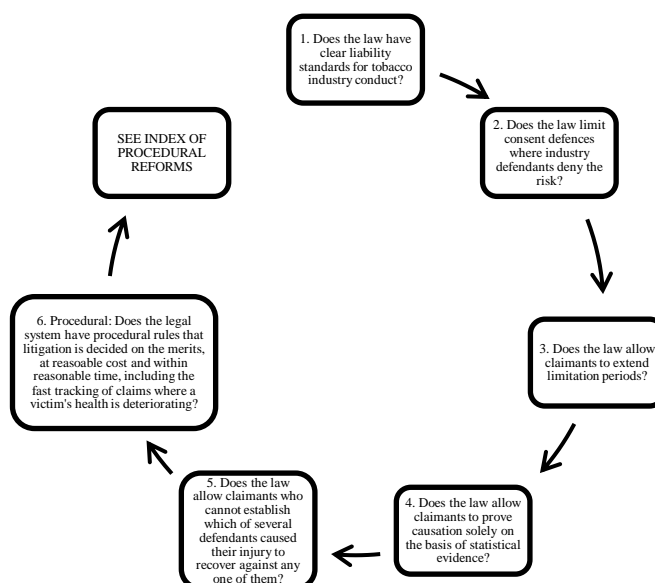


SCENARIO 2: FACILITATING ACCESS TO JUSTICE FOR VICTIMS OF TOBACCO RELATED DISEASE

ADDENDUM/LINK

DIAGRAM



BEST PRACTICES/REFORM OPTIONS IDENTIFIED IN REPORT TO COP 6/8.

Amending standards of fault/liability is a best practice/reform option identified by the Expert Group in its report to COP6.¹ It is one of the most effective ways to facilitate access to justice for victims of tobacco-related disease and it can be accomplished in a number of ways within a variety of jurisdictions by providing for one or more of the following:

a) *A clear definition of fault for manufacturers of dangerous products* [Box 1]

A clear standard of fault (or liability where fault is not a pre-requisite to liability²) is critical to ensuring that the responsibility for the harms caused by tobacco consumption is fairly apportioned. A regular feature of successful tobacco litigation outside the United States is reliance on consumer protection legislation (including consumer-focused rules in civil codes) or legislation regulating trade and commerce. In this regard it is important that the standards of fault associated with the use of dangerous or risky products apply to tobacco products as well. Examples of consumer legislation that has facilitated tobacco liability actions can be found in Canada (Québec), Italy, Brazil and Australia.³ The argument that a tobacco company, having complied with all tobacco control laws, has not

¹ FCTC/COP/6/8, Annex 2, Obstacles that Impede Effective Action in the Areas of Civil and Criminal Liability, in particular, in the Context of Civil Liability, including compensation.

² For example, laws against misleading advertising are normally based on the effect of the advertisement and not the fault of the advertiser.

³ See also, paragraphs 11, 13, 14 and 18 in Annex 1, FCTC/COP/6/8.

committed any wrong, which has been successfully relied on in a number of European civil law countries, could no longer be employed as a defence where a clear standard of fault is codified.⁴

b) *Limit defences available to the tobacco industry based on knowledge of risk and consent*
[Box 2]

It has been proven in a number of cases that the tobacco industry has awareness of the harms of tobacco products above and beyond that of the ordinary consumer, and has indeed tried to conceal that information from consumers. Defences based on the consumer's knowledge of risk and consent to harm should therefore be limited in tobacco litigation in order to acknowledge the imbalance between the knowledge of the consumer and the knowledge of the manufacturers. Common law jurisdictions recognize principles of equitable estoppel that prevent persons from maintaining legal claims or defences that are inconsistent with their own conduct. These principles are relevant to tobacco litigation given that the tobacco industry denied for decades the existence of the risk they now claim consumers voluntarily consented to. There are also a number of cases in the United States in which courts have found that the assumption of risk defence does not lie in tobacco cases, since the evidence shows that the public did not understand the nature and extent of the risk during the relevant time periods.

c) *Reverse the burden of proof in relation to fault and/or legal causation* **[Box 4]**

In many jurisdictions the burden of proof requires the claimant to establish the harm they suffered and that harm suffered was directly caused by the fault of the defendant, usually the tobacco industry. This task is made difficult without access to internal industry documents, or where claimants have limited resources to establish that the defendant's conduct, including its marketing practices, fell short of the standard required of the manufacturer/supplier in light of the available independent evidence and industry knowledge about the harmful effects of tobacco use. A reversal of the burden of proof in relation to fault, such as that demonstrated in the Italian case of *Stalteri*,⁵ coupled with a clear standard of fault, would require tobacco companies to justify their own responses to the growing evidence about the health consequences of tobacco use. Reversal of the burden of proof also played a part in the reasoning of the Brazilian courts in holding British American Tobacco subsidiaries liable for personal injuries and wrongful death.⁶

Similarly, tobacco damages and health-care cost recovery legislation in Canadian provinces includes a rebuttable legal presumption of causation where a tobacco-related wrong is established on the part of the manufacturers, and there is a population-level causal link between tobacco exposure and particular diseases. The defendant can reduce their total liability by proving on the balance of probabilities that in the case of a particular victim of disease the defendant's breach was not the cause of the exposure or disease.

d) *Allow causation between tobacco exposure and disease to be proved by statistical evidence*
[Box 4]

Despite the well-established evidence causally linking tobacco exposure to a host of serious or fatal diseases, the tobacco industry frequently defends claims by disputing whether an individual's disease was caused by exposure to tobacco smoke as opposed to some other risk factor. Some European courts have been unwilling to find causation where there were other risk factors present. The Canadian provinces' tobacco damages and health-care cost recovery legislation deals with this issue

⁴ See paragraph 12 in FCTC/COP/6/8.

⁵ *Stalteri v. BAT Italia*, Court of Appeal of Rome, decision no. 1015 of 7 March 2005 (in Italian). See also, paragraph 13 in Annex 1, FCTC/COP/6/8.

⁶ See paragraph 14 in Annex 1, FCTC/COP/6/8.

by providing that in cases brought on an aggregate basis causation can be proved by use of statistical evidence without the need to prove causation for any individual claimant or health-care recipient; legislation in Québec also allows causation to be proved on the sole basis of statistical epidemiological evidence in individual proceedings.⁷ This approach limits the ability of the tobacco industry to make spurious scientific arguments about the likely causes of an individual's disease.

- a) *Modify rules of causation so that claimants who cannot establish which of several defendants caused their injury are able to recover against any of them*⁸

Such amended rules would only be necessary where there is doubt as to whether an individual brand of tobacco smoked by a claimant made a material contribution to the claimant's disease, and would apply in cases where the fault of the defendant can be shown. The Canadian provinces' tobacco damages and health-care cost recovery legislation provides a model for this type of rule.⁹

BENEFITS AND RISKS

<u>Key Benefits</u>	<u>Key Risks/Costs</u>
<ul style="list-style-type: none"> • Allows victims of tobacco related disease to utilise the best available scientific evidence on the effect of tobacco products and tobacco industry behaviour. • Ensures tobacco industry defendants must justify their own behaviour when defending claims. 	<ul style="list-style-type: none"> • Greater access to justice will increase numbers of claims in courts, putting a strain on court resources.

Discussion of possible risks/costs of facilitating access justice for victims of tobacco-related disease

While virtually all countries recognize the importance of a person's right to access the court, and the rights of victims of mass wrongs to obtain compensation for their losses, it should be acknowledged that in some countries facilitating more litigation is considered an undesirable policy goal. Every legal system has restrictions on the type of litigation that can be brought in the courts, who can bring it (and on whose behalf it can be brought), what information claimants can obtain from their opponents, and how litigation is funded. Some countries deliberately maintain these restrictions because of cultural concerns about the suitability of litigation as a vehicle for resolving complex disputes, a desire to avoid creating a "litigious society", and concerns that the legal process might be abused thereby pressuring defendants into settling unmeritorious claims.

Importantly, none of the reasons for the above restrictions apply to tobacco-related litigation. The risk that victims of smoking-related disease could pressure the tobacco industry into settling unmeritorious claims is near zero. Even in the United States, which has the fewest barriers to access courts, the

⁷ *Tobacco Related Damages and Health Care Costs Recovery Act 2008*, (Québec, Canada) sections 15 and 24.

⁸ This rule is also relevant to collective actions.

⁹ See for example *Tobacco Damages and Health Care Costs Recovery Act 2000* (State of British Columbia, Canada), section 7.

tobacco industry has voluntarily settled very few claims. Some settlements are only reached after trial and a verdict has been made in favour of the claimant.¹⁰ The majority of successful outcomes have been obtained by a jury verdict or judgement, which were then upheld on appeal.

Tobacco litigation is not undesirable if its purpose is to alter tobacco manufacturers' behaviour and/or obtain compensation for the costs of tobacco use. Article 19 of the WHO FCTC makes it clear that litigation is an important means of obtaining compensation for the social and economic losses caused by tobacco use. Thus civil and criminal liability regimes to facilitate litigation against the industry should be promoted in line with Article 19, not discouraged.¹¹

Discussion of the benefits of facilitating access to justice for victims of tobacco-related disease

Since Article 19 is specifically concerned with liability, Parties do not need to choose between regulatory measures intended to redistribute and reduce the costs of smoking on the one hand, and litigation to determine liability and obtain compensation where appropriate on the other. The general principles of the WHO FCTC, as set out in Article 4, recognize that Parties should adopt comprehensive tobacco control policies, and that liability issues are an important part of tobacco control. Private and public litigation against tobacco companies has been an important tool for advancing the fundamental public health goal of tobacco control: reducing the morbidity and mortality caused by tobacco products. Tobacco litigation has offered a unique opportunity to shed light on the practices of tobacco manufacturers, exposing once-secret internal documents and giving a voice to former industry insiders. The media coverage of tobacco litigation has served to educate and reinforce messages about the health risks associated with the use of tobacco products. By focusing on the conduct of the manufacturers and their role in the injuries at issue, tobacco litigation has played an important role in de-normalizing tobacco industry practices that contribute to the toll of tobacco on public health.

In the majority of jurisdictions, in both developed and developing countries, existing general restrictions on litigation make successful prosecution of a claim against the tobacco industry more difficult, and any litigation against the tobacco industry would be difficult, long, and costly whether it is brought by a state, private health insurers, authorized bodies, or victims of smoking related diseases. Developing countries often lack the legal infrastructure for efficiently and fairly handling complex litigation affecting large numbers of people. There are a number of legal and financial impediments that would need to be addressed before any litigation against the industry could be said to be viable. In this regard, procedure reforms to make claims easier to prove, less costly to bring, and quicker to litigate can be found in the 'Index of Procedural Reforms Relevant to All Civil Claims (Scenarios)' of the Expert Group's Report to COP7.

¹⁰ See, for example, the case of *Evans* discussed in Section 2(a).

¹¹ None of the information and analysis set out above is intended to deny the possibility that there may be other efficient ways of redistributing the costs of tobacco use, especially future costs, and in so doing reduce the total harm caused by tobacco.