ The “Television without Frontiers” Directive would have prohibited tobacco companies from sponsoring television programs.¹⁰² This Directive, which intended to ban all direct and indirect advertising was enacted by the European Community in July of 1998 and should have been implemented by member states by July 20, 2001.¹⁰³ It looked like Europe was to take a giant step in the fight against tobacco. In December of 2002, the European Union voted to outlaw tobacco advertising in newspapers, magazines, on the Internet and at sporting events.¹⁰⁴ The restrictions were approved by thirteen out of fifteen E.U. health ministers. Germany was the main opponent, arguing that the restrictions go too far when applied to print media sold outside of the country.¹⁰⁵ In 2000, the European Court of Justice ruled that earlier attempts to restrict tobacco gave the European Union too much control over tobacco advertising, an area that should be reserved for control by E.U. member states.¹⁰⁶

A. “So Close Yet So Far”—The Leigh Day Case

Until October 2003, no tobacco case had made it past the discovery stage in the United Kingdom. In fact, a few cases that experienced success have died after years of tiresome discovery. Such an example is the Leigh Day case, named for the law firm representing the plaintiffs, and the first class action lawsuit against a tobacco company. After six years of pretrial preparation, the case never reached trial because forty-six of the fifty-two class-action plaintiffs simply gave up on the extended litigation.¹⁰⁷ Litigants were discouraged into abandoning their claims against the tobacco company when the High Court found major faults regarding statute of limitation issues and problems relating to what he believed were “speculative” negligence claims.¹⁰⁸

¹⁰¹ Melissa Alegre, *We’ve Come a Long Way Baby (or Have We?): Banning Tobacco Advertising and Sponsorship in the European Union*, 26 B.C. INT’L & COMP. L. REV. 157, 159 (2003).

¹⁰² *Id.*; “Television without Frontiers” directive 89/552/EEC, 1989 O.J. (L298); Council Directive 98/43/EC, 1998 O.J. (L 213) 9, 10-11.

¹⁰³ *Id.*

¹⁰⁴ BBC News, *EU Adopts Tobacco Ad Ban* (Dec. 2, 2002), available at <http://news.bbc.co.uk/2/hi/europe/2535071.stm>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; Case C-376/98, F.R.G. v. Eur. Parliament & Council of the E.U., [2000] E.C.R. I-8419 (2000).

¹⁰⁷ Ernest Beck, *UK Tobacco Lawsuit’s Collapse May Send Litigation up in Smoke*, THE WALL ST. J. Interactive Edition, Mar. 1, 1999, available at <http://lists.essential.org/intl-tobacco/msg00060.html>.

¹⁰⁸ *Id.*

The case officially ended on February 26, 1999, after a ruling that thirty-six of the plaintiffs suffering from lung cancer could not continue their case against U.K. tobacco giants Gallaher and Imperial Tobacco (Gallaher, Imperial) because they had been diagnosed with the disease more than three years prior to suing.¹⁰⁹

The statute of limitations proved key to the case and eventually led to its collapse. The actions began in 1992, and a series of hearings followed on the eligibility of members of the class who had sued more than three years after they were diagnosed with cancer.¹¹⁰

The Limitations Act (1980) states that plaintiffs must bring actions within three years of being diagnosed with cancer.¹¹¹ Thirty-six of the fifty-two plaintiffs had started their actions more than three years after they had been diagnosed with cancer; this weakened the plaintiffs' case from the outset.¹¹² Nevertheless, § 33 of the Act does permit the judge hearing the case to exercise discretion in allowing cases to proceed where the statute of limitations has tolled if it would be in the "interest of justice."¹¹³

Though trial was set for January 2000, the case was dropped when High Court Judge Michael Wright ruled that the court could not allow plaintiffs' claim to proceed under § 33.¹¹⁴ Nevertheless, some commentators have suggested that the judge refused to exercise his discretion because the plaintiffs' case was weak from the beginning.¹¹⁵ The judge thought that the plaintiffs' claim that Gallaher was negligent in reducing levels of tar in its cigarettes was too "speculative" to bypass the statute of limitations problems.¹¹⁶ Although not an ultimate victory for tobacco litigants, the Leigh Day case paved the way and provided momentum for plaintiffs in the United Kingdom.

B. The First U.K. Case to Reach Trial – *McTear v. Imperial Tobacco*

The first tobacco case ever to reach trial in the United Kingdom started trial in early October of 2003.¹¹⁷ Scotland's Court of Session held a bench

¹⁰⁹ Action on Smoking and Health, *The Law Courts: UK Tobacco Litigation at* <http://www.ash.org.uk/html/litigation/uktobal.html> (last visited on Dec. 5, 2004); Hodgson v. Imperial Tobacco Ltd., [1999] C.L.Y. 459 (Q.B.D.).

¹¹⁰ Action on Smoking & Health, *supra* note 109.

¹¹¹ Limitation Act, 1980, c. 58, pt. I, § 11 (Eng.).

¹¹² Action on Smoking & Health, *supra* note 109.

¹¹³ *Id.*; Limitation Act, *supra* note 111.

¹¹⁴ Beck, *supra* note 107.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Cigarette Giant Denies Smoking Leads to Cancer*, THE LONDON OBSERVER, Oct. 6, 2003, at 7, available at <http://www.taipetimes.com/News/world/archives/2003/10/06/2003070628>.

trial, which lasted much longer than the expected twenty weeks.¹¹⁸ Some say the trial lasted so long because of “bully tactics” used by Imperial, who refused to accept the link between smoking and lung cancer, forcing Mrs. McTear’s lawyers to prove what has been accepted by doctors for over fifty years.¹¹⁹

Margaret McTear sued on behalf of her husband, Alf, who smoked two packs of cigarettes a day since 1964, when he was twenty years old.¹²⁰ Alf McTear was diagnosed with lung cancer in 1992, just three months before his death.¹²¹ He filed the case against Imperial shortly before his death.¹²² Mrs. McTear faced a difficult battle to continue the case. Among other scare tactics, Imperial requested up to £2 million to cover the costs of litigation—a move rejected by the judge.¹²³ McTear would have had no choice but to drop the case if Imperial had forced her to cover the costs of the trial.¹²⁴

There is much hesitation from the tobacco industry because it fears that a win for McTear would lead to a chain of litigation by smokers and their families similar to that occurring in the United States.¹²⁵ Imperial refused to accept that cigarettes can cause cancer and it used all its strength to fight Mrs. McTear; there are more than twenty cases pending in Scotland, which will be allowed to proceed if Mrs. McTear’s case is successful.¹²⁶

Nevertheless, McTear faces a challenge similar to the plaintiffs in the Leigh Day case, as McTear’s pleas for Legal Aid have twice failed due to the case’s poor chances for success.¹²⁷ McTear is determined and has asked for £500,000 in damages. She hopes that the case will serve as an example and pave the path for future plaintiffs.¹²⁸ Mrs. McTear has always said that the money is not as important to her as having Imperial accept the fact that

¹¹⁸ *Id.*

¹¹⁹ Press Release, Action on Smoking and Health (Scotland), Imperial Tobacco’s Behaviour Despicable Says ASH, (Nov. 11, 2003), at <http://www.ash.org.uk/html/press/031111.html>.

¹²⁰ See *Cigarette Giant Denies Smoking Leads to Cancer*, *supra* note 117.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ David Jones, *Smokers Case Against UK Tobacco Firm Goes to Trial*, FORBES, Oct. 3, 2003, available at <http://www.forbes.com/business/energy/newswire/2003/10/03/rtr1099170.html>.

¹²⁶ Action on Smoking and Health (Scotland), *Products Liability – Scottish Legal Case*, at http://www.ashscotland.org.uk/issues/tob_intro.html (last visited Dec. 5, 2004).

¹²⁷ *Id.* For a discussion on Legal Aid, see *infra* Part IV.A.

¹²⁸ *Id.*

cigarettes cause cancer and that it should protect future generations.¹²⁹

A decision was expected in April of 2004, but as of January 2005, it had not been released by the High Court. Regardless of the outcome, the McTear case will be crucial for the future of tobacco litigation in the United Kingdom—either by chilling future cases, or opening the floodgates for litigants.

IV. WHY THE AMERICAN MODEL OF FIGHTING THE TOBACCO INDUSTRY IS NOT ADAPTABLE TO THE UNITED KINGDOM

The simple truth is that the U.S. and U.K. legal systems are inherently different. Below I point out several reasons why the two systems are different, and argue that the inherent difference between the legal systems of the United States and the United Kingdom has caused different results in tobacco litigation.

A. Class Action Lawsuits in the United Kingdom

Unlike the United States where there is a tradition supporting class actions as a way of impacting social policy, in other countries, including the United Kingdom, the tradition does not exist.¹³⁰ Most nations outside of the United States have determined that “tort litigation is not an effective or efficient method to achieve social or personal justice,”¹³¹ and therefore, rely on government regulation to dictate public policy.¹³² The idea of an attorney general who “represents” the public interest is a good example of the fundamental difference between the role of private parties and the judicial system, and helps to explain why there are great obstacles to bringing class actions in Europe, including the United Kingdom.¹³³ Because of the strong reliance on government intervention in the private marketplace, there is very little “incentive” to use class actions to shape public policy.¹³⁴ There is no evidence that in nations with strong governmental regulation schemes in place, regulation through compensation would serve as an effective tool in shaping policy.¹³⁵

Whereas class actions in the United States are governed by Rule 23 of the Federal Rules of Civil Procedure, the United Kingdom does not have a

¹²⁹ Jones, *supra* note 125.

¹³⁰ Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute*, 10 MICH. ST. J. INT’L L. 205, 207 (2001).

¹³¹ *Id.* at 208-09.

¹³² *Id.* at 207.

¹³³ *Id.* at 208.

¹³⁴ *Id.*

¹³⁵ Faulk, *supra* note 130, at 208.

similar structure governing multi-party litigation.¹³⁶ The United Kingdom does, however, have a means of organizing a class, referred to as the “lead case” method.¹³⁷ Here, a lead plaintiff is chosen from a group of prospective plaintiffs, and usually is the individual with the strongest case.¹³⁸ Sometimes a plaintiff who has been given legal aid is chosen so that the government will end up financing the claim through Legal Aid.¹³⁹ This approach has been criticized because it is impossible for the lead claimant’s case to solve all the issues of the entire class.¹⁴⁰ Further, the rest of the class is required to wait pending the results of the lead case, a process which is considered unnecessarily time consuming.¹⁴¹

As a side note, the Legal Aid Scheme was established in 1949 in order to advance the British government’s aim of “assist[ing] people who cannot afford to pay the cost of resolving disputes about their rights in practical ways.”¹⁴² To obtain legal aid, applicants must prove that they are eligible for legal aid by showing “reasonable grounds for bringing, defending, or participating in the suit.”¹⁴³ The McTear case demonstrates the difficulties in funding a tobacco suit with legal aid.¹⁴⁴ Mrs. McTear’s request for legal aid was rejected by the Legal Aid Board because of concerns regarding spending public money in a long, drawn-out case which had “limited prospects of a worthwhile return” due to issues relating to Mr. McTear’s contributory negligence.¹⁴⁵ The law firm of Ross Harper & Murphy subsequently took the McTear case on a ‘no-win, no-fee’ basis.¹⁴⁶ Legal Aid’s reluctance to gamble on plaintiffs who have small chances of winning their claims because of contributory negligence issues exacerbates the problem and makes class actions even more difficult to bring when plaintiffs lack funds.¹⁴⁷

B. Loser Pays Attorneys’ Fees

In addition to the idea that litigation is not accepted as a suitable means

¹³⁶ Kristen Garman Rogers, *Mad Plaintiff Disease?: Tobacco Litigation and the British Debate over Adoption of U.S.-Style Tort Litigation Methods*, 27 GA. J. INT’L & COMP. L. 199, 221 (1998).

¹³⁷ *Id.* at 222-23.

¹³⁸ *Id.* at 223.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Rogers, *supra* note 136, at 223.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 225.

¹⁴⁵ *Id.*

¹⁴⁶ Action on Smoking and Health (Scotland), *supra* note 126.

¹⁴⁷ Rogers, *supra* note 136, at 226.

of shaping public policy, the majority of the international community forces litigants to take a greater level of responsibility—and risk—in having the court system resolve personal disputes.¹⁴⁸ Thus, the loser often pays a substantial, if not the entire, amount of their opponent's legal expenses, which discourages frivolous suits that have no merit.¹⁴⁹ This rule, applied to tobacco litigation in the United Kingdom, ensures that injured parties are compensated more often by non-judicial means than by law suits.¹⁵⁰ In other words, it makes it less attractive for individuals to resort to the courts to adjudicate their claims. Thus, greater responsibility is given to the legislature to look out for its citizens, as the legislature is more accountable to the public than are the courts.¹⁵¹

Having to pay for one's opponent's legal costs removes much incentive to litigate if not almost certain of victory; this disincentive is even greater in the extremely expensive class-action context.¹⁵² This point is of crucial importance in tobacco cases where the discrepancy in resources between the defendant tobacco companies and the litigants is so great.¹⁵³

C. Punitive Damages Are Not Popular in the United Kingdom

In the United Kingdom, punitive damages are awarded only (1) "where there has been oppressive, arbitrary or unconstitutional conduct by servants of the government," and (2) "where the defendant's conduct was calculated to make a profit for them which might well exceed the compensation payable to the plaintiff as damages."¹⁵⁴ This definition arose in the 1964 case of *Rookes v. Barnard* which dealt with defamation.¹⁵⁵ Prior to 1964, there was also a third category similar to justifications of punitive damages in the United States, which was rejected in *Rookes v. Barnard*: "where defendant acted willfully, wantonly, oppressively and in conscious disregard for the plaintiff's rights, the plaintiff could recover" aggravated damages.¹⁵⁶ English courts have specifically rejected extending punitive (aggravated) damages to situations beyond the two expressed in *Rookes*.¹⁵⁷ The court refused to award punitive damages in *AB v. South West Water Services Ltd.*, where plaintiffs who suffered sickness from drinking

¹⁴⁸ Faulk, *supra* note 130, at 207.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Rogers, *supra* note 136, at 228.

¹⁵³ *Id.* at 203.

¹⁵⁴ *Rookes v. Barnard*, 1 All E.R. 367 (1964); *see also* Rogers, *supra* note 136, at 218.

¹⁵⁵ *Rookes*, 1 All. E.R. 367.

¹⁵⁶ *Cassell & Co. v. Broome*, 1 All E.R. 801 (1972); *see also* Rogers, *supra* note 136, at 218.

¹⁵⁷ Rogers, *supra* note 136, at 218-19.

contaminated water provided by defendant water service company, charged that defendants withheld information from health authorities and customers to minimize the consumption of the infected water and did not provide an alternative water source.¹⁵⁸ This situation, which is extremely similar to what tobacco plaintiffs often claim, fell on deaf ears with the *AB* judge who referred to *Casell* and read *Rookes* extremely narrowly to hold that negligence, even when “coupled with deceit,” is not the type of action for which exemplary (punitive) damages are to be awarded.¹⁵⁹ Thus, the British courts have eliminated a crucial element that has worked to “bring tobacco companies to the bargaining table”¹⁶⁰ in the United States. If the United Kingdom really is serious about following the United States’ lead in holding tobacco companies responsible for the ill effects of smoking, limiting the situations in which punitive damages are awarded so narrowly takes it a huge leap backwards in its fight against big tobacco.

D. Conditional Attorney’s Fees

Conditional attorney’s fees were introduced in the United Kingdom in 1995.¹⁶¹ The system was in place in Scotland prior to 1995 and applies to England and Wales except in family law and criminal law.¹⁶² Conditional fees allow British attorneys to enter “no fee, no win” agreements—if the client loses, no fee is awarded, and if the client is successful, the fee is charged.¹⁶³ However, U.K. attorneys “may not contract for a percentage of damage awards as compensation for their work.”¹⁶⁴ Nevertheless, very few tobacco litigants opt for contingency fee agreements (the *McTear* case is a rare exception) because most tobacco litigants are dissuaded by the “loser pays” rule.¹⁶⁵ Contingency fees are working out much better than skeptics assumed when they were first introduced, as law firms are accurate in assessing risks, and lawyers usually do not simply take on projects to make money but rather to affect social change.¹⁶⁶ Taking cases on contingency in an effort to effect change through litigation rather than legislation is considered an “Americanization” of the U.K. legal system.¹⁶⁷ Thus, because of changes in the way the United Kingdom views the courts and

¹⁵⁸ *AB v. S.W. Water Servs. Ltd.*, 1 All E.R. 609 (1993).

¹⁵⁹ *Rogers*, *supra* note 136, at 219.

¹⁶⁰ *Id.* at 218.

¹⁶¹ Geraint Howells, *Tobacco Litigation in the U.S. – Its Impact on the United Kingdom*, 22 S. ILL. U. L.J. 693, 696 (1998).

¹⁶² *Faulk*, *supra* note 130, at 227.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Rogers*, *supra* note 136, at 229. *See supra* Part IV.B.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

litigation against tobacco companies (e.g. the introduction of contingency fees), it is likely only a matter of time before verdicts similar to those handed down in U.S. courts are handed down in the United Kingdom.

E. The Issue of Personal Responsibility

Some commentators have argued that the reason why the cases against the tobacco industry do not even get to court is because European society places more importance on the idea of "personal responsibility" for one's actions than in the United States.¹⁶⁸ Smoking is viewed in Europe and the United Kingdom as a matter of personal choice.¹⁶⁹ European society believes that individuals should take responsibility for their actions. This might be yet another reason why tobacco claims against cigarette companies have not been very successful in the United Kingdom.¹⁷⁰

In Europe, a third of the adult population smokes cigarettes despite the fact that close to 500,000 people die from smoking related diseases per year in the European Union.¹⁷¹ The bottom line is that people are still dying regardless of whose responsibility it is, be it in Europe or the United States. In order to counter the belief that individuals who smoke should not have the right to sue cigarette companies for their personal choices, British tobacco plaintiffs can argue "addiction as injury."¹⁷² This theory argues that it is not really an issue of personal responsibility because the tobacco companies caused the plaintiff's addiction by increasing nicotine levels and thus, they no longer had control over their smoking habits.¹⁷³ Although it is true that cigarette companies did not force anybody to *begin* smoking, "addiction as injury" still remains the best weapon against the defense that smoking and its subsequent health problems is an issue of personal responsibility, and not an issue in which the courts should get involved.

V. CONCLUSION

Tobacco litigation plaintiffs have been much more successful in the United States than in the United Kingdom. First, plain and simple, the United States has gotten a head start. Whereas warnings on cigarette packs became mandatory in the United States in 1964, they were not required in the United Kingdom until 1971.¹⁷⁴ Additionally, the U.K. courts have refused to hear *any* case against the tobacco industry until October of

¹⁶⁸ Beck, *supra* note 107.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Alegre, *supra* note 101, at 158.

¹⁷² Kearns, *supra* note 52, at 1342.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

2003.¹⁷⁵ Some commentators have argued that cases against the tobacco industry do not even get to court is because European society places more importance on the idea of “personal responsibility” for one’s actions.¹⁷⁶

Next, tobacco litigation has not been successful for U.K. plaintiffs because the system in the United Kingdom is fundamentally different than in the United States. First, most cases are heard before a judge, as opposed to a jury, who is often much less sympathetic to the plaintiff.¹⁷⁷ Further, the United Kingdom does not use the courts as a method of shaping public policy the way the United States does.¹⁷⁸ The United Kingdom uses legislative means to dictate its public policy and thus is hesitant to punish private parties in order to send a message out to the public.¹⁷⁹ Of course, this policy explains the United Kingdom’s hesitancy in awarding punitive damages. In the United Kingdom, punitive damages are awarded in the narrowest of circumstances and it does not look like tobacco plaintiffs would qualify for an award for punitive damages under recent U.K. common law.¹⁸⁰ In addition, although having a conditional fee system set up where the plaintiff does not have to pay his attorney’s fees unless he wins might seem to encourage plaintiffs to bring tobacco suits in court, the fact that U.K. law requires the loser in a litigation to pay for the attorneys’ fees of the victor works to intimidate many small plaintiffs into not taking their claims to court.¹⁸¹ Although the theory behind having the loser pay attorneys’ fees works to discourage frivolous lawsuits that unnecessarily tie up the courts, plaintiffs like Mrs. McTear are at risk of losing their homes¹⁸² in their quest to seek justice from big tobacco.

Finally, relying on class actions is problematic, even in the United States, which has a longer history of tobacco litigation than the United Kingdom. Often, the problem of application of state law or the law of similar claims by members of the extremely large classes leads courts to disallow the certification of the class because they believe that suits are better handled individually.¹⁸³ In the United Kingdom, where group actions are not all that popular in the first place, certification of classes and judicial and public acceptance of class actions as a method of bringing justice often does not bring any result. As can be seen in the Leigh Day case, after years of discovery the judge hearing the case decided that the class of fifty-two

¹⁷⁵ See Jones, *supra* note 125.

¹⁷⁶ Beck, *supra* note 107.

¹⁷⁷ *Id.*

¹⁷⁸ Faulk, *supra* note 130, at 209.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Rogers, *supra* note 136, at 229.

¹⁸² Jones, *supra* note 125.

¹⁸³ See generally Tischler, *supra* note 93.

plaintiffs did not have much of a case because their claims were too attenuated.¹⁸⁴

Despite all of the problems facing tobacco litigation in the United Kingdom, the fact that the McTear case finally got past discovery and reached the courtroom shows that there is hope for such litigation in the future. Although the McTear case has been criticized by commentators as being weak for the plaintiffs, it is definitely a step in the right direction and, if successful, might open the door for similar claims against the tobacco industry in the United Kingdom. The court's decision in McTear will be crucial to the future of tobacco litigation in the United Kingdom.

¹⁸⁴ Beck, *supra* note 107.

