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Torts: Products Liability--Cigarette Manufacturer--Lung Cancer

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with manufacturing whiskey, and a picture was taken of the accused standing next to his still. In each case the accused was not told or advised that posing for the picture was optional. The element of compulsion in the *Spencer* case is the same as it was in the Alabama and Georgia cases. It arises where the accused feels he must obey the officer because he was not told he had a right to disobey him. For example, in the *Spencer* case the accused had no choice whether he would perform the tests before the movie camera. This is what caused the motion picture of the coordination tests to be tainted as evidence.

This decision and others that preceded it in Oklahoma show conclusively that Oklahoma follows the more liberal interpretation of the prohibition against compulsory self-incrimination.¹⁶ "The proper guide in the interpretation of the constitutional guaranty against compulsory self-incrimination is not the probability of the evidence; but is the capability of abuse."¹⁷ It may be argued that convictions are hard to get if the prohibition is construed liberally. This may be true. However, the Oklahoma Constitution does not state merely that the accused cannot be compelled to testify; but says: "No person shall be compelled to give evidence which will tend to incriminate him."¹⁸ As was held in the *Spencer* case, the term evidence in its ordinary meaning includes more than just testimony. Therefore, it would seem that if the framers of the constitution intended for it to mean only testimony, they would have used the term testimony and not the term evidence.

Expediency or zeal should not be the criteria when individual constitutional rights are involved. The court in the *Spencer* case is saying that law enforcement agencies should be more cognizant of the rights of the accused during their investigation. As Chief Justice Warren stated in *Spano v. New York*:¹⁹ "[T]he police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from actual criminals themselves."

Gerald Weis

TORTS: PRODUCTS LIABILITY—CIGARETTE MANUFACTURER—
LUNG CANCER.

In *Pritchard v. Liggett & Meyers Tobacco Company*,¹ plaintiff brought suit against a cigarette manufacturer alleging that cancer² of his

¹⁶ See 28 R.C.L. *Witnesses* § 20 (1921).

¹⁷ *Allen v. State*, 183 Md. 603, 39 A.2d 820 (1944).

¹⁸ OKLA. CONST. art. 2, § 21.

¹⁹ 360 U.S. 315, 320, 321 (1959).

¹ 350 F. 2d 479 (3d Cir. 1965).

² *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292, 293 (3d Cir. 1961). The cancer involved here is medically known as bronchogenic carcinoma, squamous cell type (footnote by the court).

right lung was caused by smoking Chesterfields from 1921 to 1953.³ Plaintiff based his claim on theories of negligence and breach of warranty. He alleged that the tobacco company was liable for negligence in manufacturing cigarettes containing carcinogenic⁴ ingredients and in failing to warn consumers of the presence of those ingredients. He also claimed that defendant was liable for breach of both express and implied warranties. Plaintiff proffered the following evidence: (a) testimony of five eminent physicians on a positive causal relationship between cancer and cigarette smoking; (b) various advertisements of defendant's product which assured the public the cigarettes were harmless; (c) that certain tests defendant had conducted in 1952, resulting in the widely publicized conclusion that the cigarettes had no harmful effect on "nose, throat, and accessory organs," were in fact inconclusive and inadequate; and (d) that between 1921 and 1953 defendant made no further tests of its product.

On the defendant's motions, the district court dismissed the warranty count and directed a verdict for defendant on the negligence count because of insufficient evidence to support a verdict on that theory. The court of appeals reversed and remanded the case for a new trial, holding there was sufficient evidence to warrant a jury finding on the following questions: (a) the causal relation between smoking and cancer; (b) the alleged negligence of the defendant; and (c) the alleged breaches of warranties.⁵

The new trial in November of 1962 resulted in a jury verdict for the defendant based on special interrogatories submitted to the jury by the court.⁶ The jury found: (a) plaintiff's smoking of Chesterfields was "the cause or one of the causes" of his lung cancer; (b) defendant was not negligent; (c) defendant made no express warranties upon which plaintiff relied as an inducement to purchase the cigarettes; and (d) plaintiff assumed the risk by smoking the cigarettes.

The court of appeals reversed the trial court in July of 1965 and granted plaintiff a new trial.⁷ The majority ruled that the trial court's charge on express warranty was defective for vagueness and for telling the jury they could not find an express warranty unless the "seller actually intended to be bound by his statement." The court of appeals unanimously reversed judgment for defendant because of the trial court's flawed instruction that assumption of risk would be a defense without clarifying for the jury the two different meanings of that defense. In its primary sense,

³ Pritchard v. Liggett & Meyers Tobacco Co., 134 F. Supp. 829 (W.D. Pa. 1955).

⁴ "Carcinogenic" is defined as that which produces cancer. MALLOY, MEDICAL DICTIONARY FOR LAWYERS 106 (2d ed. 1951). "It has long been established that prolonged contact with some kinds of extrinsic irritants produces a marked affinity for certain cancer types." These irritants are called carcinogenic agents. Small, *Gaffing at a Thing Called Cancer: Medico-Legal Conflicts in the Concept of Causation*, 31 TEXAS L. REV. 630, 634-5 (1953).

⁵ Pritchard v. Liggett & Meyers Tobacco Co., 295 F.2d 292 (3d Cir. 1961).

⁶ Pritchard v. Liggett & Meyers Tobacco Co., Civil No. 12820, W.D. Pa., Nov. 9, 1962.

⁷ Pritchard v. Liggett & Meyers Tobacco Co., *supra* note 1.

assumption of risk involves knowing of a risk, appreciating it, and voluntarily choosing to encounter it. In its secondary meaning, assumption of risk is equivalent to contributory negligence and involves failure to use due care for one's own safety. The court held that assumption of risk in the primary sense is a defense to a warranty action, but in the secondary sense it is not.⁸ The court stated:

There was overwhelming evidence that many of the defendant's advertisements carried factual affirmations, professedly based on medical research, that Chesterfields were safe and smoking them could have no adverse effect on "the nose, throat and accessory organs." These advertisements were calculated to overcome any fears the potential consumers might have had as to the harmful effects of cigarettes, and particularly Chesterfields. Under the circumstances it is difficult to perceive how the plaintiff, a cabinetmaker with no scientific background, could have been charged with notice or knowledge of a danger, which the defendant, with its professed superior knowledge, extensively advertised did not exist.⁹

Law suits against tobacco companies arising out of injuries sustained from using tobacco products are not new, but this case is significant because of the possibility of a recovery without showing any particular foreign deleterious substance. There have been many cases involving fish-hooks, worms and other materials in chewing and smoking tobacco and also cases involving exploding cigars.¹⁰ Probably the most famous case is where the plaintiff sued a tobacco manufacturer for damages sustained as a result of discovering a human toe in a state of putrefaction imbedded in a plug of Brown Mule chewing tobacco.¹¹ The similarity between the foreign substance cases and the cigarette-cancer cases just about ends with naming the tobacco companies as defendants.

There have been at least six other cases involving the smoking-cancer problem, but three of them will not be discussed because the litigation involved only procedural or pleading matters and did not go to the substantive problems.¹² The case of *Lartique v. R. J. Reynolds Tobacco Co. and Liggett & Meyers Tobacco Co.*,¹³ pointed out that in Louisiana, in the case of food products and other articles intended for human consumption,

⁸ *Challis v. Hartloff*, 136 Kan. 823, 18 P.2d 199 (1933); *Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962); *Hansen v. Firestone Tire & Rubber Co.*, 276 F.2d 254 (6th Cir. 1960); *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

⁹ *Pritchard v. Liggett & Meyers Tobacco Co.*, *supra* note 1, at 486.

¹⁰ *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936); *Corum v. R. J. Reynolds Tobacco Co.*, 205 N.C. 213, 171 S.E. 78 (1933); *Liggett & Meyers Tobacco Co. v. Rankin*, 246 Ky. 65, 54 S.W.2d 612 (1932).

¹¹ *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918).

¹² *Cooper v. R. J. Reynolds Tobacco Co.*, 256 F.2d 464 (1st Cir. 1958); *Padovani v. Bruckhausen*, 293 F.2d 546 (2d Cir. 1961); *Mitchell v. American Tobacco Co.*, 183 F. Supp. 406 (M.D. Pa. 1960).

¹³ 317 F.2d 19 (5th Cir. 1963).

there is a principle of strict liability regardless of fault. However, liability is only for a defective condition not contemplated by the consumer, the harmful consequences of which, based on the state of human knowledge, are foreseeable. The court stated, "Thus far, public policy has not decreed absolute liability for 'the harmful effects of which no developed skill or foresight can avoid.'"¹⁴

In *Green v. American Tobacco Co.*,¹⁵ the Florida Supreme Court decided that an implied warranty of wholesomeness does not require that the risks of harm because of deleterious matter in the product need be known to the manufacturer. The court said the basis of liability is the undertaking or agreement by the manufacturer to be responsible in the event the thing sold is not in fact merchantable. The Fifth Circuit remanded the case for the trial court to determine whether the cigarettes were "reasonably fit and wholesome for human consumption."¹⁶ The main issue in *Ross v. Phillip Morris Co.*,¹⁷ was whether implied warranty applied only to substances in the manufactured product, the harmful effects of which could be foreseen by ordinary human skill and foresight. The court said that under the facts of the case absolute liability would not cover substances in the manufactured product which were not foreseeably harmful.

The increased knowledge of the causal relation of smoking and cancer may work a hardship on tobacco companies because they can no longer benefit by the rule that implied warranty of wholesomeness is limited to those risks which could be foreseeable by the application of reasonable human skill and foresight. The cases discussed show a trend toward holding tobacco companies strictly liable under an implied warranty. However, case law on the cigarette-cancer problem is definitely in a state of flux and the Federal Cigarette Labeling and Advertising Act¹⁸ may have far-reaching ramifications. In this writer's opinion, the act is the result of shrewd political maneuvering and compromise between the cigarette industry and Congress. The act is an apparent boon to the cigarette industry. It provides a privileged sanctuary for cigarette advertising by prohibiting restrictions on merchandising by state and local bodies. The act requires only the labeling of cigarette packages "CAUTION: CIGARETTE SMOKING MAY BE HARMFUL TO YOUR HEALTH." This

¹⁴ *Id.* at 39.

¹⁵ 154 So.2d 169 (Fla. 1963).

¹⁶ 325 F.2d 673 (5th Cir. 1963).

¹⁷ 828 F.2d 3 (8th Cir. 1964).

¹⁸ Federal Cigarette Labeling and Advertising Act, U.S. CODE CONG. & AD. NEWS 1506, Pub. L. No. 89-92, 89th Cong., 1st Sess. §§ 4, 5(b) (Aug. 20, 1965).

"It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Such statement shall be located in a conspicuous place on every cigarette package and shall appear in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the package. § 5. (b). No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."