

## Do Comparisons Between Tobacco and Climate Change Liability Withstand Scrutiny?

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**Research Commented On:** [“From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability”](#) (2017) *Geo Envtl L Rev* (forthcoming)

A few years ago, the Canadian Press [reported](#) that environmental groups were “taking inspiration from the legal fight against tobacco to fire warning shots at major energy companies over their alleged role in funding climate change denial and blocking climate-friendly legislation.” The next day, an [editorial](#) in the Calgary Herald suggested that “the comparison doesn’t stand up to even cursory examination. One is a product that is always hazardous to human health when consumed, the other is a staple of the modern world.” Setting aside for a moment the fact that tobacco wasn’t [always understood as hazardous to human health](#) (back in the 1950s, almost one in every two Americans smoked, and cigarettes were ubiquitous in homes, places of work, universities, restaurants and bars), the past few years have seen an increasing number of comparisons made between the fossil-fuel industry’s potential liability for climate change and “Big Tobacco’s” liability for tobacco-related disease. Very few of these comparisons, however, have considered the legally relevant similarities and differences between these two contexts in detail. In our most recent [paper](#), recently accepted for publication in the Georgetown Environmental Law Review, we set out to do just that.

### What We Found

Our research began with the unprecedented story of tobacco litigation and liability, and specifically the decision by several U.S. states (followed shortly thereafter by most Canadian provinces) to sue the tobacco industry directly for the public – as opposed to private – healthcare costs of tobacco-related disease. Not only did they sue the tobacco industry, but they also passed legislation to remove some of the legal hurdles that private plaintiffs had encountered in seeking compensation for tobacco-related harms in previous waves of unsuccessful tobacco litigation. As one example, these laws allowed the provincial plaintiffs to rely on statistical and epidemiological data to establish the necessary links between smoking, tobacco-related disease, and the province’s healthcare costs. In the U.S., the industry went from never losing a case to settling for US \$240 billion as part of what is known as the [Master Settlement Agreement](#).

We then asked ourselves whether similar developments might be possible in the future if, as a result of society’s failure to adequately address the climate change problem, governments of all levels are faced with unprecedented public costs to remediate the resulting damage (*e.g.* damage from increased floods, droughts, fires, etc.) and to adapt to new climatic regimes (some of which are described [here](#)). We conclude that while there are some important differences between these two contexts, from a legal perspective the comparison is actually quite apt. Both contexts involve products (tobacco and fossil-fuels) initially considered harmless but increasingly understood as

posing significant risks, not just to their direct consumers but to the broader public as well. Probably the single most important factor in our analysis, however, is the public nature of the costs incurred in both contexts: public healthcare costs as a result of tobacco-related disease, and the various public remedial and adaptation costs that are expected to arise as a result of climate change. Other similarities include [well-documented](#) campaigns of denial in the face of mounting scientific evidence in both contexts.

## Implications

Based on recent developments (see *e.g.* the big auto-makers' [letter](#) to the new EPA administration requesting the postponement of tougher fuel-economy standards), it appears that the fossil-fuel industry is focusing exclusively on current regulatory regimes as constraining their decision-making, ignoring the traditional role of tort law – and the potential for civil liability in particular – in providing a “floor” for reasonable conduct, including the avoidance of reasonably foreseeable risks.

This regulatory focus is perhaps not so surprising in light of the current difficulties being encountered in what we describe as the first wave of [current climate litigation](#). However, and without foreclosing the viability of these early efforts (and recognizing that this first wave of climate litigation is still building in Canada, see [here](#) for example), our analysis suggests that these difficulties are not immutable and may be overcome by future legislatures motivated to find funding for significant public costs that will otherwise be borne by the tax-paying public.

More concretely, this means that it may not be in auto-makers' best interest to postpone more stringent emissions standards, irrespective of the regulatory landscape, as this may be seen in hindsight as not meeting the applicable standard of care. Gasoline retailers and auto-makers may also want to start [warning the public](#) more explicitly about the risks of fossil-fuel consumption. As the costs of electric vehicles continue to come down, auto-makers may also want to re-think their marketing strategies with respect to high emissions vehicles, [sales of which are apparently at an all-time high](#). Oil and gas producers may want to scrutinize their operations to ensure that best available technologies are being adopted [wherever possible](#), that climate risk is minimized, and that R & D funding is directed towards low-, no- and negative-emissions technologies.

We, too, have further research to do. Although our paper should not be considered preliminary, we are fully aware that some aspects require further analysis and discussion – including with industry. We welcome those discussions as we move forward with this project.

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