500-09-025387-150

COURT OF APPEAL OF QUÉBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on May 27, 2015 and rectified on June 9, 2015 by the Honourable Justice Brian Riordan.

Nos. 500-06-000076-980 – 500-06-000070-983 S.C.M.

ROTHMANS, BENSON & HEDGES INC.

APPELLANT /
INCIDENTAL RESPONDENT
(Defendant)

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ

JEAN-YVES BLAIS

CÉCILIA LÉTOURNEAU

RESPONDENTS /
INCIDENTAL APPELLANTS
(Plaintiffs)

- and -

IMPERIAL TOBACCO CANADA LTD.

JTI-MACDONALD CORP.

MIS EN CAUSE
(Defendants)

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FACTUM OF THE APPELLANT
ROTHMANS, BENSON & HEDGES INC.

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ARGUMENT OF THE APPELLANT ROTHMANS, BENSON & HEDGES INC.

OVERVIEW

1. Rothmans, Benson & Hedges Inc. ("RBH" and, together with the other Appellants, "Defendants") appeals from the final judgment (the "Judgment") of the Honourable Justice Brian Riordan (the "Trial Judge") of the Superior Court of Québec.

2. The Trial Judge found Defendants liable to more than a million class members and awarded damages totaling roughly $15 billion without the slightest evidence that Defendants' supposed faults—failing to warn sooner or to use stronger warnings than the government required—caused *any* class member, let alone *all* of them, to smoke. He also found, again without any evidence about actual class members, but based solely on presumptions from epidemiology, that *every Blais* class member's disease was caused by smoking, even though he acknowledged that many class members' diseases were *not* caused by smoking.

3. The Trial Judge arrived at those conclusions despite undisputed evidence that the overwhelming majority of the public has been aware of the health risks of smoking for many decades. He acknowledged that unequivocal Supreme Court of Canada decisions required Respondents ("Plaintiffs") to prove that Defendants' faults caused every class member's smoking and injury, but declared those decisions "totally incompatible" with the class action regime[1]—even though they are the leading decisions *about* class actions. Indeed, the Supreme Court of Canada recently reaffirmed the very decisions that the Trial Judge disregarded, reiterating

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[1] Judgment at paras. 687-689.

that it is a "vital foundation for all class proceedings in Canada" that a class action "cannot operate to create or modify substantive legal rights".[2]

4. There is no dispute that Plaintiffs failed to prove that Defendants' supposed failure to warn sooner or better caused *any* class member to smoke, let alone all of them; indeed, Plaintiffs did not even try to make such proof, proclaiming it "impossible".[3] But, rather than acknowledge the inevitable consequences of Plaintiffs' failure to prove causation, the Trial Judge filled the gaps in Plaintiffs' proof by inventing factual presumptions purportedly based on "common sense",[4] not evidence, and special legal rules applicable only to tobacco companies. He compounded the injustice by announcing these special legal rules and presumptions for the first time in his final judgment. This denied Defendants their right to know and meet the case against them and resulted in a fundamentally unfair trial and outcome.

5. By presuming that Defendants' supposed failure to warn caused *all* class members' smoking—notwithstanding the undisputed and indisputable evidence to the contrary—the Trial Judge essentially made Defendants insurers of their legally sold and heavily regulated product. Thus, he found Defendants liable for each and every class member's smoking, including 80% liable even to the "at least half, and likely more" who chose to smoke after 1980—the date by which he arbitrarily determined that *everyone* knew or should have known that smoking causes cancer and other serious diseases—and declared those who chose to smoke after that date to have done so because of "stupidity".[5]

6. He also presumed, based solely on epidemiological evidence about disease in populations, that smoking caused *every Blais* class member's disease, even while

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2 *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at para. 62.
3 Judgment at para. 798.
4 Judgment at para. 803.
5 Judgment at paras. 828-834, 922.

acknowledging that this would mean holding Defendants liable to class members whose diseases were *not*, in fact, caused by their smoking.

7. The Trial Judge created these presumptions and special rules largely by invoking his own sense of morality rather than law. Thus, he declared Defendants' conduct "immoral"[6] and explicitly acknowledged that he was motivated by the "simple, common-sense notion that it is high time that the [Defendants] started to pay for their sins".[7]

8. In taking this approach, the Trial Judge disregarded the nature of, and fundamental limits on, his judicial role: "le juge ne fait pas fonction de législateur dans notre système qui consacre la séparation des pouvoirs".[8] Rather, "[l]e rôle du juge est de dire le droit et de rendre justice dans le cadre de la loi".[9] The judge "is not entitled to ignore binding precedent".[10] Nor is he entitled "to apply only the law of which [he] approves" or to decide cases with a view to only what he "deems fair or pertinent".[11] Nor, when it comes to facts, can he rely on "speculation", "mere conjecture or remote hypotheticals" in lieu of evidence.[12] Rather, "the trial judge must scrutinize the relevant *evidence* with care to determine whether it is more likely than not that an alleged event occurred", and apply the law accordingly.[13] "[I]t must be the law that governs and not a judge's individual beliefs that may conflict with the law".[14]

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6 Judgment at para. 339.
7 Judgment at para. 1200.
8 *M.S. c. L.K.*, [1986] R.J.Q. 2038, [1986] J.Q. no 1063 (C.A.) at para. 23.
9 *Ruffo (Re)*, 2005 QCCA 1197 at para. 323.
10 *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 44.
11 *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para. 52.
12 *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 137.
13 *F.H. v. McDougall*, 2008 SCC 53 at para. 49 (emphasis added).
14 *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 40.

9. RBH adopts the arguments in its Inscription and in the other Defendants' factums on these and numerous other errors committed by the Trial Judge. RBH focuses here on a single issue: causation.

10. Having sued on behalf of more than a million class members, Plaintiffs assumed the burden of proving a causal connection between Defendants' faults and the class members' injuries. This Court explicitly confirmed Plaintiffs' burden during the trial:

> [L]e fardeau des intimés ne s'arrête pas à la démonstration de l'existence de la faute de l'appelante et de ses codéfenderesses à l'égard des membres des deux groupes, mais aussi à celles, indissociables, du préjudice et du lien de causalité, et ce, à l'égard de chacun des membres de ces groupes.[15]

11. As the Trial Judge recognized, Plaintiffs needed to prove two separate causal links:

(a) *Conduct causation*: Defendants' faults caused each and every class member to smoke;[16] and

(b) *Medical causation*: for all class members, wrongfully caused smoking led to their injuries—*i.e.*, to disease in *Blais* and to dependence in *Létourneau*.[17]

12. Plaintiffs led no evidence on the first link and did not carry their burden on the second. Either failure was sufficient to preclude liability. The Trial Judge erred in nonetheless imposing liability, and proceeding directly to collective recovery, without Defendants' being able to test for any class member either of the two causal links the Trial Judge simply presumed for everyone.

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15 *Imperial Tobacco Canada Ltd. c. Létourneau*, 2014 QCCA 944 at para. 41.

16 Judgment at paras. 687, 790 and fn. 359. Defendants have also referred to this concept as "fault causation" or "wrongfully induced smoking causation".

17 Judgment at paras. 668, 687. Defendants have also referred to this concept as "disease causation" or "injury causation".

13. For conduct causation, the Trial Judge acknowledged that Plaintiffs "did not even try" to meet their burden.[18] They chose to lead no evidence of the necessary causal link between Defendants' supposed failures to warn and class members' smoking.

14. To hold Defendants liable despite an evidentiary vacuum, the Trial Judge first had to abandon the established legal test for causation and invent a new—and incomprehensible—test in "claim[s] for tobacco-related damages",[19] then had to rely on an unjustifiable presumption to satisfy his new test for each of the million-plus class members. The Trial Judge based his presumption not on evidence—as Plaintiffs had adduced none on this critical point—but instead on "[m]ere common sense".[20] His presumption ignored his own findings and uncontroverted evidence that (i) the overwhelming majority of smokers have known, and indeed overestimated, the health risks for many decades, (ii) people smoke for a wide variety of reasons and (iii) millions still choose to start and continue smoking today, despite graphic health warnings covering 75% of every cigarette package.

15. In *Blais*, Plaintiffs also presented no evidence about what caused any individual class member's disease, as was required for medical causation. Plaintiffs offered only epidemiological evidence (evidence not even drawn from the class members themselves), which their own expert admitted was novel and untested. The evidence should have been rejected for that reason alone. And even taken at its highest, the evidence showed only that, among those who smoked a certain amount, smoking had caused the disease in question in *some* and had *not* caused it in others. The Trial Judge erroneously treated this evidence that *some* class members' diseases were caused by smoking as *conclusive* evidence that *all* class members' diseases were.

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18 Judgment at para. 798.
19 Judgment at para. 794.
20 Judgment at para. 803.

16. To reach this counterfactual conclusion, the Trial Judge relied on s. 15 of the *Tobacco-related damages and health care costs recovery act*[21] ("TRDA"). He interpreted s. 15 as permitting him to find or presume that every class member's disease was caused by smoking even though Plaintiffs' epidemiological analysis actually *proved* that a substantial percentage of class members' diseases were *not* caused by smoking.[22] That interpretation is contradicted by s. 15's text, context and purpose. It is also inconsistent with the Trial Judge's own ruling that ss. 16 and 17—the provisions of the TRDA that actually *do* create presumptions of causation in health care cost recovery actions—were inapplicable.

17. To make matters worse, the Trial Judge announced his erroneous interpretation of s. 15 for the first time in the final judgment. That was patently unfair to Defendants, given that (i) the Trial Judge had previously, repeatedly and explicitly confirmed that *Plaintiffs* had the burden of *proving* causation for each and every class member and (ii) Defendants had previously, repeatedly and explicitly told the Trial Judge that they would lead different evidence if, for some reason, he decided to shift the burden on causation to Defendants.

18. Any one of the Trial Judge's errors is sufficient to render the Judgment unsupportable. Taken together, they denied Defendants a meaningful chance to defend themselves and required them to compensate class members for harms unrelated to any fault of Defendants—harms in many cases not caused by smoking, let alone by any fault of Defendants proven to have caused that smoking. The Trial Judge's erroneous and unsupported presumptions pile one atop the other, forming a precarious pyramid of presumptions on which the Judgment rests. Once any of those presumptions fails, so too does the whole edifice. Here, all the presumptions fail. The Judgment must be set aside.

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21 C.Q.L.R. c. R-2.2.0.0.1.

22 Judgment at para. 693.

PART I – FACTS

19. RBH adopts the other Defendants' more extensive recitations of the facts.

20. In nearly three years of trial, no class member ever testified, and no evidence from or about any of the million class members was ever presented. Despite seeking damages for smoking-related injuries, Plaintiffs presented no evidence showing that class members' smoking was caused by Defendants' supposed faults. Plaintiffs also presented no evidence that any individual class member's injury was caused by smoking. Nonetheless, the Trial Judge found that Defendants' failure to warn caused *all* class members' smoking and that smoking caused their injuries.

21. The Trial Judge condemned RBH, solidarily with other Defendants, to pay *Blais* class members moral damages of more than $6.8 billion excluding interest and the additional indemnity.[23] He also condemned RBH to pay punitive damages of more than $46 million in both *Blais* and *Létourneau*.[24]

22. Plaintiffs' primary theory was that tobacco products are a "trap" and that Defendants committed a fault by merely selling them.[25] The Trial Judge rejected this ground of liability.[26] The Trial Judge held instead that the main fault of Defendants was a failure to warn class members of the health risks of smoking. He held that this fault occurred continuously from 1950 to 1998, despite (i) undisputed evidence of widespread public awareness over this period of the

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23 Judgment at para. 1209.

24 Judgment at paras. 1221, 1236.

25 Plaintiffs' Notes and Authorities (July 9, 2014) at para. 1: "Cigarettes are a mischievous, useless product designed to trap users in a toxic and often deadly addiction. A reasonable manufacturer would not design, sell, or market such a product." See also Judgment at paras. 21-24.

26 Judgment at para. 482.

health risks of smoking, (ii) government-approved warnings on every cigarette package since 1972 and every cigarette advertisement since 1975 and (iii) his own findings that everyone knew or should have known of the risks by 1980, which necessarily means that many must have known before that date.

PART II – ISSUES IN DISPUTE

23. As explained in para. 9, above, RBH focuses on a single issue in this factum: causation. There are two relevant questions:

(a) Did Plaintiffs establish conduct causation—*i.e.*, that Defendants' faults caused each and every class member to smoke?

(b) Did Plaintiffs establish medical causation—*i.e.*, that wrongfully caused smoking led to all class members' injuries—meaning disease in *Blais* and dependence in *Létourneau*?

24. The answer to both questions is "no". Plaintiffs' claims failed.

PART III – ARGUMENT

A. Plaintiffs did not prove conduct causation.

25. Plaintiffs chose to lead no evidence that Defendants' faults caused *any* class member, let alone *all* of them, to smoke, declaring it "impossible to prove".[27] As conduct causation could not be established without evidence, Plaintiffs' claims failed.

26. The Trial Judge acknowledged that Plaintiffs did not prove causation under the established but-for test, which would have required them to show that no class members would have smoked if only Defendants had warned sooner or better. In fact, he acknowledged that such warnings "would not have stopped all smoking" and that "even in the presence of such warnings today, people start and continue to smoke".[28]

27. That should have ended the causation analysis and the case. Instead, the Trial Judge compounded his error by effectively adopting an irrebuttable presumption of causation. He did so based on his acceptance of Plaintiffs' argument that "it stands to reason" Defendants' failure to warn was "the cause of people's starting or continuing to smoke, even if there is no direct proof of that".[29]

28. He announced his rejection of the but-for causation standard and his adoption of a "[m]ere common-sense"-based[30] presumption of causation for the first time in the Judgment—thus depriving Defendants of any meaningful opportunity to know and meet the case against them. But his presumption failed to meet the CCQ's requirements. And even if the Trial Judge could have drawn such a presumption,

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27 Trial Tr., Sept. 30, 2014 at 81:24-82:9.
28 Judgment at para. 803.
29 Judgment at paras. 792, 806-807.
30 Judgment at para. 803.

it had to be rebuttable at the stage of individual claims. Collective recovery could not be awarded.

I. The Trial Judge erred in creating a new legal test for causation.

29. To establish liability, a plaintiff must prove fault, injury and a causal connection between the two.[31] The Trial Judge committed two key errors in finding that Defendants' failure to warn caused all class members' smoking, which, in turn, caused their injuries.

30. First, while it is clear that the Trial Judge rejected the long-established but-for test for proving causation,[32] it is not clear what test he applied, how Plaintiffs met it or what Defendants could have offered to disprove it. He said only that he was establishing a "presumption of fact" based on "[m]ere common sense" that better warnings would have had "some effect" on consumers.[33] He invented this new "some effect" test just for tobacco companies and did so without any evidence about why any class member smoked (much less all of them), and even though he acknowledged that many of them would have smoked even absent Defendants' faults. Whatever new causation test the Trial Judge was applying, it was not the law.

31. Second, he equated but-for cause with sole cause, and used that false analogy to justify his creation of this amorphous new "some effect" causation test. If the Trial Judge had correctly required Plaintiffs to prove that but for Defendants' faults, all

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31 CCQ art. 1607; *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122 at paras. 156-157; Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8th ed. (Cowansville, Que.: Yvon Blais, 2014) at para. 1-665.

32 Judgment at paras. 793-794.

33 Judgment at para. 803.

class members would not have smoked, his own findings would have compelled him to conclude that Plaintiffs failed to meet their burden.

(a) Plaintiffs were required to prove that, in the absence of Defendants' faults, all class members would not have started or continued smoking.

32. The Trial Judge erroneously held that Plaintiffs did not need to show that Defendants' faults were a but-for cause of class members' smoking. He stated that "the Court does not believe that it is necessary" to determine that "it is probable that [the class members] would not have smoked had they been properly warned".[34]

33. The Trial Judge made "proof" of causation a foregone conclusion by ruling that it "stands to reason" that Defendants' faults "were one of the factors that caused the [class members] to start or continue to smoke" *even if* they would have smoked anyway.[35] This was a clear error of law. The "logical, direct and immediate" standard in art. 1607 CCQ requires a plaintiff to show that the injury would not have occurred in the absence of the fault.[36] The plaintiff must show that the fault was a but-for—or "essentielle"[37]—cause of the injury, or that the injury would not have occurred but for the fault.

34. This requirement is evident in the doctrine:

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34 Judgment at paras. 793-794.

35 Judgment at paras. 792, 801, 803, 807.

36 *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122 at paras. 152, 156, 162, 166, 177.

37 *Pullan c. Gulfstream Financial Ltd.*, 2013 QCCA 1888 at para. 52.

> Lorsque l'absence de faute n'aurait absolument rien changé au cours des choses, le lien de causalité est évidemment exclu.[38]

35. This basic requirement is also evident in the case law, at all levels.

36. For example, in *L'Écuyer v. Québec (Attorney General)*, the Superior Court found that causation was not proven and dismissed the plaintiffs' action because they would have been injured even in the absence of the defendant's fault.[39] Causation was not proven because the fault was not necessary to the injury.

37. In *Marcotte c. Simard*, the defendant lawyer had failed to pursue the plaintiffs' entitlement to the additional indemnity in a cross-appeal. This Court found that causation turned on whether the plaintiffs would have received the additional indemnity but for the defendant lawyer's negligence:

> Qu'en est-il, maintenant, des dommages et du lien de causalité? Pour obtenir gain de cause, Marcotte et Morin devaient démontrer que, n'eut été de la faute des intimés, la Cour d'appel aurait, selon toute probabilité, accueilli leur appel incident.[40]

38. Similarly, in *Hinse v. Canada (Attorney General)*, the Supreme Court of Canada agreed with this Court that if the plaintiff in that case would have been injured even in the absence of the defendant's fault, causation was not proved. That is, because the plaintiff would not "inevitably" have been acquitted even if the defendant had

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38 Lara Khoury, "Lien de causalité" in JurisClasseur Québec, *Obligations et responsabilité civile*, fasc. 21, loose-leaf (consulted on October 7, 2015) (Montréal: LexisNexis Canada, 2014) (Q.L.) at para. 13. See also Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8th ed. (Cowansville, Que.: Yvon Blais, 2014) at para. 1-687: "Ce ne sont donc pas toutes les conditions *sine qua non* qui peuvent et doivent être retenues, mais seulement celles qui ont rendu objectivement possible la réalisation du préjudice."

39 *L'Écuyer v. Québec (Attorney General)*, 2014 QCCS 5889 at paras. 364-366, 392.

40 *Marcotte c. Simard*, [1996] R.R.A. 554, [1996] J.Q. nº 1115 at para. 31.

conducted a timely review of his pardon application, the defendant's fault did not cause the plaintiff's injury.[41]

39. Indeed, in a different case, the Trial Judge himself recognized that art. 1607 CCQ's "logical, direct and immediate" standard requires a showing that the plaintiff's injury would not have occurred but for the defendant's fault:

> A finding of fault against a party is not sufficient to hold it civilly liable for damages suffered by a plaintiff. Article 1607 of the Civil Code requires that those damages be an "immediate and direct" consequence of that fault. In an impressive review of the law on medical liability, our colleague, Michel Delorme, J.S.C., put it this way: "*But for that fault, would Plaintiff have sustained the damages that he is claiming?*"[42]

40. Nevertheless, the Trial Judge expressly rejected the but-for test in this case. His reasoning cannot withstand scrutiny.

41. First, the Trial Judge stated that it was unnecessary to apply the but-for test because Plaintiffs were advancing "a claim for tobacco-related damages".[43] But a judge may not create special laws for particular defendants, or for the benefit of particular plaintiffs. If a judge objects to binding precedents, his or her recourse is to write reasons explaining the perceived problem, not to unilaterally change the law.[44]

42. By discarding the applicable causation test and contriving a new one just for tobacco companies, the Trial Judge violated the most fundamental limits on his judicial role. "Le rôle du juge est de dire le droit et de rendre justice dans le cadre

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41 *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 123, aff'g 2013 QCCA 1513 at para. 175.

42 *Liss v. Watters*, 2010 QCCS 3309 at para. 158, (Riordan J.) (rev'd on other grounds *Watters v. White*, 2012 QCCA 257), quoting *Charbonneau c. Centre hospitalier Laurentien*, 2009 QCCS 4974 at para. 32 (emphasis added).

43 Judgment at para. 794.

44 *Canada v. Craig*, 2012 SCC 43 at para. 21.

de la loi";[45] "le juge ne fait pas fonction de législateur dans notre système qui consacre la séparation des pouvoirs".[46]

43. Second, the Trial Judge stated that the but-for test would entail the too-difficult task of "proving a negative"—*i.e.*, that all class members would not have smoked if Defendants had warned sooner or better.[47] But this is precisely what the law demands of Plaintiffs, and the analysis that the law required the Trial Judge to undertake. Deciding what probably would have happened had the fault not occurred is inherent in determining whether a fault was a necessary cause of an injury:

> Pour établir le comportement qu'aurait normalement suivi la GRC n'eût été la faute d'omission reprochée aux policiers de la Ville, l'on cherche en vain comment le sujet aurait pu être abordé autrement que par le biais de questions hypothétiques aux témoins. Lorsque l'on parle d'une faute d'omission, établir le comportement qui aurait été adopté n'eût été cette faute peut difficilement s'aborder autrement. C'est la nature même de la faute qui le commande.[48]

44. Third, the Trial Judge erroneously equated but-for cause with exclusive cause. He suggested the but-for test would require Defendants' faults to be the *sole* cause, as opposed to *a* cause, of smoking.[49] This is wrong. The law does not require that

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45 *Ruffo (Re)*, 2005 QCCA 1197 at para. 323.

46 *M.S. c. L.K.*, [1986] R.J.Q. 2038, [1986] J.Q. no 1063 (C.A.) at para. 23.

47 Judgment at paras. 793-794.

48 *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122 at para. 177. The appellant had argued that the evidence of the RCMP officers was inadmissible because it contained hypotheticals. See also *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 73; *Chouinard v. Landry*, [1987] R.J.Q. 1954 (C.A.).

49 Judgment at paras. 791-794.

a fault be the sole cause of an injury, but the fault must have been necessary for the injury to occur.[50]

(b) If the Trial Judge had applied the correct test, his own findings would have required him to hold that causation was not proven.

45. If the Trial Judge had applied the right test and asked himself whether Defendants' faults were a but-for cause of class members' smoking, he could have concluded only that causation had not been proven.

46. On the Trial Judge's own findings, many class members would still have smoked even in the absence of Defendants' supposed faults. The Trial Judge held that more warnings "would not have stopped all smoking".[51] He also found that "some long-time smokers are able to quit fairly easily" but "chose[] not even to try to stop", even after they were fully aware of the risks.[52] The necessary import of these findings is that these people's smoking was simply not caused by any failure to warn. Claims by these people would fail. But they are nonetheless class members to whom Defendants have been held liable: the Trial Judge noted that it "is not possible to carve them out" from the rest of the class, and ruled that they could all recover nonetheless.[53]

47. Because the class comprises a substantial number of members who would still have smoked even in the absence of Defendants' failure to warn and thus whose

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50 Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8th ed. (Cowansville, Que.: Yvon Blais, 2014) at paras. 1-707, 1-721; *Clements v. Clements*, 2012 SCC 32 at paras. 8, 12; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374 at paras. 200-202. See also *Pullan c. Gulfstream Financial Ltd.*, 2013 QCCA 1888, at paras. 44, 52. The trial judge had erroneously found that one of the defendants, Gulfstream, was not liable because its fault alone would not have caused the damage—*i.e.*, it was not a sole or sufficient cause. This Court imposed liability on Gulfstream because its fault was necessary in order for the harm to occur, which is the correct standard.

51 Judgment at para. 803.

52 Judgment at paras. 829-830.

53 Judgment at para. 830.

smoking was not caused by that fault, the Trial Judge could only have concluded that causation was not proven for the class as a whole. The Trial Judge erred in finding to the contrary.

II. Plaintiffs did not even try to prove conduct causation, to any standard.

48. Evidence is required to prove causation. But Plaintiffs led no evidence of a causal connection between Defendants' supposed failure to warn and class members' smoking. Plaintiffs explicitly admitted this.[54] The Trial Judge explicitly acknowledged this.[55] No matter the test for causation, Plaintiffs could not and did not meet their burden without evidence.

49. Throughout the trial, the Trial Judge confirmed that Plaintiffs had to prove causation. He also recognized that Defendants' role and right was to challenge Plaintiffs' evidence of causation—assuming there would be some:

> [N]ous reconnaissons que les demandeurs ont le fardeau d'en faire la preuve et d'établir un lien de causalité avec une faute des Compagnies. Nous reconnaissons également que les Compagnies ont le droit d'essayer de contrer la preuve avancée par les demandeurs dans ce sens.[56]

50. The Trial Judge had confirmed Plaintiffs' burden to prove causation before the trial even started:

> Quant aux dommages moraux, … le fardeau d'en faire la preuve de l'existence et d'établir un lien de causalité incombe concrètement aux demandeurs.[57]

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54 Trial Tr., Sept. 30, 2014, at 81:18-82:9.

55 Judgment at para. 798.

56 *Conseil québécois sur le tabac et la santé c. JTI-Macdonald Corp.*, 2013 QCCS 4863 at para. 50.

57 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2009 QCCS 830 at para. 21.

51. He had also observed that Plaintiffs planned to meet their burden by way of expert evidence:

> Il semble évident que la preuve de ces éléments, en ce qui concerne la collectivité des groupes, devra être faite principalement par voie d'expertises. D'ailleurs, c'est justement l'intention annoncée par les demandeurs.[58]

52. Plaintiffs complained that proving causation under the established test would have been "impossible", and asserted that evidence about why class members smoked would be "meaningless".[59] But litigants do not get to avoid the law just because it may be hard to comply with.

53. Plaintiffs did not try to meet their burden of proving causation even though they were reminded repeatedly of it. Plaintiffs' claims therefore failed.

III. The Trial Judge filled Plaintiffs' evidentiary vacuum with an erroneously drawn and demonstrably false presumption.

54. Rather than find for Defendants because of Plaintiffs' acknowledged failure to prove causation, the Trial Judge turned to a factual presumption to fill the vacuum. Thus, he simply declared based on "common sense" that Defendants' faults must have had "some effect on any rational person".[60] It is far from clear what he meant by this. If many class members would have smoked even with better warnings, as the Trial Judge acknowledged they would have, it is incomprehensible how the lack of such warnings had any "effect" on their smoking. In any event, the Trial Judge's presumption did not meet the requirements of art. 2849 CCQ and therefore cannot stand.

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58 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2009 QCCS 830 at para. 24.

59 Trial Tr., Sept. 30, 2014, at 81:24-82:9.

60 Judgment at paras. 803.

55. A factual presumption is an inference drawn from a proven, known fact to an unknown fact.[61] To be valid, it must be serious, precise and concordant.[62] *Serious* refers to the strength of the inference: the known fact must establish the unknown fact in a "clear and obvious manner". A presumption is *precise* if no other or conflicting inferences arise from the known fact. Finally, a *concordant* presumption is consistent with the entire record, including—but not limited to—other inferences.[63] These criteria for a presumption apply no differently in class actions than in individual cases.[64]

56. The Trial Judge's presumption failed to meet even one of these three essential criteria. Indeed, it was the very kind of presumption against which art. 2849 CCQ is meant to guard:

> En précisant que ne peuvent être retenues que les présomptions "graves, précises et concordantes," le législateur *a voulu écarter l'utilisation de celles qui seraient fondées sur de simples hypothèses ou possibilités* de même que sur des éléments de preuve contradictoires ou incompatibles qui ne sauraient rendre probable l'existence du fait inconnu.[65]

(a) Without a known fact from which to start, the Trial Judge's presumption was neither serious nor precise.

57. A presumption under art. 2849 CCQ must start from a proven, known fact. Here, there was no known fact in evidence about why class members smoked to initiate a serious and precise presumption that Defendants' supposed faults caused each of more than a million class members, over a span of 50 years, to smoke. Indeed,

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61 CCQ art. 2846.
62 CCQ art. 2849.
63 *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 71.
64 Jean-Claude Royer, *La preuve civile*, 4th ed. (Cowansville, Que.: Yvon Blais, 2008) at para. 843.
65 *Charbonneau c. Centre hospitalier Laurentien*, 2009 QCCS 4974 at para. 49 (emphasis added).

it is difficult to imagine any fact that could give rise to such an all-encompassing presumption. A presumption is a way of drawing a conclusion from evidence; it "does not allow for the filling of an evidentiary void" based solely on a judge's gut instinct.[66]

58. The probative value of the known fact determines the seriousness and precision of the presumption.[67] If the so-called known fact is uncertain, not actually proven or otherwise flawed,[68] any presumption sought to be drawn about the unknown fact will likely be neither serious nor precise.

59. *Biondi c. Syndicat des cols bleus regroupés de Montréal (SCFP-301)* shows well how an inference about an unknown fact can properly be drawn from known facts. There, the unknown fact was why the class members had fallen on the sidewalks. The known facts were that the sidewalks were covered with snow and ice, the class members had fallen and several class members testified that they had slipped on the ice. Because people do not ordinarily fall on sidewalks when they are clear, the known facts permitted the court to presume that the snow and ice had caused all class members to fall.[69]

60. Here, in contrast, the known facts—failures to warn—do not logically support the Trial Judge's sweeping inference about the unknown fact—why *all* class members smoked. While people do not typically fall on sidewalks that are not slippery, they often do smoke even when they have been warned.

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66 *Watters v. White*, 2012 QCCA 257 at para. 167, leave to appeal refused [2012] S.C.C.A. No. 150.

67 *Crispino c. General Accident Insurance Company*, 2007 QCCA 1293 at paras. 66-67.

68 *Crispino c. General Accident Insurance Company*, 2007 QCCA 1293 at para. 67; *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 72.

69 *Biondi c. Syndicat des cols bleus regroupés de Montréal* (SCFP-301), 2010 QCCS 4073 at paras. 160-161, aff'd *Montréal (Ville de) c. Biondi*, 2013 QCCA 404. Even in *Biondi*, though, the presumption was rebuttable, as we discuss in the next section.

61. The Trial Judge said his presumption was based simply on "[t]he existence of faults of this nature".[70] Since the faults were failures to warn, the Trial Judge apparently decided that it is in the "nature" of a failure to warn to cause everyone to engage in the activity that should have been warned about. This reasoning would mean that causation could be presumed in *every* failure to warn case without any evidence of what the plaintiff would have done had she or he been warned. That is not the law.

62. Moreover, Defendants' faults fluctuated over the 50 years they supposedly spanned. The Trial Judge found that Defendants variously published warnings that failed to persuade consumers,[71] abstained from publishing public statements at all,[72] pointed to the scientific controversy over the cause of smoking with technical accuracy[73] or circulated technical information only to the scientific community.[74] These disparate events, occurring at disparate times, cannot be summarized as "faults of this nature" and then used to initiate a presumption that each class member's smoking, at each point in time, was caused by all of the faults supposedly committed by Defendants both before and after each class member began smoking.

63. There was nothing to link any of Defendants' supposed faults—let alone all of them in all decades—to class members' smoking. Plaintiffs led no evidence about why class members smoked, what they knew about the health risks of smoking and when, whether they saw the government-approved warnings that have been on every pack since 1972 or whether additional warnings would have made any difference to them. The Trial Judge therefore could not presume that every class member smoked because of Defendants' supposed failure to warn. This is

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70 Judgment at paras. 800, 803.
71 Judgment at *e.g.* paras. 110, 115, 117, 129-130, 232, 287.
72 Judgment at paras. 239, 265, 271.
73 Judgment at paras. 247, 257-259, 265-267.
74 Judgment at paras. 254-255.

especially so given the inherent variability in how any individual class member would behave, at any stage in his or her life, in response to a warning. There are simply too many factors that vary from individual to individual to support a sweeping presumption about what caused more than a million individuals to smoke.

64. Recognizing the absence of the required clear and obvious connection between the known and unknown facts, the Trial Judge attempted to justify the supposed seriousness of his presumption by declaring it "[m]ere common sense".[75] But the invocation of common sense does not substitute for evidence, especially when it comes to the reasons for decisions made over half a century by more than a million people:

> Insistence on the application of common sense notions of causation may thus sanction inconsistency in the case law and, leaving this concept without precise meaning, may have the effect of allowing decisions based solely on '*sentiment*' (feelings) and rules which depend on the area of the law concerned and the judge's sympathy for the victim.
>
> …
>
> Common sense cannot serve as *the* justification [for a finding of causation], as it may permit judges to abdicate the difficult task of adjudicating causation by clothing value judgments in the guise of rules and to seek to justify a desired conclusion with the illusion of intellectual argument.[76]

65. In fact, the Supreme Court of Canada recently rejected a presumption of causation specifically because it was based solely on the trial judge's common-sense view of what must be true:

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75 Judgment at para. 803.

76 Lara Khoury, *Uncertain Causation in Medical Liability* (Cowansville, Que.: Yvon Blais, 2006) at 202-203 (internal citations omitted; emphasis in original).

> Poulin J.'s assertion that the Minister's investigation should [TRANSLATION] "surely" have led to the same result as the report of the Commission de police is based on assumptions and inferences that are not supported by any analysis. …
>
> Poulin J…. drew inferences and made findings of fact that were not supported by the evidence…It has therefore not been proven that the alleged failure... was the probable cause of the failure to discover the miscarriage of justice in Mr. Hinse's case. To conclude otherwise would be to rely on mere conjecture or remote hypotheticals. A court's conclusion with respect to civil liability cannot be based on speculation such as this.[77]

66. In addition, the Trial Judge did not properly assess whether other inferences were also possible, as the criterion of precision requires.

67. First, he misunderstood the criterion, conflating it with his "it-stands-to-reason", common-sense method of "proving" causation.[78] Second, he held that his presumption could be precise even if other inferences were available.[79] But, as the Supreme Court of Canada has recently confirmed, a presumption is not precise if it is "also possible to draw different and even contrary results, [and] to infer the existence of various and contradictory facts".[80]

68. The Trial Judge's presumption was not precise for exactly the reason given by the Supreme Court. The Trial Judge explicitly found that both his presumption—all

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77 *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at paras. 132, 137 (affirming *Canada (Procureur général) c. Hinse*, 2013 QCCA 1513 at para. 177, holding that "[p]areille inférence ne peut tout simplement pas être tirée du dossier, cela dit malgré toute la déférence due au jugement de première instance en pareille matière").

78 Judgment at para. 804: "To say that 'it is not reasonably possible to arrive at a different or contrary result or fact' [the test for precise presumptions] does not necessarily mean that the faults have to be the only cause of smoking, or even the dominant one [the causal test]. Nor is absolute certainty required".

79 Judgment at paras. 804-806.

80 *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 71, quoting M. L. Larombière, *Théorie et pratique des obligations*, new ed., vol. 7 (Paris: Durand et Pedone-Lauriel, 1885) at 216, also quoted in *Barrette v. Union canadienne, compagnie d'assurances*, 2013 QCCA 1687 at para. 33 and *France Animation s.a. v. Robinson*, 2011 QCCA 1361 at para. 120, quoting *Longpré v. Thériault*, [1979] C.A. 258 at 262.

class members smoked because Defendants failed to warn of smoking's dangers—*and* other, inconsistent inferences—*e.g.*, class members smoked because they liked it or *wanted* to live dangerously—were possible:

> The inference sought here is that the Companies' faults were one of the factors that caused the Members to smoke. The Court does not see how it would be reasonably possible to arrive at a different or contrary result, all the while recognizing that there could be other causes at play, e.g. environmental factors or "social forces", like peer pressure, parental example, the desire to appear "cool", the desire to rebel or to live dangerously, etc.[81]

69. The criteria of seriousness and precision were not satisfied. The Trial Judge's presumption of causation in lieu of proof was invalid.

(b) The Trial Judge's presumption was irreconcilable with the evidence, and therefore not concordant.

70. The Trial Judge's presumption also did not meet the criterion of concordance because it was demonstrably counterfactual.

71. The Trial Judge entirely failed to consider the criterion of concordance. He rejected its applicability on the ground that he was drawing only one presumption.[82] But concordance considers a presumption's consistency with the entire record—not merely with other presumptions being drawn.[83] In any event, the Judgment is replete with other inferences and presumptions.[84]

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81 Judgment at para. 806.

82 Judgment at fn. 366: "The third condition does not apply here since there is not more than one presumption to be drawn".

83 See, *e.g.*, *Compagnie d'assurance canadienne générale c. Parent*, [1994] R.J.Q. 2587 (S.C.) at paras. 66, 76, aff'd [1999] J.Q. nº 4319 (C.A.); *Général Accident, compagnie d'assurance du Canada c. Municipalité de Pointe-Calumet*, [2004] J.Q. nº 10377 (S.C.) at para. 86.

84 See, *e.g.*, Judgment at paras. 235, 264, 616.

72. Had the Trial Judge considered concordance as required, he would have found that his presumption of universal causation was inconsistent with the record. It simply could not stand in the face of his own conflicting findings and the incompatible evidence.

73. To start, the Trial Judge's presumption that everyone smoked because they were not warned is irreconcilable with his own finding that some people would have smoked even if they had been warned:

> Mere common sense dictates that clear warnings about the toxicity of tobacco would have had some effect on any rational person. Of course, that would not have stopped all smoking, as evidenced by the fact that, even in the presence of such warnings today, people start and continue to smoke.[85]

74. It is common knowledge, and was admitted, that people choose to start smoking even today, despite highly restrictive municipal, provincial and federal laws, vigorous public health campaigns and graphic warnings occupying 75% of cigarette packages to remind them of the risks. The Trial Judge ascribed this to "stupidity".[86] Plaintiffs' counsel ascribed it to intense rebelliousness.[87] Whatever the appropriate label, it does not change that many people smoke for reasons having nothing to do with any failure to warn.

75. In any event, the Trial Judge could not presume that Defendants' failure to warn of the health risks of smoking caused all class members to smoke, given the uncontradicted evidence and findings that class members were aware of the risks. The Trial Judge actually found as a fact that a majority of the population knew the risks of smoking before 1980, and that a "vast majority" did after 1980.[88] A presumption that all these class members smoked and continued to smoke

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85 Judgment at para. 803.
86 Judgment at para. 833.
87 Trial Tr., Sept. 30, 2014, at 84:11.
88 Judgment at paras. 124, 333 and fn. 179.

because Defendants failed to warn them is irreconcilable with the Trial Judge's finding that they already knew the risks.[89]

76. In fact, class members more than *knew* the risks; they generally overestimated them. Defendants' expert Dr. Kip Viscusi testified that, dating back to the 1960s, the public substantially *overestimated* the health risks of smoking.[90] The Trial Judge accepted this uncontroverted testimony as true, but inexplicably found its relevance "not clear".[91] Its relevance is that if people were still choosing to smoke when they overestimated the risks—and it is undisputed that they were and are—additional warnings would not have made a difference to them, as Dr. Viscusi testified.[92] On this uncontroverted record, the Trial Judge could not reasonably presume that "clear warnings about the toxicity of tobacco would have had some effect on *any* rational person".[93]

77. Similarly, the Trial Judge's presumption defies the uncontradicted evidence of Defendants' expert Dr. James Heckman, who won the Nobel Prize in Economics for his work on causal inference. Dr. Heckman testified that there are many complex and interactive influences on smoking,[94] and that warnings and marketing are *not* a significant factor in causing people to smoke or not.[95] In fact, nothing Defendants did—not the introduction of low-tar cigarettes, not the inclusion of larger warnings on packs, not marketing efforts—had any discernible impact on

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89 The Trial Judge actually found as a fact that most *Blais* class members chose to start or continue smoking even once they knew or should have known the risks: Judgment at para. 922.

90 Judgment at paras. 306, 309.

91 Judgment at para. 309; Viscusi Trial Tr., Jan. 20, 2014, at 133:24-134:4.

92 Judgment at para. 305; Viscusi Trial Tr., Jan. 20, 2014, at 91:7-10, 122:1-20.

93 Judgment at para. 803 (emphasis added).

94 Heckman Expert Report, Trial Exhibit 21320.1 at 16.

95 Heckman Expert Report, Trial Exhibit 21320.1 at 14-16.

smoking prevalence.[96] The Trial Judge did not make even a passing reference to Dr. Heckman's undisputed evidence.

78. Finally, the presumption ignores all individuality among the class members, treating them as perfectly homogeneous with respect to their knowledge, risk tolerances and motives. The classes comprise over a million people, of all ages, genders, upbringings, educations, occupations and attitudes. It is absurd to suggest that *all* of them smoked because of Defendants' faults and that, in the absence of those faults, *not one* of them would have smoked solely for pleasure, for stress relief or as an aid to concentration—benefits of smoking that the Trial Judge explicitly acknowledged.[97]

79. The fact is that the percentage of Canadians who smoke was in steady and dramatic decline beginning in the early 1960s (smoking prevalence did not peak in the 1980s, as the Trial Judge erroneously wrote),[98] and that it declined from over 50% to about 20%.[99] It is impossible to marry this clear picture of steadily reducing starting and steadily increasing quitting with a presumption that all class members were in all decades making their decisions because they had not been warned adequately of the health risks.

80. The Trial Judge erred in presuming that all class members smoked and continued to smoke because of Defendants' supposed failure to warn. His presumption was neither serious, nor precise, nor concordant. It cannot stand.

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96 Heckman Expert Report, Trial Exhibit 21320.1 at 14-16.
97 Judgment at para. 225.
98 Judgment at para. 238 and fn. 32.
99 Report of the Canadian Cancer Society, "Tobacco Use in Canada: Patterns and Trends," Trial Exhibit 40495.33 at 14.

IV. Any presumption had to be rebuttable at the stage of individual claims.

81. Even if his presumption of universal causation could be considered valid, it could not support an order for collective recovery of *class-wide* damages. Defendants had the right to present relevant evidence of individual circumstances that would rebut the presumption that class members smoked because of Defendants' supposed failure to warn. The Trial Judge erred by awarding relief to *all* class members without providing Defendants a meaningful opportunity to examine the individual circumstances of *any* of them to prove why they smoked.

82. In *Biondi*, as described above, a number of class members testified that the defendants' faults had made the roads and sidewalks into "une véritable patinoire" and that this had caused them to slip and fall.[100] The trial court drew an inference that the class members (all of whom had fallen in the space of a few days) had likely fallen because of the defendants' faults. On appeal, all three judges agreed that this presumption, even if the trial judge were justified in drawing it, had to be rebuttable at the stage of individual claims through an examination of individual class members' circumstances.[101] In concurring reasons, Fournier J.A. noted that a *conclusive* class-wide presumption of causation—as the Trial Judge adopted here—would impermissibly deprive the defendants of their right to raise a defence.[102]

83. Similarly, in *Tremblay c. Lavoie*, the class members claimed damages for sexual abuse they had suffered as children at a Catholic boarding school. Prescription was raised as a defence. Based on the testimony of a sample of the actual class members, the trial court drew a class-wide presumption that prescription was postponed because it was objectively impossible for the class members to act. But

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100 *Biondi c. Syndicat des cols bleus regroupés de Montréal (SCFP-301)*, 2010 QCCS 4073 at para. 160, aff'd *Montréal (Ville de) c. Biondi*, 2013 QCCA 404.

101 *Montréal (Ville de) c. Biondi*, 2013 QCCA 404 at para. 136.

102 *Montréal (Ville de) c. Biondi*, 2013 QCCA 404 at para. 53.

that presumption was necessarily rebuttable in individual claims through proof that any given class member was, in his or her case, able to sue.[103] The alleged abusers had the right to defend themselves by raising individual class members' circumstances.[104]

84. Here, by awarding collective recovery based on the presumption that all smoking was caused by Defendants' failure to warn, the Trial Judge foreclosed any examination of individual circumstances that would prove the contrary. He incorrectly treated the question whether Defendants' failure to warn caused class members to smoke as an on-off switch: either on for the whole class at all times, or off for the whole class at all times. He took this all-or-nothing approach despite acknowledging the obvious: why people smoke, even if they have been fully warned, is an individualized, not class-based, inquiry.[105]

85. For instance, the class members include people who, by virtue of their employment, cannot be taken to have started smoking in even the slightest ignorance of the risks. They include Health Canada smoking and health researchers who resided in Hull. They include members of the "general scientific community" in Québec, who read the academic journals linking smoking with disease and addiction.[106] And they include anyone whose doctor, mother, teacher or friend ever gave them stern warnings not to smoke. All these people, and anyone else who also knew of the risks, take the conclusive benefit of the presumption even though it is apparent that no failure to warn could have affected their behaviour and that they therefore have no valid claim.

86. The classes also include people whose motivations render any failure to warn irrelevant. For example, they include people who smoked for pleasure, who

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103 *Tremblay c. Lavoie*, 2014 QCCS 3185 at paras. 305-308, 316-317, 319.
104 *Tremblay c. Lavoie*, 2014 QCCS 3185 at para. 316.
105 Judgment at paras. 803, 806.
106 Judgment at paras. 254-255.

experienced no dependence and who were able to start and stop at will;[107] people who started to smoke as rebellious twenty-somethings, precisely *because* they had been repeatedly warned of the risk; and people who were well informed and simply decided that, for them, the reward of smoking outweighed the risk. Yet, the Trial Judge conclusively presumed that these people, too, smoked because of Defendants' failure to warn, even though their individual circumstances prove they did not.[108]

87. Thus, the Trial Judge erred not only by presuming causation in the erroneous and counterfactual way he did, but also by awarding collective recovery based on that presumption. Defendants had the right to rebut the presumption on a case-by-case basis at the stage of individual recovery by examining the circumstances of what individual class members knew about the health risks of smoking, why they smoked and whether earlier or stronger warnings would have affected their smoking. The Trial Judge declared all such individualized evidence useless,[109] and effectively denied Defendants the right to use it to rebut his presumption of causation. He did this by (i) denying Defendants access to individual class members' records, (ii) announcing his presumption only after the close of evidence and (iii) awarding collective recovery based on the presumption rather than leaving recovery to individual proceedings in which Defendants could disprove causation.

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107 The Trial Judge explicitly acknowledged that some *Létourneau* class members may experience no dependence: Judgment at para. 815.

108 The Trial Judge also needed individualized evidence to assign shared liability. He did not have that evidence, but he assigned shared liability anyway. For example, he decided that all *Blais* class members who started to smoke on or after January 1, 1976 should be ascribed a 20% share of liability: see Judgment at paras. 828, 833-834. Without any individualized evidence, this 20% share of liability applies equally to a doctor who started after he was advised by another doctor that he was at a very high risk of cancer and should definitely not smoke, as to a class member with learning disabilities who had never been to school or seen a doctor when he started.

109 *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp*., 2009 QCCS 830 at paras. 9-11. See also *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp*., 2011 QCCS 4090 at paras. 23- 26.

B. Plaintiffs did not prove medical causation in *Blais*.

88. In addition to having the burden of proving that Defendants' failure to warn caused all class members to smoke—which they failed to do—Plaintiffs were required to prove that their injuries were caused by smoking. They failed to carry that burden as well.

89. Plaintiffs sought to prove entirely by epidemiological evidence that smoking caused every *Blais* class member's disease. Epidemiology studies patterns of disease in populations. Plaintiffs' evidence thus showed, at most, that smoking causes the four diseases suffered by the *Blais* class in *some* class members. But it showed equally that smoking did *not* cause the four diseases in other class members. And because epidemiology is not designed to address causation in individuals, it could show nothing about *which* class members fell into which category.

90. Thus, taken at its highest, Plaintiffs' epidemiological evidence could have supported a *rebuttable* presumption that smoking caused the disease in question in persons with a requisite smoking history.

91. The Trial Judge erred by treating Plaintiffs' epidemiological evidence that smoking caused disease in some class members but not others as *conclusive* proof that it caused *all* class members' diseases. To perform this alchemy, he misinterpreted TRDA s. 15 as allowing Plaintiffs to prove disease causation in individuals—known as *specific* causation—solely by epidemiological evidence.[110] This was an error.

92. In effect, the Trial Judge interpreted s. 15 as creating a legal presumption that, if smoking *can* cause a disease (general causation) then it *did* cause it for each class member (specific causation). Nothing in the text, context or purpose of s. 15 supports that astonishing interpretation. Section 15 establishes that statistical and

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[110] Judgment at para. 693.

epidemiological evidence are sufficient to prove *general* causation. A different section—s. 17, which does not apply in a class action—expressly creates a presumption of *specific* causation once general causation is proven. The Trial Judge's interpretation of s. 15 to do the work of s. 17 is belied by the language, structure and purpose of the TRDA. This was an error.

93. The Trial Judge also erred in relying on Plaintiffs' epidemiological evidence to create what amounted to an *irrebuttable* presumption that smoking caused each class member's disease. Specifically, he based his presumption of universal medical causation on the evidence of Plaintiffs' expert Dr. Jack Siemiatycki. The Trial Judge found this evidence "particularly valuable",[111] but he did not subject it to the four-part test for admitting novel scientific evidence, which Dr. Siemiatycki's evidence admittedly was. Had he subjected Dr. Siemiatycki's evidence to that test, it would have been apparent that it did not meet the threshold requirements for admission and could not support the Trial Judge's extraordinary, counterfactual presumption.

I. Plaintiffs' epidemiological evidence could prove general causation but not specific causation, and proof of both was required.

94. To establish medical causation for every member of the *Blais* class, Plaintiffs had to prove both general causation—smoking *can cause* a particular disease—and specific causation— smoking *did, in fact*, *cause* each class member's disease. General causation was admitted by Defendants.[112] Specific causation was not. But Plaintiffs elected to lead only epidemiological evidence, which cannot prove specific causation. Plaintiffs' claims therefore failed.

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111 Judgment at para. 696.

112 Judgment at fn. 359 (noting that "general" causation was not disputed).

95. Once Defendants admitted general causation, Plaintiffs were still required to prove specific causation:

> [A] plaintiff must first prove "general" or "generic" causation—that a particular substance is capable of causing a particular disease. Next, a plaintiff must prove "specific" or "individual" causation — that exposure to a particular toxic substance did, in fact, cause the plaintiff's illness.[113]

96. In a class action, specific causation must be proven for each class member:

> [T]he class action mechanism cannot be used to make up for the absence of one of the constituent elements of the cause of action. A class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings ….
>
> As I mentioned above, for a class action to be allowed, the plaintiff must establish the elements of fault, injury and causal connection in respect of each member of the group.[114]

97. By its very nature, however, epidemiology cannot prove specific causation. Epidemiology is the study of disease in a population as a whole. Epidemiology could, for example, compare a population of smokers to a similar population of non-smokers. If the smokers had a significantly greater incidence of a disease, and the study adequately controlled for other possible causes, the epidemiology could identify smoking as a cause of that type of disease. Thus, epidemiology can prove that smoking causes a particular disease and it can estimate how many smokers

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113 Patrick Hayes, "Exploring the Viability of Class Actions Arising from Environmental Toxic Torts: Overcoming Barriers to Certification" (2009) 19 J. Env. L. & Prac. 190 at 195 (emphasis added), quoted in *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para. 53 and *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 (CanLII) at para. 95. See also Lara Khoury, *Uncertain Causation in Medical Liability* (Cowansville, Que.: Yvon Blais, 2006) at 49-50; *Montréal c. Biondi*, 2013 QCCA 404 at para. 49 (Fournier J.A., concurring); *Brousseau c. Laboratoires Abbott ltée*, 2011 QCCS 5211 at para. 35; *Baghbanbashi et al. v. Hassle Free Clinic et al.*, 2014 ONSC 5934 at paras. 8-9.

114 *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 at paras. 52-53 (internal citations omitted).

in a given population developed that disease because of smoking. It cannot, however, tell us *which* smokers in a population developed the disease because of smoking and which developed it because of some other factor:

> L'épidémiologie est une branche de la médecine publique qui étudie la fréquence et la répartition des maladies dans le temps et l'espace chez une population humaine, ainsi que le rôle des facteurs qui déterminent cette fréquence et cette répartition.[115]

98. Logically, then, epidemiological evidence can prove only general causation at a population level. It cannot prove causation in individuals:

> [L]'épidémiologie permet d'élaborer des équations qui déterminent, sur le plan statistique, le risque qu'un certain nombre de cancers du poumon dans une population donnée soit causé par une cause ou par une autre, telle l'exposition aux C.T.P.V.s [coal tar pitch volatiles] et le tabagisme, mais on ne peut, par une équation, déterminer dans un cas individuel si le cancer du poumon est dû à l'exposition aux C.T.P.V.s ou au tabagisme.[116]

99. "In short, epidemiological evidence is not determinative of individual causation".[117]

100. For instance, epidemiology could show that 80-85% of lung cancers are caused by smoking, which means that 15-20% are not. Epidemiology cannot identify which individuals are in the 80-85% and which are in the 15-20%. Yet, the Trial Judge held Defendants liable to both groups, including the *thousands* of unidentified class members whose disease, according to the epidemiology, was *not* caused by smoking. In so doing, the Trial Judge disregarded the fundamental principle that

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115 *Spieser c. Canada*, 2012 QCCS 2801 at para. 469; see also, to the same effect, *Commission de la santé et de la sécurité du travail et Tremblay (Succession de)*, 2002 LNQCCLP 2 at para. 82; *Berthiaume c. Val Royal Lasalle ltée*, 1991 CarswellQue 1079 (S.C.) at para. 694.

116 *Commission de la santé et de la sécurité du travail et Tremblay (Succession de)*, 2002 LNQCCLP 2 at para. 215.

117 *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at para. 395.

defendants are not liable for injuries they did not cause. The Judgment cannot stand.

II. Dr. Siemiatycki's analysis could not prove specific causation.

101. Plaintiffs' sole evidence on specific or medical causation was that of epidemiologist Dr. Siemiatycki. Based on his analysis of population-wide epidemiology, he estimated the amount a person would have to smoke for his or her relative risk for each of the four *Blais* diseases to exceed 2.0.[118] He testified that this meant that it was more likely than not that smoking caused the disease of *each individual* who met his criteria.[119] This makes no sense and is inconsistent with how relative risk is used in epidemiology and in courts of law.

102. First, relative risk describes the incidence of disease observed in one population compared to another—not in individuals. Dr. Siemiatycki acknowledged that his use of relative risk to establish causation in individuals was "novel" and untested.[120] That alone rendered his evidence unreliable and inadmissible and it therefore could not support the Trial Judge's presumption of medical causation for the entire class.

103. Second, even if Dr. Siemiatycki's admittedly "novel" and untested analysis *could* be used to prove individual causation—and it cannot—by the very nature of relative risk, it could not prove, as Plaintiffs were required to, that *all* class members' diseases were caused by smoking.

104. Again, relative risk compares the incidence of disease between populations. Thus if 10% of non-smokers developed a disease compared to 20% of smokers, the smokers' relative risk for that disease would be double that of non-smokers, or 2.0.

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118 Dr. Siemiatycki's analysis is replete with errors beyond those addressed here. RBH adopts JTI-Macdonald Corp.'s submissions on this issue.

119 Judgment at para. 714.

120 Judgment at para. 698.

But that does not mean that smoking caused the disease in each of those smokers. To the contrary, 10% of smokers would have developed the disease even had they been non-smokers. Thus, a relative risk of 2.0 means that smoking caused the disease in 50% of the smokers and, importantly, that it did *not* cause it in the other 50%.

105. Dr. Siemiatycki identified what he called "critical amounts", the amount of smoking at which he said a person's relative risk for each of the four *Blais* diseases would be greater than 2.0. But, even crediting Dr. Siemiatycki's flawed analysis, a relative risk greater than 2.0 just means that smoking caused the disease in more than half the class members *but did not cause it* in some substantial, unidentified percentage comprising less than half. Yet Dr. Siemiatycki purported to turn this showing that smoking caused disease in some class members but not others into *conclusive* proof that smoking caused all class members' disease.

106. Indeed, courts and tribunals have *rejected* using relative risk in Dr. Siemiatycki's counterfactual way, recognizing that adjudicators cannot simply convert relative risks "into decisions about causation using the legal standard of 'balance of probabilities'".[121] At most, a relative risk greater than 2.0, in addition to establishing general causation, can create a *rebuttable* presumption in favour of specific causation benefitting each member of the exposed population:

> Where the epidemiological evidence demonstrates a risk ratio above 2.0, then individual causation has *presumptively* been proven on a balance of probabilities, absent evidence presented by the defendant to rebut the presumption. On the other hand, where the risk ratio is below 2.0, individual causation has

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121 *WSIAT Decision No. 600/97*, 2003 ONWSIAT 2153 at para. 118, quoted with approval in *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at para. 551. Indeed, in *St. Jude* at paras. 539-544, the court explicitly rejected an argument that a relative risk of *less* than 2.0 should foreclose the opportunity to prove specific causation using individualized evidence.

> *presumptively* been disproven, absent individualized evidence presented by the class member to rebut the presumption. …
>
> I also note that the level of a risk ratio relative to 2.0 determines the *extent* of the evidentiary responsibility for the party on whom it lies. In other words, a class member faces a greater evidentiary hurdle where the risk ratio for the complication [condition] he/she suffered is 1.2, than when it is 1.8. … Likewise, the defendant faces a greater hurdle where the risk ratio is 4.0, than where it is 2.2. …
>
> This approach is entirely consistent with the case law. … *Hanford Nuclear*, *Daubert II*, the U.S. *Reference Manual on Scientific Evidence* [*Hanford Nuclear Reserve Litigation*, 292 F. (3d) 1124 (9th Cir. 2002), *Daubert v. Merrill Dow Pharmaceuticals*, Inc., 43 F. (3d) 1311 (9th Cir. 1995), Federal Judicial Center, *Reference Manual on Scientific Evidence*, 2d ed. (Washington D.C.; Federal Judicial Center, 2000)], and the procedure employed by the WSIAT [Ontario Workplace Safety and Insurance Appeals Tribunal] all support the use of a risk ratio of 2.0 as a presumptive, rather than prescriptive, standard for individual causation.[122]

107. But any presumption of specific causation must be assessed, and can be rebutted, in light of individualized evidence. Put differently, the presumption determines *who* bears the burden of leading individualized evidence on specific causation, and the *heft* of that burden. It never constitutes conclusive proof or makes individualized evidence irrelevant:

> [W]hether or not a risk ratio is above 2.0 bears on *how* questions of individual causation ought to be determined….
>
> [W]hether or not the risk ratio is above 2.0 determines *upon whom* the evidentiary responsibility falls in determining individual causation….

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[122] *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at paras. 556-558 (emphasis both in original and added).

> [T]he risk ratio for any given complication [condition] determines both the *direction* and the *extent* of the evidentiary responsibility *when individual claims are brought forward*.[123]

108. Despite all this, the Trial Judge ruled that epidemiology proving that smoking caused some class members' diseases was sufficient to prove that smoking caused all class members' diseases. Doing so created an improper *irrebuttable* presumption of medical causation. Defendants could challenge the *amount* of smoking necessary to trigger the presumption as to all class members—Dr. Siemiatycki's "critical amounts"[124]—but any evidence that individual class members' diseases were not, in fact, caused by smoking would be "useless".[125] He denied Defendants any meaningful ability to rebut the presumption at the individual level in any event, first by denying them access to class members' medical records,[126] and then by awarding collective recovery based on the presumption, with no subsequent individual proceedings on causation. All of this was erroneous.

109. The Trial Judge held that *Andersen v. St. Jude Medical* supported his approach.[127] But he ignored *St. Jude*'s teaching that any presumption of individual causation *must* be rebuttable by *individualized* evidence in subsequent individual, not class,

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123 *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at paras. 555-557 (emphasis both in original and added). See also, *e.g.*, *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para. 57: "For example, if it were found that hormone therapy doubles the risk of developing breast cancer, the individual class members, depending on their individual circumstances, may more readily prove specific causation".

124 Judgment at paras. 718-719, 742. In effect, the Trial Judge invited Defendants to identify different amounts of smoking at which the Trial Judge could draw a similarly fallacious conclusion that everyone's disease was caused by smoking.

125 *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp*., 2009 QCCS 830 at paras. 9-11. See also *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp*., 2011 QCCS 4090 at paras. 23- 26.

126 *Conseil québécois sur le tabac et la santé c. JTI-Macdonald Corp.*, 2013 QCCS 4863, aff'd *Imperial Tobacco Canada Ltd. c. Létourneau*, 2014 QCCA 944.

127 Judgment at paras. 717-718.

proceedings.[128] *St. Jude* also explained that ignoring individualized evidence, and treating causation as all-or-nothing, risked making defendants liable for disease they did not cause.[129]

110. That is precisely what happened here. The Trial Judge conceded, as he had to, that "[e]pidemiological analysis, being based on the study of a population, will inevitably include a certain number of cases that would not qualify *were individual analyses to be done*".[130] But the law does not permit a judge to hold defendants liable to *thousands* of individuals they undeniably did not injure merely because they are hard to identify and sort out.[131]

111. When Plaintiffs chose to proceed with a class action, they undertook the burden of proving causation for each class member. Epidemiological evidence that smoking caused the diseases of some class members, but did *not* cause it for others or for all, does not suffice. The Trial Judge erred in treating Dr. Siemiatycki's analysis as conclusively proving causation for all class members and in awarding collective recovery on that basis.

III. The Trial Judge's reliance on TRDA s. 15 to support his view that epidemiology can conclusively prove causation in individuals is untenable.

112. To justify his conclusion that epidemiology established causation for all class members, the Trial Judge relied on TRDA s. 15, which he interpreted to permit

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128 *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at paras. 556-558.

129 *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at paras. 534-535, quoting Federal Judicial Center, *Reference Manual on Scientific Evidence*, 2d ed. (Washington D.C.; Federal Judicial Center, 2000) at 362, fn. 82.

130 Judgment at para. 745 (emphasis added). See also para. 691: "epidemiology deals with causation in a population and not with respect to each member of it".

131 See, *e.g.*, *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 at paras. 52-53. See also *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at paras. 49, 62.

class action plaintiffs to prove specific causation solely by epidemiology.[132] This was an error.

113. The Trial Judge's interpretation of s. 15 flies in the face of its text, context and purpose and is inconsistent with the science of epidemiology. Properly interpreted, s. 15 establishes that epidemiology can prove general, not specific, causation. Section 15 does nothing to change the substantive law requiring proof of causation for each class member. Nor does it change the science of epidemiology, which, as set forth above, can prove only general causation in populations, not specific causation in individuals.

114. The TRDA's main purpose is to "establish specific rules for the recovery of tobacco-related health care costs" by the government.[133] Section 15 is one such rule, applicable on its face to collective health care costs recovery actions. In such actions, it provides that "proof of causation" may be established "on the sole basis" of statistical or epidemiological evidence.[134] But this can only mean proof of *general* causation, because that is the only form of causation that the government must prove in a collective action.

115. Section 15 must be understood in combination with sections 16 and 17. Section 16 describes the elements that the government must prove in a collective action. In particular, s. 16(2) requires the government to prove only *general* causation:

> 16. For a defendant who is a party to an action brought on a collective basis to be held liable, the Government must prove, with respect to a type of tobacco product involved in the action, that…

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132 Judgment at paras. 691-693.

133 TRDA s. 1.

134 In this sense, s. 15 precludes the suggestion that statistical or epidemiological evidence can show only an association—see, *e.g.*, Judgment at para. 246. While *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 clearly established that this evidence can show general causation, *St. Jude* was not decided until many years after the TRDA's enactment.

> (2) exposure to the type of tobacco product may cause or contribute to a disease or the general deterioration of a person's health; …

116. If the government proves the s. 16 elements, including general causation, then s. 17 gives the government the benefit of certain presumptions. In particular, s. 17(2) creates a presumption of *specific* causation:

> 17. If the Government establishes the elements of proof required under section 16, the court presumes…
>
> (2) that the exposure to the type of tobacco product manufactured by the defendant caused or contributed to the disease or general deterioration of health, or the risk of disease or general deterioration of health, of a number of persons who were exposed to that type of product.

117. Thus, the purpose of s. 15 is to set forth how the government may prove the type of causation required under s. 16—general causation. It cannot logically apply to proof of specific causation because the government never has to prove specific causation. Specific causation is *presumed* under s. 17 once the government proves general causation.

118. Indeed, if s. 15 allowed proof of *specific* causation solely by epidemiological evidence, as the Trial Judge found, it would render s. 17 superfluous—the same epidemiology the government used to prove general causation as required by s. 16 would also prove specific causation without need for the s. 17 presumption.[135]

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[135] Sections 15-17 apply on their face only to collective health care costs recovery actions by the government. Section 25, however, incorporates s. 15 into tobacco class actions; it does not do the same for ss. 16 and 17. Section 15, however, cannot mean one thing in collective recovery actions and another in class actions. Thus, if the Trial Judge's interpretation of s. 15 were correct, it would also apply in collective recovery actions and render s. 17 superfluous.

119. Moreover, Trial Judge's interpretation of s. 15 would effectively read ss. 18 and 19 out of the TRDA as well. Under those sections, the defendant in a collective recovery action by the government may rebut the s. 17 presumption of specific causation with proof that its fault did not cause the disease of some or all the persons whose medical costs the province seeks to recover. But the Trial Judge interpreted s. 15 to permit epidemiology to establish *conclusive* proof that smoking caused all class members' diseases, with no rebuttal as to other possible causes. Because that interpretation of s. 15 cannot be squared with ss. 18 and 19, it must be erroneous.

120. Plaintiffs were required to prove that smoking caused all class members' diseases. They offered only epidemiological evidence that smoking causes those diseases in some members of a population, and the Trial Judge ruled that sufficient to establish that smoking caused all class members' diseases. Because that ruling was based on an erroneous and untenable interpretation of TRDA s. 15, the Judgment must be reversed.

IV. The Trial Judge should have rejected Dr. Siemiatycki's evidence as unreliable.

121. Regardless of the standard applied, Plaintiffs did not adduce any admissible evidence to prove that each class member's disease was caused by smoking. Had the Trial Judge exercised his "gatekeeper" function by subjecting Dr. Siemiatycki's evidence to the scrutiny due all novel scientific evidence,[136] he could not have properly admitted or relied on it.

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136 *R. v. J.-L.J.*, 2000 SCC 51 at para. 1.

122. In addition to the usual criteria governing the admissibility of all expert evidence, novel scientific evidence must meet an additional four-part test to ensure it is sufficiently reliable:

> 1. whether the ... technique can be and has been tested[;]
>
> 2. whether the ... technique has been subjected to peer review and publication[;]
>
> 3. the known or potential rate of error ...; and,
>
> 4. whether the theory or technique used has been generally accepted ... .[137]

123. Furthermore, where the evidence comes close to the ultimate issue for the fact-finder, as Dr. Siemiatycki's evidence did here, it must be scrutinized even more strictly than usual.[138]

124. Dr. Siemiatycki admitted that his analysis was "novel" and that the notion of a "critical dose" of smoking was previously unknown in the scientific literature.[139] Though the Trial Judge acknowledged that Dr. Siemiatycki's work had to be "sufficiently reliable and convincing for it to be adopted by the Court",[140] he failed to scrutinize it under the required four-part test.

125. Though scrutiny was required because of the novelty of Dr. Siemiatycki's approach, the Trial Judge perversely relied on the novelty to avoid the scrutiny:

> Given its unique application, Dr. Siemiatycki's system has never really been tested by others and thus cannot have been either validate[d] or invalidated by any scientific community. He, on the other hand, swore in court that its results are probable, even to the point of being conservative. We place great confidence in that.

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137 *R. v. Trochym*, 2007 SCC 6 at para. 36, quoting *R. v. J.-L.J*, 2000 SCC 51 at para. 33; see also *R. v. Mohan*, [1994] 2 S.C.R. 9.

138 *R. v. J.-L.J.*, 2000 SCC 51 at para. 37; *R. v. Mohan*, [1994] 2 S.C.R. 9 at 25.

139 Judgment at para. 698; Siemiatycki Trial Tr., Feb. 18, 2013, at 50:8-51:20.

140 Judgment at para. 713.

> The Court found Dr. Siemiatycki to be a most credible and convincing witness, unafraid to admit weaknesses that might exist and forthright in stating reasonable convictions, tempered by a proper dose of inevitable incertitude. He fulfilled the expert's mission perfectly.[141]

126. That Dr. Siemiatycki "swore" his results were "probable" cannot substitute for the scrutiny of novel expert evidence required by law. Under the required four-part test, the Trial Judge's own findings compel the conclusion that Dr. Siemiatycki's evidence was inadmissible:

Test for admissibility of novel scientific evidence	**The Trial Judge's findings**
1. Whether the theory or technique can be and has been tested	Dr. Siemiatycki "did not have the luxury of being able to apply standard epidemiological techniques" (para. 697). "Given its unique application, Dr. Siemiatycki's system has never really been tested by others" (para. 729).
2. Whether the theory or technique has been subjected to peer review and publication	It is "accurate" that "Dr. Siemiatycki admitted in cross-examination that … the notion of a 'critical amount' of smoking was previously unknown in the literature" (paras. 699-700, internal citations omitted).
3. The known or potential rate of error or the existence of standards	"Dr. Siemiatycki's 'best estimate' would surely fall short of acceptable" if the scientific standards for source bias were applied (para. 755). Defendants' experts Dr. Marais (an applied mathematician) and Dr. Mundt (an epidemiologist) identified many errors in Dr. Siemiatycki's analysis, but they were holding Dr. Siemiatycki to too high a standard (paras. 733-737, 750-751).

[141] Judgment at paras. 729-730. Applying the Trial Judge's logic, the more unique and novel the proffered evidence, the *less* the need for it to be evaluated by the scientific community before it is admitted at a trial.

4. Whether the theory or technique used has been generally accepted	It is "accurate" that "[n]either Dr. Siemiatycki's 'critical amount' nor his 'legally attributable fraction' is part of the received scientific methodology. It is a novel science devised exclusively for the purposes of these proceedings" (paras. 699-700, internal citations omitted). "Dr. Siemiatycki's system has never really been tested by others and thus cannot have been either validate[d] or invalidated by any scientific community" (para. 729).

127. Thus, the Trial Judge himself found that Dr. Siemiatycki's evidence failed each prong of the four-part test for the admissibility of novel expert testimony, yet admitted it and relied virtually exclusively on it as proof of medical causation. The Trial Judge was wrong to find that scientific evidence that was novel, untested, not peer reviewed and not generally accepted by other scientists is nonetheless good enough for a courtroom merely because he found Dr. Siemiatycki credible and it was the only evidence Plaintiffs offered.[142]

C. Plaintiffs also did not prove medical causation in *Létourneau*.

128. The Trial Judge found that tobacco dependence is an injury and that *Létourneau* class members were therefore injured.[143] He unilaterally determined that class members should be able to "self-diagnose" whether they were in the class,[144] and therefore "translated",[145] "arbitrate[d]",[146] and "estimate[d]"[147] his way to a checklist for dependence that was not supported by the expert evidence from either side, and amended the *Létourneau* class definition to fit his checklist.[148] But as there

142 Judgment at paras. 723-729, 765; *R. v. Trochym*, 2007 SCC 6; *R. v. J.-L.J*, 2000 SCC 51*; R. v. Mohan*, [1994] 2 S.C.R. 9.
143 Judgment at paras. 665-667.
144 Judgment at para. 771.
145 Judgment at para. 782.
146 Judgment at para. 783.
147 Judgment at para. 785.
148 Judgment at paras. 788-789.

was no expert evidence that persons satisfying the Trial Judge's checklist meet the medical criteria for tobacco dependence, there was no proof that *Létourneau* class members suffered any injury because of their smoking.

129. The Trial Judge's dependence checklist requires four years of daily smoking. He purported to draw this requirement from the testimony of Plaintiffs' expert Dr. Juan Negrete. But Dr. Negrete testified only that the "first verifiable symptoms of dependence, according to clinical diagnostic criteria, appear within three-and-a-half to four years of starting to use nicotine".[149] He did not equate seeing the "first verifiable symptoms" of dependence with *proof* of it.

130. Beyond this, the checklist ignores the uncontroverted evidence that there is no set number of years after which someone is automatically dependent:

(a) Dr. Negrete himself does not make a diagnosis of dependence without conducting a personal examination of a smoker;[150]

(b) the *Diagnostic and Statistical Manual of Mental Disorders*, on which Dr. Negrete relies, states that individual assessment by a qualified health professional is required for diagnosis;[151]

(c) the "three-and-a-half to four" year figure used by Dr. Negrete is based on nothing more than a study in which smokers were given a self-assessment tool and which was designed to detect initial emergence of first symptoms;[152] and

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149 Judgment at paras. 773, 776; Negrete Trial Tr., Mar. 20, 2013, at 117:4-21.

150 Negrete Trial Tr., Mar. 21, 2013, at 18:17-20:11; Negrete Trial Tr., Apr. 3, 2013, at 252:20-257:14.

151 Negrete Trial Tr., Mar. 21, 2013, at 131:17-25.

152 Negrete Trial Tr., Mar. 20, 2013, at 117:4-21; Negrete Trial Tr., Mar. 21, 2013, at 152:15-10.

(d) other authoritative research contradicts the "three-and-a-half to four" year figure.[153]

131. All that can be said about *Létourneau* class members is that they meet the Trial Judge's idiosyncratic checklist, not that they are dependent or have suffered any injury caused by smoking. Proof of medical causation requires expert evidence, and no expert evidence supports the Trial Judge's checklist as a means of proving dependence.

D. Defendants were denied a fair trial.

132. In his injudicious pursuit of "the spirit and the mission of the class action",[154] the Trial Judge denied Defendants a fair trial.

133. Defendants were led to believe throughout the trial that Plaintiffs had the burden of proving legal and medical causation. The Trial Judge stated repeatedly that Plaintiffs had the burden.[155] This Court stated that Plaintiffs had the burden.[156] The CCQ states that Plaintiffs have the burden.[157] Defendants founded their defence on the premise that Plaintiffs had the burden. And they did not lie in the weeds: Defendants told the Trial Judge—explicitly and more than once—that this was the foundation of their defence.[158]

134. Nevertheless, when Defendants received the Judgment, they learned for the first time that the Trial Judge had effectively shifted the burden to Defendants to *disprove* causation. The Trial Judge's bait-and-switch approach violated

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153 Negrete Trial Tr., Mar. 21, 2013, at 36:24-37:5, 97:8-98:12.

154 Judgment at para. 976.

155 See *e.g. Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2013 QCCS 1993 at para. 5; *Conseil québécois sur le tabac et la santé c. JTI-Macdonald Corp.*, 2013 QCCS 4863 at para. 50.

156 *Imperial Tobacco Canada Ltd. c. Létourneau*, 2014 QCCA 944 at para. 41.

157 CCQ art. 2803.

158 A reminder he appears to have found exasperating: see *e.g.* Judgment at paras. 35, 260-261.

Defendants' *Charter*-protected *audi alteram partem* rights to answer the case against them and to know the case to be met.[159]

135. After the close of Plaintiffs' case, Defendants argued that Plaintiffs had not even tried to meet their burden, and the actions should be dismissed. The Trial Judge acknowledged that Plaintiffs had not met their burden of proving causation, but refused to dismiss the case, going so far as to suggest that the requisite proof might be found in the Defendants' evidence.[160]

136. The first hint that the Trial Judge might resort to the TRDA to fill the gaps in Plaintiffs' proof was not until near the end of Defendants' case, when the Trial Judge provided the parties with a draft Plan of Notes and Authorities. Defendants were taken aback by the reference in that document to the possible application of the TRDA and informally asked for clarification of his intentions; he refused to give it.[161]

137. RBH then filed a motion—before Defendants closed their case—asking the Trial Judge to reveal whether he intended to apply any legal presumptions or alter the burden of proof and explaining that if he did, RBH would need to change its proof:

> The defence has been conducted on the foundation that the Plaintiffs have the burden of demonstrating not just that smoking causes disease, which is not in dispute, but that the Defendants' alleged misconduct caused the class members' claimed injuries.
>
> The focus of the Defendants' motion to dismiss at the close of the Plaintiffs' case-in-chief was that the Plaintiffs had failed to

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159 *Charter of Human Rights and Freedoms* (the "*Charter*"), C.Q.L.R. c. C-12; *Imperial Tobacco Canada Ltd. c. Québec (Procureure générale)*, 2015 QCCA 1554 at para. 52; Louis LeBel, "Reflections on Natural Justice and Procedural Fairness" (2013) 26 Can. J. of Admin. L. & Prac. 51 at 53; *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 at 233.

160 *Conseil québécois sur le tabac et la santé v. JTI-Macdonald Corp.*, 2013 QCCS 1924 at para. 15.

161 Motion of Defendant Rothmans, Benson & Hedges Inc. for Ruling on Presumptions (Apr. 8, 2014) at paras. 32-33.

> carry their burden of proving causation. The Court acknowledged in denying the motion that the Plaintiffs might not have carried their burden, and has stated several times both before and since that Plaintiffs have the traditional plaintiff's burden of proving that the Defendants' alleged misconduct caused their claimed injuries.
>
> In reliance on the existing law and this Court's repeated assurances that those fundamental principles apply here, the Defendants have prepared and presented a case designed to confirm that the Plaintiffs have not carried their burden of proof.[162]

138. The motion stated that Defendants would try to disprove causation if the Trial Judge reversed his prior stance.[163] It described, in great detail, the steps that Defendants would take and the nature of the evidence that Defendants would introduce.[164]

139. But the Trial Judge gave no hint that he had changed his mind. To the contrary, he ruled that Plaintiffs could not take the benefit of the legal presumption of causation under TRDA s. 17, signaling that Defendants need not lead their evidence.[165]

140. Only when they received the Judgment did Defendants learn that the Trial Judge had shifted the burden of proof to them by way of previously unannounced and untenable factual and legal presumptions.

141. Defendants could not possibly have anticipated that they bore the burden of proof. Plaintiffs had adduced no evidence that could validly give rise to a factual presumption. Accordingly, Defendants could not have "entrusted"[166] the task of

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162 Motion of Defendant Rothmans, Benson & Hedges Inc. for Ruling on Presumptions (Apr. 8, 2014) at paras. 1-3.

163 Motion of Defendant Rothmans, Benson & Hedges Inc. for Ruling on Presumptions (Apr. 8, 2014) at paras. 7, 38.

164 Motion of Defendant Rothmans, Benson & Hedges Inc. for Ruling on Presumptions (Apr. 8, 2014) at paras. 8-9, 37, 39-40.

165 Trial Tr., Apr. 23, 2014, at 262:2-263:15.

166 Judgment at para. 808.

rebutting the Trial Judge's presumption to any expert witnesses. The Trial Judge's assertion that they had done so was nonsensical.

142. Furthermore, in the wake of the Trial Judge's clear ruling that the TRDA s. 17 presumption was inapplicable, Defendants could not possibly have anticipated that the Trial Judge would read s. 15 as creating the same result. The Trial Judge's assertion that Defendants' experts should have "been informed" of s. 15's "critical role" was disingenuous in light of RBH's requests for clarification and the Trial Judge's refusal to give it.[167]

143. If the burden of proof was to be shifted, Defendants had to be given both notice of that shifting and the opportunity to mount a full defence:[168]

> A party should not be left in the position of discovering, upon receipt of the tribunal's decision, that it turned on a matter on which the party had not made representations because the party was not aware it was in issue.[169]

144. Otherwise, reversing the burden of proof risked "compensat[ing] a plaintiff… for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone".[170] And, as here, highly relevant evidence may be kept from the court and the public, simply because Defendants were led to believe that they did not need to tender it.

145. Thus, in concurring reasons in *Biondi*, Fournier J.A. held that a conclusive, class-wide factual presumption of causation would impermissibly deprive the defendants

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167 Judgment at para. 737.

168 *Nova Scotia (Director of Assessment) v. Knickle*, 2007 NSCA 104 at para. 39; Louis LeBel, "Reflections on Natural Justice and Procedural Fairness" (2013) 26 Can. J. of Admin. L. & Prac. 51 at 53.

169 Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham, Ont.: LexisNexis Butterworths, 2011) at 43.

170 *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327.

of their right to raise a defence.[171] And this Court has acknowledged that while the legal presumption in TRDA s. 17 is "particulièrement sévère" and "costaud," it is ultimately constitutional because it gives Defendants notice and respects their rights "de présenter une défense pleine et entière".[172]

146. The Trial Judge's presumptions applied immediately, categorically and conclusively. They foreclosed any individual examination of any class member's true entitlement to anything. In invoking them by surprise, without notice to anyone, and after countless assurances to the contrary, the Trial Judge denied Defendants a fair trial.

E. <u>There was an inadequate factual basis for holding RBH liable.</u>

147. There was a paucity of evidence to support the Trial Judge's condemnation of RBH.

148. The Trial Judge largely accepted the evidence of RBH's witnesses. He also largely accepted RBH's submissions. The Trial Judge agreed that RBH did *not* commit a fault simply by selling a dangerous product to class members, did *not* attempt to keep its customers dependent on nicotine by developing higher nicotine tobacco, did *not* purposefully fail to produce a non-addictive cigarette, did *not* fail to warn of the dangers of "compensation" in smoking lower tar and nicotine cigarettes, did *not* mislead the public by use of the descriptors "light" or "mild", did *not* commit a fault by advertising a legal product including even to adult non-smokers, did *not* willfully market to or target minors and did *not* convey false information to consumers about its products in advertisements, including by way of so-called "lifestyle" advertising.[173]

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171 *Montréal (Ville de) c. Biondi*, 2013 QCCA 404 at para. 53 (Fournier J.A., concurring).

172 *Imperial Tobacco Canada Ltd. c. Québec (Procureure générale)*, 2015 QCCA 1554 at paras. 68, 69.

173 Judgment at paras. 198-201, 356, 384, 412-13, 419, 424, 434, 438, 482, 544.

149. In fact, when the Trial Judge spoke of RBH at all, he spoke primarily of RBH's responsible conduct as a responsible manufacturer. He did not find that RBH made even one misrepresentation to the public concerning the risks of its products. He accepted the following as "true":

> After 1958, RBH did not make any statements intended for the public, did not publish any statements and did not run any marketing campaigns on the smoking and health issue.[174]

150. Indeed, the Trial Judge approved of RBH's decision to remain silent in the face of government initiatives related to low-tar cigarettes.[175] Yet he condemned RBH and the other Defendants when they adopted that same silence in the face of prolific government initiatives to remind the public of the health risks of smoking.

151. In discussing RBH's liability, the Trial Judge pointed to only a single 1964 speech by RBH's marketing director to the Advertising and Sales Association in Montreal.[176] The Trial Judge decried this speech as "smack[ing] of hypocrisy, dishonesty and blind self-interest at the expense of the public". But the Trial Judge failed to mention that the speech (1) was not to the public at all but rather to an industry group; (2) was expressly presented as his "personal view" (being titled "One Tobacco Man's Views"); and (3) merely pointed out that, as was true at the time, many independent scientists—including the Mayo Clinic—had criticized the 1964 U.S. Surgeon General's Report. Furthermore, the Trial Judge did not find that this isolated incident had any effect on anyone. Indeed, it would be difficult to conclude that it had, given that it was not delivered to the public, in contrast to the widespread media coverage of the Surgeon General's Report.

152. Beyond that single statement, the Trial Judge could point only to a small number of Canadian Tobacco Manufacturers' Council and Ad Hoc Committee statements

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174 Judgment at paras. 628-629 (quoting from RBH's Notes & Authorities at para. 895).
175 Judgment at paras. 355-356.
176 Judgment at paras. 629-630.

over the five relevant decades.[177] But many of these "statements" were made privately, and were not directed to, or even accessible by, the public; others were protected by Parliamentary privilege; and all of them were fully explained by Defendants at trial.[178]

153. Nevertheless, the Trial Judge held RBH solidarily liable with the other Defendants. The Court's decision to reduce RBH's share of moral damages to only two-thirds of its market share is an explicit acknowledgment—albeit an inadequate one—of the scant evidence against RBH.[179]

154. In addition, the sole articulated basis for the punitive damages award against RBH is directly contradicted by the evidence. The Trial Judge acknowledged that punitive damage awards must be supported by individual findings against each defendant. But the only finding against RBH, apart from the 1964 speech described above, concerned events that took place *after* the "Class Period".

155. The Trial Judge held that RBH's failure immediately to switch to indirect-cured tobacco, which contains reduced tobacco-specific nitrosamines ("TSNAs"), was evidence that its *Charter* violations were intentional and supported punitive damages.[180] But he also held that "RBH's use of those inventories [of direct-cured tobacco] took place just after the end of the Class Period".[181]

156. Wrongful conduct occurring after the Class Period cannot support an award of punitive damages going back fifty years.

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177 Judgment at para. 627.
178 RBH adopts the other Defendants' submissions on this issue.
179 Judgment at paras. 1007, 1008, 1012 (assigning a 20% share to RBH, instead of its 30% market share).
180 Judgment at paras. 638-642.
181 Judgment at para. 641.

157. Furthermore, there was no evidence that indirect-cured, reduced-TSNA tobacco is meaningfully less dangerous than other tobacco, and thus no basis to hold that any delay was culpable conduct reflecting a "lack of concern over the harm they were causing to their customers".[182] Indeed, RBH's Scientific Advisor Steve Chapman acknowledged that carcinogenic nitrosamines were reduced in indirect-cured tobacco, but that there was "no way to know" whether its use made for a less hazardous cigarette.[183] This was uncontradicted.

158. In any event, RBH had no ability to switch to indirect-cured tobacco instantly. Curing is performed by farmers, not manufacturers.[184] Growers required time to convert their kilns, in part due to a shortage of available machinery and technicians.[185] Defendants collectively paid $20 million to hasten the kiln conversions.[186] The anonymous Ontario tobacco auction system made it impossible for Defendants to purchase only from growers who had already converted.[187] The Canadian government, including the Ministries of both Agriculture and Health, knew about the low-TSNA phase-in plan and kiln conversions in advance and did not object to the timing or the implementation.[188] The Minister of Agriculture even warned against any "drastic move from the industry" and threatened increased regulations if Defendants did not continue to purchase from Canadian tobacco growers, including those not yet able to indirect-cure.[189]

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182 Judgment at para. 642.
183 Judgment at para. 640.
184 Trial Tr., Dec. 19, 2013, at 43:16-20.
185 Trial Tr., Dec. 19, 2013, at 44:5-47:16.
186 Robitaille Trial Tr., Dec. 19, 2013, at 48: 9-49:4.
187 Robitaille Trial Tr., Dec. 19, 2013, at 82:22-84:1.
188 Robitaille Trial Tr., Dec. 19, 2013, at 86:4-9, 227:1-228:24.
189 Robitaille Trial Tr., Dec. 19, 2013, at 86:4-9, 227:1-228:24.

159. RBH coordinated with government to introduce the use of indirect cured tobacco. Its conduct should have been applauded by the Trial Judge, not seized on and twisted into a basis for punitive damages.

160. The legal errors in the Judgment occasion an injustice to all Defendants. For RBH, that injustice is compounded by the absence of any real factual basis for its liability.

PART IV – CONCLUSIONS

161. RBH asks this Court to

ALLOW its appeal;

SET ASIDE the Judgment as against RBH;

THE WHOLE with costs, in appeal and in first instance.

Montréal, December 11, 2015

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PART V – AUTHORITIES

Jurisprudence *(cont'd)* **Paragraph(s)**

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Doctrine

Doctrine ***(cont'd)*** **Paragraph(s)**

COUNSEL'S CERTIFICATE

We undersigned, McCarthy Tétrault LLP, do hereby certify that the above Factum of the Appellant Rothmans, Benson & Hedges Inc. does comply with the requirements of the *Rules of the Court of Appeal of Québec in Civil Matters*.

Montréal, December 11, 2015

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