

Court File No. C17773/97

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**LJUBISA SPASIC, AS ESTATE TRUSTEE OF
THE ESTATE OF MIRJANA SPASIC**

Plaintiff

- and -

**IMPERIAL TOBACCO LIMITED, and
ROTHMANS, BENSON & HEDGES INC.**

Defendants

**STATEMENT OF DEFENCE OF THE DEFENDANT,
ROTHMANS, BENSON & HEDGES INC.**

A. Introduction

1. The defendant, Rothmans, Benson & Hedges Inc. ("RBH"), has no knowledge of the allegations made in paragraphs 2 and 3 of the Fresh as Amended Statement of Claim (the "Claim").
2. RBH denies the remainder of the allegations made in the Claim except as hereinafter admitted.
3. The plaintiff ("Spasic") claims she started smoking in Canada in 1975, when she was 29 years of age. She only smoked four products manufactured by RBH (Peter Stuyvesant, Benson & Hedges, Rothmans and Craven Menthol). Spasic claims she smoked Peter Stuyvesant from 1976 to 1982. The other three RBH brands were smoked by Spasic for considerably shorter and more intermittent periods of time.

B. Awareness of Health Risks

4. From at least 1972, television and radio programs, magazine, newspaper and journal articles,

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government publications, anti-smoking advocates, parents, physicians, religious leaders and word-of-mouth created public awareness about the health risks associated with smoking including cancer and the risk that smoking could be difficult to quit (collectively, the "Public Warnings").

5. Health Canada has, effectively since 1972, required RBH to place health warnings on its products ("Package Warnings").

6. Spasic did not smoke any product manufactured by RBH which did not contain the Package Warnings. Spasic did not smoke any product manufactured by RBH until she was 29 years of age. From the Public and Package Warnings, Spasic was aware of the health risks associated with smoking RBH tobacco products before and each time she made the decision to smoke.

7. Spasic was not aware of, let alone acted upon, any representations made by RBH.

C. Addiction

8. Spasic believed that smoking was "addictive" before she made any decision to smoke any product manufactured by RBH.

9. RBH denies that Spasic was "unable" to quit smoking. RBH pleads that Spasic commenced and continued to smoke products manufactured by RBH as a matter of personal choice and could have quit if she had chosen to do so.

10. RBH denies that it manufactures its products to create, facilitate, maintain or heighten "addiction".

11. The methods for the measuring and reporting of nicotine and tar on cigarette packages were specifically prescribed by the federal government. At all times, RBH complied with the legislative requirements.

D. Marketing

12. Since 1989, RBH has been effectively prohibited from conducting any product advertising

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(except during a brief period following the Supreme Court of Canada's decision striking out portions of legislation which prohibited that advertising), but permitted to advertise its sponsorship of certain events.

13. RBH's marketing activities, during the times relevant to this action and otherwise, were only designed to attract market share from its competitors by either persuading current smokers of RBH products not to switch to a brand manufactured by a competitor and/or persuading current smokers of products marketed by competitors of RBH to switch to an RBH product.

14. Spasic was not aware of any of RBH's marketing activities. Even if she had been aware of them, Spasic never interpreted any marketing activity, statement, descriptive term or label as in any way constituting a representation relating to the health consequences of smoking.

15. Further, and in the alternative, Spasic never relied upon any RBH representation to modify her behaviour to her detriment.

16. RBH states that its products were and are merchantable and fit for the purpose for which they were intended. RBH denies that it breached any consumer protection legislation or the *Sale of Goods Act* and denies owing any obligations to Spasic pursuant to such legislation.

E. Document Retention

17. RBH has a document retention policy which requires that certain documents be retained for specified periods of time. Documents required to be maintained can usually be discarded after the specified period of time has expired in the discretion of the person holding the position of the recipient of the document. Documents that do not require retention pursuant to the document retention policy can be discarded at the discretion of the recipient of a document.

18. In 1995, RBH was named as a defendant in an action commenced by the lawyers who act for Spasic (the "First Action"). This was the first product liability action commenced against RBH and, upon being notified of the claim, RBH modified its document retention policy so that all documents relevant to the First Action had to be retained.

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19. RBH maintains that, as a result of its document retention policy, more documents have been retained than would have been retained without the document retention policy.

20. RBH is not aware of any document relevant to Spasic's claim that has ever been discarded with the intention of keeping the document or the information contained therein from a potential plaintiff.

21. Regardless of its document retention practices, RBH maintains that it did not owe a duty to Spasic prior to the Claim to preserve and maintain documents relevant to the allegations set out therein.

22. In the alternative that RBH did owe Spasic such a duty, it did not breach that duty. Moreover, even if RBH breached that duty, Spasic is not entitled to relief therefrom. RBH denies that a claim for spoliation exists as a cause of action at law or that Spasic suffered any damages as a result of the alleged breach of duty.

F. Damages

23. RBH denies that the damages suffered by Spasic as alleged in the Claim resulted from her smoking of RBH products. In the alternative, Spasic breached her duty to mitigate her damages when, being aware of the risks of smoking, she chose not to stop or reduce her smoking. In any event, the damages claimed are excessive, remote and not otherwise recoverable at law.

G. Defences

24. RBH pleads that if Spasic had a cause of action against RBH, which is denied, then any such action is prescribed pursuant to the *Limitations Act*. Spasic believed prior to January 1, 1989 that she was "addicted" to cigarettes.

25. RBH pleads that any cause of action for alleged failure to adequately warn of the risks associated with smoking is pre-empted by the government action mandating the Package Warnings. In addition, RBH pleads that as a result of the Public Warnings and Package Warnings, Spasic was adequately warned or otherwise made aware of the health risks associated with smoking and chose not to modify her behaviour.

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26. RBH pleads that any damages allegedly suffered by Spasic were caused by the sole acts of Spasic including the fact that she voluntarily chose to smoke and continued to smoke notwithstanding the Public Warnings and the Package Warnings.

27. RBH pleads that Spasic voluntarily assumed any alleged health risks associated with smoking when she voluntarily chose to smoke and continued to smoke when she was aware of the alleged health risks.

28. RBH denies that its actions are subject to the strict liability doctrine. In any event, RBH denies that it manufactured a defective product.

H. Conclusions

29. RBH denies that it breached any obligations purportedly owed to Spasic and denies any wrongdoing whatsoever.

30. RBH denies that Spasic suffered any damages as a result of RBH's conduct.

31. RBH requests that this action be dismissed with costs.

Dated: May 1, 2003

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Court File No.: C17773/97

v. IMPERIAL TOBACCO et al
- Defendants

SPASIC
- Plaintiff -

ONTARIO
SUPERIOR COURT OF JUSTICE
(PROCEEDING COMMENCED AT TORONTO)

Statement of Defence

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May 1, 2003

BY FAX (416) 961-2827Sommers & Roth
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Dear Mr. Seibert:

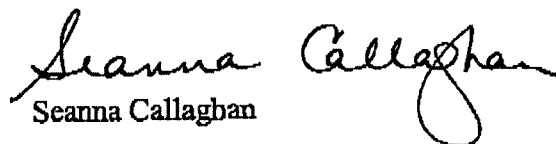
Re: Spasic v. Rothmans, Benson & Hedges Inc. ("RBH")

Enclosed please find the Statement of Defence of the Defendant, RBH, served upon you pursuant to the Rules of Civil Procedure.

I have recently returned from maternity leave and will be assisting Mr. Sofer in the conduct of this action. Accordingly, would you please address all e-mails and faxes with respect to this action to both Mr. Sofer and myself.

We trust the foregoing is satisfactory.

Yours very truly,


Seanna Callaghan

SLC/ic

Encl.

cc: Steven Sofer
Nancy Roberts
Deborah Glendinning

TOR_LAWS354006 v1

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Date May 1, 2003

Re RBH ats Spasic

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Message

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