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Tobacco firms could be held liable in deaths, lawyer says

BY GRAHAM FRASER
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Tobacco manufacturers could be liable for charges of criminal negligence causing death or bodily harm, according to a legal opinion obtained by the Non-Smokers' Rights Association.

"... it is my opinion that in law a charge of criminal negligence causing death or bodily harm could be made out," says lawyer David Doherty after specifying that he was making a number of assumptions which the association had proposed to him.

Garfield Mahood, executive-director of the association, asked for an opinion from Mr. Doherty of the Toronto law firm McCarthy and McCarthy on whether the manufacturers may be held responsible for the bodily harm and death caused by smoking.

David Sweanor, a lawyer with the association, said that Mr. Doherty, a former Crown attorney, was asked for the opinion because he is considered an expert in questions of criminal responsibility and criminal negligence.

The opinion is part of a presentation which the association is making today to the parliamentary committee studying Bill C-51, a law proposed by Health and Welfare Minister Jake Epp to ban tobacco advertising and promotion.

Mr. Mahood said Mr. Doherty was asked to assume that cigarettes are a cause of death and disease.

"We can prove that tobacco causes death and disease," Mr. Mahood said. "To save research costs, we asked Mr. Doherty to assume that."

Representatives from tobacco companies in Canada appeared before the parliamentary committee yesterday and repeated their position that there is no proved link between smoking and health.

"I assume that there is evidence which demonstrates significant and very serious risks of a serious nature to the health of those who smoke cigarettes," Mr. Doherty wrote in the opinion. "I also assume that there is evidence to establish that cigarette manufacturers know of, or have reason to know of, these risks."

Based on these assumptions, Mr. Doherty said that there was case law that indicated that cigarette manufacturers are under a duty to warn consumers of the risk inherent in the use of their product.

He said that he was assuming that there is evidence from which it can be concluded that the present warning on cigarette packages does not adequately inform smokers of the nature of the risk caused by smoking.

He added that the warning on cigarette packages "is effectively neutralized by the advertising efforts made by the manufacturers to present their product in a favorable light."

In the opinion, Mr. Doherty laid out the principles of criminal negligence, which may involve "wanton or reckless disregard for the lives or safety of other persons."

He said that when criminal negligence is based on a failure to perform a duty, it must be established that the accused foresaw the danger, failed to act, and that his failure to act was unjustified.

Then, Mr. Doherty laid out the question of causation.

"The final question becomes whether that failure to act caused the bodily harm of the victim," he said.

"In this case we have the following chain of events. The manufacturer sells cigarettes and fails to meet his duty to adequately warn the consumer. That consumer then proceeds to smoke cigarettes. The smoking of those cigarettes leads to disease which results in the death of the consumer."

Mr. Doherty said that the key question is whether this failure to warn the customer is, in fact, the cause of death.

He wrote that the so-called "but for" test is applied in these cases.

"Would the death have occurred 'but for' the failure to warn?" he wrote. "This is a matter of evidence."

However, Mr. Doherty warned that the question of how well-known the risks of a product are can be very important in establishing criminal responsibility, and the failure of the manufacturer to do his duty.

"The more notorious the dangers in the use of the product, the more difficult it will be to prove that the failure to warn had anything to do with the victim's use of the product," he wrote.

In his summary, Mr. Doherty said that the application of criminal law principles to such a case would be "not without difficulty" since "the criminal law has traditionally not been used in such situations."

"However, accepting the assumptions you have given me and taking it as a given that those assumptions could be supported by the evidence, it is my opinion that in law a charge of criminal negligence causing death or bodily harm could be made out."

The article EM8801 reprinted above is used in Figure 9.14 of the STAT 220 Course Materials and in Figure 11.4 of the STAT 231 Course Materials.

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