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Torts--Cigarette Smoking--Proximate Cause of Lung Cancer

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Recent Decisions

TORTS — CIGARETTE SMOKING — PROXIMATE CAUSE OF LUNG CANCER

Pritchard v. Liggett & Myers Tobacco Company, 295 F.2d 292 (3d Cir 1961)

Otto Pritchard's right lung became infected with cancer and was removed in 1953. In his suit against Liggett & Myers Tobacco Company,[1] he alleged that the cancer was caused by smoking Chesterfields from 1921 to 1953. He further alleged that the tobacco company was liable for its negligence in manufacturing cigarettes containing carcinogenic[2] ingredients and for its failure to warn consumers of the presence of those ingredients. He also claimed Liggett & Myers was liable for the breach of both express[3] and implied warranties.

On the defendant's motions, the district court dismissed the warranty counts on the ground that Pritchard's notice of the breach was neither timely nor sufficient as a matter of law, and it directed a verdict for the defendant on the ground that there was no substantial evidence to support a verdict on a negligence theory.[4] The court of appeals reversed and remanded the case for a new trial, holding there was sufficient evidence to warrant a jury finding on the following questions: the causal relation between the smoking and the cancer, the alleged negligence of the defendant, and the alleged breaches of warranties.[5]

Certainly, causation is the crucial issue in a case of this type. In *Pritchard v Liggett & Myers Tobacco Company* five doctors, cancer experts, testified that in their opinion the lung cancer was caused by smoking cigarettes. The defendant contended that this testimony was insufficient as a matter of law to establish a causal relationship in the absence

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

2. "Carcinogenic" is defined as causing cancer. STEDMAN'S MEDICAL DICTIONARY 263 (1961) "It has long been established that prolonged contact with some kinds of extrinsic irritants produces a marked affinity for certain cancer types." These irritants are called carcinogenic agents. Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630, 634-35 (1953)

3. Pritchard claimed that Liggett & Myers advertisements in newspapers, magazines, radio, and television from 1934 to 1953 amounted to express assurances that smoking Chesterfields would have no harmful effect on the lungs. Advertisements in 1952 and 1953 stated, "Nose, throat and accessory organs not adversely affected by smoking Chesterfields." Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 297 (3d Cir. 1961).

4. Pritchard v. Liggett & Myers Tobacco Co., W.D. Pa., May 3, 1960. "In ultimately granting the motion the district court did not make it clear whether the proof of causation was insufficient or whether his decision was based solely on plaintiff's failure to prove negligence." Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 296 (3d Cir. 1961).

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

of a general acceptance of such a relationship by the medical profession.[6] The court of appeals held that this contention could not be sustained in the light of its past decisions on this point[7] and that, at best, the contention was one for the jury since it concerned the weight to be given to the expert opinions.

The validity of the court's ruling on this point seems evident in the light of decisions in similar suits in other jurisdictions. Although the tobacco companies have apparently always been successful in these cases,[8] seemingly recoveries have not been lost because of an inability to establish a causal relationship between smoking and cancer.[9]

This judicial refusal to require general medical acceptance is readily

6. There have been several decisions seemingly supporting the defendant's contention, but the scientific bases for the expert opinions as to the causal relationship in such cases are much less than the evidence supporting the contention that cigarette smoking causes cancer. The cases cited by the defendant involved such diseases of unknown origin as leukemia and mongolism. Brief for Appellee, pp. 47-49. See Sevigny s Case, 337 Mass. 747, 151 N.E.2d 258 (1958); Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959)

7. The court was referring to its decisions in Brett v. J. M. Carras, Incorporated, 203 F.2d 451 (3d Cir. 1953), and in Deitz v. United States, 228 F.2d 494 (3d Cir. 1955). The former involved a claim that Paget's disease of the plaintiff's skull was caused by trauma, and the latter, that the plaintiff's eye disease was caused by falling paint. In the *Brett* case one of the plaintiff's expert witnesses testified that his opinion was as scientific as one could get about Paget's disease. The court held in regard to the sufficiency of that testimony to establish cause: "That is enough, unless there is a rule that there can be no recovery, based on negligence, for a disease the cause of which is not yet known with absolute certainty to medical science. Respondents have shown us no such pronouncement, nor have we found any." Brett v. J. M. Carras, Inc., 203 F.2d 451, 453 (3d Cir. 1953).

8. *Cancer and Cigarettes,* 7 Current Med., Nov. 1960, p. 8.

9. See Cooper v. R. J. Reynolds Tobacco Co., 256 F.2d 464 (1st Cir. 1956), *cert. denied,* 358 U.S. 875 (1958); Ross v. Philip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958); Green v. American Tobacco Co., unreported case tried in the United States District Court in Miami, Florida, in August 1960, and discussed in 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 386 (1960-61); and *Cancer and Cigarettes,* 7 Current Med., Nov. 1960, p. 8. "[T]hese cases are very significant in that for the first time 'reasonable medical certainty' was not required in the testimony." *Ibid.* The decisions in these cases are in line with the recent holding of the United States Supreme Court in Sentilles v. Inter-Carribbean Shipping Corporation, 361 U.S. 107 (1959).

The plaintiff in *Sentilles* claimed that an injury he had received while a seaman on the defendant's vessel had activated a previously latent tubercular condition. In reversing a judgment for the defendant, the Supreme Court held: "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. *Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes* of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs." *Id.* at 109. (Emphasis added.)

Two other cases involving cigarette smoking as the cause of lung cancer are Mitchell v. American Tobacco Company, 183 F. Supp. 406 (M.D. Pa. 1960); and Lartique v. Liggett & Myers and R. J. Reynolds Tobacco Companies, unreported case cited in 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 1388 (1961). For a discussion of possible theories of recovery for lung cancer in a suit against a cigarette manufacturer, see Brumfield, *Liabilities of Tobacco Industry: Cancer and Its Relationship to Smoking — Is It Actionable,* in 1958 BELLI SEMINAR, TRIAL AND TORT TRENDS 1 (1959). For an excellent brief discussion of the liability of tobacco manufacturers and sellers for various injuries including lung cancer, see Annot., 80 A.L.R.2d 681 (1961).

explainable by the observation of legal scholars that the doctor's and the scientist's concept of "cause" is entirely different from the lawyer's conception of that term.[10] The doctor requires a high degree of certainty of the existence of a causal relationship between a particular factual situation and a disease before he will admit the existence of such a relationship. The lawyer, on the other hand, has not required such certainty. This divergence is apparent in those cases in which trauma was the alleged cause of cancer and in other cases in which something other than cigarette smoking was the alleged cause.

There have been numerous recoveries in such cases even though the alleged cause of the cancer has been no more conclusively established by scientific evidence than the contention that cigarette smoking causes cancer. In fact, doctors have steadfastly refused to recognize trauma as a cause of cancer;[11] yet the recoveries for cancer caused by trauma have been numerous.[12] And where the claim has been that the defendant's act aggravated an existing cancer, there has been an even greater number of recoveries.[13]

Although allowing the jury to decide whether the plaintiff has proven that his lung cancer was the result of smoking cigarettes opens the door to possible recoveries against cigarette manufacturers,[14] it is uncertain what measures these companies will be compelled to take to avoid the possible adverse results of litigation. However, any measures that might be taken could, it seems, only be beneficial to the consuming public. But aside from the effect on the tobacco industry, it must be concluded, in the light of the cases discussed above, that the court of appeals' decision in *Pritchard v. Liggett & Myers Tobacco Company* is correct. Where there is reliable medical testimony presented to establish the causal relation, that issue should be considered by the jury in suits against cigarette manufacturers, as it has been in similar cases.

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10. See Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630 (1953); *Cancer of the Lung — Breach of Warranty in Cigarette Sales?,* 1 Current Med., Sept. 1954, pp. 35, 38.

11. Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630, 636-39 (1953)

12. See, *e.g.,* Lee v. Blessing, 131 Conn. 569, 41 A.2d 337 (1945) (cancer of the breast caused by injury received in automobile accident); Pittman v. Pillsbury Flour Mills, Inc., 234 Minn. 517, 48 N.W.2d 735 (1951) (cancer of the breast); Menarde v. Philadelphia Transp. Co., 376 Pa. 497, 103 A.2d 681 (1954) (cancer of the breast resulting from bruise received when streetcar started forward prematurely) For additional cases, both in tort and in workman s compensation, see Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630, 639, 641-44 (1953); 10 NACCA L. J. 65 (1952)

13. *Id.* at 36. And see, *e.g.,* Scobey v. Southern Lumber Co., 218 Ark. 671, 238 S.W.2d 640 (1951) (lung cancer aggravated by saw filings and emery dust), Hagy v. Allied Chem. & Dye Corp., 122 Cal. App. 2d 361, 265 P.2d 86 (1953) (lung cancer aggravated by smog)

14. But the difficulties to be overcome before recovery can be had are still great. See, *e.g.,* cases cited in note 9 *supra.*