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PRODUCT LIABILITY

TOBACCO

Plaintiffs in tobacco litigation are misusing the clinical status and label of addiction as an excuse to escape full responsibility for the incontrovertibly conscious choices they make in smoking cigarettes despite the open and obvious health risks involved, says attorney David L. Wallace in this BNA Insight. Addicted or not, in the courtroom a smoker should bear full responsibility for yielding to addiction, because he or she is a legal actor with causal power, not the hapless puppet of brain processes, the author says.

Addiction and Responsibility: Thoughts on the Misuse And Misunderstanding of Addiction in the Courtroom



By DAVID L. WALLACE

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couldn't help it. I can resist everything except temptation.

— Oscar Wilde

At this writing, a New York man is in police custody for murdering four people while robbing a pharmacy of its hydrocodone inventory. It is not likely that he will escape criminal punishment for his actions based on a claim of opiate addiction as an excusing or disabling condition. Absent evidence of cognitive incapacity rising to the level of legal insanity, a criminal court will call his actions voluntary and punish him accordingly.

The same week, a jury awarded the family of a Florida man \$5 million in compensatory damages in a civil action against a tobacco manufacturer after finding that the decedent was “addicted” to ordinary cigarettes containing nicotine and that nicotine addiction was the “legal cause” of his lung cancer and resulting death. The award was trimmed, however, based on plaintiff’s confession of “partial fault,” which led the jury to allocate 60 percent of the fault to the smoker based on comparative fault principles.

What a paradox addiction has become in the courtroom. On the criminal side, addiction is seen as *voluntary* and punishable behavior, whereas on the civil side

it is seen as *involuntary*, or to some degree “forced,” behavior meriting reward in the form of money damages. To paraphrase Shakespeare, something is truly “rotten,” as in wrong, with the state of the American court system in relation to the litigation of addiction claims.

Evidence of this phenomenon can be seen in the Florida courts, where plaintiffs in the so-called *Engle*-progeny litigation are routinely using the medical model of addiction as a “brain disease” to secure riches from juries in compensation for the health consequences of regular smoking. These cases follow in the wake of the Florida Supreme Court’s post-trial decertification of the original *Engle* class action in 2006, on the grounds that individual issues predominated. *Engle v. Liggett Group Inc.*, 945 So.2d 1246 (Fla. 2006).

Being “pragmatic,” Florida’s highest court decided it made sense to recycle some of the jury’s general findings of fact—that nicotine is addictive, smoking causes lung cancer, etc. To this end, it ruled that these findings would have preclusive effect in all individual *Engle* actions filed by 2008. *Id.* at 1269-70. Thousands of suits followed. Since early 2009, through the trial of some 50 suits now, juries have awarded *Engle*-progeny plaintiffs a total of almost half a billion dollars in compensatory and punitive damages.

The disparate treatment of addiction claims in the court system raises the legal question of how addiction can justify reward under certain circumstances (cigarettes), but not excuse punishment in other settings (alcohol, cocaine, heroin, etc.)—and, more broadly, why there should be any difference at all.

Some will say *no matter*: that the results are just deserts for tobacco companies for all the sickness that tobacco use causes. Some will say that *ends justify means*: that anything (including litigation) that hurts tobacco makers or raises cigarette prices is a good thing—a net social benefit from a public-health perspective. Some will say that the medical model and rhetoric of “brain disease” has *therapeutic benefits*: that it helps to destigmatize addiction for treatment purposes, no matter collateral consequences. But this is bad law.

Plaintiffs’ theory of nicotine addiction in tobacco litigation is rooted in the medical model of nicotine addiction as a “brain disease.” According to Dr. Leshner, who began popularizing this addiction model in the late 1990s when he headed the National Institute of Drug Abuse: “That addiction is tied to changes in brain structure and function is what makes it, fundamentally, a brain disease. A metaphorical switch in the brain seems to be thrown as a result of prolonged drug use. Initially, drug use is a voluntary behavior, but when that switch is thrown, the individual moves into the state of addiction, characterized by compulsive drug seeking and use.” A. Leshner, “Addiction is a Brain Disease and it Matters,” 278 *Science* 45, 46 (1997).

Tobacco plaintiffs use this disease metaphor of addiction to claim victim status with the aim of avoiding or splitting legal responsibility for the health consequences of smoking. Ignoring the fact that smoking behavior is indivisibly influenced by both pharmacologic and psychological factors (see, e.g., USDHHS, *The Health Consequences of Smoking: Nicotine Addiction* 465 (1988); APA, *Diagnostic and Statistical Manual of Mental Disorders* 192 (4th ed. 2000) (DSM-IV-TR)), they say that the stimulating combination of nicotine’s

positive and negative reinforcing effects on the body makes smoking a “constrained choice” because “[y]ou can’t easily put the cigarettes down and walk away from them”—it’s “hard to quit.” See *Mack v. R.J. Reynolds Tobacco Co.*, No. 01-2008-CA-3256 (Fl. Cir. Ct.) (Trial Tr. Vol. 16, 1157, Mar. 10, 2011) (testimony of Dr. K. Michael Cummings).

Banking on the moral relativism of comparative fault schemes, plaintiffs confess “partial fault” as an excuse for not trying hard enough to quit smoking, and argue on fairness grounds that defendants must share responsibility for putting ordinary cigarettes containing nicotine into the marketplace—because “[w]ithout nicotine, people would not continue to smoke.” See *In Re: Engle Progeny Cases Tobacco Litigation (Sulcer)*, No. 2007-CA-2540 (Fl. Cir. Ct.) (Trial Tr. vol. XXI, 2091, Apr. 11, 2011) (testimony of Dr. K. Michael Cummings).

As one of the plaintiff’s lawyer behind this litigation explains, “[w]ithout an opportunity to compare and apportion plaintiff’s fault, the jury may decide the case against” them. See H. Acosta et al., “Confessing Fault,” *J. Acad. Fl. Tr. Lawyers*, 28 (June 2003). In sum and substance, plaintiffs self-apply the label of nicotine addiction as an excuse for not successfully giving up the habit of smoking. Here it is argued that nicotine addiction—properly understood—is not an excusing condition that diminishes either human agency or personal responsibility, and that the comparative fault doctrine (as well as the collateral estoppel effect of the original *Engle* jury’s factual findings) should not figure in the analysis until a plaintiff has made out a prima facie liability case.

Using Legal Paradigms to Make Sense of Addiction

There are a number of conceptual difficulties with plaintiffs’ theory of addiction liability in tobacco litigation. Preliminarily, though, characterizing nicotine addiction as a disease does not strip a smoker of moral agency (causal power) or trump any other legal rules of conduct. There is no evidence, for example, that regular use of nicotine impairs mental functioning. See DSM-IV-TR, *supra*, at 269. Further, a diagnosis of nicotine addiction “does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.” *Id.* at xxxiii.

Every day, in fact, millions of people smoke cigarettes non-habitually or otherwise exert control over temptations to smoke. They do so in response to an array of commonplace factors, including increasingly prevalent legal bans or restrictions on public smoking, price increases, monetary incentives, health problems, and the aging process. See, e.g., K. Volpp et al., “A Randomized, Controlled Trial of Financial Incentives for Smoking Cessation,” 360 *New Eng. J. Med.* 699 (Feb. 12, 2009) (finding that financial incentives significantly increase rates of smoking cessation); U.S. Dep’t of Health and Human Services, *Monograph 15: Those Who Continue to Smoke: Is Achieving Abstinence Harder and Do We Need to Change Our Interventions* (2003) (finding higher quit rates among older smokers). This is all strong evidence that nicotine addiction does not rob smokers of the general capacity for exercising choice and control over their behavior in response to motivational change. (Otherwise, legal prohibitions

against public smoking and “stop smoking” campaigns would be pointless and cruel.) And this is really all that needs to be said about addiction as a medical condition in litigation, because the issue is only relevant to the extent a diagnosis of addiction negates human agency, which is simply not the case.

The Elements Essential to a Prima Facie Case

So many befogging things have been said and written over the years now about addiction from a medico-scientific perspective that it is probably best for tobacco defendants to avoid chasing too much down that rabbit-hole—where things only get “curiouser and curiouser”—in favor of focusing attention on what nicotine addiction means as a legal problem in the courtroom, for responsibility purposes. The point is to recast plaintiffs’ nicotine addiction theory as a problem of law in terms of the essential elements of a prima facie tort case, including duty and proximate causation.

In this regard, let plaintiffs call nicotine addiction (regular smoking) a disease; it is for medical purposes. Then argue that it is a disease of choice for legal purposes, and that plaintiffs are responsible for yielding to it—under either a duty or proximate cause analysis. Let plaintiffs say that it can be difficult to quit smoking for a host of reasons, including nicotine effects. Then, argue that: 1) the effects of nicotine on the brain and body are simply reasons or motives for smoking; and 2) any unpleasantness associated with *not* smoking, such as irritability, frustration, anger, anxiety, difficulty concentrating, and restlessness (see DSM-IV-TR, *supra*, at 266), is simply not substantial enough to warrant recognition as an excusing condition as a matter of law—under the label of superseding or “sole proximate cause.”

The long and short of the strategy is to make the game about primary assumption of risk as a doctrine that limits or protects against legal responsibility (as a matter of fairness and public policy) by defeating the existence of a prima facie case, from the perspective of a duty or proximate causation analysis. See, e.g., *Morgan v. State of New York*, 90 N.Y.2d 471 (N.Y. 1997) (primary assumption of risk “is really a principle of no duty or no negligence and so denies the existence of any underlying cause of action”); L. Green, *Judge and Jury* 196 (1930) (“The problems dealt with under ‘proximate causation’ involve limitations upon legal responsibility or legal protection—the phase of legal theory concerned with rights and duties.”); *Courtney v. American Oil Co.*, 220 So. 2d 675, 677 (Fla. Dist. Ct. App. 1969) (“The concept of proximate cause has at least two functions. One is to require a causal connection between an alleged act of negligence and a result for which damages are sought. The other is to limit the liability of the alleged wrongdoer for the consequences of his negligence.”); *Semenza v. Drutzrovsky*, 177 So. 2d 880, 883 (Fla. Dist. Ct. App. 1965) (“It is notorious that proximate cause is in most cases what the courts will it to be and that it is at best a theory under which the courts justify liability or shield from liability those that the courts find should not in reason or logic be responsible for a given result.”).

Plaintiffs in tobacco litigation make such a show confessing “partial fault” that they seem to forget that without first establishing the essential elements of a prima facie case, there is “logically nothing to compare with any misconduct” on their part. *Morgan*, 90 N.Y.2d

at 485; see also *Atkins v. Glens Falls City School District*, 53 N.Y.2d 325, 333 (N.Y. 1981) (“a court is always required to undertake an initial evaluation of the evidence to determine whether the plaintiff has established the elements necessary to a cause of action”).

Notably, plaintiffs do not argue that addiction negates the capacity for choice or control over their smoking behavior. They instead characterize the choices they make to smoke cigarettes as “constrained” or “less free” than other lifestyle choices, allegedly because of addiction. What makes smoking a “constrained choice,” however, is the competition of reasons for continued smoking on one hand (including nicotine effects), with reasons for not smoking on the other, which should be wholly unremarkable.

In criminal actions, reasons for action can be motives, and in tort cases they can amount to primary assumption of risk (or consent). Categorizing regular smoking as an addiction or a “constrained choice”—because of nicotine effects—changes nothing of legal significance. In sum, the decision to smoke is not “qualitatively or quantitatively different from thinking, deciding and choosing in any other area of human life,” all of which are encumbered to some degree by the memory of prior experience or knowledge of socially constructed expectations, among other things. J. Davies, *The Myth of Addiction* 54 (Routledge 2010) (1992).

The Moral Clarity of Primary Assumption of Risk

From this perspective, plaintiffs’ confession of “partial fault” begins to look an awful lot like primary assumption of risk, which is exactly how defendants in tobacco litigation should reframe this plea. If, as plaintiffs suggest, nicotine addiction is like a metaphorical gun to the head (“smoke or else”), then the smoker’s finger is on the trigger. More specifically, under the heading of primary assumption of risk, defendant has the option of arguing the lack of a prima facie liability case based on either the absence of a duty to protect a plaintiff from himself or that its conduct is not the proximate (as in most substantial) cause of plaintiffs’ injuries. Against plaintiffs’ metaphor of “brain disease,” nicotine addiction can be cast in the metaphor of temptation—like apples in the Garden of Eden—and the legal vocabulary of reasons (or motivation) for action. More generally, at the threshold, primary assumption of risk doctrine can be used to frame the question of legal interest in these cases as one of responsibility (*who-should-pay*) rather than simply factual causation (*what-happened*)—namely whether, as a problem of law and a matter of policy, people who voluntarily choose to begin smoking cigarettes on purpose, notwithstanding the health risks involved, are entirely responsible for the consequences of their actions, including addiction. See, e.g., *Dep’t of Transp. v. Anglin*, 502 So.2d 896, 899 (Fla. 1987) (“the question of whether to absolve a negligent actor of liability is more a question of responsibility than simply one of factual causation.”).

Crying “foul,” plaintiffs will counter that the assumption of risk defense has been abolished by the widespread adoption of comparative-fault doctrine, but this is not true of primary assumption of risk. This form of assumption of risk is simply another way of denying the existence of any underlying cause of action based on the lack of duty or proximate causation. See *Morgan*, 90 N.Y.2d at 485; *Howell v. Clyde*, 620 A.2d 1107 (Pa.

1993). As such, it has not been truly repudiated in any state, regardless of what contributory or comparative scheme prevails. P. Hayden, “*Butterfield Rides Again: Plaintiff’s Negligence as Sole or Superseding Cause in Systems of Pure Comparative Responsibility*,” 33 *Loy. L.A. L. Rev.* 887, 894 (2000); see also *Elder v. Pac. Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 657 (Cal. Ct. App. 1977) (notwithstanding comparative fault law “plaintiff must still establish a prima facie case by proving that defendant was negligent, and that that negligence was a proximate cause of his injuries Where either element of proof is lacking a nonsuit is justified, and the label ‘sole proximate cause’ may be properly applied to plaintiff’s conduct.”).

This strategy enables defendants to introduce “a refreshing moral clarity to legal problem-solving, pushing aside the moral relativism of comparative fault”—which is where plaintiffs in tobacco litigation hurry to bury the issue of personal responsibility—in order to permit “a declaration that a plaintiff who recklessly hurts himself is properly accountable for ‘the whole damn thing.’” D. Owen, *Products Liability Law* § 1.3 (2d ed. 2008). Analyzing this issue from the perspective of sole proximate cause, one commentator explains that while “the contributory negligence rule created inequity by placing too stringent a line on plaintiff’s fault, pure comparative negligence posits no line at all,” and, consequently, “erodes both the moral foundation of the fault system and the notion of self-responsibility which, many believe, still needs nurturing in modern tort law.” Hayden, *supra*, at 892-93.

Tobacco litigation, in fact, might be the best ground in which to reintroduce and revive primary assumption of risk as an ameliorant or safety-valve “to avoid making the slightly faulty defendant pay the overwhelmingly faulty plaintiff a very large sum of money” under comparative fault law, much as courts once used last-clear-chance and patent-danger rules to ameliorate the harsh effects of the all-or-nothing contributory negligence rule. *Id.* at 920-21.

Otherwise, “every allegation of a breach of duty no matter how remote from an injury would result in a jury trial.” *Kwoka v. Campbell*, 296 So. 2d 629, 631 (Fla. Dist. Ct. App. 1974). This of course is exactly what has been happening in the *Engle*-progeny litigation. A significant factor in this regard, however, is that the original *Engle* jury’s factual findings do not have any collateral estoppel effect, and comparative-fault principles are not operationalized, until after an *Engle*-progeny plaintiff establishes the essential elements of a prima facie case at the outset. Cf. *Exxon Co., U.S.A. v. Sofec Inc.*, 517 U.S. 830, 837 (1996) (applying maritime law: “There is nothing internally inconsistent in a system that apportion damages upon comparative fault only among tortfeasors whose actions were proximate causes of an injury. Nor is there any repugnancy between the superseding [or sole proximate] cause doctrine, which is one facet of the proximate causation requirement, and a comparative fault method of allocating damages.”). In different words, the first line of defense in cases of this sort should be at the threshold, on the grounds that the failure of the essential elements of duty and proximate causation—as proxies for primary assumption of risk—warrants summary dismissal, directed verdict, or nonsuit.

Primary Assumption of Risk in Practice

There are numerous examples of this principle in practice. In *Carlotta v. Warner*, 601 F. Supp. 749 (E.D. Ky. 1985), for example, the court used plaintiff’s sole proximate cause in diving through an inner tube into a swimming pool to award summary judgment to the defendant. Explaining that the “doctrine of comparative negligence does not mean that plaintiff is entitled to recovery in some amount in every situation in which he can show some negligence of the defendant, however slight,” the court framed the issue in terms sole proximate cause. *Id.* at 751. It then held that defendant’s negligence could “not be considered a substantial factor in causing the accident” since its “only negligence was in failing to prevent plaintiff from injuring himself.” *Id.* at 753-54; see also *Tennyson v. Brower*, 823 F. Supp. 421, 423-24 (E.D. Ky. 1993) (denying plaintiff’s motion for new trial because “[t]he jury could well have found that [his] negligence was the sole cause of the accident in the popular sense.”). The parallel to tobacco litigation is obvious.

Kroon v. Beech Aircraft Corp., 628 F.2d 891 (5th Cir. 1980), decided under Florida law, is another excellent illustration. Plaintiff took off from an airport in Titusville with his plane’s gust lock still engaged, causing him to abort takeoff and crash. Like plaintiffs in the *Engle*-progeny litigation, he admitted his own contributory negligence and argued that the defendant had to share legal responsibility under Florida’s comparative fault scheme. His theory was that the gust lock should have been designed so that the plane could not be operated at all when the controls were locked, which is similar to plaintiffs’ claim in tobacco litigation that defendants should sell only de-nicotinized cigarettes (so as to prevent people from *wanting or having any reason* to smoke). The trial court granted defendant’s motion for summary judgment on the ground that the sole proximate cause of the accident was plaintiff’s negligence, and the Fifth Circuit affirmed, holding: “If there was any fault in the design of the gust lock system, it was clearly no more than a remote condition that furnished Kroon with the opportunity to be careless.” *Id.* at 894; see also *Anglin*, 502 So. 2d at 898 (distinguishing negligence that sets a chain of events in motion from negligence that “simply provide[s] the occasion for the negligence of another”). A similar remoteness argument could be made in the post-*Engle* litigation—namely, that plaintiffs’ injuries are self-inflicted by virtue of their *self-administration* of nicotine.

Bruner v. Anheuser-Busch Inc., 153 F. Supp. 2d 1358, 1359 (S.D. Fla. 2001), where plaintiffs sought recovery for “the negative consequences of their own abuse of alcohol,” is to like effect. Granting defendants’ motion to dismiss, the court found no cause of action because “voluntary drinking of alcohol is the proximate cause of an injury, rather than the manufacture or sale of those intoxicating beverages.” *Id.* at 1361; see also *Klein v. Raysinger*, 470 A.2d 507, 510 (Pa. 1983) (“the great weight of authority supports the view that in the case of an ordinary able-bodied man it is the consumption of the alcohol, rather than the furnishing of the alcohol, which is the proximate cause of any subsequent occurrence”). Accord *Watson v. Lucerne Mach. & Equip. Inc.*, 347 So.2d 459, 461 (Fla. Dist. Ct. App. 1977) (affirming summary judgment because plaintiff’s “demise was caused solely by his own actions”).

The same result can be achieved from the perspective of duty analysis. See, e.g., *Campo v. St. Luke Hosp.*, 755 A.2d 20, 27 (Pa. Super. 2000) (“any duty owed in this instance does not extend to the protection of Dr. Campo from his own addiction and resulting death. . . . Allowing recovery for the unfortunate but self-inflicted harm suffered by Dr. Campo is inconsistent with Pennsylvania authority encouraging personal responsibility for one’s own transgressions.”); *Howell v. Clyde*, 620 A.2d 1107, 1113 (Pa. 1993) (“Although the [lower] court granted the nonsuit on the basis of an assumed risk rather than because of an absence of duty, the analysis, nonetheless, is substantially the same.”); *Turcotte v. Fell*, 68 N.Y.2d 432, 439 (N.Y. 1986) (“If the risks of th[e] activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty.”); *Morgan v. State of New York*, 90 N.Y.2d 471, 485 (N.Y. 1997). In effect, in the guise of duty and proximate cause analysis, these courts are essentially “stepping in to create (or more properly, revive) some special rules to avoid making the slightly faulty defendant pay the overwhelmingly faulty plaintiff a very large sum of money. Hayden, *supra*, at 921. Tobacco litigation should be no different.

By reframing plaintiffs’ confession of fault as primary assumption of risk or no-duty or sole proximate cause, defendants can throw on plaintiff “the primary burden of protecting his own interest” (as the “first bulwark against outside interference”) based on the longstanding policy that “courts are the last resort” of those who “cannot protect themselves, not those who merely do not.” F. Bohlen, “Contributory Negligence,” 21 *Harv. L. Rev.* 233, 253 (1908). This argument, moreover, is fully consonant with the law’s reasonable person standard, which holds all adults to a duty of reasonable care in the circumstances not only for the safety of others, but *themselves* as well. While “it may be awkward to conceptualize the plaintiff as owing the defendant a duty to protect herself from her own negligence, the law requires the plaintiff to conform to the same standard of conduct as the defendant—the reasonable person of ordinary prudence under like circumstances.” *Restatement (Second) of Torts* § 464 (1965). This important legal principle has been lost in tobacco litigation.

The defense, in a nutshell, is that being addicted to nicotine for purposes of medical diagnosis and treatment (i.e., smoking on a regular basis despite knowledge of smoking-related medical problems) does not trump well-established rules of conduct for legal purposes. More specifically, a diagnosis of nicotine addiction *does not*: (a) rebut the legal presumption of competence (human agency)—that is, practical reasoning skills or the capacity for choice and control over one’s behavior; or (b) trump the reasonably prudent person standard as a uniform standard of behavior—that is, the duty to exercise due care for the safety of oneself and others in the circumstances consistent with legal requirements. Consider, for example, that a smoker otherwise meeting criteria for the diagnosis and treatment of nicotine addiction is not, by virtue of that status alone, disqualified from voting, obtaining a driver’s license, marrying, making other contracts, or, perhaps most tellingly, giving health care providers informed consent for medical treatment purposes.

In a similar vein, the symptoms of nicotine withdrawal associated with smoking cessation are not so dreadful or substantial that they can be said to give rise

to an excusing or disabling condition for purposes of avoiding or mitigating personal responsibility for the health consequences of continuing to smoke. No matter how unpleasant the relatively mild signs and symptoms of nicotine withdrawal may be, they are not by degree or kind like the pressures that typically support the duress defense. They can be managed by a variety of strategies, and are not so extreme as to be incompatible with blame. “In summary, to characterize addiction as a disease is not necessarily morally incompatible with saying that addicts are responsible for yielding to it.” R. Bonnie, “Responsibility for Addiction,” 30 *J. Am. Acad. Psychiatry & Law* 405, 413 (Nov. 2002); see also Davies, *supra*, at 54 (“If, as seems to be the case, there is variability in severity of withdrawals as a function of time, place, expectation or whatever, then it becomes increasingly difficult to conceptualize withdrawals as the basic powerhouse or engine-room for ‘addictive’ behavior.”).

In sum, regardless of addiction to nicotine, smokers generally are expected to obey (and do) legal commands restricting tobacco use in certain places (e.g., airplanes, restaurants, workplaces, etc.) by exercising control over their smoking behavior. Further, even under the medical model of addiction, individuals are encouraged and expected to take responsibility for the clinical treatment of their addictions. There is no reason for a different rule to govern the assessment of responsibility in tort litigation.

Forming Reasons for Action Is an Essential Quality of Personhood, Not a Non-Responsibility Condition

The key if defendants are to turn the tide in the *Engle* litigation is for them to highlight the critical differences and “imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.” See DSM-IV-TR, *supra*, at xxxiii. The take-away is that for purposes of legal judgments, including responsibility assessment and ascription, smoking on a regular basis is not involuntary action in the sense of mere bodily movement (like blinking or twitching), but rather voluntary action in that it is willful (like winking). See G. Heyman, *Addiction: A Disorder of Choice* 103 (Harv. U. Press 2009) People who smoke cigarettes on a regular basis (against medical advice) or “use drugs do so for their own reasons, on purpose, because they like it, and because they find no adequate reason for not doing so”—just as people have reasons for rock climbing, football, or playing the violin. Davies, *supra*, at xi.

Defendants in tobacco litigation can show that people all the time voluntarily act in ways that are on balance self-defeating or problematic and that, so far as law is concerned at least, unwelcome or less than optimal behavioral outcomes do not establish irrationality, involuntariness, or legal excuse (non-responsibility). For legal purposes, such behavior is part of the human condition. See, e.g., USDHEW, *Smoking and Health* 355 (1964) (“Historically, man has always found and used substances with actual or presumed psychopharmacologic effects ranging in activity from the innocuous ginseng root to the most violent poisons It will suffice to note that this human drive is so universal and may be so powerful that man has always been willing to risk

and accept the most unpleasant symptoms and signs.”); G. Heyman, *supra* at 173 (“[P]opulation trends and lever-pressing rates [in animal studies] tell the same story: choice tends to produce less than optimal outcomes.”).

Whatever one’s peculiar vulnerability, however strong the physiological and environmental influences that bear upon smoking behavior, “people knowingly take the risk of becoming addicted when they use drugs with addictive properties that are well known.” Bonnie, *supra*, at 409; see also Davies, *supra*, at x (smoking “makes sense for them . . . given the choices available”). In the end, addiction is a difficult choice, not no-choice or even an unreasonably difficult choice. As such, plaintiffs in tobacco litigation are arguably responsible for “the whole damn thing” by virtue of the failure of a *prima facie* case. As no less an authority than Dean Prosser once put it, “it may be no bad policy to hold a fool according to his folly.” See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 32, 173 (5th ed. 1984).

None of this is intended to deny or minimize the reality of addiction as a vexing social problem, or to gainsay the efforts of medical science, and allied disciplines, to better understand and treat addictive behaviors. But unless the addiction question is conceptually reframed in litigation as a legal problem in terms of the essential elements of a *prima facie* liability case (as opposed to a medical status), including duty and proximate causation, tobacco litigation will continue to be used by plaintiffs to devalue personal responsibility by defining the addiction issue as a nicotine or chemical problem as opposed to how cigarette smokers behave. See D. Dripps, “Recreational Drug Regulation: A Plea for Responsibility,” 1 *Utah L. Rev.* 117, 128 (2009) (explaining that the distributive principle of “fault” for legal responsibility purposes implicates interests “entirely inapposite” to the distributive principle of “need” for treatment purposes).

Current and former smokers should not be allowed to continue using the medical model of addiction as a “brain disease” to strip themselves of human agency and the related capacity for mental (as opposed to biological) causation. Nicotine addiction is simply a label applied to certain categories of behavior “to enable clinicians and investigators to diagnose, communicate about, study, and treat people.” DSM-IV-TR, *supra*, at xxxvii. It is not mere bodily movement, a force of nature, or a chemically mediated biological phenomenon that operates like “an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid.” *Commonwealth v. Mosler*, 4 Pa. 264, 267 (Pa. 1846). Stripped of disease imagery and related rhetoric, the pharmacological and peripheral effects of nicotine (positive or negative) are just reasons for ac-

tion, not a pathogen giving rise to an excuse or non-responsibility for the long-term health risks of regular smoking based on comparative fault principles.

Conclusion

Plaintiffs in tobacco litigation are misusing the clinical status and label of addiction as an excuse to escape full responsibility for the incontrovertibly conscious choices they make in smoking cigarettes despite the open and obvious health risks involved. They seek to avoid responsibility for their otherwise voluntary actions—and bury personal responsibility—in the “information contained in a clinical diagnosis” common to the medical arena. In the process, they devalue personal responsibility in terms of “the questions of ultimate concern to the law.”

The result is bad law. It is “a grave error” for the legal system “to assume that addictive drug use or addiction-related conduct is involuntary and to build such an unworthy assumption into” common law doctrine, as is happening with all too much frequency in tobacco litigation. H. Fingarette, “Addiction and Criminal Responsibility,” 84 *Yale L. Rev.* 413, 444 (1975). As a general rule, law courts do not indiscriminately apply “definition[s] of ‘mental disease or defect’ . . . developed with medical considerations of diagnosis and treatment foremost in mind.” *U.S. v. Lyons*, 731 F.2d 243, 246 (5th Cir. 1984) (en banc). Why should tobacco litigation and “nicotine addiction” be any different? In the final analysis, the addiction question in tobacco cases is a legal judgment that should turn on long-abiding common law theories of human agency, duty, proximate causation, and personal responsibility—not medical paradigms or related considerations.

In the courtroom, the best way to characterize nicotine addiction (i.e., seeking and using cigarettes on a regular basis) for accountability purposes is as a reason for action, a behavioral motivation or influence. Instead of allowing juries to make them millionaires for doing as they pleased, smokers should be nonsuited on the basis that they are responsible for “the whole damn thing” on the principle of consent. Plaintiffs’ medical model of nicotine addiction as “disease” is a false picture—a fiction of affliction. It is just an alternative way of describing the common mine run of behaviors and temptations associated with any strong force of habit. Addicted or not, in the courtroom, a smoker should bear full responsibility for yielding to addiction, because he or she is a legal actor with causal power, not the “hapless puppet of brain processes.” S. Morse, “Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience,” 9 *Minn. J. L. Sci. & Tech.* 1, 23 (2008).