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Suing the Tobacco Companies in U.S. and Japan

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by
Stephen, D. Sugarman
Agnes Roddy Robb Professor of Law UC Berkeley
Guest Professor Kyoto University Law Faculty
Visiting Scholar Kobe University Law School

My focus will be on lawsuits for money damages brought against tobacco companies by smokers—or sometimes brought by the families of smokers who have died. In the U.S. we call these “tort” claims, or product liability claims. In most of the rest of the world, these cases fall under the general heading of civil liability.

The first thing to emphasize is that smokers have filed and continue to file product liability lawsuits, even though these cases have so far been almost completely unsuccessful in obtaining financial compensation for tobacco victims. In the U.S., smokers have been suing the cigarette manufacturers since the 1950s. Of the hundreds of cases that have been brought, most have eventually been abandoned without recovery in the face of the ferocious defense put up by the tobacco companies and their unified policy of never settling these claims for partial compensation.¹⁾ Many cases have been tried, but (so far as I can tell) in all but four the claimants have lost. In one of those four, the jury, rather bizarrely, found for the claimant but awarded no damages,²⁾ and in the other three cases (discussed below) the claimant’s victory was overturned on appeal. Nonetheless, smokers keep suing, and one prominent Florida lawyer recently claimed to have 150 cases in various stages of litigation.

For a long time, this litigation seemed confined to the U.S., but in recent years lawyers in other countries have started down the same path. Although I don’t know of any yet successful product liability cases in other countries, there now appear to be cases in process from countries

1) Gary Schwartz, “Tobacco Liability in the Courts” in *Smoking Policy: Law, Politics and Culture*, R. Rabin and S. Sugarman, eds., 131 (New York: Oxford University Press 1993).

2) *Horton v. American Tobacco Company* (Mississippi 1990), discussed by Schwartz, *supra*, at 144.

as varied as Spain, Australia, Panama, France, and Japan.³⁾ At present, at least two cases are on file here, one in Nagoya and the other in Tokyo.⁴⁾

Lawyers keep bringing these cases for what I sense to be a variety of reasons. Some think their claimant presents more favorable facts. Others think that the law is changing (or will change) in their favor. Still others believe that if public disapproval of the tobacco companies grows, the law will be applied more favorably to their clients. Finally, some seem more interested in using the courtroom, and its accompanying disclosures and publicity, as one of several forums through which broader tobacco-control policies are advanced.

To be sure, if these cases were ever to succeed in great numbers, there is the prospect of great wealth for anti-tobacco lawyers, at least in the U.S. and perhaps elsewhere. But for now, the lawyers are mainly out of pocket a great deal of money for their time and expenses, and with little to show for it.⁵⁾

Still, perhaps the tide is beginning to turn. A Florida lawyer named Woody Wilner recently won two jury trials in lawsuits by smokers against tobacco companies, and his clients were awarded substantial sums. For example, one claimant obtained a verdict for almost a half a million dollars. Nonetheless, the tobacco companies have successfully appealed both cases. In one, the appeals court ruled that the victim had allowed the statute of limitations to lapse before filing his case, and hence his claim should have been dismissed at the outset. In the other, the appeals court ruled that the tobacco defendants were correct in initially objecting to the county in which the case was brought, and this will probably lead to a new trial elsewhere.⁶⁾

On the other hand, maybe sometime the claimant's lawyer and the trial court will get all the technical steps right, and these two cases show that, with the right evidence, American juries can be convinced to blame tobacco-related injuries on the tobacco companies. Attorney Wilner has said that he believes he has been helped by recent disclosures from tobacco industry secret files that many believe have badly damaged the

3) See Geraint Howells, "Tobacco Litigation in the U.S.—Its Impact in the United Kingdom," 22 Southern Illinois University Law Journal 693 (1988).

4) See "Smoking in Japan—1997 Profile" in TOPICS in Japan, Tobacco Problems Information Center (TOPIC), August 7, 1997, Bungaku Watanabe, Director.

5) See generally, Robert Rabin, "Institutional and Historical Perspectives on Tobacco Tort Liability" in *Smoking Policy*, supra at 110.

6) Wilner's two cases are *Carter v. Brown and Williamson* and *Widdick v. Brown and Williamson*. For updated information about U.S. legal developments, see these websites: www.tobacco.neu.edu and www.smokescreen.org.

reputations of these companies. These formerly secret documents are not only used in the lawsuits themselves, but also they are described and discussed in the mass media, so that ordinary citizens who sit on juries may come with quite different attitudes than they might have had in the past.⁷⁾ Of course, trying these cases before juries is almost uniquely an American phenomenon. In pretty much all of the rest of the world, including both Japan and other so-called common law nations, these cases would be tried by judges alone.

Therefore, this seems the right point to turn to the legal merits of these cases. As an initial matter, it is important to say something about "causation" and its proof. For decades tobacco companies, in litigation and other public documents, maintained that tobacco simply did not cause cancer, heart disease, and the like. Or, at least they asserted that proof of a causal connection did not exist.⁸⁾ This assertion is contrary to a huge number of studies, and lately at least some top U.S. tobacco company executives have finally conceded that cigarettes are indeed responsible for a large number of premature deaths, for example, due to lung cancer.⁹⁾ But not every tobacco company has made this concession. Some continue to insist that, although epidemiological studies suggest that tobacco is an important risk factor for cancer, heart disease, and the like, since no conclusive scientific explanation of exactly how cigarettes produce these diseases has been presented, the causal connection remains unproved. By holding this position, tobacco leaders put themselves in a small minority, at least in the U.S. There, for example, smokers themselves overwhelmingly believe that smoking causes lung cancer. Indeed, smokers believe that the risk of getting lung cancer from smoking all your life is actually greater than it is. But since they underestimate the risk of heart disease, for example, overall they seem to have the risk from smoking about right. That is, about half of lifetime smokers will eventually die from smoking.¹⁰⁾

However, in many lawsuits, merely proving generally that tobacco causes disease (what we call "general causation") doesn't really get individual claimants very far. After all, in all legal systems individual victims

7) An important compilation of some of these papers may be found in Stanton A. Glantz, et. al., *The Cigarette Papers* (Berkeley: University of California Press 1996). Many more documents may now be found on the worldwide web; a good starting point is www.tobacco.org.

8) Schwartz, *supra*.

9) See, e.g., the testimony of RJReynolds CEO Steve Goldstone before the Commerce Committee of the U.S. House of Representatives on January 28, 1998 See www.tobacco.org.

10) W. Kip Viscusi, *Smoking: Making the Risky Decision* (New York: Oxford University Press, 1992).

have to prove that their own injury was caused by their own smoking. Actually, for those with lung cancer, it may well be enough simply to prove that you were a regular smoker. This is because, although it is possible to get lung cancer from other source (and this claimant might possibly have done so), the vast majority of lung cancers are indeed brought about by smoking.¹¹⁾ After all, in civil litigation victims are usually only required to prove facts "by the weight of the evidence" and not beyond any possible doubt. To be sure, the tobacco companies defend some lung cancer cases by pointing to alternative causes of lung cancer which might have injured this specific claimant—for example, that he worked with asbestos or similar lung-damaging material. Hence, some lung cancer claimants present easier cases than do others on the causation issue.

But the story is quite different if you are a smoker and suffer heart disease. Although the scientific community is well persuaded that vast numbers of smokers die from heart disease because they smoke, it is also true that a large proportion of smokers who suffer heart disease do so for reasons unconnected to their smoking.¹²⁾ Hence, general causation evidence will usually be quite insufficient in these cases, and the claimants will have to do what the tobacco companies say they cannot do—that is, prove that their heart disease was caused by their smoking rather than something else. For this reason, most of the cases brought to date have been cancer cases, even though the U.S. Surgeon General says that the annual U.S. death toll from smoking includes about the same number of heart disease victims as lung cancer victims. This reality ought to make one skeptical about whether the litigation system could ever provide individualized compensation to everyone with a tobacco-related disease.

Causation, in any event, is only part of the story. Even if smoking brought about your injury or death, this alone does not necessarily demonstrate that the tobacco companies should provide compensation—that is, that they are legally responsible. This brings me to a discussion of the possible substantive bases of liability for the tobacco industry.

In the U.S., for the past 35 years, there has been much written in the scholarly literature about the idea of "enterprise liability"—and quite a bit of this writing has been in support of the concept.¹³⁾ Basically, the idea of

11) U.S. Department of Health and Human Services, *Smoking and Health: A National Status Report: A Report to Congress, Second Edition*, 37-43 (Washington DC: Office on Smoking and Health, Centers for Disease Control 1990).

12) *Ibid.*

13) See, e.g., Guido Calabresi, *The Costs of Accidents* (New Haven: Yale University Press 1970) and Virginia Nolan and Edmund Ursin, *Understanding Enterprise Liability* (Philadelphia: Temple University Press, 1995).

enterprise liability for product injuries starts from the notion that proof of causation should be enough to establish liability—that is, if the manufacturers of products are going to profit from their sale, then those companies have a duty to compensate those people who are injured by their products. Put differently, the costs of accidents should be one of the costs of manufacture—and, like labor and capital costs, should be incorporated in the price of the product.

While some scholars make this argument on ethical grounds, most of the argument for enterprise liability is based on policy reasons. Let me put forward what I see as the three major policy arguments for enterprise liability as they would be made in the context of cigarette smoking.¹⁴ One is that enterprise liability presents a good mechanism for providing insurance to the unlucky ones who later turn out to be injured by a product. In other words, all smokers pay extra when they smoke, so that the 50% who later get sick will have their losses covered. A second argument is that if tobacco companies have to compensate all those who suffer from tobacco-related diseases, they will have a tremendous incentive to develop a safer cigarette. A third argument is that if cigarettes are forced to carry their true cost in their price (including the cost of disease), this will cause desirable changes in consumer conduct. Some will realize that smoking is more dangerous than they had imagined and will quit, whereas others, especially children, will not start in the first place. Otherwise, without full cost internalization, smokers will be purchasing cigarettes at a subsidized price.

In fact, however, no American court, and so far as I know, no court in any other wealthy nation, has on its own embraced this sweeping notion of enterprise liability. In some countries, legislation has created enterprise liability for certain accidents to innocent bystanders, such as nuclear power plant accidents—but nowhere for tobacco-related disease. Perhaps this is merely a matter of politics, and in many nations the tobacco companies have traditionally been politically powerful indeed. But I think it is more than that. The logic of enterprise liability, after all, applies well beyond tobacco products, and most public officials, including judges, in the end appear unpersuaded by the arguments on its behalf.

The insurance argument, for example, is perhaps undermined by the fact that the civil litigation system is administratively so expensive to operate—making the “insurance” provided very costly, and in the tobacco context this “insurance” is probably something that smokers would not

14) See generally, Jon D. Hanson and Kyle D. Logue, “The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation” 107 *Yale Law Journal* 1163 (1998).

want to pay for. If nothing else, in most wealthy countries their health care will be paid for anyway. As for the safety incentive, many believe first that there already exist tremendous market incentives to produce a safe cigarette, were that really possible, and second that sweeping enterprise liability unfairly imposes legal burdens on those who sell products that cannot be made safer. Finally, many believe that the best way to confront smokers with the dangers of smoking is not through cost internalization, but instead through effective warnings.

Some favor enterprise liability for tobacco products because they believe that smokers are not paying their way—both because their smoke harms others and because they use a disproportionate share of health care resources. But this is an empirical question to which some scholars have given the opposite answer. They say that smokers already more than pay their way because, first, they pay high excise taxes on cigarettes and, second, they die early and so do not claim their share of public retirement pensions and nursing home services.¹⁵⁾

In other words, legal regimes have been as unwilling to impose sweeping strict liability on cigarette companies, as they have been unwilling to impose it on auto companies, airlines, pharmaceutical drug manufacturers, alcoholic beverage makers, and the like. Put differently, for business in general, the law continues to require, not just that the product causes harm, but also that there is something wrong with the product. In legal terms, the product must be “defective.”

As the law of product liability has developed over the past 35 years, “defective” products have been understood to come in three varieties.¹⁶⁾ One is the “manufacturing” defect. Here we are talking about a case in which an individual product deviates from what the consumer expects, and from what the manufacturer intends, and does harm. This could be a motor vehicle whose wheel collapses, or a loaf of bread or a bowl of rice sold with a dangerous pin in it, or a drug into which some poisonous substance has found its way before leaving the factory. In most wealthy countries, manufacturers of products like these are liable to victims without the victims having to prove that the manufacturer’s employees did anything specific in a careless way—although often the accident itself shows that there must have been negligence on the assembly line or in the product inspection room.

15) See, e.g., Willard C. Manning, et. al., “The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?” *Journal of the American Medical Association* 261 (1989).

16) Restatement of the Law (Third) of Torts: Products Liability, section 2 (Philadelphia: American Law Institute 1998).

This is not the basic problem with cigarettes, however. Occasionally, a case arises in which someone has smoked a "bad" cigarette and is injured, and those victims (when their proof is clear) should win their case without much trouble. But for the overwhelming majority of smoking victims, the problem is different. Their cigarettes were made exactly as the manufacturer intended.

In these much more important types of cases, in which a lawsuit attacks the manufacturer's entire product line, American courts have basically required victims to prove that the product is defective either in its "design" or in its "warning." And, in all of the U.S. states (where civil liability is a matter of individual state law, not federal law), both "design" and "warning" defect cases effectively require proof of fault. That is, claimants must show that, when the defendant chose to put the product into the market, it either knew or should have known either (1) that the product was more dangerous than it warned about, or (2) that the product could reasonably have been made safer than it was. I should also add that just because a product could be designed more safely, that is not enough to make it defective if, for example, the safety improvement would make the product enormously more expensive or a great deal less productive for its intended use. In any event, these are the two main bases on which tobacco products must be legally attacked—in the U.S., and in most other places. In the end, it is a matter of proving manufacturer fault. There is simply no strict liability merely for being in business.

Before discussing how the tobacco cases come out (or should come out) under these two accepted legal bases for liability, I want to take a moment to cover one side point. Some people have claimed that tobacco products are different from most other products and should be treated differently by the law. As some tobacco-control advocates often put it, tobacco products are the only consumer products that will inevitably kill if used exactly as directed. This suggests that perhaps cigarettes could be found to be defective products simply because of their danger—that is, even if there is no safer cigarette available and even if users are well warned of the dangers (two issues to which I will return shortly). But courts so far seem unwilling to use product liability law in this way. The implication of such a finding is that cigarettes simply should not be sold, because that is what it means to find that a product is defective. That is, as the law has developed, a "defective" product is one in which, in its current form, is unacceptable. Usually that means adding more warnings or changing the design. But if danger alone made a product defective, it would imply the duty to withdraw the product altogether.

There is one famous case from the state of New Jersey in which the

State Supreme Court appeared to have said just that.¹⁷⁾ A backyard swimming pool about one meter deep was proving to be so dangerous, despite warnings not to dive head first into it, that the Court held the manufacturer liable and, in effect, said that the product should be taken off the market. But this case has not been followed by other U.S. courts, and later the New Jersey legislature largely overruled its own Court with a new product liability statute.¹⁸⁾ The latest version of the Restatement of Torts (Third) from the American Law Institute pretty much takes this same position.¹⁹⁾ It leaves a tiny space for a court to find a product utterly without any social benefit and to be condemned as defective even if there is no alternative and the dangers are clear. But experience shows that, in practice, this won't happen. If no regulatory agency has condemned the product, then the courts are going to leave it to the market, that is to ordinary consumers, to decide whether they want the product or not despite its dangers—especially for products like cigarettes that mainly (although not entirely) harm users rather than third parties. I think this result is explained both by America's general resistance to Paternalism and by the fear the judges have that certain dangerous products will be condemned by juries that ought not be. For example, I drive a soft top convertible, knowing that I could be injured badly if the car turns over. If "defect" could be based on danger alone, a jury might conclude that this sort of car is too dangerous to be on the road. Of course, other legal systems might take a different position on whether to hold product makers liable on the basis of danger alone. But, so far, I don't see the laws of other nations moving in that direction.

This brings me to the narrower grounds that are realistically now available to smokers who sue the tobacco companies—warning and design defect claims.

In my judgment, the design defect strategy is not a promising one. The public health community has long insisted that there is no such thing as a safe cigarette. For example, in Japan, virtually all cigarettes that are sold are filter-tipped, but in the U.S., many are not. Are those unfiltered cigarettes defective in design because they are more dangerous—perhaps because they cause the smoker to breathe in a higher level of "tar" that would otherwise be captured by a filter? The traditional public health answer has been that filtered cigarettes are no safer. The argument seems

17) O'Brien v. Muskin, 94 N.J. 169 (1963).

18) For a discussion of the new statute and its impact in a cigarette context, see Dewey v. RJ Reynolds Tobacco Co., 121 N.J. 69 (1990).

19) See generally, Thomas C. Galligan, Jr., "A Primer on Cigarette Litigation Under the Restatement (Third) of Torts: Products Liability," 27 Southwestern University Law Review 487 (1998).

to be that smokers still take smoke into their lungs, that tobacco is still being burned near the smoker's mouth, that smokers commonly defeat the filter's potential effectiveness by holding their fingers over the tiny holes on the outside of the filter, and that many smokers inhale filter cigarettes more deeply.

This last argument also explains why low-nicotine cigarettes are thought to be no safer—and possibly even more deadly. The idea is the smokers need their familiar level of nicotine and so will defeat the apparent objective of low nicotine brands by drawing more smoke into their lungs.

Some years ago in America, the tobacco giant RJ Reynolds tried to market a brand called Premier that was essentially a non-cigarette that looked like a cigarette. It contained the nicotine and flavoring that smokers were used to and a tiny amount of tobacco. But it didn't really burn. Rather it glowed, and hence created no smoke. Possibly this product would have been considerably safer than conventional cigarettes, although no one really knows that, because smokers apparently just didn't like it. A few tried it, but most quickly gave it up. Soon, RJ Reynolds abandoned the product. In short, as marketed, Premier did not appear to be a viable, alternatively-designed product. It is, perhaps, better understood as a nicotine-replacement device—like the nicotine gum and nicotine patch products that are fairly widely in use in the U.S. and now coming into the Japanese market. But in terms of product liability law, it does not appear that cigarettes are likely to be deemed defective in design because they aren't constructed in the way Premier was.

Having said this, I want to acknowledge that lately in the U.S. talk of "safer" cigarettes is back in the news. Some people are claiming that the major tobacco companies long ago conspired not to develop or market such products, with the implication that they knew about, or could easily have developed, them. Moreover, it appears that the possibility of a safer cigarette was part of the evidence introduced in at least one of the recent Florida cases that was initially won at the trial level. Hence, it is possible that we will see more lawyers using this argument in the future. For now, however, I put the design defect case aside as speculative, and I note that the Japanese cases now underway do not appear to rely on this theory.

This brings me then to the main basis upon which nearly all individual cigarette litigation to date has been based—the failure to warn. Interestingly enough, in the U.S. cases, there are two quite different aspects to the defective warning claim, and I will take them up in turn. The first concerns warnings about the direct dangers of smoking. The second concerns warnings about the addictive nature of cigarettes.

With respect to warnings that cigarettes cause cancer, heart disease and the like, I will argue that, in certain respects, Japanese claimants appear to have far stronger legal cases than do their American counterparts.

In 1965, the U.S. Congress provisionally required warnings to be placed on cigarette packages and tobacco ads, and in 1969, the warnings were strengthened somewhat and the requirement made permanent.²⁰⁾ In several American cases, the claimants have argued, however, that these required warnings were legally inadequate for purposes of civil liability. They asserted, in effect, that the Congressionally-mandated warnings could be treated by the states as merely establishing a national minimum. But, they argued, state tort law could impose stronger warnings on the companies. However, in a case called *Cipollone*, the U.S. Supreme Court disagreed.²¹⁾ It concluded that the 1969 Congressional amendments "pre-empted" the field, preventing the states from permitting product liability claimants to win their case on the ground that the federal warnings were insufficient. This means that ordinary warning defect cases will fail in the U.S. with respect to warnings made in 1969 and after. And, increasingly, of course, smokers will have begun smoking after this date. (The Supreme Court did leave room for claimants to prove fraud, but that will be much more difficult.)

Nevertheless, in several cases the argument has been made that the tobacco companies should have warned the smoker of the dangers of cigarettes even before 1964, when, of course, there were no warnings on the packages. That was the year that the U.S. Surgeon General issued his famous Report that officially declared the deadly nature of cigarettes. These claimants argue that the tobacco companies knew of the dangers of smoking long before the Report was issued and should have told their customers. One problem with these cases in the past has been proving precisely what the companies knew before 1964. Recent disclosures from the companies' files may make that easier, however. At present, of course, there are many living smokers who started smoking before 1964. Indeed, some are still under 50 years of age, although their numbers will significantly decline over time. But even proving that the companies knew of the dangers of smoking before 1964 is not all that the victims must prove.

It is a central proposition of American tort law that the victim must show not only that the injurer did something wrong, but also that this

20) The Public Health Cigarette Smoking and Advertising Act of 1969, 15 U.S.C. sections 1331-1340 (1998).

21) *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

wrong caused the victim's injury. In warning cases, this means that the victim must show that the warning would have made a difference—that is, had he been warned, he would have heeded the warning and would not have been hurt. In most cases, this is not difficult to demonstrate. Indeed, it is often virtually assumed to be true. For example, if the product maker fails to warn users that those with certain allergies will be made ill by its product, courts broadly assume that victims who know they have such allergies would not have used the product had they been properly warned.

Sometimes, however, the warning would have made no difference. An example may be taken from the field of informed consent to medical treatment. Suppose that the patient properly complains that the doctor failed to warn her that the surgery she agreed to might cause her to lose the use of her arm. Surely, patients are entitled to know of this risk before they agree to surgery. Yet, suppose the doctor accurately replies that, because the patient would have died without the surgery, clearly she would have agreed to it even had she known of the risk of losing an arm. On these facts, the failure to warn about the risk of losing an arm made no difference, and so the doctor is not liable for the consequences of the lost arm.

A similar problem confronts lawsuits by American smokers who started before 1964. Simply put, because they did not quit smoking either when the Surgeon General's Report was issued or when the warnings went onto the packages and the ads, how can they claim that an earlier warning would have made any difference to them? In other words, analogously to the doctor in my example, the tobacco companies can argue that these people would have become smokers even if warnings had always been given.

In order to combat this claim, it seems to me that the smoker is now forced to put forward the addiction argument. That is, I believe the claimant must assert that he never would have started smoking had he known of the dangers at the outset, but by the time he learned about those dangers he was addicted and was unable to quit. Proof that he tried and failed would certainly help here.

Although this argument should be effective if it is believed, juries in several U.S. cases seem to have been unpersuaded by the addiction claim. Even though the Surgeon General says the nicotine in cigarettes makes people addicted,²²⁾ those juries seem to think that smoking is basically

22) For a thorough discussion of the nature of nicotine addiction, see National Institute of Medicine, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths*, B. Lynch and R. Bonnie, eds. 29 (Washington DC: National Academy Press, 1994).

voluntary. This sort of thinking, in effect, blames the smoker for his own injuries.

Japanese claimants, by contrast, may not need to prove addiction. First of all, the Ministry of Finance has recently ruled that the warning required in Japan is only a minimum, and that the tobacco companies are, and always have been, free to give stronger warnings.²³⁾ Assuming that the Japanese courts accept this conclusion, Japanese claimants will not face the pre-emption problem that U.S. claimants face.

Second, the Japanese warning is incredibly mild, and in important respects affirmatively misleading.²⁴⁾ Although smokers are warned that cigarettes cause harm, the warning seems to tell them that they don't have to worry about this harm if they don't smoke "too much." Tobacco control advocates around the world find this astounding. This warning conveys the idea that smoking is like drinking, and that moderate smoking is quite all right. But, that conclusion surely would be rejected by most neutral scientists in Japan and elsewhere. Moreover, no indication is given in the Japanese warning as to what counts as "too much." Certainly, if someone is thinking about an analogy to alcoholic beverages, he could smoke a pack a day and consider that not at all excessive—even though scientists will testify that smoking that much is very dangerous.

Hence, in the Japanese cases, the claimants might well be able to prove both (1) that the cigarette companies have long known that the warning they provide in Japan is wholly inadequate, and (2) that if a proper, stronger warning were given, they never would have started smoking in the first place. Unlike the tobacco manufacturers in the U.S. cases, the defendants in the Japanese cases are not in the comparable position of being able to point to the smoker's failure to quit in the face of a strong warning.

To be sure, Japanese claimants today are less well positioned to argue that the manufacturers seduced them to start smoking when children. Japan Tobacco ("JT") was almost the monopoly provider of cigarettes when nearly all of the smokers who are currently ill from smoking took up their habit, and JT engaged in rather little advertising in those earlier days. But while evidence about tobacco advertising may help win the sympathy of American juries, in my view it is not an essential element of the legal claim.

23) Interview with Dr. Yumiko Mochizuki-Kobayashi, Ministry of Health and Welfare, Tokyo, Japan September 18, 1998. (Dr. Mochizuki is the Ministry of Health and Welfare's key professional working on tobacco control policy).

24) See generally, Mark Levin, "Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan" 8 *Stanford Law & Policy Review* 99 (1997).

Japanese claimants who began smoking before 1964 are also in a stronger position than their American counterparts. As I explained earlier, the U.S. claimants have to show that the companies knew of the dangers of smoking before the Surgeon General issued his report. But the Japanese claimants ought to be able simply to assert that JT should have properly warned them after 1964 when all large tobacco companies worldwide clearly became aware of the U.S. Surgeon General's Report. Indeed, for these purposes, it is to the claimant's advantage to assume that he is not addicted to cigarettes, and that he has only continued to smoke because of his failure to understand their true dangers.

Of course, Japanese courts could decide that, even if the warnings on cigarettes sold in Japan are completely inadequate, smokers already know how dangerous cigarettes are from other sources (such as from tobacco education programs in schools), and hence they don't really need stronger official warnings. But such a conclusion would be very harsh, in my view, and would reflect a degree of sympathy to wrong-doing defendants that many would find quite shocking. Moreover, the underlying evidence seems to be that Japanese people indeed do not believe that smoking is as dangerous as it is.²⁵⁾ I note that a huge number of Japanese doctors still smoke, whereas only a tiny number do in the U.S.

Japanese claimants these days generally have yet another advantage over their American counterparts. Even if they switched brands during their smoking career, they probably switched from one JT brand to another. Even now JT controls more than 75% of the Japanese market.²⁶⁾ In the U.S., by contrast, smoker claimants often face another difficult causation problem. They smoked brands of different manufacturers during their lifetime and can't really demonstrate that it was the cigarettes of one company, rather than another, that caused the disease they now have.

Whether this means the Japanese claimants will win their cases more easily than American claimants have is another matter, and I will not try to predict the future here. Not only is it too early to tell just what the industry's full defense strategy will be here in Japan, but also there is relatively little experience in Japan with defective product cases generally.²⁷⁾

I want to close simply by noting that lawsuits by individual smokers for money damages represent only one of the several types of tobacco litiga-

25) Interview with Dr. Akira Oshima, Center for Adult Disease, Osaka, Japan, September 11, 1998. (Dr. Oshima is one of Japan's leading epidemiologists in the smoking field.)

26) Levin, *supra*.

27) But see Luke Nottage and Yoshitaka Wada, "Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?" 6 *ZjapanR* 40 (1998).

tion now going on in the U.S. Other cases include lawsuits by non-smokers who claim to have been injured by second-hand smoke, lawsuits by non-smokers seeking to make workplaces and public places smoke free, and lawsuits by states against tobacco companies which accuse the companies of misconduct and seek, as punishment, the reimbursement of the health care costs of treating people with tobacco-related diseases.²⁸⁾

This range of cases is perhaps best seen as one part of the wider tobacco-control movement, a movement that is ultimately more interested in the enactment of new legislation that will reduce smoking and protect non-smokers, than it is in obtaining individual financial compensation for victims.

In this respect I note that, in the case filed in Tokyo, the lawyers for the Japanese claimants also asserted that they were seeking to achieve from the litigation a wide range of new tobacco policies and not merely money for their clients. Whether these lawyers and the broader group of anti-smoking organizations in Japan can join together and achieve their common goals also remains quite uncertain.²⁹⁾

For now, Japan continues to have the highest rate of smoking in all of the world's wealthy countries.³⁰⁾ And although the male smoking rate is coming down slowly, it is still astoundingly high when compared with rates in places like the U.S., the U.K., France, Canada and Germany. Moreover, the smoking rate for Japanese women is on the rise, especially among younger women who work outside the home. Many believe this increase is due to the tremendous advertising campaigns that the multinational tobacco companies have undertaken since gaining access to the Japanese market about 12 years ago, and they may be right.³¹⁾ But it could also be that the increase in smoking by young women is mainly a result of the changing role of women in Japan. Whatever the truth, we should expect the anti-tobacco forces to point to the increase in the smoking rate of Japanese women as a good example of the evils from tobacco advertising that must be stopped. If nothing else, this argument,

28) See generally, 22 *Southern Illinois University Law Journal* (Spring 1998) (special issue on tobacco litigation); and 27 *Southwestern University Law Review* (No. 3 1998) (special issue on tobacco litigation).

29) See "Japan Tobacco taken to court in Tokyo" *The Japan Times*, May 16, 1998 at 2. Several anti-smoking leaders I interviewed during September and October 1998 said that they support the litigation.

30) The prevalence rate for adults in Japan is around 35%, comprised of around 55% of men and 15% of women. This compares with an adult smoking rate in the U.S., for example, of around 25%. For details, consult the WHO website at www.who.int/psa/toh.htm.

31) See Yumiko Mochizuki-Kobayashi, "Impact of Cigarette Marketing on Female Smoking" (on file with the author).

which is easily understood by the ordinary person, may help to bring the tobacco companies into disfavor. And as I suggested earlier, in a world in which law not only leads society, but also reflects society, getting the public to dislike the tobacco companies may ultimately be the key to getting the legal system to hold them accountable for the tobacco-disease epidemic.³²⁾

32) See generally, Stephen D. Sugarman, "The Smoking War and the Role of Tort Law" in *The Law of Obligations: Essays in Celebration of John Fleming*, P. Cane and J. Stapleton eds., 343 (Oxford: Oxford University Press 1998).