Producer Liability for Damages Caused By the Use of Tobacco

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The fight against active and passive use of tobacco is one of the major health concerns of the present times.

In Europe there have been yet only a few legal suits against tobacco manufacturers, filed usually by non-governmental or health and social security organizations claiming repayment of expenses with the treatment of affected smokers. [1] [2] Private associations dedicated to prevent the use of tobacco and alcohol have recently won several judicial cases. For instance, the Service Nationel des Chemins de Fer [3], in France, has been convicted and forced to pay damages for failure to enforce the law that prohibits smoking in public places.

A French bank has also been forced to pay a considerable amount of money to the family of a bank employee, dead due to lung cancer, for disrespect of hygiene and security in the workplace regulations.

The French tobacco manufacturer SEITA have been found guilty [4] of persistent and serious omission to inform the smokers about the dangers of Gauloise cigarettes, and that it's cancerous and addictive properties and has been since forced inform the public about the risks of dependence and the serious health risks which are associated with the use of their products [5].

In the USA, although it is estimated that more than 40,000 Americans a year die of illnesses related to tobacco use and although thousands of individual claims have been filed against manufacturers the truth is that in only very few of these cases have tobacco companies been condemned to pay compensation for damages caused by the use of tobacco.

Governmental institutions, however, have been luckier and have successfully claimed reimbursement of the amounts expended by public health institutions in the treatment of tobacco related illnesses. The legal argument behind the successful claims is the alleged failure by tobacco manufacturers to supply the general public with important information regarding the dangerousness of the product. [6] [7]

American tobacco companies have been forced to pay such huge amounts of money under these claims that they have been forced to settle with the government. [8] In 1997, tobacco companies and the representatives of 29 states have signed a spectacular agreement that granted the tobacco industry relative judicial impunity. In fact, this agreement has forbidden class actions suits against tobacco companies and severely restricted individual claims.

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[1] Mark D. Fridy, «How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking…».
[2] *Cfr.* Elizabeth Brenner Drew, «The Quiet Victory of the Cigarette Lobby: How It Found the Best Filter Yet – Congress», *The Atlantic Monthly*, September 1965.
[3] In this suit, although the employer was found guilty of failure to enforce the law, no connection was found between the disease and the smoke inhalation in the work place.
4 One suit was filed in 1996 by Richard Gourlain, a lung and tongue cancer patient, claiming more than two and a half million francs as compensation for damages suffered. Also in 1996, the family of Suzanne Berger, who died of lung cancer, filed a suit against de French manufacturer, asking they be condemned to inform the public about the grave dangers associated with the use of their products and claiming mote than a million francs as compensation.
[5] Cf. ISABELLE DESBARATS, «Le droit à réparation des victimes directes du tabagisme», *Recueil Dalloz*, 1998.
[6] Robert L. Rabin, *Tobacco Tort Litigation in the United States*.
[7] *Cfr*, ,*State of Texas versus The American Tobacco Company e.a.*, *State of New Jersey versus R.J. Reynolds Tobacco Company e.a.*, e *State of Utah versus R.J. Reynolds Tobacco Company e.a.*.
[8] Cf. American Council on Science and Health's press release, 27/05/1997, (*Public-Health Scientist Urges Attorneys General: Don't Sign 'Global Settlement' Granting Cigarette Companies Immunity from Lawsuits*).

In turn, the tobacco industry have agreed to apply 250 billion dollars, in 25 years, to the benefice of the victims of tobacco use and of numerous heath organizations, have renounced to advertise in public panels, the Internet and sporting events and have agreed to pay bigger amounts in tax.

A part of the American public have already claimed, however, that this agreement has created a new kind of tax – which has been termed *taxation through litigation* [9] – because the expenses will be imputed to smokers, to the ratio of about 45 cents per packet.

On the ethical plan, however, one cannot help thinking that perhaps these civil liability claims against tobacco manufacturers imply a form of infantilization in our society. Our legal system may become too unstable and unpredictable, over-penalising (as is the case in the USA), and we will turn into either victims or culprits [10].

But, in the purely legal plain, is it or is it not conceivable that direct victims of the use of tobacco be able to claims repayment for damages against the manufacturers?

The first problem comes with identifying the correct type of liability in question. Is it civil liability or does it arise from the existence of a contract?

In any case, the actual verification of the producer's liability will be subordinated to a triple factor: the existence of damage, behaviour imputable to the manufacturer and a causality relation between this behaviour and the damage.

And regarding producer liability, there is an important distinction to be made between a *defective product* and an *inherently dangerous product* [11]. A *defective product* is, by definition, a product that presents security defects, turning it impossible or improper for the use it was originally conceived.

Therefore, the victim can invoke the violation of the manufacturer's guarantee. The liability of the producer and of other agents in the commerce chain is usually thought to be objective and therefore the victim will only have to demonstrate the defect of the product and its' direct relation to the damage [12]

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[9] Cf. Peter J. Ferrara, «No Taxation through Litigation», *Independence Issue Paper*, 19/07/1999.
[10] *Idem, ibidem*.
[11] *Idem, ibidem.*
[12] *See Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. This Directive establishes the principle of liability without fault applicable to European producers. Where a defective product causes damage to a consumer, the producer may be liable. Producer is taken to mean: the producer of a raw material, the manufacturer of a finished product or of a component part; the importer of the product; any person putting their name, trade mark or other distinguishing feature on the product; any person supplying a product whose producer or importer cannot be identified. Where two or more persons are liable for the same damage, they shall be liable jointly and severally. Proof of damage A product is defective where it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: the presentation of the product; the reasonable use of the product; the time when the product was put into circulation. The injured person carries the burden of proof. He must prove: the actual damage; the defect in the product; the causal relationship between damage and defect. However, he does not have to prove the negligence or fault of the producer or importer. The producer is not recognized as liable if he proves that: he did not put the product into circulation; the defect appeared after the product was put into circulation; the product was not manufactured to be sold or distributed for profit; the product was neither manufactured nor distributed in the course of his business; the defect is due to compliance of the product with mandatory regulations issued by the public authorities; the state of scientific and technical knowledge at the time when the product was put into circulation was insufficient to identify the defect; the defect of a component was caused during the manufacture of a final product. When the injured person is at fault, the producer's liability may be reduced. The Directive applies to damage: caused by death or by personal injuries; caused to an item of property intended for private use or consumption. However, Member States may set a limit for the total liability of a producer in the case of death or personal injury caused by identical items with the same defect. In addition, the Directive does not apply to injury or damage arising from nuclear accidents covered by international conventions ratified by the Member States.*
The injured person has three years within which to seek compensation. This period starts from the date on which the injured person became aware of the damage, the defect and the identity of the producer. In addition, the producer is no longer liable ten years after the date the product was put into circulation.
No contractual clause may allow the producer to limit his liability in relation to the injured person. National provisions governing civil liability still apply – www.europa.eu.

Inherently dangerous products, on the contrary, are those which, to be able to fulfil the function their where originally conceived for, cannot help being dangerous. The product is dangerous regardless the existence of any defect and the manufacturer must take what measures it can to prevent this danger – which is inevitable or which will arise in known specific circumstances does not attempt against the user. In this case, the product is dangerous before being harmful and we can therefore conclude that the threat of the danger constitutes, in the last analysis, the true difference between an inherently dangerous product and a product that is defective and – because of this – can be dangerous.

Is tobacco an inherently dangerous product? The World Health Organization has conducted studies that more than 4 million people die, each year, of illnesses related to the use of tobacco and scientists have successfully identified in all tobacco brands the product responsible for human cancer of the lung, benzopyrene, which causes a malignant mutation in lung cells. Reports recently made public also seem to demonstrate that it is possible to manufacture safer cigarettes, but the tobacco industry have systematically ignored failed to reduce the amount of nicotine in tobacco, allegedly because it would be too expensive.

Moreover, reports delivered to the United States Congress and to representatives of the largest manufacturers and distributors of tobacco more than twenty years ago already showed that cigarettes were the leading cause of fatal fires in the United States, accounting for twenty-five per cent of deaths (thousand Americans per year) and injuries (four Americans per year) caused by fires and annual losses of more than four billion dollars. The same studies proved possible to manufacture cigarettes safer as regards the risk of fire, using thicker and less porous tobacco paper. Here is an example of a material barrier that the manufacturer has a duty to create against the natural dangerousness of the product. [13]

This constitutes, no doubt, illegal behaviour: the agent is guilty of violating the obligation to inform the public and of creating every possible material obstacle to the dangerousness of the product.

We know, however, that regulations advertising have long predicted this problem, on the one hand, forbidding tobacco advertising and on the other hand imposing the inclusion of information for the smoker, both generic (tobacco seriously damages your health, smoking causes cancer, etc..) and a specific (the list of minimum quantities of certain substances that make up the product) in the package where the product is presented. This information does not however truly meet its' purpose unless it complete and intelligible and is not made ridiculous or uncharacteristic.

Tobacco is therefore, in face of the laws definition of defect, a dangerous and not a defective product - this is the prevalent opinion in Europe since the instatement of Directive 85/374, and in the United States since courts began to impose restrictions on product liability claims whenever it can be demonstrated that the products in question are inherently unsafe.

Liability is, by consequence, not objective and must depend on proven guilt. The producer must be found guilty of violating the obligation to inform the public of the dangerousness of the product and of failing to do everything technically possible to prevent damages.

How can one prove, however, the direct relationship between such guilty behaviour and the damage generated?

There are in fact two distinct theories: one, called the equivalence of conditions theory, states that a factor causes damage when the damage would not be produce were it not for the verification of that factor. A factor is considered causal, therefore, simply when it exists in the chain of events that leaded to the damage. This theory allows us to state that the manufacturer liable simply because it failed to compel with the information obligation. The events leading to the damage would not have been produced if the manufacturer had correctly informed the smoker of the inherent risks of the product and, therefore, this factor is causal to the damage that subsequently occurs.

Another theory, however, makes it more difficult to demonstrate tobacco manufacturer's liability. The so called theory of adequate causality considers only those factors in the chain of events that were capable of causing the damage, disregarding all other factors, excluding, therefore, natural, accidental or unexpected circumstances and all other factors that have would not directly caused the damage. Therefore, a simple failure to inform is not, according to this theory, adequate cause of the damages [14].

[13] Cf. «Fire Safe Cigarettes: The Tobacco deal Ignores Injuries and Deaths from Fires Caused by Cigarettes», 02/02/98.
[14] Cf. ISABELLE DESBARATS, «Le droit à réparation…».

Other factors that can exclude producer liability include:

- The acceptance of the risk by the victim, which constitutes a form of consent;
- The victim's previous health problems or predispositions; and
- The concurrence of the victim's with the manufacturer's guilty or illicit behaviour.

And it is surely arguable that at least two of these excluding factors exist in the case of tobacco. In fact, the victim smokes because it chooses to, therefore accepting the risk and being as guilty as the manufacturer is of negligent behaviour. And if a victim has previous health problems, the damage is consequently aggravated and the manufacturer, arguably, cannot be made liable – or, at least, completely liable - for this. The causality relation will be, in these cases, excluded in some legal systems (England and Germany, for instance). In other systems, like the Portuguese, the causality is not excluded but the amount of the compensation is largely reduced.

But is there real consent on the part of the cigarette smoker? Can the tobacco industry really claim the user fully understood and accepted the risks of using the product and, therefore, suffered the damage voluntarily?

Human involuntary action is so rare that to accept the existence of consent in such cases would mean that non-liability or reduced compensations would be the rule instead of the exception.

The tobacco industry claims that they are not liable, because the victims of the damage caused by tobacco behave negligently, by direct action, because they should to use the product, by omission, because they do not take the necessary medical precautions and because they are not duly diligent in the search of information.

Tobacco victims claim that the industry is liable because it fails to compel with information obligations [15] [16] and because it does not take the necessary steps to reduce the dangerousness of the product. And it has been added that tobacco is made addictive [17] on purpose by the manufacturers, to increase sales, which, if proven, would imply not only civil but also criminal liability.

We have to conclude that, although there is some form of consent and of concurrence of guilty behaviour on the part of the victim, the responsibility of the tobacco industry cannot be excluded. In fact, tobacco manufacturers profit large billions from the sale of a highly harmful product and must be made liable for any failure to inform and publicize, in an adequate manner, the dangers of the product or to compel with the elementary obligations of prudence and diligence and security.

Although every individual must be made responsible for its own behaviour, the questions of false publicity, glamour publicity and the use of tobacco by children and teenagers cannot be ignored. And we cannot ignore, also, the fact that tobacco addiction has been classified as a real illness by the World Health Organization, an one that causes psychological and physical dependence that requires medical and therapeutically help [18].

Almost every country recognizes the need to deal with this problem and the difficulty in making the producer liable for damages, and laws must continue to be created worldwide to prevent the use of tobacco, protect passive smokers, help smokers that want to break the habit, protecting children and teenagers, regulating or completely prohibiting tobacco advertising, carefully regulating manufacturing and selling conditions and heavily taxing tobacco as a mean of reducing its' use.

[15] «Product Liability Concerns», *The Cigarette Papers*.
[16] Cf. «Dark Secrets of Tobacco Co. Exposed», *The Y-1 Papers.*
[17] Cf. « *Don't you hate being lied to?*».
[18] «Portugueses ignoram prevenção do tabaco», in Jornal de Notícias, 01/05/2000.

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