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Sales -- Implied Warranty Liability of Cigarette Manufacturers

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SALES—IMPLIED WARRANTY LIABILITY OF CIGARETTE MANUFACTURERS

The plaintiffs' decedent instituted an action against the defendant and alleged that he had contracted lung cancer as a result of smoking cigarettes manufactured by the defendant.[1] Subsequent to the decedent's death, his administrator was substituted as the plaintiff.[2] The jury rendered a general verdict for the defendant,[3] upon which judgment was entered. The instructions from the court were that under Florida law, liability under an implied warranty of wholesomeness of products sold in their original package does not extend to those situations wherein the manufacturer had neither knowledge nor the opportunity to acquire knowledge, of harmful substances in the product.[4] On appeal,[5] the

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1. The plaintiff claimed that he had smoked the defendant's product, Lucky Strike cigarettes, since 1924 or 1925, and that he had smoked from one to three packages of cigarettes a day until 1956 when his physician advised him that he had lung cancer. By this time, the cancer had become incurable. The plaintiff died approximately 2 years after the diagnosis, his death occurring 3 months after he had instituted the present suit.

2. Pursuant to FLA. STAT. § 45.11 (1961), the decedent's claim survived and was prosecuted by his administrator who, in accordance with FED. R. CIV. P. 25(a), was substituted as plaintiff. The decedent's widow filed suit pursuant to FLA. STAT. §§ 768.01 & 768.02 (1961), the Florida Wrongful Death statute. The two suits were consolidated for trial.

3. The jury also answered the following written interrogatories which were submitted to them under authority of FED. R. CIV. P. 49(b):

(1) Did the decedent Green have primary cancer in his left lung?
Yes X
No
If your answer is "yes," then
(2) Was the cancer in his left lung the cause or one of the causes of his death?
Yes X
No
If your answer to the above question is "yes" then
(3) Was the smoking of Lucky Strike cigarettes on the part of the decedent, Green, a proximate cause or one of the proximate causes of the development of cancer in his left lung?
Yes X
No
If your answer to the above question is "yes," then
(4) Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent, Green, would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung?
Yes
No X

4. The court instructed the jury, in part, that:

> The manufacture of products which are offered for sale to the public in their original package for human consumption . . . impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold, but such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed skill or foresight can afford knowledge. Record, Green v. American Tobacco Co. (S.D. Fla. 1958).

The court refused to instruct the jury as requested by the plaintiff that when a manufacturer sells a product in its original package for human consumption and the product contains a latent defect which renders the product unsuitable for the use intended or dangerous to the health of the user, the manufacturer will be liable for the injury caused by the defect whether or not the manufacturer knew of the latent danger.

5. 304 F.2d 70 (5th Cir. 1962).

United States Court of Appeals for the Fifth Circuit affirmed the decision of the district court on the ground that Florida law does not hold a manufacturer liable "as an absolute insurer against consequences of which no developed human skill and foresight could afford knowledge."[6]

The court of appeals granted a rehearing to the extent necessary to certify to the Supreme Court of Florida[7] a question concerning the liability of cigarette manufacturers under the doctrine of implied warranty.[8] In response to the certified question, the supreme court *held*: in Florida, implied warranty liability will be imposed upon the manufacturer of a defective or unwholesome product irrespective of his knowledge of the product's condition.[9] *Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963).

In the sale of foods[10] or other products for human consumption or intimate bodily use,[11] there arises an implied warranty that the article is wholesome or fit for its purpose. Approximately one-half of the American jurisdictions, either by case law or statute, impose strict liability for injuries resulting from food or drink sold in a defective condition.[12]

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6. *Id.* at 76.

7. FLA. STAT. § 25.031 (1961); FLA. R. APP. P. 4.61 (1962). See note 42 *infra*.

8. The certified question was as follows:

> Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung? Green v. American Tobacco Co., 154 So.2d 169, 170 (Fla. 1963).

9. "[A] manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty. . . ." Green v. American Tobacco Co., *supra* note 8, at 170.

10. 77 C.J.S. *Sales* § 331 (1952).

11. The RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 7, 1962), reflects the trend toward expanding the scope of manufacturer's liability. The *Restatement* includes in its classification of products for "intimate bodily use" products intended for internal human consumption or "application or contact with the body, when the application or contact is of an 'intimate' character," and specifically mentions cigarettes. Section 402A applies only when the product's defective condition makes it unreasonably dangerous. The Restatement provides that "good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . ." *Id.* at 5.

12. See Annot., 77 A.L.R.2d 7 (1961). The RESTATEMENT (SECOND), TORTS, note 11 *supra*, has formulated the following rule relating to products liability:

> § 402A. Special Liability of Sellers of Products for Intimate Bodily Use
> One engaged in the business of selling food for human consumption or other products for intimate bodily use, who sells such a product in a defective condition unreasonably dangerous to the consumer, is subject to liability for bodily harm thereby caused to one who consumes it, even though
> (a) the seller has exercised all possible care in the preparation and sale of the product, and
> (b) the consumer has not bought the product from or entered into any contractual relation with the seller.

The *Restatement* lists 19 states which by case law impose strict liability in food and drink cases and 5 states which have statutes to the same effect.

The rationale supporting the Florida rule of strict liability[13] was clearly set forth by the supreme court in *Blanton v. Cudahy Packing Co.*,[14] wherein a manufacturer and canner of a defective meat product was held liable for breach of warranty:

> The manufacturer knows the content and quality of the food products canned and offered to the public for consumption. The public generally is vitally concerned in wholesome food, or its health will be jeopardized. If poisonous, unhealthful and deleterious foods are placed by the manufacturer upon the market and injuries occur by the consumption thereof then the law should supply the injured person an adequate and speedy remedy.[15]

This rationale was subsequently applied in a case in which a restauranteur was held liable for breach of an implied warranty of wholesomeness.[16] The court noted that as between the restauranteur and the consumer, the former was in the better position to determine and control, through the use of his facilities, the quality of the food served. Following these two cases, the supreme court held retail dealers liable on the theory of implied warranty when they sold canned goods containing deleterious substances which rendered the foods unfit for human consumption.[17] These cases concerning consumable products marked an unmistakable trend leading to the conclusion that as between the consumer and the party responsible for placing the article on the market, only the latter is in the position to prevent injuries which are caused by unwholesome products.[18] Consequently, the strict liability which had been imposed was not dependent upon the vendor's knowledge, actual or implied, of a defective condition.[19] Quite the contrary, as the court had clearly pointed out, knowledge was not a prerequisite to liability:

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13. See note 9 *supra* and accompanying text.

14. 154 Fla. 872, 19 So.2d 313 (1944).

15. Blanton v. Cudahy Packing Co., 154 Fla. 872, 876-77, 19 So.2d 313, 316 (1944). See also Miami Coca Cola Bottling Co. v. Todd, 101 So.2d 34 (Fla. 1958); Hoskins v. Jackson Grain Co., 63 So.2d 514 (Fla. 1953); Florida Coca Cola Bottling Co. v. Jordan, 62 So.2d 910 (Fla. 1953); Canada Dry Bottling Co. v. Shaw, 118 So.2d 840 (Fla. 2d Dist. 1960).

16. Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949).

17. Food Fair Stores, Inc. v. Macurda, 93 So.2d 860 (Fla. 1957) (worms in a can of spinach); Sencer v. Carl's Markets, Inc., 45 So.2d 671 (Fla. 1950) (sardines contained foreign matter).

18. In addition to the manufacturer's or seller's ability to prevent injuries, the court has noted other factors which require these parties to bear the risk of loss. *E.g.*, Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949) (express or implied assurance of wholesomeness as advertised); Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So.2d 313 (1944) (liability should depend not upon the intricacies of the law of sales and privity but upon right, justice and welfare of the general purchasing and consuming public).

19. "Whether it be tort or contract, a breach of warranty gives rise to strict liability which does not depend upon any knowledge of defects on the part of the seller, or any negligence." PROSSER, TORTS § 83, at 494 (2d ed. 1955). See 1 WILLISTON, SALES § 242 (rev. ed. 1948).

> The ultimate holding of the court of appeal is to the effect that proof of actual or implied knowledge of a defect on the part of a retailer is essential to his liability on an implied warranty. . . . Here again we think its confidence was misplaced. . . .[20]

In the instant case, the Florida Supreme Court placed cigarettes in the food and consumable products classification. As a result, Florida became the first jurisdiction to impose strict warranty liability on cigarette manufacturers for cancer proximately caused by smoking.[21] However, earlier cases in other jurisdictions had already indicated that manufacturers might be held liable under any of several theories.

In the widely publicized case of *Pritchard v. Liggett & Myers Tobacco Co.*,[22] the plaintiff alleged, in essence, that the defendant had been negligent in its failure to warn of the deleterious substances present in its product and that the defendant had breached an implied warranty of wholesomeness.[23] The Third Circuit, in reversing the lower court, held that it was for the jury to determine whether the defendant had breached a warranty of merchantability and whether it was negligent in not properly testing its product to determine its harmful effects.[24] The apparently

20. Carter v. Hector Supply Co., 128 So.2d 390, 392 (Fla. 1961), *affirming* 122 So.2d 22 (Fla. 3d Dist. 1960). Although the quoted statement was a dictum, the court's position on the question of knowledge was not to be doubted. As noted by the court in the *Green* case, since liability had been imposed on retailers of canned goods when practically speaking, there was no opportunity to acquire knowledge of the defect, knowledge could not be deemed essential to liability. Further, in Smith v. Burdines, Inc., note 11 *supra*, the court, by necessary implication, did not consider knowledge of the defect as a requisite of liability. The plaintiff had purchased lipstick containing a poisonous substance. The retailer did not know, nor could not have known, of the dangerous chemical in the product. While the decision was based upon the fact that the plaintiff had relied on the vendor's skill and judgment in recommending the product for a particular use, the fact remains that the vendor had no knowledge of the deleterious substance and yet, implied warranty liability was imposed.

21. No attempt has been made in this note to discuss the problem of establishing the causal connection between smoking and cancer. As stated in note 3 *supra*, the jury in the instant case found that the causal connection had been established. For a general discussion of the medical aspect of the cigarette cancer problem, see Burgess, *Lung Cancer Liability of Cigarette Manufacturers*, 2 TORT & MEDICAL YEARBOOK 166 (1962); Hastings, *"We the Jury, Find: Cigarettes Cause Cancer"—A Products Liability Challenge*, 1 TORT & MEDICAL YEARBOOK 213 (1962). See also Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 B.C. IND. & COM. L. REV. 285 (1963) for a consideration of the relationship between the smoking and cancer problem and implied warranty.

22. 295 F.2d 292 (3d Cir. 1961), *reversing* 134 F. Supp. 829 (W.D. Pa. 1955) (plaintiff claimed that he had smoked cigarettes from 1921 to 1953).

23. The court stated that in addition to this warranty, an action might lie for breach of a warranty of fitness for a particular purpose. However, in this case, the two warranties would seem to be co-extensive. See 1 WILLISTON, SALES § 235 (rev. ed. 1948).

24. Defendant claimed that it had conducted tests in 1952 to determine the effects of smoking on the nose, throat and accessory organs. However, the court stated that there was evidence to support the contention that these tests were inconclusive and inadequate to support claims that smoking was harmless.

For a discussion of several cigarette cancer cases, see FREEDMAN, ALLERGY & PRODUCTS LIABILITY 66 (1961). See also R. J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963); Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960), both of which deal with the problem of when the statute of limitations forecloses an action for cancer caused by smoking.

unyielding position taken in the *Green* decision was not present in *Pritchard* for several reasons. First, the court said that the jury could be instructed to consider the practices of other cigarette manufacturers in determining merchantability.[25] Second, in *Pritchard*, the plaintiff introduced advertisements for the defendant's cigarettes which not only extolled the pleasures to be derived from smoking, but which could also be reasonably interpreted as *expressly* assuring a consumer that no harm would befall him as a result of smoking.[26]

Another case which indicated that warranty liability might be imposed upon cigarette manufacturers was *Ross v. Philip Morris Co.*[27] The Missouri district court had granted the defendant's motion for summary judgment on the ground that Missouri law required privity in order for warranty liability to be imposed.[28] A subsequent Missouri Supreme Court decision[29] stated in a dictum that in cases involving products for human consumption, privity was not essential to liability on a warranty of merchantability or wholesomeness. On the strength of this opinion, the district court vacated its former opinion and denied the defendant's motion for summary judgment.[30]

Other courts have refused to impose liability on cigarette manufacturers. In *Cooper v. R. J. Reynolds Tobacco Co.*,[31] the plaintiff's complaint attempted to set forth an action in deceit. However, the advertisements upon which the plaintiff claimed to have relied, were not those which were published by the defendant,[32] and therefore, the plaintiff failed to sustain her burden.

Cases dealing with government action concerning the contents of cigarettes are R. J. Reynolds Tobacco Co. v. FTC, 192 F.2d 535 (7th Cir. 1951); United States v. 46 Cartons, 113 F. Supp. 336 (D.N.J. 1953); FTC v. Liggett & Myers Tobacco Co., 108 F. Supp. 573 (S.D.N.Y. 1952).

25. The court in the *Pritchard* case pointed out, as did the Florida Supreme Court in the *Green* case, that this evidence could not be conclusive of merchantability or fitness, but the *Green* case seemed to foreclose any consideration of this evidence.

26. Some of the advertisements made by defendant were: "'A good cigarette can cause no ills and cure no ailments . . . but it gives you a lot of pleasure, peace of mind and comfort . . . .' 'Nose, throat and *accessory organs* not adversely affected by smoking Chesterfields.'" Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 296-97 (3d Cir. 1961). The court stated that the evidence indicated an express warranty by the defendant that there would be no harmful effects on the lungs.

27. Memorandum opinion No. 9494, U.S. Dist. Ct. (W.D. Mo.) Oct. 22, 1959, reproduced in Anderson, *Observations on the Law of Implied Warranty of Quality in Missouri: 1960*, 1960 WASH. U.L.Q. 71, 74-75.

28. Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958).

29. Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959).

30. Subsequently, on July 10, 1962, a jury returned a verdict in favor of the defendant tobacco company on the issues of implied warranty and negligence. Judgment was entered on the verdict and also on the defendant's motion for summary judgment with regard to the plaintiff's count for fraud and deceit which the court had previously sustained.

31. 256 F.2d 464 (1st Cir. 1958), *affirming* 158 F. Supp. 22 (D. Mass. 1957). The plaintiff also alleged a breach of warranty by the defendant, but because Massachusetts law did not recognize this action in the absence of privity, the count was stricken from the complaint. See also 234 F.2d 170 (1st Cir. 1956).

32. In her complaint, the plaintiff alleged that the defendant's advertisements, upon

Lartigue v. Liggett & Meyers Tobacco Co.[33] was decided by the Fifth Circuit on the ground that although Louisiana law imposed strict liability on manufacturers of defective food products, and even conceding that cigarettes are in this classification, this liability would be imposed only when the harm resulting from the defect was a *foreseeable* consequence.[34] This decision, however, can afford cigarette manufacturers little in the way of refuge from the apparent trend toward strict liability. The court of appeals noted policy reasons which required the imposition of liability upon manufacturers as a cost of production.[35] Of greater significance, however, is the fact that the entire opinion was, of necessity, couched in terms of the manufacturer's inability to foresee the harm resulting from its product based upon a lack of medical knowledge as to the harmful effects of smoking.[36] Medical research has recently suggested, if not established, the causal connection between smoking and cancer and in the future, foreseeablility might not insulate manufacturers from liability even under this limited theory of strict liability.[37]

A disturbing aspect of the *Green* case is that the court did not pass upon the question of whether cigarettes are unmerchantable as a matter of law. Although they would seem to be merchantable under prevailing definitions of the word,[38] the court imposed strict liability

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which the plaintiff's decedent supposedly relied, stated that "20,000 doctors say that Camel cigarettes are healthful" and "Camel cigarettes are harmless to the respiratory system." The defendant produced evidence, which was not refuted, that its advertisements in fact stated that "more doctors smoke Camels than any other cigarette" and that Camels will "agree with your throat." Cooper v. R. J. Reynolds Tobacco Co., 158 F. Supp. 22, 24-25 (D. Mass. 1957).

33. 317 F.2d 19 (5th Cir. 1963).

34. The court pointed out that under this limited application of strict liability, it was not necessary to establish that the defendant had knowledge of the defective condition or that it failed to use due care, but it was necessary to establish that predicated upon existing knowledge, the product contained a substance from which the harm might be expected to flow.

35. As a matter of public policy, the court said that the risk of injuries caused by defective foods is an incident of doing business and that since the consumer is unable to protect himself from these defects, the producer must bear the responsibility. But as a matter of policy from the manufacturer's point of view, the court held that Louisiana implied warranty liability does not include harm resulting from "unknowable" risks.

36. "*At this point*, it cannot be said that cigarette smokers who started smoking before the great cancer-smoking debate relied on the tobacco companies' 'warranty' that their cigarettes had no carcinogenic element. Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 39-40 (5th Cir. 1963). (Emphasis added.)

37. See note 34 *supra*.

38. 77 C.J.S. *Sales* § 183 (1952) (of a quality such as is generally sold in the market and suitable for the purpose for which it was intended); 46 AM. JUR. *Sales* § 149 (1943) (such as is usually sold in the market; or, medium quality). See also UNIFORM COMMERCIAL CODE § 2-314.

The court cited, with apparent approval, a statement made by Dean Prosser that " 'goods are merchantable only if they are fit for ordinary use.' " Green v. American Tobacco Co., 154 So.2d 169, 173 (Fla. 1963), citing Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 168 (1943).

irrespective of the traditional concept of merchantability.[39] In previous food cases,[40] strict liability was imposed in cases of *defective* products, defective in relation to products which are ordinarily placed on the market.[41] In the instant case, liability was imposed for harm caused by cigarettes which were apparently on a par with *all* cigarettes. Therefor, the inescapable conclusion is that under Florida law, cigarette manufacturers are insurers of their product irrespective of their inability to alter the product's composition and still retain its identity, and without regard to the public's awareness of the effects of smoking. Further, it is questionable whether the policy which supports strict liability in cases of food products supports the same liability in cigarette cases.[42]

The upshot of the few cases which have considered the cigarette cancer problem is that the courts are faced with an area having enormous ramifications. On one hand, a plaintiff whose body has been infected with a dread disease is seeking his remedy in the courts, claiming that cigarettes caused his condition. On the other hand, as a matter of economics, more decisions like the instant case could well spell the annihilation of the tobacco industry.

It is submitted that the decision in the *Green* case extended the application of implied warranty liability to a factual situation beyond the scope of the underlying basis of the doctrine. As the Florida Supreme Court and leading authorities in the field of warranty have stated, in cases involving *food* products which are essential to the public health, the ultimate consumer, who is unaware of a defect in the product against which he is unable to protect himself, should be afforded every possible protection. It is the writer's opinion that this rationale need not be applied to cigarettes, a product the characteristics of which the public is aware, and which obviously is neither essential to the public health

39. The imposition of strict liability precludes consideration of industry standards which have been considered an integral component of the concept of merchantability. See note 25 *supra* and accompanying text.

40. See notes 14 through 18 *supra* and accompanying text.

41. In Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (concurring opinion), Judge Goodrich, although concurring in the result reached by the majority of the court that the case should be remanded for another trial, made the following statement:

> If a man buys whiskey and drinks too much of it and gets some liver trouble as a result I do not think the manufacturer is liable unless (1) the manufacturer tells the customer the whiskey will not hurt him or (2) the whiskey is adulterated—made with methyl alcohol, for instance. The same surely is true of one who churns and sells butter to a customer who should be on a nonfat diet. The same is true, likewise, as to one who roasts and sells salted peanuts to a customer who should be on a no-salt diet. Surely if the butter and the peanuts are pure there is no liability if the cholesterol count rises dangerously. *Id.* at 302.

In this case, there was no claim that Chesterfields were not made of commercially satisfactory tobacco.

42. See Anderson, *Observations on the Law of Implied Warranty of Quality in Missouri: 1960*, 1960 WASH. U.L.Q. 71.

nor a necessity in any sense of the word, notwithstanding its addictive nature or the "powers of commercial persuasion."[43]

BARRY N. SEMET

43. Upon receipt of the answer to the question certified by it to the Florida Supreme Court, the Fifth Circuit heard the case for the second time and reversed the prior judgments and remanded the case for a new trial on the issues of liability and damages. Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963). The court of appeals predicated its action on the Florida Supreme Court's statement that it need not pass upon the "scope and breach of the implied warranty that a product supplied for human consumption shall be *reasonably fit and wholesome* for that general purpose." Green v. American Tobacco Co., 154 So.2d 169, 171 (Fla. 1963). (Emphasis added.) Since the jury had not determined whether or not the cigarettes were "reasonably fit or wholesome," and since the majority of the court of appeals concluded that this concept of reasonable fitness limited the scope of the defendant's warranty, a jury determination of this issue was essential to liability.

There are, however, two factors which lead to the contrary conclusion. First, as stated in the dissenting opinion, the Florida Supreme Court answered in the affirmative the certified question of whether absolute liability would be imposed upon cigarette manufacturers for cancer caused by their products. Since the majority opinion stated that the parties were bound by the jury's responses to the first three interrogatories, note 3 *supra*, which included the finding that the defendant's cigarettes were a proximate cause of the decedent's lung cancer, this, in conjunction with the answer to the certified question, should have been sufficient for the court of appeals to render judgment for the plaintiff on the issue of liability and remand the case solely for a determination of damages. Second, the following statement made by the Florida Supreme Court dispels the conclusion that the scope of liability is determined by reasonable fitness:

> The contention that wholesomeness of a product should be determined on any standard other than *actual safety for human consumption*, when supplied for that purpose, is a novel proposition in our law, and one which we are persuaded has no foundation in the decided cases. Green v. American Tobacco Co., 154 So.2d 169, 173 (Fla. 1963). (Emphasis added.)

Although this statement was made in reference to industry standards as a basis for determining fitness for consumption, its clear import, as well as that of the entire opinion, is that absolute liability will be imposed if the cigarettes caused the cancer.