California Western Law Review

Volume 25 | Number 2 Article 3

1-1-1989

Personal Choice and Civil Coe Section 1714:45: An Epilogue for California's Smoking and Health Litigation

Martin R. Glick

H. Joseph Escher III

Personal Choice and Civil Code Section 1714.45: An Epilogue for California's Smoking and Health Litigation†

MARTIN R. GLICK*
H. JOSEPH ESCHER III**

INTRODUCTION

At their peak in December 1986, forty-nine smoking and health lawsuits had been served, and thirty-five were pending against tobacco company defendants in California. Since that time, no California case has gone to trial, and the number of the served and pending cases has declined to sixteen. Only one plaintiffs' counsel is still involved in the litigation. At the time of this writing, a motion for judgment on the pleading governing all of the sixteen pending cases has just been granted by the appellate court in *American Tobacco Co. v. Superior Court.*[1] No additional smoking and health lawsuits have been served on the tobacco defendants in California since the passage of Civil Code section 1714.45 in September 1987. The explanation for the virtual extinction of the much-heralded "new wave" of smoking and health litigation in California[2] is straightforward: the immunity declared by Civil Code section 1714.45, and the eviscerating effect of the preemption and "personal choice" defenses on plaintiffs' core theories of recovery.

The authors of *The "New" Wave In Smoking and Health Litigation—Is Anything Really So New?* (Tennessee Article)[3] recog-

† Martin R. Glick and H. Joseph Escher III are members of the law firm of Howard, Rice, Nemerovski, Canady, Robertson & Falk, which serves as counsel to R.J. Reynolds Tobacco Company in California smoking and health cases. The views expressed herein are those of the authors and do not necessarily reflect the views of Howard, Rice or R.J. Reynolds.

* Martin R. Glick—J.D., Ohio State University (1964); B.A., (1961).

** H. Joseph Escher III—J.D., University of Chicago (1977); B.A., Stanford University (1974).

1. 89 C.D.A.S. 893 (Feb. 6, 1989).

2. The national trend is also strongly in the direction of a declining number of both new and pending actions. Nearly 70 new actions were served on tobacco companies at the beginning of 1986, with only one new action filed in the six months since the verdict in Cipollone v. Liggett Group, Inc., No. 83-2964 (D.N.J. 1988). *See* CRUDELE, *The Smoke Clears*, N.Y. MAGAZINE, Nov. 14, 1988 at 28 (describing other dismissals by plaintiffs' counsel).

3. Crist & Majoras, *The "New" Wave in Smoking and Health Litigation—Is Anything Really So New?*, 54 TENN. L. REV. 551 (1987).

nized that the "new wave" of tobacco litigation would founder, as had the earlier cases, on general public awareness of the alleged risks of smoking, and personal choice and responsibility. This Article will not restate the Tennessee Article's detailed analyses of the historical public awareness of alleged risks associated with smoking, and the preemptive effect of the congressionally-mandated warnings since 1966. Rather, this Article focuses on the effect of California's recently enacted Civil Code section 1714.45,[4] the assumption of risk defense in California, and the recent national developments in the smoking and health litigation, especially the three cases[5] which have been tried by juries since publication of the Tennessee Article. Before beginning the analysis of California's comment i statute and recent developments, it is useful to summarize the state of California law prior to the passage of Civil Code section 1714.45, especially the defense of federal preemption.

I. THE EFFECT OF PREEMPTION ON PLAINTIFFS' THEORIES

A. The Preemptive Effect of the Labeling Act

More than twenty-five federal and state courts—including all California courts that have considered the issue since the Third Circuit's 1986 decision in *Cipollone v. Liggett Group, Inc.*,[6]—have held that the Federal Cigarette Labeling and Advertising Act (Labeling Act)[7] preempts most, if not all, of plaintiffs' post-January 1, 1966 claims. Simply put, Congress declared that the warnings mandated by the Labeling Act were adequate to inform consumers of "any relationship between smoking and health," and preempted any state or federal effort to impose, inter alia, different or additional warnings; or any different or additional obligations with respect to the advertising or promotion of cigarettes. The conclusion that state common law product liability actions were subject to preemption was first articulated by the United States District Court for the Eastern District of Tennessee in *Roysdon v. R.J. Reynolds Tobacco Co.*[8] and confirmed shortly thereafter by the United States Court of Appeals for the Third

4. Civ. Code § 1714.45 codifies the personal responsibility analysis of RESTATEMENT (SECOND) OF TORTS § 402A comments g & i (1964).

5. Horton v. American Tobacco Co., (Holmes County, Miss. 1988) (unreported case); Cipollone v. Liggett Group, Inc., No. 83-2864 (D.N.J.); Girton v. American Tobacco Co., *sub nom.* Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987).

6. 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

7. 15 U.S.C. §§ 1331-1342 (1982 & Supp. III 1985).

8. 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988).

Circuit in *Cipollone v. Liggett Group, Inc.*[9] The Third Circuit's holding in *Cipollone* is as follows:

> [T]he Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

The overwhelming weight of authority, both inside and outside of California, has accepted the compelling logic of *Roysdon* and *Cipollone*. Several courts have concluded that preemption eliminates all of plaintiffs' post-January 1, 1966 claims,[10] and several other cases have been dismissed in the wake of complaints gutted by preemption rulings.

B. Plaintiffs' Theories and the Scope of Preemption

1. Strict Liability/Failure to Warn Theory—Plaintiffs' central theory of liability prior to *Cipollone* was strict liability/failure to warn. After *Cipollone*, any such post-1965 claim is clearly preempted. Pre-1966 failure to warn claims present their own obvious problems, and do not escape unaffected by the same principles underlying the preemption rulings. The first problem involves pre-1966 common knowledge as to the alleged dangers of smoking. As described at length in the Tennessee Article, the Advisory Committee's Report to the Surgeon General in 1964 and the warnings (which have appeared on all cigarette packages since January 1, 1966) were hardly the first news Americans had received as to the claimed harmful effects of smoking.[11] Reports of risks of smoking have been pervasive in every form of communication throughout the century, and indisputably throughout the entire smoking history of the smokers in the "new wave" of smoking and health liti-

---

9. 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

Forster v. R.J. Reynolds Tobacco Co., 423 N.W. 2d 691 (Minn. App. 1988), appeal accepted No. C-87-2170 (Minn. Sup. Ct. filed May 27, 1988). *Forster* is the only published opinion decided after the Third Circuit decision in *Cipollone* which finds that the Labeling Act does not preempt state common law claims. In *Forster*, the state intermediate court of appeals relied on the reversed trial court opinion of Cipollone v. Liggett Group, 593 F. Supp. 1146 (D.N.J. 1984). The *Forster* decision is currently on appeal to the Minnesota Supreme Court.

10. *Cipollone*, 789 F.2d at 187. *See, e.g.*, Sahli v. Manville Corp., No. 230512 (Cal. Super. Ct. filed May 14, 1987).

11. *See, e.g.*, Austin v. Tennessee, 179 U.S. 343, 348 (1900) (in which the United States Supreme Court noted the "very general" awareness of the "deleterious effects" of cigarette smoking).

gation. Indeed, comment i to section 402A of the *Restatement (Second) of Torts*, drafted in 1962, specifically acknowledges the widespread and common knowledge of risks attributed to smoking. This widespread awareness defeats strict liability as a matter of law, and also defeats as a matter of fact any possible causal connection between plaintiffs' injury and any pre-1966 "failure to warn."[12]

In addition, plaintiffs face two other severe and perhaps insurmountable burdens in proving a causal relationship between a pre-1966 "failure to warn" and the development of disease over twenty years later. First, having ignored warnings adequate as a matter of federal law for more than twenty years, plaintiffs will have trouble convincing anyone that a pre-1966 warning would have been heeded.[13] Plaintiffs' only possible response is to contend that their alleged "addiction" to smoking precluded cessation in 1966.[14] The fact that more than forty million Americans have voluntarily stopped smoking since 1965[15] is a very convincing factual rejoinder to this "addiction" counterargument. Furthermore, the "addiction" argument is self-defeating for plaintiffs' theories of recovery because it implies that the smoker tried to quit before 1966 (most likely due to health concerns attributable to actual awareness of reported risks), and that any pre-1966 warning would not have affected the smoker's behavior.[16]

Second, plaintiffs face a major challenge in attempting to prove that pre-1966 smoking, allegedly tainted by a failure to warn, either "caused" or was a substantial contributing cause of a contemporary injury. Epidemiological evidence—extensively relied on by plaintiffs in an attempt to prove that cigarette smoking "causes" disease—is also self-defeating because it indicates that if the smoker had ceased smoking in 1966, any statistically inferred

---

12. *See also* RESTATEMENT (SECOND) OF TORTS § 402A comment j (1964). Comment j provides that there is no duty to warn of commonly known dangers, including those from consumption of a product over a long period of time, using alcohol and foods with saturated fats as examples. Alcohol, butter and sugar are also used as examples in comment i. *E.g.*, Garrison v. Heublein, Inc., 673 F.2d 189 (7th Cir. 1982) (dismissing product liability action against vodka manufacturer noting that both comments i and j deal with products which are not unreasonably unsafe because of the common knowledge of their dangers). *See generally* Crist & Majoras, *supra* note 3, at 595-96.

13. *See, e.g.*, Girton v. American Tobacco Co., *sub. nom.* Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987) discussed *infra* at notes 135-40 and accompanying text.

14. Any claim that "addiction" negated the effectiveness of the statutory warning required by the Labeling Act post-1965 is preempted. *See* Cipollone v. Liggett Group, Inc., 649 F. Supp. 664, 674 (D.N.J. 1986) (on remand).

15. PUBLIC HEALTH SERVS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., SMOKING AND HEALTH: A REPORT OF THE SURGEON GENERAL 466 (1987).

16. *See infra* notes 100-25 and accompanying text which discusses the legal insufficiency of the "addiction" counterargument.

risk essentially returns to that of the general population within fifteen years, long before any illness at issue developed.[17] Thus, as a general rule, plaintiffs' central theory—strict liability/failure to warn—has been defeated by the scope of preemption announced in *Cipollone*.

2. Strict Liability/Design Defect Theory—Following *Cipollone*, California plaintiffs retreated to a strict liability/design defect theory of liability. Plaintiffs appeared to intend to proceed on both the "consumer expectations" and "risk-benefit" prongs of the test for design defects announced in *Barker v. Lull Engineering Co.*[18] They immediately encountered insurmountable hurdles. First, one cannot argue that a product is more dangerous than an adequately warned consumer would expect, and thus the "consumer expectations" test of liability is clearly preempted for post-1965 smoking.[19] Second, Congress determined that consumers adequately warned pursuant to the Labeling Act should have the right to decide whether or not to smoke. Assuming arguendo the applicability of the risk-benefit prong of *Barker*'s design defect test to cigarettes as a product, the Labeling Act should be found to preempt any effort to reweigh the congressionally-drawn balance of interests.[20] Indeed, as recognized in *Palmer v. Liggett Group, Inc.*,[21] one of the purposes of the Labeling Act was to protect commerce in tobacco to the "maximum extent" consistent with the informational goals of the warnings. Plaintiffs cannot argue that the risks of cigarettes outweigh their benefits without arguing that the congressional balancing of interests was improper. Finally, this "generic" approach to risk-benefit analysis is inconsistent with the requirements of California design defect law.[22]

---

17. *See, e.g.*, PUBLIC HEALTH SERVS., U.S. DEP'T OF HEALTH AND HUMAN SERVS., SMOKING AND HEALTH: A REPORT OF THE SURGEON GENERAL viii (1982) ("fifteen years after quitting cigarette smoking, the former smoker's lung cancer risk, for example, is reduced close to that observed in nonsmokers").

18. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

19. *See, e.g.*, Sahli v. Manville Corp., No. 230512, slip op. at 2. (Cal. Super. Ct. May 14, 1987) ("[t]o the extent that the remaining allegations assert a claim for design defect under the consumer expectations test, the claim is preempted by the Act for sales after 1965 because such a claim depends directly upon the allegations that the federally mandated warning fails adequately to inform consumers of the health risks of cigarettes"). *See generally* Crist & Majoras, *supra* note 3, at 577-78.

20. *See, e.g.*, Sahli v. Manville Corp., No. 230512 (Cal. Super. Ct. May 14, 1987) ("[t]o the extent that the remaining allegations assert a claim for design defect under the risk-benefit test, the claim is preempted by the Act for sales after 1965 because, in alleging that cigarettes are defective solely because they carry risks to health plaintiff seeks to have a jury reweigh the regulatory balance of the interests arrived at by Congress in the Act"). *See generally* Kelso, *Brown v. Abbott Laboratories and Strict Products Liability*, 20 PAC. L.J. 1, 21 (1988).

21. 825 F.2d 620 (1st Cir. 1987).

22. *See generally* Crist & Majoras, *supra* note 3, at 578-82; James, *The Untoward*

3. Negligence Theories—Plaintiffs' negligence theories closely parallel their strict liability causes of action.[23] The preemption analysis for negligence also closely parallels that of strict liability. Thus, post-1965 negligent failure to warn claims are clearly preempted under *Cipollone*, and pre-1966 negligent failure to warn claims suffer from the same difficulties as pre-1966 strict liability/failure to warn claims. Plaintiffs' claims of negligent design also encounter the same preemption problems as the strict liability/design defect claims. In order to have a negligent design, there must be a design alternative and a negligent design cause of action cannot be turned into an analysis of whether it was unreasonable to sell cigarettes at all—that is inconsistent with the scope of preemption in *Cipollone* and with California product liability law generally.[24] Plaintiffs' potpourri of other allegations of negligence (negligent advertising, promotion, sale, failure to test, etc.) are no more than subcategories of negligent failure to warn and design defect claims already discussed. Under *Cipollone* and its progeny, any post-1965 claim which depends upon an allegation of insufficient warning, or advertising and promotion, is preempted, and a generic "risk-benefit" condemnation of cigarettes is insupportable under California product liability law and the Labeling Act.

The complaints in the California litigation also contain allegations (now routine in product liability cases), of fraud and "conspiracy." Since it is logically inconsistent to allege a conspiracy to commit negligent acts, the theory typically alleged is one to misrepresent or "suppress" information regarding the alleged dangers of smoking. On remand, the district court in *Cipollone* held that such a post-1965 conspiracy claim was clearly preempted under the Third Circuit's analysis in *Cipollone*. Although the pre-1966 conspiracy claims survived a *Cipollone* dismissal, those claims faced very serious factual difficulties, including their inherent improbability in the face of widespread public awareness and causation problems,[25] and they were flatly rejected by the *Cipollone* jury.

4. Breach of Implied Warranty Theory—The final theory routinely pleaded in the California complaints is breach of implied warranty. Virtually all of such allegations have been dismissed

---

Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability, 54 CALIF. L. REV. 1550, 1553 (1966). *See* discussion *infra* at notes 36-56 and accompanying text.

23. *See generally* Kelso, *supra* note 20 (analyzing "strict" products liability, especially design defect, as a form of negligence law).

24. *See* Sahli v. Manville Corp., No. 230512 (Cal. Super. Ct. May 14, 1987); Kelso, *supra* note 20, at 21.

25. *See supra* notes 10-17 and accompanying text.

pursuant to demurrer for failure (and inability) to allege privity between the smoker and the manufacturer.[26] In any event, all post-1965 implied warranty theories would be crippled by the express disclaimer of the implied warranty as set out in the congressionally-mandated warnings,[27] as well as an inability to prove reliance.

In conclusion, plaintiffs' complaints after the application of preemption under *Cipollone* are only shadows of their original allegations. Even without Civil Code section 1714.45's recognition of the application of comment i to tobacco in California, plaintiffs were faced with attempting to establish highly problematic causation on, at best, truly marginal theories of liability. The immunity declared by Civil Code section 1714.45 eliminates any remaining window of opportunity to reach a jury with a claim that liability should attach to the manufacture or sale of tobacco products.

II. CIVIL CODE SECTION 1714.45 AND COMMENT i

A. California Law Prior to Civil Code Section 1714.45

California pioneered the development and exposition of strict products liability, and initially embraced the American Law Institute's articulation of that doctrine as set forth in *Restatement* section 402A and its comments.[28] However, prior to the passage of the Civil Liability Reform Act of 1987, no California decision had expressly addressed a manufacturer's liability for common consumer products like tobacco, alcoholic beverages, butter or sugar. Nonetheless, Civil Code section 1714.45 represents an accurate articulation of preexisting law. Under Section 402A, strict liability is imposed for products which are in a "defective condition unreasonably dangerous."[29] The term "defective condition" is de-

---

26. *See* Hauter v. Zogarts, 14 Cal. 3d 104, 114 n.8, 534 P.2d 377, 383 n.8, 120 Cal. Rptr. 681, 687 n.8 (1975).

27. *See id.* at 118-20, 534 P.2d at 386-87, 120 Cal. Rptr. at 690-91; CAL. COM. CODE § 2316 (Deering 1986).

28. *See generally* Kelso, *supra* note 20, at 10-15.

29. RESTATEMENT (SECOND) OF TORTS § 402A (1964) provides as follows:

(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 consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

fined in comment g to Section 402A,[30] and the term "unreasonably dangerous" is explained in comment i. In both cases, the framers declared their intent *not* to include common consumer products such as tobacco and alcoholic beverages in the scope of strict liability. Comment i specifically provides:

> i. *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 the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.[31]

Given the widespread awareness of health risks commonly believed to be inherent in the use of such products as tobacco, alcohol, and foods high in saturated fats, comment i concludes that these products are *not* "unreasonably dangerous." The drafters of comment i reasoned that consumers should be free to choose to consume those products, and manufacturers free to sell them, without imposition of liability. Indeed, to make this point more explicitly, the framers added the "defective" requirement to foreclose liability for such products.[32]

---

30. *Id.* Comment g provides in relevant part that "[t]he rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." It is important to note that the consumer expectations concept is central to this definition of "defect."

31. RESTATEMENT (SECOND) OF TORTS § 402A comment i.

32. In the meetings of the American Law Institute in 1961, where Section 402A was debated, Dean Prosser (the Reporter for the Restatement) stated that the word "defective" was added to the section to make it clear that products with commonly perceived inherent risks, like alcohol and tobacco, were not considered to be the subject of strict liability:

> The Council then proceeded to raise the question of a number of products which, even though not defective, are in fact dangerous to the consumer—whiskey, for

In *Cronin v. J.B.E. Olson Co.*,[33] the California Supreme Court acknowledged that California tort law had generally accepted Section 402A of the *Restatement*, including comment i. However, the court in *Cronin* noted that Section 402A's term "unreasonably dangerous" was confusing and ambiguous, and appeared to inject a notion of negligence ("unreasonable") which strict liability had been developed to eliminate: "[the unreasonably dangerous requirement] has burdened the injured plaintiff with proof of an element which rings of negligence."[34] To avoid this confusion, the *Cronin* court eliminated the "unreasonably dangerous" language from Section 402A's articulation of strict liability, but retained the "defect" requirement.[35] The *Cronin* court did not, however, abandon the rule and rationale of nonliability for common consumer products which meet consumer expectations, within the

---

example [laughter]; cigarettes, which cause lung cancer; various types of drugs which can be administered with safety up to a point but may be dangerous if carried beyond that—and they raised the question whether "unreasonably dangerous" was sufficient to protect the defendant against possible liability in such cases.

Therefore, they suggested that there [sic] something must be wrong with the product itself, and hence the word "defective" was put in; but the fact that the product itself is dangerous, or even unreasonably dangerous, to people who consume it is not enough. There has to be something wrong with the product.

38th Annual Meeting of the American Law Institute Proceedings 87-88 (1961) (emphasis added). *See also* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830 (1973).

Early drafts of the comments to Section 402A clearly establish that comment i was intended to clarify the fact that the principles of strict liability did not apply to tobacco products. In the 1961 draft, the basic substance of current comment i was contained in former comment f, but with an important difference: former comment f did not contain a reference to alcohol or tobacco products. Former comment f read, in part:

f. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the food makes it unreasonably dangerous to the consumer. Many products cannot be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from overconsumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use in Italy 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, without special knowledge of its characteristics.

37th Annual Meeting of the American Law Institute Proceedings 37 (1961).

When the reach of Section 402A was extended beyond food in 1962, comment f was redrafted. The new comment—comment i—made specific reference to the very products (alcohol and tobacco) that Dean Prosser had identified as not defective and not subject to liability in his statement to the American Law Institute in 1961. Comment i expressed the drafters' intent that certain products which "cannot possibly be made entirely safe for all consumption" were not to be actionable under Section 402A. Comment i clearly established that tobacco products such as cigarettes were not considered to be "defective" or "unreasonably dangerous" within the meaning of Section 402A.

33. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

34. *Id.* at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 441. *Cf.* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 32 (1973) ("the term 'unreasonably dangerous' was meant only as a definition of defect.").

35. *See generally* Kelso, *supra* note 20.

meaning of both comments g and i.

Nor did the court's landmark decision in *Barker v. Lull Engineering Co.*[36] change that result. After reiterating its adherence to the standard established in *Cronin*, the *Barker* court went on to consider the definition of "defect" in products liability cases. *Barker* is best known for its articulation of two alternative tests for liability in typical products liability cases:

> [A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors . . . the benefits of the challenged design do not outweigh the risk of danger inherent in such design.[37]

The *Barker* court then reviewed and summarized prior cases as falling into two distinct categories. First, "a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[38] This standard is analogous to an implied warranty theory[39] and tracks the language found in comments g and i to section 402A. The court noted that such a standard is insufficient in situations where the design of the product embodies excessive preventable danger, because consumers might have no idea how safe the product could be made.[40] The *Barker* court therefore adopted a second standard, holding that:

> [A] product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies "excessive preventable danger," or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design.[41]

In this alternative design context, the court concluded that the jury should consider the following factors in applying the risk-benefit test to a challenged design feature of a product:

> [T]he gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.[42]

---

36. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).
37. *Id.* at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228.
38. *Id.* at 429, 573 P.2d at 454, 143 Cal. Rptr. at 236.
39. *Id.* at 429-30, 573 P.2d at 454, 143 Cal. Rptr. at 236.
40. *Id.* at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.
41. *Id.*
42. *Id.* at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

It is logical to conclude, albeit arguably somewhat unclear from the opinion in *Barker*, that in the absence of proof that a feasible alternative design existed and would have prevented the injury, plaintiff is not entitled to a risk-utility instruction.[43] Proof that a product, rather than the product's design, caused the injury is legally insufficient. A plaintiff should be required to make a prima facie showing that the injury was proximately caused by a specific design feature of the product, and that an alternative design for the product was available which would have prevented the injury. This proximate cause analysis was at the heart of the district court's directed verdict for defendants on the "alternative design" claim in *Cipollone*.

At least one California case has implicitly addressed this issue of the requirement of an alternative design. In *Garcia v. Joseph Vince Co.*,[44] plaintiff sustained an eye injury in a fencing match when his opponent's saber penetrated his mask. Plaintiff sued the saber and mask manufacturers on the theory of strict liability. As to the claim against the mask manufacturer, the court noted that there was no evidence that the manufacturer could have designed a mask that would not have been penetrated by the defectively sharp and pointed saber that injured plaintiff.[45] The court held that plaintiff failed to present sufficient evidence of a design defect to go to the jury, and granted a nonsuit in favor of defendant:

> No testimony was adduced by plaintiff that a fencing mask either exists or can be designed which will prevent penetration by a sharp-edged saber. To the contrary the unrebutted testimony was that any mask can be penetrated by a sharp-edged saber. Plaintiff failed to present any evidence that the state-of-the-art or existing technology is capable of perfecting a mask which cannot be penetrated by a sharp-edged saber.[46]

Because plaintiff failed to demonstrate the existence of alternative mask designs which would have prevented his injury, the *Garcia* court refused to impose strict liability under either prong of *Barker's* design defect test: "[s]imply because fencing masks cannot be made absolutely safe against all risks does not make a manufacturer liable for placing them on the market."[47]

The focus in *Garcia* on the requirement of a design alternative was addressed in a more tangential fashion in *Campbell v. Gen-*

---

43. *See generally* Brown v. Superior Court, 44 Cal. 3d 1049, 1062 (1988) ("*Barker* contemplates a safer alternative design is possible . . . .").

44. 84 Cal. App. 3d 868, 148 Cal. Rptr. 843 (1978).

45. *Id.* at 879, 148 Cal. Rptr. at 849.

46. *Id.*

47. *Id.* at 879, 148 Cal. Rptr. at 850. *See id.* at 878, 148 Cal. Rptr. at 849 (citing Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 812 (1966)).

eral Motors Corp.[48] In *Campbell*, plaintiff was sitting on a side-facing bus seat, when an abrupt turn caused her to lose her balance and fall. In front of each of the forward-facing seats on the bus was a "grab bar" mounted on the back of the forward-facing seat immediately ahead. Because plaintiff's side-facing seat did not face the back of another seat there was no grab bar in front of her. At trial plaintiff contended that the bus should have been designed to place a guard rail within her reach. The trial court granted a nonsuit, apparently reasoning that insufficient evidence was presented to demonstrate that such a guard rail would have prevented her fall. The California Supreme Court reversed, holding that:

> [P]laintiff produced sufficient evidence to establish a prima facie case of causation. The evidence justified a conclusion that a design feature of the bus—the absence of a restraining bar or pole—was a substantial factor in causing the injury. Under the second prong of *Barker*, plaintiff discharged her evidentiary burden. At this point, the burden of proof should have shifted to defendant to offer evidence relevant to a risk-benefit evaluation of the design of the bus.[49]

It seems clear from the California Supreme Court's opinion in *Campbell* that had plaintiff failed to present evidence regarding the feasibility of an additional guard rail, the nonsuit would have been proper. This impression is reinforced by the court's approving quotation of Dean Prosser's formulation of the question before a jury in an ordinary tort case: " 'what would have happened if [the product had been] otherwise.' "[50] Presumably, if plaintiff had not shown that the product could have been otherwise, plaintiff would not have carried her burden of proof. Although *Garcia* and *Campbell* appear to stand for the proposition that the availability of a risk-utility instruction turns on proof of a feasible design alternative, *Barker* explicitly did not decide this issue, and accordingly left some ambiguity as to the status of this requirement in California products liability law. In *Barker*'s footnote 10, modifying a sentence regarding "excessive preventable danger," the California Supreme Court commented that this case presented the court "no occasion to determine whether a product which entails a substantial risk of harm may be found defective even if no safer alternative design is feasible."[51] Nor has any subsequent case presented such an opportunity generally, or specifically with re-

48. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).
49. *Id.* at 126, 649 P.2d at 232, 184 Cal. Rptr. at 899.
50. *Id.* at 120, 649 P.2d at 228, 184 Cal. Rptr. at 895 (quoting Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 382 (1950) (interpolation in original)).
51. 20 Cal. 3d at 430 n.10, 573 P.2d at 455 n.10, 143 Cal. Rptr. at 237 n.10.

spect to the kinds of products referred to in comment i as to which reported risks are well known. The status of *Barker* footnote 10 as a disclaimer in dicta aside, no reported California decision since *Barker* or before passage of Civil Code section 1714.45 imposed design defect/risk-benefit strict liability on the manufacturer of a product without a showing of an alternative design.

On the other hand, lower courts have addressed the *Barker* issues with respect to common consumer products like those mentioned in comment i. In *Galbraith v. R.J. Reynolds Tobacco Co.*,[52] the trial court refused plaintiffs' request for a risk-benefit instruction in a smoking and health case. Similarly, in *Bojorquez v. House of Toys, Inc.*,[53] the Court of Appeal addressed the issue of liability for another common product (slingshots), the risks of which were commonly perceived. Implicitly declining *Barker*'s invitation to consider liability for products (like slingshots) whose "norm is danger," the *Bojorquez* court essentially followed the reasoning of comment j in holding that a slingshot sold without a warning was not defective, anecdotally indicating that "common knowledge" of these inherent dangers has existed "[e]ver since David slew Goliath."[54]

Subsequent to the passage of Civil Code section 1714.45, the California Supreme Court unambiguously embraced *Restatement* comment k in *Brown v. Superior Court.*[55] *Brown* involved a prescription drug (DES), and clarified the post-*Barker* uncertainty as to California's acceptance of comment k's exclusion of prescription drugs from certain types of strict liability. Although the policy rationales for the exclusion of comment i products and comment k products are somewhat different, *Brown* and Civil Code section 1714.45 demonstrate that California law embraces the exclusions from strict liability set out in the comments to *Restatement* Section 402A, despite the rejection of Section 402A's "unreasonably dangerous" language in *Cronin*, and the two-prong design defect test in dicta in *Barker*. Thus, *Brown* declares and clarifies the application of comment k in California in the same way that Civil Code section 1714.45 explicitly declares the application of comment i.

Prior to the passage of Civil Code section 1714.45, California law had not rejected the content of comment i, only the vocabulary "unreasonably dangerous" of *Restatement* section 402A. The

52. No. 144417 (Cal. Super. Ct. Dec. 18, 1985).
53. 62 Cal. App. 3d 930, 133 Cal. Rptr. 483 (1976).
54. *Id.* at 932-34, 133 Cal. Rptr. at 483-85.
55. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988). *See generally* Kelso, *supra* note 20.

Garcia and *Bojorquez* cases implicitly or explicitly recognized the lack of liability for products without alternative designs, emphasizing that the dangers of the products in those cases were well known, and within the expectations of the common consumer. However, no reported California case had separately addressed the status of comment i's rule of nonliability for common consumer products with commonly perceived inherent risks, such as alcohol, sugar or tobacco. The passage of Civil Code section 1714.45 made it clear that comment i is the law of California.[56]

B. The Statutory Language and Interpretation of Civil Code Section 1714.45

Civil Code section 1714.45 was part of the "historic compromise" of the Civil Liability Reform Act of 1987 (the Act), and as a small part of that tort reform package, was subject to eleventh-hour negotiated compromise and consideration. The actual language of California's "comment i" statute is as follows:

> (a) In a product liability action, a manufacturer or seller shall not be liable if:
>
> (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and
>
> (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in comment i to Section 402A of the Restatement (Second) of Torts.
>
> (b) For purposes of this section, the term "product liability action" means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty.
>
> (c) This section is intended to be declarative of and does not alter or amend existing California law, including *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988.

Although the organization of Civil Code section 1714.45 is somewhat awkward,[57] the legislative intent is clear. The statutory language of subsections (a)(1) and (a)(2) closely tracks comments g and i of *Restatement* section 402A.[58] In addition to paralleling the analysis of comment i, Civil Code section 1714.45(a)(2) makes explicit reference to the same products identified in Section 402A as being outside the scope of strict liability, but also makes

56. *See infra* notes 57-76 and accompanying text.
57. *See* American Tobacco Co. v. Superior Court, 89 C.D.O.S. 893 (Feb. 6, 1989).
58. *See supra* notes 28-42 and accompanying text.

explicit reference to comment i following the end of the statement of the three-prong standard: "as identified in comment i to Section 402A of the Restatement (Second) of Torts." This statutory incorporation by reference of the analysis of the *Restatement* is unqualified, and follows the list of products "such as sugar, castor oil, alcohol, tobacco, and butter" which are listed and discussed in comment i. It is hornbook law that where a statute refers to a secondary source, that source should be consulted in determining legislative intent.[59]

The "legislative history" of Civil Code section 1714.45 also demonstrates an intent to foreclose litigation over personal life style choices involving the use of products like those identified in subsection (a)(2). Thus, an analysis of Civil Code section 1714.45 prepared by a Legislative Committee consultant contemporaneously with its enactment pointed out that the statute "[c]odifies appellate court decisions that products such as high-cholesterol foods, alcohol, and cigarettes that are inherently unsafe and known to be unsafe by ordinary consumers, are not to be subject to product liability lawsuits."[60]

There is a clear-cut and compelling analysis made contemporaneously with the passage of the Act by the California Trial Lawyers Association, the primary participant for plaintiffs' groups in its drafting. That document, entitled "Intent of Major Provisions," was specifically relied on by the court of appeal in *American Tobacco Co. v. Superior Court*[61] and provides in relevant part as follows:

> This language was very carefully selected to insure that the immunity would only apply to the five specific products mentioned, i.e., sugar, alcohol, tobacco, butter and castor oil, but also allowing for the inclusion of some other product. The parties decided against the word "only" to allow for the possibility of some other product that appears on the market in the future and possesses all of the necessary characteristics of these five products as those characteristics are identified in Section 402A.
>
> Each of the five products is identified in Restatement Section 402A, Comment (i) as containing universally known dangers inherent in the product itself that are beyond further remedy or removal. Each of those products is voluntarily and physically consumed by the individual routinely despite the known inherent dangers. All attempts to ban or regulate the sale or availability of these products has [sic] been soundly rejected despite the con-

59. *See generally* CAL. EVID. CODE § 450, Law Revision Commission Comments (1965) (Deering 1986).

60. M. Redmond, Republican consultant to the Assembly Judiciary Committee, *Talking Point Explanation of S.B. 241 (Lockyer)* (Sept. 24, 1987).

61. 89 C.D.O.S. 893, 894 (Feb. 6, 1989).

> demnation of the perils to one's health. This reflects society's decision in favor of their availability.
>
> Since the dangers cannot be further reduced, minimized or alleviated without removing the product from the market, product liability suits would only require or cause their removal. The policy decision has already been made by society in favor of their availability.
>
> . . . .
>
> By restricting the immunity to (a) inherently unsafe products and (b), intended for personal consumption such as alcohol, sugar, tobacco, butter and castor oil as identified in Comment (i) of 402A, *it was intended and understood that the immunity would apply to the five products identified.*
>
> As identified in 402A(i), these five products have certain distinct characteristics in consumption, societal acceptance and known uncorrectable dangers.[62]

The context in which Civil Code section 1714.45 was enacted further confirms that the legislature's intent was to eliminate existing tobacco product liability actions and to preclude future lawsuits relating to other "lifestyle" products such as alcoholic beverages and rich foods. Indeed, the California tobacco products liability lawsuits were the only "comment i" type lawsuits pending in California, although alcoholic beverage product liability actions have been brought in several states.[63] The court in *American Tobacco Co.* emphasized the importance of legislative context and purpose in determining the intent of the legislature, and concluded that the legislative context "strongly indicate[d]"[64] an intention to immunize tobacco and the other enumerated products.[65]

Section 1714.45 was passed by the Legislature against the backdrop of tobacco trials in California, Tennessee, New Jersey and elsewhere, as well as the fact that over thirty other tobacco cases were pending in California, and had received widespread publicity. Accordingly, Section 1714.45 specifically references "pending" product liability actions, making clear that the statute

---

62. CALIFORNIA TRIAL LAWYERS ASSOCIATION, INTENT OF MAJOR PROVISIONS (1987) (emphasis added).

63. *See, e.g.*, Morris v. Adolph Coors Co., 735 S.W.2d 578 (Tex. Ct. App. 1987); Maguire v. Pabst Brewing Co., 387 N.W.2d 565 (Iowa 1986); Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984); Garrison v. Heublein, Inc., 673 F.2d 189 (7th Cir. 1982) (all dismissing product liability actions against alcoholic beverage manufacturers on the ground that the risks of alcohol consumption are commonly known).

64. *American Tobacco Co.*, 89 C.D.O.S. 893, 994 (Feb. 6, 1989).

65. "In construing a statute . . . [t]he court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction." Alford v. Pierno, 27 Cal. App. 3d 682, 688, 104 Cal. Rptr. 110, 114 (1972) (citing Estate of Jacob, 61 Cal. App. 2d 152, 155 (1943)); *see also* California Mfrs. Ass'n v. Public Util. Comm'n, 24 Cal. 3d 836, 844, 598 P.2d 836, 840-41, 157 Cal. Rptr. 676, 680 (1979) (explaining that historical context is an important aspect of determining legislative purpose).

shall apply to such cases.

The organizational structure of Civil Code section 1714.45 was a subject of controversy after passage of the statute. One lower court[66] had concluded that the list of products ("sugar, castor oil, alcohol, tobacco, and butter") and the explicit reference to comment i ("as identified in comment i") could only mean that comment i's analysis of nonliability for the listed products was intended to be incorporated into Civil Code section 1714.45. In other words, since comment i is precisely an analysis of nonliability for common products for personal consumption with commonly perceived and inherent dangers ("cannot be made entirely safe for all consumption"), the statute's incorporation of comment i and the enumerated products must be considered to be a declaration that the enumerated products meet all three prongs of the nonliability standard.

The opposing argument, accepted by other superior courts prior to reversal by the court of appeal in *American Tobacco Co.*, emphasizes the placement of the reference to the enumerated products and comment i in Civil Code section 1714.45(a)(2). According to this analysis, the enumerated products are only examples of "common consumer product[s] intended for personal consumption," and not examples of products which are commonly known to be inherently dangerous. Aside from relegating to mere coincidence the fact that the enumerated products clearly meet common perceptions as to the other two prongs of the statutory test,[67] this analysis fails to give *any* effect to the reference to comment i. Accordingly, this analysis runs afoul of the maxim of statutory construction that effect should be given to all of the statutory language.[68] The court of appeal in *American Tobacco Co.* recognized

---

66. Hunyada v. Raymark Indus., No. 349090 (Sacramento Super. Ct. 1988).

67. *Accord*, Wade, *supra* note 32, at 842 ("[i]f a danger in the use of a particular product is a matter of common knowledge and the public is fully aware of it and still freely buys the product, then the product may well be found to be duly safe. Two common products where this may well be true today . . . are liquor and the danger of alcoholism, and cigarettes and the danger of lung cancer").

As the Legislature has declared, the alleged dangers of smoking are well-known and recognized. For example, since 1909 the California statutes have contained provisions requiring instruction on the alleged dangers of smoking: 1909 Cal. Stat. ch. 269 (repealed 1929); 1929 Cal. Stat. ch. 2 amended as 1943 Cal. Stat. ch. 71 amended as 1959 Cal. Stat. ch. 2 amended as 1968 Cal. Stat. ch. 917 (repealed 1972); CAL. EDUC. CODE § 512.60 (Deering 1987 & Supp. 1988).

Further, since 1966, Congress has required that warnings of the alleged dangers of smoking be placed on every pack of cigarettes sold in the United States. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1342 (1982 & Supp. III 1985).

68. Napa Valley Educators' Ass'n v. Napa Valley Unified School Dist., 194 Cal. App. 3d 243, 248, 239 Cal. Rptr. 395, 397 (1987) (quoting California Teachers Ass'n v. Governing Bd., 145 Cal. App. 3d 174, 179, 204 Cal. Rptr. 20, 23 (1983)) (" 'effect should be given to the statute as a whole, and to its every word and clause so that no part or

that the reference to comment i is a reference to comment i's analysis of tobacco as a consumer product with inherent dangers which are commonly known: "[t]he reference to this language and these same products in section 1714.45 would be entirely inappropriate if the legislative intendment was not to erode the enumerated items from product liability on a rationale analogous to that discussed in comment i . . . . " Thus, as a matter of both legislative intent and statutory construction, the enumerated products in Civil Code section 1714.45(a)(2) are intended to be a declaration that those products meet all three prongs of the statute's standard for nonliability.[69]

Civil Code section 1714.45(c) states that the statute is "declarative of . . . existing California law" and applies to pending cases. Subsection (c) specifically references *Cronin v. J.B.E. Olson Corp.*[70] as being included in the existing law which has not been altered by Civil Code section 1714.45. As discussed, comment i to *Restatement* section 402A is entitled "Unreasonably dangerous" and is in substance an analysis of certain products which are not by definition unreasonably dangerous.[71] *Cronin*, on the other hand, had rejected the "unreasonably dangerous" language of the strict liability test, relying instead on "defect" language alone. However, it is doubtful from both *Cronin* and *Restatement* section 402A that the use of either of the two verbal articulations of the strict liability standard makes any analytical (as opposed to procedural) difference. The specific reference to *Cronin* in the "declarative of existing law" provision of Civil Code section 1714.45(c) must mean that the acceptance of comment i's analysis of no liability for products which are "not unreasonably dangerous" was not meant to be a wholesale reintroduction of the "unreasonably dan-

---

provision will become useless or meaningless, since it is presumed that every word and provision was intended to have some meaning and function' "). *See also* Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963) ("legislature is presumed to have used no superfluous words"). *See generally* Mason v. United States, 260 U.S. 545, 554 (1923) (Sutherland, J.) (emphasizing the primacy of the canon of giving effect "to every part of a statute, if legitimately possible"); *accord* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.21 (4th ed. 1984).

69. *See generally* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.18 (4th ed. 1984) (references to a qualifying class must be interpreted in light of germaneness to the subject).

The fact that the descriptive clause "such as sugar . . . alcohol, tobacco . . ." is separated from the remainder of subsection (a)(2) by a comma is yet another reason to interpret that clause as referring to all three prongs of § 1714.45's immunity standard. *See id.* § 47.33 ("[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.") (citing Board of Trustees v. Judge, 50 Cal. App. 3d 920, 926, 123 Cal. Rptr. 830, 834 (1975)).

70. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

71. *See supra* notes 32-35 and accompanying text.

gerous" prong of the strict liability test in *Restatement* section 402A into California strict liability law.[72] Thus, consistent with *Cronin*, California plaintiffs after Civil Code section 1714.45's effective date still do not need to demonstrate "unreasonable danger" in addition to "defect." However, Civil Code section 1714.45 does codify the conclusion reached in comment i that common products for personal consumption with commonly perceived inherent risks do not give rise to liability. Indeed, this conclusion is consistent with California law prior to the passage of Civil Code section 1714.45, and with *Cronin* itself.[73]

The conclusion that comment i precludes liability for ordinary cigarettes was recently affirmed by the Sixth Circuit Court of Appeals in *Roysdon v. R.J. Reynolds Tobacco Co.*[74] The district court had ordered a directed verdict for defendant on comment i grounds. The preemption defense had resulted in the dismissal of all failure to warn claims prior to trial. The Sixth Circuit first affirmed the district court's dismissal of plaintiff's failure to warn claims on preemption grounds,[75] agreeing with the Third Circuit in *Cipollone*, and the First Circuit in *Palmer*. The Sixth Circuit then addressed the comment i issue, noting that Tennessee law provided for strict products liability if a product is defective or unreasonably dangerous, even though *Restatement* section 402A provides that both defect and unreasonable danger must be shown.[76] The Sixth Circuit determined that the Camel and Winston cigarettes smoked by plaintiff were not "defective," stressing that "consumer knowledge about the risks inherent in the use of a product is one factor to be considered when determining if a product is defective." Although the *Roysdon* court observed that "[t]he normal use of cigarettes is known by ordinary consumers to

---

72. *See* American Tobacco Co. v. Superior Court, 89 C.D.O.S. 893, 894 (Feb. 6, 1989).

73. *Cronin* specifically addressed comment i to *Restatement* section 402A as part of its analysis of the "unreasonably dangerous" requirement in both theory and practice. 8 Cal. 3d at 132, 501 P.2d at 1161, 104 Cal. Rptr. at 443. *Cronin* appeared to note with approval comment i's rejection of liability for comment i products like sugar and butter because "such dangers are squarely within the contemplation of the ordinary consumer." Nonetheless, *Cronin* rejected the practical effect of the "unreasonably dangerous" requirement in addition to "defect." *But see* American Tobacco Co. v. Superior Court, 89 C.D.O.S. 893, 894 (Feb. 6, 1989) (noting in dicta that Section 1714.45 "creates an immunity that cannot be conferred without altering . . . existing California law.").

74. 849 F.2d 230 (6th Cir. 1988). The lower court's decision is reported at 623 F. Supp. 1189 (E.D. Tenn. 1985).

75. TENN. CODE ANN. § 29-28-103 (1978). Although plaintiff had smoked prior to 1966, the Tennessee ten-year statute of repose limited proof to the ten years prior to the commencement of the action in 1984.

76. *See* TENN. CODE ANN. § 29-28-105(a) (1978). The district court had noted that Tennessee had adopted comment i as part of its common law. *See Roysdon*, 623 F. Supp. at 1191 n.1.

present grave health risks," that did not translate into a "flaw" constituting a "defect," citing to a case involving alcoholic beverages.[77] Because there was no evidence that the cigarettes smoked by plaintiff "present[ed] risks greater than those known to be associated with smoking," the jury could not conclude that the cigarettes were "defective." Turning to the issue of unreasonable danger, the *Roysdon* court again emphasized consumer expectations, and affirmed the district court's taking of "judicial notice" of the common knowledge of the claimed dangers of smoking, and the conclusion that there had been no showing by plaintiff of "unreasonable danger."

Consistent with the legislative history of Civil Code section 1714.45, comment i, and pre-existing California law, the California Legislature clearly intended that Civil Code section 1714.45 declare a rule of nonliability for the products enumerated in the statute and in comment i, including tobacco. The court of appeal in *American Tobacco Co.* has now plainly affirmed this construction of Section 1714.45, declaring immunity for tobacco products.

III. Assumption of Risk, Smoking and Personal Responsibility

A. The Continued Viability of Implied Assumption of Risk as a Complete Defense

Recent California case law developments affirm the viability of implied assumption of risk as a complete defense separate from and in addition to California's "pure" comparative fault system. This assumption of risk defense should present an additional serious obstacle to plaintiffs in smoking and health actions, and is implicit in the personal choice/personal responsibility policy embodied in comment i and Civil Code section 1714.45.

The tobacco defendants' assumption of risk defense is that by smoking cigarettes with knowledge of the claimed risks of smoking, plaintiffs assumed those risks, and, as a result, are barred from any recovery. Since January 1, 1966, all consumers have been adequately warned as a matter of federal law of "any relationship between smoking and health," and must therefore be deemed to have assumed such risks. As discussed in the Tennessee Article, the risks of cigarette smoking were commonly appreciated well before 1966. This complete defense of implied assumption of risk is to be distinguished from a comparative fault analysis, which only reduces plaintiff's recovery by a percentage of fault

77. Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984).

attributable to plaintiff.

In *Li v. Yellow Cab Co.*,[78] the California Supreme Court replaced the all-or-nothing rule of contributory negligence with the doctrine of pure comparative negligence. In the course of adopting the rule of comparative negligence, the court discussed the effect of comparative negligence on assumption of risk. The court first noted that assumption of risk, as that doctrine had been applied in California, encompasses conduct which might or might not involve negligence by the plaintiff. Quoting *Grey v. Fibreboard Paper Products Co.*,[79] the court in *Li* reasoned that "where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, the plaintiff's conduct . . . is in reality a form of contributory negligence."[80] The second historical form of assumption of risk also encompasses those situations where a plaintiff is deemed to have agreed to relieve a defendant of an obligation of reasonable conduct toward him. This situation does not involve contributory negligence, but involves a reduction of the defendant's duty of care. However, *Li* held that those particular cases in which the form of assumption of risk involved is "merely a variant of the former doctrine of contributory negligence," the assumption of risk defense is "to be subsumed under the general process of assessing liability in proportion to negligence."[81]

In assessing the effect of *Li*, it is helpful to examine the two principal cases the California Supreme Court cited in its holding regarding assumption of risk. In *Grey v. Fibreboard Paper Products Co.*, the California Supreme Court noted that the term "assumption of risk" had been used by courts to describe several kinds of situations which demanded different kinds of treatment.[82] In "simple" terms, the court distinguished between those situations where a plaintiff unreasonably undertakes to encounter a specific known risk, and those situations where a plaintiff is held to agree to relieve a defendant of an obligation of reasonable conduct toward him. The court held that only in the former situation is there also contributory negligence. The latter situation does not involve contributory negligence, but only a reduction of defend-

78. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

79. 65 Cal. 2d 240, 245, 418 P.2d 153, 156, 53 Cal. Rptr. 545, 548 (1966).

80. *Li*, 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872. Prior to the decision in *Li*, the conceptual distinctions between assumption of risk and contributory negligence were relatively unimportant as a practical matter, because both focused on plaintiff's conduct, and either would constitute a complete defense.

81. *Id.* at 829, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

82. *Grey*, 65 Cal. 2d at 245, 418 P.2d at 156, 53 Cal. Rptr. at 548.

ant's duty of care.[83]

The court in *Li* also cited *Fonseca v. County of Orange*.[84] In *Fonseca*, the court discussed the nature of contributory negligence and assumption of risk:

> Assumption of risk involves the negation of defendant's duty; contributory negligence is a defense to a breach of such duty; assumption of risk may involve perfectly reasonable conduct on plaintiff's part; contributory negligence never does; assumption of risk typically embraces the voluntary or deliberate incurring of known peril; contributory negligence frequently involves the inadvertent failure to notice danger.[85]

The court in *Fonseca* went on to discuss the overlap between contributory negligence and assumption of risk, noting that a plaintiff's decision to encounter a known risk can itself be unreasonable because the danger is out of all proportion to the advantage which he is seeking to obtain, in which case the plaintiff's conduct could be viewed as also a form of contributory negligence.[86]

Since *Li*, the California Supreme Court has not specifically addressed the viability of assumption of risk as a complete defense where plaintiff's conduct is not merely a variant of contributory negligence. However, the California Supreme Court has continued implicitly to acknowledge that assumption of risk remains a complete defense in appropriate circumstances. In *Daly v. General Motors Corp.*,[87] the court extended the application of comparative negligence to strict liability causes of action. In so doing, it reaffirmed its holding in *Li* "that the defense of assumption of risk, insofar as it is no more than a variant of contributory negligence, was merged into the assessment of liability in proportion to fault."[88] Despite this opportunity to broaden the extent to which comparative negligence eliminated the defense of assumption of risk, the court repeatedly stated that assumption of risk was merged into comparative negligence only to the extent that plaintiff's conduct amounts to negligence.[89] This implied acknowledgement of implied assumption of risk as a complete defense in situations which were not "mere variants" of comparative negligence was perceived by certain appellate courts which articulated the distinction as one between "duty" and negligence.[90]

---

83. *Id.* at 245-46, 418 P.2d at 156, 53 Cal. Rptr. at 548.
84. 28 Cal. App. 3d 361, 104 Cal. Rptr. 566 (1972).
85. *Id.* at 368-69, 104 Cal. Rptr. at 571.
86. *Id.* at 369, 104 Cal. Rptr. at 571.
87. 20 Cal. 3d 725, 575 P.2d 1167, 144 Cal. Rptr. 380 (1978).
88. *Id.* at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385.
89. *Id.* at 735, 738, 742, 575 P.2d at 1167, 1169-70, 1172, 144 Cal. Rptr. at 385, 387, 390.
90. In Rudnick v. Golden West Broadcasters, 156 Cal. App. 3d 793, 798, 202 Cal.

More recently, the continued viability of the implied assumption of risk defense[91] was explicitly acknowledged and applied in *Ordway v. Superior Court.*[92] The plaintiff in *Ordway* was a professional jockey who was thrown from her horse and injured as a

---

Rptr. 900, 903 (1984), Judge Crosby stated that in *Li*, "the Supreme Court explicitly noted reasonable assumption of risk involved 'a reduction of defendant's duty of care.' " Judge Crosby further explained:

> Reasonable implied assumption of risk is one of three forms of assumption of risk. The other two are express assumption of risk . . . , and unreasonable implied assumption of risk, where plaintiff, by negligent conduct, is held to agree to relieve defendant of a legal duty. Only the last was affected by *Li*.

Id. at 798-99, 202 Cal. Rptr. at 903. Judge Crosby made reference to commentators who have stated that " 'a number of *fact patterns that look like reasonable implied assumption of risk may still result in a verdict for defendant* [under a system of comparative fault], *if they are recast under the duty concept*' " and " 'the future relation between assumption of risk and comparative negligence [in California] . . . require[s] the safety valve of "no duty" for continued recognition of certain isolated instances of reasonable assumption of risk.' " *Id.* at 799-800, 202 Cal. Rptr. 672 (emphasis added by court, brackets in original) (citations omitted).

See also Neinstein v. Los Angeles Dodgers, Inc., 185 Cal. App. 3d 176, 229 Cal. Rptr. 612 (1986). In *Neinstein*, the court stated that in situations where the plaintiff has reasonably assumed a risk, "his conduct will not be considered as fault under comparative negligence. Rather, the court will decide whether defendant has breached a duty to the plaintiff." *Id.* at 183, 229 Cal. Rptr, at 615-16 (quoting *Rudnick*, 202 Cal. App. 3d at 797, 202 Cal. Rptr. at 902). The court agreed with the conclusion that the decision to sit in an unscreened section of a baseball stadium "is neither negligent nor blame-worthy," and therefore, comparative fault principles do not apply. *Id.* at 183-84, 229 Cal. Rptr at 616.

In Nelson v. Hall, 165 Cal. App. 3d 709, 211 Cal. Rptr. 688 (1985), the court held that assumption of risk was a complete bar in the case before it because the plaintiff had reasonably encountered the risk that a dog might bite while being treated. The court reasoned that "[a] veterinary assistant cannot be deemed to have unreasonably encountered a risk that is inherent in his or her job. Therefore, this type of assumption of the risk is not subsumed by comparative fault and, hence, is a complete defense." *Id.* at 714, 211 Cal. Rptr. at 672.

The fact that California courts continue to recognize the defense of express assumption of risk also lends support to the continued existence of implied reasonable assumption of risk. In cases involving scuba diving, dirt bike racing, motorcross racing, and parachuting, courts since *Li* have enforced express waivers of liability so long as the waivers were valid and did not violate public policy. *See* Madison v. Superior Court, 203 Cal. App. 3d 589, 250 Cal. Rptr. 299 (1988); Coates v. Newhall Land & Farming, Inc., 191 Cal. App. 3d 1, 236 Cal. Rptr. 181 (1987); McAtee v. Newhall Land & Farming Co., 169 Cal. App. 3d 1031, 216 Cal. Rptr. 465 (1985); Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 214 Cal. Rptr. 194 (1985).

91. *See generally* Rosenlund, *Once a Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California*, 20 U.S.F. L. REV. 225 (1986); Comment, *Assumption of the Risk in Alaska after the Adoption of Comparative Negligence*, 6 UCLA ALASKA L. REV. 244, 257 (1977); Schwartz, *Li v. Yellow Cab Company: A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747 (1976). *But see* Segoviano v. Housing Auth., 143 Cal. App. 3d 162, 170, 191 Cal. Rptr. 598, 584 (1983) (where the plaintiff was injured during a flag football game, the court concluded that if a plaintiff's conduct in assuming a risk is reasonable, there is still no basis for barring or reducing plaintiff's recovery); Titus v. Bethlehem Steel Corp., 91 Cal. App. 3d 372, 382, 154 Cal. Rptr. 122, 128 (1979) (dicta); Gonzalez v. Garcia, 75 Cal. App. 3d 874, 142 Cal. Rptr. 503 (1977) (dicta).

92. 198 Cal. App. 3d 98, 243 Cal. Rptr. 536 (1988). *Accord*, King v. Magnolia Homeowners Assoc., 205 Cal. App. 3d 1312, 253 Cal. Rptr. 140 (1988).

result of interference from another horse and jockey during a race. Plaintiff sued the owner of the offending horse, among others. The Court of Appeals ordered that summary judgment be granted in favor of the owner of the offending horse, concluding that reasonable implied assumption of risk was still a complete defense, and that it constituted an inferred agreement to relieve a potential defendant of a duty of care based on the potential plaintiff's conduct in encountering a known danger. The court in *Ordway* carefully noted the difference between comparative fault and implied assumption of risk.

The *Ordway* court recognized that implied assumption of risk as a mere variant of comparative fault had been merged into comparative negligence after *Li*, but nonetheless rejected the reasoning of *Segoviano v. Housing Authority*,[93] stating that "the individual who knowingly and voluntarily assumes a risk, whether for recreational enjoyment, economic reward, or some similar purpose, is deemed to have agreed to reduce the defendant's duty of care."[94] The reasonable/unreasonable distinction was recognized by the *Ordway* court as an awkward one, which could be more easily understood as a distinction between " 'knowing and intelligent' versus 'negligent or careless.' "[95]

The implied assumption of risk defense is directly applicable to smoking and health litigation, because plaintiffs and their decedents were well aware of the claimed danger of contracting potentially fatal diseases from smoking cigarettes. When "reasonable" implied assumption of risk is understood as "knowing and intelligent" as opposed to "negligent or careless,"[96] it becomes even more apparent that assumption of risk should operate as a complete bar to plaintiffs' recovery in smoking and health litigation.[97] To hold otherwise would require the trier of fact to ignore the common awareness of the widespread claims of adverse health consequences from smoking, and to conclude that the Labeling Act warnings failed to adequately apprise consumers of the risks attributed to smoking.

Plaintiffs' in the pending California smoking and health cases will clearly not be able to argue plausibly that their diseases, or

93. 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983) (discussed *supra* note 90).
94. *Ordway*, 198 Cal. App. 3d at 104, 243 Cal. Rptr. at 539.
95. *Id.* at 105, 243 Cal. Rptr. at 540.
96. *Id.*
97. *Cf.* Sias v. Secretary of Health and Human Servs., No. 86-2117, slip op. (6th Cir. Nov. 22, 1988) (denying social security benefits for vascular diseases allegedly caused by smoking, reasoning that "[t]he social security act did not repeal the principle of individual responsibility. Each of us faces myriads of choices in life and the choices we make whether we like it or not have consequences").

those of the decendents, were not within the contemplated range of possibilities of which they had actual knowledge.[98] Plaintiffs' "synergism" allegation is that a given population group (*i.e.*, smokers with high exposure to asbestos fibers) is more likely to develop lung cancer. Nonetheless, for any individual within that population group, the possibility of contracting lung cancer is precisely one of the commonly perceived risks impliedly assumed by smoking.[99] Even if another disease is claimed to have been caused by smoking, the fact that plaintiff knew of the claims of serious health risks from smoking should not prevent the operation of the assumption of risk defense.[100]

---

98. Sperling v. Hatch, 10 Cal. App. 3d 54, 61, 88 Cal. Rptr. 704, 709 (1970) (quoting Tavernier v. Maes, 242 Cal. App. 2d 532, 544 (1966)). *See also* Fuller v. California, 51 Cal. App. 3d 926, 941, 125 Cal. Rptr. 588, 595 (1975) (knowledge of the magnitude of the risk does not require that the exact nature of the injury be foreseen); Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 718, 127 Cal. Rptr. 745, 750 (1976) (quoting *Sperling*, 10 Cal. App. 3d at 61, 88 Cal. Rptr. at 709).

In Tavernier v. Maes, 242 Cal. App. 2d 532, 534-44, 51 Cal. Rptr. 582, 584 (1966), the court held that by participating in a softball game, the plaintiff assumed the risk of being bumped or bruised by bodily contact on a close play. The court reasoned that actual knowledge of the specific danger does not require that the victim foresee the particular accident and injury which in fact occurred. Rather, "[t]he specificity, particularity, and magnitude in question must refer to the scope and source of possible dangers. . . . If the accident and the resultant injury fall within general hazards . . . of which the victim had knowledge he may be found to have assumed the risk thereof." *Id.* at 543-44, 51 Cal. Rptr. at 582. *But cf.* Vierra v. Fifth Ave. Rental Servs., 60 Cal. 2d 266, 274, 32 P.2d 193, 198, 383 Cal. Rptr. 777, 782 (1963) (knowledge of danger of flying concrete during construction does not show knowledge of danger of flying metal caused by defective tool used in the construction).

A decedent's assumption of risk can be used to bar recovery by his heirs in a wrongful death case to the same extent as in a personal injury suit. In Coates v. Newhall Land & Farming, 191 Cal. App. 3d 1, 236 Cal. Rptr. 181 (1987), the court held that a decedent's express assumption of risk bars recovery by the decedent's heirs in a wrongful death suit. The court relied on two "California decisions indirectly acknowledging that a decedent's assumption of the risk implied by conduct may bar a wrongful death action." *Id.* at 6, 236 Cal. Rptr. at 183-84.

But cf. Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal. App. 591, 291 P. 848 (1930), where the court stated that the decedent's assumption of risk, "[e]ven though it might have been available against the decedent had he lived and brought suit for damages on account of personal injuries, it cannot operate to defeat his mother's independent statutory right of action given her under the provisions of section 376 . . . ." *Id.* at 598, 291 P. at 850. In *Rovegno*, decedent apparently drowned while swimming in defendant's unattended pool. In dicta, the court rejected defendant's argument that decedent, who was a member of the defendant-association and who was bound by its rules and regulations, assumed the risk.

99. Federal preemption should preclude drawing fine distinctions among consumers and their awareness of risks, whether based on "synergy," or other personal factors such as genetic susceptibility or other environmental exposures. *See generally* Crist & Majoras, *supra* note 3.

100. *See* Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988). *Roysdon* involved a claim of vascular disease allegedly caused by smoking and cigarette "addiction." In affirming a directed verdict for defendant, the court determined that "whether there was knowledge regarding Mr. Roysdon's specific medical problem is irrelevant in light of the serious nature of the other diseases known at that time to be caused by

B. *The Claim of "Addiction" to Tobacco Does Not Avoid the Assumption of Risk Defense*

Plaintiffs' obvious (and perhaps only) response to the implied assumption of risk defense is to argue that the allegedly "addictive" character of cigarettes affects the "voluntary" nature of smoking, and therefore precludes an assumption of risk defense. In other words, plaintiffs seek to avoid personal responsibility for their choice to smoke by putting in issue the "quality" of the choice which constitutes the assumption of risk.[101] This attempt to offer an alleged impairment of volition as a legal excuse for personal choices runs contrary to legal, ethical and social norms of personal responsibility, and should be rejected.

The American legal system was founded on the twin premises of free will and individual responsibility.[102] Likewise, California's constitutional system is grounded on these concepts.[103] These fundamental premises of our legal culture provide the basis for the normative legal rule that individuals are held accountable for their actions, when taken with knowledge of the circumstances. Only extreme circumstances are judged sufficient to release individuals from legal responsibility for their decisions. For example, insanity—the inability to know what one is doing, or to distinguish right from wrong—is recognized as a defense to criminal actions.[104] Similarly, severe mental retardation has been held to excuse certain criminal behavior.[105] Less extreme claims of excuse for action, such as diminished capacity, irresistible impulse, or other personality weaknesses or disorders, are not recognized in California.[106] The irrelevancy of such claims is a matter of fundamental social policy; a considered decision to hold individuals gen-

---

cigarette smoking." *Id.* at 236. Brisboy v. Fibreboard, 429 Mich. 540, 418 N.W. 2d 650 (1988).

101. The "addiction" argument is legally insufficient to defeat the preemptive effect of the Labeling Act on product liability claims, and should also be found insufficient on preemption grounds to negate the assumption of risk defense. *See* Crist & Majoras, *supra* note 3, at 598-601. *But cf.* Garne, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980) (arguing for "addiction" as the central theory in the "new wave" of smoking and health litigation).

102. *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (noting that "the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility").

103. *E.g.*, CAL. CONST. art. I, § 1 ("All people are by nature free and independent . . . .").

104. People v. Skinner, 39 Cal. 3d 765, 771, 704 P.2d 752, 755, 217 Cal. Rptr. 685, 688 (1985).

105. *See In re* Ramon M., 22 Cal. 3d 419, 428, 584 P.2d 524, 530, 149 Cal. Rptr. 387, 393 (1978).

106. *See* CAL. PENAL CODE §§ 25, 28 (Deering 1985).

erally responsible for their knowing actions.[107]

Individual personality traits are simply not recognized as relevant legal excuses.[108] Thus, an irritable person cannot raise his personality as a defense to civil assault. A prevaricating individual cannot defend on that basis against a charge of defamation or perjury. And a greedy individual cannot avoid liability for embezzlement by virtue of his nature.

Courts previously have excluded so-called "addiction" evidence where such evidence did not amount to insanity or incompetence. For example, in *Powell v. Texas*,[109] a public drunkenness prosecution, the United States Supreme Court affirmed the decision to prohibit testimony regarding the defendant's chronic alcoholism that supposedly made him an "involuntary drinker."[110] Citing "[t]raditional common-law concepts of personal accountability," the Court found it impossible to draw legally meaningful "distinctions between a 'compulsion' . . . and an 'impulse.' "[111]

> It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter concept. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[112]

Soon after *Powell*, the United States Court of Appeals for the District of Columbia ruled en banc that evidence of alleged addiction to narcotics should be excluded from a trial for possession of

---

107. *See id.* § 28(b). "As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse. . . ."

108. Although such alleged disorders may arouse sympathy and be deserving of humane psychological treatment, they cannot serve as excuses for avoiding legal responsibility. As the U.S. Supreme Court recently noted in the related context of allegedly involuntary confessions, an individual's "perception of coercion flowing from [a mental disorder], however important or significant such a perception may be in other disciplines, is a matter" outside the governing legal constraints. Colorado v. Connelly, 479 U.S. 157, 170-71 (1986). The Court held that a person who confessed due to an alleged psychological compulsion, but who was otherwise competent, could not avoid the consequences of his confession. Absent coercion, "voluntariness is irrelevant to the presence or absence of the elements of a crime . . . ." *Id.* at 168. *See also* Miller v. Fenton, 474 U.S. 104, 116 (1985) ("[v]oluntariness . . . has always had a uniquely legal dimension").

109. 392 U.S. 514 (1968).

110. *Id.* at 518.

111. *Id.* at 526, 535.

112. *Id.* at 526.

heroin.[113] More recently, the United States Court of Appeals for the Eighth Circuit ruled that evidence of "pathological gambling" should be excluded from an embezzlement prosecution.[114] Unless the defendant could produce evidence amounting to an insanity defense, his proffer of evidence showing only a pathological inability to control his need for money was insufficient.[115]

Identically, an alleged tobacco "addict"[116] should not be able to raise that "disorder" as a defense to personal responsibilities for his choices. The fact is that over forty million Americans in the last two decades have decided to quit smoking despite the allegedly "addictive" nature of tobacco. Even if the excuse of tobacco "addiction" was deemed relevant to an assumption of risk defense, there are grave scientific difficulties with claims that tobacco "addiction" or "tobacco dependency" rendered a plaintiff unable to exercise volition. In order to prove this assertion, plaintiffs must show that it can be scientifically ascertained whether a person is unable to stop smoking, and that plaintiff meets the applicable criteria. Neither burden can be met.

Historically, the standard for admissibility of novel scientific evidence has been the one set out in *Frye v. United States*:[117] "courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[118] The *Frye* standard has been adopted in California, and requires "a preliminary showing of general acceptance of the

113. United States v. Moore, 486 F.2d 1139, 1147-48 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 980 (1973). "[P]sychic dependence, and a claim of psychic incapacity, [does] not establish a defense under settled judicial doctrine . . . ." 486 F.2d at 1178 (Leventhal, J., concurring).

114. United States v. Lewellyn, 723 F.2d 615, 619-20 (8th Cir. 1983).

115. *Id.* Significantly, the Eighth Circuit found it immaterial in *Lewellyn* that pathological gambling was added, as was the tobacco disorder (*see infra* note 131), as a "disorder of impulse control" to DSM-III in 1980. THE AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) (DSM-III). 723 F.2d at 618. The court emphasized the introductory disclaimer in DSM-III that "[t]he purpose of DSM-III is to provide clear descriptions of diagnostic categories . . . . The use of this manual for nonclinical purposes, such as the determination of legal responsibility . . . must be critically examined in each instance . . . ." *Id.* at 618 (quoting DSM-III). The Eighth Circuit found DSM-III to be of no aid in the context of legal responsibility for one's acts. *See also* United States v. Lyons, 731 F.2d 243, 246 (5th Cir. 1984), *cert. denied*, 469 U.S. 930 (1984) (addiction, "voluntary or involuntary," can provide no defense to criminal charges of any kind).

116. DSM III added a diagnosis for the disorder of "tobacco dependency" in 1980. DSM-III at 176. This disorder was not recognized in DSM-II (1968), and its description was revised this year. Thus the validity of the DSM-III description is far from well-accepted. Moreover, the 1987 revision of the DSM-III itself never uses the term "addiction."

117. 293 F. 1013 (D.C. Cir. 1923).

118. *Id.* at 1014.

new technique in the relevant scientific community."[119] The psychological evidence of "addiction" to smoking which plaintiffs will doubtless seek to present is subject to the *Frye* standard.[120]

Whether experts are able even to diagnose mental disorders has been seriously questioned by the Supreme Court of California: " '[m]ental illness' is generally acknowledged to be a vague and uncertain concept. Categories of mental diseases are notoriously unclear, often overlap, and frequently change. The experts themselves often disagree on what is an appropriate diagnosis."[121]

Even if an initial diagnosis can be made, the problem of predicting the consequences of a mental "disorder" is one that has likewise been expressly noted by the California Supreme Court: "[It] must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. Yet those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness . . . ."[122] In *Tarasoff v. Regents of the University of California*,[123] the American Psychiatric Association, joined by several other mental health organizations, filed an amicus brief which asserted that mental health professionals are unable to reliably predict future violent behavior. The court noted that: "[t]herapists, in the present state of the art, are unable reliably to predict violent acts; their forecasts, amicus claims, tend consistently to overpredict violence, and indeed are more often wrong than right."[124]

The essence of plaintiff's "addiction" claims are that habitual use of tobacco so overbears one's free will that a smoker is unable to stop smoking. However, as demonstrated *supra*, it is clear that the concept of "addiction" and its relation to individual choice or free will has no accepted scientific meaning. The scientific principle involved here—that "addiction" to cigarettes robs smokers of free choice—has not been shown to be either reliable or valid. Professor Herbert Fingarette, in an exhaustive review of the literature on the effect of "addiction" on voluntary behavior, con-

---

119. People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976).

120. People v. Shirley, 31 Cal. 3d 18, 53, 723 P.2d 1354, 1374, 181 Cal. Rptr. 243, 264 (1982). "[W]e do not doubt that if testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts, it would likewise be subjected to the *Frye* standard of admissibility."

121. Conservatorship of Roulet, 23 Cal. 3d 219, 234, 590 P.2d 1, 10, 152 Cal. Rptr. 243, 264 (1979) (footnote omitted).

122. People v. Burnick, 14 Cal. 3d 306, 326, 535 P.2d 352, 365, 121 Cal. Rptr. 488, 501 (1975) (emphasis added) (footnote omitted).

123. 17 Cal. 3d 425, 551 P.2d 334, 13 Cal. Rptr. 14 (1976).

124. *Id.* at 437-38, 551 P.2d at 344, 131 Cal. Rptr. at 24 (footnote omitted).

cluded: "[T]here is no generally accepted scientific explanation of addiction, and perforce *no scientific basis for establishing that addictive behavior is generally involuntary.*"[125]

The problem of predicting the consequences of mental disorders is especially vexing in the context of evaluating a person's capacity to exercise personal choice. Plaintiffs cannot show "general agreement" in the relevant scientific community that it can be scientifically determined whether a person's capacity for self-control is so impaired that he is unable to quit smoking. In the absence of such a showing, scientific evidence regarding the "addictive" nature of cigarette smoking does not even meet the standards for admissability under the *Frye* test, let alone defeat the implied assumption of risk defense.[126]

IV. Recent Trials in Smoking and Health Cases

During the "new wave" of smoking and health litigation, only five cases have gone to trial. This number is dwarfed by the number of voluntary and involuntary dismissals. Two of the "new wave" cases, *Galbraith* and *Roysdon*, were tried in 1985 and have been discussed elsewhere, including the Tennessee Article. No cigarette cases were tried in 1986 or 1987, but three were tried in 1988. In approximate chronological order, these three were *Horton*,[127] *Cipollone*,[128] and *Girton*.[129] As discussed more fully below,

125. Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 433-34 (1975) (emphasis added) (footnote omitted).

126. In a major study analyzing the application of DSM-III criteria for tobacco dependence the authors noted that "we know of no tests of the validity of the DSM-III definition of tobacco dependence." Hughes, Hatsukami, Mitchell & Dahlgren, *Prevalence of Tobacco Dependence and Withdrawal*, presented at the 47th annual meeting of the Committee on Problems of Drug Dependence in Baltimore, MD June 1984. AM J. PSYCHIATRY. When the authors tested these criteria, they found the definition to be "over-inclusive and thus may lack diagnostic discriminability." The authors concluded that "[t]his result suggests the DSM-III definition for tobacco dependence needs to be reformulated." According to a recent article, published before the revision of DSM-III, the sections in DSM III-R dealing with "substance use disorders" (including tobacco dependence) were to be "changed substantially." Rounsaville, Kosten, Williams & Spitzer, *A Field Trial of DSM III-R Psychoactive Substance Dependence Disorders*, 144 AM. J. PSYCHIATRY 351-55 (1987). The authors of this study stated that, "field-testing [of the new criteria] was essential for the section on psychoactive substance use disorders because of the major revisions that have been made." *Id.* at 351. However, "tobacco dependence" was not included in the field trial; therefore, no studies of the "substantially" revised criteria for tobacco dependence have been conducted, and no evidence of the reliability of these criteria are available. *See id.* at 352. *Cf.* PUBLIC HEALTH SERVS., DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING, NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL (1988) (concluding that "[c]areful examination of the data makes it clear that cigarette and other forms of tobacco are addicting"). *But cf.* Crist & Majoras, *supra* note 3, at 596-98 (arguing against an "addiction" classification for tobacco).

127. Horton v. American Tobacco Co., (Holmes County, Miss. 1988) (unreported case).

128. Cipollone v. Liggett Group, Inc., No. 83-2864 (D.N.J. June 13, 1988).

Horton led to a hung jury and mistrial; *Cipollone* led to a mixed verdict, completely vindicating two of the three tobacco defendants; and *Girton* resulted in an unambiguous defense verdict.

Because the casts of players and the applicable law, at least as applied in these cases, of the three jurisdictions (Mississippi, New Jersey, and Pennsylvania), varied so significantly, it is difficult to draw any unifying legal conclusions, or to extrapolate those conclusions to California. On the other hand, it is clear that during jury deliberations fundamental notions of personal choice and personal responsibility were unremitting obstacles to plaintiffs.

A. Horton v. American Tobacco Company

Because no opinion was issued in *Horton*, any after the fact analysis of the court's reasoning is difficult. The trial court granted defendant's *Restatement* section 402A comment i motion, dismissing plaintiffs' strict liability claim. This ruling is particularly noteworthy because it rejected plaintiffs' arguments that cigarettes containing additives and trace amounts of residues of agricultural chemicals are "contaminated" within the meaning of comment i. Relying on plaintiffs' decedent's testimony that advertising was irrelevant to him, the court rejected every effort by plaintiffs to circumvent that admission. At the conclusion of the month-long trial, the jury was charged on plaintiffs' breach of implied warranty and negligent design claims. The instructions specifically referenced plaintiffs' additive and agricultural chemical residue "contamination" claims, and a requirement that such "contaminants" caused Horton's injuries.[130] The jurors were also charged under Mississippi's law of "pure" comparative negligence, which would have permitted plaintiffs to recover something even if their decedent had been found ninety-nine percent responsible for his own injury. No assumption of risk defense is allowed in Mississippi. The jury was, however, unable to reach a verdict, and a mistrial was declared.

A variety of post-trial motions for permission to file interlocutory appeals, including an appeal of the preemption ruling, were denied by the Mississippi Supreme Court. Resolution of the substantive issues must thus await a retrial, which may be scheduled

---

129. Girton v. American Tobacco Co., *sub nom.* Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987).

130. *See Horton* jury charge: "and further find that such Pall Mall cigarettes were not wholesome and fit for smoking because they contained contaminants such as pesticide residues, poisons, toxic agents or carcinogens other than those naturally found in tobacco . . . and if you further believe that such contaminants, if any, were in themselves a contributing proximate cause . . . ."

in 1989.

B. *Cipollone v. Liggett Group, Inc.*

A comprehensive review of *Cipollone* is not possible within the remaining pages of this Article. The case has already generated more than twenty-five published opinions; most were by the district court, but three came on interlocutory appeals to the Third Circuit. In addition, two petitions for *certiorari* were submitted to but denied by the United States Supreme Court. Nor has the final chapter been written, for all parties have appealed to the Third Circuit.

Cipollone is, of course, best known for its preemption decisions. The Third Circuit's opinion was discussed above, as were certain aspects of the district court's decision on remand, which grudgingly applied the Third Circuit's opinion to dismiss many of plaintiff's post-1965 claims. However, *Cipollone* is also noteworthy in several other respects. Ignoring certain New Jersey and Third Circuit precedents (construing New Jersey law) to the contrary, the district court speculated pursuant to *Erie*[131] that a claim based on a generic risk-utility test was available under New Jersey law even though no alternative "safe" design was alleged. Although the district court held that such a claim was viable, that conclusion subsequently was rejected by the New Jersey legislature which, like California, adopted a comment i statute. Thereafter, the district court gave effect to the legislative determinations.

Trial commenced in early February 1988 and concluded approximately four months later. Already truncated by the preemption and comment i rulings noted above, plaintiff's case was further narrowed by the district court's ruling on defendants' motion for directed verdicts. Despite unnecessary and antagonistic rhetoric, the court dismissed (1) plaintiff's pre-1966 failure to warn and breach of warranty claims against Lorillard and Philip Morris (whose cigarette brands had not been used by plaintiff's decedent until after 1966), (2) plaintiff's claims of negligent failure to research and test against all defendants, and (3) plaintiff's claim of failure to market an allegedly "safer" cigarette against Liggett.[132]

The jury returned a mixed verdict, finding in favor of defendants Lorillard and Philip Morris, rejecting (as against them and Liggett) plaintiff's claims of pre-1966 fraud and civil conspiracy. The jury also found that although Liggett's failure to warn pre-1966 was a proximate cause of plaintiff's decedent's death, she

131. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
132. Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487 (D.N.J. 1988).

had assumed the risk and thus was eighty percent responsible for her own injuries. Accordingly, under New Jersey's law of comparative negligence, she was barred from recovery on her negligent and strict liability failure to warn claims. The jury also found that Liggett had breached an express warranty; although it awarded plaintiff $400,000, it awarded Rose Cipollone's estate nothing.

The verdict on the express warranty claim defies logic until the district court's instructions are considered. Specifically, the court eliminated from its instructions any requirement that the alleged warranty must be found to be a part of the basis of the bargain, *i.e.*, that reliance must be shown (or at least that any presumed reliance not be disproved). The instructions similarly foreclosed any other means by which plaintiff's decedent's assumption of the risk could be factored in as a defense to the express warranty claim. The court later justified its instruction, stating that it concluded "that a buyer's reliance on an affirmation or promise is irrelevant to a determination of whether that statement 'becomes part of the basis of the bargain.' "[133]

Apart from the fact that this view turns the law of warranty on its head, what is most remarkable is that approximately a month before, the same court in the same case had reached precisely the opposite conclusion. Thus, in its directed verdict decision, the district court had written: "[w]hether such affirmations, once made, are part of the basis of the bargain is a question of fact for the jury."[134] Inexplicably, that question of fact was not submitted to the jury.

Although *Cipollone* is now on appeal, it is not too early to begin to assess its implications. First, although it was heralded as the strongest test against the industry, *Cipollone* confirmed jurors' unwillingness to award damages to a smoker for conscious lifestyle choices. Second, the mixed verdict provides no encouragement for other plaintiffs because it did not begin to cover plaintiff's counsel's published estimates of out-of-pocket expenses. Indeed, there have been very few new cases filed since *Cipollone*, while a much larger number of cases have been dismissed. Third, the verdict against Liggett, which could well be reversed on appeal, has focused additional attention on the irrationality of this kind of litigation.[135]

---

133. Cipollone v. Liggett Group, Inc., No. 83-2864, slip op. at 9 (D.N.J. Aug. 24, 1988) (denying motions for new trial and JNOV).

134. Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1497 (D.N.J. Apr. 21, 1988).

135. Some of the *Cipollone* jurors have even publicly expressed both regret about the award and hope that it will be reversed on appeal. THE AM. LAW., Sept. 1988, at 31-37.

C. *Girton v. American Tobacco Company*

Girton is the most recent of the cigarette cases to be tried, but the first in which a claim of a synergistic interaction between smoking and asbestos was at issue. The case was filed by John Gunsalus (who died before trial, resulting in the substitution of Girton as executor) in federal court in Philadelphia against sixteen asbestos manufacturers, the Tobacco Institute, and The American Tobacco Company (American). On November 24, 1987, the Tobacco Institute's motion for summary judgment was granted, and American's motion for summary judgment was granted in part and denied in part.[136] Plaintiff dismissed or settled with all of the asbestos defendants prior to trial.

Apart from its disposition of some novel claims, the opinion is interesting on several issues akin to those raised in the California cases. Specifically, the court held, relying on comment i to Section 402A, that "plaintiff may not recover from defendant American Tobacco Company for injuries caused by the inherent dangers of cigarette smoking without showing a defect," and that "[t]he only cognizable defect asserted by plaintiff is the failure adequately to warn of the dangers of cigarette smoking."[137] The court also dismissed plaintiff's risk-utility claim because Pennsylvania had not adopted that theory of liability,[138] and because "[w]hether products should be banned or whether absolute liability should be imposed for their use are determinations more appropriately made by the legislative branch of government."[139] Finally, the court dismissed plaintiff's misrepresentation claim (its analysis would have been applicable to the time-barred express warranty claim) because, in addition to the fact that the advertisements at issue "probably were not representations of fact as a matter of law," they were "not the kind of representations upon which reasonable people would rely"[140] in evaluating safety because they related to mildness and enjoyment, and "these alleged representations lack sufficient causal nexus to the harm of which plaintiff complains."[141]

Thus, after applying preemption, the only issue was whether

136. Girton v. American Tobacco Co., *sub nom.* Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987).

137. *Id.* at 1158.

138. *Accord* Miller v. Brown & Williamson Tobacco Corp., 679 F. Supp. 485 (E.D. Pa. 1988), *aff'd*, 856 F.2d 184 (3d Cir. 1988).

139. *Gunsalus*, 674 F. Supp. at 1159. *See* Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985) (similar analysis in handgun case).

140. Compare this ruling with the preceding discussion of the warranty claim in *Cipollone.*

141. *Gunsalus*, 674 F. Supp. at 1160.

American was liable in negligence or strict liability for a pre-1966 failure to warn. After trial, on the sole issue of strict liability/failure to warn which included presentation of testimony on "addiction" and the "information environment," the jury found that although American had failed to warn pre-1966, that failure did not proximately cause plaintiff's decedent's injury and death. Accordingly, a defense verdict was entered.

It is difficult to determine the specific basis for the jury's conclusion that there was no proximate cause. Each of the proximate cause problems discussed in this Article were raised during trial, and each is sufficient in and of itself to explain the jury's finding. It is not difficult to determine, however, that the jury flatly rejected plaintiff's effort to argue that "addiction" somehow excused the smoker's lifestyle choices.

Conclusion

The interpretation of Civil Code Section 1714.45 by the appellate court in *American Tobacco Co.* should definitively conclude the "new wave" of smoking and health litigation in California. It is expected that the combination of preemption, comment i, assumption of risk and the fundamental moral sense of jurors regarding personal choice and responsibility should eventually put an end to the faltering "new wave" in other jurisdictions as well.