2A. BOX 2: SUBSTANTIVE DEFENCES OF THE TOBACCO INDUSTRY TO CLAIMS FOR COMPENSATION

This section deals with the substantive defences the industry typically uses against claims for compensation made by victims of tobacco related disease and how Parties can facilitate access to justice for those victims despite this. Tobacco companies typically defend smoking and health litigation on the merits of a claim using three different grounds (some of which apply with greater weight in some legal systems than others):

a) The defendant has broken no tobacco control law or other statute;
b) Any breach of a legal duty by the defendant was not the cause of the plaintiff's decision to commence or continue using tobacco products; or
c) The claimant's exposure to tobacco products was not the cause of their injuries.

Most, if not all, successful tobacco lawsuits—whatever their form—have had to overcome one or more of these arguments. Often the evidence regarding the industry's own conduct, and the causal relationship between the industry's conduct and a claimant's smoking behaviour and subsequent illness clearly shows both breach of a duty by the manufacturer and causation between the manufacturer's breach and the claimant's injuries. Nonetheless, in some countries statutory provisions have been necessary or helpful in defining the relevant legal standard (including defences available, shifting the burden of proving breach, and clarifying the type of evidence that is admissible to prove causation).

a) Substantive Defence 1: The defendant has broken no tobacco control law or other statute

The most important way to overcome this substantive defence is to have clear liability standards for the manufacturing, supply and marketing of tobacco products. One factor that has proved fatal to damages claims brought in European jurisdictions is a finding by the court that the defendant complied with laws regulating the manufacture and sale of tobacco products, including labelling requirements, and hence committed no legal wrong.[1] This approach is not justified in the case of tobacco litigation for a number of reasons:

- Many aspects of tobacco industry marketing have been designed to distract and detract from health warnings on tobacco products by portraying tobacco use as stylish and compatible with a healthy lifestyle. Tobacco companies have not merely complied with labelling laws; they have sought to undermine them.
- Tobacco companies have publicly questioned whether there was a causal link between smoking and disease, and the need for warnings, often lobbying against their introduction or the strengthening thereof.
- The proposition that manufacturers and suppliers who know that they are selling a dangerous product could take no steps to inform consumers and would-be consumers of those risks until the government acts to do so is untenable, certainly where manufacturers' own knowledge of the risks exceeds that which is publicly available and known by consumers.

The defence that "no tobacco control law or statute has been breached" is untenable in common law jurisdictions given that manufacturers have an independent common law duty of care to take reasonable steps to avoid harm to consumers or fully inform them of the dangers of using the product. Although the argument has been successfully advanced in a number of civil law countries, it is noteworthy that civil jurisdictions that do have a clear definition of fault have seen successful cases mounted against the tobacco industry.[2]

[1] A Study on Liability and the Health Costs of Smoking, DG SANCO (2008/C6/046), Final Report, December 2009.

2 For example, Article 2050 of the Italian Civil Code and Article 4:201 of the Principles of European Tort Law.

The only successful smoking and health damages claim in Europe to date is the Italian case of *Stalteri*.[3] Mr Stalteri was a lung cancer victim who sued British American Tobacco (BAT) Italia in tort for personal injury. Following his death, the claim was continued by his family, who also pursued a claim for wrongful death. The essence of the claim was that BAT Italia failed to inform Mr Stalteri of the hazards of smoking. The claim was dismissed at first instance, but on appeal to the Rome Court of Appeal judgement was given in favour of Mr Stalteri. BAT Italia was required to pay damages of EUR 200,000 to his family and EUR 20,000 of legal costs.[4]

Crucial to the success of the *Stalteri* case was the Court of Appeal's classification of the manufacture of tobacco as a "dangerous activity" (l'attivita pericolosa), which allowed the court to apply Article 2050 of the Italian Civil Code. Article 2050 has two features missing in many other European jurisdictions: (1) it reverses the burden of proof and (2) it has a clear definition of fault, namely the need "to take all appropriate measures."[5]

Therefore, it was incumbent upon BAT Italia to prove that they had taken all appropriate measures to avoid harm. The Court of Appeal held that BAT Italia could not discharge its burden under Article 2050 by merely showing that it had not breached any tobacco control laws. Rather, the company had an obligation to inform customers of the health hazards of smoking, which it failed to do. This conclusion was no doubt made easier by the fact that no warnings appeared on Italian cigarette packs until 1991.

Unfortunately, in 2005 Tribunale di Roma held that Article 2050 of the Civil Code should not be applied to manufacture of tobacco products, as it could not be equated to dangerous activities such as the manufacture of bloodborne products.[6] This position is unconvincing. There is no more inherently dangerous product than tobacco, which kills half of its long term users, and the mere fact that consumers or would-be consumers have some awareness of the risks of using the product – as they may also do with bloodborne products – does not alter its inherently dangerous character. Nevertheless, the effect of the 2005 decision is that Article 2050 of the Civil Code the same provision has not been available for tobacco-related cases since the *Stalteri* case.

Whether the legal standard for manufacturing, supplying and marketing of tobacco is couched in the common law language of a duty of care to consumers, or a requirement to take 'all appropriate measures' (which is taken from Article 2050 of the Italian Civil Code and instrumental to the *Stalteri* case[7]) a standard which requires tobacco defendants to take all reasonable steps to ensure potential and existing consumers are fully informed, and are not liable to be mislead, about the health consequences of tobacco products, is fully justified in light of the inherently dangerous and addictive nature of the product and the grave harm it causes.

b) Substantive Defence 2: Any breach of a legal duty by the defendant was not the cause of the plaintiff's decision to commence or continue using tobacco products

To some extent there may be different cultural attitudes to the question of the comparative fault of manufacturers and consumers for the harm caused by smoking. For example, in 2010, 76% of Ontario adults said tobacco companies are responsible for the smoking-related health problems of smokers.[8] By contrast most European Courts have exonerated manufacturers for the harm caused by tobacco use, even in relation to periods when there were no warnings on tobacco products, or when warnings were vague and lacked specific information about the harm caused by tobacco use. This approach is said to be justified because smokers are aware of the dangers. The French case of *Gourlain*[9] is a good

[3] *Stalteri v. BAT Italia,* Court of Appeal of Rome , decision no. 1015 of 7 March 2005.
4 The decision was upheld by the Corte di Cassazione in 2007 (Corte di Cassazione 30.10.2007, no 22884).

[5] This definition is similar to that which prevails in common law jurisdictions.
[6] *Tonutto et al v. ETI Spa,* Civil Court of Rome, decision no. 8067 of 11 April 2005.
[7] The only successful personal injuries damages claim against a tobacco manufacturer to date in Europe, discussed above at part 2(d).
[8] 2010 Centre for Addition and Mental Health, Monitor Survey, analysis by Ontario Tobacco Research Unit.
[9] Cour de cassation, 2 ème civ. 20 November 2003, *Gourlain*.

example of this position. The Cour de Cassation stated that the claimant should not have ignored the detrimental consequences that smoking has on health not only because of the warnings required on all cigarette packages since 1976 but also because it stated that the harmful effects of smoking are common knowledge.

This claim fails to take into account how the level of public knowledge has changed over time, and that even today public knowledge of the dangers is often superficial.[10] Many aspects of tobacco industry marketing have been designed to distract and detract from health warnings on tobacco products by portraying tobacco use as stylish and compatible with a healthy lifestyle. Moreover, tobacco companies have publicly questioned whether there was a causal link between smoking and disease, and the need for warnings, often lobbying against their introduction or the strengthening of them.

At a general level it can be safely asserted that where the information available to consumers and would-be consumers about the harmful effects of smoking was limited (either because there were no warnings, or the warnings were general and vague, and/or the industry publicly denied or cast doubt on the evidence suggesting smoking was harmful and addictive, and/or the industry marketed their tobacco products as stylish, healthy, or healthier than other brands on the market) it is more likely that a court could find that the industry was at fault and not the individual smoker. This is especially so if they began smoking at a young age, when they were not in a position to make a fully informed and voluntary choice to start what usually becomes a long-term addiction with serious health consequences. A finding that the tobacco manufacturer (or supplier) was at fault does not, of course, preclude the possibility that the claimant was also partly at fault (often known as "contributory negligence") and thus partly legally responsible for the consequences of their smoking behaviour. Contributory negligence might be an available defence where the smoker took no action to try to quit smoking even after they became aware that their addiction was potentially fatal.

The tobacco industry's main defence to smoking and health claims in tort is that the claimant voluntarily consented to the risk of injury. This defence, known as voluntary assumption of risk or *volenti non fit injuria*, requires that the claimant fully understands the nature and extent of the risk involved, and voluntarily consents to incurring that risk. As one English judge put it, in a different context:

> *A man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditional, so that he may be able to choose wisely, but the absence of any feeling of constraint so that nothing shall interfere with the freedom of his will.*[11]

The law of voluntary assumption of risk could be clarified in circumstances where the tortfeasor publicly denied or cast doubt on the existence or extent of the risk. Statutory reform might include prohibition of this defence in relation to conduct that occurred before the defendant's public acknowledgement of the risks accurately reflected its own internal research and generally accepted scientific opinion.[12]

There will be many cases where it is doubtful that the voluntary assumption of risk applies on the facts. Where a person starts smoking as an adolescent with a limited understanding of the risks involved, and by the time they acquire such knowledge they are already addicted to nicotine (which

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[10] *See e.g.*, Slovic, P. (2001). Cigarette smokers: Rational actors or rational fools? In P. Slovic (Ed.), *Smoking: Risk, perception, & policy* (pp. 97–124) Thousand Oaks, CA: Sage; Weinstein, N., Slovic, P., Waters, E., & Gibson, G. (2004). Public understanding of the illnesses caused by cigarette smoking. *Nicotine & Tobacco Research, 6*, 349–355 ; M. M. Scollo & M. H. Winstanley (2012) (Eds.), *Tobacco in Australia: Facts and issues* (4th ed.). Melbourne: Cancer Council Victoria. Retrieved from http://www.tobaccoinaustralia.org.au/ Sec. 3.34.

[11] *Bowater v Rowley Regis Corp* [1944] K.B 476, 479 (Scott LJ); *Imperial Chemical Industries Ltd v Shatwell* [1965] A.C. 656, 681-682 (Lord Hobson).

[12] Reference Quebec Statute and judgment.

research shows is addictive as heroin and cocaine[13]) it is therefore difficult to characterise their decision to continue smoking as truly voluntary, which is a critical element of the *volenti* defence.

c) *Substantive Defence 3: The claimant's exposure to tobacco products was not the cause of their injuries (causation)*

To successfully claim damages for the harm caused by tobacco use in all legal systems, it is necessary to prove: (1) that the injuries were caused by tobacco use (sometimes referred to as cause in fact), and (2) that the defendant is legally responsible for the tobacco-related harm because it was caused by their wrongdoing (sometimes referred to as legal causation). A surprisingly large number of cases outside the United States have failed on the basic question on whether or not the plaintiff's injuries are caused by tobacco use. Courts in Europe in particular have been reluctant to find causation in cases where there are other known risk factors for the injuries suffered by the claimant.[14]

A good example of the causation problem is a Spanish case,[15] the facts of which are similar to the Italian case of *Stalteri*. The plaintiffs were the widow and children of the smoker who died of lung cancer after smoking for more than 20 years. They sued the national tobacco manufacturer for damages, on the grounds that the defendant had failed to provide adequate information about the highly addictive nature of cigarettes. The court of first instance dismissed the claim on the basis of unproven causal link between smoking and the death of the deceased. The court emphasized that there could also be other important factors and causes of the lung cancer: environmental pollution or genetic predisposition of the deceased. The statistical evidence presented in court was deemed insufficient. The court of the second instance upheld this decision, as did the Tribunal Supremo.

Problems of factual causation stem from a reluctance to accept epidemiological evidence based on population groups as proof of causation in individuals, even if the statistical evidence demonstrates that the likelihood of the plaintiff's injuries being caused by tobacco use are well over 50% and often in the region of 80% or higher. [16]

Given that the standard of proof in civil cases is the balance of probabilities (i.e. that tobacco is more likely than not to be the cause of the claimants injuries or losses) causation should be straightforward for most claims alleging tobacco-related illnesses given the weight and reliability of the epidemiological evidence showing that tobacco is by far the biggest risk factor for many serious and fatal diseases including lung cancers, emphysema or chronic obstructive pulmonary disease (COPD), heart disease and stroke.

Moreover, the Quebec legislation allows proof of causation based on statistical evidence in private class actions and proceedings brought on an individual basis. It relevantly provides:

> *15. In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.*

[13] UK Royal College of Physicians, *Nicotine Addiction in Britain* 2000.
[14] See A Study on Liability and the Health Costs of Smoking, DG SANCO (2008/C6/046), Final Report. December 2009.
[15] Tribunal Supremo, 4 March 2009, RJ STS 1123/2009.
[16] This was the estimate of causation by medical experts in the successful *Stalteri* case in Italy.

> *24. The provisions of section 15 that relate to the establishment of causation between alleged facts and to proof of health care costs are applicable to actions brought on an individual basis.*[17]

Epidemiological evidence should be admissible as evidence of causation in individual claims, given that many clinical judgments about whether an individual's disease has been caused by tobacco use are made wholly or partly on the basis of such evidence. The judicial concern in places other than Quebec about the reliability of statistical evidence relates to whether it can be relied on *exclusively* to prove causation in an individual case when there is no other evidence to indicate the cause of the claimant's injuries. In instances where a very high percentage of diseases can be attributable to tobacco use, it is eminently reasonable to prove causation for an individual based on statistical evidence alone. As the Supreme Court of Canada has ruled, causation need not be determined with scientific precision.[18]

[17] Tobacco-related Damages and Health Care Costs Recovery Act, CQLR c R-2.2.0.0.1.
[18] *Snell v. Farrell*, [1990] 2 S.C.R. 311.