

# **Drowning One's Sorrow: The Legal Implications of Alcoholism among Indigenous People**

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Recent years have seen the development of tort claims in class actions against companies that produce potentially harmful products. The lead in legal precedents was set by claims made in the United States against tobacco companies. Beyond the empirical data presented and the legal arguments enunciated in these U.S. claims, an overall strategy, partly extra-judicial, was worked out. This involved a heightened public awareness of the nature of tobacco addiction, and focused pressure on the weakest and smallest of the companies to agree to a settlement of the claims. This avoided far more disastrous consequences for those companies, but also implied a certain degree of "guilt", with clear-cut implications for larger companies. The larger companies had until then stood steadfast in their denial both of any addictive properties of their product, or of any wrongdoing on their part.

## **Actions Against Alcohol Companies by Indigenous Peoples**

Since the initial successes in litigation against the tobacco companies other products, including guns and chemicals, have already been exposed to similar claims.<sup>1</sup> Until now alcohol companies have been spared such battles. This article looks at the possibility of mounting similar actions (either class actions or on an individual basis) against alcohol companies with a specific focus on possible claims by Indigenous peoples, because in widely separated parts of the world they have suffered special harm as a result of alcohol.<sup>2</sup> This harm has been linked to the impact of Western society including the dispossession of Indigenous people from their homelands, the diminution of the value of traditional customs and the enforced acculturation by colonisers.<sup>3</sup>

There is also a fair amount of solid historical evidence that highlights the harm experienced by Indigenous peoples as a result of the exploitative use that many Western groups (both individuals and companies) made of alcohol as a means of enticing Indigenous people to trade and to work, and in some instances to develop patterns of passivity. Peter Mancall notes that the alcohol trade became "crucial to the way colonists and Indians understood each other. Indians' responses to liquor reinforced colonists' notions about their cultural and social inferiority." Arguing that the "alcohol business needs to be viewed in a wider context," he claims that, "The liquor trade joined with the growing colonial population and recurring epidemics to destabilize Indian villages, and perhaps contributed to the decision of countless Indians to sell their lands to colonists and move westward beyond colonial settlement."<sup>4</sup>

In similar vein, Marcia Langton claims that alcohol was used as part of a strategy to entice the Aborigines to closer contact with, and dependence on, the settler

population. She argues that the significant factor, ignored in studies of Aborigines, is the role of British men who deliberately provided the alcohol "to trick and debilitate those Aborigines who had survived the smallpox and the destruction into which they were forced."<sup>5</sup>

Further evidence as to the damage caused to Indigenous communities in America is provided by Anthony Wallace, who writes that, "[I]n order to lubricate the wheels of commerce, unscrupulous traders often sold or gave whiskey to a Native American population that had no experience with any drug more intoxicating than native tobacco or, in the Southeast, the 'black drink' a ceremonial emetic...there is no question that the behavioral and physical effects of alcohol ravaged native communities..."<sup>6</sup>

### **Problems with Mounting an Action**

A possible reason for the immunity so far enjoyed by alcohol companies is that their product is known to be harmful—and is thus often sold with restrictions as to where, when and to whom it can be sold.

This factor presents a key difference between tobacco and alcohol. Alcohol was never presumed not to be dangerous, whereas tobacco was considered non-addictive, positive in its soothing effect and inconsequential in any claimed detrimental impact. Indeed, a crucial aspect of the tobacco litigation was the fact that the executives of the companies were shown to have deliberately misled the public. Evidence emerged that some companies were not only aware of the addictive properties of their product, but had invested in examining means to increase the addictive effect.<sup>7</sup> No similar claims could be made as to alcohol. The liquor companies have never denied the harmful effects of their product, when not taken in moderation. The illness caused by drink is known, including *delirium tremens*, and the possible fatal cumulative consequences.

Even so, it is possible that people who succumbed to the blandishments of liquor and then became unable to resist it, might have a possible claim. Some recent litigation by cigarette smokers in the U.S. has been successful, despite the fact that the harmful effect had been known when they took up smoking and the warnings as to danger to health had been clearly announced and explained.<sup>8</sup>

As for Indigenous people, they may well be unaware of the full nature of the danger to their health posed by drinking alcohol; furthermore, there may well be biological propensities to adverse reactions which science and medicine has not, as yet, fully resolved. Nevertheless, it should be conceded at the outset that any litigation against liquor companies would encounter difficulties of a type that did not affect the tobacco litigation, particularly the vast array of different intoxicating drinks, as well as the many more companies involved. Indeed, it might be necessary to consider challenging an umbrella organization of the liquor industry *per se*.

In any event, what must be stressed is that Indigenous peoples may have a more viable claim than the rest of the population as a result of the special harm they have suffered due to alcohol. The very fact that controls were often instituted by governmental authorities over the sale of alcohol to Indigenous peoples, is a clear indication of the awareness of the harm being caused. But such controls do not exculpate entirely the overall responsibility of governments and companies of Western society.

## Conclusion

In recent years, throughout the common law world, the judicial system has been effectively used by Indigenous groups to further their interests. Thus far, no attempt has been made to extend the litigation to the problems caused to Aboriginal people by the use of alcohol. Possible ways forward include a full-blown judicial struggle or, perhaps preferably, negotiations could be entered into with the liquor industry (or selected companies within it). Failure on the part of such companies to acknowledge some responsibility for harm caused in the past and present, linked to a generous offer of compensation, might well lead to litigation of the type that has caused so much embarrassment to the tobacco industry.

The harm to Indigenous people is undoubted, as is the capacity of the liquor industry to provide compensation. This is their possible legal obligation; it is certainly their moral and social responsibility.

### Notes:

1. <sup>1</sup>For a good up-to-date description of the key developments in this litigation, see Hanoch Dagan and James J. White, "Governments, Citizens and Injurious Industries," *New York University Law Review* 75 (2000), p. 354.
2. <sup>2</sup>See, for instance, P. Lyon, *What Everybody Knows about Alice: A Report on the Impact of Alcohol Abuse in the Town of Alice Springs* (Alice Springs: Tangentyere Council, 1990); M. Brody and K. Palmer, *Alcohol in the Outback* (ANU North Australia Research Unit, 1984).
3. <sup>3</sup>See discussion in Leon Sheleff, *The Future of Tradition. Customary Law, Common Law and Legal Pluralism* (London: Frank Cass, 2000).
4. <sup>4</sup>Peter C. Mancall, *Deadly Medicine: Indians and Alcohol in Early America* (Ithaca: Cornell University Press, 1995), p. 170.
5. <sup>5</sup>Marcia Langton, "Rum, Seduction and Death: Aboriginality and Alcohol," *Oceania* 63 (1992-93), p. 203.
6. <sup>6</sup>Anthony Wallace, *The Long, Bitter Trail: Andrew Jackson and the Indians* (New York: Hill and Wang, 1993), pp. 23-24.
7. <sup>7</sup>The information was initially sent to health researchers in California. Today, tens of thousands of pages of internal documents of the tobacco industry are available.
8. <sup>8</sup>For a good analysis of the issue, see Richard L. Cupp, Jr., "A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in 'Third Wave' Tobacco Litigation," *University of Kansas Law Review* 46 (1988), p. 467. For a leading relevant case dealing with plaintiff's culpability, see *Carter v. Brown and Williamson Tobacco Co.* (No. 95-00934 CA) (Fla. Cir. Ct. Duval County, Aug. 9, 1996); but for an alternative view see earlier case, *Pritchard v. Liggett & Myers Tobacco Co.*, 370 F. 2d 95 (3rd Circ. 1966).