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## McTorts: The Social and Legal Impact of McDonald's Role in Tort Suits

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# McTORTS: THE SOCIAL AND LEGAL IMPACT OF McDONALD'S ROLE IN TORT SUITS

*Professor Caroline Forell \**

*[W]hat makes us cringe when we hear about a four-hundred-pound man suing McDonald's[?]*<sup>1</sup>

*We do it all for you.*

--- McDonald's commercial jingle

## INTRODUCTION

McDonald's is not just a fast food corporation. Around the world the Golden Arches<sup>2</sup> and the prefix "Mc"<sup>3</sup> epitomize what is

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\* Clayton R. Hess Professor of Law, University of Oregon School of Law. I benefited from my colleagues' comments when I presented a version of this article at a session of the University of Oregon School of Law's Academic Flash Mob. Thanks to Dorothy Kim, Ben Dore, Jen Costa and Morgan West for their excellent research assistance and to Ellen Range for her helpful input on an earlier draft.

<sup>1</sup> Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1654 (2004).

<sup>2</sup> According to Eric Schlosser, "[t]he Golden Arches are now more widely recognized than the Christian cross." ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 5 (Harper Perennial 2005) (2001).

<sup>3</sup> McCafe, McFrankenstein, McJobs, McKids, McLibel, McMansions, McMuffins, McTorts, McWorld, McLawsuits, McNuggets—whenever 'Mc' is used in front of a common word, McDonald's, or something it symbolizes, is the reference point. In the pamphlet that led to the libel suit, dubbed 'McLibel,' the accusations were stated starkly: "McDollars, McGreedy, McCancer, McMurder, McDisease, McProfits, McDeadly, McHunger, McRipoff, McTorture, McWasteful, McGarbage." Tom Kuntz, *Word for Word/The McLibel Trial; Your Lordship, They Both Think They Have a Legitimate Beef*, N.Y. TIMES, Aug. 6, 1995, <http://www.nytimes.com/1995/08/06/weekinreview/word-for-word-mclibel-trial-your-lordship-they-both-think-they-have-legitimate.html?src=pm>. In *Quality Inn Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198 (D. Md. 1988), where Quality

good and bad about American capitalism. It is therefore not surprising that when McDonald's is a party to a lawsuit, the outcome of that lawsuit may have broad implications. This article examines the interaction between McDonald's, public policy, and tort law<sup>4</sup> from both historical and social psychological perspectives. I demonstrate that certain tort cases involving McDonald's have had particularly important social consequences that I attribute to McDonald's special ability to influence the human psyche.

McDonald's invented the fast food industry, transforming the dining experience into fast, uniform, clean, and efficient assembly lines. Through what is described by sociologist George Ritzer as "McDonaldization,"<sup>5</sup> McDonald's founder Ray Kroc made eating out readily available and affordable to everyone. As another commentator noted, McDonald's "changed the eating habits of Americans [and] revolutionized the food service and processing industries."<sup>6</sup>

With more than 32,000 restaurants worldwide,<sup>7</sup> McDonald's

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Inn's "McSleep Inn" was held to infringe McDonald's trademark, the court noted that:

In 1977, McDonald's began advertising a fanciful language called 'McLanguage' that featured the formulation of words by combining the 'Mc' prefix with a variety of nouns and adjectives. In television advertising viewed by the Court, Ronald McDonald is shown teaching children how to formulate 'Mc' words, and he used words such as McService, McPrice, McFries and McBest.

*Id.* at 203. Professor Tushnet, in discussing the McSleep Inn case notes: "Even if McDonald's can enjoin McSleep Inns, the pervasive communicative use of Mc as shorthand for a set of qualities keeps the mark's meaning from being locked down." Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 551 (2008). Professor Heymann describes "Mc-" as a "generative metaphor." Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1336 (2010). She explains that it takes on meanings that consumers can use to generate additional word formations: either as applied to food items or to other items. *Id.* This does not, however, reflect a loss of meaning in the association between "Mc-" and McDonald's. *Id.* at 1336-37. Instead, the use of metaphor is an indication of the mark's strength. *Id.* at 1337.

<sup>4</sup> Note that I include statutory claims under the tort label where they provide tort-like civil remedies for tort-like harms—damages and injunctions.

<sup>5</sup> GEORGE RITZER, *THE MCDONALDIZATION OF SOCIETY* (6th ed. Pine Forge Press 2011) (describing how McDonald's methods of service and food production have transformed modern life, Ritzer first published this sociology text in 1994).

<sup>6</sup> JOHN F. LOVE, *MCDONALD'S: BEHIND THE ARCHES* 8 (1986).

<sup>7</sup> As McDonald's website notes: "[W]e're proud to have become one of the world's leading food service retailers, with more than 32,000 restaurants serving more than 60 million people in more than 100 countries every day." *Our Story*,

dominates the global fast food industry<sup>8</sup> and continues to have by far the largest share of the market.<sup>9</sup> According to a January 2009 *Time* magazine article, even recessions have little impact on the fast food giant's ability to succeed; McDonald's was one of only two companies listed in the Dow Jones Industrial Average for which share prices increased in 2008.<sup>10</sup> *Time* quoted one industry expert as saying: "In the worst of times for the restaurant industry, it's the best of times for McDonald's."<sup>11</sup>

McDonald's has come to be more than the sum of its parts<sup>12</sup> as is evidenced by the power of using McDonald's name to evoke strong feelings, ranging from patriotism, devotion, and pride to resentment, envy, and outrage. As a result, how McDonald's chooses to engage an adversary in the civil liability arena, how that adversary responds, and how the media and others portray the parties and their motives, can significantly influence tort law and public policy.

In this article I examine how certain tort suits involving McDonald's have helped to shape our worldview in important ways. The first section considers McDonald's cachet as the American fast food icon. Specifically, it looks at how McDonald's uses marketing more skillfully than most of corporate America. It demonstrates that McDonald's is particularly adept at manipulating customers' desires

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MCDONALDS.COM, [http://www.mcdonalds.com/us/en/our\\_story.html](http://www.mcdonalds.com/us/en/our_story.html) (last visited Nov. 22, 2011).

<sup>8</sup> See Blair Chancey, *Skinner: McDonald's is "Recession Resistant"*, QSR (Oct. 22, 2008), <http://www.qsrmagazine.com/news/skinner-mcdonalds-recession-resistant>; Ken Jones, *McDonald's Corp. (NYSE: MCD): Q1 2011 Earnings Roundup*, STOCK WIZARD BLOG (Apr. 21, 2011, 5:12 AM), <http://istockwizard.blogspot.com/2011/04/mcdonalds-corp-nyse-mcd-q1-2011.html> (stating first quarter 2011 profits rose in the U.S., U.K., France, Russia, Germany, Australia, China and around the world); Ken Jones, *McDonald's Corp. (NYSE: MCD): Q2 2011 Earnings Roundup*, STOCK WIZARD BLOG (July 22, 2011, 5:16 AM), <http://istockwizard.blogspot.com/2011/07/mcdonalds-corp-nyse-mcd-q2-2011.html> (stating second quarter 2011 profits rose to \$1.41 billion).

<sup>9</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 536 n.26 (S.D.N.Y. 2003).

<sup>10</sup> Sean Gregory, *In Lean Times, McDonald's Only Gets Fatter*, TIME (Jan. 21, 2009), available at <http://www.time.com/time/business/article/0,8599,1872629,00.html>.

<sup>11</sup> *Id.*

<sup>12</sup> As anthropologist James Watson puts it: "McDonald's has become a saturated symbol, so laden with contradictory associations and meanings that the company stands for something greater than the sum of its corporate parts." James L. Watson, *Introduction: Transnationalism, Localization, and Fast Foods in East Asia*, GOLDEN ARCHES EAST: MCDONALD'S IN EAST ASIA 1, 2 (James L. Watson 2d ed. 2006).

by using their customers' dispositional beliefs, that individual choice and personal responsibility are free of situational influence, to the company's advantage.<sup>13</sup> McDonald's has had extraordinary success in making what benefits McDonald's appear to be what American consumers freely choose, and making what harms McDonald's appear to be due to the complainant's failure to take personal responsibility. This success has made its influence far more pervasive than most other corporate entities.

I then describe McDonald's interface with American and global society, from its creation in 1954 up until the first important tort suits were brought in the 1990s. This provides the background for the important tort cases of the mid-nineties. Next, I examine three tort cases involving McDonald's:<sup>14</sup> *McDonald's Corp. v. Steel and Morris*,<sup>15</sup> more commonly known as *McLibel*,<sup>16</sup> the British libel suit that backfired on McDonald's; *Liebeck v. McDonald's Rest.*,<sup>17</sup> the notorious McDonald's Hot Coffee case<sup>18</sup> that remains the poster child

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<sup>13</sup> "Situationism" is a social psychology term that "refers to the view that behavior is produced more by contextual factors and people's attempts to respond to them . . . than by stable characteristics within people." David J. Arkush, *Situating Emotions: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for the Law* 3-4 n.1 (Aug. 20, 2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003562); see also *About the Situationist*, THE SITUATIONIST, <http://thesituationist.wordpress.com/about/> (last visited Nov. 22, 2011) (describing situationism as "an approach that is deliberately attentive to the situation.").

<sup>14</sup> Other important tort cases involving McDonald's include *Faverty v. McDonald's Rests. of Oregon, Inc.*, 892 P.2d 703 (Or. Ct. App. 1995) (awarding damages against McDonald's for overworking an employee whose car collided with plaintiff's when the employee fell asleep) and *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274 (Ky. Ct. App. 2010) (awarding damages against McDonald's for breaching its duty to protect employee from caller's abusive hoax that resulted in her being sexually assaulted and imprisoned when it had notice of multiple previous successful hoaxes).

<sup>15</sup> *McDonald's Corp. v. Steel & Morris*, [1997] EWHC (QB) 366 (Eng.), available at [http://www.mcspotlight.org/case/trial/verdict/verdict\\_jud.html](http://www.mcspotlight.org/case/trial/verdict/verdict_jud.html); see also *McDonald's Corp. v. Steel*, [1995] 3 All E.R. 615 (Eng.); *Steel & Morris v. United Kingdom*, [2005] ECHR 68416/01.

<sup>16</sup> JOHN VIDAL, *McLIBEL: BURGER CULTURE ON TRIAL* (1997).

<sup>17</sup> *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994) *vacated sub nom.* *Liebeck v. Restaurants*, No. CV-93-02419, 1994 WL 16777704 (N.M. Dist. Nov. 28, 1994).

<sup>18</sup> I use the term that was the title of a recent documentary about this case. *HOT COFFEE* (HBO 2011) (a documentary by Susan Saladoff).

for tort reform; and *Pelman v. McDonald's Corp.*,<sup>19</sup> the childhood obesity lawsuit against McDonald's. I discuss how, because of McDonald's unique position in society and its adept manipulation of the public's beliefs in individual choice and personal responsibility, McDonald's involvement with these cases has strongly influenced important public policy issues.

I conclude that McDonald's economic, psychological, and symbolic influence is so pervasive that public perception of McDonald's role in a hotly disputed lawsuit can serve as a particularly powerful catalyst for legal changes such as tort reform. Furthermore, such lawsuits can raise societal awareness about and lead to changes in the marketing and content of fast food.

When McDonald's is involved in a lawsuit, the general public takes notice. This is because the McDonald's name elicits a multitude of powerful meanings that enable a suit involving the restaurant chain to be used by the parties and by other interests, ranging from social activists (McLibel), to corporate America (the Hot Coffee case), to health advocates (the obesity suits) to effectively reframe an issue of public interest. While lawsuits involving other large corporations, such as Ford Motor Company (the Ford Pinto case),<sup>20</sup> Eli Lilly (the DES cases),<sup>21</sup> and Philip Morris (the tobacco cases),<sup>22</sup> have also highlighted both tort law's and mega-corporations' societal influence, no single corporate entity's involvement in tort litigation has had as large of an impact as McDonald's. The three tort cases I examine highlight this impact. Each involves one or more of the roles that tort law has played in recent years, including compensating injured victims, intimidating critics, punishing corporate misfeasance, changing corporate behavior, corrective justice, raising public awareness, and the tort reform backlash against personal injury law and lawyers that occurred at the end of the last century.

Tort law involves the ever-present tension between the

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<sup>19</sup> *Pelman v. McDonald's Corp.*, No. 02-7821, 2011 WL 1230712 (S.D.N.Y. Feb. 25, 2011), *stipulation of voluntary dismissal with prejudice*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *dismissed by partial summary judgment denied* by No. 02 Civ. 7821, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003) *vacated in part*, 396 F.3d 508 (2d Cir. 2005), *on remand motion granted* by 396 F. Supp. 2d 439 (S.D.N.Y. 2005), *motion to strike granted in part* by 452 F. Supp. 2d 320 (S.D.N.Y. 2006), *class certification denied* by 272 F.R.D. 82 (S.D.N.Y. 2010).

<sup>20</sup> *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

<sup>21</sup> See, e.g., *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984).

<sup>22</sup> See generally WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 227-64 (2004).

freedom to pursue one's interests without interference and the need to avoid harm to others and compensate when such harm occurs.<sup>23</sup> Certain lawsuits involving McDonald's highlight this constant tension. Should individuals be held liable for publishing claims that McDonald's products are extremely harmful to society as McDonald's alleged in *McLibel*? When someone spills extremely hot McDonald's coffee on her lap and suffers third degree burns, should McDonald's be held economically responsible as claimed in the Hot Coffee case? Should McDonald's be responsible for harm to children resulting from the consumption of unhealthy food when McDonald's intentionally, and very effectively, markets such food to children as claimed in the obesity suits?

Obviously, McDonald's and other entities that sell products and services to individual consumers would prefer that financial responsibility for such injuries lie with someone other than themselves. To achieve this goal, such corporations frame the issue in tort cases as involving freedom and personal responsibility. Thus, McDonald's darkly warns that making it bear the loss will limit not only its own freedom, but also the freedom of its customers.<sup>24</sup> Even when the harm alleged is to children, McDonald's reminds us that it is the parents who should bear the responsibility.<sup>25</sup>

McDonald's takes advantage of most people's beliefs that purchasing decisions are self-generated.<sup>26</sup> Its use of slogans such as "I'm lovin' it" and "We do it all for you" is based on knowledge that, while marketing substantially influences eating preferences, most people believe that such preferences are based on independent personal choice.<sup>27</sup> Thus, McDonald's manipulates the public's love affair with the ideas of individual liberty and personal choice for its own benefit. It actively encourages consumers to believe that they are in the driver's seat, that they are independent agents, and that they are the ones exercising their liberty interests to freely choose McDonald's because it provides them with what they already want or, as "I'm lovin' it" suggests, even love.

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<sup>23</sup> W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 6 (5th ed. 1984).

<sup>24</sup> See Benforado et al., *supra* note 1, at 1749 (responding to the documentary, *SUPER SIZE ME* (Roadside Attractions 2004)).

<sup>25</sup> Brief for Defendant-Appellee McDonald's Corporation at 3, *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) ("Many of these conditions can be avoided by the choices a person confronts every minute of every day regarding diet, exercise, and lifestyle—choices that are inherently personal and parental, and certainly beyond the control of McDonald's or the judicial system.").

<sup>26</sup> Benforado et al., *supra* note 1, at 1657-58.

<sup>27</sup> Benforado et al., *supra* note 1, at 1688.

Tort suits involving McDonald's provide an opportunity to penetrate McDonald's marketing fog and demonstrate that, in many instances where consumers believe that they are freely exercising informed choice, their decisions are in fact heavily influenced by sophisticated marketing techniques and lack of information or misinformation that puts them at risk of injury. In order to negatively shape public perception of their opponents in such tort suits, McDonald's responds to such charges with the same claims of individual responsibility and freedom it has used so successfully in selling its products over the years. Specifically, McDonald's blames the greedy injured party and the personal injury bar for bringing what it asserts are frivolous claims.

### I. SITUATIONISM

In explaining McDonald's power over the public imagination and how this affects lawsuits involving it, I rely on the social psychology theory called "situationism" that recognizes the strong effect that environmental influences can have on individual decision-making.<sup>28</sup> Situationism challenges the dominant conceptions that human behavior results mainly from free will and internal disposition,<sup>29</sup> with minimal impact from outside influences. Underestimating "the influence of the situation on behavior and overestimat[ing] the influence of personal dispositions and choice"<sup>30</sup> explains the power of marketing.

The 2004 article *Broken Scales*, co-authored by Adam Benforado, John Hanson<sup>31</sup> and David Yosifon, tackles the relationship between fast food and obesity. In particular, *Broken Scales* focuses on McDonald's and its ability to "dispositionalize the situation."<sup>32</sup> It argues that the dispositional worldview "exaggerate[s]

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<sup>28</sup> PHILIP ZIMBARDO & MICHAEL LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 93-95 (McGraw-Hill 1991).

<sup>29</sup> See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 285 (2003).

<sup>30</sup> Benforado et al., *supra* note 1, at 1657.

<sup>31</sup> John Hanson is a professor at Harvard Law School and a leading proponent of situationism. This term and the contrasting term "dispositionism" has been used in the legal context by Professor Jon Hanson and various co-authors. See, e.g., Benforado et al., *supra* note 1, at 1654 n.16; Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008); Hanson & Yosifon, *supra* note 29; see also *About the Situationist*, *supra* note 13).

<sup>32</sup> Benforado et al., *supra* note 1, at 1691.



the role of disposition, personality, or choice and [underestimates] the role of situation, environment, and context in accounting for human behavior.”<sup>33</sup> Relying on the famous and often replicated Milgram experiments<sup>34</sup> as well as other studies indicating that environmental forces can be used to heavily influence what people believe to be their independent choices,<sup>35</sup> the article explains how McDonald’s and other corporations’ marketing shapes human desires to maximize profits for shareholders.<sup>36</sup>

Corporate marketing’s use of the public’s dispositionism applies to McDonald’s as follows: First, McDonald’s exploits the existing situation and then creates additional situational variables that encourage consumer behavior that benefits McDonald’s. Next, McDonald’s uses its media and marketing savvy to effectively attribute this behavior to consumer choice. Through aggressive advertising, McDonald’s praises consumers for knowing what’s good for them. That what is good for them happens to be McDonald’s fast food simply demonstrates that McDonald’s is a model corporate citizen, providing what consumers know they want and need.<sup>37</sup> Thus, McDonald’s famous marketing catchphrases, “We do it all for you,” “You deserve a break today,” and their current folksy claim on the customer’s behalf, “I’m lovin’ it,” resonate with consumers and are

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<sup>33</sup> *Id.* at 1657–58.

<sup>34</sup> STANLEY MILGRAM, OBEEDIENCE TO AUTHORITY (Perennial Classics 2004) (describing the experiment where ordinary people delivered what they believed were increasingly painful electric shocks to other people simply because a professor requested they do so). A recent replication of Milgram’s experiments is reported in Jerry M. Berger, *Replicating Milgram: Would People Still Obey Today?*, 64 AM. PSYCHOLOGIST 1 (2009). Between 1994 and 2004, a series of bizarre Milgram-like situations occurred at fast food restaurants around the nation. A stranger would call a fast food restaurant, pretending to be a police officer. He would convince the restaurant manager and others to strip-search and even sexually assault an employee at his direction. One of the most egregious cases resulted in the victim recovering more than \$1 million in compensatory damages and \$5 million in punitive damages against McDonald’s. *McDonald’s Corp. v. Ogborn*, 309 S.W.3d 274 (Ky. Ct. App. 2009). According to the appellate court: “The caller was successful in accomplishing his perverse hoax more than thirty times at different McDonald’s restaurants . . . .” *Id.* at 281.

<sup>35</sup> Benforado et al., *supra* note 1, at 1654–88.

<sup>36</sup> *Id.* at 1691. Another corporate example of taking advantage of consumer’s belief in dispositionism through situationism is the egregious case of the tobacco companies. Throughout the 20th Century they manipulated and misled the public into thinking that they were independently choosing to smoke and that the cigarette companies were simply providing them with a product that they wanted. See HALTOM & MCCANN, *supra* note 22.

<sup>37</sup> Benforado et al., *supra* note 1, at 1691.

highly effective.<sup>38</sup>

These techniques succeed because most people want to believe that their decisions are based on their rational internal decision-making process, and are unaffected by external pressures. Since it feels good to embrace McDonald's attribution to personal choice of the purchasing decisions that McDonald's heavily shapes, consumers happily or, more accurately, delusionally, buy what McDonald's wants them to buy. Consumers rationalize this behavior based on appealing aspects of McDonald's food: it is inexpensive, tasty, and convenient. Until someone else brings it to their attention, the public for the most part remains ignorant about the costs of such food to their, and society's, well-being.

A stark example of McDonald's success at manipulating consumers was its trademark Supersize fries and drinks.<sup>39</sup> Until 2004,<sup>40</sup> McDonald's took advantage of Americans' attraction to both fast food and deals by offering, at little extra cost, to double the portion even though this was much more food than was necessary to satisfy a customer's hunger or caloric needs.<sup>41</sup> Moreover, McDonald's framed the customer's decision to supersize in such a way that it would appear as if the conduct was motivated by an unmediated and smart consumer choice.<sup>42</sup> In fact, if not for McDonald's both offering twice the food at much less than twice the price, and not requiring the customer to look gluttonous by coming

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<sup>38</sup> Emily Bryson York, *McDonald's Unveils 'I'm Lovin' It 2.0: Fast-Feeder Reboots 7-Year-Old Campaign in Wake of Massive Sales and Share Gains*, ADVERTISING AGE (Apr. 22, 2010), <http://adage.com/article/news/marketing-mcdonald-s-unveils-lovin-2-0/143453/> ("I'm Lovin' It' is now the company's most successful and longest-running campaign, surpassing the iconic 'You deserve a break today' . . .").

<sup>39</sup> Associated Press, *McDonald's Phasing Out "Super-Size" Menu*, RED ORBIT (Mar. 2, 2004, 6:00 AM), [http://www.redorbit.com/news/science/49940/mcdonalds\\_phasing\\_out\\_supersize\\_menu/](http://www.redorbit.com/news/science/49940/mcdonalds_phasing_out_supersize_menu/).

<sup>40</sup> *Id.*

<sup>41</sup> See Benforado et al., *supra* note 1, 1676–84 & nn. 97–132 (explaining that our biological food cravings aren't motivated by caloric needs).

<sup>42</sup> Framing is described as "[a]n effect of the description, labeling, or presentation of a problem on responses to it." ANDREW M. COLMAN, A DICTIONARY OF PSYCHOLOGY 295 (3d ed. 2009); see also Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981); see also Benforado et al., *supra* note 1, at 1668 ("The ways in which we construe our world and make attributions of causation, responsibility, and blame depend largely upon who presents the information, narratives, and images to us and how").

back for seconds,<sup>43</sup> the customer probably would not have paid to gorge himself and McDonald's would not have profited from this unhealthy consumer "choice."<sup>44</sup>

The impact of McDonald's situationism is not limited to the current obesity crisis. As the cases examined in this article demonstrate, the unique position that McDonald's enjoys in the world enables it to employ situationism more effectively and with broader impact than most other corporations.<sup>45</sup> A major reason for this is McDonald's intense focus on young children. From a very young age,<sup>46</sup> McDonald's uses Ronald McDonald, Happy Meals, playgrounds, Chicken McNuggets, movie tie-ins, and more, to create an unconscious recognition of the company in the minds of children. As a result, children believe that they are choosing McDonald's

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<sup>43</sup> MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 105-06 (2006). Pollan describes how David Wallerstein, who discovered the profitability of supersizing in movie theater popcorn and drink sales, joined McDonald's and convinced Ray Kroc to supersize. As Pollan notes:

[T]he dramatic spike in sales confirmed the marketer's hunch. Deep cultural taboos against gluttony—one of the seven deadly sins, after all—had been holding [customers] back. Wallerstein's dubious achievement was to devise the dietary equivalent of a papal dispensation: Supersize it! He had discovered the secret to expanding the (supposedly) fixed human stomach.

See also Delroy Alexander, *Will They Buy It? McDonald's Plan to Eliminate Supersize Portions Could Anger Its Most Loyal and Biggest-Spending Customers*, CHI. TRIB. (Mar. 4, 2004), available at <http://www.chicagotribune.com/business/chi-0403040339mar04,0,7078753.story>.

<sup>44</sup> Benforado et al., *supra* note 1, at 1654.

<sup>45</sup> McDonald's stands apart from its main rivals in the burger business, Burger King and Wendy's. They clearly do not have the same financial clout and symbolic and psychological power as McDonald's. Among companies that, like McDonald's, sell food and beverages, Starbucks is most comparable in successfully marketing an American image and lifestyle. However, its market is limited to teenagers and above, and its focus is more on a relatively benign beverage instead of fattening fast food. McDonald's is currently targeting Starbucks' customers with its McCafe items. Like McDonald's, Coca-Cola symbolizes America. However, it has a serious rival in Pepsi and is only about soft drinks. Other all-American companies with cachet sell things that have inherent value, not unhealthy food. For example, Nike is another American symbol; however, it is about shoes, clothes, and athletics and encourages a healthy lifestyle. Walmart is another internationally known American corporation but its main focus is not serving food and its main target is not children. Instead they provide a wide range of useful services and products. Finally, like McDonald's, Disney's main target is children but its main business is entertainment with its amusement parks, toys, and movies instead of unhealthy fast food.

<sup>46</sup> See *infra* text accompanying notes 81-86.

products, when in fact McDonald's psychological manipulations heavily influence their choices. It is no accident that Ronald McDonald is now as well known to children as Santa Claus.<sup>47</sup>

McDonald's relationship with its consumers that it cultivated since they were children has a powerful impact when McDonald's is under attack. When someone—whether she is a social activist,<sup>48</sup> documentary moviemaker,<sup>49</sup> or a plaintiff in a lawsuit<sup>50</sup>—challenges McDonald's motives and behavior, McDonald's can ominously warn the folks whom it befriended as children that their rights are being threatened and they are likely to respond by taking McDonald's side.<sup>51</sup> As a result, tort litigation that attempts to hold McDonald's responsible for harms its customers suffer risks serious backlash as the Hot Coffee case clearly demonstrates.

The next section lays the historical foundation for how McDonald's and tort law interrelate today. For many years, McDonald's control of its image and stated concern for its customers' and employees' well-being went unchallenged. It was an all-American success story that provided Americans with what they wanted. McDonald's fed the myth that corporate America's goal of maximizing profit by creating, and then fulfilling desires, translated perfectly into providing for the welfare of customers.

## II. MCDONALD'S PRE-TORT LITIGATION HISTORY (1954–1990)

The first appellate tort case reported in Westlaw involving McDonald's does not appear until the late 1970s.<sup>52</sup> In fact, policy-influencing tort litigation in which McDonald's was a party only began in earnest in 1994 with the McLibel and Hot Coffee cases.

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<sup>47</sup> *Quality Inn Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198, 203 (D. Md. 1988); see also SCHLOSSER, *supra* note 2, at 4 ("American schoolchildren found that 96 percent could identify Ronald McDonald. The only fictional character with a higher degree of recognition was Santa Claus.").

<sup>48</sup> See, e.g., the McLibel defendants and other members of Greenpeace, discussed *infra* text accompanying notes 89-162.

<sup>49</sup> See, e.g., *HOT COFFEE* (HBO 2011); *SUPER SIZE ME* (Kathbur Pictures 2004).

<sup>50</sup> See, e.g., Stella Liebeck, the plaintiff in the Hot Coffee case, discussed *infra* text accompanying notes 163-234.

<sup>51</sup> See *infra* text accompanying notes 163-234.

<sup>52</sup> The first negligence claim reported on Westlaw in which McDonald's was a named defendant was a slip and fall case. *Woodruff v. McDonald's Rests.*, 142 Cal. Rptr. 367 (Cal. App. 1st Dist. 1977).

Nevertheless, McDonald's history up through the 1980s set the stage for several important torts cases of the 1990s and the 21st Century. This history demonstrates McDonald's burgeoning ability to influence consumer behavior, sometimes in dangerous and unhealthy ways.

The pre-1990s story of McDonald's coincides with and reflects the immense changes that have occurred in the United States and around the world since the mid-20th century. The tremendous impact of the automobile, television, globalization, and increased busyness of everyday life all assisted McDonald's in its successful quest to both dominate the fast food market through McDonaldization and change the way we eat and think about food through its skilled use of situationism. The following history incorporates both McDonald's milestones and the events that McDonald's influenced, or that influenced McDonald's.

#### *A. Ray Kroc, Founding Father*

*I believe in God, family and McDonald's—and in the office, that order is reversed.*

—Ray Kroc<sup>53</sup>

In 1954, fifty-two-year-old Ray Kroc, a high school dropout, then working as a milkshake mixer salesman, first visited McDonald's, a wildly successful and thoroughly unconventional drive-in hamburger stand owned by two brothers in San Bernadino, California.<sup>54</sup> Kroc recognized the genius of the McDonald brothers' "Speedee Service System" which was the precursor to McDonaldization: fast, inexpensive, and highly routinized take-away, with a limited, but all-American, menu of food that could be eaten without utensils.<sup>55</sup> With both the baby boom and the love affair with the car in full swing, the McDonald brothers offered the perfect service and food combination for post-war America.

Seeing the almost unlimited potential of the business model, Kroc persuaded the McDonald brothers to permit him to franchise

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<sup>53</sup> RAY KROC & ROBERT ANDERSON, GRINDING IT OUT: THE MAKING OF MCDONALD'S 124 (St. Martin's Paperbacks 1977).

<sup>54</sup> *Id.* at 6, 13–14. Maurice and Richard McDonald opened their first drive-in restaurant in 1937. SCHLOSSER, *supra* note 2, at 19. In 1948, they closed down and fired all their carhops. *Id.* When they reopened, they had converted their restaurant into the fast food cash cow that so impressed Kroc when he visited them in 1954. KROC & ANDERSON, *supra* note 53, at 6.

<sup>55</sup> SCHLOSSER, *supra* note 2, at 19–20.

McDonald's, including its neon Golden Arches, nationwide.<sup>56</sup> In 1955, Kroc opened his first McDonald's Restaurant in Des Plaines, Illinois.<sup>57</sup> Soon dissatisfied with the McDonald brothers' lack of ambition and cooperation, Kroc bought all the rights to the McDonald's concept from them in 1961 for \$2.7 million.<sup>58</sup> He then opened up a McDonald's across the street from the McDonald brothers' restaurant and drove them out of business.<sup>59</sup>

Kroc and McDonald's thrived. The corporate motto was "Quality, Service, Cleanliness & Value" and McDonald's pursued these goals very seriously.<sup>60</sup> Soon thereafter, other fast food entrepreneurs took notice of and began to imitate the McDonald's method of selling that had led to its extraordinary success: focus on more for less,<sup>61</sup> routinization, mechanization, and strict top-down control of every aspect of the business.<sup>62</sup> The McDonaldization<sup>63</sup> of American dining was underway.

In the early 1960s, each McDonald's restaurant prominently displayed, in the millions, the number of its fifteen-cent<sup>64</sup> burgers sold nationwide. Americans driving on the new interstate freeways to and from the suburbs or on the family vacation would spot the Golden Arches that they had seen in TV commercials, and keep tally as the millions added up. By 1963, one billion hamburgers had been

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<sup>56</sup> SCHLOSSER, *supra* note 2, at 35.

<sup>57</sup> LOVE, *supra* note 6, at 71. Kroc incorporated McDonald's the same year. *Id.* at 41. See also *The Ray Kroc Story*, MCDONALD'S, [http://www.mcdonalds.com/us/en/our\\_story/our\\_history/the\\_ray\\_kroc\\_story.html](http://www.mcdonalds.com/us/en/our_story/our_history/the_ray_kroc_story.html) (last visited Nov. 22, 2011).

<sup>58</sup> KROC & ANDERSON, *supra* note 53, at 122.

<sup>59</sup> *Id.* at 123. According to John Love, Kroc did this out of anger that led him to exclaim: "I hated their guts." LOVE, *supra* note 6, at 194. He also told a friend: "I'm going to get those sons of bitches." *Id.* at 200. Love described what Kroc did as follows:

The moment the deal was completed, Kroc unleashed the frustrations that had built up during his seven years of dealing with the brothers: He hopped on a plane to Los Angeles, bought a piece of property . . . — one block away from the brothers' seminal fast food drive-in—and ordered the construction of a brand-new McDonald's store. It had only one purpose: to put the McDonald's brothers' unit out of business.

*Id.* at 199–200.

<sup>60</sup> KROC & ANDERSON, *supra* note 53, at 91.

<sup>61</sup> RITZER, *supra* note 5, at 81–82.

<sup>62</sup> *Id.* at 116–19.

<sup>63</sup> See generally *id.* at 1–52.

<sup>64</sup> McDonald's did not raise the price of its hamburgers from 15 cents until 1967. KROC & ANDERSON, *supra* note 53, at 158.

sold.<sup>65</sup>

In 1963 Ronald McDonald made his debut, and McDonald's focus on children as customers began in earnest. Ronald became a ubiquitous presence in commercials during children's TV programs, and as a result, children pestered their parents to take them to McDonald's. They still do. Because of children's naivety and vulnerability, aggressive marketing to them made McDonald's situationism particularly effective and enduring. Soon, entire generations were growing up believing that Ronald McDonald was their trusted friend.

In 1965, McDonald's went public.<sup>66</sup> By 1967, with its national success solidly assured, McDonald's began opening restaurants outside the United States, starting in Canada but soon expanding to countries around the world.<sup>67</sup> During these first ten-plus years of business, the mainstay of McDonald's was its regular burgers, fries, shakes, and soft drinks.<sup>68</sup> These four staples made up the combination that people craved: salt, sugar, and fat.<sup>69</sup>

### *B. McDonald's After Ray Kroc*

*Two all-beef patties, special sauce, lettuce, cheese, pickles, onions on a sesame-seed bun.*

—McDonald's Big Mac jingle

A big change occurred at McDonald's in 1968 when Fred Turner replaced Ray Kroc as CEO<sup>70</sup> and introduced its still wildly

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<sup>65</sup> Ray Kroc, *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/323708/Ray-Kroc> (last visited Nov. 22, 2011).

<sup>66</sup> *Travel Through Time With Us!*, MCDONALD'S, [http://www.aboutmcdonalds.com/mcd/our\\_company/mcd\\_history.html](http://www.aboutmcdonalds.com/mcd/our_company/mcd_history.html) (to access this information, select year 1965) (last visited Nov. 22, 2011).

<sup>67</sup> *Id.* Today, McDonald's profits from its overseas sales far exceed those from its domestic restaurants. See Daniel Workman, *McDonalds Global Sales: Big Mac's International Revenues Sizzle in 2006*, SUITE101 (Oct. 24, 2006), <http://www.suite101.com/content/mcdonalds-global-sales-a8090>.

<sup>68</sup> LOVE, *supra* note 6, at 293.

<sup>69</sup> Lyndsey Layton, *David Kessler: Fat, Salt and Sugar Alter Brain Chemistry, Make Us Eat Junk Food*, WASH. POST (Apr. 27, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/26/AR2009042602711.html>.

<sup>70</sup> Kroc described Turner as the son he had never had. KROC & ANDERSON, *supra* note 53, at 160–61. He worked for Kroc from almost the beginning of

popular<sup>71</sup> signature product, the Big Mac.<sup>72</sup> Because it was profitable, the selling of more and more food per person became McDonald's modus operandi. In 1973, the Quarter Pounder was introduced.<sup>73</sup>

The targeting of children ratcheted up when the Happy Meal made its debut in 1979.<sup>74</sup> It consisted of the most all-American of foods with the salty, fatty, and sugary flavors that kids crave:<sup>75</sup> a burger, fries, apple pie, and drink.<sup>76</sup> To seal the deal, Happy Meals also included a toy.<sup>77</sup> Around the same time the Federal Trade Commission ("FTC") proposed regulations banning commercials directed at children.<sup>78</sup> Under pressure from McDonald's and other food corporations, Congress rejected the FTC's proposal.<sup>79</sup> Congress went further in 1980, when it specifically prohibited the FTC from further action regulating advertisements to children.<sup>80</sup>

McDonald's. *Id.* at 92.

<sup>71</sup> See Valerie Phillips, *40-year-old Big Mac is No Small Potato*, DESERET NEWS (Aug. 6, 2008, 12:09 AM), <http://www.deseretnews.com/article/700248487/40-year-old-Big-Mac-is-no-small-potato.html>.

<sup>72</sup> LOVE, *supra* note 6, at 294; *Travel Through Time With Us!*, *supra* note 66. This was also the year when David Wallerstein, the inventor of supersizing, joined McDonald's. POLLAN, *supra* note 43, at 105.

<sup>73</sup> *Travel Through Time With Us!*, *supra* note 66.

<sup>74</sup> *Id.*

<sup>75</sup> According to David Kessler, former commissioner of the FDA:

"Highly palatable" foods—those containing fat, sugar and salt—stimulate the brain to release dopamine, the neurotransmitter associated with the pleasure center . . . . In time, the brain gets wired so that dopamine pathways light up at the mere suggestion of the food, such as driving past a fast-food restaurant, and the urge to eat the food grows insistent. Once the food is eaten, the brain releases opioids, which bring emotional relief. Together, dopamine and opioids create a pathway that can activate every time a person is reminded about the particular food.

This happens regardless of whether the person is hungry.

Layton, *supra* note 69.

<sup>76</sup> Benforado et al., *supra* note 1, at 1694 ("McDonald's . . . exploit[s] our patriotic impulses, and perhaps also nostalgic ones, by serving a distinctly American meal and reminding us of such at every opportunity: a hamburger, fries, milkshake, and even an apple pie.").

<sup>77</sup> See Kayla Webley, *A Brief History of the Happy Meal*, TIME MAGAZINE (Apr. 30, 2010), available at <http://www.time.com/time/nation/article/0,8599,1986073,00.html>

<sup>78</sup> *The FTC and Child-Directed Marketing*, CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD, <http://www.commercialfreechildhood.org/actions/ftcbackground.htm> (last visited Nov. 22, 2011).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*; see also Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (prior to 1984 amendment).



By 1980, Happy Meals were already a hit. At that time, only 6.5 percent of American children, aged six to eleven were obese.<sup>81</sup> In 1983, McDonald's introduced Chicken McNuggets, a product specially designed for children.<sup>82</sup> During the next decade, many of America's children began to balloon in size. By 1994, 11.3 percent of American children, aged six to eleven, were obese, a 40 percent increase since 1980.<sup>83</sup>

The extraordinary rise of McDonald's and McDonaldization in the last half of the 20th century is an example of how American capitalism and savvy entrepreneurship can transform a sector of the economy and even a way of life. Ray Kroc was a superb salesman with a great product and revolutionary system for selling food; the man, the product, and the system came along at the right time. Kroc passionately believed that what he was selling not only benefited himself, but was also good for his customers, his franchisees, his suppliers, and America as a whole.<sup>84</sup> McDonald's excelled at selling fast food to Americans and the world because of the system it perfected and because of its brilliant marketing strategies.<sup>85</sup> Kroc and his successors appear to have had no qualms about marketing directly to children in order to get customers in the door.<sup>86</sup> Apparently since fast food consisted of the all-American menu of burgers, fries, shakes and soft drinks, it was self-evidently good for children.

Much of the American public found Ray Kroc and his successors' "We do it all for you" credo to be credible. This made it profitable for McDonald's to heavily market its claim that it was providing a product that perfectly meshed with its customers' self-created desires to eat lots of fast, cheap, and tasty food. Thus, McDonald's situationist attribution of its success to serving its customers' interests fit easily into the popular dispositional view that consumers know what they want independently of outside influence, and that McDonald's just happens to provide what consumers already know they want.

In the 1990s, social activists and injured plaintiffs began to

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<sup>81</sup> Tara Parker-Pope, *Hint of Hope as Child Obesity Rate Hits Plateau*, N.Y. TIMES (May 28, 2008), <http://www.nytimes.com/2008/05/28/health/research/28obesity.html>. During the 1960s and 70s the childhood obesity rate was five percent. *Id.*

<sup>82</sup> *Travel Through Time With Us!*, *supra* note 66 (to access this information, select year 1983, then select note 3).

<sup>83</sup> Parker-Pope, *supra* note 81.

<sup>84</sup> See generally KROC & ANDERSON, *supra* note 53.

<sup>85</sup> LOVE, *supra* note 6, at 6.

<sup>86</sup> *Id.* at 215, 219.

question McDonald's portrayal of itself as having the best interests of the public in mind, and thus McDonald's and tort law began to interact.

### III. McDONALD'S AND TORT LAW – THREE CASES

McDonald's and tort law had little to do with each other before Kroc's death in 1984,<sup>87</sup> and throughout the rest of the 1980s.<sup>88</sup> It was not until 1994 that McDonald's went to battle in tort cases of social moment. That year, McDonald's was involved in tort litigation on both sides of the Atlantic - as the plaintiff in the McLibel case in England and as the defendant in Stella Liebeck's Hot Coffee case in New Mexico.

Both cases reflected the warring views of those who believe that what is good for large corporations is good for society versus those who believe corporate entities have no regard for human welfare, only for profit. McLibel was a public relations nightmare that made McDonald's into McBad, and therefore negatively affected its ability to exert influence through situationism. In contrast, Stella Liebeck's Hot Coffee suit remains the leading case in corporate America's successful use of situationism to accomplish tort reform by making McDonald's into McGood. References to this case still evoke both sympathy and outrage on behalf of McDonald's and other corporate victims. The case is such an embedded part of our mass psyche that it reflexively summons up images of greedy tort lawyers and self-interested tort plaintiffs who choose to assume a risk, and then sue when their own behavior causes injury.

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<sup>87</sup> *Travel Through Time With Us!*, *supra* note 66 (to access this information, select year 1984, then select note 1). Kroc's memory is kept alive today at the Ray Kroc Museum in Oak Brook, Illinois and through his book GRINDING IT OUT. KROC & ANDERSON, *supra* note 53. Tom Robbins' quotation appears in this book: "Columbus discovered America, Jefferson invented it, and Ray Kroc Big Mac'd it." *Id.* at 208.

<sup>88</sup> See, e.g., *Miller v. McDonald's Corp.*, 439 So. 2d 561 (La. Ct. App. 1983) (alleging negligence in failing to prevent a shooting by another customer); *Brown Tutrix of Dugas v. McDonald's Corp.*, 428 So. 2d 560 (La. Ct. App. 1983) (slip and fall); *Rodger v. McDonald's Rests. of Ohio, Inc.*, 456 N.E.2d 1262 (Ohio Ct. App. 1982) (alleging negligence in failing to protect plaintiff from being attacked in the restroom). The pattern was the same in federal courts with the first cases involving negligence appearing around 1985. Most of the civil cases against McDonald's concerned franchise agreements.

*A. McLibel*

## 1. Setting the Stage

The first socially important tort suit involving McDonald's was the libel case of *McDonald's Corp. v. Steel and Morris*,<sup>89</sup> best known as McLibel. It was brought in England by McDonald's,<sup>90</sup> and involved a battle over whose truth about McDonald's should be the basis for consumer decision-making. McDonald's sought to flatter the public into believing that they wisely choose its family-friendly service and nutritious products, all while continuing to receive good value for their money.<sup>91</sup> In contrast, social activists sought to disabuse the public of this notion, presenting McDonald's instead as an amoral corporation solely out for profit, using its marketing savvy to fool the public into purchasing food that is bad for them, their children, animals, and the environment.<sup>92</sup> Which one was true? McDonald's portrayal of itself as providing the *fast* food that its customers wanted, and therefore simply satisfying consumers' informed and self-created desires? Or the social activists' portrayal of McDonald's as misleading the public regarding its motivations of profit for profit's sake, business, and shaping the public's desire for *junk* food, thereby making McDonald's customers' choices inauthentic, unwise, and unhealthy?

McLibel began in September 1990 when McDonald's served five "London Greenpeace"<sup>93</sup> supporters with libel writs for distributing a six-sided leaflet titled, "What's Wrong With McDonald's? Everything They Don't Want You to Know."<sup>94</sup> In England, McDonald's already had 380 restaurants and was opening a new one every week.<sup>95</sup> McDonald's claimed that Greenpeace's low-

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<sup>89</sup> *McDonald's Corp. v. Steel & Morris*, [1997] EWHC (QB) 366 (Eng.).

<sup>90</sup> Summary of the Judgment at 2, *McDonald's Corp. v. Steel & Morris*, [1997] EWHC (QB) 366 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/QB/1997/366.html>.

<sup>91</sup> *Id.* at 7.

<sup>92</sup> *Id.* at 11; see also London Greenpeace Grp., *What's Wrong with McDonald's?*, MCSPOTLIGHT.ORG, <http://www.mcspotlight.org/case/pretrial/factsheet.html> (last visited Nov. 22, 2011) (setting out the text of the activists' leaflet in full).

<sup>93</sup> London Greenpeace is not in any way connected to Greenpeace International. See London Greenpeace Grp., *supra* note 92 (London Greenpeace identifies itself as an independent group).

<sup>94</sup> Summary of the Judgment, *supra* note 90 at 10, 14; see also London Greenpeace Grp., *supra* note 86.

<sup>95</sup> Summary of the Judgment, *supra* note 90 at 6. McDonald's first British

budget publication was full of false claims about McDonald's that were damaging its reputation.<sup>96</sup>

If the Greenpeace pamphlet was indeed having a significant harmful impact on McDonald's, it was not only damaging its reputation but also its skillful use of situationism. As the authors observe in *Broken Scales*: "The ways in which we construe our world and make attributions of causation, responsibility, and blame depend largely upon who presents the information, narratives, and images to us and how."<sup>97</sup> The trial judge in *McLibel*, Justice Bell, noted that "[McDonald's] . . . success must primarily depend on the provision of what its customers want . . . ."<sup>98</sup> McDonald's had been highly successful in framing its relationship to British consumers as one of a good citizen and neighbor who had its customers' desires and best interests at heart.<sup>99</sup> As Justice Bell stated, "[McDonald's] success is promoted by vigorous marketing which portrays its brand image as a benevolent, community-based, family-aware, ever-growing, green giant providing consistent quality, service, cleanliness and value."<sup>100</sup> The social activists' leaflet told a very different story about McDonald's. It accused McDonald's of gross misrepresentation.<sup>101</sup> According to the leaflet, consumers' decisions to eat at McDonald's were deliberately manipulated so that they failed to factor in the reality that McDonald's was providing unhealthy food, harming the environment, brainwashing children, abusing animals, engaging in unfair labor practices, and more.<sup>102</sup> Its message suggested that if it proved to be profitable to McDonald's, then the health of customers, animals, and the planet be damned.<sup>103</sup>

McDonald's sued for defamation because it was concerned that these claims might negatively affect its reputation and bottom

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restaurant opened in 1974. *Id.* at 5. By May 1996 there were 674. *Id.* at 6. In 2011 "[t]here are almost 1200 restaurants to be found in a variety of locations . . . ." *A Bit About Us*, MCDONALD'S, <http://www.mcdonalds.co.uk/about-us/development/overview.shtml> (last visited Nov. 22, 2011). McDonald's serves "two and a half million customers in the UK every day." *McDonald's Enters Best Companies Rankings in Recognition of Innovative Employer Practices*, MCDONALD'S, <http://www.mcdonalds.co.uk/about-us/latest-news/latest-news.shtml> (last visited Nov. 22, 2011).

<sup>96</sup> Summary of the Judgment, *supra* note 90 at 13.

<sup>97</sup> Benforado et al., *supra* note 1, at 1668.

<sup>98</sup> Summary of the Judgment, *supra* note 90 at 7.

<sup>99</sup> *See id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See generally* London Greenpeace Grp., *supra* note 92.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

line. If believed, these claims might cause consumers to think more critically about McDonald's goals and products. Additionally, such claims might cause consumers to recognize that McDonald's could manipulate their desires. If there was an inexpensive, low-risk, and simple way to keep its situationist frame as McGood intact by stopping Greenpeace from reframing McDonald's societal role as McBad, it made sense for McDonald's to take that path. And that is exactly what McDonald's sought to do by suing Greenpeace members for libel.

McDonald's played hardball from the start. Before suing five Greenpeace activists, McDonald's infiltrated this group of no more than thirty people to discover who was primarily responsible for the leaflet.<sup>104</sup> With this information in hand, McDonald's then used tort law to attempt to stop the social activists from disseminating this information, thereby silencing its critics and preventing their different story about its role in consumer decision-making from being told.

English defamation law is much more favorable to plaintiffs in cases involving public figures and issues of public concern than its constitutionalized American cousin.<sup>105</sup> As a *New York Times* article

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<sup>104</sup> VIDAL, *MCLIBEL*, *supra* note 16, at 192–93. In 1971, a small group of activists founded London Greenpeace to protest the French atom bomb; it never had more than 30 members. David J. Wolfson, *McLibel*, 5 *ANIMAL L.* 21, 24 (1999).

<sup>105</sup> Unlike American law where the plaintiff has the burden of proving the allegedly libelous statements were false, under British law at the time of the *McLibel* case, the defendant had the burden of proving by the preponderance of evidence that the statements were true. Summary of the Judgment, *supra* note 90 at 61. Furthermore, unlike the American law under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, there was no constitutional protection of defendants in suits against public figures such as McDonald's or on matters of public concern, including those issues addressed in the fact sheet. Compare DAN B. DOBBS, *THE LAW OF TORTS* 1173–75 (2000) (American libel law), with *Steel & Morris v. United Kingdom*, [2005] ECHR 68416/01. In the case of *Steel & Morris v. United Kingdom*, the European Court of Human Rights described English defamation law as it existed at the time of the *McLibel* decision:

Under English law . . . [t]he plaintiff carries the burden of proving “publication”. As a matter of law, (*per* Bell J at p. 5 of the judgment in the [*McLibel*] case):

“any person who causes or procures or authorises or concurs in or approves the publication of a libel is as liable for its publication as a person who physically hands it or sends it off to another. It is not necessary to have written or printed the defamatory material. All those jointly concerned in the commission of a tort (civil wrong) are jointly and severally liable for it, and this applies to libel as it does to any other tort”.

published soon after the McLibel verdict noted: "Britain has long been considered the world's libel capital."<sup>106</sup> By the 1990s, McDonald's had become adept at using British libel law as a weapon against anyone who threatened its image and its use of situationism. It had successfully obtained apologies and retractions from many other British critics by suing them in or merely threatening them with libel suits.<sup>107</sup> Defendants such as these Greenpeace activists therefore had to take McDonald's lawsuit very seriously since a successful libel plaintiff could be awarded substantial money damages and possibly obtain an injunction to literally silence its opponents' speech.<sup>108</sup>

Based on past experience, McDonald's did not expect its suit to go to trial; instead it expected the defendants to apologize and stop distributing the pamphlet in exchange for McDonald's dropping its suit.<sup>109</sup> But this time it was different. To McDonald's surprise, and later, dismay, two of the social activists, Helen Steel and David Morris, did not apologize. Instead, they decided to fight.<sup>110</sup> Denied

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A defence of justification applies where the defamatory statement is substantially true. The burden is on the defendant to prove the truth of the statement on the balance of probabilities. It is no defence to a libel action to prove that the defendant acted in good faith, believing the statement to be true. English law does, however, recognise the defence of "fair comment", if it can be established that the defamatory statement is comment, and not an assertion of fact, and is based on a substratum of facts, the truth of which the defendant must prove.

As a general principle, a trading or non-trading corporation is entitled to sue in libel to protect as much of its corporate reputation as is capable of being damaged by a defamatory statement.

*Id.* at ¶¶ 37–40.

<sup>106</sup> Sarah Lyall, *A Libel Law that Usually Favors Plaintiffs Sends a Chill Through the British Press*, N.Y. TIMES, July 7, 1997, <http://www.nytimes.com/1997/07/07/business/libel-law-that-usually-favors-plaintiffs-sends-chill-through-british-press.html>. Accord Rachel Ehrenfeld, *A Legal Thriller in London*, NEWSWEEK, June 7, 2010, <http://www.thedailybeast.com/newsweek/2010/05/28/a-legal-thriller-in-london.html>. See also Robert L. McFarland, *Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism*, 79 MISS. L.J. 617, 625–27 (2010).

<sup>107</sup> See VIDAL, MCLIBEL, *supra* note 16, at 46–47.

<sup>108</sup> *Id.* at 313–14. See, e.g., Bin Mahfouz v. Ehrenfeld, [2005] EWHC (QB) 1156 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/QB/2005/1156.html>.

<sup>109</sup> VIDAL, MCLIBEL, *supra* note 16, at 46–47.

<sup>110</sup> The other three parties apologized for the leaflet's contents and, in exchange, were dropped from the suit. *Id.* at 77.

legal aid representation,<sup>111</sup> the defendants represented themselves. McDonald's could have at this point simply dropped the suit without having spent much money or time, and without serious harm to its public image and its successful application of situationism. In perhaps an effort to send a strong message to other would-be critics,<sup>112</sup> McDonald's chose to aggressively pursue its libel suit against two unemployed idealists, turning the case into a cause célèbre involving a clash of worldviews.<sup>113</sup>

## 2. The Trial

Once the activists made it known that they intended to stand their ground, neither side was willing to give in. Years passed during which the parties battled on. Steel and Morris continued to represent themselves with unpaid support from barrister, Keir Starmer. They also had support from the McLibel Support Campaign that was formed soon after the lawsuit began and which raised over 35,000 pounds throughout the course of the litigation.<sup>114</sup> When it became apparent that Steel and Morris were committed to the suit, McDonald's hired one of England's best libel lawyers, Richard Rampton, to head its legal team.<sup>115</sup>

Unlike most British civil suits, defamation cases are usually

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<sup>111</sup> This later resulted in a successful lawsuit by activists Steel and Morris against the British government in the European Court of Human Rights for violating their right to legal representation and free speech. *Steel & Morris v. United Kingdom*, [2005] ECHR 68416/01.

<sup>112</sup> It is something of a mystery why McDonald's was willing to spend over ten million pounds and seven years to pursue this case in which they were awarded sixty thousand pounds plus costs that they never bothered to try to collect. Wolfson, *supra* note 104, at 21. Mike Love, who was McDonald's top public relations representative asserted: "We believe we have a trust placed in us. A lot of people trust McDonald's. The allegations challenge that trust. If we don't stand up, then it would be seen that there is some truth in the allegations." John Vidal, *You and I Against McWorld*, THE GUARDIAN (London) Mar. 9, 1996, <http://www.guardian.co.uk/uk/1996/mar/09/johnvidal>; see also McDonald's, *Why McDonald's Is Going to Court*, MCSPTLIGHT.ORG, [http://www.mcspotlight.org/case/pretrial/factsheet\\_reply.html](http://www.mcspotlight.org/case/pretrial/factsheet_reply.html) (last visited Nov. 22, 2011).

<sup>113</sup> VIDAL, MCLIBEL, *supra* note 16, at 285; see also Kuntz, *supra* note 3 ("[A]s world views collide").

<sup>114</sup> VIDAL, MCLIBEL, *supra* note 16, at 175-76. This paled in comparison to the more than *ten million* pounds that McDonald's spent on this lawsuit. Wolfson, *supra* note 104, at 22.

<sup>115</sup> VIDAL, MCLIBEL, *supra* note 16, at 88.

tried to a jury. However, Rampton successfully petitioned Justice Bell to have McLibel tried only to a judge.<sup>116</sup> On June 28, 1994, almost four years after Helen Steel and David Morris were first served, the trial in *McDonald's Corp. v. Steel and Morris*<sup>117</sup> began.<sup>118</sup> In late summer 1994, McDonald's informed Steel and Morris that it was interested in discussing settlement, and flew in top executives from the United States to negotiate with the two activists.<sup>119</sup> However, the parties could not reach an agreement and so the proceedings dragged on for nearly three more years, making it the longest trial in British history.<sup>120</sup> In February 1996, activists who supported the defendants' anti-corporate worldview launched the widely read anti-McDonald's McSpotlight Website.<sup>121</sup> The negative publicity for McDonald's only increased as Morris and Steel and their supporters became more adept at taking advantage of the media coverage.<sup>122</sup> Finally, in December 1996, the trial ended and Justice Bell began his deliberations.<sup>123</sup> As the McSpotlight Website notes:

The media frenzy continued as the Judge deliberated, with Channel 4 TV news stating that the McLibel case was considered to be "The biggest Corporate PR disaster in history." In early February [1997] Macmillan published their hardback book on the trial "McLibel—Burger Culture on Trial" by John Vidal (part written by the Defendants, whose names were removed from the cover on legal advice!). On the first anniversary of its launch, on 16th February, McSpotlight doubled its size overnight with the addition of all the official court transcripts. In May, Channel 4 broadcast "McLibel," a 3 ½ hour . . . reconstruction of the case. As far as McDonald's attempts to suppress debate over the matters raised in the leaflets and the trial, the cat was now so far out of the bag it had disappeared over the horizon.<sup>124</sup>

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<sup>116</sup> *Id.* at 88–94.

<sup>117</sup> *McDonald's Corp. v. Steel & Morris*, [1997] EWHC (QB) 366 (Eng.).

<sup>118</sup> Summary of the Judgment, *supra* note 90 at 14, 16.

<sup>119</sup> VIDAL, MCLIBEL, *supra* note 16, at 122–23.

<sup>120</sup> *Id.* at 295; Wolfson, *supra* note 104, at 21.

<sup>121</sup> *Start Here*, MCSPLIGHT.ORG, <http://www.mcspotlight.org/help.html> (last visited Nov. 22, 2011).

<sup>122</sup> *The McLibel Trial Story*, MCSPLIGHT.ORG, <http://www.mcspotlight.org/case/trial/story.html> (last visited Nov. 22, 2011).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*



On June 19, 1997 Justice Bell delivered his verdict.<sup>125</sup> While he found in favor of McDonald's in an almost 800-page opinion,<sup>126</sup> it was a pyrrhic victory.

Even though Steel and Morris were unable to prove, as British libel law required, that all the leaflet's claims were true, they did prove the truth of a number of the claims including that McDonald's advertising preys on young children. Justice Bell found:

McDonald's advertising and marketing is in large part directed at children with a view to them pressuring or pestering their parents to take them to McDonald's and thereby to take their own custom to McDonald's. This is made easier by children's greater susceptibility to advertising which is largely why McDonald's advertises to them so much . . . . [T]he sting of the leaflet to the effect that [McDonald's] exploit[s] children by using them, as more susceptible subjects of advertising, to pressurize their parents into going to McDonald's is justified. It is true.<sup>127</sup>

This practice of targeting children has been a key component of McDonald's success since as early as 1963.<sup>128</sup> It has enabled McDonald's to mold consumer choices from a very young and impressionable age. Concerns about this practice are raised again in the *Pelman* childhood obesity lawsuit discussed later in this article.<sup>129</sup>

Other charges that Steel and Morris proved to be true included the leaflet's claim that McDonald's "pays its workers low wages, . . . helping to depress wages for workers in the catering trade in Britain."<sup>130</sup> They also proved:

[T]he pretence by [McDonald's] that their food had a positive nutritional benefit . . . the further allegation that, if one eats enough McDonald's food, one's diet may well become high in fat etc., with the very real risk of heart

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<sup>125</sup> *Id.*

<sup>126</sup> See *McDonald's Corp. v. Steel & Morris*, [1997] EWHC (QB) 366 (Eng.) (the 800 page decision); see also Summary of the Judgment, *supra* note 90.

<sup>127</sup> Summary of the Judgment, *supra* note 90 at 140-141, 143; see also VIDAL, MCLIBEL, *supra* note 16, at 306-07.

<sup>128</sup> See *supra* text accompanying notes 81-86.

<sup>129</sup> See *infra* text accompanying notes 235-277.

<sup>130</sup> Summary of the Judgment, *supra* note 90 at 187; see also VIDAL, MCLIBEL, *supra* note 16, at 309.

disease, was [also] justified.<sup>131</sup>

These findings are also echoed in the *Pelman* plaintiffs' allegations.<sup>132</sup>

### 3. The Impact of McLibel

The McLibel litigation<sup>133</sup> was a public relations disaster for McDonald's. As one British lawyer noted, McDonalds "turned a flea bite on [its] big toe into a postulating boil all over the body corporate."<sup>134</sup> Viewed as a battle between David and Goliath,<sup>135</sup> the lawsuit mobilized anti-McDonald's activists both locally and around the globe. The McSpotlight website had received more than fifteen million hits by the time the verdict was returned.<sup>136</sup> Two days after the verdict, Steel and Morris helped distribute thousands of the

<sup>131</sup> Steel & Morris v. United Kingdom, [2005] ECHR 68416/01.

<sup>132</sup> *Pelman v. McDonald's Corp.*, 237 F.Supp. 2d 512, 532 (S.D.N.Y. 2003).

<sup>133</sup> The final chapter of the McLibel saga occurred in 2005. In 1999, Morris and Steel had lost their appeal to the English Court of Appeal on the finding that they had libeled McDonald's. *Steel & Morris v. United Kingdom*, [2005] ECHR 68416/01 at ¶¶ 30–34. In response to this loss, in 2000, Morris and Steel applied to sue the United Kingdom in the European Court of Human Rights. *Id.* at ¶ 1. In 2004, that court accepted review, *Id.* at ¶5, and in 2005 the European Court of Human Rights declared that in the McLibel trial, the United Kingdom violated Morris and Steel's rights to a fair trial and freedom of expression under Article 6, § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at ¶¶ 72, 98. The British government was ordered to pay the two activists a total of 35,000 plus almost 50,000 in attorneys' fees and court costs. *Id.* at ¶¶ 109, 112. In 2005 35,000 were equal to approximately \$47,000 U.S. Dollars and 50,000 were equal to approximately \$67,500 U.S. Dollars. *See* XE, <http://www.xe.com> (last visited Aug. 5, 2011).

<sup>134</sup> David Leonhardt, *Ground Beef, Sweat, and Tears*, BLOOMBERG BUSINESSWEEK, Jan. 12, 1998, <http://www.businessweek.com/archives/1998/b3560222.arc.htm> (reviewing MCLIBEL by John Vidal). The fact that McDonald's private detectives spied on the members of London Greenpeace reflected particularly badly on the company. VIDAL, MCLIBEL, *supra* note 16, at 69–72, 192–96. From 1989 to 1991, McDonald's hired private investigators to infiltrate London Greenpeace. *Id.* One of the spies for McDonald's even distributed the allegedly defamatory leaflets. *Id.*

<sup>135</sup> According to one commentator the combined income of Steel and Morris "was approximately \$10,000 per year[,] an amount McDonald's was spending on lawyers' fees every two days of the case." Kevin Danaher, *A Clash of Cultures: The McLibel Case*, CORPORATE GLOBALIZATION RESISTANCE, <http://anticafta.tripod.com/id59.html> (last visited Nov. 22, 2011).

<sup>136</sup> VIDAL, MCLIBEL, *supra* note 16, at 326. During the month when the verdict was handed down, the site was accessed more than two million times. *Id.*

legally libelous leaflets outside their neighborhood McDonald's "as part of a global protest and 'Celebration of Victory' by thousands of people."<sup>137</sup>

Despite the personal costs to Morris and Steel, they and their causes fared quite well. Without *McLibel*, Morris and Steel never would have been able to get years of worldwide publicity for their views.<sup>138</sup> One commentator noted that "[m]ore than 800 newspapers around the world covered the trial . . . ."<sup>139</sup> As a result of the media and the McSpotlight internet coverage, as well as the *McLibel* book, Morris, Steel, and their supporters raised public awareness about McDonald's targeting of children, its labor practices, its environmental impact, its unhealthy food, its treatment of farm animals<sup>140</sup> and, through marketing, its use of situationism to make people believe they were rationally and wisely choosing when in fact McDonald's was heavily influencing their decision-making.<sup>141</sup>

To the extent that McDonald's intended to use tort law for the legitimate purpose of defending its reputation through its libel suit, it failed. Even with a verdict in its favor, the suit cost McDonald's an estimated ten million pounds to prosecute<sup>142</sup> and resulted in an award that it did not even try to collect.<sup>143</sup> More importantly, because of the widespread negative publicity surrounding the case, its reputation was most likely diminished rather than vindicated. As one commentator concluded based on the *McLibel* case: "The advent of the Internet and growing awareness among activists that they can take on the corporate giants [ensured] that companies have to find ways

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<sup>137</sup> VIDAL, *MCLIBEL*, *supra* note 16, at 313. The book continued: "More than 500 McDonald's stores out of 750 in the UK [were] leafleted. Groups in at least twelve countries [distributed] at least 500,000 leaflets." *Id.*

<sup>138</sup> Publicity such as the McSpotlight website, the, *McLibel* book and movie, and national and international media coverage.

<sup>139</sup> Leonhardt, *supra* note 134.

<sup>140</sup> One law review author described *McLibel* as follows: "*McLibel* is the most extensive and critical legal discussion in legal history about the inherent cruelty in modern common farming practices." Wolfson, *supra* note 104, at 23.

<sup>141</sup> See VIDAL, *MCLIBEL*, *supra* note 16, at 136-50 (providing evidence about McDonald's advertising and marketing to children).

<sup>142</sup> *Id.* at 6.

<sup>143</sup> McDonald's was awarded £60,000 which was approximately \$96,000 in 1997 U.S. dollars. Sarah Lyall, *Her Majesty's Court Has Ruled: McDonald's Burgers Are Not Poison*, N.Y. TIMES, June 22, 1997, <http://www.nytimes.com/1997/06/22/weekinreview/her-majesty-s-court-has-ruled-mcdonald-s-burgers-are-not-poison.html>. McDonald's was also entitled to its legal costs under Britain's loser-pays rule.

other than litigation to defend their reputations.”<sup>144</sup>

Instead of being a legitimate libel case, many have viewed McLibel as an attempt by McDonald’s to use tort law for the less than legitimate purpose of intimidating and silencing its critics even when their criticism and attempts to unmask its use of situationism were justified.<sup>145</sup> After McLibel, McDonald’s appears to have lost its appetite for using libel suits as a weapon in English courts. However, this suit apparently did not prevent the usage of similar tactics elsewhere. For example, in 2002 the *New York Times* reported that McDonald’s sued Chilean Carmen Calderon for \$1.25 million for allegedly defaming it when she complained to the health department that her son suffered food poisoning from eating a McDonald’s hamburger.<sup>146</sup> The ensuing health department inspection and \$650 fine for excessive levels of bacteria were publicized, and this action ultimately led to the lawsuit.<sup>147</sup> In a familiar tactic, McDonald’s said it would drop the lawsuit if Calderon signed “a letter endorsing McDonald’s position that something else must have caused her son’s ailment . . . .”<sup>148</sup> Thus, the McLibel decision, while widely publicizing the negative aspects of McDonald’s and energizing anti-corporate activists, may not have changed corporate tactics towards critics in countries where such tactics might still be tolerated and effective.

In countries such as the United States where libel suits are not a feasible way to combat social activist critiques, corporations such as McDonald’s, instead use surrogates.<sup>149</sup> Having a third party

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<sup>144</sup> GARY DAVIES ET AL., CORPORATE REPUTATION AND COMPETITIVENESS 119 (2003).

<sup>145</sup> David Rolph, *Corporations’ Right to Sue for Defamation: An Australian Perspective*, 22 Ent. L. REV. 195 (2011) (refers to McLibel as demonstrating corporate use of defamation “to silence dissent and stifle public debate.”); see also David Allen Green, *Why Should Companies Be Allowed to Sue for Libel?* THE GUARDIAN, Aug. 12, 2010, <http://www.guardian.co.uk/commentisfree/libertycentral/2010/aug/12/libel-corporate-entities-right-to-sue>.

<sup>146</sup> Larry Rohter, *For Burgers in Chile, Hold the Criticism*, N.Y. TIMES, Mar. 31, 2002, <http://www.nytimes.com/2002/03/31/world/for-burgers-in-chile-hold-the-criticism.html>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* The news article also noted: “During an earlier controversy involving McDonald’s, officials here were quick to support the company’s position. After health inspectors detected E. coli bacteria and briefly closed a McDonald’s restaurant last year, senior officials from the Ministries of Labor and Health made a point of going there to eat hamburgers, with television cameras in tow.” *Id.*

<sup>149</sup> See, e.g., THE CENTER FOR CONSUMER FREEDOM, [www.consumerfreedom.com](http://www.consumerfreedom.com) (last visited Nov. 22, 2011).

respond to social criticism, as opposed to McDonald's doing so directly, is likely to be perceived as more credible.<sup>150</sup> The most successful example of this technique is the Hot Coffee case discussed in the next section where McDonald's sat back and let the media and tort reform advocates take a simple torts case and turn it into a tall tale about corporate victimization by a selfish plaintiff, a greedy torts lawyer, and a legal system gone haywire.<sup>151</sup>

Interestingly, McLibel had little immediate impact on McDonald's itself. While the McLibel lawsuit obviously was not good for McDonald's image, there is no credible evidence that it had any measurable negative effect on what mattered most – the bottom line.<sup>152</sup> One month after the McLibel verdict, McDonald's "reported a 4.2 [percent] increase in second-quarter profit."<sup>153</sup> In 1997, McDonald's also reported \$34 billion in sales<sup>154</sup> and that it planned to open 2,400 restaurants, 80 percent of which would be outside the United States.<sup>155</sup> As to the specific economic impact on McDonald's in England, its sales in Great Britain appear to have been unaffected by the McLibel trial and verdict.<sup>156</sup> This suggests that even when presented with what Justice Bell found to be the truth – that McDonald's exploits children, misrepresents the nutritional value of its food, and engages in cruel treatment of animals – consumers continue to flock to McDonald's restaurants.

One purpose of tort liability is to change behavior. This was the main reason McDonald's sued; it wanted Greenpeace to stop publishing the offensive pamphlet. In this case, however, if the lawsuit changed anyone's behavior, it was likely that of McDonald's. It is unclear whether the negative publicity for McDonald's changed its corporate practices regarding the many substantive areas of criticism.<sup>157</sup> As one commentator noted, "[i]t would be hard to point to specific policy changes that McDonald's made because of the

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<sup>150</sup> Benforado et al., *supra* note 1, at 1728.

<sup>151</sup> See, e.g., *HOT COFFEE* (HBO 2011).

<sup>152</sup> According to the European Court of Human Rights, the judge in the McLibel trial did not find that the leaflet "had any impact on the sale of McDonald's products." *Steel & Morris v. United Kingdom*, [2005] ECHR 68416/01; see also VIDAL, *MCLIBEL*, *supra* note 16, at 176–77.

<sup>153</sup> *McDonald's Profit Up 4.2%; Expansion Plans to Shrink*, L.A. TIMES, July 18, 1997, <http://articles.latimes.com/1997/jul/18/business/fi-13812> [hereinafter *McDonald's Profit Up*].

<sup>154</sup> Leonhardt, *supra* note 134.

<sup>155</sup> *McDonald's Profit Up*, *supra* note 153.

<sup>156</sup> DAVIES ET AL., *supra* note 144, at 119.

<sup>157</sup> VIDAL, *MCLIBEL*, *supra* note 16, at 327.

trial.”<sup>158</sup> In addition, McDonald’s continued to use its marketing skills to promote its situationism.

Despite the fact that McDonald’s won the case, McLibel demonstrated that the little guy could stand up to one of the richest corporations in the world. Furthermore, McLibel publicized and limited McDonald’s and other large corporations’ practices of using the law to silence legitimate criticism.

Most importantly, McLibel energized and mobilized anti-corporate activists and “left a substantial organizational legacy.”<sup>159</sup> As a result of the case, information contradicting McDonald’s message that it does it all for us is much more available and accessible. McLibel provided worldwide publicity for views that countered McDonald’s situationism. These views have garnered greater public support over time. McDonald’s and other fast food corporations’ recent provision of healthy alternatives to salt, sugar, and fat, and decisions to provide information to customers about what their food contains<sup>160</sup> can be partly attributed to the organizational network that was established in support of the McLibel defendants and their causes. Starting with McLibel, social activists’ strategic use of tort law on issues such as nutrition, additives, and obesity has meant that the public is no longer solely at the mercy of McDonald’s and other fast food corporations’ situationist spin. Later, cases such as *Pelman* successfully prodded McDonald’s into providing meaningful opportunities to make informed decisions regarding the health implications of what customers and their children eat when they dine at its restaurants.<sup>161</sup>

The importance of McLibel for those who opposed McDonald’s and other multinational corporations’ influence and use of situationism, however, was dwarfed by the opposite effect of the 1994 McDonald’s Hot Coffee case – *Liebeck v. McDonald’s Rests*.<sup>162</sup>

### B. Hot Coffee

*The case involving burns from McDonald’s coffee is likely*

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<sup>158</sup> Danaher, *supra* note 135.

<sup>159</sup> *Id.*

<sup>160</sup> The backs of McDonald’s placemats (printed on recycled paper) now contain detailed nutrition information about its products. As the placemat says on the front: “Turn it and Learn it! Nutrition information on reverse.”

<sup>161</sup> *Nutrition*, MCDONALD’S, [http://www.mcdonalds.com/us/en/food/food\\_quality/nutrition\\_choices.html](http://www.mcdonalds.com/us/en/food/food_quality/nutrition_choices.html) (last visited Nov. 22, 2011).

<sup>162</sup> *Liebeck v. McDonald’s Rest.*, No. 93-02419, 1995 WL 360309, at \*1 (D. N.M. Aug. 18, 1994).

responsible for more of the everyday knowledge about the U.S. justice system than any other lawsuit.<sup>163</sup>

### 1. Setting the Stage

During the 1990s, while the McLibel saga unfolded in England, McDonald's continued its high caloric love affair with the American people.<sup>164</sup> In 1992, Bill Clinton was elected President. He was frequently photographed eating McDonald's products. "Bubba," as Clinton was nicknamed, was America's most famous and powerful junk food consumer.<sup>165</sup>

The late '80s and early '90s was also the time when the tort reform movement, which focused on statutorily limiting the amount and kinds of money damages injured plaintiffs could recover, was experiencing substantial success in state legislatures.<sup>166</sup> This movement was backed by the entities that were on the receiving end of many tort suits, specifically, sellers of services and manufacturers of goods,<sup>167</sup> including McDonald's.

In addition to fast food, McDonald's sold and served coffee

<sup>163</sup> HALTOM & MCCANN, *supra* note 22, at 184.

<sup>164</sup> POLLAN, *supra* note 43, at 105–06.

<sup>165</sup> President Clinton is a prime example of someone who could not resist the lure of fast food. That changed in 2004 when Clinton underwent major heart surgery to clear his arteries. Denise Grady, *Unblame the Victim: Heart Disease Causes Vary*, N.Y. TIMES, Sept. 11, 2004, <http://www.nytimes.com/2004/09/11/health/11clinton.html>. Dr. Gail Frank, a professor of nutrition commented on the cause of Clinton's health problems: "I'm more inclined to believe ex-President Clinton's condition is very much dominated by environment. We've seen him in the media so often coming out of McDonald's." *Id.* In 2011 Clinton became a vegan, eschewing all animal products. Nancy Shute, *Bill Clinton's Life as a Vegan*, NPR (Aug. 20, 2011), [http://www.npr.org/blogs/health/2011/08/20/139782972/bill-clintons-life-as-a-vegan?ps=sh\\_sthdl](http://www.npr.org/blogs/health/2011/08/20/139782972/bill-clintons-life-as-a-vegan?ps=sh_sthdl) ("Bill Clinton became renowned on the campaign trail for his ability to snarf up burgers and fries. Heart bypass surgery convinced him to cut back on the grease. In the past year, Clinton's gone even further: He's gone vegan.").

<sup>166</sup> See Janet Currie & W. Bentley MacLeod, *First Do No Harm? Tort Reform and Birth Outcomes*, 123 Q.J. ECON. 795, 802 (2008); see also Ronen Avraham, Database of State Tort Law Reforms (DSTLR 3rd) (University of Texas School of Law - Law & Economics Research Paper No. 184, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=902711](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711); *Summary of Medical Malpractice Law*, MCCULLOUGH, CAMPBELL & LANE LLP, <http://www.mcandl.com/introduction.html> (last updated Aug. 9, 1998).

<sup>167</sup> HALTOM & MCCANN, *supra* note 22, at 45–49.

heated to approximately 180 to 190 degrees.<sup>168</sup> On February 27, 1992, while sitting in the passenger seat of her nephew's parked car in Albuquerque, then unknown but now infamous<sup>169</sup> seventy-nine-year-old Stella Liebeck suffered third-degree burns to her groin area when, in the process of trying to remove the lid from a styrofoam cup, she spilled coffee that she had purchased four minutes earlier at a McDonald's drive-through window.<sup>170</sup> Liebeck was hospitalized for more than a week.<sup>171</sup> Despite a series of skin grafts, she was partially disabled for almost two years and permanently disfigured.<sup>172</sup>

Two weeks after Liebeck was injured, she wrote to McDonald's headquarters to request that McDonald's pay any medical costs that were not covered by Medicare and the lost wages for her daughter who took care of Liebeck while she recovered.<sup>173</sup> While her request would have amounted to between \$10,000 and \$15,000, McDonald's instead offered her only \$800.<sup>174</sup> Six months later, Liebeck retained an attorney who had settled a similar scalding coffee case against McDonald's in the late 1980s for \$27,000.<sup>175</sup>

After McDonald's rebuffed his demand letter, Liebeck's attorney filed a products liability suit for strict torts liability under the warranty provisions of the Uniform Commercial Code.<sup>176</sup> Liebeck sought compensation for her injuries and also asked for punitive damages based on a charge that, in routinely selling coffee that McDonald's knew could cause serious burns, it acted with reckless-

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<sup>168</sup> *Id.* at 189 (quoting Liebeck's attorney: "McDonald's manual specifying that coffee should be made at temperatures between 195 and 205 degrees, and served at temperatures between 180 and 190 degrees."). Quoting also renowned burn experts: "that liquids between 180 and 190 degrees cause full thickness, third-degree, highly painful and disfiguring burns in less than seven seconds." *Id.*

<sup>169</sup> STELLAAWARDS.COM, <http://www.stellaawards.com> (last visited Nov. 22, 2011) (dedicating itself to "to exposing lawsuit abuse with real cases" and inspired by Stella Liebeck).

<sup>170</sup> HALTOM & MCCANN, *supra* note 22, at 185.

<sup>171</sup> *Id.* at 186.

<sup>172</sup> *Id.*

<sup>173</sup> *Are Lawyers Burning America?*, NEWSWEEK, Mar. 19, 1995, <http://www.thedailybeast.com/newsweek/1995/03/19/are-lawyers-burning-america.html> [hereinafter *Are Lawyers Burning America?*] (asking McDonald's to consider reducing the temperature of its coffee); see also RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 268 (1996).

<sup>174</sup> HALTOM & MCCANN, *supra* note 22, at 45-49.

<sup>175</sup> *Id.*

<sup>176</sup> *Liebeck v. McDonald's Rest.*, No. 93-02419, 1995 WL 360309, at \*1 (D. N.M. Aug. 18, 1994).



indifference to the welfare of its customers.<sup>177</sup>

Through her attorney, Liebeck offered to settle for \$300,000 but McDonald's was not interested.<sup>178</sup> After all the pleadings and discovery were completed, a court-ordered mediator recommended that McDonald's settle for \$225,000.<sup>179</sup> Unlike in its previous spilled coffee cases,<sup>180</sup> McDonald's refused the settlement recommendation and decided to go to trial.<sup>181</sup>

## 2. The Trial

In 1994, the same year that the non-jury McLibel trial began its three-year marathon run in London, Liebeck's case was tried to a New Mexico jury.<sup>182</sup> Predictably, McDonald's portrayed the case as being about dispositional individual responsibility and choice.<sup>183</sup> Warning that individuals like Liebeck and her attorney were out to take away Americans' right to choose, McDonald's trial attorney described the trial as being about "how far you want our society to go to restrict what most of us enjoy and accept."<sup>184</sup>

Prior to hearing the evidence, jury members were highly dubious about Liebeck's claim.<sup>185</sup> Their pre-trial views coincided with McDonald's dispositional frame that spilling coffee on oneself is a matter of personal responsibility. The foreperson said that he "wasn't convinced as to why [he needed] to be there to settle a coffee spill."<sup>186</sup> Another juror commented that, before the trial, "I was just insulted . . . . The whole thing sounded ridiculous to me."<sup>187</sup> Another juror noted that "she had started the case thinking the suit was frivolous."<sup>188</sup> Yet another said: "I was very skeptical of the case."<sup>189</sup> Still another commented: "When I first heard about the case, I thought, yeah, right. A cup of coffee. Why are we wasting our

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<sup>177</sup> HALTOM & MCCANN, *supra* note 22, at 187.

<sup>178</sup> *Id.* The attorney later acknowledged that Liebeck would have been willing to accept much less.

<sup>179</sup> *Id.* at 187-88.

<sup>180</sup> Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1.

<sup>181</sup> HALTOM & MCCANN, *supra* note 22, at 188.

<sup>182</sup> Liebeck, 1995 WL 360309, at \*1.

<sup>183</sup> HALTOM & MCCANN, *supra* note 22, at 192-93.

<sup>184</sup> *Are Lawyers Burning America?*, *supra* note 173.

<sup>185</sup> See Gerlin, *supra* note 180; NADER & SMITH, *supra* note 173, at 268.

<sup>186</sup> HALTOM & MCCANN, *supra* note 22, at 194.

<sup>187</sup> *Are Lawyers Burning America?*, *supra* note 173.

<sup>188</sup> *Id.*

<sup>189</sup> NADER & SMITH, *supra* note 173, at 268.

time?"<sup>190</sup>

As the trial progressed, however, the evidence changed the jurors' minds. McDonald's admitted that it served its coffee very hot and that it did so because marketing studies "showed that customers prefer their coffee very hot."<sup>191</sup> It justified its actions as giving the public what they wanted. The jury ultimately found this justification unpersuasive because the evidence showed that: McDonald's coffee was dangerously hot and McDonald's knew it; McDonald's coffee was served hotter than coffee served elsewhere; most McDonald's customers were unaware that McDonald's coffee was both hotter than coffee served elsewhere and that, if spilled, it posed a serious risk to their safety; and McDonald's knew and did not care that its customers did not know about the danger because hotter coffee meant greater sales.<sup>192</sup> This final point concerning their risk versus private utility assessment was the clincher. As one commentator noted, "[b]y emphasizing this pecuniary motive, attorneys for the plaintiff thus sought to strip the mega-corporation of its family-friendly marketing hype and to expose a fearsome Goliath that the David-like plaintiff was challenging."<sup>193</sup>

On August 17, 1994, after a one-week trial, the jury deliberated only four hours before returning a verdict that demonstrated how differently they now viewed Liebeck's claim.<sup>194</sup> They no longer saw the case as exclusively about Liebeck's lack of personal responsibility. They found instead that Liebeck had suffered \$200,000 in injuries and that *both* Liebeck and McDonald's were responsible.<sup>195</sup> Notably, however, they found that Liebeck bore 20 percent of the responsibility while 80 percent of Liebeck's injury was attributed to McDonald's for failing to protect and adequately warn its customer.<sup>196</sup> Therefore, after deducting the 20 percent that they found to be attributable to Liebeck, the jury awarded her \$160,000 in compensatory damages.<sup>197</sup> Regarding the reprehensibility of McDonald's conduct in serving coffee that, based on more than 700 complaints,<sup>198</sup> it knew could cause and had caused other incidents of

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<sup>190</sup> *Id.*

<sup>191</sup> HALTOM & MCCANN, *supra* note 22, at 192.

<sup>192</sup> *Id.* at 190; NADER & SMITH, *supra* note 173, at 269.

<sup>193</sup> HALTOM & MCCANN, *supra* note 22, at 190.

<sup>194</sup> *Id.* at 193.

<sup>195</sup> HALTOM & MCCANN, *supra* note 22, at 193.

<sup>196</sup> Liebeck v. McDonald's Rest., No. 93-02419, 1995 WL 360309, at \*1 (D. N.M. Aug. 18, 1994).

<sup>197</sup> *Id.*

<sup>198</sup> *Are Lawyers Burning America?*, *supra* note 173.

severe burns, the jury reacted strongly by also awarding Liebeck \$2.7 million in punitive damages.<sup>199</sup>

The verdict demonstrated that after hearing the evidence, the jury wholeheartedly endorsed Liebeck's claims that McDonald's bore most of the responsibility for her injury and that McDonald's should compensate her. They also agreed with Liebeck that McDonald's should be punished for its callous decision to disregard its consumers' safety.<sup>200</sup> The jury did not accept McDonald's claim, "We do it all for you" but instead believed that McDonald's does it all for profit. In order to pressure McDonald's to change how it does business, the jury awarded an amount of punitive damages that was based on McDonald's income from its harm-inducing behavior.<sup>201</sup> Thus, the \$2.7 million punitive award was intended to equal two days of McDonald's coffee revenues.<sup>202</sup> The trial judge, Robert H. Scott,<sup>203</sup> later affirmed the appropriateness of the punitive damages stating, "I conclude that the award of punitive damages is and was appropriate to punish and deter the Defendant for their wanton conduct and to send a clear message to this Defendant that corrective measures are appropriate."<sup>204</sup> However, Judge Scott reduced the amount of punitive damages to \$480,000, which equaled three times the amount of compensatory damages awarded.<sup>205</sup> It is unknown how much money Liebeck actually received because, after reducing the punitive damages, Judge Scott ordered a settlement conference at which the parties settled for an amount that McDonald's insisted be kept confidential.<sup>206</sup>

The trial outcome was a clear victory for Liebeck, who accomplished much of what she wanted. In addition to the damage award providing compensation and punishment, the case appears to have changed McDonald's behavior. In Liebeck's hometown,

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<sup>199</sup> *Liebeck*, 1995 WL 360309, at \*1.

<sup>200</sup> HALTOM & MCCANN, *supra* note 22, at 193.

<sup>201</sup> NADER & SMITH, *supra* note 173, at 269-70.

<sup>202</sup> HALTOM & MCCANN, *supra* note 22, at 193. According to Haltom and McCann: "The closing argument by the plaintiff's lawyers noted that McDonald's sells over a billion cups of coffee a year, which generates daily revenues of \$1.35 million; [thus,] payment of two days' revenue from coffee might constitute a reasonable basis for punitive damages." *Id.* at 191.

<sup>203</sup> Judge Scott is described as a conservative Republican. NADER & SMITH, *supra* note 173, at 271.

<sup>204</sup> *Id.* at 272 (quoting transcript of record, *Liebeck v. McDonald's Rest.*, No. 93-02419, 1995 WL 360309 (D. N.M. Aug. 18, 1994)).

<sup>205</sup> *Id.*

<sup>206</sup> HALTOM & MCCANN, *supra* note 22, at 192.

McDonald's lowered the temperature at which it served coffee.<sup>207</sup> At the national level, McDonald's coffee lids now carried the warning "HOT! HOT! HOT!" and warnings were also posted at most McDonald's drive through windows indicating that that "Coffee, tea, and hot chocolate are VERY HOT."<sup>208</sup>

The jury verdict and the trial court's endorsement of this outcome in Liebeck's case demonstrate that in a specific case, a good trial attorney representing a credible sympathetic plaintiff can overcome the corporate situationist spin that preys on the public's naïve belief in dispositionism. When given the chance to put on evidence that provided the full context for what superficially appeared to be a frivolous claim, Liebeck's lawyer was able to help the decision-makers penetrate the web of misinformation that fit their first impressions, but did not accurately portray how and why Liebeck was injured.

The rest of America, however, did not have the opportunity to listen to and reflect on the entire story from the perspective of both parties. As a result, the American public based their opinions about Liebeck's case on widely circulated spin and half-truths that were heavily skewed in favor of McDonald's.<sup>209</sup>

### 3. The Backlash

Liebeck's case and *McLibel* produced opposite results. McDonald's won the actual *McLibel* case, but in the process, damaged its reputation and energized the anti-corporate movement that sought to reframe McDonald's image as harming rather than supporting consumers. In contrast, McDonald's lost big in the actual Liebeck case, but McDonald's and its allies in the torts war won a huge situationist victory in state legislatures and the court of public opinion by reframing the case so that McDonald's, rather than Stella Liebeck, was the victim.<sup>210</sup>

A critical reason for these opposite effects is that *McLibel* and Liebeck's cases also differed in how the media covered them. The actual *McLibel* trial was reported on in great depth, clearly benefiting the social activists as the details of the case were explained in minute detail. In contrast, the publicity concerning the Liebeck case came *after* the verdict was handed down.

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<sup>207</sup> *Id.* at 194; see also NADER & SMITH, *supra* note 173, at 272.

<sup>208</sup> HALTOM & MCCANN, *supra* note 22, at 194.

<sup>209</sup> See HALTOM & MCCANN, *supra* note 22, at 210; HOT COFFEE (HBO 2011); NADER & SMITH, *supra* note 173, at 267.

<sup>210</sup> See, e.g., HOT COFFEE (HBO 2011).

The verdict in Liebeck's case was widely reported. An accurate and detailed account of the evidence presented at trial was published on the front page of the *Wall Street Journal*.<sup>211</sup> Most stories, however, presented it in a contextual vacuum that clearly benefited McDonald's. Twenty-six leading newspapers immediately announced that a woman had won a huge verdict against McDonald's for spilling coffee on herself.<sup>212</sup> The headline for the AP story read, "Woman Burned by Hot McDonald's Coffee Gets \$2.9 Million."<sup>213</sup> This pithy version of Liebeck's case was repeated over and over by the media.<sup>214</sup> Almost overnight, it became the prime symbol for McDonald's and its allies' situationist spin that this was a case that was about thwarted dispositionism, illustrating how tort law's greedy plaintiffs and trial attorneys were stifling personal choice and discouraging personal responsibility. Full balanced coverage offered by the *Wall Street Journal*,<sup>215</sup> and six months later in *Newsweek*,<sup>216</sup> was no match for sound bites and headlines that aligned with corporate interests and most Americans' dispositional worldview. The case that the jury and judge found so compelling on behalf of Liebeck had been transformed into a frivolous lawsuit brought by an undeserving plaintiff and her greedy lawyer in an out-of-control tort system that threatened the availability of the products and services that consumers wanted. Just as it had been for the jurors before they heard the evidence, the public at large viewed the McDonald's coffee spill as a case about the lack of Liebeck's personal responsibility and the threat by Liebeck, her attorney, the jury, and the court system, to consumers' choice of goods and services.

Single-handedly, the fictionalized Hot Coffee tort story reinvigorated the then flagging tort reform movement that sought to limit tort litigation. As Haltom and McCann explained in their book, *Distorting the Law*:

By 1994, the national tort reform movement seems to be on the wane. A decade of failure to pass major national legislation in Congress had sapped reformists' energies and nurtured frustration. The easy victories at the state level had been exhausted and even these were being undone or undercut through effective litigation campaigns by trial

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<sup>211</sup> Gerlin, *supra* note 180.

<sup>212</sup> HALTOM & MCCANN, *supra* note 22, at 196.

<sup>213</sup> *Id.* at 198.

<sup>214</sup> See, e.g., HALTOM & MCCANN, *supra* note 22, at 183.

<sup>215</sup> Gerlin, *supra* note 180.

<sup>216</sup> *Are Lawyers Burning America?*, *supra* note 173.

lawyers. In short, the tort reform movement was on its heels, locked into an increasingly defensive battle. Then along came the McDonald's case—the perfect anecdotal antidote to the movement's maladies.<sup>217</sup>

Large corporations and their allies let it be known that they wanted to help protect Americans from the tort lawyers and plaintiffs like those in the McDonald's coffee case who sought to limit their freedom.<sup>218</sup> They successfully used Liebeck's case as a horror story, demonstrating the need for legislative limits on non-economic and punitive damages.<sup>219</sup>

Six months after the verdict, in response to the tidal wave of outrage against Liebeck, her lawyer, tort lawyers, and the tort system as a whole, *Newsweek* devoted a substantial amount of space to Liebeck's case and its impact on the tort reform movement.<sup>220</sup> *Newsweek* stated that "[t]he spill that badly wounded Stella Liebeck is now scarring the landscape of American law."<sup>221</sup> The article noted that the coffee spill case was at the center of a bitter fight over tort reform that "was the most hard-fought battle of the new Congress."<sup>222</sup> The article explained that making good on the Republicans' "Contract with America" pledge, Congress passed legislation that set national limits on tort damage awards.<sup>223</sup> It noted that a Congressman who backed the bill explained how tort reform was for the benefit of his constituents by saying "[i]f there's a Robin Hood aspect, it is to take from lawyers and give to the average working American."<sup>224</sup> Thus, according to supporters of federal tort reform, demonizing lawyers and the legal system while limiting tort damages was going to benefit the regular Joe. Apparently, the fact corporate America lobbied for,<sup>225</sup> and benefited from, tort reform was deemed irrelevant.

The tort reformers reframed the Hot Coffee case to create a compelling story that had nothing to do with coffee, burgers, fast food, or, in the end, what actually happened. Instead, their version of

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<sup>217</sup> HALTOM & MCCANN, *supra* note 22, at 225.

<sup>218</sup> *Are Lawyers Burning America?*, *supra* note 173.

<sup>219</sup> *Id.*; NADER & SMITH, *supra* note 173, at 266-67.

<sup>220</sup> *Are Lawyers Burning America?*, *supra* note 173.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*; see also NADER & SMITH, *supra* note 173, at 258. President Clinton vetoed this legislation on May 2, 1996. *Id.* Even though many states have enacted limits on tort damages, bills to enact national limits are introduced each session of Congress, none of the federal bills have ever become law.

<sup>224</sup> *Are Lawyers Burning America?*, *supra* note 173.

<sup>225</sup> NADER & SMITH, *supra* note 173, at 259-60.

Liebeck's case served the much larger situationist goal of creating an environment where personal injury lawyers and their clients who sued businesses were viewed as selfish and undeserving. The tort reformers were highly successful.<sup>226</sup> For example, ABC News was still reporting in 2007 that "[t]he poster child of excessive lawsuits seems to be the 1992 case against McDonald's brought by a woman who burned herself when she spilled coffee on her lap."<sup>227</sup> Even today, the McDonald's Hot Coffee case continues to effectively conjure up an image of a plaintiff who lacked personal responsibility, her greedy tort lawyer, and a broken torts system.<sup>228</sup> The 2011 documentary titled "Hot Coffee," which first aired on HBO, was the latest attempt to educate the general public about what really happened in Liebeck's case.<sup>229</sup> Whether this is, or will be, more successful than the previous failed attempts remains to be seen.

Undoubtedly, corporate America's version of the McDonald's Hot Coffee case has negatively affected how people view consumer lawsuits in the United States and abroad.<sup>230</sup> Would people react as

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<sup>226</sup> See, e.g., STELLAAWARDS.COM, *supra* note 169; *Seinfeld: The Maestro* (NBC television broadcast Oct. 5, 1995); *Harvey Birdman, Attorney at Law: Very Personal Injury* (Cartoon Network television broadcast Sept. 23, 2001); *Late Show with David Letterman* (CBS television broadcast June 29, 1995), available at [http://www.cbs.com/late\\_night/late\\_show/top\\_ten/](http://www.cbs.com/late_night/late_show/top_ten/) ("Top Ten Dr. Kevorkian Tips for Summer: 4. Take a bunch of friends to McDonald's and pour scalding coffee on each other . . ."); *Late Show with David Letterman* (CBS television broadcast Jan. 8, 1996), available at [http://www.cbs.com/late\\_night/late\\_show/top\\_ten/](http://www.cbs.com/late_night/late_show/top_ten/) ("Top Ten Blizzard Safety Tips . . . 8. Clear snow off driveway with just one scalding hot cup of McDonald's coffee . . ."); *Mercedes-Benz: Smooth Ride* (Propaganda Films television advertisement 1997) ("Here's your scalding-hot cup of tea, Grandma.").

<sup>227</sup> Lauren Pearle, *I'm Being Sued for WHAT?*, ABC NEWS, May 2, 2007, <http://abcnews.go.com/TheLaw/story?id=3121086&page=1>.

<sup>228</sup> See, e.g., *Law v Common Sense: Will Barack Obama Protect Americans from his Fellow Lawyers?*, THE ECONOMIST, Jan. 15, 2009, <http://www.economist.com/node/12932224/> ("Some judges think even the nuttiest plaintiffs deserve their day in court. As the judge who let a woman sue McDonald's for serving her the coffee with which she scalded herself put it: 'Who am I to judge?'"); Matthew Heller, *Court Shuts Down References to "Iconic" Coffee Case*, ONPOINTNEWS.COM (Apr. 24, 2011), <http://www.onpointnews.com/NEWS/Court-Shuts-Down-References-to-Iconic-Hot-Coffee-Case.html>; Joe Messerli, *A New Frivolous Lawsuit Statute*, BALANCEDPOLITICS.ORG, [http://www.balancedpolitics.org/editorial-frivolous\\_lawsuits.htm](http://www.balancedpolitics.org/editorial-frivolous_lawsuits.htm) (last updated July 14, 2011).

<sup>229</sup> See, e.g., HOT COFFEE (HBO 2011).

<sup>230</sup> I have had a number of personal conversations with small business owners in both England and Australia where they bitterly point to the Hot Coffee case as the prime example of how the international influence of American tort law has led

they continue to do when Liebeck's case is mentioned if, instead, it was the Burger King or Starbucks Hot Coffee case? I assert that it matters that the defendant was McDonald's because of all that its name evokes about personal freedom and responsibility and its special relationship from childhood with Americans and, more and more, with people from around the world.

The Hot Coffee case and McLibel were not indicative of a sudden increase in tort litigation involving McDonald's. Rather, reported tort decisions in which McDonald's was a party remained quite rare throughout the 1990s.<sup>231</sup> The next round of McDonald's tort litigation began in the new millennium.<sup>232</sup> *Pelman v. McDonald's Corp.*,<sup>233</sup> the most socially significant of these lawsuits, focused on what McDonald's does best: sell fast food to children. With the filing of *Pelman*, Justice Bell's findings in the McLibel case that McDonald's preys on children and that its food lacks nutrition became the basis of new tort litigation in the United States.<sup>234</sup>

### *C. Pelman v. McDonald's, the Childhood Obesity Case*

#### *Chicken McNuggets, rather than being merely chicken fried*

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to soaring liability insurance rates for their businesses.

<sup>231</sup> One interesting case during this time was *Faverty v. McDonald's Restaurants of Oregon, Inc.*, 892 P.2d 703 (Or. Ct. App. 1995), *appeal dismissed*, 971 P.2d 407 (Or. 1998) (allowing an injured motorist to recover against McDonald's for negligently overworking a young employee who collided with plaintiff when he fell asleep while driving home).

<sup>232</sup> For example, Hindus and vegetarians charged that McDonald's misrepresented that there was no beef in its french fries. *McDonald's Fries Cost \$10M: Chain to Pay Vegetarians, Hindus for Not Disclosing it Used Beef Flavoring in French Fries*, CNNMONEY.COM (June 5, 2002, 5:43 PM). The case settled and the \$10 million was donated to charity. Chidanand Rajghatta, *McDonald Pays Up Hindu Veggie Groups in US*, TIMES INDIA (July 12, 2005, 9:25 PM), [http://articles.timesofindia.indiatimes.com/2005-07-12/us/27846118\\_1\\_vegetarian-groups-harish-bharti-mcdonald](http://articles.timesofindia.indiatimes.com/2005-07-12/us/27846118_1_vegetarian-groups-harish-bharti-mcdonald). See also *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274 (Ky. Ct. App. 2009), discussed *supra* note 34.

<sup>233</sup> *Pelman v. McDonald's Corp.*, No. 02-7821, 2011 WL 1230712 (S.D.N.Y. Feb. 25, 2011), *stipulation of voluntary dismissal with prejudice*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *dismissed by, partial summary judgment denied by* No. 02 Civ. 7821(RWS), 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003), *vacated by remanded in part by* 396 F.3d 508 (2d Cir. 2005), *on remand motion granted by* 396 F. Supp. 2d 439 (S.D.N.Y. 2006), *motion to strike granted in part by* 452 F. Supp. 2d 320 (S.D.N.Y. 2006), *class certification denied by* 272 F.R.D. 82 (S.D.N.Y. 2010).

<sup>234</sup> See *supra* text accompanying notes 220-225.



*in a pan, are a McFrankenstein creation of various elements not utilized by the home cook.*

—Judge Sweet in *Pelman v. McDonald's Corp.*<sup>235</sup>

### 1. Setting the Stage

The year 2000 ushered in a more health-conscious national leadership. President George W. Bush was depicted as fit and athletic and was never pictured eating fast food. In January 2001, President Bush's Surgeon General announced an action plan to deal with what was described as an obesity epidemic.<sup>236</sup> The action plan did not include regulating fast food or advertising to children.<sup>237</sup> In 2002, the nation was shocked by the Center for Disease Control's report that during 1999 to 2000, 16 percent of children, aged six to nineteen, were obese.<sup>238</sup> Six years earlier, childhood obesity was reported to have increased from 6.5 percent in 1980 to 11.3 percent in 1994.<sup>239</sup> As of 2008, the rate had leveled off at a very unacceptable 16.9 percent.<sup>240</sup> Thus, by the time Barrack Obama took Office in 2008, childhood obesity was a public health crisis.<sup>241</sup> During Obama's

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<sup>235</sup> *Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512, 535 (S.D.N.Y. 2003).

<sup>236</sup> OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., *The Surgeon General's Call to Action To Prevent and Decrease Overweight and Obesity* 2001 (2001), <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

<sup>237</sup> *Id.*

<sup>238</sup> *Prevalence of Obesity Among Children and Adolescents: United States, 1999–2000*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/data/hestat/overweight/overweight99.htm> (last visited Oct. 27, 2011).

<sup>239</sup> Cynthia L. Ogden, Katherine M. Flagel, Margaret D. Carroll & Clifford L. Johnson, *Prevalence and Trends in Overweight Among US Children and Adolescents, 1999–2000*, 288 J. AM. MED. ASS'N 1728 (2002). Other countries that have recently adopted an American diet have experienced even greater increases in the rates of childhood obesity. See Elisabeth Rosenthal, *Fast Food Hits Mediterranean; a Diet Succumbs*, N.Y. TIMES, Sept. 24, 2008, <http://www.nytimes.com/2008/09/24/world/europe/24diet.html>.

<sup>240</sup> Cynthia Ogden & Margaret Carroll, *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963–1965 Through 2007–2008*, CTR. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/nchs/data/hestat/obesity\\_child\\_07\\_08/obesity\\_child\\_07\\_08.htm](http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.htm) (last updated June 4, 2010).

<sup>241</sup> *Food for Thought: How to Improve Child Nutrition Programs: Hearing Before the Subcomm. on Educ. Reform*, 108th Cong. 4 (2003) (statement of Vice Admiral Richard H. Carmona, Surgeon Gen., United States Public Health Service, United States Department of Health & Human Services), available at

Administration, First Lady Michelle Obama has made healthy eating, especially for children, her signature cause.<sup>242</sup> However, regulating how fast food restaurants interact with children has not been part of her agenda.

As childhood obesity took center stage, McDonald's faced increasing pressure regarding the nutritional value of its food and its focus on children. Eric Schlosser's *Fast Food Nation*, a biting social critique of fast food that targeted McDonald's in particular, was published in 2001.<sup>243</sup> Among the bestseller's criticisms were that fast food was a major cause of obesity in adults and children<sup>244</sup> and that the ingredients in items such as Chicken McNuggets were unhealthy.<sup>245</sup>

## 2. The Lawsuit and Its Influence

In 2002, tort law got involved with the childhood obesity crisis when minors Ashley Pelman and Jazlyn Bradley, through their parents, brought a class action against McDonald's for making them and other children obese and causing serious obesity-related medical issues.<sup>246</sup> This suit was the brainchild of law professor and public interest lawyer, John F. Banzhaf III, who had previously been involved in the tobacco industry litigation.<sup>247</sup> With the huge success of the tobacco litigation in mind,<sup>248</sup> this lawsuit was intended to force

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<http://ftp.resource.org/gpo.gov/hearings/108h/90132.txt>.

<sup>242</sup> Sheryl Gay Stolberg, *Childhood Obesity Battle is Taken Up by First Lady*, N.Y. TIMES, Feb. 10, 2010, <http://www.nytimes.com/2010/02/10/health/nutrition/10obesity.html>.

<sup>243</sup> SCHLOSSER, *supra* note 2.

<sup>244</sup> *Id.* at 240–43.

<sup>245</sup> *Id.* at 140.

<sup>246</sup> Marc Santora, *Teenagers' Suit Says McDonald's Made Them Obese*, N.Y. TIMES, Nov. 21, 2002, <http://www.nytimes.com/2002/11/21/nyregion/teenagers-suit-says-mcdonald-s-made-them-obese.html>. An earlier lawsuit in 2002 by an adult, who claimed his obesity was caused by eating fast food was withdrawn. Complaint at 9–14, *Barber v. McDonald's Corp.*, No. 23145/2002 (N.Y. Sup. Ct. filed July 24, 2002) available at <http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp.pdf>. See generally David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 376–78 (2007).

<sup>247</sup> *Ms. Bradley Meet Adm. Poindexter*, AM. SPECTATOR (Dec. 2, 2002, 12:02 AM), <http://spectator.org/archives/2002/12/02/ms-bradley-meet-adm-poindexter>; 150 CONG. REC. H949 (daily ed. Mar. 10, 2004) (statement of Rep. Keller); see also Professor John F. Banzhaf III: *Using Legal Action to Help Fight Obesity*, BANZHAF.COM, <http://banzhaf.net/obesitylinks.html> (last visited Nov. 22, 2011).

<sup>248</sup> Melissa Grills Robinson, Paul N. Bloom & Nicholas H. Lurie, *Combating*

a big change in how and what McDonald's markets to children. It was therefore a different kind of claim than the Hot Coffee suit brought by Stella Liebeck, even though she too sought not only compensation, but also, through the award of punitive damages, a change in how McDonald's conducted business.

The claims by Pelman and Bradley against McDonald's were not well received by the media. As one commentator noted:

This litigation provoked an intense, mostly negative response in the news media and the court of public opinion. Columnists called the case a "cartoon of a lawsuit" and suggested that it was the lawyers who were poised to "get fat" on McDonald's. The case showed up in fifth place on Citizens Against Lawsuit Abuse's "Best of the Bizarre" for 2002, one spot behind the Montana man who changed his name to Jack Ass and then sued the makers of the TV show *Jackass* for harming his reputation.<sup>249</sup>

The main critique of the childhood obesity litigation was dispositional: obesity was the personal responsibility of the plaintiffs and their parents.<sup>250</sup>

In January 2003, federal district court judge Robert Sweet dismissed Pelman and Bradley's suit in *Pelman v. McDonald's Corp.* (*Pelman I*).<sup>251</sup> His opinion focused on personal responsibility and assumption of risk. Judge Sweet stated bluntly:

If a person knows or should know that eating copious orders of supersized McDonald's products is unhealthy and may result in weight gain (and its concomitant problems) because of the high levels of cholesterol, fat, salt and sugar, it is not the place of the law to protect them from their own excesses. Nobody is forced to eat at McDonald's. (Except,

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*Obesity in the Courts: Will Lawsuits Against McDonald's Work?*, 24 J. PUB. POL'Y & MARKETING 299, 299 (2005).

<sup>249</sup> Michelle M. Mello, Eric B. Rimm & David M. Studdert, *The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity*, 22 HEALTH AFFAIRS 207, 207 (2003) (footnotes omitted).

<sup>250</sup> Adam Cohen, *Editorial Observer; The McNugget of Truth in the Lawsuits Against Fast-Food Restaurants*, N.Y. TIMES, Feb. 3, 2003, <http://www.nytimes.com/2003/02/03/opinion/editorial-observer-mcnugget-truth-lawsuits-against-fast-food-restaurants.html> ("Fast-food litigation has been greeted coolly so far because it appears to run up against a core American value: personal responsibility.").

<sup>251</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

perhaps parents of small children who desire McDonald's food, toy promotions or playgrounds and demand their parents' accompaniment.) Even more pertinent, nobody is forced to supersize their meal or choose less healthy options on the menu.<sup>252</sup>

Judge Sweet did not completely close the door on this lawsuit. His dismissal allowed plaintiffs to amend their complaint<sup>253</sup> and, citing the RESTATEMENT (SECOND) OF TORTS § 402A, he suggested a way for the plaintiffs to make out a triable products liability claim.<sup>254</sup> He graphically described Chicken McNuggets as a "McFrankenstein creation of various elements not utilized by the home cook."<sup>255</sup> He also set out the long list of ingredients, many of which were unpronounceable.<sup>256</sup> Relying on Schlosser's *Fast Food Nation*, Judge Sweet continued his damaging critique of Chicken McNuggets, noting: "[W]hile seemingly a healthier option than McDonald's hamburgers because they have 'chicken' in their names, [they] actually contain twice the fat per ounce as a hamburger."<sup>257</sup> Judge Sweet then critiqued the contents of McDonald's french fries and set out another list of artificial and unpronounceable ingredients.<sup>258</sup>

Noting that McDonald's win in *Pelman* felt more like a loss and came at a time when it had "just suffered the first quarterly loss in its history," the *New York Times* assessed the damage to McDonald's from the critique Judge Sweet provided in his dismissal and then gave McDonald's the following advice:

McDonald's should ramp up its fitful efforts to make its food more nutritious. The Pelman plaintiffs have plainly identified a problem. With obesity at epidemic levels—more than 60 percent of adults are now overweight or obese—McDonald's is doing real harm by promoting

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<sup>252</sup> *Id.* at 533 (footnote omitted). Judge Sweet also noted that the public had voiced its disapproval of this suit based on "the decline of personal responsibility and the rise of the cult of victimhood." *Id.* at 518 n.5.

<sup>253</sup> *Id.* at 543.

<sup>254</sup> *Id.* at 534.

<sup>255</sup> *Id.* at 535.

<sup>256</sup> *Id.*; see also MICHAEL POLLAN, IN DEFENSE OF FOOD: AN EATER'S MANIFESTO 150 (2008). The listed ingredients for Chicken McNuggets violated all the "don't eats" in one of the rules set out in Michael Pollan's book, which states, "Avoid food products containing ingredients that are a) unfamiliar, b) unpronounceable, [and] c) more than five in number." *Id.*

<sup>257</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 535 (S.D.N.Y. 2003).

<sup>258</sup> *Id.*

“extra value meals” that contain three-quarters of the calories an adult needs for a full day.<sup>259</sup>

Eleven months later, in November 2003, McDonald’s “rolled out to its U.S. system newly reformulated white-meat Chicken McNuggets, which contained forty fewer calories and less fat” than the version it had sold for almost twenty years.<sup>260</sup> A number of commentators believe that Judge Sweet’s “McFrankenstein” critique of Chicken McNuggets played a major role in persuading McDonald’s to make them more nutritious. Judge Sweet did not have to rule in favor of the plaintiff to get McDonald’s to act. *Pelman* was on the media’s radar and the coverage of Judge Sweet’s comments, along with his leaving the door open for the plaintiffs to keep their case going forward, was enough to help achieve one of the main goals of the *Pelman* litigation: changing the contents of McDonald’s products.

When the *Pelman* plaintiffs appeared to win the first round, and even though their revised complaint was dismissed later that same year,<sup>261</sup> the response from the food manufacturers was swift. Their lobbyists took an aggressive stance and sought legislative bans on obesity-related lawsuits.<sup>262</sup> By 2005, twenty-three states had enacted “Cheeseburger” bills that granted food manufacturers immunity from obesity lawsuits in state courts.<sup>263</sup> While similar legislation at the federal level failed, the ability of McDonald’s and its allies to persuade state legislators to enact such legislation only reinforced how powerful they are and affirmed and that their message of personal responsibility resonated with legislators.

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<sup>259</sup> Cohen, *supra* note 250.

<sup>260</sup> Ron Ruggless, 2003 *Ad*, BNET (Dec. 22, 2003), [http://findarticles.com/p/articles/mi\\_m3190/is\\_51\\_37/ai\\_111935602/](http://findarticles.com/p/articles/mi_m3190/is_51_37/ai_111935602/). This article also reported that “[n]ew nutrition-oriented menu items gave a boost to same-store sales . . . , McDonald’s Corp. posted a 15.1-percent increase in same-store sales . . . , [and a]nalysts credited the promotion of entrée salads and chicken strips for the increases.” *Id.*

<sup>261</sup> *Pelman v. McDonald’s Corp.*, No. 02 Civ. 7821(RWS), 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003).

<sup>262</sup> Michele Simon, *Can Food Companies be Trusted to Self-Regulate*, 39 LOY. L.A. L. REV. 169, 223 (2006).

<sup>263</sup> Burnett, *supra* note 246, at 365; see Associated Press, *Dayton Rejects “Cheeseburger Bill”*, CBS MINN. (May 27, 2011), <http://minnesota.cbslocal.com/2011/05/27/dayton-rejects-cheeseburger-bill/>; Daily Editorial Board, *No Obesity Lawsuits Here: The Legislature Should Protect Food Industry from Frivolous Lawsuits*, MNDAILY.COM (Feb. 24, 2011), <http://www.mndaily.com/2011/02/24/no-obesity-lawsuits-here>.

Meanwhile, Morgan Spurlock's *Super Size Me*, a documentary in which the camera follows Spurlock as he eats only at McDonald's for a month and, as a result, suffers serious health consequences, was first shown in 2004.<sup>264</sup> It received rave reviews<sup>265</sup> and was seen by sizable audiences.<sup>266</sup> In an interview about the movie, Spurlock observed that the *Pelman* lawsuit inspired him to make the documentary.<sup>267</sup> The movie, combined with *Pelman* and *Fast Food Nation*, drew further attention to McDonald's ingredients and the size of its portions. While denying its decision had anything to do with Spurlock's film, McDonald's began eliminating supersizing soon after *Super Size Me* premiered.<sup>268</sup>

In 2005, the Second Circuit Court of Appeals breathed new life to the *Pelman* lawsuit by reversing Judge Sweet's dismissal of some claims and remanding it back to his court.<sup>269</sup> That same year McDonald's started including nutritional information about its products on its packaging.<sup>270</sup> Again it seems likely that this was at least in part a response to the reinstatement of *Pelman*.<sup>271</sup>

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<sup>264</sup> SUPER SIZE ME (Kathbur Pictures 2004).

<sup>265</sup> *Super Size Me*, ROTTEN TOMATOES, [http://www.rottentomatoes.com/m/super\\_size\\_me/](http://www.rottentomatoes.com/m/super_size_me/) (last visited Nov. 22, 2011).

<sup>266</sup> *Super Size Me* (2004), IMDb.com, <http://www.imdb.com/title/tt0390521/business> (last visited Nov. 22, 2011); see also *Super Size Me*, The-Numbers.com, <http://www.the-numbers.com/movies/2004/SIZEM.php> (last visited Nov. 22, 2011).

<sup>267</sup> Susan Dominus, *You Want Liver Failure With That?*, N.Y. TIMES, May 2, 2004, <http://www.nytimes.com/2004/05/02/movies/02DOMI.html?scp=2&sq=You%20Want%20Liver%20Failure%20With%20That&st=cse>. In this interview with Susan Dominus, Spurlock recalls:

It was Thanksgiving 2002, and I was sitting on my mother's couch watching the news about the lawsuit that two young women had filed against McDonald's, claiming it was responsible for their obesity. And a spokesperson for McDonald's came on and said, you can't link their obesity to our food—our food is healthy, it's nutritious. I thought, if it's so good for me, I should be able to eat it every day, right? As much as I want. It'd be fine. That was it—the light went on.

*Id.* See also Patricia Thomson, *Oversized America*, RAZOR (May 2004), <http://www.patriciathomson.net/SupersizeMe.html>.

<sup>268</sup> Associated Press, *McDonald's Phasing Out Supersize Fries, Drinks*, MSNBC.COM (Mar. 3, 2004), [http://www.msnbc.msn.com/id/4433307/ns/business-school\\_inc\\_/t/mcdonalds-phasing-out-supersize-fries-drinks/#.TILdoL\\_SdWE](http://www.msnbc.msn.com/id/4433307/ns/business-school_inc_/t/mcdonalds-phasing-out-supersize-fries-drinks/#.TILdoL_SdWE).

<sup>269</sup> *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) (limiting the remand solely to statutory consumer fraud claims because plaintiffs dropped tort claims despite urging by district court. judge to reframe its products liability claim).

<sup>270</sup> Melanie Warner, *McDonald's to Add Facts on Nutrition to Packaging*, N.Y. TIMES, Oct. 26, 2005, <http://www.nytimes.com/2005/10/26/business/26food.html>.

<sup>271</sup> Sean Parnell, *McDonald's Responds to Nutrition, Obesity Concerns*,

In 2006, Michael Pollan first published his bestseller *The Omnivore's Dilemma*,<sup>272</sup> which is highly critical of fast food in general and McDonald's in particular. Meanwhile, McDonald's settled a lawsuit by attorney Stephen Joseph's nonprofit advocacy group, BanTransFat.com, for \$8.5 million, based on its misrepresenting to the public that it had started using healthier cooking oil.<sup>273</sup> McDonald's suffered another legal and public relations disappointment when, in 2006, the *Pelman* trial judge refused to grant its new motion to dismiss.<sup>274</sup> Finally, however, *Pelman* ended with a whimper when the court refused to certify the class in 2010<sup>275</sup> and the plaintiffs voluntarily dismissed their suit in early 2011.<sup>276</sup>

Despite the failure of the *Pelman* lawsuit, its backers claimed that much of what they wanted to accomplish by suing McDonald's was achieved. In asking for attorneys' fees and monetary damages, they observed:

Defendant has made substantial changes to its products and cooking oils, completely modified its website with nutritional tools and information, now offers local educational programs on obesity, instituted fruits/vegetables yogurts, McVeggie Burger, vegetables and Premium Salads on its menus, and actually changed the composition of its Chicken McNuggets . . . all in the last seven months. In essence, the Defendant has "constructively settled" this case by affording all equitable and remedial remedies requested.<sup>277</sup>

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HEARTLAND INST. (Apr. 1, 2006), <http://news.heartland.org/newspaper-article/2006/04/01/mcdonalds-responds-nutrition-obesity-concerns>.

<sup>272</sup> POLLAN, *supra* note 43.

<sup>273</sup> *McDonald's Settles Trans Fats Lawsuits*, N.Y. TIMES, Feb. 12, 2005, <http://www.nytimes.com/2005/02/12/business/12food.html>.

<sup>274</sup> *Pelman v. McDonald's Corp.*, 452 F.Supp. 2d 320 (S.D.N.Y. 2006).

<sup>275</sup> *Pelman v. McDonald's Corp.*, 272 F.R.D. 82 (S.D.N.Y. 2010) (denying class certification).

<sup>276</sup> *Pelman v. McDonald's Corp.*, No. 02-7821, 2011 WL 1230712 (S.D.N.Y. 2011) (stipulation of voluntary dismissal with prejudice); *see also* Gary Long, Greg Fowler & Simon Castley, *Obesity Lawsuit Against McDonald's Concludes*, LEXOLOGY.COM (Mar. 3, 2011), <http://www.lexology.com/library/detail.aspx?g=6b70ec3f-504a-4563-b1bb-b675d8b00466>.

<sup>277</sup> *Pelman v. McDonald's Corp.* No. 02 CV 7821, 2003 WL 23474957 at 17 (S.D.N.Y. 2003).

#### IV. McDONALD'S AND TORT LAW—THE FUTURE

Because it wants to retain its situational power over the public's imagination, McDonald's rightly fears the ability of tort lawyers and their activist allies to destroy the restaurant chain's ability to make people believe that they are freely making wise decisions on matters such as hot coffee, healthy food, and childhood obesity. On the other hand, personal injury attorneys and public interest activists have learned the hard way that McDonald's is a formidable adversary, capable of shaping the public's response to a lawsuit or a jury verdict. As the Hot Coffee case demonstrates, McDonald's and its allies are powerful opponents who can turn a jury verdict for a badly burned old lady into a morality play portraying the victimization of McDonald's, an organization trying only to preserve Americans' individual choice and responsibility. As the quick enactment of Cheeseburger laws in almost half the states demonstrates, McDonald's and its allies can get special anti-torts legislation passed in a hurry. The rare legal victories against McDonald's have resulted from either effective advocacy to a jury or fear of such advocacy that leads McDonald's to settle.

McDonald's will continue to be the focus of litigation aimed at issues larger than individual personal injuries. Happy Meals<sup>278</sup> are a current target of both litigation and local government action.<sup>279</sup> In December 2010, Monet Parham, a Sacramento mother of two, sued McDonald's in California state court under California's consumer protection statute seeking to prevent it from offering toys with its Happy Meals.<sup>280</sup> She was represented by The Center for Science and the Public Interest<sup>281</sup> whose litigation director, Stephen Gardner, described McDonald's as "the stranger in the playground handing out candy to children."<sup>282</sup> In July 2011, McDonald's attempt to move the

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<sup>278</sup> Ronald McDonald is also under attack but, unlike Happy Meals, so far no tort suits have been brought against him. See Jim Goad, *Bring Us the Head of Ronald McDonald*, TAKI'S MAGAZINE (May 23, 2011), [http://takimag.com/article/bring\\_us\\_the\\_head\\_of\\_ronald\\_mcdonald#axzz1VnwV12Oc](http://takimag.com/article/bring_us_the_head_of_ronald_mcdonald#axzz1VnwV12Oc).

<sup>279</sup> Emily York, *McDonald's to Make Happy Meals More Healthful*, L.A. TIMES, July 25, 2011, <http://articles.latimes.com/2011/jul/25/business/la-fi-mcdonalds-20110726>.

<sup>280</sup> *Class Action Lawsuit Targets McDonald's Use of Toys to Market to Children*, CENTER FOR SCI. PUB. INT. (Dec. 15, 2010), <http://www.cspinet.org/new/201012151.html>.

<sup>281</sup> CENTER FOR SCI. PUB. INT., <http://www.cspinet.org/> (last visited Nov. 22, 2011).

<sup>282</sup> *Litigation Project—Current Docket*, CENTER FOR SCI. PUB. INT.,



case to federal court failed.<sup>283</sup> Also in July 2011, McDonald's announced plans to make Happy Meals healthier by decreasing the serving size of fries and including fruit.<sup>284</sup> McDonald's attributed its decision to "parental and consumer pressure."<sup>285</sup> Notably, however, it also made it clear that toys in Happy Meals are here to stay.<sup>286</sup>

McDonald's is not giving up on kids. In order to continue to maintain its hold on them and their parents, McDonald's is again "the official restaurant" of the Summer Olympics,<sup>287</sup> depicting itself "as a nutritionally responsible marketer, particularly when it comes to children."<sup>288</sup> At the 2012 Olympics, it is offering Happy Meals for the first time at McDonald's Olympic restaurants.<sup>289</sup> McDonald's is also sponsoring "McDonald's Champions of Play" that will bring children aged six to ten from around the world to the Olympics.<sup>290</sup> According to the *New York Times*, "[t]here will also be elements of the Champions of Play program for 2012 that will take place in local markets, among them a website devoted to 'balanced eating and fun play' and special packaging for Happy Meals."<sup>291</sup> The use of television to reach children is also continuing. A 2011 study reported that, while children see fewer food and beverage ads than in the past, there has been "a large jump in children's exposure to TV ads for fast-food restaurants."<sup>292</sup> Thus, McDonald's situational power to

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<http://www.cspinet.org/litigation/current.html> (last visited Nov. 22, 2011).

<sup>283</sup> Parham v. McDonald's Corp., No. C 11-511 MMC, 2011 WL 2860095 at \*2 (N.D. Cal. July 20, 2011).

<sup>284</sup> Stephanie Strom, *McDonald's Trims Its Happy Meal*, N.Y. TIMES, July 26, 2011, <http://www.nytimes.com/2011/07/27/business/mcdonalds-happy-meal-to-get-healthier.html>.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Gregg Cebrzynski, *McDonald's Seeks to "Enrich" Kids with its Beijing Olympics Initiative*, NATION'S RESTAURANT NEWS (Aug. 19, 2007), <http://www.nrn.com/article/mcdonald's-seeks-'enrich'-kids-its-beijing-olympics-initiative>.

<sup>288</sup> Stuart Elliott, *McDonald's Uses Olympics for Its Own Balancing Act*, N.Y. TIMES, July 20, 2011, <http://mediadecoder.blogs.nytimes.com/2011/07/20/mcdonalds-uses-olympics-for-its-own-balancing-act/>.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> Robert Preidt, *Kids Still See Unhealthy-Food Ads on TV, Study Finds*, HEALTHDAY (Aug. 2, 2011), <http://www.consumer.healthday.com/Article.asp?AID=655441>. See also Elsie M. Taveras et al., *Randomized Controlled Trial to Improve Primary Care to Prevent and Manage Childhood Obesity: The High Five for Kids Study*, 165 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 714 (2011).

influence how Americans and the rest of the world feed themselves continues unabated. But today, thanks in part to litigation, consumers are more aware of what fast food contains, the offerings at McDonald's are more healthful, and McDonald's encourages a balanced diet and exercise. .

## V. CONCLUSION

In this article, I examined three lawsuits involving McDonald's: *McLibel*, the Hot Coffee case and the *Pelman* obesity lawsuit. I showed that the impact on society of these tort cases has been greater because of what McDonald's means to us – both good and bad. The interaction between McDonald's and tort law has provided a means for various actors to affect the fast food industry, tort law, and corporate America, sometimes in favor of and sometimes in opposition to McDonald's and other similarly situated corporate entities.

McDonald's has had an extraordinary influence on our lives, including our individual psyches. With thousands of restaurants worldwide, McDonald's is everywhere. It has revolutionized how and what we eat. McDonald's creates desires for its products even when eating them is not in our best interests. McDonald's achieves this by feeding our dispositionism and beliefs in free will and choice, while manufacturing a situation that makes what it sells into what we believe we freely want and choose. Its extraordinary success at this can be attributed, in part, to its befriending us as young children with Happy Meals, clowns, playgrounds, toys, movie tie-ins, and Chicken McNuggets.

When an injured party or a protester seeks to make McDonald's accept responsibility and civil liability is at stake, McDonald's frames the claims of injury as attacks on both McDonald's and its customers' freedom and choice. Thus, whether as the plaintiff or the defendant, McDonald's uses the same means to prevail in the civil litigation that have worked so well in selling its products: it situates itself as a victim of attacks by the undeserving, the greedy, the irresponsible and the unscrupulous.

The way this approach has played out for McDonald's in these three lawsuits has varied widely. Even though McDonald's was the plaintiff in *McLibel*, this case was about little guys standing up to big corporations and fighting back. *McLibel* demonstrated that corporate bullying can backfire, and that when the bully is McDonald's, people will pay attention. It helped social activists

organize worldwide, especially on the Internet,<sup>293</sup> and gave extraordinary media coverage to their views on McDonald's and the environment, labor, children, and health. Even though the activist defendants lost in court, they won in the court of public opinion. McLibel also inspired law reform by illustrating corporate misuse of British libel law.<sup>294</sup>

Hot Coffee started as a quest by a badly burned elderly woman for compensation and ended up limiting tort damages and discouraging frivolous lawsuits. It demonstrated how sound bites involving McDonald's that resonate with the public's dispositionist worldview can have a significant impact on how law and lawyers are perceived. It was a tall tale that got anti-tort laws passed in a hurry. Even though Liebeck won her case, she and the tort system lost the hearts and minds of her fellow Americans. Today the Hot Coffee myth still has legs. When I asked my 2011 first year Torts class if they had heard of the Hot Coffee case before coming to law school, all sixty of them said they had, even though most of them were under the age of ten when Liebeck was injured.

*Pelman* was about making fast food healthier and its contents more transparent. It demonstrated that tort law can help accomplish such worthy goals without awarding money damages. Even though the case was dismissed, it motivated McDonald's to change the food it offered, to promote health instead of overeating, and to provide information about its food so customers could make informed decisions about what to eat. The case encouraged McDonald's change from supersizing to promoting a balanced diet. *Pelman I* described Chicken McNuggets as McFrankenfood in 2003, and not surprisingly, they were reformulated to be healthier later that year. Furthermore, in 2004 McDonald's launched its 'Go Active' program for children, encouraging them "to exercise and eat more healthful meals."<sup>295</sup> Considering McDonald's success with its young target audience, emphasizing healthy eating and exercise is a very positive development that could actually make kids healthier in the long run.

McDonald's is *sui generis*.<sup>296</sup> And, as McLibel, Hot Coffee

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<sup>293</sup> MCSPLIGHT.ORG, <http://www.mcspotlight.org> (last visited Nov. 22, 2011).

<sup>294</sup> David Rolph, *Corporations' Right to Sue for Defamation: An Australian Perspective*, 22 ENT. L. REV. 195 (2011), available at <http://ssrn.com/abstract=1914129> (discussing Australia's limiting of corporations' right to sue for defamation based on "[t]he spectre of *McLibel*").

<sup>295</sup> Cebrzynski, *supra* note 287.

<sup>296</sup> *Sui generis* is Latin for "of its own kind." BLACK'S LAW DICTIONARY (9th ed. 2009).

and *Pelman* all demonstrate, some of the cases involving it are too. The extraordinary economic and psychological influence of McDonald's has made, and will continue to make, tort suits involving McDonald's more likely to change both law and society. In the words of one of McDonald's catchy jingles: "*Nobody can do it like McDonald's can.*"<sup>297</sup>

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<sup>297</sup> *List of McDonald's Ad Programs*, WIKIPEDIA.ORG, [http://en.wikipedia.org/wiki/List\\_of\\_McDonald%27s\\_ad\\_programs](http://en.wikipedia.org/wiki/List_of_McDonald%27s_ad_programs) (last visited Nov. 22, 2011).