

Product liability

Richard A Daynard,¹ Eric LeGresley²

¹Northeastern University,
School of Law, Boston,
Massachusetts, USA
²Tobacco Control Consultant,
Ottawa, Ontario, Canada

Correspondence to

Dr Richard A Daynard,
Northeastern University, School
of Law, Boston, MA 02115,
USA; r.daynard@neu.edu

Received 30 August 2011
Accepted 12 September 2011

ABSTRACT

Product liability litigation has made important contributions to tobacco control, especially by uncovering incriminating industry documents and publicizing product dangers and industry misconduct. WHO Framework Convention on Tobacco Control (FCTC) Article 19 encourages Parties to strengthen legal procedures to facilitate these lawsuits and to establish mechanisms for mutual assistance. Creative lawyers will continue to find ways to bring the tobacco industry to justice in forums around the world.

THE PAST AS PROLOGUE

Product liability litigation has played a critical, if supporting, role in tobacco control. Most prominently, lawsuits brought by US state attorneys general in the mid-1990s seeking reimbursement for expenses incurred in treating residents for smoking-related diseases forced the industry to begin disgorging incriminating internal documents, now numbering over 13 million and available on the internet, detailing industry misbehaviour around the world.¹ Public exposure of these misdeeds made the tobacco industry politically toxic, easing the way for subsequent regulatory legislation. Under the Master Settlement Agreement resolving these cases, the industry agreed to eliminate various marketing techniques and promotional stratagems and pay the states about \$10 billion/year, resulting in dramatic cigarette price increases that greatly reduced teenage smoking. Some of that money went into effective tobacco control programs.

Every stage of tobacco litigation (initial filings, motions, hearings, decisions, appeals) provides 'teachable moments' for public education about the underlying issues: the health consequences of smoking, addictiveness, and tobacco industry misbehaviour. The cases dramatise the impact of smoking on real people, not just statistics. Even the industry's counterspin, that smokers who contract lung cancer 'assumed the risk', implicitly acknowledges the reality of the causal link.

Product liability litigation can take many forms. Most legal systems allow individuals, including smokers or their survivors, to seek compensation for their financial and emotional losses from product manufacturers that sell unreasonably dangerous products, fail to warn about the dangers of these products, and/or actually lie about these dangers. In the USA, multimillion-dollar punitive damages, designed to deter others from misbehaving like tobacco companies, are sometimes also available. Similar cases can be brought by victims of secondhand smoke, though establishing causation in cases against tobacco manufacturers has proven extremely difficult; obtaining workers

compensation from employers, however, has become fairly routine.² Injuries from cigarette-caused fires are compensable, since cigarettes with low ignition propensity can easily be manufactured.³ Injured smokers and non-smokers are not the only possible plaintiffs: as mentioned, many US states were permitted to sue tobacco companies in the 1990s for medical costs incurred in caring for smokers whose diseases could be attributed to tobacco industry misconduct. Similar cases are pending in Israel, and most Canadian provinces now have legislation facilitating such lawsuits. Finally, legal systems sometimes permit consumers with similar claims to proceed in a single class action, greatly reducing litigation costs. Courts have been reluctant to allow class actions for personal injuries, where much of the evidence may be about the specific circumstances of each class member, but have been more willing to allow them where the claimed losses are just financial, such as cases seeking recovery of the amounts smokers paid for fraudulently marketed 'light' and 'low tar' cigarettes.

Closely related to product liability litigation are cases brought to stop tobacco industry misconduct brought by parties who were not themselves injured by that behaviour. The US Department of Justice brought a successful case against the major tobacco companies to prevent their continued violations of the Racketeer Influenced and Corrupt Organisations Act.⁴ And a non-governmental organisation in Bangladesh obtained a judicial order enjoining British-American Tobacco (BAT) from engaging in illegal marketing tactics, while similar orders have been sought in Nepal.⁵

The efficacy of product liability litigation depends as much on procedural rules as on substantive legal doctrines (legal 'rights'). In most countries other than the USA, the absence of contingency fees (where plaintiff's lawyers are compensated with a portion of the plaintiff's judgement or settlement, if any) means the lawyers must either provide their services for free or bill their ill, dying, or bereaved clients on an ongoing basis: hence, few such cases are brought. Worse, many legal systems require plaintiffs who lose their cases to pay the defendant's legal costs, thus putting the plaintiff's remaining assets at risk. These unfortunate procedural rules can, of course, be changed by court rule or statute.

GOING FORWARD

Litigation should never be the centrepiece of an overall tobacco control strategy. In the US the class action on behalf of non-smoking flight attendants resulted in an agreement establishing the Flight Attendants Medical Research Institute, which has funded valuable tobacco control research. It did not,

however, play much of a role in the largely successful efforts in the USA to make public places smoke free. The lawsuits brought by states to recover their costs of providing medical care to the tobacco industry's victims succeeded in doing that and much more, but they did not bankrupt the industry as some tobacco control activists had hoped. The civil case brought by the US Department of Justice produced a powerful and encyclopaedic judicial opinion finding that the major cigarette manufacturers had been involved in seven different conspiracies to commit fraud and had earned the designation 'racketeers', but the court-ordered remedies were not significant. Some advocates fear that the Canadian medical cost recovery litigation will be settled without requiring the companies to disgorge incriminating internal documents. That said, litigation does contribute to tobacco control in important ways, including providing advocates with evidence and judicial language supportive of a broad range of tobacco control initiatives.

Article 4.5 of the WHO Framework Convention on Tobacco Control (FCTC) recognises that 'issues relating to liability... are an important part of comprehensive tobacco control'. Article 19, 'Liability', provides that 'Parties shall consider taking legislative action... to deal with... civil liability, including compensation where appropriate'. Legislation correcting the procedural rules that prohibit contingency fees and shift litigation costs to the losing party, permitting consumer class actions, and facilitating healthcare cost recovery lawsuits, are examples of such highly desirable legislative action. Article 19 also encourages parties to assist each other in carrying out legal proceedings and to share relevant information with each other, and invites the Conference of the Parties (COP) to develop 'appropriate international approaches to these issues' as well as to support parties in their activities relating to liability. What the COP could most usefully do is to set up a mechanism for collecting, archiving and sharing litigation documents and for providing advice and assistance—electronically or in person—to attorneys bringing liability cases against the tobacco industry.

For at least a decade tobacco company defendants in the US have admitted on their websites and ceased to deny in court that smoking is the major cause of lung cancer and chronic obstructive pulmonary disease (COPD), though they often contest the diagnosis or aetiology in particular cases. By contrast, and despite universal availability of the internet, tobacco defendants in Europe and Asia have been remarkably successful in confusing courts on the epidemiology of smoking

What this paper adds

This paper briefly summarises more than 60 years of litigation against the tobacco industry and discusses the strategy's continued usefulness around the world.

and disease. The recent acceleration in the globalisation of tobacco control efforts, inspired by the FCTC and supported by the Bloomberg and Gates Foundations, and the commitment of parties under Article 12 of the FCTC to conduct public education on tobacco control issues, can be expected to equalise around the world knowledge of basic tobacco epidemiology. Similarly, the presence of millions of easily accessible internal tobacco industry documents on the internet should simplify the process of establishing the liability of the major transnational tobacco companies and their affiliates.

While most tobacco product liability cases to date have been in the USA, the rest of the world should catch up over the course of the next 20 years. Canada, Argentina, Brazil and Israel each have multiple cases already. In the USA it took 42 years and three waves of litigation from the first filed case in 1954 to the first legal victory in 1996; success in a variety of types of cases soon followed. Every advance in tobacco litigation to date has been accomplished by lawyers who, despite their doubting colleagues, saw the possibilities for justice and pursued them. While each system imposes its own procedural hurdles and opportunities, creative and persistent lawyers can and will find routes to obtain justice in every region of the world.

Competing interests None.

Provenance and peer review Commissioned; externally peer reviewed.

REFERENCES

1. *Legacy Tobacco Documents Library*. <http://legacy.library.ucsf.edu>.
2. **Miura M**, Daynard RA, Samet JM. The role of litigation in tobacco control. *Salud Publica Mex* 2006;**48**(Suppl 1):S121–36.
3. **Coalition For Fire-Safe Cigarettes**. *Fire-Safe Cigarettes: About Fire-Safe Cigarettes: Myths v. Realities*. <http://firesafecigarettes.org/itemDetail.asp?categoryID=50&itemID=1045&URL=About%20fire-safe%20cigarettes/Myths%20vs.%20realities> (accessed 30 Aug 2011).
4. *United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1 (D.D.C.2006), affirmed, 566 F.3d 1095 (D.C.Cir.2009), cert. denied 130 S. Ct. 3502. 2010.
5. **Gostin LO**. The "tobacco wars"—global litigation strategies. *JAMA* 2007;**298**:2537–9.

Feasibility of tobacco product liability litigation in Uganda: invited commentary

The US tobacco litigation experience discussed in the paper on product liability by Daynard and LeGresley¹ shows that suing the tobacco industry to hold it responsible for harm caused by its products is a daunting yet rewarding undertaking. While public interest litigation in Uganda brought about smoke-free legislation,² product liability litigation against the tobacco industry remains underdeveloped.

Uganda's legal system, based on English common law, allows individual personal injury claims and 'class action' or 'representative action' suits. Only two product liability cases have been brought against the tobacco industry in Uganda.^{3,4} Both were personal injury claims by individual smokers but were dismissed on technical grounds in their early stages. The plaintiffs were ordered to pay part of the defendants' costs, highlighting a disincentive for tobacco product liability litigation in low-income countries like Uganda. Such litigation is prohibitively expensive, especially when the financially superior tobacco companies use 'delay tactics' intended to pressure the plaintiff to give up. The proposal for legislation (relating to Article 19 of the Framework Convention on Tobacco Control) correcting the