

"MAD PLAINTIFF DISEASE?"¹ TOBACCO LITIGATION AND THE BRITISH DEBATE OVER ADOPTION OF U.S.-STYLE TORT LITIGATION METHODS

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I. INTRODUCTION

In 1604, England's King James I denounced smoking as "[a] custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs, and in the black stinking fume thereof, nearest resembling the horrible Stygian smoke of the pit that is bottomless."² Despite the monarch's denunciation of smoking, tobacco is the very weed on which the British Empire was built. James I may have been initially dismayed by the dependence of the fledgling Jamestown colony on the growth of tobacco, but he soon discovered that England could make a fortune taxing "the vile crop."³ And it did. As for his personal opinion of tobacco, James I was ahead of his times: his statement accurately reflects many modern Britons' attitudes toward tobacco.

Britain's contemporary anti-tobacco crusader is a lawyer rather than a king. London-based solicitor Martyn Day is heading a lawsuit filed by forty-three lung cancer sufferers against Imperial and Gallaher tobacco companies, Britain's two largest tobacco manufacturers.⁴ The suit has been described in the British Press as "a model compensation case for all sufferers of smoking-related diseases in Britain."⁵ Although not scheduled for trial until

¹ Heidi Dawley, *And Now, Mad Plaintiff Disease*, BUSINESS WEEK, Nov. 10, 1997, available in 1997 WL 14814224.

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² Susan DeFord, *Tobacco: The Noxious Weed that Built a Nation*, WASH. POST, May 14, 1997, at H01.

³ *Id.*

⁴ James Doran, *UK Cigarette Giants Meet Their Match: High Noon Edges Nearer in Lawman Martyn Day's Crusade to Make the Tobacco Industry Pay*, SCOTSMAN, Jan. 18, 1998, at 4, available in LEXIS, UK Library, UKPAPR File. The case name is *Hodgson & Ors v. Imperial Tobacco Ltd. & Gallaher Group Plc.* [hereinafter *Hodgson*]. See *English Lawyers Successful in Keeping Client Contracts from Tobacco Companies*, MEALEY'S LITIG. REP., Feb. 19, 1998, available in LEXIS, LEGNEW Library, LITIG File.

⁵ Doran, *supra* note 4, at 4.

April 1999, the case has already been the subject of landmark rulings and may forever alter the face of class action litigation in Great Britain.⁶ However, it is hard to tell if Martyn Day's most formidable opponent is the tobacco industry or the conservative British legal establishment.

For years, legal experts in Britain have considered implementing reforms to modernize the British legal system. Many of the proposed reforms would result in adoption of American-style legal practices and devices, such as mechanisms for facilitating multi-plaintiff litigation and funding arrangements resembling contingency fees. The proposals have been sharply criticized by many members of the British legal community. Transplanting the American legal system has been labelled another example of "Americanization" frequently criticized in Britain and throughout the world. One British commentator has opined that British children are so exposed to American films and television that they are more familiar with the topography of the United States than that of Britain.⁷ The same is true of their knowledge of the American justice system.⁸ That commentator poses the question:

Why do we have to have [Americanisation] thrust down our throats? Especially Americanisation of the law . . . Why are we bringing their system here? We do not get the other parts of the American justice system, though. No written Constitution. No protection against entrapment. No more right to silence. No Freedom of Information Act . . . The British system has deep flaws. But destroying the best bits of it and substituting the worst of an alien and failed system mocked and scorned by the very films which proselytise it across the globe is madness.⁹

⁶ See discussion in text, *infra* at 50.

⁷ John Hendy, QC, *The American Way Is Not For the UK*, LAWYER, Jan. 21, 1997, at 14, available in LEXIS, UKJNL Library, LAWYER File.

⁸ *Id.*

⁹ *Id.* See also, *Yes, Smoking Kills, But Litigation Is Ruinous*, INDEPENDENT, June 23, 1997, at 14, available in LEXIS, UK Library, UKPAPR File. The *Independent* quotes a commentator who states: "We are not prejudiced against the United States in proclaiming the superiority of the British way. We are only prejudiced against lawyers. It is a paradox that the Land of the Free is actually a land chained by excessive legislation, litigation, and pettyfogging nannydom." *Id.*

Despite the hesitance of such critics within the British legal establishment, tobacco litigation could be the catalyst that hastens reform. Martyn Day is determined to go forward.¹⁰

Day's crusade against the tobacco industry has public support. Public outrage over allegations that tobacco companies conspired to keep secret the harmful effects of smoking and manipulated the amount of nicotine in cigarettes to promote addiction may be great enough to shake even the British legal establishment to its core. By all recent accounts, the Labour government led by Prime Minister Tony Blair is sympathetic to the public outcry.

In addition to benefitting from government support, tobacco plaintiffs may use incriminating tobacco company documents discovered in American suits against multi-national tobacco companies. At the very least, American lawsuits and the historic settlement between 46 States and American tobacco giants are providing a psychological boost to potential litigants in Britain.

However, the British tobacco industry is confident that the obstacles to successful suits against it in Great Britain are insurmountable. The Director of Britain's Tobacco Manufacturers Association has said that the legal and tax environments in the two countries are incomparable.¹¹ A leading London newspaper makes a similar forecast with respect to any suits against tobacco companies contemplated by British health care providers.¹² In other words, success in the U.S. does not ensure comparable results in Britain.

This Note tests the validity of the statement made by the Director of Britain's Tobacco Manufacturers Association. Are the two systems incomparable? Or is the British legal system becoming Coca-Colonized?¹³

¹⁰ Day has said, "In the law new ground has to be broken. I have no desire to deal with the stuffy everyday business of the courts. If the law does not provide for people who deserve to be heard then the law has to change. It is a progressive thing." Doran, *supra* note 4.

¹¹ *UK Tobacco Industry Confident of Avoiding U.S. Style Litigation*, AFX NEWS, June 23, 1997, available in LEXIS, NEWS Library, EXTAFX File.

¹² *Yes, Smoking Kills, But Litigation Is Ruinous*, *supra* note 9.

¹³ Although the author does not know the origin of the term "Coca-Colonization," the term is used by scholars in various fields to describe American cultural imperialism and cultural hegemony in the latter half of the 20th century. Reinhold Wagnleitner, associate professor of history at the University of Salzburg, Austria, uses the term "Coca-Colonization" in his book about the cultural influence of the United States in Austria since World War II. REINHOLD WAGNLEITNER, COCA-COLONIZATION AND THE COLD WAR: THE CULTURAL

Although not an attempt at providing a comprehensive study of tobacco litigation in the United States (which spans four decades), Section II provides an overview of the waves of U.S. tobacco litigation leading up to the recent settlement between the tobacco industry and 46 States. The terms of the settlement are not as significant to the British suits as are the aspects of law and culture in the United States that drove the tobacco companies into settlement negotiations. Section II also provides a brief history of British tobacco litigation and settlements to date along with a brief look at the legal theories that may be employed against the British tobacco industry. As will be seen, British products liability law is comparable to its American counterpart; thus the substantive law is not the greatest obstacle British plaintiffs face. Section III analyzes the procedural deficiencies and somewhat archaic features of the British legal system that reveal themselves in the tobacco litigation context, along with proposed reforms. Recent developments suggest that the British could be "reluctantly coming to the conclusion that facilitation of claimant litigation has a place in making and enforcing public policy in their country, as it has come to have a place in ours."¹⁴

II. BACKGROUND: A BRIEF HISTORY OF TOBACCO LITIGATION IN THE UNITED STATES AND GREAT BRITAIN

Prior to the \$206 billion settlement between 46 United States Attorneys General and the tobacco industry, several waves of tobacco litigation occurred in the United States. The first wave began in the 1950s and ended

MISSION OF THE UNITED STATES IN AUSTRIA AFTER THE SECOND WORLD WAR (1994). Professor Wagnleitner is careful to note that "Americanization," i.e. the cultural Cold War that followed World War II, is more specifically "Euro-Americanization." He states: "[T]he development of the modern consumption-oriented society is inconceivable without the consumption of America by the Europeans; before Europe could become Americanized, America had to be Americanized first. In this sense, we are surely all Americans—in other words, strangers in a strange land." *Id.* at 7.

¹⁴ Geoffrey C. Hazard, Jr., *Brits Adopt U.S.-Style Tort Litigation Methods*, NAT'L LAW J., Jan. 13, 1997, at A15. Professor Hazard also suggests that the British have realized that the legislative process is ill-equipped to take on established interests such as the tobacco industry. He states: "Claimant litigation fills a gap between individual decision-making—for example, a decision not to smoke cigarettes—and mobilization of legislative authority to change the legal ground rules. It is now familiar that in the complexities of bureaucratic and parliamentary maneuver, established interests can long postpone legislative efforts to change the rules. This phenomenon is not peculiar to use of tobacco or to the United States." *Id.*

in the mid-1960s.¹⁵ The immense financial resources of the tobacco companies relative to the resources of individual plaintiffs barred success in this first period.¹⁶ Most of the litigants were individuals and their families who had been affected by tobacco-related diseases.¹⁷ The defendants were rich, powerful, and capable of manipulating the system to create high front-end costs for plaintiffs.¹⁸ For example, law firms for the tobacco companies coordinated their efforts in cases in which the companies were named as multiple defendants to cut down their costs. The discovery process was used to increase pre-trial expenses. Depositions, interrogatories, motions, and challenges could be endless. Expensive expert witnesses were crucial to establish the unproven causal link between smoking and lung cancer and to explain the effects of tobacco advertisements. The personal injury lawyers who represented tobacco plaintiffs generally operated without the financial backing of a firm, and the cost of financing tobacco lawsuits proved too much for them. The cases were ill-suited for contingency fee representation because the cases were high risk with little hope of pre-trial settlement.¹⁹ However, a couple of encouraging judicial decisions left open the possibility that the tobacco industry was not impenetrable.²⁰

¹⁵ Robert L. Rabin, *A Sociological History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992) (providing a detailed account of the cases in both the first and second waves of tobacco litigation and the characteristics of each period that inspired litigants to sue).

¹⁶ Richard A. Daynard, LITIGATION BY STATES AGAINST THE TOBACCO INDUSTRY, Address at the 10th World Conference on Tobacco or Health in Beijing, China (Aug. 26, 1997) (quoting an unnamed R.J. Reynolds' lawyer who said, "The way we won the cases, to paraphrase General Patton, is not by spending all of Reynolds' money, but by making the other son-of-a-bitch spend all of his."). Professor Daynard's presentation can be found in full at Northeastern University's tobacco website (visited Sept. 12, 1997) <<http://www.tobacco.neu.edu/tot/97-3/special.htm>>.

¹⁷ *Id.*

¹⁸ Rabin, *supra* note 15, at 858, 860 (noting that plaintiffs' attorneys were also guilty of "dubious lawyering" leaving plaintiffs both "outmanned and outgunned" in some instances).

¹⁹ Rabin, *supra* note 15, at 858.

²⁰ See, *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956) (finding that a cause of action for deceit was stated where tobacco company advertisement stated that cigarettes were harmless and tobacco company knew the statement was false); *Pritchard v. Liggett & Meyers Tobacco Co.*, 350 F.2d 479, 486 (3d Cir. 1965), *cert. denied*, 382 U.S. 987 (1966) (finding that assumption of risk defense failed where evidence failed to support that smoker knew or had reason to know of cigarettes' harmful effect).

A. *The Impact of Cipollone*

The second wave of U.S. tobacco litigation began in the 1980s and continued through the early 1990s. Prior to 1992, the consensus among state and federal judges was that federal cigarette labeling acts preempted product liability litigation against cigarette manufacturers.²¹ Then, in *Cipollone v. Liggett Group*,²² the United States Supreme Court held that the 1965 Federal Cigarette Labeling and Advertising Act did not preempt state law actions against cigarette manufacturers and did not preempt claims based on theories of express warranty, intentional fraud and misrepresentation, or conspiracy.²³ However, the Court held that the Public Health Cigarette Smoking Act of 1969 does preempt claims "based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in [manufacturers'] advertising or promotions."²⁴ Thus plaintiffs who began smoking after 1969 cannot sue on a failure to warn theory because they were warned of the dangers inherent in smoking, but plaintiffs who began smoking before the 1969 amended warning requirements may do so.

In 1994 Dr. David Kessler, Director of the Food and Drug Administration, announced that the agency was contemplating regulating nicotine and cigarettes as drugs.²⁵ Dr. Kessler was reacting to internal industry documents uncovered during *Cipollone*. The documents hinted that tobacco companies may have manipulated the amount of nicotine in cigarettes to increase the likelihood of addiction.²⁶ In the United States, Dr. Kessler's announcement combined with *Cipollone* opened the floodgates to a torrent of tobacco litigation that has continued unabated since 1994.

During this wave, new plaintiffs emerged to test the strength of *Cipollone*. Among the new plaintiffs were state governments suing on behalf of

²¹ Rabin, *supra* note 15, at 869.

²² 505 U.S. 504, 112 S. Ct. 2608, 120 L.Ed. 2d 407 (1992).

²³ *Id.* at 530. The petitioner in *Cipollone* sued on behalf of his mother who died of lung cancer after smoking for 42 years. *Id.* at 508. The petitioner alleged that the defendants, three tobacco manufacturers, were culpable under four theories: (1) breach of express warranty contained in their advertising, (2) failure to warn consumers about the hazards of smoking, (3) fraudulent misrepresentation, and (4) conspiracy to deprive the public of medical and scientific information about smoking. *Id.*

²⁴ *Id.* at 530.

²⁵ Daynard, *supra* note 16.

²⁶ *Id.*

taxpayers whose taxes, through the Medicaid program, provided health care for injured smokers.²⁷ Most of these states, like most individual plaintiffs, pursued tobacco companies on traditional common law theories such as negligence; others relied on state statutory schemes such as anti-trust and consumer protection acts.²⁸ While state governments and insurance companies sued to recoup their costs, individuals used class actions to share costs. Incriminating internal tobacco company documents surfaced. Grassroots efforts promoting tobacco-targeted legislation and government regulation increased. Stories circulated that the tobacco industry manipulated cigarette nicotine content to promote addiction and targeted children with cartoon advertising campaigns. As a result, the public perception of tobacco companies shifted in the United States.

During this period, the strength of the *Cipollone* ruling was also tested in Britain as plaintiffs asserted that tobacco manufacturers intentionally misrepresented the harmful effects of smoking tobacco and conspired to keep this information hidden from the public. For example, one plaintiff alleged that two British tobacco manufacturers, Gallaher and Hergall, (1) manufactured and marketed cigarettes with the knowledge that the consumption of cigarettes was likely to cause ill health, (2) continued "to encourage consumption of cigarettes while becoming increasingly aware of the dangers to health," (3) failed to adequately react to the knowledge that consumption of cigarettes was dangerous to health, (4) supplied cigarettes to the public knowing that they were dangerous to health, (5) failed to notify the public of the health risks in a timely manner, (6) failed to conduct timely research into the health risks of cigarette smoking, and (7) failed to react sufficiently and in a timely manner to the risks of smoking identified by medical and scientific research.²⁹ This case remains unresolved.

²⁷ Michael K. Mahoney, Comment, *Coughing up the Cash: Should Medicaid Provide for Independent State Recovery Against Third-Party Tortfeasors Such as the Tobacco Industry*, 24 B.C. ENVTL. AFF. L. REV. 233, at 239 (1996).

²⁸ *Id.* at 239, 240. The states that relied on traditional common law theories include Mississippi, West Virginia, Louisiana, and Massachusetts. In a recently settled suit, Minnesota and its Blue Cross/Blue Shield of Minnesota co-plaintiff relied on anti-trust and consumer protection claims, among others. *Id.*

²⁹ *Dean v. Gallaher, Ltd.; Dean v. Hergall, Ltd.*, C.A. (Civil Division) (N.Ir.) (Transcript, Feb. 17, 1995), available in LEXIS, UK Library, ALLCAS File. The plaintiff, who began smoking 20 years earlier, suffered from Buerger's disease, a rare and incurable circulatory disease that results in constriction of the arteries in the upper and lower extremities sometimes leading to gangrene. *Id.* The plaintiff attributed his disease to smoking cigarettes

In 1992, another case began in Scotland.³⁰ The plaintiff began smoking cigarettes manufactured by Imperial Tobacco in 1962 and continued smoking until 1992 when he was diagnosed as having lung cancer. The plaintiff's claim was that the defendant knew or should have known that smoking was addictive and dangerous to health "a substantial time" before 1964 and should have warned smokers of potential health risks associated with smoking when they knew of the danger.³¹ Government health warnings were not required on cigarette packages in Great Britain until 1971,³² at which time plaintiff became aware that smoking cigarettes could cause fatal diseases. Plaintiff alleged that he attempted to stop smoking after 1971 but could not stop because he was addicted; in 1993, he died of lung cancer.³³ The lawsuit against the tobacco companies is ongoing with his wife suing as executrix.

B. Passive Smoking Claims

As the anti-tobacco forces began gearing up for battle in Britain, in the United States a class-action suit filed by flight attendants settled with the major tobacco companies in October 1997 for \$300 million.³⁴ The flight attendants had developed smoking-related illnesses after years of inhaling second-hand smoke, so-called "environmental tobacco smoke," while working. The tobacco companies were not forced, as a term of the settlement, to admit that second-hand smoke was harmful; however, the settlement proceeds will be spent on the study of smoking-related diseases.³⁵ The 60,000 flight attendants involved in the class-action suit made allegations of "fraud, lies, and misrepresentation."³⁶ They received no money from the settlement, but they retained the right to pursue individual claims against the companies.³⁷ Most importantly, the companies agreed

manufactured by the defendants. *Id.*

³⁰ *McTear's Executrix v. Imperial Tobacco, Ltd.*, 1997 SLT 530 (Extra Div. 1996), available in LEXIS, UK Library, ALLCAS File.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Mireya Navarro, *Cigarette Makers Reach Settlement in Nonsmoker Suit*, N.Y. TIMES, Oct. 10, 1997, at A1.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

to bear the burden of proof on the causal link between second-hand smoke and smoking-related illnesses in any ensuing individual suits.³⁸ Although a victory for the individual flight attendants involved in the suit, the settlement was not a broad victory for other Americans suffering from prolonged exposure to second-hand smoke. Because of environmental and genetic factors which contribute to the occurrence of illnesses commonly associated with smoking, proving causation is extremely difficult for smokers and virtually impossible for non-smokers.³⁹

Passive smoking claims have not been pursued against tobacco companies in Britain. However, several cases involving passive smoking in the workplace have been pursued against employers. In January 1993, Britain's first settlement in a passive smoking case was made by a council worker against her employer.⁴⁰ The plaintiff argued that her colleagues' smoking at work had caused her to develop bronchitis. According to plaintiff, her employer knew that smoking in the office was a nuisance in 1986, but failed to take precautionary measures until 1990. In 1990, plaintiff's employer designated a special room for smokers and forbade smoking outside the room. Despite such efforts, smoke "continued to escape from the smoking-room . . . and staff were also continuing to smoke in the toilets and passages."⁴¹ Plaintiff sued on a negligence theory and settled out-of-court for £15,000. Her employer insisted "the settlement was made without any admission of liability."⁴² As a result of this settlement, the issue in future British passive smoking cases is likely to be the point in time when employers should have taken action to remove the risks of tobacco smoke.⁴³

Although this settlement was not judicially binding, plaintiff's attorneys in *Bland* were optimistic following the settlement that its precedential value was strong.⁴⁴ The British arm of the international anti-smoking lobby Action on Smoking and Health [hereinafter ASH] heralded the *Bland* settlement as the case that opened the floodgates to passive smoking claims

³⁸ *Id.*

³⁹ The flight attendants' situation was ideal for successful environmental tobacco smoke claims—prolonged exposure in small aircraft cabins.

⁴⁰ Jonathan McLeod, *Smoke Signals*, LAW SOC'Y'S GAZETTE, Feb. 3, 1993, at 5, available in LEXIS, UKJNL Library, LSG File.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

in Britain.⁴⁵ Others are not so optimistic. A solicitor advising the plaintiff's legal team in *Bland* stated that the situation involved in the settlement was unusual because plaintiff worked for a local government authority.⁴⁶ The solicitor believes that local and health authorities will be held to a higher standard of care than other employers because they are looked on to set an example.⁴⁷

Similarly, observers in the United States are split over whether the flight attendants' settlement and other settlements bode well for the tobacco industry or anti-smoking forces. The tobacco industry has heralded the flight attendants' settlement as a victory that aided their bargaining position as they negotiated for the then-proposed national settlement.⁴⁸ However, it could be that the industry settled the flight attendants' suit and other suits⁴⁹ to avoid the publicity associated with a trial as they negotiated for implementation of the proposed national settlement.

C. Legal Theories

The dearth of decided tobacco cases in Great Britain makes it difficult to predict which legal theories will succeed in defeating tobacco companies in court or driving them to the negotiation table. However, the cases discussed above reveal that the causes of action pursued by British plaintiffs are based on theories also pursued in the United States.

⁴⁵ McLeod, *supra* note 40.

⁴⁶ *Id.*

⁴⁷ *Id.* The detractors were mistaken, at least in the employment context. Following *Bland*, another case involving a nongovernmental employer arose. The Employment Appeals Tribunal refused to hear an employer's appeal of a decision by the industrial tribunal. The employee had left her employment because her employer failed to accommodate the employee's desire to be away from her colleague's smoking. The employee, after quitting her job, claimed constructive dismissal, and she won. The industrial tribunal implied a term into the employment contract, i.e. "that it is an implied term in every contract of employment that the employer will provide and maintain a working environment which is reasonably tolerable to all employees." Stephen Bedeau, "No Smoking" in the Workplace, *NEW LAW J.*, Jan. 9, 1998, at 10, available in LEXIS, UKJNL Library, NLJ File (summarizing the facts of *Waltons & Morse v. Dorrington*, (1997) I.R.L.R. 488 (Eng.)).

⁴⁸ Navarro, *supra* note 34.

⁴⁹ For example, the suit brought by the state of Mississippi settled in summer 1997 for \$3.3 billion, and the state of Florida settled with the industry in the same summer for \$11.3 billion. *Id.*

Since 1789, when the United States officially severed its ties to British common law, liability for defective products has emerged as a separate and distinctive area of law. In both countries, its foundation lies in the traditional areas of contracts and torts with the addition of various statutory schemes. Product liability law in the United Kingdom is primarily based on a relatively new strict liability scheme created by the Consumer Protection Act of 1987 and is supplemented by traditional warranty and negligence theories.⁵⁰ The traditional theories remain comparable, if not virtually identical, despite over 200 years of separation; however, even contracts and torts have evolved at different rates and in slightly different directions. Thus, it is necessary to review the basics and point out where the divergence occurs.

In Britain, like the United States, contractual liability is increasingly regulated by statute.⁵¹ The conditions of merchantable quality⁵² and reasonable fitness for a particular purpose⁵³ imposed by the Sale of Goods Act 1979, are the most important of the statutory provisions regulating contractual liability. The two provisions closely resemble the Uniform Commercial Code's implied warranties of merchantability and fitness for a

⁵⁰ RODNEY NELSON-JONES & PETER STEWART, *PRODUCT LIABILITY: THE NEW LAW UNDER THE CONSUMER PROTECTION ACT 1987* (1988) (providing a thorough explanation of the Act and the contract and tort theories that it supplements).

⁵¹ R.F.V. HEUSTON & R.A. BUCKLEY, *SALMOND & HEUSTON ON THE LAW OF TORTS* § 12.1 (20th ed. 1992). Some relevant statutes include: the Sale of Goods Act, 1979; the Supply of Goods (Implied Terms) Act, 1973; the Supply of Goods and Services Act, 1982; the Fair Trading Act, 1973; and the Unfair Contract Terms Act, 1977. *Id.*

⁵² Sale of Goods Act, 1979, § 14(2) (Eng.), available in LEXIS, UK Library, STATIS File. Section 14(2) provides: Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition—(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

⁵³ Sale of Goods Act, 1979, § 14(3) (Eng.), available in LEXIS, UK Library, STATIS File. Section 14(3) provides: Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known either (a) to the seller, or (b) where the purchase price or part of it is payable by installments and the goods were previously sold by a credit-broker to the seller, to that credit-broker, any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose. This holds true whether or not it is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller or credit-broker. *Id.*

particular purpose.⁵⁴ Whereas the requirement of privity has been somewhat loosened in the United States by such doctrines as third party beneficiary, privity of contract still poses a great obstacle for British plaintiffs suing under a warranty theory.⁵⁵

Privity does not pose a great obstacle to the immediate transferee of a defective product, and warranty theories can be successfully employed. However, in the typical product liability case, an intermediary such as a retailer stands between the injured party and the producer of the defective product. Privity prevents the injured party from suing the producer directly. To recover from the producer, the injured consumer must turn to some other theory of liability such as negligence. In the landmark case, *Donoghue v. Stevenson*,⁵⁶ Lord Atkin defined the duty of care in the case of defective products.

. . . [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.⁵⁷

A recent British commentator, citing *Donoghue*, averred that if a manufacturer can be liable for allowing a snail to be present in a bottle of ginger beer, then a tobacco company could be liable for allowing harmful chemicals to be present in cigarettes.⁵⁸

Still untested in the context of tobacco litigation is the Consumer Protection Act of 1987.⁵⁹ The Act imposed a regime of strict liability for defective products without entirely displacing the traditional common law

⁵⁴ U.C.C. §§ 2-314, 2-315 (1977).

⁵⁵ See generally NELSON-JONES & STEWART, *supra* note 50.

⁵⁶ 1932 App. Case. 562 (finding negligence where plaintiff found a decayed snail in a bottle of ginger beer manufactured by the defendant).

⁵⁷ *Donoghue, id.* at 599. See also, HEUSTON & BUCKLEY, *supra* note 51, at § 12.4.

⁵⁸ *Staring Down the Barrel of a Smoking Gun*, LAWYER, June 24, 1997, at 18-19, available in LEXIS, UKJNL Library, LAWYER File.

⁵⁹ Consumer Protection Act, 1987, ch. 43, § 1 (Eng.), available in LEXIS, UK Library, STATIS File.

remedies.⁶⁰ The United Kingdom adopted the Act to implement the European Community (EC) Directive on Product Liability, adopted by the Council of the EC in 1985.⁶¹ The focus of liability under the Act is on causation rather than negligence (or breach of duty).⁶² A "producer" under the Act is someone who manufactured a product, someone who "won or abstracted" a product (if it was not manufactured), or someone who processed a product.⁶³ The definition of "product" under the Act would seem to include processed tobacco products.⁶⁴ A product is defective if "the safety of the product is not such as persons generally are entitled to expect . . ."⁶⁵ The Act also provides the following defenses: (1) defendant complied with other enactments or Community obligations,⁶⁶ (2) the product's alleged defect did not exist "at the relevant time,"⁶⁷ and (3) the

⁶⁰ HEUSTON & BUCKLEY, *supra* note 51, at 297.

⁶¹ *Id.* at § 12.5. See also Directive of the European Communities, July 25, 1985 (No. 85/374/EEC).

⁶² Consumer Protection Act, 1987, ch. 43, § 2(1) (Eng.), available in LEXIS, UK Library, STATIS File. Section 2(1) reads: [W]here any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage. *Id.*

⁶³ *Id.*, § 1(2).

⁶⁴ *Id.*, § 2(4). Section 2(4) reads: [N]either subsection (2) nor subsection (3) [both explaining to whom liability extends under the Act] above shall apply to a person in respect of any defect in any game or agricultural produce if the only supply of the game or produce by that person to another was at a time when it had not undergone an industrial process. Section 1(2) defines "agricultural produce" as "any produce of the soil, of stockfarming or of fisheries." *Id.*

⁶⁵ *Id.*, §§ 3(1), 3(2), Section 3(2) reads: In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including (a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product; (b) what might reasonably be expected to be done with or in relation to the product; and (c) the time when the product was supplied by its producer to another; and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question. *Id.*

⁶⁶ *Id.*, § 4(1)(a) (Eng.).

⁶⁷ *Id.*, §§ 4(1)(d), 4(2) (Eng.). Section 4(2) defines "relevant time": [relevant time] means (a) if the person proceeded against is a person [who produced the product, who has held himself out to be the producer of the product, or who has imported the product into a member state from outside the member states], the time when he supplied the product to another; (b) if [the person proceeded against did not produce the product, hold himself out

scientific and technical knowledge at the time the product was under the defendant's control was not such that the defendant would have reason to know of the defect.⁶⁸ In addition to the listed defenses, the common law defenses of contributory negligence⁶⁹ and *volenti non fit injuria*⁷⁰ are retained. With remarkable foresight, some commentators pointed out shortly after the Act was adopted that the Act would not bar use of a consent defense by cigarette producers.⁷¹ However, they pointed out that the cigarette producers may not need to invoke this defense "since a product is only defective if its safety is not such as persons generally are entitled to expect; and the risk of lung cancer is so well known that it is hard to argue cigarettes are defective just because they cause it."⁷² In other words, cigarettes are not defective products under the Act. Other commentators disagree.⁷³

III. ANALYSIS: IS AMERICAN-STYLE LITIGATION BECOMING AN "EXPORT COMMODITY?"⁷⁴

American tobacco litigation is followed closely in the British and European press. The focus of most reporting is on the lawyers, particularly

as a producer, or import the product from a nonmember state], the time when the product was last supplied by a person [who produced the product, held himself out as producer, or imported the product from a nonmember state]. *Id.*

⁶⁸ *Id.*, § 4(1)(e). This is commonly known as the "state of the art" defense.

⁶⁹ *Id.*, § 6(4). Section 6(4) expressly adopts the Law Reform (Contributory Negligence) Act 1945 and section 5 of the Fatal Accidents (Contributory Negligence) Act, 1976 "[w]here any damage is caused partly by a defect in a product and partly by the fault of the person suffering the damage." Although the Consumer Protection Act does not require the plaintiff injured by a defective product to prove the fault of the producer of the product, the producer must prove the contributory fault of the injured plaintiff. NELSON-JONES & STEWART, *supra* note 50, at 76. The plaintiff's recovery would be reduced by the amount that he contributed to his own injury under a comparative negligence analysis. NELSON-JONES & STEWART, *supra* note 50, at 76.

⁷⁰ NELSON-JONES & STEWART, *supra* note 50, at 77. Nelson-Jones and Stewart argue that, although consent to injury is not expressly listed as a defense in the statute, its presence is implicit in the language of the statute. It seems to follow that the common law defenses would be retained since the common law remedies were not abolished by the Act. *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See generally *Staring Down the Barrel of a Smoking Gun*, *supra* note 58, at 18-19.

⁷⁴ Hazard, *supra* note 14. "What is going on in the Mother Country of the common law?," Professor Hazard asks. "Apparently, tort litigation American-style is becoming an export commodity."

plaintiffs' lawyers. One prominent London newspaper framed the litigation in epic terms—a battle of legal cultures pitting "suave northerners from America's respectable blue-chip law firms" against lawyers from small southern law firms "whose accents and behaviour amply confirmed the Southern stereotype."⁷⁵ A recent headline in the Daily Telegraph exclaims, "Tobacco Lawyers Smell \$90M Fees."⁷⁶ The article's author explains that the "\$90M fees" will be shared by lawyers in two Southern firms—one in Charleston, South Carolina, headed by "a flamboyant character who has been known to turn up at negotiations with his white poodle," and the other in the "sleepy" town of Pascagoula, Mississippi, headed by a lawyer who flies his own Learjet yet operates his law firm out of a shopping mall.⁷⁷ An English legal journal reports a similar story in less poetic and somewhat angrier terms:

UK lawyers keen to praise their noble U.S. colleagues who stood up to the tobacco barons to win \$300 bn [sic] for the health of citizens should think again. The lawyers involved are often the same individuals who took as fees 60 per cent of the settlements of earlier asbestos litigation and similar proportions in breast implant cases . . .⁷⁸

The latter article was at least fair enough to point out that tobacco company lawyers were "raking it in" too.⁷⁹ Another article in a European news publication focused instead on tobacco farmers in Greece who will be unemployed once the American "prohibitionists," having "taken Manhattan" and attempting to take London, target Berlin.⁸⁰

This drama unfolds amidst an emerging anti-tobacco political culture in Britain. The Labour government has passed a European Union directive banning all forms of tobacco advertising.⁸¹ The government is considering

⁷⁵ Marcel Berlins, Book Review: *Smoking Out the Culprits*, SUNDAY TIMES, March 29, 1998, (Features), available in LEXIS, UK Library, TTIMES File.

⁷⁶ Charles Pretzlik, *Tobacco Lawyers Smell \$90M Fees*, DAILY TEL., Dec. 4, 1997, at 37, available in LEXIS, UK Library, TELEGR File.

⁷⁷ *Id.*

⁷⁸ *For Health's \$\$\$ake?*, LAWYER, July 8, 1997, at 12, available in LEXIS, UKJNL Library, LAWYER File.

⁷⁹ *Id.*

⁸⁰ Julian Coman, *The Tobacco Industry in Individual EU Countries Is in General Decline*, EUROPEAN, Feb. 23, 1998, at 8, available in LEXIS, WORLD Library, EUPEAN File.

⁸¹ Julie Wolf, *EU Bans Tobacco Ads After Years of Debate*, WALL ST. J. EUROPE, Dec. 5, 1997, available in 1997 WL-WSSE 12216781.

a proposal to raise the legal age for buying tobacco from sixteen to eighteen.⁸² There is talk of a potential ban on smoking in all public places after four studies were released detailing the health risks of secondhand cigarette smoke to non-smokers.⁸³ However, it is more likely that the government will favor "voluntary measures rather than actual legislation" to curb smoking in public places.⁸⁴

In addition to government support, tobacco plaintiffs may use incriminating tobacco company documents discovered in American suits against multinational tobacco companies. In the United States, discovery was widely used to uncover tobacco company documents. In the now-settled case *Minnesota v. R.J. Reynolds Tobacco Co.*, attorneys uncovered evidence that tobacco companies shifted records to sites abroad or destroyed potentially incriminating documents.⁸⁵ Those attorneys collected 30 million pages of documents and established a document repository in England to house records collected in Europe.⁸⁶ The documents were offered to Congress for study in deciding whether to endorse the then-proposed national settlement.⁸⁷ More importantly for potential British plaintiffs, many of the documents are available on the Internet.⁸⁸

⁸² *Britain Considering Raising Legal Tobacco-Buying Age From 16 to 18*, AGENCE-FRANCE PRESSE, Nov. 26, 1997, available in 1997 WL 13442415.

⁸³ Jill Palmer, Minister: *We Want Ban on Cigs in Public; Smokers Face Curb After New Alert; Smoking Set to be Banned in Public Places*, MIRROR, Oct. 18, 1997, at 14. The author quotes Health Minister Tessa Jowell who wants to see smoking outlawed altogether in public places. The studies that prompted the statement were released by St. Bartholomew's and St. George's hospitals in London and from the anti-smoking lobby, Action on Smoking and Health [ASH], in October, 1997. The studies revealed that inhaling secondhand smoke causes two million avoidable illnesses in Britain each year, increases a non-smoker's risk of lung cancer and heart disease by a quarter, and increases the likelihood or severity of chest infections such as asthma, bronchitis, and pneumonia in children. *Id.*

⁸⁴ Glenda Cooper & Andrew Yates, *Labour Favors Voluntary Curbs on Cigarettes*, INDEPENDENT, March 12, 1998, at 5, available in LEXIS, UK Library, INDPNT File (quoting the anti-smoking group, ASH, following release of a Scientific Committee on Tobacco and Health report linking passive smoking to lung cancer).

⁸⁵ Barry Meier, *Minnesota Official Invites Congressional Scrutiny of Tobacco Industry Files*, N.Y. TIMES, July 28, 1997, at A10.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Josh Karlen & Bob Van Voris, *Web Fuels Suits Against Tobacco Worldwide*, NAT'L LAW J., March 30, 1998, at A7. One plaintiff, Blue Cross and Blue Shield of Minnesota, posted the most damaging documents on its website (visited Nov. 8, 1998) <<http://www.mnbluecrosstobacco.com>>. Of special interest to the *Hodgson* suit plaintiffs will

Commentators urge that such documents help potential British plaintiffs in three ways: (1) some of the documents are "directly relevant" to British suits because the same tobacco companies are involved; (2) "others detail meetings between U.S. Tobacco executives and their British counterparts;" and (3) the documents reveal what "industry executives knew about their companies' marketing strategies, the addictive power of nicotine, the health consequences of smoking and other issues."⁸⁹ Such discoveries bode well for the prospect of a negotiated settlement with tobacco companies in Britain and bode well for the claimants in the ongoing *Hodgson* group action suit.

The *Hodgson* suit, Britain's first group action funded on conditional fee, began in 1992 with advertisements placed in two English newspapers⁹⁰ and has since bulldozed its way through the English court system. The plaintiffs, all suffering from lung cancer after years of smoking, claim that the defendant tobacco companies failed to reduce the nicotine, or tar, in cigarettes after learning that the substance is a carcinogen.⁹¹ Martyn Day, the lawsuit's lead solicitor, threatened to end the suit in 1997 when the defendants, Gallaher and Imperial tobacco companies, announced that they intended to sue plaintiffs' attorneys for costs should the plaintiffs' lose at trial.⁹² Still feigning ignorance as to the basis for the plaintiffs' claims, in early 1998 the companies sought a court ruling that would have (1) required

likely be a 28 year-old Gallaher Tobacco Company memo that details the conclusions of a study conducted to determine whether smoking causes cancer in dogs. The memo concluded that the study proved beyond a reasonable doubt that smoking causes cancer in dogs and that it is highly likely that smoking causes cancer in humans too. *Id.* When the memo was released in March 1998, Gallaher's stock prices immediately fell 4%. *Id.*

⁸⁹ *Id.* Note, however, that the English Court of Appeal, acting pursuant to an Act implementing the Hague Evidence Convention, frustrated attempts by Minnesota lawyers to conduct videotaped depositions of British-American Tobacco Company executives in Britain. The court emphasized that the deponents could not adequately prepare for the American lawyers' questions because the requests for information presented to them were "wide and uncertain." John R. Schmertz & Mike Meier, *Despite Major Efforts of Plaintiffs and Minnesota Court in Complex Tobacco Litigation to Develop Requests for Oral Testimony Abroad that Comply with English Law, English Court of Appeal Concludes that They Fail to Pass Muster*, INT'L LAW UPDATE, Jan. 1998, available in LEXIS, WORLD Library, ILAWUP File.

⁹⁰ Marion McKeone, *Firms Test Interest in Tobacco Litigation*, LAW SOC'Y'S GAZETTE, July 8, 1992, at 7, available in LEXIS, UKJNL Library, LSG File.

⁹¹ *Staring Down the Barrel of a Smoking Gun*, *supra* note 73.

⁹² Sameena Ahmad, *UK Tobacco Lawsuits May be Halted*, INDEPENDENT, Oct. 7, 1997, at 23, available in LEXIS, UK Library, INDPNDT File.

Martyn Day and his associates to turn over to defendants copies of the conditional or contingency fee agreements that they entered with the plaintiffs and (2) allowed the companies to pursue Day and associates for costs should the plaintiffs' claims fail. The prospective ruling was described by the British media as a virtual tobacco Armageddon that would either end tobacco litigation in Britain or result in a torrent of American-style litigation.⁹³ But the tobacco companies' tactic would backfire, leaving the tobacco industry to deal with an alarming precedent.

To call it a landmark ruling is an understatement. The January 28, 1998, ruling bars the tobacco companies, Imperial and Gallaher, from trying to recoup the cost of a successful defense from plaintiffs' attorneys and keeps confidential the plaintiffs' conditional fee agreements.⁹⁴ Martyn Day, commenting on the significance of the ruling, called it "a major step forward [that] will ensure the Lord Chancellor's flagship concept of extending the scope of conditional-fee agreements will not have been stopped in its tracks . . ."⁹⁵ Whether the ruling will open the floodgates to tobacco litigation in Britain, as *Cipollone* did in the U.S, remains to be seen, but it is now more likely.

Professor Geoffrey Hazard has noted that the *Hodgson* suit is not an anomaly; it reflects an institutional shift in attitudes toward U.S.-style tort litigation methods:

A band of plaintiffs lawyers in England would not be able to solicit cases, band together for their prosecution and do it on a contingent fee unless there was at least acquiescence from the bar at large and from the bench in that country . . . [Y]ielding on the old restrictions they once embraced cannot be accidental or the result of moral exhaustion.⁹⁶

⁹³ *Id.* Ahmad wrote, "At issue is whether tobacco companies in the UK can claim costs against a growing number of solicitors organising group actions here on a no-win-no-fee basis. If they can, group actions in the UK could end before they have even started. If they cannot, the UK faces a tidal wave of US-style litigation . . . Should the judge rule in favour of the tobacco companies, experts said it would make US-style tobacco litigation in the UK a dim prospect." *Id.*

⁹⁴ *English Lawyers Successful in Keeping Client Contracts from Tobacco Companies*, *supra* note 4.

⁹⁵ Martyn Day, *The Relief of the Ungagged Man*, *GUARDIAN*, Feb. 13, 1998, at 17, available in LEXIS, UK Library, GUARDN File.

⁹⁶ Hazard, *supra* note 14.

The *Hodgson* ruling will undoubtedly increase interest in multi-plaintiff, contingent fee litigation in Britain. But does the ruling also signify a fundamental paradigm shift within the British legal establishment and within British society? Are the British "leaving behind their 'must not grumble' mentality . . . and turning litigious?"⁹⁷ Legal experts in Britain are not denying that a shift of some magnitude has occurred and attribute it to (or blame it on) the Thatcher administration which "stressed less government and greater individual rights."⁹⁸ However, it is premature to proclaim the British legal system "democratized."

Even after the *Hodgson* ruling, the fact remains that the British and American legal systems are not identical, and the factors that drove the tobacco industry to the bargaining table in the United States are barriers in British suits. The potential roadblocks in Britain include the following: (1) British courts do not award punitive damages except in narrowly construed circumstances; (2) British lawyers are not allowed to contract for a percentage of their clients' damage awards; (3) and the English rule on costs requires a losing litigant to pay the expenses of the winning litigant.⁹⁹ In addition, the British system lacks an effective mechanism for handling multi-plaintiff litigation. Successful suits by the British government and health authorities are unlikely, and, even if tobacco plaintiffs win, the damage awards will likely be much less than those awarded by juries in comparable American suits¹⁰⁰ because suits against tobacco companies in Britain will

⁹⁷ Dawley, *supra* note 1.

⁹⁸ *Id.* This "Conservative attitude," says one official, "rocketed through the population as a new cultural idea." *Id.* (quoting an unnamed legal services official).

⁹⁹ *Id.* See also, Hazard, *supra* note 14. Professor Hazard points out that the English generally do not use juries in civil cases, unless fraud is alleged. English judges "are less forthcoming in fixing damages." The English have more limited discovery (although the documents uncovered in the U.S. suits will help in this regard), and the English are loathe to adopt the U.S. practice of "stirring up plaintiffs' claims and then financing their prosecution." *Id.* See also, Jessica Smerin, Book Review, *Books: Smoking Can Seriously Damage the Truth; Dirty Business: Big Tobacco at the Bar of Justice* by Peter Pringle, GUARDIAN, April 9, 1998, at 15, available in LEXIS, UK Library, GUARDN File (noting that there are "important differences of style and principle between the British and American legal systems").

¹⁰⁰ In the ongoing Day group action suit, each plaintiff seeks only £50,000 in damages, making the tobacco companies' total liability, should the suit be successful, approximately £2 million. *British Court Allows Major Tobacco Suit—Class Action May Give Green Light To Anti-Smoking Forces in Europe*, INT'L HERALD TRIBUNE, July 5, 1997, available in 1997 WL 4492436.

be decided by a judge.¹⁰¹ Each distinction will be discussed in greater detail below.

A. Punitive Damages

In the United States, punitive damages have been called "the lever that brought the tobacco companies to the [bargaining] table."¹⁰² In Britain, exemplary or punitive damages are awarded in only two categories of cases: (1) where there has been oppressive, arbitrary or unconstitutional conduct by servants of the government, and (2) where the defendants' conduct was calculated to make a profit for them which might well exceed the compensation payable to the plaintiff as damages.¹⁰³ Prior to *Rookes v. Barnard*,¹⁰⁴ there was a third category of cases in which exemplary damages could be awarded—a category more akin to the justification behind punitive damage awards in the United States. Where the defendant acted wilfully, wantonly, oppressively and in conscious disregard for the plaintiff's rights, the plaintiff could recover "aggravated damages."¹⁰⁵ However, the *Rookes* court rejected that category.¹⁰⁶

Since the two remaining categories were defined in 1964, two prominent cases have further limited the scope of punitive damages in Britain.¹⁰⁷ In *Cassell*, plaintiff sued defendant publisher for libel after defendant published a book that blamed plaintiff for the sinking of a British naval vessel in World War II. Plaintiff warned defendant of his intent to sue before the book was published, but the defendant calculated that its profits from the sale of such a sensational book would outweigh the costs of paying damages to plaintiff at trial. Lord Diplock stated that *Rookes* "was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence

¹⁰¹ *Id.*

¹⁰² Peter Passell, *The Split Over Punitive Awards In Getting the Bad Guys*, N.Y. TIMES, July 10, 1997, at D2 (quoting Michael Pertchuk, head of The Advocacy Institute in Washington, a non-profit group linked to the anti-smoking coalition).

¹⁰³ *Rookes v. Barnard*, 1 All ER 367 (1964) (involving the tort of intimidation).

¹⁰⁴ *Id.*

¹⁰⁵ *Cassell & Co. Ltd. v. Broome & Another*, 1 All ER 801 (1972) (explaining the category rejected by *Rookes*).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; *AB & Others v. South W. Water Serv. Ltd.*, 1 All ER 609 (1993).

and deceit. Its express purpose was to restrict, not to extend, the anomaly of exemplary damages."¹⁰⁸

In 1993, Lord Diplock's argument was clarified and affirmed in *AB & Others v. South West Water Services Ltd.*¹⁰⁹ In *AB*, the plaintiffs suffered ill effects as the result of drinking contaminated water from the defendant water authority's drinking water system. The plaintiffs alleged nuisance, negligence, and a violation of the Consumer Protection Act of 1987.¹¹⁰ The defendants allegedly withheld accurate and consistent information; failed to give proper information to health authorities and customers to minimize the effects of consumption of contaminated water; and failed to provide clean water from an alternative source but instead continued to supply the contaminated water.¹¹¹ The plaintiffs' accusations in *AB* should sound eerily familiar to tobacco plaintiffs. Yet, the plaintiffs were not awarded exemplary damages. The case confirms that for exemplary damages to be awarded in Britain the cause of action must be one for which exemplary damages were awarded prior to 1964.¹¹²

As Judge Stuart-Smith explained in *AB*, a claim based on an Act adopted in 1987 could not possibly have been the subject of punitive damages in 1964.¹¹³ The court in *Cassell* made clear that negligence, along with deceit, was not a cause of action for which exemplary damages could be awarded.¹¹⁴ Contracts were discarded as a possibility as well.¹¹⁵ It appears that the rule on punitive damages will not change without statutory measures. Thus, British tobacco plaintiffs, who will likely rely on the Consumer Protection Act and on negligence and warranty theories, will lack the force of threatened punitives to drive tobacco companies into negotiations.

¹⁰⁸ *Cassell*, *supra* note 105, at 874.

¹⁰⁹ *AB*, *supra* note 107.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Cassell*, *supra* note 105, at 874.

¹¹⁵ *See id.*

B. "State Suits" and Suits By Health Care Providers

The British health care system is managed through a series of trusts that are grouped together under an umbrella organization called the National Health Service Confederation.¹¹⁶ The National Health Service Confederation, although unwilling to take action at present, is interested in the possibility of pursuing tobacco companies for the costs of treating smoking-related illnesses.¹¹⁷ However, the Confederation faces problems of funding¹¹⁸ and authority. The British Department of Health has issued no statement of intent to pursue tobacco companies for the costs of treating smoking-related illnesses. Indeed, the Department takes the position that health authorities do not have the statutory power to pursue claims against the tobacco industry.¹¹⁹ In June 1997, the Health Minister issued a statement that no "precipitative action" could be taken by health authorities and that any action eventually taken would be done as part of a national strategy.¹²⁰ Of primary concern to the Department of Health is the cost of potential litigation.¹²¹ Lawyers who represented states in the U.S. agreed to finance the litigation in return for ten to twenty percent of any settlement or judgment.¹²² That may not be an option in Britain.¹²³ Funds for health authority suits would likely come from the public coffers—money allocated for healthcare, not litigation.¹²⁴

"State" suits for medical costs are also problematic in Britain because of high tobacco taxes. For smokers suffering from lung cancer in England, the old saying that death and taxes are the only things in life that are certain rings especially true. England makes a fortune taxing tobacco. Approximately £10 billion is contributed to the Exchequer each year by smokers in

¹¹⁶ Jo Knowsley, *BMA Calls For British Cigarette Firms To Be Sued*, SUNDAY TEL., June 22, 1997, at 5.

¹¹⁷ Clare Dyer, *NHS Trusts May Sue Tobacco Firms*, GUARDIAN, Oct. 16, 1997, at 4, available in LEXIS, UK Library, GUARDN File.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ John von Radowitz, *Minister Holds Back On Tobacco Challenge*, PRESS ASS'N NEWSFILE, June 26, 1997, available in LEXIS, UK Library, PANEWS File.

¹²¹ *Id.*

¹²² Barry Meier, *Record Legal Fees Loom as Major Issue in Tobacco Deal*, N.Y. TIMES, June 23, 1997, at 139.

¹²³ See discussion in text, *infra*, Part III.D.

¹²⁴ Von Radowitz, *supra* note 120.

Britain.¹²⁵ Most potential tobacco plaintiffs are terminally ill, and all have paid dearly for their habits—in taxes as well as their health. Four-fifths of the price of cigarettes goes in tax; in the United States, the average is around one-third.¹²⁶ The National Health Service spends an estimated £610 million annually treating smoking-related illnesses;¹²⁷ but the government takes in around £10 billion a year in tobacco taxes.¹²⁸ As a result, health authorities may find their biggest problem to be justifying a lawsuit, not funding one.

C. Group Actions

As noted above, the use of class actions proved favorable for plaintiffs in American tobacco litigation.¹²⁹ What the British call "group actions" and the Americans call "class actions" share the same essential feature. Each makes available "remedies to a number of litigants with a common grievance against a common opponent in circumstances where there are questions of fact and/or law common to all the individual claims."¹³⁰ However, unlike Rule 23 of the Federal Rules of Civil Procedure and the various state court mechanisms governing class actions in the United States, no formal court procedures govern multi-plaintiff litigation in the United Kingdom.¹³¹ In Scotland, each case in a group action has to be taken separately; thus "groups actions" are not really group actions at all.¹³² In England, the

¹²⁵ Andrew Woodcock, *Cigarette Cash Goes Straight to the Taxman*, PRESS ASS'N NEWSFILE, July 1, 1997, (Home News Section), available in LEXIS, NEWS Library, CRNWS File.

¹²⁶ Yes, *Smoking Kills, But Litigation Is Ruinous*, supra note 9.

¹²⁷ Woodcock, supra note 125.

¹²⁸ *Id.*

¹²⁹ See generally, Richard Epstein, *Big Tobacco's Big Mistake*, N.Y. TIMES, June 25, 1997, at A19 (Editorial) (arguing that tobacco companies in the United States succumbed to the proposed national settlement because plaintiff's lawyers "skillfully shifted their firepower to faceless class-action litigation").

¹³⁰ Andrew Lockley, *Regulating Group Actions*, 139 NEW L.J. 798, 798 (1989), available in LEXIS, UKJNL Library, NLJ File.

¹³¹ Colin Stutt, *One for All? The Legal Aid Board's Proposals for the Reform of Multi-Party Action Court Procedures*, LAW SOC'Y'S GAZETTE, Oct. 6, 1993, at 26, available in LEXIS, UKJNL Library, LSG File.

¹³² Jennifer Trueland, *Scots Face Lone Fight in Courts*, SCOTSMAN, Nov. 8, 1997, at 2, available in LEXIS, UK Library, SCOTSM File.

existing procedures have been developed *ad hoc* by judges.¹³³ Two methods are available. Order 15, Rule 12 of the Rules of the Supreme Court of England allows for a representative action for members of clubs or associations who want to institute proceedings using nominated representatives.¹³⁴ The procedure removes the need for a member of a club or association to become a party to the suit.¹³⁵ Two requirements must be met to use the representative action procedure. First, the parties being represented must have a common interest or grievance.¹³⁶ Second, the relief sought must be beneficial to all the parties represented in the action.¹³⁷ The second requirement makes the representative action almost useless in the tobacco litigation setting because the relief must benefit all the members of the represented class equally.¹³⁸ Thus representative actions are more appropriate in suits involving a collective fund rather than individual plaintiffs.¹³⁹

The second means of organizing a group action in England is the "lead case" device.¹⁴⁰ A plaintiff must be selected from the prospective plaintiff class.¹⁴¹ That plaintiff is usually assumed to have the strongest case from among the class; however, often a plaintiff who has been granted legal aid is chosen so that the government finances the action through the Legal Aid

¹³³ James Burnett-Hitchcock & Suzanne Burn, *Class Action—A Radically Different Approach to Handling Multi-Party Actions is Outlined in a New Law Society Report*, LAW SOC'Y'S GAZETTE, Nov. 22, 1995, at 16-17, available in LEXIS, UK Library, LSG File (noting that the courts have to cope with new types of complex claims without any new procedures or guidelines).

¹³⁴ Supreme Court Act, 1981, § 84 (Eng.), available in LEXIS, UK Library, STATIS File. The Rules of the Supreme Court govern procedure in the Queen's Bench Division. RONALD WALKER AND RICHARD WARD, *ENGLISH LEGAL SYSTEM*, 284-85 (6th ed. 1985). See also, Lockley *supra* note 130, at 798-99; Christopher J. Maley, Survey, *Toxic Torts: Class Actions in the United States and England*, 19 SUFFOLK TRANSNAT'L L. REV. 523, 529 (1996).

¹³⁵ See Lockley, *supra* note 130, at 798.

¹³⁶ Maley, *supra* note 134, at 529.

¹³⁷ *Id.*

¹³⁸ *Id.*, at 533.

¹³⁹ *Id.*, at 533. However, courts are occasionally more lenient with representative actions. See, e.g., *M. Michaels (Furriers) Ltd. v. Askew*, 127 Sol.J. 597 (Eng. C.A. 1983) (granting an injunction to prevent animal rights activists from picketing furriers without all members being party to the action).

¹⁴⁰ Lockley, *supra* note 130, at 799.

¹⁴¹ See *id.*

Fund.¹⁴² The lead case device has been criticized because the chosen lead case can never "resolve all the issues raised by a group of claimants."¹⁴³ In addition, the process is very time consuming because the lead plaintiff's case is sent through while the other plaintiffs' claims are stayed pending the outcome of the lead case.¹⁴⁴ As one commentator has observed, the lead case device is inefficient because "a great deal of time . . . is devoted to researching individual claims."¹⁴⁵

A series of distinct and sometimes conflicting proposals for reform of the present group action mechanisms has been made in recent years. In 1995, the Lord Chancellor¹⁴⁶ issued a proposal for multi-party action reform focusing on legal aid. Lord Woolf, the Master of the Rolls, proposed a more active role for judges in managing group actions.¹⁴⁷ Another proposal advocates use of inquisitorial tribunals rather than courts to "investigate and resolve" multi-plaintiff claims.¹⁴⁸ If implemented, a tribunal, rather than plaintiffs, would control the way a case is presented.¹⁴⁹ As a result, the tribunal method will likely be unpopular with plaintiffs' and defendants' lawyers.

¹⁴² *Id.* This practice of choosing a legally aided plaintiff to go forward as lead case has been called into question. See *Davies v. Eli Lilly & Co.*, 1 W.L.R. 1136, 1141 (1987). In *Davies*, the court determined that any damages awarded plaintiffs would go to repay the Legal Aid Fund for the costs associated with the lead plaintiff's claim and that all costs would be divided equally among the plaintiffs. *Id.*

¹⁴³ *Stutt*, *supra* note 131, at 26.

¹⁴⁴ *Maley*, *supra* note 134, at 530.

¹⁴⁵ *Id.* at 534.

¹⁴⁶ The Lord Chancellor is a government minister, speaker of the House of Lords, and head of the Judiciary. The LC is appointed by the Crown on advice of the Prime Minister. P.W.D. REDMOND, *GENERAL PRINCIPLES OF ENGLISH LAW*, (I.N. Stevens & P. Shears eds., 6th ed. Pitman Publ'g 1990) (1964).

¹⁴⁷ See *Burnett-Hitchcock*, *supra* note 133 (summarizing Lord Woolf's interim report of June 1995); see also *Group Actions Finally Face up to the Winds of Change*, Lawyer, Dec. 12, 1995, at 13 (summarizing Lord Woolf's interim proposal). Lord Woolf, as Master of the Rolls, heads the Civil Division of the English Court of Appeal. As the Lord Chancellor's Deputy, the Master of the Rolls controls the admission of solicitors to the Rolls of the Supreme Court, which permits them to practice. See *Redmond*, *supra* note 146.

¹⁴⁸ *James Burnett-Hitchcock & Suzanne Burn, Class Action—A Radically Different Approach to Handling Multi-Party Actions Is Outlined in a New Law Society Report*, LAW SOC'Y'S GAZETTE, Nov. 22, 1995, at 16, available in LEXIS, UKJNL Library, LAWYER file. See also, *Group Actions Finally Face up to the Winds of Change*, *supra* note 147 (summarizing the four reform proposals); Legal Aid Board, *Issues Arising for the Legal Aid Board and the Lord Chancellor's Department from Multi-Party Actions*, May 1994.

¹⁴⁹ *Group Actions Finally Face up to the Winds of Change*, *supra* note 147.

The Law Society¹⁵⁰ concluded that the inquisitorial tribunal method would result in unjust decisions. Their criticism focused on the lack of legal representation for plaintiffs before the tribunal, the need for complex product liability suits to be publicized, and the complexity of the issues involved, before a court accustomed to handling complex legal matters.¹⁵¹

Of foremost concern to all parties are the issues of funding group actions and making them cost-effective. A primary method of funding group action litigation currently, and another problem with the system, is government-provided legal aid under the Legal Aid Scheme established in 1949.¹⁵² The program was created to recognize 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."¹⁵³ To obtain legal aid, an applicant must satisfy scope and eligibility requirements.¹⁵⁴ For a civil suit, the legal aid applicant must have reasonable grounds for bringing, defending, or participating in the suit.¹⁵⁵ Whether such reasonable grounds exist is determined by the Legal Aid Board Office.¹⁵⁶ In a criminal case, the applicant must show that "the grant is desirable in the interests of justice."¹⁵⁷ In both contexts, financial eligibility requirements must be met, although they are much more stringent for civil litigants than criminal defendants.¹⁵⁸ Under the program's "Green Form scheme" an applicant may request the "legal advice and assistance" of a solicitor for up to two

¹⁵⁰ The Law Society supervises the training and discipline of solicitors, as opposed to barristers. The Society was established for this purpose by a series of Solicitors' Acts passed between 1839 and 1974. Redmond, *supra* note 146.

¹⁵¹ Burnett-Hitchcock & Burn, *supra* note 148.

¹⁵² *Legal Aid—Targeting Need*, Lord Chancellor's Dept. Green Paper, ch. 1, §1.9 (1995), reprinted in GARY SLAPPER & DAVID KELLY, SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM, 471 (1996).

¹⁵³ *Id.* at § 1.5, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 471.

¹⁵⁴ *Id.* at App. 1, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 476.

¹⁵⁵ *Id.* at App. 1 ¶ 2, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 477.

¹⁵⁶ *Id.*, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 477.

¹⁵⁷ *Id.* at App. 1 ¶ 8, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 477.

¹⁵⁸ For civil litigants, the applicant's disposable income and capital is taken into account. Depending on income, recipients of aid must contribute to the cost of the suit and must repay the Legal Aid Board upon receiving an award at trial. *Id.* at App. 1 ¶¶ 3-7, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 477. For criminal defendants, there is no set upper income limit, and aid will be granted in most cases. Only 10% of successful applicants in the criminal context are required to contribute to the costs. *Id.* at App. 1 ¶ 12, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 478.

hours of work.¹⁵⁹ The time limit may be extended with permission of the Legal Aid Board.¹⁶⁰ The time limits and the need to request permission to extend them create problems for solicitors dealing with indigent clients and undoubtedly contribute to the impracticality of the present legal aid system in the tobacco litigation context.¹⁶¹

The *McTear* case, described in detail above,¹⁶² exemplifies the problems that arise when an attempt is made to fund a tobacco suit with legal aid. Once the original plaintiff died of lung cancer, his widow sought to continue the action as executrix and applied for legal aid. The application for legal aid was denied for unreasonableness,¹⁶³ a denial which the Board has a right to make pursuant to the Legal Aid (Scotland) Act 1986.¹⁶⁴ The Board explained that the suit posed difficult problems of "volenti and/or contributory negligence," and the Board was not persuaded that these questions would be "resolved substantially in favour of the applicant."¹⁶⁵ The anticipated length, complexity, expense, and difficulty of the suit added to the Board's reluctance.¹⁶⁶ The Board stated that "it would be unreasonable to hazard a substantial amount of public money on a case with such limited prospects of a worthwhile return."¹⁶⁷

¹⁵⁹ *Id.*, at App. 1 ¶¶ 15-16, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 478-79. See, Legal Aid Act, 1988 (Commencement No. 1) Order 1988, Part III (Advice and Assistance), available in LEXIS, UK Library, STATIS File.

¹⁶⁰ *Legal Aid—Targeting Need*, supra note 152, at App. 1 ¶ 16, reprinted in SOURCEBOOK ON THE ENGLISH LEGAL SYSTEM at 479.

¹⁶¹ Martyn Day, solicitor for present group action tobacco suit, has written: "Initial applications must be strongly supported, with the applicants being able to respond to defendants' representations, even though such work can only be done under the green form scheme for free causing a great strain on any legal aid practice's resources." Day, *If At First . . . Perseverance Is the Name of the Game in the Bid to Get Legal Aid for Complex Cases*, LAW SOC'Y'S GUARDIAN GAZETTE, Feb. 28, 1996, at 20, available in LEXIS, UKJNL Library, LSG File.

¹⁶² See discussion in text *infra* Part II.B.

¹⁶³ *McTear v. Scottish Legal Aid Board*, 1997 SLT 108, 1995 SCLR 611 (Court of Session: Outer House) (15 Feb 1995).

¹⁶⁴ The Act provides: "[Civil] legal aid shall be available to a person if, on an application made to the Board (a) the Board is satisfied that he has a *probabilis causa litigandi*; and (b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid." Legal Aid (Scotland) Act 1986 (c 47), § 14(1), available in LEXIS, UK Library, STATIS File.

¹⁶⁵ *McTear*, supra note 163.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

The plaintiff sought judicial review of the Board's decision and received it. However, the reviewing court may only review the process by which the Board reached its conclusion and cannot reverse the Board's decision unless perverse or unreasonable.¹⁶⁸ In this case, the primary issue was whether the Board should have considered the potential cost of the litigation and likelihood of success in making its decision to deny aid. In an apparent attempt to soothe the fears of the reviewing court that *McTear's* suit would not open the floodgates to a torrent of tobacco litigation in Scotland, an expert for the plaintiff pointed out that *McTear* was not a test case and would not "determine the outcome of similar issues" in other potential suits.¹⁶⁹ As to the issue of costs, it was argued that the Legal Aid Board has the power to control a legally aided plaintiff's costs throughout the suit by refusing to allow certain expert witnesses to be employed, restricting the number of expert witnesses, and/or imposing conditions on the employ of expert witnesses.¹⁷⁰ However, the reviewing court decided that the Legal Aid Board was correct in considering both costs and the defenses of contributory negligence and *volenti* in making its decision.¹⁷¹ Especially important was the Board's weighing of the expected amount of damages that could be recovered and the probable cost of the suit. The likelihood that the deceased smoker would be found contributorily negligent and *volens* was high since he continued to smoke for twenty years after warning labels appeared on cigarette packages.¹⁷² The damages would be proportionately reduced, increasing the likelihood that costs would exceed damages. Thus, the Board's decision was found to be reasonable under the circumstances. When an expenditure of public funds is at issue, cost/benefit analyses will often end litigation before it starts. As a result, legal aid is not even a viable method of funding tobacco lawsuits when the plaintiff is an individual.

Legal aid and the present group action mechanisms make an unfortunate combination in the tobacco litigation context. In the ongoing *Hodgson* suit, the plaintiffs filed petitions for legal aid in July 1992.¹⁷³ The applications

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *McTear's Executrix*, *supra* note 30.

¹⁷³ Martyn Day & Charles Hopkins, *Smoke Signals—The Litigious Storm Gathering Over the Tobacco Industry*, LAW SOC'Y'S GUARDIAN GAZETTE, Nov. 24, 1993, at 32, available in LEXIS, UKJNL Library, LSG File.

were denied after a year of protracted haggling with the Legal Aid Board.¹⁷⁴ On appeal, the applications were again refused because the Legal Aid Board was not convinced that cigarette manufacturers owed plaintiffs a duty of care and that there was a breach in any event.¹⁷⁵ In a final appeal, the Legal Aid Board determined that the tobacco industry did, in fact, have a duty to minimize the risks associated with smoking and that the manufacturers were in *prima facie* breach.¹⁷⁶ Despite this determination, the Board denied the applications because they were not convinced that the plaintiffs stood an adequate chance of success on their claims.¹⁷⁷ The plaintiffs applied for judicial review of the administrative board's decision to deny the applications, but the aid was again denied by the Queen's Bench Division.¹⁷⁸

D. Conditional Fees

When the *Hodgson* suit began in 1992, conditional fee arrangements or contingency fees were not an option in Britain. In 1995, however, an Act came into force that permits "no win, no fee" arrangements in nearly all areas except criminal law and family law.¹⁷⁹ The Act extends to England and Wales a system that had been in place in Scotland for some time.¹⁸⁰ The British version of contingency fees, however, is not identical to the American version. The Act permits British attorneys to enter a "no win, no fee" agreement with clients. If the plaintiff loses on her claim, no fee is owed. If the plaintiff is successful, a fee is charged. Unlike the American version of contingency fees, British attorneys may not contract for a percentage of damage awards as compensation for their work.¹⁸¹

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Courts and Legal Services Act 1990 (date in force 1995), available in LEXIS, UK Library, STATIS File. See also, *No Win, No Fee—No Pain*, LAWYER, Oct. 8, 1996, at 16, available in LEXIS, UKJNL Library, LAWYER File.

¹⁸⁰ The Scottish version is commonly known as a "speculative action." Andrew Lockley, *Regulating Group Actions*, NEW L.J., June 9, 1989, at 798, available in LEXIS, UKJNL Library, NLJ File.

¹⁸¹ Lord Mackay, The Lord Chancellor, *Reducing Risks for Clients—The Introduction of the Conditional Fee Scheme in England and Wales Should Benefit Clients and Widen Access to Justice*, LAW SOC'Y'S GAZETTE, July 5, 1995, at 10, available in LEXIS, UKJNL Library, LSG File. Lord Mackay notes "the inherent conflict of interest" present in a system that

Some practitioners are very optimistic about the new system, and the Law Society has endorsed it. Problems persist, however, and many details on how conditional fees are to be handled have not been worked out satisfactorily. For instance, conditional fees are not permitted in medical malpractice suits, and the Bar and Law Society disagree whether legal malpractice suits may be funded on a contingency basis.¹⁸² How attorneys may advertise conditional fees is a question that remains to be answered.¹⁸³ Whether the solicitor or barrister handling a given case should bear the risk of loss associated with an unsuccessful claim remains unclear. Arguably, the risk should fall on the barrister alone since barristers are "ultimately in charge" once they take on a case.¹⁸⁴ The issue foremost in the minds of legal aid reformers is the English rule on costs. If anything bars successful implementation of conditional fees in Britain, it will most likely be costs.

The general rule in England is that unsuccessful plaintiffs are liable for defendant's costs. The 1995 Act permitting "no win, no fee" cases did not change the traditional rule of awarding costs to successful defendants.¹⁸⁵ As a result, losing plaintiffs must fund their adversary's defense in addition to absorbing their own legal costs. This creates a massive disincentive to litigate in any case, especially in expensive group action litigation. The attorney in a contingent fee case is subsidizing his client's case; therefore the attorney becomes an interested party who can be sued for costs. At least, this is what experts thought before the January 1998 *Hodgson* ruling.

The Scottish experience confirms the fears of English solicitors and supports arguments in favor of abandoning the traditional rule on costs. As

allows a lawyer's fee to increase with the amount of a plaintiff's damage award. The 1995 Act relates the lawyer's fee to the amount of legal work actually performed by the lawyer. *Id.*

¹⁸² Fiona Bawdon, *Improving Conditions—One Year On and the Dire Predictions Made at the Start of Conditional Fees Have Failed To Come True*, LAW SOC'Y'S GUARDIAN GAZETTE, Nov. 27, 1996, at 23, available in LEXIS, UKJNL Library, LSG File. Because the Conditional Fee Act of 1995 includes personal injury actions, the Law Society takes the position that legal malpractice associated with a personal injury actions should also be covered by the Act. See, *Conditional Fees in Professional Negligence Cases*, LAW SOC'Y'S GUARDIAN GAZETTE, Nov. 27, 1996, at 30, available in LEXIS, UKJNL Library, LSG File.

¹⁸³ Bawdon, *supra* note 182.

¹⁸⁴ Ferrier Charlton, *Place Your Bets—Contingency Fees May Be Exactly What the Legal System Needs*, LAW SOC'Y'S GAZETTE, July 7, 1993, at 19, available in LEXIS, UKJNL Library, LSG File. Charlton, a solicitor, states that it is "quite clear" that barristers should bear both the technical and financial risks of losing. *Id.*

¹⁸⁵ *No Win, No Fee—No Pain*, *supra* note 179.

noted above, contingency fees have been available for some time in Scotland. However, little use is made of the conditional fee arrangement since potential Scottish plaintiffs are deterred by the "loser pays" rule.¹⁸⁶

Considering the disincentive created by the "loser pays" rule and the need to hold product manufacturers, including those in the tobacco industry, accountable for harms caused by their products, a powerful policy argument cautions against forcing plaintiffs' attorneys to pay defendants' costs.¹⁸⁷

Despite the problems, conditional fee agreements are becoming popular,¹⁸⁸ and the fears expressed when the Act was implemented have failed to materialize. Firms are not "coming unstuck financially" for improperly assessing risks.¹⁸⁹ Lawyers are not "growing fat" and robbing their clients of huge percentages of damage awards.¹⁹⁰ Solicitors are finding barristers willing to take on cases.¹⁹¹ For example, a leading barrister was signed on to the *Hodgson* suit despite the risk of losing an estimated £3 million should the suit be unsuccessful.¹⁹² No "seismic shift" in access to the justice system has occurred as a result of contingency fees, as the lack of media attention to the issue reveals.¹⁹³ The mainstream media in Britain did not seize upon the issue until the *Hodgson* suit began capturing headlines.¹⁹⁴

Lawyers for British tobacco companies have been closely monitoring the ongoing debate over adoption of contingency fees in Britain. Said one: "U.S. litigation was mainly promoted by lawyers working on a contingency

¹⁸⁶ John Peysner & Paul Balen, *Acting on Condition—As Conditional Fee Litigation Develops, How Should This New Area of Work Be Managed by Solicitors?*, LAW SOC'Y'S GAZETTE, Sept. 13, 1995, at 16, available in LEXIS, UKJNL Library, LSG File.

¹⁸⁷ Martyn Day, who leads the present group action suit against the tobacco industry, said before the landmark January 1998 ruling, that he would drop his suit should he be potentially liable for costs. Ahmad, *supra* note 92.

¹⁸⁸ "Over 1000 clients a month are choosing to fund cases under the 'no win, no fee' agreements." *No Win, No Fee—No Pain*, *supra* note 179. In June 1997, a firm devoted entirely to such cases opened. It is believed to be the first such firm that operates solely on a contingency fee basis.

¹⁸⁹ Bawdon, *supra* note 182.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* As of November 1996, leading personal injury barrister Dan Brennan, QC, was handling the *Hodgson* suit. *Id.*

¹⁹³ *Id.*

¹⁹⁴ See generally *id.*

fee basis and hoping for a big pay day.”¹⁹⁵ The lawyer’s statement is true in that there seems to be a close association between contingency fees and high damage awards. American attorneys often defend high awards on two bases: (1) complex cases often require tremendous expenditures in preparation for trial (this is especially so when the defendant is an entire industry), and (2) intangible harms such as pain and suffering, emotional distress, and loss of earning capacity are real injuries that deserve substantial compensation.¹⁹⁶ The merits of such arguments aside, critics of increased “Americanization” of the British legal system argue that damages available to winning plaintiffs in Britain are inadequate to cover the extra costs plaintiffs must bear in the absence of legal aid.¹⁹⁷ Thus adoption of American-style contingent fees will inevitably require an adjustment to British damage awards.

IV. CONCLUSION

This Note has demonstrated that British tobacco litigation is inexorably tied to the debate concerning increased Americanization of the British legal system. As the United Kingdom struggles through its first wave of tobacco litigation, British lawyers are running into many of the obstacles that stood in the way of American suits in the 1950s and 1960s. However, many of the problems they face are uniquely British, and public policy may, perversely, be their greatest obstacle. British lawyers and litigants have begun to realize that claimant litigation, class actions, and contingency fees can be tools for achieving social justice. This is especially true, as U.S. tobacco plaintiffs have learned over the decades, when the defendant is an industry capable of wearing down its weaker opponents by manipulating the judicial system.

¹⁹⁵ Neil Rose, *Up in Smoke—Despite a Recent Legal Aid Board Decision Smoking Litigation Could Still Run*, LAW SOC’Y’S GUARDIAN GAZETTE, Aug. 2, 1996, at 10, available in LEXIS, UKJNL Library, LSG File.

¹⁹⁶ See David Joseph, *Disaster Litigation—the USA Way*, NEW L.J., Oct. 20, 1989, at 1419, available in LEXIS, UKJNL Library, NLJ File.

¹⁹⁷ *Americanisation: Why Do We Have to Have It Thrust Down Our Throats? Especially Americanisation of the Law*, LAWYER, Jan. 21, 1997, at 14, available in LEXIS, UKJNL Library, LAWYER file.