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Today's Tort Suits Are Stranger Than Fiction

By Professor Michael I. Krauss, J.D.

Summary

Once a product had to be "defective or unreasonably dangerous" for there to be liability. Today that standard has become inconvenient to a plaintiffs' bar that seeks to enrich itself by filing lawsuits of no merit that defendants nevertheless will find cheaper to settle than to defend in court. Progress is not always linear.

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Back in 1997, shortly after tobacco companies had agreed to settle lawsuits with the various states' Attorneys General, one Mark F. Bernstein wrote a parody of the settlement in the *Wall Street Journal*. Bernstein's parody, entitled "A Big Fat Target," excoriated "junk food" sellers for raising our cholesterol, makers of kids' movies for encouraging spectator lifestyles, and "Wisconsin Cheese Lords" for clogging our arteries. Mr. Bernstein recognized that his critique of these producers was "a bit preposterous," given our free will to consume these industries' products. But as he concluded, "It is too hot to exercise. Dieting demands will power, and why bother if you're just a victim? Come on, America. Get off that couch and sue."

To paraphrase Art Buchwald, parody of tort law is becoming more and more difficult to write. Teenagers in New York City recently filed a lawsuit against McDonald's Corp., alleging that that corporation's food "caused" them to gain as much as 200 pounds in weight and to develop heart disease and diabetes. One, who stands 5' 9", tips the scales at 270 pounds; another, more diminutive at 5' 3", weighs 200. These plaintiffs frequented restaurants "nearly every day of the week," says their lawyer, Samuel Hirsch. Hirsch contends that "toy promotions" and "Happy Meals" were a "lethal combination," literally forcing these impressionable youths to over-consume at McDonalds.

Concern for the young doesn't stop Mr. Hirsch from also representing one Caesar Barber, 56, who is suing McDonald's, Burger King Corp., KFC Corp. and Wendy's International for "making him overweight." Mr. Barber, 5' 10" and 272, has had two heart attacks, but still consumes fast food three or four times every week. Presumably more resistant to small toys than the teenagers, Mr. Barber was allegedly hypnotized by restaurants' advertising. For instance, he believed that advertising that (accurately) asserted that burgers were 100 percent beef "meant it was good for you. I thought the food was OK. The fast food industry has wrecked my life. I was conned. I was fooled. I was tricked."

Tort suits against Big Fat are but the latest round in the trial bar's "blame the inanimate object" game. These suits follow in the footsteps of litigation against "Big Tobacco," gun makers, and former suppliers of lead paint, all of which are products that can be used in harmful ways. Professor John Bahnzaf of George Washington University's School of Law, one of the promoters of this game, has admitted that he would prefer to tax to death products he does not like. Alas, pesky elected legislators refuse to enact the taxes Bahnzaf and other gurus *know* we need to protect us from temptation. So litigation, before unelected judges, is used to obtain what can't be got using the proper constitutional techniques.

The gun and lead paint suits have been spectacularly unsuccessful, as have

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been tobacco suits (other than the settlement with the states). Lawsuits against Big Fat will fail in the end. But they will cost defendants tens of millions in lawyers' and court fees and will result in payoffs to Mr. Hirsch and to the rest of the plaintiffs' bar. That's what these suits are about. They are not about tort law.

For there is absolutely no proof that the food sold by Big Fat is "defective and unreasonably dangerous" (the legal standard for liability). True, if an individual consumed nothing other than Big Macs, that individual's diet would be unbalanced and relatively unhealthy. But none of the defendants advise or recommend that anyone consume their food exclusively. Indeed, even the preposterous post-pubescent plaintiffs in Mr. Hirsch's "class action" allegedly consumed fifteen meals per week at home. One wonders what they ate there. There is no such thing as bad food (unless of course, the food is adulterated or poisoned). There are merely poor eating habits.

Until recently, we assumed that a citizen's free choices were the legal cause of both caloric intake and sweaty out-take. But if there is no free will, as the plaintiffs maintain, there are many more culprits than Big Fat. Why isn't Mom the "cause" of Junior's obesity? She could have declined to give Junior the funds needed to go to the fast food joint; she could have fed Junior salads at home; she could have signed Junior up for the soccer team. Mom, unlike Wendy's, actually has what the law calls a "special relationship" with Junior — she has affirmative duties toward her child. Or maybe the public schools "cause" Junior's obesity: over 79 percent of high schoolers get no physical education during any given week. While we're at it, why not sue zoning boards for "causing" Junior's obesity? They segregate quarter-acre single-family residences, "making" us take our cars to shops and community centers. What about carmakers, come to think of it? They "force" us to buy their motorized couches with their ubiquitous TV ads and zero-percent financing. What about oil companies, that price gasoline so low that we are "forced" to take the car instead of walking a mile to the bus stop? If we relax principles of tort, we have lots of candidates for liability.

Those who back the lawsuits against Big Fat deplore the "epidemic" of obesity, as if it were the equivalent of smallpox or polio epidemics which resulted in mandatory vaccination programs. But smallpox and polio, unlike obesity, spread involuntarily. The obesity "epidemic" is not of this ilk. It is a complex result of shifts in living patterns and of cultural phenomena that lead to choices to over-consume food and under-consume exercise. Those choices, if socially inappropriate, may be criticized. Existing legislation may inadvertently contribute to the problem, and new laws (reforming zoning bylaws, or relaxing the public school monopoly, or modifying the food stamp program) may have a useful role to play in solving the problem. But reducing obesity is not within the scope of tort law. Suing Big Fat is a big fat mistake.

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