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Cigarette Litigation's Offspring: Assessing Tort Issues Related to Guns, Alcohol, & Other Controversial Products In Light of the Tobacco Wars

Gary T. Schwartz*

INTRODUCTION

Let me begin by commenting on what I shall refer to as the structure of danger with respect to tobacco, guns, and alcohol. Tobacco—mainly in the form of cigarettes—provides undeniably significant benefits for consumers. Cigarettes, I am told, improve one's concentration. Cigarettes, I also learn, have a very good taste. In addition, cigarettes function simultaneously as an effective antidepressant and an effective tranquilizer. To that extent, a cigarette is a kind of miracle drug that one cannot otherwise acquire in the medical marketplace. It is available, moreover, without going through the costly intervention of any physician.

Nevertheless, cigarettes kill more than 400,000 Americans per year. Those who die are, in almost all instances, the immediate consumers of tobacco products. They suffer death even though they use those products in altogether normal and proper ways. To be sure, it can be argued plausibly that cigarette smokers make a deliberate choice in deciding to smoke in the first place. Accordingly, whatever is left of the tort defense of assumption of risk is relevant to whatever tort claims they might bring. Even so, it would be difficult for a court to conclude that cigarette smokers behave unreasonably in smoking cigarettes, and therefore are guilty of contributory negligence. Actually, many of us are no doubt sanctimonious nonsmokers, who might indeed be willing to say that smoking cigarettes is unreasonable. Obviously, however, tobacco companies defending against lawsuits are not in a position to argue that buying and using their products consists of an

*. William D. Warren Professor, UCLA School of Law. These introductory remarks were originally prepared for purposes of oral presentation at Pepperdine's Symposium, *Beyond Tobacco: Cigarette Litigation's Offspring: Assessing Tort Issues Related to Guns, Alcohol, and other Controversial Products in Light of the Tobacco Wars*. Subsequently, the Law Review Editors have asked to publish my remarks, and I have agreed to this. My footnoting is minimal.

unreasonable act on the part of smokers themselves. Therefore, in litigation against those companies, the companies are in a position to invoke assumption of risk as a possible affirmative defense; yet it would be awkward for them to argue contributory or comparative negligence as a separate defense.

As far as guns are concerned, they provide very substantial benefits in terms of both self-defense and recreational activities such as hunting. Nevertheless, guns are responsible for many deaths and injuries each year. An important point is that guns rarely kill or injure the consumers who themselves buy the gun products. Rather, guns kill innocent third parties, who have in no way assumed the risk of the dangers associated with guns. Even so, in general, guns produce these results because of the careless or even willful misuse of the guns by those who have purchased and own the guns. These misusers, then, are the principal tortfeasors with respect to the injuries that guns produce. Nevertheless, these principal tortfeasors are frequently not apprehended or identified. And even if they are apprehended, they are frequently insolvent with respect to liability for the harms their tortious conduct has caused. As far as the use of guns is concerned, an obvious and pertinent point is that most gun owners use guns in normal and appropriate ways. It is a limited, though clearly significant, fraction of all gun owners who misuse guns either negligently or willfully in ways that impose serious injuries on innocent third parties.

Turn now to alcohol. As properly used by most consumers, alcohol provides plenty of recreational and relaxing benefits. Not only that, but alcohol in moderate use evidently improves the health of those who drink and consume it. A beer a day helps keep the doctor away. That is literally true. According to the recent medical literature, one or two drinks per day of beer or wine appear to be associated with significantly improved health outcomes. However, when alcohol is overutilized by consumers, it can destroy the consumers' own health. Furthermore, if used by consumers at improper times, alcohol can be highly productive of serious injuries. There are 20,000 auto fatalities per year that are associated with drinking on the part of the driver of one of the cars involved in the accident. Moreover, even though most of the publicity has been focused on alcohol and drunk driving, alcohol is an enormous contributor to serious accidents in all kinds of other ways. Of all adult pedestrians who are killed in highway accidents, about 30 percent are legally drunk at the time of the accidents themselves. Of all people killed by falling down stairs and by drowning in bodies of water, roughly half are intoxicated at the time of the fatal accidents. Hence alcohol is a background factor in a quite large percentage of all fatal accidents. In all these ways, alcohol used improperly (or used at improper times) is a disaster in terms of bringing about serious health problems and personal injuries.

In sum, all three products—tobacco, guns, and alcohol—are quite dangerous. Nevertheless, the structure of danger differs significantly from product to product. Keep in mind, moreover, that modern products liability rules, as expansive as they seemingly are, do not impose liability on dangerous products as such. Rather, they impose liability on products that contain what the law refers to as defects.

Consider automobiles. About 40,000 people die in auto crashes each year, and several million more suffer personal injuries. The overall economic cost of auto accidents is well over a hundred billion dollars per year. But even though automobiles are enormously dangerous, there is no general or "wholesale" rule making auto manufacturers automatically liable for all auto accidents that result. Rather, lawsuits are brought against auto makers on a limited "retail" basis for accidents that seem caused by particular defects in cars. When I gathered data on all of this several years ago, my data indicated that automakers end up bearing liability for only a tiny fraction of all auto accidents—a fraction much less than one percent.¹

By now, we are quite familiar with the elements of the concept of defect within products liability. Arguments for products liability might seem strong against cigarette manufacturers: after all, their products produce injury even though they are used by consumers in entirely normal ways. But despite this fact, it turns out to be very hard to figure out where the defect lies in tobacco or in cigarettes. Manufacturing defects simply are not much of an issue. A warning has been provided on cigarette packages under federal law since the mid-1960's. Moreover, claims of failure to provide warnings in addition to those required by federal law may well be legally preempted by the federal statute itself. As far as design defects are concerned, proof of a design defect depends in large part on the demonstration of a better alternative design. In the context of cigarettes, it is very difficult to identify an alternative design that would reduce the danger of cigarettes without significantly impairing the value they provide to cigarette smokers. The recent gun cases, have raised allegations that guns could incorporate safety devices that might be effective in somewhat reducing the accident rate. Yet, the overall desirability of these safety devices seems quite controversial. Moreover, such safety devices would be effective in eliminating only a limited fraction of all gun-related injuries. Obviously, no safety device would prevent a bad person from using a handgun and deliberately inflicting a gun wound in the course of committing a crime.

What has been genuinely novel about the tobacco cases in recent years, and now the gun cases as well, is that suits have been brought not by injured victims themselves but rather by public entities, state and local. What are these suits all about? Of course, states incur health costs on account of Medicaid programs, and cities incur health care costs on account of public hospitals. In addition, with respect to the gun cases, cities absorb law-enforcement costs in tracing down the consequences of gun-related crimes.

As far as health care is concerned, assume that the patients themselves--the

1. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 633 (1992).

immediate victims—have tort claims against tobacco companies or gun companies. Assume further that they receive health care treatment from state and local programs. It is possible, then, that these public entities can assert the claims of the primary victims by way of subrogation. Subrogation either can exist under the common law, or specific state statutes and perhaps local ordinances can provide for it. However, the question with respect to subrogation-like claims is whether those claims must proceed case-by-case, or whether the public entities can in some sense aggregate individual claims and assert them in a mass-tort-like way.

Subrogation apart, public agencies obviously incur economic costs in providing treatment to those who suffer disease on account of tobacco, or injuries and disease on account of guns or alcohol. Given these economic costs, quite without regard to subrogation, public entities possibly can bring direct suits against manufacturers for having suffered economic losses on account of what might be the tortious conduct of the manufacturers themselves. Here, however, the public entities run into the general rule that in negligence law (and products liability as well) there is no cause-of-action for the infliction of mere economic loss. To be sure, there are a number of important exceptions to that general rule. In addition, the general rule has itself been seemingly overturned by leading opinions in a limited number of states; California happens to be one of those states. The California opinion twenty years ago, *J'Aire Corp. v. Gregory*,² can plausibly be read as creating a general cause of action for the negligent infliction of economic loss.³ Accordingly, in California the public entities' claims may be considerably stronger than they would be in the majority of states.

Returning to the tobacco litigation, I can state that never has so much money changed hands on account of lawsuits in which the legal theories have been so uncertain—not wrong, but rather uncertain. The 1997 global settlement (which ended up failing because of a lack of Congressional implementation) was for a sum of money in excess of \$300 billion. The subsequent 1998 settlement between states and tobacco companies is for an amount considerably in excess of \$200 billion. The only commentaries I can find on the legal theories that underlie the settlement are one article⁴ and one student comment,⁵ which both roughly favor the states' legal theories, and an Alabama task force report, co-authored by a law professor, which generally disapproves of those theories.⁶ There has been a scattering of lower-court opinions, which have generally allowed cases to proceed

2. 598 P.2d 60 (Cal. 1979).

3. See *id.* at 63.

4. See Raymond E. Gangarosa, Frank J. Vandall, & Brian W. Willis, *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 *FORDHAM URB. L.J.* 81 (1994).

5. See Michael K. Mahoney, Comment, *Coughing up the Cash: Should Medicaid Provide for Independent State Recovery Against Third-Party Tortfeasors Such as the Tobacco Industry?*, 24 *B.C. ENVTL. AFF. L. REF.* 233 (1996).

6. See William H. Pryor Jr., et al., *Report of the Task Force on Tobacco Litigation*, 27 *CUMB. L. REV.* 577 (1996-97). The law professor is Michael DeBow.

on some theories, but have rejected other theories. The only state supreme court ruling I am aware of is in Iowa; the Iowa Supreme Court basically threw out the Iowa state case.⁷ The 1997 and 1998 settlements are really amazing in terms of what they include. Settlement money, for example, goes to states like Kentucky and Alabama that were not even parties to the suits--states that had refused to join in the litigation efforts. Under the terms of the 1998 settlement, money is now going from tobacco companies to tobacco farmers who will lose sales and revenue on account of the settlement, but whose actual legal rights obviously have not been violated by anything that the tobacco companies have done. The future annual payments that tobacco companies will be making to the states may be adjusted pursuant to a formula which allows the tobacco companies' payments to go down if cigarette sales decline.

All of this gives states a very odd incentive to hope for an increase in tobacco sales rather than a decrease. Consider, moreover, companies that might be new entrants into the cigarette market and which might thereby take business away from those existing companies who are bound by the expensive terms of the settlement; how can those new companies be prevented from dramatically expanding their sales? It turns out that the settlement contains terms specifying that tobacco companies' payments to states will decline if the market share enjoyed by those tobacco companies itself declines. Moreover, the settlement requires the states to enact various measures that will make it expensive for new companies to gain entry into state tobacco markets. This, then, is a settlement that obviously raises questions about the violation of the competitive norms established by various antitrust statutes.⁸

Given all the oddities in the settlement, one could possibly complain about irresponsible appellate courts making bad law, and about irresponsible juries coming in with inappropriate verdicts. But once again, there have in fact been no state supreme court opinions that have endorsed the state claims. In addition, there have been no jury verdicts in favor of those claims--though a jury was in fact deliberating the Minnesota case at the time that this case was settled. However bad the litigation results might possibly be, those results have been a matter of voluntary settlements on the part of the tobacco industry. These are settlements that are particularly surprising because until now tobacco companies have been famous for hanging tough, for having out-prepared, outspent, and out-hustled plaintiffs (and their lawyers) at every turn in the previous rounds of individual litigation.

7. See *State v. Phillip Morris, Inc.*, 577 N.W.2d 401 (Iowa 1998).

8. See the overview provided in Jeremy Bulow & Paul Klemperer, *THE TOBACCO DEAL*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 323 (Martin N. Baily et al. eds., 1999).

Why then this dramatic change in tobacco companies' litigation strategy? One explanation focuses on the dynamics of the state suits. In those suits, the plaintiffs' side was very well prepared and very well financed. A separate explanation is that in these new state suits, the states were able to take advantage of internal company documents suggesting the irresponsibility of the tobacco companies. A third explanation is that tobacco companies had simply become weary of being charged with corporate irresponsibility; they may have wanted, by entering into the settlement, to declare that "we are now responsible corporate citizens rather than corporate outlaws."

If, however, the latter has been the industry's strategy, my estimate is that this strategy is failing or backfiring. The willingness of tobacco companies to pay \$300 billion (or \$200 billion) seems to have entailed a kind of public acknowledgment by the companies of their own guilt and responsibility. This is a public acknowledgment that makes those companies more vulnerable, rather than less vulnerable, to other kinds of legal challenges. The companies' implicit acknowledgment of their responsibility in the state settlement may well have contributed to the \$51 million verdict in an individual smoker's claim in San Francisco just a couple weeks ago.⁹ This is a verdict which, including punitive damages, would have been severely regulated by the 1997 settlement, but which is unaffected by anything in the terms of the 1998 settlement.

Overall, as I consider the state suits, what I think we are seeing is a new kind of legal proceeding. This proceeding entails, first of all, a shift from private law to public law. Secondly, the proceedings seem less concerned with precise legal theories, and more concerned with a kind of public melodrama. I am told that before the state suits were filed, a meeting of state attorneys general was convened by Mark Moore, the Attorney General of Mississippi. Those attorneys general were inclined to ask, "What are the elements of the causes of action that we're alleging here?" Attorney General Moore basically responded by saying, "Forget the elements. Let me show you the internal company documents that will help mobilize jury sentiment in favor of our cases." It seems clear that the public perception of tobacco company misbehavior has played a very large role in the companies' belief that these are cases they might well lose, and therefore should be inclined to settle.

In comparing the tobacco litigation to the alcohol litigation and also the gun litigation, one can easily say that it is the apparent misbehavior of tobacco companies that enables the tobacco litigation to stand apart. Even the Wall Street Journal editorialized a while ago to the effect that there should be a special place in hell for tobacco company executives. (To be sure, the Journal went on to say that there should also be a special place in hell for overly aggressive trial lawyers.)

9. See Myron Levin, *Tobacco Firm Liable in Cancer Case*, L.A. TIMES, Feb. 10, 1999, at A1; Joseph Menn & Myron Levin, *Jury Awards \$50 Million in Tobacco Case*, L.A. TIMES, Feb. 11, 1999, at A1. The verdict was about \$1 million in compensatory damages and then \$50 million in punitive damages.

It is hard to identify a special place in hell for the executives of alcohol companies, or for that matter auto makers, even though those companies' products entail a very high injury rate. As for gun manufacturers, a year ago most of us would have been inclined to say that their behavior has not been seriously problematic. On account of litigation, however, we are now learning about possible instances of misbehavior, including the adoption of marketing strategies that may be designed to circumvent state regulatory efforts. We learn more about these strategies in Denise Dunleavy's contribution to this symposium.

