

Highlighting the Ethical Minefields of Acting for the Big Tobacco

VicHealth Legal Consultant Jonathan Liberman Speaks to Castan Centre

By Lauren Smith

In the 1950's, it was stated fervently and unequivocally by tobacco companies that there were no links between cigarettes and cancer and other fatal conditions. Five decades of illness, death and research later and incredibly their line has hardly changed. Now though, a series of law suits around the world is bringing those walls of unreality down and a conspiracy theory to best the Pelican Brief is emerging. The tobacco industry has been found out.

Jonathan Liberman, Legal Consultant for the VicHealth Centre for Tobacco spoke recently at a Castan Centre public lecture about the ethical dilemma faced by lawyers representing tobacco companies. Mr Liberman, a major contributor to the debate on tobacco issues, began with a background on how the activities of tobacco companies have been exposed over the decades. Gradually, through a series of cases, it came to light that the companies had known about addiction to cigarettes for decades, but had actively sought to keep that knowledge a secret amongst themselves. Companies sought to maximize nicotine delivery and absorption, so as to create and sustain smokers' addictions, and made false health claims about low tar/low nicotine cigarettes. Liberman said the courts have found that marketing to young people is still practiced today so as to ensure that dying customers are replaced. Perhaps most controversially of all, tobacco companies have suppressed scientific research, destroyed documents to avoid litigation and improperly asserted lawyer-client privilege for the same purpose.

Liberman then turned to the role that lawyers play, stating that, while lawyers have a duty to act in the best interests of their client, they also have a countervailing interest to refrain from misleading the court: lawyers are prevented from assisting their client in criminal activities. When a client is engaged in criminal behaviour and requires the lawyer's silence or even assistance to further that behaviour, lawyers must act in favour of their higher duty; that of the promotion of justice.

As illustrated by Liberman, the characteristic tobacco company requires its legal representatives to assist in facilitating and legitimising the sale of a potentially lethal product. Liberman referred to the Supreme Court of Oregon case *Williams v Philip Morris and RJ Reynolds*, in which the court stated "viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter. ... Today, its actions would constitute at least second-degree manslaughter, a Class B felony." What is to be made of the lawyer who assists in this process?

Lawyers retained by tobacco companies have often been found in breach of these duties to justice. Liberman quoted Judge Kessler in *USA v Philip Morris et al*, who said "at every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implemen-

tation of its fraudulent schemes." It was held in that case that lawyers had devised and coordinated strategies, controlled and directed scientific research and experiments, subsidized scientific experts with grants from the Center for Tobacco Research if they spoke positively of the industry and carried out document destruction practices. Liberman also pointed out that tobacco attorneys had come under fire in the Australian case of *McCabe v British American Tobacco*, which highlighted the impropriety of the relationship between BAT and its retained solicitors, detailing how solicitors of private firms would work on the premises of the client company for months at a time and travel together to conferences to discuss litigation tactics.

While millions of smokers around the world battle an addiction heralded as the most difficult on earth to shake, Liberman pointed out that lawyers sometimes stand between those smokers and justice. He quoted Christine Parker and Adrian Evans (pictured below) who said that lawyers can "act as 'gatekeepers' – who can 'disrupt misconduct by withholding their cooperation from a wrongdoer'". It is this role of gatekeeper in our society that requires lawyers to act with integrity in upholding the fair processes of the law. They have the ability to either help or hinder the almost unbelievable behaviour of Tobacco companies and it is, as expressed by Judge Kessler, 'sad and disquieting' that many lawyers have chosen to use their role in support of this criminal and abhorrent behaviour.

It is beyond us at this stage to determine the future of the tobacco industry, but Liberman reminded his audience that the legal profession, both as individuals and as a whole, should be aware of its pivotal role in the delivery of justice and act to retain its integrity in the face of corporate pressure.

For Jonathan Liberman's presentation, go to www.law.monash.edu.au/castan centre and click on "public events and lecture series".



Jonathan Liberman (middle) with Castan Centre Director, Professor Sarah Joseph (L), and Associate Professor Adrian Evans (R)