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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	***Andrew Roman, Joel Rochon*** and
	)	***Douglas Lennox*** for the Plaintiffs
JASMINE RAGOONANAN and PHILIP	)	
RAGOONANAN, by their estate	)	***Lyndon A.J Barnes*** *and*
representative, DAVINA PAGOONANAN,	)	***Andrea Laing*** for the Defendant
and RANUKA BAB OOLAL, by her estate	)	Imperial Tobacco Canada Limited
representative, VASHTI BABOOLAL	)	
	)	***Steven L Sofer*** for the Defendant
Plaintiffs	)	Rothmans, Benson & Hedges Inc.
	)	
- and -	)	***E A. Cherniak*** *and*
	)	***Susan* B. *Wortzman*** for the
IMPERIAL TOBACCO CANADA	)	Defendant JTI-MacDonald Inc.
LIMITED, ROTHMANS, BENSON &	)	
HEDGES INC. and JTI-MacDONALD INC	)	**HEARD**: November 8 and 9, 2000
	)	
Defendants	)	

CUMMING J.:

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

Background

[1] At about 3:30 a.m. on January 18, 1998, a fire and resulting tragedy occurred in the Brampton, Ontario townhouse residence of the plaintiff Davina Ragoonanan ("Ms. Ragoonanan"). The fire destroyed the residence. Ms. Ragoonanan's three year old daughter, Jasmine Ragoonanan, died in the fire. Ms Ragoonanan's 16 year old brother, Philip Ragoonanan, also died. Ms. Ragoonanan brings this action as the representative of their estates. In this capacity, she brings the action as a putative representative plaintiff in a class proceeding under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 *("CPA").*

[2] The cause of the fire was an unextinguished cigarette. The claim alleges a cigarette manufactured by the defendant ITCL that Philip Ragoonanan had been smoking "came into contact with the couch "where he intended to sleep that night." It is alleged the unextinguished cigarette smouldered for some time before the couch burst into flames whereupon the fire spread quickly. Ms. Ragoonanan was able to escape along with a two-year old, Jaden Ragoonanan, and Ronald Balkaran, by jumping from a window.

[3] Ranuka Baboolal, the 15 year old daughter of the plaintiff, Vashti Baboolal ("Ms. Baboolal"), also died in the fire. Ms. Baboolal also brings this action as the estate representative of her daughter.

[4] The defendants, Imperial Tobacco Canada Limited ("ITCL"), Rothmans, Benson & Hedges Inc. ("RBH") and JTI-MacDonald Inc. ("JTI-M") are Canadian corporations carrying on the business of manufacturing consumer products from tobacco - in particular, cigarettes. They allegedly supply the entire Canadian market for cigarettes. The defendant ITCL allegedly manufactured the cigarette which is related to the fire.

The Class Proceeding

[5] The representative plaintiffs bring the action o n behalf of a putative class defined in the pleading as: persons in Canada who suffered a loss or injury as a result of a fire after October 1, 1987 which occurred when a cigarette ignited upholstered furniture or a mattress; the estates of persons who died in any such fires; and persons with a derivative claim.

[6] The essence of the claim is the allegation that the injuries, deaths and property losses could have been avoided if the cigarettes sold by the defendants had been so-called "fire safe cigarettes". The claim alleges that the defendants' existing cigarettes may smoulder for some time and then ignite with a "flash over effect", being a sudden open flame with hot expanding gases. The pleading alleges that if the defendants cigarettes were "fire safe" then the deaths, injuries and property losses would have been avoided or, at least, reduced.

[7] The claim refers to "fire safe" cigarettes as cigarettes which have "a reduced propensity for igniting, upholstered furniture and mattress fires". The variations identified in the claim include the "self-extinguishing cigarette" (with a reduced circumference, reduced tobacco packing density and/or reduced paper porosity), the "reduced conductivity cigarette" or the employment of an "alternative nicotine delivery device". The pleading alleges that the three defendants' cigarettes all suffer from the same defect in design.

[8] The pleading asserts as common issues: whether the defendants owed a duty of care, whether there was a breach of the duty of care such that there is liability in negligence or product liability in tort and whether there are compensable losses.

[9] The claim in negligence and product liability is founded on the theory that the defendants manufactured an inherently defective product when they knew how to manufacture a safer product. The plaintiffs allege that it is foreseeable to the defendants that cigarettes, being addictive due to nicotine, will be consumed at all times of the day and night in the home. The plaintiffs allege the defendants have a duty to provide smokers with the safest possible cigarette so as to minimize or eliminate the foreseeable harm to smokers and others from fire through an unextinguished cigarette. The plaintiffs further allege that the defendants have deliberately chosen not to manufacture fire safe cigarettes because such cigarettes might cause a decrease in sales.

The Motions

[10] The defendants move under rule 21.01(l)(b) to strike the pleading on the basis that "it discloses no reasonable cause of action". A motion to strike a class claim may be brought in advance of a certification hearing. See *Stone v. Wellington (County) Board of Education* (1999), 29 C.P.C. (4") 320 (Ont. C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 336.

[11] A plaintiff must plead all the material facts on which he or she relies and which must be proven to establish a cause of action in law. *Balanyk v. University of Toronto,* [1999] O.J. No. 2162 at para. 29 (S.C.J.). A purely legal question is presented with a Rule 21.01(1)(b) motion: does the statement of claim disclose a legally sufficient claim, that is, is it substantively adequate? *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 at 264 (Ont. C.A.). As well, the pleading is not to be struck out where the law has not been fully settled in the jurisprudence or a novel cause of action is presented. *Nash v. Ontario* (1995), 27 O.R. (3d) I *(C.A.); Khanna v. Royal College of Dental Surgeons of Ontario* (2000), 47 O.R. (3d) 95 (C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 244.

[12] The test for striking all, or part, of a pleading is whether it is "plain and obvious" that the claim does not disclose a reasonable cause of action. The facts alleged in the pleading are accepted as true for the purpose of the motion, unless they are patently incapable of proof. *Hunt v. Carey Canada Inc.,* [19901 2 S.C.R. 959 at 979-80.

[13] Two issues are raised. Both are issues of first impression in Ontario

First Issue: Can there be "causation - in - fact" on the part of RBH or JTI-M?

[14] For the purpose of the submissions with respect to the first issue - raised by RBH and JTI-M- it is assumed that the pleading raises a reasonable cause of action against ITCL by the representative plaintiffs.

[15] RBH and JTI-M raise an issue of first instance to class proceedings in Ontario. Is it sufficient to meet rule 21.01(l)(b) requirements that a representative plaintiff has a reasonable cause of action against one defendant (ITCL) although there is no

representative plaintiff with a cause of action against the other defendants (PBH and JTIM)? They submit that it is plain and obvious that the plaintiffs' claims, rooted in negligence and products liability, cannot succeed as against them. They assert that, in a class proceeding under the *CPA,* for any given defendant there must be at least one representative plaintiff who has "a reasonable cause of action" disclosed in the pleading against that defendant.

[16] PBH and JTI-M submit that it is insufficient for a representative plaintiff to have a cause of action on the face of the pleading against one defendant (ITCL) but not other defendants (RBH and JTI-M), even though at least some members of the putative class would have a cause of action on the face of the pleading against those other two defendants.

[17] First, RBH and JTI-M say that, on the face of the pleading, their cigarette products were not involved in respect of the fire in question. RBH and JTI-M did not manufacture the cigarette which is allegedly responsible for the fire. The pleading alleges the cigarette was made by ITCL. That is, the representative plaintiffs do not have any factual relationship with RBH or JTI-M. Put simply, they say that, on the face of the pleading, the products of RBH and JTI-M could not possibly have *caused* the representative plaintiffs' damages. Therefore, RBH and JTI-M submit they cannot conceivably be liable to the representative plaintiffs on the basis of the products they sell.

[18] The authorities distinguish between "causation-in-fact" and legal causation or “proximate cause". Causation-in-fact is a minimal threshold, the test for which is whether the injury would have been sustained "but for" the defendant's act or omission. On the assumption that a "fire safe" design would prevent or lessen the risk of cigarette-related fires, this minimal threshold has been met with respect to the defendant ITCL.

[19] The pleading asserts that the defendants are each negligent in the manufacture and marketing of a defective product, their cigarettes. The claim is that all three defendants' products suffer the same defect in design. The claim alleges that a remedy to the common defect is equally available to all defendants. The claim asserts that each defendant has some putative class members who have a cause of action against that defendant.

[20] The single alleged pleading deficiency is that the representative plaintiffs who have a "reasonable cause of action" disclosed by their pleading against ITCL do not on the face of the pleading have any cause of action against RBH and JTI-M. The fire could have occurred irrespective of the actions or inactions of RBH and JTI-M. Rather, it is only some putative class members who may have a "reasonable cause of action" disclosed by the pleading against RBH and JTI-M due to other alleged fires.

[21] In Stone v. Wellington (County) Board of Education, supra, the respondents moved under rule 20 to dismiss the action because of a statutory limitation period. The representative plaintiff was shown to have no claim because of the expiry of the limitation period. The Court of Appeal dismissed the plaintiff s. appeal, stating that the CPA requires that "the representative plaintiff be anchored in the proceeding as a class member, not simply a nominee with no stake in the potential outcome" (at p. 322).

[22] In the case at hand the representative plaintiffs are anchored in the proceedings as class members. But their personal cause of action is against only ITCL. They purport to represent class members who have a cause of action against ITCL as well as those who have a cause of action against RBH or JTI-M.

[2] For an individual action to proceed against a particular defendant, there must be at least one plaintiff who has a cause of action against that defendant. *Minister of Finance of Canada v. Finlay (*1986), 33 D.L.R. (4th) 321 at 332-33 (S.C.C.).

[24] An action may not be brought against a stranger with whom the plaintiff does not have any relationship that can be the subject of cause of action. See for example *Stern v. Imasco Ltd. (*1999), 38 C.P.C. (4th) 347 at 373-75 (Ont. S.C.J.).

[25] Rule 21.01(l)(b) requires a pleading to disclose "a reasonable cause of action". To the same effect, section 5(l)(a) of the *CPA* sets forth one criterion for certification as being that the pleadings disclose a "cause of action."

[26] PBH and JTI-M submit that, where a representative plaintiff has a cause of action against one named defendant, the pleading cannot be sustained *by that representative plaintiff* against an unrelated group of defendants who have allegedly engaged in conduct similar to that of the one named defendant. RBH and JTI-M submit that the representative plaintiffs have not suffered any injury or damages on account of the acts or inaction of RBH and JTI-M. They say that the representative plaintiffs, not having a cause of action against the unrelated group of defendants (RBH and JTI-M), cannot bring an action on behalf of those allegedly injured by the unrelated group of defendants. They can only bring their action against ITCL.

[27] Conspiracy is not pleaded in the instant situation. The plaintiffs do not allege the defendants *collectively* provided that no fire-safe cigarette was available on the market. Nor is the cause of action of the representative plaintiffs against the three defendants advanced on a "market share" theory, which might apply if the plaintiffs did not know who manufactured the cigarette involved in the fire. See *Gariepy v. Shell Oil Co.,* [2000] O.J. No. 3804 at para. 11 (S.C.J.). The "market share" theory, sometimes applied in class proceedings, is analogous to joining multiple defendants in a civil action where there is doubt as to the person or persons from whom the plaintiff is entitled to relief: rule 5.02(2)(c).

[28] American courts have taken the position in class actions that the representative plaintiffs must have a cause of action against *all* defendants. See *La Mar v. H & B Novelty & Loan Co.,* 489 F.2d 461 at 462 (9th Cir. 1973); *Newburg On Class Actions, 3*d ed. (West 1992) at pp. 2-30 to 2-40 and 2-53 to 2-69.

[29] However, rule 23(a) of the United States *Federal Rules of Civil Procedure* has a "'typicality" requirement which is not seen in either the British Columbia *Class Proceedings Act ("B.C. Act")* or the Ontario CPA. The typicality requirement means that

the representative plaintiffs must have the same cause of action against the defendants as all members of the class.

[30] There is a threshold standing requirement in the United States for both individual and class actions. A plaintiff must establish his or her personal standing to sue a defendant before attempting to satisfy the requirements of class certification. *Angel Music, Inc. v. ABC S ports, Inc.,* 112 F.R.D. 70 at 73, 74 (S.D.N.Y. 1986). See also *Chevalier v. Baird Savings Association,* 66 F.R.D.105 at 108, 109 (E.D. Penn. 1975).

[31] Similarly an Australian court has held that, in meeting the requirements of s. 33C(l)(a) of the *Federal Court Act,* at least one representative plaintiff must have a claim against each defendant. *Phillip Morris (Australia) Ltd. v. Nixon,* [2000] FCA 229 per Sackville J. at pp. 40-41.

[32] It has been recognized in both Ontario and British Columbia that a representative plaintiff need not have a cause of action against every defendant. In *Bendall, v. McGhan Medical Corp. (1993)*, 14 OR. (3d) 734 (Gen. Div.), the class action was brought against three defendants, each of whom manufactured breast implants. Montgomery J. noted that each plaintiff had a cause of action against one defendant. Therefore, he held (at p. 744) that the pleadings disclosed a cause of action as required by s. 5(1)(a) of the *CPA*.

[33] In *Campbell v. Flexwatt Corp.,* [1998] 6 W.W.R. 275 at 288-90, leave to appeal to S.C.C. denied (1998), 228 N.R. 197n *("Campbell"),* the British Columbia Court of Appeal rejected the position that each representative plaintiff must have a cause of action against all defendants.

[34] The Court of Appeal in *Campbell* did not expressly find that for each defendant there need not be a representative plaintiff with a cause of action against that defendant. Rather, the Court held that each representative plaintiff need not have a cause of action against all defendants (at pp. 288-89). In *Campbell,* each defendant was the subject of a cause of action by at least one representative plaintiff.

[35] In *Harrington v. Dow Corning Corp.,* [2000] B.C.J. No. 2237, aff'g (1996), 22 B.C.L.R. (3d) 97 (S.C.) *("Harrington"),* the British Columbia Court of Appeal (Finch J.A. and Esson J.A. dissenting) dismissed an appeal from a certification order given by Mackenzie J. The claim in *Harrington* was against manufacturers and distributors of silicon breast implants. A resident and a non-resident subclass are described.

[36] There were two issues in the appeal: whether there was a "common issue" and whether a class proceeding was the preferable procedure for the resolution for any common issue found in respect of the non-resident subclass.

[37] Fitness was seen as a generic issue common to all silicone gel breast implants. The case involved at least 80 different models. The action was certified as a class action without requiring a representative plaintiff for each manufacturer, even though there were 16 defendants and the representative plaintiff had a cause of action against only five of them.

[38] MacKenzie J., in making the certification order, stated that the representative plaintiff "does not allege personal experience with breast implants of several manufacturers and some defendants contend that she cannot represent claims against those manufacturers." (1996), 22 B.C.L.R. (3d) 97 at 114 (B.C.S.C.). Accordingly, MacKenzie J. found that "it may be appropriate to divide the class into subclasses by manufacturer, with separate representatives for each class".

[39] The issue as to whether the representative plaintiff did not have a *cause of action* against each manufacturer was not raised as an issue in the context of the "cause of action" prerequisite for certification. It was implicit in the reasoning of the motions judge, as well as that of Huddart J.A. for the majority in the Court of Appeal, that for the purposes of certification it was sufficient for there to be *class members* who would have a cause of action against a given named defendant. There were common issues to be determined for all class members and all defendants. There was not a representative plaintiff with a cause of action against some of the defendants, but this was not seen as an issue in order to certify the proceeding as a class proceeding. The Court of Appeal decision in *Campbell* (which preceded the Court of Appeal decision in *Harrington) had* also recognized that there were at least some defendants in *Harrington* against whom the representative plaintiff did not have a cause of action (per Cumming J.A. at p. 289).

[40] *Campbell* involved the appeal by defendants of a certification order relating to a plaintiff class of owners of Radiant Ceiling Heating Panels ("RCHPs"). The defendant manufacturers did not dispute there was "a cause of action" (at p. 288). However, they argued "that each representative plaintiff must have a cause of action against each defendant". The court held. (at p. 289) that "it is not necessary that a representative plaintiff have a cause of action against each defendant" as a prerequisite to certification. This is the same position as seen in Ontario: *Bendall v. McGhan, supra,* at p. 744.

[41] However, the Court-of Appeal in *Campbell* went further in disposing of the issue. Cumming J.A. emphasized that s. 4(l)(a) of the B.C. Act (similar to s. 5(l)(a) of the *CPA)* “ simply requires that there -be a cause of action" (at p.289). Accordingly, the Court held that there is "no requirement that there be a representative plaintiff with a cause of action against every defendant".

[42] It appears the defendants in *Campbell* did not object to the substantive adequacy of the claim against them, but rather, only to the adequacy of the representation of the class. The court held (at p. 295) that, after the determination of the threshold question as to whether "the RCHPs were fit for the purpose for which they were intended", any need to create subclasses or appoint further representative plaintiffs could be addressed.

[43] Thus, the issue at hand was not directly before the Court in either *Campbell or* Harrington. However, it seems implicit to the findings in those cases that the “cause of action” against at least one named defendant, there are putative class members with a cause of action against the other defendants and an allegedly defective generic product is in issue that raises common issues of fact or law.

[44] A purposive analysis of the *CPA* must be kept in mind. Section 5 of the *CPA* sets forth the requirements for a certifiable class proceeding. The touchstone is a commonality of issues with respect to "the claims... of the class members" (s. 5(l)(c)). The pleadings must disclose "a cause of action" (s. 5(l)(a)). This requirement can arguably be interpreted as relating to the "claims... of the class members" (s. 5(l)(c)). There must be at least one representative plaintiff (s. 5(l)(b)).

[45] The representative plaintiff must, *inter alia,* "fairly and adequately represent the interests of the class" (s. 5(l)(e)), but there is no requirement that the representative plaintiff have a cause of action against all defendants. Nor is there any mandatory stipulation that there *must* be more than one representative plaintiff where there are claims by class members that raise common issues not shared by all the class members.

[46] Section 5(2) of the *CPA* does not *require* the appointment of a representative plaintiff for a subclass as a prerequisite to certification unless the members of the subclass:

> ... have claims ... that raise common issues not shared by all the class members, so that, *in the opinion of the court,* the protection of the interests of the subclass members requires that they be separately represented... [emphasis added]

[47] The plaintiff must meet the five criteria of *s. 5(l)* as a prerequisite to certification. It may be that subclasses will be mandatory at -the time of certification with a representative plaintiff for each subclass.

[48] The *CPA* is merely a procedural statute. It cannot create substantive rights. The *CPA* does not lessen the requirement of rule 21.01(l)(b). The rules of court apply to class proceedings: s. 3 5 CPA.

[49] While rule 2 1.01 (1)(b) applies to any class proceeding, the requirement of that rule for the disclosure of a "reasonable cause of action" should be interpreted so as to be consistent with the statutory regime legislated by the *CPA*.

[50] The essence of a class proceeding is that it is an action with a representative plaintiff on behalf of a group of persons (a class) who have a cause of action in respect of which there are common issues of fact or law. It is axiomatic that the representative plaintiff must have a cause of action against a defendant in the action. A "plaintiff' is, by definition, someone who brings an action against a defendant because of an asserted cause of action against the defendant. The pleading must disclose a "reasonable cause of action" in law. Otherwise, there is no good reason to utilize the machinery of the courts and the proceeding should be brought to an end.

[51] The criterion of s. 5(l)(a) of the *CPA* and the requirement of rule 21.01(l)(b) are commonly viewed as being identical in application. Query whether there is a difference? Section 5(l) of the *CPA* comes into play at the time of the motion for certification. That

provision looks to the "cause of action" (s. 5(l)(a)) in the context of the "claims of the class members" (s. 5(l)(c)) and a representative plaintiff who will necessarily be a member of the class.

[52] Looked at in the context of the motion for certification there is arguably not a prerequisite required by s. 5(l)(a) to have a representative plaintiff with a cause of action against each defendant. For the purposes of certification, it may be enough if the pleading provides that class members have a cause of action against the defendants and there is at least one representative plaintiff. *Campbell and Harrington* both dealt with a motion for certification. They did not deal with a pre-certification motion under B.C. rule 19(24), being the equivalent to rule 21.01(l)(b) in Ontario. As well, it is clear that in both *Campbell and Harrington,* for each defendant there were known putative class members with a cause of action against the defendant. This was not disputed by the defendants.

[53] It is not necessary to offer any definitive interpretation for s. 5(l)(a) of the *CPA* in the context of the rule 21 motion at hand. As I have said, it is recognized that the requirements of rule 21 and the procedural regime for class proceedings determined by the provisions of the *CPA* should be consistent one with the other.

[54] In my view, and I so find, it is not sufficient in a class proceeding, for the purpose of meeting the requirement of rule 21.0(1)(b), if the pleading simply discloses a **44** reasonable cause of action" by the representative plaintiff against only one defendant and then puts forward a similar claim by a speculative group of putative class members against the other defendants.

[55] At the earlier point in time of the rule 21.01(l)(b) motion, the representative plaintiff is the only plaintiff party to the pleading. The putative class members can not be considered parties until certification is granted by the court. In addition, in the case at hand there can not be any certainty that there are any persons with a cause of action against PBH and JTI-M. There can not be a cause of action against a defendant without a plaintiff who has that cause of action. In my view, -for every named defendant there must be a party plaintiff with a cause of action against that defendant to meet the rule 21 threshold.

[56] This result does not inhibit class proceedings with multiple defendants when there is a generic product (or generic defect) in issue, so long as the pleading discloses a reasonable cause of action against each defendant by a representative plaintiff. The rule 21.01(l)(b) motion of course precedes any certification motion. The determination of this rule 21.01(l)(b) motion is without prejudice to a representative plaintiff with a cause of action against RBH/JTI-M bringing a new class proceeding and seeking an order for joinder with the action at hand. Until there is a plaintiff who has such a cause of action, it is entirely speculative as to whether there is anyone with such a claim. A defendant should not be made subject to a speculative claim which presumes that one or more unknown persons possibly has a cause of action. It would be wrong to put a defendant to the expense of the litigation process if there is no reasonable cause of action against that defendant on the face of the pleading.

Disposition of First Issue

[57] For the reasons given, the statement of claim is struck out as against the defendants RBH and JTI-M because no reasonable cause of action by a *representative plaintiff* against those defendants is disclosed.

58] In my view, this interpretation meets the requirement of rule 21 that the pleading discloses a "reasonable cause of action".

[59] This interpretation also does not detract from the underlying policy goals of the *CPA* being to facilitate access to justice, judicial efficiency and behaviour modification. The goal of "access to justice" is to afford claimants, who are *similarly situated* to the representative plaintiff to bring their common cause of action against one or more defendants.

[60] There may be claimants in the same action with claims against different defendants. This will be possible where there is a generic product in issue, such that there is a like cause of action, albeit by different claimants against different defendants. Each representative plaintiff need not have a cause of action against every defendant. But there must be, at the least, a representative plaintiff with a cause of action against any given defendant to meet the rule 21.01(1)(b) standard.

Second Issue: Do the defendants owe a duty of care to the plaintiffs?

[61] All three defendants submit there can be no liability imposed upon the manufacturer of a product for injuries arising out of the use of its product where such use is associated with dangers both obvious and commonly known to the general public. *Deshane v. Deere & Co.* (1993), 17 C.C.L.T. (2d) l30 at 147-48 (Ont. C.A.), leave to appeal to S.C.C. refused (I 994), 20 C.C.L.T. (2d) (3 18n. The defendants say it is a known risk that an unattended cigarette may cause a fire. Therefore, they submit, there is no legal duty to design a "fire safe" cigarette.

[62] Similarly, defendants submit there is no duty to warn with respect to dangers that are obvious or commonly known, such as that a knife or axe will cut. *Schulz v. Leeside Developments Ltd. (I* 978), 6 C.C.L.T. 248 at 258-59 (B.C.C.A.), leave to appeal to S.C.C. refused (1979), 90 D.L.R. (3d) 98n, citing *Prosser's Law of Torts,* 4th ed. at p. 649.

Causation-in-fact

[63] The question of factual causation involves as inquiry into “whether the relation between the defendant's breach of duty and the plaintiff s injury is one of cause and effect in accordance with 'scientific' or 'objective' notions of physical sequence." Fleming, *The Law of Torts,* 9th ed. (Sydney: LBC**,** 1998) at p. 218. The question at this stage is only whether the act or omission is causally relevant to the damage that has occurred.

[64] The basic test for causation in tort is the "but for" test. According to this test, the defendant's breach is a cause of the plaintiff s harm if such harm would not have occurred without - or but for - that breach. If the result would not have occurred without the defendant's breach, factual causation is established. On the other hand, if the result would have occurred regardless, causation has not been established.

[65] Any outcome is the result of a complex interaction of factors, any number of which may be necessary pre-conditions to the occurrence of that outcome. It follows that there may be more than one wrongful act which can be said to cause the plaintiff s injury. Because the plaintiff need not show that it is the defendant's conduct *alone* which caused the injuries, the existence of other contributory factors, including the wrongdoing of others, will not be a bar to the defendant's liability.

[66] In the present case, it is clear on the face of the pleading that the smoker's negligence was a cause of the injuries. Assuming, however, that the manufacturer ITCL was negligent in failing to make its' cigarettes "fire safe", such a failure might be seen as *an additional cause* of the injuries. The pleading asserts that, but for ITCL's cigarette not being fire safe, the injuries and losses would not have been sustained. The plaintiffs assert the fire could not have occurred *but for* both Mr. Ragoonanan's failure to extinguish the cigarette and ITCL's failure to design the cigarette to be "fire safe". Factual causation therefore would be established.

Legal Causation - Proximate Cause

[67] The more difficult question is whether the design features are a "proximate cause" of the damage. The authorities are clear that the intervening act of a third person - whether innocent, negligent, or malicious - does not necessarily break the chain of causation. Similarly, the last wrongdoer is no longer the only one to whom liability can attach.

[68] Passing, the "but for" test of factual causation is a necessary, but not a sufficient condition for legal liability. Once causation-in-fact has been satisfied, the next question is whether there is legal causation - i.e. whether the defendant's negligence was the “proximate cause" of the injuries. This involves an inquiry into whether or not the injuries incurred by the plaintiff were too remote a consequence of the defendant's act.

[69] While factual and legal causation can be dealt with as two aspects of the same inquiry, there is also an argument that they should be viewed separately, as two distinct elements of the tort, and not intermingled. Linden, in *Canadian Tort Law,* 6th ed. (Toronto: Buttenworths, 1997) describes the difference between the two elements in the following way (at p. 326):

> Although one cannot totally and completely divorce the two issues, it can be said that cause-in-fact is fundamentally a question of fact, which can be treated relatively expeditiously in most tort litigation. Proximate cause or remoteness, on the other hand, cannot be handled so simply, because it

> deals with the limits of liability for negligent conduct, which involve more complicated legal analysis. This process of determining the *extent of* liability (not its *basis)* demands delicate value judgments and the drawing of fine lines. It is more a question of law and policy than fact.
> [emphasis in original]

Foreseeability

[70] The test for proximate cause is whether a reasonable person in the defendant's position could have foreseen the risk of the injury occurring as a consequence of his or-her negligence. *The Wagon Mound (No 1),* [1961] A.C.388 (P.C.). The question of foreseeability is concerned with the limits or extent of liability for conduct which was admittedly negligent. *Cotic v. Gray (I* 981), 17 C.C.L.T. I38 (Ont. C.A.), aff'd (1984), 26 C.C.L.T. 163 (S.C.C.). 'While the actual injury that occurred must be foreseeable, it is enough that the injury is of a class or character that is foreseeable. The precise manner in which the injury occurs need not be foreseeable. *Hughes v. Lord Advocate, [1963]* 1 All E.R. 705 (H.L.); R. *v. Coti (1974),* 51 D.L.R. (")d) 244 at 252 (S.C.C.). In addition, it is sufficient to impose liability if there was a "possibility" or a "real risk" - rather than a probability - of the injury occurring. *The Wagon Mound (No. 2),* [1966] 2 All E.R. 709 *(P.C.); Hoffer v. School District of, Assiniboine South* (1971), 21 D.L.R. (3d) 608 (Man. C.A.), aff'd (1973), 40 D.L.R. (3d) 480 (S.C.C.).

[71] According to the plaintiffs' allegations, a fire such as that which caused the plaintiffs' injuries starts after an unextinguished cigarette is left smouldering inside the crevice of a couch, perhaps for hours, before sufficient heat is built up for ignition to occur. One could argue that, however foreseeable it is that a cigarette will be dropped perhaps causing a small bum in clothing or household fabrics - it is not foreseeable that a cigarette will be allowed to smoulder for hours in the upholstery until it ignites, causing a serious fire. The negligence of the smoker consists not only in leaving a lit cigarette to bum, but also in allowing it to smoulder for hours until a fire occurs.

[72] However, as a practical matter, the possibility or "real risk" of a fire being caused by a cigarette is clearly foreseeable. It is at least arguable that the possibility of fires and the injuries they cause would be foreseeable to a reasonable person in the position of a cigarette manufacturer. Indeed, in my view, the court can take judicial notice of the dancers of careless smoking,. The notoriety of the dancers of careless smoking in itself arguably overcomes any challenge to foreseeability.

[73] Arguably, it is foreseeable that people will be injured in fires caused by the *misuse* of cigarettes by smokers. It follows that there is at least a real possibility that any negligence in the manufacturer's design of cigarettes can be considered a proximate cause of such injuries.

Novus Actus Interveniens and the Actions of Third Parties

[74] Historically, an intervening cause or force, actively operating to produce the harm after the defendant's negligent act, was seen to have "snapped the chain of causation", absolving the initial wrongdoer of legal responsibility. However, the modem approach is that a defendant's liability is not necessarily negated by such intervening causes, whether innocent, negligent or intentional. See Fleming, *supra,* at pp. 246-54 and Linden, *supra*, at pp. 366-83.

[75] One of the situations where the chain of legal causation was traditionally broken was the case of "the last wrongdoer". Where one party's negligence did not cause any injury until acted upon by the negligent - or intentional - act of another, it was the last human wrongdoer who was held responsible for the injury. However, with statutes allowing for the apportionment of liability between wrongdoers, there is no longer a need to find only one responsible party. As a consequence of this, and the general liberalization of tort liability, the rule is no longer followed. Instead, the general principles are applied and liability apportioned between wrongdoers where appropriate.

[76] An example of this trend is *Smith v. Inglis* (1978), 6 C.C.L.T. 41 (N.S.C.A.), where the Nova Scotia Court of Appeal apportioned liability between a negligent manufacturer of a refrigerator and its negligent user. The plaintiff received an electric shock caused by a combination of a manufacturing defect in the refrigerator's electrical system and the removal of a grounding prong from the refrigerator's electrical cord. The Court held that it was foreseeable that the grounding prong would be removed to fit a two-prong outlet, such that any defect in the refrigerator could cause such an injury. The plaintiffs use of the refrigerator with knowledge that the safety feature had been removed caused a reduction of damages due to contributory negligence, but was not a bar to recovery. See also *Good-Wear Treaders v. D & B Holdings* (1979), 8 C.C.L.T. 87 (N.S.C.A.), aff’g (1978), 28 N.S.R. (2d) 3O9.

[77] *In Robson v. Ashworth (1985),* 'J-'l C.C.L.T. 229 (Ont. H.C.J.), aff’d (1987), 40 C.C.L.T. 164 (Ont. C.A.). an action was brought against a physician by the family of a man who committed suicide. One of the grounds for liability was that the doctor was negligent in renewing the deceased's prescription of the barbiturates which he used to kill himself The Court held that the doctor was negligent in renewing the prescription and that his provision of the barbiturates contributed to the suicide, such that factual causation was made out. However, the Court held that the doctor was not legally responsible for the patient's death. While not explicitly analyzing the issue in terms of proximate cause or *novus actus interveniens,* the trial judge found (at p. 252):

> ...the concept of personal responsibility demands that those who knowingly and deliberately misuse a useful thing ought to be aware that the responsibility for that misuse is theirs and n6t that of the person who, albeit negligently, gives it to them.

[78] Having, found that the deceased made the decision to commit suicide in a sane state and that the provision of the drugs did not contribute to that decision, the Court concluded that the doctor was not liable. In addition, the doctor did not know, and could not reasonably have known, that the deceased would commit suicide. The case was distinguished from one where the actions of the defendant contributed to the deceased's mental state, such that "his personal responsibility for his own acts is eliminated or seriously diminished." The Court of Appeal dismissed the appeal, stating, (per Thorson J.A., Cory and Krever JJ.A. concurring, at pp. 165-66):

> [The trial judge] concluded that it was the deceased who was responsible for the taking of his own life and that he did so knowingly and deliberately while he was sane. Thus the legal responsibility for his death ought not to be borne in this case by the respondent when it was the deceased himself who misused the barbiturates, albeit that by prescribing them on this particular occasion the respondent, as it happened, provided the deceased with the means by which, in combination with the alcohol consumed by him. he chose to end his life. We see no reason to disagree with this conclusion.

[79] *In Smith v. Littlewoods Organisation Ltd.,* [1987] 1 All E.R. 710 (H.L.), the owner of an empty theatre was held not to be liable for injuries to neighbouring premises caused by a fire started by children who had illegally entered the unattended building. The owner did not have, and could not have been expected to have, information suggesting that such events were likely to occur. The fact that a percentage of the population would be prone to such illegal entry, a percentage of them would cause a fire and a percentage of the fires would spread to neighbouring premises did not add up to the "probability of a fire against which Littlewoods should have guarded".

[80] As can be seen, the -case law in this area deals with a variety of issues, including duty of care, standard of care and causation. Cases such as *Smith v. Littlewoods, supra,* consider whether the defendant had sufficient control over either the third party or the means of creating the injury to justify imposition of a duty of care. *Robson v. Ashworth, supra,* is closer to the present case, in that it involves the liability of the provider of goods for injuries caused by the misuse of those goods.

[81] However, the situation at hand goes further towards a "product defect" case in that it is alleged that the manufacturer could have *designed* the product in a way to make it safe in the event of misuse. (Since it is alleged that the product can be made safe, the issue does not arise whether the manufacturer would have a duty not to manufacture the product if the risk could not be offset.)

[82] Further, the plaintiffs have alleged that the defendants intentionally produce an addictive product, the addictive quality of which contributes to its abuse. This implies knowledge of the likely misuse of the product. Indeed, it implies an active contribution by the manufacturer to the likely abuse of the product.

Is a Cigarette Manufacturer under a Duly to Produce Fire Safe Cigarettes?

[83] Manufacturers owe a duty of care to users and others who may forseeably be affected by their products. In addition, assuming a manufacturer in the position of ITCL is negligent in failing to design a fire safe cigarette, such negligence is arguably a proximate cause of injury from cigarette-related fires. At the very least, it does not appear to be plain and obvious" that the claim will fail on any of these elements.

[84] Klar et. al., in *Remedies in Tort,* Vol. 3 (Toronto: Carswell, 1987), state the elements of a cause of action in product liability as follows (at ch. 20, §8):

> (i) the defendant owed a legal duty of care to the plaintiff in respect of the product; (ii) the product was defective; (iii) the defendant was negligent in failing to meet the requisite standard of care; (iv) the defect caused the plaintiffs injuries: and (v) the plaintiff suffered damage as a result of the defendant's negligence.

[85] In the United States' case law, the analysis tends to focus upon whether the product was defective. Arguably, that is central in the Canadian context as well, except that there is the additional "standard of care" step which is unnecessary in the context of U.S. strict liability. Since the standard of care is unlikely to be resolved in a summary proceeding and the duty of care is arguably a given, the key issues are likely to be the alleged defect and causation. As seen above, there is at least an arguable case for proximate cause. The analysis below will focus on the issue of product defects - whether manufacturing, design or "marketing" (failure to warn).

[86] In applying the above principles to the issue at hand, it will be helpful to look at two situations for comparison: a car manufacturer's duty to design a "crashworthy" automobile and the United States' courts' treatment of the "fire safe" cigarette issue.

The Crashworthy Automobile

[87] The situation of the "crashworthy" automobile is, at least superficially, analogous to the case of the "fire safe" cigarette. In both cases, there is a product which is safe - at least insofar as the injury complained of can be avoided - if used with care and absent the wrongdoing of another person. However, both the cigarette and the automobile can be dangerous in the event of misuse by the user or other dangerous activity by a third party. In the case of the cigarette, the wrongful conduct may involve the user dropping or failing to extinguish the cigarette or a third party bringing a highly flammable substance I into contact with it. In the case of the automobile, the misconduct may involve negligent driving on the part of either the driver of the vehicle or another driver. In either case, there may be a combination of wrongful acts which contribute to the injury.

[88] Assuming, that either the cigarette or the automobile work properly and as expected, there is no sense in which any defect in the product has caused or contributed to the occurrence of any event which may give rise to injury. Rather, in the circumstances described above, the negligence or mischief of individual actors is entirely responsible for the incident. But what if the manufacturer could have taken steps to prevent or reduce any injuries caused by the negligence or mischief of the individual actors? Does a manufacturer like ITCL have a duty to take such steps, and can it be liable if there is neglect to do so?

[89] On the issue of a manufacturer's duty to design an automobile which is reasonably "crashworthy", the courts have overwhelmingly answered this question in the affirmative. Initially, the American courts were reluctant to find that an auto manufacturer had a duty to foresee negligent driving and car crashes. Manufacturers were held to be under no duty to protect vehicle occupants from injuries arising from car accidents which were not caused or contributed to by any malfunctioning of the vehicle itself. The logic was that cars were meant to be driven, not crashed, so that automobile accidents were outside of the "intended use" of the vehicle. See *Evans v. General Motors Corporation,* 359 F.2d 822 (7" Cir. 1966).

[90] The holding in *Evans* was sharply criticized and quickly reversed. Today, the United States' courts have almost unanimously held that an auto maker is under a duty to design a "reasonably crashworthy" automobile. *Camacho v. Honda Motor Co., Ltd.,* 741 P.2d 1240 (Col. 1987). See also *Huff v. White Motor Corporation,* 565 F.2d 104 (7th Cir. 1977); *Daly v. General Motors Corporation,* 575 P.2d 1162 (Cal. 1978); *Knippen v. Ford Motor Company,* 546 F.2d 993 (D.C. Cir. 1976); *Ward v. Honda Motor Co.,* 33 Va. Cir.400 (1994); *Passwaters v. General Motors Corporation,* 454 F.2d 1270 (8th Cir. 1972).

[91] Liability is based on the fact that collisions occur in the course of the ordinary use of the automobile and, consequently, it is foreseeable that injuries would occur if the car fails to withstand collision as well as it might be expected to. The initial crash is likely caused by a driver's negligence and it is the second collision of a vehicle occupant with the vehicle interior that causes injury. Such a sequence of events is foreseeable and the consumer has a reasonable expectation that the manufacturer has taken due care not to expose the vehicle occupant to unreasonable risk of injury in the event of collision.

[92] *In Gallant v. Beitz* (1983), 148 D.L.R. (3d) 522 (Ont. H.C.J.), Linden J. held that such a duty does exist in Canadian law. In the result, the liability of a negligent driver and a claim against the third party vehicle manufacturer for additional injuries allegedly caused by the negligent design of the vehicle were both issues to go to trial.

[93] The inability of a vehicle to reasonably withstand collision can arguably be viewed as a "hidden defect". In contrast, the Massachusetts Court of Appeals *in Tibbetts v. Ford Motor Company, 3*58 N.E.2d 460 (1976) held that a plaintiff who was injured when he inserted his fingers into a decorative slot in an automobile wheel cover had no case against the manufacturer. The Court held (at p. 462) that the sharp edge on the slot

could be classed along with a great many common dangers "as a result of which significant injuries are possible but are not reasonably to be anticipated".

American Experience

[94] As seen above, courts in the Unites States have approved the imposition of a duty upon auto manufacturers to take reasonable care to reduce injuries caused by auto accidents. They have, however, been virtually unanimous in their refusal to impose a similar duty on cigarette manufacturers to design "fire safe" cigarettes. *Sacks v. Phillip* M*orris Inc.,* 1996 U.S. Dist. LEXIS 15184 (D.Md.), aff ‘d 1998 U.S. App. LEXIS 5777 (4 Ih *Cir.); Kea7-ney v. Phillip Morris Inc.,* 916 F.Supp. 61 (D.Mass. 1996) at 7-11*; Frulla v. Phillip Morris Inc.,* (W.D. Tenn.) (Jan. 10 1990) [unreported]; *Lamke v. Futorian Corporation,* 709 P.2d 684 (Okla. S.C. 1985); *Griesenbeck v. American Tobacco Company,* 897 F.Supp. 815 (D.N.J. 1995).

[95] The questions of duty of care, standard of care and proximate cause tend to get obscured in these cases. This is perhaps due in part to the adoption by most American jurisdictions of a rule of strict liability and in part to the fact that all three questions involve policy decisions designed to limit the scope of liability. The questions get blurred into the single question: did the manufacturer have a duty to design fire resistant cigarettes? See *Kearney v. Phillip Morris, supra,* at 69; *Knippen v. Ford, supra,* at 996.

[96] In one case, a court granted summary judgment on the basis that the expert evidence put forward by the plaintiff was incapable of proving causation-in-fact. *Kearney v. Phillip Morris, supra.* The test results relied upon by the plaintiff, comparing the ignition propensities of various brands of cigarettes, used a different type of material than that which had caught fire. It was admitted that the test results could not be used to infer reduced ignition propensity with respect to the fabric on the plaintiff s sofa.

[97] *In Kearney v. Phillip Morris, supra,* summary judgment was granted in favour of the defendant on the causation in-fact issue. However, the court also dismissed the claim on the around that it was certain to fail as a matter of law. It was held that because the risk of fire from a lit cigarette was obvious, a manufacturer has no duty to design a reduced ignition propensity product. The court cited (at p. 72) the following passage from the Massachusetts Court of Appeals in *Killeen v. Harmon Grain Products, Inc.,* 413 N.E.2d 767 at 769-70 (1980):

> Toothpicks, like pencils, pins, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of glass, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. It is part of normal upbringing that one learns in childhood to cope with the dangers posed by such useful everyday items. *It is foreseeable that some will be careless in using such items and will be injured, but the policy of our law in such cases is not to shift the loss from the careless user to a blameless manufacturer or supplier.*

[emphasis added]

[98] In each of the other "fire-safe" cigarette cases cited above, the court struck out the claim for essentially the same reason. Under the strict liability regimes, the courts had to decide whether the absence of a reduced ignition propensity design made the cigarettes "defective" or "unreasonably dangerous". In each case, the court held that the cigarettes were not unreasonably dangerous or defective and hence there could be no liability. Most commonly, this conclusion arose by applying the so-called "consumer expectations" test.

[99] The Supreme Court of Oklahoma defined the term "unreasonably dangerous" in *Lamke v. Futorian Corporation,* 709 P.2d 684 at 686, citing *Kirkland v. General Motors Corp.,* 521 P.2d 1353 (Okla. 1974), in the following terms:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

[100] In *Lamke v. Futorian, supra,* a claim against the sofa manufacturer for failing to design a fire resistant sofa was dismissed. The result of these decisions is that, where the risks inherent in a consumer product are obvious to a reasonable consumer, the manufacturer is under no obligation either to warn of those risks or to design the product to reduce or eliminate them.

The "risk-utility" test

[101] There is some dispute in the U.S. case law as to when the "consumer expectations" test is to be applied. There is authority to the effect that where the claim is with respect to an alleged defect in the manufacturer's design, the test is inappropriate. In its place, the so called "risk-utility" test is proposed. In *Sacks v. Phillip Morris, supra,* at pp. 10-16, the Federal Court for the District of Maryland accepted that the risk-utility test was applicable to a design defect claim. The risk-utility analysis now looks as well to the manufacturer‘s reasonable foresight, rather than simply the consumer's expectations.

[102] *In Sacks v. Phillip Morris, supra,* the District Court, citing its previous decision in *Rock v. Oster Corp.,* 810 F.Supp. 665 at 666 (1991), held that the issue in such a case is 'whether a manufacturer, knowing the risks inherent in his product, acted reasonably in putting it on the market" (at pp. 13 - 1 4).

[103] The factors relevant to the risk-utility test are set out by the District Court in *Sacks v. Phillip Morris, supra,* at pp. 10- 11 (citing, *Rock v. Oster, supra),* as follows:

1. The usefulness and desirability of the product;
2. The availability of other and safer products to meet the same need;
3. The likelihood of injury and its probable seriousness;
4. The obviousness of the danger;

5. Common knowledge and normal public expectation of the danger (particularly for established products);
6. The avoidability of injury by care in use of the product; and
7. The ability to eliminate dancer without seriously impairing the usefulness of the product.

(See also *Camacho v. Honda, supra,* at p. 1247)

[104] Evidence is needed to make the risk-utility analysis. A balancing of interests exercise is required.

[105] The Courts in *Rock v. Oster, supra, and Sacks v. Phillip Morris, supra,* held that the inherent risk of bums from a hot fondue pot and of fires from a lit cigarette. respectively, did not render those products unreasonably dangerous. The fact that the dangers were obvious and well known and could be avoided through the exercise of reasonable care outweighed the fact that alternative designs were available which might have reduced the risk of injury from misuse. *Sacks v. Phillip Morris, supra,* at pp. 15-16.

[106] The Court in *Sacks v. Phillip Morris, supra,* also rejected a claim in negligence, on the basis of the so-called "latent/patent" or "open and obvious" test. According to this test. "there is no liability on the part of a manufacturer for negligence, either in *design* or in failure to warn, where the defect is open and obvious to the consumer." *Sacks v. Phillip* M*orris, supra,* at pp. 16-17. However, it should be noted that the "open and obvious" test has been seriously questioned by many U.S. courts. See for example *Camacho v. Honda, supra,* at p. 1245.

[107] Similar findings have occurred with respect to common, straightforward products. *In Killeen v. Harmon Grain Products Inc., supra,* a toothpick manufacturer was not liable for injuries to a child who fell on the playground while sucking a toothpick. The allegation was that the toothpick could have been made safer by being rounded on one end. The Court found (at pp. 769-70) that the toothpick was "exactly what it was represented to be. neither more nor less, with no hidden dangers or unpredictable propensities" and could not be considered "unreasonably dangerous" merely because it could foreseeably cause injuries if misused.

[108] Similarly the courts have rejected claims against manufacturers of glass products when injuries occurred as a result of the glass breaking from misuse. See *Vincent v. Nicholas E. Tsiknas Co., Inc. 151* N.E.2d 263 (Mass. 1958); *Venezia v. Miller Brewing Co.,* 626 F.2d 188 (1st Cir. 1980); *Stuto v. Corning, Glass Works,* 1990 WL 105615 (D.Mass.).

[109] A handgun manufacturer has been held not to be liable for injuries to an innocent bystander caused by the careless handling of the gun, on the basis that the risk fro@ careless handling is obvious and well known. *Mavilia v. Stoeger Industries,* 574 F.Supp. 107 (D.Mass.1983). However, this approach is perhaps predicated upon an underlying view that it is not guns that kill people, but people who kill people. It might well be that

Canadian courts would take a different approach to contributory negligence from that found in American jurisprudence. In addition, more recent U.S. case law brings the state of U.S. law on this issue into question. See for example W*hite v. Smith & Wesson, 97* F.Supp. 2d 816 (N.D. Ohio 2000).

[110] Recently, the risk-utility test was formally adopted in the *Restatement (Third) of Torts: Products Liability § 2* (1998). Previously, comments g and i of the *Restatement (Second) of Torts §* 402A (I 965) had limited the concept of "defect" in ordinary consumer products to cases where the product was dangerous in a way not contemplated by the consumer. This is the "consumer expectations" test.

[111] The *Third Restatement* holds that a product is defective in *design* "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design...and the omission of the alternative design renders the product not reasonably safe".

[112] In J.A. Henderson, Jr. & F.B. Ingersoll, "Postscript: Arriving at Reasonable Alternative Design: The Reporters' Travelogue" (1997) 3O U. Mich. J.L. Ref. 563 at 565, the authors explain why the American Law Institute opted for the new approach:

> ... [I]n cases alleging defective design one cannot identify the defect by referring to the manufacturer's own design standards. Those very standards are under attack as being defective. One cannot mouth the words "strict liability" and hope to convey any message regarding how one should determine liability. In the context of product design, the term "strict liability" proves vacuous. To give any meaning to the liability standard, one must look outside the manufacturer's own product design to discover an objective standard with which to determine effectiveness.

[113] Fundamental to the new approach is that there is a foreseeable risk of harm and the availability of a "reasonable alternative design". The authors respond to arguments in favour of a parallel "consumer expectations test" by suggesting that it is incapable of being a stand-alone test and that consumer expectations continue to play a role in the risk-utility test. This is consistent with both the case law cited above and the comments and reporters' note to the new *Restatement.* The final paragraph of comment g includes the following:

> The mere fact that a risk presented by a product design is open and obvious, or Generally known, and that the product thus satisfies expectations, does not prevent a finding that the design is defective. But *the fact that a product design meets consumer expectations may substantially influence or even be ultimately determine on risk-utility balancing* in judging whether the omission of a proposed alternative design renders the product not reasonably safe.
> [emphasis added]

[114] The Restatement arguably is simply in line with increasing judicial authority to the effect that consumer expectations are not necessarily determinative when there is an allegation of a defect in a manufacturer's design.

[115] In *Robins v. Kroger,* 982 S.W.2d 156, the Texas Court of Appeals reversed a lower court's dismissal of a claim against the manufacturer of a cigarette lighter. The Court affirmed the dismissal of the claims for negligent manufacturing and marketing, strict liability for manufacturing and marketing defects and express warranties. However, the Court found there were triable issues with respect to the claim based on *design* defect. Because a claim for defective design is based upon safer alternatives, there was necessarily an issue of fact that must go to trial. The Court found that the lighter was not in the nature of a "common tool" but rather was a mechanical device. Cases where there was an obviousness of the risk and the ability to contain it with the exercise of reasonable care were therefore not controlling.

[116] The Texas Circuit Court in *Stacks v. Phillip Morris Inc.,* No. 26294 (Tex. Cir. Ct.) (Sept. 12, 2000) [unreported], rejected a summary judgment motion by Phillip Morris, but did not provide reasons for the decision. The Order denying the motion appears to represent the only such outcome in a "fire-safe" cigarette case to date in the United States.

[117] It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There may well be other background events which were necessary preconditions. The "but for" test which requires a plaintiff to establish that the injury would not have occurred but for the negligence of the defendant is the general, but not conclusive, test. Causation may be established where there are materially contributing factors to the occurrence of the injury because of a defendant's negligence. *Athey v. Leonati, [1996]* 3 S.C.R. 458 at pp. 466-67, per Major J.

Conclusions

[118] Canadian courts, like those in the United States, have concluded that manufacturers can be liable for design defects, including those which cause injury only when coupled with the negligence or other wrongdoing, of the user or a third party. *Gallant v. Beitz, supra; Good-Wear-Treaders v. D & B Holdings, supra; Smith v. Inglis, supra.*

[119] The risk-utility approach has also been utilized. In *Harrington,* the majority judgment of the British Columbia Court of Appeal 'Set forth (at paras. 42 to 46, per Madam Justice Huddart) a four step approach to a product liability case alleging, negligent design, manufacture or marketing. Her analysis is in the nature of the "risk-utility test". Such a test is endorsed as well by Professor Waddams in *Products Liability*, 3rd ed. (Toronto: Carswell,'1993).

[120] *In Harrington* Huddart J.A. held that the first step is to determine whether the product is defective under ordinary use or, although non-defective, has a propensity to

injure (para. 42). The second step is the assessment of the state of the manufacturer's knowledge of the dangerousness of its product (para. 4(3). Huddart J.A. viewed these first two steps as the "risk assessment".

[121] If the value of the product's use outweighs its propensity to injure then the third step is an assessment of the reasonableness of a warning to consumers (para. 45). The fourth and final step will be the determination of individual causation and damages. This will include an assessment as to whether the user's knowledge of the risk would have prevented the injury.

[122] The defendants' position is that a manufacturer of cigarettes does not have a legal obligation to design a safer product because the lit cigarette only creates a danger if the user is negligent. The danger can be prevented by the consumer.

[123] Canadian courts have also applied the risk-utility test. *Rentway Canada Ltd. v. Laidlaw Transport Ltd.* (1989), 49 C.C.L.T. 150 at 164 (Ont. H.C.J.), aff'd [I 994] O.J. No. 50 *(C.A.); McEvoy v. Ford Motor Co.,* [1989] B.C.J. No. 16'39 (S.C.). In *Rentway v. Laidlaw, supra,* at p. 164, Granger J. compiled a list of factors similar to that in *Sacks v. Phillip Morris, supra,* which may be considered when "balancing the risks inherent in the product, as designed, against its utility and cost" (citing *Voss v. Black & Decker Mfg Co.*. 450 N.E. 2d 204 at 208 (N.Y.C.A.):

1. The utility of the product to the public as a whole and to the individual user;
2. The nature of the product - that is, the likelihood that it will cause injury;
3. The availability of a safer design;
4. The potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced;
5. The ability of the plaintiff to have avoided injury by careful use of the product;
6. The degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff-, and
7. The manufacturer's ability to spread any costs related to improving the safety of the design.

[124] The criteria include factors related to the user's ability to perceive and avoid the risk. Thus, the role of the user is relevant not only to the defences of contributory negligence and *volenti nonfat injuria,* but also to the questions of standard of care and product defect. Where the risk of injury is not caused by a hidden danger, but an obvious characteristic inherent in the product, and where the exercise of reasonable care by the user can completely avoid the risk, these factors point towards a finding of no liability. On the other hand, the other factors relating to the risk and utility of the product and the practical ability of the manufacturer to guard against any risks must also be considerd.

[125] One reason it is suggested the consumer expectations test is inadequate is that most consumers are insufficiently aware of the functioning of various products to know what to expect. Where, however, a risk posed by a product's design is both well known

and capable of being offset by the use of reasonable care, the consumer's safety is arguably in his or her own hands.

[126] Given that the court takes on an essentially regulatory role in conducting a risk utility analysis, there may be good arguments in favour of limiting application of the test. Fleming, *supra,* discusses the competing interests in the following terms (at pp. 537-38):

> In other cases, a safer design, such as provision of a guard on a lawnmower, might have reduced or negated the risk. Much more complex are cases where the particular design did not cause the accident but at most failed to protect against its consequences, for example in complaints that a car was not crashworthy, that is, did not offer sufficient protection in a collision caused by the driver's or a third party's negligence. In principle, that should be no obstacle, since it is well established that negligence may consist in failing to avoid aggravation of injuries, as by omitting to wear a seatbelt. Typically the design is the outcome of a conscious choice, often made by the manufacturer on the basis of relative cost so as to accommodate consumer preferences or even the public interest (for example light cars offer less collision protection but are cheaper and save on petrol). *Some caution in reviewing such managerial decisions is appropriate because the judicial system is ill-equipped to cope with such 'polycentric" issues. Moreover, an adverse decision condemns the whole production line and therefore has far greater cost implications.*
> [emphasis added]

[127] *In Nicholson v. John Deere Ltd* (I 986), ")4 D.L.R. (4") 542 (Ont. H.C.J.), var'd on other grounds (1989) 57 D.L.R. (4") 639 (Ont. C.A.), a lawn mower was designed so that the gas tank was in close proximity to the battery. The plaintiff, while refueling, her lawn mower in an open garage, allowed the gas cap to come into contact with the battery, causing, a spark which ignited the gas vapours, causing a fire. The Court held that, in both her actions and her knowledge, the plaintiff was a reasonable consumer. She had no reason to believe that her actions could in any way cause such events to occur. The design of the lawn mower posed a serious and unnecessary risk to consumers and the manufacturer was liable for the injuries sustained. The Court of Appeal upheld the decision, save for a variation of the cost order.

[128] In *Rentway v. Laidlaw, supra,* at p. 158 (citing *Gallant v. Beitz, supra),* Granger J. held that manufacturers have a duty to make "reasonable efforts to reduce any risk to life and limb that may be inherent in the design of their products." In that case, it was alleged that the tread of a truck tire foreseeably separated, causing a short-circuit which darkened the headlights. The Court held that the risk of short circuiting while the truck was travelling at high speeds outweighed the cost of putting the headlights on separate circuits to avoid such accidents. However, it was not proved that this was the cause of the accident, so the case against the manufacturer was dismissed.

[129] *In Rentway v. Laidlaw, supra,* the risk was not obvious, the product was not straightforward and the risk existed even with the exercise of reasonable care by the user. As in *Nicholson v. John Deere, supra, or Smith v. Inglis, supra,* the Court in *Rentway v. Laidlaw, supra,* did not have to address the question of whether the manufacturer has a duty to adopt an alternative design for a product *where the risks are obvious* and occur only when the user does not exercise reasonable care.

[I3] The cigarettes in the present case are arguably safe (at least with respect to fire safety) when handled properly. So too is the risk of fire obvious. The distinction suggested above is therefore applicable. The importance of finding that the design of the product rendered it unsafe for use by a reasonably prudent and careful consumer is illustrated in the following passage in *Nicholson v. John Deere, supra,* at p. 547:

> It was argued that strict liability does not attach to the actions of a manufacturer. Clearly it does not. However, once a design is found to be knowingly lacking in the area of safety or inherently dangerous for the reasonably prudent and careful consumers of a product, the burden upon the manufacturer is a heavy one of ensuring that the danger is brought home to the consumer.
> [Emphasis added]

[13] Reading this passage disjunctively, however, a product can be defective giving rise to manufacturer's liability if the design is (a) knowingly lacking in the area of safety or (b) inherently dangerous for the reasonably prudent and careful consumer. This leaves open the question of whether a product can be knowingly lacking in the area of safety even though it would not be dangerous to a reasonably careful consumer.

[14] In *Deshane v. Deere & Co. (1993),* 15 O.R. (3d) 225 (C.A.), leave to appeal to S.C.C. denied (1 994), 17 O.R. (3d) xvi (note), the Court of Appeal reversed a jury's finding of liability on the manufacturer of a forage harvester. An employee had been injured by falling into the harvester's moving feed roles and the jury apportioned liability 98% to the manufacturer and 2% to the employer. The Court of Appeal held that the risk posed by moving feed roles was so obvious that the manufacturer had no duty to warn of the risk. Dubin, C.J.0., for the majority, cited *Prosser's Law of Torts, 4* th ed. (1971) at p. 649, which was cited in *Schulz v. Leeside Developments Ltd.* (1978), 6 C.C.L.T. 248 (B.C.C.A.), as follows:

> *Obvious Dangers*
>
> One limitation commonly 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. Thus 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 a finger.

[emphasis added (by the Court of Appeal)]

[133] The danger in *Deshane v. Deere, supra,* was caused primarily by the equipment's modified use, in respect of which the Court found the manufacturer was not involved. Noteworthy is the expression "the seller's entire liability", which suggests that design defect claims in such circumstances cannot succeed. However, as with the other cases, the issue did not need to be decided.

[134] There is no authority in Canada and next to none in the United States which suggests a design defect claim can succeed where the risk is obvious and the product is not dangerous when used in a reasonably prudent manner. Unlike Canada, there is authority in the United States which suggests it cannot.

[135] ITCL submits that it is notorious that an unattended cigarette constitutes a risk of a fire. A consumer must take reasonable care. A consumer chooses to incur the risk in such a situation. *Grant v. Australian Knitting Mills Limited (1936),* 1 W.W.R. 145 at 160 (P.C.), per Lord Wright. Injury can be avoided if a smoker exercises reasonable care. *Sacks v. Phillip Morris, supra,* at pp. 15-16. However, the pertinent issue is whether. notwithstanding the notoriety of the risks of misuse, manufacturers have deliberately designed the product in such a way as to cause misuse. It is arguable that, by enhancing the addictive features of the product, they encourage obsessive use that leads to people smoking when they are weary or unwell and likely to fall asleep. The courts have found tavern owners liable for serving liquor to intoxicated persons who subsequently came to harm. See *Stewart v. Pettie* (1995), 121 D.L.R. (4th) 222 (S.C.C.).

[136] ITCL submits that. as a matter of law, the "risk-utility" analysis cannot apply to such a situation because the carelessness of the consumer in not avoiding the risk outweighs any conceivable argument that the cigarette manufacturer has a legal obligation to re-design and create a "fire safe" cigarette that would reduce the risk of fire. ITCL submits that there is no duty of care owed by the manufacturer in this situation. Moreover. ITCL asserts, the manufacturer cannot be found to be the proximate cause of any injuries or loss. The fire is not caused by the actions of the manufacturer.

[I37] ITCL submits that the case at hand is distinguishable from the situation seen with the exploding gas tank upon a collision of an automobile. ITCL points out that in that situation there was no negligence on the part of the plaintiff and the vehicle had a *latent* defect. However, it is to be noted that in the lit cigarette situation, as in the case at hand, there will often be claimants who were not smoking but were injured in the fire or suffered property loss. The putative class includes non-smokers as well as smokers. These third parties are not negligent. As well, the statement of claim pleads that it is reasonably foreseeable to ITCL that, because nicotine is addictive consumers will often smoke at night in their residences. A court might find that, once the harm is foreseeable, the contributory negligence or *volenti non fit injuria* issues are to be dealt with as an apportionment of liability and not as a basis for avoiding the duty of care. See generally *Ingles v. Tutkaluk Construction Ltd., [20001* 1 S.C.R. 298.

Disposition of the Second Issue

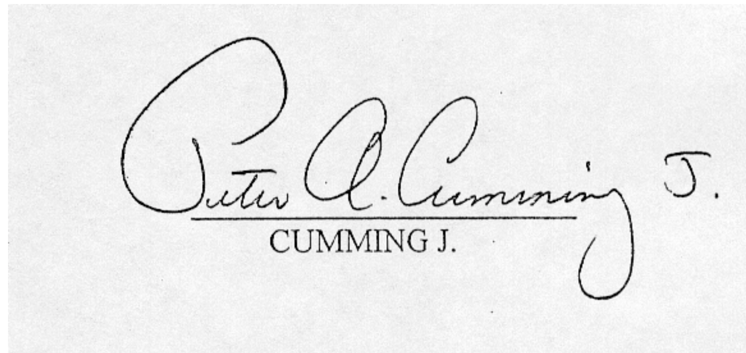
[138] In my view, and I so find, the risk-utility theory of liability for the defective design of a product is a plausible legal theory in support of the asserted cause of action in the plaintiffs' pleading. Evidence is needed to consider the application of the risk-utility theory of liability to ITCL's product. The rule 21.01(l)(b) motion at hand is, of course, simply a determination that it is not "plain and obvious" that the plaintiffs' pleading does not disclose a reasonable cause of action. In my view, and I so find, the plaintiffs' pleading meets this standard.

[I39] For the reasons given, the motion of the defendants is dismissed with respect to the second issue.

Overall Disposition

[140] For the reasons given, the pleading is struck against the defendants RBH and JTI-M on the basis of my finding, in respect of the first issue.

[141] For the reasons given, the motion of ITCL is dismissed on the basis of my finding in respect of the second issue.



RELEASED: December 5. 2000

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JASMINE RAGOONANAN and PHILIP RAGOONANAN, by their estate representative, DAVINA RAGOONANAN, and RANUKA BABOOLAL, by her estate representative, VASHTI BABOOLAL

Plaintiffs

- and –

IMPERIAL TOBACCO CANADA LIMITED, ROTHMANS, BENSON & HEDGES INC. and JTI-MacDONALD INC

Defendants

REASONS FOR DECISION

CUMMING J.

Released: Dec 5, 2000