Court File No: NY-21513/97

THE SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH T. BATTAGLIA

(Plaintiff)

and

IMPERIAL TOBACCO LIMITED

(Defendant)

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P R O C E E D I N G S A T T R I A L

BEFORE THE HONOURABLE MADAM JUSTICE P.A. THOMSON

On Tuesday, November 28, 2000

At Toronto, Ontario

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APPEARANCES:

Mr. D. Lennox	For Plaintiff
Mr. L. Barnes Ms. D. Glendinning	For Defendant

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TUESDAY, NOVEMBER 28, 2000

THE COURT: Okay, we're finished with the evidence, nobody's had any second thoughts or any other ideas, okay. Mr. Lennox.

MR. LENNOX: Well Your Honour, I see from the Rules of Court that in a jury trial I go last but in a Judge's trial it's up to your discretion. I'm happy to go first and my friend will follow and perhaps I could have a brief reply at the end.

THE COURT: My practice is Plaintiff first and if I need to hear from the Defence I do and then the Plaintiff gets rebuttal. So, parts of this case I will be hearing from the Defence unless somebody has a terrible objection to that I prefer it that way in terms of my own thinking.

ORAL SUBMISSIONS BY MR. D. LENNOX:

Well Your Honour, I want to finish where I started which is that this case is about responsibility and choice. It's about the responsibility of the manufacturer for its product and for the information that is communicated to consumers about its product and it's about the choices that its executives made in how to design and market that product. And, what to tell consumers about the product, and what not to tell consumers or Health Canada or scientists and public health about the product. And the Defendant in this case has fundamentally

denied any responsibility for its product or for the information that appears on the package. It's played, in this trial, a game of blame shifting Your Honour. It has said that if there are any problems with the product, which are denied, then my client, Joe Battaglia should have been aware as, I think it was my friend's opening statement in which they described Joe as a "veteran smoker" and an "insider", as if he had some special knowledge about tobacco science, which plainly, as a high-school drop-out he doesn't. He never received press releases about ventilated cigarettes, he never sold ventilated cigarettes, he never operated a smoke machine, he never was around when smoke machines were being used. My client doesn't have any special knowledge here that corrects the information imbalance that exists between the manufacturer and consumer.

The suggestion also is that Health Canada is somehow at fault and there has been blame shifting on to the government. Blame the government. And the evidence here today has been that there has been imbalance between Health Canada and the industry. That people like Neil Collishaw, working at Health Canada, have done their best with the information resources they had, to try and get fair and accurate information to consumers about these products but they have not always completely understood the science. The understanding at Health Canada of the science

of light cigarettes has developed over time. And, next year, regulations are going to go into effect to provide better information to consumers about light cigarettes but, what Health Canada did or didn't do or how long it took Health Canada to come to this policy arrangement doesn't excuse the manufacturer. During the trial I took you specifically to Section 9, Sub.2 of the Tobacco Products Control Act. This is the only Legislation that's ever been in place to regulate the industry. You will recall that my friend opened his case by saying that tobacco is an incredibly regulated product, one of the most regulated products there is in Canada. The evidence actually is that in the forty-nine some years, since the first reports of smoking causing disease, government regulation has been sparse. There was a voluntary code between 1972 and 1989 and between 1995 and present, and only for a brief period of time, between 1989 and 1995, was there any legislation in place. And that legislation specifically said, in Section 9 Sub.2, that this legislation does not supplant or replace or relieve the manufacturer of the duty to warn. It doesn't supplant the common law. My friend told you, well, cigarettes are a legal product and it is true that Parliament has not prohibited the sale of cigarettes, has not banned them, so, in that sense, what my friend says is true. But, the law is more than just what Parliament says. The law includes common law duty, like negligent misrepresentation, failure

to warn, product defect and, whether or not the product as sold is a legal product is up to you to decide. If the Defendant breached a common law duty then damages flow so, for the Defendant to say it's a legal product that doesn't help you. That doesn't tell you what you need to decide in this case.

There's no reason why the defendants could not have provided better information to consumers. They have ample opportunity to communicate with consumers when it suits their purposes. They can buy space in newspapers and they do. They could have printed better information on the packages. They could have changed their voluntary code that they operated under. They could have printed information on the inside of the package. They could have included an insert. They have, on occasion, Mr. Brown gave evidence on this point, they have on occasion provided information to consumers when it suited their purposes. In the early 1990's they included a petition in the slide package of the cigarette, a petition against high taxes on the sale of cigarettes. And when we think about it, if you go to Shopper's Drug Mart, one of the companies that Imasco used to own, go into a Shopper's Drug Mart and buy any drug, you get a print-out, you get a little information kit with your drug. Now these are the side effects or beware of this, you know, if you take this pill don't go out in the sun because you might get an extra bad sunburn

because you took this pill. Lots of drug companies provide information about their product to consumers. This particular drug, what information has the Defendant provided? How is the consumer to make sense of 4 milligrams of tar and .4 milligrams of nicotine which appear on the package? One of the arguments that so to speak, the Defendant seems to be advancing is that Health Canada has some kind of vote. I think Mr. Crawford said, "Well Your Honour, I wouldn't call Health Canada, they might not want to talk to me." Any other manufacturer, if they have a problem with a safety regulation, they can go to Health Canada and say "you know, we have a better way of structuring this regulation." You can imagine, for example, air bags. It's required that cars have air bags. It's required that the air bags be in the front and there's been some concerns raised that may be putting air bags right at the front is dangerous for some people, some little kids get hurt when the air bag explodes into their face.

THE COURT: In fairness, the first report that was ever written on air bags was written by me in 1975.

MR. LENNOX: Well, there you go. See how long it's takes for safety regulations to come into effect. And you see, the importance of the common law to provide incentives for manufacturers to improve their product, would be well familiar with the importance of the common law in bringing about important changes to the

automotive industry. Work with Ralph Nader, the Ford Pinto case, classic case where…

THE COURT: You're too young to remember that. I wrote the report on that too…

MR. LENNOX: I read the case law Your Honour and I read the books that people like Mr. Nader have left behind, he's still around I should say, but books that he's written. At any rate, common law plays an important role in bringing about safer products and in holding manufacturers to important duties to the public. The case of Ford Pinto is a classic case where the regulated failed and the common law intervened to get exploding gas tanks off the highway. They stated the Firestone case, another classic example where the regulatory failed in the United States and Canada and it failed to identify and take action regarding an important safety defect. But the common law has intervened. There were cases brought in the United States long before the product was recalled that helped bring about the product recall both in Canada and the U.S. and helped get these defective tires off our highways. My point about air bags is, if you're Mercedes or Volvo and you want to make a safer car, umm, it's certainly open for you to go to the regulator, the Canadian government and say, "we want to put air bags in our vehicle, we're concerned about putting them at the front. We've come up with a way to put them in the roof of the car and the side of the car, and that's going to protect those little kids and it's going to

protect everybody and it's better." My point is, that a responsible manufacturer can always go to the regulator and say, "look, whatever regulatory regime you're using and you want to improve it, here's how to improve it" and it was always open, in my submission, to the Defendant to go and say "look, Health Canada, we understand why you want to provide tar and nicotine numbers to smokers but, we're concerned about it. We've done our own testing and here's our testing and here's our results. We think that you could provide better information, more information, you could provide a range of figures, or you could provide some kind of clarification." So, the industry could have, on its own, the Defendant could have, on it's own, provided us better, more accurate information to the consumer or they could have gone to Health Canada and said, "look, we're going to redraft the voluntary agreement. What do you think about making it better, providing better information?

And you'll recall that there was this Toronto Star article in 1981 saying the ad stabbed at this report and said, "look, ventilated cigarettes are generating higher yields" and there was some questioning in the House of Commons about that. This was at a time when there was the voluntary agreement in place, and in fact, the industry amended the voluntary agreement in 1984. Why didn't they, at the time of the amendments, do something about this tar

and nicotine problem with the light cigarettes? It's certainly open for them to do that and they failed to do it. And they failed to do it in the last five years when this, again, they've been under this voluntary regime. Point Your Honour is that common law punishes manufacturers for negligent conduct and there is ample negligent conduct here. There are ample examples of things that they could have done better that would have advanced and protected public safety.

It's important to recognize what information the Defendant's actually have. Part of why Ford is held liable for exploding gas tanks is because they knew about it. You've heard the evidence from executives at Imperial Tobacco and you can make that determination but there's evidence there that they knew that there was a problem, that they knew consumers didn't have accurate information. You'll recall the testimony of Don Brown, former President of Imperial Tobacco, he acknowledged that the Defendant's conducted marketing groups and focus groups on consumers. And he acknowledged that consumers would tell the Defendant that they thought light cigarettes were safer. He even acknowledged that some consumers were telling the Defendant that they taped over the holes. Now, we can argue, you know, about who created this perception of "light cigarettes are safer". My friends say it was Health Canada's fault or Reader Digest's fault. I'd say it too, that the perception came from the

industry itself and I presented you with that Rothman's ad from a 1958 Toronto Star, but whoever created the perception, the point is the Defendant's know about it and they've done nothing to correct it, and they do nothing to correct it because it fits in with their marketing plans. We'll sell more cigarettes by not correcting this misperception.

Your Honour, in many ways the trial we have heard is an historic one. It's the first time a tobacco company has ever been brought to trial in Ontario. It's only the second time in Canadian history that a tobacco company has been brought to trial. The only other case was in Quebec in 1997, again in Small Claims Court, Madam Laterno, a schoolteacher sued, I believe, for $247.00 which was the cost of her nicotine patch. She was unrepresented, I believe the trial lasted a day and she was unsuccessful. You are the first Judge in Canada, who has heard this evidence that we have presented to you over these past few days, this past week or so. When it comes time for you to write your Judgment you should recognize that future generations of Canadians are going to look back on it and they're going to want to have answers about the Twentieth Century. I'm being very serious Your Honour, they're going to want to know how is it that such a harmful product could have been sold for so long to so many people?

The first cancer studies, involving tobacco, were published in 1951 by Dr. Ernst Wineman. Future generations are going to want to know how it is that in the year 2000 we still have tobacco scientists like Dr. Massey saying that more studies are needed. The Defendant is here today Your Honour trying to rewrite history. The first public statement about smoking causing disease was made in the Canadian Senate in June of this year by Imperial Tobacco President Bob Bexon. Now, both Mr. Crawford and Doctor Massey said that Imperial Tobacco had had some kind of private epiphany in the 1980's, that they had come to some kind of realization that smoking and disease were related back in the 80's and they can't provide me with the precise date. Doctor Massey pointed to the minutes of a meeting in Vancouver in 1989 but he couldn't find the exact reference, so maybe they talked about it back in 1989, they just didn't write it down.

They're trying to rewrite history here when they say they had this realization and we just didn't tell consumers about it or we didn't think we needed to share this private epiphany with consumers. I do want to take you to the statement made by then Imperial Tobacco President, John Louis Mercier in Parliament in 1987, and you can judge here, when it comes time to write the history of tobacco, you can judge as to what was actually going on. It's the Plaintiff Volume, Tab 23, it's page 394. In the

left hand column, part way down Michelle Copps says, "Mr. Mercier, is it the position of your counsel that lung cancer can be caused by smoking?" Mr. Mercier, "it is not the position of the industry that tobacco causes any disease. Our position is that epidemiological studies are essentially statistical comparisons. All they can demonstrate is an association. They cannot and will not demonstrate a cause and effect relationship." Ms. Copps, "you do not accept the fact that smoking can either cause or contribute to lung cancer? So, you're going to tell my father-in-law who has just been operated on for a severe tumour, and he smoked for over 40 years, that his smoking has nothing to do with it, having this malignant tumour?" Mr. Mercier, when we look at the statistics we find that the great majority of smokers do not get lung cancer or the other diseases associated with smoking. Our views are that, in the context of the current scientific knowledge, these diseases are most likely caused by the interaction of many factors. The role, if any, that tobacco or smoking plays in the initiation and the development of these diseases is still very uncertain. The issue is still unresolved.

So Your Honour, there is a very important point here about history, that publicly they're saying, in the 80s, that smoking doesn't cause disease. It's unresolved. And privately, at sometime during the 80s, they had an epiphany, which they

didn't share. And, it's a very important point when, for them, to come to Court now and say "Oh, it was a big misunderstanding. We always thought that there was this problem with smoking and disease," that's just wrong. And for them to say, it was Mr. Crawford who said "we thought that consumers had enough information and we didn't feel that we needed to do anything to warn consumers." Well, that is kind of corporate arrogance, which is appropriately punished by Torte Law. If you're going sell a product that causes disease, that causes harm, that causes suffering, you owe, at the very least, a duty to consumers to make sure that they have all the information. Not just from public health authorities, but from union and manufacturer, that before somebody ends up in a hospital bed sick, you've got to give them every chance to make an informed decision about that. You'll recall from Mr. Bexon's paper, and this is found at Tab, I'm just turning there, Tab 11 of the Plaintiff's Briefs. If you turn to Page 122, you see at the top, "The Industry". This is Bob Bexon's paper but he's citing the studies that Imperial Tobacco had done where they asked people if they thought smoking was dangerous, if they thought that you could smoke, say three or what have you, and the response was not 100%. There were consumers who believed the industry, that smoking was not harmful, that causation had not been made out, my client believed the industry. One of the few things that he took with him from

Rothman's was loyalty and that was loyalty to the industry. So, for Mr. Crawford to say that he thinks that everybody knows, that everybody has complete information, is not substantiated by this paper done by Mr. Bexon. And, it's an assumption that he's making that it is inappropriate. Don't assume that people already have the knowledge. Provide them with the knowledge.

The Defendants have done a, have gone to great pains to distance themselves from the paper of Mr. Bexon. It was delivered at a structured creativity conference where people were told to think outside of the box. Say what was on their minds and it doesn't reflect the policy of the company, that's their position. My submission is that this paper should be given a great deal of light because it's one of the few papers that they were writing what they actually thought and they were not being censored. They presented documents to you where they are being censored, where they rewrite the minutes of meetings. They presented the letter from Mr. Herd to Doctor Massey saying "well, I instinctively don't like to publish studies on smoking behaviour, this paper from Cathy McBride supports the Kozlowski theory, it will be problematic to report it." In general, the industry is very careful with what they put on paper. They're concerned about liability and they're very concerned about what gets written down. This paper from Bob Bexon is

a great example of where they actually wrote what they thought and, if Mr. Bexon was so off key as to what Imperial Tobacco Policy was then, in my submission, he wouldn't be President of the Company.

While I'm on this paper, a point I wish to make is that the industry's called a lot of their Chief Executives to come here, to North York. They called Don Brown and they called Doctor Massey, both very highly placed, but, they didn't promise that, and this is my Brief of Authorities Your Honour. And when I come to the legal submissions I'll spend more time on it, but there is a case there, Ontario Court of Appeal case called, just let me find it for you quickly, it's at Tab 7, called Claybourne Industries. You are entitled to draw an adverse inference where witnesses are not called. And there are two instances where you could draw an adverse inference against the Defendant for failure to call witnesses. The first is Dr. Susan …, who was the Defendant's Cardiologist who was in the Courtroom. She watched Doctor Graham's testimony and they didn't call her. So, you are entitled to draw an inference, that her evidence would have supported the Plaintiff's case. And in my submission you're also entitled to draw an inference against the Defendants for not calling Mr. Bexon. Mr. Bexon, it's my understanding, is a resident of Montreal. I had no ability to bring him here. Small Claims Court summonses, I

don't believe, extend out of provinces. I may be wrong but I certainly didn't have the resources to investigate that and it's my understanding that a Small Claims summons goes as far as the O.P.P. can find people and I had no way to get a Bench Warrant for somebody in Montreal. They didn't call him, I couldn't have called him, you can draw an adverse inference from that.

I just want to go through the witnesses Your Honour and the first witness we heard from was Mr. Collishaw and he introduced to you the documents from Gilpin. He also explained that government efforts to improve information going to the consumers and the difficulties that the government was labouring under, the imbalance of information that existed between Health Canada and the industry. And, he also talked to you about tobacco science, how smoke machines work. The ISO smoke machine, the puff duplicator and the Ferrari smoke machine. He took you through various reports of how he measured yields from light cigarettes, the B.C. Government Reports, the Imperial Tobacco Studies and we looked at the study of thirteen smokers who smoked a 15 milligram tar cigarette. I think it was DuMaurier that they smoked and that quite a number of people in that study of thirteen smokers took large puff volumes. And they had short puff intervals which supports the science that's in the greater public community, which is that puff volume, puff duration, these things

matter. They affect the yield that smokers get and Mr. Collishaw went through the lab stat reports of 1996 for the Matinee Extra Mild which show that as factors are changed, as puff volume, puff duration, intervals, vent blocking, as all these factors are changed the yields increase. Mr. Collishaw explained to you what the tendency is. The trend is that smokers get more. On a balance of probabilities smokers smoking light cigarettes are going to get more than what's on the package. And even slightly altering the conditions affects those numbers significantly. Now, do we have exact figures for Joe? No, it's expensive. The Plaintiff comes here with limited resources but that kind of evidence is unnecessary in a civil case. We operate, in civil litigation, on a balance of probabilities. I learned how to look at trends. Do we have to know exactly what Joe got every time he takes a puff? No. The evidence before you on this point is sufficient, that you can say, on a balance of probabilities, Joe got more. Now, one thing about Neil's testimony was he was very careful. He tried to be very balanced and he tried to assess information as it was presented to him, and he learned more about the industry from this trial. And at the end of the trial he looked at all the information and said, "You know, my fundamental conclusions remain the same, but this has been very interesting." A problem that Plaintiff's always fix in product liability cases is that they're not the manufacturer. The

manufacturer knows more about the product. The manufacturer has scientists who work full time on the product. The manufacturer has, in this case, has it's own lab with 35 scientists and access to the greater DAT lab with over 400 scientists. Whether they're talking about Ford Pintos, or asbestos insulation or cigarettes, the Plaintiff is always at a fundamental disadvantage. The Plaintiff doesn't have the same information that the manufacturer does. The Plaintiff can get documents, sometimes, through a whistle blower or through discoveries or what have you and the Plaintiff can point to the documents and say to the Court, "look, these documents say whatever about exploding gas tanks or about cigarettes or about what Johns Mansville knew about asbestos. That's really all the Plaintiff can do. It is extraordinarily rare for an engineer at Ford or a Doctor at Johns Mansville or a scientist at a tobacco company to come forward and to sit in the witness box and say, "this is how it really happens." Whistle blowers are extraordinarily rare and for the most part pointless in product liability cases. All they have is their documents and experts that they try and find who are not part of the industry. The Defendant's, in cross-examination, tried to point out "Well, Mr. Collishaw, you never worked for a tobacco company, how can you come here today?" Mr. Collishaw is careful with his conclusions and his evidence and the fact that, that he didn't work for a tobacco company is not decisive here. He

certainly has worked for a large bureaucracy and he certainly does know a great deal of tobacco science and you are entitled to put reliance on Mr. Collishaw and on his conclusions and the fact that he doesn't work for a tobacco company is not important.

Now, Dr. Graham came here today, or, this past week, and he said "Joe has coronary heart disease." Whether he has other conditions is not really important because smoking plays a very powerful role in causing coronary heart disease. Does it have to be the sole cause of coronary heart disease? No it does not. If we look at a Supreme Court Case in the Brief of Authorities, Tab 2. Tab 2 is the Supreme Court of Canada Case 1996, *Athey and Leonati*, and it is the latest statement by the Supreme Court of Canada on the Law of Causation. I've highlighted in your text the relevant principals and they are at Paragraphs 13 to 17 beginning at the bottom of Page 5.

The relevant principles are this, you don't have to show that wrongful conduct was the sole cause of an injury. All you need to show is that, and here's the key phrase in Paragraph 15, all you need to show is that the Defendant's negligence materially contributed to the occurrence of the injury. That's in Paragraph 15, the first sentence, top of page 6. So, there may have been a lot of factors that contributed to Joe's

coronary heart disease and Dr. Graham's evidence was that smoking is a very important causal factor. There may have been some other factors as well but the legal standard for causation in Canada is that those other factors are not important. All you need to show is that the wrongful conduct materially contributed to the injury. And Joe has significant injuries. He has this heart disease which worsened between 1991 and 1999, he had a silent heart attack some time between 1991 and 1999, he had surgery on his leg in 1996 and the prognosis is not good. There has been deterioration and there may continue to be deterioration if Joe doesn't stop smoking. Doctor Graham stated that in the next five years there's a 27% chance of death for my client. Doctor Graham also gave evidence that there are great benefits to quitting smoking. If Joe had been successful in quitting smoking, if the Matinee Extra Mild had helped him to wean himself off nicotine his health would be a lot better. And, Doctor Graham explained all the benefits that accrue. The deterioration which he has undergone, between 1991 and 1999 would have been avoided. Joe may some day finally quit smoking, I hope that he does. It would be the greatest reward as a lawyer if he would achieve that goal but there has been deterioration, which has occurred, which is not going to be reversed. And, so, when Joe was purchasing his Matinee Extra Mild beginning in 1994, operating under the assumption that it would help him, he was

suffering damage which was not going to go away. He was also paying money. Before a manufacturer is entitled to reap the benefits of the sale of it's product, it ought to provide fair and accurate information to consumers and if the consumer is buying a product under a misperception then there ought to be compensation for that.

The next witness we heard from was my client. We said, Joe is not a tobacco scientist. He said that he thought that light cigarettes were safer and they would help him to quit. And when I asked him where that belief came from he said, common sense logic. And, for the average consumer, you know, you see numbers on a package and there's no real explanation. It's just understandable that a consumer would look in a store, would look at various products in a store and say this one has 4, this other one has 10, this other one has 17. Surely common sense logic of consumers is wrong, I'm doing myself a favour by going to the 4. We have a lot of products out there that have figures on them, light beer, whisky, 2% milk, high octane gasoline. There's a lot of numbers that get quoted and if the numbers on cigarettes, nobody expects that if you gulp 2% milk quickly and you don't take 58 second intervals between gulps, nobody expects to get more fat in your milk. Nobody expects that, under certain conditions, a light beer is going to get you a lot more drunk than the 4% alcohol

would indicate. The manufacturer knows that there are all these other numbers out there. And if these numbers on the package are very different from numbers for gas mileage, or whatever other consumer information is out there, if these numbers operate in a really scientifically, they're very different in how they operate from 2% milk then the manufacturer has a duty to provide that kind of an explanation. To say, this isn't 2% milk but you're going to get the same amount of fat no matter how you drink the milk. These are cigarettes and how you smoke affects what you get. My client has said that he would like to quit. He said he's tried many times. He has tried hypnosis, he's tried the patch, and he's had partial success for periods of time but the cravings haven't gone away. The pain, the desire for nicotine hasn't gone away. And the Defendant knows this. That's why they study nicotine. That's why they study smoker behaviour with light cigarettes. The industry knows Joe and it built their marketing strategy around Joe. They know that he's caught in a dilemma. He wants to quit but it's hard to quit so he's looking for a third alternative and for him that third alternative is to smoke the lightest cigarette he can find that still gives him his fix. Now the industry is blaming Joe for making that decision. But, if you look at the Defendant's, if you look at witnesses for the Defendant, Purdy Crawford and he said "I'm not a smoker, I can't explain how

the numbers work". He received a memorandum notifying him as to when the numbers on the packages were changing, that information must have been important, why would he get the memo otherwise? Mr. Crawford denied any understanding of what the numbers were about or how they worked. Mr. Crawford has a lot more education than my client and certainly a lot more experience in the tobacco industry than my client. Then they called their consultant who used to work for Health Canada, this is their $1,600.00 a day witness, Canadian, and that was Burt Liston and he said, "he didn't even know where the holes are". If you look at the package, the holes blend in nicely with the cigarette. They're hard to see. I think the fairest conclusion from my client's evidence is that he's confused about cigarettes. He gets a lot of conflicting information from a lot of different sources about cigarettes. At one point he had been told that Rothman's, that if he smoked them, if you kept a certain amount of butt length, that would protect you. I guess the remaining tobacco is supposed to act like some kind of filter and one of the toxins would stay in the butt length that you didn't smoke. He gets a lot of conflicting information about cigarettes and that affects his ability to quit. We had Dr. Hammer from New Jersey, he's a $7,500.00 a day, U.S. witness. He talked about the importance of motivation. Now really Dr. Hammer's evidence was a tautology because what he

came here to say is that "everyone who quits has motivation, and everyone who fails to quit doesn't have motivation" so, his evidence is true by definition, at least that's his position. It's for you, as the Judge, to make the ultimate determination what it is about smoking that makes it hard to quit. You certainly heard evidence from Dr. Graham that he does his level best. He tries very hard to help people and he prescribes things like patches and nicotine replacement therapy and he spends time with his patients. With every one of his patients he tries to get them to quit the best way that he knows how. I submit to you that as between Dr. Graham's bedside manner and Dr. Hammer's bedside manner there's no contest. In any event, even Dr. Graham has trouble getting people to quit. He told you quite graphic evidence about how people with amputations are still outside the hospital smoking. They've lost so much and yet they can't shake the craving. At any rate, Dr. Hammer said that information effects motivation. His point was that telling people that smoking is addictive keeps them from quitting because this is bad information, it dis-empowers them and okay, that's an interesting point, maybe the packages should be changed to read that "smoking causes dependency" instead of addiction, maybe we should use a different term. As I understand it, the use of the word "addiction" is to warn people, particularly young people, that if they start smoking before the age of majority, if they start

smoking as young people, that this is going to have some long term consequences and that they're going to have some trouble down the road. But, whether we call it an addiction or a dependency, fine, it doesn't phase me but I think what we can draw out of that is that information affects motivation and if the industry, either through act or omission, causes information, bad information to reach smokers, information such as smoking doesn't cause disease, it's not been proven, not established or that light cigarettes are somehow safer, then that saps motivation. If people are going to quit they shouldn't be receiving conflicting information. It's hard to quit. There are pains to go through, there are cravings to go through and if people are being told, "well, you don't have to quit, smoke this lighter cigarette", that's a very attractive choice to someone who is a smoker. Before we blame smokers for making that choice we first need to remove that conflicting information. Now, I wanted to talk about Dr. Massey. He was a serious scientist with Imperial Tobacco and even he conceded that some smokers block some of the holes some of the time. In my submission even that small concession is significant. That information should have been communicated and it wasn't. Now, Dr. Massey doesn't think that hole blocking is all that important. We disagree. We also submit that hole blocking is only one aspect of smoking behaviour that results in people getting ill. Puff volume is very important.

Some backed my submission a great deal of what smokers inhale reaches the lungs. Maybe some ends up in the mouth, maybe some leaks out of the nose but it's Mr. Collishaw's opinion that a great deal of the smoke reaches the lungs. So, puff volume is important and the intervals are important too. Hole blocking is just one factor, one part of how smokers get more and Dr. Massey doesn't think it's very significant but evidence that would state the opposite of that conclusion, the report of Cathy McBride is not published. There are, and Dr. Massey took us through these industry articles written by Dayton and Lewis from BAT and RJR and some other industry articles. They've got them all stacked up and they are citations to the Cathy McBride report but they don't actually, they cite this unpublished report but then they don't actually cite what was a very important conclusion in Cathy McBride's report. A very important conclusion that never gets revealed or discussed in these other surveys and that is that hole blocking most frequently occurs in cigarettes of the one to four milligram tar range. It's exactly the tar range that the Matinee Extra Mild is and those are the cigarettes that are most likely to be hole blocked. Even the studies that the industry does choose to publish, and we pick this up yourself Your Honour, the range of error is considerable. Holes are twelve point five millimetres. The smoking machine only inserts to a depth of nine millimetres. Smokers insert to a

depth of about eleven millimetres and there's a variation of about four point eight millimetres which is most pronounced on the cigarettes of the one to four milligram tar range. Now, the defendants produced some evidence to say well, the Viscount and the Craven A cigarettes, also four milligram cigarettes, also under the B.C. government studies produce high tar and nicotine. And, these are made by Rothmans, Benson and Hedges, not really germane to this case. If Rothmans, Benson and Hedges is also designing ventilated cigarettes that have these features of providing more to the smokers than on the package, it's not relevant. It may be that all tobacco companies in Canada that sell four milligram cigarettes are making certain design choices that cause smokers to get ill. What's relevant in this case is the Matinee Extra Mild which my client smoked during the time frame that this law suit specifically focuses on. We could have looked at other light cigarettes but this is Small Claims Court and we decided to focus on a particular brand, not because Matinee Extra Mild is unique, they're the only cigarette that is perhaps doing this but simply because we wanted to focus the case. So, that other cigarettes do this is not important.

I'm going to go through the case law, and to start with Tab 1, is *Queen and Cognos*, this is in the Supreme Court's definitive statement on negligent misrepresentation, and on page 12 I've

highlighted the five stage test on negligent misrepresentation. The first test is that there must be a duty of care based on a special relationship between a representor and a representee. In my submission, in a product liability case, that is always made up. There is a special relationship between a consumer and a manufacturer and when the consumer buys the product that creates the special relationship. Number two, the representation in question must be untrue, inaccurate or misleading. In my submission the information on the package is a representation. The industry has control over what goes on the package. Under the voluntary code they have control over what went on the package, under the legislative regime they could have spoken to Health Canada about changing that information or they could have provided additional information on the inside of the package, through an insert, something, whatever. There's a representation on the package that the industry had control of, either absolute control or the ability to correct. Now, the representation must be untrue, inaccurate or misleading. In my submission the balance of the evidence makes that adage, smokers get more. Number three, the representor must have acted negligently in making said representation. Well, you've looked at the documents Your Honour, did the defendants know or ought to have known that the information was inaccurate. Their own documents told them, in my submission, that it

was inaccurate. The Toronto Star article from 1981 told them that it was inaccurate, they had knowledge. Number four, the representee, that's my client, must have relied in a reasonable manner on said negligent misrepresentation. That's made out, my client said he looked at the package. It mattered to him. And, on an objective standard, you're the Judge, you're asking what should a reasonable person have done? My submission is it's reasonable for consumers to rely on information on packages. Number five, the reliance must have been detrimental to the representee in the sense that damages resulted. In my submission that's also made out. Joe suffered damage in two ways as we explained, one, his efforts to quit were frustrated, he was receiving inaccurate and conflicting information and he continued to smoke and he got sick. He also suffered damage because he purchased the product. In my submission all five of those tests are made out. Now, so I've only taken you to Tab 2 and that's after *Leonati* and I won't go back to that, that's the case on causation. Tab 3 is *Lambert and Lastoplex* and it's an important case because it has to do with the duty to warn. It also included the duty to warn here. This is the Supreme Court of Canada 1972 and it's a very interesting case. The facts are explained on page three. The manufacturer sold lacquer for painting chairs, furniture, and on the package of the lacquer was the warning, and that's set out in the third paragraph, "Caution Inflammable".

And, what happened was the plaintiff was painting a chair, in his basement, and there was a furnace in the next room. The door was closed and there was a furnace with a pilot light and so, the plaintiff, he read the warning and he thought, like a reasonable consumer would think, fine, I shouldn't hold an open flame to this lacquer. But, what he didn't understand was that the fumes from the lacquer could travel. They could travel a long way and they travelled underneath the door into the adjoining room where they were ignited by the pilot light and they caused an explosion and Mr. Lambert was badly, badly burned. What the Supreme Court says, on page four, the first paragraph at the top which I've highlighted is, "the applicable principle of law, according to which the positions of the parties in this case should be assessed may be stated as follows, where manufactured products are put on the market for ultimate purchase and use by the general public and carry danger, in this case by reason of high inflammability." Although put to the use for which they are intended, the manufacturer, knowing of their hazardous nature, has a duty to specify the attendant dangers which it must be taken to appreciate a detail not known to the ordinary consumer. A general warning, as for example, that the product is inflammable, will not suffice where the likelihood of fire may be increased according to the surroundings in which it may reasonably be expected that the product will be used. The required explicitness of the

warning will, of course, vary the danger likely to be encountered in the ordinary use of the product. A general warning from Health Canada, that smoking causes disease, is not sufficient under this case law. Specific warnings are necessary. Specific warnings regarding light cigarettes are necessary in the same way that *Lastoplex* had to explain that fumes can travel and that it matters how you use the product. The defendant here had a duty to explain what light cigarettes are and what light cigarettes are not, and that it matters how you use the product. The next case in my Brief of Authorities, Tab four, it is *Crocker and Sundance* and that's a Supreme Court decision, 1988. In that case the plaintiff was at a ski resort and he was drunk. He rode down an inner tube not once but twice, drunk. The operators of the ski resort knew he was drunk and they had orchestrated this contest with this inner tube race and they knew he was drunk and they had this contest and they had him sign a waiver. He signed this standard form waiver saying I won't sue. Well, he went down on this inner tube and the first time he kind of hurt himself and on the second time on the inner tube he really hurt himself and he was paralyzed. The defence offered by the defendants was Volenti, the defence was voluntary assumption of risk, it's all the drunk's fault. The Supreme Court of Canada, on page nine and ten, talks about volenti in Canada. What it says at the end of paragraph thirty-two, on page ten is, "since the Volenti

defence is a complete bar to recovery and therefore anomalous in an age of apportionment, the Court has tightly circumscribed its scope. It only applies in situations where the plaintiff has assumed both the physical and the legal risk involved in the activity. Now, Dr. Hammer's evidence in the United States has been sometimes effective. Not necessarily him but, there is one case where he testified in Florida and it lost, the industry lost and there's another case in New York where the industry won. But the argument in the U.S., the industry down there, they wrap themselves in the American Flag and they wrap themselves in the U.S. Constitution and they talk about personal choice and the right to smoke yourself to death is akin to the right to bear arms. It's all American values. While you're the first Judge in Canada to hear this argument but in Canada, we have laws of apportionment and we don't say that, we're very, very circumspect about where we will say it's all the plaintiffs, and you have to be really careful. The test for, a Volenti defence , is very high in Canada. You've got to sign your life away, you've got to be totally informed before Volenti kicks in. In Canada, what we say is there may be some cases where there may be some fault on the plaintiff. What we do under the Negligence Act in Canada is we just apportion. We say, in this case, as drunk as Mr. Crocker was, as stupid as he was, his percentage of the liability was only 25% and the ski resort carried 75% liability. The next

case, we're nearly half way through the case book Your Honour, the next case is Hollis and Dow Corning. This is another Supreme Court decision and you'll notice a trend here, I'm going to give you high authority to work with, this involved a woman who got silicone gel breast implants and it caused her some real problems. She said that she had not been warned by Dow Corning about the problems with gel implants and that Dow Corning knew a long, long time ago that these implants were not a good idea. So, she sued Dow and she sued her Doctor who implanted the implants. The Court was trying to figure out who was at fault, Dow Corning, the Doctor or the plaintiff. They talked, they talked, this is a failure to warn case, they talk about the duty of a manufacturer and that's on page ten, paragraph twenty-one. I've highlighted it in the text for you. And, that's really the theme that I'm driving at here, at the bottom of paragraph twenty-one, "the duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product." Dow Corning didn't tell Ms. Hollis all there was to know about breast implants so Dow Corning was found liable. An interesting point in the Hollis and Dow case was this, Dow argued that suppose we had warned the Doctor, suppose we had told Dr. Birch about the problems with breast implants, be careful. What Dow is saying is well, the plaintiff has to prove

that the Doctor would have warned the patient. Dow didn't warn the Doctor but they're saying look, if we had warned the Doctor, which is called the learned intermediary rule which is, you can warn the expert, and then you don't have to warn the consumer. If they had warned the expert, there's no reason to think, or the plaintiff can't prove that the expert would have told the patient. What the Supreme Court of Canada says is that that's too hard a test in terms of causation. You can't force the plaintiff to disprove a hypothetical. You can't, there's a discussion on this beginning on page twenty, of the Judgment and I've highlighted it for you. It is unfair to the plaintiff to have to prove what would have happened if a warning had been given. The Supreme Court adopts the opinion of Mr. Justice Robbins of the B.C. Court of Appeal, I've highlighted that quote and he says that, "the suggestion that the determination of this causation issue, other than by way of an objective test, would place an undue burden on drug manufacturers. He's answered by noting that, drug manufacturers are in a position to escape all liability by the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of the product, of which they know or ought to know. So, the defendant says look, if they'd warned the Doctor you've got to prove what would have happened. The Court says that's too hard, that's unfair to the plaintiff. You, the defendant, could have

avoided this whole situation by simply providing a warning. Again, page twenty-five, I've highlighted it, the Supreme Court, paragraph fifty-five, "to require Ms. Hollis to do so would be to ask her to prove a hypothetical situation relating to her Doctor's conduct, one moreover brought about by Dow's failure to perform it's duty. While the legal and persuasive onus in a negligence case generally falls on the plaintiff, I do not see how this can require the plaintiff to prove a hypothetical situation of this kind. Now, let me explain how this works in this case. The defendants are going to say, even if we had put better information on the package, Joe still would have smoked. They can say well, Bob Bexon finally admitted the truth in the Canadian Senate in June of this year and Joe's still smoking. So, you can't prove causation because even if we had warned Joe back in 1994, he's still smoking today and plaintiff loses. In my submission we don't know what would have happened in 1994 if this information had been provided. We don't know what Canada would be like if the defendants had admitted that smoking caused disease back in the 1980s, or the 1970s or the 1960s or the 1950s. These are impossible, hypothetical questions. Joe said that he could quit smoking if you put him on an island away from all his friends and companions who smoke. If the industry had provided fair warnings about smoking in the 1950s Joe would be living on that island today. How many people would be smoking today if

the industry had acknowledged the science back then? What, how would Health Canada had approached things differently? There are so many variables, there are so many factors, we don't know what would have happened. All we can say is that Joe didn't get full and fair disclosure and there's no reason why he shouldn't have got full and fair disclosure and that information affects motivation and that it's very hard to quit. What the industry did, what the defendant did was they deprived Joe of the chance to quit and they did so for profit. They did so to keep in business, to expand their business. And, based on the holding in Hollis and Dow, for the plaintiff to have to prove what he would have done in a hypothetical situation or how the world would have been different, in a hypothetical situation, is not required in this case. There would be no case at all if the defendants had simply provided full and fair disclosure to consumers. Now, I want to follow this holding in Hollis and Dow because it is picked up and adopted in the next case by the Ontario Court of Appeal and that's at Tab 6. That's *Walker and Osborne vs. York Finch General Hospital*. This is a case where the plaintiffs contracted HIV and died. They got HIV from contaminated blood and they sued, among others, they sued the Red Cross. What they said was that the Red Cross was negligent in failing to screen blood donors in the early 1980s. The American Red Cross issued pamphlets to potential blood donors saying that if you are in a high-

risk group, don't give blood. By high-risk group they meant intravenous drug users, gay males and others who had been identified as having a high-risk of carrying the disease. So, the plaintiff said that the Red Cross was negligent. What the Red Cross turned around and did was they phoned the actual donor who gave the blood that infected Ms. Walker. They found a Robert M. who was dying of AIDS and they conducted a Rule 36 Hearing by video tape to preserve his evidence for trial. They showed Robert M. the plaintiff's pamphlet. The plaintiff said you should have used this pamphlet saying if you're in a high-risk group, don't donate blood please, and they showed it to Robert M. on his deathbed and he said, "I wouldn't have been deterred by that pamphlet, I still would have donated blood in all likelihood." So, the Red Cross said look, even if we had used this pamphlet Mrs. Walker still would have died because it wouldn't have stopped Robert M. from donating blood. The Court of Appeal said the plaintiff doesn't have to go that far. That's extending the chain of causation too far. We can never really know what Robert M. would have done. We can never really know what the impact of that pamphlet would have been on Robert M.'s friends and peers who might have read it and said to him don't donate blood. So, the Court of Appeal said legal causation is made out and Mrs. Walker's estate received this compensation. There is another case in the Brief of Authorities. I've given you *Claybourne*

Industries, that's at Tab 7. That deals with the adverse inference for failing to call a witness. Tab 8, that's *Robb versus the Canadian Red Cross*. That's a decision of Madam Justice MacFarland and it picks up on Hollis and Dow and the Walker case and I've highlighted the relevant…

THE COURT: It's not MacFarland it's Ellen McDonald.

MR. LENNOX: It's E. MacFarland?

THE COURT: No, McDonald.

MR. LENNOX: McDonald, sorry.

THE COURT: Big, big difference.

MR. LENNOX: Madam Justice McDonald, alright, being of Scottish ancestry I should catch that so, I apologize. At any rate, I've highlighted the relevant passages on page 24 and 25. Again, they pick up on this idea that plaintiffs don't have to disprove hypotheticals. And then the next case I've cited to you is at Tab 9 and that is *Rentway Canada versus Laidlaw*. It's a decision of Mr. Justice Granger, leave to appeal to the Ontario Court of Appeal was denied. Rentway Canada is the leading case in Ontario on product liability, that is, on defective products. The test for when there is a defective product is at page nine of the decision of Mr. Justice Granger, which I've highlighted for you. It's a seven-part test. Number one is the utility of the product to the public as a whole and to the individual user. It's a balancing test, you consider all these factors and you decide on a cost benefit analysis whether the

product was defective or not. If you apply this test to the Ford Pinto case you'd say you could make a safer Pinto for eight dollars. That was the difference between the Pinto that exploded and the Pinto that wouldn't explode. You could make a safer Pinto for eight dollars and it cost people an awful lot of money because dozens of people were killed in explosions. So, if you figured out that eight dollars for a safer gas tank versus all the lives that were lost, that's how you decide that it's a defective product. Now, in this case, stage number one is the utility of the product to the public as a whole and to the individual user. Well, I'm a non-smoker so maybe that's not fair for me to make this submission but I will anyway, I would submit that the utility for cigarettes is very low. They neither feed, nor clothe nor house. They're not something that's fundamental that people need. They're not like automobiles that we need to get around in. In the balancing test for cigarettes, low utility. Number two, of the nature of the product, that is, the likelihood that it will cause injury. Well, in the balancing test cigarettes are very likely to cause injury so that factor is high and that factor weighs in favour of the plaintiff. Number three, the availability of a safer design. Well, Your Honour, we took you to the letter from Sir Patrick to Mr. Crawford in 1986 and in my submission that's evidence of the availability of a safer design. A safer design which is only, in

the case of Nitrocamines, being introduced fifteen years later. Number four, the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced. It is true that you can look at whether a safer design would have been acceptable to consumers. That's something that you balance. Is a Ford Pinto with a non-exploding gas tank acceptable to consumers, well, that's how you do the balancing test. In this case, you don't really know if a safer design would be acceptable to consumers because a safer design hasn't been test marketed in Canada. We don't know how Canadians would respond to it and there's another factor as well, it's one thing to market a product that's been redesigned, if you look at the Eclipse, it has this stuff that looks like tobacco in it but is different. It's one thing to market it, just to launch on the market, but it's another thing to market it saying the current product we sell will kill you and the product that we have might not. If you're denying, for fifty years, if you're denying that smoking will kill you the consumer acceptability of a safer product is going to be low. If you've got light cigarettes on the market and you've got Eclipse on the market and you're not telling consumers that one is a bit more dangerous than the other, then, well of course people aren't going to buy it. Why should they buy this funny looking cigarette when you're not telling them that the cigarette that they're currently smoking

will kill them? So, it's difficult for you to deal with consumer acceptability because, in my submission, consumers have never been properly informed. Number five is the ability of the plaintiff to avoid injury by careful use of the product. And, I emphasize "by careful use." Used as intended, the current product kills. There's no safe way to smoke it. So, I don't see how number five helps the defendants at all. Number six, the degree of awareness of the potential danger of the product, which can be reasonably attributed to the plaintiff. Well, my client is confused about the risks of the product and the defendant is, in part, responsible for that confusion and so I don't see how that factor helps the defendant. And then last factor, number seven, is the manufacturer's ability to spread any cost. You've heard evidence that the defendants have got 400 scientists, forty-five in Montreal and 400 world-wide. They've got the resources to make a safer product if they really want to and in my submission they haven't. If you read the letter from Sir Patrick, the gist of the letter from Sir Patrick anyway, is don't make a safer product because that means admitting that the current product is unsafe. In my submission the progress on making a safer product at Imperial Tobacco's Laboratories has been painfully slow. And that's in part, my submission, due to the fact that they don't want to know the answers. Dr. Massey says we still need more studies on whether smoking causes

disease. They even have their own health people. You can't make a safer product until you bring yourself to the realization that the current product is unsafe. So, in my submission, when you go to apply this balancing test you need to be mindful of the fact that, in my submission, the defendant's just haven't tried hard enough and that that is enough to establish liability for defective product design.

Then we'll skip ahead to Tab 12. This is a decision of the United States Court of Appeals from the Fifth Circuit. Just by way of explanation there are nine U.S. Court of Appeals on the Federal level. This one covers the Southern United States. They are second only to the Supreme Court of the United States. This case involved asbestos. It's important because it deals with defective products. In this case, and I've highlighted the important passage on page two, paragraph thirteen, in this case, plaintiff had lung disease from exposure to asbestos. He sued a whole bunch of companies that had exposed him over the years to asbestos. One of the major ones, Johns Mansville, went bankrupt through all its litigation because of all the people that had been hurt. But, he continued to sue the other companies and he adduced evidence, he adduced evidence at trial of what Johns Mansville knew about the risks of asbestos, to show that these other companies knew or ought to have known of safer ways to deal with

asbestos. The defendant's objected to this information from Johns Mansville because it didn't relate to them and what the Federal Court of Appeal said is this, "Burrell", that's another asbestos case, "holds all manufacturers to the knowledge and skill of an expert. They are obliged to keep abreast of any scientific discoveries and are presumed to know the results of all such advances. Moreover, they each bear the duty to fully test their products, to uncover all scientifically discoverable dangers before the products are sold." The actual knowledge of an individual manufacturer is not the issue. That the dangers of asbestos were known to Johns Mansville at the time of Dante's exposure from the same risks were scientifically discoverable by other asbestos corporations. Therefore, the testimony of the Medical Director of the industry's largest member, is relevant to the plaintiff's attempt to meet the evidentiary burden defined in *Boro Boro*. Why I've submitted this case is, the defendant's may say okay, well there are these other companies that came up with Eclipse or came up with Gold Smoke or B.A.T. may have had research on safer cigarettes, but that's not us. And, what this case says, is you can look at advances made by other companies. Imperial Tobacco, if it's lagging behind these other companies, you can find it liable. It's assumed to be just as smart as these other companies, and to have scientists, just like these other companies and if they don't come up

with a safer product and somebody else does, you can find them liable. Turning to Tab ten, we've also pleaded the Torte of Deceit. The elements of the Torte of Deceit are set out by Klar in "Remedies in Torte", and I've highlighted them.

THE COURT: This is who?

MR. LENNOX: Klar, it's a Canadian text on Torte Law. It says that to establish the Torte of Deceit the Plaintiff must plead and prove that i, the Defendant, made a false representation of fact and I would say that the information on the packages is false and number ii, that representation was made with knowledge of it's falsehood. Again, if you look at the industry's documents, they knew. From the Toronto Star article in 1981, they knew. Number iii, a representation was made with the intention that it should be acted upon by the Plaintiff or by a class of persons which includes the Plaintiff in the manner which resulted in damage to him. Now, you won't find a document by the Defendant which says, how do we get Joe Battaglia? They're not that focussed but if you do read Mr. Bexon's 1984 Report they talk about how do we keep people from quitting? And, so they were focussed on a class of persons, which included Joe, so, number iii is made out. Number iv, the Plaintiff acted upon a representation. Well, this is different from negligent misrepresentation. There is no requirement for reasonable reliance and in the year 2000, in an age of post-modern cynicism, we might say, how could it have been reasonable for

anyone to believe the tobacco industry about anything? This actually was Madam Justice Susan Day O'Connor's comment in the U.S. Supreme Court some months ago when they heard the case involving Brian Williamson and the Food and Drug Administration. And the lawyers for the Food and Drug Administration were trying to regulate the industry said, "Your Honour, those executives got in front of Congress and they said, nicotine is not addictive and they said all kinds of things. And they raised their right hand and they said that before Congress." Madam Justice O'Connor said, "well surely no one believed them." Maybe this Judge has that position, she was looking back in hindsight from the year 2000 to 1994, maybe that's a view that some people have, how can you get fooled by these guys? It's not reasonable to believe them. Well, in my submission, it's reasonable for a consumer to believe information that appears on packages but, even if it's not reasonable for anyone to believe the industry about anything, that doesn't matter because under the Torte of Deceit all that matters is that the Plaintiff acted upon the representation. My client believed them. He subjectively believed them. And he acted upon representation about the product. That's item four, he bought the product and item five is he suffered damage. So, the Torte of Deceit is made out.

Now, there are five Causes of Action that I pleaded in the Statement of Claim. And I've been through four of them, Negligent Misrepresentation, Failure to Warn, Product Defect and Torte of Deceit. There is one other one, which is Implied Breech of Warranty, which I think, is kind of interesting because the industry doesn't have a direct contractual relationship with Joe to sell cigarettes to client stores. And I've looked at the common law issues on this. I think, that there is an argument to be made. That the corner stores are really agents and that there really is a contractual relationship, or one and that at common law, at least, not in the Sale of Goods Act, but at least at common law, one could imply a breach of warranty. I've given this a lot of thought and I think that there is a case to be made but it's also my belief that the Defendants will appeal this decision if it's favourable to the Plaintiffs, they'll appeal on everything. I think that this area of law is an area of law that is not entirely worked out. I don't want to give Divisional Court or the Court of Appeal or the Supreme Court something that makes them want to treat the Defendant's appeal seriously so I'm going to withdraw that particular Cause of Action. I don't think it adds anything. I think that Torte Law is sufficient here, that Torte Law, that a valid Cause of Action is made out in Torte. That damages are made out in Torte and any argument they would make, under implied

breach of warranty, would be essentially the same, would result in the same outcome. So, I mean, I'm going to withdraw that Cause of Action and file this, entirely in Torte and leave contract law to the experts.

THE COURT: Okay, Cavalier and then thirteen you haven't talked about.

MR. LENNOX: Yes, I'm going to come to that.

THE COURT: Oh, sorry, I thought you were closing up to finish.

MR. LENNOX: I want to make sure that, you know, everything that's been in there has been in there for a reason. I don't want to give you cases if there's no reason for you to read. The first case to look at is Tab eleven. These are both American cases and Tab eleven is a case with Patricia Henley and Philip Morris. Patricia Henley got lung cancer and she sued Philip Morris and the case was heard before a Federal Judge in San Francisco, California. The Jury found Philip Morris liable for Patricia Henley's lung cancer and then the industry asked the Judge to overturn the verdict as unreasonable. The Judge refused to overturn the verdict. He did reduce the punitive damages. There were punitive damages of fifty million dollars. The Judge reduced it to twenty five, not because he thought that Philip Morris was less deserving of punishment, but he was concerned that if Patricia Henley got fifty million dollars that would leave less money for other people in a similar situation. He wanted the punitive damages to be fairly distributed

among people who had valid claims. Anyway, why I've cited the Henley case, and there are an awful lot of cases out of the U.S. on tobacco, nearly all the cases between 1953 and 1996, well, in fact, all the cases between 1953 and 1996, the industry ultimately won. In recent years they've been losing. And not all the time that I've been going under cases that are losing. The principal out of the decision of Mr. Justice Moncton of California, prior to page thirteen and it's this, "there appears to be tension, if not inconsistency, in the contentions of Philip Morris' advanced, in support of the judgment notwithstanding the group." On the one hand, the company repeatedly urges that the Plaintiff, a lung cancer victim, is barred from suit because the risks of smoking have long been a matter of common public knowledge. On the other hand, the company asserts that it has never agreed with the Surgeon General's conclusion that smoking has been proven to cause cancer. Having asserted that causation has not been established Philip Morris cannot argue persuasively that members of the general public know better and, by reason of their superior knowledge, are deprived of legal recourse." That's essentially what's happening here. The defendant's are blaming Joe, saying that Joe should have known better and yet, for many, many years the defendant's denied that their product caused harm. So, Mr. Justice Northwood said, you know that's just not fair, the defendant can't have it both ways. The last

case I want to take you to is at Tab thirteen and this is a decision of the Supreme Court of Florida. It's not the Bush and Gore case but it came out the same week so, they weren't just worrying about who was going to be president of the United States. This was decided November 22nd, 2000 and this case was the first case where the tobacco industry decisively lost in a jury trial in Florida in 1996. It involved Brian Williamson and it was the first case where the jury got the documents, the jury saw what was going on, and the jury awarded a verdict in favour of Mr. Grady Carter who had developed lung cancer. The Judge affirmed the verdict. The Divisional Court, sort of the intermediate Appeal Court, overturned the verdict. And they overturned it on some rather narrow technical grounds, principally, the Plaintiff had missed the limitation period by four days. He was first diagnosed with lung cancer on February 10, 1991 and he filed his lawsuit on February 14, 1995, which is four days short of the Florida Statute of Limitations. Anyway, the Florida Supreme Court upheld the jury verdict and considered the limitation period issue and found that that was unfair, and they also considered something else which is germane to this case. Because the plaintiff's argued that, and some of the evidence that the Plaintiff's used is highlighted at page nine and ten of the Decision of the Florida Supreme Court, the plaintiff's argued that the defendant's could have done more to advise

consumers. There was an affidavit from a Professor Richard Pauly who is a Professor of Marketing at Simon Fraser University in British Columbia who is down in B.C., or down in Florida in this case. And it was Dr. Pauly's evidence, and it's set out there, and it was also Dr. Finegold's and it's set out there, that there are all kinds of things that the industry could have done in terms of press releases, ads in newspapers and inserts in the cigarettes that would have better informed consumers. And that was the basis for liability in that case. An interesting wrinkle in the United States is that in 1969, the U.S. Congress passed the *Federal Cigarette Labelling Act* and it said that all cigarettes in the U.S., from 1969 forward, this is twenty years before our legislation, all cigarettes from 1969 forward have to carry the warning the Surgeon General says. In the U.S. there was an issue of paramountcy between Federal Legislation and State Legislation. State Legislation is sub-servant and what is considered State Legislation is Torte Law so, all kinds of Plaintiff's sued the tobacco industry saying you didn't warn us. That's a Torte and that's a State Act. It's State Legislation. And the industry, for many, many years, was successful in saying well, we're protected by this Act, this 1969 Federal Act. They can't sue us for failure to warn because of this Federal Legislation that says we have to print something on the package. And in this case, the Supreme Court of Florida

case, they say well, regardless of what the Federal Legislation says, you still could have done other things so the 1969 Act doesn't protect you. In any event, Canada is a very different environment. I guess you're the first Canadian Judge to think about this but, under our Constitution, Property and Civil Rights is clearly a Provincial responsibility, Section 91, sub three, it's a Provincial responsibility. There's nothing the Federal Government can do in Canada to prevent the Common Law Action for failure to warn because that's Provincial. And, also, just to be sure, when the Federal Government passed Legislation in 1989, which was struck down in 1995, they specifically said, this does not affect any Common Law deeds. They wanted to make sure that the Canadian Legislation did not get used by the tobacco industry in the same way that the U.S. 1969 Federal Labelling Act got used.

So, those are the cases that I would like you to consider and I just want to wrap up with this observation, my friend, in his opening said that small claims court shouldn't be used as a forum for special interests. I couldn't disagree with my friend more. Torte Law, Civil Litigation is not just about money. It is about justice and it is about uncovering the truth so that society benefits. This court is funded by the taxpayers. It is a public body that has a role in shaping public policy and in giving the disenfranchised,

the poor, the weak a voice so that democracy can function. In the same way that lawsuits against Ford Pinto's, brought by Nader's Raiders, had an enormous public benefit and were supported by NGO's. In the same way that that happened this case has a public benefit and that is appropriate. I think that that's a wonderful opportunity that the Ontario Government has provided to its citizens in creating Small Claims Court. We have three branches of Government. We have the Executive of the Prime Minister, we have the Legislative of Parliament and we have our Courts and our Courts help make the laws that help make society better. There is nothing wrong with somebody coming to this Court and saying, "we have been wronged Your Honour. We want you to consider this important issue, we want you to apply Common Law principles to it and come to a decision so that democracy is advanced and so that views that are not expressed in any other form are expressed." I hope that if there is ever another situation where there is a powerful corporation, let's say they're polluting the environment or they're treating workers unfairly, I hope that the Small Claims Court will be there to provide a voice because that is exactly the function of Small Claims Court. The Defendant's have fought this case as if their corporate lives depended on it. They have spent an awful lot of money. We know what they've spent on the two expert witnesses. In my submission this case does not threaten their existence, but it is

important. This case is not about putting the tobacco industry out of business. They could lose a thousand small claims court cases and still show a healthy bottom line. I for one, my firm, is certainly not interested in doing a thousand small claims court cases. This has been an expensive endeavour for us and we've done it on principle but we're not in the business of doing this. Mr. Battaglia naively believed that for a two hundred-dollar down-payment he could bring small claims court cases against this industry. It's just not going to happen. Your verdict is not going to see your docket crowded the next day with a thousand small claims court cases. It's just not the case. But, your verdict is important. We don't come here to put the industry out of business or we come here out of a duty to history, out of a duty to justice, and we come here because we hope that the industry will change. And we hope that this verdict will finally hold them responsible, in a legal sense, for their past conduct and that this verdict will provide corporate incentives for them to do better in the future and for other industries to do better in the future. We live in an era of increasing globalization and increasing power of corporations. In my submission, corporations, we've given them personhood but it goes beyond that. I mean, corporations have immortality, you can't put them in jail. They amass incredible resources and wealth. It's very difficult for the individual

to stand up to a large corporation and very few people ever do. Small Claims Court is an important safeguard on the power of corporations and of the importance of individuals and I have very much enjoyed presenting this case to Your Honour and I look forward to your verdict.

THE COURT: Thank you. You know what I'd like to do, I'd like to take an early lunch so, come back a quarter after one.

R E C E S S

U P O N R E S U M I N G :

THE COURT: Okay, who's doing what here?

MR. BARNES: Your Honour, I'd like to hand up to you, if I might, another case book with about an equal number of cases but fortunately, a couple of them are the same so at least we've identified common principles and it's a very brief submission...

ORAL SUBMISSIONS BY MR. L. BARNES:

Your Honour, I'd like to start by offering one observation. I listened very carefully to Mr. Lennox and the one thing that I agreed with in his opening submission is, that at the end of the day, the issue really before you is whether there's been a breach of a duty by the defendant. That's really the issue that brings us here and, many of the other issues that were discussed by

Mr. Lennox, in his opening, may be interesting issues but this is not a commission of inquiry into the tobacco industry. What we have to deal with here is the legal issues that involve this plaintiff and this defendant. The other issue that I wish to raise, which I do not agree with, when Mr. Lennox suggests, that Torte Law exists to punish. That Torte Law exists to provide restitution, not to punish. So, what I would like to try and do is basically, stay out of a lot of the evidence, which I say, at the end of the day, may well be interesting, may well be relevant in another forum but is of no assistance to this Court. In determining, what I say, is actually quite a narrow issue that you will have to determine, and that is, has there been breach of some standard of care whether it be in Torte, in Product Liability, in Deceit. But, at the end of the day, I think we come down to the same factual matrix, which applies to all of the allegations that are being made against Imperial Tobacco.

Now, I start by way of an overview and I say that the focus here is on the plaintiff. It's about the responsibility of the plaintiff as to whether or not the plaintiff has made choices and now needs to accept the responsibility for taking those particular choices. And that this defendant has done absolutely nothing to undermine those choice or to deceive Mr. Battaglia. Remembering as we go through this

evidence that in 1994, on Mr. Battaglia's own evidence, he was addicted and on the evidence of Doctor Graham, who was called by the plaintiff, he already had coronary heart disease. We start with that proposition. Now, we spent a bit of time in the evidence, putting into context for the Court, the genesis of the machine drive deliveries. Now, I don't wish to belabour that too much other than to make certain observations about what the evidence says. I think it's clear that the Canadian Government, in certainly the mid to late sixties, was persuaded that lower tar delivery products would be beneficial to smokers if in fact they could not stop smoking. And, we see that, and I won't turn you to it, I'm sure Your Honour was told as many times that you're going to look at the Exhibits in detail. But, and I preference this in my materials, that you'll remember the McEachern memo to Cabinet where this is first being evidenced. And at the same time we have the communications going back and forth between Health Canada, and I'm going to use, if you don't mind Your Honour, Health Canada throughout without going through the various changes because I quite honestly don't know what they are. But, the communications going on with Health Canada inquiring as to whether or not the industry can provide the tar and nicotine levels, the concerns of the industry expressing about standardization, the concerns as to what in fact people are going to use this information for. And that's evidenced in the first two or three

Exhibits. You'll remember the memorandum from Mr. Laforte. And, the Government does receive these numbers and does recognize that in fact there has to be some form of standardization. And, I think it's interesting to note that the Canadian Government is not operating in a vacuum. At the same time we have exactly the same exercise going on south of the border and over the pond. We have the Government in the United States focussing on the very same issue and developing a standardized procedure. And you'll recall that we looked at the FTC Press Release, which is in the materials, and we looked at material from the Surgeon General talking about the benefit of lower delivery products and we looked at the British information from the independent scientific committee. So, they're not operating in a vacuum, they're following along what's going on and they decide that there is some advantage to putting a number on the pack which would be a comparative guide for the consumer. And I don't think that it's challenged in this Courtroom. It certainly wasn't challenged by Mr. Collishaw, but in fact, it was intended to be a comparative guide. Now, in order to have a comparative guide, you've got to have some form of standardization to develop the guide. And, we know that a standard was developed in conjunction with both the industry and the Government and in some respects it was modelled after the standards in the U.S. What we also know is that, if in fact, you change any of

the parameters of the methodology, you'll get a different result. But the objective was to have a result that would be a comparative guide so, as long as we were comparing apples to apples, that's what the Government wanted. And, based on that methodology, in 1974 numbers started appearing on the pack. Prior to 1974 information was being provided by the Federal Government in the various News Releases that we looked at the other day and we know that those News Releases are talking, certainly in the '70s, about the ventilation holes, that's specifically being addressed in the News Releases. But, at the same time that this is going on, we also know that it would be impossible to design any sort of test that would be a predictor of what any particular individual would get. And, that's why these were intended to be a comparative guide, each individual smokes differently. That's what we heard in the evidence, that an individual may smoke the first cigarette differently than the second cigarette or the third cigarette or the fourth cigarette. So, it was a comparative guide, and it was to be used by that way. And it seems to be understood by the witnesses and it's clearly evidenced in the record, that it was to be no more than a comparative guide so that a consumer could look and, following the advice of the health community or the government, to smoke a lower delivery product, they'd be able to look at one package and another package and they'd have a comparative guide as between those

packages. Now, we know in 1988 legislation came in and we've heard a lot about that legislation. But what we do know is that when the legislation came in there was a move, I think as either Mr. Collishaw or Mr. Liston said, to try and have a standardized procedure yet again. And so they went to this ISO method and we heard that the ISO method made a change in one of the parameters or perhaps two of the parameters, that once again it was intended to come up with some sort of a standard methodology to allow comparisons.

THE COURT: When was that?

MR. BARNES: That was in 1988, when the legislation, the TPCA came in. And, we also know, even though you might recall there was some suggestion that this was the standard created by the industry. But that clearly is not true on the record, that the Government was on the ISO Committee and at the end of the day, it's the Government that mandated it. Regardless of who was on the Committee, the Government mandated it in legislation and I think it's interesting to pause here because there's always suggestion about this other methodology that now is going on the package in the coming months, i.e. this intensive method. That intensive method, Your Honour, was well known to the Government in 1988. You'll recall that we looked at the evidence the other day, with respect to The Toronto Star story, that you made a note is at Tab 15, and the private member that then came in and said, "listen, based on this we better make it a

hazardous product", and so, it's clearly been before the Government. The Monique Begin Press Release, which I believe is Tab 18 if my memory serves me correctly, talks about the values will be doubled if in fact the ventilation holes are closed. So that in 1988, the Government clearly, when it was setting the standard had the same information available to it about the intensive method that it now has when it's passing it's new legislation. The legislation that they introduced in 1997. Now, I sort of say that en passant, because I'm really not certain that a lot turns on that. Because, clearly in 1988, what was designated was another comparative measurement. I think something that my friend said which I challenge on the evidence is that the evidence is not that putting this information on the package would in fact make it better, in fact you heard Doctor Liston, in Mr. Liston's evidence it might make it more confusing. So, yes there will be more information the package, as to whether that information is better or not, time will only tell. But, at the moment, the evidence that you have from somebody that was involved, obviously in these earlier discussions, is that it's going to allow for the consumer to perhaps now be confused, the basis for comparison may not be there. So, I don't think there's any evidence to suggest that it's better. It's certainly another piece of information that the Government has now legislated.

Now, just talking about 1994 for a moment, as I said when I began, in 1994 is a similar year for you in deciding this case. His evidence is clear that he has been aware for many, many, many years about the health risks associated with smoking in 1994. And, he's been aware in 1994, for at least twenty years, on his evidence, that he was already addicted. And with both of those pieces of information he decided to purchase ITL's products. When he purchased that product, I ask you to remember first of all, that the information that was on the product is the same type of information that's been on the products actually since those products have been in existence. Remembering that the two products in issue have been around from 1978 and 1984. The information that is on the product, when in fact he purchases it in 1984, is the information that is prescribed by legislation. Not only the information but the methodology for putting the information on the pack. So, it's the same information that he has seen and used in his purchasing decisions for the last many, many years. There was a lot of evidence led through Mr. Collishaw, which was his speculation about the Matinee products being elastic. And, it seems to me that I might observe, that when one puts this in context, it may be that this is what this case is all about. Because, you'll recall that up until Mr. Battaglia seeing the 60 Minutes program, he was quite prepared to accept the responsibility for his actions. Then he watches

the 60 Minutes program and thinks that the companies are, in fact, manipulating their products. You then have Mr. Collishaw's paper, making that accusation about the products being elastic but now, as I understand Mr. Collishaw's evidence, I think he came back in the witness box in reply and said that, if I quoted his evidence carefully, he says that "he had been speculating about the elastic products in his paper. He had heard the evidence and that speculation has now been put to rest. He's satisfied that they've not been marketed by Imperial Tobacco Limited." And I think in a nutshell, that really is the end of the case. I think that's how this case got driven, I think that's what Mr. Battaglia got in the box and started saying, I think that he said that he saw something on a television show in 1997. He assumed that the Canadian industry was doing the same thing, they were making an elastic product, they were manipulating their nicotine and off he goes. And then we couple that with Mr. Collishaw's paper where, in his evidence in-Chief, clearly he was raising that speculation and that speculation was being answered. And, if you read the pleadings, I suggest to you that really is the way that the case was originally characterized and now it's taken a sort of a shift because, in fact, the evidence on elasticity is not there. Now, as well, and I'm just dealing with some factual assertions which are not prepped. The Matinee products don't now, they didn't then represent the lowest deliveries

of any Canadian brand. They don't have the highest ventilation among Canadian brands. And, I think a very important factor, is in fact that the filter tip ventilation in that product today is the same as it was when it was introduced. And, that is true for both products. And I think that as well, that in addressing, I just want to digress for a moment to the comment that was made about Mr. Bexon. I think when you think about the allegations that have been made in this Courtroom, and the broader policy issues that are being raised, even though I keep urging you to focus on the issue which I think you'll eventually have to address, and which is a legal issue as opposed to an inquiry issue, this defendant has come forward to more senior people to answer those allegations. They came forward with the Chairman and they came forward with the Senior Scientists. My friend points to a document in 1994 and says to you, based on a Court of Appeal decision in Ontario, you should draw an adverse inference because Mr. Bexon's here. Let me just address that. That document in 1994, first of all it's been explained by two witnesses, thirdly, it's not relevant to the issue that you have to decide. When you look at what the Court of Appeal says in that case, the adverse inference was being drawn against somebody that was party to the transaction which was an issue before the Court. Here, my goodness me, if I go up on that CD ROM, there's seven hundred odd documents and what Mr. Bexon said...

THE COURT: A couple of hundred thousands...
MR. BARNES: Well, we'd be here a long time if we had to deal with those. We brought in the two people that could meet the allegations and they stood here and their evidence was tested. And, to point to a document from 1984 which has got no relevance as to whether we breached the Standard of Care to Mr. Battaglia in 1994 and then ask you to draw some adverse inference I think is very, very unfair. And in fact, you don't really even need to deal with Mr. Bexon's evidence or any evidence in 1994 in my submission, or in 1984, it's 1994 that we have to focus on.

Now, I think it's interesting, we talked about the numbers being on the package since 1974. Just remembering what Mr. Battaglia says, he says that he looked very carefully at the numbers when making his brand selection and his desire was to move down. You may recall that evidence. But, I suggest to you, that that may not be a fair representation of what in fact he does. And, when we look at his actual brand history, which is Exhibit number ten, which is the table and that table was put together based on the information that Mr. Battaglia had provided, we'll see that he actually moves up and down. He moves from a low of one point one to a high of twelve, up and down during that period. And what the evidence is, remembering Mr. Lennox talks about hypotheticals, and I'll come back and deal with the hypotheticals because what Mr. Lennox

has said about what the Supreme Court of Canada says is not quite right. But, it's not a hypothetical. He was asked a specific question by Mr. Lennox, and, this is the evidence that Your Honour has to operate on. He said had there been a range of deliveries printed on the packages of Matinee, what would he have done? Alright, do you remember that evidence? He said that he would have tried another product. And that is a very important piece of evidence. He didn't say he would quit. He said he would try another product. And, in fact, another telling piece of information was that when he found out about the concerns that we've been dealing with for the past week, he's known that for a year and a half, he doesn't switch brands until three months ago. So, he learns about it a year and a half ago, he learns about these numbers that you've heard a lot of evidence about, and it's only three months ago that he takes action. So, you can clearly draw an inference that the information about the pack numbers had absolutely no impact on Mr. Battaglia. He didn't do anything about it for a year and a half. And, if we now look at the product that he's smoking, he in fact is smoking a product which has the same inherent characteristics and the same numbers, which is a Vantage Slim 100's or, quite a long descriptor, it has the same characteristics as the Matinee Slims product and they provide the same deliveries about which he is complaining. The same deliveries that he is now complaining,

he says that he doesn't like the deliveries in the Matinee product, he's gone to another product that has the same deliveries. Give or take, whatever the numbers might be, but we heard Doctor Massey's evidence. And we did look at the Viscount Slims, you may recall that Your Honour, when we looked at that, and my friend says, just pausing there for a moment, he says we shouldn't look at the competitor's information. We did, however, look at a competitor's advertisement in 1958 when that suited his purpose but let's not deal with that. The relevance here is twofold, first of all, there was a suggestion that somehow this product is unique and is cheating the machines. That's clearly just asperious at best. When you look at the evidence, and you recall the evidence of Doctor Massey, that in order to get the numbers down to where the Government wanted them, on a sales weighted average basis, and particularly looking at the CO issue, carbon monoxide issue, ventilation was the most important element. It's the only way you could get them down. So, these other products are ventilated as well. When we looked at what's on the VC information today we see, in fact, that the other two products, as Doctor Massey and his calculation showed, actually are higher than Imperial's. They're up at 700 odd per cent, Imperial's are at 650 or something, I'm just roughing these, because really the absolute number, it's the principal that's important. So, we look at that, and it's interesting to note,

just once again digressing, that I think at some point if you look at the chart about Mr. Battaglia's smoking history, he was smoking Viscount 100's that he reported. And the only reason that Vantage brand is not reported at the moment is, based on the market share that it has in British Columbia, you'll recall Doctor Massey's evidence, I think that if you have less than one per cent of the market you don't need, at this moment in time, to report your numbers. But, like all good things those days will come to an end and everybody will have to report their numbers but at the moment, that's the reason that we can't go to a website and find the number. But, based on the numbers that are reported on the pack and based on the fact that it's a ventilated product, as Doctor Massey said, you're going to get the same, once you go to the intensive method, you're going to get the same sort of 600 - 700 per cent. So, Mr. Battaglia's gone to another product, which has got the same numbers on the intensive scale. And, as I say, he only did that three months ago. Once again, he did not stop smoking. Now, let's deal with the question about did he in fact receive more than what's on the pack. I observe, first of all, that I think that this is a bit red herring. What the pack number is, it represents, it's an average and I ask you to remember that. It's an average prescribed as a comparative number. And, based on the evidence before you there is no way that one can know. In fact, an interesting

comment that Mr. Battaglia made in his evidence, you may recall, is he's a light smoker. Dainty and light, whatever that means, but certainly I understand what light smoker is. Dainty smoker, I conjure up quite an image in my mind so I think I'll pass on. So, what we know is that we can't determine what it is that he's actually getting and so, it could equally be higher, it could be lower or it could be the pack number. But what is clear, is that if he had smoked any other product and his manner, if he had smoked another comparable low delivery product and his manner of smoking would be the same as it is with ours, then he would have got the same deliveries. Remembering that he said he wasn't going to quit when he was asked the question, just going to choose another product and keep smoking. Now, Mr. Collishaw, in his evidence in-Chief, now I think we'll just look at this for a moment if you don't mind, if I could ask you just to reach for the Plaintiff's Volume One. And if I could ask you to go to Tab Four, Page sixty-four, I think this is the easiest place to look at it. This was a chart, when Mr. Collishaw was giving evidence he was trying to use to suggest that in fact Mr. Battaglia got a higher level of nicotine than the reported deliveries. You may recall that evidence. And, what Doctor Massey then took was actually the evidence that Mr. Battaglia had given, which was he smoked twenty-five cigarettes a day. And, when you take the evidence of the plaintiff, which is the only evidence that's

relevant, if you took the evidence of the plaintiff that he smokes twenty-five cigarettes a day, and then you plug it in to the Table that Mr. Collishaw uses, you'll see that in fact, instead of getting point four milligrams of nicotine he would have got point three two. You may recall, do you recall Your Honour how that's done? Would it be helpful if I just reminded you?

THE COURT: Go Ahead.

MR. BARNES: All right, the bottom axis…

THE COURT: 24 times 25 I think that's got to be…

MR. BARNES: 24 times 25, maybe I'll go through it, explain it, maybe I'll get lost. Okay, the delivery is point four, you multiply it by the number of cigarettes, you're quite right, equals ten. Alright, we then go along the chart on the bottom base line and we go up and we find that that gives us somewhere between eighty and eighty-five per cent of the reported delivery. The reported delivery being point four, you take eighty or eighty-five per cent of point four and you get point three or point three five. So, that if in fact you were to apply this chart to the evidence of the plaintiff, then he'd get less than the stated deliveries on the pack. And, why I say that in fact this evidence, even though interesting, I think supportive of every argument that we have to meet, the fact is that Imperial did nothing to it's product to ensure that he would get a higher delivery than stated on the pack, absolutely nothing. It measured the pack

deliveries in accordance, with the methodology prescribed by the Legislation.

Now, let's talk for a moment about the ventilation holes because that seems to have taken perhaps a larger proportion in this case than it should. He gave evidence, once again, and this is the evidence that we have to address Your Honour, is Mr. Battaglia's evidence, the evidence in 1994, he gave evidence that he was aware of the ventilation holes. He testified that he knew how to manipulate his smoking to get a hit. Remember, he'd done this for you. He clearly demonstrated to the Court that he knew by covering it up and sucking it, he could get a hit. So, he knew about the holes and he knew by covering them he could get a hit. There's nothing that Imperial, or any other manufacturer, can do to control his behaviour when using a product. He clearly knew what he was doing. He's a professional smoker, he said that in his evidence. Let's not be tricked by listening to Mr. Lennox saying this is a neophyte, this is a fellow that was in the industry for twelve years and seemed to have quite a good memory about certain events that transpired almost forty years ago. You'll recall, and we'll come to it in a moment, he had a vivid recollection of his meeting with Doctor Dunn, the other Doctor…

THE COURT: Patrick O'Neil.

MR. BARNES: Patrick O'Neil, that's right. Also why I think it's important to focus on this,

nothing that Imperial could have done could control the way that he chose to use the product. Doctor Liston felt that there were no other appropriate warnings that were relevant. If an individual decides to change his or her smoking behaviour, it's up to the individual. But, when you deal with this individual, which is the only individual you've got to deal with, that's why I ask you to continually keep your eye on the narrow issue. It's not the general policy discussion of the sort of Court of Inquiry that we want to have on tobacco generally. What did this man know? He told you he knew about the holes, knew how to cover them, suck it in and get a hit, he told you that he knew about what you could do with the butt length, clearly understands that if you modify your behaviour you're impacting on the numbers. He told you about ventilation and veracity and paper and I think actually, when we look at the record, we'll see that he was also talking about ventilation holes as well. But clearly he understood that he had holes in the paper that allows you to dilute the air and all of those things are important for a lighter product. And clearly, when it comes down to using this product, he knows there are holes and he knew when he covered them that he'd get a larger hit. Now, let's just take it another step further, I don't know how many rungs of the ladder we have to go up but let's talk about the lower delivery product. My friend keeps on making an assertion that there is

somehow evidence before the Court that lower delivery products are not safer. There's not a shred of evidence before the Court on that point at all. In fact, the evidence is the contrary and it starts with the intuitive or logical explanation that Mr. Battaglia gave which is intuitively or logically, it's better. That's why, if you've got something in a substance that is bad for you and you take less of it then inarguably, you're better off taking the product that's got less. That was the explanation that Mr. Brown gave as well. As well, what we know is that there is some evidence that's being led and actually, the evidence was led by me. To respond to a couple of other assertions that, dealing with this whole concept of compensation, because compensation once again seems to have taken on a life unto itself. And, the allegations that were specifically made against us in the pleading. It was found that people compensate to get higher yields by blocking the ventilation holes in the filter and secondly, that they inhale deeper. You may recall that we had a fair bit of evidence on that. And, I'd just like to, because I think this is critical evidence. Because when we were dealing with this whole concept of what Mr. Battaglia may or may not have done, first of all I say, the inquiry ends when the evidence points to the fact that he knew what he was doing and he chose to do it. He knew he was getting a larger hit. That's in my submission, the answer, in many respects, to a lot of the issues. But,

secondly, let's suppose that somebody is compensating, what are the effects of that compensation? It doesn't necessarily translate into disaster. The fact is, that if somebody is compensating they are still going to get less than, for example, in Mr. Battaglia's case, I think his evidence was Your Honour, that he came off a product called Benson and Hedges and I think his evidence was that it was eight and eight. And, so he came off a product that was eight and eight and he goes to a product that's four and four. Alright, so let's suppose then that there's allegation of compensation and I suggest to you that the evidence that you have to look at here is the evidence of Doctor Massey and the literature. Mr. Collishaw may have expertise in certain areas but he's not been involved in doing this sort of testing, he said that. He's not been involved in, he's observed the machine but, he's not done any testing himself and I'd suggest to you that you've got to look at the literature to answer this inquiry. So, if we can just look at the literature for a brief moment just to remind you, and let's deal, if we could, with Tab Twenty-seven of the Red Volume. Tab Twenty-seven of the Red Volume and you'll recall, we sort of went through these various exercises the other day that, okay, how many people are actually engaged in the vent blocking and Doctor Massey took you through the literature and it was in that range of four to ten per cent. I think it was three point seven to ten point four per

cent if I remember and then we got into the next discussion, okay, well now we've got that number okay, so there may be that number of people that are involved in vent blocking. What does that actually mean? What does vent blocking mean? And, the answer was well, it's not complete vent blocking, it's only fifty per cent. And, that number itself is very suspect. But, the importance of that fifty per cent number, in fact there are two points I want to make on this, that the fifty per cent number records vent blocking on one puff. So, that if you only block the vents on one puff, I don't know how many puffs you get in the rest of your cigarette but, and never block any more, you are treated for the purposes of this paper and literature as being part of the group that blocked. So, that when you're in the category, you're in the category even if you only block it on one puff. And, secondly, the delivery that's measured makes no distinction between the puff volume and what's inhaled into the lungs. So, it's an extremely conservative methodology. And, when we look at what the conclusions are, and they're set out on page two, "the incidence of vent blocking by fingers is quite low and relatively insignificant." That's at the bottom of page two, starting with "conclusions..." "the incidence of vent, zone blocking by fingers is quite low and relatively insignificant. The most reliable estimate for lip blocking is that up to twenty-five per cent of smokers may cover the vents

during at least one puff and for most the coverage is partial. Ventilation zone blocking, as it occurs in practice, has only a relatively minor affect, if any, on human smoke yields compared to other smoker behaviour factors. When a human smoker inadvertently, partially or completely blocks the filter ventilation during smoking he or she adjusts by taking smaller and fewer puffs." Now, that's what the literature says. Let's make the assumption for a moment that Mr. Battaglia is one of these people that falls in this category. And I say to you, he falls in this category because he knows what he's doing and I think you've got my point on that one. What does it translate into? Let's have a look at Tab Twenty-six and see if we can get some help. Go over to Tab Twenty-six, and we've looked at this once before, if we go to Tab Twenty-six and look at Table Six for a moment, that's going to try and help us understand what it means, in effect, of deliveries. So, that's Tab twenty-six Your Honour, of the Red Book again. So, if we go to that, which is page seventy-eight, you'll see that if he is in the category, in the left-hand column of somebody that's got fifty per cent blocked, and as I say, that's an ultra conservative number, alright? And, this is a person that is smoking a four, a point four nicotine product, if you go over the column you'll see that he would receive point four four. That individual, in this case Mr. Collishaw, or pardon me, sorry, Mr. Battaglia

would receive point four four. Remembering that the stated delivery on the pack is point four and if I could just remind you at that point that the Legislation that deals with the reporting requires the rounding to the nearest tenth. So, a point four four becomes a point four and a point four five becomes a point five. So, the reporting wouldn't change on that example. Because of the way that Legislation is designed you don't report other than in tenths of a decimal point so that when you've got a point four four it is reported as point four. So, that's if you took him as being one of these people that did it on one occasion, and that one occasion when he did it, that's the number that you get out of the literature. Now, that clearly indicates that that product is certainly lighter than the product he came off of which is the eight and eight. There's absolutely, first of all, it satisfies in my submission that there's nothing erroneous about the information. But, if somehow somebody is trying to suggest that it's got to be exactly the same, isn't it interesting when we look at the literature we're given the benefit of the doubt. We put him into the category of people that are doing it, which is a low number, we give him the maximum ventilation blocked, he still gets the same as the pack number. That's what the literature says. Now, I think Doctor Massey's evidence was, and I don't think it was challenged, he wasn't really cross-examined on it at all, was that when you cut

through all of this, I think that he said, I think, some of the smokers block some of the holes on some of the puffs on some occasions on some cigarettes. They're like five Ss. And, what we do know from reading the literature is that compensation is, in some people, and that's some people, seems to be a very small number, partial and short-term. So that short-term is something that should not be lost as a fact. It's short-term and that's what the literature says and that's what the evidence is that Your Honour has to decide on. And, what we've really looked at clearly indicates why the Government was doing what they were in the 80s and that's encouraging people, if they can't stop, to go to a low delivery product. Logic would dictate that if there's something in it that's bad for you, and you take a little less of it, that you'll be a little bit safer. What that means, nobody really knows. Working from the proposition that the health people did that there is no such thing as a safe cigarette. And, that is something that initially, you'll recall that Imperial expressed their concerns for the Government saying, listen, there's nothing, and this goes back very early on and the evidence, when they were talking to the Government about mandating these numbers. We say look, logic might tell you that this is the right conclusion but there's nothing in the science that demonstrates this, and that is sort of the quandary that we saw in the literature. But that is where we are today on the evidence, on the

issue of compensation and safer cigarettes. There's absolutely no evidence before you, Your Honour, to suggest that they're not safer. None at all. It's just the logic that they're safer because less is better than more. It was an interesting example, I mean I don't know whether it was worth responding to or not but I'll give you an observation on the two per cent milk and the light products. First of all, I think that gas is a better comparison, that gasoline is a better comparison than perhaps the two per cent milk. Obviously, I think you have to have in mind that what you've got is an average number on the pack, like an average mile. I think most people would know that if you put your foot to the floor that in fact, you might get a little different gas consumption than if you didn't do that. That's the same thing with Mr. Battaglia. He knew that if he covered the holes, up go the numbers. Two per cent milk, if somebody's drinking two per cent milk, think about it, they drink it because they want less fat, if they drink five gallons of it they might not be getting less fat. It's all a matter of what you're doing with the product. It doesn't change the representation, if it's two per cent milk, it's still two per cent milk. Drink five gallons of it and you might have a little bit more fat than you anticipated.

So, I'd like to turn, if I might to the addiction. And, I think that it's interesting to

observe that after two hours and ten minutes, listening to Mr. Lennox, he never once addressed the issue of Mr. Battaglia quitting smoking. Never once addressed that. And he has quit smoking and you've heard that evidence. He claims that he cannot quit. Let's measure that against the facts that you have before you. He's quit for a variety of periods of time. He says that in 1996 he used the 'patch' for six weeks and he quit for three to six months. In the early 90s he quit for six months. He quit cold turkey in the mid 1970s. The evidence on the mid 70s is contradictory. If you look at the evidence that you heard in Court, he said that he quit for two days. If you look at the Affidavit of SULPHA (ph.) that's before you, which was discussed with him in cross-examination, you'll see that he said that he quit, the time that he quit cold turkey in the 70s, he quit for three months. However, I think the most important piece of evidence, the unequivocal evidence, is the fact that he quit for between two or three years in the late 1980s. And I think it's important to remember that when he quit, during that period, remember he testified that it was the good life. Now, when he was questioned about why he went back to smoking I think that he summed it up. In his evidence in-Chief he said, and I'm going to deal with the instances in particular, "I tried to quit and I have quit and circumstances occurred in my life and I went back." And that's the answer. Nothing to do

with nicotine at all. Circumstances occurred in my life and I went back. The motivation that we heard not only Doctor Hammer talk about but Doctor Graham. Doctor Graham talked about motivation and the support from family members and he gave the examples of when he went back. There was divorce, there was a broken relationship, bankruptcy and on one occasion, a new business venture was creating stress. That's the evidence that he gave. But the unequivocal evidence is we have one period of up to three years. And, what we have is, we did not hear an addiction expert come forward on behalf of the Plaintiff and, in fact what we did have what is Doctor Hammer's evidence which was unequivocal that Mr. Battaglia can quit smoking if he's properly motivated. And, I think that the evidence before you, you didn't need Doctor Hammer's evidence to tell you that. It's clear, if somebody hasn't been smoking for two years and you were talking to them I think you'd make a fair assumption that if somebody said they haven't been smoking for two years that they have quit smoking. It's a pretty fair observation to the man on the street. Well, "when did you last smoke?" "Oh, two years ago." "Oh, you've quit?" "Yes." It's pretty obvious that he's been able to quit smoking and he's quit for up to six months. And, I think it's also important to remember the evidence that Doctor Hammer, if in fact it's a concern, that clearly, after a brief period of time, there's no physical effect of the

nicotine left in the body. It's not something that's sitting around two or three years later. It's gone. And he also spoke about some suggestion of heightened addiction and there's just no concept that he's aware of and there's no concept that he's aware of in the literature. So, that if somehow, there's a determination by the Court, that he is in fact dependent on nicotine, and I don't think that really is open on the evidence, based on the evidence that's before you, he was dependent on it prior to 1994. Nothing changed after 1994. There was no heightening. So, that once again, making the conscious choice to take up Imperial's products in 1994, it had nothing to do with his nicotine dependence. It already existed, if in fact, it's there.

Let's turn for a moment then and try and ascertain the injuries that Mr. Battaglia is trying to lay at the foot of Imperial. He's suggesting that his heart condition somehow is as a result of his use of the Matinee products. Well, that evidence I suggest to you, is completely contradicted by Doctor Graham. The coronary artery disease existed in 1991 and Doctor Graham's evidence was that it likely had begun ten or twenty years prior to that time. It's not something that just happens like that. It's of long term duration and began some ten to twenty years earlier. And, there is no evidence, I just want to be clear on this with you Your

Honour, and what occurred between 1991 and 1999, the question that was put to Doctor Graham was, did Mr. Battaglia's physical symptoms change between 1991 and 1999? The answer to that was no. And he conceded in cross-examination that in 1991 he could have had blockage in all three arteries. He was asked that question and as well, he could not identify with any precision, when the silent heart attack occurred. So, there is no change in the physical symptoms between 1991 and 1999. So, that any role that smoking may have played is not an issue that Your Honour has to grapple with because what on the record is clear, is that it pre-existed his use of these products. Once again, that's why you don't need to embark on a much broader inquiry. Because, when you look at the case of Barr, you start in 1994 and the un-contradicted evidence of the plaintiff's own doctor. Existed in 1991, symptoms haven't changed between 1991 and 1999 and that it may well be that there was blockage in the three arteries in 1991 and all of this started some ten or twenty years ago. And with respect to the addiction, I think I've given you my point on that, but clearly, whatever addiction means, and we've heard a variety of explanations, but clearly, in the terms that Mr. Battaglia was using it, is I can't quit. That just is not true on the record and, if you flip it around, and you accept that it's true, it was true before 1994. So, either way the blame does not lie on Matinee products. And, once again, you don't need to get

into that inquiry either. Now Your Honour, with that background I'd like to try and deal with the legal principles that have been asserted against me. The way I've looked at them and the way I'm going to argue them, basically there are three arguments I think, in Torte, that have been levelled against me. There's been the negligent misrepresentation that's a product liability, which I think has got two arms. It's sort of got a strict liability arm and I didn't actually hear that being advanced too closely today, and then it's got the defective/design a safer cigarette and finally, deceit. I was going to argue the contract claim but that's been abandoned and I think properly so. So, the misrepresentation, I never do misrepresentation, the good news is that my friend and I at least agree with what the principles are. We don't agree as to the interpretation but I have set out in the material the legal argument on these points. That's starting at page number, it would be paragraph thirty-two, Your Honour and my friend read to you or, pointed you to his Volume of *Queen and Cognos* and clearly, the five prong test, that's set out by Mr. Yakaguchi is the same one that's set out in my material. The only qualifier is that if you look at the fourth prong of the test, and then we'll come back and deal with why I say that there's absolutely no issue here between my clients and Mr. Battaglia. The fourth prong that the representor must have reasonably relied on the negligent misrepresentation. Because, after

a two prong test, and that's set out in Allen Lindon's text, which I've given you, and you'll find that at Tab three, but first of all you've got to, you need evidence to show that you relied on it. And secondly, the second element, you've then got to show that it was reasonable to rely on it so that it becomes an objective test and I'm sure you are familiar with that. But, if we now start with looking at some things, the first one being, there must be a duty of care based on a special relationship. I'm not going to suggest that there's not in this case, I'll move to the other four but, what I'd would just like to remind you is on so many of these tests, the plaintiff's got to succeed on all of them. All parts, so that if one part gets knocked out then that's the end of the exercise. So, from the Defendant's point of view it's nice, if you win on one you can stop, but the reality is the burden is on the plaintiff to meet all five of them. So, the first one is the representation in question must be untrue, inaccurate or misleading. There is no untrue representation here at all. What is it that we're looking at? We're looking at a number that says it's an average. It's a comparative guide. There's absolutely nothing untrue about it. It's exactly as the Legislation requires it to be. There's been absolutely no suggestion, where you would have a breach of that representation, in my submission, is if somebody came in and said if you took the methodology and did it properly then

it would be a different number. If you took the methodology that's prescribed by the Legislation, trotted in another expert that said "listen, we did it that way, we applied those parameters, that shouldn't be point four that should be point seven." That will be a representation that would give some relief perhaps in a different situation. That's the representation that would be in error. That's not what's being suggested to you here at all. There's no suggestion that the pack number is anything other than in accordance with the methodology. So, there's absolutely nothing that is untrue about that representation. The number that is represented on the pack is exactly what it's intended to be. It was never intended to indicate to Mr. Battaglia that that was the exact number that he would receive. It was an average number. An average seen, that if you apply the various tests and various calculations in the literature, you could also come to a conclusion on the record, that in fact he got that number or got less. That's the evidence that's really before you. And, as well, you can also, when looking at the fact that the representor must have relied on the negligent misrepresentation. Think about that for a moment. If you find there is something wrong with the representation, which I'm certainly not inviting you to do, in fact quite the contrary, he was well cognisant of the fact that deliveries vary depending on smoking behaviour. His evidence on this point was not

extracted in cross-examination. This is evidence that came out in-Chief when he was telling you about his time at Rothmans. He's telling you that they're telling me to go around and do the butt lengths and tell people that if they leave a longer butt they won't be inhaling as much. He clearly knows that butt lengths, he clearly knows that the porosity of the paper, all of those things affect deliveries. And, he clearly knows with this product that if you close the holes you get more. That he knows. And so, he knows, that he gets different numbers depending on how he smokes. He told you that under oath. I get a bigger hit when I suck in, has to tell you that that gives you a different hit than if you don't suck in when you're a light or dainty smoker. Similarly, there's absolutely no representation on the pack about health claims, none at all. Remembering again, that in 1994 there is no advertising and no promotion other than the point-of-sale pack displays that Mr. Collishaw talked about allowed in this country. None at all. So there hasn't been any advertising or promotion for five years before he takes up this product. So, there's no health claim being made and I don't think Mr. Battaglia, in fairness, has gone into the box to suggest that Imperial is making a health claim. And, his evidence was he came to the conclusion based on logic, that they were safer. That's where he got to, that was his evidence. And I think the record is clear, and I think Mr. Lennox almost conceded it in argument

that the message about the safer products was not coming from the industry, it was coming from the medical community and from the Government. And, as well, I think on the evidence you can conclude that a lower delivery product arguably is safer, whatever safer means. Because compensation, whatever type of compensation we've got, what we know is that it's never complete. That is abundantly clear. So, there are very low percentages of people engaged somehow on one occasion for one puff for a short duration is not complete. And also, this was pointed out to me, I wanted to just emphasize that there was no representation, I don't think it's been suggested, there's no representation that's been made by Imperial that these products, the Imperial products will help him quit smoking. That just doesn't exist anywhere in the evidence. Let's talk about the fourth element, or pardon me, the last element of the test, final reliance. What his own evidence is, and once again, that's the evidence that's important to this Court, is that if he had known that the deliveries from the Matinee products would have been higher he said that, "I would have chosen another low delivery product." And that's Mr. Battaglia's evidence. So, what does that tell us? It tells us two things, it tells us one, he would not have quit smoking and two, that the deliveries of the other lower delivery products would not have been any different. And, you can measure that answer as well by the fact, as I

said to you earlier, he's known for a year and a half about the numbers on Matinee and didn't do anything until three months ago. So, you know, if you accept his evidence, it's as I say, his evidence is determined on the fact that there's no reliance and in fact when he did know, for eighteen months he didn't take any action. That's why I say, at some point in time Your Honour, there's got to be some responsibility on Mr. Battaglia. So, had the package information been different, that's what we come down to, Mr. Battaglia wouldn't have acted any differently. He would have used another product, ventilated product, low delivery product, same numbers. He would have continued to smoke. As to the fifth element of the test, damages, even if I go down on all the other points, there are no damages. The addiction and the heart condition existed prior to the use of the Matinee products. When you think about it for a moment, the only reason we're here is because he didn't quit in 1991 when Doctor Graham told him to. If you look at it in context you can, there's this great gap when all of a sudden, somehow in 1994, Matinee products have been blamed for everything that's happened to this man. This man was given a very stern lecture by Doctor Graham and as Mr. Lennox said, who's got the better bedside manner, Doctor Hammer or...

THE COURT: (Laughter)

MR. BARNES: ...that's right, point well taken. I heard the lecture, he would have given that

lecture, he swore he gave that lecture he was strident about it. So, in 1991 he's told to quit and he doesn't quit, then he comes along and wants to blame our products in 1994. You think about that. He is the victim of his own choice. He continued to smoke after he was told in 1991, he was clearly able to quit, he wasn't motivated to quit, he chose not to quit, and somehow he's compiling together a claim based on our products some three years later. And the evidence is unequivocal. He was able to quit and he chose not to. Now, as I say, and I don't think I need to argue it, I have a couple of pages in here talking about, product's liability doesn't exist in Canada. And I think that clearly is the law, and I don't think that's been suggested by my friend, but I have given you those authorities and you'll see those, basically, in paragraphs thirty-eight, thirty-nine and forty. So, what does that say to me? Well, let me try and address the case in product liability that was being advanced by Mr. Lennox. And, this really is around a safer product. As I said, I don't think he was arguing strict liability. Some general tenets that are important to have in mind as we assess this, and once again, we're going to put up the test and we're going to knock it down. Now, first of all, the duty in Canada, at the moment, is to design a product to be reasonably safe for the consumer to use. And we find that in *Rentway* and I'm going to come back to *Rentway* in a minute because I think there's some points

that you should have brought to your attention about *Rentway*. The next one, which is a very important principle, the fact that the product may be dangerous does not, in itself, attract liability on the manufacturer and I'm sure you've heard that before. So, sort of with those principles in mind, what has the plaintiff got to establish? Interestingly enough, we're on common ground again using KLAR. KLAR uses again, I'm sure you've heard this argued to you before in Court, but basically there are a variety of tests out there. So I've taken a five prong test which benefits the plaintiff but, once again, the plaintiff has got to establish all of the elements and it seems my friend is content to rely on KLAR. This is what the plaintiff has got to establish, and I'm going to bring that back to you in a moment because somehow, during the argument that I was listening to, it seemed to me that we were bearing the burden on behalf of the defendants. And, no matter how you slice or dice this, the burden is still on the plaintiff. Regardless of what Court we're in we still have a burden on the plaintiff. So, first of all, the defendants owe them a Duty of Care in respect to their product. Secondly, that the products were defective, thirdly they were negligent, the Defendants were negligent in failing to meet the requisites found under care, fourthly, caused the plaintiffs injuries, fifthly, the plaintiff suffered damages as a result. Now, let's first of all just dwell for a

moment on the first concept of, is the product defective? And, the quote that I've given you there is directly out of Waddams, which you'll find at Tab twelve. It's got to fall short in some way of what it ought to be. In other words, what is reasonable to expect of the product? And, one of the cases that I've cited in the case book, which is at Tab thirteen, I'll just give you the page reference is 264, I'm sorry I didn't highlight this, but if I could just ask you to note 264 in Tab thirteen Your Honour. And it really, what we're doing here is looking at the language at the bottom of the page where Mr. Justice Stratton is quoting from *McAlister and Donoghue*, "for there to be a liability under Lord Atkin's statement it is clear that a product must fall short in some way of what it ought to be. The product, in other words, must be defective. Some test of the concept of defect therefore is required. This must be a general and flexible test and it would seem that the concept cannot be defined, except in terms of what it was reasonable to expect of the product, in all of the circumstances." I pause here and I say, I don't think we're dealing with a defective product here at all. That's really not been the issue that's been addressed in the evidence. The issue that's been addressed in the evidence, I think, is a safer cigarette. I think that this product, on any objective standard, performs exactly as a common person would expect. It's a cigarette and it performs exactly as intended.

Yes, there will be an argument put that it is a dangerous product, but that does not, in itself, render the product defective. That's not the test for a defective product.

THE COURT: How do you define a cigarette and what it's purpose is?

MR. BARNES: I'm sorry?

THE COURT: How do you define a cigarette and what it's purpose is?

MR. BARNES: I guess, if somebody smoked that cigarette, the way I would look at would be this, to the user of the product, if they took the product, that in fact is in issue in this case, and somebody that smoked that product, they would know that that product was a cigarette. There wouldn't be any suggestion that, for whatever benefits that individual consumer expected to get out of the use of that product, those would be satisfied. So, that would be the objective standard. Just remembering some law school, *Donohue and Steven*, the snail and the bottle, that wouldn't be expected, about what you'd find on a bottle of a soda pop. I just believe that when you look at it it's an objective standard and that in fact what we're really dealing with is whether this product should have been, in fact, designed in a safer way. And, I think that's the evidence that I've heard that's been put against me. Now, I think that it's important, just so you've got the principle about dangerous products because, let me just ask you to look for a moment with me, if you will, at Tab

number ten which is a decision of the Ontario Court of Appeal. If I could ask you to look at the decision of Mr. Justice Gallaghan I believe on page 148. Do you have that Your Honour?

THE COURT: Um-hum.

MR. BARNES: Page 148, and why I think this is important. That under the heading "The Ontario Court of Appeal is adopting the language of the B.C. Court of Appeal" in a decision in the Schultz case and just under the heading "Obvious Dangers", "one limitation commonly placed upon the duty to warn, or for that matter, the seller's entire liability", and I'll pause there. And I think it's important that you note that it's the Ontario Court of Appeal that has italicized and highlighted those words. If you go back and look at the B.C. decision, they were not italicized. So, the Ontario Court of Appeal has put emphasis on those words so that one limitation is placed upon the duty to warn. Or, for that matter the seller's entire liability is that he is not liable for dangers that are known to the user or are obvious to him or are so commonly known that it can be reasonably assumed that the user will be familiar with them. Then we talk about the, sort of the typical ones, there is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode or a hammer may mash your finger. So, with that proposition in mind, first of all, you could make an argument that in fact there is no

corresponding duty to warn Mr. Battaglia of anything because the dangers of this product are so well known. But, even if we accept and put that aside for a moment, what we do know as fact is that when he started to use the Matinee products, and once again I bring you back to 1994, the very two things that he complains about, addiction and coronary heart disease, are specific warnings on the packages. So, we have mandated warnings dealing with the two specific issues. But then, we can also measure that against what his evidence is. Clearly, he was well aware of the health risks by 1994 and he certainly knew that he was addicted on his own evidence. He told us that, he learned that in the mid 70s. And he's known, on his own evidence, since 1950 some odd, I think he said 1957, about the benzpyrene discussion that he had with Patrick O'Neil Dunn where he said that Dunn told him, admitted to him I think was Mr. Battaglia's word, that benzpyrene is cancerous. He also tells us that in the mid 1970s, the first occasion that he tried to quit, that one of the reasons he tried to quit was because of the health risks associated with smoking. And then he also said that prior to switching to the Matinee brands, he said it was important to quit because he'd been inundated about how bad they were. In any event, you clearly have the evidence of Doctor Graham that Mr. Battaglia was putting his health at significant risk by continuing to smoke. So, let's look at the

obligation with respect to a safer cigarette. Let me just talk to you for a moment about two or three things that my friend was discussing. I think that, let me start with the suggestion about hypotheticals, my friend was talking to you about what the Supreme Court of Canada said, I think in *Hollis*, let me just find that for a moment because I want to put this in the proper context. Because, at the end of the day, the answer to these questions that Mr. Battaglia has been asked about what he would do are not hypothetical questions. They are questions that, a new witness must climb into the box and answer, and he was asked questions about, "if there's a range what would I do, I'd take another product and continue smoking." "If I knew that this product was higher, what would I do, I'd take another low product then I'd quit, not continue smoking." And he was never asked the question he should have been asked, because if in fact Eclipse was on the market, what would he have done? Now, why I say it's important for you to have an understanding that these are not hypothetical questions is because my friend, I think, has mischaracterized what *Sprinkler Canada* was doing. The debate in the Supreme Court of Canada came out of the language in *Ortho*, which I don't know if Your Honour recalls, but that was a pill that a woman said that if she had known about something she wouldn't have taken the pill, and Mr. Justice Holland, when he was trying the case, said I'm prepared to accept the evidence of

that individual. Subjective test, not an objective test. That's what's being discussed in the Supreme Court of Canada. What they're saying, in the Supreme Court of Canada, and I'm looking, I'm just going to show you where that is, but if you can follow Your Honour, on the *Hollis* case my friend took you to page twenty-five. And, what was going on in *Hollis*, if I understand it, is that we've got this learned intermediary theory. But what they were saying is that you, defendant, cannot shelter under some sort of suggestion that even if you communicated the information to the Doctor, the Doctor might not have communicated it to the patient. That's the issue in the Supreme Court of Canada. That was the hypothetical that the plaintiff didn't need to prove. What the plaintiff did need to prove was that if she had the information she would not have used the product. A subjective test to that question and we see that in this case. If I could ask you just for a moment to look, paragraph fifty-five, where I think my friend was reading to you, which is at Tab number five at page twenty-five. At tab five, page twenty-five, numbered paragraph fifty-five. If you could just follow that you see, I say this because while *Dow* is correct in submitting that there was some ambiguity at trial concerning purchase warning practices, *Dow's* argument is based upon the assumption, that to succeed in her claim Ms. *Hollis* must prove that Birch would have warned her that *Dow* had properly warned Birch. I

do not think that assumption is well founded. Ms. *Hollis*, it will be remembered, demonstrated that *Dow* had breached it's duty to warn, that she would not have, you see, she would not have undergone the medical procedure if she had been fully informed of the risks. So, the test hasn't removed it from the plaintiff getting in the Box to say what she would or would not do, they simply said we're not going to allow you to work on some assumption that the Doctor may or may not have given her the information. The question being put to the witness is, witness, if you had been provided with this information would you have had a breast implant? The answer is no, I would not, subjective test not to be measured by objective evidence. Exactly the same question that was put to the witness in *Ortho and Buchanan*, went to the Court of Appeal where they were arguing no, no you shouldn't accept that witnesses' evidence, it's so self-serving. That's always the answer. And the Court of Appeal said no, no, no the trial Judge is entitled to accept the credibility of the witness on that fact and doesn't measure by an objective standard. Clearly here, the evidence here, it's not a hypothetical question he was asked, what would you do when you saw this range? I'd go to another product, I'd keep smoking. What would you do if our numbers were too high? Not a hypothetical question. I'd take another one, another low one. They're the same deliveries but I'd pick another low one. They're not

hypothetical questions and finally, on the point of safer cigarette, there was no evidence put in the Box, well, if you had this Eclipse product, whatever it contains glass, fibres, whatever, would you have used it? Never heard that evidence. So, anyway, I just wanted to make sure that we understood what the Supreme Court of Canada is saying. And when you consider the other two cases you'll see that the test that they've set out is the witness is still entitled, or, is still required to assert that they would have done something differently on a different set of circumstances and it's on a subjective basis.

Now, I digress for a moment, when we looked at this risk utility, and once again I'll use my friend's Volume, when we looked at risk utility, risk utility is not the law in Ontario. Let's not be misguided by that. Risk utility is one test that is applied by some Judges on some occasions and we've been pointed to one Judge who chose to use it in 1989 I believe. I want to show you that even when you read this case that it hasn't really changed the law dramatically, you've still got to deal with the evidence that's at *Barr*. We can look at tests until the cows come home but you've got to come back and look at the facts. So, if I could ask you just to look at Tab nine for a moment...

THE COURT: That Judge is Granger who subsequently went to the Court of Appeal.

MR. BARNES: Oh, absolutely, no, no, all I'm suggesting is that there are many ways that people look at liability, risk utility being one way. I don't think you'll find a Court of Appeal decision that says risk utility is the only way that we look at it. But, even if we accept that for a moment, there are certain things that still exist, even in this decision when we push through it. And, what I say is, first of all, let's look at the top, let's start at the bottom, and let's try to put it in context of what this Court is looking at. If we look at the bottom of page eight, what we're looking at Your Honour, is a case of a manufacturer of a tractor-trailer. So, what we are facing is a trial Judge that makes the Finding that (Packer) was aware that tread separation could occur and the following tread could cause damage to the lighting system. Alright, so, clearly what we've got here, alright, is a danger that the manufacturer is aware of that's not been disclosed to the consumer. And I mean, when my friend got up and referred to the Ford Pinto case, I mean, clearly what we have there is a latent defect. We're talking about a consumer that didn't know that the gas tank is going to explode. One does not assume that the gas tank is going to explode. Here they're already aware, this might be closer to the Firestone analogy, I don't know, here we've got a Judge that starts off with this proposition. Then he said that the design must be reasonably safe for the environment in which

it's to be used. It doesn't come to any great surprise that if you know you've got a tread separation that somebody's going to come to the conclusion there might be a bit of liability. But, in going through it, now I'm just showing you why we still have to come back to the facts of *Barr*. Whatever tests we apply, that when we apply the risk utility that my friend read to you, you'll see in the middle of page nine, "the plaintiff, of course, is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was substantial likelihood of harm and", and it's the and, "and it was feasible to design the product in a safer manner." So, the burden, the burden on this is the plaintiff's and that's re-enforced by another case that I've given you in my materials and if I could just ask you to note, if you would for a moment, Tab six of my volume at page twenty-five. This is a 1993 decision.

THE COURT: Six?

MR. BARNES: I'm sorry, it's Tab number six, it's at page twenty-five. And, just at paragraph 114 on page twenty-five Your Honour. They're numbered on the left-hand side. You'll see, I disagree with the plaintiff's proposition. Rather, the burden of proof of each of the elements of negligence in a product liability case is no different than in other cases, it remains on the plaintiff throughout, as it does in this case. Now, with those thoughts in mind, let's just look at what the evidence is, the so-

called safer cigarette. First of all, I think it speaks volumes that no evidence was led by the plaintiff on Eclipse. I mean, for all you've heard in this evidence about what the plaintiff started out suggesting, and I heard a third point in Mr. Lennox's submissions, he talked about Gold Smoke and he talked about Eclipse. He didn't talk about them through his own witnesses, he put them to the defendant's in cross-examination. He then raised the spectre of the Sheehy letter. So, when you think about it, what is the evidence that you have? You have the evidence, and this is un-contradicted, that Imperial's been working to try and find a safer, and as we know safer is an undefined term, for many, many years. We know that they're making progress in nitrocamines. We know that they have considered a variety of alternatives and we know that there is a degree of optimism but nobody can put a date on it. We certainly know from Doctor Massey's evidence that this information was shared with the Federal Government. And I think it's interesting that Mr. Collishaw didn't remember that until his memory was jogged. And if you take a look at the level of detail that was in that agenda, you can see that they were talking about biological activity which is exactly the sort of work that was going on. What we also know is that measured against any objective to design a safer product is getting something that's acceptable. And as I say here, what the obligation of the plaintiff is is to demonstrate, on the evidence, that there is

a design alternative. What does the evidence show us? The evidence shows that we're working away trying to do something and we're optimistic that something, one day, will be achieved. The product that they come in and suggest, with a straight face, Eclipse is a product that somehow we should be looking at. Without calling any evidence themselves we see he's run into tremendous resistance in the U.S. You've seen what the Anti's are doing in the U.S. They're complaining about it. It's in test market and if you read the evidence in those Press Releases the Anti's are saying it's not safer. And I suggest to you that's probably why we didn't hear any evidence. You can be rest assured, I think, on the record that you've got, that if positions for a smoke-free Canada who seem to have an intimate role in this case, knew of a specific product that was on the market that we should be manufacturing, somebody would have climbed in the Box to tell us about it. The fact is that Eclipse has run into a tremendous maelstrom in the U.S. It's in the test market. Gold Smoke, you've heard, without anybody suggesting whether it's better or worse, for whatever reason it's now being put forward as another product, it's something that we've entered into a contractual relationship to move forward in the test market with that. So, you couple that with the evidence of Brown and Massey about what in fact Imperial is doing, you couple it with the fact they're going out on December 10th to review, again with

the Department of Health, against the burden that is on the plaintiff to show that there is an alternative design available and they do not meet that burden. In fact, the evidence, which was all innuendo, is being dealt with specifically by the defendant's witnesses.

Now, we have a couple of more areas to deal with Your Honour. Deceit. I think the fundamental difference between negligent misrepresentation and deceit is deceit connotes fraud. And, what I've set out for you in paragraph number fifty-four is the test for deceit. First of all, the defendant made a false representation. I think you have my evidence on that. It's exactly the same evidence I make on other points. There's no false representation here at all. It's exactly what the law requires us to do, it's exactly what it's stated to be, it's an average, it's done in exactly in accordance with the methodology. There is absolutely nothing false about it. The representation was made, with knowledge of its falsity, it's exactly the same point. It's not false or a reckless indifference towards its truth. Complying with Legislation cannot be, in any measure, a reckless indifference towards truth. I've done what the Government prescribed me to do and I put it on the pack. That's the representation. So, to suggest that there's falsity and reckless indifference is impossible in the facts of this case. The representation was made with the intention that, it should be

acted upon by the plaintiff, but it is a pack number that shows an average. What I was thinking about, the deceit allegation, I must say that I really felt that the deceit allegation, Your Honour, was driven at the elastic product. And I think that's really being abandoned but I think you got my point that there's absolutely no deception by Imperial Tobacco towards Mr. Battaglia and this product. We did nothing to deceive him and there's nothing elastic. He formed his own judgment about the low delivery products. He checked the numbers and that's the extent of what the evidence is. A contract plan has been abandoned so there's no sense dealing with that. Now, I want to talk, just before I sum up, on causation. I'll come back to where I started. In 1994, when he made the choice to use the product, the injuries that he is complaining about were in existence. Not to belabour the evidence, but he says that he knew, sometime in the 1970s, that he'd been addicted since 1958 and started the use of Matinee products in 1994 did not in any way contribute to this addiction or the inability to quit. Nothing in the product that was preventing him from quitting. The heart condition pre-existed and I've gone over that evidence with you. Any injuries that Mr. Battaglia is suffering today are as a result of him deciding to continue smoking after he was told by Doctor Graham in 1991 that he should quit. He was hurting his health. He's got a serious heart problem, do something about it.

It's one of the modifiers that you can do. He told him to do something about his cholesterol. Didn't do anything about that, as we saw, at least up until 1998. He would be better today. And, you measure that against what's on the packs as well. The packs state in 1994, addictive, coronary heart disease, it's all there. You measure that against what he knew, it's all there. It just doesn't come together.

There may be just a couple of other points that I just want to raise with you if I may. There are just a couple of odd points that I might coddle together in response to what my friend said so that you get my point on it. Could I ask you for a moment to just turn to Tab eleven, Volume One. This is now dealing with the infamous Mr. Bexon, even though he's not here. If you go to Tab eleven and look at page one-twenty-two for a moment, Mr. Lennox was saying that you could look at the top of one-twenty-two as I understand it and suggest that fifty-four per cent of the people knew that it, it doesn't mean that the other fifty-four per cent thought it was safe. He's taking the flip side, he said you look at the forty-six per cent that say there's no safe cigarette therefore you can say that the other fifty-four per cent therefore knew it was safe. That's certainly not what that is saying. And, as I said, I really don't think much turns on what was going on in 1984 but in any event, I think we should just be clear on the record.

There was some, I just want to address, there was some points being made, I don't want to be unfair for what they suggested but Mr. Lennox said somehow Imperial was telling Mr. Battaglia to smoke low delivery products. In fact, the evidence that is in front of you is that he came to his own decision. He's a pack numbers watcher. He gave you that evidence. He did not suggest that Imperial had made any representation or suggestion to him that he in fact should smoke a lower delivery product. So, I don't know where that was coming from, certainly not in the evidence and I don't think Mr. Battaglia even suggested that himself. In fact, if you remember, you will also recall when you go through Mr. Battaglia's evidence that everybody was telling him to quit. That was actually his evidence. Everyone was telling him quit and he goes back to the discussions when he said his parents were talking about coffin nails and cancer sticks. Just a couple of other points, there was some suggestion that Doctor Liston had said that he did not know that Matinee, he did not know where the holes were on the Matinee product. I just ask you to remember that in context. He was asked that question. He said that he didn't smoke the product. I mean it wasn't as if he could look at the product he wouldn't see them. I think the record has been abundantly clear that those holes are visible. But the suggestion was that he didn't know where they were the fact wasn't, his answer was that

wasn't a product that he smoked. Just to be clear on Post, the striking down of the Legislation in 1995, just so Your Honour has this one, I'm not sure that it's relevant but I just want to make sure you clearly have this point. The regulation prescribing the numbers to be on the pack was struck down late in 1995 by the Supreme Court of Canada. That reporting Legislation, pardon me, the reporting regulation and the methodology for reporting to the Federal Government was not, so that the manufacturers continue to have to report in accordance with the ISO method to the Department of Health and Welfare. And you heard the explanation from Mr. Brown who then felt that it would be sensible to continue that methodology in the voluntary code having to do one thing with the Federal Government. They were using it to publish their data and we will continue to use that. Now, just before I turn to my conclusion, it might be helpful for you to have the one case that actually has been decided in Canada, which is the case that my friend referred to. Let me just, while I do that, if I can find my own copy of it, let me just make an observation about the U.S. cases. I don't intend to deal with the U.S. cases but I just want to give you an observation. The only reason I'm handing up a Canadian case is I think now that you're aware of it you should have it and secondly, I would encourage you, when we're dealing with this topic it might be more helpful to look at a case that's been decided in

Canada rather than south of the border. As my friend said, there have been several hundred cases in the U.S. and I could come in here and deluge you with cases where the industry has been successful. And we could read to you all of the various Findings that had been made in those cases. However, that is really not going to assist you because it's the law of Ontario that you have to apply and you have a very limited number of facts that you need to deal with in order to make your determination. And my general observation about U.S. cases, as to why I don't think they are of very much assistance, is that first of all, we have the U.S. market, we have a U.S. product that's fundamentally different, we have a different regulatory environment, we have different companies, we have different documents, we have different facts and finally, we have different product liability laws which vary from state to state. So, trying to read a line into a U.S. decision is not particularly helpful. I think I've given you the law as I understand it to be in Canada and I think you have to take the facts that I've reviewed with you and apply it to the law. But let me just take you for a moment, if I might, through this one case and as I say, I put this, Your Honour, in the what it's worth department...

THE COURT: I used to be a member of the Quebec Bar so I'll have some understanding...

MR. BARNES: ...well, let me just put one point to you, which troubled me and has not been raised by

my friend. Because you all obviously know this, and I have since learned it, that when they talk about the claim in contract in Quebec it's because they sweep up the retailer into the definition of the manufacturer. So they confound, based on their civil codes and contractual liability, which I say is not existent in Ontario because of our Sale of Goods Act, still maintain the requirement of privity. So, there is that distinction when you read the sections in this case from contractual claims and why one can succeed in Quebec that's based on a broader definition under the code. So, I hope they can tell you something that you already knew if that's the case. So let me just take you to through this case for a moment and maybe you can just make some notes. This is a lady that started smoking in 1964 and interestingly enough she switched to Matinee and wanted to complain about no warning about addiction. So, there are some issues that are similar and I think it's just helpful, basically at least, to be aware of where there are some paragraphs which might be of some value to you. So, we've got this woman that basically started, she eventually does quit and she's claiming the cost of the patch, I think as Mr. Lennox said to you. The whole issue was whether there was a failure to warn and while the Judge was dealing with this, first of all I think you might find it interesting, just by way of background, starting at the bottom of page six. Now, what we're reading here Your Honour, I'm

quite happy to give you the French if you prefer but this is the translation, in any event, what we have here on pages six and seven they say this little discussion about addiction. And you'll recall that Mr. Brown was talking about the traditional idea, probably the way that I grew up thinking about addiction and now the way people think about it today. So, that sort of sets out the evolution of addiction and where we are today. Then we find on page eight, the first, pardon me, the second paragraph, "nonetheless for the purposes of the present case this debate appears to be academic insofar as since 1994, manufacturers have printed on certain packages that cigarettes are addictive. Anyhow it is not contested and generally recognized that is very difficult to quit smoking." Really what we've got, the same pack situation here but we've got one other element in this case, is that in 1994 when he started with this particular product he himself admits that he knew, so he didn't need to rely on the pack for that information. There also is medical evidence in that case and you'll see that once again talking about withdrawal, in the second last paragraph on the page, "withdrawal does not create any danger to health or to the life of the individual contrary to certain other substances such as alcohol or drugs." Sort of what Doctor Hammer was saying when he was giving his evidence. And then we've got the talk, on the top of the next page, about the use of the patch and then at the bottom of

the page, basically what we've got is that people can quit if they're properly motivated which is not dissimilar to the evidence that you've listened to for the past several days. And, once again, we have the evidence of Mr. Battaglia that he has in fact quit for up to three years. If I could ask you to look at page ten because I think this is really the same thing that I've been trying to press upon you here, when he talks about, the learned Judge talks about the question and issue. "The present judgment does not purport to be a study of all of the aspects or legal consequences relating to the manufacture, marketing and consumption of tobacco products." Really that's what my friend was suggesting that this is. This is some sort of an inquiry, we've got to go off on some broader folly. What I'm saying is really the issue that we have to come down to is a very narrow issue and we've got to look at the law and apply it to the limited circumstances of this case. And then, we do have the discussion about the Quebec contract action. And then, if we just look at page fifteen for a moment, in the third paragraph on page fifteen, "in other words manufacturers are not under a duty to warn eventual users of their product of facts which are of general knowledge, that is to say that are so well known in the community that they have become more or less indisputable". And two paragraphs further down, "applying these principles to the facts proven in this case", once again we come back to the facts of Barr, "It

must be recognized that for a very long time it has been generally known within the population that the use of cigarettes is harmful to health." We don't even need to deal with the general population in our case, Mr. Battaglia's already given us that evidence. And then, finally, the bottom of the next page and that's really what I was suggesting to you when I opened, "as an adult person she must assume the consequences of her choice of activities who's risks and dangers were known." And, that clearly is the point that we have with Mr. Battaglia, when he started to use our products in 1994. So, what do I say in answer to the allegations that have been made? Did the defendant deceive or mislead Mr. Battaglia? The answer to that is unequivocally no. The product is not elastic, it's just like all other low delivery products. You change the methodology you'll change the numbers. That's been known from day one and known by Mr. Battaglia as well. It's been marketed for years, there's no change in the method of ventilation, the holes were visible in 1978, in 1984, they're visible today. There is nothing that's been done to design that product which will intentionally cause the consumer to receive a higher delivery. The evidence is clear that he, Mr. Battaglia, knew that he would get more, he would get a hit if he closed the holes. And I've told you what my view is, that there's absolutely no evidence to suggest that they're not safer even though we've heard that. That just was not the

evidence. There's nothing in those products that prevented him from quitting, we've heard that, the evidence is clear that there's no such thing as a heightened addiction. That's the unequivocal evidence from the expert. And, if we had provided more information, we've heard his evidence, he'd go to another product and he'd continue smoking. All of the injuries that he alleges that he has suffered existed before he made the choice to use the Matinee product. He's fully able to quit and if he'd quit back in 1991 we wouldn't be here today. So, for all of those reasons I would say that the Plaintiff cannot make out a claim against Imperial and it should be dismissed. Those are my submissions.

THE COURT: We'll take ten minutes before I hear back from you in Court.

R E C E S S

U P O N R E S U M I N G :

REPLY BY MR. D. LENNOX:

Your Honour I have about seven points, which I'll try to make quickly. The first point is Joe believed the industry. He believed them until the 60 Minutes broadcast in 1997. My friend had made comments about what Joe knew or should have known or what Joe should have done prior to 1997 and that's just not germane to this case. Joe doesn't have reason to disbelieve industry until

the 60 Minutes broadcast in 1997, shortly before he commenced this lawsuit on his own, unrepresented. Point number two, my friend said that if there had been a range printed on the label that Joe would have smoked another lower delivery product, he would have kept smoking. The response to that is if there had been a range printed on all the low delivery products out there, there wouldn't be a low delivery product. If you look at the lab stat report that Mr. Collishaw provided yesterday, when there were dozens and dozens of different products on that chart tested under different conditions, when you test the products at what is approaching a maximum yield condition, as the B.C. government has done, the yields for the Matinee Extra Mild are very close to the yields for other products out on the market. The numbers that are on the package today have the Matinee Extra Mild at four and four, we know that there are other products out there at sixteen and sixteen and what have you. The variation is large based on the numbers that are on the package today. But, if you incorporate this range there are no low delivery products. The Matinee Extra Mild tests pretty close to what other so-called higher yield, higher tar products test like. So, it's no answer to say that Joe would have smoked another low delivery product. If the industry had gotten together and changed the voluntary code a long time ago there wouldn't be such a thing as low delivery products. Consumers wouldn't be running

around with this misperception that there was such a thing and that it was safer. Another point to make, third point is my friend talked about how the numbers were just an average for comparison purposes. Well, the average is an average based on a machine test. So you test one hundred cigarettes and the average yield from testing one hundred cigarettes is… . That's not an average of what people get, it's an average of what a machine gets. My friend talked about gasoline mileage and how everybody knows that your gasoline mileage can vary. I think that's an interesting comparison. Auto makers print a range of numbers on their cars. You go to the lot and you get highway mileage and city mileage and you get an owner's manual that explains how that works, provides lots of information. The consumer, as the purchaser of an automobile, you can verify that information very easily. You've got a fuel gauge in your car, you have a mileage gauge in your car, you can figure out how often you fill up at the gas station, how much gas you put in your car. You can figure out what mileage you're getting and if you're not getting the right mileage you can send a strongly worded note to Ford or Chrysler or what have you. Consumers don't have the same ability to figure out what these numbers on the Matinee pack mean and they should have been given better information to help them figure out what those numbers mean and to make sure that they're not labouring under a misperception. Next point, my friend mentioned

that, or submitted that Torte Law is not about punishment. Well, in fact it is, and that's what punitive damages are for and the claim they get. Of course Torte Law is about punishments. Compensatory damages are a form of punishment. Compensatory damages hurt a defendant at the same time that they restore a plaintiff and sometimes Courts are so outraged by what a corporate defendant has done that they award damages above and beyond that. In this case, my submission, my client's damages for compensatory, his compensatory damages exceed the six thousand dollar threshold. He has a claim that in a regular Court would be worth more than six thousand dollars. But, we're limited to that six and we've also asked for punitive damages and if you feel you need to go there that's certainly open for you after this case. Next point, my friend said that there was no health claim on the package. And you'll recall that Don Brown said, his evidence was that they didn't say anything about light cigarettes in their advertising because that would be a health claim and that's not allowed under their voluntary code or whatever code they operate under. And, I provided Don Brown with a copy of an ad from the 1980s when they had the voluntary code. The numbers were in fact on the ad for the Matinee Extra Mild. It seems to me like they were making a health claim in the ad and they're making a health claim on the package when it comes to advertising these yields. Next point, the Quebec

case. That was an unrepresented plaintiff and the allegation was addiction only. There was no issue there about light cigarettes. There wasn't the evidence that's here before you today. That case was simply not helpful. Next point, I think I've said seven or eight points here, well, just while I'm on that, my assistant tells me, reminds me of Don Brown's evidence. Don Brown said that the numbers were a health claim so that they wouldn't have put the numbers on the ads and I showed him that they in fact did. The numbers are a health claim in respect to ads, then they are certainly a health claim in respect to the package. My friend said that I hadn't called any witnesses on safer products. I did call a witness, Mr. Purdy Crawford and I thought maybe he would know something about safer products being as he was the head of this Canadian empire and he had this letter from Sir Patrick. To my shock Mr. Crawford said he didn't really know much about safer products at all. He didn't really know what nitrocamines were. So, we dealt with the issue of safer products in cross-examination through Mister Brown and Doctor Massey. And what is certainly left on the table is that Doctor Massey agreed that yes, nitrocamines are a carcinogen and it's our allegation that they should have removed any carcinogens as quickly as they could. As soon as they had the ability to do so, and not fifteen years after a letter from Sir Patrick. In our submission Mr. Battaglia, while he does not have

lung cancer yet, he is at risk and he should have been protected from that risk. Now, the amazing part of this case, the defendants, my friend said in his close, if Joe was addicted or if Joe had heart problems then this developed before 1994. And my friend stopped short of saying that Joe should have sued Rothmans but again, I think implicit in his argument is what's been going on all along which is blame shifting. It's not Imperial Tobacco that bears any responsibility for this product, it's Joe or it's Health Canada or it's some other tobacco company and they didn't go that far but I think that was where it was heading, that argument. The evidence from Doctor Graham is that Joe got worse and the case law I provided to you, particularly *Weinberg and Lastoplex*, the case with the exploding lacquer on the chair is that a manufacturer has a duty to provide specific warnings. And in this case the manufacturer has failed to live up to it's responsibilities and so, for those reasons, the defendant's arguments fail, plaintiff is entitled to damages in this case. Thank you very much.

THE COURT: Okay, well, thank you all very much. I'll reserve two things, my decision and how I'm going to give it. I might give a written decision or I might just call everybody back, so you'll hear from me after Christmas.

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THIS IS TO CERTIFY that the foregoing
is a true and accurate transcription
of the record made by sound recording
apparatus to the best of my skill and ability.

Vicki Charles, Court Reporter