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Lung Cancer Liability of Cigarette Manufacturers

Richard H. Burgess*

THE REPORTED INCIDENCE RATE of lung cancer in the United States increased by over a factor of ten from 1930 to 1959.¹ More than 29,000 persons died of lung cancer in the United States in 1956.² Cigarette smoking is one of the chief suspects, and various agencies and research institutes are now saying definitely that is one of the worst of the culprits.^{3, 4, 5}

The medical evidence is quite strong as to tobacco causation of lung cancer. However, this leaves several legal questions to be answered before a plaintiff can recover from a cigarette manufacturer. The primary question at hand is: Do cigarette manufacturers impliedly warrant that their product is not dangerous to health; or, if not, do they have a duty to warn the public or the consumers in some direct way of the probable dangers to health in smoking. To phrase it differently, recovery will most likely lie in either implied warranty or in negligence, until statutory provisions are made to help with the problem.

One cannot reliably solve the issues involved by looking to precedent, for there is very little. Few cases have met the issue face to face. The cases are beginning to come up rapidly, though, and certain types of pleadings may soon begin to win cases more consistently than others.

No cases have come to the attention of the author in which the plaintiff actually has recovered damages for lung cancer due to smoking. This is far from a static field, however, and some plaintiff may soon win damages in such a case. It should be noted that lung cancer cases are generally brought as wrongful death actions.

Since smoking is often a very deeply rooted habit, and considering that an estimated 60% of the men and 30% of the women in the United States are smokers,⁶ the problem will not readily be solved by telling people to quit smoking. Perhaps cigarette manu-

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¹ Cole, Statement of the American Cancer Society on Cigarette Smoking and Lung Cancer, 172 J. A. M. A. 1425 (1960).

² Burney, Smoking and Lung Cancer; A Statement of the Public Health Service, 171 J. A. M. A. 1828 (1959).

³ 171 *Id.* 1835, 1836.

⁴ Cole, *supra* n. 1.

⁵ Wynder, Laboratory Contributions to the Tobacco Cancer Problem, *British Med. J.* 317 (1959).

⁶ Burney, *op. cit. supra* note 2; referring to: Hammond, Lung Cancer Death Rates in England and Wales Compared with those in the U. S. A., 2 *British Med. J.* 649-654 (1958).

facturers will be able to avoid liability in the near future on the theory of assumption of risk. This would not necessarily decrease the public health problem, which could be approached from two sides: (1) effectively exclude the carcinogens from cigarette smoke,⁷ or (2) educate coming generations to realize that the more a person smokes, with no minimum threshold level, the more likely he is to die of lung cancer.⁸

The Medical Aspect

As stated above, lung cancer is a dread killer, having accounted for close to one third of all the cancer deaths in 1956,⁹ showing a rapidly increasing death rate. A thirty year increase of 1000% in the incidence rate of any disease would be alarming. Let us look at the possible causes for this mushrooming.

Some of the factors involved in the increase are: (1) smoking, (2) inhalent carcinogens, (3) inflammatory metaplasia, (4) progress in diagnosis, (5) longevity, and (6) occupational exposure.¹⁰ These factors are listed in what is probably the actual order of their seriousness. The items other than smoking will be discussed first.

Carcinogens, or cancer producing agents, are becoming much more prevalent in the atmosphere than previously, due largely to automotive exhaust and industrial waste.¹¹ When these chemicals are inhaled in sufficient quantities, lung cancer is produced.

Inflammatory metaplasia is a complex phenomenon involving the changing of normal tissue into malignant tissue due to inflammation or irritation.

Progress in diagnosis now permits many cases to be identified as lung cancer that would previously have been diagnosed as some form of pneumonia, or would have been hidden by tuberculosis or otherwise missed.

Many old age diseases are found much more often in the general population when the average life expectancy is increased. Lung cancer is no exception.

In the more highly industrialized society of today, more people are exposed to carcinogenic substances than ever before.

Even allowing for all these factors, smoking has caused, or at least is blamed for, the major part of the increase in the lung cancer incidence rate. Several carcinogens have been isolated from cigarette smoke. These substances, in sufficient concentra-

⁷ Wynder, *supra* n. 5 at 321.

⁸ Cole, *supra* n. 1.

⁹ Burney, *supra* n. 2, referring to: National Office of Vital Statistics, 2 Vital Statistics of the United States: Mortality Data, 1956 (1958).

¹⁰ Rosenblatt and Lisa, *Cancer of the Lung: Pathology, Diagnosis and Treatment*, 28 (1956).

¹¹ Burney, *supra* n. 2.

tions, have caused the development of malignancy in test animals.¹² Statistics that have been well kept show a very strong correlation between smoking and lung cancer.¹³ No threshold level of cigarette consumption below which smoking is "safe" is indicated in the records.¹⁴

Several points have been brought out on either side of the issue of the culpability of cigarettes. The pro-cigarette people can point out that no pulmonary carcinomas have been started in test animals by cigarette smoke. One difficulty with doing this is that the mice and guinea pigs die too rapidly simply from overdosages of smoke to allow malignancies to develop.¹⁵

The theory has been postulated that there is sometimes an inherited tendency in a person that causes him both to want to smoke and to develop lung cancer, the usual visualization of the idea being a slight bronchial irritation that both causes cancer and is particularly soothed or in some way satisfied by smoke. This theory recently received a telling blow in a report from several Seventh Day Adventist hospitals.¹⁶ It seems that statistical evidence shows that the incidence rate of lung cancer in the general population is much greater than among members of the Seventh Day Adventist Church. Also, it showed the same incidence rates among men and women of that church, as opposed to a five to one ratio between the sexes in the general population.¹⁷ The significance of these figures is pointed out by the fact that members of this religious group are opposed to smoking and do not indulge in it. If the hereditary smoking-lung cancer hypothesis were to accommodate these data it would have to postulate also an hereditary disposition not to belong to the Seventh Day Adventist Church among persons who would later in life develop lung cancer.

The public has been led to believe that filter tip cigarettes are "safe," or at least much safer than those without filters. Present filters cannot selectively remove such specific components as carcinogens.¹⁸ Many filters remove perhaps as much as 20% of the tars from the smoke; however, what gets through is still potent. Filters partially reduce the amount of inhaled carcinogen only if the smoker doesn't smoke any more filtered cigarettes than he would non-filtered ones, and if the same tobacco blend continues to be used.

The emphasis so far has been on cigarettes. There is a distinct difference in the probability of lung cancer being developed by

¹² Wynder, *supra* n. 5, 318.

¹³ Burney, *supra* n. 2.

¹⁴ Cole, *supra* n. 1.

¹⁵ Wynder, *supra* n. 11.

¹⁶ (News article), 1 *British Med. J.* 1465 (1959); referring to: Wynder, Lemon and Bross, 12 *Cancer* 1016 (1959).

¹⁷ Burney, *supra* n. 2, 1833.

¹⁸ *Id.* at 1835.

persons who have smoked cigars, pipes and cigarettes. The probability of a cigarette-only smoker contracting the disease are seven times as much as for a cigar-only smoker and almost three times as much as for a pipe-only smoker.¹⁹ A cigarette smoker is twenty-six times as likely to develop lung cancer as is someone who has never smoked.²⁰

There is laboratory evidence that cigarette smoke may have more carcinogenic activity than cigar or pipe smoke, due partly to the higher burning temperatures of cigarettes.²¹ This higher temperature is due to the fineness and the compactness of the tobacco in cigarettes. Cigarette smoke is inhaled deeper and more regularly than pipe or cigar smoke. It might also be pointed out that different curing processes are used for the different products such as combinations of drying and bacterial fermentation.²²

The United States Public Health Service,²³ the American Cancer Society,²⁴ the Swedish State Medical Council,²⁵ the British Medical Research Council,²⁶ and the Study Group on Smoking and Health set up by the American Cancer Society, the American Heart Association, the National Cancer Institute and the National Heart Institute²⁷ have all issued definite statements, the cumulative effect of which is that:

Cigarette smoking particularly is associated with an increased chance of developing lung cancer * * *. Unless the use of tobacco can be made safe, the individual person's risk of lung cancer can best be reduced by the elimination of smoking.²⁸

The Legal Aspect

Wrongful death actions often involve large amounts of money. The courts are generally quite conservative when it comes to opening up new fields in which many potential suits are

¹⁹ Hammond and Horn, *Smoking and Death Rates—Report on 44 Months of Follow-up of 187,783 Men: Death Rates and Causes*, 166 J. A. M. A. 1294 (1958).

²⁰ *Ibid.*

²¹ Wynder, *supra* n. 5.

²² Private communication, Drenowatz (1960).

²³ Burney, *supra* n. 2.

²⁴ Cole, *supra* n. 1.

²⁵ Sweden, *Statens Medicinska Forskingsrad, Ulredning om Tobaksroknings Biologiska och Medicinska Verkninger*. (State Medical Council, Investigation into the Biological and Medical Effects of Tobacco Smoking) (1958).

²⁶ Britain Medical Research Council, *Cancer of the Lung: Recent Knowledge of Causative Factors*, Annual Report of the Medical Research Council for the year 1955-1956.

²⁷ Burney, *supra* n. 2, 1832.

²⁸ *Id.* at 1836.

waiting for a breakthrough to begin collecting enormous awards from a single industry. This industry, just a few years ago, was rarely looked to as a wrongdoer of such great magnitude as to be liable for a multiplicity of hundred thousand dollar negligence and implied warranty suits.

This is a situation in which one discovers in just a very few years that he is not only a terrible menace to the public health, but may soon have to pay for harm that he may have done innocently.

As mentioned above, no lung cancer cases have yet resulted in money damages actually being awarded against a cigarette manufacturer. Several cases are currently pending on first hearing and on appeal. No one can predict just what will happen, except that the likelihood is that some plaintiff will win one of these cases sometime.

The evidence in these cases rests on what is described in, *Matter of Miller v. National Cabinet Co.*²⁹ as the "possibility doctrine."

Every medical researcher would be proud to predict the cause or causes of leukemia or other forms of cancer, and turn out to be right. This does not mean that each doctor's pet theory is more than an informed guess.³⁰

This is judicial resistance to the best scientific proof available. Perhaps in the above cited case involving benzol poisoning leading to leukemia, the resistance was justified. Normally one thinks of scientific proof as more exact than legal proof. However, conclusions as to what the facts are must always be drawn from evidence. If there is a preponderance of the evidence in one direction, the court should not ignore it on such grounds as that a preponderance of the presented evidence is insufficient.

The case of *Pritchard v. Liggett & Meyers Tobacco Co.*³¹ was thrown out of the trial court on the ground of no substantial evidence after twenty days of hearings. The case is now being appealed.

On the other hand, in *Green v. American Tobacco Co.*,³² the jury came to the conclusion that the lung cancer had been caused by smoking the defendants' cigarettes, but awarded no damages because defendant had no proven knowledge of the danger of smoking its cigarettes when the cause of action arose.

*Mitchell v. American Tobacco Co. and P. Lorillard Co.*³³ has so far set forth the principle that, at least in Pennsylvania, the statute of limitations runs from the time when the cause of action

²⁹ 8 N. Y. 2d 277, 204 N. Y. S. 2d 129 (1960).

³⁰ *Id.* at 138.

³¹ A. P. Dispatch, May 4, 1960 (W. D. Pa.).

³² A. P. Dispatch, August 3, 1960 (D. C. Fla.).

³³ 183 F. Supp. 406 (M. D. Pa., 1960).

becomes apparent and objective, rather than when the plaintiff last smoked defendants' product. This case is still in the courts. The complaint alleges in part:

that defendants were negligent in not warning the public and particularly the decedent that the use of the said tobacco by smoking would precipitate or lead to the development of cancer, and instead of warning the public and particularly the decedent of such bad effects from the use of their products, defendants negligently and carelessly advertised that the use of their products had no ill effects and that the users of their products would receive great satisfaction and enjoyment by smoking their tobaccos.³⁴

The case of *Cooper v. R. J. Reynolds Tobacco Co.*³⁵ was dismissed by the trial court and on several appeals partly because of technically improper pleadings, but primarily because of lack of any proof of the alleged advertisements on the basis of which the suit was brought. The cause of action was fraud. One of the advertisements was alleged to have said:

Twenty thousand doctors say that *Camel* cigarettes are healthful.³⁶

when the actual advertisement referred to said only:

More doctors smoke *Camels* than any other cigarette.³⁷

The case of *Lartigue v. Liggett & Meyers Tobacco Co.*³⁸ was recently decided in New Orleans, by a jury, in favor of the defendant, in a \$150,000 lung cancer case. Appeal is being taken.

As can be seen from these cases, the trial method is neither speedy nor sure, but the stakes are large and the manufacturers have much to lose.

It appears that this is one field of liability that could be greatly clarified and stabilized by the proper type of legislative action. The Senate of the State of South Dakota attempted to take drastic measures in Senate Bill No. 5 of 1959. This bill would have required the imprinting of a stamp, to be placed on packages of cigarettes, bearing a skull and cross-bones and the statement:

The use of this product is not recommended by the State of South Dakota. The use thereof may cause death from cancer or heart disease.

The bill did not pass.

There is good authority to the effect that states may place reasonable and proper regulations on various kinds of advertising

³⁴ *Ibid.*

³⁵ 234 F. 2d 170 (C. A. Mass., 1957).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ A. P. Dispatch, October 11, 1960 (D. C. La.).

without violating the guarantee of the equal protection of the laws.³⁹ The police power of the states may be used to prohibit or to regulate tobacco advertising, if the power is used properly.⁴⁰

Tobacco is not now included in the Pure Food, Drug and Cosmetic Act,^{41, 42} but chewing gum is. It might be good to amend this act to include regulations on tobacco, especially extending the misbranding provision⁴³ to the advertising of tobacco products. This would provide penalties if the advertising was false—or misleading—in any particular. A very good case could be made that advertisements of tobacco products for fun and pleasure are grossly misleading as to the dangers to health involved in smoking.

Some Possible Remedies

If the public health is to be maintained, there are two possible antidotes for the situation: (1) clean up tobacco, (2) get rid of tobacco.

If the tobacco industry is to long survive, there are two possible remedies: (1) clean up tobacco, (2) have the smoker definitely assume the risk.

These two approaches have a common factor. If carcinogens can be effectively excluded from tobacco smoke, all the problems mentioned in this paper will be solved for the future. A considerable amount of work is being expended in this direction.^{44, 45}

In the meantime there will be lawsuits and much legislation will probably be passed. This legislation might require tobacco product manufacturers to either advertise or put on their packages plain, specific warnings. The warnings need not be offensive and might refer to probable danger in using the product in "excessive" amounts. Such a warning by the manufacturer, whether voluntary or statutory, would most likely earn the manufacturer immunity from subsequent lung cancer, heart disease and other types of suits covered by the smoker's assumption of the risk.

Until one of the two relatively stable positions outlined above is reached, litigation will be fought on many grounds, including negligence and implied warranty, and the suits will be defended on several grounds, including assumption of risk and lack of fault. Who wins in these test cases will be as much a question of how the law is applied as of what the facts are.

³⁹ *People v. Pennock*, 249 Mich. 578, 293 N. W. 759 (1940); *Ritholz v. Johnson*, 246 Wis. 442, 17 N. W. 2d 590 (1945).

⁴⁰ *State v. Packer Corp.*, 77 Utah 500, 297 P. 1013 (1931), 29 C. J. 2d 265, note 90.

⁴¹ *Post*, Food Additives: Legal Recognition of a Scientific Problem, 9 Clev.-Mar. L. R. 503 (1960).

⁴² 21 USCA Ch. 9, Subch. II, Sec. 321.

⁴³ *Id.* at Sec. 343.

⁴⁴ Wynder, *supra* n. 5.

⁴⁵ Burney, *supra* n. 2.