In 1964, the Surgeon General’s Advisory Committee on smoking and health announced that “cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.” The 1964 report established that cigarette smoking males had a 70% excess risk of mortality over nonsmokers; that smoking was causally related to lung cancer in men, and was one of the most important causes of chronic bronchitis in men and women. The report, however, did not establish causality between smoking and either death from coronary heart disease, or lung cancer in women. The 1964 study was based on approximately 6,000 articles in the world literature on smoking and health.

Fifteen years later, a report of the United States Surgeon General, supported by over 30,000 articles on smoking and health, announced that “cigarette smoking is the single most important preventable environmental factor contributing to illness, disability and death in the United States.” The report concluded the general mortality rate for smokers of cigarettes to be about 1.7 as compared to nonsmokers, with the ratio being somewhat less for women. The report announced the following: 1) that cigarette smoking was the major cause of lung cancer; and 2) that smokers, including cigarette, pipe and cigar smokers, had a six to thirteen times greater mortality rate from cancer of the larynx than nonsmokers, and a three to ten times greater mor-

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2Id. at 31.
3Id.
4Id. at 32.
5Id. at 31.
6Id. at 14.
8Id. at 1-5.
9Id. at VII.
10Id. at 1-10.
11Id. at 1-11.
12Id. at 1-16.
13This comment is limited to potential litigation arising from cigarette induced cancer. However, the theories of liability are applicable to other tobacco related items particularly chewing tobacco, popularly known as snuff. Snuff is popular among high school students and contains no warning label. Consider Sean Marsee, an 18 year old high school athlete who used approximately a can of snuff daily since the age of 12. Sean developed cancer and died approximately a year after diagnosis, admitting that he still craved the snuff. Fingner, Sean Marsee’s Smokeless Death, READERS DIGEST 107 (Oct. 1985).
14The report concluded that cigarette smoking was causally related to cancer of the esophagus, urinary bladder, kidney and pancreas. Id. at 1-17.
tality rate from cancer of the oral cavity.¹⁶ Most significantly, the 1979 report determined that cigarette smoking is one of the risk factors for certain cardiovascular diseases.¹⁷

By 1983, the Surgeon General announced¹⁸ that “cigarette smoking should be considered the most important of the known modifiable risk factors for coronary disease in the United States,”¹⁹ with cigarette smoking being “the major cause of coronary heart disease in the United States.”²⁰ The 1983 report announced a two to fourfold greater incidence of coronary heart disease in smokers than nonsmokers and a 1.7 death rate.²¹ Alarming, the 1983 report estimated that cigarette smoking was responsible for the premature death, between 1965 and 1980, of over three million people.²² “Unless the smoking habits of the American people change, perhaps 10% of all persons now alive may die prematurely of heart disease attributable to their smoking behavior. The total number of such premature deaths may exceed twenty-four million”²³

Cigarettes are a manufactured product,²⁴ processed and distributed by a United States industry with total estimated revenues in 1984 of twenty-nine billion dollars²⁵ and profits of 3.1 billion dollars.²⁶ In spite of massive scientific evidence linking causally cigarette smoking to cancer, no manufacturer of cigarettes or tobacco products has been required to pay damages to a user for health-related liability.²⁷ Plaintiffs’ attorneys, however, are preparing a new

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¹⁶Id.
¹⁷Id. at 4-63. The report indicated that smoking was a risk factor for heart attack manifest as fatal and non-fatal myocardial infarction. The effect was dose related with a stronger association at younger ages. Smoking was associated with arteriosclerotic aneurysm of the aorta and atherosclerosis, although the association between smoking and stroke or hypertension was inconclusive. Id. at 4-64.
²¹Id. at IV.
²²Id. at 127.
²³Id. at 128.
²⁴Id.
²⁵Id.
²⁶The United States tobacco industry in 1980 was ranked second only to the automobile industry in degree of concentration. KINNEY, TOBACCO’S GLOBAL ECONOMY: IS NORTH CAROLINA LOSING? THE TOBACCO INDUSTRY IN TRANSITION 204, (W. Finger ed. 1981). Four major firms, R.J. Reynolds, Philip Morris, Brown and Williamson and American Brands controlled 88% of the market. Id.
assault. Armed with strict liability in tort, and a renewed sense that society is perhaps ready to hold the tobacco companies accountable, a number of attorneys have filed suits to recover damages from alleged cigarette induced cancer and heart disease.

This comment, divided into two major sections, will review the reasons for past inability to collect damages from the tobacco industry and explore possible theories of recovery that may be advanced in the new round of pending litigation.

I. THE GREAT DEBATE

The apparent voluntary consumption of a manufactured product that kills has been one of the great debates in United States history, and con-

28Bean, Cigarette and Cancer: Lawyers Gear up to Battle Tobacco Firms, WALL ST. J., April 29, 1985, at 27, col. 3.

29The stocks were trading well below their peak levels of the previous twelve months. “The problem — Wall Street is nervous about pending products liability litigation and this concern has fostered generally weak price momentum for the stocks of American Brands, Philip Morris, R.J. Reynolds and U.S. Tobacco.” VALUELINE. supra note 26, at 337.

30Currently there are estimated to be 40 suits pending. STANDARD & POOR’S CURRENT ANALYSIS. supra note 27, at F.1. By the end of 1985 three Texas law firms plan to file more than 100 additional suits. Bean, supra note 28, at col. 5.

31One suit involves the death of a sixty-eight year old man who smoked three packs of Camels a day and eventually died of lung cancer and emphysema. Bean, supra note 28, at col. 4. In another, the victim, who died of cancer and emphysema “spent his last days wearing an oxygen mask, which he occasionally removed so he could sneak drags on a cigarette.” Id. at col. 4.

32STANDARD & POOR’S CURRENT ANALYSIS. supra note 27, at F.1.

33See infra text accompanying notes 38-52. Although this comment is limited to United States jurisdictions the smoking and health issue is being addressed world wide. FINGER. supra note 24, at 301. At least 35 countries have taken action primarily by enacting legislation on advertising prohibitions, health warning labels, restrictions on smoking in public places and public funds for education, with the intent to prevent youths and young adults from starting to smoke. Id. at 301, 304-09.

34There is considerable evidence that smoking may not entirely be voluntary but rather addictive, similar to other forms of drug abuse. J. HENNINGFIELD. NICOTINE: AN OLD FASHIONED HABIT 83 (1985). The National Institute on Drug Abuse and the United States Public Health Service have testified that cigarette smoking was an instance of drug abuse and that patterns of relapse were similar to that of heroin addicts and alcoholics. Id. at 88. The issue, however, is complex and not entirely resolved. In congressional debates one senator stated that cigarette smoking was in the same category as “potato chip” consumption. Id. at 86. Regardless of how medical evidence finally determines the addictive qualities of cigarette smoking, the answer will impact on issues such as assumption of the risk, failure to warn and generally in the allocation of fault in comparative negligence jurisdictions. For an analysis of the failure to warn issue with regards to dependency and the possible defenses, See Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S. CAL. L. REV. 1423 (1980).

35The American Cancer Society has estimated that in 1982, one hundred and thirty-nine thousand people died from smoking-related cancer; one hundred and twenty-three thousand from cardiovascular disease associated with smoking and fifty-two thousand from noncancerous chronic lung disease. N.Y. Times, Sept. 16, 1985, at 3, col. 1.

36Some of the early critics included James I, who succeeded Queen Elizabeth. James I published a COUNTERBLASTE TO TOBACCO (1604) and imposed high impost duties on the substance. R. TROYER & G. MARKLE. CIGARETTES: THE BATTLE OVER SMOKING 31 (1983). (hereinafter cited as TROYER). Opposition to cigarettes in the 1600’s was also based on health claims. Tobacco was generally thought to cause sterility, insanity and birth defects. Id. at 32. There were also moral overtones analogous to drunkenness and it was believed smoking cigarettes induced irresponsibility and was religiously offensive. Id. However, early users of tobacco advocated its healthful qualities and it was generally regarded as an all-purpose healer. W. Fall, 1985]
tinues to be an enigma in contemporary health conscious America. This comment, however, will not focus on the historical aspects embodied in the extensive literature dealing with the history of tobacco, the manufacture of cigarettes, the remarkable growth of its use in the United States, or the massive publicity campaigns conducted by the major United States tobacco companies. Nor, will there be an extensive discussion of the scientific studies regarding the health consequences of cigarette smoking. If any summary can be made or conclusions drawn from such a complex and extensively treated issue as cigarette smoking, then perhaps the evolution of the Cigarette Labeling and Advertising Act is appropriate. By Act of July 27, 1965, Congress declared that it would be unlawful to sell any cigarette without the following statement: "CAUTION, CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH." In 1970, the warning was changed to read: "WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH." Effective October 12, 1985, it will be unlawful for anyone to sell a cigarette or to advertise its sale (except outdoor billboards) without one of the following labels: SURGEON GENERAL'S WARNING: SMOKING CAUSES LUNG CANCER, HEART DISEASE, EMPHYSEMA, AND MAY COMPLICATE PREGNANCY. Cigarettes were banned on radio and television

Although there have been no actual deaths reported, great concern is expressed about dioxin, EDB in grain pellets, formaldehyde, acid rain and various food additives. Whelan, supra note 36, at 1. Thousands die each year from smoking related diseases yet only mild protest exists. Id. Five reasons have been suggested:

1) The cigarette culture was established long before the harmful effects were known.
2) Cigarettes are physically addicting and psychologically habit forming.
3) Long-term effects are easy to rationalize.
4) The tobacco industry through advertising has reassured smokers that it is safe.
5) Tobacco Industry has tremendous political clout. Id. at 1-2.


The modern cigarette industry is credited with being born on April 30, 1894, when the new Bonsack cigarette-rolling machine operated successfully for a full working day, Whelan, supra note 36, at 41. However, per capita use of tobacco has slipped. In 1979, the average American smoked, chewed or sniffed less tobacco than in any year since 1898. W. Finger, supra note 24, at 119.

Estimated annual expenditures in 1981 were three hundred and four million dollars. Whelan, supra note 36, at 180. The great 20th century cigarette advertising campaign allegedly began after World War I. Id. at 57.


15 U.S.C. § 1333 (1982), amended by 15 U.S.C. § 1333a(a)(1) (Supp. II 1984). Cigarette manufacturers and advertisers by the act are required to rotate the warning quarterly. Included in the rotation are the following:
Clearly, the debate that began almost four hundred years ago must be decided on the basis of overwhelming scientific evidence. The most recent scientific data on smoking and health documents the costs of smoking in 1980, in the United States, in terms of health-related effects, to be estimated at forty-seven billion dollars.\(^7\) In 1985, it was estimated that smoking-related diseases would result in productivity losses to the economy of twenty-seven to sixty-one billion dollars and health care costs would approach\(^8\) twelve to thirty-five billion dollars.

Obviously, smoking produces injury, with such injury resulting in economic loss and damages. The litigatable issue in the pending cigarette cases is, who will pay? For, in spite of the vast amount of evidence, health researchers are not entirely convinced,\(^9\) nor is it likely that the tobacco industry will capitulate on the issue of causality. The debate, then, fully documented, is threatening to return to the courts. There, plaintiffs’ attorneys, supported by thousands of studies indicating a causal relationship between smoking and cancer and propounding novel theories of recovery, will seek to reverse what has been total victory for the cigarette industry to date.

A. Prior Litigation


Green v. American Tobacco Co.\(^5\) is a landmark case involving cigarette manufacturer liability, not only in terms of its substantive law, but also its procedural history and the intensity with which it was obviously litigated. In Green, Edwin Green, Sr. brought suit against the American Tobacco Company in December 1957, alleging that he had acquired lung cancer as a result

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**SURGEON GENERAL’S WARNING:** QUITTING SMOKING NOW GREATLY REDUCES SERIOUS RISKS TO YOUR HEALTH; SURGEON GENERAL’S WARNING: SMOKING BY PREGNANT WOMEN MAY RESULT IN FETAL INJURY, PREMATURE BIRTH, AND LOW BIRTH WEIGHT; SURGEON GENERAL’S WARNING: CIGARETTE SMOKING CONTAINS CARBON MONOXIDE.

\(^{15}\) U.S.C. § 1335 (1982), amended by 15 U.S.C. § 1335 (1982), amended by 15 U.S.C. § 1335a (Supp. II 1984). The ban in 1971 involved cigarettes and little cigars. The 1984 amendment requires that all manufacturers provide to the secretary a list of the ingredients added to tobacco in the manufacture of cigarettes. The companies required to submit the data will not be identified and the information will be treated as trade secret or confidential information.


\(^{17}\) N.Y. Times, Sept. 16, 1985, at 3, col. 1.

\(^{18}\) A member of the advisory committee responsible for the “blue-ribbon” Surgeon General’s Advisory Committee on Smoking and Health of 1964, Mr. Carl Seltzer contended as late as 1981, that scientific data does not support the conventional view that cigarette smoking causes coronary heart disease (CHD). Mr. Seltzer generally believes that faulty assumptions regarding the statistical models have flawed the results and that further research is required. *Seltzer, Cigarette Smoking and Coronary Heart Disease: A Questionable Connection, The Tobacco Industry in Transition* (W. Finger ed. 1981).

\(^{19}\) Green v. American Tobacco Co., 304 F.2d. 70 (5th Cir. 1962).
of smoking Lucky Strike cigarettes. The suit asserted six theories of liability. The district court sustained directed verdicts on all counts except breach of implied warranty and negligence. The case was submitted to a jury upon the two theories, with a general verdict being rendered for the defendant. However, the jury, in answering interrogatories, indicated that although Green did have lung cancer in his left lung caused by smoking Lucky Strike cigarettes, the defendant "by the reasonable application of human skill and foresight could not have known that users of Lucky Strike cigarettes ... would be endangered by the inhalation of ... smoke ... of contracting cancer."

On appeal, the Fifth Circuit affirmed the district court. The court applied Florida law holding that a defendant was not an absolute insurer against consequences of which developed human skill and foresight could not afford knowledge.

In a strong dissent, Judge Cameron argued that the theory of implied warranty requires absolute liability for damages caused by a breach. His contention was that under the warranty theory a defendant is conclusively presumed to know of any unwholesome condition and is answerable in damages to a purchaser who is made ill as a result. The lack of knowledge is imputed as a fault rendering liability. Judge Cameron further characterized implied warranty as an unconditional guarantee to Green that use of Lucky Strikes would not be harmful by reason of any deleterious substance or ingredient.

The dissent in this case coupled with the import of the resounding question carried considerable weight and lead to the petition for rehearing being granted to the extent necessary to certify the issue to the Florida Supreme Court.

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51 Edward Green, Sr. began smoking cigarettes in 1924 or 1925 when he was sixteen years old. He smoked from one to three packs per day for thirty years until 1956 when he was advised that he had contracted cancer of the left lung. Edwin Green died as a result of the cancer on February 25, 1958. Id. at 72.
52 Breach of implied warranty; breach of express warranty; negligence; misrepresentation; battery; violation of the Federal Food, Drug and Cosmetic Act, the Federal Trade Commission Act, and the Florida Food, Drug and Cosmetic Act. Id. at 71.
53 Id.
54 Id.
55 Principle issues were whether Mr. Green's death was caused by a cancer in the lung and whether that cancer was caused by smoking Lucky Strikes. Eight eminent medical doctors testified for each side and were in sharp disagreement. The issue was submitted to the jury. Id. at 72.
56 Id. at 77.
57 The basis of the appeal was that the trial court erred in holding that the implied warranty of fitness, under Florida law, does not cover deleterious substances in a product, which were unknown or unforeseeable. Plaintiff contended that the knowledge of the manufacturer is irrelevant and immaterial to liability under Florida's theory of implied warranty. Id. at 72-73.
58 Id. at 77.
59 Green v. American Tobacco Co., 304 F.2d. 70, 81 (5th Cir. 1962) (Cameron, J., dissenting).
60 Id. at 82.
61 Id. at 78.
62 Id. at 81.
On certification, the Florida Supreme Court held that a manufacturer’s or seller’s knowledge, actual or constructive, as to the unwholesome condition of its products is irrelevant to the liability issue under a theory of implied warranty. Furthermore, the supreme court held that Florida law imposed absolute liability on a manufacturer for a breach of implied warranty of fitness involving death caused by the use of cigarettes.

The case returned to the Fifth Circuit, with both sides moving for a judgment on the issue of liability. The Fifth Circuit initially noted that the remaining issue entailed the scope of the defendant’s implied warranty. In the court’s opinion the implied warranty required a product to be reasonably fit, wholesome, and have a reasonable fitness for human use or consumption. The defendant argued that there was no evidence that Lucky Strike cigarettes were not reasonably fit and wholesome. The court, however, noting expert testimony, held that if a jury believed that expert testimony it could have reasonably inferred cigarettes were not reasonably fit or wholesome and therefore defendants were not entitled to a directed verdict. However, since the issue of reasonableness was not addressed by the original jury, the case was remanded for a new trial. Since the jury had already determined issues of

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63 Id. at 85.
65 The following question was certified to the Florida Supreme Court: 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?
66 *Green,* at 170-71.
67 Id.
68 Id. at 70-71.
70 Plaintiffs moved for a judgment on the issue of liability based on the Florida certification. Id. at 674. The defendant argued that under the Florida Supreme Court’s rule a product must be reasonably fit, wholesome and have a reasonable fitness for human use or consumption. The court’s opinion pointed out that the question, as framed, did not present the issue of whether the cigarettes, which caused the cancer, were unmerchantable as a matter of law. *Green,* 154 So. 2d at 170.
71 *Green,* at 675. The court reasoned that, although defendant’s knowledge or ability to know was irrelevant to the liability issue under implied warranty, there must be a breach of that warranty. If cigarettes are reasonably fit and wholesome, then no breach results. *Id.*
72 American contended that its cigarettes were of no greater danger than cigarettes bearing other brand names. *Id.* at 676. There was no contention that the cigarettes contained any foreign substance, spoiled, or contaminated ingredient. *Id.*
73 Dr. Ernest L. Wynder, an expert witness, testified that the major factor that causes lung cancer in American males is smoking, yet conceded that the vast majority of smokers do not get lung cancer. *Id.* at 676-77. By vast majority Dr. Wynder meant that nine in ten smokers do not develop lung cancer. *Id.* at 677.
74 *Id.* at 677.
75 *Id.* at 678.
causality and reliance, those issues were foreclosed at the second trial.⁷⁶ Again, Judge Cameron dissented,⁷⁷ arguing that the Florida Supreme Court conclusively decided the case.⁷⁸ He concluded that the issue was never whether cigarettes were reasonably fit and wholesome to any person besides Green,⁷⁹ and further that the parties stipulated that the issue certified to the Florida Supreme Court would decide the outcome of the litigation.⁸⁰

The second trial resulted in a jury decision that cigarettes were reasonably fit for human consumption, which the plaintiff appealed.⁸¹ The Fifth Circuit noted that the only issue at the second trial was whether cigarettes were reasonably fit and wholesome for human use.⁸² The court also noted the judgment date in the second trial of November 27, 1964.⁸³ The Court felt that date was significant for on May 5, 1965, the Florida Supreme Court in McLeon v. W.S. Merrell Company⁸⁴ stated that Green v. American Tobacco Company “applied a rule of absolute or strict liability to the manufacturer of a commodity who had placed it in the channels of trade for consumption by the public generally.”⁸⁵

The court reasoned that since Florida law required absolute liability, Mr. Green was entitled to rely on the implied assurances that Lucky Strike cigarettes were wholesome and fit and, therefore, his widow could hold the tobacco company absolutely liable for the injuries found by a prior jury to have been sustained by him.⁸⁶ The court reversed the second jury, entered judgment for plaintiff on the issue of liability and remanded the issue of damages to a third jury.⁸⁷

Judge Simpson vehemently dissented,⁸⁸ contending that the majority
misconstrued Florida law by the characterization of Green as imposing strict liability without fault. Judge Simpson argued that strict liability without fault only applied to defective products, regardless of whether the defect was potentially discoverable by the manufacturer. He then asserted that the court was not dealing with a flawed, defective or adulterated product, but rather, one exactly like any other brand. Without a defect, there was no liability.

The third jury never had the opportunity to consider damages. On a petition for rehearing, the Fifth Circuit, sitting en banc, entered the following per curiam opinion:

The Court sitting en banc recedes from and overrules the decision of the majority of the panel in this case. Both parts I and II of the opinion are overruled by the Court. We affirm the judgment of the courts for the reasons and upon the principles set forth in Judge Simpson’s dissent . . . . Affirmed.

So concluded the Green litigation. The case litigation lasted approximately twelve years. It involved two jury trials, one having a duration of over ten days. It encompassed scores of expert witnesses, two jury verdicts for the defense, in spite of a finding of causality, and a judgment not withstanding the verdict for the plaintiffs, but no damages.

2. Lartigue v. R.J. Reynolds

Lartigue v. R.J. Reynolds Tobacco Co. involved another jury tried case

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8 Id. at 110.
9 Id. at 111.
10 Id. at 110. “Even under the new strict liability in tort . . . theory found in Section 402A of the Restatement of Torts (Second), comment i provides: Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.” Id.
11 Id.
12 Id. The Justice stated he would affirm the lower Court and write “finis” to this long and troublesome litigation. Id. at 113.
14 Id.
15 Chief Judge Brown dissented, with Coleman and Godbold, Circuit Judges, joining. Id. at 1168. Justice Brown characterized Green as “a mystery wrapped in an enigma,” particularly for not recertifying to the Florida Supreme Court the issue of absolute liability. Id. at 1169. “No one knows just what the Supreme Court of Florida wuld say about the wholesomeness of a product that in one out of ten users brings about the dreaded cancer.” Id.
16 The United States Supreme Court denied certiorari. 397 U.S. 911 (1970).
18 317 F.2d. 19 (5th Cir. 1963).
concerning cigarette manufacturer liability.100 On a general verdict for defendants, the plaintiff appealed on the basis of improper jury instructions regarding implied warranty and negligence.101 The Fifth Circuit interpreted Louisiana law as imposing strict liability on a manufacturer for a breach of the implied warranty of merchantability.102 However, the court required, in a strict liability case, that the product contain some defect, with the resultant harm being a foreseeable consequence.103 "It is necessary to show that the warranted product contained an element from which, on the basis of existing human knowledge, harm might be expected to flow."104 Addressing the contention that the defendants were negligent in failing to warn users of the dangerous propensities of cigarettes, the court reasoned that given the state of medical and scientific evidence at the time, defendants had no knowledge of the harm, either actual or constructive, so as to require a warning.105


In Pritchard,106 a directed-verdict was granted to the defendants on causes of action grounded in negligence and breach of warranty.107 The appellate court, in ordering a new trial, held that jury questions were presented by the issues of breach of an express108 or implied warranty of merchantability,109 and possible negligence in failing to warn110 or use reasonable testing in determining whether the product caused injury.111 At the second trial, the jury found that, although smoking Chesterfield cigarettes caused the plaintiff's cancer,112 the

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100 Frank J. Lartigue smoked two packs of cigarettes per day for fifty-five years, until he was operated on for cancer of the larynx. He died of lung cancer on July 13, 1955. Plaintiff's claim was based on breach of implied warranty and negligence. Defendants pleaded contributory negligence and assumption of the risk, offering evidence that Lartigue's other illnesses aggravated or were suspected causes of cancer. Id. at 22.

101 The alleged improper instructions allowed the judge to find that the cigarettes manufactured by the defendant were usable as such at the time Lartigue's cancer started. Id. at 23.

102 Id. at 35.

103 Id.

104 Id.

105 The court reasoned that the warning must be made either when smoking started or when the cancer developed. Since medical science was not aware of the health effects of smoking at either time the defendants could not be held liable for negligence. Id. at 40.

106 Id.


108 Pritchard alleged that smoking Chesterfield cigarettes from 1921 to 1953 caused his cancer of the right lung. Id. at 294.

109 The warranty relied on appeared in a July 16, 1934 Pittsburgh newspaper in which it was claimed as to Chesterfields: "A good cigarette can cause no ills and cure no ailments...but it gives you a lot of pleasure, peace of mind and comfort." Id. at 296. Later that month it was stated: "there is no purer cigarette made than Chesterfield." Id.

110 Id. at 297.

111 Id. at 299.

112 Id. at 300.

113 Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d. 479, 482 (3d Cir. 1965).
defendants could not be charged with negligence.\textsuperscript{114} Furthermore, the jury found that the defendant made no express warranties,\textsuperscript{115} with an ultimate finding that absent reliance the plaintiff assumed the risk of injury.\textsuperscript{116}

On appeal, the Third Circuit reversed and remanded for a new trial\textsuperscript{117} on the basis that reliance was not required where factual affirmations flowed to the public with the natural tendency of inducing a purchase.\textsuperscript{118} In addition, since contributory negligence was not a viable defense in a breach of warranty action,\textsuperscript{119} assumption of the risk in the sense of contributory negligence was not available.\textsuperscript{120} Apparently, at this point the suit was dropped and no subsequent decisions deal with its outcome.\textsuperscript{121}

Other actions were brought against cigarette companies involving cancer-related liability.

4. **Hudson v. R.J. Reynolds**

In *Hudson v. R.J. Reynolds Tobacco Company,*\textsuperscript{122} a suit brought by Marvin Belli,\textsuperscript{123} the court overruled defendants' appeal from a judgment denying their motion for summary judgment based on the statute of limitations.\textsuperscript{124} However, a second motion for summary judgment by the defendants was sustained on the grounds that an implied warranty under Louisiana law extends only to knowable and foreseeable risks.\textsuperscript{125} The decision was affirmed on appeal\textsuperscript{126} and a petition for rehearing *en banc* was denied.\textsuperscript{127}

5. **Ross v. Philip Morris Co.**

In *Ross v. Philip Morris Co.,*\textsuperscript{128} the court, basing its decision on the state

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 487. The trial court had denied a motion for a new trial. *Id.*
\textsuperscript{118} Id. at 482.
\textsuperscript{119} Id. at 485.
\textsuperscript{120} Id. The court did recognize that a consumer could misuse a product and suffer non-actionable damage because of that misuse. *Id.*
\textsuperscript{121} Although the prospects of winning appeared promising, the plaintiff dropped the suit. *Whelan, supra* note 36, at 157.
\textsuperscript{122} 427 F.2d 541 (5th Cir. 1970).
\textsuperscript{123} Attorney Belli has recently filed damage suits against two major tobacco companies in behalf of John C. Galbraith, a former smoker who died of lung cancer and heart disease. The suit was brought on strict liability, negligence, failure to warn and fraud. *Whelan, supra* note 36, at 157. For a disposition of that case see *infra* text accompanying notes 217-28.
\textsuperscript{124} R.J. Reynolds Tobacco v. Hudson, 314 F.2d 776, 778 (5th Cir. 1963).
\textsuperscript{125} Hudson, 427 F.2d at 542.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} 328 F.2d 3 (8th Cir. 1964).
of scientific knowledge existing when the plaintiff began smoking in the 1930's,129 held that the defendant could not have foreseen smoking was dangerous to the general public.130 Without that foreseeability, the court affirmed a jury verdict in favor of the defendant.131

6. Cooper v. R.J. Reynolds

In Cooper v. R.J. Reynolds Tobacco Co.,132 the plaintiff on appeal, the court overturned a dismissal for an inadequately drafted complaint,133 but lost on a motion for summary judgment granted by the district court134 and affirmed on appeal.135 The grant of summary judgment was premised on plaintiff's inability to produce the necessary advertisements that allegedly ex- tolled the healthful and harmless quality of the defendant's cigarettes.136 The advertisements were necessary to sustain plaintiff's allegation of reliance.137


In Mitchell v. American Tobacco Co.,138 the court reversed defendant's motion to dismiss based on the statute of limitations.139 However, the suit was apparently dropped and no reported decision deals with its outcome.140

8. Padovani v. Bruchhausen

Finally, in Padovani v. Bruchhausen,141 the plaintiff successfully vacated, on mandamus, a preclusion order142 based on insufficient pretrial statements.143 Again, however, the suit was apparently dropped and no other reported decision deals with its outcome.

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129 Id. at 8.
130 Id.
131 Id. at 16. The verdict was based on the fact that defendant's brand of cigarettes were no more defective than any other brand and conformed to industry standards.
132 234 F.2d 170 (1st Cir. 1956).
133 Id. at 172.
135 Cooper v. R.J. Reynolds Tobacco Co., 256 F.2d 464 (1st Cir. 1958).
136 Cooper, 158 F. Supp. at 24.
137 Id.
139 Statute of limitations begin to run when plaintiff is first aware of the cancer. Id. at 411.
140 WHALEN, supra note 36, at 157.
141 293 F.2d 546 (2d Cir. 1961).
142 The trial court's preclusion order was pervasive. It prevented the plaintiff from offering evidence of lay witnesses except the plaintiff and his wife; expert testimony; evidence of damages except for one hospital and two doctor bills; and evidence on the issue of liability in either negligence or breach of warranty. Id. at 547.
143 The action was one for negligence and breach of warranty against Liggett & Myers Tobacco Company. Plaintiff was seeking damages for cancer of the larynx allegedly caused by smoking defendant's cigarettes. Id.
B. From The 1960's To The Present Decade

The cases present an interesting array of issues involving negligence, warranty and strict liability which will impact on future litigation in this area. Those cases illustrate that causality will not present a future obstacle. For although causality was a complex issue, the juries that considered the issue found cigarettes caused the litigated injury. Rather, of greater import in future cases is the warranty issue and the reasonable safety of the product — arguably a negligence theory. For instance, concepts of the foreseeability of harm, reasonably fit and wholesome, and reasonably safe, embody traditional negligence concepts. The decisions, therefore, largely depended on policy considerations, reflecting society's values and the state of medical knowledge at the time the cases were decided. Particularly, in Lartigue, there was a noticeable blending of negligence and warranty theories.

The cases were, for the most part, decided in the 1960's prior to or shortly after the American Law Institute adopted strict liability, and the courts were obviously grappling with the limits and semantic contours of strict liability. Of course, as medical knowledge advances and scientific evidence accumulates, concepts such as foreseeability, reasonable fitness, wholesomeness, merchantability and unreasonable dangerousness, change as do theoretical

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144 In Green, the first jury found that one of the causes of Edwin Green's death was smoking cigarettes, Green v. American Tobacco Co., 304 F.2d. 70, 71-72 (5th Cir. 1962). However, the second jury heard expert testimony to the effect that the cause of cancer was unknown and, therefore, it could not be said that cigarettes were unreasonably fit and wholesome, Green, 391 F.2d at 104. The second jury was faced, therefore, with two mutually impossible propositions; 1) that Green's cancer was caused by smoking; and 2) that no one knows the cause of cancer. Id. The trial judge was presented with the determined fact that Green died from the use of the product in presiding over the determination of whether such a product was nevertheless reasonably safe for use by the general public. Id.

145 In Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963), the judge was certain that the jury, in finding for the defendant cigarette company, never got beyond the issue of causality since the plaintiff did not prove the causal connection between smoking and lung cancer. Lartigue, 317 F.2d at 23. However, interrogatories were not propounded to the jury, which returned a general verdict. The issue on appeal was whether the harmful effects of cigarettes were foreseeable. Lartigue, 317 F.2d at 35. In Pritchard, the jury found that cigarette smoking was one of the causes of the plaintiff's cancer. Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 482 (3d Cir. 1965).

146 The trial judge's instructions, in Lartigue regarding warranty, imposed liability on a manufacturer who did not exercise reasonable diligence and care in determining whether its products were reasonably safe for intended use. Lartigue, 317 F.2d at 23. Thus, the jury found that the defendant was liable for the injuries sustained by the plaintiff as a result of the plaintiff's use of the product.

147 Apparently the jury foreman in the Green case felt that cigarettes were not safe but was instructed by the judge to decide if cigarettes were reasonably safe. N.Y. Times, Nov. 30, 1964, at 15, col. 1.

148 The court in Lartigue indicated that courts will hold sellers of food products strictly liable to the ultimate consumer, yet the results have been difficult to rationalize. Lartigue, 317 F.2d at 26. Recovery has been based on contract, agency, implied fitness, warranty and strict liability. Id. The court in Lartigue adopted a characterization of strict liability in tort as requiring foreseeability of harm as a consequence of the existence of a defect. Id. at 36. It also indicated that the standard of safety as to strict liability in tort is the same as the standard in negligence theory. Id. at 37.
under-pinnings of substantive negligence and strict liability law. Theories of warranty, involving merchantability, were fully litigated in the *Green* case.

However, *Green* was decided prior to the first Surgeon General’s report implicating cigarette smoking and cardiac disease which theoretically could dramatically increase the potential number of plaintiffs. To the extent that merchantability is a game of numbers, and a jury question, and since there has been fifteen years of additional medical evidence expanding the potential victims of smoking, it is not inconceivable that a case can be made in such a way so as to demonstrate that the standard has been breached.

Whether a theory of merchantability will ultimately succeed remains to be seen. Undoubtedly, the issue will be raised. However, plaintiff’s lawyers may well rely on a type of product liability theory, or strict liability in tort for ultimate success.

II. FUTURE LITIGATION AND PRODUCT'S LIABILITY

The judicial development of product liability doctrine has a rich heritage. As judicially created common law, it is a complex coalescence of fraud, negligence, strict liability based on implied warranty and tort. Generally, liability in a product’s case is predicated on strict liability and/or negligence.

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151 Only four or five percent of all persons coming into contact with a certain dye react to it. Yet, a buyer of a hat impregnated with that dye is not precluded from recovering from the seller on an implied warranty that the hat is reasonably fit for its intended use. *Zirpola v. Adam Hat Stores, Inc.*, 122 N.J.L. 21, 4 A.2d 73 (1939). See generally, J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 9-7 (2d ed. 1980).


153 Misrepresentations as to product safety, although not constituting a contract, constitutes fraud, with the party making the misrepresentation responsible to the injured party. Langridge v. Levy, 150 Eng. Rep 683 (Ex. 1837), aff’d. 150 Eng. Rep. 1458 (Ex. 1838). See generally, Past, Present and Future, supra note 151.

154 Product liability based on negligence theory was developed through a line of cases beginning with *Thomas v. Winchester*, 6 N.Y. 397 (1852) and *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). It is a theory of recovery for personal injury as a result of the defendant having created an unreasonable risk, which is foreseeably dangerous. See generally, PROSSER & KEETON, THE LAW OF TORTS, § 96 (5th ed. 1984) [hereinafter cited as PROSSER]; Past, Present and Future, supra note 151, at 338.

155 Upon determination that a product is not reasonably fit, there was no need to show fault or privity on the part of the manufacturer. Past, Present and Future, supra note 151, at 341. This doctrine was initially applied to food products, however, extension to other products was accelerated through *Henningson v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d. 69 (1960). See generally, PROSSER, supra note 153, at 690.

156 Once a product is shown to be defective and unreasonably dangerous there was no need to show fault on the manufacturer. PROSSER, supra note 151, at 692. Strict liability on warranty posed a number of problems. It required some sort of promise or undertaking on the part of the manufacturer and reliance by the plaintiff upon that promise or warranty. Id. However, there are policy considerations that arguably required a type of liability extending beyond concepts of promissory or contractual obligations:

1. Costs of defective products can best be borne by enterprises who make and sell the product;
2. Cause of accident prevention can be promoted by adopting strict liability; and
3. Negligence is very difficult to prove. Id. at 692-93.

157 Four theories of recovery are available under the complexities of modern product liability law. PROSSER, supra note 153, at 678. These are:
Strict Liability In Tort

In 1963, the California Supreme Court, in an opinion by Justice Traynor, decided *Greenman v. Yuba Power Products, Inc.*\(^1\) *Yuba* is generally acknowledged as the genesis of modern strict liability in tort.\(^1\) The *Yuba* decision\(^1\) clearly rejected the concept that a contract, express or implied, was necessary to recover for personal injuries caused by either a defective product\(^3\) or negligence on the part of the defendant.\(^6\)

The *Yuba* court indicated that the purpose of strict liability was “to insure that the costs of injuries resulting from defective products are borne by the manufacturers which put such products on the market rather than by the injured persons who are powerless to protect themselves.”\(^6\) The court held that a manufacturer is “strictly liable in tort when an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”\(^1\) In *Yuba*, the requisite liability was established upon proof by the plaintiff of injury caused while using the product in the intended manner as a result of an unknown defect in design and manufacture.\(^6\) Accordingly, the alleged negligence or contractual relationship between the plaintiff and the defendant was held to be irrelevant.\(^6\)

The *Yuba* court did not grapple with the concept of defective.\(^6\) In 1965, however, the American Law Institute focused concern on the definition of defective when it adopted Section 402A.\(^6\) It was this concern over definition that led the American Law Institute to characterize defective as “unreasonably dangerous.”\(^6\) This additional requirement of “unreasonably dangerous” was

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1. Strict liability in contract for breach of an express or implied warranty;
2. Negligence liability in contract for breach of an express or implied warranty that the product was designed and constructed in a workmanlike manner;
3. Negligence liability in tort; or

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\(^{158}\) *PROSSER, supra* note 153, at 694.

\(^{159}\) Plaintiff was injured while using a Shopsmith combination saw, drill and wood lathe, when a large piece of wood flew out of the machine and struck him on the forehead inflicting serious injury. *Greenman*, 5 Cal. 2d at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698.

\(^{160}\) “[L]iability is not . . . governed by . . . contract warranties but by . . . strict liability in tort. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

\(^{161}\) *Id.*

\(^{162}\) *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

\(^{163}\) *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

\(^{164}\) *Id.*

\(^{165}\) The plaintiff in *Yuba* introduced, through expert witnesses, substantial evidence that his injuries were caused by defective design and construction. *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

\(^{166}\) *RESTATEMENT (SECOND) OF TORTS* § 402A (1965).

\(^{167}\) *Id.* Special Liability of Seller of Product For Physical Harm to User or Consumer:

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or
specifically included to preclude liability against cigarette manufacturers.\(^6\)

Section 402(A), comment i, seems to expressly exclude cigarette manufacturers and liquor distillers,\(^7\) and to some extent, the issue of whether cigarettes are unreasonably dangerous was previously litigated in the *Green* case.

With the holding in *Yuba* and the enactment of Section 402A,\(^8\) diverse forms of strict liability spread rapidly throughout the jurisdictions.\(^9\) There developed in the common law a split of authority as to whether a product not only had to be defective, but unreasonably dangerous as well. Several courts reasoned that to require a product be defective and unreasonably dangerous would resurrect the negligence concepts that strict liability was intended to lay to rest.\(^10\) To do so, would lead to a practical formulation of strict liability that was indistinguishable from negligence.\(^11\) However, the majority opinion generally requires both elements.\(^12\) The result is that, under the guise of unreasonably dangerous, numerous shades of strict liability have developed so as to ap-

\(^6\)Dean Prosser, in characterizing the development of defective, unreasonably dangerous, indicated that the American Law Institute was concerned that some products, particularly whiskey, cigarettes and some type of drugs may be unreasonably dangerous, yet not defective. Defective was included to protect the manufacturers from liability in such cases. Therefore, the product must not only be dangerous, or unreasonably dangerous but must be defective. 38 ALI Proceedings 87-88 (1961).

\(^7\)RESTATEMENT (SECOND) OF TORTS §402A, comment i (1965). *Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by “unreasonably dangerous” in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because it can make people sick, and is especially dangerous to alcoholics; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because if it is the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

\(^8\)WHITE & SUMMERS see very little distinction between merchantability and defective condition, unreasonably dangerous. Apart from the fact that defective, unreasonably dangerous is somewhat narrower because it does not purport to reach all defective goods, they find both terms nearly synonymous. J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE 335 (2d ed. 1980). To the extent that merchantability is synonymous to defective, unreasonably dangerous, the same arguments can be applied with the same outcome expected as in the *Green* case.

\(^9\)Section 402A Liability in Tort swept the country and nearly every state has adopted some version of strict liability. PROSSER, supra note 153, at 694.


\(^11\)Id. at 133, 501 P.2d. at 1162, 104 Cal. Rptr. 442.

\(^12\)Most jurisdictions have apparently adopted both the defective and unreasonably dangerous requirements, although the element of danger may not be unusual. *Id.*
In the cigarette cases therefore, in order to prevail, a plaintiff must generally show that cigarettes are defective and must also overcome the clear intent of comment i, of section 402A, Restatement (Second) of Torts. The American Law Institute proceedings seemingly indicate that comment i was developed because of concern that the Institute had with the limits of strict liability. However, those proceedings transpired in the early 1960's when the uproar over the health effects of cigarette smoking was just beginning.

The wording of comment i, as well as the discussion among the members of the Institute, reflected a point of view, perhaps unconsciously, that cigarettes as well as alcohol in moderate quantity were reasonably safe and become unreasonably dangerous only when used in excess. They arguably did not contemplate that the prolonged use of cigarettes, even in moderation, posed significant dangers. Assumably then, comment i applies to excessive use or misuse of a product, rather than to proper or moderate use which becomes unreasonably dangerous through prolonged exposure, particularly if the perceived danger is not within current scientific knowledge or is ameliorated by industrial advertising.

In addition to the arguable inapplicability of comment i to damage caused by cigarettes, some products, not otherwise defective, have been deemed to be defective because the manufacturer has failed to warn of a danger in using the product. The issue then becomes not whether the product is defective but whether the warning is adequate.

Assuming that a plaintiff is able to overcome section 402A, comment i, he still must show that the product is unreasonably dangerous.

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177 See supra text accompanying notes 167-70.

178 Whalen, supra note 36, at 97.

179 Good whiskey is not unreasonably dangerous merely because it will make some people drunk. RESTATEMENT (SECOND) OF TORTS. 402A, comment i (1965).

180 See supra notes 167-70.

181 "Notwithstanding that a product is properly made, a manufacturer has a duty to warn of latent limitations respecting its use, where such use might be dangerous . . ." Biller v. Allis Chalmers Mfg. Co., 34 Ill App 2d. 47, 180 N.E.2d. 46 (1962).

182 For material that addresses the issue of when a non-defective product becomes defective because of a failure to warn see generally 63 AM. JUR. 2d. Product Liability § 329 (1984); Brody, Recovery Against Tobacco Companies. 21 TRIAL 49 (Nov. 1985); supra text accompanying notes 180-81.

183 See supra text accompanying notes 172-75.
Negligence, Strict Liability And Comparative Fault

Generally, strict product liability in tort and negligence involve the same cause of action against different hypothetical defendants. In strict liability the plaintiff is required to impugn the product. In negligence, it is the conduct of the defendant that is the issue. For instance, to recover in strict liability the plaintiff must show a flaw in the product that is unreasonably dangerous. He need not, however, show that the defendant was negligent in either causing the defect, failing to eliminate the defect, or failing to warn. Ironically, however, in strict liability the conduct of the plaintiff is very often in issue. If the product is improperly used or the plaintiff is aware of the defect, the product is no longer unreasonably dangerous and no liability results. Therefore, in defending strict liability cases emphasis is often on the plaintiff, similar to assumption of the risk or contributory negligence; theoretically, defenses available in a pure negligence action. What has emerged, therefore, is an apparent coalescence of strict liability and negligence into comparative fault or comparative negligence.

It is not within the scope of the comment to analyze the very complex and extensive application of comparative fault to strict product liability in tort among the various jurisdictions. However, because of the adoption, albeit

184PROSSER. supra note 153, at 695.
185Id.
186Id. at 160.
187Id. at 695.
188Id. at 692.
189What should a reasonable purchaser contemplate as unreasonably dangerous? PROSSER. supra note 153, at 699.
190Id. at 698-99.
191Comparative negligence is generally an apportionment of damages between the parties who are at fault. PROSSER. supra note 153, at 470. The plaintiffs respective fault does not bar his recovery but reduces his damages in proportion to his fault. Id. at 472.
not uniform, of comparative fault principles, various defenses become available depending on how a particular jurisdiction conceptually analyzes traditional negligence theory involving assumption of the risk, contributory negligence and allocation of fault. The particular jurisdiction where a cigarette cancer case is filed will, of course, be critical in determining what traditional defenses will or will not be available.\textsuperscript{193} However, what is more critical and perhaps more important than terminology is the policy considerations underlying comparative fault in strict liability theory.

Generally, the theoretical policy underpinning of strict liability in tort involves a risk-bearing economic theory based on the assumption that a manufacturer can shift the cost of a defective product to purchasers by charging a higher price.\textsuperscript{194} Comparative negligence, on the other hand, theoretically strives to apportion fault based on the respective conduct of the plaintiff and defendant.\textsuperscript{195} Each theory, though focusing on different subjects, generally involves apportionment to some degree based on equity principles.\textsuperscript{196} If the suit is brought in strict liability, or in negligence, equity principles suggest that the damages incurred by the plaintiff should be apportioned according to the defendant's and plaintiff's respective fault.\textsuperscript{197}

To the extent that policy arguments involving equity principles characterize both negligence and strict liability it becomes necessary to conceptualize factors that would impact on the issue. First, comparative fault or negligence requires that the loss be allocated or shifted to the person who created it.\textsuperscript{198} In addition, the following secondary factors have been suggested:\textsuperscript{199}

1. The product's utility.


\textsuperscript{193}In jurisdictions that have adopted comparative negligence, a number of decisions have held that the adoption of comparative negligence does not vitiate the common law defense of assumption of the risk as an absolute bar to damages. Other decisions have held that the institution of comparative negligence entailed the complete abrogation of the defense of assumption of the risk. Still others have relegated it to the status of a damage reduction factor in the apportionment calculation. See generally, Annot., 16 A.L.R. 4th 700 (1982).

\textsuperscript{194}PROSSER. \textit{supra} note 153, at 693.

\textsuperscript{195}Id. at 470.

\textsuperscript{196}O'Shea, \textit{Alcohol and Tobacco Manufacturers and Sellers Liability in a Post-Alvin Era}, 72 ILL. B.J. 510 (1983-84). Judge O'Shea analyzed the Illinois negligence theory after comparative negligence was adopted by the Illinois Supreme Court in Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). He concluded that the total damages incurred by the plaintiff be apportioned on the basis of the relative degree to which the defendant's negligence (in a negligence action) or the defendant's defective product (in a products liability action) and the plaintiff's conduct proximately caused them. O'Shea, \textit{supra} note 196, at 511.

\textsuperscript{197}O'Shea, \textit{supra} note 196, at 511.

\textsuperscript{198}PROSSER. \textit{supra} note 153, at 469.

2. Cost of making the product safer.
3. Warnings.
4. Availability of insurance.
5. Cost to society in terms of health care and human life.
6. Profit motive and the effect of advertising.
7. Economic effect on the cigarette industry.
8. Alternative design.

In those cases and jurisdictions where policy considerations dominate over semantic distinctions, the plaintiffs will be more likely to prevail in a cigarette cancer case. For instance, it could be argued that a cigarette smoker is aware or should be aware that cigarettes cause cancer and, therefore, either assumes the risk or is contributorily negligent. However, given the high cost of smoking in terms of human life and health, the enormous impact of advertising and the profits of the industry, it can conceivably be argued that the industry is partially at fault. Whether a product is defective and unreasonably dangerous, will tend to depend not on whether it is flawed or abnormal, but on whether its risks outweigh its benefits given a causal connection between the product and the resultant injury. This would imply a similar policy analysis involving many of the same factors illustrated above. The issue, in these policy arguments, then becomes whether the product causes injury and how the injury or damage should be allocated among various parties given the delineated factors.

On a cause of action involving either negligent or strict liability for failure to warn, it would be necessary to resolve a number of complex issues impacting on the plaintiff’s comparative fault or negligence. For example, have the cigarette manufacturers adequately warned of the dangers of smoking? If so, have their advertising neutralized the warnings? Have the cigarette manufac-

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O'Shea, supra note 196, at 512.

Id.

Id.

The adequacy of a warning will vary among jurisdictions. For instance, what constitutes an adequate warning was stated in Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85 (4th Cir. 1962):

To be of such character the warning must embody two characteristics: First, it must be in such form that it could reasonably be expected to catch the attention of the reasonably prudent man in the circumstances of its use; secondly, the content of the warning must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.

In Crane v. Sears, Roebuck & Co., 218 Cal. App. 855, 860, 32 Cal. Rptr. 754, 757, the sufficiency of the warning was approved as follows:

the warning should be such that if followed would make the product safe for users. To comply with this duty the manufacturer or supplier must appropriately label the product, giving due consideration to the likelihood of accident and the seriousness of consequences from failure to so label it as to warn of any dangers that are inherent in it and its use or that may arise from the improper handling or use of the product.

For various interpretations of the adequacy of the warning see generally Annot., A.L.R.3d 239 (1973).

It is contended that the warning given by tobacco companies fail to meet any standard as to adequacy. Brody, Recovery against Tobacco Companies. 21 TRIAL 49 (Nov. 1985). Warnings do not specify how cigarettes are dangerous, what the consequences of smoking are or the risks of addiction. Id.
turers intentionally misrepresented the effects of smoking? Are cigarettes addictive as to obviate any and all warnings?²⁰⁵

Whether these issues are analyzed in terms of assumption of the risk, unreasonable dangerousness or comparative negligence, it may be more meaningful to characterize them as various policy choices and to resolve them in terms of a risk versus benefit rationale. Moreover, resolution of these issues does not impose a win or lose situation, since apportionment or comparative fault will dominate. It is not unlikely that an allocation of damages could result in an apportioned recovery for plaintiff.

**Current Litigation**

The issues of assumption of risk and the adequacy of warnings has been addressed recently in *Cipollone v. Liggett Group, Inc.*²⁰⁶ The cigarette company in this case²⁰⁷ tried to argue that their compliance with federal warning requirements²⁰⁸ immunized it from liability as to anyone who has chosen to smoke cigarettes inspite of the warning.²⁰⁹ The company argued that federal legislation had created an irrebuttable presumption that the consumer had assumed the risk of injury.²¹⁰ The court rejected this argument, however, holding that the Cigarette Labeling Act did not preempt state common law of products liability.²¹¹ Although none of the substantive issues were resolved, the court indicated that even though Congress has permitted the tobacco industry to flourish, knowing full well the consequences of doing so, "one would hope that those fiscal considerations were weighed against the costs of illness and death caused by cigarette smoking, as well as the moral responsibility of protecting the young and future generations who have not yet begun to smoke."²¹² Clearly, a benefit versus risk analysis was proposed.

The *Cipollone* case regarding the adequacy of the warnings is squarely at odds with the recent decision of *Roysdon v. R.J. Reynolds Tobacco Co.*, that held the plaintiff could not contest the adequacy of congressionally mandated health warnings on cigarette packs.²¹³ The court in *Roysdon*,²¹⁴ directed a ver-

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²⁰⁵See supra note 34.
²⁰⁷A cigarette smoker suffering from lung cancer brought state common-law products liability suit against cigarette companies. The suit was based on strict liability, negligence, intentional tort and breach of warranty. *Id.* at 1146.
²⁰⁸See supra text accompanying notes 42-46.
²⁰⁹*Cipollone*, 593 F. Supp. at 1148.
²¹⁰*Id.*
²¹¹*Id.* at 1154.
²¹²*Id.* at 1147.
²¹⁴Plaintiff was Floyd F. Roysdon who smoked Reynolds's cigarettes since childhood. *Id.* Roysdon tried to hold the cigarette company liable for vascular disease that forced amputation of a leg. *Id.*
dict in favor of the defendants, R.J. Reynolds, holding that the plaintiff had not established a prima facie case that the product was unreasonably dangerous. In Galbreth v. R.J. Reynolds Tobacco Co., the first jury decision since the 1960 cigarette cases, a jury in Santa Barbara, California voted nine to three not to hold R.J. Reynolds liable for the death of a sixty-nine year-old man allegedly caused by smoking Reynolds' cigarettes since he was a teenager. The case was argued by Marvin Belli who asserted that cigarettes were clinically addictive and that R.J. Reynolds was negligent in failing to warn consumers of the alleged risk. Apparently, causality was never established and the jurors indicated they were unconvinced that smoking was addictive. As to the issue of assumption of the risk, John Strauch, Reynolds' lead counsel stated that the verdict demonstrated that the core issue of these cases remained the same: "that smoking is an issue of individual responsibility." Two crucial rulings affected the decision. First, the judge ruled that the Surgeon General's reports of 1964, warning of the danger of smoking were "hearsay" and not admissible as evidence. Second, Belli was not permitted to pursue the role of advertising. The plaintiff's family, commenting that at least the trial showed the American public what it is to die by inches, promised to appeal.

215 The verdict was directed without hearing the company's defense. Id.
216 Judge Thomas Hull, in reaching his decision, stated, "[t]he decision in this case is not what Mr. Roysdon knew or did not know about the dangers of smoking, the question is what an ordinary consumer would be expected to know." N.Y. Times, December 14, 1985, at 7, col. 6.
218 Id.
219 The plaintiff was a Mr. Galbraith, who smoked two to three packs of cigarettes a day for most of his life. Id. After his death the suit was continued by his family. Id.
220 Attorney Belli also argued one of the 1960 cigarette-cancer cases. For a discussion of that case see supra text accompanying notes 122-27.
221 Bean, supra note 218, at col. 2.
222 The medical evidence in the case was complicated by the plaintiff's long history of health problems unrelated to smoking. His death was not directly attributable to diseases linked to smoking. The death certificate listed the cause of death as arteriosclerotic heart disease and pulmonary fibrosis. Lung cancer and emphysema were listed as contributing causes. Id. However, Stacy Proft, jury foreman stated, "We want to stress that we don't like smoking and we feel smoking is harmful, the only reason we didn't go to that verdict was the evidence wasn't there." Elyria Chronicle-Telegram, December 24, 1985, at A4, col. 3. Thomas Workman, Reynolds' chief attorney, predicted the cigarette companies would continue to win because science doesn't know the cause of cancer. Id. at col. 6.
223 The jurors indicated that while smoking may have been a habit for Mr. Galbraith, he made the choice to continue to smoke despite warnings from his doctor and others. Chambers, Reynolds Wins Suit on Smoker and His Death, N.Y. Times, December 24, 1985, at 7, col. 1.
224 Attorney Strauch's statement suggests that the appropriate forum for resolution of the cigarette cases is the legislature rather than the courts. Bean, supra note 213, at col. 3.
225 Chambers, supra note 223, at col. 1.
226 Id. Commenting on the rulings, Attorney Belli indicated he had never seen such a case more replete with errors. He expressed no doubt that it would be reversed on appeal. Id.
227 The trial lasted five weeks with a total of twenty-two witnesses, mostly experts called by both sides. Id.
228 Attorney Belli also promised to pursue similar cases in the future indicating that by next Christmas, "we'll have one of these under our belts for the plaintiffs." Elyria Chronicle-Telegram, December 24, 1985, at A4, col. 4.
Arguably a person who has voluntarily smoked is more susceptible to an assumption of the risk defense. However, any policy considerations involving comparative negligence and a risk versus benefit analysis must necessarily consider nonsmokers who are exposed to the harmful effects of cigarette smoke. Additionally, there is evidence that smoking results in susceptibility to disability and death from other environmental factors. One such factor is apparently asbestos. It is contended that cigarette smoking is responsible for a proportion of the asbestos-related damages and that cigarette manufacturers should be third-party defendants in the asbestos litigation.

In GAF Corp. v. American Brands Inc., New Jersey based GAF Corporation claimed that asbestos workers who smoked were more likely to develop respiratory disease. However, GAF was unsuccessful in naming a number of tobacco companies as codefendants in the 201 asbestos-liability suits the company faces. The decision to dismiss the GAF motion was not based on the merits of the claim but on the fact that it would delay current asbestos litigation. As a result, GAF has filed suit in California Superior Court against five tobacco companies claiming they should share in the asbestos-related liability.

CONCLUSION

The cigarette cases provide fascinating insights, not only into contemporary American society, but in evolving and emerging doctrinal theories of negligence and strict liability. In the early 1960's, plaintiffs attempted to

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230 Reprinted in OCCUPATIONAL RESPIRATORY DISEASE ASBESTOS ASSOCIATED DISEASES, 577 (1980). (Incidence of certain cancers seem to increase among workers who smoke but not among their non-smoking colleagues).


232 Id. at 303.

233 Id. at 310.

234 Bean, supra note 213, at col. 4.

235 Id.

236 Id.

pigeon hole without success the cigarette cancer cases into one of the existing theories of recovery. Both the theories and society have changed. With the emergence of comparative negligence, products liability and an anti-smoking mood in America, the ultimate resolution is difficult to predict.

Although the first round of this new wave of product liability suits has clearly been won by the cigarette companies, the issues are far from being resolved, particularly in a suit where causality is not in dispute. There is little doubt that cigarettes cause cancer and cardiac-related diseases. There is equally, little doubt that the cigarette companies earn enormous profits from selling cigarettes. Sadly though equally as true, people continue to smoke in spite of the obvious damage. Whether these conflicting considerations can be merged into a successful theory of recovery remains to be seen. The attempt to do so, however, may prove lucrative.\(^2\)

\(^{2}\) If plaintiffs are successful, the United States tobacco industry would be destroyed. Standard & Poor's Current Analysis, supra note 27, at F.2. Given the worst scenario in which the cigarette companies are held to both compensatory and punitive damages, the amount could exceed seven billion dollars per year. \textit{Id.}