



## Question: Whose fault was it?

[by James Kilpatrick]

In classic Greek drama, conflicts often were cast as struggles of right against right. In our courts, asserted right generally sues alleged wrong. But now and then a case comes along that offends the jaded eye: It pits wrong against wrong, i.e., an indefensible plaintiff sues an indefensible defendant. Consider, if you please, *Philip Morris v. Judy Boeken, Trustee*.

Counsel for the tobacco company last month asked the Supreme Court to hear its appeal from a hefty judgment last April in the California Court of Appeals. The case involves an award of \$55 million in damages to the widow of a fellow in California who couldn't quit smoking. The question is, whose fault was that? The fault of Philip Morris? Or the fault of Richard Boeken?

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Full disclosure: Your court columnist, meaning me, began smoking the stubs of his father's cigars in 1932. This was behind the family garage. I was 12. I moved up to Camels and Kools. In college, I affected a pipe. As a young reporter, I switched to Lucky Strikes. For 60 years I smoked pack after pack of brand after brand. I wheezed, I coughed, I stank.

Did I ever try to quit? Let me count the ways! I tried hypnosis. I tried counseling. I tried the yucky chewing gum. Time after time I went cold turkey. Nothing worked. And then, eight years ago, as a recent widower, I fell in love. That did it. My lady made it clear: It was Marianne or Marlboros, but not both. I have not touched a cigarette since Dec. 31, 1997.

In the case at hand, Richard Boeken began as I did. He started smoking at the age of 10, sneaking butts from dirty ashtrays. At 13 he

was smoking real cigarettes. At 14 he was coughing through two packs a day. At trial four years ago, he swore that for many years he believed, unbelievably, that cigarettes were good for him. At some point, however, as the California court explained, Boeken began to suspect that smoking "bore some relationship to his bronchitis." What a revelation! What a linkage of probable cause and painful effect!

Finally he faced facts: He was addicted. He tried to stop smoking in 1967, when his girlfriend gave him an ultimatum: Quit or else. He quit, but when he resumed smoking after three weeks, she left him. He tried again in 1976. No luck. In 1980 he tried hypnosis. For three or four weeks he attended meetings of Smoke Enders. He tried the 12-step program of Smokers Anonymous. He chewed Nicorette gum. At trial, he swore that if Philip Morris had ever told him that cigarettes cause lung cancer and death, "he would not have smoked."

Well, hokum! Richard Boeken was neither deaf, dumb nor blind. He did not dwell upon some peak in Patagonia. He lived in California, for Pete's sake. It boggles the mind to believe that he was unaware of the warnings on those two packs a day. If he had truly — really truly — wanted to quit, he could have quit as millions of other addicts have quit in recent years. As a juror, I would not have awarded him a single dime.

This is not to absolve the cigarette manufacturers. They're a callous bunch. The California court placed the net worth of Philip Morris at \$30 billion to \$35 billion. The company earns a profit "of nearly \$30 million per day." As far back as 1948 the

manufacturers had good reason to believe that nicotine is carcinogenic. One study after another has established a causal connection: Cigarettes do indeed cause cancer in some smokers — not in all smokers, but in up to a third of them.

In contemptuous disregard for these clinical studies, the cigarette manufacturers until quite recently have gone about business as usual. They have capitalized upon the physical attraction of the Marlboro man. They have portrayed a dirty habit as a sociable little pleasure. Lately the companies have begun to derogate their own products, especially for young smokers, but you can tell their hearts aren't really in it.

In its opinion last April, the California court attempted to justify the jury's staggering award. "This is basically a case of wrongful death resulting from fraudulently marketing a defective product." Well, permit a dissenting opinion. This is basically a case of a predictable death resulting from the purblind stupidity of a man who didn't have the willpower to quit 40 years ago.

His name in the law books is Richard Boeken, but it might as well have been Legion. In life he was one among many.

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