

# Putting truth into action: using the evidence for justice

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The World Health Organization (WHO) calculates that, over the course of the 20th century, tobacco industry products claimed 100 million victims.<sup>1</sup> With no disrespect to the statisticians in Geneva, we'd put the toll at 100 million and one. In the tobacco epidemic, as in all of history's wars, the first casualty was truth. For half a century, it lay beneath a mountain of cover-ups, distortions and lies. And we're still digging out.

Fortunately, facts are stubborn things. They have a way of prevailing, sooner or later, against even the most sophisticated of corporate conspiracies. Sooner or later. That's the problem, of course, because, in the end, buying time is what this conspiracy is about. "Doubt is our product," as a candid Brown & Williamson document puts it.<sup>2</sup> A decade of doubt means billions of dollars in profits. Not to mention 50 million victims.

## TRUTH MATTERS

That's why the truth matters, and matters urgently. That's why, when Minnesota sued cigarette manufacturers in the 1990s, we made it our priority to battle our way into the secret document vaults and why we insisted the 35 million pages we found there be shared with the world. We were deeply honoured when former Surgeon General C Everett Koop called it one of the most important public health achievements of the century, and when the Minnesota litigation team received WHO's Tobacco Free World Award. Now that Minnesota's legislature, like those of most of the states of the US, has squandered the tobacco settlement payments on everything except tobacco control, we take solace in the ongoing global impact of the documents. Already they've provided material for about 450 scientific articles and government reports.<sup>3</sup>

That's gratifying in itself, because the truth has intrinsic value. It sets the record straight; it restores the integrity of the scientific discourse; and it gives consumers a better chance at making informed decisions. But the real value of the truth is in its power to effect change. The great British statesman Benjamin Disraeli put it best. "Justice," he said, "is truth in action." And so our challenge is not simply to find the truth, but to put it into action.

Not that the documents, and the stories they tell, aren't already at work. We think they're saving lives. We know they're making a difference.

## TRANSFORMING THE LITIGATION ENVIRONMENT

They're making a difference for victims of tobacco-related diseases, by transforming the litigation environment. By mapping decades of deceit, they're giving victims a head start toward justice—so much so that one law firm has even pre-packaged key documents into what it calls a "trial in a box".<sup>4</sup> This evidence is making it economically feasible for individual victims to go toe-to-toe against the manufacturers' legal legions. Despite the industry's scorched earth litigation tactics, the documents have helped victims win more than 40% of the US legal verdicts returned in the last decade, as documented by Douglas *et al*, in this journal supplement.<sup>5</sup>

Even more importantly, the documents are helping drive breathtaking changes in public policy. This is one field where the research doesn't gather dust on library shelves. In case after case, it's the stuff of front-page headlines and political shake-ups. Already, revelations from the documents have uncovered sabotage of WHO programmes, linked senior political figures to global smuggling, and exposed the hidden hand of tobacco lobbyists in national policies from Argentina to Egypt to Germany. In more than a few cases, they've altered the course of national debates.

Many would say the greatest contribution of lawsuits and document disclosures has been in helping re-frame the tobacco issue. They've helped us understand that this epidemic is so intractable, not simply because nicotine is addictive or because teenagers are reckless, but because a powerful industry depends on its perpetuation. The drumbeat of disclosures rivets our attention on the root cause of the crisis. That's the first step toward accountability.

## DEPOSITION AND TRIAL TESTIMONY ARCHIVE

Now that process is enriched and speeded by creation of an important new resource. The Deposition and Trial Testimony Archive (DATTA), from which the articles in this supplement are drawn, breathes life into the paper. Where documents alone may be disjointed and fragmentary, the DATTA testimony offers context, connecting the dots of seemingly unrelated clues. Where written records are tantalising, but obscure, the testimony can explain, fleshing out or confirming what the documents only hint. It is as though archaeologists, straining to interpret an ancient culture from the evidence of pottery shards and projectile points, were to find the contemporaneous writings of an ancient observer, describing the culture they study. Or, in the metaphor of Davis *et al*,<sup>6</sup> if the written documents are momentary snapshots, then, at their best, transcripts of testimony are motion pictures, with interaction, inflection and nuance. Litigation transcripts assume even greater importance given indications that the whole truth will never be found in the industry's files, because manufacturers have systematically sanitised, altered or shredded much of the documentary record.<sup>7</sup>

The DATTA transcripts are dynamic. They reflect testimony given under oath. Unlike public statements made at news conferences, in media interviews or even in legislative testimony, this testimony goes into depth, probing the meaning behind the sound bites. Above all, it is subject to the courts' most powerful tool for truth-finding: cross-examination. The contrast between tobacco executives' public positions and the positions they take in the courtroom, under the unflinching light of cross-examination at the hand of skilled advocates, can be dramatic and telling. The industry's public posturing about its "youth smoking prevention" programmes, for example, is belied by cross-examination about the actual patterns of spending and evaluation for these programmes, as summarised by Wakefield *et al* in this supplement.<sup>8</sup>

The information in these transcripts has special value in at least three added respects. Most immediately, it offers litigants a preview of the manufacturers' litigation playbook. The articles in this supplement reconstruct that playbook, illuminating the themes and patterns guiding the industry's courtroom strategies. Milberger *et al*<sup>9</sup> trace the evolution of the manufacturers' scattershot responses to evidence of cancer causation; Max *et al*<sup>10</sup> examine the tactics used to undermine econometric models of consumer damages; and Balbach *et al*<sup>11</sup> demonstrate the ways "information" and "choice" are deployed to absolve manufacturers not only of responsibility for smokers' behaviour, but even of accountability for the truth of their own statements. Goldberg *et al*<sup>12</sup> provide the first systematic analysis of the industry's treatment of advertising issues, suggesting rebuttals for the industry's recurring themes, while Cummings *et al*<sup>13</sup> explain the arguments that have enabled defendants to escape accountability for failing to develop less hazardous products.

Second, the heat of litigation smokes out the manufacturers' true views, forcing them to defend positions long discredited by science and stripping away the mask of reform they cultivate so carefully. As recounted by Francis *et al*,<sup>14</sup> for example, the industry's muted public statements on second-hand smoke give way in the courtroom to frontal assaults on epidemiology itself. In the public arena, manufacturers no longer find it tenable to dispute the addictiveness of nicotine, but in the courtroom, as Henningfield *et al*<sup>15</sup> show, the old denials continue unchanged, with defendants likening cigarettes to the "addictions" of chocolate or even carrots.

Third, analysis of the industry's courtroom tactics can offer unique insights into the things the defendants don't say elsewhere—and may even suggest where they're headed. For example, as Wayne<sup>16</sup> demonstrates in this supplement, manufacturers' evolving courtroom treatment of "harm reduction" issues helps us anticipate their possible plans for marketing novel products. By comparing their courtroom exploitation of corporate social responsibility themes to theoretical models of corporate responsibility, Chaiton *et al*<sup>17</sup> predict the possible evolution of the industry's policy arguments.

With all this in mind, the challenge before us is clear. If Disraeli was right, and justice really is truth in action, then finding and mobilising the truths contained in the industry's files and the litigation transcripts should be a top priority.

### PUTTING DATTA TO WORK

Part of this challenge is to see that the DATTA collection is put to work. The articles published here are important, but they only begin to tap the information in this 800 000 page resource. Funds should be marshalled to exploit this asset fully. The trial bar, for example, would profit immediately from systematic research to understand better the prior testimony of each of the industry's senior executives and hired guns, if only to prepare for their next appearances. And the archive should be expanded. Impressive though its contents are, the organisers themselves identify promising areas for expansion, including transcripts of important litigation outside the United States and transcripts of regulatory proceedings.<sup>6</sup>

More fundamentally, it is time to renew the quest for internal industry documents. Since the vaults were flung open in 1998, a perception has arisen that we now know all there is to know. Far from it. Existing disclosure requirements cover only those companies named as defendants in the US litigation and documents from subsequent US health-related litigation against these same companies. While these documents continue to yield rich rewards, many of the most important files have never seen daylight.

What do we mean? Consider some of the documents still *not* covered by disclosure requirements:

- Documents of the global tobacco giants and domestic subsidiaries that were not involved in the US litigation, such as Japan Tobacco, Inc, China National Tobacco, ITC, Imperial Tobacco, Rothman's and Swedish Match, to name just a few.
- Documents produced in courts outside the United States.
- Documents produced in litigation about issues other than health, including, for example, smuggling, political activities, document destruction, international trade, and patent claims on new products.
- More than a million pages of documents withheld as privileged in the US litigation because defendants claimed they were confidential attorney–client communications.

It is high time we went after these and similar records. The recent conclusion of the US government's historic "rack-teering" case against major cigarette manufacturers represents a good start. Finding that "disclosure requirements will act as a powerful restraint on Defendants' future fraudulent conduct",<sup>18</sup> US District Court Judge Gladys Kessler ordered a series of expanded disclosures representing the most important contribution to transparency since the settlements of 1998. If upheld on appeal, her order will extend the life of the industry-funded document depositories by 15 years; require BATCO to establish a document website for the first time; expand disclosure obligations to include employee depositions and US administrative proceedings; and reveal more information about documents withheld based on claims of attorney–client privilege.<sup>19</sup> These are important advances.

But there's more to be done, and opportunities and responsibilities for the rest of us. Where's the trial bar? Prying documents free can be an exhausting, inch-by-inch ordeal, and it is understandable that new disclosure remedies may not command the same priority for weary plaintiff's counsel as does the prospect of recouping years of financial investment. Ultimately, though, this is short-sighted. A damning document unearthed today will return dividends for years of cases to come. It is time for a new investment of energy and resources in expanding the library.

### IMPLEMENTING THE FCTC

Finally, it is time for national governments, beginning with the 140 parties (as of 28 September 2006) to the WHO Framework Convention on Tobacco Control (FCTC), to consider their own options and obligations. Effective treaty implementation begins with an understanding of the ways tobacco companies have sabotaged a country's policies in the past. That means uncovering and analysing the industry documents—something that need not involve costly and unpredictable litigation, but that can be achieved instead through parliamentary investigations, public hearings or perhaps even as a condition of import licenses.<sup>20</sup> There can be no overstating the power of these inquiries: nothing sparks reform like proof that a whole nation has been duped.

"Our product is doubt" proclaims the tobacco industry, but we're not buying. In the marketplace of history, we'll bet on a competing product. Our money is on the truth, every time. Especially when we put it into action, not just for health, but for justice.

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A	8.5	1.5
B	8.3	1.5
C	9.0	2.1
D	10.6	2.4



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