A Reflection on the Duty to Warn After Létourneau v JTI-MacDonald: A Future for Obesity Litigation in Canada?

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Diet-related chronic diseases are on the rise in Canada and obesity is leading the charge. Over 60% of Canadian adults and one third of Canadian children are either overweight or obese. In 2011, it was estimated that the economic cost of obesity in Canada ranged from $4.6 billion to $7.1 billion annually. A "maze of policy incoherence" has resulted in a failure to identify strategies to significantly reduce the rates of obesity, with most proposals focused on state-centred solutions like the taxation of sugar-sweetened beverages or mandatory labelling. . But there have also been calls for private law interventions, most commonly, tort litigation. While some scholars argue that tort litigation is an inappropriate public health strategy, others point to tobacco litigation as a model template. Indeed, obesity has been depicted as "the next tobacco" and as the "next big thing" for litigators. In light of this claim, this arrticle

Les maladies chroniques liées à l'alimentation sont en hausse au Canada et l'obésité mène la charge. Plus de 60 % des adultes canadiens et un tiers des enfants canadiens font de l'embonpoint ou sont obèses. En 2011, on a estimé que le coût économique de l'obésité au Canada se situait entre 4,6 et 7,1 milliards de dollars par an. Un « dédale d'incohérences politiques » a empêché d'identifier des stratégies permettant de réduire de manière significative les taux d'obésité, la plupart des propositions étant axées sur des solutions centrées sur l'État , comme la taxation des boissons sucrées ou l'étiquetage obligatoire. Mais des appels ont également été lancés en faveur d'interventions de droit privé, le plus souvent des litiges en matière de responsabilité civile. Alors que certains chercheurs affirment que le litige en responsabilité civile est une stratégie de santé publique inappropriée, d'autres soulèvent le litige en matière

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considers what lessons might be drawn from the Canadian tobacco litigation experience. In particular, it considers how the recent duty to warn case out of Québec, Létourneau v JTI-MacDonald (Létourneau), might shape a future for obesity litigation in Canada. It argues that Létourneau affirms the standard set out in Buchan v Ortho Pharmaceutical, which imposed a positive duty on manufacturers to proactively identify potential risks and harms and sets out criteria for assessing when a warning is sufficiently adequate to facilitate meaningful consumer choice.

de tabac comme un modèle exemplaire. En effet, l'obésité a été décrite comme « le prochain tabac » et comme « la prochaine grande opportunité » pour les avocats plaidants. À la lumière de cette affirmation, cet article examine les leçons que l'on peut tirer de l'expérience canadienne en matière de litiges liés au tabac. En particulier, il examine comment la récente affaire Létourneau c JTI-MacDonald (Létourneau), sur l'obligation d'informer au Québec, pourrait façonner l'avenir des litiges relatifs à l'obésité au Canada. Il soutient que l'affaire Létourneau confirme la norme établie dans l'affaire Buchan c. Ortho Pharmaceutical, qui a imposé aux fabricants une obligation positive d'identifier de manière proactive les risques et les préjudices potentiels et a établi des critères pour évaluer si un avertissement est suffisamment adéquat pour faciliter un choix véritable pour le consommateur.

Introduction

It is widely recognized that diet-related chronic diseases are on the rise, and obesity is leading the charge.[1] Obesity is projected to surpass tobacco use as the leading cause of preventable deaths globally.[2] In 2014, Dr Ng and colleagues estimated that 2.1 billion people were overweight, more than double the worldwide prevalence of 1980,[3] and the World Health Organization indicated that over 650 million adults were obese.[4] The situation has been described as "a tsunami of obesity that will eventually affect all regions of the world."[5] Canada has already been affected. Over 60% of Canadian adults and one third of Canadian children are either overweight or obese,[6] of which one in four adults and one in ten children are clinically obese.[7] In 2011, it was estimated that the economic cost of obesity in Can-

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1 See E Amine et al, *Diet, Nutrition and the Prevention of Chronic Diseases: Report of a Joint WHO/FAO Expert Consultation on Diet* (Geneva: World Health Organization, 2002) at 4–6.

2 See generally Charles H Hennekens & Felicita Andreotti, "Leading Avoidable Cause of Premature Deaths Worldwide: Case for Obesity" (2013) 126:2 Am J Med 97.

3 See Marie Ng et al, "Global, Regional, and National Prevalence of Overweight and Obesity in Children and Adults During 1980–2013: A Systematic Analysis for the Global Burden of Disease Study 2013" (2014) 384 Lancet 766 at 770.

4 "Obesity and Overweight" (1 April 2020), online: *World Health Organization* <www.who.int/mediacentre/factsheets/fs311/en/>.

5 Sonia S Anand & Salim Yusuf, "Stemming the Global Tsunami of Cardiovascular Disease" (2011) 377 Lancet Public Health 529 at 529.

6 See Standing Senate Committee on Social Affairs, Science and Technology, *Obesity in Canada: A Whole-of-Society Approach for a Healthier Canada* (Ottawa: Government of Canada, 2016) at iv, 1; *Obesity in Canada: A Joint Report from the Public Health Agency of Canada and the Canadian Institute for Health Information* (Ottawa: PHAC & CIHI, 2011) at 4, online (pdf): <www.phac-aspc.gc.ca/hp-ps/hl-mvs/oic-oac/assets/pdf/oic-oac-eng.pdf> [perma.cc/7F5F-LMTN] [PHAC & CIHI].

7 According to the Canadian Obesity Network, "clinically obese" suggests that these individuals may "require immediate support in managing and controlling their weight": see "Obesity in Canada" (6 June 2017), online: *Canadian Obesity Network* <www.obesitynetwork.ca/obesity-in-canada> [perma.cc/V82M-F4MC].

ada ranged from $4.6 billion to $7.1 billion annually.[8] There is also a high social cost associated with obesity,[9] particularly for obese individuals who face high rates of discrimination and bias.[10]

It is thus unsurprising that there have been calls for multifaceted policies and interventions to address obesity. However, to date there is insufficient evidence that identified strategies will significantly reduce rates of obesity.[11] Instead, what exists is "a maze of policy incoherence,"[12] where competing policy solutions result in a cacophony of options that serves to confuse policymakers.[13] As governments, international agencies, and public health organizations grapple with how to address obesity, it has been recognized that some action must be taken in order to prevent the situation from getting worse.[14]

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8 See PHAC & CIHI, *supra* note 6 at 29.

9 See e.g. Kelly D Brownell, "The Chronicling of Obesity: Growing Awareness of its Social, Economic, and Political Contexts" (2005) 30:5 J Health Pol Pol'y & L 955.

10 See Ximena Ramos-Salas, "The Ineffectiveness and Unintended Consequences of the Public Health War on Obesity" (2015) 106:2 Can J Public Health e79 at e80.

11 See Timothy Caulfield & Nola M Ries, "Obesity Policy: The Way Forward" (2014) 22:3 Health L Rev 28 at 28, citing Ng, *supra* note 3. See also Christina A Roberto et al, "Patchy Progress on Obesity Prevention: Emerging Examples, Entrenched Barriers, and New Thinking" (2015) 385 Lancet 2400 at 2400.

12 Neil Seeman & Patrick Luciani, *XXL: Obesity and the Limits of Shame* (Toronto: University of Toronto Press, 2011) at 64.

13 See T Lang & G Rayner, "Overcoming Policy Cacophony on Obesity: An Ecological Public Health Framework for Policymakers" (2007) 8 Obes Rev (Supplement 1) 165 at 166.

14 See Helen L Walls et al, "Public Health Campaigns and Obesity - A Critique" (2011) 11 BMC Public Health 136 at 4, online: *BioMed Central* <www.biomedcentral.com/1471-2458/11/136> [perma.cc/2TFA-LA3X]. Some suggest that obesity rates have plateaued: see e.g. Nadeem Esmail with Patrick Basham, "Obesity in Canada: Overstated Problems, Misguided Policy Solutions" (2014), online (pdf): *Fraser Institute* <www.fraserinstitute.org/sites/default/files/obesity-in-canada.pdf> [perma.cc/86YH-5HA4]. However, Roberto et al note that the positive changes "mainly stem from a flattening of childhood obesity … where rates [are] already high" (*supra* note 11 at 2400).

Many scholars and public health officials have called for more drastic uses of domestic and international law to combat obesity.[15] By and large, the vast majority of attention has been given to the role of the state. For example, there have been calls for the taxation of sugar-sweetened beverages,[16]

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[15] See e.g. Nola M Ries & Barbara von Tigerstrom, "Legal Interventions to Address Obesity: Assessing the State of the Law in Canada" (2011) 43:2 UBC L Rev 361 [Ries & von Tigerstom, "Legal Interventions"]; Nola M Ries, "Piling on the Laws, Shedding the Pounds? The Use of Legal Tools to Address Obesity" (2008) Health LJ 101 at 126 [Ries, "Piling on the Laws"]; Michelle Mello, "Legal and Policy Approaches to the Obesity Epidemic" (2012) 8:5 Surg Obes Relat Dis 507; Jennifer L Pomeranz et al, "Innovative Legal Approaches to Address Obesity" (2009) 87:1 Milbank Q 185 at 206–07; James G Hodge Jr, Andrea M Garcia & Supriya Shah, "Legal Themes Concerning Obesity Regulation in the United States: Theory and Practice" (2008) 5 Aust New Zealand Health Policy; Robyn Martin, "The Role of Law in the Control of Obesity in England: Looking at the Contribution of Law to a Healthy Food Culture" (2008) 5 Aust New Zealand Health Policy; Boyd A Swinburn, "Obesity Prevention: The Role of Policies, Laws and Regulations" (2008) 5 Aust New Zealand Health Policy; Lawrence O Gostin, "Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity" (2007) 297:1 JAMA 87 at 88; Roger S Magnusson, "What's Law Got To Do With It? Part I: A Framework for Obesity Prevention" (2008) 5 Aust New Zealand Health Policy; Roger S Magnusson, "What's Law Got to Do With It? Part II: Legal Strategies for Healthier Nutrition and Obesity Prevention" (2008) 5 Aust New Zealand Health Policy; Jess Alderman et al, "Application of Law to the Childhood Obesity Epidemic" (2007) 35:1 JL Med & Ethics 90; Edward P Richards et al, "Innovative Legal Tools to Prevent Obesity" (2004) 32:4 JL Med & Ethics (Special Supplement) 59; Richard A Daynard, "Legal Approaches to the Obesity Epidemic" (2003) 13:5 CP Rev 154.

[16] See Barbara von Tigerstrom, "Taxing Sugar-Sweetened Beverages for Public Health: Legal and Policy Issues in Canada" (2012) 50:1 Alta L Rev 37; Nola M Ries, "Legal and Policy Measures to Promote Healthy Behaviour: Using Incentives and Disincentives to Control Obesity" (2012) 6:1 McGill JL & Health 1 at 17–26; Nicole L Novak & Kelly D Brownell, "Taxation as Prevention and as a Treatment for Obesity: The Case of Sugar-Sweetened Beverages" (2011) 17:12 Curr Pharm Des 1218.

mandatory menu labelling,[17] prohibitions against certain ingredients,[18] and the modification of zoning by-laws to alter food environments.[19] But there have also been calls for private law interventions, most commonly, tort litigation.[20] Tort litigation is often presented as part of a broader, multi-faceted strategy that can be used to compliment other regulatory action.[21]

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17 See Barbara von Tigerstrom, "Food Labelling Regulation to Promote Healthy Eating" (2011) 20:1 Health L Rev 18 at 18–19; Barbara von Tigerstrom & Tristan Culham, "Food Labelling for Healthier Eating: Is Front-of-Package Labelling the Answer?" (2009) 33:1 Man LJ 89 at 100; Ries, "Piling on the Laws", *supra* note 15 at 114–17; Jennifer L Pomeranz & Kelly D Brownell, "Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws" (2008) 98:9 Am J Public Health 1578.

18 See Nola M Ries, "Food, Fat and the Law: A Comment on Trans Fat Bans and Public Health" (2007) 23 Windsor Rev Legal Soc Issues 15.

19 See Marice Ashe et al, "Land Use Laws and Access to Tobacco, Alcohol, and Fast Food" (2007) 35:4 JL Med & Ethics (Special Supplement) 60 at 60; Julie Samia Mair, Matthew W Pierce & Stephen P Teret, "The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity" (October 2005), online (pdf): *The Centers for Law and the Public's Health* <www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf> [perma.cc/GNE2-KNZY].

20 See Richard A Daynard, P Tim Howard & Cara L Wilking, "Private Enforcement: Litigation as a Tool to Prevent Obesity" (2004) 25:3 J Public Health Policy 408; Michelle M Mello, Eric B Rimm & David M Studdert, "The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity" (2003) 22:6 Health Aff 207 at 212; Jeremy H Rogers, "Living on the Fat of the Land: How to Have Your Burger and Sue it Too" (2003) 81:3 Wash ULQ 859; Ashley B Antler, "The Role of Litigation in Combating Obesity Among Poor Urban Minority Youth: A Critical Analysis of *Pelman v McDonald's Corp*" (2009) 15:2 Cardozo JL & Gender 275; Jason A Smith, "Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity" (2006) 28:3 U Ark Little Rock L Rev 443.

21 For example, Gostin identifies tort law as "a strategy complementary to direct regulation," in situations "[w]here direct regulation through the political process fails": Lawrence Gostin, *Public Health Law: Power, Duty, Restraint*, 2nd ed (New York: Milbank Memorial Fund, 2008) at 202. See also WE Parmet & RA Daynard, "The New Public Health Litigation" (2000) 21 Annu Rev Public Health 437; Peter D Jacobson & Soheil Soliman, "Litigation as Public Health Policy: Theory or Reality?" (2002) 30:2 JL Med & Ethics 224; Wendy E Parmet, "Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy" (1999) 36:5 Hous L Rev 1663; Peter D

The use of tort litigation to advance public health is not without controversy.[22] For example, some scholars argue that litigation is an unjustified and inappropriate solution for addressing public health problems such as obesity[23] and that, at best, the gains promised through litigation are "unsubstantiated and speculative."[24] Nevertheless, many contend that obesity litigation holds some promise, particularly given the perceived success of tobacco litigation.[25] While it is beyond the scope of this paper to thoroughly

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Jacobson & Kenneth E Warner, "Litigation and Public Health Policy Making: The Case of Tobacco Control" (1999) 24:4 J Health Pol Pol'y L 769; Timothy D Lytton, "Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation" (2004) 32:4 JL Med & Ethics 556.

22 See Roger Brownsword, "Public Health, Private Right, and the Common Law" (2006) 120 Public Health (Supplement 1) 42. See also Jacobson & Soliman, *supra* note 21; Arthur B LaFrance, "Tobacco Litigation: Smoke, Mirrors and Public Policy" (2000) 26 Am J L & Med 187.

23 See Theodore H Frank, "A Taxonomy of Obesity Litigation" (2006) 28:3 U Ark Little Rock L Rev 427 at 429; Joseph P McMenamin & Andrea D Tiglio, "Not the Next Tobacco: Defenses to Obesity Claims" (2006) 61:3 Food & Drug LJ 445; Sarah Taylor Roller, Theodore Voorhees Jr & Ashley K Lunkenheimer, "Obesity, Food Marketing and Consumer Litigation: Threat or Opportunity?" (2006) 61:3 Food & Drug LJ 419; Richard C Ausness, "Tell Me What You Eat, and I Will Tell You Whom to Sue: Big Trouble Ahead for 'Big Food'?" (2005) 39 Ga L Rev 839 at 843.

24 Roller, Voorhees & Lunkenheimer, *supra* note 23 at 429. Even those supportive of the use of law to address obesity consider litigation a "wild card": WA Bogart, "Law as a Tool in 'The War on Obesity': Useful Interventions, Maybe, But, First, What's the Problem?" 2013 41:1 JL Med & Ethics 28 at 35.

25 See e.g. Jada J Fehn, "The Assault on Bad Food: Tobacco-Style Litigation as an Element of the Comprehensive Scheme to Fight Obesity" (2012) 67:1 Food & Drug LJ 65 at 66–67; Richard A Daynard, "Lessons from Tobacco Control for the Obesity Control Movement" (2003) 24:3–4 J Public Health Policy 291 at 294; Jess Alderman & Richard A Daynard, "Applying Lessons from Tobacco Litigation to Obesity Lawsuits" (2006) 30:1 Am J Prev Med 82; Brooke Courtney, "Is Obesity *Really* the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation" (2006) 15:1 Ann Health L 61; Kelly D Brownell & Kenneth E Warner, "The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?" (2009) 87:1 Milbank Q 259 at 266–267, 286; John J Zefutie Jr, "From Butts to Big Macs—Can the Big Tobacco Litigation and Nation-Wide Settlement with States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?" (2004) 34:4 Seton Hall L Rev

review tobacco litigation,[26] obesity has been depicted as "the next tobacco"[27] and as the "next big thing" for litigators.[28] In light of this claim, this article considers what lessons might be drawn from the Canadian tobacco litigation experience. In particular, it considers whether the recent duty to warn case out of Québec, *Létourneau v JTI-MacDonald*[29] (*Létourneau*), might signal a future for obesity litigation in Canada.

This article proceeds in five parts. Part one provides an introduction to the duty to warn. This will be followed in part two with a review of *Buchan v Ortho Pharmaceutical*[30] (*Buchan*), a leading case from the Ontario Court

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1383; Jonathan S Goldman, "Take That Tobacco Settlement and Super-Size It!: The Deep-Frying of the Fast Food Industry?" (2003) 13 Temp Pol & Civ Rts L Rev 113.

[26] For a review of tobacco litigation see Stephen E Smith, "'Counterblasts' to Tobacco: Five Decades of North American Tobacco Litigation" (2002) 14:1 Windsor Rev Legal Soc Issues 1; Robert L Rabin, "The Tobacco Litigation: A Tentative Assessment" (2001) 51:2 DePaul L Rev 331; LaFrance, *supra* note 22; Victor Han, "The History of Tobacco Litigation" (1988) Burson-Marsteller Position Paper, online: <www.industrydocuments.library.ucsf.edu/tobacco/docs/kpvm0105> [perma.cc/2NE2-ELZ5]; Martha A Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics*, 3rd ed (Washington, DC: CQ Press, 2012). For a discussion of tobacco control in Canada, see Barbara von Tigerstrom, "Tobacco Control and the Law in Canada" in Tracey M Bailey, Timothy Caulfield & Nola M Ries, eds, *Public Health Law & Policy in Canada*, 3rd ed (Markham, ON: LexisNexis, 2013) 323 [von Tigerstrom, "Tobacco Control"].

[27] Brownell & Warner, *supra* note 25. See also Joanna Blythman, "The New Tobacco" (2004) 34:9 Ecologist 17; Sarah Avery, "Is Big Fat the Next Big Tobacco?" *The News & Observer* (18 August 2002) A25; Shelley Branch, "Obese America: Is Food the Next Tobacco?" *Wall Street Journal* (13 June 2002) B1; Lee J Munger, "Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Epidemic" (2004) 3:2 Conn Pub Intl LJ 456.

[28] Andrew M Dansicker, "The Next Big Thing for Litigators" (2004) 37:4 Maryland Bar J 12 at 14. See also Franklin E Crawford, "Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability" (2002) 63 Ohio St LJ 1165 ("[t]he history of tobacco litigation is the future of the fast food industry" at 1169).

[29] 2015 QCCS 2382 [*Létourneau*], aff'd 2019 QCCA 358.

[30] [1986] 25 DLR (4th) 658, 35 CCLT 1 (ONCA) [*Buchan* cited to DLR].

of Appeal on the adequacy of warnings. *Buchan*, which was affirmed by the Supreme Court of Canada in *Hollis v Dow Corning Corp*[31], clearly articulates that manufacturers have a positive duty to proactively identify potential risks and harms, and sets out specific criteria for assessing when a warning is sufficiently adequate to facilitate meaningful consumer choice.[32] This is discussed as the "*Buchan* standard". Part three then examines the history of tobacco litigation in Canada prior to *Létourneau*. With this backdrop, part four considers how Justice Riordan of the Superior Court of Québec addressed the adequacy of the warnings provided by tobacco companies in *Létourneau*. The focus of this paper is on Justice Riordan's decision, although it does consider the Court of Appeal of Québec's decision. Part five concludes by considering what the decision in *Létourneau* might mean for the future of obesity litigation in Canada. This article will argue that *Létourneau* affirms the standard set out in *Buchan* in concrete terms by assessing the actions of the defendant tobacco companies. It raises important questions about how this standard of adequacy of warning might be applied in future duty to warn cases, and what it might mean for obesity litigation.[33]

I. The Duty to Warn

When discussing obesity litigation, the example that comes to mind for most people is the infamous "McLawsuit,"[34] *Pelman v McDonald's Corp*[35] (*Pelman*). *Pelman* was a suit brought in New York by two teenagers who claimed that eating at McDonald's had caused them to become obese. Despite ultimately rejecting the plaintiff's claim that McDonald's owed a duty

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31 [1995] 4 SCR 634 at para 47, 129 DLR (4th) 609 [*Hollis*].

32 *Buchan*, *supra* note 30 at para 18.

33 *Létourneau* adds to this jurisprudence in several respects. Given the multitude of issues that Justice Riordan considered in his judgment – and the length of his judgment, which is 1253 paragraphs – it is not possible to review all aspects of *Létourneau* that are relevant for the duty to warn. This article will focus on a specific aspect of the judgment – namely, the adequacy of the warnings provided by the tobacco companies. Similarly, the Court of Appeal decision goes beyond consideration of the duty to warn – and is itself a lengthy case, at 1285 paragraphs. For the purposes of this article, the focus is on the discussion about the duty to warn.

34 Mello, Rimm & Studdert, *supra* note 20.

35 237 F Supp 2d 512 (SDNY 2003) [*Pelman*].

to warn about the dangers inherent in its products,[36] in a "highly unusual move,"[37] Judge Sweet suggested how the plaintiffs might amend their claim in his decision to grant McDonald's motion to strike. He suggested the plaintiffs could allege that McDonald's foods were so unhealthy that either they would fall outside of the reasonable expectations of consumers, for example by being highly processed, or they would be dangerous in their intended use. Speaking to the first, Judge Sweet observed, "[i]f plaintiffs were able to flesh out this argument in an amended complaint, it may establish that the dangers of [McDonald's] products were not commonly well known and thus that [McDonald's] had a duty to customers."[38] The plaintiffs did not heed Judge Sweet's advice, and never raised these arguments.[39] Judge Sweet ultimately dismissed the plaintiff's amended claim, observing that he had "laid out in some detail the elements that a properly pleaded complaint would need to contain" and that the plaintiffs had simply failed to follow his guidance.[40] While the case did find some traction at the Second Circuit of

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[36] Judge Sweet notes that the plaintiffs failed to establish that the dangers in McDonald's products went beyond that which was "open and obvious" to a reasonable consumer (see *ibid* at 541).

[37] Matthew T Salzmann, "More Than a Fat Chance For Lard Litigation: The Viability of State Medicaid Reimbursement Actions" (2004) 56:4 Rutgers L Rev 1039 at 1052. It is commonly asserted that Judge Sweet essentially laid out a "roadmap" for the amended claim. See Alyse Meislik, "Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry" (2004) 46:4 Ariz L Rev 781 at 793; Forrest Lee Andrews, "Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry" (2004) 15 Alb LJ Sci & Tech 153 ("the *Pelman* opinion set forth the framework for a potentially successful claim" at 175).

[38] *Pelman*, *supra* note 35 at 536. Judge Sweet describes Chicken McNuggets™ as a "McFrankenstein" creation that an individual would not recreate at home, and observes: "[i]t is at least a question of fact as to whether a reasonable consumer would know – without recourse to the [McDonald's] website – that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger" (*Pelman*, *supra* note 35 at 535).

[39] See Caleb E Mason, "Doctrinal Considerations for Fast-Food Obesity Suits" (2004) 40:1 Tort Trial & Ins Prac LJ 75 at 81; William B Werner, Andrew Hale Feinstein & Christian E Hardigree, "The Risk to the American Fast-Food Industry of Obesity Litigation" (2007) 48:2 Cornell Hotel & Restaurant Administration Q 201 at 203.

[40] *Pelman v McDonald's Corp*, 2003 WL 22052778 at 14, 2003 US Dist LEXIS 15202 (SDNY 2003).

the Court of Appeals,[41] ultimately the trial "ended with a whimper"[42] when the court refused to certify the class action in 2010.[43] Despite the court's rejection of the plaintiffs' claim in *Pelman*, the court seemed to identify the duty to warn as a promising avenue to pursue in future obesity litigation.

The duty to warn is an obligation imposed on manufacturers under product liability law.[44] The "cornerstone" of product liability law is the concept of a defect.[45] In order for liability to arise, a product must be defective in some way. The Ontario Law Reform Commission suggested that the concept of a defect "cannot be defined except in terms of what it was reasonable to expect of the product in all the circumstances."[46] A defect indicates that a

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41 In January 2005, the Second Circuit Court of Appeals surprised many by vacating the dismissal of the case. It remanded the case only for the purpose of considering the plaintiffs' claims about deceptive advertising. This was not a resounding victory or loss for either side since the court only reversed the dismissal on the grounds that the amended complaint set out the minimal requirements. See *Pelman v McDonald's Corp*, 396 F (3d) 508 at 511–12 (2nd Cir 2005). The court denied McDonald's motion to strike the claim, while also striking part of the plaintiff's claim. See *Pelman v McDonald's Corp*, 452 F Supp (2d) 320 (SDNY 2006).

42 Caroline Forell, "McTorts: The Social and Legal Impact of McDonald's Role in Tort Suits" (2011) 24:2 Loy Consumer L Rev 101 at 146

43 See *Pelman v McDonald's Corp*, 272 FRD 82 (SDNY 2010). In 2011, the plaintiffs voluntarily dismissed their suit. See *Pelman v McDonald's Corp*, 2011 WL 1230712 (SDNY 2011) (stipulation of voluntary dismissal with prejudice), cited in Lawrence O Gostin & Lindsay F Wiley, *Public Health Law: Power, Duty, Restraint* (Oakland: University of California Press, 2016) at 693.

44 James Cassels & Craig Jones, *The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (Toronto: Irwin Law, 2005) at 1. See also Douglas Harrison, *The Law of Product Warnings and Recalls in Canada* (Markham: LexisNexis, 2013) at 5. Harrison points out, however, that there are other potential claims involving warnings, such as fraudulent misrepresentations.

45 Lawrence G Theall et al, *Product Liability: Canadian Law and Practice* (Aurora, ON: Cartwright Group, 2010) at L1-8.

46 Ontario Law Reform Commission, *Report on Products Liability* (Ontario: Ministry of the Attorney General, 1979) at 13, cited in *Holt v PPG Industries Canada Ltd* (1983), 25 CCLT 253 at 264, [1983] AJ No 191 (QB).

product is in some way substandard or unreasonably dangerous to a user.[47] Defects generally fall into one of three categories: defective design, defective manufacturing, and defective warning.[48]

A design is considered defective when a product is unduly dangerous because of the way the manufacturer designed it. Manufacturers have a duty of care when designing a product to "avoid safety risks and to make the product reasonably safe for its intended purposes."[49] This obligation includes ensuring that the product's design is "crashworthy."[50] This means that manufacturers need to consider the foreseeable accidents or misuses of their products, and need to adequately test the design to safeguard against known risks.[51] Manufacturing defects are said to occur when a product

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47 The language of "unreasonably dangerous" is from *Restatement (Second) of Torts* §402A (1965).

48 See Cassels & Jones, *supra* note 44 at 32. See also Theall et al, *supra* note 45 at L1-8, who note that there is a fourth category, breach of warranty, which is based on contract law. *Arora v Whirlpool Canada Ltd* also identifies a fourth category: "manufacturers have a duty of care to compensate consumers for the cost of repairing a dangerous product that presents a real and substantial danger" (2012 ONSC 4642 at para 264 [*Arora*]).

49 *Goodridge v Pfizer Canada Inc*, 2010 ONSC 1095 at para 81 [*Goodridge*]; *Arora*, *supra* note 48 at para 264.

50 *Gallant v Beitz* (1983), 42 OR (2d) 86 at 90, 148 DLR (3d) 52 (HCJ). See also Theall et al, *supra* note 45 at L2-5.

51 See *LeBlanc v Marson Canada* (1995),139 NSR (2d) 309 at para 18, [1995] NSJ No 140 (SC). Manufacturers are not expected to be able to forecast all dangers, which would essentially raise the duty to that of an insurer. See *Lem v Barotto Sports Ltd*, [1976] 69 DLR (3d) 276 at 288, 1 CCLT 180 (Alta SC) [*Lem*]. Manufacturers are expected to foresee risks identifiable according to the "state of the art" at the time of the design. For a further discussion about "state of the art", see Dean F Edgell, *Product Liability Law in Canada* (Toronto: Butterworths, 2000) at 27–30; Theall et al, *supra* note 45 at L6-12–L6-14. Waddams suggests medical drugs are a good example of how this can apply: "A drug thought by everyone to be safe may turn out to be dangerous, but at the time of manufacture and distribution it may be that the best medical opinion could not have foreseen the danger. In such a case there would be no defence in a strict liability jurisdiction, but there might be a defence in a jurisdiction that requires proof of negligence" (Stephen Waddams, *Products Liability*, 5th ed (Toronto: Carswell, 2011) at 74).

"fail[s] to conform to their intended … specifications."[52] Such is the case when a foreign object is found in a food product.[53] Of these two categories, design defects carry the greater liability risk[54] while manufacturing defects are more likely to occur.[55]

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[52] Cassels & Jones, *supra* note 45 at 32. See also *Donoghue v Stevenson*, [1932] UKHL 100, [1932] AC 562 at 595 [*Donoghue*]; *Arora*, *supra* note 49 at para 264 and *Goodridge*, *supra* note 50 at para 81.

[53] There are numerous Canadian cases on point. For example, there have been cases dealing with a fly in a water bottle (*Mustapha v Culligan of Canada Ltd*, 2008 SCC 27), a dead mouse in a coke bottle (*Mathews v Coca-Cola Company of Canada Ltd*, 2 DLR 355 at 356, [1944] OR 207 (CA)), maggots in chocolate biscuits (*Farmer v Interbake Foods Ltd* (1981), 49 NSR (2d) 111 at 112, 12 ACWS (2d) 392 (SC(TD))), a piece of a hypodermic needle in a flank steak (*Kean v Sobey's Inc* (1997), Nfld & PEIR 27 at 28, ACWS (3d) 23 (Nfld SC(TD))), and shards of glass found in chocolate milk (*Shandloff v City Dairy Ltd*, [1936] 4 DLR 712 at 712–13, [1936] OR 579 [*Shandloff*]), bread (*Arendale v Canada Bread Co Ltd*, [1941] 2 DLR 41 at 42, [1941] OWN 69, (CA) [*Arendale*]), and a soft drink (*Zeppa v Coca-Cola Limited*, [1955] OR 855 at 859, 1955 CanLII 160 (CA) [*Zeppa*]). These are not the only type of manufacturing defect cases that involve food products. See e.g. *Mayburry v Ontario (Liquor Control Board)*, [2001] OJ No 1494 (QL) at para 2, [2001] OTC 271 (Sup Ct), aff'd 163 OAC 192, 2002 CanLII 53276 (in which the court held a manufacturer liable for damages that arose when a bottle of alcohol exploded, and glass fragments injured the plaintiff).

[54] See *Goodridge*, *supra* note 49 ("[l]iability for a blameworthy design has greater scope than the liability for a defective product because a defective product may be a single aberration, but a design defect extends to all of the products manufactured with that chosen design" at para 87).

[55] When a manufacturing defect does occur, "the inference of negligence is practically irresistible" (*McMorran v Dominion Stores Ltd* (1976), [1977] 74 DLR 186 at 191, 14 OR (2d) 559). See also *Goodridge*, *supra* note 49 at para 82; *Arendale*:

> [W]hen one manufactures for human consumption, any article, fluid or solid, he putting it on the market gives an implied warranty that it contains no deleterious substance; and that if the ultimate consumer is injured by the presence of such deleterious substance he is entitled to damages unless the manufacturer proves that it was there introduced by some agency, other than his own – in other words he must prove that this deleterious article did not obtain entrance through his act or negligence but that of some other. The onus is on the manufacturer so to prove (*supra* note 54 at 41).

The final category, defective warning, is a relatively new area of tort law – at least as presently understood.[56] The basic underlying rationale for the duty to warn is that consumers rely on manufacturers to provide accurate information about the risks inherent in the use of their products.[57] As Justice La Forest held in *Hollis*, "[t]he duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product."[58] The duty exists to overcome knowledge disparities in the "relationship of reliance" between manufacturer and consumers.[59] Given that manufacturers have a self-interest in promoting their products, they may exaggerate the benefits or not disclose the risks associated with the use of the product.[60] Requiring warnings alerts consumers to the risks associated with using a product, allowing them to make informed choices. When an adequate warning is provided, it acts as a bar to recovery for the risks a consumer knowingly takes.[61] A defective warning occurs when a manufacturer has knowledge, or ought to have knowledge, of an inherent danger of a product but fails to provide this information to the consumer.

The leading duty to warn case in Canada is *Lambert v Lastoplex Chemicals Co*.[62] *Lambert* purchased a fast-drying lacquer sealer that he applied to a parquet floor in his basement. The can of lacquer had three caution notices instructing the use to keep the product away from open flames.[63] Despite

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56 Theall et al, *supra* note 45 at L1-4 point out that *Ross v Dunstall*, [1921] 62 SCR 393, 63 DLR 63 is an early duty to warn case as the court held that the manufacturer had a duty to warn purchasers of the dangers of rifle firing when an unlocked bolt appeared to be locked.

57 See *Hollis*, *supra* note 31 at para 21.

58 *Ibid* at para 21.

59 See *ibid*.

60 See *ibid* at para 46.

61 As Cassels & Jones, *supra* note 45 at 48, have written, "The essence of the duty to warn is the concept of an individual's responsibility for his or her own conduct. Inseparable from the idea of fault-based liability is the idea that one should not be able to recover for a risk knowingly taken".

62 [1972] SCR 569, 25 DLR (3d) 121 [*Lambert* cited to SCR]. *Per Dickson v Broan-NuTone Canada Inc*, [2007] OJ No 5114 (QL) at para 30, 2007 CarswellOnt 9931, "the leading statement on the duty to warn remains … *Lambert.*"

63 For the court's assessment of the warnings, see *Lambert*, *supra* note 63 at 573.

these warnings, *Lambert* did not extinguish the pilot lights on his furnace or water heater. While *Lambert* neared the end of the project, a line of flame advanced across the floor and caused an explosion when it reached the open can of sealer, resulting in property damage and burns to *Lambert*. The Supreme Court of Canada found the manufacturer liable for failing to provide an adequate warning. The Court held there was a duty to provide explicit warnings commensurate with the level of danger that an ordinary consumer would encounter when using the product in the intended way. In this case, the Court unanimously agreed that the three existing warnings lacked the explicitness required.[64] Moreover, the Court held that manufacturers cannot simply pass on the risk of injury to consumers for dangers that the manufacturer is aware of, even if said injuries arise in the ordinary course of use.[65] This standard is heightened when a product is intended for human consumption.[66] The leading case on point is *Hollis*, where the Supreme Court of Canada recognized that products that are ingested, consumed, or placed in the body, necessarily require a high standard of care given that their "great capacity to cause injury to consumers" renders a plaintiff immediately vul-

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64 See *ibid* ("[a] home owner preparing to use that lacquer sealer could not reasonably be expected to realize by reading the three cautions that the product when applied as directed gives off vapours to such a degree as likely to create a risk of fire from a spark or from a pilot light in another part of the basement area" at 125).

65 Specifically, the Court stated:

> Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use. Their duty does not, however, end if the product, although suitable for the purposes for which it is manufactured and marketed, is at the same time dangerous to use; and if they are aware of its dangerous character they cannot, without more, pass the risk of injury to the consumer (*ibid* at 124–25).

66 See Cassels & Jones, *supra* note 44 at 23. Interestingly, the authors note this high standard exists for "manufacturers of inherently dangerous products or products designed for human consumption." This suggests that they consider products to be consumed and inherently dangerous products to be equivalent, or at least to impose the same obligation on manufacturers.

nerable.[67] According to *Hollis*, this heightened expectation for disclosure of risks protects public health and increases consumer choice.[68]

One of the challenges in failure to warn claims is determining what level of knowledge is necessary before a consumer can be said to have voluntarily assumed the risk.[69] According to *Hollis*, the requirement is for manufacturers to provide consumers with "clear, complete and current" information, and to do so on an ongoing and continuous basis.[70] Moreover, manufacturers are required to warn consumers about foreseeable misuses of a product.[71] In order for a consumer to have adequate information, a warning needs to be sufficient to substantially reduce the danger level and presented in a manner that a consumer would notice.[72] While the precise requirements of warnings are made on a case-by-case basis,[73] as with general negligence claims, foreseeability of harm is considered a touchstone for determining what constitutes reasonable care. Lem held that foreseeability limits liability in duty to warn cases to "dangers that are known or ought reasonably to be known to the manufacturer in the use of his product, which is to say dangers that are reasonably foreseeable."[74] At present, the trend is for manufacturers to

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67 See *Hollis*, *supra* note 31 at para 23. Although *Hollis* specifically contemplates medical products (silicone breast implants), the principle can easily be extrapolated to food products. See Cassels & Jones, *supra* note 44 at 23.

68 See *Hollis*, *supra* note 31 at para 26.

69 See Cassels & Jones, *supra* note 44 at 49.

70 See *Hollis*, *supra* note 31 at para 26.

71 Manufacturers are required to warn about dangers that "might arise out of reasonably foreseeable fault on the part of the purchaser in its contemplated use" (*Lem*, *supra* note 51 at para 22). See also Cassels & Jones, *supra* note 44 at 50.

72 In addition to the case law discussed in this section (e.g. *Lambert*, *supra* note 63), see Jane Stapleton, *Product Liability* (Toronto: Butterworths, 1994) at 253 who points out that a plaintiff should have to prove that "warning was feasible" and "that it would have attracted the attention of a relevant party so that injury could and would have been avoided."

73 See Alvin S Weinstein et al, *Products Liability and the Reasonably Safe Product: A Guide for Management, Design, and Marketing* (Toronto: John Wiley & Sons, 1978) at 25, stating, "It is the court that must make a threshold decision on whether in any case the danger level and the nature of product use are such that society ought to consider the imposition of safety features."

74 *Lem*, *supra* note 51 at 287. See also *Deshane v Deere & Co*, [1993] 15 OR (3d)

provide warnings.[75] However, a warning on its own is not sufficient – as *Lambert* clearly demonstrates.[76] The obligation on manufacturers is to provide adequate warnings. The Ontario Court of Appeal in *Buchan* articulated clear guidance on when a warning will be considered adequate.

II. The *Buchan* Standard: Adequacy of Warnings

In August 1971, Pauline Buchan was 23 years old when she started taking Ortho-Novum 1/50, a contraceptive pill manufactured and distributed by Ortho Pharmaceutical. On 11 September, after taking the pills for just under six weeks, she suffered a stroke. The stroke left Mrs. Buchan disabled, with paralysis of her left arm and leg, and caused brain damage.[77] Justice Holland, for the Ontario High Court of Justice, found that there was a "tendency, and a clear association" between oral contraceptive use and stroke, even though the "exact mechanism" remained unknown.[78] Accepting that only a "small percentage of users will sustain serious complications from taking oral contraceptives," Justice Holland nevertheless found the oral contraceptives to be dangerous, and that there was thus a "high duty to warn the consumer of the danger."[79] Justice Holland found that Mrs. Buchan's stroke was "caused or materially contributed to by taking oral contraceptives manufactured by Ortho," that Ortho "was negligent in failing to

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225 at 233, [1993] OJ No 2233 (QL) (CA) (the dissenting opinion argued that a manufacturer might have to warn about foreseeable modification of a product).

75 Weinstein et al offer an explanation for this trend, noting that "[s]ince warnings are relatively inexpensive and require no major redesigning of the product, the natural tendency of manufacturers is to *warn* against rather than *redesign* against a foreseeable danger" (*supra* note 66 at 40). The authors further clarify that "[w]arnings are an apparently inexpensive mode of dealing with risks that cannot be designed out of a product without adding substantially to its costs or otherwise affecting its utility" (*ibid* at 62).

76 *Lambert*, *supra* note 63.

77 *Buchan v Ortho Pharmaceutical (Canada) Ltd*, [1984] 8 DLR (4th) 373, [1984] OJ No 3181 (QL) (HCJ), [*Buchan* H Ct J cited to DLR].

78 *Ibid* at 382.

79 *Ibid* at 386.

warn Mrs. Buchan directly and indirectly," and that "[t]his failure to warn was causative of Mrs. Buchan's injuries."[80]

In his decision, Justice Holland rejected the notion that adherence to the legislative requirements, in this case imposed by the Food and Drugs Act[81], shields the manufacturer from a responsibility to warn consumers directly.[82] Such legislative requirements, he contended, are minimums.[83] Justice Holland also held that warning physicians did not discharge the burden on manufacturers to warn the consumer directly,[84] although he did recognize that "[a]ctual knowledge of the risks by the doctor would break the chain of causation."[85] In this instance, he determined that the manufacturer had not adequately warned the prescribing physician.[86] As a result, Mrs. Buchan was not adequately warned. Had she been properly warned of the risks, she stated she would not have taken the oral contraceptive, a claim Justice Holland found to be credible.[87]

In reaching this conclusion, Justice Holland applied a subjective test, which was a departure from the objective test used in medical malpractice claims set out prior to *Reibl v Hughes* (*Reibl*).[88] In *Reibl*, the Supreme Court of Canada recommended a modified approach to the reasonable person test, given the barriers that an objective test posed to patients.[89] Specifically, the Court asked what a reasonable person in the plaintiff's position would have

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80 *Ibid* at 410.

81 RSC 1970, c F-27.

82 See *Buchan* H Ct J, *supra* note 78, at 393–95. Specifically, at 395, Justice Holland held, "The Act does not … replace the common law duty to warn."

83 See *ibid* at 397.

84 See *ibid* at 393.

85 *Ibid* at 407.

86 See *ibid* at 400.

87 See *ibid* at 401–04. Justice Holland thought Mrs. *Buchan* to be credible and refers to her testimony that she avoids risky behaviours and was careful about her health, which led her to avoid harmful things such as smoking, at 404.

88 *Ibid* at para 404–05, citing *Reibl v Hughes*, [1980] 2 SCR 880 at 898–99, 114 DLR (3d) 1 [*Reibl*].

89 See *Reibl*, *supra* note 89 at 898.

done. According to Justice Holland, however, there is a distinct difference between medical malpractice and product liability suits. Whereas patients will generally follow the advice of his or her doctor, there is no "intimate relationship between the manufacturer and the ultimate consumer."[90] Because the consumer is capable of making a fully informed decision, they have a right to be informed of all the risks.[91] Justice Holland contended that if the *Reibl* test were to be applied, this would require the plaintiff to determine what a reasonable person in the plaintiff's situation would have done. Not only would this impose on the plaintiff "a difficult evidentiary burden," it would "render the duty to warn meaningless."[92] Instead, the court held that the proper test should ask whether "a reasonable person in the plaintiff's particular position, if fully informed, would not have taken the drug."[93]

Ortho appealed the decision on all these points.[94] Ortho denied a direct duty to warn consumers about its products' risks, and asserted that, to the extent that any duty was owed, such a duty was satisfied by Ortho's adherence to the statutory standards established under the Food and Drugs Act.[95] Ortho also argued that the prescribing physician was aware of the risks, and that further warnings would have been redundant. In addition, they claimed that a reasonable person in the plaintiff's position would have followed the advice of their prescribing physician and taken the pill even if they had been properly warned.

The Ontario Court of Appeal dismissed Ortho's appeal, but it did so by relying on reasoning that departed from that of Justice Holland. Writing for the unanimous court, Justice Robins proceeds on "the assumption that

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90 *Buchan* H Ct J *supra* note 78 at 405.

91 See *ibid* at 405. This distinction was affirmed by the Court of Appeal in *Buchan*, *supra* note 30 at para 74, and later by the Supreme Court of Canada in *Hollis*, *supra* note 31 at 44, and has been the subject of considerable discussion, a full consideration of which is beyond present purposes. See e.g. Matthew Lewans, "Subjective Tests and Implied Warranties: Prescriptions for *Hollis* v. *Dow Corning* and *ter Neutzen* v. *Korn*" (1996) 60 Sask L Rev 209 at 211; Denis W Boivin, "Factual Causation in the Law of Manufacturer Failure to Warn" (1998) 30 Ottawa L Rev 47.

92 *Buchan* H Ct J *supra* note 78 at 406.

93 *Ibid* at 406.

94 See *Buchan*, *supra* note 30 at 665–66.

95 *Supra* note 82.

manufacturers of contraceptive pills … are under a duty to warn only prescribing physicians of the risks associated with the use of their products."[96] This approach is contingent on an analysis of the learned intermediary doctrine.[97] Consequently, the court did not feel it was necessary to decide the case on the basis of whether the statutory requirements pre-empted the common law duty to warn.[98] After considering the warnings that Ortho had provided to the medical profession, Justice Robins concluded that the manufacturer "failed to give the medical profession warnings commensurate with its knowledge of the dangers inherent in the use of Ortho-Novum," and in so doing, "breached its duty to warn."[99]

In reaching this decision, the court focused primarily on the adequacy of the warning provided. In his opening remarks about the duty to warn, Justice Robins clearly articulated what is necessary for a warning to be considered accurate. He observed that for a warning to be adequate:

> [i]t should be communicated clearly and understandably in a manner calculated to inform the user of the nature of the risk and the extent of the danger; it should be in terms commensurate with the gravity of the potential hazard, and it should not be neutralized or negated by collateral efforts on the part of manufacturer.[100]

Justice Robins also affirmed the Court's decision in *Lambert*, noting that it provided guidance for determining the explicitness required of a

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96 *Buchan*, *supra* note 30 at 673. Justice Robins acknowledges that this approach is the most favourable position for Ortho.

97 The learned intermediary doctrine holds that a manufacturer can discharge its obligation to warn consumers directly if they instead warn the prescribing physician. See discussion in *Buchan*, *supra* note 30 at paras 23ff.

98 See *ibid* at 22. The Court did consider the role of statutes such as the *Food and Drugs Act*, *supra*, note 85 prior to considering the learned intermediary doctrine. See *ibid* at 670–73. Had the Court accepted Justice Holland's approach, Justice Robins notes that "the trial judge's conclusion that the information provided to consumers did not satisfy the duty is undoubtedly correct" (*ibid* at 672).

99 *Buchan*, *supra* note 30 at 679.

100 *Ibid* at 659.

warning.[101] He further noted that adequacy will be determined by what is reasonable in the circumstances. For example, Justice Robins notes that in instances when there is a low probability of injury or a small class of consumers that may be harmed, "these factors must be balanced against such considerations as the nature of the drug, the necessity for taking it, and the magnitude of the increased danger to the individual consumer."[102]

The court also observed that the duty is a continuous one.[103] Justice Robins notes that manufacturers have a "duty to keep abreast of scientific developments pertaining to its products through research, adverse reaction reports, scientific literature and other available methods" and "must make all reasonable efforts to communicate the information to prescribing physicians."[104] Moreover, when medical evidence exists that shows an inherent danger, "the manufacturer is not entitled to ignore or discount that information in its warnings solely because it finds it to be unconvincing."[105] Rather, manufacturers are obligated to "be forthright and tell the whole story."[106] Justice Robins also held that manufacturers could not justify a failure to warn by claiming that physicians could learn of the risk through other sources – "[t]he manufacturer's duty to warn continues notwithstanding that the information may be otherwise available."[107]

The criterion for adequacy proposed here helps to explain why the Court of Appeal rejected the use of the objective test in *Reibl* for product liability cases. Although Justice Robins does not adhere to Justice Holland's proposed test, he still concluded that "the *Reibl* test is inappropriate."[108] Instead, it is up to the trier of fact in each case to determine whether or not a particular customer would have been influenced by a warning.[109] Whether

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101 See *ibid* at 667.

102 *Ibid* at 678.

103 See *ibid* at 667.

104 *Ibid* at 678.

105 *Ibid*.

106 *Ibid*.

107 *Ibid* at 680.

108 *Ibid* at 685.

109 See *ibid* at 686.

a reasonable person would heed a warning is "beside the point," because the decision to heed a warning is an individual decision.[110] This is why the adequacy of the warning is so important: full disclosure of the inherent risks in a product "facilitates meaningful consumer choice and promotes marketplace honesty."[111] Moreover, as Justice Robins notes, moving away from the objective test does not impose a very serious burden on manufacturers, who are in a position to avoid liability simply by providing "a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know."[112]

Thus, *Buchan* set a standard of what is necessary for a warning to be considered adequate, identifying seven principles. These principles are reviewed in Table 1. The Supreme Court of Canada affirmed *Buchan* in Hollis.[113] While the Court does not specifically identify all of the same principles, Justice La Forest, writing for the majority, does note that the informational advantage that manufacturers have requires them to provide "clear, complete and current informational disclosure"[114] on an ongoing and

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110 *Ibid* at 687. The judge continued to state that "[t]he selection of a method of preventing unwanted pregnancy in the case of a healthy woman is a matter, not of medical treatment, *but of personal choice*, and it is not unreasonable that notice of a serious potential hazard to users of oral contraceptives could influence her selection of another method of birth control" [emphasis added].

111 *Ibid*. This is reiterated in *obiter* by Justice Robins. Noting that his comments were not necessary for his judgment, at 688, Justice Robins nevertheless explained that the aspect of choice in this case was especially germane, given that women had choices about the form of birth control they wish to use. He goes so far as to say that "[m]anufacturers of this drug should be obliged to satisfy the general common law duty to warn the ultimate consumer as well as prescribing physicians. To require this would not be to impose any real burden on drug manufacturers or to unduly interfere with the doctor-patient relationship as it exists with regard to the prescription of this drug" (*ibid* at 688–89). What it would do, however, would allow women to make "informed and intelligent decisions" about their reproductive health (*ibid* at 689).

112 *Ibid* at 687.

113 In fact, to date, the only court to question the Ontario Court of Appeal's ruling in *Buchan* was the British Columbia Court of Appeal in its decision in *Hollis v Dow Corning*, [1993] 103 DLR (4th) 520, 41 ACWS (3d) 455 [*Hollis*, BCCA cited to DLR]), which was overturned by the Supreme Court of Canada.

114 *Hollis*, *supra* note 31 at para 539.

forthright basis.[115] Justice La Forest also affirms Justice Robins's claim that manufacturers can easily avoid any undue burden by simply providing clear warnings.[116] This high standard is justified because it "protects public health by promoting the right to bodily integrity, increasing consumer choice and facilitating a more meaningful doctor-patient relationship."[117]

Table 1. ***The*** *Buchan* ***Standard for Adequacy of Warnings***

1.	Warnings must be communicated clearly and understandably.
2.	Warnings must be communicated in a manner calculated to inform the user of the nature of the risk and extent of the danger.
3.	Warnings must be communicated in terms commensurate with the gravity of the potential hazard.
4.	Warnings must be explicit.
5.	Warnings should not be neutralized or negated by collateral efforts on the part of the manufacturer.
6.	There is a duty to keep abreast of scientific developments.
7.	There is a continuous duty to warn consumers of new risks.

One of the *Buchan* criteria not discussed in Hollis is the prohibition of collateral efforts on the part of manufacturers to negate or neutralize warnings.[118] While several courts have referred to this prohibition when quoting

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115 *Ibid* at para 541. Here, Justice La Forest cites *Buchan*, *supra* note 30 in holding that manufacturers cannot ignore or discount information that it finds unconvincing.

116 See *Hollis*, *supra* note 31 at paras 26, 44, citing *Buchan*, *supra* note 30.

117 *Ibid* at para 26.

118 The Court of Appeal's decision does quote the entire passage from *Buchan* cited earlier, and thus does highlight that manufacturers should not negate or neutralize warnings, but it does not go into further detail on this point. See *Hollis* BCCA, *supra* note 117 at 539.

Buchan,[119] no court has expanded on what it means for warnings. That is to say, no court has considered what types actions on the part of a manufacturer would amount to negating or neutralizing a warning. While *Létourneau* does not explicitly elaborate on this point,[120] Justice Riordan spent considerable time in his judgment discussing the collateral efforts on the part of manufacturers. As part five will demonstrate, the court in *Létourneau* was especially concerned with the efforts – or lack thereof – of tobacco manufacturers to warn users of potential harms associated with smoking. The court ultimately found that the warnings provided by the tobacco companies were inadequate. Before examining *Létourneau*, we will first review the history of tobacco litigation in Canada.

III. Tobacco Litigation in Canada

Civil litigation is one of the many suggested ways that law can be used to assist in obesity prevention, management, and treatment. This recommendation, in large part, has been motivated by the perceived success of tobacco litigation. Tobacco litigation has played a critical role as part of a broader tobacco control strategy. Tobacco lawsuits have helped to shape the policy environment and reframe the public discourse, and have impacted the sale of tobacco products.[121] However, while the experience of tobacco litigation may provide a useful template and learning opportunity for obes-

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119 See e.g. *Pittman Estate v Bain*, [1994] 112 DLR (4th) 257 at 382, 46 ACWS (3d) 573; *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1995] 126 DLR (4th) 1 at 24, 56 ACWS (3d) 228 (NFLDCA); *Strata Plan N38 v Charmglow Products*, [1987] BCJ No 2776 (QL) at para 21, 8 ACWS (3d) 392 (BCSC); *Muir v Volvo Canada Ltd*, [2000] BCJ No 1970 (QL) at para 30, 2000 BCPC 96; *Walford (Litigation Guardian of) v Jacuzzi Canada Inc*, [2005] OJ No 1376 (QL) at para 120, [2005] OTC 258 (Sup Ct J) ; *Privest Properties Ltd v Foundation Co of Canada* , 128 DLR (4th) 577 at 638, [1995] 10 WWR 385 (BCSC); *More v Bauer Nike Hockey Inc* , [2011] 5 WWR 105 at para 240, 13 BCLR (5th) 61 (SC); *Can-Arc Helicopters Ltd v Textron Inc*, [1991] 86 DLR (4th) 404 at 414, [1992] 3 WWR 604 (BCSC); *Ocean Falls Corp v Worthington (Canada) Inc*, [1986] BCJ No 810 (QL) at para 52, 1986 CarswellBC 3618 (WL Can) (BCSC); *Double Bar L Ranching Ltd v Bayvet*, 1993 CanLII 6718 at 7 (SKQB).

120 *Supra* note 29.

121 See generally Graham E Kelder Jr & Richard A Daynard, "The Role of Litigation in the Effective Control of the Sales and Use of Tobacco" (1997) 8:1 Stan L & Pol'y Rev 63; Constance A Nathanson, "Social Movements as a Catalyst

ity litigation,[122] not all consider tobacco litigation a success.[123] Critics also point out that food and tobacco are distinct public health problems,[124] and that obesity presents a more complex problem since no specific behaviour (tobacco use) or product (tobacco) can be identified as the underlying cause of disease or injury.[125]

Perhaps the biggest challenge with using tobacco litigation as an example for obesity litigation in Canada is the dearth of tobacco lawsuits.[126]

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for Policy Change: The Case of Smoking and Guns" (1999) 24:3 J of Health Politics & Law 421.

122 Many suggest that the experience of tobacco control can be used to avoid pitfalls. See e.g. Joshua Logan Pennel, "Big Food's Trip Down Tobacco Road: What Tobacco's Past Can Indicate About Food's Future" (2008) 27:1 Buff Pub Int LJ 101.

123 See e.g. R Shep Melnick, "Tobacco Litigation: Good for the Body but Not the Body Politic" (1999) 24:4 Health Pol'y & L 805; Marshall B Kapp, "Tobacco Litigation, Round Three: It's the Money and the Principle" (1999) 24:4 Health Pol'y & L 811; McMenamin & Tiglio, *supra* note 23 at 517.

124 McMenamin & Tiglio, *supra* note 23 ("[t]he contrast of food with tobacco is stark" at 446). The authors further note that "[t]o model tobacco litigation, proponents of obesity litigation may attempt to obscure some of the significant differences between tobacco and food" (*supra* note 23 at 463). Some of these differences are significant. For example, the sale of tobacco to minors is illegal, whereas the sale of fast-food is not. See Pennel, *supra* note 123 at 128. See also Daynard, "Lessons from Tobacco Control", *supra* note 25 at 294–95.

125 Additionally, consider that it is widely held that there is no safe exposure to tobacco products, which cannot be said for food products. That said, some contend this might actually render the food industry more vulnerable – after all, "while you cannot stop tobacco from being dangerous, you can make food less unhealthy." See Bénédict Coestier, Estelle Gozlan & Stéphan Marette, "On Food Companies Liability for Obesity" (2005) 87:1 American J Agricultural Economics 1 at 2–3.

126 See Lara Khoury, Marie-Eve Couture-Ménard & Olga Redko, "The Role of Private Law in the Control of Risks Associated with Tobacco Smoking: The Canadian Experience" (2013) 39 Am J L & Med 442 at 443. This is not to say that the potential for tobacco litigation has not been explored. See e.g. Wendy Linden, "The Potential for a Tort Action against Tobacco Manufacturers in Canada" (1987) 6:3 Advocates' Soc J 25; Rob Cunningham, "Tobacco Products Liability in Common Law Canada: (1990) 11:2 Health L Can 43; Megan

Tobacco litigation is a relatively recent phenomenon in Canada,[127] and only a few cases have ever made it to the courts. In part, this may stem from the fact that Canadians have publicly funded health care, and do not need to pursue civil litigation in order to recover health care costs. It is also likely relevant that, in stark contrast to American lawsuits, Canadian courts are not in the habit of handing out staggering punitive damages awards. Discussions about Canadian tobacco litigation thus far have been mostly limited to health care cost recovery actions initiated by provincial governments.[128]

Evans, "Products Liability in Ontario: Is the Tobacco Industry in Trouble?" (1998) 8 Windsor Rev Legal Soc Issues 113.

127 Tobacco litigation was still sufficiently novel in Canada in 2000 that some questioned whether or not it would be part of Canada's public health arsenal. See e.g. Barbara Sibbald, "Will Litigation Become Part of Public Health Arsenal in Canada's War Against Smoking?" (2000) 162:11 CMAJ 1608 at 1609. For an overview of tobacco litigation in Canada, see Khoury, Couture-Ménard & Redko, *supra* note 127. For a general overview of the use of law in tobacco control efforts in Canada, see von Tigerstrom, "Tobacco Control", *supra* note 26.

128 In 1997, British Columbia enacted the *Tobacco Damages Recovery Act* (SBC 1997, c 41), later renamed the *Tobacco Damages and Health Care Cost Recovery Act* (SBC 2000, c 30). These acts enabled the province to sue tobacco companies to recover the health care costs. Both Acts were challenged by the tobacco industry. All provinces have since enacted similar legislation. For a discussion about these lawsuits, see FC DeCoste, "Smoked: Tradition and the Rule of Law in *British Columbia v. Imperial Tobacco Canada Ltd*." (2006) 24 Windsor YB Access Just 327; Eric LeGresley, "Recovering Tobacco-Caused Public Expenditures from the Tobacco Industry: Options for Provincial Governments" (1998), online: *Non-Smoker's Rights Association* <nsra-adnf.ca/key-issue/recovering-tobacco-caused-public-expenditures-from-the-tobacco-industry-options-for-provincial-governments/> [perma.cc/GW2M-NH7S]; Elizabeth Edinger, "The Tobacco Damages and Health Care Costs Recovery Act: *JTI-Macdonald Crop. v. British Columbia (Attorney General)*" (2001) 35:1 Can Bus LJ 95; Barbara Sibbald, "All Provinces Likely to Join Tobacco Litigation" (2005) 173:11 CMAJ 1307; Devrin Froese, "Professor Raz, the Rule of Law, and the *Tobacco Act*" (2006) 19:1 Can JL & Jur 161; Robin M Elliot, "British Columbia's Tobacco Litigation and the Rule of Law" in Patricia Hughes & Patrick A Molinari, eds, *Participatory Justice in a Global Economy: The New Rule of Law* (Montreal: Canadian Institute for the Administration of Justice, 2004), online: <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1026&context=emeritus_pubs> [perma.cc/7BLJ-NNDT]; Jacob J Shelley, "The Crown's Right of Recovery Act" (2010) 18:3 Health L Rev 15.

This is not to say that there have been no tobacco lawsuits in Canada. There have been a few, but most were dismissed by the courts before the substantive claims were argued. For example, the claim in *Perron v RJR MacDonald*[129], alleging that tobacco companies neglected to determine risks associated with smoking and failed to warn users about such risks, was dismissed because the action had been commenced outside of the appropriate limitation period. *Caputo v Imperial Tobacco Ltd*[130] failed to certify a class action because the action was deemed to be inappropriate for a class proceeding. Class certifications were also denied in *Ragoonanan Estate v Imperial Tobacco Ltd*, which claimed cigarettes to be defective because they posed an unreasonable risk of igniting residential fires,[131] and in *Sparkes v Imperial Tobacco Canada Limited*[132], which claimed that tobacco companies deceived consumers by marking "light" or "mild" cigarettes. A class was certified by the British Columbia Superior Court in *Knight v Imperial Tobacco Canada Limited*[133], but the substantive matters of the claim have yet to be heard, as the court continues to deal with preliminary matters.[134] Individual suits have also had very limited success. For example, while Joe Battaglia was successful in bringing a case against tobacco companies to trial for damages that resulted from smoking, he ultimately lost his claim.[135]

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129 [1996] BCJ No 2093 (QL) at paras 22–23, 81 BCAC 303 (CA).

130 (2004), 236 DLR (4th) 348 at 375, 128 ACWS (3d) 874 (Ont Sup Ct J).

131 In this case, three people died when a fire started in the townhome of Davina Ragoonanan by the cigarette of one of the deceased. Although the court only refused to certify the action against two of the three named defendants initially, the plaintiffs ultimately failed to have the class certified against the third defendant. See *Ragoonanan v Imperial Tobacco*, [2005] 78 OR (3d) 98, aff'd [2008] 54 CPC (6th) 167.

132 2008 NLTD 207 at paras 1, 7, 121, 282 Nfld & PEIR 177 [*Sparkes*].

133 2005 BCSC 172 at para 76, 250 DLR (4th) 347. For access to some of the litigation documents, see Physicians for a Smoke Free Canada, "*Kenneth Knight v. Imperial Tobacco Ltd*." (last visited 7 May 2020), online: *Tobacco Litigation* <www.smoke-free.ca/litigation/webpages/Knight.htm> [perma.cc/7LPF-2GM6].

134 See e.g. *R v Imperial Tobacco*, 2011 SCC 42, [2011] 3 SCR 45 (the Supreme Court rejected Imperial Tobacco's attempt to add the Government of Canada as a third party to the suit).

135 *Battaglia v Imperial Tobacco*, [2001] OJ No 5541 (QL) (Sup Ct J). This judgment is interesting for several reasons. Perhaps most striking was the fact that

While it is reported that he appealed the ruling, he did so without counsel, and died shortly thereafter.[136] Thus, in Canada, looking to tobacco litigation as an example for obesity litigation has limited value. That limited value has resulted in tobacco litigation, by and large, being ignored as a strategy that could be adopted. At most, scholars considering the role for law in obesity prevention refer to litigation in passing[137] – and often simply refer to the American experience.[138] *Létourneau* may change this.

Mr. Battaglia, who had worked for the tobacco company Rothmans, was willing to settle his case for a sum of one dollar and an apology. The defendants preferred a trial. For media coverage, see Physicians for a Smoke Free Canada, "Battaglia vs. Imperial Tobacco et al." (last visited 7 May 2020), online: *Tobacco Litigation* <www.smoke-free.ca/litigation/webpages/Battaglia.htm> [perma.cc/BVW6-QPUL] [PSCF, "Battaglia"].

136 See PSFC, "Battaglia", *supra* note 136.

137 See e.g. Ries, "Piling on the Laws", *supra* note 15 at 104. An exception might be Nola M Ries & Barbara von Tigerstrom, "Law and the Promotion of Healthy Nutrition and Physical Activity", in Tracey M Bailey, Timothy Caulfield & Nola M Ries, eds, *Public Health Law & Policy in Canada*, 3rd ed (Markham: LexisNexis, 2013) 323 at 367–74 [Ries & von Tigerstrom, "Law and the Promotion of Healthy Nutrition and Physical Activity"]) The authors spend several pages on litigation in this area and identify deceptive marketing as the most promising type of action.

138 In the examples given in note 138, Ries, "Piling on the Laws", *supra* note 15 at 104 refers only to Frank, *supra* note 23 and Daynard, Howard & Wilking, *supra* note 20. Ries & von Tigerstrom, "Law and the Promotion of Healthy Nutrition and Physical Activity", *supra* note 138 refers almost exclusively to US authorities and cases, referencing only a class action against Vitaminwater as a Canadian example. This action has since been discontinued. See *Wilkinson v Coca-Cola Ltd* (13 November 2014), Montreal, Que CA 500-09-024570-145 (desistment), online: *Consumer Law Group* <www.clg.org/pdf/3/8/7/Discontinuance.pdf> [perma.cc/QQ54-6PMS]. Elsewhere, Ries & von Tigerstom note that the bulk of the literature on legal interventions has focused on the legal and cultural context in the United States, but unfortunately they do not address litigation: Ries & von Tigerstom, "Legal Interventions", *supra* note 15 at 362.

IV. Létourneau c JTI-MacDonald

Representing 1.8 million Quebecois, and seeking damages upwards of $27 billion,[139] *Létourneau* is the largest lawsuit of its kind in Canadian history.[140] It spent more than 13 years in the courts before certification was granted in 2005 – the claim suit originated in two class actions that were both filled in 1998. In May of 2015, Justice Riordan found for the plaintiffs, holding the three defendant tobacco companies, Imperial Tobacco, JTI-MacDonald, and Rothmans, Benson & Hedges, liable for over $15 billion for several faults, including failing to warn consumers about the risks inherent in their products.

The genesis of *Létourneau* was two separate class actions. The first, the *Létourneau*[141] file, was brought on behalf of persons in Québec who were dependent on nicotine. Ms. Létourneau originally initiated a small claims case, seeking a $300 reimbursement for nicotine patches.[142] The second, the *Blais* file,[143] was brought on behalf of smokers in Québec who had smoked

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139 See "Quebec Smokers, Tobacco Firms Face off in $27B Lawsuit", *CBC News* (12 March 2010), online: <www.cbc.ca/news/canada/montreal/story/2012/03/12/quebec-tobacco-lawsuit-damages-smoking-related-illness.html> [perma.cc/MQ6H-9K5K].

140 See Andrew Chung, "Tobacco Lawsuit: Landmark Case Launched by Smokers Makes It to Quebec Court", *Toronto Star* (12 March 2012), online: <www.thestar.com/news/canada/2012/03/12/tobacco_lawsuit_landmark_case_launched_by_smokers_makes_it_to_quebec_court.html> [perma.cc/2YW7-VKNE]. For a comprehensive overview of tobacco litigation in Canada, including access to original documents, statements of claims, etc., see Physicians for a Smoke Free Canada, "Litigation" (last visited 7 May 2020), online: *Tobacco Litigation* <www.smoke-free.ca/litigation> [perma.cc/FT4X-TQBX].

141 *Supra* note 29 at para 1. The full case name is *Cécilia Létourneau c JTI-Macdonald Corp, Imperial Tobacco Canada Ltd & Rothmans, Benson & Hedges Inc*, and the court number assigned to the case is 500-06-000070-983.

142 *Létourneau c Imperial Tobacco ltée*, 162 DLR (4th) 734 at 736, [1998] RJQ 1660.

143 *Létourneau*, *supra* note 29 at para 1. The full case name is *Conseil Québecois sur le Tabac et la Santé and Jean-Yves Blais c JTI-Macdonald Corp, Imperial Tobacco Canada Ltd & Rothmans, Benson & Hedges Inc*, and the court number assigned to the case is 500-06-00076-980.

a minimum of five pack years, which amounts to 36,500 cigarettes,[144] and had been diagnosed with lung cancer, cancer of the throat, or emphysema.[145] These claims were brought against the three aforementioned tobacco companies. Between the two files, there were eight common questions of fact and law before the court, although the court only considered seven.[146] These seven questions are identified in Table 2.

Table 2. ***The Seven Common Questions Considered in*** *Létourneau*

A.	Did the Defendants manufacture, market, and sell a product that was dangerous and harmful to the health of consumers?
B.	Did the Defendants know, or were they presumed to know of the risks and dangers associated with the use of their products?
C.	Did the Defendants knowingly put on the market a product that creates dependence and did they choose not to use the parts of the tobacco containing a level of nicotine sufficiently low that it would have had the effect of terminating the dependence of a large part of the smoking population?
D.	Did the Defendants trivialize or deny or employ a systematic policy of non-divulgation of such risks and dangers?
E.	Did the Defendants employ marketing strategies conveying false information about the characteristics of the items sold?
F.	Did the Defendants conspire among themselves to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use?
G.	Did the Defendants intentionally interfere with the right to life, personal security, and inviolability of the class members?

The court was charged with determining whether the three companies were responsible for moral (compensatory) damages and punitive damages.

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144 The court had a formula for this: "A 'pack year' is the equivalent of smoking 7,300 cigarettes, as follows: 1 pack of 20 cigarettes a day over one year: 365 x 20 = 7300. It is also attained by 10 cigarettes a day for two years, two cigarettes a day for 10 years etc." (*ibid* at para 2, n 4). Thus, 5 "pack years" amounts to 36,500 cigarettes (5 x 7,300).

145 See *ibid* at para 2 (both class descriptions are identified).

146 See *ibid* at paras 3–5.

For the *Blais* file, Justice Riordan found the defendants liable for moral (compensatory) and punitive damages on four grounds.[147] He awarded $6,858,864,000 in moral damages,[148] which, with interest and additional indemnity, amounted to $15.5 billion.[149] Under the *Létourneau* file, Justice Riordan found the defendants at fault under the same heads of damage, but did not assess compensatory damages, contending that the plaintiffs failed to provide sufficient accuracy for the total amount of their claims.[150] For both actions together, the court awarded a total of $131,090,000 in punitive damages. Of this, $131,000,000 was attributed to the *Létourneau* file.[151] Given the high damages awarded for the *Blais* file, the court reduced the punitive damage claim in this file to $30,000 per company, representing a dollar for each Canadian death the tobacco industry causes every year.[152]

Before proceeding, it is important to note that much of what the court discusses in *Létourneau* is specific to Québec.[153] The plaintiffs' claims were grounded in Québec's Consumer Protection Act[154] and *Charter of Human Rights and Freedoms*[155], and relied on the application of Québec's *Tobacco-Related Damages and Health Care Costs Recovery Act*.[156] Notwithstanding this, the court's articulation about the duty to warn is relevant for the rest

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147 See *ibid* at para 643.

148 See *ibid* at para 1005.

149 See *ibid* at para 1014.

150 See *ibid* at para 950.

151 See *ibid* at para 1113. The court assessed punitive damages for both files at once, and then attributed 90% to the *Blais* file and 10% for the *Létourneau* file. See *ibid* at para 1084.

152 See *ibid* at para 1088.

153 See *ibid* at para 668. For example, many of the findings are specific to the legislation considered, such as the discussion of the use of epidemiological evidence under the *Tobacco-Related Damages and Health Care Cost Recovery Act*, CQLR, c R-2.2.0.0.1 [*Cost Recovery Act*].

154 CQLR, c P-40.1.

155 CQLR, c C-12.

156 *Cost Recovery Act*, *supra* note 154. The constitutionality of the legislation has been upheld by the Québec courts. See *Imperial Tobacco Canada Ltd c Québec (PG)*, 2014 QCCS 842, aff'd 2015 QCCA 1554, leave to appeal to SCC refused, 36741 (5 May 2016).

of Canada. Indeed, Justice Riordan noted that the rules relating to the duty to warn in Québec and the common law provinces are sufficiently similar, holding that "the issue of a manufacturer's duty to warn is one where the two legal systems coexisting in Canada see the world in a similar way, and for which we see no obstacle to looking to common law decisions for inspiration."[157] Moreover, as will be discussed next, much of the court's discussion of the duty to warn in Québec is derived from and consistent with the common law.

Létourneau concerned tobacco manufacturers' duty to warn consumers of the risks inherent in tobacco use (referred to in the case as the "obligation to inform").[158] Justice Riordan identified 11 aspects of the duty to warn in the context of article 1468 of the Civil Code of Québec (see Table 3), and in so doing relies on H*ollis, Lambert,* and *Buchan* as authorities for several of these principles.[159] A comparison of these with the *Buchan* standard for adequacy demonstrates considerable overlap and general agreement.

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157 *Létourneau*, *supra* note 29 at para 219.

158 See e.g. *ibid* at para 19.

159 See *ibid* at para 227 (of the 11 principles, Justice Riordan cited *Hollis*, *supra* note 31 as the authority for principles 1, 6, 7 and 8; *Lambert*, *supra* note 63 for principles 3, 8 and 9; and *Buchan*, *supra* note 30 for principle 6). Justice Riordan then cited a summation (*ibid* at para 228) from Pierre-Gabriel Jobin & Michelle Cumyn, *La vente*, 3rd ed, (Cowansville: Éditions Yvon *Blais*, 2007) at 294–95.

Table 3. Eleven Principles of the Manufacturer's Duty to Warn

1. The duty to warn "serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product".[160]
2. A manufacturer knows or is presumed to know the risks and dangers created by its product, as well as any manufacturing defects from which it may suffer.
3. The manufacturer is presumed to know more about the risks of using its products than is the consumer.
4. The consumer relies on the manufacturer for information about safety defects.
5. It is not enough for a manufacturer to respect regulations governing information in the case of a dangerous product.
6. The intensity of the duty to inform varies according to the circumstances, the nature of the product and the level of knowledge of the purchaser, and the degree of danger in a product's use; the graver the danger the higher the duty to inform.
7. Manufacturers of products to be ingested or consumed in the human body have a higher duty to inform.
8. Where the ordinary use of a product brings a risk of danger, a general warning is not sufficient: the warning must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product.
9. The manufacturer's knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility.
10. The obligation to inform includes the duty not to give false information; in this area, both acts and omissions may amount to fault.
11. The obligation to inform includes the duty to provide instructions as to how to use the product so as to avoid or minimize risk.

One of the central issues in the case was the point at which tobacco manufacturers' duty to warn would be rendered unnecessary given the pre-existing knowledge of consumers. As JTI-MacDonald argued, "[t]here is no obliga-

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160 *Létourneau*, *supra* note 29 at para 227 citing *Hollis*, *supra* note 31 at para 21.

tion to warn the warned."[161] This is a common refrain for tobacco companies – that they had no duty to warn consumers that were already aware of the risks associated with smoking.[162] To this end, they contended that the public was receiving sufficient information about the dangers of smoking from other sources, including parents, schools, doctors, and the mandatory warning labels required by the government.[163] One of the important tasks set before the court was to determine when the general public would have sufficient knowledge to render warnings moot. Justice Riordan goes into considerable detail to make this determination, and ultimately identifies a "knowledge date" of 1 January 1980 for the *Blais* file and 1 March 1996 for the *Létourneau* file.[164] For both files, the manufacturer's responsibility to warn consumers ceased as of these dates.

Thus, the conduct the court was considering for each file was that which occurred prior to the identified knowledge dates. If the companies knew during the identified class period of the increased risk of disease or dependence, they were obligated to warn consumers accordingly.[165] Consistent with the case law on point, if the warnings provided were incomplete or did not sufficiently identify the nature or degree of danger, then the obligation was not met.[166] Importantly, Justice Riordan noted that the obligation to provide a warning is not conditional. Rather, there is a "positive duty to

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161 *Létourneau*, *supra* note 29 at para 585 citing *Létourneau* (Notes of JTI-MacDonald's), *supra* note 29 at para 1492..

162 For example, this argument has also been raised by tobacco companies in Australia. See S Champan & SM Carter, "'Avoid Health Warnings on All Tobacco Products for Just as Long as We Can': A History of Australian Tobacco Industry Efforts to Avoid, Delay and Dilute Health Warnings on Cigarettes" (2003) 12:SuppIII Tobacco Control iii13 at iii19.

163 See *Létourneau*, *supra* note 29 at para 185.

164 See *ibid* at paras 121, 130. 1 March 1996 was chosen because it was 18 months after the implementation of mandatory addiction warnings were implemented on 12 September 1994, and the court assumed it would have taken one to two years for these warnings to come into effect. The 1 January 1980 date was chosen based on the testimony of experts before the court, and Justice Riordan's conclusion that the public would have known about the dangers of smoking prior to legislated warnings being required in 1988.

165 See *ibid* at para 184.

166 See *ibid* (Justice Riordan noted "[t]hat is the case here" at para 232).

act."[167] The duty "is not to warn the consumer 'provided that it is reasonable to expect that the consumer will believe the warning'"[168] as such an expectation "would be nonsensical and impossible to enforce."[169] This is consistent with the Ontario Court of Appeal's decision in *Buchan*, which affirmed the use of the subjective test.[170] Moreover, Justice Riordan held that it was not necessary to show that no one would have smoked had the companies provided the appropriate information. Instead, he noted, "It suffices to find that proper knowledge was capable of influencing a person's decision to begin or continue to smoke."[171]

Justice Riordan was unequivocal on his position as to whether or not the tobacco companies met their duty. He concluded that "the Companies shirked their duty to warn in a most high-handed and intentional fashion."[172] Indeed, his review of the tobacco companies on this point is scathing. He held that the companies had acted with a "calculated willingness to put [their] customers' well-being, health and lives at risk for the purpose of maximizing profits,"[173] behaviour that is "far outside the standards" of what is acceptable.[174] He found that their actions were not only intentional, and

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167 *Ibid* at para 282.

168 *Ibid* at para 281.

169 *Ibid*.

170 See *Buchan*, *supra* note 30 at paras 77–78.

171 *Létourneau*, *supra* note 29 at para 516 [emphasis added]. Justice Riordan made this declaration while considering Québec's *Consumer Protection Act*. Thus, its applicability to the duty to warn overall may be limited. However, it resonates with other aspects of his judgment where he maintained that the obligation on the manufacturers was to provide the information that they had.

172 *Ibid* at para 278.

173 *Ibid* at para 338. He noted at several points in his judgment that the companies acted with "ruthless disregard for the health of their customers" (*ibid* at para 833), or appeared to have "a total absence of concern over the fact that its products were harming its consumers' health" (*ibid* at para 579). Justice Riordan tempered some of his findings, however, noting that the companies' actions were not necessarily motivated by malevolent desires, but simply with an aim of maximizing profits. See *ibid* at paras 485–86.

174 *Ibid* at para 339.

"beyond irresponsible,"[175] but "reprehensible"[176] and constituted an "egregious fault."[177]

Of the various activities of the tobacco companies, Justice Riordan is particularly critical of the tobacco companies' ongoing policy of silence.[178] By remaining silent, he noted that the companies clearly could not have met their duty to warn of the dangers.[179] He rejected the tobacco companies' notion that this silence was inconsequential, refusing the assertion that consumers were adequately informed by the ongoing news and media coverage.[180] Similarly, he rejected the argument that warnings would not have mattered because consumers would likely not have believed any warnings provided by the tobacco companies.[181] Justice Riordan also did not allow the tobacco companies to use the mandated government warnings as a shield.[182]

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175 *Ibid* at para 288. Justice Riordan suggested that the companies were "intentionally negligent."

176 Specifically, Justice Riordan stated, "The Companies' liability under both statutes stems from the same reprehensible conduct" (*ibid* at para 1027). He subsequently noted that "actions and attitudes …. were, in fact, 'particularly reprehensible' and must be denounced and punished in the sternest of fashions" (*ibid* at para 1038).

177 *Ibid* at para 269.

178 Justice Riordan used the expression "policy of silence" See e.g. *ibid* at paras 56, 271, 337, 523.

179 See *ibid* at para 313.

180 See *ibid* at para 86. Justice Riordan noted "[t]he Companies rely on this evidence to show that the general public was aware of the negative publicity about smoking through newspaper and magazine articles, but the knife cuts both ways" (*ibid* at para 264), and points to the "voluminous marketing material circulated" (*ibid* at para 86) by the companies.

181 See *ibid* at para 271.

182 For example, Justice Riordan rejected the following argument:

> The Companies make much of the fact that, even if they had wanted to misled the public about the dangers of smoking, which they assure that they did not, current governmental regulation of the industry creates an impermeable obstacle to any such activity. All communication between them and the public, in their submission, is prohibited, thus assuring that absolute prevention has been attained. It follows, in their logic, that there

As he observed, the tobacco companies consistently resisted the warnings and attempted to have them watered down.[183] Indeed, he pointed out that the companies would have known that the warnings were insufficient to properly inform consumers and that "they actively lobbied to keep them that way."[184] He was especially critical when discussing company documents that appear to celebrate the state of uncertainty that existed within the government when it was grappling with how to determine how to provide warnings about the risks of smoking in a meaningful way.[185]

Part of the uncertainty the government was contending with was undoubtedly influenced by another tactic employed by the tobacco companies, namely, to actively work to create uncertainty by promulgating a scientific controversy. Justice Riordan observed that the tobacco companies were extolling a scientific controversy message, both to the broader public and its own employees.[186] This was more than an outright denial – although Justice Riordan noted that tobacco companies did deny the risks associated with their products[187] – it was a suggestion that the issues were "complicated, multi-dimensional and, especially, inconclusive, requiring much further research."[188] The companies would insist that the research identifying risks

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can be no justification for awarding any punitive damages (*ibid* at para 1032).

183 See *ibid* at para 272. See also *ibid* at para 463 where he noted the companies' "efforts not only to hide the truth from the public but, as well, to delay and water down to the maximum extent possible the measures that Canada wished to implement to warn consumers of the dangers of smoking."

184 *Ibid* at para 287. He considered this a "most serious fault."

185 See *ibid* at paras 581–583.

186 With regard to the message extolled to the public, see *ibid* at para 246. With regard to that extolled to employees, see *ibid* at para 247 ("[e]ven to its own employees, ITL was denying the existence of scientifically-endorsed link between cigarette smoking and disease and trivializing the evidence to that effect").

187 See *ibid* at para 250, where He noted that the companies "wilfully and knowingly denied those risks and trivialized the evidence showing the dangers associated with their products" (*ibid*) and that they asserted that cigarettes had "been unfairly made a scapegoat" (*ibid* at para 251).

188 *Ibid* at para 252. Justice Riordan did address the fact that the companies were "technically" right. As he noted, many of the Companies' statements were technically accurate: "Science has not, even today, been able to identify the actual physiological path that smoking follows in causing the Diseases. That,

with tobacco use was poor, and that it needed to be done by "real" scientists.[189] In addition to the "cynical refusal" to accept any science that identified dangers with tobacco products,[190] Justice Riordan found that the tobacco companies refused to do the necessary research to demonstrate otherwise.[191] Instead, by perpetuating the myth of a scientific controversy, the tobacco companies were attempting to "lull the public into a sense of non-urgency about the health risks."[192] Part of the way that the companies attempted to do this was by not disclosing – and in some instances, destroying[193] – the relevant information it did have. These efforts did not impress Justice Riordan who, citing Hollis, observed that incomplete knowledge could not serve as a defence for failing to warn.[194] Thus, the tobacco companies not only failed to warn consumers, they were found to be intentionally negligent given their purposeful attempt to remain ignorant of the risks, thereby willingly putting their consumers at risk.[195]

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however, is neither a defence nor any sort of moral justification for denying the link." (*ibid* at para 267) See also *ibid* at para 457, where he noted some of the scientific controversy points "are technically true when taken on a point-by-point basis," but where he nevertheless declares that knowledge of harm was enough to trigger a duty to warn.

189 See *ibid* at para 245.

190 See *ibid* at para 474.

191 See *ibid* at para 212, where Justice Riordan noted that at trial a former president of one of the companies "testified that BAT's lawyers frowned on ITL performing scientific research to verify the health risks of smoking because that might be portrayed in lawsuits as an admission that it knew or suspected that such risks were present." See *ibid* at para 472, where he noted that the companies were not necessarily at fault for not doing the research. But see *ibid* at para 474, "[w]here fault can be found, however, is in the failure or, worse, the cynical refusal to take account of contemporaneous, accepted scientific knowledge about the dangers of the Companies' products and to inform consumer accordingly."

192 *Ibid* at paras 458, 485.

193 For a discussion about "deadwood" and the role of lawyers in destroying evidence, see *ibid* at paras 357–78.

194 See *ibid* at para 614, citing *Hollis*, *supra* note 31 at para 41.

195 See *ibid* at para 288.

Consistent with *Buchan* and *Lambert*, *Létourneau* stands for the principle that the duty to warn does more than simply offer recourse to individuals harmed by faulty warnings – it also imposes an important obligation on manufacturers for which they ought to be held accountable independent of any finding of negligence. To put it another way, the obligations under the duty to warn exist independently of whether or not a failure to warn in a particular instance can be shown to result in harm. The potential for harm to arise is sufficient to trigger a manufacturer's responsibility to both investigate and disclose any risks.[196] Moreover, as articulated in *Buchan*, warnings about risks must be adequate. In *Létourneau*, the companies failed to meet the *Buchan* standard. The tobacco companies did not provide clear and explicit warnings that informed consumers about the potential hazards associated with the use of their products, and they made no attempt to provide any new information about the risks their internal research did discover. Worse than failing to keep up with the science, the companies actively conspired to discount and undermine the science,[197] and they worked towards neutralizing and negating the information the public did have. As Justice Riordan observed, it is easy to understand the impulse to brand the tobacco companies' actions as "immoral."[198] The reprehensible conduct of the tobacco companies lead Justice Riordan to conclude, during his assessment of punitive damages, "[i]f the Companies are allowed to walk away unscathed now, what would be the message to other industries that today or tomorrow find themselves in a similar moral conflict?"[199]

Following Justice Riordan's judgment, the tobacco companies appealed to the Court of Appeal of Québec on several, often overlapping grounds.[200] In March 2019, a unanimous decision of five justices held that the tobacco companies "failed to demonstrate errors of law or palpable and overriding errors", electing to make only minor corrections to Justice

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196 To be liable for harms that arise from a failure to warn, a plaintiff would still need to prove causation. Justice Riordan did go through this analysis, although a review of his analysis is beyond the scope of this essay. See *ibid* at paras 647–836.

197 See e.g. *ibid* at paras 447, 449, 571.

198 *Ibid* at para 339.

199 *Ibid* at para 1037.

200 For the grounds of appeal, see *Imperial Tobacco Canada Ltée c Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 at paras 107–11 [*Imperial Tobacco Canada c Conseil québécois*].

Riordan's decision.[201] These minor corrections did not pertain to Justice Riordan's articulation of the duty to warn, but rather to issues such as the date on which the class period began.[202] The unanimous upholding of Justice Riordan's judgment by the court of appeal – which, if anything, went further than Justice Riordan's judgment[203] – is an important signal about the obligation of manufacturers to warn consumers about the dangers in the products they sell.

With respect to the duty to warn, the court of appeal held that the "intensity of obligation imposed on the manufacturer to provide information is directly proportional to the level of the danger and the potential harm associated with the use of the product."[204] It further noted that when a product is mass produced, the obligation increases.[205] Similarly, if a product is "intended to be ingested or implanted or introduced into the body," such a product "requires a particularly high level of information."[206] This information must be "accurate and complete" and any warning must be "sufficient in order for the user to fully understand the danger and risk associated with the use of the product, as well as its possible consequences and know what to do (or not do) to avoid them or, if necessary, remedy them."[207] On this point, the court noted that even detailed information may not be sufficient, pointing to *Lambert* and Hollis, among other cases.[208]

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201 *Ibid* at para 1277.

202 See *ibid* at para 178.

203 The court of appeal addressed matters that the plaintiffs had originally raised but that Justice Riordan had elected to not focus on in his judgment. For example, the court of appeal examined the use of scientific controversy and the targeting of children. These arguments, which are beyond the scope of this article, are not examined here.

204 *Ibid* at para 282.

205 See *ibid*.

206 *Ibid*.

207 *Ibid* at para 283.

208 See *ibid* at para 283; *Lambert*, *supra* note 63; *Hollis*, *supra* note 31. The court also identified *Mulco Inc c Garantie, compagnie d'assurance de l'Amérique du Nord*, [1990] RRA 68, 1990 CarswellQue 476; *OB Canada Inc c Lapointe*, [1987] RJQ 101, 1986 CarswellQue 248.

According to the court of appeal, informational inequality between a manufacturer and consumer justifies that a manufacturer assumes the risks that may transpire when a product is brought to market.[209] Moreover, this inequality necessitates that information provided by the manufacture be "accurate (i.e., true), exact, understandable and complete and accurately reflect the nature and seriousness of the danger, the risks of its materialization and the significance of the harm that may result."[210] Importantly, the court also noted that the information that is to be provided is not limited to the information that was known at the time the product was first introduced into the market. Rather, manufacturers must provide information about the dangers that become apparent to them even after the product has been put on the market and "[i]ts obligation in this respect lasts and remains as long as the product is on the market."[211]

The court of appeal also dealt with whether a user's knowledge of the danger of a product may negate the obligation to provide information. On this point, the court noted that general knowledge of a product may not be sufficient, particularly when there has been a "campaign of disinformation."[212] Rather, a consumer must have enough information to make an informed choice:

> In other words, knowing that a product is dangerous, like knowing that an activity may be dangerous, is not sufficient: the manufacturer must prove that the victim had a precise and complete idea of the danger and risk associated with it and, in the same way, that he or she was informed of the means to be taken to deal with or avoid them, if any.[213]

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209 See *Imperial Tobacco Canada c Conseil Québécois*, *supra* note 200 at para 285.

210 *Ibid* at para 289.

211 *Ibid* at para 298.

212 *Ibid* at para 328. The court further noted that the "extent of required knowledge is that which allows for the conclusion of the *voluntary* assumption of risk" (*ibid* at para 337) [emphasis in original].

213 *Ibid* at para 351.

If a consumer does not have enough information to make an informed choice, the court held that they cannot be found at fault for failing to take the precautions that they may had taken had they been properly informed.[214]

While there is much in Justice Riordan's and the court of appeal's decisions that warrants further examination, it is sufficient for present purposes to close here with following from the court of appeal decision:

> Did the appellants fail to fulfill their duty to inform? This question can only be answered in the affirmative. Not only did they intentionally conceal the pathological and addictive effects of the cigarettes they marketed from the public and users, they collectively developed and implemented at the same time a disinformation program aimed at undermining any information contrary to their interests; they maintained false scientific controversies, they hijacked debates, lied to the public (and even to public authorities), topping it all off with misleading advertising strategies contrary to their own Codes of conduct…[215]

V. What Létourneau Means for Obesity litigation

If, as has been suggested, obesity litigation is a promising strategy based on the success of tobacco litigation, then it is worth considering the potential future for obesity litigation in Canada in light of the decision in *Létourneau*. As discussed above, prior to *Létourneau* there was no real success to speak of with respect to tobacco litigation in Canada – particularly for civil litigants. Thus, *Létourneau* provides the first real opportunity in Canada to assess how obesity litigation may be informed by tobacco litigation. Alongside the affirming decision of the court of appeal, Justice Riordan's decision, as the court of first instance, remains useful for evaluating the duty to warn as it might be applied to food products. This is because Justice Riordan did not attempt in his judgment to reinvent the duty, or to extend its scope or application, but instead applied the existing law concerning the duty to warn to the product in question, cigarettes. This approach gives an indication as to how obesity litigation in Canada can be framed. While there are some

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214 See *ibid* at para 361.

215 *Ibid* at 477.

challenges with using *Létourneau* as a template, the decision in the Superior Court of Québec suggests that there may be a future for obesity litigation.

Before considering how Justice Riordan's decision is relevant for obesity litigation, however, it is worth noting that Canadian product liability jurisprudence is already applicable to the products associated with obesity – that is, to food and beverage products (henceforth "food products"). This is an uncontroversial claim,[216] as food products have been part of what is now product liability law since its origins.[217] Moreover, there is a long history of cases imposing liability on food manufacturers.[218] Consider, for example, the seminal negligence case, *Donoghue*, which concerned the liability of the manufacturer of ginger beer containing a decomposing snail.[219] Similarly, other early negligence cases dealt with food products. For example, in 1919, the Supreme Court of Nova Scotia allowed a plaintiff who found powdered

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[216] What might be more controversial is that obesity litigation should focus on food products. While not addressed at length here, diet plays a critical role in obesity. It is estimated that 60% to 100% of obesity amongst Canadians is related to diet, specifically, excess calorie consumption. See Sara N Bleich et al, "Why is the Developed World Obese?" (2008) 29:1 Annu Rev of Public Health 273 at 283–84. Moreover, there is solid evidence to suggest that the rising prevalence in overweight and obesity occurred simultaneously with shifts in diet and the types of products available for consumption. For example, in 2002, 530 more calories per person per day were available in the Canadian food supply than in 1985. See *ibid* at 281. During this time, there was an increase in the prevalence of obesity in Canada. See generally Laurie K Twells et al, "Current and Predicted Prevalence of Obesity in Canada: A Trend Analysis" (2014) 2:1 CMAJ Open E18.

[217] For example, the *Restatement (Third) of Torts* § 1 (1998) considers the application to food, noting: "[a]s early as 1266, criminal statutes imposed liability upon victualers, vinters, brewers, butchers, cooks, and other persons who supplied contaminated food and drinks". See also Reed Dickerson, *Products Liability and the Food Consumer* (Westport, CT: Greenwood Press, 1972) at 20, pointing to a case appearing in 1431, where it was held that if a tavern sells corrupted food, the person suffering harm would have "an action against the taverner on the case even though he makes no warranty to me."

[218] See *ibid* at 26. Dickerson observes that "[s]ome kind of special civil responsibility undoubtedly attached to retail food sales long before the modern warranties expressed by the sales statutes were developed, and this responsibility ultimately came to be classed as a 'warranty' obligation" at 26.

[219] See *Donoghue*, *supra* note 52 at 562.

glass in a chocolate bar to bring an action against the manufacturer.[220] The court held that "there was a duty to the public not to put on sale such a dangerous article as the chocolate bar in question," and found the defendant to be guilty of negligence and the proximate cause of the plaintiff's injuries.[221]

Additionally, because food products are ingested, it is clear that the standard of care expected of food manufacturers is heightened.[222] Theall and colleagues argue that food manufacturers face among the highest standards of care, given that all of their products are ingested, suggesting that "the standard has been characterized as approximating strict liability."[223] Consider, for example, how the matter was framed by the court in Shandloff:

The effect, as I take it, of [*Grant* and *Donoghue*] is to establish that a manufacturer who prepares and puts upon the market food in a container which prevents examination by the ultimate consumer is liable to the ultimate consumer for any defects which exist in the goods so marketed which arise from negligence or lack of care. The lack of care essential to the establishment of such a claim increases according to the danger to the ultimate consumer, and where the thing is in itself dangerous, the care necessary approximates to, and almost becomes, an absolute liability.[224]

The Ontario Court of Appeal in *Heimler v Calvert Caterers Ltd*[225] affirmed that the burden imposed on those handling food products approxi-

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220 See *Buckley v Mott* (1919), 50 DLR 408, 1919 CarswellNS 63 (NS SC) [*Buckley v Mott* cited to DLR].

221 Edgell, *supra* note 51 at 9 citing *Buckely v Mott*, *supra* note 222 at 409.

222 See Dickerson, *supra* note 219 ("[i]t is commonly said that the food manufacturer is held to a higher standard of care than other manufacturers" at 128).

223 Theall et al, *supra* note 45 at L5-4.

224 *Shandloff*, *supra* note 54 at 719.

225 56 DLR (3d) 643 at 2, 8 OR (2d) 1 [*Heimler*]. This case involved liability for food served at a wedding where a guest contracted typhoid. Although the case dealt specifically with food handlers, the court's finding that "[t]he standard of care demanded from those engaged in the food-handling business, is an extremely high standard…", can be applied more broadly to food manufacturers. Indeed, in its discussion of *Heimler*, the court in *Brunski v Dominion Stores Ltd* (1981), 20 CCLT 14, 13 ACWS (2d) 162 at para 25 (ON H Ct J) extends the finding to include "food producers and distributors."

mates absolute liability. This is, in part, because of the relationship of reliance that exists between a food manufacturer and consumer.[226]

Thus, courts have recognized that food manufacturers have an obligation to avoid putting dangerous food products into circulation. What needs to be ascertained, then, is what counts as a dangerous food. Many of the early product liability cases involving food products concerned adulterated foods or manufacturing errors.[227] Dangerous food, then, could be contrasted with "pure food" and would encompass corrupted food products. In this sense, the concept of "dangerous foods" would be restricted to food safety issues arising from manufacturing defects or from the negligence of food handlers. This class of issues is vastly different than that which arises from the continued consumption or overconsumption of food products. It has been suggested that the overconsumption of food products and, in particular, of unhealthy food products (sometimes described as "pathogenic" food or as part of a toxic food environment),[228] gives rise to obesity, diabetes, and cancer, among other diet-related diseases.[229]

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226 See Edgell, *supra* note 51 at 17.

227 See e.g. *Donoghue*, *supra* note 52 (snail in ginger beer); *Shandloff*, *supra* note 54 (glass in chocolate milk); *Arendale*, *supra* note 54 (glass in bread); *Zeppa*, *supra* note 54 (glass in a soft drink).

228 See generally Norm RC Campbell, Kim D Raine & Lindsay McLaren, "'Junk Foods,' 'Treats,' or 'Pathogenic Foods'? A Call for Changing Nomenclature to Fit the Risk of Today's Diets" (2012) 28:4 Can J Cardiol 403.

229 See e.g. Jacob J Shelley, "Addressing the Policy Cacophony Does Not Require More Evidence: An Argument for Reframing Obesity as Caloric Overconsumption" (2012) 12:1 BMC Public Health 1042 at 3, online: <www.biomedcentral.com/1471-2458/12/1042> [perma.cc/3M6A-PBKS] [Shelley, "Addressing the Policy Cacophony"]. It is far beyond the scope of this chapter to review the science and evidence on this point. See also Corinna Hawkes et al, "Smart Food Policies for Obesity Prevention" (2015) 385:9985 Lancet 2410. Even food manufacturers point to overconsumption as a problem. See e.g. Katie Little, "Posts on McDonald's Employee Site Bash Fast Food", *CNBC* (23 December 2013), online: <www.cnbc.com/2013/12/23/post-on-mcdonalds-employee-site-bashes-fast-food.html> [perma.cc/9WV8-98G6].

To claim that a food product is inherently dangerous would require making a claim that the food product has a defective design.[230] Success in a defective design claim could have grave consequences for a food manufacturer. It would require a manufacturer to redesign a product – a costly and perhaps impossible task.[231] Moreover, it may have drastic consequences for some populations. It is clear that dependency on certain food products varies by neighborhood, region, and socio-economic status, among other factors.[232] Courts will likely be reluctant to declare an entire product line negligently designed if a community is dependent on that product.[233] Courts may also be reluctant to accept that a food product's design is defective if the product only causes harm when the harm is merely a consequence of overconsumption.[234] A court is more likely to accept that the risk inherent

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230 A defective design claim would argue that a food product has been designed in such a way that the risks outweigh the benefits. This is one of the arguments Justice Sweet identified he would accept from the plaintiffs in their amended claim in *Pelman*, *supra* note 35, but that the plaintiffs failed to submit.

231 But also consider that if all similar products carry the same risk, then the product may not be deemed defective. See Theall et al, *supra* note 45 ("[a]lthough not conclusive, evidence that the defendant's product presented no greater risk than similar products of other manufacturers, and contained the same level of available technological innovation, can lead the court to find no defect in the defendant's design" at L2-10).

232 This thinking applies to civil liability as well. Antler, *supra* note 20 argues that *Pelman*, *supra* note 35 would have had a better chance of success had it focused on poor, urban African-American children, as their food choices were far more restricted than the plaintiffs in *Pelman.*

233 Stapleton, *supra* note 59 ("[i]t is also one which courts may well be reluctant to uphold if grave socio-economic dislocations are thereby threatened because a firm, an industry, or a community is dependent on that product line" at 252). The author notes that "where the design is this dangerous *and* where a finding of liability would clearly threaten to precipitate major socio-economic dislocations, as it would in the product-category cases where the defect is generic and not remediable by modification to an alternative design, courts face a serious separation of powers dilemma" at 254.

234 This point requires consideration beyond the scope of this article. Indeed, a determination of what level of risk is sufficient to render a product defective is at the heart of the defective design analysis. Suffice it to say that manufacturers are required to, among other things, consider the foreseeable misuses of their products and to adequately test their design to safeguard against known or reasonably foreseeable risks.

in the overconsumption of a product merits some form of warning to the consumer.[235] Avoiding a failure to warn claim only imposes on a manufacturer the minor costs associated with providing a label to warn users of the risks associated with a product. For a failure to warn claim to succeed, a consumer need only show that the product was defective because it did not have an adequate warning. He or she does not have to demonstrate that an entire product is defective.[236]

This is what the court ultimately found in *Létourneau*: tobacco manufacturers had an obligation to warn consumers of the risks associated with smoking cigarettes, and, by failing to provide adequate warnings to consumers, they were liable for the resulting harm. While one may disagree with Justice Riordan's interpretation of the facts or with his application of the law, *Létourneau* does not represent a departure from the existing jurisprudence. The plaintiffs were relying on well-established case law pertaining to the duty to warn. This same case law could be used by claimants who allege that food manufacturers have an obligation to provide warnings about the known and foreseeable risks associated with the consumption of their products.[237]

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235 There is considerable overlap between the two defective design and defective warnings cases, however. As Theall et al, *supra* note 45 at L1-8 note, failure to warn claims are more akin to negligent design claims than negligent manufacturer claims. They observe that both types of cases require an assessment of "the nature and extent of the risk and then considers whether, given the level of the risk, the warnings were adequate" (*ibid* at L1-9). An important difference, however, is that while there is a need to consider the risks associated with the use of a product in a defective warning case, there is no need to find a defect per se in the product itself. Instead:

> "[g]etting from the injury or damage to the conclusion that the warning was defective requires a consideration of whether the risk which materialized to harm the plaintiff was reasonably foreseeable. One must then consider whether the nature and extent of the risk merited a better warning, and next, whether a better warning would have prevented the harm to this plaintiff" (*ibid* at L3-2).

236 Sometimes a warning is required because a product cannot be redesigned. See *ibid* ("where prevailing technology does not allow for the manufacture of a safer product, the court may still find the manufacturer liable if the risk could have been reduced or avoided through adequate warnings to the user" at L2-9).

237 While such a discussion is beyond the scope of this article, there is an important discussion to be had about what is required to prove causation in duty to

So, beyond being an example of how the duty to warn can be applied to a specific set of facts, what does *Létourneau* mean for obesity litigation? Perhaps most importantly, *Létourneau* affirms what is required of manufacturers to adequately warn consumers. As noted above, Justice Riordan's decision can be understood as an application of the standard of adequacy articulated in *Buchan*. In *Buchan*, the Ontario Court of Appeal held that the duty to warn requires manufacturers to provide warnings that are clearly communicated and that inform users about the nature of the risk inherent in a product. With some limited exceptions, such as food products containing allergens, food manufacturers do not provide any warning about the risks associated with the use of their products. While many food products do provide nutritional information and disclose their ingredients, as required by the *Food and Drugs Act*,[238] the decision in *Buchan* suggests that food manufacturers will not be able to rely on adherence to regulatory requirements as a shield, given that such regulation represents a minimum standard of what is expected. *Létourneau* suggests that the way industry responds to regulatory initiatives may be a relevant consideration when considering liability. As noted previously, Justice Riordan was unimpressed by the tobacco industry's attempt to water down any regulatory efforts that could not be prevented outright. The Canadian government is currently reconsidering how it regulates food products as part of its "Healthy Eating Strategy,"[239] and the way in which the food industry responds to these efforts presents an opportunity to gauge how receptive the food industry will be to increased regulation and oversight.

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warn cases. For example, Botterell and Essert make a compelling case that "atypical cases," which arguably could include duty to warn cases, require an atypical application of normative principles. See Andrew Botterell & Christopher Essert, "Normativity, Fairness, and the Problem of Factual Uncertainty" (2009) 47:4 Osgoode Hall LJ 663. See also Boivin, *supra* note 92; Vaughan Black, "Decision Causation: Pandora's Tool-Box" in Jason Neyers, Erika Chamberlain & Stephen Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 309.

238 *Supra* note 82, s 5.

239 Health Canada, *Healthy Eating Strategy*, (Ottawa: Health Canada, 2016), online (pdf): *Government of Canada* <www.canada.ca/content/dam/canada/health-canada/migration/publications/eating-nutrition/healthy-eating-strategy-canada-strategie-saine-alimentation/alt/pub-eng.pdf> [perma.cc/MV98-FQC5].

Létourneau is also unequivocal about the requirement for manufacturers to keep abreast of scientific developments. This duty is not limited to research that manufacturers undertake but extends to research undertaken by others to identify risks. *Buchan* explicitly held that manufacturers have an ongoing obligation to test products and to respond to the findings of others. Food manufacturers cannot ignore, minimize, or simply deny the risks that others identify with their products – even when the manufacturer is not convinced by the research. This is critically important in the context of obesity, where the food industry has attempted to minimize the role its products have played. As Bogart observes, the food industry

> aims to convince legislators and the public that the science relating diet to health is so uncertain that regulation promoting better eating and drinking and aimed, in any way, at its products is mostly unnecessary and would, in any event, be mostly ineffective. In any event, diet and weight are a matter of personal responsibility, accountability, and discipline.[240]

In *Létourneau*, Justice Riordan found that rather than warn the public about the known risks, the tobacco companies attempted to discredit, downplay, and ignore the science. These tactics have been emulated by the food industry.[241]

Food manufacturers cannot hide behind ignorance. As the body of evidence grows about risks, the onus on the manufacturer also grows. This means that manufacturers cannot simply ignore the evidence they find inconvenient or unconvincing. Instead, manufacturers must provide adequate warnings in order to ensure that consumers can make an informed choice, taking into account all of the available science. On this point, food manufacturers theoretically will be cooperative. After all, the food industry has long emphasized the importance of consumer choice, particularly as it relates to obesity, championing the idea of "personal responsibility."[242] Warnings not

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240 *Bogart*, *supra* note 24 at 34.

241 For example, some media attention was brought to internal documents from the sugar industry. See Kelly Crowe, "Sugar Industry's Secret Documents Echo Tobacco Tactics: Sugar Association's Intent to Use Science to Defeat Critics Uncovered by Dentist", *CBC News* (8 March 2013), online: <www.cbc.ca/news/health/story/2013/03/08/f-vp-crowe-big-sugar.html> [perma.cc/Z434-FKRQ]; Brownell & Warner, *supra* note 25.

242 See e.g. the discussions in Kelly D Brownell et al, "Personal Responsibility

only help consumers make informed choices, their legal effect is to shift responsibility for potential harms from the manufacturer to the consumer. Warnings facilitate personal responsibility – provided, of course, that they are adequate.

Justice Riordan was critical of the tobacco industry's attempt to neutralize or negate public understanding of the dangers of their products – or, as he put it, their attempt to "lull" the public into a sense of non-urgency. Consider the actions of some food manufacturers. For example, despite the known risks associated with consumption of sugar-sweetened beverages (SSB),[243] PepsiCo continues to market these products as "fun-for-you" without any warnings about inherent or foreseeable risks.[244] Similarly, fast food restaurants make misleading claims about the healthfulness of their food products[245] or fail to disclose the dangers of ingredients used. In fact, many individuals would not be able to even identify the ingredients used in many

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and Obesity: A Constructive Approach to a Controversial Issue" (2010) 29:3 Health Affairs 379; Nicole L Novak & Kelly D Brownell, "Obesity: A Public Health Approach" (2011) 34:4 Psychiatr Clin North Am 895. Here, the industry is following the lead of the tobacco industry, who have long emphasized that smokers need to be held personally responsible for their decisions. Indeed, in *Létourneau* the tobacco companies make this point. See e.g. *Létourneau*, *supra* note 29 at paras 305–09 (testimony by Kip Viscusi arguing that smokers had enough information to make rational decisions).

243 It is beyond the scope of this article to identify all the risks associated with the consumption of SSB. However, consider the following texts, which link SSB consumption with overweight and obesity: Vasanti S Malik et al, "Sugar-Sweetened Beverages and Weight Gain in Children and Adults: A Systematic Review and Meta-Analysis" (2013) 98:4 Am J Clin Nutr 1084 at 1100; Vasanti S Malik et al, "Sugar Sweetened Beverages, Obesity, Type 2 Diabetes and Cardiovascular Disease Risk" (2010) 121:11 Circulation 1356; "Reducing Consumption of Sugar-Sweetened Beverages to Reduce the Risk of Childhood Overweight and Obesity" (last modified 11 February 2019), online: *World Health Organization* <www.who.int/elena/titles/ssbs_childhood_obesity/en/> [perma.cc/ZDN5-RU7D]; Lisa Te Morenga, Simonette Mallard & Jim Mann, "Dietary Sugars and Body Weight: Systematic Review and Meta-analyses of Randomized Control Trials and Cohort Studies" (2013) 346 BMJ e7492; Mark A Pereira, "Sugar-Sweetened and Artificially-Sweetened Beverages in Relation to Obesity Risk" (2014) 5:6 Adv Nutr 797.

244 See Novak & Brownell, "Obesity", *supra* note 244 at 904.

245 See Mary O Hearts et al, "Nutritional Quality at Eight U.S. Fast-food Chains: 14-year Trends" (2013) 44 Am J Prev Med 589.

fast foods. Consider Judge Sweet's comments in *Pelman* that McDonald's Chicken McNuggets™ are a "McFrankenstein" creation using ingredients that an individual would not recreate at home.[246] As Justice Sweet stated, "It is at least a question of fact as to whether a reasonable consumer would know without recourse to the McDonalds' website that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger."[247] Products that are held out as being safe but in fact are not are, if anything, more dangerous, particularly for users that may be sensitive or vulnerable.[248] In effect, such products become more like "a wolf in sheep's clothing instead of an obvious wolf."[249]

One of the reasons that the tobacco companies in *Létourneau* emphasized that the science was complicated, multi-dimensional, and inconclusive was to challenge the notion that their fault (i.e., failing to warn) caused people to consume their product (i.e., smoke). While there is some legitimacy to the claim about complicated science – a point Justice Riordan acknowledged, noting the "controversial scientific waters"[250] – he rejected the idea that the science must be certain about "the cause."[251] Instead, he found it sufficient to note that the fault of the tobacco companies was a cause.[252]

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246 *Pelman*, *supra* note 35 at 535.

247 *Ibid*. Following *Pelman*, McDonald's did reformulate the Chicken McNuggets™, although it is not entirely clear whether this was strictly in response to the lawsuit. See Melissa Healey, "War on Fat Gets Serious" (3 January 2004) *LA Times*, online: <www.latimes.com/health/la-na-obesity24jan24b-story.html> [perma.cc/ME6N-585U].

248 See Waddams, *supra* note 51 at 58.

249 *Hodge & Sons v Anglo-American Oil Co* (1922), 12 Ll L Rep 183 at 187. While the court here was not considering the duty to warn or products held out as being safe, this sentiment seems to be applicable. This passage has been cited in failure to warn cases. See *Ruegger v Shell Oil Company of Canada*, 41 DLR (2d) 183 at 189, [1964] 1 OR 88 ; *Rivtow Marine Ltd v Washington Iron Works*, [1974] SCR 1189 at 1209, 40 DLR (3d) 530.

250 *Létourneau*, *supra* note 29 at para 766. Of course, as noted, the tobacco companies are largely responsible for creating the controversy.

251 *Ibid* at paras 791–809.

252 See *ibid* at para 804, where Justice Riordan noted that the fault does not have to be "the only cause of smoking, or even the dominant one." Justice Riordan also noted, "Where the proof shows that the other causes existed, it might be necessary to apportion or reduce liability accordingly" (*ibid* at para 795).

As Justice Riordan noted, "Mere common sense dictates that clear warnings about the toxicity of tobacco would have had some effect on any rational person."[253] It is not necessary to demonstrate that warnings would influence everyone's choice to stop smoking.[254] Similarly, even though warnings on food products may not prevent the consumption of said products, common sense suggests that they will have an effect on some people. As discussed in *Buchan*, the question of what food products to consume is a personal choice. Warnings about the known or foreseeable risks in the product are necessary, because they provide consumers with adequate information to facilitate meaningful consumer choices.

Importantly, *Létourneau* also makes it clear that the mere consumption of a product may not be sufficient to impose liability. As discussed above, to be eligible for inclusion in the *Blais* file, a plaintiff had to smoke a minimum of 5 "pack years". What level of consumption of a specific food product (or class of products)[255] would be required to give rise to liability? Consider, for example, SSBs. Is there a "litre years" threshold equivalent for SSBs? Would SSBs be too inclusive of a product category, given that, in addition to soda, it would include many juices, milk drinks, and energy drinks? In addition, for recovery under the *Blais* file, the plaintiffs had to have been diagnosed with one of the three identified diseases: lung cancer, cancer of

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253 *Ibid* at para 803.

254 Justice Riordan noted that this is evidenced by the fact that "even in the presence of such warnings today, people start and continue to smoke" (*ibid*).

255 One of the contentious aspects of tobacco litigation has been holding various manufacturers jointly liable for a failure to warn. It is common in tobacco litigation for tobacco manufacturers to argue that plaintiffs fail to demonstrate that the harm resulted from the use of their particular product. For example, Justice Riordan addressed this in his judgment, where he ultimately determined that the three tobacco manufacturers "jointly participated in a wrongful act that resulted in an injury" (*ibid* at para 449) and referred to the collusion between the defendant companies (see *ibid* at paras 447–49, 935–36). There is an argument to be made that similar collusion has existed in some sectors of the food industry – particularly given that only a handful of companies produce the vast majority of commercially prepared foods – although this would be a matter for the court of first instance to assess on the evidence. For a breakdown of ownership in the food industry, see Kate Taylor, "These 10 Companies Control Everything You Buy", *Business Insider* (28 September 2016), online: <www.businessinsider.com/10-companies-control-the-food-industry-2016-9> [perma.cc/UE63-MPWS].

the throat, or emphysema.[256] For obesity litigation, would plaintiffs be required to demonstrate a specific diagnosis of obesity? This seemingly simple requirement may, in fact, complicate matters. Obesity is not universally recognized as a disease,[257] and there is no agreement even among those who do identify obesity as a disease as to when that diagnosis should be made.[258] Additionally, there is a vociferous debate about whether or not obesity is necessarily harmful,[259] and thus courts would likely have to consider whether obesity gives rise to an actionable loss.

In this respect, the requirements set out by the court to be included in either of the classes examined in *Létourneau* may serve as an impediment to obesity litigation. Of course, this is only the case if obesity litigation proceeds as a class action. There is good reason to suspect that this will necessarily be the case, especially given the outcome in *Létourneau*. This would come at extreme personal and financial cost to an individual claimant. Moreover, despite the large damages award in *Létourneau*, the amount claimed per individual plaintiff would be woefully inadequate to justify pursuing litigation outside of a class action. Members of the *Blais* file with lung or throat cancer sought $100,000 and members with emphysema sought $30,000; members of the *Létourneau* file sought $5,000.[260] Such damages, even if punitive damages were to be awarded, would likely be insufficient to cover the cost of litigation. While obesity litigation would undoubtedly have to proceed as a class action, it is not clear that a class will be certified. As noted above, certification has already been difficult in Canadian

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256 Recall that the *Létourneau* file did not address a specific disease, but instead included all those "addicted to the nicotine contained in the cigarettes" (*supra* note 29 at para 2).

257 See e.g. Lee Stoner et al, "Should Obesity be Considered a Disease?" (2014) 134:6 Perspect Public Health 314.

258 While traditionally based on body-mass index (BMI), there is considerable resistance to the use of BMI in clinical settings. Alternative approaches have been identified, such as the Edmonton Obesity Staging System. See AM Sharma & R Kushner, "A Proposed Clinical Staging System for Obesity" (2009) 33:3 Int J Obes 289.

259 Although a full discussion of this point is beyond the scope of this article, the debate often concerns whether or not someone who is obese can also be healthy or fit. See e.g. Joshua A Bell et al, "The Natural Course of Healthy Obesity over 20 Years" (2015) 65:1 JACC 101.

260 See *Létourneau*, *supra* note 29 at para 10.

tobacco litigation, with certification being denied in Ragoonanan Estate[261] and Sparkes[262]. Moreover, certification was denied in the now infamous McLawsuit, *Pelman*.[263] While the requirements for the certification of a class are not explored here, this will present a formidable obstacle to overcome before courts would even begin to consider the merits of a failure to warn case.

There are other additional issues that warrant further consideration concerning the application of duty to warn principles to food products. For one, some thought needs to be given to what risks associated with food are so obvious and notorious that a warning will not be required.[264] Additionally, there is legitimate concern that oversaturation may be a problem; if there are warnings on everything, this might only serve to confuse consumers and render warnings meaningless.[265] Consideration needs to be given to what food products require warnings, and for what risks.[266] Obesity is only

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261 *Supra* note 132.

262 *Supra* note 133.

263 *Supra* note 35.

264 Despite some of the mythology about consumers' knowledge about food, there is a large body of evidence to suggest that most people are not that informed about food products generally, including current attempts to convey nutritional information (e.g., nutrition fact panels), and thus are unlikely to be able to ascertain the true risks associated with consumption (or overconsumption) of food products. See e.g. Shelley, "Addressing the Policy Cacophony", *supra* note 231; Lisa Levy et al, "How Well Do Consumers Understand Percentage Daily Value on Food Labels?" (2000) 14:3 Am J Health Promot 157; Fuan Li, Paul W Miniard & Michael J Barone, "The Facilitating Influence of Consumer Knowledge on the Effectiveness of Daily Value Reference Information" (2000) 28:3 J Acad Mark Sci 425 at 427.

265 Waddams, *supra* note 51 at 61, for this reason, argues that courts appear to be demanding more explicit warnings for products that are really dangerous: "It is understandable that in an age where thousands of products are labelled with skulls and crossbones and other lurid symbols the consumer's sensitivity becomes a little jaded, and something more is required of a product that really is dangerous.". See also *Restatement (Third) of Torts*, which states that "[i] n some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users." (*supra* note 219 at § 2-*i*).

266 For example, there has been some discussion about whether alfalfa sprouts

one risk associated with food products. There are also legitimate procedural concerns about whether obesity litigation claims will clog the already overburdened courts, as well as speculative concerns about the impact litigation against the food industry (let alone judgments in favour of obese plaintiffs) may have on the food system (e.g., increasing the price of food, undermining incentives for the food industry to promote healthy foods,[267] or hampering innovation[268]), given that we all rely on the food industry. These are not unimportant concerns; they are undoubtedly matters that a court will have to consider.

Notwithstanding these challenges, obesity litigation does not require the creation of a new theory of liability. Indeed, this is what is made evident through *Létourneau*. Product liability law, specifically the duty to warn, already imposes upon manufacturers an obligation to provide warnings for products that are known to cause harms, whether through proper use or misuse of the product. This obligation exists even when an industry does not accept the evidence of harm. What *Létourneau* makes clear is that manufacturers are expected to provide adequate warnings, consistent with the conditions set out in *Buchan*, to ensure that consumers are making informed choices.

Conclusion

Under Canadian law, it is well established that manufacturers have a duty to warn consumers about the risks inherent in their products. This duty is heightened in instances when a product is ingested or consumed. While the courts have found manufacturers liable for failing to warn about risks in situations where the risk is statistically small,[269] as the court in *Buchan* noted, manufacturers can easily avoid liability simply by disclosing known risks to users. The underlying rationale for this duty is that it allows con-

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require a warning, given the numerous salmonella and *E. coli* outbreaks in recent years. See Claire Leschin-Hoar, "Should Sprouts Come with a Warning Label?", *National Public Radio* (16 February 2016), online: <www.npr.org/sections/thesalt/2016/02/25/468032778/should-sprouts-come-with-a-warning-label> [perma.cc/XF74-UBXU].

267 See Roller, Voorhees & Lunkenheimer, *supra* note 23 at 420.

268 See McMenamin & Tiglio, *supra* note 23 at 518.

269 See *Hollis*, *supra* note 31 at para 41.

sumers to make informed choices about the products they consume. This duty extends to food manufacturers. Food products that have inherent risks with their consumption, including known or foreseeable risks with overconsumption, require adequate warnings to consumers. Despite this requirement, most food products do not contain such warnings.

Many have observed that the food industry has learned from the tobacco industry, and that ultimately it has adopted the tobacco industry's playbook.[270] This has included the food industry mimicking the tobacco industry's approach to resisting labelling and warning requirements.[271] Like the tobacco industry, the food industry has actively undermined and thwarted attempts by the state to impose a stricter regulatory environment. It has ignored and denied the research identifying risks with its products, while simultaneously attempting to generate a scientific controversy about these risks.[272] Ultimately, despite the clear duty food manufacturers have to warn consumers, they have remained silent. Thus far, much like the tobacco industry, the food industry has benefitted from this strategy. However, the tobacco industry is starting to be held to account for their failure to adequately warn consumers. Perhaps it is time for the food industry to learn another lesson from the tobacco industry, by looking to *Létourneau*. Should it choose to ignore this lesson, *Létourneau* may very well pave the way for the future of obesity litigation in Canada.

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270 See Linda Dorfman et al, "Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare" (2012) 9:6 PLoS Med e1001241 at 4–5; Kelly D Brownell & Kenneth E Warner, "The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?" (2009) 87:1 Milbank Quarterly 259 at 262; Jess Alderman & Richard A Daynard, "Applying Lessons from Tobacco Litigation to Obesity Lawsuits" (2006) 30:1 Am J Prev Med 82 at 85–86.

271 See Rob Moodie et al, "Profits and Pandemics: Prevention of Harmful Effects of Tobacco, Alcohol, and Ultra-Processed Food and Drink Industries" (2013) 381 Lancet 670 at 674; Keith Leslie, "Ontario Bowed to the Food Industry Pressure on Menu-Labelling Legislations: Critics", *CTV News* (10 August 2016), online: <www.ctvnews.ca/health/ontario-bowed-to-food-industry-pressure-on-menu-labelling-legislation-critics-1.3022863> [perma.cc/34HA-U7GQ].

272 See Moodie et al, *supra* note 73 at 670; Maira Bes-Rastrollo et al, "Financial Conflicts of Interest and Reporting Bias Regarding the Association between Sugar-Sweetened Beverages and Weight Gain: A Systematic Review of Systematic Reviews" (2013) 10:12 PLoS Med e1001578 at e1001578.