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Will Alberta's Lawsuit Against Opioid Manufacturers Improve Public Health?

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Matter Commented On: Litigation Against Opioid Manufacturers

Opioid-related deaths and injuries are a critical public health issue, with one Canadian dying every two hours due to opioids. Individuals who become addicted to prescribed opioids may progress to buying legal products on the black market or taking illegal substances like heroin. Heroin is increasingly laced with synthetic opioids such as fentanyl, which can be lethal even in small doses. In 2018, 73% of accidental opioid-related deaths in Canada involved synthetic opioids.

Drug companies are now under fire for their aggressive promotion of opioids and for helping to supply the black market, thereby profiting substantially from the suffering of others. Beginning in the late 1990s, companies falsely assured the medical community that their products were not addictive and encouraged doctors to prescribe opioids for conditions they would not effectively treat, leading to a surge in prescriptions. Given the quantity of opioids they distributed, drug companies also knew or ought to have known that their products were being diverted to the black market. For example, one US criminal case alleges that drug company Miami-Luken sent a staggering 5.7 million opioid pills to a small town in West Virginia over a period of seven years. In 2008 alone, it shipped 5264 pills for every one of Kermit, West Virginia's 380 residents, which were clearly being diverted to the black market.

These opioid prescriptions have come at a significant cost, both in terms of human health and government resources. For example, Alberta reports spending $53 million per year on opioid-related health care and is planning to spend an additional $40 million. The conduct of opioid manufacturers has led to several lawsuits in the US and, more recently, Canada. On October 14, Alberta announced that it will join British Columbia's class action lawsuit against opioid manufacturers and distributors.

US Litigation

An Oklahoma court recently ordered Johnson & Johnson to compensate the state $572 million for "engag[ing] in false and misleading marketing of both their drugs and opioids generally." This week in Ohio, a landmark case began that involves thousands of municipal, county, state, and individual plaintiffs and various defendants, including drug companies, pharmacies, and individual doctors.

Instead of going to trial, several opioid manufacturers have opted to enter into settlements. For example, Purdue paid $600 million to the US federal government, $270 million to Oklahoma, $10 million to West Virginia, $19.5 million to Oregon, $24 million to Kentucky, and smaller amounts

to other states. In another substantial settlement, Reckitt Benckiser (maker of Suboxone) agreed to pay $1.4 billion to settle all US claims.

Canadian Litigation by Individual Plaintiffs

Individual plaintiffs who sustained injuries due to opioids are pursuing a $1.1 billion claim against almost two dozen drug manufacturers in Ontario. They allege that defendants "knew that anyone who injected opioids would be at significant risk of becoming addicted" and "knew or ought to have known that their representations regarding the risks and benefits of opioids were not supported by, or were contrary to, scientific evidence." The proposed representative plaintiff is a former emergency room doctor prescribed Percocet for a thumb injury. His addiction allegedly caused him to lose his license to practice medicine, his job, and custody of his children.

While individuals injured by opioids may eventually receive compensation, they could also lose their cases due to difficulty proving causation or insufficient common issues for class action certification, as occurred in several of the cases filed against tobacco manufacturers (see e.g. here, here, and here). Despite the addictiveness of these products, judges may also be concerned with the role plaintiffs played in their own injuries. For example, in a US lawsuit against a fast food manufacturer, the court emphasized the fact that plaintiffs knew about the dangers of fast food and noted the concern with personal responsibility. Defendants may similarly point out that plaintiffs knew about the dangers of black market opioids and heroin, went to multiple doctors to obtain prescriptions, or took medication in quantities beyond that which they were prescribed. Courts may also struggle with liability in cases where plaintiffs started with prescribed opioids before proceeding to illegal products because this would entail holding manufacturers liable for injuries directly caused by illegal products that they did not produce (even if their products acted as a gateway).

Canadian Litigation by Government Plaintiffs

In 2018, British Columbia filed a claim against dozens of opioid manufacturers and distributors such as Shopper's Drug Mart, alleging that they "contributed to a epidemic of addiction, and that they placed profits over the health and safety of the health care system." The province argues that manufacturers knew or ought to have known the dugs were addictive and were making their way into the illicit market. They also claim that manufacturers deceptively marketed opioids as being less addictive than they were and encouraging doctors to prescribe them for conditions they were not effective in treating.

In furtherance of its lawsuit, British Columbia passed legislation, the *Opioid Damages and Health Care Costs Recovery Act*, SBC 2018, c 35, which is nearly identical to laws enacted by provincial governments to facilitate the recovery of damages against tobacco companies (see e.g. *Crown's Right of Recovery Act*, SA 2009, c c-35).

BC's law will aid in the recovery of incurred and future health care costs in five main ways. First, it gives the government its own cause of action against a manufacturer for an "opioid-related wrong", as opposed to merely having a subrogated claim as part of a case by individuals against these companies (sections 2(1)-(3)). Second, instead of requiring proof that particular opioid

products caused particular injuries in particular individuals, government claimants are able to prove causation and quantify damages on the basis of presumptions about causation and aggregate statistical evidence (sections 2(4)-(5), 3(1)-(4), 5). Third, the legislation allows damages to be apportioned based on the defendant company's share of the opioid market (section 3(3)(b)). Fourth, it provides that the limitation period begins two years after the law's enactment, thereby also reviving any cases previously dismissed due to the expiry of a limitation period (section 6). Fifth, the legislation is retroactive, permitting the government to sue for opioid-related wrongs that occurred before the law's enactment (section 10).

Other provinces have announced their intention to join BC's class action, including Newfoundland, Ontario, and now Alberta. Alberta is also considering enacting legislation that would facilitate the recovery of health care costs from opioid manufacturers.

Does Litigation Improve Public Health?

Although governments, academics, individual plaintiffs, and advocacy groups have shown considerable interest in litigation against those who manufacture unhealthy food, guns, alcohol, opioids, tobacco, and other potentially harmful products, it is unclear whether these cases improve the public's health.

One of the potential advantages of such litigation is that it may bring important public health issues to the attention of the public. For example, Mather argues that the pre-trial discovery process helped to bring the deceptive practices of tobacco companies to light. This educational function of tort law could be beneficial if individuals use this information to make healthier choices. For example, if a patient reads a news report about the class actions against opioid manufacturers, he may ask his doctor about addiction issues before accepting a prescription. However, it is not clear how much litigation adds to the education that citizens already receive on these topics from health classes in school, campaigns by governments, the media, and other sources. Furthermore, given the considerable expense and time required for litigation, this is certainly not the cheapest or most expeditious way of conveying health information to the public.

Even if they are successful against drug companies in court, plaintiffs may never collect financial damages. For example, US opioid manufacturer Insys filed for bankruptcy protection shortly after entering into a $225 million settlement. Similarly, when faced with lawsuits by smokers and provincial governments seeking to recoup the costs of treating tobacco-related illness, Canadian tobacco companies have sought creditor protection.

If governments do eventually receive compensation for health care costs, the only way that it will generate public health improvements is if they invest those damages accordingly, rather than merely subsuming the funds into provincial coffers. However, it has historically been difficult to persuade policy-makers to adequately invest in public health initiatives (see e.g. here and here).

Apart from compensation, deterrence is another goal of tort litigation. This goal is advanced when defendants are made to internalize the economic costs of their products, which leads to injury-minimizing behaviour in the future. In this regard, damage awards may prompt individual defendants, and industries more generally, to better inform consumers and the medical profession

of the dangers of their products and to make more cautious and evidence-based product claims. However, there are concerns with both underdeterrence and overdeterrence in the context of public health litigation. With respect to underdeterrence, opioid manufacturers may not be motivated to change their behaviour, given that their revenue may well exceed any damage award. Furthermore, drug companies can merely pass the costs of litigation onto consumers.

Litigation may also over-deter by discouraging socially useful practices. For example, if a pharmaceutical manufacturer is successfully sued for promoting opioids, they may declare bankruptcy and stop making other products that are beneficial to health. Manufacturers may also be motivated to stay away from producing products that are riskier in terms of their side effects, even though those products also have important health benefits.

Conclusion

Even if litigation discourages aggressive marketing tactics or generates damages that help to fund public health programs, this is unlikely to happen anytime soon. Similar litigation against tobacco companies has been going on for decades, without any money in sight. Therefore, it is essential that governments not wait to recover health care costs to address this problem or forego evidence-based public health interventions such as supervised consumption sites (see e.g. here and here) in favour of litigation. According to a recent report, staff at Alberta's supervised consumption sites have successfully reversed 4305 overdose events with a 100% success rate, avoided 3709 emergency medical services calls, and made over 10,000 referrals to addiction and treatment services, saving an estimated $5 for every $1 spent. Yet Alberta recently halted funding for three sites (pending the completion of a socio-economic review) and its Associate Minister of Addiction and Mental Health is under fire for his comments on addiction and supervised consumption.

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