

BETWEEN:

JOSEPH T. BATTAGLIA

(Plaintiff)

- and -

IMPERIAL TOBACCO LIMITED

(Defendant)

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE MADAM JUSTICE PAMELA THOMSON

on Tuesday, June 5, 2001

at TORONTO, Ontario

APPEARANCES:

Mr. D. Lennox

- Counsel for the Plaintiff

Ms. D. Glendinning &

- Counsel for the Defendant

Mr. L. Barnes

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REASONS FOR JUDGMENT

THOMSON, J. (orally) :

CIGARETTES AND SMOKING

A "safe cigarette" is an oxymoron.

The evidence here indicates that cigarettes and cigarette smoke is harmful to humans. They can contribute to the cause, continuation, or exacerbation of many illnesses such as heart disease and lung cancer. (Exhibit 1 Tab 4, pp. 80-84, Tab 7, p.106; Exhibits 16, 19, 23, 25, 29).

People become physically and psychologically dependent on cigarettes. The Defendant's American psychiatric witness posited that there was no such thing as addiction, in the sense of alcohol or heroin addiction. He told us that all components absorbed by the body are gone within three days of smoking, and therefore the dependence and the physiological reason for dependence goes. Dr. Hammer likened the dependence to that of a chocolate or football "addiction."

The former President of the Defendant, Mr. Brown, accepted "that smoking could be addictive in the same way as gambling," in his evidence. There have been earlier discussions about the Defendant's approach to the hazard or health of smoking, and I'll mention some of them later.

Dr. Graham, who was pretty much the first witness

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after Dr. Collishaw, is a Professor of Medicine at University of Toronto and a practicing cardiologist whose curriculum vitae eminently qualifies him as an expert. He is also a member of Physicians for a Smoke-Free Canada, and a cookbook consultant. He describes tobacco dependence as, "the condition of being a slave to a habit."

His evidence indicates that smoking, which he calls a modifiable risk factor, can contribute to, (along with other risk factors such as age, gender, genetics), and can be a cause of heart disease. Smoking affects the tone of the blood vessels, lowers the oxygen in the blood, and causes the blood to become sticky so that platelets catch on the artery walls and eventually clog up the artery.

Smokers have two to four times the chance of a non-smoker to get coronary heart disease. Smoking clearly accelerates the progression of heart disease. Within days of stopping, the chemistry of the blood improves, and the tone of the artery walls is better. Although the blood and the body stabilize over two to three years such that there is a dramatic drop of risk for cardiovascular disease, it takes ten to fourteen years before the risk of a former smoker matches that of a lifelong non-smoker. The direct link of smoking to cancer (be it "feeble" or "indisputable") has been known since the 1950's. (Exhibit 1 Tab 4, pp. 81-84, Tab 12, p. 145-146, Tab 22).

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KNOWLEDGE OF DEFENDANT

Those facts were known by the Defendant and its parent and sister companies, long before anyone else. (Exhibit 6 Tab 3). Although lawsuits are not supposed to be about morality and are supposed to stick to the facts and the law, I don't know how one gets around dealing with both of those in any lawsuit: some more than others.

Twenty-five billion light, mild, extra mild and ultra mild cigarettes sell annually, which is not as much as others, but pretty close. (Exhibit 30).

The Defendant says, 'we will make no health claims; therefore, we don't need to do health studies.' They stopped doing consumer studies in the 1980's: 'we will allow the government to set testing standards, information, and labelling requirements. We will upstage the government by putting in voluntary codes as to advertising, and state that we won't give health advice. We will not publish behavioural studies that do not reflect well on our product.' This line of thought was an abdication of responsibility. The Defendant gave up on an intention to develop a safer cigarette, (articulated in 1963). It opted to not research a "Health Oriented cigarette," which would be free of carcinogens and toxins. Instead, from 1986, the emphasis was on a "Health Reassurance cigarette," such as those with lower tar, nicotine, and carbon monoxide. (Exhibit 1 Tab 4, pp. 49-63, Tabs 5, 7, Tab 10, pp. 121-124, 130-132, Tab 12, p. 151, Tab

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14, p. 160, Tab 24, pp. 430-436; Exhibit 23).

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In 1977, a huge secret report with 20 numbered copies was sent by the defendant's parent to the Defendant. We have one of those numbered copies. (Exhibit 1 Tabs 14, 15). This report shows the extent and the depth of the knowledge of the defendant and its parent, with respect to the importance and wide ranging effects of nicotine. It was finally recognized in 1996 by the defendant's parent company in England that it is not feasible to eliminate carcinogens. So the idea was to lower the tar and nicotine, whether or not they were really safer. Its parent went to great lengths in 1982 to internally set out a "secret" strategy of resistance to counter concerns such as relations with government, media, and the medical community; medical controversy; marketing and advertising; labelling; measuring methods and standards; and taxes. (Exhibit 1 Tab 13; Exhibit 26).

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Mr. Bexon, who was a free thinker and a management employee, and, I believe, is the President now, posited that lights were being created as a brand change, not as a product change, and that the ultra milds and extra milds, were created as a third alternative to those who could not quit or who could not cut back on the number of cigarettes or how they smoked them. The Defendant recognized and operated upon that recognition: that there is a reassuring effect in smoking lighter cigarettes.

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(Exhibit 1 Tab 4, pp. 54, 64, Tab 11, Tab 14, p. 160). I do not want to leave anybody with the understanding that the Defendant is not trying to design a safer cigarette, a less hazardous cigarette. We were told of many, many kinds of experiments which have not been successful. A cigarette is, by definition, tobacco in a tube that consumers want to smoke. They have recently been looking at different curing of tobacco, such that there will be a different type of tobacco this year. Now, I do not know whether that is being grown or harvested this year. There is a recognition by the Defendant that the less hazardous the cigarette is, together with the best taste, they will not lose their customers. They do recognize, though, that their customers want to be weaned from nicotine, and want less toxic constituents of tar and nicotine in their bodies.

One of the most disturbing facts is that the numbers on the package - for instance, "Tar, 4.0 milligrams, Nicotine, .4" - are "averages" created by testing on smoking machines. The Defendant knew from the 1980's, and well before 1988 when the Tobacco Control Act came in, that the machine numbers were less than human numbers because of smoker behaviour and because of the design or construction of extra mild cigarettes. (Exhibit 1 Tab 4, pp. 52, 63, Tab 16, pp. 177-181, Tab 17, pp. 220-228, 230-235; Exhibit 6 Tab 1; Exhibit 7; Exhibit 13, Appendix #8; Exhibit 21, p. 109,874,615; Exhibit 25, p. 110,067,719;

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Exhibit 26, p. 512,106,887; Exhibit 29). That 'average' would have had a lot more meaning if people had understood that it was a statistical average, based on a machine smoking, without reference to how a human being smokes.

The Defendant knew how deeply people put their cigarettes in their mouth, on average, and this is an arithmetical average, it may be even a statistical average, and as a result of that study, they moved the filtering ventilation holes down to 12 millimetres from the end of the filter. (Exhibit 6 Tabs 25, 26, 27; Exhibit 21, p. 109,874,617). That action was based on studies which showed a "mean," (which means "average" in the dictionary), of 11.6 millimetres that people would put their mouth on. That mean had a range of plus or minus four, so it, to my simple mind at any rate, without a statistics background, means that some people do it to six mm, some do it up to 15 mm and the average statistical number is 11.6 mm. So the filter holes, the ventilation holes are at 12. They knew but they did not allow the study which dealt with those studies to be published (Exhibit 21), until 1997. (Exhibit 6 Tabs 24, 25). Moving the ventilation to 12 mm is certainly better than 11, 11½, or 10 or less, but one wonders why they did not move it to 15 mm or to 5 mm (Exhibit 7, p. 683). I gather from the evidence of Dr. Massey that the design of the cigarette is such that if you move the filtering down to 15, you would weaken the cigarette in terms of design and physically, so

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5 that they arrived at the 12 millimetre line as being the furthest down they could go on a filter without compromising the rest of the tube. Of course, they probably realized that by not so doing more people will obstruct the ventilation holes.

10 A 1982 memo points out that the Defendant is trying to get, from smaller amounts of smoke, maximum sensory and pharmacological sensations without the harm, so they began studying the smoking process. They spent less time looking at the biological effects of smoking, probably because they did not like the answers. (Exhibit 1 Tab 8, p. 103; Exhibit 23).

INDUSTRY REGULATION

15 The industry has done its part in self-regulation. They started in 1964 with a Voluntary Code. It is clear from the internal documents filed that this was operating under the premise that 'the best defence is offence.' (Exhibit 26) They clearly were under pressure from the government, (Exhibit 25 #4.1, 6.4; Exhibit 26) so they set out 10 advertising standards which continue to this day and have been widely and wisely expanded over the years. (Exhibit 6 Tabs 33-38) In 1972, 1976, and 20 1984, there were further advertising standards added.

25 In 1972, (Exhibit 6 Tab 8) they agreed to put on the warnings that "Health Canada says cigarettes are not good for you"; "Cigarettes can be 30

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addictive"; "Do not inhale"; similar things. They also agreed and published they would not manufacture cigarettes with more than 22 milligrams of tar, or 1.6 milligrams of nicotine. Certainly, all the numbers that I saw, show that they have kept well within that. Over the period from 1965 to present, all numbers appear to have gone down by at least 20%. (Exhibit 6 Tabs 4, 7, 12, 13) But these numbers vary from year to year. (Exhibit 6 Tab 17; Exhibit 20) These warnings, which were put on the package in 1972, were added to advertisements in 1976.

The 1976 Code also provided that manufacturers must put the average tar and nicotine on packages and in the ads. They go on in 1984 to stop all ads on radio and television, and stop direct marketing.

In 1995, after the Tobacco Control Act was struck down, they immediately passed a new Voluntary Code with regulations. In 1996, that Code was amended to agree to no ads in computer games; no paying a fee so people in videos or movies would use their brand; no billboards near schools; directing ads at adults. In 2000, the government of Canada placed new regulations with respect to measuring the toxic constituents, and if you have seen cigarettes lately, with respect to the labels and the pictorial messages. A picture is worth a thousand words.

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RECENT REVELATIONS

5 In 2000, Mr. Bexon, as President of the Defendant, stated to a Senate Hearing that the company position would be, if asked, "that [for] people who choose to smoke, cigarettes will cause fatal lung disease in some people," and "we would agree that cigarette smoking causes disease in some people," and "the entire world knows there are real risks associated with cigarette smoking," and "I know there are risks; I know there are significant risks." (Exhibit 1, Tab 22) That is a long way from earlier befuddling comments of officials of the Defendant: they have come a long way. (Exhibit 1 Tabs 23, 24).

15 The problem with the "low tar and low nicotine" concepts is that the reality is different from the perception. (Exhibit 16) Now, the reality is not as bad as Mr. Battaglia thought, nor as bad as Mr. Collishaw posited in his evidence, or in his earlier papers.

20 Our reality in Canada is very different from the reality of American cigarettes. Apart from tasting better, they do not have additives and they use Canadian tobacco. They are a different product. Just because there are things going on in the United States, does not mean they are going on in Canada, and, as a matter of fact, they are not going on in Canada. Mr. Collishaw admitted as much with respect to the aspect of "elasticity" in cigarettes which appears to be a focus elsewhere.

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Nonetheless, the Defendant knew that people perceived lower tar and nicotine cigarettes to be 'healthier' - I will not use that word again - less hazardous, and they pandered to it. There have been benefits because of that pandering in terms of over-all health statistics. The only thing that seems to be worse as opposed to better, is the new kind of lung cancer created deeper in the lung, (adenocarcinoma).

HISTORY

With respect to the history of the tobacco industry, I have a long lecture here but I am not going to give it, despite the hundreds of hours it took me to do it. Just to highlight: In 1942 and 1943, the first studies on the effects of nicotine were published. The public did not hear much, though. People did not seem to pay attention, although maybe government people are squirrelling away. In 1958, there was an ad in the Toronto Star that promoted the healthiness of smoking and promoted that, "If you want to be healthy, take less risk, then take less tar and nicotine." I think that was about the last time we saw anything like that, and quite understandably. In 1964, the Surgeon General of the United States came out with his first study, and made a general recommendation that people should switch to lower tar and nicotine. That had a goodly amount of press. In 1967, they got their third study out, and this time, the Cabinet of Canada is given some memos with respect to that study. (Exhibit 6 Tab 3)

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In 1968, the Toronto Star had a big report on a federal Department of Health study done by a professor at the University of Waterloo. (Exhibit 6 Tab 5) Now, I do not know his name, but it is probably Professor W.S. Rickert, (who is my favourite author when it comes to reading this material: I like his charts; you can understand them). Professor Rickert started publishing charts with measurements of tar and nicotine, and interestingly, the cigarettes with the lowest tar and nicotine then, are not around anymore. The article in the Star was clearly to promote "safer smoking," (which is also an oxymoron). The conclusions of the study, which were publicized in the Toronto Star, were to avoid the high numbers; that tar had a number of substances which could cause cancer; take a longer time between puffs; leave a long butt; smoke longer cigarettes; take the cigarette out and put it down after a puff; and do not inhale. So the Government of Canada finally got into the act. After that, there are regular press releases: I have no evidence at all that any of those press releases were paid attention to. (Exhibit 6)

In 1966, the government and the Defendant met, and there were discussions about the industry and about the health implications of smoking. (Exhibit 6 Tab 1). The U.S. Surgeon General issues his first report in 1972. (Exhibit 6 Tab 20). The 1977 secret paper recognized people become dependent on cigarettes, and looked at the definitions of

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5 "addiction," "dependence," and "habituation," by discouraging the use of the word "addiction" because it is a medical term, or was in origin, and by encouraging the use of the word "dependence," which is fair enough, from their point of view and that of Dr. Hammer, since there is a "difference" between "cigarette addiction" and "heroin addiction." The same study talks about working on consumer reassurance by taking advantage of the perception of the mildness and the sense of "low" deliveries. In 1976, they do not want to lower the nicotine too much or consumers will not want to smoke. In 1975, there are numbers that show that the machine numbers are well below human numbers; there is a 60% increase in tar, nicotine and smoke volume over that smoked by a machine. It is not until the 1980's that independent research begins, both within the Department of Health and at the University of Waterloo. As time goes along, the Defendant learns more, the Department of Health learns more, and the public learns more. In 1989, Draft Minutes (Exhibit 23) show the defendant's parent stopped research on the mechanisms of smoking-associated diseases. (Exhibit 1 Tab 4, p.51). They preferred to look at smoke chemistry in an attempt to reduce the constituents that were of regulatory concern, and to develop reductions in specific constituents, such as cigarettes very low in carbon monoxide, which could tempt a smoker who had heart disease because, they posit, "the less carbon monoxide, the better it is for your heart." They also started

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in 1989 to get serious about plant biotechnology.
(Exhibit 23)

It appears that there was a machine in the mid-80's that mimicked people and measured 10 smokers simultaneously, and I heard all about it, but that was not a big secret. They discussed it with people from Department of Health who did not seem to twig, and did not follow up. At one meeting, there were people from the Department of Agriculture who may not have talked to the people in the Department of Health. I do not know, but they certainly did not publicize. The existence of the machine is "disclosed" in 1995. (Exhibit 1 Tab 16, p. 176)

THE SCIENCE AND ART OF SMOKING AND OF CIGARETTES

As I said earlier, the Defendant uses Canadian tobacco without additives, and is attempting to address the issue of the toxic constituents and the carcinogens in the smoke. The three main smoke components, when one lights and puffs a cigarette, are tar, (which is particulate matter), nicotine, and carbon monoxide. The tar and nicotine content has gone down dramatically over the last 40 years, (20% since 1968). The ratio between the tar and the nicotine has also changed for the better. While nicotine seems to be the dependence and taste trigger, it also has harmful chemical side effects. Tar is the most important and poisonous part with respect to health risks. There have been, over the years, changes to paper porosity, to filters, to

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5 the use of filler tobacco bits, and ventilation holes, (visible and invisible). In this case, the ventilation holes can be seen. Over 60% of Canadian cigarettes are ventilated. The purpose of the new 2001 method of curing tobacco, is to lower the nitrosamines, which are the really bad guys in the tar portion of cigarettes.

10 The effect of smoking depends on several factors, in addition to the chemical composition of the smoke and to the taste of a cigarette. Much research and many studies have been done relating to smoking behaviour as a component of smoking effects. (Exhibit 1 Tabs 16, 17, pp. 220-228; Exhibit 6 Tabs 28, 30, 31, 32; Exhibit 7 Tabs 22, 25, 29). There have been, and are, smoking machines which measure tar, nicotine and carbon monoxide. Nobody suggests that these machines smoke like human beings. Nonetheless, these machine measurements are the world-recognized standard, not only for how long a cigarette is to be, and how many inches it is supposed to go into the machine, and how many puffs it takes, and how deep those puffs are, and so on. All of that, until recently, has not even approximated human behaviour. (Exhibit 29, p. 9)

25 Human behaviour affects what happens to the chemicals that are in the smoke: How many puffs do you take? How often? How deeply do you inhale? How much do you inhale? How big are your puffs? How close to the filter do you smoke it down? How and

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where is it held between puffs? How and where is it held during puffs? How far do you insert the filter into the mouth? What do you do with the cigarette in between puffs? Does saliva wet the filter? Do you bite the filter? All kinds of things.

The importance of behaviour is key to assessing the validity of the common impression that lower tar and nicotine cigarettes are less harmful. Particularly important is the blocking of the ventilation holes, in common with the length and volume of puffs, and the depth and volume of inhalation. The issue of the size of the puffs is called "intensity," and the depth of the inhalation, (which brings more nicotine into the system), is called compensation. (Exhibit 7)

It has been known to government and the Defendant for 20 years that blockage will affect inhalation and satisfaction, and will increase the amount of tar dramatically, as well as not so dramatically increase the amount of nicotine and carbon monoxide. I heard over and over again, and I accept, "Some people block some holes some of the time." Every smoker is different and every smoker smokes each cigarette differently. Maybe even a smoker smokes each puff differently, although we didn't get down to that detail. (Exhibit 1 Tab 4, p. 56; Exhibit 6 Tabs 23, 24, 26, 27, 31, 32; Exhibit 22; Exhibit 29, p. 10)

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The blockage of the ventilation holes can occur with the fingers, which appears to be relevant if the fingers stay with the cigarette while a puff is being taken because it cuts down on the amount of air going in with the smoke. The ventilation holes can also be blocked with the upper or lower lip. I am not going to talk about the people that knowingly put tape over them: those people are of no concern.

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It still is a mystery, why the defendant chose 12 millimetres. At 12 millimetres, Mr. Battaglia blocked some of the holes with his mouth. I understand that there is a point at which, if you take it down, there will be more finger blocking. I do not know if that is important or not. Maybe people take their fingers off when they take a puff, so it would not matter. The most recent studies show that if the holes are 12 millimetres from the end, as they are in Matinée Extra Mild King Size and the other Matinée Extra Milds, 72% of smokers do not cover with the mouth, 25% cover partly, and 3% cover completely. Whether this is conscious, unconscious, by accident or design, is not part of those numbers. (Exhibit 2 Tab 27)

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"Coverage" means 50%. Obviously, you would have to work pretty hard to cover 100% of the holes with your lips. Other than holding the cigarette and making a circle around it, it would be hard to cover all the holes with the fingers: the studies

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5 indicate the fingers cover about 25%. Dr. Massey, the defendant's scientist, said that the blockage results in a "minor" increase in the amount of smoke, but the studies show that the amount that is inhaled, or is puffed in, is greater when the holes are blocked, certainly greater than the machines. But for the majority, this is not the case. Dr. Massey says that people who have been smoking the same ventilated cigarette for awhile will, if they cover the holes all the time, take fewer puffs of less volume, which means they are smoking less intensely. How deeply they are inhaling was not addressed. (Exhibit 6 Tab 27; Exhibit 25; Exhibit 29, p. 9)

10 It appears that the larger puffs, and holding the puff longer happens when people change cigarettes. When you go to the really, really light cigarettes, where you "smoke air," as Mr. Battaglia said, people will take greater volumes. The body will, through its behaviour, compensate for less tar and less nicotine. Interesting, that same thing happens in reverse if you move from a Matinée Extra Mild to, for instance, a Matinée, which is stronger. People will take less volume in and will inhale more shallowly, so they compensate, and smoke less intensely when they first change. The evidence is that that behaviour only lasts for a short term. Nobody defined what short term is, but eventually, the behaviour goes back and assumes a normal pattern. (Exhibit 1 Tab 17, p. 228-230; Exhibit 6 Tabs 18, 26; Exhibits 7, 22; Exhibit 29,

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p. 4).

5 With respect to the science and measurement of how much of various components there are, it fills books. Suffice it to say that Matinée Extra Mild King Size, which were the primary cigarette smoked by the Plaintiff, along with Matinée Extra Mild Slim 100s, (which I will just call the "Slims"), have more nicotine than Craven A, McDonald's Select Ultra Mild, and Medallion. They have more tar than McDonald's Select Ultra Mild, Viscount, Medallion, Craven A Ultra Mild King Size, and Craven A Special Mild, and they have more carbon monoxide than Craven A Ultra Mild King Size, McDonald's Select Ultra Mild King Size, and Medallion. This was a study in 1996 at the University, done for Canada's Department of Health (Exhibit 29). Matinée Extra Mild King Size has less than most other cigarettes. It has less than, within its own brand, Regular Size Extra Mild, less than Slims, Regular, and 100's and obviously less than Matinée in overall tar component. It appears that unless the Plaintiff is willing to go to "sucking air" with Medallion or Viscount, he is stuck with what the market has.

25 Now there are new ways of measuring. (Exhibit 16). People will COMPENSATE by smoking more INTENSIVELY to obtain "satisfaction": (Exhibit 1 Tab 13, p. 154, Tab 17, pp. 206, 222, 228-236; Exhibit 20, pp. 100,535,053 to 6). This is why the numbers on the package are so unreal and unreliable. (Exhibit

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6 Tabs 27, 31, 32). British Columbia is requiring measurements to be filed on a yearly basis, I think. Those numbers are much higher, but they are all measured the same way, and those new numbers show that there is, for humans, less difference between a Regular and an Extra Mild Matinée than the numbers on the packages. Again, it depends on whether you obstruct the ventilation holes or not. If you take a puff under the new criteria, and obstruct - and that is 100% obstruction here, because it is a test by a machine - tar goes up four times, nicotine three times, and carbon monoxide four times. It may be, as Dr. Massey says, there is little effect on the amount of smoke, but it certainly appears that there is an effect on the amount of tar, nicotine and carbon monoxide that is going into the body.

PLAINTIFF'S HISTORY

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Now we come to Mr. Battaglia. Mr. Battaglia started to smoke in 1958, at age 17. He worked at Rothmans, where he started, and he smoked Rothmans' products while he worked there. When the Surgeon General's report came out in the '60's, he was told by his superiors, both in the marketing and development departments, that the Surgeon General was wrong, and that nicotine was not bad: and sure it may be dependence making, but it is safe, and there is no risk. If he really wanted to make sure there was no risk, he should leave a longer butt. There was a suggestion, at some time during his employment, that he smoke king size and take the

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5 same number of puffs as he would if he were smoking a regular, then put it out, so he would avoid the bad stuff, the toxins in the tobacco.

10 Between 1958 and 1974 or 1975, Mr. Battaglia smoked a variety of high and medium tar cigarettes, as well as Benson and Hedges Lights. He, during this period, was a fierce defender of the cigarette industry, and believed those people he worked for and others like them would not try and sell something if it were harmful. To put it in his words, "It's common sense. If it's not healthy, they wouldn't try to sell it." Well, I guess we all know the answer to that. Mr. Battaglia stopped a few times. The evidence bounces around. We have got charts, we have Mr. Battaglia in an affidavit, we have Mr. Battaglia in his statement, we have Mr. Barnes in cross-examination, we have Mr. Battaglia in direct examination. The bottom line is, he started and he stopped after 1975 on several occasions. He went back as many times as he stopped because he is still smoking. So one day it will be more stops than starts, you see, and then he will be okay. He truly believed cigarettes were not addictive. He did not believe his dad who said that they were "coffin nails." Laterally, in 1992, he quit for a couple of years. His quitting methods were cold turkey, the patch, hypnotism, I do not think acupuncture. But some bad things happened in his life and the Plaintiff started to smoke again around 1993, or 1994. He started what I call a brief flirtation with Benson and Hedges.

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He quickly switched, in 1994, to Matinée Extra Mild King Size, and until partway through the trial, smoked those and Slim 100s.

In 1996, the Plaintiff had an embolism in his leg, and an operation. In 1999, he had an angiogram which showed three of his arteries blocked.

He relied on the numbers on the package where it says that he would get the "average" amount, thinking that he, as an average smoker - he called himself a professional smoker - is an average guy. He knew he could get more than the average by covering the ventilation holes, tightening up on the filter or breathing deeply, which he demonstrated with a cigarette that was not lit. Generally, he described his smoking as "dainty." He took a puff, and analyzed it. It appeared that one finger was over some of the holes while he was holding it. For the life of me, I did not see whether he took his fingers off the holes while he took a puff - I thought he was going to do it more than once. Dr. Massey saw him release hold while puffing. He said that his lips were near, and to some extent over, the ventilation holes. Mr. Battaglia, you knew that cigarettes were not good for you.

In 1997, the Plaintiff saw a T.V. programme, and truly felt betrayed by the industry. That is when he got mad and came to this Court. He believed, based on the information in that programme and

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5 other information obtained after, that the nicotine content of his cigarettes was being manipulated in such a way that he got hundreds of times more than was on the package. This is not true in Canada. He truly came to understand, at that point, that he was addicted to the nicotine in the cigarette smoke, and because of that dependence, continued to want to have cigarettes on a regular basis.

10 He had believed that the numbers on the package were a guide as to what he was actually smoking, given that he was an average Joe. Even though he had been told to quit by his parents, his doctors and friends, he believed that the warnings were not necessarily true because they were put on there by government who did not know half as much as the industry itself. The defendant's parent had some 15 400 scientists at its disposal. In England and around the world there were hundreds of scientists looking at this, and he believed that if what the government said was true, the industry would say so. Until 1997, that is. The Plaintiff suspected that smoking was not good for him.

20 In 1991, he consulted Dr. Graham who I mentioned at the very beginning of my reasons, because of pressure from a friend. He saw Dr. Graham several times. Many tests were done. He was told that he had a heart problem, a cholesterol problem, and a hypertension problem, and that he had better stop smoking. He did stop, for two years. The problem was Mr. Battaglia was never contacted by the doctor 25 30

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to whom Dr. Graham reported because Mr. Battaglia was not a patient of that doctor, but rather the doctor was his friend's doctor. Somehow or other, the doctor got a report on Mr. Battaglia, did not contact the friend and say, "You better get this to your friend," so it ended up in the doctor's files. Dr. Graham diagnosed the Plaintiff as having an underlying ischemic heart disease and recommended not only to stop smoking, but to take ASA daily and nitroglycerine as needed.

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In early 1999, after his embolism, Mr. Battaglia was sent by his general practitioner to other cardiologists, and it becomes clear that Mr. Battaglia is in deep trouble. The silent ischemia diagnosed by Dr. Graham had now produced small infarcts, and significant coronary heart disease. He is told to re-start the ASA, which means to me that somewhere between '91 and '99, Mr. Battaglia stopped taking the ASA. He starts getting tested and has an electrocardiogram in February. He meets all these people. The one cardiologist sends him to another cardiologist for consultation and so on.

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The happy consequence is that Mr. Battaglia does not need surgery. During 1999, his medical condition became stable because of medical management, despite the fact that he kept smoking. He had another ECG in December of 1999: the evidence of Dr. Graham was that there was no deterioration between February and December (not, Mr. Barnes, from '91 to '99 as you understood it).

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So that is the good news.

The bad news is that his chances of living another ten years to get the benefit of pure, clean lungs is not high.

The Plaintiff would change brands. He would go up, certainly before the 1990s, but then, generally, he bounced down. He probably compensated. He did this because he knew he should not smoke. (Exhibit 10) He understands that he has not beat his dependency because he keeps coming back to the smoking. So he thinks, "Well, I've tried all these other ways. Maybe I'll just sort of wean myself off the nicotine, sort of a more pleasurable therapy." And that is what he thought he was doing when he went down to the Matinéés: he was lessening the nicotine, and therefore, lessening his dependence. Or so he thought. As a side benefit, but not so much of concern to him before 1999, was that he would get less "bad stuff." He thought that he would become less addicted because it was less nicotine, and that the problems that he had in 1996 would be slow to grow into something serious because he would be also getting less tar.

He chose them because they had the low numbers and a taste, rather than low numbers and no taste. The conundrum was that no matter what, with Matinée Extra Mild King Size and Slim 100s, he was getting as low as you could go, except for the

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two brands mentioned earlier.

5 The evidence is clear that you are either addicted
or you are not; you are either dependent or you are
not. It is like being a little bit pregnant: you
cannot be a little bit pregnant. You cannot be a
little bit addicted. The only way to permanently
10 stop is as suggested by Dr. Hammer. In this case,
the Plaintiff is not saying, "It is the
Defendant's fault that I'm addicted." We are
talking about holding themselves out as appearing
to help him quit and to help him smoke with less
hazard to his body. The Plaintiff knew about
15 porous cigarette paper, because he had marketed
Rembrandt back in the 1960s. He knew about the
concept of air mixing with the tobacco through a
porous paper, as being "better" for you. He
understood blocking the holes or not blocking the
holes would affect the amount of hazardous material
20 he was getting.

It is clear from the evidence, and recognized by
those who have been through this lawsuit, that
nicotine dependency is, in and of itself, not
25 "dangerous" to health. It is something that one
must overcome if one wants to delete the dangers of
tar and carbon monoxide. There may be harmful
things in nicotine: it is certainly not the focus
of the literature. The only way you can avoid the
dangers of tar and carbon monoxide is to beat the
30 desire for nicotine stimulation.

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5 If the Plaintiff had not smoked Matinée Extra Mild King Size or Slim 100s, but something else, would he have been better off today? With respect to being dependent on cigarettes, no. With respect to less tar and carbon monoxide, yes, if he had smoked Medallion from 1977 on, or Viscount from 1980 on or Viscount 1, from sometime in the 1980s.

10 Mr. Battaglia, with great common sense, (it made sense to me), said to himself, "Well, if the numbers are lower, it is less hazardous. If you smoke Matinée Extra Mild because less is better, and more, i.e. Matinée Regulars, is worse, surely that same principle applies to the amounts of smoke that the smoker smokes. If you take less puffs, more breaks, fewer cigarettes; if you take smaller mouthfuls, you inhale less deeply and less long, if you have lots of sidestream smoke coming out your nose and the side of your mouth, you'll be better off. Less is better and more is worse." He had figured things out with respect to the ventilation holes.

25 The tar in cigarettes has thousands of chemicals in it, but we focused in the trial on 40 poisons, including things like acetone, formaldehyde, nitrosamines, all kinds of things that we would not put into our bodies any other way. We learned from Dr. Graham what the effect can be on the body with respect to those prone to heart disease: it can trigger the heart disease or it can aggravate and accelerate, which is what is the issue here.

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TORT FINDINGS

In Lambert [1972] SCR 569, which was varnish on a parquet floor, the Supreme Court of Canada said that the words "inflammable" on the tin were not enough; that they should have said, "Do not use near an open flame." What happened in that case was that they were not using it near an open flame but the fumes got near an open flame and there was a very unpleasant fire and explosion. The Supreme Court of Canada said they had to do better than just a generic inflammable sticker.

We do not have just a general package of cigarettes with numbers on it. We have a package of cigarettes that not only says it is hazardous to your health, but shows pictures of all kinds of ugly things. The numbers turn out, and this is after a lot of analyzing and agonizing, to be useful for one thing, and that is to compare it with other packages of cigarettes. Those numbers told the plaintiff that he had a choice of two other cigarettes to give him less of everything. Even if he smoked the maximum of those other two lower cigarettes, he would get less tar, nicotine and CO2 than if he had smoked the minimum in a *Matinée*. (Exhibit 29)

Without playing around with statistics, the Plaintiff would be left with the same choices. The new regulations call for a range, but not a range of absolute numbers. It is a range of means, which is defined as an average of averages, an

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average of top averages of the averages, and bottom averages of the averages. So all we are now getting is a range of averages, a range of mean calculations on the new cigarette packages.

Knowing that these numbers are statistically non-human does not help the Plaintiff make a better health choice, or a better choice in terms of brand. He already knows, just from the numbers, whatever they mean, that Matinée Slim numbers are less than others: all of the evidence shows that. Even if you use the standard deviation factors, the range of averages is still the lowest, after Medallion and Viscount One.

Should the Defendant have put warnings on the packages, in addition to the health information? Should they put a warning that those toxic constituents can be varied in amount, depending on how a smoker smokes? Maybe so, but I do not think it would have made one whit of difference to Mr. Battaglia, who already knew how to vary his smoking habits, and who already knew that less was better, and more was not so good. The fact that the industry and the Defendant were not forthcoming with what they knew in another time is balanced by their being forthcoming whenever they were asked a question at this trial. As far as I am concerned, I think every question was answered honestly and fairly. The bottom line is, however you measure, however you smoke, Matinée Extra Mild are going to give you less than any

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5
other cigarette, unless you decide that you are going to smoke them intensely, with full compensation, with totally blocked holes, on a consistent 100% basis. The evidence of Mr. Battaglia is that he does not smoke like that.

10
Mr. Massey posited that the Plaintiff, based on the demonstration, and his description of himself as a dainty smoker, would have been getting, on a balance of probabilities, less than the averages on the package. There was reference to a curve and a chart Mr. Collishaw used, which showed, as I understood it, the more you smoke, the more gunk you are going to get. When he took Mr. Battaglia's evidence: 25 to 35 cigarettes a day, a dainty smoker, longer butt, partially covered holes by the lips, where the Plaintiff was on that graph indicated he was below the stated averages on the package.

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Mr. Battaglia's heart disease got worse over an eight year period, two of which he did not smoke. In 1999, with medical management and the ASA, and various other drugs attending to the hypertension, the cholesterol and the diabetes, his condition stabilized. Yet he was still smoking. So the smoking did not continue to speed up the deterioration of his arteries in 1999. Based on the studies of the Defendant, based on the studies of Health Canada, there was nothing to indicate the Plaintiff smoked intensively in such a way as to get significantly higher doses than on the package.

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He had already modified his behaviour by deciding on butting out sooner.

A warning to people who smoke that they can get more nicotine or less nicotine, depending on how they smoke the cigarette, seems like bringing coals to Newcastle. I cannot find that there was a duty to warn Mr. Battaglia that the numbers he would be getting would only relate to the number on the package depending on his behaviour.

Briefly, there was argument about deceit, and I think the evidence is clear that the facts, as I have found them, do not fall within the tort of deceit as I have understood it. We are not dealing with breach of implied warranty. I have dealt with the duty to warn, which leaves the issue of negligent misrepresentation.

NEGLIGENT MISREPRESENTATION

The Defendant knew that the Plaintiff and other smokers, other customers, would rely on those numbers, and that those numbers were based on an average smoking machine, smoking in a manner unlike a human being. The word "average" was a word and a concept introduced by the Canadian Tobacco Manufacturers Council, in the 1976 Voluntary Code. The word average appears to be an adjective, or a descriptor, modifying the numbers that follow on the package. "Toxic Constituents (Average)," and then the numbers start on the line underneath.

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5 "Average" has a simple meaning of "ordinary, common, usual," which is how Mr. Battaglia understood it. It is also an arithmetic term, meaning adding two or more numbers and dividing the total by the number of numbers. In this sense, the word "average" can be either a verb, an adjective or a noun. When it is a noun, it is interchangeable with the word "mean." "Average" is also a term in the science of statistics, along with such words as regression, replicate, standard deviation, mean values, grand mean, and coefficient variants. Those averages are now being put aside, and the Government is looking at ranges. But not ranges of absolute numbers: a range of averages. Those average numbers are much larger because the new testing mechanisms, again recognized by the International Organization of Standardization, use the "Intense Method" (intense meaning larger puffs).

20 The intense method of testing narrows the gap between all cigarettes and dramatically increases the 'numbers.' (Exhibit 16). The machine that was used, up until last year or the year before, was built to measure non-ventilated cigarettes, and its parameters are unrelated to how any human being smokes, in terms of blockage, puff volume and other criteria. So, as I've stated earlier, this number meant nothing, other than being used to compare it with similar average numbers on other packages.

30 The new B.C. numbers, these are 1996 numbers, are

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increased with respect to Matinée Extra Mild King Size. The numbers are 72% higher from an unobstructed test to an obstructed test, an unobstructed small volume puff, to an obstructed large volume puff. And the other numbers are similar. But the point is that so are all the other cigarettes similarly increased, some less so, some more so, and Matinée is still close to the bottom.

It is not unreasonable to use the numbers as a "hazard gauge." The government suggested it back in 1964 and in press releases, and Health Minister John Munroe made a big deal of it back in the 1970s. The Defendant knew that people, including the Plaintiff as an average person even though he worked for a tobacco company, would rely on those numbers. When he worked there were no numbers; they were just starting to come out, and he did not care about the numbers. All he wanted to do was make sure he sold his quota of cigarettes.

Despite the protestations of the Defendant, publishing the numbers is making a health claim, particularly when you know that Mr. Battaglia and others do not know that the number is statistically created from a machine, far from reality. The Defendant was well aware of people's reliance on the numbers.

There is evidence in a Quebec case where former President, D. Brown gave evidence. (Exhibit 1 Tab

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5 24). The evidence of Mr. Brown here, was that the time for tiptoeing around the issue of the hazardness of smoking was gone. He knew, and the company knew, people within the Defendant knew, that lower numbers suggested less hazardous cigarettes. The lower numbers in the tar indicate less risk of cancer, and less risk of contracting heart disease, or, as in Mr. Battaglia's case, less risk of accelerating that disease so fast there is a 25% possibility of dropping dead suddenly.

10 They knew people thought less nicotine just had to be better for them. Well, we know it is not. You are either hooked or you are not.

15 We now know that "Extra Mild" or "Light" or "Ultra Mild," - any of those combination of words, do not mean that there is a sub-species of cigarettes that all come within certain parameters. What it means is that it has less than its parent, in the same brand. Nonetheless, people relied on that average number to make certain conclusions. Granted, the government got them to keep putting it on the packages, in 1988, when they passed the statute, but they had been doing it before. That does not take away from the Defendant's responsibility for thinking up the word, and for using the words "average," "low," "mild" and never disabusing anybody that it was a machine that didn't smoke like a human. Nonetheless, Mr. Battaglia could read, and he knew what the numbers were, and all

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of the cigarettes are measured by the same mechanism, invalid though it may be for reality purposes, so he could make his decisions.

This average number is a misrepresentation. It misrepresents that the average number is a simple arithmetic number.

It suggests to me and to Mr. Battaglia that a whole bunch of people got together and smoked, and they measured, and that is what the average was. But it was not people, it was smoking machines as earlier described. The lower numbers suggest they are less hazardous, and is only true, depending on how you smoke.

It is so simple to put "statistical average based on smoking machine" on the package. The use of the word "average," without describing what it is and fessing up to what it is, suggests how much the smoker is going to get, give or take a few multi-milli-milligrams. That is two elements of negligent misrepresentation. (Exhibits 16, 29)

Mr. Battaglia relied on those numbers to give him an indication of what he was getting. Now, in relative terms, it was an indication. It told him he was not getting as much as Players Filter Tip but they did not tell him he could get almost as much, had he been an intense smoker, as a dainty Players smoker. That reliance, in my view, was reasonable in the context of a smoker who also

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knows that the number can depend on how he smokes a cigarette.

The last element is whether there was a detriment to the Plaintiff from this misrepresentation of the concept and word "average," by non-feasance as much as anything. The answer is 'No.' He still had an indication of the numbers. All numbers were being measured by the same criteria.

His heart disease stabilized in 1999, when he started taking proper medication, brought his HDL down, his diabetes was under control, and the hypertension was gone. It is impossible to say that the smoking was a significant factor, other than a minor one, in the acceleration of his disease. Otherwise, in 1999, even though he was under proper medical management, his condition would have deteriorated at least a bit: it did not between February and December.

CONCLUSION

I accept the conclusion of Dr. Massey that on a balance of probabilities Mr. Battaglia was not getting a lot of nicotine or a lot of tar, based on how he smoked, where he smoked, how many he smoked, and so on.

He wanted these cigarettes to wean him from nicotine. That cannot happen. He is probably getting less than most. I do not know if the science could tell me whether it was less than the

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average of this machine.

5 If he had been told the number was a statistical average from a machine that did not smoke like a human, he would not have stopped smoking. He was given a false sense of security, that's true. The only thing that he could have done was quit.

10 Well, he knew that he should quit anyway, so knowing that the average comes from a machine is not going to encourage him, if his doctor can't, his girlfriend can't, his lawyer can't, "his judge" can't. The plaintiff is the only one who has control over whether he will smoke at all, how much he will smoke, what brand or the numbers he will smoke, and how he will smoke. Only he can decide to overcome his dependency and clean out his body. The evidence of his own doctor is that there are dramatic improvements within a week, and then again, after two years. He can improve his chances of living by stopping immediately. Nicotine, no matter how little, acts within the body and mind to create dependency: less is not less. There is a craving for nicotine whether a little or a lot is inhaled. Although probably inhaling more tar than indicated, the Plaintiff was getting less - although not a lot less - than other cigarettes. Smoking more or smoking less is an act of will.

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30 The misrepresentations were relied on but not to the detriment of the Plaintiff. Doubtless, smoking affected his health, but not significantly: his

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5 health deteriorated for many known and unknown reasons, yet did NOT get worse once under proper medical supervision in 1999. Surely, had his smoking been a significant factor, his ECG would have shown a poorer result than the earlier one.

10 One comment on Létourneau and Imperial Tobacco, the 1998 decision of the Cour de Petits Créances in Rimouski, Quebec. I see nothing wrong with the reasoning of the judge there. I appreciate it was a different issue, and the evidence was extremely sparse.

15 Common sense is common sense and I guess that is what this all comes down to. I must dismiss the Claim, based on the facts peculiar to the Plaintiff.

20 In some ways, I feel as if I could write a book as thick as all of these put together, and I would like to thank counsel for all the work they did. I have received a wonderful education. It makes me want to go back and take courses in statistics, chemistry, physics, biology, and mathematics, just to name a few.

25 THE COURT: Were there any offers to settle, under the rules that I should consider with respect to the order as to costs, or do you have any argument on costs? I'll bet you Mr. Lennox is going to be shorter so could I hear from you first? Do you have anything to say other than waiting to see what

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Mr. Barnes has to say?

MR. LENNOX: I just want to wait to see what Mr. Barnes has to say.

MR. BARNES: Your Honour, I wonder - it's been a lengthy judgment. Would it be possible to perhaps put some submissions in writing to you? Would that

THE COURT: No. That costs money. That costs money. No.

MR. BARNES: Well, I wasn't intending to do that. Would you

THE COURT: I'd like to take a break.

MR. BARNES: Would that be fine then?

THE COURT: But I want to deal - I want this out of my life today.

MR. BARNES: Could I ask you one question, because I'm sure a lot of people are going to ask. Are you planning to have the judgment then come back to you before you approve it for release?

THE COURT: Well, I mean, as far as I'm concerned, I'm done. If somebody orders the transcript, I'll edit it. If somebody is ordering it for appeal purposes, then I will stick in some citations and references to exhibits, because I have that written. It's excruciatingly boring, and I'm confident that everything I said can be backed up.

*** R E C E S S ***

UPON RESUMING:

THE COURT: I'm all ears, Mr. Barnes.

MR. BARNES: You can have an early afternoon; my client is not seeking costs, Your Honour.

THE COURT: I even did some research. I'm very glad to hear that. Well, then my decision time is finished. Then, the case is dismissed. No costs, as asked.

MR. LENNOX: Thank you, Your Honour.

MR. BARNES: Thank you, Your Honour.

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

Diane Stocker
Diane Stocker, Court Reporter

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