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DYING FOR A CIGARETTE: WHO'S TO BLAME?

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Introduction

THE TORT of negligence is primarily concerned with the conduct of individuals within society and seeks to act as a deterrent by modifying a person's behaviour. However, within any society a conflict of interest(s) may arise resulting in harm including physical injury. The law of tort has evolved through case law, legislation and public policy, the last either by recognising a duty of care exists or restricting such a duty to prescribed criteria. Public policy has been an issue when dealing with claims in Britain against the tobacco industry for smoking related illnesses. In America actions brought against tobacco manufacturers have been successful. The Labour Government has recognised the controversial issues involved in smoking tobacco and is attempting to address the health problems. Tony Blair openly acknowledges the dangers related to smoking in the preface to the White Paper:[1]

> *In Britain today, more than 120,000 people are going to die over the next year* from illnesses directly related to smoking. And the year after that, and the year after that. Unless we all do something. . . . [This] is a testimony to individual and family suffering which need not happen. This appalling waste of people's lives. . . . Smoking Kills (p. 1).

This is a damning statement against the tobacco industry and their products and begs the question, "are manufacturers of tobacco products liable under the tort of negligence?" The law of tort has defined criteria to prove liability, based upon a burden of proof on a balance of probability. For example, the claimant must demonstrate he or she was owed a duty of care, breach of duty and loss suffered as a consequence. To support such a claim in negligence the claimant must adduce evidence to show the defendant was aware of the risks involved, i.e., foreseeability, and as a result caused the harm. To answer this question and fulfil the above criteria the author will present scientific evidence carried out and give a comparison with the American approach.

In 1950 Sir Richard Doll and Sir Austin Bradford Hill comprehensively documented the history of the evidence and harm caused by the usage of tobacco. This documentary evidence was examined by the Health Education Authority (HEA), the statutory body which advises the Government on health education issues, which claimed this documentation was available to the tobacco industry in the United States and Britain. They believed the

[1] Smoking Kills, Cm 4177, 1998.

tobacco industry was well aware of the dangers associated with smoking and chose to ignore and deny the dangers.[2] This was supported by the Royal College of Nursing (RCN)[3] and Action On Smoking and Health (ASH),[4] which submitted evidence to the House of Commons Select Committee:[5]

> By 1950 it was clear that smoking was a likely cause of serious illness and premature death—in the 1950s the link was established beyond reasonable doubt. Since 1950 the range of diseases and magnitude of risks have become better understood, so that it is now possible to attribute over 50 medical conditions and 20 diseases causing premature death to smoking. As knowledge has progressed, estimates of the mortality and morbidity attributable to smoking have increased. (p. 1)

It may be argued that many consumers are now aware of the risks associated with smoking tobacco products through the Government's warnings on the packaging of cigarettes and advertisements. However, should this absolve the tobacco industry or regulators from their responsibility and actions being brought for negligence? Alternatively, it may be argued, liability is strict under the Consumer Protection Act 1987, Part I, which exists alongside liability in negligence. Under this legislation the consumer does not have to prove negligence if it is deemed a manufacturer's product is defective and the cigarette maker would not be able to avoid liability.[6] However, the claimant must still prove a causal link between the defect in the product and his injuries.[7] Furthermore, since the 1987 legislation came into force there are no reported cases which deal specifically with Part I and product liability, which makes it difficult to evaluate the impact of this legislation[8] although ASH and RCN believe the tobacco industry should be made liable for the harm caused by their products and labelled their products as a "killer".[9] To establish whether or not the tobacco manufacturers should be held liable under the tort of negligence it is first necessary to examine the legal rules on causation.

Causation

Causation is the physical connection between what is perceived to be the defendant's negligence and the claimant's damage. The claimant must prove the damage was caused by the defendant's breach of duty and that it was not too remote. The former part is referred to as causation in fact, while the latter deals with causation in law. Causation in fact deals with cause and effect; the methodology used by lawyers and the judiciary to determine the issue, which is referred to as the "but for" test. The claimant must prove on

[2] Health Education Authority (14 January 2000) *The Tobacco Industry and the Health Risks of Smoking*, a Memorandum by the Health Education Authority, Select Committee.

[3] An organisation which sets standards in nursing.

[4] Which was founded by the Royal College of Physicians in 1971 to preserve the health of the community and educate the public on issues concerning smoking.

[5] Action on Smoking and Health and The Royal College of Nursing (2 February 1999): *The Conduct of the Tobacco Industry*, Select Committee on Health, Minutes of Evidence.

[6] Although the author is aware of the 1987 legislation implemented to protect the consumer, it is the intention to focus on the law of tort, i.e., the common law.

[7] See R. Bradgate *Commercial Law*, 2nd ed., 2000, Butterworths 351.

[8] *Ibid*., p. 351.

[9] *Op. cit*. p. 1.

a balance of probabilities "but for" the defendant's behaviour the claimant would not have suffered harm. However, if the loss would have occurred regardless of the defendant's conduct, then in law the defendant is not the primary cause of harm. For example, in the case of *Barnett* v. *Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, which involved a patient who complained of vomiting and stomach pains, the patient was not examined, was sent away without any treatment and was told to see his own doctor. He died five hours later from arsenic poisoning. Based upon expert evidence presented, it was proven that the patient was beyond help and would have died even if he had received treatment. Therefore, the doctor's negligence was not the cause of death. Arguably, the usage of the "but for" test relies heavily upon evidence presented and speculation by the court to what might have happened if the defendant acted in a different way. The House of Lords examined the criteria for causation again in the context of an omission to act when dealing with "special skill" and the medical profession in the case of *Bolitho* v. *City and Hackney Health Authority* [1997] 1 WLR 582. This case dealt with a young child who had been suffering from respiratory problems and was under hospital observation. Complications had occurred on two occasions and on both occasions the Sister requested a Doctor attend. The Doctor failed to respond to both requests and the child suffered a fatal third episode of respiratory problems, causing a cardiac arrest and brain damage. Based upon the criteria for causation it was necessary to prove if a Doctor had attended, before the last episode, would or should she have intubated the child, which may have prevented the physical harm? On the medical evidence presented, the court found, on a balance of probabilities, that the Doctor would not have intubated and this was supported by medical opinion. The onus of proving causation is placed with the claimant who must demonstrate on a balance of probabilities that the defendant's breach caused the damage. This may be an impossible task for the claimant to prove, particularly in claims relating to medical conditions, for example tobacco products.

The second limb to proving causation, causation in law, relates to remoteness of damage; causation in fact has been established, but this will not automatically prove the defendant is liable. There is a cut-off point where the defendant will be deemed, in law, not to be liable and the damages suffered are said to be "too remote". Arguably, this legal rule was established to limit the overall extent of an alleged tortfeasor's liability to a claimant. Therefore, even if the defendant's breach is a cause in fact resulting in the claimant's damage, compensation will be denied if the damages are said to be "too remote". It is this element which links with public policy, i.e., either recognising or denying a duty of care and liability. The implications of a judge's ruling when making a policy decision will either open the floodgates, i.e., pave the way for additional claims, or restrict future claims in particular areas of law. One such area is smoking related illnesses and the tobacco manufacturers' responsibility. This was illustrated in the first class action, commenced by Martyn Day, against the tobacco manufacturers in Britain.

Tobacco products and foreseeable risks

It was inevitable, given the scientific evidence, that a claim would be brought against the tobacco industry in Britain. In 1992 Martyn Day, a senior partner with Leigh, Day and Co. commenced a class action against the British tobacco companies for personal injuries as a direct result of the use of their products. An outline of this action is given in Mr Day's Memorandum to the House of Commons Select Committee,[10] where he claimed the tobacco industry was aware of the risks, i.e., the level of tar contained in a cigarette was the cause of lung cancer, yet chose to ignore those risks which resulted in physical harm for the consumer. He based this allegation on the following argument:

> The available studies indicate that a reduction in the yield of smoke condensate of a cigarette and a reduction in the amount that comes in contact with the lung will be followed by a reduction of the risk of lung cancer (p. 6)

Mr Day examined the earlier evidence carried out by Sir Richard Doll and Sir Austin Bradford in 1950, which comprehensively documented the history of the evidence of harm caused by the usage of tobacco and reported to the House of Commons Select Committee that the rise in the number of deaths from lung cancer linked to tobacco products increased between 1922 and 1947.[11] Further, he claimed that deaths in Britain increased: ". . . 15-fold from 612 to 9,287 per annum".[12] He found that: ". . . the results from the first 20 years of the study, and other studies at the time, substantially underestimated the hazards of long term use of tobacco: it now seems that about half of all regular cigarette smokers will eventually be killed by their habit".[13]

Claims such as these support a genuine cause of action against the manufacturers of tobacco, yet, in Britain, it appears that social policy and the funding of litigation have acted as a deterrent in bringing a successful claim in negligence against the tobacco industry. The question of funding was raised by Martyn Day in his Memorandum. One of the main barriers discussed was legal aid.[14] He believed that if it was not granted in such cases this would result in a denial of justice.

Mr Day commenced an action against the tobacco industry on behalf of his clients in a class action[15] which involved 52 claimants suffering from various diseases alleged to have been caused by smoking. Mr Day had applied for legal aid to fund his clients' claim, which was initially granted

[10] 2 February 2000.
[11] *Ibid.*, p. 2.
[12] 12 P. 2.
[13] 13 P. 2.
[14] Following the Government's White Paper, *Modernising Justice*, the funding of legal services (legal aid) has been taken over by the Legal Services Commission and a body known as the Community Legal Service has been set up to take control over in the civil legal aid sector. This was implemented through the Access to Justice Act 1999. Personal injury cases are now dealt with on a conditional fee: no win, no fee.
[15] *John Barrie Hodgson & Ors v. Imperial Tobacco Ltd & Ors* (1999) QB; see Lawtel Transcript, case number C8600377, 9 February 1999.

for a short period of time but eventually withdrawn. To pursue any further action the strongest cases were selected and proceeded on a conditional fee scheme, i.e., no win, no fee.[16] This allowed the claim to proceed against the tobacco companies Imperial and Gallagher, commonly known as British American Tobacco (BAT) and the case was set to be heard for late 1999/ 2000. However, the claimants' action was further thwarted by a successful application by BAT for an order to bar the claimants' action under the Limitation Act 1980.

Two thirds of the claimants represented by Martyn Day were suffering from lung cancer and had issued proceedings more than three years from diagnosis. Many claims are now considered time barred, since no action may be brought against a defendant for personal injuries after three years from the accrual of the cause of injury. Mr Justice Wright, who had been allocated the case, agreed with BAT's claim and refused to allow the claim to proceed. This was commented on by Robins[17] who claims an additional reason why the claim was not successful was:

> Mr Justice Wright singled out Leigh, Day & Co for criticism . . . The firm had begun the action in 1992 when it placed advertisements inviting people suffering from smoking-related illnesses to contact the firm. The Judge claimed that the motivation from the plaintiffs was the practice's 'advertised willingness' to take on the tobacco companies. The reasons why the plaintiffs were out of time, the Judge continued, were the 'product of the ingenuity' of the lawyers and not representative of 'either the reality or the instructions'. Such behaviour was to be deprecated . . . (p. 9)

To compound matters the claimants' team of lawyers was given the option to sign a personal undertaking not to pursue any future claims against the tobacco industry, not to make reference to evidence which had been revealed and not to campaign against the tobacco industry. In exchange for this undertaking BAT would not pursue costs, amounting to £15 M against the claimants. In response to this undertaking Mr Day stated in his Memorandum: "Although these are extremely onerous undertakings, . . . I felt that our absolute duty was to protect the Claimants and we, therefore, signed them".[18]

The American approach

The American tobacco industry was facing the same allegations against their products and the publicity was beginning to have an adverse effect. Casale et al.[19] claim that since the 1950s there have been over 1,800 lawsuits filed against the tobacco industry in the United States alleging personal injury through the consumption of tobacco products. Such cases were not always successful, due to the defence of consent, that is, the claimant (smoker) was

[16] The Courts and Legal Services Act 1990. Section 58 legitimised conditional fee agreements. See also footnote 11.
[17] J. Robins (1999) Out of Puff, *Law Society Gazette*, Vol. 96, p.9.
[18] P.2.
[19] G. Casale & R. N. Raval US Tobacco Litigation: a lot of smoke, but no fire for the insurance industry [1999] *International Journal of Business Law* 2-13.

aware of the risks associated with smoking but still consumed tobacco. Juries have accepted this defence. As a result, the tobacco industry have become known as the invincible "Big Tobacco".[20]

The first action commenced in the United States was in 1954 by Eva Cooper, who unsuccessfully filed a wrongful death action against R. J. Reynolds Tobacco Co. for the death of her husband who had died from lung cancer.[21] One of the reasons why the case failed was, similarly to the British case, financial: personal funds could not provide the lawyers to face the army of lawyers representing the tobacco industry. Thus, for the next two decades, subsequent litigation was quickly quashed by the tobacco industry's well-funded defence team.[22]

Legislation—a defence and absolution

Legislation was implemented in America to ensure the consumer would eventually have knowledge of smoking associated risks. As far as the tobacco industry were concerned, this would shift the onus of responsibility onto the consumer and arguably act both as a defence and absolution for the tobacco industry. In Britain, health warnings began to appear on advertisements and cigarette packets by 1971.[23] As in America this was initiated by the Government and not the tobacco industry. Casale[24] believes this legislation, which purported to inform the consumer of the dangers of smoking, gave the tobacco industry a successful defence against common law claims, i.e., they made the consumer aware of the risks and voluntarily put themselves at risk (volenti non fit injuria).

Casale[25] claims this defence continued to protect the tobacco industry until 1983 when a lawsuit was filed and concluded in the case of *Cipollone* v. *Ligget Inc*., 893 F2nd 541, 551 (5rd Cir.) (1990). This case concerned Rose Cipollone (the claimant) who had smoked approximately one to two packets of cigarettes a day between 1942 to the very early 1980s.[26] Ms Cipollone was diagnosed with lung cancer in 1981 but was unable to give up smoking, even when she had a lung removed. In 1984 she died. However, before her death she had issued a product liability lawsuit against Ligget, Philip Morris and Lorillard for suffering and claimed monetary damages relating to her lung cancer.[27] In 1988 Ms Cipollone's estate was awarded $400,000. The court found that the tobacco industry had made an express warranty that its products were safe in the years before any warnings were legally required for tobacco products. This was the first monetary award made against a tobacco company. However, the award was appealed and in 1992 it was overturned by the Supreme Court. Apart from wearing the claimant's estate down, the tobacco industry had successfully relied upon the legal defence of

[20] *Ibid*., p. 4.
[21] C. Molenkamp *et al*. *The People vs. Big Tobacco: How the States Took On the Cigarette Giants: Bloomberg Press*, 1998, at 250.
[22] See Casale, n. 19 at 4.
[23] Health Education Authority, 14 January 2000, 3; see footnote 2.
[24] *Op. cit*., 4
[25] *Ibid*. 5.
[26] 893 F 2d 541, 551.
[27] Casale, 5.

contributory negligence.[28] The claimant's estate was unable to fund any further action against the tobacco industry. Arguably, the tobacco industry had the financial ability to exhaust the claimant's (estate) funds and defeat the claim, again.

Although the 1992 Supreme Court did not support the award made to Ms Cipollone's estate, there has been more recent litigation against the tobacco industry. The disclosure of confidential documents and supporting evidence by "whistleblowers," i.e., employees who reveal inside information, demonstrated that although the tobacco industry was aware of the health risks associated with its products, it still manipulated the levels of nicotine to enhance addiction.[29] This has led to a massive attack on the tobacco industry in America. Since 1997 class actions worth billions of dollars have been initiated.

Smoking kills

In Britain, the current Government has published a White Paper: *"Smoking Kills"*[30] which highlights the dangers related to smoking. It appears to be aware of the health risks associated with cigarette smoking, particularly the high rates of death related to smoking in comparison to other European countries. The White Paper states that: "Women under 65 in the UK have the worst death rate from lung cancer of all EU countries except Denmark",[31]and further that:

> Smoking is the single greatest cause of preventable illness and premature death in the UK. Smoking kills over 120,000 people in the UK a year—more than 13 people an hour. Every hour, every day. For the EU as a whole the number of deaths from tobacco is estimated at well over 500,000 a year. A generation after the health risks from smoking were demonstrated beyond dispute, smoking is still causing misery to millions. Smoking is still killing. (1.1)

This begs the question of whether any party is prepared to accept moral responsibility for so many deaths.

The issue of moral responsibility

The claims made by RCN and ASH, above, that the tobacco industry has had scientific knowledge of the dangers associated with smoking for the past fifty years, yet chose to ignore it, is supported by the HEA. They claim the American company Brown and Williamson, a subsidiary of British American Tobacco, had scientific knowledge many years ahead of the general scientific

28 This defence may be raised by the defendant who claims that the claimant contributed to his/her injuries.
29 Casale, 6.
30 *Op. cit.*
31 1.15.

community, which gave specific details relating to the impact of smoking on humans. HEA further claim:

> Although the Brown & Williamson documents provided an insight to one company, it is clear from other documents filed in the Minnesota litigation that the level and depth of knowledge held by this one company was relatively common throughout the industry (p. 3).

The HEA in their Executive Summary to the House of Commons Select Committee outlined the research carried out which linked smoking with lung cancer and other illnesses which begins in 1950 with the aforementioned Doll and Bradford-Hill paper. This was followed by the American Cancer Society Nine State Study in 1952; the US Veterans Study in 1954; the Canadian Veterans Study in 1955; the American Cancer Society Twenty Five States Study in 1959/1960; and The Royal College of Physicians' Report "Smoking and Health," in 1962. The Surgeon-General's and the US Department of Health and Human Services' reports throughout this period came to a similar conclusion, namely, that smoking is causally related to lung cancer and other ailments and is a leading contributory cause of death. The Memorandum summarises the research:

> . . . the harmful effect of smoking is, in the Department of Health's view, incontrovertible. Convincing evidence that smoking is extremely harmful emerged in the 1950s and has been widely available since the 1960s. Smoking is the single greatest cause of preventable illness and premature death in the UK and kills over 120,000 people in the UK a year. Smoking causes over a third of all cancer deaths in the UK, amounting to 46,500 deaths a year. In the UK in 1995, 84 per cent of all (male and female) lung cancer deaths were caused by smoking. One out of five male and one out of 10 female deaths from circulatory heart diseases were caused by smoking. In 1995 this was estimated to be a total of 40,300 circulatory disease deaths. Cigarette smoking caused a third of all circulatory deaths under age 65. (p. 4)

Given the amount of research undertaken which demonstrates the link between tobacco products and health issues, inferences arise which justify a conclusion, in the absence of an explanation, that the tobacco industry has been negligent. Further, in view of this knowledge, and with reference to the work of Doll and Bradford-Hill, the HEA argues:

> Any manufacturer of any product which is dangerous to health has a responsibility to warn those who may be affected by that product. The principle of responsibility in common law negligence ('the duty of care') was established in the House of Lords in 1932, in the Matter of *Donoghue* v. *Stevenson*. Thus tobacco companies had a moral and legal responsibility to warn consumers and others who would be affected of the dangers of smoking. (p. 3)

However, as the HEA claim: "The tobacco industry has never voluntarily warned its customers about the dangers of smoking, and only recently has done so in the United States, having been coerced by the threat of legal

action from the States' Attorneys General".[32] Thus, from the evidence presented it would be fair to say tobacco products cause cancer and are dangerous. However, if a product is bad it is either withdrawn from the market or made safe. The current Government is not proposing either of these options in their White Paper. Therefore, it would appear the tobacco industry and the Government can be held jointly responsible for the number of deaths caused by smoking. However, it may be argued that, in view of the health warnings and adverse publicity surrounding the smoking of tobacco products, consumers are now in a position to shoulder some responsibility themselves.

Nicotine—a highly addictive drug

In March 1998 a UK Government Scientific Committee stated:

> Over the past decade there has been increasing recognition that underlying smoking behaviour and its remarkable intractability to change is addiction to the drug nicotine. Nicotine has been shown to have effects on the brain dopamine systems similar to those of drugs such as heroin and cocaine.[33]

If this claim is correct, is the consumer making an informed choice? According to the HEA[34] a third of smokers were not aware that the main cancer causing substance in cigarettes is tar, and not nicotine, adding insult to injury. They concluded their Memorandum to the House of Commons Select Committee by stating:

> Cigarettes are by far the most dangerous consumer product on the market. It is shocking that consumers have less information about cigarettes than they have about any other product. Government should require tobacco companies to give more accurate and more appropriate information about products to consumers. (p. 9)

The Government are not proposing to reduce the risk or remove the product from the market, rather they intend to spend public money to help individuals stop smoking. Removing the product from the market would seem the most radical solution to the problem. However, as nicotine is highly addictive, both physically and psychologically, any attempt to remove cigarettes with no ready substitution, nor comprehensive contingency plan, might possibly have serious implications and repercussions. However, to allow tobacco companies to carry on producing products which will not only induce addiction but will increase such a condition may be seen as socially irresponsible. This needs to be addressed and the Government's White Paper, while addressing the problems of individual smokers, does not appear to be dealing with the manufacturers.

[32] *Op. cit*., 3.
[33] Report of the Scientific Committee on Tobacco and Health (1998) UK Government, Department of Health, March 1998, para 1.30.
[34] *Op. cit*., 9.

The Government's proposals[35] are to increase public awareness of the dangers of smoking whilst recognising the individual's right of choice, and for the smoker to take individual responsibility for themselves. The White Paper is quite clear: non-intervention, persuasion through education, advertising and the offer of help for those addicted are believed to be the right way to approach the problem.

Nicotine: an uncontrolled drug

The current Government recognises that action in areas of personal choice is a difficult and sensitive issue. If introduced today, tobacco, a uniquely dangerous product, would not stand a chance of being legal. However, as the White Paper states: "smoking is not against the law. We do not intend to make smoking unlawful".[36]

If nicotine were to be treated as a drug, based upon the chemical effects it has upon the brain and body, then as with most drugs there is a risk of side effects, some of which may be harmful in themselves. When deciding the safety issue a balance is drawn between the risk of harm from the drug and the risk of the illness. With regard to tobacco the risks are well documented and the public are now informed through publicity and advertisements.

Nicotine addiction: the American approach

In the United States the Food and Drug Administration (FDA) is responsible for ensuring that food is fit for human consumption, that medical devices and cosmetics are safe to use, and for regulating drugs. The FDA derives its authority from the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 et seq. which allows control over products which are inhaled, ingested, implanted or otherwise used in close contact with the consumer. It is this jurisdiction that led to the FDA asserting they had legitimate power to control the consumption of cigarette and tobacco products. They supported this argument by stating:

> Cigarettes . . . deliver a pharmacologically active dose of nicotine to the body through inhalation, and smoking tobacco, which delivers a pharmacologically active dose of nicotine . . . deliver [ing] a pharmacologically active substance to the bloodstream . . . no products cause more death and disease than cigarettes and smokeless tobacco.[37] (p. 1)

Thus, the FDA believed they had the right to regulate cigarettes. To prove this, the then Chairman of FDA, David Kessler, began to investigate the tobacco industry. In 1994 he received information which revealed that the

[35] 1.26.
[36] 1.25.
[37] Food and Drug Administration (August 1996) Executive Summary: Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products are Nicotine Delivery Devices Under the Federal Food, Drug and Cosmetic Act: http://www.fda/gov/opacom/campaign/tobaco/ execsum

tobacco manufacturer Brown & Williamson had created a tobacco plant with an extremely high level of nicotine. According to Mollenkamp[38] the tobacco industry were:

> . . . creating the breed to be able to mix it with tobacco that had lower levels of tar. In other words, Brown & Williamson was attempting to maintain or increase the level of nicotine in cigarettes even as it lowered the amount of tar. (p. 111)

On the 21 March 2000, before the Supreme Court of the United States the case of *Food and Drug Administration, et al., Petitioners* v. *Brown and Williamson Tobacco Corporation et al.* was heard and Justice O'Connor stated:

> In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.[39]

Justice O'Connor explained that to allow FDA to regulate tobacco would cause a number of inconsistencies; for example, the FDCA required the FDA to determine a regulated product as "safe" before it may be sold or allowed to remain on the market.[40] The Act requires the FDA to prevent the marketing of any drug or device where the "potential of inflicting death or physical injury is not off-set by the possibility of therapeutic benefit."[41] Thus, the FDA would have to ban tobacco products, a remedy the court found to be unacceptable and would be contrary to Congressional intent. The court believed that Congress did not intend to give the FDA the authority to regulate tobacco when they enacted the FDCA.

In light of this ruling the FDA will not regulate nicotine as an addictive drug. The Supreme Court has clearly placed responsibility with Congress and it is Congress which must now demonstrate that they have dealt with any foreseeable problems. However, Congress' responsibility to protect the consumer from dangerous products must be viewed in light of the Multistate Master Settlement Agreement of November 23, 1998.

Counting the cost

Read[42] suggests that the implications of dealing with the direct causes of nicotine addiction would have economic consequences which would have a

[38] *Op. cit.*
[39] http://supct.law.cornell.edu/supct/html/98- 1152.ZO.html, at 2.
[40] 21 USC$ 393(b)(2) (1994 ed., Supp. III).
[41] See *United States* v. *Rutherford*, 442 US 544, 556 (1979).
[42] D.R. Read (1996) *The Politics of Tobacco: Policy networks and the Cigarette Industry*, Avebury.

direct effect on the revenue the Government receives from the sale of cigarettes. He claims that:

> Cigarettes provide governments with one of their biggest and most valuable sources of revenue. They support thousands of jobs, both directly and indirectly, particularly crucial in times of economic recession. In 1991, total revenue yield to the British government from excise duties was £21,143 million; tobacco products contributed £5,636 million, an increase of 2.1 per cent on the previous financial year. (p. 3)

This relationship between the Government and the tobacco industry is evidence that there is a conflict of interest in providing the consumer with a safe product and making money for both parties, the Government and the tobacco industry. Read claims this relationship is due to the fact that: " . . . tobacco manufacturers remain securely attached to a product which is cheap to make and highly profitable. Being addictive, it is also easy to sell and, as such, much less affected by economic trends amongst consumers".[43] The economic factors form a strong link between the Government and the tobacco industry. If the Government were to penalise the tobacco manufacturers by introducing legislation, the reduction in profits would result in a domino effect within the economy. For example, Read believes that strong productivity and sales allow suppliers to increase employment and suggests that: "83,500 people (0.3 per cent of the work force) are employed full-time as a direct consequence . . . by the tobacco industry".[44] Arguably, this produces a dilemma for the Government in a choice between support for a possible decline in the tobacco industry and the health of the nation.

It is against this background that one can see and explain the development of policies concerning smoking emerging and one is provided with some understanding as to why successive Governments have not taken direct action against the tobacco industry. Troyer and Markle[45] claim that the controversial issue surrounding health and smoking is: " . . . not an isolated phenomenon, but a series of interconnected events, behaviour and action shaped by political, economic and social forces'".[46]

The cost related factors in Britain

The cost of smoking for the National Health Service (NHS) is estimated to be £1.7 billion every year.[47] The current Government intends to address this problem by attempting to reduce tobacco smoking but in the meantime the present system is paid for by the taxpayer. The NHS is paid for by the taxpayer[48] regardless of whether or not the victim of a tort, such as one who has suffered personal injuries, is able to successfully recover compensation. It is not only the cost to the NHS but also to agencies such as Social

[43] *Ibid*., 1.
[44] *Ibid*., 3.
[45] R. J. Troyer & G. E. Markle Cigarettes: *The Battle Over Smoking*, Rutgers University Press, 1983.
[46] P. 11.
[47] Cm 4177.
[48] For a wider perspective on costs not paid through the tort system but met by the taxpayer refer to P Cane, *Atiyah's Accidents, Compensation and the Law*, Fifth Edition, 1993, Butterworths, 342.

Services which provide support and care for those suffering from smoking related illnesses.

The conflict of interest between health care and raising revenue is self-evident. The present system lacks integrity, allowing the tobacco industry to continue to produce a product which results in smoking related illnesses. These illnesses are treated by an organisation, the NHS, which is dependent on the public purse, which is filled by raising revenue from those that make the product, consume the product and non-smokers. To allow such a system to operate is tantamount to negligence on behalf of the Government. Thus, the question that needs to be addressed is: how should the NHS claim back the cost for treating smoking related illnesses?

Counting the cost in the United States—The Multistate Master Settlement Agreement

The Multistate Master Settlement Agreement (MMSA) involved the tobacco industry reimbursing States for its health care expenditure for ailments related to smoking tobacco. The producers participating in the settlement are Philip Morris, R.J. Reynolds Tobacco (a subsidiary of RJR Nabisco Holdings), Lorillard Tobacco (a subsidiary of the Loews Companies) and Brown & Williamson Tobaccos (a subsidiary of British American Tobacco).

Initially, the Settlement was to be given the force of law by Congress. However, negotiations broke down on the 8th April 1998 and the process failed. However, the tobacco industry, aware of the claims, continued to negotiate with individual States resulting in settlements. For example, on the 2 July 1997 a settlement was made with Mississippi: this state was to receive $3.3 billion dollars over 25 years, with annual payments of at least $134 million. Florida settled their claim on the 16 January 1998 for $14.5 billion over 25 years, resulting in annual payments of $580 million. The most far reaching settlement was made with Minnesota on the 8 May 1998 for $6.5 billion. Further settlement resulted in another 46 States accepting $206 billion,[49] which will be paid over 25 years, to compensate each State for medical costs related to smoking tobacco. The agreement did not need the approval of Congress and was structured to bring an end to pending and future lawsuits.

Individual claims outside the MMSA

The MMSA has attempted to settle State claims, compensate the health system and restrict advertising. However, this has not prevented litigation in the form of either class actions or individual claims against the tobacco industry. Such claims, which were previously unsuccessful, are now succeeding. For example, a Los Angeles' complainant, Lesley Whitely, who

[49] The historical background is discussed in G. Kelder & P. Davidson (March 24, 1999) http://www.tobacco.neu.edu/msa/msa_analysis. The document is available in Portable Document Format (PDF), which you need to view using Adobe Acrobat Reader.

was diagnosed with lung cancer and had started smoking after the Surgeon General's warning notice began to appear on cigarette packets in the 1960s, was recently awarded $20 M (£12.6 M) in punitive damages from Philip Morris and R.J. Reynolds, two of the largest tobacco companies in America.[50] The award was made because the companies had designed their cigarettes in a negligent manner and made misleading (false) statements to the public. The punitive damages were made in addition to $1.7 M to compensate the claimant for medical care and loss of earnings, and to compensate the complainant's husband for loss of companionship.

Conclusion

Asking who is to blame for the deaths of 120,000 people a year in Britain from illnesses directly related to smoking yields the answer is the tobacco industry, the Government and the consumer. However, as when dealing with the issue of law, health, moral responsibility, freedom of choice and economic consequences, it becomes apparent that the blame could be apportioned in varying degrees to any or all three depending on the issue.

People continued to smoke even though in the 1950s scientific evidence revealed that smoking tobacco was dangerous. Also, the tobacco industry was aware of the scientific evidence but was also aware that nicotine was highly addictive and "the cigarette pack . . . [was] a storage container for a day's supply of nicotine". Yet, while denying that nicotine was addictive, it increased dependency on its product through the use of additives which increased the speed at which nicotine was transported to the brain.

In Britain, the tobacco industry owed a duty of care to the consumer under the law of tort. This duty of care was established through the case of *Donoghue* v. *Stevenson* in which Lord Atkin enunciated: "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". The RCN and ASH claim that by the 1950s the link between smoking and serious illness and premature death was "established beyond reasonable doubt". The degree of risks involved with smoking tobacco products was foreseeable at the time when scientific knowledge was not only made available but made known to the tobacco industry. Thus, they breached the duty of care and as a result of that breach the consumer suffered harm or even death. Subsequently it may be said that in not preventing harm, it caused the harm. Until public policy dictates otherwise, the courts will continue to use mental gymnastics to exclude causation in law, whilst documentary evidence demonstrates causation in fact. Unless the legal position changes the tobacco industry will continue to be legally blameless, while the consumer continues to die for a cigarette. Even now, no claim against the tobacco industry has been successful in Britain due to legal technicalities, such as causation in law, being time barred under the Limitation Act 1980 and the financial considerations involved in funding such a claim.

The tobacco industries in the United States have faced similar allegations under the law of tort for causing personal injury or death and have, until

[50] Reported in The Times: http://www.the- times.co.uk/new, on the 29 March 2000, by Grace Bradberry.

recently, successfully defended such allegations in court. However, class actions brought by claimants who suffer from smoking-related illnesses have not only been successful but have resulted in millions of dollars being awarded in punitive damages. This reflects not only the feelings and attitudes of juries but also the recognition of such claims.

It would seem that the reason why the tobacco industry has not made recompense to the National Health Service for the costs incurred through smoking-related illnesses is due to an economic situation in which, "cigarettes provide Governments with one of their biggest and most valuable sources of revenue". In 1991, as we have seen, excise duties amounted to £21,143 million, whereas the cost of smoking for the NHS is estimated to be £1.7 billion every year. Thus, there appears to be a conflict of interest in providing the consumer with a safe product and generating income for both the Government and the tobacco industry, which ostensibly places the blame for smoking related deaths on both equally.

The provisions of the MMSA attempt to acknowledge and address the problems associated with tobacco products. Not only does the MMSA attempt to control the sale and promotion of such products but it has compensated the medical system for the cost of treatment due to smoking-related ailments. Arguably this has not only raised awareness of the dangers associated with smoking tobacco products but has sent a message to the tobacco industry: that its product is defective and it is to blame. The tobacco companies involved in the settlement have accepted this responsibility by paying vast amounts of compensation to individual States in full and final settlement.

Smoking while knowing the dangers involved appears to be an individual decision which should be respected. While personal choice should be acknowledged and individuals' needs met, consumers should be fully informed of the dangers of smoking tobacco products. Smoking tobacco, a substance which is highly addictive, may lead to physical ailments and the likelihood that the consumer may end up dying for a cigarette.

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