LIBRARY COPY.

SUPREME COURT OF VICTORIA

MAJOR TORTS

No. 4423 of 1996

PHYLLIS LYNETTE CREMONA

Plaintiff

v.

PHILIP MORRIS & ORS

Defendant

JUDGE: HEDIGAN, J.

WHERE HELD: MELBOURNE

DATES OF HEARING: 6 November 1997

DATE OF JUDGMENT: 13 November 1997

APPEARANCES:	Counsel	Solicitor
For the Plaintiff	Mr. J. Keenan, Q.C. Mr. P. Bravender-Coyle	Holding Redlich
For the 1st & 4th Defendant	Mr. J. Sher, Q.C. Mr. J. Ruskin, Q.C. Mr. M. Wheelahan	Arthur Robinson & Hedderwicks
For the 2nd Defendant	Mr.N. McPhee, Q.C.. Mr. D. Beach	Mallesons Stephen Jaques
For the 3rd Defendant	Mr. R. Stanley, Q.C. Mr. D. Martin	Clayton Utz

GT:SC V.G.R.S. 9603 2404

HEDIGAN, J.: The application with which I partly deal in these reasons relates to the plaintiff's summons to file and serve a sixth further amended statement of claim in the proceeding. I do not find it necessary to set out in detail the long history over the last 18 months or so of the plaintiff's amendments to her statement of claim. There have been many more than six amendments or proposed amendments. Indeed the latest proposed sixth further amended statement of claim (the one which I announced would be marked "A" for the present purposes) is the third or fourth version of the latest version. I have recently given rulings concerning the plaintiff's interrogatories for the examination of the first defendant Philip Morris. It would have been necessary for me to hear argument and rule upon an application by all the defendants for the striking out of the nearly 1400-page further and better particulars of the plaintiff of the fifth further amended statement of claim. The necessity for so doing has, mercifully, been obviated by the substantial re-shaping of the statement of claim in the latest proposed sixth further amended statement of claim. The plaintiff has now substantially reduced the ambit of the claims made, basically founding her case upon damage to her lungs allegedly caused by the nicotine in cigarettes smoked by her, causing or creating an addiction to and dependence upon cigarettes, which she alleges the defendants either knew or constructively knew would or might arise from cigarette smoking, concerning which there was failure to give adequate warning. Mr. Keenan, Q.C., leading counsel for the plaintiff, stated in open court that the vast further and better particulars delivered would no longer be relied on and that the particulars given in the proposed sixth further amended statement of claim (to be filed and served by 20th November 1997) would constitute the whole of the particulars relied on.

However, whilst the parties have worked towards this narrowing of the issues between them, and are contining to do so, one of the proposed amendments in the proposed sixth further amended statement of claim involves an alteration of the time span of addictive smoking of cigarettes manufactured by the first defendant. The period alleged in the earlier statements of claim ran from the year 1969 to 1981,

encompassing the three brands of cigarettes manufactured by Philip Morris which were smoked by the plaintiff, namely Malboro, Peter Jackson and Peter Jackson Extra Mild. The expanded period may broadly be described as running from 1968 to 1987, although there is some doubt raised by variations not only in the proposed amended statement of claim but by reference to particulars and answers to interrogatories by the plaintiff as to what is really being suggested.

A schedule handed to the Court by leading counsel for Philip Morris, Mr. J. Sher, Q.C., closely analyses the alterations through the various court documents of the plaintiff's assertions as to the years within and between which she smoked not only cigarettes of different brands manufactured by the first defendant but cigarettes manufactured by the provisionally added defendant Godfrey Phillips, namely Viscount cigarettes and cigarettes manufactured by other defendants. There is some reason to take the view that there is substance in the criticism advanced that these variants raise some doubt as to what it is that the plaintiff is truly alleging but I am not of the view that this aspect should dominate my consideration of whether or not the proposed amendment ought to be allowed. Mr. Sher submitted that the affidavits of Miss Toop of the solicitors handling the matter for the plaintiff, indicate that from August 1993 the plaintiff's smoking history had been provided to her solicitors and counsel but had undergone substantial and continuing revision so that, in his submission, the application for leave to amend was based on a non-credible history of smoking. The only material lodged in support of the application was an affidavit of Mrs. Cremona which in substance stated that she had forgotten, when giving instructions to her lawyers, that she had subsequent to 1981 continued to smoke one of the brands manufactured by Philip Morris, namely Peter Jackson Extra Mild, even though she was, during that period, smoking cigarettes manufactured by other defendants as well. In effect she stated that she smoked between Peter Jackson Extra Mild between 1983 and 1987. When she did smoke them, it might amount to between one to three cigarettes some days "not every day but only rarely". The circumstances in which she did this were when she smoked her husband's cigarettes, these being the brand he smoked. Considerable reliance was placed by the defendant upon the relatively minor

consumption of the first defendant's described cigarettes, particularly when the plaintiff's particulars and answers appeared to indicate that during that period she was smoking perhaps 200 cigarettes or so a week manufactured by the other defendants.

Having regard to the matters of costs and difficulties to which I shall shortly refer, the amendment should not be allowed. It was emphasized in the submissions of counsel for Philip Morris that the whole issue of whether it did make any difference was conjectural. It was put that I ought infer that the failure to put before me any medical evidence that the rare smoking of Peter Jackson Extra Mild in the relevant period was material prompted an inference that it did not, an inference which it was put was a logical and reasonable inference even if no regard was had to the absence of such material. Further, it was said that although as a general rule amendments of this kind might ordinarily be granted, subject to issues of cost and inconvenience to the parties and the Court, the plaintiff did not lose her chance of recovery in respect of that period because she was suing two other defendants in respect of their liability for her smoking their cigarettes. Put another way, there was not lost all chance of recovery.

I note no explanation was put forward in any of the material on behalf of the plaintiff as to why the date was moved back from 1969 to 1968. In the year 1968 the plaintiff was smoking Viscount cigarettes, manufactured by, in effect, a non-party. The argument was advanced by reference to the well-known line of authorities to the effect that amendments would ordinarily be allowed. Unless there was prejudice, whether the prejudice was one that could be remedied by an appropriate order of costs had to be viewed in the light of the unarticulated certainly that costs would be incapable of being recovered. It was strongly submitted that I should conclude that costs would never be recovered against Mrs. Cremona, reliance being placed upon material referred to in the affidavit of Mr. Hobday, the solicitor for the first defendant, concerning efforts to raise money to fund the plaintiff's case, and the divesting by the plaintiff of her only asset, so that she would be without resources accessible by the defendant. Emphasis was placed upon the matters referred to in the affidavit of Mr. Hobday that, in order to

meet the extended case, the first defendant would have to review documents in its possession, and freshly attend to discovery of those that were relevant to its actual knowledge and its constructive knowledge of the risk in the new period. This involved, it was said, massive efforts to locate and analyze the literature available in the public domain related to the period 1981 to 1987, bearing upon the first defendant's constructive knowledge of the risk as well as its actual knowledge leading to the enlargement at great cost of its inquiry from expert and lay witnesses in relation to that period.

The affidavit suggested that there were at least 1,000 articles relevant to the issues published between 1981 and 1987. With respect to the issue of addiction and nicotine in the smoke, it was put that since the plaintiff's allegations about the effects of nicotine appeared, on its pleading, to be founded on the 1988 U.S. Surgeon-General's report, there were 178 journal articles on that aspect alone which post-dated 1981. As to compliance with post-1973 warnings in respect of the additional period, it was said to involve large but necessary enquiries to enable the first defendant to prepare its defence concerning compliance during that period. The same principle was said to attract consideration of the actions of more specific warnings (all within the rubric of failure to warn relied upon by the plaintiff) and of the legislative-regulatory matrix which the first defendant would have to address in respect of the extended period between 1981 and 1987. In Mr. Hobday's estimate, this involves approximately eight to nine thousand additional documents in the possession of the first defendant in order to assess their relevance to the proposed amended case. He estimated that would take six legally qualified staff six weeks to complete although he was not able to predict how many additional documents would need to be discovered. As I understood his affidavit, he was suggesting that his estimate was at the lower end of the likely discovery task.

These matters are obviously of considerable significance not only to the defendant but to the Court. The cost of the necessary defence investigations will be massive. The delays occasioned by such additional preparation upon the commencing

date of the trial will be significant. Perhaps even more significant, the amendments will not only affect the first defendant's defence but will wash over onto the management of the other defendant's cases, as smoking of their cigarettes took place in the relevant period. Allowance of the amendment is bound not only to extend the time for preparation for trial but is also likely substantially to extend the trial time.

The first defendant essentially put the proposition that it was being asked to address a further seven years, with all the actual and constructive knowledge involved, and the issues raised under paragraph 21 of the proposed amended statement of claim. It suggested that another 50 per cent of the investigation, discovery and trial time might be involved.

Mr. Keenan, Q.C., leading counsel for the plaintiff, said the amendment was required because of the distracting capacity to the jury of smoking in this period (even if not extensive and only sporadic) if it were not pleaded. He said it was necessary to explore the full smoking history of Mrs. Cremona because all smoking had an emphysemic effect, what he called the dripping tap effect. He argued the statement of claim raised a question of failure to warn and anything that involved smoking in the period where failure to warn in the appropriate way occurred was a relevant matter.

But I am not convinced by the plaintiff's arguments in this respect. Indeed, I suspect that the reason the plaintiff is seeking to add to the span of years of smoking Peter Jackson Extra Mild is connected with the fear that some such smoking might be unearthed and be attacked as being unpleaded. However, until the plaintiff herself mentioned this relatively minor smoking extension, it was not be likely to play any part in the case at all, particularly having regard to the fact she was smoking other cigarettes during the relevant period. Put another way, in my judgment there is little or no apparent benefit to the plaintiff's case to raise the very low level of smoking to which her affidavit is addressed. On the other hand, the countervailing considerations of prejudice, balancing the defendant's prejudice against plaintiff's prejudice, are massive both in respect of time and cost to the first defendant and time and cost to the other defendants, and time and cost to the Court. There is no doubt there will be

delays in trial commencement and considerable additional expense to all defendants, particularly the first defendant.

I do not ignore that the plaintiff's claim in this case is said to be a test case. I have no doubt that the plaintiff has no resources to meet the first defendant's allowance of costs of this amendment to the pleadings, much less the costs of the trial, if she lost. I accept that the first defendant could not approach the trial on the basis that the matters pleaded, if allowed, are insignificant and could be safely ignored, although my own view is as I have stated. Notwithstanding the apparent peripheral relevance of the matter, the plaintiff is still pressing forward and, for all the defendant knows or I know, the minor smoking in the extended period might develop into a relevant issue. I am bound to say I do not myself believe that this is likely to occur, and perhaps the first defendant does not either. Nevertheless, a prudent course of preparation would be to prepare to repel the same inferences in respect of the extended period as might exist in relation to the already pleaded period. Mr. Hobday's affidavit in paragraphs 15 to 21 closely examines and reproduces admissible material in relation to the plaintiff's smoking history, her instructions to her lawyers and the broader objectives involved in this case, having regard to its test case status.

I have paid close attention to the written submissions on behalf of the plaintiff with respect to the proposed amendment. There would appear to be little dispute between the parties as to the guiding principle that amendments ought to be made if they can be made without injustice to the other side. See Commonwealth v. Verwayen (1990) 170 C.L.R. 394; Cropper v. Smith (1884) 26 Ch.D. 700 at 710-11. The Court of Appeal in Howarth v. Adey (1996) 2 V.R. 525 had occasion to look at issues of amendments to pleadings, prejudice to the parties and the impact of such amendments on the disposition of the Court's business, accepting that an application to amend should ordinarily be allowed provided that any injustice arising to the other party could be compensated by the imposition of terms. Concern about the potential impact of an application to amend on the Court's management and practices should be cautiously approached by me. However, I take the view that the matter as raised in the

affidavit of Mr. Hobday concerning the impact of costs on the first defendant and on trial time, when balanced against the apparently peripheral relevance of the factual content of the proposed amendments, are material matters for me to consider.

In Howarth, the view of the Court was that the discretion of the trial judge had miscarried, that he gave too much emphasis to perceived prejudice likely to flow to the defendant, and insufficient weight to the interests of the plaintiff including the loss of opportunity to present the desired case. Nevertheless, such cases turn upon their own facts.

As there are other defendants whose cigarettes the plaintiff was smoking at the relevant period, the rejection of the amendment does not result in the plaintiff losing her right to make legitimate claims. It was argued before me that the amendment here virtually raised a futile claim. Whether that is putting the matter too high is not necessary to decide because I am of the opinion on the balancing of the rights of either side, that the plaintiff loses very little whereas the first defendant, and to a lesser extent the second and third defendants, will be considerably disadvantaged if the amendment is allowed. The Court will also be substantially inconvenienced.

On balance, for the reasons articulated, I do not propose to allow the proposed amendments to the statement of claim, that is, those amendments proposed by substituting as an amendment in paragraph 5(a) the year "1968" instead of the year "1969"; in 5(b) the date "1987" instead of the date "1981"; and 5(c) the date "1987" instead of the date "1981". The same proposed amendments are disallowed in respect of paragraph 7 (where the dates beyond 1981 were pleaded), paragraph 8, (the same) and all other consequential paragraphical amendments, 12, 15 (insofar as it relates to the first defendant), 16 , 19(a), 20(a), 21(a), 22 (insofar as it extends the first-named defendant's cigarettes to "1987").

CERTIFICATE

I certify that the preceding 7 pages are a true copy of the reasons for judgment of Hedigan, J. of the Supreme Court of Victoria delivered on 13th November 1997.

DATED the 13th day of Nov. 1997.

Associate