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In the Growing Wave of Climate Litigation, Could the Automobile Industry be Next?

By: Martin Olszynski

Litigation Commented On: *County of San Mateo v Chevron Corp.*, Docket number(s): 3:17-cv-04929-MEJ, *County of Marin v Chevron Corp*., Docket number(s): 3:17-cv-04935, *City of Imperial Beach v Chevron Corp*., Docket number(s): 4:17-cv-04934, *People of State of California v BP p.l.c.*, No CGC-17-561370 (Cal Super Ct, filed Sept 19, 2017); *People of State of California v BP p.l.c.*, No RG17875889 (Cal Super Ct, filed Sept 19, 2017)

Over the course of the summer, five California municipalities (San Mateo County, Marin County, and the City of Imperial Beach as a first group, San Francisco and Oakland as a second) filed statements of claim against many of the world's largest oil and gas companies – including Exxon Mobil, Chevron, BP, Shell, and Canada's own Encana – claiming that these companies should be liable for the current and future costs incurred by these municipalities as a result of climate change, and especially those associated with rising sea levels. In this post, I consider whether the world's top automobile manufacturers could be next in the defendant line. I've been thinking about automobile manufacturers' potential liability for a while now, having first considered the issue in a recent article co-authored with Professors Sharon Mascher and Meinhard Doelle (which we blogged about here). This post's focus on car manufacturers has been motivated by two separate but related developments in particular: (i) the automobile manufacturers' December 2016 letter to Scott Pruitt, the then-new head of the United States' Environmental Protection Agency (EPA), requesting that he reconsider the "strict" fuel efficiency standards for cars and light trucks established by the Obama administration; and (ii) the industry's response to a potential zero emission vehicle (ZEV) mandate currently being considered here in Canada, and especially the industry's suggestion that it "can't control consumer tastes".

As further set out below, the automobile industry's letter to Scott Pruitt suggests an exclusive focus on regulatory standards as determinative of the industry's applicable standard of care (and potential liability for the breach thereof), which, under Canadian common law at least, would be misplaced. Similarly, the industry's refusal to acknowledge its role in shaping consumer preferences also appears misplaced and may be a source of liability going forward.

The California Suits

The California climate change statements of claim have been well summarized by Michael Burger, Executive Director at Columbia University's Sabin Centre for Climate Change Law:

> Each of the complaints presents the same simple, compelling storyline: These fossil fuel companies *knew*. They knew that climate change was happening, that

> fossil fuel production and use was causing it, and that continued fossil fuel production and use would only make it worse. They knew this, but they hid it. And then they lied about it, and paid other people to lie about it for them. All the while they profited from it, and plotted to profit more. Ultimately, their actions caused sea levels to rise, and thereby caused harm, are continuing to cause harm, and are contributing to future harm to the plaintiff governments and their residents. Accordingly, the complaints claim that the defendant companies should be held liable and forced to pay, both for the costs the local governments are incurring to adapt to sea level rise and for the companies' own willful, deceptive, and malicious behavior.

While these are not the first climate change lawsuits to be filed in the United States, they are the first to expand the causes of action beyond the standard public nuisance action, to include negligence, failure to warn (a specific form of negligence), and design defect (plaintiffs are also suing in private nuisance and trespass). The inclusion of these additional causes of action, coupled with the above-noted elements of knowledge and denial, have fueled comparisons to the tobacco litigation of previous decades, the influence of which is also manifest in the wording and structure of the various statements of claim. In the table below, I have excerpted the opening paragraph of San Mateo's statement of claim (right column) along with an excerpt from the U.S. Federal Court's decision in *United States v Philip Morris USA, Inc et al*., 449 F Supp. 2d 1 (DDC 2006) (left column), in which the United States government was mostly successful in its action against the tobacco industry under the *Racketeer Influenced and Corrupt Organizations Act* ("RICO"), 18 USC §§ 1961-1968:

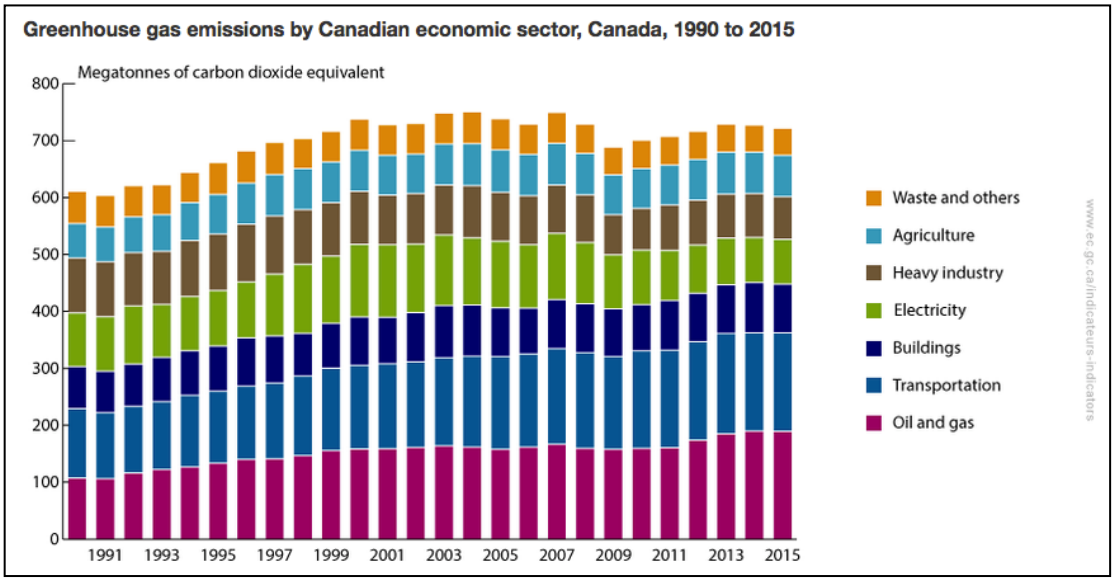
United States v Philip Morris USA, Inc et al., 449 F Supp 2d 1 (DDC 2006).	*County of San Mateo v Chevron Corp.*, Docket number(s): 3:17-cv-04929-MEJ
[…] [This case] is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community… In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that	Defendants, major corporate members of the fossil fuel industry, have known for nearly a half century that unrestricted production and use of their fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate. They have known for decades that those impacts could be catastrophic and that only a narrow window existed to take action before the consequences would not be reversible. They have nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats, discredit the growing body of publicly available scientific evidence, and persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel pollution. At the

success exacted.	same time, Defendants have promoted and profited from a massive increase in the extraction and consumption of oil, coal, and natural gas, which has in turn caused an enormous, foreseeable, and avoidable increase in global greenhouse gas pollution…

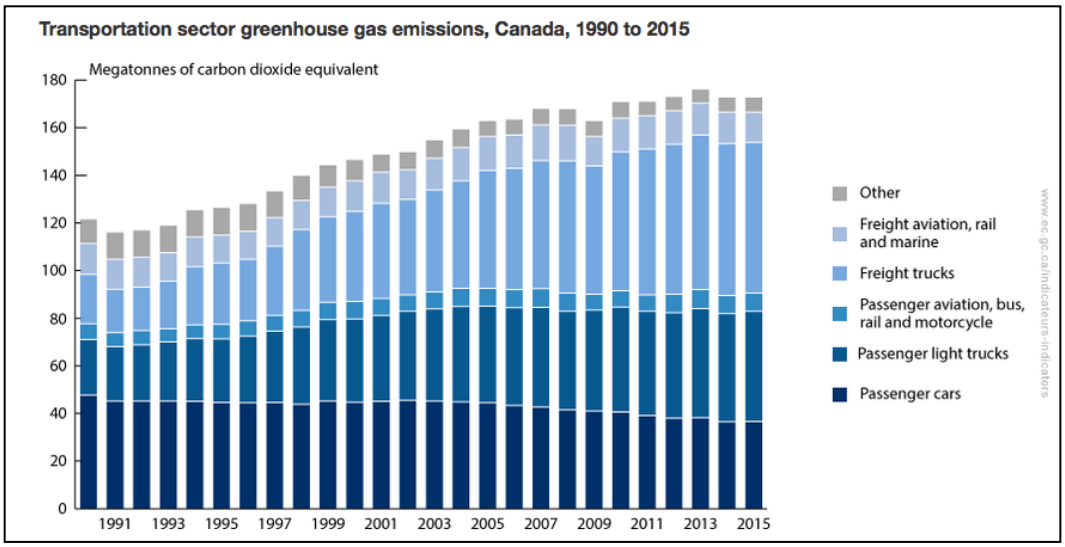
In addition to this narrative of knowledge and denial, it is the expanded list of potential causes of action, and the failure to warn especially, that have me thinking about the automobile industry.

The Transportation Sector as a Major Source of Greenhouse Gas Emissions

The transportation sector is responsible for a significant portion of most developed countries' greenhouse gas emissions and Canada is no exception. According to Environment Canada's most recent assessment (2015), the transportation sector is responsible for roughly 24% of Canada's emissions:



Of course, the transportation sector is not homogenous but rather consists of freight (air and truck), personal travel (aviation, bus, and rail) and personal vehicles, which Environment Canada has further – and usefully – subdivided between passenger light trucks and passenger cars:



Aside from the massive increase in emissions from freight trucks (a topic for a future post; in the meantime see here), what captured my attention is that the emissions from passenger cars have actually decreased since 1990, but emissions from passenger light trucks have significantly increased. According to Environment Canada,

> Between 1990 and 2015, GHG emissions from the transportation sector grew by 42%. Part of this increase was due to a higher number of vehicles on the road and to changes in vehicle type used. Although total passenger emissions grew by 17%, emissions from cars declined by 23%, *while emissions from light trucks (including trucks, vans and sport utility vehicles) doubled.* (emphasis added)

As it turns out, this is entirely consistent with data showing that around 2006, sales of passenger class "cars" decreased while passenger class "trucks" sky-rocketed:

Car vs. Truck Sales (Canada, 1965-2016)

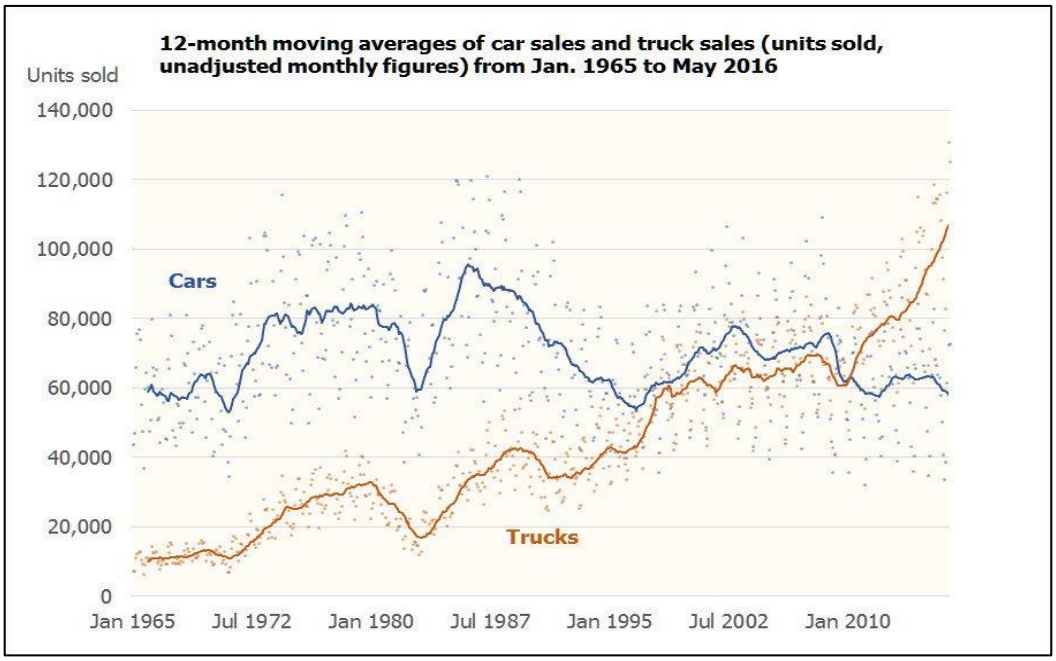


Figure by J. Carson with data from Statistics Canada.

In other words, in the decade during which scientific understanding of climate change advanced significantly, automobile manufacturers have been producing and selling more and more emissions-intensive vehicles.

Negligence, Regulatory Standards and the Failure to Warn

Under Canadian common law, in order to succeed in an action for negligence (including for a failure to warn), a plaintiff must establish the following five elements:

1) That the defendant owed the plaintiff a duty of care;
2) That the defendant breached the applicable standard of care;
3) That the plaintiff has suffered damage or harm;
4) That the defendant's breach caused or contributed to the plaintiff's damage;
5) That the plaintiff's damages are not too remote or indirect.

With respect to the automobile industry, I can see potential actions both in negligence generally and for failure to warn. Because time and space do not permit a detailed consideration of each of the above elements, I have focused my analysis on the applicable standard of care. Consistent with the current suite of California lawsuits, I assume that the plaintiffs in such litigation would also be municipalities or perhaps state/provincial level governments that are incurring and will continue to incur costs because of climate change (I return to this issue and the duty of care briefly towards the end of this post).

With respect to negligence, and acknowledging at the outset its novelty, the argument would be that automobile manufacturers breached the applicable standard of care by selling – and continuing to sell – internal combustion engine (ICE) vehicles whose cumulative emissions create a reasonably foreseeable risk of harm to the plaintiffs by virtue of their contribution to anthropogenic climate change. Now, in response to such an argument, the industry would undoubtedly point to any applicable regulatory standards and their compliance therewith. In Canada, these standards are found in the *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*, SOR/2010-201. While clearly relevant, Canadian law is also clear that mere compliance with regulatory standards is not determinative of liability in negligence. Perhaps the most authoritative statement on this front is the Supreme Court of Canada's decision in *Ryan v Victoria (City)*, [1999] 1 SCR 201, 1999 CanLII 706 (SCC) at paras 28-9:

> [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
>
> [29] *Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive*. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but *it does not extinguish the underlying obligation of reasonableness*… Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence... *By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability*… Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that *one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties*. (emphasis added)

In *Ryan*, the Supreme Court went on to explain that the more detailed the statutory or regulatory standard, the more persuasive it will be in terms of benchmarking the common law standard of care (at para 40). But the Court also made clear that "the weight to be accorded to statutory compliance…depends on the nature of the statute *and the circumstances of the case*" (at para 39, emphasis added). It is at this juncture that the automobile manufacturers' letter to Scott Pruitt becomes relevant. Assuming that the EPA does try to water down emissions standards, would a court be entitled to take such facts into account (i.e. that a previous standard had been established but was subsequently weakened in what appears to be a classic example of regulatory capture), rendering such regulatory standards less persuasive in the standard of care analysis? As one of my students pointed out when we discussed the matter in my tort law class last week, doing so

would seem to raise separation of powers concerns, a consideration explicitly noted by the Supreme Court in *Ryan*. As another student pointed out, however, it is not as though such a standard would be struck down (which is the domain of judicial review). The matter would be one of private liability at common law.

I suspect that the administrative record leading up to any such revised standards would fit within the rubric of "the circumstances of the case" (*Ryan* at para 39), but could not find any precedents on point. In any event, in *Ryan* (as in previous cases), the Supreme Court of Canada was also clear that the persuasiveness of legislative standards also depends on their scope (at para 40), and it is here that an action for failure to warn warrants further consideration. Under Canadian law, there is "a clear duty owed by manufacturers, not only to make and design their products reasonably, but to warn about any dangerous aspects of their products. These warnings must be explicit and reasonably communicated" (Linden, Klar, Feldthusen, *Canadian Tort Law: Cases and Materials*, 14th ed, at 499).

Readers may be surprised to learn that, unlike many other countries, Canada does not require automobile manufacturers or car dealerships to place fuel efficiency labels on cars in the show room (i.e. doing so is voluntary). Setting aside for a moment that these labels speak to *fuel efficiency* and not the risks of climate change, anecdotally it appears that some dealerships will post the labels on their most efficient models, but often fail to place them on their trucks, SUVs, and sports cars. I have also begun to take note of the kinds of models placed at the front of various dealerships. My impressionistic answer? Trucks and SUVs.

This seems like a good time to return to the industry's position that it cannot control customer tastes. According to Business Insider, Fiat Chrysler, Ford and General Motors were amongst the top 10 U.S. companies in terms of advertising spending in 2014, at $2.2 billion, $2.5 billion, and $3.1 billion, respectively. That seems like a lot of money to spend on something that the industry claims to not control. Moreover, recent analysis by the Sierra Club makes clear that only a fraction of this advertising is going towards ZEV models:

> According to the data, Ford advertised its gasoline-powered Focus in about 4,750 instances on cable and broadcast TV to national audiences, whereas it only advertised its Focus Electric in about 200 instances to a national TV audience. That's nearly 24 times more non-EV ad instances! Similarly, Mercedes advertised its C-Class gas guzzler in about 1,400 instances on national TV, whereas it didn't advertise its B-Class electric vehicle at all to a national TV audience.

In my view, it is at least arguable that the automobile industry is – and has been for some time – in breach of its duty to warn consumers of the climate change risks associated with its ICE model vehicles, creating a reasonably foreseeable risk of harm to plaintiff municipalities. And while some readers may scoff at the suggestion that cars should come with climate change warning labels, consider the recently taken photograph of a PetroCanada gas pump below on the left (this photo is from Saskatoon, SK but I have seen them in Calgary as well):

The green label encourages customers to "play your part in helping to reduce climate change by using our products responsibly" and directs them to an industry website for more information. While I can only speculate, I suspect that such labels are a response to the efforts of Robert Shirkey at Our Horizon, who since 2013 has been advocating for the placement of climate change warning labels on gasoline pumps (such as the one above on the right). In November of 2016, the municipality of North Vancouver became the first in Canada to pass a bylaw requiring such labels, although concerns have been expressed that the labels are not nearly as direct as they should be, having been "largely co-opted" by industry (for a summary of the research on warning labels, see this submission to the federal ZEV panel).

To be clear, the challenges faced by the plaintiff municipalities in the California lawsuits are significant, as they would be in any lawsuit against automobile manufacturers. One of the biggest challenges insofar as negligence and failure to warn are concerned is that a duty of care (the first element discussed above) is usually owed to individuals (e.g. consumers of vehicles), not to municipalities or other levels of government. On the other hand, I would argue that once the cumulative and public nature of any given harm becomes apparent, as it did in this context long ago, public institutions such as municipal governments become reasonably foreseeable plaintiffs.

I am also aware of recent announcements by various manufacturers of their plans to build out their electric fleets (see e.g. here). The question, in my view, is whether such plans are sufficiently ambitious in light of what we know (and have known for a couple of decades at least) about climate change. Going forward, the industry may wish to mitigate this risk by transitioning their fleets as quickly – if not as profitably – as possible, rather than obfuscating behind consumer tastes. In the meantime, the federal government's ZEV advisory panel should seriously consider mandatory climate change warning labels as one tool for increasing the uptake of ZEVs.

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