



Obesity Litigation: Who's to Blame?

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It's often assumed that "fat people have only themselves to blame" is the beginning and end of all wisdom on the subject. There are only four problems with this assumption: (1) fat people are not always to blame; (2) blaming fat people doesn't exclude blaming others as well; (3) obesity litigation isn't principally about fat people; and (4) obesity litigation isn't principally about blame.

1. *Are fat people always to blame?* The explosive growth of bariatric surgery for treating obesity underlines the fact that willpower is often not enough. It has been noted that "obesity is the natural response to the current environment". We evolved as a species in environments where the food supply was often uncertain and almost everyone routinely engaged in strenuous physical activity. It is not surprising that our biology is biased in favor of eating as much as we can as often as we can. Poorer Americans have fewer alternatives to the ubiquitous high-calorie-density snacks and fast foods, and fewer opportunities to exercise, than those of us higher up on the socio-economic scale. Should they then be blamed for the fact that they're also fatter than us?

2. *If A is to blame, does that mean B isn't?* Is blaming a zero-sum game? Thinking about causal responsibility is instructive on this point. If a momentarily-distracted driver hits his brakes too late to avoid hitting a boy who darted onto a busy road to retrieve a ball, which one (boy or driver) is causally responsible for the accident? Silly question, right? Obviously they both are. So, which one is *more* causally responsible? Still a silly question! Each one is completely responsible, since but for either one the accident wouldn't have happened. Now, what if we add another party? Say, GM. Assuming GM made the brakes defectively, so that had they operated properly the car would have stopped just short of the boy even though the driver had reacted slowly, GM would have been completely causally responsible as well. And so on. The theoretical limit on total causal responsibility for a single incident is not 100%, but infinity.

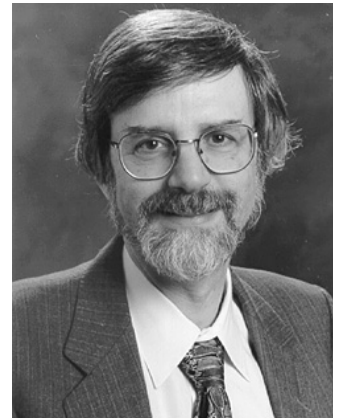
What about blame? Is the boy to blame for darting into the street? Is the driver to blame for not paying more attention? Is GM to blame for defectively designing the brake system? Answering these questions requires a richer description of the facts than we have in the hypothetical. But what is clear is that these three questions are independent of each other. The facts we're missing are facts about the boy, the driver, and GM respectively. Whether, for example, the particular boy was or was not old enough to know better cannot possibly affect the question of whether GM was to blame for defectively designing a safety-critical component the failure of which was a but-for cause of the accident. Nor does the fact that comparative negligence statutes require juries to apportion 100% of

the blame among the responsible parties mean that moral fault works that way, or even basic legal culpability.

The point of this, of course, is that the questions of whether certain food marketers are causally responsible for exacerbating the obesity epidemic, and whether they should be held morally and legally responsible as well, are simply not answered by addressing the blameworthiness of consumers for their own overweight.

3. *Is obesity litigation really about fat people at all?* Not necessarily. It's also about people who aren't fat yet, but in danger of becoming fat. People like young children who are exposed to thousands of junk food commercials each year, and teenagers who have to walk by Coke machines in their school hallways many times each day. And people like adults who want their kids to have a nutritious diet, or who want to watch their own weight, and who are continually deceived by misleading claims for high calorie density foods ("low fat", "contains all essential vitamins"). Seeking damages for harm already done may be a worthwhile goal, but it faces daunting causal problems and is easily misunderstood. Seeking injunctions to stop unfair and deceptive practices, and restitution for their victims, is immediately understandable and simpler to prove.

4. *Is it all about blame, anyway?* No, it's really about public health! The mere prospect of obesity litigation has already served as a "news peg" for hundreds of media stories about the emerging obesity epidemic and its consequences, bringing these issues to public attention for the first time. Also, food companies have begun to at least talk about analyzing their own contributions to the epidemic and making appropriate changes to their products and promotional policies. Actual lawsuits under state consumer protection acts against deceptive claims and unfair marketing practices may end some egregious behavior and discourage much more. That's why the Public Health Advocacy Institute has already held one conference on "Legal Approaches to the Obesity Epidemic" at Northeastern University School of Law in Boston, and will hold the second one this coming September. The public health problem is simply too serious to let misconceptions about blame impede a promising strategy for dealing with one of the causes of the obesity epidemic.



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