RESEARCH PAPER

Tobacco control implications of the first European product liability suit

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Objective: To examine tobacco control implication of the first European product liability suit in Finland.
Methods: Systematic search of internal tobacco industry documents available on the internet and at the British American Tobacco Guildford Depository.
Results: Despite legal loss, the litigation contributed to subsequent tobacco control legislation in Finland. The proceedings revealed that the industry had concealed the health hazards of its products and, despite indisputable evidence, continued to deny them. The positions taken by the industry rocked its reliability as a social actor and thus weakened its chances of influencing tobacco policy. Despite fierce opposition from the tobacco industry, tobacco products were included in the product liability legislation, tobacco was entered on the Finnish list of carcinogens, and an extensive Tobacco Act was passed in Parliament.
Conclusions: Tobacco litigation might not stand alone as a tool for public health policymaking but it may well stimulate national debate over the role of smoking in society and influence the policy agenda.

In 1988, a personal injury case was filed in the Helsinki District Court against tobacco companies. Subsequently, two criminal cases were launched in Espoo and Helsinki. For a long period Finland remained the only country outside the USA and Australia where a claim against tobacco companies was litigated in court.

Pentti Aho's claim was based on the fact that he had been smoking Klubi and North State cigarettes from 1941 to 1986 and had been diagnosed with laryngeal cancer and other illnesses in the 1980s, which according to him were caused by smoking.¹ The defendants in the personal injury case were Rettig Oy and Suomen Tupakka Oy, the importers, manufacturers, and marketers of the said cigarettes. The British company British American Tobacco (BAT) was, because of its subsidiary Suomen Tupakka (BAT Finland since 1992, subsequently BAT Nordic), the only international tobacco company to be a direct defendant in the Finnish product liability suit. Rettig was at that time an RJ Reynolds (RJR) licence holder in Finland, but the lawsuit did not concern the RJR cigarette brand (in 1995 RJR bought Rettig). Philip Morris (PM), the market leader in Finland, and its licence holder, Amer, were thus not parties in the product liability suit.

The tobacco companies' internal documents have provided a unique opportunity to examine the planning and implementation of their strategies for different issues and market areas. The documents have shed light on the tobacco industry's attempts to exert influence vis-à-vis the World Health Organization,² the hotel and restaurant business,³ the pharmaceutical industry,⁴ scientific research on passive smoking,⁵ science policy and research practices,^{6,7} EU advertising policy,⁸ Central and South American markets,⁹ and Nordic tobacco policy.^{10–13}

This article will focus on the tobacco control implications of tobacco litigation in Finland. Experiences from litigation in the USA will provide a backdrop for the analysis. The article will then focus on the material—that is, the background, content, and limitations of the tobacco documents. The actual analysis will focus on three points: the first concentrates on the litigation process while the other two relate to the outcomes of litigation.

Firstly, we are interested in the roles of international tobacco companies and the level of control they employed in

Finnish litigation. On court records only two local manufacturers, Rettig and Suomen Tupakka, were parties to the lawsuit in Finland. The defendants sought to portray the cases as a legal dispute played at the local level with Finnish tobacco manufactures and their attorneys as key actors.^{14,15} Earlier research has made it clear that PM dominated the industry's efforts to undermine tobacco control measures in the Finnish market.¹⁶ Given the dominant role of PM on the global lobbying scene and more specifically its strong presence on the Finnish market, it is reasonable to assume that PM might have tried to control Finnish litigation.

At the time of the legal proceedings, Finnish tobacco legislation was to be reviewed, and the court cases became an important battlefield for the definition of tobacco as a social problem.¹⁷ We will attempt to assess whether the litigation contributed to subsequent tobacco control legislation in Finland. Finally, we will assess whether the litigation affected the course of litigation in Europe.

THE THREE WAVES OF TOBACCO LITIGATION

The first wave of product liability lawsuits against tobacco companies originated in the USA in March 1954 and ended in September 1978. During that time 125 reimbursement cases were filed, all without exception ending in defeat for the plaintiffs.¹⁸ The defence for the cases in the first wave was built on general causality: smoking does not induce disease.

Expansion of product liability in general triggered off a second wave of claims.¹⁹ In almost all US states, liability for damages was expanded when the causation issue switched from contributory negligence to comparative negligence.²⁰ At the same time, scientific proof of the dangers of smoking began to mount, and the industry found it more difficult to deny the link between smoking and disease. Gradually, the tobacco companies began to admit that there was a statistical link between smoking and disease and that smoking was a hazard to health.

The Rose Cipollone case, which was filed in 1983, is the best known of the second wave lawsuits and in many

Abbreviations: BAT, British American Tobacco; B&W, Brown & Williams; JMF, Jacob, Medinger & Finnegan; PM, Philip Morris; PMI, PM International; RJR, RJ Reynolds; SHB, Shook, Hardy & Bacon

respects served as an example for the product liability case in Finland. Instead of general causality, the defence now appealed to a specific causality—in other words, to whether smoking had induced the disease of this particular smoker. The court of first instance ruled the case partially in favour of the plaintiff: the tobacco company was ordered to pay US\$400,000 in damages to Rose Cipollone's husband, after her death from lung cancer during the legal proceedings. Later this case, too, dried up as it became too expensive for the plaintiff's lawyers to continue litigation. The tobacco companies' defence had succeeded in warding off two waves of lawsuits by appealing to the fact that the plaintiff herself had been the cause of the harm: nobody had forced her to smoke.

A new phase in tobacco litigation began when the individual states joined in the lawsuits in 1994. Documents proving that the tobacco companies knew of the addictive nature of nicotine gradually came into the hands of the plaintiff's attorneys. The documents destroyed the defence's argument of a voluntary health risk. At the same time, directors of tobacco companies had assured the consumers and the US Congress that nicotine is not addictive. Addiction turned out to be the leading theme in the third wave of lawsuits.²¹

METHODS

Tobacco documents relating to the Aho trials were located in the following electronic archives: tobaccodocuments.org (all collections), legacy.library.ucsf.edu, and www.pmdocs.com. The search was conducted between December 2001 and September 2003 by using names of persons, organizations and publications as search words. In addition to the plaintiff, personal names included the names of attorneys, witnesses and judges; organizations included the names of tobacco companies and their law firms. Data collection with multiple search terms was continued until a point of saturation was reached.

The BAT documents located in the Guildford Depository constitute an important part of the material, because a BAT subsidiary was a party to the legal proceedings. The search of the Guildford documents in February 2002 and in December 2003 was based on file headings, file opening dates and file owners' names.

The documents have been analysed in more detail by placing them in the organizational, hierarchical and strategic context of the tobacco litigation. Subsequently, the documents have been used to illustrate the said themes as they appear on the basis of the documents. Information conveyed by the documents has not been checked with the people mentioned in them.²² The material has, however, been supplemented with documents from the Finnish tobacco litigation which the Physicians for Social Responsibility - Finland organization has published as a series of books based on individual hearings.

In evaluating the material, it should be borne in mind that the documents have been generated during the presentation in court of evidence on the health hazards of tobacco, when each party can request from the other any information that is essential to the hearing. A major shortcoming as far as this article is concerned is that, during the presentation of evidence, no information needs to be disclosed on matters concerning the relationship between an attorney and his client or related documents. The PM and BAT archives, however, incorporate a section which contains information on documents withheld on the basis of attorney-client privilege or some other judicial claim (The Privilege Log). This section of the archives includes only the index information on the documents and the archive can only be investigated using document numbers (PM) or document

titles (BAT). All the Privilege Log documents relating to the Aho case have been scrutinized using the information on the location of the files relating to the case or using search words derived from the cases.

RESULTS

The level of control

Finland was a very unlikely country for the first lawsuit to be filed against tobacco companies in Europe. Although the Finnish Tobacco Act from 1976 was thought strict at the time it came into force, it was outdated and had a number of loopholes by the end of the 1980s. Meanwhile, tobacco policy was at a standstill.²² Tobacco was not on the list of carcinogens and manufacturers were not required to disclose the ingredients of products. Nor was there much of a tradition in product liability litigation in Finland.²³

Erkki Aurejärvi, who is a professor of civil law, had been commissioned by the National Board of Health to compile a report on tobacco regulation and on how to apply the product liability rules to tobacco. According to Aurejärvi's report completed in 1986, there was no cause for action for any claims since the manufacture and marketing of tobacco was legal. At the time, Aurejärvi's report was gratifying news for the tobacco companies.²⁴ However, the issue of whether tobacco companies otherwise acted in compliance with Finnish law remained open in Aurejärvi's report. By 1988 Aurejärvi was convinced that the tobacco companies had indeed committed a breach against Finnish law and decided to act as the plaintiff's pro bono attorney.²⁵ Aurejärvi was able to summon an influential group of medical and legal experts to contribute to this public interest case without compensation.

The Finnish litigation can be divided into three categories: one relating to product liability, the second to the criminal liability of the tobacco companies, and the third to the scientific discussion of the health hazards of smoking at a more general level.²⁶ The third was an examination of the merits of whether Ismo Virtanen, a professor of anatomy, who was a witness for the tobacco industry, had been guilty of perjury when he had dismissed smoking as a cause of cancer. As the only Finnish witness from the medical profession, Virtanen was paid altogether €46 000 to testify for the tobacco companies in Helsinki District Court. The perjury indictment was processed in Helsinki District Court for three years in 22 hearings. The indictment was finally dismissed by a vote of 2–2, the chairman voting for dismissal. However, the Court of Appeal sentenced Virtanen for tax evasion. The criminal liability case and the perjury case were connected with the product liability suit and supported on the plaintiff's side.²⁷ As a whole, the lawsuits constitute a major process both in time and volume that is still partially incomplete. By 2000, the minutes of proceedings comprised a total of more than 6000 pages.

The proceedings of the personal injury claim began at Helsinki District Court on 16 June 1988—that is, only three days after the court had ruled in the USA for the first time that the tobacco industry had to pay damages in the Cipollone case. The Helsinki District Court rejected the product liability suit on 2 April 1993, on the basis that the sale of tobacco is allowed. The court did not appraise the medical evidence. The court's opinion was that the defendant was not liable for damages due to the fact that no contributory negligence had been established. The Court of Appeal criticised the defendants for misleading the consumers by not telling them about the health hazards of tobacco. No damages were pronounced, however, because in the court's view the causality between Aho's illnesses and tobacco had not been shown. The fact that, despite the two countries' different legislation, the ruling of the Court of

Appeal in particular reflected the judgments of the US courts of law in the first and second wave tobacco suits is an indication of the effectiveness of the defence strategies.

The Supreme Court dismissed the product liability suit in June 2001 by a vote of 4–1. The majority had accepted the general causality between smoking and illnesses, but were not fully certain if smoking had caused Aho's illnesses. The Supreme Court took the view known as "casting the blame on the tobacco victim"^{28–29}—a well known tobacco industry strategy for winning product liability cases. The court stated that when smoking Aho "assumed knowingly the risk that it may cause serious harms to his health".³⁰ An application was made for the reversal of this decision which the Supreme Court rejected in spring 2003. The attorney working for the plaintiff has made an application concerning Finnish tobacco litigation to the European Court of Human Rights.

Tobacco industry documents do not portray the lawsuits as local disputes of minor importance. On the contrary, it is fair to say that the proceedings in Finland were interpreted as an international threat. The tobacco companies' defence was prepared by a group of attorneys, which met in various compositions in Helsinki, London, and New York. Other parties involved in the preparatory work included PM, RJR, and BAT's US based subsidiary Brown & Williams (B&W). Even the small US based company Liggett participated in the preparatory work.^{31–33}

In addition to their in-house attorneys, the international companies used law firms. In November 1988, a B&W attorney recommended to the RJR attorney James Goold—referring to the Council of Tobacco Research special projects—that Edwin Jacob from Jacob, Medinger & Finnegan (JMF) should be hired for the medical defence in the Aho case.³⁴ JMF was among the most important law firms used by the US tobacco companies to look after their interests both in courts of law and in terms of research funding.^{35–38}

JMF was also the key expert in the medical aspects of the perjury case. The Guildford Depository includes almost 400 pages of invoices which JMF had sent to its client BAT Finland between 1992 and 1995.³⁹ Most of the invoices are related to the defence in the perjury case (table 1). The invoices indicate that the cooperation with the Finnish attorneys has been extremely close. The firm went through the opponent's material looking for gaps, shortcomings, contestable interpretations, and mistakes. JMF experts also looked for medical arguments in support of the defence and material for the cross examination of the opponent's witnesses.

In medical matters at least, material produced for US cases was used as the basis for the defence.^{40–42} In January 1989, RJR's attorney James Goold sent a memo on the carcinoma of larynx and on what the industry's stand was on the causality between tobacco and disease to the Rettig attorney, two lawyers from the law firm Shook, Hardy & Bacon (SHB), the BAT attorney and to Edwin Jacob.⁴³

The most important document relating to the background to the litigation is a letter sent to Rettig's own attorney and to Mikko Tulokas, who represented the company, by RJR's James Goold in March 1989—that is, just before the presentation of evidence by the defendants.⁴⁴ The letter emphasised the fact that the industry should use the same argumentation and terminology in the Aho case as in the USA. The defence attorneys of the international tobacco companies feared that unorthodox statements made by their Finnish colleagues could be used against the companies in litigation outside Finland. James Goold pointed out that the industry had admitted that smoking was a risk factor, but...

"As you know, we continue to maintain that smoking has not been, scientifically established to be the cause of these

Table 1 Example of the working practices of a tobacco industry law firm

A short summary of the grounds for billable hours by one medical expert working for Jacob, Medinger & Finnegan, the outside counsel in the Finnish tobacco litigation, illustrates the firm's practices:

- 8 November 1993: Scanning recent animal LCA paper for Finnish issue material
- 29 September 1994: Review background and prepare memo on the larynx cancer cases by time period reported in Greenland study (the interpretation of the Greenland study was one count in the indictment against Virtanen)
- 21 November 1994: Began review of various data sets and critiques with view to developing rebuttal for RBL (tobacco industry's attorney) to Doll 40 year report claims "SM twice as dangerous as thought"
- 11 December 1994: Continue on a point outline with rebuttal ideas re Teppo (opponent's witness) statement; review and identify errors and misinformation in Teppo testimony (work continued for several days)
- 21 December 1994: Began review of recent larynx cancer papers omitted by Vainio (opponent's witness) with view to impeach claims
- 3 January 1995: Evaluated literature that could be used to disprove Vainio's arguments about Dalbey's rat tests and searched for other weak points in Vainio's testimony (work lasted for several weeks)
- 11 January 1995: Obtained disproving and critical views against the argumentation set in Doll's research (Virtanen was said to have distorted Doll's findings)
- 2 March 1995: Completed and distributed Vainio mega mouse cross report; began assessment on literature for rebutting Vainio claims re Dalbey rat study; continued identifying points and formulating preliminary rebuttal possibilities Vainio testimony (work continued for several days)
- 16 March 1995: Tested alternate graphic presentation for Prener Greenland data (disputable point in Virtanen's testimony)
- 24 March 1995 Continued development of examples of aetiological error based on epidemiologic data
- 30 March 1995 Completed report on peptic ulcer example of smoking causation reversal; developed Buerger's disease example (later used as an argument in the hearing)
- 28 April 1995 Developed updated estimates from recent reports on prospects for percentage of smokers not dying of LCA for Kantor (Virtanen's attorney) brief

LCA, lung cancer.

diseases in general, or most importantly for litigations such as Aho, in any given individual. We, therefore, try very hard to avoid any statement or terminology that can be read as an admission that we agree smoking has been established as a cause."⁴⁵

In connection with the perjury case, Aho's attorney claimed that Rettig's outside counsel Mikko Tulokas, was against the introduction of "tobacco industry's medicine" in Finland because he did not consider it credible.⁴⁶ It was not possible to prove the claim at the time. The Goold letter lets it be understood that Tulokas, who was later appointed a member of the Supreme Court, had had misgivings about the sense of a strict denial strategy. Goold points out that Tulokas had asked in a meeting held in London whether tobacco could be said to "contribute to cancer".⁴⁷ Goold dismissed the proposition outright because this could be interpreted as admitting causality.

Defence strategies

There is less detailed information on the companies' litigation strategies due to the attorney-client confidentiality rules.^{48–49} The secret memoranda incorporate, for example, testimonials by expert witnesses and their preparation.^{50–51} Generally the industry's defence was based on a strategy familiar from second wave tobacco lawsuits in the USA. Suomen Tupakka and Rettig attorneys attempted on the one hand to show that Pentti Aho had been aware of the adverse effects of smoking but had continued to smoke despite them.¹ On the other hand, they also tried to dispute the link between Aho's illnesses and smoking (specific causality).

Goold's letter describes how US litigation strategies were going to be used in Finland.⁴⁴ The starting point was the "scientific fact" referred to by Goold: what the mechanism was that made cells carcinogenic or the lung tissue expand had not been proved; there was no precise information on what ingredients in tobacco smoke caused illnesses; the animal tests had not confirmed the link between tobacco smoke and cancer; and the research on humans was partially contradictory. Goold admitted surprisingly openly that the evidence presented by the tobacco industry had not in the past convinced the judges or the juries that tobacco would not cause cancer or other illnesses. The evidence had, however, shown that the issue was more complicated than was originally thought and the risks smaller and thus supported the industry's views on the health effects of tobacco. According to Goold, the industry's attorneys had succeeded in making the plaintiff's witnesses admit in cross examination that the connection between tobacco and illnesses was only an epidemiological assumption or opinion.

"At least in our experience, it can be more effective to have a plaintiff's expert admit he does not have all the answers than it is to put on a witness sponsored by industry," Goold said.⁵²

The last point refers to the inherent contradiction of the industry's dual defence strategy—the denial and awareness of health hazards. Goold writes:

"I recognise that there is some inconsistency between our saying everyone knows about the risk, while saying at the same time that we do not believe the scientific basis for the risk has been proven. But I can assure you that we have found that judges and juries in other countries who have heard the evidence have found the industry position to be reasonable. Accordingly, whenever you use words like "danger", "harm", "detriment", etc. of smoking, I would urge you to include an adjective like "claimed", "alleged", "reported", "widely publicized" etc., in order to maintain the flexibility to argue that the scientific issues have not been resolved."⁵³

The Finnish litigation differed, however, from the Cipollone case in the sense that the defendants did not attempt to crush the opposition by exhausting the plaintiff. In fact, quite the opposite. In the product liability case, the plaintiff steamrolled a group of Finnish frontline physicians into the courtroom to balance the defendants' mainly US experts, who had been working for the tobacco industry for years. When the defendants finally managed to get a Finnish doctor, Ismo Virtanen, to testify on their behalf, the publicity branded him a dissident in the Finnish medical community and he was sued for perjury.⁵⁴

Control efforts by PM

Tobacco documents illustrate that PM was actively participating in the joint defence of the industry from the very beginning. In May 1988, a month before the case was filed, a meeting was arranged in Helsinki between the BAT senior lawyer and lawyers from RJR as well as from PM and Amer.⁵⁵ An attorney from SHB representing PM was also invited. In early June 1988, the BAT senior lawyer sent round a memo on the division of labour and responsibilities in the Aho case.⁵⁶

The close cooperation continued after the start of the court proceedings. In December 1988, a meeting relating to the Aho case was held in New York. It was attended by the RJR lawyer, BAT senior lawyer, and SHB's Steven Parrish representing PM.⁵⁷ At the end of 1988, Parrish transferred

to the employ of PM, where his responsibilities included the Aho case. Parrish followed on location the three first hearings of the court and reported on them in February 1989. According to Parrish, PM was even ahead of BAT in its preparations of the Aho defence.⁵⁷

On a commission from PM, SHB obtained witnesses for the Aho trial.⁵⁸ The partnership between the various parties was not totally without problems. SHB attorneys regretted the unwillingness of JMF's Edwin Jacob to cooperate more and expressed their concern at the type of witnesses he was going to find and what they might say on the subject of general causality. According to Parrish, SHB should not try to develop witnesses aggressively for the Aho case, but should monitor the situation and attend meetings.⁵⁹ However, the cooperation between BAT/JMF and PM/SHB continued in the defence preparations for the perjury case.^{60–62}

Soon after the first case was filed, BAT, RJR, and PM began to discuss the PR effects of the litigation. BAT and RJR made a decision about the advice of their Finnish attorneys to adopt a low profile in public. PM did not approve and wanted to respond to the "propaganda" in equal measure. In February 1989, Parrish said in a slightly optimistic tone that he had discussed the matter with the BAT senior lawyer and believed that he had finally understood that the industry had to join in and rectify the "wrong" accusations. The plan was that two attorneys were to discuss a media strategy in connection with the next court hearing.⁶³

This marked the beginning of a power struggle over the tobacco industry's publicity strategy. On the morning of 12 May 1989, Parrish sent a message to the PM head office saying that he was extremely frustrated: the industry had not been able to agree on a joint action programme. According to Parrish, the reason was that the Finnish attorneys were claiming that public exposure would weaken the chances of winning the case, and the BAT and RJR lawyers did not dare to go against their advice.⁶⁴

In the afternoon, however, Parrish reported that the BAT and RJR attorneys had agreed to compile a joint communiqué to be used at the next hearing. Parrish's aim was to create an "Aho team" which would study the litigation documents during the next hearing and compile responses which would be distributed via the defence lawyers, PR consultants, and The Finnish Tobacco Industries' Federation.⁶⁵

But the project made no progress. On 8 June 1989, Parrish said that he had continued his "losing battle": the Finnish attorneys were adamant about keeping the case inside the courtroom, although it had created much bad publicity for the industry. BAT and Rettig had agreed to consider a joint press release but this was not enough for Parrish. He had suggested that he would appear in court with one or two other attorneys and respond to the claims of the plaintiffs; BAT and Rettig had turned down his offer.⁶⁶ An effort was made to assure other companies of the necessity of a publicity campaign by collecting negative press coverage on the industry that had been published in Finland.⁶⁷

Finally, PM managed to worry RJR about the negative publicity and a joint communiqué was drafted.⁶⁸ In his letter to the RJR and BAT lawyers, Parrish says that he is—in his own words—unexpectedly very satisfied with the press release.⁶⁹ The release written in the name of the Finnish Tobacco Industries' Federation had been compiled by RJR's James Goold and it branded the proceedings as a publicity stunt by anti-tobacco activists.⁷⁰ However, on 26 June 1989, Parrish had to report that, just before the court proceedings, BAT had decided—without prior warning—that it would not comment on the case and this being so, it backed out of the joint front.⁷¹

The judgment was scheduled for publication at the beginning of February 1992. PM and Amer had taken up

the issue at the industry's meeting on legal affairs in September. Consequently the Finnish Tobacco Industries' Federation established a working group for the preparation of a communications plan relating to the court ruling. The plan had three targets: to minimise the number of new lawsuits, to ensure publicity for the industry's views, and to pacify the interest groups.⁷²

The preparatory work of the federation alone was not enough for PM. Together with Amer it developed alternative communications strategies and plans.⁷³ PM and Amer representatives prepared themselves, for example, for the eventuality that three weeks before the court ruling the anti-tobacco activists would start a rumour about the tobacco industry losing their first court case in Finland and so arouse media interest.⁷⁴

In November 1991, Johan Puotila, the PM manager of corporate affairs in Scandinavia, compiled an internal memo on communications policy in the Aho case. Puotila noted that Rettig's owner Gilbert von Rettig is Finland's Howard Hughes: he shuns all publicity and does not allow his directors to appear in the media.⁷⁵ In December 1991, Phillip Morris International (PMI) compiled a detailed media plan for communicating about the judgment and preparing for alternative decisions on the case. The plan was to delegate the responsibility to the "PR-War Room",⁷⁶ later the name was changed to the "operations centre".⁷⁷ The plan included instructions on how to give interviews on the courthouse steps, company press releases, content analysis of the judgment, press briefings, telephone interviews, publicity monitoring after the judgment, and international and PM internal communications practices.^{78–81} The judgment was expected to receive considerable international attention, because the plan was accompanied by a covering letter reminding all involved that PM would need camera teams, editing equipment and studios in Europe, the USA, and Australia and satellite connections connecting them.⁸²

According to BAT documents, the plan was to arrange a meeting relating to the Aho case on 16 January 1992 in London. Those invited to attend included BAT's in-house and outside counsel, six representatives from PM and two from Amer.⁸³ The aim was probably to agree at least on consistent answers to the media and to coordinate responses to requests for interviews.⁸⁴

Eight days before the meeting, Johan Puotila wrote to Darianne Dennis, who was in charge of PMI corporate affairs, stating that Suomen Tupakka was not planning to send anyone to the London meeting. The reason, according to Erkki Salo from Suomen Tupakka, was that "Finnish and international/American communications are such different cases".⁸⁵ Puotila also thought that Rettig would not be sending anyone either. The only hope was that BAT and RJR would succeed in persuading Suomen Tupakka and Rettig to take part. Puotila's analysis of the situation was:

"I've looked through the communications plan you sent me and overall it looks fine... It seems we have a good manuscript for the play, our only problem is that the actors and actresses are on strike. And this can't be handled using stuntmen only."⁸⁵

Puotila wanted no written material relating to the meeting to be sent direct from PM.⁸⁶ The reason was probably that PM did not wish to give the impression that it was pressuring others. Puotila also recommended preparing for a lack of cooperation.⁸⁷ It would seem though that the meeting led to some sort of cooperation, because on 28 January PM's Darianne Dennis sent BAT a package of material drafted by PMI.⁸⁸

In addition, PM compiled a manual on its own communications policy.⁸⁹ The intention was to write articles for legal publications on the judgment after it was issued and evaluate the chances of a newspaper conducting an opinion poll on such themes as freedom of choice and personal responsibility.⁹⁰ The aim was not to create publicity abroad. Instead PM was going to ensure that it would be able to respond—particularly if the plaintiff won—to all its opponent's attempts to spread anywhere in the world information about the case that it considered biased or otherwise erroneous.⁹¹

On 31 January the BAT public relations department sent its communications guidelines on the Aho case to the company management.⁹² They were very similar to PM's corresponding instructions.^{93–94} On the eve of the judgment, PM sent out a widely circulated reminder that a judgment was forthcoming and emphasising that PM was not a party to the lawsuit. The PM directors were told that, because of possible repercussions from the case, PM had taken part in planning the media strategy.⁹⁵

The industry's joint front broke down partially over the publicity strategy. Despite strong pressure from PM, BAT and RJR did not participate in the public debate on the case during the district court proceedings. Their strategy could be justified by PM's non-involvement directly as a party in the product liability suit, although, as the market leader in Finland, it suffered most from the negative publicity. PM in particular seems to have seen the proceedings as part of the health policy battle to reduce smoking and crush the tobacco industry. The court judgment was not the only thing that mattered, the argumentation in the proceedings was as important. Rettig represented the other extreme on the scale, being known for its low publicity profile; it saw the product liability case as a purely juridical issue.

Tobacco control implications

In order to evaluate the indirect effects of the litigation, the legal proceedings must be set in the broader framework of tobacco regulation. The main concerns in the light of the industry's internal correspondence relating to the litigation are the reform of the product liability legislation, the provisions concerning the disclosure of the ingredients of tobacco, and the proposition for a new Tobacco Act. These issues were discussed within the same networks as the legal proceedings.^{96–101}

The industry suffered the first regulatory setback at the very beginning of the legal proceedings. The plaintiff's attorney, Erkki Aurejärvi, asked the Consumer Complaint Board to take a stand on some of the key questions litigated in court. The statement favoured the plaintiff's viewpoints.¹⁰² The industry tried to play down the consequences by calling the statement "a premature and one-sided expression of opinion that was generated without the benefit of any information from the tobacco industry".¹⁰³

Despite the statement by the Consumer Complaint Board, the government proposal for a new product liability law in 1990 did not include tobacco products. It is very unusual that Parliament would amend a proposal issued by the government. In this case it happened. On 8 June 1990 Johan Puotila reported what was going on in Parliament:

"In short: Mr. Aurejaervi has got his message through, we have definitely not. The memorandum is in its wording very clear: The Product Liability Law should be applied to tobacco products. This is not suggested to be specifically said in the law itself, but the memorandum of the Second Law Committee has the same effect, as it shows the intention of the legislator."¹⁰⁴

A major ground for the Second Law Committee to include tobacco products was the fact that the tobacco industry denied the health hazards of its products as was clearly illustrated in court at the time.¹⁰⁵

Since the early 1990s, the major issue in the Finnish market, however, was the proposition for a new Tobacco Act. PM launched a major lobbying effort to counter the Ministry's plans to introduce severe workplace/restaurant smoking restrictions, to ban brand diversifications and trade information, and to decrease legal protection given to the industry. The strategy was to build a wide network of allies with a common self interest and to target briefings with key politicians, political parties, authorities, and unions. Due to the pending litigation, PM was left alone to implement the strategies. BAT Finland's strategy for 1993–97 stated that the company would not participate in the discussion about the health hazards of smoking because of the litigation.¹⁰⁶ The ratio was to eliminate all statements that could be later used against the company in court.¹⁰⁷ The PM representatives regretted that the other companies based in Finland could not take part in the lobby against the new Tobacco Act because of the litigation.¹⁰⁸

The litigation also hampered PM's own lobbying efforts. Denying the hazards caused by tobacco in the Aho litigation—despite indisputable scientific evidence—consumed the credibility of the industry and it did not manage to win support either from public opinion or from the legislators.

The effects on the course of European litigation

The Aho case was the first of its kind in Europe and the tobacco companies certainly had no wish to continue litigation elsewhere. The situation was also somewhat unclear in the USA. The Supreme Court did not pass judgement on the Cipollone case until the end of 1992. In preparing for judgment in the Aho case, PM referred to the Cipollone case in its questions and answers memo.¹⁰⁹ Whatever the judgment was going to be in Finland, the industry was supposed to answer that it would not affect the Cipollone case.

However, it seems that litigation in Europe was not so much a legal risk as a PR risk for the tobacco industry. The Steven Parrish memos and other correspondence from the Aho case suggest that, unlike in Cipollone case, the tobacco industry was the underdog in Finland and could not use the scorched earth strategy. On the contrary, the industry attempted to show that the opponent misused the Finnish judicial system.^{110–115} In 1991 Johan Puotila conceded that the plaintiff's attorney Erkki Aurejärvi had "prepared the case rather well" and has been successfully "driving a media campaign".¹¹⁶ As late as June 1995, Finland was referred to as a risk area at a high level internal meeting of PM, because of Professor Aurejärvi.¹¹⁷

Indeed, the tobacco companies succeeded in their most important aim: they won the product liability suit and Finland did not become the model country, which could have opened the gates for an avalanche of corresponding lawsuits. The outcome surely discouraged litigation in other European countries. The tobacco manufacturers' international networks later used experiences from the Aho case. Even before the district court ruling, the PM senior lawyer had written to his colleague at BAT concerning a meeting between the industry attorneys to be held in March 1992 in the UK and suggested that one or two key lawyers in the Aho case be invited to attend. The first judgment in the case would by then be available and it was thought to be worthwhile introducing it to a large audience.¹¹⁸ In his reply to the PM senior lawyer, another BAT lawyer noted that Edwin Jacob, whose help in the Aho case in scientific and medical matters

What this paper adds

Europe's first product liability litigation was initiated in Finland in 1988. The tobacco industry tried to play down the importance of the process by portraying it as a local dispute with no international connections. Tobacco industry documents suggest that international tobacco companies considered the legal proceedings in Finland as a global threat. Despite its legal loss, the litigation contributed to tobacco control in many ways. The proceedings revealed that the industry had concealed the health hazards of its products and, despite indisputable evidence, continued to deny them. The positions taken by the industry rocked its reliability as a social actor and thus weakened its chances of influencing tobacco policy. Despite fierce opposition from the tobacco industry, tobacco products were included in the product liability legislation, tobacco entered on the Finnish list of carcinogens, and an extensive Tobacco Act was passed in Parliament. The Finnish experience was that litigation does not stand alone as a means to achieve public health policy goals. Litigation complements a broader approach to tobacco control policymaking by stimulating national debate over the role of smoking in society. Thereby it may well move the policy agenda.

had proved extremely valuable, had also been invited.¹¹⁹ The BAT lawyer also wrote to Robert Liljeström on the subject and invited him to London.¹²⁰

The tobacco industry drew attention to the Aho case in the UK in autumn 1992, when it presented its response in the dispute concerning legal aid in litigation against the tobacco industry.¹²¹ The case was mentioned as one example of the fact that product liability suits did not succeed in any country.¹²² The perjury case was discussed at an international meeting of tobacco industry attorneys in June 1994.¹²³

DISCUSSION

In the light of the tobacco documents, Finnish tobacco litigation appears not so much a threat against two tobacco manufacturers operating in a small country as a threat against the whole tobacco industry. The preparatory work was conducted in committees or groups, which assembled the companies' internal and external resources and were of crucial significance for the implementation of the defence. Another important matter for the industry was for the Finnish defence to be constructed on the same principles as in the USA. In addition to using the same argumentation, that meant using the same terms and descriptions, for example, about general and specific causality. The witnesses were also partly the same. The companies were probably worried about something being said in Finland concerning the health hazards of smoking that would not be consistent with what had been said in the USA and which could be used against the industry elsewhere.

What is particularly interesting is that PM took such an active role in the court case and made a concerted effort to influence public debate on the subject. In the early 1990s, PM was not just the leading tobacco company in the western world, but was by far the most effective lobbyist for the industry. Its operations covered the whole world and were more extensive than those of the Tobacco Institute, which is the industry's joint lobbying organisation.¹²⁴ PM's interest can also be explained by the fact that it dominated the Finnish market through Amer and the negative side effects of the litigation reflected most strongly on it.

Despite its legal loss, the litigation contributed to subsequent tobacco control legislation in Finland. The proceedings

revealed that the industry had concealed the health hazards of its products and, despite indisputable evidence, continued to deny them. The positions taken by the industry rocked its reliability as a social actor and thus weakened its chances of influencing tobacco policy. Despite fierce opposition from the tobacco industry, tobacco products were included in the product liability legislation, tobacco entered on the Finnish list of carcinogens, and an extensive Tobacco Act was passed in Parliament.

The outcomes from the Finnish cases on tobacco control support the hypothesis presented by Jacobson and Warner who argue that the role of the litigation is to complement a broader, comprehensive approach to tobacco control.¹²⁵ Tobacco litigation might not stand alone as a tool for public health policymaking but it may well stimulate national debate over the role of smoking in society and influence the policy agenda.

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The Lighter Side

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