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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JASMINE RAGOONANAN AND PHILIP RAGOONANAN, BY THEIR ESTATE REPRESENTATIVE, DAVINA RAGOONANAN, AND RANUKA BABOOLAL, BY HER ESTATE REPRESENTATIVE, VASHTI BABOOLAL	)	***Andrew Roman, Joel Rochon*** and ***Saki Tambakos*** -- for the Plaintiffs
Plaintiffs	)	
- and -	)	
IMPERIAL TOBACCO CANADA LIMITED	)	
Defendant	)	
-and-	)	***Lyndon A.J. Barnes, Deborah Glendinning*** and ***Andrea Laing*** -- for the Defendant
DAVINA RAGOONANAN AND RONALD BALKARRAN	)	
Third Parties	)	
	)	**HEARD:** February 7, 8, 9, 10 and 11, 2005

REASONS FOR DECISION

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

CULLITY J.

[1] These proceedings arose out of a fire at a residential property in Brampton, Ontario in the early hours of January 18, 1998. Jasmine and Philip Ragoonanan and Ranuka Baboolal (“Jasmine", "Philip" and "Ranuka" respectively) died as a result of the fire. The other occupants, Davina Ragoonanan (" Davina ") and Ronald Balkarran ("Ronald") and their two-year-old son, Jaden, survived. Davina was the mother of Jasmine and the sister of Philip, Ranuka was Philip's former girl friend and Ronald was Davina's common-law spouse.

[2] The property was a three-storey attached townhouse. The evidence indicates that the fire probably started in the living room on the second floor. Davina, Ronald and Jaden were sleeping in a bedroom on the third floor when the fire was discovered. They escaped through a window. The bodies of Jasmine, Ranuka and Philip were discovered elsewhere on the third floor.

[3] Two motions had been set down to be heard - a motion for summary judgment by the defendant ("ITCL") and the plaintiffs’ motion to certify the proceedings under the *Class Proceedings Act, 1992* ("CPA"). The materials for each of the motions had been filed. Plaintiffs’ counsel submitted that the certification motion should be disposed of before questions relating to the merits of the action were considered and determined. In the submission of ITCL’s counsel, the motions should be heard in the reverse order.

[4] I do not think there should be any inflexible rule that motions for summary judgment should either precede, or follow, motions for certification. In many cases it will probably be more appropriate to adopt the latter course so that the class would be bound if summary judgment is granted and evidence relating to the merits of the plaintiff's claims would not be addressed prior to the hearing of the motion to certify them under the CPA. In this case, as to a considerable extent - although not entirely - the motion for summary judgment was directed at individual questions of causation relating to the plaintiffs’ claims and as, if the motion was successful, this would disqualify them as representative plaintiffs for the putative class, I decided that it should be heard first.

The Claims

[5] The action was commenced by the "estate representatives" of Jasmine, Philip and Ranuka on their behalf and that of all persons in Canada who suffered injury, or a loss, as a result of a fire that occurred after October 1, 1987 where the fire was caused by a cigarette manufactured by ITCL - or by either of two other defendants - igniting upholstered furniture or a mattress. The estates of deceased persons and persons with derivative claims are also included in the putative class. In their factum filed for the purposes of the certification motion, plaintiffs’ counsel have proposed to reframe the class definition so that it covers persons who claim that a fire was caused by an ITCL cigarette and does not beg a question of causation that is relevant to the merits of the claims. As I will explain, claims against the two other original defendants are no longer asserted in the action.

[6] The claims are based on the alleged negligent manufacture and design of cigarettes produced by the defendant. It is pleaded that the defendant knew, or ought to have known: (a) that its cigarettes were dangerous because they were not “fire safe”; and (b) how to manufacture and sell a fire-safe cigarette. Although, as I will indicate, amendments have been made to the statement of claim since it was issued on January 11, 2000, it has, at all times, alleged that the fire on which the claims of the proposed representative plaintiffs are based was caused by a cigarette manufactured by the defendant.

[7] In a decision released on December 5, 2000, after a hearing on November 8 and 9, 2000, Cumming J. ordered that the claims asserted on behalf of the putative class against the two other cigarette manufacturers were to be struck out pursuant to rule 21.01 (1) (b) as the pleading disclosed no reasonable cause of action by a representative plaintiff against them. The learned judge declined to strike the claims against the present defendant noting that 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". In finding that factual causation would be established if the facts pleaded were proven, he stated:

> 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 a cigarette to be "fire safe". Factual causation therefore would be established.

[8] Cumming J. then considered whether ITCL owed a duty of care to the plaintiffs and members of the putative class - including the question of reasonable foreseeability - and he concluded that:

> … 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 (1) (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 the standard.

[9] I have quoted from the reasons on the earlier motion under rule 21.01 (1) (b) because, in their factum delivered for the purpose of the motion for summary judgment, plaintiffs’ counsel submitted that it was immaterial whether the fire was caused by a cigarette that Philip had been

smoking, or by one smoked by Davina or Ronald. I believe it is clear that the learned judge dealt with ITCL's motion to strike on the basis of a plea that an unextinguished cigarette that Philip had been smoking came in contact with a couch in the living room and that ignition resulted.

[10] The relevant paragraphs in the statement of claim, as issued on January 11, 2000, are paragraphs 10 - 15.

> 10. The cause of the fire was an unextinguished cigarette manufactured by the defendant ITL.
>
> 11. The plaintiff, Philip Ragoonanan, had been smoking and watching television on the couch in the second floor living room of the Ragoonanan Townhouse. He intended to sleep on the couch that night.
>
> 12. The rest of the occupants of the Ragoonanan Townhouse were asleep in bedrooms on the third floor of the residence. Davina, Ronald and Jaden were asleep in the front bedroom on the third floor (the "Master Bedroom"). Ranuka and Jasmine were asleep in the rear bedroom on the third floor (the "Children's Bedroom").
>
> 13. Philip Ragoonanan fell asleep while smoking.
>
> 14. One of the DuMaurier cigarettes that he had been smoking came in contact with the couch where he was sleeping. The cigarettes smouldered for some time, before the couch ultimately burst into flames.
>
> 15. From there, the fire spread quickly through the rest of the Ragoonanan Townhouse, as well as into an adjoining townhouse.

[11] On November 10, 2000, Douglas Lennox - the solicitor who had drafted the statement of claim - swore an affidavit for the purpose of a motion to withdraw the admission in paragraph 13. The relevant parts of the affidavit are as follows:

> 2. I drafted the original statement of claim in this proceeding. The original statement of claim contains an admission which I made inadvertently. Specifically, paragraph 13 of the original statement of claim reads as follows:
>
> "Philip Ragoonanan fell asleep while smoking".
>
> 3. In talking with my clients after issuing the statement of claim, they have informed me that this admission is incorrect. They tell me that they simply do not know whether Philip fell asleep or not.

> The fact however that his body was found on the third floor of the Ragoonanan residence suggests that he was not anywhere near the couch on the second floor when it ultimately burst into a flash over fire.
>
> 4. By way of explanation for the admission, I believe it was made by myself following a review of voluminous technical materials on the issue of fire safe cigarettes. I believe that it was an assumption I made, based on a review of those materials. This assumption however does not reflect the information actually provided to me by my clients.

[12] At his cross-examination on his affidavit, Mr Lennox explained that, some months before he had any contact with the Ragoonanans, he had become interested in the possibility of litigation against tobacco companies that did not manufacture fire-safe cigarettes. He had reviewed available reports and information on fires caused by cigarettes and had drafted a statement of claim in respect of hypothetical facts and parties. He had then looked for newspaper reports of such fires in Ontario and found references to the fire in which the Ragoonanans had been involved. Mr Lennox contacted an individual who was attempting to raise money to help the family, identified himself as a lawyer who was interested in products liability and offered his assistance. He later received a phone call from Davina, met with her and subsequently adapted the precedent he had previously created. She reviewed it and instructed him to commence the proceedings. She made no comment on it other than to correct the spelling of Jaden's name.

[13] In March, 2000, Mr Lennox was present when, in the course of an interview with a journalist, Davina stated that she did not know whether Philip had fallen asleep while smoking. On the advice of plaintiffs' counsel, Mr Roman, Mr Lennox decided that paragraph 13 should be deleted and his affidavit of November 10, 2000 was sworn for that purpose. Although this occurred the day after the conclusion of the hearing before Cumming J., I presume that the mistake was drawn to the learned judge's attention as Mr Lennox had been aware of it since March of that year.

[14] On March 19, 2001, a fresh amended statement of claim was delivered which does not contain an allegation that Philip fell asleep while smoking. The paragraphs that refer to the cause of the fire are otherwise similar to those in the original pleading and are as follows:

> 24. The cause of the fire was an unextinguished cigarette, believed to be of the DuMaurier brand, manufactured by the Defendant.
>
> 25. The plaintiff, Philip Ragoonanan, had been smoking and watching television on the couch in the second floor living room of the Ragoonanan Townhouse. He intended to sleep on the couch that night.

> 26. The rest of the occupants of the Ragoonanan Townhouse were asleep in bedrooms on the third floor of the residence. Davina, Ronald and Jaden were asleep in the front bedroom on the third floor. Ranuka and Jasmine were asleep in the rear bedroom on the third floor.
>
> 27. The origin of the fire was the couch on the second floor where Philip had last been seen alive, seated on the couch, smoking.
>
> 28. One of the cigarettes that Philip had been smoking came into contact with the couch. The cigarette smouldered for some time, before the couch ultimately burst into flames.

[15] ITCL had delivered its statement of defence in February, or March, 2001 in which it denied that the plaintiff's damages were caused by a careless disposal of a cigarette and, in the alternative, pleaded that the proximate cause of the fire was Philip's negligent behaviour. The third party claim of ITCL that was delivered in April, 2001 alleges that, if the fire was caused by the careless disposal of smoking materials by Philip, the damages were caused by the negligence of Davina or Ronald in failing to supervise his behaviour. In the replies of the plaintiffs, and the third party defendants, it is alleged that Philip was so addicted to ITCL's cigarettes that he was unable to give up smoking and that "he smoked incessantly, even at night, after everyone else had gone to bed".

[16] In view of the history of the proceedings, and the state of the pleadings, it is not surprising that, when moving for summary judgment, the defendant assumed that it was an integral part of the plaintiffs' case that a cigarette that Philip had been smoking had come in contact with the couch in the living room and was a cause of the fire. As I have indicated, the correctness of this assumption was, in effect, denied by plaintiffs' counsel in their factum. In their submission, even if the court was not prepared to find that Philip had been smoking in the house that night, there was evidence that raised a triable issue under paragraph 24 in relation to cigarettes smoked by Davina and Ronald. As this submission is inconsistent with the material facts alleged in paragraph 28 of the statement of claim, I am satisfied that it is not open to the plaintiffs on the basis of their case as pleaded.

Summary judgment

[17] ITCL seeks judgment under Rule 20 on the ground that there is no genuine issue for trial in respect of the causal link that the plaintiffs must establish between ITCL's conduct and the fire. More specifically, the notice of motion asserts that there is no genuine issue on whether the damages allegedly suffered by the plaintiffs were caused by a product manufactured by ITCL, or by its failure to manufacture a fire-safe cigarette. In their factum, and at the hearing, ITCL's counsel identified the following material facts that the plaintiffs would have to prove before the required causal connections could be found:

> (1) Philip Ragoonanan was smoking a cigarette in the Ragoonanan townhouse on the night of January 18, 1998;
>
> (2) the cigarette smoked by Philip Ragoonanan started the Fire by igniting the Ragoonanan Couch;
>
> (3) if the cigarette smoked by Philip Ragoonanan started the Fire, that cigarette was manufactured by ITCL;
>
> (4) if an alternative design was manufactured and marketed by ITCL as a "fire-safe" or "self-extinguishing" cigarette, Philip Ragoonanan would have obtained such a product and smoked it on the night of January 18, 1998; and
>
> (5) if a safer alternative design existed, it would not have caused the Fire if it was carelessly extinguished on the Ragoonanan Couch in the circumstances present in the Ragoonanan townhouse on the night of January 18, 1998.
>
> [Counsel's references to the night of January 18, 1998 throughout their factum refer to the night preceding the discovery of the fire on January 18, 1998 - *ie.*, January 17, 1998.]

[18] In the submission of ITCL's counsel, each of such facts was essential to the plaintiff's claims and there is no evidence on which a rational trier of fact could find that any of them had been proven. As, in the absence of such evidence, the plaintiffs could not possibly succeed at trial, it was submitted that there was no genuine issue to be tried. Among other authorities, ITCL's counsel cited *Fitzpatrick Estate v. Mendronic Inc*, [1998] O.J. No. 517 (G.D.) and *Kreutner v. Waterloo Oxford Co-op Inc et al* (2000), 50 O.R. (3d) 140 (C.A.) where summary judgment was granted to defendants on the basis that the claims pleaded lacked evidential support.

(a) Causation: Philip's smoking

[19] The evidence, and the submissions of counsel, on the first three of the above material facts can, I think, be considered together. On these facts I note that, although ITCL's case for summary judgment would obviously be stronger if the evidence pointed unequivocally to some other cause of the fire, it would not be required to identify another more probable cause at trial. Nor did it attempt to do so on this motion. For the present purposes it would be sufficient if there is no evidence on which a rational trier of fact could find that Phillip's smoking of an ITCL cigarette contributed to the start of the fire - no evidence on which it could possibly discharge the burden, at trial, of proving causation. On the other hand, if the evidence is equivocal between a number of possible causes - including Philip's smoking - triable issues are more likely to be raised than if the evidence pointed to a different cause. In this respect, ITCL's position on this

part of the motion is somewhat unusual in that its counsel did not submit that a court at trial could find that any one of a number of possible causes was more probable than any other. It was sufficient, in their submission that it was clear from the limited evidence available that a rational trier of fact would not be able to find that Philip's smoking of an ITCL cigarette was more probable than the others. Motions for summary judgment are, I think, more commonly made on the basis that only one view of the material facts is tenable or, at least, could be found to be probable.

[20] The burden of establishing that there are no triable issues is, and always remains, on the defendant as the moving party. For this purpose, counsel for ITCL relied on:

> (a) an absence of evidence that Philip was smoking in the living room or elsewhere in the townhouse on the night of January 17, 1998, or at any other time;
>
> (b) evidence that Philip was not permitted to smoke in the house and that he had not done so between the hours of 10 pm and midnight on January 17, 1998;
>
> (c) an absence of evidence that the point of origin of the fire was on the couch;
>
> (d) an absence of evidence that, if Philip was smoking a cigarette in the living room, ignition resulted from contact between the cigarette and the couch;
>
> (e) an absence of evidence that any such cigarette was manufactured by ITCL;
>
> (f) evidence that the ignition source may have been an electrical malfunction;
>
> (g) an absence of evidence that excluded the possibility that the ignition source was a careless use, or disposal, of a cigarette smoked by Davina or Ronald;
>
> (h) an absence of evidence that excluded the possibility that the ignition source was a careless use, or malfunction, of a cigarette lighter; and
>
> (i) a report of an investigator with the Fire Marshal's Office that concluded that the cause of the fire was "undetermined".

[21] For the purpose of complying with rule 20.04 (1), and satisfying what Morden J.A. in *Hi-Tech Group Inc v. Sears Canada Inc*, [2001] O.J. No. 33 (C.A.) described as the "evidential burden or something akin to an evidential burden (because the motions judge does not find

facts)" that might be found to arise from the evidence – and the absence of evidence - on which ITCL relied, counsel for the plaintiffs submitted that there was sufficient direct, and circumstantial, evidence with respect to the facts, and expert opinion evidence, in the record to require a trial of the issue whether ignition resulted from contact between an ITCL cigarette, that Philip had been smoking, and the couch.

[22] This evidence consisted of:

> (i) Davina's evidence that Philip was a smoker and invariably smoked DuMaurier cigarettes manufactured by ITCL;
>
> (ii) the report of the investigator with the Fire Marshal's Office that, although classifying the cause of the fire as "undetermined", stated that
>
> "careless use of smoking materials by [Philip] who was a noted heavy smoker" was "strongly suspected".
>
> (iii) evidence that classification of the cause of a fire as "undetermined" meant only that the cause could not be identified with certainty;
>
> (iv) expert evidence that the fire probably started at the location of the couch on which Philip had been seated while Davina and Ronald were with him and where he intended to sleep that night;
>
> (v) evidence that unextinguished cigarettes are a major source of fires and that upholstery on which unextinguished cigarettes are left can smoulder for considerable periods before bursting into flame;
>
> (vi) evidence of the investigator that the possibility of an electrical malfunction had been excluded by an engineer from the Fire Marshal's Office who had inspected the site;
>
> (vii) expert evidence that such an accidental electrical ignition source of the fire was improbable; and
>
> (viii) expert evidence that the probable ignition source of the fire was an unextinguished cigarette that came in contact with the couch.

[23] Ms Glendinning strongly contested the reliability of the inferences that plaintiffs' counsel submitted could be drawn from the circumstances, the evidence of the investigator's suspicion

and the evidence of the expert on which counsel relied. While not in a position to dispute Davina's evidence that Philip smoked cigarettes, she submitted that Davina's affidavit evidence that these were "invariably" of a brand manufactured by ITCL was "qualified" by her answers given in cross-examination that raised a question whether she would be likely to know which brand of cigarettes Philip smoked. Ms Glendinning also pointed to the evidence of Davina in cross-examination that, during the period from approximately 10 pm to midnight on the night of January 17, 1998, she and Ronald had been in the living room with Philip and that, although during that time she and Ronald each smoked at least one cigarette, Philip did not do so. She said that she knew he smoked cigarettes but that, as he was only 16 years of age, she disapproved of this and did not permit him to smoke in the house. There is no evidence that he was observed, or was suspected of, doing so by any member of the household on this occasion, or on any other.

[24] The investigator's strong suspicion that the fire had been caused by a careless use of smoking materials by Philip did not, in Ms Glendinning's submission, exclude the use of a cigarette lighter and, in any event, it could not be accepted because it is likely that it was, at least, influenced by statements obtained by the investigator from police officers who had interviewed Davina and Ronald after the fire. Davina is said to have told them that, when she went to bed, Philip was lying on the couch watching television and smoking. The officer also reported that it had been learned that "all occupants, on the night of the fire, were smoking and [Philip] was a very heavy smoker and had a habit of lying on the couch smoking and watching television". The statements, which, as reported by the investigator, are hearsay of hearsay, are inconsistent with Davina's evidence on her cross-examination. Neither the investigator, nor the police officers, provided affidavits and they were not examined as witnesses.

[25] Ms Glendinning relied on evidence that the Fire Marshal's Office had adopted a four-fold classification of levels of confidence that should attach to opinions relating to fire causation after investigations have been conducted: (a) Conclusive; (b) Probable; (c) Possible; and (d) Suspected. These standards are set out in the National Fire Protection Association's Guide which states that, unless the applicable level is either Conclusive or Probable, the cause should be listed in a report as "undetermined ".

[26] The evidence of Mr Timothy Leier - an engineer specialising in fire investigations - was that, in practice, investigators from the Fire Marshal's Office are instructed to list a cause as "undetermined" if it cannot be determined conclusively. Ms Glendinning submitted that this evidence should be rejected as Mr Leier was not able to provide any official written confirmation of the practice and that, in consequence, the only legitimate inference from the investigator's finding that the cause was undetermined was that it had not been found possible to identify any conclusive, or probable, cause.

[27] Mr Leier had also determined that the point of origin of the fire was probably at the location of the couch. He reached this conclusion on the basis of the investigator's report and an examination of the photographs taken of the site. This evidence was contrasted by Miss Glendinning with that of the investigator who stated only that the "suspected point of origin" was the couch. In her submission, even this qualified identification of the source must be considered

to be doubtful in view of the likely influence of the statements that had been reported to the investigator by the police officers.

[28] Ms Glendinning submitted, further, that the investigator's statement that all accidental and electrical causes were eliminated by the engineer from the Office of the Fire Marshal should be rejected because a report of the engineer - dated more than 12 months later - stated that "it is not possible to completely eliminate electricity as a possible cause". Mr Leier's opinion that the investigator had exercised his own judgment and reached an opinion contrary to that of the engineer, was, in Ms Glendinning's submission, simply an unsupported inference.

[29] However, the engineer did not address the question of a probable cause and Mr Leier's own opinion that an electrical malfunction could be excluded was based on the specific findings of the engineer and the fact that none of the electrical devices he inspected was located within what, in Mr Leier's opinion, was the probable area of origin for the fire. The importance he placed on this is indicated earlier in his affidavit when he described the methodology sanctioned by the National Fire Prevention Association's Guide for fire investigations:

> The identification of at least an area of origin for any fire is crucial in the determination of a fire ignition source and cause.
>
> Once an area or point of fire origin has been determined, the ignition source can then be addressed. All reasonable possible ignition sources within the area of fire origin must be considered in the course of a competent and proper fire investigation. [The National Fire Prevention Association's Guide] permits an ignition source and cause finding to be made in one of two ways. There can either be remaining distinct proof of one specific ignition source or all possible causes, save one, can be ruled out or eliminated. Due to the consuming nature of fire, it is common in fire investigations that an ignition source and cause are determined by the elimination of all other possible causes in the area of origin rather than by the remaining physical evidence of a single ignition source.

[30] Mr Leier concluded that, with the elimination of electrical devices as possible ignition sources in the area of origin, only smoking materials remained as a reasonable cause of the file. In his opinion, a lighter was unlikely to have provided the ignition source as an open flame would probably have led to immediate flaming combustion of the first material ignited and, in consequence, would probably have been noticed at an early stage of the fire sequence. His overall conclusion was:

> In my opinion, this fire probably started in the living room south wall couch with a lit cigarette as the ignition source. I am unable to determine the specific means or sequence by which a lit cigarette

> came to be on/in the couch. These conclusions are not made contrary to those voiced by the [investigator] but were made at a different level of certainty accepted by civil courts.

[31] In Ms Glendinning's submission, a rational trier of fact could not reasonably, or properly, attribute weight to this conclusion as it was probably tainted by Mr Leier's acceptance of the references in the investigator's report to the statements obtained by the police officers from Davina - statements that were not only hearsay of hearsay but directly in conflict with aspects of her sworn evidence when under cross-examination.

[32] Ms Glendinning relied, also, on expert evidence of Mr Richard Kooren that was filed on behalf of the defendant. While Mr Kooren was generally in agreement with Mr Leier with respect to the approved methodology for fire investigations, he did not agree that it was possible to identify an area in the close vicinity of the couch as where the fire originated. Nor was he prepared to exclude the possibility of electrical and other ignition sources of the fire. The general thrust of his evidence was that the investigator's conclusion of "undetermined" with respect to causation was probably correct and that, in any event, it is now too late to expect that any other conclusion could reasonably be arrived at.

[33] On the basis of this evidence, the absence of any physical evidence of the ignition source, and because I should assume that I have a complete evidential record, Ms Glendinning submitted that it would not be possible for a rational trier of fact to find on a balance of probabilities that the plaintiffs had proven any of the first three material facts set out above. Mr Roman's counter submission was that there was a triable issue with respect to each of them. He submitted that the absence of direct evidence - an absence that resulted from the extensive fire damage and the fact that Philip is not alive to testify - does not exclude the possibility that, at a trial, causation might be proven by circumstantial, and expert opinion, evidence. The task of choosing between the inconsistent opinions of Messrs Leier and Kooren is, in Mr Roman's submission, pre-eminently one that only a trial judge can perform.

[34] Although Ms Glendinning was able to cast doubt on the reliability of parts of Mr Leier's evidence, I do not believe she succeeded in discrediting it to an extent that his opinions relating to the location of the origin of the fire and the unlikelihood that the ignition source was either electrical or a lighter should be disregarded for the purpose of this motion. On the basis of the evidence, I am not prepared to find that a trial is unnecessary to determine the relative weight to be given to the opinions of the experts on these questions.

[35] The fire must have had an ignition source. The only possible sources that have been identified are the careless use of cigarettes or lighters by Philip, Davina or Ronald, and an accidental electrical malfunction. Although, on the basis of Mr Kooren's evidence, ITCL's counsel invited me to find that, because each of these possibilities was open on the evidence, a rational trier of fact could not find that the misuse of cigarettes by Philip was a probable cause, Mr Leier's evidence, if accepted, would exclude the use, or misuse, of a lighter and electricity as probable causes.

[36] The question I have found more difficult is whether, if it is found that the ignition source was a cigarette and that ignition resulted from its contact with the couch, a triable issue is raised by the allegation that it was one that Philip had been smoking. There is evidence that Philip was the last person in the living room on the night of January 17, 1998 and that he was last seen at approximately midnight sitting on the couch where he intended to watch television and then sleep. There is no evidence of the length of time he remained there. There was evidence that he smoked DuMaurier cigarettes but no evidence to support the investigator's hearsay report that he was a heavy smoker or the allegation in the third party defence of Davina and Ronald that he smoked "incessantly, even at night, after everyone else had gone to bed." There was evidence that he was not permitted to smoke in the house and that, on the night of the fire, he did not do so before midnight. On the other hand, Davina and Ronald had been smoking in the living room on that occasion and, although the fire was not discovered until approximately 3:45 am, there is expert evidence that, when an unextinguished cigarette comes in contact with combustible material, the material can smoulder for between 30 minutes and four hours, and possibly longer, before flaming occurs. There is, however, no evidence that would explain how a cigarette of Davina, or Ronald, could have come in contact with the couch where Philip was sitting when. they left the living room at midnight. The probabilities must be that, if it had provided the ignition source, it would already have been in contact with the couch on which Philip was seated at that time.

[37] Ms Glendinning's submission was that, on the assumption that no other evidence would be available at trial, the court could not possibly find in favour of the plaintiffs' plea that a cigarette that Philip had been smoking provided the ignition source and, in consequence, that there was no genuine issue for trial on that allegation. The question that has troubled me is whether, in order to accept that proposition and to conclude that a trial is unnecessary, I would have to engage in the process of weighing the evidence that the Court of Appeal has repeatedly held is outside the rule of a judge disposing of a motion under Rule 20. In *Dawson v. Rexcraft Storage and Warehouse Inc*, [1998] 164 D.L.R. (4th) 257 (C.A.), at page 269, Borins J.A. stated:

> Rule 20 is the mechanism adopted by the Rules of Civil Procedure for deciding cases where it has been demonstrated clearly that a trial is unnecessary and would serve no purpose. I recognize, however, that deciding when a trial is unnecessary and would serve no purpose is no mean task. However, in my respectful view, in determining this issue it is necessary that motions judges not lose sight of their narrow role, not assume the role of the trial judge and, before granting summary judgment, be satisfied that it is clear that a trial is unnecessary. This is not to say that the court is not to consider the evidence which constitutes the record. Indeed, to do so is central to determining the existence of a genuine issue in respect to material facts.

[38] Later in his judgment, when referring to the analytical approach adopted under the Federal Rules of Civil Procedure in the United States - an approach that he considered should be

adopted by motions judges when determining the existence of a genuine issue of material fact - Borins J. A. commented:

> In applying a test which focuses on whether the entire record could lead a rational trier of fact to find for the nonmoving party, what the court is saying is there is no evidence on which the plaintiff's claim, or the defendant's defence, can succeed. In a sense, the courts have come to equate "genuine issue for trial" with "genuine need for trial". However, at the end of the day, it is clear that the courts accord significant deference to the trial process as the final arbiter of the dispute which has brought the parties to litigation. If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear that claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue.

[39] I have not found the distinction between weighing the evidence and considering it, to determine whether a triable issue exists, easy to apply to the evidence in this case. The decisions in *Fitzpatrick* and *Kruetner* on which the defendant relies were cases where there was either uncontradicted evidence contrary to the plaintiff's assertions of fact, or a complete absence of evidence to support them. In consequence, there was no difficulty in distinguishing between what the motions judge might think another judge would find at a trial from what such a judge could properly find. In this case there is evidence from which different, albeit weak, inferences could be drawn and I am of the opinion that I would be required to weigh - and not merely consider - the evidence and to usurp, or trespass on, the role of a trier of fact if I were to hold that a trial is unnecessary to determine whether the fire probably originated when a cigarette that Philip had been smoking came in contact with the couch.

[40] The fact that, because of the circumstances, there is a dearth of direct evidence of causation in fact does not mean that the question cannot be determined at a trial. As, however, this will require the court to choose between competing inferences to be drawn from evidence of the circumstances, it reduces the likelihood that summary judgment could properly be granted. Where the evidence is reasonably capable of supporting competing inferences, the process of weighing the evidence and making findings of fact should be done at trial and not on a paper record: *Transamerica Occidental Life Assurance Co v. Toronto-Dominion Bank* (1999), 44 O.R. (3d) 97 (C.A.), at page 110 *per* Osborne J.A.; *Aguonie v. Galion Solid Waste Material Inc.,* (1988), 38 O.R. (3d) 161 (C.A.), at page 173 *per* Borins J.A.. On the other hand, it has been insisted that:

> The motions judge hearing a motion for summary judgment is required to take a hard look at the evidence in determining whether there is, or is not, a genuine issue for trial. *1061590 Ontario Ltd. v.*

> *Ontario Jockey Club* (1995) 21 O.R. (3d) 747 (C.A.), at page 557 *per* Osborne J.A.

[41] I note also that if, after my review of the record and the submissions of counsel, the question whether a triable issue exists is, in my judgment, "in balance", the motion must be dismissed.

[42] Whether one of a number of possible causes is a probable cause in any case cannot be considered in isolation and without regard to the relative strengths and weaknesses of the other possible causes. It is, I believe, open to a court at a trial in any such case to find that evidence is insufficient to establish that any one cause is more probable than the others - that the probable cause is undetermined or "accidental" - and, on that ground, that a plaintiff had not discharged the burden of proving causation. Such a decision was reached at trial in *Cromie v. Fry*, [1999] O. J. No. 4046 (S.C.J.) where Reilly J. stated:

> The task of establishing the origin and cause of fires may fairly be said to hold a special place in the law relating to negligence. That is because the best evidence as to origin and cause is so often destroyed or rendered less reliable by the fire itself. "Possible" causes may not be established as "probable" causes simply because the evidence has been destroyed. The court must carefully examine the available evidence and do its best to determine whether such evidence permits an inference, on a balance of probabilities, as to the cause of the fire. As in every case, mere speculation and conjecture are impermissible, absent an evidentiary base. However the court must be mindful of the unenviable position of the defendant, who may be left in the position, as a result of the fire, of being unable to demonstrate other probable causes of the fire. The court should not "seize upon" a remaining "possible" cause as the "probable" cause simply because the evidence of other "possible" causes has been destroyed.

[43] While I am in respectful agreement with the comments and caveats of Reilly J., I am satisfied that the submissions of counsel for ITCL could not be accepted without weighing the available evidence in a sense, and to an extent, that is not appropriate on a motion for summary judgment. The case is, I believe, close to the line, and the evidence connecting Philip’s smoking to the fire is undoubtedly weaker than Mr Lennox envisaged when he adapted his precedent - or intended prototype - for an action against cigarette manufacturers. However, despite the absence of direct evidence of the ignition source of the fire in this case, there is, I believe, sufficient circumstantial, and expert, evidence to entitle the plaintiffs to have the correctness of their allegations with respect to the source - and with respect to the first three of the material facts identified by counsel for the defendant - determined at a trial.

(b) Causation: Philip’s likely behaviour

[44] Ms Glendinning's submission that summary judgment should be granted on the basis that there is no evidence that Philip would have smoked a fire-safe cigarette manufactured by ITCL relates to a different issue of causation. The issue is not whether a cigarette manufactured by ITCL provided the ignition source of the fire, but whether, even if it did this, a causal connection could be established between the fire and the failure of ITCL to develop and market a fire-safe cigarette. There is, again, no direct evidence that bears upon this question. It would be surprising if there was as the inquiry relates to the likely behaviour of a person now deceased in circumstances which, *ex hypothesi*, have not occurred.

[45] Counsel for the plaintiffs challenged the relevance of the inquiry. In their factum, they described the argument that there must be evidence that Philip would have smoked a fire-safe cigarette as scandalous and without any legal foundation. In paragraphs 99 and 100, they continued:

> There is no basis to impose on the plaintiffs a requirement to prove by evidence that a deceased 16 year-old boy would have, hypothetically, smoked a non-existent ITCL cigarette with safer design features that ITCL had chosen not to design and market in Canada.
>
> It is unnecessary for the plaintiffs to disprove a negative hypothetical. We will never know if Philip would have purchased a safer cigarette, if such a product had been made available, and it is impossible to ask him now. The law does not require plaintiffs to try to answer such unanswerable and irrelevant questions. If that were the law, no one who had suffered the most serious loss imaginable - a loss of one or more family members - could ever be a representative plaintiff. Had the defendant replaced its defective cigarettes with fire-safe ones, which are commercially acceptable and no more toxic than conventional cigarettes, as it should have, by then, Philip would have had no choice but to smoke a fire-safe cigarette, and would probably still be alive today.

[46] I am satisfied that Ms Glendinning was correct in her submission that the plaintiffs could not succeed at trial in establishing a necessary causal link between ITCL's alleged negligence and the fire unless the court was satisfied that, on the night of January 18, 1998, Philip would probably have smoked fire-safe cigarettes manufactured by ITCL instead of the allegedly defective DuMaurier brand. This, I believe, is correct in principle and required by the reasoning of the Supreme Court of Canada in *Hollis v. Dow Corning Corp*, [1995] 4 S.C.R. 634, on which all counsel relied.

[47] Although the members of the court who heard the appeal in *Hollis* did not agree on the correct formulation of the applicable test, they all recognized the relevance to causation of the

plaintiff's likely response if an appropriate warning had been given by the manufacturer of a defective product.

[48] In *Hollis,* and in *Reibl v. Hughes* (1980), 114 D.L.R. (3d) 1 (S.C.C.) and *Arndt v. Smith et al* (1997), 148 D.L.R. (4th) 48 (S.C.C.) - leading cases on causation in medical negligence - the plaintiff had given evidence that her, or his, behaviour would have been materially affected if the defendant had discharged its duty to warn of risks to which the plaintiff had been exposed.

[49] The issue on which the members of the court were divided in *Hollis* was whether - as the majority held - the inquiry into the plaintiff's likely behaviour if the alleged breach of duty by the manufacturer had not occurred was entirely subjective, or whether the modified objective approach adopted in *Reibl* for cases of medical negligence should be applied. In *Arndt*, the correctness of the latter approach in cases of the latter kind was confirmed by the majority but McLachlin J. and, *semble*, Iacobucci and Sopinka JJ, while preferring a subjective test for medical negligence, recognized that the probative force of a plaintiff's evidence of her likely behaviour could be tested by an examination of all the facts and an application of a standard of reasonableness. The test that McLachlin J. preferred, even in cases of medical negligence was one

> which asks what the particular plaintiff would have done in all the circumstances, but accepts that the reasonableness of the one choice over another, as reflected in the medical advice the plaintiff would have received, is an important fact bearing on that decision.

[50] Earlier, McLachlin J. had quoted - with, I think, approval - the view of Sopinka J. (dissenting) in *Hollis* that

> the most reliable approach in determining what would in fact have occurred is to test the plaintiff’s assertion by reference to objective evidence as to what a reasonable person would have done.

[51] If I understand the reasoning of the majority in *Hollis* correctly, credible evidence of the plaintiff with respect to her, or his, likely behaviour will be determinative in cases of a manufacturer's liability for defective products so that, in the words of Robins J.A. in *Buchan v. Ortho Pharmaceutical (Canada) Ltd* (1986), 12 O.A.C. 361 (C.A.) that were quoted with approval:

> Whether a so-called reasonable woman in the plaintiff's position would have done likewise is beside the point.

[52] However, I have found nothing in the majority judgment in *Hollis* that is inconsistent with the view of McLachlin J. in *Arndt* that, in determining whether the plaintiff's evidence is credible and reliable, reasonableness may play a part.

[53] None of the approaches supported by different judges in the above cases requires that evidence of the plaintiff must be available at trial. Whether the focus of the relevant inquiry is entirely on how this plaintiff would have behaved - tested or untested by considerations of reasonableness - or how a reasonable person in the position of this plaintiff would have behaved, the answer must be obtained on a balance of probabilities from a consideration of the evidence that is adduced - the burden of persuasion resting on the plaintiff at all times. Where, as here, the relevant plaintiff is not available to testify, I do not see how the question of reasonableness can be ignored. Whether or not that is correct, I am satisfied that, depending on other findings that might be made at a trial, it would be open to the court to find that, on the night of January 18, 1988, Philip would have smoked a fire-safe cigarette and not the allegedly defective product. If the evidence at trial satisfied the court that ITCL could have manufactured and marketed a fire-safe cigarette that would otherwise be identical to the brand smoked by Philip, the court might well find that it was negligent in not replacing the defective product with the new product under the same brand name and that it was probable, if that had been done, that Philip would have continued his invariable practice of smoking DuMaurier cigarettes.

[54] The conclusion just reached is premised on the existence of a triable issue relating to ITCL's ability to develop a fire-safe cigarette. The premise was disputed by ITCL's counsel in connection with the fifth, and last, of the material facts – set out in paragraph 17 above - that, in their submission, are unsupported by evidence. If that submission is not accepted, the issue relating to Philip's likely behaviour must also be tried.

(c) Causation: Fire-safe cigarettes?

[55] The remaining issue of fact that ITCL's counsel submitted was essential to the plaintiffs' case was whether the fire would not have occurred if a fire-safe cigarette had been carelessly left on the couch. The general thrust of counsel's submissions was that there is no evidence that it is possible to manufacture a cigarette that would not have ignited the upholstery on the couch if carelessly left there. As the plaintiffs' filed affidavits of experts to the effect that such a possibility exists, the submission made on behalf of ITCL can be accepted only if such witnesses are discredited, or if their evidence is patently unreliable or otherwise insufficient to give rise to a triable issue.

[56] Although I accept the possibility that, on a motion for summary judgment, the evidence of expert witnesses might be rejected on such grounds, I believe it is clear that, where the experts are qualified and their opinions on material issues are in conflict, the decision to prefer the evidence of one over another should be made at trial unless the motions judge is satisfied that the opinions on one side have no probative force.

[57] The plaintiffs filed opinions, and reports, that referred to a mass of published research that has been conducted by governmental committees, industrial bodies and academics in North America into the possibility of developing fire-safe - or reduced ignition propensity - cigarettes. A former senior employee of an affiliate of the defendant swore an affidavit in which he deposed to extensive research conducted within the corporate group before a decision was made to

terminate it and suppress any results that had been obtained. Dr John Hoffman, whose experience in investigating fires and studying fire-prevention, covers 40 years and who has given evidence on behalf of plaintiffs and defendants in numerous civil proceedings in jurisdictions in the United States, Canada, Colombia and Puerto Rico, gave evidence that it is possible to design a cigarette with a considerably reduced propensity for causing household fires relative to that of the cigarettes produced by ITCL. In his opinion, if reduced ignition propensity methods had been applied in the manufacture of DuMaurier brand cigarettes, " it is more likely than not that that the Ragoonanan fire would not have occurred ". He based that conclusion on cigarette testing he had conducted in his laboratory, on his years of experience as a fire scientist and on his review of the considerable amount of the published literature on fire-safe cigarettes.

[58] Dr Hoffman's conclusions on the above matters conflicted with those of an expert witness, Mr Gordon Damant, who swore an affidavit delivered on behalf of ITCL. On the basis of his evidence, and their own meticulous examination of that of Dr Hoffman, counsel for ITCL challenged the reliability and utility of the laboratory testing that Dr Hoffmann had conducted and identified numerous respects in which his testing methodology was, in their submission, substantially inadequate to support his conclusions. These they described as inconclusive, incomplete and inconsistent.

[59] The submissions of counsel on this question occupied a large part of the hearing. Much of the time was spent on the adequacy of the methods that have been developed to test alternative-design cigarettes that would have a reduced propensity for ignition if placed in contact with combustible materials, and the significance of the results obtained from such testing. In this connection, considerable emphasis was placed on the fact that, in his laboratory tests, Dr Hoffman did not attempt to test the fire propensities of various brands of cigarettes on upholstery, or other material, of the kind that covered the Ragoonanan couch. In Dr Hoffman's opinion this was unnecessary for the purpose of testing the relative fire propensities of ITCL cigarettes and those that have been marketed as comparatively "fire safe". It is possible that no such evidence is now available.

[60] The evidence adduced on both sides was extensive and impressive. Counsel explored the methodology employed by Dr Hoffman in considerable detail. As on the other questions that were addressed, Ms Glendinning's submissions were notable for their thoroughness and the skill and tenacity with which they were presented. However, I do not find it necessary to discuss the specifics of her criticisms, or Mr Roman's response to them, as by the end of the hearing I was satisfied that I was being asked to perform the role of a trier of fact to an even greater extent than on the other questions. While certain aspects of Ms Glendinning's destructive analysis of Dr Hoffman's conclusions may have hit the mark, I am not prepared to find that his methodology and conclusions can be discounted to an extent that would justify a finding that there are no triable issues raised by the conflict between his opinions and those of Mr Damant. I am satisfied that the plaintiffs' assertion that ITCL had the ability to develop and market a cigarette, that would have been sufficiently fire-safe to have prevented the fire, raises an issue that cannot properly be decided on this motion.

[61] In reaching this conclusion I have given careful consideration to the decision of Judge Robert E. Keeton in *Kearney v. Philip Morris* 916 F. Supp. 61 (1996) in which summary judgment was granted to the defendant on the plaintiff's claim for damages in respect of deaths that occurred from a fire that was assumed to have started when an unextinguished cigarette manufactured by the defendant was left in contact with a couch. The results of laboratory testing were relied on to show that cigarettes could be manufactured that would probably not have ignited the particular fabric covering on the couch. The court held that, after the defendant had made "a showing" by "pointing out" to the court that the evidence was insufficient to support the responding party's case:

> … plaintiff's case fails to survive the cause-in-fact-requirement. Plaintiff must prove that the alleged negligence, or the alleged defect in the cigarette, more probably than not was a cause-in-fact of the injuries; otherwise defendant is entitled to summary judgment as a matter of law. As explained below, plaintiff's evidence is inadequate to support a reasoned finding by a finder of fact that the alleged negligence or the alleged defect of the cigarette was, more probably than not, a cause-in-fact of the fatal fire, and that the deaths in this case, more probably than not, would not have occurred if the cigarette left unattended … had been a cigarette of plaintiff's proposed alternative design."

[62] Despite the approval accorded in *Dawson* to the approach adopted in other decisions under the Federal Rules of Civil Procedure in the United States, it is not clear to me that the court's description of the burden of proof on the plaintiff, as a responding party, is the same as that adopted under Rule 20 in cases such as *Hi-Tech* to which I have referred earlier in these reasons. Similarly, the approval given by Morden J.A. in that case to a statement of Griffiths J. in *Kaighin Capital Inc v. Canadian National Sportsmens' show* (1987), 58 O.R. (2d) 790, at page 792 that:

> … where the court, on reviewing the pleadings, affidavit evidence and other material, concludes that the question of whether there is a genuine issue for trial, is in balance, the application of the moving party must fail,

might be contrasted with the statement in *Kearney* that:

> On issues where the nonmovant bears the burden of proof, he or she must present definite, competent evidence to rebut the motion.

[63] That statement is, I believe, more consistent with an interpretation of the description of the applicable test in *Guarantee Company of North America v. Gordon Capital Corporation*,

[1999] 3 S.C.R. 423, at pages 434 - 5 that, as a result of the reasoning in *Hi-Tech*, does not appear to be open to me.

[64] I have a similar difficulty in reconciling the meticulous examination, and rejection, of expert evidence tendered on behalf of the plaintiff in *Kearney* with the repeated assertion that is not the role of a judge to weigh evidence when considering motions under Rule 20.

[65] Independently of the difficulties I have mentioned, I am not prepared, on the evidence presented in this case, to reach the same decision as that in *Kearney*. Overall, the learned judge was of the opinion that the expert evidence could not bridge the gap between the results of the testing in that case and their application to the actual fire that had occurred. An "inferential leap for which no reasoned basis is proffered" was said to be required if that was to be done. Here, the methodology of the testing was different and I must decide whether triable issues have been raised on the basis of the evidence before me. The laboratory testing performed by Dr Hoffman was derived from standard tests supported by the American Society for Testing and Materials as a method of predicting the relative propensity of a cigarette to ignite upholstered furnishings. As he explained – more than once - when it was put to him in cross-examination that the tests could have no practical significance unless they involved an application of ignition sources to materials the same as those of the couch, the standard tests were designed to ensure, and necessarily presupposed, that they would have general significance.

[66] One of the tests performed by Dr Hoffman compared the ITCL cigarettes with a brand that was designed to self-extinguish rather than to continue burning when not being smoked. As Dr Hoffman said:

> If a cigarette extinguishes before involving other material, the fire performance of the materials becomes irrelevant for the purpose of determining whether different cigarettes will, or will not, cause ignition.

[67] Dr Hoffman’s conclusions were :

> The ignition propensity of cigarettes can be reasonably and reliably measured. Conventional cigarettes have a high ignition propensity. ‘Fire-safe’ cigarettes have a low ignition propensity. ‘Fire-safe’ cigarettes are demonstrably less likely to cause fires.
>
> Had ITCL adopted a ‘fire-safe’-cigarette design features in its products it is more likely than not that the Ragoonanan fire, and many others like it, would have been prevented.

[68] I am satisfied that the question whether these opinions are to be preferred to those of the expert on which the defendant relied must be determined at a trial and not on this motion.

Disposition of the Motion for Summary Judgment

[69] I am of the opinion that that the defendant has not discharged the burden of proving the absence of a triable issue on any of the five questions of causation on which its counsel relied. The defendant's case was presented with thoroughness and a meticulous examination of the evidence at a hearing that extended over five days - longer than many trials. Although counsel's submissions were always formulated in terms of the requirements of Rule 20, I am satisfied that the exercise I was asked to perform was more expansive than the authorities permit. In consequence, the motion is dismissed.

[70] Submissions on costs may be made in writing by the respondents within 21 days of the release of these reasons. The moving party will have 10 days in which to respond.

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CULLITY J.

Released: March 9, 2005

COURT FILE NO.: 00-CV-183165 CP
DATE: 20050309

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Defendant

REASONS FOR DECISION

CULLITY J.

Released: March 9, 2005