

The *Carbolic Smoke Ball Co* case: how the smoke ball affected the law of contract

From 1889 to 1893 an influenza epidemic swept through Europe killing both rich and poor in a very democratic fashion. In England, Prince Albert Victor, the grandson of Queen Victoria and second in line to the throne, caught the disease and within two weeks was dead. A few days later Emily Carlill also caught the disease, but unlike the Prince, she survived. At the Carbolic Smoke Ball Company there were probably a few who harboured secret regrets about Emily's fate; for Emily, having recovered, sued the company. On what basis did she sue?



Before catching influenza Emily had been persuaded by the company's seductive advertising to try its Carbolic Smoke Ball. A smoke ball was a rubber ball – containing carbolic acid – with a tube attached. The tube was inserted in the user's nose and the ball squeezed. The aim was to make the nose run. In this way the influenza was supposedly flushed out.

The advertisement promised readers that if they used the smoke ball, they would not catch influenza. The advertisement went further and promised readers (in large print) a reward of £100 if they did catch influenza. To convince the public of its sincerity the company prominently claimed that it had deposited £1,000 with the Alliance Bank. When Emily caught influenza she asked for her 'reward' of £100. The company flatly refused. If she wanted the money, Emily had no option but to sue.

The smoke ball was almost certainly ineffective in preventing or curing influenza. The use of carbolic acid probably meant that it did more damage than good. But the company was not alone in promising magical medical cures that were largely illusory. A host of competing medications jostled for attention in the pages of the *London Illustrated News*, the *Pall Mall Gazette*, the *Times* and other leading newspapers. The causes of influenza were unknown; and so the epidemic was a goldmine for those with a bogus remedy and no ethical scruples about fleecing a nervous and gullible public. The age of mass advertising had arrived and what better than an epidemic to make a killing.

Emily Carlill won her case because the court was able to apply traditional contract principles. In many ways this was just luck. Indeed, Emily Carlill would never have sued if the reward had not been so huge: £100 was a lot of money in 1892. The deposit of £1,000 with the Alliance Bank made it difficult for the company to argue that the advertisement was just a mere advertising puff; it was clearly an offer. If the company had shown a little less hubris, it might well have escaped liability.

Emily was lucky. Generally the nineteenth century was not a good time for consumers; in the main the law lagged behind the technical and commercial innovations that characterised the age. At the time of Carlill's case there was little control over the sale of medicines. This was no doubt due in part to the veil of ignorance that surrounded many medical conditions, but it was also due in part to the spirit of the times. The notion that it was the role of government to police socially detrimental activities (other than traditional crimes) was largely unknown. Thus, there were also few controls over advertising. Even though it lost the case the Carbolic Smoke Ball Company did not change its questionable activities; it merely rearranged its advertisement to make it almost impossible to collect the reward (which it then arrogantly increased to £200, although the £1,000 deposited with the Alliance Bank was never seen again). It would take another 50 years or more before society accepted the need for effective restrictions on misleading advertising. Today the Carbolic Smoke Ball Company's advertising would never survive the British consumer protection laws.