

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

MCCLELLAN J
AND A JURY OF FOUR

FOURTEENTH DAY: TUESDAY 3 APRIL 2001

20956/96 - MARLENE SHARP (NEE ELLIOTT) v STEPHEN GUINERY
T/AS THE PORT KEMBLA HOTEL & ORS

<SORELL LEE SCHWARTZ (10.03AM)
ON FORMER OATH, CROSS-EXAMINATION CONTINUED

SEMMER: Q. Over night have you had the opportunity to
consider which of these articles which you have written were
those in respect of which you received money from the
Tobacco Institute or the tobacco industry?

A. Yes, sir.

Q. And how many?

A. I checked them on the copy of the curriculum vitae. (Mfi
19 shown.) There were six that were done as part of our
contract with the Tobacco Institute in Washington and there
were two that were done under the Philip Morris grant to
Georgetown University.

Q. Yesterday when I asked you about this trip that you took
to Japan I said to you, "Who sponsored your attendance at
the conference", that was the ETS conference, and this was
your answer: "I was told the, it's, I've, some Japanese
industry which involved tobacco and minerals I think, or
something like that. I don't, I'm not sure exactly but it
was, it came from some Japanese industry." Do you remember
that's the answer you gave to the question who sponsored
your attendance at the conference?

A. Yes.

Q. There is no doubt, is there, that your attendance there
was sponsored by the tobacco industry?

A. No, there is no doubt at all, and I - and there was no
implication--

Q. Sorry?

A. There was no implication that it wasn't. It was a
tobacco industry sponsored conference, but from what I was
told it was sponsored or underwritten by a Japanese tobacco
industry.

Q. I think you agreed yesterday that you had written a
letter to Philip Morris International in December 1987
following that conference enclosing a secret report. Is
that correct?

A. Well, I don't know--

OBJECTION ("SECRET REPORT"). TO BE REPHRASED.

Q. A report for your information and not for general dissemination; is that right?

A. Well, yes. I have no idea - that's what it says, but I don't have any idea what the report says. 5

Q. That's a copy of the letter?

A. Yes, it appears to be.

Q. Well, that's your signature, isn't it, professor? 10

A. No, it is not my signature.

Q. You see your name appears there?

A. Yes. 15

Q. It was signed on your behalf, was it?

A. It appears to have been, yes.

Q. You sent a copy to Mr Rupp; is that right? 20

A. Yes.

Q. He is the lawyer for the Tobacco Institute in Washington DC, isn't he?

A. He was. 25

LETTER TO PHILIP MORRIS INTERNATIONAL DATED DECEMBER 1987 TENDERED.

DEAKIN: I don't see the relevance of it. The fact that he attended a conference and sent a report which isn't tendered which is enclosed with this letter is just irrelevant. What issue does it go to, with respect? My friend said yesterday that it goes only to credit. Well, in that case it can't be accepted. 30 35

HIS HONOUR: That proposition would be right.

SEMMLER: Yes. It goes to his connection with the tobacco industry. 40

HIS HONOUR: It goes to credit?

SEMMLER: Yes. 45

HIS HONOUR: I reject it.

SEMMLER: Q. You remember I asked you a number of questions yesterday about how much money you had received from the tobacco industry. Do you remember those questions? 50

A. Yes, sir, I do.

Q. You weren't able to recall the specifics, were you?

A. Specifics of-- 55

Q. Of the amounts of money you have received from the tobacco industry?

A. No, I can't recall the specifics.

- Q. Could I just hopefully help to refresh your recollection. Would you agree that in respect of work you did between 1 and 30 November 1987 you charged \$2,800 to Covington & Burling, the solicitors for the Tobacco Institute, in a bill dated 9 January 1988? 5
- A. Yes, that's correct.
- Q. And that was a bill on the letterhead of this Centre for Environmental Health and Human Toxicology; correct? 10
- A. That's correct.
- Q. In addition to that \$2,800 you charged for a whole lot of expenses here; is that right? 15
- A. Yes. That's - we maintained a literature database and that's the costs for that database, yes.
- Q. Amongst the expenses you charged, for instance, for that period, 1 to 30 November '87, you charged the Tobacco Institute \$600 for your database; is that right? 20
- A. Well, for computer services concerning the database. That was probably for programming or something like that, but the other material, the other expenses here also appear to be the database, books and journals.
- Q. In fact you also charged them \$500 for photocopies; see that? 25
- A. Yes.
- Q. And \$410 for administrative support, including the database update; correct? 30
- A. Yes, it's there.
- Q. And then in a separate invoice you charged for education and preparation of SWT. What's that? 35
- A. Scientific witness team.
- Q. And what was the scientific witness team? 40
- A. The scientific witness team were a group of people who the tobacco industry had gathered together to present testimony at various hearings and the like, and we had the responsibility for making sure that they were scientifically cognisant of what was going on.
- Q. This was for some testimony that this team was giving with the Environmental Protection Agency in the United States; is that right? 45
- A. From what's written on the bill, yes.
- Q. And for 15 hours work you charged \$2,625 to the tobacco industry; correct? 50
- A. Yes.
- Q. And again there were a whole lot of expenses claimed, including photocopying and other matters; correct? 55
- A. Yes.
- Q. And then in a separate invoice in respect of what you describe as original data analysis, preparation of

scientific papers, participation in scientific meetings, you charged the Tobacco Institute \$1,750 for ten hours work; correct?

A. Yes.

Q. And the total of the invoice in respect of yourself, Dr Boulter, who is one of the trio that ran this organisation that you were associated with back in those days, and for a research associate the total invoice was \$21,213 on that occasion, correct, or is that--

OBJECTION. QUESTION WITHDRAWN.

Q. That \$21,000 relates to a couple of invoices, doesn't it?

A. Yes, I'm quite sure it does. I'm not exactly certain.

Q. Then on 16 February 1988 in respect of what's described as the environmental tobacco smoke project, December 1 to 31 1987, you charged the solicitors for the Tobacco Institute \$3,675 for 21 hours work; is that right?

A. Yes.

Q. And Dr Witorsch seems to have charged \$3,675 for 21 hours work; is that right?

A. It says so, yes. That's exactly what it says on the invoice.

Q. And the total bill issued by your Centre for Environmental Health and Human Toxicology and sent to the solicitors or the attorneys for the Tobacco Institute on that occasion was \$20,534, wasn't it?

A. Yes, for all the other, yes.

Q. A \$20,534 bill for work between 1 and 31 December 1987 charged to the Tobacco Institute; correct?

A. Including all the professionals besides Dr Witorsch and myself, yes.

Q. \$20,000 for a month's work?

A. For a month's work for five people plus expenses - six people plus expenses.

Q. Then without wishing to take too much time over this, there are other invoices for other amounts, another amount of \$3,850 that you charged for education coordination and interaction with the EPA. Is that included in the other invoice or is that a separate invoice?

A. I don't know.

Q. And on 8 March 1988 you charged \$2,800 for 16 hours work to the Tobacco Institute through their attorneys Covington & Burling for ETS review and evaluation of scientific literature, maintenance and update of literature database, original data analysis, preparation of scientific papers, participation in scientific meetings in January of 1988?

A. That's correct.

Q. And the total invoice that your Centre for Environmental Health and Human Toxicology sent out for work done in one month, that is, January 1988, was \$8,766; is that right?

A. That's what it says.

Q. See this invoice here directed to Philip Morris Europe, on this occasion for travel, hotel, et cetera, Stockholm meeting \$5,000, was that for one of your attendances, professor?

A. One of my attendances? Yes. There was a meeting in Stockholm that Philip Morris had of its scientific consultants having to do with nicotine pharmacology, nicotine pharmacokinetics. It was not a public scientific meeting, it was a meeting of just the people who were Philip Morris consultants, Philip Morris grantees, actually.

Q. And you charged them \$5,094; do you see that?

A. For travel, hotel.

Q. Et cetera?

A. Et cetera, for Dr Boulter and myself, yes.

Q. Dr Boulter is the other person of the three in this centre?

A. That's correct.

Q. Is that right?

A. Well, she was.

Q. And this was in 1990, this is two years after you say you were fired by the tobacco industry?

A. No, I never said - I did not say that I was fired by the tobacco industry. I said that the Tobacco Institute fired me from doing its testimony in 1988 because I was not cooperative. From that point on the work I did was primarily with Philip Morris on nicotine modelling. I believe that's consistent with my statement from yesterday.

Q. Thank you, I'm sure it is. They didn't fire Professor Witorsch, did they?

A. I think matters dealing with Professor Witorsch you should ask Professor Witorsch.

Q. I shall, thank you. Yesterday you seemed to have trouble recalling the kind of ball park figure that you received through the university--

OBJECTION.

Q. --for the work that you did on this project that was paid for by Philip Morris Switzerland. Can you remember you couldn't recall the precise amount?

DEAKIN: I object. The objection was to my friend using the phrase ball park, and your Honour disallowed the question.

SEMMLER: I will withdraw that word.

Q. You remember I was trying to get some information from you to assist the jury as to how much you had received from Philip Morris Neuchatel in Switzerland for this work that you did in the period from 1988 through the early nineties. Do you remember that question?

A. Well, I remember it, but not as you have stated. You had said "didn't you get some", and then used some large term, massive amount or considerable amount of money. You never once asked me to make an estimate of how much money it was. You just used various adjectives as to size. If you had asked me what an estimate of the amount of money it was I would have been happy to give it to you, but you didn't ask it.

Q. I will ask it now, professor.

A. The grants that we received from Georgetown, I will use the word ball park, was somewhere between \$75,000 and \$130,000, \$140,000 per year.

Q. Per year?

A. Per year. This was the grant money that went to Georgetown. It included the grant money for salary components, university salary components for me, for Dr Boulter, for - it paid for a post doctorate research associate.

Q. But the--

A. I haven't finished.

Q. We are just concerned with how much exchanged hands at the moment.

DEAKIN: It is very plain from the professor's answers that this money went to the university, not to him, and in answer to a question of how much you got the witness must be entitled to say where the money went when it was paid to the university.

HIS HONOUR: Mr Semmler, we are going to find out in the end. Why don't we let the witness tell us.

SEMMLER: Q. Carry on.

A. The money paid for a salary component, probably about 10 to 15 per cent of my university salary, a salary component for Dr Boulter, who was also in the faculty at the university. It paid for a post doctoral research associate, it paid for a graduate student, and then it paid for supplies in services and it paid for - it was called university overhead expenses, which is attached to every grant.

Q. That money was paid by Philip Morris Neuchatel; correct?

A. Yes, sir.

Q. And that money enabled you to do this research that you were so particularly interested in, didn't it?

A. It allowed me to do the research on the mathematical modelling, yes.

Q. You said it was something like \$130,000 a year?

A. You mean just now?

Q. Yes.

A. I said between \$75,000 and \$130,000.

Q. When you were asked specifically about this at page 1125 of the transcript when I said to you, "Are we talking hundreds of thousands of dollars", you said "no". Do you remember that?

A. Yes, and that's consistent--

Q. Was that the truth?

A. Of course it is the truth.

Q. Over how many years did you receive in excess of \$130,000?

OBJECTION.

DEAKIN: The question was asked how much he received. It wasn't a question directed to how much the university received, part only of which flowed on to him.

SEMMLER: With respect, no. He said Philip Morris Neuchatel made a grant, or it was said made a grant for your research, I don't recall the exact amount. We were clearly talking about the grant for the research, not money he specifically received.

DEAKIN: Your research work.

SEMMLER: And that's exactly what it was.

HIS HONOUR: I am not sure where we have got to. The last question was answered, I think. There is now another question. Is there an objection to the next question?

DEAKIN: My friend is accusing the witness of not disclosing the amounts that he received from these grants from Neuchatel.

SEMMLER: I will withdraw that question and put it in a different way.

Q. I will just quote the question and answer:

"Q. How much did they (that is, Philip Morris Switzerland) contribute to your research work over the period from 1989 until 1992?

A. Well, only their contribution from Neuchatel was a grant through Georgetown University. I don't know - I don't recall what the exact amount of money was.

Q. Could you just do your best to give the jury a ball park idea at least? Are we talking about hundreds of thousands of dollars?

A. No."

Were they the questions and answers that were given on this subject yesterday?

A. I would agree, if you are reading the transcript correctly.

Q. Now, was that true that Philip Morris Switzerland did not contribute to your research work over the period '89 until '92 a sum which could be described as hundreds of thousands of dollars. Is that true or not, professor?

A. Well, what I was responding to, when we speak of grants, you are quite correct if you look at '89 to '92 it is not accurate.

Q. What is not accurate?

A. The answer, but when--

Q. Was it true or false?

A. You are going to have to let me finish, okay. When I interpreted your answer, as we often do in grants, as to what an annual amount was. Your use of the words hundreds of thousands in the two dimensions of the question, the impression you were giving of this hundreds of thousands of dollars of this money pouring in, but as research grants go it was a very small research grant for a university.

Q. I wasn't asking you about comparative grants, was I?

A. I still haven't finished.

Q. Carry on.

A. You are correct. If you are looking at plurals and looking at what was received it is probably over the period of three years, probably was in the \$250,000 \$300,000 range, so that fills the definition of hundreds, and therefore I stand corrected, but I was not intending to deceive anybody because there would be no purpose in that.

Q. You answered the question with a simple no and you acknowledge now that that was incorrect?

A. I acknowledge that it was incorrect.

Q. In respect of the work that you have done over the years numerous grants have been made by the tobacco industry to fund that work. True or false?

A. Well, so we don't get into the same problem we got before, I'm not going to go by generalities. You are going to have to pick a number or a range of numbers and I will respond to it.

Q. No, I'm not going to do it, professor, you are here to answer my questions and you are the one who knows, I don't, how many grants you have received from the tobacco industry. Can you give us, I won't use the word ballpark, but can you give us a rough idea of how many grants over the years you have received from the tobacco industry?

A. Grants to the university?

Q. Grants to anyone, either directly to you or the university in respect of work that you have performed?
A. For Philip Morris I received grants for a period of three years, from the Tobacco Institute as supported my work on the modelling the period from about '84 to '88.

Q. And how much are we talking about in rough figures for these grants?

DEAKIN: Can we avoid the ambiguity the last time my friend asked about this. Is he asking about how much was paid to the university or is he asking about how much was paid for this witness's research work.

SEMMLER: There is no ambiguity in the question I read to the witness, and there is no ambiguity in this question. It is whether it is channelled through the university or directed to him, how much money was paid for the work that was done. It is quite clear.

DEAKIN: It may be plain, but the words "your research work" we would submit doesn't make it clear to the witness that what he is asking about is not your personal research work and the funding of your personal research work but it is a question directed towards money provided to the university which in part funds his personal research work. Now, that's the ambiguity. My friend has asked his questions in that form and we submit it doesn't make it clear what he is asking about. Is he talking about the university or is he talking about the professor in person? ?

HIS HONOUR: Mr Semmler, you have heard what Mr Deakin says. You will accept the fate that will befall you from any other question you ask.

SEMMLER: Absolutely.

Q. Professor, I am talking about money that changed hands, do you understand? I am talking about money that moved from the coffers of the tobacco industry to either directly to you or to the university in respect of work that you performed. Do you understand that that's what I am asking about?

A. Okay, and I will attempt to parse this.

Q. Sorry?

A. I will attempt to parse this.

Q. Parse this, divide it up?

A. Yes. Philip Morris, money to the university was for three years, somewhere between \$75,000 and \$130,000 a year - probably not as high as \$130,000, probably \$75,000, but we can say around \$100,000 a year. So that money went directly from Philip Morris to the university and then it was channelled in into our research, as we said. For my research work there was money that was sent to the Centre for Environmental Health, our company. For the research work that we did at the university, which was the modelling

work that the institute paid for, I would say from a period of about 1984 to 1988 about \$50,000 to \$75,000 a year went from the Centre for Environmental Health, which was our company, to the university to pay for the research, that money having been received from the Tobacco Institute. So it went from the Tobacco Institute to the centre to our research at Georgetown. Then all of the other money, which is consulting, in other words, it has nothing to do with - it did not have to do with our research, but it is the consulting, that is the database and our getting ourselves up-to-date on the ETS matter, attending meetings and such like that, I tell you I cannot give an estimate, I cannot give you an estimate because there were many, many people involved, and you saw the bills, they involved numbers of different people, and all I can tell you is that over the period of that time the bills that you have would not be considered atypical. They wouldn't be \$20,000 a month because that involves some special - but certainly \$5,000 or \$6,000 a month would not be atypical.

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SEMMLER: Q. Have you received grants from other bodies in the United States for your work?

A. Oh, certainly.

Q. What kind of bodies?

A. The National Institute of Health, the National Institute of Environmental Health Sciences, the National Heart Lung and Blood Institute. I received grants from the American Medical Association Research Foundation.

Q. Is it fair to say you have received grants from a whole lot of bodies?

A. Yes.

Q. (Approached). In your curriculum vitae which you sent to the attorneys for the defendant in this case which was duly served upon us, the lawyers for the plaintiff, you have a heading in that curriculum vitae "Grants Awarded", haven't you?

A. Yes.

Q. And you have referred to the people like the American Medical Association, the National Institute of Environmental Health Sciences, Food and Drug Administration, haven't you?

A. Yes.

Q. Did you refer under the heading "Grants Awarded" to the Tobacco Industry?

A. No.

Q. You were anxious to conceal the fact you had done work for that industry, weren't you?

A. No.

Q. Whilst you included these other people you were just telling the jury about, there was not one mention under the heading "Grants Awarded" in your curriculum vitae of all of this money that was paid in respect of work that you were doing by the Tobacco Industry; true or false?

A. The reason that tobacco doesn't show up there, as the reason that a large number of other industrial sources don't show up there, is because they were not competitive. What is on my curriculum vitae are those that were received competitively. I have received, I have received support from many different industries in the United States that supported our work, very similar to what Philip Morris did. They also are not listed on there.

Q. You knew when you compiled that curriculum vitae, that is a history of your life's work, you knew the purpose of that was to show just how well qualified you were to give an objective expert opinion with the issues raised in this Court case. You knew that, didn't you?

A. No. That curriculum vitae is a running document that started 40 years ago and gets added to, gets added to. I can assure you, it is not intended for the purpose of court testimony in general or, and certainly not this Court in particular.

Q. But you sent it along when you sent your report, didn't you?

A. I was asked to.

Q. Now, you would agree with this statement, wouldn't you: That the purpose of the Tobacco Industry is not the altruistic pursuance of knowledge for knowledge's sake. You would agree with that statement, wouldn't you?

A. You mean the purpose of their support?

OBJECTION. QUESTION ALLOWED.

WITNESS: Yes I would agree with that.

Q. You have recognised that for a long while, haven't you?

A. Yes.

Q. ~~Notwithstanding your recognition that they don't have this good citizen approach to things, they don't have an altruistic purpose in funding, you are quite happy to accept all this money from the Tobacco Industry, weren't you?~~

A. Yes, but I should say I extend the same comment to all industry support I have received. I have never received industry support because some industry had this overwhelming desire to improve the knowledge of mankind.

Q. Now, you have never examined the plaintiff in these proceedings, have you?

A. I'm not a physician so I would not have examined her, so yes.

Q. You are not an epidemiologist?

A. I'm not a trained epidemiologist but I use, I use and deal with epidemiological data and have designed epidemiological studies.

Q. The question was simple, are you an epidemiologist?

A. I do not consider myself an epidemiologist by training.

Q. You have never done any research of your own into the causes of cancer, have you?

A. Into the causes of cancer--

Q. Is that a hard question?

A. Yes, I'm trying to, I'm recalling work that I've done. No, I have not.

Q. You have never done any original research regarding the health effects of tobacco?

A. Yes, I have.

Q. You are aware that two peak--

A. By the way, "yes" means, you presented me with a negative so I want to make sure. I have done research on the health effects of tobacco, original research.

Q. Yes, thank you. Which would be the two peak US bodies concerned with research into the causes of cancer, in your

view?

A. I would say the National Cancer Institute, probably the MD Anderson Hospital, Memorial, Sloane Kettering. I would put those in the top.

Q. The American Association for Cancer Research? 5

A. I don't, I don't know that they do research. They are a group but I thought you were referring to the organisations that actually do research.

Q. Perhaps I should make it clearer. The American Association for Cancer Research is a peak body of cancer research in the United States, true or false? 10

A. True.

Q. The American Society for Clinical Oncology is a peak body of those who, on a daily basis with medical degrees, deal with cancer and its causes; correct? 15

A. Deal with cancer and its treatment.

Q. Thank you. You are not a member of either of those bodies, are you? 20

A. I'm not.

Q. Have you heard of the IARC? 25

A. Certainly.

Q. You have a great deal of regard for it, don't you? 30

A. I'm not sure what that means.

Q. What is your attitude to it? 30

A. It provides, it provides an, it is an information gathering and evaluating organisation that serves the World Health Organisation.

Q. It is the World Health Organisation's body for cancer research, isn't it? 35

A. Well, for cancer assessment, not really cancer research.

Q. I see. When were you last called upon by the FDA to do any consulting work, professor? 40

A. About, I guess about three months ago.

Q. You know that bodies, regulatory agents in the United States like the Environmental Protection Authority use what is described as a "weight of evidence" approach to things such as the environmental effects of tobacco smoke. You know that, don't you? 45

A. That is a regulatory method, yes.

Q. And you disagree with the approach which relies upon the weight of the evidence, don't you? 50

OBJECTION. QUESTION ALLOWED. 55

A. I disagree with it from a scientific and logical approach. I don't disagree with it from a regulatory approach.