2E. BOX 6: BURDEN OF PROOF

One way of ameliorating the difficulties encountered by claimants in some jurisdictions in proving fault and causation is to reverse the burden of proof. As already noted, the reversal of the burden of proof was an important feature of the successful *Stalteri* case.[1] It also played a part in the reasoning of the Brazilian courts in holding BAT subsidiaries liable for personal injuries and wrongful death in *Sivieri* and *Dias.*[2] These cases suggest that reversing the burden of proof alone is not sufficient to guarantee success - in both the Italian and Brazilian cases there was a clear liability standard - reversing the burden of proof certainly made it easier for claimants to establish liability on the part of the BAT subsidiaries.

Circumstances in which it has been held appropriate or necessary to reverse the burden of proof (either based on civil codes or doctrines developed by the courts) include:

a) Where the defendant is engaged in a dangerous activity.[3]
b) Where there is information asymmetry between the defendant and the claimant.[4]
c) Where the claimant suffers damage of a kind that is typically caused by the defendant's act.[5]
d) Where it is considered reasonable and fair to do so.[6]
e) Where the defendant is engaged in a profit making activity.[7]

All of the above circumstances apply to tobacco litigation. Accordingly, it would be reasonable for jurisdictions to reverse the burden of proof in determining fault and/or causation, especially (but not only) in countries where claimants have limited resources available to obtain the evidence necessary evidence to prove fault and causation in tobacco-related claims.

[1] Discussed above at part 2 (d).
[2] Discussed above at part 2 (c).
[3] See for example, Article 2050 of the Italian Civil Code; Article 4:201 of Principles of European Tort Law.
[4] This may be because the defendant has better access to relevant documentation (for example, in product liability cases), or is responsible for keeping relevant documentation but has failed to do so (for example, in medical negligence cases).
[5] In such cases the claimant must still prove that they have suffered the relevant injury. See for example, Germany, and the U.S. case of *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980).
[6] Article 150 of Dutch Code of Civil Procedure.
[7] Brazil based on the doctrine of risk liability: see part 2 above.