COMMENTARY

Some Reflections on the Relationship of Risk, Harm and Responsibility in Recent Tobacco Lawsuits, and Implications for Public Health

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Tobacco smoking is a major cause of death and disease around the world.1,2 A series of recent civil law suits by groups of individuals as well as governments has resulted in multi-billion-dollar verdicts against tobacco companies in the US, and many more such suits are in preparation or likely to come.3,4 The logic of the law suits is as follows: tobacco smoking causes major harms to health, and tobacco manufacturers have known about these dangers and effects for decades, but withheld this knowledge or even denied it to consumers. Therefore, the many long-term smokers now suffering or dying from smoking-related diseases, like lung cancer, heart disease, etc., and governments carrying the major health care and cost burden on a societal level3 are justified in holding tobacco manufacturers liable for these harms and costs. The claimants charge that tobacco corporations acted maliciously and irresponsibly in exposing them to a dangerous product and its deadly consequences.

However, we are of the opinion that there is reason and opportunity to engage in some critical reflection on the principles and the logic behind this argument in its own specific instance; on the argument’s implications for the relationship and responsibilities of state or governments, the consumer, and producers in the wider context of public health, risk and policy; and on the argument’s implications for other fields of public health.

First, we find it peculiar to see ‘the state’ – in the form of various levels of government – as suitors against tobacco companies. Governments have been explicitly aware of the deadly risks and consequences of tobacco consumption for over four decades, with new research (much of it government funded) accumulating every day since the 1960s.6 Although this (public) knowledge has existed for decades, governments have maintained tobacco products’ status as regular non-drug goods. Tobacco products are arguably the most accessible kind of ‘drug’ in Canada today, sold in ubiquitous retail and hospitality outlets. In allowing so, governments have neglected to a substantial degree ways of reducing consumption – such as through price and access control, which have been used effectively in other fields (i.e., alcohol policy).7 Finally, over the decades, governments profited in the multi-billion-dollar range through tax revenues from tobacco sales, and generously subsidized tobacco manufacturing as an export industry.2 In light of this seemingly ambiguous, haphazard approach of state action in reducing harms to society from tobacco consumption, how legitimate is it then for governments to claim they have been innocently ‘victimized’? Furthermore, one may suggest that in light of the relatively lax demand control policy towards tobacco, states have unduly neglected their essential (and constitutionally enshrined – see S. 7 of Canada’s Charter of Rights and Freedoms) role as protectors of citizens’ lives, health and welfare in allowing considerably more tobacco use-related harms than what necessarily had to occur. May this, then, even be a legal basis for civil suits of harmed smokers against governments for failed protective action (compa-

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rable to the legal argument made in the case of the recent Canadian ‘tainted blood scandal’)?

A second big question mark relates to the individual ‘victim’ of tobacco harms, the tobacco consumer. In the recent court cases, the suitors claimed that, despite all education, prevention, warnings, information campaigns, media reports, popular knowledge on the health risks of tobacco smoking that has penetrated North American society for the past couple of decades, they were not at all aware or informed of the possibility and severity of these consequences. Can any North American who has participated in everyday social life over the past 20 years reasonably make this claim? This seems hardly possible, but is a highly important issue in principle when debating the share of responsibility to be carried by citizens and consumers in activities entailing potentially risky or harmful consequences. Although this may be very difficult and arbitrary in practice, it seems inevitable that a basic share of responsibility is assumed by generally healthy-minded, rational choice-making consumers as long as a reasonable minimum share of information, education and prevention on risks and harms is provided by a key source. This source, especially in areas where interests of ‘health’ and ‘business’ meet, primarily ought to be the (welfare) state, since it is probably illogical to expect such information delivery from the partial side of industry, as it would act against its main (corporate) interests. On that level – and especially in the context of contemporary post-welfarist society which emphasizes the ideology of (neo-) liberalism, and individual freedom, and risk-friendly responsibility in so many other spheres8,9 – it appears obscure how tobacco
smokers are suddenly construed as completely uninformed, irrational and powerless agents. This may imply that the awareness about the dangers of tobacco smoking exists with smokers, but that their ability to reduce their harmful behaviour is fundamentally hindered by their overwhelming state of nicotine dependence. This is a difficult issue, but likely only credibly claimed by smokers who have persistently tried (and failed) all possible treatment options. On the other hand, this may necessitate that the state (or the public health care system) actively encourage or require smokers to engage in dependence treatment (similar to ongoing initiatives in cancer prevention).

The final point to be made questions the logic and rationale of the tobacco suit argument for other contexts of law, risk and responsibility in the public health domain. For instance, it is empirically proven that the use of automobiles, handguns, skis or parachutes causes considerable amounts of death, illness and harms and costs. Let us comparatively illustrate the arguments for smoking and automobile use. Both would constitute contributing causes for many health conditions defined by the International Classification of Diseases (ICD). For both, the associated risks of mortality and disability are considerable, although the majority of people engaging in these activities do not die from directly related causes (for tobacco smoking, see ref. 12). Both activities cause harm to third parties (second-hand smoke, accidents involving pedestrians, environmental damage). For both, it appears commonsensical to assume that consumers are aware of the potential risks, harms and responsibilities of engaging in these activities. Nevertheless, these commodities are treated fundamentally differently by law and policy. While governments have embarked on a systematic campaign against cigarette producers, no such efforts seem likely against the auto industry. In the case of automobile use, the state, through law and regulations, aims instead to strike a balance between reducing harms and maintaining individual liberties (by imposing laws, regulations, prevention and education deemed most appropriate). For other activities mentioned posing risks to public health (like skiing), the lion’s share of responsibility for the risks that come with using the commodity lie with the consumer, and are covered through risk-protection mechanisms like voluntary insurance.

However, neither for cars nor skis would it seem legitimate to take manufacturers to court for the harms and costs that have resulted from their products and their regular use. It seems clearly assumed and accepted that driving is ‘risky business’ (although there are no stickers on cars, nor prevention campaigns telling drivers that “driving can kill you”); that the car-producing industry will not stop manufacturing or selling cars just because they kill users; that the state and individual are required to take precautionary measures to limit risks and harms; and that the ensuing harms and costs (from accidents) are a result of an inevitably remaining share of risk that is quietly to be carried by individual and society. Would it be desirable to change these assumptions and apply the ‘tobacco logic’ to all products and activities potentially dangerous to public health?

On the other hand, there are numerous services and programs aiming at the reduction of drug-use-related harms for which there is empirical evidence indicating improvements to overall public health or the health of specific populations (i.e., needle exchange services for injection drug users), yet they are not broadly provided by the public system. Should this be a basis for civil legal action against governments, in that the state is not providing optimal care and interventions, or where should the line be drawn? The above thoughts shall by no means deny the fact that smoking is an extremely harmful activity causing enormous amounts of disease and death, that tobacco corporations have made huge profits from it, and that a reduction of these harms and costs is in dire need. However, it appears that the general principles and balance of risk and responsibility, as they apply to the key agents of state, industry and citizens/consumers in other fields of ‘health’, have become peculiarly bent in the field of tobacco use. These shifts may or may not be legitimate and a sign of ideological, social and legal evolution in contemporary society, yet it seems that in the case of tobacco some fundamental reflection is in order.

The authors are smoke-free proponents. They have never been and are not funded or supported by tobacco industry, and do not wish these reflections to be read in any way as a legitimization of tobacco corporations’ information or business practices as relating to the harms of tobacco smoking. The authors’ views do not necessarily reflect those of the organizations to which they belong.

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Response to commentary on page 39.
Tobacco Industry Litigation and the Role of Government: A Public Health Perspective

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We welcome this opportunity to comment on issues raised by our colleagues on the role of government in tobacco industry litigation. Fischer and Rehm (pp. 7-8, this issue) argue that it is hypocritical and may be inappropriate for the state to initiate litigation against the tobacco industry. We propose a different ‘tobacco logic’: starting to smoke is rarely the rational act of informed adults, tobacco is not comparable to other consumer products, the government does not profit from tobacco, and litigation is a key component of a comprehensive tobacco control strategy.

Tobacco is a highly addictive drug, which most smokers begin to use as children or adolescents.1 Most beginners believe they will not become addicted, yet many quickly do,2,3 and most who continue to smoke as adults are addicted. While we agree that the public is much better informed than it used to be about the dangers of smoking, we do not believe that most beginners are well informed about their own susceptibility to addiction.

No other consumer product (including vehicles, and certainly skis) kills half its long-term users, when used exactly as intended by the manufacturer. Just as industrial polluters are held responsible for the environmental damage they cause, tobacco manufacturers should be held responsible for the societal damage they knowingly cause, as manifested by at least 34,000 deaths, 194,000 hospital admissions, and $2.68 billion in health care costs annually in Canada.4,5

The misperception persists that governments profit from tobacco. In fact, conservative estimates of health costs are at least double provincial government tax revenues for tobacco.6

Litigation can be viewed as one reinforcing component of a comprehensive strategy to control tobacco use that could provide a number of benefits to public health.6 Successful litigation would likely lead to price increases by the industry to cover costs, ultimately resulting in reduced smoking and health care costs. Litigation is a public health measure that, like water treatment, is not generally practicable at the individual level.

Tobacco litigation also helps to denormalize the tobacco industry and its products, a key element (along with prevention, protection, and cessation) in Canada’s National Tobacco Strategy. One of the major benefits of litigation in the United States has been the release of industry documents. Through the discovery process, we have learned about industry efforts to mislead the public, suppress research, and target youth and potential quitters.

Although the federal government and several provincial health ministries have made significant advances in tobacco control – including bans on advertising and promotion, protection from second-hand smoke, and graphic health warnings – we agree with Fischer and Rehm that other actions by government are not only warranted, but are urgently needed. The most critical of these, tax increases, can only be undertaken by government. The tax increases that were implemented in the 1980s resulted in a substantial decrease in the prevalence and level of smoking, particularly among youth. The illegal activities of the tobacco industry in orchestrating the smuggling that ensued have now been brought to light. Lack of progress on cigarette taxes and other key tobacco control measures, such as increased restrictions on smoking in public places and workplaces, is due to industry lobbying, lack of public concern, political ideology, and other political factors.

While the role of the state in public health and some of the concerns raised by Fischer and Rehm are worthy of further debate, we hope that such debate will not delay the implementation of measures that are known to be effective. Litigation can play an important role in holding the tobacco industry accountable for its contribution to the continuing epidemic of tobacco-related disease and death.

The opinions expressed in this article are those of the authors and not of their respective institutions.

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